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8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE WESTERN DISTRICT OF WASHINGTON

11 **UNITED STATES OF AMERICA,**
12 Plaintiff,
13 v.
14 **STATE OF WASHINGTON, et al.,**
15 Defendants.

No. 2:70-cv-9213-RSM

**MOTION TO VACATE 1998
STIPULATION BETWEEN
THE SWINOMISH TRIBAL
COMMUNITY AND THE UPPER
SKAGIT INDIAN TRIBE, OR IN
THE ALTERNATIVE FOR
REFERRAL TO MEDIATION**

Note for Hearing: Friday, June 7, 2019

Without Argument

23 INTRODUCTION

25 In 1998, a Stipulation was lodged with this court that was signed by the
26 chairmen and counsel for the Swinomish Tribal Community and the Upper
27 Skagit Indian Tribe, respectively (Subproceeding No. 93-1, lodged Oct. 21,
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1998) (Exhibit 1 of Declaration). That document provides for a division of harvestable salmon bound for the Skagit River drainage between these two tribal communities. It provides that Swinomish may harvest 50% of the salmon available for tribal treaty harvest of Skagit River stocks, while the Upper Skagit Indian Tribe may catch up to 44% of the fish available for tribal harvest.

Paragraph 4.5.1 specifically provides that:

4.5 Allocation Between the Parties

4.5.1 The parties agree to the following allocation for Skagit anadromous stocks:

Species	Upper Skagit	Swinomish
Chum	44%	50%
Pink	44%	50%
Coho	43%	49%
All other species	44%	50%

For the following reasons, the Court should vacate its approval of the stipulation or refer the matter for mediation.

ARGUMENT

Movant Sauk-Suiattle Indian Tribe is an original plaintiff intervenor in C70-9213. The Court, in its original decision found *inter alia* as follows:

The Sauk-Suiattle Tribe is composed primarily of the descendants of the Sakhumehu and other Indians who lived on the upper reaches of the Skagit River system in 1855. [FPTO ¶ 3-85; Ex. USA-29, p. 12; Ex. USA-58; Ex. UPS-2] Those Indians were party to the Treaty of Point Elliott. [Ex. USA-29, p. 9; Ex. UPS-2, pp. 19-21] A Sakhumehu village was located at the confluence of the Sauk and Skagit Rivers.

1 [Ex. USA-58] The Sakhumehu Indians are named in the preamble to
2 the Treaty of Point Elliott; and one of the treaty signatories is
3 identified as a Sakhumehu. At treaty time the Sauk River Indians,
4 who were known variously as Sock-a-muke, Sakhumehu or Sock a
5 bute, regarded themselves as a distinct and separate group and were
6 so regarded by other Indians and by non-Indians. Their separate
7 identity was consistently recognized in reports referring to them
8 before, during and after the Treaty. Prior to and during treaty times
9 these Indians intermarried to a considerable extent with the Upper
10 Skagit and Stillaguamish Indians.

11 384 F. Supp. at 375-76. Like any tribal party to this case, the Sauk-Suiattle
12 Indian Tribe has the right to the opportunity to make a moderate livelihood from
13 the in-common treaty share of the fish available for harvest. The Sauk-Suiattle
14 Indian tribe is not a signatory to the agreement between the two tribes who
15 signed the stipulation. As such, it is not legally binding upon the Sauk-Suiattle
16 Indian Tribe.
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18 The presently determined Usual and Accustomed fishing grounds and
19 stations of the Sauk-Suiattle Indian Tribe are within the upper reaches of the
20 Skagit River system:
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23 The usual and accustomed fishing places of the Sauk River Indians at
24 the time of the treaty included Sauk River, Cascade River, Suiattle
25 River and the following creeks which are tributary to the Suiattle
26 River: "Big Creek, Tenas Creek, Buck Creek, Lime Creek, Sulphur
27 Creek, Downey Creek, Straight Creek, and Milk Creek. Bedal Creek,
28 tributary to the Sauk River, was also a Sauk fishing ground. [Ex.
29 USA-29, p. 13; Ex. MS-10, p. 3, l. 1-6]

1 Final Decision No. 1 (Finding of Fact No. 131). However, because the upriver
2 freshwater reaches are where salmon *spawn*, the Sauk-Suiattle Indian Tribe has
3 refrained from harvesting fish there in order to protect the spawning areas.
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5 Since the 1970's, based upon a verbal handshake between the then
6 Chairman of the Swinomish Tribal Senate and Sauk-Suiattle Indian Tribe
7 Chairman James Lawrence Joseph, the Sauk-Suiattle Indian Tribe was invited to
8 fish in the marine water estuary areas within the members of the Swinomish
9 Tribal Community fished.
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12 In 1998, the Swinomish Tribal Community and the Upper Skagit Indian
13 Tribe, in a move reminiscent of Spain and Portugal's execution of the Treaty of
14 Tordesillas, signed a stipulation dividing the tribal share of the Skagit River
15 anadromous fishery, stipulating that Swinomish could harvest 50% of the tribal
16 treaty allocation of Skagit River stocks and Upper Skagit 44%. The Sauk-
17 Suiattle Indian Tribe was not a signatory and, until recently was not aware of the
18 stipulation.
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23 The Stipulation violates the ability of the Sauk-Suiattle Indian Tribe to
24 make a moderate livelihood from fishing and should be revisited or referred to
25 mediation in that the area covered is essentially the area through which salmon
26 must pass en route to the upriver reaches in sufficient unintercepted numbers to
27 accommodate the needs of Sauk-Suiattle Indians.
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1 “Moderate livelihood” means” an apportionment that assures that the
2 Indians' reasonable livelihood needs would be met. Washington v. Washington
3 State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 685
4 (1979):
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7 [T]he central principle here must be that Indian treaty rights to a
8 natural resource that once was thoroughly and exclusively exploited
9 by the Indians secures so much as, but no more than, is necessary to
10 provide the Indians with a livelihood -- that is to say, a moderate
11 living.

12 443 U.S. at 686. According to the Supreme Court:
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14 It bears repeating, however, that the 50% figure imposes a maximum,
15 but not a minimum, allocation. As in *Arizona v. California* and its
16 predecessor cases, the central principle here must be that Indian treaty
17 rights to a natural resource that once was thoroughly and exclusively
18 exploited by the Indians secures so much as, but no more than, is
19 necessary to provide the Indians with a livelihood -- that is to say, a
20 moderate living. Accordingly, while the maximum possible allocation
21 to the Indians is fixed at 50%, the minimum is not; the latter will,
22 upon proper submissions to the District Court, be modified in
23 response to changing circumstances. If, for example, a tribe should
24 dwindle to just a few members, or if it should find other sources of
25 support that lead it to abandon its fisheries, a 45% or 50% allocation
26 of an entire run that passes through its customary fishing grounds
27 would be manifestly inappropriate, because the livelihood of the tribe
28 under those circumstances could not reasonably require an allotment
29 of a large number of fish.

30 443 U.S. at 688. The United States Court of Appeals for the Ninth Circuit
31 recently determined that the operation and maintenance of culverts which reduce

1 the number of fish that would otherwise return to or pass through the Tribes'
2 usual and accustomed fishing grounds and stations to such a degree as would
3 deprive the tribes of the ability to earn a moderate living from the fishery is a
4 violation of the right reserved in the Stevens Treaties. United States v.
5 Washington, 853 F. 3d 946 (9th Cir. 2017). The stipulation involved in this
6 proceeding accomplishes essentially the same forbidden result. By allocating to
7 themselves 94% of the Skagit River stocks available for tribal treaty harvest, the
8 number of fish that would otherwise return to or pass through the usual and
9 accustomed fishing grounds and stations of the Sauk-Suiattle Indian Tribe is
10 reduced, resulting in the inability of Sauk-Suiattle fishermen and women to earn
11 a moderate livelihood from participation in the fishery.
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14 At the time of Initial Decision No. 1, the Sauk-Suiattle Indian Tribe had 30
15 fishermen. Finding of Fact No. 132. The Upper Skagit Indian Tribe had 30
16 fishermen. Finding of Fact No. 148. The current tribal enrollment in the
17 Swinomish Tribal Community is approximately 778 according to the Northwest
18 Service Unit Health Board.¹ According to the Northwest Service Unit Health
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26 ¹ However, it should be borne in mind that the Swinomish Tribal Community is not a tribe *per*
27 *se*. Notwithstanding that the *Swinomish* were a signatory to the Treaty of Point Elliott, the
28 *Swinomish Tribal Community* is not necessarily the successor in interest of the Swinomish
29 Tribal Community, the Swinomish Tribal Community is composed *inter alia* of "all persons of
Indian blood lawfully enrolled upon the Swinomish Indian Reservation and residing there June
1, 1935[.]"

1 Board, the Upper Skagit Indian Tribe is composed of approximately 504
2 members, approximately half of which reside on the Tribe's 84 acre reservation.
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4 Tribal enrollment in the Sauk-Suiattle Indian Tribe is 309. Based upon these
5 simple demographics, the Sauk-Suiattle harvest should be at least 24%. It is also
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7 noteworthy that Finding of Fact No. 130 of this court's original decision found
8 that:

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10 No separate reservation was established for a Sauk-Suiattle Tribe in
11 their area. They were permitted to move to reservations established in
12 the general vicinity; *and the majority who moved to a reservation*
13 *moved to the Swinomish Reservation*, but most remained in their
14 aboriginal area

15 312 F. Supp. at 376. As such, a portion of those enrolled in the Swinomish
16 Tribal Community derive their treaty fishing rights from the Sauk-Suiattle Indian
17 Tribe. Additionally, it would be entirely equitable to adjust the Swinomish and
18 Upper Skagit stipulated allocations downward, to reflect that (a) the Sauk-
19 Suiattle Indian Tribe has borne the burden for 40+ years of refraining from
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21 harvests in or near spawning grounds in order to propagate the runs, while being
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23 allowed only a measly 6% portion left from the stipulation; and (b) based upon
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25 fisheries harvest returns for Chinook salmon, the Upper Skagit Tribe has
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1 exceeded its percentage of the catch it may take in four of the last 5 seasons
2 (Exhibit 2 of Declaration).
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4 As was stated in Initial Decision No. 1, moderate livelihood may depart
5 downward to the extent tribes have less economic need for reliance upon fishing
6 and a greater ability to rely upon other sources. Unlike the Swinomish and
7 Upper Skagit Tribes which are situated in close proximity to populated areas, the
8 Sauk-Suiattle Indian Tribe is situated on a 19 acre reservation in a remote
9 unincorporated area of the North Cascade Mountains. The closest town, six
10 miles away is Darrington, Washington which has a population of 1,406, men
11 women and children, and little opportunities for employment. According to U.S.
12 Bureau of Indian Affairs *American Indian Population Estimates and Labor*
13 *Force Reports*, the unemployment rate for Sauk-Suiattle Indians is
14 approximately 65% and 14% of those employed are below the federal poverty
15 level. Until April 2019, when it built a small bingo hall, the Tribe had no casino
16 of the likes of Swinomish Northern Lights Casino and Hotel nor like the Skagit
17 Casino Resort and fuel filling station operated by the Upper Skagit Indian Tribe.
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25 A fact that should not be over looked is how the fisheries are
26 executed now. Fishery regimes are now shaped to target hatchery returns. These
27 hatchery returns can be intercepted in fisheries on the Skagit River downstream
28 from their hatchery of origin (Marblemount).
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1 Another hatchery return targeted is the Baker River Sockeye. The Sauk-
2 Suiattle Indian Tribe was party to the Baker River Hydroelectric Project (FERC
3 No. 2150 settlement agreement), which provided that the Sauk-Suiattle Indian
4 Tribe has a right to the harvestable surplus of returning Baker River Sockeye.
5 However, *commercial* terminal fishery access to Baker River Sockeye can *only*
6 be implemented in the lower Baker River or below in the Skagit River or Skagit
7 Bay.
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11 CONCLUSION

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13 For the following reasons, the stipulation between the Swinomish Tribal
14 Community and the Upper Skagit Indian Tribe purporting to divide 94% of the
15 available tribal treaty share of salmon bound for the Skagit River drainage
16 between themselves leaving 6% escapement to Sauk-Suiattle's customary fishing
17 grounds violates the right of the Sauk-Suiattle Indian Tribe to a moderate
18 livelihood from the fishery. The court's 1998 approval of the stipulation should
19 be vacated and the matter referred for arbitration to determine an appropriate and
20 equitable adjustment of the harvest rates claimed by the signatories in the
21 stipulation.
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26 DATED this 3rd day of April, 2019.

27
28 Respectfully submitted,
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1 S/ Jack W. Fiander

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8 CERTIFICATE OF SERVICE

9 The undersigned certifies that the foregoing motion was filed with the Clerk of
10 Court using the CM/ECF system and served electronically upon:

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12 S/ Jack W. Fiander
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