THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SKOKOMISH INDIAN TRIBE, a federally recognized Indian tribe, on its own behalf and as *parens patriae* of all enrolled members of the Indian tribe, Plaintiff, v. PETER GOLDMARK, Washington State Commissioner of Public Lands and Administrator for the Department of Natural Resources et al., Defendants.	NO: 3:13-cv-05071-RBL PLAINTIFF, SKOKOMISH INDIAN TRIBE'S RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS AMENDED COMPLAINT NOTE ON MOTION CALENDAR: AUGUST 2, 2013 ORAL ARGUMENT REQUESTED

I. RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS

Plaintiff, Skokomish Indian Tribe, moves the Court to deny the State Defendants' Motion to Dismiss Amended Complaint and Defendants Prosecuting Attorneys' Joint Motion to Dismiss Plaintiff's Amended Complaint, ("Defendants' Motions"). Dkt. # 59; Dkt. # 60. Defendants have ignored material and conclusive facts alleged in the Amended Complaint. Dkt. # 50.

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Defendants further fail to allege facts sufficient to support the Defendants' Motions, and federal law, equity and good conscience do not support a dismissal.

If the Court, however, determines that a more definite statement is necessary to avoid a dismissal, Plaintiff, Skokomish Indian Tribe, moves the Court for leave to amend the Amended Complaint pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure. Dkt. # 50; Fed. R. Civ. P. 15(a)(2) (The court should freely give leave when justice so requires); LCR 15.

II. ARGUMENT AND STATEMENT OF FACTS

A. *The Court should deny Defendants' Motions under Rules 12(b)(1), "lack of subject-matter jurisdiction", and 12(b)(6), "failure to state a claim upon which relief can be granted".*

The federal courts have spent many decades crafting the legal standards for review of Rules 12(b)(1) and 12(b)(6) motions. Fed. R. Civ. P. 12(b)(1) and 12(b)(6). In applying these legal standards to this action, the Court should consider the allegations contained in the Amended Complaint and the following argument. Dkt. # 50. The Court should also consider that if permitted to proceed with discovery practice, Plaintiff, Skokomish Indian Tribe's allegations will be confirmed.

In regards to Rules 12(b)(1) and 12(b)(6), Article III of the Constitution of the United States of America provides:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority*;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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U.S. Const. art. III, § 2, cl. 1 (Emphasis Added).[1] "Standing is a threshold matter central to our subject matter jurisdiction." *Bates v. United Parcel Services, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007). "In limiting the judicial power to 'Cases' and 'Controversies,' Article III of the Constitution restricts it to the traditional role of Anglo–American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492, 129 S.Ct. 1142, 1148 (2009). "The doctrine of standing is one of several doctrines that reflect this fundamental limitation." *Summers*, 555 U.S. at 493, 129 S.Ct. at 1149. It requires federal courts to satisfy themselves that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction." *Id.* Furthermore, to establish Article III standing, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty International USA et al.*, 133 S.Ct. 1138, 1140 (2013). Threatened injury must be certainly impending to constitute injury in fact. *Clapper*, 133 S.Ct. at 1141. "[P]ast wrongs do not in themselves amount to real and immediate threat of injury necessary to make out a case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 103, 103 S.Ct. 1660, 1666 (1983) (Citations Omitted). "Of course, past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury." *O'Shea v. Littleton,* 414 U.S. 488, 496, 94 S.Ct. 669, 676 (1974). "But here the prospect of future injury rests on the likelihood that respondents will again be arrested for

[1] See also 28 U.S.C. § 1331; 28 U.S.C. § 1362; 28 U.S.C. § 2201; 28 U.S.C. § 2202.

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and charged with violations of the criminal law and will again be subjected to bond proceedings, trial, or sentencing before petitioners." *Id.*

As for declaratory judgments, "[t]he controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth et al.*, 300 U.S. 227, 240-41, 57 S.Ct. 461, 464 (1937). "A 'controversy' in this sense must be one that is appropriate for judicial determination." *Aetna*, 300 U.S. at 240, 57 S.Ct. at 464. The United States Supreme Court in *Medimmune,* summarized the law as follows: "[b]asically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Medimmune, Inc. v. Genentech, Inc., et al.*, 549 U.S. 118, 127, 127 S.Ct. 764, 771 (2007).

In considering Rule 12(b)(6), the United States Supreme Court in *Twombly*, determined that the "Federal Rule of Civil Procedure 8(a)(2) requires only '*a short and plain statement of the claim* showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which its rests." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 1964 (2007)(Emphasis Added). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss *does not need detailed factual allegations*, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555, 127 S.Ct. at 1964-65 (Emphasis Added and Citations Omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 127 S.Ct. at 1965. The United States Supreme Court in applying

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these general standards to the § 1 claim under the Sherman Act, opined, "[a]nd, of course, a well-pleaded complaint may proceed *even if its strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely*.'" *Twombly,* 550 U.S. at 556, 127 S.Ct. at 1965. The United States Supreme Court in *Iqbal,* reaffirmed that "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal,* 556 U.S. 662, 679, 129 S.Ct. 1937, 1950 (2009).

1. The Treaty of Point No Point of January 26, 1855 (12 Stat. 933) is the Supreme Law of the Land; and constitutes a Legally Protected Interest.

"A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." *Washington v. Fishing Vessel* Ass'n, 443 U.S. 658, 675, 99 S.Ct. 3055, 3069 (1979); U.S. Const. art. I, § 10, cl. 1 ("No State shall enter into any Treaty"). The Treaty of Point No Point of January 26, 1855 (12 Stat. 933) is such a contract between the United States and Plaintiff, Skokomish Indian Tribe, both acting as two sovereign nations. Article 14 of the Treaty of Point No Point of January 26, 1855 (12 Stat. 933) specifically provides, "This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States." 12 Stat. 933; *Fishing Vessel Ass'n*, 443 U.S. at 693, fn. 33, 99 S.Ct. at 3079, fn. 33; *United States v. Washington*, 520 F.2d 676, 684 (9th Cir. 1975). Once ratified and proclaimed, the Treaty of Point No Point of January 26, 1855 (12 Stat. 933) became the supreme law of the land. 12 Stat. 933 (Ratified March 8, 1859 and Proclaimed April 29, 1859); U.S. Const. art. II, § 2, cl. 2; U.S. Const. art. VI, cl. 2; U.S. Const. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts").

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Article 4 of the Treaty of Point No Point of January 26, 1855 (12 Stat. 933) guarantees "[t]he right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; ***together with the privilege of hunting and gathering roots and berries on open and unclaimed lands***. Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens."[2] ("Privilege"). This is a legally protected interest, as the Treaty of Point No Point of January 26, 1855 (12 Stat. 933) "was not a grant of rights to the Indians, but a grant of right from them,-a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 664 (1905).

2. A Case and Controversy, which is definite and concrete, exists over the Parties' interpretation of the Treaty of Point No Point of January 26, 1855 (12 Stat. 933); and Parties' legal interests are adverse.

It is a forgone conclusion that the parties' legal interests are adverse. Plaintiff, Skokomish Indian Tribe, maintains the broadest interpretation of the Treaty of Point No Point of January 26, 1855 (12 Stat. 933) and Defendants view it narrowly, or alternatively seek abrogation of the Treaty.[3] Plaintiff, Skokomish Indian Tribe's interpretation of the Treaty of Point No Point of January 26, 1855 (12 Stat. 933), however, trumps the interpretation advanced by Defendants. The United States Supreme Court held:

> Accordingly, it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule. It has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in

[2] U.S. Const. art. I, § 8, cl. 3 provides further, that Congress shall have Power "To regulate Commerce with foreign Nations, and among the several States, and with the *Indian Tribes*".

[3] U.S. Const. art. III, § 2, cl. 1 (The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .).

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> which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. "[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." . . . This rule, in fact, has thrice been explicitly relied on by the Court in broadly interpreting these very treaties in the Indians' favor.

Fishing Vessel Ass'n, 443 U.S. at 675-76, 99 S.Ct. at 3069. The anthropological record also supports Plaintiff, Skokomish Indian Tribe's interpretation. Dkt. # 50 at p. 10-29.

There is an actual case and controversy, which is definite and concrete, arising from Defendants' enforcement of a disputed interpretation of the Treaty of Point No Point of January 26, 1855 (12 Stat. 933). Dkt. # 50 at p. 30-48. Unfortunately, no federal adjudication exists to lift this cloud of uncertainty and end this actual case and controversy, which touches on the legal relations of the parties. In particular, no party to this action can agree on the meaning of any of the following terms: hunting; gathering; roots; berries; open lands; and unclaimed lands. No party to this action can agree on the extent of the regulatory and enforcement authority guaranteed by the Treaty of Point No Point of January 26, 1855 (12 Stat. 933). No party to this action can agree on the allocation of Treaty resources as guaranteed by the Treaty of Point No Point of January 26, 1855 (12 Stat. 933), between the Plaintiff, Skokomish Indian Tribe, and the State of Washington. The laws of the State of Washington, in conflict with the Treaty of Point No Point of January 26, 1855 (12 Stat. 933), the supreme law of the land, are also preempted by the Treaty. U.S. Const. art. VI, cl. 2; U.S. Const. art. I, § 10, cl. 1. No party to this action, however, can agree on the extent of this preemption. The laws of the State of Washington

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further ignore this preemption in its entirety.[4] Any reference to the laws of the State of Washington includes but is not limited to the laws of the State of Washington and of all political subdivisions of the State of Washington including Counties.

3. The Injury (Harm) to Plaintiff, Skokomish Indian Tribe, and its members is concrete and particularized, actual or imminent or certainly impending, irrefutably traceable and causally linked to the Defendants' enforcement of the disputed interpretation of the Treaty of Point No Point of January 26, 1855 (12 Stat. 933).

When a cloud of uncertainty lingers over the interpretation of a ratified treaty and extent of a federal preemption, the Court should carefully consider if the laws of the State of Washington are void for vagueness. Dkt. # 50 at p. 45-46. The United States Supreme Court, for example, held "[t]hat the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v, General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127 (1926) (Citations Omitted). Further holding that:

> "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. See *Connally v. General Constr. Co*., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926) ('[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law'); *Papachristou v.*

[4] Noting an exception, R.C.W. 37.12.060 provides, "Nothing in this chapter . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, statute, or executive order with respect to Indian land grants, hunting, trapping, or fishing or the control, licensing, or regulation thereof", but is nevertheless silent as to gathering.

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> *Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) ('Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids' (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888 (1939) (alteration in original))). This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. See *United States v. Williams*, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'"

F.C.C. v. Fox Television Stations, Inc., 132 S.Ct. 2307, 2317, 183 L.Ed.2d 234 (2012).

Absent a federal adjudication lifting this cloud of uncertainty and ending this actual case and controversy, the Plaintiff, Skokomish Indian Tribe and its members are left guessing. Every time a member of Plaintiff, Skokomish Indian Tribe, considers whether or not to exercise his or her Privilege to hunt or gather he or she is forced to ask the questions, "Will I be subject to an unlawful and illegal seizure of persons or property, or even be arrested and prosecuted today? What will the monetary impact be to me if I refrain from hunting and gathering out of fear of being seized, arrested and/or prosecuted? How will my cultural and religious customs and practices survive if I cannot hunt and gather?" Dkt. # 50 at p. 30-48. The members of Plaintiff, Skokomish Indian Tribe, named in the Amended Complaint will testify under oath to their well-founded fears of being seized, arrested and/or prosecuted by Defendants, based upon actual encounters with individual Defendants and/or Defendants' subordinates. Dkt. # 50 at p. 46-47; *O'Shea v. Littleton,* 414 U.S. 488, 496, 94 S.Ct. 669, 676 (1974).

Plaintiff, Skokomish Indian Tribe, requests that the Court consider the following examples of the Defendants' enforcement or threatened enforcement. In one example, a farmer owns private fee land (e.g. private homestead) that is operated exclusively as a farm, ("Farm land"), and in a

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manner not inconsistent with hunting. The Farm land is recognized by the State as being open to State licensed hunters and is within Plaintiff, Skokomish Indian Tribe's Territory recognized by Defendants. Dkt. # 50-6; Dkt. # 50-7; Dkt. # 50-8; Dkt. # 50-9; Dkt. # 50-10; Dkt. # 50-11; Dkt. # 50-12; Dkt. # 50-13. Farmer freely consents to Plaintiff, Skokomish Indian Tribe, hunting on the Farm land. After adopting a disputed interpretation of Article 4 of the Treaty of Point No Point of January 26, 1855 (12 Stat. 933), Defendant Bob Ferguson (Attorney General), advises and directs other Defendants that the Farm land is not "open and unclaimed lands" within the scope of the Privilege. *Id.* Furthermore, if members of Plaintiff, Skokomish Indian Tribe, attempt to exercise their Privilege to hunt on the Farm land, the members may be seized, arrested and prosecuted under the laws of the State of Washington. *Id.* Defendant Phil Anderson (Director for WDFW), Defendant Bruce Bjork (Assistant Director for WDFW and Chief of WDFW Enforcement) and Defendant County Prosecutors accept the advice and direction of Defendant Bob Ferguson (Attorney General). *Id.* These Defendants threaten Plaintiff, Skokomish Indian Tribe, that if it attempts to exercise the Privilege on the farm land, its members will be seized, arrested and prosecuted. *Id.* WDFW's public website provides further evidence of Defendant Phil Anderson's and Defendant Bruce Bjork's acceptance of this disputed interpretation and reaffirmation of this threat, stating, "[g]enerally, the off-reservation areas reserved for treaty hunting are those lands that are 'open and unclaimed' and were either ceded by the tribe to the federal government or were traditionally used for hunting and occupied by the

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tribe. Lands are 'open and unclaimed' if they are not privately owned and they are put to a use that is not inconsistent with hunting."[5]

Another example for the Court's consideration rests with State public lands not used in a manner inconsistent with hunting, which are recognized by the State as being open to State licensed hunters, and are not within Plaintiff, Skokomish Indian Tribe's Territory "recognized" by Defendants. Dkt. # 50-6. Plaintiff, Skokomish Indian Tribe, further asserts that the lands are within the traditional hunting grounds of the Twana, thus in Plaintiff, Skokomish Indian Tribe's Territory. Defendants fail to provide any administrative or other legal method to contest this erroneous territorial determination, thus denying Plaintiff, Skokomish Indian Tribe, and its members meaningful due process. U.S. Const. amend. V, VI, and XIV. Furthermore, after adopting a disputed interpretation of Article 4 of the Treaty of Point No Point of January 26, 1855 (12 Stat. 933), Defendant Bob Ferguson (Attorney General), advises and directs other Defendants that "[a] tribal member hunting outside his or her tribe's ceded area or traditional hunting ground is not exercising a treaty right, even if the place is 'open and unclaimed". Dkt. # 50-12; Dkt. # 50-13. Additionally, if members of Plaintiff, Skokomish Indian Tribe, attempt to exercise their Privilege to hunt on said public lands, the members may be seized, arrested and prosecuted under the laws of the State of Washington. Dkt. # 50-6; Dkt. # 50-7; Dkt. # 50-8; Dkt. # 50-9; Dkt. # 50-10; Dkt. # 50-11; Dkt. # 50-12; Dkt. # 50-13. Defendant Peter Goldmark (Public Lands Commissioner and Administrator for DNR), Defendant Lenny Young (Supervisor

[5] Washington Department of Fish and Wildlife, *WDFW Help, available at* http://wdfw.wa.gov/help/questions/137/Why+do+Native+Americans+have+their+own+separate+hunting+and+fishing+seasons%3F (last visited July 29, 2013).

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for DNR), Defendant Phil Anderson (Director for WDFW), Defendant Bruce Bjork (Assistant Director for WDFW and Chief of WDFW Enforcement) and Defendant County Prosecutors accept the advice and direction of Defendant Bob Ferguson (Attorney General). *Id.* These Defendants continually threaten Plaintiff, Skokomish Indian Tribe, that if it attempts to exercise the Privilege on the lands, its members will be seized, arrested and prosecuted. *Id.*

In another example, there are public lands owned by Kitsap County, State of Washington, that are within Plaintiff, Skokomish Indian Tribe's Territory recognized by Defendants, however, Shelley E. Kneip, attorney for Defendant Russell D. Hauge, wrote in an email dated May 31, 2013, ". . . Only the county commissioners can agree to any 'gathering' on county lands, and unless and until that happens county personnel will not treat Skokomish Tribal members any differently than normal." Dkt. # 50 at p. 44. Plaintiff, Skokomish Indian Tribe, received a copy of Chapter 10.12 of the Kitsap County Code. Section 10.12.050, thereof, provides, "[i]t is unlawful to remove, destroy, mutilate or deface any tree, shrub, flower or other plant . . . ." Section 10.12.170, thereof, provides, "[i]t is unlawful to violate or fail to comply with any park rule or regulation duly posted by the park director, and the park director or any park attendant shall have authority to eject from the park any person acting in violation of this chapter." Section 10.12.190, thereof, lastly provides, "[v]iolation of any provision of this chapter is a misdemeanor, punishable as provide in Section 1.12.010 of this code." This constitutes an actual and concrete threat to seize, arrest and prosecute members of Plaintiff, Skokomish Indian Tribe, that attempt to exercise the Privilege on these lands.

In addition to the actual or threatened unlawful and illegal seizures of persons and property, arrests and prosecutions, the injury (harm) inflicted on Plaintiff, Skokomish Indian Tribe, and its

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members by Defendants' denial of access to these lands and resources guaranteed by the Treaty of Point No Point of January 26, 1855 (12 Stat. 933) includes but is not limited to monetary damages, as well as damages related to the detrimental interference with Plaintiff, Skokomish Indian Tribe's cultural and religious customs and practices. Based on the foregoing analysis, this injury (harm) is concrete, particularized, actual or imminent or certainly impending and irrefutably traceable or causally linked to Defendants actions. Prospective injunctive relief was requested in the Amended Complaint to stop Defendants from inflicting any further injury (harm) upon Plaintiff, Skokomish Indian Tribe, and its members. Dkt. # 50 at p. 54.

4. This action is redressable by a favorable ruling and appropriate for judicial determination; and there is a compelling and sufficient immediacy and reality warranting a declaratory judgment and other relief.

Considering all of the facts and the illustrative examples, it is indisputable that all of the Defendants, have conspired and acted in collusion to unlawfully and illegally attempt to diminish and/or abrogate the Privilege guaranteed by Article 4 of the Treaty of Point No Point of January 26, 1855 (12 Stat. 933), by wielding the weapon of their choosing, the County Defendants (i.e. the Prosecutors). Dkt. # 50-6; Dkt. # 50-7; Dkt. # 50-8; Dkt. # 50-9; Dkt. # 50-10; Dkt. # 50-11; Dkt. # 50-12; Dkt. # 50-13. Defendants have further used their subordinates to facilitate this unlawful and illegal venture. *Id.*

Defendants cannot assert sovereign immunity to bar redress or an appropriate judicial determination in this action, by virtue of their unlawful, illegal and invalid intentional conduct and actions in direct violation of federal law. U.S. Const. amend. XI; *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Plaintiff, Skokomish Indian Tribe, and its members will suffer immediate and irreparable harm unless the Court enjoins the Defendants from unlawfully

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interfering with Plaintiff, Skokomish Indian Tribe's exercise of the Privilege guaranteed by Article 4 of the Treaty of Point No Point of January 26, 1855 (12 Stat. 933).

Rule 19 of the Federal Rules of Civil Procedure furthermore does not bar redress by a favorable ruling as discussed in Section II (B). A judicial determination is also appropriate.

B. *The Court should deny Defendants' Motions under Rule 12(b)(7), "failure to join a party under Rule 19".*

A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a) (Necessary Party).

If a person who is required to be joined if feasible cannot be joined, the Court must determine whether, *in equity and good conscience*, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
> (2) the extent to which any prejudice could be lessened or avoided by:
> (A) protective provisions in the judgment;
> (B) shaping the relief; or
> (C) other measures;
> (3) whether a judgment rendered in the person's absence would be adequate; and
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b) (Indispensable Party).

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1. The Court can accord complete relief among existing parties.

District Court Judge Martinez was previously faced with the actions of Plaintiff, Skokomish Indian Tribe and held that "[f]inally, the Skokomish argue that the S'Klallam Request for Determination fails to plead with particularity, in that it fails to name 'necessary and indispensable parties' as defendants . . . Specifically, the Skokomish contend that other tribes who fish in Hood Canal, such as the Suquamish and Lower Elwha, should have been named. However, this subproceeding concerns the Hood Canal Agreement, to which the Suquamish Tribe is not a signatory. And while the Lower Elwha Band of Klallam Indians is a party to the Agreement, ***there was no need to join them as defendants because it is the actions of the Skokomish, and the Skokomish alone, that are at issue***. No tribes other than those named in the Request for Determination are either necessary or indispensable parties to this subproceeding." *United States v. Washington*, 393 F.Supp.2d 1089, 1096 (W.D.Wash. 2005) (Emphasis Added).

If the Court chooses to apply District Court Judge Martinez's joinder test, then no other person need be joined because, ***it is the actions of the Defendants, and the Defendants alone, that are at issue***. Fed. R. Civ. P. 19(a)(1)(A). Plaintiff, Skokomish Indian Tribe, is not altering the current state of affairs existing between non-party Indian tribes. Dkt. # 50 at p. 50-57. With the exception of on reservation or Indian Country conduct, no Indian tribe can regulate another Indian tribe's hunting and gathering activities absent a consensual lawsuit, an intertribal

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agreement supported by a waiver of sovereign immunity or an act of Congress.[6] For example, the Quileute and Hoh Tribes cannot currently regulate the hunting and gathering activities of Plaintiff, Skokomish Indian Tribe, in the following GMUs: Wynoochee, Sol Duc, Dickey and Quinault Ridge. Defendants' regulatory authority is also preempted by treaties, federal law and the laws of the State of Washington.[7] Thus the Court can accord complete relief among existing parties.

2. No person's ability to protect their interest is impaired or impeded and the United States of America negotiated, executed, ratified and proclaimed numerous and varying treaties with Indian Tribes which has historically resulted and will continue to result in double, multiple, or otherwise inconsistent obligations.

No other person need be joined as a necessary party. Fed. R. Civ. P. 19(a)(1)(B). All other persons and Indian tribes that wish to claim an interest relating to the subject of this action may freely intervene and are in fact, invited to intervene. Dkt. # 50 at p. 54-57. As discussed previously, only Defendants will be affected, as it is their actions along that are at issue, and the current state of affairs existing between non-party Indian tribes remains unaltered. Dkt. # 50 at p. 50-57. But just as significant, the United States of America negotiated, executed, ratified and proclaimed numerous treaties with Indian tribes containing differing terms.[8] 10 Stat. 1132; 12 Stat. 927; 12 Stat. 933; 12 Stat. 939; 12 Stat. 945; 12 Stat. 951; 12 Stat. 957; 12 Stat. 963; 12 Stat. 971; *Fishing Vessel Ass'n*, 443 U.S. at 675-76, 99 S.Ct. at 3069. These treaties are

[6] See 18 U.S.C. § 1151 (Indian Country); 25 U.S.C. § 1301 et seq.; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, 98 S.Ct. 1670, 1684, 56 L.Ed.2d 106 (1978); U.S. Const. art. I, § 8, cl. 3 provides further, that Congress shall have Power "To regulate Commerce with foreign Nations, and among the several States, and with the *Indian Tribes*".

[7] U.S. Const. art. VI, cl. 2; Pub. L. 83-280; R.C.W. 37.12.060.

[8] 12 Stat. 945 (the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens, is also secured to them); 12 Stat. 971 (together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands).

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furthermore subject to different interpretations based on each individual Indian tribe's understanding of their treaty, as supported by their unique anthropological record.[9] *Id.* The very nature of the treaty process developed and employed by the United States of America has and will continue to result in double, multiple, or otherwise inconsistent obligations. *Id.* Therefore, Defendants' concern is without merit and their request to dismiss fatally flawed.

3. This action seeks to enjoin the Defendants from unlawfully interfering with Plaintiff, Skokomish Indian Tribe's lawful exercise of the Privilege and no other persons need be joined, even if the Court determines that there are other Necessary Parties.

The Court must determine whether or not, *in equity and good conscience*, the above-entitled action should proceed among the existing parties. Fed. R. Civ. P. 19(b). If the Court adopts the narrowest interpretation of Rule 19(b) of the Federal Rules of Civil Procedure, individual Indian tribes, including the Plaintiff, Skokomish Indian Tribe, still have a right to challenge another parties' regulatory authority even without joining all other "potentially" impacted Indian tribes.

In the first instance, the Confederated Tribes of the Colville Reservation commenced an action seeking to prohibit the State of Washington from enforcing its asserted traffic violation, under R.C.W. Ch. 46.63, and to secure a judicial declaration that the matter is governed by tribal law and enforceable only by officers duly commissioned by the Tribes and in the Tribes' own court. *Confederated Tribes of the Colville Reservation v. State of Washington*, 938 F.2d 146, 146-147 (9th Cir. 1991) (Not all Indian tribes in the State of Washington and not all Indian tribes impacted by Pub. L. 83-280 were joined in the action; See also Pub. L. 83-280, Sec. 2, 18 U.S.C.

[9] For example, the usual and accustomed fishing grounds and stations of Indian tribes vary depending on their anthropological record. See *United States v. Washington,* 384 F.Supp. 312, 359-382 (W.D.Wash. 1974).

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Sec. 1162; Pub. L. 83-280, Sec. 4, 28 U.S.C. Sec. 1360; R.C.W. 37.12.010). The Court concluded R.C.W. Ch. 46.63 should be characterized as a civil, regulatory law. *Id.* at 149. Under it, the State of Washington may not assert jurisdiction over tribal members on the Colville Reservation. *Id.*

Also, in another action for declaratory judgment and injunctive relief, the Court of Appeals for the Eighth Circuit found that absent tribal consent, the State of South Dakota has no jurisdiction over the highways running through Indian lands in the State. *Rosebud Sioux Tribe v. State of South Dakota*, 900 F.2d 1164, 1166 (8th Cir. 1990) (Not all Indian tribes in South Dakota and not all Indian tribes impacted by Pub. L. 83-280 were joined in the action), *reh'g denied, cert. denied,* 500 U.S. 915, 111 S.Ct. 2009, 114 L.Ed.2d 98 (1991).

In yet again another declaratory judgment, the Court of Appeals for the Fourth Circuit found that the lack of congressional consent precludes Swain County from levying a tax on the personal property possessed by members of the Eastern Band of Cherokee Indians on the reservation where they reside. *Eastern Band of Cherokee Indians v. Lynch*, 632 F.2d 373, 382 (4th Cir. 1980) (This decision has nationwide implications and not all impacted Indian tribes were joined).

Lastly, the Mille Lacs Band and several members sued Minnesota, its Department of Natural Resources, and state officials (collectively State), seeking a declaratory judgment that they retained their usufructuary rights and an injunction to prevent the State's interference with those rights. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999). Justice O'Connor delivered the opinion of the Court which found, "[i]n 1837, the United States entered into a Treaty with several Bands of Chippewa Indians." *Mille*

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Lacs Band of Chippewa Indians, 526 U.S. at 175, 119 S.Ct. at 1191. "Under the terms of this Treaty, the Indians ceded land in present-day Wisconsin and Minnesota to the United States, and the United States guaranteed to the Indians certain hunting, fishing, and gathering rights on the ceded land." *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 175-176, 119 S.Ct. at 1191 After an examination of the historical record, the United States Supreme Court concluded that the Chippewa retain the usufructuary rights guaranteed to them under the 1837 Treaty." *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 176, 119 S.Ct. at 1191. This too supports Plaintiff, Skokomish Indian Tribe's ability to proceed without joining any other Indian tribe.

If the Court adopts a broader interpretation of the indispensability rules as applied in the courts of the State of Washington, individual Indian tribes, including Plaintiff, Skokomish Indian Tribe, would have a right to challenge the State of Washington's jurisdiction and the actions of its officials, employees, and agents even if a judgment would fundamentally and indisputably impair or impede a non-party Indian tribe's ability to protect their interests. Fed. R. Civ. P. 19(b). In this instance, the Automotive United Trades Organization "brought suit against Washington State and its officials, challenging the constitutionality of disbursements the State gives to Indian tribes under fuel tax compacts." *Automotive United Trades Organization v. State of Washington*, 175 Wash.2d 214, 219-20, 285 P.3d 52, 54 (2012). "The trial court dismissed the amended complaint for failure to join indispensable parties—namely, the Indian tribes party to the agreements—under CR 19." *Auto*, 175 Wash.2d at 220, 285 P.3d at 54 The Washington State Supreme Court reversed, holding "the tribes are not indispensable parties under CR 19(b)." *Id.* "Although the tribes are necessary parties under CR 19(a) whose joinder is not feasible due to tribal sovereign immunity, equitable considerations allow this action to proceed in their

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absence." *Id.* This conditions a finding of indispensability upon "pragmatic considerations". *Auto*, 175 Wash.2d at 228, 285 P.3d at 58 (See *Schutten v. Shell Oil Company*, 421 F.2d 869, 873 (5th Cir. 1970)).

The Washington State Supreme Court in *Auto* further opined that ". . . 'complete justice' may not be served when a plaintiff is divested of all possible relief because an absent party is a sovereign entity." *Auto*, 175 Wash.2d at 233, 285 P.3d at 60. "In such an instance, the quest for 'complete justice' ironically leads to none at all—an outcome at odds with the equitable purposes underlying compulsory joinder." *Id.* "Nor does our respect for sovereign immunity compel this result." *Id.* "Sovereign immunity is meant to be raised as a shield by the tribe, not wielded as a sword by the State." *Id.* "An absentee's sovereign immunity need not trump all countervailing considerations to require automatic dismissal." *Id.*

Ultimately, it could be said when the constitutionality or validity of a law or conduct is called into question, equity will not suffer a wrong to be without a remedy.[10] In the above-entitled action, for example, Defendants have committed a wrong by voluntarily choosing to unilaterally interpret the Treaty of Point No Point of January 26, 1855 (12 Stat. 933) via the criminal process through enforcing invalid criminal statutes, sidestepping entirely Defendants' Rule 12(b)(7) argument which is based on tribal *Sovereign Immunity*. Dkt. # 59 at p. 13-22; *State v. Byrd*, 29 Wash.App. 339, 628 P.2d 504 (1981) (Member of Plaintiff, Skokomish Indian Tribe); *State v. Miller*, 102 Wash.2d 678, 689 P.2d 81 (1984) (Member of Plaintiff, Skokomish Indian Tribe); *State v. Buchanan*, 138 Wash.2d 186, 978 P.2d 1070 (1999) (Consistently applied to Plaintiff,

[10] *Ubi jus ibi remedium.*

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Skokomish Indian Tribe, by Defendants). Equity and good conscience, therefore, demand that Plaintiff, Skokomish Indian Tribe, should have the right to legally contest that unilateral interpretation and seek a judicial remedy in the federal courts, outside of the domain of the criminal courts and criminal statutes of the State of Washington. Fed. R. Civ. P. 19(b).

4. Precedent and the Treaties dictate that the Court may adjudicate a dispute between an Indian Tribe and State & County Defendants, but should avoid ruling on the intertribal allocation of resources, ownership or governing authority over lands in Indian Country.

The Court should follow the well established precedent set leaving intertribal allocation of resources to be resolved among the Indian tribes themselves. Fed. R. Civ. P. 19(b)(2). This doctrine can be broadly interpreted to include more than just fish, for example, game, roots, berries and other resources derived from lands. For instance, the United States Supreme Court opined that "[t]he court left it to the individual tribes involved to agree among themselves on how best to divide the Indian share of runs that pass through the usual and accustomed grounds of more than one tribe . . . With a slight modification, the Court of Appeals for the Ninth Circuit affirmed . . . and we denied certiorari . . . ." *Fishing Vessel Ass'n*, 443 U.S. at 671-72, 99 S.Ct. at 3067. The United States Court of Appeals for the Ninth Circuit more recently reaffirmed that "[i]ntertribal allocations of the fisheries have historically been a matter for the tribes to resolve amongst themselves, as sovereigns. The Hood Canal Agreement was just such an act. For that reason, both the trial court and the Supreme Court in this case disclaimed any responsibility for allocating the tribal portion of fisheries shared by multiple tribes. Assuming that our precedents are correct in holding that the district court has jurisdiction to make these allocations, it nevertheless retains its discretion under the equitable allocation doctrine to decline to do so."

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United States v. Washington, 573 F.3d 701, 708 (9th Cir. 2009). Furthermore, "[a]nd for, disputes among Indian tribes, there is something to be said for a private dispute resolution procedure among themselves . . . ."[11] *Id.* at 708-09.

Plaintiff, Skokomish Indian Tribe, is neither seeking to alter the current state of affairs existing between non-party Indian tribes nor the intertribal allocation of resources. Thus, *Makah Indian Tribe v. Verity* is inapplicable. Dkt. # 50 at p. 50-57; *Makah Indian Tribe v. Verity,* 910 F.2d 555 (9th Cir. 1990) (The Makah Indian Tribe brought the action to challenge federal regulations allocating ocean harvests of migrating Columbia River Salmon, thereby attempting to alter the intertribal allocation of fish, without joining the other affected Indian tribes).

Plaintiff, Skokomish Indian Tribe, also does not seek to alter the intertribal ownership or governing authority over lands in Indian Country; thus joinder of additional Indian tribes is not required.[12] *Confederated Tribes of the Chehalis Reservation v. Lujan,* 928 F.2d 1496 (9th Cir. 1991) (The Confederated Tribes challenged the United States' continuing recognition of the Quinault Indian Nation as the sole governing authority for the lands within Quinault Indian Reservation, but failed to join the Quinault Indian Nation); *Quileute Indian Tribe v. Babbitt,* 18 F.3d 1456 (9th Cir. 1994) (The Quileute Indian Tribe's action sought to overturn the Department of Interior's decision that certain fractional property interests within the Quinault Indian

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[11] *Cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 72, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978)(expressing the need for caution before subjecting disputes arising between Indians to a federal forum). Even in the event that tribal government to tribal government dispute resolution fails, an alternative exists to resolve the matter absent intervention of the Court. Specifically, the relevant treaties in the Pacific Northwest provide in the event of intertribal differences no tribe shall make war on any other tribe, except in self-defense, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby. See 10 Stat. 1132; 12 Stat. 927; 12 Stat. 933; 12 Stat. 939; 12 Stat. 945; 12 Stat. 951; 12 Stat. 957; 12 Stat. 963; 12 Stat. 971.

[12] 18 U.S.C. § 1151.

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Reservation escheat to the Quinault Indian Nation rather than to the Quileute Indian Tribe, but failed to join the Quinault Indian Nation); *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272 (10th Cir. 2012) (The suit addressed the status of lands on the Wind River Indian Reservation which are shared by the Eastern Shoshone and Northern Arapaho, as "co-tenants occupying the same land", without joining the Eastern Shoshone).

5. The Prayer for Relief provides for an explicit, unequivocal and irrevocable limitation on any and all findings, conclusions, judgments, orders, decrees, however characterized, granted in this action by the Court.

The Prayer for Relief in the Amended Complaint limits the binding effect of any and all findings, conclusions, judgments, orders, decrees, however characterized, granted by the Court to the parties to the action only, as well as, limits the parties' enforcement obligations. Dkt. # 50 at p. 54-56. It is further requested that the Court enter an order authorizing, without further leave of the Court, the intervention of and/or consensual joinder of any other person. *Id.* This eliminates and avoids any and all prejudice, by not altering the current state of affairs existing between non-party Indian tribes. Dkt. # 50 at p. 50-57; Fed. R. Civ. P. 19(b). The relief would be adequate and no other remedy exists if the action were dismissed for nonjoinder. *Id.* As such, no other parties need be joined and the Defendants' Motion based on Rule 19 of the Federal Rules of Civil Procedure should be denied.

C. *The Court should deny the Defendants' Motions in their entirety.*

Defendants' Motions fail to provide any other legal or equitable basis sufficient to support dismissal of the Amended Complaint, and thus should be denied.

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III. CONCLUSION

The Amended Complaint contains material and conclusive facts establishing subject matter jurisdiction and the existence of a claim upon which relief can be granted by the Court. Dkt. # 50. Defendants cannot assert sovereign immunity and no other person or Indian tribe need be joined. Defendants cannot cure these deficiencies to their arguments by supplemental briefing and/or through oral argument and Plaintiff, Skokomish Indian Tribe, respectfully requests that the Court deny the Defendants' Motions.

Dated this 29th day of July, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2013, I electronically filed the *Plaintiff, Skokomish Indian Tribe's Response to Defendants' Motions to Dismiss Amended Complaint*, with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties which are registered with the CM/ECF system and the following:

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