



# Skagit County Prosecuting Attorney

## Richard A. Weyrich

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### CRIMINAL DIVISION

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### FAMILY SUPPORT DIVISION

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CHIEF DEPUTY  
**KURT E. HEFFERLINE**

SENIOR DEPUTY  
**GWEN L. HALLIDAY**

June 14, 2017

Eric Shepard  
Associate Solicitor  
Division of Indian Affairs  
Office of the Solicitor  
Department of the Interior  
1849 C Street, NW, Room 6511  
Washington, D.C. 20240

Rebekah Krispinsky  
Acting Assistant Solicitor  
Branch of Tribal Government Services  
Division of Indian Affairs  
Office of the Solicitor  
Department of the Interior  
505 Marquette Avenue NW, Suite 1800  
Albuquerque, NM 87102

**RE: Swinomish Constitutional Amendment – Territory and Jurisdictional Claims**

Mr. Shepard and Ms. Krispinsky,

Thank you for discussing the proposed Swinomish Indian Tribal Community's ("SITC") Constitutional Amendments with me last week. Following our conversation, I wanted to recap Skagit County's ("County") position on this issue.

For the reasons set forth below, Skagit County respectfully requests that the United States, to the extent it approves the SITC Constitutional Amendments Article 1 Sections 2 and 3, provide clarification and precise definition as to the boundaries of the SITC Reservation, as well as the scope of the jurisdiction and authority envisioned by an approval. To the extent it is not possible to do so, Skagit County requests that the United States reject the SITC Constitutional Amendments until these issues can be clarified.

Absent rigorous clarification or disapproval, we share the BIA Regional Director's fear that "this expansion of tribal jurisdiction may lead to conflicts as the [Swinomish] Tribe flexes its regulatory authority within an expanded tribal territory."<sup>1</sup>

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<sup>1</sup> Letter from BIA Northwest Regional Director Stanley Speaks to Swinomish Chairman Brian Cladoosby, Enclosure 1, dated September 13, 2016, <https://www.skagitcounty.net/Home/Documents/Press/3702P5-Response%20to%20Swinomish.pdf> (last visited June 14, 2017).

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**Main Office**  
605 S. Third Street  
Mount Vernon WA 98273  
(360) 416-1600  
Fax: (360) 416-1648  
prosecutor@co.skagit.wa.us

**Civil Division**  
Administration Bldg., 700 S 2<sup>nd</sup> St., Rm 202  
Mount Vernon WA 98273  
(360) 416-1600  
Fax: (360) 416-1649  
prosecutor@co.skagit.wa.us

**Family Support Division**  
PO Box 1226, 208 E Blackburn Rd Ste 203  
Mount Vernon WA 98273  
(360) 416-1161 fax (360) 416-1163

**1. SITC Reservation Boundary.** Skagit County shares the concerns regarding the March's Point area discussed in Tesoro's letter dated May 4, 2017 to Interior Secretary Zinke.<sup>2</sup> SITC has identified the March's Point region as an acquisition target, an area of land valued at over \$10 billion due to extensive existing industrial development. Contrary to SITC's claims, it has been established as a matter of law that the SITC reservation is bounded in the north by the 1873 Executive Order. Nevertheless, SITC leadership's repetitive, highly public assertions about the status of March's Point are wrongfully devaluing property in the area,<sup>3</sup> and we request that any approval of the SITC Constitutional Amendments make the legal northern boundary of the SITC reservation explicitly clear.

**2. SITC Off-Reservation Jurisdiction.** As we discussed last week, Skagit County is extremely concerned about the implications of SITC's off-reservation jurisdictional and territorial assertions. Specifically, SITC asks the United States to approve the following new constitutional language:

*To the fullest extent possible consistent with applicable federal law and the sovereign powers of the Tribe, 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 such other lands and water as is necessary for access to such fishing, hunting and gathering areas.*

*Further, jurisdiction shall extend to all persons, subjects, property and activities that may hereafter be included within the jurisdiction of the Tribe.*

Proposed SITC Constitutional Amendment Article 1, Section 3.

In addition, SITC proposes to amend its own constitutional definition of SITC "territory" to include "all lands, water, property, airspace, surface rights, subsurface rights and other natural resources...in which the Tribe now or in the future has any interest...." Proposed SITC Constitutional Amendment Article 1, Section 2.<sup>4</sup>

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<sup>2</sup> <https://www.skagitcounty.net/Home/Documents/Press/Zinke%20Letter%2005%2003%202017.pdf> (last visited June 14, 2017).

<sup>3</sup> See, Letter from Board of Skagit County Commissioners to SITC Chairman Cladoosby dated April 5, 2017, copy available at <https://www.skagitcounty.net/Home/Documents/Press/04-05-2017%20-%20Ltr%20to%20Brian%20Cladoosby%20-%20SITC%20Claim%20to%20March%20Point%20Region.pdf> (last visited June 14, 2017).

<sup>4</sup> Black's Law Dictionary defines "jurisdiction" as "[a] government's general power to exercise authority over all persons and things within its territory," and an "interest" as "[a] legal share in something; all or part of a legal equitable claim to or right in property." Black's Law Dictionary, 7<sup>th</sup> Edition, 816, 855.

Skagit County first had the opportunity to review SITC's proposed constitutional amendments in October 2016, approximately 15 months after SITC initiated the amendment process with the Department of the Interior.

Shortly thereafter, we obtained a September 13, 2016 letter from BIA Regional Director Stanley Speaks to SITC Chairman Cladoosby, which, in an enclosure prepared by the Regional Solicitor's Office, stated as follows:

*The proposal to modify Article I [of the SITC Constitution] presents significant changes to this section with expansive language to the jurisdiction and territory of the Tribe. The changes do present contradictions to applicable law. Additionally, potential conflicts may arise if this amendment is enacted. The proposed amendment first defines the Tribe's territory and then secondly defines the Tribe's jurisdiction.*

*In the section defining territory, the proposed changes delete all the reference to the Executive Order of September 9, 1873 (Executive Order), in pursuance of Article III of the Treaty of Point Elliott, January 22, 1855 (12 Stat. 928). The Executive Order (Attachment 3) defines the northern boundary of the Swinomish Indian Reservation. Removal of this language is in contradiction to the Executive Order.*

***Next, the section on jurisdiction includes "all persons, subjects, property and activities occurring within its territory as defined by this Article." A potential expansion in territory as defined in the first section allows for a potential expansion of jurisdiction and regulatory authority as defined in the second section. If the proposed amendment is enacted, this expansion of tribal jurisdiction may lead to conflicts as the Tribe flexes its regulatory authority within an expanded tribal territory.<sup>5</sup>***

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<sup>5</sup> Letter to SITC from BIA Regional Director Stanley Speaks dated September 13, 2016, Enclosure 1 at 2-3 (copy attached as **Exhibit 1**) (bolding added). A copy is available online at <https://www.skagitcounty.net/Home/Documents/Press/3702P5-Response%20to%20Swinomish.pdf> (last visited June 14, 2017).

Since then, Skagit County has repeatedly attempted to engage SITC in dialogue, explicitly seeking an explanation of the scope of the territory and jurisdiction SITC asserts under the Treaty.<sup>6</sup> SITC has flatly refused to engage at any meaningful level, substantially exacerbating our community's concerns.

First and foremost, it is important to understand the context in which this arises. SITC is the second largest of four federally-recognized tribes in Skagit County, with 540 Native Americans served by the SITC reservation according to the 2010 census, while Skagit County represents approximately 116,000 citizens. SITC tribal government employs approximately 200 individuals, an inordinate number of whom are litigation attorneys. Unlike most area tribes, SITC pays no per capita distributions to its members, instead directing its resources into activities such as the one presently under discussion.

Under its current leadership (Chairman Brian Cladoosby), SITC has, since the mid-90s, pursued a broad-ranging and programmatic effort to assert direct control over the Skagit River ecosystem at the expense of its democratically-elected governments, asserting rights over taxation, land use, water rights and a broad range of issues on a constant and ongoing basis, with contentious litigation the norm, costing our county many millions of dollars in legal costs and deeply damaging relations between tribal and non-tribal communities.

By contrast, Skagit County has a warm and cooperative relationship with the other three federally-recognized tribes in Skagit County. We recently negotiated mutual services agreements regarding gaming and cannabis with the Samish Indian Nation, Skagit County's largest tribe.<sup>7</sup> We jointly completed the largest habitat restoration project in our ecosystem, the Hansen Creek Restoration Project, located on Skagit County-owned land, in partnership with the Upper Skagit Indian Tribe.<sup>8</sup>

Furthermore, Skagit County supports post-carbon initiatives that help create sustainability and resilience in our community, such as experiments in agricultural food production that also protect salmon habitat functions and values.

It is Skagit County's strong preference to work on positive, creative, forward-looking initiatives such as this with our four local tribes, rather than remaining mired in the kind of revenge-based conflict ideology that appears to motivate SITC's leadership.

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<sup>6</sup> See, e.g., Letter to SITC Tribal Attorney Stephen LeCuyer dated April 24, 2017, available at <https://www.skagitcounty.net/Home/Documents/Press/Letter%20to%20LeCuyer%2004242017.pdf>

<sup>7</sup> "County and Samish Indian Nation Sign Compensation Agreement," December 15, 2015, [http://www.goskagit.com/all\\_access/county-samish-indian-nation-sign-compensation-agreement/article\\_736035db-d242-57aa-bf80-bf48e3807809.html](http://www.goskagit.com/all_access/county-samish-indian-nation-sign-compensation-agreement/article_736035db-d242-57aa-bf80-bf48e3807809.html) (last visited June 14, 2017).

<sup>8</sup> "Upper Skagit Tribe Uses Groundbreaking Methods In Hansen Creek Project," Northwest Treaty Tribes, October 15, 2009, <https://nwtreatytribes.org/upper-skagit-tribe-uses-groundbreaking-methods-in-hansen-creek-project/> (last visited June 14, 2017).

We appreciate Chairman Cladoosby's position as the current Chairman of the National Congress of American Indians through the end of 2017, and we understand his national role. However, Skagit County's focus is on Skagit County, and we believe that sound public policy dictates that the United States, in recognizing tribal sovereignty, also attempt to incentivize a reasonable level of cooperation and peaceful coexistence. Recent years, in our view, have seen decidedly the opposite.

The fact is that we cannot say exactly the nature, form and scope of the likely "*conflicts as the [Swinomish] Tribe flexes its regulatory authority within an expanded tribal territory,*" but, like Regional Director Speaks, we are certain they will occur. Following are a few examples.

- SITC is claiming territorial jurisdiction over any land in which it claims an "interest." SITC Constitutional Amendment Article I Section 2. We are concerned this is an effort to end-run the already-inadequate limitations on fee-to-trust acquisitions pursuant to the 1934 Indian Reorganization Act.
- If the Article I SITC Constitutional Amendments are approved by the United States as written, we believe it is a certainty that SITC will assert, in a broad range of proceedings and fora, that the United States has endorsed SITC jurisdiction over anything that impacts treaty-protected fisheries or land in which SITC has any "interest." Obviously, the ambiguity itself is concerning.
- On the SITC website, SITC itself explains that the expanded jurisdiction and territorial claims are necessary to achieve expanded "returned jurisdiction" and "newly delegated jurisdiction," specifically referencing the assertion of off-reservation jurisdiction under Treatment as States (TAS) authority pursuant to the Clean Water Act and Clean Air Act.<sup>9</sup> Skagit County believes that citizens of our county who own land off-reservation should be able to buy and sell land with the certainty that they are governed and regulated by state and county law, and not by the laws of the Swinomish Indian Tribal Community. Approval of the Article I SITC Constitutional Amendments, absent clear definition and clarification, will call that assumption into significant doubt.
- It is critically important to recognize, given the outsized political, financial and legal power that SITC wields over the local economy, press, local government and state government, that the mere assertion of legal rights by SITC takes on a life of its own even without a judicial decision. A good example is provided by the situation at March's Point, where property owners are suffering devaluation of their property, which SITC has previously identified as an acquisition target, simply because of SITC's public statements about the status of their land. The Board of Skagit County Commissioners has explicitly asked SITC to litigate this issue in federal court, but SITC refuses, presumably because it perceives more advantage in holding this threat over our

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<sup>9</sup> SITC webpage, <http://standup.vote/swinomish/recommended-changes/territory-and-jurisdiction/> (last visited June 13, 2017).

community rather than having it decided. We believe that approval of the Article I SITC Constitutional Amendments will substantially increase situations of this nature throughout our community.

- An intersectional cause for concern is that the SITC Constitutional Amendments will remove Interior's role in approving new SITC laws. *See*, SITC Constitutional Amendment Article II Section 2 (removing Secretarial review of tribal ordinances). We believe that if the Article I SITC Constitutional Amendments are approved without clarification, SITC intends to begin passing tribal ordinances that assert various forms of off-reservation jurisdiction that, SITC will contend, are consistent with federal law. This is the crux of the concern expressed by Regional Director Speaks' letter.

If the United States approves the Article I Constitutional Amendments without providing clarity as to their scope, it will necessarily fall to our small rural community to attempt to resist SITC overreach by asserting inconsistency with federal law, effectively condemning our small rural community to many more years of conflict and litigation with SITC.

As we discussed last week, we believe that the mere reference in the SITC Constitutional Amendments to federal law consistency (“[t]o the fullest extent possible consistent with applicable federal law and the sovereign powers of the Tribe”) will fail to constrain SITC's ongoing pattern of behavior. Instead, it will incentivize a new round of SITC aggression against Skagit County and our community under the guise of expanded jurisdiction under federal law.

In an April 24, 2017 letter to the Skagit County Board of Commissioners, BIA Regional Director Speaks opined that SITC might be attempting to claim jurisdiction over regulation of their own treaty fishermen and hunters, citing *U.S. v. Washington*, 384 F.Supp. 312, 332 (1974) and *Mescalero v. Mescalero Apache Tribe*, 462 U.S. 324, 330 (1983).

In addition to being a small portion of the situation, this has already been the law for the past four decades, and part of the SITC Constitution for the past eight decades. As you are aware, *U.S. v. Washington* (Boldt Decision) specifically allows for this right, and also makes clear that it cannot be expanded as SITC is now attempting:

*The Plaintiff tribes having a federally-recognized tribal government have jurisdiction (in conformity with their tribal constitutions or other applicable tribal rules or federal statutes) to enact and enforce regulations relating to the exercise outside reservation boundaries by their members of fishing rights secured to said tribes by treaty. However, the tribes cannot enlarge the right beyond that secured in the treaty.*<sup>10</sup>

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<sup>10</sup> 384 F. Supp. at 403.

And the previous version of the SITC Constitution, in place for the past eighty years, already provided that SITC jurisdiction “shall extend to such other lands as may be hereafter added thereto under any law of the United States.” Prior SITC Constitution Article 1 Section 2.

**Thus, off-reservation regulation of tribal hunting and fishing is a right that SITC plainly already possessed, both judicially and under its own constitution.** Accordingly, an assertion of off-reservation jurisdiction over its own members’ treaty hunting and fishing activities cannot and does not logically explain why SITC is now going through so much trouble to claim jurisdiction, off-reservation, over “all land, water, and airspace [etc]...in which the Tribe now or in the future has an interest,” nor all “usual and accustomed areas” and “open and unclaimed lands”, as well as lands “used to access” those areas.

It seems patently clear from our perspective that SITC is spinning up a broad, new, expanded jurisdictional assertion that has not previously existed, which is exactly why Regional Director Speaks correctly took issue with the proposed new SITC constitutional language.

**While the proposed language regarding March’s Point and the 1873 Executive Order was modified prior to the SITC election, the jurisdictional language that Regional Director Speaks found so troubling has not been modified.** Thus, we continue to share Regional Director Speaks’ concerns about the SITC Constitutional Amendments.

In light of the foregoing, any reasonable county government would be highly concerned. On its face, SITC is asking Interior to recognize SITC jurisdiction over most of Skagit County, off-reservation. As discussed below, this is inconsistent with both federal law and sound public policy.

**a. SITC’s Proposed Constitutional Amendments Violate The 1855 Treaty of Point Elliott And Are Therefore Facially Inconsistent With Federal Law.**

SITC’s jurisdictional claim under the Treaty cannot be saved by a federal law consistency proviso, because, as discussed below, SITC’s jurisdictional claim is inherently and explicitly inconsistent with the 1855 Treaty of Point Elliott.

SITC’s assertion of jurisdiction over “usual and accustomed fishing grounds and stations” and “open and unclaimed lands” arises from the 1855 Treaty of Point Elliott (“**Treaty**”), which guaranteed the right to fish in common with the citizens of the territory. Applying the well-established canon of construction that treaties are to be interpreted as they would have been by the tribes signing them at the time,<sup>11</sup> it has been judicially established that treaty tribes have the right to half the available salmon harvest,<sup>12</sup> the right to co-manage the fishery,<sup>13</sup> and the right to enjoy

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<sup>11</sup> *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 675–676, (1979).

<sup>12</sup> *U.S. v. Washington*, 384 F. Supp. at 343-44.

<sup>13</sup> *Id.*

actions by the State that threaten treaty fisheries.<sup>14</sup> In addition, the Treaty affords signatory tribes the right to “hunting and gathering roots and berries” on any “open and unclaimed lands.” Treaty Article 5.

By their plain language, SITC’s constitutional amendments purport to extend these rights to assert jurisdiction over any off-reservation land with any arguable nexus to SITC’s claimed treaty rights or territory.

When the Treaty was signed, tribes reserved fishing rights, reservations monetary payments, and other rights, in consideration for which they released their sovereign jurisdiction over the remainder of the land base. See, Treaty Article I (“The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them...”) This should not be a particularly controversial characterization of the Treaty.

That was the Treaty’s central point, and the benefit of the bargain. As SITC Chairman Cladoosby is fond of saying about the Treaty, “a deal is a deal.”<sup>15</sup>

Should the United States approve the proposed SITC Constitutional Amendments as they are written, we believe that SITC will assert that both the United States and SITC, as the parties to the Treaty, have approved expanded jurisdiction under the Treaty. Again, as with many situations previous to this one, the mere assertion of this claim will have a tremendous impact on local government and property owners, and our small rural community will be left on its own to defend against this dangerous and deeply undemocratic idea.

For this reason, it critical that the United States carefully define the off-reservation jurisdiction and territory that the United States is endorsing by approval of the SITC Constitutional Amendments.

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<sup>14</sup> *U.S. v. Washington* (Culvert Case), 853 F.3d 946 (9<sup>th</sup> Cir. 2017). Unlike the State of Washington, Skagit County does not disagree with the idea that tribes should have the right to enjoin specific state actions that are substantially damaging treaty resources, based on a specific situation, supported by actual, scientifically-supportable evidence. But that is a far different question than endorsing tribal direct jurisdiction over off-reservation land, people and resources.

<sup>15</sup> See, “Swinomish Angles for More Jurisdiction,” La Conner Weekly News, December 7, 2016, <http://laconnerweeklynews.com/main.asp?SectionID=2&subsectionID=160&articleID=1121> (last visited June 14, 2017).



**b. SITC's Proposed Constitutional Amendments Violate The U.S. Constitution's Guarantee Clause, And Are Therefore Facially Inconsistent With Federal Law. Skagit County Supports Consultation With Tribes, But Co-Management Of Skagit County With The Four Small Tribes Located Here Is Unworkable And Inconsistent With Representative Democracy.**

As you are likely aware, the philosophical underpinning behind SITC's Article I Constitutional Amendment arises from the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), and Article 32(2) in particular:

*Article 32(2) States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*

Skagit County concurs with the UNDRIP's "free and informed consent" on the 7,000 acre SITC Reservation – because we believe that local governments, tribal or otherwise, are entitled to democratic governance and self-determination, SITC just as much as Skagit County.

For example, Skagit County has not opposed SITC's ongoing litigation with Burlington Northern Santa Fe ("BNSF") Railroad over unconsented shipments of Bakken crude across the SITC reservation.<sup>16</sup>

Which is to say, Skagit County takes a very progressive view of tribal sovereignty on the SITC Reservation, but also believes that we need clear jurisdictional boundaries in order to avoid the kind of pernicious conflict that has consumed our community for the past two decades, and, frankly, served few besides the large number of non-Indian litigators employed on SITC's behalf.

This is not about opposing tribal sovereignty as a concept, but rather, as the saying goes, the idea that clearly defined fences make for good neighbors.

UNDRIP's "free and informed consent" language has literal applicability in the context of actually oppressed indigenous minorities such as the Karen in Myanmar, who are being subjected to forced labor, forced resettlement and denial of citizenship and land rights on an ongoing basis.<sup>17</sup>

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<sup>16</sup> Washington Tribe Wins Limit To BNSF Oil Shipping, Law360, June 9, 2017, <https://www.law360.com/articles/932971/washington-tribe-wins-limit-to-bnsf-oil-shipping> (last visited June 12, 2017).

<sup>17</sup> Myanmar and the Karen Conflict, January 18, 2016 <http://reiffcenterblog.cnu.edu/2016/01/myanmar-and-the-karen-conflict-the-longest-civil-war-you-have-never-heard-of/> (last visited June 13, 2017).

But it has considerably less literal applicability in the context of an American Indian Tribe such as SITC, which represents less than 0.4% of our county's population, and is fully assimilated and ascendant in the dominant economic and governance model. Among other things, SITC holds a regional gambling monopoly and many other preferential rights including formal recognition as a sovereign government, that, unlike any other government, can and does legally direct a significant amount of money to non-tribal political campaigns. SITC and its members are not disenfranchised. Rather, they are already super-enfranchised. Additional off-reservation jurisdiction is neither necessary nor appropriate here.

When announcing the United States was dropping its opposition to UNDRIP, the Obama Administration recognized that UNDRIP does not mean that each of the four tribes in Skagit County should possess veto power over every governmental decision within any area over which a tribe claims traditional, pre-colonization usage:

*[T]he United States understands [the importance of a] call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those tribal leaders, before the actions addressed in the consultations are taken.<sup>18</sup>*

Skagit County recognizes that these issues have taken center stage in the internationally-publicized opposition to the Dakota Access Pipeline (“**DAPL**”) adjacent to the Standing Rock Sioux Reservation in North Dakota, planned to carry crude oil from the Bakken fields. While Standing Rock leadership was consulted during the process, they declined to agree to the ultimate DAPL plan approved by the United States, leading to large scale protests.

Skagit County is a highly environmentally progressive jurisdiction, which is perhaps why SITC has ignored our repeated invitations to discuss the substantive goals and concerns motivating SITC's expansive jurisdictional claims.<sup>19</sup>

For example, Skagit County took the lead in successfully litigating the requirement that Shell Oil prepare an Environmental Impact Statement (EIS) before constructing a Bakken crude-by-rail

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<sup>18</sup> White House Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples, December 18, 2010, <http://www.achp.gov/docs/US%20Support%20for%20Declaration%2012-10.pdf> (last visited June 12, 2017).

<sup>19</sup> See, Letter from Skagit County to SITC Tribal Attorney dated April 24, 2017, <https://www.skagitcounty.net/Home/Documents/Press/Letter%20to%20LeCuyer%2004242017.pdf> (last visited June 14, 2017).

terminal in Skagit County,<sup>20</sup> a project that has since been cancelled, largely rendering moot SITC's ongoing litigation against BNSF over Bakken crude shipments.<sup>21</sup>

As another example, Skagit County opposed the diversion of 5,000,000 gallons per day from the Skagit River for what would have been the world's largest industrial water bottling operation. SITC tacitly supported this environmentally-devastating plan, which was ultimately withdrawn due to local opposition from many others besides SITC.<sup>22</sup>

Which is to say, SITC's jurisdictional expansion cannot be justified by the idea of an unresponsive non-tribal government on environmental issues. Whatever this is about, it is not about opposition to fossil fuel development or legitimate environmental concerns. It is, at its core, about SITC's effort to dismantle representative democracy, an assertion of political control over an unrepresented majority for its own sake.

It is worth noting that Skagit County, in one of many unsuccessful prior efforts to appease SITC leadership's expansive ambitions, has already attempted to manage our ecosystem by first obtaining SITC's "free and informed consent," going far beyond the consultation that even the Obama Administration envisioned.

For example, in 1996, SITC persuaded Skagit County to enter a water rights planning agreement which required consensus on all decisions pertaining to water allocation from the Skagit River, the third largest river (by discharge volume) on the U.S. West Coast.<sup>23</sup>

SITC promptly "weaponized" the consensus requirement, opposing any decision pertaining to agricultural irrigation water. As a result, today, there is no water available for agriculture in the Skagit Valley, causing a great deal of hardship with no demonstrated benefit for treaty fisheries, in the process upending Skagit County's 50-year old democratically-established Comprehensive Plan

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<sup>20</sup> "Judge Grants County's Motion to Dismiss Shell Lawsuit; EIS To Continue As Planned," Skagit Valley Herald, May 21, 2015, [http://www.goskagit.com/all\\_access/judge-grants-county-s-motion-to-dismiss-shell-lawsuit-eis/article\\_96139fc3-17a5-5af7-9f42-ed9c322cf222.html](http://www.goskagit.com/all_access/judge-grants-county-s-motion-to-dismiss-shell-lawsuit-eis/article_96139fc3-17a5-5af7-9f42-ed9c322cf222.html) (last visited June 12, 2017).

<sup>21</sup> "Shell Calls Off Rail Unloading Facility Project," Skagit Valley Herald, October 6, 2016, [http://www.goskagit.com/skagit/shell-calls-off-rail-unloading-facility-project/article\\_8abcda56-e13c-5d90-ab76-979694366750.html](http://www.goskagit.com/skagit/shell-calls-off-rail-unloading-facility-project/article_8abcda56-e13c-5d90-ab76-979694366750.html) (last visited June 12, 2017).

<sup>22</sup> Email Exchange Between Defending Water In The Skagit Basin and SITC Leadership, Skagit River History, <http://www.skagitriverhistory.com/Tribal%20Docs/2012-05-09%20Letter%20to%20the%20Swinomish%20Indian%20Tribal%20Community.pdf> (last visited June 14, 2017).

<sup>23</sup> 1996 Memorandum of Agreement Regarding Utilization of Skagit River Basin Water For Instream And Out Of Stream Purposes, <https://www.skagitcounty.net/PlanningAndPermit/Documents/CWSP2000/AppendixG.pdf> For example, Section IV.G(2) provides that "[i]f the Parties cannot agree, then they may not seek or approve any changes relating to water quantity associated with the expansions of service areas for a period of 50 years from the effective date of this Agreement."

that makes preservation of our agricultural land base our community's highest goal. See, "Skagit County Suggests Swinomish Drop Lawsuit In Water Dispute," December 16, 2012.<sup>24</sup>

SITC declined to drop the lawsuit mentioned in this article, pursuing it to the Washington Supreme Court. See, *Swinomish v. State*, 178 Wn.2d 571(2013). The Supreme Court's resultant procedural decision upended an existing careful compromise over water rights (SITC's underlying objective), and, today, as a result, all water rights for agriculture have been invalidated, back-dated to 2001.

The quantity of water that Skagit Valley agriculture needs (100 cfs) to remain viable is less than 1% of the Skagit River's minimum flow of 10,000 cfs, a shockingly small amount of water when compared to river system usage by agriculture around the American West. Depriving Skagit Valley agriculture of access to irrigation water has, and will have, no demonstrable benefit for treaty fisheries.

This is precisely the kind of grossly unreasonable behavior from SITC that our community has endured over the course of the past two decades, and an example of why we are so concerned about this latest SITC effort.

The point being, Skagit County's experience with tribal consent as a predicate to democratic governance is both extensive and entirely negative, owing almost entirely to SITC's actions when afforded the opportunity to withhold "free and informed consent" to our community's systems of democratic governance.

Skagit County fully supports reasonable consultation regarding Skagit County's land use plans and laws, and recognizes judicially-established rights to protect treaty fisheries. However, we are very concerned that implicit federal recognition of concurrent jurisdiction by SITC over the off-reservation land base will, in effect, grant SITC veto power over our community's decisions made through our systems of representative democracy.

It will in effect put a small group of tribal leaders in a superior position over the community's laws, rendering democratic elections for such positions as County Commissioner, Public Utility District Commissioner and other local positions increasingly superfluous and irrelevant. We note that this is not a speculative fear, but rather a paradigm that Skagit County is already experiencing.

Such a thing would, among other things, violate the Constitutional promise of a republican form of government, as set forth by the U.S. Constitution, Article IV, § 4, the Guarantee Clause. The

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<sup>24</sup> <http://www.seattletimes.com/seattle-news/skagit-county-suggests-swinomish-drop-lawsuit-in-water-dispute/> (last visited June 14, 2017).

U.S. Supreme Court has explained that the Guarantee Clause protects “the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies.” *Duncan v. McCall*, 139 U.S. 449, 461 (1891). Affording one of four tribes in our county veto power over our democratically-established system of laws and governance is simply not consistent with that promise.<sup>25</sup>

### 3. Conclusion.

The idea of tribal sovereignty must be appropriately balanced with our system of representative democracy, and it is clear that SITC’s Constitutional Amendments, in seeking concurrent off-reservation jurisdiction, go too far. While we believe that the SITC Constitutional Amendments violate federal law, we propose the least disruptive remedy.

Skagit County respectfully requests that the United States clarify the boundaries of (1) SITC’s reservation and (2) the full extent of off-reservation jurisdiction and territory envisioned by approval of the SITC Constitutional Amendments. If that is not possible, then Skagit County requests that the United States reject the proposed SITC Constitutional Amendments.

We request that we be provided opportunity to review any drafts of clarification language; be furnished with a copy of the decision in this matter; and be made a formal party of record.

Very Truly Yours,



Will Honea  
Senior Deputy

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<sup>25</sup> In *County of Charles Mix v. Department of the Interior*, a South Dakota county argued that the federal government bringing 39 acres into trust violated the U.S. Constitution’s Guarantee Clause. 674 F.3d 898 (8<sup>th</sup> Cir. 2012). On appeal the 8<sup>th</sup> Circuit Court of Appeals rejected the county’s assertion, holding that the county’s “argument does not show how the Secretary’s decision has in any way altered the form of the county’s government or limited the ability of its citizens to elect their own representatives.” 674 F.3d at 902. The same cannot be said here, and we believe that federal endorsement of SITC jurisdiction and territory, to the extent not qualified and defined, will violate the Guarantee Clause.