HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiff, v. STATE OF WASHINGTON, et al., Defendant.	Case No.: C70-9213 Subproceeding No. 20-[PENDING] **UPPER SKAGIT INDIAN TRIBE'S MOTION FOR A TEMPORARY RESTRAINING ORDER** **ORAL ARGUMENT REQUESTED**

I. RELIEF REQUESTED

The Upper Skagit Indian Tribe (Upper Skagit), whose adjudicated U&A includes (but is not limited to) the entire Skagit River, seeks an emergency order requiring the Sauk-Suiattle Indian Tribe (Sauk) to close an unlawful fishery in the Skagit River which is not "in conformity with Final Decision #1." *U.S. v. Washington*, 384 F. Supp. 312, 419 (W.D. Wash. 1974) (what is now Paragraph 25(a)(1) of the Permanent Injunction, *see* 18 F. Supp. 3d 1172, 1213).

Judge Boldt found that Sauk had U&A in the Suiattle, Sauk, and Cascade rivers, and the tributaries of those rivers. *Id.* at 376. The Skagit River, into which those three rivers flow, is conspicuously absent from that list. Yet on September 24, 2020, the Sauk issued a regulation purporting to authorize a treaty fishery in the Skagit River beginning Sunday, September 27, 2020,

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and continuing Sundays through Wednesdays for seven weeks,[1] and Sauk members have now fished under that purported regulation.[2] The Court should close this fishery and stop the fishing via a temporary restraining order. The fishing is unlawful. It is clearly outside Sauk's adjudicated U&A, which is neither ambiguous nor can be read to mean something other than its apparent meaning. It also impinges on the legitimate exercise of treaty rights by Upper Skagit members. Barring such illegal fisheries is critical to preserving the rights of Upper Skagit and is in the public interest, which is to honor adjudicated rights. *See U.S. v. Washington*, 459 F. Supp. 1020, 1068-69 (W.D. Wash. Mar. 10, 1976) ("the court has been made aware that other treaty tribes have sought to expand their usual and accustomed fishing places not in accordance with the procedures of paragraph 25 but by filing fishing regulations merely including such additional places," which "evidences a disregard for the court's rulings and procedural guidelines meticulously set forth in Final Decision #I").[3]

II. SUMMARY

In this motion, Upper Skagit will establish the following:

1. *Likelihood of success on the merits*: Sauk is limited by this Court's decree, which allows Sauk only to "authorize its members to exercise the right" of "taking fish secured to" Sauk "within the limits . . . prescribed herein." 384 F. Supp. at 401 ¶ 15. Judge Boldt found that Sauk U&A "included Sauk River, Cascade River, Suiattle River and the following creeks which are tributary to the Suiattle River—Big Creek, Tenas Creek, Buck Creek, Lime Creek, Sulphur Creek, Downey Creek, Straight Creek, and Milk Creek. Bedal Creek, tributary to the Sauk River, was also a Sauk fishing ground." *Id.* at 376 (citing Ex. USA-29, p. 13; Ex. MS-10, p. 3, l. 1-6). None

[1] Hawkins Decl. Ex. 1.

[2] Hawkins Decl. ¶ 6.

[3] *See also U.S. v. Washington*, No. 19-1, 2019 WL 5963052 (W.D. Wash. Nov. 13, 2019) (issuing injunction prohibiting Lummi from fishing in certain areas in which it claimed Judge Boldt adjudicated it to have U&A); *U.S. v. Washington*, No. 11-2, 2015 WL 12670517, at *2 (W.D. Wash. Mar. 27, 2015) (same); 459 F. Supp. at 1068 (admonishing Stillaguamish for issuing fishing regulation for area not delineated in its U&A).

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of those rivers, tributaries, or creeks is the Skagit River. Therefore, Sauk's regulation authorizing its members to exercise the right of taking fish from the Skagit River is unlawful.

2. *Upper Skagit will suffer irreparable harm if relief is not granted*: The law of this case is that injunctive relief is called for here. The law of the case is that unlawful fishing constitutes an unlawful limitation on the exercise of the treaty right to fish for which the treaty tribes are "without an adequate remedy at law to redress or prevent." 384 F. Supp. at 404 ¶ 46. *I.e.*, Sauk fishing in the Skagit River is, *by the Court's own definition*, an unlawful limitation of Upper Skagit's treaty right for which Upper Skagit has "no adequate legal remedy" and is, therefore, "irreparable harm," for which injunctive relief is the appropriate remedy. *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) ("Irreparable harm is . . . harm for which there is no adequate legal remedy."). Upper Skagit's subsistence, culture, and spiritual health are dependent on a full exercise of its treaty right. Unlawful Sauk fishing in the Skagit River diminishes that right and will reduce the fishing opportunities of Upper Skagit members now and in the future. The unlawful encroachment of Sauk will also disrupt the entire North of Falcon process, tearing apart the intricate management agreements negotiated over countless hours to protect the most fragile of fisheries, irreparably impacting all of the fin fish species upon which the Upper Skagit rely.

3. *The balance of equities weighs heavily in Upper Skagit's favor*: In the 46 years since Judge Boldt determined Sauk's U&A, Sauk has never treaty fished in the Skagit River without invitation. Sauk will suffer no harm if the Court preserves the status quo, as its fishers can proceed as they have for the last 46 years. Given the irreparable harm, the equities tip sharply in Upper Skagit's favor.

4. *An injunction is in the public interest*: The issuance of a temporary restraining order will protect settled expectations in the fishery, ensure the orderly management of disputes, and discourage tribes opening fisheries without first establishing the right to do so.

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III. FACTS

A. Judge Boldt's Sauk U&A Findings Did Not Include the Skagit River.

Judge Boldt found Upper Skagit's fresh water U&A and Sauk's U&A in his 1974 decision, finding Upper Skagit's U&A as the Skagit River (384 F. Supp. at 379) and Sauk's U&A as the "Sauk River, Cascade River, Suiattle River and the following creeks which are tributary to the Suiattle River—Big Creek, Tenas Creek, Buck Creek, Lime Creek, Sulphur Creek, Downey Creek, Straight Creek, and Milk Creek. Bedal Creek, tributary to the Sauk River, was also a Sauk fishing ground" (*id.* at 376). From the date of that finding until November 27, 2020, Sauk is not known to have treaty fished in the Skagit River without an invitation.[4]

Judge Boldt relied on only two exhibits in making his Sauk U&A findings: USA-29 and MS-10.[5] USA-29 was Barbara Lane's report on the Sauk. Throughout, she repeatedly distinguishes Sauk (who she says are descendants of Sa-ku-me-hu) from "the residents of the main Skagit River" / "the Skagit River people":

- "The Starling report is not very informative about the Sock-amuke, or Sauk, but it is important to note that the Sauk River people are listed as a separate entity distinct from the Skagit River people." (p. 2)
- "In this tally the Sa-ku-me-hu, or Sauk Indians, are again distinguished from the residents of the main Skagit River." (p. 3)
- "Let us begin with the basic similarities in culture which the Sauk people shared with their downstream neigbors [sic] on the Skagit and Stillaguamish river systems." (p. 7)[6]

The only mention of Sauk fishing on the Skagit River is on the basis of relationships with Upper Skagit:

> Apparently the sites along the Sauk and Suiattle rivers were considered to be the fishing grounds of the Sauk-Suiattle group, although others might sometimes join them in fishing there. In similar fashion some of the Sauk people went to the

[4] Schuyler Decl. ¶ 5.

[5] Hawkins Decl. Exs. 3, 4.

[6] Hawkins Decl. Ex. 3.

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> Cascades on the Skagit River to fish and to Baker River to fish with Upper Skagit friends and relatives there. (p. 11) [7]

Dr. Lane's conclusion is on page 13, which is the page Judge Boldt cited in his finding. She wrote:

> The principal fisheries of the Sauk Indians included Sauk River, Cascade River, Suiattle River and the following creeks which are tributary to the Suiattle River -- Big Creek, Tenas Creek, Buck Creek, Lime Creek, Sulphur Creek, Downey Creek, Straight Creek, and Milk Creek. Bedal Creek, tributary to the Sauk River was also a Sauk fishing ground. (p. 13)[8]

MS-10, the only other evidence cited by Judge Boldt in making his U&A finding about Sauk, was James Enick's September 1973 written testimony. On page 3, lines 1-6 (the portion cited by Judge Boldt), he testified,

> Q: What were the areas where your tribe traditionally fished?
>
> A: Wherever the people were, but mostly on the Sauk River, the whole river, and all of the streams coming into the river, that's where the Indians fished.
>
> Q: Where has the Sauk-Suiattle Tribe lived?
>
> A: Up and down the Skagit River and the Sauk River mostly.[9]

B. Sauk Issued a Fishery Purporting to Authorize Treaty Fishing on the Skagit River, and Sauk Fished Pursuant to that Regulation.

On September 24, 2020, Sauk issued a regulation purporting to authorize treaty fishing in the Skagit River beginning Sunday, September 27, and continuing Sundays through Wednesdays for seven weeks.[10] Sauk fished in accordance with that regulation.[11] Below, the larger map shows that the Suiattle River (4) flows to the Sauk River (3), and the Sauk (3) and Cascade (2) rivers flow to the Skagit River (1). The Skagit River area for which Sauk has issued a regulation is circled in the larger map and approximately between the two blue points (5) and (6) in the smaller map.[12]

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[7] Hawkins Decl. Ex. 3.

[8] Hawkins Decl. Ex. 3.

[9] Hawkins Decl. Ex. 4, p. 3.

[10] Hawkins Decl. Ex. 1.

[11] Hawkins Decl. ¶ 6.

[12] Hawkins Decl. ¶ 7.

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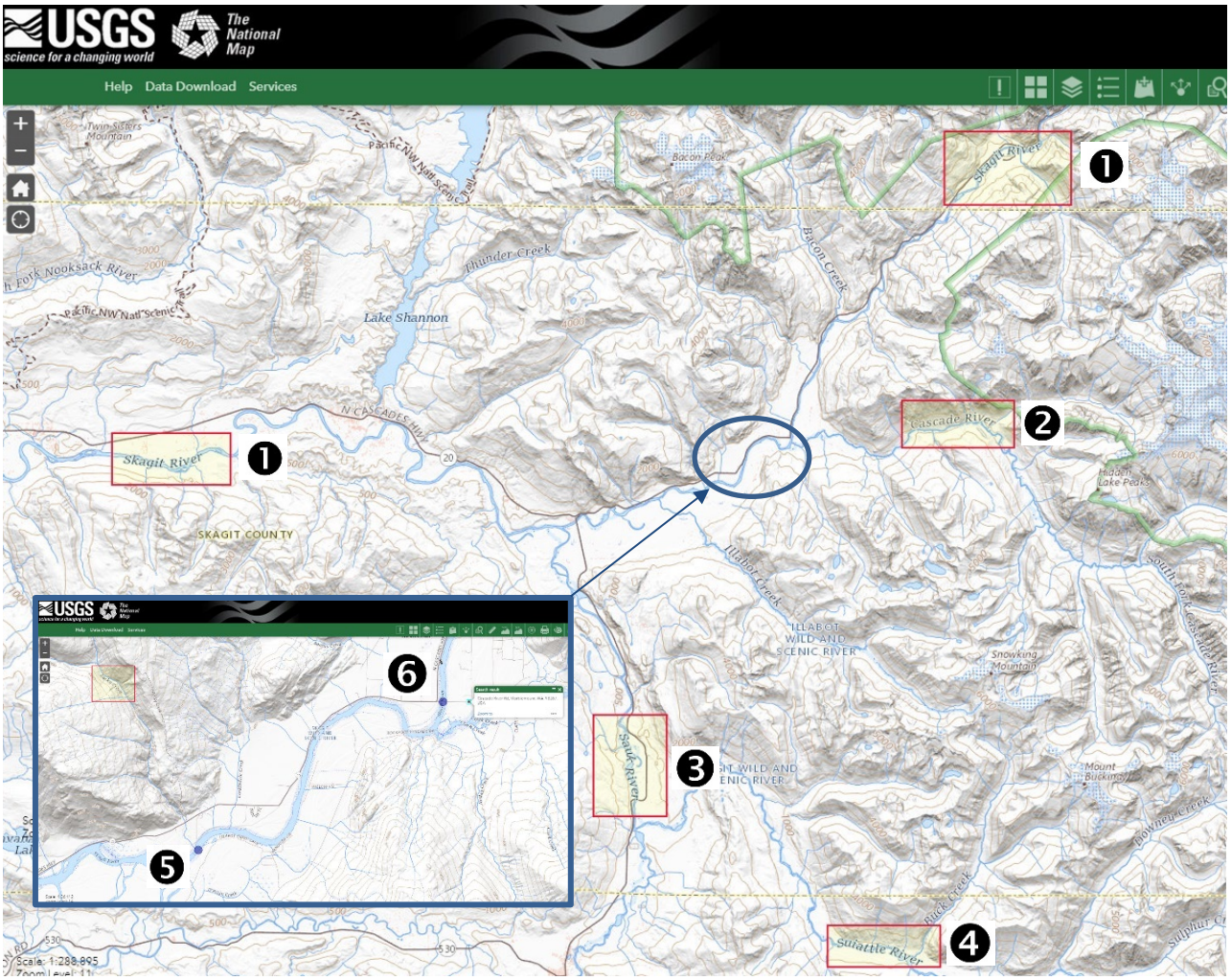

C. Sauk's "Justification" for Its Fishery Is Fatally Flawed.

Sauk "justifi[ed]" its regulation in the regulation itself, stating it was:

> In accordance with U.S. versus Washington, Finding of Fact No. 2, finding Exhibit USA-20 which states that "the principal fisheries of the Sakhumehu were the headwaters of the Skagit River including Baker River, Sauk River and the smaller creeks which belonged to the water system" as a fact "established by a preponderance of the evidence" (312 F. Supp. at 350).[13]

The citation is miscited, but appears to be to the findings of fact incorporated into Final Decision #1, in which Judge Boldt found:

> The anthropological reports and testimony of both Dr. Barbara Lane and Dr. Carroll Riley have been thoroughly studied and considered by the court. In so doing, the court has noted the nature, extent and duration of field work in the case

[13] Hawkins Decl. Ex. 1.

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> area and academic research. During trial constant observation was made of the attitude and demeanor of both experts while on the stand as witnesses, and the substance of their testimony has been carefully evaluated. Allowance for the criticism by defendants that some of Dr. Lane's conclusions are "over formulated" has been made in evaluating her testimony in every instance where the criticism might be applicable. Based upon these and other factors, the court finds that in specific facts, the reports of Dr. Barbara Lane, Exhibits USA-20 to 30 and USA-53, have been exceptionally well researched and reported and are established by a preponderance of the evidence. They are found to be authoritative and reliable summaries of relevant aspects of Indian life in the case area at and prior to the time of the treaties, including the treaty councils, Indian groups covered by the treaties, the purposes of the treaties and the Indians' understanding of treaty provisions. In these particulars, nothing in Dr. Lane's report and testimony was controverted by any credible evidence in the case. Dr. Lane's opinions, inferences and conclusions based upon the information stated in detail and well documented in her reports, appeared to the court to be well taken, sound and reasonable. In summary, the court finds that where their testimony differs in any significant particular, the testimony of Dr. Lane is more credible and satisfactory than that of Dr. Riley and is accepted as such except as otherwise specified.

384 F. Supp. at 350.

From this, Sauk looks to USA-20, which was Dr. Lane's summary that preceded her analysis of each individual tribe.[14] In it, she stated, "The principal fisheries of the Sakhumehu were the headwaters of Skagit River including Baker River, Sauk River and the small creeks which belonged to that water system." But she clarified that statement in her report specific to Sauk, stating that the Baker and Skagit rivers were places to which Sauk travelled to fish with "Upper Skagit friends and relatives."[15] Her conclusion in the report specific to Sauk excluded the Baker and the Skagit rivers.[16] Judge Boldt adopted that conclusion as his finding of Sauk's U&A, taking into consideration both reports, but, importantly, specifically relying only on USA-29 (and not USA-20) for his findings of Sauk's U&A and with clarity demonstrating his intent to limit Sauk's

[14] Ex. USA-20, 7th page of PDF ("*Summary of Anthropological Report in U.S. v. Washington* . . . Documentation on specific tribes is not provided here, but is available in the full report of which this is a summary.") (filed at Hawkins Decl. ¶ 5).

[15] Hawkins Decl. Ex. 5, p. 11.

[16] Hawkins Decl. Ex. 5, p. 13.

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U&A to Dr. Lane's more specific conclusions.

Judge Boldt's findings not only tracked those of Dr. Lane, his findings and conclusions also largely tracked those submitted by the federal government, including those relating to Sauk,[17] with the exception that Judge Boldt added the citation to Mr. Enick's written testimony (but not Mr. Enick's more definitive oral testimony at F-42,[18] which Judge Boldt added as a citation to findings concerning "Modern Indians" and "modern times," 384 F. Supp. at 358 ¶ 33, 376 ¶ 132, but not as to Sauk's U&A). Notably, Sauk did not agree with some of the federal government's proposed conclusions, and filed a competing set for the Court's consideration, but took no issue with the proposed U&A findings as to Sauk.[19] The Court adopted Lane's specific conclusions set forth in USA-29 not USA-20 (which were copied in the federal government's recommendations) and limited Sauk's U&A to waters upriver of the Skagit River.

D. Careful Management of the Skagit River Fishery Requires Preplanning, Not Unilateral Openings.

Pursuant to the North of Falcon process,[20] Upper Skagit manages the treaty fishery in the Skagit River with the State of Washington and the Swinomish Tribal Community, which also has adjudicated U&A in the Skagit River.[21] Through pre-season and in-season coordination, the co-managers take steps to ensure the protection of the resource.[22] For instance, Upper Skagit has never fished in the Skagit River area now opened by Sauk because that area contains chinook spawning grounds.[23] The planning is methodical and careful.[24] Fishing pursuant to Sauk's

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[17] *See* No. 70-9213, Dkt. 386, pp. 44-45 (filed at Hawkins Decl. Ex. 6).

[18] Hawkins Decl. Ex. 8, p. 11.

[19] *See* No. 70-9213, Dkt. 392 (filed at Hawkins Decl. Ex. 7).

[20] *See, e.g.*, Northwest Treaty Tribes, *Treaty Tribes and State Reach Agreement on 2020 Fisheries* (Apr. 10, 2020), https://nwtreatytribes.org/treaty-tribes-and-state-reach-agreement-on-2020-fisheries/.

[21] Schuyler Decl. ¶ 4.

[22] Schuyler Decl. ¶ 4.

[23] Schuyler Decl. ¶ 4.

[24] Schuyler Decl. ¶ 4.

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unlawful regulation was not part of any plan.[25]

IV. ARGUMENT

A. Upper Skagit Complied with the Filing Requirements.

The Court may hear this emergency request pursuant to Paragraph 25(b)(7) of the Permanent Injunction as modified in 1993. *See* 18 F. Supp. 3d at 1213. Upper Skagit has complied with the requirements of Paragraph 25(b)(7) by: (a) initiating a subproceeding to determine the issues raised by this motion (requirement A); (b) filing and serving this motion on all parties (requirement B); and (c) filing and serving a declaration of counsel stating that Upper Skagit (i) has made a *bona fide* effort to resolve the emergency issue with the affected parties, (ii) has failed to resolve that dispute, (iii) has provided actual notice of this motion to Sauk, and (iv) believes the matter constitutes an emergency (requirement C, *see* declaration of David Hawkins).

B. Standards for Issuing a Temporary Restraining Order

The factors the Court must balance when considering a motion for a TRO are "substantially identical" to those for a preliminary injunction. *Stuhlbarg Int'l. Sales Co. v. John D. Brush & Co.,* 240 F.3d 832, 839 n.7 (9th Cir. 2001). "A preliminary injunction, of course, is not a preliminary adjudication on the merits but rather a device for preserving the status quo and preventing the irreparable loss *of rights* before judgment." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984) (emphasis added). A party seeking a preliminary injunction must show: (1) a likelihood of success on the merits; (2) irreparable harm if relief is not granted; (3) the balance of equities tips in the party's favor; and (4) an injunction is in the public interest. *Winter v. Nat'l Res. Def. Council*, 555 U.S. 7, 20 (2008). "[A] stronger showing of one element may offset a weaker showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

The four factors strongly weigh in favor of issuing a TRO to protect Upper Skagit from the

[25] Schuyler Decl. ¶ 4.

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harm of Sauk's conduct while the Court determines if Sauk's conduct is consistent with this Court's decree.

C. Upper Skagit Is Likely to Prevail on the Merits.

Upper Skagit easily meets the requirement that it show that there are "serious questions going to the merits" of its claim that Sauk's U&A does not include the Skagit River. Subp. No. 11-2, 2015 WL 12670517, at *1 (*quoting Cottrell*, 632 F.3d at 1135). When there is a dispute about whether an area is within a tribe's adjudicated U&A, the court must determine if the finding "was ambiguous, or that Judge Boldt intended something other than its apparent meaning." *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1023 (9th Cir. 2010).

Judge Boldt's findings about Sauk's U&A are in paragraph 131 of Final Decision #1:

> The usual and accustomed fishing places of the Sauk River Indians at the time of the treaty included Sauk River, Cascade River, Suiattle River and the following creeks which are tributary to the Suiattle River—Big Creek, Tenas Creek, Buck Creek, Lime Creek, Sulphur Creek, Downey Creek, Straight Creek, and Milk Creek. Bedal Creek, tributary to the Sauk River, was also a Sauk fishing ground. (Ex. USA-29, p. 13; Ex. MS-10, p. 3, l. 1-6)

384 F. Supp. at 376.

Not "ambiguous." The finding regarding Sauk's U&A is not ambiguous. It does not include the Skagit River. Instead, it lists only rivers which flow into the Skagit River.

No evidence "Judge Boldt intended something other than its apparent meaning." Nor is there any evidence that Judge Boldt meant to include the Skagit River despite excluding it. *See Upper Skagit*, 590 F.3d at 1024 (even when using a geographic term which unambiguously includes an area, Judge Boldt nonetheless might have intended it to have a more restrictive meaning). Judge Boldt identified the Skagit River when he intended to include it in a tribe's U&A. 384 F. Supp. at 379 (Upper Skagit's U&A "included numerous areas along the Skagit River"). His exclusion of the Skagit River *in findings made the same day as to another tribe*, *id.*, is compelling evidence that he intended to exclude the Skagit River as to Sauk. *See United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000) ("Had he intended to include the Strait of Juan de

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Fuca in the Lummi's usual and accustomed grounds and stations, he would have used that specific term, as he did elsewhere in *Decision I*."); *Upper Skagit Indian Tribe*, 590 F.3d at 1025 ("From this it is reasonable to infer that when he intended to include an area, it was specifically named in the U&A. . . . That Judge Boldt neglected to include Skagit Bay and Saratoga Passage in the Suquamish's U&A supports our conclusion that he did not intend for them to be included.").

The law of the case is that Judge Boldt's intent as to the areas he cited should be determined by the evidence he cited, which is finite and complete. *U.S. v. Washington*, 18 F. Supp. 3d 1123, 1162 (W.D. Wash. Feb. 15, 1990) (quoting 384 F. Supp. at 347-48). For Sauk's U&A finding, Judge Boldt cited only USA-29 (Dr. Lane's Sauk report) and MS-10 (tribal member Mr. Enick's 1973 written testimony about his knowledge of fishing locations).[26] He did not cite USA-20 (Dr. Lane's summary concerning all tribes)[27] on which Sauk now relies, nor did he cite F-42,[28] Mr. Enick's more definitive oral testimony.

But, even if he had cited that evidence, the fact that Judge Boldt *considered* Dr. Lane's statement (or Mr. Enick's oral testimony) that Sauk fished in the Skagit River, and yet did not *include* the Skagit River in his U&A finding, is compelling (if not conclusive) evidence of his intent to *exclude* the Skagit River from Sauk's U&A. Because Judge Boldt considered evidence of Sauk fishing in the Skagit River (including in USA-20, MS-10, and F-42) and "specifically determined" that, *despite that evidence*, Sauk did not have U&A in the Skagit River, that is "the end of the matter." *Muckleshoot Indian Tribe v. Tulalip Tribes*, 944 F.3d 1179, 1184 (9th Cir. 2019).

Sauk is limited by this Court's decree: it may "authorize its members to exercise the right" of "taking fish secured to" Sauk only "within the limits . . . prescribed herein." 384 F. Supp. at 401 ¶ 15; *see also id.* at 403 ¶ 36 (tribes have "jurisdiction . . . to enact" treaty fishing "regulations" but

[26] Hawkins Decl. Exs. 3, 4.

[27] Hawkins Decl. Ex. 5.

[28] Hawkins Decl. Ex. 8, p. 11.

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"cannot enlarge the right beyond that secured in the treaty"). Judge Boldt explicitly made those findings and conclusions part of Final Decision #1. *Id.* at 329 ("All fact findings and legal rulings stated herein and the detailed Findings of Fact, Conclusions of Law and Decree signed and entered by the court are hereby made a part of this decision."). Because Sauk issued a regulation purportedly authorizing a treaty fishery where Sauk does not have adjudicated U&A, Upper Skagit will prevail on its claim that Sauk has violated Final Decision #1 and will be entitled to a permanent injunction enjoining that action.

D. Upper Skagit Will Suffer Irreparable Harm if Sauk Fishes Pursuant to Its Regulation.

"Irreparable harm is . . . harm for which there is no adequate legal remedy." *Arizona Dream Act Coalition*, 757 F.3d at 1068. As explained below, Judge Boldt found and concluded that fishing by persons who do not have a treaty right to fish constitutes a limitation on the treaty right and that such fishing, if unlawful, constitutes harm for which there is no adequate legal remedy (*i.e.*, is irreparable harm).

The bands that formed what is now known as the Upper Skagit Indian Tribe reserved to themselves the right of taking fish from the river of their name. *See* 384 F. Supp. at 331, 379, 407. Upper Skagit's treaty fishery is[29] and always has been[30] an essential element of the survival and continuity of the tribe's culture, sacred to its people, and an essential part of who they are. These statements are just as true today as when Judge Boldt found them so.[31] Upper Skagit's treaty right was a reservation as against any other, including other Indians who did not customarily fish from time to time in the Skagit River. *See id.* at 331, 401 ¶ 20. Judge Boldt recognized that fishing by persons who did not have a treaty right to fish there was a "limit[ation]" of "[t]he

[29] Schuyler Decl. ¶ 3.

[30] The reserved right of taking fish "constituted both the means of economic livelihood and the foundation of native culture" which reservation "protected the Indians' right to maintain essential elements of their way of life" and was "a part of larger rights possessed by the treating Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to their existence than the atmosphere they breathed." 384 F. Supp. at 406-07.

[31] *See supra* notes 24 & 25.

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exercise of a treaty tribe's right to take . . . fish." *Id.* at 402 ¶ 25. Thus, Sauk fishing in the Skagit River is, *by the Court's own definition*, a limitation of Upper Skagit's treaty right. *Id.* Not only does the incursion itself (*i.e.*, the unlawful fishing itself, without even landing one fish) constitute a limitation on the right, any fish caught by Sauk will count toward the treaty share, meaning the fishery will be shortened, reducing not only Upper Skagit's take, but also its time on the water.

Judge Boldt concluded that tribal members lack "an adequate remedy at law to redress or prevent unlawful" limitations on "their exercise of fishing rights reserved and secured" by treaty because "the treaty rights that are asserted are unique and the damages which have been or will be sustained are not susceptible of definite monetary determination." 384 F. Supp. at 404 ¶ 46.[32] In other words, it is the law of the case that Sauk's illegal fishery in the Skagit River has and is causing Upper Skagit "irreparable harm."

Sauk's illegal fishery is inflicting irreparable harm in other ways. Upper Skagit, Swinomish, and the State co-manage the fishery in the Skagit River.[33] Prior to the fall season, the two tribes devoted many hours to negotiating with each other and the State to plan for the season, with the goal of protecting the resource.[34] Because Sauk has no U&A in the Skagit River, neither its expected effort (meaning the expected number of boats multiplied by the number of fishery hours) nor where it planned to fish were taken into account.[35] Notably, Upper Skagit has never fished in the Skagit River area now opened by Sauk because it is the location of chinook spawning

[32] But, even if it were purely economic, compensatory relief may not be available in these (or any other) proceedings. *See Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 471 (9th Cir. 1984) (financial injury is irreparable when it will not "be available in the course of litigation"); *United States v. Washington*, 909 F. Supp. 787, 793 (W.D. Wash. 1995) (tribal sovereign immunity prevents special master from being empowered to award damages against tribes for shellfish plan violations); *see also Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014).

[33] Schuyler Decl. ¶ 4.

[34] Schuyler Decl. ¶ 4.

[35] Schuyler Decl. ¶ 4.

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grounds.[36] The current unlawful fishing is undermining and will continue to undermine a careful planning effort that was based on adherence to law.[37]

Sauk's blatant disregard of this Court's order comes at the expense of Upper Skagit, decreases the fishing opportunity for those who have depended upon it for generations, and severely disrupts the plan that responsible tribes and the State have created. The Sauk incursion into the Skagit River has and will "result in reduced catch for [Upper Skagit] and the displacement of [Upper Skagit's] fishers, creating harm that is cultural as well as economic and therefore not readily compensable." Subp. No. 11-2, 2015 WL 12670517, at *1 (finding irreparable harm to S'Klallam from Sauk fishing); *see also* Supb. No. 19-1, 2019 WL 5963052, at *6 (finding irreparable harm to the Region 2 East Tribes from Lummi fishing where "the co-management and regulation of the treaty tribes' harvest quota is interrelated, the outcome of the fishing is variable, and the fishery is deeply ingrained in the cultural identities of the Region 2 East Tribes"); Subp. No. 91-1, 2017 WL 1064460, at *2 (W.D. Wash. Mar. 21, 2017) ("irreparable harm if the Inside Tribes are allowed to continue fishing"). Upper Skagit must be protected from this irreparable harm, just as the Region 2 East Tribes were as to Lummi in 2019, S'Klallam was as to Sauk in 2015, and Quileute was as to the Inside Tribes in 2017. *Id.*

E. The Balancing of Equities Favors the Upper Skagit.

Preserving the status quo pending resolution of Upper Skagit's request for permanent injunctive relief will leave Sauk in the position it has been in for the past 46 years. By contrast, allowing Sauk to fish in the Skagit River pending a ruling on whether that fishing is unlawful would be an extraordinarily inequitable turn of events. The Sauk incursion would immediately and permanently impact the Upper Skagit's cultural and treaty fishing rights in its established U&A and disrupt a carefully and laboriously crafted management plan predicated on adherence to law.

[36] Schuyler Decl. ¶ 4.

[37] Schuyler Decl. ¶ 4.

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If unchecked, Sauk's action could also set a dangerous precedent that would threaten fisheries management throughout the region: that a tribe (or other interest group) can resort to extra-judicial actions to seize fishing rights and resources and then litigate those rights after the fact. The Court should not implicitly endorse such an approach, particularly in this case, where the balance of equities tips heavily toward the Upper Skagit because of its demonstrable likelihood to prevail in this case.

F. The TRO Serves the Public Interest.

Sauk's intrusion into the Skagit River threatens the management system of an important fishery that sustains treaty tribal fishers and non-Indian commercial and recreational fishers alike. The unauthorized, unilateral actions of Sauk will disturb the delicate balance of resource allocation between the tribes and the State. That balance must be left intact while the Court determines whether Sauk is in violation of Final Decision #1.

Permitting Sauk to fish in the Skagit River will also embolden other tribes (or other interest groups) to claim dominion over new fisheries by simply beginning to fish in the area, forcing those with recognized fishing rights to sue to protect their rights while suffering invasion of such rights pending resolution. Within two years of his Final Decision #1, Judge Boldt chastised the tribes for pursuing an identical course of action, even threatening the imposition of sanctions. 459 F. Supp. at 1068-69. Citing this admonishment, the Court recently held,

> [I]t is in the public interest to ensure the orderly management of disputes within this long-running case and to discourage Tribes from opening fisheries without establishing a right to do so in accordance with the procedures erected under Paragraph 25 of the permanent injunction in Final Decision #1.

Subp. No. 19-1, 2019 WL 5963052, at *6 (quoting Subp. No. 11-2, 2015 WL 12670517, at *2)).

G. No Bond Is Necessary.

Rule 65(c) allows, but does not require, the Court to require a bond upon issuance of a TRO. *See Johnson v. Coutureir*, 572 F.3d 1067, 1086 (9th Cir. 2009) (rule "invests the district court with 'discretion as to the amount of security required, *if any*'" (citation omitted)). Recently,

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the Court has gone from requiring only a nominal bond of $250 in Subp. No. 11-2, 2015 WL 12670517, at *2 (noting that "the need to post a substantial bond would effectively discourage Tribes from seeking access to the very adjudicative mechanisms that this Court insists they use to secure their treaty rights"), to requiring no bond in Subp. No. 19-1, 2019 WL 5963052.

The Court should not require a bond.

V. CONCLUSION

The Court should (1) issue a temporary order requiring Sauk to close the Skagit River fishery, enjoining the Sauk from opening or participating in any fishery in the Skagit River until the Court has ruled on Upper Skagit's motion for a preliminary injunction, and requiring Sauk to take all actions necessary to ensure that its members comply with that order; (2) construe this motion and briefs filed in support of and opposition as a motion for preliminary injunction and briefs in response such that no additional written briefing is required or allowed absent new circumstances, and then only to explain those new circumstances and their impact on the legal determination that the Court must make; and (3) set a date for the preliminary injunction hearing.

DATED this 29th day of September, 2020.

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