The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SKOKOMISH INDIAN TRIBE, a federally recognized Indian tribe, Plaintiff, v. PETER GOLDMARK, et al., Defendants.	No. 3:13-cv-05071-RBL MEMORANDUM OF PROPOSED *AMICI CURIAE* INDIAN TRIBES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS UNDER RULE 19 NOTE ON MOTION CALENDAR: AUGUST 2, 2013

I. INTRODUCTION

The undersigned federally-recognized Indian tribes (the "proposed *amici*") have moved for leave to appear as *amici curaie* in this case. Dkt. #66. Pending the Court's ruling on that motion, the proposed *amici* offer this Memorandum to support the Defendants' Motions to Dismiss, Dkt. Nos. 59 & 60. This Memorandum addresses the issue of whether certain absent tribes with established rights in the territory at issue in this case are necessary and indispensable parties under Rule 19(b) of the Federal Rules of Civil Procedure. The proposed *amici* take no position on the other arguments raised in Defendants' Motions.

In cases such as this where a plaintiff seeks to exercise treaty hunting or gathering rights in a given area, all tribes who have established, legally recognized treaty rights to hunt and/or gather in that area are required parties to the lawsuit. Because those tribes' sovereign immunity

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prevents their joinder to this suit, this case should be dismissed under Rule 12(b)(7) of the Federal Rules of Civil Procedure.

II. BACKGROUND

From 1854-1856, Governor Isaac Stevens and his agents executed eight treaties with Native American tribes in what would eventually become Washington State.[1] *See U.S. v. Washington*, 384 F. Supp. 312, 330 (W.D. Wash. 1974). By signing the "Stevens Treaties," tribes reserved the right to continue their traditional activities, such as hunting and fishing. *U.S. v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 49 L.Ed. 1089 (1905).

Today, Washington State recognizes 24 tribes with off-reservation treaty hunting rights in the state. Four of those tribes hunt pursuant to the treaty at issue in this case, the Treaty of Point No Point: the Plaintiff, Skokomish Indian Tribe, and the Jamestown S'Klallam, Lower Elwha Klallam, and Port Gamble S'Klallam Tribes. In the Treaty of Point No Point, the signatory tribes ceded the lands which they traditionally used, as identified in Article 1 of the Treaty:

> The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, viz: Commencing at the mouth of the Okeho River, on the Straits of Fuca; thence southeastwardly along the westerly line of territory claimed by the Makah tribe of Indians to the summit of the Cascade Range; thence still southeastwardly and southerly along said summit to the head of the west branch of the Satsop River, down that branch to the main fork; thence eastwardly and following the line of lands heretofore ceded to the United States by the Nisqually and other tribes and bands of Indians, to the summit of the Black Hills, and northeastwardly to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded to the United States by the Dwamish, Suquamish, and other tribes and bands of Indians, to Suquamish Head; thence northerly through Admiralty Inlet to the Straits of Fuca; thence westwardly through said straits to the place of beginning[.]

12 Stat. 933. The tribes reserved the right to continue their traditional hunting and fishing practices on the ceded lands: Article 4 of the treaty guarantees to the signatory tribes "[t]he right of taking fish at usual and accustomed grounds and stations" and "the privilege of hunting and

[1] Treaty of Olympia, 12 Stat. 971; Treaty of Point No Point, 12 Stat. 933; Treaty of Medicine Creek, 10 Stat. 1132; Treaty of Point Elliot, 12 Stat. 927; Treaty of Neah Bay, 12 Stat. 939; Treaty with the Yakamas, 12 Stat. 951; Treaty with the Walla Walla, Cayuse, Etc., 12 Stat. 945; Treaty with the Nez Percés, 12 Stat. 957.

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gathering roots and berries on open and unclaimed lands." 12 Stat. 933, Art. 4. This language is substantially the same in all of the Stevens Treaties.

While the fishing provision of the Stevens Treaties has been determined to reserve to each tribe the right to harvest up to 50 percent of the fish that pass through its traditional fishing grounds, *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), the scope of the hunting and gathering provision has never been litigated in federal court (with the exception of two narrow issues decided in *United States v. Hicks*, 587 F. Supp. 1162, 1163 (W.D. Wash. 1984) (Olympic National Park not included within the Treaty of Olympia hunting right) and *Holcomb v. Confederated Tribes of Umatilla Indian Reservation*, 382 F.2d 1013, 1014 (9th Cir. 1967) (tribe's hunting rights were not diminished by the admission of Oregon into the Union)).

However, Washington State courts did address the Stevens Treaty hunting provision in *State v. Buchanan*, 138 Wn.2d 186, 207, 978 P.2d 1070 (1999) (en banc). In *Buchanan*, the Washington State Supreme Court held that the Stevens Treaty reserved to the tribes the right to hunt within the lands ceded to the United States in the treaties (called "ceded areas"), as well as on any other lands that a tribe could prove were "actually used for hunting and occupied by the [] Tribe over an extended period of time." *Buchanan*, 138 Wn 2d at 207.[2] The various ceded areas are depicted in a map promulgated by the Washington State Department of Fish and Wildlife. This map is attached as Exhibit 12 to the Skokomish Tribe's Amended Complaint, Dkt. # 50-6 (June 19, 2013), and attached here as Exhibit A for reference. The state permits tribal signatories to a particular treaty to hunt within the associated ceded area.

Within the Treaty of Point No Point ceded area (shown in green in the portion of Exhibit A that is reproduced below), a total of eight tribes exercise treaty hunting rights. First, the four co-signatories to the Treaty—the Skokomish, Jamestown S'Klallam, Lower Elwha Klallam, and

[2] The proposed *amici* agree with the Skokomish Tribe's assertion that this aspect of the *Buchanan* decision has created considerable confusion due to the lack of a formal mechanism to evaluate and determine traditional hunting areas. *See* Am. Compl., Dkt. # 50, p. 37:16-18. While there are other aspects of the *Buchanan* decision that the proposed *amici* disagree with, we do not raise them here.

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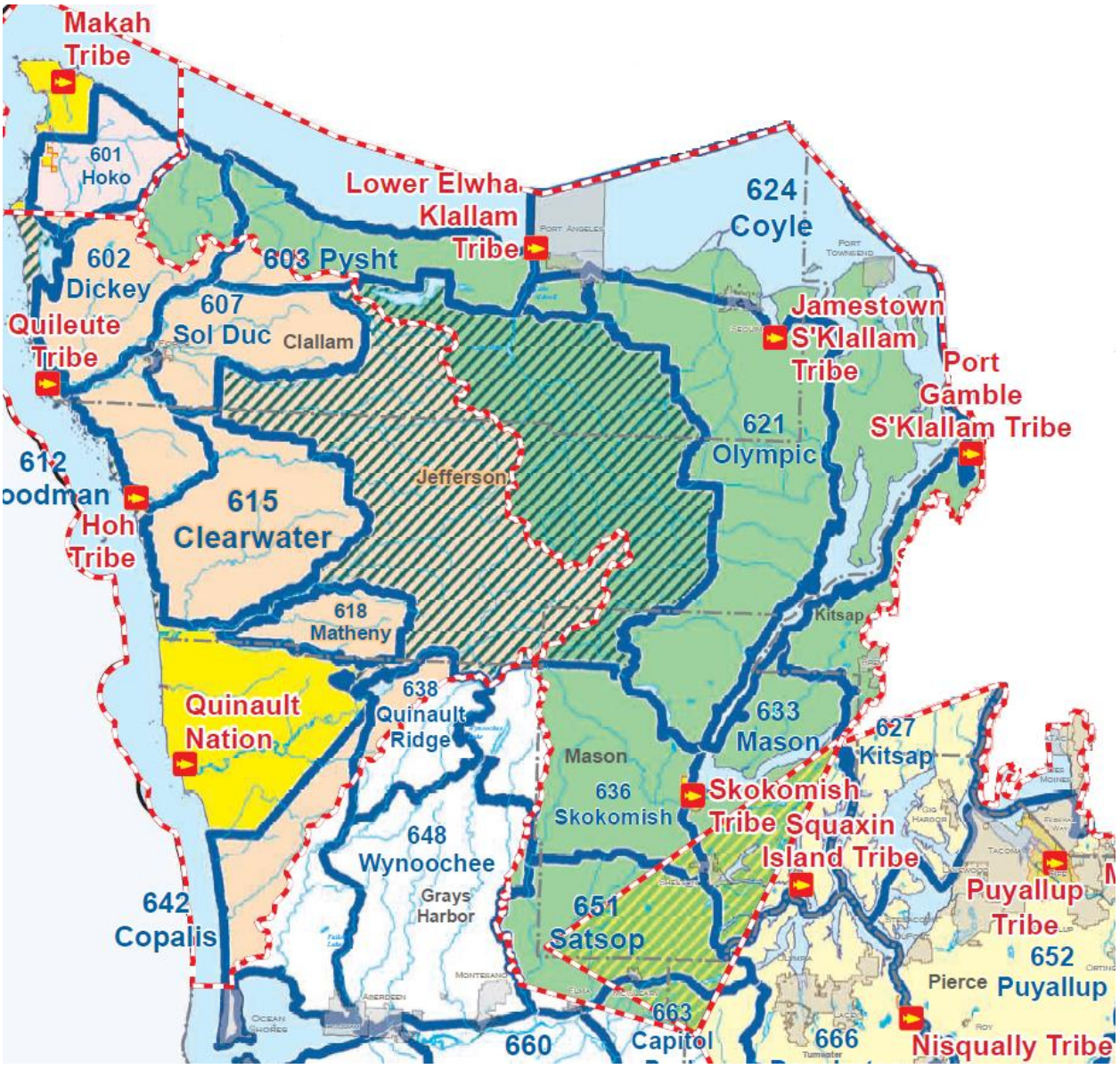
Port Gamble S'Klallam Tribes—exercise treaty hunting rights within the ceded area. Second, the signatories to the Treaty of Medicine Creek (the Nisqually, Puyallup, Squaxin Island, and Muckleshoot Tribes) hunt in a large portion of the Treaty of Point No Point ceded area that overlaps with the Treaty of Medicine Creek ceded area (shown as a hatched yellow and green area in the map below).



Skokomish also appears to assert hunting and gathering rights in the Treaty of Olympia ceded area—the proposed *amici's* ceded area (shown in peach in the map above). Currently, no

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tribes except the Treaty of Olympia signatories (the proposed *amici* and the Quinault Indian Nation) have rights to hunt and gather in that area. However, Skokomish asserts that the Defendants' interpretation of its treaty rights as disallowing hunting and gathering in the Sol Duc, Dickey, and Quinault Ridge Game Management Units—all areas within the Treaty of Olympia ceded area—is "inaccurate, incomplete, and in direct conflict with Plaintiff, Skokomish Indian Tribe's interpretation of the Privilege" of hunting and gathering. Am. Compl., Dkt. # 50, p. 38:4-8, 39:17-42:15; Exhibits G, H, and I to Am. Compl., Dkt. # 50-7 (communications from certain Defendants refusing to permit Skokomish to hunt in Sol Duc, Dickey, and Quinault Ridge due to lack of evidence of traditional use by Skokomish of such locations). The proposed *amici* would be directly affected if Skokomish obtained rights to hunt and gather within the Treaty of Olympia ceded area.

Therefore, eleven tribes—eight tribes with established, legally recognized rights to hunt within the Point No Point ceded area, and three tribes (the proposed *amici* and the Quinault Indian Nation) with established, legally recognized rights to hunt within areas in which Skokomish seeks to obtain rights to hunt and gather (the "Affected Tribes")—have a vital interest in Skokomish's claims in this suit.

III. THE SOVEREIGN IMMUNITY OF THE AFFECTED TRIBES REQUIRES THAT THE CASE BE DISMISSED

Because the Affected Tribes have a vital interest in the subject matter of this case such that a judgment in their absence would impair their ability to protect their interests or potentially subject Defendants to inconsistent obligations, the Affected Tribes are necessary parties to the case under Rule 19(a). Furthermore, because the Affected Tribes cannot be joined due to their sovereign immunity from suit and because a judgment in their absence would cause them severe prejudice, they are indispensable parties under Rule 19(b).[3] The importance of sovereign

[3] As of December 1, 2007, Rule 19 no longer refers to "necessary" or "indispensable" parties. Instead, it refers to "persons required to be joined if feasible" and persons in whose absence, if they cannot be joined, the action should not proceed. Proposed amici use "necessary" and "indispensable" for consistency with the Defendants' Motions.

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immunity and the severe prejudice that the Affected Tribes would be subjected to if the case were to proceed to judgment in their absence requires that the case be dismissed.

A. The Affected Tribes are Necessary Parties

Rule 19 provides for mandatory joinder of persons required for just adjudication. Such persons include those who have an interest in the subject matter of the action and whose ability to protect their interests would be impaired or impeded if the adjudication proceeded in their absence, and those persons who, if left out of the case, could leave an existing party to the case subject to a substantial risk of incurring inconsistent obligations. Fed. R. Civ. P. 19(a)(2)(i).

As discussed above, because the hunting and gathering provision of the Stevens Treaties has never been litigated in federal court, all tribes with established, legally recognized hunting and gathering rights in the subject territory have a vital interest in how the Treaty is interpreted and enforced. *See Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990) (finding that tribes who shared treaty rights to salmon had an interest in the Makah Tribe's claim seeking reallocation of the treaty salmon harvest); *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1279 (10th Cir. 2012) (finding that a co-signatory tribe to a 1905 agreement had an interest in a lawsuit concerning the status of ceded land under that agreement because "a determination of that status in the absence of the Eastern Shoshone would, 'as a practical matter[,] impair or impede' the ability of the Eastern Shoshone to protect that interest.").

As the Skokomish Tribe admits, its interpretation of the Treaty of Point No Point "is unique to the Plaintiff, Skokomish Indian Tribe." Am. Compl., Dkt. # 50, p. 31:1-2. Undoubtedly, the eleven other tribes with established, legally recognized hunting rights in the subject territory (i.e., the Jamestown S'Klallam, Lower Elwha Klallam, Port Gamble S'Klallam, Nisqually, Puyallup, Squaxin Island, Muckleshoot, and proposed *amici* Tribes) also have unique interpretations of the Treaty. Yet Skokomish unilaterally seeks a determination of what it admits is a "disputed interpretation of the [hunting and gathering] Privilege." *Id.* at 32:12-13.

A determination of the scope and extent of the Point No Point hunting and gathering

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privilege in the absence of the Affected Tribes would impair the ability of those tribes to seek a different interpretation of the Treaty in a later proceeding. Moreover, if those tribes *could* succeed in obtaining a different interpretation, it would subject the Defendants to inconsistent obligations. *See Makah Indian Tribe v. Verity*, 1988 WL 144137, at *17 (W.D. Wash. 1988) *aff'd in relevant part*, 910 F.2d 555 (9th Cir. 1990) (where one tribe sought re-allocation of treaty fishing resource, "the State has no assurance that a favorable result in this suit will protect it from subsequent suits brought by other tribes on the same legal basis. For this reason alone, the non-party treaty tribes are indispensable to this litigation"); *Northern Arapaho Tribe*, 697 F.3d at 1279 (in case concerning the status of land ceded to the government by tribes, "the State of Wyoming would be left at a substantial risk of inconsistent obligations, because nothing would stop the Eastern Shoshone [an absent entity and party to the land cession agreement], unbound by the decision, from relitigating the issue."). Therefore, the Affected Tribes are necessary parties; a judgment in their absence would impair their ability to protect their interests and would subject Defendants to a substantial risk of inconsistent obligations in regulating and enforcing hunting and gathering rights.

B. The Affected Tribes Cannot be Joined

Under Rule 19(a), a necessary party will generally be joined as a party to the action. *See Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459 (9th Cir. 1994). Indian tribes may not be joined, however, where they have not waived sovereign immunity. *Id.* There has been no such waiver by the Affected Tribes in this case. In fact, Skokomish admits that "[j]oinder is not . . . feasible as to any other federally recognized Indian tribe, which possesses sovereign immunity." Am. Compl., Dkt. # 50, p. 51:1-2. The Court must therefore determine whether the Affected Tribes are indispensable parties under Rule 19(b).

C. The Affected Tribes are Indispensable Parties

If a person described in Rule 19(a) cannot be made a party for some reason, the court must determine, under Rule 19(b), "whether, in equity and good conscience, the action should

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proceed among the existing parties or should be dismissed." The factors to be considered in making that determination include the following four: (1) the extent to which a judgment rendered in the person's absence might be prejudicial to the person or the existing parties; (2) the extent to which the prejudice could be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action were dismissed. In this case, the importance of the Affected Tribes' interests and of tribal sovereign immunity to the resolution of the case dictates that it should not, in equity and good conscience, go forward in the Affected Tribes' absence. Fed. R. Civ. P. 19(b).

1. A Judgment Rendered in the Absence of the Affected Tribes Would Cause Significant Prejudice

The judgment that Skokomish seeks in this case would cause considerable prejudice to the Affected Tribes. First, Skokomish seeks a determination of "the scope of the Privilege of hunting and gathering . . . [under] the Treaty of Point No Point." Am. Compl., Dkt. # 50, p. 53:1-3. A determination on the scope and extent of the hunting and gathering privilege would govern what lands and resources are available to all four signatory tribes—not just Skokomish—for hunting and gathering under the Treaty of Point No Point. *See Northern Arapaho Tribe*, 697 F.3d at 1281-82 (finding second tribe would suffer prejudice where "two distinct tribes possess an equal undivided interest in the same land, and the treaty right at issue implicates the very status of that land. The Northern Arapaho's treaty rights vis-à-vis the State of Wyoming are inseparable from the Eastern Shoshone's treaty rights."); *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 774 (D.C. Cir. 1986) ("Conflicting claims by beneficiaries to a common trust present a textbook example of a case where one party may be severely prejudiced by a decision in his absence."). Furthermore, as mentioned above, the Affected Tribes would be significantly prejudiced in seeking a different interpretation of the treaty in any future proceeding.

Second, Skokomish seeks a declaration that it has exclusive regulatory and management

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authority of hunting and gathering under the treaty rights contained in the Treaty of Point No Point. Skokomish asks this Court to declare (1) its "exclusive regulatory and management authority" under the Treaty, *id.* at 53:8-13; (2) that it has "exclusive authority to determine the time, place, and manner" of hunting and gathering under the Treaty of Point No Point, *id.* at 33:9-11, 34:1-3; and (3) that it has the right to hunt and gather "up to and including one hundred percent (100%) of any game, roots and berries" and a declaration of such allocation, *id.* at 35:11-12, 53:14-16. Furthermore, Skokomish asserts that these rights extend to "all lands within the ceded area boundaries" of the Point No Point Treaty and to "all other lands not within the ceded area boundaries" upon which the privilege of hunting and gathering is guaranteed under the Point No Point Treaty. *Id.* at 36:6-17. A judgment granting Skokomish exclusive management authority and the right to take up to 100 percent of all game, roots and berries in the subject territory would reduce or eliminate the rights that the Affected Tribes currently enjoy in the territory. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990) (affirming district court decision that "absent tribes had an interest in the suit [regarding allocation of a treaty resource] because 'any share that goes to the Makah must come from [the] other tribes.'").

In sum, a judgment in the absence of the Affected Tribes would prejudice any future attempt to obtain a different interpretation of the Point No Point Treaty hunting and gathering rights, and could result in a reduction or an elimination of the rights they currently exercise. Therefore, Skokomish's argument that "[a] judgment rendered in the absence of a Non-Party Treaty Tribe . . . shall not result in prejudice to said Non-Party Treaty Tribe" is meritless, and this factor favors dismissal.

2. It is Not Possible to Lessen or Avoid Prejudice

With respect to the second factor in the indispensability analysis, it is not possible to lessen or avoid prejudice to the Affected Tribes. Skokomish seeks a full adjudication of the hunting and gathering right of the Treaty of Point No Point; a judgment will necessarily and unavoidably impact the three other signatory tribes to the Treaty of Point No Point. If the Court

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rules that the scope of the hunting and gathering right of the Treaty of Point No Point does not extend to certain lands or resources, all signatory tribes to the Treaty would have to abide by those limitations, not just Skokomish. As the State Defendants correctly stated, "[l]ands and resources are either subject to treaty hunting under the Treaty or they are not." State Defendants' Mot. to Dismiss Am. Compl., Dkt. # 59, p. 20:24-25 (July 3, 2013). The all-or-nothing nature of the interests of the absent tribes favors dismissal. Furthermore, if the court rules that Skokomish has exclusive authority to manage and harvest up to 100% of the resources under the hunting and gathering right, the Affected Tribes' opportunity and rights in the subject territory would necessarily be reduced or eliminated. There is no way to lessen this prejudice absent joining the Necessary Parties in this case. Thus, the second factor weighs in favor of dismissal.

3. A Judgment Rendered in the Absence of the Affected Tribes Would be Inadequate

The third factor also supports dismissal. Whether a ruling in the absence of certain persons would be adequate depends upon whether the ruling comports with the interest of the courts and the public in complete and efficient settlement of controversies. This "public rights" exception does not apply where the plaintiff seeks only to enforce its own treaty rights. *Northern Arapaho Tribe*, 697 F.3d at 1281 ("Appellant seeks only to enforce its own, treaty-based rights; thus, the 'public rights' exception . . . does not apply."); *cf.* Am. Compl., Dkt. # 50, p. 31:1-2 "Plaintiff, Skokomish Indian Tribe's interpretation of the Treaty of Point No Point of January 26, 1855 (12 Stat. 933) is unique to the Plaintiff, Skokomish Indian Tribe."). Furthermore, because the Defendants would be subject to future litigation on the same issues, a judgment in this case would not effect a complete resolution. *Confederated Tribes of the Chehalis v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991) (holding that "success by the plaintiffs in this action [concerning the Quinault Indian Nation's authority over the Quinault Reservation] would not afford complete relief to them. Judgment against the federal officials would not be binding on the Quinault Nation, which could continue to assert sovereign powers and management responsibilities over

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the reservation."); *Northern Arapaho Tribe*, 697 F.3d at 1283 ("There would be nothing 'complete, consistent, [or] efficient' about the settlement of this controversy if the State of Wyoming were required to relitigate the issue with the Eastern Shoshone, with potentially different results."). Therefore, the third factor favors dismissal.

4. Plaintiff's Lack of an Adequate Remedy Cannot Trump Sovereign Immunity

The fourth factor, existence of an adequate remedy if the action is dismissed, is the only factor that weighs against dismissal. Skokomish would not have an alternate forum for its claims if this case were dismissed. However, whether under Rule 19(b)(4) the plaintiff would have an adequate remedy if the action were dismissed is all but foreclosed as a consideration when the absent party is a sovereign government.

> A case may not proceed when a required-entity sovereign is not amenable to suit. These cases instruct us that where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.

Republic of the Philippines v. Pimentel, 553 U.S. at 867. *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) ("If the necessary party is immune from suit, there may be 'very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor.'"); *see also Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) ("[L]ack of an alternative forum does not automatically prevent dismissal of a suit. Sovereign immunity may leave a party with no forum for its claims."). Furthermore, there is no reason that one sovereign should be given preference where other sovereigns share equal interests in the case; Skokomish's interests here cannot trump the sovereign immunity of the other signatory tribes to the Treaty of Point No Point. *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986) ("It is wholly at odds with the policy of [sovereign] immunity to put the [sovereign] to th[e] Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it."). Although this factor weighs against dismissal, it does not outweigh the

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other three factors, all of which support dismissal.

D. This Case Cannot Continue in Equity and Good Conscience Without the Affected Tribes

Skokomish seeks to litigate hunting and gathering rights under the Treaty of Point No Point without including other tribes who share rights under that treaty or who would be affected by the proposed interpretation of the Treaty. Skokomish also asks this Court to rule that it has exclusive management authority and an allocation of up to 100% of the hunting and gathering resources, in the absence of eleven other tribes that have established, legally recognized rights to hunt in the territory in which Skokomish claims such exclusive authority (which includes lands within the proposed *amici's* ceded area). The prejudice that the Affected Tribes will suffer if a judgment is rendered in their absence cannot be lessened or avoided; and any judgment in this matter would not effect a complete resolution of the issues due to potential future litigation by the Affected Tribes. The first three factors of the Rule 19(b) analysis therefore strongly favor dismissal. Furthermore, the fact that the fourth factor does not favor dismissal is to be given relatively little weight where the source of the Plaintiff's inability to obtain an adequate remedy is sovereign immunity. Accordingly, the Absent Tribes are indispensable parties to the suit.

IV. CONCLUSION

When the Rule 19 factors are analyzed with an appreciation of the importance of the Affected Tribes' sovereign immunity and interest in the case, it is clear that they are necessary and indispensable parties and that this case cannot proceed in good conscience without them. The proposed *amici* therefore request that the Defendants' Motions to Dismiss be granted.

Respectfully submitted this 22nd day of July, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2013, I electronically filed the foregoing Memorandum of Proposed *Amici Curiae* Indian Tribes In Support Of Defendants' Motion To Dismiss Under Rule 19 with the Clerk of the Court using the CM/ECF system, which will notify all parties in this matter who are registered with the Court's CM/ECF filing system of such filing.

DATED this 22nd day of July, 2013.

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