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. LEONARD FORSMAN, et al., Defendants.	No: 3:16-cv-05639-RBL **PLAINTIFF, SKOKOMISH INDIAN TRIBE'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS (DKT. NO. 15)** **ORAL ARGUMENT REQUESTED**

I. INTRODUCTION

This matter is brought to enforce the Plaintiff, Skokomish Indian Tribe's primary right within Skokomish (or Twana) Territory against the Defendants, and the Defendants alone, for their violations of the primary right in respect to hunting and gathering. This primary right is guaranteed by Article IV of the Treaty of Point No Point of January 26, 1855. 12 Stat. 933 art. IV; U.S. Const. art. VI, cl. 2 (Supreme Law of the Land). Prior adjudications provide clarity and absolute certainty as to the meaning of the primary right under Article IV. *United States v. Washington,* C70-9213 (W.D. Wash. 1970-Present); *United States v. Washington,* 626 F. Supp. 1405 (W.D. Wash. 1985), *aff'd, United States*

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

v. Washington, 764 F.2d 670 (9th Cir. 1985); *United States v. Washington*, C70-9213 Dkt. No. 20722 at p. 5: ll. 6-8 (W.D. Wash. 2014) (The Stevens Treaty Tribes, including the Suquamish Indian Tribe and the Defendants, State of Washington and United States of America are all bound by the prior adjudications in *United States v. Washington*, and by any resulting appeals therefrom); *Suquamish Tribe v. United States Department of the Navy et al.*, 2:12-cv-01455-RBL, Dkt. No. 79 (W.D. Wash. 2013).

Neither the Defendants nor the Suquamish Indian Tribe can assert a sovereign immunity defense, legislative immunity defense or any other defense to this action. The Defendants engaged in and continue to engage in unlawful conduct in violation of federal law and acted beyond the scope of their legal authority set forth in Article III of the Suquamish Constitution. The Defendants' unlawful conduct, additionally, involves the exercise of administrative or executive capacities for which Defendants may not assert legislative immunity. This includes the Defendants taking steps to administratively promote, enforce and implement the unlawful taking of Treaty resources. Furthermore, as this enforcement action is against the Defendants, and the Defendants alone, for their violations of the primary right, as guaranteed by the Treaty of Point No Point of January 26, 1855 (12 Stat. 933) and as otherwise adjudicated, no other person or persons need be joined. Fed. R. Civ. P. 19. The Defendants' comparison to *Skokomish v. Goldmark et al.*, is simply not relevant to these proceedings. *Skokomish v. Goldmark et al.*, 3:13-cv-05071, Dkt. No. 50 (W.D. Wash. 2013).

The Defendants' unlawful conduct has resulted in harm (injury) that is concrete, particularized, actual and imminent, as well as, directly caused by the Defendants' acts. At a minimum, there remains a concrete, particularized, and imminent threat of harm (injury),

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

specifically, at any time Treaty resources will be harvested in violation of the primary right. Defendants have in no way indicated that they will cease and desist in unlawfully exercising their administrative or executive capacities by opening the harvest of Treaty resources within Skokomish (or Twana) Territory. Also, economic losses include, but are not limited to, the expenditure of tribal funds by the Skokomish Indian Tribe in order to respond to resource management issues resulting from Defendants' unlawful conduct. This is an ongoing expense. Furthermore, the Defendants, in unlawfully exercising their administrative or executive capacities by opening the unauthorized harvest of Treaty resources within Skokomish (or Twana) Territory have compromised the ability of the Plaintiff, Skokomish Indian Tribe to enter into mitigation plans to "compensate for any loss of resource" within Skokomish (or Twana) Territory, relative to other Indian tribes. This is both an economic loss and diminishment of self-governance powers.

Lastly, the pleadings are legally sufficient and this Court has jurisdiction to grant the relief requested. As such, the Plaintiff, Skokomish Indian Tribe, respectfully requests that the Defendants' Motion to Dismiss (Dkt. No. 15) be denied.

II. ARGUMENT

A. Plaintiff, Skokomish Indian Tribe retains primary rights over all Treaty resources located within Skokomish (or Twana) Territory pursuant to Article IV of the Treaty of Point No Point of January 26, 1855 and as otherwise legally protected by federal law.

When the language of the Treaty of Point No Point of January 26, 1855 is considered in concert with the prior court record, it is indisputably clear that the Plaintiff, Skokomish Indian Tribe retains its primary right over all Treaty resources located within Skokomish (or Twana) Territory. Specifically, that the Plaintiff, Skokomish Indian Tribe:

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

(1) retains its rights and privileges guaranteed under Article IV of the Treaty of Point No Point, the Treaty being self-executing without the need for a court adjudication; (2) has an adjudicated territory that it long used and occupied; and (3) exercised and may continue to exercise control over that territory, which includes the primary right to restrain other Indians from intrusion on or unauthorized use of its territory. The legal analysis of this primary right is set forth below.

The self-executing Treaty of Point No Point of January 26, 1855 was ratified March 8, 1859, proclaimed April 29, 1859 and is the supreme law of the land. 12 Stat. 933; 12 Stat. 933 art. XIV ("This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States"); U.S. Const. art. VI, cl. 2. The United States Constitution expressly provides in support that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

It was guaranteed in Article IV of the Treaty of Point No Point of January 26, 1855 that "[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." 12 Stat. 933 art. IV.

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

The Treaty of Point No Point of January 26, 1855 has been subject to judicial interpretation on numerous occasions. 12 Stat. 933. The following is a cursory overview of applicable proceedings, and does not reflect the full scope of binding precedent.

A waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978). By litigating, trying and appealing the meaning of Article IV of the Treaty of Point No Point of January 26, 1855 (12 Stat. 933), the Suquamish Indian Tribe, for itself and the Defendants, has invoked the jurisdiction of the federal courts, thereby expressly waiving sovereign immunity. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 667 (1999). Furthermore, the Stevens Treaty Tribes (including the Suquamish Indian Tribe), State of Washington and United States of America are all bound by the prior adjudications in *United States v. Washington,* and by any resulting appeals therefrom. *United States v. Washington,* C70-9213; *United States v. Washington,* C70-9213 Dkt. No. 20722 at p. 5: ll. 6-8 (W.D. Wash. 2014) ("Indeed, a priori limitations on party participation would jeopardize important due process rights, as it remains a fundamental principle that all parties to a lawsuit are bound by a judgement or decree within it.").

In *United States v. Washington,* the Court specifically found that:

> 353. In his 1854–55 journal, George Gibbs, a lawyer, ethnographer and secretary to the 1855 Treaty Commission, ***described Skokomish (or Twana) territory as***:
>
> > extend[ing] from Wilkes' Portage northwest across to the arm of Hood Canal up to the old limits of the Tchimakum, thence westerly to the summit of the Coast Range, thence southerly to the head of the west branch of the Satsop, down that branch to the main fork, thence east to the summit of the Black Hills, thence north and east to the place of beginning.
>
> (Tr. at Hearing, p. 29–30.) Gibbs' description of Twana territory embraces Hood Canal and its drainage basin northward along the canal to the point on the west

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

> shore now known as Termination Point, which was the southern limit of the Tchimakum shown on a map prepared by Gibbs in 1856.[1] (Ex. SK–SM–4; *see also* Ex. SK–SM–5 for contemporary names.) Gibbs' description of Twana territory was based on information gathered from Indians at and before the treaty councils and at contemporaneous meetings. ***The court finds it to be the best available evidence of the treaty-time location of Twana territory.***

United States v. Washington, 626 F. Supp. at 1489; *United States v. Washington*, C70-9213, Dkt. No. 9611 at p. 1: ll. 17-24 (W.D. Wash. 1984) ("As special master [Robert E. Cooper, United States Magistrate (Retired) Special Master] appointed to hear the above-entitled matter pursuant to the court's order of March 11, 1982, I conducted a trial on the issues raised by the request for determination on May 5 and 6, 1983, and on June 6 and 7, 1983. The parties participating at trial were the Skokomish Indian Tribe, as proponent of the request for determination, the Suquamish Indian Tribe, as an objecting party, and the United States, which took no position on the request.").[2] Any reference to Skokomish (or Twana) Territory within this Response, means the territory described above by George Gibbs which extends well beyond just Hood Canal.

The Court, furthermore, specifically found that:

> 354. Gibbs' description of Twana territory is also corroborated by other evidence in this proceeding, including the work of Dr. T.T. Waterman and Dr. Elmendorf.

---

[1] On June 17, 1981, the Skokomish Indian Tribe filed a Request for Determination of its claim that its pre-treaty occupancy and control over the Hood Canal drainage area gave it the primary right to control fishing by any other Indian tribe. *United States v. Washington*, 626 F. Supp. at 1468, *aff'd*, *United States v. Washington*, 764 F.2d 670 (9th Cir. 1985). In the course of this action, the Court first determined the full geographic extent of Skokomish (or Twana) Territory as described by Gibbs and then for purposes of the Request for Determination, found that the Hood Canal drainage area was embraced and encompassed within it.

[2] During the course of this litigation and in its Order, the Court fully adopted the Report and Recommendation, Findings of Fact, Conclusions of Law of Special Master Robert E. Cooper, dated January 19, 1984. *United States v. Washington*, 626 F. Supp. at 1487. Special Master Robert E. Cooper, however, noted in his Report and Recommendation that, "[w]ith respect to the findings of fact that are accompanied by citations to the record, it is not my intention to indicate that the evidence specifically cited is the only evidence supporting a particular finding or that other evidence not cited that could support the finding was not considered." *United States v. Washington*, C70-9213, Dkt. No. 9611 at p. 2: ll. 10-16 (W.D. Wash. 1984).

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

> Waterman, an anthropologist working with Indian informants around 1920, compiled an extensive list and map of sites used by Indians in the western Washington area, including the Suquamish, Klallam and Twana Indians. ***His data confirm that the areas within the Skokomish (or Twana) territory described by Gibbs were long used and occupied by the aboriginal Twana people.*** (Tr. of Hearing, pp. 43–49.) Dr. Elmendorf, who did not have access to Gibbs' 1856 journal or to Waterman's site information, concluded that the aboriginal Twana territory encompassed, with minor variances, the same area described by Gibbs in his 1854–55 journal. (Ex. SK–SM–1, pp. 22–23, 92–93.) The accuracy of Dr. Elmendorf's list of Twana sites (Ex. 2 to Ex. SK–SM–1, pp. 32–55) is also corroborated by Waterman's earlier list. Dr. Lane found that the cross-checking made possible by these independent sources of data presented a particularly reliable basis for determining the location of treaty-time Twana territory. (Tr. of Hearing, pp. 45–48.) The court agrees, and upon consideration of all the relevant evidence in this matter, finds that the treaty-time territory of the Twana Indians encompassed[3] all of the waters of Hood Canal, the rivers and streams draining into it, and the Hood Canal drainage basin south of a line extending from Termination Point on the west shore of Hood Canal directly to the east shore, as depicted on Exhibit A hereto. (*See also* Ex. G 17(h).)

United States v. Washington, 626 F. Supp. at 1489-90 (emphasis added). Again, Skokomish (or Twana) Territory described above by George Gibbs extends well beyond Hood Canal. Also, in the supplementing of this finding:

> 355. The court finds that the foregoing description of Twana territory is also consistent with the customary Indian understanding of territory at treaty times. . . .

United States v. Washington, 626 F. Supp. at 1490.

Additionally, hunting was expressly litigated and the Court found that:

> 352. At and before treaty times, the Twana engaged in a variety of fishing and hunting activities in and around Hood Canal and the streams flowing into it. These activities included river and stream fishing for salmon and other species; saltwater fishing in the canal by trolling, spearing and other methods; clamdigging and other shellfish gathering on the tidal zone of the canal; herring-roe harvesting in canal waters; and water-fowl hunting and marine-mammal hunting and trapping on the waters and tide flats of the canal. (Ex. SK–SM–1, pp. 32–35; Ex. 2 to Ex. SK–SM–1, pp. 56–84.) The Twana assigned some of these activities, such as water-fowl and marine-mammal hunting, to specialists who possessed "guardian spirit power"

[3] See fn. 1.

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

> giving them unusual prowess in the activity. (Ex. SK–SM–1, p. 37.) Although river fishing was the most important source of fish for the Twana, all of the other fishing and marine hunting activities noted above were also important to them. (384 F.Supp. at 377; Ex. SK–SM–1, pp. 32–38; Ex. USA 23, p. 8.)

United States v. Washington, 626 F. Supp. at 1489. The Court of Appeals for the Ninth Circuit affirmed the District Courts findings, and summarized in its opinion that:

> The district court found that all areas of the Hood Canal, and the rivers and streams draining into it were easily accessible by canoe to the Twana and were intensively used by and of great importance to them for ***food-gathering activities***.

United States v. Washington, 764 F.2d at 674.

> The Court, also, specifically found that:
>
> 356. The Twana and their neighbors, like other treaty-time Indians in the case area, ***recognized a hierarchy of primary and secondary or permissive use rights***, including fishing rights. (Tr. of Hearing, pp. 14–18; finding 12 herein.) The people occupying a territory held the primary right to fish in the territory. . . The secondary or permissive fishing rights were ineffective, however, unless holders of the primary fishing right first invited or otherwise permitted persons with secondary rights to fish in the territory. The holders of the primary fishing right exercised the prerogative to exclude some or all secondary users from their territorial fishing grounds for any reason they deemed adequate. . . .

United States v. Washington, 626 F. Supp. at 1490. As noted in the opinion, these primary and secondary or permissive use rights extended beyond just fishing. The Court of Appeals for the Ninth Circuit also considered the District Court's findings and in its opinion wrote:

> The customary behavior of treaty-time Indians generally reflected these common understandings through ***restraint from intrusion on or unauthorized use of others' territories***. The court found, however, that ***the Twana had readily available means of deterring unauthorized use of their territory***, such as social disapproval, magical retaliation, and possibly physical force.

United States v. Washington, 764 F.2d at 674. The Court, additionally, specifically concluded that:

> 92. The aboriginal primary right of the Twana Indians to take fish ***within their territory*** was fully preserved to the Skokomish Indian Tribe by the Treaty of Point

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

> No Point, 12 Stat. 933 (January 26, 1855), as a "right of taking fish" thereunder. Members of tribes other than the Skokomish Tribe may not exercise treaty fishing rights by fishing at usual and accustomed places of those tribes ***within the territory described in finding 354***, above, south of the line shown on Exhibit A hereto, without the prior express consent of the Skokomish Indian Tribe. Subject to the limitations contained in the following paragraph, the Skokomish Indian Tribe possesses the right to preclude or otherwise regulate Indian treaty fishing by members of tribes other than the Skokomish Tribe within the area described in finding 354, above.

United States v. Washington, 626 F. Supp. at 1491. The reference to "within their territory" references back to Finding 353, which provides in relevant part:

> 353. In his 1854–55 journal, George Gibbs, a lawyer, ethnographer and secretary to the 1855 Treaty Commission, described Skokomish (or Twana) territory as:
>
> > extend[ing] from Wilkes' Portage northwest across to the arm of Hood Canal up to the old limits of the Tchimakum, thence westerly to the summit of the Coast Range, thence southerly to the head of the west branch of the Satsop, down that branch to the main fork, thence east to the summit of the Black Hills, thence north and east to the place of beginning.

United States v. Washington, 626 F. Supp. at 1489. The reference to "within the territory described in finding 354," merely fixed a portion of the northern boundary of Skokomish (or Twana) Territory by virtue of contemporary points of reference, specifically, "south of a line extending from Termination Point on the west shore of Hood Canal directly to the east shore." *United States v. Washington*, 626 F. Supp. at 1489-90. Finding 354, also still references back to Finding 353. *United States v. Washington*, 626 F. Supp. at 1489 ("His data confirm that the areas within the Skokomish (or Twana) territory described by Gibbs were long used and occupied by the aboriginal Twana people.").

The Court of Appeals for the Ninth Circuit affirmed the United States District Court's earlier finding, conclusions and rulings, which are now both the Law of the Case and Circuit. *United States v. Washington*, 764 F.2d at 674.

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

Many decades later, the Suquamish Indian Tribe brought an action against the United States Department of the Navy and others over a federal project in Hood Canal, and this Court in its Order on Reconsideration ruled:

> The Order concluded: "If the primary right holder has agreed that the Navy's mitigation plan will ***compensate for any loss***, it is difficult to see how a secondary right holder can challenge the plan."
>
> To be clear, the Court did not rule that the Skokomish may abrogate the Suquamish's treaty rights. But as a practical matter, the Skokomish may agree—and may enter a written agreement—with the Navy that the proposed mitigation plan compensates for ***any loss of resources***. . . The Skokomish need not consult with the Suquamish to form that agreement. It remains difficult to see how the Suquamish will succeed in showing that the EHW-2 "abrogates" their treaty rights when the primary right holder has agreed that the Navy's mitigation plan compensates for ***any resource loss in the area***.

Suquamish Tribe v. United States Department of the Navy et al., 2:12-cv-01455-RBL, Dkt. No. 79 at p. 3: ll. 12-22 (W.D. Wash. 2013). Resources in the area would include not only fish, but for example, waterfowl and marine mammals. *United States v. Washington*, 626 F. Supp. at 1489 ("hunting activities").

Even if the Defendants claim that issues were not raised by prior pleadings in *United States v. Washington* or any other case, Rule 15(b)(2) provides that:

> When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move--at any time, even after judgment--to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

Fed. R. Civ. P. 15(b)(2).

The Plaintiff, Skokomish Indian Tribe, also asserts and states the following affirmative defenses against any challenge of these prior adjudications and appeals: res judicata; collateral estoppel; judicial estoppel; and issue preclusion.

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

In light of the foregoing evidence and potential defenses, the Plaintiff, Skokomish Indian Tribe retains primary rights over all Treaty resources located within Skokomish (or Twana) Territory pursuant to Article IV of the Treaty of Point No Point of January 26, 1855 and as otherwise legally protected by federal law.

B. Defendants' Assertion of Sovereign Immunity and Legislative Immunity is Legally Flawed and Fails as a Matter of Law and in Equity.

1. Sovereign Immunity: Tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct.

The Defendants have asserted sovereign immunity as an absolute bar and have grossly misconstrued the legal and equitable principals behind the *Ex parte Young* doctrine. The United States Supreme Court has consistently held that, "[t]he state cannot . . . impart to the official immunity from responsibility to the supreme authority of the United States." *Ex parte Young,* 209 U.S. 123, 167 (1908). More recently, it was held that "[a]s this Court has stated before, analogizing to *Ex parte Young*, [citation omitted], tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct." *Michigan v. Bay Mills Indian Community,* 134 S.Ct. 2024, 2035, 188 L.Ed.2d 1071 (2014); *see also Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140, 1154 (10th Cir. 2011) ("Today we join our sister circuits in expressly recognizing *Ex parte Young* as an exception not just to state sovereign immunity but also to tribal sovereign immunity.")

The Defendants have specifically challenged the exercise of jurisdiction under *Ex parte Young*, claiming that "the requested relief will require . . . disposition of unquestionably sovereign property." (Defendants' Motion to Dismiss, Dkt. No. 15 at p. 9:

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

ll. 10-12). As discussed in Section II (A) of this Response, the Plaintiff, Skokomish Indian Tribe has an adjudicated territory in which it can deter unauthorized use of Treaty resources by the Suquamish Indian Tribe and its members; and thus, the Suquamish Indian Tribe cannot show an "unquestionable sovereign property" right to harvest Treaty resources located within Skokomish (or Twana) Territory.

In debunking the further claims of lack of jurisdiction under *Ex parte Young*, it is helpful to review *Vann v. Kempthorne*, in which the United States Court of Appeals for the District of Columbia Circuit eloquently concluded that:

> Applying the principle of *Ex parte Young* in the matter before us, we think it clear that tribal sovereign immunity does not bar the suit against tribal officers. *Santa Clara Pueblo*, which relied on *Ex parte Young* to hold a tribal officer "not protected by the tribe's immunity from suit," dictates this result. [Citation Omitted]. The Freedmen allege that the Cherokee Nation's officers are in violation of the Thirteenth Amendment and the 1866 Treaty, and seek an injunction preventing Chief Smith "from holding further elections without a vote of all citizens, including the Freedmen." Pls.' Second Am. Compl. ¶ 74, J.A. 138. Faced with allegations of ongoing constitutional and treaty violations, and a prospective request for injunctive relief, officers of the Cherokee Nation cannot seek shelter in the tribe's sovereign immunity.

Vann v. Kempthorne, 534 F.3d 741, 750 (D.C. Cir. 2008). In the reaching this decision, the Court addressed the Cherokee Nation invoking footnote 11[4] of *Larson*, arguing that "tribal sovereign immunity bars the suit against its officers because the requested relief really runs against the tribe itself." *Vann v. Kempthorne*, 534 F.3d at 750. The United

[4] Footnote 11 provides: "[o]f course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 (1949).

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

States Court of Appeals for the District of Columbia Circuit, did not find this argument persuasive and held that:

> This is reminiscent of the losing argument in *Ex parte Young*. See 209 U.S. at 142, 149, 28 S.Ct. 441 (rejecting state officer's "objection ... that the suit is, in effect, one against the State of Minnesota"). The argument is no more persuasive a century later.

Id. The Defendants invoked the same misguided defense that the requested relief "would operate against the Suquamish Tribe. . . ." (Defendants' Motion to Dismiss, Dkt. No. 15 at p. 12: ll. 1-3). As such, the Court should reject this defense.

The Defendants also have challenged the exercise of jurisdiction under *Ex parte Young*, claiming that "the requested relief will require affirmative actions by the sovereign." (Defendants' Motion to Dismiss, Dkt. No. 15 at p. 9: ll. 10-12). This defense was likewise found to be deficient by the United States Court of Appeals for the District of Columbia Circuit, specifically:

> This relief, if granted, would not oblige the tribe's officer to use his discretionary authority to comply with the injunction. To the contrary, it would prevent the officer from exercising any such authority in violation of the Thirteenth Amendment or the 1866 Treaty.
>
> . . .
>
> At bottom, the Cherokee Nation's reliance on footnote 11 and similar pronouncements reflects wishful thinking. The tribe imagines a world where *Ex parte Young* suits cannot proceed if they will have any effect on a sovereign. But that is what *Ex parte Young* suits have always done. See, e.g., *Milliken*, 433 U.S. at 288–90, 97 S.Ct. 2749 (relying on *Ex parte Young* in suit to desegregate public schools); *Griffin v. County Sch. Bd.*, 377 U.S. 218, 228, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964) (same); *Orleans Parish Sch. Bd. v. Bush*, 242 F.2d 156, 160–61 (5th Cir.1957) (same); *Sch. Bd. v. Allen*, 240 F.2d 59, 62–63 (4th Cir.1956) (same). To credit the tribe's position would be to conclude that *Larson* overruled *Ex parte Young* in dicta, in a footnote, without even citing the case. We doubt whether a case of such monumental importance could have come to rest in such a shallow grave. . . We therefore reject the Cherokee Nation's argument.

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

Vann v. Kempthorne, 534 F.3d at 754-55. The injunctive relief requested in the Plaintiff, Skokomish Indian Tribe's Complaint is consistent with this type of relief, in that the Plaintiff, Skokomish Indian Tribe merely requests:

> An injunction, pursuant to 28 U.S.C. § 2202, prohibiting Defendants, and their successors and assigns, directly or indirectly, from engaging in unlawful conduct by opening hunting or gathering within Skokomish (or Twana) Territory, in violation of Plaintiff, Skokomish Indian Tribe's primary right to regulate and prohibit treaty hunting and gathering, which is a legally protected interest guaranteed by Article IV of the Treaty of Point No Point of January 26, 1855 (12 Stat. 933) and as declared by the Court.

(Compl., Dkt. No. 1 at ¶ 52 (3)). This relief would prevent the Defendants (i.e. officers) from exercising any such authority in violation of the primary right (i.e. federal law).

Also, it is also important to revisit the United States Supreme Court's decision in *Michigan v. Bay Mills Indian Community*, in which the Court opined: "[b]ut a State, on its own lands, has many other powers over tribal gaming that it does not possess (absent consent) in Indian territory." *Michigan v. Bay Mills Indian Community*, 134 S.Ct. at 2034. Here, the Plaintiff, Skokomish Indian Tribe is similarly positioned, as it has an adjudicated territory in which it can deter unauthorized use of Treaty resources by the Suquamish Indian Tribe and its members.

The United States Supreme Court, furthermore, opined that:

> So, for example, Michigan could, in the first instance, deny a license to Bay Mills for an off-reservation casino. . . And if Bay Mills went ahead anyway, Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license.

Michigan v. Bay Mills Indian Community, 134 S.Ct. at 2035. Here, the Plaintiff, Skokomish Indian Tribe has in the Complaint alleged that:

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

> 49. Plaintiff, Skokomish Indian Tribe, objects to and has not consented to the Suquamish Indian Tribe or its members exercising the treaty privilege to hunt or gather within Skokomish (or Twana) Territory.

(Compl., Dkt. No. 1 at ¶ 49). This is analogous to "denying a license." The Plaintiff, Skokomish Indian Tribe brought a suit against tribal officials and employees (rather than the Tribe itself) seeking an injunction to stop the opening of hunting or gathering within Skokomish (or Twana) Territory without "a license" (i.e. express consent of the Plaintiff, Skokomish Indian Tribe). The Defendants, for example, open hunting or gathering by issuing permits to members of the Suquamish Indian Tribe. Suquamish Tribal Code § 14.3.8 (Annual Permit). Alternatively, the Defendants administer (govern) a department which promotes hunting or gathering without "a license." This is akin to opening and operating a tribally owned casino without a license.

In light of all of the overwhelming legal precedent, the Defendants' assertion of sovereign immunity fails. The action should proceed under the *Ex parte Young* doctrine.

2. Legislative Immunity is Inapplicable to this Action.

Defendants conflate acting in legislative capacities with acting in administrative or executive capacities. Legislators have absolute immunity when they act "in their legislative capacities, not in their administrative or executive capacities." *Bechard v. Rappold*, 287 F.3d 827, 829 (9th Cir. 2002). In *Community House, Inc.*, the Court of Appeals for the Ninth Circuit held that:

> We consider four factors in determining whether an act is legislative in its character and effect: "(1) whether the act involves ad hoc decisionmaking, or the formulation of policy; (2) whether the act applies to a few individuals, or to the public at large; (3) whether the act is formally legislative in character; and (4) whether it bears all the hallmarks of traditional legislation." [Citations Omitted] The first two factors are largely related, as are the last two factors, and they are not mutually exclusive.

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

Community House, Inc. v. City of Boise, Idaho, 623 F.3d 945, 960 (9th Cir. 2010).

As to the Defendants' Motion to Dismiss (Dkt. No. 15), the Defendants have misconstrued or chosen to mischaracterize the basis for inclusion of Exhibit A, Suquamish Hunting Regulation Addendum (2013) and (2016). (Ex., Dkt. No. 1-1). Exhibit A simply documents areas within Skokomish (or Twana) Territory that are directly impacted by the Defendants' unlawful conduct. The Defendants' insistence that their actions are merely legislative also defies logic in light of the remedy crafted by the United States Supreme Court in *Michigan v. Bay Mills Indian Community*. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. at 2035. This remedy being the ultimate closure of a tribally owned casino for unlawfully operating without "a license" issued by Michigan. The Plaintiff, Skokomish Indian Tribe likewise seeks an injunction not to compel the Suquamish Indian Tribe or its members to utilize their legislative capacities to amend the Suquamish Constitution or laws, but to prohibit the Defendants from exercising their administrative or executive capacities to unlawfully open hunting or gathering within Skokomish (or Twana) Territory. In other words, the relief requested includes the closing down of those aspects of departmental operations that run afoul of federal law.

Some general examples of acts taken in administrative or executive capacities include, but are not limited to: pre-season and post-season harvest monitoring and data collection; the drafting of anthropological reports; the physical act of posting regulations or disseminating newsletters for public viewing; issuing permits to individuals; interviewing and employing staff, approving staff assignments and timesheets, performing staff evaluations; paying staff salaries or other expenses (i.e. submitting requisitions for

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

payment of debts and signing checks); negotiating mitigation packages or other agreements, and monitoring compliance under those agreements. These are not legislative functions.

The Defendants do exercise a broad range of administrative or executive capacities and the Suquamish Constitution and laws provide evidence. This is not meant as an exhaustive list. For example, "[t]he governing body of the Suquamish Indian Tribe" is the Suquamish Tribal Council; and the Defendants (with the exception of Robert Purser, Jr., Fisheries Director for the Suquamish Indian Tribe) are sitting members thereof. Suquamish Const. art. III. These Defendants, that are sitting members of the Suquamish Tribal Council, "have the following powers and duties . . . [t]o . . . *enforce* ordinances. . . .[t]o take such actions as are necessary to carry into effect any of the foregoing powers and duties. . . ." Suquamish Const. art. III (a)-(j). The Chairman of the Suquamish Tribal Council (Defendant, Leonard Forsman), for example, also may "exercise any authority specifically delegated to him by the Tribal Council." Suquamish Const. art. VI, § 1 (Duties of Officers). Additionally, the duties of the Chairman (Defendant, Leonard Forsman) and Treasurer (Defendant, Robin Sigo) of the Suquamish Tribal Council include signing all checks. Suquamish Const. art. VI, §§ 1 and 4 (Duties of Officers).

The Defendant, Robert Purser, Jr., as the Fisheries Director is responsible for the *implementation* of: the Suquamish Tribal Code Title 14. Fishing and Hunting, Chapter 14.3 Hunting; and overseeing the *enforcement* of this chapter and regulations issued pursuant to this chapter. Suquamish Tribal Code § 14.3.11. The Defendant, Robert Purser, Jr., as the Fisheries director has responsibilities regarding implementation, for example:

> **14.3.8.** Annual Permit. No person shall hunt or trap pursuant to this chapter without first obtaining from the tribal fisheries director an annual hunting permit. The tribal

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

> council may establish a license fee for each category of permit. (Res. 88-007 (part), passed Jan. 28, 1988)
>
> **14.3.15.** Hunting for Ceremonial Purposes. The fisheries director may issue short-term permits for the hunting of animals needed for funerals, religious ceremonies, and tribal community ceremonies. Such a permit shall specify the species, sex, and number of animals to be taken; the name of the hunter; and the dates during which the permit is valid. Permits may be issued under this section for hunting during a closed season. (Res. 88-007 (part), passed Jan. 28, 1988)
>
> **14.3.18.** Intergovernmental Agreements. The fisheries director is authorized to negotiate agreements relating to the management and protection of game with the government of any other treaty tribe, the State of Washington, or the United States government. No such agreement shall be binding unless approved by the Suquamish Tribal Council. (Res. 88-007 (part), passed Jan. 28, 1988)

Suquamish Tribal Code § 14.3.8 (Annual Permit); § 14.3.15 (Hunting for Ceremonial Purposes); See also § 14.3.16 (Annual Regulations); § 14.3.17 (In-Season Regulations); § 14.3.18 (Intergovernmental Agreements).

Another, more specific example of acts performed by these Defendants in their administrative or executive capacities can be seen by reference to Suquamish's Olympic Mountains and Hood Canal hunting claim. In the first instance, the Defendant, Leonard Forsman, is the Chairman and co-author of an anthropological report entitled, "Suquamish Hunting in the Olympic Mountains and Hood Canal by Leonard Forsman, M.A. and Dennis Lewarch, M.A." dated June 17, 2008. Decl. of Earle David Lees, Ex. A. This report was issued by the "Suquamish Tribe" and provided to the Washington State Department of Fish and Wildlife. *Id.* The drafting of this report is in no way a legislative act.

For another instance of non-legislative activities, one only needs to look to the following program description found on the Suquamish Indian Tribe's website:

> The ***Archaeology and Historic Preservation Program of the Fisheries Department*** is responsible for protecting cultural resources within . . . the traditional territory of the Suquamish People. . .

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

http://suquamish.nsn.us/Departments/Fisheries/THPO.aspx. Consider that, Defendant, Robert Purser, Jr., is also the Fisheries Director and his department is directly involved in this expansion claim. Defendant, Leonard Forsman, again as Chairman co-authored a second report generated this time by the Archaeology and Historic Preservation Program Suquamish Tribe entitled, "Suquamish Hunting in the Olympic Mountains and Hood Canal," dated August 19, 2009 and also submitted to the Washington State Department of Fish and Wildlife. Decl. of Earle David Lees, Ex. B.

A letter was also sent to Michele K. Culver, Washington Department of Fish and Wildlife, from Leonard Forsman, Chairman of the Suquamish Tribe. Decl. of Earle David Lees, Ex. C. This correspondence was sent on the official letterhead of the Suquamish Tribe, Office of Tribal Council. *Id.* The letter provides in relevant part:

> You propose a meeting . . . I will direct appropriate Suquamish Tribe staff and legal counsel to contact you to discuss the timing, format and agenda for this meeting. . .The Suquamish Tribe will engage WDFW in a dialogue on this matter only because it appears that until a federal court confirms the full breadth of the Suquamish Tribe's hunting rights, duly authorized tribal member hunters are at a risk of interference and criminal prosecution by agents of the state. Our discussions will *not* be about proving our treaty hunting rights. Rather, they will be to demonstrate that we have pre-existing rights, and if the state cannot fully respect our sovereignty until a federal court demands it, the state must at the least exercise its enforcement and prosecutorial discretion in the interim. . . Please contact, Mr. Rob Purser, Director of Fisheries . . . to assist in organizing our meeting, and to confirm that WDFW will permit this discussion to take place without the continued threat of state enforcement interference . . . .

Id. In review, the Defendants cannot be said to be acting in a legislative capacity.

Considering everything, the Defendants cannot assert legislative immunity for acts taken in their administrative or executive capacities. The motion should be denied.

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

C. No Other Persons Need Be Joined.

The Defendants' claim that all of the Stevens Treaty Tribes, and possibly other persons or entities, need to be joined is a factually and legally flawed argument. Fed. R. Civ. P. 19. In support of the Defendants' joinder claim, the Defendants have equated this narrowly tailored enforcement action based on settled law, with a prior action brought against officials of the State of Washington and several counties seeking to break new legal ground by defining such terms as "opened and unclaimed." *Skokomish v. Goldmark et al.*, 3:13-cv-05071, Dkt. No. 50 at ¶ 145 (W.D. Wash. 2013). The Defendants' unsupportable position is not relevant and the comparison deficient in regards to this motion.

As for this settled law, the Plaintiff, Skokomish Indian Tribe's primary right is already guaranteed in Article IV of the Treaty of Point No Point of January 26, 1855. 12 Stat. 933 art. IV; U.S. Const. art. VI, cl. 2 (Supreme Law of the Land). A summary of prior adjudications interpreting and supporting this primary right is additionally set forth in Section II (A) of this Response. The law is established and defined, and simply put, the Plaintiff, Skokomish Indian Tribe has an adjudicated territory in which it can deter unauthorized use of Treaty resources by the Suquamish Indian Tribe and its members. *United States v. Washington*, 626 F. Supp. at 1489 (adjudication of Skokomish (or Twana) Territory); *United States v. Washington*, 626 F. Supp. at 1489-90 (adjudicated Skokomish (or Twana) territory was long used and occupied by the aboriginal Twana people.); *United States v. Washington*, 626 F. Supp. at 1490 (a hierarchy of primary and secondary or permissive use rights); *United States v. Washington*, 764 F.2d at 674 (restraint from intrusion on or unauthorized use of others' territories); *Suquamish Tribe v. United States Department of the Navy et al.*, 2:12-cv-01455-RBL, Dkt. No. 79 at p. 3: ll. 12-22 (W.D.

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

Wash. 2013) (". . . mitigation plan will compensate for any loss . . . for any loss of resources . . . compensates for any resource loss in the area). The mechanism being deployed in this action to deter unauthorized use is the requested declaratory judgment and injunctive relief, which is brought against the Defendants, and the Defendants alone.

D. The Court has Jurisdiction and the Complaint is Legally Sufficient.

1. The Court has Jurisdiction.

The Defendants' assertion that the Court lacks jurisdiction is without merit. To establish Article III standing, the Plaintiff, Skokomish Indian Tribe ". . . 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 Intern., Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1386 (2014); *see also Pyramid Lake Paiute Tribe of Indians v. Nevada, Dep't of Wildlife*, 724 F.3d 1181, 1187-88 (9th Cir. 2013). The Plaintiff, Skokomish Indian Tribe has met this burden, having sufficiently plead the necessary harm (injury), causation and judicial redressability.

Neither the Defendants nor the Suquamish Indian Tribe can assert a sovereign immunity defense, legislative immunity defense or any other defense to this action. The Defendants engaged in and continue to engage in unlawful conduct in violation of federal law and acted beyond the scope of their legal authority set forth in Article III of the Suquamish Constitution. Suquamish Const. art. III ("The Council shall have the following powers and duties subject to any limitations by applicable State laws or statutes of the United States and the regulations of the Secretary of the Interior"). The Defendants' unlawful conduct, additionally, involves the exercise of administrative or executive

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

capacities for which Defendants may not assert legislative immunity. Also, no other person or persons need be joined. Fed. R. Civ. P. 19.

Defendants' unlawful conduct has also resulted in actual, potential, and future harm (injury) to the Plaintiff, Skokomish Indian Tribe. The harm (injury) includes, but is not limited to: the loss of treaty resources utilized for subsistence and cultural preservation; economic losses; and threatened diminishment of self-governance powers. (Compl., Dkt. No. 1 at ¶ 51.) This harm (injury) is concrete, particularized, and actual and imminent, as well as, directly caused by the Defendants' acts taken in their administrative or executive capacities.

Even if the Court accepts Defendants' speculation that perhaps no Treaty resources were harvested by members of the Suquamish Indian Tribe yet, there remains a concrete, particularized, and imminent threat of harm (injury), specifically, that at any time Treaty resources will be harvested in violation of the Plaintiff, Skokomish Indian Tribe's primary right. Defendants have in no way indicated that they will cease and desist in unlawfully exercising their administrative or executive capacities by opening the harvest of Treaty resources within Skokomish (or Twana) Territory. Fed. R. Evid. 406 (Habit; Routine Practice); *see also* (Ex., Dkt. No. 1-1). and Decl. of Earle David Lees, Exs. A-C.

Beyond the loss of treaty resources utilized for subsistence and cultural preservation, the Plaintiff, Skokomish Indian Tribe, also suffered and will continue to suffer economic losses directly attributable to the unlawful exercise of the Defendants' administrative and executive capacities. Economic losses also include, but are not limited to: the expenditure of tribal funds by the Skokomish Indian Tribe in order to respond to resource management issues resulting from Defendants' unlawful conduct. This is an ongoing expense. Wildlife

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

and other natural resources are not limitless, and the Plaintiff, Skokomish Indian Tribe and State of Washington are obligated to act as co-managers of those resources, located within their territories, to ensure the natural resources continued existence and availability for lawful and regulated harvests by Indians and non-Indians. This policy is similar to that adopted by the Suquamish Indian Tribe, specifically, "[i]t is the policy of the Suquamish Tribe and the purpose of this chapter to protect, enhance, and conserve game resources used by members of the tribe." Suquamish Tribal Code § 14.3.2.

There is additional harm (injury) that has and may imminently result in economic losses and the diminishment of self-governance powers. Particularly, the Defendants, in exercising their administrative or executive capacities by opening the unauthorized harvest of Treaty resources within Skokomish (or Twana) Territory, have compromised the ability of the Plaintiff, Skokomish Indian Tribe to enter into mitigation plans to "compensate for any loss of resource" within Skokomish (or Twana) Territory, relative to other Indian tribes. *Suquamish Tribe v. United States Department of the Navy et al.*, 2:12-cv-01455-RBL, Dkt. No. 79 at p. 3: ll. 12-22 (W.D. Wash. 2013). In essence, the Defendants have in violation of federal law unlawfully clouded title to the Treaty resources located in Skokomish (or Twana) Territory and damaged the reputation of the Plaintiff, Skokomish Indian Tribe. The potential for economic losses is significant and the risk of harm (injury) concrete, particularized, and actual and imminent, and is directly related to the unlawful exercise of Defendant's administrative and executive capacities.

2. The Complaint is Legally Sufficient.

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

Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100 (Tel) • 360.877.2104 (Fax)

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). The United States Supreme Court in applying these general standards to the § 1 claim under the Sherman Act, opined, "[a]nd, of course, a well-pleaded complaint may proceed *even if it 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).

In light of all of the foregoing arguments, the Plaintiff, Skokomish Indian Tribe has conclusively exceeded this requirement.

III. CONCLUSION

The Plaintiff, Skokomish Indian Tribe respectfully requests that the Defendants' Motion to Dismiss (Dkt. No. 15) be denied.

DATED this 3rd day of October, 2016

s/Earle David Lees, III, WSBA No. 30017
Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
Email: elees@skokomish.org
Tel: 360.877.2100
Fax: 360.877.2104
Attorney for the Skokomish Indian Tribe

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2016, I electronically filed the *PLAINTIFF, SKOKOMISH INDIAN TRIBE'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS (DKT. NO. 15)* 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.

DATED this 3rd day of October, 2016

s/Earle David Lees, III, WSBA No. 30017
Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
Email: elees@skokomish.org
Tel: 360.877.2100
Fax: 360.877.2104
Attorney for the Skokomish Indian Tribe