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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SPRAWLDEF et al.,

Petitioners,

v.

The Guidiville Rancheria of California, a federally recognized Indian Tribe, et al.,

Respondents.

Case No. 18-cv-03918 YGR

NOTICE OF MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SPECIALLY APPEARING GUIDIVILLE RANCHERIA OF CALIFORNIA'S MOTION TO DISMISS

Date: March 5, 2019
Time: 2:00 p.m.
Place: Oakland Courthouse, Courtroom 1, Fourth Floor

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on March 5, 2019 at 2:00 p.m., or at such time thereafter as the matter may be heard, in the courtroom of the Honorable Judge Yvonne González Rogers, located at the Ronald V. Dellums Federal Building, 1301 Clay Street, Oakland, California, Respondent Guidiville Rancheria of California ("Guidiville" or "Tribe") (specially appearing and not consenting to the jurisdiction of this Court in this matter) will, and hereby does, move the Court for an order pursuant to Fed.R.Civ.P. 12(b)(1) dismissing Petitioners' claims against the Tribe for lack of subject matter jurisdiction because the Tribe has not expressly and unequivocally waived its sovereign immunity to this lawsuit. Additionally, the Tribe will, and hereby does move the Court for an order dismissing the lawsuit in its entirety pursuant to Fed.R.Civ.P.12(b)(7) for failure and inability to join the Tribe, a proper party as required by Fed.R.Civ.P. 19 such that in equity and good the lawsuit cannot proceed in the Tribe's absence.

This Motion is based on this Notice, the accompanying Memorandum of Points and Authorities, the accompanying Declaration of Donald Duncan and the exhibits thereto, all pleadings and papers in this action, such oral argument as may be presented to the Court, and any other matters of which the Court may take judicial notice.

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I. SUMMARY OF MOTION.

The stated purpose of the Petition is to void the Settlement Agreement and Stipulated Judgment agreed upon by the three Respondents, the Guidiville Rancheria of California ("Tribe"), the City of Richmond ("City") and Upstream Point Molate LLC ("Upstream"), which was the culmination of years of litigation in CV 12-1326-YGR. The Tribe has not waived its sovereign immunity from the Petition. Accordingly, the claims against the Tribe should be dismissed. As a proper party that cannot be joined to the instant Petition, the case cannot in equity and good conscience proceed in the Tribe's absence. Accordingly, the Petition in its entirety should also be dismissed.

II. LEGAL STANDARDS IN THE APPLICATION OF THE INSTANT MOTION TO DISMISS.

The Tribe seeks an order that the claims against it be dismissed pursuant to Fed.R.Civ.P. 12(b)(1) because it enjoys sovereign immunity from the claims, and therefore, the Court lacks subject matter jurisdiction to adjudicate such claims. The Tribe seeks an order dismissing the lawsuit in its entirety pursuant to Fed.R.Civ.P. 12(b)(7) because the Tribe is a proper party that cannot be joined, and accordingly, pursuant to Fed.R.Civ.P. 19 (also referred to herein as "Rule 19"), the Court cannot in equity and good conscience proceed with the case without the Tribe.

A. Legal Standards In The Application Of 12(b)(1) Motions Based On Sovereign Immunity.

Rule 12(b)(1) is the vehicle to seek dismissal based on sovereign immunity. *Mills v. United States*, 742 F.3d 400, 404 (9th Cir. 2014). Suits against sovereign governments are barred for lack of subject matter jurisdiction unless the government expressly and unequivocally waives its sovereign immunity from suit. *Id.*; *E.V. v. Robinson*, 906 F.3d 1082, 1090 (9th Cir. 2018).

The Tribe's motion is both a facial attack and a factual attack on jurisdiction. The Complaint, on its face, fails to make any allegation whatsoever that the Tribe's sovereign immunity has been expressly and unequivocally waived or abrogated. The Tribe submits evidence (of facts which it anticipates will not be disputed) in support of its motion to make clear, as a matter of both federal law and tribal law, that its immunity has not been waived regarding Petitioners' claims. Declaration of Vice-Chairman

Donald Duncan In Support of Tribe's Motion to Dismiss ("Duncan Declaration"). In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. *Safe Air v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

B. Legal Standards In The Application Of Rule 19.

A party may move to dismiss a complaint for "failure to join a party under Rule 19." Fed.R.Civ. P. 12(b)(7)*; Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022-25 (9th Cir. 2002). Similarly, named parties (or non-parties) that have not consented to the court's jurisdiction may specially appear to seek dismissal pursuant to Rule 19. *See Friends of Amador County v. Salazar*, 554 Fed. Appx. 562, 564 (9th Cir. 2014); *Milligan v. Anderson*, 522 F.2d 1202, 1203-04 (10th Cir. 1975). Similarly, a court may address whether to dismiss a case under Rule *19 sua sponte*. *Republic of Philippines v. Pimental*, 553 U.S. 851, 861 (2008).

1. Rule 19's three-step process.

Fed.R.Civ.P. 19(a)(1) provides:

> *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 19(b) provides:

> When Joinder Is Not Feasible. If a person who is required to be joined if feasible 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 factors for the court to consider include:

> (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.

Rule 19[1] provides a three-step process for determining whether the court should dismiss an action for failure to join a purportedly indispensable party. *E.E.O.C. v. Peabody Western Coal Co.*, 400 F.3d 774, 779 (9th Cir. 2005); *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999); *Skokomish Indian Tribe v. Forsman*, 738 Fed. Appx. 406, 408 (9th Cir. 2018); *see also Pimental*, 553 U.S. at 855-57; *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) (describes same process as a two-step process). First, it asks whether the absent party is "necessary (i.e., required to be joined if feasible) under Rule 19(a)." *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1179 (9th Cir. 2012); *White v. Univ. of Cal.*, 765 F.3d 1010, 1026 (9th Cir. 2014); *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991).

To determine whether a party is necessary under Rule 19(a), the court "must consider whether 'complete relief' can be accorded among the existing parties, and whether the absent party has a 'legally protected interest' in the subject of the suit." *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir.

[1] Many of the cases cited in support of the Tribe's motion were issued prior to 2007. When Rule 19 was amended in 2007, the word 'necessary' was replaced by 'required' and the word 'indispensable' was removed. The changes were intended to be 'stylistic only' and 'the substance and operation of the Rule both pre- and post-2007 are unchanged." *Pimental*, 553 U.S. at 855-56; *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962, 969 n.6 (9th Cir. 2008).

1992); *Ward, v. Apple, Inc*., 791 F.3d 1041, 1048 (9th Cir. 2015); *Union Pacific Railroad Co. v. Runyon*, 320 F.R.D. 245, 250 (D. Ore. 2017); *NovelPoster v. Javitch Canfield Group*, 2014 WL 1312111 at *5 (N.D. Cal. 2014). Complete relief is not attainable where the absent party is a tribe that is a signatory to the agreement at issue because the judgment would not be binding on the tribe, which could assert its rights under the agreement. *Clinton v. Babbitt*, 180 F.3d 1081,1089 (9th Cir. 1999) (requested judgment would preclude absent tribe from fulfilling its obligations under settlement agreement); *Pit River Home and Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1099 (9th Cir. 1194) ("[E]ven if the Association obtained its requested relief in [a dispute over which group of Indians are beneficial owners of a certain piece of property], it would not have complete relief, since judgment against the government would not bind the [other group of Indians], which could assert its right to possess the [property]."); *Chehalis*, 928 F.2d at 1498 (noting that judgment against federal officials in an action challenging an agreement between the United States and the Quinault Nation would not bind the Nation); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir. 1975); cf. *Alto v. Black*, 738 F.3d 1111, 1126-27 (9th Cir. 2013) (Tribe not necessary party in APA challenge by disenrolled members because relief was merely remand to Department of the Interior and because Tribe's interests are adequately represented by Bureau of Indian Affairs); *Cachil Dehe Band*, 547 F.3d at 970; (mere financial interest is insufficient).

If the court finds that a party is not "necessary," then the court does not need to consider the second step under Rule 19 and the case may continue without the absent party. *Makah,* 910 F.2d at 559; *Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996). If the party is "necessary," the court must then determine whether that party is "indispensable" so that "in equity and good conscience" the suit should be dismissed. *Id.*

If the court finds that a party is necessary, the court asks whether it is "feasible to order that the absent party be joined." *Id.* "A party is indispensable if in 'equity and good conscience,' the court should not allow the action to proceed in its absence." *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1161 (9th Cir. 2002) (citing Fed.R.Civ.P. 19(b)). To make this determination, the court balances four factors: (1) the prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy,

even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum. *Id.* at 1161–62; *Kescoli*, 101 F.3d at 1310. If it is not feasible to join the absent party, the court asks whether the case can proceed without it — and if not, dismisses the action. *Peabody Western Coal*, 400 F.3d at 779, Fed.R.Civ.P. 19(b).

An indispensable party is one which "not only [has] an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Peabody Western Coal*, 400 F.3d at 780 (quoting *Shields v. Barrow*, 58 U.S 130, 139 (1855). The classic examples are non-parties to the lawsuit who are parties to contracts that are at issue in the underlying lawsuit. *Friends of Amador County*, 554 Fed. Appx. at 564 (appellants seek to invalidate tribe's compact with state); *Greyhound Racing*, 305 F.3d at 1022-25 ("[t]he interests of the tribes in their compacts are being impaired and, not being parties, the tribes cannot defend those interests."); *Southwest Center for Biological Diversity v. Babbitt*, 150 F.3d 1152 (9th Cir. 1998) (party to settlement agreement regarding water rights at issue in litigation); *Dawavendewa*, 276 F.3d at 1161 (absent tribe was party to lease that provided for tribal preference in hiring); *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 788 (D.C. Cir.1983) ("an action seeking rescission of a contract must be dismissed unless all parties to the contract, and others having a substantial interest in it, can be joined"); *Chaudry v. Musleh*, 2018 WL 3361846 at *3 (N.D. Ill. 2018).

The burden of persuading the court that a party must be joined (or the case dismissed) falls to the movant. *Makah*, 910 F.2d at 558. There is no precise formula for determining whether a particular nonparty should be joined under Rule 19(a). The determination is heavily influenced by the facts and circumstances of each case. *Cachil Dehe Band*, 547 F.3d at 970; *Northern Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 468 (9th Cir. 1986); *M.O.R.E., LLC v. United States*, 2012 WL 4902802 at *3 (N.D. Cal. 2012). To determine whether Rule 19 requires the joinder of additional parties, the court may consider evidence outside the pleadings. *McShan v. Sherrill*, 283 F.2d 462, 464 (9th Cir. 1960); *Behrens v. Donnelly*, 236 F.R.D. 509, 512 (D. Hawaii 2006) (citing Charles A. Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure: Civil 3d*. § 1359 at 68 (2004); *Brimberry v. Northwestern*

Mutual Life Ins. Co., 2014 WL 689911 at *2 (C.D. Cal. 2014); *Backer v. United States*, 2014 WL 4267500 at *2 (E.D. Cal. 2014); *Barnes v. Raytheon Technical Services Co. LLC*, 2013 WL 2317727 at *2 (D. Ariz. 2013); Estate *of Burkhart v. United States*, 2008 WL 4067429 at *2 (N.D. Cal. 2008).

2. Rule 19 in the context of lawsuits brought against non-consenting federally recognized tribes properly leads to dismissal of the lawsuit.

Because the Tribe is immune and therefore cannot be joined involuntarily, and because the Tribe is a necessary, indispensable party under Rule 19, the entire case must be dismissed per Rule 12(b)(7). *Salt River Project*, 672 F.3d at 1179; *Greyhound Racing*, 305 F.3d at 1022-25.

a. The Tribe's interest in maintaining sovereign immunity leaves very little room in balancing the four factors of rule 19(b).

A tribe's interest in sovereign immunity so greatly outweighs a plaintiff's interest in litigating its claims that there is "very little room for balancing of other factors" under Rule 19(b) in such cases. *Greyhound Racing*, 305 F.3d at 1025. 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 vested with sovereign immunity. *White*, 765 F.3d at 1028; *See, e.g., Dawavendewa*, 276 F.3d at 1152*; Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) ("Plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity."); *Chehalis*, 928 F.2d at 1499; *Enterprise Management Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) ("[w]hen, as here, a necessary party under Rule 19(a) is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves"). Federal courts acknowledge that plaintiffs may be left with no adequate remedy upon dismissal for non-joinder, "[b]ut this result is a common consequence of sovereign immunity, and [the Tribe's] interest in maintaining [its] sovereign immunity outweighs the [Appellants'] interest in litigating their claims." *White*, 765 F.3d at 1028; *Greyhound Racing*, 305 F.3d at 1025; *Friends of Amador County*, 554 Fed. Appx. at 566; *Skokomish Indian Tribe*, 738 Fed. Appx. at 409; *Center for Biological Diversity v. Pizarchik*, 858 F. Supp. 2d 1221, 1228 (D. Colo. 2012). Thus,

although the Rule 19(b) factors still must be considered, the court's "discretion in balancing the equities ... is to a great degree circumscribed, and the scale is already heavily tipped in favor of dismissal." *Id*. *See also Comenout v. Whitener*, 2015 WL 917631 at *4 (W.D. Wash. 2015); *Northern Arapahoe Tribe v. Harnsberger*, 660 F. Supp. 2d 1264, 1280 (D. Wyo. 2009).

b. In very limited circumstances where a remaining party will adequately represent the interests of the absent tribe, the case may proceed.

There are limited situations where the case has proceeded because the remaining parties are able to adequately protect the absent tribe's interests. *See, e.g.*, *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999) (named defendant, Secretary of Commerce able to protect tribes' fishing rights); *Southwest Center*, 150 F.3d at 1152 (named defendant, United States, able to protect tribe's water rights). The United States is often able to adequately represent an absent tribe because the federal government regularly has a fiduciary or trust relationship with federally recognized tribes. *Alto*, 738 F.3d at 1127-28; *See also Union Pacific Railroad Co.,* 320 F.R.D at 252 ("The United States is often able to adequately represent an absent tribe because the federal government regularly has a fiduciary or trust relationship with federally recognized tribes").

A non-party is adequately represented by existing parties if: (1) the interests of the existing parties are such that they would undoubtedly make all of the non-party's arguments; (2) the existing parties are capable of and willing to make such arguments; and (3) the non-party would offer no necessary element to the proceeding that existing parties would neglect. *Southwest Center*, 150 F.3d at 1153-54; *Shermoen*, 982 F.2d at 1318. Mere similarity of interests is not sufficient. *Hansen v. Peoples Bank of Bloomington*, 594 F.2d 1149, 1153 (7th Cir. 1979).

Courts in this Circuit have denied Rule 19 motions in some circumstances where the United States is advancing its trust responsibility to a tribe and thereby its interests and the tribe's interests are sufficiently aligned. *Alto*, 738 F.3d at 1128. However, governmental entities (or other remaining parties) are unable to adequately represent tribal interests where the governmental entity (or other remaining parties) may pursue a settlement or litigation strategy that diverges from the tribe's. *Friends of Amador*

County, 554 Fed. Appx. at 564 ("[t]he government's response to the district court's questions on this issue at a status conference caused the district court to suspect that the government favored judicial resolution of the lawsuit as opposed to early dismissal, and would seek to avoid taking positions contrary to its national Indian policy, even if contrary to the Tribe's interest"); *Pit River*, 30 F.3d at 1101 ("We have held that the United States cannot adequately represent an absent tribe, when it may face competing interests."). Moreover, where the remaining parties did not themselves pursue dismissal per Rule 19, that factor itself demonstrates that their interests diverge from the tribe's. *Friends of Amador County*, 554 Fed. Appx. at 564.

When a present party is not the federal government with its attendant trust responsibility to federally recognized Indian tribes, but rather is another governmental entity which has a "broad obligation" to serve many people, that party generally does not share a sufficient interest with an absent tribe to satisfy the first Rule 19(b) factor. *White*, 765 F.3d at 1027 (finding that a state university could not adequately represent the interests of the absent tribes because the university had a "broad obligation to serve the interests of the people of California, rather than any particular subset," and therefore had different motivations); *Union Pacific Railroad Co*., 320 F.R.D. at 252 (County government has broad obligations and no trust responsibility to protect absent tribes' treaty rights).

c. The public rights exception does not apply where the absent party is a sovereign tribe.

The federal courts do recognize a public rights exception where the lawsuit is narrowly restricted to the protection and enforcement of public rights. *National Licorice Co. v. N.L.R.B*., 309 U.S. 350, 363 (1940). In order for the public rights exception to apply, (1) "the litigation must transcend the private interests of the litigants and seek to vindicate a public right" and (2) "although the litigation may adversely affect the absent parties' interests, the litigation must not destroy the legal entitlements of the absent parties". *White*, 765 F.3d at 1028, *Kescoli*, 101 F.3d at 1311, *Conner v. Burford*, 848 F.2d 1441, 1459 (9th Cir. 1988); *Union Pacific Railroad Co*., 320 F.R.D. at 256-57. Where the lawsuit seeks to extinguish the tribe's substantial legal entitlements, it precludes application of the public rights exception. *See Shermoen*, 982 F.2d at 1319 ("Because of the threat to the absent tribes' legal

entitlements, and indeed to their sovereignty, posed by the present litigation, application of the public rights exception to the joinder rules would be inappropriate."); *see also Kennedy v. United States Dept. of the Interior*, 282 F.R.D. 588, 599 (E.D. Cal. 2012). The only circumstance of which the Tribe is aware in which the public rights exception has prevented dismissal of a case where the absent tribe has been found necessary and indispensable under Rule 19 is *Makah*, 910 F.2d at 559 n.6. There, the Ninth Circuit reversed the District Court's denial on the Makah Indian Tribe's Rule 19 motion in most respects, but allowed claims seeking ***future*** compliance with administrative rules to proceed on remand. *Id.*

III. THE PETITION SEEKS TO VOID THE AGREEMENT AND STIPULATED JUDGMENT ENTERED BY THIS COURT IN *GUIDIVILLE RANCHERIA, ET AL. v. UNITED STATES, ET AL.*

The First Amended Petition (Doc. 32) in its prayer for relief, ¶ 1 requests this Court to "set aside and void any approvals, entitlements, findings or resolutions related to the City's action approving (the Settlement Agreement and Stipulated Judgment)" (Doc. 32 at. 8, ¶ 1). Petitioners express their intended result in the litigation in ¶ 2 of the Petition: "to invalidate" the City's action approving the Settlement Agreement and Stipulated Judgment. (*Id.* at 2, ¶ 2), Petitioners allege the City's "approval of the resulting judgment, should be rendered and declared null and void." (*Id.* at 8, ¶50). Petitioners allege they "are entitled to a writ of mandate commanding Respondents (which includes the Tribe) to vacate and rescind the challenged action. (*Id.* at 8, ¶ 51).The Petition further seeks in its Prayer for Relief to enjoin Respondents (including the Tribe) from "approving land use, development agreement, land disposition agreement, sales or other transaction of land at Point Molate." (*Id.* at 8, ¶2).

Moreover, Petitioners make material misstatements of the facts, which misstatements appear to be knowingly made in order to understate the Tribe's interest. For example[2], Petitioners assert "Upstream began thereafter to obtain the government approvals necessary to develop the Point Molate Casino. . . ."(*Id.* at 4, ¶23) and assert "[u]ltimately, Upstream failed to obtain necessary approvals. . ." (*Id.* at 5, ¶26).The Tribe, not Upstream, sought the approvals necessary for the property to qualify for

[2] ¶ The Petition also grossly misstates the Ninth Circuit's actions in vacating the District Court's rulings and remanding the case. (Doc. 32 at 5,¶29)

gaming. *See* Duncan Declaration at 3, ¶ 14. Indeed, only federally recognized tribes have the capacity or standing to seek such approvals. 25 U.S.C. § 2719; 25 C.F.R. § 292.3. Additionally, Petitioners assert that "*Upstream* alleged the City failed good faith duties" and that "*Upstream* also alleged that the City failed to approve the project environmental impact statement." (Doc. 32 at 5, ¶27). The Tribe ***and*** Upstream made those allegations, as is readily apparent by review of the Complaint and Amended Complaints in the *Guidiville* litigation. Additionally, Petitioners allege "[y]et the judgment. . . serves as a development agreement with *Upstream* to provide that housing", effectively ". . .providing Upstream Point Molate what is effectively a development agreement. . ." (*Id.* at 6, ¶38 and at 8, ¶46) A simple reading of the Judgment informs that it is clearly not a development agreement between the City and Upstream. Rather, on its face, it is a Court Judgment that contemplates the City will go through a public process to set the parameters of the future development of Point Molate with an as yet unknown developer.

Although the Tribe denies the allegations advanced by Petitioners, if the Judgment (*arguendo*) did serve as a development agreement with Upstream, it would serve as a development agreement with both Upstream and the Tribe. Perhaps Petitioners anticipated the Tribe's instant Rule 19 motion and deliberately misrepresented its allegations to obfuscate the Tribe's interests that are to be seriously prejudiced if this litigation is allowed to proceed.

The Petition in its prayer for relief seeks to enjoin "Respondents from approving land use, development agreement, land disposition agreement, sales or other transactions of land at Point Molate unless compliant with the Brown Act." (Doc. 32 at 8, ¶2) Similarly, in its prayer for relief, the Petition seeks to require "Respondents to tape record their closed sessions concerning any Point Molate-related litigation." (*Id*. at 8, ¶3). The Tribe assumes this request is an inadvertent drafting error, as the Brown Act does not apply to the Tribe or tribal government decision-making processes, and also does not apply to Upstream as it is a for-profit entity. Unsurprisingly, there is no allegation in the Petition that the Brown Act does apply to the decisions of the Tribe or Upstream, and there is no colorable basis to make such an allegation. The Tribe assumes that Petitioners are seeking an order that the City (and not the Tribe or Upstream) comply with the Brown Act going forward, and that the City (and not the Tribe or

Upstream) record its closed-door sessions. As discussed in Section IV(D), below, correcting the Complaint to seek relief that does not void the Settlement Agreement and seeks that the City comply with the Brown Act and record its closed sessions going forward, would result in a lawsuit in which the Tribe is not a necessary party. As currently pled, the crux of the Petition is a blatant attempt to void the Settlement Agreement and Stipulated Judgment in Case No. CV 12-1326-YGR. As discussed below, as currently pled, the lawsuit must be dismissed in its entirety.

IV. DISCUSSION.

Applying the legal authority and substantive and extensive case law set forth in Section II above to the First Amended Petition described in Section III above, it is clear that this matter may not proceed against the Tribe, and accordingly, must be dismissed.

A. The Tribe Is a Proper (Necessary) Party To The Instant Litigation.

The Tribe meets both criteria set forth above for establishing that it is a proper or necessary party, either of which is sufficient to proceed to the next step in the Rule 19 analysis. The Tribe claims an interest in the subject matter of the Petition and complete relief cannot be accorded amongst the remaining parties in the Tribe's absence. Presumptively, the Court already recognized the Tribe's status by directing Petitioners *sua sponte* to amend their Petition to name both the Tribe and Upstream. The Tribe's valid claim of interests in the subject matter of the litigation is self-evident. The Tribe has a legally-protected interest as a party to the Settlement Agreement and Stipulated Judgment. The April 12, 2018 Judgment in Case No. CV 12-1326-YGR, *inter alia*, (1) expressly provides for the conveyance of land by the City to the Tribe in certain circumstances, (April 12, 2018 Judgment at 6, ¶ 25); (2) expressly provides for the payment of land sales or land lease proceeds to the Tribe, (*Id.* at 5-6, ¶¶ 21-23); (3) expressly reserves the Tribe's ability to pursue having conveyed lands taken into trust for any lawful purposes, (*Id.* at 11,¶ 43); and (4) expressly acknowledges the Tribe's ability to pursue a license for use of City-owned or City-controlled property, (*Id.*). These legally-protected interests are clearly sufficient to establish the Tribe as a proper or necessary party, but the Tribe's interests in the subject matter of this litigation go far beyond the four corners of the document. Discussed in greater detail in Section C(2), below, the Settlement Agreement and Stipulated Judgment is a mere part, but a significant

part, of the Tribe's post-restoration efforts to return to the family of mature tribal governments, with a land base and resources to serve its membership and preserve its culture. These tribal governmental interests bolster the Tribe's position as a proper or necessary party to the instant litigation.

Complete relief cannot be accorded to Petitioners in the Tribe's absence. The Tribe would not be bound by a Judgment that purports to undo the Settlement Agreement and Stipulated Judgment. The Tribe still could attempt to enforce its rights under the Settlement Agreement and Stipulated Judgment. The parties would face inconsistent obligations if the instant lawsuit proceeded without the Tribe. If Petitioners were to prevail, the City, and Upstream as well, the Tribe would still expect them to fulfill their obligations to the Tribe under the Settlement Agreement and Stipulated Judgment, enforceable by contempt proceedings while being confronted with the inconsistent obligation to consider the Settlement Agreement to be void (and therefore in violation of the Stipulated Judgment). The circumstances here are similar to the cases set forth in Section II above, finding that the subject tribes were parties to contracts at issue, except that here, the agreement has not only been consummated, it has also been approved by the federal Court and memorialized in a stipulated judgment entered by the Court.

B. It Is Not Feasible To Join The Tribe, Which Has Not Waived Its Sovereign Immunity From The Petition.

The Tribe is immune from Petitioners' lawsuit[3] and has not waived that immunity. Accordingly, it is not feasible for the Tribe to be joined in Petitioners' lawsuit.

Indian tribes are "domestic dependent nations" that exercise inherent sovereign authority over their members and territories. *Oklahoma Tax Com'n v. Citizen Band of Potawatomi*, 498 U.S. 505, 509-510 (1991); *Turner v. United States*, 248 U.S. 354, 358 (1919); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). Tribal sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Michigan v. Bay Mills Indian Community*,____U.S.____, 134 S. Ct. 2024, 2030 (2014); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986). Under the common-

[3] The District Court's order of attorneys' fees against the Tribe despite its claims of immunity in Case No. CV 12-1326-YGR, which order was vacated by the Ninth Circuit because the City is not a prevailing party, *Guidiville Band v. United States*, 704 Fed. Appx. 655, 660 (9th Cir. 2017), does not in any way alter the straightforward analysis that the Tribe is immune from Petitioners' instant lawsuit.

law doctrine of tribal sovereign immunity, Indian tribes are protected from suits for monetary damages and from declaratory or injunctive relief. *Quinault Indian Nation v. Pearson for Estate of Comenout*, 888 F.3d 1093, 1096 (9th Cir. 2017).

Suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation. *Citizen Band*, 498 U.S. at 509-510*; Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *United States v. U.S. Fid. & Guar. Co*., 309 U.S. 506, 514 (1940) ("Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void."). Recently, the U.S. Supreme Court admonished that federal courts may not "carv[e] out exceptions" to the broad protections sovereign immunity provides federally recognized tribal governments. *Bay Mills Indian Community*, 134 S. Ct. at 2031 (2014). In light of Supreme Court precedent, the Ninth Circuit employs "a strong presumption against waiver of tribal sovereign immunity." *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001); *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989).

A waiver of tribal sovereign immunity may not be implied from the tribe's actions, "but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58-59. *See also Ramey Construction v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982); *C & B Invs. v. Wis. Winnebago Health Dept*., 198 Wis.2d 105, 108, 542 N.W.2d 168, 169 (1995) ("a surrender of sovereign immunity by a nation must be advertent.").

Further, any purported waiver must be duly authorized as a matter of tribal law. The person or entity that allegedly waived the immunity must have the authority to waive that immunity. *United States v. USF&G*, 309 U.S. 506, 513 (1940); *Hydrothermal Energy Corp. v. Fort Bidwell*, 170 Cal. App. 3d 489, 496 (Cal. App. 1985); *MM&A Productions v. Yavapai Apache Nation*, 234 Ariz. 60, 316 P.3d 1248 (Ariz. App. 2014); *Harris v. Lake of the Torches Resort*, 2015 WL 1014778 (Wisc. App. March 10, 2015) (An attorney's attestations in court are insufficient to waive tribal immunity unless the attorney is duly authorized under tribal law to do so). The Guidiville Indian Rancheria Constitution vests the Guidiville Tribal Council, as the governing body of the Tribe, with the sole authority to waive the

Tribe's sovereign immunity. *See* Duncan Declaration at 2, ¶¶ 8-9. The Guidiville Tribal Council has not waived the Tribe's sovereign immunity regarding Petitioners' claims. *Id* at 2, ¶ 11.

The Tribe has not waived its tribal sovereign immunity with respect to the Petitioners' claims. The Settlement Agreement does not provide for a waiver of the Tribe's immunity.

C. In Equity And Good Conscience, The Petition Cannot Proceed In The Absence Of The Tribe.

As discussed in Section II(B) above, where joinder is not feasible because the absent party is a sovereign tribal government, which has not waived its immunity, dismissal is appropriate without further regard to the four factors identified in Rule 19(b). There is very little room for balancing of the other factors set out in Rule 19(b), because immunity is viewed as an interest compelling by itself. Although that rule is not absolute in the Ninth Circuit, all of the four factors weigh sharply in favor of dismissal here. Moreover, the remaining parties are not able to adequately represent the interests of the absent Tribe, and the public rights exception recognized by some courts is not applicable in these circumstances. All these factors taken into consideration, in equity and good conscience, the Petition cannot proceed in the absence of the Tribe.

1. The four Rule 19(b) factors.

Rule 19(b)'s first factor, the prejudice to any party or to the absent party, weighs heavily in favor of dismissal. The prejudice to the Tribe if the case proceeds in its absence is overwhelming and problematic. The Tribe stands in great jeopardy to lose its rights secured by the mediated and negotiated Settlement Agreement and Stipulated Judgment, including: (1) the right to have land conveyed by the City to the Tribe in certain circumstances; (2) the right to pursue having such land taken into trust by the United States for any lawful purpose; (3) the right to payment of monies, which monies are earmarked by the Tribe as governmental revenue to pursue its governmental objectives; and (4) the ability to maintain the Tribe's presence in the area through pursuing the licensing of City-owned or City-controlled land. Those rights are secured in the Settlement Agreement and Stipulated Judgment, which was finalized only after years of effort by the Tribe to secure the federal approvals necessary to have the

Point Molate lands taken into trust and years of ensuing litigation, as the Tribe struggled to establish its land base after having been wrongfully terminated by the federal government and then restored to federal recognition in 1991 by judicial decree. Judgment in *Scotts Valley v. United States*, No. C-86-3660-VRW (N.D. Calif. Sept. 6, 1991) attached as Ex. B to Duncan Declaration. Moreover, the unraveling of the Settlement Agreement and Stipulated Judgment creates its own quagmire. Because the Tribe will not be bound by the decision of this Court in this litigation, this Court will need to resolve the conflicting obligations of the parties in Case No. CV 12-1326-YGR. Subsequent to the entry of the Stipulated Judgment, and in reliance on that Stipulated Judgment, the Tribe and the United States reached agreement on terms to dismiss the Tribe's claims against the United States. If judgment in this litigation causes the revival of the claims in the now-settled Case No. CV 12-1326-YGR, it prejudices both the Tribe and the City, as well as Upstream and the non-party United States. In contrast, the prejudice to the Petitioners is minimal. Their concerns of the City acting without transparency (even if there was a Brown Act violation, which allegation the City disputes) are belied by the status filings (set out in detail below) in Case No. CV 12-1326-YGR. There is no basis to believe the City will not be transparent with land use decisions regarding Point Molate – indeed the City has embarked on an extensive public process regarding its land use decisions. *See* Exhibit C to Duncan Declaration. The prejudice factor overwhelmingly favors dismissal.

The second and third factors of Rule 19(b), whether relief can be shaped to lessen prejudice and whether an adequate remedy, even if not complete, can be awarded without the absent party, are problematic so long as Petitioners' objective is to void the Settlement Agreement and Stipulated Judgment. Voiding the Settlement Agreement and Stipulated Judgment inherently causes prejudice, and a remedy that voids the Settlement Agreement and Stipulated Judgment cannot be awarded without the absent Tribe. As discussed in Section IV(D) below, Petitioners could amend their Petition so as not to seek voiding the Settlement Agreement and Stipulated Judgment. By doing so, seeking relief that is directed at ensuring the City's transparency going forward could indeed result in relief shaped to lessen the prejudice, and the litigation could move forward without the absent Tribe.

Rule 19(b)'s fourth factor, whether there exists an alternative forum, also weighs in favor of

dismissal. The litigation that resulted in the Settlement Agreement and Stipulated Judgment, Case No. CV 12-1326-YGR, potentially provides an alternative forum in which Petitioners could have pursued their claims and sought to prevent the Court's approval of the Settlement Agreement. Petitioners confess to having had knowledge and awareness of the then-pending litigation. (Doc. 32 at 5, ¶ 27). A review of (1) the docket in Case No. CV 12-1326-YGR, a matter of public record; (2) the stipulation submitted on February 2, 2018 (Doc. 357 in case CV 12-1326-YGR); and (3) the Order entered on February 4, 2018 (Doc. 358 in case CV 12-1326-YGR) each informs Petitioners of the immanency of finalizing the Settlement Agreement. Similarly, the minute entry of February 6, 2018 informs that Upstream and the Tribe had reached agreement in principle to settle the claims between them and the City. (Doc. 351 in case CV 12-1326-YGR). A review of the stipulation filed on February 8, 2018 and Court's Order of February 8, 2018 (Docs. 354 and 355 in case CV 12-1326-YGR) further reveals the status of the efforts to finalize the Settlement Agreement. Similarly, the Judgment approving and memorializing the Settlement Agreement, entered on April 12, 2018, further informs Petitioners of the consummation of the Settlement Agreement along with its specific terms. (Doc. 361 in case CV 12-1326-YGR). This transparency deflates the Petitioners' sincerity in their concerns alleging Brown Act violations, but more germane to the instant motion, reveals that Petitioners had an opportunity for an alternative forum, to seek intervention or seek *amici curiae* status and present any valid objections to the proposed Settlement Agreement, but failed to timely avail themselves of that opportunity.

More than four months after being aware of the then-eminent Settlement Agreement and Stipulated Judgment, Petitioners did seek intervention on June 6, 2018 (*Guidiville et al. v. The United States et al.,* Case No.: cv-12-1326, Doc. 372). The Court on July 6, 2018 denied that motion to intervene without prejudice, noting Petitioners' failure to address standing (*Guidiville et al. v. The United States et al.,* Case No.: cv-12-1326, Doc. 380). Yet, to date, no effort to address standing has ever been submitted by Petitioners in that litigation. The Tribe believes that its immunity from third party claims, combined with Petitioners' untimeliness, would have defeated any effort by Petitioners to intervene. However, Petitioners own failure to pursue the alternative forum, the original forum out of which the Settlement Agreement and Stipulated Judgment arose,

certainly militates against Petitioners in consideration of the alternative forum factor when determining whether in equity and good conscience the case may proceed without the absent Tribe.

As discussed in Section II(B)(1) above, even if no alternative is available to Petitioners, that factor would not justify proceeding without an absent tribe that cannot be joined because if its immunity.

2. The remaining parties do not adequately represent the interests of the absent tribe.

Neither the City nor Upstream are able to adequately represent the Tribe's interests. The Tribe's interests in the Settlement Agreement and Stipulated Judgment diverge significantly from the interests of the remaining parties. The Settlement Agreement and Stipulated Judgment are a critical part of the Tribe's post-termination agenda to establish a viable land base, which in turn enables the Tribe to advance the historic and inherent governmental purposes and responsibilities of the Tribe.

Belaboring the obvious, the Tribe is a federally recognized Indian tribe. *See* 83 Fed. Reg. 34863 (Jul. 23, 2018). Moreover, it is a tribe left landless and without resources as a result of the federal government's wrongful termination of the Tribe in 1965, allegedly pursuant to the California Rancheria Act enacted in 1958 (PL 85-671). The failed policies of the termination era left the Tribe landless and without any resources. In 1991, the Tribe was one of four tribes that prevailed in litigation against the United States over their wrongful termination. *Scotts Valley v. United States*, No. C-86-3660-VRW (N.D. Calif. Sept. 6, 1991). In the stipulated judgment entered in that litigation, the United States agrees that the Tribe was wrongfully terminated. *See* Ex. A to Duncan Declaration. Notice of the restoration of the Tribe's recognition was published in the Federal Register. 57 Fed. Reg. 5214 (Feb. 12, 1992). In 1992, the newly restored Tribe had no land base, as all of its lands had been lost during the period of wrongful termination. *See* Duncan Declaration at 3, ¶ 15.

Restoring a viable land base is the crux of the Tribe's agenda. *Id.* at 3-4, ¶ 16. To achieve that goal, the Tribe requires a parcel of land large enough to support multiple tribal uses, including but not limited to: Tribal housing (to accommodate the entire membership); tribal government headquarters for member access to the tribal government and tribal services; cultural facilities such as dance grounds and roundhouse for religious and traditional intertribal gatherings; plant communities to support traditional

medicines, basket making and tule boat materials; open space, water and biological communities to be restored to their natural condition; recreation facilities; access to public transportation; job training opportunities; employment opportunities; individual business opportunities; educational opportunities; entertainment opportunities; health and wellness opportunities; and economic development opportunities. *Id*. The Tribe sought to achieve its governmental objectives through the agreement with the City to support the Tribe's efforts to have a portion of the Point Molate lands taken into trust. *Id*. at 4, ¶ 17. The proposal was not just about gaming, or even primarily about gaming. The proposed gaming facility that was intended to be the source of the governmental revenues to manifest the Tribe's agenda, as well as to pay for the massive environmental cleanup costs associated with the closed Navy Fuel Depot. *Id*. at 4, ¶ 17. The Settlement Agreement and Stipulated Judgment put an end to the City's purported contractual obligation to support the Tribe's efforts, but the Tribe's pursuit of a viable land base remains intact. Neither the City nor Upstream have such an interest to protect, only the Tribe has that interest.

Unlike the cases cited in Section II(B)(2)(b) above, which found the United States may adequately represent an absent tribe, the City does not have a formal trust responsibility to the Tribe. The City could have raised the Rule 19 defects on its own, potentially avoiding the inconveniences to the Tribe and the inherent infringement of its sovereign immunity that it is now enduring in having been named as a co-respondent and having to bring the instant motion to dismiss. That the City did not seek dismissal on Rule 19 grounds, itself establishes that the City cannot be relied upon by the Tribe to raise the argument. *See Greyhound Racing*, 305 F.3d at 1018 and n.5 (State of Arizona, and not the compacted Indian tribes, brought the Rule 19 problem to the court's attention acknowledging that the state's interests and the tribes' interests in the gaming compacts are not properly aligned). The motivation for the City to aggressively oppose Petitioners' claims must be drawn into question here where political opponents of any practical development of the formal Navy Depot lands have attempted to undermine the Settlement Agreement and Stipulated Judgment and could direct the City's counsel to soften its advocacy against the Petition. *See* Ex. D to Duncan Declaration. Just as the courts found the University of California in *White*, and the county government in *Union Pacific Railroad*, to be unable to

adequately represent the interests of the absent tribes because they each had a "broader obligation to serve many people," other than the absent tribes, so too should this Court find that the City is unable to adequately represent the Tribe's interests.

Upstream is also unable to adequately represent the Tribe's interests. The Tribe and Upstream do have similar interests, and have cooperated and worked closely in the legal proceedings in CV 12-1326-YGR, but as set forth in Section II(B)(2)(b) above, mere similar interests are insufficient. Upstream is a for-profit corporation with a profit motive, in sharp contrast to the Tribe's motive in entering the Settlement Agreement and Stipulated Judgment. Upstream has no trust responsibility to the Tribe, has no responsibility or obligation to secure a viable land base for the Tribe, and does not share the Tribe's governmental interests in terms of restoring a viable land base to support its government and members.

Neither the interests of the City or Upstream are such that they can "undoubtedly make all the non-party's arguments." Their willingness and capability of making all the Tribe's arguments are such that the Tribe cannot rely on them because their interests diverge. Only the Tribe can be relied upon to assert the necessary element of conveying land to the Tribe, or proceeds from land sales or leases to the Tribe, such that the Tribe can then use those resources to secure other lands. The diverging interests would also prevent the remaining parties from protecting the Tribe's interests in any settlement discussions, where no remaining entity would have the willingness or motivation to protect or advance the Tribe's interests.

3. The public rights exception does not apply.

As set forth in Section II(B)(2)(c) above, the public rights exception does not apply to circumstances where the absent party is a sovereign tribe that has not waived immunity. Those circumstances are present here.

D. Although The Current First Amended Petition Is Flawed, An Amendment Narrowing The Relief Requested To Future Compliance By The City To Brown Act Regulations Could Proceed In The Tribe's Absence.

Petitioners can cure the defect in their Petition by an amendment that seeks only the relief requested in ¶¶ 2-4 of the Petition's Prayer for Relief. An amended petition could potentially state

claims against the non-immune Defendants in a way not necessitating joinder of the Tribe itself, namely, by not challenging the validity and enforceability of the Settlement Agreement and Stipulated Judgment. *See Kennedy*, 282 F.R.D. at 595-96; *Cachil Dehe Band*, 547 F.3d at 977 (observing that in Makah, the court "made clear that Rule 19 required 'the scope of the relief available to the Makah on their procedural claims [to be] narrow' and limited to prospective relief," and holding that in a dispute regarding gaming licenses "Rule 19 necessarily confines the relief that may be granted ... to remedies that do not invalidate the licenses that have already been issued to the absent [tribes]").

V. CONCLUSION.

For the reasons set forth above, the claims against the Tribe must be dismissed with prejudice for lack of subject matter jurisdiction because the Tribe has not waived its sovereign immunity to Petitioners' claims. The Tribe being a necessary and indispensable party, or a proper party that cannot be joined such that in equity and good conscience, the case cannot proceed in the Tribe's absence, the petition in its entirety must be dismissed pursuant to Rule 19, with prejudice as to its claims against the Tribe. If the petition is dismissed without prejudice to its claim against the City, Petitioners would be free to amend their Petition so long as the amended petition does not seek to void the Settlement Agreement and Stipulated Judgment in CV-12-1326-YGR.

DATED: January 9, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2019, I caused a copy of the foregoing to be served through the Court's CM/ECF System to all parties.

s/ Scott Crowell

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