THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiff, vs. STATE OF WASHINGTON, et al., Defendant.	No. C70-9213 Subproceeding 24-1 SUQUAMISH, SWINOMISH, AND TULALIP'S REPLY IN SUPPORT OF MOTION TO DISMISS NOTING DATE: JANUARY 24, 2025

I. INTRODUCTION

Sauk seeks to litigate the geographic scope of its U&A for the third time. Suquamish, Swinomish, Tulalip and Upper Skagit (Responding Tribes) filed a Motion to Dismiss. *U.S. v. Washington,* Subp. 24, Dkt. 27 (Mot.). In Sauk-Suiattle Indian Tribe's Response to the Motion, *U.S. v. Washington*, Subp. 24-1, Dkt. 29 (Resp.), Sauk offers a hodgepodge of arguments that directly contradict the judgment in Subproceeding 20-1, seek to rewrite the law of case by limiting the application of *Muckleshoot I* and *Muckleshoot III*, and fail to satisfy Sauk's burden to establish jurisdiction. Further, allowing relitigation of Sauk's U&A would run afoul of four

Office of Tribal Attorney
SWINOMISH INDIAN TRIBAL COMMUNITY
11404 Moorage Way
La Conner, Washington 98257
TEL 360/466-3163; FAX 360/466-5309

finality doctrines. Accordingly, this case should be dismissed under FRCP 12(b)(1). The case should also be dismissed under FRCP 12(b)(6) because Sauk failed to plead a plausible claim for U&A in the Claimed Waters because it has not alleged any evidentiary facts of actual fishing that would allow this Court to grant the relief sought.

II. SAUK HAS FAILED TO MEET ITS BURDEN TO ESTABLISH JURISDICTION.

Sauk has failed to establish this Court's jurisdiction under Paragraph 25(a)(6) because it cannot demonstrate that its U&A has not been "specifically determined."

A. Subproceeding 20-1 Held that Sauk's U&A is Specifically Determined and Excludes Unnamed Waters.

Subproceeding 20-1 invoked Paragraph 25(a)(1) to interpret Sauk's U&A finding, which is limited to twelve rivers and streams in the Skagit River basin and does not include any of the Claimed Waters. *U.S. v. Washington*, 384 F. Supp. 312, 376, FF 131 (W.D. Wash. 1974) (*FD1*). Sauk argued that Judge Boldt impliedly included the Skagit River in its U&A. This Court and the Ninth Circuit disagreed, holding that Sauk does not have U&A in the Skagit River. *Upper Skagit Indian Tribe v. Sauk-Suiattle Indian Tribe*, 66 F.4th 766, 774 (9th Cir. 2023); *U.S. v. Washington*, Subp. 20-1, Dkt. 47, Order on Pending Motions at 13 (W.D. Wash. 2021) (20-1 Order) (SHD000013).

Sauk now seeks to relitigate this holding:

> Even if Judge Boldt did not impliedly intend to include the Skagit River in [*FD* 1], it does not follow that he specifically determined that Sauk-Suiattle did *not* fish the Skagit River during treaty times.
> …
> A holding that Judge Boldt intended to omit the Skagit River from his list of Sauk-Suiattle U&A *goes no further than saying he intentionally did not decide the issue*.

Office of Tribal Attorney
SWINOMISH INDIAN TRIBAL COMMUNITY
11404 Moorage Way
La Conner, Washington 98257
TEL 360/466-3163; FAX 360/466-5309

Resp. at 10-11 (last emphasis added). Relatedly, Sauk argues that "nothing in any holding suggests that the Court considered evidence and made any sort of negative specific determination regarding Sauk-Suiattle and the waters it now claims as part of its U&A." Resp. at 6.

This unsupported and frivolous argument directly contradicts the plain language of both this Court's order and the Ninth Circuit opinion. This Court ruled that "Judge Boldt *intentionally omitted the Skagit River* from [Sauk's] U&A." 20-1 Order at 13 (SHD000013) (emphasis added). The Ninth Circuit affirmed: "Judge Boldt *intended to omit the Skagit River* from the Sauk tribe's [U&A]." *Upper Skagit*, 66 F.4th 766 at 768 (emphasis added). These are "negative specific determinations" regarding Sauk's claim to U&A in the Skagit River. To argue that the language in these opinions does not mean what it plainly says, but instead means only that Judge Boldt intended not to decide the issue, tortures the English language and flouts this Court's and the Ninth Circuit's clear and binding rulings.

Sauk argues that because 20-1 only involved the Skagit River, it has no application to the other Claimed Waters. Resp. at 9-10. This argument ignores a key holding: that Sauk's U&A finding is *unambiguous*. *Upper Skagit*, 66 F.4th at 771 (FF 131 "clearly and unambiguously establishes Judge Boldt's intent not to include the Skagit River in the Sauk tribe's U&As."); 20-1 Order at 11 ("[Sauk's] U&A appears to unambiguously omit the Skagit River.") (SHD000011). Because an unambiguous U&A finding by definition clearly and precisely describes what is included in, and therefore what is excluded from, a Tribe's U&A, the holding that Sauk's U&A is unambiguous necessarily means that Judge Boldt specifically determined *all* of Sauk's U&A, *not* just a portion of it, as Sauk argues. As this Court has previously explained, in this situation

Office of Tribal Attorney
SWINOMISH INDIAN TRIBAL COMMUNITY
11404 Moorage Way
La Conner, Washington 98257
TEL 360/466-3163; FAX 360/466-5309

"neither [25(a)(1) nor 25(a)(6)] confer jurisdiction … *because there is no ambiguity* in [the U&A finding] and the scope of that U&A *has been determined*…." *U.S. v. Washington*, Subp. 17-1, Dkt. 42, Order Granting Motions for Summary Judgment and Denying Cross-Motion at 12 (W.D. Wash. 2017) (17-1 Order) (SHD000026) (emphasis added).

Less than two years ago, this Court and the Ninth Circuit held that Sauk's U&A is unambiguous and does not include the Skagit River or any other unnamed waters. To paraphrase the Ninth Circuit, this is, and should have been, the end of the matter. *See Muckleshoot Indian Tribe v. Tulalip Tribes*, 944 F.3d 1179, 1184 (9th Cir. 2019) (*Muckleshoot III*).

B. This Court Should Reject Sauk's Attempt to Rewrite the Law of the Case by Narrowing Muckleshoot I.

Muckleshoot Tribe v. Lummi Indian Tribe, 141 F.3d 1355 (9th Cir. 1998) (*Muckleshoot I)* governs assertions of continuing jurisdiction under Paragraph 25. In that case, Judge Rothstein found that the ambiguity of the phrase "the present environs of Seattle" meant that aspect of Lummi's U&A finding was not specifically determined, such that 25(a)(6) jurisdiction was available to interpret the phrase. *Id.* at 1360. The Ninth Circuit reversed:

> Judge Boldt, however, did 'specifically determine[ ]' the location of Lummi's [U&A], albeit using a description that has turned out to be ambiguous. [Paragraph 25(a)(6)] does not authorize the court to clarify the meaning of the terms used in the decree or to resolve an ambiguity with supplemental findings which alter, amend or enlarge upon the description in the decree.

Id.

Because *Muckleshoot I* involved clarifying an ambiguous U&A finding, Sauk attempts to limit its application to that context. It argues that because it seeks to establish new U&A,

Office of Tribal Attorney
SWINOMISH INDIAN TRIBAL COMMUNITY
11404 Moorage Way
La Conner, Washington 98257
TEL 360/466-3163; FAX 360/466-5309

rather than clarify or resolve an ambiguity in Sauk's U&A finding, *Muckleshoot I's* limitation on supplemental findings is inapposite. Resp. at 12-13. There are at least three problems with this argument.

First, this Court routinely applies the *Muckleshoot* framework to cases in which tribes have sought new U&A. *See, e.g.,* 17-1 Order at 12 (SHD000026) (denying Skokomish's attempt to expand its U&A for lack of 25(a)(6) jurisdiction because Skokomish's U&A finding is unambiguous). Sauk cites no precedent to the contrary, because none exists.

Second, *Muckleshoot I* held that Paragraph 25(a)(6) prohibits supplemental findings which "alter, amend, or *enlarge upon*" a specifically determined U&A. 141 F.3d at 1360 (emphasis added). If *Muckleshoot I* were limited to the interpretation of existing U&A findings, as Sauk argues, the Court would not have added the phrase "or enlarge upon." There would be no need, because Paragraph 25(a)(1) proceedings cannot enlarge U&A. *See id.*

Third, as discussed above, Sauk's U&A finding is unambiguous. As a result, there is nothing left to clarify, resolve, or decide regarding Sauk's U&A, and the supplemental findings Sauk seeks would "alter, amend, or enlarge upon" Judge Boldt's finding in contravention of *Muckleshoot I*.

C. Like Muckleshoot III, This Case Should be Dismissed for Lack of Jurisdiction.

In Subproceeding 17-2, Muckleshoot attempted to litigate the geographic scope of its U&A for the third time. This Court dismissed the case for lack of jurisdiction because Judge Boldt specifically determined Muckleshoot's U&A in *FD1* and a prior 25(a)(1) proceeding in Subproceeding 97-1 had already interpreted the geographic scope of Muckleshoot's marine

Office of Tribal Attorney
SWINOMISH INDIAN TRIBAL COMMUNITY
11404 Moorage Way
La Conner, Washington 98257
TEL 360/466-3163; FAX 360/466-5309

U&A finding and found it was limited to Elliott Bay. As a result, Muckleshoot could not expand its U&A using Paragraph 25(a)(6). *U.S. v. Washington*, Subp. 17-2, Dkt. 40, Order Granting Motions to Dismiss at 8-10 (W.D. Wash. 2018) (17-2 Order) (SHD000022-SHD000024). *Muckleshoot III* affirmed the dismissal. 944 F.3d at 1185.

Sauk significantly misstates *Muckleshoot III*'s holding and, in doing so, attempts to rewrite the law of the case. In its view, *Muckleshoot III* held that an area Judge Boldt excluded from a tribe's U&A finding is specifically determined only if Judge Boldt "necessarily considered" the area. Resp. at 13.

This is not the law of the case.

The fundamental question in *Muckleshoot III* was whether a tribe with U&A specifically determined by Judge Boldt and subsequently clarified as to geographic scope in a Paragraph 25(a)(1) proceeding can bring a Paragraph 25(a)(6) case to expand its U&A. *Muckleshoot III*'s answer to that question and holding is no:

> Subproceeding 97-1 . . . definitively determined that the Muckleshoot's saltwater fisheries in Puget Sound had been limited by Judge Boldt to Elliott Bay. Therefore, the district court below did not err in holding that it lacked jurisdiction under Paragraph 25(a)(6) … and properly dismissed [the case].

944 F. 3d 1179 at 1185. Although the district court stated that Judge Boldt "necessarily considered" areas beyond Elliott Bay, *Muckleshoot III* did not purport to change the law of the case or announce a new rule that requires an analysis of whether Judge Boldt "necessarily considered" the claimed waters as a precondition to a tribe's U&A being specifically determined. *See generally,* 944 F.3d at 1184-85. Indeed, such a holding would be in tension with the law of the case established in *Muckleshoot I* and its progeny.

Office of Tribal Attorney
SWINOMISH INDIAN TRIBAL COMMUNITY
11404 Moorage Way
La Conner, Washington 98257
TEL 360/466-3163; FAX 360/466-5309

This case is identical to *Muckleshoot III*. Here, like there, Judge Boldt specifically determined a U&A. Here, like there, a subsequent 25(a)(1) proceeding clarified the geographic scope of the finding and limited it to certain waters. And here, like there, 25(a)(6) jurisdiction is unavailable to expand the tribe's U&A and the case should be dismissed.

Sauk's interpretation of Paragraph 25(a)(6) appears to be that U&A is never specifically determined unless the court grants it. But the Ninth Circuit has already rejected this interpretation. The dissent in *Muckleshoot III* argued that Paragraph 25(a)(6) "invokes[] the court's jurisdiction to consider further evidence showing the tribe historically fished at *additional locations not included in* [*FD1*]." 944 F.3d at 1185-86 (Ikuda, J., dissenting) (emphasis added). But the dissenting opinion, which Sauk relies heavily upon, see Resp. at 10-11, was rejected by the majority of the panel and is therefore contrary to the law of the case, as Sauk tacitly admits. *See* Resp. at 15 (suggesting that *Muckleshoot III* should be overruled).

Moreover, Sauk's Paragraph 25(a)(6) interpretation ignores its plain language and renders the phrase "not specifically determined" superfluous by eliminating any case to which it could be applied. Under Sauk's view, *no* tribe's U&A would be specifically determined. Any tribe could invoke Paragraph 25(a)(6) at any time to expand its U&A into any waterbody not listed in its U&A finding, even if that claim—like Muckleshoot's claim in *Muckleshoot III* and Sauk's claim here—had already been considered and rejected. This would lead to endless relitigation of claims long ago decided, be extraordinarily burdensome on the courts and the parties, and upset the settled expectations of countless parties to the case.

Office of Tribal Attorney
SWINOMISH INDIAN TRIBAL COMMUNITY
11404 Moorage Way
La Conner, Washington 98257
TEL 360/466-3163; FAX 360/466-5309

D. Washington II is Distinguishable and Sauk's U&A Cannot Be Relitigated.

Sauk argues that this case should proceed because it is "on all fours" with *U.S. v. Washington,* 873 F. Supp. 1422 (W.D. Wash. 1994) (*Washington II*) and, to a lesser extent, other post-*FD1* proceedings in which tribes established or expanded their U&As. In *Washington II*, Upper Skagit sought and eventually won U&A in certain marine waters. 873 F. Supp. at 1449-50. Sauk reasons that because Judge Boldt did not include marine waters in either Sauk's or Upper Skagit's U&A findings, it, like Upper Skagit, should be allowed to seek marine U&A and present new evidence. Resp. at 7-8. However, Sauk ignores two important points that distinguish *Washington II*.

First, this Court has repeatedly held that 25(a)(6) jurisdiction is "contingent on the Court's finding, or the parties agreeing, that the disputed waters … were not specifically determined…." *E.g.*, 17-1 Order at 12 (SHD000026). In *Washington II*, the parties *agreed* that Upper Skagit's marine U&A had not been specifically determined and that its claims could proceed. *See, e.g.*, *U.S. v. Washington*, Subp. 89-3, Dkt. 14233, Stipulation Re: Presentation of Tribal Usual and Accustomed Claims and Evidence at 2-3 (SHD000047-SHD000048). There is no such agreement here.

Second, *Washington II* and all of the other U&A proceedings Sauk references, *see* Resp. at 2-3, were decided *prior* to *Muckleshoot I*. This is critical because regardless of the Court's practice related to supplemental findings prior to *Muckleshoot I*, the law of the case that applies today to all tribes, including Sauk, is that 25(a)(6) jurisdiction is unavailable when a tribe's U&A has been specifically determined. *See, e.g., Muckleshoot III*, 944 F. 3d 1179 at 1185;

Office of Tribal Attorney
SWINOMISH INDIAN TRIBAL COMMUNITY
11404 Moorage Way
La Conner, Washington 98257
TEL 360/466-3163; FAX 360/466-5309

Muckleshoot I, 141 F.3d at 1360. The fact that Upper Skagit was able to proceed in *Washington II* cannot override the fact that 25(a)(6) jurisdiction is not available in this case because Sauk's U&A is specifically determined.

E. Finality Doctrines Preclude Relitigation of Sauk's U&A.

Four finality doctrines require dismissal of this case: *res judicata*, collateral estoppel, law of the case, and judicial estoppel. *See* Mot. at 16-21. Sauk has not addressed our arguments in any depth and appears to agree that whether the finality doctrines apply turns on whether its U&A has been fully determined. *See* Resp. at 16. Because the geographic scope of Sauk's U&A has been fully resolved by *FD1*, Subproceeding 20-1, and *Upper Skagit Indian Tribe*, 66 F. 4th 766, the doctrines apply and Sauk cannot relitigate its U&A for a third time.

III. SAUK'S RFD FAILS TO STATE A PLAUSIBLE CLAIM FOR ADDITIONAL U&A.

Sauk's claims should also be dismissed under FRCP 12(b)(6) for failing to state a claim upon which relief can be granted because Sauk's RFD presents no facts sufficient to support its claim for U&A in the Claimed Waters under the "controlling law [of the case]," "which mandates proof of fishing at and before treaty times." *Stillaguamish Tribe of Indians v. Washington*, 102 F.4th 955, 960 (9th Cir. 2024) (quotation omitted). Instead of alleging facts that Sauk "customarily fished [in the Claimed Waters] from time to time before treaty times," *FDI*, 384 F. Supp. at 332, Sauk argues that RFDs are not subject FRCP 12(b)(6) and implores the Court to allow it to survive until discovery. Resp. at 22.

However, based on the facts alleged in its RFD, Sauk failed to plead a plausible claim that it has U&A in the Claimed Waters. Further, Sauk's Response failed to allege any additional facts

Office of Tribal Attorney
SWINOMISH INDIAN TRIBAL COMMUNITY
11404 Moorage Way
La Conner, Washington 98257
TEL 360/466-3163; FAX 360/466-5309

to cure its deficient RFD and failed to request leave to amend. Pursuant to FRCP 12(b)(6), Sauk's RFD should be dismissed with prejudice because Sauk fails to allege *any* evidentiary facts that, even if accepted as true, would prove that Sauk customarily fished the Claimed Waters.

A. Sauk's RFD is Subject to the FRCPs.

Sauk's RFD is a pleading that is subject to the FRCPs, including 12(b)(6), and Sauk's arguments to the contrary are flatly wrong. *U.S. v. Washington*, 18 F. Supp. 3d 1172, 1214–15 (W.D. Wash. 1991) ("Motion practice, discovery and case scheduling in subproceedings initiated under this paragraph 25 shall be conducted in accordance with the [FRCPs] and the general and civil rules of this court."); *see also* 17-1 Order at 4 (SHD000019) (discussing Rule 12(b)(6) review of allegations set forth in a RFD/complaint).

Sauk's efforts to evade basic pleading thresholds are unpersuasive. Sauk claims "this Court should not require RFDs filed by existing parties [to] follow every judicial requirement developed to test the sufficiency of pleadings under the [FRCPs] because "RFDs are not complaints … [or] a form of 'pleading,' which would be required for Rule 12(b)(6) to apply." Resp. at 17. But as noted above, this Court treats RFDs as complaints because they are an "initial pleading that starts a civil action and states the basis for the court's jurisdiction, the basis for the plaintiff's claim and a demand for relief." Complaint, Blacks Law Dictionary 123 (3rd Pocket Ed. 2006).

Sauk's argument appears to be that the sufficiency of an RFD depends on whether pre-filing procedures were satisfied and whether the RFD "set[s] forth the factual and legal basis for

Office of Tribal Attorney
SWINOMISH INDIAN TRIBAL COMMUNITY
11404 Moorage Way
La Conner, Washington 98257
TEL 360/466-3163; FAX 360/466-5309

the claim of relief." Resp. at 18 (quoting *U.S. v. Washington*, 18 F. Supp. 3d at 1214). But this is just another way of stating what FRCP 8 and the well pleaded complaint standard require. While Sauk is correct that pre-filing procedures were satisfied in this case, that is far from "the only question[.]" Resp. at 18. The relevant question under FRCP 12(b)(6) is whether Sauk's RFD alleges evidentiary facts sufficient to state a claim for relief. It has not.

Sauk's request to exempt its RFD from minimum pleading standards is contrary to law and common sense and would place a significant burden on judicial and party resources to engage in extensive discovery based on nothing more than Sauk's threadbare allegation that it has U&A in the Claimed Waters.

B. Sauk's Response Conflates Legal Conclusions with Evidentiary Facts.

Sauk's RFD fails to allege supporting evidentiary facts that, if accepted as true, would prove that Sauk customarily *fished* in the Claimed Waters at treaty times, a necessary finding for this Court to grant Sauk the relief it seeks. Rather than attempt to cure this deficiency, Sauk instead argues semantics by nitpicking the use of commonly interchangeable words like "evidentiary facts" versus "evidence" and "show" versus "plead". *See* Resp. at 19. Sauk acknowledges that its RFD must allege evidentiary facts—not just ultimate facts— that support the claimed relief, *id*., and then argues that it has met its burden because alleging U&A in a particular area "means the very same thing as alleging that the tribe customarily fished at that location during treaty times." Resp. at 29. But this is nothing more than a threadbare allegation which is unsupported by evidentiary facts that could prove its claims.

Even when considered in the most positive light, all Sauk's RFD alleges are legal

Office of Tribal Attorney
SWINOMISH INDIAN TRIBAL COMMUNITY
11404 Moorage Way
La Conner, Washington 98257
TEL 360/466-3163; FAX 360/466-5309

conclusions, which cannot be accepted as true and must be supported by evidentiary facts. *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009) ("A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth."). Because Sauk's RFD is not supported by factual allegations of actual fishing in the Claimed Waters at treaty times, it fails to satisfy minimum pleading requirements and should be dismissed. *Id.* ("While legal conclusions can provide the complaint's framework, they must be supported by factual allegations."); *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194, n.6 (9th Cir. 2015) ("[P]laintiffs must plead evidentiary facts: 'who, did what, to whom (or with whom), where, and when'") (quoting *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008)).

There is one simple explanation for Sauk's unusual request that the Court "not require" Sauk to plead evidentiary facts in its RFD related to treaty time fishing, Resp. at 17, 20, 22, and for Sauk's failure to attempt to cure the deficiency in its RFD: Sauk has no evidence of customary fishing to support its claims, a necessary prerequisite for this Court to grant relief.

C. Sauk's Feeble Attempt to Defend Its RFD Is Unavailing Because Sauk Has No Evidence of Treaty-Time Fishing Activities in the Claimed Waters.

As an alternative to Sauk's hapless request to barrel straight into fact and expert discovery despite its failure to plead sufficient evidentiary facts, Sauk argues that what it calls its "supporting evidence" or "supporting allegations" in the RFD are enough to survive a 12(b)(6) motion. Resp. at 20-23. These include Sauk's claims that it had villages on or near the Skagit River; enjoyed fishing access to the Skagit and Baker Rivers; was the largest and "most important tribe" on the Skagit River, resulting in a large and intricate kinship web; occasionally

Office of Tribal Attorney
SWINOMISH INDIAN TRIBAL COMMUNITY
11404 Moorage Way
La Conner, Washington 98257
TEL 360/466-3163; FAX 360/466-5309

traveled to saltwater to procure marine life; and may have collected clams when forcibly removed to Penn Cove and Holmes Harbor during the post-treaty Indian Wars. Resp. at 21 (citing to portions of the RFD). But none of these claims allege evidentiary facts of customary fishing in the Claimed Waters sufficient to give rise to U&A. *See Upper Skagit*, 66 F.4th at 773; 20-1 Order at 11-13 (SHD000044-000046); Mot. at 10, 22-28.

Sauk's claim to U&A on the Skagit and Baker Rivers is based on its claims of villages, camps, or presence on or near those rivers. But this alone is insufficient to establish U&A, *Upper Skagit*, 66 F.4th at 774, and importantly, this allegation of presence does not apply to the vast majority of the Claimed Waters. Further, intermarriage rights are personal, permissive rights that do not establish U&A for an entire tribe. *See id*. And Sauk apparently concedes this point by failing to address it.

Sauk's allegations of seasonal movement between winter villages and summer camps to procure marine resources, Resp. at 21, is conclusory at best and fails to allege evidentiary facts because Sauk does not allege that any procurement occurred within the Claimed Waters or was a result of customary fishing activities and not trade. Tellingly, *FD1* included a factual finding that Sauk traveled to saltwater to procure marine resources, but nevertheless did not find that Sauk had any marine U&A. *FD1*, 384 F. Supp. at 376 (FF 132). And the Ninth Circuit has held that this evidence does not give rise to U&A. *Upper Skagit*, 66 F.4th at 774.

Sauk's only allegation of actual fishing is that when the Sauk were forcibly removed to Whidbey Island during the post-treaty Indian Wars, a Sauk chief requested a clamming permit. Resp. at 21. Even if this allegation were true, it does not allege evidentiary facts to support a

Office of Tribal Attorney
SWINOMISH INDIAN TRIBAL COMMUNITY
11404 Moorage Way
La Conner, Washington 98257
TEL 360/466-3163; FAX 360/466-5309

claim to U&A in the waters surrounding Whidbey Island, let alone the rest of the Claimed Waters. It suggests, at most, that during the post-treaty Indian wars, Sauk may have collected clams on a temporary basis and under extraordinary circumstances. This is insufficient to establish U&A and provides no evidentiary facts related to the vast majority of the Claimed Waters.

Sauk has failed to plead any evidentiary facts that could prove that Sauk customarily fished in the Claimed Waters such that this Court could grant Sauk's requested relief for U&A. Pursuant to 12(b)(6), this Court should dismiss Sauk's RFD.

D. Allowing Sauk to Amend Its RFD Would Be Futile.

In its Response, Sauk did not allege any additional facts that could cure its deficient RFD and did not request leave to amend. Based on the insufficient RFD and Sauk's failure to allege additional evidentiary facts or request leave to amend, any amendment to the RFD at this point would be futile and this Court should dismiss this subproceeding with prejudice. *See Kroessler v. CVS Health Corp.*, 977 F.3d 803, 815 (9th Cir. 2020) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend") (*quoting Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995)); *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1144, n.8 (9th Cir. [I]t is even more difficult to perceive an abuse of discretion [of the district court's failure to grant leave to amend] when the plaintiffs never sought leave to amend below.").

Instead of curing its deficient RFD, Sauk indicates that it intends to call an expert witness who will explain how Sauk's "supporting evidence" or "supporting allegations" discussed above

Office of Tribal Attorney
SWINOMISH INDIAN TRIBAL COMMUNITY
11404 Moorage Way
La Conner, Washington 98257
TEL 360/466-3163; FAX 360/466-5309

are actually "evidence of historical fishing[.]"[1] The Court should reject Sauk's unreasonable and highly unusual request to engage in "robust fact and expert discovery" now in order to allow Sauk to seek to find evidentiary facts that FRCP 8, FRCP 12, and the well pleaded complaint standard all require to be plainly and clearly stated in its RFD. Because the RFD is deficient and any proposed amendment to the RFD would be futile, this Court should dismiss with prejudice under FRCP 12(b)(6).

IV. CONCLUSION

For the reasons discussed in the Responding Tribes' Motion and above, this Court should dismiss Sauk's RFD with prejudice.

Respectfully submitted this 24th day of January, 2025.

SWINOMISH INDIAN TRIBAL COMMUNITY

By: *s/ Emily Haley*
s/ Weston LeMay
Emily Haley, WSBA #38284
Weston LeMay, WSBA #51916
Office of Tribal Attorney
Swinomish Indian Tribal Community
11404 Moorage Way
La Conner, WA 98257
Tel: (360) 466-1135
ehaley@swinomish.nsn.us
wlemay@swinomish.nsn.us

Attorneys for Swinomish Indian Tribal Community

SUQUAMISH INDIAN TRIBE

By: *s/ Maryanne E. Mohan*
Maryanne E. Mohan, WSBA #47346
Office of Tribal Attorney
Suquamish Indian Tribe
P.O. Box 498
Suquamish, WA 98392
Tel: (360) 394-8489
mmohan@squamish.nsn.us

Attorney for Suquamish Indian Tribe

1 Sauk also alludes to "anthropological work" but in doing so, fails to allege, or even hint at, any underlying evidentiary facts related to customary fishing at the Claimed Waters.

TULALIP TRIBES

By: *s/ Tyler J. Eastman*
Tyler J. Eastman, WSBA #59174
6406 Marine Dr.
Tulalip, WA 98271
Tel: (360)717-4529
teastman@tulaliptribes-nsn.gov

Attorney for Tulalip Tribes

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2025, I electronically filed this SUQUAMISH, SWINOMISH, AND TULALIP'S REPLY IN SUPPORT OF MOTION TO DISMISS with a word count of 3979 with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to all parties registered in the CM/ECF system for this matter.

s/ Emily Haley
Emily Haley, WSBA No. 38284
Swinomish Indian Tribal Community
11404 Moorage Way
La Conner, WA 98257