

THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA et al.,
Petitioners,

vs.

STATE OF WASHINGTON et al.,
Respondent.

Case No. C70-9213

Subproceeding No. 20-01

SWINOMISH RESPONSE TO
UPPER SKAGIT MOTION
FOR SUMMARY JUDGMENT

Noting Date: October 30, 2020

INTRODUCTION

The Swinomish Indian Tribal Community (Swinomish), an Interested Party in this subproceeding, submits this Response to the Upper Skagit Indian Tribe (Upper Skagit) Motion for Summary Judgment. Dkt. 24. This motion, along with the Sauk-Suiattle Indian Tribe (Sauk) Motion to Dismiss for Lack of Jurisdiction, Dkt. 27, will determine whether this case proceeds in haste to its conclusion or whether the parties will engage in meaningful negotiations that could obviate the need for further litigation. Swinomish has usual and accustomed fishing places (U&A) and exercises treaty fishing rights a portion of the Skagit River system, as do Upper

1 Skagit and Sauk.¹ Swinomish and Upper Skagit jointly convened the meet and confer that
 2 preceded the filing of this subproceeding. Declaration of James Jannetta, Ex. A. However, after
 3 the meet and confer was closed, the tribes' paths split. Upper Skagit chose litigation, filing for a
 4 temporary restraining order, Dkt. 2, and, after denial of that effort moving for summary judgment
 5 barely a week after this subproceeding was filed. Dkt. 24. On the same day Upper Skagit's
 6 motion was filed, Swinomish served Upper Skagit and Sauk with a Notice of Demand for
 7 Mediation, Jannetta Dec. Ex. B, in accordance with Paragraph 25(b)(2) of the Permanent
 8 Injunction issued in the Boldt Decision, as amended in 1993. *U.S. v. Washington*, 18 F. Supp. 2d
 9 1172, 121 (W.D. Wash. 1993) (Paragraph 25).

10 Upper Skagit's Motion for Summary Judgment, filed at the outset of this subproceeding,
 11 is premature and should be dismissed without prejudice so that negotiations can proceed in
 12 accordance with Paragraph 25.
 13

14 BACKGROUND AND PROCEDURAL HISTORY

15 This case is part of a broader controversy concerning Sauk fishing in the Skagit River
 16 watershed that has simmered for several years and spilled over into the North of Falcon process.
 17 Sauk is an upriver tribe with U&A in three tributaries of the Skagit River - the Sauk River,
 18 Suiattle River, Cascade River, and their respective tributaries. *U.S. v. Washington*, 384 F. Supp.
 19 312, 376 (W.D. Wash. 1974). Last year Sauk sought to invalidate the settlement agreement
 20 between Swinomish and Upper Skagit concerning the Skagit River fishery and obtain an
 21 allocation of the Skagit River fishery. *U.S. v. Washington*, 70-CV 9213, Dkt. 21935 (May 3,
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 23
 24

25 ¹ See Swinomish U&A finding, *U.S. v. Washington*, 459 F. Supp. 1020, 1049 (W.D. Wash. 1975); Upper Skagit
 U&A finding, *U.S. v. Washington*, 384 F. Supp. 312, 379 (W.D. Wash. 1974); Sauk U&A finding, *id.* at 376.

2019). This Court denied Sauk any relief. *U.S. v. Washington*, Subp. 93-01, Dkt. 348 (July 22, 2019).

This year's controversy was presaged in the North of Falcon process and came to a head when Sauk issued a regulation purporting to open a portion of the mainstem of the Skagit River to coho salmon fishing by its members. Jannetta Dec. Ex. A, pp. 3-4. The regulation was issued on September 24 for a fishery opening on September 27. *Id.* The next day, September 25, Swinomish and Upper Skagit jointly convened a meet and confer under Par. 25(b)(1), claiming that Sauk had no U&A in the Skagit mainstem, and therefore any fishing there would violate the Boldt Decree. Jannetta Dec. Ex. A, pp. 1-2. The meet and confer was held (via Zoom) on September 29. The parties did not reach agreement and the meet and confer was closed at the end of the meeting. Jannetta Dec. ¶ 3.

Thereafter, Swinomish and Upper Skagit diverged in approach. Just hours after the meet and confer was closed, Upper Skagit filed a Motion for a Temporary Restraining Order against Sauk fishing in the Skagit mainstem. Dkt. 2. The Court granted leave to open this subproceeding on September 30. Dkt. 8. Thereafter, on the same day, Upper Skagit filed its Request for Determination claiming that Sauk had no U&A in the Skagit mainstem, Dkt. 9. Swinomish entered an appearance in the subproceeding that same day as well, Dkt. 11, but took no part in the TRO proceedings.

The Court denied the motion for a TRO on October 5. Dkt. 20. The Court found that though Upper Skagit was likely to succeed on the merits, it had not established the requisite irreparable harm. *Id.* On October 7, Upper Skagit joined with a few interested party tribes in a motion for reconsideration. Dkt. 22. That motion is pending as of this writing.

Swinomish did not join in the TRO motion or the motion for reconsideration. Though we agree with Upper Skagit on the merits of its claim, we perceive a broader fishery issue with Sauk

1 that will not be solved by this litigation and that is best addressed by negotiation through
2 mediation. Accordingly, on October 8 Swinomish served upon Sauk and Upper Skagit by email
3 a Notice of Demand for Mediation issued under the aegis of Paragraph 25(b)(2). Jannetta Dec. ¶
4 4, Ex. B.

5 That same day, October 8, Upper Skagit filed its Motion for Summary Judgment. Dkt.
6 24. The motion was filed barely a week after the subproceeding was opened and over seven
7 weeks before Sauk's response to the RFD was due. *See* Paragraph 25(b)(4) (party has 60 days in
8 which to respond to and RFD).

9 The next day, October 9, Sauk countered with two pleadings. First, Sauk filed a Request
10 for Referral to Mediation that consented to mediation. Dkt. 26. While not styled as such, this is
11 apparently in response to the Swinomish demand for mediation. In addition, Sauk filed a Motion
12 to Dismiss for Lack of Jurisdiction, predicated primarily on Upper Skagit's failure to comply
13 with the requirements of Paragraph 25. Dkt. 27.

14 On October 19 Sauk filed a response to Upper Skagit's summary judgment motion. Dkt.
15 28. The response reiterates Upper Skagit's failure to comply with Paragraph 25 and raises
16 further jurisdictional concerns that are addressed in the Argument, below.

17 This flurry of action was taken in precipitately within a short time period. Upper Skagit
18 filed its Motion for Summary Judgment eight days after the Court authorized the opening of this
19 subproceeding, and the noting date of this motion, October 30, is a month after the case was
20 opened. The throttle in this subproceeding is wide open, and Swinomish asks the Court to apply
21 the brakes.
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ARGUMENT

I. The Court Should Consider the Pending Motions Together.

The pending motions, considered together, will shape the future of this subproceeding. The Court can move forward to consider the Upper Skagit summary judgment motion and perhaps resolve the controversy in its infancy. Or it can deny the motion as premature and stay for mediation, or dismiss the subproceeding altogether for lack of jurisdiction, either of which will pave the way for mediation and perhaps resolution of the controversy by agreement of the parties.

Swinomish favors mediation. In the Swinomish response to the Sauk Motion to Dismiss, due to be filed by November 2, Swinomish will support dismissal of the subproceeding without prejudice to allow for compliance with Paragraph 25 and make way for mediation.² If the Court dismisses the subproceeding, it need not address the Upper Skagit Motion for Summary Judgment, which will then be moot. However, if the Court decides to continue this subproceeding, Swinomish urges the Court to dismiss the summary judgment motion as premature, as argued below.

II. The Court Should Deny the Summary Judgment Motion as Premature.

Since the Court's ruling on Upper Skagit's motion for TRO did not dispose of this subproceeding, Par. 25(b)(8) provides that the case pled in the RFD "shall be disposed of in accordance with paragraph 25 in the ordinary course of business." Paragraph 25, in turn, provides that motions practice is to be conducted under the Federal Rules of Civil Procedure and applicable local rules. Par. 25(b)(5). *See also* Par. 25(b)(9).

² Logically Swinomish might have addressed the Sauk motion to dismiss first. However, the noting date for that motion is a week later than the noting date for the Upper Skagit summary judgment motion, so the latter motion is being addressed first.

1 Upper Skagit's motion for summary judgment was properly filed within the time allowed
 2 under the Federal Rules. Fed. R. Civ. P 56(b) provides that unless the local rules or the Court's
 3 order directs otherwise, "a party may file a motion for summary judgment at any time until 30
 4 days after the close of discovery." However, it is clear that this provision, added to the Federal
 5 Rules in the 2010 amendments, does not alter the prior jurisprudence concerning motions that are
 6 premature though timely filed. The Rules Committee points out in its comments on Rule 56(b):

7 Although the rule allows for summary judgment to be filed at the
 8 commencement of an action, in many cases the motion will be premature until the
 9 nonmovant has had time to file a responsive pleading or other pretrial proceeding
 have been had.

10 This is clearly one of those "many cases."

11 In accordance with the Committee notes, district courts have continued since the 2010
 12 amendment to dismiss motions for summary judgment as premature when they are filed early in
 13 the case. This is especially true where, as here, the motion is filed before the defendant's time to
 14 answer the complaint has elapsed. *See, e.g., Turner v. County of San Diego*, 2016 WL 6804998
 15 (S.D. Cal. 2016 (collecting cases); *Anderson v. Becerra*, 2020 WL 1788548 *1 (E.D. Cal. 2020);
 16 *Williams v. Yuan Chen*, 2011 WL 4354533 *3 (E.D. Cal. 2011). Moreover, a summary judgment
 17 motion is premature where, as here, it is "uncertain which allegations are in dispute, much less
 18 which disputes might raise genuine issues of material facts." *Bart Street III v. ACC Enterprises*,
 19 2017 WL 4293142 *1 (D. Nev. 2017), *quoting Mohamed v. Jeppesen Dataplan*, 614 F. 3d 1070,
 20 1100 n. 15 (9th Cir. 2009).

21 In this case, it is not clear whether there is any need for litigation at all, let alone whether
 22 there are facts in dispute, and the motion was filed extremely early in the case. Here, the motion
 23 was filed before Swinomish, one of the three tribes directly involved in treaty fishing in the
 24 Skagit River basin, has had any opportunity to involve itself in the case, and while Swinomish
 25

1 was asserting a right to mandatory mediation under Paragraph 25(b)(2). Jannetta Dec. Ex. B. Nor
 2 has Swinomish had the opportunity to file a motion for leave to file a cross-RFD, as it did in
 3 similar circumstances in Subp. 05-3, discussed below, or otherwise respond to the RFD. *U.S. v.*
 4 *Washington*, Subp. 05-3, 20 F. Supp. 3d 777, 799 (W.D. Wash. 2005). Moreover, Swinomish
 5 cannot be accused of being tardy when the summary judgment motion was filed barely a week
 6 into the 60 days granted parties to respond to an RFD. Par. 25(b)(4).

7 However, most compelling reason to deny the summary judgment motion as premature is
 8 that it would cut off the requirement and opportunity for mediation and further negotiations in a
 9 circumstance in which one party, Swinomish, has asserted a right to mandatory mediation,
 10 Jannetta Dec. Ex. B, and the other, Sauk, has move to dismiss the subproceeding for lack of
 11 compliance with Paragraph 25, Dkt. 27, and has filed a request for and consent to mediation.
 12 Dkt. 26. It surely is premature to consider the merits of a summary judgment motion when
 13 further negotiations are demanded and in the offing, demonstrating a chance to resolve the
 14 controversy without litigation. That is especially true in *U.S. v. Washington*. This subproceeding
 15 is governed by Paragraph 25, and as the Court recently admonished the parties:
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17 It should be very clear to the parties by now that these procedures are
 18 intended to reduce litigation, conserve the Court's and the parties' resources, and
 19 make subproceedings more efficient and manageable by narrowing inter-party
 20 disputes.

21 *U.S. v. Washington*, Subp. 17-01, 2017 WL 3726774 *4 (W.D. Wash. 2017).

22 This Court has previously dismissed a summary judgment motion as premature under
 23 similar though less compelling circumstances. In Subp. 05-3, Upper Skagit filed an RFD
 24 challenging fishing by the Suquamish Indian Tribe in Skagit Bay. Early in the case (though not
 25 as early as in this case) Upper Skagit filed a motion for summary judgment. Swinomish, which
 was in the process of seeking to enter the case by filing a cross-RFD, opposed the motion as

premature. The Court struck the motion as premature to allow the case to unfold in an orderly fashion. *U.S. v. Washington*, Subp. 05-3, 20 F. Supp. 3d 777, 800 (W.D. Wash. 2005). This decision came further into the case and did not involve any issue of continued negotiations, and that situation is less compelling than the situation presented here.

In addition, Sauk has raised a factual issue that affects whether the Court has jurisdiction in this case. Jurisdiction over Upper Skagit's RFD is predicated upon Paragraph 25(a)(1), which is in turn dependent upon Sauk opening a fishery in or fishing in The Skagit River mainstem, and thus purportedly outside its U&A. Dkt. 9, ¶ 2. Sauk asserts that the fishery authorized by its regulation is actually in the Cascade River, and not the Skagit. Dkt. 28, pp. 5-7. It appears that this is a material factual issue that needs resolution, precluding summary judgment at this time.

CONCLUSION

In its rush to judgment, Upper Skagit's motion is premature and would foreclose mediation demanded or desired by the other parties. If, after addressing Sauk's motion to dismiss, the Court should deem it necessary or desirable to address the motion for summary judgment, the Court should dismiss the motion without prejudice as premature.

Respectfully submitted this 26th day of October, 2020.

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8 **CERTIFICATE OF SERVICE**

9 I hereby certify that on October 26, 2020, I electronically filed the attached *Swinomish*
10 *Response to Upper Skagit Motion for Summary Judgment* with the Clerk of the Court using the
11 CM/ECF system, which will send notice of the filing to all parties registered in the CM/ECF
12 system for this matter.

13 By: /s/ James M. Jannetta
14 James M. Jannetta, WSBA No. 36525
15 Counsel for Swinomish Indian Tribal Community
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