

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.: 20-1

**UPPER SKAGIT INDIAN TRIBE'S
OPPOSITION TO MOTION TO DISMISS**

**NOTED ON MOTION CALENDAR:
November 6, 2020**

I. OPPOSITION

The Court should deny Sauk's motion to dismiss for the same reasons Upper Skagit provided in its summary judgment reply. *See* Dkt. 31, pp. 3-6. With two additions, Upper Skagit provides the same response here, as it must. *See, e.g., Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 345 (9th Cir. 1996) (the Federal Rules of Civil Procedure do not sanction "the incorporation of substantive material by reference" and district court did not abuse discretion in striking arguments incorporated by reference); *Calence, LLC v. Dimension Data Holdings, PLC*, 222 Fed. App'x 563, 566 (9th Cir. 2007) (district court did not abuse discretion in refusing to consider argument incorporated by reference from earlier briefing).

A. The Court Retains Jurisdiction to "Finally Dispose[]" of Upper Skagit's RFD and Mediation Is Not Mandated.

The analysis in this section is the same as provided in Upper Skagit's reply in support of its

1 motion for summary judgment. *See* Dkt. 31, pp. 3-6.

2 In 1993, the Court modified Paragraph 25 of the Court's permanent injunction, detailing
3 what must occur before filing an RFD "except for an emergency matter." Paragraph 25(b) begins:

4 *To invoke this court's continuing jurisdiction, the party seeking relief shall*
5 *initiate a subproceeding in this action by filing a request for determination.*
Subproceedings will be conducted in accordance with the following procedures:

6 (1) Before a request for determination is filed (*except for an emergency*
7 *matter, addressed below*) the party seeking relief ("requesting party") shall meet
8 and confer with all parties *Except as provided in subparagraph (b)(7)*, no
request for determination shall be filed sooner than 15 days after the conclusion of
negotiations.

9 (2) If the requesting party and the affected parties are unsuccessful in
10 negotiating a solution to the issue in accordance with subparagraph (b)(1), the
11 requesting party or any affected party may demand mediation within 12 days after
the conclusion of the unsuccessful negotiations. . . .

12 *U.S. v. Washington*, 18 F. Supp. 3d 1172, 1213-14 (W.D. Wash. Aug. 24, 1993) (emphasis added).

13 "[E]xcept for an emergency matter, addressed below" and "[e]xcept as provided in subparagraph
14 (b)(7)" refer to this provision:

15 (7) Any party may seek determination of an emergency matter subject to
16 satisfaction of the following conditions: (A) *the party shall initiate a*
17 *subproceeding* (if not previously initiated) *by filing and serving on all parties a*
18 *request for determination*; (B) the requesting party shall file with the request and
19 serve on all parties a motion for temporary restraining order or preliminary
20 injunction, which *shall comply with and be decided in accordance with the civil*
21 *rules and legal standards generally governing such motions*; and (C) the
22 requesting party shall file and serve a declaration of counsel stating that the party
23 has made a bona fide effort to resolve the emergency issue with the affected
24 parties and has failed to do so; that actual notice of the motion has been provided
25 to each party that is the subject of the motion; and that the matter in issue
constitutes an emergency in the judgment of the party and its attorney. Motions
for temporary restraining orders shall be filed only in circumstances where
irreparable harm is likely to occur before a hearing on a motion for preliminary
injunction can be scheduled.

Id. at 1215 (emphasis added). The last sentence, that "[m]otions for temporary restraining orders
shall be filed only in circumstances where irreparable harm is likely to occur before a hearing on a
motion for preliminary injunction can be scheduled," does not condition jurisdiction on irreparable

harm. Instead, it requires parties, when time permits, to file a motion for a preliminary injunction (which is noted four Fridays after filing, LCR 7(d)(3)) instead of a motion for a temporary restraining order (which is noted the day it is filed, LCR 7(d)(1)).

The next provision is Paragraph 25(b)(8), which provides, “*Unless the ruling on the motion for temporary restraining order or preliminary injunction finally disposes of the request for determination in its entirety, the request shall be decided in accordance with this paragraph 25 in the ordinary course of the court’s business.*” *Id.* (emphasis added). *I.e.*, in revising Paragraph 25 in 1993, the Court specifically contemplated exactly what happened here: that an RFD could be filed to deal with an exigency but that the issues underlying it might not be resolved by the Court’s granting or denying temporary or preliminary injunctive relief. The Court’s conclusion here that, despite showing harm and a likelihood of success on the merits, a TRO should not issue does not divest the Court of jurisdiction. To the contrary, Paragraph 25(b)(8) plainly states that if the “ruling” (whether granting or denying injunctive relief) does not “finally dispose[] of the [RFD] in its entirety,” the Court is to “decide[]” the RFD “in accordance” with Paragraph 25. *Id.*

Upper Skagit’s RFD is already filed,¹ so that cannot mean that its RFD is terminated, with the parties going back to the pre-filing requirements, including the mediation requirement in Paragraph 25(b)(2), which Swinomish (partners with Sauk in a strategic cooperative concerning management of the watershed²) seeks to invoke.³ Nor can it mean that Swinomish can mandate that Upper Skagit engage in post-filing mediation. Mediation is not a process by which “the request” will be “*decided*.” Mediation is a “process” by which *the parties* resolve disputes “other than by adjudication by a presiding judge” (LCR 39.1(a)(3)); it does not involve *the court* “decid[ing]” the dispute (18 F. Supp. 3d at 1215). Instead the reference to “shall be decided”

¹ Upper Skagit notes that the emergency continues despite the denial of the temporary restraining order: Sauk continues to fish in violation of this Court’s Final Decision #1.

² Skagit River System Cooperative, see <http://skagitcoop.org/> (“A natural resources consortium of the Sauk-Suiattle Indian Tribe and the Swinomish Indian Tribal Community”).

³ See Dkt. 29, pp. 2, 4, 7.

1 refers to the process by which the Court will “decide[]” the RFD, *i.e.*, the *post-filing* provisions,
 2 meaning those which follow Paragraph 25(b)(3) (“After complying with the foregoing
 3 requirements (including Rule 39.1 mediation if applicable), a party seeking relief shall file . . . a
 4 ‘request for determination,’”) including outlining the date to answer the RFD and that the
 5 Federal Rules of Civil Procedure apply. *Id.* at 1214-15.

6 Because Upper Skagit complied with Paragraph 25(b)(7) in filing its RFD, Upper Skagit
 7 “invoke[d] this court’s continuing jurisdiction.” Because the court’s ruling on Upper Skagit’s
 8 motion for a TRO did not “finally dispose[]” of Upper Skagit’s RFD “in its entirety,” jurisdiction
 9 remains invoked, and the subproceeding should continue and “be decided, in accordance with” the
 10 remainder of Paragraph 25. 18 F. Supp. 3d at 1215.

11 **B. The Additional Arguments Sauk Made in Its Motion to Dismiss Are Baseless.**

12 Sauk stated in its motion to dismiss (but not its opposition to summary judgment) that, “No
 13 Order has been entered accepting filing of the proposed Request for Determination.” Dkt. 27, p. 4.
 14 That is not correct. Upper Skagit filed its RFD as directed to do so by the Court. Dkt. 8 (“It is
 15 further ORDERED that the Clerk shall open this matter as a new subproceeding Upper Skagit
 16 may then file its Request for Determination.”); Dkt. 9 (filed RFD). Sauk also claimed in its motion
 17 to dismiss that this subproceeding was like subproceeding no. 11-2, but that is not accurate: there,
 18 “[t]he declaration of counsel” did “not meet the required standard for establishing the existence of
 19 an emergency.” *U.S. v. Washington*, 20 F. Supp. 3d 899, 962 (W.D. Wash. 2008). The Court
 20 found the opposite here in granting leave to open the subproceeding (Dkt. 8) based on a declaration
 21 attesting to that emergency (Dkt. 3 ¶ 6) and in its ruling on the motion for injunctive relief (Dkt.
 22 20, p. 4).

23 **II. CONCLUSION**

24 For the foregoing reasons, the Court should deny Sauk’s motion to dismiss.
 25

1 DATED this 2nd day of November, 2020.

2 UPPER SKAGIT INDIAN TRIBE

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