No. 94157-2

SUPREME COURT OF THE STATE OF WASHINGTON

NORTH QUINAULT PROPERTIES, LLC, a Washington limited liability company; THOMAS LANDRETH, an individual; and BEATRICE LANDRETH, an individual,

Petitioners,

v.

STATE OF WASHINGTON; and PETER GOLDMARK, in his official capacity as Commissioner of Public Lands,

Respondents.

MEMORANDUM OF *AMICUS CURIAE* QUINAULT INDIAN NATION IN OPPOSITION TO PETITION FOR REVIEW

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I. INTRODUCTION

The Quinault Indian Nation ("Nation"), pursuant to RAP 13.4(h), asks the Court to deny the Petition for Review.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Nation files this [Proposed] *Amicus Curiae* Brief to provide additional factual and legal context for this Court concerning the status of Lake Quinault and the substantial interests of the Nation that are implicated by this Petition. The Nation asks this Court to deny review of the Court of Appeals' January 30, 2017 decision which correctly concluded that Petitioners' challenge to the "status" of Lake Quinault and the Nation's Reservation boundary cannot be countenanced.

III. STATEMENT OF THE CASE

On December 30, 2014, Petitioners filed a Federal Court lawsuit against the Nation and the State to seek, among others, a "court determination as to the status of Lake Quinault and the property rights of non-tribal property owners abutting the Lake and court determination as to the public's right to access of the Lake, its shore and lakebed." *North Quinault Properties LLC, et al. v. Quinault Indian Nation*, et al., 3:14-cv-06025-RBL (USDC, West. Dist. WA). CP 6, 57-87. Their current artful pleading to shoehorn this case into the public trust doctrine notwithstanding, which the Court of Appeals correctly labeled "doubtful",

the ownership status question remains exactly the judicial determination that Petitioners want this Court to review. Pet. App. A at 5.

On March 4, 2016, the Honorable Anne Hirsh of Thurston County Superior Court issued two orders that (1) granted amicus curiae status to the Nation and (2) granted the State's Motion for Summary Judgment that sought dismissal of the case under CR 19 because, among other things, the Nation and the United States are necessary parties that cannot be joined because of their respective unwaived sovereign immunity. CP 307-13.

On January 30, 2017, Division One of the Court of Appeals affirmed the Trial Court. In pertinent part, the Court of Appeals found that "It is uncontested that the Nation ***claims*** an interest in the subject of this action: Lake Quinault" and that "It is also uncontested that neither the Nation nor the United States can be made subject to suit absent its consent." Pet. App A. at 4 (emphasis in original). As a result, the Court concluded that "Only if the Nation and the United States were parties could there be a proper resolution of ownership issues that are at the heart of this case. In the absence of both, there cannot be a proper resolution of these issues. Accordingly, RCW 7.24.110 is not satisfied in either respect." *Id.* at 6. The instant Petition followed on February 22, 2017.

IV. ARGUMENT

The Petition does not present any issues that warrant review under RAP 13.4(b). First, the decision of the Court of Appeals does not conflict with *Automotive United Trades Organization v. State,* 175 Wash.2d 214, 285 P.3d 52 (2012), or any other decision of this Court or the Court of Appeals. Second, no substantial public interest will be advanced by accepting review. Although they continue to attempt to conceal this fact, the relief Petitioners seek requires a threshold finding that Lake Quinault is not land held in trust for the Nation by the United States that lies within the exterior boundaries of the Nation's Reservation. For purposes of this *amicus curiae* brief, the Nation will focus on the second issue.

This is a challenge to the "status" of Lake Quinault, seeking to shift jurisdiction and ownership away from the Nation to the State of Washington. *See generally* CP 5–35; App. Br. at 1 (stating, albeit incorrectly, that "(Lake Quinault) abuts the reservation of the [Nation], which Nation has unilaterally asserted ownership and jurisdiction over this navigable waterway..."); Pet. at 1 ("Appellants are property owners and Washington State citizens who own property on or near Lake Quinault and who have had their access to the Lake severely restricted or denied as a result of the [ ] Nation"); *id.* at 5 ("the Nation *claims* an interest in the Lake, but the Appellants argue there is no legally supportable basis for this

claim") (emphasis in original). Petitioners' arguments are wholly at odds with the facts and the law. To grant review, the Court would need to ignore the plain language of an Executive Order establishing the boundaries of the Quinault Indian Reservation and numerous Federal actions that affirm the Nation's long-standing ownership of Lake Quinault within the exterior boundaries of the Nation's Reservation.

Sovereignty over Lake Quinault is vested in the Nation and there is nothing warranting review under RAP 13.4(b)(1) or 13.4(b)(4). The Petition should be denied.

A. The Court Should Deny Review Because the Court of Appeals Correctly Determined the Nation Is A Necessary Party That Cannot Be Joined

Under CR 19, the court must determine whether a party is needed for just adjudication. *See Gildon v. Simon Prop. Group,* 158 Wash.2d 483, 494, 145 P.3d 1196 (2006) (citing *Crosby v. Spokane County*, 137 Wash.2d 296, 306, 971 P.2d 32 (1999); CR 19 (a)). As explained below, the Court of Appeals correctly dismissed this case in accordance with this Court's jurisprudence because the Nation should, but cannot be, joined based on the legal status of Lake Quinault.

1. Lake Quinault Definitely Lies Within the Nation's Reservation Boundaries

There is no credible dispute that Lake Quinault is within the Nation's Reservation and that United States holds title to the land under

Lake Quinault in trust for the Nation. Indian tribes are necessary parties to actions affecting their legal interests. *Wilbur v. Locke,* 423 F.3d 1101, 1113 (9th Cir. 2005) (internal quotation omitted). This issue is well-settled and does not warrant review under RAP 13.4(b).

First, this Court need look no further than the language of the 1873 Executive Order itself, which expanded the reservation set aside in the Treaty of Olympia and describes the eastern boundary of the Nation's Reservation as follows: "... thence in a direct line to the most southerly end of Quinaielt Lake; thence northerly ***around the east shore of said lake to the northwest point thereof***; ..." CP 276. Petitioners ignore the Executive Order to focus on the events occurring after 1891 at their peril. Tribal title to a reservation is the same whether the reservation has been created by statute or treaty or by executive order. *Parravano v. Babbitt*, 70 F.3d 539, 544 (9th Cir. 1995). Courts have uniformly held that treaties, statutes and executive orders must be liberally construed in favor of establishing Indian rights. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 (1985). In addition, once a reservation is established, there is a strong presumption that it remains intact. *See DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975). Courts do not lightly infer diminishment of reservations, and resolve any ambiguities concerning alleged diminishment in favor of the Indians. *Hagen v. Utah*, 510 U.S.

399, 410-11 (1994). The fact of statehood does not change this analysis. *See Moore v. United States*, 157 F.2d 760, 764 (9th Cir. 1946) (implied rights arising from executive order creating the Quileute Reservation take precedence over express rights granted to subsequently created state).

Second, Federal courts have also found that Lake Quinault is part of the Nation's Reservation. *See United States v. Washington*, 626 F.Supp. 1405, 1428 (W.D. Wash. 1981) (finding that the "Quinault Reservation . . . tapers to Lake Quinault about 21 miles inland, ***which is contained within the reservation and represents its easternmost portion.***"), *aff'd* 694 F.2d 188 (9th Cir. 1982) (Canby, J. concurring), *cert. denied,* 463 U.S. 1207 (1983) (emphasis added).

Third, the United States has concluded on three separate occasions that Lake Quinault has long been recognized to lie within the Nation's Reservation boundaries. In 1961, the United States concluded that "***boundaries of the reservation include the entire lake [and] the United States holds title to the bed of the entire lake in trust for the Indians of the Quinault Reservation.***" CP 277–79. In 2009, the U.S. Department of Interior Office of the Regional Solicitor in Portland Oregon took another look at the matter and again concluded, "***the Quinault Indian Tribe [ ] owns the entire lakebed of Lake Quinault because the entire lake falls within the boundaries of the Reservation***, which was established prior to

Washington entering into statehood." CP 280. And, most recently, in 2012, the U.S. Department of Interior Bureau of Land Management conduced a dependent resurvey of Lake Quinault which acknowledged "***The entire lakebed***, including the land between the high and law water mark, ***is therefore within the boundary of the reservation***." CP 339. The document affirms that Lake Quinault is "a Federal interest lakebed." *Id.*

A judgment rendered in the Nation's absence that purports to decide whether the State owns and can regulate Lake Quinault, which lies within the exterior boundaries of the Nation's Reservation, would greatly prejudice the Nation. *Confederated Tribes of the Chehalis Indian Reservation v. Lujan,* 928 F.2d 1496, 1498 (9th Cir. 1991) (Quinault Indian Nation is a necessary party to action challenging the Quinault's governing authority).

Indeed, for this Court to question the Nation's exercise of authority over the Lake in the Nation's absence, as Petitioners want this Court to do, would "interfer[e] with tribal autonomy and self-government". *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 59 (1978); *Mudarri v. State,* 147 Wash. App. 590, 606-07, 196 P.3d 153 (2009) (finding necessary party where, "as a practical matter", ruling would impact absent party). Petitioners' challenge to the "status" of Lake Quinault and what government can exercise jurisdiction over it simply cannot proceed in the

Nation's absence. *Dawavendewa v. Salt River Project*, 276 F.3d 1150, 1161-62 (9th Cir. 2002) (holding that tribal sovereign immunity bars joinder, and noting "[i]f the necessary party enjoys sovereign immunity from suit, some courts have noted that there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as 'one of those interests "compelling by themselves,"' which requires dismissing the suit").

2. The Nation Cannot Be Joined

The second step under CR 19(b) is also satisfied – there is no waiver of the Nation's inherent sovereign immunity. A waiver of sovereign immunity must be expressed, and the Nation has taken no express action to waive its immunity here, nor has such a waiver been alleged. *Wright v. Colville Tribal Enter. Corp.*, 159 Wash.2d 108, 112, 147 P.3d 1275 (2006). Joinder of the Nation is legally impossible.

B. The Court Should Deny Review Because Dismissal Was Appropriate As the United States Is Also A Necessary Party That Cannot Be Joined

Even if Petitioners could somehow avoid the absolute bar of the Nation's sovereign immunity, Petitioners still cannot challenge the Nation's authority to own and regulate Lake Quinault because, as the Court of Appeals correctly notes, they failed to join the United States.

Petitioners' entire case is built on an untruth that "the Nation has no legally supportable interest to the Lake." Pet. at 8. But saying so does not make it true and does not overcome the Executive Order, Federal case, and United States' actions to the contrary that are conveniently ignored by Petitioners. The decision of the Court of Appeals does not warrant review.

V. CONCLUSION

For the foregoing reasons, this case does not conflict with Supreme Court precedent or involve a matter of substantial public interest warranting review. The Nation respectfully requests this Court deny the Petition.

DATED April 18, 2017.

RESPECTFULLY SUBMITTED,

Rob Roy Smith, WSBA No. 33798
Attorneys for Amicus Curiae Quinault Indian Nation

PROOF OF SERVICE

I certify that on April 18, 2017, I caused to have served an original and one copy upon the Supreme Court Clerk's Office, and one true and correct copy upon Thomas Dickson, Elizabeth Dickson, Edward Callow, and Terence Pruit of the following **MEMORANDUM OF *AMICUS CURIAE* QUINAULT INDIAN NATION IN OPPOSITION TO PETITION FOR REVIEW** by the method(s) indicated below:

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DATED this 18th day of April, 2017, at Seattle, Washington.

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