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 REPLY TO RESPONSES TO SKOKOMISH'S CROSS-MOTION FOR SUMMARY JUDGMENT

I. Skokomish's Primary Right includes the "Right of Taking Fish" within its entire Territory; the prior unambiguous Determination and rulings (including findings) are supported by the contemporaneous evidentiary record.

The Skokomish Indian Tribe's usual and accustomed fishing area and primary right extend to all of Skokomish (or Twana) Territory. The responding parties claim, however, that the language contained in the final judgment is ambiguous or is being misinterpreted; and thus, this Court should look to the Special Master's and district court's underlying "intent," drawn from the entire record before the issuing court. *Muckleshoot Indian Tribe v. Lummi Indian Tribe*, 141 F.3d 1355 (9th Cir. 1998) ("Muckleshoot I"); *Muckleshoot Indian Tribe v. Lummi Indian Nation*, 234 F.3d 1099 (9th Cir. 2000) ("Muckleshoot II");

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

U.S. v. Muckleshoot Indian Tribe, 235 F.3d 429 (9th Cir. 2000) ("Muckleshoot III"); *U.S. v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000); *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020 (9th Cir. 2010); *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129 (9th Cir. 2015). This approach simply does not apply, as the determination is and was actually supported by the evidentiary record and the language is not ambiguous.

Even if this Court were to disagree that the determination is "complete," the prior rulings remain binding on all of the parties to *United States v. Washington* (C70-9213). (Law of the Case and Circuit; Issue and Claim Preclusion). These prior rulings, including the findings, would serve as an unassailable basis upon which this Court could summarily determine (or confirm) the Skokomish Indian Tribe's usual and accustomed fishing grounds and primary right extend to the contested areas located outside the Hood Canal Drainage Basin. (Request for Determination, *United States v. Washington,* Main at Dkt. No. 21473 at ¶3.12, §IV; sp. 17 -01 at Dkt. No. 3 at ¶3.12, §IV). As noted in earlier briefing in this subproceeding, Paragraph 25(a)(6) was also expressly invoked as a basis for this Request for Determination. Paragraph 25(a)(6) allows the Court to determine "[t]he location of any of a tribe's usual and accustomed fishing grounds." (Order Modifying Paragraph 25 of Permanent Injunction, Main Dkt. No. 13599 at ¶25(a)(6)).

But again, the geographic boundaries of Skokomish (or Twana) Territory are in fact fixed and definite, leaving no ambiguity, and the territory extended at Treaty-times:

> . . . 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 embraces Hood Canal and its drainage basin northward along the canal to the point on the west shore now

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

> known as Termination Point . . . 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. 1405, 1489 at Finding No. 353 (W.D. Wash. 1985) ("George Gibbs, [was] a lawyer, ethnographer and secretary to the 1855 Treaty Commission."); *Muckleshoot Indian Tribe v. Lummi Indian Tribe*, 141 F.3d at 1359 ("what [the issuing court] meant in precise geographic terms."). These geographic boundaries are based on evidence considered by the Special Master and district court. *Id.* (i.e. George Gibbs' territorial description from his 1854-55 journal, which "[t]he court finds . . . to be the best available evidence of the treaty-time location of Twana territory."); *Muckleshoot Indian Tribe v. Lummi Indian Tribe*, 141 F.3d at 1360 ("the only relevant evidence is that which was considered by [the issuing court] when he made his finding."); *see also U.S. v. Muckleshoot Indian Tribe*, 235 F.3d at 432-33. "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." *United States v. Washington*, 626 F. Supp. at 1489 at Finding No. 354. The "data confirm that the areas within the Skokomish (or Twana) territory described by Gibbs were long used and occupied by the aboriginal Twana people." *Id.* And lastly, "[t]he 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.

Having considered these findings and others, the Special Master and district court correctly 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.

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

United States v. Washington, 626 F. Supp. at 1491 at Conclusion No. 92, *aff'd*, 764 F.2d 670, 674 (9th Cir. 1985) ("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.").

Furthermore, the responding parties should also be reminded that a primary "right of taking fish" within one's territory is not a concept unique to Skokomish. As part of the reserved rights under Article IV of the Treaty of Point No Point (12 Stat. 933), the signatories also reserved the right to exclude other Indians from their individual territories. The Court previously "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." *United States v. Lower Elwha Tribe*, 642 F.2d 1141, 1144 (9th Cir. 1981). The Lower Elwha Tribe was the first of the Point No Point Treaty signatories to judicially confirm their reservation of right to exclude other Indians from their territory, so they might without disruption freely exercise their primary right of taking fish. The Court of Appeals for the Ninth Circuit wrote in its opinion:

> The finding that the Lower Elwha Tribe controlled fishing east of the Hoko River rests primarily on the testimony of Dr. Barbara Lane, an anthropologist. She testified that the treaty-time Elwha occupied the area east of the Hoko and considered it their territory.
>
> She stated that the prevailing conception of tribal territory among Northwest Indians comprised the right to exclude members of other tribes.

United States v. Lower Elwha Tribe, 642 F.2d at 1142-1143. That court "concluded that the Lower Elwha Tribe is entitled to exercise the primary Indian fishing right." *Id.*

In sum, the Skokomish Indian Tribe's Treaty fishing rights extend to the entire territory described by George Gibbs in his Journal from 1854-55, not just Hood Canal. The

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

courts adopted that territorial description as the "best available evidence of the treaty-time location of ***Twana territory***," and the rights of "the ***Twana Indians*** to take fish within ***their territory*** was fully preserved." This is what the courts plainly determined, and many decades later it is not readily subject to revision under the existing Federal Rules of Civil Procedure.

II. A motion to modify or amend the Final Judgment or Order is not properly before the Court – Rule 60 Motion to Vacate.

To achieve the results desired by the responding parties, this Court would need to modify or amend the final judgment on the merits (e.g. vacating the existing judgment then limiting its application to just Hood Canal or possibly manipulating the findings to redefine the boundaries of Skokomish's territory). (*see* Muckleshoot I through III). Such a motion, however, is not properly before this Court.

Rule 60 of the Federal Rules of Civil Procedure is a means by which one or more parties to *United States v. Washington* (C70-9213) could seek to vacate a final judgment or order, subject to certain limitations. Fed. R. Civ. P. 60. The Skokomish Indian Tribe was previously threatened with such an action. The Suquamish Indian Tribe in 2013, for example, served a Meet and Confer letter indicating their "intent to file a Rule 60(b)(2) motion to reopen subproceeding 81-01, *Skokomish Indian Tribe v. Suquamish Tribe* based on Suquamish's discovery of heretofore unavailable evidence," the same subproceeding that serves as a basis for this claim. (Suquamish M&C Letter, *United States v. Washington*, Main Dkt. No. 20483) ("Based on the new evidence, Suquamish will be requesting that the court change the geographic location of the northern boundary of Skokomish's primary rights in Hood Canal from the Hood Canal Bridge to a line that starts from Misery Point

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

on the east side of the Canal to Pulali Point on the west side of canal."); *United States v. Washington*, 626 F. Supp. at 1405 (also known as sp. 81-01), *aff'd*, 764 F.2d 670. The Suquamish Indian Tribe failed to consider that Rule 60(c)(1) limits the filing on such a claim based on newly discovered evidence to "no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c)(1). The time to file had long since passed and the Suquamish Indian Tribe did not ultimately proceed with the motion to vacate.

If the responding parties wish to pursue a motion or motions to vacate, they too must comply with the pre-filing requirements of Paragraph 25(b). (Order Modifying Paragraph 25 of Permanent Injunction, Main Dkt. No. 13599 at ¶25(b)). Ultimately, if the Court were to vacate the judgment and a retrial resulted in changes to the boundaries described by George Gibbs for Skokomish (or Twana) Territory or caselaw establishing that "[t]he people occupying a territory held the primary right to fish in the territory," Treaty tribes with usual and accustomed fishing areas in Hood Canal and beyond would be significantly impacted, for better or worse. *United States v. Washington*, 626 F. Supp. at 1490.

III. The Court's authority was not limited by the Hood Canal Agreement.

The S'Klallam's argument as to the effect of the Hood Canal Agreement on this action is without any merit. Earlier in this case, the Skokomish Indian Tribe summarized the history of the Hood Canal Agreement, writing that:

> 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) . . . it was "the intent of the Stipulating Parties to

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

> 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*.

(Skokomish's Cross-Motion, Main Dkt. No. 21513 at p. 2: ll. 5-17, sp. 17-01 Dkt. No. 32, at p. 2: ll. 5-17). And as stated earlier, "[t]he Hood Canal Agreement . . . 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." *Id*. at p. 10: ll. 2-4; (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).

It should also be noted that this was not a global settlement of the case, the Suquamish Indian Tribe was not one of the signatories to the Hood Canal Agreement. (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). The signatories to the Hood Canal Agreement knew that the determination following the four-day trial with the Suquamish Indian Tribe would have significant lasting consequences. *Id.* The trial participants had the Court consider the totality of Skokomish (or Twana) Territory which extends beyond Hood Canal, and draw from the Treaty-time anthropological record to support its findings and conclusions. *Id.* The outcome was not what was entirely expected, for any of the parties to *United States v. Washington* (C70-9213).

In the Hood Canal Agreement, for example, the northern boundary for the primary right regulatory area was set "between Foulweather Bluff and Olele Point," but the Court, based in part on the trial, determined the northern boundary to be farther south, specifically

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

from "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." (Hood Canal Agreement, *United States v. Washington*, Main Dkt. No. 21473 at p. 17, sp. 17-01 Dkt. No. 3 at p. 17); *United States v. Washington*, 626 F. Supp. at 1486-87. As a result, the Suquamish Indian Tribe gained access to a portion of the Hood Canal fishery, in which the Skokomish retained a right to take fish but not necessarily the right to exclude others. Within this "portion" (i.e. Area 9) there was even a dispute as recently as 2015 concerning the Suquamish Indian Tribe's opening of a chum fishery. (Order Denying Motion, *United States v. Washington*, Main Dkt. No. 21171). And it is worth noting that the S'Klallam and Squaxin were both parties to that recent dispute. *Id.*

In conclusion, the S'Klallam's misleading assertions as to the Hood Canal Agreement are utterly without merit. It is well known that the adversarial process shapes the scope of the litigation. Fed. R. Civ. P. 15(b). Following a trial, the final judgment on the merits may include results not otherwise contemplated by the initial filings. It is the responsibility of the parties to actively participate and bring timely legal challenges, if they believe that their client was wronged. Only the Suquamish Indian Tribe challenged the judgment, and that was not successful. *United States v. Washington,* 764 F.2d 670 (9th Cir. 1985).

IV. The Pre-Filing Process was Satisfied.

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 told the participants that it intended to consider the participants' written requests,

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

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.

It is also inaccurate and very misleading to suggest that the Skokomish Indian Tribe, during the pre-filing process, did not draw a legal and factual distinction between the portions of the Satsop fishery lying within Skokomish (or Twana) Territory and those that do not. (Email timestamped, "Mon, June 13, 2016 at 6:37 PM," and distributed by Joe Panesko, Sr. Counsel for the Washington State Attorney General's Office, to parties.); (State of Washington's Answer, Main at Dkt. No. 21508, sp. 17-01 at 27). The Skokomish Indian Tribe for years has consistently argued that it need not produce additional evidence of fishing or any Treaty-based activity within Skokomish (or Twana) Territory before it can engage in the harvest of any Article IV Treaty-resource (e.g. fishing, hunting or gathering resources). 12 Stat. 933 art. IV.

In conclusion, the pre-filing requirements were satisfied. Regardless of what was said by the opposing parties, they were all aware that the Skokomish Indian Tribe wanted to fish in the Satsop watershed and exercise a primary right over it. It is also abundantly clear, in light of all of the motions, that there is no possibility of settlement because no one can agree on the effect of the earlier determinations.

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

Dated this 4th day of August, 2017.

s/Earle David Lees, III, WSBA No. 30017
Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
Email: elees@skokomish.org
Tel: 360.877.2100
Fax: 360.877.2104
Attorney for the Skokomish Indian Tribe

SUPPLEMENTAL CERTIFICATION

I, the undersigned, on August 4, 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 August 4, 2017, I electronically filed the *SKOKOMISH'S REPLY TO RESPONSES TO 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 4th day of August, 2017.

s/Earle David Lees, III, WSBA No. 30017
Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
Email: elees@skokomish.org
Tel: 360.877.2100
Fax: 360.877.2104
Attorney for the Skokomish Indian Tribe