LESTER J. MARSTON State Bar No. 081030
Rapport and Marston
405 West Perkins Street
Ukiah, CA 95482
Telephone: (707) 462-6846
Facsimile: (707) 462-4235
marston1@pacbell.net
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
EUREKA DIVISION

YUROK TRIBE, on behalf of itself and its members

Plaintiffs,

v.

RESIGHINI RANCHERIA and GARY MITCH DOWD,

Defendants.

Case No. 1:16-CV-02471-NJV

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: November 14, 2017
Time: 10:00 a.m.
Judge: Honorable Nandor J. Vadas

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Rules of Civil Procedure

TO THE PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 14, 2017, at 10:00 a.m., or as soon thereafter as the matter may be heard in the Courtroom of the Honorable Nandor J. Vadas, Magistrate Judge of the United States District Court for the Northern District of California, Eureka Division, located at 3140 Boeing Avenue, Mckinleyville, California 95519, defendants will move the Court for an order dismissing plaintiffs' complaint, pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure.

RELIEF SOUGHT BY THE DEFENDANTS

Defendants seek an order from the Court dismissing the plaintiffs' complaint on the following grounds:

1. The defendant, Resighini Rancheria ("Tribe"), is a federally recognized Indian tribe, that enjoys sovereign immunity and cannot be sued without its consent;

2. The Tribe has never given its consent to be sued in this case and has not otherwise waived its immunity from suit in favor of the plaintiffs and, therefore, all of plaintiffs' causes of action as they pertain to the Tribe must be dismissed;

3. The Tribe has organized a Tribal government under the provisions of the Indian Reorganization Act, 25 U.S.C. § 476, under a written Constitution, approved by the Secretary of the Interior, which designates the Resighini Tribal Council as the governing body of the Tribe;

4. Defendant, Gary Mitch Dowd ("Councilman Dowd") is the Secretary of the Tribal Council and has been sued in his official capacity. As an official of the Tribe, tribal sovereign immunity extends to Councilman Dowd, because all actions the plaintiffs allege in its complaint were undertaken by Councilman Dowd in his official capacity;

5. The plaintiffs seek an order from this Court determining the extent and nature of the Tribe's federally reserved right to fish in the Klamath River. As such, the Tribe is a necessary and indispensable party to this case, pursuant to Rule 19 of the Federal Rules of Civil Procedure, who must be joined as a party to this case, but who cannot be joined because the Tribe enjoys sovereign immunity from suit; therefore, all remaining causes of action pertaining to Councilman Dowd, being sued in his individual capacity, must also be dismissed. Thus, plaintiffs' entire complaint must be

dismissed on sovereign immunity grounds and on the grounds that plaintiffs have failed to join a necessary and indispensable party to the proceeding; and

6. Such other relief as the Court deems appropriate in granting defendants' motion dismissing the plaintiffs' complaint in its entirety.

This motion is based on all pleadings and papers already on file herein, the memorandum of points and authorities filed in support of this motion, the declaration of Rick Dowd filed in support of this motion, and such other pleadings, papers, or evidence that may be introduced prior to the hearing on this motion.

Dated: October 4, 2017

Respectfully Submitted,
RAPPORT & MARSTON

By: */s/ Lester J. Marston*
Lester J. Marston, Attorney for the Defendants

ISSUES TO BE DECIDED

1. Are plaintiffs' claims against the Resighini Rancheria barred by the Tribe's sovereign immunity from suit?

2. Are plaintiffs' claims against Gary Mitch Dowd, in his official capacity as the Secretary of the Tribe's Tribal Council, barred by Mr. Dowd's official immunity from suit?

3. Is the Tribe a necessary and indispensable party to this lawsuit?

4. Are plaintiffs' claims against Mr. Dowd barred, since the Tribe is a necessary and indispensable party, who cannot be joined in the lawsuit because of the Tribe's sovereign immunity from unconsented suit?

STATEMENT OF FACTS

The relevant facts of this case are set forth in the declaration of Rick Dowd filed in support of Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction. For the Court's convenience, the Defendants will not repeat those facts here, but rather incorporate them by this reference as if set forth here in full.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS

INTRODUCTION

The Tribe is a federally recognized Indian Tribe. Declaration of Rick Dowd in Support of Defendants' Motion to Dismiss ("Dowd Declaration"), p.1, ¶ 2. As such, the Tribe enjoys sovereign immunity from suit and cannot be sued without its consent. The Tribe has neither given its consent to be sued by the plaintiffs nor waived its sovereign immunity in favor of the plaintiffs. Dowd Declaration, p. 4, ¶ 20. Notably, the plaintiffs have plead neither the existence of any documents that could plausibly constitute a waiver of tribal sovereign immunity, nor offered any evidence of the Tribe's intent to abrogate the Tribe's immunity so as to subject the Tribe to suit by the plaintiffs.

In addition, defendant, Gary Mitch Dowd, is the Secretary of the Tribe's Tribal Council (Dowd Declaration, p.4, ¶ 19), and as such is clothed with the Tribe's immunity from suit for all acts done on behalf of the Tribe in his official capacity.

Finally, the fishing right at issue in this case is a federally-reserved Tribal property right to fish and not a right belonging to any individual. The Tribe, therefore, is a necessary and indispensable party to this case, because the plaintiffs are seeking to determine the nature and extent of the Tribe's federally reserved property right. The Tribe, however, cannot be joined in the lawsuit because of its sovereign immunity from suit. Therefore, the remaining causes of action alleged in the complaint against Councilman Dowd in his individual capacity must also be dismissed.

The Tribe, therefore, seeks dismissal of plaintiffs' entire complaint, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(7), on the grounds that this Court lacks jurisdiction over the subject matter of this action.

ARGUMENT

I. STANDARD OF REVIEW

Federal Rules of Civil Procedure Rule 12(b)(1), allows for a motion to dismiss based on lack of subject matter jurisdiction. See Fed. R. Civ. P. 12(b)(1). It is a fundamental precept that federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978); *K2 Am. Corp. v. Roland Oil & Gas*, 653 F.3d 1024, 1027 (9th Cir. 2011). Limits upon federal

jurisdiction must not be disregarded or evaded. *Owen Equip.*, 437 U.S. 365, 374 (1978)*; Jones v. Giles*, 741 F.2d 245, 248 (9th Cir. 1984). "It is presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994)*; K2 Am.*, 653 F.3d at 1027. Rule 12(b)(1) motions may be either facial, where the inquiry is confined to the allegations in the complaint, or factual, where the court is permitted to look beyond the complaint to extrinsic evidence. *See Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014)*; Safe Air For Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). When a defendant makes a factual challenge "by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Safe Air*, 373 F.3d at 1039; *see Leite*, 749 F.3d at 1121. The court need not presume the truthfulness of the plaintiffs' allegations under a factual attack. *Wood v. City of San Diego*, 678 F.3d 1075, 1083 n.2 (9th Cir. 2011)*; Safe Air*, 373 F.3d at 1039. The plaintiff must show by a preponderance of the evidence each requirement for subject-matter jurisdiction, and as long as the dispute is not intertwined with an element of the plaintiffs' causes of action, the court may resolve any factual disputes itself. See *Leite*, 749 F.3d at 1121, n.3*; Safe Air*, 373 F.3d at 1039-40.

Therefore, the plaintiffs bear the burden of establishing subject matter jurisdiction in this case. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

In addition, the standard of review under Rule 12(b)(7) for a motion to dismiss for failure to join an indispensable party under Rule 19 of the Federal Rules of Civil Procedure ("Rule 19") is subject to a three-step inquiry: (1) is the absent party necessary under Rule 19(a); (2) is it feasible to join that party; and (3) if not feasible, can the action proceed in equity and good conscience absent the indispensable party, or must the action be dismissed? *See Salt River Project Agric. Improvement and Power Distr. v. Lee*, 672 F. 3d 1176, 1179 (9th Cir. 2012) (citing *EEOC v. Peabody W. Coal Co.*, 400 F. 3d 774, 779-80 (9th Cir. 2005)).

II. DEFENDANTS ENJOY THE PROTECTION OF SOVEREIGN IMMUNITY FROM THIS SUIT.

A. The Tribe Enjoys Sovereign Immunity From Unconsented Suit.

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). The sovereign immunity of an Indian tribe is coextensive with that of the United States itself, *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1050 (9th Cir. 1985), rev'd on other grounds, 474 U.S. 9 (1985), and thus extends to governmental and commercial activities whether they occur on or off a reservation. *See Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998).

> To date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred . . . . Nor have we yet drawn a distinction between governmental and commercial activities of a tribe . . . . Though respondent asks us to confine immunity from suit to transactions on reservations and to governmental activities, our precedents have not drawn these distinctions.

Id. at 754-55.

Generally, inclusion of an Indian tribe on the Federal Register list of federally recognized tribes is sufficient to establish a tribe's entitlement to sovereign immunity. *Larimer v. Konocti Vista Casino Resort, Marina & RV Park*, 814 F. Supp. 2d 952, 955 (N.D. Cal. 2011), citing *Ingrassia v. Chicken Ranch Bingo and Casino*, 676 F. Supp. 2d 953, 957 (E.D. Cal. 2009); *Cherokee Nation v. Babbitt*, 117 F. 3d 1489, 1499 (D.C. Cir. 1997).

The Tribe is included on the list of federally recognized tribes promulgated by the Bureau of Indian Affairs, Department of the Interior, 79 Fed. Reg. 4749 (Jan. 29, 2014). As such, it enjoys tribal sovereign immunity from unconsented suit and cannot be sued without its consent.

Moreover, it must be recognized that "sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation." *Chemehuevi*, 757 F.2d at 1047, fn. 6 (internal citations omitted); *Rehner v. Rice*, 678 F.2d 1340, 1351, rev'd on other grounds, 463 U.S. 713 (1983) (tribal sovereign immunity applies "irrespective of the merits" of the claim asserted against the tribe). Rather, it presents a pure jurisdictional question. *Chemehuevi*, 757 F.2d at 1051. Accordingly, where, as here, a federally recognized Indian tribe properly raises sovereign

immunity, the court is deprived of jurisdiction to adjudicate any of the claims alleged against the Tribe in the complaint.

B. Defendant Dowd Is Similarly Cloaked In The Tribe's Sovereign Immunity From Suit.

Tribal sovereign immunity extends to tribal officials when acting in their official capacity and within the scope of their authority. *See Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002); *Snow v. Quinalt Indian Nation*, 709 F.2d 1391, 1321 (9th Cir. 1983); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *Hardin v. White Mountain Apache*, 779 F.2d 476, 479-480 (9th Cir. 1985); *Davis v. Littel*, 398 F.2d 83, 84 (9th Cir. 1968). "Tribal officials" are not limited to political officials, but include all employees of a tribe if they are acting within the scope of their employment. *See Cook v. AVI Casino Enters. Inc.*, 548 F.3d 718, 727 (9th Cir. 2008). The relevant inquiry for sovereign immunity purposes is not whether an individual or the tribe itself is named in the suit, but whether the relief sought is, in effect, sought against the Tribe. *Larimer*, 814 F. Supp. 2d at 957.

Plaintiffs' complaint seeks relief against Gary Mitch Dowd in his official capacity as the Secretary of the Tribe. Complaint, p. 4, ¶ 12. Other than to allege that "Defendant Dowd is being sued in his official . . . capacity," there are no facts alleged in the complaint that Councilman Dowd took any action in his official capacity as the Secretary of the Tribe's Tribal Council. *Id.* Since the complaint alleges no facts that Councilman Dowd, at any time relevant to the facts alleged in the complaint, undertook any actions in his official capacity, Dowd is being sued simply because he is an officer of the Tribe. As such, the complaint must be dismissed as it pertains to Councilman Dowd, as Secretary of the Tribe's Tribal Council, based upon his sovereign immunity from suit. *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F. 3d 1288, 1296 (10th Cir. 2008). "[T]he interest in preserving the inherent right of self-government in Indian tribes is equally strong when suit is brought against individual officers of the tribal organization as rather than against the tribe itself." *Id., citing Nero v. Cherokee Nation of Okla.*, 892 F. 2d 1457, 1462 (10th Cir. 1989). Accordingly, "a tribe's

immunity generally immunizes tribal officials from claims made against them in their official capacities." *Native Am. Distrib.*, 546 F. 3d at 1296.[1]

C. The Tribe Has Not Waived Its Tribal Sovereign Immunity From Suit And Congress Has Not Abrogated Its Immunity.

Although tribal sovereign immunity may be waived by an Indian tribe or abrogated by Congress, any such abrogation must be unequivocally expressed and is to be narrowly construed. *Santa Clara Pueblo*, 436 U.S. at 58 (a waiver of tribal sovereign immunity "cannot be implied but must be unequivocally expressed."). *Accord*, *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) ("To abrogate tribal immunity, Congress must unequivocally express that purpose."); *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989) ("[T]ribal sovereign immunity remains intact unless surrendered in express and unequivocal terms.").

Furthermore, the requirement that the waiver be "unequivocally expressed" is not a "requirement that may be flexibly applied or even disregarded based on the parties or the specific facts involved." *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998). "In the absence of a clearly expressed waiver by either the tribe or Congress, the Supreme Court has refused to find a waiver of tribal sovereign immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case." *Id*.

Moreover, the Ninth Circuit has held that "[t]here is a strong presumption against waiver of tribal sovereign immunity," *Demontiney v. U.S. ex rel. Dept. of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 811 (9th Cir. 2001). It is "the plaintiff," not the defendant, who "bears the burden of showing a waiver of tribal sovereign immunity." *Hall v. Mooretown Rancheria*, No. 2:12-cv-1856 LKK GGH PS, 2013 U.S. Dist. Lexis 81446, at *10 (E.D. Cal. June 10, 2013) *citing Ingrassia v. Chicken Ranch Bingo and Casino*, 676 F.Supp.2d 953, 956-57 (E.D. Cal. 2009).

[1] Nor could a suit be maintained against Councilman Dowd in his official capacity under the exception created under *Ex parte Young*, 209 U.S. 123 (1908), because the plaintiffs have failed to allege any facts that Councilman Dowd has the "requisite enforcement connection" necessary to prevent Resighini Tribal members from fishing in those portions of the Klamath River that lie within the Yurok Reservation. *Burlington Northern & Santa Fe Ry. Co. v. Vaugh*, 509 F. 3d 1085, 1092-93 (9th Cir. 2007).

Like tribal waivers of sovereign immunity, congressional abrogation cannot be implied. *See Okla. Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla*., 498 U.S. 505, 509 (1991) (Supreme Court holding that an abrogation of tribal sovereign immunity by Congress cannot be determined by implication and must be expressly stated); *C & L Enterprises*, 532 U.S. at 418 ("To abrogate tribal immunity, Congress must 'unequivocally' express that purpose").

The Tribe has not waived its immunity in favor of the plaintiffs. Dowd Declaration, p. 4, ¶ 20. Nor has Congress enacted legislation containing expressed or explicit language abrogating the Tribe's immunity and authorizing the plaintiffs to sue the Tribe or its officials for the causes of action alleged in the complaint. *Id*., at p. 4, ¶ 21. In fact, the complaint is devoid of any allegation whatsoever that the Tribe has waived its immunity or that Congress has abrogated the Tribe's or its officials' immunity. Based upon the Tribe's sovereign immunity and that of its officials, the Court has no choice but to dismiss the Tribe and Gary Mitch Dowd, in his official capacity from the lawsuit.

> Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy, as suggested by California's argument, the application of which is within the discretion of the court . . . . Consent alone gives jurisdiction to adjudge against the sovereign. Absent that consent, the attempted exercise of judicial power is void . . . . Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.

California v. Quechan Tribe of Indians, 595 F.2d 1153, 1155 (9th Cir. 1979), citing *United States v. United States Fidelity and Guarantee Co.*, 309 U.S. 506 (1940).

Having shown that the Court has no jurisdiction over the Tribe and Councilman Dowd in his official capacity, based on the Tribe's and Dowd's sovereign immunity from suit, the only remaining question is whether the plaintiffs can litigate its claims against Councilman Dowd in his individual capacity. As will be shown below, the answer to that question is a resounding: No!

III. PLAINTIFFS' CLAIMS ARE BARRED BECAUSE THEY REQUIRE THE JOINDER OF A NECESSARY PARTY, THE TRIBE, THAT CANNOT BE JOINED BECAUSE THE TRIBE ENJOYS SOVEREIGN IMMUNITY FROM SUIT.

The absence of an effective waiver or abrogation of the Tribe's sovereign immunity applicable to the plaintiffs' claims requires that the entire complaint be dismissed because of the plaintiffs' inability to join the Tribe, who is necessary and indispensable to the litigation. Fed. R. Civ. P. Rule 19.

Under Rule 19, the Court must engage in a two-step analysis. First, the Court must determine whether a party is "required":

> (1) *Required Party.* 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 claims an interest relating to the subject 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 impede 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.

Fed. R. Civ. P. Rule 19.

If a party is found to be required, but cannot be joined, the Court must determine whether the absent party is indispensable and, therefore, whether the matter must be dismissed: If a person who is required to be joined 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 plaintiffs seek a declaration that the Tribe does not possess a federally-reserved right to fish within the Klamath River that lies within the boundaries of the Yurok Indian Reservation. However, the Tribe's federally reserved right to fish is a Tribal property right and not an individual Indian right.

> We hold that the use of accustomed fishing places, whether on or off the reservation, is a tribal right for adjustment by the Tribe and the fact that certain Indians have been allowed to have sole use of a particular spot by the Tribe gives the individual no property right against the Tribe . . . .

Whitefoot v. United States, 293 F. 2d 658, 663 (Ct. Cl. 1961), cert. denied, 369 U.S. 818 (1962), *See also, United States v. Gallaher*, 275 F. 3d 784, 789 (9th Cir. 2001) (holding reserved treaty fishing rights "belong to the tribe as a whole and not to any one individual").

Thus, any order issued by this Court relating to the plaintiffs' claims would not bind the Tribe with regard to the issue of where the Tribe possesses a federally reserved right to fish in the Klamath River. Any such order would, thus, fail to accord complete relief to the plaintiff. Rule 19(A). *See also Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir. 1975); *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991) ("*Confederated Tribes*").

The Tribe also has an interest relating to the subject of this action and is so situated that the disposition of this action in the Tribe's absence will, as practical matter, impair or impede its ability to protect that interest.

As stated above, the Tribe's federally reserved fishing right is a tribal property right. A determination by the Court that the right does not exist or is subject to regulation by the Yurok Tribe would most certainly affect the Tribe's interests. That conclusion is entirely consistent with other decisions where courts have concluded that Indian tribes are necessary parties to actions affecting their legal interests. *Confederated Tribes,* 928 F. 2d at 1500 (holding Indian tribe was a necessary and indispensable party where relief sought would affect the exercise of the tribe's sovereign jurisdiction over reservation); *See,* e.g. *McClendon v. United States*, 885 F. 2d 627, 633 (9th Cir. 1989) (Indian tribe is a necessary party to an action seeking to enforce a lease agreement signed by tribe); *Enterprise Mgt. Consultants Inc. v. United States*, 883 F. 2d 890, 893 (10th Cir. 1989) (Indian tribe is a necessary party to an action seeking to validate a contract with the tribe).

If there was any doubt the Tribe is a necessary party, that doubt was laid to rest by a case strikingly similar to this case: *Skokomish Indian Tribe v. Forsman*, No. C16-5639 RBL, 2017 U.S. Dist. LEXIS 42730 (W.D. Wash. Mar. 23, 2017).

In that case, the Skokomish Indian Tribe sued Councilmembers and Fisheries Director of the Suquamish Indian Tribe, alleging that the Suquamish Tribe and its members violated the Skokomish's hunting rights by allowing their tribal members to hunt in Skokomish's treaty territory. *Id.* at *2. The defendants, individual officers of the Suquamish Tribe, moved to dismiss the complaint on the grounds that the Suquamish Tribe was a necessary and indispensable party to the proceeding who, because it enjoyed sovereign immunity from suit, could not be joined as a party and therefore, the complaint had to be dismissed. *Id.* at *3.

The Court dismissed the Skokomish's complaint for failure to join the Suquamish Tribe. In reaching this conclusion, the Court found that the Suquamish Tribe was a necessary and indispensable party to the proceeding who could not be joined, because of its sovereign immunity from suit.

> A declaration that Skokomish "has the primary right to regulate and prohibit treaty hunting and gathering within Skokomish . . . Territory" will necessarily impact absent signatory tribes. *See Goldmark*, 994 F. Supp. 2d at 1187. A

> favorable decision would also leave both parties subject to multiple or otherwise inconsistent results in future litigation. It is very likely that if the Court entered a judgment impacting treaty hunting rights of Suquamish and other Stevens Treaty Tribes, these tribes would seek legal recourse. Based on the foregoing, the Court concludes the Suquamish . . . with claimed hunting rights in the Twana Territory are necessary parties.
>
> * * * *
>
> None of these tribes explicitly waived their sovereign immunity from suit regarding their Point No Point or Stevens Treaty hunting rights, thus none can be joined under Rule 19.

Id. at *18-19.

Since the Tribe is a necessary and indispensable party to the proceeding, the only issue remaining to be resolved by the Court is whether in "equity and good conscience" the action can proceed absent the necessary tribe, the Resighini Rancheria. *Confederated Tribes*, 928 F. 2d at 1499.

Rule 19(b) provides the factors a Court should consider in determining whether an action should be dismissed because as here, a required party, the Resighini Tribe, cannot be joined because of its sovereign immunity. The factors are: "(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." Fed. R. Civ. P. 19(b); *see also Makah Indian Tribe v. Verity*, 910 F. 2d 555, 560 (9th Cir. 1990).

The first factor in the Rule 19(b) analysis, prejudice to either existing or absent parties, is essentially the same as the legal interest test under Rule 19(a). *See Quileute Indian Tribe v. Babbitt*, 18 F. 3d 1456, 1460 (9th Cir. 1994); *see also American Greyhound Racing Inc. v. Hall*, 305 F. 3d 1015, 1024-25 (9th Cir. 2002) ("not surprisingly, the first factor of prejudice, insofar as it focuses on the absent party, largely duplicates the consideration that made a party necessary under Rule 19(a).").

As shown above, with respect to the legal interest test, the Tribe has a protectable interest in the outcome of the litigation. It has a federally-reserved fishing right that could either be eliminated or made subject to the Yurok Tribe's regulation. A decision eliminating the Tribe's fishing right or subjecting the Tribe's fishing right to Yurok regulation would have devastating effects on the Tribe's

sovereign authority to enact and enforce its own laws regulating the fishing of its members. Thus, the prejudice prong of Rule 19(b) weighs in favor of the Court finding that the action should be dismissed.

With respect to the second factor under Rule 19(b), it is not possible to lessen or avoid the prejudice to the Tribe. The plaintiffs seek a determination from this Court that the Tribe has no federally-reserved fishing right to fish in their portions of the Klamath River that lie within the Yurok Reservation. In addition, Yurok seeks an order from the Court that it has the right to regulate fishing by the Tribe's members or, in the alternative, that the Tribe's members can fish if they subject themselves to California's fishing laws. The Court cannot grant any of the relief requested by the plaintiffs without eliminating or reducing the Tribe's federally-reserved fishing right. As a result, there is no way to lessen the prejudice the Tribe will suffer by shaping the relief granted or by placing provisions in the judgment. Thus, the second Rule 19(b) factor weighs in favor of dismissing the complaint.

The third factor, whether a judgment rendered in the Tribe's absence would be adequate, also requires dismissal of the complaint in this case. Whether a judgment is adequate for Rule 19(b) purposes refers to the "public stake in settling disputes" among the parties to the litigation. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968). Any judgment entered by the Court in the Tribe's absence would not settle the litigation. The Tribe would continue to assert its federally-reserved fishing right and members of the Tribe, authorized to fish in the Klamath River under the Tribe's fishing ordinance, would continue to fish in the Klamath River pursuant to the authority granted to them by the Tribe. Any judgment entered by the Court in this case would not be complete, given the significant possibility that the parties to the litigation would face subsequent litigation, initiated by the Tribe on the same issues with potentially different results. *See*, e.g. *Northern Arapaho Tribe v. Harnsberger*, 697 F. 3d 1272, 1283 (10th Cir. 2012). Thus, the third factor favors dismissal.

The fourth and final factor – the existence of an adequate remedy if the action was dismissed – was addressed in a case that is factually very similar to this case: *Skokomish Indian Tribe v. Goldmark*, 994 F. Supp. 2d 1168 (W. Wash. 2014). There, the Skokomish Tribe sued certain state officials seeking an order from the Court that it possessed the exclusive right to regulate hunting by members of other Indian tribes in territory Skokomish asserted was their exclusive hunting territory. In dismissing

the Skokomish's complaint for failure to join the other tribes as necessary and indispensable parties under Rule 19, the Court addressed all of the Rule 19 factors, including the fourth and final factor under Rule 19(b).

> The Ninth Circuit has consistently held that a tribe's interest in sovereign immunity outweighs the lack of an alternative forum. *United States v. Washington*, 573 F. 3d 701, 708 (9th Cir. 2009) (acknowledging that the tribe might not be able to sue another tribe seeking allocation of a resource because the other tribe could involve sovereign immunity, but pointing out that "not all problems have judicial solutions"); [citation omitted]; *see Wichita*, 788 F. 2d at 777 n. 13 (stating that when a necessary party is immune from suit, "there is very little room for balancing of other factors."). Furthermore, there is no reason that one sovereign should be given preference where other sovereigns share equal interests in the case . . . .
>
> * * * *
>
> In sum, Skokomish Indian Tribe seeks to litigate hunting and gathering rights under the Treaty of Point No Point and asks this court to declare that it has exclusive management authority over those Treaty rights and is entitled to an allocation of up to one hundred percent of the relevant resources. The prejudice that other signatory tribes to the Treaty will suffer if a judgment is rendered in their absence cannot be alleviated or avoided and any judgment would not render a complete resolution of the issues due to potential future litigation by other affected parties. Although Skokomish Indian Tribe will likely not have an alternative forum following dismissal of this action, this factor does not outweigh the others which favor dismissal particularly where the Tribe's inability to obtain an alternative forum is due to the necessary parties' sovereign immunity. Accordingly, the court concludes that "in equality and conscience" this matter should be dismissed without prejudice for failure to join indispensable parties.

Skokomish Indian Tribe, 994 F. Supp. 2d at 1192.

Based upon the application of Rule 19(b) factors, there is no doubt that "in equity and conscience" the complaint in this case should be dismissed for failure to join an indispensable party.

CONCLUSION

The Tribe has shown that it and Councilman Dowd, in his official capacity as the Secretary of the Tribe's Tribal Council, enjoy sovereign immunity from suit and cannot be sued without their consent. Neither the Tribe nor Dowd have given their consent to the plaintiff to sue them in this case or otherwise waived their sovereign immunity from suit in favor of the plaintiffs.

In addition, the Tribe and Councilman Dowd have shown that the Tribe is a necessary and indispensable party to this litigation who cannot be joined as a party to the litigation because it enjoys sovereign immunity from suit.

For these reasons and the reasons stated above, this Court must grant the Tribe's and Councilman Dowd's motion and dismiss the plaintiffs' complaint in its entirety.

Dated: October 4, 2017

Respectfully Submitted
RAPPORT AND MARSTON

By: /s/ *Lester J. Marston*
Lester J. Marston, Attorney
For the Defendants, Resighini Indian Rancheria and Gary M. Dowd

CERTIFICATE OF SERVICE

I am employed in the County of Mendocino, State of California. I am over the age of 18 years and not a party to the within action; my business address is that of Rapport & Marston, 405 West Perkins Street, Ukiah, CA 95482.

I hereby certify that I electronically filed the foregoing with the Clerk of the United States District Court for the Northern District of California by using the CM/ECF system on October 4, 2017.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; executed on October 4, 2017, at Ukiah, California.

/s/ Ericka Duncan
Ericka Duncan