



Skagit County Board of Commissioners

Ron Wesen, First District
Kenneth A. Dahlstedt, Second District
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April 11, 2017

Stanley M. Speaks, Regional Director
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RE: Second Objection of Skagit County to Proposed Changes to Swinomish Indian Tribal Community (SITC) Constitution Regarding Off-Reservation Jurisdiction Pursuant to 1855 Treaty of Point Elliott

Director Speaks,

We write as a follow up to our November 28, 2016 objection letter, which pertains to tribal Constitutional Amendments proposed by the Swinomish Indian Tribal Community (“SITC”). If approved by SITC, the Constitutional Amendments will require agency action in the form of approval or rejection by the Secretary of the Interior.

Please accept this additional letter of objection as part of the record of agency action in this matter. As a formal party of record and interest, we request that you please keep us informed, in advance, of any agency action or decision regarding SITC’s proposed Constitutional Amendments.

In our 11/28/2016 letter, we objected to SITC’s proposed expansion of the SITC reservation to include the March’s Point area, the location of two existing refineries.

After sending our 11/28/2016 letter, we obtained documents through the Freedom of Information Act (“FOIA”) from your offices, reflecting that your offices rejected SITC’s claim to March’s Point. In response, SITC modified their proposed Constitutional Amendment to remove reference to a reservation that would encompass March’s Point.

We believe your decision was correct, and thank you for your diligent attention to the applicable facts and law. Accordingly, it is our understanding that the United States does *not* concur with SITC that the SITC reservation extends northward and westward beyond the surveyed line established by the 1873 Executive Order.

That noted, the FOIA-responsive documents we obtained from your offices reflect that SITC continues to explicitly assert jurisdiction, on the basis of the 1855 Treaty of Point Elliott, over all “usual and accustomed fishing grounds and

stations” (including lands used to access usual and accustomed areas), as well any “open and unclaimed lands” that SITC claims for hunting and gathering.¹ 10 Stat. 1133.

While the precise area over which SITC is claiming off-reservation jurisdiction is not specified, based on *U.S. v. Washington* and SITC’s tribal code, it would appear to encompass many thousands of acres of off-reservation privately-owned shoreline, agricultural land, public land, and public waters.²

Furthermore, it is unclear if SITC is asserting criminal jurisdiction; land use jurisdiction; general police power jurisdiction; regulatory jurisdiction – or all of the foregoing. It is also unclear if SITC’s jurisdictional claim includes in its ambit only SITC tribal members; all Native American citizens; or all United States citizens in an assertion of general joint jurisdiction.

It is also unclear if SITC proposes to divide up jurisdictional authority with the other treaty tribes who share usual and accustomed areas within Skagit County, or if there would be overlapping tribal jurisdiction asserted by multiple tribes alongside Skagit County’s general police power jurisdiction.

Despite various requests, Skagit County has received no substantive information from SITC regarding SITC’s intentions about any of these questions. That noted, our experience strongly suggests that SITC will interpret the vast ambiguity in the Constitutional Amendments in the most expansive manner possible.

Based on our research, it is our understanding that SITC intends that “jurisdiction” for the purposes of the Constitutional Amendment involve off-reservation jurisdiction over any local government action with any impact or nexus to treaty fishing, hunting, or gathering rights.

This is plainly contrary to federal law.

As you are aware, the basic premise of the 1855 Treaty of Point Elliott (“**Treaty**”) was that SITC relinquished all interest in lands now forming Skagit County, in consideration for which SITC reserved a fifteen square mile reservation; monetary payments; fishing and hunting rights; federal health care; education; and certain other reserved rights. 10 Stat. 1133; *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 661 (1979).

We recognize that the Treaty contains implied rights arising from rights explicitly reserved. In particular, federal courts have established that the Treaty requires the State of Washington to protect salmon habitat, on grounds that if there are no salmon left the Treaty’s fishing rights have little meaning. See, e.g., *U.S. v. Washington* (Culvert Case), 827 F.3d 826, 851-53 (9th Cir. 2016).

We also recognize that treaties must be construed not as a lawyer would today construe them, but as the treaties would have been understood by the Indians signing the treaties at the time. *Fishing Vessel*, 443 U.S. at 675–76 (“[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.”)

¹ SITC Proposed Constitutional Amendment Article II, Section 3 (“Except as prohibited by federal law, the Swinomish Indian Tribal Community shall have jurisdiction over all persons, subjects, property and activities occurring within (a) its territory as defined by this Article; and (b) the Tribe’s usual and accustomed fishing grounds and stations and all open and unclaimed lands, as guaranteed by treaty for fishing, hunting and gathering, and on property used for access to fishing, hunting and gathering areas.”)

² See, *U.S. v. Washington*, 459 F.Supp. 1020, 1049 (1975)(i.e., the Boldt Decision), which states that “[t]he usual and accustomed fishing places of the Swinomish Tribal Community include the Skagit River and its tributaries, the Samish River and its tributaries and the marine areas of northern Puget Sound from the Fraser River south to and including Whidbey, Camano, Fidalgo, Guemes, Samish, Cypress and the San Juan Islands, and including Bellingham Bay and Hale Passage adjacent to Lummi Island.” See also SITC Code Title 18-01.020(G)(“The Tribe’s treaty fishing right also includes the right to cross private lands to access treaty secured usual and accustomed fishing grounds and stations and to occupy private land for the purposes specified in the treaty.”)

All this noted, relinquishment of *jurisdiction* over lands outside the Treaty reservation was the central premise of the Treaty, and the main benefit of the bargain for the citizens on the other side of the agreement – something the Indians signing the Treaty fully understood.

Accordingly, SITC's claim to off-reservation jurisdiction violates the Treaty of Point Elliott and thus federal law, and cannot be approved.

Not only does SITC's off-reservation jurisdictional assertion directly violate the Treaty's basic intent and purpose, but also violates Treaty Article IX, which states that (“[Swinomish] promise to be friendly with all citizens [of the United States], and they pledge themselves to commit no depredations on the property of such citizens.”)

Skagit County landowners are already experiencing difficulty selling property to third party buyers in areas over which SITC has claims expanded jurisdiction, and SITC's assertions are inherently suppressing off-reservation property values as a result. Accordingly, SITC's off-reservation jurisdiction claims, which are obviously contrary to federal law, constitute “depredation on the property of [Skagit County's] citizens,” and therefore offend Treaty Article IX.

As we raised in our 11/28/2016 letter, given the long-standing history of disputes and litigation between local tribes over “usual and accustomed” and “open and unclaimed” lands, we are concerned that other tribes will make similar claims, leading to overlapping and inconsistent jurisdictional authority as well as many years of contentious litigation.

For the foregoing reasons, we re-assert our objection to SITC's proposed Constitutional Amendments to the extent they assert off-reservation jurisdiction under authority of the Treaty of Point Elliott, and respectfully request that the United States decline to approve Section 3 of the proposed SITC Constitutional Amendments.

**BOARD OF COUNTY COMMISSIONERS
SKAGIT COUNTY, WASHINGTON**



Ron Wesen, Chair
Commissioner



Kenneth A. Dahlstedt
Commissioner



Lisa Janicki
Commissioner

cc: Senator Maria Cantwell
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Representative Suzan DelBene
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