THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiff(s), v. STATE OF WASHINGTON, et al., Defendant(s).	No: C70-9213 Subproceeding: 17-sp-01 SKOKOMISH'S RESPONSE; AND SKOKOMISH'S CROSS-MOTION FOR SUMMARY JUDGMENT (ORAL ARGUMENT REQUESTED) NOTING DATE: AUGUST 4, 2017

I. SUMMARY OF ARGUMENT

Through a protracted legal process, the district court and the Ninth Circuit specifically determined that the Skokomish Indian Tribe's usual and accustomed fishing area, as well as, primary right extend to all of Skokomish (or Twana) Territory. As such, this remains both the law of the Case and the Circuit. The parties to *United States v. Washington*, furthermore, are barred by the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) from further contesting Skokomish's Treaty rights within Skokomish (or Twana) Territory.

To provide background, the original request for determination was filed on June 17, 1981. On March 11, 1982, the district court approved the *Order of Reference to Special*

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Master (Usual and Accustomed Fishing Grounds), referring the "issue of determining the 'usual and accustomed fishing grounds' of the Skokomish Tribe" to the Honorable Robert E. Cooper, United States Magistrate (retired), as Special Master. Ex. A. A copy of this Order is attached hereto and incorporated by reference herein, as Exhibit A.

During this process, the Hood Canal Agreement was approved by Walter E. Craig, United States District Court Judge, on March 8, 1983. The Hood Canal Agreement was a limited settlement between the Skokomish Indian Tribe, Jamestown S'Klallam Tribe, Lower Elwha Klallam Tribe and Port Gamble S'Klallam Tribe as to aspects of the Hood Canal fishery only. (Hood Canal Agreement, *United States v. Washington*, Main Dkt. No. 21473 at pp. 11-28, sp. 17-01 Dkt. No. 3 at pp. 11-28). Also, it was "the intent of the Stipulating Parties to confirm and preserve the pre-treaty historical relationship between the Clallam and Skokomish (or Twana) peoples concerning fishing rights within the Hood Canal fishery." *Id.* at p. 13. Under the terms of the Hood Canal Agreement, the "Skokomish Tribe has the primary right to fish in the Hood Canal fishery." *Id*. at 17. As used in this Agreement, the term "'Hood Canal fishery' includes all waters of the Hood Canal south of a line drawn between Foulweather Bluff and Olele Point, and all rivers and streams·draining into Hood Canal." *Id*.

At the time the Hood Canal Agreement was approved, the Skokomish Indian Tribe was "entirely dependent on the Hood Canal fishery for its catch because it [had] no established usual and accustomed fishing places outside Hood Canal and the rivers and streams draining into it." *Id.* at 14. This circumstance changed following the trial conducted after the approval of the Hood Canal Agreement.

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The trial was conducted by the Special Master on May 5 and 6, 1983, and on June 6 and 7, 1983, in order to resolve remaining objections. This trial resulted in extensive unambiguous findings as to Skokomish (or Twana) Territory, supported by the law and the best available Treaty time evidence, memorialized in the Special Master's Report. It is abundantly clear from the Special Master's Report that the Special Master, in order to resolve the issues posed by the original request for determination and later by the parties during the litigation phase and at trial, chose to first determine the full geographic scope of Skokomish (or Twana) Territory, as well as, the use, occupancy and control of the area. The Special Master then determined that Hood Canal and its drainage basin were embraced or encompassed within Skokomish (or Twana) Territory.

Additionally, the Special Master's Report comes with a disclaimer, specifically, ". . . ***it is not my intention*** to indicate that the evidence specifically cited is the only evidence supporting a particular finding or that other evidence not cited that could support the finding was not considered." (Special Master's Report, *United States v. Washington*, Main Dkt. No. 21473 at p. 31, sp. 17-01 Dkt. No. 3 at p. 31). The Special Master also did not base his findings exclusively on any single document, but considered "the testimony of the witnesses at trial, the documentary evidence of record in this proceeding, relevant evidence introduced in earlier proceedings in this case, and the argument of counsel," to support his own independent recommendation as to Skokomish's U&A and control thereof. *Id.* On March 22, 1984, the district court fully adopted the Special Master's "Report and Recommendation, Findings of Fact, Conclusions of Law," with disclaimer. *United States v. Washington*, 626 F. Supp. 1405, 1487 (W.D. Wash. 1985).

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In light of this disclaimer and the clear absence of any ambiguity in the findings, the Court should not look beyond the Special Master's Report or published opinion to determine intent. When reviewing these findings, the Court should carefully note the repeated reference to the terms: "territory," "territories," and "territorial." These terms are inextricably intertwined within the final judgment, as a whole. To excise these terms from the final judgment, or to modify them, would completely undermine the judgments' foundation.

At the heart of this judgment, is the district court's succinct finding that:

> In his 1854–55 journal, George Gibbs, a lawyer, ethnographer and secretary to the 1855 Treaty Commission, described Skokomish (or Twana) ***territory*** as:
>
> > extend[ing] from Wilkes' Portage northwest across to the arm of Hood Canal up to the old limits of the Tchimakum, thence westerly to the summit of the Coast Range, thence southerly to the head of the west branch of the Satsop, down that branch to the main fork, thence east to the summit of the Black Hills, thence north and east to the place of beginning.
>
> . . . Gibbs' description of Twana ***territory*** was based on information gathered from Indians at and before the treaty councils and at contemporaneous meetings. The court finds it to be the best available evidence of the treaty-time location of Twana ***territory***.

United States v. Washington, 626 F. Supp. at 1489 at Finding No. 353. This finding as to the geographic description of Skokomish (or Twana) Territory, as it existed at Treaty times, is not ambiguous in any way, as all of its boundaries are concisely delineated. With the exception of the political boundary between the Skokomish (or Twana) and the Tchimakum, all of the other territorial borders described by George Gibbs in his "1854-55 journal" are set by reference to unambiguous fixed geographic points or landmarks, for example the "west branch of Satsop" or "summit of the Black Hills." The district court eliminated any potential claim of ambiguity as to the political boundary by expressly

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determining its location by using modern points of reference (i.e. Termination Point and the Hood Canal Floating Bridge). *United States v. Washington*, 626 F. Supp. at 1486-1487; (Special Master's Report – Exhibit A, *United States v. Washington,* Main Dkt. No. 21473 at p. 46; sp. 17-01 Dkt. No. 3 at p. 46).

It is, furthermore, undeniable that the district court intended to determine the location, use, occupancy and control of all of Skokomish (or Twana) Territory, specifically:

> Gibbs' description of Twana ***territory*** is also corroborated by other evidence in this proceeding . . . His data confirm that the areas within the Skokomish (or Twana) ***territory*** described by Gibbs were long used and occupied by the aboriginal Twana people. . . concluded that the aboriginal Twana ***territory*** encompassed, with minor variances, the same area described by Gibbs in his 1854–55 journal . . . Dr. Lane found that the cross-checking made possible by these independent sources of data presented a particularly reliable basis for determining the location of treaty-time Twana ***territory***.

United States v. Washington, 626 F. Supp. at 1489 at Finding No. 354. Also, in the supplementing of this finding:

> The court finds that the foregoing description of Twana ***territory*** is also consistent with the customary Indian understanding of ***territory*** at treaty times.

United States v. Washington, 626 F. Supp. at 1490 at Finding No. 355.

Additionally, it is undeniable that it was the district court's intention to equate occupancy of a territory with the "primary right to fish in the territory." Specifically:

> The Twana and their neighbors, like other treaty-time Indians in the case area, recognized a hierarchy of primary and secondary or permissive use rights, including fishing rights. (Tr. of Hearing, pp. 14–18; finding 12 herein.) *The people occupying a* ***territory*** *held the primary right to fish in the* ***territory***. . . The secondary or permissive fishing rights were ineffective, however, unless holders of the primary fishing right first invited or otherwise permitted persons with secondary rights to fish in the ***territory***. The holders of the primary fishing right exercised the prerogative to exclude some or all secondary users from their ***territorial*** fishing grounds for any reason they deemed adequate. . . .

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United States v. Washington, 626 F. Supp. at 1490 at Finding No. 356. The court found "that the treaty-time Twanas' control of their ***territory*** inhered primarily in the network of shared customary understandings concerning ***territory***." *United States v. Washington*, 626 F. Supp. at 1491 at Finding No. 357. The Ninth Circuit considered the findings and in its opinion affirming the district court's decision wrote:

> The record supports the court's finding that at treaty times, the Twana held the primary fishing right within their ***territory***, and that this right was acknowledged by neighboring tribes. . .The customary behavior of treaty-time Indians generally reflected these common understandings through restraint from intrusion on or unauthorized use of others' ***territories***. The court found, however, that the Twana had readily available means of deterring unauthorized use of their ***territory***, such as social disapproval, magical retaliation, and possibly physical force.

United States v. Washington, 764 F.2d 670, 674 (9th Cir. 1985). The district court in making its determination concluded that:

> The aboriginal primary right of the Twana Indians to take fish within their ***territory*** was fully preserved to the Skokomish Indian Tribe by the Treaty of Point No Point, 12 Stat. 933 (January 26, 1855), as a "right of taking fish" thereunder.

United States v. Washington, 626 F. Supp. at 1491 at Conclusion No. 92.

In review, there is no ambiguity and it was undeniably the intention of the district court to determine the geographic boundaries of Skokomish (or Twana) Territory and the use, occupancy and control thereof. There is no basis to displace the law of the Case and no authority at the district court level to ignore the law of the Circuit. The parties to *United States v. Washington,* are also barred by the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) from further contesting Skokomish's Treaty rights.

Prior to bringing this matter back before the Court, the Skokomish Indian Tribe satisfied the pre-filing requirements of Paragraph 25(b). (Order Modifying Paragraph 25 of Permanent Injunction, Main Dkt. No. 13599 at ¶25(b)). The Skokomish Indian Tribe

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made it clear to the participants that the Skokomish Indian Tribe intended to consider the participants' written requests, comments and questions, when drafting the Request for Determination. During this pre-litigation process, some participants argued that existing case law barred or potentially barred Skokomish's claim to the "entire Satsop fishery," which is comprised of areas inside and outside of Skokomish (or Twana) Territory. In response, the Skokomish Indian Tribe chose to rely upon the existing case law to confirm Skokomish's Treaty rights within Skokomish (or Twana) Territory, which already includes a significant portion of the Satsop fishery.

The factual allegations are additionally "well-pleaded" within the Request for Determination. (Request for Determination, *United States v. Washington,* Main at Dkt. No. 21473, sp. 17-01 at Dkt. No. 3). The Request for Determination is correctly brought pursuant to Paragraphs 25(a)(1) through 25(a)(7). (Request for Determination, *United States v. Washington,* Main at Dkt. No. 21473 at ¶3.12, sp. 17-01 at Dkt. No. 3 at ¶3.12). This Court has jurisdiction under 28 U.S.C. § 1331. The inability of the Skokomish Indian Tribe to open a subsistence fishery in the East Fork of the Satsop River, which is located in Skokomish (or Twana) Territory, as a result of the threat of sanctions, constitutes a concrete and particularized injury in fact that is "likely to be redressed by a favorable judicial decision." (Request for Determination, *United States v. Washington,* Main at Dkt. No. 21473 at ¶¶1.2-1.4, sp 17-01 at Dkt. No. 3 at ¶¶1.2-1.4).

As such, the Skokomish Indian Tribe is entitled to summary judgment in the Skokomish Indian Tribe's favor. The motions brought by the Jamestown S'Klallam Tribe, Port Gamble S'Klallam Tribe and Squaxin Island Tribe should be denied. (S'Klallam Motion, *United States v. Washington,* Main Dkt. No. 21495, sp. 17-01 Dkt. No. 21);

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(Squaxin Motion, *United States v. Washington*, Main Dkt. No. 21498, sp. 17-01, Dkt. No. 23).

II. ARGUMENT

A. Legal Standard for Summary Judgment

Rule 56(a) of the Federal Rules of Civil Procedure provides that:

> A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

Fed. R. Civ. P. 56(a). Additionally, a party asserting that a fact cannot be disputed must support the assertion by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). "The court . . . may consider other materials in the record." Fed. R. Civ. P. 56(c)(3) (*see United States v. Washington*, C70-9213, and appeals therefrom). "In evaluating the evidence to determine whether there is a genuine issue of fact," the Court draws "all inferences supported by the evidence in favor of the non-moving party." *Walls v. Central Contra Costa Transit Authority*, 653 F.3d 963, 966 (9th Cir. 2011).

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B. Statement of Facts, Law and Argument

1. Skokomish's U&A and Primary Right in all of Skokomish (or Twana) Territory is Determined.

The courts have specifically determined that the Skokomish Indian Tribe's usual and accustomed fishing area, as well as, primary right extend to all of Skokomish (or Twana) Territory. Skokomish's primary right to take fish (a reserved right) is protected by the Treaty of Point No Point. 12 Stat. 933; *United States v. Winans*, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of rights to the Indians, but a grant of right from them,-a reservation of those not granted."); *United States v. Lower Elwha Tribe*, 642 F.2d 1141, 1144 (1981) (The Court "infer[red] that the tribes reasonably understood themselves to be retaining no more and no less of a right vis-à-vis one another than they possessed prior to the treaty.").

The court process began with the filing of the original request for determination on June 17, 1981. (Original RFD, *United States v. Washington*, Main Dkt. No. 7636). On March 11, 1982, the district court approved the *Order of Reference to Special Master (Usual and Accustomed Fishing Grounds)*, referring the "issue of determining the 'usual and accustomed fishing grounds' of the Skokomish Tribe" to the Honorable Robert E. Cooper, United States Magistrate (retired), as Special Master. Ex. A.

Following this referral, a portion of the dispute was resolved upon approval of the Hood Canal Agreement on March 8, 1983. (Hood Canal Agreement, *United States v. Washington*, Main Dkt. No. 21473 at pp. 11-28; sp. 17-01 Dkt. No. 3 at pp. 11-28). With respect to the Hood Canal Agreement, it was "the intent of the Stipulating Parties to confirm and preserve the pre-treaty historical relationship between the Clallam and

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Skokomish (or Twana) peoples." *Id.* at p. 13. How this relationship was to be preserved remains disputed. The Hood Canal Agreement, however, did not limit the ability of the district court to determine additional "usual and accustomed fishing grounds" for the Skokomish Indian Tribe, at any time or even during the later trial.

To bring closure to this dispute, a trial was later conducted by Robert E. Cooper, Special Master, that lasted several days between May 5, 1983 and June 7, 1983. (Special Master's Report, *United States v. Washington,* Main Dkt. No. 21473 at pp. 29-46; sp. 17-01 Dkt. No. 3 at pp. 29-46). As a result of that trial, it was determined that:

> In his 1854–55 journal, George Gibbs, a lawyer, ethnographer and secretary to the 1855 Treaty Commission, ***described Skokomish (or Twana) territory as***:
>
> > extend[ing] from Wilkes' Portage northwest across to the arm of Hood Canal up to the old limits of the Tchimakum, thence westerly to the summit of the Coast Range, thence southerly to the head of the west branch of the Satsop, down that branch to the main fork, thence east to the summit of the Black Hills, thence north and east to the place of beginning.
>
> (Tr. at Hearing, p. 29–30.) ***Gibbs' description of Twana territory*** embraces Hood Canal and its drainage basin northward along the canal to the point on the west shore now known as Termination Point, which was the southern limit of the Tchimakum shown on a map prepared by Gibbs in 1856. (Ex. SK–SM–4; *see also* Ex. SK–SM–5 for contemporary names.) ***Gibbs' description of Twana territory*** was based on information gathered from Indians at and before the treaty councils and at contemporaneous meetings. ***The court finds it to be the best available evidence of the treaty-time location of Twana territory***.

United States v. Washington, 626 F. Supp. at 1489 at Finding No. 353. This boundary description of Skokomish (or Twana) Territory is clear and certain, and not ambiguous. *U.S. v. Lummi Indian Nation,* 235 F.3d 443, 449 (9th Cir. 2000) (Only "[w]hen interpreting an ambiguous prior judgment, the reviewing court should 'construe a judgment so as to give effect to the intention of the issuing court.'"); *Muckleshoot Indian Tribe v. Lummi*

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Indian Tribe, 141 F.3d 1355, 1359 (9th Cir. 1998) ("what [the judge] meant in precise geographic terms.").

When reviewing the Special Master's Report and published opinion, it is unquestionably clear that the court intended to define the boundaries of all of Skokomish (or Twana) Territory, as well as, the use, occupancy and control thereof. The concept of territory being "critical and necessary" and "essential" to the final judgment on the merits. The district court specifically determined that:

> ***Gibbs' description of Twana territory is also corroborated by other evidence in this proceeding***, including the work of Dr. T.T. Waterman and Dr. Elmendorf. Waterman, an anthropologist working with Indian informants around 1920, compiled an extensive list and map of sites used by Indians in the western Washington area, including the Suquamish, Klallam and Twana Indians. His data confirm that ***the areas within the Skokomish (or Twana) territory described by Gibbs were long used and occupied by the aboriginal Twana people***. (Tr. of Hearing, pp. 43–49.) Dr. Elmendorf, who did not have access to Gibbs' 1856 journal or to Waterman's site information, concluded that the ***aboriginal Twana territory encompassed, with minor variances, the same area described by Gibbs in his 1854–55 journal.*** (Ex. SK–SM–1, pp. 22–23, 92–93.) The accuracy of Dr. Elmendorf's list of Twana sites (Ex. 2 to Ex. SK–SM–1, pp. 32–55) is also corroborated by Waterman's earlier list. Dr. Lane found that the cross-checking made possible by these independent sources of data presented a ***particularly reliable basis for determining the location of treaty-time Twana territory***. (Tr. of Hearing, pp. 45–48.) The court agrees, and upon consideration of all the relevant evidence in this matter, finds that the treaty-time territory of the Twana Indians encompassed all of the waters of Hood Canal, the rivers and streams draining into it, and the Hood Canal drainage basin south of a line extending from Termination Point on the west shore of Hood Canal directly to the east shore, as depicted on Exhibit A hereto. (*See also* Ex. G 17(h).)

United States v. Washington, 626 F. Supp. at 1489-90 at Finding No. 354; *see Muckleshoot Indian Tribe v. Lummi Indian Tribe*, 141 F.3d at 1360 ("the only relevant evidence is that which was considered by" the judge "when he made his finding."); *see also U.S. v. Muckleshoot Indian Tribe*, 235 F.3d 429, 432-33 (9th Cir. 2000). Again, Skokomish (or

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Twana) Territory described above by George Gibbs extends well beyond Hood Canal. Further, in the supplementing of this finding, it was determined that:

> The court finds that the foregoing ***description of Twana territory*** is also consistent with the customary Indian understanding of territory at treaty times.

United States v. Washington, 626 F. Supp. at 1490 at Finding No. 355.

With the exception of the political boundary between the Skokomish (or Twana) and the Tchimakum, all of the other territorial borders described by George Gibbs in his "1854-55 journal" are set by reference to unambiguous fixed geographic points or landmarks, for example, the "summit of the Black Hills." 12 Stat. 933 (Treaty of Point No Point, Article I . . . "summit of the Black Hills"); 10 Stat. 1132 (Treaty of Medicine Creek, Article I . . . "summit of the Black Hills"). The district court, additionally, resolved any ambiguity as to the political boundary between the Skokomish (or Twana) and the Tchimakum by expressly determining its location by using modern points of reference, specifically:

> . . . south of the line displayed on Exhibit A (attached to Special Master's Report and Recommendation, etc…) commencing on the west shore of Hood Canal at Termination Point and following the course of the Hood Canal Floating Bridge to the east shore of the canal.

United States v. Washington, 626 F. Supp. at 1486-1487; (Special Master's Report – Exhibit A, *United States v. Washington*, Main Dkt. No. 21473 at p. 46; sp. 17-01 Dkt. No. 3 at p. 46). The district court did not expressly or definitively incorporate by reference any other map(s) generated by or from the works of George Gibbs, T.T. Waterman or Elmendorf. Rather, the district court simply relied upon Gibbs' description of Skokomish (or Twana) Territory (Finding Nos. 353-355) as the "best available evidence of the treaty-time location of Twana territory."

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The district court equated occupancy with the "primary right to fish in the territory," specifically determining that:

> The Twana and their neighbors, like other treaty-time Indians in the case area, recognized a hierarchy of primary and secondary or permissive use rights, including fishing rights. (Tr. of Hearing, pp. 14–18; finding 12 herein.) ***The people occupying a territory held the primary right to fish in the territory***. . . The secondary or permissive fishing rights were ineffective, however, unless holders of the primary fishing right first ***invited or otherwise permitted persons with secondary rights to fish in the territory***. The holders of the primary fishing right exercised the prerogative to exclude some or all secondary users from their ***territorial fishing grounds*** for any reason they deemed adequate. . . .

United States v. Washington, 626 F. Supp. at 1490 at Finding No. 356. The court found "that the ***treaty-time Twanas' control of their territory*** inhered primarily in the network of shared customary understandings concerning ***territory***." *United States v. Washington*, 626 F. Supp. at 1491 at Finding No. 357. The Ninth Circuit considered these findings and in its opinion affirming the district court's judgment wrote:

> The record supports the court's finding that at treaty times, the Twana held the primary fishing right within their ***territory***, and that this right was acknowledged by neighboring tribes. . . The customary behavior of treaty-time Indians generally reflected these common understandings through ***restraint from intrusion on or unauthorized use of others' territories***. The court found, however, that the ***Twana had readily available means of deterring unauthorized use of their territory***, such as social disapproval, magical retaliation, and possibly physical force.

United States v. Washington, 764 F.2d at 674. The district court when rendering its determination concluded that:

> The ***aboriginal primary right of the Twana Indians to take fish within their territory was fully preserved*** to the Skokomish Indian Tribe by the Treaty of Point No Point, 12 Stat. 933 (January 26, 1855), as a "right of taking fish" thereunder.

United States v. Washington, 626 F. Supp. at 1491 at Conclusion No. 92.

Having now reviewed the findings, it is important to note the disclaimer issued by Robert E. Cooper, Special Master, which provides in relevant part:

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> After considering the testimony of the witnesses at trial, the documentary evidence of record in this proceeding, relevant evidence introduced in earlier proceedings in this case, and the argument of counsel, I hereby make the findings of fact . . . With respect to the findings of fact that are accompanied by citations to the record, it is not my intention to indicate that the evidence specifically cited is the only evidence supporting a particular finding or that other evidence not cited that could support the finding was not considered.

United States v. Washington, C70-9213, Dkt. No. 9611 at p. 2: ll. 3-16 (W.D. Wash. 1984); *United States v. Washington*, 626 F. Supp. at 1487 (district court adopted "the Report and Recommendation, Findings of Fact, Conclusions of Law," with disclaimer). This appears to be a blatant measure, to protect against challenges to this independent recommendation. In light of this disclaimer and the clear absence of ambiguity in the findings, the Court should not look beyond the Special Master's Report or published opinion to determine intent.

In sum, through this protracted legal process, the courts have specifically determined that the Skokomish Indian Tribe's usual and accustomed fishing area, as well as, primary right extend to all of Skokomish (or Twana) Territory. This is the law of the Case. *Mussacchio v. U.S.*, 136 S.Ct. 709, 716 (2016) ("'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'"); *U.S. v. Lummi Indian Nation*, 235 F.3d at 452 ("For the doctrine to apply, the issue in question must have been 'decided explicitly or by necessary implication in [the] previous disposition."). This is also the law of the Circuit. *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (*en banc*) ("We now hold that the exceptions to the law of the case doctrine are not exceptions to our general 'law of the circuit' rule, i.e., the rule that a published decision of this court constitutes binding authority which 'must be followed unless and until overruled by a body competent to do so . . . .'"). There is no

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ambiguity and it was undeniably the intention of the district court to determine the geographic boundaries of Skokomish (or Twana) Territory and the use, occupancy and control of the area. There is no basis to displace the law of the Case and no authority at the district court level to ignore the law of the Circuit.

United States v. Washington, is also a single or unitary case, for which there is privity between parties. *United States v. Washington,* C70-9213 Dkt. No. 20722 at p. 4-5 (W.D. Wash. 2014). This Court, in a prior action within this case, determined that:

> Although vigorously contested through the instant Motions, the scope of Interested Party participatory rights in *U.S. v. Washington* subproceedings has remained clear and constant throughout the history of this long-running case and is dictated by its structure. As the Makah and Interested Parties point out, *U.S. v. Washington* is a single case, controlled since 1970 by a single master docket. . . Indeed, a priori limitations on party participation would jeopardize important due process rights, as it remains a fundamental principle that all parties to a lawsuit are bound by a judgment or decree within it. . . This Court has repeatedly reaffirmed the unitary nature of *U.S. v. Washington* . . . .

United States v. Washington, C70-9213 Dkt. No. 20722 at p. 4-5 (W.D. Wash. 2014).

These parties include the Stevens Treaty Tribes, State of Washington and United States of America. These parties had actual and/or constructive notice of the issues and claims raised during the extensive litigation over Skokomish's rights within Skokomish (or Twana) Territory. *United States v. Washington*, 626 F. Supp. 1405, *aff'd*, 764 F.2d 670; Ex. A; Fed. R. Civ. P. 15(b)(2). These identical issues and claims were "actually litigated." *Id*. The determination as to Skokomish's rights within all of Skokomish (or Twana) Territory was "critical and necessary" and "essential" to the final judgment on the merits, as all of the components are inextricably intertwined. *Id*

The parties to *United States v. Washington,* thus, are barred by the doctrine of res judicata (claim preclusion) from further contesting Skokomish's rights within Skokomish

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(or Twana) Territory. *Id.*; *Owens v. Kaiser Foundation Health Plan, Inc*., 244 F.3d 708, 713 (9th Cir. 2001) ("Res judicata" is "also known as claim preclusion."); *Ruiz v. Snohomish County Public Utility District No. 1*, 824 F.3d 1161, 1164 (9th Cir. 2016) ("Res judicata applies when there is: (1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between parties."); *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2305 (2016) ("The doctrine . . . prohibits 'successive litigation of the very same claim' by the same parties.").

These parties' challenges are likewise barred by the doctrine of collateral estoppel (issue preclusion). *Id.*; *Beauchamp v. Anaheim Union High School Dist*., 816 F.3d 1216, 1225 (9th Cir. 2016) (Collateral estoppel is also known as issue preclusion); *B & B Hardware, Inc. v. Hargis Industries, Inc*., 135 S.Ct. 1293, 1303 (2015) ("[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.").

2. The Pre-Filing Requirements were Satisfied.

A Meet and Confer was held on November 4, 2015. The Skokomish Indian Tribe timely demanded mediation, which took place on April 28 through April 29, 2016, at Skokomish's sole expense. On April 29, 2016, the Skokomish Indian Tribe agreed to keep mediation open until July 31, 2016, to further consider "requests, comments and questions." (Email timestamped, "Tue, June 14, 2016 at 1:25 PM," and distributed by Skokomish to parties.). "If no settlement was reached by July 31, 2016, then commencing August 1, 2016, the Skokomish Indian Tribe was free to file a Request for Determination." *Id.* The Skokomish Indian Tribe later provided notice that it "modified the scope of the Request

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for Determination, based on the comments and legal concerns raised by parties to *US v. Washington* and other Indian tribes." (Email timestamped, "Fri, Aug 5, 2016 at 8:55 AM," and distributed by Skokomish to parties.). These steps taken by the Skokomish Indian Tribe are entirely consistent with the principals espoused in Paragraph 25(b).

The Squaxin Island Tribe and others now dispute Skokomish's ability to modify the request based on the "comments and legal concerns raised by" the parties during the pre-filing process. This line of argument, however, is entirely without merit or is simply moot. Today, if the Skokomish Indian Tribe filed a request for determination using the exact language contained in the Meet and Confer letter (without reference to the protracted pre-filing discourse and resulting compromise), it would change nothing. The Skokomish Indian Tribe would still file a motion for summary judgment, based on existing law, as it pertains to the already adjudicated Skokomish (or Twana) Territory. Fishing within those waters lying outside Skokomish (or Twana) Territory, would be determined pursuant to Paragraph 25(a)(6), only if the Skokomish Indian Tribe chose to pursue those claims.

To provide the Court with some background, initially, the Skokomish Indian Tribe sought to protect its reserved Treaty right to take fish within the "entire Satsop Fishery." The Skokomish Indian Tribe anticipated that this would be primarily a ceremonial or subsistence fishery. This fishery includes waters lying within Skokomish (or Twana) Territory, which is already adjudicated. It also includes waters which may lie outside of Skokomish (or Twana) Territory (or the Point No Point Ceded Area) where the right to fish may not have yet been adjudicated, for example, the Chehalis River. Unfortunately, the Skokomish Indian Tribe in advancing its claims was faced with very vocal and resolute objections from participants, both on factual and legal grounds.

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To address the factual basis, the Skokomish Indian Tribe invited Dr. Nile Robert Thompson, Ph.D. of Dushuyay, to the scheduled Meet and Confer, as well as, the mediation. The Skokomish Indian Tribe directed Dr. Nile Robert Thompson to freely address the questions posed by participants during this pre-filing process. In an effort to increase the likelihood of success during mediation, the Skokomish Indian Tribe also served mediation materials entitled "Some Anthropological Observations on Data Pertaining to the Relationship Between the Satsop and the Skokomish Indian Tribes" by Dr. Nile Robert Thompson, which is approximately 100 pages in length. Despite this exchange, as of July 31, 2016, no agreement was reached as to the sufficiency of the factual evidence.

As for the legal aspect of the claim, participants argued and continue to do so, that existing law is dispositive of this claim, with the Skokomish Indian Tribe being effectively barred from obtaining relief. This discussion being a component of the Paragraph 25 pre-filing process, which includes the discussion of "[w]hether earlier rulings of the Court may have addressed or resolved the matter in issue in whole or in part." (Order Modifying Paragraph 25 of Permanent Injunction, Main Dkt. No. 13599 at ¶25(b)(F)). One particular line of argument, for example, advanced by the participants opposed to Skokomish's claim, involved the traditional notion of "case area," with some participants believing that the Satsop watershed is outside of the "case area."

Once the affected parties reached this factual and legal deadlock, nothing in Paragraph 25(b) required or mandated any further discussion or disclosure. Yet, in response to these legal objections and consistent with Skokomish's prior commitment to take into consideration the participants' "comments and legal concerns," the Skokomish Indian Tribe voluntarily limited its claim to fishing within Skokomish (or Twana) Territory,

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which is already the law of the Case and the Circuit, so this would resolve the matter "in whole or in part." The Skokomish Indian Tribe further expressly reserved the right to bring future claims, both at commencement of the pre-filing process and in the filed Request for Determination. (Request for Determination, Main Dkt. No. 21473 at ¶ 3.16; sp. 17-01, Dkt. No. 3 at ¶ 3.16).

Any suggestion that Skokomish's claim to a primary right to harvest "***all Treaty resources***" located in Skokomish (or Twana) Territory was concealed is wholly disingenuous, as this has been the official public position of the Skokomish Indian Tribe for many years. For example, in June 2013, the Skokomish Indian Tribe brought a case against state and county officials, alleging that:

> 49. An early historical reference to the Plaintiff's, Skokomish Indian Tribe's territory can be found in George Gibbs' notebook from 1854-1855, which is attached hereto and incorporated herein as Exhibit A. George Gibbs wrote as to Skokomish territory, it extends "from Wilkes' portage N.W. across to the arm of Hood's Canal, up to the old limits of the Tchimakum, then westerly to the summit of the Coast range, thence southerly to the head of the west branch of the Satsop, down the branch to the main fork, then east to the summit of the Black Hills, then N & E to the place of beginning." George Gibbs, *Cascade Road-Indian Notes 1854–1855* (1855).

(Amended Complaint, *Skokomish v. Goldmark, et al.*, 3:13-cv-05071 (W.D. Wash.) at Dkt. No. 50 at ¶ 49). The Skokomish Indian Tribe also sought a declaration as to Skokomish's "exclusive regulatory and management authority." The Jamestown S'Klallam and Port Gamble S'Klallam (hereinafter, the "S'Klallam"), the State of Washington and the Squaxin Island Tribe were all aware of this claim.

More recently, last year, the Skokomish Indian Tribe relied on *United States v. Washington*, to support its primary rights lawsuit against members of the Suquamish Tribal

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Council and its Fishery Director over hunting and gathering within Skokomish (or Twana) Territory. The Complaint provides in relevant part that:

> 46. Plaintiff, Skokomish Indian Tribe, as such, likewise possesses the primary right to regulate and prohibit treaty hunting and gathering within Skokomish (or Twana) Territory by the Suquamish Indian Tribe and its members. 12 Stat. 933 art. IV; U.S. Const. art. VI, cl. 2.
>
> 47. This primary right to regulate and prohibit treaty hunting and gathering within Skokomish (or Twana) Territory is supported by: reliable evidence contemporary with the Treaty of Point No Point of January 26, 1855 and extensive post-treaty anthropological research; and the record contained in *United States v. Washington*, C70-9213 (W.D. Wash.), and any appeal therefrom. See also 12 Stat. 933; 12 Stat. 933 art. I (Ceded Area); 12 Stat. 933 art. IV (Reserved Treaty Rights and Privileges); *State v. Miller*, 102 Wn.2d 678, 689 P.2d 81 (1984) (For treaty purposes, there is no operative distinction between the terms right and privilege); *State v. Buchanan*, 138 Wn.2d 186, 978 P.2d 1070 (1999); William W. Elmendorf, *The Structure of Twana Culture* (1960); William W. Elmendorf, *Twana Narratives* (1993); *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *United States v. Washington*, 626 F. Supp. 1405 (W.D. Wash. 1985) and *United States v. Washington*, 764 F.2d 670 (9th Cir. 1985).

(Complaint, *Skokomish v. Forsman, et al.*, 3:16-cv-05639 (W.D. Wash.) at Dkt. No. 1).

On July 25, 2016, a copy of the Complaint from *Skokomish v. Forsman et al.* was emailed to Joseph Shorin, attorney for the State of Washington. (Email timestamped, "Mon, July 25, 2016 at 6:02 PM," and distributed by Skokomish.). The State later provided materials to support Skokomish's litigation. (Exhibits, *Skokomish v. Forsman, et al.*, 3:16-cv-05639 (W.D. Wash.) at Dkt. No. 19-1).

Another copy of the Complaint was emailed to Lauren Rasmussen for the S'Klallam on July 21, 2016. (Email timestamped, "Thu, July 21, 2016 at 4:31 PM," and distributed by Skokomish.). The S'Klallam were granted amici status and Lauren Rasmussen wrote in her Amici Brief, that "Skokomish relies on *U.S. v. Washington* rulings for precedent for this action. . . Those rulings establish that an area of Twana territory

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exists." (S'Klallam Amici Brief, *Skokomish v. Forsman, et al.*, 3:16-cv-05639 (W.D. Wash.) at Dkt. No. 20-2 at p. 4: ll. 14-15). The S'Klallam, furthermore, acknowledged the Skokomish Indian Tribe's claim "over all Treaty resources located within Skokomish (or Twana) Territory." *Id.* at p. 5: ll. 12-13.

Kevin Lyon, attorney for the Squaxin Island Tribe, also apparently tracked the progress in this action, as he even attended the oral argument held on March 10, 2017.

Considering all of the foregoing, the Court should deny any motion to dismiss for failure to comply with the Paragraph 25 pre-filing process.

3. The Request for Determination is Well-Pleaded.

As for the filed Request for Determination, the factual allegations contained therein are also well-pleaded. (Request for Determination, *United States v. Washington,* Main at Dkt. No. 21473, sp. 17- 01 at Dkt. No. 3); *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 1964 (2007) ("Federal Rule of Civil Procedure 8(a)(2) requires only '*a short and plain statement of the claim* showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which its rests."); *Ashcroft v. Iqbal,* 556 U.S. 662, 679, 129 S.Ct. 1937, 1950 (2009) ("[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.").

The Request for Determination is correctly brought pursuant to Paragraphs 25(a)(1) through 25(a)(7), as the participants cannot agree on the applicability of any one subsection. (Request for Determination, *United States v. Washington,* Main at Dkt. No. 21473 at ¶3.12; sp. 17 -01 at Dkt. No. 3 at ¶3.12). This Court also has jurisdiction under 28 U.S.C. § 1331 to grant the relief requested. *United States v. Washington*, 20 F. Supp.3d 986, 1038 (W.D.

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Wash. July 8, 2013) ("The Hoh and Quinault . . . contend that the Court does not have jurisdiction over the waters outside the original case area, which extended only to the three-mile limit. This is incorrect. The Court's subject matter jurisdiction in this case arises from the treaties under 28 U.S.C. § 1331. That jurisdiction extends to all treaty-based fishing . . . ."); (Findings of Fact and Conclusions of Law and Memorandum Order, *United States v. Washington*, sp. 09-01, Dkt. No. 369); *see also* (Amended Judgment, *United States v. Washington*, sp. 09-01, Dkt. No. 395). Skokomish (or Twana) Territory was expressly included within the "case area." *United States v. Washington*, 626 F. Supp. at 1489 at Finding No. 353.

Lastly, the inability of the Skokomish Indian Tribe to open a subsistence fishery in the East Fork of the Satsop River, which is located in Skokomish (or Twana) Territory, as a result of the threat of sanctions, constitutes a concrete and particularized injury in fact that is "likely to be redressed by a favorable judicial decision." (Request for Determination, *United States v. Washington,* Main at Dkt. No. 21473 at ¶¶1.2-1.4,; sp. 17 -01 at Dkt. No. 3 at ¶¶1.2-1.4); *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1386 (2014); *see also Pyramid Lake Paiute Tribe of Indians v. Nevada, Dep't of Wildlife,* 724 F.3d 1181, 1187-88 (9th Cir. 2013). Considering all of the foregoing, the Skokomish Indian Tribe is entitled to summary judgment in its favor.

III. CONCLUSION

In conclusion, the courts have expressly determined that the Skokomish Indian Tribe's usual and accustomed fishing area, as well as, primary right extend to all of Skokomish (or Twana) Territory. This is both the law of the Case and the Circuit. The parties to *United States v. Washington,* furthermore, are barred by the doctrines of res

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judicata (claim preclusion) and collateral estoppel (issue preclusion) from further contesting Skokomish's Treaty rights within Skokomish (or Twana) Territory.

In particular, Skokomish (or Twana) Territory was described by George Gibbs, and determined by the courts, as:

> extend[ing] from Wilkes' Portage northwest across to the arm of Hood Canal up to the old limits of the Tchimakum, thence westerly to the summit of the Coast Range, thence southerly to the head of the west branch of the Satsop, down that branch to the main fork, thence east to the summit of the Black Hills, thence north and east to the place of beginning.

United States v. Washington, 626 F. Supp. at 1489 at Finding No. 353. "[T]he areas within the Skokomish (or Twana) territory described by Gibbs were long used and occupied by the aboriginal Twana people. *United States v. Washington*, 626 F. Supp. at 1489 at Finding No. 354. "The people occupying a territory held the primary right to fish in the territory." *United States v. Washington*, 626 F. Supp. at 1490 at Finding No. 356. Based on these findings and other findings, the district court correctly concluded that, "[t]he aboriginal primary right of the Twana Indians to take fish within their territory was fully preserved to the Skokomish Indian Tribe by the Treaty of Point No Point, 12 Stat. 933 (January 26, 1855), as a 'right of taking fish' thereunder." *United States v. Washington*, 626 F. Supp. at 1491 at Conclusion No. 92.

The pleadings and process are sufficient, therefore, the Court has jurisdiction to grant the relief requested in the Request for Determination. The granting of a summary judgment in favor of the Skokomish Indian Tribe is appropriate as there is "no genuine dispute as to any material fact and the," Skokomish Indian Tribe, "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. The motions brought by the Jamestown S'Klallam Tribe, Port Gamble S'Klallam Tribe and Squaxin Island Tribe should also be denied.

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Dated this 26th day of June, 2017.

s/Earle David Lees, III, WSBA No. 30017
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SUPPLEMENTAL CERTIFICATION

I, the undersigned, on June 26, 2017, certify under penalty of perjury under the laws of the State of Washington, the United States of America and the Skokomish Indian Tribe that the foregoing is true and correct to the best of my knowledge.

s/Earle David Lees, III, WSBA No. 30017
Attorney for the Skokomish Indian Tribe

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2017, I electronically filed the *SKOKOMISH'S RESPONSE; AND SKOKOMISH'S CROSS-MOTION FOR SUMMARY JUDGMENT* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties which are registered with the CM/ECF system.

Dated this 26th day of June, 2017.

s/Earle David Lees, III, WSBA No. 30017
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EXHIBIT A

Order of Reference to Special Master

(Usual and Accustomed Fishing Grounds)

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, et al., Plaintiffs, vs. STATE OF WASHINGTON, et al., Defendants.	Civil No. 9213 - PHASE I ORDER OF REFERENCE TO SPECIAL MASTER (Usual and Accustomed Fishing Grounds)

Before the Court is the issue of determining the "usual and accustomed fishing grounds" of the Skokomish Tribe. Resolution of this issue will require consideration of historical, anthropological and other evidence, likely to include both expert and lay testimony.

The Court finds this is an appropriate matter for assignment to a Special Master, pursuant to Rule 53(b) of the Federal Rules of Civil Procedure. It is therefore ORDERED:

(1) This matter is referred to the Honorable Robert E. Cooper, United States Magistrate (retired), as a Special Master.

(2) The Special Master shall enter such orders, schedule and preside over such conferences and hearings, and take such other actions as he deems necessary and appropriate to accomplish the purposes of this Order.

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(3) The Federal Rules of Civil Procedure, the Federal Rules of Evidence and the local rules of this Court shall apply in all hearings and other proceedings before the Special Master.

(4) At the conclusion of proceedings before him, the Special Master shall file with the Court, and serve upon all interested parties, a full written report, including his recommendations as to disposition. The precise form of the report shall be within the discretion of the Special Master.

(5) The report of the Special Master shall be subject to review by the Court, in accordance with the provisions of Rule 53(e), Fed. R. Civ. P.; provided, however, that no transcript of the evidence need be filed with the report of the Special Master unless one or more of the parties arranges for the preparation and filing thereof.

(6) The Special Master shall submit to the Court and parties a summary of the time he expends in connection with his duties under this Order, and his related expenses. He shall receive compensation at $40.00 per hour, together with his reasonable expenses. The Court shall determine how that amount is to be apportioned among the parties, and when it is to be paid.

(7) Any and all deadlines or hearing dates previously set in connection with this matter are set aside. The Special Master shall set all such future dates, and shall contact the parties upon receipt of this Order.

(8) The Clerk shall direct copies of this Order to counsel for all interested parties, and to the Special Master.

Order of Reference

(9) Other.

DATED this 11th day of February, 1982.

Walter E. Craig
UNITED STATES DISTRICT JUDGE

Order of Reference