No. 17-35760

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff*,

v.

SKOKOMISH INDIAN TRIBE, *Petitioner-Appellant*,

v.

JAMESTOWN S'KLALLAM TRIBE; PORT GAMBLE S'KLALLAM TRIBE; SQUAXIN ISLAND TRIBE, *Respondents-Appellees*,

v.

TULALIP TRIBES; QUILEUTE INDIAN TRIBE; HOH TRIBE; LUMMI TRIBE; QUINAULT INDIAN NATION; NISQUALLY INDIAN TRIBE; SUQUAMISH INDIAN TRIBE; MUCKLESHOOT INDIAN TRIBE; PUYALLUP TRIBE; UPPER SKAGIT INDIAN TRIBE; SWINOMISH INDIAN TRIBAL COMMUNITY, *Real-parties-in-interest*.

On Appeal from the United States District Court
for the Western District of Washington
No. C70-9213
Hon. Ricardo S. Martinez

APPELLEE SQUAXIN ISLAND TRIBE'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Appellee Squaxin Island Tribe is an Indian tribe with a governing body duly recognized by the Secretary of the Interior. 83 Fed. Reg. 4235, 4239 (January 30, 2018). Accordingly, a corporate disclosure statement is not required by Rule 26.1 of the Federal Rules of Appellate Procedure.

Date: April 15, 2018

Kevin Lyon

*/s/ Kevin Lyon*_____
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INTRODUCTION

The district court properly dismissed the Skokomish Indian Tribe's ("Skokomish") Request for Determination ("RFD") that seeks judicial recognition of a usual and accustomed fishing grounds ("U&A"), and a primary right to exclude all other tribes, over a vast area. The court recognized that Skokomish had abused not only the pre-filing procedures that Judge Boldt established as a precursor to the court's continuing jurisdiction, but also had blatantly and persistently misrepresented to the court the record in a 1981 subproceeding in an effort to achieve its goal. Moreover, the district court correctly found that Skokomish's claim improperly rested on but one piece of evidence from the 1981 subproceeding – a quote from George Gibbs' 1854-55 journal in Finding of Fact #353 – that Skokomish decades later was magnifying and distorting in a manner that defied the conclusions of law in the district court's 1984 decision and the record. Finally, the district court appropriately found that Skokomish did not and could not meet the criteria that are required to obtain the district court's continuing jurisdiction in *United States v. Washington*.

JURISDICTIONAL STATEMENT

Appellant Skokomish incorrectly asserts that that the district court "had and continues to have jurisdiction" under 28 U.S.C. § 1331 and § 1362. *See* Opening Br. 1. Rather, the district court correctly determined that it lacked continuing

jurisdiction over Skokomish's Request for Determination ("RFD") because: (1) Skokomish failed to follow the pre-filing requirements established in ¶ 25(b) of Judge Boldt's permanent injunction in *United States v. Washington* that are a prerequisite to district court jurisdiction over its claim; and (2) no subpart in ¶ 25(a) of the permanent injunction conferred such jurisdiction.[1] ER10, 13.

Moreover, the district court held that "other general bases for federal jurisdiction" did not provide jurisdiction. ER12. While the district court's jurisdiction over the entire *United States v. Washington* proceeding originally derived from 28 U.S.C. § 1331 and § 1362, ¶ 25 of Judge Boldt's permanent injunction is the source of the district court's continuing jurisdiction and must be carefully followed.

Appellee Squaxin Island Tribe ("Squaxin") concurs that this Court has jurisdiction under 28 U.S.C. § 1291, and with Skokomish's description of the dispositive order that Skokomish appealed.

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[1] This refers to Paragraph 25(b) of Final Decision # I, *United States v. Washington*, 384 F.Supp. 312, 419 (W.D. Wash. 1974), as modified by the rulings in ER325-332.

COUNTER-STATEMENT OF ISSUE(S) PRESENTED

1. Whether Skokomish failed to comply with court ordered pre-filing procedures that are required to invoke its continuing jurisdiction in *United States v. Washington*. (Argument § I.B)

2. Whether Skokomish's instant Request for Determination ("RFD") failed to satisfy the prerequisites required by Judge Boldt's permanent injunction for the district court's continuing jurisdiction to provide the requested relief. (Argument § I.C)

3. Whether the district court 1984 primary rights ruling in Subproceeding 81-1 as to waters within the Hood Canal basin can serve as a basis for Skokomish U&A and primary rights outside of the Hood Canal basin. (Argument § II)

4. Whether the district court correctly dismissed Skokomish's case with prejudice because Skokomish could not invoke any provision of Judge Boldt's injunction that allows the district court continuing jurisdiction to determine if Skokomish has usual and accustomed fishing grounds ("U&A") and primary rights located outside the Hood Canal basin. (Argument § III)

STATEMENT OF THE CASE

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

1. Skokomish Sought a Primary Right Within the Hood Canal Basin, Where it Had Adjudicated U&A.

In 1974, Judge Boldt specifically determined that Skokomish's adjudicated U&A "included all the waterways draining into Hood Canal and the Canal itself." *See United States v. Washington*, 384 F.Supp. 312, 377 (FF #137) (W.D. Wash. 1974); ER90 (locator map). In 1981 in Subproceeding 81-1, Skokomish returned to the district 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". ER 1411; *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 within a tribe's adjudicated UA& 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 district court held that Skokomish had a primary fishing right within the Hood Canal basin. ER63.

Judge Boldt in Final Decision #1 established specific instances when a party could return to invoke the district court's continuing jurisdiction, the sixth of which (known as ¶ 25(a)(6)) is, "The location of any of a tribe's usual and accustomed

fishing grounds not specifically determined by Final Decision # I". ER11. Notably, in Subproceeding 81-1 Skokomish did not invoke this provision to seek additional U&A *outside* the Hood Canal basin. Instead, Skokomish then sought only a determination of its primary fishing right *within* its previously adjudicated U&A in the Hood Canal basin. ER1411. The original Order of Reference to Special Master incorrectly stated that the issue was to determine Skokomish's U&A. ER32. Skokomish's then-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." ER53. Accordingly, the Amended Order of Reference stated that the issue was a determination of Skokomish's "primary right" in the "Hood Canal Fishery", and not a determination of the Skokomish's U&A. ER 55.

During Subproceeding 81-1, Skokomish repeatedly informed the district 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 <u>these tribes, unlike the Skokomish, have access to fisheries outside the Canal</u>.

> 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.

ER120, 121 (emphases added).

In 1983, Skokomish again informed the district court in Subproceeding 81-1 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. ER144. The district 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. (ER135)

Skokomish continued litigating against the Suquamish Indian Tribe in Subproceeding 81-1. The United States filed a memorandum entitled, "United States Memorandum Re Primary Rights in Hood Canal and its Watershed" which repeatedly emphasized that the legal and geographic scope of the proceeding was the Hood Canal basin. ER25-28; *see* Section II.C below.

In 1984, the district court held that Skokomish had a primary fishing right 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. (ER59)

In 1985, this Court affirmed the Skokomish's primary right in Hood Canal and its drainage. *United States v. Skokomish Indian Tribe*, 764 F.2d 670, 674 (9th Cir. 1985). It held, "The district court's holding that the Twana/Skokomish held the primary fishing right in the Hood Canal and its drainage area was based on reliable evidence contemporary with the treaty and extensive post-treaty anthropological research." The district court had not cited to any evidence of Skokomish regularly fishing outside of the Hood Canal basin. *See* ER59-63.

To summarize, the district court's decision in Subproceeding 81-1 held that Skokomish had a primary right in within its previously determined U&A. The district court did not hold that Skokomish had primary rights, let alone U&A, anywhere outside of Hood Canal.

2. The District Court in Subproceeding 81-1 Adopted Findings of Fact Supporting its Decision that Skokomish had a Primary Fishing Right in the Hood Canal Basin.

The district 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.[2]

In its decision, the district court also mentioned numerous evidentiary submissions that supported its finding that Skokomish had a primary fishing right 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. (ER61: FF#353) (referred to herein as "Gibbs journal")

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[2] ER59-62: *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." (Emphases added). Exhibit A as referenced by the district court is a map that depicts the northern portion of Hood Canal with the aforementioned line. ER256.

Skokomish's instant claim to having previously adjudicated U&A and a primary fishing right outside of the Hood Canal basin throughout this area rests on this quote from the Gibbs journal in FF #353. *See*, *e.g.*, ER214-216, 218 (¶¶ 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 the description of *all* of the lands that *all* of the Point No Point Treaty tribes ceded in that treaty:

> . . . 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; . . . . (Addendum to Skokomish Opening Br. 2)

Moreover, Skokomish now interprets the Gibbs journal language in FF #353 as encompassing portions of southwestern Puget Sound marine inlets and the freshwaters that flow into them, waters that Judge Boldt in Final Decision #1 recognized as Squaxin U&A.[3] *See* ER90 (locater map). Skokomish also interprets

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[3] In 2017 in shellfish Subproceeding 89-3-306, Skokomish cited the Gibbs journal language to assert U&A and primary rights in these marine waters. ER42-49; *see* Section B.4, below. Judge Boldt had held, however, 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

the Gibbs language as encompassing other areas previously ceded by the Nisqually, Puyallup and Squaxin Island tribes in the Treaty of Medicine Creek.[4] Section B.2, below.

After the district court quoted the Gibbs journal in Finding of Fact #353, its Conclusions of Law ("COL"): (1) re-confirmed Skokomish's U&A in the Hood Canal basin (ER63, COL #91); and (2) held that Skokomish had primary fishing rights in a portion of the Hood Canal basin – i.e., "within the territory described in finding 354, above, south of the line shown on Exhibit A hereto". *Id.* (COL #92)

The court in Subproceeding 81-1 based its decision to recognize Skokomish's primary rights in Hood Canal on facts showing that Skokomish controlled those waters and that the Hood Canal basin waters were "unique". ER60 (FF #349); *see also* ER60-62: FF #353 (Court found that "Gibbs' description of Twana territory embraces Hood Canal and its drainage basin"); FF

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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 id.* at FF #140 (Squaxin ancestors inhabited the southwestern Puget Sound inlets).

[4] Gibbs's description of Twana territory in FF #353 cannot be as expansive as Skokomish asserts because Gibbs repeatedly depicted much of the territory south and east of the Hood Canal Basin as the territory of the Medicine Creek Tribes. ER93 (Gibbs 1854 map, illustrating the "lands ceded [by Medicine Creek tribes] … and lands to be ceded [by Point No Point tribes and all others]…"); ER95 (Gibbs and Stevens 1855 map); and ER97 (Gibbs 1856 map).

#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'") (emphases added). Moreover, the district court found 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." ER62 (emphases added). Finally, the district 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." ER60 (FF #350). Skokomish now seeks rights in territory "well beyond just Hood Canal". ER216 (¶ 3.8).

Accordingly, the district 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* ER61-62 (FF ##353, #354).

B. The Procedural History of Skokomish's RFD.

1. Skokomish's 2016 M&C Request 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 ("M&C Request"). ER65-67. The Request stated that Skokomish would invoke the district court's continuing jurisdiction under ¶ 25(a)(6) and ¶ (a)(7)[5] to seek previously unadjudicated U&A in "the entire Satsop Fishery" (all of which lies outside and south of the Hood Canal basin), and a declaration that Skokomish had a primary right to take fish there. *Id.*; *see* ER90 (locator map). As noted earlier, parties invoke ¶ 25(a)(6) when asking the district court to determine the location of a tribe's U&A not specifically determined by Judge Boldt in Final Decision #I. ER11. Paragraph 25(a)(6) is the vehicle for presenting new evidence of additional U&A. *United States v. Washington*, 20 F.Supp.3d 899, 962 (W.D. Wash. 2008).

Skokomish's M&C Request defined the "Satsop Fishery" as including specifically listed freshwater bodies. ER66. In its M&C Request and at the M&C itself, Skokomish made no mention of Subproceeding 81-1, or the district court's

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[5] Paragraph 25(a)(7) allows parties to invoke the district court's continuing jurisdiction in order to determine "[s]uch other matters as the court may deem appropriate." ER11.

1984 decision, or the Gibbs journal language in FF #353, or any marine waters. *See id.*; ER126 (¶ 2). Moreover, at the M&C and earlier, Squaxin informed Skokomish that part of its 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). *Id.* The focus of the M&C was the evidence on which Skokomish relied. *See* Opening Br. 29.

2. Skokomish's Mediation Addressed Only its Satsop Fishing Claim.

Following the M&C, Skokomish demanded mediation of its "Satsop Fishery Claim". ER69. After mediation, Skokomish's counsel informed the mediator and parties that while mediation was unsuccessful, Skokomish 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." ER74. Skokomish did not explain how it had modified the scope. ER10. Squaxin expected that Skokomish would modify its request to withdraw the primary right matter and claims to Puget Sound marine and freshwaters. ER38.

3. Skokomish Proposed Four Fisheries in the Satsop Drainage.

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 East Fork. ER79-88; ER90 (locator map). In an accompanying memorandum, Skokomish's counsel informed Squaxin and other

tribes – for the first time – that based on the district 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". ER78. Squaxin objected to Skokomish's proposed fisheries on numerous grounds. ER37-40.

4. Skokomish's RFD Sought "Confirmation" that it Holds Previously Adjudicated U&A and Primary Fishing Rights in an Expanded Area Outside of the Hood Canal Basin.

Skokomish's RFD, filed on April 28, 2016, asked the district court to "confirm[]" that it has previously adjudicated U&A and primary rights in all of the area described in the Gibbs journal (FF #353), which is "outside of Hood Canal Drainage Basin". ER218 (§ IV). This area extends beyond the "entire Satsop Fishery" that Skokomish described at the M&C. Section B.1 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. *See* ER90, n. 3 above, and next paragraph. These latter waters were adjudicated as Squaxin U&A in Final Decision #1, and for no other tribe. 384 F.Supp. at 378 (FF #141).

On April 10, 2017, Skokomish asserted to the district court in shellfish Subproceeding No. 89-3-306, that it possessed U&A and a primary fishing right in Hammersley, Totten and/or Eld Inlets based upon the Gibbs journal description of Twana Territory in FF #353 of Subproceeding 81-1 and the court's 1984 ruling. ER42-44. 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. ER47-49.

Finally, at the May 30, 2017 Rule 26(f) conference in the instant case, Skokomish's counsel said that he did not anticipate conducting discovery because he was relying on the 1984 district court's decision in Skokomish's primary rights case, and that Skokomish's case involved a matter of law rather than fact. ER35.

SUMMARY OF THE ARGUMENT

I. Judge Boldt's permanent injunction, as amended, established prerequisites to invoking the district court's continuing jurisdiction over new matters *United States v. Washington*. Parties must both fulfill pre-filing requirements in ¶ 25(b) and seek the kind of relief that is described by one or more of the subsections in ¶ 25(a). Here, Skokomish failed to follow ¶ 25(b) pre-filing requirements with respect to its "meet and confer" and mediation. And, Skokomish failed to identify a specific subparagraph under ¶ 25(a) that entitled it seek relief under the district court's continuing jurisdiction.

II. Skokomish wrongly uses the district court's decision in Subproceeding 81-1, specifically Finding of Fact #353, as a vehicle for claiming U&A and a primary right outside of the Hood Canal basin. Its arguments defy longstanding precedent for determining a tribe's U&A, the Amended Order of Reference that defined the scope of Subproceeding 81-1, the position of the United States in that subproceeding, and the plain language of the district court's 1984 decision. Moreover, Skokomish is judicially estopped from arguing that it has U&A and a primary right outside of Hood Canal. Finally, Skokomish's attempts to reframe and expand the determination in Subproceeding 81-1 violate the principle of party presentation.

III. The district court properly dismissed Skokomish's RFD with prejudice because Skokomish did not and could not in the future present a claim for relief under ¶ 25(a).

Squaxin also joins the arguments raised by Appellees Jamestown and Port Gamble S'Klallam Tribes except where noted herein.

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION OVER SKOKOMISH'S RFD.

A. Standard of Review

Squaxin brought its motion under Fed. R. Civ. P. 12(b)(6) for Skokomish's failure to state a claim upon which relief may be granted and, in the alternative, for summary judgment. ER2. Since Squaxin and others requested that the district court examine documents outside the RFD, the district court converted the motions to ones for summary judgment. ER5-6.

The Court reviews a district court's decision on cross-motions for summary judgment *de novo*, applying the same standard used by the district court under Federal Rule of Civil Procedure 56(c). *Admiral Ins. Co. v. Debber*, 295 F. App'x. 171 (9th Cir. 2008). It determines whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.* It may affirm the district court's grant of summary judgment on any ground supported by the record. *Id.*

B. Skokomish Failed to Comply with the Pre-Filing Requirements in ¶ 25(b).

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

Paragraph 25(b) of Judge Boldt's permanent injunction established procedures for bringing new matters before the district court. 384 F.Supp. at 419. In 1993, the district court amended and expanded these procedures. ER7. The amended ¶ 25(b) 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 district court and make subproceedings more efficient and manageable by narrowing inter-party disputes. *Id*. Paragraph 25(b) applies to the instant subproceeding. *Id.*

The district court's intent that parties seriously negotiate is evidenced by the high level of detail in the procedures in ¶¶ 25(b)(1) and (2). *See id.* Because the district court retained jurisdiction in *United States v. Washington* for limited and express purposes, the pre-filing requirements of ¶ 25(b) are jurisdictional and strictly construed. *United States v. Washington*, 20 F.Supp.3d 899, 986 (W.D. Wash. 2012). "Litigation is a last resort for resolution of inter-tribal fishing disputes, and the avenues of negotiation and mediation must be thoroughly explored first." *Id.*

As described below, Skokomish's abuse of the ¶ 25(b) process and unfounded assertions in the shellfish case required Squaxin to invest considerable legal resources defending its interests. ER126-127 (¶ 3). The district court held, in the context of discussing possible sanctions against Skokomish, that Skokomish had "failed to engage in the proper pre-filing requirements". ER18. Skokomish now attempts to hide behind the cloak of confidentiality constraints, implying that somehow the Court cannot fully review the sufficiency of Skokomish's actions and omissions vis-à-vis the 25(b) pre-filing process. Opening Br. 26-27. There are no confidentiality issues, however, that preclude this Court's review. The record clearly shows that Skokomish subverted the pre-filing requirements in ¶ 25(b).

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

For the following reasons, Skokomish's M&C deviated from 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." ER7. 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 B.1, above. In stark contrast to the "matter in issue" later 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 (1) in all

or part of the "entire Satsop Fishery", or (2) 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 a primary fishing right in any marine waters.[6] *Id*. Accordingly, significant differences existed between the "matter in issue" that Skokomish presented at the M&C and in the RFD concerning: (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 presenting new evidence 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 the matter in issue in whole or in part". ER7. Again, Skokomish did not discuss at the M&C its eventual RFD claim that it possesses previously adjudicated U&A and a primary fishing right outside of Hood Canal. Section B.2, above. In fact, Skokomish did not mention its interpretation of the district court's 1984 decision in

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[6] The Court should disregard Skokomish's attempt to make hay from the fact that a Squaxin policy representative did not attend the M&C with Squaxin's attorney. *See* Opening Br. at 28-29. Skokomish fails to explain how the nonpresence of a Squaxin policy person rectifies its failure to follow ¶ 25(b)(1) pre-filing procedures.

Subproceeding 81-1 until March 9, 2017, well after it had concluded the M&C and mediation. Section B.3, above. The district court held that Skokomish's modifying the scope of the RFD "defeat[ed] the purposes of any meaningful attempt to resolve the issue amongst the tribes." ER10.

Skokomish seems to argue that it be excused from compliance with ¶ 25(b)(1)(A) because Squaxin knew before Skokomish filed its Request RFD that Skokomish's legal grounds would ultimately be based on FF #353; that Skokomish would claim fishing rights throughout the area described in Gibbs's journal; and that Skokomish would interpret the Gibbs journal so expansively that it would include some Puget Sound marine and freshwaters. *See* Opening Br. 30-31. First, as described above, not until the M&C and mediation had concluded did Squaxin learn of the full scope and legal basis for Skokomish's claims – including Skokomish's U&A and primary rights claims to Squaxin's exclusive U&A in Hammersley Inlet, Totten Inlet, Oakland Bay, and Eld Inlet and their associated freshwaters.[7] *See* ER90 (locater map); Section B.4, above. Second, Squaxin's learning at the M&C that Skokomish's claim was located in the area that the

[7] The Court should disregard Skokomish's assertion that Squaxin was "unwilling to concede their [sic] claim over the Satsop fishery", Opening Br. 32, as Squaxin has never claimed U&A or issued fishery regulations anywhere in the Satsop drainage.

Nisqually, Squaxin and Puyallup tribes ceded in the Medicine Creek Treaty[8] does not account for Skokomish's having not discussed its legal theory and full geographic scope at the M&C, including the southwestern Puget Sound inlets and associated freshwaters.

Finally, ¶ 25(b)(1)(A) requires that the parties "discuss" at the M&C "the basis for the relief sought by the requesting party." ER7. 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 B.1, above. Skokomish did not take the position, however, that it would seek the district court's continuing jurisdiction to confirm that the "entire Satsop Fishery", much less all of the area described in the Gibbs journal (FF #353), was previously adjudicated as Skokomish U&A with a primary fishing right. *Id.* Accordingly, the district court correctly held that Skokomish's actions were inconsistent with the principles espoused in ¶ 25(b). ER10.

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[8] U&A and ceded territory are two separate concepts that Skokomish wrongly conflates, and the latter is irrelevant here. *See* Opening Br. 31-32. Moreover, the Court should disregard Skokomish's unsupported assertion that prior litigation "confirmed" that the area of overlap between the Medicine Creek and Point No Point treaties is Skokomish territory. *See id.* at 31. Among other things, this issue was neither litigated nor decided in the decisions that Skokomish cites. *See id.*

3. Skokomish 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. ER328. Here, the mediation conducted by Skokomish covered only its claim to U&A and a primary right in the "entire Satsop Fishery", and not the larger area of "Twana Territory" that Skokomish now interprets FF #353 as covering. Section B.2, above.

Moreover, Skokomish concluded the mediation with its statement that it would be modifying its request in response to the concerns expressed. *Id.* 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.[9] Section B.4, above. The district court correctly held that Skokomish's modifying the scope of its RFD after mediation was completed "defeat[ed] the purpose of any meaningful attempt to resolve the issue amongst the tribes." ER10.

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[9] Skokomish continues to inexplicably assert that it accommodated the other tribes' and the state's concerns after mediation by greatly expanding the geographic area for which it claimed U&A and primary rights to all of Twana Territory outside of the Hood Canal basin. *See* Opening Br. 33. Skokomish's assertion is nonsensical as the new area vastly exceeded the "entire Satsop fishery" that Skokomish began with in its M&C Request and at the M&C. *See* ER90 (locater map).

This 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.

Finally, the Court should find irrelevant Skokomish's implicit argument that it need not have followed ¶ 25(b)'s mediation requirement because "there was and is no possibility of settlement." *See* Opening Br. 30. As the district court held, "these procedures require the parties to negotiate and mediate issues in a meaningful way, and to seriously explore the potential for compromise." ER10 (emphasis in original). Paragraph 25(b) does not envision that settlement discussions be subverted or glossed over because the initiating party believes them to be a waste of time.

4. Skokomish Filed an Inaccurate Certification Attesting to Compliance With ¶ 25(b).

Additional ¶ 25 pre-filing procedures adopted in 2012 require that the initiating motion "shall contain a certification that pre-filing meet and confer requirements of Paragraph 25(b) have been met." ER322. Skokomish's compliance certification is inaccurate. When measured against its RFD, Skokomish's pre-filing M&C Request and mediation omitted its basis for relief and did not disclose that earlier district court rulings may have addressed or resolved the matter. *See* ER7 (¶¶ 25(b)(1)(A), (F)); Sections B.1-4, above. Indeed, Skokomish's efforts under ¶ 25(b) did not even raise its new claim for marine

waters in southwestern Puget Sound and their tributaries, or its reliance on the district court's 1984 ruling in Subproceeding 81-1.

C. Skokomish's RFD Failed to Invoke the District Court's Jurisdiction Under ¶ 25(a).

1. Skokomish Failed to Identify the Subsection of ¶ 25(a) that Applied to its RFD.

Subparagraphs ¶¶ 25(a)(1) through (a)(7) provide seven different bases under which an RFD may proceed. Parties to *United States v. Washington* must specifically identify at least one subsection to invoke the district court's continuing jurisdiction. ER12 (parties must "identify[] a specific basis of jurisdiction). The district court noted that "it was not the court's job to guess at the asserted basis for jurisdiction." *Id.*

Skokomish, however, vaguely cited to all seven subsections for the Court's continuing jurisdiction. ER217 ¶ 3.12. Not only was this confusing to the district court and the parties, it was also a complete departure from Skokomish's initial representation at the M&C that it was invoking ¶ 25(a)(6). Section B.1, above. Skokomish's excuse for citing every subsection in ¶ 25(a) was that it "needed flexibility to respond to attacks being brought by multiple parties on differing grounds", and that some defenses might be raised by treaty tribes that didn't participate in the pre-filing process. Opening Br. 36-37. The Court should reject this novel argument. Skokomish fails to explain how some unknown defense

would cause it to alter its choice of ¶ 25(a) subsection. More important, Skokomish is the master of its claim, and long-established law is that Skokomish must identify its basis for invoking the district court's continuing jurisdiction. *See* ER12.

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 I.B.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 district court interprets the record before Judge Boldt, as contrasted with a ¶ 25(a)(6) proceeding in which the parties can submit new evidence. *United States v. Washington*, 20 F.Supp.3d at 962. Citing 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 by 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 B.4, above. His statement is inconsistent with Skokomish's position at the M&C, as well as with Skokomish's assertion in its opening brief (p. 35) that it would have, if permitted, submitted an expert report with its RFD.

2. No ¶ 25(a) Subsection Applies To Skokomish's RFD.

Skokomish's RFD sought no relief to which it is entitled under ¶ 25(a). As noted in Section I.C.1 above, Skokomish cited to all seven subsections of ¶ 25(a). Its failure to specifically delineate the basis for its RFD left the responding parties and the court to use the process of elimination to attempt to identify its actual basis for the RFD.

Ultimately, no subsection in ¶ 25(a) applies to Skokomish's RFD. Subsection (a)(2) does not apply (whether a proposed state regulation is reasonable and necessary for conservation), or subsection (a)(3) (whether a tribe is entitled to exercise powers of self-regulation), or subsection (a)(4) (disputes over the subject matter of the case), or subsection (a)(5) (claims to returns of seized or damaged fishing gear or its value), or subsection (a)(7) (other matters that the court deems appropriate).[10] *See* ER11.

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[10] Skokomish asserts that (a)(4) and (a)(7) are "directly relevant" without explanation. Opening Br. 37. Skokomish also argues for the first time that subparagraphs (a)(2), (a)(3), and (a)(5) "may be implicated" because it continues to

Nor does subsection (a)(6), which provides continuing jurisdiction to determine "[t]he location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision #1". ER11. Skokomish's RFD on its face rules out ¶ 25(a)(6) as a basis for relief because it suggests no other basis for its RFD other than to "confirm" previously existing rulings. ER216 (¶ 3.9), ER218 (§IV.A). This is underscored by statements made by Skokomish's counsel during the Rule 26(f) conference. Section B.4, above.

Also fatal to Skokomish's ¶ 25(a)(6) claim are its repeated assertions that Twana Territory was "specifically determined" to be the location of its primary right and, by necessity, its U&A. Opening Br. 17, 19. Skokomish's assertions that previously existing rulings specifically determined its U&A (and primary right) make ¶ 25(a)(6) inapplicable, since that section only applies to the "location of any of a tribe's usual and accustomed fishing grounds *not specifically determined* by Final Decision # I. *See* ER 11.

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have a contentious relationship with the state of Washington. *Id.* at 38. Skokomish speculates that the State might block its attempt to open a fishery outside of Hood Canal by implementing regulations that are not "reasonable and necessary for conservation", or might disregard Skokomish's self-regulatory status, or might seize or damage Skokomish fishing gear. Opening Br. 38. It is well established that district courts lack jurisdiction over purely speculative claims. *See, e.g.*, *Lucero v. Hensley*, 920 F.Supp. 1067, 1077 (C.D. Cal. 1996).

Finally, ¶ 25(a)(1) is unavailable as a basis for continuing jurisdiction, and Skokomish offers no reason for citing this subsection. Parties invoke this subsection only to "to determine whether a party's actions are in conformity with Final Decision #1." It comes into play when there is potential ambiguity in Judge Boldt's findings. ER12-13. Here, the district court properly held, "There is no ambiguity in Judge Boldt's determination of the Skokomish U&A" as including "all the waterways draining into Hood Canal and the Canal itself." ER13, 14. Skokomish does not argue otherwise. ER14 n.5 (district court noted that "Skokomish agree that there is no ambiguity in the scope of their U&A"). Moreover, as described in Sections A.1 & .2 above and II below, the 1984 subproceeding did not expand Skokomish's U&A outside of Hood Canal. The district court's 1984 decision merely recognized Skokomish's primary right within part of the Hood Canal basin where Skokomish already had U&A. *Id.*

II. THE DISTRICT COURT'S 1984 RULING IN SUBPROCEEDING 81-1 CANNOT SERVE AS A BASIS FOR U&A OR A PRIMARY FISHING RIGHT OUTSIDE OF THE HOOD CANAL BASIN.[11]

A. Skokomish Seeks to Upend Binding Precedent for Determining U&A and Primary Rights.

For decades, federal courts have applied the standard established by Judge Boldt for what a tribe must demonstrate to prove off-reservation fishing rights at

[11] The scope of review is the same as for Section I above.

usual and accustomed grounds and stations. *See* ER14. A tribe must provide evidence of fishing grounds where its members "customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe. . . ." 384 F.Supp. at 332. The phrase "usual and accustomed" applies in a restrictive sense and does not apply to sites used only occasionally or incidentally. *Id.* at 356. If and only if the evidence is sufficient and court recognizes a tribe's U&A, will it (if asked) move to the next step of querying whether the evidence indicates that a tribe controlled all or part of the U&A to the extent that it could exclude others from fishing there. *See, e.g., United States v. Lower Elwha*, 4459 F.Supp. 1066, 1066-1067 (W.D. Wash. 1976), *aff'd*., 642 F.2d 1141 (9th Cir. 1981). If so, then the court will recognize that tribe's primary fishing right. *See id.*

Here, Skokomish turns this longstanding approach on its head. Since it is "difficult" to prove the locations where it customarily fished outside of the Hood Canal basin, Skokomish reasons, the Court should accept a novel second "path". Opening Br. 12. That path consists of elevating and transforming a Finding of Fact about "territory" in the district court's 1984 primary right decision into a legal determination of Skokomish's U&A and primary fishing right outside of the Hood

Canal basin.[12] *See id.*. Skokomish seeks this outcome even though all of the Findings of Fact in that decision are devoid of any evidence of Skokomish having customarily fished there. *See* ER59-63. Skokomish's novel alternate path entirely skips the "difficult" step of presenting evidence of where the Skokomish people customarily fished. *See* Opening Br. 12. Contrary to Skokomish's assertion, there is no legal precedent for this approach.[13]

Finally, as the district court correctly noted, Skokomish cited "no legal authority whatsoever for their [sic] assertion that Mr. Gibbs' reference to Twana 'territory' – by itself and without supporting evidence of regular and customary fishing practices at identified locations – satisfied the standard to establish additional U&A." ER17. While the concept of "territory" may be relevant to a determination of primary rights, there is no legal support for using it as a substitute for evidence of regular and customary fishing in the context of a U&A

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[12] For example, Skokomish argues, "[A] Treaty-time occupied territory is always [U&A]", and the occupier can exclude other Indians. Opening Br. 8.

[13] Skokomish wrongly implies that the courts took this or a similar alternate path in a dispute between the Lower Elwah and Makah tribes. Opening Br. 13-15, citing *United States v. Lower Elwha*, 459 F.Supp. 1066, 1066-1067 (W.D. Wash. 1976), *aff'd.*, 642 F.2d 1141 (9th Cir. 1981). In that case, the accepted approach was followed, i.e.: (1) submitting evidence of customary fishing; (2) obtaining judicial recognition of U&A within a prescribed geographic area; and (3) seeking and obtaining judicial recognition of a primary fishing right within the U&A. *See id.*

determination. Nor is there legal support for Skokomish's approach of elevating a finding of fact into a conclusion of law.

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

Skokomish restyles Subproceeding 81-1 as if it expanded or redetermined the geographic boundary of its U&A. This is incorrect. Skokomish's U&A was determined in, and only 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." *See id.*

In Subproceeding 81-1, Skokomish voluntarily elected not to claim a broader area for tactical reasons, and now cannot return to court now to retroactively reverse itself. *See* Sections A.1 & .2, above. Moreover, the limited nature of that subproceeding was further confirmed by the district court's 1982 Amended Order of Reference to Special Master, which explicitly recognized that the matter was not a U&A matter, but a primary rights matter.[14] Section A, above.

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[14] The Court should therefore disregard Skokomish's assertions that other parties had "actual and/or constructive notice" that Subproceeding 81-1 was a determination of Skokomish's rights outside of the Hood Canal basin, and that such issues or claims were "actually litigated." *See* Opening Br. 24. There is simply no basis for applying the doctrines of *res judicata* or collateral estoppel. *See id.* Squaxin joins the arguments raised in § I.C. of the S'Klallam Opening Brief, pp. 25-26.

The amended Order of Reference followed the discussion with Magistrate Cooper on May 18, 1982:

> The COURT: [. . .] I did check the petition, and my order of reference did not include the hearing of the primary rights, just the usual and accustomed fishing places.
>
> MR. O'LEARY [counsel for the Skokomish]: Your Honor, the difficulty raised with that reference is that the Skokomish has no pending petition for recognition of usual and accustomed places.
>
> …
>
> THE COURT: So I will, if you wish, contact Judge Craig and see if he wishes to make that order of reference on the primary rights. I don't know.
>
> MR. O'LEARY: We would so request your Honor, that if you deem that it needs clarification, that the request [unreadable].
>
> THE COURT: I think for the purpose of the record, there ought to be some amendment to the order of reference to clarify it. (ER53, emphases added).

Skokomish ignored the Amended Order of Reference in the district court proceeding, *see* ER16, likely because it was inconsistent with Skokomish's theory that Judge Craig in Subproceeding 81-1 recognized Skokomish's U&A and primary right in Twana Territory outside the Hood Canal basin. Even after Squaxin and other parties pointed out the existence and content of the Amended Order, Skokomish persisted in its argument and failed to correct the record or, as the district court found, to "acknowledge [its] misrepresentation at all". ER17-18. The district court thus found that Skokomish had "blatantly misrepresented the record" and "attempt[ed] to circumvent the limitations of [the district court's]

continuing jurisdiction" by ignoring the Amended Order. ER15, 18. The court *sua sponte* considered imposing sanctions against Skokomish. ER17-18.

Skokomish now tries to trivialize its misrepresentation as an "unwarranted concern[]". Opening Br. 46-47. Its purported explanation for relying on the original Order of Reference is unclear.[15] Whatever the supposed basis, however, Skokomish had two opportunities to acknowledge the amended Order of Reference below, and chose not to do so.

Finally, the Court should reject Skokomish's assertion that the district court used Skokomish's ignoring of the Amended Order of Reference and misrepresentations as "a basis to abrogate Skokomish's Treaty right to take fish." *See* Opening Br. 47. Skokomish neither has an adjudicated Treaty right to U&A or a primary right outside of the Hood Canal basin, nor grounds for invoking the district court's continuing jurisdiction to obtain these rights. Accordingly, there is no abrogation.

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[15] Skokomish says that it attached the original, unamended Order of Reference because it was linked to the Special Master's Report and Recommendation, and that it "does not dispute" that the Hood Canal Agreement refers to the Amended Order. Opening Br. 47.

C. The United States Understood Subproceeding 81-1 to be Geographically Limited to the Hood Canal Basin.

Subproceeding 81-1, upon which Skokomish bases its entire argument, was never intended to address any tribe's rights outside of the Hood Canal basin. In this regard, it is instructive to look at the United States position in the subproceeding. ER25-28. It carefully avoided taking "sides" in the dispute between the Skokomish and the Suquamish, making its neutral assessment of the scope of the matter before the district court all the more availing. ER25. The very title of its memorandum makes this clear: "United States Memorandum Re Primary Rights in Hood Canal and its Watershed." *Id*. The United States then repeated its understanding of what Skokomish is seeking: "In the present proceeding the Skokomish Tribe claims primary rights over the Suquamish Tribe in portions of Hood Canal and its watershed." ER27 (emphasis added).

The United States advocated for a narrow finding, and in so doing again emphasized that the geographic scope of the matter to be determined was confined to the Hood Canal basin. It "urge[d] the special master and the Court to confine their findings and conclusions of law to the particular facts and circumstances involved in the Hood Canal situation." ER26. The United States did so "to be sure that other tribal parties in this case are not adversely impacted by any decision of findings which the Special Master may recommend or the Court may adopt." *Id.* It asked that the "Court make its ultimate finding and holding on this point with

regard to the specific nature of Hood Canal." ER27. To support this request, the United States cited to Dr. Barbara Lane's testimony that "The Hood Canal is a very special kind of marine area, perhaps unique in the case area of U.S. v. Washington." *Id*.

It closed by again emphasizing the limitation of the ruling to Hood Canal, specifically to avoid misapplication of the ruling in the future:

> Any findings with respect to the nature of either tribe's rights on Hood Canal should clearly show the basis for the conclusion the Court ultimately reaches in order to avoid a future misapplication of that conclusion to other waters in Puget Sound where the factual situation may be different. (ER28, emphasis added)

The United States' memorandum clarifies what was known to every participant in Subproceeding 81-1, including the Skokomish: the matter was limited to a determination of primary rights within Skokomish's previously adjudicated U&A, i.e. the Hood Canal basin. Remarkably, Skokomish ignores the United States' memorandum and its caution that Subproceeding 81-1 not be used outside of Hood Canal.

D. The Plain Language of the Court's 1984 Decision Makes Clear that Skokomish's Primary Fishing Right was Recognized Only in the Hood Canal Basin.

The district court's 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. *See* ER60. The quote from George Gibbs's journal in FF #353 was but one piece of evidence that supported the district court's decision that Skokomish had a primary fishing right in the Hood Canal basin where Judge Boldt had earlier determined it had U&A. *Id*. Nowhere did the district court find that Skokomish had U&A and a primary fishing right throughout the area that Gibbs described in FF #353.

The decision's plain language indicates that the only evidence of the Skokomish people's customary fishing presented to the court was limited to the Hood Canal basin.[16] As the district court correctly noted, "Mr. Gibbs' description of Twana territory [in FF #353] "did not identify or discuss any locations where fishing occurred." ER17. In fact, there is not a speck of evidence cited in the 1984 decision that demonstrates fishing by the Skokomish people outside of the Hood Canal basin. *See* ER59-63. Accordingly, the plain language of the Conclusions of Law are similarly restricted to the Hood Canal Basin. ER63, COL #91: "The court has previously held that the usual and accustomed fishing places of the

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[16] ER60-61: FF # 351 ("Congregations of Twana moved along the canal shores, generally from south to north as the summer season progressed, to fish and to obtain other resources in and along the canal."); 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.").

Skokomish Indian Tribe encompass Hood Canal and the rivers and streams draining into it."

Moreover, the structure of the district court's 1984 order makes this eminently clear. The district court, before quoting the Special Master's Findings of Facts and Conclusions of Law, determined 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. ER59 (emphasis added). The district court then held, "This order constitutes a final decision . . . on the Skokomish Tribe's request for a *determination of its primary right*." ER59.

Next, the district court adopted the Special Master's Findings of Fact. Before quoting Gibbs in FF #353, the district court referred to "territory" comprised of the Hood Canal basin.[17] The district court, also before reaching FF #353, described in depth the "unique body of saltwater" known as Hood Canal (ER60, FF # 349), the principle rivers and smaller streams that flow into Hood Canal (*id*.), Twana villages in Hood Canal (*id.*, FF #350), and the Twana people's "intensive[]" use of and names for places in Hood Canal and its drainage (ER60-

[17] *See* ER59-60, FF #348: Drs. Lane and Elmendorf "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).

61, FF #351; *see also* ER61-62, #354). Nowhere did the district 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 the 1984 decision's references to "their territory" that follow the Gibbs journal quote in FF #353, arguing that all such references mean something beyond the Hood Canal basin. Opening Br. 6-22; Skokomish RFD: ER211-212 (¶¶ 1.1-1.2), ER 214-216 (¶ 3.5-3.10). Skokomish's argument is unconvincing. All of the general references to "their territory" that follow FF #353 are explained by the Court's conclusion that Skokomish held a primary fishing right only within the Hood Canal basin.[18] ER61-63.

Finally, the district court again confirmed that the primary right was in the Hood Canal drainage by finding that the Twana people, like their neighbors,

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[18] The district court, immediately after quoting Gibbs, states that Gibbs's Twana territory "embraces" the Hood Canal basin. (ER61, FF #353, emphasis added). It 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." (ER61-62, FF # 354, emphasis added). And, after noting that Dr. Elmendorf's Twana area roughly tracked that described by Gibbs, the district court concluded that the treaty-time "territory" of the Twana Indians encompassed the Hood Canal basin. (ER62, FF #354).

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."[19] ER62 (FF #355). There is simply no similar description of areas outside of the Hood Canal basin as "territory" that the Skokomish fished in, controlled, or held U&A or a primary fishing right within.

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

Skokomish asked the district court to "confirm[]" that it has U&A and a primary fishing right throughout Twana territory as described by Gibbs in FF #353. ER218 (§ IV(A)). The district 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."[20] To "ratify" is "the confirmation of a previous act done . . . , as, confirmation of a voidable act . . . . It is equivalent to a previous authorization and

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[19] Skokomish's claims to U&A and primary rights outside of the Hood Canal basin are also inconsistent with the district court's finding that the Skokomish peoples' aboriginal neighbors included the Satsop and Squaxin Indians. ER60 (FF #350).

[20] *See* The Law Dictionary at http://thelawdictionary.org/confirm/ (accessed April 17, 2018).

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.).

The district 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 district court in Subproceeding 81-1, the parties never argued it, and it was not included in the relief awarded by the district court. What Skokomish actually seeks is for the district court to relieve it from the order in Subproceeding 81-1, which requires a motion under Fed. R. Civ. P. 60(b). Skokomish neither impliedly nor expressly brought such a motion. Squaxin joins the arguments to this effect filed by Appellees Jamestown and Port Gamble S'Klallam Tribes.

F. 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 its 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 district court that: (1) it needed a primary fishing rights in the Hood Canal basin because it lacked U&A elsewhere; and (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 A.1. The district court adopted those assertions and ruled in Skokomish's favor. Thirty three years later, Skokomish informed the district court – in the instant subproceeding, in the shellfish case, and in its two dismissed hunting cases[21] – that it has always had adjudicated U&A and primary rights outside of Hood Canal but only now seeks to exercise those rights.

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[21] *Skokomish v. Goldmark*, 994 F.Supp.2d 1168 (W.D. Wash. 2014), and *Skokomish Indian Tribe v. Leonard Forsman et. al.*, No. C16-5639RBL, 2017 WL 1093294 (W.D.Wash. 2017), appealed, No. 17-35336 (9th Cir.).

Skokomish also plays "fast and loose" with the courts by now asserting that its U&A and exclusive fishing area extend well beyond the Hood Canal basin, when it decades earlier justified its need for a fishing right in the Hood Canal basin because it lacked access to fisheries outside of it. *See* Section A.1, above; *New Hampshire*, 532 U.S. at 750.

Second, the district 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 district 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 district court (and this Court) through its statements that inflate the Gibbs journal quote in FF #353 and that discard its earlier basis for needing a primary right – i.e., that it could not fish outside of the Hood Canal basin.

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. Sections B.2 & .3,

above. As Squaxin intensively exercises its Treaty rights in these areas, such an outcome would be devastating. *See* ER127 (¶ 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 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.

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

Skokomish essentially asks this Court to find that in Subproceeding 81-1 the district court *sua sponte* granted Skokomish relief that vastly exceeds that sought

in its 1981 RFD.[22] The principle of party presentation, however, prohibits such a finding. It 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). 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).

Skokomish's arguments do not comport with the principle of party presentation. First, in Subproceeding 81-1, the district court relied on the parties to frame the issues for decision, and reflected that in its Amended Order of Reference. Sections A, II.B, above. The sole issue that Skokomish presented and that the parties litigated was whether Skokomish had primary fishing rights in the Hood Canal basin. Sections A.1 & .2, II.B, above. Second, the district 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 district 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

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[22] *See* ER 214, ¶ 3.5 (RFD asserts that the district court 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"; ER215, ¶ 3.7 (the district court "*legally described*" the Twana territory boundaries for purposes of finding Skokomish's U&A and primary fishing right. (Emphases added.)

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.

III. THE DISTRICT COURT PROPERLY DISMISSED SKOKOMISH'S RFD WITH PREJUDICE.

A. Standard of Review.

The court reviews for abuse of discretion a district court's decision to dismiss with prejudice. *Okwu v. McKim*, 682 F.3d 841, 844 (9th Cir. 2012); *see also Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1358 (9th Cir. 1998) (reviewing a decision regarding the management of litigation for abuse of discretion).

B. The District Court Properly Found that no Avenue Exists for Continuing Jurisdiction Under ¶ 25(A).

The Court should disregard Skokomish's implication that the district court dismissed its RFD with prejudice because of Skokomish's misrepresentation of the record. Opening Br. 47. While that caused the district court to consider sanctions, it ultimately decided otherwise.[23] ER17-19.

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[23] The S'Klallams seem to argue that dismissal with prejudice was appropriate due to Skokomish's misrepresentation. S'Klallam Tribes' Answering Br. 28. While Squaxin agrees that Skokomish's misrepresentation and disregard for procedural

The district court's dismissal with prejudice was based on Skokomish's inability to now and in the future bring a claim under any subsection of ¶ 25(a) for U&A and/or primary rights outside of the Hood Canal basin. *See* ER13, 1718. Despite Skokomish improperly filing the RFD under all seven sections of ¶ 25, the district court correctly recognized that only two could conceivably apply: ¶ 25(a)(1) and ¶ 25(a)(6).[24] The court initially proceeded under ¶ 25(a)(1) and concluded that: (1) there was no ambiguity in Judge Boldt's Final Decision #1, which limited the scope of Skokomish's U&A to the Hood Canal basin; and (2) Subproceeding 81-1 was a primary rights determination within that geographic area, and could not and did not expand Skokomish's U&A beyond the Hood Canal basin. ER11-17.

As to ¶ 25(a)(6), the lower court properly concluded that Final Decision #1 specifically determined Skokomish's U&A. ER13, 17. The court then held that no ¶ 25(a)(6) analysis was or could be warranted because that is available only where

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rules may well have warranted such a sanction, the district court made clear that its dismissal with prejudice was based on the merits. ER13, 17-18.

[24] The reasons that ¶ 25(a)(2)-(a)(5) do not apply are discussed in Section I.C.2, above.

a tribe's U&A has not been "not specifically determined by Final Decision #1".[25] *Id.*

The Court should also reject Skokomish's suggestion that if this Court finds that no existing decision recognizes Skokomish's U&A or primary rights beyond the Hood Canal basin, that Skokomish be permitted to bring a ¶ 25(a)(6) proceeding in the future. Opening Br. 44-46. First, the district court's correct determination that Skokomish's U&A was specifically determined precludes such an action. Second, even if Skokomish's U&A had *not* been specifically determined, Skokomish is judicially estopped from seeking U&A outside the Hood Canal basin. Part of the basis for Skokomish's success in Subproceeding 81-1 was its own argument that it held no U&A beyond the Hood Canal basin. Section A.1, above. Skokomish cannot gain U&A through a contrary argument thirty years after the fact.[26] Finally, the Court should not reward Skokomish with yet another

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[25] Squaxin disagrees with Appellee S'Klallams' assertion that this Court could find that the district court abused its discretion by failing to authorize a silent, not-pleaded and unsubstantiated ¶ 25(a)(6) claim.

[26] The Court should find unavailing Skokomish's assertion that other tribes have brought ¶ 25(a)(6) claims in the past. Opening Br.42, 44-45. Notably, Skokomish's case differs from the 1980-1981 subproceeding in which the Nisqually and Puyallup tribes sought new U&A under ¶ 25(a)(6), because in that proceeding no party asserted that Nisqually's and Puyallup's U&As had been specifically determined so as to preclude continuing jurisdiction under ¶ 25(a)(6). Moreover, Squaxin concurs with the S'Klallam Brief's discussion of the courts'

bite at the apple after having brought not only the instant subproceeding but two other federal cases in which it seeks primary hunting and gathering rights – i.e., the ability to exclude other tribes – throughout the area described in George Gibbs's journal (FF #353).

Accordingly, the district court correctly dismissed Skokomish's case with prejudice.

CONCLUSION

For the foregoing reasons, the Court should uphold the judgment of the district court.

Date: April 18, 2018

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change in practice regarding ¶ 25(a)(6) (pp. 27-28). As a collateral issue, Skokomish incorrectly asserts that Squaxin sought additional U&A in that proceeding. Opening Br. 44-45. The district court recently confirmed that Judge Boldt had recognized Squaxin's U&A as encompassing some of the very same waters at issue in the 1980-1981 proceeding. *United States v. Washington*, 193 F.Supp.3d 1190 (W.D. Wash. 2016).

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 32-1(a) because this brief contains 11,298 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Word Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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