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*Of Attorneys for Defendant Raymond James Native  
American Housing Opportunities Fund II, L.L.C.*

The Honorable Ricardo S. Martinez

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MATTHEW LEWIS, d/b/a U S FINISH,  
Plaintiff,

v.

RAYMOND JAMES NATIVE AMERICAN  
HOUSING OPPORTUNITIES FUND II,  
L.L.C., a Delaware Limited Liability Company

Defendant.

Civil Case No. 2:11-cv-01596-RSM

**MOTION TO DISMISS OF  
DEFENDANT RAYMOND JAMES  
NATIVE AMERICAN HOUSING  
OPPORTUNITIES FUND II L.L.C.  
PURSUANT TO RULE 12(b)(1) and  
12(b)(7)**

NOTE ON MOTION CALENDAR:  
NOVEMBER 25, 2011

(ORAL ARGUMENT REQUESTED)

Defendant Raymond James Native American Housing Opportunities Fund II L.L.C. (“**Fund**”) respectfully submits this Motion to Dismiss the Complaint as to the Fund pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and Fed. R. Civ. P. 12(b)(7) for failure to join necessary and indispensable parties under Fed. R. Civ. P. 19. Previously, on August 31, 2011, the state court dismissed Defendants Tulalip Housing Limited Partnership #3 (“**Limited Partnership**”), Michael Alva, Patti Gobin, and Charles James pursuant to CR 12(b)(1) for lack of subject matter jurisdiction under CR 82.5(a) and pursuant to CR 12(b)(7) for failure to join a

1 necessary and indispensable party under CR 19.

2 **I. SUMMARY OF KEY FACTS**

3 Plaintiff Matthew Lewis, d/b/a U S Finish (“**Plaintiff**”) filed a lawsuit seeking to collect  
 4 over \$1.7 million allegedly owed for construction work performed on a 66-unit low income housing  
 5 project located on the Tulalip Tribes reservation in Tulalip, Washington (“**Project**”). Despite  
 6 having no contractual relationship or dealings directly with the Fund, Plaintiff asserts unjust  
 7 enrichment and quantum merit claims against the Fund based on the Fund’s receipt of federal low  
 8 income housing tax credits. *See*, Complaint ¶4.3 (Notice of Removal (dkt #1), Ex. 1). However,  
 9 this Court lacks subject matter jurisdiction because, pursuant to CR 82.5(a), the Tulalip Tribal  
 10 Court has exclusive jurisdiction over Plaintiff’s claims. Alternatively, the Tulalip Tribal Court has  
 11 concurrent jurisdiction over this matter such that it should be dismissed pursuant to CR 82.5(b) in  
 12 order to be heard in the Tulalip Tribal Court.

13 Additionally, the Tulalip Tribes of the Tulalip Reservation (“**Tulalip Tribes**” or “**the**  
 14 **Tribes**”) is a necessary and indispensable party to this litigation under Fed. R. Civ. P. 19 as it is the  
 15 other party to the two subcontracts under which Plaintiff claims payment. The Tulalip Tribes is the  
 16 general contractor (through its Housing Department) under these two subcontracts with Plaintiff.  
 17 The two equity claims asserted by Plaintiff in this case against the Fund cannot be resolved without  
 18 examination and interpretation of the Plaintiff’s two subcontracts with the Tulalip Tribes; the work  
 19 performed by Plaintiff thereunder and whether it conforms with the Project plans and  
 20 specifications; whether payments are due to Plaintiff thereunder; and whether the Fund has been  
 21 unjustly enriched on the Project. Moreover, as the General Partner in the Limited Partnership, the  
 22 Tulalip Tribes is liable under RCW 25.10.401(1) for the Limited Partnership obligations, if any,  
 23 under the two equity theories asserted by Plaintiff.<sup>1</sup> However, since the Tulalip Tribes is a  
 24 sovereign nation with sovereign immunity, it cannot be joined as a party in this action.

25 \_\_\_\_\_  
 26 <sup>1</sup> RCW 25.10.401(1) states:

Except as otherwise provided in subsections (2) and (3) of this section, all general partners are liable jointly and severally for all obligations of the limited partnership unless otherwise agreed by the

Further, the Limited Partnership is also a necessary and indispensable party under Fed. R. Civ. P. 19 since the construction contract for the Project is between the Limited Partnership and the Tulalip Tribes and, in turn, the Tulalip Tribes, as general contractor, entered into the two subcontracts with Plaintiff to complete this construction work. With the recent dismissal of the Limited Partnership from this matter by the Court on August 31, 2011, dismissal of the Fund is also warranted for the same reasons. Additionally, the Fund cannot represent the interests of the now dismissed Limited Partnership in this case as only the General Partner, the Tulalip Tribes, can so represent the Limited Partnership's interests. Therefore, the Court should grant the Fund's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(7).

## II. RELIEF REQUESTED

The Fund moves to dismiss all claims in the Complaint against it pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(7).

## III. STATEMENT OF FACTS

The Limited Partnership is a Washington limited partnership governed by an Amended and Restated Limited Partnership Agreement dated June 1, 2009 ("Limited Partnership Agreement"). *See*, Motion to Dismiss by Tulalip Housing Limited Partnership #3, Michael Alva and Patti Gobin husband and wife, and Charles James and Jane Doe James, husband and wife ("**Limited Partnership Motion to Dismiss**"), p. 2 (attached hereto as Exhibit 1); *see also*, Declaration of Ronald M. Diner in Support of the Fund's Rule 12(b)(2) and Rule 12(b)(6) Motions to Dismiss ("**Diner Decl.**"), ¶3 (attached hereto as Exhibit 2). The sole General Partner of the Limited Partnership is the Tulalip Tribes, a federally recognized Indian tribal government. Diner Decl. ¶3; Limited Partnership Motion to Dismiss, 2:20-21. The Fund is the sole Limited Partner of the Limited Partnership. Diner Decl. ¶3.

The Limited Partnership's purpose is to construct, own, operate, and maintain 66 housing units for low-income members of the Tulalip tribal community on land owned by the Tulalip Tribes

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claimant or provided by law."

(the “**Project**”). Diner Decl. ¶4; Limited Partnership Motion to Dismiss, 2:25-26. The Fund agreed to provide capital contributions to the Limited Partnership to construct the Project in exchange for the receipt of federal low-income housing tax credits that are allocated to the Limited Partnership from the Washington State Housing Finance Commission (“**Housing Commission**”). Diner Decl. ¶11; Limited Partnership Motion to Dismiss, 3:2-5. The Tulalip Tribes, as General Partner, also loaned the Limited Partnership funds to construct the Project and has guaranteed the tax credits allocated to the Fund, the completion of the construction of the Project, and to fund all operating deficits of the Limited Partnership. Limited Partnership Motion to Dismiss, 3:7-10. The Tulalip Tribes is also the general contractor for the construction of the Project and entered into a construction contract with the Limited Partnership for a fixed contract price of \$10,796,172. *Id.* at 3:10-12.

The Fund’s capital contributions to the Limited Partnership are contingent upon a certification by the Tulalip Tribes that there is no litigation pending against the Limited Partnership. *Id.* at 3:13-18. When the Tulalip Tribes submitted a certification that \$2,267,196.12 was due under its construction contract, the Tulalip Tribes also submitted a certificate to request a capital contribution from the Fund. *Id.* at 3:19-22. The Fund refused to make the capital contribution to the Limited Partnership because of a lawsuit Plaintiff had filed in the Tulalip Tribal Court. *Id.* at 3:22-24.

The Tulalip Tribes, through its Housing Department, entered into two subcontracts with Plaintiff for a total fixed price of \$8,369,927.92 for the construction of the Project. *Id.* at 4:2-4. Each subcontract includes a forum selection clause which states, “Disputes under this contract shall be resolved in the Tulalip Tribal Court.” *Id.* at 4:17-18. All administration of the subcontracts, including bookkeeping and payments, occurred on the Tulalip Tribes Reservation. *Id.* at 4:22-23. The subcontracts were negotiated and executed on the Tulalip Tribes’ Reservation. *Id.* at 4:4-6. Incorporated into each subcontract is a general condition of the contract for construction which states:

1 The tribal court or other tribal dispute resolution entity or mechanism of the tribe  
 2 having jurisdiction over the project shall have **exclusive jurisdiction over any**  
 3 **suit that may be filed relating to the contract**, provided that this designation  
 shall not be deemed to be a waiver of sovereign immunity of the OWNER.

4 *Id.* at 4:14-16 (emphasis added).

5 The Tulalip Tribes' architect reviewed the Project and provided a report to Mr. Michael  
 6 Alva, the executive director of the Tulalip Tribes Housing Department, on September 21, 2010  
 7 wherein the architect identified unauthorized changes and construction deficiencies in the  
 8 construction of the Project by Plaintiff. *Id.* at pp. 4-5. The architect concluded that Plaintiff's non-  
 9 compliance with the requirements of construction under the subcontracts resulted in costs of  
 10 \$781,858.82 and recommended a cost credit be issued to the Tulalip Tribes in this same amount.  
 11 *Id.* at 5:2-4. Further, the architect recommended withholding an additional sum of \$654,604.08, as  
 12 retention, until final acceptance of the Project (which has not occurred). *Id.* at 5:9-10. Plaintiff has  
 13 insisted on payment in full, and so refused to accept a partial payment of \$206,385.32 by the  
 14 Tulalip Tribes. *Id.* at 5:5-11.

15 On July 1, 2011, Plaintiff filed this instant suit against the Limited Partnership and the Fund,  
 16 among other defendants. Plaintiff asserted two causes of action against the Fund—one for unjust  
 17 enrichment and the other quantum meruit. *See*, Complaint, pp. 4-5. Plaintiff's two causes of action  
 18 against the Fund are based on the alleged benefit the Fund is receiving in the form of federal low-  
 19 income housing tax credits from Plaintiff's work on the Project.

20 On August 24, 2011, the Limited Partnership and individual defendants filed a Motion to  
 21 Dismiss pursuant to CR 12(b)(1) and CR 82.5(a), and CR 12(b)(7) and CR 19. The Limited  
 22 Partnership Motion to Dismiss argued that the Court did not have subject matter jurisdiction  
 23 because the Tulalip Tribal Court had exclusive jurisdiction under CR 82.5(a), which required  
 24 dismissal under CR 12(b)(1). Moreover, the Limited Partnership asserted that the Tulalip Tribes  
 25 was a necessary and indispensable party because of its role as General Partner of the Limited  
 26 Partnership and as general contractor that had subcontracted with Plaintiff, but that the Tulalip

1 Tribes could not be made a party in this matter because of its sovereign immunity. The state court  
 2 heard oral argument on August 31, 2011 and dismissed the Limited Partnership and the individual  
 3 defendants pursuant to CR 12(b)(1) as required under CR 82.5(a), and CR 12(b)(7) pursuant to CR  
 4 19.

#### 5 **IV. ARGUMENT**

##### 6 **A. The Court Lacks Subject Matter Jurisdiction Over the Claims Against the Fund**

###### 7 *1. Exclusive Jurisdiction of the Tulalip Tribal Court*

8 As argued in the Motion to Dismiss of the Limited Partnership (and as accepted by the state  
 9 court in its ruling of August 31, 2011), this Court lacks subject matter jurisdiction over this matter  
 10 because the Tulalip Tribal Court has exclusive jurisdiction. CR 82.5(a) requires a court to dismiss  
 11 an action for lack of subject matter jurisdiction if exclusive jurisdiction over a matter in controversy  
 12 has been reserved or granted to an Indian tribal court. To determine whether a tribal court has  
 13 jurisdiction over people not members of a tribe, a court must apply the test established in *Montana*  
 14 *v. United States*, 450 U.S. 544, 101 S.Ct 1245, 67 L.Ed. 493 (1981). *See, Rodriguez v. Wong*, 119  
 15 Wn. App. 636, 640 (2004); *see also, Cordova v. Holwegner*, 93 Wn. App. 955, 971 P.2d 531  
 16 (1999). A tribe will have jurisdiction over 1) non-tribal members “who enter into a consensual  
 17 relationship with the tribe or its members;” or 2) non-member conduct that “threatens or has some  
 18 direct effect on the political integrity, the economic security, or the health and welfare of the tribe,”  
 19 based on the tribe’s “inherent power” to regulate such matters. *Rodriguez*, 119 Wn. App. at 640.  
 20 Once jurisdiction over the person is established, that jurisdiction is considered exclusive to the tribe  
 21 if it is necessary “to protect tribal self-government or to control internal relations.” *Id.* at 643  
 22 (citing *Williams v. Lee*, 358 U.S. 217 (1959); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905) (“a  
 23 tribe has inherent authority to prescribe the terms upon which noncitizens may transact business  
 24 within its border”)). The jurisdiction of a tribal court is exclusive if the exercise of state court  
 25 jurisdiction would impermissibly infringe on tribal self-government. *Cordova*, 93 Wn. App. at 966.  
 26 That is the case here since, fundamentally, Plaintiff’s claim requires it to prove that it performed

1 authorized work on the Project that met the plans and specifications on the Project, so that Plaintiff  
 2 should be paid under the two subcontracts with the Tulalip Tribes. This is a matter involving  
 3 whether the Tulalip Tribes are required to pay Plaintiff the claim under the subcontracts, which  
 4 Plaintiff must first establish before it could ever proceed with its equity claims.

5 Both Washington and federal case law demonstrate that when a case involves the interests  
 6 of a tribe, exclusive jurisdiction lies with the tribal court. In *Rodriguez v. Wong*, the trial court  
 7 found that both prongs of the *Montana* ruling were met because the plaintiff had entered into a  
 8 “consensual relationship” with the tribe through his employment with the tribe and also because the  
 9 relationship fell within the tribe’s “inherent power” to regulate its relationship with employees. 119  
 10 Wn. App. at 641. The court then found that the tribe’s jurisdiction was exclusive because state  
 11 court assertion of jurisdiction would have “directly affect[ed] the tribe’s political integrity” by  
 12 requiring the tribe to either submit to state jurisdiction for its entire employment regime or else  
 13 adopt different standards for members and non-members. *Id.* at 643 (citation omitted).

14 Similarly, the Ninth Circuit has held that a tribal court had exclusive jurisdiction over a  
 15 dispute involving a contractor who sued a tribal housing authority in federal court after the housing  
 16 authority had obtained a writ of attachment in tribal court and had seized the contractor’s equipment  
 17 because of deficiencies in the contractor’s construction work for the tribe. *R.J. Williams Co. v. Fort*  
 18 *Belknap Housing Auth.*, 719 F.2d 979, 983 (9th Cir. 1983). In that case, the court held that the  
 19 tribal court had exclusive jurisdiction, explaining that a “tribal court is generally the exclusive  
 20 forum for the adjudication of disputes affecting the interests of both Indians and non-Indians which  
 21 arise on the reservation.” *Id.* at 983. The court stated that because the dispute between the  
 22 contractor and the tribal housing authority “calls into question the validity or propriety of an act  
 23 fairly attributable to the tribe as a governmental body, tribal self-government is drawn directly into  
 24 the controversy” and thus the tribal court has exclusive jurisdiction.” *Id.* at 983-84.

25 Here, Plaintiff entered into a “consensual relationship” with the Tulalip Tribes by entering  
 26 into and executing the two subcontracts (with the forum selection clause contained in each). Not



1 only did Plaintiff expressly consent to the exclusive jurisdiction of the Tulalip Tribal Court,  
2 Plaintiff contracted with the Tulalip Tribes, constructed housing on the Tulalip Tribes Reservation,  
3 which housing is available to members of the Tulalip Tribes, and the administration of the  
4 subcontracts occurred on the Tulalip Tribes Reservation. Moreover, the Tulalip Tribes faces  
5 substantial economic impacts because the Limited Partnership's withholding of the sum of  
6 \$2,267,196.12 is based on the litigation filed by Plaintiff in Tribal Court and on the architect's  
7 report and recommendation to the Tulalip Tribes to hold back payments because of the  
8 unauthorized changes and construction defects in the housing units caused by Plaintiff. *See*,  
9 Limited Partnership Motion to Dismiss, 4-5 and 9:10-12. Thus, the Tulalip Tribal Court,  
10 necessarily, has exclusive jurisdiction over this matter.

11 Furthermore, the Tulalip Tribal Court's jurisdiction over Plaintiff is exclusive because  
12 Plaintiff's dispute "calls into question the propriety of an act fairly attributable to the tribe as a  
13 governmental body." *R.J. Williams*, 719 F.2d at 983. Although Plaintiff asserts that its claims are  
14 equitable in nature (see generally, Plaintiff's Opposition to Limited Partnership Motion to Dismiss),  
15 Plaintiff's two claims against the Fund call into question the Tulalip Tribes' decisions regarding  
16 withholding payment to Plaintiff under the two subcontracts. Moreover, the Tulalip Tribes  
17 negotiated, executed, and administered the subcontracts on the Reservation; Plaintiff came on to the  
18 Tulalip Tribes' Reservation to perform all work under the subcontracts. The administration of the  
19 subcontracts all occurred on the Reservation. *See*, Limited Partnership Motion to Dismiss, 9:18-24.  
20 Thus, Washington state court jurisdiction would infringe on the Tulalip Tribes' self-government in  
21 adjudicating a dispute that necessarily involves the Project decisions by the Tulalip Tribes made  
22 through its housing authority, all of which requires Tribal Court adjudication in its contracts. *Id.* at  
23 pp. 9-10.

24 Exclusive jurisdiction in the Tulalip Tribal Court is warranted because Plaintiff meets both  
25 prongs for determining jurisdiction: 1) Plaintiff has entered into a "consensual relationship" with  
26 the Tulalip Tribes through its subcontracts and the work it performed on the Reservation; and 2) the



1 Tulalip Tribes faces an economic impact because whether Plaintiff's claim is due must be  
 2 determined under the two subcontracts and the Project plans and specifications which, in turn,  
 3 determines the obligation of the Tulalip Tribes to pay some or all of Plaintiff's claims or not. The  
 4 Tulalip Tribal Court's jurisdiction is exclusive because Plaintiff's claims directly involve the  
 5 Tulalip Tribes' decision to withhold payment to Plaintiff under the two subcontracts, and especially  
 6 given that the Tulalip Tribes negotiated, executed, and administered the subcontracts on the  
 7 Reservation. Pursuant to CR 82.5(a), the Court should dismiss the Fund from this action under Fed.  
 8 R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

9 *2. Concurrent Jurisdiction of the Tulalip Tribal Court*

10 Even assuming, without admitting, that the Tulalip Tribal Court does not have exclusive  
 11 jurisdiction, CR 82.5(b) still mandates that this case be heard in the Tulalip Tribal Court. Plaintiff's  
 12 claims in this case are simply an attempt to circumvent the forum selection clause in the two  
 13 subcontracts as both require: "Disputes under this contract shall be resolved in the Tulalip Tribal  
 14 Court." *See*, Limited Partnership Motion to Dismiss, 4:17-18. Here, instead of suing directly on  
 15 the subcontracts, Plaintiff's complaint in this case against the Fund asserts that an implied contract  
 16 existed between Plaintiff and the Fund, and/or that the Fund has been unjustly enriched. *See*  
 17 *generally*, Complaint, pp. 4-5.

18 However, the extent of Plaintiff's performance and whether Plaintiff is to be paid for its  
 19 performance requires examination of whether Plaintiff has complied with its the two subcontracts  
 20 with the Tulalip Tribes and complied with the applicable Project plans and specifications. All of  
 21 these matters are governed by the forum selection clause in the two subcontracts, which require the  
 22 Tulalip Tribal Court to decide them. Given that all of Plaintiff's dealings regarding construction of  
 23 the Project were with the Tulalip Tribes, and the outcome of this matter has a direct effect on the  
 24 Tulalip Tribes economic interests, it is apparent, when considering the "nature of the action [and]  
 25 the interests and identities of the parties" pursuant to CR 82.5(b), that these claims should be  
 26

litigated in the Tulalip Tribal Court. The Court should dismiss all claims against the Fund pursuant to Fed. R. Civ. P. 12(b)(1) pursuant to CR 82.5.

**B. The Tulalip Tribes and the Limited Partnership Are Each a Necessary and Indispensable Party in this Matter**

Under Fed. R. Civ. P. 12(b)(7), a court may dismiss an action for “failure to join a party under Rule 19.” Fed. R. Civ. P. 19 governs joinder of parties needed for adjudication and provides for dismissal where joinder of a necessary party is impossible. Where a party is necessary but impossible to join, it is deemed “indispensable.” The Ninth Circuit uses a three-step process for applying Rule 12(b)(7):

First, the court must determine whether a nonparty should be joined under Rule 19(a). We and other courts use the term “necessary” to describe those “[p]ersons to [b]e [j]oined if [f]easible.” Fed. R. Civ. P. 19(a).... If an absentee is a necessary party under Rule 19(a), the second stage is for the court to determine whether it is feasible to order that the absentee be joined. Rule 19(a) sets forth three circumstances in which joinder is not feasible: when venue is improper, when the absentee is not subject to personal jurisdiction, and when joinder would destroy subject matter jurisdiction. *See* Fed.R.Civ.P. 19(a).... Finally, if joinder is not feasible, the court must determine at the third stage whether the case can proceed without the absentee, or whether the absentee is an “indispensable party” such that the action must be dismissed.

*E.E.O.C. v. Peabody W. Coal Co.*, 400 F.3d 774, 779 (9th Cir. 2005) (internal citations omitted); *see also, Paiute-Shoshone Indians of Bishop Community of Bishop Colony, Cal. V. City of Los Angeles*, 637 F.3d 993, 997 (9th Cir. 2011).

1. The Tulalip Tribes and the Limited Partnership Are Necessary Parties

The first step of the three-step process to determine if a non-party is a required party is a two-part analysis. *Paiute-Shoshone Indians*, 637 F.3d at 997. First, the court must determine whether the court can award complete relief to the parties present without joining the non-party. *Id.* (citation omitted). In the alternative, the court evaluates whether the non-party has a “legally protected interest in this action that would be impaired or impeded by adjudicating the case without it.” *Id.* (internal quotations and citations omitted).

Here, the Tulalip Tribes and the Limited Partnership each have a legally protected interest

1 that would be impaired or impeded if this case proceeds without them. The Tulalip Tribes was the  
 2 entity that decided to withhold payment to Plaintiff based on the Tribes' architect's  
 3 recommendation. Thus, the Tulalip Tribes may, assuming without admitting, be exposed to  
 4 liability under their subcontracts with Plaintiff and under the Limited Partnership as the General  
 5 Partner. *See*, Limited Partnership Motion to Dismiss, p. 18. Moreover, interpretation of whether  
 6 the forum selection clause in the two subcontracts requires Plaintiff to bring equity claims that arise  
 7 from the two subcontracts in Tribal Court is an issue that will directly affect the Tulalip Tribes.  
 8 Therefore, the Tulalip Tribes is a necessary party.

9 Furthermore, the Limited Partnership has a legally protected interest because the Fund, as  
 10 Limited Partner, cannot be liable for any obligations of the Limited Partnership. *See*, RCW  
 11 25.10.321. Thus, if the Court determines that Plaintiff should be entitled to compensation for the  
 12 construction work that Plaintiff alleges is still owing, the Limited Partnership, not the Fund will  
 13 face liability. The Fund is not liable under RCW 25.10.321 for the obligations of the Limited  
 14 Partnership, even if the Fund "participates in the management and control of the limited  
 15 partnership."

16 2. *The Tulalip Tribes and the Limited Partnership Cannot Feasibly be Joined*

17 Under the second step of Rule 19, sovereign immunity has consistently been held as  
 18 evidence that a party cannot be joined. *See, Paiute-Shoshone Indians*, 637 F.3d at 998 (United  
 19 States cannot be joined as a party because of sovereign immunity). Moreover, Washington and  
 20 federal case law dismiss suits under Rule 12(b)(7) where the indispensable party is an Indian tribe  
 21 with sovereign immunity. In *Mudarri*, the Court of Appeals affirmed dismissal of a suit by a  
 22 private casino owner against the state seeking invalidation of the state's contract with a tribe for  
 23 exclusive operation of certain casino games. 147 Wn. App. 590. The court in that case determined  
 24 that the Puyallup Tribe was a necessary party to the suit because it was a party to the contract  
 25 underlying the dispute. *Id.* at 604-05. In concluding that dismissal was appropriate due to the  
 26 Puyallup Tribe's sovereign immunity, the court reasoned:

Here, the third CR 19(b) factor is dispositive: The Tribe's sovereignty renders it uniquely immune to a private lawsuit without its consent, and the Tribe has not consented to Mudarri's lawsuit. In the Tribe's absence, the trial court cannot render a judgment on Mudarri's challenges to the State-Tribe Compact; thus, the trial court cannot adequately address these claims. CR 19(b)(3). Because no judgment can be rendered in the Tribe's absence, we do not address the other three factors.

*Id.* at 605. In *Matheson v. Gregoire*, the Court of Appeals noted that although a plaintiff may not have an adequate remedy if a case is dismissed for failure to join an Indian tribe due to its sovereign immunity, "the Ninth Circuit has regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for plaintiffs." 139 Wn. App. 624, 636 (2007) (relying on *Wilbur v. Locke*, 423 F.3d 1101, 1115 (9th Cir. 2005), *abrogated on other grounds*, *Levin v. Commerce Energy, Inc.*, 130 S.Ct. 2323, 176 L.Ed.2d 1131 (2010)). Moreover, cases involving direct attacks on tribal contracts often result in dismissal under Fed. R. Civ. P. 19. *See, Manybeads v. United States*, 209 F.3d 1164, 1166 (9th Cir. 2000); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1156-57 (9th Cir. 2002).

The Limited Partnership cannot be joined because it has already been dismissed by the state court on August 31, 2011 pursuant to CR 12(b)(1) and 12(b)(7). Importantly, the Tulalip Tribes is the General Partner of the Limited Partnership. The Tulalip Tribes is liable for any obligation of the Limited Partnership. *See*, RCW 25.10.401. Thus, if the Limited Partnership is joined in this action, then the Tulalip Tribes must be joined as well because it is liable for the Limited Partnership's obligations. However, the Tulalip Tribes' sovereign immunity shields it from being brought in this forum. Therefore, the Limited Partnership cannot be joined.

### 3. Equity and Good Conscience Demonstrate that this Case Cannot Proceed in this Forum

The final step, whether the case can proceed in equity and good conscience, requires consideration of at least four interests:

(1) the plaintiff's interest in having a forum; (2) the defendant's interest in not proceeding without the required party; (3) the interest of the non-party by examining the extent to which the judgment may as a practical matter impair or impede its ability to protect its interest in the matter; and (4) the interests of the court and the public in complete, consistent, and efficient settlement of controversies.

*Paiute-Shoshone Indians*, 637 F.3d at 1000 (internal quotations and citations omitted). This step requires “a ‘practical examination of [the] circumstances’ to determine whether an action may proceed ‘in equity and good conscience’ without the absent party.” *Id.* (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119 n. 16, 88 S.Ct. 733 (1968)).

This case cannot proceed in equity and good conscience without the Tulalip Tribes and the Limited Partnership as parties to the action. First, this is not the forum in which Plaintiff can proceed. The two subcontracts specifically state that the Tulalip Tribal Court is the appropriate forum for Plaintiff to bring any action relating to the two subcontracts.

Second, Plaintiff’s two equity claims against the Fund are, in effect, barred because both equity claims, as alleged, involve the performance of work by Plaintiff on the Project, which is owned by the Limited Partnership. As stated, the Fund by Washington statute cannot be liable for the alleged obligations of the Limited Partnership even assuming, without admitting, the Fund as limited partner “participates in the management and control of the limited partnership.” *See*, RCW 25.10.321. Rather, the Tulalip Tribes, as General Partner of the Limited Partnership, will be liable for any obligations of the Limited Partnership and will have to indemnify the Fund if Plaintiff is successful in a claim against the Fund relating to non-payment under the two subcontracts, as is the case here. *See*, RCW 25.10.401.

Likewise, given the recent dismissal on August 31, 2011 by the state court of the Limited Partnership as a party, this action cannot proceed against the Fund alone. This is because the Fund as a limited partner has no liability for any alleged obligations of the Limited Partnership under RCW 25.10.321.<sup>2</sup> Plaintiff’s theory that the Fund is unjustly enriched necessarily and indispensably involves both the Tulalip Tribes and the Limited Partnership as parties. The Limited

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<sup>2</sup> RCW 25.10.321 states:

**No liability as limited partner for limited partnership obligations.** An obligation of a limited partnership, whether arising in contract, tort, or otherwise, is not the obligation of a limited partner. A limited partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for an obligation of the limited partnership solely by reason of being a limited partner, even if the limited partner participates in the management and control of the limited partnership. [2009 c 188 § 303.]

Partnership owns the Project constructed on Tulalip Tribes Reservation lands. Diner Decl. ¶4. The Fund is merely an investor limited partner in the Limited Partnership. *See, id.* at ¶5. The Tulalip Tribes is the General Partner that manages the affairs of the Limited Partnership. *See, Limited Partnership Motion to Dismiss*, pp. 4-5; *see also*, Diner Decl. ¶¶3, 9-10. The Project's federal low-income housing tax credits are first allocated by the Housing Commission to the Limited Partnership, which, in turn, are passed down to the Fund. Diner Decl. ¶11, *Limited Partnership Motion to Dismiss*, 3:2-5. Obviously, complete performance of the work by Plaintiff on the Project needs to comply with Project plans and specifications and the terms of the two subcontracts before the work is finally accepted by the Tulalip Tribes' architect, and by the Tulalip Tribes as the general partner of, and on behalf of, the Limited Partnership, neither of which has not yet occurred. The Limited Partnership is a necessary and indispensable party, but has been dismissed, and so the claims against the Fund must be dismissed.

Third, the Tulalip Tribes need to protect their interests because Plaintiff is directly disputing the payment withheld by the Tulalip Tribes due to the non-conformance by Plaintiff with the two subcontracts, namely, the construction deficiencies and unauthorized changes identified by the Tribes' architect. The recommendations made by the Tulalip Tribes' architect to withhold the sum of \$781,858.82 as a cost credit to be issued to the Tulalip Tribes, and to withhold the sum of \$654,604.08 in contract retention until final acceptance of the Project directly involve the Tribes. Thus this Court should dismiss this action under Fed. R. Civ. P. 12(b)(7) for failing to join a necessary and indispensable party under Fed. R. Civ. P. 19.

If the lawsuit threatens indirect impairment of a tribal contract, dismissal is warranted. In *Kesoli v. Babbitt*, a Navajo Tribe member sued the Secretary of the Interior regarding mining leases on both Navajo and Hopi tribal lands. 101 F.3d 1304 (9th Cir. 1996). Even though no mining contracts had been approved under a settlement agreement in *Kesoli* and the plaintiff challenged only the provision addressing mining near burial sites, the absent party (the Hopi Tribe) nevertheless held a protected interest in the outcome of the case. Dismissal was the only course to

1 take because the Hopi Tribe had sovereign immunity. *Id.* at 1310; *see also, Clinton v. Babbitt*, 180  
2 F.3d 1081 (9th Cir. 1999) (“pulling a single legal thread from the tapestry of the settlement could  
3 cause it to unravel and thereby impair the interests of the absent parties”).

4 Here, the Tulalip Tribes is an indispensable party as the general contractor under two  
5 subcontracts with Plaintiff and as the General Partner of the Limited Partnership. Plaintiff contends  
6 that the Fund has received some benefit because the Fund is receiving federal low-income housing  
7 tax credits while Plaintiff is not being paid. *See generally*, Complaint. However, the Fund has no  
8 relationship with Plaintiff regarding the withholding of payment to Plaintiff. The Tulalip Tribes  
9 was the entity that decided to withhold payment to Plaintiff based on the Tribes’ architect’s  
10 recommendation. Thus, the Tulalip Tribes may, assuming without admitting, be exposed to  
11 liability under their subcontracts with Plaintiff and under the Limited Partnership as the General  
12 Partner. *See*, Limited Partnership Motion to Dismiss, p. 18. The Tulalip Tribes are a necessary and  
13 indispensable party, but cannot be joined due to its sovereign immunity.

14 Fourth, complete, consistent, and efficient settlement of the issues of this case will only  
15 occur if this case is dismissed and Plaintiff is required to bring its claims in the proper forum—the  
16 Tulalip Tribal Court. Plaintiff agreed to the Tulalip Tribal Court’s jurisdiction over the subject-  
17 matter involving Plaintiff’s work under the two subcontracts. Moreover, the Tulalip Tribal Court is  
18 the only place where Plaintiff can potentially bring a claim against the Tulalip Tribes. Complete  
19 settlement of the issues in this case cannot occur in this forum. Therefore, the Court should dismiss  
20 Plaintiff’s claims against the Fund for failure to join a necessary and indispensable party, that is,  
21 both the Tulalip Tribes and the Limited Partnership.

## 22 **V. CONCLUSION**

23 The Court should dismiss Plaintiff’s claims of unjust enrichment and quantum meruit  
24 against the Fund because the Tulalip Tribal Court has exclusive jurisdiction over this matter and  
25 because Plaintiff has failed to join a necessary and indispensable party, that is, both the Tulalip  
26



1 Tribes and the Limited Partnership. The Court should grant this Motion to Dismiss Plaintiff's all  
2 claims against the Fund pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(7).

3 DATED this 3rd day of November, 2011.

4 /s/ Gregory J. Miner

5 Gregory J. Miner

6 Washington State Bar No. 34699

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14 *Of Attorneys for Defendant Raymond James Native*  
15 *American Housing Opportunities Fund II, L.L.C.*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 3, 2011, I electronically filed the **MOTION TO DISMISS OF DEFENDANT RAYMOND JAMES NATIVE AMERICAN HOUSING OPPORTUNITIES FUND II L.L.C. PURSUANT TO RULE 12(b)(1) and 12(b)(7)** with the Clerk of the court using the CM/ECF system which will send notification of such filing to said person(s) indicated below:

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*Of Attorneys for Plaintiff Matthew Lewis d/b/a US Finish*

DATED this 3rd day of November, 2011.

/s/ Gregory J. Miner  
Gregory J. Miner