DO NOT PUBLISH

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LILLIAN McCOVEY SHERMOEN, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.

and

DALE RISLING, SR., et al.,

Intervenor-Defendants.

No. C-90-2460 WHO

MEMORANDUM OPINION AND ORDER

In this action, plaintiffs, some seventy native American Indians and The Coast Indian Community of Yurok Indians of the Resighini Rancheria, a federally recognized tribe, seek a judicial declaration that the Hoopa-Yurok Settlement Act, 25 U.S.C. §§ 1300i-1300i-11, unconstitutionally infringes their rights to freely associate in matters of political concern, violates their rights under the Due Process, Takings and Equal Protection clauses of the Fifth Amendment to the Constitution of

the United States, and exceeds the power granted to Congress by the Constitution to regulate matters concerning Indian affairs. Defendants[1] and intervenor defendants, Dale Risling, Sr., Clifford Lyle Marshall, Robert D. Hostler, and John M. Scott (collectively "defendants"), have moved the Court pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure to dismiss the action for failure to join indispensable parties under Rule 19 of the Federal Rules of Civil Procedure.[2]

The Court, having considered the pleadings and oral argument of counsel, hereby grants, for the reasons discussed below, defendants' motion and dismisses this action with prejudice.

I.

On October 31, 1988, Congress enacted the Hoopa-Yurok Settlement Act (the "Act") in an attempt to settle decades of bitter and protracted litigation involving the efforts of various individuals and tribes to gain control over the Hoopa Valley Reservation ("Hoopa Valley"), a federally created reservation along the banks of the Trinity and Klamath Rivers. Congress

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[1] Defendants are the United States of America and the United States Department of Interior, Bureau of Indian Affairs; and in their official capacities, Manuel Lujan, Secretary of the Interior; Eddie Brown, Assistant Secretary of the Interior/Indian Affairs; Ronald M. Jaeger, Area Director, Sacramento Area Office, Bureau of Indian Affairs; and Karole Overberg, Superintendent, Northern California Agency, Bureau of Indian Affairs.

[2] Defendants also have moved the Court to dismiss the action pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. But given the Court's finding that the action must be dismissed for failure to join indispensable parties, the Court need not address defendants' 12(b)(1) and 12(b)(6) motions.

passed the Act only after extensive hearings and committee meetings at which members of all affected tribes participated. In fact, plaintiffs' lawyer participated in, and testified during, the hearings.

By the terms of the Act, Congress ratified and confirmed the Hoopa Valley Tribe as federally recognized and organized, 25 U.S.C. § 1300i-7, and affirmed the Karuk Tribe as federally recognized and organized. § 1300i(b)(7). The Act also recognizes and authorizes the Yurok Tribe, which previously had been recognized but not organized. § 1300i-8. The Act also partitions the existing Hoopa Valley Reservation into the Hoopa Valley Reservation and the Yurok Reservation. § 1300i-1. Finally, the Act creates the Hoopa-Yurok Settlement Roll under which those individuals who qualify for inclusion on the Roll will receive compensation for past grievances. §§ 1300i-3,4.

II.

Defendants argue that both the Hoopa Valley Tribe and the Yurok Tribe are necessary to an adjudication of this action under Rule 19 of the Federal Rules of Civil Procedure. They then argue that because Indian tribes are immune from suit under the doctrine of sovereign immunity, the action must be dismissed. The Court agrees.

Rule 19(a) of the Federal Rules of Civil Procedure provides in relevant part that a person should be joined as a party to an action if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the

> action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

In determining whether absent parties are necessary to an action under 19(a), the Court must undertake a two-part analysis and test. Makah Indian Tribe v. Verity, 910 F.2d 555, 558 (9th Cir. 1990). In the first part of the test, the Court must determine whether it can grant complete relief to those already parties to the action. Second, the Court must determine whether the absent tribes have legally protected interests in the suit. If the Court finds that the absent parties do have legally protected interests in the action, it must then determine whether those interests will be impaired if the suit proceeds without them being joined. Applying this test to the facts of the instant case, the Court finds that the absent parties are necessary under Rule 19(a).

A.

In the first prong of the test, namely, whether complete relief is possible among those already parties, defendants claim complete relief cannot be given because all dispensable parties are not before the Court. But notwithstanding which parties are or are not before the Court, the Court is able to grant the requested relief. Either the Act is constitutional or it is not. If the Court finds that the Act is unconstitutional, plaintiffs will have received all the relief for which they prayed. If the Court finds the Act constitutional, then the

defendants, as well as the absent parties, who would presumably argue for the Act's constitutionality, would receive all the relief for which they prayed. The presence or absence of any other parties in no way limits the Court's ability to determine the constitutionality of the Act. This is not to say, however, that a finding that the Act is unconstitutional would not adversely affect those not present. It would. But the harm suffered by absent parties is properly analyzed under the second prong of the test and in no way alters the finding that the Court can grant complete relief among those already present.

B.

In the second prong of the test, the Court must determine whether the absent parties have legally protected interests in the outcome of this action.

Plaintiffs argue that the absent parties lack a legally protected interest in this litigation because "'[i]n litigation involving the adjudication of public rights, non-parties who may be adversely affected by a decision in plaintiffs' favor do not have a protectable [sic] interest which would require their joinder under Rule 19.'" Plaintiffs' Response to Defendants' Motions to Dismiss, filed Jan. 3, 1991, at 68 (quoting 3A J. Moore, J. Lucas, G. Grotheer, Moore's Federal Practice ¶ 19.07 [2-0] at 1001-101 (1990) (emphasis added). There are, however, two major problems with this argument. The first problem is that the public rights exception to traditional joinder rules is applicable in deciding whether a party is indispensable, not whether they have a legally protected interest. Makah, 910 F.2d at 559 n.6 ("Even if the absent tribes were 'necessary' to the

Makah's procedural claims, they would not be 'indispensable'"). It is only after a finding that a party has a legally protected interest in the litigation that a Court seeks to determine whether that party is indispensable to the action. Id. at 559.

The second problem with plaintiffs' public rights argument is that the rights plaintiffs seek to enforce are not "public rights," but rather are personal to plaintiffs. As noted above, plaintiffs challenge the Act on the basis that it unconstitutionally infringes their rights to freely associate in matters of political concern and violates their rights under the Due Process, Takings and Equal Protection clauses of the Fifth Amendment to the Constitution of the United States. These clearly are not public rights. To the extent that plaintiffs challenge what they consider to be the unequal distribution of the Hoopa Valley's assets, they also cannot be said to be asserting public rights. As the court noted in Makah, where a plaintiff seeks reallocation of certain assets, the public rights exception to traditional rules of joinder has no efficacy. That having been said, the Court now turns to the determination of whether the absent tribes have legally protected interests in this litigation that might be impaired or impeded by their inability to be joined in this action.

There is no question that the Act creates certain legally protected interests in the absent parties. For example, the Act authorizes the creation of the Yurok Tribe. The Act then grants certain property rights to the newly formed Yurok Tribe,

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as well as to the existing Hoopa Valley Tribe.[3] It is equally clear that an order of this Court declaring the Act unconstitutional would adversely impact the rights granted to the absent parties by the Act. Thus, plaintiffs' protestations aside, there is no question that the absent parties do have legally protected interests in the outcome of this litigation. The Court next must determine whether these rights will be impaired or impeded by this litigation. Makah, 910 F.2d at 558. The Court finds that any such rights undoubtedly will be impaired by this litigation.

One important factor in determining whether an absent party's interest will be impaired is whether that party's interest is adequately represented by one already a party to the action. Heckman v. United States, 224 U.S. 413 (1912). As noted in Makah, "[t]he United States may adequately represent an Indian tribe unless there is a conflict between the United States and the tribe." 910 F.2d at 558. But the Makah court also noted that the federal government may not be able to protect the interest of absent tribes where the interests of those tribes conflict with the interests of tribes that are parties to the action. Just such a situation is present here.

Plaintiffs ask this Court to declare the Act unconstitutional. While the government arguably has as much interest in having the constitutionality of the Act upheld as do the absent parties, it nonetheless is true that the interests of the

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[3] Plaintiffs argue that the Hoopa Valley Tribe should be considered a party to this litigation because certain members of the Tribe are parties. But it is quite clear that the Hoopa Valley Tribe members who are present are appearing in their individual capacities and not as representatives of the tribe.

present and absent tribes are widely divergent. One of plaintiffs' primary complaints in this action is what they consider to be the grossly inequitable partition of the Hoopa Valley Reservation. Thus, a major goal that plaintiffs seek to achieve in this litigation is to have the reservation returned to the state it was in prior to the effective date of the Act. If successful, the effect will be a divestment of property rights that have inured to the benefit of the absent tribes. Thus, because the interests of the tribes conflict so greatly, the Court finds that the government cannot adequately represent the interests of the absent tribes.

The Court finds support for its position in two recent cases, Wichita & Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765 (D.C. Cir. 1986), and Kickapoo Tribe of Oklahoma v. Lujan, 728 F. Supp. 791 (D.D.C. 1990). In Wichita, a number of tribes were litigating the rights to certain property held in trust for the tribes by the government. In holding that the action must be dismissed for failure to join indispensable parties, the court noted that "whatever allegiance the government owes to the tribes as trustee, is necessarily split among the three competing tribes involved in the case. This case, therefore, falls squarely under the rule that when 'there is a conflict between the interests of the United States and the interests of Indians, representation of the Indians by the United States is not adequate.'" 788 F.2d at 775 (quoting Manygoats v. Kleppe, 558 F.2d 556, 558 (10th Cir. - 1977)).

Here, as in Wichita, the parties are fighting over a finite parcel of land that the government holds in trust for the

Indians. Thus, there is nothing to lead this Court to believe that the government's allegiance in this action is any less split among the various tribes than was the government's allegiance in Wichita.

Kickapoo also provides persuasive authority for the position that the defendants would have the Court adopt. In Kickapoo, an Indian tribe brought suit to enjoin the Secretary of the Interior from recognizing and dealing with a newly created independent tribe. Because of the sovereign immunity enjoyed by the challenged tribe, it was not joined in the action. The district court dismissed the action for failure to join the absent tribe finding that it was an indispensable party under Rule 19. In so finding, the court noted that it did not believe that the government could adequately represent the absent parties. While the court did recognize that the government has an interest in defending agency actions and authority with respect to tribal reorganization, the court held that the absent tribe "has an interest in its own survival, an interest which it is entitled to protect on its own." 728 F.Supp. at 797. The United States Court of Appeals for the Ninth Circuit recently reached the same conclusion in a case with similar facts.

In Confederated Tribes of the Chehalis Indian Reservation v. Lujan, 928 F.2d 1496 (9th Cir. 1991), various groups of Indians brought suit against federal officials seeking to enjoin the government from recognizing and dealing with the Quinault Indian Nation (the "Nation") as the governing body of the Quinault Indian Reservation. Because of the sovereign immunity enjoyed by the Nation it was not named as a party to the action.

The government then moved to dismiss the action, pursuant to Rule 19, for failure to join an indispensable party. The district court granted the motion finding that the Nation was indeed an indispensable party.

In affirming, the Ninth Circuit explicitly rejected the plaintiff tribes' argument that the government could adequately represent the absent Nation, holding that "the United States cannot adequately represent the Quinault Nation's interest without compromising the trust obligations owed to the plaintiff tribes." Id. at 1500.

The Court is persuaded by the analysis in Confederated Tribes and Kickapoo and finds that the Yurok Tribe, which the Act recognizes and authorizes to organize, similarly has an overriding interest in its existence that the government cannot adequately represent without compromising the government's trust obligations to the other tribes. Therefore, the Court finds that the absent tribes have legally protected interests in the stake of this litigation that will be impaired in their absence and are, thus, necessary parties under Rule 19(a).

III.

Having so determined, the Court must now "determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent [tribes] being thus regarded as indispensable." Fed. R. Civ. P. 19(b). To determine whether the absent tribes are indispensable under Rule 19(b), the Rule instructs courts to consider four factors:

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> first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id. Applying these factors to the case at bar, the Court finds that the absent tribes are indeed indispensable.

A.

First, with respect to the prejudice the absent tribes will suffer from any adverse judgment, there can be do doubt that the absent tribes will be prejudiced severely if plaintiffs obtain the judgment they seek in this action. As noted above, plaintiffs seek to have the Act declared unconstitutional. Because the Act granted certain property rights in the Hoopa Valley to the absent tribes, any judgment invalidating the Act would necessarily have a deleterious effect on the absent tribes. As the court noted in Wichita, "[c]onflicting claims by beneficiaries to a common trust present a textbook example of a case where one party may be severely prejudiced by a decision in his absence." Wichita, 788 F.2d at 774.

Nonetheless, plaintiffs argue that the fact that the absent tribes are free to intervene in this action acts to mitigate any prejudice the absent tribes might suffer. But this contention was expressly rejected by the courts in Wichita, 788 F.2d at 775, Makah, 910 F.2d at 560, and Confederated Tribes, 928 F.2d at 1500. The Wichita court noted that to hold to the contrary would "put the tribe[s] to th[e] Hobson's choice between

waiving [their] immunity or waiving [their] right not to have a case proceed without [them]." Wichita, 788 F.2d at 776.

B.

Second, there is no way that the Court can shape relief so as to lessen or avoid the prejudice to the absent parties. Like the situations presented in both Makah and Wichita, the interest in the reservation land and resources over which the parties are fighting is of a finite quantity. Plaintiffs seek the return of lands that they contend are unconstitutionally taken by the terms of the Act. This is not a situation where plaintiffs merely seek monetary relief to compensate them for what they contend is an unconstitutional taking; rather, this is an equitable action in which plaintiffs seek to have the land itself returned. Any relief granted to them by the Court would necessarily involve taking away interests in the Hoopa Valley given to the absent tribes by the terms of the Act. Thus, there is no way to shape the relief to lessen or avoid prejudice to the absent tribes.

C.

The third factor the Court must consider under Rule 19(b), whether "a judgment rendered in the [tribes'] absence will be adequate," tips in favor of a finding that the absent tribes are not indispensable because the Court undoubtedly has the power to grant the relief requested by plaintiffs. Nonetheless, as the court in Wichita noted "[t]his factor, however, cannot be given dispositive weight when the efficacy of the judgment would be at the cost of absent parties' rights to participate in litigation that critically affect [sic] their interests." 788 F.2d at 777.

D.

The fourth and final factor the Court must consider is whether plaintiffs will have an adequate remedy if the action is dismissed. While it is true that dismissal of this action will leave plaintiffs without a forum in which to present a number of their claims,[4] this factor alone does not necessarily bar the Court from dismissing the action. As the court noted in Wichita, just because the plaintiff will not have an alternative forum elsewhere "'does not mean that an action should proceed solely because the plaintiff otherwise would not have an adequate remedy, as this would be a misconstruction of the rule and would contravene the established doctrine of indispensability.'" Id. at 777 (quoting J. Moore, supra, ¶ 19.07-2[4] at 19-153 (1984)).

The court then noted that "when a necessary party is immune from suit, there is very little room for balancing of other factors, since this 'may be viewed as one of those interests "compelling by themselves."'" Id. at 777 n.13 (quoting J. Moore, supra, ¶ 19.15 at 19-266 n.6 (1984)). The Ninth Circuit, too, has noted that the doctrine of sovereign immunity might very well lead to a situation where a plaintiff is left without a forum in which to bring his claims. Makah at 560, Confederated Tribes, 928 F.2d at 1500.

Based on the above analysis, the Court finds that the balance of the four factors just discussed tips sharply in favor

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[4] Defendants correctly point out that even if the Court dismisses this action, plaintiffs will still be able to bring an action in the Court of Claims for monetary relief for the allegedly unconstitutional taking of their property. In fact, the Act itself expressly provides for such an action. 25 U.S.C. § 1300i-11(a).

of finding that the absent tribes are indispensable. Therefore, the Court has no alternative but to dismiss the action pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure.

This finding is consonant with both the Ninth Circuit's recent opinion in Confederated Tribes and a recent opinion from the Second Circuit, both of which affirmed decisions by district courts finding certain tribes indispensable in situations closely resembling the situation in the case at bar.

As discussed above, the court in Confederated Tribes upheld a district court's determination that a missing tribe was indispensable to the proper adjudication of an attempt to enjoin federal officials from recognizing and dealing with the missing tribe. In so doing, the court concluded that the district court had properly determined that the missing tribe was a party whose interests in the subject of the litigation might be impaired in their absence, and in whose absence the action should not proceed.

In Fluent v. Salamanca Indian Lease Authority, 928 F.2d 542 (2d Cir. 1991), nearly six hundred lessees challenged the constitutionality of the Seneca Nation Settlement Act of 1990, by which Congress approved the renewal of a number of leases between the lessees and the Seneca Nation of Indians ("Nation") and appropriated $35 Million toward the rental payments. Because of the sovereign immunity enjoyed by the Nation, it was not joined in the action. Finding that resolution of the claims presented by the lessees would impair and impede the Nation's ability to protect its interests created by the Seneca Nation Settlement Act of 1990, the district court dismissed the action pursuant to

Rules 19(b) and 12(b)(7) of the Federal Rules of Civil Procedure.

In affirming, the Second Circuit noted that "as the beneficiary of a substantial sum of money from the federal government it is manifest that the Nation has a vital interest in the constitutionality of the 1990 Act." 928 F.2d at 547. The court then held that the district court properly concluded that the "paramount importance accorded the doctrine of sovereign immunity under rule 19" justified dismissing the action. Id. To reach that conclusion, the Second Circuit relied on the same cases that the Court discussed above, Wichita and Makah, as well as a Tenth Circuit case, Enterprise Management Consultants, Inc. v. United States ex rel. Hodel, 883 F.2d 890, 894 (10th Cir. 1989) ("[w]hen, as here, a necessary party under Rule 19(a) is immune from suit, 'there is very little room for balancing of other factors' set out in Rule 19(b) . . . .") (quoting Wichita, 788 F.2d at 777 n.13).

IV.

For the foregoing reasons,

IT IS HEREBY ORDERED that defendants' motion to dismiss this action pursuant to Rules 19 and (12(b)(7) of the Federal Rules of Civil Procedure is hereby GRANTED, and the case dismissed with prejudice.

Dated: May 22, 1991.

William H. Orrick

William H. Orrick
United States District Judge