No. 08-35794

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiffs-Appellees,

v.

STATE OF WASHINGTON; et al,

Defendants-Appellees,

v.

SAMISH INDIAN TRIBE,

Movant-Appellant.

On Appeal From The United States District Court For The Western District Of Washington Case No. C70-9213, Subproceeding 01-2
Honorable Ricardo S. Martinez, United States District Judge

REPLY BRIEF BY MOVANT-APPELLANT SAMISH INDIAN TRIBE

REDACTED — FOR PUBLIC DISCLOSURE

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I. Legal Argument

Treaty Tribes do not directly respond to the legal issues raised by the Samish Tribe in its Opening Brief such as law of the case and law of the circuit. Opening Brief, pp. 7-14. For example, on the issue of whether denial of a petition for rehearing constitutes an adverse ruling on the issues raised in the petition, Treaty Tribes respond only is that one of the decisions cited by the Samish Tribe on this issue was later vacated. Treaty Tribes' Answering Brief ("TT Brief") at 66-67; *Landreth v. CIR*, 845 F.2d 828 (9th Cir. 1988), *vacated*, 859 F.2d 643 (9th Cir. 1988). The Samish Tribe apologizes for this inadvertent omission, but it does not undermine the three additional reported cases (as well as unreported decision) that reached the same holding. Opening Brief at 12-14.

The second *Landreth* opinion is not a rejection of the principle that a denial of rehearing is a denial on the merits. TT Brief at 67. The *Landreth* Court denied preclusive effect to a previous decision pursuant to a Circuit rule that allows a three judge panel to reexamine Circuit precedent when "intervening authority" undermines the continued vitality of that precedent. 859 F.2d at 648. Intervening authority is any type of judicial or legislative authority whose existence post-dates the filing of the original opinion. *Id.* Under *Landreth II*, the intervening authority

must be specifically discussed in the order denying rehearing in order to be given preclusive effect. *Id.* That is not the situation in this appeal. The Court's quotation of language from *In re Grand Jury Investigation*, 542 F.2d 166, 173 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1047 (1977) was only a "*Cf.*" citation, not approval. 859 F. 2d at 648.

Treaty Tribes claim that the denial of rehearing and rehearing en banc in *Samish Indian Tribe v. Washington*, 394 F.3d 1152 (9th Cir. 2005), *cert. denied*, 546 U.S. 1090 (2006) ("*Samish I*"), *Samish*, Dkt. 82,[1] ER 69-70, was only a "summary denial" of rehearing under *U.S. v. Cote*, 51 F.3d 178 (9th Cir. 1995). TT Brief at 66. The Court asked the Samish Tribe to file a Response Brief and allowed amicus briefs before circulating and denying the three separate petitions for rehearing. *Samish*, Dkt. # 67 (Order); Dkt. # 80 (Response Brief). This was not a summary denial of rehearing under *Cote*.

II. Factual Assertions Made by Treaty Tribes

Treaty Tribes' Brief is replete with inaccurate factual assertions that have no basis in the record. There are too many of these factual errors for the Samish Tribe to address in this Reply Brief. Samish will address two examples to demonstrate the general credibility of Treaty Tribes' factual assertions. Just because the Samish

[1] The Samish Tribe uses the same shorthand references to docket numbers of pleadings from three separate court proceedings that it identified in footnote 1 of its Opening Brief.

Tribe does not specifically disagree with other factual assertions made by Treaty Tribes does not mean it agrees with those assertions.

First is Treaty Tribes' assertion that the Samish Tribe did not petition for federal recognition until 1979 after it had been denied treaty status by Judge Boldt in *Washington II*, 476 F.Supp. 1101, as part of a conscious strategy to claim treaty tribe status only to bolster the Tribe's claim to federal recognition. TT Brief at 5. The factual assertion that Samish followed such a strategy is patently false.

The fact that the Samish Tribe petitioned for federal recognition in 1972, before *Washington I* was decided in February 1974 and before the Samish Tribe moved to intervene in August 1974, Dkt. # 687, is well documented. *See Greene v. Babbitt*, 943 F.Supp. 1278, 1281 (W.D. Wash 1996); *Samish I*, 394 F.3d at 1155-6; *Samish Indian Nation v. United States*, 419 F.3d 1355, 1358 (Fed. Cir. 2005). Samish applied for recognition three times before 1979 – in 1972, 1974 and 1975. Dkt. # 40, pp. 3. n.2, 34-36. Treaty Tribes' unsubstantiated factual assertion that Samish did not file its recognition petition until after its treaty status was determined by Judge Boldt is incorrect.[2]

The second inaccurate factual assertion made by Treaty Tribes is that the Samish Tribe had $_____ of "other income" available from August 1994

[2] Treaty Tribes cite a general memo sent by the Tribe's legal counsel to 16 tribes in support of this assertion. SER 822. *But see* Letter dated September 16, 1980, from Sasha Harmon, Coordinator, Evergreen Legal Services, to Chairman Ken Hansen, responding to Samish criticisms of and disappointment in its representation. ER 842-844.

through 1996 that "was not restricted as to use" and that "could have been used to pay for work on the [Samish Rule 60(b)(6)] motion." TT Brief at 18, 48.

This allegation is taken from the Samish Tribe's first official federal audit, covering August 1994 through 1996. *See* ER 445-51. In the district court, Samish submitted additional audit pages omitted by Treaty Tribes that showed that this money was grant funds from the Department of Human Services, Administration for Native Americans ($_____), ER 450, and from the Snohomish County Early Childhood Education and Assistance Program ($_____). ER 451. *See* Dkt. # 259, pp.19-20 (Samish Reply Brief). These grant funds were not restricted. Treaty Tribes' repeated assertion to the contrary remains false.

The Samish Tribe submitted the Tribe's audits from August 1994 through 2000 to the district court. ER 445-473. They demonstrated beyond doubt that the Samish Tribe had insufficient funding during this time to file the Tribe's Rule 60(b) (6) motion.[3] Declarations from Samish tribal officials clearly demonstrate that the Tribe had insufficient available funding to bring the motion before 2001. *See* TT Brief at 19 (setting out Samish auditor's summary of two small Samish funds);

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[3] This conclusion is reinforced by Judge Martinez's focus on the availability of pro bono representation to determine whether Samish had the legal resources necessary to file its Rule 60(b)(6) motion during this time. ER 16-18. Treaty Tribes submitted hundreds of pages of Samish financial records to assert that Samish had funds to hire legal counsel earlier. Samish countered all of Treaty Tribes' arguments on this issue. Judge Martinez did not find that Samish had financial resources to hire counsel, only that it used its pro bono counsel unwisely pursuant to the standards of Rule 60(b)(6).

Dkt. #s 261, 262, 311, ER 119-122, 142-148 (declarations of Samish officials). The Samish Tribe began work on its Rule 60(b)(6) motion as soon as it started receiving gaming lease payments in late 2000 and discretionary federal attorney fee funding in mid-2001 (the original motion filed in December 2001 had 104 pages and 500 pages of exhibits). *See* Dkt. # 11, p.1 (Treaty Tribes' Memo in Support of Motion to Strike). It really did take a year for the Samish Tribe to complete such a huge endeavor -- to prepare its Rule 60(b)(6) motion, discuss it with the membership, make changes, obtain final tribal approval, and file. The Tribe's treaty rights counsel contract was entered into on July 1, 1999, *see* SER 547-552; TT Brief at 18, and was dependent upon available funding. Once that funding started to arrive in late 2000, work on the motion began and continued.

III. Finality Concerns

The Opening Brief showed that finality concerns arising from the Samish Tribe's re-entry into *U.S. v. Washington* were addressed and rejected by the Ninth Circuit in *Samish I*, and were not subject to further litigation on remand. Opening Brief, pp. 18-21. Treaty Tribes claim that the district court properly addressed finality concerns again on remand because the Samish Tribe withdrew a finality proposal it made years earlier in a motion for reconsideration. TT Brief at 38-39. *See* Dkt. # 69. Judge Rothstein expressly acknowledged that this proposal was not a settlement proposal and had been submitted by Samish only to address her concerns regarding potential disruption if Samish were allowed to intervene in *U.S.*

v. Washington. Order Denying Motion to Strike, March 13, 2003, pp. 3-4, Dkt. # 89, ER 40-41.

One admission made by Treaty Tribes in their Answering Brief cannot be over-emphasized in importance. For the first time, Treaty Tribes acknowledge that it was they – Treaty Tribes -- who rejected the finality proposal contained in Samish's motion for reconsideration. TT Brief at 39. Treaty Tribes took this proposal off the table. They have never rescinded this rejection, even while they argue that Samish should be punished for its demise. It served no purpose for Samish to continue to refer to this proposal once Treaty Tribes rejected it. Further, once the Ninth Circuit ruled that the finality concerns the proposal were addressed to were unsubstantiated and speculative, 394 F.3d at 1161-62, the proposal served no further purpose and expired.

The Samish Tribe has repeatedly acknowledged in this proceeding that the district court can impose appropriate conditions on the Tribe's re-entry into *U.S. v. Washington*. Elements of the Samish Tribe's finality proposal could be part of that discussion. Conditions under Rule 60(b) are discussed in greater detail in the next section. What is important at this point is to stress that while Samish has always been willing to address conditions, Treaty Tribes have consistently rejected any such discussion. For example, Treaty Tribes stated early in this sub-proceeding that any settlement offer or conditions proposed by the Samish Tribe would be unacceptable, and that any settlement discussions would be useless. *See* Status

Report, June 18, 2002, Dkt. # 34. Judge Martinez's denial of Samish's Rule 60(b)(6) motion because of finality concerns, based on this factual record, is error of law.

Treaty Tribes also neglect to mention that Samish's finality proposal is a physical impossibility under a 1998 secret agreement entered into by Treaty Tribes that prohibits them from agreeing to Samish exercise of treaty fishing rights, under any circumstances. This 1998 Agreement between the Lummi and Swinomish Tribes was not disclosed until Samish obtained a copy of it in discovery in 2006.[4] Settlement Agreement Between Lummi Nation and Swinomish Indian Tribal Community, June 15, 1998, Dkt.# 224, Ex. 1 & 2, attached at ER 826-831. The two tribes bound themselves to fight any claim by another tribe to be a successor to the historical Samish Tribe or to exercise Samish treaty fishing rights. Section 3. Each tribe can initiate federal court action to prevent the other tribe from violating the agreement, Section 4.

Lummi and Swinomish have never rescinded this Agreement. It remains in full force and effect and the two tribes cannot agree to Samish's finality proposal, even if imposed by the district court. The Samish Tribe made its finality proposal in January 2003, based on Treaty Tribes' specific representation during oral argument on December 5, 2002 that all agreements involving treaty fishing rights among

[4] Lummi and Swinomish resisted disclosure of the Agreement and supporting documents. *See* Dkt. # 229, Dkt. # 244 (Order, Aug. 15, 2006).

treaty tribes were matters of public record. Dkt. # 69, p. 3, ER 552. Counsel for the Lummi and Swinomish Tribes did not correct this misstatement. The existence of the secret agreement would have made the Samish Tribe's finality proposal a useless exercise if it had been known. Its existence was clearly relevant to that discussion and Judge Rothstein's finality concerns.[5] The district court, Judge Martinez, was informed of the existence of this secret agreement, but ignored it in ruling that Samish's withdrawal of its finality proposal was grounds to deny Samish's Rule 60(b)(6) motion. Based on the actual facts, this ruling was error of law.

IV. Conditions for Samish Re-entry into *U.S. v. Washington*

It was error of law for the district court to deny the Samish Tribe's Rule 60(b)(6) motion again on remand on finality grounds. While the district court said it reached this result because the Samish Tribe had rejected the finality proposal discussed in the previous section, the subjects addressed in that proposal and any other issues should have been addressed by the district court as part of conditions imposed on the Samish Tribe as part of re-entry into *U.S. v. Washington*. F.R.C.P.

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[5] In light of the existence of this secret agreement, which predated the Samish Tribe's initial Rule 60(b)(6) motion in December 2001, Treaty Tribes' response to the district court that Samish first be required to comply with the *U.S. v. Washington* Paragraph 25 procedure before its motion could be filed, *see* Dkt. # 10, 11 (Motion to Strike Samish Motion), and that settlement and resolution should be discussed under that procedure, was a delaying tactic .

60(b)(motion to be granted on "just terms").[6] The Samish Tribe addressed conditions for reentry into *U.S. v. Washington* several times, over a five year period. *See, e.g.*, Dkt. # 40, Memo in Support of Samish Rule 60(b)(6) motion, Aug. 23, 2002, pp. 39-40, Dkt. # 137, Samish Brief on Remand, Aug, 12, 2005, pp. 19-29, ER 537-547; Dkt # 236, Samish Supplemental Brief, Aug. 1, 2006, pp. 19-20, ER 484-485; Dkt. # 309, Samish Response Brief, May 18, 2007, pp. 8-19. The Samish Tribe repeatedly stated that it would abide by the law of the case and would not disrupt final decisions. Treaty Tribes' assertion that the Samish Tribe intends to attack every prior decision in *U.S. v. Washington* if it is allowed to re-enter the case, *see* TT Brief at 21, 24, 39, is completely without merit. *See, e.g.*, Dkt. # 236, p. 19 (Samish clarifies and repeats that it does not intend to disrupt or attack any prior decision in the case).

The Samish Tribe also will not "wreak havoc" on existing management agreements. *See* TT Brief at 38-39. There is absolutely no evidence of such intent. Treaty Tribes make such allegations only because it makes Samish intervention in

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[6] Judge Rothstein denied Samish's Rule 60(b)(6) motion in December 2002 and again on reconsideration in February 2003 in part on the ground that Samish intervention could not be allowed under any circumstances or conditions. Dkt. #s 68, 75. ER 63-65, 44-45. This stance has evolved on remand into a more refined opposition arguing that Samish has not agreed in advance or guessed the correct conditions that would allow it to join the case. *See* Dkt. # 329, pp. 24-26, ER 27-29. FRCP 60(b), however, imposes the duty of determining appropriate conditions for re-entry on the court. *See* Dkt. # 147, p. 2, ER 502 (Treaty Tribes' Motion for New Scheduling Order, requesting court to schedule hearing to discuss conditions if Samish's motion is granted).

U.S. v. Washington appear dangerous. The district court has more than enough authority under Rule 60(b) to ameliorate any actual concerns that may exist. This issue should be left to the district court, as part of granting the Samish Tribe's Rule 60(b)(6) motion.

Treaty Tribes allege that the Samish Tribe intends to argue that it is the sole successor to the historical Samish Tribe and to the Nuwha'ha Tribe if it is allowed to re-enter *U.S. v. Washington*. *E.g.*, TT Brief at 37. *But see*, *e.g.*, Dkt. # 309, pp. 8, 12 (Samish is "a successor"). It is only Treaty Tribes that seek to deny successorship status -- they continue to reject any connection between the historical and the federally-recognized Samish Tribe.

The Ninth Circuit in *Samish I* raised questions about whether Judge Boldt's findings of fact on Lummi and Swinomish treaty status were sufficient to include Samish successorship. 394 F.3d at 1160 and n. 12. If it ever becomes appropriate as a "clarification" of Judge Boldt's original ruling, *see*, *e.g.*, *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1359-60 (9th Cir. 1998), the district court may need to visit this matter after Samish is allowed to re-enter *U.S. v. Washington*.[7]

With regard to successorship to the Nuwha'ha Tribe, separate proceedings took place at the same time – Samish acknowledgment before the Department of Interior Office of Hearings and Appeals (hearing in August 1994, *see Greene III*,

[7] It could be raised by existing parties to the case at any time now in a new sub-proceeding, even without Samish re-entry.

943 F.Supp. at 1282) and Upper Skagit treaty exercise in *U.S. v. Washington*, 873 F.Supp. 1422, 1449 (W.D.Wash., Dec. 20, 1994) – both independently concluding that each was a successor to the Nuwha'ha Tribe. The United States was a party to both proceedings. At some point these concurrent proceedings may need to be reconciled. The Samish Tribe's sovereign and successor status is not an attack on the rights of other tribes.[8]

Treaty Tribes argue that they were promised the opportunity to litigate the exercise of Samish treaty fishing rights. This is still the case. Samish recognition did not automatically grant treaty status. This does not mean, however, that Treaty Tribes have the right to litigate every conceivable claim. The Ninth Circuit, in denying intervention to the Tulalip Tribes in Samish's administrative acknowledgment proceeding, stated that the Tulalip Tribes would have the right to litigate the "allocation" or "reallocation of treaty fishing rights." *Greene v. United States*, 996 F.2d 973, 977-78 (9th Cir. 1993)("*Greene I*").

[8] On the other hand, the United States' continued argument that the Samish Tribe is not a real Indian tribe but only a "modern-day tribe" it decided to acknowledge for limited purposes, United States' Answering Brief ("US Brief") at 6-7 and n. 4, cannot be reconciled with the Samish administrative acknowledgment proceeding, with *Greene III*, or with *Samish I*. All three decisions concluded that the Samish Tribe was a successor to the historical Samish Tribe, and did not merge with Lummi or Swinomish. *E.g.*, *Greene III*, 943 F.Supp. at 1283-84; Judgment, *Greene*, Dkt. # 330, ER 778-79; *Samish I*, 394 F.3d at 1159-60. The United States was a full party in these cases and lost. It is a violation of the federal government's trust responsibility to the Samish Tribe for it to continue to say that the Samish Tribe is not the historical Samish Tribe. *See* Section 103, Pub.L.No. 103-454, 108 Stat. 4791-92, Nov. 2, 1994 (Subsection (2) – "the United States has a trust responsibility to recognized Indian tribes").

Allocation is one component of the determination and exercise of treaty rights. No authority allows one Indian tribe to attack the federally recognized status of another tribe; this is what Treaty Tribes are after. Recognition of an Indian tribe is a matter between the federal government and an Indian tribe. Federal courts are required to give deference to the determination by the Executive Branch, with treaty status of a tribe like the Samish Tribe subsequently determined in that context. No other tribe has had to litigate or defend its federally recognized status in *U.S. v. Washington*.

No decision promised Treaty Tribes the right to relitigate Samish federal recognition in *U.S. v. Washington* or elsewhere. While the Ninth Circuit in *Samish I* said that under the facts the Samish Tribe was required to prove to achieve recognition under the Federal Acknowledgment Regulations, treaty status is probably inevitable, 394 F.3d at 1159, Treaty Tribes will still be able to litigate the reallocation of treaty fishing rights involving Samish on the same basis that the treaty rights of other recognized tribes in the case were litigated.

V. The Necessity of Challenging the Findings Removed from the Torbett Samish Acknowledgment Decision by Assistant Secretary Deer

The main challenge made by Treaty Tribes and the United States to the amount of time it took for the Samish Tribe to bring its Rule 60(b)(6) motion after recognition has to do with the period between November 8, 1995, when Assistant Secretary Ada Deer issued her "final" Samish recognition decision, and November

1, 1996, when district court Judge Zilly issued his judgment in *Greene v. Babbitt*, No. C89-645Z (W.D.Wash.). Treaty Tribes argue that on November 8, 1995, the Samish Tribe was federally recognized and did not need to appeal the Deer Decision except as a litigation choice to buttress future treaty claims. *E.g.*, TT Brief at 43-45; U.S. Brief at 19-21.[9]

The Samish Tribe's appeal of Assistant Secretary Deer's decision and reinstatement of the deleted findings were necessary for full, valid federal recognition of the Samish Tribe. A number of federal benefits and services require that a tribe have historical ties and connections as an eligibility condition. *See, e.g.*, 25 C.F.R. Parts 151, 292 (Indian tribe must demonstrate historical connection to obtain land in trust or for gaming). Assistant Secretary Deer's decision rejected the Samish Tribe's historical character and existence.

The findings deleted by Assistant Secretary Deer from Judge Torbett's Samish decision were necessary to meet the mandatory criteria set out in the Federal Acknowledgment Regulations at 25 C.F.R. §§ 83.7(b), (c), (e). *See Greene I*, 996 F.2d. at 976.[10] Judge Zilly specifically found in *Greene III* that

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[9] The United States at least acknowledges that Assistant Secretary Deer's Decision did not become final until 1996, after Treaty Tribes' appeals of that decision were rejected. US Brief at 19. *See* Opening Brief at 27 (discussion of timing); 61 Fed. Reg. 26922, May 29, 1996 (rejection by Secretary of Interior of Swinomish and Upper Skagit appeals; confirmation of final Samish federal acknowledgment).

[10] The Court stated that to "gain federal acknowledgment, the Samish must establish the requisite social cohesion and community, continuity of political authority and ancestry from a historic tribe. See 25 C.F.R. §§ 83.1 thru 83.7."

reinstatement of the deleted findings was necessary for federal recognition. For example:

> The focus and result of the ex parte contact between the government lawyer and Assistant Secretary Deer was to eliminate findings that would be favorable to the Samish in connection with their eligibility for benefits under federal law.

943 F.Supp. at 1285 (emphasis added); *see id.* at 1288. To finally obtain confirmation of its sovereign status and to qualify for all federal Indian benefits and services, it was necessary to appeal Assistant Secretary Deer's November 8, 1995 decision and to have critical findings reinstated. The time necessary to complete this process was not a litigation choice; the Tribe's Rule 60(b)(6) motion could not be filed until this process was completed.

VI. Judge Zilly's Reinstated Findings

The Samish Tribe engaged in an extensive showing in its Opening Brief which clearly demonstrated that the findings set out in the Judgment in *Greene v.Babbitt*, No, C89-645Z (W.D.Wash), *Greene*,Dkt # 330, ER 778-779, were the findings specifically reinstated in the official, final Samish recognition judgment. Opening

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Without reinstatement of the deleted findings, the Samish Tribe would always be susceptible to collateral legal challenges that Samish recognition failed to comport with the Federal Acknowledgment Regulations and that the Samish Tribe does not qualify as a federally recognized Indian tribe. Treaty Tribes made this argument when they sought to reopen the *Greene III* decision, *see* Opening Brief at 4-5, and they will no doubt raise it again if given the opportunity. For example, the Swinomish Tribe maintains that it does not recognize the Samish Indian Tribe as a federally recognized Indian tribe. *See* Dkt. # 23, Ex. 39 (letter dated April 10, 1997, from Swinomish legal counsel to Samish Chairperson: "we do not recognize your organization as a tribe"), letter attached at ER 832-33.

Brief at 39-47. The reinstated findings incorporated a combination of testimony and expert witness opinions and conclusions and are determinations that satisfied specific mandatory recognition criteria at 25 C.F.R. § 83.7.[11]

Judge Martinez violated the law of the Circuit by accepting Treaty Tribes' argument that Judge Zilly did not mean to reinstate the findings actually set out in the Judgment, and that the Judgment was only a "paraphrase" of the findings that Judge Zilly really intended to reinstate – completely different findings. Opinion, Dkt. # 329, ER 19-26. Judge Martinez accepted Treaty Tribes' argument that the Samish Tribe engaged in inequitable conduct by actually relying on the findings reinstated by Judge Zilly in the Judgment in *Greene v. Babbitt*. ER 26.

In its Opening Brief, the Samish Tribe presented authority that questioned the authority of a court to revise and interpret the decision of another court. Opening Brief at 38-39. Treaty Tribes did not respond to these arguments; instead, they merely repeat the arguments made to Judge Martinez that the findings reinstated by Judge Zilly in *Greene v. Babbitt* were not the findings he actually intended to reinstate. This argument by Treaty Tribes violates precedent in case law to which Treaty Tribes were parties. In *Muckleshoot Tribe v. Lummi Indian Tribe*, 141, F.3d 1355, 1359 (9th Cir. 1998), the Ninth Circuit cited with approval

[11] Judge Zilly described the term "finding" in ALJ Torbett's Decision as follows: "The ALJ's finding was based on his evaluation of the testimony presented at the hearing, including a weighing of the evidence and assessment of the credibility of the witnesses." *Greene* III, 943 F.Supp. at 1284.

two cases that expressly addressed under what circumstances a prior judgment can be reviewed by another court. *Narramore v. United States*, 852 F.2d 485 (9th Cir. 1988); *United States v. Angle*, 760 F.Supp. 1366 (E.D. Cal. 1991), *rev'd on other grounds*, *Wackerman Dairy, Inc. v. Wilson*, 7 F.3d 891 (9th Cir. 1993).

In *Narramore*, the Ninth Circuit held: "If the judgment is unambiguous, the court may not consider 'extraneous' evidence to explain it." 852 F.2d at 490 (citing *Gila Valley Irrig. Dist. v. United States*, 118 F.2d 507, 510 (9th Cir. 1941)). In *Angle*, the district court held: "Certain principles have been developed . . . that can guide a successor court in construing a litigated decree. It is well-established that extraneous evidence may not be considered if the judgment is unambiguous." 760 F.Supp. at 1371-72 (citing *Narramore* and *Gila Valley*).[12]

Neither Treaty Tribes nor Judge Martinez ever argued or asserted that the Judgment entered by Judge Zilly in *Greene* was ambiguous; instead they discuss extraneous evidence to argue that the judgment was not what Judge Zilly intended to reinstate. *See* TT Brief at 28-29.They did not explain how the district court has authority to ignore and revise Judge Zilly's unambiguous judgment. That Judgment stated:

[12] While *Angle* was reversed on other grounds in *Wackerman*, the Ninth Circuit actually affirmed this part of the *Angle* decision. 7 F.3d at 897 n.13 ("We do not find the . . . decree ambiguous. We thus need not resort to the extraneous material urged upon the court to interpret them.").

(3) The following three findings of Administrative Law Judge Torbett, originally entered on August 31, 1995 but later rejected by Assistant Secretary Deer, are reinstated:

1. Part of the Noowhaha tribe merged with the Samish (see ALJ Recommended Decision at 22; Final Determination dated November 8, 1995, at 12-13, 32.
2. Many of the Samish families that settled on the Swinomish Indian Reservation did not relinquish their Samish affiliation (see Final Determination at 35, and reference to record contained therein).
3. The Department of Interior could not adequately explain why the Samish had beenomitted from a list of federally recognized tribes prepared during the 1970s (see ALJ Findings 1-3; Final Determination at 16, 38-39).

Greene, Dkt. # 330, Nov. 1, 1996, ER 778-79. The findings reinstated are express, clear, succinct and unambiguous. Treaty Tribes and Judge Martinez failed to explain how the district court could ignore the law of this Circuit and consider outside evidence to review Judge Zilly's Judgment. This failure is an error of law that requires reversal.

Even if the Judgment were somehow ambiguous, the *Angle* decision, cited with approval in *Muckleshoot v. Lummi*, unequivocally states: "In the event there is a conflict between the judgment and the findings of fact, the former must control. *See generally* 46 Am.Jur.2d, *Judgments*, § 76; *see also Eakin v. Continental Illinois Natl. Bank & Tr. Co.*, 875 F.d 114, 118 (7th Cir. 1989) (where judicial opinion is inconsistent with judgment, latter controls because judgment creates the

obligation).” 760 F.Supp. at 1372.[13] Neither Treaty Tribes nor Judge Martinez explain what gave the district court authority to also ignore this rule of law.

Treaty Tribes’ Answering Brief , and its long discussion of why Judge Zilly did not really intend to reinstate the findings expressly reinstated in his judgment, is therefore irrelevant. This discussion and evidence should not have been considered by the district court, and Judge Zilly’s Judgment should not have been changed.

Treaty Tribes’ discussion of *Greene* does, however, reveal for the first time their real agenda in seeking to alter Judge Zilly’s decision in *Greene v. Babbitt*, and why they tried so hard to have Judge Martinez reinstate different findings by Judge Zilly in *Greene* rather than the actual findings reinstated in the Judgment. Treaty Tribes make the astounding claim that the actual Samish recognition decision is Assistant Secretary Deer’s Final Determination in favor of Samish recognition on November 8, 1995, rather than ALJ Judge Torbett’s August 31, 1995 Samish decision or Judge Zilly’s November 1, 1996 Judgment in *Greene v. Babbitt*. TT Brief at 31-32.

It is not surprising that Treaty Tribes seek this result. Assistant Secretary Deer’s Samish decision removed all references to Samish historical existence and

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[13] *Eakin* actually states: “Judicial opinions do not create obligations; judgments do. *Azeez v. Fairman*, 795 F.2d 1296, 1297 (7th Cir. 1986). In the event of a conflict between the opinion and the judgment, the judgment controls. *Bethune Plaza, Inc. v. Lumpkin*, 863 F. 2d 525, 527-28 (7th Cir. 1988).”

successorship from ALJ Torbett's decision. Assistant Secretary Deer embarked on this task solely as a political matter, to protect the Swinomish, Upper Skagit and Lummi Tribes from adverse consequences of Samish recognition.[14] Her action was not based on evidence or testimony presented in the Samish due process acknowledgment hearing ordered by Judge Zilly and conducted by ALJ Torbett, *see Greene*, Dkt. # 169, Order, February 25, 1992, 1992 WL 533059; *Greene*, Dkt. # 214, Order (Transcript, Hearing on Motions), Sept. 18, 1992. Rather, it was a perversion of the due process that Judge Zilly held the Samish Tribe was due.

The problem with what Treaty Tribes seek is that the findings they advocate from Assistant Secretary Deer's Samish decision, *see* TT Brief at 32, are the exact findings that were overturned (Deer Decision) and reinstated (Torbett Decision) by

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[14] *See, e.g.*, Transcript of Oral Argument, July 18, 1996, *Greene v. Babbitt*, No. C89-645Z (W.D.Wash), *Greene*, Dkt. # 318, p. 40-41 (R. Anthony Rogers, counsel for the United States, responding to questions from the court about Assistant Secretary Deer's ex parte meeting(s) with Assistant Solicitor Scott Keep on Samish recognition: "May I also say, sir, that she did not – there also was not in the room any representative of the Swinomish Tribal Indian Community, whose interests were affected by the decision of the administrative law judge and some of the findings that he had entered that were very troublesome to the Assistant Secretary and were a major part of the revision that she made to the findings of the administrative law judge."); p. 42 (*id.*: "And the findings that are involved, that are at issue here, involve parties over whom the Assistant Secretary has political and other responsibilities as the Assistant Secretary for Indian Affairs to work with on a daily basis the way tribes in this part of the United States interrelate with one another legally, politically and otherwise, and those findings entered into by the administrative law judge posed significant threats, in the Assistant Secretary's view, to those interrelationships over which she had responsibility."), Transcript attached as Exhibit 4 to Dkt. # 260. *See Greene v. Babbitt*, 943 F.Supp. at 1285-86, 1288-89 (Keep's role in the Samish recognition decision).

Judge Zilly when he confirmed Samish recognition. *See* Judgment, *Greene*, Dkt. # 330, ER 778-779. Treaty Tribes' effort to revise history and anoint a different document as the real Samish recognition decision is meritless. A brief review of Judge Zilly's decision in *Greene* shows that he completely rejected Assistant Secretary Deer's Samish decision.

Judge Zilly reviewed the Deer decision pursuant to 5 U.S.C. § 706, "which provides that the court shall (2) hold unlawful and set aside agency action, findings and conclusions found to be (arbitrary and capricious, not in accordance with law, without observance of procedures required by law, or unsupported by substantial evidence). 943 F.Supp. at 1285 (emphasis added). Judge Zilly found that the Deer decision violated all of these standards. References include: "the putatively illegal conduct of defendant",: p. 1285; "antithesis of due process and was fundamentally unfair," p. 1286; ex parte meetings with Asst. Secretary Deer "rendered the proceedings fundamentally unfair and violated . . . due process," *id.*; "agency delays or violations of procedural requirements are so extreme," p. 1288; "fundamentally unfair," *id.*; "issues already decided in [Samish's] favor by the [ALJ] and improperly rejected by Assistant Secretary Deer," *id.*; "agency has repeatedly demonstrated a complete lack of regard for the substantive and procedural rights of the petitioning party," *id.* at 1288-89; "Assistant Secretary Deer's ultimate rejection of the findings was based solely on the improper ex parte contacts with one of the parties' lawyers", *id.* at 1289.

Treaty Tribes participated in these ex parte contacts with Assistant Secretary Deer. 943 F.Supp. at 1283. Judge Zilly concluded by finding and ruling:

> Administrative Law Judge Torbett conducted a thorough and proper hearing on the question of the Samish's tribal status, and made exhaustive proposed findings of fact after considering all the evidence and the credibility of the witnesses. . . . In this case, the government should be bound by the findings of the Administrative Law Judge, which were prepared after all parties had an opportunity to be heard.

943 F.Supp. at 1288-89. There is no limit to this ruling. Under the standard set out in 5 U.S.C. § 706 and under the express holding of Judge Zilly in his decision, the only possible conclusion is that the Deer Decision was rejected. The Torbett Decision, as confirmed and reinstated by Judge Zilly, was the only "fair" Samish recognition decision that complied with fundamental legal requirements of due process.

The decision in *Samish I* supports this conclusion. Treaty Tribes argued to the Ninth Circuit that they (Lummi, Swinomish and Upper Skagit Tribes) were the only political successors to the historical Samish Tribe, and therefore the Samish Tribe could not be. Their arguments included the evidence that was before Judge Boldt on Lummi and Swinomish treaty status – reports prepared by "the renowned anthropologist, Dr. Barbara Lane." *Samish*, Dkt. # 60, p. 4 (Lummi and Swinomish Petition for Rehearing). The Ninth Circuit decision in *Samish I* had expressly concluded that the Samish Tribe remained as a political successor to the historical

Samish Tribe. 394 F.3d at 1160-61. The Court's denial of Lummi and Swinomish's petition for rehearing preserved and reconfirmed this conclusion.

The Court's conclusion regarding Samish successorship in *Samish I* was not dicta. TT Brief at 59-62. It was an essential finding necessary to meet the mandatory criteria in the Federal Acknowledgment Regulations. 394 F.3d at 1160-61. It was an essential part of the Court's decision that the Samish Tribe's recognition was an extraordinary circumstance that justifying the reopening of the judgment in *Washington II*.

VII. Judicial Estoppel

In the proceeding below, Treaty Tribes argued the issue of judicial estoppel, but it was not expressly decided by the district court. In its Opening Brief , the Samish Tribe asked the Court to rule on this issue so the Tribe does not go through another cycle of litigation on remand. Treaty Tribes include argument on this issue in their Answering Brief. *E.g.*, pp. 34-38, 63.

Treaty Tribes' judicial estoppel argument, in essence, is that the Samish Tribe is precluded from relying on or quoting from the Ninth Circuit's decision in *Samish I* to which it and Treaty Tribes were parties, because Samish has taken allegedly inconsistent positions on issues in the past on issues decided in that case. *Id.*, p. 63. Treaty Tribes allege in particular that because the Samish Tribe previously argued that Samish recognition would have a limited effect on treaty status, it cannot use or quote the *Samish I* Court's holding that "although we have never explicitly held

that federal recognition necessarily entitles a signatory tribe to exercise treaty rights, this is an inevitable conclusion." 394 F. 3d at 1159.

The assertion that a prevailing party to a Ninth Circuit decision is prohibited from using that decision to its benefit is certainly novel. Treaty Tribes provide no authority for this specific point, instead citing authority on the general proposition that a party may not take conflicting positions during a case. The reality is that the Ninth Circuit in *Samish I* clarified the law in this Circuit ("although we have never explicitly held"), and Samish has relied on the Court's decision. [15]

Treaty Tribes and the United States fundamentally misconstrue the prior decisions of the Ninth Circuit in *Greene I* and *Greene II* to argue that the Ninth Circuit ruled that the Samish Tribe would never be allowed to revisit the judgment against it in *Washington II*, under any circumstances, in any forum, even after recognition. *E.g.*, US Brief at 10-11. The Samish Tribe has always expressed its interest in seeking treaty status, throughout the recognition process. Samish continued to purse recognition even after the judgment against it in *Washington II* because the United States, Judge Boldt and Treaty Tribes represented that if the

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[15] It should also be remembered that *Samish I* is the first of these three Ninth Circuit decisions written with knowledge of the specific facts justifying Samish federal recognition. *Greene I* (996 F.2d 973) and *Greene v. Babbitt*, 64 F.3d 1266 (9th Cir. 1995) (*Greene II*) were procedural decisions written before Judge Torbett's Samish recognition decision was issued, and were issued at the point where Samish had been denied recognition by the BIA in 1987 (as well as in 1979 in *Washington II*).

Tribe achieved recognition, that fact would probably merit revisiting treaty status. *See Samish I*, 394 F.3d at 1155 n.4.

The Ninth Circuit Samish decisions expressly acknowledged the "inevitab[ility]" of a Samish challenge in *U.S. v. Washington* to the judgment against it in *Washington II* if the Samish Tribe successfully achieved federal recognition. *See Greene I*, 996 F.2d at 975, 978 (Samish assertion of treaty fishing rights the next step after recognition; that direct challenge, which must take place in *U.S. v. Washington*, and where Treaty Tribes are parties, is inevitable).[16] The federal courts made it clear that Samish could not revisit the judgment against it in *Washington II* in its recognition proceeding, but they also made it clear beyond dispute that treaty rights could and probably would be revisited in *U.S. v. Washington* if Samish successfully achieved acknowledgment. There was no

[16] The district court in *Greene v. Babbitt* made the same statement. *See* Order dated Sept. 18, 1992, *Greene*, Dkt. # 214, ER 834-841 (Samish required to show it is the historical Samish Tribe to achieve recognition despite Tulalip Tribes' objection that such showing will "ipso facto" result in treaty status, ER 836-38; challenge to treaty rights judgment can only take place in *U.S. v. Washington*, where Tulalip will be a party. ER 839. The United States argues in its Answering Brief that Judge Zilly ruled in 1990 that the Samish Tribe was precluded from relitigating its treaty or successorship status, US Brief at 8 n.5, but that ruling was modified by the court's September 18, 1992 rulings. *Greene*, Dkt. # 214, ER 836-37 ("they're going to have a right to try and prove everything (including that they are the historic Samish Tribe) that is necessary to prove in order to gain acknowledgment."). *See Greene*, Dkt. # 169, Order dated Feb. 25, 1992, pp.4-5, 1992 WL 533059, p. 2 (citing *Greene*, Dkt. # 102, Order dated Sept. 20, 1990, granting U.S. Motion for Partial Summary Judgment).

inconsistency in the Tribe's legal positions during the various Samish proceedings. Treaty Tribes' judicial estoppel arguments are without merit.

VIII. Inconsistent Samish Decisions

The United States argues that the Court's decision in *Samish I* is inconsistent with prior Ninth Circuit Samish decisions, and requests en banc review of all Samish Ninth Circuit decisions. US Brief at 25-26. The United States asked for the same relief after *Samish I* was decided. *See Samish*, Dkt. # 61, ER 692-701. This request was denied. *Samish*, Dkt. # 82 (Order Denying Rehearing and Rehearing En Banc). The Court's *Samish I* decision repudiated the United States' argument that the Samish decisions are inconsistent. *See* 394 F.3d at 1157-1160. The United States cites no Court rule or procedure that allows it to just call for en banc review, particularly where the same request was previously rejected. It is a sad but true fact that the United States has never accepted or abided by any court decision in which the Samish Tribe has prevailed.

The Court in *Samish I* properly determined, based on prior Ninth Circuit precedent, that federal recognition is relevant to the issue of treaty status, 394 F.3d at 1157-59 ("the district court erred in concluding that . . . recognition is irrelevant"), despite dicta to the contrary in *Greene II*, 64 F.3d at 1270. Federally recognized tribes did not have to prove that they had "maintained an organized tribal structure" throughout history, *Washington II*, 641 F.2d at 1372, in order to

obtain treaty status.[17] Findings of fact made to acknowledge treaty status for recognized tribes state only that the tribe "is recognized by the United States as a currently functioning Indian tribe." *See, e.g., Washington I*, 384 F.Supp. at 359 (Hoh), 360 (Lummi). The Ninth Circuit before *Samish I* never addressed what recognized tribes must prove to exercise treaty status.

As the Ninth Circuit stated in *Greene I*, the inquiries necessary to gain federal acknowledgment and to assert treaty fishing rights are similar, but serve a different legal purpose and have an independent legal effect. 996 F.2d at 976-77. Once the Samish Tribe successfully achieved federal recognition, the Tribe had the legal right to be treated the same as every other federally recognized tribe when it sought to revisit its treaty status. While recognition is not necessary to obtain treaty status, *Greene I*, 996 F.2d at 976, it is usually, especially with the proof required for acknowledgment under the federal acknowledgment regulations, sufficient. *Samish I*, 394 F.3d at 1157-58.

While treaty status for a recognized tribe like Samish may be inevitable, *Samish* I, 394 F.3d at 1159, it is not automatic or self-executing. *Greene I*, 996 F.2d at 977: "Even if they obtain federal tribal status, the Samish would still have to confront the decisions in *Washington I and II* before they could claim fishing

[17] Descendancy from a treaty signatory is also required, however. *Confederated Tribes of Chehalis Reservation v. Washington*, 96 F.3d 334 (9th Cir. 1996), *cert. denied*, 520 U.S. 1168 (1997).

rights." The scope of that confrontation is left to be determined by the district court when Samish's Rule 60(b)(6) motion is granted.

Only unrecognized tribes had to specifically prove maintenance of an organized tribal structure to exercise treaty rights. *Washington I*, 520 F.2d at 693 (Stillaguamish and Upper Skagit); *Washington III*, 641 F.2d at 1368 (five tribes). The statement in *Greene II* that "recognition or lack of recognition" does not determine treaty rights, 64 F.3d at 1270, cites only to *Washington II*, 520 F.2d at 692-93, and its discussion of the treaty rights of non-recognized tribes. It must be understood as referring only to that principle. It was *dicta* and was properly distinguished by the Court in *Samish I*. 394 F.3d at 1158. *See* US Brief at 14 (Court wrong in "treat[ing]" this statement as dicta).

The Samish Ninth Circuit decisions, including *Samish I*, are not inconsistent with each other.

IX. Miscellaneous Issues

Two minor issues require a brief response. Treaty Tribes cite to an alleged 1996 contract between the Samish Tribe's lawyer during recognition, Russel Barsh, and the Tribe for treaty rights issues, as evidence the Tribe could have brought its motion earlier. TT Brief at 45-47. Treaty Tribes argue that this contract was in effect. For whatever reason, probably because there was no money to fund it, it was never finalized. It was never approved by the Assistant Secretary for Indian Affairs (required at that time by 25 U.S.C. § 81). It was never fully executed. The

reasons why are unknown. While Samish clearly wanted to bring its treaty rights claims - the proposed contract reflects that desire – the Tribe's financial audits from this period demonstrate beyond dispute that it lacked funds.

Second, Treaty Tribes allege that Samish could have filed its Rule 60(b)(6) motion earlier because legal counsel did two preliminary background memos on potential avenues of legal relief regarding the judgment against Samish in *Washington II*. TT Brief at 51. These preliminary background memos, prepared on a pro bono basis in a few hours, were written as part of the federal administrative process under 25 C.F.R. Part 89.40 to apply for discretionary federal attorney fee funding.[18] The Samish Tribe did not have funds to bring the motion at that time. *See* 25 C.F.R. § 89.42(b)(tribe must show inability to pay for lawsuit to obtain federal attorney fee funding).

CONCLUSION

Based on the foregoing discussion and on the Samish Tribe's Opening Brief, the decision of the district court denying the Samish Tribe's Rule 60(b)(6) motion should be reversed as a matter of law. The matter should be remanded with

[18] Between 1998 and 2000, the only funded counsel contract the Samish Tribe had was limited to Self-Determination Act program representation. Lawsuits, especially where the United States would be an adverse party, are not permitted. *See* Dkt #236, pp.15-19 and n.23, ER 480-484.

instructions for the district court to grant the motion in favor of the Samish Tribe and conduct appropriate further proceedings.

DATED: January 29, 2009.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED.R.APP.P. 32(a)(7)(C) and CIRCUIT RULE 32-1 FOR CASE NUMBER 08-35794

I certify that:

__x__ 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Reply brief is

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January 29, 2009
Date

s/ Craig J. Dorsay
Attorney for Movant-Appellant, Samish Indian Tribe

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2009, I electronically filed the foregoing REPLY BRIEF BY MOVANT-APPELLANT SAMISH INDIAN TRIBE, REDACTED FOR PUBLIC DISCLOSURE with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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