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IN THE SAUK-SUIATTLE TRIBAL COURT SAUK-SUIATTLE TRIBAL COURT
COURT CLERK

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3 Sauk-Suiattle Indian Tribe

) Case No. SAU-CIV-01/22-001

4
5 v.

) CITY OF SEATTLE'S MOTION TO DISMISS

6 City of Seattle

) NOTE for MOTION CALENDAR by Court
) Clerk

8
9 **I. Introduction**

10 1. Defendant The City of Seattle (the "City") seeks dismissal of this action. On
11 January 6, 2022, the Sauk-Suiattle Indian Tribe (the "Tribe" or "Sauk-Suiattle") initiated this
12 matter seeking declaratory relief against the City.¹ The Tribe's complaint concerns the
13 City's operation of the Skagit River Hydroelectric Project (the "Project") and the alleged
14 effects of its dams, reservoirs and generating facilities (collectively the "Project Dams") *inter*
15 *alia*, Sauk-Suiattle's usufructuary treaty fishing rights. Tribal courts have limited adjudicatory
16 authority. Further, federal law provides clear limits to tribal court authority over non-
17 member activity; tribal courts have no authority to regulate the conduct of nonmembers,
18 such as the City, that occurs outside the boundaries of the tribe's reservation, such as the
19 City's operation of the Project Dams in full compliance with its Federal Energy Regulatory
20 Commission ("FERC") license. Because the Tribe's complaint alleges injury from nonmember
21 activity off the reservation, this matter should be dismissed due to lack of jurisdiction.
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25 ¹ On January 18, 2022, the Tribe filed an Amended Civil Complaint for Declaratory Judgment. The substantive allegations raised in the Amended Complaint are substantially similar as those raised in the initial Complaint.

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II. Factual Background

A. Historic and Procedural Background of the Project

2. The Project Dams are located on the Skagit River in Whatcom County, Washington, and are not located on Sauk-Suiattle Reservation land or fee lands within the Sauk-Suiattle Reservation. See Order Accepting Settlement Agreement, Issuing New License, and Terminating Proceeding, 71 FERC 61,159 ¶ 61,552 (May 16, 1995), 1995 WL 301337 (“1995 Relicensing Order”).^{2,3}

3. In 1927, FERC’s predecessor agency, the Federal Power Commission, licensed the Project for 50 years. See Federal Power Commission, License on Government Lands, Project No. 553, Washington, City of Seattle (Oct. 28, 1927). (“1927 License”)⁴; *see also*, 1995 Relicensing Order at 61,527. The Tribe has availed itself of FERC’s pervasive authority over the Project since at least 1978, entering into a 1981 settlement agreement with the City that established a flow regime and required flow-related fishery studies. Order Conditionally Approving Interim Offer of Settlement, 15 FERC 61,144 at 61,329 (May 12, 1981), 1981 WL 35104.⁵ The Tribe expressly accepted the conditions that FERC imposed on its approval of

² Exhibit A at A-7.

³ Furthermore, the Project Dams are not located on any of the water bodies where the Tribe has adjudicated treaty fishing rights. *See United States v. Washington (Boldt Decree)*, 384 F. Supp. 312, 376 (W.D. Wash. 1974) (determining that the Tribe’s usual and accustomed fishing places “included Sauk River, Cascade River, Suiattle River, and the following creeks which are tributary to the Sauk River—Big Creek, Texas Creek, Buck Creek, Lime Creek, Sulphur Creek, Downey Creek, Straight Creek, and Milk Creek,” as well as “Bedal Creek, tributary to the Sauk River”); *see also* Order on Pending Motions at 9-13, *United States v. Washington*, No. C70-9213 RSM, ECF (W.D. Wash. Oct. 26, 2021) (determining that the Skagit River is “unambiguously” and “intentionally” omitted from the list of the Sauk-Suiattle’s usual and accustomed fishing places.) (*Sauk-Suiattle Sub-proceeding*).

⁴ Exhibit B at B-7

⁵ Exhibit C at C-2, C-3.

1 the settlement. Order Declaring Interim Settlement Effective and Partially Releasing a
2 Condition, 16 FERC 61,044 at 61,078 (July 24, 1981), 1981 WL 33308.⁶

3 4. Approximately ten years later, in the proceedings on the City's application for
4 a new license to replace the expired 1927 license, the City, the Tribe and others reached
5 multiple settlement agreements, resolving "all issues related to the [P]roject's operation[s],
6 fisheries, wildlife, recreation and aesthetics, erosion control, archaeological and cultural
7 resources and traditional cultural properties." 1995 Relicensing Order at 61,529.⁷ The Tribe
8 signed onto the over-arching Offer of Settlement and the Fisheries Settlement Agreement
9 (the "Fisheries Settlement Agreement"). *Id.* at 61,529.⁸; *see also*, Offer of Settlement at 1,
10 Skagit River Hydroelectric Project No. 533, Dkt. No. EL-78-36 (FERC 1991) (attached hereto as
11 Exhibit E).⁹ The Fisheries Settlement Agreement established the City's "obligations relating
12 to fishery resources affected by the [P]roject, including numerous provisions to protect
13 resident and migratory fish species." *Id.* at 61,530.¹⁰ FERC adopted the Fisheries Settlement
14 Agreement through the 1995 Relicensing Order, which authorized maintenance and
15 operation of the Project for another 30 years. *See id.* at 61,532.¹¹ For the duration of the
16 license, the Fisheries Settlement Agreement "establishes [the City's] obligations relating to
17 the fishery resources affected by the [P]roject." *Id.* at 61,530, 61,532.¹²

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23 ⁶ Exhibit D at D-2.

24 ⁷ Exhibit A at A-4.

25 ⁸ Exhibit A at A-4.

⁹ Exhibit E at E-311.

¹⁰ Exhibit A at A-9.

¹¹ Exhibit A at A-27.

¹² Exhibit A at A-9.

1 5. The Secretaries of Commerce and the Interior were mandatory participants in
2 the 1995 Relicensing proceeding and could have required that the 1995 license include
3 construction, maintenance and operation of fish passage. However, those agencies chose
4 not to require fish passage. Instead, they, “along with” other settling parties, including the
5 Tribe, concurred “all issues concerning environmental impacts from relicensing of the
6 Project, as currently constructed are satisfactorily resolved[.]” *Id.* at 61,535.¹³ FERC,
7 therefore, did not require the City to construct and operate fish passage at the Project,
8 though FERC reserved its “authority to require fish passage in the future, should
9 circumstances warrant” and “after notice and opportunity for hearing.” *Id.* at 61,535 n. 28.¹⁴
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11 6. The 1995 Relicensing Order provided the City with a 30-year license to
12 operate the Project. That license will expire in 2025. Since 2020, the City has been engaging
13 in a multi-year FERC process to obtain a new license to operate the Project. *See*, Seattle City
14 Light; Notice of Intent to File License Application, Filing of Pre-Application Document. 85 FR
15 39896 (July 2, 2020). Numerous federal and state resource agencies, affected Tribes
16 (including Sauk-Suiattle), and interested parties are actively involved and again, fisheries
17 issues are an important part of the process. *See*, Study Plan Determination for the Skagit
18 River Hydroelectric Project, dated July 16, 2021 (“Study Plan Determination”).¹⁵ The Tribe
19 commented on several aspects of the proposed study plan (*id.* at 1, 2, B-3, B-5, B-30), and
20 the plan includes a study of the feasibility of fish passage at the Project. *Id.* at A-1- A-4.
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24 ¹³ Exhibit A at A-20.

25 ¹⁴ Exhibit A at A-20. In 2011, the Tribe, the City and other Parties to the 1995 Fisheries Settlement Agreement revised it, but again did not require fish passage. *See*, Revised Fisheries Settlement Agreement, Skagit River Hydroelectric Project, FERC No. 553, at 2 (Jan. 2011) (attached hereto as Exhibit F).

¹⁵ Exhibit G at G-1, G-10, G-12, G-37.

1 **B. The Tribe’s Complaint**

2 7. The Tribe’s Complaint contains four claims.¹⁶ *See* Complaint, 14-15. First, the
3 Tribe claims that the City as violated the Treaty-based usufructuary property interests of the
4 Tribe and its members in contravention of the 1855 Treaty of Point Elliott (“Point Elliott
5 Treaty”). *Id.* at 14. Second, the Tribe argues that the City’s “blockage of water” constitutes
6 an “arbitrary and capricious seizure” of salmon habitat and the Tribe’s water property rights
7 in violation of the Fourth Amendment of the United States Constitution. *Id.* at 14-15. Third,
8 the Tribe argues that the City’s operation of the Project Dams has infringed upon its
9 members’ “religious and cultural practices” that are protected by the Treaty of Point Elliott,
10 the federal American Indian Religious Freedom Act and the First Amendment of the United
11 States Constitution. *Id.* at 15. Fourth, the Tribe argues that the City’s alleged disclaiming of
12 exclusive responsibility for salmon decline has “direct and proximate results of citizens
13 placing the blame” on the Tribe, which constitutes fraud and intentional or negligent
14 inflection of emotional distress. *Id.*

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17 8. The Tribe asserted this Court has jurisdiction under the “inherent tribal
18 sovereignty of the Sauk-Suiattle Indian Tribe, the Constitution and Bylaws of the Sauk-
19 Suiattle Tribe Indian Tribe, the Law and Order Code of the Sauk-Suiattle Tribe, *Montana v.*
20 *United States*, 450 U.S. 544 (1981) and the natural laws of the Sauk-Suiattle Indian Tribe.” *Id.*
21 at 10.
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24 ¹⁶ It appears that the allegations in the Complaint are asserted on behalf of the Tribe, unnamed members of
25 the Sauk-Suiattle Tribe and other, unspecified Lushootseed and Sakhumehu Peoples. This Motion is directed at
the interests and authority of the Sauk-Suiattle Indian Tribe and its Tribal Court, the federally recognized Indian
Tribe, as it appears at 85 FR 5462 (Jan. 20, 2020). The City cannot reasonably ascertain potential standing for
other entities/potential parties that the Tribe references in the Complaint.

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III. Argument and Authority

A. Legal Standard for Motion to Dismiss from Tribal Court

9. The burden of proving jurisdiction rests with the party that asserts it.

Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). When a plaintiff seeks to litigate a claim in tribal court, the plaintiff must prove the tribal court has jurisdiction over nonmembers under the *Montana* Doctrine and other applicable tribal law. *See also*, *Skokomish Indian Tribe v. John Smith*, 9 NICS App. 33 (Oct. 2009).

10. "Exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes and so cannot survive without express congressional delegation," *Montana* at 450 U.S. 544, 564 (1981) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Williams v. Lee*, 358 U.S. 217 (1959)). Tribal courts have no adjudicatory authority over non-member activity, particularly if that conduct occurs on land outside the exterior boundaries of the Tribe's reservation. *Montana v. United States*, 450 U.S. 544, 565 (1981).

11. The Sauk-Suiattle Tribal Law and Order Code includes a jurisdictional statement for the Tribal Court:

Section 2.020 Tribal Court – Jurisdiction

The territorial jurisdiction of the Sauk-Suiattle Tribal Court shall extend to all territory in which the Sauk-Suiattle Indian Tribe has a beneficial interest, including but not limited to, the Sauk-Suiattle Indian Reservation, all usual and accustomed fishing grounds and stations, and any other lands or areas which may be acquired for or held in the name of the Sauk-Suiattle Indian Tribe.

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The subject matter jurisdiction of the Sauk-Suiattle Indian Tribal Court shall extend to all matters of law and equity, whether civil or criminal in nature, arising under the laws of the Sauk-Suiattle Indian Tribe.

The personal jurisdiction of the Sauk-Suiattle Tribal Court shall extend to all persons over whom the Sauk-Suiattle Indian Tribe exerts jurisdiction, to the fullest extent permissible under applicable law.

B. There is no tribal court jurisdiction under Sec. 2.020 of the Sauk-Suiattle Law & Order Code

12. Section 2.020 of the Sauk-Suiattle Tribal Code establishes tribal court jurisdiction over matters only when all three elements of jurisdiction are met: territorial jurisdiction, subject matter jurisdiction and personal jurisdiction. However, tribal jurisdiction over non-members is ultimately a question of federal law.¹⁷

1. The Tribal Court lacks subject matter and personal jurisdiction over the City “under applicable law”

13. Both subject matter and personal jurisdiction are requirements for any court to adjudicate a matter presented to it; tribal courts included. Section 2.020 contains a self-limiting term to tribal court personal jurisdiction: “to the fullest extent permissible under applicable law.” Federal case law addressing tribal court authority over nonmembers is “applicable law” this Court must evaluate when determining jurisdiction under Sec. 2.020. Section 2.020 also addresses tribal court subject matter jurisdiction with a catch all provision

¹⁷ In spite of the plain text of the Tribal Code, under well-established federal precedent, Tribal Court lacks jurisdiction over non-member activity on the Suak-Suiattle Reservation unless one of the two exceptions of the *Montana Doctrine* apply. See, *infra*.

1 for "all matters...arising under the laws of the Sauk Suiattle Indian Tribe." (emphasis added).

2 The federal case law addressing tribal court jurisdiction generally addresses subject matter
3 and personal jurisdiction in a consolidated fashion. The federal case law analysis addresses
4 the limits of both subject matter and personal jurisdiction over nonmembers, like the City.

5 14. Personal jurisdiction is generally understood as the requirement that a
6 specific court has power over a defendant, often based on minimum contact with the forum.
7 Tribal courts have been recognized to have personal jurisdiction over claims that arise from
8 tribal member conduct that occurs on a tribe's reservation that implicate the tribe's
9 interests. *See Williams v. Lee*, 358 U.S. 217, 223 (1959). But tribal court personal jurisdiction
10 is limited: tribes do not have authority to regulate the conduct of nonmembers, particularly
11 if that conduct occurs on land that is outside the boundaries of the tribe's reservation or on
12 land that is within the exterior boundaries of the reservation but held in fee. *See Montana*,
13 450 U.S. at 565; *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327
14 (2008) (noting that the "sovereignty that the Indian tribes retain is of a unique and limited
15 character" that "centers on the land held by the tribe and on tribal members within the
16 reservation" (internal citations and quotation marks omitted)).

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19 15. Federal case law has determined that inherent tribal personal jurisdiction
20 "do[es] not extend to the activities of non-members of the tribe," *Montana*, 450 U.S. at 565,
21 and is "cabined by geography: [t]he jurisdiction of tribal courts *does not extend beyond tribal*
22 *boundaries.*" *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 938 (9th Cir.
23 2009) (emphasis added) (citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 657 n. 12
24 (2001)). Further, applicable federal case law determines that a tribe's regulatory jurisdiction
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1 dictates the outer limits of its tribal court's adjudicatory authority. *See Strate v. A-1*
2 *Contractors*, 520 U.S. 438, 453 (1997). *Montana's* "delineation of members and
3 nonmembers, tribal land and non-Indian fee land, stemmed from the dependent nature of
4 tribal sovereignty" describing the link between the location factor and the extent of a tribal
5 court's civil jurisdiction. *Atkinson Trading Co.*, 532 U.S. at 647, 650.

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7 16. In an effort to meet the requirement for subject matter jurisdiction, the
8 Tribe's Complaint implies that the Tribe has usufructuary property interests in "wild plants
9 and animals," which would include the salmon upon which the Complaint is predicated.
10 While the Complaint is not explicit, the Tribe may be arguing that, by extension, the tribal
11 court would have regulatory or adjudicatory authority in its usual and accustomed fishing
12 grounds over nonmembers on the theory that the Tribe has property interest/s in the
13 salmon. Again, the Complaint is not explicit, but the articulation of the property interest/s in
14 the salmon might be an attempt to establish subject matter jurisdiction, "under the laws of
15 the Sauk Suiattle Indian Tribe." Property interests can be elements to the subject matter
16 jurisdiction analysis because an alleged injury to plaintiff's property interest due to
17 defendant's conduct could confer subject matter jurisdiction, provided the court has
18 jurisdiction over the property interest at hand. However, applicable federal case law
19 establishes that a tribe's interest in off-reservation property alone is insufficient to satisfy
20 the jurisdiction requirements set forth by *Montana* and subsequent cases. Furthermore, the
21 Tribe is misdirected in its articulation of the extent of any usufructuary property right/s.
22 Article 5 of the Treaty of Point Elliott provides a Treaty-based usufructuary right "of taking
23 fishing at usual and accustomed grounds" and not a property interest in the fish runs within
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1 any usual and accustomed fishing area. See *Nez Perce Tribe v. Idaho Power Company*, 847 F.
2 Supp. 791 (D. Idaho 1994) (citing *Washington v. Washington State Commercial Passenger*
3 *Fishing Vessel Ass'n*, 443 U.S. 658 (1979)). Under “applicable law” the Tribe does not have a
4 blanket property right *in fish* throughout the entire Skagit River Basin and thus, cannot
5 predicate subject matter jurisdiction upon a generalized interest in the well-being of the
6 species/es.

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8 17. In addition, the Tribe’s Complaint asserts an unspecified claim under a Federal
9 statute, the American Religious Freedom Act. 42 U.S.C. § 1942. In *Seven Arrows L.L.C. and*
10 *Grand Casinos, Inc. v. Tulalip Tribes of Washington*, the Tulalip Tribal Court of Appeals ruled
11 that, “[a]bsent legislative directive the Court of Appeals will not adopt federal law...” No.
12 TUL-CI-4/96-499/5 NICS App. 6 (July 14, 1997), see also, *Nevada v. Hicks* 533 U.S. at 368;
13 *King Mountain Tobacco Co.*, 569 F.3d at 944. Nothing in the American Indian Religious
14 Freedom Act suggests that it was intended by Congress to expand tribal subject jurisdiction
15 for enforcement of the federal statute. Here, the Tribe is asking this Court to adopt federal
16 statutory law and assign potential liability under the United States Code. There is not
17 “applicable law” to confer subject matter jurisdiction on this Court for purposes of this
18 federal statute.¹⁸

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20 18. Here, the City’s alleged conduct and its Project Dams are unequivocally
21 beyond the exterior boundaries of the Tribe’s reservation and there is no Tribal Court
22 subject matter or personal jurisdiction. Consequently, the allegations in the Complaint are
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25 ¹⁸ Further, the American Indian Religious Freedom Act provides for enforcement under the process outlined in the U.S. Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* Under the Civil Rights Act, aggrieved parties may file administrative complaints with federal agencies or file suit for appropriate relief in federal court.

1 outside the regulatory and adjudicatory jurisdiction of this Court by function of “applicable
2 law.”¹⁹

3 **2. The Tribal Court lacks territorial jurisdiction over the City because the alleged**
4 **conduct did not occur on the Sauk-Suiattle Reservation, any usual and accustomed**
5 **fishing grounds or any other lands held in the name of the Tribe.**

6 19. The Sauk-Suiattle Tribal Law and Order Code Sec. 2.020 delineates the
7 territorial jurisdiction for the Tribal Court. There is no basis for tribal court territorial
8 jurisdiction over the City under tribal law. The Tribe’s Complaint fails to articulate any
9 alleged actions of the City that occur either on the Sauk-Suiattle Indian Reservation or usual
10 and accustomed fishing grounds and stations adjudicated for the Tribe’s use. Section 2.020
11 also seeks to apply tribal court jurisdiction over “all territory in which the Sauk-Suiattle Tribe
12 has a beneficial interest.” While the City does not concede that any sort of beneficial interest
13 would be sufficient to territorial jurisdiction, the Tribe’s Complaint makes no allegation of
14 City activity upon any such land.

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16 20. The Tribe’s reservation is located on approximately 23 acres in Skagit and
17 Snohomish counties. *See*, U.S. Census Bureau, 2020 Census- Tribal Tract Map: Sauk-Suiattle
18 Reservation (Jun. 14, 2021)²⁰; *see also*, Statement of the Honorable Janice Mabee, Chairman
19 of the Sauk-Suiattle Indian Tribe, H.R. 3697 and H.R. 3742, To Amend the Act of June 18,
20 1934 to Reaffirm the Authority of the Secretary of the Interior to Take Land Into Trust for
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24 ¹⁹ Further, a prerequisite to filing suit against the City, Plaintiffs are required to file a Claim for Damages with
25 the City under RCW 4.96.020 and SMC 5.24.005. The Tribe did not file a claim under either Washington’s or
Seattle’s claims filing statutes. The City does not waive any claims associated with these jurisdictional issues for
legal review of tort claims against the City.

²⁰See, https://www2.census.gov/geo/maps/DC2020/TribalTract/r3625_sauk-suiattle/DC20TT_FR3625.pdf

1 Indian Tribes (2009) (“In 1982, two small parcels of land totaling about 23 acres were taken
2 into trust for the Tribe and designated as our Reservation.”).

3 21. The Project Dams are all located on the portion of the Skagit River in
4 Whatcom County. *See*, 1995 Relicensing Order at 61,528. The Tribe has not asserted any
5 overlap of the Project Dams and the Tribe’s reservation or usual and accustomed fishing
6 places.

7 22. As recently as October 2021, the Tribe litigated the scope of its usual and
8 accustomed fishing grounds and stations. *See*, *Sauk-Suiattle Sub-proceeding*. That sub-
9 proceeding includes a definitive statement that the Skagit River was “unambiguously” and
10 “intentionally” omitted from the list of Sauk-Suaittle’s usual and accustomed fishing grounds
11 and stations in the *Boldt Decree*. The Project Dams are not located within the Tribe’s
12 adjudicated usual and accustomed fishing grounds and stations.

13 23. The Complaint describes “homelands” and “1855 Treaty Ceded Territory” but
14 does not use the terms “usual and accustomed fishing grounds and stations” or other terms
15 used in Sec. 2.020 to describe this Court’s territorial jurisdiction. *See*, Complaint at 5 and 15.
16 At no point are terms like “homeland” or “1855 Treaty Ceded Territory” defined in the
17 Complaint or in Sauk-Suiattle Tribal law. The Complaint does not allege any specific City
18 action within the exterior boundaries of the Sauk-Suiattle Indian Reservation nor any specific
19 City action within the Tribe’s usual and accustomed fishing grounds and stations. The Tribe
20 cannot predicate this Court’s territorial jurisdiction on unidentified territory by using vague
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1 terms to avoid the factual context of its adjudicated usual and accustomed fishing grounds
2 and stations.²¹

3 24. Because the Project Dams are located off the Tribe's reservation and outside
4 the Tribe's usual and accustomed fishing grounds and stations, there is no basis for tribal
5 court territorial jurisdiction over the City under Sec. 2.020.

6 **C. Because of the City's nonmember status, there is a legal presumption against tribal**
7 **court jurisdiction under the *Montana* Doctrine.**

8 25. In *Montana*, the U.S. Supreme Court established two narrow exceptions to its
9 general rule that tribes do not have regulatory jurisdiction over nonmembers. *Montana*, 450
10 U.S. at 565-66. First, it noted that "the tribe may regulate ... the activities of nonmembers
11 who enter consensual relationships with the tribe or its members." *Id.* at 565. Second, under
12 *Montana*, tribes may regulate "the conduct of [nonmembers] on fee lands within its
13 reservation when that conduct threatens or has some *direct effect* on the political integrity,
14 the economic security, or the health and welfare of the tribe." *Id.* at 566. (emphasis added).

15 26. To fit within one of these two narrow exceptions, "[t]ribal assertion of
16 regulatory authority over non-members must be connected to that right of the Indians to
17 make their own laws and be governed by them." *Nevada*, 533 U.S. at 453. "[E]fforts by a
18 tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively
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23 ²¹ Again, the City does not concede that the Tribal Court can exercise jurisdiction over nonmembers and their
24 conduct in usual and accustomed fishing grounds and stations. By definition, a tribe's usual and accustomed
25 fishing grounds and stations are off-reservation, and federal law provides that tribal courts cannot exercise
jurisdiction over nonmembers outside the boundaries of a tribe's reservation. *See, Boldt Decree*, 384 F.Supp. at
332 ("The Findings of Fact set forth the treaties under which each tribe, or its predecessors, negotiated with
the United States, and in which the Indians expressly reserved the right to fish off reservation at usual and
accustomed fishing places.").

1 invalid.” *Plains Commerce Bank*, 554 U.S. at 330. “The burden rests on the tribe to establish
2 one of the exceptions to *Montana’s* general rule ..., [which] are ‘limited’ ones, and cannot be
3 construed in a manner that would ‘swallow the rule,’ or ‘severely shrink’ it.” *Id.* (citations
4 omitted).

5 27. While the City denies that any of its actions or the Project Dams are located
6 within the boundaries of the Sauk-Suiattle Reservation, which would be a prerequisite to the
7 Tribal Court determining whether it may exercise jurisdiction over the non-member City
8 under one of the two *Montana* exceptions, the City also rejects that either *Montana*
9 exception could apply.
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11 **1. There is no consensual relationship between the City and Sauk-Suiattle that**
12 **constitutes consent to the Tribal Court’s adjudicatory jurisdiction.**

13 28. Under *Montana*, tribal courts may “regulate...the activities of nonmembers
14 who enter consensual relationships with the tribe or its members.” *Montana* 450 U.S. at
15 565. But the relationship triggering tribal court authority cannot be any type of consensual
16 relationship between the parties; there must be some nexus between the relationship and
17 the nonmember’s conduct at issue. *See King Mountain Tobacco Co.*, 569 F.3d at 941-42
18 (noting that “[a] nonmember’s consensual relationship in one area ... does not trigger tribal
19 civil authority in another”); *Crowe v. Dunlevy P.C. v. Stidham*, 640 F.3d 1140, 1152 (10th Cir.
20 2011) (noting that, for the consensual relationship exception to apply, “the dispute before
21 the tribal court must arise directly out of that consensual relationship”).
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24 29. Here, there is no consensual relationship between the City and the Tribe that
25 would be “of the qualifying kind” contemplated in *Montana* to submit the City to tribal court

1 jurisdiction. At no point did the City enter into an agreement, accord or contract with the
2 Tribe related to the operation of the Project Dams, and that consented to tribal court
3 jurisdiction, that could be the nexus for which this Court could reasonably assert its
4 adjudicatory authority under *Montana*. Furthermore, the Tribe has no inherent authority to
5 regulate the off-reservation conduct of nonmembers that may affect its off-reservation
6 fishing rights.

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8 **2. The City's alleged conduct does not threaten nor have any direct effect on the
Tribe's political integrity, economic security or health and welfare.**

9 30. The second exception of *Montana* recognizes tribal government authority to
10 regulate the conduct of nonmembers "on fee lands within its reservation when that conduct
11 threatens or has some direct effect on the political integrity, the economic security or the
12 health and welfare of the tribe." *Montana*, 450 U.S. at 566. Under this exception, "[f]or a
13 tribe to have authority over such nonmember conduct, [t]he conduct of must do more than
14 injure the tribe, it must 'imperil the subsistence of the tribal community.'" *Evans v.*
15 *Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1306 (9th Cir. 2013) (quoting
16 *Plains Commerce Bank*, 554 U.S. at 341).

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18 31. Courts have acknowledged that "[t]o some extent, it can be argued that torts
19 committed by or against Indians on Indian land always 'threaten or ha[ve] some direct effect
20 on the political integrity, the economic security or the health or welfare of the tribe.'" *King*
21 *Mountain Tobacco Co.*, 569 F.3d at 943 (quoting *Montana*, 450 U.S. at 566); accord *Strate*,
22 520 U.S. at 457-58. But in the context of tribal court jurisdiction over nonmembers, it is a
23 narrow acknowledgment. For example, in *Strate*, the U.S. Supreme Court observed that
24 while "[u]ndoubtedly, those who drive carelessly on a public highway running through a
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1 reservation endanger all in the vicinity, and surely jeopardize the safety of tribal
2 members...[,] if *Montana's* second exception requires no more, the exceptions would
3 severely shrink the rule." 520 U.S. at 457-58. "The second exception envisions situations
4 where the conduct of the nonmember poses a *direct* threat to tribal sovereignty," not a
5 "generalized threat that torts by or against its members pose for any society." *King*
6 *Mountain Tobacco Co.*, 569 F.3d at 943.

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8 32. The Tribe's Complaint attempts to frame a handful of alleged indirect
9 downstream effects of the Project Dams, including some "bullying" actions by unnamed
10 third parties, as the City's infringement of the Tribe's civil rights under the Federal
11 Constitution and treaty-reserved usufructuary treaty rights. See Complaint at pg. 13 ¶¶6.1-
12 6.J. The Project Dams' alleged direct and indirect effects are off-reservation, and
13 furthermore, are not sufficient to confer adjudicatory authority when the source of the
14 effects does not directly affect "political integrity, the economic security, or the health and
15 welfare of the tribe." *Montana*, U.S. 450 at 566.

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17 33. The City recognizes and does not dispute the importance of the salmon
18 fisheries and the existence of the species to, among other things, the worldview, culture and
19 livelihood of the Tribe and its tribal members. However, the City's operation of the Project in
20 compliance with its FERC license does not, even if true, directly affect the Tribe's "political
21 integrity, the economic security, or the health and welfare of the tribe" in any "catastrophic"
22 manner that is required under *Montana's* second exception. The U.S. Supreme Court
23 clarified that this exception "does not permit the exercise of civil authority [over
24 nonmembers] whenever it might be considered 'necessary' to self-government." *Atkinson*
25

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1 *Trading Co.*, 532 U.S. at 657 f. 12. “[U]nless the drain of the non-member’s conduct upon
2 tribal services and resources is *so severe* that it actually ‘imperils’ the political integrity of the
3 Indian tribe, there can be no assertion of civil authority beyond tribal lands.” *Id.* (emphasis
4 added).

5 34. While the City does not concede that any of its actions or the Project Dams
6 are within the boundaries of the Sauk-Suiattle Reservation, therefore precluding tribal court
7 jurisdiction, the Tribe also has not asserted any impairments to the political integrity of the
8 Tribe. Therefore, the second *Montana* exception does not apply, and the Tribal Court cannot
9 assert jurisdiction over the City in this matter.
10

11 **IV. Conclusion**

12 35. The City respectfully requests this Motion be granted.

13 Dated this 4th day of February, 2022.

14 

15 _____
16 Diana R. Bob/WSBA No. 37405
17 Attorney for City of Seattle
18 Member of Sauk-Suiattle Tribal Bar

19 **CERTIFICATE OF SERVICE**

20 I hereby certify that a copy of this Motion to Dismiss and an email link to an FTP Site with Exs. A-G
21 were served by Electronic Mail this 4th day of February 2022 to:

22 -Jack Fiander, Attorney for Sauk-Suiattle Tribe

23 

24 _____
25 Diana R. Bob