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WESTERN DISTRICT OF MICHIGAN
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October 13, 2015

Judge Gordon J. Quist
U.S. District Judge
482 Federal Building
110 Michigan Ave. NW
Grand Rapids, MI 49503

Dear Judge Quist,

The Lac Courte Oreilles Band of Lake Superior Chippewa Indians (hereinafter "Tribe"), 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 Tribe 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 Tribe 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 Tribe declines to intervene in this litigation. Furthermore, the Tribe 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 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 (6th Cir. 2004). Ordinarily, courts employ a three-part process to assess whether joinder is proper under Rule 19. Courts answer these questions: is the absentee's presence necessary? If the absentee's presence is necessary, is its joinder feasible? 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). As Indian tribes are immune from suits in state and federal court, the tribe is not subject to joinder. See *Makah Indian Tribe v. Verity*, 910 F.2d 555, 557 (9th Cir. 1990). The inquiry thus focuses on the elements of necessity and indispensability.

Necessary Party

Rule 19(a) provides guidelines on determining whether an individual or entity is a

necessary party. Rule 19(a) provides:

Persons to be Joined if Feasible: A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action 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. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, the party shall be dismissed from the action.

Fed.R.Civ.P. 19(a).

In the Treaty of 1842, the Tribe along with the other signatory tribes reserved certain rights. These reserved rights are legal interests of each of the signatory tribes, making the tribes necessary parties to actions affecting those legal interests. *Keweenaw Bay Indian Community v. State*, 11 F.3d 1341 (6th Cir. 1993). On a practical level, a treaty rights case requires the active participation by the tribes to demonstrate their ability to regulate their members' activities. Without that showing, a judgment could define those reserved rights narrowly, impairing and impeding the tribes' ability to exercise their reserved rights. *See Glancy*, 373 F.3d at 671. The state may also be subject to multiple lawsuits involving the tribes' and various tribal members claiming an interest in the Treaty of 1842. *Keweenaw Bay Indian Community*, 11 F.3d at 1347.

Although sovereign immunity can be waived, 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) (failure to intervene is not a component of the prejudice analysis where intervention would require the absent party to waive sovereign immunity) (citing *Wichita & Affiliated Tribes*, 788 F.2d at 776) and *Makah Indian Tribe*, 910 F.2d at 560.

The Tribe along with the other signatory tribes are necessary parties, however tribal sovereign immunity shields the tribes' from being compelled to participate in this case.

Must the Action Be Dismissed Because the Tribe is Indispensable?

Courts employ the balancing test in Rule 19(b) to determine the indispensability of a party. Rule 19(b) provides:

Determination by Court Whenever Joinder Not Feasible. If a person described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the

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parties before it, or it should be dismissed, the absent person thus regarded as indispensable. The factors to be considered by the court include: first, 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.

Fed.R.Civ.P. 19(b).

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. Within the instant case, none of the named parties can adequately represent the Tribe or other signatory tribes' interests. The State of Michigan would be the tribes' opposing party in a suit over its reserved treaty rights; and while an individual tribal member of the Keweenaw Bay Indian Community may share some of the tribes' interests in a treaty rights case, and it appears that the Keweenaw Bay Indian Community is an indispensable party, in fact all of the treaty signatory tribes are indispensable parties as the tribes' represents many tribal members, and promulgates and enforces their own regulations against those members.

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

A Tribe's interest in maintaining its sovereign immunity may outweigh a plaintiff's interest in litigating a claim. *Confederated Tribes of Chehalis Indian Reservation*, 928 F.2d at 1500. Dismissing the Plaintiff's claim would 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 Tribe to intervene in the litigation as the only way to protect its rights.

The Tribe respectfully requests that the court find that it cannot "in equity and good conscience" proceed without the Tribe along with the other signatory tribes, and dismiss the case.

Sincerely,



Kekek Jason Stark.

Legal Director / Tribal Attorney

cc: Tribal Governing Board
Ann McCammon Soltis, GLIFWC Intergovernmental Affairs Director
Mr. Joseph O'Leary, Attorney at Law