Re: Samish Indian Nation’s Applications to Transfer Lands on March Point into Trust

Dear Mr. DeBergh and Ms. Young:

In an April 24, 2012, letter from Marc Slonim to Mr. Stan Speaks (4/24/2012 Slonim Letter), the Tribe submitted a historical report and supporting documentation demonstrating that March Point was within the original boundaries of the Swinomish Indian Reservation. See E. Richard Hart, March Point and the Swinomish Reservation (Apr. 11, 2012) (Hart Report). Mr. Slonim’s letter explained that, under the Bureau’s fee-to-trust regulations, written consent from the Swinomish Indian Tribal Community (Tribe) is necessary before lands can be acquired in trust for the Samish Indian Nation (SIN) on March Point. This is true whether or not March Point is within the current boundaries of the Reservation because, under the regulations, the consent requirement extends to current and former reservations.

SIN responded to the Tribe’s position in a December 22, 2014, letter from its Chairman, Thomas D. Wooten, to Mr. Speaks. As discussed in more detail below, Chairman Wooten acknowledged that March Point was within the original and current boundaries of the Swinomish Reservation. He cited both the Hart Report and SIN’s own research in asserting that March Point was included within the original reservation boundaries, and stated that President Grant’s 1873 Executive Order did not lawfully remove March Point from the Reservation. However, Mr. Wooten argued that the Tribe’s consent to the acquisition of lands in trust for SIN on March Point
was not necessary because the Reservation had been reserved for all of the Point Elliott treaty tribes, including the aboriginal Samish, and that the March Point portion of the Reservation, in particular, had been reserved for the aboriginal Samish. According to Mr. Wooten, because the Tribe allegedly was organized in 1936 by the Indians residing on the Swinomish Reservation as defined in President Grant’s Executive Order, the Tribe has no claim to the March Point portion of the Reservation.

The Tribe responded to these arguments in a November 24, 2015, letter from Marc Slonim to Mr. Speaks (11/24/2015 Slonim Letter) and in an April 13, 2016 Letter from Emily Haley to Mr. Speaks (Haley Letter), as well as in other submissions and government-to-government consultation meetings with the United States. In response to the Haley Letter, SIN prepared a June 6, 2016 Memorandum (SIN Memo) which again argues that the Tribe’s consent is not, in fact, required. However, the most striking feature of the SIN Memo is its complete rejection of the propositions acknowledged by Chairman Wooten in 2014. In particular, the SIN Memo argues that the boundaries of the Swinomish Reservation were not defined until President Grant issued his Executive Order in 1873, so that March Point was never within the Reservation and that, if it was, it was lawfully excluded from the Reservation by his order. Given this stunning reversal of SIN’s position regarding March Point, the Tribe believes it is necessary and appropriate to submit this letter in response to the SIN Memo.

As an initial matter, we note that the majority of the SIN Memo addresses issues which are irrelevant to the consent issue. For example, SIN again attempts to attack the Tribe’s status as a tribe. See SIN Memo at 7. It argues that SIN has a more significant historical connection to March Point than the Tribe does. See SIN Memo at 6, 12-18. It again attempts to attack the Tribe’s adjudicated successorship to tribes and bands that were party to the Treaty of Point Elliott, including the treaty Samish. See SIN Memo at 20-21. And it claims that SIN’s governing structure “compares favorably with,” “overshadows,” and “far outshines” the Tribe’s governing structure since Treaty time. See SIN Memo at 22. To the extent these arguments are intended to demonstrate that, if March Point was included in the original Swinomish Reservation, it is not the Tribe’s current or former reservation but SIN’s current or former Reservation, they are addressed in the Slonim and Haley Letters.

As discussed in those letters, the Reservation was not intended by the United States or understood by the Indians to accommodate the treaty Samish, and SIN is not in any event a successor-in-interest to the treaty Samish. To the contrary, the Swinomish Tribe is the lawful successor to the Indians who occupied the Reservation and on whose behalf it was reserved. As discussed in the Slonim and Haley letters, there is substantial historical and legal support for each of these propositions, and they are consistent with the Bureau’s longstanding position regarding the ownership of the Reservations established in the Stevens’ treaties. We will not repeat that discussion here, but will simply highlight one piece of the historical evidence. When the United States surveyed the Reservation in 1874 following the 1873 Executive Order, it was the Indians residing on the Reservation who complained about the exclusion of March Point from the survey. In particular, on February 4, 1874, “Sub-agent Eugene Chirouse wrote from the Tulalip Reservation to report that the ‘Swinomish Indians came this morning in great number to my office very much excited, and requested me to write for them and inform you that they are not
[satisfied] with the way the Surveyors Survey their Reservation and they ask you to be kind enough to give yourself to the Surveyors the true Map of their Reservation with orders to Survey accordingly.” Hart Report at 116 (emphasis added). There was no complaint from an independent, off-reservation Samish Tribe regarding the survey. The complaint came instead from the Reservation’s residents, referred to by the Indian Office as Swinomish Indians. The Tribe, which re-organized in 1936 under the Indian Reorganization Act as the representative of all Indians occupying the Reservation, is their lawful successor-in-interest.

Apart from its attempt to claim the March Point portion of the Swinomish Reservation on SIN’s behalf, the SIN Memo makes four main claims regarding the consent issue. First, SIN argues that the Bureau should not even consider whether March Point is or was within the Swinomish Reservation. However, this argument fails because the Bureau’s trust acquisition regulations and other authorities require the Bureau to consider this question. Second, despite previously admitting that March Point was and is within the Swinomish Reservation as established by Treaty, SIN now argues that March Point was never part of the Swinomish Reservation. The primary difficulty with this argument is that the historical record does not support it; instead, it strongly supports the conclusion that March Point has always been part of the Swinomish Reservation. Third, despite previously admitting that the 1873 Executive Order could not lawfully change the Swinomish Reservation’s boundary, SIN now argues that the Executive Order was actually effective to diminish the Reservation because it was authorized by Congress through the Treaty. However, nothing in the Treaty authorized the President to diminish the Swinomish Reservation, and even if the Executive Order had been effective in diminishing the Reservation, lands on March Point would still qualify as reservation lands for purposes of the Bureau’s trust acquisition regulations. Fourth and finally, SIN argues that the Tribe is precluded by prior litigation from asserting any interest in, or rights related to, March Point. However, the only claim that the Tribe has raised in the context of SIN’s fee-to-trust applications is the narrow and specific claim that March Point is within the current or former Swinomish Reservation for purposes of the Bureau’s trust acquisition regulations, and this claim has never been considered in any litigation. While several cases have superficially considered or commented upon the Reservation’s boundaries, they did not involve the same parties or the same claim as the one the Tribe has raised here. Below, we address each of these issues in greater detail.

25 C.F.R. Part 151 Requires the Bureau to Consider Whether Lands on March Point Are or Were Within the Swinomish Reservation

SIN argues that the Bureau should not consider whether March Point is or was within the Swinomish Reservation, and suggests that if the Bureau were to consider this issue, it would violate SIN’s due process rights. See SIN Memo at 2. In its view:

[A] fee-to-trust application submitted by [SIN] is not the appropriate forum to adjudicate – especially for the first time – [the Tribe’s] newly raised claim that the geographic area known as March’s Point is currently part of the Swinomish Reservation. [The Tribe] should be required to adjudicate such a claim in a forum where its sovereign immunity is waived and all potentially affected parties have a full opportunity to completely litigate the merits.... [I]ts claim cannot and should
not be determined in this administrative fee-to-trust proceeding. Such
determination would negatively affect the legal rights of [SIN] without the benefit
of due process.

SIN Memo at 2.1

However, the Bureau’s trust acquisition regulations require the Bureau to consider whether
lands to be acquired in trust for a tribe are or were within another tribe’s reservation. 25 C.F.R. §
151.8 provides that “[a]n individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition …” (emphasis added). The term “reservation” is
defined as “that area of land over which the tribe is recognized by the United States as having
governmental jurisdiction, except that … where there has been a final judicial determination that a
reservation has been disestablished or diminished, Indian reservation means that area of land
constituting the former reservation of the tribe as defined by the Secretary.” 25 C.F.R. § 151.2(f).
In light of the plain language of these regulations, the regulatory history, case law interpreting and
applying the regulations, and the Bureau’s longstanding administrative practice, see Haley Letter
at 4-11 and authorities cited therein, SIN’s unsupported assertion that the Bureau should not
consider whether the lands on March Point that are the subject of SIN’s fee-to-trust applications
are or were within the Swinomish Reservation is baseless. Moreover, it is unclear how the
Bureau’s consideration of this mandatory question regarding SIN’s fee-to-trust applications, in a
process which SIN initiated and has fully participated in (including with respect to this very issue),
could possibly “negatively affect the legal rights of [SIN] without the benefit of due process.” SIN
Memo at 2.2

Lands on March Point Are or Were Within the Swinomish Reservation

Because the Bureau must consider whether March Point is or was within the Swinomish
Reservation, we turn again to that issue. As we have previously explained, the location of a portion
of the original boundary of the Swinomish Reservation is a north-south line running across the
isthmus of land separating Fidalgo and Similk Bays, such that all of March Point was included
within the original Swinomish Reservation as established by the Treaty. See, e.g., Hart Report at
A number of historical documents demonstrate the United States’ and tribes’ intent and
understanding with respect to this issue. These include, but are not limited to, maps prepared by
members of the United States Treaty Commission immediately prior to and following the Treaty

1 It is important to note that this argument is completely inconsistent with the argument SIN makes in the very next
paragraph of its Memo, namely, that “[the Tribe’s] claimed rights to March’s Point have been adjudicated and
determined against the [Tribe], as well as the United States.” SIN Memo at 2. A claim cannot simultaneously be both
a “newly raised claim” asserted “for the first time” and a claim that has been “adjudicated and determined.”

2 We note that this is not the first time that SIN has suggested in its voluminous submissions regarding its March Point
fee-to-trust applications that the Bureau would violate SIN’s due process rights if the Bureau reaches a conclusion as
to the law or the facts with which SIN disagrees. It should go without saying, but this is not the standard for
determining whether a due process violation has occurred.
which depict March Point within the Reservation (see Hart Report Figures 6, 10, 11, 13 and accompanying text and exhibits), and maps prepared by the federal government between 1855 and 1870 which depict March Point within the Reservation (see Hart Report Figures 14 - 21 and accompanying text and exhibits). To our knowledge, the United States has never disputed that March Point is within the boundaries of the Swinomish Reservation as established by Treaty, and we do not believe that this point can be disputed given the compelling historical record with respect to it.

As we also have previously explained, an Indian reservation established by treaty remains intact unless and until Congress acts to disestablish or diminish the reservation. See, e.g., Nebraska et al. v. Parker et al., 136 S.Ct. 1072, 1078-79 (2016). Because Congress has never acted to disestablish or diminish the Swinomish Reservation, it is the Tribe’s position (and SIN’s former position, of which more below) that the Reservation boundaries remain intact and that March Point is within the Reservation for purposes of the Bureau’s trust acquisition regulations. See Haley Letter at 2-11. Although the 1873 Executive Order purported to change the Reservation boundary to exclude March Point from the Reservation, there is no authority for the proposition that the President can unilaterally disestablish or diminish a treaty reservation, and any such suggestion is foreclosed by well-settled federal law. See Haley Letter at 2-5. Importantly, SIN concedes that this is the case: “the terms of the treaty approved by Congress control, and [] the Executive Branch has only that authority over Indian Affairs delegated to it by Congress.” SIN Memo at 5.

As indicated above, the positions expressed in the SIN Memo regarding the establishment of the Reservation, the status of lands on March Point, and the intended and actual effect of the 1873 Executive Order reflect a 180-degree flip-flop from SIN’s prior admissions regarding these issues. As SIN itself has explained, March Point was and is part of the Reservation as established by the Treaty of Point Elliott:

[SIN] agrees with the [Tribe] that March’s Point was and is part of the reservation established by Governor Isaac I. Stevens in Article 2 of the 1855 Treaty of Point Elliott, the tract of land identified as “the peninsula at the southeastern end of Perry’s Island, called Sha’is-quihił.” Treaty of Point Elliott, ratified March 8, 1859, 12 Stat. 927....

[SIN] has conducted its own research and retained its own experts on this issue and believes it is beyond reasonable dispute that the original reservation established on Fidalgo Island included March’s Point, and that the western boundary of that reservation is as it was drawn in the mid-1850s by Governor Stevens, George Gibbs and other federal officials - a north-south line extending north from Similk Bay to Fidalgo Bay, and that the reservation includes March’s Point. In addition to the sources cited in E. Richard Hart’s April 11, 2012 report on March Point for the [Tribe], it is also the only reasonable geographic conclusion from the definition of

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3 As indicated above and discussed in greater detail below, the Bureau need not determine whether March Point is part of the current or former Swinomish Reservation in order to determine that it is within the Reservation for purposes of the trust acquisition regulations because regardless whether March Point is current or former Reservation lands, it falls within the definition of “reservation” in 25 C.F.R. § 151.2(f). See Haley Letter at 4, 6-11.
the terms "isthmus" and "peninsula" as used in 1855. As a self-effectuating reservation established pursuant to a ratified treaty, the 1873 Presidential Executive Order purporting to redefine and reduce that treaty reservation without an Act of Congress and adequate compensation was void and of no legal effect. Legally, that treaty reservation continues in existence until properly vacated or diminished.

Letter from Tom Wooten to Mr. Speaks at 1 (December 22, 2014) (Wooten Letter) (emphasis added). It was apparently only after the Tribe pointed out the obvious legal consequences of this position that SIN flip-flopped and now claims that the Reservation was not, in fact, a "self-effectuating reservation" that was "established by Governor Isaac I. Stevens in Article 2 of the 1855 Treaty." Id.

Despite its earlier admissions, SIN now takes the position that March Point was never within the Swinomish Reservation because the Reservation was not established until the 1873 Executive Order was issued. See SIN Memo at 5. The primary difficulty with this assertion is that the historical record simply does not support it. As SIN continues to concede, the United States and tribes that signed the Point Elliott Treaty always intended for the Reservation to include March Point. See SIN Memo at 4 ("[SIN] agrees with [the Tribe] about the original intent of the Point Elliott Treaty with regard to the reservation on Perry's [Fidalgo] Island"). As noted above, the United States prepared numerous maps both before and after the Treaty but prior to the Executive Order which depict the existence and location of the Swinomish Reservation. Other federal records created after the Treaty but prior to the Executive Order describe the existence and location of the Swinomish Reservation. The United States stationed various Indian agents or farmers-in-charge on the Swinomish Reservation prior to the Executive Order, and federal records reflect their ultimately unsuccessful efforts to protect the Swinomish Reservation from encroachment by non-Indian trespassers. There is no evidence demonstrating or suggesting that the Executive Order was intended to or did define the Swinomish Reservation boundary in the first instance or was issued to clarify the Reservation boundary because of confusion over its location. To the contrary, all of the available evidence indicates that the Executive Order attempted to change the boundary to exclude March Point from the Reservation. See Hart Report at 53-62, 73-75, 80, 83-88, 100-101, 109, 117-1, 121; Hart Report Figures 6, 10, 11, 13 and accompanying text and exhibits; Hart Report Figures 14 – 21 and accompanying text and exhibits; Haley Letter at 1-2; April 24, 2012 Slonim Letter at 2-4. Given all of this history, it is ridiculous to assert that the Swinomish Reservation did not exist until the 1873 Executive Order was issued or to assert that the Reservation never included March Point.

Nevertheless, SIN attempts to bolster its latest position by claiming that the Executive Order was somehow necessary because the boundaries of the Reservation were not defined in the Treaty. See SIN Memo at 7. While it is true that the Treaty does not legally describe the boundaries of the Reservation, it clearly describes the Reservation as "the peninsula at the southeastern end of Perry's [Fidalgo] Island, called Sha'is-quihl." Treaty of Point Elliott, Art. 2. As SIN itself has explained, there is only one reasonable conclusion to be reached with respect to the location of the Reservation and its boundaries given the geographic descriptors used in Article 2 of the Treaty and in contemporaneous federal records describing the location of the Reservation.
and its boundaries. See Wooten Letter at 1. Additionally, to the extent that any ambiguity as to the Reservation's location or boundaries existed historically or exists today based solely on the Treaty's text, that ambiguity was and is easily resolved by reference to all of the maps prepared by the United States both prior to and after the Treaty depicting the Reservation's location and boundaries. Notably, these maps include an 1855 map prepared by George Gibbs, an important member of the United States Treaty Commission, which clearly sets “the peninsula at the southeastern end of Perry’s [Fidalgo] Island” apart from the remainder of Fidalgo Island and labels the Reservation with the two names it was known by, “Swinamish [sic]” and “Sha’is-quihl.” See Hart Report Figure 13 and accompanying text and exhibits. This map and other historical documents discussed in the Hart Report indicate that the location of the boundaries of the Reservation were well understood by Indians and non-Indians alike following the Treaty despite the fact that the Treaty lacked a legal description of the Reservation boundary, and undercuts SIN’s suggestion that the Executive Order was somehow necessary to clarify the Reservation’s boundaries. See, e.g., Hart Report at 52-62, 84-85, 95-99.

SIN also tries to support its new position by claiming that the Treaty “required additional Executive Branch action before any of [the] reservations was deemed established for purposes of the treaty.” SIN Memo at 9. However, this claim is belied by the plain language of the Treaty, the historical context in which the Treaty was made, and the historical record. Under Article 1 of the Treaty, the tribes ceded their interest in millions of acres of land in northern Puget Sound. Article 2 of the Treaty reserved from this cession four tracts of land. It states that:

There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: [the Suquamish Reservation]; [a portion of the present-day Tulalip Reservation], [the Swinomish Reservation], and [the Lummi Reservation]. All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use....

Treaty of Point Elliott, Art. 2 (emphasis added). Article 3 of the Treaty reserved from the cession a township of land. In contrast to the language of Article 2, it provides that:

There is also reserved ... one township of land for the purpose of establishing thereon an agricultural and industrial school ... with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in [Washington] Territory. Provided, however, That the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

Treaty of Point Elliott, Art. 3 (emphasis added). A comparison of this language indicates that the Article 2 reservations were established automatically under the Treaty for the immediate use of the tribes. Stated another way, the plain language of the Treaty indicates that the Article 2 reservations were, as Chairman Wooten asserted, “self-effectuating.” See Wooten Letter at 1. Moreover, while Article 3 of the Treaty indicates that additional action by the President was contemplated with respect to the location of the general reservation, neither Article 2 nor Article 3 of the Treaty
indicates that additional action by the President was even contemplated, let alone required, with respect to the location of the Article 2 reservations.

The language of other provisions of the Treaty supports this interpretation of Articles 2 and 3. For example, Article 4 of the Treaty required the tribes to remove to the Article 2 reservations within one year of the Treaty. This provision would make little sense if the reservations were not established automatically under the Treaty but instead required additional action by the President or other federal officials to establish them.

This interpretation of the Treaty is also supported by the historical context in which the Treaty was made. As the Hart Report explains, one of the primary goals of the United States in concluding the Stevens treaties was to extinguish Indian title to all lands in Washington Territory while consolidating the tribes on as few, and as small, reservations as possible. See, e.g., Hart Report at 27. In light of this goal, the members of the United States Treaty Commission were of different minds as to the number of reservations to establish. Several of them believed that a single larger reservation was preferable. Others believed that a number of smaller reservations scattered throughout the Territory were preferable. Mr. Hart believes that the language in Articles 2 and 3 of the Treaty reflects a decision on the part of the Treaty Commission to establish a number of smaller reservations but leave open the possibility of consolidating the tribes on a larger general reservation at a later date. In Mr. Hart's opinion, the latter possibility "was intended to placate the Indian Office, and was not considered to be a realistic alternative." Hart Report at 38; see also Hart Report at 31-32, 35-39, 42-43, 45-46, 51.

The historical record is also consistent with this interpretation of Articles 2 and 3 of the Treaty. There is no record of the President taking formal action to establish the four Article 2 reservations, and yet, as described above with respect to the Swinomish Reservation, those reservations were nevertheless established and supervised by federal officials long before the mid-1870s. In addition, the view that removing all of the tribes to a larger general reservation was unrealistic turned out to be the correct one: the Article 3 general reservation was never established; the Article 2 reservations established in the five treaties ceding lands west of the Cascades were never disestablished; and the tribes that occupied the Article 2 reservations were never required to remove to or settle upon a general reservation, at Tulalip or elsewhere.

For all of these reasons, SIN's current claim that March Point was never within the Swinomish Reservation because the Reservation was not established until the 1873 Executive Order was issued lacks merit.

*The Treaty Did Not Authorize the President to Diminish the Reservation, and Even if it Did, Lands on March Point Would Still Qualify as Reservation Lands for Purposes of 25 C.F.R. Part 151*

As noted above, SIN previously admitted that "it is beyond reasonable dispute that the original reservation established on Fidalgo Island included March's Point." Wooten Letter at 1. In an attempt to avoid the consequences of this fact, SIN now takes the position that even if March Point was originally within the Swinomish Reservation, it is no longer within the Swinomish
Reservation because Congress authorized the President to change the Reservation boundaries or diminish the Reservation. See SIN Memo at 5-7. Stated another way, despite previously stating that the Executive Order was “void and of no legal effect,” Wooten Letter at 1, SIN now claims that the Executive Order was valid and effective to set the northern boundary of the Reservation because it was issued in accordance with the Treaty. However, a careful analysis of the Treaty and the history of the President’s actions (or inaction, as the case may be) with respect to the Swinomish Reservation demonstrates that the President was not authorized to take the action he purported to take, namely, to change the Swinomish Reservation boundaries or diminish the Reservation.

SIN now claims that the Treaty “expressly gave the President discretionary authority to establish a permanent reservation on [Fidalgo Island] different than the one originally intended by the [T]reaty negotiators.” SIN Memo at 5 (emphasis in original). SIN does not quote any language from the Treaty or even cite to an Article of the Treaty to support this claim. See id. Because the Treaty does not, in fact, expressly grant the President any such authority, we understand SIN to mean that various provisions of the Treaty impliedly granted the President this authority. We address these provisions in turn.

First, SIN argues that the “present use and occupation” language in Article 2 of the Treaty indicates that the Article 2 reservations “were only temporary or conditional, subject to future alteration at the discretion of the President.” SIN Memo at 5. As discussed above, in light of the historical context and record, it is questionable whether the Article 2 reservations were truly meant to be temporary. See, e.g., Hart Report at 51, 93 (explaining that there was no recorded discussion at the Treaty Council indicating that the Article 2 reservations were to be temporary and that there is no indication in the historical record that the tribes understood the Article 2 reservations to be anything other than permanent). Regardless of what was intended, it is plainly evident at this point in time that the Article 2 reservations were not, in fact, temporary. They were established immediately after the Treaty and continue to exist today, more than 160 years after the Treaty. Even more importantly, the Treaty expressly stated that the President was authorized to change the location of the Article 3 general reservation, as noted above. The fact that the Treaty did not similarly state that the President was authorized to change the location of the Article 2 reservations strongly suggests that the United States and tribes did not intend to, and that the Treaty did not, authorize the President to change the location of the Article 2 reservations. The fact that the United States Treaty Commission learned from its mistake in failing to negotiate specific reservation locations at the Medicine Creek Treaty Council and then negotiated specific reservation locations at the treaty council immediately following the Medicine Creek Council, the Point Elliott Treaty Council, also strongly suggests that the President was not free to unilaterally change the location of the Article 2 reservations. See Hart Report at 34-36, 39-43.

SIN also claims that the “surveyed and marked out” language in Article 2 of the Treaty impliedly authorized the President to alter the boundaries of the reservations. See SIN Memo at 5. What the Treaty actually says is that the reservations “shall be set aside ... for [the tribes’] exclusive use” and surveyed and marked out “as necessary.” It requires a tortured reading of the actual language of the Treaty to conclude that it provides authority for the President to disregard the boundaries of the reservations established by the Treaty; if anything, it seems to suggest that
the President and other United States officials were required to *defend* those boundaries against encroachment by outsiders. We are not aware of any evidence that it was “necessary” to survey and mark out the Swinomish Reservation prior to the Executive Order. On its face, the Executive Order did not purport to survey and mark out the Reservation and the Reservation was not, in fact, surveyed and marked out until *after* the Executive Order was issued. *See* Hart Report at 116.

Next, SIN argues that “Article 3 of the Point Elliott Treaty specifically delegates to the President the authority to establish the permanent Swinomish reservation however he saw fit.” SIN Memo at 5. However, as discussed elsewhere in this letter, while Article 3 of the Treaty clearly granted the President authority to establish the “central agency and general reservation” somewhere other than at Tulalip, its plain language does not purport to authorize the President to set or modify the boundaries of the Article 2 reservations, including the Swinomish Reservation, or speak in any way to the President’s power with respect to the Article 2 reservations or their boundaries. Moreover, we are not aware of any Presidential action to establish the general reservation or change its location, which is the only presidential power Article 3 arguably speaks to.

Finally, SIN argues that Article 7 of the Treaty provided “additional, separate discretionary authority for the President to establish a reservation anywhere within the Territory he deemed appropriate.” SIN Memo at 5. What Article 7 actually says is this:

The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations [established in Article 2 of the Treaty] to the said general reservation [established in Article 3 of the Treaty], or such other suitable place within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable....

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4 The SIN Memo implies that an “1872 survey” surveyed the Swinomish Reservation in accordance with the Treaty and subsequently formed the basis for an Executive Order “confirming” the boundaries of the Swinomish Reservation. *See* SIN Memo at 5. The “1872 survey” was actually completed by John Cornelius in 1871 pursuant to a contract that excluded surveying lines within the Swinomish Reservation. The Cornelius survey is discussed in detail in the Hart Report. Although Mr. Cornelius surveyed certain sectional and meander lines within the portion of the Reservation lying between Fidalgo, Similk, and Padilla Bays, this was not in accordance with but in contravention of the Treaty. *See* Hart Report at 102-14. Thus, while SIN is correct that lines in the Cornelius survey appear to have provided the basis for the boundary line in the Executive Order, SIN’s suggestion that the “1872 survey” surveyed and marked out the Swinomish Reservation in accordance with the Treaty is not supported by the historical record. Notably, SIN cites no historical evidence to support that suggestion.
Treaty of Point Elliott, Art. 7. By its plain language, this Article arguably authorizes the President (1) to remove the tribes from their Article 2 reservations to the general reservation at Tulalip or elsewhere after compensating them for the loss of their property; (2) to consolidate them with other tribes and bands located elsewhere; and (3) to allot the reservations if certain conditions were met.

On its face, the Executive Order did not attempt to accomplish any of these results. It did not purport to require the tribes on the Swinomish Reservation to remove to the Tulalip Reservation or elsewhere (and certainly did not compensate them for the loss of any property); it did not purport to consolidate the tribes on the Swinomish Reservation with tribes located elsewhere; and it did not purport to allot the Reservation (and the Reservation was not, in fact, allotted until after the Executive Order was issued). Instead, it purported to establish a Reservation boundary which was different from, and significantly smaller than, the boundary of the Reservation established by Treaty. More simply stated, the Executive Order purported to diminish the Reservation, which is not one of the three powers arguably granted to the President under Article 7 of the Treaty. As a result, the Executive Order was ineffective to change the boundaries of the Reservation or diminish the Reservation and the Reservation remains intact.

All available records pertaining to the Executive Order are discussed in the Hart Report. Notably, nowhere in those records is there any suggestion that the Order was based on authority conferred on the President in the Treaty; in particular, none of the treaty provisions on which SIN now relies is even mentioned in those records. See Hart Report 103-116. Rather, it appears that the President’s advisors believed he had unilateral authority to alter the boundaries of a reservation established in a treaty based on the number of Indians residing on the reservation and/or the potential for conflict with non-Indians who had unlawfully settled on the reservation. Id. Because it is now clear that the President had no such authority, the Order’s attempt to diminish the boundaries of the Swinomish Reservation was void and of no effect. See, e.g., Minnesota v. Mille Lacs Band, 526 U.S. 172, 188-89 (1999). SIN’s efforts to justify the Order based on treaty provisions not mentioned at the time, and which on their face do not purport to authorize the President to diminish the Reservation’s boundaries, lacks merit.

It is important to note that even if the Treaty had authorized the President to diminish the Reservation (and it did not for the reasons explained above), lands on March Point would still qualify as Reservation lands for purposes of the Bureau’s trust acquisition regulations. As a result, the Bureau would still be required to obtain the Tribe’s written consent prior to accepting lands on March Point into trust for SIN or its members. As we have previously explained, the relevant question under the Bureau’s trust acquisition regulations is whether the lands at issue were ever within another tribe’s reservation, not whether the lands at issue are currently within another tribe’s reservation. See Haley Letter at 4-11 and authorities discussed therein. Because it cannot reasonably be disputed that March Point is within the Swinomish Reservation as established by the Treaty, whether March Point is within the current or the former Swinomish Reservation is irrelevant. The important point is that it is one or the other, and the Tribe’s consent to non-member trust acquisitions is required in either case.
The Tribe is Not Precluded from Claiming, and the United States is Not Precluded from Determining, that March Point is Within the Swinomish Reservation for Purposes of 25 C.F.R. Part 151

In an attempt to avoid the requirement that the Bureau obtain the Tribe’s written consent prior to accepting lands on March Point into trust for SIN, SIN argues that the Tribe is precluded by prior litigation from asserting any interest in, or rights related to, March Point. See SIN Memo at 2-4, 7, 12. However, as explained in greater detail below, the only interest in, or right related to, March Point that the Tribe has asserted with respect to SIN’s fee-to-trust applications is the Tribe’s narrow and specific assertion that March Point is within the Swinomish Reservation for purposes of the Bureau’s trust acquisition regulations.\(^5\) This issue has never been considered in prior litigation and the Tribe and the United States would not be precluded from claiming that March Point is within the Swinomish Reservation for purposes of 25 C.F.R. Part 151 in undefined and hypothetical litigation which may occur at some point in the future.

We note that the SIN Memo does not contain the type of careful and fact-specific analysis that would actually be required to determine whether the Tribe and/or the United States would be precluded in future litigation from asserting that March Point is within the Swinomish Reservation for purposes of the Bureau’s trust acquisition regulations. Several different common law doctrines limit relitigation of claims or issues under certain circumstances. Those doctrines serve different jurisprudential purposes and apply under different sets of circumstances. The law regarding the doctrines is complex and heavily fact-dependent, making application of the doctrines to any particular scenario difficult to predict. It is even more difficult to adequately address or predict the application of these doctrines in the abstract. See generally Moore’s Federal Practice, Third Ed. §§ 131.01; 131.20[1], [4].

The doctrine of claim preclusion or res judicata “prohibits successive litigation of the very same claim by the same parties.” Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292, 2305.

\(^5\) In an earlier submission, the Tribe discussed the fact that the Indian Claims Commission (ICC) considered claims brought on behalf of the treaty Samish and the treaty Swinomish and determined that Samish aboriginal territory did not include, and Swinomish aboriginal territory did include, March Point, and also determined that the treaty Samish did not have multiple villages on March Point at treaty time. We indicated that these findings were consistent with the weight of anthropological authority regarding the territories and villages of the treaty Samish and treaty Swinomish at Treaty time. See Haley Letter at 16-22. We did not discuss these issues because the Tribe is asserting a general interest in, or right related to, March Point beyond claiming that March Point is within the Reservation for purposes of 25 C.F.R. Part 151 or because the Tribe believes that the Bureau’s authority to accept SIN’s March Point properties into trust absent its consent depends upon which tribe can prove a greater historical connection to March Point. Instead, we did so to demonstrate that SIN’s earlier arguments that the Swinomish Reservation, or the March Point portion of it, was reserved for the treaty Samish or is really SIN’s reservation, that March Point was traditional Samish exclusive territory which the Swinomish were only permitted to visit, and that the territorial boundary between the aboriginal Samish and aboriginal Swinomish ran along the southern base of March Point such that all of March Point was within the territory of the aboriginal Samish were inconsistent with the historical record and incorrect. We note that SIN repeats many of those arguments in its most recent submission, see SIN Memo at 6, 12-18, and that the Tribe’s position with respect to them has not changed, although we do not respond to them again here.
(2016) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)) (emphasis added). The doctrine applies if six elements are met:

1. the same (or a closely related) party
2. brought a prior suit asserting the same cause of action or claim,
3. the prior case was adjudicated by a court of competent jurisdiction and
4. was decided on the merits,
5. a final judgment was entered, and
6. there is no ground, such as fraud, to invalidate the prior judgment.


The vast majority of claim preclusion cases address whether a later case involves the “very same claim” as a prior case. The Ninth Circuit considers four factors in considering this question:

1. whether rights or interests established in a prior judgment would be destroyed or impaired by prosecution of the second action;
2. whether substantially the same evidence is presented in the two actions;
3. whether the two suits involve infringement of the same right; and
4. whether the two suits arise out of the same transactional nucleus of facts.

*Turtle Island Restoration Network v. United States Dep’t of State*, 673 F.3d 914, 917-18 (9th Cir. 2012) (quoting *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1981), cert. denied, 459 U.S. 1087 (1982)). Of these, the fourth factor is most important. *Id.* at 918.

The doctrine of issue preclusion or collateral estoppel prohibits “relitigation of issues actually litigated and necessary to the outcome of the first action.” *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5 (1979) (emphasis added). The doctrine applies if four elements are met:

1. there was a full and fair opportunity to litigate the issue in the previous action;
2. the issue was actually litigated in that action;
3. the issue was lost as a result of a final judgment in that action; and
4. the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action.

*Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1050 (9th Cir. 2008) (quoting *United States Internal Revenue Serv. v. Palmer (In re Palmer)*, 207 F.3d 566, 568 (9th Cir. 2000)).

Before turning to the prior cases that SIN claims preclude the Tribe, it is helpful to consider the nature of the Tribe’s asserted interest in light of these principles. In the context of SIN’s fee-to-trust applications, the Tribe has not asserted broad, sweeping rights with respect to March Point. For example, it has not asserted: ownership of any lands on March Point (with the exception of those it has purchased recently on the open market); a right to take possession of lands on March Point (other than those owned by the Tribe); a right to exercise regulatory jurisdiction or taxing authority over non-Tribal lands on March Point; or a right to compensation from the United States
or anyone else for the Tribe’s purported loss of lands on March Point. Instead, the Tribe has asserted a very narrow and specific right: the right to approve or disapprove non-member trust acquisitions of lands on March Point in accordance with the Bureau’s trust acquisition regulations. As noted above, no court has ever considered whether Tribe has a right to veto non-member trust acquisitions of lands on March Point, and consideration of this question will not destroy or impair rights or interests established in prior litigation. While the Tribe’s assertion depends on evidence related to the location of the reservations established under the Treaty and, to a lesser extent, evidence related to the circumstances surrounding the 1873 Executive Order, it is primarily an assertion that lands on March Point qualify as reservation lands for purposes of 25 C.F.R. Part 151 as a matter of law. While several prior cases have considered or mentioned the Reservation’s boundaries, none of those cases involved an alleged infringement of the same right the Tribe asserts here, which arises under the Treaty in a general sense, but arises under the Bureau’s trust acquisition regulations specifically because the Bureau has chosen by regulation and prior administrative practice to decline to accept land into trust for a tribe if it is within the current or former reservation of another tribe and the other tribe has not consented to the acquisition.

With these factors in mind, we turn to the cases which SIN claims preclude the Tribe from asserting any interest in, or rights related to, March Point. As explained below, none of these cases precludes the Tribe or the United States because they did not involve the same parties or the same claim, or the same issues as those present here.

The first case SIN cites is *Washington Territory v. Deere*, Jefferson County Criminal Cases, Case File 664, Washington State Archives, Northwest Branch. SIN argues that this case finally determined that March Point was never within the Swinomish Reservation and states that “[SIN] and [the Tribe] may not agree with the decision, but it exists.” SIN Memo at 7; see also id. at 2. This case is discussed at length in the Hart Report. See Hart Report at 88-102. It was a criminal prosecution by Washington Territory against W.Y. Deere, a farmer-in-charge stationed on the Swinomish Reservation who burned down the house of a non-Indian. Deere defended on the ground that the non-Indian was trespassing on the Reservation and that he (Deere) was acting within the scope of his authority in attempting to remove the non-Indian from the Reservation. A jury ultimately acquitted Mr. Deere of the charges against him, indicating that the house in question was located within the Reservation. However, in the course of charging the jury, the judge issued a pronouncement as to his view that the Swinomish Reservation boundary was in a location that excluded March Point. See Hart Report at 89-92.

There are a number of problems with the judge’s reasoning, see id. at 90-102, but the important point for present purposes is that this case does not preclude the Tribe from claiming or the United States from determining that March Point is within the Reservation for purposes of the Bureau’s trust acquisition regulations. Claim preclusion does not apply because neither the Tribe nor the United States was a party to the case, which was brought by the Territory against government employee, and the case did not involve the “very same claim” as the Tribe’s assertion that March Point is within the Reservation for purposes of 25 C.F.R. Part 151. Additionally, issue preclusion does not apply because the question whether March Point was within the Swinomish Reservation as established by Treaty was not at issue in the case and the resolution of that question was not necessary to the judgment of acquittal. Moreover, that issue was not fully and fairly
litigated: the available records do not indicate that Mr. Deere offered, or Judge Jacobs considered, any of the available historical evidence regarding the location of the Swinomish Reservation as established by Treaty, see Hart Report at 92, and Deere had no basis for appealing the judge’s pronouncement regarding the boundary because he was acquitted by the jury. Because the house that burned was not on March Point the question whether March Point was within the Swinomish Reservation was irrelevant to the claims and defenses in the case. See Hart Report at 89.

SIN also cites *Duwamish et al. v. United States*, 79 Ct. Cl. 530 (1934), cert. denied, 295 U.S. 755 (1935). SIN does not discuss this case in any detail, but it appears from its parenthetical description of the case that SIN believes the case finally determined that the Swinomish Reservation as established by Treaty was 59 acres smaller than the area described by the Executive Order, the apparent implication being that March Point was never part of the Reservation. See SIN Memo at 3. The *Duwamish* case was litigated in the Court of Claims pursuant to a special jurisdictional statute and involved claims for money damages against the United States for failures to comply with certain stipulations contained in the Stevens treaties. See *Duwamish*, 79 Ct. Cl. at 532-34. In its decision, the Court of Claims stated that the Swinomish Reservation “was duly made and was subsequently enlarged by Executive order of September 9, 1873, the addition consisting of 59.75 acres. As thus enlarged the reservation contained 7,448.8 acres.” Id. at 549.

The *Duwamish* case does not preclude the Tribe from claiming or the United States from determining that March Point is within the Reservation for purposes of the Bureau’s trust acquisition regulations. Claim preclusion does not apply because, even if we assume that some of the groups of individual descendants involved in the *Duwamish* case were the same parties as those involved here, the *Duwamish* case did not involve the same claim. The claims asserted in *Duwamish* were claims of compensation for individuals based on aboriginal title or possessory rights to land. As noted above, the Tribe is not here claiming ownership of or possessory rights to land. See, e.g., *United States v. Washington*, 641 F.2d 1368, 1374 (9th Cir. 1981) (stating that because the claims asserted in *Duwamish* and before the ICC “involved compensation for individuals, not fishing rights for tribal units [the] causes of action and factual issues litigated were different, and the doctrines of res judicata and collateral estoppel are therefore inapplicable”); see also *Greene v. Lujan*, 1992 WL 533059 at *3 (No. C89-645Z, W.D. Wash. 1992). Issue preclusion does not apply either. Even assuming that the parties or privies element is met, the issue that the Court of Claims decided was that the Executive Order expanded the Reservation by 59.75 acres. The Court did not decide which lands were in the Reservation prior to the Executive Order, did not decide which lands the Executive Order purportedly added to the Reservation, and did not decide anything specifically with respect to March Point, including whether March Point was ever within the Swinomish Reservation, the relevant issue here. Moreover, there are serious questions

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As the United States has explained, the claims in the *Duwamish* case were brought by groups of individual descendants “based on historical events and historical tribes.” These descendant groups did not have to be organized or function as a political or governmental entity, or to be recognized as such by the United States, at the time the case was brought. See Letter from Marc Slonim to Mr. Speaks at 56-57 (March 9, 2016). It is clear that the groups of descendants involved in the *Duwamish* case who brought historical claims of the treaty Samish and treaty Swinomish were not the Samish Indian Nation and/or the Swinomish Indian Tribal Community as those entities are constituted today. Whether SIN, the Tribe, neither, or both were in privity with the descendant groups involved in the *Duwamish* litigation for preclusion purposes is significantly less clear.
as to whether the effect of the Executive Order was fully and fairly litigated in the Duwamish case and as to the validity of this aspect of the Court of Claims’ judgment. The Reservation was not surveyed until after the Executive Order was issued and, prior to a survey, it would have been impossible to calculate the purported effect of the Executive Order on the Reservation’s acreage down to hundredths of an acre. See Hart Report at 121-22.

The next cases SIN cites are two proceedings before the Indian Claims Commission (ICC): Swinomish Tribal Community v. United States, ICC Dkt. No. 293, and Swinomish Tribe v. United States, ICC Dkt. No. 233. With respect to Docket 293, SIN argues that “the [Tribe] made a claim that the reservation established under the Treaty of Point Elliott was larger than what was actually established by the United States. The ICC, however, after commissioning an investigation, found that the [Tribe’s] claim had no factual basis.” SIN Memo at 2. It also argues that the Tribe agreed with the ICC’s conclusion in a 1964 Swinomish Indian Senate resolution authorizing dismissal of ICC Dkt. No. 293. Id. at 3. With respect to Docket 233, SIN claims that the ICC compensated the Tribe “for the taking of the eastern half of March Point, ... legally extinguish[ing] any potential claims that [the Tribe] still owns or has jurisdiction over those lands.” SIN Memo at 3.

Congress established the ICC to hear claims for money damages by tribes or identifiable groups of Indian descendants against the United States arising prior to 1946. Because the ICC’s authority was limited to granting monetary relief, the ICC could award judgments based on historic tribes’ loss of rights in land, but could not confirm or enforce other types of tribally-owned rights. As a result, the vast majority of the claims asserted in the ICC were claims to determine the areas in which historic tribes held aboriginal title and to determine whether the United States paid unconscionable consideration for the cession of such lands. See generally, Smith, M. and Neuman, J., Keeping Indian Claims Commission Decisions in Their Place: Assessing the Preclusive Effect of ICC Decisions in Litigation Over Off-Reservation Treaty Fishing Rights, 31 U. Haw. L. Rev. 475 (Summer 2009).

The ICC cases do not preclude the Tribe from claiming or the United States from determining that March Point is within the Reservation for purposes of the Bureau’s trust acquisition regulations. The questions that exist as to whether the Duwamish case and the present situation involve the “very same claim by the same parties” are equally applicable to the ICC proceedings. Importantly, SIN concedes that this is the case. It states that “the ICC proceedings involved only financial compensation and did not establish any precedent for any other purpose.” SIN Memo at 7. It also states that “the ICC cases ‘only involved compensation for individuals....’ Because the causes of action and factual issues litigated were different, the doctrines of res judicata and collateral estoppel are inapplicable.” SIN Memo at 12 (quoting United States v. Washington, 641 F.2d at 1374) (emphasis added). Given these concessions, SIN’s arguments elsewhere in its Memo that the ICC decisions preclude the Tribe and/or United States make no sense.

Moreover, it is clear that the question whether March Point was within the original or current Swinomish Reservation was not fully and fairly litigated in Docket 293 or 233. In Docket 293, the Tribe’s claim focused on the exclusion of islands and fishing grounds to the south and west of the Reservation as established in the Treaty and Executive Order. See Docket 293, Petition at 13-14 (Paragraph XIX) (Aug. 6, 1951). On February 11, 1964, the Tribal Senate adopted a
resolution stating that, because it did not have evidence to support that claim, it requested the claim be dismissed by the ICC. Resolution No. 154 (Feb. 11, 1964). However, because the Tribe was not represented by counsel, the Bureau of Indian Affairs declined to concur in the Tribe's request for dismissal of the claim. Memorandum from Commissioner of Indian Affairs to Solicitor, Indian Legal Activities (May 1964). Thereafter, the ICC contracted with Dr. Herbert Taylor to prepare a report on the claim.

In his initial report, Dr. Taylor presented three possible approaches that the ICC might take: (1) take cognizance of the Tribe's resolution and dismiss the claim; (2) hold that the claim duplicated claims for the loss of aboriginal lands and fishing grounds made by the aboriginal Swinomish Tribe and dismiss the claim on that basis; or (3) hold that the Tribe was entitled to be heard separately for losses arising from the exclusion of the lands and fishing grounds from the Reservation. Of these approaches, Dr. Taylor preferred the latter. Memorandum from Herbert C. Taylor to Indian Claims Commission at 10 (June 16, 1970). However, in a revised report, Dr. Taylor stated he was only able to locate three documents regarding the boundaries of the treaty reservation — (1) an 1873 letter from Acting Secretary B. R. Cowen to President Grant requesting issuance of the Executive Order; (2) a map accompanying Cowen's letter; and (3) the Executive Order — and that these documents did not support the Tribe's claim. Memorandum from Herbert C. Taylor, Jr. to Indian Claims Commission at 12-13 (Mar. 6, 1971). Notably, Dr. Taylor did not locate any of the evidence assembled in the Hart Report, including the maps prepared by the treaty drafters, the Indian Office and the General Land Office or the extensive correspondence and reports from the Indian Office, which shows that the United States clearly intended and the Indians understood the Reservation to include March Point. On the basis of Taylor's report, the ICC dismissed the Tribe's claim. *Swinomish Tribal Community v. United States*, 25 Ind. Cl. Comm. 465 (June 25, 1971).

There is no basis for concluding that the question whether March Point was included within the treaty reservation was fully and fairly litigated in this proceeding. First, the Tribe's claim did not focus on March Point, but on aboriginal Swinomish lands and fishing grounds south and west of the treaty reservation. Second, after the petition was filed, the Tribe was not represented by legal counsel, and, unable to come up with evidence to support its claim regarding lands and fishing rights south and west of the reservation, requested that it be dismissed. Third, still without counsel, the Tribe did not participate at all in commissioning Dr. Taylor's report and presented no response to it. Thus, far from fully and fairly litigating the question whether March Point was included within the treaty reservation, the Tribe did not litigate that claim at all.

The issue also was not litigated in Docket 233. In that docket, the Tribe received compensation for unconscionable consideration paid by the United States for lands to which the aboriginal Swinomish tribe held aboriginal title. However, the compensation was provided under a settlement agreement, not a decision of the ICC. *See Swinomish Tribe of Indians v. United States*, 28 Ind. Cl. Comm. 220 (July 6, 1972). In approving the settlement agreement, the ICC did not discuss whether the Tribe was receiving compensation for lands on March Point or whether such

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7 We enclose copies of the Petition, the Tribe's resolution, the Commissioner of Indian Affairs memorandum and the Taylor reports cited in the text.
lands were or should have been included in the Reservation, and there is no evidence that the parties themselves addressed those issues in negotiating the settlement. *Id.* Moreover, because the Tribe had lost title to the lands on March Point, it was entitled to compensation for them whether or not they were within the Tribe’s reservation. *See, e.g., Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (distinguishing ownership of lands from “reservation status”). Thus, the fact that the Tribe may have received some monetary compensation for some lands on March Point does not preclude the Tribe from asserting or the United States from determining that those lands were included in the Reservation.

Finally, SIN cites *United States v. Washington*. According to SIN, the following statement from the case “address[es] th[e] exact issue” of the Tribe’s interest in, or rights related to, March Point:

>[The Tribe] is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government on the Swinomish Indian Reservation.... The reservation was established pursuant to [the Treaty] by the [Executive Order].

*See SIN Memo at 3-4 (quoting *United States v. Washington*, 459 F.Supp. 1020, 1039 (W.D. Wash. 1975)).* However, nothing in *United States v. Washington* precludes the Tribe from claiming or the United States from determining that March Point is within the Reservation for purposes of the Bureau’s trust acquisition regulations. As SIN well knows, *United States v. Washington* involves claims regarding whether particular tribes or entities are treaty tribes (i.e., are successors-in-interest to tribes or bands that signed the Stevens treaties) and claims regarding the nature and scope of off-reservation fishing rights that were secured to treaty tribes in the Stevens treaties. The case did not involve any claims or issues regarding the location of the Swinomish Reservation or whether March Point was or is within it, and any such claim or issue certainly was not fully and fairly litigated in *United States v. Washington*. A single phrase cherry-picked out of the entire body of case law that comprises *United States v. Washington* does not change these conclusions.

Preclusion principles are complex, very fact-specific, and do not lend themselves to universal or bright line rules. While any claim of preclusion by prior litigation would need to resolved after additional careful analysis if additional ligation is filed in the future, SIN’s generalized argument that the Tribe is precluded from claiming, and the United States is precluded from determining, that March Point is within the Reservation for purposes of the Bureau’s trust acquisition regulations lacks merit.

**Conclusion.**

For the reasons discussed above and in our earlier submissions, the Bureau must obtain the Tribe’s written consent prior to accepting SIN’s March Point properties into trust. Because the Tribe has not given its consent, the Bureau should deny SIN’s pending fee-to-trust applications for lands on March Point.
Thank you for your consideration of the Tribe’s views. Please let us know if you have any questions regarding the information presented in this letter.

Sincerely,

Emily Haley
Tribal Attorney

cc (via Federal Express, with enclosures):
Lawrence Roberts, Principal Deputy Assistant Secretary – Indian Affairs
Stanley M. Speaks, Northwest Regional Director
Craig Dorsay, Attorney for Samish Indian Nation
Before the
Indian Claims Commission
of the United States

SWINOMISH TRIBAL COMMUNITY, a corporation,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Petition No. 233

WARREN J. GILBERT
Attorney of Record for Petitioner
208 Matheson Building
Mount Vernon, Washington
Before the
Indian Claims Commission
of the United States

SWINOMISH TRIBAL COMMUNITY, a corporation,  
   Petitioner,  

vs. 

THE UNITED STATES OF AMERICA,  
   Defendant.  

WARREN J. GILBERT  
Attorney of Record for Petitioner  
208 Matheson Building  
Mount Vernon, Washington
Comes now the Swinomish Tribal Community, a corporation, and respectfully petitions and represents as follows:

I

Your petitioner is a Federal Corporation chartered under the Act of June 18, 1934, and constitutes a recognized Indian Tribe organized under a constitution and by-laws ratified by the Indians of the Swinomish Reservation on November 29, 1935, and approved by the Secretary of Interior on January 27, 1936, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984) as amended by the Act of June 15, 1935 (49 Stat. 378). Your petitioner has authority to present this claim for and on behalf of the members of the said tribal community.

II

This claim is brought under the provisions of public law 726, 79th Congress, Chapter 959, 2nd Session, an Act of Congress approved August 13, 1946, and claimant relies upon Section 2 thereof for its claim (60 Stat. 1049; 25 U. S. C. 70 (a)).

III

No suit is pending in the Court of Claims or in the Supreme Court of the United States nor has any claim been filed in the Court of Claims under legislation in effect on the date of the approval of the said Indian Claims Commission Act, upon or involving the claim herein presented or any part thereof.
The members of the Swinomish Tribal Community are of various Indian Tribes, bands or other identifiable groups but are mainly Indians of the Swinomish, Samish, Nooksack, Skagit, also known as the Lower Skagit or Whidbey Island Skagit, tribes.

The ancestors and predecessors in interest of the members of the Swinomish Tribal Community held exclusively, possessed, owned and occupied from time immemorial prior to January 22, 1855, the lands hereinafter described and which are situate in what is now known as Skagit, Whatcom, Island, Snohomish and San Juan Counties in the State of Washington and which are more particularly described as follows:

Beginning at Point DeMott on the Northwest tip of Camano Island in Township 32 North, Range 2 East Willamette Meridian in Island County, Washington; then South to the entrance of Holmes Harbor in Township 30 North, Range 2 E. W. M.; thence West to the intersection of the East-West center line of Section 7, Township 30 North, Range 2 E. W. M. with the Meander line of Admiralty Inlet (which intersection point is about 3 miles North of Lagoon Point on Whidbey Island); thence in a Northwesterly direction in a straight line to Point Partridge on Whidbey Island in Township 32 North, Range 1 W. W. M.; thence in a Northeasterly direction in a straight line to the Northwest tip of Whidbey Island, known as North Beach, in Township 34 North, Range 1 E. W. M.; thence in a Westerly direction to Iceberg Point on Lopez Island in Township 34 North, Range 2...
W. W. M.; thence in a Northwesterly direction to Davis Point on Lopez Island in Section 9, Township 34 North, Range 2 W. W. M.; thence in a Northeasterly direction through Port Stanley on Lopez Island in Section 12, Township 35 North, Range 2 W. W. M. to the Northwest corner of Obstruction Island in Township 36 North, Range 1, W. W. M.; thence in an Easterly direction through Obstruction Pass and continuing in an Easterly direction to the Southern tip of Lummi Island in Township 36 North, Range 2 E. W. M.; thence in a Northeasterly direction to the North section line of Section 25, Township 37 North, Range 2 E. W. M. at its point of intersection with Chuckanut Bay; thence East along the said North Section line of Section 25 to the Northeast corner of Section 25, Township 37 North, Range 3 E. W. M., said point of intersection being the Range line between Ranges 3 E. W. M. and 4 E. W. M.; thence South on the said range line between Range 3 E. W. M. and Range 4 E. W. M. to the Northeast corner of Section 24, Township 35 North, Range 3 E. W. M.; thence West along the North line of said sections 24, 23, 22, 21, 20 and 19 of Township 35 North, Range 3 E. W. M. to the Northwest corner of Section 19, Township 35 North, Range 3 E. W. M.; thence in a Southwesterly direction to the Southwest corner of Section 33, Township 34 North, Range 3 E. W. M.; thence in a Northeasterly direction in a straight line to the center point of Section 35, Township 34 North, Range 4 E. W. M.; thence in a Southwesterly direction in a straight line to the Northwest corner of Section 18, Township 31 North, Range 3 E. W. M.; thence in a Northwesterly direction in a straight line across Port Susan flats and on across Livingston Bay and Camano Island to point of beginning.

VI

On January 22, 1855, the predecessors in interest of
your petitioner and certain other tribes of Indians on
the one part and the United States of America on the
other part entered into a treaty in writing commonly
known and referred to as the Treaty of Point Elliott
(12 Sta. 927) which is approved and ratified by the
Senate of the United States on March 8, 1859, and
proclaimed by the President of the United States on
April 11, 1859. By the terms of said treaty the prede-
cessors in interest of the petitioner ceded, relinquished
and conveyed to the United States all of their separate
tribal rights, title and interest in and to said lands.

VII

'To induce the petitioner and other tribes and bands
of Indians to enter into the said treaty the United
States of America made certain promises and repre-
sentations which were at the time taken and under-
stood by the representatives of your petitioner as
being binding upon the defendant and which it was
understood would be and were embodied in the said
treaty and which promises and inducements upon the
basis of fair and honorable dealings between the
parties, should be recognized and enforced.

VIII

By the terms of the aforesaid treaty the considera-
tion for the above mentioned cession by the said Indian
Tribes was the total sum of One Hundred Fifty-
Thousand and no. 100 Dollars ($150,000.00) to be
The said sum of money was completely inadequate and unconscionable consideration for the said lands and territories ceded and relinquished by the said Indian tribes. The lands and territories were at the time of cession of great value, comprising in part rich and fertile agricultural lands, heavily forested lands, mineral lands and valuable fishing locations. The defendant well knew and fully understood that the said lands and territories were at the time of the said treaty of Point Elliott worth such an amount as to cause the sum of Thirteen Thousand Six Hundred Thirty-six and no/100 Dollars ($13,636.00) for each separate tribe or band. The defendant in treating the predecessor in interest of the petitioner and other Indian tribes parties to the treaties in such manner as it did acted unfairly and dishonorably against the standards of equity and conscience.

IX

The fair and reasonable value of the lands formerly occupied by claimants together with the timber, minerals, dwellings and cultivated areas thereon in 1855 and at the time they were taken by the defendant.
was the sum of One Hundred Twenty Million and no/100 Dollars ($120,000,000.00).

X

The aforesaid claim was asserted by petition in the United States Court of Claims, Cause No. F-275, Duwamish et al Indians vs. United States, 79 Court of Claims 530, petition for writ of certiorari denied by the Supreme Court of the United States in 295 U. S. 755. The action therein was for breach of treaty and no claim was asserted at that time nor did the Court have jurisdiction to consider a claim based upon unconscionable consideration and other grounds as set forth by the Act of Congress heretofore referred to in Paragraph II above.

XI

As an inducement to secure the execution of the aforesaid treaty of Point Elliott by your petitioner the United States of America represented that your petitioner would continue to have rights to fish in usual and accustomed areas and in the usual and customary manner and methods, which right would not be subject to interference by the Government or any Government. Failure on the part of the defendant to secure these rights to the said petitioners have resulted in damage to your petitioner in the sum of Twenty Million and no/100 Dollars ($20,000,000.00).
Negotiations and transactions between the petitioner and the United States and the inducements made by the United States to the petitioner and the members thereof leading to the execution of the aforesaid treaty of Point Elliott caused the members of the petitioner to believe that the United States would make available for settlement not less than eighty (80) acres of ground to each Indian over the age of twenty-one (21) years. Article VII of the treaty of Point Elliott provides as follows:

"The President may hereafter, when in his opinion the interest of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on re-munerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor."
The sixth article of the Omaha Treaty referred to therein reads, insofar as pertinent, as follows:

"The President may from time to time at his discretion cause the whole or such portion of the lands hereby reserved * * * to be surveyed into lots and to assign to such Indian or Indians of said tribe as are willing to avail themselves of the privilege and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one-quarter of a section; to each family of three and not exceeding five, one-half section; and to each family of six and not exceeding ten, one section; and to each family over ten, one-quarter section for every additional five members. (10 Stat. 1043)."

Your petitioner believed at the time of executing the said treaty that the provisions thereof relative to the allotment of land were mandatory upon the United States of America and relied thereon in entering into the said treaty of Point Elliott.

XIII

Fair and honorable dealing between the parties and based upon the understanding had by your petitioner at the time of the Point Elliott Treaty would require that there be made available land for settlement by members of your petitioner or in the alternative that damages for failure so to do be paid. Your petitioner has been damaged in the sum of Twenty Million and no/100 Dollars ($20,000,000.00) by failure of the defendant to make available land for settlement in sufficient quantities so that each member over the
age of twenty-one years would have had a tract of eighty (80) acres.

XIV

The above and foregoing claim was asserted by petition in the United States Court of Claims, Cause No. F-275, Duwamish et al Indians vs. United States, 79 Court of Claims 530, certiorari denied 295 U. S. 755. The Court in the cited case was without jurisdiction to go beyond the written treaty and the claim herein set forth is based upon the provisions of the Act of 1946 and specifically Section 2 thereof, being 25 U. S. C., Section 707(a) in that fair and honorable dealings between the parties and good equity and conscience would require the treaty to be revised to provide that the allotment of the said eighty (80) acres to each Indian over the age of twenty-one be mandatory.

XV

Prior to the execution of the treaties of 1855, the Congress of the United States enacted a law known as the Oregon Donation Act of September 7, 1850 (9 Stat. 496). By the terms of said Act it was possible for white settlers and American half-breed Indians to secure title to from three hundred (300) to six hundred forty (640) acres of land and under the provisions of the Oregon Donation Act large quantities of land was patented and taken from your petitioner without any compensation being paid therefor.
This action on the part of the defendant has been to the damage of your petitioner in the sum of Five Million and no/100 Dollars ($5,000,000.00).

XVI

By Act of Congress dated March 2, 1853 (10 Stat. 172) enacted for the purpose of establishing the territorial Government of Washington, it was provided in Section 20 as follows:

"That when the lands in said Territory shall be surveyed under the direction of the Government of the United States, preparatory to bringing the same into market or otherwise disposing thereof, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to common schools in said Territory. And in all cases where said sections sixteen and thirty-six, or either or any of them, shall be occupied by actual settlers prior to survey thereof, the county commissioners of the counties in which said sections so occupied as aforesaid are situated, be, and they are hereby, authorized to locate other lands in an equal amount in sections, or fractional sections, as the case may be, within their respective counties, in lieu of said sections so occupied as aforesaid."

Pursuant thereto land was set over to the territory and taken from your petitioner without any just compensation being paid therefor, all of which has been to the damage of your petitioner in the sum of Five Million and no/100 Dollars ($5,000,000.00).

XVII

The claims asserted in the immediately two preced-
All of the foregoing claims have been presented by petition before the Indian Claims Commission of the United States by the separate tribal organizations of the Kikiallus, Swinomish, Lumish, and Skagit, also known as Lower Skagit or Wildbey Island Skagits, tribes of Indians, and all of which claims are now pending before the said Indian claims commission of the United States. Your petitioner asserts these claims for and on behalf of all members of your petitioner so that substantial justice may be done under the act of Congress establishing the Indian Claims Commission and as heretofore referred to in Paragraph II above.

XIX

At the time of the establishment of the Swinomish Indian Reservation it was the understanding of your petitioner and your petitioner was lead to believe by representations made on behalf of the defendant that the area encompassed in the said Swinomish Indian
Reservation would be as follows:

Commencing at the mouth of Telegraph Slough in Section 6, Township 34 North, Range 2 E. W. M.; thence following Telegraph Slough in a Southwesterly direction to its intersection with Swinomish Slough; thence following the East side of Swinomish Slough with the Northwest corner of Section 1, Township 33 North, Range 2 E. W. M.; thence following the high tide line in a Southeasterly direction to the mouth of Sullivan Slough in said Section 1, Township 33 North, Range 2 E. W. M.; thence in a Southerly direction around Hiki or Iki Island; thence in a Northwesterly direction around Goat Island and continuing in a Westerly direction to the entrance to Dugualla Bay in Township 33 North, Range 2 E. W. M.; thence in a Northerly direction from the entrance of Dugualla Bay past Hope Island, Skagit Island and on to the entrance to Similk Beach in Township 34 North, Range 2 E. W. M., and across to the Southeast corner of Fidalgo Bay in Township 34 North, Range 2 E. W. M.; thence East to point of beginning.

Failure of the defendant to so establish the boundary lines of the reservations has resulted in a loss of property and valuable fishing rights to the petitioner.

The loss of property which should be included within the bounds of the reservation is of the reasonable value of One Million and no/100 Dollars ($1,000,000.00). The loss of exclusive fishing rights within said area is to the damage of your petitioner in the sum of Five Million and no/100 Dollars ($5,000,000.00).

WHEREFORE, your petitioner prays for judgment as follows:
1. That claimant have and recover judgment against the defendant in the sum of One Hundred Seventy-six Million and no/100 Dollars ($176,000,000.00), together with interest thereon from January 22, 1855, and its costs and disbursements herein incurred.

2. That attorneys fees be fixed and allowed in such sum as the Court shall deem just, not exceeding the percentage or amount fixed by statute.

3. For such further, other and additional relief as is equitable and just in the premises.

WARREN J. GILBERT,
Attorney of Record for Petitioner,
208 Matheson Building,
Mount Vernon, Washington.

Of Counsel:
HARWOOD BANNISTER,
FREDERICK W. POST,
MALCOLM STEWART McLEOD.

STATE OF WASHINGTON, }  
COUNTY OF SKAGIT. } ss.

JOSEPH JOE, being first duly sworn, on oath, deposes and says: That he is the President of the Swinomish Tribal Community; and that he is duly authorized to make this verification for and on behalf of the petitioning tribe; that he has read the above and fore-
going Petition, knows the contents thereof and believes
the same to be true.

Subscribed and sworn to before me this 12th day of August, 1951.

Notary Public in and for the State of Washington, residing at Mount Vernon.
A resolution of the Swinomish Indian Senate authorizing the Indian Claims Commission to dismiss claim of Swinomish Indian Tribal Community vs. United States of America, Docket No. 293.

WHEREAS, the Swinomish Indian Tribal Community filed in Docket No. 293, before the Indian Claims Commission of the United States, a claim against the United States setting forth claims that were also set forth by the separate tribal organizations of the Kikiallus, Swinomish, Samish, and Skagit, also known as the Lower Skagit or Whidbey Island Skagit, tribes of Indians, and these claims having heretofore been stricken by the Indian Claims Commission as the same were presented by the separate tribal organizations, and

WHEREAS, there remained only the claim of the Swinomish Indian Tribal Community that the boundaries of the Swinomish Indian Reservation as established encompassed a lesser area than that which was represented at the time of the treaty, and

WHEREAS, petitioner is unable to present any evidence of representations made to the effect that the area of the reservation should have been greater, and it appearing that it is not desirable to press the claim further; now, therefore, it is hereby

RESOLVED by the Senate of the Swinomish Indian Reservation, pursuant to Article VI, Section 1 (f) of the Constitution and By-Laws, that the Indian Claims Commission be requested to dismiss the claim of the Swinomish Indian Tribal Community vs. the United States, Docket No. 293.

PASSED this 11th day of February, 1964.

ATTEST: Chairman, Swinomish Indian Senate

Secretary

CERTIFICATION

The undersigned Chairman and Secretary of the Swinomish Indian Senate hereby certify that at a meeting of the Swinomish Indian Senate held at LaConner, Washington, on the 11th day of February, 1964, at which a quorum was present, the foregoing resolution was adopted by a vote of seven (7) for and zero (0) against.
To: Solicitor, Indian Legal Activities

From: Commissioner of Indian Affairs

Subject: Suquamish Tribal Community v. United States, Docket No. 293

Before the Indian Claims Commission

The Department of Justice sent us a request on December 20, 1963, to call to the attention of the Suquamish Tribal Community the matter of engaging claim counsel to prosecute Indian Claims Commission Docket No. 293 or to express its views regarding dismissal of the case.

Our Area Director at Portland had the matter presented to the Indians. The Suquamish Indian Senate adopted a resolution on February 11 authorizing the Indian Claims Commission to dismiss the docket.

The Suquamish Indians do not have a claims attorney engaged under an approved contract to represent its interests and prosecute Docket No. 293. The Indians acted on the matter without legal advice. As to the merits of the pending docket, the Bureau has no knowledge. We therefore are unable to concur with the resolution authorizing dismissal of Docket No. 293.

It is recommended that you advise the Department of Justice of our position.

(SGD) JAMES E. DUFFY
Associate Commissioner

Surname
Chrony
Mailroom
Holdup

Glovelly/aft 3/20/64
REM per Mr. Officer:aft 4/27/64 REM 4/30/64
REM/jsp 5/2/64
REM Glovelly/jsp 5/4/64
To

Indian Land Claims Commission, Washington, D. C.
Attention: Harry E. Webb, Jr., Esq., Chief Counsel
Herbert C. Taylor, Jr., Professor of Anthropology and Dean for Research and Grants, Western Washington State College, Bellingham, Washington
16 June 1970

Subject
Docket No. 293 -- Swinomish Tribal Community v. United States Investigation Report

This report shall be divided into five (5) sections:

I. Statement of the problem.

II. The identity of the Swinomish Tribe or band.

III. The identity and composition of the Swinomish Tribal Community.

IV. A discussion of the remaining cause of action (Paragraph XIX) in Docket No. 293.

V. Conclusions and recommendations.

I. Statement of the problem.

On August 8, 1951, the Swinomish Tribe of Indians, through their then attorney of record, Warren J. Gilbert, filed a petition (Docket No. 233) in which they requested compensation for lands and fishing rights taken from them as a result of the treaty of January 22, 1855 (see Kappler, Indian Affairs: Laws and Treaties, Vol. II (Treaties)).

Two days later, on August 10, 1951, the Swinomish Tribal Community filed a petition with the Indian Land Claims Commission through their then attorney of record, Warren J. Gilbert, asking for compensation for loss of land, fishing and hunting rights held prior to the treaty of January 22, 1855 by not only the Swinomish but also the Kikiallus, the Samish and the Lower Skagit.

Two petitions filed at virtually the same time with the petitioners in each case being styled Swinomish seems to have created no little confusion. Eventually the Department of Justice moved to dismiss Docket No. 293, partly on grounds of lack of prosecution and partly on the grounds that the claims presented by the Swinomish Tribal Community were already covered in petitions set before the Indian Land Claims Commission by the various tribes from whence were descended the members of the Swinomish
Community. On April 25, 1955 the defense filed a motion, stipulated by counsel for the Swinomish Tribal Community, to strike and dismiss paragraphs IV through XVIII of Docket No. 293. This left as the sole cause of action in Docket No. 293 Paragraph XIX which alleges that because the Reservation, established by Executive Order in 1873, was so much smaller than the petitioner had been led to believe it would be, that they had lost property and valuable fishing rights.

Herewith the text of Paragraph XIX of Docket No. 293:

At the time of the establishment of the Swinomish Indian Reservation, it was the understanding of your petitioner and your petitioner was led to believe by representations made on behalf of the defendant that the area encompassed in the said Swinomish Indian Reservation would be as follows:

Commencing at the mouth of Telegraph Slough in Section 6, Township 34 North, Range 3 E.W.M.; thence following Telegraph Slough in a Southwesterly direction to its intersection with Swinomish Slough; thence following the East side of Swinomish Slough with the Northwest corner of Section 1, Township 33 North, Range 2 E.W.M.; thence following the high tide line in a Southeasterly direction to the mouth of Sullivan Slough in said Section 1, Township 33 North, Range 2 E.W.M.; thence in a Southerly direction around Niki or Iki Island; thence in a Northwesterly direction around Goat Island and continuing in a Westerly direction to the entrance of Dugualla Bay in Township 33 North, Range 2 E.W.M.; thence in a Northerly direction from the entrance of Dugualla Bay past Hope Island, Skagit Island and on to the entrance to Similk Beach in Township 34 North, Range 2 E.W.M., and across to the Southeast corner of Fidalgo Bay in Township 34 North, Range 2 E.W.M.; thence East to point of beginning.

Failure of the defendant to so establish the boundary lines of the reservations has resulted in a loss of property and valuable fishing rights to the petitioner.

The loss of property which should be included within the bounds of the reservation is of the reasonable value of One Million and no/100 Dollars ($1,000,000.00). The loss of exclusive fishing rights within said area is to the damage of your petitioner in the sum of Five Million and no/100 Dollars ($5,000,000.00).
II. The identity of the Swinomish Tribe or band.

On January 22, 1855 there was signed at Point Elliott a treaty between the United States, represented by Territorial Governor Isaac I. Stevens and a wide variety of Indian tribes, bands and villages, a treaty which extinguished Indian land title in the Puget Sound area. One of these tribes or bands is listed as the Swin-á-mish. Whether the Swinomish are a separate tribe or constituted in 1855 a band of the Skagit is a matter of considerable scholarly dubiety. Hodge in his Handbook of American Indians (Smithsonian Institution, Bureau of American Ethnology, Bulletin 30) says that the Swinomish are "said to be a subdivision of the Skagit, formerly on Whidbey id., Northwest Washington, now under the Tulalip School Superintendency. The Skagit and Swinomish together numbered 268 in 1909."

Swanton in The Indian Tribes of North America (Smithsonian Institution, Bureau of American Ethnology, Bulletin 145) says of the Swinomish that they "belonged to the coastal division of the Salishan linguistic family, and are sometimes called a subdivision of the Skagit." He gives their location as "On the northern part of Whidbey Island and about the mouth of Skagit River." Swanton further states that in 1937 a population of 285 Swinomish were reported. Here Swanton is almost surely referring to the population of the then obtaining Swinomish Tribal Community and not solely to the descendants of the Swinomish Band or Tribe.

In his 1936 Tribal Distribution in Washington, Leslie Spier cites the Swinomish as an identifiable band in the following terms:

Swinomish and others. Although Gibbs (1856) includes Swinamish and Skwonamish under the designation Skagit, in his earlier account he separates them. "Below the Skagit's again, occupying land on the main upon the northern end of Whidby's island, Perry's [Fidalgo] island, and the Canoe passage [Swinomish Slough ?], are three more tribes, the Squinamish [Swinomish], Swodamish, and Sinaahmish." (53) While Eells also classified the Swinomish as a Skagit band, it seems preferable to follow this statement of Gibbs. Solely for convenience, I am mapping all three under the name Swinomish.
In an unpublished manuscript, which is attached as an appendix to this report, Chief Martin J. Sampson of the Swinomish Tribe describes the aboriginal territory of the Swinomish:

The domain of the Swinomish once included the east half of Fidalgo Island (known in the Treaty of 1855 as Perry's Island), up Deception Pass, the north end of Whidbey Island including the north half of Dugualla Bay and west to the shore line including the present Naval Base, and all that area encompassed by a line beginning at Dugualla Bay running in an easterly direction to Bald Island, then northeasterly to a point about halfway to Mount Vernon, then north to Req Creek (north of Telegraph Slough), then through Padilla Bay between Bayview and Fidalgo Island to Hat Island, then south along the middle of Fidalgo Bay, to the south end of the Bay, then in a southerly direction to the northwest end of Deception Pass which includes the easterly half of Fidalgo Island as already stated.

The remains of the Swinomish who lived on the site of the present Naval Base, before the first epidemic of smallpox, were unearthed during the building of the base, placed in a large box and buried in the base of the airfield tower. Joseph P. Willup was one of the people who helped gather the remains of his ancestors.

Sometime back in the dim past a band of the Kik-i-allus emigrated from the Utsaladdy area to where the Model Village is situated just across the Swinomish Channel from LaConner. Here they settled, multiplied in numbers and prospered to such a degree that they extended their holdings to the large territory outlined above. In due time they became known as Swinomish.

A population of 1000 was quite evenly distributed over all the area then owned by the tribe. One of the larger villages was at the headwaters of Sullivan Slough. The houses were well-fortified with deep ditches surrounding them filled with sharp ironwood stakes. Owing to its strategic location it could be reached by large canoe through Sullivan Slough only at high tide, or by small canoe through the many small sloughs that led from Swinomish Channel.

The weight of the evidence would seem to indicate that in 1855 there were identifiable bands of Indians called Swinomish who occupied at least the northern portion of Whidbey Island and an area about the mouth of the Skagit near the present LaConner and included within this area was all of the land now known as the Swinomish Reservation.
According to Mr. Chester J. Higgman, Tribal Operations Officer (Enrollment) of the Bureau of Indian Affairs at Everett, Washington, in 1953 there were 160 individuals carried on the rolls of the Swinomish aboriginal tribe as distinguished from the Swinomish Tribal Community. According to Chief Martin Sampson, there are at present (June 1970) approximately 100 individuals extant who can lay claim to being descended from aboriginal Swinomish as distinguished from the rolls of the Swinomish Tribal Community.

III. The identity and composition of the Swinomish Tribal Community.

The Everett office of the Bureau of Indian Affairs estimates that there are 600 persons currently (1970) enrolled in the Swinomish Tribal Community. Therefore Indians of Swinomish aboriginal ancestry comprise only a small minority of the total group known as the Swinomish Tribal Community.

The Swinomish Indian Reservation was established by Executive Decree in 1873 and allotments of land were given initially to a number of Indians who were not Swinomish. Indeed the government, or more accurately the Bureau of Indian Affairs, did not seem concerned at that time nor since at distinguishing between an Indian of Swinomish ancestry and one drawn from neighboring tribes.

Currently the situation with regard to membership in the Swinomish Tribal Community and in the Swinomish Tribe may be summarized as follows:

1) One can belong to both.
2) As currently constituted, the Swinomish Tribal Community was organized in 1935 under the Indian Reorganization Act.
3) The Swinomish Tribal Community has a majority of members who are not Swinomish but who resided, or whose ancestors resided on or about the Swinomish Reservation in June of 1935.
4) The current leadership of the Swinomish Tribal Community recognizes the existence of a separate entity, the Swinomish aboriginal tribe which includes only members who can trace their ancestry to
the Swinomish Tribe in pre-treaty times. According to the leadership of the Swinomish Tribal Community, in the persons of Mr. Dewey Mitchell, chairman, and Mr. Tandy Wilbur, business manager, the Swinomish aboriginal tribe is at present without formal organization but Chief Martin J. Sampson is probably recognized as their major spokesman.

As some evidence of the degree of mixture of tribes currently found in the Swinomish Tribal Community, it might be noted that Mr. Dewey Mitchell, the chairman, is registered as an Upper Skagit while Mr. Tandy Wilbur, the business manager, is registered as a Lower Skagit. At the very least, descendants of the following aboriginal bands or tribes are to be found registered with the Swinomish Tribal Community: The Kikiallus, the Swinomish, the Suquamish, the Samish, the Lower Skagit and the Upper Skagit. It is quite probable that a more exhaustive search would unearth additional tribes and bands represented among the membership of the Swinomish Tribal Community. Many of these tribes and bands no longer have an effective tribal organization of their own and some, such as the Swinomish, do not have funds to retain counsel. The Swinomish Tribal Community is well organized and does retain counsel (the current attorney of record for the Swinomish Tribal Community is Harwood Bannister, Esq. of Mount Vernon -- it will be remembered that Warren J. Gilbert of Mount Vernon was attorney of record for both Docket No. 233, the suit by the Swinomish Tribe, and Docket No. 293, the suit by the Swinomish Tribal Community at the time these petitions were initially filed).

In summary, the Swinomish Tribal Community is an artifact of post-treaty days, being comprised of descendants of many tribes and bands. This community is now well organized both as a political and as a business entity.

IV. A discussion of the remaining cause of action (Paragraph XIX) in Docket No. 293.

The lands and fishing rights claimed in Paragraph XIX of Docket 293 were in aboriginal times Swinomish lands. Hence, if aboriginal land title
is to be considered the sole grounds upon which a plea for redress of grievances may be addressed to the Indian Land Claims Commission, the claims under Paragraph XIX should be brought by the Swinomish Tribe and not by the Swinomish Tribal Community.

However, the policy of agents of the United States Government clearly was to settle Indians from a number of tribes and bands on the Swinomish Reservation. In fact the Swinomish Reservation was so severely constricted in size as to deny fishing grounds held in aboriginal times by the Swinomish. Thus, in the latter part of the 19th century and during the first 70 years of the 20th century a hardship has been wreaked upon all the Indians of the Swinomish Tribal Community, not just those Indians of Swinomish descent.

One final comment should be added to this section. According to Mr. Chester J. Higgman, previously mentioned as Tribal Operations Officer (Enrollment) in the Everett office of the Bureau of Indian Affairs, on February 11, 1964 the Swinomish Tribal Community passed a Resolution No. 154 in which they ask that their claims under Paragraph XIX, Docket No. 293, be dropped. No judicial cognizance seems to have been taken of this in the papers forwarded to me by the chief counsel of the Indian Land Claims Commission, nor did Mr. Bannister, the attorney for the Swinomish Tribal Community; seem to be aware of it. I strongly suspect that:

1) The Resolution never got into the judicial process.
2) The leadership of the Swinomish Tribal Community and their attorney now have every intention of pressing their claims under Paragraph XIX of Docket No. 293.

The contents of Resolution No. 154 are as follows:

RESOLUTION NO. 154

A RESOLUTION of the Swinomish Indian Senate authorizing the Indian Claims Commission to dismiss claim of Swinomish Indian Tribal Community vs. United States of America, Docket No. 293.
WHEREAS the Swinomish Indian Tribal Community filed in Docket No. 293, before the Indian Claims Commission of the United States, a claim against the United States setting forth claims that were also set forth by the separate tribal organizations of the Kikiallus, Swinomish, Samish, and Skagit, also known as the Lower Skagit or Whidbey Island Skagit, tribes of Indians and these claims having heretofore been stricken by the Indian Claims Commission as the same were presented by the separate tribal organizations, and

WHEREAS there remained only the claim of the Swinomish Indian Tribal Community that the boundaries of the Swinomish Indian Reservation as established, encompassed a lesser area than that which was represented at the time of the Treaty, and

WHEREAS Petitioner is unable to present any evidence of representations made to the effect that the area of the Reservation should have been greater, and

IT APPEARING that it is not desirable to press the claim further; NOW, THEREFORE, it is hereby resolved by the Senate of the Swinomish Indian Reservation, pursuant to Article VI, Section 1(f) of the Constitution and By-Laws, that the Indian Claims Commission be requested to dismiss the claim of the Swinomish Indian Tribal Community vs. The United States, Docket No. 293.

PASSED this 11th day of February, 1964.

ATTEST:

/s/ Laura Wilbur  
LAURA WILBUR  
Secretary

/s/ Dewey Mitchell  
DEWEY MITCHELL, Chairman  
Swinomish Indian Senate

CERTIFICATION

The undersigned Chairman and Secretary of the Swinomish Indian Senate hereby certify that at a meeting of the Swinomish Indian Senate held at LaConner, Washington, on the 11th day of February, 1964, at which time a quorum was present, the foregoing RESOLUTION was adopted by a vote of seven (7) for and zero (0) against.
Investigation Report
Docket No. 293

Certification (Cont'd)  
/s/ Dewey Mitchell  
DEWEY MITCHELL, Chairman  

/s/ Laura Wilbur  
LAURA WILBUR, Secretary  
SWINOMISH INDIAN SENATE

V. Conclusions and recommendations.

The amalgam of Indians currently enrolled in the Swinomish Tribal Community are descended from at least half a dozen identifiable tribes and bands of Salishan-speaking Indians and only a small minority of them are descended from the Swinomish. The land and fishing rights for which they are claiming compensation in Paragraph XIX of Docket No. 293 were Swinomish land and Swinomish fishing rights in aboriginal times. Further, in Docket No. 233 (Swinomish Tribe of Indians, Petitioner vs. United States of America, Defendant), Paragraphs VIII and X, the Swinomish aboriginal tribe is requesting compensation for the same lands and these same fishing rights.

However, there is no doubt in my mind that it was government policy in the 1870's and thereafter to move upon the Swinomish Reservation Indians drawn from other tribes and bands. Furthermore, there is little doubt in my mind that the Reservation boundaries should have been drawn to include the islands at the mouth of the Skagit River and the adjacent valuable fishing grounds. Thus the members of the Swinomish Tribal Community would seem to me to have a legitimate grievance, though not one emanating from the Treaty of Point Elliott and not one based upon their aboriginal holdings, but rather based upon the manner in which they were treated by the Executive Order of 1873 setting up the Reservation and their subsequent poverty resulting from the White man taking over what had been Swinomish fishing grounds.
My conclusions and recommendations have been requested as a part of this report (they are presented with some apology since I lack legal training and judicial background). There seem to me to be three approaches readily available to the Commission:

1) Take judicial cognizance of Resolution 154 in which the Swinomish Indian Senate requested that Docket 293, and more particularly that section contained in Paragraph XIX, be dismissed (this document was signed by Mr. Dewey Mitchell, who is still serving as chairman of the Swinomish Tribal Community).

2) Hold that the claims for loss of land and loss of fishing rights encompassed in Paragraph XIX of Docket No. 293 are duplicatory of the claims set forward by the Swinomish Tribe in Paragraphs VIII and X of Docket 233 and that Docket No. 293 is therefore dismissed.

3) Hold that while the Swinomish aboriginal tribe should be compensated for losses incident to the Treaty of Point Elliott in 1855, that the Indians who suffered losses in the virtual century that lies between the establishment of the Reservation and the present are those Indians now known as the Swinomish Tribal Community and that, therefore, they are entitled to be heard under Paragraph XIX of Docket No. 293.

Of these alternatives, I prefer the latter. It is my memory that in the English Common Law a distinction is sometimes made between justice and right (as in a Petition of Right to the Crown). By accepting the Swinomish Indian Tribal Community's Resolution No. 154 or by simply dismissing Docket No. 293 as duplicatory, the Commission could with ease avoid a most complex and confusing trial. If the Indian Swinomish Tribal Community, on the other hand, is to be heard on possible compensation for loss of fishing rights and land incident to the Reservation being set up in 1873, then there will be an inevitable conflict between counsel for the Swinomish as an aboriginal tribe and counsel for the Swinomish as a current tribal community.
Naturally, I am not recommending that compensation be paid twice. It seems to me that the Swinomish aboriginal tribe is entitled to be heard on losses suffered by virtue of the Treaty and the Swinomish Tribal Community is entitled to be heard on losses subsequently sustained.
BIBLIOGRAPHY


Sampson, Chief Martin J. *Indians of Skagit County: An Outline of Native History From an Indian's Point of View* (unpublished manuscript), n.d.


Harry E. Webb, Jr., Esq.
Chief Counsel
Indian Claims Commission
Riddell Building
1730 K Street, N.W.
Washington, D. C. 20006

Dear Mr. Webb:

Herewith my revised report on Docket No. 293 -- Swinomish Tribal Community v. United States. This report of 6 March 1971 replaces my initial report of 16 June 1970. Would you please be so good as to return to me all of the reports dated 16 June 1970.

I trust you will find that this report incorporates all the changes suggested in my memorandum to you of 16 November 1970, namely:

1) That the identity of the Swinomish Tribe or Band has been expanded to include additional citations upon tribal identity and territoriality of the various tribes or bands whose descendants are currently listed on the rolls of the Swinomish Tribal Community.

2) The results of investigations in the National Archives and elsewhere relative to the Executive Order of 1873 which established the Swinomish Reservation.

3) The excision from my previous report of all material recommending certain courses of action by the Indian Claims Commission and otherwise expanded version of my report, Section V, entitled Summary.

In brief, you will find that I am unable to locate ethnographic or historical evidence which should support Paragraph XIX, Docket No. 293. I remain strongly of the opinion that such material at one time existed.

Herewith please find a reiteration of my previous fees and charges, plus expenses for the days that I spent working upon this investigation in Washington, D.C. in the month of February, 1971.

Sincerely,

Herbert C. Taylor, Jr.

HCT:rh
Attachments

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This report shall be divided into five (5) sections:

I. Statement of the problem.

II. The identity of the Swinomish Tribe or Band.

III. The identity and composition of the Swinomish Tribal Community, with notes upon tribes whose descendants comprise portions of that community.

IV. A discussion of the remaining cause of action (Paragraph XIX) in Docket No. 293.

V. Summary.

I. Statement of the problem.

On August 8, 1951 the Swinomish Tribe of Indians, through their then attorney of record, Warren J. Gilbert, filed a petition (Docket No. 233) in which they requested compensation for lands and fishing rights taken from them as a result of the treaty of January 22, 1855 (see Kappler, Indian Affairs: Laws and Treaties, Vol. II (Treaties)).

Two days later, on August 10, 1951, the Swinomish Tribal Community filed a petition with the Indian Claims Commission through their then attorney of record, Warren J. Gilbert, asking for compensation for loss of land, fishing and hunting rights held prior to the treaty of January 22, 1855 by not only the Swinomish but also the Kikiallus, the Samish and the Lower Skagit.

Two petitions filed at virtually the same time with the petitioners in each case being styled Swinomish seems to have created no little confusion. Eventually the Department of Justice moved to dismiss Docket No. 293, partly on grounds of lack of prosecution and partly on the grounds that the claims presented by the Swinomish Tribal Community were already covered in petitions set before the Indian Claims Commission by the
various tribes from whence were descended the members of the Swinomish Tribal Community. On April 25, 1955 the defense filed a motion, stipulated to by counsel for the Swinomish Tribal Community, to strike and dismiss paragraphs IV through XVIII of Docket No. 293. This left as the sole cause of action in Docket No. 293 Paragraph XIX which alleges that because the Reservation, established by Executive Order in 1873, was so much smaller than the petitioner had been led to believe it would be, that they had lost property and valuable fishing rights.

Herewith the text of Paragraph XIX of Docket No. 293:

At the time of the establishment of the Swinomish Indian Reservation it was the understanding of your petitioner and your petitioner was lead to believe by representations made on behalf of the defendant that the area encompassed in the said Swinomish Indian Reservation would be as follows:

Commencing at the mouth of Telegraph Slough in Section 6, Township 34 North, Range 3 E.W.M.; thence following Telegraph Slough in a Southwesterly direction to its intersection with Swinomish Slough; thence following the East side of Swinomish Slough with the Northwest corner of Section 1, Township 33 North, Range 2 E.W.M.; thence following the high tide line in a Southeasterly direction to the mouth of Sullivan Slough in said Section 1, Township 33 North, Range 2 E.W.M.; thence in a Southerly direction around Hiki or Iki Island; thence in a Northwesterly direction around Goat Island and continuing in a Westerly direction to the entrance of Dugualla Bay in Township 33 North, Range 2 E.W.M.; thence in a Northerly direction from the entrance of Dugualla Bay past Hope Island, Skagit Island and on to the entrance to Similk Beach in Township 34 North, Range 2 E.W.M., and across to the Southeast corner of Fidalgo Bay in Township 34 North, Range 2 E.W.M.; thence East to point of beginning.

Failure of the defendant to so establish the boundary lines of the reservations has resulted in a loss of property and valuable fishing rights to the petitioner.

The loss of property which should be included within the bounds of the reservation is of the reasonable value of One Million and no/100 Dollars ($1,000,000.00). The loss of exclusive fishing rights within said area is to the damage of your petitioner in the sum of Five Million and no/100 Dollars ($5,000,000.00).
II. The identity of the Swinomish Tribe or Band.

On January 22, 1855 there was signed at Point Elliott a treaty between the United States, represented by Territorial Governor Isaac I. Stevens and a wide variety of Indian tribes, bands and villages, a treaty which extinguished Indian land title in the Puget Sound area. One of these tribes or bands is listed as the Swin-a-mish. Whether the Swinomish are a separate tribe or constituted in 1855 a band of the Skagit is a matter of considerable scholarly dubiety. Hodge in his *Handbook of American Indians* (Smithsonian Institution, Bureau of American Ethnology, Bulletin 30) says that the Swinomish are "said to be a subdivision of the Skagit, formerly on Whidbey id., Northwest Washington, now under the Tulalip School Superintendency. The Skagit and Swinomish together numbered 268 in 1909."

Swanton in *The Indian Tribes of North America* (Smithsonian Institution, Bureau of American Ethnology, Bulletin 145) says of the Swinomish that they "belonged to the coastal division of the Salishan linguistic family, and are sometimes called a subdivision of the Skagit." He gives their location as "On the northern part of Whidbey Island and about the mouth of Skagit River." Swanton further states that in 1937 a population of 285 Swinomish were reported. Here Swanton is almost surely referring to the population of the then obtaining Swinomish Tribal Community and not solely to the descendants of the Swinomish Band or Tribe.

In his 1936 *Tribal Distribution in Washington*, Leslie Spier cites the Swinomish as an identifiable band in the following terms:

Swinomish and others. Although Gibbs (1856) includes Swinamish and Skwonamish under the designation Skagit, in his earlier account he separates them. "Below the Skagits again, occupying land on the main upon the northern end of Whidby's island, Perry's [Fidalgo] island, and the Canoe passage [Swinomish Slough ?], are three more tribes, the Squinamish [Swinomish], Swodamish, and Sinaahmish." (53) While Eells also classified the Swinomish as a Skagit band, it seems preferable to follow this statement of Gibbs. Solely for convenience, I am mapping all three under the name Swinomish.
In an unpublished manuscript, which is attached as an appendix to this report, Chief Martin J. Sampson of the Swinomish Tribe describes the aboriginal territory of the Swinomish:

The domain of the Swinomish once included the east half of Fidalgo Island (known in the Treaty of 1855 as Perry's Island), up Deception Pass, the north end of Whidbey Island including the north half of Dugualla Bay and west to the shore line including the present Naval Base, and all that area encompassed by a line beginning at Dugualla Bay running in an easterly direction to Bald Island, then northeasterly to a point about halfway to Mount Vernon, then north to Red Creek (north of Telegraph Slough), then through Padilla Bay between Bayview and Fidalgo Island to Hat Island, then south along the middle of Fidalgo Bay to the south end of the Bay, then in a southerly direction to the northwest end of Deception Pass which includes the easterly half of Fidalgo Island as already stated.

The remains of the Swinomish who lived on the site of the present Naval Base, before the first epidemic of smallpox, were unearthed during the building of the base, placed in a large box and buried in the base of the airfield tower. Joseph P. Willup was one of the people who helped gather the remains of his ancestors.

Sometime back in the dim past a band of the Kik-i-allus emigrated from the Utsaladdy area to where the Model Village is situated just across the Swinomish Channel from LaConner. Here they settled, multiplied in numbers and prospered to such a degree that they extended their holdings to the large territory outlined above. In due time they became known as Swinomish.

A population of 1000 was quite evenly distributed over all the area then owned by the tribe. One of the larger villages was at the headwaters of Sullivan Slough. The houses were well-fortified with deep ditches surrounding them filled with sharp ironwood stakes. Owing to its strategic location it could be reached by large canoe through Sullivan Slough only at high tide, or by small canoe through the many small sloughs that led from Swinomish Channel.

The weight of the evidence would seem to indicate that in 1855 there was an identifiable band of Indians called Swinomish who occupied at least the northern portion of Whidbey Island and an area about the mouth of the Skagit near the present LaConner and included within this area was all of the land now known as the Swinomish Reservation.
According to Mr. Chester J. Higgman, Tribal Operations Officer (Enrollment) of the Bureau of Indian Affairs at Everett, Washington, in 1953 there were 160 individuals carried on the rolls of the Swinomish aboriginal tribe as distinguished from the Swinomish Tribal Community. According to Chief Martin Sampson, there are at present (June 1970) approximately 100 individuals extant who can lay claim to being descended from aboriginal Swinomish as distinguished from the rolls of the Swinomish Tribal Community.

III. The identity and composition of the Swinomish Tribal Community, with notes upon tribes whose descendants comprise portions of that community.

The Everett office of the Bureau of Indian Affairs estimates that there are 600 persons currently (1970) enrolled in the Swinomish Tribal Community. Therefore Indians of Swinomish aboriginal ancestry comprise only a small minority of the total group known as the Swinomish Tribal Community.

The Swinomish Indian Reservation was established by Executive Decree in 1873 and allotments of land were given initially to a number of Indians who were not Swinomish. Indeed the government, or more accurately the Bureau of Indian Affairs, did not seem concerned at that time nor since at distinguishing between an Indian of Swinomish ancestry and one drawn from neighboring tribes.

Currently the situation with regard to membership in the Swinomish Tribal Community and in the Swinomish Tribe may be summarized as follows:

1) One can belong to both.

2) As currently constituted, the Swinomish Tribal Community was organized in 1935 under the Indian Reorganization Act.

3) The Swinomish Tribal Community has a majority of members who are not Swinomish but who resided, or whose ancestors resided on or about the Swinomish Reservation in June of 1935.
4) The current leadership of the Swinomish Tribal Community recognizes the existence of a separate entity, the Swinomish aboriginal tribe which includes only members who can trace their ancestry to the Swinomish Tribe in pre-treaty times. According to the leadership of the Swinomish Tribal Community, in the persons of Mr. Dewey Mitchell, chairman, and Mr. Tandy Wilbur, business manager, the Swinomish aboriginal tribe is at present without formal organization but Chief Martin J. Sampson is probably recognized as their major spokesman.

As some evidence of the degree of mixture of tribes currently found in the Swinomish Tribal Community, it might be noted that Mr. Dewey Mitchell, the chairman, is registered as an Upper Skagit while Mr. Tandy Wilbur, the business manager, is registered as a Lower Skagit. At the very least, descendants of the following aboriginal bands or tribes are to be found registered with the Swinomish Tribal Community: The Kikiallus, the Swinomish, the Suquamish, the Samish, the Lower Skagit and the Upper Skagit. It is quite probable that a more exhaustive search would unearth additional tribes and bands represented among the membership of the Swinomish Tribal Community. Many of these tribes and bands no longer have an effective tribal organization of their own and some, such as the Swinomish, do not have funds to retain counsel. The Swinomish Tribal Community is well organized and does retain counsel (the current attorney of record for the Swinomish Tribal Community is Harwood Bannister, Esq. of Mount Vernon -- it will be remembered that Warren J. Gilbert of Mount Vernon was attorney of record for both Docket No. 233, the suit by the Swinomish Tribe, and Docket No. 293, the suit by the Swinomish Tribal Community at the time these petitions were initially filed).

Herewith a brief summary of the aboriginal identification and location of those tribes and bands whose descendants are now registered with the Swinomish Tribal Community, other than the Swinomish themselves:
1) The Kikiallus. Hodge (p. 687) identifies these people as the Kikiallu and states that they were a Skagit sub-tribe formerly living on the north end of Whidbey Island and at the mouth of the Skagit River, but that they are now located on the Swinomish Reservation. Spier (p. 37) identifies a band called the "Squa-na-mish" who lived in the vicinity of the "Kickuallis River" which he in turn identifies as one of the mouths of the Skagit River. Martin Sampson (p. 24) identifies the Kik-i-allus as a tribe which occupied the valley of the Skagit River from its mouth to Mount Vernon, except for the north fork of the Skagit, and also indicates that the Kikiallus were to be found on Whidbey Island. The present writer regards the Kikiallus as an aboriginal band of the Skagit who have by now come to be identified as Swinomish.

2) The Suquamish. According to Swanton (p. 445) the Suquamish were located on the west side of Puget Sound from Applegate Cove to Gig Harbor. However, Spier (p. 34) locates the Suquamish as on both sides of Puget Sound, including in their territory the present Bainbridge Island as well as the territory "between Apple Tree Cove (at Kingston) on the north and Gig Harbor on the south." There is some indication that the Suquamish were becoming amalgamated with the Duwamish at the time of the Treaty of Point Elliott.

3) The Samish are identified by Hodge (p. 421) as "a Salish division formerly on the river or bay of the same name in Washington, now on Lummi res." While it is true that the Samish had close contacts with the Lummi, and in fact it was a Lummi chief who signed for the Samish at the Treaty of Point Elliott, some Samish drifted south to become part of the Swinomish Reserve while some drifted north to become part of the Lummi Reservation. Spier (p. 37) points out that Gibbs in 1856 showed the Samish as a band of the Lummi or, more properly, the Nuh-lum-mi. However, Spier notes that the Samish language was more closely affiliated with Skagit and Nisqually than with Lummi and he identifies the Samish as a separate tribe.
4) The Skagit. Hodge (p. 585) locates the Skagit on the Skagit River "particularly about its mouth" and on the middle portion of Whidbey Island, especially at Penn's Cove. In Hodge's view, the term Skagit neither signified a tribe nor a band but was a blanket term used to cover a large number of bands who spoke closely related dialects. Amongst these bands he includes the "Kikiallu" and the "Swinamish." Swanton (pp. 441-42) shows a large number of subdivisions and villages belonging to the Skagit but does not extend the Skagit to the mouth of the Skagit River. He evidently is classifying those Indians now regarded as "Upper Skagit" with those now known as "Lower Skagit" in one grouping but appears to be making a distinction between the Swinomish and the Skagit. Spier (p. 36) says that the term Skagit is properly used for the people at the mouth of the Skagit River but that it has been used for a group of bands occupying the islands opposite the mouth of the Skagit and occupying the wide drainage area of the Skagit River and its tributaries. Spier shows the Kikiallus as a band of the Skagit but after some discussion decides to regard the Swinomish as a separate tribe.

In summary, the Indians currently enrolled as the Swinomish Tribal Community and living on the so-called Swinomish Reserve are in fact descended from many tribes and bands. The Swinomish Tribal Community is an artifact of post-Treaty days. If the Swinomish Tribal Community had the right to bring suit for aboriginal possession, their claims would extend to both coasts of Puget Sound as well as a considerable number of islands and would include the drainages of the Stillaguamish, the Skagit and the Samish, among other rivers. In fact, suit for recompense for unconscionable amounts paid as a result of the Treaty of Point Elliott have been brought by descendants of the various aboriginal tribes and thus paragraphs IV through XVIII of Docket No. 293 (the suit brought by the Swinomish Tribal Community) were redundant and, as previously noted, these paragraphs have been struck and dismissed. This leaves only the claim of the Swinomish Tribal Community that they were promised a larger reservation
and more extensive fishing rights than they in fact got under the Executive Decree of 1873 establishing the Swinomish Reservation.

IV. A discussion of the remaining cause of action (Paragraph XIX) in Docket No. 293.

The lands and fishing rights claimed in Paragraph XIX of Docket 293 were in aboriginal times Swinomish lands. Hence, if aboriginal land title is to be considered the sole grounds upon which a plea for redress of grievances may be addressed to the Indian Claims Commission, the claims under Paragraph XIX should be brought by the Swinomish Tribe and not by the Swinomish Tribal Community.

However, the policy of agents of the United States Government clearly was to settle Indians from a number of tribes and bands on the Swinomish Reservation. In fact the Swinomish Reservation was so severely constricted in size as to deny fishing grounds held in aboriginal times by the Swinomish. Thus, in the latter part of the 19th century and during the first 70 years of the 20th century a hardship has been wreaked upon all the Indians of the Swinomish Tribal Community, not just those Indians of Swinomish descent.

One final comment should be added to this section. According to Mr. Chester J. Higgman, previously mentioned as Tribal Operations Officer (Enrollment) in the Everett office of the Bureau of Indian Affairs, on February 11, 1964 the Swinomish Tribal Community passed a Resolution No. 154 in which they ask that their claims under Paragraph XIX, Docket No. 293, be dropped. No judicial cognizance seems to have been taken of this in the papers forwarded to me by the chief counsel of the Indian Claims Commission, nor did Mr. Bannister, the attorney for the Swinomish Tribal Community, seem to be aware of it. I strongly suspect that:

1) The Resolution never got into the judicial process.

2) The leadership of the Swinomish Tribal Community and their attorney now have every intention of pressing their claims under Paragraph XIX of Docket No. 293.
The contents of Resolution No. 154 are as follows:

RESOLUTION NO. 154

A RESOLUTION of the Swinomish Indian Senate authorizing the Indian Claims Commission to dismiss claim of Swinomish Indian Tribal Community vs. United States of America, Docket No. 293.

WHEREAS the Swinomish Indian Tribal Community filed in Docket No. 293, before the Indian Claims Commission of the United States, a claim against the United States setting forth claims that were also set forth by the separate tribal organizations of the Kikiallus, Swinomish, Samish, and Skagit, also known as the Lower Skagit or Whidbey Island Skagit, tribes of Indians and these claims having heretofore been stricken by the Indian Claims Commission as the same were presented by the separate tribal organizations, and

WHEREAS there remained only the claim of the Swinomish Indian Tribal Community that the boundaries of the Swinomish Indian Reservation as established, encompassed a lesser area than that which was represented at the time of the Treaty, and

WHEREAS Petitioner is unable to present any evidence of representations made to the effect that the area of the Reservation should have been greater, and

IT APPEARING that it is not desirable to press the claim further;

NOW, THEREFORE, it is hereby resolved by the Senate of the Swinomish Indian Reservation, pursuant to Article VI, Section 1(f) of the Constitution and By-Laws, that the Indian Claims Commission be requested to dismiss the claim of the Swinomish Indian Tribal Community vs. The United States, Docket No. 293.

PASSED this 11th day of February, 1964.

ATTEST:

/s/ Laura Wilbur
LAURA WILBUR
Secretary

/s/ Dewey Mitchell
DEWEY MITCHELL, Chairman
Swinomish Indian Senate
CERTIFICATION

The undersigned Chairman and Secretary of the Swinomish Indian Senate hereby certify that at a meeting of the Swinomish Indian Senate held at LaConner, Washington, on the 11th day of February, 1964, at which time a quorum was present, the foregoing RESOLUTION was adopted by a vote of seven (7) for and zero (0) against.

/s/ Dewey Mitchell
DEWEY MITCHELL, Chairman

/s/ Laura Wilbur
LAURA WILBUR, Secretary
SWINOMISH INDIAN SENATE

V. Summary.

The amalgam of Indians currently enrolled in the Swinomish Tribal Community are descended from at least half a dozen identifiable tribes and bands of Salishan-speaking Indians and only a small minority of them are descended from the Swinomish. The land and fishing rights for which they are claiming compensation in Paragraph XIX of Docket No. 293 were Swinomish land and Swinomish fishing rights in aboriginal times. Further, in Docket No. 233 (Swinomish Tribe of Indians, Petitioner vs. United States of America, Defendant), Paragraphs VIII and X, the Swinomish aboriginal tribe is requesting compensation for the same lands and these same fishing rights.

However, there is no doubt in my mind that it was government policy in the 1870's and thereafter to move upon the Swinomish Reservation Indians drawn from other tribes and bands. Furthermore, there is little doubt in my mind that the Reservation boundaries should have been drawn to include the islands at the mouth of the Skagit River and the adjacent valuable fishing grounds. Thus the members of the Swinomish Tribal Community would seem to me to have a legitimate grievance, though not one emanating from
Investigation Report
Docket No. 293

the Treaty of Point Elliott and not one based upon their aboriginal holdings, but rather based upon the manner in which they were treated by the Executive Order of 1873 setting up the Reservation and their subsequent poverty resulting from the White man taking over what had been Swinomish fishing grounds.

When I began this investigation, I was reasonably confident that it would be possible to establish, both through ethnographic evidence and historical evidence, that the Swinomish Tribal Community had in fact been promised more land (and attendant fishing rights) than they were subsequently awarded under the Executive Decree of September 9, 1873. This assumption sprang from experience in nine (9) previous Indian claims cases. I found it very difficult to believe that the Swinomish and the descendants of other tribes to be concentrated on the Reservation would have willingly agreed to so small an allotment of land and to the consequent restriction of their fishing rights. Further, it had been my theretofore obtaining experience that the Indians were promised, at least verbally, more than they received and that it was possible to establish this through ethnographic informants and from documentary records.

In this case I have been unable to establish, either through ethnographic informants or through a search of the historical records, that the Swinomish Tribal Community was promised more than it received in the Reservation set up by President Grant's decree in 1873. Not only this, but the Swinomish Tribal Community's governing body (Swinomish Indian Senate) had, as previously noted, in February of 1964 passed a resolution in which they stated that they were unable to present any evidence of representations made to the effect that the area of the Reservation should have been greater and, consequently, they requested that Docket No. 293 be dismissed.

After checking with several of the older and more knowledgeable members of the Swinomish Tribal Community, I decided that it was not going to be possible to establish through informants that Paragraph XIX of Docket No. 293 was viable. Thereupon, I turned to a more extensive search
for documentary evidence of the viability of Paragraph XIX of Docket No. 293. There are no documentary records maintained by the Everett office of the Bureau of Indian Affairs which go back as far as 1873 and I was unable to locate any information bearing effectively on this subject in the University of Washington library. A search of the National Archives revealed the following:

1) A letter dated September 5, 1873 from B. R. Cowen, Acting Secretary of the Department of the Interior, addressed to President Grant, conveying map of the proposed Reservation together with a request that the President issue an Executive Order defining the northern boundary of the Swinomish Reservation.

2) The map referred to in the preceding paragraph.

3) A copy of the President's Executive Order of September 9, 1873 establishing the northern boundary of the Swinomish Reservation.

It should be noted that the Executive Order of 1873 only established the northern boundary. Presumptively, it was felt unnecessary to define eastern, western and southern boundaries because the Swinomish Reservation occupies a peninsula bounded by Similk Bay to the west, Swinomish Slough to the east, and Puget Sound to the south. However, the original of the map is in color and has red lines drawn through the area not occupied by the Swinomish Reservation and shown on the map, and has the Swinomish Reservation outlined in pale yellow. The area outlined as the Swinomish Reservation shows the same boundary as that set forth in the Executive Order and is also the same area as that occupied by the Swinomish Reservation today.

Some effort was made to locate correspondence from Washington Territory and from the Bureau of Indian Affairs precedent to the establishment of these boundaries. I was unable to locate it.

Thus I am unable to produce evidence which would support the position set forth in Paragraph XIX of Docket No. 293.
BIBLIOGRAPHY


Sampson, Chief Martin J. Indians of Skagit County: An Outline of Native History From an Indian's Point of View (unpublished manuscript), n.d.


APPENDIX

1) Resolution No. 154 of the Swinomish Indian Senate.

2) Copies of a file of correspondence from the National Archives containing Secretary Cowen's letter of September 5, 1873 to President Grant and President Grant's Executive Order of September 9, 1873.

3) A copy of the map which accompanied this correspondence (note that the map is a black-and-white whereas the original was lightly colored).

4) A copy of a manuscript by Chief Martin Sampson of the Swinomish, entitled INDIANS OF SKAGIT COUNTY.
RESOLUTION NO. 151

A resolution of the Swinomish Indian Senate authorizing the Indian Claims Commission to dismiss claim of Swinomish Indian Tribal Community vs. United States of America, Docket No. 293.

WHEREAS, the Swinomish Indian Tribal Community filed in Docket No. 293, before the Indian Claims Commission of the United States, a claim against the United States setting forth claims that were also set forth by the separate tribal organizations of the Kikiallus, Swinomish, Samish, and Skagit, also known as the Lower Skagit or Whidbey Island Skagit, tribes of Indians, and these claims having heretofore been stricken by the Indian Claims Commission as the same were presented by the separate tribal organizations, and

WHEREAS, there remained only the claim of the Swinomish Indian Tribal Community that the boundaries of the Swinomish Indian Reservation as established encompassed a lesser area than that which was represented at the time of the treaty, and

WHEREAS, petitioner is unable to present any evidence of representations made to the effect that the area of the reservation should have been greater, and it appearing that it is not desirable to press the claim further; now, therefore, it is hereby

RESOLVED by the Senate of the Swinomish Indian Reservation, pursuant to Article VI, Section 1 (f) of the Constitution and By-Laws, that the Indian Claims Commission be requested to dismiss the claim of the Swinomish Indian Tribal Community vs. the United States, Docket No. 293.

PASSED: this 11th day of February, 1964.

ATTEST:
LAURA WILBUR
Secretary

CERTIFICATION

The undersigned Chairman and Secretary of the Swinomish Indian Senate hereby certify that at a meeting of the Swinomish Indian Senate held at LaConner, Washington, on the 11th day of February, 1964, at which a quorum was present, the foregoing resolution was adopted by a vote of seven (7) for and zero (0) against.
The President

I have the honor to submit herewith a copy of a communication addressed to this Department, and also a map thereof, containing a sketch of the reservation, with the proposed boundary lines shown thereon.

In view of the facts set forth in this communication of the Commissioners above referred to, I must respectfully request that an Executive Order be issued defining the boundary as described.

I have the honor to be,

D. R. Conner
Acting Secretary
Executive Mansion

September 9th

Agreeable to the within request of the Acting Secretary of the Interior, I have directed that the Northern boundary of the Similkameen Indian reservation in the Territory of Washington be as follows, to wit: Beginning at low-water mark on north side of Similkameen Bay at a point where the same intersects the north and south line bounding the East side of the survey, thence north, line to a point where the same intersects the section line, thence north and ten (10) in township 34 North, Range 2 East, thence north, line to a point where the same intersects the section line of said section line and ten in said township and range, thence on said section line, to the South East corner of said 3 - thrones North on each line of said section line, to a point where the same intersects low-water mark on the shore of Padilla Bay.

U.S. Grant