THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA *et al*, Plaintiffs, v. STATE OF WASHINGTON *et al*, Defendants.	Civ. No. C70-9213 Subproceeding No. 17-01 SQUAXIN ISLAND TRIBE'S MOTION TO DISMISS SKOKOMISH INDIAN TRIBE'S REQUEST FOR DETERMINATION OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT ORAL ARGUMENT REQUESTED Note date: June 30, 2017

I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 7, 12(b)(1), 12(b)(6)[1] and Local Rule 7(b), the Squaxin Island Tribe ("Squaxin") respectfully moves for an order dismissing the Skokomish Indian Tribe's ("Skokomish") Request for Determination ("RFD"), Dkt. No. 3. Under Rule 12(b)(1), the Court lacks subject matter jurisdiction, and under Rule 12(b)(6) Skokomish has failed to state a claim upon which relief can be granted. Squaxin reserves all non-threshold questions regarding the merits for a separate stage of the proceedings if this RFD is not dismissed.

[1] Under amended ¶ 25(b)(5) of Judge Boldt's Injunction, motion practice in subproceedings initiated under ¶ 25 is conducted in accordance with the Federal Rules of Civil Procedure and the Court's general and civil rules. 18 F.Supp.3d 1172, 1214-1215 (W.D. Wash. 1993).

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II. SUMMARY OF ARGUMENT

Skokomish seeks to have this Court alter its 1974 initial ruling and 1984 ruling in Subproceeding 81-1 to declare that Skokomish holds usual and accustomed fishing area ("U&A") and primary fishing rights in a vast area outside of the Hood Canal basin. As described below, Skokomish's case should be dismissed because: (1) the Court lacks jurisdiction; and (2) Skokomish has failed to state a claim upon which relief could be granted or, alternatively, Squaxin is entitled to summary judgment.[2]

As to (1), Skokomish's RFD should be dismissed because Skokomish has completely subverted the clear and specific pre-filing requirements of ¶ 25 of Judge Boldt's Injunction.[3] 18 F.Supp.3d at 1214-1215 (W.D. Wash. 1993) ("¶ 25"). Skokomish's RFD significantly differs from the geographic area, basis for relief, and scope of relief that it presented at its "meet and confer" ("M&C"). In the RFD, Skokomish for the first time asks the Court to find that its 1984 decision in Subproceeding 81-1 adjudicated Skokomish U&A and primary rights well outside of the Hood Canal basin.[4] Additionally, Skokomish's RFD improperly fails to identify for the Court and the parties the specific subsection(s) of ¶ 25(a) under which it intends the RFD to proceed.

As to (2), Skokomish's RFD should be dismissed because it fails to state a claim on which relief can be granted or, alternatively, Squaxin is entitled to summary judgment. Skokomish is attempting to retroactively expand the scope of this Court's previous rulings to outside of the Hood Canal basin, even though the Court recognized Skokomish's U&A and primary fishing

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[2] Under Rule 12(d), a Rule 12(b)(6) motion is converted to a Rule 56 summary judgment motion if matters outside the pleadings are presented and not excluded by the Court.

[3] As Judge Boldt stated, "Those tribes or counsel expanding fishing places in a manner inconsistent with Final Decision #1 are admonished to follow its provisions or risk sanctions." 459 F.Supp. at 1068, 1069 (W.D. Wash. 1976).

[4] Based on language in Skokomish's RFD and theories presented in several federal hunting and gathering rights cases that it filed, Skokomish may also be asking the Court to confirm a primary hunting and gathering right in Twana territory. *See* Section V.B.2 below. Squaxin urges the Court to reject any such claims.

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rights as only within the Hood Canal basin. Because the entire basis of Skokomish's RFD turns on an inaccurate reading of these rulings, it fails to state a cognizable claim for relief.

III. RELIEF SOUGHT

Squaxin seeks dismissal of Skokomish's RFD, Dkt. No. 3, with prejudice.

IV. RELEVANT FACTS

A. Skokomish Has Adjudicated U&A and a Primary Fishing Right in the Hood Canal Basin.

In 1974, Judge Boldt specifically determined that Skokomish's adjudicated U&A "included all the waterways draining into Hood Canal and the Canal itself." *United States v. Washington*, 384 F.Supp. 312, 377 (FF #137) (W.D. Wash. 1974); Squaxin Ex. 1: Locator map. In 1981 in Subproceeding 81-1, Skokomish returned to the Court to request a determination that its "treaty fishing rights in Hood Canal and all the rivers and streams draining into Hood Canal are primary to the rights of any other tribe". Squaxin Ex. 6: Skokomish RFD, Dkt. No. 7636 at p. 1 (June 17, 1981); *United States v. Washington*, 573 F.3d 701, 705 (9th Cir. 2009) ("In 1981, the Skokomish Indian Tribe requested a determination that it had the primary right to fish in the Hood Canal."). A primary right is the power to regulate or prohibit fishing by members of other treaty tribes. *United States v. Skokomish Indian Tribe*, 764 F.2d 670, 671 (9th Cir. 1985). Skokomish was successful, as the Court held that it had a primary fishing right within the Hood Canal basin. 626 F.Supp. 1486, 1491 (W.D. Wash. 1984).

Notably, in Subproceeding 81-1 Skokomish did not invoke ¶ 25(f), presently ¶ 25(a)(6), to seek additional U&A outside the Hood Canal basin. Instead, Skokomish in Subproceeding 81-1 sought only a determination of a primary right within the previously adjudicated Hood Canal basin. Squaxin Ex. 6: Skokomish RFD, Dkt. No. 7636, at p. 1. *See also* Squaxin Ex. 9:

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Amended Order of Reference to Special Master, Dkt. No. 8465 (July 12, 1982) (amending previous order of reference to cover only determination of a primary right, and not U&A).[5]

During Subproceeding 81-1, Skokomish repeatedly informed the Court and other parties that it needed a primary fishing right in the Hood Canal basin because it lacked any adjudicated U&A outside of it. For example, Skokomish's Memorandum of Points and Authorities that accompanied its RFD stated:

> Even if hardship were a factor for consideration here, any hardship to the Klallam or Suquamish by virtue of their exclusion from the Hood Canal fishery would be minimal since these tribes, unlike the Skokomish, have access to fisheries outside the Canal.
>
> While other tribes that have usual and accustomed fishing areas in Hood Canal have access to outside fisheries, such as the Straits of Juan de Fuca or Puget Sound, to offset increased competition or poor salmon runs, the Skokomish are confined exclusively to Hood Canal. In a good or bad year, the Skokomish must live within the economic confines of the Canal's salmon yield."

Squaxin Ex. 7: Skokomish Memo., Dkt. No. 7637, at pp. 10, 11 (June 17, 1981) (emphases added).

In 1983, Skokomish again informed the Court that it lacked U&A outside the Hood Canal basin when it settled its primary rights case with the Port Gamble Band of S'Klallam Indians, Lower Elwha Band of S'Klallam Indians and Jamestown Band of S'Klallam Indians. Order re Hood Canal Agreement. 626 F.Supp. at 1468. The Court when entering the Hood Canal Settlement Agreement accepted and relied upon Skokomish' statements regarding the limitations of its U&A, holding:

> Today the Skokomish Tribe continues to be entirely dependent on the Hood Canal fishery for its catch because it has no established usual and accustomed fishing places outside Hood Canal and the rivers and streams draining into it." (*Id.*, emphasis added.)

[5] With respect to correcting the order of reference in Subproceeding 81-1, Skokomish's counsel stated, "Your Honor, the difficulty raised with that reference is that the Skokomish has no pending petition for recognition of usual and accustomed places." Squaxin Ex. 8: Portion of Transcript at p. 20, l. 2-9 (May 18, 1982).

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Skokomish continued litigating against the Suquamish Indian Tribe in Subproceeding 81-1. In 1984, the Court held that Skokomish had primary fishing rights in the Hood Canal basin:

> The Skokomish Indian Tribe holds the primary right to take fish in Hood Canal and on all rivers and streams draining into Hood Canal south of the line displayed on Exhibit A . . . commencing on the west shore of Hood Canal at Termination Point and following the course of the Hood Canal Floating Bridge to the east shore of the Canal. (*Id.* at 1489, emphasis added. Order attached as Squaxin Ex. 10)

The Court in Subproceeding 81-1 also adopted the Special Master's Findings of Fact, which included: (1) repeated confirmations that the geographic scope of the subproceeding was the area previously determined to be Skokomish's U&A – i.e., the Hood Canal basin; and (2) repeated findings concerning Skokomish's (or Twana) occupation, use and control of the Hood Canal basin.[6]

In its decision, the Court also mentioned numerous evidentiary submissions that supported its finding that Skokomish had primary fishing rights in the Hood Canal basin. These included a quote from George Gibbs's 1854-1855 journal that described "Skokomish (or Twana) territory" as:

> extend[ing] from Wilkes' Portage northwest across to the arm of Hood Canal up to the old limits of the Tchimakum, thence westerly to the summit of the Coast Range, thence southerly to the head of the west branch of the Satsop, down that branch to the main fork, thence east to the summit of the Black Hills, thence north and east to the place of beginning. (*Id.* at 626 F.Supp at 1489 (FF #353).)

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[6] *See, e.g.*, FF #348 ("In this proceeding to determine whether the Skokomish Indian Tribe, as successor in interest to the aboriginal Twana Indians . . . holds the primary right to take fish in the waters of Hood Canal and in the rivers and streams draining into it. . . ."); FF #349 ("Hood Canal is a unique body of saltwater in the case area."); FF #350 ("At and before treaty times, the Twana Indians occupied nine winter villages situated in the Hood Canal drainage basin."); FF #351 ("All areas of Hood Canal, and the rivers and streams draining into it, were easily accessible by canoe to the treaty-time Twana people residing in the nine winter villages."); FF #352 ("At and before treaty times, the Twana engaged in a variety of fishing and hunting activities in and around Hood Canal and the streams flowing into it."); FF #354 ("The court agrees, and upon consideration of all the relevant evidence in this matter, finds that the treaty-time territory of the Twana Indians encompassed all of the waters of Hood Canal, the rivers and streams draining into it, and the Hood Canal drainage basin south of a line extending from Termination Point on the west shore of Hood Canal directly to the east shore, as depicted on Exhibit A hereto." *Id.* at 1487-1490 (emphases added). Exhibit A as referenced by the Court is a map that depicts only the northern portion of Hood Canal with the aforementioned line, which Skokomish attached to its instant RFD. Dkt. No. 3 at p. 46.

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Skokomish's instant claim to having previously adjudicated U&A and primary fishing rights outside of the Hood Canal basin rests on this quote. *See, e.g.,* RFD, Dkt. No. 3, at ¶¶ 3.5, 3.7, 3.9, 3.14, and § IV(A). The area described by Gibbs extends well outside of Hood Canal and its drainage, and fairly mimics Gibbs' description of *all* of the lands that the Point No Point Treaty tribes ceded:

> . . . thence southeastwardly along the westerly line of territory claimed by the Makah tribe of Indians to the summit of the Cascade Range; thence still southeastwardly and southerly along said summit to the head of the west branch of the Satsop River, down that branch to the main fork; thence eastwardly and following the line of lands heretofore ceded to the United States by the Nisqually and other tribes and bands of Indians, to the summit of the Black Hills, and northeastwardly to the portage known as Wilkes' Portage; . . . . (Treaty of Point No Point, Article 1, 12 Stat. 933 (1855))

Skokomish now interprets the Gibbs language in FF #353 as encompassing portions of Southern Puget Sound marine inlets and the freshwaters that flow into them that Judge Boldt in Final Decision #1 recognized as Squaxin U&A.[7] Skokomish also interprets the Gibbs language as encompassing other areas previously ceded by the Nisqually, Puyallup and Squaxin Island tribes in the Treaty of Medicine Creek.[8] *Id.*

After the Court quoted Gibbs' journal, it went on to hold that Skokomish had primary rights in the area that was previously adjudicated as Skokomish U&A (i.e., the Hood Canal basin) because the Skokomish controlled those waters and because those waters were "unique". 626

[7] Recently in shellfish Subproceeding 89-3-306, Skokomish cited the Gibbs language to assert U&A and primary rights in these marine waters. *See* Section IV.B.4, below. Judge Boldt held that this was Squaxin U&A: 384 F.Supp. at 378 (FF #141: "During treaty times the Squaxin Island Indians fished for coho, chum, chinook, and sockeye salmon at their usual and accustomed fishing places in the shallow bays, estuaries, inlets and open Sound of Southern Puget Sound and in the freshwater streams and creeks draining into those inlets."). *See also* FF #140 (Squaxin ancestors inhabited the southwestern Puget Sound inlets).

[8] Gibbs' description of Twana territory in FF #353 cannot be as expansive as Skokomish asserts because Gibbs' repeatedly illustrated much of the territory south and east of the Hood Canal Basin as the territory of the Medicine Creek Tribes. Squaxin Ex. 2: Ex. B190, Gibbs 1854 map (illustrating the "lands ceded [by Medicine Creek tribes] … and lands to be ceded [by Point No Point tribes and all others]…"); Squaxin Ex. 3: Ex. B243, Gibbs and Stevens 1855 map; and Squaxin Ex. 4: Ex. SK-SM-4, Gibbs 1856 map.

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F.Supp. at 1488 (FF #349). *See also id.* at 1488-1490 (emphases added): FF #353 (Court found that "Gibbs' description of Twana territory embraces Hood Canal and its drainage basin"); FF #354 (areas "within the Skokomish (or Twana) territory described by Gibbs were long used and occupied by the aboriginal Twana people."; FF #351 ("The main arm of Hood Canal was a 'central directional axis for all of Twana territory"). The Court held in FF #355 that the Twana people "most intensely felt" that they owned "Hood Canal" . . . its shoreline and the streams draining into it"; and that the "[Hood Canal] drainage basin as a whole was considered Twana country." *Id.* at 1490 (emphases added). Finally, the Court recognized that outside of Hood Canal, the Twana people interacted to varying degrees with, among others, "[t]he Squaxin Indians overland on the Sound to the south and southeast, and the Satsop Indians to the southwest." *Id.* at 1488 (FF #350) (emphasis added). Skokomish now admits that it seeks rights in territory "well beyond just Hood Canal", that "being just one small part of the whole." RFD, Dkt. No. 3, at ¶ 3.8.

Accordingly, the Court in its decision in Subproceeding 81-1 did not hold that Skokomish had U&A and a primary right in fresh or marine waters anywhere outside of the Hood Canal basin. *See generally* 626 F.Supp. at 1489 (FF ##353, #354).

B. The Procedural History of Skokomish's RFD.

1. Skokomish's 2016 M&C Stated its Intent to Seek Additional U&A and Primary Rights to the "Entire Satsop Fishery" Under ¶ 25(a)(6).

On September 30, 2015, Skokomish distributed a Request for a Meet and Confer ("Request"). Squaxin Ex. 11: Skokomish M&C Request. The Request stated that Skokomish

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would invoke ¶¶ 25(a)(6) and (a)(7)[9] to seek previously unadjudicated U&A in "the entire Satsop Fishery" (all of which lies outside of the Hood Canal basin), and a declaration that Skokomish had a primary right to take fish there. *Id.*; Squaxin Ex. 1: Locator map. As noted earlier, parties invoke ¶ 25(a)(6) when asking the Court to determine the location of a tribe's U&A not specifically determined by Final Decision #I. Skokomish's Request defined the "Satsop Fishery" as including specifically listed freshwater bodies. *Id.* Squaxin Ex. 11: Skokomish M&C Request. In its Request and at the M&C, Skokomish made no mention of Subproceeding 81-1, or the Court's 1984 decision, or George Gibbs's journal language in FF #353, or any marine waters. At the M&C and earlier, Squaxin informed Skokomish that part of the proposed Satsop fishery was located within the area that the Nisqually, Squaxin and Puyallup tribes had ceded in the Medicine Creek Treaty (signed before Skokomish's Treaty of Point No Point). Declaration of Kevin Lyon at ¶ 2 (June 8, 2017) ("Lyon Dec.").

2. <u>Skokomish's Mediation Addressed Only its Satsop Fishing Claim</u>.

Following the M&C, Skokomish demanded mediation of its "Satsop Fishery Claim". Squaxin Ex. 12: Skokomish Notice of Demand for Mediation (Nov. 10, 2015). After mediation, Skokomish's counsel informed the mediator and parties that while mediation was unsuccessful, it had "modified the scope of the [RFD], based on the comments and legal concerns raised by the parties to *U.S. v. Washington* and other Indian tribes." Squaxin Ex. 13: Email from E. Lees.

3. <u>Skokomish Proposed Four Fisheries in the Satsop Drainage</u>.

On March 9, 2017, Skokomish distributed to other tribes and the state four proposed fisheries in the East Fork of the Satsop River and Bingham Creek, which flows into the Satsop's

[9] Paragraph 25(a)(7) allows parties to invoke the Court's continuing jurisdiction in order to determine "[s]uch other matters as the court may deem appropriate." 18 F.Supp.3d at 1214-1215.

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East Fork. Squaxin Ex. 1: Locator map; Squaxin Ex.14: Skokomish memo and proposed fisheries. In an accompanying memorandum, Skokomish's counsel informed Squaxin and other tribes – for the first time – that based on the Court's 1984 decision in Subproceeding 81-1, Skokomish possessed U&A in these waters and a primary fishing right to exclude other tribes because these waters were "outside of the Hood Canal Watershed but within Skokomish (or Twana) Territory." *Id.* at p. 2. Squaxin objected to Skokomish's proposed fisheries on numerous grounds. Squaxin Ex. 15: Squaxin objection letter.

4. Skokomish's RFD Seeks "Confirmation" that it Holds Previously Adjudicated U&A and Primary Fishing Rights in an Expanded Area.

Skokomish's RFD asks the Court to "confirm[]" that it has previously adjudicated U&A and primary rights in the area described in Gibbs's journal (FF #353), which is "outside of Hood Canal Drainage Basin". Dkt. No. 3 at p. 8, § IV (Relief). This area extends beyond the "entire Satsop Fishery" that Skokomish described at the M&C. Sections IV.B.1, 2 above. As interpreted by Skokomish, the area described in FF #353 also encroaches on area previously ceded by the Nisqually, Puyallup and Squaxin Indians in the Treaty of Medicine Creek; including portions of the marine waters of Hammersley Inlet, Totten Inlet, the entirety of Oakland Bay, Eld Inlet, and their respective freshwater drainages. Squaxin Ex. 1: Locator map. These latter waters were adjudicated as Squaxin U&A in Final Decision #1, and no other tribe. 384 F.Supp. at 378 (FF #141).

On April 10, 2017, Skokomish asserted to this Court in shellfish Subproceeding No. 89-3-306, Dkt. No. 348, that it currently possesses U&A and a primary fishing right in Hammersley, Totten and/or Eld Inlets based upon Gibbs' description of Twana Territory in FF #353 of Subproceeding 81-1 and this Court's 1984 ruling. (Squaxin Ex. 16: Skokomish filing.)

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Skokomish was objecting to a settlement agreement between Squaxin and shellfish growers that addressed the status of tideland parcels in those inlets. *Id.* Squaxin filed a response to Skokomish's assertion. Squaxin Ex. 17: Squaxin response, Dkt. No. 350; RFD, Dkt. No. 3 at ¶ 3.11.

Finally, at the May 30, 2017 Rule 26(f) conference, Skokomish's counsel said that he did not anticipate conducting discovery because he was relying on the Court's decision in Skokomish's primary rights case, and that Skokomish's instant case involved a matter of law rather than fact. Declaration of Sharon Haensly at ¶ 2 (June 8, 2017).

IV. ARGUMENT

A. Arguments Relating to the Court's Lack of Jurisdiction

1. Paragraph 25's Requirements are Jurisdictional and Must be Strictly Construed.

Paragraph 25 of Judge Boldt's permanent injunction established procedures for bringing new matters before the Court. 384 F.Supp. at 419. In 1993, the Court amended and greatly expanded these procedures. 18 F.Supp.3d at 1214-1215. The amended ¶ 25 procedures require the parties to negotiate and mediate issues in a meaningful way, and to seriously explore the potential for compromise, before initiating a formal proceeding. *Id.* Their purpose is also to reduce burdens on the Court and make subproceedings more efficient and manageable by narrowing inter-party disputes. *Id.* Paragraph 25 applies to the instant subproceeding.

The Court's intent that parties seriously negotiate is evidenced by the high level of detail in the procedures in ¶¶ 25(b)(1) and (2). Because the Court retained jurisdiction in this case for limited and express purposes, the pre-filing requirements of ¶ 25 are jurisdictional and strictly

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construed.[10] "Litigation is a last resort for resolution of inter-tribal fishing disputes, and the avenues of negotiation and mediation must be thoroughly explored first." *United States v. Washington*, Subproceeding No. 12-1, Order [Dismissing Nisqually's second RFD], Dkt. No. 20274 at p. 4 (Dec. 5, 2012).

As described below, Skokomish's abuse of the ¶ 25 process and unfounded assertions in the shellfish case have required Squaxin to invest considerable legal resources defending its interests. Lyon Dec. at ¶ 3.

2. <u>Skokomish's M&C Failed to Follow the Requirements of ¶ 25(b)(1)</u>.

For the following reasons, Skokomish's M&C and mediation did not conform to the requirements of ¶ 25(b)(1). First, ¶ 25(b)(1) requires that before filing an RFD, the party seeking relief "shall" meet and confer with all parties that may be directly affected by the request and attempt to negotiate a settlement of "the matter in issue." At best, Skokomish at the M&C stated its intent to adjudicate under ¶ 25(a)(6) additional U&A and a primary fishing right in the "entire Satsop Fishery". Section IV.B.1, above. In stark contrast to the "matter in issue" now presented in its RFD, Skokomish at the M&C made no mention of any claim to possessing previously adjudicated U&A and a primary fishing right either in all or part of the "entire Satsop Fishery", or in the southwestern Puget Sound inlets and the freshwaters that flow into them where Squaxin has adjudicated U&A. *Id.* In fact, Skokomish made no mention whatsoever at the M&C about seeking U&A and primary fishing rights in any marine waters. *Id.* Accordingly, significant differences exist between the "matter in issue" as presented at the M&C and the RFD concerning:

[10] *United States v. Washington*, Subproceeding No. 12-1, Order [Dismissing Nisqually RFD], Dkt. No. 20274 at p. 4 (Dec. 5, 2012); *see also United States v. Washington*, Subproc. 11-1, Order on Motion to Dismiss [Nisqually's first RFD], Dkt. No. 60 at p. 2 (Feb. 13, 2012) ("The procedures set forth in Paragraph 25 are mandatory for invoking the continuing jurisdiction of this Court, and may not be excused or modified.").

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(1) the geographic area where Skokomish asserts previously adjudicated U&A and primary fishing rights, and (2) the kind of relief it seeks – i.e., confirmation of previously adjudicated rights, as opposed to a declaration of additional U&A under ¶ 25(a)(6) and a primary fishing right that had never been litigated.

Second, ¶ 25(b)(1)(F) similarly requires that Skokomish have "discuss[ed]" at the M&C "whether earlier rulings of the court may have addressed or resolved in the matter in issue in whole or in part". Again, Skokomish did not discuss at the M&C its current RFD claim that it possesses previously adjudicated U&A and a primary fishing right outside of Hood Canal. Section IV.B.1, above. Skokomish did not mention its interpretation of the Court's 1984 decision until March 9, 2017, well after it had concluded the M&C and mediation. Section IV.B.3, above.

Finally, ¶ 25(b)(1)(A) requires that the parties "discuss" at the M&C "the basis for the relief sought by the requesting party." At the M&C, Skokomish generally described some anthropological and historical evidence that it intended to use to support its ¶ 25(a)(6) claim to U&A and primary fishing rights in the entire Satsop Fishery. Section IV.B.1, above. Skokomish did not take the position that it would seek the Court's continuing jurisdiction to confirm that the "entire Satsop Fishery", much less all of the area described in George Gibbs' journal (FF #353), had previously been adjudicated as Skokomish U&A with a primary fishing right. *Id.*

3. <u>Skokomish Failed to Comply with ¶25 by Vaguely Citing Subparagraphs 25(a)(1) Through (a)(7) for the Court's Continuing Jurisdiction</u>.

Subparagraphs ¶¶ 25(a)(1) through (a)(7) provide the parties with seven different bases under which an RFD may proceed. Skokomish vaguely cites to all of them for the Court's continuing jurisdiction. RFD, Dkt. No. 3, at ¶ 3.12. Not only is this confusing to the Court and the parties, it is also a complete departure from Skokomish's initial representation at the M&C

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that it was invoking ¶ 25(a)(6). Section IV.B.3, above. At no point, does Skokomish identify the subparagraph under which it intends to proceed.

Moreover, Skokomish's citing to all seven paragraphs for continuing jurisdiction without reference or clarification completely defeats the purpose of Judge Boldt's having delineated separate paragraphs in the first place. Paragraph 25's detailed procedures are intended to narrow claims and promote settlement before invoking judicial resources. Section V.A.1, above. A party's sowing confusion and misrepresenting the bases for claims does nothing to promote these worthy goals.

Finally, Skokomish's defect is not a mere technicality. In a ¶ 25(a)(1) proceeding, the Court interprets the record before Judge Boldt, as contrasted with a ¶ 25(a)(6) proceeding in which the Court allows the submission of new evidence. *United States v. Washington*, 20 F. Supp. 3d 899, 962 (W.D. Wash. 2008). A citation to both raises questions such as whether Skokomish is arguing that its claim is supported by evidence in the record before Judge Boldt, as opposed to yet-undisclosed new evidence. Skokomish's counsel informed the parties' counsel during the Rule 26(f) conference that he did not anticipate conducting discovery because he was relying on the Court's 1984 decision in Skokomish's primary rights case, and that the instant case involved a matter of law rather than fact. Section IV.B.4, above.

Finally, it is unclear whether some of ¶ 25's subparagraphs, for example ¶ 25(a)(2) and ¶ 25(a)(3), have any connection at all to the litigation. Skokomish's disordered, misleading approach squarely contravenes the letter and spirit of ¶ 25 and should be rejected.

4. <u>Skokomish does not Seek any Relief Available to it Under ¶ 25</u>.

Skokomish's RFD does not seek any relief to which it is entitled under ¶ 25. As noted above, Skokomish cites to both ¶¶ 25(a)(1) and (a)(6) as well as all the other subsections.

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Skokomish's failure to more specifically delineate the basis for its RFD leaves the responding parties to use the process of elimination to identify the actual basis for the RFD. Skokomish's RFD on its face appears to rule out ¶ 25(a)(6) as a basis for relief because it does not suggest any other basis for its RFD than previously existing rulings. This is confirmed by statements made by Skokomish's counsel during the Rule 26(f) conference. *See* Section IV.B.4, above.

Subparagraph ¶ 25(a)(6) is unavailable to Skokomish for an additional reason. Skokomish can only bring a ¶ 25(a)(6) proceeding "to determine the location of [its U&A] that was not specifically determined by Final Decision #I." 18 F.Supp.3d at 1213 (emphasis added). Skokomish is arguing, however, that Subproceeding 81-1 specifically determined its U&A. Thus, a ¶ 25(a)(6) proceeding is unavailable to Skokomish.

The remaining potential basis for Skokomish's claim is ¶ 25(a)(1) "to determine whether a party's actions are in conformity with Final Decision #1." Skokomish identified no action by a party or non-party to which it seeks a determination as to conformity to Final Decision #1. In RFD ¶¶ 1.2-1.4, Skokomish identifies, respectively, the objections of Squaxin, the S'Klallams and the state. While Skokomish might try to proceed under ¶25(a)(1) with respect to its own action – i.e., its proposal to open a fishery in the Satsop, East Satsop and Bingham Creek waters – its request here is far broader.

5. Skokomish Has Denied the Parties the Right to Demand Mediation of Skokomish's Entire Claim under ¶ 25(b)(2).

Paragraph 25(b)(2) states that if the parties are unsuccessful in negotiating a solution to the issue at the M&C, the requesting party or any affected party may demand mediation within a prescribed time period. Here, the mediation conducted by Skokomish covered only Skokomish's claim to U&A and primary rights in the "entire Satsop Fishery", and not the larger area that

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Skokomish now interprets FF #353 as covering. Section IV.B.2, above. Moreover, Skokomish concluded the mediation with its statement that it would be modifying its request in response to the concerns expressed. Section IV.B.2, above. A reasonable person would expect, based on this statement, that Skokomish would be narrowing its request to accommodate some of the parties' interests. Instead, Skokomish filed an RFD with its expanded, never-before-discussed claim and theory. The Court should reject Skokomish's attempt to mislead the parties and deprive them of their right to demand mediation of Skokomish's full claim and basis for its claim.

6. Skokomish Has Filed an Inaccurate Certification Attesting to Compliance with ¶ 25.

Paragraph 25 pre-filing procedures require that the initiating motion "shall contain a certification that pre-filing meet and confer requirements of Paragraph 25(b) have been met." Amended Supplemental Order on Paragraph 25 Procedures, Dkt. No. 20254 (Nov. 20, 2012). Skokomish's compliance certification is inaccurate. Ex Parte Motion, Dkt. No, 21470, at ¶ 2.5; RFD, Dkt. No. 3 at ¶ 3.11. When measured against its RFD, Skokomish's pre-filing M&C and mediation omitted its basis for relief and did not disclose that earlier Court rulings may have addressed or resolved the matter. *See* ¶ 25(b)(1)(A) and (F); Sections IV.B.1, 2, above. Indeed, Skokomish's efforts under ¶ 25(b) did not even raise its new claim for marine waters in Puget Sound and their tributaries or its reliance on the Court's 1984 ruling.

B. Arguments Relating to Skokomish's Failure to State a Claim Entitling it to Relief

1. Standard for a Fed. R. Civ. P. 12(b)(6) Motion.

A Rule 12(b)(6) motion asserts a failure to state a claim upon which relief can be granted. A plaintiff's complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It must allege

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enough facts to move past possibility and on to plausibility of entitlement to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007). A complaint cannot simply leave open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery. *Id.* at 561. Determining whether a complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. *Iqbal*, 556 U.S. at 679.

Under Rule 12(d), a Rule 12(b)(6) motion is converted to a Rule 56 summary judgment motion if matters outside the pleadings are presented and not excluded by the Court. The Court may consider the following without converting the Rule 12(b)(6) motion into a Rule 56 motion: (1) documents attached to Skokomish's RFD; (2) documents attached to this motion to dismiss that are central to the claim and referenced by the RFD; (3) documents that are part of the public record; and (4) matters subject to judicial notice. *Whittiker v. Deutsche Bank Nat. Trust Co*., 605 F. Supp. 2d 914, 925 (N.D. Ohio 2009). Here, all of the documents except the Locator map (Squaxin Ex. 1) and attestations in the Lyon and Haensly declarations fall under these categories.

For the reasons below, Skokomish's RFD either fails to present a claim to relief that is plausible on its face, or entitles Squaxin to summary judgment.

2. <u>The Court's 1984 Ruling in Subproceeding 81-1 Cannot Serve as a Basis for U&A Outside of Hood Canal and its Drainage Basin</u>.

Subproceeding 81-1 is, and always was, a determination of Skokomish's primary rights within its previously adjudicated U&A of the Hood Canal basin. As such, a decision in Subproceeding 81-1 could never have recognized any Skokomish fishing rights beyond the area originally determined as U&A by Judge Boldt – i.e., the Hood Canal basin. In this subproceeding

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(and elsewhere)[11], Skokomish attempts to elevate the single quote by George Gibbs (FF #353) to alter the entire structure and holding of Subproceeding 81-1. Because this reading is unsupported by existing case law, Skokomish's RFD fails to state a legally cognizable claim.

a. Subproceeding 81-1 was not a Determination of U&A.

In its RFD, Skokomish restyles Subproceeding 81-1 as if it determined the geographic boundary of its U&A. This is incorrect. That had occurred in Final Decision #1. 384 F.Supp. at 377. In contrast, Subproceeding 81-1 was a determination of primary rights within Skokomish's previously determined U&A, namely "all the waterways draining into Hood Canal and the Canal itself." In Subproceeding 81-1, Skokomish chose not to claim a broader area for tactical reasons and now cannot return to Court to retroactively reverse itself. *See* Section IV.A, above. The limited nature of that subproceeding was further confirmed by the Court's Amended Order of Reference, which explicitly recognized that the matter was not a U&A matter, but a primary rights matter. *Id.*

b. The Plain Language of the Court's 1984 Decision Makes Clear that Skokomish's Primary Rights were Recognized Only in the Hood Canal Basin.

The Court's 1984 opinion in Subproceeding 81-1 repeatedly confirmed that the geographic scope of its order and Skokomish's primary fishing rights was the Hood Canal basin, since this was the "unique" area that the Skokomish people controlled. Section IV.A, above. George Gibbs' journal was but one piece of evidence that supported the Court's decision that Skokomish had a primary fishing right in the Hood Canal basin where Judge Boldt had

[11] Skokomish filed two federal cases that make this same argument about Gibbs journal quote in FF #353, but expanded it to refer to treaty hunting rights. *See Skokomish Indian Tribe v. Forsman*, No. C-16-5639, Order Granting Defendants' Motion to Dismiss, 2017 WL 1093294 at *6 (March 23, 2017); *Skokomish Indian Tribe v. Goldmark*, No. C13-507, Complaint (Dkt. No. 1) at ¶ 61, ¶ 63 (Jan. 1, 2013). The Court dismissed both cases. *Forsman*, above; *Goldmark*, 994 F.Supp.2d 1168 (W.D. Wash. 2014). Skokomish has appealed the *Forsman* decision to the Ninth Circuit.

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determined it had U&A. *Id.* Nowhere did the Court find that Skokomish had U&A and primary fishing rights throughout the area that Gibbs described in FF #353.

Moreover, the structure of the Court's 1984 order makes this eminently clear. The Court, before quoting the Special Master's Findings of Facts and Conclusions of Law, ordered that the Skokomish held the "primary right to take fish in Hood Canal and the freshwaters draining into it" south of a line indicated on a map. 626 F.Supp. at 1486-1487. The Court then held, "This order constitutes a final decision . . . on the Skokomish Tribe's request for determination of its primary right." *Id.* at 1487.

Next the Court adopted the Special Master's Findings of Fact. Before quoting Gibbs in FF #353, the Court referred to "territory" comprised of the Hood Canal basin.[12] The Court, also before reaching FF #353, described in depth the "unique body of saltwater" known as Hood Canal (FF # 349), the principle rivers and smaller streams that flow into Hood Canal (*id.*), Twana villages in Hood Canal (FF #350), and the Twana people's "intensive" use of and names for places in Hood Canal and its drainage (FF #351, *see also* #354). *Id.* at 1487-1490. Nowhere did the Court make these same express findings as to areas outside of the Hood Canal basin. Accordingly, the order's plain language holds that the Hood Canal drainage is the "territory" that the Skokomish people controlled and within which they exercised a primary fishing right.

Skokomish tries to capitalize on subsequent references to "their territory" that follow Gibbs' journal quote in FF #353, arguing that all such references mean something beyond the Hood Canal basin. RFD, Dkt. No. 3, at pp. 1-2 (¶¶1.1-1.2), pp. 4-6 (¶ 3.5-3.10). Skokomish's argument is unconvincing. First, the Court, immediately after quoting Gibbs, states that Gibbs'

[12] Id. at 1487 (FF #348) ("Both concluded that at treaty times the Twana Indians controlled the territory comprised of, and held the primary right to take fish in, the Hood Canal drainage basin and the waters of Hood Canal south of the Port Gamble area.") (emphasis added).

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Twana territory "embraces" the Hood Canal basin. *Id.* (FF #353, emphasis added). Second, the Court then held that Dr. T.T. Waterman's list of place names confirmed that "areas within the Skokomish (or Twana) territory described by Gibbs were long used and occupied by the aboriginal Twana people." *Id.* at 1489 (FF # 354, emphasis added). Third, after noting that Dr. Elmendorf's Twana area roughly tracked that described by Gibbs, the Court concluded that the treaty-time "territory" of the Twana Indians encompassed the Hood Canal basin. *Id*. (FF #354) Fourth, the Court again confirmed that the primary right was the Hood Canal drainage by finding that the Twana people, like their neighbors, bounded their territories at the divides between drainage basins; that Hood Canal was its centerpiece; and that Hood Canal's shorelines and the streams draining into it were "most intensely felt to be owned by the Twana people."[13] *Id.* at 1490 (FF #355). There is simply no similar description of areas outside of the Hood Canal basin as "territory" that the Skokomish controlled or held U&A or a primary fishing right within. Accordingly, subsequent general references to "their territory" that follow FF #353 are clarified by the Court's conclusion that Skokomish held a primary fishing right only within the Hood Canal basin. *See id.* at 1491.

c. The Principle of Party Presentation Dictates that the Court in Subproceeding 81-1 Recognized Skokomish as Having Primary Rights Only Within the Hood Canal Basin.

Skokomish asks this Court to find that in Subproceeding 81-1 it *sua sponte*[14] granted Skokomish relief that vastly exceeds that sought in its 1981 RFD. Dkt. No. 3 at p. 8 § IV(A); at ¶

[13] Skokomish's claims to U&A and primary rights outside of the Hood Canal basin are also inconsistent with the Court's finding that the Skokomish peoples' aboriginal neighbors included the Satsop and Squaxin Indians. *Id.* at 1488 (FF #350).

[14] 2 "*Sua sponte*" means "of one's own accord; voluntarily", and "Used to indicate that a court has taken notice of an issue on its own motion without prompting or suggestion from either party." Cornell Legal Information Institute at https://www.law.cornell.edu/wex/sua_sponte (accessed June 7, 2017).

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3.5 (asserting that the Court during trial [in Subproceeding 81-1] "chose to determine the Treaty-time boundaries of Skokomish (or Twana) Territory [as described by Gibbs]), as well as the use, occupancy and control thereof"; at p. 5, ¶ 3.7 (the Court "legally described" the Twana territory boundaries for purposes of finding Skokomish's U&A and primary fishing right. (Emphases added.) The principle of party presentation, however, prohibits such a finding. This principle dictates that a court relies on the parties to frame the issues for decision, and acts as neutral arbiter of just those matters. *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). The Supreme Court has held:

> [Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties. . . ."

Id., quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (C.A.8 1987) (R. Arnold, J., concurring in denial of reh'g en banc). Additionally, a court "before acting on its own initiative . . . must accord the parties fair notice and an opportunity to present their positions." *Day v. McDonough*, 547 U.S. 198, 210 (2006).[15]

In Subproceeding 81-1, Skokomish sought only the primary right to fish within "the Hood Canal drainage area", which is where Judge Boldt had previously adjudicated its U&A. Section IV.A, above. Over thirty years later, Skokomish asserts that the Court in that subproceeding *sua sponte* expanded the scope of Skokomish's claim and relief sought to U&A and primary fishing rights in a large area outside of the Hood Canal basin.

[15] *See also* Bradley Scott Shannon, *Some Concerns About Sua Sponte*, 73 Ohio State L.J. 27-39 (2012) ("Admittedly, the notion that federal court judges have at least some power to act *sua sponte* seems beyond dispute. Also seemingly beyond dispute are at least certain aspects of the process that should be employed in this context – for example, that the parties ordinarily should be given notice of the act contemplated by the court and an opportunity to respond thereto.").

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Skokomish's arguments do not comport with the principle of party presentation. First, in Subproceeding 81-1, the Court relied on the parties to frame the issues for decision. The sole issue that Skokomish presented and that the parties litigated was whether Skokomish had primary fishing rights in the Hood Canal basin. Section IV.A.1, above. Skokomish chose not to claim a broader area for tactical reasons and now cannot return to Court to retroactively reverse itself.

Second, the Court in Subproceeding 81-1 acted as a neutral arbiter of the issue that Skokomish presented, and no more – i.e., a primary right in the Hood Canal basin. *Id.* Finally, if the Court had intended *sua sponte* to broaden the scope of Skokomish's RFD, it did not "accord the parties fair notice and an opportunity to present their positions" on the issues of whether Skokomish had U&A and a primary fishing right outside of Hood Canal. *See Day*, 547 U.S. at 210 (2006). Accordingly, adopting Skokomish's theory requires finding that the Court acted in a manner that was inconsistent with the principle of party presentation.

3. <u>The Court Cannot Award the Relief of "Confirm[ing]" that Skokomish has U&A and Primary Fishing Rights in all of Twana Territory</u>.

Skokomish asks the Court to "confirm[]" that it has U&A and primary fishing rights throughout Twana territory as described by Gibbs in FF #353. RFD, Dkt. No. 3 at p. 8 § IV(A). The Court lacks authority to award such relief. In the litigation context, to "confirm" means to "complete or establish that which was imperfect or uncertain; to ratify what has been done without authority or insufficiently."[16] To "ratify" is further defined as "the confirmation of a previous act done . . . , as, confirmation of a voidable act . . . . It is equivalent to a previous authorization and relates back to time when act ratified was done. . . ." *State of Alaska v. United States*, 16 Cl. Ct. 5, 10 (1988), quoting Black's Law Dictionary (5th ed.).

[16] *See* The Law Dictionary at http://thelawdictionary.org/confirm/ (accessed June 8, 2017)

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The Court cannot now "confirm" that it previously recognized in Subproceeding 81-1 Skokomish's U&A and primary fishing rights outside of Hood Canal. Skokomish did not present that issue to the Court in Subproceeding 81-1, the parties never argued it, and it was not included in the relief awarded by the Court. What Skokomish actually seeks is for this Court to relieve it from the order in Subproceeding 81-1, which requires a motion under Fed. R. Civ. P. 60(b). Skokomish has not impliedly or expressly brought such a motion.

4. Skokomish is Judicially Estopped from Asserting that it Has U&A and a Primary Right Outside of Hood Canal Based Upon the Court's Ruling in Subproceeding 81-1.

Under the judicial estoppel doctrine, when a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, it may not thereafter assume a contrary position simply because his interests have changed, especially if it prejudices a party who acquiesced to the position formerly taken by him. *New Hampshire v. Maine*, 532 U.S. 742, 743 (2001). The following factors inform a court's decision whether to apply the doctrine in a particular case. First, a party's later position must be clearly inconsistent with its earlier position. *Id.* Second, courts ask whether the party succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. *Id.* Third, courts ask whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id*. Here, all three factors are met.

First, Skokomish's current position is "clearly inconsistent" with its position in Subproceeding 81-1. *See id.* at 743. In that subproceeding, Skokomish told the Court that: (1) it needed a primary fishing rights in the Hood Canal basin because it lacked U&A elsewhere; and

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(2) that it had primary fishing rights in the Hood Canal basin because that area was unique and intensively used, occupied and controlled by the Skokomish people. Section IV.A, above. The Court adopted those assertions and ruled in Skokomish's favor. Thirty three years later, Skokomish informs this Court – in the instant subproceeding, in the shellfish case, and in its two dismissed hunting cases – that it has always had adjudicated U&A and primary rights outside of Hood Canal but only now seeks to exercise those rights.

Second, the Court's acceptance of Skokomish's current, inconsistent position would create the perception that either the first or the second court was misled. *Id.* at 743. Squaxin is unaware of evidence that Skokomish misled the Court in Subproceeding 81-1 about either its need for a primary right in the Hood Canal basin because it lacked U&A elsewhere, or the uniqueness of Hood Canal as an area that the Skokomish people intensively occupied, used and controlled. Accordingly, Skokomish now appears to mislead the Court through its statements that inflate the Gibbs quote in FF #353.

Third, Skokomish if not estopped will derive an unfair advantage and impose an unfair detriment on Squaxin by asserting these inconsistent positions. *Id.* Skokomish claims U&A and a primary right to exclude Squaxin from fishing in its adjudicated U&A in Hammersley Inlet, Totten Inlet, the entirety of Oakland Bay, Eld Inlet, and their respective freshwater drainages. Section IV.B.4, above. As Squaxin intensively exercises its Treaty rights in these areas, such an outcome would be devastating. Lyon Dec. at ¶ 4. Squaxin would either have to share Treaty fish and shellfish with Skokomish, or Skokomish could assert a primary right and exclude Squaxin from fishing and shellfishing there.

Skokomish seeks the same in additional areas ceded by the Nisqually, Puyallup and Squaxin Indians in the Treaty of Medicine Creek, which include the Satsop drainage. Excluding

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Squaxin from ever exercising its Treaty rights in this area will also harm Squaxin and its members by cutting off potentially valuable resources. Moreover, since Skokomish never took this position in Subproceeding 81-1, Squaxin had neither notice nor an opportunity to defend its sacred interests. Accordingly, the Court should estop Skokomish from taking the position that the Gibbs journal quote in FF #353 affords it U&A and a primary fishing right outside of Hood Canal.

V. CONCLUSION

For the reasons herein, the Tribe respectfully asks the Court to dismiss Skokomish's RFD with prejudice.

DATED this 8th day of June, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2017, I electronically filed the following with the Clerk of the Court using the CM/ECF system: (1) the instant Motion to Dismiss; (2) Proposed Order; (3) Declaration of Kevin Lyon and attached exhibits; and (4) Declaration of Sharon Haensly, which will send notification of such filing to the persons required to be served in this subproceeding whose names appear on the Master Service List.

s/Sharon Haensly
Squaxin Island Legal Department

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