No. 17-35336

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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-Appellant,

v.

LEONARD FORSMAN, Chairman of the Suquamish Tribal Council, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Washington
No. 3:16-cv-05639
Hon. Ronald B. Leighton

APPELLEES' ANSWERING BRIEF

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INTRODUCTION

The district court properly dismissed this case brought by the Skokomish Indian Tribe ("Skokomish") against the Tribal Council members of the Suquamish Indian Tribe, including Leonard Forsman, Chairman; Bardow Lewis, Vice-Chairman; Nigel Lawrence, Secretary; Robin Sigo, Treasurer; Luther Mills, Jr., Tribal Council member; Rich Purser, Tribal Council member; Sammy Mabe, Tribal Council member (collectively "Tribal Council members"); and Robert Purser, Jr., Fisheries Director for the Suquamish Indian Tribe ("Fisheries Director," and, collectively with Tribal Council Defendants, the "Tribal Official" or "Defendants").

Skokomish's claims against the Defendants are, in practical reality and in law, claims that must be asserted against the Suquamish Indian Tribe ("Suquamish Tribe"), not Suquamish Tribal officials. In order for Skokomish to prevail on the merits of its claims, the district court would necessarily have had to 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. 99, Addendum 1–6, and of the Suquamish Tribe under the Treaty of Point Elliott of January 22, 1855, 12 Stat.

927 ("Point Elliott Treaty"), Addendum 7–13.[1] Skokomish claims the exclusive right to regulate hunting in "Twana territory", though that right has never been adjudicated, nor is "Twana territory" expressly called out or preserved in the Treaty of Point No Point. Skokomish has not named as defendants the Suquamish Tribe or any of the three other Point No Point Treaty signatory Tribes.[2] Indeed, as the district court properly found, Skokomish *cannot* name these Tribes, or any other Stevens Treaty Tribes[3] claiming treaty hunting rights on "open and unclaimed lands" within the "Twana territory," because the Tribes are all cloaked with sovereign immunity from suit. The Suquamish Tribe and other Stevens Treaty Tribes are required parties under Fed. R. Civ. P. 19 because the declaratory

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[1] The Treaty of Point No Point and the Treaty of Point Elliott are two of the treaties executed by Isaac I. Stevens, Governor of Washington Territory, and his agents from 1854–1856 with Native American Tribes in areas that would eventually become the State of Washington. The treaties are generally referred to as the "Stevens Treaties."

[2] In addition to Skokomish, the Jamestown S'Klallam, Port Gamble S'Klallam, and Lower Elwha Tribes are signatories to the Point No Point 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 Elliott Treaty (which, in addition to Suquamish, include the Lummi, Nooksack, Stillaguamish, Swinomish, Upper Skagit, Sauk Suiattle, Tulalip, and Muckleshoot Tribes). The Medicine Creek Treaty is set forth in the Addendum at 14–20. The Point Elliott Treaty is set forth in the Addendum at 7–13.

relief sought by Skokomish necessarily implicates the ability of these other Tribes to assert their own treaty hunting rights. Proceeding in their absence would impair or impede these Tribes' ability to protect a claimed legal interest relating to the subject of the action.

Moreover, the action challenged by Skokomish – the governmental promulgation of hunting regulations – is an action taken by the Suquamish Tribe, through its elected governing body Tribal Council, not any of the Defendants individually, and is an action that is inherently legislative in nature. As such, the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), is not applicable. Skokomish's claims are barred both by the sovereign immunity of the Suquamish Tribe and its Tribal officials, and by legislative immunity.

Finally, although the jurisdictional and procedural issues (Rule 19, and sovereign and legislative immunity) are an insurmountable bar to Skokomish's claims, and therefore must be the focus of this appeal, Skokomish's suit is based upon the unsubstantiated assertion that the Point No Point Treaty reserved to Skokomish the primacy over and exclusive hunting right within "Twana territory".[4] *See* Order, ER 14 (describing Skokomish's claims). But those "primary" hunting rights have never been adjudicated. In order for the district

[4] The main thrust of the Stevens Treaties was to reserve specific rights to hunt fish and gather in the Tribes, in exchange for *extinguishing* the majority of aboriginal title in the territory. *See e.g.* 12 Stat. 933, Art. 1, Addendum 2.

court to determine whether or not the acts of the Defendants are unlawful, the district court would first have to determine the scope of both Skokomish's and the Suquamish Tribe's treaty-secured "privilege of hunting and gathering roots and berries on open and unclaimed lands,"[5] (and likely other Stevens Treaty Tribes', as well). Skokomish has not established the merits of its claim to an exclusive hunting right in "Twana territory", and cannot do so here because of tribal sovereign immunity. *See Skokomish Indian Tribe v. Goldmark,* 994 F.Supp.2d 1168, 1174 (W.D. Wash. 2014) ("the scope of the hunting and gathering provision in the [Stevens Treaties] has not been previously litigated in federal court.") The district court therefore properly dismissed this case based upon Fed. R. Civ. P. 19, tribal sovereign immunity, and legislative immunity.

JURISDICTIONAL STATEMENT

Defendants-Appellees generally agree with Skokomish's statement of jurisdiction. The district court had federal question jurisdiction under 28 U.S.C. § 1331.

[5] Point No Point Treaty, Art. IV. Addendum 3; Point Elliott Treaty, Art. V, Addendum 9.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because this is an appeal from the district court's final order and judgment dismissing the case. Defendants-Appellees agree that Skokomish's appeal is timely.

ADDENDUM

Pursuant to Ninth Circuit Rule 28-2.7, all relevant statutory, constitutional, and/or regulatory authorities are set forth in the Addendum to Skokomish's Opening Brief.

ISSUES PRESENTED

I. Whether the district court properly concluded that the Suquamish Tribe and other Stevens Treaties Tribes are required and indispensable parties that cannot be joined because of their sovereign immunity, and therefore properly dismissed this action based on Fed. R. Civ. P. 19;

II. Whether tribal sovereign immunity bars this suit against the Suquamish Tribal Council members and the Tribal Fisheries Director, notwithstanding the limited exception under the *Ex Parte Young* doctrine, where the relief sought would or could affect the treaty rights of the Suquamish Tribe and other Stevens Treaties Tribes, and where none of the Suquamish Tribal Council members has the requisite enforcement connection to the challenged law;

III. Whether the legislative immunity of the Suquamish Tribal Council members and Fisheries Director bars this suit because all of the allegedly unlawful actions at issue are legislative in nature; and

IV. Whether the district court properly denied leave to amend where amendment would be futile given that the Suquamish Tribe and other Stevens Treaties Tribes are required and indispensable parties to any suit affecting the "privilege of hunting and gathering roots and berries on open and unclaimed lands" under the Stevens Treaties.

STATEMENT OF THE CASE

The Skokomish Tribe is a successor in interest to the Skokomish and Twana people. Order, ER 14. From 1854–1856, Isaac I. Stevens, Governor of Washington Territory, and his agents, executed several treaties with Native American Tribes in areas that would eventually become the State of Washington.[6] *See Washington v. Washington State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 661-62, 666 n.2 (1979)(*Passenger Vessel*); *United States v. Washington*, 384 F. Supp. 312, 330 (W.D. Wash. 1974). These treaties are commonly referred

[6] *See, e.g.*, Treaty of Olympia, 12 Stat. 971; Treaty of Point No Point, 12 Stat. 933; Treaty of Medicine Creek, 10 Stat. 1132; Treaty of Point Elliot, 12 Stat. 927; Treaty of Neah Bay, 12 Stat. 939; Treaty with the Yakimas, 12 Stat. 951; Treaty with the Walla Walla, Cayuse, Etc., 12 Stat. 945; Treaty with the Nez Perces, 12 Stat. 957. *See* Addendum 1–52.

to as the "Stevens Treaties." *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 523 n.3 (9th Cir. 2005) (Berzon, J., dissenting). By signing the "Stevens Treaties," the Tribes reserved the right to continue their traditional activities, such as hunting and fishing. *United States v. Winans*, 198 U.S. 371, 381 (1905); *see also Passenger Vessel*, 443 U.S. at 667-68.

The 1855 Treaty of No Point, upon which Skokomish bases its alleged primary and exclusive hunting rights in "Twana territory", is one of these Stevens Treaties. Order, ER 15. The signatory tribes of the Point No Point Treaty include the Skokomish, the Jamestown S'Klallam Tribe, the Lower Elwha Tribal Community, and Port Gamble S'Klallam. Order, ER 15. In Article I of the Treaty, the signatory tribes ceded to the United States certain lands which they had traditionally used. *See* 12 Stat. 933, Art. 1, Addendum 2. The Tribes, however, reserved the right to continue their traditional hunting, gathering, and fishing practices on ceded and certain other lands. Specifically, Article IV of the treaty states in pertinent part 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 . . . *together with the privilege of hunting and gathering roots and berries on open and unclaimed lands*. . . ." 12 Stat. 933, Art. IV, Addendum 3 (emphasis added).

In 1985, the United States District Court for the Western District of Washington interpreted *Article I* of the Point No Point Treaty and confirmed Skokomish's primary *fishing* right in "Twana territory" – roughly, Hood Canal. *See U.S. v. Washington*, 626 F.Supp. 1405, 1486–87 (W.D. Wash. 1985). But *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.* Simply put, there has never been a determination, in *U.S. v. Washington* or anywhere else, that Skokomish has primary treaty hunting rights in the "Twana territory", nor has *Article IV* of the Point No Point Treaty ever been interpreted as to the scope of the treaty rights now asserted by Skokomish. *See* Order, ER 15; *see also Goldmark*, 994 F.Supp.2d at 1174, 1174 n. 5.

This case is one of several attempts by Skokomish to assert its "exclusive" treaty rights under the Point No Point Treaty. Indeed, this case is the second case that the district court dismissed, on nearly identical grounds. Prior to filing this case, Skokomish brought a similar lawsuit against officials of the State of Washington seeking to litigate the scope and extent of its treaty hunting rights. That case sought similar relief, and, like this case, was dismissed by the district court because the Suquamish Tribe and the other Stevens Treaty Tribes are

indispensable or "required" parties that could not be joined because of their tribal sovereign immunity. *See Goldmark*, 994 F.Supp.2d at 1186–92.[7]

Skokomish brought the current case, this time suing every member of the Suquamish Tribal Council, together with the Suquamish Tribe's Fisheries Director. As in *Goldmark*, the district court dismissed Skokomish's claims because Skokomish failed to join indispensable parties – the Suquamish Tribe and other federally recognized Indian Tribes. Amended Judgment, ER 4. The district court further found that Skokomish's claims against the Suquamish Tribal Council members must be dismissed because the Tribal Council members are entitled to sovereign and legislative immunity. *Id.*

This case is also the *third* time Skokomish has brought litigation based upon a faulty interpretation of the scope and nature of its treaty rights. In a recent *U.S. v. Washington* Sub-proceeding, No. 17-01, Skokomish filed a Request for Determination seeking "[a]n Order confirming the Skokomish Indian Tribe's right to take fish and to exercise Skokomish's primary [fishing] right within those portions of Skokomish (or Twana) Territory lying outside of the Hood Canal

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[7] Skokomish filed a Notice of Appeal of the district court's decision in *Goldmark*, No. 14-35209, but later moved to dismiss the appeal voluntarily pursuant to Fed. R. App. P. 42(b). The motion to dismiss the appeal was granted by this Court on August 14, 2014.

Drainage Basin;" and an injunction prohibiting other Tribes from interfering with Skokomish's "primary" right to fish in "Twana territory". *See* Order Granting S'Klallam and Squaxin Island Tribes' Motions for Summary Judgment and Denying Skokomish Indian Tribe's Cross-Motion for Summary Judgment (quoting Request for Determination), SER 3. On cross-motions for summary judgment, the district court found that Skokomish had "blatantly misrepresented the record" in the description of the scope of Skokomish's adjudicated treaty right to fish in "usual and accustomed fishing grounds and stations." SER 14–15. That misrepresentation led the district court to *sua sponte* consider sanctions against Skokomish. SER 14, n. 6, SER 16–17. In particular, the district court in the 17-01 subproceeding expressed concern "with the way Skokomish presented the record of the underlying proceedings in an attempt to support their legal claims and circumvent jurisdictional issues in this proceeding." SER 16–17.[8]

Similarly, in *Goldmark,* which, like the current case involved Skokomish's claimed primary *hunting* right in the "Twana territory", the district court found that "the scope of the hunting and gathering provision [under the Stevens Treaties] has not been previously litigated in federal court." *Goldmark,* 994 F.Supp.2d at 1174

[8] Skokomish filed an appeal of the district court's decision in Sub-proceeding on September 21, 2017. Ninth Circuit Appeal No. 17-35760. That appeal is included in Skokomish's Statement of Related Cases.

n. 5. Finally, in the current case, the district court concluded, notwithstanding Skokomish's assertions to the contrary, that there has never been a determination that Skokomish has primary treaty hunting rights in the so-called "Twana territory". *See* Order, ER 15.

Skokomish's claims are based upon the unsubstantiated assertion that the Point No Point Treaty reserved to Skokomish the primary and exclusive hunting right within "Twana territory". *See* Order, ER 14 (describing Skokomish's claims). Skokomish frames this case as a "violation of the Skokomish Indian Tribe's primary right over its territory," Opening Brief at 3, and seeks declaratory and injunctive relief "confirming" its primary hunting right and enjoining the Suquamish Tribe's enforcement of purportedly unlawful hunting in "Twana territory". Order, ER 15. But the scope of the treaty hunting rights under the Stevens Treaties has not been adjudicated, which is fatal to Skokomish's claims.

Because a determination regarding Skokomish's claim that it has "primary" or "exclusive" hunting rights within "Twana territory" would necessarily require a determination as to the meaning and the scope of the hunting and gathering right under the respective Stevens Treaties securing the "privilege of hunting and gathering roots and berries on open and unclaimed lands," the district court properly found that the Suquamish Indian Tribe and other Stevens Treaties are

indispensable or "required" parties that cannot be joined because of their sovereign immunity. ER 28.

The district court also properly found that the Suquamish Tribal Council members have sovereign immunity, and that the limited exception under the *Ex Parte Young* doctrine does not apply because the Tribal Council members lack the requisite enforcement connection to the challenged hunting regulations. ER 22–23. The district court further found that the Tribal Council members have legislative immunity because all of the actions alleged in the Complaint are legislative in nature. ER 23–24. Finally, the district court noted that, although Skokomish did not ask for leave to amend its complaint in lieu of dismissal, filing an amended complaint would have been futile. ER 28–29.

Skokomish timely filed this appeal. *See Skokomish's Second Amended Notice of Appeal* filed on July 27, 2017. ER 1.

SUMMARY OF THE ARGUMENT

Skokomish asserts that it has the right to regulate the off-reservation hunting activities of the Suquamish Tribe (and other Stevens Treaty Tribes), notwithstanding that the scope of the right under the respective treaties securing the "privilege of hunting and gathering roots and berries on open and unclaimed lands" has never been adjudicated. ER 26; *see also Goldmark*, 994 F.Supp.2d at 1174. The Suquamish Tribe and the other Stevens Treaty Tribes are required

parties to this suit because the suit is dependent upon a determination of the scope of all of their treaty hunting rights. Yet the Tribes cannot be joined because they each have sovereign immunity that no Tribe has waived. The Tribes are also indispensable, because they 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 if this case proceeds in their absence. That prejudice cannot be lessened by shaping any judgment; to the contrary, any judgment would be inadequate to protect the Stevens Treaty Tribes' interests. The district court's dismissal with prejudice of Skokomish's claims based on Rule 19 should therefore be affirmed.

Skokomish attempts to overcome tribal sovereign immunity by asserting that the limited exception under the *Ex Parte Young* doctrine applies to the Suquamish Tribal Council members and the Fisheries Director. *Ex Parte Young* does not apply here. First, as the district court found, none of the Suquamish Tribal Council members has the requisite enforcement connection to the allegedly unlawful hunting ordinance. Order, ER 22.[9]

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[9] The district court found that the only Defendant with the requisite enforcement connection is the Fisheries Director. Order, ER 22. The Suquamish Tribe argues on appeal that this Court should find that the *Ex Parte Young* doctrine does not apply to *any* of the Suquamish Tribal Defendants, *see infra*, Section II(C).

In addition, on this Court's *de novo* review, the district court's judgment that the *Ex Parte Young* doctrine does not waive the Suquamish Tribal Council members' immunity here could also be upheld on an alternate basis not relied on by the district court. A review of the relief sought by Skokomish makes clear that Skokomish is seeking a judgment that is operative against *the Suquamish Tribe*. *See* Complaint at ¶ 52(1), ER 167 (seeking a judgment declaring that Skokomish "has the primary right to regulate and prohibit treaty hunting and gathering . . . *by the Suquamish Indian Tribe*"); *accord* Complaint at ¶ 52(2), ER 167 ("declaring that neither *the Suquamish Indian Tribe* nor members of the Suquamish Indian Tribe shall exercise the treaty privilege to hunt or gather . . ."") (*emphases added*). The *Ex Parte Young* does not apply where, as here, the "relief sought will operate against the sovereign," such as when the requested relief requires "affirmative actions by the sovereign or disposition of unquestionably sovereign property." *See Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1160 (9th Cir. 2002) (citation omitted).[10]

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[10] The district court acknowledged *Dawavendewa*, but found that it did not apply because Skokomish had "sued only the Suquamish Officers in their official capacities[.]" ER 21–22. As set forth below, the Suquamish Tribe respectfully submits that this Court could find the *Ex Parte Young* doctrine does not apply here on the alternate grounds described in *Dawavendewa* because the relief sought would operate against the Suquamish Tribe and implicates the Suquamish Tribe's treaty rights.

As the district court has twice recognized, the scope of the treaty hunting rights at issue in this case have not been previously adjudicated. *See* Order, ER 26; *Goldmark,* 994 F.Supp.2d at 1174, and 1174 n. 5. Any determination regarding whether the Suquamish Tribal Council members and Fisheries Director acted outside their authority (which is required in order for *Ex Parte Young* to apply)[11] is inexorably bound up with the treaty hunting rights of the Suquamish Tribe. Because the relief sought by Skokomish seeks to define the scope of treaty hunting rights of the Stevens Treaty Tribes, which are "sovereign property" of the Tribes, on *de novo* review this Court could alternatively find that the *Ex Parte Young* doctrine is simply inapplicable on that basis.

The district court also properly found that the Tribal Council members have legislative immunity because all of the allegations in the Complaint involve legislative, not executive or administrative, actions.

Finally, the district court, *sua sponte,* properly denied leave to amend because amendment of the Complaint in this case would be futile, given that the

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[11] *See* Order, ER 21 (In order to show that *Ex Parte Young* applies, "Skokomish must at a minimum … allege a 'viable claim that the tribal officials acted outside their authority, so as to subject them to suit.'" *Quoting Imperial Granite Co. v. Pala Band of Missions Indians,* 940 F.2d 1269, 1271 (9th Cir. 1991)).

Suquamish Indian Tribe and other Stevens Treaty Tribes are indispensable parties that cannot be joined.

ARGUMENT

I. SKOKOMISH FAILED TO JOIN INDISPENSABLE PARTIES.

A. Standard Of Review

The district court's decision to dismiss an action for failure to join an indispensable party is reviewed for an abuse of discretion. *See Ward v. Apple Inc.*, 791 F.3d 1041, 1047 (9th Cir. 2015); *Paiute-Shoshone Indians of Bishop Cty. v. City of Los Angeles*, 637 F.3d 993, 997 (9th Cir. 2011); *Dawavendewa*, 276 F.3d at 1154. To the extent that the determination whether the movant's interest is impaired by failure to join an allegedly indispensable party involves an interpretation of law, review is de novo. *See American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022 (9th Cir. 2002); *Dawavendewa*, 276 F.3d at 1154.

B. Sovereign Immunity Precludes Skokomish From Joining The Suquamish Tribe And Other Treaty of Point No Point Tribes That Are Indispensable Or Required Parties Under Rule 19.

The district court applied a three-step test in determining whether this case should be dismissed for failure to join an indispensable party under Rule 19: (1) is the absent party necessary under Rule 19(a); (2) is it feasible to join that party; and (3) if not feasible, can the action proceed in equity and good conscience absent the indispensable party, or must the action be dismissed? Order, ER 24, citing *Salt*

River Project Agric. Improvement and Power Dist. v. Lee, 672 F.3d 1176, 1179 (9th Cir. 2012) (internal citations omitted). Applying this test to the facts in this case, the district court properly concluded that the Suquamish Tribe and other Stevens Treaty Tribes are necessary and indispensable parties that cannot be joined, and that the action must therefore be dismissed.

1. The Suquamish And Other Stevens Treaty Tribes Are Necessary Parties Under Rule 19(a).

The district court determined that the Suquamish Tribe and other Stevens Treaty Tribes are necessary parties under Rule 19(a) if:

> (1) this Court cannot accord 'complete relief among existing parties' in the Tribes' absence, or (2) proceeding in the Tribes' absence will 'impair or impede' the Tribes' ability to protect a 'claimed legal interest' relating to the action, or 'leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.' *See Alto v. Black*, 738 F.3d 1111, 1126 (9th Cir. 2013).

Order, ER 25. The district court found that the Suquamish Tribe and other Stevens Treaty Tribes are necessary parties under both prongs.

The Suquamish Tribe and other Stevens Treaty Tribes have a claim to treaty hunting rights in "Twana territory". At a minimum, the Suquamish Tribe and the other signatory Tribes to the Point Elliot, Point No Point, and Medicine Creek Treaties 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.[12] 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*, 173 F.3d 1158, 1167 n. 10 (9th Cir. 1999) (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 to treaty hunting rights in the "Twana territory" – and their concomitant status as required parties in this exact context – have previously been recognized. *See Goldmark*, 994 F.Supp.2d at 1187–88 (describing Skokomish's claims and finding that the judgment sought in that case, which is virtually identical to the relief sought here, would prejudice other signatory Tribes to the Point No Point Treaty). "A determination of the scope and extent of the hunting and gathering privilege would necessarily involve a determination of what lands and resources are available to

[12] All of these Stevens Treaties have identical or very similar language that reserved "the privilege of hunting and gathering roots and berries on open and unclaimed lands." *See e.g.*, Article V of the Treaty of Point Elliott, Addendum 9.

[Stevens Treaty] signature tribes, not just Skokomish Indian Tribe under the [Point No Point Treaty]." *Id*. at 1187 (*citing Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1281-82 (10th Cir. 2012)).

As this Court 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]." *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).

The district court therefore properly found:

> Skokomish's claim necessarily rests on the accuracy of its assertion that its primary hunting right in Twana territory is settled law. But Skokomish's right is far from clearly established. Article IV of the Point No Point Treaty reserved to all four signatory tribes "the privilege of hunting and gathering roots and berries on open and unclaimed lands," without reference to a primary right. The court in *U.S. v. Washington* did not clearly establish Skokomish's primary hunting right

> because the case principally (if not exclusively) concerned fishing rights. The Suquamish and other Stevens Treaty Tribes with hunting and gathering rights in the subject area have a "claimed legal interest" to Twana territory hunting rights. A declaration that Skokomish "has the primary right to regulate and prohibit treaty hunting and gathering within Skokomish (or Twana) Territory will necessarily impact absent signatory tribes. *See Goldmark*, 944 F. Supp. 2d at 1187. A favorable decision would also leave both parties subject to multiple or otherwise inconsistent results in future litigation. ... Based on the foregoing, the Court concludes Suquamish and other Stevens Treaty Tribes with claimed hunting rights in the Twana territory are necessary parties.

Order, ER 26.

2. The Suquamish Tribe And Other Stevens Treaty Tribes Cannot Be Joined Due To Their Sovereign Immunity.

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 (9th Cir. 1992) (*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.

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. *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 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*, *infra*, at Section II (discussing sovereign immunity). In the words of the district court, "these tribes may not be joined as parties absent clear waiver of sovereign immunity. None of these tribes explicitly waived their sovereign immunity from suit regarding their Point No Point or Stevens Treaty hunting rights, thus none can be joined under Rule 19." Order, ER 26. (Citations omitted).

3. A Judgment Rendered In The Other Stevens Treaty Tribes' Absence Would Prejudice Those Tribes, And Therefore Equity And Good Conscience Require Dismissal.

As noted by the district court, Order, ER 25, "[a] necessary party becomes indispensable if the action cannot proceed in equity or good conscience in the party's absence." *citing Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). Rule 19(b) provides four factors for determining whether a party is indispensable: "(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. The district court determined that each of these factors weighed in favor of dismissal.

With respect to the first factor, the analysis concerning prejudice is substantially identical to the legal interest test under Rule 19(a). Order, ER 27, citing *Goldmark*, 994 F.Supp.2d at 1190. The district court found that "[a] judgment in favor of Skokomish's primary hunting right under the Point No Point Treaty, the Point Elliott Treaty, and the Medicine Creek Treaty possess inferior rights, subservient to the Skokomish's primary hunting right because it will unavoidably deprive them of their own claimed treaty hunting rights." Order, ER 27; *see also Goldmark*, 994 F.Supp.2d at 1188 ("A judgment granting Skokomish Indian Tribe exclusive management authority and the rights to take up to one hundred percent of all game, roots and berries would necessarily reduce or eliminate the rights that other signatory tribes currently enjoy in the territory.")

As to the second factor set forth in Rule 19(b)(2), the district court properly concluded that "[t]here is no practical way to lessen or avoid [the prejudice to the Stevens Treaty Tribes]." Order, ER 27. The relief sought by Skokomish inexorably implicates the treaty rights and interests of, at a minimum, the signatory Tribes to the Point No Point, Point Elliott, and Medicine Creek Treaties, and likely implicates the 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.*, *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).[13] "[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, an order by the district court declaring Skokomish's "primary" or "exclusive" right to regulate hunting activity within "Twana territory" under the Point No Point Treaty—which has never been adjudicated—

[13] 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; aside from Skokomish, no Stevens Treaty Tribe has voluntarily appeared to establish the scope and extent of their respective *hunting* rights, and the case below was not initiated by the United States in its fiduciary capacity on behalf of any Tribe.

would necessarily impact the rights of both other signatory Tribes to the Point No Point 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. As stated by the district court, "[t]he inherent prejudice to absent tribes strongly supports the conclusion that the court cannot proceed in their absence." Order, ER 27.

Next, the district court properly concluded that 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 nonparties--the Suquamish Tribe and its members--and it is axiomatic that non-parties cannot be bound by a judgment. *See* Complaint at ¶52(2), ER 167 (seeking declaration vis-à-vis the Suquamish Tribe and its members). Additionally, "adequacy" in the Rule 19 context "refers to the public stake in settling disputes by wholes, whenever possible." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 870 (2008) (*quoting Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (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 Point No Point Treaty. Complaint at ¶52 (1-3), ER 167. A holding to this effect would necessarily require a finding that each of the other signatory Tribes to the

Point Elliot Treaty, the Point No Point Treaty and the Medicine Creek Treaty (which Tribes' Treaty ceded lands overlap with those of the Point No Point 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). The district court properly held that a judgment in this case "would not be complete or efficient in the interest of the public or the courts" and that "[t]his factor weighs against proceeding in the absence of the other treaty tribes." Order, ER 27–28.

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.[14] 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 this Court stated 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 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. As this Court 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,

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[14] As the district court noted, "If *U.S. v. Washington* confirmed Skokomish's primary hunting right, the Court should dismiss this action and permit Skokomish to file a subproceeding there. But even if Skokomish has no alternate forum, such a reason without more is insufficient to proceed in the absence of necessary parties." Order, ER 28 (citations omitted).

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, the district court appropriately found Rule 19 precluded joinder of necessary parties, and that proceeding with nonjoinder was not appropriate, and dismissed Skokomish's claims pursuant to Rule 12(b)(7).

4. Skokomish Misrepresents The *United States v. Washington* Jurisprudence And Inappropriately Relates The Fishing Rights Decisions Therein To Hunting Rights In This Separate Case.

As it did below, Skokomish dedicates a significant portion of its Opening Brief arguing the merits of its claim with reference to its interpretation of 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 treaties of "taking fish at usual and accustomed grounds and stations."[15] Skokomish argues that the district court erred in finding that Rule 19 required dismissal, boldly declaring that "the matter of fact and law is well established" in

[15] Secured to Skokomish under Article IV of the Point No Point Treaty, Addendum 3, and secured to the Suquamish Tribe under Article V of the Point Elliott Treaty, Addendum 9.

prior *United States v. Washington* fishing rights decisions that Skokomish has *both* hunting and fishing rights in waters and lands it claims as "Twana territory," and that its rights are primary to those of all other Stevens Treaty tribes, and therefore, "no other Tribe can claim an interest in "Twana territory." Skokomish claims that "the law is settled and all of the neighboring Stevens Treaty tribes, the State of Washington, and the United States are bound," and because of this, the district court should not have found joinder of the Suquamish Tribe or any other Stevens Treaty tribe as a necessary party. Opening Brief pp. 46-49.

First, as explained above and made clear twice by the district court, the *U.S. v. Washington* proceedings are of no consequence here because that case did not adjudicate tribal hunting rights. *See* Order, ER 26; *Goldmark,* 994 F.Supp.2d at 1174, and 1174 n. 5. The failure of Skokomish to fully acknowledge those prior clear decisions that hunting rights have not been adjudicated in *United States v. Washington* is problematic. And, even presupposing that *U.S. v. Washington did* establish a primary treaty hunting right in Skokomish (which it has not), Skokomish would necessarily be compelled to bring these hunting based claims as a subproceeding in *U.S. v. Washington* under the continuing jurisdiction of the district court to enforce its decree, rather than as a separate action. *See* Order, ER 28 ("If *U.S. v. Washington* confirmed Skokomish's primary hunting right, the

Court should dismiss this action and permit Skokomish to file a subproceeding there.")

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. at 327–28. From its inception through present day, *U.S. v. Washington* and the subproceedings have always been exclusively concerned with the 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") (emphasis added); *Goldmark,* 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's instant suit does not seek to litigate the scope or extent of the treaty fishing rights that were the subject of the prior decisions in *U.S. v. Washington*, but instead seeks a declaration from the district 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" because of the *fishing* right determinations made in *U.S. v. Washington*. There is no "well established" or

"settled" law in *United States v. Washington* regarding hunting rights that binds all Stevens Treaty Tribes, the State of Washington and the United States that is importable to the instant case that can preserve its claims. The district court has firmly rejected these same base contentions of Skokomish twice in Rule 19 analyses, and Suquamish respectfully urges this Court to affirm.

II. THE CLAIMS BROUGHT BY SKOKOMISH ARE BARRED BY THE SOVEREIGN IMMUNITY OF THE SUQUAMISH TRIBE

A. Standard of Review

Whether an Indian tribe possesses sovereign immunity is a question of law reviewed de novo. *See Pistor v. Garcia*, 791 F.3d 1104, 1110 (9th Cir. 2015); *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1091 (9th Cir. 2007); *Linneen v. Gila River Indian Cmty*, 276 F.3d 489, 492 (9th Cir. 2002).

B. The Suquamish Tribal Officials Are Entitled To Sovereign Immunity.

The Suquamish Tribe is a federally recognized Indian Tribe. *See* 82 Fed. Reg. 4915, 4918 (January 17, 2017) ("Suquamish Indian Tribe of the Port Madison Reservation" included on the list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs"). "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*, 832 F.3d 1011, 1016 (9th Cir. 2016), quoting *Michigan v. Bay Mills Indian Cmty.*, ___ U.S. ___, 134 S.Ct. 2024, 2030 (2014) ("*Bay Mills*") and

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). The Supreme Court has characterized an Indian Tribe's sovereign immunity as a "necessary corollary to Indian sovereignty and self-governance," *Bay Mills*, 134 S.Ct. at 2030, quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986). The Supreme Court has "time and again treated the doctrine of tribal immunity as settled law." *Bay Mills*, 134 S.Ct. at 2030–31 (internal quotation marks and citations omitted). Absent a clear and unequivocally expressed waiver of immunity by a Tribe or abrogation of immunity by Congress, suits against Indian tribes are barred. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (citations omitted). The district court properly found that there is no such waiver in this case, and therefore dismissed the claims against the Suquamish Tribal Council members.

C. The *Ex Parte Young* Does Not Apply, Because The Relief Sought By Skokomish, If Granted, Would Necessarily And Principally Operate Against The Suquamish Tribe.

In general, 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. Skokomish invoked the doctrine of *Ex Parte Young*, 209

U.S. 123 (1908), in an effort to circumvent these established principles of tribal sovereign immunity.[16] *See* Complaint at ¶7, ER 152 (invoking *Ex Parte Young* as exception to sovereign immunity). The *Ex Parte Young* exception is limited, however, and does not apply in this case.

In order for the *Ex Parte Young* exception to apply, Skokomish must have "alleged an ongoing violation of federal law and [must seek] prospective relief." Order, ER 21, quoting *Burlington Northern,* 509 F.3d at 1092, and citing *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.,* 535 U.S. 635, 642 (2002). In addition, as the district court stated, "Skokomish must at a minimum, … allege a 'viable claim that the tribal officials acted outside their authority, so as to subject them to suit.'" Order, ER 21, quoting *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991). Significantly, however, "*Ex Parte Young* does not apply where the 'relief sought will operate against the sovereign,' such as when the requested relief requires 'affirmative actions by the sovereign or disposition of

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[16] 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); *Bay Mills,* 134 S.Ct. at 2035 ("As this Court has stated before, analogizing to *Ex parte Young*, … tribal immunity does not bar [a suit against tribal officials or employees (rather than the Tribe itself)] for injunctive relief against *individuals,* including tribal officers, responsible for unlawful conduct." (internal citations omitted) (emphasis in original).

unquestionably sovereign property.'" *Dawavendewa,* 276 F.3d at 1160 (citation omitted).

In this instance, the doctrine of *Ex Parte Young* does not provide a valid basis for the Court to adjudicate the scope of the Suquamish Tribe's rights under the Point Elliott Treaty, which is exactly what Skokomish seeks to do in this case. *Dawavendewa,* 276 F.3d at 1160 *citing Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101–02 (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 the district court that Skokomish has "primary" treaty hunting rights that are superior to those of the Suquamish Tribe, the resolution of Skokomish's claims would necessarily and fundamentally impact the treaty rights held by the Suquamish Tribe, as opposed to simply limiting any actions individually taken by the Suquamish Tribal Council members or the Suquamish Fisheries Director.

The requested relief in this case seeks, in effect, to litigate the scope of the treaty hunting rights held by the Suquamish Tribe in its capacity as a federally recognized Indian Tribe. Those treaty hunting rights are "unquestionably sovereign property" and the *Ex Parte Young* exception does not apply here. *See*

Muckleshoot Indian Tribe v. Hall, 698 F.Supp. 1504, 1510 (W.D. Wash. 1988) (describing Tribes' treaty right to take fish as "a property right, protected under the fifth amendment." (citing *Menominee Tribe of Indians v. United States,* 391 U.S. 404 n. 12, 412 (1968). Although the district court did not rely upon this rationale in its dismissal of Skokomish's claims, on *de novo* review this Court should affirm the district court on the alternate basis that the relief sought would operate against treaty hunting rights of Suquamish and other Indian tribes.

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 Point No Point Treaty and Article V of the Point Elliott Treaty, respectively. This identical language is present in each of these 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 one another. As the district court described:

> Skokomish's claim necessarily rests on the accuracy of its assertion that its primary hunting right in Twana territory is settled law. But Skokomish's right is far from clearly established. Article IV of the Point No Point Treaty reserved to all four signatory tribes 'the privilege of hunting and gathering roots and berries on open and unclaimed lands,' without reference to a primary right. The court in *U.S. v. Washington* did not clearly establish Skokomish's primary hunting right because the case principally (if not exclusively) concerned fishing rights.

ER 26; *see also Goldmark,* 994 F.Supp.2d at 1174 n. 5 (noting previous Stevens Treaty 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").

Skokomish's Complaint 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-à-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 gravamen of Skokomish's Complaint is that the Suquamish Tribe is promulgating 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." Because there is no adjudication as to Skokomish's hunting rights, Skokomish has not made a viable claim that the Suquamish tribal

officials acted outside their authority, so as to subject them to suit. Thus, *Ex Parte Young* does not apply.

Moreover, that necessary predicate (a determination of its underlying hunting rights) is exactly what Skokomish is seeking in the form of a judgment operative against the Suquamish Tribe and its members. *See* Complaint at ¶52(2), ER 167 (seeking a declaration that "neither *Suquamish Indian Tribe nor members of the Suquamish Indian Tribe* shall exercise treaty privileges") (emphasis added).[17] The resolution of Skokomish's claims will affect the Suquamish Tribe's rights under the Point Elliot Treaty. This Court could therefore affirm the dismissal of this case on the alternate basis, not relied upon by the district court, that the limited exception under *Ex Parte Young* does not apply here because the relief sought would operate against the Suquamish Tribe and implicates treaty hunting rights that are the sovereign property of the Tribes.

D. The Suquamish Tribal Council Members Do Not Have The Requisite Enforcement Connection To the Hunting Regulations At Issue.

As the district court recognized, in order to invoke the limited exception under *Ex Parte Young*, the plaintiff must allege that the named defendants have a

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

"requisite enforcement connection" to the challenged law. Order, ER 21, quoting *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092–93 (9th Cir. 2007) (holding the *Ex Parte Young* exception did not apply to tribal chairmen responsible only for adopting, not enforcing, a challenged tax). The enforcement connection must be "fairly direct." Order, ER 21, quoting *L.A. Cnty Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992). A generalized duty to enforce the law is insufficient to subject an official to suit under *Ex Parte Young*. *Id.*

The alleged action complained of by Skokomish—the 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." Addendum 68. Under the Suquamish Hunting Ordinance, the Fisheries Director recommends annual regulations to the Suquamish Tribal Council, which then votes to adopt them on behalf of the Suquamish Tribe.[18] Skokomish did not allege in its Complaint that Defendants have 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, Addendum 64 (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*

[18] *See* Suquamish Hunting Ordinance at Paragraph 14.3.16, Addendum 68.

exception did not apply to tribal chairman responsible only for adopting, as opposed to enforcing, challenged tax).

The district court concluded that "only one of the named Defendants has the 'requisite enforcement connection' to the allegedly unlawful hunting ordinance." Order, ER 22. According to the district court, only the Suquamish Fisheries Director, who "oversees the hunting enforcement and allocates both short term and annual hunting permits to Suquamish Tribal members … exhibits the requisite enforcement connection." Order, ER 22. "***Conversely, Suquamish Tribal Council members have only the authority to promulgate and generally manage hunting ordinances.***" Order, ER 22 (emphasis added).

For the reasons described in Section II(C), *supra*, the *Ex Parte Young* exception does not apply here because the relief sought by Skokomish would operate against the Suquamish Tribe and would dispose of unquestionably sovereign property (treaty hunting rights). In its de novo review, this Court could, in applying the law to the facts, find that the sovereign immunity bars *all* of Skokomish's claims, including those against the Fisheries Director as well as the Tribal Council members. In the alternative, however, it is clear that the Tribal Council members do not have the requisite enforcement connection, and that this Court should therefore affirm the district court's dismissal of the claims against them.

III. THE SUQUAMISH TRIBAL COUNCIL MEMBERS ARE ENTITLED TO LEGISLATIVE IMMUNITY.

A. Standard of Review

Whether an individual is entitled to legislative immunity is a question of law reviewed de novo. *See Cmty. House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 959 (9th Cir. 2010); *Kaahumanu v. County of Maui*, 315 F.3d 1215, 1219 (9th Cir. 2003); *San Pedro Hotel Co. v. City of Los Angeles*, 159 F.3d 470, 476 (9th Cir. 1998); *see also Chappell v. Robbins*, 73 F.3d 918, 920 (9th Cir. 1996) (reviewing de novo dismissal based on absolute legislative immunity).

B. The Suquamish Tribal Council Members Are Entitled To Legislative Immunity Because All Of The Actions Alleged In The Complaint Are Legislative In Nature.

The only alleged unlawful action of the Suquamish Tribal Council members at issue in this case is "opening hunting" in "Twana territory" by promulgating and adopting regulations. However, the governmental promulgation of hunting regulations is a legislative function. "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 (1998). This immunity is absolute, and applies to claims for damages and 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, 732–33 (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 the Suquamish Tribal Council members here. *Bogan v. Scott-Harris*, 523 U.S. at 49 (legislative immunity 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).

Skokomish concedes that legislative immunity protects the Suquamish Tribal Council members in their promulgation of hunting regulations, because such activity is unquestionably legislative in character. *See also* Complaint at ¶18-19, ER 154–155 (noting that the regulations were "issued pursuant to Paragraph 14.3.16 of the Suquamish Hunting Ordinance.") 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.

Addendum 68.

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 alleges pertain to "Twana territory" were adopted by Suquamish through the legislative process. The district court properly found that legislative immunity bars Skokomish's claims against the Suquamish Tribal Council members.

C. The Recommendations Of Hunting Regulations By The Fisheries Director To the Suquamish Tribal Council Is An Integral Step In the Legislative Process.

The district court found that only the Tribal Council members have legislative immunity, and that the Fisheries Director "is not entitled to legislative immunity because his authority to issue hunting licenses involves ad hoc decision making." ER 24. Suquamish Tribe respectfully submits that, on *de novo* review, this Court should find that the Fisheries Director also has legislative immunity. The recommendation of hunting regulations by the Fisheries Director to the Suquamish Tribal Council, and the adoption of hunting regulations by the Tribal Council members, 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 the Fisheries Director 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). Legislative immunity therefore precludes Skokomish's claims against the Fisheries Director, as well as the Tribal Council members.

D. The Executive And Administrative Actions Alleged In Skokomish's Opening Brief Were Not Described With Particularity In The Complaint, And Therefore Are Not Appropriately Considered On Appeal.

Skokomish now alleges that Defendants' actions are "executive in nature," Opening Brief at 29, not legislative, and that legislative immunity therefore does not apply. However, the district court found "no evidence that [the Suquamish Tribal Council members] engaged in non-legislative functions." ER 24. Because

all of the "actions" alleged in the Complaint are legislative in character, the district court properly dismissed Skokomish's claims against the Suquamish Tribal Council members based on legislative immunity.

Skokomish's Opening Brief sets out a litany of various executive and administrative actions that it claims Defendants have taken in violation of Skokomish's claimed treaty rights. Opening Brief at pp. 29–33. First, none of these actions were alleged with any particularity in the Complaint itself, and therefore were not properly before the district court to be considered as a basis for denying the motion to dismiss. *See Broam v. Bogan*, 320 F.3d 1023, 1026 n. 7 (9th Cir. 2003). These after-supplied assertions and arguments likewise should not be considered on appeal.

Second, even if these actions were properly presented on appeal, none of the actions alleged (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". Even liberally construing Skokomish'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 actually adopted regulations "opening hunting" in "Twana territory" pursuant to a legislative process. Complaint at ¶50, ER 166 (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 (and therefore not considered by the district court) that either rely on the legislatively adopted regulations for their connection to Plaintiff's claims or focus on, 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 (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.

IV. THE DISTRICT COURT DID NOT ERR BY DENYING SKOKOMISH LEAVE TO AMEND ITS COMPLAINT.

A. Standard of Review.

Leave to amend is generally reviewed for abuse of discretion. *See Curry v. Yelp, Inc.*, 875 F.3d 1219, 1224 (9th Cir. 2017); *Ventress v. Japan Airlines*, 603 F.3d 676, 680 (9th Cir. 2010). Denial of leave to amend is not an abuse of discretion where amendment would be futile. *See Flowers v. First Hawaiian Bank*, 295 F.3d 966, 976 (9th Cir. 2002); *see also McKesson HBOC v. New York State Common Retirement Fund, Inc.*, 339 F.3d 1087, 1090 (9th Cir. 2003) (no abuse because complaint could not be cured by amendment). Dismissal without leave to

amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment. *See Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 655(9th Cir. 2017*), cert. denied sub nom. Missouri ex rel. Hawley v. Becerra*, 137 S. Ct. 2188 (2017); *Thinket Ink Info Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004).

B. The District Court Properly Found That Amendment Of The Complaint Would Be Futile.

Skokomish did not ask for leave to amend its complaint in lieu of dismissal. Order, ER 28. The district court nevertheless considered the question "because on a 12(b)(6) motion, 'a district court should grant leave to amend even if no request was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.' *Citing, Cook, Perkiss & Lieche v. N. Cal. Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990); *see also* Fed. R. Civ. P. 15(a)(2) ('The court should freely give leave when justice so requires.')" Order, ER 28.

The district court properly found that filing an amended complaint would be futile because "[i]f *U.S. v. Washington* truly confirmed Skokomish's primary hunting right, Skokomish's claim must be filed as a subproceeding in that case. Even if it did not, amendment of the claims asserted would not and could not remedy the fact that [Skokomish] cannot adjudicate its right absent the other interested tribes, and it cannot join those tribes." Order, ER 28.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Date: January 22, 2017

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellees, to the best of their knowledge, state that Appellant Skokomish Indian Tribe has identified the only related case pending in the Ninth Circuit.

Date: January 22, 2018

/s/ John W. Ogan

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,734 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using [insert name and version of word processing program] Times New Roman 14-point font.

Date: January 22, 2018

/s/ John W. Ogan

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: January 22, 2018

/s/ John W. Ogan