

1
2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 ROBERT DOUCETTE, et al.,

7 Plaintiffs,

8 v.

9 RYAN ZINKE, et al.,¹

10 Defendants.

C18-859 TSZ

MINUTE ORDER

11 The following Minute Order is made by direction of the Court, the Honorable
12 Thomas S. Zilly, United States District Judge:

13 (1) Defendants' motion to dismiss, docket no. 9, is DENIED. The Court is
14 satisfied that the Nooksack Indian Tribe of Washington (the "Nooksack Tribe" or the
15 "Tribe") and the individuals elected to the Nooksack Tribal Council in 2017 (namely,
16 Richard George, Agripina Smith, Roy Bailey, and Katherine Romero (aka Canete)) are
17 not "necessary" persons within the meaning of Federal Rule of Civil Procedure 19(a)(1).
18 The Court can afford "complete relief" among the existing parties, *see Alto v. Black*, 738
19 F.3d 1111, 1126 (9th Cir. 2013),² and the Tribe and aforementioned council members do

20
21 ¹ Defendants propose to substitute Assistant Secretary for Indian Affairs Tara Katuk Mac Lean
22 Sweeney for John Tahsuda III. John Tahsuda was not, however, sued in his capacity as Acting
23 Assistant Secretary, but rather as Principal Deputy Assistant Secretary ("PDAS"), a position that
he continues to occupy. Thus, substitution of Assistant Secretary Sweeney for PDAS Tahsuda
is not authorized by Federal Rule of Civil Procedure 25(d). Because one of the decisions
challenged in this matter was taken by PDAS Tahsuda while he was exercising the authority of
Assistant Secretary for Indian Affairs, plaintiffs are GRANTED leave to amend their complaint
to join Assistant Secretary Sweeney as an additional defendant. Any amended complaint shall
be electronically filed within fourteen (14) days of the date of this Minute Order.

² In *Alto*, the Ninth Circuit concluded that the relief sought, namely remand to the Bureau of
Indian Affairs ("BIA") for redetermination of the plaintiffs' enrollment status, would be
"meaningful" as between the plaintiffs and the defendants (various Department of the Interior
and BIA officials) "even if it does not bind the Tribe directly." 738 F.3d at 1126. The Ninth

1 not have the requisite “legally protected interest” that might be impaired by their absence,
2 *see Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990); *see also Sac & Fox*
3 *Nation of Mo. v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001).³ Although the Tribe has
an interest in having a governing body, it does not have a legally protected interest in

4 Circuit reasoned that, unlike in matters in which a tribe was found to be “necessary” because the
injury at issue resulted from “the absent *tribe’s* action,” in *Alto*, the challenged decision was
5 “that of the named agency defendant[s].” *Id.* (emphasis in original). The plaintiffs in *Alto* were
Marcus Alto, Sr. and his descendants, who successfully applied in 1987 to be enrolled in the San
6 Pasqual Band of Mission Indians (the “San Pasqual Band”). *Id.* at 1116. In 2007, the plaintiffs’
membership was challenged on the ground that Marcus Alto, Sr., by then deceased, was adopted,
7 and did not have the requisite degree of blood to be enrolled. *Id.* The San Pasqual Band’s
enrollment committee voted to disenroll the plaintiffs and requested that the BIA approve its
8 decision. *Id.* at 1116-17. The BIA’s regional director denied the request, but the Assistant
Secretary for Indian Affairs reversed and issued a disenrollment order, which was the subject of
9 the suit in *Alto*. *Id.* at 1117. The Ninth Circuit observed that the plaintiffs did not “ask the
federal court to decide *ab initio* whether they meet the Band’s enrollment criteria,” but rather
10 sought “review under the APA’s arbitrary and capricious standard” of the Assistant Secretary’s
action in issuing the disenrollment order. *Id.* at 1123. Because the first three of plaintiffs’ five
11 APA claims stemmed from an injury that “resulted from the Secretary’s actions in ruling the
Altos ineligible for tribal membership, not from the Band’s prior actions with regard to the
12 membership issue,” the *Alto* Court ruled that the San Pasqual Band’s absence did not preclude
“complete relief” among the existing parties. *Id.* at 1127. The Ninth Circuit acknowledged that
13 enforcement issues might later arise if the San Pasqual Band declined to abide by the BIA’s
decision, but those problems, which were anticipated in the plaintiffs’ fourth and fifth APA
claims, were not before the *Alto* Court and did not affect its “complete relief” analysis. *Id.*

14 ³ In moving for dismissal pursuant to Rule 19, defendants rely on *Timbisha Shoshone Tribe v.*
U.S. Dep’t of the Interior, 290 F.R.D. 589 (E.D. Cal. 2013), *appeal dismissed as moot*, 824 F.3d
15 807 (9th Cir. 2016), but that case is distinguishable. Unlike in the current litigation, in *Timbisha*
Shoshone, the plaintiffs actually won the first of the two elections at issue and were challenging
16 the Assistant Secretary’s rejection of the first (2007) election’s results. The crux of the
plaintiffs’ claim was that they, and not the tribal council members elected in the second (2011)
17 election, were the proper governing body for the Timbisha Shoshone Tribe. Because the judicial
relief sought, namely invalidating the decisions rejecting the 2007 election and approving the
18 2011 election, would have had the effect of reinstating the plaintiffs as the tribal council, the
members of the tribal council who were elected in 2011 and facing potential ouster had a legally
19 protected interest in the litigation. *See id.* at 597. In contrast, plaintiffs in the instant case do not
suggest that they are the rightful members of the Nooksack Tribal Council. They assert only that
20 defendants acted arbitrarily and capriciously, abused their discretion, exceeded their authority,
and/or failed to comply with Department of the Interior regulations and policies in endorsing the
21 election in which plaintiffs made unsuccessful bids to be on the Nooksack Tribal Council. If the
Court were to grant relief to plaintiffs, the effect would *not* be to unseat the current members of
22 the Nooksack Tribal Council. Rather, defendants would be required to re-evaluate whether they
must interpret Nooksack tribal law in assessing the validity of the challenged election conducted
23 in 2017.

1 exactly who holds which office, and although the current council members have an
2 interest in keeping their positions, such interest is not legally protected if they procured
3 their seats improperly. In asking that the United States Department of the Interior
4 (“Interior”) and the Bureau of Indian Affairs be required (on the requested remand) to
5 abide by applicable regulations and policies and to exercise their discretion properly
6 when re-assessing the validity of the 2017 election, plaintiffs seek relief that would affect
7 only the future conduct of Interior’s and/or the BIA’s administrative process, and as to
8 the particular procedures prospectively used by a federal agency, neither the Tribe nor the
9 absent council members have a legally protected interest. *See Makah*, 910 F.2d at 558;
10 *see also Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256,
11 1261-62 (9th Cir. 2000).⁴

12 Even if the Tribe and/or council members elected in 2017 are “necessary”
13 persons, they are not “indispensable” within the meaning of Federal Rule of Civil
14 Procedure 19(b). The four factors outlined in Rule 19(b) weigh heavily in favor of this
15 action continuing. The risk of prejudice is minimal (and the Court need not be concerned
16 with the availability of means for lessening or avoiding prejudice) because the Tribe and
17 council members George, Smith, Bailey, and Romero (aka Canete) will be adequately
18 represented by the existing defendants, whose interests are aligned with those of the
19 absent persons. *See Sac & Fox Nation*, 240 F.3d at 1260 (observing that the plaintiffs’
20 claims “turn solely on the appropriateness of the Secretary’s actions, and the Secretary is
21 clearly capable of defending those actions”). In contrast, plaintiffs would have no
22 alternative forum in which their claims could be heard if the Tribe and/or the council
23 members elected in 2017 were deemed indispensable. *See id.*⁵ The Court cannot “in
equity and good conscience” dismiss this matter pursuant to Rule 19(b).

15 ⁴ Contrary to defendants’ assertion, plaintiffs do not seek “an order setting aside the Department
16 [of the Interior]’s recognition of the existing Council,” *see* Reply at 2 (docket no. 13), but rather
17 request a declaratory judgment that defendants’ departure from “established policy” was *inter*
18 *alia* “arbitrary and capricious,” *see* Compl. at § VII(A) (docket no. 1). In arguing that, to be
19 afforded “complete relief,” plaintiffs necessarily desire (and must have) more from the Court
20 than an order directed at Interior Secretary Zinke and/or other defendants because the Nooksack
21 Tribe need not comply with Interior’s decisions, *see* Reply at 8-9, defendants completely ignore
the sequence of events leading up to the 2017 election. The only reason that the 2017 election
was conducted was Interior’s insistence that it would not recognize the Nooksack Tribal Council,
for purposes of government-to-government relations, until the council was duly constituted in
accordance with tribal law. Defendants’ contention that they now cannot compel a valid election
is inconsistent with and undermined by Interior’s and BIA’s previous behavior, and their reliance
on *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496 (9th Cir.
1991), is misplaced.

22 ⁵ The Court is persuaded that *White v. Univ. of Cal.*, 765 F.3d 1010 (9th Cir. 2014), which was
23 cited by defendants, does not dictate a different result. In *White*, a divided panel of the Ninth
Circuit observed that “very little need” exists for balancing the Rule 19(b) factors when a

1 (2) In light of the ruling in Paragraph 1, above, and having reviewed the Joint
2 Status Report submitted by the parties, docket no. 14, the Court SETS the following dates
and deadlines:

3 Defendants' responsive pleading due	January 11, 2019
4 Administrative Record ⁶ shall be filed by	January 25, 2019
5 Plaintiffs' dispositive motion (not to exceed 24 6 pages in length) shall be noted for May 10, 2019, 7 and filed by	March 7, 2019
8 Defendants' consolidated response and cross- 9 motion (not to exceed 48 pages in length) shall be noted for May 10, 2019, and filed by	April 4, 2019
10 Plaintiffs' consolidated reply and response to cross-motion (not to exceed 36 pages in length) 11 shall be filed by	April 26, 2019
12 Defendants' reply (not to exceed 12 pages in length) shall be filed by	May 10, 2019

13
14
15
16 "necessary" person is immune from suit because "immunity itself may be viewed as the
17 compelling factor." *Id.* at 1028. The majority referenced what it described as a "wall of circuit
18 authority" standing for the proposition that dismissal under Rule 19 was proper when the absent
19 party is a tribe invested with sovereign immunity. *Id.* Every case, however, within the "wall of
20 circuit authority" involved an absent tribe that was a party or signatory to a contract sought to be
21 enforced in the litigation. In this matter, although the Memorandum of Agreement ("MOA")
signed by then Nooksack Tribal Council Chairman, Robert Kelly, Jr., was the vehicle via which
Acting BIA Northwest Regional Director Twyla Stange endorsed the 2017 election and PDAS
Tahsuda recognized the Nooksack Tribal Council, the parties to the MOA agreed that it was not
a binding contract, Ex. D to Galanda Decl. (docket no. 12-4 at 5), and plaintiffs do not seek in
this action to either enforce or invalidate the MOA. Thus, the "wall of circuit authority" cited in
White does not mandate a conclusion that the Nooksack Tribe is "indispensable" merely because
it is immune from suit.

22 ⁶ The administrative record shall be filed via the Case Management and Electronic Court Files
23 ("CM/ECF") system. A working hardcopy of the administrative record, tabbed and bound in a
three-ring notebook, must be provided to the Court at the time any dispositive motion is filed.

1 (3) Within fourteen (14) days of the date of this Minute Order, the parties shall
2 meet and confer and file a Joint Status Report indicating whether this matter should be
3 stayed pending a decision by the United States Court of Appeals for the Ninth Circuit in
4 Rabang v. Kelly, No. 18-35711 (on appeal from W.D. Wash. Case No. C17-88-JCC).

5 (4) The Clerk is directed to send a copy of this Minute Order to all counsel of
6 record.

7 Dated this 20th day of December, 2018.

8 William M. McCool
9 Clerk

10 s/Karen Dews
11 Deputy Clerk