THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiff(s), v. STATE OF WASHINGTON, et al., Defendant(s).	No: C70-9213 Subproceeding: 17-03 SKOKOMISH INDIAN TRIBE'S POST-TRIAL BRIEF – ANSWER TO QUESTION 11 WITH HOH TRIBE JOINING

The Skokomish Indian Tribe (Interested Party) submits the following post-trial briefing response to Question 11 (Main Dkt. No. 22518 at p. 4 : ll. 1-13) posed by the Court. The Hoh Tribe (Interested Party) joins the legal arguments and principles asserted herein.

Question No. 11. Hasn't the Court previously concluded, in earlier subproceedings, that tribes "took fish, including shellfish, from the marine and fresh waters, tidelands, and bedlands adjacent and subjacent" to their established sites/villages?

Answer:

Yes, the placement of sites/villages and ability to access fishing places has historically served as a factual basis to support the determination of usual and accustomed fishing grounds and stations. This Court, however, consistently since the Boldt Decision

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

found that a tribe's fisheries can extend beyond just where they lived.[1] For example, the Skokomish maintained a number of sites/villages in the Hood Canal drainage and Judge Boldt in *Washington I,* relying in part on Dr. Barbara Lane's reports, determined that Skokomish's usual and accustomed fishing places were not restricted to just the areas "adjacent and subjacent" to the sites/villages but more broadly "included all the waterways draining into Hood Canal and the Canal itself." 384 F. Supp. at 377 Finding No. 137 (Emphasis Added).

Placement of Sites/Villages:

Judge Boldt specifically found that "[t]he Skokomish Tribe is composed primarily of descendants of the Skokomish and Too-an-ooch who at treaty times *lived in the drainage area of Hood Canal*." 384 F. Supp. at 376 Finding No. 134 (Emphasis Added). "At that time the two names were used to describe the *communities of the upper and lower portions of Hood Canal* respectively" and "[t]hese groups were different segments of the Too-an-ooch or Twana group." *Id.* at 377 (Emphasis Added). "Prior to and during treaty times the

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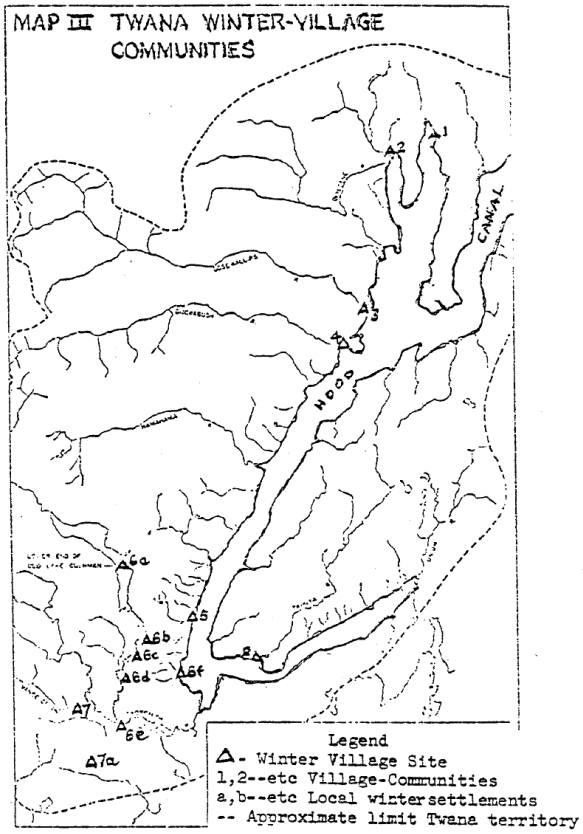
[1] *United States v. Washington,* 384 F. Supp. 312, 332 (W.D. Wash. 1974) ("the court finds and holds that every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other 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."); *United States v. Washington*, C70-9213, (Subproceeding 14-02) Main Dkt. No. 21324 at p. 10 : ll. 10-15, ll. 25-28 ("Nisqually confuses Dr. Lane's descriptions of where the Squaxin lived with her descriptions of where the Squaxin fished. But Dr. Lane's own language differentiated the two. As noted by Squaxin, when describing where the Squaxin lived, Dr. Lane's language was more restrictive. For example, in describing where Squaxin people lived, Dr. Lane used the term "southwestern" to limit 'Puget Sound.' . . . In contrast, when describing where the Squaxin fished, Dr. Lane stated more broadly that they "fished all the streams and creeks draining into the inlets at the head of Puget Sound as well as the bays, inlets, and the Sound itself.").

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

Twana Indians located villages for easy access to fishing stations." 384 F. Supp. at 377 Finding No. 136. Dr. Barbara Lane penned an *Anthropological Report on the Identity, Treaty Status and Fisheries of the Skokomish Tribe of Indians* (Exhibit USA-23). This Report included as Appendix 1 a list and map of Twana Winter-Village Communities:

APPENDIX 1. List and Map of Twana Winter-Village Communities
compiled by W. W. Elmendorf
(Copyright 1960 by Washington State University.
Used by permission.)



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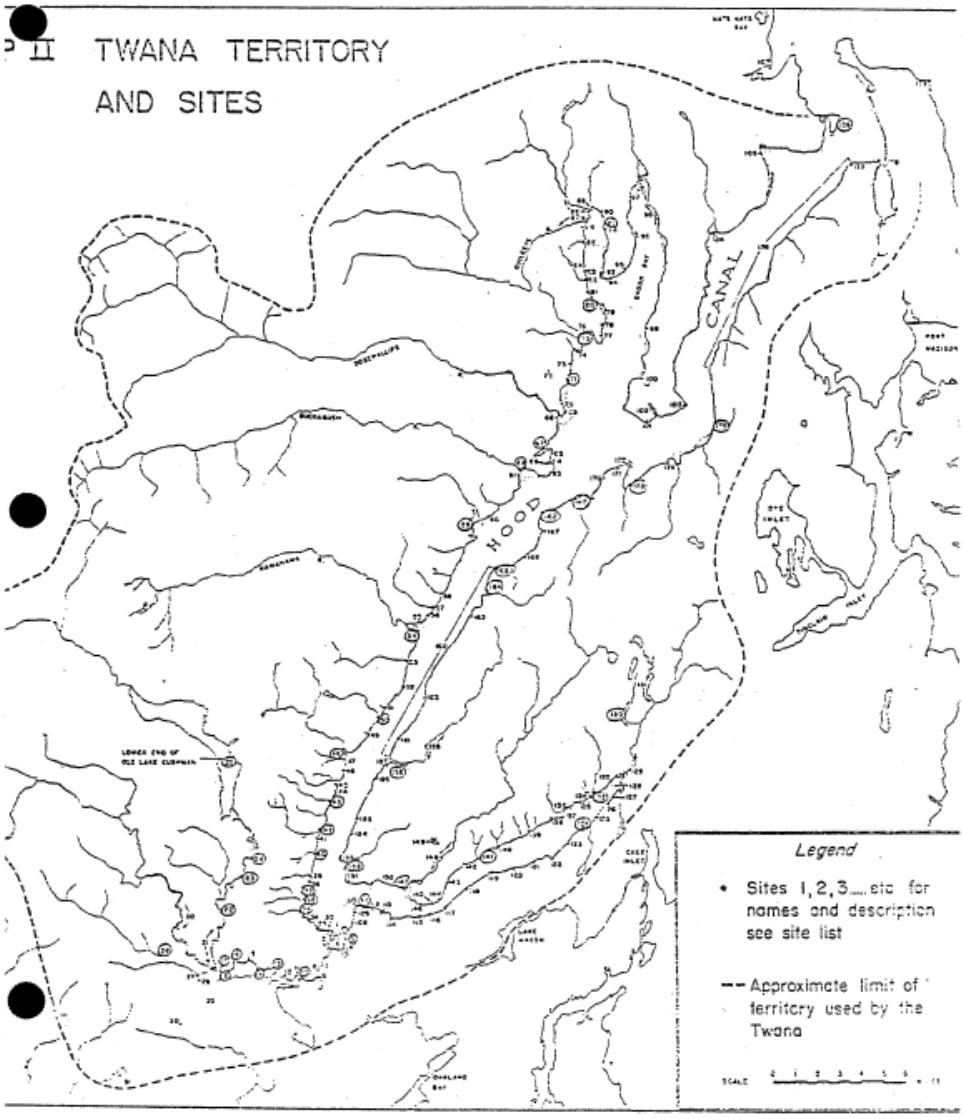
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

This Report also included in Appendix 3 a list of Twana site names collected by T.T. Waterman. A map of *Twana Territory and Sites* was included as Appendix 5 of Exhibit USA-23:

APPENDIX 5. List and Map of Twana Site Names prepared by W.W. Elmendorf between 1938-1956 63 0020



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N. 80 Tribal Center Road
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360.877.2100 (Tel) • 360.877.2104 (Fax)

Likewise, in Subproceeding 81-1[2] (Skokomish's Primary Rights Case), the District Court later found that "[a]t and before treaty times, the Twana Indians occupied nine winter villages situated in the Hood Canal drainage basin. Eight of these villages were saltwater communities located at or near the mouths of streams flowing into Hood Canal." *United States v. Washington*, 626 F. Supp. 1405, 1488 Finding No. 350 (W.D. Wash. 1985), *aff'd*, 764 F.2d 670 (9th Cir. 1985).

Ability to Access Fishing Places and Actually Fishing:

As earlier noted, Judge Boldt found in *Washington I* that "[p]rior to and during treaty times the Twana Indians located villages for *easy access to fishing stations*. They 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." 384 F. Supp. at 377 Finding No. 136 (Emphasis Added). In Subproceeding 81-1 (Skokomish's Primary Rights Case), the Ninth Circuit opined that "[t]he district court found that all areas of the Hood Canal, and the rivers and streams draining into it were *easily accessible by canoe* to the Twana and were intensively used by and of great importance to them for food-gathering activities.[3]" 764 F.2d at 674 (Emphasis Added). "This is supported by the narrow,

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[2] A primary right is a right of taking fish and the judicial recognition of that primary right looks to similar factors employed to establish usual and accustomed fishing grounds and stations. 626 F. Supp. At 1491 Conclusion No. 92 ("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."), *aff'd*, 764 F.2d 670; *Id*. at 1490-1491 Finding Nos. 356 and 357 (Primary rights and secondary rights or invited guests).

[3] The District Court determined that "[a]t and before treaty times, the Twana engaged in a variety of fishing and hunting activities in and around Hood Canal and the streams flowing into it. These activities included river and stream fishing for salmon and other species; saltwater fishing in the canal by trolling, spearing and other methods; clam-digging and

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
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elongated configuration of the canal, which varies in width from one to four miles." *Id.* As such, "[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." 384 F. Supp. at 377 Finding No. 137.

Access and Connectivity of Usual and Accustomed Fishing Places

In *Decision I,* "Judge Boldt defined a U&A [Usual and Accustomed] as '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.' *United States v. Washington*, 876 F.3d 1004, 1007 (9th Cir. 2017), *citing*, 384 F. Supp. at 332. "Importantly, a U&A cannot be established by 'occasional and incidental trolling' in marine waters 'used as thoroughfares for travel.'" *Id., citing,* 384 F. Supp. at 353.

It is inherently illogical, however, to create geographically separate usual and accustomed fishing areas and exclude the bodies of water that connect them when accessible.[4] As the law of the case, this logic was applied in more than one instance. For example, the Court found that "the Squaxin Island Indians fished . . . at their usual and accustomed fishing places in the shallow bays, estuaries, inlets and open Sound of Southern

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other shellfish gathering on the tidal zone of the canal; herring-roe harvesting in canal waters; and water-fowl hunting and marine-mammal hunting and trapping on the waters and tide flats of the canal." 626 F. Supp. at 1489 Finding No. 352.

[4] *United States v. Washington*, C70-9213, (Subproceeding 14-02) Main Dkt. No. 21324 at p. 12 : ll. 2-5 (Nisqually's interpretation of Judge Boldt's decision would illogically give Squaxin two geographically separated U&As and exclude the body of saltwater that connects them.). *See* also *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129, 1135 (9th Cir. 2015) (Waters west of Whidbey Island).

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Puget Sound and in the freshwater streams and creeks draining into those inlets." 384 F. Supp. at 378 Finding No. 141. This was also as earlier noted, applied to the Skokomish to include "all the waterways draining into Hood Canal and the Canal itself." *Id.* at 377 Finding No. 137. Neither of these determinations created a checkerboard map of fishing places or disconnected a tribe's sites/villages.

Coextensive Finfish, Shellfish, and Other Fisheries – Need Not be Adjacent or Subjacent to Sites/Villages:

In Subproceeding 17-03, a distinction between the taking of fish and shellfish need not be drawn. As, the District previously found "that, as a matter of treaty interpretation, the Tribes' usual and accustomed grounds and stations cannot vary with the species of fish." *United States v. Washington,* 873 F. Supp. 1422, 1431 (W.D. Wash. 1994). "Therefore, the Tribes have the right to take shellfish at those usual and accustomed grounds and stations adjudicated in *Washington I*, including all bedlands and tidelands *under or adjacent* to those areas." *Id.* (Emphasis added). The Ninth Circuit, agreed, opining that "the Treaties grant the Tribes a right to take shellfish of every species found *anywhere within* the Tribes' usual and accustomed fishing areas []." *United States v. Washington,* 157 F.3d 630, 643 (9th Cir. 1998) (Emphasis added). This applies even if it is not adjacent and subjacent to sites/villages.

Question 11(a)(i). Are there any examples where tribal members lived on a shoreline but did not have U&A extending into adjacent and subjacent waters?

Answer:

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

The Skokomish Indian Tribe acknowledges the courts have imposed a limitation on certain presented evidence to support a determination of usual and accustomed fishing grounds and stations, specifically, holding:

> Because the court was provided with copies of findings of fact supporting decisions of the Indian Claims Commission, a caveat concerning that source of information is appropriate. The primary purpose of those proceedings was for the establishment of aboriginal territories in order to base claims for compensation pursuant to 25 U.S.C. s 70a. That inquiry was not directed to determining fishing places but to prove land use and occupancy. In the present case, the findings of the Claims Commission of the Indian coastal and river villages, from which fishing activities may be presumed, coincide with the findings of Dr. Lane and the testimony of Mrs. Dover. Future utilization of Indian Claims Commission decisions and findings for the purpose of establishing usual and accustomed fishing places shall be given consideration consistent with the above stated limitations.

United States v. Washington, 459 F. Supp. 1020, 1059 (W.D. Wash. 1975). This foregoing limitation can, however, be overcome.

Specifically, the location and extent of usual and accustomed treaty fishing areas may be determined by direct evidence or reasonable inferences, or upon credible testimony. 459 F. Supp. at 1059 ("In 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."); *Lummi*, 841 F.2d 317, 318 (9th Cir. 1988) ("Documentation of Indian fishing during treaty times is scarce. Dr. Lane, an acknowledged authority in the field, has testified that what little documentation does exist is 'extremely fragmentary and just happenstance.' Accordingly, the stringent standard of proof that operates in ordinary civil proceedings is relaxed. *United States v. State of Washington* ('Makah'), 730 F.2d 1314, 1317 (9th Cir. 1984)."). It is, in Skokomish's eyes, inconceivable that at and during Treaty-times a tribe would forgo utilizing a valuable food source located in adjacent and subjacent waters to its villages. It remains the burden, however, of the requesting tribe to show the

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

location of its villages through direct evidence or reasonable inferences, or with credible testimony. Once a village site is determined a reasonable inference may be drawn that the tribe fished in the adjacent and subjacent waters. *See* 384 F. Supp. at 377 Finding No. 136 ("located villages for easy access to fishing stations."). How far U&A extends out into adjacent waters must be determined based in part on the tribe's ability to access the fishery (e.g., dipnet vs. canoe), use as a "home territory," and use as a guest. *See United States v. Washington*, 129 F. Supp.3d 1069 (W.D. Wash. 2015); *see supra* pp. 5-7 and *infra* pp. 10-11 (Primary Rights findings).

Question 11(a)(ii). Are there any examples where U&A was found based on sustained and regular presence on the shoreline of a water body?

Answer:

Yes, in part, eight of the Skokomish Indian Tribe's villages were saltwater communities located at or near the mouths of streams flowing into Hood Canal. 626 F. Supp. at 1488 Finding No. 350, *aff'd*, 764 F.2d 670. However, the courts specifically found that "the Twana Indians located villages for easy access to fishing stations" and further actually fished in saltwater and freshwater areas. 384 F. Supp. at 377 Finding No. 136; *see supra* pp. 3-4 (Dr. Barbara Lane's Report – Appendices).

Question 11(b). Is it correct that, outside of specific grounds that may be some distance from a tribe's "home territory," most U&A determinations are premised primarily on a tribe's presence and access? Are any prior U&A determinations instructive?

Answer:

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

Yes, as discussed, the placement of sites/villages and ability to access tribal fisheries has historically served as the principal factual basis to support the determination of usual and accustomed fishing grounds and stations.

Also, the courts have expressly recognized fishing rights within "specific grounds that may be some distance from a tribe's 'home territory.'" 384 F. Supp. at 332 ("the court finds and holds that every fishing location . . . 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 . . . ."). To avoid inter-tribal debate, Findings 356 and 357 (626 F. Supp. at 1490-1491, *aff'd*, 764 F.2d 670) are restated in their entirety, as they provide a detailed explanation of "home territory":

> 356. 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. Women who married into a community outside their natal territory retained secondary fishing rights in that territory. Marriage relatives could also acquire such secondary rights in the natal territories of their spouses. The secondary or permissive fishing rights were ineffective, however, unless holders of the primary fishing right first invited or otherwise permitted persons with secondary rights 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.) The court finds that at and before treaty times, the Twana Indians held the primary fishing right within their territory, and this right was acknowledged by neighboring peoples. (Tr. of Hearing, pp. 68–69, 144–146, 159–162.) To the extent that Klallam and Suquamish people fished in Twana territory at treaty times, the court finds they did so by virtue of secondary rights or as invited guests. (Tr. of Hearing, pp. 66–67; Ex. SK–SM–2; Ex. SK–SM–1, pp. 22, 44–46, 57.) The court further finds that the Suquamish Tribe's evidence of fishing activity by Suquamish people in the Hood Canal area around the turn of the 20th Century, even if fully credited, would not support a finding that, at treaty times, the Suquamish Tribe's forebears fished in Twana territory as other than persons holding secondary rights subject to the Twanas' primary right.
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> 357. The Twana and their treaty-time neighbors, including the Klallam and the Suquamish, enjoyed peaceful relations founded on marital, ceremonial and other

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

cultural ties. (Tr. of Hearing, pp. 16–18, 141; Ex. SK–SM–1, pp. 56–61; Ex. 2 to Ex. SK–SM–1, pp. 283, 465.) Because of these peaceful relations, it was unnecessary for the Twana to defend their territory or the fishing places within it from unauthorized use by non-Twana neighbors and there is no evidence that such unauthorized use occurred. There was a common understanding among the Twana and their neighbors concerning the respective location of their territories and the nature of fishing rights in those territories. (Tr. of Hearing, pp. 184–46; Ex. SK–SM–1, pp. 40–42, 57–58.) The customary behavior of Indian people in the area at and before treaty times generally reflected these common understandings through restraint from intrusion on or unauthorized use of others' territories. (Tr. of Hearing, pp. 17–18, 60, 162; Ex. SU–SM–22 at pp. 54–55.) The court finds that the treaty-time Twanas' control of their territory inhered primarily in the network of shared customary understandings concerning territory. However, the court also finds that Twana had readily available means to deter unauthorized use of their territory and fishing areas within it. These included social disapproval and magical retaliation against would-be intruders, both of which deterrents were taken very seriously in the aboriginal societies of western Washington. (Ex. SK–SM–1, pp. 54–57.) It is also highly likely that had the other deterrents proved inadequate, the Twana would have responded with physical force to extreme or obvious intrusions upon their fishing territory. (Ex. SK–SM–1, pp. 118–119.)

Dated this 3rd day of June, 2022.

Respectfully Submitted,

s/Earle David Lees, III, WSBA No. 30017
Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
Email: elees@skokomish.org
Tel: 360.877.2100
Fax: 360.877.2104
Attorney for the Skokomish Indian Tribe

s/Craig J. Dorsay, WSBA No. 9245
s/Lea Ann Easton, WSBA No. 38685
Dorsay & Easton LLP
1737 NE Alberta St., Suite 208
Portland, OR 97211-5890
E-Mail: craig@dorsayindianlaw.com
E-Mail: leaston@dorsayindianlaw.com
Tel: 503.790.9060
Attorneys for the Hoh Indian Tribe