

JACK W. FIANDER
TOWTNUK LAW OFFICES, LTD.
SACRED GROUND LEGAL SERVICES, INC.
5808A SUMMITVIEW AVENUE, #93
YAKIMA, WA 98908
(509) 961-0096
TOWTNUKLAW@MSN.COM

HONORABLE RICARDO MARTINEZ

Kehl Van Winkle
Sauk-Suiattle Indian Tribe
Office of Legal Counsel
5318 Chief Brown Lane
Darrington, WA 98241
(360) 436-2231
kvanwinkle@sauk-suiattle.com

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

UNITED STATES OF AMERICA, et al.,

No. C-70-9213

Plaintiff,

Sub. No. 20-sp-001

v.

STATE OF WASHINGTON, et al.,

**REPLY MEMORANDUM OF SAUK-
SUIATTLE INDIAN TRIBE IN
SUPPORT OF MOTION TO
DISMISS SUBPROCEEDING 20-1**

Defendants,

UPPER SKAGIT INDIAN TRIBE,

Intervenor-Plaintiff,

v.

SAUK-SUIATTLE INDIAN TRIBE,

Intervenor-Plaintiff.

A. INTRODUCTION

Plaintiff Upper Skagit Indian Tribe begins its opposition by stating that “the Court should deny Sauk’s motion to dismiss for the same reasons Upper Skagit provided in its

summary judgment reply”. Consequently, since the Upper Skagit Indian Tribe response to defendant’s motion to dismiss essentially reiterates those stated in its previous brief (docket entry no. 31), each of such arguments previously made shall be addressed *seriatim*.

B. [PLAINTIFF’S] ARGUMENTS

1. “Upper Skagit properly invoked this court’s jurisdiction pursuant to 25 (b) (7)”.

Perhaps plaintiff’s intent in invoking the court’s jurisdiction was to address what it believed was an emergency matter. Whether emergency relief was warranted was resolved by the court finding a lack of irreparable harm to the plaintiff (docket entry no. 22284). The emergency matter having been addressed, plaintiff now openly admits that its motion for summary judgment attempts to piggyback a Paragraph 25 (a) (1) on the back of its 25 (b) (7) invocation:

Upper Skagit seeks a ruling, pursuant to Paragraph 25(a)(1), that Sauk violated Final Decision #1 by authorizing its members to fish in the Skagit River based on a purported, but not adjudicated, treaty right to do so.

See, 20-1 docket entry no. 31 at 2, ln. 7-9. To its credit, plaintiff correctly states that Paragraph 25 (b) (8) of the Court’s permanent injunction, as amended states as follows:

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., p. 4, ln. 23-25. Plaintiff’s motion for temporary restraining order did not resolve all of the issues plaintiff raised. Consequently, the ultimate determination it seeks must proceed “in accordance with this paragraph 25 in the ordinary course of the court’s business.” The proper process for a Paragraph 25 (a) (1) proceeding as described in “this” Paragraph 25 “in the ordinary course” of the court’s business is to await litigation until all parties have had the opportunity to request or participate in mediation. Whether denominated as lack of

jurisdiction or, as plaintiff-intervenor Swinomish describes it, “premature”, immediate litigation of plaintiff’s motion for summary judgment is not “in the ordinary course of the court’s business.”

2. “The Paragraph 25(b)(2) mediation requirement does not apply... to RFDs filed pursuant to Paragraph 25(b)(7)”.

This argument is the same as has been addressed above. Once the TRO was denied, to the extent that issues raised by plaintiff such as its 25 (a) (1) allegation, are to be otherwise conducted in accordance with Paragraph 25. Plaintiff’s assertion that “this paragraph 25” merely alludes to *subparagraph* 25 (b) (7) rather than the ordinary course followed by the court when a 25 (a) (1) RFD is sought is contrary to the plain language in the concluding language of Paragraph 25 set forth in 25 (b) (8).

3. “Sauk does not seriously claim adjudicated U&A in the Skagit River”.

At present, Sauk has not filed a Paragraph 25 (a) (6) proceeding seeking rights in the entirety of the Skagit River. That is outside the scope of this subproceeding.

4. “Upper Skagit seeks a ruling, pursuant to Paragraph 25(a)(1), that Sauk violated Final Decision #1”.

That is correct. However, Upper Skagit did not proceed in accordance with the ordinary course applicable to a proceeding under Paragraph 25 (a) (1), that ordinary course being enumerated in Paragraph 25 (b) (8).

5. “For two years, Sauk has taken actions based on its claim to U&A in the Skagit River”.

Here, plaintiff apparently refers to subproceeding 93-1 in which defendant Sauk did *not* assert a U&A in the Skagit River but, rather, sought to vacate a stipulation between two

1 tribes that Sauk was not a signatory to which resulted in interception of anadromous fish
 2 which would otherwise return to upstream tributaries of the Skagit River drainage where
 3 Sauk may undeniably harvest fish.

4 6. Sauk previously “fil[ed] a baseless motion to vacate”.

5 The basis of denial of defendant’s motion seeking to vacate the stipulation in 93-1
 6 was not that the movant’s claim was baseless. Rather, the order denying the motion was on
 7 grounds that all parties are bound by all decisions of the court whether they were participants
 8 in a subproceeding or not.

9 7. “Sauk’s leadership maintains that...it may exercise a treaty right to fish in the
 10 Skagit River coextensive with the established rights of Upper Skagit”.

11 That is not the basis for enactment of Regulation No. SSIT-2020-004 nor does such
 12 regulation purport to authorize activities “coextensive” with Upper Skagit. Rather, it
 13 authorized fishing activities in the headwaters of the Skagit River as found in FF No. 2,
 14 headwaters meaning upriver reaches where freshwater tributaries contribute to the flow and
 15 freshen a stream.

16 8. “At any point, Sauk could have invoked this Court’s continuing jurisdiction—as
 17 many tribes have—to litigate whether it should be allowed to fish in the Skagit River”.

18 As stated in the attached declaration of James D. Roberts (Exhibit A), as recently as
 19 1993, Sauk lacked the resources to continue participating in litigation necessary to
 20 specifically identify certain of its customary fishing locations (docket entry no. 13431)
 21 (October 30, 1993). Finding good cause, the Court allowed the Sauk and Stillaguamish
 22 Tribes to reserve such identification and dismissed their participation without prejudice
 23 (docket no. 13485) (December 10, 1993).
 24
 25

1 9. “Swinomish’s claim that mediation is appropriate (Dkt. 28, pp. 3-4) is directly
2 contrary to its leadership’s expressed agreement to close the meet and confer because the
3 parties would not be able to resolve the dispute themselves”.

4 This argument misunderstands the difference between a meet and confer and
5 mediation. Notwithstanding that parties may be unable to resolve a dispute “themselves” this
6 does not render the need for mediation ineffective. Mediation is performed by a third party
7 such that the parties are not merely meeting themselves. As to a meet and confer, if
8 negotiations fail, “any affected party may demand mediation within 12 days after the
9 conclusion of the unsuccessful negotiations.” Once the time for requests for mediation can be
10 submitted has been exhausted, only then may a party proceed with a request for
11 determination.
12

13 10. “Upper Skagit’s RFD is already filed, so that cannot mean that its RFD is
14 terminated.”

15 Neither the mere approval to file a Request for Determination nor its filing constitute
16 a determination that the jurisdictional requirements associated with it are not subject to
17 question. Opening an emergency subproceeding under Paragraph 25 (b) (7) does not
18 constitute approval to proceed with a request for determination under Paragraph 25 (a) (1)
19 absent strict compliance with the full requirements of Paragraph 25. The procedures set forth
20 under Paragraph 25 are mandatory for invoking the continuing jurisdiction of the Court, and
21 “may not be excused or modified.” *United States v. Washington*, 20 F. Supp. 3d 899, 962
22 (W.D. Wash. 2008). Where an RFD fails to meet these procedural requirements, the RFD
23 and the subproceeding must be dismissed. *Id.*
24
25

1 The remaining tertiary arguments in plaintiff's previously filed reply brief in support
2 of its motion for summary judgment are not pertinent to the jurisdictional issue: "Sauk's
3 unilateral actions have negatively impacted Upper Skagit's exercise of its treaty right"
4 (Sauk's fishery was 17 miles upstream of the nearest Upper Skagit fishery); Sauk disrupted
5 the North of Falcon process (North of Falcon is a process outside the Court's processes); and
6 "its interference with Upper Skagit's ability to take from the Skagit River" (harvesting fish
7 that have escaped beyond river reaches opened by Upper Skagit caused no interference with
8 its agreed fisheries take).

9
10 In this subproceeding, Upper Skagit has invoked Par. 25(a)(1) as the ground for
11 jurisdiction, claiming that Sauk is fishing outside of its usual and accustomed fishing places
12 (U&A), and thus in violation of the Boldt Decree. Dkt. 9, ¶ 2. In addition to asserting a
13 proper ground for jurisdiction, however, a party must also satisfy the procedural requirements
14 of Par. 25(b). While Upper Skagit may have correctly pled the grounds for continuing
15 jurisdiction under Par. 25(a)(1), it has not met the preliminary requirements of Par. 25(b), the
16 purpose of which is to reduce litigation, conserve the Court's and the parties' resources, and
17 make subproceedings more efficient and manageable by narrowing inter-party disputes. One
18 major preliminary requirement that has yet to be fulfilled is the mediation demanded by
19 Swinomish under Par. 25(a)(2) (Exhibit B) and consented to by Sauk-Suiattle (20-1 docket
20 no. 26).

21 CONCLUSION

22
23 For the foregoing reasons, the preliminary requisites for invoking the court's
24 continuing jurisdiction to determine a dispute arising under Paragraph 25 (a) (1) of the Court's
25

1 permanent injunction have not been satisfied and exhausted. Consequently the motion to
2 dismiss should be granted.

3 Respectfully submitted,

4 DATED this 2nd day of November, 2020.

5 SAUK-SUIATTLE INDIAN TRIBE

6 By:

7 S/Jack W. Fiander

8 Counsel for Intervenor Plaintiff

9 Sauk-Suiattle Indian Tribe

10 Certificate of Service

11 I certify that the foregoing was filed with the Clerk of Court and served upon all parties using
12 the court's CM/ECF system.

13 S/Jack W. Fiander