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NO. 92458-9

SUPREME COURT OF THE STATE OF WASHINGTON

JORDYNN SCOTT,

Appellant,

v.

JOHN OR JANE DOE, Director of the Department of Licensing, a subdivision of the State of Washington, in his/her official capacity and the STATE OF WASHINGTON, and PETER'S TOWING, a Washington Corporation, and John and/or Jane Doe, unidentified Swinomish Tribal Police Officers and General Authority Police Officer pursuant to RCW 10.29 in their official Capacity and individually,

Respondents.

**RESPONSE BRIEF OF
DIRECTOR OF DEPARTMENT OF LICENSING**

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I. INTRODUCTION

The superior court properly dismissed Jordynn Scott's Complaint because she could not join the Swinomish Indian Tribal Community (Swinomish Tribe) as a party, which was an indispensable party in whose absence her claims could not proceed.

The Swinomish Tribe found heroin, marijuana, and drug paraphernalia in Scott's vehicle and forfeited the vehicle under Swinomish Tribal law. Scott brought suit in superior court. The Complaint sought declarations on the limits of the Tribe's police and judicial authority and the validity of its actions but did not name the Tribe as a party. In light of the nature of the claims and the absence of the Tribe, the superior court followed the language of Civil Rule (CR) 19 and case law and found the Tribe was necessary and indispensable and dismissed the case because the Tribe is immune from suit.

In her brief, Scott virtually ignores the CR 19 factors. Instead, she argues that the Tribe's sovereign immunity was either waived or immaterial because the Complaint listed two unnamed and unserved tribal officers as potential defendants. Her legally and factually meritless reasoning is that these officers were exercising power under RCW 10.92.020(2), a new statute that allows certain tribal police officers, in certain circumstances, to "exercise the powers of law enforcement of a

general authority Washington peace officer.” But to rely on this statute, she must assume that the unnamed tribal officers were enforcing Washington State law. They were not. The tribal officers seized her vehicle on Swinomish land pursuant to *tribal law*. Nothing in the record suggests the officers were exercising state authority under RCW 10.92, making the chapter immaterial.

The superior court properly dismissed the Complaint based on CR 19 because the Complaint unequivocally sought relief that would define the Swinomish Tribe’s police authority and judicial authority, and such claims could not in equity and good conscience proceed in the Tribe’s absence.

II. COUNTERSTATEMENT OF THE ISSUES

Where the Complaint sought judicial declarations regarding the authority and validity of practices by the Swinomish Indian Tribal Community (Swinomish Tribe) police and courts, did the superior court properly dismiss the Complaint under CR 19 for failure to join the Swinomish Tribe as an indispensable party?

III. STATEMENT OF THE CASE

The Swinomish Tribal Police discovered heroin, marijuana and drug paraphernalia in Scott’s vehicle. CP 38-39. The Swinomish Tribal Police seized the vehicle, and the Swinomish Tribe brought a forfeiture

proceeding pursuant to its criminal laws in the Swinomish Tribal Court, which issued an Order Granting Forfeiture. *Id.* A notice of the hearing in the tribal court was sent via registered mail to Scott but she did not file a written response. CP 38, Br. of Appellant at 1. The Swinomish Tribe later presented the Forfeiture Order to the Department of Licensing (Department), which transferred title from Scott to the Swinomish Tribe. CP 5-6.

After waiving the opportunity to challenge the forfeiture in tribal court, Scott brought this suit in state court. The Complaint challenged the Swinomish Tribal Police's authority to seize vehicles involved in controlled substance violations and the Swinomish Tribal Court's authority to issue forfeiture orders for the vehicles. *See* CP 3-9 (Complaint). She named John/Jane Doe Tribal Police Officers, Peter's Towing, and the Director of the Department as defendants. CP 3. The John/Jane Doe Tribal Police Officers were never identified, named, or served as Scott intended to "bring them before the court by way of a writ of attachment of an insurance company." CP 147. The Complaint sought a declaration from the Whatcom County Superior Court that the Swinomish Tribe had no "jurisdiction" over her. CP 6. It also sought a "declaration and injunction against any and all Swinomish tribal Police Officers from entering into Washington State and confiscating any private

property.” CP 8. It further sought damages under 42 U.S.C. § 1983, including punitive damages, against the unnamed tribal police officers. *Id.*

Based on these core claims regarding lack of tribal jurisdiction and authority, and the invalidity of tribal practices, the Complaint also sought a declaration and injunction against the Department from transferring a vehicle title based on *any* forfeiture order from *any* tribal court unless the transferee is a Native American. CP 8.

The Director filed a motion to dismiss under CR 19 for failure to join an indispensable party—the Swinomish Tribe. The motion showed that the Complaint sought to have the court determine the Swinomish Tribe’s rights and limits of authority in its absence.¹ CP 69-72. It also showed that the Swinomish Tribe could not be joined due to its sovereign immunity. CP 72-74. Concluding that the named defendants could not provide the relief Scott sought and that the Tribe would be prejudiced by any relief granted with no ability to shape relief in a way to mitigate the prejudice against the tribe, the Whatcom County Superior Court dismissed the suit. CP 185.

¹ The Complaint sought a “declaration . . . that the Swinomish Tribe has no jurisdiction over the plaintiff.” CP 6. In a motion for declaratory judgment that was denied in light of the CR 19 dismissal, Scott sought “declaratory judgment that the ongoing practice of the Swinomish Nation Police Department of seizing and forfeiting the motor vehicles owned by non-tribal members for violation of the Swinomish Indian Nation’s Drug Forfeiture statute violates federal law.” CP 184.

Scott appealed, requesting direct review by the Washington State Supreme Court. The Director opposed direct review.

IV. STANDARD OF REVIEW

This Court reviews a “trial court’s decision under CR 19 for an abuse of discretion and review[s] any legal determinations necessary to that decision de novo.” *Automotive United Trades Orgs. v. State (AUTO)*, 175 Wn.2d 214, 221, 285 P.3d 52 (2012), citing *Gildon v. Simon Prop. Grp. Inc.*, 158 Wn.2d 483, 493, 145 P.3d 1196, 1202 (2006). When there are no disputed factual issues, this Court sits in the same position as the trial court and may independently evaluate the CR 19(b) indispensability criteria. *Id.* at 229.

V. ARGUMENT

The superior court dismissed this case for failure to join a necessary and indispensable party. This is the sole issue presented by this appeal. Questions raised by Scott in her brief about “whether RCW 10.92 will function” are not before the Court because that statute only operates when tribal officers enforce Washington law. Here, they were enforcing tribal law on tribal land. This Court should affirm the dismissal because the superior court properly determined Scott sought relief that would prejudice the rights of the Swinomish Tribe, making the Tribe both

necessary and indispensable. Given that the Tribe could not be joined due to its sovereign immunity, the matter was properly dismissed.

A. The Superior Court Properly Dismissed Scott's Case Because the Swinomish Tribe Is a Necessary and Indispensable Party That Could Not Be Joined Due To the Tribe's Sovereign Immunity

Under CR 19, when determining whether to dismiss a case because a necessary party is indispensable and cannot be joined, the court employs a three step analysis. *AUTO*, 175 Wn.2d at 222. First, the court determines whether an absent party is “necessary” for a just adjudication under CR 19(a).² *Id.* If the party is “necessary,” the court next asks whether the non-party can be joined. *Id.* Finally, if joinder is not possible, the court determines whether the non-party is “indispensable” by weighing

² Washington Civil Rule 19(a) provides:

(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede the person's ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and the person's joinder would render the venue of the action improper, the joined party shall be dismissed from the action.

the four factors outlined in CR 19(b)³ to determine whether, “in equity and good conscience,” the case should be dismissed because the non-party is “indispensable.” *Id.* The Director, as the party urging dismissal, had the burden of persuasion. *Id.* If it appears from an initial appraisal of the facts that there is an unjoined, indispensable party, the burden shifts to Scott, the party whose interests are adverse to the unjoined party, to negate this conclusion. *Id.*

As shown below, the Swinomish Tribe is necessary for a just adjudication of the claims Scott raises in her complaint. But the Tribe cannot be joined because of sovereign immunity. And, the Tribe is indispensable because a judgment rendered in the Tribe’s absence will prejudice the Tribe, will not be adequate, and Scott has other adequate remedies.

³ Washington Civil Rule 19(b) provides:

(b) Determination by Court Whenever Joinder Not Feasible. If a person joinable under (1) or (2) of section (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person’s absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person’s absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

1. The Swinomish Tribe is a necessary party because Scott sought declaratory and injunctive relief affecting the Tribe's jurisdiction, authority, and police practices to enforce its own forfeiture laws.

The Swinomish Tribe is necessary under the plain language of CR 19(a), which describes three ways to determine that a party is “necessary.” First, a party is necessary if, in its absence, the court cannot afford complete relief among existing parties. CR 19(a)(1). Second, a party is necessary if it has an interest in the action and resolving the action in its absence may, as a practical matter, impair or impede its ability to protect that interest. CR 19(a)(2)(A). Third, a party is necessary if it has an interest in the action and resolving the action in its absence may leave an existing party subject to inconsistent obligations because of that interest. CR 19(a)(2)(B). Here, the Swinomish Tribe is necessary under the first two options: the superior court could not have afforded complete relief in the Tribe's absence, and the Tribe had an interest in the subject of the suit such that resolving the interest without the Tribe would impede its ability to protect that interest.

Under the first option, the superior court could not have afforded complete relief among the existing parties based on the relief Scott requested. CR 19(a)(1). The Complaint requested a “declaration from [t]his court that the Swinomish Tribe has no jurisdiction over the plaintiff”

and an injunction preventing the Department from “honoring in the future any orders from any tribal court directing it to change ownership and issue new certificates of title for vehicles in favor of the tribe unless the tribe can demonstrate that the former owner is a Native American.” CP 6. In her motion for declaratory judgment, Scott also sought “declaratory judgment that the ongoing practice of the Swinomish Nation Police Department of seizing and forfeiting the motor vehicles owned by non-tribal members for violation of the Swinomish Indian Nation’s Drug Forfeiture statute violates federal law.” CP 184. But an injunction and declaration against the Director would not bind the Tribe or its employees. *City of Seattle v. Fontanilla*, 128 Wn.2d 492, 503, 909 P.2d 1294 (1996) (judgment does not bind a non-party except in certain limited circumstances). Because Scott sought both declarations and injunctions concerning the Swinomish Tribe’s “jurisdiction” and police “practices,” the Court could not afford complete relief in the Tribe’s absence. CR 19(a)(1). The Tribe is therefore a necessary party to adjudicating such matters.

Under the second option, the Swinomish Tribe is necessary because it has a direct interest in the declarations and injunctions that are the subject of the suit. CR 19(a)(2). A party has an interest in the subject of the suit, making it necessary, if the absent party claims a legally

protected interest in the action and the absent party's ability to protect that interest will be impaired or impeded. *Wilbur v. Locke*, 423 F.3d 1101, 1112 (9th Cir. 2005), *abrogated on other grounds by Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 130 S. Ct. 2323, 176 L. Ed. 2d 1131 (2010).⁴ The absent party's interest must be "sufficiently weighty." *AUTO*, 175 Wn.2d at 224 (Indian tribes' interest in receiving payments in accordance with State fuel tax compacts was a legally protected interest making tribes "necessary" parties). The Swinomish Tribe has an undeniable interest in the application of its criminal code, the practices of its police, and the jurisdiction and orders of its Tribal Court.⁵

The Tribe's status as a necessary party is strongly supported by analogous case law. *See Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991). In *Chehalis*, the Court upheld a CR 19 dismissal based on the indispensable status of

⁴ Though federal decisions interpreting the federal counterparts of Washington rules are not binding on Washington courts, Washington courts treat them as persuasive authority. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182, 188 (1989).

⁵ Whether a federally recognized Indian Tribe can forfeit a nonmember's vehicle cannot be addressed in this appeal. Should a nonmember seek to dispute this issue, the State reserves the right to address it in a proper forum. As shown by the briefing, the Director's argument need only address how the Tribe is both necessary and indispensable to the claims made by Scott. Given the nature of those claims, it is immaterial whether or how Scott could have prevailed if she had not waived her opportunity to challenge the Tribe's forfeiture in the tribal court, or if she had properly mounted a collateral attack to the tribal action in a federal court. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852-53, 105 S. Ct. 2447, 2452, 85 L. Ed. 2d 818 (1985) (allowing a party to litigate whether a tribal court exceeded the limits of its jurisdiction as a federal question under 28 U.S.C. § 1331).

the Quinault Indian Nation, because the Quinault Tribe had an interest in litigation challenging its governing authority within the Quinault Reservation. *Id.* at 1499-1500. Here, Scott's claims and requested relief similarly sought to impair the Swinomish Tribe's ability to exercise authority within the Swinomish Reservation—specifically, the Tribe's authority to enforce its criminal code through its Tribal Police and Tribal Court. As in *Chehalis*, adjudicating Scott's asserted claims without the Swinomish Tribe would "impair or impede" the Tribe's interests. *See* CR 19(a)(2)(A).

Finally, the Tribe's interests could not be adequately represented by the Director, who has no stake in whether the Tribe has authority to seize and forfeit a non-member's vehicle. The Director is charged with administering the laws relating to the issuance of vehicle titles and registrations. *See* RCW 46.01.030(1). This is consistent with the holding in *AUTO* where the Court held the State cannot adequately represent the tribes, as the State "lays no claim to a special trust relationship with the Indian tribes." *AUTO*, 175 Wn.2d at 225. Nor is there any other defendant in the case who would represent the Tribe's interest. The unnamed individual tribal police officers identified in the caption were never served and never identified, so Scott's reliance on them is irrelevant. In any event, they cannot represent the Tribe's interests in the issuance

and enforceability of tribal court orders given that they were unnamed and not made into parties.

In short, the superior court was correct in assessing that the Swinomish Tribe was a necessary party to this lawsuit.

2. The Swinomish Tribe cannot be joined due to sovereign immunity.

The second step in the CR 19 analysis is to determine whether the necessary non-party can be joined. Joinder of the Tribe is not feasible because it is immune from suit. *Equal Emp't Opportunity Comm'n v. Peabody W. Coal Co.*, 400 F.3d 774, 780-81 (9th Cir. 2005) (joinder is not feasible when tribal sovereign immunity applies.). Indian tribes are immune from lawsuits or court process in the absence of congressional abrogation or waiver. *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 112, 147 P.3d 1274 (2006). *See generally AUTO*, 175 Wn.2d at 226; *Chehalis*, 928 F.2d at 1499. And for the reasons discussed below in section V.B, the Tribe did not waive its immunity from suit. Given that the Swinomish Tribe cannot be involuntarily joined to this lawsuit, the question becomes whether the Tribe is indispensable as defined by CR 19(b).

With regard to Scott's apparent attempt to bypass the Tribe's sovereign immunity bar by naming John and Jane Doe tribal officers, this

ploy fails. First, she has never identified or served any individual officers. CP 147. Second, her claims affect the interests of the Tribe as a government, not the interests of the Tribe's individual employees.⁶ Therefore, it is immaterial in this case that tribal immunity does not bar a suit for prospective non-monetary relief against tribal officers allegedly acting in violation of federal law. *Burlington N. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991), *overruled on other grounds by Big Horn Cnty. Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000).

⁶ Tribal sovereign immunity affects a court's *personal jurisdiction* over a tribal government. It is entirely different from whether state law applies to a tribe or its members. Moreover, sovereign immunity generally does not create a barrier to personal jurisdiction over an individual. These principles are well established by the United States Supreme Court. For example, the State of Oklahoma argued that as a result of tribal sovereign immunity, it had authority to tax but no remedy. The Court said:

There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. See *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 514, 111 S. Ct. 905, 912, 112 L. Ed. 2d 1112 (1991). In a fishing case, the Court explained:

The doctrine of sovereign immunity which was applied in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S. Ct. 653, 84 L. Ed. 894, does not immunize the individual members of the Tribe. ... [T]he successful assertion of tribal sovereign immunity in this case does not impair the authority of the state court to adjudicate the rights of the individual defendants over whom it properly obtained personal jurisdiction.

Puyallup Tribe v. Washington, 433 U.S. 165, 171-73 (1973).

Nor is there any reason to allow Scott further time to join the unserved, unnamed officers. A plaintiff can name, as parties to a suit, officials who are responsible for ongoing implementation of the allegedly unlawful practice to proceed under an analogy to *Ex parte Young* rationale. *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (internal citation omitted) (holding tribal official allegedly responsible for administering and collecting a challenged tax was not immune from suit seeking declaratory and injunctive relief; but, claim against tribal official who was not responsible for enforcing the tax was barred by tribal sovereign immunity). However, Scott does not argue in her opening brief, nor does the Complaint allege, that unnamed tribal police officers acting in their official capacities have any authority over the contents of the Swinomish Tribe's criminal code, operations of the Swinomish Tribal Court, or forfeitures or other permanent deprivations of property. Rather, the relief sought by Scott would on its face operate against the Swinomish Tribe and the Swinomish Tribal Court. Because these entities are immune from suit, joinder is not feasible.

3. The Swinomish Tribe is an indispensable party.

The superior court properly determined that the Swinomish Tribe is an indispensable party and that the case should be dismissed in the Tribe's absence. All four factors of this third step in the CR 19 analysis

weigh in favor of determining that the Swinomish Tribe is indispensable. The four factors are: (1) the prejudice to the absent Tribe; (2) whether the Court could shape any relief granted to reduce any prejudice; (3) whether an adequate remedy can be awarded without the absent Tribe; and (4) whether there exists an adequate remedy if the action is dismissed for nonjoinder. CR 19(b)(1)-(4). These factors must be weighed using a “careful exercise of discretion” that “defies mechanical application.” *AUTO*, 175 Wn.2d at 229. After the court determines how heavily a factor weighs in favor for or against dismissal, the court next determines whether the “case can proceed ‘in equity and good conscience’ without the absentee in light of these factors.” *Id.* The doctrine of indispensability “preserves the rights of absentees to be heard in controversies affecting their rights.” *Id.* at 227.

Here, all four factors weigh in favor of dismissal of the case. Scott sought declarations, damages, and injunctive relief affecting the rights of the Tribe, and her case could not in equity and good conscience proceed without its presence.

a. Adjudication without the Swinomish Tribe would have resulted in actual prejudice to its rights.

Adjudication without the Swinomish Tribe would have resulted in actual prejudice to the Tribe if Scott had prevailed, making the first factor

weigh heavily in favor of dismissal. The first factor considers the extent to which a judgment rendered in the Tribe's absence might prejudice the Tribes or the existing parties. CR 19(b)(1). In evaluating this factor, the Court in *AUTO* accorded heavy weight to the Tribes' sovereign status and their self-governance as "respect for the inherent autonomy Indian tribes enjoy has been particularly enduring." *AUTO*, 175 Wn.2d at 229-30 (quoting *Florida Paralegic Ass'n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1130 (11th Cir. 1999)). Here, there is more than potential prejudice to the Tribe. If Scott obtained the relief she requested, it would actually prejudice the Tribe's interests. Specifically, the requested relief would impair the Tribe's ability to apply its criminal code as it has interpreted it. It would bind the conduct of its Tribal Court. It would address the validity of tribal police practices. And it would do all this after Scott failed to make any objections in Swinomish Tribal Court.

b. The prejudice to the Swinomish Tribe could not be reduced by protective provisions in the judgment.

Given the relief Scott sought in her Complaint, the prejudice to the Swinomish Tribe could not be reduced by any protective provisions in the judgment. This second factor considers the extent to which any prejudice could be lessened or avoided by protective provisions in the judgment, shaping the relief, or other measures. CR 19(b)(2). The Complaint

suggests no way in which such prejudice could be lessened or avoided under CR 19(b)(2). Nor did Scott make any arguments below or to this Court that abandon any of her claims affecting the Swinomish Tribe's authority. Thus, the relief Scott requests—damages against the tribal police officers, an order that the Swinomish Tribe has no jurisdiction over her, and a prohibition against the Department from transferring title pursuant to a tribal court order—squarely impairs the absent Tribe's interests.

In *AUTO*, the plaintiff proposed joining the tribal officials who signed or enforced fuel tax compacts as a prejudice-lessening measure. *AUTO*, 175 Wn.2d at 232. But there, as here, that argument was unpersuasive because “the real party in interest” in a suit concerning the Tribe's police power and court orders “is the tribe itself—which is immune.” *Id.* Therefore, the prejudice to the interests of the Tribe cannot be mitigated because of the relief sought by Scott.

c. Adequate judgment cannot be rendered in the Swinomish Tribe's absence.

Because Scott's requested relief concerns tribal authority, an adequate judgment cannot be rendered in the Swinomish Tribe's absence. CR 19(b)(3). The intent of the analysis under this third factor is not to examine the adequacy of the judgment from the point of the view of the

plaintiff but to determine whether a judgment would comport with “the interest of the courts and public in complete, consistent, and efficient settlement of controversies.” *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 11, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968) (analyzing identical provision in Federal Rule of Civil Procedure 19).

In *Mudarri v. State*, the court held that this factor was dispositive of an Indian tribe being an indispensable party. *Mudarri v. State*, 147 Wn. App. 590, 606, 196 P.3d 153 (2008). The court held that the “Tribe’s sovereignty renders it uniquely immune to a private lawsuit without its consent, and the Tribe has not consented to Mudarri’s lawsuit. In the Tribe’s absence, the trial court cannot render a judgment on Mudarri’s challenges to the State-Tribe Compact; thus, the trial court cannot adequately address these claims.” *Id.* Here, the same is true. The requested relief seeks to bind the Tribe and cannot be rendered in the Tribe’s absence, making dismissal proper.

d. An alternative forum is available.

Because Scott has (or had) other forums available to her, the fourth factor, “whether a plaintiff will have an adequate remedy if the action is dismissed for nonjoinder,” also favors dismissal. CR 19(b)(4). This factor “indicates that the court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum

where better joinder would be possible.” *AUTO*, 175 Wn.2d at 233 (quoting Fed. R. Civ. P. 19 advisory committee note).

Scott has two obvious forums for airing her disagreement with the tribal police seizure of, and the tribal court order forfeiting, her vehicle: tribal court and federal court. At the tribal court, Scott could have challenged the forfeiture proceeding while it was pending; she apparently chose not to do so. CP 103. In federal court, Scott can properly litigate the question of tribal authority. This is because the question of whether a tribal court has exceeded the lawful limits of its jurisdiction is a federal question under 28 U.S.C. § 1331. *Nat’l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852-53, 105 S. Ct. 2447, 2452, 85 L. Ed. 2d 818 (1985). Tribal officials, including tribal court judges, may be sued in federal court for prospective injunctive relief under the doctrine of *Ex parte Young*. E.g., *Michigan v. Bay Mills Indian Cnty.*, 134 S. Ct. 2024, 2035, 188 L. Ed. 2d 1071 (2014) (“analogizing to *Ex parte Young*, 209 U.S. 123 (1908), tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct”); *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176 (9th Cir. 2012) (tribal officials); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154-56 (10th Cir. 2011) (tribal court judge).

The availability of alternative forums is the critical difference between this case and *AUTO*, which Scott cites as authority for reversing dismissal of her case. In *AUTO*, the plaintiffs brought claims that could only be challenged in a Washington State court because they challenged the legality Washington State fuel tax compacts entered into with the tribes pursuant to a Washington State statute. *AUTO*, 175 Wn.2d at 219. Here, however, Scott has other, more appropriate, avenues to seek relief concerning the tribal authority and forfeiture.

And even if there were not an alternative forum, “this factor is all but foreclosed as a consideration when the absent party exercises sovereign immunity [because] [t]he Ninth Circuit has consistently held that a tribe’s interest in sovereign immunity outweighs the lack of an alternative forum.” *Skokomish Indian Tribe v. Goldmark*, 994 F. Supp. 2d 1168, 1192 (2014) citing *United States v. Washington*, 573 F.3d 701, 709 (9th Cir. 2009); see also *Mudarri*, 147 Wn. App. at 606 (Although an indispensable party’s sovereign immunity may leave a party with no forum for its claims, the lack of an alternative forum does not automatically prevent dismissal based on the inability to join an indispensable party that has not waived its sovereign immunity). *But see AUTO*, 175 Wn.2d at 233 (“An absentee’s sovereign immunity need not trump all countervailing considerations to require automatic dismissal.

Instead, courts must carefully consider the circumstances of each case in balancing prejudice to the absentee's interest against the plaintiff's interest in adjudicating the dispute.”). Thus, consideration of this factor in CR 19(b)(4) favors dismissal.

B. RCW 10.92 Is Irrelevant to This Case

Scott did not explicitly address the three part CR 19 inquiry or four factor test for indispensability before the superior court. CP 144-159. Nor does she sufficiently address the issue in her briefing before this Court to negate the conclusion that the Tribe is a necessary and indispensable party. *See* Br. of Appellant at 27-28. Instead, she argues that this case is about how “RCW 10.92 will function.” Br. of Appellant at 8. She argues that sovereign immunity does not prevent her from seeking to attach insurance coverage of the Tribe under RCW 10.92. *Id.* at 18. But these arguments about RCW 10.92 are legally and factually immaterial in this case and do not overcome the conclusion that the Tribe is indispensable.

RCW 10.92 is irrelevant because that statute does not even begin to work until a tribal officer acts to enforce a Washington State law. *See* RCW 10.92.020. Under RCW 10.92.020(1), a tribal police officer, in the circumstances proscribed by the statute, is “authorized to act as a general authority Washington peace officer . . . has the same powers as any other general authority Washington peace officer to enforce *state laws in*

Washington.” (emphasis added). Thus, the statute is peculiarly about when a tribal officer might exercise state law; it has nothing to do with when a tribal officer exercises tribal authority. To allow its officers to exercise state authority, the statute requires the tribe to acquire liability insurance to cover “tortious conduct of tribal police officers *when acting in the capacity* of a general authority Washington peace officer.” RCW 10.92.020(2)(a)(ii) (emphasis added).

Nothing in RCW 10.92 purports to operate as a waiver of a tribe’s sovereign immunity when a tribal police officer acts to enforce *tribal laws*. The statute states only that if a tribal police officer engages in tortious conduct *when enforcing a Washington State law*, the statute prohibits the Tribe from raising a defense of sovereign immunity to the extent of the policy coverage. RCW 10.92.020(2)(a)(ii). However, the statute also makes clear that when acting as a tribal police officer, “Nothing in [the] chapter impairs or affects the existing statute and sovereignty of [the] sovereign tribal governments.” RCW 10.92.020(7). Thus, under the plain language of the statute, even the fact that a tribal officer may in certain circumstances exercise state authority under RCW 10.92, there is no waiver of the Tribe’s general sovereign immunity. And, relevant to this case, there is certainly no suggestion of waiver when a tribal police officer acts to enforce *tribal laws*—as in this case.

Scott, however, argues that whenever tribal officers who are qualified to act under RCW 10.92.020 go beyond the limit of their tribal authority, they act to enforce Washington State laws and trigger RCW 10.92. This makes no sense. There is no evidence that the tribal officers acted to enforce Washington law. Rather, the record is undisputed that both the seizure and forfeiture occurred pursuant to the Swinomish Tribe's criminal code and a tribal court order. Br. of Appellant at 1. Scott relies on three cases to support her argument that whenever a tribal police officer who has authority under RCW 10.92 exceeds their authority as a tribal police officer they are enforcing Washington State laws. These cases are clearly distinguishable.

First, in *Bressi v. Ford*, the tribal police conceded they were acting under color of state law as cross-deputized officers when they issued citations for violations of Arizona state law. *Bressi v. Ford*, 575 F.3d 891, 895 (9th Cir. 2009). The only complicating factor of that case, that Scott cites to, was that the officers had set up a road block on a portion of the state highway that was within the reservation. *Id.* at 895-96. Thus the issue was tribal authority over non-Indians on public right-of-ways. *Id.* at 896. But, as an Arizona case, it sheds no light on the operation of RCW 10.92.

Second, *State v. Eriksen* is distinguishable because the court held only that tribal police officers lack the inherent authority to stop and detain non-Indians on ordinary state land outside the Indian reservation. *State v. Eriksen*, 172 Wn.2d 506, 515, 259 P.3d 1079, 1084 (2011). Like *Bressi*, *Eriksen* does not address the issue of tribal authority solely on tribal land when enforcing a tribal ordinance. *Eriksen* did not involve officers who were exercising authority under RCW 10.92, so there is no holding or implication that tribal officers with RCW 10.92 authority would somehow open their tribal employer to a suit like Scott's.

Third, Scott cites *Tenneco Oil Co. v. The Sac and Fox Tribe of Indians of Oklahoma*, 725 F.2d 572 (10th Cir. 1984), for the proposition that though the Tribe may have sovereign immunity, its individual officers do not when they act beyond their powers. Br. of Appellant at 23-24. Again, this case has nothing to do with RCW 10.92 and does not aid her argument. Moreover, as discussed above, Scott seeks relief that concerns the Tribe as a sovereign, by addressing its authority, jurisdiction, and validity of police practices. That type of relief runs against the Tribe, not individual officers. And, the point is moot given that Scott did not name or serve any individual tribal officers.

In short, the Swinomish Tribe would likely disagree that it did not have the authority to forfeit Scott's car. This obvious point of contention

underscores the necessity of the Tribe's participation in the claims brought by Scott concerning the Tribe's authority. Accordingly, dismissal under CR 19 was appropriate.

C. The Director Does Not Claim That She Has Tribal Sovereign Immunity

Scott incorrectly argues that the Director asserted the tribe's sovereign immunity on her own behalf. Br. of Appellant at 25. The Swinomish Tribe's sovereign immunity is a fact that prevents it from being joined as a party. The Director does nothing more than include this fact in the CR 19 analysis.

Further unavailing is Scott's argument that whether the Swinomish Tribal police officers were acting to enforce Tribal law or state law is an issue that the unnamed tribal officers or their insurance companies could make at trial. Br. of Appellant at 20. This argument utterly ignores the fact that the only party to this lawsuit is the Director. The unnamed tribal officers are both unnamed *and* unserved. Though Scott was ready with a writ of attachment to attach an insurance policy, Scott did nothing with the writ for the two months between its issuance and the CR 19 hearing.

D. Attorney Fees Should Not Be Awarded in This Case

Attorney fees may be awarded only when authorized by "contract, statute, or recognized ground in equity." *Bowles v. Washington Dep't of*

Ret. Sys., 121 Wn.2d 52, 69 (1993). Scott appears to make four arguments to justify her request for attorney fees to this Court. All four arguments fail.

First, Scott is not entitled to attorney fees based on her 42 U.S.C. § 1983 claim under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, because she is not a "prevailing party." See Br. of Appellant at 28-29. To claim that status—and the award of attorney fees—she must have obtained "actual relief on the merits of [her] claim [that] materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-112, 113 S. Ct. 566, 572-73, 121 L. Ed. 2d 494 (1992). Because Scott's case was dismissed under CR 19, even a reversal of that ruling would not make her a prevailing party for attorney fees under 42 U.S.C. § 1988. *Sole v. Wyner*, 551 U.S. 74, 82, 127 S. Ct. 2188, 2194, 167 L. Ed. 2d 1069 (2007) (a party is not prevailing unless and until there is a material change in the legal relationship of the parties).

Second, Scott is not entitled to attorney fees under the "common fund" theory. See Br. of Appellant at 29. That theory "authorizes attorney fees only when the litigants preserve or create a common fund for the benefit of others as well as themselves." *Bowles v. Washington Dep't of Ret. Sys.*, 121 Wn.2d 52, 70 847 P.2d 440, 449 (1993). An example of

when a “common fund for the benefit of others” was created in a case, thus justifying attorney fees, was when plaintiffs successfully increased the funds available for the payment of Washington State pensions. *Id.* But here, Scott neither prevailed nor successfully increased common funds benefitting others. Indeed, there is no colorable basis to even believe that her case could be certified as a class action.

Third, attorney fees are not appropriate based on the “bad faith” of the Director. *See* Br. of Appellant at 30. Scott cites no case law that would support her claim. Moreover, she bases her argument of “bad faith” and “misconduct” on nothing more than the Director’s disagreement with her legal interpretation of RCW 10.92. If this were true, the State would act in bad faith every time it defended a lawsuit—an untenable and absurd proposition.

Fourth, there should be no attorney fees under the private attorney general doctrine—even if she was correct that she is somehow advancing the interests of state of law. *See* Br. of Appellant at 30. As she explicitly concedes in her brief, this theory of attorney fees has been rejected by the Washington State Supreme Court in *Blue Sky Advocates v. State*, 107 Wn.2d 112, 122, 727 P.2d 644 (1986). *Id.* Scott is not entitled to attorney fees.

VI. CONCLUSION

For the foregoing reasons, the Director respectfully asks this Court to affirm the superior court's dismissal of the Complaint for failure and inability to join a necessary and indispensable party.

RESPECTFULLY SUBMITTED this 4th day of May, 2016.

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PROOF OF SERVICE

I, Amy Phipps, certify that I caused a copy of this document—
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I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 4th day of May, 2016, at Olympia, Washington.



AMY PHIPPS, Legal Assistant