

No. 25-1391
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Sauk-Suiattle Indian Tribe

Plaintiff-Appellant,

v.

State of Washington, Swinomish Indian Tribal Community, Tulalip Tribes of Washington, Suquamish Indian Tribe, and Upper Skagit Indian Tribe,

Appellees,

Squaxin Island Tribe, Stillaguamish Tribe of Indians, Hoh Indian Tribe, Nisqually Indian Tribe, Puyallup Tribe of Indians, and Lower Elwha Klallam Tribe,

Interested Parties.

Appeal from the United States District Court for the Western District of Washington (Seattle), Case No. 2:24-sp-00001-RSM · Honorable Ricardo S. Martinez, District Judge

OPENING BRIEF OF APPELLANT SAUK-SUIATTLE INDIAN TRIBE

Jack Warren Fiander, WSBA No. 13116
Towntnuk Law Offices, Ltd.
Sacred Ground Legal Services, Inc.
5808A Summitview Avenue #93
Yakima, WA 98908
(509) 969-4436
towntnuklaw@msn.com

Counsel for Appellant
Sauk-Suiattle Indian Tribe

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure 26.1, the undersigned counsel for Plaintiff-Appellant Sauk-Suiattle Indian Tribe certifies that the Sauk-Suiattle Indian Tribe is a tribal government and as such does not have a parent corporation and no private or publicly-held corporation owns stock in the Sauk-Suiattle Indian Tribe.

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STATEMENT OF JURISDICTION

The Sauk-Suiattle Indian Tribe initiated Subproceeding 2:24-sp-00001 under the district court's continuing jurisdiction in *United States v. Washington*. The district court's jurisdiction arises under 28 U.S.C. §§ 1331, 1345, and 1362. The district court entered a final order on February 4, 2025 dismissing the case and ordering closure of its file on February 4, 2025 (ER-17) denied reconsideration of its order of dismissal on February 10, 2025(ER-2). Sauk-Suiattle timely filed its notice of appeal on February 27, 2025 (ER-83). This Court possesses jurisdiction over this appeal under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Did the district court commit error in converting the motion to dismiss into a motion for summary judgment when the resolution of factual issues was inextricably intertwined with whether it possessed subject matter jurisdiction?
2. Did the district court err in granting summary judgment without clearly stating the bases for its decision by specific references to the record as required by Fed. R. Civ. P. 56?
3. Was it error to dismiss Sauk-Suiattle's Request for Determination on grounds that Sauk-Suiattle alleged no new evidence, when Paragraph 25 (b) (3) of the court permanent injunction, as amended, prohibited submission of evidence in a

Request for Determination? 18 F. Supp. 3d 1214.

4. Did the district court erroneously conclude that all of Sauk-Suiattle's usual and accustomed fishing grounds had been specifically determined by Judge Boldt?

5. Did the district court erroneously conclude that that the decision in subproceeding 20-1, which was an enforcement action to determine whether a Sauk-Suiattle fishing regulation was not in conformity with the court's 1974 decree, governs this case?

6. Did the district court err in ruling that Sauk-Suiattle's Request for Determination was barred by lack of subject matter jurisdiction?

STATEMENT OF THE CASE

United States v. Washington is unique in that the court provided a process for a party to invoke the continuing jurisdiction of the court for the purpose of seeking additional fishing grounds. That process involves giving notice of such intent at a "meet and confer", after which an interested party may request mediation, and the filing of a Request for Determination containing 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.

Paragraph 25 (a) (6) of the permanent injunction of the district court,¹ as amended², provides that a plaintiff tribe may invoke the continuing jurisdiction of the court by submission of a Request for a Determination that an area be determined to be a Usual and Accustomed area within which it holds treaty fishing rights. The provision has been interpreted to mean that if the district court previously made a specific final determination of the scope of the entirety of a requesting tribe's Usual and Accustomed fishing grounds the proceeding, called a subproceeding, cannot be maintained.

The district court opened such a subproceeding on September 17, 2024 (ER-74). Responding tribes moved to dismiss on November 22, 2024 on grounds of Fed. R. Civ. P. 12 (b) (6), Fed. R. Civ. P. 12 (b) (1), the Law of the Case, collateral estoppel and other grounds. On February 4, 2025, the court essentially converted the motion into a motion for summary judgment and dismissed appellant Sauk-Suiattle's request on grounds of lack of subject matter jurisdiction (ER-21), holding that the entirety of Sauk-Suiattle usual and accustomed fishing grounds had been specifically determined in 1974 and Sauk-Suiattle's request contained no new evidence in support of its request (ER-23). Appellant timely appealed.

¹ 384 F. Supp. at 419.

² 18 F. Supp. 3d at 1214.

STANDARD OF REVIEW

At first blush, since the district court chose to convert the motion to dismiss into one for summary judgment without denominating it as such, the summary judgment standard would apply. Fed. R. Civ. P. 56 provides:

A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c). On a motion for summary judgment, the evidence is viewed in the light most favorable to the nonmoving party. *Universal Health Services, Inc. v. Thompson*, 363 F. 3d 1013, 1019 (9th Cir. 2004).

However, in this appeal, there were facts in dispute, and the resolution of those facts were so intertwined with the issue of whether the district court possessed subject matter jurisdiction that it was error to convert respondent's motion to dismiss into a motion for summary judgment. Consequently, review is *de novo*. *Lake v. Ohana Mil. Communities, LLC*, 14 F.4th 993, 1000 (9th Cir. 2021); *LN Mgmt.*,

LLCv. JPMorgan Chase Bank, N.A., 957 F.3d 943, 949 (9th Cir. 2020); *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1151 (9th Cir. 2017); *Atwood v. Fort Peck Tribal court Assiniboine*, 513 F.3d 943, 946 (9th Cir. 2008); *Coyle v. P.T. Garuda Indonesia*, 363 F.3d 979, 984 n.7 (9th Cir. 2004); *United States v. Peninsula Comm., Inc.*, 287 F.3d 832, 836 (9th Cir. 2002).

Therefore, since the Motion to Dismiss was erroneously *sua sponte* converted to a Motion for Summary Judgment (without notice to the parties, the opportunity for discovery, and where there were disputed facts, the standard that should be applied *de novo* is that applicable to a motion to dismiss under the law of the case that Requests for Determination should be liberally granted. 20 F. Supp. 3d 899, 893 (W.D. Wash. 2008). Because “in determining usual and accustomed fishing places the court cannot follow stringent proof standards.” 459 F. Supp. 1020, 1059 (W.D. Wash. 1978). Applying such standards, which are further detailed in Paragraph 25 (b) (3) of the court’s permanent injunction, dismissal was erroneous:

The request for determination shall contain *a short and plain statement* setting for 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.*

18 F. Supp. at 1214 (emphasis added).

INTRODUCTION

First, let us lay to rest any concerns that the continuing jurisdiction of the district court in *United States v. Washington* should be laid to rest. *United States v. Oregon*, which had its genesis in *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969), preceded *United States v. Washington* and that case's ongoing jurisdiction continues to this day and was, and continues to be, instrumental in resolving disputes among the States of Washington, Oregon, the United States, tribal nations, and private recreational and commercial fishing groups over a wide range of important public issues. The landmark case of *United States v. Washington* provided the model for *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), addressing important fisheries and water quality issues in the Great Lakes region. The parties to that case, and the district court for the Southern District of Michigan, recently confirmed their commitment to maintaining the case on August 24, 2023 (ECF 2132 of 2:73-cv-00026-PLM). The late Honorable George H. Boldt saw the need for such an orderly process:

More than a century of frequent and often violent controversy between Indians and non-Indians over treaty right fishing has resulted in deep distrust and animosity on both sides. This has been inflamed by provocative, sometimes illegal, conduct of extremists on both sides and by irresponsible demonstrations instigated by non-resident opportunists.

Proceedings and subproceedings within the main case of *United States v. Washington* have helped resolve not only intertribal disputes over fishing territories peaceably—unlike is often the case in Southeast Alaska where disputes over who can harvest fish in open waters results in violence—but also has served to resolve disputes among the United States, the State of Washington, and tribal nations over issues as broad as environmental degradation³ and allocation of fisheries harvests among tribal, commercial and recreational interests in order to conserve anadromous approved by the district court and agreed to by various user groups have been instrumental in assuring that anadromous fish harvest levels are compliant with Endangered Species Act⁴ concerns. The public interest is well served by having such a process for finally determining such issues via an orderly process.

SUMMARY OF ARGUMENT

In the unique circumstances of *United States v. Washington*, resolution of whether, at and before the time of a treaty, a tribe engaged in fishing at customary grounds not identified in the 1974 decree involves mixed questions of law and facts. Where resolution of such facts is necessary, and is inextricably intertwined with whether the district court possesses jurisdiction to entertain the claim of a tribe to

³ 853 F. 3d 946 (9th Cir. 2017).

⁴ 16 U.S.C. § 1531, *et seq.*

additional fishing grounds not identified in the initial decision, it is error to immediately convert a Fed. R. Civ. P. 12 (b) (1) motion to dismiss into Fed. R. Civ. P. motion for summary judgment and dismiss Sauk-Suiattle's request for determination for not having alleged new evidence, without notice to the parties where such facts are disputed, where discovery of evidence has not occurred, and where Sauk-Suiattle was prohibited by Paragraph 25 (b) (3) of the Court's permanent injunction from submitting evidence supporting its claim to additional customary fishing grounds. Had the district court not done so, the relaxed standard of review for a motion to dismiss would have applied, with all allegations of the Request for Determination presumed to be true and construed in favor of the non-moving party.

Applying *de novo* review to Sauk-Suiattle's Request for Determination, the only conclusion is that it conformed to all provisions of Paragraph 25 (a) and (b) and dismissal denied, and the matter be set for trial following the parties conduct of discovery.

Finally, the district court erred in determining that a proceeding brought by another tribal party under an entirely separate provision of the court's permanent injunction [Paragraph 25 (a) (1) and (7)] which sought to enjoin a Sauk-Suiattle fishing regulation opening a fishing season at a discrete area of the merging of the Cascade and Skagit Rivers precludes Sauk-Suiattle from seeking, under injunction

Paragraph 25 (a) (6), additional fishing grounds in marine and fresh waters not even involved in that proceeding.

ARGUMENT

A. The district court erred in converting the motion to dismiss into a motion for summary judgment since the resolution of factual issues was inextricably intertwined with jurisdiction.

The district court, in dismissing appellant’s subproceeding states that:

The Responding Tribe’s Motion is factual, relying on matters beyond the Request for Determination, although they cite only court decisions, pleadings, and evidence filed in *U.S. v. Washington*. These materials may be considered without converting the 12 (b) (1) challenge into a motion for summary judgment. *Safe Air for Everyone v. Meyer*, 373 F. 3d 1035, 1039 (9th Cir. 2004).

The district court misreads *Safe Air v. Meyer*, 373 F. 3d 1035 (9th Cir. 2004), leaving out crucial portions of that opinion. In *Safe Air*, this Circuit *actually* held that the district court committed *error* in dismissing the complaint on jurisdictional grounds. In reversing the district court’s decision, this Circuit plainly confirmed that a jurisdictional challenge constitutes a “factual” attack where it relies on extrinsic evidence and does not assert lack of subject matter jurisdiction solely on the basis of the pleadings. *Morrison v. Amway Corp.*, 323 F.3d 920, 924 n. 5 (11th Cir. 2003). However, the panel in *Safe Air* held that converting a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12 (b) (1) into one for summary

judgment was *error* where the jurisdictional and substantive factual issues are so intertwined that the existence of jurisdiction is dependent upon resolution of the factual issues. As stated in *Safe Air*, where the jurisdictional and substantive issues “are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits of an action” converting the motion to one for summary judgment is error. 373 F. 3d 1035.

As applied to this case, the district court itself acknowledged that “the parties disagree on whether the disputed waters in question have been determined or not”. (ER-8). Thus, resolution of that *factual* issue and the opportunity to present evidence on it by Sauk-Suiattle is inseparable from the issue of jurisdiction. Appellant submitted an RFD alleging that it engaged in fishing at certain locations at and before the time of the treaty and that it sought to have these adjudicated to be additional customary fishing grounds of appellant. (ER-65). As such, the question of whether the court possessed continuing jurisdiction over appellant’s claims based upon its factual allegations identifying such areas is inseparable, or intertwined, with the merits of appellant’s claims.

In such a scenario, where the resolution of factual evidence is necessary in order to resolve jurisdiction, dismissal is warranted only "where the alleged claim under the constitution or federal statutes clearly appears to be immaterial and made

solely for the purpose of obtaining federal jurisdiction or where such claim is wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. 678, 682-83 (1946). It cannot be said that the facts alleged in appellant's RFD to the district court are "wholly insubstantial and frivolous." Additionally, as the United States Supreme Court has enunciated, disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. Even if converting the motion to dismiss into a motion for summary judgment were warranted, the standard for grant of summary judgment was lacking as the basis for the decision is unclear from the record

Although a summary judgment does not necessarily require entry of findings of fact and conclusions of law, Rule 56 requires that the court state on the record the basis for its decision. Without referencing what it was relying upon for its determination that all customary fishing grounds of appellant had previously been specifically determined in Finding of Fact 131 of the 1974 Initial Decision, the court merely said "there is significant support for that proposition in the record and prior rulings" (ER-22, line 9). It is impossible for an appellate panel to review such a ruling absent specific citation to which "proposition[s] in the record" support such determination. (1-ER-22).

Lacking specific reference, it cannot be determined whether the "record"

referred to is the entire record in *United States v. Washington* since 1970, the record in the instant or other subproceedings, or refers to the briefing associated with the motion to dismiss. For purposes of appellate review, the district court's decision should be explicit enough to give the appellate court a clear understanding of the *basis* of the trial court's decision. See, *Vance v. Am. Hawaii Cruises, Inc.*, 789 F.2d 790 (9th Cir. 1986).

In this appeal, the district court's cursory statement that "there is significant support for that proposition in the record and prior rulings" (ER-22) is also insufficient to enable a litigant or appellate body to discern the basis for a decision. Such detail is essential since it appears that the standard for review of the district court's dismissal order is *de novo*, which such review is troublesome to perform in the absence of specific references to what was relied upon as the basis for such decision. Moreover, it is extremely difficult for an *appellant* to assign *error* arising *Baker v. TDCJ-CID* from a district court decision when it cannot be determined *where* in the record supporting authority for the decision was derived. The Fifth Circuit case of⁵ is illustrative. Accordingly, the panel should find that the standard for a grant of summary judgment were not met, that dismissal be reversed, and the matter set for trial.

⁵ Fifth Circuit No. 18-10127 (July 30, 2019).

In *Baker*, the Fifth Circuit reversed the grant of summary judgment in favor of the defendants where the district court did not give sufficient reasons for its summary judgment. There, the district court concluded that plaintiff failed to provide evidence sufficient to demonstrate a genuine issue for trial and granted summary judgment “for the reasons set forth in defendant’s motion.” Here, the district court states “having reviewed the matter, the court agrees with the responding tribes and will deny the Request and dismiss this subproceeding.” ER-18, line 15-16). At ER-22 ln. 6-7, the district court, although admitting that “the parties disagree on whether the disputed waters in question have been specifically determined or not,” then adopts respondent’s position without referencing any specific record or reason other than that:

There is significant support for that proposition in the record and prior rulings.

The district court concludes its order by announcing that it had reviewed the motions, briefing, declarations and exhibits “and the remainder of the record” and dismissed the subproceeding without ever identifying what “in the remainder of the record” it was referring to. ER-24.

C. The district court committed error in dismissing appellant's Request for Determination on grounds that it alleged no new evidence. Neither established law nor the Law of the Case requires the pleading of new evidence.

The district court states dismissively that “the Request cites no newly discovered information, relying instead on the work of anthropologists like Barbara Lane and Sally Snyder previously submitted to this Court.” ER-20 (line 15). Which demonstrates two errors. First, the applicable standard of review of a Request for Determination. Like a complaint in a civil action which need only set forth a short and plain statement of the claim showing that the pleader is entitled to relief⁶, according to the Law of the Case the only substantive requirement of an RFD is that it set forth a factual and legal basis of the claim for relief. 18 F. Supp. 3d 1172, 1214 (W.D. Wash. 1991). Essentially, it is notice pleading:

The request for determination shall contain *a short and plain statement* setting for 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.*

18 F. Supp. at 1214 (emphasis added). In this regard, the district court erred by treating the motion to dismiss as a motion for summary judgment and by requiring evidence to be *submitted* for the court's evaluation without informing the parties and in conflict with the Law of the case and with the Federal Rules of Civil Procedure.

⁶ *Ascroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). 14

Under Federal Rule of Civil Procedure 8 (a) (2), a pleading must merely contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). A claim should be dismissed only if it appears beyond doubt that the plaintiff can establish no set of facts under which relief can be granted. *Watson v. Weeks*, 436 F. 3d 1152, 1157 (9th Cir. 2006). There is no requirement that a plaintiff plead the evidence it intends to rely upon in support of the facts alleged in its complaint. If that were the case, the complaint filed by the United States in 1970 to initiate this case would never have survived muster.

Notwithstanding that the law of the case provides that evidence shall *not* be submitted in an RFD, the district court repeatedly mentions that “the Request cites no newly discovered information” (ER-20) (line14), “Sauk-Suiattle has not discovered any new evidence” (ER-20) and unequivocally states that:

The Request cites no newly discovered information, relying instead on the work of anthropologists like Barbara Lane and Sally Snyder previously submitted to this Court.

(ER-20). Later, the district court softened its opinion, stating that the facts alleged in appellant’s Request for Determination only “appeared” to be evidence previously reviewed by the Court (ER-4, line 10). Such an assumption without specifically referencing what, in the record, such an assumption was based upon is not helpful to a reviewing court nor to a party seeking to appeal. Upon being reminded that the

Court overlooked that appellant had new evidence in the form of its expert historian, Dr. Peter Whitely (ER-11, lines 8-14), the district court responded confusingly that “the reason the Court did not address expert historian Whitely by name is that his name is not evidence.” (ER-4 at lines 7-8). Then stated that:

References to facts that will come to light but are not presented in the briefing are not particular helpful.

(ER-4, lines 11-12). However, it *was* “presented in the briefing” that a 1980 report on Baker River Indian Fisheries constitutes new evidence which could not possibly have been considered by the Court in 1974 (ER-12). The district court said such information was inconclusive and speculated that “such reports *could* include facts known to Judge Boldt or discovered after the Decision—it is just not clear”. ER-4, lines 16-17) (emphasis added). It is not clear how such information could be deemed “inconclusive” nor how it could be assumed that Judge Boldt was already aware of the facts in the report *without the district court even having read it* or the parties having had the opportunity to engage in discovery to see what it says. In doing so in order to avoid entertaining the subproceeding brought by appellant, the district court applied the Rule 56 in a manner inconsistent with Rule 1.

In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), a plaintiff commenced a civil action in September 1980 and, a year later in September 1981, the defendants filed a motion for summary judgment which was ultimately upheld by the Supreme Court. However, in *Celotex*, the Court noted that no serious claim could be made that plaintiff had in any way been “railroaded” by the premature filing of a motion for summary judgment since the parties had completed discovery and a year had passed between initiation of plaintiff’s lawsuit and the motion. Additionally, the Court stated that any potential prejudice to the plaintiff could have been avoided if plaintiff had invoked Rule 56 (f) “which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.” 477 U.S. at 327.

In contrast to the procedural posture in *Celotex*, appellant Sauk-Suiattle’s Request for Determination was filed on September 17, 2024 and respondents motion to dismiss was filed on November 22, 2024. No Discovery had occurred, nor could then plaintiff Sauk-Suiattle have submitted factual evidence yet in support of its Request since Paragraph 25 (a) (6) since Paragraph 25 (b) (3) expressly forbade Requests for Determinations from alleging factual evidence (“The request shall not contain legal argument or be accompanied by submission of evidence”). 18 F. Supp. at 1214. Nor could appellant have relied upon Fed. R. Civ. P. 56 (f) to avoid being

railroaded because the parties had no way of even knowing that the district court might, little more than a week after the close of briefing, convert the motion to dismiss into one for summary judgment.

D. The District Court erred in ruling that there was no subject matter jurisdiction for a Paragraph 25(a)(6) sub-proceeding based on the Court's decision that the disputed waters had been specifically determined by Judge Boldt.

The Court dismissed Appellant's subproceeding based, at least in part, on finding that as set forth in Final Decision #1, "Sauk-Suiattle's U&A is unambiguous, specifically determined, and that it excludes any unnamed waters." ER-23 at lines 8-9). As Appellant discusses below, none of these three findings should have been used to dismiss Appellant's subproceeding.

First, Sauk-Suiattle accepts that the District Court and the Ninth Circuit held that the usual and accustomed fishing areas (U&A) associated with appellant identified in Final Decision #1 are unambiguous. *Upper Skagit Indian Tribe v. Sauk-Suiattle Indian Tribe*, 66 F.4th 766, 771 (9th Cir. 2023). If the U&A were ambiguous, and in need of clarification, then the proper way to invoke the District Court's continuing jurisdiction would have been under Paragraph 25 (a) (1) of the district court's permanent injunction. But where a tribe's purpose is not to *clarify* an

ambiguous U&A, but rather to ask for a new adjudication on a waterbody that has not yet been specifically determined, then the proper procedure is to invoke Paragraph (a)(6). That is precisely what Appellant did in this case.

Second, the term “specifically determined” comes from Final Decision #1, and it refers to whether a waterbody’s status as U&A has been adjudicated. Specifically, the test for subject matter jurisdiction under a Paragraph 25(a) (6) subproceeding is as follows:

The parties or any of them may invoke the continuing jurisdiction of this court in order to determine . . . the location of any of a tribe’s usual and accustomed fishing grounds not specifically determined by Final Decision #1[.]

384 F. Supp. at 419 and 18 F. Supp. At 1172. Judge Boldt in 1974 and Judge Rothstein in 1993 used the same language—allowing parties to invoke the District Court’s continuing jurisdiction to determine the location “of any of a tribe’s” U&A not specifically determined.

The particular wording used by Judge Boldt and repeated by Judge Rothstein was meant to allow a tribe to focus a subproceeding on *any* of its claimed U&A not already specifically determined. Thus, the question for subject matter jurisdiction to open a new subproceeding is not whether *any* of a tribe’s U&A has been specifically determined, which would preclude not only Sauk-Suiattle but also every other tribe with U&A adjudicated in Final Decision #1 from seeking additional

customary fishing grounds, but rather whether the U&A status of the *claimed waters* at issue have been specifically determined. If so, the Tribe's subproceeding should be dismissed. If *not*, then the Tribe should be allowed to present evidence regarding its treaty-time fishing practices on that body of water and obtain a ruling on the merits from the District Court.

In this case, no court has ever specifically determined, or even discussed, whether Sauk-Suiattle has U&A in any body of *marine* waters. Therefore, even if no other claim survived the test, the District Court should have recognized its continuing jurisdiction to adjudicate the Tribe's claims to the multiple marine waterbodies identified by Appellant in its Request For Determination (RFD). Likewise, Appellant's claim to U&A on the *Baker River* has never been adjudicated. In fact, none of the *U.S. v. Washington* judges have entertained an adjudication that mentioned the Baker River in any discussion of Sauk-Suiattle fishing customs and traditions. Therefore, the District Court's dismissal of Appellant's request to adjudicate appellant's claim that the Baker River was also a usual and accustomed fishing ground which had not previously been specifically determined.

With regard to the Tribe's claims for U&A on the *Skagit* River, prior to initiating the current Subproceeding 24-1, the Tribe's position was that Final Decision #1 was ambiguous because Judge Boldt's list of Sauk-Suiattle U&A did

not include the Skagit River, but the District Court preceded that list with several positive findings and evidentiary references connecting Appellant with the Skagit River, creating confusion as to Judge Boldt's omission. Therefore, in Subproceeding 20-1, Appellant argued that the area appellant's members were engaging in fishing was implicitly included as part of Sauk-Suiattle U&A. The District Court disagreed with the Tribe and the Ninth Circuit affirmed, holding that Judge Boldt "did not intend to include the Skagit River in the Sauk tribe's U&As." *Upper Skagit Indian Tribe*, 66 F.4th at 774. While assumed "intent" could conceivably be a factor in a Paragraph 25 (a) (1) proceeding, the test in a Paragraph 25 (a) (6) proceeding is whether evidence of customary fishing in a specifically identified area was before Judge Boldt from which after full consideration he "specifically determined" and rejected such evidence.

Appellant cannot accept the position that Judge Boldt considered evidence and specifically determined that the waters claimed by appellant below do *not* qualify as additional Sauk-Suiattle usual and accustomed fishing grounds. Nowhere in the entire Final Decision #1 did Judge Boldt make any such negative determinations for any body of water in relation to any tribe. Had he intended to make such an out-of-character ruling for all waters claimed by appellant, he would have clearly stated his negative conclusion and included a discussion of supporting

evidence. If a negative determination were intended, Judge Boldt would have clearly stated his holding and included much better support for it, or at least discounted the positive evidence he raised. The lack of any such clarity in Final Decision #1 with regard to the Skagit River and the Sauk-Suiattle Tribe compels the conclusion that Judge Boldt did not intend to make a determination against the Skagit River's U&A status, and therefore, that the Skagit River's status has not been specifically determined.

Finally, in the decision below, the District Court held that the list of Sauk-Suiattle's U&A in Final Decision #1 "excludes any unnamed waters." ER-9. In this appeal, the panel must decide whether fishing on any "unnamed waters" is now forever lost to Appellant without the benefit of proper fact-finding and adjudication, as the District Court has held in the proceeding under Paragraph 25 (a) (1), or whether Appellant may invoke Paragraph (a)(6) of the District Court's injunction for a full adjudication on certain unadjudicated waters where it claims treaty based U&A.

E. The district court erred in concluding that denial of appellant’s claim of fishing rights in marine waters is supported by the outcome of a subproceeding involving the Muckleshoot Tribe whose U&A had been specifically determined by Judge Boldt to include only the marine waters of Elliott Bay.

The District Court considered Subproceeding 2:17-sp-00002 (“*Muckleshoot III*”) as analogous and expressly stated in its dismissal order that it was “controlling in this case”. (1-ER 10, lines 7-8). In its Order denying Sauk-Suiattle’s motion for reconsideration, the district court *reversed* course, denying that it said *Muckleshoot* was controlling precedent, which it undeniably did:

7	proceeding, Subproceeding 20-1. Subproceeding 17-2 and the rulings above occurred after	
8	Washington II and are controlling precedent.	

(ER-24) (line 7-8) and stating that the court cited that subproceeding as merely as an “analogous” case discussing the application of collateral estoppel under similar facts (1-ER-4).

The District Court’s only analysis regarding the similarities between these subproceedings is that, like Sauk-Suiattle, Muckleshoot had also previously been subjected to a Paragraph 25(a) (1) enforcement proceeding, Subproceeding 97-1 (“*Muckleshoot II*”). The District Court below correctly noted that *Muckleshoot III*

held that:

Subproceeding 97-1 [*Muckleshoot II*] had already interpreted the geographic scope of Muckleshoot's marine U&A finding it was limited to Elliott Bay. As a result, Muckleshoot could not expand its U&A using Paragraph 25(a)(6).

1-ER-24, lines 1-2. However, the District Court failed to consider *how* the Court in *Muckleshoot II* concluded that the Muckleshoot's marine U&A was limited to Elliott Bay or to provide any analysis as to why that reasoning is analogous to the holding in Subproceeding 20-1, beyond the fact that they were both Paragraph 25(a)(1) subproceedings. Inferences made by the district court in past sub-proceedings do not necessarily bind the court to come to the same legal conclusions in others where as in this case the evidence is more equivocal.

In *Final Decision #1*, Judge Boldt had held that the Muckleshoot Tribe has U&A “secondarily in the saltwater of Puget Sound. 384 F. Supp. at 367. In *Muckleshoot II*, the Muckleshoot Tribe brought a Paragraph 25(a)(1) subproceeding to clarify the geographic scope of the saltwater U&A already determined by Judge Boldt. The District Court determined that Judge Boldt had intended the “saltwater of Puget Sound” to mean Elliott Bay. *United States v. Washington*, 19 F. Supp. 3d

1252, 1310 (W.D. Wash. 1997), *aff'd* 235 F.3d 429. In *Muckleshoot III*, the Muckleshoot sought to expand its marine U&A *beyond* Elliott Bay through a Paragraph 25(a)(6) subproceeding but the Court held that the entirety of Muckleshoot's marine U&A had been specifically determined in *Muckleshoot II*. *Muckleshoot Indian Tribe v. Tulalip Tribes*, 944 F.3d 1179, 1185 (9th Cir. 2019).

The most glaring distinction between the Muckleshoot subproceedings and Sauk-Suiattle's subproceedings are that both Muckleshoot subproceedings involved the same body of water, Puget Sound, a portion of which was *specifically* named, *i.e.*, Elliott Bay. Judge Boldt included saltwater U&A for Muckleshoot in Final Decision #1. Muckleshoot later clarified the boundaries of that saltwater U&A and were then prohibited from expanding that boundary because the tribe's saltwater U&A was already specifically determined.

In the present appeal, Judge Boldt did not adjudicate *any* saltwater U&A for Sauk-Suiattle in Final Decision #1. Nor did the Paragraph 25(a) (1) subproceeding brought by the Upper Skagit Tribe involve any alleged fishing in marine waters not in conformity with Initial Decision I. Nevertheless, the District Court held that Subproceeding 20-1 should exclude Sauk-Suiattle from claiming saltwater U&A

because “the Court has already re-examined the evidence before Judge Boldt in a 25(a) (1) subproceeding” despite that subproceeding not examining *any* evidence regarding saltwater, and that was outside the scope of that subproceeding. Unlike the Muckleshoot trilogy, appellant Sauk-Suiattle’s rights to fish in marine waters have never been adjudicated. As such, there is nothing from which to conclude that Judge Boldt’s intended such an exclusion.⁷

Rather than cherry-picking *Muckleshoot II* from among some eighty subproceedings in *United States v. Washington* as supporting authority for its dismissal order, the district court could more easily have cited the 1976 subproceeding involving the Stillaguamish Tribe and ruled to the opposite. There, in a Paragraph 25 (a) (1) enforcement proceeding brought by the Tulalip Tribes, Judge Boldt upbraided Stillaguamish for attempting to unilaterally expand its fishing places without following the procedures to seek additional fishing grounds set forth in Paragraph 25 (a) (6). *United States v. Washington*, 459 F. Supp. 1020, 1068 (W.D. Wash. 1978), *aff’d*, 645 F.2d 749 (9th Cir. 1981). This Circuit noted that:

If Stillaguamish intended to establish its right to fish in marine waters—a prerogative that Judge Boldt stated was not foreclosed by the 1974 U&As determination—it would have to do so by following the procedures set forth in Paragraph 25 of the initial injunction.

⁷ Similarly, Subproceeding 20-1 did not seek any clarification and did not re-examine any evidence before Judge Boldt, regarding the Baker River.

Stillaguamish Tribe v. State of Washington, Ninth Cir. No. 23-35066, slip opinion at 7 (May 21, 2024). Notwithstanding that Judge Boldt took umbrage at Stillaguamish for opening a fishing season at fishing grounds not expressly identified in the court’s initial decision, he said:

The Stillaguamish Tribe may *at any future time* apply to this court for hearing . . . regarding expanded usual and accustomed fishing places *so long as such application is in accordance with paragraph 25 of the court’s injunction*.

459 F. Supp. at 1068 (emphasis added). As applied to this appeal, Judge Boldt in that subproceeding—which is unquestionably among that body of law known as the law of the case—established that: (1) a decision in a Paragraph 25 (a) (1) subproceeding does not necessarily govern the outcome in one brought under 25 (a) (6); (2) that a subproceeding by a tribe seeking adjudication of additional fishing grounds may be brought at any future time notwithstanding the passage of time; and (3) such an application, presently denominated a Request for Determination, must be in accordance with paragraph 25, as appellant Sauk-Suiattle’s was.

The only body of water which overlaps between Subproceeding 20-1 and the present subproceeding is the Skagit River. However, the Court’s reasoning in *Muckleshoot III* is not applicable to Sauk-Suiattle’s claim to the Skagit River. In *Muckleshoot III* the Court considered District Court’s reasoning in *Muckleshoot II* and held that when re-examining the evidence before Judge Boldt, Judge Rothstein

determined “that he had *necessarily considered* whether the Muckleshoot had fishing places in various parts of Puget Sound but that he had in the end concluded that such places were limited to Elliott Bay.” *Muckleshoot III*, 944 F.3d at 1184 (emphasis added). Judge Boldt’s Findings of Fact state which areas are included in a Tribe’s U&A, but he never expressly *excluded* any bodies of water from a Tribe’s U&A. He also noted that his Findings were not a complete inventory of any tribe’s U&A and created the Paragraph 25 procedures for Tribe’s to claim U&A not specifically determined by Final Decision #1. *Final Decision #1*, 384 F. Supp. at 333. Because of this, a negative determination regarding a Tribe’s U&A is only appropriate where Judge Boldt *necessarily* considered a body of water and excluded it from Final Decision #1. Without the ability to read the mind of Judge Boldt, it is not enough that he may have considered a body of water for a tribe’s U&A, or even that he probably or likely considered a body of water. The Court can only definitely determine that Judge Boldt intended to exclude a body of water he did not mention if he necessarily considered it.

The nature of marine waters allowed the Court to be confident that Judge Boldt, in determining Muckleshoot’s U&A, necessarily considered the waters around Elliott Bay but intentionally excluded them. When Judge Boldt was required to define the bounds of marine water U&A for Muckleshoot, it was his own pen that

drew where each marine U&A ended, leaving the Court to conclude that Judge Boldt necessarily determined that fishing did not occur beyond the Judge’s boundary line.

To hold that a tribe is precluded from adjudicating its U&A on waters that were not listed in Final Decision #1 flies in the face of Judge Boldt’s carefully structured decision. Judge Boldt specifically acknowledged that he did not—and could not—adjudicate every waterbody for every tribe. He stated that it would be “impossible to compile a complete inventory of any tribe’s usual and accustomed grounds and stations.” 384 F. Supp. at 353.⁸

F.The district court committed error in ruling that the decision in subproceeding 20-1 governs this case.

⁸ This is precisely Appellant’s situation. In the early 1970s, during the original *U.S. v. Washington* litigation, the Tribe had extremely limited financial resources and had to accept group-representation offered by a legal services organization. The resulting adjudication of Sauk-Suiattle U&A was not complete, but the Tribe understood that when the time was right, it would be allowed to return to court and claim its full U&A. By no means is the Appellant wealthy now. Paying for lawyers and historians still causes a major financial strain and diminishes tribal funds that provide direct services to its people. Nevertheless, Appellant believes that the time is right for its return to court, seeking long-delayed treaty fishing rights in the Skagit River, Baker River, and in certain marine waterbodies in the Puget Sound. After so many years, finding that the door is shut on such claims is unjustified and insulting. This Court should reverse the lower court, remand for proceedings consistent with Final Decision #1 Paragraph (a)(6).

The issue in a 25(a) (1) proceeding is whether a party acted not in conformity with the 1974 decree in Initial Decision I. Which explains why 2:20-sp-0001 (20-1) does not govern this case. 25 (a) (1) provides:

(a) The parties or any of them may invoke the continuing jurisdiction of this 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 # 1 or this injunction[.]

In its Request for Determination under Paragraph 25 (a) (1), Upper Skagit, referencing its Exhibit 1, alleged that “Sauk issued a regulation purporting to authorize a treaty fishery in a *portion* of the Skagit River beginning on September 26, 2020.” See Ex. 1. Case 2:20-sp-00001-RSM Document 1-1, p. 4, ¶ 9 (emphasis added). Exhibit 1 was a copy of Sauk’s fishing regulation opening only a specific portion of the confluence of the Cascade and Skagit Rivers:

1. Area 78P: Cascade River from confluence to just above bridge crossing Cascade River on Rockport-Cascade Road.
2. Area 78D: Skagit River from 100 yards upstream of the Cascade River Road Bridge downstream to Rocky Creek just above Illabot Creek complex.

Case 2:20-sp-00001-RSM Document 1-1, p. 8 (Ex. 1). Sauk-Suiattle responded that

Although it is less than clear what “activities” plaintiff deems not to have been in conformity with the final decision, it appears to have been the enactment of a regulation by the defendant authorizing its members to harvest Coho in the area of the confluence of the Cascade and Skagit Rivers. If, on the other hand, plaintiff’s complaint is that defendant’s members fished in the area described in defendant’s regulation, the regulation raises a fair question of disputed fact, *i.e.*, at what point at the confluence, or mouth, of the Cascade River where its waters commingle with those of the Skagit, does it become the Skagit River and cease being the Cascade River.

Pp. 5-6 of ECF 28 of 2:20-sp-00001-RSM. That this was the sole issue in 20-1 was confirmed by Upper Skagit at oral argument in the Ninth Circuit:

Sauk’s claim below was: (1) that Upper Skagit procedurally was barred from suit because it didn’t comply with Paragraph 25 (b) whatever, and (2) that the waters where they fished could be considered part of their U&A.

Oral Argument, Ninth Circuit No. 21-35985 (Nov. 9, 2022), at 21:58 to 22:18. As counsel for Upper Skagit stated at oral argument: “Counsel below was very specific as to where he described the area at issue”. Oral Argument, Ninth Circuit No. 21-35985 (Nov. 9, 2022), at 22:20 to 22:29. Which perhaps explains Judge Ikuta’s comment that “I see arguments from the text, from the record, for a 25(a)(6) [subproceeding].” Oral Argument at 7:05, *Upper Skagit Indian Tribe v. Sauk-Suiattle Indian Tribe*, 66 F.4th 766 (9th Cir. 2023) (No. 21-35985).⁹

⁹ <https://www.ca9.uscourts.gov/media/video/?20221109/21-35985>

Appellant’s argument in 20-1 was that its members were not engaging in fishing in the *Skagit River* but rather were in the Netherlands of the “confluence” of the Cascade and Skagit Rivers and therefore not outside the scope of the express language of the decree. Since the district court concluded that Sauk were *in* the Skagit River—without explaining why—and since the Skagit River was not mentioned in the decree it was reasonable to conclude that SSIT was acting “not in conformity” with the decree. A proceeding under *that* paragraph is not filed by the tribe engaging in the alleged lack of conformity but by a complaining tribe—in 20-1 the Upper Skagit Tribe sought to enjoin Sauk-Suiattle—which is manifestly different from a 25(a) (6) proceeding. In one proceeding the issue is whether a party was acting contrary to express language of the decree and merely reviewing the language in the decree is dispositive, while in the other involves a party themselves asserting a new claim for geographic areas not specifically addressed in the decree and which was not therefore “specifically determined.” One is an action to limit a party to the scope of the written decree. The other seeks to expand the scope of the written decree.

G. The District Court erred in ruling that appellant’s claim to fishing rights in marine waters was barred by lack of subject matter jurisdiction, whereas the claims of tribes in Washington II to rights in marine waters could survive dismissal because the litigants “waived” lack of subject matter jurisdiction.

In Finding of Fact 148 Judge Boldt listed the usual and accustomed fishing places of the Upper Skagit Tribe as composed of numerous freshwater streams along the Skagit River, extending from about Mt. Vernon upstream to Gorge Dam. 384 F. Supp. at 379. The similarities in Finding of Fact 148 and Appellant’s Finding of Fact 131¹⁰ are striking. Both Findings of Fact appear to limit each tribe to a specific set of riverine U&A.¹¹ In neither of Judge Boldt’s two findings of facts relating to the

¹⁰ “The usual and accustomed fishing places of the Sauk River Indians at the time of the treaty included Sauk River, Cascade River, Suiattle River and the following creeks which are tributary to the Suiattle River [listing nine creeks].” 384 F. Supp. at 376.

¹¹ The similarities between Sauk-Suiattle and Upper Skagit’s Finding of Facts goes beyond merely textual similarities. In Finding of Fact 147 Judge Boldt incorporated the determination of the Indian Claims Commission that the Upper Skagit Tribe is the successor in interest to “ten separate villages on the Upper Skagit and Sauk Rivers.” *Final Decision #1*, 384 F. Supp. at 379. One of those villages identified by the Indian Claims Commission was Sah-Ku-Mehu. *Upper Skagit Tribe of Indian v. United States*, 8 Ind. Cl. Com. 475, 476 (1960). While Appellant has consistently held out that Sah-Ku-Mehu always maintained a distinct identity from the other Upper Skagit Tribes, their close ties and geographic proximity has at times led certain ethnographers, anthropologists and the courts to include Sah-Ku-Mehu as a member of the Upper Skagit Tribes. Indeed, this is a position that the Upper Skagit Tribes continue to hold out. See Dr. Bruce Miller, *Upper Skagit Tribal Historical Overview*, UPPER SKAGIT INDIAN TRIBE, (Mar. 21 2025), <https://upperskagittribe-nsn.gov/who-we-are/> (“The Upper Skagit Indian Tribe is a federally recognized Indian tribe composed of eleven predecessor bands, including the Nuwha’ha,

Upper Skagit Tribe does he indicate that the Tribe had any U&A in marine waters, nor any marine presence at all. The farthest downstream area Judge Boldt named was Mount Vernon, an area which is still approximately six miles from the saltwater. Judge Boldt did not indicate that the Upper Skagit Tribe had any U&A outside of an unambiguously identified river. Because Finding of Fact 148 and Finding of Fact 131 are nearly identical in their geographic limitations of two neighboring tribes, the law of the case requires that Appellant should be allowed to bring Paragraph 25(a)(6) subproceeding.

The District Court's only attempt to distinguish Appellant's present claim from Upper Skagit's in *Washington II* is that "the parties there *agreed* that marine waters [were] not specifically determined." (ER-23 lines 15-16). Subject matter jurisdiction cannot be conferred upon a United States district court merely by agreement of the parties.

H. Due to the inconsistencies created by the district court stating it declined to rule on certain issues while expressing its opinion upon and citing authority for them, neither an appellant nor reviewing panel can clearly determine what grounds the district court premised its ruling on nor which issues can be assigned as error.

Nookachamps, Bsigwigwils, Bsxwexwehwa'¹, Chobahabish, Sabelxu, Saylayotsid, Shayayotsid, Kwabatsabsh, *Sahkumehu*, and Skaywih") (emphasis added).

That the district court was determined to deny appellant's Request for Determination and dismiss the subproceeding is evident throughout its Order Granting Motion to Dismiss. It commenced its order by noting that appellant's fishing places were determined in 1974 and that "over 40 years passed without further litigation on this issue." Then, the district court felt it necessary to reinforce the assertions of respondents:

The Responding Tribes call the above claimed waters "far beyond the areas Sauk customarily fished at and before treaty time..." and move to dismiss for, *inter alia*, lack of subject matter jurisdiction and violating *res judicata*, collateral estoppel, law of the case, and judicial estoppel.

ER 4. Neither laches nor lapse of time bars assertion of rights reserved by treaty. *United States v. Washington*, 157 F.3d 630, 649 (9th Cir. 1998) ("[L]aches or estoppel is not available to defeat Indian treaty rights.") (quoting *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983)); and *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 334 (9th Cir. 1956). If that were the case, *United States v. Washington* could never have been brought 115 years after execution of the treaties reserving tribal rights to take fish. As Judge Boldt stated, "the mere passage of time has not eroded, and cannot erode, the rights guaranteed by solemn treaties that both sides pledged on their honor to uphold. 384 F. Supp. At 407.

Nor was it pertinent for the district court to note the distance of appellant from

the marine waters claimed in its Request for Determination. If distance was a factor in determining the geographic scope of a party's rights, the distant Yakama might never have been found to hold rights in the case area. *See, e.g.*, 384 F. Supp. At 380.

Nor was it consistent with judicial temperament for the district court to characterize appellant's Request for Determination as "the Skagit River is back, and much more" (ER-18, line 4), that appellant's claim to rights in marine waters was "dead on arrival" (ER-20, line 22), or that appellant's claims twisted logic and reality. ER-22, line 19. None such statements were necessary or appropriate to the court's determination.

What is further confusing is that, while stating that it "declines to issue a ruling" on collateral estoppel and other issues, the district court in the same paragraph *announces* it as a basis for its decision:

At the very least, the question of a U&A for the Skagit River should be barred by collateral estoppel.

ER-24, line 11-12. It is difficult to perceive how an appellant can assign error to a

legal conclusion where the district court, in the same paragraph, enunciates collateral estoppel as a *basis* which buttresses its ruling while stating that *declines* to issue a ruling on that issue—when it just did.

To the same effect is the court’s pronouncement in the same paragraph that, although respondents moved to dismiss under the law of the case, it “declines to issue a ruling” on that issue as well, even though throughout its Order the district court quotes selected statements of the law of the case in support of its ruling, cherry-picking such internal case law as “the court retained jurisdiction in this case for limited and express purposes” (ER-21, lines 16-17) while ignoring other principles such as “in determining usual and accustomed fishing places the court cannot follow stringent proof standards,” 459. F. Supp. 1020, 1059 (W.D. Wash. 1978), and that “motions to open a new subproceeding should be liberally granted.” 20 F. Supp. 3d 899, 983 (W.D. Wash. 2008). These, too, are the law of the case.¹²

¹² In Finding of Fact 130 Judge Boldt found that:

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

384 F. Supp. 376. It has never been explained how the Swinomish Indian Tribal Community, which is an assemblage of Puget Sound Indians established by the

The foregoing is among the many inconsistent reasons the court gave for its decision below. The district court in *Initial Decision I* drew no distinction between appellant and the Sahkumehu signatory to the Treaty of Point Elliott, using the names Sauk-Suiattle, Sauk River Indians, and Sahkumehu interchangeably. 384 F. Supp. at 375-376. Nevertheless, the district below attempts to draw a distinction between “marine-fishing Sah-ku-mehu and the river-based Sauk-Suiattle—a connection that was overlooked by Judge Boldt[.]” That makes no sense. While on one page the district court touts Judge Boldt’s “careful review” of all of the evidence before him, the district court on the next page asserts that an uncaredful Judge Boldt “overlooked” whether Sauk-Suiattle and the Sahkumehu were distinct entities. It is *res judicata* that appellant is the latter’s successor in interest. Merely overlooking something does not constitute a specific determination.¹³ Nor does judicial fatigue merit dismissal of appellant’s Request for Determination.

Wheeler-Howard Act of 1934, can assert that appellant Sauk-Suiattle lacks treaty rights when treaty rights exercised by Swinomish derive in significant part from members of appellant’s tribe who were removed to the Swinomish Reservation.

¹³ While chastising Sauk-Suiattle of “half-paraphrasing” Judge Boldt’s finding, the district court fails to note that Judge Boldt himself half-paraphrased the testimony of Barbara Lane he inaccurately referenced. Dr. Lane’s testimony was actually:

In addition to procuring salmon (including steelhead) and other fish in the foothills region, the Sauk people travelled to the saltwater to procure

CONCLUSION

For the foregoing reasons, the decision of the district court should be *reversed*.

Respectfully submitted,

SAUK-SUIATTLE INDIAN TRIBE

By:

S/Jack Warren Fiander, WSBA 13116

Counsel for Appellant Sauk-Suiattle
Indian Tribe

marine life, particularly shellfish, unavailable in their own territory. At least in historic times, the beaches around Tulalip were a favorite resort.

2-ER-56, Exhibit FPTO, cited at 384 F. Supp. 376 (Finding of Fact 132).

Certificate of Service

The foregoing Brief of Appellant was filed with the Clerk of Court and copies served upon all counsel of record using the court's electronic system.

S/Jack W. Fiander

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FOR THE NINTH CIRCUIT**

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