John Pace (USB 5624)
Lewis Hansen Waldo Pleshe Flanders, LLC
3380 Plaza Way
Salt Lake City, Utah 84109
Tel/801-521-2515
Fax/801-746-6301
Email/jpace@lhwplaw.com

Scott W. Hansen (USB 1347)
Lewis Hansen Waldo Pleshe Flanders, LLC
8 East Broadway, Suite 410
Salt Lake City, Utah 84111
Tel/801-746-6300
Fax/801-746-6301
Email/swhansen@lewishansen.com

Stewart Gollan (USB 12524)
Utah Legal Clinic
214 East 500 South
Salt Lake City, Utah 84111
Tel/801-328-9531
Fax/801-328-9533
Email/stewartgollan@utahlegalclinic.com

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

MARY BENALLY, et al.,	:	PLAINTIFFS' MEMORANDUM OPPOSING MOTION TO REQUIRE JOINDER OF ADDITIONAL PARTIES
Plaintiffs,	:	
vs.	:	Case No. 2:12-cv-00275—DN
GARY R. HERBERT, et al.,	:	Judge David Nuffer
Defendants.	:	

Plaintiffs, through counsel John Pace, Scott W. Hansen, and Stewart Gollan, hereby oppose Defendants' Motion and Memorandum to Require Joinder of Additional Parties, namely (1) all members of the Utah Navajo Trust Fund (NTF) (which would effectively this lawsuit to proceed as a class action), and (2) the United States of America.

FACTS

1. Federal law created a common fund, the NTF, funded by 37.5% of oil and gas royalties derived from a specific area of the Navajo Reservation located in San Juan County, Utah, intended to benefit the "health, education and general welfare" of the Navajo residing in San Juan County. Utah is the trustee of the NTF. 47 Stat. 1418 (March 1, 1933), as amended by Publ. L. 30-306, 82 Stat. 121 (1968) (together, the 1933 Act, unless otherwise noted).

2. The NTF is a *discretionary* trust. *Pelt v. Utah*, 104 F.3d 1534, 1544 (10th Cir. 1996) (*Pelt I*) ("We hold that Congress intended to create a discretionary trust for the benefit of the San Juan Navajos with the State of Utah as trustee and the 37½% royalties as the res.")

3. Each individual plaintiff in this lawsuit is a Navajo who resides in San Juan County, and is a beneficiary of the NTF. Each therefore enjoys legal standing to challenge the Defendants' violation of the 1933 Act, and their breach of fiduciary obligations. Verified Complaint. Doc. # 2, pp. 3-4.

4. In 2008, the Utah Legislature passed a law that purports to deprive Defendants of all discretion to administer the NTF, except to fund certain college grants under very restrictive conditions, and certain limited projects then already in progress. HB 352 (2008); Doc. # 2, pp. 9-11.

5. Utah has unsuccessfully sought congressional amendment of the 1933 Act that would appoint a different NTF trustee to succeed Utah. *E.g.*, Doc. # 2, p. 14.

6. Utah, meanwhile, has continued to accept the 37.5% royalty payments, and to apply a portion of those proceeds to cover any and all administrative costs incurred in managing the NTF. Doc. # 2, p. 10; Utah Code Ann. § 51-9-504(2)(a) (2011) (requiring creation of a "holding fund" to collect, *inter alia*, future royalty payments.)

7. In the early 1960s, Utah sought amendment of the 1933 Act. Then, as now, Utah continued to collect the royalty payments, while effectively freezing most or all expenditures for the beneficiaries' welfare. This court sharply criticized Utah's "niggardly" behavior, and ordered it to "proceed in good faith to exercise its discretion in administering and expending said fund . . . until, if at all, the said statue has been changed by Act of Congress. *Sakizzie v. Utah Comm. Indian Affairs*, 215 F.Supp. 12, 24 (D. Utah 1963) (supplemental proceedings).

ARGUMENT

Procedural Background

Defendants moved this court for an order requiring joinder of all NTF beneficiaries and the United States of America in the present action as indispensible parties under Rule 19 of the Federal Rules of Civil Procedure and, in the absence of such joinder, for an order dismissing this action pursuant to Rule 12(b)(7). Doc. # 20. However, for the reasons set out below, neither an order requiring joinder nor an order dismissing this action would be appropriate because neither the non-party NTF beneficiaries nor the United States of America are indispensible parties for the purposes of Rule 19 analysis. Defendants' motion should therefore be denied.

Relevant Legal Standards and Authority

Rule 19(a)(1) of the Federal Rules of Civil Procedure provides, in relevant part:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person [to be joined] claims an interest relating to the subject matter of the action and is so situated that disposing of the action in the person's absence may:

> (i) as a practical matter impair or impeded the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Rule 19(b) of the Federal Rules of Civil Procedure provides:

> If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
>
> **(1)** the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> **(2)** the extent to which any prejudice could be lessened or avoided by:
>
> **(A)** protective provisions in the judgment;
>
> **(B)** shaping the relief; or
>
> **(C)** other measures;
>
> **(3)** whether a judgment rendered in the person's absence would be adequate; and
>
> **(4)** whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Determining whether an absent party is indispensable under Rule 19 requires a two-part analysis. *Rishell v. Jane Phillips Episcopal Memorial Medical Center*, 94 F.3d 1407, 1411 (10th Cir. 1996) The court must first determine under Rule 19(a) whether the party is necessary to the suit and must therefore be joined if joinder is feasible. *Id.* If the absent party is necessary but cannot be joined, the court must then determine under Rule 19(b) whether the party is indispensable. *Id.* Defendant's bear the burden of proof to demonstrate the unjoined party's indispensability, *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier*, 17 F.3d 1292, 1293 (10th Cir. 1994), and only if the unjoined party is shown to be indispensible should the

lawsuit be dismissed. *Rishell*, 94 F.3d at 1411. However, courts will not dismiss a lawsuit for failure to join a party upon the speculative possibility that the interests of the unjoined party may be affected by the litigation. *See, e.g.*, *Sever v. Glickman*, 298 F.Supp.2d 267, 275 (D. Conn. 2004); *Swartz v. Beach*, 229 F.Supp.2d 1239, 1250-51 (D. Wyo. 2002).

Significant is the "principle deeply rooted in this Court's Indian jurisprudence" that "statutes are to be construed liberally in in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima v. Conf. Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (internal quotation marks and alterations omitted).

This memo first addresses why this action need not proceed as a plaintiff class action. It then establishes that the federal government is not a necessary party.

I. EACH BENEFICIARY IS NOT A NECESSARY PARTY WHERE, AS HERE, THE ONLY RELIEF SOUGHT IS DEFENDANTS' COMPLIANCE WITH FEDERAL LAW.

Defendants assert that a decision in this case might somehow subject Utah to "inconsistent obligations because of [possible] future claims by . . . non-party beneficiaries." Doc. # 20, p. 4. However, Defendants provide no specifics with respect to what claims, if any, might be brought by non-party beneficiaries. Plaintiffs herein merely seek to require Utah to follow federal law; that is, to resume exercising its discretion in administering the NTF for the beneficiaries' health, education and general welfare. This is the same discretion that the 2008 legislation now prohibits. Plaintiffs do not seek to require Utah to exercise its discretion in one manner or another.[1]

[1] Indeed, "The beneficiary [of a discretionary trust] cannot obtain the assistance of the court to control the exercise of the trustee's discretion except to prevent an abuse by the trustee of his discretionary power[.]" *Pelt I*, 104 F.3d at 1544, n.10 (quoting 2 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 128.3 (4th ed. 1987).

The only plausible non-party beneficiary's interest inconsistent with Utah's resumed NTF administration in compliance with federal law would be one in which the beneficiary wanted Utah to continue violating federal law. No NTF beneficiary has a cognizable legal interest in Utah's violation of federal law. Plaintiffs, therefore, adequately represent the only conceivable legitimate interests of non-party beneficiaries: Utah's compliance with federal law.

The Ninth Circuit Court of Appeals addressed an issue similar to that raised in the case at bar in *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990). A plaintiff Indian tribe, the Makah, brought suit seeking declaratory and injunctive relief based upon a challenge to the legality of the regulatory processes used to determine the allocation of fishing rights to Columbia River salmon. Plaintiff argued, *inter alia*, that regulations promulgated and applied by the Secretary of Commerce to determine respective fish harvest quotas of various Indian tribes violated federal law, specifically the Fishery and Management Act of 1976 (FCMA) and the Administrative Procedures Act. Defendants contended that various non-party tribes also subject to the harvest quotas were indispensible parties under Rule 19 of the Federal Rules of Civil Procedure because granting relief to the Makah would potentially reduce the portion of the fish harvest allocated to non-party tribes and might violate existing treaty rights. The trial court dismissed the lawsuit on that basis. On appeal, the Ninth Circuit Court of Appeals reversed the trial court's determination with respect to the plaintiff's procedural claims, concluding that the absent tribes were not necessary parties with respect to these claims because the relief sought would "affect only the future conduct of the administrative process [and] . . . all of the tribes ha[d] an equal interest in an administrative process that is lawful" *Makah*, 910 F.2d at 559.

As in *Makah*, Plaintiffs in the present action seek only a determination that Utah's resignation as trustee of the NTF was unlawful and injunctive relief ordering Defendants to

comply with federal law. Defendants will not be subject to future inconsistent claims in future litigation because no non-party beneficiary has a cognizable legal interest in the continuation of illegal conduct by the State of Utah.

II. THE RESTATEMENT RECOGNIZES THE AUTHORITY OF A SINGLE BENEFICIARY TO ENFORCE A TRUST

The Restatement recognizes the authority of a single beneficiary to enforce a trust:

> A suit to enforce a private trust ordinarily (see Reporter's Note) may be maintained by any beneficiary whose rights are or may be adversely affected by the matter(s) at issue. The beneficiaries of a trust include any person who holds a beneficial interest, present or future, vested or contingent.

Restatement (Third) of Trusts § 94(1) cmt. b (2009). In form and function, the NTF is a private "discretionary" trust. *Pelt I*, 104 F.3d at 1544. The rule, however, also applies to trusts that are both private and charitable in nature. Restatement (Third) of Trusts § 94 cmt. a (introduction).

III. THE *PELT* COURT DID NOT DETERMINE THAT ALL LAWSUITS INVOLVING THE NTF PROCEED AS CLASS ACTIONS

Defendants, without explanation, assert that the Tenth Circuit in the *Pelt* litigation somehow ruled that every lawsuit involving the NTF proceed as a class action. That simply is not accurate.[2] Three lawsuits challenging Utah's administration of the NTF were filed before *Pelt*. Two of the three *did* proceed as class actions. *Pelt v. Utah*, 539 F.3d 1271, 1286-89 (2008) (*Pelt II*) (holding that the beneficiary class was not adequately represented in either class action lawsuit for purposes of claim or issue preclusion in *Pelt*). Only the third pre-*Pelt* lawsuit was filed by individual beneficiaries not seeking class certification—beneficiaries who purposely did not seek to proceed as a class: *Bigman v. Utah Navajo Development Council, Inc., et al.* (Case No. C-77-31 (D.Utah 1977)).

[2] Attorney John Pace, co-counsel for Plaintiffs herein, represented the plaintiff class in *Pelt* for the entirety of said litigation.

The appeals court in *Pelt II* found that the *Bigman* plaintiffs did not provide adequate representation of the unnamed NTF beneficiaries' interests so as to preclude later claims because the *Bigman* plaintiffs expressly disavowed representing the other beneficiaries. "[A]t a minimum" in non-class action litigation, the court declared, where a beneficiary seeks to represent the interests of other beneficiaries in enforcing a trust, "the parties to the first litigation [must understand] their suit to be in a representative capacity." *Pelt II*, 539 F.3d at 1289 (citing *Taylor v. Sturgell*, 128 S.Ct. 2161, 2176 (2008)). *Taylor*, 128 S.Ct. at 2176. The court found the *opposite* to be true in *Bigman*:

> Nothing in the record indicates that the *Bigman* plaintiffs understood that they were suing on Beneficiaries' behalf; indeed, it is undisputed that the decision not to pursue a class action was intentional and precipitated by tensions between the original and new beneficiaries.

Id.

By contrast, the Verified Complaint herein makes clear on every page that individual Plaintiffs represent the interest of all beneficiaries in their efforts to force trustee Utah merely to comply with federal law, and resume its exercise of prudent discretion over the NTF. For example:

> 6. Utah NTF administrators are violating federal law and, in the process, causing irreparable harm to thousands of beneficiaries for whom the NTF has historically operated to build safe and affordable housing; bring electricity to existing homes; develop critical water sources for people, crops and livestock; provide business opportunities in southeastern Utah; supplement college tuition and costs; promote safety and stability in communities and families; and, meet the beneficiaries' many additional health, educational, economic, transportation and humanitarian needs.

Doc. # 2, pp. 2-3. Plaintiffs understand and acknowledge that they represent the interests of all NTF beneficiaries in seeking to require Utah's compliance with federal law.

IV. THE UNITED STATES IS NEITHER A NECESSARY NOR AN INDISPENSABLE PARTY.

A. This Court Determined That The United States Is Not An Indispensible Party to NTF Litigation in *Pelt, et al. v. Utah, et al.*, Case No. 2:92-CV-00639 TC, United States District Court for the District of Utah.

In *Pelt*, Utah also filed a rule 12(b)(7) motion to dismiss, asserting *inter alia* that the United States was an indispensible party. The court denied Utah's motion, and instead ordered the plaintiffs to "invite" the United States to intervene. The United States declined the invitation. *Pelt I*, 104 F.3d at 1539. Because this court has already decided the issue, and because the parties herein are in privity with those in *Pelt*, Defendants are barred from re-litigating the indispensability of the United States.

B. The United States Is Not A Necessary Party Under Rule 19(a)

To determine whether the United States is an indispensible party under Rule 19, the court must first determine under Rule 19(a) whether it is necessary to the suit. *Rishell*, 94 F.3d at 1411. If it is not a necessary party under Rule 19(a), it cannot be an indispensible party under Rule 19(b). The determination of whether the United States is a necessary party under Rule 19(a) requires assessment of three factors. The court must consider (1) whether complete relief would be available to the parties already in the suit, (2) whether the absent party has an interest related to the suit which as a practical matter would be impaired, and (3) whether a party already in the suit would be subjected to a substantial risk of multiple or inconsistent obligations. *Rishell*, 94 F.3d at 1411., Fed.R.Civ.P. 19(a). Addressing the first prong of the Rule 19(a) analysis, Defendants argue that in the absence of the United States, complete relief will not be available to the parties because, if Plaintiffs prevail, "there will need to be litigation and/or a decision as to how the State will operate the [NTF] . . . includ[ing] a determination as to eligibility for monies,

criteria for awarding monies to beneficiaries, and other matters." Doc. # 20, p. 5. This wholly mischaracterizes the relief sought by the Plaintiffs in this action. Plaintiffs merely seek an order that Utah resume its duties as trustee of the NTF as required under federal law. Plaintiffs seek no relief with respect to how Utah manages NTF, merely that Utah resume its exercise of discretion. *See generally* Verified Complaint. Doc. # 2.

With respect to the second prong of the Rule 19(a) analysis, whether the absent party has an interest related to the suit which as a practical matter would be impaired, the interests of the United States will not be impaired if it is not joined as a party. Plaintiffs merely wish for Utah to abide by federal law. If that is the result, the United States would have no reason or remedy for seeking a different result. The United States may not reasonably complain if Utah is following federal law as interpreted by a federal court.

With respect to the final prong of the Rule 19(a) analysis, no party already in the suit would be subjected to a substantial risk of multiple or inconsistent obligations in the absence of the United States. No party will have a future legally cognizable interest in Utah's continuing violation of federal law and the only conceivable interest of the United States, ensuring compliance with federal statute as interpreted by federal case law, will be well represented by the Plaintiffs herein.

Because the United States is not a necessary party to this litigation, Defendants' motion to dismiss for failure to join indispensible parties should be denied.

C. Should Defendants Seek To Challenge The Constitutionality Of The 1933 Act, Notice To And Intervention by The United States Is Governed By Fed. R. Civ. P. 5.1.

Defendants, however, promise to file a claim or defense that might excuse Utah's violation of federal law. If any such claim involves the alleged unconstitutionality of the 1933 Act, Defendants, not Plaintiffs, must notify the United States of its claim. Fed. R. Civ. P. 5.1. Upon its receipt of said notice, the United States may seek to intervene. If it does not, it is bound by the decision of this court.

If any such claim by Defendants is non-constitutional in nature, and proves successful as a matter of law, the risk that the United States might somehow seek to impose obligations upon Utah that are inconsistent with a federal court's final order are speculative in the extreme. As noted above, courts will not dismiss a lawsuit for failure to join a party upon the *speculative possibility* that the interests of the unjoined party may be affected by the litigation. *Sever*, 298 F.Supp.2d at 275; *Swartz*, 229 F.Supp.2d 1250-51.

D. Plaintiffs Have No Objection to Inviting the United States to Intervene in Conformity with this Court's ruling in *Pelt.*

Plaintiffs do not object to following the same general procedure ordered by this court in *Pelt*. Plaintiffs will not object to Defendants giving notice of the lawsuit to the proper agents of the United States, including an invitation to intervene. Such notice, however, must include a detailed description of any claim Defendants intend to assert to justify their violation of federal law. Plaintiffs, moreover, must be shown the proposed invitation before it is conveyed, and be given an opportunity to comment and, if necessary, object to its content should cause arise for such an objection.

CONCLUSION

For the reasons set forth herein, Utah's rule 19 motion to join indispensible parties and Rule 12(b)(7) motion to dismiss should be denied. Non-party beneficiaries are not indispensable parties, therefore, this lawsuit need not proceed as a class action. Similarly, the United States is not an indispensable party, because Defendants are barred from re-litigating the issue, and because any threat that the United States might somehow seek to impose obligations upon Utah that are inconsistent with a federal court's final ruling is wildly speculative. Therefore Defendants Motion to Dismiss for Failure to Join Indispensible Parties (Doc. # 20) should be denied.

Dated this 24th day of April, 2014.

Utah Legal Clinic
Lewis, Hansen, Waldo, Pleshe, Flanders LLC
Attorneys for Plaintiffs

/S/ Stewart Gollan

STEWART GOLLAN
JOHN PACE
SCOTT W. HANSEN