Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SKOKOMISH INDIAN TRIBE,

Plaintiff,

v.

LEONARD FORSMAN, et al.,

Defendants

Case No. 3:16-cv-05639 – RBL

DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION PURSUANT TO FRCP 12(B)(1), FOR FAILURE TO STATE A CLAIM PURSUANT TO FRCP 12(B)(6), AND FOR FAILURE TO JOIN INDISPENSABLE PARTIES PURSUANT TO FRCP 12(B)(7)

NOTE ON MOTION CALENDAR:

October 7, 2016

ORAL ARGUMENT REQUESTED

MOTION TO DISMISS

The named defendants, Leonard Forsman, Chairman of the Suquamish Tribal Council, Bardow Lewis, Vice-Chairman of the Suquamish Tribal Council, Nigel Lawrence, Secretary of the Suquamish Tribal Council, Robin Sigo, Treasurer of the Suquamish Tribal Council, Luther Mills, Jr., Member of the Suquamish Tribal Council, Rich Purser, Member of the Suquamish Tribal Council, Sammy Mabe, Member of the Suquamish Tribal Council (collectively the "Tribal Council Defendants"), and Robert Purser, Jr., Fisheries Director for the Suquamish Indian Tribe ("Purser" and collectively with Tribal Council Defendants, the "Defendants"), hereby respectfully move this Court for an order dismissing the claims asserted by plaintiff

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Skokomish Indian Tribe (alternatively "Skokomish" or "Plaintiff"), pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, Rule 12(b)(6) for failure to state a claim upon which relief can be granted, and Rule 12(b)(7) for failure to join indispensable or required parties under Rule 19.

This case is not the first time that Skokomish has sought to litigate the scope and extent of its treaty hunting rights in this Court. Skokomish previously filed a similar lawsuit seeking nearly identical relief, which was dismissed on similar grounds to those presented in this motion. *Skokomish Indian Tribe v. Goldmark*, 994 F.Supp.2d 1168 (W.D.Wash. 2014). Instead of suing officials of the State of Washington, as in the previous case, Skokomish is now suing every member of the Suquamish Indian Tribe's (the "Suquamish Tribe") Tribal Council, together with the Suquamish Tribe's Fisheries Director.

There are three reasons this case must be dismissed. First, and as set forth in more detail below, Skokomish's claims against Defendants are, in practical reality and in law, claims that must be asserted against the Suquamish Tribe, not Suquamish tribal officials. In order for Skokomish to prevail on the merits of its claims, this Court must necessarily resolve novel and contested issues pertaining to the treaty hunting rights of Skokomish under the Treaty of Point No Point of January 26, 1855, 12 Stat. 933 ("PNP Treaty"), and of the Suquamish Tribe under the Treaty of Point Elliot of January 22, 1855, 12 Stat. 927 ("Point Elliot Treaty"). The action challenged by Skokomish—the governmental promulgation of hunting regulations—is an action taken by the Suquamish Tribe, not any of the Defendants individually, and is action that is inherently legislative in nature. As such, the doctrine of *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908), is not applicable, and Skokomish's claims are barred by sovereign immunity of the Suquamish Tribe or the legislative immunity of Defendants and subject to dismissal under Fed. R. Civ. Pro. 12(b)(1) or 12(b)(6).

Secondly, Skokomish has failed to adequately plead a cognizable injury resulting from

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the Suquamish Tribe's promulgation of hunting regulations sufficient to establish standing. Skokomish's allegation with respect to the connection between the Suquamish Tribe's promulgation of hunting regulations and the "loss of treaty resources" and unspecified "threatened diminishment of self-governance powers" is both nebulous and conclusory. Even presuming that Skokomish could show a cognizable injury that has not been pleaded, standing also requires a showing of redressability. Here, the Skokomish claim to the exclusive right to regulate hunting in the "Twana territory" would, in order to be effective, need to be binding on numerous Stevens Treaty Tribes not party to this suit.[1] Skokomish's alleged injury would not be susceptible to remediation by order of this Court absent the joinder of the non-party Stevens Treaty Tribes who, as noted herein, cannot be joined due to their sovereign immunity. Therefore, dismissal for lack of standing under the "case or controversy" requirement of Article III of the United States Constitution is justified.

Third, Skokomish has not named as defendants the Suquamish Tribe or any of the three other PNP Treaty signatory Tribes.[2] Skokomish cannot name these Tribes or any other Stevens Treaty Tribes claiming treaty hunting rights on "open and unclaimed lands" within the "Twana territory" in which Skokomish alleges it has the exclusive right to regulate hunting, because each Stevens Treaty Tribe is cloaked with sovereign immunity from suit.[3] A significant number of the Stevens Treaty Tribes, however, are required parties under Fed. R. Civ. Pro. 19, because the declaratory relief sought by Plaintiff necessarily implicates each of the Stevens Treaty Tribes',

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[1] *See infra* at nn. 2-4, listing Stevens Treaty Tribes with potential hunting claims in "Twana territory", which Plaintiff appears to contend includes, for hunting purposes, "all of the waters of Hood canal, the rivers and streams draining into it, and the Hood Canal drainage basin south of the line extending from Termination point on the west shore of Hood Canal directly to the east shore." *See* Complaint, Dkt. # 1, at ¶3, ¶¶40-41.

[2] In addition to Skokomish, the Jamestown S'Klallam, Port Gamble S'Klallam, and Lower Elwha Tribes are signatories to the PNP Treaty.

[3] This includes, but is not necessarily limited to, the signatory Tribes to the Treaty of Medicine Creek of December 26, 1854, 10 Stat. 1132 (the "Medicine Creek Treaty") (The signatories to the Medicine Creek Treaty are the Nisqually, Puyallup, Squaxin Island, and Muckleshoot Tribes), and the other signatories to the Point Elliot Treaty (which, in addition to Suquamish, include the Lummi, Nooksack, Stillaguamish, Swinomish, Upper Skagit, Sauk Suiattle, Tulalip, and Muckleshoot Tribes).

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and the Suquamish Tribe's, ability to assert their own treaty rights. Proceeding in their absence would impair or impede those Tribes' ability to protect a claimed legal interest relating to the subject of the action.[4] For those reasons and the reasons set forth below, dismissal is also appropriate under Rule 12(b)(7) and Rule 19.

I. STANDARD OF REVIEW

A. Motion Pursuant to Fed. R. Civ. Pro. 12(b)(1)

A complaint must be dismissed under Rule 12(b)(1) if, considering the factual allegations in the light most favorable to the plaintiff, the action: (1) does not arise under the Constitution, laws, or treaties of the United States, or does not fall within one of the other enumerated categories of Article III Section 2 of the Constitution; (2) is not a case or controversy within the meaning of the Constitution; or (3) is not one described by any jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198, 82 S.Ct. 691 (1962). When considering a motion to dismiss for lack of standing or sovereign immunity pursuant to Rule 12(b)(1), the court is not restricted to the face of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir.1988), *cert. denied*, 489 U.S. 1052, 109 S.Ct. 1312, 103 L.Ed.2d 581 (1989). The plaintiff bears the burden of proving the existence of subject matter jurisdiction. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir.1989).

Skokomish, as the party invoking this Court's jurisdiction, bears the burden of establishing standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130 (1992). In evaluating whether Skokomish has made this showing, the "court must accept as true

[4] The scope of the hunting rights in "Twana territory" held by other signatory Tribes to what are generally referred to as the "Stevens Treaties" (which include the Treaty of Olympia,12 Stat 971, Treaty of Neah Bay, 12 Stat 939, Treaty with the Yakimas, 12 Stat. 951, Treaty with the Walla Walla, Cayuse, etc., 12 Stat. 945, Treaty with the Nez Perces, 12 Stat. 957, in addition to the PNP Treaty, Point Elliot Treaty, and Medicine Creek Treaty), have not been resolved judicially or otherwise, and also may render such Tribes required parties. *See, Skokomish Indian Tribe v. United States*, 410 F.3d 506, 523 n.3 (9th Cir. 2005) (noting that the treaties were a series of treaties brokered by then-Territorial Governor Isaac Stevens and are commonly referred to collectively as the "Stevens Treaties").

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all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121 (9th Cir. 2010). "General factual allegations of injury resulting from the defendant's conduct may suffice …" *Cardenas v. Anzai*, 311 F.3d 929, 933 (9th Cir. 2002) (*quoting Lujan*, 504 U.S. at 561, 112 S.Ct. 2130); *see also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 n. 3, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) ("*Lujan*, since it involved the establishment of injury in fact at the summary judgment stage, required specific facts to be adduced by sworn testimony; had the same challenge to a generalized allegation of injury in fact been made at the pleading stage, it would have been unsuccessful."). The allegations in the complaint, however, cannot be construed so liberally as to extend the Court's jurisdiction beyond constitutional limits. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). Moreover, because Skokomish is seeking injunctive relief, it must show "a very significant possibility of future harm." *Montana Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 979 (9th Cir. 2013) (*citation omitted*).

B. Motion Pursuant to Fed. R. Civ. Pro. 12(b)(6)

Under Fed. R. Civ. Pro. 12(b)(6), the Court may dismiss a complaint if it fails to "state a claim upon which relief can be granted." In order to survive a Rule 12(b)(6) motion to dismiss, factual allegations in the pleading "must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true . . . ." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007). A pleading that sets forth only '"labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937 (2009) (*quoting Twombly*, 550 U.S. at 555). While courts must accept all of the factual allegations in a complaint as true, there is no such obligation with respect to legal conclusions. *Id.* at 678-79. A complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when

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the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "This standard asks for more than a sheer possibility that a defendant has acted unlawfully, but is not akin to a probability requirement." *Turner v. City and County of San Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015) (*quoting Iqbal*, 556 U.S. at 678) (internal quotation marks omitted).

C. Motion Pursuant to Fed. R. Civ. Pro. 12(b)(7).

A motion to dismiss for failure to join a required party under Rule 19 is subject to a three-step inquiry: (1) is the absent party required to be joined if feasible under Rule 19(a); (2) if so, is it feasible to join that party; and (3) if not, can the case proceed, or in light of the missing parties, do equity and good conscience require dismissal? *Salt River Project Agr. Imp. and Power Dist. v. Lee*, 672 F.3d 1176, 1179 (9th Cir. 2012) (*citing EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 779-80 (9th Cir. 2005)). A party is required to be joined if feasible, as relevant here, if the Court determines that the party "claims an interest relating to the subject of the action," and resolving the action in their absence may "as a practical matter impair or impede [their] ability to protect the interest." Fed. R. Civ. Pro. 19(a)(1)(B)(ii). If a party cannot be joined due to sovereign immunity or another reason, the Court must determine whether or not the case may proceed in "equity and good conscience." Fed. R. Civ. Pro. 19(b). In making this determination, four factors are considered: "(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 non-joinder." *Id.*; *see also*, *Skokomish v. Goldmark*, 994 F.Supp.2d at 1190. A determination concerning joinder is "a practical one and fact specific." *Washington v. Daley*, 173 F.3d 1158, 1165 (9th Cir. 1999) (*citing Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990)). In

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this case, the missing parties are all sovereign Tribes with identical Treaty hunting language setting out the "privilege of hunting … on open and unclaimed lands." *See, e.g.*, Point Elliot, Art. V; PNP Treaty, Art. IV.

II. ARGUMENT

A. This Court lacks jurisdiction to consider the claims or grant the relief requested by Skokomish because they are barred by the sovereign immunity of the Suquamish Tribe.[5]

1. Sovereign immunity precludes the assertion of Skokomish's claims directly against the Suquamish Tribe.

The Suquamish Tribe is a federally recognized Indian Tribe. *See* 81 Fed. Reg. 26826 (May 4, 2016) (listing Suquamish as recognized Tribe). "Among the core aspects of sovereignty that tribes possess is the common-law immunity from suit traditionally enjoyed by sovereign powers." *Bodi v. Shingle Springs Band of Miwok Indians*, --- F..3d ---, 2016 WL 4183518 at *3 (9th Cir. 8 Aug. 2016) (internal quotation marks and citations omitted). An Indian Tribe's sovereign immunity is a "necessary corollary to Indian sovereignty and self-governance," *id.*, and the Supreme Court has "time and again treated the doctrine of tribal immunity as settled law." *Michigan v. Bay Mills Indian Community*, --- U.S. ---, 134 S.Ct. 2024, 2030-31 (2014) (internal quotation marks and citations omitted). While an Indian tribe may waive its immunity, absent a clear and unequivocally expressed waiver by a tribe or congressional abrogation, suits against Indian tribes are barred. *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509, 111 S.Ct. 905 (1991) (*citing Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670 (1978)). No such waiver has or can be found in this case, and the

[5] The arguments advanced in this section seeking dismissal pursuant to Fed. R. Civ. Pro. 12(b)(1), are advanced alternatively pursuant to Fed. R. Civ. Pro. 12(b)(6), as motions predicated on tribal sovereign immunity have been deemed properly brought under either provision. *See, e.g.*, *Bodi v. Shingle Springs Band of Miwok Indians*, --- F..3d ---, 2016 WL 4183518 at *2 (9th Cir. 8 Aug. 2016) (reviewing motion to dismiss based on tribal sovereign immunity under 12(b)(1)); *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005); *but see Elwood v. Drescher*, 456 F.3d 943, 949 (9th Cir. 2006) (motions to dismiss based on sovereign immunity are evaluated under 12(b)(6)).

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Complaint is devoid of any allegation that the Suquamish Tribe has waived its sovereign immunity. As such, and to the extent this Court finds: (a) Plaintiff's claims are directed principally at the Suquamish Tribe; (b) redressing Plaintiff's claims would require binding the Suquamish Tribe to any judgment; or (c) that the Suquamish Tribe is a required party under Rule 19, Skokomish's claims should be dismissed on the grounds of the Suquamish Tribe's sovereign immunity.

2. The doctrine of *Ex Parte Young* does not apply, since the relief sought by Skokomish, if granted, would necessarily and principally operate to restrain the Suquamish Tribe from acting, as opposed to the named Defendants.

It is readily apparent that Plaintiff purposely elected not to name the Suquamish Tribe as a defendant in an effort to circumvent established principles of tribal sovereign immunity by explicitly invoking the doctrine of *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908).[6] Complaint, Dkt. # 1 at ¶7 (invoking *Ex Parte Young* as exception to sovereign immunity). In this instance, however, the doctrine of *Ex Parte Young* does not provide a valid basis for this Court to adjudicate the scope of the Suquamish Tribe's rights under the Point Elliot Treaty, which is exactly what Skokomish is asking this Court to do. *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1160 (9th Cir. 2002) (*citing Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101–02, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984)) ("if the relief sought will operate against the sovereign, the suit is barred"). The rights reserved to each of the Stevens Treaty Tribes are communally held by each "tribe qua tribe" and not held by individual tribal members. *U.S. v. Washington*, 520 F.2d 676, 688 (9th Cir. 1975). By seeking a declaration from this Court that Skokomish has "primary" treaty hunting rights that are superior to those of the Suquamish Tribe, the resolution of Skokomish's claims will necessarily and fundamentally

[6] The doctrine of *Ex Parte Young* has been held to apply to tribal officials in the same manner as it applies to federal and state officials. *See generally Burlington N.R.R. v. Blackfeet Tribe*, 924 F.2d 899, 901-902 (9th Cir. 1991), *overruled on other grounds by Big Horn County Elec. Co-op v. Adams*, 219 F.3d 944 (9th Cir. 2000).

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impact the treaty rights held by the Suquamish Tribe, as opposed to simply limiting any actions individually taken by the Defendants.

In general, the Suquamish Tribe's sovereign immunity extends to tribal officers acting in their official capacity and within the scope of their authority. *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008). Because Skokomish has named each of the Defendants in their official capacity only, they would ordinarily be entitled to assert the Suquamish Tribe's sovereign immunity as a bar to Skokomish's claims. While Defendants do not dispute that suits against tribal officials may be permitted under the doctrine of *Ex Parte Young* when it is alleged that those officials acted beyond their authority in violation of federal law, a suit will nevertheless be barred by sovereign immunity (notwithstanding illegal action taken by an official) "when the requested relief will require affirmative actions by the sovereign or disposition of unquestionably sovereign property." *Dawavendewa*, 276 F.3d at 1160-1161. As such, the doctrine of *Ex Parte Young* does not provide an exception to the Suquamish Tribe's sovereign immunity or otherwise permit Skokomish to bring suit to litigate the scope of the treaty hunting rights held by the Suquamish Tribe in its capacity as a federally recognized Indian Tribe.

Both Skokomish and the Suquamish Tribe have the right of "hunting and gathering roots and berries on open and unclaimed lands," which is secured by identical language found in Article IV of the PNP Treaty and Article V of the Point Elliot Treaty, respectively. This identical language is present in each of the Stevens Treaties. Unlike the fishing rights reserved under the Stevens Treaties, however, no court has previously determined how, or even if, the hunting rights of the Stevens Treaty Tribes' interact with each other. *See, e.g., Skokomish Indian Tribe v. Goldmark, supra*, 994 F.Supp.2d at 1174 n. 5 (noting cases, and that none pertain to one tribe's ability to regulate the off-reservation hunting activity of another tribe's members, much less Skokomish's claimed exclusive right to regulate hunting activities of other Stevens Treaty

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Tribes' members within "Twana territory"). This is, however, the gravamen of Skokomish's Complaint, which necessarily seeks to litigate whether the Suquamish Tribe's members may exercise the Suquamish Tribe's right to hunt in "Twana territory" and whether the Suquamish Tribe's rights are "secondary" or have a lower priority vis-a-vis Skokomish's rights such that Skokomish can prohibit the Suquamish Tribe's members (and members of any other Stevens Treaty Tribe) from exercising treaty hunting rights in "Twana territory."

The alleged action complained of by Skokomish—the issuance and promulgation of regulations opening treaty hunting areas—is not the type of "action" subject to the *Ex Parte Young* exception to sovereign immunity. In *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F. 2d 1269 (9th Cir. 1991), a plaintiff sued officials of the Pala Band for their action in denying the plaintiff a road easement. Reviewing the Complaint in that case, the Ninth Circuit noted that:

> The complaint alleges no individual actions by any of the tribal officials named as defendants. As far as we are informed in argument, the only action taken by those officials was to vote as members of the Band's governing body against permitting Imperial to use the road. Without more, it is difficult to view the suit against the officials as anything other than a suit against the Band. The votes individually have no legal effect; it is the official action of the Band, following the votes, that caused Imperial's injury.

940 F. 2d at 1271. The Complaint here presents a nearly identical set of facts. The regulations attached to the Complaint as evidence of the Defendants' "actions" were on their face approved and "issued pursuant to Paragraph 14.3.16 of the Suquamish Hunting Ordinance." Dkt. # 1-1 at pp. 2-3. Under the Suquamish Hunting Ordinance, the Fisheries Director (here Purser) recommends annual regulations to the Suquamish Tribal Council, which then votes to adopt them on behalf of the Suquamish Tribe.[7] Skokomish has not alleged that Defendants have

[7] *See* Suquamish Hunting Ordinance at Paragraph 14.3.16, a true and accurate copy of which is attached as Exhibit 1 to affidavit of James Rittenhouse Bellis filed herewith (hereinafter "Suquamish Hunting Ordinance"). Suquamish Hunting Ordinance is also available electronically at http://www.suquamish.nsn.us/Portals/0/hunt_regs.pdf (last visited September 9, 2016).

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attempted to enforce any of these regulations vis-à-vis Skokomish, and Skokomish cannot make that allegation because the regulations and Suquamish Hunting Ordinance do not apply to any Skokomish tribal members outside the bounds of the Suquamish Tribe's Reservation. *See* Suquamish Hunting Ordinance at Paragraph 14.3.3 (noting scope of application limited to persons within the boundaries of the Suquamish's reservation or exercising hunting rights secured to the Suquamish Tribe by the Point Elliot Treaty). As such, none of the Defendants have "the requisite enforcement connection" necessary for the *Ex Parte Young* exception to apply, insofar as the only "action" alleged is the issuance and adoption of the regulations themselves. *See Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092-1093 (9th Cir. 2007) (holding *Ex Parte Young* exception did not apply to tribal chairman responsible only for adopting, as opposed to enforcing, challenged tax).

The gravamen of Skokomish's complaint is that the Suquamish Tribe is issuing hunting regulations for its members in areas where the Suquamish Tribe allegedly has no treaty rights to hunt or where such hunting rights are inferior to those of Skokomish. In order to evaluate Skokomish's claims, this Court would be required to evaluate and render judgment on the nature and scope of the Suquamish Tribe's treaty hunting rights as a necessary predicate to determining the validity of Defendants' alleged "actions." Indeed, that is exactly what Skokomish is seeking in the form of a judgment operative against the Suquamish Tribe and its members. *See* Complaint, Dkt. # 1 at ¶52(2) (seeking a declaration that "neither *Suquamish Indian Tribe nor members of the Suquamish Indian Tribe* shall exercise treaty privileges") (emphasis added).[8] The resolution of Skokomish's claims will affect the Suquamish Tribe's rights under the Point Elliot Treaty, and "it is clear from the essential nature and effect of the relief sought that [the Suquamish Tribe] is the real, substantial party in interest," as opposed to any of the Defendants.

[8] While the requested relief is nominally for declaratory judgment, a judgment declaring that a person "shall not" take action, is plainly injunctive in nature. Skokomish is in effect seeking injunctive relief against the non-parties Suquamish and Suquamish tribal members.

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Shermoen v. U.S., 982 F.2d 1312, 1320 (9th Cir. 1992). Because the relief sought by Skokomish would operate against the Suquamish Tribe, the *Ex Parte Young* exception does not apply and Skokomish's claims are barred by the Suquamish Tribe's sovereign immunity.

3. In the alternative, each of the Defendants is entitled to legislative immunity since the actions alleged are each legislative in nature.

The sole "action" Skokomish alleges Defendants took, and on which the entirety of Skokomish's claim is based, is the governmental promulgation of hunting regulations. Complaint, Dkt. # 1, at ¶50 (alleged unlawful conduct is "opening hunting" in "Twana territory" by issuing and adopting the regulations attached to the Complaint as Exhibit A or similar regulations in the future). "The principle that legislators are absolutely immune from liability for their legislative activities has long been recognized in Anglo-American law." *Bogan v. Scott-Harris*, 523 U.S. 44, 49, 118 S.Ct. 966 (1998). This immunity is absolute, and applies to both claims for damages and claims for injunctive relief. *Community House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 959 (9th Cir. 2010) (*citing Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732-733, 100 S.Ct. 1967 (1980)). Legislative immunity is not limited to federal and state legislators, and extends to legislative activities at all levels of government including tribal officials such as Defendants here. *Bogan v. Scott-Harris*, 523 U.S. at 49 (applies to all levels of government); *Runs After v. U.S.*, 766 F.2d 347, 354-355 (8th Cir. 1985) (members of tribal council entitled to legislative immunity); *accord Grand Canyon Skywalk Development, LLC v. Hualapai Indian Tribe of Ariz.*, 966 F.Supp.2d 876, 885-886 (D.Ariz. 2013) (tribal council members entitled to legislative immunity for passing ordinance and resolution).

As Skokomish concedes in its Complaint, these regulations are promulgated pursuant to *legislative* authority of all the Defendants. *See* Complaint, Dkt. # 1 at ¶18-19 (noting official duties of Defendants and character thereof). Both of the regulations attached as Exhibit A to the

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Complaint were "issued pursuant to Paragraph 14.3.16 of the Suquamish Hunting Ordinance." Dkt. # 1-1 at pp. 2-3. Paragraph 14.3.16 of Suquamish's Hunting Ordinance provides, in full:

> **14.3.16.** Annual Regulations. No later than one month before each hunting season, the fisheries director and hunting committee shall recommend to the tribal council annual regulations necessary to carry out the purposes of this chapter. The regulations may establish open areas, open seasons, bag limits, limitations on methods of taking game, and other measures to ensure the wise use and conservation of game resources. Before proposing annual regulations, the fisheries director shall obtain available information on the abundance and territories of various wildlife species within the areas covered by this chapter, shall consult with the Washington State Department of Wildlife on game conservation needs in those areas, and shall obtain the recommendations of the hunting committee regarding the proposed regulations.[9]

The recommendation of hunting regulations by Defendant Purser to the Suquamish Tribal Council, and the adoption of hunting regulations by the Tribal Council Defendants are both "integral steps in the legislative process" mandated by the Suquamish Hunting Ordinance, and therefore plainly legislative in character. *Bogan v. Scott-Harris*, *supra*, 523 U.S. at 55. Specifically, the development and promulgation of annual hunting regulations involves the formulation of policy; the regulations are generally applicable to the Suquamish Tribe's members; and the regulations are approved by the Suquamish Tribal Council through formal legislative action; thus, both the actions of Purser in recommending the regulations, and the Tribal Council in approving them bear all the hallmarks of traditional legislation. *See Kaahumanu v. County of Maui*, 315 F.3d 1215, 1220 (9th Cir. 2003) (setting forth four factor test to apply in determining legislative character of official acts); *see also Grunert v. Campbell*, 248 Fed. Appx. 775, 777 (9th Cir. 2007) (promulgation of fishing regulations was legislative in character, entitling board members who voted to adopt regulations to legislative immunity). As

[9] *See* Suquamish Hunting Ordinance, *supra* at n. 8.

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such, the absolute legislative immunity of Defendants precludes Skokomish's claims from going forward.

Skokomish's claims do not allege a threat of enforcement or any act taken by any of the Defendants pursuant to an allegedly invalid law. As a practical matter, the Suquamish Tribe's regulations at issue do not even purport to regulate Skokomish or the hunting activity of Skokomish tribal members. Instead, Skokomish takes issue with the fact that the regulations Skokomish says pertain to "Twana territory" were adopted by Suquamish through the legislative process. Because the "action" Defendants are alleged to have taken is legislative in character, however, Skokomish's claims are barred by Defendants' legislative immunity and should be dismissed.

B. This Court lacks jurisdiction because Skokomish has not, and cannot, plead causation of a cognizable injury or redressability sufficient to demonstrate standing or support the requested injunctive relief.

Skokomish bears the burden of demonstrating standing for each claim it seeks to press and for each form of relief sought. *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S.Ct. 1854 (2006). In order to establish constitutional standing, a plaintiff must "have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark Int'l., Inc. v. Static Control Components, Inc.*, --- U.S. ---, 134 S.Ct. 1377, 1386 (2014) (citation omitted); *see also Lujan v. Defenders of Wildlife*, *supra*, 504 U.S. at 560-561 (at a minimum, a plaintiff must show (1) an injury in fact that is concrete, particularized, and actual or imminent; (2) that the injury is caused or fairly traceable to defendant's conduct; and (3) that the injury is likely to be redressed by a favorable court decision). Where a Plaintiff is not the object of regulations objected to—as is the case here, insofar as the Suquamish Tribe's regulations do not purport to regulate the conduct of

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Skokomish—"standing is not precluded, but it is ordinarily substantially more difficult to establish." *Lujan*, 504 U.S. at 562 (internal quotation marks and citations omitted). Here, Skokomish has failed to adequately plead facts supporting causation and cannot establish redressability, each of which is independently necessary for Skokomish to carry its burden of demonstrating standing.

1. Skokomish has not alleged causation with respect to any concrete injury.

The Complaint alleges two injuries: (1) "loss of treaty resources utilized for subsistence and cultural preservation," and (2) "threatened diminishment of self-governance powers." Complaint, Dkt. # 1 at ¶51. Skokomish, however, has failed to offer anything more than conclusory allegations of causation. "To satisfy the causality element for Article III standing, [Skokomish] must show that the injury is causally linked or 'fairly traceable' to [Defendants'] alleged misconduct, and not the result of misconduct of some third party not before the court." *Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1141 (9th Cir. 2013). Attenuated causation is insufficient, and "where the causal chain involves numerous third parties whose independent decisions collectively have a significant effect on plaintiffs' injuries … the causal chain is too weak to support standing." *Id*. at 1142 (quoting *Native Village Of Kivalina v. Exxon Mobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012)).

The only action the Complaint alleges Defendants have taken is "opening hunting" within "Twana territory." Complaint, Dkt. # 1 at ¶50. Even presuming that these actions are taken by Defendants and not the Suquamish Tribe, there is no allegation that any member of the Suquamish Tribe has hunted in this area or taken game within "Twana territory," let alone any allegation that the treaty hunting activity of the Suquamish Tribe's members has been caused by Defendants' "opening hunting." There is also no allegation that treaty hunting activity of the Suquamish Tribe's members has diminished the amount of game or other resources available to members of Skokomish to take within "Twana territory" such that it would cause any significant

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impact on the ability of Skokomish (or its tribal members) to utilize "treaty resources for subsistence and cultural preservation." *Id*. at ¶51. Moreover, the injury alleged by Skokomish, even if supported by sufficient allegations in an amended pleading, would necessarily have to identify and sort through the collective independent decisions and actions of multiple third-parties (e.g., both non-treaty non-Indian hunters hunting under State law, and members of other Stevens Treaty Tribes, including Skokomish hunters exercising treaty hunting rights) in order to establish any significant effect and who caused that effect. As such, the Complaint fails to adequately plead the causation necessary to establish standing and should be dismissed.

2. Skokomish's claims cannot be redressed by an order of this Court.

In addition to the Complaint's defects in failing to adequately allege causation, the larger hurdle for Skokomish is establishing redressability. Notably, and with limited exceptions, no court has previously ruled on the scope of any Stevens Treaty Tribe's rights to regulate off-reservation hunting of third parties, including other Stevens Treaty Tribes. *See*, *e.g.*, *Skokomish Indian Tribe v. Goldmark*, *supra*, 994 F.Supp.2d at 1174 n. 5 (noting cases, and that none pertain to one Tribes' ability to regulate the hunting activity of another Tribe, much less Skokomish's claimed exclusive right to regulate hunting activities of other Stevens Treaty Tribes' members within "Twana territory"). As noted in the Complaint, Suquamish's Tribal Council and its Fisheries Director have authority under the Suquamish Tribal Code and the Tribe's Constitution to promulgate hunting regulations *on behalf of the Tribe*. Complaint, Dkt. # 1 at ¶18. In order to be effective, any order issued by this Court would necessarily have to be binding on the Suquamish Tribe, as well as any other Stevens Treaty Tribe that has or may in the future claim any right to hunt in "Twana territory." The sovereign immunity of each of these Tribes, however, precludes joining them and compelling the Suquamish Tribe and other Stevens Treaty Tribes to adjudicate their respective Treaty hunting rights vis-à-vis Skokomish. *See supra* at Section II(A)(1); *see also infra* at Section II(C) (pertaining to sovereign immunity and inability

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of Skokomish to join required parties). Because the injuries alleged by Skokomish cannot be redressed by an order of this Court, Skokomish cannot meet the constitutional standing requirements of Article III necessary to vest this Court with subject matter jurisdiction. Therefore Skokomish's claims should be dismissed pursuant to Fed. R. Civ. Pro. 12(b)(1).

C. Sovereign Immunity precludes Skokomish from joining not only the Suquamish Tribe but also other Stevens Treaty Tribes that claim or could claim treaty hunting rights in "Twana territory," each of which is a required party under Rule 19, and therefore equity and good conscience requires dismissal of Skokomish's claims.

1. The Suquamish Tribe and other Stevens Treaty Tribes are parties that are required to be joined if feasible.

The Suquamish Tribe, as well as other Stevens Treaty Tribes, have a claim to treaty hunting rights in "Twana territory." At a minimum, both the Suquamish Tribe and the other signatory Tribes to the Point Elliot Treaty, PNP Treaty, and the Medicine Creek Treaty have claims or potential claims to hunting rights in the area described by Skokomish as "Twana territory" subject to Skokomish's allegedly exclusive regulatory authority. While Skokomish may, and almost certainly does, dispute the claims of other Stevens Treaty Tribes, the fact that the claims are disputed does not impact the analysis under Rule 19. Rule 19 only requires a party to *claim* an interest. *See* Fed. R. Civ. Pro. 19(a)(1)(B); *accord Washington v. Daley*, *supra*, 173 F.3d at 1167 n. 10 (disputed treaty rights constitute a claim sufficient to require joinder if feasible under Rule 19(a)); *accord Klamath Tribe Claims Committee v. U.S.*, 97 Fed.Cl. 203, 211-212 (2011) (Rule 19 does not require the absent party to actually possess an interest, but merely requires them to claim such an interest) (collecting cases, citations omitted).

Moreover, the claims of these various Stevens Treaty Tribes and their status as necessary parties in this exact context has previously been recognized. *See Skokomish Indian Tribe v. Goldmark*, *supra*, 994 F.Supp.2d 1187-88 (noting Skokomish's prior claims and that an identical requested judgment would prejudice other signatory Tribes to the PNP Treaty). "A determination of the scope and extent of the hunting and gathering privilege would necessarily

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involve a determination of what lands and resources are available to [Stevens Treaty] signature tribes, not just Skokomish Indian Tribe under the [PNP Treaty]." *Id*. at 1187 (*citing Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1281-82 (2012)). As the Ninth Circuit has previously recognized with respect to other Stevens Treaties, granting Skokomish the relief it seeks here—a declaration that Skokomish has the primary right to regulate and prohibit treaty hunting and gathering within "Twana territory"—"would necessarily violate the treaty rights of absent signature tribes." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990). While Skokomish's complaint "does not expressly seek to enjoin any action by another signatory tribe, the requested relief, if granted, would without doubt affect the rights of other parties who are signatories of the [Stevens Treaties]." *Skokomish v. Goldmark*, 994 F.Supp.2d at 1189; *accord Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498-1499 (9th Cir. 1991) (tribes are necessary parties to actions affecting their legal interests) (citations omitted).

In addition to their respective claims to treaty hunting and gathering rights in "Twana territory," "the absent [Stevens Treaty Tribes] have an interest in preserving their own sovereign immunity, with its concomitant right not to have their legal duties judicially determined without consent." *Shermoen v. U.S.*, 982 F.2d 1312, 1317 (*quoting Enterprise Mgt. Consultants v. U.S. ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989)). Therefore, each Stevens Treaty Tribe that claims or could claim treaty hunting rights in "Twana territory" is a party required to be joined if feasible under Rule 19.

2. The Suquamish Tribe and other Stevens Treaty Tribes cannot be joined due to their sovereign immunity.

While required parties under Rule 19 will generally be joined as a party to the action, Indian tribes may not be joined where they have not waived their sovereign immunity. *Skokomish v. Goldmark*, 994 F.Supp.2d at 1191 (*citing Quileute Indian Tribe v. Babbit*, 18 F.3d 1456, 1459 (9th Cir. 1994). The sovereign immunity of each of the Stevens Treaty Tribes

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operates to render those Tribes immune for nonconsensual actions in federal court. *Confederated Tribes of Chehalis*, 928 F.2d at 1499 (*citing McClendon v. U.S*, 885 F.2d 627, 629 (9th Cir. 1989)); *see also, supra*, at Section III(A)(1) (discussing sovereign immunity). Therefore none of the Stevens Treaty Tribes, including the Suquamish Tribe, may be joined under Rule 19.

3. A judgment rendered in the other Stevens Treaty Tribes' absence would prejudice those Tribes, and therefore equity and good conscience require dismissal.

Because the other Stevens Treaty Tribes, as required parties, cannot be joined, the Court must determine whether or not the case may proceed in "equity and good conscience." Fed. R. Civ. Pro. 19(b). In making this determination, four factors are considered: "(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." *Id*.; *see also Skokomish v. Goldmark*, 994 F.Supp.2d at 1190.

With respect to the first factor, the analysis concerning prejudice is substantially identical to the legal interest test under Rule 19(a). *Skokomish v. Goldmark*, 994 F.Supp.2d at 1190 (citations omitted). For the reasons set forth above in Section III(C)(1), the Stevens Treaty Tribes, including the Suquamish Tribe, would be prejudiced if this case is permitted to proceed in their absence. Therefore this factor weighs in favor of dismissal.

As to the second factor set forth in Rule 19(b)(2), in this case it is not possible to lessen or avoid the prejudice to the Stevens Treaty Tribes by including protective provisions in the judgment, shaping the relief, or through other measures. The relief sought by Skokomish inexorably implicates the treaty rights and interests of, at a minimum, the signatory Tribes to the PNP Treaty, the Point Elliot Treaty, and the Medicine Creek Treaty, and likely implicates the

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claimed treaty rights of a number of other Stevens Treaty Tribes. First, there is no recognized hunting right analogue to the primary / secondary rights determinations applicable in the context of treaty fishing rights under *U.S. v. Washington*. *See, e.g., Skokomish v. Goldmark,* 994 F.Supp.2d at 1174 & n. 5 (so noting, citing cases, and generally noting limited jurisprudence on scope and extent of rights conferred by the Stevens Treaties' hunting rights language).[10] "[D]ue to the similarity between the various Stevens Treaties, courts have repeatedly looked to prior decisions interpreting other Stevens Treaties for guidance." *Id*. at 1191 n. 12 (*citing Nez Perce Tribe v. Idaho Power Co.*, 847 F.Supp. 791, 806 (D.Idaho 1994)); *see also U.S. v. State of Oregon*, 718 F.2d 299, 301-302 & n. 2 (9th Cir. 1983) (looking to prior cases interpreting various Stevens Treaties when construing scope of rights afforded under other Stevens Treaties). Because of their interrelated interpretation, any order of this Court declaring Skokomish's "primary" or "exclusive" right to regulate hunting activity within "Twana territory" under the PNP Treaty—which has never been adjudicated—will necessarily impact the rights of both other signatory Tribes to the PNP Treaty as well as other Stevens Treaty Tribes claiming hunting rights in the area. As such, the prejudice to the non-parties that cannot be involuntarily joined cannot be mitigated. This factor therefore also weighs in favor of dismissal.

The inadequacy of any judgment rendered in this case also militates in favor of dismissal under the third factor. First, Skokomish is seeking declaratory and injunctive relief against non-parties--the Suquamish Tribe and its members--and it is axiomatic that non-parties cannot be bound by a judgment. *See* Complaint, Dkt. # 1 at ¶52(2) (seeking declaration vis-à-vis the Suquamish Tribe and its members). Additionally, "adequacy" in the Rule 19 context "refers to

[10] Additionally, it is worth noting that the tribes voluntarily elected to participate in the adjudication of their respective treaty *fishing* rights, and thereby waived their sovereign immunity in *U.S. v. Washington*. *See U.S. v. Washington (Compilation of Major Post-Trial Substantive Orders, Jan. 1, 2013-Dec. 31, 2013)*, 20 F.Supp.3d 986, 1055 (W.D.Wash. 2013) (so noting). This case does not present an analogous situation, as aside from Skokomish, no Stevens Treaty Tribe has voluntarily appeared to establish the scope and extent of their respective hunting rights, and this matter was not initiated by the United States in its fiduciary capacity on behalf of any tribe.

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the public stake in settling disputes by wholes, whenever possible." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 870, 128 S.Ct. 2180 (2008) (*quoting Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733 (1968)) (internal quotation marks omitted). Skokomish seeks a declaration that it has "primary" hunting and gathering treaty rights in "Twana territory" secured to Skokomish under Article IV of the PNP Treaty. Complaint, Dkt. # 1 at ¶52 (1-3). A holding to this effect would necessarily require a finding that each of the other signatory Tribes to the Point Elliot Treaty, the PNP Treaty and the Medicine Creek Treaty (which Tribes' Treaty ceded lands overlap with those of the PNP Treaty Tribes) has only "secondary" hunting rights subservient to Skokomish's treaty hunting rights in "Twana territory." Because such a result would not be binding on those Tribes, however, "there would be nothing complete, consistent, or efficient about the settlement of this controversy" since the rights of each of the other Stevens Treaty Tribes could be re-litigated in other proceedings with potentially different results. *Northern Arapaho Tribe, supra*, 697 F.3d at 1283; *see also Republic of Philippines*, 553 U.S. at 870-871 (going forward without required parties when to do so would likely result in multiple litigation of the same issue does not serve the public interest in settling disputes as a whole protected by Rule 19). Therefore this factor also weighs strongly in favor of dismissal.

As to the fourth factor—whether Skokomish would have an adequate remedy if the case were dismissed for nonjoinder—Skokomish may not have an adequate remedy if this case is dismissed. However, "although Rule 19(b) contemplates balancing the factors, when 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." *White v. University of California*, 765 F.3d 1010, 1028 (9th Cir. 2014) (citations omitted). As the Ninth Circuit went on to note in *White*, "virtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether a remedy is available, if the absent parties are Indian tribes invested with

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sovereign immunity." *Id*. (citations omitted). Here, any prejudice to Skokomish caused by the lack of an available remedy is "outweighed by prejudice to the absent entities invoking sovereign immunity." *Republic of Philippines*, 555 U.S. at 872. This factor is therefore entitled to little weight in the analysis, and as the Ninth Circuit has noted with respect to prior Skokomish claims seeking to allocate treaty resources that were barred by the sovereign immunity of the other Stevens Treaty Tribes involved, "not all problems have judicial solutions." *U.S. v. Washington*¸ 573 F.3d 701, 708 (9th Cir. 2009).

Here, there are a significant number of parties that are required parties under Rule 19, and none of them are susceptible to joinder based on their sovereign immunity. Because each of the Stevens Treaty Tribes would be prejudiced by a determination of the meaning of the "open and unclaimed" clause in the event this case were to proceed in their absence, that prejudice cannot be lessened by shaping any judgment; and as any judgment would be inadequate to protect their interests, dismissal of Skokomish's claims is appropriate pursuant to Rule 12(b)(7).

III. CONCLUSION

Skokomish cannot avail itself of the *Ex Parte Young* doctrine, because Skokomish is plainly seeking to challenge the rights of the Suquamish Tribe to take the action complained of as opposed to the legal authority of any of the individual Defendants, and in the alternative because each of the Defendants is entitled to absolute legislative immunity for the actions forming the basis of the Complaint. Skokomish has also failed to adequately allege how the Suquamish Tribe's promulgation of hunting regulations (or the Defendant's approval thereof in the context of the legislative process) is connected with the claimed injuries. Absent joinder of parties who cannot be joined, an order of this Court will not redress Skokomish's alleged injuries. As such, Skokomish has failed to show injury in fact or redressability, and cannot carry its burden of establishing constitutional standing. Lastly, Skokomish has not and cannot join multiple required parties under Rule 19, including the Suquamish Tribe, due to their sovereign

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immunity. Equity and good conscience strongly militate against proceeding in their absence. For each of those reasons, Defendants respectfully request that this motion be granted and an order be entered dismissing Skokomish's claims pursuant to Rule 12(b)(1), 12(b)(6), and/or 12(b)(7).

DATED this 9th day of September, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2016, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties registered in the CM/ECF system for this matter.

DATED this 9th day of September, 2016.

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