



SKAGIT COUNTY BOARD OF COMMISSIONERS

LISA JANICKI, Chair, Third District
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November 28, 2016

Stanley M. Speaks, Regional Director
Attn: Greg Norton, Tribal Government Specialist
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RE: Objection of Skagit County to Proposed Changes to Swinomish Indian Tribal Community (SITC) Constitution

Director Speaks,

We write to object to proposed changes to the Swinomish Indian Tribal Community's ("SITC") constitution currently under consideration by your office, for the reasons discussed herein.

The SITC reservation is located entirely within the jurisdictional boundaries of Skagit County. In addition to SITC, the Upper Skagit Indian Tribe, Samish Indian Nation and Sauk-Suiattle Indian Tribe are located entirely within Skagit County. SITC is the second largest of the four tribes within Skagit County's borders, consisting of approximately 700 members. Skagit County has a population of approximately 118,000, inclusive of tribal members.

Skagit County supports tribal sovereignty and self-governance, and acknowledges the injustices of European colonization. However, SITC's unprecedented jurisdictional demands are simply unacceptable and unworkable in a community that hopes to continue functioning as a democratic society, which requires a basic commitment to shared values and laws.

The proposed changes to the SITC constitution, in addition to being unlawful, if approved, would expand SITC's jurisdiction over a large area presently outside its reservation; would have a profoundly negative impact on Skagit County and our community; would infringe on Samish Indian Nation sovereignty; and would violate the Constitutional rights of our citizens.

For these reasons, we urge you to reject SITC's proposed amendments.

1. SITC's Proposed Expansion Of Reservation Jurisdiction Must Be Denied.

As the maps and documents filed with your office reflect, SITC seeks to extend its reservation jurisdiction to off-reservation lands and citizens, including much of Central Fidalgo Island; March's Point; anywhere within SITC's "usual and accustomed fishing grounds and stations" (including lands used to access usual and accustomed areas); and any "open and unclaimed lands" that SITC claims for hunting and gathering.¹

While the meaning of "open and unclaimed lands" has not been fully defined by the courts, treaty tribes in our region have taken the position that any public land not incompatible with hunting and gathering is "open and unclaimed" for the purposes of tribal treaty rights.² While the definition of "open and claimed lands" would not be established by SITC's proposed amendments in any event, the issue here is not about treaty rights at all, but rather that SITC is attempting to claim direct tribal jurisdiction over these lands – which are presently owned and regulated by public entities for the common good.

Furthermore, SITC's "usual and accustomed" treaty fishing grounds and stations (and any lands that can arguably be used to access those areas) would appear to encompass thousands of acres of privately-owned land as well as public waters.³ Here again, denial or approval of SITC's proposed constitutional amendments will not impact the scope of SITC's treaty rights, but would extend jurisdiction attendant to reservation status over those lands.

The Treaty of Point Elliott ("**Treaty**") provides that "taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the

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

² See, e.g., Northwest Indian Fisheries Commission, Treaty Hunting Rights FAQ, <http://nwifc.org/about-us/wildlife/treaty-hunting-rights-faq/> (last visited November 28, 2016).

³ See, *U.S. v. Washington*, 459 F.Supp. 1020, 1049 (1975)(i.e., the Boldt Decision), which states that "[t]he usual and accustomed fishing places of the Swinomish Tribal Community include the Skagit River and its tributaries, the Samish River and its tributaries and the marine areas of northern Puget Sound from the Fraser River south to and including Whidbey, Camano, Fidalgo, Guemes, Samish, Cypress and the San Juan Islands, and including Bellingham Bay and Hale Passage adjacent to Lummi Island." See also SITC Code Title 18-01.020(G) ("The Tribe's treaty fishing right also includes the right to cross private lands to access treaty secured usual and accustomed fishing grounds and stations and to occupy private land for the purposes specified in the treaty.")

Territory.” Treaty of Point Elliott, Article 5. While the “in common with” language of the Treaty has been focused on tribes’ right to half the State’s harvestable salmon and steelhead, we believe it also speaks to a common future in our Skagit ecosystem. It clearly does not envision a separatism-based system of endless jurisdictional conflict in which non-Indian citizens are subjected to tribal jurisdiction without their consent.

If SITC is allowed to expand its reservation and jurisdiction by federal administrative fiat and tribal election, there is no logical reason that the other three tribes within Skagit County would not assert their right to do so as well. This will inevitably lead to competing claims of sovereignty and jurisdiction by the four Skagit tribes, and many years of acrimony and litigation. The past two decades have been marred by constant litigation involving SITC against Skagit County and other tribes in our area – something we sincerely hope to avoid in the future.

It is our understanding that the SITC reservation, as surveyed subsequent to the 1855 Treaty, was demarcated by a line drawn between Turner Bay and Padilla Bay – generally consistent with the 1873 Executive Order; the pattern of development that has occurred over the ensuing 150 years; and the present reservation boundaries. There is no ambiguity as to the size of the SITC reservation, and the Bureau should not approve a SITC amendment that will create jurisdictional ambiguity and fan the flames of conflict in our community.

Even if the 1855 Treaty envisioned tribal jurisdiction over lands outside present reservation boundaries (and it did not), denial of SITC’s amendments would be required, because tribes are barred from using sovereignty arguments to expand reservation boundaries in a manner inconsistent with long-standing community patterns of development. See, *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 216-17 (2005)(“standards of federal Indian law and federal equity practice preclude the Tribe from rekindling embers of sovereignty that long ago grew cold...This long lapse of time, during which the [the tribe] did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude [the tribe] from gaining the disruptive remedy it now seeks.”) *Oneida* is squarely applicable to all SITC’s expanded claims of reservation jurisdiction.

As the map submitted by SITC reflects, SITC’s proposed changes seek to expand SITC’s reservation to encompass March’s Point and central Fidalgo Island, the location of extensive non-Indian industrial, commercial and residential development, including two refineries operated by Shell and Tesoro, which, between them, furnish a substantial portion of the tax base for Skagit County, the Anacortes School District, and various other junior taxing districts. For 2015 alone, the two refineries generated \$9,709,990 in tax revenue, which would be a disastrous loss for our community’s basic services if transferred to SITC.

SITC’s recent diversion of a substantial portion of the tax base from the La Conner School District (in which the majority are SITC children) has already created mistrust in the community, and SITC would have no obligation to deal fairly and reasonably with the Anacortes School District, which few if any SITC children attend.

SITC’s proposed constitutional amendments would also extend SITC regulatory jurisdiction over the Shell and Tesoro refineries, which, taken together, are Skagit County’s largest private employer – directly and indirectly providing approximately one-third of the

economic activity within Skagit County. While Skagit County vigorously enforces environmental laws against Shell and Tesoro (recently requiring full environmental review for two project proposals against the wishes of the refineries' operators), Shell and Tesoro are entitled to predictability in the regulations under which they are expected to operate. Abruptly removing the two refineries from the jurisdiction of Skagit County and the State of Washington and placing them under SITC's jurisdiction would constitute a violation of the refinery operators' Constitutional right to substantive and procedural due process.

Similarly, there are hundreds of residential and commercial landowners in the areas of which SITC claims jurisdiction, land that has been, for the past century and a half, under the jurisdiction of the State of Washington and Skagit County. SITC's proposed amendments would effectively deport these citizens against their will to the jurisdiction of a foreign sovereign hostile to their interests. This cannot be consistent with the Constitutional due process to which our citizens are entitled.

Skagit County government, which has regulatory and tax jurisdiction over the lands that SITC claims, is democratically elected by the entirety of the citizens within our boundaries – including the members of all four tribes, who vote in Skagit County elections at a high rate of turnout, who are fully eligible as individuals to run for all local elected offices, and who, through their tribes, presently inject a substantial amount of money into state and local political process through lobbying and very large campaign contributions. Skagit County government is subject to laws requiring open public records, open public meetings, and disclosure of financial and other conflicts of interest.

By contrast, SITC's leadership is subject to very few checks and balances, virtually no public transparency, and no accountability to our County's 118,000 citizens other than the several hundred voting members of the SITC tribe.

Affording the leadership of a small tribal political entity superior jurisdiction over private and public land outside long-established reservation boundaries, in likely conflict with the other three tribes that inhabit this ecosystem and without representation for the non-tribal citizens affected, offends the Constitutional right to equal protection and due process – for all Skagit County's citizens.

2. The SITC Amendments Should Be Rejected Because They Are Contrary To The Requirements Of The 1934 Indian Reorganization Act, And Infringe On The Samish Indian Nation's Sovereignty.

We have also reviewed the Samish Indian Nation's September 1, 2016 letter objecting to the SITC constitutional amendments. We concur with the Samish view that the SITC amendments are "contrary to federal law [and] illegal," for the reasons stated by the Samish letter.

The Samish Indian Nation ("Samish") proposes construction and operation of a gaming facility at the corner of Thompson Road and Highway 20, on land Samish purchased on the open market, land within the area that SITC now intends to annex by operation of the constitutional amendments that your office is being asked to approve. Because SITC

vehemently opposes the Samish casino on grounds that it would compete with SITC's existing casino, SITC's proposed constitutional amendments, if carried out, would almost certainly prevent Samish from opening the casino they have worked so hard to build.

In addition, Samish own other properties within the area that SITC hopes to annex, properties related to Samish Nation governmental services.

Skagit County recently entered an interlocal agreement with the Samish Nation to provide law enforcement and other services to the proposed Samish gaming facility, a project we fully support. This is in part because our experience with the Samish Nation, in this and all other matters, has been uniformly positive – reflective of the Samish Nation's commitment to a form of tribal sovereignty that recognizes not only aggressive pursuit of tribal interests and political self-determination, but the need for tribal and non-tribal communities to coexist cooperatively under a body of shared law and values.

Originally the most prominent tribe in our area prior to European colonization until decimated by smallpox and raids by other tribes, the Samish Indian Nation, for the past century, has been forced to fight against SITC opposition at nearly every turn in order to secure their identity, sovereignty, culture, and economic future. Through remarkable determination and perseverance, Samish have secured federal recognition and their own sovereignty. We believe that your office should respect Samish tribal sovereignty by denying SITC's proposed amendments.

For the foregoing reasons, as a matter of law, public policy and the long-term interests of the Skagit Valley tribes with which the federal government stands in a trust relationship, we urge you to reject Swinomish Indian Tribal Community's proposed constitutional amendments.

Sincerely,

BOARD OF SKAGIT COUNTY COMMISSIONERS



LISA JANICKI, Chair



RON WESEN, Commissioner



KENNETH DAHLSTEDT, Commissioner

cc: Senator Maria Cantwell
Senator Patty Murray
Representative Rick Larsen
Governor Jay Inslee
The Hon. Sally Jewell, Director, US Department of the Interior
Michael S. Black, Director, Bureau of Indian Affairs
M. Brian Cladoosby, Swinomish Indian Tribal Community
Jennifer Washington, Chair, Upper Skagit Indian Tribe
Tom Wooten, Chair, Samish Indian Tribe
Norma Joseph, Chair, Sauk-Suiattle Indian Tribe
The Hon. Robert Ferguson, Washington State Attorney General
Vikki Smith, Acting Director, Washington Department of Revenue
Allen Rozema, Director, Skagitonians to Preserve Farmland
Brandon Roozen, Director, Western Washington Agricultural Association
Richard Weyrich, Skagit County Prosecuting Attorney
Cory Ertel, Shell Puget Sound Refinery
Matt Gill, Tesoro Anacortes
Dr. Mark Wenzel, Superintendent, Anacortes School District
Chief Roy Horn, Fire District No. 13
Mayor Laurie Gere, City of Anacortes
Dave Thomas, Skagit County Assessor
Island County Board of Commissioners
San Juan County Board of Commissioners
Board of Directors, Wash. State Ass'n of Counties