The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NORTH QUINAULT PROPERTIES, LLC, a Washington limited liability company; THOMAS LANDRETH, an individual, and BEATRICE LANDRETH,

Plaintiffs,

v.

QUINAULT INDIAN NATION, a federally recognized Indian tribe, in its own capacity, as a class representative, and as parens patriae; STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES; ALL OTHER PERSONS OR PARTIES UNKNOWN CLAIMING ANY RIGHT, TITLE, ESTATE, LIEN, OR INTEREST IN THE LAKE AND LAKEBED KNOWN AS LAKE QUINAULT,

Defendants.

Case No.: 3:14-cv-06025-RBL

QUINAULT INDIAN NATION'S MOTION TO DISMISS

NOTE ON MOTION CALENDAR: FEBRUARY 20, 2015

ORAL ARGUMENT REQUESTED

Defendant Quinault Indian Nation ("Nation") hereby respectfully moves the Court to dismiss this action with prejudice pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(7).

The myriad property torts claimed by Plaintiffs rest on, and cannot succeed without, a threshold finding that Lake Quinault is not land held in trust for the Nation by the United States

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that lies within the exterior boundaries of the Nation's Reservation. *E.g.*, Compl. ¶¶ 7.3, 13.8. This challenge to the Nation's Reservation boundary, seeking to eliminate Lake Quinault from the Nation's jurisdiction, should be dismissed because: (1) the Nation has not waived its inherent sovereign immunity from unconsented suit, depriving this Court of subject matter jurisdiction; and (2) Plaintiffs have failed to join a required party, the United States, which cannot be joined because its sovereign immunity has also not been waived.

STANDARDS OF REVIEW

A. Federal Rule Civil Procedure 12(b)(1)

On a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the party asserting jurisdiction bears the burden of establishing subject matter jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984-85 (9th Cir. 2008). The Court should dismiss the case for lack of subject matter jurisdiction if the complaint, on its face, fails to allege facts sufficient to establish subject matter jurisdiction. *See In re (DRAM) Antitrust Litig.*, 546 F.3d at 984-85; *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir.1990).

B. Federal Rule of Civil Procedure 12(b)(7)

On Rule 12(b)(7) motion to dismiss for failure to join an indispensable party, "[t]he moving party has the burden of persuasion in arguing for dismissal." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir.1990). The court "accept[s] as true the allegations in [p]laintiff's complaint and draw[s] all reasonable inferences in [p]laintiff's favor." *Paiute-Shoshone Indians of the Bishop Cmty. v. Los Angeles*, 637 F.3d 993, 996 n.1 (9th Cir. 2011).

ARGUMENT

A. The Court Lacks Subject Matter Jurisdiction

The Court lacks subject matter jurisdiction because the Nation is protected from Plaintiffs' suit by the well-settled doctrine of tribal sovereign immunity. Tribal sovereign immunity is a matter of subject matter jurisdiction. *McClendon v. United States*, 885 F.2d 627,

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629 (9th Cir. 1989). Sovereign immunity is not a discretionary doctrine. It is the sovereign's right and it acts as an absolute bar to suit. *California v. Quechan Tribe*, 595 F.2d 1153, 1155 (9th Cir.1979).

Indian tribes possess the immunity from suit traditionally enjoyed by sovereign powers. Tribal sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986). It shields Indian tribes and tribal corporations acting as an arm of the tribe, for both on- and off-reservation conduct, from suit absent express authorization by Congress or clear waiver by the tribe. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 725 (9th Cir. 2008). "It is settled that a waiver of [tribal] sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (internal quotes omitted).

Here, aside from acknowledging that the Nation is a federally-recognized Indian tribe – and, therefore, vested with inherent sovereign immunity – the Complaint is silent as to the Nation's sovereign immunity. Compl. ¶ 5.1. There is no allegation that the Nation has expressly consented to this suit. And, there is no allegation that Congress has expressly abrogated the Nation's sovereign immunity to enable this suit to proceed. In the absence of these allegations, on the face of the Complaint, no basis exists for this Court to "interfer[e] with tribal autonomy and self-government" by exercising jurisdiction over the Nation. *Santa Clara Pueblo*, 436 U.S. at 59; *see also Snow v. Quinault Indian Nation,* 709 F.2d 1319 (9th Cir. 1983) (concluding in tax dispute that sovereign immunity bars action because "The Quinault Tribe has not consented to be sued or waived sovereign immunity in this action; nor has the Tribe been divested of its immunity by Congress.").

The Court lacks subject matter jurisdiction over the Nation, and the claims against the Nation must be dismissed with prejudice. *See Miller v. Wright*, No. 3:11-CV-05395(RBL), 2011 WL 4712245, at *4 (W.D. Wash. Oct. 6, 2011) (dismissing claims against Puyallup Tribe based on un-waived sovereign immunity).

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B. Dismissal is Necessary Because the United States is a Required Party That Cannot Be Joined

Even if Plaintiffs could somehow avoid the absolute bar of the Nation's sovereign immunity, Plaintiffs cannot challenge whether Lake Quinault is within the Nation's Reservation boundary because they have failed to join a required party: the United States.[1] *See* Compl. ¶ 13.8 ("Plaintiffs are entitled to a declaration that pursuant to the equal Footing Doctrine, ***the United States*** and the Tribe have no right, title or interest in Lake Quinault.") (emphasis added). As is the case here, the Supreme Court and the Ninth Circuit have held that the United States is generally a required party under Fed. R. Civ. P. 19 to any case where its property interests are challenged by non-Indians and the relief sought might interfere with its obligation to protect Indian lands against alienation. *Minnesota v. United States*, 305 U.S. 382, 386 (1939) ("A proceeding against property in which the United States has an interest is a suit against the United States"); *Carlson v. Tulalip Tribes of Washington*, 510 F.2d 1337, 1339 (9th Cir. 1975) (affirming grant of Tribes' Rule 19 motion involving United States in a suit to quiet title to certain waterfront lands held in trust for Tribes due to United States' immunity). Plaintiffs' claim forecloses any consideration of the boundary question under principles of sovereign immunity, as well as the unavoidable prejudice that would result to the absent party under Rule 19.

Rule 19(a) requires joinder of a person where disposing of the action in a person's absence would not afford complete relief to existing parties, where doing so would impair or impede the person's protected interest, or would subject an existing party to substantial risk of inconsistent obligations. Rule 19(a)(1)(A). All of these factors are implicated here. Numerous courts and the Solicitor for the Department of the Interior have recognized that the United States

[1] The Nation's sovereign immunity also requires dismissal of the entire Complaint under Rule 19, as Plaintiffs' challenge to the Nation's exercise of jurisdiction over Lake Quinault cannot proceed in the Nation's absence. *Dawavendewa v. Salt River Project*, 276 F.3d 1150, 1161-62 (9th Cir. 2002) (holding that tribal sovereign immunity bars joinder, and noting "[i]f the necessary party enjoys sovereign immunity from suit, some courts have noted that there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as 'one of those interests "compelling by themselves,"' which requires dismissing the suit").

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holds title to the land under Lake Quinault in trust for the Nation because Lake Quinault lies entirely within the Nation's Reservation boundary. *See Quinaielt Tribe of Indians v. United States,* 102 Ct. Cl. 822, 835 (1945) (finding that northwest boundary point of Reservation was such as to include the entire Lake); *United States v. Washington*, 626 F.Supp. 1405, 1428 (W.D. Wash. 1981) (finding that the "Quinault Reservation . . . tapers to Lake Quinault about 21 miles inland, ***which is contained within the reservation and represents its easternmost portion.***"), *aff'd* 694 F.2d 188 (9th Cir. 1982) (Canby, J. concurring), *cert. denied*, 463 U.S. 1207 (1983); Dep't of Interior Sol. Op. at 2 (July 21, 1961) (concluding that the "***boundaries of the reservation include the entire lake [and] the United States holds title to the bed of the entire lake in trust for the Indians of the Quinault Reservation***."). Thus, any ruling in favor of Plaintiffs would not afford them complete relief, as it would not bind the United States who has a legal interest in these proceedings. *Dawavendewa*, 276 F.3d at 1156.

An analogous problem was addressed by the Ninth Circuit in *Confederated Tribes v. Lujan*, 928 F.2d 1496 (9th Cir. 1991), a case that also involved the Nation. There, the court addressed an action brought by various Indian tribes against federal officials challenging the United States' continued recognition of the Nation as the sole governing authority of the Nation's Reservation. *Id.* at 1497. In affirming the district court's dismissal of the case for failure to join the Nation as an indispensable party, the Ninth Circuit held that "success by the plaintiffs . . . would not afford complete relief to them" because "[j]udgment against the federal officials would not be binding on the Quinault Nation, which could continue to assert sovereign powers and management responsibilities over the reservation." *Id*. at 1498. The issues presented by the instant Complaint presents *Confederated Tribes* in reverse. Here, the Complaint cannot proceed because a judgment against the Nation (or the state of Washington for that matter) would not be binding on the United States, who is the titled holder of the land, affording Plaintiffs little more than a pyrrhic victory. Any judgment in favor of Plaintiffs would not settle the jurisdictional dispute concerning Lake Quinault as a whole.

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The absence of the United States precludes the United States from defending its legally protected, sovereign interests, as the titled landowner. Indeed, the lawfulness of the United States' action in holding title to Lake Quinault in trust forms an understated central issue in the Complaint. Compl. ¶ 13.8. Moreover, Plaintiffs' challenge to the land status underlying Lake Quinault implicates scores of other land owners on Lake Quinault, thereby exposing the United States to potentially conflicting obligations. Rule 19(a)(1)(B)(ii). If Plaintiffs were to prevail in the United States' absence, the United States would still view the land as trust land within the Reservation, but the Nation would be unable to exercise full jurisdiction over Lake Quinault. The United States would be severely prejudiced if such a challenge were considered in their absence, and it cannot be joined because it is immune from suit.

Thus, the United States is a required party. However, its joinder is not feasible because the United States is immune from Plaintiffs' unconsented suit. *See, e.g.*, *United States v. Lee*, 106 U.S. 196, 205-07 (1882) (discussing the Federal government's immunity from unconsented suit); *United States v. Navajo Nation*, 537 U.S. 488, 502 (2003) (same); *Republic of the Phillippines v.Pimentel*, 553 U.S. 851, 867 (2008) (under Rule 19(b), "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign"); *see also Shermoen v. United States*, 982 F.2d 1312, 1318-1319 (9th Cir. 1992) (holding joinder of tribes not feasible due to sovereign immunity); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456 (9th Cir. 1994) (holding Nation is necessary and indispensable party that cannot be joined due to sovereign immunity in seeking to overturn the Department of Interior's decision that certain fractional property interests within the Nation's Reservation escheat to the Nation). Rule 19(b) requires dismissal.[2] Jurisdiction can only be divested in a suit directly challenging the land status involving the United States as a party, which cannot happen here based on sovereign immunity.

[2] Even if the United States could be joined, the challenge would be time barred. Any affirmative challenge to a decision establishing the trust status of the land must be brought pursuant to the Administrative Procedure Act (APA). *See Match-E-Be-Nash-She-Wish Band of*

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The Court's inability to join the United States means that the challenge to the Nation's Reservation boundary concerning Lake Quinault cannot be countenanced and dismissal of the Complaint with prejudice is the only remedy.

C. Dismissal with Prejudice, and Without Leave to Amend, is Warranted

To the extent the Court agrees with the Nation's Rule 12(b)(1) arguments, such dismissal must be with prejudice as the bar of sovereign immunity is absolute. *E.g.*, *Frigard v. U.S.*, 862 F. 2d 201, 204 (9th Cir. 1988). With respect to the Rule 12(b)(7) arguments, it would not be an abuse of discretion to deny leave to amend, where, as here, any proposed amendment would be futile. *See generally Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986), 806 F.2d at 1401 (stating "leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency"); *Tonasket v. Sargent*, 830 F. Supp.2d 1078, 1083 (E.D. Wash. 2011) (dismissing complaint with prejudice where claims against tribal officials barred by sovereign immunity and absent party, the State, could not be joined). Plaintiffs' entire case, including its claims against the State defendants, requires a threshold determination from this Court about the ownership status of Lake Quinault. Compl. ¶¶ 12.4 and 14.4 (Public Trust Doctrine claims), 13.4 and 13.8 (Equal Footing Doctrine claim). For all the reasons explained above, this land status determination cannot be made and any amendment is futile.

CONCLUSION

For the foregoing reasons, the Nation respectfully requests that this Court enter the [Proposed] Order dismissing this case with prejudice, and without leave to amend.

DATED this 29th day of January, 2015.

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Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012). The APA has a six-year statute of limitations. 28 U.S.C. § 2401(a). The time for such a challenge has long since run.

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