

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Cause #: 09-35772

Plaintiff, and

District Court ##:

2:89-sp-0002-RSM

2:70-cv-9213-RSM

**LOWER ELWHA BAND OF
KLALLAMS**, Lower Elwha Band
of S'Klallams; **JAMESTOWN
BAND OF KLALLAMS**,
Jamestown Band of S'Klallams;
**PORT GAMBLE BAND
CLALLAM**, Pt. Gamble Band of
S'Klallams,

**APPELLEE LUMMI
NATION'S REPLY
MEMORANDUM**

in Support of Lummi
Motion to Dismiss Appeal

Plaintiffs - Appellants,

v.

STATE OF WASHINGTON,

Defendant, and

LUMMI INDIAN TRIBE,

Defendant-Appellee.

1 The Klallams claim that a dismissal of an action without prejudice is
 2 a final appealable order. *Klallam Opposition Memorandum* at 5. That is
 3 an incomplete statement of the law in this Circuit. In this Circuit, a
 4 dismissal without prejudice is not appealable unless the aggrieved party
 5 files a written notice of intent not to amend and refile. **WMX**
 6 **Technologies, Inc. v. Miller**, 104 F.3d 1133, 1135 -1136 (9th Cir. 1997);
 7 **Lopez v. City of Needles, Cal.**, 95 F.3d 20, 22 (9th Cir. 1996). The
 8 obvious purpose of this rule is to require the parties to fully litigate all
 9 issues in the district court first, thereby preventing ‘piecemeal’ appeals to
 10 this Court, and, not coincidentally, avoiding review of decisions that are
 11 not yet final.
 12

13 Here, Judge Martinez expressly gave the Klallams leave to litigate
 14 the issues raised in their post-judgment motion by refile in a new
 15 subproceeding in *United States v. Washington*. The Klallams have not
 16 made the election required by **WMX Technologies** and **Lopez, supra**.
 17 Unless and until they do so, Judge Martinez’ order is not final and
 18 appealable.
 19

20 The Klallams claim that **De Tie v. Orange County**, 152 F.3d 1109
 21 (1998), trumps **WMX Technologies** and **Lopez**. However, **De Tie** is
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 23

1 inapposite. In ***De Tie***, this Court concluded that it had jurisdiction because
 2 the case was “over as far as the district court is concerned.” Here, in
 3 contrast, Judge Martinez made it clear that the Klallams case was **not**
 4 over as far as he was concerned:
 5

6 The Klallams’ motion for an order to show cause (Dkt #217) is
 7 DENIED, without prejudice to renewal as a new
 8 subproceeding, following the procedures set forth in
 9 Paragraph 25.

10 ***U.S. v Washington***, Subproceeding 89-2 ECF Docket #235. Since the
 11 Klallams can still litigate the issues they are raising at the district court
 12 level, this appeal is premature.
 13

14 The Klallams also claim that “interests of judicial efficiency and
 15 practicality” militate against dismissal of the Klallam appeal. *Klallam*
 16 *Opposition Memorandum at 10*. That is only true if the Klallams are willing
 17 to forego the possibility of further proceedings in the district court should
 18 they lose on the merits here. Otherwise, this Court could end up being
 19 asked to review the same issues in two separate appeals, following two
 20 separate proceedings at the district court level.
 21

22 CONCLUSION

23
 24 By refusing to make the election required by ***WMX Technologies***
 25 and ***Lopez***, the Klallams are trying to get two bites at the judicial apple at
 26
 27

1 both the district and appellate court levels. The Klallams could have
2 avoided wasting Judge Martinez' time and this Court's time by simply filing
3 a new subproceeding rather than asking Judge Martinez to hold Lummi in
4 contempt. Instead, the Klallams elected to see if they could shortchange
5 the rights of Lummi and other interested Tribes and speed up the judicial
6 process by convincing Judge Martinez that an undecided issue (the
7 location of the boundary between the "Strait of Juan de Fuca" and "the
8 waters of "Northern Puget Sound") had in fact already been decided. The
9 Klallams are trying to avoid the consequences of that choice now, and
10 should not be allowed to do so. For this reason and for all the other
11 reasons stated above and in Lummi's opening Motion, Lummi asks this
12 Court to dismiss the Klallams' appeal.

13 Dated this 1st day of October, 2009.

14 RAAS, JOHNSEN & STUEN, P.S.

15 OFFICE OF SPECIAL COUNSEL

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2009, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the persons required to be served in this Subproceeding whose names appear on the Master Service List, and on the Subproceeding Service List in Subproceeding 89-2.

RAAS, JOHNSEN & STUEN, P.S.

s/ Daniel A. Raas, WSBA #4970

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