

Case 2:13-cv-00106-GJQ ECF No. 62 filed 10/21/15 Page 1 of 3 PageID.1822

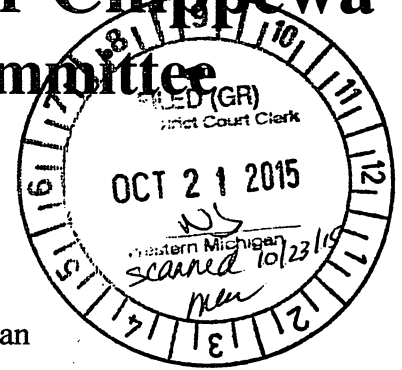
# Fond du Lac Band of Lake Superior Chippewa

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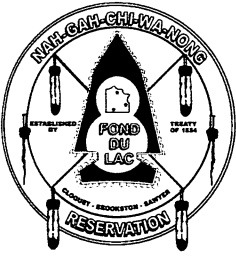
## Reservation Business Committee

October 16, 2015

Honorable Gordon J. Quist  
United States District Court for the Western District of Michigan  
482 Federal Building  
110 Michigan Ave. NW  
Grand Rapids, MI 49503



**2:13-cv-106**  
**Gordon J Quist**  
**U.S. District Judge**



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Executive Director,  
Tribal Programs  
**Chuck Walt**

Executive Director,  
Enterprises  
**Michael Himango**

Dear Judge Quist:

The Fond du Lac Band of Lake Superior Chippewa ("Band") has recently been contacted by attorney Joseph O'Leary, who is representing the plaintiff in the case *Brenda Turunen v. Keith Creagh, Director Michigan Department of Natural Resources, et al.*, File No. 2:13-cv-00106-GJQ. The Band is a signatory to the Treaty with the Chippewa, 1842, 7 Stat. 591 (hereinafter "Treaty of 1842"), the Treaty that Ms. Turunen asserts protects her farming operation from the application of state law.

The Band is aware of its right to intervene in this case, as a treaty signatory whose rights are integral to Ms. Turunen's lawsuit. After consideration, the Band declines to intervene in this litigation. Furthermore, the Band believes that it is a necessary and indispensable party to any suit that would adjudicate its rights under the Treaty of 1842, and that without its participation the suit should be dismissed.

Federal Rule of Civil Procedure 19 provides guidelines for determining whether it is necessary to dismiss a case because a person or entity has an interest in the litigation that could be impaired in the absence of that person or entity, but joinder of that person or entity cannot be accomplished. *See Glancy v. Taubman Centers, Inc.*, 373 F.3d 656, 664 (6<sup>th</sup> Cir. 2004).

Ordinarily, courts employ a three-part process to assess whether joinder is proper under Rule 19. Courts answer these questions:

1. Is the absentee's presence necessary?
2. If the absentee's presence is necessary, is its joinder feasible?
3. If its joinder is not feasible, is it indispensable?

*See W. Md. Ry. Co. v. Harbor Ins. Co.*, 910 F.2d 960, 961 (D.C. Cir. 1990).

The Band is not subject to joinder because Indian tribes are immune from suits in state and federal court. *See Makah Indian Tribe v. Verity*, 910 F.2d 555, 557 (9<sup>th</sup> Cir. 1990). The inquiry thus focuses on the elements of necessity and indispensability.

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### Necessary Party

According to Fed.R.Civ.P. 19(a), a party is “necessary” if

(1) in the person’s absence, complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may (i) as a practical matter impair or impede the person’s ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest.

In the Treaty of 1842, the Band reserved certain legal rights; the Band is thus a necessary party to actions affecting those legal rights. *Keweenaw Bay Indian Community v. State*, 11 F.3d 1341 (6<sup>th</sup> Cir. 1993). A judgment could potentially define those reserved rights narrowly, impeding the Band’s ability to exercise its reserved rights. *See Glancy*, 373 F.3d at 671.

Although sovereign immunity can be waived, failure to do so is not a component of the prejudice analysis where intervention would require the absent party to waive sovereign immunity. Furthermore, Tribes cannot be compelled to participate in actions affecting their interests. *Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1498 (D.C. Cir. 1995) (citing *Wichita & Affiliated Tribes*, 788 F.2d at 776) and *Makah Indian Tribe*, 910 F.2d at 560.

The Band is a necessary party, and tribal sovereign immunity shields the Band from being compelled to participate in this case.

### Must the Action Be Dismissed Because the Tribe is Indispensable?

Fed.R.Civ.P. 19(b) considers four factors to determine the indispensability of a necessary party:

**[F]irst**, to what extent a judgment rendered in the person’s absence might be *prejudicial* to the person or those already parties; **second**, the extent to which, by protective provisions in the judgment, by shaping relief, or other measures, the *prejudice can be lessened or avoided*; **third**, whether a judgment rendered in a person’s absence will be *adequate*; **fourth**, whether the plaintiff will have an *adequate remedy* if action is dismissed for nonjoinder. (emphases added)

**Prejudice** to an absent party requires the court to determine whether any of the currently participating parties can adequately represent the absent party’s interests. *Glancy*, 373 F.3d at 672. In this case, the State of Michigan would be the Band’s opposing party in a suit over its reserved treaty rights, and while an individual tribal member of the Keweenaw Bay Indian

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Community may share some of the Band's interests in a treaty rights case, the Band represents many tribal members and promulgates and enforces its own regulations against those members. None of the named parties can adequately represent the Band's interests in this case.

Treaty rights cases have historically involved litigation between states and tribes, with state laws restricting tribal members only where the tribe's regulation is inadequate to protect public health, safety, or the natural resource. *See e.g. Lac Courte Oreilles v. Voigt*, 668 F.Supp. 1233 (W.D. Wisc. 1987). This has involved a close review of the tribes' laws, regulations, courts and law enforcement systems. It is unlikely that the parties will be able to present the necessary evidence on the Band's mechanisms of self-government without participation by the Band, rendering the court unable to provide judgment on the treaty rights claim.

The Band's interest in maintaining its sovereign immunity outweighs the plaintiff's interest in litigating a claim. *See, e.g., Confederated Tribes of Chehalis Indian Reservation*, 928 F.2d at 1500. Dismissing the Plaintiff's claim will not preclude the Plaintiff from seeking a remedy in state court or from petitioning the legislature and state executive branch for a change in state law and regulations. However, allowing the case to proceed might force the Band to intervene in the litigation as the only way to protect its rights.

The Fond du Lac Band of Lake Superior Chippewa respectfully requests that the court find that it cannot "in equity and good conscience" proceed without the Band, and dismiss the case.

Sincerely,



Karen R. Diver  
Chairwoman

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