No.

In the Supreme Court of the United States

FRIENDS OF AMADOR COUNTY, PETITIONER

v.

SALLY JEWELL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in an action by a third party against the Secretary of the Interior under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, a putative Indian tribe may invoke its sovereign immunity to prevent a court from reviewing the lawfulness of the Secretary's decision to recognize it as a tribe.

PARTIES TO THE PROCEEDING

Petitioner is Friends of Amador County.

Respondents are Sally Jewell, Secretary of the Interior; the National Indian Gaming Commission; Jonodev Osceola Chaudhuri, Acting Chairman of the National Indian Gaming Commission; and Buena Vista Rancheria of the Me-Wuk Indians.

RULE 29.6 STATEMENT

Friends of Amador County has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, regulations, and rule: Page

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Friends of Amador County respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

This opinion of the court of appeals (App., *infra*, 1a-8a) is not published in the Federal Reporter but is reprinted at 554 Fed. Appx. 562. The opinion of the district court (App., *infra*, 11a-23a) is available at 2011 WL 4709883.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 2014. A petition for rehearing was denied on June 5, 2014 (App., *infra*, 9a-10a). On September 3, 2014, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 18, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULE INVOLVED

Pertinent provisions are set forth in an appendix to this petition. App., *infra*, 24a-27a.

STATEMENT

1. a. In 1978, the Secretary of the Interior promulgated regulations, after notice and comment, establishing a uniform process for "acknowledging that certain American Indian groups exist as tribes." 25 C.F.R. 83.2; see Procedures for Establishing That an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361 (Sept. 5, 1978); see also Procedures for Establishing That an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9280 (Feb. 25, 1994). Under the regulations, a group seeking recognition must submit a petition that is then subject to a public notice-and-comment period. 25 C.F.R. 83.9. The group must establish that it has had a "substantially continuous tribal existence" and has "functioned as [an] autonomous entit[y] throughout history until the present." 25 C.F.R. 83.3(a); accord *Montoya* v. *United States*, 180 U.S. 261, 266 (1901) ("By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though

sometimes ill-defined territory[.]"). Once recognized, a tribe is "eligible for the services and benefits from the Federal government that are available to other federally recognized tribes." 25 C.F.R. 83.12(a).

b. Under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, Indian gaming may occur only on "Indian lands." See 25 U.S.C. 2703(4). IGRA divides gaming into three classes, each subject to different regulation. 25 U.S.C. 2703(6)-(8). Class III gaming—that is, Las Vegas–style casino gaming—must be (1) authorized by a tribal ordinance that satisfies the requirements of 25 U.S.C. 2710(b) and is approved by the Chairman of the National Indian Gaming Commission (NIGC); (2) located in a State that permits such gaming; and (3) conducted in conformance with a compact between the Indian tribe and the State that the Secretary has approved or allowed to go into effect. 25 U.S.C. 2710(d)(1) and (8).

2. In a series of statutes in the early twentieth century, Congress appropriated funds for the Secretary to use "[f]or the purchase of lands for the homeless Indians in California." Act of Aug. 1, 1914, § 3, ch. 222, 38 Stat. 589; see Act of Apr. 30, 1908, ch. 153, 35 Stat. 76; Act of June 21, 1906, ch. 3504, 34 Stat. 333. In 1927, the Secretary purchased a parcel of land in Amador County, California, establishing the "Buena Vista Rancheria," which was to be used for homeless Indians. The Buena Vista Rancheria was not designated for any particular tribe or its members. Pet. C.A. Br. 12-13.

In 1934, Congress passed the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984 (25 U.S.C. 461 *et seq.*). Section 18 of that statute required the Secretary to

hold special elections to provide the adult Indians living on reservations an opportunity to determine whether the provisions of the IRA should apply to them. IRA § 18, 48 Stat. 988 (25 U.S.C. 478). The list of eligible voters living at the Buena Vista Rancheria in 1935 included only four residents—Louie Oliver, his wife Annie Oliver, Johnnie Oliver, and Josie Ray. Pet. C.A. Br. 14. The residents voted for the IRA to apply to them but did not organize or adopt a tribal constitution under Section 16 of the statute. 48 Stat. 987 (25 U.S.C. 476).

Of the four residents who were present in 1935, only Louie and Annie Oliver continued to live on the Buena Vista Rancheria. In 1958, Congress terminated federal supervision of the Buena Vista Rancheria and other rancherias in California. Act of Aug. 18, 1958, Pub. L. No. 85-671, 72 Stat. 619 (1958 Act). The statute provided for "distributing to individual Indians the assets of the reservation or rancheria," 1958 Act § 2, 72 Stat. 619, and it stated that such a distribution "shall be final, and * * * shall not be the basis for any claim against the United States by an Indian who receives or is denied a part of the assets distributed," 1958 Act § 10, 72 Stat. 621.

The Secretary carried out the 1958 Act by distributing the land of the Buena Vista Rancheria to Louie and Annie Oliver. Property of California Rancherias and of Individual Members Thereof, 26 Fed. Reg. 3073 (Apr. 11, 1961). The Secretary stated that the individuals receiving a distribution of land "are no longer entitled to any of the services performed by the United States for Indians because of their status as Indians, and all statutes of the United States which affect Indi-

ans because of their status as Indians shall be inapplicable to them." *Ibid.*

In 1979, a group of individuals who had received distributions of property from terminated rancherias brought a class action alleging that the Secretary had breached federal trust obligations in implementing the 1958 Act. Complaint, *Hardwick* v. *United States*, No. 79-1710 (N.D. Cal. filed July 10, 1979). The parties settled the litigation, and under the settlement, the Secretary announced that the class members would be "relieved from the application of" the 1958 Act and that the "Indian tribes, bands, communities or groups" of 17 named rancherias—including the Buena Vista Rancheria—would henceforth be "Indian entities * * * deemed entitled to any of the benefits or services provided or performed by the United States for Indian tribes, bands, communities or groups because of their status as Indian tribes, bands, communities or groups." Restoration of Federal Status to 17 California Rancherias, 49 Fed. Reg. 24,084 (June 11, 1984). The Secretary then added to the list of federally recognized Indian tribes the "Buena Vista Rancheria of Me-Wuk Indians of California."[1] Indian Tribal Entities Recognized and Eligible to Receive Services, 50 Fed. Reg. 6055 (Feb. 13, 1985). The Secretary did not provide prior public notice or otherwise follow the procedures set out in the tribal-acknowledgment regulations.

The Secretary's "restoration" of Me-Wuk's status was not accompanied by the acquisition of any of the

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[1] For clarity, this petition will refer to the land as the "Buena Vista Rancheria" and to the putative tribe as "Me-Wuk."

Buena Vista Rancheria land in trust for the putative tribe. The land that had been distributed to the Olivers under the 1958 Act was ultimately acquired by Donnamarie Potts, who is not a descendant of the Oliver family. Pet C.A. Br. 21; Compl. ¶ 17. After submitting to the Secretary a constitution for Me-Wuk, Potts conveyed her land to Me-Wuk and then signed a conveyance on behalf of Me-Wuk granting the land to the United States in trust for Me-Wuk. Pet C.A. Br. 21-22; Compl. ¶ 17. The government declined to accept that conveyance. Pet. C.A. Br. 22. As a result, the land remains held by Me-Wuk in fee simple.

Potts's efforts to organize a constitution for Me-Wuk precipitated a dispute with Rhonda Pope, who is a descendant of the Oliver family. Stipulated Consent Judgment, *Pope* v. *Potts*, No. 01-2255 (E.D. Cal. filed Dec. 17, 2004). The dispute was ultimately settled by an agreement under which Potts relinquished her claim to the Buena Vista Rancheria, abandoned her claim to the leadership of Me-Wuk, and acknowledged that Pope is "the only known adult lineal descendant of the original distributees of the Buena Vista Rancheria" and "the only known person with the right to participate in the organization or reorganization of" Me-Wuk. *Ibid.* In exchange, Potts received $25 million and a promise of additional monthly payments upon the commencement of gaming. *Ibid.*

In 1999, the Governor of California executed a class III gaming compact with Me-Wuk. Pet. C.A. Br. 23. The Secretary subsequently approved the compact. Notice of Approved Tribal-State Compacts, 65 Fed. Reg. 31,189 (May 16, 2000). Thereafter, the State of California negotiated an amended gaming compact

with Me-Wuk, and the Secretary allowed the compact to go into effect. Notice of Approved Tribal-State Class III Gaming Compact, 69 Fed. Reg. 76,004 (Dec. 20, 2004).

In 2005, the NIGC concluded that the Buena Vista Rancheria is "Indian land" eligible for gaming. State Defs.' Dist. Ct. Mot. to Dismiss Ex. G (Letter from Penny J. Coleman, Acting General Counsel, National Indian Gaming Commission, to Judith Kammins Albeitz (June 30, 2005)). The Commission reasoned that the Buena Vista Rancheria is "for all practical purposes" a reservation, and it concluded that the land "need not be taken into trust" for gaming to be permissible. *Ibid.*

3. Petitioner is a community organization opposed to the development of additional casinos in Amador County and committed to ensuring that government officials comply with the laws governing Indian gaming. It brought this action under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, against the Secretary, the NIGC, and the Chairman of the NIGC in the United States District Court for the Eastern District of California.[2] Petitioner alleged (1) that Me-Wuk's federal recognition was unlawful and (2) that Me-Wuk's land is not eligible for class III gaming because it is not "Indian land" as defined by IGRA. Petitioner sought a declaration that both the Secretary's decision to allow the tribal-state compact to go into effect and the NIGC's determination that gaming

[2] Petitioner also sued the State of California and Governor Arnold Schwarzenegger, but those defendants were dismissed from the suit. App., *infra*, 12a.

could take place on the Buena Vista Rancheria were invalid. App., *infra*, 13a-14a.

Me-Wuk was not a party to the litigation, but it entered a special appearance to move to dismiss the complaint for failure to join Me-Wuk as a necessary party under Federal Rule of Civil Procedure 19. The district court granted the motion. App., *infra*, 11a-23a.

4. The court of appeals affirmed. App., *infra*, 1a-8a. The court first held that Me-Wuk was a required party under Rule 19(a). *Id.* at 3a. Noting that Me-Wuk "claims several legally protected interests related to the subject of the action," the court determined that the United States could not adequately represent those interests. *Ibid.* In reaching that conclusion, the court emphasized that "the government favored judicial resolution of the lawsuit as opposed to early dismissal." *Id.* at 4a. The court stated that its "concerns" about the adequacy of the government's representation were "illustrated" by the government's failure "to take a position on [Me-Wuk's] Rule 19 motion in the district court and on appeal." *Ibid.*

The court of appeals then held that joinder of Me-Wuk "would not be feasible because [Me-Wuk] enjoys sovereign immunity as a federally recognized Indian tribe." App., *infra*, 5a. The court acknowledged that one of petitioner's claims in the litigation was that the Me-Wuk's federal recognition was invalid. But it concluded that it could not "simply turn a blind eye to [Me-Wuk's] status as a federally recognized tribe in the Federal Register." *Ibid.* In the court's view, that status means that Me-Wuk necessarily enjoys sovereign immunity—"[f]ederally recognized Indian tribes

enjoy sovereign immunity from suit." *Ibid.* (quoting *Pit River Home & Agric. Coop. Ass'n* v. *United States*, 30 F.3d 1088, 1100 (9th Cir. 1994)) (brackets in original). The court further held that a tribe may assert sovereign immunity even in a suit challenging federal agency action under the APA because the APA does not contain an "express abrogation" of tribal immunity. App., *infra*, 6a.

After concluding that Me-Wuk's sovereign immunity precluded joining it as a party, the court of appeals agreed with the district court that Me-Wuk was an indispensable party under Rule 19(b). App., *infra*, 6a-7a. It therefore affirmed the district court's judgment dismissing the action. *Id.* at 8a.

5. The court of appeals denied a petition for rehearing en banc. App., *infra*, 9a-10a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has held that a putative Indian tribe may invoke sovereign immunity to prevent a court from adjudicating an APA challenge to the decision of the Secretary of the Interior to extend federal recognition to the tribe. In other words, a group may bootstrap its assertion of tribal status into an invocation of immunity that prevents any judicial inquiry into the validity of its status. That decision conflicts with a decision of the District of Columbia Circuit, and it is contrary to settled principles of administrative law. It warrants this Court's review and correction.

The District of Columbia Circuit has held that tribal sovereign immunity is "inappropriately invoked when tribal sovereignty is the ultimate issue." *Cherokee Nation* v. *Babbitt*, 117 F.3d 1489, 1499 (1997). Under that decision, a court retains the ability to inquire

whether a tribe has been lawfully recognized and, thus, whether the tribe enjoys sovereign immunity. By contrast, the Ninth Circuit in this case—following earlier Ninth Circuit decisions—held that a court may not look behind a putative tribe's "status as a federally recognized tribe in the Federal Register," even in an action challenging that status. App., *infra*, 5a. Those decisions are irreconcilable.

The Ninth Circuit's decision is contrary to the well-established rule that a court always has jurisdiction to determine its own jurisdiction. Under the decision below, the Secretary can unilaterally divest a court of jurisdiction to review her decision to recognize a tribe. Once the tribe is recognized, it is an indispensable party under Rule 19 in any challenge to the Secretary's decision, and it may assert tribal sovereign immunity to bar that challenge. In addition, by making recognition decisions unreviewable, the Ninth Circuit has disregarded the presumption in favor of judicial review of agency action.

The question presented is important because federal recognition of tribes is of vital importance to the administration of federal statutes governing Indians. Recognition decisions are, in theory, constrained by regulation, but judicial review of such decisions is essential to ensuring that the constraints of those regulations have practical effect.

A. The Ninth Circuit's decision conflicts with a decision of the District of Columbia Circuit

Because of Indian tribes' status as "separate sovereigns pre-existing the Constitution," this Court has held that they enjoy "the common-law immunity from

suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56, 58 (1978). For that reason, "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998).

This case does not involve a suit against an Indian tribe; petitioner has sued only the Secretary and other federal officials, alleging, among other things, that the Secretary acted unlawfully in recognizing Me-Wuk as an Indian tribe. But the court of appeals held that Me-Wuk is a necessary party under Rule 19 because it has interests that will be affected by the action and, in the view of the court of appeals, the government will not adequately represent those interests. App., *infra*, 4a. As a result, the court was required to decide whether Me-Wuk is "a person who is required to be joined if feasible [but who] cannot be joined" by reason of sovereign immunity, Fed. R. Civ. P. 19(b), or, in other words, whether Me-Wuk may assert sovereign immunity in the context of an action against the Secretary seeking review of the lawfulness of the Secretary's decision to recognize Me-Wuk as an Indian tribe. While the Ninth Circuit answered that question in the affirmative, its decision is contrary to a decision of the District of Columbia Circuit.

1. In *Cherokee Nation* v. *Babbitt*, 117 F.3d 1489 (D.C. Cir. 1997), the Cherokee Nation sought review under the APA of the Secretary's decision to extend federal recognition to the Delaware Tribe of Indians. According to the Cherokee Nation, the Delawares were not a separate tribe but rather a group that had been incorporated into the Cherokee Nation, and the

Secretary's recognition decision was arbitrary and capricious and in violation of the acknowledgment regulations set out at 25 C.F.R. Part 83. 117 F.3d at 1495. The district court dismissed the complaint, concluding that the Delaware Tribe had sovereign immunity and was a necessary and indispensable party under Rule 19. *Ibid.*

The District of Columbia Circuit reversed. The court agreed that the Delaware Tribe was an indispensable party, but it held that the Tribe was not entitled to assert sovereign immunity. 117 F.3d at 1497-1500. The court explained that "the inclusion of a group of Indians on the *Federal Register* list of recognized tribes would ordinarily suffice to establish that the group is a sovereign power entitled to immunity from suit," but when a tribe has been included on the list as a result of a decision that is challenged in litigation, the Secretary's "determination cannot be dispositive of the sovereign immunity issue." *Id.* at 1499. The court reasoned that if the Secretary had "acted contrary to law," then the decision to recognize a group as a tribe "would be owed no deference." *Ibid.* It also observed that, if sovereign immunity barred review of the Secretary's recognition decision, then "recognition decisions would be unreviewable, contrary to the presumption in favor of judicial review of agency action." *Ibid.* For those reasons, the court concluded, sovereign immunity is "inappropriately invoked when tribal sovereignty is the ultimate issue." *Ibid.* After examining evidence giving rise to "doubts about the sovereign status of the Delawares," the court ultimately remanded to allow the district court

to evaluate the validity of the Secretary's decision to extend federal recognition to the tribe. *Id.* at 1503.

2. The Ninth Circuit's decision in this case is directly contrary to *Cherokee Nation*. The court acknowledged that petitioner "challenge[d] the validity of [Me-Wuk's] federally recognized status" and argued that Me-Wuk "should not be federally recognized." App., *infra*, 5a. But it held that a court "cannot simply turn a blind eye to the Tribe's status as a federally recognized tribe in the Federal Register," which it considered dispositive of the immunity question. *Ibid.* That holding is consistent with prior Ninth Circuit decisions stating categorically that "[f]ederally recognized Indian tribes enjoy sovereign immunity from suit." *Pit River Home & Agric. Coop. Ass'n* v. *Babbitt*, 30 F.3d 1088, 1100 (9th Cir. 1994); see *Native Vill. of Tyonek* v. *Puckett*, 957 F.2d 631, 635 (9th Cir. 1992) ("An Indian community constitutes a tribe if it can show that * * * it is recognized as such by the federal government[.]"). The decision below thus contributes to a conflict between the Ninth and the District of Columbia Circuits.

B. The Ninth Circuit's decision is erroneous

The question in this case is not whether an Indian tribe enjoys sovereign immunity—this Court has repeatedly held that it does. Rather, the question is whether a court has the authority to decide whether a group claiming to be a tribe is or is not a sovereign. The Ninth Circuit held that a court lacks such authority and must instead be controlled by the Secretary's decision to recognize a group as a tribe, even in the face of a challenge to the lawfulness of that decision.

That holding is contrary not only to general principles of federal jurisdiction but also to the judicial-review provisions of the APA.

1. "[I]t is familiar law," this Court has held, "that a federal court always has jurisdiction to determine its own jurisdiction." *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002); see *United States* v. *United Mine Workers*, 330 U.S. 258, 290-293 (1947). Because tribal sovereign immunity affects a court's jurisdiction, determining whether immunity exists—which, in turn, requires determining whether a group claiming to be a tribe is in fact a tribe that is entitled to claim immunity—is necessarily a function for the court.

The Ninth Circuit believed that the Secretary's view is conclusive in determining whether a putative tribe enjoys immunity and thus whether the court has jurisdiction. But while Congress has authority to define the jurisdiction of the inferior federal courts, see U.S. Const. Art. I, § 8, Cl. 9; Art. III, § 1, the Executive Branch does not. And Congress has in no way limited the jurisdiction of the courts to resolve a dispute over the status of a putative tribe. Indeed, Congress has not provided for tribal sovereign immunity at all. Rather, immunity is a common-law doctrine that "developed almost by accident." *Kiowa Tribe*, 523 U.S. at 756. Recognizing that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine," this Court has adhered to the doctrine only because of principles of *stare decisis*. *Id.* at 758; accord *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036-2039 (2014). Those principles, however, cannot justify extending the doctrine, as the Ninth Circuit has done, by allowing a would-be tribe to bootstrap its federal

recognition into an immunity from any challenge to the lawfulness of that recognition.

2. Permitting an assertion of tribal sovereign immunity to bar the exercise of jurisdiction in these circumstances would contravene the APA. The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. 702. And it specifically provides for judicial review of final agency action "for which there is no other adequate remedy in a court." 5 U.S.C. 704.

This case is not an action against Me-Wuk; it is an action against the Secretary and the NIGC. Both the Secretary's decision to allow Me-Wuk's amended gaming compact to go into effect and the NIGC's determination that the Buena Vista Rancheria is "Indian land" eligible for gaming are final agency actions, as is the underlying determination of the Secretary that Me-Wuk is a recognized Indian tribe. In the context of this case, that underlying determination is reviewable under Sections 702 and 704. By immunizing the Secretary's determination from judicial review, the Ninth Circuit's decision contravenes those provisions.

The Ninth Circuit did not suggest that a recognition decision presents a nonjusticiable question or that it is "committed to agency discretion by law." 5 U.S.C. 701(a)(2). Any such suggestion would be ill-founded. The Indian Commerce Clause of the Constitution grants Congress the limited power "[t]o regulate Commerce * * * with the Indian Tribes." U.S. Const. Art. I, § 8, Cl. 3. The existence of a "tribe" is thus a prerequisite both to congressional action and to

administrative action taken to implement statutes pertaining to Indians. And this Court long ago recognized that Congress may not "bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe" when they are not. *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913). To the contrary, "[a]ble to discern what is 'distinctly Indian,' the courts will strike down any heedless extension of that label." *Baker* v. *Carr*, 369 U.S. 186, 216-217 (1962) (quoting *Sandoval*, 231 U.S. at 46). Moreover, whatever discretion the Secretary might otherwise have in making decisions about tribal recognition, the Secretary has constrained her discretion by adopting regulations to govern such decisions. 25 C.F.R. Part 83. An agency is required to follow its own regulations, and a court may review whether it has done so. *Webster* v. *Doe*, 486 U.S. 592, 602 n.7 (1988); *Service* v. *Dulles*, 354 U.S. 363, 388 (1957).

The Ninth Circuit observed that the APA "does not expressly abrogate tribal immunity." App., *infra*, 6a. That is true, but it begs the question, which is whether immunity is available in the first place when the issue before the court is whether a group has been validly recognized as a tribe. In these circumstances, that question is answered by the APA, which reflects Congress's understanding that "judicial review should be widely available to challenge the actions of federal administrative officials," *Califano* v. *Sanders*, 430 U.S. 99, 104 (1977), and which creates a "strong presumption that Congress intends judicial review of administrative action." *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986); see *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001). Because no statute

demonstrates a "specific congressional intent to preclude judicial review" of the Secretary's recognition decisions "that is '"fairly discernable" in the detail of the legislative scheme,'" tribal sovereign immunity cannot be applied to bar such review. *Bowen*, 476 U.S. at 673 (quoting *Block* v. *Community Nutrition Inst.*, 467 U. S. 340, 351 (1984)).

C. The question presented is important and warrants this Court's review

1. This Court has defined a "tribe" to be "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Montoya*, 180 U.S. at 266. Unrecognized tribes meeting that test of tribal existence have been held to enjoy certain protections under federal law. See, *e.g.*, *United States* v. *Candelaria*, 271 U.S. 432, 441-442 (1926). Most federal benefits, however, require the establishment of a political relationship with the federal government through formal recognition. See 25 C.F.R. 83.12(a); 25 U.S.C. 479a-1(a) (requiring annual publication of "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians"). Such recognition confers important rights on an Indian tribe, including the right to exercise the powers of self-government, the right to control lands held in trust exempt from state and local law, the right to apply for federal benefits and services, the right to conduct gaming under IGRA, and the right to exercise criminal jurisdiction over Indians—and even over cer-

tain non-Indians, see Violence Against Women Reauthorization Act of 2013, § 904, Pub. L. No. 113-4, 127 Stat. 120.

If the Secretary extends recognition to a group that does not qualify as a tribe, she confers a "windfall[] on the members of a nonexistent entity." *Miami Nation of Indians* v. *United States Dep't of the Interior*, 255 F.3d 342, 351 (7th Cir. 2001), cert. denied, 534 U.S. 1129 (2002). To prevent that result, 25 C.F.R. Part 83 constrains recognition decisions not only by imposing various procedural protections but also by requiring an applicant for recognition to demonstrate that it has had a "substantially continuous tribal existence" and has "functioned as [an] autonomous entit[y] throughout history until the present" to qualify as a "tribe." 25 C.F.R. 83.3(a).

Despite the importance of the recognition regulations, it is often difficult for parties who may be affected by tribal recognition to ensure that the regulations are followed. The current administrative process for acknowledging tribes restricts participatory and appeal rights to "interested parties"—that is, parties that can "establish a legal, factual or property interest in an acknowledgment determination." 25 C.F.R. 83.1, 83.10, 83.11. If they are aware of a petition at all, nongovernmental parties usually cannot qualify for full participation in the administrative-review process. Nor are they able, in most cases, to establish Article III standing to challenge an acknowledgment decision upon its issuance. Often, it is only through challenges to subsequent land-into-trust decisions, gaming eligibility determinations, or compact approvals that such parties can obtain judicial review of the underlying

acknowledgment decision. See, *e.g.*, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct. 2199, 2210-2212 (2012) (holding that a nearby property owner has standing to challenge a decision taking land into trust for a tribe). But it is precisely those challenges that are likely to be cut off under the Ninth Circuit's rule.

If courts permit tribes to assert sovereign immunity to shield federal decisionmaking from APA review—without evaluating the legitimacy of that assertion—they will eliminate the ability of profoundly affected parties to obtain judicial review of tribal recognition decisions. The result will be to deny any redress for manifestly unauthorized exercises of power. That is not merely a hypothetical possibility; it is already occurring. The Secretary has recently "reaffirmed" tribes without following any process and without consulting the Office of Federal Acknowledgment—the component of the Department of the Interior with acknowledgment expertise. For example, as the Department's Inspector General has explained, the Secretary "reaffirmed" the Tejon Indian Tribe in California in 2012 without following "any discernable process." Department of the Interior, Office of Inspector General, *Investigative Report of the Tejon Indian Tribe* 1 (2013).[3] Likewise, the recognition decision at issue here arose from a settlement that purported to reinstate the tribes of 17 rancherias without any consideration of whether the groups involved qualified as tribes when the rancherias were set aside

[3] http://www.doi.gov/oig/reports/upload/Tejon_ROI_FINAL_PUBLIC.pdf.

or when the Secretary added them to the list of recognized tribes in 1985.

Under currently proposed amendments to the Secretary's regulations, the problem is likely to grow worse. The Secretary has proposed changes to the acknowledgment process that will further limit rights to participation while lowering the burden of proof for parties seeking acknowledgment. Federal Acknowledgment of American Indian Tribes, 79 Fed. Reg. 30,766 (May 29, 2014). Under the proposed rules, final acknowledgment of a petitioner group will be automatic, unless the State or local government where the petitioner's office is located or a federally recognized tribe within the State opposes the petition—regardless of what evidence the Secretary receives from other opponents of recognition. *Id.* at 30,779 (proposed 25 C.F.R. 83.37). The Secretary also proposes to eliminate review before the Interior Board of Indian Appeals, which historically has served as a check on the acknowledgment process. *Id.* at 30,780 (proposed 25 C.F.R. 83.44); compare 25 C.F.R. 83.11 (providing for requests for reconsideration before the Board by any interested party). In addition, the Secretary proposes to lower the burden of proof so that a putative tribe can be acknowledged by showing "more than a mere possibility" that it satisfies the criteria, even if it cannot show that it is "more likely than not" to qualify. 70 Fed. Reg. at 30,774 (proposed 25 C.F.R. 83.10(a)(1)).

Whether or not those regulatory amendments are ultimately adopted, the ability of parties to obtain judicial review of the Secretary's acknowledgment decisions will remain of vital importance. Aggrieved par-

ties must be able to test whether the Secretary's actions were arbitrary and capricious. The Ninth Circuit's decision barring judicial review warrants correction by this Court.

2. This case vividly illustrates the importance of the question presented, and the case would be a good vehicle for considering that question. The challenged federal decisions have authorized a "tribe" with no apparent historical connection to the land to open a casino that will make its members millions of dollars while severely harming petitioner and the surrounding community.

There is a serious question whether the Secretary's recognition of Me-Wuk was lawful. As noted, the Secretary did not follow any of the procedural requirements of her regulations in recognizing Me-Wuk. Had she done so, it is highly doubtful that Me-Wuk could have shown that it has had "a substantially continuous tribal existence" and has "functioned as [an] autonomous entit[y] throughout history until the present." 25 C.F.R. 83.3(a); accord 25 C.F.R. 54.3(a) (1979); see *Miami Nation of Indians*, 255 F.3d at 350 ("If a nation doesn't exist, it can't be recognized, whether or not it ceased to be a nation voluntarily.").

The validity of the Secretary's recognition decision was properly before the district court in this case. Although the decision occurred in 1985, it had no effect on petitioner at that time, and thus any challenge to it by petitioner would not have been ripe. See *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148-149 (1967) (agency action is not ripe for review until "its effects [have been] felt in a concrete way by the challenging parties"). Petitioner's claim did not ripen until 2005,

when the NIGC relied on the recognition decision in determining that gaming could take place on the Buena Vista Rancheria in Amador County. Accordingly, petitioner's claim is within the six-year statute of limitations that governs APA claims. 28 U.S.C. 2401(a); *Baltimore Gas & Elec. Co.* v. *ICC*, 672 F.2d 146, 149 (D.C. Cir. 1982) (The statute of limitations "can run only against challenges ripe for review.").

Of course, this Court need not determine the ultimate question of the legality of the Secretary's decision; instead, it need only resolve the question presented by holding that petitioner is entitled to challenge that decision. Because that question is of great importance to federal Indian law, it warrants review at this time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2014

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-17996

FRIENDS OF AMADOR COUNTY; BEA CRABTREE; JUNE GEARY, PLAINTIFFS–APPELLANTS

v.

KENNETH SALAZAR, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR; NATIONAL INDIAN GAMING COMMISSION; GEORGE SKIBINE, ACTING CHAIRMAN OF THE NATIONAL INDIAN GAMING COMMISSION, DEFENDANTS–APPELLEES, AND

BUENA VISTA RANCHERIA OF THE ME-WUK INDIANS, MOVANT–APPELLEE.

Argued: Jan. 15, 2014
Filed: Jan. 29, 2014

MEMORANDUM*

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: ALARCÓN, TALLMAN, and IKUTA, Circuit Judges.

Appellants Friends of Amador County, Bea Crabtree, and June Geary appeal the district court's dismissal of their action pursuant to Federal Rule of Civil Procedure ("Rule") 19 and its denial of their subsequent "Motion to Vacate Judgment or Order Dismissing Plaintiff's Complaint."[1] They filed suit against the State of California, the Governor of California, the U.S. Department of the Interior ("DOI"), the Secretary of the Interior, the National Indian Gaming Commission ("NIGC"), and the Acting Chairman of the NIGC. They raise several challenges relating to the Buena Vista Rancheria of Me-Wuk Indians' ("Tribe") gaming compact with California. Specifically, they allege that (1) the DOI erroneously deemed the Tribe's 67.5 acres of fee-simple land as "Indian lands" eligible for gaming, (2) the federal government erred in granting the Tribe federal recognition over 20 years ago, and (3) the Tribe's gaming ordinance and tribal-state compact were invalid *ab initio*.

The Tribe made a special appearance to file a motion to dismiss based on the Appellants' failure and inability to join the Tribe as a required and indispensable party under Rule 19. The district court granted the motion and denied the Appellants' motion to vacate

[1] While Appellants styled their motion as one to vacate the district court's dismissal under Rule 19, they urged the district court to either reconsider, amend, vacate, or modify the dismissal order pursuant to Rules 59 and 60. For ease of reference, we refer to Appellants' motion as a motion to vacate.

the judgment of dismissal. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm both rulings.

Rule 19 sets the framework for determining whether a party is required and indispensable. We must decide first whether the Tribe is a "required" party that should normally be joined pursuant to Rule 19(a)(1). If the Tribe is a required party, we then ask whether its joinder in the underlying litigation is feasible. *See* Fed R. Civ. P. 19(b). If joinder is not feasible, we conclude our analysis by determining "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." *Id.* We review the district court's resolution of these questions for an abuse of discretion. *See Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022 (9th Cir. 2002). And we apply the same standard of review to the district court's denial of Appellants' motion to vacate. *See McCarthy v. Mayo*, 827 F.2d 1310, 1314 (9th Cir. 1987).

We find no abuse of discretion in the district court's determination that the Tribe was a required party under Rule 19(a)(1). The Tribe claims several legally protected interests relating to the subject of the action. Appellants seek to invalidate the Tribe's gaming compact with California, overturn the DOI and NIGC's determination that the Tribe's land enjoys "Indian lands" status under the Indian Gaming Regulatory Act ("IGRA"), and essentially direct the Secretary to extinguish the Tribe's federal recognition. The district court concluded correctly that disposing of the action in the Tribe's absence would, as a practical matter, impair or impede the Tribe's ability to protect these substantial interests. *See* Fed. R. Civ. P. 19(a)(1)(B)(i);

Am. Greyhound Racing, Inc., 305 F.3d at 1023 ("The interests of the tribes in their compacts are impaired and, not being parties, the tribes cannot defend those interests."); *Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996) (finding a protectible interest in a tribe's lease agreements).

Appellants contend that the United States can adequately represent the Tribe's interests. *See Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) ("The United States may adequately represent an Indian tribe unless there is a conflict between the United States and the tribe."). The district court concluded otherwise. The government's response to the district court's questions on this issue at a status conference caused the district court to suspect that the government favored judicial resolution of the lawsuit as opposed to early dismissal, and would seek to avoid taking positions contrary to its national Indian policy, even if contrary to the Tribe's interest. These concerns have been illustrated by the government's inaction to date. The government did not move for its own dismissal under Rule 19, and it has declined to take a position on the Tribe's Rule 19 motion in the district court and on appeal. Nor did the government appear at oral argument or file any brief in the appeal. These inactions indicate divergent interests between the Tribe and the government. We find no abuse of discretion in the district court's considered judgment. *See Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1101 (9th Cir. 1994) ("We have held that the United States cannot adequately represent an absent tribe, when it may face competing interests.").

The district court concluded next that joinder would not be feasible because the Tribe enjoys sovereign immunity as a federally recognized Indian tribe. Appellants challenge the validity of the Tribe's federally recognized status but concede its existence. Indeed, the Tribe has been federally recognized since at least 1985, *see* Indian Tribal Entities Recognized and Eligible to Receive Services, 50 Fed. Reg. 6055-02 (Feb. 13, 1985), and it thus has "the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States," Indian Entities Recognized and Eligible to Receive Services from the Board of Indian Affairs, 77 Fed.Reg. 47,868-01 (Aug. 10, 2012).

Appellants claim that the district court erred by disregarding their allegations that the Tribe should not be federally recognized. But the court cannot simply turn a blind eye to the Tribe's status as a federally recognized tribe in the Federal Register. *See* 44 U.S.C. § 1507 ("The contents of the Federal Register shall be judicially noticed[.]"); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) ("The court need not . . . accept as true allegations that contradict matters properly subject to judicial notice [.]"). As we have explained, "[f]ederally recognized Indian tribes enjoy sovereign immunity from suit." *Pit River Home & Agric. Coop. Ass'n*, 30 F.3d at 1100.

Appellants argue in the alternative that either the Administrative Procedure Act ("APA") or the IGRA abrogates, or at least precludes a tribe's reliance on, tribal sovereign immunity. Abrogation of sovereign

immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978) (internal quotation marks omitted); *see also Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004) ("Abrogation of tribal sovereign immunity may not be implied.").

The APA provides no such express abrogation. While it unequivocally waives the United States' sovereign immunity in certain suits, it does not do the same for Indian tribes. *See* 5 U.S.C. § 702. Appellants' argument also runs counter to our precedent analyzing whether a tribe is necessary and indispensable even in APA actions. *See Makah Indian Tribe*, 910 F.2d at 558-60 (finding no abuse of discretion in the district court's Rule 19 dismissal because the involved tribes enjoyed sovereign immunity).

The IGRA likewise contains no express abrogation of tribal immunity for suits brought by private individuals challenging Indian-related administrative determinations. It provides that certain agency decisions may be appealed to the appropriate federal district court, but those actions must be brought pursuant to the APA, which, as described *supra*, does not expressly abrogate tribal immunity. 25 U.S.C. § 2714. Appellants point to no provision in the IGRA that unequivocally divests the Tribe of its sovereign immunity in suits like this, nor have we found one. We thus find no error in the district court's conclusion that the Tribe's sovereign immunity precludes joinder.

The district court did not abuse its discretion by concluding that the Tribe is indispensable under Rule

19(b)'s four-factor analysis. First, judgment in this lawsuit would prejudice the Tribe for the same reasons the Tribe is a required party. *See Am. Greyhound Racing, Inc.*, 305 F.3d at 1024-25 ("[T]he first factor of prejudice . . . largely duplicates the consideration that made a party necessary under Rule 19(a): a protectible interest that will be impaired or impeded by the party's absence."). Second, we are not persuaded that the ameliorative measures proposed for the first time in Appellants' motion to vacate would shape Appellants' requested relief to lessen or avoid prejudice to the Tribe. The Appellants seek termination of the Tribe's gaming compact, "Indian lands" status, and status as a federally recognized tribe—the same interests whose protection requires the Tribe's presence. *See id.* at 1025 (no ability to shape relief where "[t]ermination of existing compacts is central to this litigation"). Third, while Appellants might be able to obtain an adequate judgment in the Tribe's absence, "the only 'adequate' remedy would be at the cost of [the Tribe]" because the Appellants request, at a minimum, a determination that the Tribe's land is not eligible Indian lands and that the Tribe's compact with the state is invalid *ab initio*. *See Makah Indian Tribe*, 910 F.2d at 560. Fourth, we acknowledge that Appellants may be left with no adequate remedy upon dismissal for nonjoinder, "[b]ut this result is a common consequence of sovereign immunity, and [the Tribe's] interest in maintaining [its] sovereign immunity outweighs the [Appellants'] interest in litigating their claims." *Am. Greyhound Racing, Inc.*, 305 F.3d at 1025.

Finally, we agree that Appellants waived their reliance on the "public rights" exception by raising it be-

low for the first time in their motion to vacate the judgment. Nonetheless, we find no abuse of discretion in the district court's alternative holding rejecting this argument on its merits. For the public rights exception to preempt a party's Rule 19 protection, (1) "the litigation must transcend the private interests of the litigants and seek to vindicate a public right" and (2) "although the litigation may adversely affect the absent parties' interests, the litigation must not destroy the legal entitlements of the absent parties." *Kescoli*, 101 F.3d at 1311 (internal quotation marks omitted). As we have described, Appellants' lawsuit seeks to extinguish the Tribe's substantial legal entitlements. This precludes application of the public rights exception. *See Shermoen v. United States*, 982 F.2d 1312, 1319 (9th Cir. 1992) ("Because of the threat to the absent tribes' legal entitlements, and indeed to their sovereignty, posed by the present litigation, application of the public rights exception to the joinder rules would be inappropriate.").

For the reasons explained above, the district court did not abuse its discretion in dismissing this action under Rule 19 or in denying Appellants' subsequent motion to vacate.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-17996

FRIENDS OF AMADOR COUNTY; ET AL.,
PLAINTIFFS–APPELLANTS
v.

KENNETH SALAZAR, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR; ET AL.,
DEFENDANTS–APPELLEES, AND

BUENA VISTA RANCHERIA OF THE ME-WUK INDIANS,
MOVANT–APPELLEE.

June 5, 2014

ORDER

Before: ALARCÓN, TALLMAN, and IKUTA, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Tallman and Ikuta have voted to deny the petition for rehearing en banc and Judge Alarcón so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote

on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV. 2:10-348 WBS CKD

FRIENDS OF AMADOR COUNTY, BEA CRABTREE, JUNE GEARY, PLAINTIFFS,
v.

KENNETH SALAZAR, SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, UNITED STATES DEPARTMENT OF INTERIOR, THE NATIONAL INDIAN GAMING COMMISSION, GEORGE SKIBINE, ACTING CHAIRMAN OF THE NATIONAL INDIAN GAMING COMMISSION, THE STATE OF CALIFORNIA, ARNOLD SCHWARZENEGGER GOVERNOR OF THE STATE OF CALIFORNIA, DEFENDANTS

[Filed Oct. 4, 2011]

MEMORANDUM AND ORDER RE: MOTION TO DISMISS

Plaintiffs Friends of Amador County, Bea Crabtree, and June Geary brought this action against defendants Kenneth Salazar in his capacity as the Secretary of the United States Department of Interior ("Secretary"), the National Indian Gaming Commis-

sion ("NIGC"), and George Skibine (collectively the "Federal Defendants"), as well as the State of California ("State") and Governor Arnold Schwarzenegger ("Governor," collectively the "State Defendants") arising out of plaintiffs' objections to a tribal-state compact allowing the construction of a casino by the Buena Vista Rancheria of Me-Wuk Indians ("Tribe") in Amador County. The State Defendants have previously been dismissed from the suit. Presently before the court is the Tribe's special appearance as a non-party to present a motion to dismiss the Complaint for failure to join the Tribe and State as necessary parties under Federal Rule of Civil Procedure 19.

I. *Factual and Procedural Background*

In 1999, then-California Governor Gray Davis entered into a series of tribal-state compacts with fifty-nine different Indian tribes, including the Tribe, allowing class III gaming[1] on tribal land pursuant to the compacting requirements of the Indian Gaming Regu-

[1] Three classes of gaming are subject to regulation under IGRA. Class I gaming includes "social games solely for prizes of minimal value or traditional forms of Indian gaming," 25 U.S.C. § 2703(6), and is subject to solely tribal regulation. *Id.* § 2710(a)(1). Class II gaming is regulated through joint federal-tribal regulation, *id.* § 2710(a)(2), and includes games such as bingo and card games that are "explicitly authorized" or "are not explicitly prohibited by laws of the State . . . but only if such card games are played in conformity" with the state's laws and regulations. *Id.* § 2703(7). Class III gaming includes "all forms of gaming that are not class I gaming or class II gaming," such as casino games, slot machines, and lotteries, *id.* § 2703(8), and can only be authorized through a tribal-state compact, subject to federal approval and oversight. *Id.* § 2710(d)(1).

latory Act ("IGRA"), 25 U.S.C. §§ 2701-2721. (Compl. ¶ 22.) These compacts were subsequently ratified by the California legislature. (*Id.*) In August 2004, the Tribe and the Governor negotiated and completed an amended compact (the "Compact"), which was ratified by the California legislature and submitted to the Secretary as required by IGRA in September 2004. *See* Cal. Gov't Code § 12012.45. The Secretary then approved the Compact, which became effective as a matter of law. Notice of Approved Tribal-State Class III Gaming Compact, 69 Fed.Reg. 76004-01 (Dec. 20, 2004).

Plaintiffs allege that the Compact between the State and the Tribe is illegal under IGRA. The Complaint alleges that the Tribe's land is not eligible for class III gaming because it is owned in fee simple, not in trust by the federal government, and accordingly is not "Indian land" as required under the statute. (Compl. ¶¶ 8-9.) The Complaint further claims that the Tribe's federal recognition is invalid because it was established by individuals who were not true descendants of the Buena Vista Rancheria of Me-Wuk Indians and that plaintiffs Crabtree and Geary are true descendants of the peoples who lived on the Buena Vista Rancheria land. (*Id.* ¶¶ 16-18.) Plaintiffs accordingly allege that the Federal Defendants' approval of class III gaming on the Tribe's land was arbitrary, capricious, and contrary to IGRA and that the State Defendants acted unlawfully when they determined that the Tribe was eligible for class III gaming and entered into the Compact. (*Id.* ¶¶ 10, 22-27.)

Following the court's dismissal of the State Defendants, the Complaint retains two causes of action. The first claim alleges that the Federal Defendants violated IGRA by approving class III gaming on ineligible lands.[2] (*Id.* ¶ 34.) Plaintiffs' second claim alleges that the approval of the Tribe's gaming ordinance and the Compact violated the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 500-596, because such approval was arbitrary and capricious and in violation of IGRA. (Compl. ¶ 42.) The Complaint requests the court to declare that the Tribe's land is not eligible for gaming under IGRA, that the Compact is invalid under IGRA and APA, and that the environmental assessment of the land was inadequate. The Complaint also asks the court to enjoin the Tribe from further pursuit of class III gaming on its land and to create a constructive trust over funds currently being paid to the Tribe. The Tribe now moves to dismiss the Complaint pursuant to Rule 19.

II. *Discussion*

A. *Motion to Dismiss*

On a motion to dismiss, the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), *overruled on other grounds by Davis v.*

[2] The court previously dismissed this cause of action against the State Defendants because it found that IGRA does not provide a cause of action for third parties. (Docket No. 13) The Federal Defendants did not join in the prior motion and therefore the claim remains against them.

Scherer, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984); *Cruz v. Beto*, 405 U.S. 319, 322, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972). To survive a motion to dismiss, a plaintiff must plead "only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). This "plausibility standard," however, "asks for more than a sheer possibility that a defendant has acted unlawfully," *Ashcroft v. Iqbal*, ––– U.S. ––––, ––––, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009), and "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

Federal Rule of Civil Procedure 19 governs the joinder of persons necessary for a suit's just adjudication. Under Rule 19, a court must dismiss an action if: (1) an absent party is required, (2) it is not feasible to join the absent party and (3) it is determined "in equity and good conscience" that the action should not proceed among the existing parties.[3] *Republic of Philippines v. Pimentel*, 553 U.S. 851, ––––, 128 S. Ct. 2180, 2188, 171 L. Ed. 2d 131 (2008); *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991).

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[3] When Rule 19 was amended in 2007, the word "necessary" was replaced by "required" and the word "indispensable" was removed. The changes were intended to be "stylistic only" and "the substance and operation of the Rule both pre-and post-2007 are unchanged." *Republic of Philippines v. Pimentel*, 553 U.S. 851, ––––, 128 S. Ct. 2180, 2184, 171 L. Ed. 2d 131 (2008) (quoting the Rules Committee).

1. *Rule 19(a)—Required Party*

A person is a required party under Rule 19(a)(1) if (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B), the 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: (i) as a practical matter impair or impede the person's ability to protect the interest, or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest. Fed. R. Civ. P. 19(a)(1). If the Tribe satisfies either test, it is a required party under Rule 19.

First, the court cannot provide the litigation parties complete relief where the requested remedy, if granted, would fail to bind all absent parties who are in a position to act in direct contravention of that remedy. In *Dawavendewa v. Salt River Project Agricultural Improvement & Power District*, 276 F.3d 1150 (9th Cir. 2002), the Ninth Circuit upheld the dismissal of a suit because the absent Navajo Nation was a necessary and indispensable party where an applicant for employment at a nonIndian-operated power facility located on the Navajo Nation reservation challenged an employment preference contained in the operator's lease with the Nation. The plaintiff requested injunctive relief as to the lease provision at issue, and the Ninth Circuit held that complete relief could not be afforded because the absent Navajo Nation would not be bound by such relief and could still attempt to enforce the lease provision. *Id.* at 1155.

Similarly, in *Pit River Home & Agricultural Cooperative Ass'n v. United States*, 30 F.3d 1088 (9th Cir. 1994), a group of Indians sued the United States to challenge Pit River Council's beneficial ownership of Indian lands. The Ninth Circuit upheld the dismissal of suit and held that the absent Pit River Council was a necessary and indispensable party because "even if the Association obtained its requested relief in this action, it would not have complete relief, since judgment against the government would not bind the Council, which could assert its right to possess the Ranch." *Id.* at 1099.

In this case, the Tribe is not a party to the lawsuit, so it would not be bound by any judgment in favor of plaintiffs. *See E.E.O.C. v. Peabody W. Coal Co.*, 400 F.3d 774, 780 (9th Cir. 2005) ("The [proposed] judgment will not bind the Navajo Nation in the sense that it will directly order the Nation to perform, or refrain from performing, certain acts."). The Tribe could therefore act contrary to the judgment, preventing the court from according complete relief to plaintiffs.

Second, a person is a required party if the suit impairs or impedes its legally protected interests. Fed. R. Civ. P. 19(a)(1) (B)(I). Under Rule 19(a)(1)(B), a party need only "claim" an interest, not establish it with certainty. The court may only exclude claims of interest that are patently frivolous. *See Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992). This suit implicates several of the Tribe's legally protected interests that will be impaired or impeded if the suit continues.

Plaintiffs seek to invalidate the Compact and enjoin the Tribe from engaging in class III gaming. This impairs the Tribe's substantial gaming-related interests, including its right under federal law to engage in class III gaming. *See Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002) (holding that "[t]he interests of the tribes in their compacts are impaired and, not being parties, the tribes cannot defend those interests"); *Dawavendewa*, 276 F.3d at 1156 ("[N]o procedural principal 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))). Plaintiffs argue that the Tribe does not have a legally protected interest because it only has an economic interest stemming from the approval of the Compact. Unlike cases in which non-parties have indirect economic interests that do not qualify as "legally protected interests," the Tribe is a party to the Compact and has a direct, and legally protected, interest in its approval.

The Tribe also has a substantial interest in the already-determined "Indian lands" status of its Rancheria, its ability to govern that land, its ability to enforce its laws, its status as a federally-recognized Indian tribe, the two stipulated judgments that restored the Tribe and Rancheria, and its sovereign immunity not to have its interests adjudicated without its consent. *See Shermoen*, 982 F.2d at 1317 ("[A]bsent tribes have an interest in preserving their own sovereign immunity, with its concomitant 'right not to have [their] legal duties judicially determined without consent.'" (quot-

ing *Enter. Mgmt. Consultants v. U.S. ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989))). The Tribe's ability to protect these legal interests would be impeded and impaired if this action continues.

"Impairment may be minimized if the absent party is adequately represented in the suit. The United States may adequately represent an Indian tribe unless there is a conflict of interest between the United States and the tribe." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) (citations omitted). Plaintiffs argue that there is no conflict of interest between the United States and the Tribe, and therefore the suit for declaratory relief should proceed. From her response to the court's questions at the hearing on this motion, the attorney for the United States clearly does not agree. The Federal Defendants' litigation policy in this case appears to favor judicial review and to avoid taking positions that may conflict with its national Indian policy. Their failure to move this court to dismiss this case and their refusal to take a position on this motion[4] appears to conflict with the Tribe's interest in protecting their tribal status and not having their interests litigated in their absence. *See Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 1000, *modified on reh'g*, 257 F.3d 1158 (10th Cir. 2001) ("In this case, [United States] Defendants have a duty to implement national Native American policy. The Shawnee, on the other hand, have an interest in re-

[4] The Federal Defendants' counsel was questioned at length during oral arguments regarding the United States' position on the Tribe's Rule 19 motion. Her only position was that the United States has no position on the outcome of this motion.

ceiving the funds at issue in this case. The two interests are not necessarily the same.").

When asked if the United States represents the interests of the Tribe, counsel responded that "[i]t depends on what claims are being asserted" and that "the United States is in the position of having to balance" the interests. (Rep.'s Tr. of Hr'g, Def.'s Mot. to Dismiss, Oct. 12, 2010, at 10:13-20.) This balancing presents a conflict of interest with the Tribe and suggests that its legal interests may not adequately be protected if it remains an absent party. Accordingly, the Tribe is a required party in this suit.

2. *Rule 19(b)—Proceeding with Existing Parties*

Indian tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers. *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 356 (2d Cir. 2000). In order to qualify for sovereign immunity, a tribe must be federally recognized. *See Pit River Home & Agric. Coop. Ass'n*, 30 F.3d at 1100. Immunity may be waived by either Congress or the tribe itself, but only if done in an unequivocal manner. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 417, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001). The Tribe is federally recognized, and neither the Tribe nor Congress has consented to its being in this action, therefore the Tribe cannot be joined because it is immune from civil suit.

When a required person cannot be joined in the suit, the court must determine whether, "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ.

P. 19(b). Rule 19(b) outlines four factors for courts to consider in making this determination: (1) the extent to which judgment rendered in the person's absence might prejudice that person; (2) the extent to which the prejudice could be lessened or avoided by protective provisions, shaping the relief, or other measures; (3) whether judgment in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. *Id.* Because the Tribe has sovereign immunity, little balancing of these factors is required. See *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) ("If the necessary party is immune from suit, there may be 'very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor.'" (quoting *Confederated Tribes of the Chehalis Indian Reservation*, 928 F.2d at 1499)). Moreover, the factors, taken together, weigh in favor of finding that the Tribe is an indispensable party.

The first factor in the Rule 19(b) analysis is essentially the same as the legal interest test in the "necessary party" analysis. *See, e.g.*, *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994). Accordingly, the prejudice prong is met here as the Tribe's absence might prejudice several of its legally protected interests. The potential prejudice to the Tribe cannot be effectively minimized under the second factor of Rule 19(b) because no adequate relief for plaintiffs can be shaped such that the Tribe would not be prejudiced. Any adjudication of the Federal Defendants' review of the Compact or the Tribe's federal status would prejudice the Tribe's interests. The consideration of the final two prongs is not necessary where the

Tribe will be prejudiced by a judgment rendered in its absence and there is no way the court can avoid the prejudice. *See Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1498 (D.C. Cir. 1995). Accordingly, the court cannot proceed in equity and good conscience with the existing parties.[5]

B. *Sanctions*

Plaintiffs filed their papers in opposition to the Tribe's motion to dismiss on September 16, 2011. According to Local Rule 230(c), opposition to the granting of a motion must be filed and served not less than fourteen days preceding the noticed hearing date. As the hearing for this matter was set for September 26, 2011, plaintiffs filed their papers four days late.

Local Rule 230(c) provides that, "No party will be entitled to be heard in opposition to a motion at oral arguments if opposition to the motion has not been timely filed by that party." Because it is more important that the court reach the correct decision on a dispositive motion than to enforce technical sanctions, the court chose to hear counsel at oral argument, and instead to impose financial sanctions under Local Rule 110, for failure to comply with the Local Rules. Therefore, the court will sanction plaintiffs' counsel, James E. Marino, $100.00 payable to the Clerk of the Court within ten days from the date of this Order, unless he

[5] Because the Complaint is dismissed for failure to join the Tribe as a required party under Rule 19, the court will not address the Tribe's argument that the State was also an indispensable party.

shows good cause for his failure to comply with the Local Rules.

IT IS THEREFORE ORDERED that this action be, and the same hereby is, DISMISSED.

IT IS FURTHER ORDERED that within ten days of this Order James E. Marino shall either (1) pay sanctions of $100.00 to the Clerk of the Court, or (2) submit a statement of good cause explaining his failure to comply with Local Rule 230(c).

Dated: September 29, 2011

/s/ WILLIAM B. SCHUBB
William B. Schubb
United States District Judge

APPENDIX D

1. 5 U.S.C. 702 provides:

Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

2. 5 U.S.C. 704 provides:

Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

3. Federal Rule of Civil Procedure 19 provides:

Required Joinder of Parties

(a) Persons Required to Be Joined if Feasible.

(1) ***Required Party.*** 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:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) 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:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) ***Joinder by Court Order.*** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) ***Venue.*** If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) Pleading the Reasons for Nonjoinder. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) Exception for Class Actions. This rule is subject to Rule 23.