**No. 17-35336**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

SKOKOMISH INDIAN TRIBE, a federally recognized Indian Tribe, on its own behalf and as *parens patriae* of all enrolled members of the Indian Tribe,

Plaintiff-Appellant,

v.

LEONARD FORSMAN, Chairman of the Suquamish Tribal Council; et. al.,

Defendants-Appellees.

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On Appeal from the United States District Court for the
Western District of Washington
No. 3:16-cv-05639-RBL
The Honorable Ronald B. Leighton
United States District Court Judge

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# MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEES LEONARD FORSMAN ET. AL. AND AFFIRMANCE

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## MOTION TO FILE *AMICUS CURIAE* BRIEF

The Jamestown S'Klallam and Port Gamble S'Klallam Tribes hereby move to appear as *Amici Curiae* in the above entitled action and together file an *amicus* brief. The S'Klallam Tribes asked for and obtained consent to participate as *Amici Curiae* in this case by the Plaintiff-Appellant and the Defendants-Appellees and had proposed a joint briefing schedule. Dkt. 13-1. However, the Court denied the briefing schedule and noted that proposed *amicus* need to file a motion. Dkt. 14. The Port Gamble S'Klallam and the Jamestown S'Klallam Tribes (hereinafter "S'Klallam") had previously conferred with the attorneys for the Skokomish Tribe and the Suquamish Tribal Council Members, and both consented to the S'Klallam filing an *amicus* brief. *See* Declaration of Lauren Rasmussen. Fed. Rul. App. P. 29(a)(2) authorizes *amicus* filing without a motion, as it indicates that "[a]ny other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing." Also, Circuit Advisory Committee Note to Rule 29-3 supports this position, providing that "obtaining such consent relieves the Court of the need to consider a motion." Cir. Ad. Comm. Note R. 29-3.

The Skokomish Tribe, though, has asserted that because of this Court's scheduling order, a motion to appear is required, even though consent was previously given, as evident in the agreed briefing schedule (Dkt. 13-1). Now the Skokomish's position is that the S'Klallam are attempting to circumnavigate the scheduling order

by obtaining this consent. Dkt. 14; Ex. B to Decl. of Lauren Rasmussen. As a result, the Skokomish has withdrawn its consent, requiring the S'Klallam to draft this motion in short order. *Id*. The Skokomish Tribe had also previously indicated that they would not oppose a motion for leave to file an amicus brief, but now they appear to have reversed their position on this issue as well. Exs. A, C to Decl. of Lauren Rasmussen.

### A. Statement of the Interest of the Proposed *Amici Curiae.*

The proposed *amici* are sovereign federally recognized Indian tribes as acknowledged by the Secretary of the Interior for the United States of America. Article VI, Clause 2 of the United States Constitution provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, c. 2. The Tribes are signatories and successors in interest to the Treaty of Point No Point of January 26, 1855, ratified March 8, 1859, and proclaimed April 29, 1859. 12 Stat. 933.

The Skokomish and all of the proposed *amici* have treaty rights in the disputed area; these rights were adjudicated in *United States v. Washington*, 384 F. Supp. 312 (1974) (Skokomish Tribe); 626 F. Supp. 1405, 1432 (Jamestown S'Klallam), 1442 (Corrected Order Port Gamble S'Klallam), 1486 (Jamestown S'Klallam), 1468

(Hood Canal Agreement), 1486 (Primary Rights Decree of Skokomish); *United States v. Skokomish Indian Tribe*, 764 F.2d 670 (9th Cir. Wash. 1985); *United States v. Washington*, 393 F. Supp. 2d 1089 (W.D. Wash. 2005) (dispute regarding the terms of the Hood Canal Agreement); *United States v. Washington*, 573 F.3d 701 (9th Cir. Wash. 2009) (dispute regarding the Hood Canal Agreement and Allocation).

Point No Point, the name of the Treaty signing place, is located on the Kitsap Peninsula, a few miles from the Port Gamble S'Klallam Tribe's reservation in Kingston, Washington. The Port Gamble S'Klallam Tribe has its reservation located directly on Hood Canal, in the area and on the land that the Skokomish claims is solely Twana territory. All of the signatory Tribes also retained the right to hunt and gather on "open and unclaimed" lands under the same Treaty. 12 Stat. 933, art. 4.

The S'Klallam seeks participation with a simple interest in protecting its Treaty rights from diminishment, modification, or adjudication in its absence based on a misinterpretation of history or the rights at issue. The S'Klallam see themselves as an informative party, possessing information that weighs on both sides of this case, and do not wish to intervene. S'Klallam is properly one of the "interested-parties," a denomination which exists in the *United States v. Washington* framework but does not exist in other cases and the Suquamish and the Skokomish have already admitted the proposed Amici are interested parties. Dkt. 13-1.

**B. The S'Klallam's Participation is Desirable.**

The S'Klallam possess information that impacts this case, namely information regarding the historical interests and current and prior adjudications over the disputed area and the primary right. Traditionally, courts describe *amicus curiae* as follows:

> Historically, amicus curiae is an impartial individual who suggests the interpretation and status of the law, gives information concerning it, and advises the Court in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another. *See Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D. Ill. 1982). Amicus curiae fulfill the role by submitting briefing designed to supplement and assist in cases of general public interest, supplement the efforts of counsel, and draw the court's attention to law that might otherwise escape consideration. *See Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). An amicus curiae is not a party to litigation. See id.
>
> HN2 An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case, or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. *See id.* Otherwise, leave to file an amicus curiae brief should be denied. *See Northern Sec. Co. v. United States*, 191 U.S. 555, 556, 24 S. Ct. 119, 48 L. Ed. 299 (1903).

*Community Ass'n for Restoration of the Env't v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999). In considering any *amicus* request, a court will consider whether the amicus applicant is adequately represented by another party or if not represented at all, whether the applicant has "an interest in some other case

that may be affected by the decision." *Community Ass'n for Restoration of the Env't*, 54 F. Supp. 2d at 975. Courts have held that inadequacy of representation is satisfied in an intervention request if the applicant merely shows that representation may be inadequate; the applicant's burden is minimal. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983); *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006); *Citizens for Balanced Use v. Montana Wilderness Association*, 647 F.3d 893, 898 (9th Cir. 2011).

Here, the proposed *amici* have an interest in the subject of this action, and are parties in another current case potentially impacted by the question of what is the extent of the Skokomish Tribe's primary right, *Skokomish v. Squaxin et. al*., Ninth Circuit Case No. 17-35760, Dkt. 16 at p. 65, as referenced in the Skokomish Tribe's Statement of Related Cases. All of the disputed area is within the joint Point No Point ceded territory, and it is also an area where the S'Klallam hunt and gather. 12 Stat. 933. This is not to say that the Skokomish have no rights in that area, just that the priority of their rights is at issue. The extent of the Skokomish's claim might infringe on or overlap with the rights of the other Tribes who signed the same Treaty (e.g., Jamestown S'Klallam, Port Gamble S'Klallam, and Lower Elwha Klallam Tribes). Also, outside guidance is necessary as both parties claim historical relationship to the disputed area as well as interpret differently or place different

emphasis on prior settlement agreements that govern the various relationships (e.g., Hood Canal Agreement). *See* ER 109-120.

Further, the proposed *amici* are signatories to the same Treaty as Skokomish and have an interest that could be impaired by an inconsistent decision in the above-entitled action. *See* 12 Stat. 933 (Treaty of Point No Point).

Here, there are overlapping interests and an active intertribal dispute regarding the various rights in Hood Canal, and in this case, S'Klallam interests are inadequately represented. For example, the Skokomish appear to assert that they can control the disputed territory without S'Klallam consent as well as unilaterally declare where the boundaries are located, ER 166-167; similarly, the Suquamish are not parties to the Hood Canal Agreement and do not have reservations located in the territory adjacent to the areas claimed by Skokomish nor did Suquamish sign the Treaty of Point No Point. *See* 12 Stat. 933. Therefore, S'Klallam's interests cannot be represented by the Suquamish here. Skokomish likewise cannot represent the S'Klallam interests because it is Skokomish that is seeking to control the territory, an act that, based on the Hood Canal Agreement, requires S'Klallam consent.

## CONCLUSION

The Port Gamble S'Klallam Tribe and Jamestown S'Klallam Tribe hereby move to appear as *amici* and submit the attached brief.

Dated: January 26, 2018.

s/Lauren P. Rasmussen

*Attorney for the Port Gamble S'Klallam*
*and Jamestown S'Klallam Tribes*

## CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2018, I electronically filed the foregoing Motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

All participants are registered CM/ECF users and will be served copies of the foregoing Motion via the CM/ECF system.

Dated: January 26, 2018.

s/Lauren P. Rasmussen

*Attorney for the Port Gamble S'Klallam and Jamestown S'Klallam Tribes*

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SKOKOMISH INDIAN TRIBE, a federally recognized Indian Tribe, on its own behalf and as *parens patriae* of all enrolled members of the Indian Tribe,

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# PORT GAMBLE S'KLALLAM AND JAMESTOWN S'KLALLAM TRIBES' AMICUS BRIEF SUPPORTING LEONARD FORSMAN ET. AL. AND AFFIRMANCE

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## CORPORATE DISCLOSURE STATEMENT

Proposed *Amici*, Port Gamble S'Klallam Tribe and Jamestown S'Klallam Tribe, are federally recognized Indian Tribes. They have issued no shares of stock to the public and have no parent company, subsidiary, or affiliate that has done so.

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## STATEMENT OF CONSENT TO FILE AMICUS BRIEF

The Port Gamble S'Klallam and the Jamestown S'Klallam Tribes (hereinafter "S'Klallam") conferred with the Skokomish Tribe and the Suquamish Tribal Council members, and both had consented to the S'Klallam participating in this case. *See* Dkt. 13-1 (Proposed Scheduling Order). However, Skokomish revoked its consent two days ago. *See* Motion for Leave to Appear, Declaration of Lauren Rasmussen with Exhibits A, B, C.

## STATEMENT OF IDENTITY AND INTEREST OF AMICUS

The S'Klallam are signatories to the Treaty of Point No Point with the Skokomish Tribe. Treaty of Point No Point, 12 Stat. 933 (Act of Jan. 26, 1855); *see* Opening Brief of the Skokomish ("Opening Br.") at 5-7, Addendum 2. Skokomish's assertion that there is a *res judicata* impact of decisions and agreements with the S'Klallam in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) ("*Decision I*"), is pivotal to Skokomish's claim for relief. If this Court were to adopt Skokomish's factual and legal assertions as true, though, the S'Klallam would be greatly harmed, as Skokomish would be able to attempt to exclude them from the Point No Point ceded territory, where S'Klallam currently hunt. Such an action would be contrary to the Treaty rights secured by all four Tribes. *See* 12 Stat. 933.

The S'Klallam do not believe the "primary right" to control fishing in the narrow body of water known as Hood Canal—adjudicated in *Decision I*, 384 F. Supp. 312, automatically equates with an identical *primary right* to exclude or prohibit hunting in the territory surrounding the Canal. It is regarding this issue that the S'Klallam seek to provide guidance to this Court.

## STATEMENT REGARDING AUTHORSHIP

Pursuant to Fed. R. App. P. 29(a)(4)(E), the undersigned attorney for the S'Klallam authorized this brief, and no party or party's counsel contributed money

to fund preparing or submitting the brief, and no other person, other than the *amici* contributed money to fund the preparation of this brief.

## STATEMENT REGARDING ADDENDUM

Pursuant to Ninth Circuit Rule 28-2.7, all relevant statutes, treaties, etc., are contained in the brief or addendum of Plaintiff-Appellant Skokomish Indian Tribe.

## SUMMARY OF ARGUMENT

The S'Klallam seek to draw the Court's attention to two main aspects of the Skokomish's argument that warrant additional perspective: (1) the issue of *res judicata*; and (2) the proper procedure and forum for this dispute. As for the *res judicata* issue, this case was properly dismissed because there is no prior ruling on "primary right" authority as it relates to hunting rights. The only "primary right" ruling determined by the district court and affirmed by this Court related to the right to control fishing areas within Hood Canal. *United States v. Washington*, 626 F. Supp. 1405, 1490, *aff'd*, 764 F.2d 670 (9th Cir. 1985).

This exact question was already answered in *Skokomish v. Goldmark*, when the court recognized that the "scope of the hunting and gathering provision" had not yet been litigated in federal court. *Skokomish v. Goldmark*, 994 F. Supp. 2d 1168, 1174 n. 5 (W.D. Wash. 2014); Suquamish Officers' Answering Brief ("Answering Br.") at 10. In addition, in a case also on appeal with this Court, the Skokomish were

ordered to cease "blatantly misrepresenting the record" of its prior primary right adjudication. SER 14.[1] This case represents a surprising third attempt by Skokomish to assert to a court that an issue was decided in their favor, when in fact, the issue was never considered or decided. *Goldmark*, 994 F. Supp. 2d 1168, 1174, n. 5; SER 14; ER 26 ("But Skokomish's right is far from clearly established.").

## RESPONSE TO APPELLANT'S STATEMENT OF THE CASE

The Skokomish Tribe recites only part of the history of the Treaty and the relationship of the Tribal parties, and by eliminating key portions, it obfuscates the impact this case has on the S'Klallam.

### A. Territory of the Point No Point Treaty.

The Skokomish claim that some portion of the shared Point No Point Treaty territory belongs *exclusively* to them. Opening Br. at 5-7. In doing so, Skokomish overstates or misconstrues many historical facts. For example, in its recitation of the facts, the Skokomish assert that the Skokomish Indian Tribe is a successor to the Twana and Skokomish people. Opening Br. at 5. At the same time, it claims for the first time on appeal that Chimakum (also spelled "Tchimakum" and "Chemakum") successorship has not been determined. *Id*.; ER 150-168 (Complaint). The

[1] *Skokomish v. Squaxin et. al.*, Ninth Circuit Court of Appeals Case No. 17-35760 (D.C. No. 2:17-sp-01-RSM).

Skokomish are incorrect. S'Klallam successorship to Chimakum interests was recognized in an Indian Claims Commission ("ICC") opinion:

> The Chimakum country was taken possession of by the S'Klallam in about 1855 to 1857 and their people became subjects of the S'Klallam Tribe. (Stevens' Report, 1854). It is, therefore, our opinion that the petitioner has the right to assert any Chimakum claim to this action because they became merged into the S'Klallam prior to the ratification of the Treaty of Point No Point, but after the treaty had been signed.
>
> Taking this view of the time element of such merger, which we believe the evidence adequately reflects, of the Chimakums into the S'Klallams, only the S'Klallam Tribe has legal status today to present their claim, since no other entity is, or has been, in existence to represent them since such merger in 1857. (House Report No., 2689, 83d Congress, 2nd Session; I Tr. pp. 23-24).

*S'Klallam Tribe of Indians vs. United States*, 5 Ind. Cl. Comm. 697, 699 (Dec. 2, 1957), http://digital.library.okstate.edu/icc/v05/v05toc.html.[2] This means that prior Chimakum territory is considered S'Klallam territory, contrary to Skokomish's implication. Opening Br. 5.

**B. The Primary Right Determination and The Hood Canal Agreement.**

A primary right is a Tribe's power to regulate or prohibit fishing by members of other treaty Tribes. *United States v. Skokomish Indian Tribe*, 764 F.2d 670, 671 (9th Cir. 1985). The Skokomish's primary right was adjudicated with other Tribes,

[2] The ICC was a special tribunal created to try pre-1946 Indian claims against the federal government; it no longer exists today. *See Six Nations Confederacy v. Andrus*, 610 F.2d 996, 997, 198 U.S. App. D.C. 54 (D.C. Cir. 1979).

including the Suquamish, and settled *vis-à-vis* the S'Klallam and Klallam through the Hood Canal Agreement. *Id.* at 670, 671; ER 109. The Skokomish's primary right was never adjudicated, though, with respect to hunting or with respect to any territory outside the water of Hood Canal. *See id.* at 670-671.

This Court found that the Skokomish's ability to control Hood Canal fishing was supported by the area's geography because Hood Canal "was a narrow, elongated configuration of the canal, which varies in width from one to four miles." *United States v. Skokomish Indian Tribe*, 764 F.2d at 674. More specifically, in *United States v. Skokomish Indian Tribe*, Finding of Fact 355, this Court found that Skokomish's "sense of ownership" was "along the waters at its center":

> This pattern reflected the predominant Indian conception that territories were centered on the water bodies or courses upon which people relied for subsistence. Territory was most clearly defined, and the sense of ownership strongest, along the waters at its center and was generally less sharply defined at the peripheries.

*Id*. at 674. The Hood Canal Agreement contains the stipulation of the Skokomish's "primary right" as it is applicable to the to the S'Klallam people, who also fished in Hood Canal at Treaty times. *See* ER 114-115; *United States v. Washington*, 626 F. Supp. at 1442 at Finding of Fact 340 ("At treaty times, the Klallams regularly visited Hood Canal for fishing, shellfish digging and berry picking."). This primary right with respect to its S'Klallam neighbors has clear limitations, though, with which the Skokomish do not heed. One limit is geographic: this primary right is limited to

Hood Canal waters—not the land surrounding those waters which is at issue here. This limit is found in the text of the Hood Canal Agreement:

> A. The Skokomish Tribe has the primary right to fish in the Hood Canal fishery. 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.

ER 114. The second limit is scope: the right pertains to a recognition by the S'Klallam of a right limited fishing not to hunting. The third limit is permission: the right cannot be exercised "under any condition or for any reason whatsoever" against the S'Klallam without their consent. ER 115. Thus, even if their primary right related to hunting, such a right could not be used without consent.

**C. Primary Rights and Hunting.**

The only Skokomish case involving hunting and the primary right, thus far, is a case involving a claim with respect to the Point No Point Treaty. *Goldmark*, 994 F. Supp. 2d 1168, 1174. In that case, the court simply recognized that the S'Klallam also hunt within the same territory as the Skokomish:

> First, the four co-signatories of the Treaty—Skokomish Indian Tribe, Jamestown S'Klallam, Lower Elwha Klallam, and the Port Gamble S'Klallam—all exercise treaty hunting rights within the Treaty of Point No Point ceded areas.

*Goldmark*, 994 F. Supp. 2d at 1174. This is important because in that case, Skokomish already argued for its primary right to include hunting when it asked the

court to conclude it had "exclusive management authority" over the territory at issue. The court denied Skokomish's claim:

> A judgment granting Skokomish Indian Tribe exclusive management authority and the right to take up to one hundred percent of all game, roots and berries would necessarily reduce or eliminate the rights that other signatory tribes currently enjoy in the territory.

*Goldmark*, 994 F. Supp. 2d at 1188. There, the court not only failed to recognize a "self-executing" primary right to control or regulate hunting, but it also dismissed Skokomish's claim for failure to include the other Point No Point Treaty signatories in the case:

> Based on all of the foregoing, the court concludes that the other signatories to the Treaty of Point No Point, including Jamestown S'Klallam, Lower Elwha Tribal Community, and Port Gamble S'Klallam, are necessary parties to this litigation.

*Goldmark* at 1188. Therefore, Skokomish's procedural statement has failed to address a key case regarding the self-executing right to exclusive use of the territory. *See* Opening Br. 11-13; *Goldmark* at 1188.

## ARGUMENT

### I. Certain Issues Are Most Pertinent To The S'Klallam.

The S'Klallam seek to provide perspective on four main issues: (1) the impact that this case has on the S'Klallam; (2) that hunting rights were not adjudicated in *U.S. v. Washington*; (3) that *U.S. v. Washington* is the better forum to determine

whether these issues have been decided; (4) whether Skokomish has already litigated this exact exclusivity claim, in whole or in part, in *Skokomish v. Goldmark*, 994 F. Supp. 2d 1168, 1188.

### A. S'Klallam Rights Are Impacted Here, And Skokomish Fails to Acknowledge This Basic Fact.

Given the above issues, the Court's application of Fed. R. Civ. P. 19 with respect to signatory Tribes of the Point No Point Treaty is of interest to the S'Klallam:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest. Fed. R. Civ. P. 19(a)(1). "If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b).

*Goldmark*, 994 F. Supp. 2d at 1186. The district court held that the S'Klallam's rights, as well as other Tribes, would be impacted by this case because it "requires" a finding that "each of the other signatory tribes" possesses "inferior hunting rights . . . ." ER 27. In other words, the S'Klallam are necessary participants whose rights are impacted by this case but who are not joined.

### B. Skokomish Also Fails to Understand Elements of *Res Judicata.*

Skokomish's *res judicata* argument appears to be that other Tribes are *not* necessary, because there is finality on the issues raised in this case. Opening Br. at 36-37. Skokomish's argument fails, though, as it misses the threshold elements of *res judicata*:

> Generally, the preclusive effect of a former adjudication is referred to as "res judicata." The doctrine of res judicata includes two distinct types of preclusion, claim preclusion and issue preclusion. Claim preclusion "treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same 'claim' or 'cause of action.'" *Kaspar Wire Works, Inc. v. Leco Eng'g & Mach.*, Inc., 575 F.2d 530, 535 (5th Cir. 1978); *see also McClain v. Apodaca*, 793 F.2d 1031, 1033 (9th Cir. 1986).

*Robi v. Five Platters, Inc*., 838 F.2d 318, 321-322 (9th Cir. 1988). Critical to this point is that *res judicata* requires the issue to have been *actually litigated* in the prior matter:

> The issue must have been "actually decided" after a "full and fair opportunity" for litigation. 18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure: Jurisdiction § 4416, at 138 (1981) [hereinafter 18 Wright].

*Robi*, 838 F.2d 318, 322. As will be discussed below, the question of what issues were in fact litigated, and how "full and fair" the opportunity is made clear by Skokomish's Request for Determination (RFD) regarding the primary right in the case where it claims the right was adjudicated (i.e., *United States v. Washington*); its

RFD did not contain any request for relief with respect to hunting. SER 22-23. Thus, there was *no* prior opportunity to litigate this issue.

If the case is *not* governed by *res judicata* and claim preclusion, then the Suquamish Tribal Council has violated no clearly established law by issuing regulations. The first step, though, is to consider what was in fact decided.

### C. The Primary Right Has Not Yet Been Applied to Hunting.

Skokomish has alleged that Suquamish Tribal officials violated its "primary right" by issuing hunting regulations in Skokomish territory. ER 167 (Complaint, ¶ 52). In fact, the Skokomish Complaint at ¶ 52 requests an explicit declaration from this Court that Skokomish has the primary right to restrict hunting within Twana territory based on these actions:

> A declaratory judgment, pursuant to 28 U.S.C. § 2201, declaring that Plaintiff, Skokomish Indian Tribe, has the primary right to regulate and prohibit treaty hunting and gathering within Skokomish (or Twana) Territory by the Suquamish Indian Tribe and members of the Suquamish Indian Tribe; and . . . .

ER 167. In doing so, the Skokomish Tribe relies on *U.S. v. Washington* rulings for precedent in this action. ER 158-163. Those rulings establish that an area of Twana territory exists. However, those rulings do not explicitly state that any of the Twana territory is exclusive or that the "primary right" was established anywhere beyond the waterways of Hood Canal and the streams draining into it.

The S'Klallam share the same ceded territory under the Treaty of Point No Point, 12 Stat. 933, for all land-based activities as the Skokomish Tribe. Opening Br. at Addendum 2. In fact, Article 3 of their shared Treaty authorized *all of the signatory Tribes* to reside on the Skokomish reservation: "[t]he said tribes and bands agree to remove to and settle upon the said reservation within one year after the ratification of this treaty, or sooner if the means are furnished them." 12 Stat. 933, art. 3. Given this language in Article 3, if all Twana territory was intended to exclusively preserve the primary right to "regulate" treaty hunting and gathering—per Skokomish allegations in ER 167—then this is inconsistent with the Treaty's instruction for the S'Klallam to reside on the supposedly *exclusive Skokomish* territory. 12 Stat. 933, arts. 3-4. The Treaty in no way states or describes an exclusive right of the Skokomish *vis-a-vis* the S'Klallam, and similar to its interpretation of the prior rulings, the Skokomish overstates its powers and rights. Instead, the Treaty provides for the right to *hunt* on "open and unclaimed lands." 12 Stat. 933, art. 4. Thus, the Treaty language appears to state the opposite of what the Skokomish argue here: that certain rights are overlapping not necessarily exclusive.

In addition, as noted above, the Skokomish overstate the rulings and therefore, misinterpret the history of this case. ER 158-163. These rulings simply *do not* establish that the Twana *at treaty times* excluded all other Tribes from hunting or

had the power to exclude other Tribes *from hunting*. The rulings from *U.S. v. Washington*, C70-9213, with respect to hunting are minimal. *See* Orders, *U.S. v. Washington*, 626 F. Supp. at 1489, Finding of Fact 352 (Twana engaged "in a variety of fishing and hunting activities in and around Hood Canal…"); ER 162. For example, Finding of Fact 356 specifically applies the primary right to fishing, referring to it as "secondary or permissive **fishing** rights." ER 164 *citing United States v. Washington*, 626 F. Supp. at 1490 (emphasis added). No ruling applies that same right to hunting.

Dr. Barbara Lane, who testified regarding this issue in the case, refers only to areas of primary control with respect to fishing. Specifically, in Finding of Fact 379, the court discusses the meaning of "primary right[,]" and relies on Dr. Lane's testimony:

> 379. The expert testimony in this case that in some cases a particular tribe or tribes exercised preemptive territorial Fishing control at the mouths of rivers near the location of its villages as well as over certain nearby narrow or constricted waterways, bays or channels or at specific reefnet or beach seine sites and halibut banks. Such control would limit any other tribe's use of those areas to an invitational or permissive use . . . .

*United States v. Washington*, 626 F. Supp. 1405, 1530. Thus, given the obvious references to Dr. Lane's position about the primary right relating to *controlled waterbodies*, the Skokomish go too far when claiming the

expanded territory is automatically included within the prior adjudication. *See id.*; ER 166-7.

Another critical issue with the Skokomish's Complaint is that Skokomish has never before asked the court to rule on its primary right with respect to hunting or to establish primary rights in a specific territory for hunting. In their Request for Determination, filed in 1981, Skokomish requested a determination on fishing rights not hunting:

> [T]he Skokomish Tribes treaty fishing rights in Hood Canal and all the rivers and streams draining into Hood Canal are primary to the rights of any other tribe which has or claims to have usual and accustomed places there.

*Request for Determination*, SER 22. In their Memorandum of Points of Authority, Skokomish similarly ask for "judicial confirmation of its primary *fishing* rights." SER 24. It may very well be that the primary right is applicable in the manner Skokomish argues, but a court has never determined such; no such opportunity has been presented, and therefore, the Skokomish's rulings and requests here are simply unsupported.

By proceeding in this manner, Skokomish is essentially seeking to expand its primary right for fishing *vis-a-vis* the Suquamish—using the proxy of their Council's decision to issue regulations. But just as Skokomish claims that treaty rights are self-

executing, so are the Treaty rights of the Suquamish upon ratification. Opening Br. at 5, 40, n. 21.

At a minimum, this is a dispute as to which Tribes may issues regulations in this territory; however, Skokomish's request goes beyond its dispute with the Suquamish Tribal officials, because Skokomish claims to have primary right over "Treaty resources" within this territory. Opening Brief at 15. The "treaty resources" in the ceded Treaty of Point No Point are not currently under exclusive Skokomish control.

In addition, the Skokomish ask for a decision in ¶ 52 of their Complaint that it has the right to "regulate and prohibit Treaty hunting" in the territory claimed. ER 167. However, the Point No Point Treaty provides no such superior right over the S'Klallam in the Treaty territory. Opening Br., Addendum 2. Lastly, Skokomish argued that it has the right to "restrain *others from intrusion* [,]" which presumably means to include the ability to restrain the S'Klallam. ER 63 (*Transcript of Proceedings*). The Skokomish argued in fact that the area claimed within the Point No Point Ceded Territory is not the S'Klallam's territory at all, and is only the territory of the Skokomish Tribe:

> What has already been decided, the only tribe that has a territory there is Skokomish, the Twana. The S'Klallams, it is not their territory. It is not Suquamish's territory.

ER 61:13-16 (Transcript of Proceedings). This illustrates that Skokomish appears to seek a remedy with implications focused directly on Tribes, not Tribal officers and seeks much broader relief than what is indicated.

**D. This Case Belongs Under *U.S. v. Washington*.**

A new subproceeding is the proper procedure for resolving disputes regarding the meaning of a court order in *U.S. v. Washington*, including what the absence of certain language means. *Order on Paragraph 25, United States v. Washington*, 18 F. Supp. 3d 1172, 1213 (W.D. Wash. 1993). The retention of jurisdiction by the district court pursuant to that procedure includes the authority of the court to determine "(1) [w]hether or not the actions intended or effected by any party (including the party seeking a determination) are in conformity with Final Decision # I or this injunction." *Id.*

If the orders in *U.S. v. Washington*, C70-9213, establish the rights as the Skokomish claim, then the Skokomish could seek relief in that case to ask that question. ER 69-70 ("Right or wrong. They are done."); ER 159-166 (citing to various findings and rulings in *US v. Washington* for support). The case *United States v. Washington*, C70-9213, is currently assigned to the Honorable Ricardo S. Martinez. Under the Orders in that case, any determination which seeks to interpret the Final Decision No. 1, and the meaning of any subsequent orders, must be brought as a separate subproceeding in that case and determined accordingly. *See Order on*

*Paragraph 25* in *U.S. v. Washington*, 18 F. Supp. 3d 1172, 1213. Although jurisdiction to enter supplemental findings exists under continuing jurisdiction of the *U.S. v. Washington* case, even that court cannot enter such findings unless it allows all parties opportunity to present evidence. *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1360 (9th Cir. Wash. 1998). Here, if the Skokomish Tribe is seeking to enforce orders from *U.S. v. Washington*—that court is the most logical forum.[3] The district court properly recognized this point: If *U.S. v. Washington* truly confirmed Skokomish's primary hunting right, Skokomish's claim must be filed as a subproceeding in that case. ER 28: 3-4. Thus, the Skokomish cannot have it both ways: If the case is governed by *res judicata* and *claim preclusion* as Skokomish alleges [Opening Br. at pp. 38-39], then Skokomish should return to the source of those decisions and ask if Suquamish Officers' actions are in conformity with prior *US v. Washington* decisions.

[3] Skokomish notes that "if this Court determines that an enforcement action could be brought" they would "consider" filing their case in *US v. Washington*. Opening Br. at 52. But this Court's review of the matter does not contain any jurisdiction over the relief requested: nothing in their complaint or appeal includes a request for this Court to order a *separate* district court judge in *another case* to require their enforcement action to proceed. The Skokomish cite to no authority or precedent for this request.

## II. The Skokomish's Request Is Prohibited.

Skokomish has asserted that there is no Rule 19 issue because the issues have all been previously decided. Opening Br. at 16, 36. The problem is, if *res judicata* exists here, it would operate against the Skokomish Tribe's claims that territorial exclusivity was already adjudicated because the lack of a prior determination was pivotal in the court's decision in *Skokomish v. Goldmark*, 994 F. Supp. 2d 1168. In that case, the decision to dismiss Skokomish's claims was for failure to include the S'Klallam as necessary parties. *Goldmark*, 994 F. Supp. 2d at 1188. There, the court did not recognize Skokomish's claim of a "self-executing" primary right to control or regulate hunting, and it also dismissed Skokomish's claim for failure to include the other Point No Point Treaty signatories in the case. *Id.* at 1188.

Next, the Skokomish have already been admonished for overstating the impact of prior decisions. In a case currently on appeal to this Court, the district court found that the prior decisions were "misrepresented," to wit:

> Skokomish asserts that there is no ambiguity in that determination and asserts that Judge Craig, in adopting the Finding of Fact, thereby determined that its U&A encompassed the entire area described by Mr. Gibbs. Dkt. #32. In further support of their position, Skokomish point to an Order referring the matter to the Special Master for "the issue of determining the 'usual and accustomed fishing grounds' of the Skokomish Tribe," as evidence that Judge Craig ultimately expanded their U&A to the area described by Mr. Gibbs. Dkt. #32 at 1-2. As a result, Skokomish now argue that they are entitled to the relief they seek

> through the current RFD, and that all other parties are precluded from challenging such a finding. Dkt. #32. The Court disagrees.
>
> As an initial matter, Skokomish has blatantly misrepresented the record in the 1984 subproceeding.

SER 14. This misrepresentation of the record continues into this proceeding where they represent the Hood Canal Agreement as proof of superiority over all other Tribes. ER 159-162; *U.S. v. Washington*, 626 F. Supp. at 1468-70.[4] But what the Skokomish omit is under the Agreement those findings *were expressly stipulated* to in exchange for a promise *never to use the primary right* in a manner that could harm the S'Klallam rights. *See U.S. v. Washington*, 626 F. Supp. at 1469 ("Skokomish Tribe specifically **agrees that it will not, under any condition or for any reason whatsoever**, *exercise or seek to exercise its primary right its primary right on Hood Canal north of Ayock Point. . . .*") (emphases added). Thus, *even if* the primary right relates to hunting, the Skokomish may not use that very right "under any condition or any reason whatsoever" unless the S'Klallam consent to its use.

These examples illustrate that this Court should be wary of Skokomish Tribe's third attempt to argue that a particular issue was already decided in their favor, when

[4] The primary right decision itself explicitly recognizes that the Hood Canal Agreement applies between the S'Klallam and the Skokomish Tribe. *U.S. v. Washington*, 626 F. Supp. at 1491.

in fact, not only was the issue not decided, but it may very well have been decided against them.

## CONCLUSION

The S'Klallam respectfully request this Court affirm the district court decision, as narrowly as possible, to assure this issue may be thoroughly considered at the appropriate time, with all the appropriate parties, and in the appropriate forum.

Respectfully submitted, this 26th day of January, 2018.

s/Lauren P. Rasmussen

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*Attorney for Port Gamble S'Klallam*
*and Jamestown S'Klallam Tribes*

## STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, *Amici* state that to the best of their knowledge, Appellant Skokomish Indian Tribe has identified the only related case pending in the Ninth Circuit Court of Appeals.

Dated: January 26, 2018.

s/Lauren P. Rasmussen

*Attorney for the Port Gamble S'Klallam and Jamestown S'Klallam Tribes*

## CERTIFICATE OF COMPLIANCE

1. This document complies with Fed. R. App. P. 29(a)(5), Fed. R. App. P. 29(a)(4)(G), and Fed. R. App. P. 32(g)(1) because excluding parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,596 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared with a proportionately spaced typeface using Microsoft Office Word 2016 with Times New Roman, 14 pt. font.

Dated: January 26, 2018.

s/Lauren P. Rasmussen

*Attorney for the Port Gamble S'Klallam and Jamestown S'Klallam Tribes*

## CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2018, I electronically filed the foregoing Amicus Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

All participants are registered CM/ECF users and will be served copies of the foregoing Amicus Brief via the CM/ECF system.

Dated: January 26, 2018.

s/Lauren P. Rasmussen

*Attorney for the Port Gamble S'Klallam and Jamestown S'Klallam Tribes*

**No. 17-35336**

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

| | |
|---|---|
| SKOKOMISH INDIAN TRIBE, a federally recognized Indian Tribe, on its own behalf and as *parens patriae* of all enrolled members of the Indian Tribe,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>LEONARD FORSMAN, Chairman of the Suquamish Tribal Council et. al.,<br><br>Defendants-Appellees. | D.C. No. 3:16-cv-05639-RBL<br><br>U.S. District Court for the Western District of Washington, Tacoma<br><br>**DECLARATION OF LAUREN RASMUSSEN IN SUPPORT OF MOTION TO FILE AMICUS CURIAE BRIEF** |

Lauren Rasmussen
Law Offices of Lauren P. Rasmussen
1904 Third Avenue, Suite 1030
Seattle, WA 98107
*Attorney for Jamestown S'Klallam and Port Gamble S'Klallam Tribes*

**DECLARATION OF LAUREN RASMUSSEN IN SUPPORT OF MOTION**

I, Lauren Rasmussen, hereby declare under penalty of perjury under the laws of the State of Washington as follows:

1. I am over the age of 18, have personal knowledge as to the matters stated herein, and am competent to testify.

2. I am the attorney representing the proposed *Amici* Port Gamble S'Klallam Tribe and Jamestown S'Klallam Tribe (hereinafter "S'Klallam").

3. Attached are true and correct copies of emails received on the topic of consent. *See* Exhibits A through C.

4. On July 31, 2017, the Skokomish Tribal attorney and the Suquamish Tribal Council's attorneys proposed a joint scheduling order providing a deadline for the S'Klallam filing a brief in this matter, indicating their consent to S'Klallam participation. Dkt. 13-1. On August 24, 2017, the Court did not adopt that proposed schedule and indicated that any proposed *amicus* needed to file motions to participate. Dkt. 14. On December 9, 2017, the Skokomish Tribal attorney indicated that because of the order, the Skokomish no longer consented to the contents of the S'Klallam *amicus* brief, but would not oppose the S'Klallam filing a motion for leave to file an *amicus* brief. Attached as Exhibit A. The Skokomish Tribal attorney has now taken that position that, despite Fed. Rul. App. P. 29(a)(2), a motion is required even when consent was previously obtained. *See* Exhibit B (noting they

will not "grant 'consent' again."). I have attempted to explain to the Skokomish Tribal attorney that the scheduling order (Dkt. 14) does not modify the rule discouraging unnecessary motions, and I have been unsuccessful.

5. On January 24, 2018, the Skokomish Tribe indicated to me that they will not "grant 'consent' **again** so that" the S'Klallam can "circumvent the Order." *See* Exhibit B (emphasis added). I have indicated this is a hardship for the S'Klallam to have to revise the briefing and file an unnecessary and potentially unopposed motion at the last minute. The Skokomish will not reconsider its position, and it is unclear if the motion is still unopposed leaving the Court and the proposed Amici to guess as to the position of the Tribe. *See* Exhibit C.

I swear that to the best of my knowledge the foregoing is true and correct.

Executed this 25th Day of January, 2018.

s/Lauren Rasmussen

*Attorney for Jamestown S'Klallam*
*and Port Gamble S'Klallam Tribe*

## CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2018, I electronically filed the foregoing Declaration of Lauren Rasmussen with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

All participants are registered CM/ECF users and will be served copies of the foregoing Declaration via the CM/ECF system.

Dated: January 26, 2018.

s/Lauren P. Rasmussen

*Attorney for the Port Gamble S'Klallam and Jamestown S'Klallam Tribes*

# Exhibit A

Gmail **Lauren Rasmussen <lrasmuss@gmail.com>**

## 17-35336_ Skokomish v. Leonard Forsman et al.

**Lees, Earle David** <elees@skokomish.org> Tue, Dec 12, 2017 at 10:10 AM
To: Lauren Rasmussen <lauren@rasmussen-law.com>
Cc: John Ogan <john.ogan@jwoganlaw.com>, James Rittenhouse Bellis <rbellis@suquamish.nsn.us>

Lauren,

In light of the Court's prior Order, the Skokomish Indian Tribe does not consent to the brief, but it does not oppose the motion seeking permission from the Court to file the brief.

The Skokomish also do not endorse the assertions that may be raised in the brief.

--
***Very truly yours,***

Earle D. Lees, Tribal Attorney
**Skokomish Indian Tribe**
**N. 80 Tribal Center Road**
**Skokomish Nation, WA 98584**
**360.877.2100 (tel)**
**360.490.8959 (cell)**
**360.877.2104 (fax)**

# Exhibit B

Gmail **Lauren Rasmussen <lrasmuss@gmail.com>**

# Skokomish v. Forsman et al, Case No. 17-35336

**Lees, Earle David** <elees@skokomish.org> Wed, Jan 24, 2018 at 3:12 PM
To: Lauren <lauren@rasmussen-law.com>
Cc: John Ogan <john.ogan@jwoganlaw.com>

Lauren,

In the July 31, 2017 *Status Report*, Jamestown and Port Gamble were added to the briefing schedule. The Court, however, in its August 24, 2017 *Order* required that "[a]ny other parties seeking to file a brief in this appeal must file a motion for leave to file an amicus curiae brief in this court." It did not provide for "consent" as an option. The Skokomish Indian Tribe will not grant "consent" again so that you can attempt to circumvent the *Order.*

On Wed, Jan 24, 2018 at 2:39 PM, Lauren <lauren@rasmussen-law.com> wrote:

> But you already consented. Earle. Now I need a motion? In it I will have to represent you consented then withdrew your consent at the last minute. Do you really want me to do that?
>
> Sent from my iPhone
> [Quoted text hidden]
>
> <17-35336_ 014 (Scheduling Order).pdf>

--
***Very truly yours,***

Earle D. Lees, Tribal Attorney
**Skokomish Indian Tribe**
**N. 80 Tribal Center Road**
**Skokomish Nation, WA 98584**
**360.877.2100 (tel)**
**360.490.8959 (cell)**
**360.877.2104 (fax)**



**2 attachments**

**17-35336_ 013-1 (Status Report).pdf**
140K

**17-35336_ 014 (Scheduling Order).pdf**
265K

# Exhibit C

Gmail **Lauren Rasmussen <lrasmuss@gmail.com>**

## Skokomish v. Forsman et al, Case No. 17-35336

**Lees, Earle David** <elees@skokomish.org> Wed, Jan 24, 2018 at 2:22 PM
To: Lauren Rasmussen <lauren@rasmussen-law.com>, John Ogan <john.ogan@jwoganlaw.com>

Dear Lauren Rasmussen:

I conferred with my clients and they do not consent to the *amici*.

--
***Very truly yours,***

Earle D. Lees, Tribal Attorney
**Skokomish Indian Tribe**
**N. 80 Tribal Center Road**
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**360.877.2100 (tel)**
**360.490.8959 (cell)**
**360.877.2104 (fax)**



**17-35336_ 014 (Scheduling Order).pdf**
265K