



NOTE

Rule 19 and Tribal Representation in Indian Gaming Litigation

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Abstract. Since 1988, when Congress passed the Indian Gaming Regulatory Act (IGRA) into law, many Indian tribes have established gaming as a vital source of economic and political sovereignty. The process envisioned by IGRA, however, has allowed private actors to challenge tribal gaming operations by suing state and federal entities that negotiate the gaming operations with the tribes, rather than the tribes themselves. These third parties have succeeded in legal challenges enjoining tribal gaming without ever making the operating tribe a party to the suit.

Tribes, protected by the well-established doctrine of tribal sovereign immunity, frequently intervene in these suits under Rule 19, arguing that their inability to be joined necessitates dismissal of the case. An emerging disagreement among federal circuit courts underscores the procedural and practical difficulties that courts face in weighing these interests, particularly in assessing whether existing federal or state defendants can adequately represent absent tribal interests such that the case can proceed “in equity and good conscience.” This Note argues that consistent with the deference under Rule 19 case law accorded to other sovereigns, there should be a presumption of dismissal when tribes cannot be joined in discrete gaming challenges due to tribal sovereign immunity. In doing so, this Note examines Indian gaming challenges as a unique form of Administrative Procedure Act litigation and catalogs where federal, state, and tribal gaming interests diverge, underscoring why this divergence poses significant legal and practical threats to tribal sovereignty in a budding area of contemporary Indian law.

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Introduction

There is perhaps no concept so precious to Indian tribes as tribal sovereignty—the ability of tribes to self-govern and preside over internal affairs.¹ Tribal sovereignty predates the founding of the United States. It is grounded in inherent and retained autonomy affirmed by federal common law.² Tribal sovereign immunity—tribes’ inherent immunity from suit absent consent—is a necessary, implied corollary.³ Courts have continued to affirm tribal sovereign immunity, and while Congress can abrogate this immunity, such abrogation requires meeting a “high bar” of demonstrating “unequivocal” congressional intent.⁴

Tribes exercise significant sovereignty through gaming. Tribes can operate gaming facilities because they are not subject to general state laws that prohibit gambling.⁵ Nearly 250 tribal governments participate in Indian gaming, running over 500 gaming operations on Indian land and making Indian gaming a 43.9-billion-dollar industry.⁶ The revenue earned from tribal gaming is critical to tribes’ self-governance; this revenue is often used to fund tribal government programs, stimulate tribal economic development, or directly support tribal members.⁷

In response to rising state and private legal challenges to Indian gaming in the late twentieth century, Congress passed the Indian Gaming Regulatory Act

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1. See 3 DAVID S. RUBENSTEIN, *MODERN CONSTITUTIONAL LAW* § 36:2 (West 2025); FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (1942).
 2. See William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1589-90 (2013); 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, 665, 684 (2002); cf. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998) (“Though the doctrine of tribal immunity is settled law and controls this case, we note that it developed almost by accident.”).
 3. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 803 (2014).
 4. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 143 S. Ct. 1689, 1694 (2023); see, e.g., *Bay Mills Indian Cmty.*, 572 U.S. at 803-04; *Kiowa Tribe of Okla.*, 523 U.S. at 760; cf. *Upper Skagit Indian Tribe v. Lundgren*, 584 U.S. 554, 559-61 (2018) (declining to hold that tribal sovereign immunity applies to specific in rem proceedings and remanding question to Washington Supreme Court).
 5. 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).
 6. Press Release, Nat’l Indian Gaming Comm’n, NIGC Announces Record \$43.9 Billion FY 2024 Gross Gaming Revenues (July 31, 2025), <https://perma.cc/4G63-65HJ>. However, it must be noted that not all tribes participate in the Indian gaming industry, and that even for some that do operate casinos, it is not a lucrative endeavor. See James I. Schaap, *The Growth of the Native American Gaming Industry: What Has the Past Provided, and What Does the Future Hold?*, 34 AM. INDIAN Q. 365, 369, 378 (2010).
 7. See Indian Gaming Regulatory Act, 25 U.S.C. § 2710(b)(2)(B).

(IGRA) in 1988,⁸ enacting the first statutory framework for state involvement in Indian gaming.⁹ Under IGRA, before tribes can engage in the most lucrative forms of gaming, they must reach an agreement with the state, called a “compact,” that sets the rules for everything directly related to tribes’ gaming operations.¹⁰ Since its passage, however, IGRA has led to a flurry of lawsuits from all fronts as tribes seek to enforce requirements of good-faith negotiation upon states,¹¹ states seek to enjoin tribes from certain gaming operations,¹² and private parties seek to invalidate gaming agreements between states and tribes.¹³

Legal attacks that seek to enjoin Indian gaming cut to the core of tribal sovereignty—threatening not just lucrative tribal businesses, but sources of bedrock financial stability and tribal subsistence as well.¹⁴ As Matthew Fletcher, a prominent Indian and tribal law scholar, discerns: “Now that many of the wars over treaty rights have subsided, the gaming compact cases are the most controversial and important to the tribes.”¹⁵

Because nearly all this litigation is playing out in federal courts, an ordinary rule of federal civil procedure, Rule 19, has taken on critical importance. Rule 19 concerns the required joinder of parties, setting forth a multi-step process that looks at the *practical* effects of the suit to determine whether a suit should be dismissed for failure to join an indispensable party.¹⁶ The Rule most directly implicates sovereign parties who are necessary parties to the litigation but cannot be joined due to their sovereign immunity.¹⁷ Still, Rule 19 requires all parties to be joined that are critical to the suit, which includes parties practically

8. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721).

9. See Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 ARIZ. ST. L.J. 99, 99, 112 (2010). IGRA is codified at 25 U.S.C. §§ 2701-2721.

10. 25 U.S.C. § 2710(d)(3).

11. See *Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016, 1028-29 (11th Cir. 1994) (finding that IGRA does not abrogate state sovereign immunity to allow tribes to enforce the statute’s good-faith negotiation clause), *aff’d*, 517 U.S. 44 (1996).

12. See, e.g., *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 785 (2014).

13. See, e.g., *Maverick Gaming LLC v. United States*, 123 F.4th 960, 965 (9th Cir. 2024), *cert. denied*, No. 24-1161, 2025 WL 2823742 (U.S. Oct. 6, 2025) (mem.). *Maverick Gaming* is one of the most recent examples of this type of challenge and is a central focus of this Note.

14. See *Bay Mills Indian Cmty.*, 572 U.S. at 810 (Sotomayor, J., concurring) (“[T]ribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes’ core governmental functions.”).

15. Matthew L.M. Fletcher, *The Comparative Rights of Indispensable Sovereigns*, 40 GONZ. L. REV. 1, 13 (2004-2005).

16. See FED. R. CIV. P. 19. Though Rule 19 discusses required joinder of parties, the rule functionally concerns “indispensable” parties, although that specific language was omitted from the rule in a 2007 amendment. See *infra* note 60 and accompanying text.

17. See Ross D. Andre, *Compulsory [Mis]joinder: The Untenable Intersection of Sovereign Immunity and Federal Rule of Civil Procedure 19*, 60 EMORY L.J. 1157, 1178-79 (2011).

affected by the potential outcome of the suit.¹⁸ If joinder is infeasible due to, for example, a party's immunity, a court must weigh certain factors to "determine whether, in equity and good conscience," the suit should nonetheless proceed or be dismissed.¹⁹ As I argue in this Note, tribes are undoubtedly indispensable parties to gaming suits, which form a distinct category of Administrative Procedure Act (APA) litigation seeking to enjoin tribal gaming operations and therefore threaten core sources of tribal vitality. But because tribes enjoy sovereign immunity shielding them from suit in federal court, private parties have cleverly found ways to file lawsuits against nontribal parties that nonetheless seek to invalidate gaming agreements between states and tribes.²⁰

Tribes have routinely argued for Rule 19 dismissals in these gaming cases, arguing that judgment rendered in the absence of the tribe will prejudice their interests and could serve as an end run around their sovereign immunity.²¹ However, courts vary in their approach to these cases, particularly where there exists no other forum for plaintiffs to bring their claims.²² Though precedent favors dismissal under Rule 19 when a sovereign cannot be joined due to its

18. See FED. R. CIV. P. 19(a).

19. *Id.* r. 19(b).

20. Because IGRA requires the Secretary of the Interior to approve all gaming compacts prior to taking effect, *see* Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(3)(B), private plaintiffs will, for example, sue the Secretary in her official capacity to challenge the approval of a compact, seeking the remedy of setting aside her action under the APA, *see, e.g.,* *Maverick Gaming LLC v. United States*, 658 F. Supp. 3d 966, 969 (W.D. Wash. 2023), *aff'd*, 123 F.4th 960 (9th Cir. 2024), *cert. denied*, No. 24-1161, 2025 WL 2823742 (U.S. Oct. 6, 2025) (mem.); *W. Flagler Assocs. v. Haaland*, 573 F. Supp. 3d 260, 263, 265 (D.D.C. 2021), *aff'd in part, vacated in part*, 71 F.4th 1059 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 2671 (2024) (mem.). Private plaintiffs will also sue a state governor to enjoin her from entering into or renewing gaming compacts with any tribe. *See, e.g.,* *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1025, 1028 (D. Ariz. 2001), *vacated*, 305 F.3d 1015 (9th Cir. 2002).

21. *See, e.g.,* *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934, 938, 942 (9th Cir. 2022); *Diné Citizens Against Ruining Our Env't v. Bureau of Indian Affs.*, 932 F.3d 843, 847-48 (9th Cir. 2019); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325-26 (9th Cir. 1975); *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 768 (D.C. Cir. 1986); *Pembina Treaty Comm. v. Lujan*, 980 F.2d 543, 544 (8th Cir. 1992).

22. *See, e.g.,* *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) (disagreeing with the district court's view that the tribe should have brought its action in another case, since it was unclear if such an action could have been brought in that suit, but holding that the court did not abuse its discretion, as sovereign immunity may leave a party without an available forum); *Comstock Oil & Gas, Inc. v. Alabama and Coushatta Indian Tribes of Tex.*, 78 F. Supp. 2d 589, 601-02 (E.D. Tex. 1999) (denying tribe's Rule 19 motion to dismiss in large part due to a lack of an available alternate forum, which left plaintiffs "without remedy if [the] action were dismissed"), *rev'd in part on other grounds, aff'd in part on other grounds, and remanded*, 261 F.3d 567 (5th Cir. 2001); *Dewberry v. Kulonski*, 406 F. Supp. 2d 1136, 1146-47 (D. Or. 2005) (finding the tribal defendant to be an indispensable party because, even though an adequate remedy in an alternative forum was unlikely, that is the necessary consequence of sovereign immunity).

immunity,²³ courts have allowed suit where an already-named party can adequately represent the tribe's interests.²⁴

An emerging disagreement among federal circuit courts showcases judicial divergence on whether and when these cases can proceed absent relevant tribal parties. Although Rule 19 analysis is done by courts on a case-by-case basis, the Ninth and D.C. Circuits have disagreed over whether government entities can sufficiently support tribal interests in gaming suits seeking to enjoin tribal gaming operations altogether.

In 2022, a private company, Maverick Gaming,²⁵ brought suit in the U.S. District Court for the Western District of Washington against the Department of the Interior and its Secretary, Deb Haaland, and Assistant Secretary, Bryan Newland; the Governor and the Attorney General of Washington; the Chair and other officials of the Washington State Gaming Commission; and the United States.²⁶ Maverick Gaming argued that the tribal-state compact authorizing sports betting violated IGRA.²⁷ Maverick Gaming sought to void

23. See *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867, 872-73 (2008) (“[W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.”).

24. See, e.g., *Lebeau v. United States*, 115 F. Supp. 2d 1172, 1175, 1179-80 (D.S.D. 2000) (holding that tribal interests were adequately represented by the United States and that dismissal would deprive the plaintiffs of “an adequate remedy if this action is dismissed”).

25. First Amended Complaint at 2, 42, *Maverick Gaming*, 658 F. Supp. 3d 966 (No. 22-cv-05325), ECF No. 66. While Maverick Gaming awaited a decision on its petition for certiorari, it filed a Rule 35 letter notifying the Supreme Court that it had changed its name to “RunItOneTime Holdco, Inc.” Letter from Lochlan F. Shelfer, Couns., Gibson Dunn, to Scott Harris, Clerk of the Ct., Sup. Ct. of the U.S. (Sept. 10, 2025), <https://perma.cc/9PZA-VS9G>. That entity subsequently filed for bankruptcy. Press Release, *Maverick Gaming, Maverick Gaming Initiates Voluntary Chapter 11 Process with the Support of Its Key Secured Lenders Under a Transaction Support Agreement* (July 14, 2025), <https://perma.cc/7RDT-ZMPX>. For consistency, despite this name change, I refer to this entity as Maverick Gaming throughout this Note.

26. First Amended Complaint, *supra* note 25, at 4-8. It is worth noting that Maverick Gaming—and the private plaintiffs who often bring these suits—do not sue tribal officers under *Ex parte Young*, but instead bring suit under the APA and constitutional provisions to invalidate an existing compact. See, e.g., *id.* at 1, 4; Complaint at 1, *W. Flagler Assocs. v. Haaland*, 573 F. Supp. 3d 260 (D.D.C. 2021) (Nos. 21-cv-2192 & 21-cv-2513), 2021 WL 3666502, ECF No. 1. But if a court invalidated a compact and the tribe continued its gaming operations, then the tribe and, by extension, its officers, would be acting outside the scope of their authority, and the officer would be subject to suit under the *Ex parte Young* doctrine. See *Fletcher, supra* note 15, at 105-06.

27. See First Amended Complaint, *supra* note 25, at 3. Many gaming suits that attack tribal gaming operations also assert a Fourteenth Amendment violation, arguing that tribal gaming licenses violate the Equal Protection Clause by discriminating on the basis of race. See, e.g., Brief of Appellants at 41, 55, *Artichoke Joe’s Cal. Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003) (No. 02-16508), 2002 WL 32298228; *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1074-77 (D. Ariz. 2001) (rejecting the plaintiffs’ claim
footnote continued on next page

the compact agreement, vacate Secretary Haaland's approval, and enjoin the governor from entering further compacts with the tribe.²⁸ The Shoalwater Bay Indian Tribe timely intervened in the suit, asserting itself as a necessary party.²⁹ The district court held that the protected tribal interests implicated in the case favored dismissal under Rule 19, allowing Washington tribes to exclusively offer sports betting in Washington under a valid agreement with the state.³⁰ In December 2024, the Ninth Circuit affirmed the Western District of Washington's dismissal, basing its decision on the Tribe's "legally protected interest" in its gaming operation.³¹

The D.C. Circuit in 2023 reached the opposite result in a case that ultimately upheld the Seminole Tribe's exclusive right to operate online sports betting in Florida, allowing the case to proceed despite Rule 19 concerns.³² In this case, a private gaming company, West Flagler Associates, sued the Department of the Interior and Secretary Haaland, alleging that the tribal-state gaming compact that she approved allowed betting outside of tribal lands, violating both IGRA and the Constitution.³³ West Flagler Associates asked the court to vacate Secretary Haaland's approval of the compact.³⁴ The lower court found that both the Department of the Interior and the State of Florida adequately represented tribal interests.³⁵ The D.C. Circuit affirmed the ruling in a brief opinion.³⁶

Rising disagreement among lower courts over when absent tribal interests compel dismissal of a tribal gaming suit under Rule 19 and increasing attention on the scope of Indian gaming has led to two significant petitions for certiorari,

that giving tribes exclusive rights to conduct Class III gaming violates the Equal Protection Clause), *vacated on other grounds*, 305 F.3d 1015 (9th Cir. 2002). For a definition of Class III gaming, see note 181 and accompanying text below. However, such equal protection claims are not the focus of this Note.

28. See First Amended Complaint, *supra* note 25, at 4, 37.

29. *Maverick Gaming*, 658 F. Supp. at 969-70.

30. *Id.* at 975-76.

31. *Maverick Gaming LLC v. United States*, 123 F.4th 960, 972, 983 (9th Cir. 2024), *cert. denied*, No. 24-1161, 2025 WL 2823742 (U.S. Oct. 6, 2025) (mem.).

32. *W. Flagler Assocs. v. Haaland*, 71 F.4th 1059, 1070-72 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 2671 (2024) (mem.).

33. *Id.* at 1061.

34. Complaint, *supra* note 26, at 42.

35. *W. Flagler Assocs. v. Haaland*, 573 F. Supp. 3d 260, 265-66, 270-72 (D.D.C. 2021) (finding that the Department of the Interior could adequately represent the tribes due to a lack of "evidence of 'divergent interests'" (quoting *Friends of Amador Cnty. v. Salazar*, 554 F. App'x 562, 564 (9th Cir. 2014))), *aff'd in part, vacated in part*, 71 F.4th 1059 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 2671 (2024) (mem.).

36. *W. Flagler*, 71 F.4th at 1070-71.

which were both denied by the Supreme Court in the past two terms.³⁷ I argue that private plaintiffs' end run around tribal sovereign immunity is inconsistent with protections afforded to the other sovereigns and relies on a fiction that other sovereigns—states or the federal government—can adequately represent tribal interests. Courts confronted with these types of suits should scrutinize these representational arguments in adhering to Rule 19 precedent.

This Note explores the intersection of tribal sovereignty and Rule 19 in the gaming context, using the diverging outcomes in *Maverick Gaming LLC v. United States* and *West Flagler Associates v. Haaland* to examine the unique issue of tribal representation. Under Rule 19(b), it is imperative that courts understand and give adequate weight to tribal interests in gaming compact challenges when relevant tribes cannot be joined and other parties cannot adequately represent the interests of those tribes. And though Rule 19 is applied on a case-by-case basis, this Note argues that there should be a strong presumption in favor of dismissal in this context. Gaming suits without tribal defendants should not be allowed to proceed in tribes' absence, and courts should be particularly skeptical of suggestions that other sovereigns—either a state or the federal government—can adequately represent tribal interests. Despite the unique relationship between the federal government and Indian tribes, there is ample evidence of conflict between tribal, federal, and state interests.³⁸ Courts should therefore carefully scrutinize claims that other sovereigns can adequately represent tribal interests, just as they would scrutinize other legal proxy relationships. The stakes in Indian gaming cases are incredibly high, threatening the heart of tribal sovereignty, tribal funding, and self-governance.

This Note proceeds in five Parts. Part I details the history and current disposition toward Rule 19 dismissals, providing support for a presumption in favor of dismissal of gaming suits involving tribal sovereigns. The application of Rule 19 has grown into a presumption of dismissal when other sovereigns' interests are involved, though courts have steered away from applying this presumption in the tribal gaming context.³⁹ Part II provides essential background on tribal sovereignty, the federal trust relationship with tribes, and

37. For a discussion of the emerging circuit split, see Part III below. On June 17, 2024, the Supreme Court denied certiorari in *West Flagler*, with Justice Kavanaugh dissenting and Justice Jackson abstaining. *W. Flagler*, 144 S. Ct. at 2671. *Maverick Gaming* filed a petition for a writ of certiorari on May 9, 2025, *Petition for Writ of Certiorari* at 35, *RunItOneTime LLC v. United States*, No. 24-1161, 2025 WL 2823742 (U.S. Oct. 6, 2025) (mem.), which was denied on October 6, 2025, *RunItOneTime*, 2025 WL 2823742, at *1 (mem.). It is also worth noting that tribal gaming revenue increased from \$40.9 billion to \$41.9 billion from FY 2022 to FY 2023, making the tribal gaming industry more lucrative than ever before, but also opening the door to scrutiny and challenges from outside competitors. See Mavis Harris, *NIGC Announces Record \$41.9 Billion FY 2023 GGR*, NAT'L INDIAN GAMING COMM'N (June 27, 2024), <https://perma.cc/X8KM-VASK>.

38. See *infra* Part II.B; see, e.g., *United States v. Kagama*, 118 U.S. 375, 384 (1886).

39. See *infra* Part I.C-.D.

Indian gaming, showing why tribal sovereign immunity is entitled to the same comity afforded to other sovereigns. Part III examines the emerging conflict among the circuits on Rule 19 dismissals in Indian gaming litigation, focusing on how courts arrive at differing results by prioritizing adequate representation of absent interests. Part IV details why federal and state parties are inadequate proxies and analyzes how Rule 19 should operate in the Indian gaming context—namely, allowing tribes to maintain sovereignty. Finally, Part V compares this Note’s argument to the strong presumption of dismissal when state and foreign entities are involved and to the doctrinal outlook on proxy representation, arguing that courts’ strict approaches in these areas should also inform courts’ Rule 19 analyses here.

I. Rule 19 and Required Joinder

A. Rule 19’s Purpose and Text

Though it is often the plaintiff who has autonomy to shape the scope of her lawsuit, Rule 19 allows a specific party to ask the court to join the matter as an essential party when that party has been left out of the action.⁴⁰ At its core, then, Rule 19 is concerned with the ultimate fairness of the action.⁴¹ If a party’s presence is required for “fair and complete resolution of the dispute,” proceeding in that party’s absence raises irreconcilable prejudice and due process issues.⁴² When such a party cannot be joined, however, Rule 19 guides courts through determining whether to nonetheless proceed with the suit “in equity and good conscience” or dismiss the case altogether.⁴³

Rule 19 is commonly employed in contexts like real property challenges, insurance cases, contractual disagreements, and corporate disputes—all areas with complex relations between joined and unjoined parties.⁴⁴ In contract cases

40. *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 131 (2d Cir. 2013) (“Rule 19 recognizes exceptional circumstances in which the plaintiff’s choice of parties or forum must give way because of an absent party’s interest in the outcome of the action.”).

41. Note, *Federal Rules of Civil Procedure—Rule 19 and Indispensable Parties*, 65 MICH. L. REV. 968, 972-73 (1967) (“Moreover, the judge-made doctrines of ‘indispensability’ are largely self-imposed by courts to effectuate fundamental ideas of fairness when settling disputes among litigants.”).

42. *HS Res., Inc. v. Wingate*, 327 F.3d 432, 438 (5th Cir. 2003); *see also Nanko Shipping, USA v. Alcoa, Inc.*, 850 F.3d 461, 464 (D.C. Cir. 2017) (“Rule 19 promotes fair treatment of nonparties in certain circumstances where their interests, and particularly their due process rights, are at risk from litigation between others.”).

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

44. *See generally* Jacqueline A. O’Keefe, Note, *Exploring the Indispensable Party: A Survey of Common Contexts for Rule 19 Claims*, 50 ENV’T L. 855 (2020) (detailing the contexts in which Rule 19 sovereign immunity claims commonly arise).

specifically, courts have routinely held that all parties to a contract are indispensable parties.⁴⁵

Rule 19 appears frequently in the sovereign immunity context, wherein sovereigns will intervene to dismiss a suit when they cannot be joined, requiring courts to ultimately weigh a plaintiff's entitlement to adjudication of her injuries in court against concerns of prejudice to the sovereign.⁴⁶ In these cases, courts have often found that respecting the sovereignty of indispensable parties—the “perfect equality and absolute independence of sovereigns”—outweighs the rules' general aim of resolving disputes on their merits.⁴⁷ Some circuit courts have extended this deferential approach to tribal sovereigns, refusing to proceed in the tribe's absence due to the significant impacts that adjudication could have on sovereign capabilities.⁴⁸

B. Procedural Application of Rule 19

An overview of the general administration of Rule 19 provides critical context for how courts make Rule 19 determinations regarding tribal parties. As applied, Rule 19 joinder analysis requires three steps.⁴⁹ Courts must first assess whether the absent party is a required party that should be joined under Rule 19(a).⁵⁰ Second, the court must determine whether that party can be joined. Third, if the court determines the party cannot be joined, Rule 19(b) provides factors for courts to consider in assessing whether to dismiss the suit due to the required party's absence.⁵¹

45. 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1613, at 181 (3d ed. 2001).

46. See O'Keefe, *supra* note 44, at 861-64; FED. R. CIV. P. 19(b).

47. See, e.g., Republic of Philippines v. Pimentel, 553 U.S. 851, 865 (2008) (quoting Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116, 137 (1812)); Rules: Federal Rules of Civil Procedure, FED. JUD. CTR., <https://perma.cc/H7K2-9QD4> (archived Sept. 25, 2025) (“The drafters of the rules had as one of their primary aims the simplification of pleading so that cases would be resolved on their merits rather than on technicalities.”).

48. See, e.g., Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1157 (9th Cir. 2002) (“[A] judgment rendered in the Nation's absence will impair its sovereign capacity to negotiate contracts and, in general, to govern the Navajo reservation.”); Wichita & Affiliated Tribes of Okla. v. Hodel, 788 F.2d 765, 777 (D.C. Cir. 1986) (“[T]he dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.”); United States *ex rel.* Hall v. Tribal Dev. Corp., 100 F.3d 476, 478 (7th Cir. 1996) (affirming the dismissal of a vendor suit where the Menominee Indian Tribe of Wisconsin was an indispensable party); Davis *ex rel.* Davis v. United States, 343 F.3d 1282, 1288-89 (10th Cir. 2003) (affirming the dismissal of a judgment-fund claim where the Seminole Nation of Oklahoma was an indispensable party).

49. 1 STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY, RULE 19 (West 2024).

50. See FED. R. CIV. P. 19(a).

51. *Id.* r. 19(b).

Rule 19(a) analysis is based on the character of the required party. Rule 19(a)(1)(A) assesses whether the court can grant “meaningful” relief between the existing parties, without looking to the absent party.⁵² If the absent party is essential to accord adequate relief to the plaintiff, such party may be required. Rule 19(a)(1)(B)(i) looks at instances where the absent party claims an interest relating to the action and, as a *practical* matter, that interest might be impaired by the holding of the case. Thus, even though the unjoined party is not bound by the judgment, Rule 19 recognizes that practical effects arising from the judgment may still significantly impact the party such that it is required.⁵³ Rule 19(a)(1)(B)(ii) looks at whether, in the absence of a party that claims an interest relating to the action, the existing parties would be subject to “substantial risk” of “inconsistent obligations.”⁵⁴ Courts typically require concrete—rather than hypothetical—risk of inconsistent obligations, most commonly in the form of conflicting court orders.⁵⁵ Tribes often make arguments that they can satisfy the Rule 19(a) inquiry under a combination of Rule 19(a)(1)(A) and Rule 19(a)(1)(B)(i).⁵⁶

However, even if a party is found to be a required party under Rule 19(a), and the court finds that the party cannot be joined, dismissal is only necessary if the absent party satisfies the Rule 19(b) factors as an “indispensable” party.⁵⁷ Rule 19(b) offers four balancing criteria for courts to consider in making this determination.⁵⁸ Rule 19(b) factors have been understood to represent four unique interests: the plaintiff’s “interest in having a forum”; the defendant’s “wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another”; “the interest of the outsider”; and “the interest of the courts and the public in complete, consistent, and efficient settlement of controversies.”⁵⁹ The restyled Rule 19, after its last amendment in 2007, omitted the term “indispensable party,” previously used after Rule 19(b) analysis to refer to a party that could not be joined and so required dismissal of

52. *Sch. Dist. of Pontiac v. Sec’y of the U.S. Dep’t of Educ.*, 584 F.3d 253, 265 (6th Cir. 2009) (en banc).

53. *See Note, supra* note 41, at 968.

54. FED. R. CIV. P. 19(a)(1)(B)(ii).

55. *See, e.g., EEOC v. Peabody W. Coal Co.*, 610 F.3d 1070, 1082 (9th Cir. 2010) (requiring the defendant to choose between compliance with a court order or an Interior order).

56. *See, e.g., Limited Intervenor Shoalwater Bay Tribe’s Motion to Dismiss* at 13-15, *Maverick Gaming LLC v. United States*, 658 F. Supp. 3d 966 (W.D. Wash. 2023) (No. 22-cv-05325), 2022 WL 22228559, ECF No. 85; *Seminole Tribe of Florida’s Reply Memorandum to Plaintiffs’ Consolidated Memorandum in Opposition to Tribe’s Motion for Limited Intervention and Motion to Dismiss* at 16-17, *W. Flagler Assocs. v. Haaland*, 573 F. Supp. 3d 260 (D.D.C. 2021) (Nos. 21-cv-2192 & 21-cv-2513), 2021 WL 8344052, ECF No. 24.

57. FED. R. CIV. P. 19 advisory committee’s note to 1966 amendment.

58. *Id.* r. 19(b).

59. *Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 109-11 (1968).

the action altogether.⁶⁰ Courts, however, still use this term regularly,⁶¹ and the rule's amendment was more to remove redundancy and streamline the rule's application than to change the inquiry from the indispensability of the party.⁶² Rule 19(b) also requires courts to consider shaping relief to avoid prejudice in allowing the case to proceed, often in the form of monetary damages rather than injunctive relief.⁶³

While the issue of adequate representation is not explicitly mentioned in the rule, it looms large over courts' analysis of required joinder. Circuit courts have various standards for adequate representation in the Rule 19 context. Some courts analyze whether an existing party can adequately represent the absent party's interests at the Rule 19(a) stage,⁶⁴ while other courts wait until Rule 19(b) analysis to consider adequate representation.⁶⁵ The Ninth Circuit has one of the most detailed and heightened tests for adequate representation of absent party interests: "whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments; whether the party is capable of and willing to make such arguments; and whether the absent party would offer any necessary element to the proceedings that the present parties would neglect."⁶⁶ Further, in the tribal context, the Ninth Circuit examines where the interests of the existing and intervening defendants "might [later] diverge," or where no present party shares the absent tribe's "sovereign interest in ensuring that [a tribal business] continue[s] to operate and provide profits to the [tribe]."⁶⁷ The D.C. Circuit has also set a stringent standard, requiring that absent sovereign interests be "in complete alignment" with other defendants in a case in order to be protected.⁶⁸ Similarly, the Tenth Circuit requires that the government's and tribe's interests be "virtually identical,"⁶⁹ while the Fourth Circuit cautions courts to "hesitate to conclude . . . that a litigant can serve as a

60. FED. R. CIV. P. 19 advisory committee's note to 2007 amendment.

61. *See, e.g.*, PHH Mortg. Corp. v. Old Republic Nat'l Title Ins., 80 F.4th 555, 561 (5th Cir. 2023); Lone Star Silicon Innovations LLC v. Nanya Tech. Corp., 925 F.3d 1225, 1238 (Fed. Cir. 2019); Cedar Rapids Bank & Tr. Co. v. Mako One Corp., 919 F.3d 529, 534-35 (8th Cir. 2019) (citing *Helzberg's Diamond Shops, Inc. v. Valley W. Des Moines Shopping Ctr., Inc.*, 564 F.2d 816, 820 (8th Cir. 1977)).

62. *See Andre, supra* note 17, at 1168 nn.50-51.

63. *See Doe v. Exxon Mobil Corp.*, 573 F. Supp. 2d 16, 33-34 (D.D.C. 2008).

64. *See, e.g.*, Klamath Irrigation Dist. v. U.S. Bureau of Reclamation, 48 F.4th 934, 944 (9th Cir. 2022); *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992) (finding that adequate representation exists when the present party will make the same arguments as the absent party).

65. *See, e.g.*, *Glancy v. Taubman Ctrs., Inc.*, 373 F.3d 656, 669 (6th Cir. 2004).

66. *Diné Citizens Against Ruining Our Env't v. Bureau of Indian Affs.*, 932 F.3d 843, 852 (9th Cir. 2019) (quoting *Alto v. Black*, 738 F.3d 1111, 1127-28 (9th Cir. 2013)).

67. *Id.* at 855.

68. *De Csepel v. Republic of Hungary*, 27 F.4th 736, 752 (D.C. Cir. 2022).

69. *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001).

proxy for an absent party unless the interests of the two are identical.”⁷⁰ The First Circuit cautions that “without a perfect identify [sic] of interests, a court must be very cautious in concluding that a litigant will serve as a proxy for an absent party.”⁷¹ Regardless of the stage at which the rule is analyzed, the high bar with which courts approach adequate representation shows why existing parties in the Indian gaming context cannot overcome this presumption in favor of dismissal.

C. Rule 19 and Foreign and State Sovereign Immunity

Current Rule 19 precedent broadly allows courts to dismiss suits when they implicate foreign and state entities shielded by immunity.⁷² This is inconsistent with courts allowing other entities to represent required tribal parties’ interests to avoid dismissal of a suit.⁷³

Tribes and their immunity are, of course, distinct from both foreign entities and state entities. The Supreme Court has deemed tribes to be “domestic dependent nations”—entities unlike states but also unlike foreign nations.⁷⁴ The Supreme Court has also referred to tribes as “quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State Governments.”⁷⁵ This complicates comparisons of tribes’ unique sovereignty with that of other sovereigns.

Tribal immunity is rooted in federal common law, with congressional authority to alter this immunity only through a clear statement.⁷⁶ This is similar to foreign sovereign immunity, which began as a judicial doctrine and was later

70. *Nat’l Union Fire Ins. of Pittsburgh v. Rite Aid of S.C., Inc.*, 210 F.3d 246, 251 (4th Cir. 2000).

71. *Tell v. Trs. of Dartmouth Coll.*, 145 F.3d 417, 419 (1st Cir. 1998); *see also Pujol v. Shearson/Am. Express, Inc.*, 877 F.2d 132, 135 (1st Cir. 1989) (finding that the named defendant and subsidiary are “virtually identical” in that the subsidiary is “a mere ‘corporate shell’ existing separately from [the named defendant] only on paper”).

72. *See, e.g., Republic of Philippines v. Pimentel*, 553 U.S. 851, 865 (2008) (foreign state); *Gensetix, Inc. v. Bd. of Regents of the Univ. of Tex. Sys.*, 966 F.3d 1316, 1324-25 (Fed. Cir. 2020) (state university); *Fla. Wildlife Fed’n Inc. v. U.S. Army Corps of Eng’rs*, 859 F.3d 1306, 1318, 1320 (11th Cir. 2017) (state water district); *Two Shields v. Wilkinson*, 790 F.3d 791, 798-99 (8th Cir. 2015) (United States).

73. *See, e.g., W. Flagler Assocs. v. Haaland*, 71 F.4th 1059, 1071-72 (D.C. Cir. 2023) (allowing a suit to proceed due to superficial alignment of interests between a tribe and the federal government), *cert. denied*, 144 S. Ct. 2671 (2024) (mem.).

74. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831); *see Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (“The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . .”).

75. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978).

76. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 803-04 (2014).

legislatively adopted through the Foreign Sovereign Immunities Act.⁷⁷ Foreign entities are broadly shielded by immunity, but this immunity stops short of covering certain commercial activities; conduct that is commercial in nature, even if initiated by a sovereign foreign state, can be subject to suit in the United States.⁷⁸ In contrast, tribal entities are still entitled to immunity if they operate as a commercial “arm of the tribe.”⁷⁹ While state sovereign immunity is in some ways broader than tribal immunity,⁸⁰ and certainly has stronger constitutional footing, state and tribal immunity function similarly to protect the entities, and those entities’ employees operating in official capacities, from suit.⁸¹

Despite differences in how these immunities have evolved, some of the fundamental underpinnings of sovereign immunity—such as allowing entities to adjudicate cases in their own courts, affording dignity and comity to independent bodies, and preventing depletion of a sovereign’s financial assets—apply broadly to foreign, state, and tribal sovereigns.⁸² Put differently, despite the Court’s recent apprehensions about the scope of tribal sovereign immunity,⁸³ the doctrinal and policy justifications that undergird all three types

77. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998); *Verlinden B. V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486, 488 (1983); *see also* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1604-1605, § 1607 (codifying the doctrine of foreign sovereign immunity). Foreign sovereign immunity, however, also has robust roots in international trade and customary laws. Seielstad, *supra* note 2, at 677-78.

78. 28 U.S.C. § 1605(a)(2); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992).

79. *See* *Cook v. Avi Casino Enters.*, 548 F.3d 718, 725 (9th Cir. 2008); *Breakthrough Mgmt. Grp. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1181 (10th Cir. 2010); *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 177 (4th Cir. 2019); *Mestek v. Lac Courte Oreilles Cmty. Health Ctr.*, 72 F.4th 255, 259 (7th Cir. 2023).

80. For example, Congress may only abrogate state sovereign immunity with authority derived under the Fourteenth Amendment. *See* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996). Similar constraints on Congress do not exist for abrogation of tribal immunity, though Congress must do so by indicating clear intent. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794-97 (2014).

81. *See, e.g.,* *Lewis v. Clarke*, 581 U.S. 155, 158, 167-68 (2017) (holding that tribal sovereign immunity does not bar suits against tribal employees where the tribe itself is not the “real party in interest”). This is similar to the official capacity versus individual capacity distinction courts have demarcated when deciding whether state sovereign immunity applies. *See* *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

82. *See, e.g.,* *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760, 765 (2002) (“The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”); Katherine Florey, *Sovereign Immunity’s Penumbras: Common Law “Accident,” and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 784-97 (2008).

83. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998) (“There are reasons to doubt the wisdom of perpetuating the doctrine [of tribal sovereign immunity].... In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance.”); *see also* *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 815-817 (2014) (Thomas, J., dissenting); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 388-99 (2023).

of immunity share similarities. I argue that these similarities warrant comparison of courts' Rule 19 analyses across these three types of immunity.

Consider *Republic of Philippines v. Pimentel*,⁸⁴ which creates a strong presumption in favor of Rule 19 dismissal when a foreign sovereign is an indispensable party to the suit.⁸⁵ There, both a class of human rights victims and the Republic of the Philippines laid claim to relevant assets that Merrill Lynch possessed.⁸⁶ The Republic asserted immunity and filed a Rule 19 motion, arguing that the class action suit could not proceed without it.⁸⁷ The United States District Court for the District of Hawai'i and the Ninth Circuit nonetheless awarded the assets to the class, finding that "[the Republic's] claim had so little likelihood of success on the merits that the interpleader action could proceed without them."⁸⁸ The Supreme Court returned a sweeping rebuke of the Ninth Circuit's reasoning on the Rule 19 motion, finding that the comity and dignity interests of sovereign immunity compelled dismissal of the case.⁸⁹ Specifically, the Court reasoned that the "privilege is much diminished if an important and consequential ruling affecting the sovereign's substantial interest is determined, or at least assumed, by a federal court in the sovereign's absence and over its objection."⁹⁰ This case, which has been cited in over 400 cases since this ruling, has created a strong presumption—nearly a categorical rule—that foreign sovereigns are indispensable and thus warrant dismissal.⁹¹

State sovereign immunity cases similarly compel dismissal when a state party asserts immunity. States' sovereign immunity interests were strongly affirmed in *Seminole Tribe of Florida v. Florida*, wherein the Court rejected congressional abrogation of Eleventh Amendment immunity via the Commerce Clause and held that the Eleventh Amendment "serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'"⁹² And while Congress can validly waive state immunity, it must be "unmistakably clear"⁹³ and do so through an enumerated

84. 553 U.S. 851 (2008).

85. *Id.* at 871-72.

86. *Id.* at 857-58.

87. *Id.* at 855.

88. *Id.* at 860.

89. *Id.* at 866.

90. *Id.* at 868-69.

91. See Citing References for *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008), 436 results (Jan. 15, 2026), WESTLAW (on file with the *Stanford Law Review*) (filtered by "Cases").

92. 517 U.S. 44, 58 (1996) (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

93. *Id.* at 56.

power adopted after the Eleventh Amendment's enactment.⁹⁴ *Seminole Tribe* further clarifies that cases involving state sovereign interests, even if those cases are not directly *against* a state or state entity, still benefit from Eleventh Amendment immunity and the subsequent Rule 19 presumption in favor of dismissal.⁹⁵ States have relied on the strong *Seminole Tribe* precedent to successfully dismiss cases via Rule 19 challenges.⁹⁶ States have also used *Pimentel* to successfully argue that whenever there is "potential for injury to the interests" of the absent sovereign, the suit must be dismissed.⁹⁷ Indeed, in cases where states have used *Pimentel* to argue for dismissal, courts have applied *Pimentel* to all prongs of the Rule 19 analysis, indicating that the sweeping protections *Pimentel* provides for foreign sovereigns are functionally extended to state sovereigns, too.⁹⁸

The serious and consistent weight afforded to sovereign immunity in the state and foreign context makes the patchy consideration of tribes' immunity in these Rule 19 cases particularly strange. Despite the wide application of *Pimentel* to Rule 19 analyses beyond the facts of that case, the district court in *West Flagler* made efforts to distinguish the Seminole Tribe from the party in *Pimentel*.⁹⁹ The circuit court only mentioned *Pimentel* in passing without applying the case to its review of the lower court's Rule 19 determination.¹⁰⁰ Courts have not cogently explained why *Pimentel* and similar sovereign immunity precedents are not extended to the tribal immunity context. But based on the common underpinnings of all three types of immunity, on top of the unique self-determination concerns of tribes in their immunity, the weight afforded to tribal immunity in Rule 19 assessments must be reconciled with the overwhelming presumption of dismissal when states or foreign entities are involved.

94. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

95. *Seminole Tribe*, 517 U.S. at 54-58.

96. See, e.g., *Webb v. City of Tempe*, No. CV-16-03136, 2017 WL 1233827, at *3-4 (D. Ariz. Apr. 4, 2017), *aff'd*, 703 F. App'x 539 (9th Cir. 2017); *Swartz v. Beach*, 229 F. Supp. 2d 1239, 1251-52 (D. Wyo. 2002); *Horizon Bank & Tr. Co. v. Flaherty*, 309 F. Supp. 2d 178, 181-85 (D. Mass. 2004); *In re Kish*, 212 B.R. 808, 818 (D.N.J. 1997).

97. See, e.g., *Gensetix, Inc. v. Bd. of Regents of the Univ. of Tex. Sys.*, 966 F.3d 1316, 1321 (Fed. Cir. 2020); *Ali v. Carnegie Inst. of Wash.*, 306 F.R.D. 20, 25, 28 (D.D.C. 2014), *aff'd*, 684 F. App'x 985 (Fed. Cir. 2017) (per curiam); *Diaz v. Glen Plaid, LLC*, No. 13-cv-853, 2013 WL 5603944, at *8-9 (N.D. Ala. Oct. 11, 2013).

98. See, e.g., *Gensetix, Inc.*, 966 F.3d at 1321, 1326-27; *Ali*, 306 F.R.D. at 25, 28-29, 29 n.6; *Diaz*, 2013 WL 5603944, at *7-9.

99. *W. Flagler Assocs. v. Haaland*, 573 F. Supp. 3d 260, 270 (D.D.C. 2021), *aff'd in part, vacated in part*, 71 F.4th 1059 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 2671 (2024) (mem.).

100. *W. Flagler*, 71 F.4th at 1071.

D. Critiques of Rule 19

There is controversy surrounding the strong presumption in favor of dismissal under Rule 19(b) when the indispensable party is protected by sovereign immunity.¹⁰¹ The presumption has garnered criticism over the tenability of Rule 19, and specifically whether expansion of sovereign immunity doctrines over the past few decades distorts the intent underlying Rule 19—to consolidate litigation through absent party joinder.¹⁰² Most significantly, these critiques emphasize Rule 19(b)(4), which focuses on whether another adequate forum is available to the plaintiff. Critics argue that Rule 19 unduly restricts plaintiffs’ abilities to have their day in court; Rule 19 gamesmanship, they contend, allows a sovereign entity to generally dismiss any suits that even tangentially relate to an entity shielded by immunity.¹⁰³ And if a case gets dismissed in favor of the sovereign’s interests, a plaintiff’s injury goes unremedied.

These critiques often discuss sovereign immunity generally or treat tribal sovereign immunity the same as federal or foreign immunity.¹⁰⁴ However, this analysis gives short shrift to the nuanced and distinct sovereign immunity to which tribes are entitled. Specifically, these arguments fail to recognize that in the tribal context, Rule 19 dismissal could be justified by historical congressional plenary power over Indian affairs and the unique tribal autonomy—for tribes to use their own, informed practices to dictate their internal affairs—that undergirds tribal immunity.¹⁰⁵ Specifically, despite underlying concerns about the legitimacy of tribal courts, tribal courts provide adequate and appropriate forums for adjudication.¹⁰⁶ And tribal custom and tradition favoring a

101. See *supra* note 72 and accompanying text.

102. See generally Andre, *supra* note 17 (discussing increasing conflict between Rule 19 and broad sovereign immunity protections); Katherine Florey, *Making Sovereigns Indispensable: Pimentel and the Evolution of Rule 19*, 58 UCLA L. REV. 667, 710-11 (2011) (arguing that Rule 19 has become a “quasi-abstention doctrine” due to the presumption of dismissal when a sovereign is involved).

103. Nicholas V. Merkley, Note, *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, 942 (2003); *Maverick Gaming LLC v. United States*, 123 F.4th 960, 984-86 (9th Cir. 2024) (Miller, J., concurring).

104. In other words, the critiques of tribal sovereign immunity are no different than the critiques across various sovereigns’ immunity given the presumption in favor of dismissal when a sovereign entity is a defendant. See Andre, *supra* note 17, at 1190 (asserting that courts feel compelled by “the prophylactic severity of sovereign immunity,” which “mirror[s] the logic of *Pimentel*”).

105. See Florey, *supra* note 102, at 688-89.

106. Adam Crepelle, *Tribal Law: It’s Not that Scary*, 72 BUFF. L. REV. 547, 548-50 (2024). See generally Matthew L.M. Fletcher, *Professionalism in Tribal Jurisdictions*, MICH. BAR J., Nov. 2022, at 24 (noting practitioners’ lack of professionalism before tribal courts). Indeed, tribal courts take questions of judicial power seriously. See generally Elizabeth Hidalgo

footnote continued on next page

non-litigious form of conflict resolution indicates that dismissal under Rule 19 could protect tribes' custom and tradition, and thereby their sovereignty.¹⁰⁷ Allowing sovereigns to adjudicate claims in the manner they see fit seems to be a key part of the Rule 19 analysis.¹⁰⁸ Because tribal court procedure can sometimes look different from procedure in Western courts, there should be no presumption that tribal entities favor—or are even familiar with—resolution of claims in federal or state courts. This further counsels a unique application of the Rule 19 presumption in favor of dismissal to tribal entities, especially where tribes' sovereignty is so tightly bound with their subsistence. So, both Article III courts and legal scholars must acknowledge the distinct nature of tribal sovereign immunity when parsing through Rule 19 arguments, while still extending the same comity considerations given to other sovereigns, as further discussed in Part IV below.

II. Tribal Litigation Complexities and the Rise of Indian Gaming

A. Tribal Sovereign Immunity

Sovereignty—“the principle that each nation answers only to its own domestic order and is not accountable to a larger international community, save only to the extent it has consented to do so”¹⁰⁹—is of critical importance to tribes. There are myriad reasons why appropriate governance for Indian populations is a matter of tribal self-determination. For example, tribal courts are best equipped to hear legal disputes that may rely on an understanding of tribal customs.¹¹⁰ Further, tribes are culturally and politically distinct from other areas of American society, making the sovereignty of tribal governments over internal affairs all the more important.¹¹¹ There is also a need for

Reese, *Native Marburys: Judicial Review in Tribal Courts*, 93 U. CHI. L. REV. (forthcoming) (detailing tribal court opinions on judicial review to support tribal courts' structural legitimacy).

107. See Lauren van Schilfgaarde, *Restorative Justice as Regenerative Tribal Jurisdiction*, 112 CALIF. L. REV. 103, 129-33 (2024).

108. See *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008) (discussing the “historical and political significance” of the claims to the sovereign and “unique interest” that the sovereign’s courts have in adjudicating this case).

109. DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 50 (2001).

110. See *Santa Clara Pueblo v. Martinez*, 463 U.S. 49, 71, 72 n.32 (1978); *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883).

111. See Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 984 (1981); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (holding the tribe to be “a distinct community occupying its own territory . . . in which the laws of Georgia can have no force”); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (defining tribes as “domestic dependent nations”).

immunity to protect tribal assets.¹¹² Because tribes are practically foreclosed from generating revenue in the ways that states do—namely, taxation¹¹³—protecting government assets from lawsuits for money damages or those that threaten tribal funding is of great importance for tribal sovereigns.¹¹⁴ Tribal sovereign immunity thus extends to suits arising out of tribes’ commercial activities, including activities that occur off tribal land.¹¹⁵

Tribal sovereign immunity is a critical extension of tribes’ autonomy and inherent authority to self-govern. Federal law’s recognition of tribal sovereignty is rooted in early relations between Indian communities and European settlers.¹¹⁶ In adopting the Constitution, the Founders explicitly dealt with tribes through the Indian Commerce Clause, indicating a desire to uniquely address tribes as a “distinct appellation” of sovereigns.¹¹⁷ But notions of tribal sovereign immunity also stem from a pre-constitutional context that predates the founding; tribes were true sovereign nations with their own governments, institutions, and notions of diplomacy since time immemorial prior to colonization.¹¹⁸

Unlike the states of this country, whose sovereign immunity is explicitly enshrined in the Constitution,¹¹⁹ the contours of tribal sovereign immunity

112. See *Cogo v. Cent. Council of the Tlingit & Haida Indians*, 465 F. Supp. 1286, 1288 (D. Alaska 1979) (“If tribal assets could be dissipated by litigation, the efforts of the United States to provide the tribes with economic and political autonomy could be frustrated.”).

113. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 810 (2014) (Sotomayor, J., concurring) (“States have the power to tax certain individuals and companies based on Indian reservations, making it difficult for Tribes to raise revenue from those sources.”).

114. Ryan Seelau, *In Defense of Tribal Sovereign Immunity: A Pragmatic Look at the Doctrine as a Tool for Strengthening Tribal Courts*, 90 N.D. L. REV. 121, 140 (2014) (“To quote one tribal court judge, [i]t is not long ago that the only thing standing between the nation and bankruptcy was sovereign immunity.” (alteration in original) (quoting Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 338 (1998))).

115. See *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998) (“Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.”).

116. See Seielstad, *supra* note 2, at 683 (“[Tribal sovereignty] emerged from a tradition of early European contact in which discourse, commercial trade and intercourse, negotiation, and treaty-making regulated interactions and relationships between Indian nations and their people, on the one hand, and European nations and their colonial settlers, on the other hand.”).

117. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831); see also U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause); Wood, *supra* note 2, at 1625 (“The framers thus recognized tribes among the family of sovereigns and gave the President the power to make treaties with them.”).

118. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); Seielstad, *supra* note 2, at 662-66.

119. U.S. CONST. amend. XI.

originate from overlapping federal sources.¹²⁰ Tribal sovereign immunity was expressly acknowledged by the Supreme Court in *United States v. United States Fidelity & Guaranty Co.*, wherein the Court held that “Indian Nations are exempt from suit without Congressional authorization”¹²¹ by virtue of tribes’ status as “domestic dependent nations.”¹²² Congress exercises broad, plenary power over tribes, though its power is not absolute.¹²³ Because of tribes’ inherent and pre-constitutional sovereignty, Congress must “unequivocally” express any decision to abrogate tribal sovereign powers, including immunity, and courts cannot imply such intent lightly.¹²⁴ Thus, though Congress can divest tribal power, tribes retain those core attributes of sovereignty not explicitly abrogated by Congress.¹²⁵

Despite a robust doctrine of tribal sovereign immunity, this immunity varies from that of other sovereigns in the legitimacy it is afforded by the courts. Though federal courts’ adjudication of foreign sovereign interests absent the sovereign party presents “important comity concerns,”¹²⁶ those same concerns seem to dissolve when the sovereign is a tribe. Instead, the doctrine of implicit

120. See Alexander T. Skibine, *Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes*, 39 AM. INDIAN L. REV. 77, 99-100 (2014-2015) (arguing that tribal sovereignty “was probably first recognized when the United States Senate ratified the first treaty with an Indian Nation,” but that both the Constitution and the Supreme Court have also shaped the doctrine).

121. 309 U.S. 506, 512 (1940).

122. *Cherokee Nation*, 30 U.S. at 17; see Wood, *supra* note 2, at 1594.

123. *United States v. Alcea Bank of Tillamooks*, 329 U.S. 40, 54 (1946); see also Haaland v. Brackeen, 143 S. Ct. 1609, 1627 (2023) (“In a long line of cases, we have characterized Congress’s power to legislate with respect to the Indian tribes as ‘plenary and exclusive.’ . . . To be clear, however, ‘plenary’ does not mean ‘free-floating.’ A power unmoored from the Constitution would lack both justification and limits. So like the rest of its legislative powers, Congress’s authority to regulate Indians must derive from the Constitution, not the atmosphere.” (quoting *United States v. Lara*, 541 U.S. 193, 200 (2004))).

124. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014) (quoting *C & L Enters. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001)).

125. COHEN, *supra* note 1, 122-23 (“[T]hose powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.” (emphasis omitted)).

126. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866, 869 (2008) (“There is a comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so. The dignity of a foreign state is not enhanced if other nations bypass its courts without right or good cause.”).

divestiture¹²⁷ and more explicit erosion of inherent tribal power¹²⁸ underscore a fundamental distrust of tribal institutions as competent and on par with other sovereigns. This distrust is formed despite robust tribal law and procedure, relying instead on stereotypes based upon the “lawlessness of Indian country.”¹²⁹ Moreover, courts struggle to derive a clear source for tribal sovereign immunity despite its proven origin, which is inconsistent with the way that other sovereigns have been granted immunity.¹³⁰

Other sovereigns are not subject to the same treatment. For them, sovereign immunity is meant to be “resilient”¹³¹ and “absolute.”¹³² For instance, courts have already well-accepted that non-federal entities, including tribes, cannot bring damages suits against the states.¹³³ Under the Eleventh Amendment, the Supreme Court in *Seminole Tribe* easily dismissed tribal claims that states were negotiating Class III gaming compacts in bad faith due to state sovereign immunity.¹³⁴ This is despite the fact that states’ immunity effectively left the tribes with no remedy to enter into gaming compacts.¹³⁵ In *Kickapoo Tribe of*

127. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978) (sidestepping fundamental Indian law canons to find implied divestiture of tribal sovereignty). The implicit divestiture doctrine—which covers the federal government’s implicit erosion of tribal power once possessed—has been used in a series of cases since *Oliphant* to further erode tribal sovereignty without adequate textual justification.

128. See *Bay Mills Indian Cmty.*, 572 U.S. at 814 (Scalia, J., dissenting) (“I am now convinced that *Kiowa* [*Tribe of Okla. v. Mfg. Techs. Inc.*, 523 U.S. 751 (1998)] was wrongly decided; that, in the intervening 16 years, its error has grown more glaringly obvious; and that stare decisis does not recommend its retention. Rather than insist that Congress clean up a mess that I helped make, I would overrule *Kiowa* and reverse the judgment below.” (emphasis omitted)). Public Law 280, which allows state courts certain civil and criminal jurisdiction over Indians on reservations, is another example of this encroachment upon tribal sovereignty. See Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 and 28 U.S.C. § 1360); cf. Grant Christensen, *Using Consent to Expand Tribal Court Criminal Jurisdiction*, 111 CALIF. L. REV. 1831, 1844 (2023) (“Congress has continued to recognize greater inherent criminal powers for Indian tribes.”).

129. Lauren van Schilfgaarde, *(Un)Vanishing the Tribe*, 66 ARIZ. L. REV. 409, 442 (2024); see Gregory Ablavsky & W. Tanner Allread, *We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution*, 123 COLUM. L. REV. 243, 256 (2023); *Oliphant*, 435 U.S. at 197; *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 650-51 (2022).

130. Wood, *supra* note 2, at 1589, 1621-22.

131. Seth Davis, Eric Biber & Elena Kempf, *Persisting Sovereignties*, 170 U. PA. L. REV. 549, 586 (2022).

132. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 865 (2008).

133. *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 783-85 (1991); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 11-12 (1831).

134. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 51-53, 72 (1996).

135. While the United States can sue the state on the tribe’s behalf, as is discussed in Part II.B below, the federal government is quite reluctant to do so. See *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 267-70 (1997); and *Idaho v. United States*, 533 U.S. 262 (2001), which together illustrate that the state cannot claim immunity when the federal government sues on behalf of the tribe.

Indians in Kansas v. Babbitt, where the tribe sued the Secretary of the Interior seeking a declaratory judgment that a compact had been approved, the D.C. Circuit held that the state was an indispensable party and dismissed the suit.¹³⁶ Notably, the state did not even need to intervene in the suit to file a Rule 19 motion.¹³⁷ In *Pueblo of Sandia v. Babbitt*, where the tribe sought to invalidate only two specific provisions of the compact, the U.S. District Court for the District of Columbia found that the state was an indispensable party, requiring “an overpoweringly strong case . . . [to] permit a finding that the action may proceed without joinder of the [s]tate.”¹³⁸

Tribes are just as legitimate as other sovereigns.¹³⁹ Courts routinely, and sometimes even sua sponte, engage in Rule 19 dismissals with other sovereigns, acknowledging that this is a necessary cost of sovereign immunity,¹⁴⁰ meaning we must also tolerate Rule 19 dismissals when absent tribal interests are implicated.

B. The Federal Trust Relationship

Litigation involving tribes is complicated by the unique relationship tribes have with the federal government. The federal government has a trust responsibility to the tribes, meaning that the federal government ostensibly owes a duty “of good faith, loyalty, and protection” to the tribes.¹⁴¹ Early notions of this trust responsibility stem from the cases that comprise the Marshall trilogy,¹⁴² which lay out a paternalistic ward-guardian relationship wherein tribes are dependent upon the federal government for existence and protection.¹⁴³ The federal government established this trust responsibility and has maintained its existence, all while eroding tribal power through land grabs

136. 43 F.3d 1491, 1500 (D.C. Cir. 1995).

137. *Id.* at 1494.

138. 47 F. Supp. 2d 49, 56 (D.D.C. 1999).

139. *See generally* Davis et al., *supra* note 131 (cataloging the United States’s approach to Indian tribes as distinct political communities with pre-constitutional sovereignty much like international sovereigns).

140. *See* Confederated Tribes of the Chehalis Indian Rsrv. v. Lujan, 928 F.2d 1496, 1500 (9th Cir. 1991) (“Courts have recognized that a plaintiff’s interest in litigating a claim may be outweighed by a tribe’s interest in maintaining its sovereign immunity.”).

141. Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, “*We Need Protection from Our Protectors*”: *The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENV’T & ADMIN. L. 397, 399 (2017); *see also* 42 C.J.S. *Indians* § 30 (West 2025) (detailing the nature of the trust relationship between the United States federal government and Indian tribes).

142. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. McIntosh, 21 U.S. (7 Wheat.) 543 (1823).

143. *Cherokee Nation*, 30 U.S. at 17.

and rights diminishment, much of which was also under the guise of stewardship.¹⁴⁴

This trust responsibility entails a unique duty to the tribes in areas of contract, property, trust, and foreign relations law,¹⁴⁵ though the federal government has often gone to great lengths to evade or repudiate this responsibility.¹⁴⁶ This includes, for example, the Department of Justice's (DOJ) misrepresentation of historical information to courts in Indian trust litigation and repeated failure to raise the federal trust relationship in cases where it would be critical to raise.¹⁴⁷ Notably, tribes' ability to enforce this trust responsibility is extremely limited, leaving tribes with a toothless canon that mostly hinders their own self-determination.¹⁴⁸

As President Nixon recognized in his 1970 address to Congress on Indian Affairs:

[I]t is often difficult for the Department of the Interior and the Department of Justice to fulfill [the trust responsibility]. No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the Federal government has frequently found itself in precisely that position.¹⁴⁹

The federal government, acknowledging this inherent conflict, made efforts to establish a separate authority to satisfy this trust duty.¹⁵⁰ In 1972, President Nixon proposed the creation of an Indian Trust Counsel Authority, though this was dismissed by the executive branch as unnecessary given the Department of the Interior's role in representing Indian interests.¹⁵¹

In the early 1970s, the Executive Branch experimented with "split briefing" to both address this conflict of interest and fulfill the trust relationship, wherein "the United States would file a single brief in which [the Department of the Interior] would function like an Indian Trust Counsel . . . separate from arguments in the brief by DOJ against Indians."¹⁵² The Department of the Interior's position prevailed over the DOJ's position in each of the six times this

144. Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at Its Development and How Its Analysis Under Social Contract Theory Might Expand Its Scope*, 18 N. ILL. U. L. REV. 115, 124-27 (1997).

145. Rey-Bear & Fletcher, *supra* note 141, at 400-01.

146. *Id.* at 425-40.

147. *Id.* at 430-32, 434-37.

148. *See, e.g.*, *United States v. Mitchell*, 445 U.S. 535, 546 (1980); *United States v. Navajo Nation*, 537 U.S. 488, 514 (2003).

149. Special Message to Congress on Indian Affairs, 1 PUB. PAPERS 564, 573 (July 8, 1970).

150. *See, e.g.*, ADMIN. CONF. OF THE U.S., RECOMMENDATION 72-2, CONFLICT-OF-INTEREST PROBLEMS IN DEALING WITH NATURAL RESOURCES OF INDIAN TRIBES (1972), <https://perma.cc/5VF4-Y87F>.

151. Rey-Bear & Fletcher, *supra* note 141, at 426-27.

152. *Id.* at 427.

split briefing occurred.¹⁵³ However, in an effort to present a uniform front from the executive branch, the DOJ quickly ended this practice. The practice of split briefing was ended in spite of the protests of the National Congress of American Indians and the Department of the Interior, which expressed grave reservations about the DOJ's ability to adequately fulfill the trust relationship by itself.¹⁵⁴ The DOJ has maintained that it can satisfy the trust relationship alone,¹⁵⁵ though its conceptions of the trust duty owed to tribes lack detail and guidance.¹⁵⁶

Most recently, in *Arizona v. Navajo Nation*, the Court declined to side with the tribes in a breach-of-trust action, finding no specific rights-creating language in the Navajo Nation's treaty despite robust language about protection of water rights.¹⁵⁷ This opinion has further narrowed the trust relationship, allowing the federal government to make the relationship "limited or bare compared to a trust relationship between private parties at common law."¹⁵⁸ The Court has thereby signaled a step back from enforcing the federal trust relationship, signaling to the government that there are few consequences of abdicating its responsibilities as trustee of the tribes.¹⁵⁹

At the same time, other branches of the federal government have exhibited renewed support for tribal sovereignty in what has been termed the "self-determination era" for tribes.¹⁶⁰ This era, beginning in the late 1960s and early 1970s, has seen executive and legislative support for policies that support tribal

153. *Id.*

154. *Id.* at 428; see also Letter from Griffin B. Bell, Att'y Gen., Dep't of Just., to Cecil D. Andrus, Sec'y of the Interior (May 31, 1979), <https://perma.cc/KS2Q-PHF3> ("[T]he people as a whole benefit when the Executive Branch . . . protects Indian property rights recognized in treaty commitments ratified[] by a coordinate branch.").

155. See *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165-66 (2011); *Nevada v. United States*, 463 U.S. 110, 135 (1983); *Arizona v. California*, 460 U.S. 605, 627-28 (1983).

156. See *Rey-Bear & Fletcher*, *supra* note 141, at 429.

157. See 143 S. Ct. 1804, 1815 (2023); cf. *id.* at 1825 (Gorsuch, J., dissenting) ("[T]he government owes the Tribe a duty to manage the water it holds for the Tribe in a legally responsible manner.").

158. 42 C.J.S. *Indians* § 30 (2025); see Jessica Yin, Comment, *Abdication of Power: Arizona v. Navajo Nation and Judicial Refusal to Enforce the Federal Trust Relationship*, 99 WASH. L. REV. 1395, 1425-28 (2024) (detailing the Supreme Court's specific undermining of the historical guardian-trust relationship when interpreting the treaty in *Arizona v. Navajo Nation*).

159. See Yin, *supra* note 158, at 1425-28.

160. Aaron F.W. Meek, Comment, *The Conflict Between State Tests of Tribal Entity Immunity and the Congressional Policy of Indian Self-Determination*, 35 AM. INDIAN L. REV. 141, 142-46 (2010-2011); see also *NCAI History*, NCAI, <https://perma.cc/CDP8-43F2> (archived Sept. 25, 2025) (chronicling recent tribal history leading up to the beginning of the self-determination era).

economy and judicial development.¹⁶¹ As a result, tribes have been able to self-govern more effectively and create more established governing structures as sovereigns without the forced imposition of federal, Westernized ideals.¹⁶² A narrow trust relationship would perhaps be consistent with the aims of the self-determination era, so long as it is not invoked as a way to tailor tribal power when convenient. But allowing Indian gaming suits to proceed, given federal defendants' trustee relationship to the tribes, evades self-determination goals and paternalistically assumes that the federal defendants are willing to fulfill the trust relationship.

C. Tribal Gaming

Tribal gaming is a 43.9-billion-dollar industry, comprised of 532 gaming casinos owned by 243 federally recognized tribes in 29 different states.¹⁶³ This means that 42.3% of the 575 federally recognized tribes engage in some types of Indian gaming services. Though the majority of tribes do not participate in any Indian gaming, it has become the lifeline of other tribes who depend on gaming revenue for government services, employment, economic development, community and health centers, and other forms of self-determination.¹⁶⁴ Indeed, for some tribes, gaming revenue is "the sole source of revenues for the operation of the tribal governments and the provision of tribal services."¹⁶⁵ Put differently, tribes have come to rely on the revenue from Indian gaming to support their own sovereignty.¹⁶⁶ Indian casinos also uplift nearby non-Indian communities, "creat[ing] nearly 140,000 jobs in the United States, approximately [85%] of them held by non-Indians."¹⁶⁷ Through revenue-sharing agreements established as part of the authorization process, tribes contribute to the funding of local governments and special community funds, sometimes to local schools and education programs, in amounts that can outpace contributions from other

161. See Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 140-45 (2006); see, e.g., Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 5301-5423; Native American Housing Assistance and Self-Determination Act, 25 U.S.C. §§ 4101-4243; Exec. Order No. 14112, 88 Fed. Reg. 86021 (Dec. 11, 2023), *revoked* by Exec. Order No. 14236, 90 Fed. Reg. 13037 (Mar. 20, 2025).

162. See Meek, *supra* note 160, at 146, 157, 174-75 (discussing how tribal immunity has allowed tribes to establish the scope and structure of their governing bodies).

163. Press Release, *supra* note 6.

164. Fletcher, *supra* note 15, at 74; 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, 402-03 (1997).

165. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218-19 (1987).

166. See Steven A. Light, Kathryn R.L. Rand & Alan P. Meister, *Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements*, 80 N.D. L. REV. 657, 658-59 (2004).

167. Rand & Light, *supra* note 164, at 404.

sources like the lottery.¹⁶⁸ Though tribal gaming as a form of revenue has sparked some concerns about organized crime from state entities and private competitors, this obscures the real motivations behind tribal gaming opposition: economic competition.¹⁶⁹

Fueled by a desire for self-governance and amid a lack of fiduciary and trust support from the federal government, tribes turned to gaming in the 1970s as a form of sustenance, operating bingo halls and other somewhat lucrative games.¹⁷⁰ For these tribes, gaming was not “a purely capitalistic boondoggle”; it reflected a source of revenue that “began to allow the tribes and their people to survive.”¹⁷¹ Gaming itself was a way for tribes to assert “their status as pre-[c]onstitutional sovereign nations” with power over their own sovereign land.¹⁷² After several challenges to the legality of Indian gaming operations, many by states themselves,¹⁷³ the Supreme Court finally addressed the matter in *California v. Cabazon Band of Mission Indians*.¹⁷⁴ In *Cabazon*, the Court held that tribes could legally engage in gaming services free of state regulation, affirming the sovereignty that tribes retain over internal affairs on their own land.¹⁷⁵ The Court noted that while states like California may have congressionally authorized criminal jurisdiction within Indian reservations, civil regulatory jurisdiction on reservations was lacking.¹⁷⁶ *Cabazon* also identified tribal economic development and self-sufficiency as an “important” federal and tribal interest.¹⁷⁷

The Indian Gaming Regulatory Act (IGRA) emerged as a response to the ruling in *Cabazon*.¹⁷⁸ IGRA notably places a check on tribal sovereignty by requiring state and federal approval of any Indian gaming, though it still codifies the right of Indian tribes to offer gaming on Indian land.¹⁷⁹ But the statute itself claims “to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and

168. Light, Rand & Meister, *supra* note 166, at 667-69.

169. See Rand & Light, *supra* note 164, at 406-07.

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

171. Fletcher, *supra* note 15, at 111.

172. 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 (2003/2004).

173. See William V. Ackerman & Rick L. Bunch, *A Comparative Analysis of Indian Gaming in the United States*, 36 AM. INDIAN Q. 50, 52 (2012).

174. 480 U.S. 202, 205 (1987).

175. *Id.* at 221-22.

176. See *id.* at 211.

177. *Id.* at 216-19.

178. See Ackerman & Bunch, *supra* note 173, at 50; Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721.

179. See 25 U.S.C. § 2710(d)(3)(B).

strong tribal governments.”¹⁸⁰ Fundamentally, IGRA classifies gaming into three parts: Class I gaming is comprised of “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,” Class II gaming includes bingo and covered card games, and Class III gaming embraces all other gaming, most notably including Las Vegas-style casino gaming.¹⁸¹ Tribes can only purvey Class III gaming if it is (1) authorized by tribal statute, (2) authorized by the state, and (3) “conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State”¹⁸² The last requirement, that tribes must enter into a contract-like compact with the state to offer Class III gaming services, has generated the most litigation around Indian gaming, with members of the tribe and outsiders alike bringing suit to stymie gaming vendors or halt Indian gaming altogether.¹⁸³ These suits commonly hinge on state law grounds or on the argument that the governor “had no authority to bind the state to the compact.”¹⁸⁴

States and tribes must negotiate all terms and conditions for any Class III gaming activities, including jurisdictional enforcement provisions, taxation provisions, licensing provisions, and remedies for breach of contract.¹⁸⁵ However, it is important to note that these compacts can only regulate gaming on Indian land, meaning that compacts cannot make off-reservation gaming legal.¹⁸⁶ The legality of gaming off Indian land is a state issue.¹⁸⁷ IGRA requires states to negotiate with tribes “in good faith.”¹⁸⁸ However, the Supreme Court has held that tribes cannot sue states to enforce this requirement, rendering the provision toothless.¹⁸⁹ The Bureau of Indian Affairs recently finalized a comprehensive rule providing guidance on the compact process, clarifying

180. *Id.* § 2702(1).

181. *See id.* § 2703(6)-(8).

182. *Id.* § 2710(d)(1)(C).

183. Fletcher, *supra* note 15, at 13, 61.

184. *Id.* at 77.

185. 25 U.S.C. § 2710(d)(3)(C); *see, e.g.*, Idaho v. Shoshone-Bannock Tribes, 465 F.3d 1095, 1098-99 (9th Cir. 2006) (detailing specific compact provisions); Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1156-57 (9th Cir. 2002) (interpreting a compact as a contract).

186. *See* W. Flagler Assocs. v. Haaland, 71 F.4th 1059, 1062, 1065-68 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 2671 (2024) (mem.).

187. *See id.*

188. 25 U.S.C. § 2710(d)(3)(A).

189. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 75-76 (1996); CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 336 (2005).

certain issues that have led to past litigation, like the good faith requirement and off-reservation compacting limits.¹⁹⁰

To take effect, all Class III gaming compacts must finally be approved by the Secretary of the Interior.¹⁹¹ This can happen in two ways: either the Secretary affirmatively approves the compact within forty-five days of its submission to the Department of the Interior for approval, or the Secretary does not act on the compact within this forty-five-day period, in which case the compact is deemed approved under IGRA.¹⁹² The Secretary may disapprove the compact only if it violates IGRA, other federal laws, or the “trust obligations of the United States to Indians.”¹⁹³

III. Emerging Disagreement Among Circuits

Entities that have attempted to challenge the validity of gaming compacts in the past are no strangers to Rule 19 motions to dismiss involving tribal parties.¹⁹⁴ However, how courts come down on these Rule 19 motions has been mixed. While some tribes have been able to successfully assert their rights as indispensable sovereigns, other courts have not been persuaded by tribes’ Rule 19 arguments. The courts that have not granted Rule 19 dismissals in the gaming context seem most swayed by the lack of an alternative remedy in state or tribal court and the opposing party’s argument that an existing party—namely the federal or state government—can adequately represent absent tribal interests such that the suit can proceed absent tribal parties.¹⁹⁵ Two circuits represent how courts differently engage with the Rule 19 balancing test as it relates to absent tribal parties in Indian gaming cases. Broadly, the D.C. Circuit allowed an

190. Class III Tribal State Gaming Compacts, 89 Fed. Reg. 13232 (Feb. 21, 2024) (to be codified at 25 C.F.R. pt. 293).

191. See 25 U.S.C. § 2710(d)(8)(A).

192. *Id.* § 2710(d)(8)(C).

193. *Id.* § 2710(d)(8)(B).

194. See, e.g., *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1018, 1022 (9th Cir. 2002); *Artichoke Joe’s Cal. Grand Casino v. Norton*, 216 F. Supp. 2d 1084, 1118-19 (E.D. Cal. 2002), *aff’d*, 353 F.3d 712 (9th Cir. 2003); *PPI, Inc. v. Kempthorne*, No. 08cv248, 2008 WL 2705431, at *3-4 (N.D. Fla. July 8, 2008); *Friends of Amador Cnty. v. Salazar*, 554 F. App’x 562, 564 (9th Cir. 2014); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 327 F. Supp. 2d 995, 997 (W.D. Wis. 2004), *aff’d*, 422 F.3d 490 (7th Cir. 2005); *Flandreau Santee Sioux Tribe v. South Dakota*, No. 07-4040, 2009 WL 874002, at *2 (D.S.D. Mar. 30, 2009).

195. See, e.g., *Knox v. U.S. Dep’t of the Interior*, 759 F. Supp. 2d 1223, 1235-36 (D. Idaho 2010) (“[T]he Secretary approved those amendments and hence has every incentive to zealously defend its approval.”); see also *Fletcher*, *supra* note 15, at 79-94 (analyzing Rule 19 cases involving tribes and courts’ analysis of the “equity and good conscience” standard).

Indian gaming suit to proceed absent tribal interests,¹⁹⁶ while the Ninth Circuit dismissed an Indian gaming suit due to tribal sovereign immunity,¹⁹⁷ with both circuits giving different weight to the various prongs of Rule 19 analysis.

A. West Flagler Litigation

In 2021, and pursuant to IGRA, the Seminole Tribe and the State of Florida entered into a Class III gaming compact that gave the Seminole Tribe the right to offer limited online sports betting in Florida.¹⁹⁸ The compact allowed for consumers to participate in online sports betting while not physically on the Tribe's lands, so long as the wagers were conducted by the Tribe on Indian land.¹⁹⁹ The compact was then submitted to the Department of the Interior for approval, where it was "deemed approved" after forty-five days of inaction by Secretary Haaland, a process allowed by IGRA.²⁰⁰

On August 16, 2021, West Flagler Associates brought suit against Deb Haaland, then Secretary of the Interior, and the Department of the Interior, seeking to invalidate the Secretary's approval of the compact.²⁰¹ West Flagler Associates argued that the language of the compact authorized sports betting outside of Indian lands, impermissibly exceeding IGRA's scope and violating the Equal Protection Clause.²⁰² The Seminole Tribe timely intervened to file a motion to dismiss under Rule 19.²⁰³ The lower court sided with West Flagler Associates, finding that the compact violated IGRA by authorizing gaming off Indian lands.²⁰⁴

Notably, the district court also held that the Seminole Tribe was not an indispensable party, dismissing the Tribe's motion to intervene. This finding hinged on the court's belief that although the Tribe was a required party to the litigation, there was "no conflict . . . between the Secretary's interest and the interest of the nonparty Tribe[]," thus allowing the suit to proceed in equity.²⁰⁵

196. See *W. Flagler Assocs. v. Haaland*, 71 F.4th 1059, 1071 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 2671 (2024) (mem.).

197. See *Maverick Gaming LLC v. United States*, 123 F.4th 960, 983 (9th Cir. 2024), *cert. denied*, No. 24-1161, 2025 WL 2823742 (U.S. Oct. 6, 2025) (mem.).

198. See Complaint, *supra* note 26, at 1, 11-12.

199. *Id.* at 2-3.

200. *Id.* at 14.

201. *Id.* at 1, 42.

202. *Id.* at 2-4.

203. Seminole Tribe of Florida's Motion for Limited Intervention and Statement of Points of Law and Authorities in Support at 5, *W. Flagler Assocs. v. Haaland*, 573 F. Supp. 3d 260 (D.D.C. 2021) (Nos. 21-cv-2192 & 21-cv-2513), 2021 WL 8344051, ECF No. 13.

204. *W. Flagler*, 573 F. Supp. 3d at 272-75.

205. *Id.* at 270-72 (quoting *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996)).

Notably, the district court did not attempt to reconcile this decision with precedent that upholds dismissal of state defendants under very similar circumstances.²⁰⁶

Though the Department of the Interior failed to take several key stances that the tribe had advocated in appealing the decision,²⁰⁷ the D.C. Circuit upheld the lower court's denial of the Seminole's Tribe motion to intervene, stating that the relief the Tribe ultimately sought aligned with the D.C. Circuit's judgment for the Secretary and that the Tribe's role as an amicus "lessen[ed] whatever prejudice it would suffer from having this issue resolved favorably in its absence."²⁰⁸ The D.C. Circuit ultimately reversed the lower court on the issue of the compact, holding that the compact did not authorize online sports betting outside of Indian land—gaming off Indian land was only discussed, not fully permitted, by the compact, which is allowed under IGRA.²⁰⁹

The Supreme Court denied West Flagler Associates' application for stay in a memorandum opinion.²¹⁰ In Justice Kavanaugh's statement respecting the denial, he agreed that the application should be denied based on the lower court's finding that the current compact did not implicate off-reservation gaming operations, but he did not address any of the Rule 19 discussion from the lower courts.²¹¹ The Supreme Court later denied West Flagler Associates' petition for a writ of certiorari in another memorandum opinion.²¹²

B. Maverick Gaming Litigation

The Shoalwater Bay Indian Tribe entered into an amended compact with Washington Governor Inslee in 2021, allowing sports betting in tribal casinos.²¹³ Secretary Haaland subsequently affirmatively approved the agreement.²¹⁴ In 2022, Maverick Gaming, a non-tribal gaming company in Washington, brought suit against the Department of the Interior, Secretary

206. See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74-75 (1996).

207. See Reply Brief of Appellant Seminole Tribe of Florida at 14-15, *W. Flagler Assocs. v. Haaland*, 71 F.4th 1059 (D.C. Cir. 2023) (Nos. 21-5265 & 22-5022), 2022 WL 16948992.

208. *W. Flagler*, 71 F.4th at 1070-71.

209. *Id.* at 1065-66.

210. *W. Flagler Assocs. v. Haaland*, 144 S. Ct. 10, 10 (2023) (mem.).

211. See *id.* (Kavanaugh, J., respecting the denial of the application for stay); *W. Flagler Assocs., Ltd. v. Haaland*, 573 F. Supp. 3d 260, 269-72 (D.D.C. 2021), *aff'd in part, vacated in part*, 71 F.4th 1059 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 2671 (2024) (mem.); *W. Flagler*, 71 F.4th at 1070-72.

212. *W. Flagler Assocs. v. Haaland*, 144 S. Ct. 2671, 2671 (2024) (mem.). Only Justice Kavanaugh would have granted the petition, though Justice Jackson took no part in the decision. *Id.*

213. See Complaint at 3, 19, *Maverick Gaming LLC v. United States*, 658 F. Supp. 3d 966 (W.D. Wash. 2023) (No. 22-cv-05325), ECF No. 1.

214. *Id.* at 20.

Haaland, the Governor and Attorney General of Washington, the Chair of the Washington State Gaming Commission, and the United States, ultimately seeking to invalidate the Secretary's approval of the compact.²¹⁵ Maverick Gaming argued that the Class III gaming compact allowed a "discriminatory tribal gaming monopoly" over this type of gaming in Washington in violation of IGRA and the Equal Protection Clause.²¹⁶

The Shoalwater Bay Indian Tribe intervened to dismiss the lawsuit under Rule 19.²¹⁷ The U.S. District Court for the Western District of Washington allowed the tribe to intervene and then dismissed Maverick Gaming's lawsuit, agreeing with the Shoalwater Bay Indian Tribe that the protected tribal interests implicated in this case militate dismissal under Rule 19.²¹⁸ The district court conducted a thorough Rule 19 analysis, finding that the relief Maverick sought would substantially threaten tribal revenue, non-tribal employment, and tribal sovereignty generally.²¹⁹ The district court was also "convinced" that no other party could adequately represent the Tribe's interests, finding that the tribe and federal interests "clearly diverge" under Ninth Circuit precedent that requires clear and continuing overlap in interests between the present and absent parties.²²⁰ In December 2024, the Ninth Circuit affirmed the Western District of Washington's ruling, emphasizing the tribe's legally protected interest in the suit because of its tribal gaming operations and citing "a wall of circuit authority in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity."²²¹ Maverick Gaming appealed this ruling to the Supreme Court, arguing that the application of Rule 19 in APA litigation generally is ripe for resolution,²²² but the Court denied certiorari on October 6, 2025.²²³

Another such Ninth Circuit precedent upholding a Rule 19 dismissal, *Friends of Amador County v. Salazar*, is directly on point.²²⁴ There, a non-Indian interest group filed suit against California and its governor, the Department of

215. *See id.* at 4-7.

216. *Id.* at 3-4.

217. Shoalwater Bay Tribe's Motion for Limited Intervention at 3, *Maverick Gaming*, 658 F. Supp. 3d 966 (No. 22-cv-05325), ECF No. 68.

218. *Maverick Gaming*, 658 F. Supp. 3d at 969, 976.

219. *Id.* at 975.

220. *Id.* at 972-73; *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934, 947 (9th Cir. 2022).

221. *Maverick Gaming LLC v. United States*, 123 F.4th 960, 972, 981, 983 (9th Cir. 2024) (quoting *Deschutes River All. v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1163 (9th Cir. 2021)), *cert. denied*, No. 24-1161, 2025 WL 2823742 (U.S. Oct. 6, 2025) (mem.).

222. Petition for Writ of Certiorari, *supra* note 37, at 1-2.

223. *RunItOneTime LLC v. United States*, No. 24-1161, 2025 WL 2823742 (U.S. Oct. 6, 2025) (mem.).

224. 554 F. App'x 562, 566 (9th Cir. 2014).

the Interior and its Secretary, and the National Indian Gaming Commission, alleging that an already-approved tribal-state gaming compact violated IGRA.²²⁵ In a detailed analysis, the Ninth Circuit affirmed that the federal government would not adequately represent the tribe by assuming all of the same stances in litigation and that the sweeping relief asked for undoubtedly implicated the tribe as an indispensable party to the suit.²²⁶

Notably, there appears to be a discrepancy between these cases on what constitutes adequate representation by an existing party for a suit to proceed. Although Rule 19 analyses are fact-intensive inquiries, the ways that courts generally understand tribal interests in Indian gaming can be dispositive to the final decision. This discrepancy calls for resolution: Adequate representation undergirds both parts of the Rule 19 analysis, and courts must make every effort to understand tribal interests in the suit so that they can determine whether the suit should proceed “in equity and good conscience.”²²⁷ Existing parties are not obligated to represent absent tribal interests, and so ensuring that tribal interests are significantly aligned with existing interests seems to be the way this criterion can be satisfied. In Part IV, I argue that given tribes’ unique gaming interests and Rule 19’s requirements, federal or state representation is insufficient here, creating a presumption of dismissal in this context under Rule 19.

C. Other Circuits

In its petition for certiorari, Maverick Gaming argued that Seventh and Eighth Circuit precedent “in closely analogous contexts” also support a finding that the federal government can adequately support tribal interests to avoid a Rule 19 dismissal.²²⁸ Plainly, this assertion overlooks the unique posture of Indian gaming cases in the APA and Rule 19 context. The cited Seventh Circuit precedent deals with the Secretary’s invalidation of tribal constitutional amendments under the Indian Reorganization Act.²²⁹ The cited Eighth Circuit precedent involves state challenges to federal transfer of land into trust for an Indian tribe, but focuses primarily on Rule 24, not Rule 19, intervention.²³⁰

225. *Friends of Amador Cnty. v. Salazar*, No. 10-348, 2011 WL 4709883, at *1-3 (E.D. Cal. Oct. 4, 2011), *aff’d*, 554 F. App’x 562 (9th Cir. 2014).

226. *Salazar*, 554 F. App’x at 564-66.

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

228. *See* Petition for Writ of Certiorari, *supra* note 37, at 2, 19-20.

229. *Thomas v. United States*, 189 F.3d 662, 664 (7th Cir. 1999).

230. *South Dakota ex rel. Barnett v. U.S. Dep’t of the Interior*, 317 F.3d 783, 784-85 (8th Cir. 2003). Though both of these cases involve issues of importance to Indian tribes, they are not substantively similar to the Indian gaming context and therefore exceed the scope of this Note.

Attempts to lump Indian gaming-related APA litigation with APA litigation of another nature that implicates tribal interests do not adequately differentiate the distinct interests that tribes have in their gaming operations—considerations specifically delineated in Part IV below. Furthermore, the cited precedent is not compelling in the Indian gaming context specifically because of IGRA’s unique nature. IGRA stipulates a very specific contracting process for tribes and states, and the Secretary is given very limited authority to *deny* any validly entered compact.²³¹ Because of the protracted cooperative federalism scheme that IGRA specifies between states and tribes, the Secretary functions more as the final check on tribal-state negotiations as opposed to the arbiter of Indian gaming access.²³² Thus, despite limited precedent across circuits due to novel gaming challenges under the APA, Indian gaming suits demand unique considerations, which must be noted when attempting to broadly lump these suits in with other areas of Indian law.

IV. Applying Rule 19 in the Indian Gaming Context: Arguing for a Presumption of Dismissal

Part IV constitutes the primary contribution of this Note: It presents a framework for courts to determine how to treat tribes in Indian gaming cases when conducting a Rule 19 analysis. This Part opens with guidance on how to proceed under Rule 19(a), then examines each element of Rule 19(b)’s “equity and good conscience” analysis, and concludes by explaining why federal and state parties are inadequate representatives of tribal interests when tribes are themselves absent from these proceedings.

A. Tribes as Required Parties

In the gaming context, tribes are routinely held to be required parties under the Rule 19(a) analysis, commonly under the Rule 19(a)(1)(B)(i) prong, which covers parties that “claim[] an interest relating to the subject of the action” and are impaired “as a practical matter” from protecting that interest without being joined in the suit.²³³ This is particularly straightforward where the tribe is a

231. Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d), (d)(2)(B).

232. *See* *Artichoke Joe’s Cal. Grand Casino v. Norton*, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002) (“IGRA is an example of ‘cooperative federalism’ in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.”), *aff’d*, 353 F.3d 712 (9th Cir. 2003).

233. Under Federal Rule of Civil Procedure 19(a)(1)(B)(i), a party is required if “that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person’s absence may . . . as a practical matter impair or impede the person’s ability to protect the interest.” *See, e.g., Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022-23 (9th Cir. 2002); *Cachil Dehe Band of Wintun Indians of the Colusa*

footnote continued on next page

party to the compact agreement—the substantial interest in the outcome of the case as contemplated by Rule 19(a) is clear.²³⁴ The analysis in *American Greyhound Racing, Inc. v. Hull* is instructive here.²³⁵ In that case, non-Indian owners of horse and dog racing operations brought suit seeking to enjoin the Arizona Governor from entering into or renewing any gaming compacts with tribes.²³⁶ The plaintiffs argued that the renewed compacts would concentrate gaming on reservations, raising issues under IGRA and the Equal Protection Clause.²³⁷ The plaintiffs asked the court to either enjoin the Governor from renewing further compacts or allow non-tribal operators the same gaming privileges as the tribes.²³⁸ When two tribes asserted their sovereign immunity to the suit, the lower court presumed that “complete relief can be accorded among the Plaintiffs and Defendants in their absence” and that the tribes had no “legally protected interest” in the relief sought.²³⁹ This seems unintuitive, as the plaintiffs sought prospective relief—enjoining the Governor from executing new compacts with the tribes—which would effectively halt Indian gaming in the state. On appeal, however, the Ninth Circuit found that this dispute cut to the very core of the tribes’ sovereign power.²⁴⁰ In contrast to the lower court’s ruling, the Ninth Circuit held that the tribes had a “substantial” interest in all terms of this bargained contract, making them necessary parties.²⁴¹

Notably, Rule 19(a)(1)(B)(i) analysis focuses on whether interests will be affected as a *practical* matter. Courts must adequately appreciate the effect of any relief on the revenue gaming compacts provide to tribes, the long history of tribal gaming, and the reliance on associated employment benefits for tribes and surrounding communities.²⁴² In *Maverick Gaming*, for example, the Ninth Circuit explicitly noted “the importance of tribal gaming compacts and . . . revenue” and “the long history of tribal gaming and its associated benefits for the

Indian Cmty. v. California, 547 F.3d 962, 970 (9th Cir. 2008); Friends of Amador Cnty. v. Salazar, 554 F. App’x 562, 564 (9th Cir. 2014).

234. See *United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 479 (7th Cir. 1996) (finding that the tribe “clearly satisfies” the Rule 19(a) criteria because “[a] judicial declaration as to the validity of a contract necessarily affects, ‘as a practical matter,’ the interests of both parties to the contract”); cf. *Kickapoo Tribe of Indians in Kan. v. Babbitt*, 43 F.3d 1491, 1495 (D.C. Cir. 1995) (“Clearly . . . the State of Kansas has an interest in the validity of a compact to which it is a party, and this interest would be directly affected by the relief that the Tribe seeks.”).

235. 146 F. Supp. 2d 1012 (D. Ariz. 2001), *vacated*, 305 F.3d 1015 (9th Cir. 2002).

236. *Id.* at 1025.

237. See *id.* at 1028.

238. *Id.*

239. *Id.* at 1045.

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

241. *Id.*

242. See *supra* Part II.C.

tribes” in “implicat[ing] the Tribe’s legally protected economic and sovereign interests.”²⁴³ Courts must look beyond purely legal considerations²⁴⁴ to the potentially “wide-ranging consequences for gaming activities operated on Native American lands.”²⁴⁵

Plaintiffs bringing these suits commonly ask for relief that directly implicates these tribal interests: voiding the current compacting agreement by nullifying the Secretary’s approval and enjoining the state from entering further compact agreements with the tribe.²⁴⁶ Because a tribe cannot offer Class III gaming absent a valid compact under IGRA, these remedies effectively shut down tribal gaming until a new compact is validated.²⁴⁷ And because both the tribes and states willingly entered into these agreements, even if both parties were subsequently willing to enter into a similar agreement, a non-tribal entity could bring another suit asking for the same remedies. The same process would then restart, giving the tribes no certainty or stability in their gaming operations, which provide significant economic and sovereign support to tribes.²⁴⁸ The requested relief in these cases can also have “retroactive effects” on the practical rights—like the essential revenues and employment enabled by gaming compacts—upon which tribes have previously relied.²⁴⁹ Courts often consider whether an existing party can adequately represent absent tribal interests in the Rule 19(a) analysis, which is addressed separately in Part IV.C below.

There are instances, however, where tribal interests are not implicated. For example, in one Ninth Circuit case, absent tribes were not required parties in a plaintiff tribe’s action against a state regarding a compact for gambling licenses.²⁵⁰ Because the absent tribes’ main concern was freedom from competition, the court rejected the absent tribes’ arguments that the outcome of the case would have financial consequences for the absent tribes.²⁵¹ In another case, the Fifth Circuit affirmed that a tribe was not a necessary party under Rule 19(a) in a former casino employee’s Title VII action against his employer,

243. *Maverick Gaming LLC v. United States*, 123 F.4th 960, 972 (9th Cir. 2024), *cert. denied*, No. 24-1161, 2025 WL 2823742 (U.S. Oct. 6, 2025) (mem.).

244. Legal considerations, for example, could be whether the judgment would be binding or have a preclusive effect on the tribe because it is not joined.

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

246. *See, e.g.*, First Amended Complaint, *supra* note 25, at 4; Complaint, *supra* note 26, at 42.

247. *See* Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1).

248. *Id.* § 2710(b)(2)(B).

249. *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 997 (9th Cir. 2020).

250. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 965-66, 970-72 (9th Cir. 2008).

251. *Id.* at 971.

which was a gaming enterprise rather than the tribe itself.²⁵² The terms of an employer contract expressly protected the tribe from any liability for discrimination by the employer.²⁵³ The court concluded that even if the tribe was considered the plaintiff's employer, it would be exempt from the discrimination claim because Congress expressly excluded "Indian Tribes" from the definition of "employer" under 42 U.S.C. § 2000e.²⁵⁴ In other words, the presumption in favor of tribes' sovereign interests is not absolute.

B. Tribes as Indispensable Parties

Whereas the Rule 19(a) analysis examines whether a party *should* be joined if feasible, the Rule 19(b) analysis looks at whether the party is indispensable, meaning that the lawsuit *cannot proceed* in that party's absence.²⁵⁵ Considerations of "equity and good conscience"—which give the court wide discretion to contemplate whether the action should proceed—in this context still weigh strongly in favor of dismissal. It is worth reiterating the strong presumption under this prong in favor of dismissal for foreign and state sovereigns.²⁵⁶

Many courts generally weigh sovereign immunity considerations to favor dismissal, noting "the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent."²⁵⁷ In *Maverick Gaming*, for example, the Ninth Circuit cited a "'wall of circuit authority' in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity."²⁵⁸ But at least some courts seem to undervalue tribal sovereign immunity due to the Supreme Court's precarious treatment of the

252. *Hines v. Grand Casinos of La., LLC*, 140 F. Supp. 2d 701, 705 (W.D. La. 2001), *aff'd*, 31 F. App'x 832 (5th Cir. 2002).

253. *Id.*

254. 42 U.S.C. § 2000e(b); *Hines*, 140 F. Supp. 2d at 705.

255. FED. R. CIV. P. 19.

256. *See supra* Part I.C.

257. *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986); *see, e.g., United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 480-81 (7th Cir. 1996) (same); *Enter. Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) (same); *cf. Seneca Nation of Indians v. New York*, 383 F.3d 45, 48 (2d Cir. 2004) (*per curiam*) (stating that the absent party's immunity is of supreme importance).

258. *Maverick Gaming LLC v. United States*, 123 F.4th 960, 984 (9th Cir. 2024) (Miller, J., concurring) (quoting *Diné Citizens Against Ruining Our Env't v. Bureau of Indian Affs.*, 932 F.3d 843, 857 (9th Cir. 2019)), *cert. denied*, No. 24-1161, 2025 WL 2823742 (U.S. Oct. 6, 2025) (mem.); *id.* ("[V]irtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether [an alternate] remedy is available, if the absent parties are Indian tribes invested with sovereign immunity." (alteration in original) (quoting *Diné Citizens*, 932 F.3d at 857)).

tribal immunity doctrine.²⁵⁹ Other courts misunderstand the distinct purposes underlying the tribal immunity doctrine and the complicated federal-tribe trust relationship.²⁶⁰ That neither the district court nor the appellate court in *West Flagler* cited controlling precedent valuing foreign and state sovereign immunity indicates that some courts view tribal immunity distinctly.²⁶¹ If courts are to proceed with the full Rule 19(b) analysis despite tribes' entrenched sovereign immunity rights, each prong should be analyzed, giving adequate consideration to tribal interests in gaming suits.

1. Prejudice and relief

Rule 19(b)(1) strongly favors dismissal in the Indian gaming context. The Rule 19(b)(1) factor—prejudice to any party or to the absent party—has often been found to mirror the required party inquiry under Rule 19(a).²⁶² This makes

259. *See, e.g., Davis ex rel. Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1999) (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756, 758 (1998)) (“[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).”).

260. *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1259-60 (10th Cir. 2001) (finding that the Secretary of the Interior and the tribe’s interests were “virtually identical” in allowing an Indian gaming-related suit to proceed); *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001) (finding that the “potential for prejudice to the [tribe] is largely nonexistent due to the presence” of federal defendants); *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996) (finding “no conflict . . . between the Secretary’s interest and the interest of the nonparty Tribes”); *Washington v. Daley*, 173 F.3d 1158, 1167-68 (9th Cir. 1999) (allowing the suit to proceed because the government and the Tribes “do not disagree on the issues at hand” and have a trust relationship).

261. *W. Flagler Assocs. v. Haaland*, 573 F. Supp. 3d 260 (D.D.C. 2021), *aff’d in part, vacated in part*, 71 F.4th 1059 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 2671 (2024) (mem.); *W. Flagler*, 71 F.4th at 1059; *see also Kickapoo Tribe of Indians in Kan. v. Babbitt*, 43 F.3d 1491, 1496 (D.C. Cir. 1995) (“[T]his court has observed that ‘there is very little room for balancing of other factors’ set out in Rule 19(b) where a necessary party under Rule 19(a) is immune from suit because immunity may be viewed as one of those interests ‘compelling by themselves.’” (quoting *Hodel*, 788 F.2d at 777 n.13)); *Republic of Philippines v. Pimentel*, 553 U.S. 851, 868-69 (2008) (creating a strong presumption in favor of dismissal for foreign sovereigns).

262. *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024-25 (9th Cir. 2002) (the prejudice factor “largely duplicates” required party analysis); *Kickapoo Tribe in Kan.*, 43 F.3d at 1497 n.9 (“The inquiry as to prejudice under Rule 19(b) is the same as the inquiry under Rule 19(a)(2)(i) regarding whether continuing the action will impair the absent party’s ability to protect its interest.”). It is worth noting that in *West Flagler*, the district court rather easily found the tribe to be a necessary party under Rule 19(a) but did not find the tribe to be indispensable in its Rule 19(b) analysis. 573 F. Supp. 3d at 269-72. This is a contention that this court did not discuss, despite in-circuit and out-of-circuit precedent that suggests that there is significant overlap between the two analyses.

sense: “[E]normous”²⁶³ prejudice will occur to tribes with protected interests if the suit is allowed to move forward, forcing tribes to waive their immunity, a core part of their sovereignty, or be inadequately represented by an existing party.²⁶⁴ Any suit that seeks to challenge the validity of a Class III gaming compact also seeks to halt the tribe’s gaming operations and thereby harm related sovereign and financial interests.

Even more, because compact agreements are so often treated as contracts,²⁶⁵ it seems intuitive that “in an action to set aside . . . a contract, all parties who may be affected by the determination of the action are indispensable.”²⁶⁶

Rule 19(b)(2) is also straightforward: Whether “any prejudice could be lessened or avoided” is not possible given the relief plaintiffs seek.²⁶⁷ In both *Maverick Gaming* and *West Flagler*, the plaintiffs brought suit against tribes’ Class III gaming operations, asking the court to invalidate the compacts and declare Indian gaming operations unlawful.²⁶⁸ It is difficult to imagine how such relief could be tailored to lessen the prejudice to absent tribes, or non-tribal gaming entities being satisfied with anything less. The majority of gaming compact cases are “all or nothing cases, meaning that either the compacts are valid or not.”²⁶⁹ The plaintiffs want to halt Indian gaming operations, and a remedy that undoes the Secretary’s approval is a surefire way to nullify the compact itself. Thus, the “wholesale revocation”²⁷⁰ of the compact that would follow from granting such relief could not be tailored in these instances—tribes’ very right to operate their

263. *Maverick Gaming*, 123 F.4th at 980 (quoting *Am. Greyhound Racing*, 305 F.3d at 1025).

264. See, e.g., *Hodel*, 788 F.2d at 776 (“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.”); *Kickapoo Tribe of Okla. v. Lujan*, 728 F. Supp. 791, 797 (D.D.C. 1990) (“To allow this litigation to proceed in the Band’s absence would promote the worst kind of paternalism and seriously undermine the Band’s interest in its own survival.”). Though *Hodel* and *Kickapoo Tribe of Okla.* are not Indian gaming cases, they illustrate the distinct sovereignty restrictions that a tribe faces when a suit is allowed to proceed under Rule 19(b).

265. See, e.g., *Confederated Tribes of Siletz Indians of Or. v. Oregon*, 143 F.3d 481, 485 (9th Cir. 1998).

266. *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1156 (9th Cir. 2002) (quoting *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975)).

267. FED. R. CIV. P. 19(b)(2).

268. First Amended Complaint, *supra* note 25, at 4; Complaint, *supra* note 26, at 42.

269. Fletcher, *supra* note 15, at 81. For example, in *American Greyhound*, the Ninth Circuit noted that even narrowing relief to eliminate an injunction on existing compacts would not lessen prejudice to tribes who would still suffer prejudice from any “effects of the declaration that the gaming conducted by the tribes pursuant to their compacts is illegal.” 305 F.3d 1015, 1025 (9th Cir. 2002). And yet, anything less would also prejudice the plaintiff, who asked for injunctive relief as an “essential remedy.” *Id.*

270. *Maverick Gaming LLC v. United States*, 123 F.4th 960, 981 (9th Cir. 2024), *cert. denied*, No. 24-1161, 2025 WL 2823742 (U.S. Oct. 6, 2025) (mem.).

gaming facilities and the ensuing revenue to which they are entitled would be threatened.

2. Incomplete remedy

Courts typically spend relatively less time on Rule 19(b)(3), which addresses “whether a judgment rendered in the person’s absence would be adequate.”²⁷¹ This prong’s adequacy-of-judgment factor has been defined as “the ‘public stake in settling disputes by wholes, whenever possible.’”²⁷² Permitting Indian gaming litigation to proceed in the relevant tribe’s absence would not settle the underlying dispute, mainly for the reasons considered in the Rule 19(b)(2) analysis.²⁷³ While setting aside the Secretary’s compact approval seems facially adequate, courts must not stop the inquiry there. Instead, the actual *judgment*, which nullifies the gaming compact to which a tribe is a party, is necessarily inadequate because the tribe has not been joined in the suit. In other words, the binary nature of these suits necessarily requires an adequate remedy at full expense of the tribe or an inadequate remedy for the plaintiffs. A dispute about a gaming compact, therefore, cannot be resolved without the tribe present in the suit due to the very equity concerns that cause prejudice to the absent tribe to begin with.

3. Alternative forum

Where courts have allowed suits to proceed without tribal parties, this prong of the Rule 19(b) analysis—considering alternative forums for relief—has often been given substantial, nearly dispositive weight.²⁷⁴ But while this is an important prong, courts must not give it so much weight as to overwhelm the other prongs of the Rule 19(b) analysis that overwhelmingly favor tribal sovereignty interests.²⁷⁵

Challenges to Indian gaming compacts must be brought in either state or federal court—by challenging the Secretary’s validation of a compact under the APA or challenging the compact directly by suing an entity such as the governor

271. FED. R. CIV. P. 19(b)(3).

272. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 870 (2008) (quoting *Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 111 (1968)).

273. *See supra* Part IV.B.1.

274. *See, e.g., Dairyland Greyhound Park, Inc. v. McCallum*, 655 N.W.2d 474, 485-87 (Wis. Ct. App. 2002); *Pasco Int’l (London) Ltd. v. Stenograph Corp.*, 637 F.2d 496, 500-01 (7th Cir. 1980); *Anrig v. Ringsby United*, 603 F.2d 1319, 1326 (9th Cir. 1978).

275. *See Maverick Gaming*, 123 F.4th at 981 (“Because there is no alternative judicial forum in which Maverick could seek the relief it requests, the district court found that this factor weighs in favor of Maverick. However, ‘we have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs.’” (quoting *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002))).

of the state that entered into the compact with the tribe. But a tribe is protected by sovereign immunity in both of these forums.²⁷⁶ The language and prevailing doctrine of Rule 19 necessarily support dismissal when sovereign interests are at stake—regardless of the claims of the other side.²⁷⁷ Indeed, in a class action brought by human rights victims against a former president, the Supreme Court dismissed the case under Rule 19(b), even while recognizing that dismissal may create circumstances when “plaintiffs will be left without a forum for definitive resolution of their claims.”²⁷⁸

Compacts require robust intergovernmental negotiation and cooperation, the outcome of which is a contract that allows Indian gaming operations to the satisfaction of both parties. Third-party plaintiffs in Indian gaming cases do not allege that the contracts themselves are wrongful—for example, that one party entered into the contract fraudulently or under duress—but rather argue that the compacts simply should not be allowed.²⁷⁹ On that view, a single court proceeding brought by private third parties is not an appropriate forum for invalidating gaming compacts or interfering with the negotiations that produced them. Even more, IGRA itself mandates that tribes and states come to an agreement on jurisdictional selection in the event of litigation arising from the compact.²⁸⁰ Thus, the fact that the statute contemplates jurisdiction and immunity waiver as to these types of state claims, while not requiring the tribe to waive immunity to third-party suits relating to the compact, supports the inference that IGRA itself intends that the terms of tribal immunity be dictated by the tribe in compact negotiations, not by a third-party plaintiff collaterally attacking the agreement.

While plaintiffs may be foreclosed from the specific forum where they wish to bring their claim for relief, other options exist. Tribal sovereign immunity does not shield tribes from suit by the federal government,²⁸¹ nor does it extend to tribal members when sued in their individual capacity.²⁸² Individual tribal officers may be sued for injunctive relief under the *Ex parte Young* doctrine,

276. Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058, 1058 (1982).

277. 7 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 1608 (3d ed. 2001) (“[T]here may be situations in which the court will be obliged to dismiss an action even though plaintiff will not be able to assert his claim elsewhere.”); Florey, *supra* note 102, at 687.

278. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 872 (2008). The Court’s dismissal without identifying an alternative forum for relief is even more notable given that the case involved a sympathetic class action brought by human rights victims of a former president of the Philippines. *Id.* at 857-58.

279. First Amended Complaint, *supra* note 25, at 4; Complaint, *supra* note 26, at 42.

280. Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(3)(C)(ii).

281. Padraic I. McCoy, *Sovereign Immunity and Tribal Commercial Activity: A Legal Summary and Policy Check*, 57 FED. LAW. 41, 44 (2010).

282. *Lewis v. Clarke*, 581 U.S. 155, 163-64 (2017); *Puyallup Tribe, Inc. v. Dep’t of Game*, 433 U.S. 165, 171-72 (1977).

which would suffice if, as many plaintiffs contend in the gaming context, a tribal official is “authorizing gaming outside the scope of her authority.”²⁸³ Further, plaintiffs can also turn to enforcement actions—either brought under federal law for violations of IGRA²⁸⁴ or by certain states under Public Law 280.²⁸⁵ If plaintiffs are non-Indian commercial gaming competitors, or if they seek to invalidate a compact generally, parties can also utilize political avenues to lobby for broader legalization of gaming or replacement of state parties that compacted with the tribes.²⁸⁶ IGRA itself also serves as a check on tribal power—it is a prime example of Congress acting through its plenary power to allow states to weigh in on what was once absolute Indian control over this area.²⁸⁷ Consequently, IGRA does not contemplate increased judicial oversight of this area, though parties can also lobby for an amendment to IGRA that adds further process. These options further demonstrate why this prong of the Rule 19(b) analysis should not be given inordinate weight.

4. Rule 19’s public-rights exception

Federal courts have recognized a “public-rights exception” to Rule 19 joinder rules when the lawsuit pertains to the protection and vindication of public rights, notably in environmental cases where it is infeasible to join polluters and other contributing parties.²⁸⁸ The public-rights exception must not “destroy the legal entitlements of the absent parties”;²⁸⁹ in other words, it is not an exception insofar as it still protects absent party interests from complete misrepresentation.

Courts have generally declined to extend this exception to the tribal gaming context.²⁹⁰ Notably, both *Maverick Gaming* and *West Flagler Associates* argued

283. *Fletcher*, *supra* note 15, at 105; *see also* *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (“As an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe’s immunity from suit.”).

284. 25 U.S.C. § 2710(d)(7)(A).

285. *See* Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 and 28 U.S.C. § 1360).

286. *Fletcher*, *supra* note 15, at 108-09 (discussing the California recall process and referendum voting procedures that have been used to decide the fate of Indian gaming).

287. This is seen most clearly by the requirement of state compacts before tribes can offer any Class III gaming. *See* *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215-18 (1987).

288. *Jeffries v. Ga. Residential Fin. Auth.*, 678 F.2d 919, 929 (11th Cir. 1982); *Nat’l Res. Def. Council v. Berklund*, 458 F. Supp 925, 933 (D.D.C. 1978), *aff’d*, 609 F.2d 554 (D.C. Cir. 1979).

289. *White v. Univ. of Cal.*, 765 F.3d 1010, 1028 (9th Cir. 2014) (quoting *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996)).

290. *Kickapoo Tribe of Indians in Kan. v. Babbitt*, 43 F.3d 1491, 1500 (D.C. Cir. 1995); *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025-27 (9th Cir. 2002); *Shermoen v. United States*, 982 F.2d 1312, 1319 (9th Cir. 1992).

for the application of the Rule 19 public-rights exception.²⁹¹ As the Ninth Circuit noted, the “real ‘interest’” undergirding this public-rights argument “[was] in freeing themselves from the competition of Indian gaming,” which can hardly be considered a public right.²⁹² Though private plaintiffs attempt to invoke the public-rights exception as a last-ditch effort to bypass the otherwise intricate Rule 19 balancing,²⁹³ the Ninth Circuit has stated that any “incidental affect [sic]” these lawsuits might have on “governmental compliance with administrative and constitutional law” is outweighed by the clear “private interest in increasing . . . revenue.”²⁹⁴ This assertion is common in gaming compact litigation, as it is rare that plaintiffs would bring gaming compact cases for the sole interest of “proper operation of state law.”²⁹⁵ Courts have held that this is not the type of conflict for which the public-rights exception was created.²⁹⁶

C. Adequate Representation of Absent Tribal Interests

1. Federal parties

Though adequate representation by an existing party is not explicitly mentioned in Rule 19, those courts that have allowed gaming suits to proceed absent relevant tribes often give critical weight to this factor.²⁹⁷ In fact, *Maverick Gaming’s* main argument in its appeal to the Supreme Court claimed that the United States is an adequate representative of the tribe.²⁹⁸ Circuit courts

291. Federal Appellees’ Answering Brief at 11, *Maverick Gaming LLC v. United States*, 123 F.4th 960 (9th Cir. 2024) (No. 23-35136), ECF No. 19; Federal Defendants’ Response to Seminole Tribe of Florida’s Motion to Dismiss at 8, *W. Flagler Assocs. v. Haaland*, 573 F. Supp. 3d 260 (D.D.C. 2021) (Nos. 21-cv-2192 & 21-cv-2513), 2021 WL 8344054, ECF No. 34.

292. *Maverick Gaming*, 123 F.4th at 982 (alteration in original) (quoting *Am. Greyhound Racing*, 305 F.3d at 1026).

293. Petition for Writ of Certiorari, *supra* note 37, at 6-7.

294. *Maverick Gaming*, 123 F.4th at 982.

295. *Fletcher*, *supra* note 15, at 82. Note that there is no private cause of action under IGRA, so a potential plaintiff would have to assert violations of state law.

296. See *Am. Greyhound Racing*, 305 F.3d at 1026 (“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.”); *Maverick Gaming*, 123 F.4th at 982-83.

297. See *W. Flagler Assocs. v. Haaland*, 573 F. Supp. 3d 260, 270-72 (D.D.C. 2021), *aff’d in part, vacated in part*, 71 F.4th 1059 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 2671 (2024) (mem.); *Artichoke Joe’s Cal. Grand Casino v. Norton*, 216 F. Supp. 2d 1084, 1118-19 (E.D. Cal. 2002), *aff’d*, 353 F.3d 712 (9th Cir. 2003); *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001); *Knox v. U.S. Dep’t of the Interior*, 759 F. Supp. 2d 1223, 1235-37 (D. Idaho 2010).

298. Petition for Writ of Certiorari, *supra* note 37, at 24-27.

have varied approaches to adjudging adequate representation by an already-joined party.²⁹⁹ But even in jurisdictions with exacting standards regarding adequate representation, I argue that the federal government cannot adequately represent absent tribal interests due to the incompatible, diverging interests of the two parties. Even if the two parties facially share the same desired outcome in the case, this is not “the ballgame.”³⁰⁰ A closer look at the litigation approaches generally reveals that the two parties “share an interest in the ultimate outcome of th[e] case for very different reasons.”³⁰¹

a. General federal constraints in representation

The federal government does not represent the tribe as its client in Indian gaming litigation; it represents the United States.³⁰² This difference is striking: Because the Secretary of the Interior is a political appointee, if the Secretary does not advance the positions of the tribe, the DOJ and the federal government will likely choose what is in the best *federal* not tribal, interest.³⁰³ In *Maverick Gaming*, for example, the Shoalwater Bay Indian Tribe tried to negotiate for years with the state for a mutually beneficial gaming compact under IGRA.³⁰⁴ The state refused to do so, protected by its Eleventh Amendment immunity and unwilling to consent to IGRA’s mediation process.³⁰⁵ When the tribe finally opened a gaming facility on its reservation without a valid compact, the DOJ filed an *in rem* action, halting the tribe’s gaming operation and seizing the gaming machines from tribal land.³⁰⁶ Similarly, in *Diné Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, the Ninth Circuit found the

299. See *supra* Part I.B.

300. Petition for Writ of Certiorari, *supra* note 37, at 24 (stating that the DOJ’s ability to defend the Department of the Interior’s compact validation “should be the ballgame” when it comes to adequate representation).

301. *Maverick Gaming*, 123 F.4th at 974 (quoting *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934, 945 (9th Cir. 2022)).

302. 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 tribes.”).

303. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011) (“Although the Government’s responsibilities with respect to the management of funds belonging to Indian tribes bear some resemblance to those of a private trustee, this analogy cannot be taken too far.”).

304. Limited Intervenor Shoalwater Bay Tribe’s Motion to Dismiss, *supra* note 56, at 7.

305. *Id.* at 5.

306. *Id.* at 5-6. Since IGRA became law, Washington has entered into gaming compacts with each of the twenty-nine tribes in the state. *Maverick Gaming*, 123 F.4th at 967-68. This is helpful context, given that Washington’s current compacting might obscure these historical state-tribe tensions.

“overriding interest” in the federal defendants’ desire to comply with federal laws to “differ[] in a meaningful sense” from the tribe’s sovereign interests.³⁰⁷ As the Ninth Circuit noted in *Maverick Gaming*, these examples underscore the federal government’s interest in enforcement of its federal laws, which precedes any trust responsibility to the tribes.³⁰⁸

Further, though tribes and federal defendants may align, at least superficially, in interest and outcome, there is no requirement that this must remain the case for the duration of the litigation. The tribe is not protected from a “later divergence of interests” throughout the lengthy litigation process.³⁰⁹ In fact, when faced with a pending or unfavorable ruling at the district court level, the federal government has at times reversed its position on appeal.³¹⁰ Washington tribes, writing an amicus brief in the Ninth Circuit *Maverick Gaming* appeal, pose a helpful hypothetical: If the case were to proceed on the merits and the district court “issued a ‘holding that [federal law] required something other than what Federal Defendants have interpreted [it] to require,’” this would change the federal government’s litigation strategy on appeal.³¹¹

This point is perhaps best illustrated by the appellate timeline of the *Maverick Gaming* suit, which has occurred over two different administrations. At the Ninth Circuit, the government’s brief—filed during the Biden administration—echoed the intervening tribe’s argument that the federal government could not adequately represent tribal interests in this suit.³¹² The government specifically asked the Ninth Circuit to “disregard *Maverick’s* assertions that the federal government will adequately represent the Tribe’s

307. 932 F.3d 843, 855-56 (9th Cir. 2019) (“The Navajo Nation’s interest is tied to its very ability to govern itself, sustain itself financially, and make decisions about its own natural resources.”).

308. *Maverick Gaming*, 123 F.4th at 975, 977 (“Thus, in the event of a conflict between the Tribe’s interest in class III gaming and any other provision of federal law, IGRA requires the federal government to consider, and possibly prioritize, the federal law over the Tribe’s interest . . .”).

309. See *Diné Citizens*, 932 F.3d at 850 (quoting *Diné Citizens Against Ruining Our Env’t v. Bureau of Indian Affs.*, No. CV-16-08077, 2017 WL 4277133, at *3 (D. Ariz. Sept. 11, 2017), *aff’d*, 932 F.3d 843 (9th Cir. 2019)).

310. See, e.g., *City of Cleveland v. Ohio*, 508 F.3d 827, 837 (6th Cir. 2007); *United States v. Egan Marine Corp.*, 843 F.3d 674, 679 (7th Cir. 2016); *Maine v. Wheeler*, No. 14-cv-00264, 2018 WL 6304402, at *2 (D. Me. Dec. 3, 2018).

311. Brief of Non-Party Compacting Tribes as Amici Curiae in Support of Intervenor-Defendant-Appellee and in Support of Affirmance at 17, *Maverick Gaming*, 123 F.4th 960 (No. 23-35136), ECF No. 34 (alteration in original) (quoting *Diné Citizens*, 932 F.3d at 855); see also *White v. Univ. of Cal.*, 765 F.3d 1010, 1027 (9th Cir. 2014) (“[I]f a court were to determine that the La Jolla remains should not be transferred to the Kumeyaay under NAGPRA, it is questionable whether—perhaps even unlikely that—the University and the Kumeyaay would pursue the same next course of action.”).

312. Federal Appellees’ Answering Brief, *supra* note 291, at 29-30.

interests in the validity of its Compact.”³¹³ Maverick Gaming formally appealed the Ninth Circuit decision to the Supreme Court on May 9, 2025, near the beginning of the second Trump administration.³¹⁴ The government’s brief opposing a grant of certiorari was an opposing brief in name only.³¹⁵ The government’s brief advanced none of the tribe’s arguments on the merits regarding the underlying compact challenge—instead arguing that the federal government is “the only necessary and indispensable party to defend an APA claim” and that Rule 19(b) factors “militate[] against dismissing an APA suit for failure to join an absent non-federal third party.”³¹⁶ In wholly abandoning those arguments made to the Ninth Circuit, the government precisely validated tribal concerns that the federal government will not consistently and adequately represent tribal interests.

In addition, the federal government is a repeat player in federal courts. Where tribes may steer away from federal courts altogether, the United States may be bound by its prior stances through the mutual preclusion doctrine.³¹⁷ For example, in a New York land claim case, the United States needed to argue against preclusion of a current suit to vindicate tribal interests but the court found that the Indian Resources Section was bound by the prior suit and could not relitigate.³¹⁸ While this seems less relevant in the gaming context, where much of the litigation concerns one-time compact agreements, one can imagine a situation wherein a finding of an invalid compact—or even a specific negative stance taken by the federal government—could bind the tribes and states through future negotiations or the reopening of a case. This would have a much more prospective effect than any party contemplated.

Lastly, the argument that federal defendants will adequately represent tribal interests because of the federal trust responsibility to Indians³¹⁹ obfuscates the

313. *Id.* at 30.

314. *See* Petition for Writ of Certiorari, *supra* note 37, at 1-5, 35.

315. After critiquing the Ninth Circuit’s approach to Rule 19 and adequate representation in its *Maverick Gaming* opinion, the government briefly states that this is a “flawed vehicle” to answer the question presented because *Maverick Gaming* recently filed for Chapter 11 bankruptcy. Brief for the Federal Respondents in Opposition at 11, *RunItOneTime LLC v. United States*, No. 24-1161, 2025 WL 2823742 (U.S. Oct. 6, 2025) (mem.).

316. *Id.* at 11-15.

317. The issue preclusion doctrine prevents a party—here, the federal government—from relitigating a specific issue of fact or law that has already been litigated and decided in an earlier suit. 18 WRIGHT & MILLER’S FEDERAL PRACTICE & PROCEDURE § 4416 (3d ed. 2001).

318. *Seneca Nation of Indians v. New York*, 26 F. Supp. 2d 555, 559-70 (W.D.N.Y. 1998), *aff’d*, 178 F.3d 95 (2d Cir. 1999).

319. This is a stance often taken by plaintiffs and the federal government in arguing that the suit should proceed amid Rule 19 motions from absent tribes. *See, e.g.*, *United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 479 (7th Cir. 1996) (“[T]he plaintiff-relators
footnote continued on next page”

actual way that this trust relationship operates. There is no case law stating that trust responsibility alone is enough to satisfy adequate representation.³²⁰ And in practice, the trust responsibility under IGRA amounts to no fiduciary or other interest owed by the federal government that is legally enforceable by the tribes.³²¹ This pliable relationship allows the federal government to abstractly state that it advocates for tribal interests while advancing chiefly self-interested arguments. Instead, the remarkable paternalism of the ward-guardian relationship that first established this trust responsibility has softened as the federal government seeks to “promote tribal self-determination regarding governmental authority and economic development.”³²² Tribes can enter into and administer certain self-determination “contracts” with agencies—the Department of Health and Human Services, for example—through federal authorization.³²³ It is fundamentally at odds with this era of self-determination, then, that the federal government would be able to adequately represent another absent sovereign’s legal interests under this loose trust relationship.

b. IGRA-specific constraints in representation

The Department of the Interior’s interests necessarily cannot mirror tribal interests. The Secretary of the Interior must approve all valid tribal-state gaming compacts under IGRA.³²⁴ The Department of the Interior has disapproved compacts in the past, disagreeing with the tribe and the state over

object that ‘the tribe is not a necessary party as its interests are always represented by its trustee, the United States.’”); Federal Defendants’ Response to Shoalwater Bay Indian Tribe’s Motion to Dismiss at 6, *Maverick Gaming LLC v. United States*, 658 F. Supp. 3d 966 (W.D. Wash. 2022) (No. 22-cv-05325), ECF No. 94; Petition for Writ of Certiorari, *supra* note 37, at 24-27.

320. *Cf.* *Confederated Tribes of the Chehalis Indian Rsrv. v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991) (“[T]he United States cannot adequately represent the Quinault Nation’s interest without compromising the trust obligations owed to the plaintiff tribes.”); *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023-24 n.5 (9th Cir. 2002) (“As the district court pointed out, the State and the tribes have often been adversaries in disputes over gaming, and the State owes no trust duty to the tribes.”). In cases where the federal government straightforwardly satisfies adequate representation standards, there must be something more, like a tribal agreement that names the federal government as the only relevant party in prospective litigation. *See, e.g., Alto v. Black*, 738 F.3d 1111, 1128 (9th Cir. 2013) (naming the Bureau of Indian Affairs as final decisionmaker); *Cheyenne River Sioux Tribe of Indians v. United States*, 338 F.2d 906, 910 (8th Cir. 1964) (involving an agreement with “unequivocal language [as to] the procedure to be followed in the event” that certain litigation arose).

321. *See supra* notes 238-43 and accompanying text.

322. 25 U.S.C. § 5602.

323. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended in scattered sections of 25 U.S.C.).

324. 25 U.S.C. § 2710(d)(3)(A).

the legality of the contract.³²⁵ This sets up a situation where the Secretary's assessment of whether any compact complies with IGRA and other federal laws may be different from the tribes' assessment. Thus, even when a tribe has secured an agreement with the state, sufficiently satisfying tribal interests, there is no guarantee that the Department of the Interior will agree with and support the tribe's compact. Tribes have even brought suit under the APA against the Secretary and Department of the Interior over compact disapprovals, underscoring the possibility of diverging interests here.³²⁶ If the Department of the Interior is then assumed to represent tribal interests in subsequent litigation, this creates a direct conflict that contravenes tribes' right to be heard.

Even if the Secretary approves a compact, federal entities are under no obligation to make all, or even any, of the arguments that a tribe will make in compact litigation. Because the federal defendants are focused on IGRA's enforcement,³²⁷ their interests necessarily differ from tribal interests that focus on the longevity of tribal gaming operations.³²⁸ The federal defendant is also limited to the issue at stake in the litigation: whether that specific compact complies with federal law. The Department of the Interior has an interest in affirming its narrow decision-making analysis under IGRA to approve a compact.³²⁹ This differs significantly from what is at stake for the tribes, who argue that the ability to offer gaming activities on their land is "inherent authority . . . [that] predates IGRA and colonization under *Cabazon*."³³⁰ For tribal parties, "the stakes of this litigation extend beyond the fate of the [compact] and

325. See, e.g., Letter from Bryan Newland, Assistant Sec'y, Indian Affs., Dep't of Interior, to Leo Sisco, Chairman, Santa Rosa Indian Cmty. of the Santa Rosa Rancheria (July 22, 2022), <https://perma.cc/BX3J-NN8P>; Letter from Bryan Newland, Assistant Sec'y, Indian Affs., Dep't of Interior, to Jose Simon, Chairman, Middletown Rancheria of Pomo Indians of Cal. (July 22, 2022), <https://perma.cc/3F96-RFTC>; Letter from Bryan Newland, Assistant Sec'y, Indian Affs., Dep't of Interior, to Claudia Gonzales, Chairwoman, Chukchansi Indians of Cal. (Nov. 5, 2021), <https://perma.cc/7M4Z-UK6H>.

326. See, e.g., *Forest Cnty. Potawatomi Cmty. v. United States*, 330 F. Supp. 3d 269, 274-75 (D.D.C. 2018).

327. *Maverick Gaming LLC v. United States*, 123 F.4th 960, 974-75 (9th Cir. 2024), *cert. denied*, No. 24-1161, 2025 WL 2823742 (U.S. Oct. 6, 2025) (mem.).

328. See *id.* at 976 ("[A]lthough the Federal Defendants and Tribe share an interest in defending the Secretary's approval of the gaming compacts and sports betting amendments, the Federal Defendants do not share the Tribe's sovereign and economic interests in protecting and furthering its class III gaming operations.").

329. *Id.* at 974-75 (discussing the federal government's interest "in defending its own analysis that formed the basis of its decision to approve the sport-betting compact amendments" (quoting *Maverick Gaming LLC v. United States*, 658 F. Supp. 3d 966, 973 (W.D. Wash. 2023), *aff'd*, 123 F.4th 960 (9th Cir. 2024), *cert. denied*, No. 24-1161, 2025 WL 2823742 (U.S. Oct. 6, 2025) (mem.))).

330. Shoalwater Bay Tribe's Answering Brief at 24-25, *Maverick Gaming*, 123 F.4th 960 (No. 23-35136), ECF No. 23 (quoting *Maverick Gaming*, 658 F. Supp. 3d at 973).

implicate sovereign interests in self-governance.”³³¹ This includes the continued functioning of the tribe’s gaming operations and the stability that comes from the tribe’s Indian gaming business. Federal defendants may not make this argument and may even fundamentally disagree where this inherent authority conflicts with IGRA and other federal laws.³³² Thus, a superficial similarity obscures an underlying difference: The tribe sees compact-related APA litigation as a matter of sovereignty, while the federal entity views this as another case through which IGRA can be affirmed.

This issue is further illustrated in *West Flagler*, where the Department of the Interior wrote a “deemed approval letter” promising to vigorously advocate for the Seminole Tribe as an absent party.³³³ However, in the lower court, the Department of the Interior initially failed to take a position that the tribe preferred on the merits.³³⁴ The Department of the Interior also did not immediately appeal or seek a stay of the district court’s decision, all things which cut against the assurances in the Department of the Interior’s “deemed approval letter.”³³⁵ The Department of the Interior’s supplemental merits brief was barely a consideration in the district court decision, and it still omitted key arguments that the tribe implored, like arguing for the application of Indian canons of construction in the interpretation of IGRA’s compacting provisions.³³⁶

Even more, in *West Flagler*, the federal government *opposed* the Tribe’s Rule 19 motion.³³⁷ And in *Maverick Gaming*, the federal government did not file a Rule 19 motion to dismiss on behalf of the tribe. There, the United States asserted that it disagreed with the strict standard of adequate representation laid out in *Diné Citizens*, stating that the government “reserves the right to assert in future proceedings that the United States is generally the only required and

331. *Maverick Gaming*, 123 F.4th at 975 (alteration in original) (quoting *Deschutes River All. v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1163 (9th Cir. 2021)).

332. *See id.*

333. Reply Brief of Appellant Seminole Tribe of Florida, *supra* note 207, at 14-15.

334. *Id.* at 15.

335. *Id.* at 14.

336. *Id.* at 15. Though not the subject of this Note, the Indian canons of construction are a set of interpretive guidelines that courts use to interpret Indian treaties and statutes, “which ensure that ‘the language used in treaties with the Indians should never be construed to their prejudice.’” Brief of Indian Law Professors as Amici Curiae in Support of Petitioner at 4, *Herrera v. Wyoming*, 587 U.S. 329 (2019) (No. 17-532), 2017 WL 5433135 (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832)). The Supreme Court has used the Indian canons to resolve interpretive questions of treaties and statutes. *Id.* at 8. However, lower courts do not always apply the canons in Indian law cases, *see id.* at 17, so it makes sense why tribes feel the distinct need to argue for their application in a way that the federal government does not.

337. Federal Defendants’ Response to Seminole Tribe of Florida’s Motion to Dismiss, *supra* note 291, at 2.

indispensable defendant in APA litigation challenging federal agency action.”³³⁸ That federal defendants believe they can adequately represent tribal interests demonstrates a fundamental misunderstanding of the unique tribal considerations and unfulfilled trust relationship that remains.

Further, representation is inadequate when the “duties and responsibilities of the Secretary *may* conflict with the interests of the Tribe.”³³⁹ Here, the Secretary’s discretion in approving compacts or choosing to enforce IGRA’s provisions against a tribe that believes it has adequately complied with IGRA plainly shows this conflict. This again demonstrates the federal government’s “overriding interest” in complying with the law.³⁴⁰ A federal defendant could also change its position due to a change in leadership or internal policy. Government defendants have a broad duty to serve the population writ large, which may preclude them from making specific arguments, or in fact make them beholden to certain arguments that are averse to tribal interests.

Lastly, it is worth reiterating that IGRA’s explicit purpose is to “promot[e] tribal economic development, self-sufficiency, and strong tribal governments.”³⁴¹ These goals are effectuated, for example, by requiring that tribes use tribal gaming revenue for specific sovereign functions.³⁴² In other words, the purpose of the statute specifically contemplates tribal sovereignty and the tangible sovereignty that tribes derive from Class III compacts. The federal government may argue that it is the “only required and indispensable defendant,” and that it can adequately represent the absent tribes.³⁴³ But no tribe has agreed with this argument in the Indian gaming context due to the unique nature of IGRA and the relationship between Indian gaming and tribal sovereignty, only further showing why the federal and tribal governments are not aligned.

2. State parties

State parties, by contrast, seem even easier to rule out as adequate representatives of absent tribal interests. States owe no trust duty to the tribes, which is significant because cases that have proceeded without tribal interests (1) often have a federal defendant and (2) cite the trust relationship as a main

338. Federal Defendants’ Response to Shoalwater Bay Indian Tribe’s Motion to Dismiss, *supra* note 319, at 6.

339. *Manygots v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977) (emphasis added).

340. *Diné Citizens Against Ruining Our Env’t v. Bureau of Indian Affs.*, 932 F.3d 843, 855 (9th Cir. 2019).

341. Indian Gaming Regulatory Act, 25 U.S.C. § 2702(1).

342. *Id.* § 2710(b)(2)(B), (d)(1)(A)(ii).

343. Federal Appellees’ Answering Brief, *supra* note 291, at 9-10.

reason why the suit can proceed.³⁴⁴ Jurisdictions of state and tribal sovereignty have often been in competition with or come at the expense of the other—American history is littered with state attempts to undermine tribal sovereignty to expand state authority.³⁴⁵ The Supreme Court has gone so far as to observe that “the people of the [s]tates where [tribes] are found are often [tribes’] deadliest enemies.”³⁴⁶ And in many tribal gaming cases, current alignment between states and tribes obscures a historically fraught relationship over gaming.³⁴⁷ Given the historic and physical tension between tribes and states, it makes sense that states would not meet the high burden of adequate representation.

Even more, state parties are clearly averse to tribal interests in the gaming context, where states are “adversaries in disputes over gaming” with potentially adverse compact interests.³⁴⁸ This goes back to straightforward contract law: These actions necessarily require joinder of all parties to the contract.³⁴⁹ Unless a party is a plaintiff to the suit, it makes sense that all parties to the contract are aligned in wanting to preserve the validity of the contract. But allowing a single party to the contract to move forward as the sole defender on behalf of all parties to the contract is dangerous. This would effectively allow a party seeking to invalidate a contract to bring suit against one of the signatories and argue that the existing defendant adequately represents all other parties to the suit.³⁵⁰ This is not tolerated as the “general rule” of contracts litigation, and there is no reason why it should be allowed in the case of tribal-state compacts here.³⁵¹

Even where a state actor, like the governor, is aligned with the tribes on a gaming compact renewal, she does not have the same incentives or burden. Where the governor may enjoy extra state revenue by striking a deal with the tribes, “the financial consequences of not renewing the compacts would fall

344. See, e.g., *Am. Greyhound Racing v. Hull*, 305 F.3d 1015, 1023 n.5 (9th Cir. 2002); *Washington v. Daley*, 173 F.3d 1158, 1167-68 (9th Cir. 1999).

345. See, e.g., *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2504-05 (2022) (eroding tribal sovereignty by granting concurrent state criminal jurisdiction over non-Indians on reservation land).

346. *United States v. Kagama*, 118 U.S. 375, 384 (1886).

347. See, e.g., *Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136, 1147-48 (D. Or. 2005) (noting that “the State here originally challenged the classification of the Hatch Tract as restored lands to prevent the Tribes from establishing a gaming facility there”).

348. See *id.* at 1147 (quoting *Am. Greyhound*, 305 F.3d at 1023 n.5).

349. *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1156-57 (9th Cir. 2002) (“[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.” (quoting *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975))).

350. *Wilbur v. Locke*, 423 F.3d 1101, 1113-14 (9th Cir. 2005) (“[A]ll parties to a contract are necessary in litigation seeking to ‘decimate’ that contract.” (quoting *Dawavendewa*, 276 F.3d at 1157)).

351. *Id.* at 1114.

disproportionately on the tribes.”³⁵² Local and state politics are even more subject to influence and change than federal politics, which might in turn change the litigation strategy, defendants, or overall position of the joined parties.

3. Tribal self-representation

Fundamentally, tribes can only rely on themselves to properly and consistently advocate for their interests. Judge Fletcher noted this specifically in the *Maverick Gaming* oral argument, stating that “*can* adequately represent is different from *will* necessarily adequately represent.”³⁵³ One can imagine a scenario where a tribe has five arguments to make, and the existing defendants will only make three, even if they can identify all five.³⁵⁴ This can be seen in the federal parties’ briefing for the *Maverick Gaming* appeal, where the United States makes many of the same arguments as the Shoalwater Bay Indian Tribe, but then argues to make the federal government “an adequate representative of the tribe’s interests” in all APA litigation despite the tribe arguing for a case-by-case, if any, determination of adequate representation.³⁵⁵ In cases weighing foreign and state immunity with potential dismissal of the suit, adequate representation by an existing party is, at most, only superficially addressed, likely because the Court does not think to presume that another party can represent a sovereign’s distinct interests.³⁵⁶ The same skepticism should be extended to the proxy representation relationship here.

In his concurring opinion in *Maverick Gaming*, Judge Miller argues against the existing Ninth Circuit test for adequate representation.³⁵⁷ He specifically cautions against this test presumptively favoring dismissal due to absent tribal interests given “the distinctive character of APA litigation,” which examines only whether the agency’s action must be set aside.³⁵⁸ However, Judge Miller

352. *Dairyland Greyhound Park, Inc. v. McCallum*, 655 N.W.2d 474, 482 (Wis. Ct. App. 2002).

353. Oral Argument at 33:30, *Maverick Gaming LLC v. United States*, 123 F.4th 960 (9th Cir. 2024) (No. 23-35136), <https://perma.cc/R39R-UQKW> (emphasis added).

354. The Shoalwater Bay Indian Tribe specifically points to an argument it would make—that “the Tribe can lawfully offer class III gaming even without a compact”—that would not be raised by the federal defendant because it violates the IGRA scheme. *Maverick Gaming*, 123 F.4th at 977 & n.17.

355. Federal Appellees’ Answering Brief, *supra* note 291, at 26; Limited Intervenor Shoalwater Bay Tribe’s Motion to Dismiss, *supra* note 56, at 20-23.

356. *See, e.g., Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996); *Two Shields v. Wilkinson*, 790 F.3d 791, 794-99 (8th Cir. 2015); *Webb v. City of Tempe*, No. CV-16-03136, 2017 WL 1233827, at *3-4 (D. Ariz. Apr. 4, 2017), *aff’d*, 703 F. App’x 539 (9th Cir. 2017); *Diaz v. Glen Plaid, LLC*, No. 13-cv-853, 2013 WL 5603944, at *5-8 (N.D. Ala. Oct. 11, 2013).

357. *See Maverick Gaming*, 123 F.4th at 983-85 (Miller, J., concurring).

358. *Id.* at 984.

errs in his statement that “[a]lthough a judgment setting aside the agency’s action might have collateral consequences for non-parties like the Tribe, it leaves those non-parties no worse off than they would be had the agency not taken the challenged action in the first place.”³⁵⁹ In the Indian gaming context, which is itself a distinct subset of APA litigation, Judge Miller’s statement undervalues the financial reliance interests that tribes have in compacts, some of which span decades and have spawned incredibly lucrative business for a tribe. Where a tribe uses its gaming revenue to fund core sovereign functions like tribal welfare programs or tribal infrastructural improvements, the correct perspective does not ask whether setting aside the Secretary’s approval of a compact will bring the tribe back to its pre-compact position, but rather inquires as to how the specific outcome of the agency action, both before and after it is set aside, might affect the regulated beneficiaries. Especially where, as in IGRA, the form underlying the agency action is a contract between two parties, this inquiry seems more cleanly administrable than in other APA litigation.

Federal and state defendants do not rest their sovereignty on the outcomes of these suits, even if they “might conceivably ‘make all of the [tribe’s] arguments.’”³⁶⁰ And the federal government specifically has no pecuniary or sovereign interest in tribal gaming and is not a party to tribes’ compact agreements. Tribes are best positioned to properly articulate the impact of the loss of revenues to operating budgets, tribal housing, social and environmental services, and employment of tribal and non-Indian workers alike. Indeed, federal and state defendants likely do not even have access to that information. Though tribes can intervene under Rule 24(a) for the limited purpose of filing an amicus brief to convey this information, this is not an adequate substitute for Rule 19 joinder.³⁶¹ And when a tribe is an absent party, it 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.”³⁶²

V. Comparative Approaches to Absent Party Proxy Representation

Courts’ approaches to absent party representation in other areas further illustrate why absent tribal interests should be given utmost solicitude. Courts are hesitant to allow representation to proceed absent a named party that

359. *Id.* at 984-85.

360. *Ctr. for Biological Diversity v. Pizarchik*, 858 F. Supp. 2d 1221, 1227 (D. Colo. 2012) (quoting *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999)).

361. *See Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) (“Amicus status is not sufficient to satisfy this [Rule 19(b) prong], however, nor is ability to intervene if it requires waiver of immunity.”).

362. *Fletcher*, *supra* note 15, at 115.

distinctly represents a relevant party's interests.³⁶³ Intervention, for example, allows a party to intervene in a suit in certain circumstances.³⁶⁴ Specifically, a court *must* permit a party to intervene when it "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."³⁶⁵ This may sound familiar because it is almost identical to the language used in Rule 19(a)(1)(B)(i).³⁶⁶ And although the Rule 19 language is interpreted more narrowly,³⁶⁷ the way that courts interpret Rule 24 intervention is instructive for how courts should think about adequate representation transprocedurally. In the Rule 24 context, the burden to demonstrate that representation may be inadequate is "minimal."³⁶⁸ The Tenth Circuit has regularly found that representation is inadequate when governmental agencies seek to represent both the general public and a private party seeking intervention.³⁶⁹ The D.C. Circuit treats this standard as "not onerous."³⁷⁰ The Fourth and Fifth Circuits treat parties seeking "the same ultimate objective" with a "presumption" of adequate representation, which then turns to the petitioner to rebut by demonstrating inadequacy.³⁷¹

363. *See, e.g.*, *Taylor v. Sturgell*, 553 U.S. 880, 893-95 (2008) (describing only six strict exceptions to the general principle that an absent party cannot be precluded by an earlier judgment of a claim to which the entity was not a party).

364. FED. R. CIV. P. 24.

365. *Id.* r. 24(a)(2).

366. *See id.* r. 19(a)(1)(B)(i) ("A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if . . . that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest . . .").

367. Because the whole case can be dismissed if the party cannot be joined under Rule 19, courts tend to treat this version of adequate representation with a higher level of consequence and thus a narrower interpretation. *See Caleb Nelson, Intervention*, 106 VA. L. REV. 271, 334 (2020).

368. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) ("The requirement of [Rule 24] is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal.").

369. *Tri-State Generation & Transmission Ass'n v. N.M. Pub. Regul. Comm'n*, 787 F.3d 1068, 1072 (10th Cir. 2015).

370. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (quoting *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986)); *see also Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 314 (D.C. Cir. 2015) ("[G]overnmental entities do not adequately represent the interests of aspiring intervenors." (quoting *Fund for Animals*, 322 F.3d at 736)).

371. *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976); *Int'l Tank Terminals, Ltd. v. M/V Acadia Forest*, 579 F.2d 964, 967 (5th Cir. 1978).

In the context of preclusion, the Supreme Court in *Taylor v. Sturgell* rejected the doctrine of virtual representation, holding that a nonparty generally cannot be bound by a prior judgment simply because her interests were closely aligned with those of a party to the earlier case and certain additional criteria were met.³⁷² In so doing, the Court emphasized the “deep-rooted historic tradition that everyone should have [their] own day in court”; that without certain privity with a joined party, an absent entity should not suffer from some judgment.³⁷³ This is relevant to Rule 19’s prejudice analysis insofar as the court weighs adequate representation of absent interests through Rule 19(a)(1)(B)(i) or 19(b)(1). The high premium that courts place on individual self-representation, as evidenced by *Sturgell*, translates to the Rule 19 context, and specifically the tribal context, to caution against allowing federal or state defendants to represent absent tribal interests without privity or consent of the tribe. Much like a party being bound by a prior suit to which her interests are sufficiently aligned, the very notion of virtual representation parallels this idea of adequate representation in the Rule 19 context. And while *Sturgell* is more focused on the preclusive effects of proxy representation, it shows the harmful effect of non-consensual representation of absent interests and the Court’s intolerance for inadequate proxy representation outside a narrow scope of exceptions.³⁷⁴

Further, the trust relationship between tribes and the federal government imposes no legal requirement upon the federal government to advocate in tribes’ best interests, making the relationship *very* different from appointed representative relationships wherein a specific duty is owed. For example, a fiduciary representative has a “duty . . . to treat his principal with the utmost candor, rectitude, care, loyalty, and good faith.”³⁷⁵ Additionally, the agent “has a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship.”³⁷⁶ “[N]ext friend[s]” and guardians ad litem, who represent persons incapable of representing their best interests in legal proceedings, “must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate.”³⁷⁷ Even in these most paternalistic settings, there is still a requirement that the appointed representative owe certain legally enforceable duties to the represented party. In contrast, courts have held that the “limited trust relationship” owed by the United States does not give rise to a

372. 553 U.S. 880, 904 (2008).

373. *Id.* at 892-93 (quoting *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996)).

374. *See id.* at 893-95; *supra* notes 333-39 and accompanying text (discussing how the federal government misrepresented the Seminole Tribe in *West Flagler* by failing to raise specific arguments that the tribe would have made).

375. *Burdett v. Miller*, 957 F.2d 1375, 1381 (7th Cir. 1992).

376. RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. L. INST. 2006).

377. *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990); *Sam M. ex rel. Elliott v. Carcieri*, 608 F.3d 77, 90 (1st Cir. 2010).

fiduciary duty absent unambiguous statutory language.³⁷⁸ Many courts have held that IGRA does not impose fiduciary duties upon the federal government.³⁷⁹

That neither Rule 19 nor the trust relationship generally requires such an enforceable duty makes absent tribal interests even more critical: If the federal government is not bound to act in the best interest of the tribes—and Rule 19’s interpretation contains no such requirement—tribes have no reassurance that any party to the suit will adequately represent them, and no recourse when this failure ultimately proves true.

Conclusion

The Federal Rules of Civil Procedure were created “to secure the just, speedy, and inexpensive determination of every action and proceeding.”³⁸⁰ Rule 19 prioritizes justness, allowing absent parties the opportunity to intervene to dismiss the case when they are required, indispensable, *and* non-joinable. When courts see that dismissal of a suit turns on the inability to join a tribe, the Rule 19 balancing test turns into an opportunity to infuse paternalistic notions about whether a federal or state entity can speak for the tribe. Allowing these suits to proceed absent the required tribal parties effectively functions as an abrogation of tribes’ sovereign immunity. Tribes, specifically in the gaming context, cannot be spoken for—they have unique reliance, pecuniary, and sovereign interests to which no named party owes any duty.

Without clarity, non-Indian parties—often gaming competitors with commercial interests—will keep bringing compact challenges in court, and tribes will continue to ask for Rule 19 dismissals. The judicial landscape is muddled with confusing decisions: dismissals highly valuing tribal autonomy, opinions that misunderstand the trust relationship, and district courts allowing suits to proceed despite strict circuit language to the contrary. This ultimately defeats the principles of efficiency and justice meant to undergird the procedure of the courts, creating a system with little predictability or transparency. But more importantly, Indian gaming suits signal a new horizon for tribal sovereignty and courts’ roles in enforcing it. Though courts have been remarkably consistent in misunderstanding federal Indian law for the past

378. *Knox v. U.S. Dep’t of the Interior*, 759 F. Supp. 2d 1223, 1236 (D. Idaho 2010); *United States v. Mitchell*, 445 U.S. 535, 542 (1980).

379. *See Knox*, 759 F. Supp. 2d at 1236; *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1297-98 (D.N.M. 1996), *aff’d*, 104 F.3d 1546 (10th Cir. 1997); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 259 F. Supp. 2d 783, 790-91 (W.D. Wis. 2003), *aff’d*, 367 F.3d 650 (7th Cir. 2004).

380. FED. R. CIV. P. 1.

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several centuries,³⁸¹ Indian gaming for many tribes is the clearest source of tribal sovereignty. Tribal interests are too critical—too indispensable—to remain absent in these suits, and so the brightline presumption must rest with dismissal in the gaming context.

381. See Michael Doran, *Exceptionalism and Assimilation in Federal Indian Law*, 20 STAN. J. C.R. & C.L. 266, 270 (2024).