NO. 54945-0

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MAKAH INDIAN TRIBE,

Appellant,

v.

COMMISSIONER OF PUBLIC LANDS HILARY FRANZ (in her official capacity), the WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES, and the WASHINGTON STATE BOARD OF NATURAL RESOURCES,

Respondents.

AMICI CURIAE BRIEF OF HOH TRIBE, QUILEUTE TRIBE, AND THE QUINAULT INDIAN NATION

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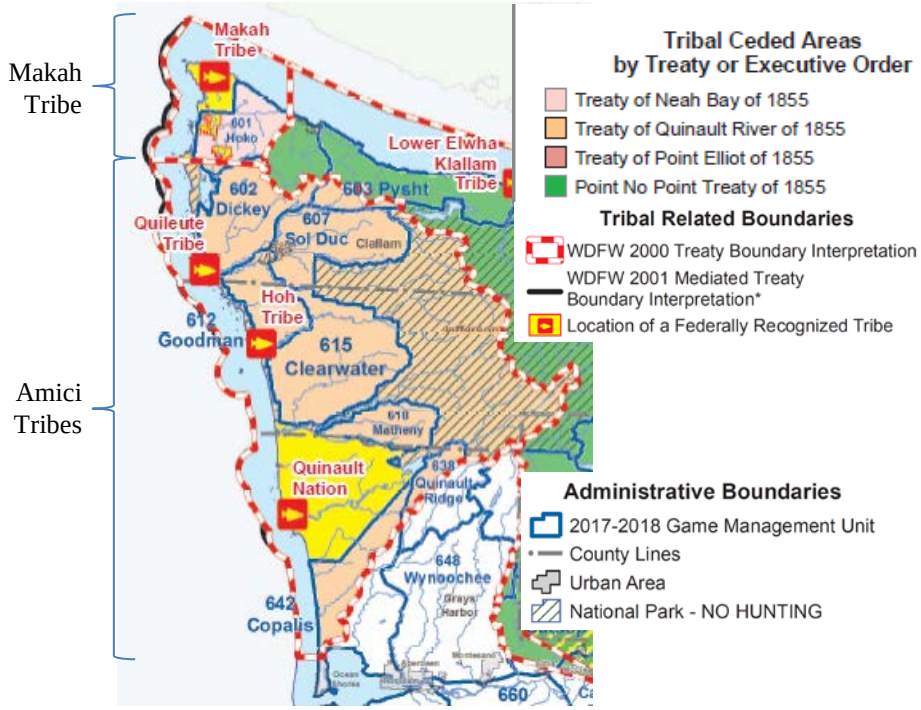
I. INTRODUCTION

The Makah Tribe challenges certain Peninsula Land Exchange decisions by the Department of Natural Resources, claiming that the decisions revoke Makah's access to areas where it purports to exercise treaty hunting rights. Makah Opening Br. at 3. But these areas are undisputedly in the treaty hunting area of the undersigned tribes—the Quileute Tribe, Hoh Tribe, and Quinault Indian Nation (collectively, the "Amici Tribes"). No court has ever recognized Makah as having treaty hunting rights in these areas and the Amici Tribes deny that Makah has them.

Because Makah's requested relief depends on a predicate finding that it has treaty hunting rights in the Amici Tribes' treaty hunting area, the Amici Tribes are indispensable parties to this case. And because the Amici Tribes cannot be joined due to their sovereign immunity, this Court should remand this case for dismissal under CR 19 and the Uniform Declaratory Judgments Act, RCW 7.24 ("UDJA").

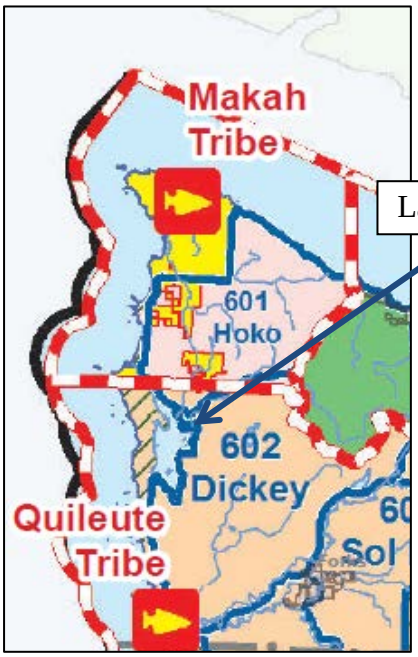
II. IDENTITY AND INTEREST OF AMICI TRIBES

The four tribes involved in this case are located on the west coast of the Olympic Peninsula. The Washington Department of Fish and Wildlife ("WDFW") depicts the aboriginal areas that the tribes ceded in their treaties with the United States government as follows:

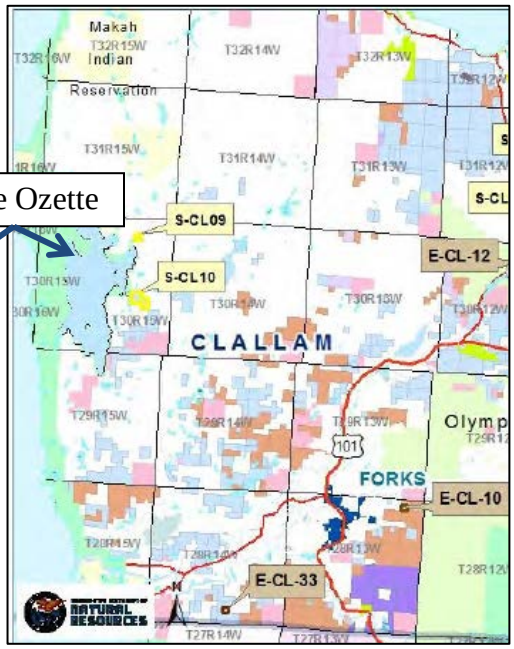


See CP 237-28.

The Amici Tribes are signatories to the Treaty of Olympia, also known as the Treaty of Quinault River. *See* Treaty with the Quinaielt, etc., July 1, 1855, 12 Stat. 971. The Makah Tribe is signatory to the Treaty of Neah Bay. Treaty of Neah Bay, Jan. 31, 1855, 12 Stat. 939. These treaties reserve to the tribes the right of hunting in their ceded lands and "traditional use" areas. *See State v. Buchanan*, 138 Wn.2d 186, 199-200, 207, 978 P.2d 1070 (1999); *infra* pages 10-11. The Amici Tribes' ceded lands encompass the Peninsula Land Exchange areas in dispute in this case, as shown by the following maps:



CP 238.



See DNR, *Peninsula Land Exchange Summary* at 3, https://tinyurl.com/y4dpcqwx; *see also* CP 58 & 248.

Makah's challenge to the Peninsula Land Exchange depends upon a predicate finding that it has treaty hunting rights in the Amici Tribes' treaty hunting area—a finding no court has ever made. The Amici Tribes' rights would be directly affected by such a finding, because Makah's exercise of treaty hunting rights in the Amici Tribes' treaty hunting area will violate the Amici Tribes' treaty rights by taking a treaty resource that belongs to the Amici Tribes.

The Amici Tribes seek dismissal of this case because (1) it requires adjudication of Makah's unsubstantiated claim to have treaty hunting rights in the Amici Tribes' treaty hunting area, and (2) such adjudication cannot occur without the Amici Tribes, who cannot be joined due to their sovereign immunity.

The Amici Tribes take no position on, and reserve all objections to, the other positions contested by Appellant and Respondents and the authority of state entities to determine federal treaty hunting rights.

III. STATEMENT OF THE CASE

A. Procedural History

On June 3, 2020, the Makah Tribe filed a Complaint and Petition for Constitutional Writ of Certiorari in Thurston County Superior Court against the Washington Commissioner of Public Lands, the Washington State Department of Natural Resources ("DNR"), and the Washington State Board of Natural Resources (collectively, "Respondents"). Makah challenged a land exchange that was approved by Respondents, alleging that "[t]he exchange transfers State lands in northwest Clallam County, where Makah members regularly hunt and otherwise exercise Treaty rights, into private ownership. In so doing, the exchange threatens to diminish Tribal members' ability to meet their subsistence and ceremonial needs by exercising their Treaty rights." CP 5-6. Makah claimed that DNR's alleged failure to "preserv[e] the Tribe's Treaty rights prior to transfer" violated the State Environmental Policy Act ("SEPA") and the Public Lands Act. CP 23-24. Makah sought a constitutional writ of certiorari and preliminary injunction to halt the exchange. CP 24-25.

Makah did not notify any of the Amici Tribes of its lawsuit. August 17, 2020 Affidavit of Lauren King ("King Aff.") ¶ 3. The Amici Tribes learned of the lawsuit on June 9, 2020, and shortly thereafter

notified counsel for the parties on June 18 that they intended to seek leave of court to file an amicus brief requesting dismissal of the case. *Id.* ¶¶ 4-5. However, following a hearing on June 19, 2020, the Thurston County Superior Court dismissed Makah's complaint. *Id.* ¶6. Amici Tribes believed this case would be moot after completion of the subject land exchanges on June 30, 2020. *Id.* ¶ 7.

On July 17, 2020, this Court held that the case was not moot. Ruling Denying Motion to Stay and Accelerating Review at 8. On August 17, 2020, the Amici Tribes filed an Unopposed Motion for Leave to Participate as Amici Curiae, which this Court granted.

In this appeal, Makah contends that the trial court (1) improperly applied SEPA in finding that a categorical exemption applies to the exchange; and (2) improperly denied Makah's motion for a writ of constitutional certiorari. Makah Opening Br. at 10-11. In this brief, the Amici Tribes address the sole issue of whether this case should be dismissed for failure to join the Amici Tribes under CR 19 and the UDJA.

B. Relevant Facts

The Quileute Tribe was involved in consultation and communication with the Department of Natural Resources ("DNR") regarding the challenged land exchanges before they took place. When DNR consulted with Quileute regarding the land exchange, Quileute expressed concerns regarding DNR meeting with Makah because the land exchange "involves land that is outside the Treaty Area of the Makah

Tribe" and because Makah was attempting "to expand the reach of their domain" by asserting treaty rights where they had none. CP 251. Such expansion "clearly ha[s] the potential to impact [Quileute's] Treaty rights in that area." *Id.*

WDFW's map of tribal ceded areas clearly shows that the Peninsula Land Exchange areas are outside of Makah's ceded area. *See supra* page 3. Washington State agencies—including DNR—have long recognized the location of Makah's treaty hunting area; WDFW has published this map for over a decade as part of its treaty hunting administration. *See* CP 235 ¶¶ 3-4. WDFW's depiction of Makah's territorial boundary conforms to the relevant treaty language and evidence from treaty times.[1]

[1] In a recent case adjudicating Makah's challenge to Quileute's and Quinault's ocean treaty fishing areas, the District Court for the Western District of Washington found that the treaty negotiators for the Treaty of Neah Bay and the Treaty of Olympia "intended to locate the northernmost extent of aboriginal Quileute territory at or near Cape Alava." *United States v. Washington*, 129 F. Supp. 3d 1069, 1107 (W.D. Wash. 2015). Cape Alava is located to the north of Lake Ozette. Because the southern boundary of Makah's ceded area is the same as the northern boundary of Quileute's ceded area, Makah's southern boundary is Cape Alava:

> The treaties for the Makah and Quileute together denote a shared boundary between the aboriginal territories of the tribes, running eastward from the coast. The Treaty of Neah Bay identifies the Makah's southern territorial boundary as beginning on the coast at "Osett, or the Lower Cape Flattery, thence eastwardly along the line of lands occupied by the Kwe-deAh-tut or Kwill-eh-yute tribe of Indians." [12 Stat. 939, art. 1.] The Treaty of Olympia likewise identifies the Quileute's northern boundary as "the southwest corner of the lands lately ceded by the Makah tribe of Indians to the United States, and running easterly with and along the southern boundary of the said Makah tribe to the middle of the coast range of mountains." [12 Stat. 971, art. 1.] Colonel Simmons, who negotiated the Treaty of Olympia, later clarified his understanding of aboriginal Quileute territory to correspond to the boundaries identified in the treaties. In

Makah now asserts that "[i]n 2008 the Tribe undertook a process which resulted in an agreement with WDFW that recognizes the Tribe's treaty right to hunt on lands that include parcels proposed to be transferred into private ownership in the Exchange." Makah Opening Br. at 10. But WDFW's written representations nowhere indicate that such an agreement exists, nor has Makah produced any such agreement. Rather, in 2007, WDFW *rescinded* a Memorandum of Understanding allowing hunting in the Amici Tribes' treaty area due to objections of other tribes, including Quileute. Affidavit of Frank Geyer, Ex. A. WDFW has since published multiple drafts of the "WDFW Procedural Guidelines for Responding to Assertions of Tribal Traditional Hunting Areas." Each version—the most recent being April 1, 2019—states that WDFW did not renew its MOU with Makah in 2007 and that in 2008 it "was left that WDFW would

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> his 1960 Puget Sound Agency report, Simmons wrote, "The treaty of Olympia with the Qui-nai-elt and the Quillehute tribes remains only to be considered. These tribes occupy the sea-coast between Oxelt or old Cape Flattery, on the north, and the Qui-nai-elt river on the south." Governor Stevens also affirmed this understanding of Quileute territory when he stated, in submitting the Treaty of Olympia to the Commission of Indian Affairs: "I herewith enclose the treaty made with the Qui-nai-elt and Quil-leh-ute Tribes of Indians on the Coast between Gray's Harbor and Cape Flattery," where "Cape Flattery" may refer to "Old" or "Lower Cape Flattery" [located in the vicinity of Cape Alava.]. . . George Gibbs' 1855 map of the "Position of the Indian Tribes and the Lands Ceded by Treaty," illustrates the boundary between the Makah and the Quileute as beginning on the coast at "Osett," which it locates just north of Flattery Rocks in the vicinity of Cape Alava. . . . Government officials continued to locate the Quileute/Makah boundary in the vicinity of Cape Alava in the decades following the signing of the treaties.

Id. at 1106-07 (citations to the record omitted).

develop a process to evaluate a tribe's claim and we discussed interim enforcement guidance for the 2008 hunting season." *Id.* ¶ 8; *see also id.*, Exs. C & D at 4. WDFW expressly acknowledges in the Procedural Guidelines that it lacks authority to determine treaty rights, and that any WDFW procedure regarding traditional use claims "is not intended to result in a final determination of the geographic scope of any tribe's treaty right to hunt, nor limit any party's position in a future determination of the geographic scope of the treaty hunting right." *Id.* Exs. C & D at 1.[2]

No party has contested the location of the Amici Tribes' ceded area boundaries. It is undisputed that the Amici Tribes' ceded area—and treaty hunting area—encompasses the Peninsula Land Exchange parcels at issue in this case.

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[2] The WDFW Procedural Guidelines and the related rescission of Makah's MOU constitute legislative facts entitled to judicial notice, as they are "established truths, facts or pronouncements that do not change from case to case but [are applied] universally." *State v. Grayson*, 154 Wn.2d 333, 340, 111 P.3d 1183 (2005) (internal quotation and citation omitted). "[H]istorical facts, commercial practices and social standards are frequently noticed in the form of legislative facts." *Id*. A court "may properly take judicial notice of such facts." *Id.* (citing ER 201); *see also Canal Station N. Condo. Ass'n v. Ballard Leary Phase II*, 179 Wn. App. 289, 322 P.3d 1229 (2013) (declining to strike a law review article and legislative history reports submitted with a reply brief because those materials were relevant to establishing "legislative facts" in evaluating the constitutionality of a statute).

The WDFW documents also conform to amici's traditional role of assisting the court. Amici Tribes have particularized knowledge of WDFW procedures and related MOUs with respect to treaty hunting. The WDFW documents that were sent to all treaty tribes in Washington—including Amici Tribes—provide important information relating to Makah's assertions regarding a purported traditional use agreement with WDFW regarding treaty hunting, as any tribal traditional use agreement must conform with the WDFW Procedural Guidelines.

To the extent the Court disagrees that the WDFW documents are entitled to judicial notice, the Amici Tribes request that the Court grant them leave to file a motion requesting permission to file the documents.

C. Statement of Issue Addressed by the Amici Tribes

Amici Tribes unquestionably have treaty hunting rights in the Peninsula Land Exchange areas at issue in this case. Makah bases its causes of action on its unfounded assertion that it also has treaty rights in the Peninsula Land Exchange areas—which no court has ever decided—and that DNR's land exchange transaction harms Makah's treaty rights. The Amici Tribes' rights will be significantly impacted by any finding that Makah has treaty hunting rights in the Amici Tribes' areas. *See Skokomish Indian Tribe v. Goldmark*, 994 F. Supp. 2d 1168, 1187–88 (W.D. Wash. 2014) (where one tribe's requested relief would result in a treaty hunting resource being taken from other tribes' established treaty hunting area, it is "a textbook example" where "one party may be severely prejudiced by a decision in his absence").

Given that Makah's standing in this case depends on its disputed assertion that it has treaty hunting rights in the Amici Tribes' treaty hunting area, are the Amici Tribes necessary and indispensable parties such that the case must be dismissed under CR 19 or the UDJA?

IV. ARGUMENT

Makah's standing and the relief it seeks in this case require a threshold finding that Makah has the right to exercise treaty hunting rights in the Amici Tribes' undisputed treaty hunting area. Granting such relief would allow Makah hunters to take a treaty resource that belongs to the Amici Tribes. The case should be dismissed because Makah has failed to join the Amici Tribes, who cannot be joined because they have not waived

their sovereign immunity.

A. Treaty Hunting Rights in Washington State

From 1854 to 1856, Governor Isaac Stevens and his agents executed eight treaties with tribes in what would become Washington State.[3] *See United States v. Wash.*, 384 F. Supp. 312, 330 (W.D. Wash. 1974). These "Stevens Treaties" reserve to the tribes the "privilege of hunting . . . on open and unclaimed lands." *Buchanan*, 138 Wn. 2d at 199-200.[4] The hunting right language is "substantially the same" in each Stevens Treaty, *see id.*, including Makah's treaty (Treaty of Neah Bay, 12 Stat. 939, art. 4) and the Amici Tribes' treaty (Treaty of Olympia, 12 Stat. 971, art. 3).

The Washington State Supreme Court addressed the scope of the treaty hunting right in *State v. Buchanan*, holding that the right allows each tribe to hunt within (1) its ceded area; and (2) other lands if the tribe can prove the lands were "actually used for hunting and occupied by the [Tribe] over an extended period of time." 138 Wn. 2d at 207. The latter category is known as "traditional use rights."

Ceded area treaty hunting rights. The various tribal ceded areas are depicted in WDFW's ceded area map. CP 237-38; *see also supra* page 3. Under their treaty and under *Buchanan*, the Amici Tribes have

[3] Treaty of Olympia, 12 Stat. 971; Treaty of Point No Point, 12 Stat. 933; Treaty of Medicine Creek, 10 Stat. 1132; Treaty of Point Elliott, 12 Stat. 927; Treaty of Neah Bay, 12 Stat. 939; Treaty with the Yakamas, 12 Stat. 951; Treaty with the Walla Walla, Cayuse, Etc., 12 Stat. 945; Treaty with the Nez Percés, 12 Stat. 957.

[4] No tribe was a party in this case, although several tribes participated as *amici.*

"established, legally recognized rights to hunt and gather" in their ceded area, *Goldmark*, 994 F. Supp. 2d at 1175, which encompasses the Peninsula Land Exchange areas at issue in this case. Makah's ceded area does not contain any of the Peninsula Land Exchange areas.

Traditional use rights. Makah now appears to assert that it has traditional use rights to the Peninsula Land Exchange areas, but no court has held that Makah has such rights in the areas, including areas S-CL09 and S-CL10. Quileute regulations prohibit hunting by non-Treaty of Olympia tribal members in Quileute's treaty hunting area, making it both a civil and criminal offense. *See* Quileute 2019-2020 Hunting Regulations, §§ I(A), (C), and (D), https://quileutenation.org/wp-content/uploads/2020/01/Hunting-Regulations-and-Corresponding-Code.pdf.

Treaty fishing rights. Contrary to what Makah insinuates in its Opening Brief (page 18), treaty hunting rights are not necessarily coextensive with treaty fishing rights. *See Buchanan*, 138 Wn. 2d at 206 (contrasting the fishing right with the hunting right); *Skokomish Indian Tribe v. Forsman*, 738 F. App'x 406, 408 (9th Cir. 2018) (unpublished) (finding meritless the assertion that "treaty *hunting* rights were adjudicated in the decades-long [treaty fishing rights] litigation stemming from *United States v. Washington*" and noting that "[n]o plausible reading" of the fishing right decisions "supports the conclusion that the litigation decided anything other than treaty *fishing* rights.") (emphasis in original). That Makah has fishing rights in Lake Ozette does not mean Makah has hunting

rights on lands east of the lake.

B. This Case Should be Dismissed Under CR 19 Because the Amici Tribes Are Indispensable Parties who Cannot be Joined.

CR 19 involves a two-part analysis. First, the court must determine whether a party is needed for just adjudication. *See Gildon v. Simon Prop. Grp.*, 158 Wn.2d 483, 494, 145 P.3d 1196 (2006) (citing *Crosby v. Spokane Cty.*, 137 Wn.2d 296, 306, 971 P.2d 32 (1999); CR 19(a)). Second, if an absent party is needed but it is not possible to join the party, then the court must determine whether in "equity and good conscience" the action should proceed or should instead be dismissed, the absent party being thus regarded as indispensable. *See id.* at 495; CR 19(b)).

As Respondents stated in their opposition to Makah's motion for a preliminary injunction in the trial court, "other tribes are indispensable parties under CR 19 with respect to treaty claims" because those tribes "assert treaty hunting and fishing rights in the state lands at issue," "[t]he Makah Tribe cannot join those tribes without their consent, and the court cannot determine whether the Makah Tribe's treaty rights extend to the lands at issue in their absence." CP 203 n.4. This proposition is squarely supported by the authorities cited by Respondents. *See id.* (citing *Keweenaw Bay Indian Cmty. v. State*, 11 F.3d 1341, 1346-47 (6th Cir. 1993) (dismissal for failure to join absent tribes claiming treaty right to fish in tribe's suit against state to protect fishery); *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1279 (10th Cir. 2012) (dismissal of tribe's request for determination of status of land shared with absent tribe);

Makah Indian Tribe v. Verity, 910 F.2d 555, 558-59 (9th Cir. 1990) (absentee tribes with treaty rights in ocean salmon fishery necessary to action by tribe seeking higher allocation)).

1. The Amici Tribes Are Necessary Parties.

The first step here is satisfied: the Amici Tribes are necessary for just adjudication. A party is necessary if that party's absence "would prevent the trial court from affording complete relief to existing parties to the action or if the party's absence would either impair that party's interest or subject any existing party to inconsistent or multiple liability." *Coastal Bldg. Corp. v. City of Seattle*, 65 Wn. App. 1, 5, 828 P.2d 7 (1992).

There is no question that Indian tribes are necessary parties to actions affecting their legal interests. *Wilbur v. Locke*, 423 F.3d 1101, 1113 (9th Cir. 2005), *abrogated on other grounds as recognized in Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 420 (2010). In this case, it is undisputed that the Peninsula Land Exchange areas where Makah claims to have treaty hunting rights are within the Amici Tribes' treaty hunting area. CP 237-38; *see also supra* page 3.

A judgment rendered in the Amici Tribes' absence that purports to decide whether Makah has the right to deplete the treaty resources located in the Amici Tribes' treaty territory would greatly prejudice the Amici Tribes. *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F .2d 1496, 1498 (9th Cir. 1991) (Quinault Indian Nation is a necessary party to action challenging the Quinault's governing authority).

A "practical impact" on the absent party makes it a necessary party to the pending proceeding. *See Mudarri v. State*, 147 Wn. App. 590, 606-07, 196 P.3d 153 (2009) (finding necessary party where, "as a practical matter," ruling would impact absent party). If the Amici Tribes later sought and obtained a different ruling, it would subject the parties to inconsistent obligations. *See Verity*, 910 F.2d at 559-60 (agreeing with the district court that "the federal government could face inconsistent rulings if the Makah were awarded a [treaty fishing] quota that violated other tribes' treaty rights"); *N. Arapaho Tribe*, 697 F.3d at 1279 (in case concerning the status of land ceded to the government by tribes, "the State of Wyoming would be left at a substantial risk of inconsistent obligations, because nothing would stop the Eastern Shoshone [an absent entity and party to the land cession agreement], unbound by the decision, from relitigating the issue").

In a similar case where the Skokomish Tribe sought a ruling on its treaty hunting and gathering rights in areas where other tribes already possessed such rights, the court ruled that the absent tribes were necessary parties because Skokomish's requested relief would have resulted in treaty resources being harvested by Skokomish that would have otherwise been available to the absent tribes. *Goldmark*, 994 F. Supp. 2d at 1187–88. "Such circumstances 'present a textbook example . . . where one party may be severely prejudiced by a decision in his absence.'" *Id.* (quoting *Wichita and Affiliated Tribes of Okl. v. Hodel*, 788 F.2d 765, 775 (D.C. Cir. 1986)). In addition, disposition of Skokomish's claims without the other tribes "would leave Defendants subject to a substantial likelihood of

multiple lawsuits rendering inconsistent results" because the absent tribes would likely "seek legal recourse in the event that the judgment deprived them of [treaty] rights to which they believe they are entitled." *Id.* at 1188.

Therefore, the Amici Tribes are necessary parties; a judgment in their absence would impair their ability to protect their interests and would subject the parties in this case to a substantial risk of inconsistent obligations with respect to treaty hunting rights. Makah's claim to have treaty hunting rights in the Amici Tribes' treaty hunting area simply cannot proceed in the Amici Tribes' absence. *Dawavendewa v. Salt River Project*, 276 F.3d 1150, 1161-62 (9th Cir. 2002) (holding that tribal sovereign immunity bars joinder, and noting "[i]f the necessary party enjoys sovereign immunity from suit, some courts have noted that there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as one of those interests compelling by themselves, which requires dismissing the suit") (internal quotations and citations omitted). The Amici Tribes are, therefore, necessary to this action.

2. The Amici Tribes Cannot Be Joined.

Under Rule 19(a), a necessary party will generally be joined as a party to the action. *See Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459 (9th Cir. 1994). However, Indian tribes may not be joined if they have not waived sovereign immunity. *Id.* There has been no such waiver by the Amici Tribes in this case. The Court must therefore determine whether the Amici Tribes are indispensable parties under Rule 19(b).

3. The Amici Tribes are Indispensable Parties.

The second step under CR 19 is also satisfied. "[T]ribal immunity quickly surfaces as a crucial issue" in a suit implicating the interests of an absent tribe "since if the tribe is an indispensable party, and cannot be joined due to its immunity, the claim may not proceed." *Wichita & Affiliated Tribes of Okla.*, 788 F.2d at 771. The importance of the Amici Tribes' interests and of tribal sovereign immunity to the resolution of the case dictates that it should not, in equity and good conscience, go forward in the Amici Tribes' absence.

CR 19(b) requires the Court to consider four factors in determining whether the Amici Tribes are indispensable: (1) the prejudice to the absent party; (2) whether the Court could shape any relief granted to reduce any prejudice;[5] (3) whether an adequate remedy can be awarded without the absent party; and (4) whether the Appellant will have an adequate remedy if the action is dismissed. CR 19(b)(1)-(4). In this case, all four factors militate in favor of dismissal.

First, prejudice is already established under CR 19(a). Second, no "shaping" of the judgment could mitigate prejudice to the Amici Tribes because Makah's relief and legal theories rely on the premise that Makah has the right to take treaty resources in Amici Tribes' treaty territory. A judgment in Makah's favor will therefore necessarily and unavoidably impact the Amici Tribes' rights. Third, a judgment rendered without the

[5] "Failure to intervene is not a component of the prejudice analysis where intervention would require the absent party to waive sovereign immunity." *Kickapoo Tribe of Indians of Kickapoo Reservation in Kan. v. Babbitt*, 43 F.3d 1491, 1498 (D.C. Cir. 1995).

Amici Tribes would also be inadequate because it would not be binding on the Amici Tribes, and because future litigation on the same issue could subject the parties to inconsistent obligations. *Confederated Tribes of the Chehalis*, 928 F.2d at 1498 (holding that "success by the plaintiffs in this action [concerning the Quinault Indian Nation's authority over the Quinault Reservation] would not afford complete relief to them. Judgment against the federal officials would not be binding on the Quinault Nation, which could continue to assert sovereign powers and management responsibilities over the reservation."); *N. Arapaho Tribe*, 697 F.3d at 1283 ("There would be nothing 'complete, consistent, [or] efficient' about the settlement of this controversy if the State of Wyoming were required to relitigate the issue with the Eastern Shoshone, with potentially different results.") Finally, while the effect of sovereign immunity may seem harsh, the recognition of immunities reflects well-established policy decisions.

Courts of this State have noted the long-standing recognition that CR 19 dismissal for inability to join a tribe due to sovereign immunity is required even though it may leave a plaintiff without a judicial remedy. *Matheson v. Gregoire*, 139 Wn. App. 624, 636, 161 P.3d 486 (2007). This case fits squarely within many years of consistent appellate decisions dismissing lawsuits under CR 19 where tribal sovereign immunity prevents joinder of a tribe to a lawsuit that would either directly or indirectly affect a contract to which the tribe was a party. *See, e.g,. Mudarri*, 147 Wn. App. at 604-09 (direct and indirect attacks on tribal agreement properly dismissed pursuant to CR 19); *see also Verity*, 910

F.2d at 560 ("[L]ack of an alternative forum does not automatically prevent dismissal of a suit. Sovereign immunity may leave a party with no forum for its claims."). Furthermore, the immunity of the absent parties itself is a compelling factor. *See Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) ("If 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." (internal quotation omitted)). There is no reason that one sovereign should be given preference where other sovereigns share equal interests in the case; Makah's interests here cannot trump the sovereign immunity of Amici Tribes. *Wichita and Affiliated Tribes of Oklahoma*, 788 F.2d at 776 ("It is wholly at odds with the policy of [sovereign] immunity to put the [sovereign] to th[e] Hobson's choice between waiving its immunity [by intervening] or waiving its right not to have a case proceed without it.").

Because the Amici Tribes are necessary, but it is not possible to join them, under "equity and good conscience" the case should be dismissed in its entirety. A judgment effectively stripping the Amici Tribes of their treaty resources cannot happen in their absence.

C. This Case Should be Dismissed Under the UDJA Due to Failure to Join Amici Tribes.

The UDJA bars this action because it mandates that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the

proceeding." RCW 7.24.110. The word "shall" is mandatory, not permissive. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

Makah seeks a declaratory judgment that Respondents' approval of the Peninsula Land Exchange violates various laws, based upon the premise that Makah has treaty hunting rights in the Peninsula Land Exchange areas. CP 23-25. As discussed above, the Amici Tribes' rights would be severely prejudiced by such declaration, but they cannot be joined to the case as required by the UDJA.

In a similar case, *North Quinault Properties, LLC v. State*, 197 Wn. App. 1056, No. 76017–3–I, 2017 WL 401397, at *1 (2017) (unpublished),[6] the Quinault Indian Nation (as *amicus*) sought dismissal of a lawsuit by property owners around Lake Quinault seeking adjudication of "the status of Lake Quinault and the property rights of non-tribal property owners abutting the Lake" and to determine "the public's right [of] access [to] the Lake, its shore and lakebed." *Id.* at *1. By treaty, the Quinault Indian Nation claimed an interest in Lake Quinault. *Id.* at *2. The Court held that the owners' request for declaratory judgment was improper in the absence of the Nation. "While [the appellant] clothes its request under the public trust doctrine" in arguing that the State had a duty to maintain public access to navigable waterways, "it does not satisfactorily explain why it should be allowed to seek adjudication of the above emphasized interests in the absence of the Nation and the United States,"

[6] Amici Tribes cite *North Quinault Properties* in this Motion as nonbinding authority with persuasive value because it involves similar facts to the instant case.

the Nation's trustee. *Id.* "Only if the Nation and the United States were parties could there be a proper resolution of ownership issues that are at the heart of this case. In the absence of both, there cannot be a proper resolution of these issues." *Id.* The Court further observed that the absence of the Quinault Indian Nation and the United States "would prejudice their rights to claim ownership in Lake Quinault." *Id.* at *3. Thus, the UDJA barred the action requesting declaratory relief. *Id.; see also Bainbridge Citizens United v. Dep't of Nat. Res.*, 147 Wn. App. 365, 373-74 198 P.3d 1033 (2008) (UDJA barred Bainbridge Citizens United's action against the DNR to require it to enforce its own regulations against alleged trespassing on state-owned aquatic lands because plaintiffs failed to join the alleged trespassers in a case that would "necessarily affect[ ] the [alleged trespassers'] interest in property ownership and use").

As in *North Quinault Properties*, Makah is asserting rights that, if recognized by this Court, would violate absent tribes' treaty rights. Thus, the UDJA requires joinder of the Amici Tribes, which their sovereign immunity prevents. The proper remedy is therefore dismissal of this case.

V. CONCLUSION

The Amici Tribes are necessary parties whose treaty hunting rights will be diminished and prejudiced by a ruling in favor of Makah in this case. Because Amici Tribes are indispensable under CR 19 and required—but unable—to be joined under the UDJA, this Court should remand this case for dismissal.

Respectfully submitted this 10th day of September, 2020.

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DECLARATION OF SERVICE

I, Sandra D. Lonon, declare under penalty of perjury under the laws of the State of Washington that I am now and at all times mentioned herein, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On September 10, 2020, I caused to be served in the manner noted copies of the foregoing through the Court's electronic court filing upon the designated parties below:

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