

1 Jack W. Fiander, WSBA 13116  
2 Townuk Law Offices, Ltd.  
3 Sacred Ground Legal Services, Inc.  
4 5808A Summitview Avenue, #97  
5 Yakima, WA 98908  
6 (509) 961-0096  
7 townuklaw@msn.com

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

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

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23 INTRODUCTION

24 The Swinomish Tribal Community, Upper Skagit Indian Tribe, and the  
25 Tulalip Tribes of the Tulalip Reservation essentially three arguments in  
26 opposition to Plaintiff-Intervenor Sauk-Suiattle Indian Tribe's motion (docket  
27 entry nos. 21962, 21964 and 21966). That: (1) the requirements for invoking the  
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1 court's continuing jurisdiction set forth in Paragraph 25 of the Court's original  
 2 injunction were not met; (2) the standard for vacation of an Order under Fed. R.  
 3 Civ. P. 60 were not met; and (3) denial of the motion is necessary to protect the  
 4 integrity of agreements entered in this court. These arguments will be addressed  
 5 in that order.  
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### 8 ARGUMENT

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 10 As to respondents' argument that the court may not entertain movant's  
 11 motion absent the filing of a Request for Determination invoking the continuing  
 12 jurisdiction of the Court, plaintiff-intervenor Sauk-Suiattle Indian Tribe's motion  
 13 does not constitute the filing of a *new* subproceeding, rather the relief requested  
 14 is that the court *revisit* an Order entered in a subproceeding in which the Court's  
 15 continuing jurisdiction was *already* invoked. *See*, Request for Determination by  
 16 Plaintiff Upper Skagit Tribe (docket entry no. 13269, June 11, 1993). As is  
 17 expressly stated in what is popularly known among the parties as "Paragraph  
 18 25":  
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23 This injunction shall not alter or deprive the parties of any right to  
 24 bring motions and other matters before this court as provided in the  
 25 Federal Rules of Civil Procedure.

26  
 27 384 F. Supp. at 419. As such, movant's motion is merely a motion, as authorized  
 28 by the Federal Rules of Civil Procedure, to consider whether an Order previously  
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1 entered by the Court in a subproceeding in which the Court's continuing  
2 jurisdiction was already invoked should be vacated and referred to mediation.  
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4 This does not appear to run afoul of the Court's injunction and is a motion  
5 provided for in the Federal Rules. Rule 60 provides *inter alia* that:  
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7 (b) On motion and just terms, the court may relieve a party or its legal  
8 representative from a final judgment, order, or proceeding for the  
9 following reasons:

10 (1) Mistake, inadvertence, surprise, or excusable neglect;

11 (2) Newly discovered evidence that, with reasonable diligence,  
12 could not have been discovered in time to move for a new trial under  
13 Rule 59 (b);

14 (3) Fraud (whether previously called intrinsic or extrinsic),  
15 misrepresentation, or misconduct by an opposing party;

16 (4) The judgment is void;

17 (5) The judgment has been satisfied, released, or discharged; it is  
18 based on an earlier judgment that has been reversed or vacated; or  
19 applying it prospectively is no longer equitable; or

20 (6) Any other reason that justifies relief.

21 (c) TIMING AND EFFECT OF THE MOTION.

22 (1) *Timing.* A motion under Rule 60 (b) must be made within a  
23 reasonable time—and for reasons (1), (2), and (3) no more than a year  
24 after the entry of the judgment or order or the date of the proceeding.

25 Rule 60 (b), Fed. R. Civ. P. As to compliance, movant has (a) identified the  
26 Order (docket entry no. 16590, October 26, 1998) which it seeks relief from, (b)  
27 sets forth grounds that justify relief—that allocation of 94% of Skagit River  
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1 system salmon stocks between two downriver tribes in a subproceeding to which  
2 movant was neither a party nor signatory impairs movant's right to harvest in  
3 Skagit River tributaries (movant's motion, *passim*), and (c) until recently,  
4 movant was not aware of the actual term of the stipulation, not having been a  
5 party to nor represented in subproceeding 2:93-00001 (motion, docket entry no.  
6 21935, May 3, 2019).

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10 Respondent Swinomish Tribal Community asserts that movant's motion  
11 must be accompanied by an affidavit (docket entry no. 21964, p. 9). No such  
12 requirement appears in Rule 60 that the motion be accompanied by an affidavit  
13 which ordinarily accompanies a motion for summary judgment. Rather, by  
14 signing and filing such a motion, counsel vouches with veracity that the motion's  
15 factual assertions have evidentiary support. Fed. R. Civ. P. 11 (b) (3). Movant  
16 asserted that the participation of movant in downriver Skagit salmon fishery was  
17 merely verbal and only recently learned that a 6% limitation was embodied in a  
18 stipulation. Upon receipt of such notice, the motion before the court was  
19 promptly filed and should be deemed to have been filed within a reasonable time  
20 after actual awareness or notice of the Order it seeks vacated. Fed. R. Civ. P. 60  
21 (c).

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28 The Honorable George H. Boldt enunciated in 1974 that:  
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1 [T]his case calls upon the Court to exercise the traditional equity  
2 powers entrusted to the Federal District Courts in declaring in clear  
3 and certain terms the special reserved nature of the treaty tribes'  
4 fishing rights and in fashioning just and appropriate relief which is  
5 comprehensive enough to protect the tribes' rights[.]

6 384 F. Supp. at 400 (Conclusion of Law No. 8). Equity essentially involves  
7 principles of fundamental fairness. The treaty fisheries of the Sauk-Suiattle  
8 Indian Tribe are situated in streams most if not all of which are tributary to the  
9 Skagit River Basin. *See*, 384 F. Supp. at 376 (Finding of Fact No. 131).  
10 Respondents' claims to 94% of stocks returning to the Skagit system at locations  
11 through which salmon returning to movant's upriver fishing grounds is  
12 fundamentally inequitable.  
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16 As was eloquently stated by Honorable District Judge Orrick in 1980, a  
17 tribe's treaty right means more than the mere right to dip one's net in the water  
18 and come up empty:  
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21 The most fundamental prerequisite to exercising the right to take fish  
22 is the existence of fish to be taken.

23 506 F. Supp. 187, 203. To permit that to happen to movant is inequitable. As  
24 such, it is not unreasonable for the Court, in the exercise of its equitable powers  
25 to allow the stipulation approved in 1998 to be revisited. The Court need not  
26 fear that allowing this will impair the integrity of the court's prior orders (Tulalip  
27 Response to Motion, p. 2, line 3). Rather, doing so will instill greater confidence  
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1 that the Court will continue to administer this case in a fashion fundamentally  
2 fair to all parties.  
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4 CONCLUSION

5 For the following reasons, the motion should be granted.  
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7 DATED this 4<sup>th</sup> day of June, 2019.  
8

9 Respectfully submitted,

10 S/ Jack W. Fiander

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12 Jack W. Fiander, WSBA 13116  
13 Counsel for Sauk-Suiattle Indian  
14 Tribe, (360) 436-0139  
15 (509) 961-0096 or (509) 969-4436  
16 towtnuklaw@msn.com

17 CERTIFICATE OF SERVICE

18 The undersigned certifies that the foregoing motion was filed with the Clerk of  
19 Court using the CM/ECF system and served electronically upon:  
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21 S/ Jack W. Fiander  
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