Recent Rulings Affirm Tribal Sovereign Immunity And Joinder

By **Benjamin Mayer, Bart Freedman and David Wang** (March 30, 2023)

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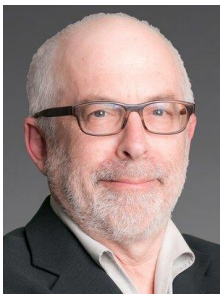

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Three recent court decisions affirm the strength of tribal sovereign immunity — even in cases where there is no named tribal party, but tribal interests are at stake.

Near the end of 2022, the U.S. Court of Appeals for the Ninth Circuit decided Klamath Irrigation District v. U.S. Bureau of Reclamation[1] and Backcountry Against Dumps v. Bureau of Indian Affairs.[2]

In both cases, the Ninth Circuit upheld dismissal based on tribes' sovereign immunity, after finding they were required parties under Federal Rule of Civil Procedure 19, which mandates joinder of required parties to a litigation absent good cause.

The U.S. District Court for the Western District of Washington followed suit last month, in Maverick Gaming LLC v. U.S.[3]

There are several takeaways from these cases. First, parties likely cannot use litigation to collaterally attack or limit tribal rights in the absence of affected tribes, unless the absent tribe and at least one named defendant have perfectly aligned interests.

Second, there has been an increased focus by agencies and courts to allow tribes to represent and advocate for their own interests and inherent sovereignty, thereby limiting ways a named defendant can adequately represent an absent tribe.[4]

Third, these cases show that only the federal government, including its agencies, is likely to be a suitable named defendant who could adequately represent an absent tribe. As tribes continue to assert their own interests and sovereignty, however, the federal government's ability to represent tribes under Rule 19 may effectively require direct authorization from affected tribes.

This merging of two well-established but distinct legal principles — tribal sovereign immunity and joinder under Rule 19 — is worth noting for parties considering challenging government actions where tribal rights are at stake.

Potential nontribal defendants to such challenges — i.e., parties who are working with tribes on projects, such as renewable energy developments or other land uses involving federal or state environmental or other regulatory reviews — should also take notice. Rule 19 combined with tribal sovereign immunity may serve to bar such challenges, or insulate such projects from challenges.

Joinder Under Rule 19: Required Party, Feasibility and Equity

Under Rule 19, failure to join a required party may result in a dismissal under Rule

12(b)(7). Courts engage in a three-part inquiry to determine whether an absent party must be joined under Rule 19:

- Whether the absent party is a required party;
- Whether joinder of that required party is feasible; and
- Whether, if joinder is infeasible, the litigation can proceed "in equity and good conscience."

Required Party Status

Under the first prong, a party is required and must be joined if (1) the court cannot provide complete relief in that party's absence, or (2) that party has an interest in the subject matter of the litigation, and is so situated that proceeding may (a) impair or impede its ability to protect its interest, or (b) leave an existing party substantially likely to incur multiple or inconsistent obligations.[5]

The crux of this analysis is whether the "absent party may have a legally protected interest at stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted."[6] This is true even when the absent party "has no legally protected interest at stake in a suit seeking only to enforce compliance with administrative procedures."[7]

An absent party's ability to protect its interest will not be impaired, however, where an existing party can adequately represent and advance its interest.[8] An existing party may adequately represent an absent party if:

- Their interests are so aligned that the existing party will make the absent party's arguments;
- The existing party is capable of and willing to make those arguments; and
- The absent party would not offer any necessary element to the case that the existing parties would neglect.[9]

Feasibility of Joinder

The court must then determine whether joinder of the required party is feasible. This requires the court to determine if it has jurisdiction over the required party, and if venue is proper.

If a required party were immune from suit under sovereign immunity principles, for instance, joinder would not be feasible. Further, per Rule 19(a)(3), "[i]f a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party."

Equity and Good Conscience

Finally, if joinder is infeasible, the court must "must determine whether, in equity and good

conscience, [the case] should proceed among the existing parties or should be dismissed."[10]

In doing so, courts consider:

- The extent to which a judgment rendered in the party's absence might prejudice it or existing parties;
- The extent to which any prejudice could be lessened or avoided by protective provisions in the judgment, shaping the relief, or other measures;
- Whether a judgment rendered in the party's absence would be adequate; and
- Whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.[11]

Sovereign Immunity: How Tribes and Their Sovereign Immunity Fit Into the Rule 19 Analysis

Tribal sovereign immunity is firmly established under federal law.[12] As the U.S. Supreme Court stated in Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc. in 1998, "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."[13]

The high court described that immunity in Michigan v. Bay Mills Indian Community in 2014 as "a necessary corollary to an Indian tribe's sovereignty and self-governance."[14]

Sovereign immunity, of course, directly affects a court's joinder analysis as a tribe cannot be compelled to join a lawsuit. That is, a tribe that is absent from the litigation, but is otherwise required under Rule 19, cannot be joined unless it waives its sovereign immunity, or that immunity is otherwise abrogated by Congress.

Southwest Center for Biological Diversity v. Babbitt

As discussed above, however, an existing party theoretically could represent an absent tribe's interests, thus negating the need to join a sovereign tribe. The Ninth Circuit addressed representation of an absent tribe's interest in Southwest Center for Biological Diversity v. Babbitt in 1998.[15]

In that case, an environmental organization brought action against the Secretary of the Interior, alleging that the secretary's plan to expand an existing dam violated the Endangered Species Act, or ESA, and the National Environmental Policy Act.[16] The U.S. District Court for the District of Arizona dismissed the suit for failure to join the Salt River Pima-Maricopa Indian Community, a sovereign tribe that had rights under a 1988 settlement agreement to store water in the expansion.[17]

The Ninth Circuit reversed, holding 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."[18]

Diné Citizens Against Ruining Our Environment v. Bureau of Indian Affairs

However, a named defendant, including the federal government, may not be able to represent a tribe's interest where that representation would be inadequate.

In Southwest Center for Biological Diversity, the court did not address the Salt River Pima-Maricopa Indian Community's interest in its sovereignty, which was not raised by any party. That issue was raised, however, in Diné Citizens Against Ruining Our Environment v. Bureau of Indian Affairs.

In that case, a coalition of conservation organizations sued the Bureau of Indian Affairs and other federal and state agencies under the ESA in the District of Arizona in 2016, challenging reauthorization of coal mining activities on land reserved to the Navajo Nation.[19]

The challengers contested the agency approval of a variety of changes and renewals to leases and mining permits possessed by the Navajo Transitional Energy Company, or NTEC, a corporation wholly owned by the Navajo Nation. NTEC filed a motion to dismiss under Rule 12(b)(7) for failure to join a required party under Rule 19 on sovereign immunity grounds.[20]

The district court granted the motion to dismiss, which the Ninth Circuit affirmed, noting that while the existing agency defendants had an interest in defending their decisions, that interest "differs in a meaningful sense from NTEC and the Navajo Nation's sovereign interest in ensuring" their continued access and profit from natural resources on their land.[21]

The Ninth Circuit distinguished Diné Citizens from Southwest Center, observing that while the federal defendants in Southwest Center "have an interest in defending their own analyses that formed the basis of the approvals at issue, here they do not share an interest in the outcome of the approvals."[22] Furthermore, "no party in Southwest had explained how the tribe's sovereignty would be implicated, as the Navajo Nation has explained here."[23]

Klamath Irrigation District v. U.S. Bureau of Reclamation

The Ninth Circuit has now made clear that an existing party and an absent party's alignment in outcome is not the only consideration for determining whether a party can and will adequately represent an absent tribe's interests.

In Klamath Irrigation District v. U.S. Bureau of Reclamation, several irrigation districts filed suit in the U.S. District Court District of Oregon in 2019 against the U.S. Bureau of Reclamation, which proposed a set of operating procedures for the Klamath federal irrigation project to fulfill obligations arising under the ESA, and to safeguard reserved water and fishing rights of the Hoopa Valley and Klamath Tribes.[24]

The irrigation districts alleged that the proposed operating procedures violated the Administrative Procedure Act, or APA, and the Reclamation Act.[25] Both the Hoopa Valley and Klamath Tribes intervened in the litigation as of right, and moved to dismiss on the grounds that they were required parties but could not be joined due to their sovereign immunity.[26]

In its ruling last September, the Ninth Circuit, relying in large part on Diné Citizens, agreed. It noted that "Reclamation's and the Tribes' interest, though overlapping, are not so aligned as to make Reclamation an adequate representative of the Tribes."[27] While "[t]he Tribes' primary interest is in ensuring the continued fulfillment of their reserved water and fishing

rights ... Reclamation's primary interest is in defending its [proposed operating procedures] taken pursuant to the ESA and APA."[28]

The Ninth Circuit made clear that even if Reclamation and the tribes "share an interest in the ultimate outcome" of the case, "such alignment on the ultimate outcome is insufficient ... to hold that the government is an adequate representative of the tribes."[29]

Backcountry Against Dumps v. Bureau of Indian Affairs

Last October, the Ninth Circuit decided a similar case. In Backcountry Against Dumps, a group challenged BIA approval of a lease between the Campo Band of Diegueno Mission Indians and Terra-Gen Development Co., a nontribal corporation, under various environmental statutes.[30]

The Campo Band intervened and filed a motion to dismiss, which the district court granted.[31] Citing Diné Citizens and Klamath, the Ninth Circuit affirmed, noting that neither the federal defendants nor Terra-Gen adequately represented the Campo Band's sovereign interests.[32]

Maverick Gaming LLC v. U.S.

The Maverick Gaming case in the Western District of Washington follows suit. A gaming company sued the U.S. Department of the Interior and Washington state officials, arguing that gaming compacts between the state and tribes under the Indian Gaming Regulatory Act violated both that act and the Fifth Amendment's equal protection clause.[33]

The compacts authorize tribes in Washington to offer sports betting.[34] One of these tribes, the Shoalwater Bay Indian Tribe of the Shoalwater Bay Indian Reservation, intervened to file a motion to dismiss on Rule 19 grounds.[35]

The district court granted the motion last month, observing the "importance of [Washington tribes'] gaming compacts and the revenue that such compacts provide," as well as the "the long history of tribal gaming and associated employment benefits for the tribes and the surrounding community."[36] The court found that, "[g]iven this history, and the economic and sovereign rights implicated by Maverick Gaming's suit, the Court agrees that Shoalwater is 'necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract.'"[37]

Maverick Gaming has appealed to the Ninth Circuit,[38] setting the stage for the Ninth Circuit to again address a tribe's ability to intervene in and dismiss a suit involving tribal interests — this time in light of the recent decisions in Klamath and Backcountry Against Dumps.

The thrust of these cases is that a tribe's sovereign rights and interests may preclude a lawsuit where those rights and interests are at stake, even if the tribe is not a named party.[39]

Potential Exceptions: The Public Rights and Immovable Property Exceptions

These cases also do not allow the public rights exception to eclipse tribal sovereign immunity. As the Ninth Circuit observed in Diné Citizens, quoting its own 1988 opinion in Conner v. Burford: "The public rights exception is a limited 'exception to traditional joinder rules' under which a party, although necessary, will not be deemed 'indispensable,' and the

litigation may continue in the absence of that party."[40]

The public rights exception is reserved for litigation that, as the Ninth Circuit held in 1996 in Kescoli v. Babbitt, "transcend[s] the private interests of the litigant[s] and seek[s] to vindicate a public right."[41] This exception may apply in cases designed "to vindicate a public right," even where litigation "could adversely affect the absent parties' interests."[42] The litigation, however, if it were to proceed under this exception, cannot destroy the absent party's legal entitlements.[43]

In both Backcountry Against Dumps and Maverick Gaming, the courts declined to apply the public rights exception. In Backcountry Against Dumps, the Ninth Circuit noted that the application of the exception depends on "whether the litigation threatens to destroy an absent party's legal entitlements."[44] And because the litigation sought to vacate approval of the Campo Band's lease, "it plainly threatens the [Campo] Band's legal entitlements."[45]

Similarly, the Western District of Washington found in Maverick Gaming that because that suit sought to invalidate tribal gaming compacts, "an acknowledged legal entitlement," the "threat posed ... to Shoalwater's legal entitlements is sufficient such that the public rights exception should not apply."[46]

It is undecided, however, whether tribal sovereign immunity can apply to bar suits involving interests in immovable real property. Under this immovable property exception, a court is not necessarily deprived of its jurisdiction by a party's assertion of sovereign immunity.

Courts have recognized this exception applies in cases involving state sovereign immunity.[47] But it remains unclear whether it applies to tribal sovereign immunity.[48]

In Upper Skagit Indian Tribe v. Lundgren, for example, the Upper Skagit Indian Tribe attempted to use joinder and sovereign immunity to dismiss a quiet title action for property allegedly acquired by individuals through adverse possession. In 2017, the Washington Supreme Court determined that the Upper Skagit could not use joinder and sovereign immunity as what the court described as a "sword" to dismiss the case.[49]

On appeal, the U.S. Supreme Court vacated and remanded in 2018, but declined to determine the scope and application of the immovable property exception in the context of tribal sovereign immunity, leaving it the Washington Supreme Court to address that question.[50] The case was dismissed on remand, and the Washington Supreme Court has yet to address the issue afterward.[51]

Conclusion

For decades, tribes have raised their sovereign immunity to defend against all types of lawsuits — including to dispense of cases where they are an absent but indispensable party.

But Klamath, Backcountry Against Dumps and Maverick Gaming change the calculus, by strongly suggesting that a tribe itself is almost always going to be the only party that can represent its own interests and sovereignty.

Thus, parties will likely not be able to move forward with challenges to projects and agreements implicating tribal interests and rights simply by not naming the affected tribe or tribes.

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[1] Klamath Irrigation District v. U.S. Bureau of Reclamation, 48 F.4th 934 (9th Cir. 2022).

[2] Backcountry Against Dumps v. Bureau of Indian Affairs, No. 21-55869, 2022 WL 15523095 (9th Cir. Oct. 27, 2022).

[3] Maverick Gaming LLC v. U.S., No. 3:22-cv-05325-DGE, 2023 WL 2138477 (9th Cir. Feb. 21, 2023).

[4] Courts have observed that sovereign immunity should be treated as more of a defensive shield than an offensive sword. See Regs. of the Univ. of Cal. v. Eli Lilly & Co., 119 F.3d 1559, 1564–65 (Fed. Circ. 1997), cert. denied, 523 U.S. 1089 (1998) ("[T]he Eleventh Amendment applies to suits 'against' a state, not suits by a state"); see also Auto. United Trade Org. v. State, 285 P.3d 52, 60 (Wash. 2012) ("Sovereign immunity is meant to be raised as a shield by the tribe, not wielded as a sword by the State"). Tribes, however, continue to use other litigation strategies to advocate for their interests. For instance, three tribes have sued the U.S. Secretary of the Interior and U.S. Bureau of Land Management over a lithium mine in Nevada's Thacker Pass, alleging, among other things, that the BLM misrepresented the extent of tribal consultation, expanded the scope of previous permit authorizations that harm cultural properties in Thacker Pass, and refused to acknowledge the cultural significance of Thacker Pass. See Complaint for Vacature and Injunctive and Equitable Relief, Reno-Sparks Indian Colony v. Haaland, No. 3:23-cv-00070 (D. Nev. Feb. 16, 2023).

[5] Rule 19(a)(1).

[6] Diné Citizens Against Ruining Our Env't v. Bureau of Indian Affs., 932 F.3d 843, 852 (9th Cir. 2019), cert denied, 141 S. Ct. 161 (2020).

[7] Id.

[8] Id. at 852 (quoting Alto v. Black, 738 F.3d 1111, 1127 (9th Cir. 2013)).

[9] Klamath Irrigation Dist., 48 F.4th at 944 (quoting Diné Citizens, 932 F.3d at 852) (internal quotation marks omitted).

[10] Rule 19(b).

[11] Rule 19(b)(1)-(4).

[12] See Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014) ("[T]ribes are 'domestic nations' that exercise inherent sovereign authority" (internal quotation marks omitted)).

[13] Kiowa Tribe of Okla. v. Mfg. Techs. Inc., 523 U.S. 751, 754 (1998).

[14] Bay Mills, 572 U.S. at 788 (internal quotation marks omitted).

[15] Southwest Center for Biological Diversity v. Babbitt, 150 F.3d 1152 (9th Cir. 1998).

[16] Id. at 1153.

[17] Id.

[18] Id. at 1154.

[19] Diné Citizens Against Ruining Our Environment v. Bureau of Indian Affairs, 932 F.3d at 847.

[20] Id. at 849–50.

[21] Id. at 849–50, 855.

[22] Id. at 855.

[23] Id. (internal citations and quotation marks omitted). The Ninth Circuit also distinguished Diné Citizens from Alto v. Black, "where the tribe had specifically granted BIA final decision-making authority over tribal membership issues, making it more plausible that the government would represent the tribe's interest—or that the government's interest and the tribe's interest had become one and the same." Id.

[24] Klamath Irrigation District v. U.S. Bureau of Reclamation, 48 F.4th at 938.

[25] Id.

[26] Id. at 942.

[27] Id. at 944.

[28] Id. at 944-45.

[29] Id. at 945.

[30] 2022 WL 15523095, at *1.

[31] Id.

[32] Id.

[33] Maverick Gaming LLC v. U.S., 2023 WL 2138477, at *2.

[34] Id. at *1.

[35] Id. at *2.

[36] Id. at *3.

[37] Id. (quoting Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 276

F.3d 1150, 1157 (9th Cir. 2002)).

[38] See Maverick Gaming LLC v. U.S., No. 23-35136 (9th Cir. Feb. 23, 2023).

[39] See Alto, 738 F.3d at 1128; supra n.23.

[40] Diné Citizens, 932 F.3d at 858 (quoting Conner v. Burford, 848 F.2d 1441, 1459 (9th Cir. 1988)).

[41] Id. (quoting Kescoli v. Babbitt, 101 F.3d 1304, 1311 (9th Cir. 1996)).

[42] Id. (quoting Kescoli, 101 F.3d at 1311) (internal quotation marks omitted); see also Nat'l Licorice Co. v. Nat'l Lab. Rels. Bd., 309 U.S. 350 (1940) (holding that absent employees from an NLRB action regarding those employees' contracts did not need to be joined because the case was "narrowly restricted to the protection and enforcement of public rights," specifically the public's interest in "the prevention of unfair labor practices").

[43] Diné Citizens (quoting Kescoli, 101 F.3d at 1311) (internal quotation marks omitted).

[44] 2022 WL 15523095, at *2 (quoting Diné Citizens, 932 F.3d at 860).

[45] Id.

[46] 2023 WL 2138477, at *8; see also Shermoen v. U.S., 982 F.2d 1312, 1319 (9th Cir. 1992) ("Because of the threat to the absent tribes' legal entitlements, and indeed to their sovereignty, posed by the present litigation, application of the public rights exception to the joinder rules would be inappropriate").

[47] See Georgia v. Chattanooga, 264 U.S. 472, 480 (1924) (holding that state sovereign immunity does not extend to "[l]and acquired by one State in another State").

[48] See Upper Skagit Indian Tribe v. Lundgren, 584 U.S. ___, 138 S. Ct. 1649, 1654 (2018).

[49] See Lundgren v. Upper Skagit Indian Tribe, 389 P.3d 569, 576 (Wash. 2017) ("[S]overeign immunity is meant to be raised as a shield by the tribe, not as a sword. ... While we do not minimize the importance of tribal sovereign immunity, allowing the Tribe to employ sovereign immunity in this way runs counter to the equitable purposes underlying compulsory joinder"), vacated and remanded by Upper Skagit, 138 S. Ct. at 1655.

[50] Upper Skagit, 138 S. Ct. at 1654. The Washington Supreme Court had made its decision in part under the Court's previous decision in County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251 (1992). See Lundgren, 389 P.3d at 573. The U.S. Supreme Court, however, determined that County of Yakima did not extend to the principle that tribes lacked sovereign immunity in in rem proceedings and therefore ordered vacatur and remand. Upper Skagit, 138 S. Ct. at 1653.

[51] Other courts have been hesitant to address the question without specific direction from Congress. See, e.g., Self-Cher-Ae Heights Indian Cmty. of Trinidad Rancheria, 274 Cal. Rptr. 3d 255, 263–64 (Cal. App. 2021) (dismissing quiet title action to public easement for coastal access on tribal property based on tribe's sovereign immunity).