



UPPER SKAGIT INDIAN TRIBE

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June 19, 2019

Hon. Ruben Gallego, Chairman
U.S. House of Representatives
Subcommittee for Indigenous Peoples
Of the United States
1331 Longworth House of Office Building
Washington, D.C. 20515-6201

Hon Paul Cook, Ranking Member
U.S. House of Representatives
Subcommittee for Indigenous Peoples
Of the United States
1027 Longworth House of Office Building
Washington, D.C. 20515-6201

Re: Opposition to H.R. 2916, "Samish Indian Land Reaffirmation Act"

Dear Chairman Gallego and Ranking Member Cook:

The Upper Skagit Indian Tribe joins the Swinomish Indian Tribal Community, the Lummi Nation and the Tulalip Tribes, hereafter collectively referred to as "Treaty Tribes", in opposition to H.R. 2916, the "Samish Indian Land Reaffirmation Act". This bill would legislate what the Courts have rejected, specifically that the Samish Nation is the legal successor in interest to the Nuwaha band that signed the Treaty of Point Elliot. Samish would have Congress contravene the Ninth Circuits holding in *U.S. v. Washington* wherein the Court held that the Samish Nation is not a "Political successor in interest to any of the Tribe's or bands of Indian's with whom the United States treated in the treaties of medicine Creek and Point Elliot." 476 F. Supp. at 1104 This is yet another attempt of the Samish Nation to infringe on the judicial process and create "new facts" which would allow them to assert treaty rights.

Although Upper Skagit did not oppose Samish in its most recent fee to trust efforts, it was forced to do so when the property at issue lay in the heart of Upper Skagit homelands. In that process Upper Skagit submitted a letter of March 9, 2017, attached hereto and incorporated herein by reference, which unequivocally establishes Upper Skagit as the adjudicated successor in interest to the Nuwaha band that signed the Treaty of Point Elliott, further Upper Skagit adopts the arguments of our fellow Treaty Tribes in opposing H.R. 2916.



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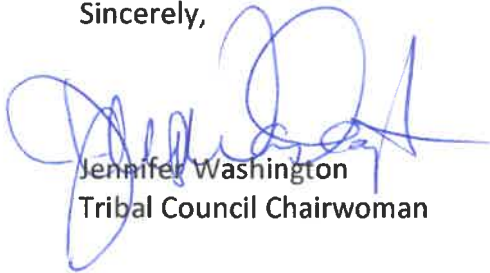
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The trust obligation held by Congress and owed to the Upper Skagit requires Congress to protect Upper Skagit's Treaty rights, rights not held by the Samish Nation. While H.R. 2916 as named has the appearance of simply affirming the rights of the Samish Nation to trust land, as a matter of law it has the effect of preempting due process, the judicial process, and thereby degrading the Upper Skagit Indian Tribe's Treaty Rights. As the Upper Skagit's trustee we strongly urge you to oppose the enactment of H.R. 2916.

The Upper Skagit Tribe respectfully request that this letter be included in the hearing record for the Subcommittee for Indigenous Peoples of the United States legislative hearing on H.R. 2916, that was held on June 5, 2019

If you have any questions please call David Hawkins, General Counsel to the Upper Skagit Indiana Tribe, at 360-854-7090.

Sincerely,



Jennifer Washington
Tribal Council Chairwoman



UPPER SKAGIT INDIAN TRIBE

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March 9, 2017

Regional Director Stanley Speaks
Northwest Region
Bureau of Indian Affairs
911 NE 11th Avenue
Portland, OR 97232

Principal Deputy Assistant Secretary Larry Roberts
Office of The Secretary
Bureau of Indian Affairs
1849 C Street N.W.
Washington, D.C. 20240

Re: Samish Indian Nation's Inaccurate Claim to Nuwaha Treaty Right connection in its Two Fee to Trust Applications adjacent to Highway 20 in Skagit County, Washington

Dear Regional Director Speaks and Principal Deputy Assistant Secretary Larry Roberts:

I write on behalf of the Upper Skagit Indian Tribe ("Tribe"), the sole adjudicated Treaty of Point Elliott successor in interest to the Nuwaha Band / Tribe, a signatory to that Treaty in 1855. It has come to the Tribe's attention that the Samish Indian Nation is seeking a fee to trust conversion of two parcels located on Highway 20 in Skagit County, WA. It is also the Tribe's understanding that the first parcel is for a gas station, which parcel fee to trust is being reviewed by the Northwest Region of the BIA in Portland and the second parcel is to be designated for gaming as a casino parcel, which parcel is being reviewed in Washington, D.C. at the Central Office of the BIA.

I. Upper Skagit is only addressing the claim of a Treaty Right connection between the currently federally recognized Samish Indian Nation and the aboriginal Nuwaha, signatory to the Treaty of Point Elliott

I first want to make it clear that Upper Skagit is not contesting the right of a federally recognized Indian tribe to have land taken in trust. Upper Skagit is aware that, with respect to these particular fee to trust applications, the Swinomish Indian Tribal Community is raising a significant number of issues in opposition to the Samish Indian Nation's two requests. Upper Skagit, however, in this letter wishes to address and contest a single issue, as stated above, in Samish's fee to trust analysis.

The Upper Skagit Indian Tribe's concern here has been prompted by the receipt of the report by

Professor Chris Friday from Western Washington University entitled "**Samish Indian Nation History in Light of the Carcieri Decision: Expert Historian's Report**" ("Report") submitted by the Samish Indian Nation. In particular, Upper Skagit is concerned about the claim in the Report with respect to the Nuwaha Band / Tribe¹ and the unintended consequences of utilizing that claim to permit a fee to trust land conversion. As will be addressed below, this claim is legally, historically, anthropologically and ethno-historically inaccurate. Any reliance by the BIA on the Samish Indian Nation's claim to an aboriginal Nuwaha Band / Tribe political / Treaty successorship would be untrue and inaccurate due to the following:

In the 1970's, the Samish Indian Nation sought to intervene in US v. Washington in order to claim treaty rights under the Treaty of Point Elliott. As Judge Boldt found in his Specific Findings with respect to Samish as an Intervenor in US v. Washington, 476 F. Supp. 1101, 1105-1106(1979):

(27). The members of the Intervenor Samish Tribe and their ancestors do not and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community. The present members have no common bond of residence or association other than such association as is attributable to the fact of their voluntary affiliation with the Intervenor entity. (Ex. USA -107; Tr. 10/29/75, 232-235)

....

(29). The Intervenor Samish Tribe is not an entity that is descended from any of the tribal entities that were signatory to the Treaty of Point Elliott.

(30). The citizens comprising the Intervenor Samish Tribe have not maintained an organized tribal structure in a political sense. Page 1106.

Upper Skagit is also concerned, as discussed below, that the two applications not be addressed on different time schedules, which bifurcation could lead to one of the fee to trust determinations prejudicing or foreclosing a full consideration of the other fee to trust application.²

II. The Nuwaha Band / Tribe did not sign the Treaty of Point Elliott on behalf of the Samish Indian Nation, but only on behalf of the present day Upper Skagit Indian Tribe.

Upper Skagit's concern and objection is that the Samish claim concerning Nuwaha as a treaty

¹ The Report's attempt to connect Samish to Nuwaha and the Treaty of Point Elliott can be found in the discussion of Pateus, an Upper Skagit ancestor from the Nuwaha Band / Tribe, at page 28 -29 of the Report. Without specific support or citation, Professor Friday asserted "Pateus signed the treaty on behalf of the Samish because of a Samish and Nuwaha merger prior to the time of the treaty council."

² Even though reviewed by separate groups in the BIA (Portland and DC), the two applications must be reviewed under a unified consideration of all of the issues raised rather than fast tracking one of the determinations to the detriment of the other determination.

signatory for the Samish Indian Nation is an attempt to

- a) circumvent the fact that it has been determined in *US v. Washington* (the Boldt Decision) in the Federal Courts that Samish is not a Tribe with Treaty rights; and
- b) circumvent scrutiny under the *Carcieri* standard announced by the United States Supreme Court.

In order to fully understand the basis for Upper Skagit's concern and the potential unintended consequences of basing a fee to trust determination on the slender thread of Samish's relationship to the Nuwaha Band / Tribe, one must first understand Upper Skagit's treaty claim to Nuwaha and the facts surrounding the Samish recognition case and its uncontested assertions concerning Nuwaha.

A. Upper Skagit as the adjudicated Treaty Nuwaha successor

The Upper Skagit Indian Tribe is a party to *US v. Washington*, the Treaty fishing case. Upper Skagit was originally determined by Judge Boldt to have Treaty fishing rights on the Skagit River. In 1989 and 1993, however, Upper Skagit sought saltwater Treaty fishing rights in the Shellfish subproceeding, 89-3, in *US v. Washington* and also for anadromous (salmon and steelhead) salt water treaty fishing rights in its own separate litigation, subproceeding 93-1. Upper Skagit's claim to those rights through Nuwaha successorship were supported by Dr. Barbara Lane, one of the leading anthropologists in the case, by Dr. Wayne Suttles and Dr. Bruce Miller, all highly experienced anthropologists accorded expert status by the Court.

The hearings for Upper Skagit's claim of successorship to Nuwaha were contested litigations. The State of Washington opposed Upper Skagit's claim to Nuwaha and saltwater Treaty fishing rights, but Upper Skagit prevailed and was declared to be the Treaty successor in interest to the aboriginal Nuwaha, signatories to the Treaty of Point Elliott.

The evidence supporting the determination of Upper Skagit successorship to Nuwaha is set forth in the attached Exhibits. These Exhibits include:

- 1) the Declaration of Dr. Barbara Lane in which Dr. Lane opined that Upper Skagit was not only the successor to Nuwaha, but she traced the continuity of leadership and membership of Upper Skagit with the family trees of descendants of the Nuwaha Band / Tribe;
- 2) Dr. Lane's testimony at trial in support of her findings and opinion; and
- 3) the testimony of Dr. Wayne Suttles, the anthropological expert for the Lummi Nation, who also opined concerning Upper Skagit's successorship to Nuwaha;

The testimony on behalf of Upper Skagit led to the Court in *US v. Washington* ruling that Upper Skagit was the legitimate successor in interest of the Nuwaha. See the attached Exhibit, the specific findings of the Court.

B. The Samish Recognition Case, *Greene v. Babbitt*, 64 F. 3d 1266 (9th Cir., 1995)

The first fact relevant to this inquiry as it relates to Nuwaha and the Samish recognition case is that the Tulalip Tribes, the Swinomish Indian Tribal Community and the Upper Skagit Indian Tribe were all denied the opportunity to intervene and be heard in the Samish recognition case. This led to the anomalous situation that only Samish was allowed to argue its claim to Nuwaha in an absolutely uncontested manner before the Court, without Upper Skagit (and other tribal) opposition and analysis for the Court to consider. The second fact relevant to this inquiry as it relates to Nuwaha is that, as discussed below, Samish had been determined 16 years earlier not to be a Treaty Tribe by Judge Boldt in *US v Washington*, which determination was not overturned by the Greene case. This *US v. Washington* binding determination precludes consideration of a connection between Nuwaha and Samish for either a treaty or Carcieri analysis.

Having identified the initial flaw in the Samish claim that Greene stands for the proposition from the Report that there was a legally recognizable “merger” between Nuwaha and Samish, the Greene Court did identify a connection between Nuwaha and Samish, just not the connection which would support a treaty or Carcieri claim.

C. Upper Skagit is a Treaty Signatory Tribe and the Samish Indian Nation is not a Treaty Signatory Tribe

Unlike Upper Skagit, the Samish Indian Nation has been determined in *US v. Washington* in three separate cases to not possess treaty rights under the Treaty of Point Elliott. This is important because the Samish attempt to now attach themselves to Nuwaha is both improper and a back door attempt to claim Treaty rights to which they are not entitled.

Along with four other tribes, Samish intervened and sought treaty rights in 1974 in *US v. Washington*. Although Samish was an unrecognized tribe at the time, Judge Boldt had already ruled that an unrecognized tribe could be entitled to treaty fishing rights. In spite of that opportunity, Judge Boldt ruled that the Samish Tribe was not a treaty tribe. He ruled that the Samish Tribe had not “lived as a continuous separate and distinct and cohesive Indian cultural or political community: and was not “descended from any of the tribal entities that were signatory to the Treaty of Point Elliott.” *United States v. Washington*, 476 F. Supp, 1101, 1106 (W.D. Wash., 1979) affirmed 641 F. 2d 1368 (9th Cir., 1981).³

After losing that case, Samish turned its attention to obtaining Federal Recognition, which occurred in 1995. *Greene v. Babbitt*, 64 F. 3d 1266 (9th Cir., 1995). This entitled Samish to be treated as a federally recognized tribe for current benefits like self-determination monies, fee to trust conversions, and Indian Health Service services, but did not change its status and make it a treaty tribe. In fact, in its recognition case, Samish reassured the Judge and the Judge ruled that recognition was not the same as treaty rights and did not entitle a recognized tribe automatically to treaty tribe status.

In an all too familiar pattern of disavowing of its own previously made binding statements, no

³ Note that the Court made it clear that Samish was not the successor to any treaty signatory, which means that it was not the successor to Nuwaha.

sooner had the Samish received federal recognition, which did not entitle them to treaty status, than in 2002 they returned to US v. Washington claiming that their federal recognition did, in fact, entitle them to claim treaty status. As a result, they claimed, Samish sought to reopen their 1974 case and get Judge Boldt's 1979 ruling reversed.

In their second bite at the treaty rights apple, Samish again failed. The District Court denied Samish relief based on recognition and the case was appealed to the Ninth Circuit. In 2005, the Ninth Circuit gave the Samish some temporary relief by sending the case back to the District Court saying that recognition could be a basis for reopening the original 1979 decision. US v. Washington, 394 F.3d 1152, 1161 (9th Cir, 2005).

This relief was temporary, because when the case went back to the District Court, the Judge denied the Samish again and the case went back to the Ninth Circuit. This time, however, the Ninth Circuit clarified its prior ruling and ruled that "We resolve the conflict in favor of the Greene proposition : recognition proceeds and the fact of recognition have no effect on the establishment of treaty rights at issue in this case." US v. Washington, 588 F. 3d 1270, 1273 (9th Cir, 2009). Samish was once again determined not to be a treaty tribe and Judge Boldt's determination that they weren't the successor to any tribe that signed the Treaty of Point Elliott is the law binding on Samish, the United States and, of course, the BIA.

D. The potential unintended consequences of the BIA accepting the Samish Indian Nation's false claim to the Nuwhaha Band / Tribe.

1. Federal Legislation

Approximately five (5) years ago, the Samish Indian Nation convinced Congressman Larsen to bring federal legislation to attempt to take 5 parcels of land into trust without following BIA fee to trust procedures. One of those parcels, the Kelleher Road parcel, was located in Nuwhaha territory which meant that it was in the Upper Skagit homeland. The Upper Skagit, the Swinomish, and the Tulalip opposed this legislation as it encroached on the Upper Skagit homeland and had the potential of creating a water bounded reservation that would not be subject to US v. Washington and would have overturned 40+ years of agreed and/ or adjudicated fishing regimes to the detriment of treaty tribes.

The legislation has not progressed over the past five years, but it is important to note the falsehoods that the Samish propagated during that time. First and foremost, even though Upper Skagit opposed the legislation at all times, Samish represented to the House Natural Resources Republican staff that Upper Skagit had changed its position and supported the Samish legislation. The other shocking falsehood from Samish was that, based upon changes of some of the language of legislation, Samish was making no claim to Treaty hunting rights. This statement was directly contrary to the letter written by the Samish Chairman claiming off-Reservation treaty hunting and gathering rights.⁴

⁴ This claim of hunting and gathering rights under the Treaty of Point Elliott is both contrary to law and indicates the danger that a BIA adoption of the Samish claim to Nuwhaha represents to all the other Point Elliott Tribes to which the BIA owes a fiduciary duty.

2. Hunting and Gathering under the Treaty of Point Elliott

The Treaty of Point Elliott is, like all other Indian treaties, the supreme law of the land. As such, only tribes signatory to the Treaty are eligible to exercise treaty rights.⁵ During the history of US v. Washington five (5) tribes have been denied treaty status, which means they were never a successor to a treaty signatory.⁶ Samish was one of those tribes denied treaty status as a result of not being a successor to any tribe or band which signed the Treaty of Point Elliott. To find that the Samish Nation has a right to claim Nuwhaha in its capacity as a treaty signatory is to provide the Samish Nation with an argument that, in spite of the binding ruling of the Federal Courts, the BIA will now recognize the Samish claim. This would further the Samish claim to treaty rights to hunt and gather, which right would diminish the hunting and gathering rights of nine (9) fully authorized Treaty tribes. Such an action would constitute a breach of the BIA's neutrality when there is a conflict between federally recognized tribes and would directly breach the fiduciary duty owed to Upper Skagit and the eight (8) other successor tribes under the Treaty of Point Elliott.

3. The Impact of a Claim to Nuwhaha as it relates to "under federal jurisdiction" under the IRA

Upper Skagit expresses no opinion as to whether the Samish Indian Nation was under federal jurisdiction in 1934 at the time of the IRA except as that claim may related to the false claim of the Samish Nation to successorship to Nuwhaha. As discussed above, the Federal Courts have held that Samish cannot be a successor to Nuwhaha for treaty purposes. Thus, whatever timeframe Samish may be able to claim as to when it came under federal jurisdiction, Samish cannot claim to have been under federal jurisdiction commencing with the Treaty of Point Elliott in 1855. For the BIA to determine otherwise would subject the decision to immediate challenge on the basis of controlling federal law.

4. The Bifurcated Fee to Trust attempt by the Samish Indian Nation

While procedurally, the two separate fee to trust applications, for the gas station parcel and the gaming parcel, is correctly bifurcated, the danger is that, in advance of a separate determination by the Central Office, the Northwest Region will decide certain critical issues contrary to the duty it owes to Upper Skagit and all of the other adjudicated Point Elliott Treaty successors and, thereby, create a fait accompli when it comes to the BIA determination of the fee to trust status of the gaming parcel. The second danger that an early Northwest Region determination is that the Samish Nation will use such a determination to resurrect its stalled claim to federal legislation. Each of these consequences breaches the BIA's neutrality and fiduciary duty and represents a potential that two separate determinations could be enunciated by the BIA from the two separate administrative sources, contrary to the interests of the Point

⁵ Two executive order reservation tribes, the Chehalis and the Colville, sought to exercise off-Reservation treaty rights, but were denied because neither of them had signed a treaty with the United States.

⁶ In addition, one tribe which was adjudicated as a signatory to a Treaty, the Yakama Nation, was denied the right to harvest shellfish under their Treaty because of a lack of proof concerning the locations they harvested in Western Washington in 1855.

Elliott Treaty tribes.

5. The work of Dr. June Collins linking the Nuwhaha Band / Tribe to the present day Upper Skagit Indian Tribe

Dr. June McCormick Collin was a noted anthropologist, who engaged in substantial anthropological investigation concerning tribes along and tied to the Skagit River. Her groundbreaking work Valley of the Spirits addressed many issues, including the Nuwhaha Band / Tribe and its relationship to Upper Skagit.⁷ As Dr. Collins opined at page 20:

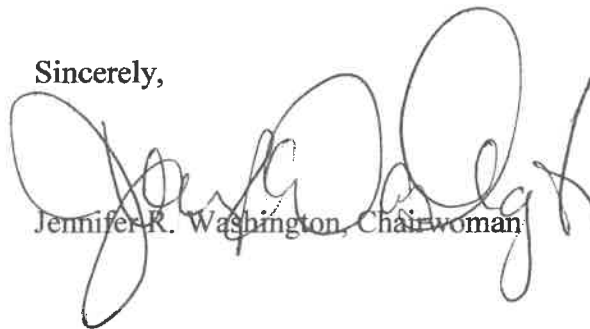
People of the extended village of duwaha, although it was located on the Samish River, had close affinities with the Upper Skagit. These people, as I have already pointed out, should not be confused with the Samish who spoke a dialect of the Straits language. The people of duwaha or the Upper Samish instead spoke the Upper Skagit- Nisqually group of languages. Mention has been made here of the Upper Skagit making portage into Upper Samish [duwaha] territory as one usual route to salt water. In the duwaha locale there were two large prairie areas, one at Warner's Prairie and one at German Prairie where both Upper Skagit and duwaha women went to get roots.

6. Conclusion and Request from the Upper Skagit Indian Tribe

For the reasons set forth above, the Upper Skagit Indian Tribe requests that the BIA, at both the Northwest Region and the Central Office, reject the false claim of the Samish Indian Nation to the successorship of the Nuwhaha Band / Tribe and to a claim that Nuwhaha signed the Treaty of Point Elliott on behalf of the Samish Tribe. Whatever other determinations are made, these unsupported claims should not factor into or become part of the record of decision by the BIA when considering the fee to trust applications submitted by the Samish Indian Nation.

In connection with the foregoing, please forward this letter and its enclosures to the appropriate parties dealing with the two fee to trust applications of the Samish Indian Nation as well as to the Solicitor(s) dealing with these matters at both the Regional and Central Office levels.

Sincerely,



Jennifer R. Washington, Chairwoman

⁷ The spelling of Nuwhaha in the book comports with anthropological spelling as "duwaha".

cc: Bodie Shaw, Deputy Regional Director, Trust Services
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Enclosures (7):

Exhibits:

Excerpt from US v. Washington with respect to the denial of Samish's attempt to intervene as a Treaty

Tribe

Excerpt from the Report of Professor Chris Friday making the wrongful claim of a Samish connection to Nuwhaha Band / Tribe

Excerpt of Decision by Judge Rafeedie in US v. Washington with respect to Upper Skagit successorship to Nuwhaha Band / Tribe

Declaration of Dr. Barbara Lane re Upper Skagit successorship to Nuwhaha Band / Tribe

Trial Testimony of Dr. Barbara Lane re Upper Skagit successorship to Nuwhaha Band / Tribe

Testimony of Dr. Wayne Suttles re Upper Skagit successorship to Nuwhaha Band / Tribe

Excerpt from Valley of the Spirits by Dr. June Collins re Upper Skagit successorship to Nuwhaha Band / Tribe

EXHIBIT

Excerpt from US v. Washington with respect to the denial of Samish's attempt to intervene as a Treaty Tribe

476 F.Supp. 1101
United States District Court, W. D. Washington,
Tacoma Division.

UNITED STATES of America et al., Plaintiffs,
v.
STATE OF WASHINGTON et al., Defendants.

Civ. No. 9213.
March 23, 1979.
Motion for Reconsideration Denied April 24, 1979.

Specific Findings as to Intervenor Samish Tribe

- (22). The Intervenor Samish Indian Tribe (herein referred to as the Intervenor "1106 Samish Tribe) is composed primarily of persons who are descendants in some degree of Indians who in 1855 were known as Samish Indians and who were party to the Treaty of Point Elliott. The 1855 Samish were not named in the treaty but were assigned, for the purpose of including them in the treaty, to the Lummi signer, Chow-its-hoot, who signed the treaty for the Lummi and the other northern bands. (PTO Part 2 PP 1 and 2; Ex. USA-75 pp. 8-9) Official estimates of the number of Samish at treaty times varied from about 98 to about 150 persons. (Ex. USA-75 p. 13)
- (23). Pursuant to the treaty most of the Samish people initially moved to the Lummi Reservation. Later others moved to the Swinomish Reservation. The present-day Lummi and Swinomish Reservation tribes include descendants of the 1855 Samish Indians. (Ex. USA-75 pp. 2, 14-16; Ex. USA-30; Ex. USA-74, pp. 3-4)
- (24). The Intervenor Samish Tribe prosecuted a claim against the United States before the Indian Claims Commission in Docket No. 261 which resulted in a monetary judgment award. (Ex. USA-111) This award will be distributed per capita to the descendants of the Samish Tribe of Indians as it existed in 1859, born on or prior to and living on the effective date of the plan prepared by the Department of the Interior for the use and distribution of judgment funds. (41 F.R. 5140, Feb. 4, 1976)
- (25). The Intervenor Samish Tribe exercises no attributes of sovereignty over its members or any territory. It is not recognized by the United States as an Indian governmental or political entity possessing any political powers of government over any individuals or territory. None of its organizational structure, governing documents, membership requirements nor membership roll has been approved or recognized by the Congress or the Department of the Interior for purposes of administration of Indian affairs. (PTO Part 2 P 2) Said Intervenor has adopted a constitution and bylaws pursuant to which it has a tribal council and a tribal chairman and purports to operate as an identifiable and distinct entity on behalf of its members. It claims 549 members. (Ex. SA-M-2; Ex. SA-79)
- (26). The Intervenor Samish Tribe's constitution provides that its membership shall consist of all persons of Indian blood whose names appear on the official membership roll of the Samish Tribe to be dated June 1, 1975, as prepared by the Secretary of the Interior, and all persons born to any member of the Samish Tribe. (Exs. SA-M-2 and SA-M-3; Tr. 10/29/75, 267) No such roll is now in existence. (Exs. USA-M-16 and USA-107, p. 3) There is no requirement of specific minimum blood quantum either as to Samish blood in particular or Indian blood in general. (Exs. SA-M-2 and SA-M-3; Tr. 10/29/75, 273-274) The Intervenor's membership roll contains 549 persons many of whom are of only 1/16th degree Indian blood. Two have only 1/32nd Samish blood. (Ex. SA-79) The tribe does not prohibit dual membership and at least one member is an officer of the Lummi Tribe. (Tr. 10/29/75, 273)
- (27). The members of the Intervenor Samish Tribe and their ancestors do not and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community. The present members have no common bond of residence or association other than such association as is attributable to the fact of their voluntary affiliation with the Intervenor entity. (Ex. USA-107; Tr. 10/29/75, 232-235)
- (28). The Intervenor Samish Tribe has had dealings with agencies of the United States, the State of Washington, and local governments and with private organizations and Indian tribes, but said dealings were not different in substance from those engaged in by any social or business entity. (Ex. USA-107 pp. 5-7)
- (29). The Intervenor Samish Tribe is not an entity that is descended from any of the tribal entities that were signatory to the Treaty of Point Elliott.
- (30). The citizens comprising the Intervenor Samish Tribe have not maintained an organized tribal structure in a political sense.

EXHIBIT

Excerpt from the Report of Professor Chris Friday making the wrongful claim of a Samish connection to Nuwaha Band / Tribe

"Samish Indian Nation History in Light of the *Carcieri* Decision: Expert Historian's Report"



Annie Lyons (Samish), Front Row, Far Left. 1930 Puget Sound Indian Fair.
(Detail from Ferd Brady Photograph Collection, 8, Center for Pacific Northwest Studies, Western Washington University, Bellingham, Washington.)

Chris Friday, Ph.D.
Professor of History
Western Washington University
30 June 2013

Vancouver Island (negotiated by Sir James Douglas, Governor of the British Colony and chief factor of the Hudson's Bay Company). Chowitsut had also built a great house on the tip of the Lummi Peninsula and marked its opening with some five feasts—an extravagant display of wealth. As Bruce G. Miller and Daniel L. Boxberger note, Chowitsut was one of a handful of regional "innovators who took advantage of changing circumstances" in the 1850s to scramble into a position as a "chief" and political leader.³⁶ Thus, when Chowitsut signed the Treaty of Point Elliott, it appears that Governor Stevens accepted the notion that his signature encompassed the "the Lummi and some other Northern Band" at the treaty council grounds.³⁷ Stevens' assignment of Samish to Lummi Reservation, acknowledged by the correspondence and reports of federal officials subsequent to the signing of the treaty, further suggests that he assumed Chowitsut to have signed for the Lummi, Samish, and Nooksack (who were unable to attend the treaty council).³⁸ George Gibbs also reported that Chowitsut's signature encompassed the Samish and Nooksack.³⁹ Later popular accounts continue to echo this position as did findings by the Court of Claims in the 1934 Duwamish case.⁴⁰

Another key individual who some argue signed for the Samish was Pateus of the Nuwaha at a village site near what became Bayview, Washington (listed in the treaty as "Pat-the-us, Noo-wa-hah sub-chief"). Pateus emerged as "an aggressive raider" sometime after the 1830s after his son had been kidnapped and made into a slave. Pateus admitted he was not *si'em* (*siáp* in his particular dialect), because he was "quick to anger, killed over minor disputes." He was even reported to have enslaved his own relatives. Nonetheless, he earned a "formidable reputation" as a "war leader" in fighting "'King George' Indians from British Columbia." A daughter's diplomatic marriage to another "innovator"

Slabebtkud of the Upper Skagit also boosted Pateus's status and influence. While not a "traditional" si'em leader, Pateus's aggressive style vaulted him to the status of a sub-chief signing the Treaty of Point Elliott. Pateus lost respect and influence as he earned a broader reputation in the years following the treaty as a "bully" and scholars have come to consider him a "disruptive leader."⁴¹ Still, a number of sources, including those of Samish at the 1927 hearings in the Duwamish Case, hold that Pateus signed the treaty on behalf of the Samish because of a Samish and Nuwhaha merger prior to the time of the treaty council.⁴²

Ethnohistorian Barbara Lane has identified at least two other individuals who signed the Treaty of Point Elliot who were Samish. She points to Kwallattum, the fifth person to sign the treaty behind Seattle, Patkanim, Goliah, and Chowitut as one likely to have signed for the Samish. (She notes the fact that he and at least one other signer appeared in the document as "General Pierce" adds some confusion.) The published treaty lists him as a "Sub-chief of the Skagit Tribe," but Lane holds that he was most likely Samish because his name closely matches that of a Samish man who owned a reefnet site in the San Juan Islands. She also argues that She-ah-delt-hu, listed as a "Sub-chief of Lummi Tribe" in the treaty was Samish and identified him as such through the ownership of a reefnet site off Lopez Island.⁴³

The list of possible Samish signers or those who signed the Treaty of Point Elliott on behalf of the Samish does not stop there. In a 1944 newspaper account, Andrew Joe (Skagit) claimed that his grandfather "Obske-ke-atum" was "appointed has the head chieftain to rule over four tribes, the Skagits, the Swinomish, the Sammish, and Kikialos, at the signing of the peace treaty in 1855." The Treaty of Point Elliott contains an "x mark" by one "Ske-eh-tum, Skagit tribe" and he was the thirty-sixth to sign the treaty.⁴⁴ While Joe's

EXHIBIT

Excerpt of Decision by Judge Rafeedie in US v. Washington with respect to Upper Skagit successorship to Nuwaha Band / Tribe

873 F.Supp. 1422
United States District Court,
W.D. Washington.

UNITED STATES of America, et al., Plaintiffs,
v.
STATE OF WASHINGTON, et al., Defendants.

No. CV 9213.
Dec. 20, 1994.

VII. SUCCESSORSHIP OF THE UPPER SKAGIT TRIBE TO THE NUWHA'HA AND THE BSGIWIGWILTS

The Upper Skagit Tribe argues that, since it is the successor of the treaty bands the Nuwha'ha and the Bsigwigwilt, it is also the successor of the rights held by the Nuwha'ha and the Bsigwigwilt with respect to the right to take shellfish. The State of Washington alone contests the political successorship of the Upper Skagit Tribe to the Nuwha'ha and the Bsigwigwilt.

24 25 Whether or not a particular group of persons has descended from a treaty signatory and has maintained an organized tribal structure is a question of fact which a district court is competent to determine. *Washington II*, 520 F.2d at 693. Furthermore, once a group is found to be the successor in interest to a treaty signatory, that group's rights under the treaty may be "lost only by unequivocal action of Congress." *Id.*, quoting *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968).

A. Successorship of the Upper Skagit Tribe

1. Successors to the Bsigwigwilt.

The Court finds that the Bsigwigwilt Tribe was previously adjudicated as the predecessor of the Upper Skagit. Thus, the Upper Skagit have the right to take fish from the usual and accustomed places of the Bsigwigwilt.

Washington I referenced and incorporated the Indian Claims Commission proceeding which had been brought by the Upper Skagit to adjudicate the issue of their predecessors-in-interest. See *Washington I*, 384 F.Supp. at 379; 8 Ind.Cls. Comm'n 475, 476-77 (Ddt. No. 92, March 25, 1960). In that proceeding, the ICC found that ten groups, including the Bsigwigwilt, were the predecessors of the Upper Skagit. Although the spelling of the Bsigwigwilt was different in the Indian Claims Commission proceeding; this Court is satisfied with the uncontroverted expert testimony presented at trial which accounted for the variations in the modern spelling.³⁴

2. Successors to the Nuwha'ha

The issue of the successorship of the Upper Skagit to the Nuwha'ha is somewhat more involved because the Nuwha'ha were not identified by the Indian Claims Commission proceeding and subsequently incorporated into *Washington I* as one of the predecessor groups of the Upper Skagit.

26 27 As a preliminary matter, it is clear that the tribe or group asserting the successorship bears the burden of proof on this issue. *Lummi Indian Tribe*, 841 F.2d 317, 318 (9th Cir.1988). Moreover, to acquire the rights of a treaty signatory tribe, a contemporary tribe must obtain "treaty tribe status." *United States v. Washington*, 641 F.2d 1368, 1370-71 (9th Cir.1981). For the Upper Skagit to obtain such status, it must demonstrate that a percentage of its members have descended from a treaty signatory and that the Tribe has maintained an organized tribal structure, including some defining characteristic of the original tribe. *Id.* at 1372-73.

a. The Suquamish Test

28 The State of Washington argues that the Court should not apply the *United States v. Washington* test described above, but instead should apply the test set forth in *United States v. Suquamish Indian Tribe*, 901 F.2d 772 (9th Cir.1990). In *Suquamish*, the Ninth Circuit held that for one signatory tribe to claim the rights of a second signatory tribe, the plaintiff must show both a consolidation or merger of the tribes and a demonstration that the tribes, together, maintained an organized tribal structure. *Id.* at 776.

*1449 The facts in this case, however, are clearly distinguishable from the *Suquamish* case. Specifically, the following differences exist: (1) at issue in *Suquamish* was the consolidation of two signatory tribes; here, no one has presented evidence that the Upper Skagit itself was a treaty signatory; (2) in *Suquamish*, the tribes were mobil, hence providing little interaction that would point to a merger; here the Nuwha'ha and other predecessor bands lived before, during, and after treaty time in the same and adjoining watersheds; and (3) in *Suquamish*, the tribes were hostile to each other; they had no interest in uniting and the United States continued to deal with each group as a separate tribe; here, the Nuwha'ha and the other bands were political allies and shared resources. Consequently, based on these differences, the Court finds the *Suquamish* test inapplicable to this action.

b. The Washington Test

29 Having found the *Suquamish* analysis to be inapplicable to these facts, the Court finds the Ninth Circuit's analysis in *United States v. Washington*, 641 F.2d 1368 (9th Cir.1981), to be the appropriate test. In that light, the evidence in this case clearly indicates that the Upper Skagit obtained treaty time status, in that it has demonstrated that the requisite percentage of its members have descended from a treaty signatory and that the it has maintained an organized tribal structure, which includes some defining characteristics of the original tribe.

Through the testimony in open Court as well as the reports submitted into evidence, the Upper Skagit demonstrated the necessary facts under the *Washington* test. First, the Upper Skagit have maintained an organized tribal structure: The Upper Skagit claim a membership of approximately 600 members, and they have a tribal council that is elected from the enrolled members of the Tribe. Second, a percentage of the members of the Upper Skagit have descended from the Nuwha'ha. Specifically, as many as 200 of the 600 current tribal members trace their direct ancestry back to the Nuwha'ha. In addition, many members of the current tribal leadership trace their heritage directly to the Nuwha'ha leadership. Indeed, four members of the present council can trace their heritage back to two of the Nuwha'ha treaty time leaders; furthermore, the present chairman of the Tribe is a direct descendent of Nuwha'ha members who were alive during treaty time. As a result, the Tribe has demonstrated that it is the successor to the Nuwha'ha, under the test set forth in *United States v. Washington*; thus the Upper Skagit have a viable claim to the treaty fishing rights of the Nuwha'ha, including the shellfishing rights, under the Stevens Treaties.

B. The Usual and Accustomed Areas of the Upper Skagit Tribe

30 Having concluded that the Upper Skagit has succeeded to the rights of the Nuwha'ha and the Bsigwigwilt, the Court must determine the usual and accustomed areas of these predecessors from which the Upper Skagit may now take fish.

1. Usual and Accustomed Areas of the Bsigwigwilt and other predecessors previously determined in Washington I.

In *Washington I*, the Court made findings in regard to the usual and accustomed fishing grounds and stations running along the rivers. Thus, the Court need now adjudicate only the usual and accustomed marine areas of the predecessors of the Upper Skagit, including the Bsigwigwilt, the Nookachamps, and the Sabelku.³⁵

The uncontroverted evidence presented at trial through oral testimony and written reports is that these predecessor groups, at and before treaty time, took fish, including shellfish, from the marine and fresh waters, tidelands, and bedlands adjacent and subjacent thereto of the areas along the Saratoga Passage on the east coast of Whidbey Island from Sneatum Point in the vicinity of Penn *1450 Cove and Harrington's Lagoon to Holmes Harbor, and on Camano Island from Utsaladdy to what is now the vicinity of Camano Island State Park and Elger Bay. In addition, these predecessor groups of the Upper Skagit also fished at the following marine and tideland locations: Deception Pass, Similk Bay, and southward to and including Penn Cove and Utsaladdy. Because the Upper Skagit have succeeded to the interests of these predecessor groups, the Upper Skagit also have the right to take fish from these usual and accustomed grounds and stations.

2. Usual and Accustomed Areas of the Nuwha'ha

The uncontroverted testimony also indicated that the Nuwha'ha, at and before treaty time, took fish, including shellfish, from the marine and fresh waters, tidelands, and bedlands adjacent and subjacent thereto of the vicinity of Bayview on Padilla Bay to the vicinity of Blanchard on Samish Bay up to and including Chuckanut Bay. Thus, because the Upper Skagit have succeeded to the interests of the Nuwha'ha, the Upper Skagit also have the right to fish, including shellfish, from these usual and accustomed grounds and stations.

VIII. ORDER REGARDING IMPLEMENTATION

This opinion interprets the plaintiff Tribes' right to take shellfish under the Stevens Treaties in light of the Shellfish Proviso limiting such right to the taking of shellfish from beds not "staked or cultivated."

Because of the complex issues and competing concerns involved in the implementation of this decision, and because the Court desires to have the benefit of the parties' prior experience in *Washington I*, the Court defers the issue of injunctive relief or any plan of implementation until there has been input from the parties.

Accordingly, the Court orders the parties to submit a jointly agreed upon plan of implementation on or before January 31, 1995. To the extent that the parties cannot agree

EXHIBIT

Declaration of Dr. Barbara Lane re Upper Skagit successorship to Nuwhaha Band / Tribe

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Judge Edward Rafeedie

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,)	
et al.,)	No. 9213 - Phase I
Plaintiffs,)	
)	Subproceeding No. 89-3
vs.)	
)	DECLARATION OF
STATE OF WASHINGTON,)	DR. BARBARA LANE
et al.,)	
Defendants.)	

Dr. Barbara Lane hereby declares:

1) I am currently an expert witness in Subproceeding 89-3.

2) I have also been designated by the Upper Skagit Indian Tribe as its expert in Subproceeding 93-1 regarding the Tribe's marine usual and accustomed grounds and stations.

3) Since Subproceeding 93-1 will not be heard until after completion of the trial in Subproceeding 89-3, I have been designated as one of the experts for the Upper Skagit Indian Tribe in Subproceeding 89-3 for the limited purpose of providing expert opinions as to some of the marine fishing areas, including shellfishing, of the Upper Skagit Indian Tribe in and around treaty times.

4) I submit this Declaration in order to provide information and opinions in lieu of an Expert Report on behalf of the Upper Skagit Indian Tribe.

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5) My Vitae and credentials have been set forth elsewhere in this Subproceeding and are incorporated herein by reference.

6) The evidence shows that one of the constituent groups of the Upper Skagit Indian Tribe, Bsigwigwilts, fished in the waters, and took shellfish along the shores, of Saratoga Passage from the vicinity of Harrington's Lagoon to Holmes Harbor on the east coast of Whidbey Island, and from Utsaladdy to what is now Camano Island State Park, on the north and west coasts of Camano Island. The evidence also shows Upper Skagit fished in and around Deception Pass and took shellfish on the west shore of Similk Bay.

7) The above opinions are based upon my review of published and unpublished ethnohistorical and ethnographic reports, including testimony and field notes of June Collins, Sally Snyder and Wayne Suttles, some of which are set forth in Exhibit A attached hereto and incorporated herein by reference.

8) I have engaged in independent examination and research concerning the Nuwha'ha. The evidence shows that one of the constituent groups of the present day Upper Skagit Indian Tribe is Nuwha'ha. The evidence also shows that Nuwha'ha fished in the saltwater from the vicinity of Bayview on Padilla Bay to the vicinity of Blanchard on Samish Bay, and up to and including Chuckanut Bay.

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Dated this 16th day of August, 1993.

Executed at Victoria, British Columbia, Canada.

I hereby declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

Barbara Lane

Dr. Barbara Lane

EXHIBIT

Trial Testimony of Dr. Barbara Lane re Upper Skagit successorship to Nuwaha Band / Tribe

UPS - 66
Exerpt Transcript
Subproceeding 89-3
Trial Testimony of Barbara Lane

CAUSE No. 9213 Sub. 93-1

PLAINTIFF
EXHIBIT
NO. UPS-105

ADMITTED

1 MR. JOHNSON: Thank you.
 2 THE COURT: We'll take our recess.
 3 THE CLERK: All rise, this Court is in recess.
 4 (Morning recess.)
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1 offer the Puyallup exhibit list. These are the exhibits relied
 2 on by my expert witness, and I would like to offer them for
 3 admission.
 4 THE COURT: Are there any objections to these?
 5 MR. MONTECUCCO: As with the other, your Honor, we
 6 will be responding in writing.
 7 THE COURT: Very well. Next witness?
 8 MR. CHESNIN: Your Honor, at this time it is the
 9 intention of the plaintiffs to allow the Upper Skagit Indian
 10 tribe to present its case with respect to its usual and
 11 accustomed shellfishing grounds and stations.
 12 The Upper Skagit Indian tribe is a federally
 13 recognized Indian tribe, and the tribe described in Final
 14 Decision 1 in the original portion of this case is here seeking
 15 a greater relief than most of the tribes.
 16 At the time of Final Decision 1, the only evidence
 17 produced by the tribe or sought at the time related to rivering
 18 salmon fishing. The tribe in this proceeding and in a parallel
 19 proceeding, 93-1, is seeking marine rights, your Honor, for
 20 usual and accustomed fishing, in particular in this proceeding,
 21 marine shellfishing rights at the usual and accustomed
 22 locations of the tribe.
 23 In addition, your Honor, as an additional portion of
 24 its presentation today and part of its pleadings, your Honor,
 25 the Upper Skagit tribe is seeking to have determined by this

1 THE COURT: Do we have any further questions?
 2 MR. JOHNSON: Your Honor, I am going to accomplish the
 3 one last question promised by attorneys. Please hand the
 4 witness what has been marked for identification UPO-21,
 5 petition before Indian Claims Commission.
 6 BY MR. JOHNSON:
 7 Q. In the course of preparation of your report,
 8 Dr. Fitzpatrick, did you consider the Indian Claims Commission
 9 proceeding petition which I have just handed to you marked as
 10 UPO-21, setting forth the claim of the Snohomish tribe of
 11 Indians?
 12 A. I considered the report that Dr. Tweddell wrote that was
 13 the substance of --
 14 THE COURT: Well, ma'am, have you seen this before?
 15 THE WITNESS: No, no.
 16 MR. JOHNSON: Thank you, your Honor.
 17 THE COURT: All right, any further cross examination?
 18 Any redirect?
 19 MR. MORISSET: I have nothing, your Honor.
 20 THE COURT: You may step down, ma'am. Call the next
 21 witness.
 22 MS. KLAPSTEIN: Your Honor, if I may, I forgot to
 23 offer the exhibit list which I gave to the clerk a couple of
 24 days ago and handed to the defendants this morning. And I
 25 realized they may have some objections, but I would like to

1 court that the Nuwba'ha bank, a bank in existence at the time
 2 of the treaty and a signatory to the treaty is a predecessor to
 3 the present day Upper Skagit Indian tribe. This will also be
 4 new evidence before the court and not previously presented in
 5 any proceeding.
 6 And with that introduction, your Honor, I would
 7 call -- and I would point out lastly, your Honor, that as a
 8 result of -- this is an expansion of the U & A issue for the
 9 tribes, this tribe is not presenting its currently adjudicated
 10 usual and accustomed areas to the court. As a result, your
 11 Honor, I would call as our first witness Dr. Barbara Lane.
 12 THE CLERK: I believe you are still under oath.
 13 BARBARA LANE,
 14 produced as a witness, having been previously sworn, testified
 15 as follows:
 16 THE CLERK: state your full name and spell your last
 17 for the court reporter.
 18 THE WITNESS: Barbara Lane, L-A-N-E.
 19 THE COURT: You have been previously sworn and you are
 20 still under oath.
 21 THE WITNESS: Thank you.
 22 MR. CHESNIN: And I would call the attention of the
 23 court to the fact that Dr. Lane's curriculum vitae has already
 24 been accepted into evidence as well.
 25 THE COURT: Yes.

DIRECT EXAMINATION

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 2 BY MR. CHESNIN:
 3 Q. Dr. Lane, would you please turn to Exhibit UPS-32 in the
 4 second volume of Upper Skagit documents which I believe is
 5 Volume 60. Dr. Lane, would you look at that, and is that the
 6 declaration which you prepared with respect to your expert
 7 opinion concerning the issues of Nuwha'ha?
 8 A. Yes. I seem to have two copies of the first.
 9 MR. CHESNIN: All right. Your Honor, in addition the
 10 document refers to an Exhibit A which was apparently
 11 inadvertently left out of the exhibit book. And I have handed
 12 to the clerk and to defense counsel a praecipe with Exhibit A
 13 which is the bibliography to that declaration for inclusion as
 14 well as it was intended and also as it appeared in the direct
 15 testimony of Dr. Lane that was filed with the court.
 16 THE COURT: All right, it may be added to the
 17 exhibit.
 18 MR. CHESNIN: thank you, your Honor.
 19 Q. Dr. Lane, would you tell the court who the Nuwha'ha were
 20 and describe what areas they occupied at or about treaty times?
 21 A. Yes, the Nuwha'ha were one of the coast Salish people in
 22 the case area. And they were located, their territory was
 23 located on the mainland south of the Lummi and the Nooksack and
 24 north of the Skagit.
 25 The main part of their territory is the Samish River

1 A. Yes. In order to determine whether in fact --
 2 THE COURT: Well, are these the materials that you
 3 relied upon?
 4 MR. CHESNIN: Those are in part, your Honor. I
 5 believe that the description will be broader than those
 6 materials.
 7 THE COURT: Well, let's just get rid of these
 8 materials then. Did you rely on each of the --
 9 THE WITNESS: Those are examples of some of the kinds
 10 of the materials.
 11 THE COURT: Some of the kinds?
 12 THE WITNESS: Yes.
 13 THE COURT: But not these?
 14 THE WITNESS: These specifically, but they are simply
 15 examples.
 16 THE COURT: Well, the ones contained on this -- what
 17 is this Exhibit Number?
 18 MR. CHESNIN: That is not an exhibit, your Honor. It
 19 is not intended to be an exhibit. It is merely intended for
 20 illustrative purposes, for the purpose of having the --
 21 THE COURT: Well, it is a lot easier to ask the
 22 witness if she relied on these rather than to go through each
 23 one. Is that what you intend to do?
 24 MR. CHESNIN: No. I do not intend to go through each
 25 one, your Honor. I intend to have the witness briefly

1 drainage area and the tributaries of the Samish River. And
 2 back to Lake Samish from which that river drains, they ventured
 3 farther inland and had temporary camps, but I won't go into
 4 that, because we are concentrating on shellfish here.
 5 Their coastal areas villages were located on the
 6 Samish Bay and Padilla Bay.
 7 Q. Dr. Lane, the Nuwha'ha signed the treaty of Point Elliott?
 8 A. Yes.
 9 Q. And who was the signatory?
 10 A. The signatory was Pateus, P-A-T-E-U-S. He was from the
 11 Nuwha'ha village on Padilla Bay.
 12 Q. Dr. Lane, had you formulated an opinion as to whether the
 13 Nuwha'ha or a predecessor band or group of the Upper Skagit
 14 Indians, Indian tribe?
 15 A. Yes, I have.
 16 Q. What is that opinion, please.
 17 A. My opinion is that the descendants of the treaty time
 18 Nuwha'ha are a constituent group member of the present day
 19 Upper Skagit Indian tribe.
 20 Q. Dr. Lane, if the clerk has not handed you yet a listing of
 21 exhibits that relate to your declaration, which is on a
 22 separate sheet of paper, a copy of which I provided to the
 23 court as well, your Honor -- can you briefly relate to the
 24 court, Dr. Lane, some of the materials which you relied upon in
 25 support of your opinion just stated?

1 describe, in summary fashion that the court has required,
 2 merely the kinds of documents that she has relied upon at this
 3 point.
 4 THE COURT: All right.
 5 THE WITNESS: Very quickly, I have relied on all of
 6 the treaty time documentation relating to Nuwha'ha that I can
 7 find, all of the historical, ethnohistorical and
 8 anthropological literature which deals with the Nuwha'ha.
 9 But in order to track the descendants of the Nuwha'ha,
 10 I had to first find out who the individual named people were
 11 who were members of the Nuwha'ha at treaty time in order to
 12 trace their descendants today.
 13 And most of the historical and anthropological
 14 literature deals with the group as such rather than
 15 individually named persons. So over the last few years, I have
 16 been doing an extensive search of land records, probate
 17 records, censuses and other nonanthropological sorts of
 18 documents in order to track the population from treaty time to
 19 now.
 20 BY MR. CHESNIN:
 21 Q. And, Dr. Lane, do you have an opinion as to whether there
 22 are definin characteristics of the Nuwha'ha which have
 23 persisted within the evolving Upper Skagit tribe?
 24 MR. GECK: Your Honor, may I make an objection? Dr.
 25 Lane, the Upper Skagit tribe filed a 2-page direct testimony.

1 Already the introduction has probably tripled the quantity of
 2 information offered as written direct testimony, and now it is
 3 going far beyond the bounds of the written direct testimony,
 4 asking about continuity that was not in the direct written
 5 direct testimony.

6 MR. CHESNIN: Your Honor, I believe that is not the
 7 case. In fact, the written testimony is the opinion of Dr.
 8 Lane. I am merely asking her to restate her opinion within the
 9 court's definition of what constitutes a predecessor band or
 10 group is the concept as both the court and counsel well know,
 11 the concept of defining characteristics. I am merely asking
 12 her to state the opinion, and then I will turn her over for
 13 cross examination.

14 THE COURT: Well, the objection will be overruled

15 BY MR. CHESNIN:

16 Q. Do you have such an opinion, Dr. Lane?

17 A. Yes.

18 Q. And could you briefly tell the court some of the
 19 materials -- I am sorry, could you briefly describe for the
 20 court that opinion?

21 A. My opinion is that the -- or what I have found is that
 22 the -- I suppose it's an opinion as well. The present day
 23 leadership in the Upper Skagit tribe is composed of a
 24 significant number of Nuwha'ha people who trace back to the
 25 leaders that were identified at treaty time, four members of

1 and the Indian fisheries, correct?
 2 A. Yes.
 3 Q. That was before this current litigation began regarding
 4 Upper Skagit shellfishing rights, correct?
 5 A. Yes.
 6 Q. And in that report, it was your opinion that the
 7 descendants of the Nuwha'ha are members of the Lummi tribe,
 8 others part of the Swinomish Tribal Community and others are
 9 members of the Samish tribe?

10 A. That's correct.

11 Q. And you also offered the opinion in that report that the
 12 temporary successors in interest of various groups, including
 13 the Nuwha'ha, are presently located on the Lummi, Swinomish and
 14 Tulalip reservations?

15 A. Can you point me to the section of the report you are
 16 reading from?

17 Q. Yes, I can. It is Exhibit UPS-27 which is in front of you,
 18 and that would be page 14. And my question was whether you
 19 offered that opinion. It is the last full paragraph on page 14
 20 of your report.

21 A. Page 14?

22 Q. Yes, page 14. The paragraph begins with, "In sum,
 23 downstream from the Upper Skagit, there were a number of groups
 24 who fished Baker anadromous runs," and in those groups, you
 25 include the Nuwha'ha?

1 the present council traced back to two of the Nuwha'ha leaders
 2 that are identified at treaty time.

3 And the present chairman of the Upper Skagit tribe who
 4 I believe has held that position for about 18 years is also a
 5 direct descendant of one of the people who was born prior to
 6 the treaty who in the family line I am able to track from that
 7 time to this.

8 Q. And do you have evidence concerning the hereditary chief
 9 relationship in the Upper Skagit tribe?

10 A. That's what I was referring to.

11 Q. Okay. Lastly, Dr. Lane, with respect to UPS-32, is that
 12 your direct testimony in that case and do you adopt it? That's
 13 the declaration, Doctor.

14 A. Yes, it is.

15 MR. CHESNIN: Your Honor, I would offer UPS Exhibit-32.

16 THE COURT: That may be admitted.

17 (Exhibit UPS-32 was received in evidence.)

18 MR. CHESNIN: Thank you, your Honor. I have no
 19 further questions for the witness at this time.

20 THE COURT: You may cross-examine the witness.

21 CROSS EXAMINATION

22 BY MR. GECK:

23 Q. Good morning, Dr. Lane. I'm Jay Geck. I'm an Assistant
 24 Attorney General representing the state of Washington. In
 25 December of 1981, you wrote a report on the Baker River dams

1 THE COURT: what page?

2 MR. GECK: Page 14. I believe the last two
 3 sentences.

4 THE WITNESS: Yes, I see that.

5 BY MR. GECK:

6 Q. Those express the opinion that temporary successors of
 7 Indian interests to the various groups, one of which is the
 8 Nuwha'ha, are presently located on the Lummi, Swinomish and
 9 Tulalip reservations and in the neighboring area; is that
 10 correct?

11 A. Yes. That was my opinion before I did the present
 12 research.

13 Q. Have you ever studied the heredities and the descendancy of
 14 the original allotees on the Upper Skagit reservation?

15 A. Well, that was partly involved in the research that I did
 16 on this matter that we are speaking of right now. Excuse me,
 17 did you say the allotees on the Upper Skagit reservation?

18 Q. Yes.

19 A. I'm sorry, I misspoke. I wasn't listening carefully to
 20 you. No, at the time I did this research, I don't think the
 21 Upper Skagit reservation had been established yet.

22 What I was thinking of when I answered your previous
 23 question was in the course of tracking Nuwha'ha descendants in
 24 the Upper Skagit tribe, I did research the history of the
 25 people who held -- the Upper Skagit people and Nuwha'ha people,

1 who held trust homesteads on the public domain in the Skagit

2 Valley.

3 Q. That was the essence of my question. Thank you.

4 A. Oh.

5 MR. GECK: No other questions of this witness.

6 THE COURT: Any further cross examination?

7 MR. CHESNIN: Just briefly, your Honor.

8 THE COURT: Just a moment.

9 MR. CHESNIN: I am sorry.

10 THE COURT: It appears there is none. Do you have
11 some redirect?

12 MR. CHESNIN: Thank you, your Honor. I apologize to
13 the court.

14 REDIRECT EXAMINATION

15 BY MR. CHESNIN:

16 Q. Dr. Lane, at the time that you wrote that Baker River, had
17 you commenced your research on behalf of the Upper Skagit tribe
18 with respect to the Nuwha'ha issue?

19 A. I'm not sure of the date, but I don't believe so.

20 Certainly at the time that I finished the research that stands
21 here, I had not begun it.

22 Q. When you did your research with respect to the issue of the
23 Nuwha'ha presence in the Upper Skagit tribe, what kinds of
24 numbers or percentages with respect to the current membership
25 of the Upper Skagit tribe did you find were related to the

1 out how many -- I haven't tried to do a head count of Nuwha'ha

2 descendants universally.

3 Q. But it is your opinion that Nuwha'ha was in fact a

4 predecessor band of the Upper Skagit tribe?

A. Yes.

6 MR. CHESNIN: Your Honor, that concludes my redirect,

7 except that at this juncture, your Honor, I would make two

8 notations: One is to offer the exhibits relating to this

9 witness' testimony. In particular, your Honor, the state has

10 provided me with a list which indicates that they have no

11 objection to Exhibit UPS-38, which is a Bow Quadrangle map.

12 Secondly, your Honor, I would offer the exhibits, and

13 I provided copies of that exhibit list with respect to this

14 matter, and although those issues are contested, your Honor, I

15 would like to indicate to the court that with respect to all of

16 these exhibits, I believe that this is an exception to the

17 general rule that your Honor has stated.

18 It is an exception for two reasons. One is under

19 Federal Rule 703, even though these relate to an expert

20 opinion, the rule refers to need not be admitted in evidence

21 and is not mandatory.

22 And secondly, as your Honor can see from the exhibit

23 which you have admitted which is her direct testimony, that

24 there is merely a bibliography at the end, and so these

25 exhibits which I have handed up to the clerk and to the court

1 Nuwha'ha tribe?

2 A. Well, I believe that I had found over a hundred
3 individuals. And at that point, I did not continue the effort
4 because it was a significant percentage of the present tribal
5 membership. And I had done the easy part. The tracking
6 individuals whose surnames have changed is very time consuming.

7 Q. And was your opinion with respect to the predecessor nature
8 of the Nuwha'ha band within the present day Upper Skagit tribe
9 also related to your determination of the large numbers of
10 Nuwha'ha descendants in the tribe?

11 A. Yes.

12 Q. And lastly, Dr. Lane, is it your understanding -- what is
13 your understanding as to whether or not the Upper Skagit tribe
14 is claiming any kind of exclusivity with respect to the
15 representation, the Nuwha'ha representation, in its group?

16 A. Oh, thank you for asking that question. No, my research
17 was trying to track those descendants who today can be
18 identified as members of the Upper Skagit tribe. And in the
19 course of that research and even before I began it, I was
20 aware, as is shown right here, that there are Nuwha'ha
21 descendants at several of the other reservation groups.

22 And I assume there may be some who are not presently
23 members of any recognized tribe and not associated with any
24 reservation. So it is a nonexclusive claim that is being made
25 here to my understanding, but I haven't similarly tried to find

1 are specific exhibits relating to the testimony and, therefore,
2 are not included in the same way as other peoples' expert
3 reports.

4 So I would offer them for admission.

5 THE COURT: Is there any objection?

6 MR. GECK: There is an objection, and the state can

7 handle it the same way as the other ones. This is very similar

8 to the other expert witnesses who are submitting

9 nonadmissible --

10 THE COURT: In what way are they different from the
11 others? How would this be different?

12 MR. CHESNIN: Well, these differ in the sense that, as
13 the court has previously ruled, most of the other ones are not
14 being admitted as a result of their relationship and their
15 citing in the report.

16 These exhibits are not cited in the report. I believe
17 the exhibits that the Upper Skagit tribe is offering are in
18 fact primarily ancient documents, your Honor, under the rules,
19 and we are prepared -- what I would like to indicate to the
20 court at this time --

21 THE COURT: What are the exhibits?

22 MR. CHESNIN: The exhibits for Dr. Lane include the
23 following, your Honor: Exhibit Number 8, Bureau of Indian
24 Affairs family tree.

25 THE COURT: That is an ancient document?

EXHIBIT

Testimony of Dr. Wayne Suttles re Upper Skagit successorship to Nuwhaha Band / Tribe

UPS - 61

Exerpt Transcript

Subproceeding 89-3

Trial Testimony of Wayne Suttles

CAUSE No. 9213 Sub. 93-1

PLAINTIFF
EXHIBIT
NO. UPS-100

ADMITTED _____

1 Q. And Annie Lyons is --

2 A. Annie Lyons is a Samish lady that I talked with.

3 Q. You also mentioned that your addendum added one

4 bibliographic reference, and what was that?

5 A. No, I think from the bibliography, I think I had not cited

6 a site survey, an archeological site survey by a man named

7 Keith Thompson who reported some of those things that he was

8 told by local non-Indians. There were just one or two

9 statements that I thought were of interest.

10 Q. And when did Mr. Thompson produce his report, if you

11 recall?

12 A. In the 1940's, the same time that I was doing ethnographic

13 work.

14 Q. Overall, Dr. Suttles, do the places mentioned in your

15 report represent all or fewer than all of the areas used by

16 these people at treaty times for shellfish harvest?

17 A. Well, certainly fewer, because I -- I only listed those

18 sites that were mentioned to me as places where people went,

19 particularly in these times of -- that they were harvesting to

20 put away for the winter or for trade.

21 MR. RAAS: Thank you very much. That concludes my

22 direct, your Honor.

23 THE COURT: All right, we will take our noon recess at

24 this time and reconvene at 1:30. Will there be any questions

25 for this witness?

1 MR. MONTECUCCO: A few, your Honor.

2 THE COURT: All right.

3 MR. RAAS: I would like to approach the reporter with

4 some spellings of names.

5 THE COURT: All right.

6 MR. RAAS: Thank you.

7 MR. CHESNIN: I have one question, your Honor.

8 THE COURT: we will let you ask it now.

9 CROSS EXAMINATION

10 BY MR. CHESNIN:

11 Q. Unfortunately, your Honor, I think it is two. It will be

12 virtually the same. Dr. Suttles, are you familiar with a band

13 or group entitled the Nuwha'ha at or about treaty times?

14 A. Yes. I am familiar with them. I wasn't around at treaty

15 time.

16 Q. That is right. And, Dr. Suttles, are you aware that a

17 large number of Nuwha'ha people went to and became a part of

18 the present day Upper Skagit tribe?

19 A. I am aware of that.

20 Q. Thank you.

21 THE COURT: All right, we will take our noon recess

22 now until 1:30.

23 (Recess)

24

25

EXHIBIT

**Excerpt from Valley of the Spirits by Dr. June Collins re Upper Skagit successorship to Nuwaha Band /
Tribe**

VALLEY OF THE SPIRITS

THE UPPER SKAGIT INDIANS
OF WESTERN WASHINGTON

BY JUNE MCCORMICK COLLINS

