No. 18-15309

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YUROK TRIBE,

Plaintiff-Appellant,

v.

RESIGHINI RANCHERIA AND GARY MITCH DOWD,

Defendants-Appellees.

On Appeal from the United States District Court
For the Northern District of California
Case No. 16-cv-02471-RMI
The Honorable Robert M. Illman

DEFENDANTS-APPELLEES' ANSWERING BRIEF

Lester J. Marston
RAPPORT AND MARSTON
405 West Perkins Street
Ukiah, California 95482
Tel. (707) 462-6846
Fax. (707) 462-4235
Attorney for Defendants-Appellees

CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee the Resighini Rancheria is a sovereign Indian nation recognized by the United States government. The Resighini Rancheria has no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad. Defendant-Appellee Gary Mitch Dowd is a tribal member of the Resighini Rancheria and has no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad.

Date: July 25, 2018

RAPPORT & MARSTON

By: */s/Lester J. Marston*
Lester J. Marston

Attorney for Defendants-Appellees, The Resighini Rancheria and Gary Mitch Dowd

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

United States Codes

Other Authorities

INTRODUCTION

This is a case brought by the Yurok Tribe, the largest Indian tribe in the State of California, for the purpose of extinguishing the fishing rights of the Resighini Rancheria, a small, federally recognized Indian tribe that is located entirely within the boundaries of the Yurok Reservation. Because the Resighini Rancheria is a sovereign Indian tribe that possesses sovereign immunity from unconsented suit, the Yurok Tribe seeks to pursue its claims against an individual Indian that is a member of the Resighini Rancheria, Gary Dowd, in order to circumvent tribal sovereign immunity and use the suit as a subterfuge to challenge the tribal, federally-reserved fishing rights of the Resighini Rancheria.

The District Court properly found that, under Federal Rule of Civil Procedure 19 ("Rule 19"), Resighini is a required party to the Yurok Tribe's claims against Dowd individually and that, in equity and good conscience, the claims against Dowd must be dismissed in the absence of the Resighini Rancheria. As demonstrated below, the District Court did not abuse its discretion in reaching these conclusions and its decision should, therefore, be affirmed.

JURISDICTIONAL STATEMENT

Resighini and Dowd generally agree with the Yurok Tribe's jurisdictional statement. OB 2. However, Resighini and Dowd assert that the District Court lacked jurisdiction over the Yurok Tribe's claims against Resighini because

Resighini possesses sovereign immunity from unconsented suit and its immunity has not been waived for the purposes of Yurok's suit. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. ____, 134 S. Ct. 2024 (2014).

Judgment in favor of Resighini and Dowd was entered in the District Court on January 25, 2018. Excerpt of Record ("ER") 003. The judgment was final as to all claims in the dispute. The Yurok Tribe's Notice of Appeal was timely filed on February 23, 2018. ER 001. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Did the District Court abuse its discretion by finding that a federally recognized Indian tribe is a required party under Federal Rule of Civil Procedure 19(a) in a suit where a plaintiff Indian tribe seeks a declaration from the court that it possesses an exclusive fishing right as against an individual member of the absent tribe?

2. Did the District Court abuse its discretion by finding that Federal Rule of Civil Procedure 19(b) requires, in equity and good conscience, that a suit be dismissed when an absent Indian tribe's federally-reserved fishing would be impaired if the suit were to proceed in its absence?

STATEMENT OF THE CASE

This dispute arises from the continuing efforts of the Yurok Tribe to diminish and extinguish the legally protected fishing rights of the Resighini Rancheria, whose members are also of Yurok descendant, SER 2-4. The issue on appeal is narrow: is the Resighini Rancheria a required and indispensable party to

the Yurok Tribe's claims against Dowd? Notwithstanding the narrow issue on appeal, in its opening brief, the Yurok Tribe sets forth a lengthy historical account that is irrelevant to the issue now on appeal. The Yurok Tribe's inclusion of these facts is likely intended to draw the Court away from the issues on appeal and to address the merits of its claims. The Court need not address these issues to decide this appeal.

It is, however, necessary to note that the Yurok Tribe has omitted numerous facts establishing the two tribes' shared historical connection to ancestral fishing stations located on the Klamath River and the anadromous fish found within that river—a resource common to the spiritual and cultural existence of the Resighini Rancheria, SER 2-4, and the Yurok Tribe, OB 3.[1] While ultimately irrelevant to the issues on appeal, these omissions are corrected in the sections below.

[1] The Yurok Tribe and the Hoopa Valley Tribe are similarly embroiled in a dispute, pitted against each other in a battle over the two tribes' right to take fish from the Klamath River. Will Houston, *Klamath River Salmon Fishing Season Set to Reopen*, Eureka Times-Standard, March 28, 2018, http://www.times-standard.com/general-news/20180328/klamath-river-salmon-fishing-season-set-to-reopen. According to a newspaper article published in the Eureka Times-Standard, Yurok Tribe Tribal Chairman Thomas P. O'Rourke, Sr., in a letter to Secretary of Commerce Wilbur Ross, Secretary of Interior Ryan Zinke, and Pacific Fishery Management Council Chairman Phil Anderson, claimed that, in 2017, "the Yurok and Hoopa Valley tribes ha[d] a federally-reserved right to half of the harvestable fall Chinook salmon in the Klamath River, which was 814 fish" for that year. The article continued, stating that, according to Yurok Tribal Council documents, "The Yurok Tribe harvested 216 fish and the Hoopa Valley Tribe **harvested 1,660 fish** . . . [Chairman] O'Rourke said the Hoopa Valley Tribe's harvest was **10 times its share**—the Yurok Tribe generally takes 80 percent of the harvest, though the

A. The Yurok People

The term, "Yurok" or "Klamath," without more, commonly refers to an ethnic group of Indian persons tied to the same ancestral homeland that encompassed a specific portion of the Klamath River, not a present-day political entity. *See Mattz v. Arnett*, 412 U.S. 481, 487 (1973); *Shermoen v. United States*, 982 F.2d 1312, 1315 (9th Cir. 1992); *Elser v. Gill Net Number One*, 246 Cal. App. 2d 30 (Cal. App. 1966). "Yurok means 'down the river.' . . . [Karok and Modok] mean, respectively, 'up the river' and 'head of the river,' and these appellations, as would be expected, coincide with the respective homelands." *Mattz v. Arnett*, 412 U.S. at 486. "The history of the Yurok people and their spiritual, social and

---

Hoopa Valley Tribe argues this rationing is not codified—which he said was greater than the tribal and non-tribal allocations combined." *Id*. (emphasis added). However, in a report to the Pacific Fishery Management Council, the Hoopa Valley Tribe, in its defense, proclaimed that "the [Hoopa Valley] tribe was not a party nor agreed to federal agencies' management . . ." *Id*. Hoopa Valley Tribe Chair stated: "Rather than continuing to ignore and erode the legitimacy of the tribe's fishing rights, it would be more fruitful to address the causes of the continuing declines of Klamath/Trinity fish populations." *Id*.

The Yurok Tribe, the largest Indian tribe in the State of California, has more than 6,100 members. ER 260. By contrast, the Resighini Rancheria has approximately **6,000 fewer** members. ER 262 (emphasis added). To allege that one man and a neighboring tribe with 6,000 fewer members constitute a substantial threat to the fishery, by comparison, is nonsensical (6,000, not 100, fisherman can, however, pose a significant risk to the protection and conservation of the Klamath River fishery); instead, the Yurok Tribe's unsubstantiated allegations that Dowd is a threat to the survival of the Klamath River fishery illustrate the actual motivation underlying the suit and appeal filed by the Yurok Tribe, which has very little to do with the fishery.

economic connections to the Klamath River is lengthy, extending from time immemorial to the present day." OB 3. Yurok identity is inextricably tied to the Klamath River. SER 2.

The Klamath River and its fishery have been a mainstay of the life and culture of the Yurok. SER 2; OB 3 ["Yurok people have always relied on the fishery of the Klamath River"]; OB 4 ["The Yurok people are fishers."]. The Yurok have fished in the Klamath River at their "usual and accustomed places" or fish stations since time immemorial. SER 2-4. Indeed, in *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981), this Court recognized that the fishing rights possessed by the Yurok Indians "at the time the [**Klamath River**] Reservation was first created" were "'not much less necessary to the existence of the Indians than the atmosphere they breathed.'" (internal citations omitted)(emphasis added). A survey of the lengthy history of the Yurok people and the creation of the Klamath River Reservation reveals that statements like these apply with equal force to the Yurok Indians of the Resighini Rancheria, *see* SER 2, including Gary Dowd, and Yurok Indians of the Yurok Tribe. *See* OB 3-4. And, importantly, neither the Hoopa-Yurok Settlement Act, which created the Yurok Reservation in 1988, nor a payment made to Gary M. Dowd in connection with timber proceeds litigation, extinguished the rights of Yurok people—some of whom are now enrolled members of the Resighini Rancheria, like Dowd—to fish at their usual and

customary fishing places within their ancestral homeland. *See* SER 3-4. For the reasons set forth in Sections B-F below, the fishing rights enjoyed by the Yuroks since time immemorial and reserved by statute in 1853 continue to the present day.

B. The Klamath River Reservation

It is well settled that the Klamath River Reservation, not the "Yurok Reservation," was established by executive order in 1855. SER 2; *Arnett v. Five Gill Nets*, 48 Cal. App. 3d 454, 458 (1975); *Parravano v. Babbit*, 861 F.Supp. 914, 919 (N.D. Cal. 1994), *aff'd* 70 F.3d 539, 542 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996); *Mattz* at 487. *But cf.* OB 3 [Yurok Tribe false claim that "[t]he Yurok Reservation was established by Executive Order on the Klamath River in 1855[.]"].

The provenience of the Klamath River Reservation is traced back to when, in 1853, Congress authorized the President "to make five military reservations from the public domain in the State of California or the Territories of Utah and Mexico bordering on said State, for Indian purposes." Act of March 3, 1853, 10 Stat. 226, 238. *See also* SER 2; *Mattz* at 487. By Act of March 3, 1855, 10 Stat. 686, 699, Congress appropriated funds for "collecting, removing, and subsisting the Indians of California . . . on two additional military reservations, to be selected heretofore . . . *Provided*, that the President may enlarge the quantity of the

reservations heretofore selected, equal to those hereby provided for." *Mattz* at 487. *See also* SER 2.

Pursuant to these authorizations, by Executive Order dated November 16, 1855, President Franklin Pierce established "the 25,000 acre Klamath River Reservation." *Shermoen v. United States*, 982 F.2d at 1314-1315. *See also Mattz* at 487 [U.S. Supreme Court Justice Blackmun, writing for the majority, stating that "President Pierce then issued his order of November 16, 1855, specifying the Klamath River Reservation and stating, 'Let the reservation be made, as proposed.'"]; SER 2. The Klamath River Reservation encompassed "a strip of territory commencing at the Pacific Ocean and extending 1 mile in width on each side of the Klamath River," *Shermeon* at 1315, *citing* 1 Charles J. Kappler, Indian Affairs, Laws & Treaties 817 (2d ed. 1904), "for a distance of twenty miles." SER 2. *See* SER 28 [map of Klamath River Reservation boundaries from "Appendix to Opinion of the Court" in *Mattz v. Arnett*, 412 U.S. 481 (1973)]. "Most of the inhabitants of this area 'were and have been Yurok Indians, also known as Klamaths.'" *Shermoen* at 1315 (internal citations omitted).

The site of the Klamath River Reservation, not the Yurok Reservation, was "ideally selected for the Yuroks. They had lived in the area; the arable land, although limited, was 'peculiarly adapted to the growth of vegetables,' 1856 Report 238; and the river, which ran through a canyon its entire length, abounded

in salmon and other fish. *Ibid*.; 1858 Report 286." *Mattz* at 487. *See* The Department of the Interior and General Land Office in Cases Relating to the Public Lands, Vol. 33, p. 217 (Government Printing Office, 1905) ["There is little question that the prevailing motive for setting apart the [Klamath] reservation was to secure to the Indians the fishing privileges of the Klamath River."]. *But cf*., OB 4 [Yurok Tribe inaccurate statement that, "[t]he Yurok Reservation . . . was 'ideally selected' for the Yuroks in large part because 'the river, which ran through a canyon its entire length, abounded in salmon and other fish.' *Parravano v. Babbit*, 861 F.Supp. 914, 919 (N.D. Cal. 1994), *aff'd* 70 F.3d 539, 542 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996)."]; OB 4 [Yurok Tribe citing to *Mattz v. Arnett*, 412 U.S. 481 (1973) for the proposition that "The Yurok Reservation was set aside for the purpose of preserving the Yurok way of life in Yurok traditional homelands. *Mattz*, 412 U.S. at 418," where, in fact, not a single reference to a "Yurok Reservation" can be found anywhere within the *Mattz* case].[2]

When the Klamath River Reservation was created for "Indian purposes," it thus reserved to the Yurok a right to fish in those portions of the Klamath River located within the boundaries of the Klamath River Reservation. SER 3. "The right

[2] Title of the Klamath River bed passed to the State of California upon admission to the Union. *See U.S. v Holt Bank*, 270 U.S. 49 (1926) and *Montana v. U.S.*, 450 U.S. 544 (1981). Any Yurok Tribe assertion that Dowd is taking fish from its reservation, if fishing from a boat in the waters of the Klamath River, is without merit.

to take fish from the Klamath River was reserved to the Indians when the reservation was created. *See Blake v. Arnett*, 663 F.2d 906, 911 (9th Cir. 1981); *People v. McCovey*, 36 Cal. 3d 517, 534, 205 Cal. Rptr. 643, 653, 685 P.2d 687, *cert. denied*, 469 U.S. 1062, 105 S. Ct. 544, 83 L. Ed. 2d 432 (1984)." *United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986).[3] Indeed, the lands "commencing at the Pacific Ocean and extending 1 mile in width on each side of the Klamath River," *Shermeon* at 1315, were "ideally selected" for that very purpose. *Mattz* at 487.

From time immemorial through the establishment of the Klamath River Reservation, the Yuroks continued to fish at their usual and customary fishing places within their ancestral homeland on the Klamath River. *See* SER 2-4.

C. The Hoopa Valley Reservation and the "Hoopa Valley Extension"

In 1864, following the establishment of the Klamath River Reservation, the Superintendent of Indian Affairs for the State of California located and proclaimed the original Hoopa Valley Reservation, pursuant to the Act of April 8, 1864, 13 Stat. 39. SER 2-3; *Mattz* at 489. The original Hoopa Valley Reservation was a twelve-mile square, extending six miles on each side of the Trinity River, SER 2, 28, and was mostly inhabited by Hoopa Indians. SER 3.

[3] *But cf.*, OB 10 [Yurok Tribe citing *United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986) for the proposition that "the right to take fish from the Klamath River was reserved to Yurok Indians when the [Yurok] Reservation was established"].

The U.S. Supreme Court, in *Mattz v. Arnett*, 412 U.S. 481, 489-91 (1973), recounted the history of the Klamath River Reservation between 1864 and 1891 as it was subsequently cast into doubt by the proclamation and creation of the original Hoopa Valley Reservation:

> The Act of April 8, 1864, 13 Stat. 39, . . . recited that "there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian reservations." It further provided that "the several Indian reservations in California which shall not be retained . . . under . . . this act, shall . . . be surveyed into lots or parcels . . . and . . . be offered for sale at public outcry, and thence afterward shall be held subject to sale at private entry." *Id*., at 40.
>
> At the time of the passage of the 1864 Act there were, apparently, three reservations in California: the Klamath River, the Mendocino, and the Smith River. It appears, also, that the President did not take immediate action, upon the passage of the Act, to recognize reservations in California. It was not until 1868 that any formal recognition occurred, and then it was the Congress, rather than the President, that acted. In that year Congress discontinued the Smith River Reservation, 15 Stat. 221, and restored the Mendocino to the public lands. *Id*., at 223. No similar action was taken with respect to the Klamath River Reservation. *Crichton v. Shelton*, 33 I. D., at 209. Congress made appropriations for the Round Valley Reservation, 15 Stat. 221, and for it and the Hoopa Valley Reservation in 1869, 16 Stat. 37, although neither of these, apparently, had been established theretofore by formal Executive Order.
>
> The Klamath River Reservation, although not reestablished by Executive Order or specific congressional action, continued, certainly, in *de facto* existence. Yuroks remained on reservation land, and the Department of Indian Affairs regarded the Klamath River Reservation as "in a state of reservation" throughout the period from 1864 to 1891. No steps were taken to sell the reservation, or parts thereof, under the 1864 Act. Indeed, in 1879, all trespassers there were removed by the

> military. In 1883 the Secretary of the Interior directed that allotments of land be made to the Indians on the reservation. In February 1889, the Senate, by resolution, directed the Secretary of the Interior "to inform the Senate what proceedings, if any, have been had in his Department relative to the survey and sale of the Klamath Indian reservation . . . in pursuance of the provisions of the act approved April 8, 1864." 20 Cong. Rec. 1818. In response, the Commissioner of Indian Affairs, by letter dated February 18, 1889, to the Secretary disclosed that no proceedings to this effect had been undertaken. An Assistant Attorney General for the Department of the Interior expressed a similar view in an opinion dated January 20, 1891.

Mattz at 489-91. *See* SER 2-3.

Any question concerning the Klamath River Reservation's continuing legal existence and any arguments that the reservation had ceased to exist, however, were effectively laid to rest when, in 1891, President Benjamin Harrison issued the Executive Order dated October 16, 1891:

> By the specific terms of that order, the Hoopa Valley Reservation, which, as we already have noted, was located in 1864 and formally set apart in 1876, and which was situated about 50 miles upstream from the Klamath River's mouth, was extended so as to include all land, one mile in width on each side of the river, from "the present limits" of the Hoopa Valley Reservation to the Pacific Ocean. The Klamath River Reservation, or what had been the reservation, thus was made part of the Hoopa Valley Reservation, as extended.
>
> The reason for incorporating the Klamath River Reservation in the Hoopa Valley Reservation is apparent. The 1864 Act had authorized the President to "set apart" no more than four tracts for Indian reservations in California. By 1876, and certainly by 1891, four reservations already had been so set apart. These were the Round Valley, referred to above, the Mission, the Hoopa Valley, and the Tule River. Kappler 830-831. Thus, recognition of a fifth reservation along the Klamath River was not permissible under the 1864 Act. Accordingly, the President turned to his authority under the Act to

> expand an existing, recognized reservation. He enlarged the Hoopa Valley Reservation to include what had been the Klamath River Reservation as well as an intervening riparian strip connecting the two tracts.

Mattz at 492-94. *See* SER 28.

By Executive Order dated October 16, 1891, the Klamath River Reservation was thus extended up to the Klamath River until it joined with the Hoopa Valley Reservation and was made a part of the Hoopa Valley Reservation. SER 3. *See* SER 28. The validity of the 1891 extension (commonly referred to as the "Hoopa Valley Extension") and the continuing existence of the area included within the original Klamath River Reservation were later upheld by the United States Supreme Court in *Donnelly v. United States*, 228 U.S. 243, *modified and reh. denied*, 228 U.S. 708 (1913). SER 3; *Mattz* at 492-94 ["The President's continuing authority so to enlarge reservations and, specifically, the legality of the 1891 Executive Order, was affirmed by this Court in *Donnelly v. United States*, 228 U.S. 243, 255-259 (1913), *reh. denied*, 228 U.S. 708, and is not challenged here."].

From time immemorial through the establishment of the Klamath River Reservation, the original Hoopa Valley Reservation, and the Hoopa Valley Extension, the Yuroks continued to fish in their at their usual and customary fishing places within their ancestral homeland on the Klamath River. *See* SER 2-4.

D. The Resighini Rancheria

In 1938, by deed dated January 7, 1938, a tract of land known as the "Rancheria" was conveyed by the owner, Gus Resighini, to the United States "in Trust for such Indians of Del Norte and Humboldt Counties, in California, eligible to participate in the benefits of the [Indian Reorganization] Act of June 18, 1934 (48 Stat. 984) as shall be designated by the Secretary of the Interior." *Coast Indian Cmty. v. United States*, 213 Ct. Cl. 129, 159 (1977). *See* SER 1-2.

> The legal description of said parcel of land, consisting of approximately 228 acres, is as follows: N 1/ 2 SW 1/ 4 Sec. 13, S 1/ 2 SE 1/4, NE 1/ 4 SE 1/4, S 1/ 2 NW 1/ 4 SE 1/4, SE 1/ 4 SW 1/4 and Lot 6, Sec. 14, N 1/ 2 NE 1/ 4 NW 1/ 4 Sec. 23; all in T. 13 N., R.1 E., Humboldt Meridian, in Del Norte County, California, excepting therefrom that portion thereof containing 78.42 acres conveyed to John E. McCreary by deed recorded in Book X of Deeds, page 217, Del Norte County Records.

Coast Indian Cmty. v. United States, 213 Ct. Cl. at 159.

The trust lands described above are located within the exterior boundaries of the original Klamath River Reservation. *See id.*; SER 4, 28. The 228-acre site, situated along the south bank of the Klamath River in Del Norte County about 3 miles from the Pacific Ocean, was purchased by the Bureau of Indian Affairs (BIA) under the authority of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, "proclaimed an Indian reservation by the Acting Secretary of the Interior on October 21, 1939 [4 Fed. Reg. 4475 (1939)], " and became known as the Resighini Rancheria. *Id.*

"Beginning in 1938, at the invitation of an agent of the BIA, certain Indian families of Del Norte and Humboldt Counties took up residence on the Rancheria." *Id.* Among the 13 families that lived on the Resighini Rancheria, one was "Venola (McCovey) and Frank Dowd." *Id*. at 161.

A number of floods and fires destroyed the homes of the Indians who resided on the Resighini Rancheria, but the Indians always rebuilt on the banks of the Klamath River (notwithstanding the Klamath River Flood of 1964, which swept away all but two rancheria homes). *See Coast Indian Cmty* at 161-162. And, in 1975, the Indians of the Resighini Rancheria, including Yuroks, organized under the provisions of the Indian Reorganization Act, 25 U.S.C. § 476, to seek recognition as a federally recognized Indian tribe. SER 1-2. While the BIA had previously urged the Indians of the Resighini Rancheria to adopt the name "Coast Indian Community," in 1975, the Indians corrected their name to reflect the identity of its members and became a federally recognized Indian tribe known as the "Coast Indian Community of **Yurok Indians** of the Resighini Rancheria." *See* Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 65 Fed. Reg. 13298, 13301 (Mar. 13, 2000)(emphasis added). The name was subsequently shortened to "Resighini Rancheria, California." *See* Indian Entities Recognized and Eligible to Receive

Services From the United States Bureau of Indian Affairs, 83 Fed. Reg. 4235, 4238 (Jan. 30, 2018).

The Klamath River fishery has been and continues to be "not much less necessary to the existence" of the Yurok Indians of the Resighini Rancheria "than the atmosphere they [breathe]." SER 2. *See Blake v. Arnett*, 663 F.2d at 909. From time immemorial to 1938, through the establishment of the Klamath River Reservation, the original Hoopa Valley Reservation, Hoopa Valley Extension, and the Resighini Rancheria, Yurok ancestors of the current members of the Resighini Rancheria fished in the Klamath River within the boundaries of the Klamath River Reservation. SER 3-4. From 1938 to the present, Yurok Indians of the Resighini Rancheria have continued to fish in the Klamath River within the Klamath River Reservation, as extended by the Hoopa Valley Extension, at their at usual and customary fishing places within their ancestral homeland. *Id*.

E. The Yurok Reservation

Approximately 50 years following the establishment of the Resighini Rancheria, the Yurok Reservation was established in 1988 by the Hoopa-Yurok Settlement Act, ER 260, not by Executive Order in 1855. The provision of the Hoopa-Yurok Settlement Act creating the Yurok Reservation describes the boundaries of the Yurok Reservation as follows:

> (c) **Yurok Reservation**.—(1) Effective with the partition of the joint reservation as provided in subsection (a), **the area of land known as**

> **the "extension" (defined as the reservation extension under the Executive Order of October 16, 1891, but excluding the Resighini Rancheria) shall thereafter be recognized and established as the Yurok Reservation.** The unallotted trust land and the assets of the Yurok Reservation shall thereafter be held in trust by the United States for the benefit of the Yurok Tribe.
> (2) **Subject to all valid existing rights** and subject to the adoption of a resolution of the Interim Council of the Yurok Tribe as provided in section 9(d)(2) all right, title, and interest of the United States—
>
> > (A) to all national forest system lands within the Yurok Reservation, and
> >
> > (B) to that portion of the Yurok Experimental Forest described as Township 14 N., Range 1E., Section 28, Lot 6; that portion of Lot 6 east of U.S. Highway 101 and west of the Yurok Experimental Forest, comprising 14 acres more or less and including all permanent structures thereon, shall thereafter be held in trust by the United States for the benefit of the Yurok Tribe and shall be part of the Yurok Reservation.

Hoopa-Yurok Settlement Act, 25 U.S.C. § 1300i-1(c)(emphasis added).

Thus, when the Yurok Reservation was finally created, all national forest system lands within the Yurok Reservation were included "subject to [the] valid existing rights" described in the Hoopa-Yurok Settlement Act, 25 U.S.C. § 1300i-1(c) above. Among those rights were the off-reservation, legally protected rights of the Yurok people and the Resighini Rancheria to fish at usual and accustomed fishing places located on the Klamath River where their Yurok ancestors had fished since time immemorial. Also, notably absent from the Hoopa-Yurok Settlement Act is any clear and unequivocal termination of the "right to take fish from the Klamath River [that] was reserved to the Indians when the [Klamath

River] reservation was created." *United States v. Eberhardt*, 789 F.2d at 1359. Such rights, therefore, were never extinguished and continue to present day.

Also, by drawing the Yurok Reservation boundaries as it did, the Hoopa-Yurok Settlement Act completely enclosed the Resighini Rancheria within the Yurok Reservation, OB 5, and encompassed the lands previously known as the Hoopa Valley Extension and the original Klamath River Reservation. *See* Hoopa-Yurok Settlement Act, 25 U.S.C. § 1300i-1(c). The Yurok Reservation surrounds the Resighini Rancheria on all sides. OB 5.[4]

F. Protection and Conservation of the Klamath River Fishery

As demonstrated above, the Yurok people and their spiritual, social, and economic connections to the Klamath River (and those portions of the river set aside in 1853) are not exclusive to present-day enrolled members of the Yurok Tribe, but additionally extend to Yuroks of the Resighini Rancheria as a matter of

[4] It is important to acknowledge that the Yurok Tribe, in its opening brief, makes various efforts to characterize the Klamath River fishery population as Yurok property (of which it claims one man is unlawfully depriving them). *See, e.g.*, OB 24. This characterization is unsupported by relevant case law. Under the doctrine of *ferae naturae*, the possession of land does not carry with it the possession of the indigenous wild animals that are upon it and the wild animals are not the "property . . . of the owner or occupier of land upon which they are found." *Union Pac. R.R. Co. v. Nami*, 498 S.W.3d 890, 897 (Tex. 2016), *quoting* 4 Am. Jur. 2D Animals § 62. *See also* Restatement (Second) of Torts § 508 cmt. a; Restatement of Torts § 508 cmt. a.; *McKee v. Gratz*, 260 U.S. 127, 134 (1922); *Ex parte Maier*, 103 Cal. 476, 483 (1894). Furthermore, California has title to the bed of the Klamath River, not the Yurok Tribe, and the Resighini Rancheria has not prevented the Yurok Tribe from harvesting its allocation of the shared harvestable resource.

law. The Klamath River fishery is significant as an integral and indispensable part of Yurok and Resighini Rancheria identity. SER 2. As such, Article V, Section 3 of the Constitution of the Resighini Rancheria vests the governing body of the Resighini Rancheria, the Business Council,[5] with the power to manage develop, protect, and regulate its members' use of wildlife, water, and all other natural resources. SER 25-26. This provision authorizes Resighini Rancheria to regulate its members' use of the Klamath River fishery resource in order to conserve it. It also underscores the importance of environmental stewardship and conservation to the Resighini Rancheria and its members, including Dowd, who is currently serving a term as Secretary of the Business Council. ER 262.

SUMMARY OF ARGUMENT

The District Court did not abuse its discretion in ruling that, under Rule 19, the Yurok Tribe's claims against Dowd in his individual capacity must be dismissed because of the inability to join Resighini. *See e.g.*, *Skokomish Indian Tribe v. Forsman*, No. C16-5639 RBL, 2017 U.S. Dist. LEXIS 42730 (W.D. Wash. Mar. 23, 2017), *aff'd* 2018 U.S. App. LEXIS 16351 (9th Cir. 2018) (unpublished); *Skokomish Indian Tribe v. Goldmark*, 994 F. Supp. 2d 1168 (W. D. Wash. 2014). The District Court correctly found that Resighini is a required party

[5] The Business Council is elected by vote of tribal members who are at least 18 years of age and older and consists of five officers: (1) a president, (2) a vice-president, (3) a secretary, (4) a treasurer, and (5) a councilman. SER 25.

to the Yurok Tribe's suit under Rule 19(a)(1)(A) because complete relief cannot be accorded as between the Yurok Tribe and Dowd in the absence of Resighini. ER 011-012. Additionally, because a federally-reserved fishing right is a tribal right and not an individual right, *Whitefoot v. United States*, 293 F. 2d 658, 663 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962), Resighini is also a required party under Rule 19(a)(1)(B), because Resighini claims an interest relating to the subject of the action and is so situated that disposing of the action in Resighini's absence would, as a practical matter, impair or impede Resighini's ability to protect that interest.

The District Court also did not abuse its discretion in ruling that Resighini is indispensable under Rule 19(b) because Resighini would or could be prejudiced by a determination regarding Dowd's, and, by necessity, Resighini's, fishing rights in the Klamath River if this case proceeds in Resighini's absence. That prejudice cannot be lessened by shaping any judgment; to the contrary, any judgment would be inadequate to protect Resighini's interests. Thus, in equity and good conscience, the Yurok Tribe's claims against Dowd cannot proceed in the absence of Resighini.

The District Court's dismissal the Yurok Tribe's claims based on Rule 19, therefore, was not an abuse of discretion and should, therefore, be affirmed.

STANDARD OF REVIEW

The District Court's decision to dismiss an action pursuant to Rule 19 is reviewed for an abuse of discretion. *See Ward v. Apple Inc.*, 791 F.3d 1041, 1047 (9th Cir. 2015); *Paiute-Shoshone Indians of Bishop Cty. v. City of Los Angeles*, 637 F.3d 993, 997 (9th Cir. 2011); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist*., 276 F.3d 1150, 1154 (9th Cir. 2002). "To the extent that the district court's determination whether a party's interest is impaired involves a question of law," it is reviewed *de novo*. *Dawavendewa*, 276 F.3d at 1154, *quoting Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1098 (9th Cir. 1994).

A district court abuses its discretion "if it base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1105 (9th Cir. 2005) (internal quotation marks omitted). The abuse of discretion standard recognizes that trial judges require considerable discretion in the performance of their duties. Because every case presents unique issues, district court judges need latitude in making decisions or the cloud of appellate correction would hang over every judgment call a trial judge makes. As the Supreme Court has recognized, federal court litigation "does not unfold like a play with actors following a script; there is no scenario and can be none. The trial judge must meet situations as they arise and to do this [a trial judge] must have broad power to cope with the complexities and contingencies inherent in

the adversary process." *Geders v. United States*, 425 U.S. 80, 86 (1976). The abuse of discretion standard is, therefore, one of the primary tools used to empower the trial judge to carry out his or her role.

In addition, "[t]hose circumstances in which Congress or this Court has articulated a standard of deference for appellate review of district court determinations reflect an accommodation of the respective institutional advantages of trial and appellate courts." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991). A district court, "[f]amiliar with the issues and litigants, . . . is better situated than the court of appeals to marshall [*sic*] the pertinent facts and apply fact-dependent legal standard[s]." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990). The abuse of discretion standard, moreover, "streamline[s] the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court[.]" *Id.* at 404.

In light of the foregoing, this Court has held that abuse of discretion is defined as "a plain error, discretion exercised to an end not justified by the evidence, [or] a judgment that is clearly against the logic and effect of the facts as are found." *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 977 (9th Cir. 2003) (citation and internal quotations omitted). Under the abuse of discretion standard, a reviewing court cannot reverse the district court's determination absent

a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors. *See McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 953 (9th Cir. 2011); *Valdivia v. Schwarzenegger*, 599 F.3d 984, 988 (9th Cir. 2010).

The abuse of discretion standard also requires an appellate court to uphold a district court determination that falls within a broad range of permissible conclusions. *See Kode v. Carlson*, 596 F.3d 608, 612-13 (9th Cir. 2010) (*per curiam*); *Grant v. City of Long Beach*, 315 F.3d 1081, 1091 (9th Cir. 2002), *amended by* 334 F.3d 795 (9th Cir. 2003). Thus, reversal under the abuse of discretion standard is possible only if the Court is "convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances." *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d at 953 (citation and internal quotations omitted). As, the Supreme Court has succinctly stated:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985).[6]

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT, UNDER RULE 19, THE YUROK TRIBE'S CLAIMS AGAINST DOWD IN HIS INDIVIDUAL CAPACITY MUST BE DISMISSED BECAUSE OF THE INABILITY TO JOIN RESIGHINI.

After correctly concluding that Resighini could not be sued because it enjoys sovereign immunity from suit (a conclusion that the Yurok Tribe does not dispute on appeal), the District Court applied the two factor test provided for in Rule 19 to determine whether the Yurok Tribe's claims against Dowd in his individual capacity could proceed in the absence of Resighini. ER 009-015. The District Court correctly concluded that Resighini was a required party under Rule 19(a) and that, under Rule 19(b), in equity and good conscience the action must be dismissed as against Dowd in the absence of Resighini. *See* ER 012; ER 015. The District Court did not abuse its discretion in coming to either of these conclusions.

The Yurok Tribe argues on appeal that the District Court erred in making both of these findings and asserts that its action may proceed as against Dowd individually in the absence of Resighini. Resighini, however, demonstrates that the

[6] While the Supreme Court considered appellate deference in the context of the "clearly erroneous" standard in *Anderson v. Bessemer City*, 470 U.S. 564, it later held that "[w]hen an appellate court reviews a district court's factual findings, the abuse of discretion and clearly erroneous standards are indistinguishable: A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. at 401.

District Court did not abuse its discretion by ruling that, under Rule 19, the action against Dowd in his individual capacity must be dismissed because Resighini is a required party under both Rule 19(a)(1)(A), because complete relief cannot be afforded between the parties in the absence of Resighini, and Rule 19(a)(1)(B), because disposing of the action in Resighini's absence would impair Resighini's ability to protect its interests. Resighini additionally demonstrates that the District Court did not abuse its discretion in finding that, in equity and good conscience, the suit against Dowd in his individual capacity must be dismissed because a judgment rendered in Resighini's absence would be highly prejudicial to Resighini, the prejudice cannot be lessened or avoided, and judgment rendered in Resighini's absence would not be adequate. For these reasons, the District Court's order should be affirmed.

A. The District Court Correctly Ruled That Resighini Is a Required Party Under Rule 19(a).

Under Rule 19(a):

> An absent tribe's joinder is "required" . . . "if either: (1) the court cannot accord 'complete relief among existing parties' in the [tribe's] absence, or (2) proceeding with the suit in its absence will 'impair or impede' the [tribe's] ability to protect a claimed legal interest relating to the subject of the action, or 'leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.'"

Skokomish Indian Tribe v. Forsman, 2018 U.S. App. LEXIS 16351 at *3, *quoting* *Alto v. Black*, 738 F.3d 1111, 1126 (9th Cir. 2013), *quoting* Fed. R. Civ. P.

19(a)(1)(A)-(B)) (changes in original).[7]

Here, the District Court, relying primarily on Rule 19(a)(1)(A), correctly found that it could not accord complete relief among the existing parties in the absence of Resighini because, "in order to grant [the Yurok Tribe] the declaratory relief it seeks, the court must necessarily decide whether Dowd 'has no right to fish within the Yurok Reservation without the consent or authorization of the Yurok Tribe, or without a license issued by the State of California.'" ER 011. "To do this," the District Court went on to state, it "must resolve Dowd's claim that Resighini Rancheria has a federally reserved fishing right." *Id*.[8] In recognition of the fact that a reserved fishing right is the right of a tribe and not an individual right, the District Court then correctly concluded that, if it were to decide Resighini's rights in its absence, it would not "bind the Rancheria with regard to the issue of where it possesses a federally reserved fishing right." *Id*. The District Court would, therefore, "be unable to afford complete relief as between Dowd and Yurok." *Id*. The District Court did not abuse its discretion in arriving at this conclusion.

---

[7] FRAP 32.1 permits citation to *Skokomish Indian Tribe v. Forsman*, 2018 U.S. App. LEXIS 16351, an unpublished decision of this Court. While it is not controlling precedent under Circuit Rule 36-3(a), the legal issues addressed in the case—whether an absent tribe is a required party under Rule 19 in litigation involving the absent tribe's hunting rights—are highly relevant to the issues in this appeal.

[8] This is so because a reserved fishing right is a tribal right and not an individual property right of tribal members. *Whitefoot v. United States*, 293 F. 2d at 663.

In its complaint, the Yurok Tribe claims that Dowd, "by asserting a right to fish and by fishing within the Yurok Reservation, without authorization from the Yurok Tribe or the State of California, [has] unlawfully interfered with the Yurok Tribe's **exclusive** federally reserved fishing right within the Yurok Reservation." ER 273 (emphasis added). However, Dowd's right to fish is not an individual right, it is a tribal property right of Resighini.

> 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 at 663.

> [T]he fishing rights reserved . . . are communal rights of the Tribe, even though the individual members benefit from those rights. The determination of when and how the rights may be exercised is an "internal affair" of the Tribe.

Settler v. Lameer, 507 F.2d 231, 237 (9th Cir. 1974). *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"]; *United States v. Three Winchester 30-30 Caliber Lever Action Carbines*, 504 F.2d 1288, 1292 (7th Cir. 1974)["The treaty rights allegedly abridged belong to the tribe as a whole and not to any one individual."]; *United States v. Michigan*, 471 F. Supp. 192, 271 (W.D. Mich. 1979)["The fishing right reserved . . . is the communal property of the tribes which signed the treaty and their modern political successors; it does not

belong to individual tribal members."]; *Attorney General v. Hermes*, 339 N.W.2d 545, 549 (1983)["Tribal rights in property, including . . . fishing rights, are owned by the tribal entirety and not as a tenancy in common of the individual members. The individual enjoys a right of user derived from the legal or equitable property right of the tribe of which he is a member."]; *United States v. Fox*, 557 F. Supp. 2d 1251, 1257 (D.N.M. 2007)["Hunting rights belong to a tribe as a whole and not to an individual member of the tribe."]; *United States v. Fox*, 557 F. Supp. 2d 1251, 1259 (D.N.M. 2007)["The Court finds . . . that this right to hunt belongs to the Navajo Tribe as a whole, and not to Fox or to any other individual."].

Thus, any order issued by the District Court relating to the Yurok Tribe's claims would not bind Resighini with regard to the issue of where Resighini possesses a federally-reserved right to fish in the Klamath River. Any such order would, therefore, fail to accord complete relief to the Yurok Tribe as against Dowd, who derives his rights from Resighini's. Rule 19(a). *See also Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir. 1975); *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991).

The Yurok Tribe asserts that complete relief can be afforded in the absence of Resighini because Dowd "purposefully gave up any rights he had to resources of the Yurok Reservation," OB 15, and, therefore, "[t]he District Court's conclusion that the Rancheria's rights are implicated by the Yurok Tribe's claims against

Dowd in his individual capacity is thus incorrect." OB 16. This argument fails because, as described above, there is no individual federally-reserved fishing right to be litigated. *Whitefoot v. United States*, 293 F. 2d at 663; *Lameer*, 507 F.2d at 237; *Gallaher*, 275 F. 3d at 789; *Three Winchester 30-30 Caliber Lever Action Carbines*, 504 F.2d at 1292. Complete relief cannot be afforded as between the Yurok Tribe and Dowd because providing complete relief, by necessity, would require a determination of Resighini's federally-reserved fishing rights and doing so without Resighini as a party to the action would not bind Resighini (and by extension Dowd) with regard to the issue of where it possesses a federally-reserved fishing right. The District Court, therefore, would be unable to afford complete relief as between Dowd and the Yurok Tribe.

The Yurok Tribe also claims that the District Court erred by finding that complete relief could not be accorded as between the Yurok Tribe and Dowd because "[a] judgment declaring the rights of Dowd as against the Yurok Tribe is complete and meaningful as between those parties, which is all that Rule 19(a)(1) requires." OB 18. Yurok cites *Alto v. Black*, 738 F. 3d at 1126, for the proposition that "relief as between disenrolled members of an Indian tribe and federal officials is complete and meaningful 'even if it does not bind the Tribe directly.'" *Id*. The Yurok Tribe then cites to cases standing for the proposition that, where the actions of the absent tribe are the cause of the injury, complete relief could not be accorded

in the absence of the tribe because the tribe would continue to cause the alleged injury. *Id*. at 18-19. From this premise, the Yurok Tribe states that "the Yurok Tribe's sole complaint is against Gary Dowd" and that the "issue can be resolved without the participation or joinder of the Resighini Rancheria because Dowd's actions are the principal cause of the injury of which Yurok complains." *Id*. at 19. This argument fails because, again, it is not Dowd's individual right that is at issue because Indian fishing rights are tribal rights and not individual rights. The issue is thus whether Resighini has a federally-reserved fishing right. Resighini will continue to assert that right in the absence of a judgment against it on the issue. That is the source of the Yurok Tribe's alleged injury, not any actions of Dowd individually. Thus, the holdings in *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F. 2d 1496, and *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F. 3d 1150, are directly on point and Resighini is a required party under Rule 19(a)(1)(A).

Resighini is also a required party under Rule 19(a)(1)(B), which states that a party is required if that party claims an interest relating to the subject of the action and is so situated that disposing of the action in the party'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. While the District Court

did not expressly rule that Resighini is also a required party under Rule 19(a)(1)(B), it did find later in its opinion that "the Resighini Rancheria has a protectable interest in the outcome of the litigation in that it asserts a federally-reserved fishing right that could either be eliminated or made subject to the Yurok Tribe's regulation." ER 013. In any event, Resighini is a required party under Rule 19(a)(1)(B) because proceeding with the suit in Resighini's absence would impair and impede its ability to protect a claimed legal interest relating to the subject of the action.

Resighini has an interest relating to the subject of the Yurok Tribe's action and is so situated that the disposition of the action in Resighini's absence will, as practical matter, impair or impede its ability to protect that interest. As stated above, Resighini's federally-reserved fishing right is a tribal property right. A determination by the District Court that the right does not exist or is subject to regulation by the Yurok Tribe would most certainly affect the Resighini's interests. That conclusion is consistent with other decisions in which courts have concluded that Indian tribes are necessary parties to actions affecting their legal interests. *See*, *e.g.*, *Skokomish Indian Tribe v. Forsman*, 2018 U.S. App. LEXIS 16351[Indian tribe is required party in action related to the tribe's hunting rights]; *Confederated of the Chehalis Indian Reservation v. Lujan,* 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]; *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 that Resighini is a required party, that doubt was laid to rest by a case strikingly similar to this case: *Skokomish Indian Tribe v. Forsman*, 2017 U.S. Dist. LEXIS 42730, *aff'd* 2018 U.S. App. LEXIS 16351. In that case, the Skokomish Indian Tribe sued Councilmembers and Fisheries Director of the Suquamish Indian Tribe alleged 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 that, because it enjoyed sovereign immunity from suit, could not be joined as a party and, therefore, that 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.

Just last month, this Court affirmed the district court's holding in *Skokomish Indian Tribe v. Forsman*. *Skokomish Indian Tribe v. Forsman*, No. 17-35336, 2018 U.S. App. LEXIS 16351 (9th Cir. June 18, 2018)(unpublished). This Court held that:

> [A]t a minimum, the Jamestown S'Klallam and Port Gamble S'Klallam Tribes are required parties to this action. Like Defendants, these amici tribes' interpretation of their reserved hunting rights conflicts with Skokomish's primary-right claim, which entails the power to exclude members from *all* other Stevens Treaty Tribes from hunting in the land at issue. Therefore, the district court correctly concluded that deciding Skokomish's claims against the Suquamish Defendants would necessarily decide Skokomish's hunting rights in relation to *the amici tribes* and potentially other absent, non-party Stevens Treaty Tribes.

Skokomish Indian Tribe v. Forsman, 2018 U.S. App. LEXIS 16351 at *4. *See also Skokomish Indian Tribe v. Goldmark*, 994 F. Supp. 2d 1168.

Like the absent tribes in *Skokomish*, litigation of Resighini's rights in its absence would, as a practical matter impair or impede Resighini's ability to protect the interest. Resighini has a claimed interest relating to the subject of the Yurok Tribe's action—where Resighini has reserved fishing rights—and is so situated that the disposition of the action in Resighini's absence will, as practical matter, impair or impede its ability to protect that interest. As stated above, Resighini's federally-reserved fishing right is a tribal property right. A determination by the District Court that the right does not exist or is subject to regulation by the Yurok Tribe would most certainly affect the Resighini's interests.

It is also important to note that, while the Supreme Court stated in *Philippines v. Pimentel*, 553 U.S. 851, 867 (2008), that a court may have leeway to address when a suit may go forward if a claimed interest is frivolous, the text of Rule 19 only requires a party to *claim* an interest. *See* Fed. R. Civ. Pro. 19(a)(1)(B); *accord Washington v. Daley*, 173 F.3d 1158, 1167 n. 10 (9th Cir. 1999)[disputed treaty rights constitute a claim sufficient to require joinder if feasible under Rule 19(a)]; *accord Klamath Tribe Claims Committee v. U.S.*, 97 Fed. Cl. 203, 211-212 (2011)[Rule 19 does not require the absent party to actually possess an interest, but merely requires them to claim such an interest]; *Keweenaw Bay Indian Cmty. v. State*, 11 F.3d 1341, 1346-47 (6th Cir. 1993)[absent tribes claiming treaty right to fish are necessary parties in other tribe's suit against state

to protect fishery]. As demonstrated above, Resighini's claimed interest is not frivolous and, if the suit were to proceed in Resighini's absence, it "would without doubt affect the rights of" Resighini. *Skokomish Indian Tribe v. Goldmark*, 994 F.Supp.2d at 1189.

Furthermore, if the Yurok Tribe were permitted to proceed in its case against Dowd individually in the absence of Resighini, litigation regarding Dowd's right to fish would necessarily impact Resighini's rights, because fishing rights are tribal rights and not individual rights. Reinstating the Yurok Tribe's suit against Dowd would, therefore, render Resighini's sovereign immunity a nullity. Tribes would be permitted to sue individual members of other tribes under the guise that the suit is only about that individual's actions but would actually be impacting and impeding the tribal fishing right. This would run counter to this Court's long standing rule that, in the context of Rule 19, tribal sovereign immunity is a "compelling factor" in the analysis. *White v. University of California*, 765 F.3d 1010, 1028 (9th Cir. 2014)(citations omitted).

The Yurok Tribe argues that Resighini's rights will not be impaired if the Yurok Tribe's claims are adjudicated in Resighini's absence because "Resighini's claimed interests here are unrelated to Gary Dowd's" and "are unaffected by the resolution of the dispute between the Yurok Tribe and Gary Dowd." OB 21. The Yurok Tribe is wrong for two distinct reasons. First, as discussed herein *ad*

nauseum, a tribal right is a tribal right and not an individual right. There is no way to litigate Dowd's individual right without affecting Resighini's rights: "Tribal rights in property, including . . . fishing rights, are owned by the tribal entirety and not as a tenancy in common of the individual members. The individual enjoys a right of user derived from the legal or equitable property right of the tribe of which he is a member." *Attorney General v. Hermes*, 339 N.W.2d at 549. Thus, this right cannot be adjudicated in Resighini's absence.

Second, even if one could separate an individual right from the tribal right, the Yurok Tribe's own pleadings demonstrate that Resighini's interests will necessarily be affected by the resolution of the dispute between the Yurok Tribe and Dowd in the absence of Resighini. The Yurok Tribe explicitly states in its Opening Brief that, as against Dowd individually:

> Yurok Tribe seeks a declaratory judgment confirming that Dowd's conduct is in violation of federal law and in contravention of the Yurok Tribe's **exclusive** reserved fishing rights

OB 12.[9]

If the Yurok Tribe is seeking a declaration that Dowd, individually, has violated the Yurok Tribe's **exclusive** right, the court would be required to determine that the Yurok Tribe does indeed possess an **exclusive** right. If that right

[9] *See also* OB 18["[B]y fishing without authorization either from the Yurok Tribe or the State of California, Dowd unlawfully interfered with the Yurok Tribe's **exclusive** federal reserved fishing right within the Yurok Reservation." (emphasis added)].

were found to be exclusive, it would, by necessity, mean that the right excludes Resighini as well. It would be highly prejudicial for such a determination to be made in Resighini's absence.

The Yurok Tribe next argues that the "District Court erred by failing to conduct a preliminary assessment of the merits of Resighini's claimed interest" and that Resighini is claiming "sovereign authority over the territory of the Yurok Tribe" when its members fish at spots within the present-day Yurok Reservation. This is simply not the case. Resighini asserts that it maintains a federally-reserved fishing right within the Klamath River Reservation, which includes locations within the present-day Yurok Reservation as established in 1988. When Resighini members fish at those locations, as they have done since time immemorial, Resighini is not asserting "sovereign authority" over the Yurok Tribe.

Finally, the Yurok Tribe argues that its suit against Dowd individually may proceed in the absence of Resighini because Dowd can adequately represent Resighini's interests. OB 26. The Yurok Tribe claims that Dowd and Resighini's interests are aligned and that Dowd would make all of Resighini's arguments. OB 26-27. This argument borders on the frivolous. Dowd's individual interests as an Indian fisher do not compare to Resighini's interest in the federally-reserved fishing rights of a sovereign Indian tribe. Resighini, as a sovereign government, has much broader interests at stake than Dowd, including, in particular, its

governmental interests in regulating its members' fishing on the Klamath through the promulgation of law and regulations. The Yurok Tribe's argument is analogous to claiming that an individual citizen of the United States could sufficiently represent the interests of the United States in a suit where the United States was required, but could not be joined, because of its immunity from suit. An individual tribal member is in no position to adequately represent the sovereign interests of his tribe, and their interests are significantly divergent. Furthermore, allowing a suit against an individual tribal member to proceed in the absence of a required tribe on the basis that the individual might make the absent tribe's arguments would render tribal sovereign immunity a nullity. Accordingly, there is no basis to conclude that Resighini's interests would be adequately represented in its absence.

For all of these reasons, the District Court did not abuse its discretion in ruling that Resighini is a required party under Rule 19(a).[10]

[10] The Yurok Tribe also argues that the District Court "wrongly rested its decision on the potential impairment of the alleged rights [Resighini] may have at stake in that dispute, its off-reservation fishing rights[,]" and that the "correct inquiry looks at what rights Dowd expressly gave up through his election not to join the Yurok Tribe in the HYSA and the consequences of the surrender of those rights as they pertain to the Yurok Tribe's claims against him as an individual." OB 14-15. This argument can be summarized as follows: the Yurok Tribe believes that its claim that it has exclusive fishing rights as against Dowd is so obvious that the District Court should have ignored the requirements of Rule 19 and proceeded to adjudicate the Yurok Tribe's claim without any analysis of the effects on Resighini's interests/rights. Not only is this claim wrong with respect to Dowd's rights, there is no basis in the law for the District Court to ignore Rule 19's requirements. Rule 19 is specifically designed to prevent that type of proceeding to

B. The District Court Did Not Abuse Its Discretion by Ruling That, Under Rule 19(b), Yurok's Claims Against Dowd Individually Could Not, in Equity and Good Conscience, Proceed in the Absence of Resighini.

Since Resighini is a required party under Rule 19(a) that could not be joined because of its sovereign immunity from suit, the District Court was then required to determine, pursuant to Rule 19(b), "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Rule 19(b) provides the following factors for the court to consider in making this determination:

> (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.

The District Court examined each of these factors in detail and found that every factor weighed in favor of Resighini and dismissal. ER 012-015.[11] As such,

---

protect the interests of absent parties.

[11] The Yurok Tribe initially argues that the "District Court erroneously limited its analysis under Rule 19(b) to the four factors set forth in the rule." This assertion is completely unfounded. The Yurok Tribe can cite to no legal authority that *requires* the court to look outside of the Rule 19 factors in making a determination as to whether the suit should, in equity and good conscience, proceed in the absence of a required party.

the District Court found that, on balance, in equity and good conscience the action could not proceed against Dowd individually in the absence of Resighini and must be dismissed. ER 015. The District Court did not abuse its discretion in making this determination.

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)["[N]ot 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 detailed above, with respect to the legal interest test, Resighini 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 Resighini's fishing right or subjecting that right to the Yurok Tribe's regulation would have devastating effects on Resighini's sovereign authority to enact and enforce its own laws regulating the fishing of its members. Resighini will be prejudiced because the Court cannot grant any of the relief requested by the Yurok Tribe against Dowd without eliminating, reducing, or, at the very least, affecting Resighini's federally-reserved fishing right. The District Court agreed, finding that "with respect to the legal interest test,

the Resighini Rancheria has a protectable interest in the outcome of the litigation in that it asserts a federally-reserved fishing right that could either be eliminated or made subject to the Yurok Tribe's regulation." ER 013.

The Yurok Tribe argues that the District Court erred by failing to "analyze how the interest of [Resighini] will be impaired or prejudiced if the case proceeds in its absence." OB 30. This is wrong. The District Court expressly found that "Resighini Rancheria has a protectable interest in the outcome of the litigation. . . ." ER 013. The Yurok Tribe next states: "Nor would adjudication of the Yurok Tribe's claims [against Dowd] affect the sovereign powers of [Resighini]." OB 30. This is wrong because, as demonstrated above, a federally-reserved fishing right is a tribal right, not an individual right. Thus, Resighini's legally protected interest in its federally-reserved fishing rights will necessarily be prejudiced by allowing this action to proceed in Resighini's absence. And, as also demonstrated above, this interest is not frivolous as the Yurok Tribe claims. Thus, the prejudice prong of Rule 19(b) weighs in favor of the District Court's finding that the action must be dismissed.

With respect to the second factor under Rule 19(b), it is not possible to lessen or avoid the prejudice to Resighini. The Yurok Tribe seeks a determination that it has an exclusive federally-reserved fishing right within its reservation, which means that the Yurok Tribe is requesting a determination that Resighini has

no federally-reserved fishing right to fish in the portions of the Klamath River that lie within the present-day Yurok Reservation. The District Court could not grant any of the relief requested by the Yurok Tribe without eliminating or reducing Resighini's federally-reserved fishing right. As a result, there is no way to lessen the prejudice Resighini would suffer by shaping the relief granted or by placing provisions in the judgment. The District Court agreed, finding that "[w]ith respect to the second factor under Rule 19(b), it is not possible to lessen or avoid the prejudice to the Rancheria." ER 013. Thus, the second Rule 19(b) factor weighs in favor of dismissing the complaint.

The District Court also found that the third factor, whether a judgment rendered in Resighini's absence would be adequate, "also requires dismissal of the complaint in this case." ER 013. 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 in Resighini's absence would not settle the litigation. Resighini would continue to assert its federally-reserved fishing right and members of Resighini, authorized to fish in the Klamath River under Resighini's fishing ordinance, would continue to fish in the Klamath River pursuant to the authority granted to them by Resighini. Any judgment entered would not be complete, therefore, given the significant possibility that the parties

to the litigation would face subsequent litigation with potentially different results. *See Northern Arapaho Tribe v. Harnsberger*, 697 F. 3d 1272, 1283 (10th Cir. 2012). Thus, the District Court correctly found that "that any judgment entered by the Court in [Resighini's] absence would not settle the litigation" and, therefore, "any judgment it could enter as to Defendant Dowd and the Yurok Tribe would be inadequate. . . ." ER 013-014. The third factor unquestionably favors dismissal.

The Yurok Tribe argues that the District Court erred in finding that this factor weighed in favor of dismissal, but only offers conclusory statements in support of its claim. *See, e.g.*, OB 32["The interests of the courts and the public generally in the complete and efficient resolution of on-going controversies would be served by a judgment against Dowd."]. The Yurok Tribe fails to demonstrate how a judgment against Dowd individually would settle the litigation. And the Yurok Tribe's statements made elsewhere in its Opening Brief demonstrate that a judgment against Dowd individually would only increase the likelihood of future litigation: "Similarly, if other Rancheria members seek to take fish from the Yurok Reservation (without a State license or Tribal permit) in the face of a declaratory judgment against Dowd, the Yurok Tribe will bring new actions against them to protect its fishery." OB 20; "[T]he Rancheria would not be bound by a judgment against Dowd and would be free to assert whatever interests it claims in future litigation or defend those interests if the Yurok Tribe brings additional actions."

OB 31. Thus, as the Yurok Tribe's own statements demonstrate, there would be nothing complete, consistent, or efficient about the settlement of this controversy through a proceeding against Dowd individually in the absence of Resighini.

The fourth and final factor—the existence of an adequate remedy if the action is dismissed—was addressed in a case that is very similar to this case: *Skokomish Indian Tribe v. Goldmark,* 994 F. Supp. 2d 1168. There, the Skokomish Tribe sued certain state officials seeking an order 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 v. Goldmark, 994 F. Supp. 2d at 1192.

Here, the District Court found that "[t]he same analysis applies to the present case." ER 015. "Although [the Yurok Tribe] will likely not have an alternative forum to seek resolution of the dispute following dismissal of this action, this does not outweigh the factors favoring dismissal, particularly because the lack of an alternative forum is due to the important doctrine of sovereign immunity." *Id*. This is particularly true in light of the fact that, "although Rule 19(b) contemplates balancing the factors, when the necessary party is immune from suit, there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor." *White v. University of California*, 765 F.3d at 1028 (citations omitted). As this Court stated in *White*, "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

immunity." *Id*. (citations omitted). Here, any prejudice to the Yurok Tribe caused by the lack of an available remedy is "outweighed by prejudice to the absent [party] invoking sovereign immunity." *Philippines v. Pimentel*, 553 U.S. at 872.

The Yurok Tribe argues that "the District Court's finding that the fourth factor weighed in favor of dismissal was error" because, "[g]iven the perilous state of the [Klamath River] fishery today, the Yurok Tribe's interest is as compelling in the Rule 19(b) balancing analysis as the immunity of [Resighini]." OB 32-33. This argument is unavailing. The Yurok Tribe is suggesting that its interest in preventing one man from fishing the Klamath River fishery outweighs Resighini's interest in sovereign immunity. It simply does not, and the Yurok Tribe has offered no legal authority in support of such a suggestion. Additionally, the Yurok Tribe's claim conflicts with controlling authority that strongly indicates that a lack of an alternative forum must always give way to a tribe's interest in sovereign immunity. *White v. University of California*, 765 F.3d at 1028. Thus, there is no basis for the conclusion that the District Court abused its discretion in finding that Resighini's interest in its sovereign immunity outweighed the Yurok Tribe's lack of an alternative forum.[12]

[12] At the end of its Opening Brief, the Yurok Tribe appears to frame *Resighini Rancheria v. Bonham*, 872 F. Supp. 2d 964 (N.D. Cal. 2012), as a ruling on the issue of whether Resighini possesses a reserved fishing right in usual and accustomed locations on land that is now within the Yurok Reservation. The

Thus, because all of the Rule 19(b) factors weigh in favor of Resighini, the District Court did not abuse its discretion in ruling that, in equity and good conscience, the Yurok Tribe's claims against Dowd individually must be dismissed in the absence of Resighini.

CONCLUSION

For all of the forgoing reasons, Resighini and Dowd respectfully request that the Court affirm the decision of the District Court.

Bonham court made no such ruling—it ruled on a standing issue that was completely unrelated to the Resighini's fishing rights.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the forgoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 25, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Ericka Duncan*
Ericka Duncan

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-15309

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [12,234] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: /s/ Lester J. Marston

Date: 07/25/2018

("s/" plus typed name is acceptable for electronically-filed documents)