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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

WILDEARTH GUARDIANS,

Plaintiff,

CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiff,

vs.

UNITED STATES FISH AND WILDLIFE SERVICE; et al.,

Defendants,

Montana Trappers Association, et al. & Fur Information Council of America,

Defendant-Intervenors.

Lead Case No. 9:16-CV-00065DWM

Member Case No. 9:17-CV-00099DWM

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT-INTERVENORS' MOTION TO DISMISS PLAINTIFFS' COMPLAINTS UNDER FED. R. CIV. P. 12(B)(7)

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 2

A. Plaintiffs' Opposition Brief Deviates from Their Complaints Relating to the Curtailment of Trapping and the Purported Relief Sought 2

B. States and Tribes Have Legally Protected Interests Relating to the Subject of this Action 5

C. The Existing Parties to This Litigation Cannot Adequately Represent the Interests of the States and Tribes 9

D. Contrary to the Service's Contention, Equity and Good Conscience Does Not Require That the Case Proceed 16

E. The Court Should Not Apply the "Public Rights" Exception Until Plaintiffs Amend Their Complaints to Ensure No Prejudice To The States and Tribes 18

III. CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

California Dump Truck Owner Ass'n v. Nichols,
924 F.Supp.2d 1126 (E.D. Cal. 2012) 13

Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs,
2017 WL 4277133 (D. Ariz. Sept. 11, 2017) 17, 19

EEOC v. Peabody Western Coal Co.,
400 F.3d 774 (9th Cir. 2005) 9

Forest Conservation Council v. U.S. Forest Serv.,
66 F.3d 1489 (9th Cir. 1995) 17

Friends of the Wild Swan v. Vermillion,
2015 WL 12748168 (D. Mont. Sept. 22, 2015) 15

Manygoats v. Kleppe,
558 F.2d 556 (10th Cir. 1977) 19

Minnesota v. Mille Lacs Band of Chippewa Indians,
526 U.S. 172 (1999).....11

Quileute Indian Tribe v. Babbitt,
18 F.3d 1456 (9th Cir. 1994) 13

Shermoen v. United States,
982 F.2d 1312 (9th Cir. 1992) 5

Union Pac. R.R. Co. v. Runyon,
320 F.R.D. 245 (D. Or. 2017).....10, 12

United States v. Sohappy,
770 F.2d 816 (9th Cir. 1985) 10

W. Shoshone Nat'l Council v. Molini,
951 F.2d 200 (9th Cir. 1991) 11

Statutes

National Environmental Policy Act 8, 9, 19

Other Authorities

79 Fed. Reg. 30399, 30412 (May 27, 2014).....14

79 Fed. Reg. 54781, 54791 (Sept. 12, 2014).....11, 14

Federal Rule of Civil Procedure 19 .....*passim*

I. INTRODUCTION

Plaintiffs oppose the final Environmental Assessment ("EA") relating to the furbearer CITES Export Program ("Program") released by the Service in May 2017. The Service (as supported by Defendant-Intervenors) favors the "no action" alternative proposed in the EA, which would maintain the Program as is.

But this litigation involves more than a mere decision whether to support or oppose the EA. The fact that Plaintiffs effectively seek to end the CITES Export Program, as the Center candidly admitted in comments to the Service,[1] is only a means by which to achieve a larger goal. That goal is the curtailment and ultimate elimination of trapping and hunting either through the total elimination of the Program or through other related court-ordered injunctive relief should Plaintiffs prevail. Plaintiffs indisputably are seeking injunctive relief against the Service, and as this Court has already found in refusing to dismiss the original suit brought by Guardians for lack of standing, the States' and Tribes' "numbers and methods of trapping" are "not wholly outside the Service's control." Doc. No. 35 (Order and Opinion) at 9.

It is disingenuous, therefore, for Plaintiffs to argue that they are not seeking an order that would "change State or Tribal authority to authorize trapping, nor,

[1] Center Comments to EA at p. 7 ("…we would support Alternative 3, which would call for ending the U.S.' participation in the CEP") (Pages 1-7 only of 54 pages of Comments attached hereto as Exhibit 1).

indeed, any continued trapping activities." Plaintiffs' Opp. at 5 (emphasis added). If elimination of trapping and hunting and an effort to impact the States' and Tribes' sovereign rights in the management of their wildlife was not the *raison d'etre* for the suit, then Plaintiffs would have no standing for the lack of redressability of their members' purported injuries allegedly caused by trapping and hunting.

Given Plaintiffs' overarching purpose, and the legally protectable rights of the States and Tribes in this case, the States and Tribes are required, indispensable parties under Rule 19(b). It is not practical to join the States and Tribes due to their sovereign immunity, and their legal interests cannot adequately be represented by existing parties. Nor can this action in equity and good conscience proceed. Finally, the public rights exception should not apply to this action given the scope of the lawsuit, the relief requested and Plaintiff's failure to limit such relief by amending their complaints. As a result, the Court should dismiss this action.

II. ARGUMENT

A. Plaintiffs' Opposition Brief Deviates from Their Complaints Relating to the Curtailment of Trapping and the Purported Relief Sought.

To provide context to the arguments below, Defendant-Intervenors draw the Court's attention to important assertions in Plaintiffs' Opposition that are at odds with allegations and claims in their complaints.

Plaintiffs contend that the relief they request would implicate "only the *export* of *bobcat pelts*." Plaintiffs' Opp. at 4 (emphasis in original). That plainly is not the case because Plaintiffs' complaints assert their members' personal interests in protecting against alleged harm of *trapping* to *every* furbearer species covered by the CITES Export Program. For example, Guardians' request "vacatur of the deficient Biological Opinion and [Incidental Take Statement], [which] would likely lessen *the extent or amount of trapping, capture or killing of species subject to export from approved states and tribal areas*." Guardians' Am. Compl. ¶ 8 (emphasis added). Similarly, the Center's Complaint pleads: "The Service's [Program] creates and maintains incentives for individuals to *kill bobcats, river otters, gray wolves, lynx and brown bears.* The Service's [Program] facilitates and allows trappers and hunters to access the lucrative international fur market through export and thus creates a profit incentive for trappers and hunters *to kill bobcats, river otters, gray wolves, lynx and brown bears.*" Center Compl. ¶ 18 (emphasis added).[2] Significantly, Plaintiffs do not address either of these paragraphs contained in their complaints, which were highlighted by Defendant-Intervenors in their opening brief. *See* Defendant-Intervenors Memorandum in Support of Motion to Dismiss ("Motion") (Doc. No. 76) at 8.

[2] Plaintiffs additionally complain about the effects of trapping on non-covered species, *i.e.*, "bycatch," as well. Guardians Am. Compl. ¶ 52; Center Compl. ¶ 13, 16, 20, 83, 109.

To the contrary, Plaintiffs submit that the injunctive relief order that they would seek from this Court "would not change State or Tribal authority to authorize trapping, nor, indeed, ***any continued trapping activities***." Plaintiffs' Opp. at 4 (emphasis added). This is highly misleading given the broad request for relief that both Plaintiffs seek. For example, Guardians' Amended Complaint expansively requests that the Court issue "***any other relief*** that this Court deems necessary, just or proper, ***or that Guardians subsequently requests***." Guardians' Am. Compl. at "Request for Relief, Part G" (emphasis added). At the same time, the Center, like Guardians, asks that the Court issue "such temporary restraining orders, preliminary injunctions and/or permanent injunctive relief ***as may be requested hereafter***" – without any limitations or constraints. Center Compl. at Request for Relief ¶ 3 (emphasis added). Once again, Plaintiffs do not address the specific language of their far-reaching relief that their complaints plead – also as highlighted by Defendant-Intervenors' Motion at 9. These broad requests for relief can only fairly be read to sustain Plaintiffs' claim of standing by seeking redress for the alleged injuries due to trapping and other activities as spelled out in the complaints.[3]

[3] Given the broad nature of the relief requested, the Service is wrong in stating that the Center "requests only the type of vague *or relatively tailored injunctive relief* that will not implicate distinct state-wide concerns." Service Opp. at 15 (emphasis added).

If, however, Plaintiffs are now seeking more limited relief – and have changed their strategy from requesting the type of broad injunctive relief that would implicate States' and Tribes' protectable interests in managing wildlife and trapping within their borders – Plaintiffs should amend their complaints accordingly in order to tailor the actual relief they seek.[4] Until then, and based on the allegations they have made and the broad relief they seek, it remains evident that Plaintiffs are pursuing this action to curtail and eliminate trapping and hunting, which the States and Tribes manage in their respective jurisdictions. Such management authority is a legally protected interest of the States and Tribes which is threatened by this lawsuit.

B. States and Tribes Have Legally Protected Interests Relating to the Subject of this Action.

Rule 19(a)(1)(B) confers required party status on one who "claims an interest relating to the subject of the action." "[T]he finding that a party is necessary to the action is predicated only on that party having a *claim* to an interest." *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) (emphasis in original). As long as the States' and Tribes' claimed interests are neither fabricated nor frivolous, such interests cannot be excluded from consideration under Rule 19. *Id*. at 1318.

[4] Indeed, Defendant-Intervenors made that specific suggestion in their opening brief, Motion at 22 n.6, but Plaintiffs to date have not moved to amend their complaints and in their brief make no mention of the suggestion or that they would even consider such action.

Plaintiffs contend that the litigation "merely seeks to enforce the public right to administrative compliance with environmental protection standards," Plaintiffs' Opp. at 11. They, therefore, assert that the States and Tribes have no legally protectable interests for Rule 19 purposes.[5] Plaintiffs are mistaken. Defendant-Intervenors have made legitimate, non-frivolous claims that the States and Tribes have legally protectable rights in this case regarding both the CITES Export Program and the management of wildlife (including trapping and hunting) within their borders.

Regarding the CITES Export Program, States and Tribes have *current, existing rights* in the Program, as demonstrated by the list of States and Tribes whose participation in the Program the Service has approved. *See* Motion, Exhibits 1-2. Plaintiffs themselves concede that by meeting conditions for approval, these States and Tribes "may operate an approved program." Plaintiffs' Opp. at 2.

Instead, Plaintiffs argue that States and Tribes have no "right" to export under CITES. *Id*. at 10. But they disregard the claim that States and Tribes have existing rights in the *Program* and the regulations thereunder that the Plaintiffs seek to vitiate, *see* Motion at 14-15, including the right to issue tags which Plaintiffs admit Guardians seeks to enjoin. Plaintiffs' Opp. at 3.

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[5] The Service does not make this argument and thus concedes that the States and Tribes have legally protectable rights in this case.

Plaintiffs also argue that the only interests claimed here are insufficient "financial" ones. *Id.* at 8-9. Yet, the comments to the EA filed by 25 States demonstrate more than a financial stake in the Program. *See*, *e.g.*, Motion at 5-6 (citing Wyoming Game and Fish Department Comments on Draft Environmental Assessment (April 7, 2017) ("If export were made illegal, this would unnecessarily impact rural lifestyles . . .")).

Regarding the overall management of wildlife and the role of trapping and harvesting of wildlife that are part of such management, these too are legally protectable interests that the States and Tribes possess and which are the subjects of this lawsuit. In contrast to the position Plaintiffs now take in their Opposition, their complaints *do* seek to impair and impede these legally protectable interests of the States and Tribes.

For example, Defendant-Intervenors highlighted that Guardians complains about snare, leg-hold and other traps allegedly leading to illegal takes of protected wildlife, and that the Center's Complaint alleges that trapping and hunting injure its members in many States. *See* Motion at 7-8. These allegations, which Plaintiffs pointedly fail to address in their Opposition, would be superfluous and irrelevant if Plaintiffs were not attacking the States' and Tribes' rights to manage their wildlife generally and trapping and hunting within their jurisdictions more specifically. It is inexplicable how Plaintiffs in their Opposition can contend that they only seek

limited relief pertaining to the export permitting regime, but not as to trapping or hunting or as to the States' and Tribes' management authority over these activities, while at the same time grounding standing in their complaints on the alleged harms of trapping and hunting for which they seek redress through this lawsuit. Plaintiffs cannot have it both ways.

Indeed, this Court in its Order and Opinion on a previous motion to dismiss filed in this case, Doc. No. 35, specifically underscored the alleged harms facing Plaintiffs' members from trapping. Plaintiffs' arguments in their Opposition disavowing attacks on trapping are in sharp contrast to the Court's finding that "if the Service is required to perform a NEPA analysis in conjunction with its administration of the CITES program, it will be required to consider the impact the program has on the species and the environment, ***addressing WildEarth members' harms***." See Doc. No. 35 at 10.

Defendant-Intervenors also specifically explain how Guardians' Amended Complaint attempts to deprive the States and Tribes of an exception from liability for incidental take of Canada lynx due to bobcat trapping and also seeks to require States and Tribes to adopt the trapping methods published by the Service. Motion at 17-18. Plaintiffs attempt to rebut Defendant-Intervenors by arguing that "the claims for declaratory relief in Guardians' and the Center's operative complaints are exclusively against the Service, as is the requested injunctive relief." Plaintiffs'

Opp. at 4. Of course, this ignores the direct fallout and harm to the States' and Tribes' ability to manage their wildlife and trapping within their borders should the relief requested be granted.[6]

Ultimately, success by the Plaintiffs in this litigation would force States and Tribes to alter the way in which they regulate the harvest of their wildlife through trapping and hunting. And as next discussed, the existing parties cannot adequately represent the States and Tribes against impairment of their legally protectable interests.

C. The Existing Parties to This Litigation Cannot Adequately Represent the Interests of the States and Tribes.

In light of the impact of this case on the States' and Tribes' ability to control and protect trapping and the management of wildlife in their midst, Defendants and Defendant-Intervenors cannot adequately represent those interests. In reality, if Plaintiffs are successful, the practical implication of the relief they seek is not only to set aside the EA, but also to invalidate certain State and Tribal sovereign rights, rules and regulations regarding trapping and hunting.

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[6] The related argument that Plaintiffs make to the effect that "violations of NEPA and Section 7 of the ESA, and these claims can be brought only against a federal agency . . ." which they claim renders the States and Tribes improper parties, and the application of Rule 19 somehow inapplicable, *see* Plaintiffs' Opp. at 20, is plainly wrong. *EEOC v. Peabody Western Coal Co.*, 400 F.3d 774, 781 (9th Cir. 2005) (the "plaintiff's inability to state a direct cause of action against an absentee does not prevent the absentee's joinder under Rule 19.").

With respect to Tribes, Plaintiffs claim that the Service adequately represents the tribal interests because "no demonstrable conflict exists between the federal government and non-party tribes." Plaintiffs' Opp. at 16. Plaintiffs also assert that "this case does not involve any tribal treaty rights." *Id.* While "the federal government regularly has a fiduciary or trust relationship with federally recognized tribes," the relief Plaintiffs seek is in this case closely relates to and, if successful, would impact Tribes' wildlife regulations and also certain treaty-reserved usufructuary rights, which the Service and Defendant-Intervenors are not capable of defending. *Union Pac. R.R. Co. v. Runyon*, 320 F.R.D. 245, 252 (D. Or. 2017) (dismissing with prejudice an action by railroad for failure to join tribes as necessary parties because the tribes' treaty-reserved fishing rights would be harmed if the action proceeded without them; county defendants and environmental group intervenors could not adequately represent the tribes' interests) (internal citations omitted).

Treaty-reserved hunting and fishing rights "are of great significance to tribes" as they are, in essence, "a function of tribal sovereignty." *Id.* at 251 (citing *United States v. Sohappy*, 770 F.2d 816, 819 (9th Cir. 1985) (holding that tribes "have a strong interest in enforcing their tribal fishing regulations according to their own dictates and concurrent federal jurisdiction might impair independent tribal control.")). Pursuant to some treaties, tribal-reserved hunting and fishing rights are

so strong they survive conveyance of title to the underlying land. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (finding, with respect to the Chippewa's 1837 Treaty, "nothing in the nature of reserved treaty rights to suggest that they can be extinguished by *implication* at statehood."). *See also W. Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 202 (9th Cir. 1991) (reiterating the Supreme Court's finding that conveyance of title does not include treaty-reserved hunting and fishing rights).

The Service itself takes the position that, in accordance with executive orders guiding Federal and Tribal relations and trust obligations, "we believe that fish, wildlife, and other natural resources on Tribal lands are better managed under Tribal authorities, policies, and programs than through Federal regulation wherever possible and practicable." 79 Fed. Reg. 54781, 54791 (Sept. 12, 2014).[7] The Service thus admits that it would also be inappropriate to manage fish and wildlife on Tribal lands as such management "is often viewed by Tribes as an unwanted intrusion into Tribal self-governance." *Id*. This supports a finding that Tribes, particularly those

[7] Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights (2016), available at: https://www.epa.gov/sites/production/files/2017-02/documents/mou_treat_rights_12-01-16_final.pdf ("The Federal Government has an obligation to honor and respect tribal rights and resources that are protected by treaties. This means that federal agencies are bound to give effect to treaty language and, accordingly, must ensure that federal agency actions do not conflict with tribal treaty rights.").

with wildlife management programs or treaty-reserved usufructuary rights, are necessary parties to this case because the Service, by its own admission, cannot adequately represent Tribes' interests.

Although Defendant-Intervenors have an interest in maintaining and furthering trapping and the trade thereof, Defendant-Intervenors do not intend nor do they have the ability to represent tribal interests. Defendant-Intervenors' organizations are not affiliated with any tribe. Defendant-Intervenors also do not represent nor do they intend to represent Tribes' sovereign regulatory interests or tribal treaty-reserved rights in this case. See *Runyon*, 320 F.R.D. at 252 (finding current parties incapable of representing tribal interests as "neither defendants nor intervenors have represented that they have the intent or ability to represent the Treaty Tribes' interests."). Given the significance of Tribal wildlife management and other treaty-reserved rights that are closely linked to Tribes' sovereignty, it is thus unlikely that the Service or Defendant-Intervenors can capably serve the interests of the Tribes whose interests may be implicated by the relief Plaintiffs seek.

Neither the Service nor Defendant-Intervenors can make all arguments on behalf of the States and Tribes, as the practical implication of the relief sought by Plaintiffs would modify and invalidate State and Tribal-specific programs implementing CITES. Precedent holds that a sovereign entity is an indispensable party if it "has an interest in a lawsuit that could result in the invalidation or

modification of one of its…rules [or] regulations." *California Dump Truck Owner Ass'n v. Nichols*, 924 F.Supp.2d 1126, 1147 (E.D. Cal. 2012). Case law moreover holds that "a party cannot avoid a finding of necessity under Rule 19 by its characterization of the issue, especially when the outcome of the litigation would affect tribal interests." *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1458 (9th Cir. 1994).

Here, Plaintiffs attempt to avoid a finding that States' and Tribes' interests are implicated by characterizing their claim for relief as a correction of the Service's erroneous administrative determination. *See* Guardians Am. Compl. ¶ 21-22. In seeking to correct the Service's administrative error, however, Plaintiffs also seek to compel the Service to reach a specific conclusion prohibiting the export of bobcat pelts from states and tribal areas, on the theory Canada lynx are vis-à-vis jeopardized. *Id*. at 22. Plaintiffs argue such relief only affects the *export* of bobcat pelts, not State and Tribal authority to authorize trapping. Plaintiffs' Opp. at 4. If Plaintiffs succeed, however, the practical implication of the relief they seek would invalidate State and Tribal management programs for CITES and ESA management of Canada lynx.

The Service's final rule revising CITES implementation regulations explains:

> "We have worked with States and Tribes to develop procedures that allow us to make the necessary findings for native species programmatically (i.e., at the State or tribal level) rather than on a permit-by permit basis. …A tag issued by the State or Tribe

> demonstrates that a particular specimen was harvested under an approved program and that the appropriate findings have been made."

79 Fed. Reg. 30399, 30412 (May 27, 2014).

The Service further reiterates States' and Tribes' indispensable regulatory role with respect to Canada lynx in the final rule designating the critical habitat area for Canada lynx:

> In the case of Tribal lands and State or private lands with finalized lynx management plans or habitat conservation plans (HCPs), we have determined that Tribal management, and State and private management in accordance with finalized plans or HCPs, is more beneficial to lynx than a critical habitat designation would be. One component of this analysis is the recognition that *many activities that could affect lynx on these lands lack a Federal nexus*, thereby precluding opportunity to achieve conservation via section 7 consultation resulting from designation. Therefore, management in accordance with Tribal forest and/or wildlife management plans and HCPs or other formal management plans on State or private lands *is more likely to result in conservation of the lynx and its habitats than would be achieved via designation as critical habitat*.

79 Fed. Reg. at 54791 (emphasis added).

The above explanations show that each State and Tribe with an approved program plays a critical regulatory role in the implementation of CITES and management of Canada lynx. State and Tribal regulatory interests are separate and distinct from the federal government's interests because State and Tribal regulations are tailored to the specific geographic area and, with respect to lynx, rarely affect activities that have a federal nexus. Given the lack of federal nexus, it is unlikely then that the Service could make all arguments on behalf of each State's and Tribe's

management programs and regulations thereto, which would inevitably be impacted if Plaintiffs are successful in "enjoin[ing] the Service from…authorizing the export of bobcat pelts or parts from state and tribal areas that include habitat for Canada lynx." Guardians Am. Compl. ¶ E.

It is even more doubtful that Defendant-Intervenors could make all arguments on behalf of States' and Tribes' regulatory interests because Defendant-Intervenors represent private individuals' recreational and commercial interests, with no specific interest to protect State and Tribal regulatory programs. Plaintiffs claim that counsel Gary Leistico "ably represented individual trappers and their associations in federal courts seeking to defend existing state trapping rules and regulations in Montana." Plaintiffs' Opp. at 19. Notwithstanding, Mr. Leistico has never represented States or Tribes on any such related matters, and, on representations of trapping associations, the trappers were allowed to intervene specifically because the interests of trappers were distinctly different than those of the state parties. In *Friends of the Wild Swan v. Vermillion*, Mr. Leistico, on behalf of the trappers association, opposed Montana's "settlement and stipulated proposed regulatory changes." 2015 WL 12748168 at *1 (D. Mont. Sept. 22, 2015). Given Defendant-Intervenors' differing interests and past opposition to Montana state trapping regulations, it is doubtful that Defendant-Intervenors are able to make all arguments on behalf of States' and Tribes' regulatory interests at stake in this case.

D. Contrary to the Service's Contention, Equity and Good Conscience Does Not Require That the Case Proceed.

The Service contends that dismissal of this matter must be barred under Rule 12(b)(7) based on the four-part test to determine whether equity and good conscience require that the case proceed even if the States and Tribes are required parties.[8] Service Opp. at 17-20. Contrary to the Service's assertion, balancing of these four factors strongly weighs in favor of dismissal of this action, as the action cannot in equity and good conscience proceed without the States and Tribes.

Regarding the first factor of prejudice, the Service asserts that it will adequately represent the States and Tribes and that, in any case, Plaintiffs "do not ask the Court to modify or overturn any particular component of state law trapping regimes," Service Opp. at 18. As discussed above, both of these assertions are incorrect. Plaintiffs are requesting expansive injunctive relief, which will impact the States' and Tribes' interests and rights that neither Defendants nor Defendant-Intervenors can adequately represent. *See* pages 4-5, 9-15, *supra*.

As to the second and third factors, Defendant-Intervenors in theory agree with the Service that relief can be tailored to lessen the prejudice, especially if the Court refrains from overbroad injunctive relief and thus avoids "collateral damage to state

[8] Plaintiffs do not argue or apply the requisite four-factor test. Thus, Plaintiffs waive the argument that any of the four factors identified by the Service weigh against dismissal.

and tribal interests." Service Opp. at 18-19. However, Plaintiffs have not filed amended complaints requesting that the Court merely remand this action back to the Service if the EA is inadequate. There is no assurance, at this time, that Plaintiffs will not seek to enjoin the CITES Export Program with all the attendant impacts such action will have on the States' and Tribes' rights and interests in controlling trapping, hunting and the management of their wildlife. If Plaintiffs thus succeed, the States and Tribes' interests will be impaired – and the States and Tribes will have no opportunity to object to the imposition of such injunctive relief as they are not parties to the action. *See* Motion at 22 (citing *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1498 (9th Cir. 1995)). And, in any case, a limited judgment for a remand alone will only prolong needless litigation – an argument that Defendant-Intervenors raised, Motion at 22-23, but the Service did not address.

Under Rule 19(b)'s fourth factor – a plaintiff's recourse to adequate remedies in a different forum should the case be dismissed – prevailing Ninth Circuit precedent applying Rule 19 holds that sovereign immunity outweighs a plaintiff's interest in litigating its claims, especially where Tribal sovereign rights are involved. *Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, 2017 WL 4277133, at *4 (D. Ariz. Sept. 11, 2017) ("wall of circuit authority" supports dismissal . . . virtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether a remedy is available, if the absent parties are Indian

tribes invested with sovereign) (citing numerous Ninth Circuit cases). In any event, Plaintiffs have alternative fora and remedies: Plaintiffs can seek changes to the CITES Export Program by asking the Service to engage in new rulemaking and also, as they themselves note, can bring lawsuits in state courts against state officials, *see*, Plaintiffs' Opp. at 20 n. 4, in order to challenge the methods and means of trapping to which they are opposed.

E. The Court Should Not Apply the "Public Rights" Exception Until Plaintiffs Amend Their Complaints to Ensure No Prejudice To The States and Tribes

Whether the "public rights" exception apples here will turn on whether the Plaintiffs are seeking to vindicate the private rights of their members versus some greater public right; whether the litigation will "destroy" or even merely "threaten" the "legal entitlements" of the States and Tribes; and whether the Plaintiffs' complaints are "aimed" at the States and Tribes as opposed to "incidentally" affecting them. *See generally* Motion at 23-24. As is obvious from all the briefs, and as already discussed above, the parties have sharply different views on these points. The key for the Court to decide which of the parties' opinions are correct is for the Court to carefully examine Plaintiffs' complaints and the relief requested to determine what this case really is about – much as Defendant-Intervenors have argued above, and need not repeat here again.

In the end, if Plaintiffs only seek a determination by this Court whether the EA is adequate and if not, then seek *only* a remand to the Service to perform an Environmental Impact Statement with no attendant injunctive relief either to stop the Program in the interim, or to stop the export of bobcat pelts (or the export of any other furbearers), then Plaintiffs should be made to say so expressly and amend their respective complaints to ensure that the scope of the case is limited. Only in that fashion can this Court possibly conclude that the "public right" exception applies and that the outcome of these lawsuits will neither prejudice the States and Tribes nor threaten or destroy any of their rights or interests in the Program or in their sovereignty in managing their own wildlife. *Cf. Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977) ("A holding that the [Environmental Impact Statement] is inadequate does not necessarily result in prejudice to the Tribe. The only result will be a new EIS for consideration by the Secretary."). However, in the absence of such disavowals by Plaintiffs, this Court should adhere to the holding of the *Dine* court which dismissed a lawsuit raising both ESA and NEPA claims, as here, because sovereign rights were implicated and the sovereign party was immune from suit and thus joinder.[9]

[9] The Service does not address *Dine* at all, and Plaintiffs weakly attempt to distinguish it, to no avail. *See* Plaintiffs' Opp. at 17 n. 3. The fact that, as Plaintiffs argue, an "arm" of the Navajo Tribe was the sovereign involved is immaterial as the court in *Dine* rightly treat the "arm" as like a sovereign itself. 2017 WL 4277133 at *3. Moreover, the fact that the nature of the threat to the sovereign differs here from

III. CONCLUSION

For all of the foregoing reasons, as well as the reasons identified in Defendant-Intervenors' Motion, the States and Tribes are necessary and "required" parties to this lawsuit based on their legal rights and interests, which will be severely limited (or eliminated altogether) if this Court adheres to Plaintiffs' requests and grants broad injunctive relief impacting wildlife management, and trapping, within the States' and Tribes' jurisdictions. Thus, the Court must dismiss Plaintiffs' complaints with prejudice.

Date: December 28, 2017

Respectfully submitted,

/s/ Ira T. Kasdan
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/s/ Gary R. Leistico
Gary R. Leistico
Attorney for Defendant-Intervenors Montana Trappers Association and National Trappers Association

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Dine is not germane. It is the threat to *any legitimately claimed* interest or right that is important, as Defendant-Intervenors have argued and have described in their opening brief and above. Motion at 14-18, 24; pages 5-9, *supra*.

CERTIFICATE OF COMPLIANCE

I, Ira T. Kasdan, certify that this brief complies with the requirements of Local Rule 7.1(d)(2). The document is proportionally spaced, has a typeface of 14 points and contains 4,754 words. I relied on the word count from Microsoft Word, which was used to prepare this document.

/s/ Ira. T. Kasdan
Ira T. Kasdan

CERTIFICATE OF SERVICE

I certify that on December 28, 2017, I electronically filed the foregoing Reply Memorandum in Further Support of Defendant-Intervenors' Motion to Dismiss Plaintiffs' Complaints Under Fed. R. Civ. P. 12(b)(7) with the Clerk of the Court through the CM/ECF system, which will send notice of the filing to all counsel of record.

/s/ Ira Kasdan
Ira T. Kasdan