

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, et al., *Respondents-Appellees,*

and

STATE OF WASHINGTON, *Defendant,*

TULALIP TRIBES, et al., *Real-party-in-interest.*

On Appeal From the United States District Court for the
Western District of Washington at Seattle

No. C70-9213

The Honorable Ricardo S. Martinez
United States District Court Judge

BRIEF OF REAL PARTY IN INTEREST STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

JOSEPH V. PANESKO
Senior Counsel

1125 Washington Street SE
Post Office Box 40100
Olympia, WA 98504-0100
(360) 586-0643

TABLE OF CONTENTS

| | | |
|------|---|---|
| I. | INTRODUCTION | 1 |
| II. | STATEMENT OF THE ISSUES | 1 |
| III. | STATEMENT OF THE CASE | 2 |
| IV. | ARGUMENT | 5 |
| | A. The Skokomish Failed to Comply With Paragraph 25(b)(1) | 5 |
| | B. The 1984 Hood Canal Primary Rights Ruling Did Not Consider nor Grant Additional U&A in the Satsop River Watershed | 6 |

TABLE OF AUTHORITIES

Federal Cases

| | |
|--|---------|
| <i>United States v. Washington</i> , 18 F. Supp. 3d 1172 (W.D. Wash. 1993) | 2, 3 |
| <i>United States v. Washington</i> , 20 F. Supp. 3d 899 (W.D. Wash. 2012) | 3 |
| <i>United States v. Washington</i> , 384 F. Supp. 312 (W.D. Wash. 1974) (Final Decision #1), <i>aff'd</i> , 520 F.2d 676 (9th Cir. 1975), <i>cert. denied</i> , 423 U.S. 1086 (1976) | 2, 9 |
| <i>United States v. Washington</i> , 626 F. Supp. 1405 (1984), <i>aff'd</i> , 764 F.2d 670 (9th Cir. 1985) | 3, 7, 8 |

State Rule

| | |
|--|---|
| Wash. Admin. Code § 220-312-020(160)-(162) | 5 |
|--|---|

I. INTRODUCTION

The Skokomish Indian Tribe (Skokomish or Tribe) asserts off-reservation treaty fishing rights in the Satsop River watershed, which area had not been claimed by the Skokomish until 2017. Judge Martinez properly dismissed the Skokomish claims with prejudice for two reasons. First, the Skokomish failed to comply with the procedures to invoke the court's continuing jurisdiction. Second, the Skokomish claim that an earlier 1984 ruling from this case expanded the Tribe's usual and accustomed fishing grounds and stations into the Satsop River watershed is patently devoid of merit. The ruling below should be affirmed.

II. STATEMENT OF THE ISSUES

1. Whether Judge Martinez correctly determined that the Skokomish failed to comply with court-ordered procedures for invoking the court's continuing jurisdiction to hear disputes concerning the implementation of its 1974 decree?

2. Whether Judge Martinez correctly determined that a 1984 ruling in this case that granted the Skokomish primary fishing rights *in a portion of Hood Canal* as against the Suquamish Indian Tribe (Suquamish) did not adjudicate

new Skokomish usual and accustomed fishing grounds and stations in the Satsop River watershed, which watershed does not flow into Hood Canal?

III. STATEMENT OF THE CASE

As part of Judge Boldt's historic 1974 ruling concerning treaty fishing rights, the court specifically adjudicated the Skokomish's off-reservation fishing rights ("usual and accustomed fishing grounds and stations" or "U&A") as including "all the waterways draining into Hood Canal and the Canal itself." *United States v. Washington*, 384 F. Supp. 312, 377 (W.D. Wash. 1974) (Final Decision #1), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

Judge Boldt retained continuing jurisdiction to implement his decree and specified the process for invoking that jurisdiction in Paragraph 25 of the court's permanent injunction. 384 F. Supp. at 419; *see id.* at 408 ("[t]he court retains jurisdiction of this case for the life of this decree"). Subsection (a) of Paragraph 25, as amended in 1993, sets out seven separate and distinct categories of disputes that any party can raise before the court. *United States v. Washington*, 18 F. Supp. 3d 1172, 1213 (W.D. Wash. 1993). Subsection 25(b)(1) requires that parties with disputes must first attempt to resolve them through a procedure informally known as a "Meet and Confer." The Meet and Confer procedure can

include mediation upon the request of any party. Only after parties have complied with the Meet and Confer procedure can any party then seek the court's permission to file a "request for determination" in district court against any of the other parties to trigger the court's continuing jurisdiction. *Id.* at 1214 (Subsection (b)(3)); *United States v. Washington*, 20 F. Supp. 3d 899, 982 (W.D. Wash. 2012). If it appears to the court that the requirements of Paragraph 25 have been met, the court opens a new "subproceeding" under the main case. 20 F. Supp. 3d at 983.

In 1981, the Skokomish invoked the court's continuing jurisdiction and filed a "Request for Determination" in which the Tribe asserted a "primary right" to fish in the southern portion of Hood Canal as against other treaty tribes. ER 101. The matter was referred to a special master, and the district court adopted the special master's findings and granted the Skokomish primary right claim in Hood Canal. *United States v. Washington*, 626 F. Supp. 1405, 1486 (1984), *aff'd*, 764 F.2d 670 (9th Cir. 1985).

In this current subproceeding, the Skokomish initiated a Meet and Confer in 2015. ER 64. The Skokomish identified only Paragraph 25(a)(6) and (a)(7) as the basis for invoking the court's continuing jurisdiction and accurately characterized the claimed Satsop fishery as an area *not* specifically determined

by Judge Boldt's original ruling. ER 66. The Meet and Confer letter never mentioned the 1984 ruling involving the Skokomish primary rights claim against the Suquamish Tribe as a basis for the claim to the Satsop fishery. ER 64-67.

In April 2017, the Skokomish filed its Request for Determination and the district court opened this subproceeding. The Skokomish broadly cited Paragraph 25(a)(1) through (a)(7) as the bases for invoking the court's continuing jurisdiction instead of specifying the exact nature of the Tribe's claim. ER 217. The Tribe now asserts that the 1984 primary rights ruling adjudicated new U&A in the Satsop watershed. More specifically, the Tribe points to one finding of fact quoting an 1854-55 journal entry that broadly described Skokomish territory as including portions of the Satsop River watershed. The Skokomish now argue that this geographic description of the Tribe's "territory" is equivalent to a finding of usual and accustomed fishing grounds and stations.

In its Request for Determination, the Skokomish named the State of Washington, the Squaxin Island Tribe, the Jamestown S'Klallam Tribe, and the Port Gamble S'Klallam Tribe as Respondents. ER 213. The Squaxin and S'Klallam Tribes moved for summary judgment against the Skokomish's claims,

which Judge Martinez granted. ER 3. The State supported the Squaxin and S’Klallam motions. ER 3, n.2. The Skokomish filed this appeal.¹

The Skokomish’s claim particularly impacts the State because the Satsop River watershed is outside of the Skokomish’s U&A adjudicated by Judge Boldt in 1974. No treaty rights have been adjudicated in the Satsop River watershed for any tribe. Accordingly, the general public presently conducts all fisheries in the watershed under state recreational regulations. *See* Wash. Admin. Code § 220-312-020(160)–(162). The State would need to reduce the non-treaty fisheries in the watershed by half if the Skokomish’s new claim to the area were granted. The State respectfully requests that this Court affirm.

IV. ARGUMENT

A. The Skokomish Failed to Comply With Paragraph 25(b)(1)

In its September 2015 Meet and Confer letter, the Skokomish never once suggested that the Tribe believed its Satsop fishery claim had already been conclusively determined by the 1984 primary rights ruling. *See* ER 64-67. To the contrary, the Tribe asserted it possessed historic and anthropological

¹ In its appeal, the Skokomish named only the Squaxin and S’Klallam Tribes as respondents-appellees, leaving the State in the position of filing a real-party-in-interest brief that is due before the appellees’ briefs under the stipulated briefing schedule. The State fully supported the Squaxin and S’Klallam Tribes’ arguments below and expects that it will similarly agree with their briefs due in April.

evidence to support a claim for *new* usual and accustomed fishing grounds and stations. *Id.* Numerous Tribes and the State participated in mediation in April 2016, but the mediation failed to achieve agreement. The Skokomish eventually emailed the parties and declared the mediation to be “unsuccessful.” ER 74.

Several months afterwards, the Skokomish communicated to all parties a new claim that the 1984 ruling involving the Tribe’s primary fishing rights in Hood Canal as against the Suquamish also expanded the Skokomish U&A to the Satsop watershed. ER 75.

Because the Skokomish’s Meet and Confer process did not involve the legal basis for its claim as presented in its Request for Determination, any effort to resolve the dispute informally with the other parties, as required by the Meet and Confer process, was necessarily incomplete. Judge Martinez correctly ruled the Skokomish failed to properly invoke the court’s continuing jurisdiction because it did not comply with the requirements of Paragraph 25 of the permanent injunction in this case.

B. The 1984 Hood Canal Primary Rights Ruling Did Not Consider nor Grant Additional U&A in the Satsop River Watershed

The Skokomish assert that Judge Craig’s 1984 ruling adjudicated additional U&A in the Satsop River watershed. In deference to the forthcoming

response briefs by the appellees, the State limits its response with the following points.

The Skokomish initiated its primary rights dispute by filing a Request for Determination in 1981. ER 101. This request focused entirely and solely on its primary right claim “*in Hood Canal and all the rivers and streams draining into Hood Canal.*” *Id.* (emphasis added). The district court’s amended order of referral to the special master defined the issue as determining “the primary right of Skokomish Indian Tribe *in Hood Canal Fishery.*” ER 55 (emphasis added). The United States submitted a brief about the dispute in 1983, and the caption was entitled “United States Memorandum Re Primary Rights *In Hood Canal and Its Watershed.*” ER 25 (emphasis added). The district court’s order adopting the special master’s findings also focused entirely and solely on the primary right claim *in Hood Canal*, proven by the fact that Hood Canal is included as part of the caption of the court’s order. *See United States v. Washington*, 626 F. Supp. at 1486. These are just a few examples of pleadings and orders from the matter demonstrating that Hood Canal, and only Hood Canal, was at issue before the court.

In summary, the Skokomish initiated its dispute in 1981 asking for one thing—the primary fishing right in Hood Canal—and the Tribe was granted that

exact relief in that defined geographic area. Accordingly, the primary rights proceeding did not involve one single piece of evidence of Skokomish members fishing in the Satsop River watershed. The Satsop River is a tributary of the Chehalis River, which empties into Grays Harbor, not Hood Canal. *See* ER 90; *United States v. Washington*, 626 F. Supp. at 1494. No other party opposed a Skokomish claim to the Satsop U&A because there was no such claim in existence. The Skokomish lack any credible basis to suggest now that the court's 1984 order granted relief on an entirely different claim that was not pleaded—an expansion of U&A into the Satsop River watershed—merely because of a single reference to an 1854-55 journal entry about the geographic scope of the Tribe's territory in the special master's findings of fact. But the Skokomish embrace this claim with zeal, going so far as to argue that no other party can now contest the purported 1984 U&A expansion because of res judicata, collateral estoppel, and issue preclusion. *See* ER 218 (Request for Determination).

It would be a serious abuse of court procedure and a violation of due process for a court to re-interpret a 34-year-old ruling as establishing an outcome that had not been pleaded nor supported by evidence by any of the parties. The State never had notice that the Hood Canal primary rights dispute could possibly expand Skokomish U&A into a different and unrelated watershed. As a result,

the State never had the opportunity to oppose or appeal any such claim. The fact that no party has previously interpreted the 1984 ruling as creating U&A in the Satsop watershed speaks volumes.

The Skokomish assert that a single historic reference to the geographic scope of the Tribe's territory resulted in the Tribe obtaining off-reservation treaty fishing rights in all of that territory. The Tribe fails to cite a single authority directly supporting this claim, and the Tribe's argument ignores Judge Boldt's legal standard for establishing U&A, which standard *is* the law of the case and cannot be challenged now. *See* 384 F. Supp. at 332, 356.

Judge Martinez correctly dismissed the request for determination, and the order should be affirmed in every respect.

RESPECTFULLY SUBMITTED this 19th day of March, 2018.

ROBERT W. FERGUSON
Attorney General

s/Joseph V. Panesko
JOSEPH V. PANESKO, WSBA #25289
Senior Counsel
1125 Washington Street SE
Post Office Box 40100
Olympia, WA 98504-0100
(360) 586-0643

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I hereby affirm that there are no known related cases pending before this Court, other than the matter identified in the Appellant's Statement of Related Cases.

Dated this 19th day of March, 2018.

ROBERT W. FERGUSON
Attorney General

s/Joseph V. Panesko
JOSEPH V. PANESKO
Senior Counsel
WSBA No. 25289

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 _____

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 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/Joseph V. Panesko

Date

March 19, 2018

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

9th Circuit Case Number(s) 17-35760

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format)

CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)