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PROSECUTING ATTORNEY
FOR SNOHOMISH COUNTY

BY SNOHOMISH COUNTY SUPERIOR COURT
FOR STATE OF WASHINGTON

STATE OF WASHINGTON

Plaintiff,

vs.

JENNIFER YOUDE,

Defendant.

No. 11-1-00384-6

MEMORANDUM OF AUTHORITIES
IN SUPPORT OF THE TULALIP TRIBES'
OBJECTION TO THE SUBPOENA DUCES
TECUM ISSUED AUGUST 26, 2011

COMES NOW the Tulalip Tribes, by and through its counsel of record, Janice E. Ellis, to submit the following Memorandum of Authorities in Support of the Tulalip Tribes' Objection to the Subpoena Duces Tecum issued by J. Okrent on August 26, 2011.

I. RELIEF REQUESTED

The Tribes respectfully seeks an Order quashing either Part (3) of the subpoena *duces tecum* issued by J. Okrent on August 23, 2011, or the entire subpoena.

II. PROCEDURAL & FACTUAL HISTORY

A. Procedural History

Jennifer Youde was arrested on February 6, 2010 for delivery of a controlled substance (marijuana). Declaration of Wayne Schakel (hereafter "Schakel Dec."). The arrest occurred within the exterior boundaries of the Tulalip Indian Reservation. *Schakel Dec.* Because Ms. Youde is non-Indian, the matter was referred to the Snohomish County Prosecutor's Office, which filed the pending charges under state law. *Id.*

1 Mr. Kradel, counsel for Ms. Youde, obtained a subpoena *duces tecum* from J. Okrent on
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3 August 26, 2011. *Court file*. The subpoena seeks (1) production of the digital recording of the
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5 telephonically authorized search warrant; (2) Tulalip Police Department policies regarding
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7 “‘buy/bust’ operations in general and specifically those targeting of [sic] individuals who provide
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9 medical marijuana;” and (3) “[c]opies of any and all communications, whether in writing, by email,
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11 text message or other electronic means, between members of the Tulalip Tribal Police Department and
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13 other members of that department or of the Tulalip Tribe’s [sic] legal department in regards to medical
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15 marijuana and its status on tribal lands.” The Tribes filed an Objection to the subpoena *duces tecum* on
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17 September 9, 2011. *Id.* Counsel for Ms. Youde filed a Response on or about September 16, 2011. *Id.*

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20 The Court set argument on the Objection for September 23, 2011. *Id.* Counsel for Ms. Youde
21
22 and for the Tulalip Tribes appeared at that hearing, which was assigned to J. Okrent. *Record of the*
23
24 *Proceedings*. The Tribes filed its formal Response to the Supboena Duces Tecum at that hearing. *Id.*
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26 The Response preserves the Tribes’ objection to jurisdiction, but responds to Parts (1) and (2) of the
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28 subpoena and renews its objections to Part (3). *Court file*. At the hearing, the parties focused their
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30 arguments on their respective positions regarding Part (3) of the subpoena. *Record of the Proceedings*.
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32 Mr. Kradel asserted that the information requested is necessary to investigate an entrapment defense
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34 for his client. *Id.* The Tribes maintained its objections to the subpoena. *Id.* The Court reserved ruling
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36 and requested additional briefing from the attorneys.¹
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40 **B. Relevant Facts**

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42 The investigation that led to Ms. Youde’s arrest began when the Tulalip Police Department
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44 received information that a person was selling drugs on the Reservation and that the individual was
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46 advertising on Craigslist. *Schakel Dec.* Det. Schakel was asked to investigate this tip and did so by
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49 ¹ J. Okrent set Tuesday, September 27th as the briefing due date for the Tribes’ Memorandum, and Friday, September 30th for Mr.
50 Kradel’s Response. The Court committed to filing a written decision by October 7, 2011. *Id.* This Memorandum is filed in compliance
with the briefing schedule set by the Court.

1 searching Craigslist for listings consistent with the information received by the Police Department. *Id.*
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3 Det. Schakel identified a number of postings on Craigslist that were possible leads and followed up
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5 with them, using his first name, "Wayne," and the email address flagrantoffender@gmail.com. *Id.*
6
7 The only advertiser who responded strongly to his inquiries was "Jen" at
8
9 medicalmaryj420@gmail.com. *Id.*, Exhibit B.
10

11 Wayne and Jen emailed back and forth on February 6, 2010 to set a time and location for Jen to
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13 deliver marijuana to Wayne. *Id.* Wayne suggested meeting at the WalMart commonly referred to as
14
15 the "Marysville Walmart" – a location that was acceptable to Jen. *Id.* Jen later offered to meet Wayne
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17 between 6:30 and 7:30pm, suggested meeting at the Bank of America by Walmart, and called Wayne
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19 at approximately 6:30 and said she'd be waiting in a silver Honda CRV at the Bank of America
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21 parking lot. *Id.* The Bank of America is located on the West side of I-5, within the exterior boundaries
22
23 of the Tulalip Reservation, and within the jurisdiction of the Tulalip Police Department. *Id.*
24

25 When Det. Schakel arrived at the parking lot, he approached the driver of a silver Honda CRV
26
27 and said, "Hello Jen." *Id.* Ms. Youde was in the vehicle with a female passenger. *Id.* Ms. Youde
28
29 handed Det. Schakel a bag containing 7g of marijuana; Det. Schakel handed her \$90. *Id.* Ms. Youde
30
31 did not ask Det. Schakel any questions or make any conversation as she handed him the package. *Id.*
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34 Ms. Youde and her passenger were subsequently taken into custody. *Id.* The vehicle was
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36 seized and a warrant was authorized to search it. *Id.* The following items were located when the
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38 vehicle was searched: over 100g of marijuana, almost 50g of a solid THC substance, 5 hydrocodone
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40 pills, 2 bottles of hashish, 20.5g of psilocybin mushrooms, a digital scale, and paperwork that appears
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42 to document drug transactions. *Id.*
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III. STATEMENT OF ISSUES

A. Should Part (3) of the Subpoena be Quashed for Requiring Disclosure of Materials Beyond the Scope of CrR 4.7?

B. Should the Subpoena be Quashed Because this Court Lacks Jurisdiction Over the Tulalip Tribes?

C. Should the Subpoena be Quashed for Violating the Tribes' Sovereign Immunity?

IV. EVIDENCE RELIED UPON

This Memorandum of Authorities is based upon the Court's records and files herein, the authorities cited within this Memorandum, the Declaration of Wayne Schakel, and the Exhibits attached thereto.

V. LEGAL AUTHORITY

A. Part (3) of the Subpoena Seeks Information Beyond the Scope of CrR 4.7.

1. The Documents Sought Under the Subpoena Do Not Meet the Materiality Standard of CrR 4.7 and the Tribes Should be Excused from Any Responsibility to Respond to the Part (3) Request.

Criminal Rule 4.7 separately identifies the discovery obligations of the prosecution and the defense. CrR 4.7(a) and (b). Where materials are held by others, the court is authorized to issue a subpoena to obtain records "which would be discoverable if in the knowledge, possession or control of the prosecuting attorney." CrR 4.7(d); *State v. Blackwell*, 120 Wn.2d 822, 845 P.2d 1017 (1993).

For information to be discoverable, it must be material to guilt or punishment. *State v. Nerison*, 28 Wn. App. 659, 663 – 664, 625 P.2d 735 (1981). Federal law instructs that a party requesting information in a criminal case must be able to "clear three hurdles": relevancy, admissibility, and specificity. *U. S. v. Nixon*, 418 U.S. 683, 700, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). Where the materiality standard is not met, compliance with the subpoena should be excused. *See, U. S. v. Reyes*, 239 F. R. D. 591, 597 – 598 (2006); *State v. Blackwell, supra*.

1 2. Defendant Cannot Establish the Affirmative Defense of "Entrapment" as a Matter of Law.

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3 Here, defense counsel would like to argue "entrapment" on behalf of Ms. Youde and has represented
4 that the subpoenaed documents are necessary to evaluate and/or prepare that defense. If that defense
5 were available to Ms. Youde, she would be entitled to "any information which the prosecuting attorney
6 has indicating entrapment of the defendant." CrR 4.7(a)(2)(iii). However, Ms. Youde cannot establish
7 that defense as a matter of law.
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12 To be available, the defense must establish on a preponderance of the evidence that (a) the
13 criminal design originated in the mind of Det. Schakel, and (b) that Ms. Youde was lured or induced to
14 commit a crime that she had not otherwise intended to commit. RCW 9A.16.070. The defense is not
15 established where a law enforcement officer merely affords the actor an opportunity to commit a
16 crime. *Id.*
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20 As Det. Schakel's Declaration describes, he began the investigation that ultimately led to
21 Ms. Youde's arrest because the Tulalip Police Department received a report that a person who
22 advertised on Craigslist was selling drugs on the Reservation. *Schakel Dec.* He therefore searched
23 Craigslist and found several postings of interest and contacted them. *Id.* Ms. Youde was the only
24 person who maintained contact with him. *Id.*
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28 The evidence demonstrates that Ms. Youde represented herself to be a medical marijuana
29 provider on Craigslist, and her posting indicated her willingness to deliver marijuana from Mt. Vernon
30 to Olympia. *Id.*, Exhibit A. Det. Schakel reasonably undertook an investigation to determine whether
31 she was distributing cannabis according to law or for criminal purposes. The investigation was
32 reasonable because the state's Medical Marijuana law, ch. 69.51A RCW, only allows individuals to
33 deliver marijuana to a qualifying patient, where the patient has been designated in advance, and the
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1 provider serves only that patient. RCW 69.51A.010(1).² The investigation shows that Ms. Youde was
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3 willing to sell Det. Schakel 7g of marijuana for \$90 – and did so. The items recovered from her
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5 vehicle demonstrate that she was likely to also deliver packaged marijuana to “Daniel,” “Andrew,”
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7 “Steve,” and “Gina.” *Schakel Dec.*
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10 Thus, defense counsel’s assertion that he needs an answer to Part (3) of the subpoena to prepare
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12 an entrapment defense is without merit. Ms. Youde offered to deliver marijuana to Det. Schakel and
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14 was not his designated provider. Indeed, he was not a qualifying patient. *Schakel Dec.* Because Det.
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16 Schakel did nothing more than give Ms. Youde an opportunity to commit a crime, she should have no
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18 expectation that she will be allowed to present the affirmative defense of entrapment. As the leading
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20 case of *State v. Smith*, 101 Wn.2d 36, 42 – 43, 677 P.2d 100 (1984), instructs:
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22 Both by statute and court decision, the entrapment defense focuses on “the
23 intent or predisposition of the defendant to commit the crime.” *Hampton v.*
24 *U. S.*, 425 U. S. 484, 488, 96 S.Ct. 1646, 1649, 48 L.Ed.2d 113 (1976).
25 Entrapment occurs only when the criminal design originated in the mind
26 of the police officer or informer, and the accused is lured or induced into
27 committing a crime he had no intention of committing. *State v. Waggoner*,
28 80 Wn.2d 7, 10, 490 P.2d 1308 (1971) Furthermore, the police, in
29 affording a suspect with an opportunity to violate the law, may use
30 deception, trickery, or artifice. *State v. Swain*, [10 Wn. App. 885, 889,
31 520 P.2d 950 (1974)]; *State v. Gray*, 69 Wn.2d 432, 418 P.2d 725 (1966).
32
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34 Because Ms. Youde cannot establish the affirmative defense of entrapment as a matter of law, the
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36 material she seeks in Part (3) of the subpoena is immaterial and the Tulalip Tribes should be relieved
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38 from any obligation to respond to it.
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41 **B. The Supboena Duces Tecum Should be Quashed Because the Court Lacks**
42 **Jurisdiction Over the Tulalip Tribes.**
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44 “Jurisdiction” refers to the Court’s authority over the subject matter, the person, and the power
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46 or authority to render a particular judgment. *Little v. Little*, 96 Wn.2d 183, 197, 634 P.2d 498 (1981).
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² For the language of the Medical Marijuana law in effect at the time of this arrest, see 2007 Wash. Laws ch. 371.

1 Here, the Superior Court lacks jurisdiction over the Tribes. *Bryan v. Itasca County*, 426 U. S. 373, 388
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3 – 389, 96 S.Ct. 2102, 48 L.Ed2d 710 (1976). Where a party lacks personal jurisdiction necessary to
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5 obtain discovery, the court rules provide a remedy that is set forth at CR 45(e)(3):
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7 When the place of . . . production . . . is . . . another . . . territory . . ., the
8 party desiring to . . . obtain production . . . may secure the issuance of a
9 subpoena . . . in accordance with the laws of such . . . territory.
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11 This Court Rule codifies the procedure necessary to comply with the expectations of *Bryan v. Itasca*
12 *County, supra*, which affirms the principle that tribal sovereignty preempts state jurisdiction. Justice
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14 Brennan, writing for the *Bryan* majority, reflected on Supreme Court precedent and noted that even
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16 under the extension of state court jurisdiction over some parts of Indian country in Public Law 280,
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18 “there is notably absent any conferral of state jurisdiction over the tribes themselves . . .” *Bryan*,
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20 *supra*, at 389. This analysis is analogous to the preemption doctrine that shields states from federal
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22 court jurisdiction under the Eleventh Amendment. *See, Pennhurst State School & Hospital v.*
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24 *Halderman*, 465 U. S. 89, 97 – 102, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). Accordingly, the subpoena
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26 issued by the Superior Court should be quashed; the court with jurisdiction to issue such a subpoena is
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28 Tulalip Tribal Court. *See, Law & Order Code of the Tulalip Tribes*, Ord. 49, §2.14.3, and §5.12.2.
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32 **C. The Subpoena Violates the Tribes’ Sovereign Immunity and Should be Quashed.**

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34 The doctrine of tribal sovereign immunity is a creation of federal common law. *Foxworthy v.*
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36 *Puyallup Tribe of Indians Association*, 141 Wn. App. 221, 226, 169 P.2d 53 (2007) (*citing with*
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38 *approval, U. S. v. United States Fid. and Guar. Co.*, 309 U. S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940)).
39
40 It is a principle that is not subject to diminution by the states. *Foxworthy, supra*, at 226; *Bryan v.*
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42 *Itasca County, supra*, at 388 – 389. Consistent with Section B, above, federal and state authorities
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44 recognize that a tribe must expressly waive its sovereign immunity before it can be subject to suit,
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1 including the responsibility to respond to a subpoena *duces tecum*. *U. S. v. James*, 980 F.2d 1314 (9th
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3 Cir. 1992).
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5 In *James*, the Ninth Circuit concluded that the District Court for the W. D. of Washington had
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7 properly quashed a subpoena *duces tecum* that sought records for use in a criminal case. The Court
8
9 wrote:
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11 It is clear that Indian tribes' immunity from suit remains intact "absent
12 express and unequivocal waiver of immunity by the tribe or abrogation of
13 tribal immunity by Congress." . . . Tribal immunity is just that: sovereign
14 immunity which attaches to a tribe because of its status as a dependent
15 domestic nation. . . . [W]e conclude that the Quinault Tribe was possessed
16 of tribal immunity at the time the subpoena was served, unless the
17 immunity had been waived.
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20 *Id.* at 1319; *see also*, *Mudarri v. State*, 147 Wn. App. 590, 602 – 604, 196 P.2d 153 (2009). In
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22 considering whether waiver had occurred, the Court acknowledged that the Quinault tribe had
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24 produced some documents in the course of the criminal litigation. It concluded that the production of
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26 records from one branch of the tribe's government did not waive immunity from another branch of the
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28 government. Here, the Tulalip Tribes has not waived its immunity. It has sought to preserve it by
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30 filing an Objection to the subpoena *duces tecum* and a Notice of Limited Appearance. This is
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32 consistent with case law, which holds that a tribal waiver of sovereign immunity must be
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34 unequivocally expressed. *U. S. v. Testan*, 424 U. S. 392, 399, 96 S.Ct. 948, 47 L.Ed. 114 (1976);
35
36 *Mudarri v. State*, *supra*, at 602 – 604. No such waiver exists.
37
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39 Preservation of the Tribes' right to sovereign immunity in this case is particularly important,
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41 where the Police Department has endeavored to provide the information necessary for the County
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43 Prosecuting Attorney's Office to comply with its obligations under CrR 4.7, but where Ms. Youde now
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45 seeks documents beyond the scope of CrR 4.7 – documents that are not material to Ms. Youde's
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47 defense, through an improper form of process that is overbroad and burdensome to the Tribes.
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VI. CONCLUSION

The Tulalip Tribes respectfully asks the Court to quash Part (3) of the subpoena because it seeks immaterial information that is beyond the scope of CrR 4.7. Alternatively, the Tribes asks the Court to quash the subpoena in its entirety, for lack of jurisdiction and because the Tribes has not waived its sovereign immunity.

RESPECTFULLY SUBMITTED this 27th day of September, 2011.

TULALIP TRIBES,
Office of the Reservation Attorney,



Janice E. Ellis, Prosecutor
Court Services Division