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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFRONIA

TULE LAKE COMMITTEE,

Plaintiff,

v.

FEDERAL AVIATION ADMINISTRATION, CITY OF TULELAKE, CALIFORNIA, CITY COUNCIL OF CITY OF TULELAKE, BILL G. FOLLIS, JUDY COBB, PHIL FOLLIS, JACK SHADWICK, ROMONA ROSIERE, and MODOC NATION fka MODOC TRIBE OF OKLAHOMA,

Defendants.

No. 2:20-cv-00688-WBS-DMC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MODOC NATION, BILL G. FOLLIS, JUDY COBB, PHIL FOLLIS, JACK SHADWICK, and ROMONA ROSIERE'S MOTION TO DISMISS

DATE: SEPTEMBER 21, 2020
TIME: 1:30 PM
COURTROOM: 5, 14TH FLOOR
JUDGE: THE HONORABLE WILLIAM B. SHUBB

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INTRODUCTION

General aviation and the public-use airports play a crucial role in the Nation's system of airports. General aviation serves many vital needs that scheduled airline services and larger airports cannot meet. These services include providing remote emergency medical flights, aerial firefighting flights, law enforcement flights, flight training, agricultural functions, time-sensitive cargo services, as well as business and personal travel. "General Aviation Airports: A National Asset," United States Department of Transportation Federal Aviation Administration, May 2012, pp. 4-10. The Federal Aviation Administration ("FAA") has recognized that the Nation's aviation would be incomplete and without the current diverse network of General Aviation airports. *Id.*

This case involves the latest in series of efforts the Tule Lake Committee ("Committee") has instigated in its ongoing attempts to shutter the Tule Lake Municipal Airport ("Airport"), a General Aviation Airport located in Modoc County, California. The purpose of the Committee's push to shutter the Airport is so that land on which the Airport sits can be converted from a General Aviation Airport to expand the monument memorializing the long-defunct World War II War Relocation Authority Tule Lake Segregation Center where people of Japanese descent were imprisoned in from May 1942 to March 1946.

As set out below, the Committee's latest attempt to strip ownership of the Airport from the Modoc Nation should be dismissed on numerous grounds, including that the Modoc Nation ("Nation"), is a necessary party to this action but, despite the Committee's efforts to name the Nation as a defendant, cannot be joined due to the Nation's sovereign immunity from unconsented suit.

FACTUAL BACKGROUND

The site that sits at the center of this controversy has a unique and complex history. From time immemorial, until their forced removal, the Modoc People occupied territory along the present-day border between California and Oregon. Tule Lake and the surrounding area were the geographic, cultural, and spiritual center of Modoc territory. William C. Sturtevant,

Handbook of North American Indians: Plateau ("Handbook of North American Indians") pp. 447-450 (1998).

I. Modoc Territory

Modoc territory was vast and included extensive fishing grounds as well as summer and winter hunting grounds. Handbook of North American Indians, at 448-450. The site where the Airport sits has special significance to the Modoc People as the Airport sits on what were the Modoc's summer hunting grounds. *Id*. Every year, in and around the area of the Airport, the Modoc established a series of seasonal villages. *Id*. From these villages, the Modoc conducted religious and cultural ceremonies related to their hunts. *Id*.

Beginning in the 1800s, as white settlers established the South Emigrant Trail, the Modoc increasingly confronted hostility directed at them from settlers seeking to establish communities in the Willamette Valley. Gregory F. Michno, *Circle the Wagons!: Attacks on Wagon Trains in History and Hollywood Films*, pp. 90-91 (2009). As more settlers came to the area, hostilities and conflict with the Modoc increased. *Id*. see also United States Department of Agriculture, Forest Service, Modoc NF History, 1945, Chapter II, Early History (last accessed July 28, 2020.) Eventually, conflicts escalated to the point that the United States interceded and began to assert pressure on the Modoc, and their neighbors the Klamath Indians, to abandon lands that non-Indian invaders sought for their settlements. *Id*.

Ultimately, the Modoc and Klamath succumbed to the pressure of the United States and agreed to the Klamath Lake Treaty of 1864 ("1864 Treaty"). James R. Arnold, The Encyclopedia of North American Indian Wars, 1607-1890, p. 507 (2011), Under the 1864 Treaty the Klamath and Modoc ceded large portions of their territory to the United States in exchange for among other things a reservation that was intended to be a home for both the Klamath and the Modoc Treaty with the Klamath, Etc., October 14, 1864, 16 Stats. 707, ratified July 2, 1866. However, when the Modoc signed the 1864 Treaty, they did so with an understanding that the United States would honor an earlier treaty the Modoc entered into with a representative of California that guaranteed the Modoc's continued possession and control of Tule Lake and the surrounding area. Handbook of North American Indians, p. 460. Based on

this understanding, and sustained pressure put on them by the United States, the Modoc left their ancestral lands for the newly created reservation in Klamath territory. *Id.*

Almost immediately upon their arrival on the Klamath reservation, the Klamath treated the Modoc as aliens and excluded them from governance and decision-making concerning life on the jointly occupied reservation. *Id.* Because of the hostility, the Modoc faced from the Klamath, the Modoc split into two bands. *Id.* One group remained committed to forging their subsistence on the Klamath Reservation despite the hostilities it faced from the Klamath. *Id.*

The other band, which was formed by the ancestors of the Nation, and led by Kintpuash, a.k.a. Captain Jack, abandoned the Klamath Reservation and returned to the Modoc's ancestral territory in and around Tule Lake. *Id.* They sought to have the United States honor the earlier executed, but unratified, treaty the Modoc made with California representatives and to establish a Modoc Reservation near where the Lost River enters Tule Lake.[1] Robert H. Ruby, John A. Brown, Indians of the Pacific Northwest: A History, p. 211 (1981).

The United States rejected the request to honor the California Treaty as well as the request for an independent Modoc Reservation. Instead, the United States sought to force Kintpuash and his followers back onto the Klamath Reservation through a series of armed attacks. James R. Arnold, The Encyclopedia of North American Indian Wars, 1607-1890, pp. 507-509 (2011). Ultimately, the United States' acts of aggression triggered what has become known as the Modoc War of 1872. During the Modoc War, which waged for over two years, the United States slaughtered large numbers of Modoc people, including women and children. At the Modoc War's end, the United States executed some Modoc leaders sending others to Alcatraz Island, where they were held as prisoners of war. Handbook of North American Indians, p. 460; Erwin N. Thompson, *The Rock: A History of Alcatraz Island 1847-1972*, p. 275 (1979).

The surviving Modoc who were not imprisoned suffered a fate that was arguably equally horrific. The United States rounded up these survivors, forced them into railroad cattle cars, and shipped them – like livestock that would ordinarily occupy their quarters – thousands of miles

[1] The point where the Lost River enters Tule Lake is approximately 10 miles from the site of the Airport.

east. Ultimately, the Modoc were finally relocated to northeast Oklahoma in what was then – and now once again is – considered Indian country.

Adding to the injuries the United States had already inflicted on the Modoc, in 1954 the United States terminated the Modoc from federal supervision, divesting the Nation of protection under federal law and its land base. Klamath Termination Act of 1954, PL 587, August 13, 1954. The Nation remained "terminated" for twenty-years until 1974 when through the exhaustive work of Chief Bill Follis, the United States reestablished formal government to government relations with the Nation by re-bestowing the Nation with federal recognition. Act to Reinstate the Modoc, Wyandotte, Peoria, and Ottawa Indian Tribes of Oklahoma as Federally Supervised and Recognized Indian Tribes, PL 95-281, May 15, 1978.

To date, the Nation has re-acquired or is in the last processes of re-acquiring large tracts of land in its ancestral territory in the area surrounding Tule Lake. This includes the approximately 356 acres that make up the Airport property, which the Nation purchased from the City in 2018.

II. The Committee's Relationship to the Property

Some 70 years after the United States' assault on the Modoc, the United States again stained the soil of the Tule Lake region. On December 7, 1941, Japan launched the infamous attack on Pearl Harbor. The attack resulted in widespread paranoia in the United States and led to open hostility toward American citizens who were of Japanese descent. Acting on the fear of the period, in 1942, President Roosevelt, through Executive Order 9066, authorized the establishment of an "Exclusion Zone" in the western United States. Under Executive Order 9066, the President authorized the local military to detain and incarcerate people of Japanese descent for what the United States claimed was a wartime exigency.

The detention and incarceration program resulting in nearly 120,000 people of Japanese descent being forcibly removed from their homes and detained in one of ten Wartime "Relocation Centers" across the United States. One of the ten camps was the Tule Lake Relocation Center, part of which was located on what is now the site of the Airport. ECF 1, p.3, ¶ 14 Initially, the Tule Lake Relocation Center held approximately 12,000 detainees. *Id.*

By every account, life at the Tule Lake Relocation Center was harsh. For detainees, normal life ceased to exist, and family structures were not only discouraged but were largely prohibited by the conditions of incarceration. Although they had not been charged with any crimes, the Japanese detainees – much like the Modoc before them – were treated as prisoners of war for no reason other than their ancestry and national origin.

In mid-1942, the United States began to attain the upper hand in World War II's Pacific Theater. This made it difficult for the United States to justify continuing to incarcerate tens of thousands of people of Japanese descent. However, the war fueled paranoia, and a growing need for additional troops led the United States to undertake a clumsy and ill-designed program to determine the "loyalty" of those incarcerated in the Relocation Centers.

The loyalty program utilized a "Loyalty Questionnaire" that was arbitrary and confusing at best, and intentionally pernicious at worst. The purported purpose of the questionnaire was to determine which of the incarcerated could be "trusted" and, therefore, released from detention.

Unfortunately, the application of the "Loyalty Program" and review of the "Loyalty Questionnaire" was as arbitrary as the questions themselves. Thus, anyone who refused to complete the questionnaire – for any reason, including as a protest to ongoing civil rights abuses – were deemed disloyal.

Continuing to be fueled by wartime paranoia, the United States deemed it necessary to segregate the incarcerated deemed "disloyal." Therefore, on July 15, 1943, the United States converted the Tule Lake Relocation Center to Tule Lake Segregation Center, which was operated as a maximum-security military prison. At the height of its occupation, the Tule Lake Segregation Center held nearly 20,000 people. ECF 1, p. 3, ¶ 14.

The Tule Lake Segregation Center operated as a form of military prison for roughly two- and one-half years with varying levels of capacity after July 1944. The Segregation Center officially closed on March 18, 1946.

III. Post-World War II History and Airport Development

Following World War II and the closure of the Tule Lake Segregation Center, land in and around the former War Relocation Authority site was offered as homesteads to returning

veterans. The Klamath Project at 100: Conserving our Resources, Dan Keppen (2004). Because the number of applications far exceeded the area available for homesteading, the United States used a lottery system to distribute the land. *Id.* Ultimately, through lottery drawings conducted in 1946, 1948, and 1949, the United States granted 216, 80-acre "homesteads" to returning veterans. *Kleppen*, p. 15. The United States issued 86 homestead patents in and around the former Tule Lake Segregation Center. *Id.*

Around the same time that homesteaders were moving into the area, the main firebreak and smaller firebreak in the defunct Tule Lake Segregation Center were converted into runways for use by crop-dusters providing services for local farmers. In 1951, the United States issued a patent to the City of Tulelake for approximately 358 acres to be used exclusively for airport purposes. ECF 1., p. 4, ¶ 19. The patent required the City of Tulelake to develop an airport on site and required that the land forever be used for the operation of a "public airport." ECF 1, Ex. A. If, for any reason, the land ceased to be used for airport purposes, the patent provided that the land "shall automatically revert to the United States pursuant to section 16 of the Federal Aviation Act[.]" ECF 1, Ex. A. Additionally, the patent provided that "[a]ny subsequent transfer of the property interest conveyed hereby will be made subject to all the covenants, conditions, and limitations contained in this document." *Id.*

As the patent required, the City of Tulelake continually used the property for airport purposes. To facilitate the continued operation of the airport, in 1974, the City entered into a 40-year lease with the County of Modoc under which the County acts as the FAA Sponsor for, and operator of, the Airport. ECF1, p. 8, ¶ 35. In January 2014, the City and the County extended the soon to expire lease for an additional 30 years. ECF 1, p. 8, ¶ 35.

IV. The Modoc Nation's Interest in the Airport and Transfer to The Modoc Nation

Since the Modoc Nation's re-recognition in 1974, the Modoc Nation has been actively pursuing the reestablishment of the Nation's historical land base in Oklahoma and in its ancestral territory along the California-Oregon border. This includes the approximately 356 acres that make up the Airport.

The Modoc Nation first became interested in the Airport in 2016. After lengthy negotiations with the City, the Modoc Nation purchased the Airport in 2018 under a Standard Purchase Agreement. ECF 1, pp. 10-11, ¶ 49-70. Under the Purchase Agreement, the Modoc Nation expressly agreed to "continue the current use of the property [as an operational public airport] in accordance with the land patent, dated January 18, 1952, as amended[.]" in perpetuity. ECF 1, Ex. E. Furthermore, the Nation accepted the Airport property subject to the existing long-term lease between the City and the County, which creates numerous obstacles to the Nation's development of the Airport. *Id*. And, the Nation accepted the Airport property subject to an Airport Operation and Maintenance Agreement between the County and Nick S. Macy. *Id*.

In exchange for the Airport property and all the associated restrictions and requirements, the Nation paid the City the sum of $17,500.00. *Id*. Additionally, as part of the consideration for the purchase of the Airport, the Nation agreed to indemnify and defend the City against "all claims, actions, causes of action, fines, penalties, and costs (including without limitation, litigation related costs and expenses and attorney's fees) … arising on or after the Date of the Agreement, related to the Property …." *Id*.

On September 13, 2018, after City Council of the City of Tulelake Ordinance Number 2018-16-01, authorizing the sale of the Airport to the Nation became effective, the Nation recorded the deed to the Airport with the Modoc County Recorder's Office. Exhibit A. Since that time, the Nation has, even in the face of unfounded challenges by the Committee, operated the Tule Lake Municipal Airport in full compliance with the terms of the Purchase Agreement, Ordinance 2018-16-01, and the Land Patent.

ARGUMENT

As addressed below, the Committee's Complaint, which has as its singular purpose, stripping the Nation of ownership of the Airport, must be dismissed. The Committee has not stated any legally cognizable claims against the Nation and the individual members of the Nation's Tribal Council. Nor can the Committee ever do so. Neither the Nation nor the individual members of the Nation's Tribal Council committed any wrongful acts or caused harm to any legally protectable interests of the Committee. Moreover, the Nation is immune from suit

and cannot be joined to this action. This last point is fatal to the Committee's claims. Because of the nature of the Committee's claims, which at their core seek to strip the Nation of ownership of the Airport, the Nation is a necessary and indispensable party under Federal Rule of Civil Procedure 19. The equities and interests at stake in this action are such that that the action should not proceed in the Nation's mandatory absence.

I. Modoc Nation and the Named Tribal Council Officials Should be Dismissed for Lack of Subject-matter Jurisdiction Under Rule 12(b)(1).

The Nation is a federally recognized Indian tribe. ECF 1, ¶ 8; 85 Fed.Reg. 5464. January 30, 2020. As a recognized Indian tribe, the Nation is a domestic sovereign. It is a bedrock principle that tribal sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Michigan v. Bay Mills Indian Community*, 572 US 782, 803 (2014); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 US 877, 890 (1985); *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002) (citing *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989); *Breakthrough Mgt. Group v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1182-83 (10th Cir. 2010) (quoting Patrice Kunesh, *Tribal Self-Determination in the Age of Scarcity*, 54 SD L. Rev. 398, 398 (2009). Tribal sovereign immunity is jurisdictional in that it not only acts as a bar to liability but also categorically bars suits against Indian tribes. *Alvarado v. Table Mtn. Rancheria*, 509 F.3d 1008, 1015-16 (9th Cir. 2007).

Importantly, tribal sovereign immunity "extends to tribal officials when acting in their official capacity and within the scope of their authority." *Cook v. Avi Casino*, 548 F.3d 718, 727 (9th Cir. 2008). As an elemental matter, a suit against tribal officials for actions taken in their official capacities is a suit against the Tribe and is barred by the Tribe's immunity. *Linneen*, 276 F.3d at 492.

Sovereign immunity is a mandatory doctrine that courts must recognize and apply. *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155(9th Cir. 1979), Accordingly, under the doctrine, Indian tribes and tribal officials are only subject to suit if either the Tribe voluntarily waives its immunity or Congress expressly and explicitly abrogates tribal immunity. *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 US 751, 754 (1998); *Oklahoma Tax*

Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 US 505, 509 (1991). Waivers and congressional abrogations of immunity must be clear, express, and unambiguous and cannot be implied. *Oklahoma Tax Comm'n*, 498 US at 509; *Pit River Home and Agr. Co-op. Ass'n v. US*, 30 F.3d 1088, 1100 (9th Cir. 1994); *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004) (congressional abrogation of immunity must be "unequivocally expressed" in "explicit legislation"). Critically, a plaintiff seeking to bring a claim against an Indian tribe or tribal officials bears the burden of establishing a waiver of tribal sovereign immunity. *Ingrassia v. Chicken Ranch Bingo and Casino*, 676 F.Supp.2d 953, 956-57 (E.D.Cal. 2009).

Modoc Nation and its individually named Tribal Council members should be dismissed from this case. Modoc Nation is immune from suit, because Congress has not explicitly abrogated their sovereign immunity, and the Tribe did not waive its immunity. The individually named Tribal Council members are immune from suit because they are named in their official capacity, Congress has not explicitly abrogated their sovereign immunity, and they did not waive their immunity.

Based on the allegations of the Committee's Complaint, the Committee seeks to sue the Nation and its individual Tribal Council members, in their official capacities, because the Nation made an offer to purchase the Airport that the City accepted. ECF 1, p. 20, ¶¶ 135, 136. Specifically, the Committee's lone "claim" as to the Nation, is that the Nation purchased the Airport for an amount the Committee claims was less than the Airport's fair market value. *Id.* Importantly, although the Committee's Complaint acknowledges that the Nation is a federally recognized Indian tribe, the Committee's Complaint contains no allegations concerning how, or what extent, the Nation waived its immunity or how, or to what extent, the Committee believes Congress has abrogated the Nation's immunity.

Similarly, in its Complaint, the Committee acknowledges that it seeks to sue the individual Tribal Council members in their official capacities ECF 1, p. 3, ¶¶ 9-13. However, the Committee's Complaint contains no allegations regarding how, or to what extent, the Nation has waived sovereign immunity concerning the official acts of its Tribal Council members.

As discussed above, absent some showing of a clear, express, and unambiguous waiver of immunity, there is no jurisdictional basis for a suit against the Modoc Nation or the members of its Tribal Council. *Okla. Tax Comm'n*, 498 US at 509; *Burley v. Onewest Bank, FSB* 2014 WL 12571400 (E.D. Cal. 2014). Nor is there any basis for claiming that the Modoc Nation waived immunity to this action or that Congress has abrogated the Modoc Nation's immunity to it. Merely alleging that the Modoc Nation entered a purchase agreement with the City to purchase the Airport is not sufficient to overcome the Modoc Nation's sovereign immunity. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1048 (9th Cir. 2006).

II. Plaintiffs Have not Asserted a Cognizable Claim Against the Nation and its Tribal Council Members.

Under *Bell Atlantic Corp. v. Twombly*, a complaint should be dismissed where it does not contain sufficient allegations of fact to state a claim that is "plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 US 544, 570 (2007). While a court must accept the material facts of a complaint as true and draw all reasonable inferences in the plaintiff's favor, this tenet does not apply to legal conclusions, and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 US 662, 678 (2009)(citation omitted). Instead, Rule 8 requires that a plaintiff set out "the particular infringing acts" with specificity. *Kelly v. LL Cool J.*, 145 FRD 32, 36 (1992).

Implicit in the rule form *Twombly* and *Iqbal* is that the plaintiff must at least allege that a defendant committed *some* wrong for which a court can provide relief. Here, the Committee does not even attempt to claim that Nation or the individual Tribal Council Members committed any "wrongful" act. Other than allegations identifying the Nation and the individual Tribal Council Members, the Committee's Complaint is nearly devoid of any substantive claims concerning the Nation and is devoid of allegations concerning the individual Tribal Council Members.

The only allegations the Committees makes that even mention the Nation are in the Committee's Second and Fourth Causes of action. These allegations are mainly legal conclusions that should be disregarded. In this category are the Committee's legally inaccurate

allegations that the Nation is not a "public agency"[2] for purposes of operating a "public airport" and cannot be a successor in function of the City in terms of operating a "public airport." (Doc 1., p. pp. 16-17, ¶¶ 98-99, 104)[3] The only other allegations concerning the Nation, and the only allegations approaching "factual" allegations, in the Committee's Complaint are allegations that the Nation failed to obtain a fair market value report for the Airport and ultimately purchased the Airport for an amount the Committee claims was less than fair market value. ECF 1, p. 20, ¶¶ 135 -136.

Put simply, the allegations the Committee makes concerning the Nation fall woefully short of what Rule 8 and *Twombly* and *Iqbal* require. Critically, the Committee's allegations do not include any particularized allegations of misconduct on the part of the Nation. For example, other than acknowledging that the Nation made an offer to purchase the Airport at a specific price and pursuant to specific conditions of consideration, the Complaint fails to include any allegations that Nation directly participated in the decisions or processes necessary to authorize or complete the sale. Nor does the Complaint contain any allegations, factual or otherwise, that tend to show that the Nation had any obligation or duty to ensure that the City or the FAA fulfilled the obligations the Committee attributes to them. Put differently, the Committee's only allegations against the Nation is that the Nation made an offer to purchase the Airport for a specific sum and other consideration including guarantees regarding the continued operation of the Airport and indemnification of the City in the event of litigation such as this and that the Nation's offer was accepted – that is it. While the fact that the City chose to sell the Airport to

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[2] The legal conclusion the Committee asserts with respect to whether the Nation is a "public agency" for purposes of owning an operating a "public airport" is flatly wrong. The Committee appears to have come to this erroneous legal conclusion by looking only at federal law as it existed in the 1940s and 1950s – a time when Tribes and their governmental existence was under nearly constant assault by narrow sighted assimilationists within Congress. Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV 139, 151-54 (1977). Notably, in reaching back over 50 years for statutory support for its claims the Committee ignores the current state of federal law, which specifically *includes* Indian tribes in the definition of "public agencies."

[3] The Committee also supports its legal conclusion with an odd and inaccurate invocation of the "judicial admission" doctrine (ECF 1, p. 16, ¶ 99.) in which the Committee claims the Nation "judicially admitted" that it was not a public entity in an unrelated state court action arising involving the interpretation of state, not federal statutes, specific to the issue of whether, the Nation could be awarded attorney fees as a prevailing party in the Committee's CEQA Actions referenced in paragraphs 34 through 40 of the Committee's Complaint.

the Nation, to the exclusion of the Committee, may not sit well with the Committee, the fact that the Nation submitted the offer the City ultimately chose is not in any way unlawful misconduct.

Even viewed through a lens favoring the Committee, there are no allegations in the Committee's Complaint that plausibly show that the Modoc Nation or its Tribal Council Members did anything wrong. Instead, if anything, the Committee's Complaint shows that in this action, the Committee has no legally cognizable claim that the Committee could bring against the Nation or its Tribal Council. Accordingly, the Committee's Complaint, as it pertains to the Nation and the Nation's Tribal Council, fails to satisfy the most basic requirements of Rule 8 and, therefore, must be dismissed. *Twombly*, 550 US at 570.

III. Plaintiff's Complaint Should be Dismissed in Total, and With Prejudice, Under Rule 19(b), Because Modoc Nation is an Indispensable Party, and Modoc Nation Cannot be Joined

Federal Rule of Civil Procedure 12(b)(7) authorizes a motion to dismiss where a plaintiff has failed to join, or cannot join, a person who is necessary and indispensable under Federal Rule of Civil Procedure 19. Fed. R. Civ. P. 12(b)(7). Rule 19 requires the joinder of all parties whose presence in a lawsuit is required for the fair and complete resolution of the dispute at issue or have an interest in the subject of the litigation and, if not joined, cannot adequately protect that interest. Fed.R.Civ.P. 19(a). Rule 19 further provides for the dismissal of litigation that in equity and good conscience should not proceed in the absence of a party that cannot be joined. Fed.R.Civ.P. 19(b).

Determining whether to dismiss a case for failure to join an indispensable party involves a three-part inquiry. EEOC *v. Peabody Western Coal Co.*, 400 F.3d 774, 779 (9th Cir. 2004) (citing *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999). First, a court must determine whether an absent party is "required" or "necessary" under Rule 19. Next, if the absent party is a "necessary" party, a court must determine whether it is feasible to join the absent party, or whether some impediment such as sovereign immunity, lack of personal jurisdiction, or the destruction of subject matter jurisdiction precludes joinder. *Peabody Western Coal Co.*, 400 F.3d at 779. And finally, if joinder of the absent party is not feasible, the court must determine whether in "equity and good conscience" the case should proceed without the absent party, or

whether the caser should be dismissed. Fed.R.Civ.P. 19(b); *Jamul Action Committee v. Chaudhuri*, 200 F.Supp.3d 1042, 1048 (E.D. Cal. 2016), quoting *Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1178 (9th Cir. 2012).

a. The Nation is a Necessary and Required Party Under Rule 19.

In pertinent part, Rule 19(a) provides that a party must be joined in two instances. First, if because of the nature of the interests and claims, it is not possible for a court to "accord complete relief among the existing parties," the absent party must be joined. Fed.R.Civ.P. 19(a)(1)(a). Second, an absent party must also be joined if the absent party "claims an interest relating to the subject matter of the action and is so situated that disposing of the action in the party's absence will, as a practical matter, impair or impede the party's ability to protect its interests, or will 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(a)(1)(B). This action implicates both considerations.

First, the Nation *owns the Airport*. The Nation purchased the Airport from the City for consideration including conditions relating to the continued long-term operation of the Airport at its present site and subject to existing leases and obligations associated with the Airport, indemnification of the City for any actions relating to the Airport in which the City might be liable, and for a purchase price that reflected the value of dedicated land subject to a reversionary interest in the United States and limitations on the use of the property to only uses related to Airport operations. And, the deed, including all of its conditions, has been duly recorded. In other words, the Nation is fully vested in the Airport.

The primary purpose of this action is to divest the Nation of ownership of the Airport. ECF 1, p. 26, ¶¶ 191-196. To be sure, the Committee's Complaint specifically requests that the Court declare and determine that the Nation's purchase agreement was null and void and thereby directly seeks to divest the Nation of ownership. *Id*. Also, the Committee's Complaint directly challenges the Nation's status as a "public agency" and tests whether the Nation could ever own the Airport. *Id*. at p. 16, ¶¶ 98-104. And, finally, the Committee's Complaint directly challenges the adequacy of the consideration the Nation paid for the Airport. ECF 1, pp. 19-21, ¶¶ 124-144.

Put differently, the Nation's ownership of the Airport and the validity of the purchase agreement between the Nation and the City are at the heart of this controversy. The Committee's principal purpose in this litigation is to void the agreement and the City's transfer of the Airport *to the Nation.* There is no legitimate or credible argument that the Nation is not a "required" party as contemplated by both Rule 19(a)(1)(a) and Rule 19(a)(1)(b).

Moreover, because of the nature of the Committee's challenges, it is impossible for the Court to "accord complete" relief if the Nation is not a party to this action. Any decision the Court may render in this action has a direct and significant impact on the Nation. If the Court determines that the purchase agreement was void, it necessarily strips the Nation of property that has already passed to the Nation, and which the Nation has possessed for nearly two years. If the Court sides with the Committee and determines that there was not adequate consideration for the sale, the effect is to either, again, void the sale and dispossess the Nation of its property, or to substantively change the terms of the Nation's agreement with the City and directly impact the Nation's treasury. And, of equal importance, if the Court sides with the Committee and determines – despite clear statutory language to the contrary – that the Nation is not a "public agency" under federal laws pertaining to airports, the Court will have effectively banned the Nation from ever purchasing and owning any airport required to be operated as a "public airport" as defined by federal law. Given the circumstances of this case and the nature of the Committee's claims, there is simply no way the Court can accord complete relief if the only parties to the action are the Committee, the FAA and the City.

Even if the Modoc Nation were not a required party under Rule 19(a)(1)(a), it would certainly be a required party under Rule 19(a)(1)(b), which is the subject of this action. Rule 19(a)(1)(b) requires an absent party to be joined in an action whenever, the absent party "claims an interest relating to the subject matter of the action" and is such a situation that disposing of the claim in the party's absence would "as a practical matter impair or impede" the absent party's ability to protects its interest, or if a decision would "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations" due to the absent party's interests. Fed.R.Civ.P. 19(a)(1)(b).

As noted, the considerations discussed above are sufficient to implicate Rule 19(a)(1)(a). However, even if there were room for debate on that issue, there is no argument that under the circumstance the Nation "claims an interest" in the subject matter of the Committee's lawsuit – which is primarily designed to dispossess the Nation of ownership of the Airport by canceling the Nation's contract with the City and to ensure that the Nation never owns the Airport. Nor is there room for debate that the Nation's absence from this action would "impair or impede" its ability to protect its interests including its present ownership of the Airport.

Of course, the Committee knows that the Nation is a "required" party for the Court to accord complete relief on the Committee's claims. This is evidenced by the fact that the Committee attempted to name the Nation, and the members of the Nation's Tribal Council, even though the Committee could not drum up a single actionable act of wrongdoing by the Nation or the Tribal Council members.

Even if the Committee had not tacitly acknowledged the necessity of the Modoc Nation's presence in this action, the Ninth Circuit, has already addressed situations involving Rule 19 issues similar to those presented here and found parties similarly situated to the Modoc Nation as "necessary" parties under Rule 19. For example, the Ninth Circuit long ago stated that there is "[n]o procedural principle more deeply embedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are *indispensable*." *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975), *cert. denied*, 425 US 903 (1976)(emphasis added). The Ninth Circuit has consistently and precisely followed this rule since *Lomayaktewa.* For example, in *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1044 (9th Cir. 1983), the Ninth Circuit cited *Lomayaktewa* and precisely stated: "all parties who may be affected by a suit to set aside a contract must be present." Similarly, in *McClendon v. United States*, 885 F.2d 627, 633, (9th Cir. 1989), the Ninth Circuit dismissed an action seeking to enforce an agreement to which an Indian tribe was a party, but which could not be joined, noting "[b]ecause the Tribe is a party to the lease agreement sought to be enforced, it is an indispensable party under Fed.R.Civ.P. 19." Likewise, in *Dawavendewa v. Salt River Project Agr. Imp. And Power Dist.*, 276 F.3d 1150, 1157 (2002), the Ninth Circuit

again reiterated that "today we reaffirm the fundamental principle outlined in *Lomayaktewa*: a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract."

b. Rule 19 Requires Dismissal.

1. Sovereign Immunity

Because the Nation is a "required" party under either Rule 19(a)(1)(a) or Rule 19(a)(1)(b), and because, as discussed above, the Nation is immune from suit, the Court must consider whether "in equity and good conscience, the action should proceed" without the Nation. Importantly, the Ninth Circuit in *Dawavendewa*, affirmed that the analysis begins and ends with Nation's sovereign immunity. In the *Dawavendewa* Court's words: "We recognize our adoption of the *Lomayaktewa's* rule requires only that we progress to the analysis of the Nation's sovereign immunity." *Dawavendewa*, 276 F.3d at 1157, fn. 6. However, the *Dawavendewa* Court nevertheless "completed the inquiry directed in Rule 19, *as alternative grounds, reinforcing the same conclusion.*" *Id.*

As the Ninth Circuit has stated, "[a]lthough 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 1010, 1028 (9th Cir. 2014) (internal quotation marks omitted). Indeed, the Ninth Circuit continued noting that "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.* (internal quotation marks omitted) (citing *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002); *Dawavendewa*, 276 F.3d 1150.; *Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2000); *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999); *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996); *McClendon*, 885 F.2d 627 (9th Cir. 1989).

Here, as addressed, the Nation is a necessary and indispensable party that is also immune from suit. Accordingly, under long-standing and consistent Ninth Circuit precedent, the Court's analysis need not progress any further, and it should dismiss this action with prejudice under Rule 19. *White*, 765 F.3d at 1028; *Dawavendewa*, 276 F.3d at 1157. Nonetheless, even if the

Nation's sovereign immunity was not dispositive on the issue, the factors outlined in Rule 19(b) militate in favor of dismissal. These factors include prejudice to the Nation, the inability to avoid or lessen the prejudice, the inability to render a complete and adequate judgment, and the adequacy of a remedy if the case is dismissed for non-joinder. Fed.R.Civ.P. 19(b)(1)-(4).

2. Prejudice

The test for determining prejudice under Rule 19(b) is essentially the same as the inquiry related to the determination of whether the Nation is a "necessary" party under Rule 19(a). *Clinton*, 180 F.3d at 1090. Here the Committee's Complaint lays out the prejudice to the Nation. As addressed above, the principal purpose of the Committee's Complaint is to cancel the Nation's purchase agreement for the Airport and to strip the Nation of ownership and possession of the Airport. ECF 1, p. 26, ¶¶ 191-195.

A decision rendered in this action would directly and substantially prejudice the Nation in that it will necessarily determine the Nation's legal interest in the Airport and could lead to the Nation being stripped of property as to which the Nation is the recorded owner. Moreover, a decision in this action in favor of the Committee on the Committee's claims that the Nation is not a "public agency" and "cannot be a successor in function" to the City, could have the effect of creating a categorical bar to the Nation ever owning the Airport. And finally, if the Court were to rule that that transfer of the Airport was legal in all respects other than the amount of monetary consideration the Nation paid for the Airport, a judgment would not only effectively strip the Nation of the Airport, but would also directly impact the Nation's treasury by requiring the Nation to dip further into its tribal funds to perfect the Airport purchase.

Under any scenario, the prejudice to the Nation if this case proceeds in the Nation's absence is extreme. This factor weighs heavily in favor of dismissal.

3. Ability to Shape Relief

As the Committee's Complaint makes clear, the singular goal of the Committee's Complaint is to strip the Nation of ownership of the Airport. Except for requested relief seeking damages and an order on the Committee's state law claims directing the City to cease and desist from "secret proceedings" and to "keep audio or video recordings of its closed sessions" (ECF 1., p. 26, ¶¶ 196-197) any relief granted would have the effect of stripping the Airport away from

the Nation. Accordingly, there is no way to shape relief so as to avoid prejudice to the Nation. This factor weighs heavily in favor of dismissal.

4. Adequacy of Relief in Nation's Absence

In this instance, as just discussed, other than minimal and mostly toothless remedies that do not accomplish even the Committee's objectives, it is impossible to grant the relief the Committee seeks without the Nation's participation. The Nation is aware of no legal mechanism by which the Court could take away the Nation's ownership of the Airport without providing the Nation due process. And any relief, other than damages and injunctive relief relating to how the City holds "closed" session meetings, necessarily would deprive the Nation of ownership, and take the Nation's property in the Nation's absence. Accordingly, at best, the Court could only provide partial relief in this instance. And, as the Ninth Circuit advised in *Dawavendewa,* "[n]o partial relief is adequate." *Dawavendewa*, 276 F.3d at 1162.

5. Availability of an Alternative Forum

The is no question that the inability to join the Nation due to the Nation's sovereign immunity would leave the Committee without a forum to challenge the Nation's ownership of the Airport. However, that is always the result when a party to any action enjoys sovereign immunity, and a claimant seeks a judgment regarding the sovereign's interests. *America Greyhound Racing, Inc. v. Hull,* 305 F.3d 1015, 1025 (9th Cir. 2002) ("[W]e have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs."); see also *Kescoli*, 101 F.3d at 1311-12 ("If 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.") Moreover, as addressed, the Ninth Circuit has ruled in numerous instances in which an Indian tribe or a sovereign is a necessary party and has shown little reluctance to dismiss the action even though dismissal would effectively leave the plaintiff without a forum. *See White*, 765 F.3d at 1028; *Dawavendewa*, 276 F.3d at 1163; *Clinton*, 180 F.3d at 1088; *Kescoli*, 101 F.3d at 1311-12; *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1461 (9th Cir. 1994); *Pit River Home & Agric. Coop. Assoc. v. United States*, 30 F.3d 1088, 1103 (9th Cir. 1994); *Shermoen v. United States*, 982 F.2d 1312, 1320-21 (9th Cir. 1992); *Confederated Tribes v. Lujan*, 928 F.2d 1496. 1500 (9th Cir. 1991); *McClendon*, 885 F.2d at 633;

Lomayaktewa, 520 F.2d at 1326-27; *see also Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 778 (D.C.Cir. 1986) and *Enterprise Mgt. Consultants, Inc. v. United States*, 883 F.2d 890, 894 (10th Cir. 1989).

CONCLUSION

Because the intended and arguably sole purpose of the Committee's action is to strip the Airport away from the Modoc Nation and divest the Modoc Nation of ownership of the Airport and cancel the Modoc Nation purchase agreement concerning the Airport, the Modoc Nation is an indispensable party to this action. However, because the Modoc Nation and its elected officials enjoy sovereign immunity, which the Modoc Nation has not waived, neither the Modoc Nation nor any of the Modoc Nation's Tribal Officials – named in their official capacity – are amenable to suit. Accordingly, based on the doctrine of tribal sovereign immunity, and principles of equity and good conscience this matter should be dismissed in its entirety, with prejudice.

Dated: August 3, 2020

Respectfully submitted,

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