No. 17-35760

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff*,

and

SKOKOMISH INDIAN TRIBE, *Petitioner – Appellant*,

v.

JAMESTOWN S'KLALLAM TRIBE; PORT GAMBLE S'KLALLAM TRIBE; SQUAXIN ISLAND TRIBE, *Respondents – Appellees*,

and

STATE OF WASHINGTON, *Defendant*,

TULALIP TRIBES; QUILEUTE INDIAN TRIBE; HOH TRIBE; LUMMI TRIBE; QUINAULT INDIAN NATION; NISQUALLY INDIAN TRIBE; SUQUAMISH INDIAN TRIBE; MUCKLESHOOT INDIAN TRIBE; PUYALLUP TRIBE; UPPER SKAGIT INDIAN TRIBE; SWINOMISH INDIAN TRIBAL COMMUNITY, *Real-party-in-interest*.

On Appeal from the United States District Court for the
Western District of Washington
No. C70-9213
The Honorable Ricardo S. Martinez
United States District Court Judge

OPENING BRIEF OF PETITIONER – APPELLANT SKOKOMISH INDIAN TRIBE

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CORPORATE DISCLOSURE STATEMENT

Appellant Skokomish Indian Tribe, ("Skokomish"), is an Indian tribe with a governing body duly recognized by the Secretary of the Interior. 83 Fed. Reg. 4235, 4239 (January 30, 2018). Accordingly, a corporate disclosure statement is not required by Rule 26.1 of the Federal Rules of Appellate Procedure.

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I. JURISDICTIONAL STATEMENT

The District Court for the Western District of Washington, (the "District Court"), had and continues to have jurisdiction pursuant to: 28 U.S.C. § 1331, as this was and is a civil action arising under the Constitution, laws, and/or treaties of the United States; and 28 U.S.C. § 1362, as this also was and is a civil action brought by an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, and/or treaties of the United States.

On August 30, 2017, the District Court issued its Order Granting S'Klallam and Squaxin Island Tribes' Motion for Summary Judgment and Denying Skokomish Indian Tribe's Cross-Motion for Summary Judgment, and Judgment in a Civil Case. ER 1, 2. This Court has jurisdiction pursuant to 28 U.S.C. § 1291, as this is an appeal from the final order and/or judgment of the District Court taken within the time allowed by Rule 4(a)(1) of the Federal Rules of Appellate Procedure. ER 21. The Notice of Appeal was filed on September 21, 2017. *Id*.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a successor in interest to the Indian people occupying a territory during Treaty-times retains the primary right to fish in the territory, under its Treaty as a right of taking fish.

2. Whether a determination as to a Tribe's primary right to take fish within their Treaty-time occupied territory, also determines that the territory is a part of the Tribe's usual and accustomed grounds and stations in which the Tribe may now take fish.

3. Whether the District Court erred by disregarding Judge Craig's determination, as affirmed by this Court, that Skokomish (or Twana) Territory, which was occupied at Treaty-time by the aboriginal Twana, extends 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.

4. Whether the District Court erred by disregarding Judge Craig's determination, as affirmed by this Court, 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.

5. Whether Judge Boldt's determination of the Skokomish's usual and accustomed grounds and stations in Hood Canal, the Hood Canal Agreement, or the later determination by Judge Craig as to Skokomish (or Twana) Territory limits the

Skokomish from seeking a determination as to additional usual and accustomed grounds and stations or a primary right over such additional fisheries.

III. ADDENDUM

Pursuant to Ninth Circuit Rule 28-2.7, pertinent constitutional provisions, treaties, statutes, ordinances, regulations and/or rules are set forth verbatim in an addendum introduced by a table of contents and attached at the end of this brief.

IV. STATEMENT OF THE CASE

A. Procedural History and Rulings Presented for Review

The United States commenced an action in 1970 seeking a declaratory judgment concerning treaty fishing, which ultimately resulted in the Boldt Decision of 1974. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974). Even after the issuance of the Boldt Decision, the parties to *United States v. Washington* retained the ability to invoke the continuing jurisdiction of the federal court under Paragraph 25 of the Permanent Injunction to seek later determinations of their rights or to resolve disputes. *United States v. Washington*, 384 F. Supp. at 419. Paragraph 25 was amended on August 23, 1993 by Judge Rothstein, and this amendment did not diminish the federal courts' continuing jurisdiction. *United States v. Washington*, 18 F. Supp. 3d 1172, 1213 (W.D. Wash. 1993). ER 325.

Having satisfied the pre-filing requirements of Paragraph 25, the Skokomish Indian Tribe filed an Ex Parte Motion for Leave to Open a New Subproceeding on

April 26, 2017. ER 305. On April 27, 2017, the District Court issued an Order Granting Leave to Open New Subproceeding. ER 257. The Skokomish Indian Tribe's Request for Determination Concerning the Skokomish (or Twana) Territorial Fishery was filed on April 28, 2017. ER 211.

On June 8, 2017, the "Motion to Dismiss or in the Alternative, Motion for Summary Judgment" was filed by the Port Gamble S'Klallam and Jamestown S'Klallam Tribes. W.D. Dkt. No. 21. On the same day, the Squaxin Island Tribe filed the "Squaxin Island Tribe's Motion to Dismiss Skokomish Indian Tribe's Request for Determination or, in the Alternative, Motion for Summary Judgment." W.D. Dkt. No. 23. On June 26, 2017, the "Skokomish's Response; and Skokomish's Cross-Motion for Summary Judgment" was filed. W.D. Dkt. No. 32.

On August 30, 2017, the District Court issued its Order Granting S'Klallam and Squaxin Island Tribes' Motion for Summary Judgment and Denying Skokomish Indian Tribe's Cross-Motion for Summary Judgment, and Judgment in a Civil Case. ER 1, 2. Skokomish's Notice of Appeal was timely filed on September 21, 2017. ER 21.

B. Treaty History; Statement of Facts

The Skokomish Indian Tribe is "a political successor in interest to some of the Indian tribes or bands which were parties to the Point No Point Treaty," specifically, the Skokomish and Too-an-ooch (or Twana). *United States v. Washington,* 384 F.

Supp. 312, 376-377 at Finding Nos. 133-134 (W.D. Wash. 1974); 12 Stat. 933; Addendum 1; ER 1420. Article IV of the Treaty of Point No Point (also known as the Treaty with the S'Klallam) secured to the Skokomish and Twana the "right of taking fish at usual and accustomed grounds and stations." 12 Stat. 933 art. IV; Addendum 3. As a condition of reserving this right, the Skokomish and Twana ceded[1] to the United States, the lands and country occupied by them which extended:

> 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.

12 Stat. 933 art. I; Addendum 2; *United States v. Washington*, 626 F. Supp. 1405, 1489-1490 at Finding Nos. 353, 354, 356 (W.D. Wash. 1984), *aff'd*, 764 F.2d 670 (9th Cir. 1985). The following legal description contained in Article I of the Treaty of Point No Point includes Skokomish (or Twana) Territory and also the neighboring occupied lands and country ceded by the S'Klallam and Chem-a-kum, specifically:

> The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, viz: Commencing at the mouth of the Okeho River, on the Straits of Fuca; thence southeastwardly along the westerly line of territory claimed by the Makah tribe of Indians to the summit of the Cascade Range; thence still southeastwardly and southerly along said summit to the head of the west branch of the Satsop River, down that branch to the main fork; thence eastwardly and following the line of lands heretofore ceded to the *the* [*sic*]

[1] The parties to the Treaty of Point No Point, however, reserved a small reservation "situated at the head of Hood's Canal." 12 Stat. 933 art. II; Addendum 2-3.

> United States by the Nisqually and other tribes and bands of Indians, to the summit of the Black Hills, and northeastwardly to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded to the United States by the Dwamish, Suquamish, and other tribes and bands of Indians, to Suquamish Head; thence northerly through Admiralty Inlet to the Straits of Fuca; thence westwardly through said straits to the place of beginning; including all the right, title, and interest of the said tribes and bands to any land in the Territory of Washington.

12 Stat. 933 art. I; Addendum 2.

V. SUMMARY OF THE ARGUMENT

Having first satisfied all of the prefiling process requirements, the Skokomish Indian Tribe filed a request to confirm its Treaty fishing rights within "those portions of Skokomish (or Twana) Territory lying outside of the Hood Canal Drainage Basin." ER 211, 218. In bringing this action the Skokomish Indian Tribe relied, in part, on binding precedent, but was also prepared to submit additional anthropological evidence, if necessary.

Previously, it was already judicially determined by Judge Craig[2] that Skokomish (or Twana) Territory extends:

> 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.

[2] Special Master Robert E. Cooper conducted the trial and prepared the Report and Recommendation, Findings of Fact, and Conclusions of Law which were fully adopted by Judge Craig. ER 239; *United States v. Washington*, 626 F. Supp. at 1487.

United States v. Washington, 626 F. Supp. at 1489 at Finding No. 353, *aff'd*, 764 F.2d 670 (Extracted from the 1854-55 journal of George Gibbs, a lawyer, ethnographer and secretary to the 1855 Treaty Commission); 12 Stat. 933 art. I; Addendum 2. As such, Skokomish (or Twana) Territory, as described by George Gibbs, includes the Hood Canal Drainage Basin and areas lying outside that drainage basin, such as, portions of the contested Satsop watershed. Some parties to this case urged the District Court to totally disregard Judge Craig's wholehearted adoption on George Gibbs' description of Skokomish (or Twana), in favor of limiting the Territory to just Hood Canal. ER 2, 126, 211. What the District Court and these parties failed to appreciate is that Judge Craig expressly found that:

> 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, *aff'd*, 764 F.2d 670. Judge Craig goes on to rely upon Gibbs' description, rather than Dr. Elmendorf's description, as the foundation for his entire determination. To the extent that the District Court ignored this earlier precedent, it erred.

Having determined the geographic boundaries of Skokomish (or Twana) Territory, Judge Craig then considered who occupied that Territory. It was found that Dr. T.T. Waterman's "data confirm that the areas within 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, *aff'd*, 764 F.2d 670. This finding is of great import as Judge Craig also determined that, "[t]he people occupying a territory held the primary right to fish in the territory." *Id*. at 1490 at Finding No. 356, *aff'd*, 764 F.2d 670. Judge Craig, thereafter, went on to conclude 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." *Id*. at 1491 at Conclusion No. 92. This conclusion of law establishes that a primary right determination includes confirmation of the regulatory or exclusionary right within a Treaty-time occupied territory, as well as a confirmation of the underlying usual and accustomed fishing right which is naturally coextensive with that territory. In other words, a Treaty-time occupied territory is always usual and accustomed grounds. 12 Stat. 933 art. IV. Additionally, the occupier has the right to take fish and to regulate the fishing activities of other Indians.

The earlier determinations resolved the dispute regarding Skokomish's primary right within Hood Canal which is embraced (or encompassed) within Skokomish (or Twana) Territory, but also had broader repercussions. The court's determination of the geographic boundaries of the entirety of Skokomish (or Twana) Territory, as well as its use, occupancy, and control effectively answers the questions

now posed regarding the contested fishery. In sum, the District Court erred by not confirming Skokomish's right of taking fish and primary right within "those portions of Skokomish (or Twana) Territory lying outside of the Hood Canal Drainage Basin."

VI. ARGUMENT

A. Standard of Review

"Questions of law are reviewed *de novo* and questions of fact for clear error." *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 350 (2011).

This Court "review[s] the district court's interpretation of treaties, statutes, and executive orders *de novo.*" *United States v. Confederated Tribes of the Colville Indian Reservation*, 606 F.3d 698, 708 (9th Cir. 2010).

This Court "review[s] de novo the district court's grant of summary judgment." *Oswalt v. Resolute Industries, Inc*., 642 F.3d 856, 859 (9th Cir. 2011); *see also Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129, 1133 (9th Cir. 2015). The Court "determine[s], viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Oswalt,* 642 F.3d at 859.

B. The earlier determinations support Skokomish's claim; and the District Court erred by dismissing the matter with prejudice

Judge Martinez erred, ruling that:

> Skokomish cite no legal authority for their assertion that Mr. Gibbs' reference to Twana "territory" – by itself and without supporting evidence of regular and customary fishing practices at identified locations – satisfies the standard to establish additional U&A.

ER 17 at ll. 2-5. In fact, Skokomish's 2017 Request for Determination does expressly contain "legal authority" to support the claim. ER 211.

Founded upon a series of well-reasoned decisions, the federal courts succinctly determined that "[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, *aff'd*, 764 F.2d 670. Skokomish (or Twana) Territory was determined to extend "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." *Id*. at 1489 at Finding No. 353, *aff'd*, 764 F.2d 670. Based on the evidence and law, Judge Craig 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.

1. There are at least two paths in *United States v. Washington* to determine: (a) usual and accustomed grounds and stations; (b) and primary rights

A Treaty tribe may seek to solely determine their usual and accustomed grounds and stations for a specific fishery. Alternatively, a Treaty tribe may seek a determination of a primary right of taking fish within a Treaty-time occupied territory, which necessarily determines both the underlying usual and accustomed grounds and stations and the regulatory control over that territory.

a. To solely determine usual and accustomed grounds and stations, the court applies a relaxed evidentiary standard to find where members of a tribe customarily fished from time to time at and before Treaty-times

Article IV of the Treaty of Point No Point secured[3] "[t]he right of taking fish at usual and accustomed grounds and stations." 12 Stat. 933 art. IV; Addendum 3. In Phase # I of *United States v. Washington*, Judge Boldt ruled that:

> . . .every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters, is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right to take fish.

[3] *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. Washington, 384 F. Supp. at 332. This definition, however, excludes fishing at "unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions." *Id*. Also, "occasional and incidental trolling was not considered to make the marine waters traveled thereon the usual and accustomed fishing grounds of the transiting Indians." *Id*. at 353.

Now, the process of actually determining the location of a tribe's usual and accustomed fishing grounds can be difficult. "Evidence concerning Indian fishing in treaty times is sketchy and less satisfactory than evidence available in the typical civil proceeding." *United States v. Lummi*, 841 F.2d 317, 321 (9th Cir. 1988). Judge Boldt even went on to find that "[l]ittle documentation of Indian fishing locations in and around 1855 exists today." *United States v. Washington*, 459 F. Supp. 1020, 1059 (W.D. Wash. 1975). As such, Judge Boldt ruled that "[i]n determining usual and accustomed fishing places the court cannot follow stringent proof standards because to do so would likely preclude a finding of any such fishing areas." *Id*. A decade later, Judge Craig restated this fundamental evidentiary rule, such that:

> Either direct evidence or reasonable inferences from documentary exhibits, expert witness reports and other testimony as to the probable location and extent of usual and accustomed treaty fishing areas may be sufficient to support a legal determination of the areas involved. Stringent proof standards are not the applicable limiting basis for such determinations.

United States v. Washington, 626 F. Supp. at 1531.

Despite these clear hurdles, Judge Boldt in Phase # I specifically determined that "[t]he usual and accustomed fishing places of the Skokomish Indians before, during and after treaty times included all the waterways draining into Hood Canal and the Canal itself." *United States v. Washington*, 384 F. Supp. at 377 at Finding No. 137. This determination was based on evidence that confirmed that "[f]ishing was the most important food acquisition technique of the Twana Indians during treaty times . . . ." *Id*. at Finding No. 135. To obtain this Treaty resource, the Skokomish or Twana "took salmon and steelhead in saltwater areas by trolling, spearing and netting, and in freshwater areas by single dam and double dam weirs and similar types of traps." *Id*. at Finding No. 136.

b. To establish a primary right of taking fish, the court determines which people "occupied" a territory during Treaty-times

From the inception of *United States v. Washington*, the courts have unequivocally linked occupancy (or residency) and the "right of taking fish" within a given territory. As far back as 1974, Judge Boldt in Phase # I determined that "[g]enerally, individual Indians had primary use rights in the territory where they resided. . . ." *United States v. Washington*, 384 F. Supp. at 353 at Finding No. 12. Judge Boldt later applied this tenet to a dispute that arose between the Lower Elwha Klallam and the Makah. *United States v. Washington*, 459 F. Supp. at 1066-1068. Judge Boldt in 1976 expressly determined that:

> The testimony and reports of Dr. Barbara Lane have been found on numerous occasions to be highly credible and well researched and justify reliance thereon by the court. Her testimony in this matter establishes that some form of a joint fishery existed on the Hoko River between the two tribes, ***that east of the Hoko River was Clallam territory*** over which the Clallams exercised some control and that any Makah fishing on rivers within the Clallam territory was due to kinship, individual in nature and based upon intermarriage, or a grant of permission. The concept of territorial control with instances of permissive use, as asserted herein, is "the generally accepted view of people concerned with ethnography of this area" and is a conclusion supported by the evidence. (Tr. Aug. 6, 1975, pp. 151-171.)

United States v. Washington, 459 F. Supp. at 1067, *aff'd*, 642 F.2d 1141 (9th Cir. 1981) (emphasis added). This Court, when affirming that determination, opined that:

> 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.[4]

United States v. Lower Elwha Tribe, 642 F.2d at 1142-1143 (emphasis added). In a footnote, this Court restated the four-part inquiry advanced by Dr. Barbara Lane in the *Lower Elwha* case, specifically that:

> Dr. Lane amplified this principle by identifying four specific factors to be considered in determining whether a tribe legitimately controlled an area: (1) proximity of the area to tribal population centers, (2) frequency of use and

[4] This 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." *United States v. Lower Elwha Tribe*, 642 F.2d at 1144.

> relative importance to the tribe, (3) contemporary conceptions of control or territory, and (4) evidence of behavior consistent with control.

Id. at fn. 4. During a later dispute the Suquamish Indian Tribe asserted that this four-part inquiry was the "law," however, this Court soundly rejected that proposition opining that:

> The court in *Lower Elwha*, however, did not state that these considerations were a rigid formula or test, but rather, indicated they were useful as an analytical tool.

United States v. Skokomish, 764 F.2d at 673.

In the mid-1980s, Judge Craig built upon these tenets, succinctly 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 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. (Tr. of Hearing, pp. 162–63.)

United States v. Washington, 626 F. Supp. at 1490 at Finding No. 356, *aff'd,* 764 F.2d 670 (emphasis added). As a matter of law, Judge Craig also 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, *aff'd,* 764 F.2d 670 (emphasis added).

In sum, a determination of a tribe's Treaty-time occupied "territory" secures both: (a) the "right of taking fish" within that territory, as a specific determination of the underlying usual and accustomed fishing grounds; and (b) regulatory authority over other tribes' harvests within the home tribe's territory (i.e., hierarchy of rights: primary, secondary or invitation rights).

2. Judge Craig adopted specific findings with respect to Skokomish (or Twana) Territory including its: geographic boundaries, Treaty-time occupancy, use and control; all of which is supported by the evidentiary record

Skokomish's right of taking fish and primary right extends to all of Skokomish (or Twana) Territory, including "those portions of Skokomish (or Twana) Territory lying outside of the Hood Canal Drainage Basin."

a. The geographic boundaries of Skokomish (or Twana) Territory are fixed and definite, thus not ambiguous

Judge Craig's determination, as affirmed by this Court, provides an unambiguous, fixed and definite description of Skokomish (or Twana) Territory as it existed at Treaty-time. *Upper Skagit Indian Tribe v. Suquamish Indian Tribe*, 871 F.3d 844, 848 (9th Cir. 2017) (the moving party bears the burden of offering evidence that the finding was ambiguous or that the court intended something other than the text's apparent meaning); *Muckleshoot Indian Tribe v. Lummi Indian Tribe*,

141 F.3d 1355, 1359 (9th Cir. 1998) ("what [the issuing court] meant in precise geographic terms."). It was specifically 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 (emphasis added), *aff'd*, 764 F.2d 670. George Gibbs' description of Skokomish (or Twana) Territory includes a portion of the Hood Canal drainage basin (south of the Tchimakum) and other areas outside of that drainage basin, such as portions of the contested Satsop watershed. Based on the construction of this finding, the term "Twana Territory" clearly means this greater area described by Gibbs as Skokomish

(or Twana) Territory, as it "embraces Hood Canal." To embrace something means, "to encircle; surround; enclose."[5]

Judge Craig went on to determine 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,[6] 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 1489-1490 at Finding No. 354 (emphasis added), *aff'd*, 764 F.2d 670. As in the earlier finding, Judge Craig

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[5] *Webster's New Universal Unabridged Dictionary* 592 (2nd ed. 1983). This dictionary was selected as it was published contemporaneously with Special Master Cooper's Report and Judge Craig's determination.

[6] Judge Craig, with purpose and intent, chose Gibbs' description of Skokomish (or Twana) Territory, rather than Dr. Elmendorf's description. As noted, Dr. Elmendorf did not have access to Gibbs' journal or to Waterman's site information.

continues to use the language, "Gibbs' description of Twana territory" and "Skokomish (or Twana) territory described by Gibbs." And, in this instance rather than using the term "embraces," Judge Craig used the term, "encompassed." Encompassed similarly means "to encircle; to surround."[7] The context allows only one interpretation, both terms "Twana territory" and "Skokomish (or Twana) territory" include the other areas outside of the Hood Canal drainage basin.

b. The use and occupancy of the Skokomish (or Twana) Territory was expressly determined

The federal courts have determined that "[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, *aff'd*, 764 F.2d 670. Judge Craig went on to specifically determine "that the areas within the Skokomish (or Twana) territory described by Gibbs were long used and occupied by the aboriginal Twana people. *Id*. at Finding No. 354, *aff'd*, 764 F.2d 670. As earlier discussed, the areas within the "Skokomish (or Twana) territory described by Gibbs" include the contested fisheries (e.g., "those portions of Skokomish (or Twana) Territory lying outside of the Hood Canal Drainage Basin"). *Id*. at 1489 at Finding No. 353, *aff'd*, 764 F.2d 670.

[7] *Webster's New Universal Unabridged Dictionary* 598 (2nd ed. 1983).

c. These findings were supported by evidentiary record before Special Master Cooper and Judge Craig

Judge Craig's determination is supported by the evidentiary record, the district court relied in part on:

- Dr. Elmendorf, who testified by deposition, is the acknowledged authority on the Twana Indians. (Tr. of Hearing, pp. 54–55, 98.) His monograph, *The Structure of Twana Culture* (1960) (Ex. 2 to Ex. SK–SM–1), is based on data collected between 1935 and 1955 from knowledgeable Indian informants born shortly after negotiation of the treaties and is widely regarded to be the best ethnography of a case-area tribe. The court finds that Dr. Elmendorf's testimony and his scholarly monograph are highly reliable.[8]

- In his 1854–55 journal, George Gibbs, a lawyer, ethnographer and secretary to the 1855 Treaty Commission, described Skokomish (or Twana) territory . . . . (Tr. at Hearing, p. 29–30.) . . . 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.[9]

- 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.)[10]

- Dr. Elmendorf, who did not have access to Gibbs' 1856 journal or to Waterman's site information, concluded that the aboriginal Twana territory

[8] *United States v. Washington,* 626 F. Supp. at 1487 at Finding No. 348, *aff'd*, 764 F.2d 670; ER 983, 1111.
[9] *United States v. Washington,* 626 F. Supp. at 1489 at Finding No. 353, *aff'd*, 764 F.2d 670; ER 883-885.
[10] *United States v. Washington,* 626 F. Supp. at 1489 at Finding No. 354, *aff'd*, 764 F.2d 670; ER 898-904.

> 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.)[11]

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"). It is also important to remember that the Special Master's Report, upon which Judge Craig based his determination, 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." ER 241 at ll. 12-16. 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,[12] and the argument of counsel." *Id.* at ll. 3-8. On March 22, 1984, the district court fully adopted the Special Master's "Report and Recommendation, Findings of

[11] *United States v. Washington,* 626 F. Supp. at 1489 at Finding No. 354, *aff'd*, 764 F.2d 670; ER 900-903 (Dr. Lane's testimony), 1136-1149 (Dr. Elmendorf's list of Twana sites).

[12] The reference to "case" can only mean, the entire record contained in *United States v. Washington*, C70-9213.

Fact, Conclusions of Law." *United States v. Washington*, 626 F. Supp. at 1487, *aff'd*, 764 F.2d 670.

Considering the abundant record, the Squaxin, S'Klallam and others failed to meet their burden to show that there was no evidence before the issuing court. *Upper Skagit Indian Tribe v. Suquamish Indian Tribe*, 871 F.3d at 848-849.

d. All of the parties to *United States v. Washington* (C70-9213) are bound by Judge Craig's decision which was affirmed by this Court

In summary, the federal courts determined that:

- "[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, *aff'd*, 764 F.2d 670.
- Skokomish (or Twana) territory extends "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. *Id.* at 1489 at Finding No. 353, *aff'd*, 764 F.2d 670.
- "[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 1489-1490 at Finding No. 354, *aff'd*, 764 F.2d 670.

- "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, *aff'd*, 764 F.2d 670.

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 443, 452 (9th Cir. 2000) ("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 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 pp. 4-5 (W.D. Wash. 2014); ER 314-315. This Court, in another subproceeding 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* . . . .

Id. These parties include the United States of America, State of Washington and neighboring Stevens Treaty tribes. 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; 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.

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 (or Twana) Territory. *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). *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.").

C. The District Court had and has jurisdiction to grant the relief request

The matter was well-pleaded and the District Court had and has jurisdiction. As such, the District Court erred by granting the motions of the S'Klallam and Squaxin Island Tribe.

1. Pre-filing requirements of Paragraph 25 were satisfied

The sufficiency of the pre-filing process was contested. Unfortunately, the Skokomish Indian Tribe's ability to dispute this spurious allegation was and remains curtailed by the confidentiality constraints of the process. Fed. R. Evid. 408 (Compromise Offers and Negotiations); Fed. R. Evid. 501 (Privilege in General); Local Civil Rule 39.1 (Alternative Dispute Resolution); Local Civil Rule 39.1(a)(6) ("all ADR proceedings under this rule, including communications. . . shall, in all respects, be confidential, and shall not be . . . made known to the trial court"); Paragraph 25(b)(3), ER 328 at ll. 25-27 (". . . complying with the foregoing requirements (including Rule 39.1 mediation if applicable)").

The Skokomish Indian Tribe in its Motion for Order to Stay noted these confidentiality constraints, writing that:

> 1.3 The act of briefing and arguing the "sufficiency" of the pre-filing process is an inefficient use of judicial time and resources. It also may force the Skokomish Indian Tribe to disclose the nature of discussions that took place during mediation conducted under Paragraph 25(b) and LCR 39.1(c)(3)-(7). *Id*. This conflicts entirely with the confidentiality requirements of that mediation process. LCR 39.1.

W.D. Dkt. No. 19. To avoid this breach of confidentiality, the Skokomish Indian Tribe even requested that the district court enter an order:

> (A) Directing the affected parties (including policy representatives and counsel) to meet and confer before September 1, 2017, to determine if mediation should be reopened and again held with a private mediator, not necessarily with Daniel Berschauer (prior mediator) . . .

W.D. Dkt. No. 19. The District Court without granting oral argument ultimately denied this motion as being "moot." ER 1, 19.

Despite these constraints, factual evidence was still submitted that supports the sufficiency of the pre-filing process. The District Court, however, misinterpreted the evidence and clearly erred by finding that, "Skokomish failed to follow the pre-filing procedures prior to filing the instant suit, and the Court could dismiss this matter on that basis"[13] and "the filing party has failed to engage in the proper pre-filing requirements . . . ."[14]

a. Meet and Confer was held resulting in no Settlement

Paragraph 25(b)(1) requires that "[b]efore a request for determination is filed . . . the party seeking relief ("requesting party") shall meet and confer with all parties that may be directly affected by the request ("affected party") and attempt to negotiate a settlement of the matter in issue. . . ." ER 326. To satisfy this

[13] ER 10 at ll. 19-22.
[14] ER 18 at ll. 18-20.

requirement, on November 4, 2015, a Meet and Confer was held at the Lucky Dog Casino Event Center, located on the Skokomish Reservation. ER 65, 70.

The Skokomish Indian Tribe initially sought to confirm its Treaty rights (i.e., right of taking fish and primary right) over the "entire Satsop fishery," which includes areas located inside and outside of Skokomish (or Twana) Territory as described by George Gibbs. *United States v. Washington*, 626 F. Supp. at 1489 at Finding No. 353 (emphasis added), *aff'd*, 764 F.2d 670; ER 65-67. In the Meet and Confer letter, Skokomish indicated that both Paragraphs 25(a)(6)[15] and 25(a)(7)[16] were implicated, because this was a request that relied heavily on prior binding precedent (i.e., findings and determinations). ER 66. However, for those fishing areas and rights, not already specifically determined, supplemental anthropological evidence would still have been utilized to support the claim.

A copy of this Meet and Confer letter and Sign in Sheet[17] were filed by the Squaxin Island Tribe with the District Court. ER 70. Of import to this matter is Paragraph 25(b)(1), which also requires that the "[p]olicy representatives of and

[15] Paragraph 25(a)(6) allows a party to invoke the continuing jurisdiction of the district court to determine, "[t]he location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision # I. . . ." ER 326 at ll. 10-13.

[16] Paragraph 25(a)(7) allows a party to also invoke the continuing jurisdiction to determine "[s]uch other matters as the court may deem appropriate." ER 326 at ll. 13-15.

[17] The Sign in Sheet contains a list of participants at the Meet and Confer. ER 70.

counsel for the participating parties shall be present at the meeting. . . ." ER 327 at ll. 5-7. Skokomish's policy representatives and counsel came to the Meet and Confer ready to enter into meaningful negotiations. ER 70, 306-307. Nothing in the District Court's record, however, indicates that the Squaxin Island Tribe had policy representatives participate at the Meet and Confer, only the Squaxin attorney's name appears on the Sign in Sheet. ER 70-72.

Regardless, the Skokomish Indian Tribe covered all of the mandatory topics[18] required by Paragraph 25(b). ER 306. As part of this process, the Skokomish Indian Tribe additionally made available Dr. Nile Thompson[19] for questioning, by all attending affected parties, as to the factual basis for the claim and request for relief. ER 306-307 at ¶¶ 2.3-2.4.

Unfortunately, during this Meet and Confer several participants summarily opposed the Skokomish's claim and request for various reasons. The S'Klallam, State of Washington and Squaxin were but three of them.

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[18] The mandatory topics include: (A) the basis for the relief sought by the requesting party; (B) the possibility of settlement; (C) whether the matter is properly one for the Fisheries Advisory Board (FAB); (D) identification of technical issues relevant to the matter in controversy, areas of agreement and disagreement on such issues, and methods for developing an agreed technical basis to narrow or resolve the controversy; (E) whether independent extra-judicial actions (e.g., regulatory action by a government agency) may remove the need for or warrant deferral of an adjudication; (F) whether earlier rulings of the court may have addressed or resolved the matter in issue in whole or in part; and (G) whether the parties can agree to mediation or arbitration of the issues before or in lieu of litigation. ER 327.

[19] Dr. Nile Thompson's signature is second on the Sign in Sheet. ER 70.

The S'Klallam made it known that they strongly "oppose[d] the Skokomish Indian Tribe exercising its primary right within those portions of Skokomish (or Twana) Territory lying outside the Hood Canal Drainage Basin, including the Satsop River and its tributary forks." ER 212-213 at ¶ 1.3. This resolute position taken by the S'Klallam persisted beyond the Meet and Confer, being consistent with the arguments they advanced in their summary judgment motion. ER 3 at ll. 1-8. As such, there was and is no possibility of settlement.

Whereas, the "State of Washington reserved its legal defenses to oppose the opening of those portions of Skokomish (or Twana) Territory lying outside of the Hood Canal Drainage Basin to fishing, including the Satsop River and its tributary forks." ER 213 at ¶1.4. Likewise, there was and is no possibility of settlement.

The Squaxin Island Tribe even attempted to portray themselves as being blindsided, having no idea about the factual and legal basis for Skokomish's claim. But to the contrary, Kevin Lyon, an attorney in the Squaxin Island Legal Department, succinctly identified the heart of the dispute in his declaration, which provided that:

> At the M&C [Meet and Confer] and earlier, I informed the Skokomish Indian Tribe's ("Skokomish") counsel Earle Lees that part of the proposed Satsop fishery was located within the area that the Nisqually, Squaxin and Puyallup tribes had ceded in the Medicine Creek Treaty (which was signed before Skokomish's Treaty of Point No Point).

ER 126 at ¶2. This statement is also consistent with Squaxin's Objection Letter dated April 21, 2017, in which Squaxin also claimed part of Skokomish (or Twana) Territory located within the Treaty of Point No Point Ceded Area. ER 36. This objection was even noted in the Skokomish Request for Determination ("Skokomish's 2017 RFD"). ER 212 at ¶ 1.2. Considering this evidence, there is no legitimate factual basis to suggest that this particular dispute was not raised before, during and after the Meet and Confer.

To be clear, this long-debated factual and legal dispute involves a triangular area of land (and water) formed from the overlap of the Treaty of Medicine Creek Ceded Area of December 26, 1854 (10 Stat. 1132 art. I) and the Treaty of Point No Point Ceded Area of January 26, 1855 (12 Stat. 933 art. I). Addendum 2, 8. The Squaxin's claim to this area, however, is utterly without merit. Litigation in *United States v. Washington* confirmed that this triangular area is embraced (encompassed) within Skokomish (or Twana) Territory and the Treaty of Point No Point Ceded Area. 12 Stat. 933 art. I; Addendum 2; *United States v. Washington,* 626 F. Supp. at 1489 at Finding No. 353, *aff'd,* 764 F.2d 670 (Description of Skokomish (or Twana) Territory extracted from the 1854-55 journal of George Gibbs, a lawyer, ethnographer and secretary to the 1855 Treaty Commission.). As such, the Squaxin Island Tribe and other Treaty of Medicine Creek tribes could not cede land (and/or waters) to the United States that never belonged to them. The Squaxin Island Tribe,

however, strongly and unwaveringly disagrees with Skokomish's analysis. Simply put, the Squaxin Island Tribe entered the pre-filing process unwilling to concede their claim over the Satsop fishery, which pre-dates the Meet and Confer.

Now, once it appeared that there was no "substantial possibility of settlement," the Skokomish Indian Tribe under Paragraph 25(b)(1) could have immediately concluded the pre-filing process. ER 327 at ll. 23-27 (emphasis added). Nonetheless, the Skokomish Indian Tribe demanded mediation and attempted to compel meaningful settlement discussion. ER 69.

b. Mediation was conducted resulting in no Settlement

Paragraph 25(b)(2) provides "the requesting party or any affected party may demand mediation within 12 days after the conclusion of the unsuccessful negotiations." ER 328 at ll. 9-12. The Skokomish Indian Tribe served a demand for mediation on the affected parties, with mediation sessions being held on April 28-29, 2016 at the Quinault Beach Resort and Casino. ER 306-307 at ¶ 2.4. Though not required by Paragraph 25(b)(2), the Skokomish Indian Tribe paid the full costs for the meeting hall rental and for the mediator's time and expenses.[20] *Id.* The Skokomish Indian Tribe also served mediation materials entitled "Some Anthropological Observations on Data Pertaining to the Relationship Between the

[20] Under Paragraph 25(b)(3), "[u]nless agreed or ordered otherwise, the parties participating in the mediation will share the mediator's fees and related expenses on a pro rata basis." ER 328 at ll. 20-24.

Satsop and the Skokomish Indian Tribes" by Dr. Nile Robert Thompson, Ph.D. of Dushuyay which was approximately 100 pages in length. ER 306-307 at ¶ 2.4. Dr. Nile Thompson was also present during the mediation to answer questions. *Id.* Mediation was held open until August 5, 2016, in hopes of reaching a partial or complete settlement. Unfortunately, mediation[21] was unsuccessful in settling this matter. ER 307 at ¶ 2.4. In the end, the parties simply deadlocked over territorial boundaries, the extent of the primary right and litigation defenses. ER 74, 310. The only alternative left was litigation.

As earlier noted, the Skokomish Indian Tribe initially sought to confirm its Treaty right of taking fish within the "entire Satsop fishery," which includes areas located inside and outside of the Treaty of Point No Point Ceded Area and Skokomish (or Twana) Territory. Based on concerns raised during the Paragraph 25(b) pre-filing process, the Skokomish Indian Tribe voluntarily limited its claim to only "those portions of Skokomish (or Twana) Territory lying outside of the Hood Canal Drainage Basin." ER 65, 74, 211. This would allow the Skokomish Indian Tribe to avoid potentially encroaching on Quinault's territory and still open a significant portion of the Satsop fishery.

[21] Notice of Occurrence of Alternative Dispute Resolution (Mediation). ER 310.

2. The pleadings are factually and legally sufficient

The Skokomish Indian Tribe well pleaded the case and the district court erred by dismissing it with prejudice. ER 1, 19, 211-256.

a. The Motion with Certification and the Request for Determination are well-pleaded

Judge Martinez in 2012 supplemented the requirements of Paragraph 25 as follows:

> Any party wishing to file a new Request for Determination shall, after complying with the pre-filing requirements of Paragraph 25 of the Permanent Injunction, as modified August 11, 1993, shall file an *ex parte* motion for leave to open a new subproceeding. . . The motion shall clearly designate who shall be the requesting and responding or affected parties, and shall contain a certification that pre-filing meet and confer requirements of Paragraph 25(b) have been met. No legal argument or other documentation is necessary.

ER 322. The "Ex Parte Motion for Leave to Open a New Subproceeding" filed by the Skokomish Indian Tribe included the required certification and did not include legal argument or other documentation and is legally sufficient. ER 211-256.

With respect the contents of a request for determination, Paragraph 25(b)(3) provides that:

> After complying with the foregoing requirements (including Rule 39.1 mediation if applicable), a party seeking relief shall file with the clerk of this court and serve upon all other parties (through their counsel of record, if any) a "request for determination," not to exceed twelve pages in length. The request for determination shall contain a short and plain statement setting forth the factual and legal basis of the claim for relief or other matter presented to the court, and a statement of the relief sought by the requesting party. *The request shall not contain legal argument or be accompanied by submission of evidence.* Counsel for the requesting party shall file with the request for

> determination a declaration attesting to that party's compliance with the requirements of subparagraph (b)(1).

ER 328-329 (emphasis added). Skokomish's 2017 RFD was not "accompanied by submission of evidence," which is expressly prohibited. *Id*. If permitted, the Skokomish Indian Tribe would have submitted an expert report.[22]

The allegations set forth in Skokomish's 2017 RFD are "well-pleaded." ER 211-256; *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 very first paragraph of Skokomish's 2017 RFD summarizes the claim providing fair notice:

> Skokomish (or Twana) Territory was legally described by George Gibbs and this Court 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

[22] The Skokomish Indian Tribe conducted research into the factual basis for asserting its claim to the Satsop, some of which was shared during mediation in the report entitled "Some Anthropological Observations on Data Pertaining to the Relationship Between the Satsop and the Skokomish Indian Tribes" prepared by Dr. Nile Robert Thompson, Ph.D. of Dushuyay. ER 307 at ¶ 2.4.

> 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. 1405, 1489 at Finding No. 353 (W.D. Wash. March 22, 1984) (George Gibbs was a lawyer, ethnographer and secretary to the 1855 Treaty Commission), *aff'd, United States v. Washington*, 764 F.2d 670 (9th Cir. 1985). The Skokomish Indian Tribe retains the Treaty right to take fish within the entirety of Skokomish (or Twana) Territory, as well as, its primary right. *Id*.; *United States v. Washington*, 384 F. Supp. 312, 376-377 (W.D. Wash. 1974); *United States v. Washington*, C70-9213; 12 Stat. 933 art. IV.

ER 211-212 at ¶ 1.1. A factual and legal summary is also contained in Paragraphs 3.1 to 3.10 of Skokomish's 2017 RFD. ER 213-216. The earlier analysis of the precedent in this brief supports the factual and legal sufficiency of the pleadings.

b. The district court has continuing jurisdiction under Paragraph 25(a)

As for jurisdiction under Paragraph 25(a), the Skokomish's 2017 RFD references the "Ex Parte Motion for Leave to Open a New Subproceeding," which contains the required pre-filing process certification. ER 306-307. Additionally, the Skokomish Indian Tribe correctly invoked the courts' continuing jurisdiction in its Request for Determination pursuant to Paragraphs 25(a)(1) through 25(a)(7). ER 217 at ¶ 3.12. This may appear at first blush to be overly broad, but the Skokomish Indian Tribe needed flexibility to respond to attacks being brought by multiple parties on differing grounds. ER 217 at ¶ 3.11. The Court should also consider that few of the 21 Treaty tribes chose to participate during the pre-filing process or make

their legal defenses known, which forced the Skokomish take this approach. ER 70-72.

Now, Paragraph 25(a) authorizes, the parties or any of them to invoke the continuing jurisdiction of the district court in order to determine:

> (1) Whether 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;
>
> (2) Whether a proposed state regulation is reasonable and necessary for conservation;
>
> (3) Whether a tribe is entitled to exercise powers of self-regulation;
>
> (4) Disputes concerning the subject matter of this case which the parties have been unable to resolve among themselves;
>
> (5) Claims to returns of seized or damaged fishing gear or its value, as provided for in this injunction;
>
> (6) The location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision # I; and
>
> (7) Such other matters as the court may deem appropriate.

ER 325-326. Paragraphs 25(a)(1), 25(a)(4), 25(a)(6) and 25(a)(7) are directly relevant to this subproceeding. For example, "[t]he Parties cannot agree 'whether earlier rulings of the [C]ourt . . . have addressed or resolved the matter in issue in whole or in part.'" ER 217 at ¶ 3.11; *United States v. Washington*, 384 F. Supp. 312; *United States v. Lower Elwha*, 642 F.2d 1141; *United States v. Washington*, 626 F. Supp. 1405, *aff'd*, 764 F.2d 670.

As for Paragraphs 25(a)(2), 25(a)(3), and 25(a)(5) they too may be implicated, as the Skokomish Indian Tribe continues to have a contentious relationship with the State of Washington. *See Washington v. United States et al.*, Supreme Court of the United States at Case No. 17-269 (Culverts). As an example, the State does not currently recognize Treaty harvest rights on the West Branch of the Satsop by any Tribe. *United States v. Washington*, C70-9213. It is, therefore, not entirely clear whether or not the State in an effort to stop the opening of a fishery, will attempt to: (a) implement regulations that are not "reasonable and necessary for conservation"; (b) disregard the Skokomish Indian Tribe's self-regulatory status;[23] or (c) seize or damage fishing gear as it has historically done. This is the reason in part for the request for a preliminary and permanent injunction prohibiting interference with the Skokomish Indian Tribe's Treaty rights. ER 218.

i. Skokomish's right to bring new claims in *United States v. Washington* remains undiminished

Nothing in Boldt Decision, the Hood Canal Agreement[24] or Judge Craig's later determination bars or limits in any way the Skokomish Indian Tribe from protecting its existing rights and also seeking a determination as to additional usual and accustomed fishing grounds and stations or the primary right over such places.

[23] As of February 19, 2015, the Skokomish Indian Tribe holds Self-Regulatory status for its fishery, pursuant to a determination of the Washington State Department of Fish and Wildlife. *United States v. Washington*, 384 F. Supp. at 340-341.
[24] ER 221-238.

The District Court erred by denying the Skokomish Indian Tribe an opportunity to pursue its well pleaded claim, Judge Martinez ruling:

> . . . . that Judge Boldt's determination of the Skokomish U&A was unambiguous, and that the 1984 subproceeding neither changed that determination nor expanded it. . . Likewise, because Judge Boldt's original determination is not ambiguous, there is no need to engage in a Paragraph 26(a)(6) analysis. The RFD will be dismissed with prejudice for all of the reasons above.

ER 17 at ll. 6-17.

As for background, the Skokomish Indian Tribe and thirteen other Indian tribes were parties to the 1974 Boldt Decision in which their usual and accustomed fishing grounds and stations were partially determined. *United States v. Washington*, 384 F. Supp. 312. Judge Boldt, for example, determined in Phase # I that:

- The usual and accustomed fishing places of the Skokomish Indians before, during and after treaty times **included** all the waterways draining into Hood Canal and the Canal itself.[25]

- The usual and accustomed fishing places of the Nisqually Indians **included** at least the saltwater areas at the mouth of the Nisqually River and the surrounding bay, and the freshwater courses of the Nisqually River and its tributaries, McAllister (Medicine or Shenahnam) Creek, Sequalitcu Creek, Chambers Creek and the lakes between Steilacoom and McAllister Creeks.[26]

- The usual and accustomed fishing places of the Puyallup Indians **included** the marine areas around Vashon Island and adjacent portions of Puget Sound, Commencement Bay, the Puyallup River and the tributary rivers and creeks.

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[25] *United States v. Washington*, 384 F. Supp. at 377 at Finding No. 137 (emphasis added).

[26] *United States v. Washington*, 384 F. Supp. at 369 at Finding No. 86 (emphasis added).

> In addition, smaller creeks adjacent cent (*sic*.) to but not tributaries of the Puyallup River were used.[27]

- During treaty times the Squaxin Island Indians fished for coho, chum, chinook, and sockeye salmon at their usual and accustomed fishing places **in** the shallow bays, estuaries, inlets and open Sound of Southern Puget Sound and in the freshwater streams and creeks draining into those inlets.[28]

The very language of these findings shows that Judge Boldt intended to include specific areas, but not exclude[29] all other areas. And particularly, in the Summary of Findings of Fact and Conclusions of Law to the Boldt Decision, Judge Boldt clearly demonstrated this intent, writing that, "[f]or each of the plaintiff tribes, the findings set forth information regarding the organization and membership of the tribe, and some, *but by no means all*, of their principal usual and accustomed fishing places." *United States v. Washington*, 384 F. Supp. at 333 (emphasis added). Judge Boldt, likewise, concluded that:

> Although no complete inventory of all the Plaintiff tribes' usual and accustomed fishing sites can be compiled today, the areas identified in the Findings of Fact herein for each of the Plaintiff tribes in general describe *some of the freshwater systems and marine areas within which the respective tribes*

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[27] *United States v. Washington*, 384 F. Supp. at 371 at Finding No. 99 (emphasis added).

[28] *United States v. Washington*, 384 F. Supp. at 378 at Finding No. 141 (emphasis added).

[29] If Judge Boldt intended to exclude an area, he would have certainly used language similar to that employed by Judge Craig. For example, Judge Craig determined that the usual and accustomed fishing places of the Jamestown S'Klallam "include . . . the waters of Hood Canal, and all streams draining into Hood Canal ***except the Skokomish River and its tributaries***." *United States v. Washington*, 626 F. Supp. at 1486 at Finding No. 358.

> *fished at the time of the treaties and wherein those tribes*, as determined above, are entitled to exercise their treaty fishing rights today.

United States v. Washington, 384 F. Supp. at 402 at Conclusion No. 26 (emphasis added).

Judge Boldt even recognized that these Phase # I determinations as to usual and accustomed fishing grounds and stations did not strip the Tribes of their Treaty right to take fish in yet unadjudicated (or confirmed) areas. Judge Boldt in his Rulings on Fisheries' Questions wrote:

> 1. Is the state or its officers authorized to arrest a member of one of plaintiff tribes fishing in contravention of state law outside the area of his tribe's usual and accustomed fishing grounds, enumerated in this Court's Findings of Fact or as determined in a subsequent proceeding in this Court, even though such individual may prove, in his defense in any criminal proceeding resulting from his arrest, that such area in which he was fishing is a usual and accustomed fishing ground of his tribe?
>
> A. Yes. . . If such tribal member is also fishing in violation of state law, he or she is subject to state arrest and criminal prosecution; provided, that if the defendant proves he was fishing at a usual and accustomed ground or station of his tribe, although not previously designated as such, it shall be a defense to any such prosecution.

United States v. Washington, 384 F. Supp. at 408.

Thus, with the goal of preserving Treaty rights firmly at the forefront of the Boldt Decision, Judge Boldt left the door open for the Skokomish Indian Tribe and the other original parties to invoke the district court's continuing jurisdiction to determine: "f. the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision #I; and g. such other matters as the

court may deem appropriate."[30] And, that is exactly what three of the successors to the Treaty of Medicine Creek (10 Stat. 1131) did in 1981, namely, the Nisqually, Puyallup and Squaxin. *United States v. Washington*, 626 F. Supp. at 1441. The vast areas added by Squaxin included specifically:

1. Those salt waters north and west of a line drawn from Mahnckes Point on the Kitsap peninsula to the westernmost point of McNeil Island bordering on Pitt Passage, then extending from Hyde Point on McNeil Island to Gibson Point on Fox Island and then extending from Fox Point on Fox Island to Point Fosdick on the Kitsap peninsula, generally known as the Carr Inlet/Henderson Bay/Hale Passage area; as well as the freshwater rivers and streams which drain into that area;

2. Those salt waters north and east of a line drawn from Hyde Point on McNeil Island to Gordon Point on the mainland and south of the Tacoma Narrows Bridge.

Id. at Finding No. 337.

Skokomish's determination in Phase # I from 1974 mirrors the findings for Nisqually, Puyallup and Squaxin by using the same inclusionary rather than exclusionary language. *See* discussion *supra* Section VI(C)(2)(b)(i) at pp. 39-40. As such, the Skokomish Indian Tribe was and is free to seek a determination as to additional usual and accustomed fishing grounds. Nothing in that determination bars a later determination of a primary right. *U.S. v. Skokomish*, 764 F.2d at 671-673.

[30] Judge Boldt retained jurisdiction under Paragraph 25 of the Permanent Injunction dated March 22, 1974. *United States v. Washington*, 384 F. Supp. at 419. Paragraph 25 was amended on August 23, 1993 by Judge Rothstein, and this amendment did not diminish the federal courts' jurisdiction to grant the same relief. *United States v. Washington*, 18 F. Supp. 3d at 1213. ER 325.

The S'Klallam, to the contrary, argue that the Hood Canal Agreement[31] approved by Judge Craig on March 8, 1983 somehow deprives the Skokomish of this right to seek an additional determination. ER 3 at ll. 3-4. The Hood Canal Agreement, however, pertained only to the "Hood Canal fishery," which "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 227 at ll. 19-22. The Hood Canal Agreement did not purport to limit in any way the Skokomish Indian Tribe's rights over those portions of Skokomish (or Twana) Territory lying outside of the boundaries of the Hood Canal fishery (e.g., Satsop fishery) or any other fishery. It is, furthermore, nonsensical to suggest that the following single sentence taken out of context from the "Basis for Settlement" section of the Hood Canal Agreement constitutes an express and unambiguous exclusionary order:

> Today the Skokomish Tribe continues to be entirely dependent on the Hood Canal fishery for its catch because it has no established usual and accustomed fishing places outside Hood Canal and the rivers and streams draining into it.

ER 224 at ll. 14-18 (emphasis added). Simply put, the Skokomish had not yet judicially "established" or determined its rights within fisheries lying outside the "the waterways draining into Hood Canal and the Canal itself."[32] Whereas, the

[31] ER 17 at ll. 13-15 (Judge Martinez found "it unnecessary to specifically address whether the RFD filed in the instant subproceeding is precluded by the Hood Canal Agreement.").

[32] *United States v. Washington*, 384 F. Supp. at 377 at Finding No. 137 (emphasis added).

Lower Elwha Klallam, Port Gamble S'Klallam Tribe and Jamestown S'Klallam Tribe, under the Hood Canal Agreement saw their usual and accustomed fishing grounds geographically limited by Judge Craig, "the Skokomish River and all of its tributaries" being expressly excluded.[33]

After approval of the Hood Canal Agreement on March 8, 1983, a four-day trial was conducted on May 5 and 6, 1983, and on June 6 and 7, 1983 by Settlement Master Cooper. ER 240 at ll. 17-21. On March 22, 1984, Judge Craig fully adopted the Special Master's "Report and Recommendation, Findings of Fact, Conclusions of Law." *United States v. Washington*, 626 F. Supp. at 1487.

Now, if Judge Craig's determination did not expand or have any effect on the Skokomish Indian Tribe's usual and accustomed fishing grounds outside of Hood Canal,[34] then it would be manifestly unjust to now deny the Skokomish Indian Tribe the same opportunity that others received,[35] such as our opponent the Squaxin Island

[33] ER 228-230; *United States v. Washington*, 626 F. Supp. at 1486 at Finding No. 358 (Order re: Jamestown Klallam Request for Determination of Usual and Accustomed Fishing Places); *United States v. Washington*, 626 F. Supp. at 1442-1443 at Finding Nos. 341-342 (Corrected Order re: Request for Determination of Port Gamble and Lower Elwha Usual and Accustomed Fishing Places).

[34] ER 17 at ll. 6-17.

[35] *United States v. Washington*, 626 F. Supp. at 1441-1142 (Nisqually, Puyallup and Squaxin determination of additional usual and accustomed fishing areas); (*United States v. Washington*, 626 F. Supp. at 1467 (Makah had "usual and accustomed offshore fishing ground . . . in addition to those areas previously determined by the Court."); *United States v. Washington*, 873 F. Supp. 1422, 1449-1450 (W.D. Wash. 1994) (Upper Skagit determination of additional usual and accustomed fishing

Tribe. *United States v. Washington*, 626 F. Supp. at 1442 at Conclusion No. 88 (As for the Nisqually, Puyallup and Squaxin, Judge Craig ruled that "[t]his determination of additional usual and accustomed fishing grounds and stations shall in no way limit these or any other parties from seeking further determination of other usual and accustomed fishing grounds and stations including any other areas embraced within the Requests for Determination as originally filed in 1980.").[36] Also, the Skokomish should not be denied the ability to bring a claim asserting a primary right over additional geographic areas. *See United States v. Skokomish*, 764 F.2d at 671-673 (the doctrine of *res judicata* is not a bar to a later primary right claim). A denial would constitute a judicial abrogation of Skokomish's Treaty right to take fish.

In the alternative, if this Court holds that Judge Craig partially determined Skokomish's right of taking fish (including primary right) within those portions of

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areas); *United States v. Washington*, 626 F. Supp. at 1442-1443 (Lower Elwha determination of additional usual and accustomed fishing areas).

[36] *See also United States v. Washington*, 626 F. Supp. at 1468 ("This determination of additional usual and accustomed fishing places shall in no way limit the Makah Indian Tribe or any other party from seeking further determination of other usual and accustomed grounds and stations."); *United States v. Washington*, 626 F. Supp. at 1443 ("This determination shall not preclude these or any other parties from seeking future determination, pursuant to subparagraph 25(f) of the Injunction of March 22, 1974 (384 F. Supp. 312, 419), of additional usual and accustomed fishing grounds and stations not affected by the Hood Canal Agreement, p. 1468 *infra*." The Jamestown S'Klallam Tribe, Lower Elwha Klallam Tribe and Port Gamble S'Klallam Tribe were precluded from seeking a later determination of fishing rights within the "Skokomish River and all of its tributaries" as these areas within the Hood Canal Fishery were expressly excluded by the Hood Canal Agreement.)

Skokomish (or Twana) Territory lying outside the Hood Canal Drainage Basin, in connection to the primary right claim to Hood Canal, then the Skokomish should be permitted to proceed to complete that determination. In completing this determination, the Skokomish Indian Tribe should be permitted to rely on that prior precedent. That determination should also not bar other future claims.

If this Court holds that Judge Craig determined Skokomish's right of taking fish and primary right extents to all of Skokomish (or Twana) Territory, then that determination should not be read as a bar to future claims beyond Hood Canal and Skokomish (or Twana) Territory. It too was inclusionary in nature, rather exclusionary.

ii. Unwarranted Concerns regarding Record

In Skokomish's 2017 RFD it was clearly noted that the Skokomish's 1981 RFD was brought to determine a primary right of taking fish.[37] Later in this subproceeding, the Skokomish Indian Tribe attached the Order of Reference to Special Master (Usual and Accustomed Fishing Grounds) dated March 11, 1982 from Skokomish's 1981 primary rights case to the "Skokomish's Response; and

[37] ER 214 at ¶ 3.3 (Skokomish's 2017 Request for Determination); ER 221 at ¶ 3 (Exhibit A to Skokomish's 2017 RFD, Hood Canal Agreement); ER 239 (Exhibit B to Skokomish's 2017 RFD, Special Master's Report and Recommendation re Skokomish Indian Tribe's Request for Determination of Primary Right in Hood Canal Fishery).

Skokomish's Cross-Motion for Summary Judgment." ER 31. This apparently caused the District Court great concern, which was entirely unwarranted.

To clarify, that exhibit was attached for the purpose of linking the reference date to the Special Master's Report and Recommendation,[38] which was fully adopted by Judge Craig and later affirmed by this Court. *United States v. Washington*, 626 F. Supp. at 1487, *aff'd*, 764 F.2d 670. The Skokomish Indian Tribe does not dispute that the Hood Canal Agreement,[39] in contrast, refers to the later Amended Order of Reference to Special Master (Primary Right of Skokomish Indian Tribe in Hood Canal Fishery).

There was no intent nor any evidence of an attempt to manipulate the facts or record. As such, the District Court should not be permitted to use this as a basis to abrogate Skokomish's Treaty right to take fish.

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[38] ER 240 at ll. 17-21 (January 19, 1984, Special Master Cooper wrote in reference to Skokomish's 1981 Request for Determination over its primary right that, "[a]s special master appointed to hear the above-entitled matter pursuant to the court's order of March 11, 1982, I conducted a trial on the issues raised by the request for determination on May 5 and 6, 1983, and on June 6 and 7, 1983."); ER 31 (March 11, 1982 Order of Reference to Special Master Cooper);

[39] ER 232 at ll. 1-4 (February 22, 1983, Special Master Cooper wrote, "pursuant to the authority conferred upon me by the Amended Order of Reference to Special Master (Primary Right of Skokomish Indian Tribe in Hood Canal), entered herein on June 13, 1982 . . . . "); ER 55 (June 13, 1982 Amended Order of Reference to Special Master Cooper).

iii. The Skokomish Indian Tribe was injured

The inability of the Skokomish Indian Tribe to even 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." ER 212 at ¶ 1.2; ER 37-40, 75; *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, 1187-1188 (9th Cir. 2013).

VII. CONCLUSION AND STATEMENT OF PRECISE RELIEF SOUGHT

This Court should reverse and remand for further proceedings consistent with the following holdings: (1) the pre-filing process and pleadings are sufficient; and (2) the Skokomish Indian Tribe retains its right of taking fish within and primary right over Skokomish (or Twana) Territory as described by George Gibbs in his 1854-55 Journal.

Respectfully submitted this 12th day of February, 2018.

s/EARLE DAVID LEES, III, WSBA No. 30017
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Skokomish Nation, WA 98584
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Attorney for the Skokomish Indian Tribe

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellant Skokomish Indian Tribe, to the best of its belief and knowledge, states that the following are deemed related:

Skokomish Indian Tribe v. Leonard Forsman et al., Ninth Circuit Docket No. 17-35336. This matter involves the exercise of the primary right over hunting and gathering within Skokomish (or Twana) Territory.

Respectfully submitted this 12th day of February, 2018.

s/EARLE DAVID LEES, III, WSBA No. 30017
Attorney for the Skokomish Indian Tribe

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-35760

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [12844] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: s/Earle David Lees, Attorney for Skokomish

Date: Feb 12, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

ADDENDUM

TABLE OF CONTENTS

Treaties with Indian Tribes

BY AUTHORITY OF CONGRESS.

THE

Statutes at Large, Treaties,

AND

PROCLAMATIONS,

OF THE

UNITED STATES OF AMERICA.

FROM

DECEMBER 5, 1859, TO MARCH 3, 1863.

Arranged in Chronological Order and carefully collated with the Originals at Washington.

WITH

REFERENCES TO THE MATTER OF EACH ACT AND TO THE SUBSEQUENT ACTS ON THE SAME SUBJECT.

EDITED BY

GEORGE P. SANGER,

COUNSELLOR AT LAW.

The rights and interest of the United States in the stereotype plates from which this work is printed, are hereby recognized, acknowledged, and declared by the publishers, according to the provisions of the joint resolution of Congress, passed March 3, 1845.

VOL. XII.

BOSTON:

LITTLE, BROWN AND COMPANY.

1863.

Treaty between the United States of America and the S'Klallams Indians. Concluded at Point no Point, Washington Territory, January 26, 1855; Ratified by the Senate, March 8, 1859; Proclaimed by the President of the United States, April 29, 1859.

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA:

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING: January 26, 1855.

Preamble.

WHEREAS a Treaty was made and concluded at Hahd Skus, or Point no Point, in Washington Territory, on the twenty-sixth day of January, eighteen hundred and fifty-five, between Isaac I. Stevens, Governor and Superintendent of Indian Affairs for the said Territory, on the part of the United States, and the hereinafter named Chiefs, Headmen, and Delegates of the different villages of the S'Klallams Indians, viz.: the Kah-tai, Squah-quaihtl, Tch-queen, Ste-tehtlum, Tsohkw, Yennis, El-hwa, Pishtst, Hunnint, Klat-la-wash, and Oke-no, and also of the Sko-ko-mish, Too-an-hooch, and Chem-a-kum tribes occupying certain lands on the straits of Fuca and Hood's Canal, in the Territory of Washington, on behalf of said tribes, and duly authorized by them; which treaty is in the words and figures following, to wit:

Contracting parties.

Articles of agreement and convention, made and concluded at Hahd-skus, or Point no Point, Suquamish Head, in the Territory of Washington, this twenty-sixth day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the different villages of the S'Klallams, viz.: Kah-tai, Squah-quaihtl, Tch-queen, Ste-tehtlum, Tsohkw, Yennis, El-hwa, Pishtst, Hun-nint, Klat-la-wash, and Oke-ho, and also of the Sko-ko-mish, To-an-hooch and Chem-a-kum tribes, occupying certain lands on the straits of Fuca and Hood's Canal in the Territory of Washington, on behalf of said tribes, and duly authorized by them.

Cession of lands to the United States.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, viz.: commencing at the mouth of the Okeho River, on the Straits of Fuca, thence southeastwardly along the westerly line of Territory claimed by the Makah tribe of Indians to the summit of the Cascade range; thence still southeastwardly and southerly along said summit to the head of the west branch of the Satsop River, down that branch to the main fork; thence eastwardly and following the line of lands heretofore ceded to the *the* United States by the Nisqually and other tribes and bands of Indians, to the summit of the Black Hills, and northeastwardly to the portage known as Wilkes' portage; thence northeastwardly, and following the line of lands heretofore ceded to the United States by the Dwamish, Suquamish, and other tribes and bands of Indians to Suquamish Head; thence northerly through Admiralty Inlet to the Straits of Fuca; thence westwardly through said straits to the place of beginning; including all the right, title, and interest of the said tribes and bands to any land in the Territory of Washington.

Boundaries.

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ante Treaties, p. 1.

Reservation.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands the following tract of land, viz.: the

amount of six sections, or three thousand eight hundred and forty acres, situated at the head of Hood's Canal, to be hereafter set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes and bands, and of the superintendent or agent; but, if necessary for the public convenience, roads may be run through the said reservation, the Indians being compensated for any damage thereby done them. It is, however, understood that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band, to occupy the same in common with those above mentioned, he shall be at liberty to do so.

Whites not to reside thereon.

Tribes to settle on reservation.

ARTICLE III. The 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. In the mean time, it shall be lawful for them to reside upon any lands not in the actual claim or occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

Privileges to the Indians.

ARTICLE IV. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however*, That they shall not take shell-fish from any beds staked or cultivated by citizens.

Payments by the United States.

ARTICLE V. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of sixty thousand dollars, in the following manner, that is to say: during the first year after the ratification hereof, six thousand dollars; for the next two years, five thousand dollars each year; for the next three years, four thousand dollars each year; for the next four years, three thousand dollars each year; for the next five years, two thousand four hundred dollars each year; and for the next five years, one thousand six hundred dollars each year.

How to be applied.

All which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

Appropriation for removal, &c.

ARTICLE VI. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of six thousand dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

Indians may be removed to other reservation.

ARTICLE VII. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of said Indians be promoted, remove them from said reservation to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal; or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be

Lands may be surveyed and assigned, &c.

surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate thereon as a permanent home, on the same terms and subject to the same regulations

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as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made therefor accordingly.

Annuities not to be taken for debts of individuals.

ARTICLE VIII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

Tribes to preserve friendly relations,

to pay for depredations.

ARTICLE IX. The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof; and they pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe, except in self defence, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the United States, but to deliver them up for trial by the authorities.

not to make war but in self defence.

To surrender offenders.

Annuities may be withheld from those drinking ardent spirits.

ARTICLE X. The above tribes and bands are desirous to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging thereto who shall be guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

United States to establish school.

ARTICLE XI. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for the period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to the sick, and shall vaccinate them; the expenses of the said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

Mechanics' shop.

To employ a physician.

Tribes to free slaves and not to acquire others.

ARTICLE XII. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

Not to trade out of the United States.

ARTICLE XIII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

When treaty to take effect.

ARTICLE XIV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States.

Signatures, January 26, 1855.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, *Governor and Superintendent.* [L. S.]

CHITS-A-MAH-HAN, the Duke of York, *Chief of the S'klallams.*	his x mark.	[L. S.]
DAH-WHIL-LUK, *Chief of the Sko-ko-mush.*	his x mark.	[L. S.]
KUL-KAH-HAN, or General Pierce, *Chief of the Chem-a-kum.*	his x mark.	[L. S.]
HOOL-HOLE-TAN, or Jim, *Sko-ko-mish sub-chief.*	his x mark.	[L. S.]
SAI-A-KADE, or Frank, *Sko-ko-mish sub-chief.*	his x mark.	[L. S.]
LOO-GWEH-OOS, or George, *Sko-ko-mish sub-chief.*	his x mark.	[L. S.]

E-DAGH-TAN, or Tom, *Sko-ko-mish sub-chief.*	his x mark.	[L. S.]
KAI-A-HAN, or Daniel Webster, *Chem-a-kum sub-chief.*	his x mark.	[L. S.]
ETS-SAH-QUAT, *Chem-a-kum sub-chief.*	his x mark.	[L. S.]
KLEH-A-KUNST, *Chem-a-kum sub-chief.*	his x mark.	[L. S.]
HE-ATL, Duke of Clarence, *S'klallam sub-chief.*	his x mark.	[L. S.]
LACH-KA-NAM, or Lord Nelson, *S'klallam sub-chief.*	his x mark.	[L. S.]
TCHOTEST, *S'klallam sub-chief.*	his x mark.	[L. S.]
HOOT-OTE ST, or General Lane, *S'klallam sub-chief.*	his x mark.	[L. S.]
TO-TOTESH, *S'klallam sub-chief.*	his x mark.	[L. S.]
HAH-KWIA-MIHL, *S'klallam sub-chief.*	his x mark.	[L. S.]
SKAI-SE-EE, or Mr. Newman, *S'klallam sub-chief.*	his x mark.	[L. S.]
KAHS-SAHS-A-MATL, *S'klallam sub-chief.*	his x mark.	[L. S.]
S'HOTE-CH-STAN, *S'klallam sub-chief.*	his x mark.	[L. S.]
LAH-ST, or Tom, *S'klallam sub-chief.*	his x mark.	[L. S.]
TULS-MET-TUM, Lord Jim, *S'klallam sub-chief.*	his x mark.	[L. S.]
YAHT-LE-MIN, or General Taylor, *S'klallam sub-chief.*	his x mark.	[L. S.]
KLA-KOISHT, or Captain, *S'klallam sub-chief.*	his x mark.	[L. S.]
SNA-TALC, or General Scott, *S'klallam sub-chief.*	his x mark.	[L. S.]
TSEH-A-TAKE, or Tom Benton, *S'klallam sub-chief.*	his x mark.	[L. S.]
YAH-KWI-E-NOOK, or General Gaines, *S'klallam sub-chief.*	his x mark.	[L. S.]
KAI-AT-LAH, or General Lane, Jr., *S'klallam sub-chief.*	his x mark.	[L. S.]
CAPTAIN JACK, *S'klallam sub-chief.*	his x mark.	[L. S.]
HE-ACH-KATE, *S'klallam sub-chief.*	his x mark.	[L. S.]
T'SOH-AS-HAU, or General Harrison, *S'klallam sub-chief.*	his x mark.	[L. S.]
KWAH-NALT-SOTE, *S'klallam sub-chief.*	his x mark.	[L. S.]
S'HOKE-TAN, *S'klallam sub-chief.*	his x mark.	[L. S.]
PAITL, *S'klallam sub-chief.*	his x mark.	[L. S.]
WEN-A-HAP, *S'klallam sub-chief.*	his x mark.	[L. S.]
KLEW-SUM-AH, *S'klallam sub-chief.*	his x mark.	[L. S.]
SE-ATT-HOME-TAU, *S'klallam sub-chief.*	his x mark.	[L. S.]
TSAT-SAT-HOOT, *S'klallam tribe.*	his x mark.	[L. S.]
PE-AN-HO, *S'klallam tribe.*	his x mark.	[L. S.]
YI-AH-HUM, or John Adams, *S'klallam tribe.*	his x mark.	[L. S.]
TI-ITCH-STAN, *S'klallam tribe.*	his x mark.	[L. S.]
SOO-YAHNTCH, *S'klallam tribe.*	his x mark.	[L. S.]
TTSEH-A-TAKE, *S'klallam tribe.*	his x mark.	[L. S.]
HE-ATS-AT-SOOT, *S'klallam tribe.*	his x mark.	[L. S.]
TOW-OOTS-HOOT, *S'klallam tribe.*	his x mark.	[L. S.]
TSHEH-HAM, or General Pierce, *S'klallam tribe.*	his x mark.	[L. S.]
KWIN-NAS-SUM, or George, *S'klallam tribe.*	his x mark.	[L. S.]
HAI-AHTS, John, *S'klallam tribe.*	his x mark.	[L. S.]
HAI-OTEST, John, *S'klallam tribe.*	his x mark.	[L. S.]
SEH-WIN-NUM, *S'klallam tribe.*	his x mark.	[L. S.]
YAI-TST, or George, *S'klallam tribe.*	his x mark.	[L. S.]
HE-PAIT, or John, *S'klallam tribe.*	his x mark.	[L. S.]
SLIMM, or John, *S'klallam tribe.*	his x mark.	[L. S.]
T'KLALT-SOOT, or Jack, *S'klallam tribe.*	his x mark.	[L. S.]
S'TAI-TAN, or Sam, *S'klallam tribe.*	his x mark.	[L. S.]
HUT-TETS-OOT, *S'klallam tribe.*	his x mark.	[L. S.]
HOW-A-OWL, *S'klallam tribe.*	his x mark.	[L. S.]

Executed in the presence of us—

M. T. SIMMONS,
C. H. MASON, *Secretary Washington Territory,*
BENJ. F. SHAW, *Interpreter,*
JOHN H. SCRANTON,
JOSIAH P. KELLER,
C. M. HITCHCOCK, M. D.,
A. B. GOVE,
H. A. GOLDSBOROUGH,
B. J. MADISON,
F. A. ROWE,
JAS. M. HUNT,
GEORGE GIBBS, *Secretary,*
JOHN J. REILLY,
ROBT. DAVIS,
S. S. FORD, Jr.,
H. D. COCK,
ORRINGTON CUSHMAN,
J. CONKLIN.

Ratification, March 8, 1859.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION,
"SENATE OF THE UNITED STATES, March 8, 1859.

"*Resolved*, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and the S'Klallams Indians occupying lands in the Straits of Fuca and Hood's Island, in Washington Territory, signed 26th January, 1855.

"Attest: "ASBURY DICKINS, *Secretary.*"

Proclamation April 29, 1859.

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eighth of March, eighteen hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this twenty-ninth day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

[SEAL.]

JAMES BUCHANAN.

By the President:
LEWIS CASS, *Secretary of State.*

BY AUTHORITY OF CONGRESS.

THE

Statutes at Large and Treaties

OF THE

UNITED STATES OF AMERICA.

FROM

DECEMBER 1, 1851, TO MARCH 3, 1855,

Arranged in Chronological Order;

WITH

REFERENCES TO THE MATTER OF EACH ACT AND TO THE SUBSEQUENT ACTS ON THE SAME SUBJECT.

EDITED BY

GEORGE MINOT, ESQ.,

COUNSELLOR AT LAW.

The rights and interest of the United States in the stereotype plates from which this work is printed are hereby recognized, acknowledged, and declared by the publishers, according to the provisions of the joint resolution of Congress, passed March 3, 1845.

VOL. X.

BOSTON:

LITTLE, BROWN AND COMPANY.

1855.

FRANKLIN PIERCE,

Dec. 26, 1854.

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Title.

WHEREAS a treaty was made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to wit:—

Articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth-day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homamish, Steh-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

Cession to United States.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott bays; thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Dwamish, or White rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes's Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon's Island, easterly and southeasterly, to the place of beginning.

Reservation for said tribes.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be

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set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

Removal thereto.

Roads may be constructed.

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however*, That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

Rights to fish.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years, three thousand dollars each year; for the next three years two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each year, and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

Payments for said cession.

How applied.

ARTICLE V. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

Expense of removal, &c.

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

Removal from said reservation.

Ante, p. 1044.

ARTICLE VII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

Annuities not to be taken for debts.

Stipulations respecting conduct of Indians.

ARTICLE VIII. The aforesaid tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

Intemperance.

ARTICLE IX. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same; and, therefore, it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Schools, shops, &c.

ARTICLE X. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employées, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

Slaves to be freed.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

Trade out of the limits of the U. S. forbidden.

ARTICLE XII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

Foreign Indians not to reside on reservation.

Treaty, when to take effect.

ARTICLE XIII. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian Affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, [L. S.]
Governor and Superintendent Territory of Washington.

QUI-EE-METL, his x mark. [L. S.]
SNO-HO-DUMSET, his x mark. [L. S.]
LESH-HIGH, his x mark. [L. S.]

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SLIP-O-ELM,	his x mark.	[L. S.]
KWI-ATS,	his x mark.	[L. S.]
STEE-HIGH,	his x mark.	[L. S.]
DI-A-KEH,	his x mark.	[L. S.]
HI-TEN,	his x mark.	[L. S.]
SQUA-TA-HUN,	his x mark.	[L. S.]
KAHK-TSE-MIN,	his x mark.	[L. S.]
SONAN-O-YUTL,	his x mark.	[L. S.]
KL-TEHP,	his x mark.	[L. S.]
SAHL-KO-MIN,	his x mark.	[L. S.]
T'BET-STE-HEH-BIT,	his x mark.	[L. S.]
TCHA-HOOS-TAN,	his x mark.	[L. S.]
KE-CHA-HAT,	his x mark.	[L. S.]
SPEE-PEH,	his x mark.	[L. S.]
SWE-YAH-TUM,	his x mark.	[L. S.]
CHAH-ACHSH,	his x mark.	[L. S.]
PICH-KEHD,	his x mark.	[L. S.]
S'KLAH-O-SUM,	his x mark.	[L. S.]
SAH-LE-TATL,	his x mark.	[L. S.]
SEE-LUP,	his x mark.	[L. S.]
E-LA-KAH-KA,	his x mark.	[L. S.]
SLUG-YEH,	his x mark.	[L. S.]
HI-NUK,	his x mark.	[L. S.]
MA-MO-NISH,	his x mark.	[L. S.]
CHEELS,	his x mark.	[L. S.]
KNUTCANU,	his x mark.	[L. S.]
BATS-TA-KOBE,	his x mark.	[L. S.]
WIN-NE-YA,	his x mark.	[L. S.]
KLO-OUT,	his x mark.	[L. S.]
SE-UCH-KA-NAM,	his x mark.	[L. S.]
SKE-MAH-HAN,	his x mark.	[L. S.]
WUTS-UN-A-PUM,	his x mark.	[L. S.]
QUUTS-A-TADM,	his x mark.	[L. S.]
QUUT-A-HEH-MTSN,	his x mark.	[L. S.]
YAH-LEH-CHN,	his x mark.	[L. S.]
TO-LAHL-KUT,	his x mark.	[L. S.]
YUL-LOUT,	his x mark.	[L. S.]
SEE-AHTS-OOT-SOOT,	his x mark.	[L. S.]
YE-TAHKO,	his x mark.	[L. S.]
WE-PO-IT-EE,	his x mark.	[L. S.]
KAH-SLD,	his x mark.	[L. S.]
LA'H-HOM-KAN,	his x mark.	[L. S.]
PAH-HOW-AT-ISH,	his x mark.	[L. S.]
SWE-YEHM,	his x mark.	[L. S.]
SAH-HWILL,	his x mark.	[L. S.]
SE-KWAHT,	his x mark.	[L. S.]
KAH-HUM-KLT,	his x mark.	[L. S.]
YAH-KWO-BAH,	his x mark.	[L. S.]
WUT-SAH-LE-WUN,	his x mark.	[L. S.]
SAH-BA-HAT,	his x mark.	[L. S.]
TEL-E-KISH,	his x mark.	[L. S.]
SWE-KEH-NAM,	his x mark.	[L. S.]
SIT-OO-AH,	his x mark.	[L. S.]
KO-QUEL-A-CUT,	his x mark.	[L. S.]
JACK,	his x mark.	[L. S.]
KEH-KISE-BE-LO,	his x mark.	[L. S.]
GO-YEH-HN,	his x mark.	[L. S.]

SAH-PUTSH, his x mark. [L. S.]
WILLIAM, his x mark. [L. S.]

Executed in the presence of us: —

M. T. SIMMONS,
Indian Agent.

JAMES DOTY,
Secretary of the Commission.

C. H. MASON,
Secretary Washington Territory.

W. A. SLAUGHTER,
1st Lieut. 4th Infantry.

JAMES MCALISTER,
E. GIDDINGS, jr.,
GEORGE SHAZER,
HENRY D. COCK,
S. S. FORD, jr.,
JOHN W. MCALISTER,
CLOVINGTON CUSHMAN,
PETER ANDERSON,
SAMUEL KLADY,
W. H. PULLEN,
P. O. HOUGH,
E. R. TYERALL,
GEORGE GIBBS,
BENJ. F. SHAW, *Interpreter*,
HAZARD STEVENS.

And whereas the said treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the third day of March, one thousand eight hundred and fifty-five, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit: —

"IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,
"*March* 3, 1855.

Consent of Senate.

"*Resolved*, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homamish, Steth-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

"Attest: ASBURY DICKINS,
"*Secretary.*"

Now, therefore, be it known that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the third day of March, one thousand eight hundred and fifty-five, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, having signed the same with my hand.

[L. S.] Done at the city of Washington, this tenth day of April, in the year of our Lord one thousand eight hundred and fifty-five, and of the independence of the United States the seventy-ninth.

FRANKLIN PIERCE.

By the President:

W. L. MARCY, *Secretary of State.*

9th Circuit Case Number(s) 17-35760

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CERTIFICATE OF SERVICE
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Signature (use "s/" format) s/Earle David Lees, III (Attorney for Skokomish Indian Tribe)

****

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Signature (use "s/" format)