The Comparative Rights of Indispensable Sovereigns

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I. INTRODUCTION

There is a long history of adjudication of the rights and responsibilities of Indians and Indian tribes in their absence. For example, during and after the nineteenth century treaty era the Michigan Ottawa and Chippewa Tribes, a time when the tribe ceded millions of acres of land to the federal government in exchange for permanent homes and protection from the encroachments of non-Indian settlers,[1] railroads, and

1. *See* United States v. Michigan, 471 F. Supp. 192, 226 (W.D. Mich. 1979), *stay granted,* 623 F.2d 448 (6th Cir. 1980), *modified,* 653 F.2d 277 (6th Cir. 1981), *cert. denied,* 454 U.S. 1124 (1981):

> The dominant motive [for the United States to enter into treaty negotiations in 1835] appears to have been to cheat the Indians out of their lands and reduce their holdings to the reservations. Thereby the Indians would be deprived of their natural habit of roaming the range of the lands on their summer and winter migrations. Thereby the Indians would be deprived of their lands before they realized their eventual value. The

land speculators, non-Indians used legal processes to divest Ottawa and Chippewa families from their rights to the land.[2] Often, non-Indian land speculators and settlers waited until the seasons when Indian families left for the wetlands in order to harvest wild rice, cattails, maple sugar, and other crops critical to their livelihood.[3] In their absence, legally savvy non-Indians would appear in Traverse City courts and argue that the Indians had abandoned their lands.[4] Notice was rarely given to Indians, few of whom were knowledgeable in Euro-American legal practice, or notice was intentionally delivered to an incorrect address.[5] The local courts, literally in league with the plaintiffs, would proceed in the absence of the Indians who normally resided on the parcel at issue.[6] The courts would declare, summarily, that the Indians had broken the treaties by leaving their homes and abandoning their homestead.[7] Titles would be granted to the non-Indian plaintiffs.[8] When the Indians returned from their traditional and seasonal harvest, their land no longer belonged to them—it belonged to non-Indian plaintiffs.[9] In another example, state and local governments would initiate taxation of the real property of Indians in violation of the treaties, sometimes raising taxes with the explicit intention of driving Indians from the land.[10] Eventually,

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figure received for the land—12½-13 cents per acre—indicates that the Indians were cheated out of their land.

Id. at 226 (citations to record omitted). *See generally* FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 15-23 (1995) (describing the treaty origins and purposes of Indian reservations).

2. *See, e.g.*, Aish-Ka-Bwaw v. Schluttenhofer, 14 Pub. Lands Dec. 548, 548, 1892 WL 885 (1892) (reversing cancellation of Indian homestead entry that had been based on abandonment). *See generally* Indian Homesteads, 4 Pub. Lands Dec. 143, 143, 1885 WL 4675 (1885):

> On the 14th of March, 1877, my predecessor directed a suspension of action upon certain contested Indian homestead entries in Ionia and Traverse City districts, Michigan, subsequently consolidated at Reed City. This was upon complaint and representation that the contests, made by white persons, were instituted for the purpose of taking advantage of the Indians' imperfect knowledge of the requirements of the land laws, and possibly meagre compliance, and thus after depriving them of their homes, such white persons and others in complicity with them were aiming to secure entries upon the land for their own benefit.

Id. at 143.

3. *Cf.* JAMES M. MCCLURKEN, GAH-BAEH-JHAGWAH-BUK: THE WAY IT HAPPENED 80 (1991).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *See* MCCLURKEN, *supra* note 3, at 79-81.

9. *Id.* at 80.

10. Bruce Alan Rubenstein, Justice Denied: An Analysis of American Indian-White Relations in Michigan, 1855-1889, at 117 (1974) (unpublished Ph.D. dissertation, Michigan State University). On the Little Traverse Bay Bands of Odawa Reservation, an Emmett County official

the taxing government would initiate a tax foreclosure of the Indian lands.[11] Millions of acres of Indian land across the nation were lost due to tax foreclosures.[12] Often, the Indians continued to live for years on the lands they believed to be secured to them by treaty.[13] Eventually, non-Indians would purchase the tax deed from the local government and force the Indian family off their land, which may have been occupied and improved for years.[14] This history is not specific to lower courts. Many fundamental United States Supreme Court decisions defining tribal civil and criminal regulatory and adjudicatory jurisdiction and Indian rights, were decided without the presence of Indian tribes.[15]

In the last thirty to forty years, most Indians and Indian tribes have acquired a modicum of legal savvy sufficient to defeat most spurious challenges to their land title and sovereignty.[16] However, the time-honored tradition of litigating the rights of Indians and Indian tribes in their absence continues in the operation of the compulsory joinder rule in some federal and state courts.[17]

This article argues that these challenges, often in state courts, effectively adjudicate the sovereign rights and responsibilities of absent Indian tribes without the tribe's consent or participation. In other words, the courts allowing these cases to proceed are abrogating the sovereign immunity of the absent Indian tribes in an illicit and backdoor manner.[18] This article argues that the merits of these cases, particularly cases regarding gaming compacts, can be resolved in a number of alternative venues and manners—namely a suit for declaratory relief against the tribe and the governor in federal court, enforcement actions in compliance with the Indian Gaming Regulatory Act ("IGRA"), limited waivers of tribal immunity in gaming compacts, or state political processes.

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summed up the policy of the local government when he said that the tax rate for Indian land would be raised until the area had "relieved itself of the presence of Indians." *Id. See also* MCCLURKEN, *supra* note 3, at 79 ("Some [Emmett] county officials claimed that the Odawa owed taxes the day they received certificates even though the parcels remained under federal jurisdiction until a patent was issued. Because of this, many Anishnabek lost their lands to the benefit of land speculators and lumber companies that acquired the timber-rich parcels for low prices.").

11. *See* MCCLURKEN, *supra* note 3, at 79.

12. *Cf. id.*

13. *Id.* at 79-80.

14. *Id.*

15. *See, e.g.*, United States v. Kagama, 118 U.S. 375 (1886); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). *See generally* DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT 27, 54, 67 (1997) (discussing the import of many of these cases).

16. *See supra* Part IV.

17. *See infra* pp. 23-122.

18. *Cf.* MCCLURKEN, *supra* note 3, at 79-80.

This article also examines the broader law of a sovereign government's indispensability in any number of areas in which tribal rights and responsibilities are litigated. For example, the ability of an Indian tribe to sue for the recovery of land—a land claims suit—often turns on whether the federal government or a state is an indispensable party.[19] In these cases, a tribe or tribal member may sue individual property owners to recover land on the theory that the transaction that conveyed the land from a tribal member or the tribe is void *ab initio*.[20] The defendant landowners may argue that the state or federal government—often at least partially to blame for the bad conveyance—is an indispensable party.[21] The trend in these cases is toward dismissing the claims.[22]

This article argues that federal and state courts tend to short change Indian tribes and tribal sovereignty in their application of the compulsory joinder rule. The courts err in giving greater weight to the narrow interests of the tribe's anti-gaming, anti-treaty rights, and anti-tribe foes over the legitimate interests of tribal sovereignty. It is apparent that state and federal courts treat the sovereign immunity of the states and federal government with more deference than the immunity of tribes. At least one court has trumpeted Supreme Court dicta for the proposition that tribal immunity is an insignificant factor.[23] However, immunity is immunity. Using procedural rules to qualify or abrogate the immunity from suit of a sovereign is an egregious abuse of discretion. Surely, the rules of procedure are not intended to operate as a backdoor mechanism for the waiver of a sovereign's immunity from suit.

Part II of this article discusses the structure of the compulsory joinder rule, identifies the interests weighed by state and federal courts, and reviews the major cases outlining the broad contours of the rule. Part III summarizes many of the so-called Indian Law cases where the court decides whether an Indian tribe is an indispensable party to litigation. Other cases involving tribes where an absent state or federal sovereign is involved are discussed as well. The section is divided into broad classes of topics, including natural resources cases, Indian land claims, tribal government operations cases, and gaming operations cases. This part outlines the broad contours of the application of the compulsory joinder rule to instances in which a tribe is the absent party and, in places, contrasting the courts' treatment of a tribe's absence with a state or federal party's absence. This part is intended to act as a primer for tribal advocates on the very extensive litigation involving tribes as absent parties. Part IV is a study of the application of the compulsory joinder rule in one area of conflict—the gaming compact cases. This discusses the application of the rule to several gaming compact cases in which the necessary and indispensable party is a tribe and, in some limited cases, a state or federal party. In the gaming compact cases,

19. *See* Nichols v. Rysavy, 809 F.2d 1317, 1331-32 (8th Cir. 1987).
20. *See* Choctaw Nation v. Seitz, 193 F.2d 456, 459-60 (10th Cir. 1951).
21. *See Nichols*, 809 F.2d at 1331-32.
22. *See id.* at 1331-34.
23. *See* Davis v. United States, 192 F.3d 951, 960 (10th Cir. 1999).

for example, the compulsory joinder rule requires courts to engage in the direct balancing of tribal sovereign rights against parties who usually have no other interest but to shut down tribal gaming facilities.[24] In most cases, even though proceeding in the lawsuit without the tribe effectively abrogates the tribe's sovereign immunity, courts will proceed.[25] This part is intended to give examples to courts and litigants of alternative and viable methods of litigating or resolving challenges, which do not involve a backdoor waiver of immunity. Part V is intended to justify the dismissal of claims brought in the absence of a tribe in interest on the grounds that to do so would serve judicial economy and efficiency in the long run. This part also acts as a defense of the sovereign immunity of tribes in these contexts and offers additional strategic suggestions to tribal litigants.

II. THE COMPULSORY JOINDER RULE AND LITIGATION INVOLVING SOVEREIGNS

A. *The Purpose of the Compulsory Joinder Rule*

The compulsory joinder rule is essential to ensure that a lawsuit will not proceed absent a party that has an interest in the litigation.[26] Under the federal rule[27] and most

24. *See supra* Part IV.

25. *Id.*

26. *See* Makah Indian Tribe v. Verity, 910 F.2d 555, 558 (9th Cir. 1990).

27. Federal Rule of Civil Procedure 19 reads as follows:

(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 the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the 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 joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) 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: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, 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; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate

state rules, the court must order absent persons joined, "if feasible."[28] If joinder is not "feasible," the court must decide if it should allow the case to proceed "in equity and good conscience."[29] The purpose of the compulsory joinder rule is to protect several interests: "(1) the interests of the present defendant; (2) the interests of potential but absent plaintiffs and defendants; (3) the social interest in the orderly, expeditious administration of justice."[30] The "basic concept of due process" requires that each interested party, joined or absent, must be allowed the opportunity to defend its respective interests.[31]

A fourth interest is stated in the rule, that is the interest of the plaintiff in determining the forum in which to bring suit.[32] As such, the due process concern is countered with the concept that "the philosophy of the compulsory joinder rule in the federal courts is to avoid dismissal whenever possible."[33] The Supreme Court wrote, "[T]he impulse is towards entertaining the broadest possible scope of action, consistent with fairness to parties; joinder of claims, parties and remedies is strongly encouraged."[34]

Prior to the amendment of Federal Rule 19 in 1966, which required a more flexible approach, the courts rigidly applied the rule, dismissing claims in which the absent party was "indispensable."[35] Since "the basic objective underlying all claim

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remedy if the action is dismissed for nonjoinder.

FED. R. CIV. P. 19(a)-(b).

28. *Id.* at 19(a).

29. *Id.* at 19(b).

30. John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 330 (1957).

31. Comment, *The Litigant and the Absentee in Federal Multiparty Practice*, 116 U. PA. L. REV. 531, 531 (1968) (citing *Hansberry v. Lee*, 311 U.S. 32 (1940)); *see also* Pamela J. Stephens, *Manipulation of Procedural Rules in Pursuit of Substantive Goals: A Reconsideration of the Impermissible Collateral Attack Doctrine*, 24 ARIZ. ST. L.J. 1109, 1125 (1992) (quoting Martin v. Wilks, 490 U.S. 755, 761 (1989) (Stevens, J., joined by Brennan, Marshall & Blackmun, JJ., dissenting)).

32. *See* FED. R. CIV. P. 19(a).

33. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 6.5, at 335 n.7 (1985) (citing Heath v. Aspen Skiing Corp., 325 F. Supp. 223, 229 (D. Colo. 1971)); *see also* Stabilisierungfonds Fur Wein v. Kaiser Stuhl Wine Distribs. Pty. Ltd., 647 F.2d 200, 208 (D.C. Cir. 1981); Narragansett Tribe of Indians v. S. R.I. Land Dev. Corp., 418 F. Supp. 798, 813 n.5 (D. R.I. 1976); Weyerhaeuser Mortg. Co. v. Equitable Gen. Ins. Co., 686 P.2d 1357, 1359 (Colo. Ct. App. 1983); Mohl v. Johnson, 911 P.2d 217, 220 (Mont. 1996).

34. United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966).

35. *See* FRIEDENTHAL ET AL., *supra* note 33, § 6.5, at 335-36 (discussing Shields v. Barrow, 58 U.S. (17 How.) 130 (1855)). *See generally* 7 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1601, at 11 (3rd ed. 2001). The previous rule was apparently overwhelmed by volumes of scholarly literature dedicated to its overthrow. *See* Schutten v. Shell Oil Co., 421 F.2d 869, 871 (5th Cir. 1970); Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254, 1254-55 (1961); Note, *Indispensable Parties in the*

and party joinder rules is rendering complete justice with as little litigation as possible,"[36] the rule was changed. The Supreme Court roundly affirmed the amended Rule 19 in *Provident Tradesmens Bank & Trust Co. v. Patterson*.[37] Here the Court overruled a Third Circuit decision that returned to the rigid pre-1966 amendment method of automatically dismissing claims whenever a party with an interest made a motion.[38] The Court relied heavily on the fact that a trial had been completed and the case had proceeded to the appellate level before the motion to dismiss was filed and reversed.[39]

The Court examined the four interests at stake in a Rule 19(b) analysis—where a determination is made if the necessary party is an indispensable party and if the suit can proceed "in equity and good conscience."[40] The first factor is the plaintiff's "interest in having a forum."[41] The Court stated, "the strength of this interest obviously depends upon whether a satisfactory alternative forum exists."[42] The second interest is the defendant's interest in "avoid[ing] multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another."[43]

Thirdly, courts must consider whether it is in "the interest of the outsider whom it would have been desirable to join."[44] The Court stated the fact that the non-party is not bound by the judgment "obviously does not mean either (a) that a court may never issue a judgment that, in practice, affects a nonparty or (b) that (to the contrary) a court may always proceed without considering the potential effect on nonparties simply because they are not 'bound' in the technical sense."[45] Quoting the rule, the Court stated, "[T]he court must consider the extent to which the judgment may 'as a

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Federal Courts, 65 HARV. L. REV. 1050, 1050 (1952); Reed, *supra* note 30, at 330-31. The 1966 amendment eliminated the terms "necessary party" and "indispensable party," *cf.* Fed. R. Civ. P. 19, but they appear to continue to be the common parlance. Surely it does not assist attorneys who must realize that "necessary" and "indispensable" are synonymous in the English language but nearly opposites in their working definitions for purpose of this rule.

36. FRIEDENTHAL ET AL., supra note 33, § 6.5, at 336.

37. 390 U.S. 102, 107 (1968).

38. *Id.*

39. *Id.* at 109, 110 n.4.

40. *Id.* at 109-11.

41. *Id.* at 109. The Court mentioned a note by the advisory committee on the Federal Rules of Civil Procedure that stated, "'[T]he 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.'" *Id.* at 109 n.3 (quoting FED. R. CIV. P. 19, advisory committee notes) (citing Fitzgerald v. Haynes, 241 F.2d 417, 420 (3rd Cir. 1957); Fouke v. Schenewerk, 197 F.2d 234, 236 (5th Cir. 1952)).

42. *Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 109.

43. *Id.* at 110.

44. *Id.*

45. *Id.*

practical matter impair or impede his ability to protect' his interest in the subject matter."[46]

The Court also spoke of the fourth interest, the interest of the court system:

> Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. We read the Rule's third criterion, whether the judgment issued in the absence of the nonjoined person will be 'adequate,' to refer to this public stake in settling disputes by wholes, whenever possible, for clearly the plaintiff, who himself chose both the forum and the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them. After trial, considerations of efficiency of course include the fact that the time and expense of a trial have already been spent.[47]

The Court made clear that the "adequacy of the judgment," or whether the case may be adequately decided by continuing without the absent party, is not the parties' interest.[48] Instead, this interest is that of the court's to efficiently and completely resolve the case.[49] Moreover, *Provident Tradesmens* is a case bound in by its facts—the parties had already gone to trial and neither side mentioned the absent party until the appellate level.[50] Perhaps, the case would have been decided differently had the compulsory joinder issue been decided at the outset.[51] Or, perhaps had the question been raised at the trial level and had the trial court proceeded without the absent party, the Court would have been more likely to agree that an otherwise indispensable party was no longer indispensable because of the judicial resources expended below.

As an adjunct to the indispensability analysis, the rule mandates that federal courts "consider the possibility of shaping relief to accommodate these four interests."[52] Put another way, the Court asked; "Can the decree be written so as to protect the legitimate interests of outsiders and, if so, would such a decree be adequate to plaintiff's needs and an efficient use of judicial machinery?"[53]

The compulsory joinder analysis undertaken by courts does not lend itself toward predictability or certainty. The Supreme Court was quick to note in *Provident Tradesmens*, "[W]hether a particular lawsuit must be dismissed in the absence of [a necessary] person, can only be determined in the context of particular litigation."[54]

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46. *Id.* (quoting FED. R. CIV. P. 19(a)).
47. *Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 111.
48. *Id.*
49. *See id.*
50. *Id.* at 109, 110 n.4.
51. *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 70, at 500 (5th ed. 1994).
52. *Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 111.
53. *Id.* at 112 n.10.
54. *Id.* at 118.

"'[T]here is no prescribed formula for determining in every case whether a person . . . is an indispensable party.'"[55]

B. *The Indispensability of a Sovereign*

Provident Tradesmens is not a suit involving a potentially immune sovereign entity.[56] Instances in which the court has no jurisdiction over the absent party effectively renders "infeasible" the ability of the court to join the absentee, which is an equitable defect, not a jurisdictional one.[57] The vast majority of cases in which the court proceeds without an absent party are those in which the absent party is not a sovereign, neither a federal, state, or tribal government.[58] The advisory committee notes, however, mention only one related issue: whether a superior federal officer is an indispensable party to a suit against an inferior officer.[59] When a sovereign is the absent party, the case transforms into a case about sovereign immunity, which is a jurisdictional question.[60] Wright and Miller note, "In many instances, a ruling that the United States is an indispensable party is the equivalent in substance of a statement that sovereign immunity bars the suit."[61]

The line of Supreme Court cases beginning with *California v. Arizona*[62] (adjudicating the Colorado River water rights of California, Arizona, the United States, and (later) several Indian tribes)[63] exemplify an interesting point—that courts are not readily willing to dismiss a case, even in the absence of a sovereign in interest. In California, the state sued the state of Arizona and the United States to quiet title to

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55. *Id.* at 118 n.14 (quoting Niles-Bement-Pond Co. v. Iron Moulders' Union Local No. 68, 254 U.S. 77, 80 (1920)).

56. *Cf. id.* at 104.

57. *See* WRIGHT, *supra* note 51, § 71, at 502 ("The cases sometimes speak, and even act, as if the failure to join a party who may be regarded as 'indispensable' is a 'jurisdictional' defect. This heresy has been rejected over and over again by authoritative cases." (footnotes and citations omitted)).

58. *See* STEPHEN C. YEAZELL, CIVIL PROCEDURE 936 (5th ed. 2000) ("Because claims of sovereign immunity will be rare, and the reach of modern long-arm jurisdiction is long, the more common objection is want of subject matter jurisdiction.").

59. *See* FED. R. CIV. P. 19, advisory committee notes (discussing Johnson v. Kirkland, 290 F.2d 440, 446-47 (5th Cir. 1961) ("The superior is indispensable as a party when, to secure the complainant from unauthorized governmental activity, it is essential that the superior take or not take action.")). *See generally* 7 WRIGHT ET AL., *supra* note 35, § 1622, at 340-42.

60. *See* Kirsten Matoy Carlson, *Towards Tribal Sovereignty and Judicial Efficiency: Ordering the Defenses of Tribal Sovereign Immunity and Exhaustion of Tribal Remedies*, 101 MICH. L. REV. 569, 580-87 (2002).

61. 7 WRIGHT ET AL., *supra* note 35, § 1617, at 254.

62. 440 U.S. 59 (1979).

63. *See* Arizona v. California, 530 U.S. 392, 397 (2000); Arizona v. California, 460 U.S. 605 (1983).

the lands beneath the Colorado River.[64] The three parties "agreed that their interests in the land in question are inextricably linked."[65] The parties also identified a jurisdictional problem. The United States did not give its consent to be sued and was therefore an indispensable party.[66] The Court held that the United States had waived its immunity and avoided the problem.[67] In *Idaho ex rel. Evans v. Oregon*,[68] the Court decided that in cases between states over the apportionment of fish runs on the Columbia River, the United States was not an indispensable party.[69] The dispute arose when Oregon and Washington entered into a fisheries management agreement with the treaty tribes.[70] Idaho alleged that the non-treaty fishers were taking "a disproportionate share of fish destined for Idaho, thereby depleting those runs to the detriment of Idaho fishermen."[71] The special master dismissed the claim on the basis that the federal government had interests in the regulation of the ocean fishery, the operation of the dams on the river, and was a trustee for the treaty tribes.[72] The Court rejected the first interest as justification for dismissal because the federal government's interest in the ocean fishery "has little to do with proper allocation of the rights to take those fish once they have entered the river."[73] The Court found on the second interest, that the United States's operation of the dams could be estimated in the instant case without the United States's participation.[74] Finally, the responsibilities of the United States as trustee to the treaty tribes' fishing rights were not at issue in the case because, after *Sohappy*, "the Indians are limited to a fixed share of the fish" that would not be affected by the result in the instant case.[75] The Court did not discuss the possibility that all of the parties, including the absent tribes, were interested in the total amount of fish available, not simply the allocation.[76]

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64. *Arizona*, 440 U.S. at 60.

65. *Id.* at 62 n.3.

66. *See id.* at 62-63 ("Thus, if the United States has not consented to be sued in an action such as this, California's motion for leave to file a complaint must be denied. 'A bill of complaint will not be entertained which, if filed, could only be dismissed because of the absence of the United States as a party.'") (quoting Arizona v. California, 298 U.S. 558, 572 (1936)).

67. *See id.* at 63 ("Because, however, we have concluded that the United States has already waived its sovereign immunity to suit in this case, we need not assess [the problem].").

68. 444 U.S. 380 (1980).

69. *See id.* at 392-93.

70. Sohappy v. Smith, 529 F.2d 570, 571-72 (9th Cir. 1976).

71. *Evans*, 444 U.S. at 385.

72. *See id.* at 386-87.

73. *Id.* at 388.

74. *See id.* at 388-89.

75. *Id.* at 390.

76. *See Evans*, 444 U.S. at 384-85.

Current and future litigation involving treaty fishing rights involve, or will involve, the preservation of the habitat.[77]

Conversely, when the plaintiffs are individual Indians or Indian tribes, the courts show no hesitation to dismiss.[78] The Supreme Court held that the United States was an indispensable party to a state highway condemnation action against Indian land held in trust by the United States for the Indians.[79] Similarly, the Court held that the United States was an indispensable party in a suit brought by the state of Oklahoma to partition the Indian allotments held in trust by the federal government.[80] These cases show, at least in an Indian Law context, how the United States might be an indispensable party as a sovereign with an interest in property at issue in the underlying dispute.

C. *The Contours of Tribal Sovereign Immunity*

It is well-established that Indian tribes have immunity from suit in federal, state, and tribal courts.[81] Recently, the United States Supreme Court reaffirmed that immunity from suit in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*[82] Tribal sovereign immunity survives even if the tribe is engaged in activity off the reservation.[83] In *Kiowa Tribe*, the Court noted that its cases "have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred."[84] Tribal immunity also survives when the tribe is engaged in commercial activities, as opposed to government activities.[85] The Court in *Kiowa Tribe* took into

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77. *Cf.* Brian J. Perron, Note, *When Tribal Treaty Fishing Rights Become a Mere Opportunity to Dip One's Net Into the Water and Pull It Out Empty: The Case for Money Damages When Treaty-Reserved Fish Habitat is Degraded*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 784 (2001).

78. *See* Minnesota v. United States, 305 U.S. 382, 386-87 (1939).

79. *Id.* at 386.

80. *See* United States v. Hellard, 322 U.S. 363, 365, 367-68 (1944).

81. *See, e.g.*, Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 753-54 (1998).

82. *Id.*

83. *See id.* 754-55, 760.

84. *Id.* at 754 (citing Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165, 167 (1977)); *see* Pink v. Modoc Indian Health Project, Inc., 157 F.3d 1185, 1188-89 (9th Cir. 1998), *cert. denied*, 528 U.S. 877 (1999); Sac and Fox Nation v. Hanson, 47 F.3d 1061, 1063-65 (10th Cir. 1995); Greene v. Mt. Adams Furniture (*In re* Greene), 980 F.2d 590, 593-97 (9th Cir. 1992); Melby v. Grand Portage Band of Chippewa, 1998 WL 1769706, at *3 (D. Minn. Aug. 13, 1998); John v. Baker, 982 P.2d 738, 758-59 (Alaska 1999); Morgan v. Colo. River Indian Tribe, 443 P.2d 421, 423-24 (Ariz. 1968); Gavle v. Little Six, Inc., 555 N.W.2d 284, 295 (Minn. 1996); Thompson v. Crow Tribe of Indians, 962 P.2d 577, 580-81 (Mont. 1998).

85. *See Kiowa Tribe*, 523 U.S. at 754-55, 760 (citing *Puyallup Tribe, Inc.*, 433 U.S. at 168; Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512 (1940)); Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 357 (2nd Cir. 2000); *Sac & Fox Nation*, 47 F.3d at 1064-65; Multimedia Games,

account the fact that the tribes may be engaged in "ski resorts, gambling, and sales of cigarettes to non-Indians" and still held that tribal immunity survived.[86] Most importantly, "tribal immunity is a matter of federal law and not subject to diminution by the States."[87]

Despite authority affirming the immunity of tribal sovereigns, most cases involving tribal sovereigns as absent parties are not simple for the courts to decide. Gaming compact cases, for example, often force the courts to weigh competing interests, such as the interests of the gaming tribes versus the interests of the state and its citizens in having the merits of the compact litigated.[88] Federal and most state courts have to rely on the standard of "in equity and good conscience" in determining whether to allow the case to proceed absent the sovereign.[89] The compulsory joinder rule's "in equity and good conscience" standard is no standard at all. It is an excuse for unfettered discretion by state and federal courts and a cover for conclusory analysis of whether cases should be dismissed for failure to join a third party with an interest in the litigation. Equity allows the courts to take virtually any factor into consideration.[90] Because courts may do so, they take into consideration a moralistic approach to Indian gaming and the rights of tribes,[91] either in favor of or against Indian gaming. In essence courts may decide the relative merits of the gaming compact in advance of the proper litigation over the merits. Courts are asked to bring their biases and prejudices to the table in deciding questions of equity.[92]

Now that many of the wars over treaty rights have subsided, the gaming compact cases are the most controversial and important to the tribes.[93] It is no secret that opponents of Indian gaming bring lawsuits in an attempt to force a change in public policy.[94] These claimants are asking the courts to reverse the decisions of the policymakers.[95] In some instances, the courts are willing to comply by using their

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Inc. v. WLGC Acquisition Corp., 214 F. Supp. 2d 1131, 1135 (N.D. Okla. 2001); Redding Rancheria v. Superior Court, 105 Cal. Rptr. 2d 773 (Cal. Ct. App. 2001); *Gavle*, 555 N.W.2d at 293. One federal appeals court wrote that it is in commercial activities where Indian tribes need the most protection. *See* Md. Casualty Co. v. Citizens Nat'l Bank, 361 F.2d 517, 521-22 (5th Cir. 1966), *cert. denied sub nom.* Md. Casualty Co. v. Seminole Tribe Inc., 385 U.S. 918 (1966).

86. Kiowa Tribe, 523 U.S. at 758 (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); *Okla. Tax Comm'n*, 498 U.S. at 505; Seminole Tribe v. Florida, 517 U.S. 44 (1996)).

87. Kiowa Tribe, 523 U.S. at 756 (citing Three Affiliated Tribes v. Wold Eng'r, 476 U.S. 877, 891 (1986); Washington v. Confederated Tribes, 447 U.S. 134, 154 (1980)).

88. *See supra* Part IV.

89. *See* FED. R. CIV. P. 19(b).

90. *See, e.g.,* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 219 (1987).

91. *See, e.g., id.*

92. *See* 3A JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 19.01 (2d ed. 1996).

93. *See Cabazon Band of Mission Indians*, 480 U.S. at 205.

94. *See generally* Sac & Fox Nation v. Norton, 240 F.3d 1250 (10th Cir. 2001).

95. *See* Pueblo v. Kelly, 104 F.3d 1546, 1551 (10th Cir. 1997).

powers of equity.[96] Courts may consider how the gaming tribes are desperately poor and in need of revenues to house, feed, and care for their constituents.[97] Perhaps, courts may take into account the possibility that a gaming tribe, with few members, has already enjoyed a massive boondoggle.[98] The court may also examine the challengers' highly-politicized anti-Indian or anti-gaming interests, and relative disinterest in state constitutional law.[99] The court may take into account the private and personal competitive interests of the challengers such as card rooms, dog and horse tracks, pornography publishers, and other gaming interests, along with the challengers' token, even hypocritical, interest in state constitutional law.[100] Perhaps, the court may look at the economic impacts and social problems potentially created by Indian gaming or the massive revenue influx to state coffers in a time of economic decay.[101] With all of these factors to weigh—which really are the same factors that the politicos must weigh when deciding whether or not to enter into a gaming compact—the court should enter into a full trial.[102] Under IGRA and the state police powers, the court is required to determine the very public policy behind Indian gaming in states, all within the context of the compulsory joinder rule.[103]

III. THE COMPULSORY JOINDER RULE IN INDIAN CASES

For the most part, courts dismiss a case when an absent tribe has a significant stake in the outcome of the litigation.[104] Many of these cases are brought by individual Indians or other tribes.[105] In many instances, the claims should have been, and could have been, brought directly against the tribe, but the plaintiffs wanted to avoid direct litigation with the absent tribe.[106] There are glaring exceptions, however, to the general trend toward dismissal.[107] Cases brought by the federal or state governments are more likely to proceed in the absence of the relevant tribe, ostensibly because of the importance of the plaintiff, as opposed to the importance of

96. *See* Grand Traverse Band of Ottawa & Chippewa Indians v. United States Attorney, 198 F. Supp. 2d 920, 928 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004).

97. *See id.* at 925-26.

98. *See, e.g.*, Pueblo v. Hodel, 663 F. Supp. 1300, 1315 n.21 (D.D.C. 1987).

99. *See* Sears v. Hull, 961 P.2d 1013, 1019 (Ariz. 1998).

100. *See, e.g.*, Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1020, 1026 (9th Cir. 2002).

101. *See Grand Traverse Band*, 198 F. Supp. 2d at 925-26.

102. *Cf. Am. Greyhound Racing, Inc.*, 305 F.3d at 1022.

103. *See id.* at 1018 (citing 25 U.S.C. § 2702 (2000)).

104. *See, e.g.*, Shermoen v. United States, 982 F.2d 1312, 1317-18 (9th Cir. 1992).

105. *See, e.g.*, Makah Indian Tribe v. Verity, 910 F.2d 555, 556 (9th Cir. 1990).

106. *See generally id.* at 560.

107. *See, e.g.*, Washington v. Daley, 173 F.3d 1153, 1171 (9th Cir. 1999).

the claim.[108] In these cases, the court proceeds even though its decision is the functional equivalent of a waiver of tribal sovereign immunity.[109]

This part of the article outlines many of the cases decided by federal and state courts regarding whether an absent tribe is an indispensable party under the compulsory joinder rule. The purpose of this part is to summarize for practitioners the major cases in each area of Indian Law jurisprudence in which the compulsory joinder rule is a basis for the decision of the court. Placing the discussion in the context of subject matter provides the added benefit of context. In many cases, it appears that courts rely on natural resource cases to support a decision in the gaming cases. Taking a case out of its context creates the problem of mixing the implicit weighing of equities in each case. A court necessarily looks at equity in its compulsory joinder analysis.[110] A court analyzing a treaty rights claim might rely on a decision in a tort claim at a casino where the equities are surely different.

A. *Natural Resources and Land*

For tribes and individual Indians, the land is everything.[111] Along with treaties, many tribes have entered into land and natural resources-related leases which are contracts.[112] Courts generally hold that a party to a contract is an indispensable party in other contexts.[113] The cases discussed in this subpart are those involving an absent sovereign.

1. Treaty Rights

Before gaming, self-governance, bureaucracy, and tribal Courts, there were treaties that tribes signed to preserve their very existence.[114] These treaties may have established reservation boundaries, or hunting, fishing, and gathering rights.[115] They may have also included the right to expel unwanted intruders, or the right to tax and

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108. *See, e.g., id.* at 1167.

109. *See id.* at 1167-68.

110. FED. R. CIV. P. 19(b).

111. *See* POMMERSHEIM, *supra* note 1, at 14, 18.

112. *See, e.g.,* Yazzie v. Morton, 59 F.R.D. 377, 379 (D. Ariz. 1973).

113. *See* Nat'l Union Fire Ins. Co. v. Rite Aid, Inc., 210 F.3d 246, 252 (4th Cir. 2000) ("At the outset, we note that 'precedent supports the proposition that a contracting party is the paradigm of an indispensable party.'") (quoting Travelers Indem. Co. v. Household Int'l, Inc., 775 F. Supp. 518, 527 (D. Conn. 1991)).

114. *See* POMMERSHEIM, *supra* note 1, at 18 ("For the Indians, a great deal was at stake [during treaty negotiations]. They were concerned not simply with having a place to live but with preserving the land, which was critical for cultural survival and spiritual succor."). *See generally* ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800 (1997).

115. *See generally* POMMERSHEIM, *supra* note 1, at 18.

prosecute non-Indians. Although state and federal governments as well as non-Indians have broken every one of these treaties, many remain extant.[116] The history and litigation over these treaties is incredibly extensive.[117] Treaty rights of fishing, hunting, and gathering are adjudicated and allocated between Indian tribes and non-Indians (including states) or between tribes.[118] Treaty cases are archetypal cases for applying the general rule that a fixed fund, of which the court is asked to allocate between parties, makes those parties indispensable to the litigation.[119] For example, in *Makah Indian Tribe v. Verity*,[120] the court dismissed an action by the Makah Indian Tribe, challenging federal regulations that implemented a settlement in litigation involving the allocation of the tribal ocean harvest of Columbia River salmon.[121] The tribe also challenged the regulations promulgated by the Secretary of Commerce to implement the settlement.[122] The Makah Tribe sought to alter the salmon allocation to its benefit.[123] However, the allocation was a fixed fund, meaning that for the Makah to prevail, another tribe or group would lose out on the salmon allocation.[124] The Ninth Circuit agreed that the other tribes involved in the settlement were necessary parties to the treaty claims.[125] The district court found that "any share that goes to the Makah must come from [the] other tribes."[126] However, the court of appeals found the other tribes were not necessary parties to challenge the regulations, reasoning that "[t]he absent tribes would not be prejudiced because all of the tribes have an equal interest in an administrative process that is lawful."[127] Applying the four-part test, the Ninth Circuit held that the absent tribes were indispensable parties as to the broader issue:

> Applying these principles, the district court concluded that the case should be dismissed. We agree with the court's analysis of the first three factors regarding the Makah's substantive claims. The district court found that prejudice was inevitable since "any relief would be detrimental to the other tribes"; the absent tribes had no proper representative because potential intertribal conflicts meant the United States could not represent all of them. The court held that there was

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116. *Cf. id.* at 122. For a broader history of Indian treaties, see FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY (1994).

117. *See* PRUCHA, *supra* note 116.

118. *See, e.g.*, Makah Indian Tribe v. Verity, 910 F.2d 555, 556 (9th Cir. 1990).

119. *See* Wichita and Affiliated Tribes v. Hodel, 788 F.2d 765, 774 (D.C. Cir. 1986).

120. 910 F.2d 555 (9th Cir. 1990).

121. *See id.* at 556, 561.

122. *See id.* at 557.

123. *Id.*

124. *See id.* at 559.

125. *Makah Indian Tribe*, 910 F.2d at 559-61.

126. *Id.* at 559.

127. *Id.*

> no way to shape relief because the 1987 harvest was a limited resource and any relief would be detrimental to either the Makah or the absent tribes. Similarly, the only "adequate" remedy would be at the cost of the absent parties because the Makah request at a minimum an equitable adjustment by the [s]ecretary. Allowing input from all the tribes would require their participation and was therefore unacceptable.[128]

This is a standard application of the compulsory joinder rule in the context of a fixed fund fact pattern. Where the spoils of the litigation are distributed as in a zero-sum game, the absent party loses directly in proportion to the winning party's gain.[129] Hence, the absent party must be indispensable. In *Makah Indian Tribe*, the sovereigns butting heads were Indian tribes, and the court rightly dismissed the action.[130]

Similarly, one tribe cannot seek to litigate the respective rights of tribes under a treaty without the presence of the absent treaty signatory tribes.[131] In *Keweenaw Bay Indian Community v. State of Michigan*,[132] Keweenaw Bay sought to protect its lake trout treaty rights by suing the state of Michigan, several state agencies, and eight individual Indians who were members of the Red Cliff Band of Chippewa Indians and the Bad River Band of Chippewa Indians.[133] The plaintiff alleged that the state defendants failed to protect the resource and that the individual defendants overharvested the resource.[134] The individual defendants argued that the two absent tribes, Red Cliff and Bad River, both signatories to the same treaty that Keweenaw Bay was trying to adjudicate, were indispensable.[135] The Sixth Circuit agreed for several reasons.[136] First, since the absent tribes were signatories to the same treaty, "[t]he likelihood that they would seek legal recourse in the event that the judgment deprived them of fishing rights to which they believe they are entitled can hardly be characterized as speculative."[137] Second, though Keweenaw Bay argued that a factual inquiry was required to determine if Bad River and Red Cliff had any interest in the treaty, the court rejected their argument and held that the absent tribes had a legally protectable interest for the purposes of the compulsory joinder rule.[138] Third, the court found that

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128. *Id.* at 560.

129. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 558 (1989).

130. *Cf. Makah Indian Tribe*, 910 F.2d at 557, 560.

131. *See, e.g.*, Keweenaw Bay Indian Cmty. v. Michigan, 11 F.3d 1341, 1346-47 (6th Cir. 1993).

132. *Id.* at 1341.

133. *Id.* at 1343-44.

134. *See id.* at 1343.

135. *See id.* at 1344.

136. *See Keweenaw Bay Indian Cmty.*, 11 F.3d at 1346-48.

137. *Id.* at 1347.

138. *Id.* (citing Shermoen v. United States, 982 F.2d 1312, 1317-18 (9th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993)).

> the absent bands' interests would be impaired or impeded by a judgment in this case, within the meaning of Rule 19(a)(2)(i), and that disposition of the case without the bands would leave the State defendants subject to substantial risk of incurring multiple or otherwise inconsistent obligations, within the meaning of Rule 19(a)(2)(ii).[139]

A treaty is an agreement between parties, just like a contract, and the parties that expect continuing benefits or that have continuing responsibilities should be treated as indispensable.[140]

Conversely, four other decisions regarding treaty rights held that the absent tribe was not a necessary party.[141] In two instances, the courts relied on an exception of sorts to the compulsory joinder rule in which the absent parties' interest may be adequately represented by the other parties.[142] The courts are more likely to find an absent Indian tribe is not indispensable where the federal government, which has an amorphous trust relationship to the Indian tribes,[143] is a party.[144] In *State of Washington v. Daley*,[145] the Ninth Circuit held the absent tribes were not necessary parties to a challenge to federal regulations governing the allocation of groundfish catches off the Washington coast because the United States could adequately defend the tribes' interests.[146] The court agreed that the absent tribes were necessary parties because, should the challengers prevail, "the [t]ribes will lose their rights to harvest whiting specifically and groundfish generally."[147] However, the court applied the rule that "[t]he United States can adequately represent an Indian tribe unless there exists a conflict of interest between the United States and the tribe."[148] The court stated:

> The government and the [t]ribes do not disagree on the issues at hand: the [s]ecretary and the [t]ribes agree that the [t]ribes have a treaty right to whiting within the area defined by the regulation and that the [t]ribes are co-managers with the federal government of the resources within those regions. Furthermore,

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139. *Id.*

140. *See* POMMERSHEIM, *supra* note 1, at 17.

141. *See* Washington v. Daley, 173 F.3d 1158, 1167 (9th Cir. 1999); Cassidy v. United States, 875 F. Supp. 1438, 1445 (E.D. Wash. 1994); Wisconsin v. Baker, 464 F. Supp. 1377, 1387 (W.D. Wis. 1978).

142. *See Daley*, 173 F.3d at 1167; *Cassidy*, 875 F. Supp. at 1445.

143. *See generally* Nell Jessup Newton, *Enforcing the Federal-Indian Trust Relationship After* Mitchell, 31 CATH. U. L. REV. 635, 635-45 (1982) (describing the trust relationship as "uncertain").

144. *See Cassidy*, 875 F. Supp. at 1445.

145. 173 F.3d 1158 (9th Cir. 1999).

146. *See id.* at 1167.

147. *Id.*

148. *Id.* (quoting S.W. Ctr. for Biological Diversity v. Babbitt, 150 F.3d 1152, 1154 (9th Cir. 1998).

> the federal government, including the [s]ecretary, has a trust responsibility to the [t]ribes.[149]

Moreover, the court concluded, there was no conflict between the tribes themselves because the level of allocations were not at issue, as in *Verity*.[150]

Daley creates problems for Indian tribes that do not trust their trustee or that take a different position than the United States.[151] The Secretary of the Interior, usually regarded as the physical embodiment of the trustee,[152] is a political appointee.[153] Depending on the politics, the secretary might not advance positions the tribes would espouse.[154] In the event there is a conflict between the Secretary of the Interior and another federal agency, the outcome of the inter-agency mediation by the Department of Justice might not be supportive of the tribes' interest.[155] Because federal litigators are busy people, they might not dedicate the time and resources that the tribes would devote to representing their own interests, especially considering the fact that the tribes' right to harvest *any* whiting and groundfish were at issue.[156]

A court will take into consideration factors other than the possible representation of the tribal interests by the federal government, such as the absent tribe's opportunity to intervene.[157] In *Cassidy v. United States*,[158] non-Indian fishers brought a claim for declaratory relief stating that the United States did not have the authority to prosecute them for fishing activities on the waters of Lake Roosevelt, which was created by the

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149. *Id.* at 1168 (citing Parravano v. Babbitt, 70 F.3d 539, 546 (9th Cir. 1995)).

150. *Daley*, 173 F.3d at 1168 (citing Makah Indian Tribe v. Verity, 910 F.2d 555, 556-57, 559 (9th Cir. 1990)).

151. *See generally id.* at 1167.

152. *Cf.* 25 U.S.C. § 2 (2002).

153. *See* Office of the Press Secretary, *Nominations Sent to the Senate* (Jan. 20, 2001) White House News Release, http://www.whitehouse.gov/news/releases/20010123-1.html.

154. A classic anecdote involving the competing interests of the Indian tribes and their trustee is the Secretary of the Interior's alleged reaction to the "Boldt decision" in *United States v. Washington,* 520 F.2d 676 (9th Cir. 1975). Vine Deloria wrote, "Interior Secretary Morton, allegedly the Indians' trustee, when told that the Indians had won, wanted to appeal the decision until informed that Interior had been supporting the tribes." Vine Deloria, Jr., *Legislation and Litigation Concerning American Indians*, *in* 436 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 93 (Richard D. Lambert ed., 1978) (citing United States v. Washington, 520 F.2d 676 (9th Cir. 1975)).

155. *See generally* Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307, 1326 (2003) ("[A]lthough language from the Department of Justice may suggest that Native American tribes themselves are the clients, the Department of Justice is adamant that the client is the United States as trustee for the tribes.").

156. *See Daley*, 173 F.3d at 1162-63.

157. *Cf.* Cassidy v. United States, 875 F. Supp. 1438, 1445 n.4 (E.D. Wash. 1994).

158. *Id.* at 1438.

commissioning of the Grand Coulee Dam on Indian reservation land.[159] The United States brought its claim under federal law which prohibits fishing activities on Indian land.[160] The fishers argued that tribes did not have authority to regulate their fishing activities in the zone of the lake set aside for the tribes' fishers.[161] The federal defendants argued that two absent tribes, the Spokane and Colville Tribes, were indispensable parties.[162] The district court found that the absent tribes were not necessary parties because despite the fact that they had hunting and fishing rights at stake, regulatory authority delegated to them by the federal government, and a general interest in preserving their own sovereignty, their interests could be adequately represented.[163] The court concluded that the United States could adequately represent their interests for two reasons.[164] First, the court noted that the United States's position on the tribes' fishing rights "does not appear to be inconsistent with the likely position of the [t]ribes."[165] Second, since the United States allegedly delegated regulatory authority to the tribes in their zone, the government's interest there was "not in conflict with the [t]ribes."[166] The court noted that "[t]he fact that the [t]ribes could intervene, but have chosen not to, is not a factor that necessarily lessens the prejudice they might suffer if this case were resolved in their absence."[167]

Here, the court made a determination of what the tribes would do if they were present, deciding the tribes' actions would not be any different than the federal government's position.[168] Perhaps, however, the tribes would have made a strategic decision to advocate for a much broader right or expanded regulatory authority. This strategy is similar to environmental cases in which the federal government issues regulations that are challenged by either the regulated industry or citizens for being either too lenient or too harsh on a polluter.[169] In *American Iron and Steel Inst. v. Environmental Protection Agency*[170] for example, the EPA promulgated regulations on source point pollution that were immediately challenged by the regulated

159. *Id.* at 1441-42.

160. *See id.* at 1440-42 (citing 18 U.S.C. § 1165 (2002)).

161. *See id.* at 1442.

162. *See Cassidy,* 374 F. Supp. at 1443.

163. *See id.* at 1444-45 (citing Shermoen v. United States, 982 F.2d 1312, 1317 (9th Cir. 1992), *cert. denied,* 509 U.S. 903 (1993)).

164. *Id.* at 1445.

165. *Id.*

166. *Id.*

167. *Cassidy,* 375 F. Supp. at 1445 n.4 (citing Confederated Tribes of the Chehalis Reservation v. Lujan, 928 F.2d 1496, 1500 (9th Cir. 1991), citing in turn Makah Indian Tribe v. Verity, 910 F.2d 555, 560 (9th Cir. 1990)).

168. *See id.* at 1445.

169. *See, e.g.,* Am. Iron and Steel Inst. v. EPA, 115 F.3d 979, 985 (D.C. Cir. 1997).

170. *Id.* at 979.

industry.[171] The National Wildlife Federation intervened and argued that the EPA had not gone far enough in reducing pollution.[172] The federation's strategy was to espouse a more radical view in order to make the regulated industry's view appear to be more out of sync and to make the government's regulations look more reasonable.[173] The strategy prevailed, even though the court rejected many of the federation's arguments, because the court did not strike down the regulations.[174] More damaging for absent tribes, however, is the court's view of their refusal to intervene or file amicus briefs.[175] This hazard appears in other contexts,[176] but is most especially damaging and misleading in the gaming compact cases, as discussed below.

In two other instances, the courts relied on other, more case-specific factors. In *Wisconsin v. Baker*,[177] the state of Wisconsin brought a claim that the tribal Governing Board of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians had engaged in setting hunting, fishing, ricing, trapping, and boating regulations that infringed on the state's right to regulate and conduct such activities on its own property.[178] The defendants, the individual tribal Board members, argued that both the absent tribe and the United States were indispensable parties.[179] The district court noted it was aware the tribe was already engaged in the so-called Voigt litigation and other related treaty rights cases.[180] It decided that "when the [b]and is already a participant in one or more other cases presently pending in this court involving the status of the Chippewa in Wisconsin, there is no reasonable basis for dismissing this action."[181] Here, the court forgot that efficieny is the basic purpose of the rules of

171. *Id.* at 985.

172. *Id.* at 1001.

173. *Cf. id.*

174. *See Am. Iron and Steel Inst.*, 115 F.3d at 1001, 1008 (upholding substantially the regulations promulgated by EPA).

175. *Cf.* Cassidy v. United States, 875 F. Supp. 1438, 1445 n.4 (E.D. Wash. 1994).

176. The recent United States Supreme Court case *United States v. Lara*, 124 S. Ct. 1628 (2004), evidences the sharp divide that can arise when the federal government and tribal interests collide. *Compare* Brief of Amicus Curiae National Congress of American Indians in Support of Petitioner at 1-4, United States v. Lara, 124 S. Ct. 1628 (2003) (No. 03-107) (arguing that Congress has the power to reaffirm the inherent authority of Indian tribes to prosecute non-member Indians) *with* Brief for the United States at 34, 45-47, *Lara* (No. 03-107) (arguing that Congress has the power to reaffirm the inherent authority of Indian tribes to prosecute non-member Indians, but in the alternative arguing, in order to preserve the federal prosecution, that the tribal prosecution of the defendant was void).

177. 464 F. Supp. 1377 (W.D. Wis. 1978).

178. *See id.* at 1377-79.

179. *See id.* at 1383.

180. *See id.* at 1384 (citing United States v. Bouchard, 464 F. Supp. 1316 (W.D. Wis. 1978), *rev'd*, Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341 (7th Cir.), *cert. denied sub nom.* Besadny v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians, 464 US. 805 (1983)).

181. *Id.*

procedure. The state could easily have intervened in the other lawsuits.[182] The court should have forced the state to show its hand. Nevertheless, the case was not particularly damaging to tribal parties as precedent because the tribe would most likely defend the individuals and participate in that manner.[183]

Treaties were made between the tribes and the federal government because the states were prohibited from making treaties through the Commerce Clause[184] and the various trade and intercourse acts.[185] In many of the treaty rights cases discussed in this subsection, the United States may be the absent party, especially when the state or an individual non-Indian brings a claim to adjudicate the rights of the parties.[186] An example is the *Wisconsin v. Baker* case discussed above, in which the defendants argued the federal government was an absent party.[187] In these cases, the treaty is a form of contract.[188] However, the *Baker* case decided correctly that the federal government was not indispensable.[189] Unlike the gaming compact cases, the federal government's rights were not at issue in *Baker*. As in nearly all Indian treaties, the consideration that flowed from the tribes to the federal government was land and peace, both of which would be preserved regardless of the outcome of the treaty rights litigation.[190] In other words, the federal government had already received its consideration and had no other interest remaining.[191] Conversely, in the gaming compact cases, the consideration due to the tribes is the continuing right to conduct gaming operations.[192] An absent tribe's interest in the outcome of those cases is considerable and, most importantly, continuing. Courts would agree that a party to a contract that expects to receive ongoing benefits is an indispensable party to a case brought to invalidate a contract.[193] Such was not the case in *Baker*, in which the absent federal government party had already received its consideration, consideration that was not threatened in the future.[194]

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182. *See Baker*, 464 F. Supp. at 1384.

183. *See, e.g.*, South Dakota v. Bourland, 949 F.2d 984, 989 (8th Cir. 1991) (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 690 (1949)), *rev'd on other grounds*, 508 U.S. 679 (1993).

184. *See* U.S. CONST. art. I, § 8, cl. 3.

185. *See, e.g.*, An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790); *see also* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 109-17 (1982) (discussing the trade and intercourse acts).

186. *See, e.g.*, Wisconsin v. Baker, 464 F. Supp. 1377, 1383 (W.D. Wis. 1978).

187. *See id.* at 1379-83.

188. *See, e.g., id.* at 1379-80.

189. *See id.* at 1387.

190. *See id.* at 1382-83.

191. *See Baker*, 464 F. Supp. at 1383.

192. *See, e.g.*, Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1023 (9th Cir. 2002).

193. *See, e.g., id.*

194. *See Baker*, 464 F. Supp. at 1383-87.

2. Leases

Many tribes, particularly in the western half of the country, have a significant land base.[195] The land is mostly rural and non-arable, but many reservations have natural resources.[196] These tribes have the opportunity to lease their land to mining interests.[197] When a tribe is a party to a contract, lease, or another agreement, the courts are more likely to find the absence of the tribe renders them indispensable.[198] Many of the decisions holding that absent tribes are indispensable parties arise out of leases of tribal land or mining leases.[199] One of the first lease cases is *Yazzie v. Morton*.[200] *Yazzie* arose when five members of the Navajo Tribe sued the Secretary of the Interior for approving coal-generated power plant leases on the Navajo Reservation.[201] The plaintiffs alleged this violated the federal government's trust responsibility to the tribe due to air pollution created by the plant.[202] The court characterized the suit as "a back door method of either asserting a class action or attempting to represent the [t]ribe without approval or authority,"[203] and determined the plaintiffs were "attempting to assert their will on the whole Navajo Tribe concerning the agreements involved."[204] It appears these two statements revealed the court's bias as it headed into its actual discussion. First, the court noted that the plaintiffs were attempting to cancel certain portions of the leases, a remedy only the tribe could pursue under the lease agreements.[205] Second, the court noted, "[f]or this lawsuit to proceed without the [t]ribe would most likely cause a number of other lawsuits to be brought by either the [t]ribe or the United States . . . and lawsuits by the individual Indians against the [t]ribe and/or the power companies."[206] Third, the court stated that "[t]he [t]ribe has a vested economic interest in having the plant operate and not shut down even temporarily."[207] Fourth, the court stated:

> Finally, the [t]ribe is an indispensable party because the land in question is part of the [t]ribe's [r]eservation, any decision reached concerning the land directly affects the [t]ribe. Plaintiffs have no vested interest in any of the land

195. *See, e.g.*, Yazzie v. Morton, 59 F.R.D. 377, 378 (D. Ariz. 1973).
196. *See, e.g., id.*
197. *See, e.g., id.*
198. *See, e.g., id.* at 383-85.
199. *See, e.g., id.* at 377-85.
200. 59 F.R.D. 377 (D. Ariz. 1973).
201. *Id.* at 379.
202. *Id.*
203. *Id.*
204. *Id.* at 380.
205. *Yazzie*, 59 F.R.D. at 380-81.
206. *Id.* at 381.
207. *Id.* at 382.

> involved, they are only permitees of the [t]ribe; their permits expire after a given period of time and at death. The [t]ribe has the superior and paramount interest in the land.[208]

Fifth, the court maintained that the case was actually an internal dispute and that the plaintiffs "may seek redress from or through the [t]ribe."[209]

The court's very broad reading of the Navajo Nation's interests provides a great deal of support for later cases involving Indian lands and contractual interests. However, this case is an interesting microcosm of the judicial thought process when confronted with a compulsory joinder question. The court must know who the plaintiffs are and why they brought the case.[210] In *Yazzie*, the court knew the plaintiffs were disgruntled tribal members who disagreed with the decision of their leadership to enter into a deal with a large utility.[211] The plaintiffs' claims were valid, but perhaps the venue was inappropriate. Still, the court felt obligated to assert these plaintiffs were minority discontents, not worth the trouble except as maybe an example to others.[212] The case was decided correctly, but the broad statement that any decision affecting Navajo land, in essence, makes the tribe a necessary party[213] is not a statement that courts are likely to rely upon in later cases.

In *Lomayaktewa v. Hathaway*,[214] traditional Hopis brought a suit to void the Hopi Tribe's coal mining lease with Peabody Coal, which would allow the mining of Black Mesa.[215] The court dismissed the action under the compulsory joinder rule because "[n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable."[216] The court, characterizing the traditional Hopi plaintiffs as negatively as the court in *Yazzie*, found first that the Hopi Tribe's prejudice would be great, considering the $20 million in royalty payments it would receive and the employment opportunities for other Hopis that would be created.[217] Second, the court weighed the millions of dollars the tribe would allegedly

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208. *Id.* at 383.

209. *Id.* at 385.

210. *See* FED. R. CIV. P. 19.

211. *See Yazzie*, 59 F.R.D. at 379.

212. *See id.* at 383.

213. *See id.*

214. 520 F.2d 1324 (9th Cir. 1975), *cert. denied sub nom.* Susenkewa v. Kleppe, 425 U.S. 903 (1976).

215. *Id.* at 1324-25.

216. *Id.* at 1325 (citing Broussard v. Columbia Gulf Transmission Co., 398 F.2d 885 (5th Cir. 1968); Tucker v. Nat'l Linen Serv. Corp., 200 F.2d 858 (5th Cir. 1953); Keegan v. Humble Oil & Refining Co., 155 F.2d 971 (5th Cir. 1946)).

217. *See id.* at 1326.

lose against the fact that the plaintiffs had no other remedy and chose to dismiss the action.[218]

The mining of Black Mesa is an extremely controversial subject for the members of the Hopi Tribe.[219] As in *Yazzie*, the plaintiffs chose the wrong venue to bring this case, but the case exemplifies the incredible difference in the value judgments exhibited by the court in comparison to the plaintiffs.[220] The court's values, of course, were the values that mattered in the end. The fact that the plaintiffs espoused a position that destroying the Black Mesa should not be done, no matter what the economic benefits afforded the tribe, was completely outside the scope of what the court would have considered equitable.[221]

In 1974, the Tenth Circuit decided *Tewa Tesuque v. Morton*,[222] a suit brought by members of the Tesuque Pueblo against the federal government to cancel a lease between the pueblo and the Sangre de Cristo Development Company.[223] The court concluded that as a party to the lease, the pueblo would be prejudiced by a judgment in its absence.[224] Like the district court in *Yazzie* and the Ninth Circuit in *Lomayaktewa*, *Tewa Tesque* concluded that the plaintiffs had an adequate remedy by "bringing the dispute before the tribal council of the [p]ueblo for determination."[225] Of these three cases brought by tribal members, this one most efficiently disposes of the matter by holding that the plaintiffs had an alternative forum and therefore would not be completely without remedy.[226]

The Ninth Circuit continues to dismiss actions that require adjudication of tribal rights under leases in their absence.[227] In *American Land Development v. Babbitt*,[228]

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218. *See id.* at 1326-27.

219. According to a complaint:

> Carving up Black Mesa by the process known as strip mining is a desecration, a sacrilege, contrary to the instruction of the Great Spirit and to the essential relationship to the land that is embodied in Hopi culture, life and religion; contrary, in short, to everything that Hopi culture and religion mean.

DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 84-85 (1979) (quoting Appellant's Compl., Lomayaktewa v. Hathaway, 520 F.2d 1324 (9th Cir. 1975) (No. 73-2132)). *See generally* Charles F. Wilkinson, *Home Dance, the Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest*, 1996 B.Y.U. L. REV. 449 (describing the spiritual and monetary losses suffered by the Hopi Tribe in the course of the mining of the Black Mesa).

220. *See* Lomayaktewa, 520 F.2d at 1326-27.

221. *See* Yazzie v. Morton, 59 F.R.D. 377, 385 (D. Ariz. 1973) (dismissing plaintiff's claims not for their merit, but for failure to join all dispensable parties).

222. 498 F.2d 240 (10th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

223. *See id.* at 242.

224. *See id.*

225. *Id.* at 243 (citing Motah v. United States, 402 F.2d 1 (10th Cir. 1968); Prairie Band of Pottawatomie Tribe of Indians v. Pukkee, 321 F.2d 767 (10th Cir. 1963)).

226. *See id.* at 243.

227. *See, e.g.*, Am. Land Dev. Corp. v. Babbitt, No. 96-15654, 1998 WL 3195 (9th Cir. Jan. 6,

the Ninth Circuit dismissed the case because the Fort Mojave Indian tribe was an indispensable party.[229] The court dismissed the action under the compulsory joinder rule relying on *Lomayektewa*.[230] The court rejected the plaintiff's argument that it would have no remedy because, "when a 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."[231] In *McClendon v. United States*,[232] the court dismissed an action by a leaseholder of land owned by the Colorado River Indian Tribe against the United States, alleging that the tribe had breached the lease.[233] The court dismissed the case, relying on *Lomayektewa*.[234] The Tenth Circuit also relied on *Lomayektewa* in *Jicarilla Apache Tribe v. Hodel*.[235] Dome Petroleum Corporation sued the federal government in an attempt to reduce the amount it would have to pay under oil and gas leases with the Jicarilla Apache Tribe.[236] The court dismissed the case, applying *Lomayektewa* and holding that "[t]he Tribe's interest in the oil leases is . . . at the heart of the controversy."[237]

The court's analysis in these cases is summary. The plaintiffs were mining companies who wanted to get around tribal immunity by suing other parties, usually the federal government, for relief.[238] These were not sympathetic plaintiffs, relatively speaking. Presumably, there is a lot of competition in these business fields and the tribes were within their right as competitors to seek the greatest yield. This area seems to fit squarely within the sort of interest most courts identify with and understand.

Conversely, in *Kescoli v. Babbitt*,[239] the Ninth Circuit revisited the Black Mesa coal mines.[240] There, a member of the Navajo Nation sued the Secretary of the Interior because he approved a special condition to Peabody Coal's mining permits, which plaintiff alleged did not "guarantee adequate protection of sacred burial

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1998).

228. *Id.*

229. *See id.* at *2.

230. *See id.*

231. *Id.* (quoting Confederated Tribes of the Chehalis Indian Reservation v. Lujan, 928 F.2d 1496, 1499 (9th Cir. 1991)).

232. 885 F.2d 627 (9th Cir. 1989).

233. *See id.* at 628.

234. *See id.* at 633 (citing Lomayaktewa v. Hathaway, 520 F.2d 1324, 1325-26 (9th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976); and Jicarilla Apache Tribe v. Hodel, 821 F.2d 537, 540 (10th Cir. 1987)).

235. 821 F.2d 537 (10th Cir. 1987).

236. *See id.* at 538.

237. *Id.* at 540.

238. *See McClendon*, 885 F.2d at 628-30; *Jicarilla Apache Tribe*, 821 F.2d at 538-39.

239. 101 F.3d 1304 (9th Cir. 1996).

240. *Id.* at 1307.

sites."[241] The court agreed with the federal defendants that the Navajo and Hopi Tribes were indispensable parties to the litigation and dismissed the action.[242] First, the court found the absent tribes economic interests, namely royalties for the tribes and reservation jobs for the tribal memberships, would be prejudiced by the adjudication of the mining leases in their absence.[243] Second, the court weighed the absent tribes' "interest in determining what is in their best interests by striking an appropriate balance between receiving royalties from the mining and protection from their sacred sites."[244] Third, the court held the tribes' interest in their immunity was the "'compelling factor'" in dismissing the claim for failure to join the tribes.[245] Specifically, the court stated, "[T]he litigation also threatens the Navajo Nation's and the Hopi Tribe's sovereignty by attempting to disrupt their ability to govern themselves and to determine what is in their best interests in balancing potential harm caused by the mining operations against the benefits of the royalty payments."[246] Fourth, the court rejected the plaintiff's attempt to invoke the "public rights" exception, stating:

> As the district court determined, Kescoli's claim "is a private one focused on the merits of her dispute rather than on vindicating a larger public interest." Although Kescoli purports to represent others who believe the burial sites should receive maximum protection, the essence of her dispute is her disagreement with the Tribal leaders over what is in the best interests of the Navajo Nation and the Hopi Tribe. She believes additional protection for the burial sites is necessary. The Navajo Nation and the Hopi Tribe, however, by agreeing to the settlement have decided this protection is sufficient and the settlement agreement should be implemented so that they will receive the desired royalties. Kescoli's action is essentially private in nature, limited to a disagreement over the appropriate direction the Navajo Nation and the Hopi Tribe should take in relation to the mining.[247]

All of these factors exist whenever a plaintiff brings a claim to invalidate a modern contract or compact in which a tribe is a party.[248]

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241. *See id.*

242. *See id.* at 1311-12.

243. *See id.* at 1310.

244. *Kescoli,* 101 F.3d at 1310 (citing Pit River Home and Agric. Coop. Ass'n v. United States, 30 F.3d 1088, 1099, 1101 (9th Cir. 1994)).

245. *Id.* at 1311 (citing Confederated Tribes of the Chehalis Indian Reservation v. Lujan, 928 F.2d 1496, 1499 (9th Cir. 1991)).

246. *Id.* at 1312.

247. *Id.* at 1311.

248. *See, e.g., id.* at 1309-12.

Kescoli is another case brought by a dissident tribal member.[249] Here, the court returns to tribal politics and the continuing struggle over the Black Mesa.[250] This is not an area the courts feel comfortable making equity decisions. For the court, the plaintiffs' rights are "private" and limited, and the importance of the Black Mesa to the plaintiffs is lost on the court.[251] Interestingly, the court almost seems to be lecturing the plaintiffs on the best manner in which to run an Indian tribe with natural resources to exploit.[252] When an Indian tribe is willing to allow outsiders to take valuable resources off tribal land for a fee, the courts understand and agree with this exercise of tribal sovereignty over its land.[253] The court strongly supports the Hopi Tribe's exercise of sovereignty and its decision to exploit resources.[254] Missing in this case, and in the older cases brought by tribal members, are the external political and economic factors that may have placed the tribal governments in a position to sign these leases.[255]

In the strongest recognition of the interests of an absent tribe, the Second Circuit dismissed an action involving the interests of the Seneca Nation in *Fluent v. Salamanca Indian Lease Authority*.[256] The plaintiffs in *Fluent* were leaseholders of the Seneca Tribe's "Congressional Villages," living on tribal land leased to non-Indians with the approval of Congress.[257] The plaintiffs sued to compel the federal government to renew the leases before they were due to expire in 1992 and also challenged the constitutionality of the Seneca Nation Settlement Act of 1990, which allowed for rental payments of millions of dollars to be made to the tribe.[258] The court dismissed the lease renewal case because only Congress could provide the relief requested by the plaintiffs.[259] The court did likewise with the constitutional challenge because the tribe was "the beneficiary of a substantial sum of money from the federal government" under the settlement act, making the tribe a necessary party.[260] The court then found that "'society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.'"[261] The tribe's immunity was adequate to justify dismissal of the suit.[262]

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249. *See Kescoli*, 101 F.3d at 1307-08.

250. *See id.*

251. *Id.* at 1311.

252. *See id.*

253. *See id.* at 1311-12.

254. *See Kescoli*, 101 F.3d at 1311-12.

255. *See generally* Wilkinson, *supra* note 219, at 450 (describing how tribes began to assert control over their own natural resources in the 1970s).

256. 928 F.2d 542 (2nd Cir. 1991), *cert. denied*, 502 U.S. 818 (1991).

257. *Id.* at 543-44.

258. *Id.* at 543.

259. *Id.* at 547.

260. *Id.*

261. *Fluent*, 928 F.2d at 548 (quoting Wichita & Affiliated Tribes v. Hodel, 788 F.2d 765, 777

The Second Circuit's annunciation of tribal sovereign rights is the strongest of the circuits confronted with the issue of the compulsory joinder rule.[263] In *Fluent*, Congress took direct action in a dispute between the tribe and non-Indian property interests and did nothing to abrogate tribal sovereignty.[264] Only through congressional mandate could the court provide relief to the appellants.[265]

State courts have followed the federal courts in cases involving tribal natural resource leases.[266] In *Lyon*, the Colorado Court of Appeals dismissed an action alleging that gas wells and drilling operations had caused air, water, and soil contamination.[267] The defendants argued that since at least some of the allegations involved operations taking place on land owned by the Southern Ute Indian Reservation, the case should be dismissed under the state compulsory joinder rule.[268] The court agreed the tribe was a necessary party that would be prejudiced by an injunction ceasing production, "significantly impact[ing] production and in turn would directly affect the [t]ribe's right to receive money under the leases."[269] The court found the tribe was also an indispensable party because the plaintiffs could seek a remedy in tribal or federal court.[270] In *Golden Oil Co. v. Chace Oil Co., Inc.*,[271] one oil company sued another for breach of leases, of which the Jicarilla Apache Tribe was a party.[272] The New Mexico Court of Appeals dismissed the case, holding that the tribe was a necessary party under the state compulsory joinder rule because it had "an interest not only in deriving economic benefits from the operation of oil and gas leases on its lands but also in protecting its sovereign right to litigate on its own behalf and in the forum of its choice."[273]

It appears to be a question of political disposition on the state courts as to whether they will defer to an Indian tribe's choice to stay out of a case.[274] New Mexico courts appear to follow the rule that a tribe has a strong interest in choosing when and where to be sued. The Colorado court held that there was an alternative

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(D.C. Cir. 1986)).

262. *Id.*
263. *Cf. id.* at 546-48.
264. *Cf. id.* at 544.
265. *Id.* at 547.
266. *See, e.g.*, Lyon v. Amoco Prod. Co., 923 P.2d 350 (Colo. Ct. App. 1996).
267. *Id.* at 352.
268. *See id.*
269. *Id.* at 356.
270. *See id.* at 357 (citing Yazzie v. Morton, 59 F.R.D. 377 (D. Ariz. 1973)).
271. 994 P.2d 772 (N.M. Ct. App. 1999).
272. *Id.*. at 773.
273. *Id.* at 775 (citing Srader v. Verant, 964 P.2d 82, 91 (N.M. 1998)).
274. *Cf. id.*

forum in which to bring the breach of contract case, that being tribal court.[275] Other courts ignore these factors, especially in gaming compact cases.[276]

Only two cases found that the absence of a tribe during the adjudication of a natural resources or land lease was insufficient to dismiss the matter under the compulsory counterclaim rule.[277] In *Lear Petroleum Corp. v. Wilson*, a split Tenth Circuit panel held the absent tribe was not an indispensable party in a suit between operators of a gas well on Cherokee, Chickasaw, and Choctaw land in Oklahoma.[278] The suit was to determine the owner of royalty payments owed by the operators.[279] Without much discussion, the court rejected a defense that the case should be dismissed on the grounds that the three absent tribes might have a claim to the royalties.[280] The court found the other parties' lack of remedy to be dispositive over the absent tribes' sovereignty.[281] The dissent noted that the court's lack of analysis left it "impossible to determine why the appellants' need for a remedy should outweigh any rights the tribes may have."[282]

The second case is more complex, unusual, and for tribal interests, unfortunate.[283] In *Comstock Oil & Gas, Inc. v. Alabama and Coushatta Indian Tribes of Texas*, oil companies sued the Alabama and Coushatta Indian Tribes of Texas and members of the tribal council, the governing body of the tribe, in an action for a declaration that the companies' oil and gas leases remained valid, even after the tribe asked for them to be declared null and void by the secretary.[284] The court held that the tribe was not an indispensable party for several reasons.[285] First, the court found that the presence of the individual council members and the Secretary of the Interior diluted the prejudice to the tribe.[286] Second, in the presence of the council members and the secretary, the relief granted would be adequate to settle the case as to the tribe.[287] Third, the court heavily weighed the lack of an available forum for the

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275. *See Lyon*, 923 P.2d at 357.

276. *See generally* Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015 (9th Cir. 2002).

277. *See* Lear Petroleum Corp. v. Wilson, 730 F.2d 1363, 1364-65 (10th Cir. 1984); Comstock Oil & Gas, Inc. v. Ala. & Coushatta Indian Tribes, 78 F. Supp. 2d 589, 601-03 (E.D. Tex. 1999), *aff'd in relevant part*, 261 F.3d 567 (5th Cir. 2001), *reh'g denied*, 275 F.3d 1034 (5th Cir. 2001).

278. 730 F.2d 1363, 1364 (10th Cir. 1984).

279. *Id.* at 1363.

280. *See id.* at 1364.

281. *See id.* at 1364-65.

282. *Id.* at 1366 (Doyle, J., dissenting).

283. *See* Comstock Oil & Gas, Inc. v. Ala. & Coushatta Indian Tribes, 78 F. Supp. 2d 589 (E.D. Tex. 1999).

284. *Id.* at 590-91.

285. *Id.* at 601-03.

286. *Id.* at 601.

287. *Id.* (citing Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968)).

plaintiffs if the case were dismissed.[288] The court had already determined that the Alabama and Coushatta Tribal Court did not properly exist,[289] so no tribal court forum was available.[290] Strangely, though the court had stated that the individual council members were not immune from suit in an action for declaratory relief because they may have been acting outside the scope of their authority,[291] the court held in the compulsory joinder analysis that the plaintiffs would not have a remedy in state court because the tribe retained its immunity.[292] Like the New Mexico court in *Golden Oil*, the court identified the tribe's own court as an alternative venue, but, unlike *Golden Oil*, this court undermined the tribe's court altogether.[293] Thus, the district court effectively litigated the validity of the tribal court in a forum that was not sanctioned by the tribe and in the absence of the tribe.[294] The case should be confined to its unusual facts and unusual analysis, but it is a good example of bringing the tribe to court by suing its officers.[295]

Other parties, besides sovereigns, that argue they are indispensable, with varying degrees of success. In *Pan American Petroleum Corp. v. Udall*,[296] the district court held that an individual Indian, a third party beneficiary of a lease, was not an indispensable party in an action brought by an oil company lessee of the Fort Berthold Indian Tribe.[297] The court held that the Secretary of the Interior, the defendant in the action, was capable of defending the absent Indian's interests.[298] The Eighth Circuit later relied upon *Pan American* in *Cheyenne River Sioux Tribe of Indians v. United States*[299] for the proposition that an Indian tribe was not an indispensable party when the federal government brought a condemnation action against a tribal member.[300] These two cases are sometimes, though rarely, cited for the proposition that the federal government can adequately represent Indian or tribal interests.[301] *Cheyenne River Sioux Tribe*, however, was an unusual circumstance

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288. *Comstock Oil & Gas, Inc.* 78 F. Supp. 2d at 602.

289. *Id.* at 598-601.

290. *Id.* at 596.

291. *Id.* at 593-94.

292. *See id.* at 601-02.

293. *Compare* Golden Oil Co. v. Chace Oil Co., Inc., 994 P.2d 772 (N.M. Ct. App. 1999), *with Comstock Oil & Gas, Inc.*, 78 F. Supp. 2d at 589.

294. *See Comstock Oil & Gas, Inc.*, 78 F. Supp. 2d at 603.

295. *Cf. id.* at 591.

296. 192 F. Supp. 626 (D.D.C. 1961).

297. *Id.* at 627-28.

298. *Id.* at 628 (citing Kerrison v. Stewart, 93 U.S. 155 (1876); Green v. Brophy, 110 F.2d 539 (D.C. Cir. 1940)).

299. 338 F.2d 906 (8th Cir. 1964), *cert. denied*, 382 U.S. 815 (1964).

300. *See id.* at 910 (citing *Pan Am. Petroleum Corp.*, 192 F. Supp. at 628).

301. *See, e.g.*, Connecticut *ex rel.* Blumenthal v. Babbitt, 889 F. Supp. 80, 83 (D. Conn. 1995); City of Sault Ste. Marie v. Andrus, 458 F. Supp. 465, 473 (D.D.C. 1978).

because there was a tribal agreement that the federal government would proceed with condemnation actions, thereby providing a more compelling argument that the federal government could adequately represent the tribe.[302] Other cases in which the federal government's angle was one of the trust relationship are not as compelling.

3. Settlement or Judgment Proceeds

Individual Indians and Indian tribes are often the beneficiaries of settlements arising out of land claims[303] and trust breach claims.[304] In many instances, more than one tribe is the beneficiary of a trust corpus and naturally, conflict may arise.[305] The more unambiguous cases in this field are cases involving a limited fund or distribution, such as when the federal government holds funds in trust for a tribe or tribal member[306] or where the absent tribe is a beneficiary of a settlement or judgment trust fund.[307] Perhaps the most influential decision in the field is the D.C. Circuit's opinion in *Wichita and Affiliated Tribes of Oklahoma v. Hodel.* With then-Judge Scalia on the panel, the court dismissed an action arising out of the distribution of land proceeds shared by three tribes, the Wichita and Affiliated Tribes of Oklahoma, the Caddo Tribe of Oklahoma, and the Delaware Tribe of Western Oklahoma.[308] The Wichita Tribe challenged an Interior Board of Indian Appeals decision that changed the distribution formula to the advantage of the Caddo Tribe.[309] Since the Caddo Tribe would be receiving the largest payment, it cross-claimed that it should receive payment back-dated to the beginning of the arrangement in the 1960s.[310] The Wichita argued it would not waive its immunity as to the Caddo Tribe's cross-claim

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302. *See* 338 F.2d at 910.

303. *See, e.g.,* Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1701 (2004); Maine Indian Claims Settlement Act, 25 U.S.C. § 1721 (2004).

304. *See, e.g.*, Hoopa-Yurok Settlement Act, 25 U.S.C. § 1300i-1 (2004).

305. *See generally* Wichita and Affiliated Tribes v. Hodel, 788 F.2d 765 (D.C. Cir. 1986).

306. *See, e.g.,* Cogo v. Cent. Council of the Tlingit and Haida Indians, 465 F. Supp. 1286, 1291 (D. Alaska 1979) ("The United States holds the judgment funds in trust for the Tlingit and Haida Tribes but could not be joined in this suit because of sovereign immunity. The United States is an indispensable party in a suit affecting property which it holds in trust for Indians or Indian tribes.") (citing Cheyenne River Sioux Tribe v. United States, 338 F.2d 906, 909-10 (8th Cir. 1964); Green v. Wilson, 331 F.2d 769 (9th Cir. 1964); Nicodemus v. Wash. Water Power Co., 264 F.2d 614 (9th Cir. 1959); First Nat'l Bank of Holdenville v. Ickes, 154 F.2d 851 (D.C. Cir. 1946)). *Cf.* Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 929 P.2d 379, 387 (Wash. 1996) (holding that the United States was not an indispensable party where it merely acted as trustee of mineral rights in action for the partition of a surface estate owned in part by an Indian tribe).

307. *See generally Wichita and Affiliated Tribes*, 788 F.2d at 765.

308. *See id.* at 767.

309. *Id.*

310. *Id.*

and further alleged that the claim could not be adjudicated in its absence or in the absence of the Delawares, an argument the court adopted.[311]

The court first noted that the absent tribes were indispensable parties because they were "beneficiaries of the trust who stand to lose if the Caddos succeed in obtaining redistributions of future income to compensate for the past."[312] Using the four-part test to determine if the case should be dismissed, the court first found that the prejudice to the absent tribes could not be relieved by the presence of the United States because "whatever allegiance the government owes to the tribes as trustee, is necessarily split among the three competing tribes involved in the case."[313] Second, the court rejected the argument that the Wichita's presence mitigated the prejudice:

> [W]e decline to hold that the *de facto* opportunity to file position papers with the court on a cross-claim is sufficient to mitigate the prejudice of non-joinder. If the opportunity to brief an issue as a non-party were enough to eliminate prejudice, non-joinder would never be a problem since the court could always allow the non-joinable party to file amicus briefs. Being party to a suit carries with it significant advantages beyond the amicus' opportunities, not the least of which is the ability to appeal an adverse judgment.[314]

Third, the court refused to abrogate the absent tribes' immunity, stating, "[t]o intervene, the Wichitas would have had to waive their tribal immunity. It is wholly at odds with the policy of tribal immunity to put the tribe to this Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it."[315] The court further wrote, "[T]he policy of tribal immunity . . . accords to tribal sovereignty and autonomy a place in the hierarchy of values over society's interest in making tribes amenable to suit."[316] Fourth, the court could not find a method to shape the relief requested to avoid prejudicing the absent tribes, noting that "[i]t would elevate form over substance to allow tribal immunity to be avoided by proceeding against an absent, indispensable, tribe because the tribe has the opportunity to file a later suit attacking the plan."[317] Fifth, the court rejected the argument that the Caddo Tribe would have no other remedy.[318] The court stated that "an action should [not] proceed solely because the plaintiff otherwise would not have an adequate remedy, as

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311. *See id.* at 774-78.

312. *Wichita and Affiliated Tribes,* 788 F.2d at 774.

313. *Id.* at 775 (citing Manygoats v. Kleppe, 558 F.2d 556, 558 (10th Cir. 1977)).

314. *Id.* (citing Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 543 (1986); Washoe Tribe v. Greenley, 674 F.2d 816, 818 (9th Cir. 1982); Moten v. Bricklayers, Masons & Plasterers Int'l Union, 543 F.2d 224, 227 (D.C. Cir. 1976)).

315. *Id.* at 776.

316. *Id.* (citing United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 513 (1940)).

317. *Wichita and Affiliated Tribes,* 788 F.2d at 776.

318. *See id.* at 777.

this would be a misconstruction of the rule and would contravene the established doctrine of indispensability."[319] The court concluded:

> Although we are sensitive to the problem of dismissing an action where there is no alternative forum, we think the result is less troublesome in this case than in some others. The dismissal of this suit is mandated by the policy of tribal immunity. This is not a case where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.[320]

The D.C. Circuit, arguably the most influential and important of the federal circuits, relied on a public policy in favor of tribal immunity from suit, established and controlled by Congress.[321] This appears to be the strongest statement in favor of dismissing a case when an absent tribe has an interest in the outcome. One could argue that, as in the Navajo and Hopi cases in which dissident tribal factions brought suit against their own tribe,[322] *Wichita and Affiliated Tribes* was essentially a dispute between Indians. In this case, however, it was a dispute between tribes.[323] The case involved a dispute over an agreement between three sovereigns, brokered by the federal government as a trustee for all three.[324]

As in treaty claims and leases, courts generally dismiss challenges to the constitutionality of a land settlement act, absent the tribes affected by that act.[325] In *Shermoen*, individual Indians and an Indian tribe sued the federal government, challenging the constitutionality of the Hoopa-Yurok Settlement Act of 1988.[326] The court held that the two absent tribes, the Hoopa Valley Tribe and the Yurok Tribe, were indispensable parties and dismissed the action.[327] The court rejected the plaintiffs' first argument that the absent tribes were not necessary parties because, if the act were unconstitutional, then the two tribes have no interest in the outcome.[328]

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319. *Id.* (internal quotation omitted) (quoting 3A Moore's Federal Practice ¶ 19.07-2[4], at 19-153 (1984)).

320. *Id.*

321. *See id.*

322. *See* Yazzie v. Morton, 59 F.R.D. 377, 379 (D. Ariz. 1973); *see also* Lomayaklewa v. Hathaway, 520 F.2d 1324, 1325 (9th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976).

323. *Wichita and Affiliated Tribes*, 778 F.2d at 767.

324. *Id.*

325. *See generally* Shermoen v. United States, 982 F.2d 1312 (9th Cir. 1992), *cert. denied*, 509 U.S. 903, (1993), *reh'g denied*, 509 U.S. 940 (1993).

326. *See id.* at 1314.

327. *See id.* at 1319.

328. *See id.* at 1317 ("Just adjudication of claims requires that courts protect a party's right to be heard and to participate in adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment of that party."). *But cf.* Citizen Band Potawatomi Indian Tribe v. Collier, 17

The court also recognized the absent tribes' "interest in preserving their own sovereign immunity, with its comitant 'right not to have [their] legal duties judicially determined without consent.'"[329] Moreover, since the conflict arose between tribes, the United States could not adequately represent the absent tribes' interests.[330] The court noted the plaintiffs did not have a forum to air their grievances but stated, "[t]his case serves as one more illustration, however, that 'Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained.'"[331] Finally, the court rejected the application of the "public rights" doctrine "[b]ecause of the threat to the absent tribes' legal entitlements, and indeed to their sovereignty, posed by the present litigation."[332]

This case highlights a few arguments that have arisen in other contexts. First, challengers argue that if a statute or compact is unconstitutional, then the tribe benefited by the statute or compact cannot have a legally protectable interest.[333] The courts usually see through this argument, sometimes labeling it 'circular' and noting that the rule allows for any absent party to be necessary and indispensable if they have a non-frivolous claim to an interest.[334] Second, the plaintiffs' attempt to invoke the 'public rights' exception was limited by the court.[335]

In another judgment fund case, *Pembina Treaty Committee v. Lujan*,[336] the Eighth Circuit dismissed an action by individual tribal members seeking an injunction that would require the Turtle Mountain Band of Pembina Chippewa Indians to present an annual budget to the federal government before the government would release funds from a judgment trust fund.[337] The plaintiffs also asked the court to declare the tribe's spending plan invalid.[338] The court agreed with the lower court that complete relief was unavailable absent the tribe, and that a judgment in its absence would affect the absentee's right to self-governance.[339] Moreover, the court found the

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F.3d 1292, 1293-94 (10th Cir. 1994) (holding that absent tribe never acquired an interest in the statute at issue and therefore was not an indispensable party), *on remand*, 142 F.3d 1325 (10th Cir. 1998), *cert. denied sub nom.* Absentee Shawnee Tribe v. Citizen Band Potawatomi Indian Tribe, 525 U.S. 947 (1998)).

329. *Shermoen*, 982 F.2d at 1317 (quoting Enterprise Mgmt. Consultants v. United States *ex rel.* Hodel, 883 F.2d 890, 894 (10th Cir. 1989).

330. *See id.* at 1318 (citing Confederated Tribes of the Chehalis Reservation v. Lujan, 928 F.2d 1496, 1500 (9th Cir. 1991)).

331. *Id.* at 1320-21 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978)).

332. *Id.* at 1319.

333. *See id.* at 1317.

334. *See, e.g., Shermoen*, 982 F.2d at 1317.

335. *See id.* at 1319.

336. 980 F.2d 543 (8th Cir. 1992).

337. *Id.* at 544.

338. *Id.*

339. *See id.* at 545-46.

case amounted to no more than "a political difficulty that must be redressed, if at all, through tribal political processes or the tribal courts."[340] The main feature of this case is the internal political dispute that was at the heart of the matter.[341]

Similarly, in *Native American Mohegans v. United States*,[342] the district court dismissed a challenge by a faction of tribal members to the constitutionality of the Mohegan Nation of Connecticut Land Claims Settlement Act.[343] The court held the absent Mohegan Tribe was an indispensable party because neither the federal government nor the state was "capable of representing [the absent tribe's] interest in ensuring that it alone receives the benefits of the casino proceeds and, while plaintiffs may lack an alternate forum for pursuit of this particular remedy, that factor does not carry the day here."[344] This case was brought by a group of Mohegan Indians who were attempting to achieve federal recognition through the courts.[345] The court was incorrect regarding the lack of alternate forum in one respect, because the group could have gone through the administrative recognition process.[346] Cases in this category are usually dismissed on the grounds that the courts do not have jurisdiction over internal tribal matters.[347]

Two cases arising out of the Navajo-Hopi land redistribution acts reached the same conclusion.[348] In *Clinton v. Babbitt*,[349] the Ninth Circuit held that the Hopi Tribe was an indispensable party to an action challenging the Navajo-Hopi Land Dispute Settlement Act of 1996.[350] The court found that the Hopi Tribe had a legally protected interest, because a declaration that the settlement act was unconstitutional would have a detrimental affect on the tribe's rights to $25 million in compensation from the United States and on the tribe's jurisdiction over the Hopi Partitioned Lands.[351] It concluded that the Hopi Tribe was an indispensable party because "the Hopi Tribe's interest in maintaining its sovereign immunity outweighs the interest of

340. *Id.* at 546.

341. *See generally Pembina Treaty Comm.*, 980 F.2d at 543.

342. 184 F. Supp. 2d 198 (D. Conn. 2002).

343. *See id.* at 201-02.

344. *Id.* at 217.

345. *See id.* at 201-02.

346. *See generally* 25 C.F.R. pt. 83.

347. *See, e.g., In re* Sac & Fox Tribe, 340 F.3d 749, 763 (8th Cir. 2003) ("Jurisdiction to resolve internal tribal disputes, interpret tribal constitutions and laws, and issue tribal membership determinations lies with Indian tribes and not in the district courts.") (citing United States v. Wheeler, 435 U.S. 313, 323-26 (1978).

348. *See generally* Manybeads v. United States, 209 F.3d 1164 (9th Cir. 2000); Clinton v. Babbitt, 180 F.3d 1081 (9th Cir. 1999).

349. 180 F.3d 1081 (9th Cir. 1999).

350. *Id.* at 1083.

351. *Id.* at 1089.

the plaintiffs in litigating their claim."[352] In a related case, *Manybeads v. United States*,[353] the Ninth Circuit dismissed a First Amendment challenge to the settlement between the parties in *Clinton v. Babbitt*.[354] The court rejected the argument that a constitutional violation to a fundamental right will go unredressed because "this principle cannot be asserted when a sovereign, not a party to the case, will suffer substantially from its vindication."[355] This principle finds its way into the compulsory joinder cases only when the plaintiff is an individual Indian or Indian tribe.[356]

Two courts refused to dismiss cases in the face of a clear tribal government interest in property.[357] First, in the Ninth Circuit's opinion in *Youpee v. Babbitt*,[358] without discussing the issue, the court proceeded without the tribes.[359] That case involved a challenge to the constitutionality of provisions of the Indian Land Consolidation Act,[360] a statute that allowed highly fractionated individual Indian land interests to escheat to the individual's tribe.[361] Certainly, the affected tribes would have had an interest in the litigation over the constitutionality of the statute, but they were never joined.[362] In a second case, somewhat similar to *Youpee*, a district court held that the interest in an Indian Claims Commission judgment fund implicates tribal interests that are insufficient to satisfy the interest required to invoke the compulsory joinder rule.[363] In *Lebeau v. United States*,[364] individual Indians sued the United States, challenging a statute that would transfer a portion of the Indians's settlement funds from the individuals to the Sisseton and Wahpeton Sioux Tribe.[365] The court ruled that the case should not be dismissed under the compulsory joinder rule because the United States could adequately represent the absent tribe's interest.[366] *Labeau* is similar to *Shermoen* and the challenges to the Hopi-Navajo land settlement acts because the absent tribes were, in effect, parties to an agreement brokered and, sponsored by the United States. However, the decision in *Labeau* is more justifiable

352. *Id.* at 1090 (citing Quileute Indian Tribe v. Babbitt, 18 F.3d 1456, 1460-61 (9th Cir. 1994)).

353. 209 F.3d 1164 (9th Cir. 2000), *cert. denied*, 532 U.S. 966 (2001).

354. *Id.* at 1166-67.

355. *Id.* at 1166.

356. *See, e.g., id.* at 1166-67.

357. *See generally* Youpee v. Babbitt, 67 F.3d 194 (9th Cir. 1995); Lebeau v. United States, 115 F. Supp. 2d 1172 (D.S.D. 2000).

358. 67 F.3d 194 (9th Cir. 1995), *aff'd on other grounds*, 519 U.S. 234 (1997).

359. *See generally id.*

360. *Id.* at 195-96.

361. 25 U.S.C. §§ 2201-2219 (2000).

362. *See Youpee*, 67 F.3d at 194.

363. *See* Lebeau v. United States, 115 F. Supp. 2d 1172, 1176 (D.S.D. 2000).

364. *Id.*

365. *See id.* at 1173.

366. *See id.* at 1176-77 (citing Babbitt v. Youpee, 519 U.S. 234, 236-45 (1997)).

because the United States, as a literal trustee to the Indian Claims Commission judgment fund, could better represent the tribe.[367]

4. Disputes Over Land

Due to colonization, many tribes have to share a land base.[368] As in the settlement fund distribution cases where more than one tribe has an interest, disputes often arise.[369] When a plaintiff brings an action claiming an interest in land owned by an Indian tribe without joining that tribe, the case will be dismissed.[370] In the characteristic case, *Quileute Indian Tribe v. Babbitt*,[371] the Ninth Circuit dismissed a case brought by the Quileute Indian Tribe against the federal government and the Quinault Indian Tribe.[372] The two tribes shared a reservation, and the Department of Interior decided that some fractional property interests within the Quinault area would escheat to the Quinault Tribe instead of the Quileute Tribe.[373] The court found that the Quinault Tribe's interest in its ability to govern was at stake[374] and that the United States could not adequately represent either side in the litigation when the two tribes are at odds.[375] The court concluded that the plaintiff's interest in litigating a claim is outweighed by society's interest in tribal immunity.[376] The court's language in *Quileute* is a particularly strong statement in favor of the absent tribal government interests.[377] The plaintiffs had already been given the opportunity to state their case to

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367. *See id.*

368. *See* Padraic I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R. Part 51*, 27 AM. INDIAN L. REV. 421, 422 (2002-03).

369. *See, e.g.*, Rosales v. United States, No. 02-55800, 2003 WL 21920015, at *1 (9th Cir. Aug. 11, 2003).

370. *See, e.g., id.* (dismissing quiet title claim against United States where Indian tribe owner was not joined).

371. 18 F.3d 1456 (9th Cir. 1994).

372. *See id.* at 1457, 1461.

373. *Id.* at 1457.

374. *See id.* at 1459 (citing Shermoen v. United States, 982 F.2d 1312, 1317 (9th Cir. 1992); Confederated Tribes of the Chehalis Reservation v. Lujan, 928 F.2d 1496, 1498 (9th Cir. 1991); Makah Indian Tribe v. Verity, 910 F.2d 555, 559 (9th Cir. 1990); McClendon v. United States, 885 F.2d 627, 633 (9th Cir. 1989)).

375. *Id.* at 1460 (citing *Confederated Tribes of the Chehalis Reservation*, 928 F.2d at 1500; *Makah Indian Tribe*, 910 F.2d at 560).

376. *See Quileute Indian Tribe*, at 1460-61 (citing *Confederated Tribes of the Chehalis Reservation*, 928 F.2d at 1500; Enter. Mgmt. Consultants, Inc. v. United States *ex rel.* Hodel, 883 F.2d 890, 894 (10th Cir. 1989)).

377. *See id.* at 1460.

the federal government during the administrative process leading up to the decision on who governed the reservation.[378] They were seeking a second shot.[379]

In *Pit River Home and Agricultural Cooperative Association v. United States*,[380] the Ninth Circuit dismissed a lawsuit by a tribal faction against the Secretary of the Interior after the Bureau of Indian Affairs ("BIA") determined that Pit River Tribal Council, and not the plaintiff, was the governing body of the tribe.[381] The dissenting faction asked the court to reverse the secretary's decision, but the court would not hear the case, holding that "[w]e cannot address these claims without prejudicing the rights of the Council to govern the [t]ribe, which the [s]ecretary has designated as the beneficial owner of the ranch."[382] *Pit River* is similar to *Quileute* because the plaintiff, here a group of Indians claiming to be the real tribe, had been given an opportunity to state their case to the Secretary of the Interior.[383] Once a tribal group becomes vested with the rights and responsibilities of being a federally recognized tribe, their interests are the kind that the rule was designed to protect.[384] These two cases, however, continue to show that the courts appear to most strongly vindicate tribal interests when tribal members, rebel factions, and other tribes attempt to litigate in the absence of the tribe in interest.[385]

A damages action brought against individual officers of an Indian tribe over actions taken in a land dispute might be dismissed under the compulsory joinder rule.[386] In *Turley v. Eddy*,[387] plaintiffs sued officers of the Colorado River Indian Tribe for evicting them from the reservation.[388] Since the absent tribe had a legitimate claim to the establishment of the boundaries of its reservation and, despite the fact their claim was far from dispositive, the tribe was deemed an indispensable party.[389] This case amounted to a quiet title action against the tribe, without their presence.[390] As in contract claims, courts are most likely to find that an absent party is indispensable in quiet title actions.[391] In this case, the plaintiff properly sued the

378. *See id.* at 1458.

379. *See id.*

380. 30 F.3d 1088 (9th Cir. 1994).

381. *See id.* at 1092.

382. *Id.* at 1102 (citing Shermoen v. United States, 982 F.2d 1312, 1320 (9th Cir. 1992)).

383. *See id.* at 1088.

384. *See, e.g., id.* at 1102.

385. *See, e.g., Pit River Home & Agric. Coop. Ass'n*, 30 F.3d at 1096.

386. *See, e.g.,* Turley v. Eddy, No. 02-56782, 2003 WL 21675511 (9th Cir. July 16, 2003).

387. *Id.*

388. *Id.* at *1.

389. *See id.* (citing Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1272 n.4 (9th Cir. 1991)); Carlson v. Tulalip Tribes, 510 F.2d 1337, 1339 (9th Cir. 1975)).

390. *See id.*

391. *See, e.g., Carlson*, 510 F.2d at 1339.

individual officers, but the court agreed with the affirmative defense of official immunity because the officers had not acted outside the scope of their authority.[392]

There is a category of rulings running through the compulsory joinder jurisprudence where a non-Indian party, often the classic bad actor, tries to invoke the absence of a tribe in order to avoid suit.[393] In *Trans-Canada Enterprises, Ltd. v. King County*,[394] the Court of Appeals of Washington held that when relief can be modified to preserve the interests of the absent party, the case may continue despite the absence.[395] The court adjudicated a claim by a non-Indian property owner against a public utility charged with maintaining a river dike that had broken.[396] The defendant argued that the Muckleshoot Tribe, which claimed ownership of the riverbed, was an indispensable party.[397] The court solved the problem by amending the lower court's order to preserve the tribe's future claim, if any.[398] The case involved an attempt by a defendant to avoid liability and judgment by trying to invoke the compulsory joinder rule.[399] With good reason, courts do not look kindly upon this strategy.[400] Rarely is an absent tribe protected by the court's modification of the relief requested.[401] In cases where the relief is all or nothing, such as when a party claims title to real property, relief usually cannot be shaped to preserve the absent party's interests.[402]

5. National Environmental Policy Act

In most cases where the action of a federal agency in conjunction with an Indian tribe is challenged under the National Environmental Policy Act ("NEPA"),[403] courts will not dismiss the action upon the failure of the plaintiff to join the absent tribe.[404] NEPA creates responsibilities for federal agencies.[405] The courts treat these cases as those in which the agency alone is in interest.[406] For example, in *Manygoats v.*

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392. *See Turley*, 2003 WL 21675511, at *1.

393. *See, e.g.*, Trans-Canada Enter., Ltd. v. King County, 628 P.2d 493, 497 (Wash. Ct. App. 1981), *review denied*, 96 Wash.2d 1002 (1981).

394. *Id.*

395. *See id.* at 497-98.

396. *See id.* at 494-95.

397. *Id.* at 497.

398. *See Trans-Canada Enter.*, 628 P.2d at 497-98.

399. *See id.* at 496-97.

400. *See id.* at 499.

401. *See id.* at 496-97.

402. *See id.* at 497.

403. 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (2000).

404. *See, e.g.*, Manygoats v. Kleppe, 558 F.2d 556, 559 (10th Cir. 1977).

405. *See* 42 U.S.C. § 4321.

406. *See Manygoats*, 558 F.2d at 559.

Kleppe,[407] the Tenth Circuit refused to dismiss an action brought by members of the Navajo Tribe seeking an injunction to stop the implementation of an agreement between the tribe and Exxon to explore for uranium.[408] The court noted that, when the United States has obligations under NEPA, "the national interest is not necessarily coincidental with the interest of the [t]ribe in the benefits which the Exxon agreement provides," and therefore the federal government did not adequately represent the absent tribe's interest.[409] The court asserted that "[a] holding that the [Environmental Impact Statement ("EIS")] is inadequate does not necessarily result in prejudice to the Tribe [because t]he only result will be a new EIS for consideration by the [s]ecretary."[410] The court also concluded that, though "[t]ribal interests may not coincide with national interests . . . [n]othing in NEPA . . . excepts Indian lands from national environmental policy."[411] This case more accurately describes the trust relationship between the federal government and the tribes.[412] Unless the federal government is administering property directly on behalf of the tribe, the argument that they could otherwise represent the tribes' interest is unconvincing.[413] The court states, in relation to NEPA, that the tribal interest is not always the national interest.[414] There should be nothing to stop a court from making that holding in most other cases where it holds the tribe is not necessary or indispensable because its trustee is a party.

More recently, in *Southwest Center for Biological Diversity v. Babbitt*, the Ninth Circuit held that the absent tribe was not a necessary party in a NEPA action.[415] The NEPA action at issue challenged the completion of the Additional Active Conservation Capacity ("AACC") behind the Roosevelt Dam, claiming the defendants did not adequately take into account the fate of the Southwestern Willow Flycatcher.[416] The defendants argued that the Salt River Pima-Maricopa Indian Community was an indispensable party and asked the court to dismiss the action.[417] The court agreed that the absent tribe was a necessary party because it had a strong interest in making the AACC available as soon as possible, however the court did not

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407. *Id.* at 556.

408. *Id.* at 557.

409. *Id.* at 558 (citing New Mexico v. Aamodt, 537 F.2d 1102, 1106 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977)).

410. *Id.* Given the more recent litigation involving tribal projects bogged down due to NEPA constraints, this statement is now wildly inaccurate. *See, e.g.*, TOMAC v. Norton, 240 F. Supp. 2d 45, 50-52 (D.D.C. 2003) (holding that the Bureau of Indian Affairs failed to analyze potential impacts of a proposed casino for the Pokagon Band of Potawatomi Indians).

411. Manygoats, 558 F.2d at 559.

412. *See id.* at 557-59.

413. *See id.* at 559.

414. *Id.*

415. 150 F.3d 1152 (9th Cir. 1998).

416. *Id.* at 1153.

417. *See id.*

dismiss the case.[418] It held that the United States could adequately represent the absent tribe's interests:[419]

> The district court did not question the ability or willingness of the United States to represent the Community adequately in the adjudication of the underlying merits of the suit, but the court concluded the government would not represent the Community adequately because the government did not support the Community's motion to dismiss the suit under Rule 19. The district court's approach is circular: a non-party is "necessary" even though its interests are adequately represented on the underlying merits by an existing party, simply because that existing party has correctly concluded that it is an adequate representative of the non-party, and therefore opposes the non-party's preliminary motion to dismiss. The district court's approach would preclude the United States from opposing frivolous motions to dismiss out of fear that its opposition would render it an inadequate representative.[420]

The court held that dismissing the case "would also create a serious risk that non-parties clothed with sovereign immunity, such as the Community, whose interests in the underlying merits are adequately represented could defeat meritorious suits simply because the existing parties representing their interest opposed their motion to dismiss."[421]

The *Southwest Center* court raised two very important issues but decided them both poorly. First, the court allowed the federal government to prevent the absent tribe from even participating in the suit when the government changed sides against the tribe.[422] The court went too far when it tried to logically extend the district court's holding to include opposition to frivolous motions to dismiss when the absent tribe's motion was far from frivolous.[423] The court left open the question of what constitutes "adequate" representation.[424] Does that mean representation that does not violate the rules of professional responsibility? It could be a very low standard. The court simply ran roughshod over the tribe's sovereign right to defend itself by choosing in which forum to litigate.

Second, the court extended its holding in an effort to create a one-trick parade of horribles whereby the tribes can stop what the plaintiffs and the court consider "meritorious suits" at any time, simply by showing up at the courthouse with a copy

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418. *See id.* at 1154.

419. *See id.* (citing Shermoen v. United States, 982 F.2d 1312, 1318 (9th Cir. 1992); Makah Indian Tribe v. Verity, 910 F.2d 555, 558 (9th Cir. 1990)).

420. S.W. Ctr. for Biological Diversity v. Babbitt, 150 F.3d 1152, 1154 (9th Cir. 1998).

421. *Id.*

422. *See id.* at 1153.

423. *See id.* at 1154.

424. *See id.* at 1153-54.

of Rule 19.[425] The court could have easily relied upon the national public policy of NEPA, as it did in *Manygoats*.[426] Instead, the court relied upon a very tenuous and clearly conflicted representation by the federal government.[427] Here, the case was probably decided correctly, but the reasoning was faulty and overly complex. Moreover, the court seemed to characterize the tribe as a Grendel-like sovereign monster, attempting to uproot federal law and take the federal courthouse away from sympathetic plaintiffs.

The exception to the trend in NEPA cases is *Village of Hotvela Traditional Elders v. Indian Health Services*.[428] A group of Hopi elders challenged the installation of a sewer line on NEPA grounds because the construction desecrated religious shrines, burial sites, ancient ruins, and prayer feathers.[429] The court held the Hopi Tribe was an indispensable party.[430] First, the court concluded the elders' request for an injunction would stop only the federal defendants from installing the sewer; the tribe could still use non-federal funds to continue the project.[431] Second, the tribe made a showing that the sewer system was critically important to combat "the increased number of cases of gastroenteritis, shigella, hepatitis and other similar diseases attacking the Hopi population within Hotvilla."[432] Third, the court noted that fourteen tribal members employed on the project stood to lose their jobs if the project were shut down.[433] Finally, and most importantly for the court, the suit infringed on the Hopi Tribe's "right to decide internal matters concerning cultural issues."[434] Again, the courts appear to be more likely to dismiss an action on the basis of tribal sovereignty when the plaintiffs are tribal members.[435] The court couches its language in terms of supporting the decisions of the tribal government policymakers—a justified rationale—but it remains to be seen if the courts will do so consistently when the plaintiffs are not raising claims based on tribal culture and tradition.

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425. *See generally S.W. Ctr. for Biological Diversity*, 150 F.3d at 1154.

426. Manygoats v. Kleppe, 558 F.2d 556 (10th Cir. 1997).

427. *See generally S.W. Ctr. for Biological Diversity*, 150 F.3d at 1154.

428. 1 F. Supp. 2d 1022 (D. Ariz. 1997), *aff'd*, 141 F.3d 1182 (9th Cir. 1998), *cert. denied sub nom.* Evehema v. Indian Health Servs., 525 U.S. 1107 (1999).

429. *Id.* at 1024.

430. *Id.* at 1026.

431. *See id.* (citing Pit River Home & Agric. Coop. Ass'n v. United States, 30 F.3d 1088, 1099 (9th Cir. 1994); McClendon v. United States, 885 F.2d 627, 633 (9th Cir. 1989)).

432. *Id.*

433. *See Vill. of Hotvela Traditional Elders*, 1 F. Supp. 2d at 1026.

434. *Id.*

435. *See id.* at 1031.

6. Secretarial Trust Acquisitions

The Indian Reorganization Act grants the Secretary of the Interior discretionary authority to acquire land and to hold that land for the benefit of individual Indians and Indian tribes in trust.[436] Because the land is held by the federal government, it is not subject to state taxation or regulation.[437] Conflicts arise when the state or local government objects to the secretary's decision or authority to take land into trust for Indians and Indian tribes.[438] In cases where a plaintiff challenges the authority of the Secretary of the Interior to take land into trust on behalf of an Indian tribe, the courts will not dismiss the claim for failure to join the absent tribe.[439] In *City of Sault Ste., Marie v. Andrus*,[440] the City of Sault Ste. Marie argued that the secretary's decision to take land into trust on behalf of the Sault Ste. Marie Tribe of Chippewa Indians amounted to an unconstitutional taking without due process.[441] The district court noted that the statute under which the secretary could take land into trust for Indian tribes, was a manifestation of the government-to-government trust relationship between the United States and the tribe.[442] The federal defendants were adequate to defend the absent tribe's interests.[443]

Considering the obvious property interest the absent tribe has in having its land taken into trust,[444] it is strange for the courts to dismiss the tribal interest so easily. A tribe's legal authority, if nothing else, is defined by its land base.[445] Since many tribes have so few acres of trust and reservation land, each parcel is a critical piece of restoring that tribe's sovereignty.[446] Arguably the current national and local politics regarding placing land into trust make it difficult for tribes to accomplish anything in this area. Leaving the tribes out in an area in which the tribes have such a monumental stake is disappointing and puzzling. Moreover, given some of the statements made by the current Secretary of the Interior,[447] it is certain that national politics do not always square with the absent tribe's interest.[448]

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436. 25 U.S.C. § 465 (2000); 25 C.F.R. pt. 151 (2004).

437. 25 C.F.R. § 1.4(a) (2004).

438. *See, e.g.*, City of Sault Ste. Marie v. Andrus, 458 F. Supp. 465 (D.D.C. 1978).

439. *See id.* at 472-73.

440. *Id.* at 465.

441. *Id.* at 467-68.

442. *See id.* at 473.

443. *See City of Sault Ste. Marie*, 458 F. Supp. at 472-73 (citing Cheyenne River Sioux Tribe v. United States, 338 F.2d 906, 910 (8th Cir.), *cert. denied*, 382 U.S. 815 (1964); Pan Am. Petroleum Corp. v. Udall, 192 F. Supp. 626, 628 (D.D.C. 1961)). Two other federal district court decisions have followed the same reasoning. Lincoln City v. United States Dep't of Interior, 229 F. Supp. 2d 1109 (D. Or. 2002); Connecticut *ex rel.* Blumenthal v. Babbitt, 899 F. Supp. 80 (D. Conn. 1995).

444. *See generally* McCoy, *supra* note 368.

445. *See id.* at 443.

446. *See generally id.* at 444-45.

447. "While I do not intend to signal an absolute bar on off-reservation gaming, I am

B. *Indian Land Claims*

In the last thirty years many tribes have begun the slow process of researching and preparing claims to their ancestral and treaty lands.[449] While the tribes often have a strong legal case on the merits, they have to wade through a high barrier of procedural problems, such as federal and state sovereign immunity, statutes of limitations, laches, and others.[450] Significant in this respect is the compulsory joinder rule, coupled with the federal or state immunity from suit, because when the federal government, acting as trustee of the tribes, brings a suit or participates on behalf of the tribe, most of these problems disappear.[451] When the United States has an interest in real property subject to land claims made by Indian tribes and the government has not consented to such claims, courts generally hold that the United States is an indispensable party.[452] In *Spirit Lake Tribe v. North Dakota*,[453] for example, the tribe sued the state for title to the Devils Lake lakebed.[454] The United States had a claim to the lake bed and was not a party to the case.[455] The court dismissed the case, holding that "when the government claims an interest in land that squarely conflicts with the interest of a Tribe, the government's presence in litigation is nearly always required to assure the proper and effective adjudication of the dispute."[456]

Only in the last few decades, have courts allowed tribes to bring a land claim suit without the participation of the federal government.[457] In *Puyallup Indian Tribe v.*

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extremely concerned that the principles underlying the enactment of IGRA are being stretched in ways Congress never imagined when enacting IGRA." Letter from Gale Norton, Secretary of the Interior, to Cyrus Schindler, President, Seneca Nation of Indians 3 (Nov. 12, 2002) (on file with author).

448. *See, e.g., id.*

449. *See generally McCoy*, *supra* note 368.

450. *See generally id.*

451. *But see, e.g.*, Carlson v. Tulalip Tribes, 510 F.2d 1337, 1339 (9th Cir. 1975).

452. *See, e.g.*, Spirit Lake Tribe v. North Dakota, 262 F.3d 732, 746-47 (8th Cir. 2001) *cert denied*, 535 U.S. 988 (2002).

453. *Id.* at 732.

454. *Id.* at 735-36.

455. *Id.* at 736.

456. *Id.* at 747 (citing Manypenny v. United States, 948 F.2d 1057, 1061 (8th Cir. 1991); Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455, 1473 (10th Cir. 1989)).

457. *See* Choctaw & Chickasaw Nations v. Seitz, 193 F.2d 456, 461 (10th Cir. 1951), *cert. denied*, 343 U.S. 919 (1952); *see also* Skokomish Indian Tribe v. France, 269 F.2d 555, 560 (9th Cir. 1959); Red Lake Band of Chippewas v. City of Baudette, 730 F. Supp. 972, 978 (D. Minn. 1990); Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899, 904 (D. Mass. 1977); Olinger v. City of Palm Springs, 425 F. Supp. 174, 176 (C.D. Cal. 1977); Salt River Pima-Maricopa Indian Cmty. v. Ariz. Sand & Rock Co., 353 F. Supp. 1098, 1101 (D. Ariz. 1972). *Cf.* Antoine v. United States, 637 F.2d 1177, 1181 (8th Cir. 1981) ("In our view, determining whether an Indian should have received a patent for an allotment of land under [25 U.S.C. §] 345 requires the presence of no party other than the United States.").

Port of Tacoma,[458] the tribe sued to quiet title to the former riverbed of the Puyallup River.[459] The Port of Tacoma argued that the state of Washington was a necessary party because it had received title to all navigable streams when it entered the Union and may have had superior title.[460] The court disagreed, however, holding that an action for ejectment would affect the state's rights if it brought a subsequent action against the tribe.[461]

The absence of the federal government on the side of the tribe creates procedural problems for the tribe, even when the federal government has no direct stake in the land claim. In a trio of cases decided months from each other in 1987, [462] the three circuits with jurisdiction over the vast majority of Indian country held that even when the United States does not claim a competing interest in the land at issue, Indian land claims should nevertheless be dismissed under Rule 19 because the actions of the United States may be implicated.[463] The Eighth Circuit, in *Nichols v. Rysavy*,[464] held that Indian land claims must be dismissed even when the United States does not claim an interest in whether the merits of the case "would depend entirely on whether the United States acted legally or illegally in granting fee patents under the blood quantum policy."[465] The court noted two other interests the United States had in the outcome of the case: first, future liability for claims made by the present owners; and second, the "resumption of fiduciary responsibility" over the land if the tribe prevailed in showing that the land never went out of trust.[466] Similarly, in *Lee v. United States*,[467] the Ninth Circuit dismissed a claim brought by non-Indians against Alaskan native corporations, alleging the United States never delivered proper land patents to the Alaskan natives because the United States was absent.[468] And in *Navajo Tribe of Indians v. State of New Mexico*,[469] the Tenth Circuit dismissed Indian land claims where the claims depended on proving the acts of the absent federal defendants were null and void.[470] The court relied heavily on the maxim: "It is a

458. 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049, *reh'g denied*, 466 U.S. 954 (1984).

459. *Id.* at 1253.

460. *Id.* at 1254.

461. *See id.* at 1256.

462. Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455 (10th Cir. 1987); Nichols v. Rysavy, 809 F.2d 1317 (8th Cir. 1987); Lee v. United States, 809 F.2d 1406 (9th Cir. 1987).

463. *See, e.g., Navajo Tribe of Indians*, 805 F.2d at 1472-73.

464. 809 F.2d 1317 (8th Cir.), *cert. denied*, 484 U.S. 848 (1987).

465. *Id.* at 1333.

466. *Id.*

467. 809 F.2d 1406 (9th Cir. 1987), *cert. denied sub nom.* Lee v. Eklutna, Inc., 484 U.S. 1041 (1988).

468. *See id.* at 1410-11.

469. 809 F.2d 1455 (10th Cir. 1987).

470. *See id.* at 1471-73.

fundamental principle of the law that an instrument may not be cancelled by a [c]ourt unless the parties to the instrument are before the [c]ourt."[471] Individual Indians bringing land claims may suffer the same fate.[472]

The Seventh Circuit criticized the trio of cases in *Sokaogon Chippewa Community v. Wisconsin*.[473] The tribe brought suit to recover a twelve square mile parcel of land that included state and federal lands, as well as private landowners.[474] The court extended the earlier trio of cases' logic and argued:

> To exaggerate slightly (because the U.S. appears to be in occupation of some of the land, although the extent of that occupation is entirely unclear on the skimpy record of this case), it is as if every time someone claimed that someone else was encroaching on his property he would have to sue not only the alleged encroacher (here Exxon) but also the alleged encroacher's predecessors in title right back to King James or Lord Baltimore (here the U.S.). So far as can be determined from an utterly inadequate record, the relationship of the U.S. to the Indians' controversy with Exxon and the other occupiers of the land in derogation of the Indians' alleged occupancy right is that of a predecessor in title (to Exxon), no more.[475]

Interestingly, the court further noted that its examination of Rule 19 would be "analyzed in relation to Indian claims."[476] The court reversed the lower court's decision finding that the case should be dismissed because of the absence of the United States, holding:

> We understand the anxieties of the American Land Title Association (which has filed a brief amicus curiae in support of the defendants) about a suit that could unsettle titles throughout a large tract of land. But on the other hand many legal wrongs were done to the Indians, and the Supreme Court recently held that an Indian tribe could bring a suit to recover land conveyed to the [s]tate of New York almost two centuries ago.[477]

Judge Posner's opinion takes the necessary case-by-case analysis to heart and rejects the summary analysis of the compulsory joinder rule employed by the lower court.[478]

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471. *Id.* at 1472 (quoting Tewa Tesuque v. Morton, 360 F. Supp. 452, 452 (D.N.M. 1973), *aff'd*, 498 F.2d 240 (10th Cir. 1974)).

472. *See* Manypenny v. United States, 125 F.R.D. 497, 500-03 (D. Minn. 1989).

473. 879 F.2d 300, 304-05 (7th Cir. 1989).

474. *Id.* at 301.

475. *Id.* at 304.

476. *Id.* at 303 (citing Wichita & Affiliated Tribes v. Hodel, 788 F.2d 765, 774-78 (D.C. Cir. 1986)).

477. *Id.* at 305 (citing County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985)).

478. *See Sokaogon Chippewa Cmty.*, 879 F.2d at 304-05.

The continued validity of the trio of cases decided in 1987 has been undermined by more recent cases. In *Wyandotte Nation v. City of Kansas City*,[479] the tribe brought a land claim against the city.[480] The court found that "there is a long-standing policy in favor of federal adjudication of suits brought by Indians if federal jurisdiction is available."[481] The state of Kansas moved for dismissal, arguing that the state was an indispensable party.[482] The court agreed that Kansas was a necessary party with significant interests in the outcome,[483] but held that the presence of other defendants "lessened" that prejudice.[484] Because the "lack of an alternative forum for plaintiff weighs against dismissal," the court declined to dismiss on the basis that the state was absent and indispensable.[485] The landowner defendant argued that the United States was an indispensable party.[486] As in *Nichols*, the court noted, "Should the tribe prevail, the court would order that the land be restored to Indian trust status. The court would therefore require the federal government to hold the land in trust for the tribe."[487] However, the United States had agreed to a voluntary dismissal with prejudice of all claims and the court held that the federal government would suffer no prejudice, so long as the case proceeded without its presence.[488] The court refused to hold that the United States was a necessary and indispensable party.[489] In *Red Lake Band of Chippewas v. City of Baudette, Minnesota*,[490] the tribe brought suit against the state and others to quiet title to a parcel of land between forty and sixty acres in size.[491] Though the court found that a judgment in favor of the tribe would have "practical consequences for the United States,"[492] the court refused to dismiss the action, distinguishing *Nichols* on the basis that the case would not threaten to cloud

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479. 200 F. Supp. 2d 1279 (D. Kan. 2002).

480. *Id.* at 1282.

481. *Id.* at 1293 (citing Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 561 n.10 (1983)).

482. *Id.* at 1289.

483. *Id.* at 1292 ("[T]he court has recognized that Kansas has asserted taxation, regulatory, and jurisdictional interests in the lands which currently are not held in trust for the tribe.").

484. *Wyandotte Nation*, 200 F. Supp. 2d at 1292. ("Although there is not a precise alignment of interests between the defendant landowners and Kansas, the court finds that the potential prejudice to the state is lessened by the fact that the defendant landowners seek the same outcome, if for different reasons.") (citing Sac & Fox Nation v. Norton, 240 F.3d 1250, 1259 (10th Cir. 2001), *cert. denied sub nom.* Wyandotte Nation v. Sac & Fox Nation, 534 U.S. 1078 (2002)).

485. *Id.* at 1293.

486. *Id.* at 1294.

487. *Id.*

488. *See id.* at 1295-96.

489. *Wyandotte Nation*, 200 F. Supp. 2d at 1296.

490. 730 F. Supp. 972 (D. Minn. 1990).

491. *Id.* at 974.

492. *Id.* at 980.

title to millions of acres of land.[493] Few, if any Indian land claims may be accurately characterized as threatening to cloud title to thousands or millions of acres of land.[494] Tribes that bring claims must research each parcel back to the time it was first alienated and the causes of that first alienation are rarely uniform.[495]

Claims to land held by the federal government in trust for tribes are subject to dismissal.[496] When individuals attempt to sue an Indian tribe to settle boundaries or quiet title, the United States is an indispensable party.[497] In *Carlson v. Tulalip Tribes*,[498] property owners neighboring the tribe sued to quiet title to waterfront lands controlled by the tribe, but legally owned by the United States.[499] The court noted that the "United States is a necessary party to any action which the relief sought might interfere with its obligation to protect Indian lands against alienation."[500] If two or more tribes claim the same parcel of land in land claims litigation, the case cannot proceed without all the tribes present.[501] In *Oneida Tribe of Indians v. AGB Properties, Inc.*,[502] the tribe brought a land claim against private landowners.[503] The tribe and two absent tribes, the Oneida Nation of New York and the Oneida of the Thames, had the same claim to the same parcels of land.[504] The court found the two absent tribes would be prejudiced if the suit proceeded because "[i]f the Tribe were to prevail and obtain possession of the land and/or monetary damages, the Absent Parties' ability to pursue the same remedies based on their claims to the land would be impaired."[505] Moreover, the court found that the defendant landowners would be prejudiced because they "could be liable to all three successor tribes for separate damages on the same piece of land."[506] The district court dismissed the suit.[507] Similarly, in *Bay Mills Indian Community v. Western United Life Assurance Co.*,[508]

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493. *See id.* ("The claim in this case is restricted to a single parcel between forty and sixty acres in size.").

494. *See, e.g., id.*

495. *See, e.g.,* Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 537-38 (N.D.N.Y. 1977).

496. *See, e.g.,* Carlson v. Tulalip Tribes, 510 F.2d 1337, 1339 (9th Cir. 1975).

497. *See id.*

498. *Id.* at 1337.

499. *Id.* at 1138-39.

500. *Id.* at 1339 (citing Jackson v. Sims, 201 F.2d 259, 262 (10th Cir. 1953)).

501. *See, e.g.,* Oneida Tribe of Indians v. AGB Props., Inc., Nos. 02-CV-233LEKDRH, 02-CV-0233, 02-CV-0235, 02-CV-0236, 02-CV-0237, 02-CV-0235, 02-CV-0236, 02-CV-0237, 02-CV-0238, 02-CV-0239, 02-CV-0240, 02-CV-0241, 2002 WL 31005165, at *3 (N.D.N.Y. Sept. 5, 2002).

502. *Id.* at *1.

503. *Id.*

504. *Id.* at *3.

505. *Id.*

506. *Oneida Tribe of Indians*, 2002 WL 31005165, at *4.

507. *See id.* at *5.

508. No. 99-1036, 2000 WL 282455, at *1 (6th Cir. Mar. 8, 2000).

the Bay Mills Tribe sought title to a parcel called "Charlotte Beach," a parcel that the Sault Ste. Marie Tribe of Chippewa Indians also claimed.[509] The court dismissed the action on the grounds that the Sault Tribe was indispensable, noting that the Bay Mills Tribe had an alternative forum[510] in its concurrent case against the state of Michigan in the Michigan Court of Claims.[511]

C. *Government Operations and Trust Relationship*

Cases challenging the government operations of Indian tribes sometimes tread into areas federal courts usually fear to tread: intramural tribal disputes.[512] These are often political disputes in which a dissenting tribal political group takes a tribal matter to federal court for relief.[513] The tribes have their strongest interest in their own operations and sovereignty, and many of the cases reflect that interest.[514] Again, it must be noted that these cases are often brought by tribal members, a group the courts have not favored in the compulsory joinder analysis.[515]

1. Governance

The most important compulsory joinder case involving tribes in the area of tribal government operations is *Dawavendewa v. Salt River Project Agricultural Improvement and Power District*.[516] Harold Dawavendewa was a Hopi Indian looking for work on the Navajo Reservation, seeking a job with the Salt River Project ("SRP").[517] The Navajo Nation required the project to employ a tribal hiring preference policy, and Dawavendewa was never interviewed.[518] The Ninth Circuit held in 1998 that the hiring preference policy violated Title VII and then remanded

509. *Id.*

510. *See id.*

511. *See* Bay Mills Indian Cmty. v. State, 626 N.W.2d 169 (Mich. Ct. App. 2001).

512. *See* B.J. Jones, *Welcoming Tribal Courts Into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 492 (1998).

513. *See, e.g.*, John C. Miller & Christopher P. Guzelian, *A Spectrum Revolution: Deploying Ultrawideband Technology on Native American Lands*, II COMMLAW CONSPECTUS 227, 291 (2003) (discussing intramural tribal disputes in the context of federal regulation of tribal telecommunication services).

514. *See generally* David B. Wiles, *Taxation: Tribal Taxation, Secretarial Approval, and State Taxation—Merrion and Beyond*, 10 AM. INDIAN L. REV. 167, 183 (1983) (demonstrating that Indian tribes inherent interest is also strongest in the context of revenues for essential governmental programs).

515. *See, e.g.*, Vill. of Hotvela Traditional Elders v. Indian Health Servs., 1 F. Supp. 2d 1022 (D. Ariz. 1997).

516. 276 F.3d 1150 (9th Cir. 2002), *cert. denied*, 537 U.S. 820 (2002).

517. *See id.* at 1153.

518. *See id.* at 1153-54.

the case.[519] On remand, the project moved to dismiss the case for failure to join the Navajo Nation and the Ninth Circuit granted the motion.[520] The court first found the Navajo Nation was a necessary party because the project was required under the terms of its lease to adopt the hiring preference.[521] The court believed the project subject to multiple and inconsistent obligations, stating, "The district court correctly observed that 'if SRP were to ignore [the] injunction, [Dawavendewa] and others like him would not receive the employment they seek,' whereas '[i]f SRP were to comply with the injunction, the Navajo Nation would be likely to take action against SRP under its lease.'"[522] The court found the absent tribe would be prejudiced in the litigation, which "threatens to impair the [n]ation's contractual interests, and thus, its fundamental economic relationship with SRP. The [n]ation strenuously emphasizes the importance of the hiring preference policy to its economic well-being."[523] The court found that "a judgement rendered in the [n]ation[']s absence will impair its sovereign capacity to negotiate contracts and, in general, to govern the Navajo reservation."[524] The court noted the same factors in determining whether the Navajo Nation was an indispensable party and found that they were in equipoise.[525] The court noted, however, that the Ninth Circuit determined that plaintiffs in prior cases had been denied a forum for airing their grievances, but nevertheless had their claims dismissed under the compulsory joinder rule on several occasions.[526]

Dawavendewa intersects another area of federal Indian law currently under attack: the political status of Indians and Indian tribes.[527] The plaintiff was very

519. *See id.* at 1154 (citing Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 154 F.3d 1117, 1120 (9th Cir. 1998), *cert. denied*, 528 U.S. 1098 (2000)).

520. *Id.* at 1163.

521. *See Dawavendewa,* 276 F.3d at 1156 (citing Pit River Home & Agric. Coop. Ass'n v. United States, 30 F.3d 1088, 1092-99 (9th Cir. 1994)).

522. *Id.* at 1155.

523. *Id.* at 1157; *see also* Kescoli v. Babbitt, 101 F.3d 1304, 1310 (9th Cir. 1996); Lomayaktewa v. Hathaway, 520 F.2d 1324, 1326 (9th Cir. 1975).

524. *Dawavendewa,* 276 F.3d at 1157; *see also Kescoli,* 101 F.3d at 1310.

525. *Dawavendewa,* 276 F.3d at 1163.

526. *See id.* at 1162 (citing *Lomayaktewa*, 520 F.2d at 1327; Confederated Tribes of the Chehalis Reservation v. Lujan, 928 F.2d 1496, 1498 (9th Cir. 1991); Shermoen v. United States, 982 F.2d 1312, 1320-21 (9th Cir. 1992); *Pit River Home*, 30 F.3d at 1102; Quileute Indian Tribe v. Babbitt, 18 F.3d 1456, 1460-61 (9th Cir. 1994); *Kescoli*, 101 F.3d at 1311; Clinton v. Babbitt, 180 F.3d 1081, 1090 (9th Cir. 1999)).

527. *See generally* Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997) (arguing in dicta that recent Supreme Court cases undermine Indian preference), *cert. denied sub nom.* Kawerak Reindeer Herders Ass'n v. Williams, 523 U.S. 1117 (1998). *But see* United States Air Tour Ass'n v. FAA, 298 F.3d 997, 1012 n.8 (D.C. Cir. 2002) (noting that the Court would not overrule Indian preference until the Supreme Court expressly does so) (citing Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n, 158 F.3d 1335, 1340 (D.C. Cir. 1998), *cert. denied sub nom.* AirStar Helicopters, Inc. v. FAA, 538 U.S. 977 (2003)).

sympathetic on one hand, but had a very poor factual situation on the other.[528] He challenged an employment preference that might have been unconstitutional but for the fact that Congress and the courts have determined that Indians are not treated differently based on their race, but because of their political status as citizens and members of the third sovereign.[529] The court largely ruled in favor of the plaintiff on the merits, but could not shape the relief to avoid conflicting obligations for the relatively "innocent" Salt River Project, which chose not to adopt the allegedly discriminatory policy, but was forced into it by the Navajo Nation.[530] It should be noted that the first Ninth Circuit decision placed this adjudication in the context of the so-called land dispute between the Hopi Tribe and the Navajo Nation,[531] a dispute largely created and exaggerated by state and federal officials and private actors.[532] What this case is really about is the fact that the plaintiff tested ninth out of twenty applicants.[533] It is unlikely he could have proven that he would have been hired but for the allegedly discriminatory employment practice.[534] Since the case never proceeded on the merits, it is impossible to know for sure.

Occasionally, a separate and unique tribal group located on another tribe's land may attempt to assert its own jurisdiction or avoid the recognized tribe's jurisdiction. In *United Keetoowah Band of Cherokee Indians v. Mankiller*,[535] the Tenth Circuit dismissed an action against individual officers and agents of the Cherokee Tribe for failure to join the Cherokee Nation.[536] The absent tribe had seized unstamped tobacco products from the plaintiffs' homes.[537] Since the Cherokee Nation was the only federally recognized tribe with jurisdiction over the individual Indians, the absent tribe was a necessary party.[538] The court dismissed the case, holding, "Since the relief requested by the Plaintiff herein directly affects the sovereignty and fundamental jurisdiction of the Cherokee Nation, the court concludes the Cherokee Nation's interests are substantial and the case cannot be completely and efficiently resolved without the presence of the Cherokee Nation."[539] This case involves the intersection

528. *See generally Dawavendewa*, 276 F.3d at 1156.

529. *See* Morton v. Mancari, 417 U.S. 535, 553-54 (1974).

530. *See generally* Dawavendewa, 276 F.3d at 1157-62.

531. *See* Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 154 F.3d 1117, 1118 n.3 (9th Cir. 1998) (citing Hopi Tribe v. Navajo Tribe, 46 F.3d 908 (9th Cir. 1995); Masayesva v. Hale, 118 F.3d 1371 (9th Cir. 1997)).

532. *See* Peter C. Astor, *Greed, Goons and Genocide: The Essays of Ward Churchill*, 21 AM. INDIAN L. REV. 425, 425-27 (1997).

533. *See Dawavendewa*, 276 F.3d at 1153-54.

534. *See generally id.* at 1163.

535. No. 93-5064, 1993 WL 307937 (10th Cir. Aug. 12, 1993).

536. *Id.* at *5-6.

537. *Id.* at *3.

538. *Id.* at *4.

539. *Id.* at *5.

of several unstated interests. First, the plaintiff unsuccessfully attempted to achieve federal recognition for several years and separate themselves from the Cherokee Nation.[540] Second, the plaintiff brought an internal dispute to the federal courts.[541] Both factors appear to have made it easier for the court to dismiss the action. The plaintiff tried to avoid the immunity problem by suing the individual tribal officers directly.[542] The court would have better decided the case on the basis of whether the defendants had the authority to act, deciding whether to dismiss using the *Ex parte Young* analysis.[543]

One of the main purposes of the doctrine of sovereign immunity is to preserve the limited finances of tribal governments.[544] This underlying policy, as well as the due process policy of not imposing financing obligations on absent parties without their participation, has importance in this context.[545] In *Guthrie v. Circle of Life*,[546] the court dismissed an action brought by parents of a disabled child for attorney fees against a school located on tribal trust land and operated by the White Earth Band of Chippewa Indians.[547] Since the fees would be paid out of funds controlled by the White Earth Business Committee, the absent tribe had an interest in ensuring that the judgment was satisfied[548] and "the tribal fisc would be compromised without the tribe having the opportunity to protect its interests."[549] By contrast, the court in *Bitsilly v. Bureau of Indian Affairs*,[550] relied on the fact that the Tenth Circuit, and other courts, had held that the Individuals with Disabilities Act allowed the parents to sue jurisdictional educational agencies in lieu of suing the schools.[551] The court did not dismiss the case for failure to join the tribally operated schools, distinguishing

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540. *See United Keetowah Band of Cherokee Indians,* 1993 WL 307937, at *4 (noting that intervening plaintiff's assertion that "they are members of the UKB, not the Cherokee tribe").

541. *See id.* at *3.

542. *Cf. id.* at *5 (noting that "[a] forthright analysis of Plaintiff's complaint compels the conclusion that the action is against the Cherokee Nation itself because the individual . . . Defendants were acting within their official capacities.").

543. *See generally* 209 U.S. 123 (1908).

544. *See* Johnson v. Navajo Nation, 14 Indian L. Rptr. 6037, 6040 (Navajo Nation Sup. Ct. 1987) ("[T]he funds of the Navajo Nation are not unlimited. Each year the funds maintained by the Navajo Nation for the operation of the Navajo tribal government are exceeded by the people's demand for more governmental services.").

545. *Cf. id.* at 6040 (noting that "[t]he Navajo people are entitled to a representative and accountable Navajo tribal government. For this reason, important decisions having direct consequences on the Navajo tribal treasury should be made by the elected representatives of the Navajo people.").

546. 176 F. Supp. 2d 919 (D. Minn. 2001).

547. *Id.* at 921.

548. *Id.* at 923.

549. *Id.*

550. 253 F. Supp. 2d 1257 (D.N.M. 2003).

551. *Id.* at 1271 (citing Beard v. Teska, 31 F.3d 942, 953-54 (10th Cir. 1994)).

Guthrie on the grounds that the schools in *Bitsilly* would not be subject to a judgment against the BIA.[552]

Claims arising out of utility contracts in which the absent tribe has exclusive regulatory jurisdiction will likely be dismissed.[553] In *Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians*,[554] the district court dismissed an action by a utility against an Indian tribe.[555] The utility argued that a counterclaim brought against the utility for failure to provide electrical service should be decided in the tribe's absence.[556] The court found that the absent tribe was a necessary party because "[t]he interest of the Tonawanda Band which is at the center of this dispute is its claimed right under the agreement to prior approval of Niagara Mohawk's provision of electrical power to [r]eservation residents."[557] As such,

> the very issue precipitating this action—*i.e.*, whether the franchise agreement requires the tribe's approval prior to Niagara Mohawk's provision of electrical service to a user on the [r]eservation—could be decided adversely to the tribe without its ever having had the opportunity to protect its interest as a party to the agreement.[558]

The court relied on the Second Circuit precedent, and ruled that "[i]n light of the 'paramount importance' of sovereign immunity, and in light of the . . . potential prejudice to the tribe's interests as a party to the franchise agreement if this action proceeds in its absence . . . [the case should be dismissed] pursuant to Rule 19 for failure to join an indespensable party."[559] This case has a very complicated procedural history and is an example of how a sovereign might become involved in a lawsuit as a plaintiff, but is not amenable to counterclaims due to its sovereign immunity.[560] The Second Circuit reaffirmed its strong rulings in favor of tribal sovereign immunity.[561] Underlying this case is the fact that the dispute, in most part, was an internal tribal matter that, unfortunately, involved the utility company as well.[562] The court would, correctly, defer to tribal political and judicial processes for resolution of the dispute.

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552. *See id.* at 1271-72.

553. *See generally* Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians, 826 F. Supp. 995, 1001-02 (W.D.N.Y. 1994).

554. *Id.*

555. *See id.* at 1004.

556. *See id.* at 999.

557. *Id.* at 1003.

558. *Niagara Mohawk Power Corp.*, 826 F. Supp. at 1004.

559. *Id.* (quoting Fluent v. Salamanca Indian Lease Auth., 928 F.2d 542, 548 (2nd Cir. 1991).

560. *See generally id.* at 998-1004.

561. *See id.* at 1001-03.

562. *See id.* at 998-99.

Courts will also dismiss suits against banks that hold an Indian tribe's money for failure to join the tribe.[563] In *Round Valley Nation v. California*,[564] the Round Valley Nation sued the banks, the state, and the Secretary of the Interior, asking the court to freeze the accounts of the federal recognized Round Valley Indian Tribes and declare the Round Valley Nation the legitimate representative of the Round Valley Indian Tribes.[565] First, the court found that the attack on the accounts held by the absent tribe would impair its interests.[566] The court held that the prejudice to the tribe's "ability and power to govern" and the absent tribe's immunity favored dismissal.[567] The strategy of going after tribal funds without the tribe's participation ensures a dismissal.[568] This appears in tribal power struggles, such as the Meskwai Casino litigation.[569]

Dismissal appears likely in inter-tribal conflicts when tribes compete for limited federal dollars.[570] In *Citizen Potawatomi Nation v. Norton*,[571] the tribe brought suit against the Secretary of the Interior, challenging her methods for calculating federal funding to the plaintiff and four absent tribes.[572] Because the absent tribes would be affected by an outcome favoring the plaintiff, the Tenth Circuit found the absent tribes to be necessary parties.[573] Because one tribe would gain over the absent four, the United States could not adequately represent the absent tribes' "varied and potentially conflicting interests."[574] The court dismissed the action, in large part relying on "the 'strong policy favoring dismissal when a court cannot join a tribe because of sovereign immunity.'"[575] This case highlights the one clear situation where the courts will not allow the federal government to represent the interests of absent tribes, that is when there is a dispute between tribes.[576]

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563. *See generally* Round Valley Nation v. California, No. C00-3329 SC, 2000 WL 1810211 (N.D. Cal. Dec. 8, 2000).

564. *Id.*

565. *Id.* at *1.

566. *Id.* at *3 (citing Confederated Tribes of the Chehalis Reservation v. Lujan, 928 F.2d 1496, 1499 (9th Cir. 1991); Quileute Indian Tribe v. Babbitt, 18 F.3d 1456, 1459 (9th Cir. 1994)).

567. *See id.* at *4.

568. Cf. *Round Valley Nation*, 2000 WL 1810211, at *4.

569. *See In re* Sac & Fox Tribe, 340 F.3d 749, 752 (8th Cir. 2003).

570. *See generally* Citizen Potawatomi Nation v. Norton, 248 F.3d 993 (10th Cir. 2001).

571. *Id.*

572. *Id.* at 995.

573. *Id.* at 998-99.

574. *Id.* at 999 (citing Cherokee Nation v. Babbitt, 117 F.3d 1489, 1497 (D.C. Cir. 1997); Makah Indian Tribe v. Verity, 910 F.2d 555, 560 (9th Cir. 1990)).

575. *Citizen Potawatomi Nation*, 248 F.3d at 1001 (quoting Davis v. United States, 192 F.3d 951, 960 (10th Cir. 1999)).

576. *See id.* at 999.

Suits challenging the jurisdiction of a tribe's court, however, may proceed without joining the absent tribe.[577] In *Yellowstone County v. Pease*,[578] the Ninth Circuit determined that a Crow Tribal Court did not have jurisdiction over an action challenging a county's right to impose property taxes on reservation land held in fee by a tribal member.[579] The tribal member argued that the Crow Tribe and the Crow Tribal Court were indispensable parties, but the court rejected the argument.[580] The court turned down the plaintiff's contention for two reasons: first, the question was a federal question, justiciable in federal courts;[581] and second, tribal courts and judges are expected to follow applicable federal court precedent.[582] The court held that, unlike cases in which the tribe's right to tax was at issue or the tribe is a party to an agreement, lease, or treaty, here the tribe and its court are not indispensable.[583] This case is poor precedent for Indian tribes. First, the plaintiff was a tribal member trying to bring a claim that the local government had no jurisdiction over him; a case he rightfully tried to bring in his tribe's court.[584] The *Montana*,[585] *Strate*,[586] and *Hicks*[587] line of cases have effectively foreclosed tribal court jurisdiction over non-members in most cases.[588] Second, the plaintiff may have had a good claim against the local government.[589] The tribe has an interest in whether their members on the reservation must pay property tax to local governments.[590] Because the tribal court jurisdiction issue took over the litigation, however, the case proceeded without the tribe.[591]

Courts generally do not dismiss tort claims under the compulsory joinder rule when the defendants are jointly and severally liable.[592] Like casino-related tort cases,

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577. *See generally* Yellowstone County v. Pease, 96 F.3d 1169 (9th Cir. 1996).

578. *Id.*

579. *See id.* at 1176-77.

580. *Id.* at 1172.

581. *Id.*

582. *Yellowstone County*, 96 F.3d at 1173.

583. *Id.*

584. *See generally id.* at 1170-71.

585. Montana v. United States, 450 U.S. 544 (1981).

586. Strate v. A-1 Contractors, 520 U.S. 438 (1997).

587. Nevada v. Hicks, 533 U.S. 353 (2001).

588. *See generally* Kimberly Radermacher, *Constitutional Law-Indian Law: The Ongoing Divestiture by the Supreme Court of Tribal Jurisdiction over Non-Members, On and Off the Reservation*, Nevada v. Hicks, *533 U.S. 353 (2001)*, 78 N.D. L. REV. 125 (2002); Thomas P. Schlosser, *Tribal Civil Jurisdiction over Nonmembers*, 37 TULSA L. REV. 573 (2001).

589. *See generally* Oneida Indian Nation v. City of Sherrill, 337 F.3d 139, 150-53 (2nd Cir. 2003) (holding that where a tribe purchased land within its reservation and Congress never changed the status of the land—that is, where Congress never authorized the alienation of the reservation land—that land is not taxable by the state), rev'd, 2005 WL 701058 (March 29, 2005).

590. *But see* Yellowstone County v. Pease, 96 F.3d 1169, 1173 (9th Cir. 1996).

591. *See generally id.* at 1173-76.

592. *See generally* Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 358 (2nd Cir. 2000).

tort claims against a tribe or an instrument of a tribe and other defendants are not likely to be dismissed on the basis that the immune and absent tribe is indispensable.[593] In *Bassett v. Mashantucket Pequot Tribe*,[594] the Second Circuit refused to dismiss a tort claim and copyright infringement case against the Mashantucket Pequot Tribe, its museum, and its agents.[595] Because copyright infringers are jointly and severally liable, dismissal of the suit would prevent the plaintiff from going after the other defendants or preventing further infringement.[596] The same was true for the tort claim.[597] Because of the nature of the torts alleged, the court did not find the tribe indispensable.[598]

2. Federal Recognition

The courts will dismiss actions that challenge the federal government's recognition of a tribe in the absence of the recognized tribe.[599] Federal recognition creates and vests property and liberty interests in a particular group.[600] An outside, or even inside, attempt to redistribute those interests is a model dispute ripe for dismissal under the compulsory joinder rule.[601] In *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*,[602] the tribes sued the Secretary of the Interior because he recognized the Quinault Indian Nation as the sole governing body of the Quinault Indian Reservation.[603] The Ninth Circuit determined the absent Quinault Indian Nation was a necessary party for several reasons.[604] First, a decision against the secretary would not bind the absent tribe, which could be expected to continue to assert "sovereign powers and management responsibilities over the reservation."[605] Second, the tribes sought a declaration that the Quinault Indian Nation was not the exclusive governing body in the Quinault Indian Reservation, a direct threat to the

593. *Id.* at 360.

594. *Id.* at 343.

595. *Id.* at 360.

596. *Id.*

597. *Bassett*, 204 F.3d at 360.

598. *See id.*

599. *See generally* Confederated Tribes of the Chehalis Indian Reservation v. Lujan, 928 F.2d 1496 (9th Cir. 1991).

600. *See id.* at 1498-99.

601. *See generally The Distorted Adversarial Posture of Title VII Affirmative Action Challenges*, 128 U. PA. L. REV. 1543, 1560-62 (1980) (discussing the relationship between compulsory joinder and due process rights).

602. 928 F.2d 1496 (9th Cir. 1991).

603. *Id.* at 1497.

604. *Id.* at 1498-99.

605. *Id.* at 1498.

absent tribe's interests.[606] The court found the absent tribe was an indispensable party, even though there was a lack of an alternative forum for the plaintiff to air its grievance, holding that "a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity."[607] The court could have noted the plaintiffs either participated or could have participated in the federal recognition process completed by the federal agency. While there may not have been an alternative *prospective* forum, there was certainly an alternative forum, provided the plaintiffs could have entered.[608]

The Tenth Circuit recently reiterated the same rule in the Seminole Nation's continuing dispute with bands of the nation, whose tribal members are descendants of escaped slaves.[609] This decision eviscerated dicta created by an earlier panel of the same court in the same case.[610] In *Davis v. United States*,[611] the Dosar Barkus and the Burner Bands sued the federal government for allowing the Seminole Tribe to exclude them from participation in some tribal assistance programs funded by federal dollars and from a judgment fund established by a lands claims suit.[612] They also sued for refusing to certify their degree of Indian blood.[613] The court dismissed the judgment fund claim, ruling that the absent tribe was indispensable.[614] The court held first that the absent tribe would most certainly react swiftly with a suit of its own if the instant case went against their interests.[615] Second, the court found the absent tribe's interest in its sovereign immunity outweighed the less weighty interest of the plaintiff in having a forum.[616] Finally, the court considered other equitable factors raised by the plaintiff,[617] but rejected them as mere restatements of other

606. *Id.*

607. *Confederated Tribes of the Chehalis Reservation*, 928 F.2d at 1500 (citing Enter. Mgmt. Consultants, Inc. v. United States *ex rel.* Hodel, 883 F.2d 890, 894 (10th Cir. 1989) (quoting Wichita and Affiliated Tribes v. Hodel, 788 F.2d 765, 777 (D.C. Cir. 1986))).

608. *See generally id.*

609. *See generally* Davis v. United States, 343 F.3d 1282 (10th Cir. 2003).

610. *See id.* at 1285-86.

611. *Id.* at 1282.

612. *Id.* at 1285.

613. *Id.*

614. *See Davis*, 343 F.3d at 1288-94.

615. *Id.* at 1292 ("Plaintiffs themselves recognize the substantial likelihood of subsequent litigation when they state (while addressing another issue): '[T]he Tribe reacts swiftly when the BIA cuts off federal funding.... The notion that [the] Tribe will not react to losing access to the $56 million Judgment Fund is absurd.'") (quoting Appellant's Opening Brief at 26, Davis v. United States, 343 F.3d 1282 (10th Cir. 2003) (No. 02-6198)).

616. *Id.* at 1293-94 ("What it means is that the plaintiff's inability to obtain relief in an alternative forum is not as weighty a factor when the source of that inability is a public policy that immunizes the absent party from suit.").

617. *See id.* at 1294 (citing Wichita and Affiliated Tribes v. Hodel, 788 F.2d 765, 774 (D.C. Cir. 1986); 7 WRIGHT ET AL., *supra* note 35, at 91).

arguments.[618] In a previous related decision, also captioned *Davis v. United States*,[619] the Tenth Circuit refused to hold that the absent tribe was an indispensable party where the secretary allegedly failed to certify the plaintiffs' Indian blood quantum.[620] The court first found that the absent tribe was a necessary party because "[a] ruling on the merits in favor of Plaintiffs on their Judgment Fund Award claim will have the practical effect of modifying the [t]ribal ordinances containing the Eligibility Requirement."[621] While considering whether the absent tribe was an indispensable party, the court asserted that an absent tribe's immunity is not a compelling factor to consider:

> [T]he Supreme Court's recent statement that the judicial concept of tribal sovereign immunity developed 'almost by accident' and the Court's admonition that, at least in the commercial context, the doctrine should be curtailed by Congress, casts doubt on any past notion that tribal sovereign immunity could be an interest compelling in itself for purposes of Rule 19(b).[622]

The court noted "there [was] a dearth of factual findings on the issue of whether the suit can proceed in equity and good conscience in the absence of the Tribe."[623] The court remanded the case in the absence of those factual findings.[624]

The Tenth Circuit appears conflicted on the issue of the continued vitality of tribal sovereign immunity. In the first opinion, the court properly remanded the case for factual findings on whether the suit should be dismissed due to the absence of the tribe. Given the high Court's criticism,[625] the court appeared to be saying that the weight given tribal immunity was drastically reduced, in comparison with the weight given federal or state immunity.[626] The second opinion, however, strongly reaffirmed the public policy of immunity; generally when the tribes have the strongest argument in favor of immunity, it boils down to their pocketbooks.[627] These two opinions serve to establish an important possibility for absent tribal parties. First, the absent tribes

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618. *Id.*

619. 192 F.3d 951 (10th Cir. 1999).

620. *See id.* at 951-54.

621. *Id.* at 959.

622. *Id.* at 960 (citing Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 756 (1998)). The court also asserted that Justice Harlan's assertion in *Provident Tradesmens* that there were interests "compelling by themselves" was mere dicta and that he never would have assumed tribal immunity was one of those factors. *See id.* at 960 n.9 (citing Provident Tradesmens Band & Trust Co. v. Patterson, 390 U.S. 102, 119 (1968)).

623. *Id.* at 961.

624. *Davis*, 192 F.3d at 961.

625. *See generally id.* at 960.

626. *See id.*

627. *See generally* Davis v. United States, 343 F.3d 1282, 1293-94 (10th Cir. 2003).

should push for factual findings supporting their arguments on the equity issues.[628] Both the relative importance of immunity and dismissal for the tribe, and the importance of the litigation, for the plaintiffs, should be fleshed out a great deal more.[629] Second, the court stated that the list of four factors is not exclusive and that additional factors could be considered.[630] The advisory committee notes to the 1966 amendment state, "The factors are to a certain extent overlapping, and they are not intended to exclude other considerations which may be applicable in particular situations."[631] The tribes should take advantage of this avenue.

Two district court cases strongly support the proposition that courts will dismiss an action to contest the Secretary of the Interior's decision to recognize an Indian tribe when the challenger does not sue the newly recognized tribe. In *Kickapoo Tribe v. Lujan*,[632] for example, the district court dismissed an action challenging the federal recognition of the Texas Band of Kickapoo Indians separately from the Oklahoma Band.[633] First, the court held the secretary would be subjected to multiple litigation and possibly inconsistent obligations because, regardless of the instant case's disposition, the Texas Band "would undoubtably continue to assert its separate existence."[634] Second, the court found that "[t]o allow this litigation to proceed in the [Texas] Band's absence would promote the worst kind of paternalism and seriously undermine the [b]and's interest in its own survival."[635] In *Masayevsa v. Zah*,[636] the district court dismissed an action brought by the Navajo Nation, claiming the secretary erred in recognizing the Southern Paiute Tribe.[637] Quoting heavily from *Kickapoo Tribe*, the court concluded, "[t]he reasoning of the district court in *Kickapoo Tribe* is forceful."[638]

The areas of internal tribal governmental affairs and federal recognition of a tribe fundamentally affect the rights and responsibilities of those tribes.[639] Disputes arising out of these areas without the participation of the affected tribe are usually dismissed

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628. *See id.* at 1289.

629. *See generally id.* at 1288-95 (analyzing the district court's decision to dismiss which involved the tribe's sovereign immunity as well as the relative importance of the litigation to the plaintiff).

630. *Id.* at 1289.

631. FED. R. CIV. P. 19 advisory committee's note.

632. 728 F. Supp. 791 (D.D.C. 1990).

633. *Id.* at 792.

634. *Id.* at 796.

635. *Id.* at 797.

636. 792 F. Supp. 1178 (D. Ariz. 1992).

637. *See id.* at 1186-87.

638. *Id.* at 1186.

639. *See* Melanie Reed, *Native American Sovereignty Meets a Bend in the Road: Difficulties in* Nevada v. Hicks, 2002 BYU L. REV. 137, 138-39 (2002) (discussing Indian tribal authority over non-members).

under the compulsory joinder rule.[640] Similarly, disputes arising out of tribal gaming operations are also dismissed.

D. *Gaming Operations*

Indian gaming started in the 1970s in Florida and California when Indian tribes began operating bingo halls and other gaming activities.[641] It is likely that every aspect of Indian gaming operations have been litigated. Several forms of disputes arose as Indian gaming became more prevalent.[642] First, since many tribes had no experience in running their own operations, they entered into management agreements with companies claiming experience in these matters.[643] Second, gaming opponents from within and without the tribe attempted various novel strategies to attack gaming vendors and contractors in order to stop or control Indian gaming.[644] Third, slip and fall claims at Indian gaming facilities and other torts arose in greater numbers.[645] Fourth, the federal government, states, and the tribes litigated whether Indian lands were eligible for gaming, whether the Secretary of the Interior should take land into trust, and other federal gaming issues.[646] As a general rule, Indian gaming is an internal matter.[647] Most of the functions and activities associated with gaming are outside of the jurisdiction of state and federal courts.[648] In virtually every one of the cases discussed in this section, the tribal court may be an alternative forum for remedy.

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640. *See* Nicholas V. Merkley, *Compulsory Party Joinder and Tribal Sovereign Immunity: A Proposal to Modify Federal Courts' Application of Rule 19 to Cases Involving Absent Tribes as "Necessary" Parties*, 56 OKLA. L. REV. 931, 943-44 (2003).

641. Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 427 (2001).

642. *See* Washburn, *supra* note 641, at 436.

643. Michael D. Cox, *The Indian Gaming Regulatory Act: An Overview*, 7 ST. THOMAS L. REV. 769, 771 (1995).

644. *See generally* Christian C. Bedortha, *The House Always Wins: A Look at the Federal Government's Role in Indian Gaming & the Long Search for Autonomy*, 6 SCHOLAR 261, 284-85 (2004) (noting that Indian gaming has met significant challenges in the past ten years).

645. *See generally* Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 776 n.332 (2002) (discussing tribal sovereign immunity and referring to a recent case where a client slipped and fell on gaming property).

646. *See generally* Sherry M. Thompson, *The Return of the Buffalo: An Historical Survey of Reservation Gaming in the United States and Canada*, 11 ARIZ. J. INT'L & COMP. L. 520, 528 (1994) (noting that Indian gaming conflicts often arise over government authority to regulate tribal enterprises in Indian land).

647. *See* Davids v. Coyhis, 869 F. Supp. 1401, 1405-06 (E.D. Wis. 1994).

648. *Id.*

1. Contract Claims

It is safe to say that when a party to a contract involving gaming-related activities attempts to adjudicate their alleged rights and responsibilities under that agreement without the gaming tribe's participation, the case will be dismissed in accordance with the compulsory joinder rule.[649] The prototype case is *Enterprise Management Consultants, Inc. v. United States ex rel. Hodel*.[650] Federal law required the Secretary of the Interior's approval of important contracts with Indian tribes, including gaming management contracts, before they could be considered valid and enforceable.[651] After the tribe and Enterprise Management entered into contracts, wherein the contractor would operate the tribe's bingo activities, several disputes arose and the tribe asked the federal agency not to approve the contracts.[652] Once the federal agency disapproved the contracts through the proper administrative review, the contractor sued the government to stop the agency from disapproving the contracts.[653] The court raised *sua sponte* the issue of whether the compulsory joinder rule compelled the dismissal of the case because the tribe, as an indispensable party, could not be joined by the contractor.[654] The court acknowledged the general rule that when "a necessary party under Rule 19(a) is immune from suit, 'there is very little room for balancing of other factors' set out in Rule 19(b), because 'immunity may be viewed as one of those interests 'compelling by themselves.'"[655] Since there was no

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649. *See, e.g.,* World Touch Gaming, Inc. v. Massena Mgmt., LLC, 117 F. Supp. 2d 271, 277 (N.D.N.Y. 2000). The court concluded:

> The basis for this action is the Lease and Sales Agreements between World Touch and the Casino. The Management Company was not a party to the agreements, as Walter Horn signed merely as the agent of the Casino. Moreover, it was the Casino, not the Management Company, that allegedly breached the agreements and defaulted on the required payments and purchases. Accordingly, based upon a review of the record in this matter, a consideration of the requirements set forth in Fed.R.Civ.P. 19(b), and plaintiff's failure to oppose dismissal under Rule 19(b), it is determined that the Tribe and the Casino are indispensable parties and in equity and good conscience the action should not proceed with the Management Company as the sole remaining defendant. Thus, the action is dismissed as against the Management Company.

Id.

650. 883 F.2d 890 (10th Cir. 1989).

651. *See id.* at 891 n.1.

652. *See id.* at 891 (citing United States *ex rel.* Citizen Band Potawatomi Indian Tribe v. Enter. Mgmt. Consultants, Inc., 883 F.2d 886, 887-89 (10th Cir. 1989)).

653. *Id.* at 892.

654. *Id.* at 892-93 (citing Wichita and Affiliated Tribes v. Hodel, 788 F.2d 765, 772 n.6 (D.C. Cir. 1986) (other citations omitted)).

655. *Enter. Mgmt. Consultants,* 883 F.2d at 894 (quoting *Wichita and Affiliated Tribes*, 788 F.2d at 777 n.13 (quoting 3A MOORE'S FEDERAL PRACTICE ¶ 19.15, at 19-226 n.6 (1984))).

question that adjudication of the validity of the contract to which the tribe was a party would affect the tribe's interest, the court weighed the effect of the suit on the tribe's sovereignty in compliance with the general rule.[656] The court held that the suit "would also effectively abrogate the tribe's sovereign immunity by adjudicating its interest in that contract without consent" and dismissed the suit.[657] *Enterprise Management* correctly weighed the significance of tribal sovereignty in the gaming arena and in its contractual relations. The sovereign immunity factors and contractual relations factors should weigh heavily in favor of dismissing a case where the tribe is absent.[658]

Other cases follow the *Enterprise Management* prototype. In related *qui tam* actions, *United States ex rel. Hall v. Tribal Development Corp.* ("*Hall III*")[659] and *United States ex rel. Hall v. Creative Games Technology, Inc.*, ("*Hall II*")[660] the Seventh and Eighth Circuits held that challenges to the validity of contracts governing Indian gaming activities must be dismissed if the gaming tribe is not joined.[661] The circuits handled a total of forty-two actions, brought by individuals opposed to Indian gaming, against merchants and vendors doing business with gaming tribes.[662] In *Hall III*, the Seventh Circuit dismissed the plaintiffs' claims against the outside vendors of the Menominee Tribe's gaming activities under the compulsory joinder rule.[663] The court easily found that since the tribe was a party to the contracts challenged by the plaintiffs, it was a necessary party under Rule 19(a).[664] The plaintiffs advanced the novel argument that since they were suing on behalf of the United States, and since the United States is the trustee of the gaming tribe, the tribe's interests were adequately represented in the suit.[665] The court disagreed, noting that although there are some circumstances when the federal government can adequately represent an absent tribe, in these circumstances the tribe would likely align itself against the plaintiffs' attempts to have their gaming vendors' contracts nullified.[666] Applying the "equity and good conscience" standard, the court

656. *See id.*

657. *Id.* (citing Jicarilla Apache Tribe v. Hodel, 821 F.2d 537, 540-41 (10th Cir. 1987)).

658. *See generally id.* at 893-94.

659. 100 F.3d 476 (7th Cir. 1996) [hereinafter *Hall III*].

660. Nos. 93-2903MN, 93-3089MN, 1994 WL 320296 (8th Cir. July 5, 1994) [hereinafter *Hall II*].

661. *See Hall III*, 100 F.3d at 478-79; *Hall II*, 1994 WL 320296, at *1.

662. *Hall III*, 100 F.3d at 477; *see also* United States *ex rel.* Hall v. Tribal Dev. Corp., 49 F.3d 1208 (7th Cir. 1995).

663. *See Hall III*, 100 F.3d at 478.

664. *Id.* at 479.

665. *See id.*

666. *Id.* (citing Confederated Tribes v. Lujan, 928 F.2d 1496, 1500 (9th Cir. 1991); Makah Indian Tribe v. Verity, 910 F.2d 555, 558 (9th Cir. 1990)).

found the tribe an indispensable party for two main reasons.[667] First, the court applied the blackletter contract principle that, "[n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable."[668] Second, the tribe's economic interest in the contracts outweighed the plaintiffs' limited interest in having the contracts nullified.[669] The court left open the possibility in which "a *qui tam* action involving different circumstances [where] a sovereign tribe might not be indispensable under Rule 19."[670]

In a very similar set of facts involving the same plaintiffs and a number of gaming tribes in Wisconsin and Minnesota, the Eighth Circuit, in an unpublished opinion affirming the district court opinion,[671] found in *Hall II* that "[i]t is inconceivable to us that a suit claiming that a contract is invalid should be allowed to proceed in the absence of all parties to the contract."[672] Like the Seventh Circuit's view of the absent tribes, the district court in *Hall I* noted that none of the affected absent tribes attempted to intervene, suggesting to the court "that the tribes themselves have a different view of the merit and wisdom of the contracts and transactions at issue in the matter."[673] The lower court went into much more detail than either circuit court did in regard to the amount of prejudice the gaming tribes would suffer.[674] The court stated:

> The plaintiffs essentially seek rescission of the contracts and disgorgement of money paid for goods and services rendered pursuant to those contracts. The message such a judgment would send to outside vendors would be that transactions with Indian gaming enterprises are subject to cancellation at any time and without regard to whether the contracts were freely and fairly negotiated, the extent to which the parties have performed their duties under the contracts or the settled expectations and reliance of the parties. Very few merchants would be willing to transact business with Indian casinos under such risky conditions. This might well signal the end of Indian gaming in the Upper Midwest. Regardless of whether such a judgment would otherwise constitute the

667. *Id.* at 481.

668. *Hall III,* 100 F.3d at 479 (quoting Lomayaktewa v. Hathaway, 520 F.2d 1324, 1325 (9th Cir. 1975), *cert. denied,* 425 U.S. 903 (1976)) (other citations omitted).

669. *See id.* at 480 (citing Wichita and Affiliated Tribes v. Hodel, 788 F.2d 765, 777 (D.C. Cir. 1986)).

670. *Id.* at 481.

671. *See generally In re* United States *ex rel.* Hall, 825 F. Supp. 1422 (D. Minn. 1993) [hereinafter *Hall I*].

672. *Hall II,* Nos. 93-2903MN, 93-3089MN, 1994 WL 320296, at *1 (8th Cir. July 5, 1994)).

673. *Hall I,* 825 F. Supp. at 1429 n.6.

674. *Id.* at 1429.

> correct application of the law, it would undeniably be prejudicial to the interests of the Indian tribes.[675]

The court also noted that no case has ever required the return of money, paid to an Indian tribe, back to an outside source without a waiver of immunity.[676] Finally, the court held that "where a necessary party is immune from suit, there may be 'very little room for balancing of other factors' because immunity may be considered a compelling interest."[677] These cases highlight areas the tribes in the gaming compact cases should develop factually. First, the tribe's reliance on certainty in developing its gaming operations is critical and should not be subject to backdoor attacks without the tribe's participation.[678] Second, and more importantly, the tribes should develop the economic interests of non-Indian contractors, vendors, and employees that would be denigrated or eliminated if Indian gaming is eliminated.[679] The *Hall* cases effectively strengthened the gaming tribes' ability to demand certainty in their relations.[680] Moreover, the court likely took into consideration, without stating so, that the plaintiffs were individuals opposed to gaming for whatever reason. They were arguably bringing an action to uphold a private interest, posing as a community or societal interest.

An exception of sorts to the general trend of *qui tam* cases arising out of contracts that involve gaming tribes arose in *United States ex rel. Steele v. Turn Key Gaming, Inc.*[681] The leader of the Oglala Sioux Tribe brought a *qui tam* action to invalidate a gaming management contract with Turn Key Gaming.[682] The tribe sued in its own tribal court to invalidate the contracts.[683] The court held that since the tribal leader's interests were the same as the tribe's (they both wanted the contracts invalidated), the tribe was not an indispensable party.[684] Moreover, the court reasoned that the tribe had alternative remedies in tribal court and would suffer no prejudice.[685] In *Gallegos v. Pueblo of Tesuque*, most important to the court, however, was the Pueblo's "compelling interest 'in protecting its sovereign right to litigate on its own

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675. *Id.*

676. *See id.* at 1429-30 (citing Pembina Treaty Comm. v. Lujan, 980 F.2d 543, 545 (8th Cir. 1992)).

677. *Id.* at 1430 (quoting Wichita and Affiliated Tribes v. Hodel, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986).

678. *Hall I*, 825 F. Supp. at 1429.

679. *Id.*

680. *Id.*; *Hall II*, Nos. 93-2903MN, 93-3089MN, 1994 WL 320296, at *1 (8th Cir. July 5, 1994); *Hall III*, 100 F.3d 476, 481 (7th Cir. 1996).

681. 135 F.3d 1249 (8th Cir. 1998).

682. *Id.* at 1250.

683. *Id.* at 1252.

684. *See id.*

685. *See id.*

behalf and in the forum of its choice.'"[686] The court acknowledged the plaintiff's right to bring a suit and expect a remedy.[687] The court held that, "[a]s a matter of public policy, the public interest in protecting tribal sovereign immunity surpasses a plaintiff[']s interest in having an available forum for suit."[688] The court added, "the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent."[689] This case is an example of an impermissible attempt to use compulsory joinder as a method of avoiding suit when a non-tribal party, adverse to the tribe, literally attempts to hide behind the tribe's own immunity.[690] Contrast this strategy with a defendant on the same side of the litigation as the tribe that is attempting to use the compulsory joinder rule to shield the absent tribe from litigation initiated without its consent. Here, the tribe's interests were represented by the plaintiff and not the defendant presenting the defense.[691]

The Eighth Circuit came to the same conclusion while adopting a different procedural stance in *Arrow v. Gambler's Supply, Inc.*[692] The Yankton Sioux Tribe hired Gambler's Supply as its management company, but terminated the relationship before the Secretary of the Interior approved the agreement[693] as required by federal law.[694] After the tribe agreed to pay Gambler's Supply a sum that would wind down the agreement, a tribal member sued the company to recover all funds expended by the tribe in its arrangement.[695] The absent tribe attempted to file a motion for dismissal under Rule 19, but the court treated it as a Rule 24 motion to intervene.[696] The court rejected the tribe's argument that it was an indispensable party, holding that Gambler's Supply and the tribe had identical interests and Gambler's Supply could adequately represent the absentee's interests.[697] This case is further out of line when

686. 46 P.3d 668, 685 (N.M. 2002), *cert. denied,* 536 U.S. 990 (2002) (quoting Golden Oil Co. v. Chace Oil Co., 994 P.2d 772, 775 (N.M. Ct. App. 1999).

687. *Id.* at 686 ("While we are 'sympathetic to [Gallegos'] frustration at [her] inability to achieve jurisdiction over the party at the heart of the dispute, [we] cannot ignore the rule of law on joinder of parties.'") (quoting Confederated Tribes of the Chehalis Indian Reservation v. Lujan, 129 F.R.D. 171, 175 (W.D. Wash. 1990)).

688. *Id.* (quoting Srader v. Verant, 964 P.2d 82, 91 (N.M. 1998)).

689. *Id.* (quoting Enter. Mgmt. Consultants, Inc. v. United States *ex rel.* Hodel, 883 F.2d 890, 894 (10th Cir. 1989) (quoting in turn Wichita and Affiliated Tribes v. Hodel, 788 F.2d 765, 777 (D.C. Cir. 1986))).

690. *See id.* at 672.

691. *Gallegos,* 46 P.3d at 672.

692. 55 F.3d 407 (8th Cir. 1995).

693. *Id.* at 408-09.

694. 25 U.S.C. § 81(b) (2002).

695. *Arrow,* 55 F.3d at 409.

696. *See id.*

697. *See id.* at 409-10 (citing Mille Lacs Band of Chippewa Indians v. Minnesota, 989 F.2d 994, 999 (8th Cir. 1993); Purnell v. City of Akron, 925 F.2d 941, 950 (6th Cir. 1991); Bottoms v. Dresser, 797 F.2d 869, 872 (10th Cir. 1986)).

compared to cases where the court finds that the federal government may adequately represent the absent tribe. The tribe attempted to intervene for the limited purpose of filing its motion to dismiss, and the court refused to allow the tribe even to intervene.[698] There can be no serious dispute that the defendant and the tribe had radically different interests in the matter.[699] Just prior to the filing of the litigation, they had terminated their contractual agreements.[700] The absent tribe tried to stop the litigation in favor of its former contractor.[701] Perhaps, the tribe wanted to ensure that future contractors would not view contractual relationships disfavorably because, although the tribe may not have wanted its contract with Gambler's Supply, it did want to contract with other vendors and management contractors.[702] The tribe's interest appeared to be to protect its reputation as a business partner.

In instances where a tribe purchases insurance to cover a potential liability exposure created by a limited waiver of sovereign immunity, the courts will dismiss a claim intended to thwart the limited waiver.[703] The Supreme Court of New Mexico, possibly the state court now most receptive of a claim that a tribe is an indispensable party, held in *Gallegos v. Pueblo of Tesuque*[704] that the pueblo was an indispensable party in a suit against its insurer.[705] In *Gallegos*, the plaintiff was a patron of the pueblo's gaming facility when she suffered an injury on the grounds.[706] She sued the insurance company in state court, and the insurance company moved to dismiss the claim, arguing that her exclusive remedy was in tribal court and that the pueblo had not waived its immunity in state court.[707] The insurer also moved to dismiss on the basis that the pueblo was an indispensable party.[708] One of the plaintiff's claims was that the insurance company had breached its contract with the pueblo by asserting the pueblo's immunity from suit in state court,[709] a fatal strategic mistake.[710] The court first stated that it could not "ignore that Plaintiff asks the court to pass judgment on the conduct of [the insurer] under the policy pursuant to her claims. . .," effectively implicating the tribe's interest.[711] Further, because the plaintiff attempted to split the

698. *Id.*
699. *See id.* at 411.
700. *Arrow*, 55 F.3d at 408-09.
701. *See id.* at 409.
702. *See id.* at 408.
703. *See, e.g.*, Gallegos v. Pueblo of Tesuque, 46 P.3d 668 (N.M. 2002), *cert. denied*, 536 U.S. 990 (2002).
704. *Id.*
705. *Id.* at 686.
706. *Id.* at 671.
707. *Id.* at 672.
708. *Gallegos*, 46 P.3d at 672.
709. *See id.* at 681.
710. *See id.*
711. *Id.* at 684.

insurer from the pueblo, the court was able to find that, in tribal court, the insurer "can or will fully represent the interests of Tesuque under the policy, and thus, Tesuque is necessary to the litigation" in state or federal court.[712] Here, there was an alternative forum for the plaintiff—in fact, the only forum available under the insurance contract—and since the insurance company was not a tortfeasor, the tribe was the only possible defendant.[713]

2. Tort Claims

Tort cases arising out of Indian gaming facilities where the defendant asserts compulsory joinder as a defense are more likely to find the tribes indespensible parties. Three cases holding that the tribes were indispensable came out of Louisiana.[714] Yet, two other cases out of Louisiana had a different result.[715] Whether the absent tribe will be considered indispensable depends on the form of the tort alleged. If the defendants are jointly and severally liable, then the absent tribe likely will not be considered indispensable.[716] In *Gore v. Grand Casinos of Louisiana*,[717] an accident victim sued the management company of the Tunica-Biloxi Indian Tribe, alleging violations of state law.[718] That case was removed to federal district court.[719] The management company argued that the gaming tribe was its employer, as defined by the state law of *respondeat superior,* and the company was therefore a possible defendant under a vicarious liability theory.[720] The court agreed the tribe was a necessary party because of the control exercised by the tribe over the gaming operations.[721] The court noted that the plaintiff had a remedy in tribal court, if she chose to pursue it, and dismissed the action.[722] In *Havekost v. Grand Casinos of Louisiana*,[723] on the exact same set of facts and the same defendant management company, the victim of an accident at a gaming facility owned by the Coushatta Tribe of Louisiana and operated by Grand Casinos of Louisiana, sued in federal district

712. *Id.*

713. *Cf. Gallegos*, 46 P.3d at 671.

714. *See generally* Havekost v. Grand Casinos of La., Inc., No. 00-CV-2204, 2000 WL 33909243 (W.D. La. Dec. 8, 2000); Gore v. Grand Casinos of La., Inc., No. CIV-A.98-1253A, 1998 WL 1990523 (W.D. La. Sept. 29, 1998); Bonnette v. Tunica-Biloxi Indians, 873 So. 2d 1 (La. Ct. App. 2003).

715. *See generally* Hines v. Grand Casinos of La., L.L.C., 140 F. Supp. 2d 701 (W.D. La. 2001); Atwood v. Grand Casinos of La., Inc., 819 So. 2d 440 (La. Ct. App. 2002).

716. *See Atwood*, 819 So. 2d. at 443.

717. No. CIV.A.98-1253A, 1998 WL 1990523 (W.D. La. Sept. 29, 1998).

718. *Id.* at *1.

719. *Id.*

720. *See id.* at *4.

721. *Id.*

722. *Gore,* 1998 WL 1990523, at *5.

723. No. 00-CV-2204, 2000 WL 33909243 (W.D. La. Dec. 8, 2000).

court.[724] The court, noting that the plaintiff sued the tribe in tribal court, agreed that tribal court was the proper venue and dismissed the action for the same reasons as stated in *Gore*.[725]

Then, in *Bonnette v. Tunica-Biloxi Indians*,[726] the Louisiana Court of Appeals dismissed a toxic mold tort action against the tribe and several others who were involved in constructing the tribe's gaming facility.[727] The plaintiffs, exposed to toxic mold at the Paragon Casino Resort, sued in state court.[728] The tribe's immunity from suit in state court necessitated its dismissal.[729] The remaining defendants moved to dismiss the claim due to the absence of the tribe.[730] The court applied the state law and determined that the tribe and the remaining defendants were not vicariously liable.[731] In fact, under the relevant state statute, the defendants would be liable only for their degree of fault.[732] The court agreed with the remaining defendants that, absent the tribe, the litigation would not settle the percentage of fault attributable to each defendant.[733] Moreover, because the plaintiffs had a tribal court remedy, the court agreed with the defendants that they might be subject to multiple and inconsistent obligations.[734]

The *Bonnette* court was obliged to distinguish an earlier Louisiana Court of Appeals case, *Atwood v. Grand Casinos of Louisiana, Inc.*[735] In this instance a blackjack dealer at the gaming facility, owned by the Coushatta Tribe of Louisiana and operated by Grand Casinos, was accused of cheating, stripped of his gaming license, and escorted by guards out of the casino.[736] The dealer sued for defamation in state court against the management company, a tribal gaming commission investigator, and a state police officer.[737] The management company and the other defendants argued the tribe was an indispensable party and moved for dismissal.[738] The court disagreed, holding that under state law the defendants' liability, if proven,

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724. *See id.* at *1.

725. *See id.* at *1-2.

726. 873 So. 2d 1, (La. Ct. App. 2003).

727. *See id.* at 3.

728. *See id.*

729. *See id.* at 4-5 (citing Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998); C&L Enters. Inc. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411 (2001); Ute Dist. Corp. v. Ute Indian Tribe, 149 F.3d 1260 (10th Cir. 1998)).

730. *See id.* at 7.

731. *Bonnette,* 873 So. 2d. at 8.

732. *See id.* (citing LA. CIV. CODE ANN. art. 2324(A) (West 2002)).

733. *See id.* at 8-9.

734. *See id.* at 9.

735. 819 So. 2d 440 (La. Ct. App.), *writ denied,* 827 So.2d 426 (La. 2002).

736. *Id.* at 441.

737. *Id.*

738. *Id.* at 441-42.

was joint and several, rendering the tribe an unnecessary party.[739] In *Hines v. Grand Casinos of Louisiana, L.L.C.*,[740] a former casino employee brought a Title VII claim of sexual harassment and discrimination against a gaming tribe's management company in state court.[741] Arguing that *Gore* was apposite, the management company moved to dismiss.[742] The court disagreed and distinguished *Gore* on the basis that the tribe had there "retained a sufficient indicia of control over the casino such that the Tribe was an indispensable party to the suit."[743] The court further noted that the management agreement expressly disclaimed liability for the tribe.[744]

The Louisiana cases demonstrate that absent tribes might not be indispensable based on tort law. The result often depends on state law.[745] Unfortunately, even when the management company is sued and the tribe is not considered indispensable, the absent tribe's interests are still implicated. The tribe suffers the bad public relations from a civil rights claim or a badly handled slip and fall case, even if it is not directly liable. The tribes should attempt to develop the factual basis for their interests outside of the scope of the state law on the alleged tort.

Following *Atwood* and *Hines,* temporally if not doctrinally, courts find that gaming tribes are generally not indispensable when their co-defendants in tort actions are jointly and severally liable. One highly publicized tort case where the court found that the gaming tribe was not an indispensable party, was *Frazier v. Turning Stone Casino*.[746] The management company for a former professional boxer sued the gaming tribe, the tribal officials, and the tribe's boxing promoter for misappropriating his image and likeness.[747] The court dismissed the tribe and tribal officials on immunity grounds.[748] The court did not find that the dismissed tribe was an indispensable party, mainly because the liability of the remaining defendants was joint and several.[749] This case exemplifies the potential bad publicity a tribe might experience if a celebrity sues the tribe and its gaming operations staff and contractors.[750] Other cases follow the same rationale. In *Multimedia Games, Inc. v. WLGC Acquisition Corp.*,[751] a gaming supply company sued the Miami Tribe of

739. *See id.* at 443 (citing LA. CIV. CODE ANN. art. 1789 (West 2002)).
740. 140 F. Supp. 2d 701 (W.D. La. 2001).
741. *See id.* at 702.
742. *Id.* at 705.
743. *Id.*
744. *Id.*
745. *See, e.g., Hines,* 140 F. Supp. 2d at 705.
746. 254 F. Supp. 2d 295 (N.D.N.Y. 2003).
747. *Id.* at 300.
748. *Id.* at 305, 310-11.
749. *See id.* at 306-07 (citing Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 360 (2nd Cir. 2000)).
750. *Cf. id.* at 300.
751. 214 F. Supp. 2d 1131 (N.D. Okla. 2001).

Oklahoma Business Development Authority and two others affiliated with the authority for copyright infringement and other business torts.[752] The court concluded the authority was immune from suit as an instrumentality of the tribe.[753] The court concluded the remaining two defendants were joint tortfeasors as to the business torts and copyright infringement allegations and allowed the case to continue.[754]

3. Gaming Lands and Gaming Enforcement Cases

The eligibility of tribes to conduct gaming on particular parcels of land or to conduct particular forms of gaming has created a large body of precedent regarding the compulsory joinder rule. In two important cases involving attempts by two tribes to establish off-reservation gaming, the Tenth Circuit held the absent tribe was not an indispensable party, in large part, because the federal government defendants were adequate to defend the absent tribe's interest.[755] First, in *Sac & Fox Nation v. Norton*,[756] three tribes and the governor of the state of Kansas sued the Secretary of the Interior to prevent him from taking land in downtown Kansas City, Missouri for gaming purposes on behalf of the Wyandotte Tribe of Oklahoma.[757] After the district court relied upon arguments made by the Wyandotte Tribe and the secretary regarding the tribe being a necessary party, the secretary reversed her position before the Tenth Circuit.[758] The court agreed with the Wyandotte Tribe that the tribe would suffer great prejudice if their ability to conduct gaming in Kansas City were lost in the adjudication, but found the prejudice was "greatly reduced" by the secretary's interest in her own defense, holding that their interests were "virtually identical."[759] The court also noted the Wyandotte Tribe "has filed pleadings at virtually all stages of this litigation and has consistently offered its views regarding why the Secretary's actions

752. *Id.* at 1132-33.

753. *See id.* at 1135 ("A tribe's sovereign status is directly related to its ability to generate revenues through the regulation of commercial activities on the reservation. The ability to contract as an economic entity impacts the tribe's fiscal resources by binding or obligating the funds of the tribe. It follows that corporate contractual provisions are actually economic matters which directly affect a sovereign's right of self government. In this way, the business entity is simply the tribe's alter ego; and thus, the real party in interest is the tribe because the vulnerability of the tribe's coffer is at issue when contracting in a commercial environment.").

754. *See id.* at 1141-44.

755. *See generally* Kansas v. United States, 249 F.3d 1213 (10th Cir. 2001); Sac & Fox Nation v. Norton, 240 F.3d 1250 (10th Cir. 2001) *cert. denied sub nom.*, Wyandotte Nation v. Sac & Fox Nation, 534 U.S. 1078 (2002).

756. 240 F.3d 1250 (10th Cir. 2001), *cert. denied sub nom.* Wyandotte Nation v. Sac & Fox Nation, 534 U.S. 1078 (2002).

757. *Id.* at 1253.

758. *Id.* at 1258 n.9.

759. *Id.* at 1259 (quoting Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr., 94 F.3d 1407, 1412 (10th Cir. 1996)).

were appropriate."[760] The court found the likelihood that plaintiffs would lack an alternative forum for their claims to be most important.[761] Similarly, in *Kansas v. United States*,[762] the state of Kansas sued the National Indian Gaming Commission to prevent the agency from making a decision that would declare land in Kansas eligible for Indian gaming on behalf of the Miami Tribe of Oklahoma.[763] After the Miami Tribe argued that it was an indispensable party to the suit, the court disagreed, relying on *Sac & Fox Nation*, which had been decided a few months earlier.[764]

Two other gaming-related cases involved claims, by the defendants, that the United States was an indispensable party, and in both cases, the court rejected the argument. In *Forest County Potawatomi Community v. Doyle*,[765] the tribe sued state and local government officials after local officials threatened to prevent the tribe from engaging in gaming operations.[766] The Redevelopment Authority of the City of Milwaukee transferred land to the tribe leading the Secretary of the Interior to take the land into trust for gaming purposes.[767] After the tribe sued, the defendants argued that both the United States and the Redevelopment Authority were indispensable parties and asked the court to dismiss the action under the compulsory joinder rule.[768] The defendants argued the Redevelopment Authority could bring a quiet title action against the United States as a result of the litigation.[769] The court disagreed, noting that the authority could always intervene if it chose.[770] In *Texas v. Ysleta del Sur Pueblo*,[771] the court held that the United States was not an indispensable party when a state brings an enforcement action to shut down a tribal casino on reservation land.[772] The tribe argued that even if the tribe prevailed against the state, the United States would eventually bring its own legal action to shut down the gaming facility, creating the possibility of multiple and inconsistent obligations for the tribe.[773] The court rejected the argument, reasoning that since the United States was never joined in *California v. Cabazon Band of Mission Indians*,[774] another case in which a state

760. *Id.* at 1260.
761. *Sac & Fox Nation*, 240 F.3d at 1260.
762. 249 F.3d 1213 (10th Cir. 2001).
763. *See id.* at 1218.
764. *Id.* at 1225-26 (citing *Sac & Fox Nation*, 240 F.3d at 1250).
765. 828 F. Supp. 1401 (W.D. Wis. 1993).
766. *Id.* at 1404.
767. *Id.* at 1406.
768. *Id.* at 1412.
769. *Id.*
770. *Forest County Potawatomi Cmty.*, 828 F. Supp. at 1413.
771. 79 F. Supp. 2d 708 (W.D. Tex. 1999), *aff'd*, 237 F.3d 631 (5th Cir. 2000), *cert. denied*, 532 U.S. 1066 (2001).
772. *See id.* at 711-12.
773. *Id.* at 711.
774. 480 U.S. 202 (1987).

brought an enforcement action to shut down tribal gaming on reservation land, it did not need to be joined in the Texas matter either.[775]

Non-Indians are not likely to be indispensable parties in litigation involving tribal gaming interests. In *United States ex rel. Morongo Band of Mission Indians v. Rose*,[776] the court threw out a former tribal bingo operations contractor's argument that the owner of land where the bingo facility was located was an indispensable party.[777] The court reasoned, "[T]he pleadings cannot mean that every non-Indian who might play bingo on the Band's land or every person who might associate himself with Rose in the future is a necessary party."[778]

IV. THE GAMING COMPACT CASES—A GENRE CASE STUDY

Indian gaming is a national multi-billion dollar enterprise and growing.[779] Some tribes acquire unimaginable wealth as a result of gaming.[780] While fewer than half of the federally recognized tribes operate successful gaming facilities; of those that do, gaming is, for the time being, the life blood of many tribes' finances, supporting all manner of governmental services, environmental protection, employment of tribal members and non-Indians, and feeding hope and capital for future non-gaming economic development.[781] Unlike federal, state, or local governments, most Indian

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775. *See generally Yselta del Sur Pueblo*, 79 F. Supp. 2d at 711 n.4.

776. 34 F.3d 901 (9th Cir. 1994).

777. *See id.* at 907-09.

778. *Id.* at 908.

779. *See In re* Kedrowski, 284 B.R. 439, 440 n.2 (W.D. Wis. 2002) ("For example, according to the National Indian Gaming Commission, in 1997 Indian gaming revenues totaled about $7.4 billion. They have increased steadily, and in 2001 tribal gaming revenues totaled $12.7 billion, an increase of almost 16% from the previous year. These revenues were based on reports from 290 tribal gaming operations nationwide."); Cy Ryan, *Study: Indian Casinos Win $14.1 Bil. in 2002,* LAS VEGAS SUN, May 20, 2003, *available at* www.lasvegassun.com/sunbin/gaming/stories/text/2003/May/20/515106057.html.

780. *In re Kedrowski,* 284 B.R. at 440 n.2; Ryan, *supra* note 779.

781. *See, e.g.,* Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the W. Dist. of Mich., 198 F. Supp. 2d 920, 926 (W.D. Mich. 2002), *aff'd,* 369 F.3d 960 (6th Cir. 2004):

> In fiscal year 2001, Turtle Creek provided approximately 89% of the Band's gaming revenue. The casino now employs approximately 500 persons, approximately half of whom are tribal members. Revenues from the Turtle Creek Casino also fund approximately 270 additional tribal government positions, which administer a variety of governmental programs, including health care, elder care, child care, youth services, education, housing, economic development and law enforcement. The casino also provides some of the best employment opportunities in the region, and all of its employees are eligible for health insurance benefits, disability benefits and 401(k) benefit plans. The casino also provides revenues to regional governmental entities and provides significant side benefits to the local tourist economy.

tribes do not have a property tax or income tax upon which to draw from in a financial pinch.[782] The Supreme Court noted in *California v. Cabazon Band of Mission Indians*:[783]

> The Cabazon and Morongo Reservations contain no natural resources which can be exploited. The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members.[784]

However, gambling is gambling, and it comes with drawbacks. Some opponents to gambling label Indian gaming as a regressive tax on the poor,[785] and accuse Indian gaming of creating or perpetuating a gateway to organized crime, gambling addiction, and attendant societal problems.[786] Opponents also assert that the expansion of gambling is morally wrong or evil.[787]

And yet, Indian gaming creates jobs,[788] establishes a reservation economy,[789] and brings Indian and non-Indian governments together in ways never before imagined.[790] If placed in the context of other forms of economic development that

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Id. (citations to record omitted).

782. *See, e.g.*, Pueblo of Santa Ana v. Hodel, 663 F. Supp. 1300, 1314 n.21 (D.D.C. 1987) ("[T]he Indians have no viable tax base and a weak economic infrastructure. Therefore they, even more than the states, need to develop creative ways to generate revenue.").

783. 480 U.S. 202 (1987).

784. *Id.* at 218-19.

785. *See* Daniel Twetten, *Public Law 280 and the Indian Gaming Regulatory Act: Could Two Wrongs Ever be Made into a Right?*, 90 J. CRIM. L. & CRIMINOLOGY 1317, 1350 (2000); Paul H. Brietzke & Teresa L. Kline, *The Law and Economics of Native American Casinos*, 78 NEB. L. REV. 263, 287 (1999).

786. Brietzke & Kline, *supra* note 785, at 290-91.

787. *Cf.* Mich. Gaming Inst., Inc. v. Bd. of Educ., 536 N.W.2d 289, 292 (Mich. Ct. App. 1995) (Corrigan, J., dissenting) ("With limited exceptions, the purpose of the current scheme of criminal laws remains to suppress gambling as an activity injurious to public morals and welfare.") (citing State *ex rel.* Comm'r of State Police v. Nine Money Falls Games, 343 N.W.2d 576, 578 (Mich. Ct. App. 1983)); N. Bruce Duthu, *Crow Dog and Oliphant Fistfight at the Tribal Casino: Political Power, Storytelling, and Games of Chance*, 29 ARIZ. ST. L.J. 171, 185-87 (1997) (discussing history of moral antipathy toward gambling).

788. *See* Kathryn R.L. Rand & Steven A. Light, *Virtue or Vice?: How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381, 403-04 (1997).

789. *See* Kathryn R.L. Rand, *There are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 CHAP. L. REV. 47, 81 & n.252 (2000).

790. *See* Carole Goldberg-Ambrose, *Pursuing Tribal Economic Development at the Bingo Palace*, 29 ARIZ. ST. L.J. 97, 98 (1997) ("[S]ome gaming tribes have been so successful that they are

pollutes the environment,[791] kills workers,[792] and generates malevolent corruption,[793] Indian gaming is relatively harm-free, even if there are challenges to Indian gaming and attacks on Indian tribes.[794] Indian tribes are not-for-profit corporations that are interested only in maximizing dividends for investors.[795] Without question, gaming revenues have brought many tribes back from a very desperate state of dependency and near-extinction.[796] As Congress has repeatedly declared improved tribal self-determination to be its policy,[797] court challenges to the validity of the gaming compacts between Indian tribes and states may turn on whether the Indian tribe is an indispensable party in accordance with the compulsory joinder rule.[798] Typically, a taxpayer group, a state legislator, or a competing business or industry, such as a racetrack or card room, may sue the state or the governor to contest the validity of Class III gaming compacts.[799] The state government defendant or the relevant Indian

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contracting with local non-Indian governments to provide services such as fire protection.").

791. *See generally* John C. Dernbach, *Pollution Control and Sustainable Industry*, 12 NAT. RESOURCES & ENV'T 101 (1997).

792. *See* Marc Linder, *Fatal Subtraction: Statistical MIAS on the Industrial Battlefield*, 20 J. LEGIS. 99, 99 (1994) ("A million workers in the United States have been killed in the line of duty alone since the 1920s.").

793. *See generally* Joseph M. Schwartz, *Democracy Against the Free Market: The Enron Crisis and the Politics of Global Deregulation*, 35 CONN. L. REV. 1097 (2003).

794. *See, e.g.*, Gavle v. Little Six, Inc., 555 N.W.2d 284, 294-95 (Minn. 1996); *cf.* Texas v. Ysleta del Sur Pueblo, 19 F. Supp. 2d 708 (W.D. Tex. 1999).

795. *See, e.g.*, Trudgeon v Fantasy Springs Casino, 84 Cal. Rptr. 2d 65, 70 (Ct. App. 1999) (acknowledging that Indian casinos are "governmental in nature"); *Gavle*, 555 N.W.2d at 295 (recognizing "the unique role that Indian gaming serves in the economic life of here-to-fore impoverished Indian communities across this country").

796. Goldberg-Ambrose, *supra* note 790, at 97-98.

797. Perhaps the most important example is the statement of Congressional purpose contained in the Indian Gaming Regulatory Act (IGRA), that IGRA was intended to promote "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1) (2000); *see also id.* § 450(a)(1) (finding that "self-government" of Indian tribes would be served by additional tribal control of federal Indian programs); § 450(b)(1) (finding that "true self-determination" of Indian tribes would be served by improved educational opportunities); § 1902 (declaring that it is the policy of Congress to "promote the stability and security of Indian tribes and families"); § 4101(7) (recognizing the "right of Indian self-determination and tribal self-governance").

798. This article will "use the familiar but confusing terminology, [where] the decision to proceed is a decision that the absent person is merely 'necessary' while the decision to dismiss is a decision that he is 'indispensable.'" Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 118 (1968).

799. *See generally* Pueblo of Santa Ana v. Kelly, 104 F.3d 1546 (10th Cir. 1997) (holding that governor lacked authority to bind state to gaming compacts); Sears v. Hull, 961 P.2d 1013 (Ariz. 1998) (holding that citizens lacked standing to challenge gaming compacts' constitutionality); Flynt v. Cal. Gambling Control Comm'n, 129 Cal. Rptr. 2d 167 (Ct. App. 2003) (holding that gaming compacts did not violate challenger's equal protection rights); State *ex rel.* Stephan v. Finney, 867

tribe in intervention argue the tribe is an indispensable party to the suit and since the tribe is immune from suit in federal and state courts, the suit must be dismissed.[800] There was a challenge to the 1997 and 1998 Michigan gaming compacts that could have turned on whether the absent tribes are indispensable.[801] Since the merits of the challenges turn on state law—separation of powers, the governor's state constitutional authority, the legislature's state constitutional authority, whether gambling is regulated versus prohibited under state law—the more recent trend is toward treating the Indian tribes as necessary, but not indispensable, parties.[802] As one court noted, these cases present "an issue of civil procedure that may have wide-ranging consequences for gaming activities operated on Native American lands."[803]

The IGRA[804] classified Indian gaming three ways.[805] First, Class I gaming includes "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations."[806] Second, Class II gaming includes high-bingo and non-banking card games.[807] Third, Class III gaming includes all other forms of gaming and generally means Las Vegas-style casino gaming.[808] Class III gaming is lawful in accordance with IGRA, only if the gaming tribe meets three requirements.[809] First, the gaming must be authorized by a tribal statute.[810] Second, the state in which the tribe is located must be a state that "permits such gaming for

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P.2d 1034 (Kan. 1994) (discussing challenge to scope of gaming allowed under state law by state attorney general); State *ex rel.* Stephan v. Finney, 836 P.2d 1169 (Kan. 1992) (discussing challenge to governor's authority to execute gaming compact by state attorney general and holding governor lacked authority); Tiger Stadium Fan Club, Inc. v. Governor, 553 N.W.2d 7 (Mich. Ct. App. 1996) (holding that state governor had authority to settle case with tribes over gaming and enter into compacts as a condition of the settlement); Narrangansett Indian Tribe v. State, 667 A.2d 280 (R.I. 1995) (holding that governor lacked authority to enter into gaming compact); *cf.* Baird v. Norton, 266 F.3d 408 (6th Cir. 2001) (holding that legislators did not have standing to challenge Michigan gaming compacts on the basis of vote nullification theory); Salt River Pima-Maricopa Indian Cmty. v. Hull, 945 P.2d 818 (Ariz. 1997) (holding that statute requiring governor to sign gaming compact was not unconstitutional violation of state separation of powers).

800. *See generally* Kansas v. U.S., 249 F.3d 1213, 1225-26 (10th Cir. 2001); Sac & Fox Nation v. Norton, 240 F.3d 1250 (10th Cir. 2001).

801. *See generally* Taxpayers Against Casinos v. State, 657 N.W.2d 503 (Mich. Ct. App. 2002), *lv. granted*, 669 N.W.2d 816 (Mich. 2003), *aff'd*, 685 N.W.2d 221 (Mich. 2004), *cert. denied*, 125 S. Ct. 1298 (2005).

802. *Sac & Fox Nation*, 240 F.3d at 1258.

803. Pueblo of Sandia v. Babbitt, 47 F. Supp. 2d 49, 49 (D.D.C. 1999).

804. 25 U.S.C. § 2701 (2000).

805. *Id.* § 2703.

806. *Id.* § 2703(6).

807. *See id.* § 2703(7).

808. *See id.* § 2703(8).

809. 25 U.S.C. § 2710(d)(i).

810. *See id.* § 2710(d)(1)(A).

any purpose by any person, organization, or entity."[811] Third, the gaming must be "conducted in conformance with a Tribal-State compact entered into by the Indian Tribe and the State."[812]

The contours of Indian gaming originated in litigation, and the scope of Indian gaming continues to be fleshed out through litigation.[813] The litigation can be roughly described as developing in waves. In the first wave, the federal courts validated Indian gaming in two important cases, one of which reached the Supreme Court. In the first, *Seminole Tribe v. Butterworth*,[814] the Fifth Circuit held that a state could not enforce its law regulating high stakes bingo on reservation land, creating the "civil/regulatory" and "criminal/prohibitory" descriptions of state gaming laws that are generally codified in 25 U.S.C. § 2703(d)(1)(C).[815] The Supreme Court later adopted that construction in *California v. Cabazon Band of Mission Indians*.[816] As a result of the Supreme Court's decision, Congress enacted IGRA ostensibly to protect tribes interested in gaming or already gaming, from states and others that objected.[817]

After the passage of IGRA, the second wave of litigation began. After tribes began to negotiate with states for gaming compacts in accordance with IGRA, many states refused to sign compacts.[818] IGRA provided that, in such a circumstance, the recalcitrant state could be sued in federal district court and forced to enter into a compact.[819] Many tribes did exactly that, with some success.[820] Eventually, the Supreme Court held in *Seminole Tribe v. Florida*[821] that the Eleventh Amendment immunized the states from suit in federal court; this decision effectively eradicates a significant feature of the gaming statute, and hands over most of the bargaining power the tribes had taken from *Cabazon* to the recalcitrant states.[822] *Seminole Tribe* meant that states could negotiate terms much more favorable to them in their compact

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811. *Id.* § 2710(d)(1)(B).

812. *Id.* § 2710(d)(1)(C).

813. *See generally* Seminole Tribe v. Florida, 517 U.S. 44 (1996); Seminole Tribe v. Butterworth, 658 F.2d 310 (5th Cir. 1981).

814. 658 F.2d 310, *cert. denied*, 455 U.S. 1020 (1982).

815. *See id.* at 315-16.

816. 480 U.S. 202, 209-10 (1987) (citing *Seminole Tribe*, 658 F.2d at 310).

817. *See* 25 U.S.C. § 2702(1) (2000) ("The purpose of this chapter is... to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.").

818. *See, e.g.*, Ponca Tribe v. Oklahoma, 37 F.3d 1422, 1424-25 (10th Cir. 1994); Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273, 276-77 (8th Cir. 1993).

819. *See* 25 U.S.C. § 2710(d)(7).

820. *See generally Ponca Tribe*, 37 F.3d at 1422; *Cheyenne River Sioux Tribe*, 3 F.3d at 273; Calvello v. Yankton Sioux Tribe, 899 F. Supp. 431 (D.S.D. 1995).

821. 517 U.S. 44 (1996).

822. *Id.* at 72-73; *cf.* Nancy J. Bride, Seminole Tribe v. Florida: *The Supreme Court's Botched Surgery of the Indian Gaming Regulatory Act*, 24 J. LEGIS. 149, 153-54 (1998) (arguing that the Supreme Court should have decided *Seminole Tribe* the other way).

negotiations.[823] The third wave of Indian gaming litigation—the gaming compact cases—arose when state governors began signing gaming compacts with Indian tribes.[824] Often, the compacts are challenged on state law grounds or on the grounds that the governor had no authority to bind the state to the compact.[825]

Along with the gaming compact cases, a parallel wave of litigation has arisen regarding the gaming conducted on lands acquired after the passage of IGRA on October 17, 1988.[826] IGRA generally prohibits gaming on Indian lands acquired after the passage of IGRA,[827] but there are exceptions.[828] In these cases, newly restored and recognized tribes, as well as tribes that acquired land for the purpose of restoring their reservation base, seek to gain these so-called "after-acquired lands."[829] Often, the lands are outside the tribes' reservation boundaries—if the tribe even has a reservation at all—and are labeled, often incorrectly, "off-reservation gaming."[830] These last two waves of litigation have arisen in the context of a very serious backlash by the non-Indian public against Indian gaming.[831]

The body of this section of the article focuses on the gaming compact cases, which turn on an absent sovereign and the court's analysis of the "equity and good conscience" standard expressed in the compulsory joinder rule in most federal and state court rules. These cases provide a useful and current view of the compulsory joinder rule and its application by modern courts where the absent party is an Indian tribe.

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823. *See Seminole Tribe*, 517 U.S. at 53.

824. *See, e.g.*, Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1017 (9th Cir. 2002); Saratoga County Chamber of Commerce, Inc. v. Pataki, 798 N.E.2d 1047, 1049 (N.Y. 2003); Dairyland Greyhound Park, Inc. v. McCallum, 655 N.W.2d 474, 476-77 (Wis. Ct. App. 2002).

825. *See, e.g., Am. Greyhound Racing Inc.*, 305 F.3d at 1017; *Saratoga County Chamber of Commerce, Inc.*, 798 N.E.2d at 1049; *Dairyland Greyhound Park, Inc.*, 655 N.W.2d at 476-77.

826. *See, e.g.*, Oregon v. Norton, 271 F. Supp. 2d 1270, 1275 (D. Or. 2003).

827. *See* 25 U.S.C. § 2719(a) (2000).

828. *See id.* § 2719(b).

829. *See, e.g., Norton*, 271 F. Supp. 2d at 1279; City of Roseville v. Norton, 219 F. Supp. 2d 130, 158-59 (D.D.C. 2002), *aff'd*, 348 F.3d 1020 (D.C. Cir. Nov. 17, 2003); Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the W. Dist. of Mich., 198 F. Supp. 2d 920, 935-36 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004); Confederated Tribes of Coos, Lower Upmqua & Suislaw Indians v. Babbitt, 116 F. Supp. 2d 155, 159 (D.D.C. 2000); Sault Ste. Marie Tribe of Chippewa Indians v. United States, 78 F. Supp. 2d 699, 703-04 (W.D. Mich. 1999); Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the W. Dist. of Mich., 46 F. Supp. 2d 689, 702 (W.D. Mich. 1999).

830. *See, e.g.* City of Roseville v. Norton, 348 F.3d 1020, 1030 (D.C. Cir. 2003).

831. *See, e.g., id.* at 1023.

A. American Greyhound Racing, Inc. v. Hull

In *American Greyhound Racing, Inc. v. Hull*,[832] the Ninth Circuit reversed a district court decision ordering the governor of the state of Arizona to give notice of intent to terminate the Arizona Indian gaming compacts upon their expiration in 2003 and enjoin the governor from negotiating new compacts.[833] The Ninth Circuit, per Judge Canby, first described the history of Indian gaming in Arizona, calling it "rocky."[834] In 1992, the Arizona legislature enacted a statute that granted authority to the governor to "enter into negotiations and execute tribal-state compacts with the Indian tribes in this state pursuant to the Indian gaming regulatory act of 1988."[835] The governor entered into gaming compacts with sixteen Arizona tribes in 1993 and 1994.[836] One tribe, the Salt River Pima Maricopa Indian Community, did not sign a compact.[837] After the Salt River Community successfully sponsored an initiative campaign requiring the governor to enter into additional compacts,[838] individuals who held anti-Indian gaming views sued the governor to enjoin her from entering into the compact.[839] The Arizona Supreme Court rejected the claim on the grounds the plaintiffs did not have standing.[840]

After discussing the history of Indian gaming in Arizona, the court turned to the compacts themselves.[841] The Arizona gaming compacts had ten-year terms, the first generation of which would expire in 2003.[842] The compacts would automatically renew unless either party gave 180 days notice of termination.[843] Since the governor had indicated an interest in modifying some of the terms of the compacts, the parties had already entered into negotiations by the time American Greyhound Racing, a company that competes with Indian gaming facilities, filed its complaint in 2000.[844]

The district court held the Arizona gaming compacts violated Arizona's prohibition on casino-style gaming and the compact authorization statute violated the

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832. 305 F.3d 1015 (9th Cir. 2002) [hereinafter *Am. Greyhound II*], *rev'g*, Am. Greyhound Racing, Inc. v. Hull, 146 F. Supp. 2d 1012 (D. Ariz. 2001) [hereinafter *Am. Greyhound I*].

833. *See Am. Greyhound II*, 305 F.3d at 1018 (citing *Am. Greyhound I*, 146 F. Supp. 2d at 1054-59).

834. *Id.* at 1019.

835. ARIZ. REV. STAT. § 5-601(A) (2002).

836. *See Am. Greyhound II*, 305 F.3d at 1019.

837. *See id.* at 1020.

838. *See id.* (citing ARIZ. REV. STAT. § 5-601-01).

839. *See id.*

840. *Id.* (citing Sears v. Hull, 961 P.2d 1013 (Ariz. 1998)).

841. *See Am. Greyhound II*, 305 F.3d at 1020.

842. *Id.*

843. *Id.*

844. *See id.*

state's separation of powers.[845] The district court also held the Arizona compacting tribes were not necessary parties to the litigation.[846] First, the district court held the tribes were not necessary parties in accordance with Rule 19(a)(1) "because complete relief can be accorded among the Plaintiffs and Defendants in their absence."[847] The court believed it was significant that American Greyhound sought only prospective relief, that is "how the [s]tate decides what duties or rights are appropriate for prospective compacts."[848] It makes little sense to say that prospective relief effectively banning Indian gaming would not injure the compacting tribes because the compacts were to expire in a few short years.[849] Perhaps the district court heard the footsteps of a property interest taking without due process claim brought by compacting tribes or a contract claim.[850] Second, the district court held tribes were not necessary parties in accordance with Rule 19(a)(2) because they had no "legally protected interest."[851] Since the only issue involved "the limits of state law" that affected "what the Governor will present to the tribes and what she can agree to,"[852] a decision in favor of the race track "would not implicate the rights IGRA guarantees the tribes."[853] Third, the district court held that since the governor retained the unfettered right to terminate the compacts, the gaming tribes had no protectable interest.[854] The district court stated, "If the right to terminate is unconstrained, the ongoing existence of an agreement is merely speculative."[855]

Initially, the Ninth Circuit held that the Arizona compacting tribes met the provisions of Rule 19(a)(2)(i) and were therefore necessary parties, overruling the district court.[856] Writing for the majority, Judge Canby stated that

> [a]lthough the Governor had indicated a desire to negotiate modified compacts, to take effect when the original ten-year compacts expired, it is by no means probable that the Governor, if unable to negotiate different agreements, would

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845. *See id.* at 1021.

846. *See Am. Greyhound I*, 146 F. Supp. 2d 1012, 1042-1051 (D. Ariz. 2001).

847. *Id.* at 1045.

848. *Id.*

849. *See id.*

850. *See, e.g.*, Brief of Amici Curiae Grand Traverse Band of Ottawa and Chippewa Indians et al. at 21 n.2, Taxpayers Against Casinos v. Michigan, 657 N.W.2d 503 (Mich. Ct. App. 2002) (No. 12283), *aff'd*, 685 N.W.2d 221 (Mich. 2004), *cert. denied*, 125 S. Ct. 1298 (2005) (discussing possible contract breach claim against State of Michigan if Indian gaming compacts are declared invalid by court).

851. *Am. Greyhound I*, 146 F. Supp. 2d at 1047.

852. *Id.*

853. *Id.*

854. *See id.* at 1046-47.

855. *Id.* at 1046.

856. *See Am. Greyhound II*, 305 F.3d 1015, 1018 (9th Cir. 2002).

> have elected to terminate the present ones and shut down virtually the entire Indian gaming industry in Arizona.[857]

Since the district court had ordered an injunction requiring the governor to give notice of intent to terminate,[858] the court held "there can be no question that automatic termination renders the compacts less valuable to the tribes."[859] As a "practical matter," the district court's injunction affected the compacting tribes' interests.[860] First, the possibility that the governor would renew the compacts was eliminated.[861] Second, the district court's injunction amounted to a ruling that the gaming compacts were illegal, raising the possibility that law enforcement authorities might be compelled to act against the tribes.[862] Third, the "sovereign power of the tribes" to negotiate was adversely affected, both in terms of bargaining power and interest of the very authority to bargain.[863] The Ninth Circuit also rejected the district court's conclusion that the compacting tribes could have no interest in illegal gaming.[864] The court held that, under Rule 19(a), the absent party's claim of an interest makes its presence necessary.[865] In other words, the merits of the claimed interest, unless completely frivolous, should not enter the Rule 19(a) equation.[866]

The Ninth Circuit's analysis highlights how the district court's opinion was almost unreal in its shelving of the compacting tribes' interest.[867] Indian gaming is a multi-million dollar industry in Arizona and the district court issued an order ending all Indian gaming upon the expiration of the compacts in 2003.[868] It is likely that the vast majority of the governmental services budget for the compacting tribes—items that would have included housing, health care, employment, social services, and everything a state and local government provides its constituents—were derived from gaming revenues.[869] Compacting tribes had been gaming six or seven years already.[870] To say that the tribes were not interested parties was an incredible twisting of logic.

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857. *Id.* at 1023.

858. *Id.*

859. *Id.* (citing Kescoli v. Babbitt, 101 F.3d 1304, 1309-10 (9th Cir. 1996)).

860. *See id.* at 1023 (quoting FED. R. CIV. P. 19(a)(2)(i)).

861. *See Am. Greyhound II,* 305 F.3d at 1023.

862. *See id.* at 1024.

863. *See id.* (citing Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1157 (9th Cir. 2002)).

864. *See id.*

865. *See id.* (citing Shermoen v. United States, 982 F.2d 1312, 1317 (9th Cir. 1992)).

866. *See Am. Greyhound II,* 305 F.3d at 1023.

867. *See id.* at 1021.

868. *See id.* at 1021-22.

869. *See, e.g.,* Rand & Light, *supra* note 788, at 382.

870. *See, e.g.,* Saratoga County Chamber of Commerce, Inc. v. Pataki, 798 N.E.2d 1047,

In the gaming compact cases, the third party and defendant factors usually weigh in favor of dismissal.[871] Most gaming compact cases are all or nothing cases, meaning that either the compacts are valid or not. In *American Greyhound*, for example, the district court had granted an injunction precluding the governor of Arizona from renewing the gaming compacts with the compacting tribes and from negotiating new compacts.[872] The Ninth Circuit found no way to ameliorate the prejudice to the absentee tribes.[873] Even removing the injunction would not have "protect[ed] the tribes from other potential effects of the declaration that the gaming conducted by tribes pursuant to their compacts is illegal."[874] Moreover, the injunction was an "essential remedy" for the plaintiffs; without it, the victory was hollow.[875] This was an all-or-nothing case. The court cannot shape a remedy to limit either side's prejudice. The compulsory joinder rule was not meant to decide these cases.

Importantly, the *American Greyhound* court rejected the application of the so-called "public rights" exception to gaming compact cases.[876] The doctrine arose in the Ninth Circuit case, *Conner v. Buford*,[877] in which the court held that environmental groups could challenge the application of environmental protection laws to oil and gas leases without joining all of the lessees.[878] The *American Greyhound* plaintiffs argued that their case should not be dismissed because it would ensure the governor acted in accordance with state law, invoking the "public rights" exception.[879] The court narrowly defined the exception, holding that to qualify for the exception, "the litigation must transcend the private interests of the litigants and seek to vindicate a public right."[880] The court looked to the plaintiffs' interest in the matter in rejecting their argument; "[T]heir interest is in freeing themselves from the competition of Indian gaming, not in establishing for all the principle of separation of powers."[881] The court further wrote, "This litigation does not *incidentally* affect the gaming tribes in the course of enforcing some public right. This litigation is *aimed* at the tribes and their gaming."[882] Judging the plaintiffs on their motivation, the court

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1049 (N.Y. 2003); Dairyland Greyhound Park, Inc. v. McCallum, 655 N.W.2d 474, 477 (Wis. Ct. App. 2002).

871. *See, e.g., Am. Greyhound II*, 305 F.3d at 1018; *Dairyland Greyhound Park, Inc.*, 655 N.W.2d at 476.

872. *See Am. Greyhound II*, 305 F.3d at 1018.

873. *See id.* at 1025.

874. *Id.*

875. *See id.*

876. *See id.* at 1025-27.

877. 848 F.2d 1441, 1458-59 (9th Cir. 1988).

878. *See id.* at 1460-61.

879. *See Am. Greyhound II*, 305 F.3d at 1025-26.

880. *Id.* at 1026 (quoting Kescoli v. Babbitt, 101 F.3d 1304, 1311 (9th Cir. 1996)).

881. *Id.*

882. *Id.*

concluded, "The plaintiffs sought this injunction to avoid competitive harm to their own operations. The general subject of gaming may be of great public interest, but the rights in issue between the plaintiffs in this case, the tribe and the state are more private than public."[883]

The "public rights" exception to the indispensable party rule appears to be a doctrine that has as much value as a substantive due process claim.[884] The Ninth Circuit might do so in extremely limited circumstances. However, the Wisconsin Court of Appeals and the New York Court of Appeals adopted a very similar rule with a much lower threshold for a plaintiff to pass.[885] The Ninth Circuit's analysis and its rejection of the doctrine in *American Greyhound* is persuasive when applied to those cases. The court found that American Greyhound Racing could not compete as well as they would have liked against the Arizona Indian gaming tribes and so they sought to undercut the legal basis for the compacting tribes' activities.[886] This motivation, purely a private economic motivation, is an important factor to weigh in an analysis that relies on the ambiguous "in equity and good conscience" standard.[887] As seen elsewhere, the plaintiffs that bring gaming compact cases are not solely interested in the proper operation of state law; these plaintiffs are anti-Indian gaming, anti-Indian, or have a purely economic private interest at stake.[888] There are no organizations devoted exclusively to state constitutional separation of powers and the typical organization wears its motivation on its sleeve, such as Taxpayers of Michigan Against Casinos,[889] People Against a Casino Town,[890] and National Coalition Against Gaming Expansion.[891] Politicians and legislators also seem to state their position clearly, usually in their vote or in their public statements.

American Greyhound was a federal court slam-dunk for the Arizona gaming tribes that asserted their rights as a sovereign.[892] The New York and Wisconsin gaming tribes have not been so successful.

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883. *Id.*

884. *See Am. Greyhound II*, 305 F.3d at 1025-27.

885. *See, e.g.*, Saratoga County Chamber of Commerce v. Pataki, 798 N.E.2d 1047, 1058-59 (N.Y. 2003); Dairyland Greyhound Park, Inc. v. McCallum, 655 N.W.2d 474, 486 & n.14 (Wis. Ct. App. 2002).

886. *Am. Greyhound II*, 305 F.3d at 1026.

887. *Id.* at 1025 (quoting FED. R. CIV. P. 19(b)).

888. *See, e.g., Saratoga County Chamber of Commerce, Inc.*, 798 N.E.2d at 1049; *Dairyland Greyhound Park, Inc.*, 655 N.W.2d at 476-77.

889. *See* TOMAC v. Norton, 193 F. Supp. 2d 182, 185 (D.D.C. 2002); Taxpayers Against Casinos v. State, 657 N.W.2d 503, 505 (Mich. Ct. App. 2003), *lv. granted*, 669 N.W.2d 816 (Mich. 2003), *aff'd*, 685 N.W.2d 221 (Mich. 2004), *cert. denied*, 125 S. Ct. 1298 (2005).

890. *See* Susan Palmer, *Casino Lawsuit in Wrong Court, State Says*, EUGENE (OR.) REGISTER-GUARD, Oct. 24, 2003, *available at* http://news.statesmanjournal.com/article.cfm?i=71426.

891. *See* City of Roseville v. Norton, 348 F.3d 1020, 1021 (D.C. Cir. 2003).

892. *See, e.g., Am. Greyhound II*, 305 F.3d at 1027.

B. Saratoga County Chamber of Commerce, Inc. v. Pataki

The most recent clash between tribal sovereignty and anti-Indian gaming plaintiffs took place in *Saratoga County Chamber of Commerce, Inc. v. Pataki*, decided by the New York Court of Appeals.[893] *Saratoga County* involved the authority of the governor of New York State to enter into gaming compacts with Indian tribes, specifically, the St. Regis Mohawk Tribe.[894] The governor entered into a gaming compact with the tribe in 1993[895] and executed an amendment to the compact in 1999 allowing the tribe to operate electronic Class III games for one year.[896] Subsequently, the governor and the tribe executed two further amendments.[897] The Department of Interior approved the compact and the first amendment, but not the latter amendments.[898] As such, since the authorization to operate electronic Class III games had expired in 2000 and the department had not approved the extensions, the tribe's continued operation of electronic Class III games was without authorization.[899] The court also noted the governor acted without legislative approval.[900]

The plaintiffs were "[l]egislators, organizations and individuals opposed to casino gambling."[901] They sought a declaratory judgment that the 1999 compact amendment and the 1993 compact were void and unenforceable.[902] They also sought an injunction against the governor from taking action to execute a gaming compact that would allow the tribe to operate electronic Class III games.[903] The New York Supreme Court granted the plaintiffs the relief they requested in 2001, and the appellate division affirmed in 2002.[904]

The state argued, at the trial court level, that New York Civil Practice Law and Rule 1001(b)(2)[905] required the dismissal of the case because the tribe was an

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893. 798 N.E.2d 1047 (N.Y. 2003) [hereinafter *Saratoga III*], *cert. denied*, 124 S. Ct. 570 (2003).

894. *Id.* at 1049.

895. *Id.*

896. *Id.* at 1050.

897. *See Saratoga III*, 798 N.E.2d at 1050.

898. *Id.*

899. *Id.*

900. *See id.* at 1049, 1051.

901. *Id.* at 1047

902. *Saratoga III*, 798 N.E.2d at 1050.

903. *Id.*

904. *See id.* at 1051 (citing Saratoga County Chamber of Commerce, Inc. v. Pataki, 293 A.D.2d 20, 26 (N.Y. App. Div. 2002) [hereinafter *Saratoga II*].

905. This rule is comparable to the Federal Rule 19(b) and reads:

> When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. If

indispensable party.[906] The trial court agreed, but the appellate division reversed.[907] The appellate court believed it "noteworthy" in its compulsory joinder analysis that "in every state whose constitution does not grant residual powers to the executive, the litigation resulted in a declaration that the compact is void and unenforceable absent legislative concurrence."[908] It further held that the public interest in resolving "the considerable uncertainty concerning the [g]overnor's authority to bind the [s]tate to tribal gaming compacts and the types of gaming that may be legally authorized in New York" outweighed the tribe's sovereign interests in not participating in a state court determination of its rights under its gaming compact.[909] The court concluded by finding that the tribe's interests were not so great after all because "the complaints do not seek to interfere with any of the [t]ribe's gaming facilities or activities," except for the electronic gaming terminals.[910]

On June 12, 2003, the New York Court of Appeals affirmed the appellate division.[911] The governor argued again the tribes should be considered indispensable parties because "a judgment eviscerating the authority under which [the tribe] operate[d] the casino should be sufficient to dismiss the action."[912] The court, by a 4-3 majority, disagreed.[913] In the words of the court, "[T]he [t]ribe has chosen to be absent."[914] For the majority, the damage done to the "sovereign prerogatives of the Indian [t]ribes"[915] are tempered by the fact that the tribe had the "opportunity to be

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> jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party. In determining whether to allow the action to proceed, the court shall consider: . . .
>
> 2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;

N.Y. C.P.L.R. 1001(b)(2) (McKinney 2003). Perhaps the most obvious deviation of C.P.R.L. 1001(b) is the omission of the phrase "in equity and good conscience" that is present in federal Rule 19(b) and most other state court compulsory joinder rules.

906. Saratoga County Chamber of Commerce, Inc. v. Pataki, 275 A.D.2d 145, 150 (N.Y. App. Div. 2000) [hereinafter *Saratoga I*].

907. *Id.* at 158-59.

908. *Id.* at 152 (citing Jicarilla Apache Tribe v. Kelly, 129 F.3d 535, 537 (10th Cir. 1997); Kickapoo Tribe of Indians v. Babbitt, 827 F. Supp. 37, 47 (D.D.C. 1993), *rev'd on other grounds*, 43 F.3d 1491 (D.C. Cir. 1995); McCartney v. Attorney General, 587 N.W.2d 824, 827 (Mich. Ct. App. 1998), *lv. denied*, 601 N.W.2d 101 (Mich. 1999); Narragansett Indian Tribe v. Rhode Island, 667 A.2d 280, 282 (R.I. 1995); State *ex rel.* Clark v. Johnson, 904 P.2d 11, 23 (N.M. 1995); State *ex rel.* Stephan v. Finney, 836 P.2d 1169, 1185 (Kan. 1992)).

909. *Id.*

910. *Id.* at 153.

911. *Saratoga III*, 798 N.E.2d 1047, 1062 (N.Y. 2003).

912. *Id.* at 1058.

913. *See id.*

914. *Id.*

915. *Id.*

heard."[916] The court used the fact that the tribe exercised its "sovereign prerogative" against the tribe, noting that its appearance as *amicus curiae* allowed the tribe to "mak[e] the same arguments we would expect to be made by the [t]ribe had it chosen to participate."[917] For the court, any prejudice the tribe would suffer by refusing to consent to state court jurisdiction was its own fault.[918] The Supreme Court in *Martin v. Wilks,* interpreting Rule 19, rejected the argument that an absent party's interest is protected by their chance to intervene.[919] The Court did not discuss the prejudice the tribe would suffer by consenting to its jurisdiction, a remarkable and unfortunate omission.

The New York Court of Appeals was persuaded that the lack of an available remedy outweighed the tribe's sovereign interests.[920] This is a powerful argument on its face, but, as shown in this article, the argument is disingenuous. The court believed that the plaintiffs would "be stripped of a remedy if we hold that the [t]ribe is an indispensable party, [and] no member of the public will ever be able to bring this constitutional challenge."[921] Moreover, the court predicted, absent adjudication of the merits, "the [e]xecutive could sign agreements with any entity beyond the jurisdiction of the Court, free of constitutional interdiction. The [e]xecutive's actions would thus be insulated from review, a prospect antithetical to our system of checks and balances."[922] The court made no attempt to discuss the interests of the sovereign, except to assert, "[T]he [t]ribe could have mitigated that prejudice by participating in the suit."[923]

The dissent emphasized the suit was an attempt by the plaintiffs to shut down the tribe's casino, "[s]ix years and millions of dollars" after the execution of the original compact in 1993.[924] The dissent distinguished the plaintiffs' challenge from other challenges in other jurisdictions by stating, "No other state or federal court, however, has grappled with indispensability in light of the extraordinary delay in bringing suit manifest here."[925] The prejudice to the tribe, by allowing the suit to proceed, in the

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916. *Saratoga III,* 798 N.E.2d at 1058 (quoting First Nat'l Bank v. Shuler, 47 N.E. 262 (1897)).

917. *Id.*

918. *See id.* at 1058-59.

919. 490 U.S. 755, 764-65 (1989); *see also* YEAZELL, *supra* note 58, at 938.

920. *Saratoga III,* 798 N.E.2d at 1058.

921. *Id.*

922. *Id.*

923. *Id.* at 1059 (citing United States *ex rel.* Steele v. Turn Key Gaming, Inc., 135 F.3d 1249, 1252 (8th Cir. 1998) (involving a suit brought by a tribal officer to invalidate a contract and where a non-Indian contractor tried to assert that the tribe's absence should have forced the court to dismiss the action)).

924. *Id.* at 1067 (Read, J., dissenting).

925. *Saratoga III,* 798 N.E.2d at 1068 & n.3 (citing State *ex rel.* Clark v. Johnson, 904 P.2d 11 (N.M. 1995); Connecticut *ex rel.* Blumenthal v. Babbitt, 899 F. Supp. 80 (D. Conn. 1995); State *ex rel.* Coll v. Johnson, 990 P.2d 1277 (N.M. 1999); Sac & Fox Nation v. Norton, 240 F.3d 1250 (10th

dissent's eyes, was exacerbated by the fact that "[i]f plaintiffs had sued even reasonably promptly, the [t]ribe could have avoided or delayed substantial investments of time and money to develop the casino."[926] The dissent was also concerned by "the potential economic threat posed by this litigation to the casino's 400-odd employees and to the [t]ribe's long-term economic prospects."[927] Moreover, the dissent argued that the tribe's reliance on the gaming compact's validity was not misplaced, due to "the [l]egislature's prompt and consistent support of the 1993 Compact."[928] The legislature's support was evidenced by legislation authorizing the State Police and the Division of Criminal Justice Systems to fulfill their responsibilities under the compact and appropriations to the State Police and the state Racing and Wagering Board to support their gaming regulatory activities.[929] The dissent relied upon *Schultz v. State.*[930] In *Schultz,* the New York Court of Appeals dismissed a taxpayer's challenge to a state financing measure because the taxpayer waited eleven months after the measure's enactment and therefore was barred by laches.[931] The dissent reasoned that if eleven months were long enough in *Schultz* to generate "profound destabilizing and prejudicial effects from delay,"[932] then six years in the gaming compact case was also too long.[933]

A court has broad discretion when viewing questions in equity, but the *Schultz* majority's failure to examine all the potential equitable factors is egregious. First, as the dissent noted, millions of dollars had been expended in furtherance of the gaming enterprise, not only by the tribe, but by the tribe's non-Indian bankers, contractors, vendors, and local governments in support of the enterprise.[934] It is well established that local governments and economies grow to depend on Indian gaming, nearly as much as the gaming tribes themselves.[935] The dissent also noted that it was probable that the casino employed hundreds of people, most of whom were probably non-

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Cir. 2001), *cert. denied sub nom.* Wyandotte Nation v. Sac & Fox Nation, 534 U.S. 1078 (2002); Dairyland Greyhound Park, Inc. v. McCallum, 655 N.W.2d 474 (Wis. Ct. App.), *review denied,* 655 N.W.2d 129 (Wis. 2002); Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015 (9th Cir. 2002)).

926. *Id.* at 1069.

927. *Id.*

928. *Id.* at 1070.

929. *See id.*

930. *See Saratoga III,* 798 N.E.2d at 1069 (citing Schultz v. State, 615 N.E.2d 953 (N.Y. 1993)).

931. *See Schultz,* 615 N.E.2d at 957-58 (Smith, J., dissenting).

932. *Id.* at 957.

933. *See Saratoga III,* 798 N.E.2d at 1072.

934. *See id.* at 1067-68.

935. *See, e.g.,* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 218-19 (1987); Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the W. Dist. of Mich., 198 F. Supp. 2d 920, 926 (W.D. Mich. 2002), *aff'd,* 369 F.3d 960 (6th Cir. 2004); Goldberg-Ambrose, *supra* note 790, at 97-98.

Indians.[936] Taking the revenue source away from the tribe might create a chain-reaction of economic devastation, starting with the tribe and moving like a wave through the local non-Indian populace and the financing bodies. The interests of absent parties, however, were rendered utterly voiceless by the majority.[937] Second, the court characterized the plaintiffs as warriors for democracy and protectors of their state constitution.[938] But these plaintiffs appear to be in the same class as the plaintiffs in *American Greyhound,* where the Ninth Circuit found them to be pushing solely private commercial interests. Or are they really minority politicians with an anti-gaming constituency, perhaps the same private commercial interests? The majority never answers these questions. Perhaps they were never raised. One question that was raised by the dissent is why did these warriors for democracy wait years and years to file suit.[939] These plaintiffs' interests could not have been consuming their every waking moment in order to let what they must have believed to be clear violations of the state constitutional separation of powers doctrine. The majority weighed these amorphous interests against the interests of the tribe, the local governments, non-Indians contractually related to the casino, and even the state.[940] Third, the majority completely ignored the alternative fora available for the plaintiffs.[941] There was a clear strategic reason that these plaintiffs sued in state court. There is a long history of state court animosity toward Indian rights, not just in New York.[942] Few, if any, tribes would consent to suit in state courts unless they had no other choice. Part of a tribe's sovereignty is the right to choose when and where to be sued.[943] For the New York Court of Appeals, an Indian tribe's interest in its sovereignty is its own interest, while the state court's interest in judicial review is its own interest and, therefore, controls. Moreover, the court did not consider the political avenues available to the plaintiffs.[944] There is no real difference between these plaintiffs and the tribal member plaintiffs—often characterized as dissidents or factions, the losers in the tribal political process—that are routinely dismissed for failure to join the absent tribe. These plaintiffs were elevated to the level of constitutional warrior. These plaintiffs

936. *See Saratoga III,* 798 N.E.2d at 1069.

937. *See id.* at 1057.

938. *Cf. id.* at 1053.

939. *See id.* at 1067.

940. *See id.* at 1057-58.

941. *Cf. Saratoga III,* 798 N.E.2d at 1076.

942. *See generally* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 313 n.11 (1997) (Souter, J., dissenting) ("And when the plaintiff suing the state officers has been an Indian tribe, the readiness of the state courts to vindicate the federal right has been less than perfect."); Native Vill. of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 553-54 (9th Cir. 1991) ("It would thus be ironic indeed if Congress then permitted only state courts, never believed by Congress to be the historical defenders of tribal interests, to determine the scope of tribal authority under the Act.") (citing 25 U.S.C. § 1901(5) (1998)).

943. *See generally* Goldberg-Ambrose, *supra* note 790, at 100-03.

944. *See Saratoga III,* 798 N.E.2d at 1049.

could have initiated a recall, like in California, or placed a referendum on the ballot, or introduced legislation to undermine the governor's asserted authority, but it appears they did nothing of the sort.[945] Perhaps, their efforts were defeated by a political majority, only to be resurrected by an activist court. Finally, given that the court's ultimate reasoning is that there is no other way for these plaintiffs to bring these constitutional claims and, as will be seen below, there are actually alternative avenues such as suing the gaming tribes directly; what the court says is that there is no other way for the plaintiffs to bring a *state* court action.[946] There is no particular right, however, to a state court action.[947]

C. Dairyland Greyhound Park, Inc. v. McCallum

Another recent case rejecting the argument that the gaming tribes are indispensable parties in gaming compact cases, is *Dairyland Greyhound Park, Inc. v. McCallum*.[948] The Wisconsin Court of Appeals, construing the Wisconsin court rule on indispensable parties,[949] held that "the interests of the public in having the

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945. *Cf.* Garreaux v. Andrus, 676 F.2d 1206, 1210 (8th Cir. 1982) ("Garreaux is not without alternative remedies in that the tribal constitution provides a procedure for passing a resolution by referendum which would be binding on the tribal council. The appellee also states that tribal council members may be voted out of office at regular or special elections."); Kickapoo Tribe v. Thomas, 10 Indian L. Rptr. 3093, 3095 (D. Kan. June 24, 1983) ("[T]he parties in this case can participate in the tribal council elections to change the makeup of the tribal council."). *See generally* Ordinance 59 Ass'n v. United States Dept. of the Interior, 163 F.3d 1150, 1157 (10th Cir. 1998) ("As the Tribe's supreme governmental body, the General Council may be suited to resolve the apparent conflict between the Tribal Court and the Business Council.").

946. *See Saratoga III*, 798 N.E.2d at 1075-76.

947. *Id.* at 1074-76.

948. 655 N.W.2d 474 (Wis. Ct. App. 2002), *review denied*, 655 N.W.2d 129 (Wis. 2002).

949. *See* WIS. STAT. ANN. § 803.03(3) (West 1994):

> [a]ny such person has not been so joined, the judge to whom the case has been assigned 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 a person as described in subs. (1) and (2) 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:
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> (a) To what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties;
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> (b) 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;
>
> (c) Whether a judgment rendered in the person's absence will be adequate; and
>
> (d) Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id.

issues . . . resolved tips the scales in favor of permitting the action to continue."[950] As in Arizona, the case was brought by a direct competitor of gaming tribes, a dog track racing concern.[951] The court relied heavily on "the interests of the public" and the lack of a remedy available to "the public" in the case of dismissal.[952] Discussing two out-of-state precedents, the California Court of Appeals decision in *People ex rel. Lungren v. Community Redevelopment Agency*[953] and the New York Appellate Division's decision in *Saratoga County Chamber of Commerce, Inc. v. Pataki*,[954] the court identified concerns that the dismissal of the case would ensure that "important and far-reaching issues" would never be heard in state courts.[955] The court concluded,

> There can be little question that the citizens of Wisconsin have a considerable interest in ensuring that state officials act in accordance with the peoples' will as expressed in the state constitution. If this action is dismissed because the tribes cannot be joined as parties, not only will Dairyland have no adequate remedy, but an important legal issue having significant public policy implications will evade resolution.[956]

Construing state law in *Dairyland Greyhound*, the court expanded upon the concepts elucidated in *American Greyhound* as applied to its own compulsory joinder rule.[957] In *Dairyland Greyhound*, the provision in the Wisconsin tribes' gaming compacts mirrored Arizona's compacts as the governor had the power to either renew or terminate the compacts.[958] The plaintiffs argued that, because the tribes did not

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950. *Dairyland Greyhound Park, Inc.*, 655 N.W.2d at 486.

951. *See id.* at 476-77.

952. *See id.* at 486-87 & n.14.

953. 65 Cal. Rptr. 2d 786 (Ct. App. 1997).

954. 275 A.D.2d 145 (N.Y. App. Div. 2000), *aff'd*, 798 N.E.2d 1047 (N.Y. 2003), *cert. denied*, 124 S. Ct. 570 (2003).

955. *Dairyland Greyhound Park, Inc.*, 655 N.W.2d at 486 (quoting *Saratoga I*, 275 A.D.2d at 151-52).

956. *Id.* at 487.

957. *Id.* at 478-79. The Wisconsin necessary party rule reads as follows:

> A person who is subject to service of process shall be joined as a party in the action if:
> (a) In the person's absence complete relief cannot be accorded among those already parties; or
> (b) The person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may:
> 1. As a practical matter impair or impede the person's ability to protect that interest; or
> 2. Leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his or her claimed interest.

WIS. STAT. ANN. § 803.03(1).

958. *See Dairyland Greyhound Park, Inc.*, 655 N.W.2d at 480.

have a "legally protected" or "enforceable right," they were not necessary parties.[959] The court held that the interest required to be claimed "is defined broadly in Wisconsin law, and that it goes well beyond the concept of a 'legally protected' interest, as Dairyland argues."[960] All that was required was "an interest of such direct and immediate character that the [absent party] will either gain or lose by the direct operation of the judgment."[961] The court concluded, "The tribes' interest in preserving their opportunity to convince the Governor of the wisdom of permitting the compacts to be extended beyond their current expiration dates is therefore a sufficient interest to render the tribes necessary parties under WIS. STAT. § 803.03(1)(b)(1)."[962]

The court agreed with the parties that the second and third factors of the rule had little weight for either side.[963] The court noted that "the Governor will either be enjoined from permitting the compacts to renew, or he will not be."[964] However, the court rejected the plaintiffs' argument that the governor was adequately aligned with the gaming tribes' interests enough to represent the tribes' interests.[965] In large part, the court employed an economic interests analysis in reaching this conclusion, relying on a May 2000 report of the Wisconsin Legislative Reference Bureau entitled, "The Evolution of Legalized Gambling in Wisconsin."[966] The report noted that the state government would receive average annual payments from the gaming tribes amounting to $23.7 million, but that the tribes expected $300 million annually in gaming profits.[967] As such, while the court acknowledged that both the governor and the tribes were aligned in seeking to protect the governor's "ability to exercise discretion and political judgment" regarding the gaming compact renewal, the court heavily weighed the fact that "the financial consequences of not renewing the compacts would fall disproportionately on the tribes."[968] The court also reviewed the sometimes acrimonious relationship between the governor's office and the tribes regarding "issues relating to the scope of Indian gaming in Wisconsin."[969] They concluded by finding that the governor would be limited in his ability, both politically

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959. *Id.*

960. *Id.* at 481.

961. *Id.* (quoting City of Madison v. Wis. Employment Relations Comm'n, 610 N.W.2d 94, 98 n.9 (Wis. 2000)).

962. *Id.* at 481-82.

963. Dairyland Greyhound Park, Inc., 655 N.W.2d at 485 (construing WIS. STAT. ANN. § 803.03(3)(b) (West 1994)).

964. *Id.*

965. *See id.* at 482-83.

966. *See id.* at 477.

967. *See id.* at 482 n.9.

968. *Dairyland Greyhound Park, Inc.*, 655 N.W.2d at 482.

969. *Id.* (citing Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 770 F. Supp. 480 (W.D. Wis. 1991), *appeal dismissed*, 957 F.2d 515 (7th Cir. 1992)).

and equitably, from arguing "the supremacy of federal law in constraining a state's ability to curtail Indian gaming."[970] The *Dairyland Greyhound* court also rejected the argument that the tribes' participation as *amici curiae* adequately protected their interests.[971] While the tribes might have their interests heard, *amicus* status "does not secure to them the procedural rights and protections of a party, for example, to engage in discovery, to file dispositive motions, or to appeal an adverse decision."[972]

This court appears to be convinced that the lack of alternative forum for the plaintiffs controlled the decision.[973] Other than this one issue, the court correctly determined that the state and the tribes had different interests; the tribes' efforts as *amici* could not allow them to adequately participate, and the tribes' interests were considerable.[974] However, the court's reliance on two out-of-state court of appeals cases is unfortunate, especially considering that the Ninth Circuit decided the case with the closest factual situation, *American Greyhound*,[975] on exactly the same day, September 19, 2002.[976]

D. Artichoke Joe's v. Norton

Although the tribal interest in the validity of its own gaming compact is significant, some courts hold that Indian tribes are not necessary parties at all; deciding instead that the state or federal party to the compact can adequately represent the tribe's interest. In *Artichoke Joe's v. Norton*,[977] the district court held that the United States could adequately represent the interests of the sixty-one California gaming tribes hauled into court by California card clubs and charities challenging the validity of the California Indian gaming compacts.[978] *Amicus curiae* California Nations Indian Gaming Association argued that the challenge should have been dismissed because the plaintiffs did not join the gaming tribes.[979] The court applied the Ninth Circuit's test for determining whether an existing party may adequately represent the interests of the absentee: "(1) the present party will undoubtably make all of the absent party's arguments, (2) the present party is capable and willing to make the absent party's arguments, and (3) the absent party would not offer any

970. *Id.* (citing Wolff v. Town of Jamestown, 601 N.W.2d 301, 306 (Wis. Ct. App. 1999)).

971. *Id.* at 482 (citing Wichita and Affiliated Tribes v. Hodel, 788 F.2d 765, 775 (D.C. Cir. 1986)).

972. *Id.*

973. *See Dairyland Greyhound Park, Inc.*, 655 N.W.2d at 482-83.

974. *See id.* at 485-86.

975. Am. Greyhound, Inc. v. Hull, 305 F.3d 1015 (2002).

976. *Dairyland Greyhound Park, Inc.*, 655 N.W.2d at 474.

977. 216 F. Supp. 2d 1084 (E.D. Cal. 2002), *aff'd on other grounds*, 353 F.3d 712 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 51 (2004).

978. *See id.* at 1118-20.

979. *Id.* at 1118.

necessary elements that the present parties would neglect."[980] Because the United States and the California gaming tribes "agree[d] on the central issue at hand: Exclusive class III gaming compacts for Indian Tribes are consistent with IGRA and the Equal Protection Clause," there could be no conflict of interest between the tribes and the United States.[981] As such, the tribes were not necessary parties and the court did not enter into the indispensable party analysis.[982]

This case was seriously undercut by the Ninth Circuit's decision in *American Greyhound* a little over a month later.[983] Surely, the district court would have found differently on the necessary party issue. Nevertheless, the decision is weak because, as the *Dairyland Greyhound* court found, the state's interest in Indian gaming is never as substantial or as fundamental as the absent tribe's.[984] Local and state politics may constrain the state defendants from advancing arguments on the expansiveness of tribal jurisdiction or the limitation of state jurisdiction.[985] Moreover, a state election may change the defendants, thereby possibly forcing a change in litigation strategy or even sides.[986] Finally, the dangers to the state from losing gaming revenues, likely a very small portion of the state budget, is nothing compared to the impact to a gaming tribe of losing its gaming revenues, likely the vast majority of its entire budget.[987]

E. *New Mexico Gaming Compact Cases*

The New Mexico courts have handled more litigation involving Indian gaming compacts than any other jurisdiction.[988] The courts have built an impressive body of law on the issue of absent tribes, Indian gaming, and the compulsory joinder rule.[989] The state cases are discussed first, followed by two New Mexico federal cases.

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980. *Id.* (citing Shermoen v. United States, 982 F.2d 1312, 1318 (9th Cir. 1992)).

981. *Id.* at 1119.

982. *See Artichoke Joe's,* 216 F. Supp. 2d at 1120.

983. *See* Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1024 (9th Cir. 2002) (finding compacting tribes were necessary parties to litigation).

984. *See* Dairyland Greyhound Park, Inc. v. McCallum, 655 N.W.2d 474, 481-82 (Wis. Ct. App. 2002).

985. *See generally id.* at 482 (stating political judgment is exercised when considering tribal compacts).

986. *See generally id.* at 481 (explaining that the lawsuit was based upon an elected official's political discretion).

987. *See generally id.* at 480 (noting that financial consequences of losing gaming revenues would be "catastrophic" for the tribes).

988. *See, e.g.,* State *ex rel.* Coll v. Johnson, 990 P.2d 1277 (N.M. 1999); Srader v. Verant, 964 P.2d 82 (N.M. 1998); State *ex rel.* Clark v. Johnson, 904 P.2d 11 (N.M. 1995).

989. *See* cases cited *supra* note 988.

1. *State ex rel. Clark v. Johnson*

In *State ex rel. Clark v. Johnson*,[990] the New Mexico Supreme Court granted a petition for writ of mandamus against the governor, precluding him from implementing the gaming compacts and revenue sharing agreements with the state's tribes and pueblos.[991] The governor entered into gaming compacts with two tribes and eleven pueblos in 1995, without the participation of the New Mexico legislature.[992] The petitioners argued the governor had no authority to bind the state because his actions violated the state constitution's separation of powers provision.[993]

The governor argued, in part, that the case should have been dismissed because the tribes and pueblos were indispensable parties.[994] The court disagreed in a summary paragraph, citing state law regarding mandamus; "In a mandamus case, a party is indispensable if the 'performance of an act [to be compelled by the writ of mandamus is] dependent on the will of a third party, not before the court.'"[995] Ignoring any interest the tribes and pueblos would have on the outcome of a case that would determine the validity of their gaming compacts, the court held they were not indispensable parties because the writ of mandamus would operate to restrict only the governor's authority.[996] Moreover, the court held that state law, not the compact, was the origin of the governor's authority, if any, and therefore the resolution of the action "does not require us to adjudicate the rights and obligations of the respective parties to the compact."[997]

The case is limited to its facts in that it arose out of a petition for writ of mandamus.[998] After *Clark*, the New Mexico Supreme Court decided *Srader v. Verant*.[999] In *Srader,* individuals who lost money gambling at Indian casinos sued the bankers of the gaming facilities, argued that the financial institutions supported illegal gambling.[1000] The court agreed with the plaintiffs that, after *Clark*, no Indian gaming was legal in New Mexico without valid gaming compacts.[1001] However, the court concluded that the gaming tribes and pueblos were indispensable parties to the suit

990. 904 P.2d 11 (N.M. 1995).

991. *Id.* at 27.

992. *See id.* at 15.

993. *Id.* (citing N.M. CONST. art. III, § 1).

994. *Id.* at 19.

995. *State ex rel. Clark*, 904 P.2d at 19 (quoting Chavez v. Baca, 144 P.2d 175, 182 (N.M. 1943)).

996. *See id.*

997. *Id.*

998. *Id.* at 15.

999. 964 P.2d 82 (N.M. 1998).

1000. *Id.* at 85.

1001. *See id.* at 88.

against the banks.[1002] First, the court held the gaming tribes and pueblos were necessary parties under the state rule.[1003] Since the plaintiffs requested that the banks freeze the gaming accounts and further requested that the state law enforcement officers investigate the gaming facilities for illegal gaming, the court found that such action:

> would halt the exchange of money upon which the tribes rely for business at their casinos. It calls for the confiscation of property and funds in which the tribes have an interest, the garnishment of tribal funds, the interruption of commercial relationships between the tribes and financial institutions, and the nullification of transactions in which the tribes have an interest. Furthermore, it calls upon government and law enforcement officials to carry out these remedies where necessary.[1004]

The court held that the gaming tribes and pueblos could not be joined, due to their immunity from suit in state courts.[1005]

The court concluded that the gaming tribes and pueblos were indispensable parties and dismissed the suit.[1006] The court said that "[a]s a matter of public policy, the public interest in protecting tribal sovereign immunity surpasses a plaintiffs interest is having an available forum for suit."[1007] The court distinguished *Clark* on the grounds that the case was an action for a writ of mandamus with a different rule to apply in the context of an indispensable party defense.[1008]

1002. *See id.*

1003. *See id.* at 90 (citing N.M. CT. R. 1-019(A)). Rule 1-019(A) reads:

> A person who is subject to service of process shall be joined as a party in the action if: (1) in his absence complete relief cannot be accorded among those already parties; or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may:
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> (a) as a practical matter impair or impede his 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 his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

N.M. CT. R. 1-019(A).

1004. *Srader*, 964 P.2d at 90.

1005. *See id.* at 91.

1006. *See id.* at 92.

1007. *Id.* at 91 (citing Enter. Mgmt. Consultants, Inc. v. United States *ex rel.* Hodel, 883 F.2d 890, 894 (10th Cir. 1989); Kickapoo Tribe v. Lujan, 728 F. Supp. 791, 797 (D.D.C. 1990)).

1008. *See id.* at 92 ("Plaintiffs cannot assume that because the tribes were held not to be indispensable parties in [*Clark*] that the tribes will always be of similar status in claims that involve gaming. [*Clark*] articulates an indispensability rule based on the special character of mandamus.").

The Arizona Supreme Court also distinguished *Clark* on the basis that the New Mexico

2. *State ex rel. Coll v. Johnson*

In *State ex rel. Coll v. Johnson*,[1009] the New Mexico Supreme Court reversed its position in *Clark* and agreed with the governor that the gaming tribes and pueblos were indispensable parties in a suit attacking the validity of the legislation authorizing Indian gaming in New Mexico.[1010] The plaintiffs were four members of the New Mexico House of Representatives and several private citizens opposed to Indian gaming.[1011]

The court, applying the "equity and good conscience rule," acknowledged the extreme importance of gaming compacts to gaming tribes.[1012] Interpreting the state court rule regarding indispensable parties,[1013] the court wrote, "Clearly, the effect of [a judgment invalidating the gaming compacts] would be deeply prejudicial to the gaming Tribes and Pueblos, resulting in the very real possibility that their gaming operations could be shut down."[1014] The possibility that the tribes might be subjected to federal criminal penalties and forfeiture persuaded the court.[1015] Missing from this analysis is the effect the invalidation of the gaming compacts would have had on the governmental services provided by the tribes and pueblos. The court held that, since the "halt to Indian gaming is the object of this litigation, no protective provisions can be crafted to insulate the Tribes or Pueblos from the effects of an adverse

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legislature had not "expressly delegated to the governor authority to enter tribal gaming compacts on the state's behalf." Sears v. Hull, 961 P.2d 1013, 1020 (Ariz. 1998). Arizona's legislature, in contrast, had "expressly authorized the Governor to execute the standard gaming compacts." *Id.* (footnote omitted). As such, the Arizona court concluded that "the serious constitutional issues that gave rise to the [*Clark*] court's decision . . . do not exist here." *Id.*

1009. 990 P.2d 1277 (N.M. 1999).

1010. *See id.* at 1278-79.

1011. *See id.* at 1278.

1012. *See id.* at 1280.

1013. *See* N.M. CT. R. 1-019(B):

> If a person as described in Subparagraph (1) or (2) of Paragraph A of this rule 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: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, 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; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id.

1014. *State ex rel Coll*, 990 P.2d at 1280 (citing Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1290-91 (D.N.M. 1996), *aff'd*, 104 F.3d 1546, 1559 (10th Cir. 1997)).

1015. *See id.*

judgment."[1016] *Coll* seriously undercuts the broader language in *Clark*, which was decided several years earlier.[1017]

3. *Mescalero Apache Tribe v. State of New Mexico*

In a 1997 case, related tangentially to the state cases, the Tenth Circuit decided *Mescalero Apache Tribe v. New Mexico*.[1018] The Mescalero Apache Tribe originally sued the state to compel it to negotiate in good faith over a gaming compact.[1019] After the tribe signed a compact with the governor, the state, through its attorney general, counterclaimed that the compact was invalid.[1020] The tribe argued the United States was an indispensable party and the counterclaim should be dismissed under the compulsory joinder rule.[1021] The court began its analysis by noting that, although the defense may be raised at any time,[1022] the tribe did not raise the compulsory joinder defense until after it had received a negative ruling in the lower court.[1023] The court found that, although the Secretary of the Interior approved the compact, the United States was not a party to the compact and, further, that the secretary's approval did nothing to affect the compact's validity under state law.[1024] The court held that the United States was therefore not an indispensable party.[1025]

4. *Pueblo of Sandia v. Babbitt*

In *Pueblo of Sandia v. Babbitt*,[1026] the district court held that the state of New Mexico was an indispensable party to a suit seeking a declaration that two provisions of a gaming compact were invalid.[1027] The tribe sought to invalidate the revenue sharing and regulatory fee provisions in its gaming compact by suing the secretary, who had stated the provisions were questionable, but allowed the compacts to be

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1016. *Id.* at 1280 (citing Srader v. Verant, 964 P.2d 82, 91 (N.M. 1998) (in turn citing *In re* United States *ex rel.* Hall, 825 F. Supp. 1422, 1429 (D. Minn. 1993), *aff'd*, 27 F.3d 572 (8th Cir. 1994))).

1017. *See generally* State *ex rel.* Clark v. Johnson, 904 P.2d 11 (N.M. 1999).

1018. 131 F.3d 1379 (10th Cir. 1997).

1019. *Id.* at 1380.

1020. *See id.*

1021. *Id.* at 1383.

1022. *Id.* (citing Thunder Basin Coal Co. v. S.W. Pub. Serv. Co., 104 F.3d 1205, 1211 (10th Cir. 1997)).

1023. *Mescalero Apache Tribe*, 131 F.3d at 1383 (citing Keweenaw Bay Indian Cmty. v. United States, 940 F. Supp. 1139, 1143 (W.D. Mich. 1996)).

1024. *Id.* at 1384 (citing Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1559 (10th Cir.), *cert. denied*, 522 U.S. 807 (1997)).

1025. *See id.*

1026. 47 F. Supp. 2d 49 (D.D.C. 1999).

1027. *See id.* at 49.

approved when the forty-five day statutory period of review expired.[1028] The secretary argued the state was an indispensable party, and the district court agreed, largely following the D.C. Circuit's *Kickapoo Tribe* decision.[1029] The court noted that allowing the case to proceed would, "in practical terms constitute an intrusion on the [s]tate's rights under the Tenth and Eleventh Amendments."[1030] The court also noted that a plaintiff must have to bring "an overpoweringly strong case . . . [to] permit a finding that the action may proceed without joinder of the [s]tate."[1031]

F. Taxpayers Against Casinos v. State of Michigan

In an unpublished trial court opinion in *Taxpayers Against Casinos v. State*,[1032] the court engaged in a summary analysis of Michigan's indispensable party rule.[1033]

1028. *See id.* at 51.

1029. *See id.* at 53-54 (citing Kickapoo Tribe of Indians v. Babbitt, 43 F.3d 1491, 1498 (D.C. Cir. 1995)).

1030. *Id.* at 54.

1031. *Pueblo of Sandia*, 47 F. Supp. 2d at 56.

1032. No. 99-90195-CZ (Ingham County Cir. Ct. Jan. 18, 2000) (on file with author), *aff'd in part, rev'd in part*, 657 N.W.2d 503 (Mich. Ct. App. 2003), *aff'd in part, rev'd in part and remanded*, 685 N.W.2d 221 (Mich. 2004).

1033. *Id.* at 14-15. The Michigan rules reads as follows:

> (A) Necessary Joinder. Subject to the provisions of subrule (B) and MCR 3.501, persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests.
>
> (B) Effect of Failure to Join. When persons described in subrule (A) have not been made parties and are subject to the jurisdiction of the court, the court shall order them summoned to appear in the action, and may prescribe the time and order of pleading. If jurisdiction over those persons can be acquired only by their consent or voluntary appearance, the court may proceed with the action and grant appropriate relief to persons who are parties to prevent a failure of justice. In determining whether to proceed, the court shall consider
>
> (1) whether a valid judgment may be rendered in favor of the plaintiff in the absence of the person not joined;
>
> (2) whether the plaintiff would have another effective remedy if the action is dismissed because of the nonjoinder;
>
> (3) the prejudice to the defendant or to the person not joined that may result from the nonjoinder; and
>
> (4) whether the prejudice, if any, may be avoided or lessened by a protective order or a provision included in the final judgment.
>
> Notwithstanding the failure to join a person who should have been joined, the court may render a judgment against the plaintiff whenever it is determined that the plaintiff is not entitled to relief as a matter of substantive law.

MICH. CT. R. 2.205.

The court first cited *State ex rel. Clark v. Johnson* for the proposition that "Indian tribes need not be joined where the claim was not for breach of contract and did not require the court to adjudicate the rights and obligations of the parties to the compact."[1034] The court disposed of the tribal interests by asserting that "the rights and obligations sought to be declared are with regards to legislative and gubernatorial authority, not with respect to compact itself."[1035] The court concluded that any prejudice to the missing four Indian tribes was diminished by the presence of two intervening management companies.[1036] The Michigan Court of Appeals reversed the decision of the trial court and did not reach the indispensable party issue.[1037]

The circuit court's summary analysis is troubling for the tribal litigant.[1038] Though the merits of the case turned mostly on state constitutional issues, the court (like the plaintiff) put its heart on its sleeve when it stated, in the first line of the opinion, that "[c]asino gambling is a highly regulated activity that has been considered a moral evil by the citizens of the state of Michigan for decades."[1039] In support of this declaration, the court cited the fact that the state electorate had not approved casino gaming in Detroit until 1996.[1040] It appears that this court was convinced of the "moral evil" of gaming, even four years after a majority of the state's electorate had approved of casino gaming.[1041] With that bias already present in

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1034. *See Taxpayers of Michigan Against Casinos*, No. 99-90195-CZ, at 15 (citing State *ex rel.* Clark v. Johnson, 904 P.2d 11 (N.M. 1995)).

1035. *Id.*

1036. *Id.*

1037. *See* Taxpayers Against Casinos v. State, 657 N.W.2d 503, 517 n.10 (Mich. Ct. App. 2003), *aff'd in part, rev'd in part and remanded,* 685 N.W.2d 221 (Mich. 2004), *cert. denied,* 125 S. Ct. 1298 (2005)..

1038. *See generally Taxpayers of Michigan Against Casinos*, No. 99-90195-CZ, at 15 (holding that prejudice would be lessened, however, not eliminated).

1039. *Id.* at 2.

1040. *See id.* at 2, n.2. At least one court recently has opined that Michigan's statutes governing gaming must now be construed as regulatory. *See* Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the W. Dist. of Mich., 46 F. Supp. 2d 689, 705 (W.D. Mich. 1999) ("Where, as in Michigan, a state operates a wide range of gambling sites and has a public lottery, the statutes must be principally viewed as regulatory.") (citing California v. Cabazon Band of Mission Indians, 480 U.S. 202, 211 (1987)); *see also* Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd., 276 F.3d 876, 878 (6th Cir. 2002) ("[C]asino gambling in Detroit . . . [is] legal."), *cert. denied,* 536 U.S. 923 (2002). Moreover, as a blue ribbon panel appointed by former Michigan Governor John Engler concluded as far back as 1995, "Society now tolerates gambling, which has entered everyday lives in many ways including lotteries, bingo, horse-race betting and illegal sports betting. Because of society's toleration of gambling, the Committee suggests that if extension of gambling represents a shift of the moral compass, it is a small one." Governor's Blue Ribbon Commission on Michigan Gaming, Blue Ribbon Report: Executive Summary (April 11, 1995), *available at* http://www.michigan.gov/mgcb/0,1607,7-120-1382_1452-14473—,00.html.

1041. *See Taxpayers of Michigan Against Casinos,* No. 99-90195-CZ, at 2 & n.2.

the courtroom, it is no wonder that the court would not exercise its equitable powers and dismiss the case in favor of the indispensable tribes.[1042]

G. *Other Gaming Compact Cases*

1. *Kickapoo Tribe of Indians v. Babbitt*

Kickapoo Tribe of Indians v. Babbitt[1043] is an interesting decision for the tribal advocate. Here, the absent party was a state.[1044] The state made all the arguments the absent tribes made in *Saratoga County* and *Dairyland Greyhound*, and the state's argument prevailed.[1045] There appears to be no substantive difference in the cases, other than that the absent party was a state in the instant case and a tribe in the other cases.[1046] The D.C. Circuit held the district court abused its discretion in denying the state of Kansas's motion for dismissal for failure to join it as an indispensable party.[1047] The tribe and the governor of the state of Kansas entered into a gaming compact in 1992.[1048] Subsequently, the attorney general of the state of Kansas filed suit in the Kansas Supreme Court in order to determine if the governor had the authority to enter into an Indian gaming compact.[1049] The tribe and the governor sent the executed compact to the Secretary of the Interior for approval.[1050] When the secretary's delegate refused to consider the compact as "submitted," as defined in the IGRA,[1051] the tribe and the governor sued, seeking a declaratory judgment that the compact was approved.[1052] Once the Kansas Supreme Court ruled against the governor, the secretary's delegate returned the compact unapproved.[1053]

The federal defendant moved to dismiss the tribe's claims for failure to join the state of Kansas, which the federal defendant argued was an indispensable party.[1054]

1042. *See generally id.* at 15 (holding the tribes were not an indispensable party).

1043. 43 F.3d 1491 (D.C. Cir. 1995) [hereinafter *Kickapoo Tribe II*].

1044. *See id.* at 1495.

1045. *See id.* at 1493 (arguing that the complaint should be dismissed because the state was an indispensable party).

1046. *See id.*

1047. *Id.*

1048. *See* Kickapoo Tribe of Indians v. Babbitt, 827 F. Supp. 37, 38 (D.D.C. 1993) [hereinafter *Kickapoo Tribe I*].

1049. *See* State *ex rel.* Stephan v. Finney, 836 P.2d 1169, 1170 (Kan. 1992). The Kansas Supreme Court in *Stephan* held that the governor had the authority to enter into negotiations with the tribe but did not have the authority to bind the state by executing a compact. *Id.* at 1185.

1050. *Kickapoo Tribe I*, 827 F. Supp. at 39.

1051. *See* 25 U.S.C. § 2710(d)(8)(c) (2000).

1052. *Kickapoo Tribe I*, 827 F. Supp. at 40

1053. *See id.*

1054. *Id.* at 40-41.

The district court denied the motion, holding the state was not indispensable.[1055] The court did find the state would be prejudiced by the approval of a compact that "was not approved in accordance with Kansas law."[1056] However, the court held there were several factors that "mitigated" the prejudice to the state.[1057] First, since the state chose not to intervene, the court "assume[d] that the State did not feel that its interest was of a magnitude worth protecting."[1058] Second, since the governor, already popularly elected by Kansas voters, approved of the compact, forcing the state to comply with its terms would not "subject the [s]tate to any burden not already accepted by the [s]tate's highest elected executive official or not already countenanced by Congress."[1059] The court also found that the lack of an available remedy for the tribe weighed heavily against dismissal.[1060] The court noted the state had already refused to negotiate in good faith over the terms of a gaming compact with the tribe, as required by the IGRA,[1061] lending support to its conclusion that "it is unlikely that plaintiffs will see any relief in the near term in any forum—judicial or otherwise—outside of this court."[1062] The court weighed two factors outside of the four expressed in Rule 19 for its determination in the "equity and good conscience" standard.[1063] First, the court noted that the state's actions—conducted through the state attorney general—had served to derail the purposes of IGRA for two years.[1064] Second, the compact had been signed by the governor who "it is assumed—had the best interests of the State in mind when she negotiated and approved the compact."[1065]

The D.C Circuit held the district court abused its discretion in holding the state was not an indispensable party.[1066] The court found fault with the lower court's analysis on several points. First, the court concluded the lower court should not have taken into consideration the fact that the state failed to intervene, stating, "[f]ailure to intervene is not a component of the prejudice analysis where intervention would require the absent party to waive sovereign immunity."[1067] Second, the court

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1055. *Id.* at 41.

1056. *Id.*

1057. *Kickapoo Tribe I,* 827 F. Supp. at 41.

1058. *Id.*

1059. *Id.* at 42.

1060. *See id.*

1061. *Id.* (citing Kickapoo Tribe v. Kansas, No. 92-4233-SAC, 1993 WL 192795 (D. Kan. May 19, 1993)).

1062. *Kickapoo Tribe I,* 827 F. Supp. at 42.

1063. *Id.*

1064. *Id.* at 42-43 (citing 25 U.S.C. §§ 2701(4), 2702(1) (2000)).

1065. *Id.* at 43.

1066. *See Kickapoo Tribe II,* 43 F.3d 1491, 1493 (D.C. Cir. 1995).

1067. *Id.* at 1498 (citing Wichita and Affiliated Tribes v. Hodel, 788 F.2d 765, 776 (D.C. Cir. 1986)).

concluded the district court's reliance on the governor's approval was faulty because of Kansas law prohibiting the governor from executing the gaming compact.[1068] The court stated the district court's discretion was "cabin[ed]" by the fact that the state was a necessary party and was immune from suit.[1069] Citing the additional factors of "fiscal interests," the court held that the case should have been dismissed.[1070] The tribe attempted to invoke the "public interest" exception to Rule 19, but the court rejected the argument,[1071] stating that the tribe's suit did "not require the joining of an infeasibly large number of parties [nor did] it appear to implicate a matter of transcending importance of the type that has previously prompted courts to apply the exception."[1072]

The district court's opinion, in most respects, reads exactly like the state court decisions in *Saratoga County* and *Dairyland Greyhound*.[1073] First, the state courts and the district court make much of the refusal of the sovereign to intervene, asserting that the prejudice to the absent sovereign would be abated by their participation.[1074] Second, the courts seemed to be saying the plaintiffs had very strong cases on the merits and that analysis weighed strongly in their favor.[1075] Third, the lack of an available remedy, coupled with their sympathetic legal positions, turned out to be the dispositive factor.[1076] The D.C. Circuit, in reversing the district court, rejected all of those arguments in favor of, essentially, one factor—the absent party in interest was a sovereign, immune from suit without its consent.[1077] The state court cases and the district court cases allowed their initial view of the merits to control the analysis.

1068. *See id.* (citing Kansas *ex rel.* Stephan v. Finney, 836 P.2d 1169, 1183 (Kan. 1992)).

1069. *Id.* at 1500 (citing *Wichita and Affiliated Tribes*, 788 F.2d at 777 n.13).

1070. *Kickapoo Tribe II*, 43 F.3d at 1500 (citing State *ex rel.* Stephan v. Finney, 836 P.2d 1169, 1176 (Kan. 1992)).

1071. *See id.*

1072. *Id.* (citing Nat'l Wildlife Fed'n v. Burford, 676 F. Supp. 271, 272, 276 (D.D.C. 1985)).

1073. *See generally* Saratoga County Chamber of Commerce, Inc. v. Pataki, 798 N.E.2d 1047 (N.Y. App. Div. 2003) (holding the tribe was not a necessary party); Dairyland Greyhound Park, Inc. v. McCallum, 655 N.W.2d 474 (Wis. Ct. App. 2002) (holding the tribe was not an indispensable party).

1074. *See Kickapoo I*, 827 F. Supp. 37, 43 (D.D.C. 1993); *Saratoga County Chamber of Commerce, Inc.*, 798 N.E.2d at 1059; *Dairyland Greyhound Park, Inc.*, 655 N.W.2d at 487.

1075. *See Kickapoo I*, 827 F. Supp. at 43; *Saratoga County Chamber of Commerce, Inc.*, 798 N.E.2d at 1058-59; *Dairyland Greyhound Park, Inc.*, 655 N.W.2d at 482.

1076. *See Kickapoo I*, 827 F. Supp. at 42; *Saratoga County Chamber of Commerce, Inc.*, 798 N.E.2d at 1058-59; *Dairyland Greyhound Park, Inc.*, 655 N.W.2d at 486-87.

1077. *See Kickapoo II*, 43 F.3d at 1500 (citing Adams v. Bell, 711 F.2d 161, 171 n.42 (D.C. Cir. 1983)).

2. *People ex rel. Lungren v. Community Redevelopment Agency*

Though not exactly the same as the other gaming compact cases, *People ex rel. Lungren v. Community Redevelopment Agency*,[1078] involved an Indian gaming development agreement between Palm Springs and the Agua Caliente Band of Cahuilla Indians, where the agency would transfer land to the gaming tribe in exchange for a percentage of the gaming revenues.[1079] The California attorney general challenged the authority of the agency to enter into the agreement.[1080] The agency moved to dismiss on the basis that the attorney general had not joined the tribe and that the tribe was an indispensable party under the Californian compulsory joinder rule.[1081] The court distinguished the case from cases in which "a party not before the court owns some unspecified interest in property which precludes a final determination of the interests held in that property by those who do not appear as parties."[1082] The court asserted that the tribe's prejudice was minimized by asserting that "the [t]ribe's object in the present litigation—establishing that the [a]gency acted lawfully in entering into the [agreement]—would duplicate that of the [a]gency and would be adequately represented by the [a]gency in the present litigation."[1083] The court noted that though parties to a contract are generally considered indispensable,[1084] the tribe's interest in the agreement was only incidental because the case "would primarily address the scope of the Agency's authority."[1085]

The court ultimately ruled that the tribe was not an indispensable party because to hold that, as a general matter, agreements including a tribe and a government subdivision could not be reviewed, would "immunize any local entity from court review of transfers of publicly owned real property to Indian tribes."[1086] The court asserted that if the court rule would permit this result, it should have been amended to explicitly state so.[1087] Instead, the court implied that "sovereign immunity [is not] intended to carry with it a broad cloak of immunity to all who have dealings with the sovereign."[1088] The court averred that the tribe's absence did "not appear to have any

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1078. 65 Cal. Rptr. 2d 786 (Ct. App. 1997).

1079. *Id.* at 787-88.

1080. *See id.*

1081. *See id.* at 790 (citing CAL. CIV. PROC. CODE § 389 (2004)).

1082. *Id.* at 792 (citing Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 774-78 (D.C. Cir. 1986)).

1083. *People ex rel. Lungren*, 65 Cal. Rptr. 2d at 792.

1084. *Id.* (citing Jicarilla Apache Tribe v. Hodel, 821 F.2d 537, 540 (10th Cir. 1987); United States *ex rel.* Hall v. Tribal Dev. Corp., 100 F.3d 476, 479 (7th Cir. 1996)).

1085. *Id.* at 793.

1086. *Id.* at 795.

1087. *See id.* at 793.

1088. *People ex rel. Lungren*, 65 Cal. Rptr. 2d at 793.

direct impact on [the] resolution of the legal issues themselves."[1089] The court determined that the most important interest in the litigation was that "of the citizens of the state, as represented by the Attorney General, in providing some review of the power of a local agency to permanently relinquish its interest in property within its control."[1090] The court allowed the case to proceed "in equity and good conscience."[1091]

In virtually all other contexts, in order for a contract to be cancelled judicially, all of the parties to the contract are indispensable.[1092] Often, the compulsory joinder analysis has an impact because it is possible that a federal court will lose its diversity jurisdiction by adding all of the parties to the contract.[1093] That is the reason for allowing the case to proceed in a state court.[1094] However, in cases involving a contract in which an Indian tribe is a party, the courts treat the Indian tribe as an alien, as though no court in the universe could have jurisdiction over that tribe.[1095] The California Appellate Court appeared to put on blinders regarding the tribe's interest in an agreement it had signed.[1096] By focusing on the absence of an available remedy, a fallacy, the court denigrated the absent sovereign's immunity.[1097]

3. *Keweenaw Bay Indian Community v. United States*

In *Keewenaw Bay Indian Community v. United States*,[1098] the district court held that the state of Michigan, a party to a gaming compact with the tribe, was not an indispensable party in a case in which the terms of the agreement were at issue.[1099] The tribe had brought a suit for declaratory relief against the federal government, who had threatened to prohibit Class III gaming under the tribe's compact, and won an initial victory.[1100] The federal government brought a motion to reconsider, asserting

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1089. *Id.* at 796.

1090. *Id.* at 795.

1091. *Id.* at 796 (quoting CAL. CIV. PROC. CODE § 389(b) (2004).

1092. *See, e.g.*, MOORE, *supra* note 92, at ¶ 19.10.

1093. *See generally* Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1063 (1985) (discussing loss of diversity jurisdiction as a result of compulsory joinder).

1094. *See, e.g., id.* at 1077 (stating that state court can be an available forum when no other choice exists).

1095. *See generally People ex rel. Lungren*, 65 Cal. Rptr. 2d at 793 (holding that due to tribal sovereign immunity, they could not be joined under the rule of compulsory joinder of indispensable parties).

1096. *See generally id.* (neglecting to consider the tribe's agreements in its analysis).

1097. *See generally id.* (focusing on the fact that dismissal would leave no available remedy).

1098. 940 F. Supp. 1139 (W.D. Mich. 1996).

1099. *See id.* at 1143.

1100. *See id.* at 1140 (citing Keweenaw Bay Indian Cmty. v. United States, 914 F. Supp. 1496 (W.D. Mich. 1996), *rev'd*, 136 F.3d 496 (6th Cir. 1996)).

that the state of Michigan was an indispensable party.[1101] The court rejected the argument, noting the federal government should have brought the issue up at a much earlier time in the proceedings; "[T]he federal defendants elected, however, to wait for a decision, and now seek to claim that the [s]tate is essential after receiving a construction of the [c]ompact with which they disagree."[1102] Moreover, the court noted that the state "admits that it was aware of the pendency of this litigation, and in fact has received and retained 5% of the revenues from the gaming here at issue."[1103] In other words, the district court relied upon the timing of the motion to dismiss, a stance consistent with a critical purpose of the rules of procedure which are judicial efficiency and conservation of judicial resources.[1104]

H. *Strategies for Tribal Litigants in Gaming Compact Cases*

Basic contract principles counsel strongly in favor of dismissal of the gaming contract cases. As the venerable Wright and Miller treatise acknowledges, "In cases seeking . . . cancellation . . . or otherwise challenging the validity of a contract, all parties to the contract probably will have a substantial interest in the outcome of the litigation and their joinder will be required."[1105] The gaming compact cases are exactly such an attempt, usually by a third party, to invalidate a gaming compact.[1106] As a general matter, courts hold that a gaming compact is a contract.[1107] "Actions seeking cancellation of contracts cannot be permitted unless all the parties to be affected by a decree shall be before the court."[1108] As such, basic contract principles compel courts to dismiss actions unless the tribe in interest is joined.[1109] Refusing to

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1101. *See id.* at 1143.

1102. *Id.*

1103. *Keweenaw Bay Indian Cmty.*, 940 F. Supp. at 1143.

1104. *See id.*

1105. WRIGHT ET AL., *supra* note 35, § 1613, at 200-03 (footnotes omitted) (citing Enter. Mgmt. Consultants, Inc. v. United States *ex rel.* Hodel, 883 F.2d 890 (10th Cir. 1989)).

1106. *See generally* Dairyland Greyhound Park, Inc. v. McCallum, 655 N.W.2d 474 (Wis. Ct. App. 2002) (bringing action by a third party to invalidate the state's Indian gaming compact).

1107. *See* Taxpayers Against Casinos v. State, 657 N.W.2d 503, 508 (Mich. Ct. App. 2003) (citing Texas v. New Mexico, 482 U.S. 124, 128 (1987)), *lv. granted*, 669 N.W.2d 816 (Mich. 2003), *aff'd*, 685 N.W.2d 221 (Mich. 2004), *cert. denied*, 125 S. Ct. 1298 (2005); Gallegos v. Pueblo of Tesuque, 46 P.3d 668, 679 (N.M. 2002); CBA Credit Servs. v. Azar, 551 N.W.2d 787, 788 (N.D. 1996).

1108. Am. Optical Co. v. Curtiss, 59 F.R.D. 644, 650-51 (S.D.N.Y. 1973) (quoting Spanner v. Brandt, 1 F.R.D. 555, 557 (S.D.N.Y. 1941)); *see* Ward v. Deavers, 203 F.2d 72, 75 (D.C. Cir. 1953); Silvers v. TTC Indus., Inc., 395 F. Supp. 1312, 1314 (E.D. Tenn. 1970); Padgett v. Theus, 484 P.2d 697, 702 (Alaska 1971); Allman v. Wolfe, 592 So. 2d 1261, 1263 (Fla. Dist. Ct. App. 1992); *cf.* Aplin v. Aplin, 389 So. 2d 844, 846 (La. Ct. App. 1980) (holding that United States was indispensable party to action seeking cancellation of sale of property to United States).

1109. *See generally* WRIGHT ET AL., *supra* note 35, § 1613, at 200-03 (footnotes omitted) (requiring courts to dismiss actions unless parties to a contract are joined).

dismiss actions brought to invalidate gaming compacts, in which the tribe is not joined, rewards anti-Indian and anti-Indian gaming elements that are engaging in a bad faith ploy to avoid dealing with the tribe.[1110] The litigants should be steered in the right direction.

1. Declaratory and Injunctive Relief in Federal Court

Individual officers and employees of Indian tribes are not immune from suit for declaratory and injunctive relief if they act outside the scope of their authority under the *Ex parte Young* doctrine.[1111] Plaintiffs could file in either federal or state court, although state court cases are likely to be removed to federal court.[1112] It is axiomatic that a "[p]laintiff has no constitutional right to a federal forum."[1113] If an Indian tribe is operating Class III gaming under a compact that is invalid under state law, for example, a plaintiff with standing could bring a claim in federal court that a tribal official is authorizing gaming outside the scope of her authority.[1114] If the compact is declared invalid, then the tribe would have no authority under federal or tribal law to authorize its officials to commence or continue gaming.[1115] Since the validity of the compact would be at issue, all the state constitutional claims would be heard.[1116] However, a potential plaintiff would have to sue on violations of state law because there is no private cause of action in the IGRA.[1117] The Tenth Circuit held in *Mescalero Apache Tribe v. New Mexico*[1118] that IGRA abrogated tribal immunity from a state suit, seeking declaratory and injunctive relief for an alleged violation of the IGRA.[1119] Other courts held that a state may seek prospective equitable relief for

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1110. *See generally id.*

1111. *See, e.g.,* Garcia v. Akwesasne Hous. Auth., 268 F.3d 76, 87-88 (2d Cir. 2001); TTEA v. Ysleta del Sur Pueblo, 181 F.3d 676, 680-81 (5th Cir. 1999); Tamiami Partners, Ltd. *ex rel.* Tamiami Dev. Corp. v. Miccosukee Tribe of Indians, 177 F.3d 1212, 1225 (11th Cir. 1999); N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty., 991 F.2d 458, 460 (8th Cir. 1993); Tenneco Oil Co. v. Sac & Fox Tribe of Indians, 725 F.2d 572, 574 (10th Cir. 1984); California v. Harvier, 700 F.2d 1217, 1223-24 (9th Cir. 1983); Wisconsin v. Baker, 698 F.2d 1323, 1332 (7th Cir. 1983).

1112. *See generally* Kaighn Smith, Jr., *Fighting for a Federal Forum in Indian Sovereignty Cases: A Primer*, 49 FED. LAW. 37 (2002).

1113. Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 849 (1989) (citing John C. McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 726 (1976)).

1114. *See* Smith v. Babbitt, 875 F. Supp. 1353, 1363 (D. Minn. 1995), *aff'd*, 100 F.3d 556 (8th Cir. 1996), *cert. denied sub. nom.* Feezor v. Babbitt, 522 U.S. 807 (1997).

1115. *See id.*

1116. *See generally id.* at 1353.

1117. *See* Davids v. Coyhis, 869 F. Supp. 1401, 1410-12 (E.D. Wis. 1994).

1118. 131 F.3d 1379 (10th Cir. 1997).

1119. *Id.* at 1385-86.

violations of an existing compact.[1120] However, plaintiffs may face a stiff sovereign immunity defense if they do not sue individual tribal officers, asserting that they acted outside the scope of their authority. In *Florida v. Seminole Tribe*,[1121] the Eleventh Circuit held that IGRA does not waive tribal immunity for prospective equitable relief, thereby distinguishing *Mescalero Apache tribe*.[1122] Moreover, the state must enter into a compact before it can attempt to enforce state law against a tribe.[1123] The same type of actions could be brought in other areas, such as treaty rights cases.

2. Enforcement Actions

Potential plaintiffs may have specific avenues to pursue in gaming cases.[1124] Federal law prohibits gaming on Indian reservations without a Class III compact, approved by the Secretary of the Interior.[1125] In many P.L. 280 states or other states with criminal jurisdiction over that state's Indian country, the state may choose to bring an enforcement action on that authority alone.[1126] Moreover, the mere threat of an enforcement action might draw out a suit from the tribe for declaratory and injunctive relief.[1127] Once the litigation begins, all of the issues and claims associated with the validity of the compact will be heard. For example, in *Spokane Indian Tribe v. United States*,[1128] the tribe brought an action for a declaration that its Pick Six

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1120. *See, e.g.*, New York v. Oneida Indian Tribe, 78 F. Supp. 2d 49, 54 (N.D.N.Y. 1999); Calvello v. Yankton Sioux Tribe, 899 F. Supp. 431, 438 (D.S.D. 1995); Maxam v. Lower Sioux Indian Cmty., 829 F. Supp. 277, 281 (D. Minn. 1993); Ross v. Flandreau Santee Sioux Tribe, 809 F. Supp. 738, 745 (D.S.D. 1992).

1121. 181 F.3d 1237 (11th Cir. 1999).

1122. *See id.* at 1242 (citing *Mescalero Apache Tribe*, 131 F.3d at 1385-86).

1123. *Id.* at 1249 n.18.

1124. *See generally* Texas v. Ysleta del Sur Pueblo, 220 F. Supp. 2d 668 (W.D. Tex. 2001) (holding potential plaintiffs can bring actions against a tribe to determine legality of gaming activity).

1125. *See generally* 25 U.S.C. §§ 2701-2721 (2000).

1126. *See, e.g., Ysleta del sur Pueblo*, 220 F. Supp. 2d at 696 (granting injunction against tribe, relying on authority granted to state under Tribe's Restoration Act), *aff'd*, No. 02-50711, 2003 WL 21356043 (5th Cir. May 29, 2003), *cert. denied*, 124 S. Ct. 497 (2003).

1127. *See, e.g.*, Citizen Band Potawatomi Indian Tribe v. Green, 995 F.2d 179, 180 (10th Cir. 1993) (adjudicating case brought by tribe seeking declaratory relief that Johnson Act did not prohibit importation of video lottery terminals); Spokane Indian Tribe v. United States, 972 F.2d 1090, 1091 (9th Cir. 1992) (adjudicating case brought by tribe seeking declaratory relief that "lotto" machines were exempt from gaming compact requirement); Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 743 F. Supp. 645, 655 (W.D. Wis. 1990) (holding that tribe could not enjoin state from enforcing state anti-gambling laws even where state had no criminal jurisdiction on tribe's reservation); *cf.* Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the W. Dist. of Mich., 198 F. Supp. 2d 920, 922 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004) (discussing suit brought by Indian tribe against the United States for declaration that tribal gaming facility was legal).

1128. 972 F.2d 1090 (9th Cir. 1992).

lottery game was a Class II gaming device and therefore did not require a Class III gaming compact with the state.[1129] The tribe's action was brought in response to a letter from the United States attorney that the game violated state law.[1130] "The Tribe and the Government ultimately agreed to resolve the issue by an action under the Declaratory Judgment Act."[1131] And, in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*,[1132] two tribes brought an action to enjoin state law enforcement officials from closing down their gaming operations and seizing their equipment.[1133] The court held that, even though the state had no authority to enforce state law on either of the two tribes' reservations,[1134] the court would not issue an injunction because "[p]laintiffs can avoid [prosecution] by refraining from operating class III gambling in violation of federal gaming regulations."[1135] However, under similar facts, the Ninth Circuit enjoined the state of California's threatened prosecutions.[1136] In *Montgomery v. Flandreau Santee Sioux Tribe*,[1137] the court suggested that plaintiffs could bring possible violations of federal gaming law to the attention of the National Indian Gaming Commission or the state, or bring the claims in tribal court.[1138] These are certainly avenues that gaming opponents may pursue.[1139]

1129. *See id.* at 1091.

1130. *See id.*

1131. *Id.* (citing 28 U.S.C. §§ 2201-02 (2000)).

1132. 743 F. Supp. 645 (W.D. Wis. 1990).

1133. *See id.* at 646-48.

1134. *See id.* at 652-54.

1135. *Id.* at 655.

1136. *See* Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 538 (9th Cir. 1994), *cert. denied sub nom.*, Sycuan Band of Mission Indians v. Pfingst, 516 U.S. 912 (1995).

1137. 905 F. Supp. 740 (D.S.D. 1995).

1138. *See id.* at 747 (citing Davids v. Coyhis, 869 F. Supp. 1401, 1412 n.13 (E.D. Wis. 1994)).

> As to the alleged ordinance violations, however, plaintiffs may not be without recourse. They might bring the alleged violations to the attention of the National Indian Gaming Commission, which has the power to enforce tribal ordinances through civil fines of up to $25,000 per violation and temporary or permanent closures of gaming operations, 25 U.S.C. § 2713; the plaintiffs could bring the alleged violations to the attention of the State, which is authorized to initiate an action in federal district court to enjoin Class III gaming conducted in violation of the Tribal-State Compact, 25 U.S.C. § 2710(d)(7)(A)(ii); or, as previously noted, the plaintiffs could pursue whatever remedies are available in Tribal Court or otherwise as provided by the terms of the Ordinance.

Id.

1139. *But cf.* Pueblo of Sandia v. Babbitt, 47 F. Supp. 2d 49, 56 (D.D.C. 1999) ("It should be self-evident that forcing a party to submit to risk of federal criminal prosecution cannot be an 'adequate alternative remedy' within the meaning of Rule 19(b)."); Wisconsin v. Baker, 464 F. Supp. 1377, 1383-84 (W.D. Wis. 1978) (discussing same principal as applied to state governments and non-Indians).

3. Political Processes

Possible plaintiffs have important political avenues to explore as well.[1140] If nothing else, cases such as *Yazzie v. Morton* [1141] and *Tewa Tesuque v. Morton* [1142] show that courts may take into consideration the political avenues available to plaintiffs.[1143] In both of those cases, the court found that the Indian plaintiffs had an adequate remedy against their own government by participating in the political arena of the tribe.[1144] In an age in which California governors can be recalled,[1145] the fate of Indian gaming is routinely decided by referendum voters in several states[1146] and federal land use decisions are made by connected political actors;[1147] thus these political avenues are significant. Courts have no reason to disregard the political processes available to plaintiffs, particularly when so many plaintiffs are legislators, other elected officials, and political focus groups with experience in the political arena.[1148]

Failure to take these effective political avenues available to non-Indians into consideration strikes one as disturbing in light of *Yazzie* and *Tewa Tesuque*. If Indian litigants' valid and possibly meritorious claims are dismissed because they had an

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1140. *See, e.g.*, Baird v. Norton, 266 F.3d 408, 409 (6th Cir. 2001) (plaintiff legislators); Yazzie v. Morton, 59 F.R.D. 377, 385 (D. Ariz. 1973) (tribal political arena); Taxpayers Against Casinos v. State, 657 N.W.2d 503 (Mich. Ct. App. 2003) (political action group plaintiff), *aff'd in part, rev'd in part and remanded*, 685 N.W.2d 221 (Mich. 2004), *cert. denied*, 125 S. Ct. 1298 (2005).

1141. 59 F.R.D. 377 (D. Ariz. 1973).

1142. 498 F.2d 240 (10th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

1143. *See Tewa Tesuque*, 498 F.2d at 243; *Yazzie*, 59 F.R.D. at 385.

1144. *Tewa Tesuque*, 498 F.2d at 243; *Yazzie*, 59 F.R.D. at 385.

1145. *See* Edward Lazarus, *One Reason Arnold Won: His Attack Ads Involving Indian Gaming, and Their Larger Context and Significance* (Oct. 16, 2003), *available at* http://writ.findlaw.com/lazarus/20031016.html.

1146. *See, e.g.*, Tom Wanamaker, *Maine Casino Plans Go up in Flames, New York Tax Deadline Extended* (Nov. 14, 2003), *available at* http://www.indiancountry.com/?1068836967.

1147. Due entirely to political considerations in 2002, the Secretary of the Interior, reversing the stance of the department in order to assist the farmers in the upper Klamath River area diverted water to the farmers; a decision that likely led directly to the massive fish-kill in September 2002. *See* Pac. Coast Fed'n of Fisherman's Ass'ns v. United States Bureau of Reclamation, No. C 02-2006 SBA, 2003 U.S. Dist. LEXIS 13745, at *28 (N.D. Cal. July 15, 2003) ("Between September 20 and September 27, 2002, approximately 33,000 chinook, coho, and steelhead salmon died in the Klamath River."). As Karl Rove supposedly stated to the Department of the Interior, "[C]ontrol of Congress will turn on [a] handful of races decided by local issues, candidate quality, money raised, campaign performance, etc." Tom Hamburger, *Water Saga Illuminates Rove's Methods: Bush Strategist Works Agencies in Bid to Make Policy Decisions Jibe with Political Goals*, WALL ST. J., July 30, 2003, at A4 (quoting Karl Rove, Presentation to Dept. of Interior Officials, Jan. 6, 2002).

1148. *See, e.g.*, Baird v. Norton, 266 F.3d 408, 409 (6th Cir. 2001); Taxpayers Against Casinos v. State, 657 N.W.2d 503, 503 (Mich. Ct. App. 2003), *aff'd*, 685 N.W.2d 221 (Mich. 2004), *cert. denied*, 125 S. Ct. 1298 (2005); Saratoga County Chamber of Commerce Inc. v. Pataki, 712 N.Y.S.2d 687 (App. Div. 2000).

opportunity to change the leaders or the policies of their respective governments, then non-Indian challengers should be held to the same standard. Tribes should strongly pursue this avenue and challenge the courts to apply the *Yazzie* and *Tewa Tesuque* cases equally.

In *Yazzie* and *Tewa Tesuque,* the tribal plaintiffs fought the political battles within their tribes and lost.[1149] Cases brought by political groups and politicians are no different.[1150] Laura Baird, for example, a former Michigan State officeholder, voted against Indian gaming proposals and was in the minority of the Michigan legislature.[1151] She is a typical litigant in these claims.[1152] She lost her political fight and attempted in two separate cases to overturn the decisions of her legislature by resorting to court action.[1153]

4. Future Gaming Compact Negotiations

In one area in particular, it may be worthwhile for tribes to consider waiving their immunity in anticipation of litigation. For tribes without a gaming compact, tribes that wish to renegotiate their current compact, and tribes whose compacts will expire in the near future, another option in the area of compact validity litigation exists—waive immunity.[1154] Tribes have increasingly engaged in waivers of immunity for business purposes.[1155] The tribes could easily negotiate such a waiver in the compact's terms and conditions.[1156] Tribes could waive immunity for suits brought only in federal court for a short period of time, say six weeks or three months, after the execution of the compact.[1157] They could even limit the waiver to certain individuals or groups—if there were identified groups the tribe would agree to face in court—or even specific issues.[1158] The tribe could extract conditions from the state in return, such as cooperation during the litigation and an agreement not to seek criminal penalties if the case goes bad.[1159] The down side would be that gaming opponents would be drawn to filing suit that they might otherwise have refrained from due to the

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1149. *See Tewa Tesuque*, 498 F.2d at 243; *Yazzie*, 59 F.R.D. at 385.

1150. *See, e.g., Baird,* 266 F.3d at 409-10, 417; *Taxpayers of Michigan Against Casinos*, 657 N.W.2d at 503, 516-17.

1151. *Baird,* 266 F.3d at 409-10.

1152. *See id.*

1153. *See id.*; *Taxpayers of Michigan Against Casinos*, 657 N.W.2d at 505.

1154. *See generally* Thomas P. Schlosser, *Sovereign Immunity: Should the Sovereign Control the Purse?*, 24 AM. INDIAN L. REV. 309, 324-28 (2000).

1155. *See generally id.* at 325-29 (discussing methods for tailoring waivers of tribal sovereign immunity).

1156. *See id.* at 324-29.

1157. *See id.* at 328.

1158. *See id.* at 326.

1159. *See generally* Schlosser, *supra* note 1154, at 325-28.

tribe's immunity.[1160] Based on the recent decade of proliferation of suits brought challenging gaming compacts, most tribes must expect some challenge.[1161] Smart tribes and state officials will know if and from what quarter a challenge will arise. While this proposal is controversial and likely will not be adopted by any tribal legal counsel, pragmatic conditions suggest it may be a reasonable alternative to being blindsided by litigation that the tribe and its compacting partners cannot control.

5. Alternative Equitable Factors Under Rule 19(b)

Some appellate courts have held that a lower court abuses its discretion by taking into account factors not listed among the four expressed in Rule 19(b) or factors with which it does not agree.[1162] However, the advisory committee notes state that these four factors are merely the factors that litigation experience taught would be the most useful to courts, strongly implying that alternative factors may be considered.[1163] Moreover, since the compulsory joinder rule's application to cases involving absent sovereigns, particularly tribes, is not an easy application, courts should be strongly encouraged to take alternative factors into consideration. The gaming compact cases offer an opportunity to examine this strategy in detail.[1164]

Courts should be made aware of the history of Indian gaming. Indian gaming arose out of the extreme poverty and devastation caused by the states and federal government and the non-Indian population in their drive to destroy, assimilate, exploit, and ostensibly help Indians and Indian tribes.[1165] Many tribes in the 1970s and 1980s had little or no functioning government due to the lack of resources and tax base with which to raise revenue.[1166] The health, employment, and social service

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1160. *Cf.* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

1161. *See, e.g., Am. Greyhound Racing II*, 305 F.3d 1015 (9th Cir. 2002); Artichoke Joe's v. Norton, 216 F. Supp. 2d 1084 (E.D. Cal. 2002), *aff'd*, 353 F.3d 712 (9th Cir. 2003); Saratoga County Chamber of Commerce v. Pataki, 712 N.Y.S.2d 687, 687 (App. Div. 2000).

1162. *E.g.*, Kickapoo Tribe of Indians v. Babbitt, 43 F.3d 1491, 1495-1500 (D.C. Cir. 1995).

1163. *See* FED. R. CIV. P. 19(b) advisory committee's note ("[Rule 19(b)] sets out four relevant considerations drawn from the experience revealed in the decided cases. The factors are to a certain extent overlapping, and they are not intended to exclude other considerations which may be applicable in particular situations.").

1164. *See, e.g., Am. Greyhound Racing II*, 305 F.3d at 1022-25; *Artichoke Joe's*, 216 F. Supp. 2d at 1118-20.

1165. *See generally* Rand & Light, *supra* note 788, at 385-96 (describing the historical relationship between tribes and the government and non-Indians as one of racial discrimination, exploitation, oppression, impoverishment, near-eradication, and ostensible tolerance and protection).

1166. *See id.* at 393 nn.66 & 68, 396 (noting that, after the federal government squeezed Indian budgets in the 1980s, tribes turned to "Indian gaming ... as a viable economic option . . . at a time when federal assistance to the tribes was being cut in the name of tribal self-determination"); Amy Head, Comment, *The Death of the New Buffalo: The Fifth Circuit Slays Indian Gaming in Texas*, 34 TEX. TECH. L. REV. 377, 385 (2003); National Indian Gaming Association, *History of Tribal Gaming*, *available at* http://www.indiangaming.org/info/pr/presskit/history.shtml (last visited Sept. 12, 2004)

needs of Indians were beyond compare in the United States at a time when most of the focus of government programs for the poor were directed at urban centers, farmers, and other minorities.[1167] Contrary to what some may call a purely capitalistic boondoggle, Indian tribes did not begin gaming in order to make a few tribal leaders wealthy.[1168] Indian gaming began to allow the tribes and their people to survive.[1169]

The tribes that began gaming looked at the state and federal law that cabined their jurisdictional authority.[1170] Following the law that had been forced upon the tribes by the non-Indian governments and courts to the letter, the gaming tribes tentatively explored what means they had available to serve the needs of their people.[1171] Gaming is about providing government services.[1172] Indian tribes are not-for-profit corporations that are interested only in maximizing dividends for investors.[1173] Many tribes operate less-than-successful casinos for the sole purpose of providing employment for tribal members.[1174] When applying IGRA, tribes must emphasize its purpose: "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."[1175]

[hereinafter National Indian Gaming Association].

1167. *See* National Indian Gaming Association, *supra* note 1166 (Indian gaming was preceded by "decades of poverty and high unemployment on often geographically remote reservations.").

1168. *But see* Head, *supra* note 1166 (indicating that tribes began gaming "to bring in revenue to improve conditions on the reservations"); National Indian Gaming Association, History, *supra* note 1166 (pointing out that gaming began to stimulate tribal economies and ensure survival).

1169. *See generally* Kristen A. Carpenter & Ray Halbritter, *Beyond the Ethnic Umbrella and the Buffalo: Some Thoughts on American Indian Tribes and Gaming*, 5 GAMING L. REV. 311, 322-25 (2001).

1170. *See* Steven Andrew Light & Kathryn R.L. Rand, *Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy*, 4 NEV. L.J. 262, 270 (2004).

1171. *See id.* at 270-71.

1172. *See Am. Greyhound Racing I,* 146 F. Supp. 2d 1012, 1063 (D. Ariz. 2001) (noting that gaming revenues allow tribes to fund housing and infrastructure projects), *rev'd on other grounds*, 305 F.3d 1015 (9th Cir. 2002); State *ex rel.* Stephan v. Finney, 836 P.2d 1169, 1171 (Kan. 1992) ("[Indian gaming] income often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding.") (quoting S. REP. NO. 446, at 1-6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3971-76).

1173. *See, e.g.*, Trudgeon v. Fantasy Springs Casino, 84 Cal. Rptr. 2d 65, 70 (App. Dist. 1999) (acknowledging that Indian casinos are "governmental in nature"); Gavle v. Little Six, Inc., 555 N.W.2d 284, 295 (Minn. 1996) (recognizing "the unique role that Indian gaming serves in the economic life of here-to-fore impoverished Indian communities across this country"), *cert. denied*, 524 U.S. 911 (1998).

1174. *See* Light & Rand, *supra* note 1170, at 279-90, 282-83; National Indian Gaming Association, *Indian Gaming Facts, available at* http://indiangaming.org/library/index.html (last visited Sept. 13, 2004) ("Many Tribes operate gaming facilities primarily to generate employment.")

1175. 25 U.S.C. § 2702(1) (2000).

Many tribes now operate casinos that provide critical employment opportunities for tribal members.[1176] Many gaming tribes employ large numbers of non-Indians from the surrounding community.[1177] Moreover, employment of tribal members at their own tribe's gaming facilities reduces the financial burden on the state's social services.[1178] Perhaps, most importantly, the economic benefits of gaming do not stop at the reservation borders.[1179] In North Dakota, for example, where Indian gaming is modest, "the annual economic benefits to the state resulting from the [five] casinos' payroll and purchases totals nearly $125,000,000."[1180]

Conversely, when Indian gaming facilities close down, Indian communities and the non-Indian communities dependent on tribal gaming are ravaged.[1181] It is axiomatic that the loss of casino jobs could devastate Indian communities.[1182] "In the absence of the casino jobs, it is likely that the tribal member employees will not find replacement jobs, will be unemployed, and will be forced to rely upon some form of public assistance relief from the state or federal government and from tribal social services programs."[1183] The closure of Indian casinos and the resulting loss of governmental revenue could force tribal governments to shut down fundamental and

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1176. *See, e.g.*, Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 743 F. Supp. 645, 646 (W.D. Wis. 1990) ("In May 1989 83% of the [casino] employees were tribal members; in February 1990 just under 80% of those employed were tribal members."); *Implementation of the Indian Gaming Regulatory Act: Hearing Before the Select Committee on Indian Affairs*, 102d Cong. 6 (1992) (statement of Sen. Thomas A. Daschle) (noting that unemployment in many reservations has dropped from eighty percent to virtually zero due to Indian gaming); Rand & Light, *supra* note 788, at 402 ("In Minnesota, for example, Indian gaming is the state's seventh- largest industry, creating over 10,000 jobs directly and 20,000 jobs indirectly.").

1177. *See, e.g.*, Saratoga County Chamber of Commerce, Inc. v. Pataki, 798 N.E.2d 1047, 1069 n.4 (2003) (Read, J., dissenting) (noting that the Oneida Indian Nation's Utica, New York casino employed 3300 people with an annual payroll of $70 million), *cert. denied*, 124 S. Ct. 570 (2003); *see also* Rand, *supra* note 789, at 76 ("[E]ven relatively modest casino revenues and levels of casino employment benefit surrounding non-Indian communities, as well as the state economy."); Rand & Light, *supra* note 788, at 404 ("Indian casinos have created nearly 140,000 jobs in the United States, approximately eighty-five percent of them held by non-Indians.").

1178. *See* Thompson, *supra* note 646, at 521 n.7 ("[T]he number of people on welfare on four rural reservations in Minnesota dropped sixteen percent after casinos were opened.").

1179. *See id.* at 543 n.167 ("Indian gaming has created tens of thousands of jobs, removed thousands from unemployment lines and existing welfare roles, and generated millions of dollars in governmental revenues for tribal, local, state, and federal governments.").

1180. *See* Rand, *supra* note 789, at 76 (citing N.D. INDIAN GAMING ASS'N, OPPORTUNITIES AND BENEFITS OF NORTH DAKOTA TRIBALLY OWNED CASINOS 7 (2000)).

1181. *See* Light & Rand, *supra* note 1170, at 267.

1182. *See, e.g.*, Wis. Winnebago Nation v. Thompson, 22 F.3d 719, 722 (7th Cir. 1994) ("[When] the [Indian gaming] facilities were forced to close[,] . . . over 300 Winnebago employees were laid off.").

1183. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 743 F. Supp. 645, 647 (W.D. Wis. 1990).

critical governmental services.[1184] The impact of the closure of tribal gaming facilities would reverberate throughout the non-Indian local communities and the state, as well, with its concomitant increase in non-Indian employment, the swelling of the welfare rolls, and the reduced non-Indian state income tax base.[1185]

6. The Motivation and Private Interests of the Challengers

In the gaming compact cases, the motivation and private interests of the plaintiffs should be fair game in the equitable analysis of the compulsory joinder rule. Often, the private interests of the plaintiffs are very easy to determine. For example, plaintiffs such as Artichoke Joe's card rooms, American Greyhound Racing, and Dairyland Greyhound Park are direct economic competitors to Indian gaming facilities.[1186] The political motivation of some plaintiffs is less obvious, but usually can be determined. For example, the Taxpayers of Michigan Against Casinos state their motivation in the name of their organization.[1187] Legislators have begun to campaign against tribal gaming, making their motivation clear.[1188] These plaintiffs are not interested in the principles underlying the merits of the gaming compact cases—separation of powers, compliance with federal gaming law, and so on.[1189] These plaintiffs are political and economic power players. If courts lined these plaintiffs up next to the gaming tribes they are suing, the equities would generally favor the tribes.[1190]

1184. *See, e.g., id.* ("Without casino revenue, the band will not be able to support tribal programs and services."). *See generally* Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058, 1073 (1982) ("Unlike other governmental bodies, Indian tribes would find the loss of assets more difficult to replace because tribes have only a limited revenue base over which to spread any losses.") (citing Atkinson v. Haldane, 569 P.2d 151, 169 (Alaska 1977)).

1185. *See* Light & Rand, *supra* note 1170, at 267 (noting the extensive benefits to states and non-tribal communities from Indian gaming).

1186. *See Am. Greyhound Racing II*, 305 F.3d 1015, 1020 (9th Cir. 2002); Artichoke Joe's v. Norton, 216 F. Supp. 2d 1084, 1089-90 (E.D. Cal. 2002); Dairyland Greyhound Park, Inc. v. McCallum, 655 N.W.2d 474, 476-77 (Wis. Ct. App. 2002), *vacated sub. nom.* Dairyland Greyhound Park, Inc. v. Doyle, 677 N.W.2d 275 (Wis. 2004); *see also Court Asked to Stop New Compacts in Wisconsin* (May 26, 2004), *available at* http://www.indianz.com/IndianGaming/archive/cat_litigation.asp ("The dog track industry is fighting the expansion of Indian gaming, saying tribes are taking over the market.").

1187. Taxpayers Against Casinos v. State, 657 N.W.2d 503 (Mich. Ct. App. 2002), *aff'd*, 685 N.W.2d 221 (Mich. 2004), *cert. denied*, 125 S. Ct. 1298 (2005).

1188. *See, e.g.*, Baird v. Norton, 266 F.3d 408 (6th Cir. 2001); Saratoga County Chamber of Commerce v. Pataki, 712 N.Y.S.2d 687 (App. Div. 2000).

1189. *See, e.g., Baird*, 266 F.3d at 408 (seeking to invalidate a gaming compact by challenging the constitutionality of the legislature's approval process).

1190. *See generally* Arlinda Locklear, *Morality and Justice 200 Years After the Fact*, 37 NEW ENG. L. REV. 593, 598 (2003) (asserting that seventy-five percent of so-called innocent landowner defendants in Indian land claims cases knew about the claims when they purchased their land).

7. Vulnerability of Tribal Economic Development

The immunity of tribal sovereigns is especially important in comparison to the immunity of state and federal governments. First, state and federal governments have large tax bases.[1191] They can tax property, income, and investment wealth with the potential to collect huge reservoirs of dollars that Indian tribes can only dream will come to the reservation.[1192] "Unlike other governmental bodies, Indian tribes would find the loss of assets more difficult to replace because tribes have only a limited revenue base over which to spread any losses."[1193] Second, Indian tribes are not mere businesses. They are governments, just like the state, local governments, and the federal government for all practical purposes.[1194] The only way for most Indian tribes to raise revenue needed to operate critical governmental programs and services is to engage in a business venture.[1195] This is not unheard of for local governments. State governments must engage in commercial enterprises, as well, in order to raise revenue.[1196] It is extraordinarily difficult for Indian tribes to conduct efficient and profitable business enterprises.[1197] Third, gaming is completely voluntary,[1198] whereas government taxation by federal, state, and local governments is not.[1199] When non-Indian governments lose a revenue stream, it does not spell catastrophe for that entity.[1200] When an Indian tribal government loses its revenue stream, the entire tribal government is at risk of being forced to shut down.[1201] The non-Indian governments can afford to lose more than once, while most Indian tribal governments

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1191. *See* David B. Jordan, Note, *Federal Indian Law: Tribal Sovereign Immunity: Why Oklahoma Businesses Should Revamp Legal Relationships with Indian Tribes After* Kiowa Tribe v. Manufacturing Technologies, Inc., 52 OKLA. L. REV. 489, 504 (1999).

1192. *See* Kenton Keller Pettit, Note, *The Waiver of Tribal Sovereign Immunity in the Contractual Context: Conflict Between the Ninth Circuit and the Alaska Supreme Court?,* 10 ALASKA L. REV. 363, 394 (1993).

1193. *In Defense of Tribal Sovereign Immunity*, *supra* note 1184, at 1073 (citing Atkinson v. Haldane, 569 P.2d 151, 169 (Alaska 1977)).

1194. *See* Robert L. Gips, *Current Trends in Tribal Economic Development*, 37 NEW ENG. L. REV. 517, 519 (2003).

1195. *See generally id.* at 517-22 (discussing general development of tribal businesses); Light & Rand, *supra* note 1170, at 267 (specifically discussing the business of gaming).

1196. *See* Department of the Treasury, *Internal Revenue Service National Office Field Service Advice*, No. 20024712 (Aug. 12, 2002) (comparing tribal golf course revenues to golf course revenues derived by facilities owned by state and local governments), *available at* http://www.irs.gov/pub/irs-wd/0247012.pdf.

1197. *See* Gips, *supra* note 1194, at 519.

1198. *See* Light & Rand, *supra* note 1170, at 266-67 (indicating that many tribes choose not to pursue gaming).

1199. *Cf.* Clifford J. Rosky, *Force Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 884 (2004).

1200. *Cf.* Pettit, *supra* note 1192, at 394.

1201. *Cf. id.*

cannot.[1202] Additionally, for absent sovereigns who do not desire or consent to litigation, the procedural rules do not allow for easy participation.[1203]

8. Difficulty of Creating Adequate Factual Record

The first factor in Rule 19(b)—prejudice to the absentee tribe—is the factor that is most important to tribes in gaming compact cases, the factor the courts tend to weigh in favor of the absent tribes, and the one factor that is almost always least developed factually.[1204] Tribes may either intervene under Rule 24(a) for the limited purpose of filing a Rule 12(b)(7) motion, file an amicus brief, or rely upon the party defendants to make the motion and the arguments.[1205] In motions practice, however, the tribe is afforded virtually no opportunity to establish facts about its gaming operations, the advantages of gaming for the tribe, the local non-Indian community and the state, nor the devastation that would be caused by the invalidation of its gaming compact.[1206] Tribes that have taken gaming cases to trial fare much better on appeal than those who rely upon motions to dismiss or cross-motions for summary judgment.[1207] It is easy for a court to give lip service to the tribe's concerns without the fully developed record.[1208]

Contrast this procedural position with *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan.*[1209] The Grand Traverse Band brought suit for declaratory relief that its Turtle Creek Casino, located on trust lands outside the reservation boundaries, met the requirements of the restored lands and restored tribes exception to the prohibition on lands acquired after October 17, 1988.[1210] The case went to a bench trial, and the band entered evidence about the history of the band's administrative termination and the importance of the gaming revenues derived from the Turtle Creek facility.[1211] Information on this track provided at an earlier hearing in the matter helped to

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1202. *Cf. id.*

1203. *See, e.g.*, Wichita and Affiliated Tribes v. Hodel, 788 F.2d 765, 774-76 (D.C. Cir. 1986).

1204. *See* Merkley, *supra* note 640, at 947-49; *see also Am. Greyhound II*, 305 F.3d 1015, 1024-25 (9th Cir. 2002); Tewa Tesque v. Morton, 498 F.2d 240, 242 (10th Cir. 1974).

1205. *See* Makah Indian Tribe v. Verity, 910 F.2d 555, 560 (9th Cir. 1990); *Wichita and Affiliated Tribes*, 788 F.2d at 774-76; Merkley, *supra* note 640, at 958, 963-64.

1206. *Cf.* Mary Lynn Tate, How to Avoid Getting Buried in Paper—Effective Motions Practice, Ass'n of Trial Lawyers of America, CLE 1079, *in* 1 ATLA ANN. CONVENTION REFERENCE MATERIALS, July 2001.

1207. *See, e.g.*, Davis v. United States, 192 F.3d 951, 961 (10th Cir. 1999).

1208. *See, e.g., Am. Greyhound II*, 305 F.3d at 1024-25.

1209. 198 F. Supp. 2d 920 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004).

1210. *See id.* at 922 (citing 25 U.S.C. § 2719(b)(1)(B)(iii)).

1211. *See id.* at 924-26 (citations to record omitted).

persuade the district court to deny the federal government's motion for a preliminary injunction against continued operation of the facility.[1212]

However, even in strong cases favoring absent compacting tribes, the court takes it as a given that the impact on the tribes would be great and does not engage in substantive analysis.[1213] The *American Greyhound* court dedicated exactly one sentence to this proposition: "The amount of prejudice to the tribes from termination of existing compacts and inability to enter new ones would be enormous."[1214] Missing from this discussion is the impact of the loss on gaming revenues to a compacting tribe's operating budget, with the attendant catastrophic derogation of tribal housing, social and human services, health care, environmental protection, and employment of tribal members.[1215] Loss of gaming puts gaming tribes back where they were before the Indian Reorganization Act—on the brink of extinction.[1216] Without a factual record, the impact on tribes is such a given that courts can seemingly ignore it in their balancing of interests.[1217]

1212. *See* Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the W. Dist. of Mich., 46 F. Supp. 2d 689, 705 (W.D. Mich. 1999).

> The third factor, the balance of hardships caused by the preliminary injunction, also weighs against the government. Accepting as true that the government has an interest in enforcing the laws, the consequence of granting the preliminary injunction and shutting down the facility is to create substantial financial hardship to the Band, its members and employees. If the government does not ultimately prevail on its statutory claims, the Band not only will have been deprived of revenues for the intervening period but also would be faced with significant obstacles to restarting the facility. In addition, numerous families within and without the Band, who are employed by Turtle Creek, will have their livelihoods interrupted. Moreover, the Band has introduced evidence that a wide variety of social services are funded by revenues from Turtle Creek. *See* Bennett Aff. ¶¶ 19-21. If the United States is ultimately unsuccessful on the merits, the intervening loss of vital services will have imposed a substantial and unnecessary hardship on a large group of individuals. In the absence of very clear likelihood of success on the merits, this factor cuts strongly against the injunction.

Id.

1213. *See, e.g., Am. Greyhound II,* 305 F.3d at 1024-25; Taylor v. Bureau of Indian Affairs, 325 F. Supp. 2d 1117, 1122 (S.D. Cal. 2004).

1214. *Am. Greyhound II*, 305 F.3d at 1025.

1215. *Cf.* Dawavendewa v. Salt River Agric. Improvement and Power Dist., 276 F.3d 1150, 1162 (9th Cir. 2002) (mentioning, but not discussing, economic prejudice to the tribe in terms of employment and tribal income), *cert. denied*, 537 U.S. 820 (2002).

1216. *See* Rand & Light, *supra* note 788, at 386-91.

1217. *See, e.g.,* Confederated Tribes of the Chehalis Indian Reservation v. Lujan, 928 F.2d 1496, 1499 (9th Cir. 1991).

V. "IN EQUITY AND GOOD CONSCIENCE"—WHERE DOES THE ABSENT TRIBE FIT?

The compulsory joinder rule should, under virtually any circumstances, prevent a court from adjudicating the sovereign rights of any sovereign—federal, state, or tribal—in its absence or without its consent. Adjudicating the rights, especially contract rights, which are the clearest cases[1218] of a sovereign without its presence is a back-door method of abrogating sovereign immunity.[1219] There are alternative avenues for plaintiffs to explore.[1220] The purposes of the compulsory joinder rule can be fulfilled by dismissing a case in deference to the absent gaming tribe.[1221] The doctrine of tribal sovereign immunity, while no stranger to criticism by federal, state, and tribal courts, remains a valid body of law and should be treated as such by courts in equity unless Congress, the arbiter of public policy, chooses to change the doctrine.[1222] Although the compulsory joinder rule is unusual in that it is intended to affect substantive rights more than other procedural rules, the rights of sovereigns are too important to be tinkered with in applying procedural rules.[1223]

A. *Dismissal Fulfills the Purposes of the Compulsory Joinder Rule*

The compulsory joinder rule was never intended to deal with sovereigns as parties.[1224] The rule originated out of questions dealing with diversity jurisdiction or instances when state court remedies were available.[1225] Judicial economy, efficiency, and predictability are served when the courts tend toward dismissing cases where absent sovereigns are necessary parties.[1226] A rule akin to more of a bright-line is justified in this instance in order to avoid multiple litigation.[1227]

If an absent tribe wishes to rely upon the indispensable party defense, then that tribe should roll the dice as early as possible.[1228] While it is true that this is a jurisdictional issue that may be raised at any time during the pendency of the litigation or even by the court itself, every fraction of judicial resources expended

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1218. *See, e.g.*, Roos v. Tex. Co., 23 F.2d 171, 172 (2nd Cir. 1927) (Learned Hand, J.).

1219. *See* Merkley, *supra* note 640, at 939-42.

1220. *See generally id.* at 955-66 (discussing alternatives to dismissal under Rule 19).

1221. *See id.* at 942-44.

1222. *See id.* at 942.

1223. *See Roos*, 23 F.2d at 172; Merkley, *supra* note 640, at 931.

1224. *But see* Merkley, *supra* note 640, at 933 n.14.

1225. *See* Provident Tradesmans Bank & Trust Co. v. Patterson, 390 U.S. 102, 120-21 (1968); Merkley, *supra* note 640, at 933 n.14.

1226. *See* Merkley, *supra* note 640, at 933-34, 942-43.

1227. *See id.* at 931.

1228. *See id.* at 933 (noting Rule 19's interest in expediency).

makes the argument less persuasive.[1229] At all costs, the argument should be made before the case goes to trial or at least before substantial fact-finding by the court.[1230] At that point, *Provident Tradesmens* gives ammunition to the argument that since judicial resources have already been expended the case may as well proceed to final resolution.[1231] However, *Provident Tradesmens* did not involve absent sovereign parties.[1232] Sovereign immunity and the indispensable party defense are jurisdictional questions that can be raised at any time during litigation.[1233] Courts would be wise to raise the matter *sua sponte* if the parties do not.

Certainty is the best tool to improve judicial efficiency and conserve resources. If a plaintiff knows the court is likely to dismiss a case in which a necessary sovereign is an absent party, then the plaintiff will choose another avenue to proceed, such as suing the sovereign directly.[1234] Courts rewarding plaintiffs for attempting to litigate the interests of Indian tribes without their presence should be aware that the tribes are not bound by the decision under *res judicata* principles.[1235] Tribes affected by an adverse decision invalidating their gaming compact, for example, could continue to game under the compact.[1236] If the plaintiffs or the state want to shut down gaming after a court invalidates the compact, they would have to initiate an enforcement action, which is something these parties could have done prior to the original lawsuit.[1237] Courts proceeding without the sovereign tribe in interest are simply adding another lawsuit to the equation.[1238] This result most certainly does not improve judicial efficiency.

The cases regarding gaming compacts and treaty hunting and fishing rights place the courts in a position to decide questions of public policy under the guise of applying the standards of equity.[1239] It is a maxim of the separation of powers

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1229. *See generally* FED. R. CIV. P. 12 (b), (h); Globe Indem. Co. v. Teixeira, 230 F. Supp. 444, 448 (D. Haw. 1963).

1230. *But see* Enter. Mgmt. Consultants, Inc. v. United States *ex rel.* Hodel, 883 F.2d 890, 892 (10th Cir. 1989) (noting that the indispensable party defense is not generally waivable even if first raised during trial or on appeal).

1231. *See* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 106-16 (1968).

1232. *See id.* at 104-07.

1233. Pit River Home and Agric. Coop. Ass'n v. United States, 30 F.3d 1088, 1100 (9th Cir. 1994).

1234. *But see* Lomayaktewa v. Hathaway, 520 F.2d 1324, 1326 (9th Cir. 1975) (indicating that tribes cannot be sued directly or through joinder absent congressional or tribal consent due to sovereign immunity).

1235. *Am. Greyhound II*, 305 F.3d 1015, 1024 (9th Cir. 2002).

1236. *See* Merkley, *supra* note 640, at 947.

1237. *See, e.g.*, Florida v. Seminole Tribe, 181 F.3d 1237, 1244 n.10 (11th Cir. 1999).

1238. *See* Tewa Tesuque v. Morton, 498 F.2d 240, 242-43 (10th Cir. 1974) ("[J]udgment . . . would not be adequate in the [tribe's] absence because it may very likely invite additional lawsuits.").

1239. *See, e.g.*, South Dakota v. Bourland, 508 U.S. 679, 687 (1993) (hunting and fishing rights); *Am. Greyhound II*, 305 F.3d at 1018 (gaming compacts).

doctrine that the courts should refrain from deciding questions of public policy.[1240] Tribal sovereign immunity is a question of federal law, not merely public policy.[1241] As several courts have held, tribal sovereign immunity is protected by the fact that Congress has seen fit to preserve it.[1242] Only Congress or the tribe can abrogate immunity.[1243] It is not the province of the courts to weigh tribal immunity any differently than the same courts would weigh state or federal immunity.[1244]

American Greyhound is a perfect example of a court choosing to apply a black-letter ruling "in equity and good conscience."[1245] The court acknowledged that the absent tribes' sovereign interests and the plaintiff's interest in a forum collided directly, leaving no way to shape relief.[1246] The court was at an impasse, or in the words of the *Dawavendewa* court, "equipoise."[1247] That is where every court that confronts this issue seems to end up.[1248] The interests of the sovereign should be dispositive at this point.[1249] The compulsory joinder rule does not have the substantive underpinnings to decide the rights of sovereigns.[1250] The alternative remedies and fora discussed below should shake the courts from their "equipoise" and convince them that dismissal is not a catastrophic result for the plaintiffs.[1251]

1240. *See* Loving v. United States, 517 U.S. 748, 757-58 (1996) ("[Separation of powers] make[s] Congress the branch most capable of responsive and deliberate lawmaking."); Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("The criterion of constitutionality is not whether we believe the law to be for the public good.") (quoting Adkins v. Children's Hosp., 261 U.S. 525, 567, 570 (1923) (dissenting opinion)); Local 1976, United Brotherhood of Carpenters v. NLRB, 357 U.S. 93, 99-100 (1958) ("[The work of Congress is] the result of conflict and compromise between strong contending forces and deeply held views. . . .").

1241. *See* Merkley, *supra* note 640, at 941.

1242. *E.g.,* Wichita and Affiliated Tribes v. Hodel, 788 F.2d 765, 777 (D.C. Cir. 1986) ("The dismissal of this suit is mandated by the policy of tribal immunity. This is not a case where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.").

1243. C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411, 418 (2001) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)); Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 759 (1998).

1244. *Cf.* Merkley, *supra* note 640, at 940-42.

1245. *Am. Greyhound II*, 305 F.3d 1015, 1024-25 (9th Cir. 2002).

1246. *Id.* at 1025.

1247. Dawavendewa v. Salt River Project Agric. Improvement and Power Dist., 276 F.3d 1150, 1163 (9th Cir. 2002).

1248. *See id.* at 1162 (citing nine previous decisions where the court held than an absent tribe was indispensable and dismissed the case despite the fact that the plaintiff would have no alternative forum).

1249. *See, e.g.,* Wichita and Affiliated Tribes v. Hodel, 788 F.2d 765, 777 (D.C. Cir. 1986).

1250. *Cf.* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978); Merkley, *supra* note 640, at 931-32.

1251. *Cf.* Merkley, *supra* note 640, at 974-75.

B. *Defending Tribal Immunity*

Courts should defer to Congress's action, or inaction, in regard to tribal sovereign immunity. The federal rules do not exist to allow creative plaintiffs to litigate a tribe's sovereign rights and responsibilities behind its back.[1252] The Eleventh Circuit in *Florida v. Seminole Tribe* put it succinctly:

> [W]e note that Congress has been consistent in its approval of the Supreme Court's tribal sovereign immunity doctrine and has acted against the background of this doctrine in order to restrict tribal immunity in certain circumstances. [*citation*] In addition, the Court has stated that "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests" associated with any decision to alter the limits of tribal immunity. [*citation*] It is little wonder, therefore, that the Court has chosen to defer to Congress rather than to revisit its own tribal sovereign immunity jurisprudence.
>
> In light of these considerations, we decline to modify the doctrine of tribal sovereign immunity absent an express command to the contrary from either Congress or a majority of the Supreme Court.[1253]

The federal rules do not waive the immunity of a sovereign and thus should not be construed to allow a suit to proceed where a sovereign's contractual rights are directly impacted, particularly with respect to gaming compacts.[1254] The court's protection of state and federal sovereignty in *Kickapoo Tribe* and *Pueblo of Sandia* should similarly work to the benefit of tribal sovereignty.[1255]

However important, the vitality of tribal immunity is not the only aspect of tribal sovereignty at issue.[1256]

C. *Problems with Continuing Without the Tribal Sovereign*

1. Confidence in the Judiciary

There is a concern by tribes and their representatives that the federal judiciary is taking a leading role in determining national and state policy in regard to Indians and

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1252. *See* FED. R. CIV. P. 1; Merkley, *supra* note 640, at 931.

1253. 181 F.3d 1237, 1245 (11th Cir. 1999) (citing Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751 (1998); Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991)).

1254. *See* Merkley, *supra* note 640, at 942.

1255. *See* Kickapoo Tribe of Indians v. Babbitt, 43 F.3d 1491, 1495-96 (D.C. Cir. 1995); Pueblo of Sandia v. Babbitt, 47 F. Supp. 2d 49, 52-54 (D.D.C. 1999).

1256. *See supra* notes 1257, 1260, 1264, 1281 (detailing concerns that the judiciary has assumed a primary role in shaping Indian policy and has blurred longstanding principles of Indian law by reevaluating and questioning the impenetrability of tribal sovereignty).

Indian tribes.[1257] There are strong claims that congressional plenary power recognized by the Supreme Court for more than two centuries is giving way to an unspoken regime change by vesting the so-called plenary power over Indian affairs in the federal courts.[1258] It goes without saying that the federal courts are not policymaking bodies in the separation of powers scheme established by the United States Constitution.[1259] Nevertheless, to tribal advocates, the federal courts are undermining the base of federal law upon which the tribes have begun to learn, understand, and rely.[1260] Just as the tribes have begun to deal with and make peace with the BIA and many state governments, their advances have been undercut by adverse federal court decisions.[1261] For many tribes, the states are no longer the "deadliest enemies"[1262] and the BIA is not a living joke,[1263] but the federal courts are in danger of being perceived by Indians and Indian tribes as the new Seventh Calvary.[1264] Tribal governments are on the brink of being "coerc[ed] . . . into following policies preferred by the national or state judiciary."[1265] As such, self-determination and self-governance of Indians and Indian tribes is gravely threatened.[1266] Perhaps what is lacking is what some call "judicial humility."[1267]

1257. *See* Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 205 (2002).

1258. *See, e.g.*, Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 56 (1987) ("[Federal plenary] power continues to expand. Now it is taking place in the Supreme Court rather than in Congress."); Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 MONT. L. REV. 313, 328 (1997) ("[T]he Court now recognizes a judicial plenary power to parse the limits of tribal court authority based on federal common law.").

1259. *See* Loving v. United States, 517 U.S. 748, 757-58 (1996) ("[Separation of powers] makes [the Legislature] the branch most capable of responsive and deliberate lawmaking."); *cf.* THE FEDERALIST No. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

1260. *See* Clinton, *supra* note 1257, at 163, 205.

1261. *See generally* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1573-75 (1996).

1262. United States v. Kagama, 118 U.S. 375, 384 (1886). *See generally* Robert A. Williams, Jr., *"The People of the States Where They are Found are Often Their Deadliest Enemies": The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981 (1996).

1263. "BIA means 'Boss Indians Around,' and the BIA is NOT your friend." Ken Bellmard, *Endeavoring to Persevere: Becoming and Being a Tribal Attorney*, 9 KAN. J.L. & PUB. POL'Y 752, 759 (1999).

1264. *See* Getches, *supra* note 1261, at 1654-55 (criticizing the Court's subjectivism and willingness to modify tribal sovereign rights to accommodate non-Indian interests).

1265. *In Defense of Tribal Sovereign Immunity*, *supra* note 1184, at 1077.

1266. *See id.* at 1069-70, 1077-78.

1267. *See* Paul L. Caron & Rafael Gely, *A Need for Judicial Humility*, 26 NAT'L L.J., Nov. 24, 2003, at 34 ("A humble judge recognizes that he or she has neither the power of the purse nor the power of the police. Instead, a judge's authority comes from the power of persuasion. . . .").

Effectively abrogating the immunity of Indian tribes from suit via the operation of a procedural court rule creates a difficult problem for the judiciary.[1268] "One consequence of adopting a rule of procedure that simply seems to ignore an accepted rule of substantive law would be to undermine confidence in the judiciary because such decisionmaking appears purely result-oriented."[1269] The courts are not the proper places to determine broad issues of federal Indian policy and, in fact, are uniquely *unqualified* to make judgments about Indian tribes and Indian people.[1270] Nevertheless, some courts are not above choosing to pursue a specific public policy in opposition of the established will of the legislature or the electorate.[1271]

2. Lack of Predictability Reduces Judicial Efficiency and Wastes Limited Judicial Resources

Courts should avoid applying illusory equitable factors. Some courts have expressed their judgment that tribal sovereign immunity is not a compelling interest that would justify dismissing a claim when the tribe is a necessary party.[1272] Federal and state courts tend to shortchange tribal sovereignty because most people view Indian tribes as a weak cousin to federal and state sovereignty.[1273] While it is true that tribal immunity may be waived by Congress, it may never be waived or abrogated by a state.[1274] For purposes of the compulsory joinder analysis, tribal immunity is at least as impenetrable as state immunity until Congress says otherwise, especially when a state or private entity is suing against tribal interests.[1275] Most courts follow the tenet that all parties to a contract are indispensable.[1276] It should be that the rule is even

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1268. *See* Stephens, *supra* note 31, at 1131 (noting that courts could be viewed as "pursuing a tactic that might destabilize a disfavored substantive rule," thereby subverting the predictability and uniformity of the judicial system).

1269. *Id.*

1270. *Cf. In Defense of Tribal Sovereign Immunity*, *supra* note 1184, at 1076-77 ("If federal or state courts attempt to litigate matters involving tribal disputes and tribal law, the risk of misinterpretation and mistake is even greater than when a federal court interprets state law, because such courts may have limited knowledge of a reservation's conditions and needs.") (citing Alvin J. Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D. L. REV. 1, 48 (1974)).

1271. *E.g.*, Taxpayers Against Casinos v. State, No. 99-90195-CZ at 2 (Ingham County Cir. Ct. Jan. 18, 2000) (on file with author), *aff'd and rev'd in part*, 657 N.W.2d 503 (Mich. Ct. App. 2003), *aff'd and rev'd in part*, 685 N.W.2d 221 (Mich. 2004), *cert. denied*, 125 S. Ct. 1298 (2005)..

1272. *See* Davis v. United States, 192 F.3d 951, 960-61 (10th Cir. 1999).

1273. *See, e.g.*, Clinton, *supra* note 1257, at 114-15, 117-18, 163 (noting that the Court has actively protected state sovereignty from judicial intrusion, but has failed to similarly respect and preserve tribal sovereignty).

1274. *See* cases cited *supra* note 1243 and accompanying text; Merkley, *supra* note 640, at 942.

1275. *See* Merkley, *supra* note 640, at 942, 946-47.

1276. *See* Dawavendewa v. Salt River Project Agric. Improvement and Power Dist., 276 F.3d

more concrete where the contractual rights of a sovereign are at stake.[1277] Both federal and state courts promulgate rules of procedure to improve the efficiency of their courts and to preserve their judicial resources.[1278] By creating this dynamic of litigating back and forth with no bright-line rule because courts are uncertain or because they disfavor tribal immunity, they are undermining the very purpose of the rule: efficiency.[1279] "[A] justification based upon the supposed 'disfavored' nature of the action affords little or no predictability."[1280] Non-Indian plaintiffs are going to continue (and, in fact, are encouraged) to sue in the absence of the tribes in interest and tribes are going to continue to assert the compulsory joinder defense until the courts establish clear guidelines.[1281] It appears that some courts will dismiss and others will not, often by making choices that are in direct contrast to the choices made by other courts.[1282] The uncertainty of this area of the law will continue long after the gaming compact cases have run their course.[1283] Plaintiffs opposed to tribal activities and relationships with non-Indians will continue to sue only the non-Indians, asserting that their dispute is only between them and the non-Indians and has nothing to do with the tribes when nothing could be further from the truth. Until courts see through this charade, the compulsory joinder rule is a bad joke.

D. *A Major Pitfall for Tribes*

Tribes that look in from the outside at state or federal court litigation that affects their gaming compact or operate as intervenors or as friends of the court do not have a lot of options.[1284] There is a real danger that the court will reject an absent tribe's motion to intervene.[1285] Some courts effectively reward plaintiffs for their back-door attempt to subrogate sovereign immunity.[1286] A court might refuse to allow the absent tribe to intervene, effectively excluding the Indian tribe from the case, even if the tribe chooses to participate.[1287] If the state or federal defendants interests are substantially

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1150, 1157 (9th Cir. 2002); Lomayaktewa v. Hathaway, 520 F.2d 1324, 1325 (9th Cir. 1975).

1277. *See Dawavendewa*, 276 F.3d at 1157.

1278. *See* People v. Carter, 678 F. Supp. 1484, 1486 (D. Colo. 1986).

1279. *See id.*

1280. Stephens, *supra* note 31, at 1133.

1281. *See generally* Getches, *supra* note 1261, at 1573 (discussing the current absence of clear guiding judicial principles in Indian Law).

1282. *See* Merkley, *supra* note 640, at 938, 948-50. *Compare* Sac & Fox Nation v. Norton, 240 F.3d 1250, 1259-60 (10th Cir. 2001), *with Am. Greyhound II*, 305 F.3d 1015, 1025 (9th Cir. 2002).

1283. *See generally* Getches, *supra* note 1261, at 1573, 1636, 1654.

1284. *See* cases cited *supra* note 1205 and accompanying text.

1285. *See, e.g.*, South Dakota *ex rel* Barnett v. United States Dep't of Interior, 317 F.3d 783, 783 (8th Cir. 2003).

1286. *See e.g., id.*; Merkley, *supra* note 640, at 963-64.

1287. *See, e.g., South Dakota ex rel Barnett*, 317 F.3d at 783.

aligned with the tribes' interest, then the court might refuse the tribes motion to intervene.[1288] The district courts in *American Greyhound* and *Artichoke Joe's* both held that the absent tribes were not necessary parties.[1289] Recently, in *South Dakota ex rel. Barnett v. United States Department of Interior*,[1290] the Eighth Circuit upheld the decision of the district court to deny an Indian tribe the opportunity to intervene in a case where the state had sued the federal government over secretarial trust acquisitions for the benefit of the tribes.[1291] Unfortunately, the tribe was undermined by its trustee, the United States, which "supported the Tribe's bid for permissive intervention but opposed its motion for intervention as a matter of right."[1292] Citing familiar Rule 19 cases, the Eighth Circuit agreed with the United States that it could adequately represent the tribe's interests and upheld the determination of the district court that the tribe could intervene, as of right.[1293] It is a real danger, even for tribes that wish to participate fully through Rule 24 intervention, that the court will act to keep the tribe out. One wonders what due process principles the Eighth Circuit conveniently forgot when it chose to keep the tribe out of a case that goes to the very heart of the tribe's governmental and political existence.

VI. CONCLUSION

The compulsory joinder analysis is an equitable analysis, for the most part, and only where a sovereign is the absent party will a court invoke more substantive jurisdictional factors into the equation.[1294] One can trace the contours of how courts apply the rule in cases in which the absent party is a tribe and compare how those courts apply the rule when the absent party is a federal or state government.[1295] The identity of the plaintiff is also an aspect.[1296] Perhaps, most important is the scope and significance of the legal rights at issue.[1297] It appears that many courts enter into the compulsory joinder analysis with an orientation toward a particular result.

In gaming and treaty rights cases, arguably the most important cases for tribes, the courts are unlikely to dismiss a challenge to a tribal right in the absence of the

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1288. *See, e.g., id.* at 786-87.

1289. *See generally* Artichoke Joe's v. Norton, 216 F. Supp. 2d 1084 (E.D. Cal. 2002); *Am. Greyhound I,* 146 F. Supp. 2d 1012, 1012 (D. Ariz. 2001), *vacated,* 305 F.3d 1015 (9th Cir. 2002).

1290. 317 F.3d 783 (8th Cir. 2003).

1291. *See id.* at 783-85.

1292. *Id.* at 785.

1293. *See id.* at 786-87 (citing Connecticut *ex rel.* Blumenthal v. Babbitt, 889 F. Supp. 80, 83 (D. Conn. 1995); S.W. Ctr. for Biological Diversity v. Babbitt, 150 F.3d 1152, 1154 (9th Cir. 1998)).

1294. *See* Carlson, *supra* note 60, at 580-87.

1295. *See* discussion *infra* Parts II, III.

1296. *Cf.* Minnesota v. United States, 305 U.S. 382, 386-87 (1939).

1297. *See, e.g.,* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 219 (1987).

tribe.[1298] Though generalizations are discouraged, one can place the parties in a grid and arrive at an educated conclusion as to the outcome of a motion to dismiss for failure to join an indispensable party in these cases. If the absent party is an Indian tribe and the plaintiffs are individual Indians, it is likely the case will be dismissed. If the absent party is an Indian tribe and the plaintiffs are other Indian tribes, it is likely the case will be dismissed. If the absent party is a federal or state government and the plaintiffs are individual Indians or Indian tribes, it is likely the case will be dismissed. If the absent party is an Indian tribe and the plaintiffs are non-Indians, it is likely the case will proceed in the absence of the tribe. It is important to note that the Supreme Court easily forced the dismissal of tribal claims that the states were negotiating in bad faith when it came to Class III gaming compacts, based on the Eleventh Amendment, even though the states' immunity effectively gave the tribes no remedy.[1299] The Court has also had no problem in denying tribes a forum in which to bring land claims against state governments.[1300]

Until Congress or the tribes formally decide that tribal immunity is not in the best interest of society, the courts should respect that state of affairs. Federal and state court procedural rules are simply that—procedure. Using the equitable analysis required under the compulsory joinder rule to criticize or ignore tribal immunity is abhorrent and recalls the not-too-distant past when non-Indians used the legal system to exploit Indians and Indian tribes, defrauding them of land, natural resources, treaty rights, and their way of life.[1301] The justice system is not intended to be used as the tool for those opposed to Indian activities to stop those activities without the presence of the Indian interests. The basic due process principle of the court system is at stake, as is the basic sovereignty principle of Indian tribal government. The strategy employed by many opponents to Indian activities is to exclude the tribes from the litigation, as if to say that this dispute is between non-Indians only and the tribes have nothing to do with it. Because it is axiomatic that the parties to a contract are indispensable and that a plaintiff with standing can bring an action for declaratory relief against tribal officials, under no circumstances should a case be allowed to proceed in the absence of the tribe in interest.

1298. See *supra* Part IV.

1299. *See* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

1300. *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997).

1301. *Cf.* MCCLURKEN, *supra* note 3, at 80 ("[Michigan Ottawas] left their land for part of each year for fishing, gathering, or by then, lumbering. It was not uncommon for Americans to declare these parcels abandoned and then take possession of them.").