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FILED

MAY 23 1991

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

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PIRTLE, MORISSET
SCHLOSSER & AYER

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

1 the United States, and exceeds the power granted to Congress by
2 the Constitution to regulate matters concerning Indian affairs.
3 Defendants¹ and intervenor defendants, Dale Risling, Sr.,
4 Clifford Lyle Marshall, Robert D. Hostler, and John M. Scott
5 (collectively "defendants"), have moved the Court pursuant to
6 Rule 12(b)(7) of the Federal Rules of Civil Procedure to dismiss
7 the action for failure to join indispensable parties under Rule
8 19 of the Federal Rules of Civil Procedure.²

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

13 I.

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

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21 ¹ Defendants are the United States of America and the
22 United States Department of Interior, Bureau of Indian
23 Affairs; and in their official capacities, Manuel
24 Lujan, Secretary of the Interior; Eddie Brown,
25 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.

26 ² Defendants also have moved the Court to dismiss the
27 action pursuant to Rules 12(b)(1) and 12(b)(6) of the
28 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.

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

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

16 II.

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

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

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

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

9 In determining whether absent parties are necessary to
10 an action under 19(a), the Court must undertake a two-part
11 analysis and test. Makah Indian Tribe v. Verity, 910 F.2d 555,
12 558 (9th Cir. 1990). In the first part of the test, the Court
13 must determine whether it can grant complete relief to those
14 already parties to the action. Second, the Court must determine
15 whether the absent tribes have legally protected interests in the
16 suit. If the Court finds that the absent parties do have legally
17 protected interests in the action, it must then determine whether
18 those interests will be impaired if the suit proceeds without
19 them being joined. Applying this test to the facts of the
20 instant case, the Court finds that the absent parties are neces-
21 sary under Rule 19(a).

22 A.

23 In the first prong of the test, namely, whether com-
24 plete relief is possible among those already parties, defendants
25 claim complete relief cannot be given because all dispensable
26 parties are not before the Court. But notwithstanding which
27 parties are or are not before the Court, the Court is able to
28 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

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

11 B.

12 In the second prong of the test, the Court must deter-
13 mine whether the absent parties have legally protected interests
14 in the outcome of this action.

15 Plaintiffs argue that the absent parties lack a legally
16 protected interest in this litigation because "[i]n litigation
17 involving the adjudication of public rights, non-parties who may
18 be adversely affected by a decision in plaintiffs' favor do not
19 have a protectable [sic] interest which would require their
20 joinder under Rule 19." Plaintiffs' Response to Defendants'
21 Motions to Dismiss, filed Jan. 3, 1991, at 68 (quoting 3A J.
22 Moore, J. Lucas, G. Grotheer, Moore's Federal Practice ¶ 19.07
23 [2-0] at 1001-101 (1990) (emphasis added). There are, however,
24 two major problems with this argument. The first problem is that
25 the public rights exception to traditional joinder rules is
26 applicable in deciding whether a party is indispensable, not
27 whether they have a legally protected interest. Makah, 910 F.2d
28 at 559 n.6 ("Even if the absent tribes were 'necessary' to the

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

5 The second problem with plaintiffs' public rights
6 argument is that the rights plaintiffs seek to enforce are not
7 "public rights," but rather are personal to plaintiffs. As noted
8 above, plaintiffs challenge the Act on the basis that it uncon-
9 stitutionally infringes their rights to freely associate in
10 matters of political concern and violates their rights under the
11 Due Process, Takings and Equal Protection clauses of the Fifth
12 Amendment to the Constitution of the United States. These
13 clearly are not public rights. To the extent that plaintiffs
14 challenge what they consider to be the unequal distribution of
15 the Hoopa Valley's assets, they also cannot be said to be assert-
16 ing public rights. As the court noted in Makah, where a plain-
17 tiff seeks reallocation of certain assets, the public rights
18 exception to traditional rules of joinder has no efficacy. That
19 having been said, the Court now turns to the determination of
20 whether the absent tribes have legally protected interests in
21 this litigation that might be impaired or impeded by their
22 inability to be joined in this action.

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

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

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

21 Plaintiffs ask this Court to declare the Act uncon-
22 stitutional. While the government arguably has as much interest
23 in having the constitutionality of the Act upheld as do the
24 absent parties, it nonetheless is true that the interests of the

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26 ³ Plaintiffs argue that the Hoopa Valley Tribe should be
27 considered a party to this litigation because certain
28 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.

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

12 The Court finds support for its position in two recent
13 cases, Wichita & Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d
14 765 (D.C. Cir. 1986), and Kickapoo Tribe of Oklahoma v. Lujan,
15 728 F. Supp. 791 (D.D.C. 1990). In Wichita, a number of tribes
16 were litigating the rights to certain property held in trust for
17 the tribes by the government. In holding that the action must be
18 dismissed for failure to join indispensable parties, the court
19 noted that "whatever allegiance the government owes to the tribes
20 as trustee, is necessarily split among the three competing tribes
21 involved in the case. This case, therefore, falls squarely under
22 the rule that when 'there is a conflict between the interests of
23 the United States and the interests of Indians, representation of
24 the Indians by the United States is not adequate.'" 788 F.2d at
25 775 (quoting Manygoats v. Kleppe, 558 F.2d 556, 558 (10th Cir. -
26 1977)).

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

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

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

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

1 The government then moved to dismiss the action, pursuant to Rule
2 19, for failure to join an indispensable party. The district
3 court granted the motion finding that the Nation was indeed an
4 indispensable party.

5 In affirming, the Ninth Circuit explicitly rejected the
6 plaintiff tribes' argument that the government could adequately
7 represent the absent Nation, holding that "the United States
8 cannot adequately represent the Quinault Nation's interest with-
9 out compromising the trust obligations owed to the plaintiff
10 tribes." Id. at 1500.

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

20 . III.

21 Having so determined, the Court must now "determine
22 whether in equity and good conscience the action should proceed
23 among the parties before it, or should be dismissed, the absent
24 [tribes] being thus regarded as indispensable." Fed. R. Civ. P.
25 19(b). To determine whether the absent tribes are indispensable
26 under Rule 19(b), the Rule instructs courts to consider four
27 factors:

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

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

14 A.

15 First, with respect to the prejudice the absent tribes
16 will suffer from any adverse judgment, there can be no doubt that
17 the absent tribes will be prejudiced severely if plaintiffs
18 obtain the judgment they seek in this action. As noted above,
19 plaintiffs seek to have the Act declared unconstitutional.
20 Because the Act granted certain property rights in the Hoopa
21 Valley to the absent tribes, any judgment invalidating the Act
22 would necessarily have a deleterious effect on the absent tribes.
23 As the court noted in Wichita, "[c]onflicting claims by benefi-
24 ciaries to a common trust present a textbook example of a case
25 where one party may be severely prejudiced by a decision in his
26 absence." Wichita, 788 F.2d at 774.

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

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

3 B.

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

19 C.

20 The third factor the Court must consider under Rule
21 19(b), whether "a judgment rendered in the [tribes'] absence will
22 be adequate," tips in favor of a finding that the absent tribes
23 are not indispensable because the Court undoubtedly has the power
24 to grant the relief requested by plaintiffs. Nonetheless, as the
25 court in Wichita noted "[t]his factor, however, cannot be given-
26 dispositive weight when the efficacy of the judgment would be at
27 the cost of absent parties' rights to participate in litigation
28 that critically affect [sic] their interests." 788 F.2d at 777.

1 D.

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

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

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

25
26 ⁴ Defendants correctly point out that even if the Court
27 dismisses this action, plaintiffs will still be able to
28 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).

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

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

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

18 In Fluent v. Salamanca Indian Lease Authority, 928 F.2d
19 542 (2d Cir. 1991), nearly six hundred lessees challenged the
20 constitutionality of the Seneca Nation Settlement Act of 1990, by
21 which Congress approved the renewal of a number of leases between
22 the lessees and the Seneca Nation of Indians ("Nation") and
23 appropriated \$35 Million toward the rental payments. Because of
24 the sovereign immunity enjoyed by the Nation, it was not joined
25 in the action. Finding that resolution of the claims presented -
26 by the lessees would impair and impede the Nation's ability to
27 protect its interests created by the Seneca Nation Settlement Act
28 of 1990, the district court dismissed the action pursuant to

