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Hon. R. Martinez, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, et

al.,

Plaintiff,

v.

STATE OF WASHINGTON, et al.,

Defendants.

Civil Action No. C-70-9213

**MOTION TO DISMISS
FOR LACK OF JURISDICTION**

Subproceeding 2:20-sp-00001

Note for Motions Docket:
October 30, 2020

MOTION

Intervenor-Plaintiff Sauk-Suiattle Indian Tribe moves the Court to dismiss further proceedings in Subproceeding 2:20-sp-00001 for lack of jurisdiction. Specifically, the court lack's jurisdiction to entertain the motion of the Upper Skagit Tribe for summary judgment (docket entry no. 24, October 8, 2020).

SUMMARY OF ARGUMENT

The plaintiff failed to properly invoke the continuing jurisdiction of the court.

STANDARD OF REVIEW

It is the burden of the filing party to identify the basis of jurisdiction, and failure to properly do so is grounds for dismissal.

ARGUMENT

In his 1974 landmark ruling, Judge Boldt set forth this Court's continuing jurisdiction over the treaty fishing rights litigation and specified the process for invoking that jurisdiction in Paragraph 25 of the Court's permanent injunction. United States v. Washington, 384 F. Supp. 312, 419 (W.D. Wash. 1974). As part of that process, Paragraph 25(b)(1) requires parties with disputes to first attempt to resolve them through the "meet and confer" process. If negotiations fail, "any affected party may demand mediation within 12 days after the conclusion of the unsuccessful negotiations." *Id.* at 1214. Once the time for mediation has been exhausted, a party may proceed to file a request for determination. *Id.* The procedures set forth under Paragraph 25 are mandatory for invoking the continuing jurisdiction of the Court, and "may not be excused or modified." United States v. Washington, 20 F. Supp. 3d 899, 962 (W.D. Wash. 2008). Where

1 an RFD fails to meet these procedural requirements, the RFD and the
2 subproceeding must be dismissed. Id.

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4 In this case, the Upper Skagit Tribe invoked the Court's continuing
5 jurisdiction based upon an "emergency matter" pursuant to Paragraph 25 (b) (7) of
6 the Court's Permanent Injunction, as amended, by United States v. Washington, 18
7 F. Supp. 3d 1172, 1213 (W.D. Wash. 1993), for the purpose of seeking immediate
8 emergency temporary relief enjoining intervenor-plaintiff Sauk-Suiattle Indian
9 Tribe from conducting a fishery near the confluence of the Cascade and Skagit
10 Rivers (subproceeding 20-01, docket no. 2). The Court denied the emergency
11 relief sought, concluding that based upon the record before it the movant failed to
12 demonstrate imminent or immediate irreparable harm (C70-9213, docket entry no.1
13 22284). Consequently, the emergency matter placed before the court was
14 resolved.

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16 Together with its motion for leave to open a new subproceeding pursuant to
17 Paragraph 25 (b) (7) to address the emergency matter that had been filed on
18 September 29, 2020, Upper Skagit submitted a "proposed" Request for
19 Determination seeking to invoke the court's continuing jurisdiction under
20 Paragraph 25 (a) (1) of the Court's Permanent Injunction to determine whether the
21 Sauk-Suiattle Tribe's activities were in conformity with Final Decision 1. Nine

1 days later (October 8, 2020), Upper Skagit filed a Motion for Summary Judgment
2 seeking a ruling that Sauk-Suiattle was not acting in conformity with Final
3 Decision 1. No Order has been entered accepting filing of the proposed Request
4 for Determination.
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7 Judge Boldt's Order, as subsequently amended in 1993, sets out seven
8 separate and distinct categories of disputes that any party can raise before the
9 Court. United States v. Washington, 18 F.Supp.3d at 1213. One subsection of
10 which (§ 25 [a] [1]) provides that the parties or any of them may invoke the
11 continuing jurisdiction of this court in order to determine whether or not the
12 actions intended or effected by any party are in conformity with Final Decision # I.
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14
15 Another subsection, Paragraph 25 (b) (7), was intended to allow the court to
16 timely address emergency matters which should be addressed immediately, as
17 opposed to the more lengthy and thoughtful process for addressing other, more
18 long term, matters identified in Paragraph 25. A party should not be allowed to
19 bootstrap a matter that is more properly a basis for invoking the court's continuing
20 jurisdiction under Paragraph 25 (a) (1) by filing subsequent, non-emergency,
21 motions dispositive of issues Judge Boldt contemplated should be fully addressed
22 by trial or mediation.
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1 The court was previously faced with this jurisdictional defect in
2 subproceeding no. 11-2:
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4 The declaration of counsel filed here does not meet the required
5 standard for establishing the existence of an emergency. Declaration
6 of Bill Tobin, Dkt. # 2. Nor does the motion for a temporary
7 restraining order establish that irreparable harm would occur from the
8 proposed action of the respondent tribe, namely the proposed opening
9 of a one-day fishery in an area over which Nisqually asserts it has
10 primary rights. The procedures set forth in Paragraph 25 are
11 mandatory for invoking the continuing jurisdiction of this Court, and
12 may not be excused or modified. Neither the original nor the amended
13 Request for Determination meets these procedural requirements, so
14 the Request and the subproceeding must be dismissed.

15 United States v. Washington, 20 F. Supp. 3d 899, 962 (W.D. Wash. 2008). In this
16 emergency subproceeding (20-1), this Court reached the same conclusion:

17 [T]he Court finds Upper Skagit's arguments too general and
18 unsubstantiated to find that irreparable harm is imminent in this case.

19 Docket No. 22284, p. 6, lines 6-8. Emergency relief having been denied, Upper
20 Skagit should not be allowed to proceed, based upon ¶ 25 (b) (7) to proceed with
21 determination of a matter that plainly falls within ¶ 25 (a) (1) and requires that,
22 prior to filing a request for determination under that authority, all parties receive
23 not less than 12 days to request mediation. The Plaintiff in 2:20-sp-00001 failed
24 to wait the required 12 days after the conclusion of negotiations for a mediation
25 demand before filing its motion for summary judgment. Even assuming that the
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1 court would allow such a loose reading of Judge Boldt's injunction as to allow
 2 Upper Skagit's motion for temporary restraining order to constitute a Request for
 3 Determination, the failure to allow time for a mediation demand by any affected
 4 party requires the striking or dismissal of Upper Skagit's motion for summary
 5 judgment or, at the very least, abstention from entertaining it.
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8 The emergency matter raised by the motion for leave to initiate a
 9 subproceeding to address the emergency was based upon the irreparable harm
 10 alleged to result from the activities of Sauk-Suiattle in allowing its members to
 11 fish at a specific location near the confluence of the Cascade and Skagit Rivers 17
 12 miles upstream from the nearest Upper Skagit area opened to fishing by its
 13 members. The Upper Skagit's motion for summary judgment, however, seeks a
 14 far broader ruling from the court that:
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18 [T]he SaukSuiattle Indian Tribe (Sauk) has no adjudicated U&A in
 19 the Skagit River and violated Final Decision #1 by issuing a
 20 regulation purporting to authorize a treaty fishery where Sauk does
 21 not have adjudicated U&A. I
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23 Such an assertion is, undeniably, not an emergency matter. As such, the
 24 procedures set forth in ¶¶ 25 (b) (1) through (6) must be complied with before the
 25 matter for which the court's continuing jurisdiction may be invoked to resolve an
 26 issue arising under Paragraph 25 (a) (1).
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28 CONCLUSION

1 The procedures set forth under Paragraph 25 are mandatory for invoking the
2 continuing jurisdiction of the Court, and “may not be excused or modified.”
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4 United States v. Washington, 20 F. Supp. 3d 899, 962 (W.D. Wash. 2008). Where
5 an RFD fails to meet these procedural requirements, the RFD and the
6 subproceeding must be dismissed. Id. Upper Skagit’s motion for summary
7 judgment seeks to resolve issues arising under Paragraph 25 (a) (1) of the
8 Permanent Injunction, as such the process for invoking the court’s continuing
9 jurisdiction for that purpose was not complied with.
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13 For the foregoing reasons, the Court lacks jurisdiction to entertain Upper
14 Skagit’s motion for summary judgment.
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16 DATED this 9th day of October, 2020.

17 SAUK-SUIATTLE INDIAN TRIBE

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19 Respectfully submitted,
20 By:

21 S/Jack W. Fiander

22 Jack W. Fiander, WSBA # 13116
23

24 Certificate of Service

25 The foregoing was filed with the Clerk of Court on this date with copies served
26 upon all counsel using the CM/ECF system.
27

28 S/Jack W. Fiander