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' REPLY IN SUPPORT OF 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

REPLY IN SUPPORT OF MOTION TO DISMISS

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 submit this Reply in support of the previously filed *Motion to Dismiss for*

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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) (the "Motion").

The opposition to the Motion submitted by the Skokomish Indian Tribe (alternatively "Skokomish" or "Plaintiff") is largely non-responsive to the issues and arguments presented in the Motion. Rather, Skokomish focuses primarily on past proceedings in a separate case, *U.S. v. Washington*, to prematurely argue the merits of its claim to "primary" treaty hunting rights in "Twana Territory." Skokomish's argument is fatally flawed in its premature merits case, but most importantly, it misses the mark by a wide margin in terms of its relevance to the pending and instantly paramount jurisdictional and procedural issues before the Court. The question at this point is whether this Court should dismiss Skokomish's Complaint and obviate the need for the Defendants and this Court to ever be burdened with engaging the misguided claims proffered therein. Where Skokomish does occasionally attempt to address the Motion, its arguments tend to circle back to inappropriate bootstrapping into the *U.S. v Washington* case.

Skokomish's protestations to the contrary notwithstanding, *U.S. v. Washington* is and always has been a case about treaty *fishing* rights secured to various Indian tribes. It does not address treaty reserved *hunting rights*—a fact this Court previously recognized in *Skokomish Indian Tribe v. Goldmark*, 994 F.Supp.2d 1168, 1174 n. 5 (W.D.Wash. 2014). In fact, the Skokomish response to the Motion regarding what has been determined in *U.S. v. Washington* becomes its undoing. This is because assuming *arguendo* that any subproceeding in *U.S. v. Washington* does "provide clarity and absolute certain as to the meaning of the primary [hunting] right," as Skokomish claims, then the proper forum and procedural mechanism for bringing the claims asserted in this matter is the initiation of a new subproceeding in *U.S. v. Washington* under Paragraph 25(a)(1). Judge Boldt crafted a means for parties to that continuing jurisdiction case to come before *that* Court to have its determinations enforced. All the parties (including

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Skokomish) and presiding judges in that case have used Paragraph 25(a)(1), and if the treaty hunting issues are the "law of the [*U.S. v. Washington*] case" in the manner argued, Skokomish is declaring and admitting *itself* that it is before the wrong Court now.

With respect to the jurisdiction and procedural issues raised in the Motion, the doctrine of *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908), does not apply because Skokomish seeks to litigate the scope of treaty rights held by the Suquamish Indian Tribe (the "Suquamish Tribe") and Skokomish has failed to show any cognizable waiver of the Suquamish Tribe's sovereign immunity that would permit this suit to proceed. Moreover, the alleged act of "opening hunting" is accomplished via the Tribal Council's adoption of regulations through legislative process. While there are various other administrative and executive actions alleged to have been taken by Defendants, none are in and of themselves objectionable, injurious, or can cause the harms to Skokomish alleged in the Complaint for which it seeks relief.

The adoption of regulations by the Suquamish Tribe's Tribal Council "opening hunting" is quintessentially legislative, and thus Defendants are entitled to legislative immunity. Skokomish also has not, and cannot, adequately plead causation necessary to establish Article III standing; and Skokomish has not and cannot join numerous federally recognized Indian Tribes that qualify as required parties under Fed. R. Civ. Pro. 19. Each of these grounds independently support dismissal of Skokomish's claims against the Defendants. For each of those reasons, as more fully set forth below and in the Motion, Defendants respectfully urge the Court to dismiss Skokomish's claims *with prejudice*.

I. ARGUMENT

A. The Prior Holdings in *U.S. v. Washington* Are Either Irrelevant or Support Dismissal

Skokomish devotes nearly half of its opposition brief arguing the merits of its claim with reference to prior holdings in *U.S. v. Washington* regarding treaty fishing rights, and as particularly relevant here, the right of Skokomish and the Suquamish Tribe under their respective

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treaties "of taking fish at usual and accustomed grounds and stations."[1] When it references Fed. R. Civ. Pro. 15, Skokomish tacitly concedes that these *U.S. v Washington* cases have nothing at all to do with the "privilege of hunting and gathering roots and berries on open and unclaimed lands" reserved to both the Skokomish and the Suquamish Tribe, and found in a separate clause of the Treaties, but nonetheless urges this Court to consider the merits of its claim prior to evaluating the procedural defenses raised in the Motion.[2] Even presupposing that consideration of the merits is appropriate at this juncture, which it is not, the prior holdings in *U.S. v. Washington* cited by Skokomish either (a) do not support its legal position or (b) require Skokomish to bring these claims via a new subproceeding in *U.S. v. Washington* under Paragraph 25(a)(1) of the final order in that case instead of a separate action before this Court.[3]

1. *U.S. v. Washington* Did Not Adjudicate Tribal Hunting Rights.

The proceedings in *U.S. v. Washington* were initiated in 1970 by the United States to enforce various Indian Tribes' treaty fishing rights. *U.S. v. Washington*, 384 F.Supp. 312, 327-

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[1] Secured to Skokomish under Article IV of the Treaty of Point No Point of January 26, 1855, 12 Stat. 933 ("PNP Treaty"), and secured to the Suquamish Tribe under Article V of the Treaty of Point Elliot of January 22, 1855, 12 Stat. 927 ("Point Elliot Treaty")).

[2] By noting Rule 15(b)(2), which permits a court to amend the pleadings on the motion of a party, Skokomish acknowledges that the pleadings in *U.S. v. Washington* do not themselves raise the issue of hunting. As discussed *infra* at Section I(A)(1), the reason the pleadings do not mention hunting is that *U.S. v. Washington* is and always has been exclusively concerned with the treaty fishing rights secured to the various Stevens Treaty Tribes. Regardless, to the extent Skokomish is convinced that a motion to amend at this juncture would be appropriate, then it would actually need to file a motion with the court that heard the proceedings in the first instance. Again the problem for Skokomish, however, is that "the scope of the hunting and gathering provision has not been previously litigated in federal court," including in *U.S. v. Washington*. *Skokomish v. Goldmark*, *supra*, 994 F.Supp.2d at 1174.

[3] Paragraph 25(a) of the permanent injunction entered in *U.S. v. Washington*, provides in relevant part as follows:

> 25. (a) The parties or any of them may invoke the continuing jurisdiction of this court in order to determine:
>
> (1) Whether or not the actions intended or effected by any party (including the party seeking a determination) are in conformity with Final Decision # I or this injunction;

Originally entered on March 22, 1974, *U.S. v. Washington*, 384 F. Supp. 312, 419 (W.D. Wash. 1974 *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975), *as modified by August 23, 1993, Order* (C70-9213, Dkt. #13599)(set forth in *U.S. v. Washington (Compilation of Major Post-Trial Substantive Orders, January 1, 1991 through December 31, 1993)*, 18 F.Supp.3d 1172, 1213 (W.D. Wash. 1991)) (hereinafter referred to as "Paragraph 25(a)(1)").

[3] *Tulalip Tribes v. Suquamish Indian Tribe, 794 F.3d 1129, 1133* (9th Cir. 2015).

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328 (W.D.Wash. 1974). From its inception through present day, *U.S. v. Washington* and the subproceedings have always been exclusively concerned with Indian Tribes' treaty rights to take fish—the hunting and gathering provision of the various Stevens Treaties has not been litigated nor has it become subject matter for litigation in the case. *See, e.g.*, *Tulalip Tribes v. Suquamish Indian Tribe*, 794 F.3d 1129, 1131 (9th Cir. 2015) (describing *U.S. v. Washington* as "complex litigation over the treaty *fishing* rights of the Indian tribes in Western Washington"); *Skokomish v. Goldmark*, *supra*, 994 F.Supp.2d at 1174 (noting that while the treaty fishing right has been litigated, "the scope of the hunting and gathering provision has not been previously litigated in federal court."). Skokomish does not seek to litigate the scope or extent of the treaty fishing rights subject of prior decisions in *U.S. v. Washington*, but instead seeks a declaration from this Court that "neither Suquamish Indian Tribe nor members of the Suquamish Indian Tribe shall exercise the treaty privilege to hunt or gather" within "Twana territory." *See* Complaint, Dkt. # 1 at ¶52(2) because of fishing right determinations made in *U.S. v. Washington*. The holdings in *U.S. v. Washington* are simply not germane to the issues raised by Skokomish's complaint in this matter, nor do they provide the "clarity and absolute certainty as to the meaning" of the hunting rights secured by Skokomish's and the Suquamish Tribe's respective treaties. Opposition, Dkt. # 19 at p. 1.

Undeterred, Skokomish baldly asserts that "hunting was expressly litigated" in a prior subproceeding in *U.S. v. Washington*, and points to a finding related to "water-fowl hunting and marine-mammal hunting and trapping on the waters and tidal flats of [Hood] canal." Opposition, Dkt. # 19 at p. 7 (quoting *U.S. v. State of Washington*, 626 F.Supp. 1405, 1490 (W.D.Wash. 1985), hereinafter referred to as the *Hood Canal Case*).[4] What Skokomish fails to advise the

[4] Similarly, this Court's prior decision in *Ground Zero Center for Nonviolent Action v. U.S. Department of the Navy*, 918 F. Supp.2d 1132 (W.D.Wash. 2013) (improperly cited by Skokomish at Dkt. # 19 p. 10), also dealt with Suquamish's assertion of *fishing* rights, as opposed to any hunting rights. *See id*. at 1141. To the extent any reference to hunting is made in that case, it is made in discussing a prior court case wherein the Makah Tribe sought a permit to hunt gray whales. *Id*. at 1153 (*citing Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004).

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Court of is the fact that such marine hunting activities have been expressly found to constitute "fishing" by the Court in *U.S. v. Washington* for purposes of construing the scope of a tribe's treaty fishing rights. *See U.S. v. Washington*, 129 F.Supp.3d 1069, 1115 (W.D. Wash. 2015) ("'fish' as used in the [treaty] encompasses sea mammals . . . a tribe's U & A for the harvest of any one aquatic species is coextensive with its U & A for any other aquatic species") (citation omitted). The leap Skokomish would have this Court make is not supported by case law. As other provisions of the same order in the *Hood Canal Case* quoted later in Skokomish's brief indicate, the holding of the Court in the *Hood Canal Case* related to the "right of taking fish" and the "exercise of treaty fishing rights" and did not relate to hunting land-based game or the clause of Skokomish's and the Suquamish Tribe's respective treaties reserving to each tribe the "privilege of hunting and gathering roots and berries on open and unclaimed lands" raised by Skokomish's complaint in this case. *See* Opposition, Dkt. # 19 at pp. 8-9, quoting *Hood Canal Case*, 626 F.Supp. at 1491.

The problem for Skokomish is that in order for the Court to determine whether or not the acts of the Defendants that Skokomish alleges are unlawful, are in fact unlawful, the Court would by necessity have to determine the scope of both Skokomish's and (at a minimum)[5] the Suquamish Tribe's treaty secured "privilege of hunting and gathering roots and berries on open and unclaimed lands,"[6] because "the scope of the hunting and gathering provision has not been previously litigated in federal court." *Skokomish v. Goldmark*, *supra*, 994 F.Supp.2d at 1174. As

[5] As noted in the Motion, the determination of the scope of the treaty hunting right would also implicate the scope of the hunting rights in "Twana territory", and hunting rights more generally, held or claimed by other signatory Tribes to what are generally referred to as the "Stevens Treaties" (which include the Treaty of Medicine Creek of December 26, 1854, 10 Stat. 1132, the Treaty of Olympia,12 Stat 971, the Treaty of Neah Bay, 12 Stat 939, the Treaty with the Yakimas, 12 Stat. 951,the Treaty with the Walla Walla, Cayuse, etc., 12 Stat. 945, and the Treaty with the Nez Perces, 12 Stat. 957, in addition to the PNP Treaty and Point Elliot 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"). The signatory Tribes to the Stevens Treaties are hereinafter referred to the "Stevens Treaty Tribes."

[6] Point Elliot, Art. V; PNP Treaty, Art. IV.

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discussed below in more detail, because those treaty rights are held by the Suquamish Tribe[7], and because sovereign immunity precludes naming the Suquamish Tribe as a defendant as would be necessary for the Court to properly adjudicate the Suquamish Tribe's treaty rights, Skokomish's claims must be dismissed.

2. Skokomish's Claims that Defendants are in Violation of prior Orders in *U.S. v. Washington* are subject to that Court's continuing jurisdiction, and must be raised via a subproceeding in that case.

While Defendants maintain that the treaty hunting rights at issue were never litigated as part of *U.S. v. Washington*, to the extent that Skokomish disagrees (as it apparently does) and contends that Defendant's actions, which were taken on behalf of the Suquamish Tribe, run afoul of the holding in the *Hood Canal Case*, Skokomish has a procedural mechanism to attempt to enforce any adjudicated rights it may have with respect to hunting under Paragraph 25(a)(1) in *U.S. v. Washington*. In particular, Skokomish can invoke the continuing jurisdiction of the district court in *U.S. v. Washington* "[w]hether or not the actions intended or effected by [the Suquamish Tribe] . . . are in conformity with Final Decision # I or [the Court's] injunction." 18 F.Supp.3d 1172, 1213 (W.D. Wash. 1991); *see also, e.g. Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1357-1158 (9th Cir. 1998) (holding district court in *U.S. v. Washington* has retained continuing jurisdiction to administer the case and resolve specified matters as they arise).

Skokomish correctly notes that the Suquamish Tribe has waived its sovereign immunity with respect to the proceedings in *U.S. v. Washington*, and is bound by the court orders *in that proceeding*. *See* Opposition, Dkt. # 19 at p. 5 (so noting). It has been hornbook law for more than fifty years that a tribe's waiver of sovereign immunity as to certain claims does not operate to waive its sovereign immunity as to other claims. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509, 111 S.Ct. 905, 909 (1991) (noting

[7] *U.S. v. Washington*, 520 F.2d 676, 688 (9th Cir. 1975) (The rights reserved to each of the Stevens Treaty Tribes are communally held by each "tribe qua tribe" and not held by tribal members).

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that the Supreme Court previously rejected that contention in 1940, and has continued to do so since).

Should Skokomish truly believe that the rights it asserts in this lawsuit were previously adjudicated by the court in *U.S. v. Washington*, and that is where Suquamish has waived sovereign immunity, then that court is the proper forum in which to seek relief. In any event, none of the arguments advanced by Skokomish in its Opposition as they pertain to the prior holdings in *U.S. v. Washington* provide an adequate basis for denying the Motion or for the Court to refuse to dismiss Skokomish's claims.

B. The Suquamish Tribe has not waived its sovereign immunity with respect to the claims asserted in this Subproceeding and the doctrine of *Ex Parte Young* does not apply.

The sole legal basis advanced by Skokomish for the proposition that (a) the Suquamish Tribe has waived its sovereign immunity[8] or (b) that "Neither Defendants nor the Suquamish Indian Tribe can assert a sovereign immunity defense"[9] is that the Suquamish Tribe has waived its sovereign immunity by participating in *U.S. v. Washington*. The district court in *U.S. v. Washington* has, however, had occasion to rule on the scope of that waiver and found that the participating Tribes' waiver pertains only to the adjudication of their treaty *fishing* rights in that proceeding. *U.S. v. Washington*, 20 F.Supp.3d 986, 1057-1058 (W.D.Wash. 2013); *accord U.S. v. Washington (Compilation of Major Post-Trial Substantive Orders, January 1, 2007 through December 31, 2007)*, 20 F.Supp.3d 828, 844 (W.D.Wash. 2007) (noting limited nature of waiver). Although Skokomish correctly cites *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677 (1978), for the proposition that waivers of tribal sovereign immunity "cannot be implied but must be unequivocally expressed," Resp. at 5, Skokomish's argument on waiver fundamentally ignores this principal in asking this Court to imply a waiver of the Suquamish Tribe's sovereign immunity as it pertains to the adjudication of its treaty hunting

[8] Opposition, Dkt. # 19 at p. 5.
[9] *Id.* at p. 21.

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rights from the Suquamish Tribe's participation in *U.S. v. Washington*. The Suquamish Tribe's participating in *U.S. v. Washington* as it pertains to the right to take fish secured to the Tribe by the Point Elliot Treaty however, does not thereafter waive its sovereign immunity from suit as to all subsequent claims asserted with respect to other rights set forth in the Point Elliot Treaty. *See Bodi v. Shingle Springs Band of Miwok Indians*, --- F.3d ---, 2016 WL 4183518 at * 4 (9th Cir. 2016) (collecting cases, noting that a tribe's waiver of sovereign immunity as to claims it affirmatively brings in federal court does not constitute a waiver of claims that can be asserted against the tribe, even where they arise out of the same set of underlying facts). Skokomish has abjectly failed to offer any evidence of the Suquamish Tribe's intent to waive its sovereign immunity with respect to the claims asserted by Skokomish.

Skokomish's argument regarding the applicability of *Ex Parte Young* is predicated in its fiction that it is not seeking relief against the Suquamish Tribe but instead "against Defendants, and the Defendants alone." *See* Opposition, Dkt. # 19 at p. 21. A review of the relief sought in the Complaint, however, makes clear that Skokomish is seeking a judgment that is operative as against *the Suquamish Tribe*. *See* Complaint, Dtk. # 1 at p. 18, ¶ 52(a) (seeking a judgment declaring that Skokomish "has the primary right to regulate and prohibit treating hunting and gathering . . . *by the Suquamish Indian Tribe*"); *accord id.*at ¶ 52(b) ("declaring that neither *the Suquamish Indian Tribe* nor members of the Suquamish Indian Tribe shall exercise the treaty privilege to hunt or gather . . .").

In order for the Court to grant Skokomish the relief it seeks—even as against the Defendants (as opposed to the Suquamish Indian Tribe)—the Court will first be required to adjudicate the scope of the "privilege of hunting and gathering roots and berries on open and unclaimed lands" secured to both Skokomish and the Suquamish Tribe to determine whether Defendants have acted outside their authority. As discussed above, and contrary to Skokomish's claims, no court has previously litigated the scope of the treaty hunting right at issue. *Skokomish*

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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 Tribes' members within "Twana territory").[10] If the Suquamish Tribe has a treaty right to hunt within "Twana Territory," then Defendants (all of whom are named in their official capacity only) are acting within the scope of their authority and are immune notwithstanding the *Ex Parte Young* doctrine, which itself requires a finding that the officials have acted outside of their authority in order to be subject to suit. *See Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (so noting) (citations omitted). Because any determination regarding the scope of Defendants' authority is inexorably bound up with the treaty rights of the Suquamish Tribe, the claims against Defendant's are barred by the Suquamish Tribe's sovereign immunity. *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1160 (9th Cir. 2002) (citations omitted). For those reasons and the reasons set forth in the Motion, Skokomish's claims must be dismissed.

C. The Operative Act Complained of is Legislative in Nature and Therefore Legislative Immunity Applies to Bar Skokomish's Claims.

As concerns legislative immunity, Skokomish in its opposition sets out a litany of various executive and administrative actions that it claims Defendants have taken in violation of Skokomish's claimed treaty rights. Opposition, Dkt. # 19 at pp. 16-19. First, none of these actions are alleged with any particularity in the Complaint itself, and are therefore not appropriately considered as a basis for denying the Motion to Dismiss. *Broam v. Bogan*, 320 F.3d 1023, 1026 n. 7 (9th Cir. 2003). Moreover, Plaintiff's citation to *Michigan v. Bay Mills*

[10] To the contrary, Skokomish's claim that the cases in *U.S. v. Washington* unequivocally and clearly establish that Skokomish exercised exclusive dominion over the exercise of hunting and gathering in "Twana territory" is undermined by other factual findings in *U.S. v. Washington*. *See, e.g., U.S. v. Washington*, 384 F.Supp. 312, 380 (W.D.Wash. 1974) (Finding of Fact No. 153, wherein the Court found "The Yakimas in the Puget Sound area were intermarried as far north as the Skokomish and controlled them to a certain extent.")

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Indian Community, 134 S.Ct. 2024 (2014), is a non-sequitur insofar as that case does not address, much less even mention, the doctrine of legislative immunity. Notwithstanding, none of these actions (e.g. issuing hunting licenses, harvest monitoring, data collection, etc.) should be in and of themselves objectionable to Skokomish except to the extent that they pertain to "Twana territory."[11] Even liberally construing Plaintiff's allegations, the issuance of annual or ceremonial licenses only apply to "Twana territory" and fall within the ambit of the Complaint where Defendants have adopted regulations "opening hunting" in "Twana territory" pursuant to a legislative process. Complaint, Dkt. # 1, at ¶50 (noting regulations). Skokomish does not dispute that the adoption of these regulations constitutes legislative action, and instead shifts its focus away from allegations in the Complaint to various other actions not alleged in the Complaint that either rely on the legislatively adopted regulations for their connection to Plaintiff's claims or, actions such as petitioning government, disseminating newsletters, or drafting anthropological reports, which would plainly be protected by the First Amendment of the United States Constitution. *See, e.g.*, *McDonald v. Smith*, 472 U.S. 479, 482-483, 105 S.Ct. 2787, 2789-2790 (1985) (noting First Amendment right of petition). Notwithstanding its pivot away from its Complaint to other incidental actions, Skokomish's claims clearly target the legislative, as opposed to the administrative or executive, actions of the Defendants, and are therefore barred by legislative immunity. For this reason and the reasons set forth in the Motion, Skokomish's complaint must be dismissed on grounds of legislative immunity.

D. Skokomish has failed to plead standing, and has not cured that deficiency with the additional conclusory allegations set forth in its opposition.

Skokomish's opposition to the Motion as it pertains to constitutional standing merely sets forth more of the same conclusory allegations regarding the impact of the "opening of hunting" in "Twana territory" by Defendants. Plaintiff's response misses the mark, as it continues to rely

[11] It is also unclear how some of the alleged actions, e.g. paying staff salaries, are in any way related to the harm complained of by Plaintiff in the complaint.

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on the potential actions of third parties not before the Court (e.g. Suquamish Tribal members that Plaintiff has not bothered to allege have taken any game within "Twana territory") to assert a causal link between the conduct complained of and the alleged injury sustained. The causal connection between "opening hunting" and the alleged diminution of resources based on the collective action of third-parties is insufficient as a matter of law to establish constitutional standing. *Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1141 (9th Cir. 2013) (citations omitted). Similarly, Plaintiff has failed to articulate, other than by conclusory statement, how "opening hunting" or other actions taken by Defendants "clouds" Plaintiff's alleged "title to Treaty resources" or damaged its reputation. Plaintiff's opposition does nothing to cure its deficient pleading or the lack of a causal link, and therefore dismissal of Plaintiff's complaint for lack of subject matter jurisdiction is and remains appropriate.

E. Skokomish's Argument Regarding Joinder is Non Responsive.

As noted in the motion, 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. Skokomish's entire opposition is predicated on the assertion that the "privilege of hunting and gathering roots and berries on open and unclaimed lands" secured to Skokomish and the Squamish Tribe under their respective treaties has previously been fully adjudicated. As already noted above, *supra* Section I(A), Skokomish's claims in this regard do not bear scrutiny. None of the cases cited from *U.S. v. Washington* purport to adjudicate treaty *hunting* rights. Moreover, and as this Court has noted, the scope of those rights and Skokomish's rights to regulate the off-reservation hunting activities of other tribes has similarly not been previously litigated. *Skokomish Indian Tribe v. Goldmark*, 994 F.Supp.2d 1168, 1174 n. 5 (W.D.Wash. 2014) (noting same). Because, as noted in the Motion, each of the Stevens Treaty Tribes (including but not limited to the Suquamish Tribe) would or could be prejudiced by a determination of the meaning of the "privilege of hunting and gathering roots and berries on open and unclaimed lands" clause

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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).

II. CONCLUSION

For those reasons and the reasons set forth in the Motion, Defendant's respectfully request that this Court enter an order dismissing Skokomish's claim, *with prejudice*, pursuant to Rule 12(b)(1), Rule 12(b)(6), and/or Rule 12(b)(7).

DATED this 7th day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on Octiboer 7, 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 7th day of October, 2016.

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