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No. 84-3894 (764 F.2d 670 (9th Cir. 1985))

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff,
QUINAULT INDIAN TRIBE, et. al.,
Plaintiffs-Intervenors,
THE SUQUAMISH TRIBE,
Plaintiff-Intervenor-Appellant,
v.
THE SKOKOMISH INDIAN TRIBE,
Plaintiff-Intervenor-Appellee,
v.
STATE OF WASHINGTON, et. al.,
Defendants.

FILED

DEC 24 1984

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BRIEF OF APPELLANT THE SUQUAMISH TRIBE

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I. STATEMENT OF ISSUES

A. Was the Skokomish Indian Tribe's action requesting a determination that it has a primary right to fish in Hood Canal and a right to exclude the Suquamish Tribe from fishing in Hood Canal barred by the doctrine of res judicata?

B. Does the Skokomish Indian Tribe have a primary right to fish in Hood Canal and a right to exclude the Suquamish Tribe from fishing in Hood Canal?

II. STATEMENT OF THE CASE

A. Nature of the Case. The Skokomish Indian Tribe filed a request for determination that the Skokomish Tribe has a primary right to fish in Hood Canal^{1/} and a right to exclude all other treaty tribes from fishing in the canal. The Skokomish request was filed in a continuing case relating to the nature and extent of treaty Indian fishing rights in Western Washington and the enforcement of those rights. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086, reh. denied, 424 U.S. 978 (1976). United States v. Washington, 459 F. Supp. 1020 (W.D. Wash. 1978), aff'd., 593 F.2d 1123 (9th Cir. 1978); substantially aff'd sub nom. Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 (1979).

B. Court Proceedings Below. The Suquamish Tribe, which had previously adjudicated treaty fishing rights in Hood Canal, United States v. Washington, 459 F. Supp. 1020, 1048, Order Re

^{1/}Hood Canal is a large saltwater inlet west of Puget Sound which supports a significant salmon fishery.

Herring Fisheries and Determination of Usual and Accustomed filed its formal opposition to the Skokomish request.^{2/} The district court (Honorable Walter E. Craig, sitting by designation) referred the request to a special master (Honorable Robert E. Cooper, U.S. Magistrate Retired). The special master conducted various hearings on the matter, including an evidentiary hearing, and filed his report and recommendation on January 20, 1984. On January 30, 1984, the Suquamish Tribe filed its objections to the Special Master's report and recommendation. By order dated March 22, 1984, the district court adopted the special master's report and recommendation and entered the findings of facts, conclusions of law and order recommended by the special master. (Ex.R. 3 and 4) By order dated April 25, 1984, the district court denied the motion of the Suquamish Tribe to vacate the order approving the special master's report and recommendation. (Ex.R. 5)

C. Disposition Below. The district court held that the Skokomish Tribe has a primary right to fish in Hood Canal and a right to exclude the Suquamish Tribe from fishing in the canal.

D. Jurisdiction/Timeliness.

1. Basis for subject matter jurisdiction in the district court.

The district court had jurisdiction over this matter pursuant to 28 U.S.C. §1362 in that this action was brought by a

^{2/}Various other tribes also initially opposed the Skokomish request. Each of these tribes subsequently either withdrew its opposition in toto or entered into a settlement agreement with the Skokomish.

The United States, which appeared and participated, took no position with respect to either the Skokomish request or the Suquamish opposition to the request.

federally recognized Indian tribe and the action arises under the Constitution, laws and treaties of the United States.

2. Basis for Jurisdiction in the court of appeals.

The Court of Appeals has jurisdiction over this matter pursuant to 28 U.S.C. §1291 in that this is an appeal of a final order of the district court.

3. Appealability.

The order of April 25, 1984, denying the Suquamish's motion to vacate was a final disposition under F.R.A.P. 4(a)(4).

4. Timeliness.

The order of April 25, 1984, finally disposing of the action, was filed on April 30, 1984. The notice of appeal was filed on May 30, 1984. Therefore the notice of appeal was timely filed under F.R.A.P. 4.

III. STATEMENT OF FACTS

Because different facts are relevant to each issue presented for review, the facts that relate to a particular issue are presented as part of the argument with respect to that particular issue.

IV. ARGUMENT

A. A DETERMINATION OF THE REQUEST OF THE SKOKOMISH TRIBE AS IT RELATES TO THE SUQUAMISH TRIBE IS BARRED BY THE DOCTRINE OF RES JUDICATA.

The district court held that a determination of the Skokomish Tribe's request for a determination that it has a primary right to fish in Hood Canal and a right to exclude other tribes from fishing in the canal is not barred by the doctrine of res judicata, citing as authority United States v. Lower Elwha

Tribe, 642 F.2d 1141 (9th Cir. 1981), cert. denied, 454 U.S. 862 (1981). Conclusion of Law No. 91. (Ex.R. 4) The standard of review to be applied in reviewing this determination is de novo review. United States v. Washington, 730 F.2d 1314 (9th Cir. 1984).

The Suquamish Tribe agrees that the opinion of this court, Lower Elwha Tribe, relied upon by the district court in determining that the Skokomish request is not barred by the doctrine of res judicata is relevant to this appeal in that it sets forth the factors to be considered by the court in determining whether a tribe has a primary fishing right in a particular area. Nowhere in that opinion or in the proceedings in the district court below was the issue of res judicata ever raised or addressed, and in fact, there was no such issue to be raised.

The Lower Elwha case was an appeal from proceedings arising out of an initial determination by the district court of the usual and accustomed fishing places of the Lower Elwha Tribe and the Suquamish Tribe, as well as various other tribes. The Makah Indian Tribe, which was the real-party-in-interest appellant in the Lower Elwha case appealed the court's final determination of the Lower Elwha's usual and accustomed fishing places. The Skokomish Tribe, however, failed to appeal the district court's final determination in those same proceedings of the usual and accustomed fishing places of the Suquamish Tribe, which included Hood Canal, and is now barred by the doctrine of res judicata from securing a determination by the court that it has a right to exclude the Suquamish Tribe from fishing in Hood Canal.

The Skokomish Tribe was one of the original plaintiff-intervenor tribes in the case from which this appeal arises. United States v. Washington, 384 F. Supp. 312, supra at 1. In its original decision the district court found:

The usual and accustomed fishing places of the Skokomish Indians before, during and after treaty times included all the waterways draining into Hood Canal and the Canal itself. Saltwater trolling and spearing were less important than river fisheries.

Finding of Fact No. 137, at 377.

The Suquamish Tribe subsequently intervened and filed a Request for Determination including a request that the court determine Hood Canal to be a usual and accustomed fishing place of the Suquamish Tribe. The Suquamish request was filed pursuant to paragraph 25 of the district court's Injunction of March 22, 1974, which provides in part:

Any party shall have an opportunity to respond to, join in, or supplement the request within seven days of its service or such other time as may be directed by the court.

Id. at 412. [Emphasis added.]

The Skokomish Tribe made no response or objection to the Suquamish request within the time limitations of paragraph 25, nor did the Skokomish Tribe then assert any claim against the Suquamish Tribe to a primary fishing right in Hood Canal nor to a right to exclude the Suquamish Tribe from Hood Canal. Neither did the Skokomish Tribe make any such objection or claim up to the time that the court entered its finding on April 18, 1975, regarding the usual and accustomed fishing places of the Suquamish Tribe which stated in part:

The usual and accustomed fishing places of the Suquamish Tribe include . . . Hood Canal.

United States v. Washington, 459 F. Supp. 1020, supra at 1.
Finding of Fact No. 5 at 1049. (April 18, 1975).

At the time of the entry of the finding regarding the usual and accustomed places of the Suquamish Tribe, the court also entered findings regarding the usual and accustomed places of several other tribes, which, like the Suquamish, had not been original parties to United States v. Washington, 384 F. Supp. 312, supra, at 1. Among those other tribes were the Swinomish Tribal Community and the Lower Elwha Tribe.

The request for determination filed by the Swinomish Tribal Community had been objected to by the Lummi Tribe, which asserted a claim against the Swinomish to a primary right in Hales Passage, which had been included in the Swinomish request. United States v. Washington, 459 F. Supp. 1020, supra at 1.
Finding of Fact No. 7 at 1049.^{3/}

As part of the order in which the court set forth its determination and findings regarding the usual and accustomed fishing places of the Suquamish Tribe, the Swinomish Tribal Community and the Lower Elwha Tribe, the court also provided each of the other parties to the case with an opportunity to have its findings relating to the fishing places of those tribes reconsidered.

The findings and determinations made in paragraphs 2 through 7 above [relating to the usual and accustomed fishing places of various tribes, including the Suquamish Tribe in Hood Canal, the Lower Elwha Tribe, and to the Lummi

^{3/}With respect to the Lummi claim, the court found that the Lummi Tribe did have a primary right in Hales Passage as against the Swinomish Tribal Community, and therefore, that the Swinomish fishing in Hales Passage would be subject to the permission of the Lummi Tribe. Id.

primary right as against the Swinomish Tribal Community in Hales Passage] are made on the basis of a prima facie showing as heretofore provided and each is subject to reconsideration on the basis of a full evidentiary hearing if requested by any party by written request filed on or before May 19, 1975.

Id. Finding of Fact No. 8.

The court also made it clear that if no request for reconsideration were filed as to any finding or determination that such finding or determination would become final and reviewable.

If no such reconsideration is requested within said time [by May 19, 1975] as to any such finding or determination, the latter shall become final and reviewable as provided by 28 U.S.C. §§1291 and 2201 without further order of this court.

Id.

Such a request for reconsideration was filed by the Makah Tribe objecting to the finding of the court relating to the usual and accustomed fishing places of the Lower Elwha Tribe and asserting a primary right against the Lower Elwhas in certain rivers and streams draining into the Straits of Juan de Fuca. Id. Footnote 7. That matter was subsequently set for a full evidentiary hearing and the final determinations of the court are set forth at 459 F. Supp. at 1066. Order Re Makah Tribe's Request for Reconsideration of Lower Elwha Usual and Accustomed Fishing Places (March 10, 1976). The Makah Tribe appealed that order and it is this court's opinion in that appeal, Lower Elwha, supra, at 3 which the district court cited in this case for the authority that the Skokomish request is not barred by the doctrine of res judicata. Obviously, Lower Elwha rose out of the district court's initial determination of

the Lower Elwha's usual and accustomed fishing places and not out of a subsequent request of the Makah Tribe seeking a determination that it had a primary right to fish and exclude the Lower Elwha Tribe from fishing in places which the court had previously, in a final order not appealed, determined to be a usual and accustomed fishing place of the Lower Elwha Tribe.

The Skokomish Tribe, unlike the Makah Tribe, failed to file a request for reconsideration objecting to the finding of the court relating to the right of the Suquamish Tribe to fish in Hood Canal or asserting a primary right against the Suquamish Tribe in Hood Canal. The Skokomish Tribe also failed to appeal the finding of the district court relating to the Suquamish right to fish in Hood Canal.

In reliance upon the finality of the district court's determination as to the usual and accustomed fishing places of the Suquamish Tribe, the Suquamish Tribe, whose fishing activities prior to 1975 had been severely limited by state regulation, embarked upon a program of expansion of the tribe's fishing fleet commensurate with the scope of the usual and accustomed fishing places of the tribe as had been determined by the district court. (CR 8512). In the period from 1975 through 1980, on average almost sixteen per cent (16%) of the tribe's annual salmon harvest occurred in Hood Canal, and in some years as much as one third (1/3) of the tribal harvest came from Hood Canal. (CR 8511).

More than six years after the district court's finding that the Suquamish Tribe has a right to fish in Hood Canal had become final and after significant tribal and individual expenditure of time and resources in reliance on that finding, the Skokomish

Tribe, on June 17, 1981, filed the request for determination which is the subject matter of this appeal, asserting that it has a primary fishing right in Hood Canal and a right to exclude the Suquamish Tribe from fishing in Hood Canal.^{4/}

The action filed by the Skokomish Tribe as it relates to the Suquamish Tribe is clearly barred by the doctrine of res judicata, which provides that a final judgment, when rendered on the merits, is an absolute bar to a subsequent action between the same parties upon the same claim or demand. Nevada v. United States, ___ U.S. ___, 103 S.Ct. 2906 (1983). The Nevada case is significant not only for being the most recent Supreme Court enunciation and application of the doctrine of res judicata, but also in that it specifically addresses the relitigation of a tribal right as to which there was a previous final adjudication.

^{4/}The Skokomish Tribe readily admits that its request for determination was filed in order to get a greater share of the fish. (CR 7637). The level of Skokomish harvest in Hood Canal had remained relatively constant from 1974 through 1980 as had the relative percentages of the harvest taken by the Skokomish Tribe and Suquamish Tribe. (CR 8511).

In its original decision the district court held that:

Where the fish allocated to Indian treaty fishermen must be divided among two or more tribes having usual and accustomed fishing places through which the fish will pass, responsibility for such division shall rest with the tribes involved.

384 F. Supp., supra at 1. Injunction of March 22, 1974, paragraph 15 at 417. This means that if a tribe desires to catch a greater share of fish than it is already taking, it must resolve that matter with the other tribes also entitled to take those fish, without court intervention. A tribe can get around this ruling and have the matter brought before the court by asserting a primary right to the entirety of its usual and accustomed areas.

This is exactly what the Skokomish Tribe has done in requesting a determination that it has a primary right to fish in each and every river and stream draining into Hood Canal and throughout the marine expanse of the canal.

In particular, in Nevada the United States and the Pyramid Lake Paiute Tribe of Indians sought to establish a fishery water right for the tribe in the fact of a prior final decree in which the tribe's irrigation water right had been finally determined. The Supreme Court held that both the United States and the tribe were barred from doing so by the doctrine of res judicata.

In the original decision of the district court out of which this appeal arises, the court left open the possibility that a tribe might request a determination regarding the location of usual and accustomed fishing places not determined by the court in its original decision. 384 F. Supp. , supra at 1 . Injunction of March 22, 1974, paragraph 25(f)at 419. An expansion of one tribe's usual and accustomed fishing areas might of necessity limit the share of the harvest of other tribe's in that area. Nothing in the district court's original decision, however, permits a tribe which was a party to the case at the time of the adjudication of another tribe's usual and accustomed fishing places, which has subsequently become final, later

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attempt to secure the right to totally exclude the second tribe from any of its usual and accustomed areas.^{5/}

The failure of the Skokomish Tribe to raise the issues relating to the right of the Suquamish Tribe to fish in Hood Canal which it now raises for the first time in its Request for Determination, at the time of the 1975 proceedings, does not overcome the bar to the present proceedings raised by the doctrine of res judicata.

The doctrine of res judicata applies to all matters of law and fact, that were or should have been adjudicated in the prior proceeding. The doctrine applies both to issues previously raised and to issues which the party now raising them had an opportunity to raise in the prior proceeding. Heiser v. Woodruff, 327 U.S. 726 (1946); Morris v. Jones, 329 U.S. 545 (1947); Angel v. Bullington, 330 U.S. 183 (1947).

The Skokomish Tribe had two opportunities at the time the court made its findings relating to the Suquamish right to fish

^{5/}In its memorandum accompanying its request for determination (CR 7637), the Skokomish Tribe broadly hinted to the court that if it were found to have a primary right in Hood Canal, it would not totally exclude other tribes from fishing in the canal.

"Though the primary fishing right necessarily includes the right to exclude other tribes from a fishery, the less drastic option of regulation . . . are (sic) also encompassed by the right. The Skokomish Tribe, in bringing this request before the Court, does not mean to imply that exclusion of other tribes from Hood Canal is the inevitable result of confirmation of its primary rights."

The reality of the matter is that at all times subsequent to the district court's determination that the Skokomish Tribe has a primary fishing right in Hood Canal, the Skokomish Tribe has totally excluded the Suquamish Tribe from fishing in the canal.

in Hood Canal to raise the issues which it now raises in its Request for Determination.

The Skokomish Tribe could have raised those issues in response to the request for determination of the Suquamish Tribe. The Skokomish Tribe also could have raised those issues in a request for reconsideration of the court's finding relating to the Suquamish right to fish in Hood Canal. If the Skokomish Tribe had filed a request for reconsideration it would have then been entitled to a full evidentiary hearing on the issues it now raises. 459 F. Supp. at 1049.

The Lummi and Makah Tribes did raise similar issues against the Swinomish Tribal Community and the Lower Elwha Tribe in the 1975 proceedings. The Skokomish Tribe, however, did not raise those issues against the Suquamish Tribe on either opportunity in those proceedings, nor did the Skokomish Tribe appeal the finding of the court relating to the right of the Suquamish Tribe to fish in Hood Canal which became "final and reviewable" on May 19, 1975.

The right of the Suquamish Tribe to fish in Hood Canal was fully litigated in 1975 in proceedings in which the Skokomish Tribe was a party with full opportunity to raise the claim it has asserted in this case that it has a right to totally exclude the Suquamish Tribe from fishing in Hood Canal. The court's determination regarding the right of the Suquamish Tribe in Hood Canal is not subject to relitigation based on claims that the Skokomish Tribe could have and should have and did not raise in 1975. The doctrine of res judicata is an absolute bar to the relitigation of the Suquamish Tribe's right to fish in Hood Canal.

B. THE DISTRICT COURT ERRED IN ITS DETERMINATION THAT THE SKOKOMISH TRIBE HAS A PRIMARY RIGHT TO FISH THROUGHOUT HOOD CANAL.

1. Standard of Review and Summary of Argument.

The district court, in approving the recommendation and report of the special master and in entering the special master's proposed findings of fact, conclusions of law and order, made a determination that the Skokomish Tribe has a primary right to fish throughout Hood Canal. To the extent that this determination was based on purely "historical" findings of fact, the standard of review is "clearly erroneous". Fed. Rule Civ. Pro. 53(e)(2); United States v. Washington, 730 F.2d 1314 (1984). In the main, however, the district court made its determination on the basis of the application of law to facts, and in that case, the determination of the district court is subject to de novo review. United States v. Washington, 730 F.2d 1314 (1984).

The district court in making its determination failed to apply the applicable law to the facts. If the district court had applied the applicable laws to the facts, it would have determined that the primary fishing right of the Skokomish, or Twana, as they have alternately been referred to in these proceedings, in Hood Canal at treaty time was limited to the areas in proximity to their permanent villages, which were located in the Dabob Bay area of the canal and in the southern part of the canal from the Great Bend south and east.^{6/}

^{6/}An illustrative map showing the locations referenced in this brief immediately follows the Conclusion.

2. The District Court Failed to Apply the Applicable Law to the Facts.

In United States v. Lower Elwha Tribe, supra at 3, the court affirmed a prior decision of this court that the Lower Elwha Tribe has a primary fishing right at certain of its usual and accustomed fishing places and a right to exclude the Makah Tribe from fishing in those locations. In its opinion, this court set forth the four factors which must be taken into consideration in determining whether a tribe has a primary right, and hence a right to exclude other tribes from fishing in a particular area:

- (1) Proximity of the area to tribal population centers;
- (2) Frequency of use and relative importance to the tribe;
- (3) Contemporary conceptions of control of territory; and
- (4) Evidence of behavior, consistent with control.

Id. at 1143, fn. 4. The district court failed to analyze the primary right claim of the Skokomish Tribe in light of these four factors, but instead utilized a less stringent "use and occupancy" standard which had previously been rejected by the district court in making determinations regarding primary fishing rights. (Ex.R. 4).

The "occupancy and use" standard was the standard utilized by the Indian Claims Commission to determine the extent of aboriginal occupancy and use, but not exclusive control, over territory. The scope of the district court's finding of a Skokomish primary fishing right is virtually identical to the scope of the Claims Commission's determination of occupancy and use of territory by the Skokomish or Twana. Skokomish Tribe of

Indian v. United States, 6 Ind. Cl. Com. 135 (March 6, 1958). In neither case, however, were the findings based on evidence which leads to a conclusion that there was exclusive control by the Skokomish or Twana of the entirety of Hood Canal.

As stated in the United States memorandum to the district court in this proceeding, "the question before the court is whether the evidence supports a finding of paramount control" by the Skokomish Tribe, not merely use and occupancy. (CR 9383). (Emphasis added.) As also noted by the United States in that memorandum, "the Supreme Court has held that the mere fact that a tribe's usual and accustomed fishing places were located in territory ceded to the United States by another tribe does not by itself give the latter tribe primary rights where in fact the two (or more) tribes customarily fished there under its own claim of right recognized by the resident tribe." Seufert Bros. Co. v. United States, 249 U.S. 194 (1919).

The district court itself had previously refused to make a determination regarding claimed exclusive fishing rights of the Tulalip Tribe in areas within the findings of the Indian Claims Commission relating to aboriginal ulalip land use and occupancy. United States v. Washington, 459 F. Supp. supra at 1, Order Re Tulalip Tribe's Usual and Accustomed Fishing Places at 1058. At that time the court cautioned:

Because the court was provided with copies of findings of fact supporting decisions of the Indian Claims Commission, a caveat concerning that source of information is appropriate. The primary purpose of those proceedings was for the establishment of aboriginal territories in order to base claims for compensation pursuant to 25 U.S.C. 70a. That inquiry was not direct to determining fishing places but to prove land use and occupancy.

Id. at 1059. (Emphasis added.)

Clearly, in the case of the Skokomish Tribe the Claims Commission did not find that the various Twana villages regarded the entirety of Hood Canal to be within their exclusive possession and control, but only those areas in the proximity of their permanent villages. As set forth by Dr. William W. Elmendorf^{7/} in his work "The Structure of Twana Culture" and as incorporated in the findings of the Indian Claims Commission in the Skokomish case:

The Twana did not look upon land surface as something to be divided up into definitely bounded and exclusively owned areas. Territorial interests were indistinguishable from subsistence interests, and these adhered to usable stretches of territory. The environs of a winter village community's settlement were used intensively by and regarded as property of that community. Away from the village environs meant away from the local watercourse and the feeling of group use ownership faded out as watershed drainage area boundaries were reached.^{8/}

Skokomish, supra at 14. Finding of Fact No. 7(a) at 148.

(Emphasis added.)

^{7/}The district court found that Dr. Elmendorf concluded both that "at treaty times the Twana Indians controlled the territory comprised of, and held the primary right to take fish in, the Hood Canal drainage basin and the waters of Hood Canal south of Port Gamble." Finding of Fact No. 348. (Ex.R. 4) Neither conclusion can be found in the record of this case, and the quotation above is a true reflection of what Dr. Elmendorf's position really is.

^{8/}In referring to "watershed drainage boundaries", Dr. Elmendorf's reference is the individual river watershed drainage boundary of each winter village; i.e., Skokomish River, Duckabush River, etc., not the entire Hood Canal watershed drainage boundary. See Section IV.B.3. below.

The proof required to make a showing of occupancy and use is much less stringent than that required where a tribe seeks to assert a claim of primary right. In addition to occupancy and use, a tribe seeking the court's determination that it has a primary fishing right in a particular area must affirmatively demonstrate the existence of each of the four factors set forth by this court in Lower Elwha Tribe, supra at 3, fn.4⁹/, at 1143.

In Hood Canal at treaty times, the Suquamish fished all the rivers and streams draining the western side of the Kitsap Peninsula up to the vicinity of Tahuya and all the reaches of the canal itself outside of Dabob Bay and down to the vicinity of the Great Bend without permission from, and not subject to exclusion by the Skokomish, or Twana. The Suquamish also fished at treaty times, without permission from and not subject to exclusion by, the Twana, on the western shores of Hood Canal from the northernmost reaches of the canal down to the tip of the Coyle Peninsula. See Section IV.B.3 below.

While these areas in Hood Canal may also have been occupied and used by the Skokomish, or Twana, they were not subject to the control of the Skokomish, or Twana.

As the district court failed to analyze the evidence in this case in accordance with the standards set forth in Lower Elwha

⁹/Of course, if the tribes had been required to make these four additional showing before the Indian Claims Commission, the aboriginal territories set forth in the Commission's findings would have been considerably reduced from the areas ultimately determined by the Commission to be within the aboriginal territory of a tribe based on occupancy and use alone.

Tribe, the task of making the proper analysis now falls on this court.

C. THE PRIMARY FISHING OF THE SKOKOMISH TRIBE IS LIMITED TO AREAS IN PROXIMITY TO THE TWANA WINTER VILLAGES.

a. Proximity to Tribal Population Centers.

The first factor set forth in Lower Elwha Tribe, supra at 3, to determine whether a tribe exercised a primary fishing right at treaty times, and hence a right to exclude other tribes from fishing in a particular area is "proximity of the area to tribal population centers."

The expert witnesses for both the Skokomish and the Suquamish agreed that at treaty times there were nine Twana communities located at permanent villages located in the Dabob Bay area, and in the southern part of Hood Canal, from the Great Bend, south and east. (Ex.R. 8, 11, 12 and 14). With the exception of Tahuya located at the Great Bend and Duhlelap in the toe, all of these villages were located on the western shore of the Canal on the Olympic Peninsula.

The Skokomish, or Twana, themselves viewed the Kitsap Peninsula, which constitutes the eastern shore of Hood Canal, as separate from the territory where their permanent winter villages were located. The Twana regarded the Kitsap Peninsula not as a peninsula connected to the rest of the land abutting the canal, but rather as an "Island." As reported by T.T. Waterman, based on his interviews with Skokomish informants in the earlier part of this century, the Skokomish viewed the Kitsap Peninsula:

. . . as an island. It is intersected deeply by many arms of the Sound, and almost cut off entirely where Case's Inlet and the Canal approach each other. The Indians

evidently considered the difference not worth
bothering about.^{10/}

(Ex.R. 8, p. 47).

There are no permanent Twana villages on the eastern shore of the Canal on the Kitsap Peninsula from the mouth of the Canal to Tahuya. There were no permanent Twana villages on the western shore of Hood Canal from the mouth to the tip of the Coyle Peninsula.

These villages comprised the "population centers" of the Twana people, and there were no "population centers" of the Twana away from these permanent villages. Neither Dr. Barbara Lane, who testified on behalf of the Skokomish Tribe at trial, nor Dr. Jay Miller, who testified on behalf of the Suquamish Tribe, maintained that there were Twana "population centers" away from the permanent villages.

When questioned as to whether there were "population centers" of the Skokomish or Twana outside of their permanent (winter) villages, Dr. William W. Elmendorf, the anthropologist who testified by deposition on behalf of the Skokomish Tribe denied that there were.

DR. ELMENDORF: . . . during the summer there was a spreading out of population over large number of areas where there was no permanent winter village settlement. And the use of some of these areas is

^{10/}The district court to the contrary found Hood Canal to be a "cul-de-sac." Finding of Fact No. 349. (Ex.R. 4). While this finding is correct under a European based conceptualization, the standard to be applied in determining treaty fishing rights issues is the contemporary (treaty time) Indian conceptualization. Lower Elwha, supra at 3, fn. 4 at 1143.

described in the monograph on The Structure of Twana Culture.

MR. O'LEARY: Would it be correct to say that there a population center during the summer?

DR. ELMENDORF: No.

MR. O'LEARY: Where ---

DR. ELMENDORF: No, I don't think so.

Deposition of Dr. William W. Elmendorf. (February 25 and 26, 1982). (Ex.R. 12, p. 28).

At treaty times, the Suquamish, as well as the Twana, had access to fishing the areas of Hood Canal away from their respective villages. The Twana travelled away from their villages northward in canoes. (CR 9287, p. 121, l. 9-14). Within a day's time the Suquamish would travel from Suquamish to the Little Beef River by going in canoes with the outgoing tide to Foulweather Bluff, and coming into the Canal with the change of tide, and with the assistance of a good breeze behind sails made of cattails get to the Little Beef by the end of day. (CR 9288, p. 197, l. 6 to p. 199, l. 3).

The Suquamish also had access to the Canal by overland trails beginning in the Puget Sound inlets on the eastern shore of the Kitsap Peninsula where the Suquamish permanent villages were located and coming out on the Hood Canal side of the Kitsap Peninsula. Such trails are known to have existed from (1) Erland's Point to the general area near Seabeck; (2) from Poulsbo to Vinland; (3) from Suquamish to Port Gamble; (4) from Gorst to Belfair; and (5) from Silverdale to the Canal. (CR 9289, p. 340, l. 10-24).

At treaty times, the Suquamish, as well as the Twana, had summer camping sites in the Canal away from their respective winter villages. The Suquamish are known to have had camping sites at least at Squamish Harbor on the western shore of the Canal; Port Gamble Bay; in the area of Lofall, Vinland and Bangor; at the mouths of the Big Beef and Little Beef; and at Dewatto. (CR 9289, p. 342, l. 3 to p. 349, l. 14).

Some of these campsites overlapped with areas in which the Twana had campsites. As to the two major stretches of the eastern shore of the Canal where summer campsites of both the Suquamish and Twana were located, Elmendorf noted that the Twana in those areas formed no social or political group or unit. (Ex.R. 8, pp. 82 and 84).

These two sites included the eastern shore of Hood Canal from Dewatto Bay to to at least two miles north of Holly or farther, and the eastern shore from Bangor north to Port Gamble. In the case of the stretch from Bangor north to Port Gamble Elmendorf termed the Twana temporarily camping there as "sojourners" and a "mere seasonal aggregation." Id. (Ex.R. 8, p. 84).

It is clear from all of the evidence presented that the only areas of Hood Canal in "proximity to tribal population centers" of the Twana were those near the permanent Twana winter villages. The Skokomish Tribe has failed to produce the necessary evidence that the entirety of Hood Canal was in proximity to tribal population centers.

b. Frequency of Use and Relative Importance.

The second factor set out in this court's opinion in Lower Elwha, supra at 3, to be considered in determining whether a

tribe has a primary right to fish in a particular area is "frequency of use and relative importance to the tribe."

Implicit in the inclusion of "relative importance to the tribe" as an element of this factor is that not all of the usual and accustomed fishing places of a tribe were of "primary" or equal importance to the tribe. The Skokomish Tribe, nonetheless, lays claim to "primary" rights throughout the entire extent of its usual and accustomed fishing areas.

The two expert witnesses upon whom the Skokomish rely in this proceeding, Dr. Barbara Lane and Dr. William W. Elmendorf, have both indicated that the river fisheries of the various Twana communities were of greater importance at treaty times than their marine, or saltwater fishing areas:

Salmon and steelhead were taken both in the saltwater of the canal and in the rivers, but the freshwater take accounted for the bulk of the catch . . .

"The bulk of the salmon catch was made in rivers, with weirs, dip nets, and harpoons, during late-summer and fall runs . . . A large part of the stream catch was smoke dried and stored for winter use."

(Elmendorf 1960:57)

River fishing was more important than canal fishing for all Twana groups, but the relative importance of the two types of fishing also varied from community to community. For the people on the Skokomish River, saltwater fishing was of minimal interest because of their particularly valuable river fisheries.

"Salt-water trolling and netting was of minor importance, in particular to the Skokomish with their large river runs of salmon."

(Elmendorf 1960:57)

Elmendorf uses the term Skokomish to designate the aboriginal community on the Skokomish River, as distinguished from other Twana.

B. Lane, "Anthropological Report on the Identity, Treaty Status and Fisheries of the Skokomish Tribe of Indians" (1973). (Ex.R. 8, pp. 7 and 8).

The district court had also previously held in its original decision that:

Saltwater trolling and spearing were less important [to the Skokomish Indians] than river fisheries.

United States v. Washington, 384 F. Supp. 312, supra at 1, Finding of Fact No. 137, at 377.

In addition, Dr. Lane testified that the rivers and streams on the Kitsap Peninsula on the eastern shore of Hood Canal "are all fairly short streams that would not compare in the amount of fish they could produce with the larger streams on the opposite shore of the Canal." (CR 9287, p. 106, l. 16-20). Joseph Andrews, the stepson of Henry Allen, one of Dr. Elmendorf's two major Twana informants, testified to like effect:

MR. O'LEARY: Did you ever go over to the east side of Hood Canal?

MR. ANDREWS: We skirted that side at times, but we crossed, and go across to the west side.

* * *

MR. ANDREWS: There is no fish on the eastern shore. There is no creeks you can go out on. It wasn't very good.

(CR 9290, p. 637, l. 14-16 and p. 638, l. 1-2).

Frequent use by the Skokomish, or Twana, of the areas in proximity to their permanent (winter) villages is well documented. As one moves away from these areas, both documentation of fishing

activities and documentation of the frequency of those activities diminishes.

For the northern part of the canal, Dr. Barbara Lane, one of the Skokomish Tribe expert witnesses, relied on reports of Skokomish, or Twana, presence in that area, rather than actual documentation of their fishing activities in the northern part of the canal, to support her conclusion that the Skokomish or Twana also fished in that area:

While not one of the foregoing materials provides clear documentation of Skokomish (Twana) fishing activities at the mouth of Hood Canal, taken together they corroborate Skokomish presence in that area from treaty times through the succeeding decades both as residents and as seasonal visitors. these, in turn, suggest traditional use of the area around the mouth of the canal for fishing purposes.

(Ex.R. 10, p. 5).

Ironically, the smaller streams on the eastern shore of Hood Canal, which the Twana found less desirable, were well suited to the Suquamish and their fishing technology which was geared to the likes of the smaller streams near their permanent villages on the eastern side of the Kitsap Peninsula. (CR 9289, p. 333, l. 3-18).

Lawrence Webster, a Suquamish elder, testified at length in the district court regarding the frequency of use and importance to the tribe of its fisheries in Hood Canal at treaty times. (CR 9288, p. 169 to 262)¹¹.

¹¹/At the time of his testimony Lawrence Webster was 84 years old, the present day chairman of the Suquamish Tribe and a VISTA volunteer. Both the Skokomish expert, Dr. Barbara Lane, and the Suquamish expert, Dr. Jay Miller, found the testimony of Lawrence Webster to be highly credible. (CR 9289, p. 332, l. 5-7, and CR 9290, p. 599, l. 13).

Lawrence Webster is the son of Julia Webster, herself adopted into the Suquamish Tribe as an infant by Jacob Wa-Hal-Chu and Mary Wi-Sid-Alt. Lawrence Webster was considered a Suquamish at the time of his birth in 1899 and often stayed with his grandparents Jacob and Mary when he was raised as a child. (CR 9288, p. 173 to 174).

Jacob was a Suquamish who was reputed to have been 112 years old at time of his death in 1911 or 12. He was a signer of the Treaty of Point Elliott, and the Sub-Chief of the Suquamish under Chief Seattle, and Chief of the Suquamish until his death. he along with other Suquamish and Duwamish including Seattle, Checo, Big John, Kitsap and Roger was instrumental in having the Suquamish Reservation set aside by the United States government. He was active in tribal affairs for most of his life. His wife Mary was a Puyallup who herself was reputed to have been 108 years old at the time of her death in 1922. (CR 9288, p. 174 to 181).

For each year except one from 1904 through 1907, Lawrence Webster, his grandparents Jacob and Mary, his mother Julia and his sister Agatha, in the company of other Suquamish families, traveled by canoe to Hood Canal where they stayed for a month to six weeks, to harvest and preserve their winter store of salmon. (CR 9288, p. 185, 186 and 195).

While the numbers in the entourage varied from year to year, Lawrence Webster has recollections of most of the people who went on those excursions. Always present was Big John, himself also a Sub-Chief of the Suquamish, who was in his early 80's. Big John would be accompanied by his wife Skagit, her name apparently designating her tribe of origin.

Also present on the excursions to Hood Canal were William Rogers, his Suquamish wife Annie and their two daughters; Jack Davis, his wife Jenny, and a son; Charlie Yuk-tin and his wife Mandy or Amanda; Charlie Win-Ai-Yuth and his wife Mary; Charlie Kukor; and Stephanie Kitsap and her husband Charlie Moses. (CR 9288, p. 186 to 194).

In the early autumn it was customary for the Suquamish people to take off in such groups all throughout Puget Sound and into Hood Canal to gather their winter store of fish. The group that Lawrence Webster accompanied into Hood Canal, with his grandfather Jacob and Big John, both of them sub-chiefs of the Suquamish, was the elite of the Suquamish people. (CR 9288, p. 176 and 189).

The assembled families would leave Suquamish in August at the time the tides were changing from day to night. Up to seven, but more usually five to six cedar canoes 20-24 feet long and made for travelling and fishing were taken. Individual families travelled together in a single canoe and the larger families also towed smaller canoes called Man-Kan-O about 12 feet long behind them with their supplies. (CR 9288, p. 193 to 194).

The group would catch the outgoing tide up to Foulweather Bluff; lunch, rest and wait for the tide to run at Twin Spits inside the Canal; and in most years continue directly to the Little Beef River. Moving down the Canal the party would paddle, but if there was a good breeze they would set up their cattail sails. (CR 9288, p. 197 to 199).

At the Little Beef River there was a small-river weir, maintained and operated under the direction of Big John. The party generally camped for a while at the Little Beef, catching

humpies (pink salmon) and silvers (coho salmon) in the weir and drying, smoking and salting their winter stores on the spot. (CR 9288, p. 199 to 201).

Each year the group of families also went to the Big Beef River where they fished using a seine. In the various years the group stopped at other locations in the Canal: They fished at Tahuya with beach seines and either at the Hamma Hamma or the Duckabush. They also stopped at Squamish Harbor where they harvested oysters and used the area near Lofall to camp and get out of the weather. Throughout Hood Canal the members of the group trolled for salmon. (Cr 9288, p. 201 to 212).

In addition to humpies and silvers, the members of the group also caught kings (chinook salmon) and steelhead, and a few chum (chum salmon). They also gathered berries, which they canned or dried to store, and grass and roots for basket making and the like. While inside the Canal, the members of the group harvested clams and oysters to eat. (CR 9288, pp. 195, 196 and 224).

Lawrence Webster's trips to Hood Canal ceased in 1908 when he went off to boarding school at Tulalip, although his grandfather Jacob continued the yearly excursions until 1910. (CR 9288, p. 185 and 226).

It was clear to Lawrence Webster that his family's excursions into Hood Canal had been going on for many years. His family seemed to know the country well as if they had always known it. When they went to the Canal they were not exploring. They knew where they were going and headed straight for it. Lawrence Webster also knew, however, that Hood Canal was not the only treaty time fishing place of the Suquamish away from their permanent villages. (CR 9288, pp. 218, 229 and 260).

The yearly trips by the Suquamish people to Hood Canal and other fishing places were a necessity and essential for their survival. Unlike most other tribes, the Suquamish had no large salmon producing rivers in the areas of their permanent villages. (CR 9287, p. 114). There were enough fish available around Suquamish for the whole tribe. (CR 9288, p. 195).

The trip that Lawrence Webster described of the group of Suquamish families going into Hood Canal was their main trip of the year. They had to get enough salmon to keep them through the winter although they ran short a couple of time. (CR 9288, pp. 224 and 225).

In addition to the excursions of the group of Suquamish accompanying his family into Hood Canal each year, Lawrence Webster knew of other groups of families living at Suquamish villages other than his family's village who went yearly to fish in Hood Canal. From Erland's Point on Dye Inlet were the Napoleons, the Sigos, the Jacksons and the Pecks, whom he believed crossed the Kitsap Peninsula by trail and then used canoes which they had stashed on the canal. (CR 9288, p. 220). From Liberty Bay were Jack and John Adams, father and son; the Guy brothers; Jim Empert and Sam Snyder who went over to the area of Vinland on the Canal by trail where they had also stashed canoes. (CR 9288, p. 220 and 248).

Dr. Jay Miller, the anthropologist testifying on behalf of the Suquamish Tribe, confirmed both (1) that the testimony of Lawrence Webster was accurate and complete and (2) that the fishing activities of the Suquamish in Hood Canal as testified by Lawrence Webster were materially the same as the fishing

activities of the Suquamish people in Hood Canal at treaty times. (CR 9289, p. 331, l. 23 to p. 334, l. 21).

Dr. Miller independently corroborated Lawrence Webster's testimony by his review of the tribal rolls and allotment records of one Suquamish Tribe, by his review of the field notes of Dr. Warren Snyder, the expert witness for the Suquamish Tribe in the Suquamish claims case, and by independent corroborating information from other tribal elders. Dr. Miller also corroborated Lawrence Webster's testimony regarding the weir on the Little Beef by comparing the weir as described by Lawrence Webster with typical Suquamish small-river weirs of similar construction and operation on the eastern side of the Kitsap Peninsula. (CR 9289, p. 332, l. 8 to p. 334, l. 18).

Dr. Miller also corroborated the testimony of Lawrence Webster as to the fishing activities of the Suquamish people in Hood Canal at treaty times through contemporaneous (treaty time) documentation and his interviews with other elders of both the Suquamish and Klallam tribes.

An early recorded encounter of non-Indians with the Suquamish people in Hood Canal was made by Wilkes, an American Naval officer, who was in charge of a scientific expedition to circumnavigate the globe in the early 1840's. The report of the encounter by the Wilkes party with the Suquamish is as follows:

On entering the canal, they encamped near some Suquamish Indians, who had received as visitors [sic] a party of fifty Clallams, by appointment to gamble for blankets: they continued their games throughout the night.

Charles Wilkes. 1845. Narrative of the U.S. Exploring Expedition, During the years 1838, 1839, 1840, 1841, 1842. (Ex.R. 13).

The map which was produced as a result of that expedition places the Suquamish on both sides of Hood Canal near the mouth, and the Twana and Skokomish on the west side of the canal and at the Great Bend. U.S. Exploring Expedition. (H. Hale) 1841. Chart of Admiralty Inlet, Puget Sound, with Hoods Canal, Oregon Territory. Ex. SU-SM-15.

In 1855 Gibbs map of Western Washington shows the Suquamish extending across the Kitsap Peninsula and Bainbridge Island, while the Skokomish, or Twana, are shown only on the western side of Hood Canal. George Gibbs. 1855. Map of the Western District of Washington Territory, showing the position of the Indian Tribes and Lands Ceded by Treaty. Ex. SU-SM-17.

Similarly, an 1854 map of Isaac Stevens, governor of the Territory, places the Suquamish on the Kitsap Peninsula from the vicinity of Seabeck on Hood Canal through what is presently West Seattle. The Skokomish are shown only on the west side of Hood Canal. U.S. Pacific Railroad War Department 1854, 5, 6, 7. Map of the Territory of the United States from the Mississippi to the Pacific Ocean. Ex. SU-SM-19. Detail of Northwestern Washington (Ex. SU-SM-18) (Isaac Stevens). Ex. SU-SM-18.

The 1855 map of Captain George Stoneman and First Lieutenant W.H.B. Whiting, engineer, places the Suquamish in the area northeast of Port Gamble and also on the Kitsap Peninsula in the area between Seabeck on Hood Canal and Silverdale. The Skokomish, or Twana, are shown only on the west side of Hood Canal. Stoneman and Whiting. 1855. Map showing Admiralty Inlet and Hood's Canal. Ex. SU-SM-20.

Dr. Miller also corroborated the testimony of Lawrence Webster regarding Suquamish fishing in Hood Canal at treaty times

with the testimony of William Kitsap in the proceedings before the Indian Claims Commission brought by the Suquamish Tribe. Kitsap, in response to questioning as to whether the Suquamish fished in Hood Canal, replied that the Suquamish fished there, on both sides. (CR 9284, p. 323, l. 19-25).

In addition to contemporaneous (treaty time) documentation, Dr. Miller also corroborated Lawrence Webster's account of Suquamish treaty time fishing in Hood Canal in his interviews with a variety of Suquamish and Klallam elders ranging in age from their 70's to their 90's. (CR 9289, p. 320, l. 6-8). The first hand experience of these tribal elders of witnessing Suquamish fishing in Hood Canal dates back to the 1890's (CR 9289, p. 337, l. 22-23) and the early 1900's.

Dr. Miller found no evidence of severe disruption of their fishing activities in Hood Canal between treaty times and the 1890's and early 1900's. (CR 9289, p. 432, l. 10-13). The major displacement of the Suquamish from their usual and accustomed fishing places occurred subsequent to the time testified to by Lawrence Webster, not before. The Suquamish clearly were not displaced to Hood Canal from other fisheries in the area. (CR 9290, p. 334, l. 22 to p. 335, l. 7).

Dr. Miller's tribal elder informants were approximately twenty-eight (28) in number. Based on their interviews, the documentation discussed above, the earlier report of Dr. Barbara Lane on Suquamish treaty fishing and the materials from T.T. Waterman and W. Snyder in the Appendices to her report, Dr. Miller concluded what the district court had previously adjudicated, that Hood Canal was a usual and accustomed fishing place of the Suquamish people at treaty time.

At treaty times, the Suquamish gathered oysters at Squamish Harbor; fished and gathered berries and shellfish at Port Gamble Bay; trolled in the Lofall area; gathered shellfish at Vinland; harvested fish and other resources and conducted important religious activities in the area in the vicinity of Bangor; harvested salmon with the use of weir on the Little Beef River and with the use of seine on the Big Beef River; trolled and went shrimping in the Holly area; trolled off the area of Dewatto; and fished on the Union River at the toe of the Canal. In addition, the Suquamish fished near Brinnon on the western shore which appears to have been a free port of sorts even though located near a Twana village site. The Suquamish trolled in all the waters of Hood Canal from the mouth south to the vicinity of Tahuya, not including the so-called "rabbit ears" of Dabob Bay. (CR 9289, p. 343, l. 20 to p. 358, l. 5).

With the exception of occasionally reported visits to the Brinnon area and fishing on the Union River at the toe of the Canal, all of the fishing and other resource gathering activities of the Suquamish people in Hood Canal at treaty times were on the western side of the Kitsap Peninsula and the marine waters of the Canal itself down to the vicinity of Tahuya.

As discussed above, the fisheries of the Suquamish people in Hood Canal at treaty times were of extreme importance to the Suquamish and vital to their survival. The Suquamish used these fisheries on a yearly, seasonal basis and relied upon their harvest of salmon in Hood Canal to sustain them through the winter months.

The burden in this case is not on the Suquamish to show the relative importance and frequent use by them of their treaty

fisheries in Hood Canal. The burden is on the Skokomish to show the relative importance and frequency of use by the Skokomish, or Twana, to each and every area in Hood Canal as to which the Skokomish Tribe now makes claim of a primary right.

In this case, however, the Suquamish have in fact demonstrated that their fisheries in Hood Canal, and especially those on the western shore of the Kitsap Peninsula were vital to their very existence. The Skokomish, or Twana, at best have demonstrated only a minor reliance on the fisheries on the eastern shore of the Canal, and have demonstrated that their principal reliance was on the fisheries conducted on the rivers and streams draining the Olympic Peninsula on the western side of the Canal.

c. Contemporary Conceptions of Control and Evidence of Behavior Consistent With Control.

The third and fourth factors respectively set forth by this court to be considered in determining whether a tribe has a primary fishing right in a particular area are "contemporary conceptions of control or (sic) territory" and "evidence of behavior consistent with control."

The attitude of Western Washington Indians at treaty times regarding territory, on the one hand, differed from their attitudes regarding fisheries, on the other hand. With respect to the Indian's concept of territorial rights, George Gibbs, who assisted Governor Isaac Stevens in arranging for the treaties observed:

"Tribes are, however, somewhat tenacious of territorial right, and well understand their respective limits; but this seems to be merely as regards their title, and they never, it is believed, exclude from them other friendly tribes. It would appear also that these lands

are considered to survive to the last remnant of a tribe, after its existence as such has in fact ceased . . . "

(Ex.R. 11, p. 17).

In the statement Gibbs went on to describe the nonexclusive nature of the fisheries in general:

"As regards the fisheries, they are held in common, and no tribe pretends to claim from another, or from individuals, seignorage [revenue] for the right of taking. In fact, such a claim would be inconvenient to all parties, as the Indians move about, on the sound particularly, from one to another locality, according to the season. Nor do they have disputes as to their hunting grounds. Land and sea appear to be open to all with whom they are not at war."

(Ex.R. 11, p. 17).

Dr. Barbara Lane, one of the expert witnesses for the Skokomish Tribe in this proceeding, has accepted the characterization of Gibbs that the fisheries were held in common with the qualification that:

. . . it is understood to refer to saltwater fisheries and if it is understood that [even in the case of saltwater fisheries] certain exceptions existed . . .

(Ex.R. 7, p. 18).^{12/}

The Skokomish Tribe in this case has laid claim to a primary fishing right in all of the marine waters of Hood Canal, and it is therefore necessary to examine each of the exceptions to an in common fishery in saltwater that Dr. Lane has set forth.

^{12/}Dr. Lane also noted that:

Techniques such as spearing or trolling in saltwater which involved individual effort were not regulated or controlled by anyone else.

(Ex.R. 7, p. 20.)

The marine, or saltwater exceptions noted in Dr. Lane's report were "the halibut, cod, and sockeye fisheries." (Ex.R. 7, p. 18). Clearly, none of these exceptions is applicable to the marine fisheries of Hood Canal. In this proceedings, Dr. Lane has testified that a primary fishing right in a marine area might be found in other circumstances:

DR. LANE: . . . Generally speaking where there is a fairly narrow stretch of saltwater such as an inlet with villages of a local group either at the head of an inlet or perhaps on both sides of it [,] although the water itself is saltwater [,] that area would be considered to be primary domain of the locally resident group in whose territory that water lay.

(CR 9287, p. 125, l. 5-11).

With one exception in one limited and confined area of the Canal, neither of the two sets of circumstances cited by Dr. Lane is present in Hood Canal. First of all there is no village of the Skokomish or Twana at the head of Hood Canal, guarding entrance as it were. Secondly, with the exception noted below, the Twana villages in Hood Canal are not on both sides of the Canal but only on the western side of the Canal on the Olympic Peninsula.

The notable exception, of course, is the area of the Great Bend, where there is a concentration of Skokomish villages on one side of the Canal and the permanent village of Tahuya on the other side. The evidence presented in this case, and in particular, the testimony of the Suquamish elder Lawrence Webster and the testimony of Dr. Jay Miller on behalf of the Suquamish Tribe, clearly demonstrates that the Suquamish at treaty times

did regard this area to be subject to the primary fishing right of the Skokomish people.

One other exception to the proposition that there is no primary fishing right in marine, or saltwater fisheries in general, was brought out in this proceeding, which follows the general proposition set forth by Dr. Lane that tribes were considered to have a primary right in the areas close to their permanent villages. (Ex.R. 7, p. 20).

With particular reference to the village of Tahuya, Lawrence Webster testified that the Suquamish would not troll right off the front of the village out of respect for people's rights and would do their trolling a comfortable distance away. While Lawrence Webster estimated that distance at Tahuya to be 200 to 300 feet (CR 9288, p. 209, l. 9-15), Dr. Miller pointed out that the actual distance might be different for each village, but in general could be defined as outside the line of sight.

In addition to their claim to a primary fishing right in all of the marine waters of Hood Canal, the Skokomish Tribe is also claiming a primary right to fish in all of the rivers and streams draining into the Canal. Their own expert, Dr. Barbara Lane, however, has previously described that right as being recognized only in the areas close to their winter villages:

. . . most groups claimed exclusive fall fishing rights near to their winter villages. Spring and summer fishing areas were often more distantly located and often were shared with other groups.

(Ex.R. 7, p. 20).

As has been discussed in the preceding portions of this brief the winter villages of the Skokomish, or Twana, north of the Great Bend were all on the western shore of the canal

extending only as far north as Dabob Bay. There were no permanent Twana villages on the eastern shore of Hood Canal on the Kitsap Peninsula from the mouth to the village of Tahuya at the Great Bend.

In the district court testimony was presented by one of the Skokomish Tribe's experts which is totally inconsistent with the claim of the Skokomish Tribe that the Twana had a primary fishing right on the eastern shore of the canal on the Kitsap Peninsula. In particular, Dr. Barbara Lane testified that the Twana would never invite an outsider, even one with affinal or other special relations with the Twana, to construct and operate a weir site in a Twana controlled fishing area. The practice would have been to invite such an outsider to harvest fish at a Twana constructed, operated and controlled weir. (CR 9287, p. 117, l. 4-7).

Lawrence Webster, of course, testified that the Suquamish, under the direction of Big John, a Sub-Chief of the Suquamish, maintained and operated a weir on the Little Beef River. It was not a weir of the type constructed by the Twana, but one specially refined by the Suquamish for small river fishing.^{13/}

In those areas where a tribe has a primary fishing right, secondary, or permissive use rights might be extended to persons outside the tribe based on a number of variables, including kinship relationship, some kind of friendship, or a very heavy run of fish, B. Lane (CR 9287, p. 15, l. 13-20). In general,

^{13/}Similarly, the evidence presented showed that the Suquamish regularly cached their canoes on the eastern side of Hood Canal, a practice inconsistent with a Twana primary fishing right. (CR 9288, p. 119, l. 25 to 120, l. 14).

according to one of the Skokomish expert witnesses, Dr. Barbara Lane, the rights extended by a tribe to outsiders to fish where the tribe has a primary fishing right would be extended not to an entire tribe, but to "specific people, individuals and perhaps family groups." B. Lane (CR 9287, p. 75, l. 4-9).

According to Dr. Lane, if a Skokomish were to marry a Suquamish and live in Suquamish territory, the Suquamish spouse and the spouse's relatives might be afforded permissive fishing rights in an area where the Skokomish had a primary fishing right, based on the marriage relationship. Neither the entire Suquamish tribe nor other unrelated Suquamish individuals, however, would be afforded such permissive rights based on that marriage alone. (CR 9288, p. 143, l. 8 to p. 144, l. 1, 2).

For this reason, the Suquamish excursion into Hood Canal described by Lawrence Webster does not fall with the realm of permissive use rights extended by the Skokomish, or Twana. Only one member of the party described by Lawrence Webster, Jack Davis, had any documented blood relationship to the Skokomish (1/4 Quilcene Skokomish). If he were to have been exercising permissive fishing rights in Hood Canal subject to the primary right of the Skokomish, or Twana, those rights might have also been extended to his wife Jenny, and their son who accompanied

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him, but certainly not to the near twenty or other unrelated Suquamish individuals who made the trip.^{14/}

Similarly, with respect to the multitude of accounts of Suquamish fishing in Hood Canal conveyed to Dr. Miller by his twenty eight tribal elder informants, that one of them Bernard Adams, was part Skokomish as well as part Suquamish, does not account for Suquamish fishing in Hood Canal by the vast majority of Suquamish who had no Skokomish affinial relationship whatsoever.

There is no doubt, however, that there were areas of Hood Canal, and in particular some of the rivers draining into the canal, where at treaty times the Skokomish, or Twana, held a primary fishing right, and as to which other tribes, and the Suquamish tribe in particular respected that right.

As described by each of the expert witnesses in this proceeding, Dr. William W. Elmendorf, Dr. Barbara Lane and Dr. Jay Miller, and as corroborated by the testimony of the tribal elders, Lawrence Webster and Joseph Andrews, a primary fishing right would in fact most often be evidenced by respect by other tribes of that right. Instances of active enforcement of a primary fishing right by the tribe holding the right would have been rare, if not nonexistent. Mere lack of evidence of

^{14/}Even assuming per arguendo that the wife of William Kitsap who made the trip was not his second wife the Suquamish Annie, but his first wife the Skokomish Annie, such that both the Rogers and the Davis families had affinial relationships with the Skokomish, if each of these families were to have been exercising permissive fishing rights in Hood Canal subject to the primary right of the Skokomish, or Twana, those rights would not have been extended to the six remaining families of Suquamish individuals who had no affinial relationship to the Skokomish and who were represented by Jacob, Big John, Charlie Kukof, Charlie Yuk-tin, Charlie Win-Ai-Yuth and Mrs. Kitsap.

enforcement per se would be no indicia whatsoever of whether or not a particular tribe held a primary right in a particular area.

As further amplified by Dr. Barbara Lane, even subsequent to the signing of the treaties the tribes continued to respect the primary fishing rights of other tribes. Dr. Lane testified that it is her impression that the respect of other tribes for the primary fishing rights which the Skokomish, or Twana, did hold at treaty times has continued to this day. (CR 9287, p. 102, l. 15-25).

The real issue in this case is not whether or not a primary right of the Skokomish, or Twana, existed and continues to exist, but where in Hood Canal in particular the Skokomish, or Twana, held that right.

As described in the Swindell affidavit executed by Robert Lewis, a Skokomish tribal elder, in 1942, the Skokomish shared various usual and accustomed fishing places in Hood Canal with the neighboring tribes to the north and northwest. The fishing places which he names, and there are twelve of them, were at or near the permanent villages of the Skokomish, or Twana, as well as on the Union River, the Hamma Hamma River and in the vicinity of Dewatto. (Ex.R. 8, p. 57-59).

None of the fishing places which Robert Lewis names which the Skokomish, or Twana, held and which they shared with others are on the western shore of the Kitsap Peninsula on the eastern side of the canal from the mouth of the canal all the way south to Dewatto. Similarly, none of those fishing places is on the

western side of the canal from the mouth south to the tip of the Coyle Peninsula.^{15/}

The report of Robert Lewis of the fishing places in Hood Canal which the Skokomish, or Twana, shared with other tribes, and as to which the Skokomish, or Twana, held a primary right to fish, was corroborated by the testimony of both Lawrence Webster, the Suquamish tribal elder, and Dr. Jay Miller, the anthropologist for the Suquamish Tribe.

In his description of the seasonal Suquamish excursions in Hood Canal, Lawrence Webster testified that the adult Suquamish members of the excursion talked about the territory of the "Skokobsh" or Skokomish as being "on the other side," meaning the "western side of the canal." (CR 9288, p. 213, l. 7-24). They recognized the west side of the canal and the boot of the canal as being Twana territory where they would need approval to fish. These same Suquamish, however, freely and without permission or approval, fished and hunted the east side of the canal and the entire Kitsap Peninsula. (CR 9288, p. 218, l. 13-25).

Lawrence Webster also testified that the Suquamish party that went to Hood Canal never went to fish on the Skokomish River:

MR. WEBSTER: . . . [T]hey didn't want to do down in that area. I think it was just natural courtesy that they had at that time that they didn't want to intrude on somebody's else's grounds.

^{15/}Robert Lewis also makes no mention of the marine waters of the canal.

(CR 9288, p. 210, l. 6-10).

In detailing the places that the Suquamish people fished in Hood Canal at treaty times, Dr. Jay Miller testified that at the following places, the Suquamish fished with the approval of and subject to the primary right of the Skokomish, or Twana: Tahuya, Duckabush, Hamma Hamma, Quilcene and Dabob. He also testified that it was likely, though not as certain, that the Suquamish fishing on the Union River at the toe of the canal was with the approval of and subject to the primary fishing right of the Skokomish, or Twana.^{16/} In addition, he testified that the Suquamish would not have trolled in the immediate vicinity of the Twana winter villages nor in the "rabbit ears" of Dabob Bay without permission or approval. (CR 9289, p. 349, l. 23 to 358, l. 13).

As to the vast majority of the marine waters in Hood Canal and as to the eastern shore of the canal down to Tahuya, and the western shore from the mouth to the tip of the Coyle Peninsula, the Suquamish fished freely and without the approval of or subject to a primary right of the Skokomish, or Twana. As Dr. Miller testified, Suquamish fishing at Twin Spits, Lofall, Bangor, on the Little and Big Beef Rivers, at Holly, Dewatto, in the vicinity of Suquamish Harbor and in most of the marine water from the mouth of the canal down to the vicinity of Tahuya without need of permission from the Skokomish, or Twana and none was ever sought. (CR 9289, p. 343, l. 16 to p. 358, l. 9).

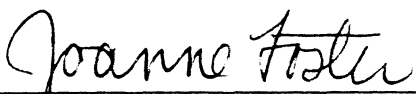
^{16/}Dr. Miller found no evidence of Suquamish fishing per se on the Skokomish River, or any of its tributaries, at treaty times but testified definitively that if the Suquamish had fished there it would have only been with the approval of the Skokomish.

V. CONCLUSION

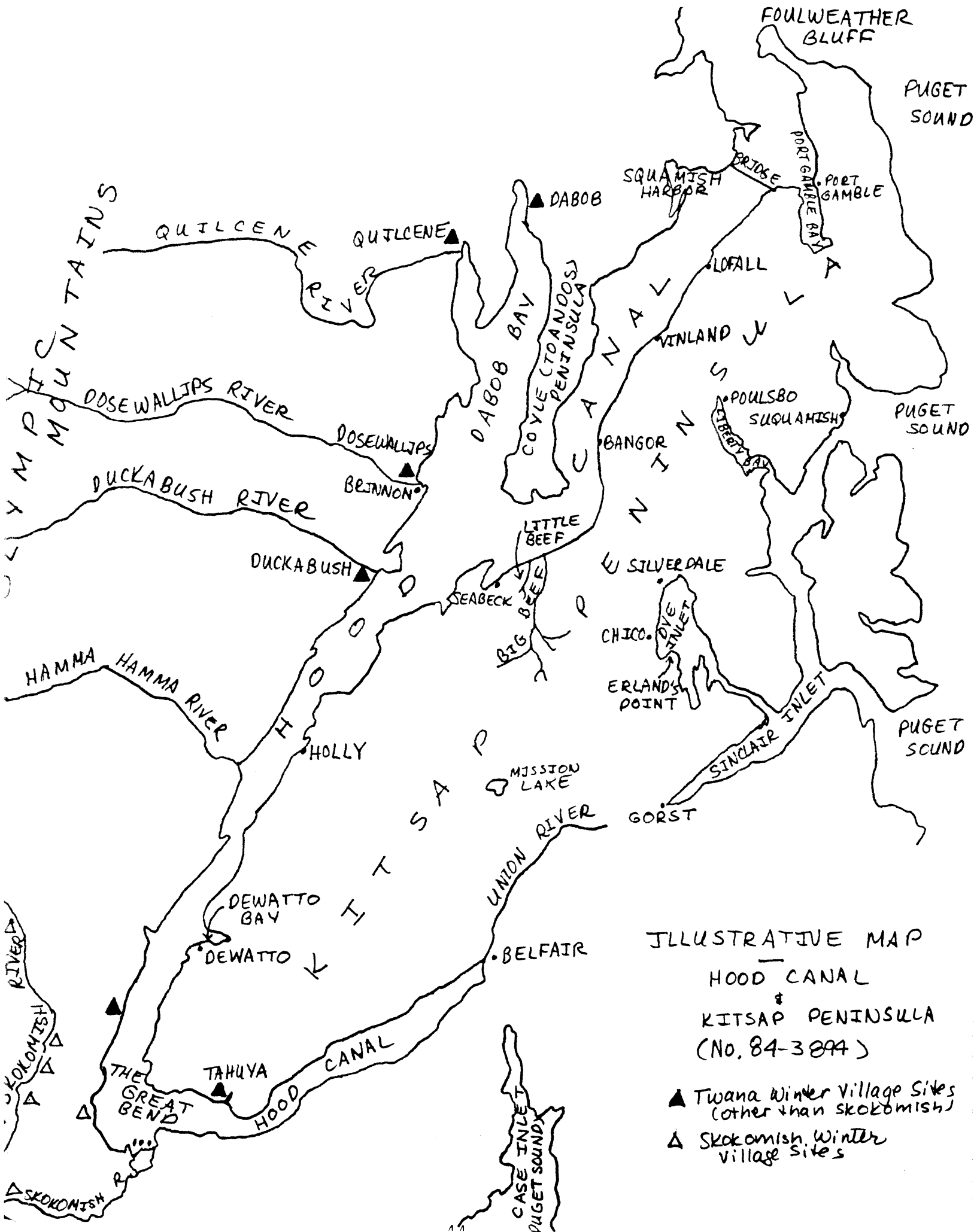
The Skokomish Tribe's request for determination that it has a primary fishing right in Hood Canal is barred by the doctrine of res judicata. The ruling of the district court below should be vacated.

The Skokomish, or Twana, did not have a primary fishing right in Hood Canal or a right to exclude the Suquamish from fishing in Hood Canal at treaty times in the areas outside the vicinity of their permanent villages located in the Dabob Bay area and in the southern part of the canal from the Great Bend south and east. Upon consideration of all the evidence in light of the four factors set forth by this court in Lower Elwha, it must be concluded that the primary fishing right of the Skokomish, or Twana, existed only in those areas, and that the Suquamish fished in the marine waters and the eastern side of the canal and on the western side of the canal from the mouth to the tip of the Coyle Peninsula without permission of and not subject to a primary right of the Skokomish, or Twana.

Respectfully submitted, this 13th day of December, 1984.



Joanne Foster
Attorney for Appellant
The Suquamish Tribe



ILLUSTRATIVE MAP
 HOOD CANAL
 &
 KITSAP PENINSULA
 (NO. 84-3894)

- ▲ Twana Winter Village Sites (other than Skokomish)
- △ Skokomish Winter Village Sites

STATEMENT OF RELATED CASES

There are a number of other appeals pending in this Court of Appeals arising out of the same case in the trial court, that case being United States v. Washington, No. 9213 (W.D. Wash.), an Indian treaty fishing rights and enforcement case over which the district court has retained continuing jurisdiction.

To the knowledge of counsel those other pending appeals are as follows:

United States v. Washington, No. 81-3111.

United States v. Washington, No. 83-1465.

United States v. Washington, No. 83-4265.

United States v. Washington, No. 84-3571.

United States v. Washington, No. 84-3769.

To the knowledge of counsel none of the five referenced appeals involve the same or closely related issues.

In addition to pending appeals, there have been a multitude of appeals arising from the same case which were previously heard in this court. To the knowledge of counsel of those cases the ones which involve the same or closely related issues are:

United States v. Lower Elwha Tribe, No. 79-4066

United States v. Washington, No. 83-3802

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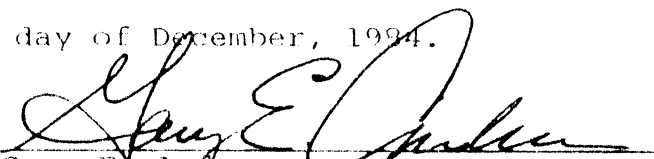
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY L. AUSTIN,)	
)	NO. 84-3968
Plaintiff/Appellant,)	
)	CERTIFICATION OF
vs.)	INTERESTED PARTIES
)	
JAMES YOUNG, et al,)	
)	
Defendants/Appellees.)	

The undersigned, counsel of record for Appellant, certifies that the following listed parties have an interest in the outcome of this case. These representations are made to enable judges of the Court to evaluate possible disqualification or recusal: There are no known interested parties, other than those participating in this case.

This certification is supplied pursuant to Ninth Circuit Court of Appeals Rule 13(b)(3).

DATED this 18th day of December, 1994.


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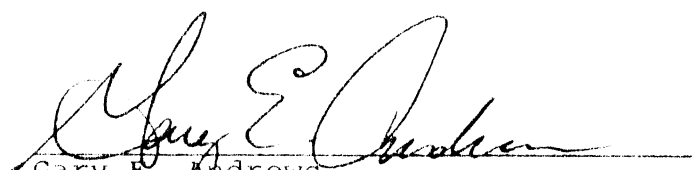
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY L. AUSTIN,)	
)	NO. 84-3968
Plaintiff/Appellant,)	
)	STATEMENT OF
vs.)	RELATED CASES
)	
JAMES YOUNG, et al,)	
)	
Defendants/Appellees.)	

COMES NOW the Appellant through his attorneys, Andrews & Moore, and offers this statement, pursuant to Rule 13(b)(4) of the rules of the United States Court of Appeals for the Ninth Circuit, as his statement of related cases.

There are no related cases known to Appellant pending in this Court that this Court may wish to consider along with the instant case.

DATED this 19th day of December, 1984.



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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY L. AUSTIN,)	
)	NO. 84-3968
Plaintiff/Appellant,)	
)	STATEMENT OF
vs.)	STANDARD OF
)	REVIEW
JAMES YOUNG, et al,)	
)	
Defendants/Appellees.)	

COMES NOW the Appellant, and offers the following as his Statement of the Standard of Reviews on Appeal, as referenced by the following sections in Appellant's Brief on Appeal:

III. Argument

- A. The Trial Court Erred in Granting Defendants' Motion To Amend the Judgment
- 1. Substantial Evidence Supports the Jury Verdict

Standard of Review: Viewing the evidence most favorable to the non-moving party, is there substantial evidence to support the verdict?

Relevant authority: California Computer Products vs. IBM, 612 F.2d 727 (9th Cir. 1979), Fountila vs. Carter 571 F.2d 487 (9th Cir. 1978), U.S. vs. Harvey 661 F.2d 767 (9th Cir. 1981)

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2. The Jury's Answers to the Special Verdict Form were not Inconsistent

Standard of Review: Are the answers so inconsistent that they are irreconcilable?

Relevant Authority: Arnold vs. Panhandle, S.F.R. Co. 353 U.S. 360, 275 Sup. Ct. 840, 1 L Ed.2d 889 (1956); United Airlines Inc. vs. Wiener 335 F.2d 379 (9th Cir. 1964), cert dismissed 85 Sup. Ct. 452, 379 U.S. 981, 1 L Ed.2d 549, Crossland v. Canteen Corp., 711 F.2d 714, 725 (5th Cir. 1983); The Aquachem Co., Inc. v. Olin Corp., 699 F.2d 516, 521 (11th Cir. 1983), Chesapeake and Ohio Railway Co. v. Barnaby, 414 F.2d 309 (6th Cir. 1969), Reiner v. Bankers Security Corp., 305 F.2d 189 (3rd Cir. 1962), Julien J. Studley v. Gulf Oil Corp., 427 F.2d 521 (1st Cir. 1969).

III. B. The Court Erred by Giving the Defendants' Instruction Regarding Assault

Standard of Review: Considering the instruction as part of the entire charge, did the instruction mislead the jury in any way.

Relevant Authority: Marquis v. Chrysler Corp., 577 F.2d 624 (9th Cir. 1978); First Virginia Bankshares v. Benson, 559 F.2d 1307 (5th Cir. 1977) reh. denied 546 F.2d 416, cert denied, 98 S.Ct. 1580, 435 U.S. 952, 55 L. Ed.2d 802; Wright v. Farmers Co-op of Arkansas and Oklahoma, 620 F.2d 694 (5th Cir. 1980)

III. C. The Court Erred in Granting Defendants' Motion in Limine.

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Standard of Review: Was the granting of Defendants' Motion in Limine clearly erroneous?

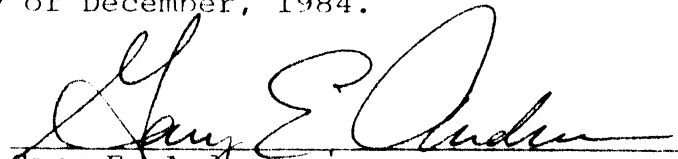
Relevant Authority: Dosier v. Miami Valley Broadcasting Corp., 644 F.2d 779, 784 (9th Cir. 1981), Cohn v. Papke, 655 F.2d 191, (9th Cir. 1980)

III. F. The Court Erred by Denying Plaintiff's Motion to Amend Judgment.

Standard of Review: Did the Plaintiff/Appellant prevail on any substantial issue so as to be a prevailing party under 42 U.S.C. § 1988?

Relevant Authority: Williams vs. Alioto, 635 F.2d 845 (9th Cir. 1980), cert. denied 101 Sup. Ct. 1723.

DATED this 19th day of December, 1984.



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