The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

MARY M. CARNEY

Plaintiff,

vs.

STATE OF WASHINGTON, WASHINGTON STATE PARKS AND RECREATION COMMISSION; and SWINOMISH INDIAN TRIBAL COMMUNITY, a federally recognized Indian tribe,

Defendants.

Case No. 2:21-CV-00415-MJP

**SWINOMISH INDIAN TRIBAL COMMUNITY'S MOTION TO DISMISS**

NOTE ON MOTION CALENDAR: APRIL 30, 2021

*Oral Argument Requested*



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## I. MOTION

Plaintiff Mary Carney filed this case against the Swinomish Indian Tribal Community (Swinomish or Tribe) and the Washington State Parks and Recreation Commission (State Parks). Plaintiff claims that, when they removed artificial fill under a roadway on their lands, the Tribe and State Parks trespassed onto a small strip of her land, temporarily interfered with an easement appurtenant to her land, and caused portions of her land to be inundated during certain high-tide or storm events. However, as the Amended Complaint acknowledges, the Tribe contends that both the strip of land and the inundated lands are owned by the United States in trust for the Tribe (either solely or in common with the State) and that Plaintiff does not have an easement on the lands at issue. Accordingly, Plaintiff seeks to quiet title to and have an easement declared across the disputed lands. Amended Complaint, Dkt. No. 1-2, ¶¶ 25, 36-40, 59-60 and Prayer for Relief A, E. She also seeks damages and an injunction ordering the Tribe and State Parks to maintain the disputed lands in a condition to her liking in perpetuity, but those claims are necessarily dependent upon her title claims. *Id.*, Prayer for Relief A-D.

The Tribe moves to dismiss under Fed. R. Civ. P. 12(b)(1), 12(b)(6), 12(b)(7) and 19 for three reasons. First, the Tribe is immune from suit. Because neither it nor Congress has waived the Tribe's immunity, this Court lacks subject-matter jurisdiction over Plaintiff's claims against the Tribe, requiring dismissal under Rule 12(b)(1). Second, because Plaintiff seeks to quiet title to and declare an easement over lands that the Tribe contends are owned by the United States in trust for the Tribe, the Tribe and United States are required parties. However, Plaintiff has failed to name the United States and neither the United States nor the Tribe can be joined. Because this suit may not proceed in their absence, it should be dismissed under Rules 12(b)(7) and 19. Third, because the United States and the Tribe have, at a minimum, a colorable claim that the disputed lands are Indian trust lands, Plaintiff's quiet title claim is barred by the Quiet Title Act (QTA),


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28 U.S.C. §2409a. Because her other claims depend on her title claims, she has failed to state any claim upon which relief may be granted and the case should be dismissed under Rule 12(b)(6).

## II. JURISDICTION

This case is within the Court's removal jurisdiction under 28 U.S.C. §§ 1441(a) and 1442(a)(2). *See* Dkt. No. 1. However, as explained in this motion, the Court lacks subject-matter jurisdiction over the claims against the Tribe, which should be dismissed under Rule 12(b)(1),[1] and the entire case should be dismissed under Rules 12(b)(6), 12(b)(7) and 19.

## III. BACKGROUND

### A. The Tribe, Its Reservation, and Its Tidelands.

Since time immemorial, the Tribe has occupied lands and waters in Northern Puget Sound, including Fidalgo Island. Fishing, shellfishing, hunting, and gathering have always been essential to the Tribe's subsistence, ceremony, economy, culture, and identity. *See, e.g.*, *United States v. Washington*, 459 F. Supp. 1020, 1039, 1049 (W.D. Wash. 1978).

In 1855, the Tribe ceded vast areas to the United States in exchange for a reservation and permanent homeland on "the peninsula at the southeastern end of Perry's [Fidalgo] Island, known as Sháis-quihl," among other things. Treaty of Point Elliott (Treaty), 12 Stat. 927, Art. II. Then as now, the Tribe heavily depended on the tidelands surrounding the Reservation, where it hunted, fished, and shellfished. The United States and the Tribe intended that the Reservation would include the tidelands and secure the Tribe's access to these critical resources in perpetuity.

[1] *See Nebraska ex rel. Dep't of Soc. Servs. v. Bentson*, 146 F.3d 676, 679 (9th Cir. 1998) ("Once a case is properly removed, a district court has the authority to decide whether it has subject matter jurisdiction over the claims.").



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In 1873, President Grant described the Reservation boundary by reference to the "low-water mark[s]" on Similk and Padilla Bays, confirming that tidelands had been included within the Reservation.[2] Executive Order of Sept. 9, 1873 (EH 0001); *State v. Edwards*, 188 Wash. 467, 469-72 (1936); *Corrigan v. Brown*, 169 F. 477, 480-81 (C.C.W.D. Wash. 1907).[3] The Department of the Interior has confirmed repeatedly that the Reservation includes adjacent tidelands which are owned by the United States in trust for the Tribe.[4] This is so despite allotment of most Reservation uplands to individual Tribal members and the subsequent alienation of many of those lands (including Plaintiff's parcel) to non-Indians. *See* n.4, *supra*; *United States v. Boynton*, 53 F.2d 297 (9th Cir. 1931) (Lummi Reservation allotments conveyed title to the line of mean high tide); *Borax Consol. v. City of Los Angeles*, 296 U.S. 10, 26-27 (1935) (in general, Federal patents convey title to line of mean high tide).

Under Federal law, the boundary between tidelands and uplands is the line of mean high tide, which is the mean of all high tides, including spring tides and neap tides, over a complete tidal epoch. *Borax*, 296 U.S. at 26-27. The line is *ambulatory*, changing location over time in response to erosion, accretion, and changes in tidal elevation. *See, e.g., Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 189 (1890); *St. Clair County v. Lovingston*, 90 U.S. 46, 56-57 (1874).

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[2] President Grant's order also purported to exclude an area known as March Point from the Reservation. Because only Congress can diminish a reservation, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462-63 (2020), the Tribe disputes the validity of that aspect of the order. This case does not involve March Point.

[3] "EH [_____]" refers to Bates stamped pages in the Exhibits to the Declaration of Emily Haley.

[4] Memorandum of the Office of the Regional Solicitor (Aug. 8, 1994) (EH 0002-0003); Memorandum of the Office of the Regional Solicitor (Aug. 18, 1972) (EH 0004-0005); Memorandum of the Office of the Regional Solicitor (Dec. 17, 1971) (EH 0006-0008); Memorandum of the Office of the Regional Solicitor (June 8, 1971) (EH 0009-0010); Memorandum of the BIA Agency Realty Office (Mar. 2, 1964) (EH 0011-0013); Memorandum of the Office of the Regional Solicitor (June 20, 1962) (EH 014-0022); Correspondence from BIA Agency Superintendent to Washington State Department of Fisheries (Apr. 19, 1936) (EH 0023-0024).



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However, if anthropogenic modifications to the shoreline move the line of mean high tide seaward, then the landward boundary of tidelands is where the line of mean high tide would be in the absence of such modifications. *See United States v. Milner*, 583 F.3d 1174, 1186-90 (9th Cir. 2009).

In 2012 the Tribe enacted and the Bureau of Indian Affairs approved a tidelands ordinance. Swinomish Tribal Code (STC), Title 23, Ch. 1 (EH 0025-051). In accordance with Federal law, the ordinance asserts that "the United States owns all [unconveyed] tidelands within the [Reservation] in trust for the [Tribe]"; that the "shoreward boundary of Tribal tidelands is the line of mean high tide" and is ambulatory; and that, "[i]f the line of mean high tide is seaward of where it would be in the absence of [anthropogenic modifications], then the shoreward boundary of Tribal tidelands is where the line of mean high tide would be in the absence of such [modifications]." STC §§ 23-01.020(A) & 23-01-060(I)((1)-(3). The purpose of the ordinance was, *inter alia*, "[t]o preserve, restore, enhance, and protect the ecological, cultural, aesthetic, economic and other values of Tribal tidelands" and to regulate their use. STC § 23-01.020.

**B. Kukutali Preserve and the Restoration Project.**

In 2010, Swinomish and State Parks reacquired nearly 100 acres of alienated Reservation lands and established Kukutali Preserve, the first jointly owned and operated tribal/state park in the country.[5] *See* Lynda Mapes, "Meet the Newest Washington State Park: Kiket Island," Seattle Times, July 14, 2010 (EH 0054-0055). The Preserve includes all of Kiket Island and an adjacent parcel on Fidalgo Island, which surrounds a tidal lagoon. The two parts of the Preserve are

[5] The Tribe and State Parks acquired the property in fee as tenants in common with equal undivided interests. With the State's support, the Tribe subsequently conveyed its 50% undivided share to the United States in trust for the Tribe. Statutory Warranty Deed, Skagit County Auditor's No. 201405270072 (May 27, 2014) (EH 0052-0053).



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connected by a tombolo. For maps depicting the Preserve, *see* Excerpt of Record of Survey, Skagit County Auditor's File No. (AF) 201203230030 (Mar. 23, 2012) (EH 0056-0057); Kukutali Preserve Locator Map (EH 0058). For a description of the tombolo, *see* Declaration of Karen Mitchell ¶ 6. Two of the primary purposes of the Preserve are to actively preserve, protect, and enhance natural ecological habitat for the benefit of native species and to promote the healthy functioning of important near-shore habitat corridors. Kiket Island Co-Management Agreement at ¶ 5, Skagit County AF 201006180123 (June 18, 2010) (EH 0059-0061).

To help carry out those goals, Kukutali Preserve undertook a restoration project in August 2018 (Project) to remove portions of an artificially elevated road that was, in effect, an unpermitted dam in the intertidal zone. Prior to the Project, Kukutali Preserve obtained all required permits, including authorization from the Army Corps of Engineers under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act:

> We have reviewed your application to perform habitat restoration activities that include removing 600 lineal feet of 2-3 foot diameter riprap along a section tombolo, and up to 800 cubic yards of artificial road fill at the Kukutali Preserve…. Nationwide Permit [] 27, Aquatic Habitat Restoration, Establishment, and Enhancement Activities [] authorizes your proposal….

EH 0141 (citation omitted); *see also* EH 0120-0140. In accordance with this approval, no native material was removed during the Project. Mitchell Decl. ¶ 9. The Project generated multiple benefits, including reestablishing more natural morphology in the area, improving fish and wildlife forage and migration, and facilitating Tribal members' subsistence, ceremonial, and cultural practices. *Id.* ¶ 6. After removal of the artificial road fill, portions of the tombolo are submerged at certain tidal elevations. *Id.*



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### C. The Current Dispute.

Plaintiff owns alienated fee land immediately south of the Fidalgo Island portion of Kukutali Preserve. *See id*., Ex. 5; EH 0056-0057. A boundary fence separates the properties.[6]

Upset about the Project, on February 25, 2021, Plaintiff filed suit against the Tribe and State Parks in Skagit County Superior Court. *See* Dkt. No. 1-1. On March 17, 2021, Plaintiff filed an Amended Complaint. Dkt. No. 1-2.[7] On March 26, 2021, the Tribe filed a Notice of Removal to this Court. Dkt. No. 1.[8]

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[6] The fence was built by one of Plaintiff's predecessors in 1979. EH 0084-0085. It is approximately 2 to 5 feet south of the legal lot line, depending on location. EH 0099. Ownership of the strip of land between the fence and the lot line is one of the issues in this case. It is the Tribe's position that the strip of land was acquired by adverse possession, either by the Tribe and State Parks' predecessors before acquisition of the Preserve in 2010 or by the Tribe and State Parks since then. Under Washington law, a boundary fence provides prima facie evidence of exclusive use and hostility for purposes of establishing adverse possession. *See*, *e.g.*, *Wood v. Nelson*, 57 Wn.2d 539, 540-41 (Wash. 1961); *Ofuasia v. Smurr*, 198 Wn. App. 133, 144-45 (Wn. App. 2017). Materials reviewed by the Tribe—including a 2001 air photo (EH 0097), a 2007 air photo (EH 0098), and a 2010 Survey commissioned by Plaintiff (EH 0099)—indicate that the Tribe and State Parks' predecessors had exclusive, actual and uninterrupted, open and notorious, and hostile possession of all land north of the fence for a period of 31 years, much longer than Washington's ten year adverse possession period. *See Chaplin v. Sanders*, 100 Wn.2d 853, 857 (Wash. 1984); RCW 4.16.020. And, because a person acquiring title by adverse possession can convey it without having had title quieted in them, *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 855 (Wash. 1962), the title conveyed to the Tribe and State Parks in 2010 included all uplands north of the fence.

Moreover, in the ten plus years following the Tribe and State Parks' acquisition of Kukutali Preserve, they installed a gate to control access to the Preserve, including all uplands north of the fence; openly, notoriously and exclusively possessed all uplands north of the fence; asserted dominion and control over such uplands; and had actual and uninterrupted possession of them. In contrast, Plaintiff took no action to relocate the fence to the lot line or otherwise reassert ownership of the disputed strip. *See* EH 0099. To the contrary, Plaintiff or someone acting on her behalf installed a "private property" sign immediately adjacent to the fence shortly after the Tribe and State Parks acquired the Preserve. EH 0100. In 2014, Plaintiff requested that the Preserve install additional "private property" signage near the fence at her driveway and at the west end of the fence, a request that the Preserve honored. *See* EH 0101; EH 0102. These actions reaffirmed the parties' mutual recognition that the fence was a boundary fence, and that uplands to the north of the fence were owned and controlled by Kukutali Preserve. This supports not only the Tribe's adverse possession claim but also a mutual recognition and acquiescence claim. *See Merriman v. Cokeley*, 168 Wn.2d 627, 630 (Wash. 2010). "[I]f adjoining property owners occupy their respective holdings to a certain line for a long period of time, they are precluded from claiming that the line is not the true one. … [R]ecognition and acquiescence affords a conclusive presumption that the used line is the true boundary." *Lamm v. McTighe*, 72 Wn.2d 587, 592 (Wash. 1967), *followed but distinguished on factual grounds by Dick v. Chenette*, 159 Wn. App. 1013 (Wn. App. 2011).

[7] The Tribe agreed to accept email service of the original and amended complaints, but expressly stated that by accepting service it did not waive its sovereign immunity from unconsented suit. EH 0062-0063; EH 0064-0067.

[8] The Tribe also filed a Limited Notice of Appearance and copy of the Notice of Removal in state court. EH 0068-0071; EH 0072-0082. The filing explicitly states that the Tribe did not intend to, and did not, waive its sovereign immunity from unconsented suit. *Id*.



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Plaintiff alleges that the strip of land between the fence and the legal lot line (*see* note 6, *supra)* includes a portion of the old roadway (all of which is north of the fence, *see* Mitchell Decl. ¶ 9 and Ex. 5; EH 0083; EH 0084-0085), and that, in removing artificial fill under the road, the Project trespassed upon that portion of her land. Amended Complaint, Dkt. No. 1-2, ¶¶ 17, 30-31. She also alleges that the Project increased inundation on the western, undeveloped portion of her property south of the fence, constituting another trespass. *Id.* ¶¶ 17, 19, 32-33. And she alleges that she owns an easement along the road with which the Project temporarily interfered.[9] *Id.* ¶¶ 18, 25, 37-38. She seeks to quiet title to the lands and have an easement declared. *Id.* ¶¶ 25, 36-40, 59-60 and Prayer for Relief A, E. She also seeks damages and an injunction ordering the Tribe and State Parks to maintain the disputed lands in a condition to her liking in perpetuity (in

[9] The Tribe denies that a valid easement exists. In 1929, the heirs of the original allottee sold Government Lots 2 and 3 of Sec. 21, T 34N, R 2E, W.M. (GL 2 and GL 3) out of trust. EH 0086-0087; EH 0088-0089. The Fidalgo Island portion of Kukutali Preserve is located on GL 2; Plaintiff's parcel is located on GL 3. While the deeds purported to create an easement over the south 30 feet of GL 2 for the benefit of GL 3, an express easement was never created, or, if it was created, was subsequently extinguished through operation of law because GL 2 and GL 3 were held in common ownership both prior to and following the conveyance out of trust. *See Coast Storage Co. v. Schwartz*, 55 Wn.2d 848, 853 (Wash. 1960); *Adams v. Deen*, 177 Wn. App. 1032 at *3-4 (Wn. App. 2013) (unpublished).

GLs 2 and 3 were held in common ownership by the heirs at the time of the 1929 conveyances. EH 0086-0087; EH 0088-0089. They continued to be held in common ownership by the Mill & Mine Company until Plaintiff's parents, the Sullivans, acquired them in 1931. EH 0090-0091. They continued to be held in common ownership by the Sullivans until the Home Owner's Loan Corporation acquired the north 299.3 feet of GL 3 and sold it to the Huntons in 1946. EH 0092-0093. This deed does not reference or create an easement over the south 30 feet of GL 2 for the benefit of GL 3. And critically, the properties came back into common ownership when the Sullivans repurchased Plaintiff's parcel (the north 99.3 feet of GL 3) in 1956. EH 0094. That deed also does not reference or create an easement across the south 30 feet of GL 2 to benefit GL 3. In 1969, the properties went back into separate ownership when the Sullivans conveyed the Fidalgo Island portion of Kukutali Preserve to several utilities. EH 0095. While the deed stated that the conveyance was "[s]ubject to an easement for roadway purposes over the south 30 feet thereof," it does not identify a dominant estate, and, as a result, appears to be a reference to the failed 1929 easement rather than an attempt to create a new easement. There were several subsequent conveyances of Plaintiff's parcel among family members, including a final conveyance to Plaintiff in 1979. EH 0096. The deed conveying title to Plaintiff made no mention of an easement over the south 30 feet of GL 2 for the benefit of GL 3.

Even if a valid easement had been created in 1929, Plaintiff's claimed use would not be within the scope of it; the purposes of the intended easement were ingress and egress from Snee-Oosh Road, the construction and maintenance of water lines, and the maintenance of telephone and power lines. EH 0086-0087; EH 088-089. The failed easement did not include the types of recreational uses Plaintiff claims the Tribe and State Parks interfered with here.



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effect, asking this Court to order the Tribe and State Parks to maintain unpermitted artificial fill to prevent natural tidal processes from affecting land on the lowland shores of Puget Sound, notwithstanding rising sea levels and other effects of climate change). *Id.* Prayer for Relief A-D.

The Tribe contends that the property Plaintiff seeks to quiet title to or have an easement declared over is owned in whole or part by the United States in trust for the Tribe. There are extensive tidelands in and around the Project that were stabilized or filled to provide road access to Kiket Island and to stabilize uplands or fill tidelands around the lagoon and adjacent to Plaintiff's parcel. Mitchell Decl. ¶ 7. These tidelands include but are not limited to areas underlying the road and areas south of the road that may now appear to be uplands because of the presence of artificial fill but are in fact filled tidelands owned by the United States in trust for the Tribe under *Milner*. *Id.* The general geomorphology of the area, historical photographs and other documentary evidence, data collected during the Project, a technical analysis of historical conditions in the area, a technical analysis of soil samples in the area, and Tribal knowledge regarding the history of the area extending back generations support these conclusions. *Id.* ¶¶ 8-15.

Thus, with respect to Plaintiff's claimed ownership of and trespass on a portion of the road, the Tribe contends that portions of the road were located on tidelands that continue to be owned by the United States in trust for the Tribe and that all other portions of the road are uplands owned by State Parks and by the United States in trust for the Tribe. *See* note 6, *supra*. With respect to Plaintiff's claim of occasional inundation on the western, undeveloped portion of her property south of the road, the Tribe contends that, under *Milner*, 583 F.3d 1186-90, it had no legal obligation to maintain artificial fill on its lands to prevent natural tidal processes from



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inundating that or any other area and that, in any event, any area south of the fence experiencing inundation is also filled tidelands owned by the United States in trust for the Tribe. Mitchell Decl. ¶¶ 7-10, 12-14, 16 and Ex. 5. With respect to Plaintiff's claim of interference with an easement, the Tribe denies that a valid easement was ever created, *see* n. 9, *supra*, and that Plaintiff could have acquired one by prescription since areas under the road are owned by the United States in trust for the Tribe. *See Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272 (9th Cir. 1991) (citing 25 U.S.C. § 177).

## IV. ARGUMENT

### A. Standards of Review.

On a motion to dismiss, Federal courts generally accept as true the factual allegations contained in the complaint and draw reasonable inferences in plaintiff's favor. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). However, where the motion is based on lack of subject-matter jurisdiction, "no presumptive truthfulness attaches to a plaintiff's allegations" and the court "may hear evidence regarding jurisdiction and resolve factual disputes where necessary." *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015) (quotations and alterations omitted). A challenge to subject matter-jurisdiction may be facial or factual. *Wolfe,* 392 F.3d at 362. A facial challenge is one that "asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id*. (quoting *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)). To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a "complaint must contain sufficient factual matter … to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (quotation omitted).



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A motion to dismiss under Rules 12(b)(7) and 19 is analyzed in three steps. First, the court "must decide whether it is *desirable* in the interests of just adjudication to join" absent parties. *Paiute-Shoshone Indians of the Bishop Cmty. v.City of L.A.*, 637 F.3d 993, 997 (9th Cir. 2011) (quotation omitted; emphasis in original). Second, the court must determine whether the absent parties could be ordered to join. *Id*. Third, the court must decide whether in equity and good conscience the case may proceed without the absent parties. *Id*.[10] The moving party bears the burden to demonstrate the nature of the absent party's interests and how those interests will be harmed if the case proceeds in their absence. *See, e.g., Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990); *Citizen Band Potawatomi Indian Tribe v. Collier*, 17 F.3d 1292, 1293 (10th Cir. 1994). The movant may present affidavits and other extra-pleading evidence to make the required showing. *Citizen Band*, 17 F.3d at 1293.

The Tribe relies on the Amended Complaint, which makes no allegation that Congress or the Tribe has waived the Tribe's immunity, as the basis for its motion to dismiss under Rule 12(b)(1), but also demonstrates that there has been no waiver. The Tribe relies on declarations to support its motion to dismiss under Rules 12(b)(7) and 19. The Tribe relies on the Amended Complaint for its motion to dismiss under Rule 12(b)(6), but also relies on declarations to show that the Tribe's claim that the disputed lands are Indian trust lands is, at a minimum, colorable.

**B. Swinomish's Sovereign Immunity Deprives This Court of Jurisdiction Over the Claims Against It and Requires that Those Claims Be Dismissed**.

[10] Rule 19 was amended in 2007 to remove references to "necessary" and "indispensable" parties, among other things. In this Motion, we use terms from the current rule, but cite several cases that use terms from the older rule. This is a distinction without a difference, however, since the Advisory Committee advised that the amendments were stylistic only and the Supreme Court has so held. *Philippines v. Pimentel*, 553 U.S. 851, 855-56 (2008).



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**1. Swinomish is Immune from Unconsented Suit and Has Not Consented to This Proceeding.**

Indian tribes are "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). As such, they exercise inherent governmental authority subject only to Congress's authority to abrogate the tribes' sovereignty. *See, e.g.*, *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014). One of the "core aspects of sovereignty that tribes possess … is the common-law immunity from suit traditionally enjoyed by sovereign powers [which] is a necessary corollary to Indian sovereignty and self-governance." *Bay Mills*, 572 U.S. at 588 (quotations and citations omitted). As a result, "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 754 (1998). Waiver may not be implied; it must be unequivocally expressed. *See, e.g.*, *Santa Clara Pueblo*, 436 U.S. at 58; *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509-10 (1991). A "tribe's immunity is not defeated by an allegation that it acted beyond its powers." *Imperial Granite*, 940 F.2d at 1271. Thus, in *Mitchell v. Tulalip Tribes of Wash.*, 740 F. App'x 600, 601 (9th Cir. 2018), the court held that an action against the Tulalip Tribes to quiet title to lands within the Tulalip Reservation had to be dismissed because neither Congress nor the tribe had waived the tribe's immunity. The same is true here.

Plaintiff does not allege that Congress authorized this suit against the Tribe and Congress has not done so. To the contrary, the QTA expressly prohibits this case from proceeding. 28 U.S.C. §2409a(a); *see also* Section IV.D, *infra*; *Save the Valley, LLC v. Santa Ynez Band of Chumash Indians*, 2015 U.S. Dist. LEXIS 181545 at *6-7, No. CV 15-02463-RGK (C.D. Cal. July 2, 2015) (no waiver of immunity for in rem actions given QTA's "express carve-out for Indian lands").



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Nor has Plaintiff alleged that the Tribe has waived its immunity, and it has not done so. To the contrary, the Swinomish Tribal Code repeatedly asserts sovereign immunity, including in the Tribe's tidelands ordinance, and contains only limited waivers of immunity for certain suits *in Tribal Court. See*, *e.g.*, STC § 2-04.040 (asserting that Tribe's "sovereign immunity … from unconsented suit has always and shall continue to extend to acts and omissions of … all [Tribal] employees in the performance and within the scope of their employment") (EH 0104), STC § 23-01.280 ("sovereign immunity of the Tribe is not in any way waived or limited by" tidelands ordinance, and such immunity extends to the Tribe and "all Tribal officials, employees, staff and agents as to all actions taken" pursuant to the ordinance) (EH 0106), STC §§ 3-08.060-070 (limited waiver of immunity for certain tort claims "brought in Tribal Court") (EH 0108-0109; EH 0111-0114).

The Tribe did not waive its immunity by removing this action. *See Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1015-22 (9th Cir. 2016). In accepting service of the original and amended complaints, in its Limited Notice of Appearance in state court, and in its Notice of Removal, Swinomish explicitly stated that it did not intend to, and did not, waive its immunity. *See* notes 6 and 7, *supra.* And in this Motion Swinomish again reiterates that it does not intend to, and does not, waive its immunity to allow this case to proceed. There is no waiver of immunity under these circumstances. *Bodi*, 832 F.3d at 1018.

**2. Swinomish's Immunity Deprives This Court of Subject Matter Jurisdiction.**

Tribal immunity is quasi-jurisdictional. *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989). Accordingly, Rule 12(b)(1) is "a proper vehicle for invoking sovereign immunity from suit." *Pistor*, 791 F.3d at 1111. Once tribal immunity is invoked, "the party asserting subject matter jurisdiction has the burden of proving its existence, i.e. that



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immunity does not bar the suit." *Id.* (quotation omitted). As noted above, at that point, "no presumptive truthfulness attaches to a plaintiff's allegations" and the "court may hear evidence regarding jurisdiction and resolve factual disputes where necessary." *Id*. (quotations and alterations omitted). "[If] the tribal defendants invoked sovereign immunity in an appropriate manner and at an appropriate stage, i.e. in a Rule 12(b)(1) motion to dismiss, [and] if they *were* entitled to tribal immunity from suit, the district court would lack jurisdiction over them and would be required to dismiss them from the litigation." *Id*. (emphasis in original).

The Tribe has invoked its immunity in an appropriate manner and at an appropriate stage of this litigation. Because Plaintiff has not even alleged that Congress or Swinomish waived the Tribe's immunity to allow this case to proceed, and because neither Congress nor Swinomish has done so, this Court lacks subject matter jurisdiction over Plaintiff's claims against the Tribe and those claims should be dismissed under Rule 12(b)(1).

### C. Under Rule 19, This Case May Not Proceed in the Absence of Swinomish and the United States.

#### 1. Swinomish and the United States are Required Parties.

Rule 19(a) requires joinder of parties whose presence is necessary to ensure complete and consistent relief or whose interests would be impeded were the action to proceed in their absence. A party is required if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) "as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Rule 19(a)(1). The Tribe and United States are required parties under these provisions.

**a. Complete Relief Cannot be Accorded Among the Parties Absent the Tribe and the United States**.



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The Amended Complaint names the Tribe as a codefendant with the State, recognizes the Tribe's ownership interest in the uplands of the Preserve, ¶ 2-3, and recognizes that the Tribe claims beneficial ownership of the disputed lands, ¶ 23. Plaintiff's seventh cause of action "seeks a judgment quieting title to all areas within the Carney Property." ¶ 60. Plaintiff further seeks an easement over lands that the Tribe contends are owned in whole or part by the United States in trust for the Tribe. ¶ 25. Plaintiff's tort claims are predicated on her title claims; she alleges that she owns the disputed lands and that the United States and Tribe do not, that she has suffered damages for alleged harms from the Tribe's and State Parks' use of the disputed lands, and that the Tribe and State Parks must maintain artificial fill on the disputed lands for her benefit.

In a quiet title action, the court cannot accord complete relief among the parties without joining all parties claiming an interest in the property. *See Minnesota v. United States*, 305 U.S. 382, 386-87 (1939); *Lyon v. Gila River Indian Cmty.*, 626 1059, 1069 (9th Cir. 2010); *Imperial Granite*, 940 F.2d at 1272 n.4. Here, that not only includes the Tribe—whose ownership interests the Amended Complaint recognizes and seeks to extinguish—but also includes the United States because the Tribe's ownership interests are held by the United States in trust for the Tribe. *Id*.

With respect to uplands in Kukutali Preserve, the United States acquired and now holds the Tribe's 50% undivided interest in trust for the Tribe. *See* note 5, *supra*. With respect to tidelands adjacent to Kukutali Preserve and Plaintiff's parcel, the United States has repeatedly affirmed its ownership of Reservation tidelands in trust for the Tribe and approved the Tribe's tidelands ordinance asserting the United States' ownership of all unconveyed Reservation tidelands, including filled tidelands. *See* § III.A and note 4, *supra.* Given the Tribe's and United States' ownership interests in these lands, complete relief cannot be afforded among the parties in their absence. As the Ninth Circuit has held, "[t]he United States is a necessary party to any



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action in which the relief sought might interfere with its obligation to protect Indian lands against alienation." *Carlson v. Tulalip Tribes of Wash.*, 510 F.2d 1337, 1339 (9th Cir. 1975).

Because the Court cannot accord complete relief absent the Tribe and the United States, they are required parties regardless of whether they have legally protected interests that would be impaired in their absence. *Paiute-Shoshone*, 637 F.3d at 998.

**b. The Tribe and the United States Have Substantial, Legally Protected Interests in this Action.**

To satisfy the alternative test under Rule 19(a), an interest must be legally protected and substantial. *Dine Citizens Against Ruining Our Env't v. BIA*, 932 F.3d 843, 852 (9th Cir. 2019). In this case, the Tribe and the United States have several interests that meet this standard. First, as discussed above, the Tribe and the United States claim ownership interests in the disputed lands which are both legally protected and substantial. Second, the Tribe has a substantial interest in the proper interpretation of its rights under the Treaty, including the reservation of tidelands for the Tribe. Where an action requires interpretation of tribal treaty rights, the tribes holding those rights are required parties. *See Skokomish Indian Tribe v. Forsman*, 738 F. App'x 406, 408 (9th Cir. 2018); *accord Skokomish Indian Tribe v. Goldmark*, 994 F. Supp. 2d 1168, 1187 (W.D. Wash. 2014) (tribe has "a vital, legally-protected interest in how the Treaty is interpreted and enforced").

Third, the Tribe and the United States also have substantial, legally protected sovereign interests in this action given the nature of Plaintiff's claims. Sovereign ownership of land, and particularly sovereign ownership of submerged lands, gives rise to "special sovereignty interests." *Idaho v. Coeur d'Alene*, 521 U.S. 261, 281 (1997). In *Idaho*, the Coeur d'Alene Tribe sued the State of Idaho to resolve a longstanding dispute regarding ownership of the beds and banks of Lake Coeur d'Alene. While the Court recognized that the Tribe's claim of an ongoing



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violation of Federal law would normally be sufficient to overcome the State's Eleventh Amendment immunity, it held that the claim was nevertheless barred because the suit was "the functional equivalent of a quiet title action which implicates special sovereignty interests." *Id*. Because the relief sought by the Tribe would have shifted substantially all benefits of ownership and control from the State to the Tribe, divested the State of regulatory jurisdiction over the lands, and diminished and even extinguished the State's control over lands and waters long deemed by the State to be an integral part of its territory, the suit affected the interests of the State as a sovereign. *Id*. at 282.

All of this is equally, if not more, true here. Plaintiff's suit is not the functional equivalent of a quiet title action, *it is an actual quiet title action*. Plaintiff seeks to dispossess the Tribe of tidelands that it has owned and occupied since time immemorial, which are a vital part of the Tribe's history, identity, and way of life. She seeks to dispossess the United States of tidelands that it has held in trust for the benefit of the Tribe and has had an ongoing obligation to defend and protect since the 1855 Treaty, and to convert Federal trust land into private fee land, changing its character from sovereign tribal territory into a parcel that could be bought and sold by anyone. As in *Coeur d'Alene*, the relief Plaintiff seeks would shift all the benefits of ownership and control over the disputed lands from the United States and the Tribe to Plaintiff. As in *Coeur d'Alene*, the relief Plaintiff seeks might divest the Tribe of regulatory jurisdiction over the disputed lands, including the jurisdiction asserted in the Tribe's tidelands ordinance, a harm separate and unique from the Tribe's ownership interest. As in *Coeur d'Alene*, the relief Plaintiff seeks would extinguish the Tribe's control over tidelands that have been, and continue to be, an integral part of its territory. The subject matter of the case and the nature of the relief sought thus



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"goes to the heart of [Swinomish's and the United States'] sovereign and proprietary interests." *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 996 (9th Cir. 2020).

**c. The Tribe and United States' Interests Will Be Impaired if This Action Proceeds in Their Absence.**

"If a legally protected interest exists, the court must further determine whether that interest will be *impaired or impeded* by the suit." *Makah*, 910 F.2d at 558 (emphasis in original). "As a practical matter, an absent party's ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit." *Alto v. Black*, 738 F.3d 1111, 1127 (9th Cir. 2013) (quotation omitted). Three factors are relevant to whether an existing party may adequately represent an absent party's interests:

> whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments; whether the party is capable of and willing to make such arguments; and whether the absent party would offer any necessary element to the proceedings that the present parties would neglect.

*Id.* at 1127-28 (quotation omitted).

The State does not and cannot adequately represent the Tribe and United States' independent, sovereign interests in this case. As parties to the Treaty of Point Elliott, the Tribe and United States are uniquely situated to interpret and enforce its terms and have a fundamental interest in protecting their rights under it. Only the Tribe and United States have a legal interest in defending their ownership to artificially filled tidelands, as resolution of that issue, while central to this case, does not directly affect the State. The Tribe and United States have access to necessary evidence such as physical and historical evidence of artificial filling of tidelands. There are also issues where the State and Tribe may not agree. For example, the Tribe and State have not always agreed on the location of filled tidelands adjacent to Kukutali Preserve, *see* EH 0017,



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n.1, and the issue could be important here because, if portions of the road were held by the United States in trust for the Tribe, neither Plaintiff nor her predecessors could have acquired an easement over it. *Imperial Granite*, 940 F.2d at 1272. In sum, the Tribe and the United States are required parties because they have substantial, legally protected interests in this action and disposing of this action in their absence would impair their ability to protect those interests.

**d. Proceeding Without the Tribe and the United States Would Leave the State Subject to Substantial Risks of Double, Multiple or Inconsistent Obligations.**

A judgment issued in absence of the United States and Tribe would not be binding upon them. The primary relief that Plaintiff seeks is to quiet title to the disputed lands, have an easement declared for her benefit, and enjoin the State and Tribe to maintain the land in a condition to her liking in perpetuity. If this Court were to grant such relief absent the United States and the Tribe, nothing would bar the United States or the Tribe from bringing a separate suit to redetermine the title issue, nothing would require the United States and Tribe to grant Plaintiff a right of way under 25 C.F.R. Part 169, and no injunction would be binding on the United States or Tribe. The State would be placed in the unenviable position of being subject to an order of this Court, while also facing potential litigation by the United States and the Tribe with respect to the same lands where there is a substantial risk of double, multiple or inconsistent obligations. For this reason as well, the Tribe and the United States are required parties under Rule 19(a).

**2. The Tribe and the United States Cannot be Joined.**

Rule 19(a) contemplates that a required party will be joined. *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459 (9th Cir. 1994). However, as discussed in § IV.B, *supra*, Swinomish cannot be joined because it possesses sovereign immunity. And, although Congress has



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authorized the United States to be joined as a party defendant in certain property disputes without particularized consent, this authority specifically *excludes* Indian trust lands. 28 U.S.C. § 2409a; *Carlson*, 510 F.2d at 1339. Thus, neither the Tribe nor the United States can be joined.

**3. The Equities Favor Dismissal.**

When a required party cannot be joined, Rule 19(b) requires the court to determine "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Rule 19 identifies four factors to guide this determination:

> (1) prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum.

*Quileute*, 18 F.3d at 1460.

The Supreme Court and Ninth Circuit have ruled repeatedly that "[i]f 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.'" *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (quoting *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991)). This is because "[a] case may not proceed when a required-entity sovereign is not amenable to suit." *Philippines*, 553 U.S. at 867. "[W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Id.* Because a sovereign's interest in protecting its immunity generally outweighs an individual plaintiff's interest in relief, "[t]he balancing of equitable factors under Rule 19(b) almost always favors dismissal when a tribe cannot be joined due to tribal sovereign immunity." *Jamul Action Comm.*, 974 F.3d at 998.

> [T]here is a "wall of circuit authority" in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity—"virtually all the cases to consider the question appear to dismiss under Rule 19, regardless of



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> whether [an alternate] remedy is available, if the absent parties are Indian tribes invested with sovereign immunity."

*Dine Citizens*, 932 F.3d at 857 (alteration in original) (quoting *White v. Univ. of Cal.*, 765 F.3d 1010, 1028 (9th Cir. 2014)).

This case warrants application of the general rule in favor of dismissal. The judgment sought by Plaintiff in this case goes to the heart of the Tribe's sovereign interests in its trust land, its Treaty rights, and its authority to regulate and control what happens on its Reservation. Proceeding without the Tribe and the United States would cause irreparable prejudice to their interests. Additionally, depending on how this Court rules on the merits, the Tribe and United States may be significantly prejudiced in future litigation regarding the Tribe's ownership of Reservation tidelands. It is not possible to lessen or avoid prejudice to the Tribe and the United States should this case proceed in their absence. A judgment will necessarily and unavoidably decide whether the Tribe and United States own the lands that they believe they own; there is no middle ground because the Tribe and United States either own the land or they do not. The all-or-nothing nature of the dispute strongly indicates that any prejudice to the Tribe and United States cannot be lessened or avoided. *See Jamul Action Comm.*, 974 F.3d at 998 ("Equity and good conscience do not permit an action disputing the Village's status as a federally recognized tribe and its ownership of land in a suit in which the Village cannot be joined."); *see also Washoe Tribe of Nev. & Cal. v. Brooks*, 175 F. Supp. 2d 1255, 1258 (D. Nev. 2001) (dismissing under Rule 19 in part because of inability to join United States under Quiet Title Act).

While further analysis is not necessary, equitable factors beyond sovereign immunity also favor of dismissal. Plaintiff's Amended Complaint seeks to preserve the unlawful filling of tidelands, to permanently fix the upland/tideland boundary, and to, in effect, enjoin the Tribe and State Parks to guarantee that Plaintiff will be held harmless from the effects of climate change in



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perpetuity, all in violation of Federal law. *See Milner*, 583 F.3d at 1187-94. She also seeks financial damages for alleged harms arising from the lawful, Federally-permitted, restoration of long-degraded natural ecosystems. The Tribe's efforts to restore Reservation lands to their natural condition is part of a broader effort to protect the environment and enable Tribal members to pursue subsistence, ceremonial, and cultural activities now and in the future. Plaintiff's interest in preserving an artificially altered physical status quo and her associated pursuit of financial damages and injunctive relief pales in comparison to the Tribe's interest in protecting and restoring its Reservation.

With respect to the availability of an alternative forum, the Swinomish Code provides for limited waiver of sovereign immunity for some tort claims against the Tribe in Tribal Court. *See* STC §§ 3-08.060-070 (EH 0108-0109; EH 0111-0114). It is not clear that Plaintiff could pursue her claims there because, among other issues, the waiver does not extend to actions to quiet title and the United States still could not be joined. However, the Tribal Code also provides an administrative mechanism by which Plaintiff could seek a determination of the shoreward boundary of Tribal tidelands adjacent to her property. STC § 23-01.200 (EH 0045-0047.

However, even if Plaintiff lacks a forum to resolve this dispute, dismissal is warranted. Lack of an alternative forum does not automatically prevent dismissal of a suit. *Quileute*, 18 F.3d at 1460-61. "'Plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity.'" *Id*. (quoting *Confederated Tribes*, 928 F.2d at 1500). "'[D]ismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.'" *Id.* (quoting *Enterprise Mgt. Consultants, Inc. v. United States*, 883 F.2d 890, 894 (10th Cir. 1989)). When this case is analyzed with an appropriate appreciation for the importance of the Tribe's and United States' respective sovereign immunities



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and the nature of the sovereign and proprietary rights at issue, the Tribe and United States are required parties in whose absence the case should not proceed.

**D. Plaintiff Has Failed to State a Claim Upon Which Relief May be Granted**.

This case should also be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Plaintiff presents seven causes of action. Amended Complaint ¶¶ 29-60. While only the seventh cause of action expressly seeks to quiet title, each of the preceding causes is predicated on Plaintiff's claim that she owns the disputed lands. For example, Plaintiff's nuisance claim asserts that "Defendants' construction and excavation activities and maintenance of Kiket Road in its current excavated and obstructed condition substantially and unreasonably interfere with Plaintiff's use and enjoyment of the Carney Property." Amended Complaint ¶ 48. The necessary predicate for this claim is that Plaintiff owns the "Carney Property" to the extent asserted, which is disputed by the Tribe. The Tribe asserts that lands on which Plaintiff claims interference are tidelands that are owned by the United States in trust for the Tribe, and that the lands on which Plaintiff claims an easement are tidelands and uplands that are also owned by the United States in trust for the Tribe. As explained above, Plaintiff's various tort claims rest on her title claims because, to decide her tort claims, the Court must first resolve the title claims. *See Lacano Invs., LLC v. Balash*, 765 F.3d 1068, 1073 (9th Cir. 2014) ("Plaintiffs allege they are 'fee simple owners' of the streambeds beneath the navigable waters, seek to lift the 'cloud' from their properties, and request that a federal court return 'full use and enjoyment of their property.' The relief Plaintiffs request 'is close to the functional equivalent of quiet title.'") (quoting *Coeur d'Alene*, 521 U.S. at 282).

Under these circumstances, Plaintiff fails to state a claim because the Amended Complaint does not plead the QTA, 28 U.S.C. § 2409a, which provides the *exclusive* mechanism


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for a private individual such as Plaintiff to quiet title against the United States. *Block v. North Dakota*, 461 U.S. 273, 286 (1983); *McMaster v. United States*, 731 F.3d 881, 899 (9th Cir. 2013); *Friends of Panamint Valley v. Kempthorne*, 499 F. Supp. 2d 1165, 1178 (E.D. Cal. 2007) ("A claim that seeks a title determination against the United States can only be brought under the QTA, not the Declaratory Judgment Act or any other law.").

Plaintiff's Amended Complaint further fails to state a claim because the QTA expressly exempts "trust or restricted Indian lands." 28 U.S.C. § 2409a(a); *Alaska Dep't of Nat'l Resources v. United States*, 816 F.3d 580, 585 (9th Cir. 2016); *Imperial Granite,* 940 F.2d at 1272 n.4. There is no cause of action available where "the lands at issue are Indian lands, or at least colorably so." *Alaska v. Babbitt*, 182 F.3d 672, 675 (9th Cir. 1999).

Here, the Tribe's contention that the lands in dispute are trust lands is more than "colorable." It is uncontested that the United States took the Tribe's interest in the uplands into trust in 2014. *See* Amended Complaint ¶ 3. Federal and state courts and multiple Interior Department decisions have held the United States holds Reservation tidelands in trust for the Tribe. *See* § III.A above. The Tribe has carefully detailed evidence of artificially filled tidelands south of the lagoon, underlying the road, and extending south of the fence onto the lands claimed by Plaintiff. Mitchell Decl. at ¶¶ 7-15 and Ex. 5. Because it is well-settled that lands that would be seaward of the line of mean high tide in the absence of artificial fill are tidelands held in trust by the United States for the Tribe, *Milner*, 583 F.3d at 1186-90, the Tribe's evidence presents, at a minimum, a "colorable" claim that the disputed lands are trust lands. *See Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir. 1987). Accordingly, Plaintiff's suit should be dismissed with prejudice under Rule 12(b)(6). *See Payne v. United States*, 2017 U.S. Dist. LEXIS 217130 at *6-10, No. 2:17-cv-00490-AB (C.D. Cal. Nov. 6, 2017).



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## V. CONCLUSION

Plaintiff's claims against the Tribe should be dismissed because neither Congress nor the Tribe has waived the Tribe's sovereign immunity from this lawsuit. The entire action should be dismissed because the Tribe and United States are required parties but cannot be joined, and this case cannot proceed in equity and good conscience in their absence. Finally, the entire action should be dismissed because all claims are predicated on Plaintiff's title claims, and those claims are barred by the QTA.

Respectfully submitted this 2nd day of April, 2021.

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 2, 2021, I electronically filed this MOTION TO DISMISS with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to all parties registered in the CM/ECF system for this matter.

s/ Emily Haley
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