**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

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| SKOKOMISH INDIAN TRIBE, a federally recognized Indian tribe, in its own capacity, as class representative, and as parens patriae, and SKOKOMISH INDIAN TRIBAL MEMBERS DENNY S. HURTADO, GORDON A. JAMES, JOSEPH PAVEL, ANNE PAVEL, MAURES P. TINAZA SR., CELESTE F. VIGIL, ROSLYNNE L. REED, GARY W. PETERSON, RITA C. ANDREWS, TOM G. STRONG, MARIE E. GOULEY, VICTORIA J. PAVEL, DENNIS W. ALLEN, JOSEPH ANDREWS SR., ZETHA CUSH, ELSIE M. ALLEN GAMBER, ALEX L. GOULEY JR., LAWRENCE L. KENYON, DORIS MILLER, GERALD B. MILLER, HELEN M. RUDY, RONALD D. TWIDDY SR., and NICK G. WILBUR SR., for themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>THE UNITED STATES,<br><br>Defendant. | ) | Civ. Action No. 11-658L<br><br>Judge Francis M. Allegra |

**SKOKOMISH INDIAN TRIBE AND INDIVIDUALLY NAMED TRIBAL MEMBERS' MEMORANDUM IN OPPOSITION TO UNITED STATES' MOTION TO DISMISS**

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## INTRODUCTION

On October 26, 2012, the United States filed a motion to dismiss (Dkt #26). Pursuant to the Court's scheduling order of October 23, 2012 (Dkt. #25), Plaintiffs hereby respond.

The Skokomish Indian Tribe and individually named members of the Tribe ("Plaintiffs") seek damages from the United States based on the government's breach of money-mandating fiduciary duties and its temporary taking of a flowage easement without just compensation. Amended Complaint, Dkt. #6. The United States moves to dismiss this case because it alleges the Court lacks jurisdiction or that Plaintiffs' Amended Complaint does not state a claim upon which relief can be granted. Dkt. # 26.

This Court plainly has jurisdiction over Plaintiffs' claims, which arise under the January 26, 1855 Treaty of Point-No-Point (12 Stats. 933), federal statutes and regulations, and the United States Constitution. The relevant sources of law contain money-mandating duties, or fair inferences thereof, and therefore fall within this Court's subject matter jurisdiction under the Tucker Act and Indian Tucker Act. Jurisdiction is not barred by 28 U.S.C. § 1500, because the United States District Court for the Western District of Washington transferred the entirety of Plaintiffs' claims against the United States to this Court. Thus, no claims against the United States were "pending" in the District Court when this action was filed.

The government alleges that the statute of limitations bars Plaintiffs' claims, but the claims in Plaintiffs' Amended Complaint retain the filing date of the original Complaint – November 19, 1999. Pursuant to the mandate of the Ninth Circuit Court of Appeals' *en banc* panel, the District Court transferred Plaintiffs' claims against the United States to this Court pursuant to 28 U.S.C. § 1631. Thus, Plaintiffs' claims are not "newly filed." The takings claim also relates back to the date of Plaintiffs' original 1999 Complaint because it arises out of the

same conduct and operative facts alleged in the 1999 Complaint. Because Plaintiffs' claims did not accrue until 1996, at the earliest, the statute of limitations is no bar.

Section 10(c) of the Federal Power Act, 16 U.S.C. § 803(c), does not immunize the United States from liability based upon its breach of obligations owed to Plaintiffs pursuant to federal law. The government alleges that Section 10(c) immunizes the United States from suit for any action or inaction related to a project under the Federal Power Act, but the government's interpretation is much too broad. Federal law imposes specific fiduciary duties on the United States, as trustee, and Section 10(c) does not wipe away the government's liability for failure to comply with its own duties. Nor can statutes prospectively immunize the United States from takings liability under the Constitution. The Court should deny the United States' motion.

## FACTUAL BACKGROUND

Pursuant to Article 2 of the Treaty of Point-No-Point, the Skokomish Indian Reservation was established to provide a homeland within the Skokomish Tribe's broader traditional territory and to protect fisheries resources and the Tribe's access to fish and other resources upon which it depends for its survival and way of life. Amended Complaint, Dkt. #6, ¶ ¶ 7-21. The purpose of establishing Indian reservations is to provide a "permanent home and abiding place" for a Tribe. *Winters v. United States*, 207 U.S. 564, 565 (1908). *See also In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d 68, 74-76 (Ariz. 2001) (holding that Indian reservations are established to provide a permanent homeland for the Indians).

The City of Tacoma began construction of the Cushman Hydroelectric Project ("Project") in the 1920s and completed it in 1930. The Project is located on the Olympic Peninsula in Washington State. (*See* Locator Maps, attached hereto as Exhibit A-1 and A-2.) Project dams and diversion structures are located on the North Fork of the Skokomish River, upstream of the Skokomish Indian Reservation. *Id.* Project components, including transmission lines and a

powerhouse, are located within the Reservation. *Id.* Amended Compl. ¶¶ 59-60; *City of Tacoma v. FERC*, 460 F.3d 53, 59 (D.C. Cir. 2006).

The Federal Power Commission issued the City a Minor Part License in 1924 pursuant to 16 U.S.C. §§ 797 and 803(i). That license authorized flooding of 8.8 acres of federal forest land for the Project.[1] Amended Compl., ¶ 49. The license did not contain any provisions to protect the Skokomish Reservation or trust resources of the Skokomish Tribe from Project impacts. *Id*., ¶¶ 57-58. During the eight decades from construction of the Project in 1930 until FERC issued a new license in 2010, the United States took no action to protect the homeland of the Tribe, nor the resources on which it depended. *Id.*, ¶¶ 60-97.

The Federal Power Act gives the Secretary of the Interior the exclusive authority and duty to impose "such conditions" as the Secretary "shall deem necessary for the adequate protection and utilization of" an Indian reservation affected by any project licensed by FERC so that "the license will not interfere or be inconsistent with the purpose for which such reservation was created." 16 U.S.C. § 797(e). The Secretary, due to concerns expressed by the Tribe, knew the Project would impact the Reservation and the Tribe's treaty rights both prior to the Project's operation and at all subsequent times. Amended Compl., ¶¶ 51-72. Yet, the Secretary did not develop any conditions to protect the Tribe's Reservation or treaty rights from the Project until 1997. *Id.*, ¶ 88. Even then, no conditions were actually imposed on the Project to protect the Tribe and its homeland until issuance of an amended FERC license in July 2010. *Id*., ¶¶ 88-94.

Many impacts to the Tribe's Reservation and trust resources arising from the Project did not occur or become apparent immediately and many are continuing even now until remediation

[1] The land was within the Olympic National Forest. The United States, on page 5 of its Memorandum (Dkt. #26-1) incorrectly states that this license "authorized flooding of 8.8 acres of the Skokomish Reservation."

and the new license conditions are fully implemented. Over a span of many years, the dewatering of the North Fork Skokomish River led to reduction in flows in the mainstem Skokomish River,[2] which caused the gradual aggradation of the mainstem Skokomish riverbed and increased flooding on the Reservation.[3] Amended Compl., ¶¶ 95-97. Indeed, 27 percent of Reservation lands (over 1,400 acres) experienced such frequent flooding by the mid-1990s that they were unusable for agriculture or habitation.[4] *Id.*, ¶¶ 86, 95. Rises in the groundwater tables, due to aggradation and flooding, caused failures in septic systems, contamination of drinking wells, and destruction of orchards and pastures by the mid-1990s. *Id*., ¶¶ 95.3-95.6. Over time, decreased flows and resulting aggradation caused by the Project severely damaged timber and agricultural resources on the Reservation and destroyed valuable wildlife habitats. *Id*., ¶¶ 95.7-95.10.

The Skokomish Tribe depended on the United States to protect its rights. In the 1920s and 1930s, when the Project was constructed and completed, federal law prohibited an Indian tribe from entering into attorney contracts to provide services to protect the Tribe's lands unless the Secretary of the Interior approved the contract. Act of March 3, 1871, c. 120, § 3, 16 Stat. 570, as amended by the Act of May 21, 1872, c. 177, §§ 1, 2, 17 Stat. 136, (formerly codified as 25 U.S.C. § 81). Amended Compl., ¶¶ 61-64. In 1930, the Commissioner of Indian Affairs refused the Tribe's request that he approve a contract for an attorney to represent the Tribe in a lawsuit challenging the Project, stating inaccurately that "steps . . . have already been taken by

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[2] The mainstem Skokomish River is also referred to simply as the Skokomish River and is labeled on the maps attached hereto as Exhibit A.

[3] Aggradation occurs when deposits of sediment, gravel, and rocks cause the floor of the river to build up over time, leading to flooding and elevated water tables in surrounding land. *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 510, n. 1 (9th Cir. 2005).

[4] Defendant's statement on page 1 of its Memorandum (Dkt. #26-1) that "[t]he completion of the Project immediately resulted in the flooding of a portion of the Skokomish Reservation . . ." is not correct, and Defendant offers no factual support for this statement. Flooding of the Reservation occurred later, as a result of the gradual aggradation of the Skokomish riverbed.

the Department of Justice to protect their [the Tribe's] interests." *Id.*, ¶¶ 64-65. In fact, the Justice Department took no steps and refused to bring suit to protect the Tribe's interests. *Id.*, ¶ 68. The United States Attorney at the time, a former attorney for the City of Tacoma, had previously tried cases relating to the damming of the North Fork on behalf of the Project, and he successfully resisted the United States' filing suit against the City. *Id*., ¶¶ 68-71.

Subsequently, the Secretary of the Interior repeatedly failed to protect the Tribe from the devastating impacts of the Project. As explained in *City of Tacoma v. FERC*, 460 F.3d at 59, the Federal Power Commission determined in 1963 that certain "minor part licenses" (as had been issued for the Cushman Project) were improperly issued because the Commission's hydropower licensing jurisdiction extends to entire projects, not just those project components that occupy federal land. FERC's jurisdictional determination in 1963 "cast a shadow of doubt over all projects that were then operating under minor part licenses, including the Cushman Project." *Id.* However, the Secretary of the Interior took no action to impose conditions on the Project in 1963, and the Project continued to operate under the minor part license without any constraints to protect the Reservation, trust resources and Tribe's treaty rights. *Id.;* Amended Compl., ¶¶ 73-74.

When the initial 50-year term of Tacoma's minor part license expired in 1974, and the City applied for a new license, FERC continued to issue annual licenses to the City until 1977 when it issued a "perpetual annual license." Amended Compl., ¶¶ 75-76. Neither FERC nor Interior imposed protective conditions in these annual licenses in the 1970s or subsequently. *Id.* In 1975, the Tribe intervened and attempted to participate in the licensing proceeding, despite its limited resources. *Id.*, ¶ 77. From 1975 forward, the Tribe repeatedly asked the Interior Department to fund the necessary studies to identify the Project's impacts on the Reservation and

the Tribe's treaty rights. *Id.*, ¶¶ 77, 81, 84. The Department repeatedly denied those requests until 1996, when it belatedly commissioned and published studies. *Id*., ¶¶ 81, 83, 84, 86.

The Department's 1996 studies formed the basis for the conditions the Secretary developed under Section 4(e) of the Federal Power Act in 1997. *Id*., ¶¶ 86, 88. Even after the Secretary commissioned studies and issued conditions on the Project's renewal, FERC renewed the City's license to operate the Project, but rejected the conditions developed to protect the Tribe. *City of Tacoma*, 460 F.3d at 60. The Tribe appealed the renewed license to the D.C. Circuit, but the Departments of Justice and Interior failed to defend the Secretary's statutory authority to issue conditions in that appeal. Amended Compl., ¶ 92.

In 2006, the D.C. Circuit (solely at the Tribe's urging) rejected FERC's argument that the Secretary's 4(e) conditions must be limited to the impacts of the Project facilities actually located on reservation lands. *City of Tacoma*, 460 F.3d at 64-67. The Court concluded that since some Project facilities are located on reservation land, the Secretary has a duty to impose any license "conditions that are designed to mitigate the effect of the project on the Skokomish River to the extent doing so is reasonably related to protecting the reservation and the Tribe." *Id.*, at 67. Relying on *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 777-79 (1984), the D.C. Circuit held that the Federal Power Act "gives FERC no discretion to reject Interior's section 4(e) conditions . . .." *City of Tacoma*, 460 F.3d at 67. Tacoma did not further appeal, and this ruling ultimately led to imposition of protective conditions in a new license issued by FERC in July 2010. *See* 132 FERC ¶ 61037 (July 15, 2010).

**PROCEDURAL BACKGROUND**

This case was initiated on November 24, 1998, when the Skokomish Tribe served an administrative Claim for Damages and Injury on the United States pursuant to the Federal Tort Claims Act for its failure to protect the Tribe from the impacts of the Cushman Project.

Amended Compl., ¶ 98. The United States failed to act on the Tribe's administrative claim and on November 19, 1999, Plaintiffs filed suit against the United States and its licensee, the City of Tacoma, in the United States District Court for the Western District of Washington, Case No. 99-5606, alleging claims principally under the Federal Tort Claims Act. *Id.*, ¶¶ 99-100.

On May 26, 2000, the District Court dismissed Plaintiffs' claims against the United States. In orders dated June 5 and August 9, 2001, the Court also dismissed Plaintiffs' claims against the City of Tacoma. *Skokomish Indian Tribe v. United States*, 161 F. Supp. 2d 1178, 1183 (W.D. Wash. 2001). Plaintiffs timely appealed. On June 3, 2003, a three-judge panel of the Ninth Circuit Court of Appeals affirmed dismissal of Plaintiffs' claims against the United States, on grounds that Section 10(c) of the Federal Power Act, 16 U.S.C. § 803(c), barred jurisdiction over Plaintiffs' claims. *Skokomish Indian Tribe v. United States*, 332 F.3d 551, 556-57 (9th Cir. 2003). The Court also affirmed dismissal of the claims against Tacoma. *Id*. at 564.

The Ninth Circuit Court of Appeals agreed to review the case *en banc*. On March 9, 2005, and in an amended opinion issued June 3, 2005, the *en banc* court declined to dismiss Plaintiffs' claims against the United States and ordered those claims transferred to the Court of Federal Claims. *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 510-11 (9th Cir. 2005).

The case was remanded to the District Court to proceed in accordance with the Circuit decision. On May 9, 2006, the District Court ordered the Clerk of that Court to "transfer the Claims against the United States to the Court of Federal Claims."[5] The District Court docket was not transferred to the Court of Federal Claims at that time, however, due in part to the appeal of certain related matters in the Ninth Circuit Court of Appeals.[6] On October 12, 2011,

[5] The Court's May 9, 2006 transfer order (Dist. Court Dkt. #187) is attached hereto as Exhibit B.

following Plaintiffs' settlement with the City of Tacoma, dismissal of Plaintiffs' appeal in the Ninth Circuit, and the transfer of the docket from the District Court, the Clerk of the Court of Federal Claims docketed this case and served a Notice of Filing pursuant to RCFC 5(b)(2)(C). Plaintiffs filed their Amended Complaint in this Court on November 11, 2011. Dkt. #5, 6.

## ARGUMENT

### I. 28 U.S.C. § 1500 and the "Simultaneous Filing Rule" Are Not Applicable Here, Because the Entirety of Plaintiffs' Claims Against the United States Were Transferred to the Court of Federal Claims.

Relying on the "simultaneous filing rule" of *United States v. County of Cook*, 170 F.3d 1084 (Fed. Cir. 1999), the United States argues that 28 U.S.C. § 1500 precludes this Court's jurisdiction and requires dismissal of Plaintiffs' Amended Complaint. This argument is wrong, because the District Court for the Western District of Washington transferred the entirety of the Skokomish Plaintiffs' claims against the United States to this Court, leaving no claims pending against the United States in the District Court. In *County of Cook*, the Federal Circuit ruled that:

> It is worth noting that § 1500 is not implicated when *all* of the claims in an action are transferred to the Court of Federal Claims pursuant to § 1631. Section 1631 mandates that the transferred claims be treated as if they were filed in the transferee court at the time they were filed in the transferor court. Therefore, when all claims in an action are transferred, no claims are pending in the district court that could preclude jurisdiction over the transferred claims in the Court of Federal Claims pursuant to § 1500.

*County of Cook*, 170 F.3d at 1091, n. 8 (emphasis in original). Here, the District Court transferred all of the Skokomish Plaintiffs' claims against the United States to this Court. *See*

[6] The then-pending appeal was from a District Court decision entered on April 12, 2006 denying Plaintiffs' Rule 60(b) motion concerning the claims against the City of Tacoma. *Skokomish Indian Tribe v. United States*, No. 99-5605 (W.D. Wash.) at Dkt. No. 179 (Feb. 9, 2006), Dkt. No. 184 (April 12, 2006), and Dkt. No. 188 (May 12, 2006). This appeal and Plaintiffs' claims against the City were subsequently resolved by a settlement agreement and consent decree. Dkt. No. 201 (July 27, 2011) (attached hereto as Exhibit D).

District Court Dkt. #187 (attached hereto as Exhibit B). Thus, contrary to Defendant's argument, *County of Cook* actually confirms that 28 U.S.C. § 1500 is inapplicable to this case.

The question of jurisdiction turns on "the state of things at the time of the action brought." *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993). Plaintiffs' original complaint, filed in the District Court in 1999, alleged seven causes of action against the United States. The causes of action against the United States, as alleged by Plaintiffs, were for (1) negligence; (2) trespass; (3) public nuisance; (4) private nuisance; (5) conversion; (6) tortious interference; and (7) violation of the Administrative Procedures Act.[7] The original complaint also alleged thirty-five separate causes of action against the City of Tacoma. *Id*.

In 2005, the Ninth Circuit Court of Appeals, sitting *en banc*, re-characterized Plaintiffs' claims against the United States *sua sponte*. According to the Ninth Circuit, "The Tribe's claims against the United States are properly characterized not as tort claims, but as claims that the United States violated its obligations under the Treaty." *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 510 (9th Cir. 2005) (en banc). The Court added:

> The Tribe is not claiming the United States behaved tortiously, but rather that the United States failed to abide by its contractual obligations to the Tribe under the Treaty. The Tribe's claims may best be characterized as arising under the Tucker Act, 28 U.S.C. § 1491, or its counterpart for Indian claims, the Indian Tucker Act, 28 U.S.C. § 1505.

*Id.* at 511. Having re-characterized the Plaintiffs' claims against the United States from tort-based claims to contract and treaty-based/breach of fiduciary duty claims, the Ninth Circuit ordered that Plaintiffs' claims against the United States be transferred to the Court of Federal Claims. *Id*. The Ninth Circuit opinion also discusses "Federal Power Act Claims;" however, Plaintiffs asserted no such claims against the United States in their Complaint. *See* 1999

[7] The United States has attached a copy of Plaintiffs' District Court Complaint as an exhibit to its Memorandum in Support of Motion to Dismiss (Dkt. #26, Exhibit B).

Complaint, at Dkt. #26, Exh. B. Rather, the United States raised the Federal Power Act, specifically 16 U.S.C. § 803(c), as a defense. *Skokomish Indian Tribe*, 332 F.3d at 556-57.

After issuance of the Ninth Circuit's mandate, Plaintiffs moved the District Court for "an order, pursuant to 28 U.S.C. § 1631, . . . that transfers claims against the United States to the Court of Federal Claims." Dist. Court. Dkt. #185, p. 2, (attached as Exhibit C-6). The United States did not file any response or opposition to Plaintiffs' motion. On May 9, 2006, the Court granted Plaintiffs' motion, ruling that: "The Skokomish Indian Tribe's Motion to Transfer Claims against the United States To The Court of Federal Claims is GRANTED, and the Clerk shall transfer the Claims against the United States To The Court of Federal Claims." Dist. Court. Dkt. #187 (attached hereto as Exhibit B). Pursuant to the Ninth Circuit's order and mandate, Plaintiffs' motion and the District Court's transfer order encompassed all claims against the United States. The United States did not seek re-consideration or appeal of the transfer order.

Defendant seeks application of *County of Cook* and 28 U.S.C. § 1500 by misstating what the Ninth Circuit did in its *en banc* order. Contrary to the United States' argument, the Ninth Circuit did not affirm dismissal of Plaintiffs' claims. Instead, it wholly re-characterized Plaintiffs' claims in their entirety as treaty-based/breach of trust claims and ordered all claims against the United States transferred to the Court of Federal Claims. *Skokomish Indian Tribe*, 410 F.3d at 510-11. The District Court then proceeded to transfer all of "the Claims against the United States" to this Court. *See* Exhibit B. Nothing in the District Court's transfer order suggests that any of the claims against the United States remained at the District Court. *Id.* Thus, the "simultaneous filing rule" of *County of Cook* is wholly inapplicable here. *County of Cook*, 170 F.3d at 1091, n.8. Although Plaintiffs' related litigation against the City of Tacoma

remained pending at the District Court, that is not relevant to 28 U.S.C. § 1500, which only applies to claims pending against the United States, not non-federal parties. 28 U.S.C. § 1500.

Application of Section 1500 in the manner approved by *County of Cook* nullifies the purpose and effect of the jurisdictional transfer statute, 28 U.S.C. § 1631. Section 1631 was enacted "to remedy the situation in which a litigant has mistakenly filed an action in a court that lacks jurisdiction." *County of Cook*, 170 F.3d at 1089. "Section 1631 was clearly intended by Congress to remedy this problem through the simple mechanism of a transfer to the court of proper jurisdiction." *Id.; Griffin*, 85 Fed. Cl. at 194 (stating § 1631 was enacted "to prevent unfairness and injustice" and "to *cure* jurisdictional defects").[8] Yet, the Court's reading of Section 1500 in *County of Cook* means that Section 1631 cannot apply where a claim properly before the Court of Federal Claims was first mistakenly brought in the District Court - unless the entire action is transferred. *Griffin*, 85 Fed. Cl. at 194; *County of Cook*, 170 F.3d at 1091, n.8. The United States' argument here would extend application of the "simultaneous filing rule" to that latter exception (transfer of all claims) and would effectively end the ability of courts to

[8] The broad remedial purposes of the transfer statute are clear from its history. The transfer statute was originally adopted in 1960. *Keene*, 508 U.S. at 216, n.11, citing Act of September 13, 1960, 74 Stat. 912 formerly codified at 28 U.S.C. §1406(c) and 28 U.S.C. §1506 (1964 ed). It was adopted to "authorize transfer of cases between the district courts and the Court of Claims and vice versa to cure jurisdictional defects." H. Rep. No. 85-2145 at 1 (1958); *see also* 104 Cong. Rec. 13163-13165 (Daily Ed. July 21, 1958). While the impetus for the 1960 Act was the uncertainty and complexities in determining the appropriate federal court to adjudicate maritime cases, the Act was written broadly and was not limited to maritime claims. Congress sought to "prevent otherwise meritorious claims from being time-barred as a result of unavoidably inappropriate choices of forum." *Id.; see also* S. Rept. No. 1894 at 2-3 (1960). The 1960 Act was amended in 1982 as part of the Federal Courts Improvement Act, and codified as amended at 28 U.S.C. §1631. In the 1982 amendment, Congress expanded the authority to transfer cases between federal courts so that transfers could be done at both the trial and appellate levels to cure jurisdictional questions that were arising with increasing frequency and to ensure that transferred cases would not be barred by limitations as a result of the transfer. S. Rep. No. 97-275 at 11 (1981). *See also Hearings on Judicial Housekeeping before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice*, 95th Cong. 2d Sess., 372-390 (1978).

transfer any claim or action to the Court of Federal Claims under Section 1631. This Court should not interpret Section 1500 in a manner that renders another act of Congress, Section 1631, nugatory. *United States v. Tohono O'odham Nation*, 131 S. Ct. 1723, 1730 (2011) ("[c]ourts should not render statutes nugatory through construction"); *Griffin*, 85 Fed. Cl. at 187 (citing cases that refuse to "read one statutory provision as limiting judicial review under another").

Application of 28 U.S.C. § 1500 has been repeatedly criticized as outdated and anachronistic. *See Keene Corp. v. United States*, 508 U.S. 200, 217 (1993) ("The trial judge in this case was not the first to call the statute anachronistic"). The Court should reject the United States' invitation to broaden the applicable scope of 28 U.S.C. § 1500 beyond that decided in *County of Cook*. A jurisdictional statute, such as § 1500, must be construed with fidelity to its terms. *Griffin v. United States*, 85 Fed. Cl. 179, 187 (2008), *aff'd*, 590 F.3d 1291 (Fed. Cir. 2009), *reh'g denied* 621 F.3d 1363 (Fed. Cir. 2010).

This Court has comprehensively analyzed and discussed in detail the reasons why 28 U.S.C. §1500 does not and should not apply when claims in a case are transferred from a district court to the Court of Federal Claims. *Griffin*, 85 Fed. Cl. at 186-195. Those reasons are equally applicable here and, at a minimum, strongly counsel against any further expansion of *County of Cook*. In addition, expansion of *County of Cook* and the "simultaneous filing rule" is ill-advised because *County of Cook* appears to be directly at odds with a prior decision of the Court of Claims in *Tecon Engineers v. United States*, 170 Ct. Cl. 389, 343 F.2d 943 (1965), as well as the Supreme Court's opinion in *Keene Corp.*, 508 U.S. 200 (1993).

In *Tecon*, which remains binding precedent in the Federal Circuit, the Court of Claims held that the bar of § 1500 applies "only when the suit shall have been commenced in the other court *before* the claim was filed in [the Court of Federal Claims]." *Tecon*, 343 F.2d at 949

(emphasis added). *Hardwick Brothers Company II v. United States*, 72 F.3d 883, 886 (Fed. Cir. 1995) (stating "*Tecon Engineers* remains good law and binding on this court"). Similarly, in *Keene*, the Supreme Court read Section 1500 "to bar jurisdiction over the claim of a plaintiff who, *upon filing*, has an action pending in any other court 'for or in respect to' the same claim." *Keene*, 508 U.S. at 209 (emphasis added).[9] The Supreme Court in *Keene* further suggested that §1500 might not be implicated if a suit in the District Court were transferred to the Court of Federal Claims pursuant to the transfer statute. *Keene*, 508 U.S. at 216 n.11. Thus, to be consistent with *Tecon* and *Keene*, and to give effect to the express text and congressional purpose of the transfer act, 28 U.S.C. § 1631, the jurisdictional bar of § 1500 would properly apply here only if the Skokomish Plaintiffs had a case pending in the District Court and arising out of the same operative facts *before* November 19, 1999. Of course, they did not.

## II. All Claims Alleged in Plaintiffs' Amended Complaint Fall Within the Subject Matter Jurisdiction of This Court. The Ninth Circuit's En Banc Order to Transfer Claims to this Court Was Proper.

Plaintiffs' Amended Complaint asserts claims against the United States for breaches of fiduciary duties that arise under the Treaty of Point-No-Point and federal statutes and regulations relating to Indian lands, as well as a claim arising under the Fifth Amendment to the United States Constitution. Such claims are within the subject matter jurisdiction of this Court pursuant to the Tucker Act, 28 U.S.C. § 1491 and the Indian Tucker Act, 28 U.S.C. § 1505. *United States v. Mitchell*, 463 U.S. 206, 226-28 (1983) (holding the United States may be accountable for money damages arising out of breaches of trust to Indian beneficiaries); *Jan's Helicopter*

[9] The Supreme Court, in *Tohono O'odham*, similarly described §1500 as applying when two separate suits have been filed – not ever suggesting that it might apply when one suit is filed and thereafter transferred. *See Tohono O'odham*, 131 S. Ct. at 1727 ("The question to be resolved is what it means for *two suits* to be "for or in respect to" the same claim.") (emphasis supplied).

*Service, Inc., v. Federal Aviation Administration*, 525 F.3d 1299, 1309 (Fed. Cir. 2008) (finding it undisputed that the Tucker Act confers jurisdiction over Fifth Amendment takings claims).

Claims in the Amended Complaint retain the filing date of the original Complaint filed in the United States District Court for the Western District of Washington on November 19, 1999. When claims are transferred pursuant to 28 U.S.C. § 1631, as they were here, "[T]he action shall proceed as if it had been filed in . . . [the transferee court] on the date upon which it was actually filed in . . . [the transferor court.]" *Stockton East Water District v. United States*, 62 Fed. Cl. 379, 389 (2004). For transferred claims, "the filing date, for purposes of the Tucker Act's six-year statute of limitations, is the date on which the action was filed in district court." *Id.*

The United States now contends that it was improper for the Ninth Circuit to transfer "Plaintiffs' tort claims" to this Court, because this Court lacks jurisdiction over tort claims. The United States' argument fails because: (1) it is predicated on its mischaracterization of the Ninth Circuit's decision; (2) the United States waived any challenge to the validity of the transfer order by not timely objecting to that order or the subsequent District Court transfer order; (3) the Ninth Circuit's decision on transfer is the law of the case; and (4) the transfer decision was correct.

First, the United States mischaracterizes the Ninth Circuit's *en banc* decision. The Ninth Circuit did not uphold the dismissal of the United States from all damages claims. The Ninth Circuit also did not order the transfer of tort claims to this Court; rather, the Ninth Circuit transferred claims alleging that the United States breached fiduciary obligations to the Tribe and violated obligations arising under the Treaty of Point-No-Point. *Skokomish Indian Tribe*, 410 F.3d at 510-11. The Ninth Circuit, *en banc*, held that the Tribe's original complaint alleged a breach of the United States' fiduciary responsibilities to the Tribe under the Treaty. *Id.*

The Court ruled that the Tribe's claims were "very much like" the breach of fiduciary duty claims adjudicated by the Court of Federal Claims in *United States v. Mitchell*, 463 U.S. 206 (1983). *Id.* at 511. Put another way, according to the Ninth Circuit, the Tribe's original complaint did not allege claims sounding in tort. Instead, the *en banc* panel ruled that the Tribe's complaint alleged claims for breach of fiduciary duty, like those in *Mitchell II*, which are properly within the jurisdiction of this Court. *Id.*[10] Based on this analysis, the Ninth Circuit did not affirm the District Court order that would have dismissed the Tribe's claims against the United States. Instead, the Ninth Circuit transferred those claims – which it clearly viewed as Treaty-rights and breach of fiduciary duty claims – to this Court.

Second, the United States has waived any objection to the transfer order. The United States did not seek rehearing of the Ninth Circuit's *en banc* order to transfer the claims against the United States to this Court[11] or petition for certiorari. Nor did it file any response to the Tribe's 2006 motion in the District Court to implement the Ninth Circuit transfer mandate. The

[10] The Ninth Circuit's decision to transfer the case to this Court may well have been prompted by an argument made by the United States in its earlier brief on appeal. In particular, the United States argued that the cases cited by the Tribe – where the United States was liable in damages for violation of treaty rights – did not support district court jurisdiction over the Tribe's FTCA claims because those cases addressed claims within the jurisdiction of the Court of Federal Claims. As the United States informed the Ninth Circuit, "Plaintiffs also cite a number of cases originating in the Court of Federal Claims for the proposition that the United States is subject to damages for violating treaty rights. These cases involve claims seeking damages for alleged violation of treaty rights over which the Court of Federal Claims has jurisdiction, as opposed to tort claims under the FTCA, and thus do not support plaintiffs' argument that the district court has jurisdiction." Brief of Appellee United States, in *Skokomish Indian Tribe v. United States*, Appeal No. 01-35854 (9th Cir. June 13, 2002) 2002 WL 32102867 at n.10 (emphasis supplied).

[11] While the United States here suggests that it questioned the propriety of the Ninth Circuit's decision to transfer the case to the Court of Federal Claims, *see* US Memorandum (Dkt. #26-1) at pp. 8-9, the United States never asked the Ninth Circuit to rehear that part of its decision or took any other action to challenge that ruling. *See* US Memorandum (Dkt. #26-1), at Ex. A (United States Brief before the Ninth Circuit only responding to the Tribe's rehearing request and expressly limiting its response to a water rights issue.) Nor did the United States ever advise the Ninth Circuit or District Court that if the Tribe's claims were transferred to the Court of Federal Claims, the United States would seek their dismissal under 28 U.S.C. § 1500.

United States did not seek reconsideration or appeal the District Court's 2006 order to "transfer the Claims against the United States to the Court of Federal Claims." Dist. Court Dkt. #187. Nor did it file any response or objection to the Tribe's 2011 motion seeking transmittal of the District Court docket to this Court, which was necessary to initiate the transfer proceeding, or to the order granting the Tribe's motion. The United States has waived any objection to the Ninth Circuit's *en banc* order to transfer claims to this Court and the subsequent District Court orders.

Third, the Ninth Circuit's decision to transfer this action is the law of the case, and there is no basis on which that Court's *en banc* decision should (or can) be re-examined. Law of the case principles apply to transfer determinations made by a coordinate court in the same case. *Christianson v. Colt Industries Operating Corp*., 486 U.S. 800, 816 (1988). In *Colt*, the Court found that a Federal Circuit determination that it lacked jurisdiction over an appeal and its transfer of the case to the Seventh Circuit was law of the case which should not have been re-examined by the Seventh Circuit. In addition, the Court found that "the policies supporting the [law of the case] doctrine apply with even greater force to transfer decisions than to decisions of substantive law; transferee courts that feel entirely free to revisit transfer decisions of a coordinate court threaten to send litigants into a vicious circle of litigation." *Id.*; *Doko Farms v. United States*, 861 F.2d 255 (Fed. Cir. 1988) (following *Colt* and applying law of case to transfer decision). Following *Colt* and *Doko Farms*, the Court must reject the United States' untimely invitation to re-examine the Ninth Circuit's *en banc* transfer determination.

Fourth, even if this Court did re-examine the Ninth Circuit's transfer determination, there is no basis to treat the claims in the Tribe's amended complaint as "tort claims" or as "newly filed." The Ninth Circuit's determination that the Tribe's claims were properly framed, not as tort claims, but as claims for breach of fiduciary duties and Treaty obligations is wholly

consistent with Federal Circuit precedent. The Federal Circuit has affirmed district court decisions to transfer claims to the Court of Federal Claims found to arise from breach of a contractual obligation, although originally framed as tort claims. *Awad v. United States*, 301 F.3d 1367, 1372 (Fed. Cir. 2002); s*ee also Wood v. United States*, 961 F.2d 195, 198 (Fed. Cir. 1992). As the Federal Circuit stated in *Awad*: "It is well established that where a tort claim stems from a breach of contract, the cause of action is ultimately one arising in contract, and thus is properly within the exclusive jurisdiction of the Court of Federal Claims . . .." 301 F.3d at 1372. Although the *Awad* plaintiff plead tort claims, the source of the government's duty to the plaintiff was based on contract and thus the claims were properly transferred, as contract claims, to the Court of Federal Claims. Similarly here, the Ninth Circuit determined that Plaintiffs' claims against the United States ultimately stemmed from the government's Treaty and fiduciary obligations to the Tribe, and thus were not actually tort claims.

The Federal Circuit's decision in *Souders v. South Carolina Public Service Authority*, 497 F.3d 1303 (Fed. Cir. 2007), cited by the government, is not to the contrary. That case rejected the efforts of a state public utility, which was the defendant in a damages suit brought by private landowners in federal district court, to use the federal government's duty to indemnify it as a basis for transforming the plaintiff's claims against the utility into claims against the United States – even though plaintiff had not made any claims against the United States. *Souders* does not affect a court's ability to determine the essential nature of a claim for purposes of determining the proper court to exercise jurisdiction. Nor does *Souders* bar a plaintiff from amending its complaint to conform to the requirements of a transfer order.

The Ninth Circuit's transfer of Plaintiffs' claims against the government is proper. Under 28 U.S.C. § 1631, the claims transferred "shall proceed as if . . . filed in [the Court of Federal

Claims] on the date upon which it was actually filed in the [district court]." Plaintiffs' claims are not "newly filed," but are deemed filed on November 19, 1999 – the date on which the district court case was filed. *Stockton East Water Dist. v. United States*, 62 Fed. Cl. 379, 389 (2004).

### III. Plaintiffs' Temporary Takings Claim Relates Back to the Original Filing Date of November 19, 1999.

Plaintiffs' Amended Complaint alleges a Fifth Amendment takings claim against the United States. While this claim is based on a legal theory not asserted against the United States in the District Court, the claim arises out of the same conduct and operative facts alleged against the United States in the 1999 District Court complaint. Thus, pursuant to RCFC 15(c)(1)(B), the takings claim relates back to the date of the original pleading, here, November 19, 1999. *Stockton East Water Dist.*, 62 Fed. Cl. at 391-392.

In *Stockton East*, the District Court transferred takings claims to the Court of Federal Claims in 2004 that were originally filed in 1993. The plaintiff's amended complaint, filed in the Court of Federal Claims following transfer, added a breach of contract claim that had not been plead in the previous 11 years of litigation. *Id.* The Court found that the District Court had not transferred a breach of contract claim to the CFC, but nevertheless permitted the breach of contract claim to proceed as if filed in the original 1993 complaint under the authority of RCFC 15(c)(1)(B) and the relation back doctrine. "Whether the [legal] theory is a takings or a breach of contract, both theories are based on the same set of facts 'that have been a part of this proceeding since its inception.'" *Id.* at 392, *quoting J.L. Simmons Co. v. United States*, 188 Ct. Cl. 684, 730, 412 F.2d 1360, 1386-87 (1969). *See also Mayle v. Felix*, 545 U.S. 644, 664 n.7 (2005) (applying Fed. R. Civ. P. 15 and holding that relation back is ordinarily allowed "when the new claim is based on the same facts as the original pleading and only changes the legal theory"); *Hall v. Spencer County*, 583 F.3d 930, 934 (6th Cir. 2009) (allowing relation back

under Fed. R. Civ. P. 15, where although "the amended complaint is substantially more sophisticated than the original complaint . . . it merely asserts a new legal theory arising out of the same occurrence as asserted in the original complaint"). This is consistent with the general principle that amendments to pleadings should be liberally permitted. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Similarly here, the takings claim asserted against the United States is based on the same operative facts and arises out of the same events as the claims plead by the Tribe in its original complaint. Thus, the takings claim, which is clearly within the jurisdiction of this Court, relates back to the original filing date of November 19, 1999.

## IV. Plaintiffs' Claims Did Not Accrue Until 1996, At the Earliest; Thus, They Are Timely Filed Under 28 U.S.C. § 2501.

Where an action has been transferred to the Court of Federal Claims by another federal court, the action "shall proceed as if it had been filed in . . . the court to which it is transferred on the date upon which it was actually filed in . . . the court from which it is transferred." 28 U.S.C. § 1631. This action was filed on November 19, 1999. Because the Tribe's cause of action against the United States accrued, at the earliest, in 1996, the Tribe's claims were filed within the six-year limitations period imposed by 28 U.S.C. § 2501.

### A. Plaintiffs' Claims Accrued in 1996, Following Publication of Scientific Studies That Linked Aggradation, And Aggradation-Related Harms, to the Cushman Project.

A cause of action accrues "when all the events which fix the government's alleged liability have occurred *and* the plaintiff was or should have been aware of their existence." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988) (emphasis in original). Construction of the Project and the dewatering of the North Fork occurred in the 1920s. However, the relationship between the Project and the harms to the Skokomish Tribe, its reservation lands, and treaty resources, were not fully known (or knowable)

to the Tribe until the United States conducted and released numerous technical studies in 1996 that demonstrated these damages had been caused and/or aggravated by the Project and would persist (perhaps worsen) unless measures were taken to change the operation of the Project.

The 1996 studies comprehensively evaluated the effects of aggradation on the river, fisheries, and shellfish habitat. Aggradation occurs when deposits of sediment cause the floor of the river to build up over time, leading to flooding and elevated water tables. *Skokomish Indian Tribe v. United States*, 410 F.3d at 510, n.1. The 1996 studies established that the de-watering of the North Fork resulted in substantially reduced flows in the mainstem of the river including those portions running through or adjacent to the reservation. These reduced flows greatly reduced the ability of the mainstem to transport silt, gravel and rocks which resulted in aggradation of the mainstem Skokomish riverbed, which caused flooding of the Reservation and a much broader scope of harm to trust resources, including failure of septic systems, contamination of water wells, blocking of fish migration, damage to orchards and pastures, and silting over of fishery habitat and shellfish beaches. *Id.* at 509-510; Amended Compl., ¶ 86. The 1996 studies also established that loss of flow to the mainstem impaired fisheries due to reduced wetted area, elevated summer water temperatures, and generally degraded aquatic habitat diversity. *Id.* For the first time, the 1996 studies showed the cause and effect relationship between the Cushman Project and the damages to Plaintiffs' reservation and resources.

Notably, the Tribe had been diligently requesting the United States to conduct technical studies related to the Project and the impacts on the Tribe for twenty years prior to 1996. Amended Compl., ¶ 81, 83, 84. The United States repeatedly refused, making it impossible for the Tribe to learn the cause and extent of its injuries. *Id.*

The accrual of a claim against the United States is suspended, for purposes of 28 U.S.C. § 2501, until the claimant knew or should have known that the claim existed. *Banks v. United States*, 314 F.3d 1304, 1310 (Fed. Cir. 2003) (reversing dismissal and finding that accrual of claims remained uncertain until publication of reports by United States government in 1990s indicating that erosion was permanent and irreversible); *Martinez v. United States*, 333 F.3d 1295, 1319 (Fed. Cir. 2003). The Tribe lacked sufficient knowledge of the claims asserted in this action until the United States released its technical studies in 1996. Once the Tribe learned of the facts that "fix[ed] the government's alleged liability" it acted promptly to pursue an administrative claim and then a lawsuit to recover damages from its federal trustee whose acts and omissions related to the Project permitted the Tribe's homeland to suffer severe damage.

The United States concedes that Plaintiffs' aggradation-related claims against the United States accrued as late as 1996. On page 22 of its Memorandum (Dkt. #26-1), the government states that "damages based on aggradation were known as of the completion of five technical reports in 1996" and thus "[a]t the very latest, Plaintiffs' claims for aggradation related damages accrued in 1996." The United States does not contest the 1996 accrual date; rather, it relies on the flawed argument that Plaintiffs' claims were not actually filed until 2011 – of course, this is incorrect. Plaintiffs' claims were filed on November 19, 1999, well within the six year time period prescribed by 28 U.S.C. § 2501.

### B. Claims Arising From the Gradual Flooding of Lands and Related Natural Resources Do Not Accrue Until Damages Have Stabilized.

Damages to the Reservation lands and natural resources, which resulted from the aggradation of the mainstem of the Skokomish River, did not occur at the time that the Cushman Dam was built. Instead, these damages occurred very gradually over time, as the dewatering of the North Fork reduced the flow of the mainstem, which in turn caused the mainstem to aggrade

and the Reservation lands to flood and fisheries and wildlife habitat to be destroyed, subjecting the Tribe's lands and natural resources to damage. Amended Compl., ¶¶ 86, 95, 97. As to these claims, well-established law holds that where the damage or taking results from a gradual physical process – like erosion or aggradation of a river – which was set in motion by the government's action, the landowner's claim for damages or just compensation against the United States does not accrue until the gradual process has "stabilized" so that the extent of the damage can be fairly ascertained. *United States v. Dickinson*, 331 U.S. 745 (1947); *Applegate v. United States*, 25 F.3d 1579 (Fed. Cir. 1994). This "stabilization doctrine" applies here.

The United States may be held liable to pay just compensation for the taking of a partial interest in land, such as the acquisition of a flowage easement. This is true even if the government-induced flooding is intermittent or temporary in duration. *Ark. Game and Fish Comm'n v. United States*, 568 U.S. ___, ___ S. Ct. ___, 2012 WL 6012490 (Dec. 4, 2012); *Jacobs v. United States*, 290 U.S. 13, 16 (1933) (intermittent overflow of land resulted in a partial taking of that land for a flowage easement for which just compensation, including interest, was due); *United States v. Dickinson*, 331 U.S. 745, 748-49 (1947); *United States v. Va. Elec. and Power Co.*, 365 U.S. 624, 627 (1961) (flowage easement is a property interest protected by Fifth Amendment). Dam operations that result in increased groundwater levels on nearby lands which damage or destroy the use of the lands for their original purpose (such as agriculture) also may result in a compensable taking. *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 809-12 (1950). "Where real estate is actually invaded by superinduced additions of water, earth, sand, or other material . . . so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution." *Ark. Game & Fish Comm'n*, 2012 WL 6012490 (Dec. 4, 2012), at *6, quoting *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 181 (1872).

The Court of Claims and Federal Circuit have given effect to these rules. For example, in *Barnes v. United States*, 210 Ct. Cl. 467, 538 F.2d 865 (1976), the Court of Claims held that the operation of a federal dam which resulted in frequent flooding of a plaintiff's land gave rise to a compensable taking of a flowage easement. The court stated:

> Generally speaking, property may be taken by the invasion of water where subjected to intermittent, but inevitably recurring, inundation due to authorized Government action . . . . A constitutional taking resulting from such flooding is not limited to instances of obvious overflowing of a river's banks. The just compensation clause of the Fifth Amendment has been found likewise applicable in cases of percolation or rising ground water . . . . A taking may result where Government-induced deposition of sediment in a riverbed causes the river to overflow its banks . . . .

*Id.* at 870 (citations omitted).

It is well settled that where, as here, the damage or taking is the result of a gradual physical process, such as erosion or aggradation by operation of a dam over a period of time, the claim does not accrue until the gradual process has "stabilized." This "stabilization doctrine" was set forth by the Supreme Court in *United States v. Dickinson*, 331 U.S. 745 (1947). In *Dickinson*, the Court held that an inverse condemnation claim does not accrue for statute of limitations purposes where the damage to the land occurred over a period of time, in which case the landowner may timely file for compensation once the problem has stabilized and the extent of the damage is fairly ascertained. *Id.* at 749. The Court held that "when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or premature litigation to ascertain the just compensation for what is really 'taken.' *Id*.

The Federal Circuit has repeatedly applied *Dickinson* and the stabilization doctrine to suspend accrual of claims against the United States based on flooding or erosion. For example, in *Nw. La. Fish & Game Preserve Comm'n v. United States*, 446 F.3d 1285 (Fed. Cir. 2006), the Court held that a claim based on the government's operation of a dam, which raised lake levels

and, in turn, prevented a state wildlife commission from controlling invasive vegetation on the lake, did not accrue when the lake levels were first increased. *Id.* at 1291-92. The court instead found that, under *Dickinson*, because the damage occurred over time, the takings claim did not accrue until it became clear that the uncontrolled growth of vegetation made the northern part of the lake completely inaccessible and virtually useless. *Id.* In *Banks v. United States*, 314 F.3d 1304 (Fed. Cir. 2003), the Federal Circuit reversed dismissal, finding that accrual of claims remained uncertain until the United States released formal reports in the mid-1990s indicating that erosion, which began in 1903 and was exacerbated by modifications to the project between 1950 and 1989, was permanent and irreversible. *Id.* at 1308-10. In *Applegate v. United States*, 25 F.3d 1579 (Fed. Cir. 1994), the Court again applied *Dickinson*, and found that the "gradual character of the natural erosion process set in motion by the Corps . . . indeed made accrual of the landowners' claim uncertain." *Id*. at 1582. In *Barnes v. United States*, 538 F.2d 865, 870-73 (Ct. Cl. 1976), the court applied the stabilization doctrine to find a claim did not accrue on the first flood of the plaintiffs' land – as the government contended – but several years later, "after it first became clearly apparent by the passage of time that the intermittent flooding was of a permanent nature." *Id.* at 873. *See also St. Bernard Parish v. United States*, 88 Fed. Cl. 528, 551-55 (2009); *Turner v. United States*, 17 Cl. Ct. 832, 835 (1989), *aff'd in part rev'd in part on other grounds*, 901 F.2d 1093 (Fed. Cir. 1990) *reaff'd on remand*, 23 Cl. Ct. 447, 457 (1991).

Determining the date that a claim accrues under the stabilization doctrine requires a highly fact-specific inquiry. *See Barnes*, 538 F.2d at 873. In the present circumstances, the intermittent flooding of the Skokomish Reservation did not stabilize, and the takings claim did not accrue, until the mid-1990s at the earliest, when the Interior Department completed its studies of the impacts of the Project on the Skokomish Reservation and treaty-protected

resources. These 1996 studies, discussed above, comprehensively evaluated and demonstrated the effects of aggradation on the river, fisheries, and shellfish habitat for the first time, (Amended Compl. ¶ 86) and determined that the cause of the problems was the Project and that these damages would continue absent changes to the Project's operations and other remediation.

Prior to 1996, surface flooding of the reservation lands had increased over the years, but there was debate about the cause.[12] The 1996 studies established that the de-watering of the North Fork, and resulting aggradation, caused flooding, septic system failures, contamination of water wells, blocking of fish migration, damage to orchards and pastures, silting over of fishery habitat and shellfish beaches, reduced water quality, elevated water temperatures, and generally degraded aquatic and wildlife habitat diversity. *Skokomish Indian Tribe*, 410 F.3d at 509-510; Amended Compl. ¶¶ 86.2 – 86.4. The 1996 studies further confirmed that the surface flooding of the reservation lands was inevitably recurring and not an intermittent or isolated problem. The 1996 studies also revealed a solution – the restoration of flow to the North Fork through release of water from Cushman Dam No. 2. Based on these studies, increased flows into the North Fork became a central component of conditions ultimately imposed on the Project in 2010. *Id.*, ¶ 97.

In sum, a claim against the United States arising out of a gradual process, such as the aggradation of a river and the related increases in groundwater levels put in motion by the United States, as occurred here, does not accrue, for purposes of the statute of limitations, until it was established that the damage was of a permanent nature and its cause was ascertained. As

[12] This debate has a long history and was a disputed issue in the relicensing proceedings before FERC. Although the federal government, as a result of its 1996 studies, recognized and agreed that the Cushman Project caused these problems, the City of Tacoma continued to dispute this in both the proceedings before FERC and the District Court case – claiming that the aggradation of the river was caused by factors other than the Cushman Project. *See, e.g.*, Brief of City of Tacoma in *City of Tacoma v. FERC*, No. 05-1054 (D.C. Cir), 2006 WL 479613 at *7(D.C. Cir.).

demonstrated above, the permanent nature of the damage to Reservation lands and resources and its cause were not determined here until the United States completed and released its technical studies in 1996. Once that occurred, the Tribe acted promptly to pursue an administrative claim and then a lawsuit to recover damages from its federal trustee whose acts and omissions relating to the Project permitted the Tribe's homeland to suffer such severe damage.

### C. The Statute of Limitations Does Not Begin to Run Where There is A Reasonable Prospect That the Government Will Repair the Damage.

Related to the stabilization doctrine, a landowner's claim against the government does not accrue where the government has made promises or taken actions that lead the landowner to reasonably believe that the damage will be repaired or contained. This rule, which also finds its source in *Dickinson*, is illustrated by *Applegate v. United States*, 25 F.3d 1579, 1582-83 (Fed. Cir. 1994). *Applegate* involved claims for compensation for erosion caused by a harbor project, which was originally built in the 1950s. *Id.* at 1580. Beginning in 1952, the harbor project caused the shoreline to recede. *Id.* In 1962, Congress authorized the construction of a plan to replenish the beach, but the plan was delayed while it was studied by the Corps. *Id.* Over the years, mitigation proposals were renewed by the United States and then delayed. The last proposal to replenish the beach was announced in 1988, but the plan was never constructed. *Id*. at 1580-81. In 1992, the affected landowners brought suit for compensation for the lost land. *Id*. at 1581. The Federal Circuit applied *Dickinson*, and stated that "with promises of a sand transfer plan renewed as recently as 1988, the landowners did not know when or if their land would be permanently destroyed." *Id*. at 1582. The Court determined that "due to both the very gradual nature of this particular continuous physical process and the Corps' promises to restore the littoral flow of sand, this taking situation had not stabilized by 1986 – six years before the landowner filed suit. The statute of limitations does not bar this action." *Id*. at 1583.

The principles from *Applegate* apply here. The City's original license to operate the Cushman Project expired in 1974 prior to the date that the damages and flooding impacts on the reservation had stabilized. The Tribe promptly intervened in the relicensing proceeding in 1975, and repeatedly requested the Department of the Interior to fund the necessary studies to identify the damages caused by the Project to the Reservation and the Tribe's treaty rights and the extent of those damages and to impose Section 4(e) conditions. Amended Compl. ¶¶ 77-84. It was reasonable for the Tribe to expect Interior to act with reasonable diligence to do so.

The Department of the Interior itself intervened in the Cushman relicensing proceeding in 1978. *Id*., ¶ 78. Several times in the late 1970s, the Department indicated that it would take steps to study and repair the damages the Tribe had suffered (*id*., ¶¶ 79-81), and several times in the 1980s, the Department considered but did not provide funding to study the extent of the damages caused to the Tribe's treaty rights by the Cushman Project. (*Id*., ¶¶ 81-84). It was not until the mid-1990s that the Department conducted the necessary studies which, in turn, confirmed that the damages to the Reservation and the related natural resources: (1) were not intermittent conditions but permanent ones; (2) were caused by the Cushman Project; and (3) could be mitigated by imposition of conditions on the hydropower license for the project. Here, as in *Applegate*, "due to both the very gradual nature of this particular continuous physical process" coupled with the time it took before the government completed the studies that confirmed the permanence of the damages and its cause, "this taking situation had not stabilized" until the mid-1990s – within six years before the Tribe filed suit. *Applegate*, 25 F.3d at 1582-84. As in *Applegate*, the statute of limitations does not bar Plaintiffs claims arising from aggradation of the river and the related flooding of reservation lands and destruction of natural resources.

### D. Alternatively, Plaintiffs' Claims Did Not Accrue Until Conclusion of the FERC Administrative Proceeding, and Appeals, as the Elements Giving Rise to Plaintiffs' Claims Were Established in that Forum.

Alternatively, the damages claims in this case did not accrue until the administrative proceedings before FERC, including judicial review of those proceedings were concluded. A claim does not accrue until "all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue here for his money." *Nager Elec. Co., Inc. v. United States*, 368 F.2d 847, 851 (Ct. Cl. 1966). *See also Henke v. United States*, 60 F.3d 795, 799 (Fed. Cir. 1995); *L.S.S. Leasing Corp. v. United States*, 695 F.2d 1359, 1365 (Fed. Cir. 1982). As a corollary to this principle, "if a necessary element to a claim must be established in a different forum, the claim will not accrue for § 2501 until that element is finally established in the other proceeding." *Samish Indian Nation v. United States*, 419 F.3d 1355, 1369 (Fed. Cir. 2005) citing *Heck v. Humphrey,* 512 U.S. 477, 489-90 (1994); *Midgett v. United States*, 603 F.2d 835, 839 (Ct. Cl. 1979). For example, where a separate administrative or judicial determination is needed to establish a missing element regarding a claim, that claim accrues when the separate proceeding is completed and the previously missing element has been established.

The Supreme Court applied this principle in *Heck v. Humphrey*, 512 U.S. 477 (1994), an action under 42 U.S.C. § 1983 seeking damages for the petitioner's allegedly unlawful criminal conviction for manslaughter. The Court held that such a claim – like a common law action for malicious prosecution – cannot proceed unless the underlying conviction is overturned on appeal or through a writ of habeas corpus. *Id*. at 484-87. Since the petitioner's separate appeals and habeas actions failed to undo the conviction, the case was dismissed. Significantly, Justice Scalia's opinion noted that the Section 1983 claim could not accrue for statute of limitations purposes until the underlying conviction was reversed. *Id*. at 489-90. If the conviction is never overturned, no claim for damages accrues because the elements of the claim simply do not exist.

The Court of Claims has also recognized that where a necessary element of a claim must be established by a favorable outcome in a different forum, that claim does not accrue until that favorable outcome is obtained and is final. *Midgett*, 603 F.2d 835, 839-40. There, the parents of a deceased member of the armed forces sought compensation from the federal government in connection with his death. The government presumed the soldier had deserted, and refused to pay. However, in a separate state court proceeding, it was determined that the serviceman was presumed dead. Based on the state court death certificate, the parents sought damages against the government, including a death gratuity for their serviceman son. The government argued that the claim accrued on the date the serviceman was missing and thus that the claim was barred by the statute of limitations. The Court rejected the government's position, stating, "[t]he statute of limitations does not begin to toll until 'all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.'" *Id*. at 839 (citation omitted).

The Federal Circuit applied these principles in *Samish Indian Nation*, 419 F.3d 1355 (Fed. Cir. 2005), holding that the tribe's claims for damages against the United States arising from the government's wrongful failure to treat the tribe as federally-recognized "did not accrue until [the Tribe] obtained a final determination from the district court, through their APA challenge, that the government's conduct underlying its refusal to accord federal recognition, before 1996, was arbitrary and capricious." *Id.* at 1373. The Court found that because only the District Court, and not the Court of Federal Claims, had jurisdiction to review the lawfulness of the Secretary's decision regarding tribal recognition, the tribe's claim for damages arising from the government's wrongful refusal to treat the tribe as federally-recognized did not accrue until the district court entered judgment in the recognition proceedings. *Id.* at 1374.

The history of these proceedings falls within these rules. Under the Federal Power Act, only FERC and the Interior Department could impose conditions on any hydropower license necessary to protect an Indian Reservation. 16 U.S.C. § 797(e). In the 1930s, the United States said it would take care of the Tribe, but then did nothing. Amended Compl., ¶ 64. When the Skokomish Tribe and its members tried to protect the Tribe's fisheries though litigation, they were told that they could not do so unless represented by the United States. *Id.*, ¶¶ 65-68.

From that point forward, the Tribe's only recourse was to pursue the remedies available through the FERC proceeding – a process that was not open until relicensing proceedings were initiated in 1974 – and then not until after all issues were raised and exhausted in the course of the FERC proceedings. The courts have made clear that disputes regarding the Secretary of the Interior's actions regarding 4(e) conditions could only be raised in the proceedings before FERC and then as part of the ultimate judicial review of the final license as a whole. *Escondido*, 466 U.S. at 477-78 (1984). Indeed, the courts have found that even claims arising under statutes other than the Federal Power Act, but which related to a license proceeding before FERC, could not proceed until they were advanced as part of the FERC proceedings. *See, e.g. California Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 910-13 (9th Cir. 1989) (where a tribe and environmental group had not timely intervened in a FERC proceeding they could not bring separate action against Forest Service under NEPA and the American Indian Religious Freedom Act for alleged violations of those acts); *Southwest Center for Biological Diversity v. FERC*, 967 F. Supp. 1166, 1178-79 (D. Ariz. 1997) (dismissing suit to compel Forest Service to comply with requirements of the Endangered Species Act and to participate in FERC hydropower licensing proceeding, as such issues had to be advanced in the context of the FERC proceeding).

The Skokomish Tribe did what the law required. The Tribe intervened and actively participated in the FERC relicensing proceedings as soon as relicensing proceedings were initiated. As a result of the Tribe's efforts, the Interior Department finally, although belatedly, conducted the studies of the impacts of the project on the Tribe's reservation lands and resources that should have been initiated years earlier. When legal issues were raised about the Secretary's authority to impose section 4(e) conditions on this Project, it was the Tribe that aggressively litigated and secured the favorable D.C. Circuit ruling that the Secretary had such authority. *City of Tacoma v. FERC*, 460 F.3d 53, 64-67 (D.C. Cir. 2006).

The elements necessary for the Tribe's claim for damages against the United States were not established until the 1996 studies demonstrated that the Project caused the damages to the Reservation and resources, and until the D.C. Circuit confirmed the scope of the Secretary's authority under section 4(e) in *City of Tacoma v. FERC*. Moreover, because those issues – the scope of the Secretary's authority to impose conditions under section 4(e) and the factual findings regarding the impacts of the Project on the Tribe's Reservation and Treaty rights – could only be initially adjudicated in the context of the FERC proceeding, the Tribe's claims for damages against the United States did not accrue until that proceeding was concluded and the elements necessary to state a claim against the United States were established.

For this reason too, the Tribe did not and could not have raised these damages claims under the Indian Claims Commission Act ("ICCA"), formerly codified at 25 U.S.C. § 70 *et seq.* The Tribe's claims before the Indian Claims Commission ("ICC") were limited to claims for damages for the loss of the Tribe's aboriginal territory. *See Skokomish Tribe of Indian v. United States*, 6 Ind. Cl. Comm. 135 (1958); 9 Ind. Cl. Comm. 359 (1961); 12 Ind. Cl. Comm. 197 (1963). At the time the ICCA was enacted there were no pending proceedings before FERC

regarding the license for the Project in which the impacts to the Tribe resulting from the Project could be raised. In 1963, when FERC determined that minor part licenses were invalid, neither it nor the Department of the Interior did anything to reopen proceedings on the Project license. More fundamentally, because the ICC only had jurisdiction to hear claims that accrued before August 13, 1946, *see* 25 U.S.C. § 70a, neither the 1963 FERC determination nor any of the damages to the Skokomish Reservation and Treaty rights resulting from the gradual aggradation of the river could have been raised in the ICC. *Round Valley Indian Tribes v. United States*, 97 Fed. Cl. 500 (2011) (ICC only had jurisdiction over claims that had accrued as of August 13, 1946; claims accruing after that date are not barred by the ICCA). Also, the damages on the Reservation had not occurred at the time of the ICCA. Since those claims did not accrue before 1946 they could not have been adjudicated under the ICCA.

As in *Heck*, *Midgett*, and *Samish*, Plaintiffs' claims for damages against the United States did not accrue and could not have accrued until the predicate elements were resolved in separate proceedings.

**E. Plaintiffs Have A Continuing Claim Against the United States.**

Alternatively, Plaintiffs can pursue damages suffered in the time period of November 1993 to the present under the continuing claim doctrine. The continuing claim doctrine applies where, as here, the government has a continuing, ever-present, duty that it has failed to fulfill. *See Boling v. United States*, 220 F.3d 1365, 1373 (Fed. Cir. 2000); *Mitchell v. United States*, 13 Cl. Ct. 474, 485-86 (1987); *Mitchell v. United States*, 10 Cl. Ct. 787, 788 (1986). The doctrine also applies where separate actions (or failures to act) by the government give rise to independent claims. *Brown v. United States*, 195 F.3d 1334, 1341 (Fed. Cir. 1999). Where the

continuing claims doctrine applies, the plaintiff may seek damages for the six-year period immediately preceding the filing of the lawsuit. *Mitchell*, 10 Cl. Ct. at 788.

*Brown*, *Boling*, and *Mitchell* apply here. In *Brown*, the Federal Circuit found that BIA regulations, which required that the Secretary of the Interior review and adjust rent due under a lease of allotted Indian lands at least once every five years, created a new potential cause of action at each five year interval. *Brown*, 195 F.3d at 1341. Because the Secretary had the exclusive authority to impose conditions on the Cushman Project under Section 4(e) at all times, the Tribe can, at the very least, recover damages for the Secretary's failure to impose conditions in November 1993 and for damages that failure caused from that date forward. As the Federal Circuit noted in *Boling v. United States*, 220 F.3d at 1373, "the continuing claims doctrine has been applied when the government owes a continuing duty to the plaintiffs. In such cases, each time the government breaches that duty, a new cause of action arises." *Id.*

In *Mitchell*, the Claims Court found duties that triggered application of the continuing claim doctrine. First, the Court held that the BIA had an ongoing duty to regenerate timber resources after harvesting on the reservation. *Mitchell*, 10 Cl. Ct. 787, 788 (1986). "The existence of a continuing duty to regenerate means that on each day the BIA failed in its duty to regenerate a given stand, there arose a new cause of action." *Id.* Second, in a subsequent decision in *Mitchell*, the Claims Court found that the BIA's persistent failure to take action to prevent or cure logging practices that damaged the river and, in turn, damaged the fisheries on which the Tribe relied, was a continuing injury for which the Tribe could seek redress under the continuing claim doctrine. *Mitchell*, 13 Cl. Ct. 474, 486 (1987).

> Plaintiffs say, however, that the acts they complain of did not happen just once. Rather, they maintain that these environmentally injurious logging practices, though somewhat curtailed as a result of enforcement procedures begun by the BIA in the late 1960s, nevertheless continued well into the 1970's. Plaintiffs point out too that

> the harm from these practices is on-going in the sense that, so long as the harm-creating conditions remain uncorrected – the gravel not restored, the congestion not cleared – the adverse effects upon fish migration and reproduction continue . . . *i.e.*, a claim characterized by the BIA's failure to perform an ongoing duty prescribed by law. . . . Assuming the facts are as plaintiffs claim them to be – that the described logging-related practices are a source of continuing injury contributing to the long-term decline of the Reservation's fishing waters – then plaintiffs do, indeed, have a continuing claim, *i.e.*, the right to seek redress for the BIA's continued tolerance, after October 18, 1965, of logging practices and stream conditions detrimental to the Reservation's fishing waters.

*Id.* at 485-86.

In this case, as noted, the United States had a continuing obligation under Section 4(e) of the Federal Power Act at all times during the license renewal proceeding to ensure that licenses issued within a reservation contained conditions "necessary for the adequate protection and utilization of such reservation." 16 U.S.C. § 797(e); *City of Tacoma v. FERC,* 460 F.3d 53, 64-66 (D.C. Cir. 2006). The Ninth Circuit, in *Escondido Mut. Water Co. v. FERC*, 692 F.2d 1223, 1236 (9th Cir. 1982), *aff'd* 466 U.S. 765 (1984), stated "It is equally obvious from the plain language of the [Federal Power Act] that Congress intended to limit and circumscribe the broad authority granted to the Commission to issue licenses in the public interest, by requiring those licenses not to be detrimental to the interests of Indians on reservations." *Id.* The Ninth Circuit added, "[w]e find in the plain language of the FPA a policy to foster the development of water power projects in the public interest, *to the extent, and only to the extent, that such can be done without abandoning the fiduciary duties owed by the United States to dependent Indian tribes*." *Id.* (emphasis added). At a minimum, the Tribe has a cause of action against the United States for failure to impose conditions necessary to protect its treaty rights from 1993 until July 15, 2010, when Section 4(e) conditions first went into effect in the amended license.

### F. Litigation of the Accrual Date Is Not Barred By Collateral Estoppel or Law of the Case.

There is no merit to the government's arguments that Plaintiffs are bound, under law of the case or collateral estoppel, by the Ninth Circuit's conclusion that Plaintiffs' state-law claims against the City of Tacoma accrued in 1989. US Memorandum (Dkt. #26-1) at 22-23 (citing *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 517 (9th Cir. 2005)). There is no identity of issues that would permit either of these doctrines to apply. The Ninth Circuit's ruling on this issue was based on interpretation of the Washington state-law statute of limitations for negligence claims and applied only to Plaintiffs' state law claims asserted against the City of Tacoma. *Skokomish Indian Tribe*, 410 F.3d at 518, applying *Giraud v. Quincy Farm & Chem.*, 102 Wash. App. 443, 6 P.3d 104, 109 (2000) (discussing state-law "discovery" rule for accrual of claims for negligence). The Court made no ruling on the accrual date of claims asserted against the United States under federal law. Despite its determination of the accrual-date for state law claims asserted against the City, the Court expressly found that Plaintiffs' federal claims against the United States could proceed in the Court of Federal Claims. *Id.* at 510-11. Because the state-law standard used to determine the statute of limitations applicable to Plaintiffs' state-law claims against the City of Tacoma differs from the federal law standards for determining the timeliness of Plaintiffs' claims against the United States (as discussed in sections IV.A through E above), there is no identity of issues for purposes of collateral estoppel.[13]

[13] Under collateral estoppel, "[i]ssues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits be the same." *Peterson v. Clark Leasing Corp.*, 451 F.2d 1291, 1292 (9th Cir. 1971). *See also Estate of H.S. True, Jr. v. Commissioner of Internal Revenue*, 390 F.3d 1210, 1232-34 (10th Cir. 2004) (collateral estoppel did not apply even though first proceeding adjudicated value of contracts for purposes of gift taxes since later proceeding required a determination of the value of the same contracts but for purposes of estate taxes); *Copeland v. Merrill Lynch & Co., Inc.*, 47 F.3d 1415, 1422 (5th Cir. 1995) (issues adjudicated in bankruptcy proceeding were considered under a different legal standard and therefore were not collateral estoppel in a later breach of contract claim ); *North v. Walsh*, 881 F.2d 1088, 1095 (D.C. Cir. 1989) (rulings from grand jury proceeding regarding release of records were not collateral estoppel in a later FOIA suit to obtain the same records

The Ninth Circuit's opinion on the accrual date of Plaintiffs' state law claims against the City of Tacoma has no collateral estoppel effect for the additional reason that, notwithstanding the Ninth Circuit's opinion, Plaintiffs' claims against the City of Tacoma were subsequently resolved by a settlement agreement and consent decree entered by the District Court in 2011.[14] As the Supreme Court made clear in *Arizona v. California*, 530 U.S. 392, 414-416 (2000), principles of collateral estoppel do not apply to issues that were addressed in the context of cases that are ultimately resolved by settlement agreement or consent decree.

In a misguided effort to bolster its collateral estoppel argument, the government contends that because the United States and the City of Tacoma were both defendants in the case brought by the Tribe, the United States, solely by virtue of being a co-defendant, can rely on a state-law claim accrual rule that applied to the City even though such a defense was not litigated, much less decided, as against the United States. Nothing in the law supports such an unprecedented and expansive use of collateral estoppel. The cases on which the government relies, *Union Pacific Railroad Co. v. United States*, 292 F.2d 521 (Ct. Cl. 1961); *Scooper Dooper Inc. v.*

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since applicable legal standards differed); *Clark v. Watchie*, 513 F.2d 994, 999 (9th Cir. 1975) (findings made in state court action regarding breach of fiduciary duty were not collateral estoppel in later suit under federal securities laws as legal standards differed); *Finnerman v. McCormick*, 499 F.2d 212 (10th Cir. 1974) (determination of deceased pilot's employment status for purposes of a workman's compensation claim did not preclude litigation of his employment status for purpose of later tort claims which was reviewed under different legal standards). *Avenues In Leather, Inc. v. United States*, 317 F.3d 1399, 1404 (Fed. Cir. 2003) (explaining that because "different issues of law are presented in this litigation" collateral estoppel did not apply).

[14] In particular, following the Ninth Circuit's 2005 decision, when the case was remanded to the District Court, the Tribe filed a Rule 60(b) motion regarding its claims against the City of Tacoma. *See Skokomish Indian Tribe v. United States*, No. 99-5606 (W.D. Wash) Tribe's Motion at Dkt No. 179 (Feb. 9, 2006). The District Court denied the Tribe's Rule 60(b) motion on April 12, 2006, *id.* at Dkt No. 184, and the Tribe appealed. *Id*. at Dkt. No. 188 (May 12, 2006). While the appeal was pending, the Tribe and Tacoma reached agreement on terms for settling the claims and that settlement agreement was approved by the District Court and entered as a consent judgment on July 27, 2011. *Id.* at Dkt. No. 201 (attached as Exhibit D).

*Kraftco Corp.*, 494 F.2d 840, 845 (3d Cir. 1974), did nothing more than apply collateral estoppel to an issue that was actually litigated and decided against the party in the prior proceeding.

Because the issue of accrual of Plaintiffs' federal law claims against the United States has not been litigated or decided, the United States' claim of collateral estoppel lacks merit. None of the four required elements of collateral estoppel are met, and there is no law of the case on the accrual issue from the Ninth Circuit's opinion that applies to the United States.

## V. Section 10(c) of the Federal Power Act Does Not Immunize the United States From Liability for Plaintiffs' Claims.

Section 10(c) of the Federal Power Act, 16 U.S.C. § 803(c), does not immunize the United States from liability based on its own breaches of obligations owed to the Skokomish Tribe and its members pursuant to treaty, statute, its fiduciary trust obligation, or the Constitution. The Ninth Circuit *en banc* panel declined to adopt the rulings of the District Court and initial Ninth Circuit panel, which would have dismissed claims against the United States on grounds that Section 10(c) immunized the United States from all liability. Instead, the *en banc* panel held that Plaintiffs' claims against the United States should be transferred to proceed in this Court. *Skokomish Indian Tribe*, 410 F.3d at 510-11.

Prior cases confirm that the scope of the United States' Section 10(c) immunity is limited to tort liability arising from acts of the licensee. *See DiLaura v. Power Auth. of the State of New York*, 982 F.2d 73, 78 (2d Cir. 1992). In enacting Section 10(c), "Congress simply wanted to preserve the right of injured property owners to bring actions for damages against licensees in state court under traditional state tort law, and to shield the United States against liability." *Id.* S*ee also Seaboard Air Line R.R. v. County of Crisp*, 280 F.2d 873, 875-76 (5th Cir. 1960) (Section 10(c) "disclaim[s] liability on the part of the United States *for the acts of the licensee*) (emphasis added). As the Ninth Circuit *en banc* panel noted, "[t]he Tribe is not claiming the

United States behaved tortiously, but rather that the United States failed to abide by its contractual obligations to the Tribe under the Treaty." *Skokomish Indian Tribe*, 410 F.3d at 511. The Court analogized Plaintiffs' claims here to those brought and adjudicated in *Mitchell II*, finding that *Mitchell II* "is very much like our case, in which the Tribe's claims against the United States are for breach of its fiduciary obligations under the Treaty." *Id.* Section 10(c) does not immunize the United States from liability arising out of its own contractual or trust-based obligations, as opposed to tort-based liability arising out of the independent acts of the licensee.

Indeed, as a general rule, where the government acts in violation of a statute or regulation, it is not immune from damages. For example, in *Berkovitz v. United States*, 486 U.S. 531 (1988), although addressing a claim under the Federal Tort Claims Act, the Court held that the government was not immune from liability where an agency, in issuing a license, violated a specific statutory and regulatory directive. *Id.* at 542-43. The Court further held that even without an express mandatory duty, the government could be liable in damages if it licensed an activity either: (1) without determining compliance of the activity with regulatory standards, or (2) after a determination that the activity did not comply with the regulatory standards. *Id.* at 544. *See also Confederated Salish and Kootenai Tribes of the Flathead Reservation v. United States*, 181 Ct. Cl. 739, 745-46 (1967) (tribe stated a claim in damages against the United States arising from the government's failure to comply with its obligations under treaty and the Federal Power Act to ensure that the tribe received full value of a hydroelectric power site licensed to a private utility on its reservation lands).

Nor does Section 10(c) bar constitutional claims arising under the Fifth Amendment, such as Plaintiffs' temporary takings claim. Congress may not limit the constitutional duties of the United States by statute. In *Turner v. United States*, 17 Cl. Ct. 832 (1989), *aff'd in part rev'd*

*in part on other grounds*, 901 F.2d 1093 (Fed. Cir. 1990) *reaff'd on remand*, 23 Cl. Ct. 447 (1991), the Court determined that the federal immunity provisions of the Flood Control Act did not extend to a Fifth Amendment takings claim, *Turner,* 17 Cl. Ct. at 834-35, and damages were awarded to the affected landowner. *Turner,* 23 Cl. Ct. at 447-60. Similar to Section 10(c), the Flood Control Act provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place . . .." 33 U.S.C. § 702c. The Court explained that, "[i]t has long been established that when Congress exercises powers conferred upon it by the Constitution, as it did when enacting § 702c, 'it must proceed subject to the limitations imposed by th[e] Fifth Amendment, and can take [property] only on payment of just compensation.'" *Turner,* 17 Cl. Ct. at 834 (internal citations omitted). "The immunity provision in 33 U.S.C. § 702c does not extend to Fifth Amendment claims." *Id*. at 835.

While Section 10(c) of the Federal Power Act may protect the United States from liability arising from the tort-based malfeasance of its licensee, the City of Tacoma, Section 10(c) does not immunize the United States from liability based on its own breaches of obligations owed to the Skokomish Tribe and its members pursuant to statute, its fiduciary trust obligation, the Treaty of Point-No-Point, or the Constitution. *See Central Green Co. v. United States*, 531 U.S. 425, 436-37 (2001) (declining to apply blanket immunity provision of Section 702c of the Flood Control Act simply because the damage arose from a flood control project).

## VI. The United States May Be Liable for a Fifth Amendment Taking Despite the Involvement of a Third Party.

The government contends that Plaintiffs have failed to state a claim against the United States for a temporary taking of a flowage easement across the reservation because, according to the government, a party other than the United States caused the taking. However, the United

States can be liable for a Fifth Amendment taking where the federal government has a sufficient role in the taking of the property even though a third party is also involved in the action.

In *Hendler v. United States*, 952 F.2d 1364, 1378-1379 (Fed. Cir. 1991), the Federal Circuit held that the plaintiff stated a claim against the United States for a Fifth Amendment taking when officials from the state of California, acting pursuant to an order issued by the EPA under CERCLA, entered the plaintiff's land (over plaintiff's objection) and installed wells to monitor water quality. The Court found the United States liable for a Fifth Amendment taking of an interest in the plaintiff's land, reasoning that the California officials entered the plaintiff's property under the authority of CERCLA, which meant "that their activities within the scope of the Order are attributable to the Federal Government for purposes of takings law just as are the activities of EPA itself." *Hendler*, 952 F.2d at 1379. In so ruling, the Federal Circuit rejected the argument that the government makes here. It held that proof of an agency relationship between the United States and a third party is one way - but not the only way - that the United States may be held responsible for the actions of a third party. *Id.* at 1378. The Federal Circuit went on to state that "[a] permanent physical occupation authorized by [a government] is a taking without regard to whether the [government], or instead a party authorized by the [government], is the occupant." *Id.* at 1379 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 n.9 (1982). While in *Loretto*, "the authorizing government was a state, rather than the federal government, . . . the principle remains the same." *Id.*

The Federal Circuit has applied *Hendler* to find that other federal actions – under which state and local governments invade private property for a public use – can establish a basis for federal liability to pay just compensation to the affected landowner. For example, the Court found the United States liable for a taking in the context of federal approval of rails-to-trails

conversions of abandoned railroad rights of way when the private landowner's reversionary interest in the right of way is allowed, by virtue of federal action, to be used by a local government for recreational purposes. *Preseault v. United States*, 100 F.3d 1525, 1551 (Fed. Cir. 1996) (en banc) (plurality); *Toews v. United States*, 376 F.3d 1371, 1381-82 (Fed. Cir. 2004) (applying *Preseault* and *Hendler* to hold federal government liable for a Fifth Amendment taking of the reversionary interest in a right of way because of its role in permitting the City's use of it).

The Court of Federal Claims has adhered to this rule in other takings cases, as well. *See Capreal, Inc. v. United States*, 99 Fed. Cl. 133, 136 (2011) ("If there is a taking, the U.S. Government is responsible even if another public entity actually establishes the recreational trail, because the entity acquiring the trail is acting pursuant to U.S. Government authority"); *Jenkins v. United States*, 102 Fed. Cl. 598 (2011) (following *Preseault*, *Toews*, and *Hendler*, and finding that the government can be liable for a taking even if the actions of the third party were based on a federal order and did not require the federal government to have either entered into a cooperative agreement with the third party or have taken some other affirmative action).

The balance of the cases cited in the government's motion recognize this basic principle, but based on the specific facts at issue in each of those cases, merely conclude that the United States did not have a sufficient role in the matter to be liable for a Fifth Amendment taking of the plaintiff's property.[15] Here, the United States may be subject to takings liability due to its significant and continuous role in the licensing, construction, and operation of the Project.

[15] *See, e.g. Lion Raisins Inc. v. United States*, 416 F.3d 1356 (Fed. Cir. 2005); *Erosion Victims of Lake Superior Regulation v. United States*, 833 F.2d 297 (Fed. Cir. 1987) (stating general rule that United States can be liable for a Fifth Amendment taking even if the complained-of action was taken by another sovereign, but found, on specific facts of that case, that the United States did not have sufficient control over the actions of the third party to provide a basis for a claim against the United States); *May v. United States*, 80 Fed. Cl. 442, 445 (2008) (pro se plaintiff's complaint did not include allegations of any federal government action); *Hufford v. United*

## VII. Federal Law Establishes Money Mandating Fiduciary Duties.

There is no question that Plaintiffs can recover money damages for the temporary taking of property under the Fifth Amendment to the Constitution. *United States v. Sioux Nation*, 448 U.S. 371 (1980); *Shoshone Tribe v. United States*, 299 U.S. 476 (1937); *United States v. Creek Nation*, 295 U.S. 103 (1935). The Supreme Court recently confirmed that government-induced flooding, temporary in duration, (as presented here) may result in an unconstitutional taking. *Ark. Game and Fish Comm'n v. United States*, ___ S. Ct. ___, 2012 WL 6012490 (Dec. 4, 2012).

In addition, the Treaty of Point-No-Point and statutes cited in the Amended Complaint, while they do not explicitly demand money damages in the event of breach, can '"fairly be interpreted as mandating compensation by the Federal Government for the damage sustained,'" in the circumstances of this case. *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206, 217 (1983) (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)). As the Court observed in *Mitchell II*, fiduciary duties arise when all required elements of a common-law trust are met – where the United States acts as trustee, a tribe is the beneficiary, reservation lands and resources are the trust corpus and the government exercises "elaborate control" over that Indian property. *Id*. at 225. When a trust relationship exists, "it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties." *Id*. at 226.

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*States*, 87 Fed. Cl. 696, 704 (2009) (pro se plaintiff who brought suit against private individuals, civic association and United States, failed to make any allegations that federal government had a role in the alleged loss); *Moorish Sci. Temple of Am. v. United States*, 2011 WL 2036714 (Fed. Cl. May 25, 2011) (plaintiff who claimed loss as a result of a state court's approval of a sheriff's sale of foreclosed property failed to state taking claim against the United States); *Ark. Game and Fish Comm'n v. United States*, 87 Fed. Cl. 594, 615 (2009), *reversed*, 637 F.3d 1366 (Fed. Cir. 2011) (intermittent flooding of land was not frequent enough to constitute a taking), *reversed*, 568 U.S. ___, ___ S. Ct. ___, 2012 WL 6012490 (Dec. 4, 2012) (holding that government-induced flooding temporary in duration is not exempt from takings liability).

In *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474-75 (2003), the Supreme Court held that a 1960 statute created a fiduciary relationship mandating compensation for breach of trust because it stated that Fort Apache, a former military post on that Tribe's reservation, was held in trust by the United States for the White Mountain Apache Tribe, and authorized the Secretary of the Interior to make use of the lands of the historic fort "for administrative and school purposes for as long as they are needed for the purpose." *Id*. at 468-469. The Court held in *White Mountain Apache* that because the 1960 Act "invest[ed] the United States with discretionary authority to make direct use of portions of the trust corpus," and the United States did use the trust property, the statute "supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States." *Id*. at 475. The Court held that the 1960 Act made the government liable for money damages for wasting the trust property when it occupied it as contemplated by the Act. *Id*. at 479.

Similar to *White Mountain Apache* and *Mitchell II*, federal law imposes fiduciary duties on the government to protect the lands and rights to hunt and fish secured to the Skokomish Tribe and its members in the Treaty of Point-No-Point. As set forth more specifically in Section VII.A, *infra*, the Treaty explicitly established a fiduciary relationship between the government and the Tribe, which obligated government officials to preserve and protect the Reservation lands and rights to hunt and fish. Instead, the government allowed destruction of fisheries and flooding of reservation lands by the Cushman Project where it had the statutory authority and the duty to limit and control for the purposes of protecting the reservation lands and resources. Since the United States has "charged itself with moral obligations of the highest responsibility and trust[,]" and its conduct in carrying out its treaty obligations with Indian tribes "should therefore be judged by the most exacting fiduciary standards," *Seminole Nation v. United States*,

316 U.S. 286, 296-97 (1942), the Treaty and relevant statutes, fairly interpreted, subject it to money damages for the failure to preserve the reservation lands and resources.

### A. The Treaty of Point-No-Point Established a Fiduciary Relationship That Required the Government to Protect the Lands and Resources of the Skokomish Reservation.

The Treaty of Point-No-Point specifically reserved certain land for the exclusive use and occupation of the signatory tribes, including the Skokomish Tribe. Treaty of Point-No-Point art. 2, Jan. 26, 1855, 12 Stats. 933, II Kappler, Indian Affairs: Laws and Treaties 674 (1904), *at* http://digital.library.okstate.edu/kappler/Vol2/treaties/skl0674.htm. The purpose of the Treaty was to establish a permanent home for the Skokomish with access to sufficient resources by which the Tribe and its members could sustain themselves, in exchange for the Tribe's cession of thousands of acres of their aboriginal territory. Amended Compl. ¶¶ 7-45. The Treaty further prohibited residence by "any white man" on the Reservation without the Tribe's consent, stating,

> nor shall any white man be permitted to reside upon the same without permission of the said tribes and bands, and of the superintendent or agent; but, if necessary for the public convenience, roads may be run through the said reservation, the Indians being compensated for any damage thereby done them.

Treaty, Art. 2. Article 4 of the Treaty also secured to the Tribe "the right of taking fish at usual and accustomed grounds and stations." *Id*., Art. 4. The Supreme Court held this right to entitle the Tribe to harvest fifty-percent of the available fish at these places. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (hereafter "*Washington Fishing Vessel*"). The existence of these fish and the guaranteed access to them went far to insuring that the reservation was indeed a sustainable "homeland" for the Skokomish people.

The Treaty created a fiduciary relationship between the United States and the Tribe which required the government, as Trustee, to preserve and protect the Reservation lands and resources. The specificity of the Treaty language provides a fair inference of money damages

when the government failed to discharge these duties. The Federal Circuit and this Court have expressly held that treaty provisions similar to those contained in the Treaty of Point-No-Point establish a source of law on which a damages claim against the United States may be based. *See Richard v. United States*, 677 F.3d 1141 (Fed. Cir. 2012); *Tsosie v. United States*, 825 F.2d 393 (Fed. Cir. 1987); *Elk v. United States*, 70 Fed. Cl. 405 (2006) and 87 Fed. Cl. 70 (2009). In each of these cases, the court had jurisdiction to adjudicate a damages claim against the United States arising from the federal government's treaty obligation to protect and compensate the Tribe and its members for misconduct by "bad men." In so ruling, the courts have found that the treaty obligations have continued force, *Tsosie v. United States*, 825 F.2d 393 (Fed. Cir. 1987), and must be construed as the Indians would have understood them, *Richard v. United States*, 677 F.3d 1141 (Fed. Cir. 2012), because, "a treaty with an Indian tribe is a contract and should be interpreted to give effect to the intent of the signatories." *Elk v. United States*, 87 Fed. Cl. 70, 78 (2009), citing *Washington Fishing Vessel*, 443 U.S. at 675.

These cases apply here because the Treaty of Point-No-Point, in addition to establishing a fiduciary obligation on the part of the United States to protect the Skokomish Reservation and off-reservation fishing and hunting rights from destruction, expressly obligated the United States not to permit "any white man" to reside on the reservation without the Tribe's permission, and – where public rights of way over the reservation were needed – expressly required that the Indians be compensated for any damage thereby done them. Those obligations, considered in light of Indian understanding, created a money-mandating duty on the part of the United States analogous to the treaty obligations considered in *Tsosie, Richard* and *Elk,* and provide a basis on which this Court has subject matter jurisdiction over Plaintiffs' claim for damages against the United States arising from a breach of those treaty obligations.

The government mistakenly characterizes Plaintiffs claim as being "that the Treaty of Point-No-Point requires the United States to maintain the Tribe's historic fishery unaltered by man-made actions." Dkt. #26-1, at pp. 31, 34. On the contrary, Plaintiffs simply claim the Treaty creates a money-mandating duty that required the government to protect the reservation's lands and a viable reservation fishery for the Tribe. *Washington Fishing Vessel*, 443 U.S. at 664-68, 678-79. The government concedes that this Treaty right to take fish meant that there would be some fish available to be taken. Dkt. #26-1, at pp. 34-35 (citing *Washington Fishing Vessel* and *United States v. Washington*, 506 F. Supp. 187, 203 (W.D. Wash. 1980)). Here, however, the government permitted complete destruction of the fish stocks from the North Fork of the Skokomish, which meant there were no fish to take. And it allowed the Cushman Project to gradually inundate more than 25 percent of the reservation lands, rendering them unusable and substantially damaging the on-reservation fisheries and other natural resources.

Plaintiffs do not claim that the Treaty "creates an absolute right for preservation of the fishing from all man-made impacts," as the government alleges. Thus, the government's reliance on *United States v. Washington*, 694 F.2d 1374 (9th Cir. 1982), on en banc reh'g, 759 F.2d 1353 (9th Cir. 1985) and *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791 (D. Idaho 1994) is misplaced. In *Nez Perce*, the tribe sued a private company for causing a mere decrease in the fish population it had a treaty right to fish. In *United States v. Washington*, the Ninth Circuit vacated (but did not reverse) a declaratory judgment imposing a duty on the State of Washington "to refrain from degrading or authorizing the degradation of the fish habitat to an extent that would deprive the treaty Indians of their moderate living needs." 759 F.2d at 1354. The Court rested its decision "on the proposition that issuance of the declaratory judgment . . . is contrary to the exercise of sound judicial discretion" because "the legal standards that will govern the State's

precise obligations and duties under the treaty . . . will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case." *Id*. at 1357.[16]

Here, the government allowed the destruction of major fisheries reserved to the Tribe. As the Supreme Court held in *Washington Fishing Vessel*, the Tribe's right to take fish from the Skokomish River means more than "merely the chance . . . occasionally to dip their nets into" the dried up riverbed and come out empty. 443 U.S. at 679. The government also allowed inundation of over 25 percent of the reservation with accompanying consequential damages to reservation fisheries and other resources, not simply *some degree* of man-made despoliation.

*Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995), cited by the government, is also inapposite. Plaintiffs' claim is not simply that the United States did not "bring an enforcement action." *Id.* It is that the United States failed in its duty to take any action at all to protect the reservation and the Plaintiffs' fishery, as it had the duty to do under the Treaty and the Federal Power Act (see Section VII.B., *infra*). *Shoshone-Bannock Tribe*, moreover, dealt with a "doubly contingent tribal hunting right: the federal lands outside the Reservation must remain unoccupied, and game must continue to be found on those federal lands." In fact, the tribe in *Shoshone-Bannock* sought to force the government to defend a water rights claim derived from that clearly contingent hunting right language in the Fort Bridger Treaty. *Id*. at 1482. Here, Plaintiffs seek damages for the government's failure to protect

[16] Subsequently, the District Court ruled that the Treaties include an implied right to habitat protection. "The Court hereby declares that the right of taking fish, secured to the Tribes in the Stevens Treaties, imposes a duty upon the State to refrain from building or operating culverts . . . that hinder fish passage and thereby diminish the number of fish . . .." *U.S. v. Washington*, No. 70-9213, Subproceeding 01-1, W.D. Wash., Order of Aug. 22, 2007, Docket No. 388, at 12. The Treaties therefore include an "implied promise that neither the negotiators nor their successors would take actions that would significantly degrade the resource . . .." *Id.* at 11. As of December 10, 2012, the implementation phase of this decision is still pending.

Reservation lands and treaty rights to a functioning fishery; the government's duty to protect these lands and treaty rights is not contingent or derivative.

In *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417 (1991), the Claims Court held that establishing reservations by statute and executive orders "create(d) a trust arrangement pursuant to which the United States held in trust for the tribes legal title to both their reservation land and any corresponding vested water rights." *Id*. at 425. The Claims Court held that the creation of this trust by statute and executive orders establishing the reservations "was sufficient to waive sovereign immunity (of the United States) so as to permit an action alleging a breach of that trust" claiming money damages for the government's failure to "protect the trust property against damage or destruction" in water rights litigation where it represented the tribes. *Id*. at 426. Similarly, in the present case, the Treaty creating the trust duty to protect the Reservation and fishery from destruction forms the basis for money damages against the United States. The only difference between this case and *Fort Mojave* is that in *Fort Mojave* the United States had taken some affirmative action to protect the tribe's rights in litigation, but was charged with doing it inadequately. In the present case, the United States completely failed to exercise any authority in litigation or otherwise to protect the Skokomish treaty rights.

### B. The Federal Power Act Also Requires the Government to Protect Reservation Lands and Resources.

Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e) requires the government to ensure that licensed projects are consistent with the purposes of any Indian reservation impacted by the project, and requires the government to develop and impose conditions necessary for protection and utilization of a reservation used by a licensee. The Ninth Circuit construes the portion of § 4(e) applying to Indian reservations as a statute passed for the benefit of tribes. *Escondido Mut. Water Co. v. FERC*, 692 F.2d 1223, 1236 (9th Cir. 1982), *aff'd* 466 U.S. 765

(1984). The Ninth Circuit determined that "Congress intended to limit and circumscribe the broad authority granted to the Commission to issue licenses in the public interest, by requiring those licenses not to be detrimental to the interests of Indians on reservations." *Id.* at 1236. The Court also found "in the plain language of the FPA a policy to foster the development of water power projects in the public interest, *to the extent, and only to the extent, that such can be done without abandoning the fiduciary duties owed by the United States to dependent Indian tribes*." *Id*. (emphasis added). In *City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006), the D.C. Circuit determined that the Secretary of the Interior has the duty under Section 4(e) to "impose license conditions that are designed to mitigate the effect of the project on the Skokomish River to the extent doing so is reasonably related to protecting the reservation and the Tribe."

Section 4(e) gave the Secretary of the Interior the exclusive authority to prescribe conditions on the Cushman Project necessary to protect the purposes of the Skokomish Reservation. The Tribe had no authority to set such conditions. As in *White Mountain Apache Tribe*, this matter was in the exclusive control of the United States. Although the government had the duty under the Act to protect the reservation's lands and resources from the operation of the Cushman Project, it failed completely. Conditions were not imposed on the Project to protect the Reservation until 2010, eight decades after the Project commenced operation.[17]

Prior to 2010, the government violated § 4(e) by issuing a minor part license to the City without imposing any conditions, despite knowing that the project would impact the reservation. The government continued to violate the law by failing to issue license conditions from 1924

[17] Plaintiffs do not challenge the 2010 conditions, as the government mistakenly alleges. Gov't Br. at 44. Rather, Plaintiffs seek money damages for the government's utter failure to issue and enforce conditions before 2010, resulting in a dried up riverbed, impaired fisheries, loss of habitat, flooding, and contamination of wells and septic system failures.

until 2010 even though the dams diverted the entirety of the North Fork of the Skokomish River.

### C. The United States Is Liable in Money Damages for its Failure to Exercise Statutory Authority It Possessed to Protect the Reservation and its Resources From Encroachment of the Cushman Project.

#### 1. The Indian Non-Intercourse Act Also Supports Money-Mandating Duties in the Circumstances Of This Case.

The Indian Non-Intercourse Act provides that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177. The Act's purpose "has been held to acknowledge and guarantee the Indian tribes' right of occupancy[] …, and clearly there can be no meaningful guarantee without a corresponding federal duty to investigate and take such action as may be warranted in the circumstances." *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975). In *Passamaquoddy*, the court held that the Non-Intercourse Act imposed fiduciary duties on the government, and that the government could not refuse to bring a claim under that Act on behalf of a tribe against non-Indian trespassers on the basis that it had no fiduciary duty to do so. *Id.* at 379-80.

Here, the government allowed the City of Tacoma to flood Plaintiffs' lands and destroy their treaty protected fishery despite the promise in the Treaty of Point-No-Point that no "white man" could enter reservation lands without consent of the tribe and payment of compensation to it. Rather than investigating the inundation of reservation lands and preventing it, the government did nothing for decades. The government had a money-mandating duty under the Non-Intercourse Act to take some action to protect the Reservation lands and resources from trespassers and their actions, including the actions of its own licensees. Whatever discretion the

government may have had, it did not extend to doing nothing at all given the affirmative duties of the United States under the Treaty and Federal Power Act to protect the reservation and other resources. The Indian Non-Intercourse Act is therefore fairly interpreted in these circumstances as subjecting the United States to money damages for total failure to take any protective action.

**2. The Act of June 30, 1834 Creates a Money-Mandating Fiduciary Duty on the Facts of this Case to Prohibit Trespassing on Indian Lands.**

The Act of June 30, 1834, c. 161, § 11, 4 Stat. 730, 25 U.S.C. § 180 confirms the government's duty to remove trespassers from tribal treaty lands. Under the Act, trespassers are liable to a penalty of $1,000, and the government may utilize whatever measures, including military force, as necessary to eject the trespassers. 25 U.S.C. § 180. This Act "is directed at preventing unlawful occupation . . . of Indian lands by non-Indians." *Cherokee Nation of Oklahoma v. United States*, 21 Cl. Ct. 565, 574 (1990).

The 1834 Act creates a cause of action against trespassers and provides for a fine (*Cherokee Nation of Oklahoma*, 21 Cl. Ct. at 574), which leads to a fair inference that the Act mandates a right of recovery in damages. *See Agwiak v. United States*, 347 F.3d 1375, 1379-80 (Fed. Cir. 2003) (holding that an act was money mandating where it stated that employees were entitled to payment and that such payment shall be made "under regulations prescribed by the President"). While the Act gives the government some discretion in how to remove trespassers or alleviate the consequences of the trespass, a complete refusal to enforce the Act – especially given the provisions of the Treaty – as occurred here would entirely defeat its purpose. At the time of the initial trespass and for years thereafter, the Tribe could not bring its own action against the City of Tacoma, and the government's refusal to do so made the Act's imposition of liability meaningless—an outcome Congress cannot have intended. In this case, the

government's total failure to protect Plaintiffs' reserved lands and resources by ejectment or some other appropriate action is the basis for monetary damages under the 1834 Act - in conjunction with the government's duties arising under the Treaty and Federal Power Act.

### 3. The Act of March 3, 1893 Creates a Money-Mandating Duty in this Case for the Government to Represent Plaintiffs.

The Act of March 3, 1893, c. 209, § 1, 25 U.S.C. § 175 provides that "[i]n all States and Territories where there are reservations . . . the United States attorney shall represent them in all suits at law and in equity." Despite its mandatory language, courts have interpreted the Act to be discretionary in two circumstances – when the Justice Department: (1) cannot represent a tribe due to a conflict of interest; or (2) finds that the tribe's claims are meritless. *Hopi Tribe v. United States*, 97-301L, 2002 WL 31961409 (Fed. Cl. Dec. 27, 2002); *see also Rincon Band of Mission Indians v. Escondido Mut. Water Co*., 459 F.2d 1082, 1084-85 (9th Cir. 1972); *United States v. Gila River Pima-Maricopa Indian Cmty.*, 391 F.2d 53, 56-57 (9th Cir. 1968); *Siniscal v. United States*, 208 F.2d 406, 410 (9th Cir. 1953); *Salt River Pima-Maricopa Indian Cmty. v. Arizona Sand & Rock Co.*, 353 F. Supp. 1098, 1100 (D. Ariz. 1972); *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1481-82 (D.C. Cir. 1995). Contrary to the government's position (Dkt. #26-1, at 40-41), courts have held that the duty to represent tribes is discretionary only in those two circumstances. *See Chemehuevi Indian Tribe v. Wilson*, 987 F. Supp. 804, 807 (N.D. Cal. 1997). Neither of these circumstances are present here – no conflict of interest exists and Plaintiffs' claims are meritorious.

Plaintiffs repeatedly requested that the Department of Justice represent them in a suit against the City of Tacoma. Moreover, the government admitted that it had a right to bring suit for damages to the Tribe's treaty rights. Amend. Compl., at ¶ 69. In the context of the provisions of the Treaty of Point-No-Point, the Act of March 3, 1893 establishes a fiduciary duty

to protect Plaintiffs' Reservation lands and resources through legal representation, and fairly infers that money damages are available to the Tribe upon breach of that duty.

### D. *Mitchell II* establishes that the Act of June 25, 1910 and the Indian Reorganization Act of 1934 Create Money Mandating Duties Related to Timber Management.

The government has assumed comprehensive control over timber management on trust lands. Act of June 25, 1910, c. 431, § § 7-8, 36 Stat. 855, 857 codified as amended at 25 U.S.C. §§ 406-407; Indian Reorganization Act of 1934, c. 576, 48 Stat. 984, 25 U.S.C. § 466; 25 C.F.R. Part 141 (1958); 25 C.F.R. Part 141 (1965); 25 C.F.R. Part 163 (1984); 25 C.F.R. Part 163 (1995); 25 C.F.R. Part 163 (2010). The Supreme Court expressly so held in *Mitchell II*, 463 U.S. 206. Here, the Reservation consists of trust lands that included stands of timber, and as a result of the foregoing statutes and regulations, the government has money mandating fiduciary duties to preserve the forest lands in its natural state when requested by the Indians, and to preserve such lands in a perpetually productive state. As in *Mitchell II*, the statutes and regulations here "clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities." *Id*. at 224.

*Mitchell II* conclusively establishes that the statutes and regulations under which the United States assumed responsibility for the management of timber on Indian trust lands are money-mandating and provide this Court with jurisdiction over a claim by a Tribe and its members for damages arising from the government's failure to properly protect and manage those resources. The government seeks to avoid the force of *Mitchell II,* first, by pretending that the allotment of reservation lands somehow freed the government of any duty to manage Indian trust timber. US Memorandum (Dkt. #26-1) at 42. The government's "allotment" argument fails

as the Supreme Court in *Mitchell II* found these trust duties to apply specifically to timber on lands that had been subject to allotment. 463 U.S. at 206, 224-228.

Second, the government seeks to avoid *Mitchell II* by the wholly inaccurate assertion that "the United States compensated the Tribe for aboriginal title to 3,840 acres of the Skokomish Reservation and 2,000 acres of inland water . . ." in the proceedings before the Indian Claims Commission. US Memorandum (Dkt. #26-1) at 42. Review of the ICC decisions make clear that the Tribe's claims before the ICC only dealt with claims that accrued by 1946 and only involved the loss of the Tribe's aboriginal title to lands ceded under the Treaty of Point-No-Point and located outside the boundaries of the Skokomish Reservation.[18] The Tribe's claims before the ICC did not include any claims or issues regarding any rights or interests within the Skokomish Reservation. No compensation was paid by the United States for any Reservation lands or resources as a result of the ICC proceedings and those proceedings are no bar here.

### E. The American Indian Agricultural Resource Management Act Imposes a Mandatory Duty on the Government to Protect and Conserve Indian Agricultural Lands.

Under the American Indian Agricultural Resource Management Act of 1993 (AIARMA), Pub. L. 103-177, 107 Stat. 2011, 25 U.S.C. § 3701, et. seq., the government must manage Indian agricultural lands in a manner that protects, conserves, utilizes, and maintains the highest production potential on such lands. 25 U.S.C. § 3711(a)(1). In managing the agricultural lands, the government must act in such a way that protects and preserves "wildlife, fisheries, cultural resources, [and] recreation . . . ." 25 U.S.C. § 3711(a)(3). The government must also "regulate water runoff and minimize soil erosion." *Id*. Congress placed specific obligations on the

[18] *See Skokomish Tribe of Indian v. United States*, 6 Ind. Cl. Comm. 135 (1958); 9 Ind. Cl. Comm. 359 (1961); 12 Ind. Cl. Comm. 197 (1963).

government with respect to managing agricultural lands. In fact, 25 U.S.C. § 3711(b)(1) explains that a tribe may develop an agricultural resource management plan, but if the tribe elects not to do so, the government must develop or effectuate such a plan.

The government incorrectly asserts that Plaintiffs rely only on the congressional findings portion of the statute. Dkt. #26-1, at 43. In fact, Plaintiffs rely on the substantive language of 25 U.S.C. § 3711, which describes specific duties placed on the government by Congress.[19] Also, the Treaty of Point-No-Point required the government to protect the Reservation lands and resources, including agricultural resources. Thus, Plaintiffs do not seek to expand the trust responsibility, but rather to be compensated for the government's breach of its trust duties. Requiring the government to manage Indian agricultural resources through development or implementation of a plan in order to meet congressionally imposed objectives, as AIARMA does, rises to the level of control found in the timber statutes in *Mitchell II*, 463 U.S. at 225 (discussing a regulation requiring the government to manage "Indian forests so as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests[]"). Here, the government completely failed to protect agricultural land on the Reservation, breaching its duties under the Treaty of Point-No-Point and the AIARMA.

**CONCLUSION**

By solemn Treaty and contract, the United States set aside a reservation to serve as a homeland for the Skokomish people. The United States failed to protect that homeland and the resources on which the Tribe and its members relied. Based on the argument above, Plaintiffs respectfully request that the Court deny the United States' motion to dismiss.

[19] The government's reliance on *El Paso Natural Gas. Co. v. United States,* 774 F. Supp. 2d 40, 49 (D.D.C. 2011), is misplaced. That case simply addressed whether AIARMA created a private right of action for purposes of a suit brought under the APA. Nowhere did the district court address AIARMA for purposes of the money-mandating test regarding claims in the CFC.

DATED this 10th day of December, 2012.

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