by Thomas P. Schlosser

# Understanding Federal Rule of Civil Procedure 19 and Its Application in the Sovereign Immunity Cases

The familiar concept that federally recognized Indian tribes are protected by sovereign immunity leads to interesting and confusing results in cases interpreting Rule 19 of the Federal Rules of Civil Procedure—Required Joinder of Parties.

"As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*[1] The doctrine of tribal immunity is settled law and has often been reaffirmed by the U.S. Supreme Court since *Turner v. United States*,[2] and *United States v. United States Fidelity & Guaranty, Co.*[3] Sovereign immunity inures to the benefit of those Indian tribes who are acknowledged as such by the United States.[4]

Sovereign immunity protects the sovereign's money and property, the treasury, and the domain. It is often said that "tribal immunity applies to suits for damages as well as those for declaratory and injunctive relief."[5] But with respect to declaratory and injunctive relief, this statement is frequently contradicted by application of the *Ex parte Young*[6] doctrine (suits against state officer not barred by state sovereign immunity). Thus, many cases turn on whether the presence of a tribal official in the case can allow a claim for declaratory or injunctive relief to go forward despite Rule 19, and even though the tribe is not a party due to its refusal to waive sovereign immunity.

Rule 19 was reworded, but not substantively changed in 2007. Subsection (a) lists the persons required to be joined if feasible, and subsection (b) directs how the court should respond when a person who is required to be joined cannot be joined.[7] Both issues are important.

Notice first that required parties under Rule 19(a) are described in much the same way as are parties who may intervene as of right under Rule 24(a). Both rules refer to persons who claim an interest relating to the subject of the action and are so situated that disposing of the action may, as a practical matter, impair or impede the person's ability to protect his or her interests. The cases under Rule 24(a) thus provide guidance as to which persons are required to be joined if feasible under Rule 19(a).

Sometimes there is little difficulty in satisfying the requirements of Rule 19(a) and the focus, instead, is on what the court should do and how it should apply the factors of Rule 19(b). In particular, courts vary on the significance of factor (4) and "whether the plaintiff would have an adequate remedy if the action is dismissed for nonjoinder." Sometimes an alternate forum is not obvious, but exists. Sometimes the absence of an alternate forum is dispositive and sometimes not.

While the results of sovereign immunity/Rule 19 cases cannot all be explained on the basis of established law, the purpose of this paper is to suggest that they are more understandable when separated into cases concerning contracts, property, and exercises of governmental authority. Where the principal claim seeks to obtain contract benefits, money, land, or other property, then the tribe, as owner, is likely required to be joined and, if that cannot be done, the claim is dismissed on Rule 19 grounds. On the other hand, where the exercise of governmental authority by the United States or the tribe itself is at issue, the *Ex parte Young* doctrine likely applies, and the tribal official is an adequate representative of the absent tribe's governmental interest. In *Santa Clara Pueblo v. Martinez*,[8] the Court noted that an officer of the pueblo was not protected by the tribe's immunity from suit, citing *Ex parte Young*. In other words, the nature of a plaintiff's claim for relief is generally determinative of whether sovereign immunity is really a barrier or whether the *Ex parte Young* doctrine would allow a case to proceed where tribal officials are parties. Several illustrative cases below have been grouped into these three categories: (1) contracts, (2) property, and (3) governmental activity.

## Contracts

*Lomayaktewa v. Hathaway*,[9] illustrates the operation of sovereign immunity and Rule 19 in the contract context. In this case, village leaders of a traditional Hopi faction sought to void a lease of reservation land to a coal company. The U.S. Court of Appeals for

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the Ninth Circuit upheld dismissal because the Hopi Indian Tribe was an indispensable party which, absent consent, could not be joined to the case. The court observed that no procedural principle is more deeply embedded in the common law than in an action to set aside a lease or contract all parties who may be affected by the determination of the action are indispensable.

*Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. California*,[10] is a closer case. Here, the Colusa Indian Tribe sued California asserting breach of the tribal-state gaming compact and seeking declaratory and injunctive relief regarding the state Gambling Commission's interpretation of the compact's statewide limit on the number of gaming machine licenses. The district court ruled that because other tribes were signatories to compacts with identical language, they were required parties. Accordingly, the court dismissed.

The Ninth Circuit ruled that the absent tribes were not required parties for Colusa's claim regarding the number of machine licenses authorized by their compact. Although dozens of tribal compacts contained identical language concerning the number of machine licenses, the court ruled that the absent tribes' only significant interest was in being free of competition. The court found no express protection from more competition in the compacts and emphasized that the limit on the number of machines applied only to the group of compacts entered into in 1999. The court noted that newer compacts did not apply a statewide limit. Thus, the requirements of Rule 19(a) were not met.

## Property

*Larson v. Domestic & Foreign Commerce Corp.*,[11] is a classic case concerning suits regarding ownership of property. The corporation sued federal War Assets Administrator and Surplus Property Administrator Robert Littlejohn, seeking an injunction to enjoin the sale by the United States of certain surplus coal to any person other than the plaintiff. The plaintiff sought a declaration that the sale to plaintiff was valid and the sale to a second buyer was invalid. The Supreme Court held that federal sovereign immunity barred the suit which attempted to obtain federal coal. In this instance, however, the aggrieved party likely has a claim for damages in the U.S. Court of Federal Claims.

In the Indian context, *Wichita & Affiliated Tribes of Oklahoma v. Hodel*,[12] is illustrative. There, one Indian tribe sought review of a decision of the Interior Board of Indian Appeals concerning distribution of income from land restored to a tribe that no longer existed in its original form but had been succeeded by three separate Indian tribes. The second and third tribes intervened as defendants and one tribe filed a crossclaim against the U.S. Department of the Interior (DOI). The court held that voluntary intervention was an express waiver of the tribes' right not to be joined in the first tribe's suit against the DOI. The first tribe, however, did not waive its tribal immunity as to the crossclaim filed against the DOI. Both the first and the third tribes were indispensable parties in whose absence the second tribe's crossclaim against the Department for retroactive redistribution of income from land could not proceed.

*United Keetoowah Band of Cherokee Indians of Oklahoma v. United States*,[13] presents a much closer case. The Keetoowah Band sued the United States for damages arising from a legislative settlement concerning the Arkansas Riverbed. The Cherokee,

Choctaw, and Chickasaw Nations Claims Settlement Act, 25 U.S.C. § 1779, provided incentives for three settling tribes to relinquish their claims to former riverbed lands. The Act also provided a procedure to resolve claims brought by any other tribe, such as the plaintiff. The Act extinguished all riverbed claims and permitted nonsettling tribes to file a claim against the United States for compensation. The Act also created a special holding account, funded by some of the monies that would otherwise go to the settling tribes, to be held pending resolution of claims brought by nonsettling tribes. Thus, success by nonsettling tribes in a claim against the United States would reduce the Act's compensation to settling tribes.

The trial court dismissed the Keetoowah Band's claim finding that under Rule 19 the Cherokee Nation of Oklahoma was a necessary and indispensable party that could not be joined because of sovereign immunity. The court of appeals reversed, finding that the Keetoowah Band's claim was against the United States only and the Cherokee Nation could not be a necessary party within the meaning of Rule 19.

## Governmental Activity

*Ex parte Young*, is the foundational example of a claim affecting a sovereign which is not barred by sovereign immunity. The Minnesota Attorney General sought a writ of habeas corpus because he had been jailed for contempt of court. A federal court enjoined the attorney general from instituting criminal proceedings against railroads under a state statute. A federal court had issued an injunction restraining the railroads from complying with the Minnesota statute, which reduced their rates in violation, allegedly, of the U.S. Constitution. The Supreme Court ruled that a state has no power to give an official any immunity from responsibility to the supreme authority of the United States. If the action to be enforced is unconstitutional, the use of the name of the state to enforce that act is a proceeding without authority and one that does not affect the state in its sovereign or governmental capacity. An official seeking to enforce an act that violates the federal Constitution comes into conflict with the superior authority of the Constitution and is stripped of his official or representative character. Such an officer is subjected to the consequences of his individual conduct.

In *Confederated Tribes of the Chehalis Indian Reservation et al. v. Lujan et al.*,[14] Indian tribes and individual Indians brought suit seeking declaratory and injunctive relief enjoining the Secretary of the Interior from dealing with the Quinault Indian Tribe as sole governing body of a reservation. The district court, granted the government's motion to dismiss, and plaintiffs appealed. The Ninth Circuit held that the suit was properly dismissed for failure to name the Quinault Indian Nation as a party.

Plaintiffs requested an interpretation of federal law, an injunction prohibiting federal officials from dealing with the Quinault Indian Nation as the governing body of the Quinault Indian Reservation, and a judgment declaring that plaintiffs have equal rights in the reservation. In a lengthy partial dissent, Judge Diarmuid O'Scannlain noted that there is no trust fund or limited resource at issue in this case; there is "no pie to carve up." Joinder of the absent tribe should be irrelevant to a challenge upon the authority of federal officials to designate a tribe to have governing authority over the reservation. Judge O'Scannlain believed that the request for an injunction concerning recognition of a governing body should be dismissed as nonjusticiable while other claims, such as apparent civil rights claims, should not be dismissed.

Two recent cases illustrate the applicability of suits against officers. *Salt River Project Agricultural Improvement & Power District v. Lee*,[15] involved non-Indian employers who sought a declaratory judgment that Navajo tribal officials lacked authority to regulate employment relations at their plant. The Salt River Project sought an injunction staying the claims of its former employees under tribal law. The district court dismissed on the basis of Rule 19 but the court of appeals held that the tribe was not a necessary party and that the tribal officials could be sued in their individual capacity for attempting to enforce the tribal ordinance contrary to federal law.

In *Vann v. U.S. Department of the Interior*,[16] Freedmen (descendants of former slaves of the Cherokee Indian Nation), sued the Secretary of the Interior, the Cherokee Indian Nation, and the principal chief in his official capacity, for allegedly violating a treaty freeing the Cherokee slaves and their descendants and guaranteeing to them all rights of native Cherokees, including the right to tribal membership and the right to vote in tribal elections. The district court dismissed on the grounds that the Cherokee Indian Nation had sovereign immunity and was a required party whose interests could not be adequately represented by the principal chief. The U.S. Court of Appeals for the District of Columbia Circuit held that the suit could proceed against the chief in his official capacity without the tribe as a party.

In neither *Salt River Project* nor *Vann* was any specific tribal contract or property at issue. Instead, those cases sought to enjoin tribal action said to violate provisions of federal law. Arguably, there is no conflict between cases applying Rule 19 and sovereign immunity and other cases that avoid the problem by applying the *Ex parte Young* doctrine. This is because when neither tribal contracts nor property are directly affected by the action, tribal sovereign immunity does not actually apply. Sovereign immunity protects the tribal treasury and domain; it is not a basis for protecting actions of tribal officials which are unauthorized by the tribe or which violate federal law. Thus, for example, an action seeking review of an environmental impact statement regarding a lease on Indian lands is not barred by sovereign immunity.[17] Such an action does not call for any action by or against the tribe or its property. To bar such actions because of the absence of a tribal party would be to immunize virtually all public and private activity on Indian lands from oversight under federal environmental laws. ⊙

## Endnotes

[1]523 U.S. 751, 754 (1998).

[2]248 U.S. 354 (1919).

[3]309 U.S. 506 (1940).

[4]*See* 25 U.S.C. § 479a and 77 Fed. Reg. 47868 (Aug. 10, 2012).

[5]Newton et al., Cohen's Handbook of Federal Indian Law 637 (2012).

[6]209 U.S. 123 (1908).

[7]Fed. R. Civ. P. 19.

**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.

[8]436 U.S. 49, 59 (1978).
[9]520 F.2d 1324 (9th Cir. 1975).
[10]547 F.3d 962 (9th Cir. 2008).
[11]337 U.S. 682 (1949).
[12]788 F.2d 765 (D.C. Cir. 1986).
[13]480 F.3d 1318 (Fed. Cir. 2007).
[14]928 F.2d 1496 (9th Cir. 1991).
[15]672 F.3d 1176 (9th Cir. 2012).
[16]No. 11-5322, ___ F.3d ___ (D.C. Cir. Dec. 14, 2012).
[17]*Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977).

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should be able to demonstrate prior to becoming licensed to practice law." *Id.*

[15]18 U.S.C. § 1153.

[16]*See* UBE Score Transfer, Idaho State Bar website, isb.idaho.gov/admissions/ube/ube_transfer.html.

[17]*See* Tribal State Court Forum, State of Idaho Judicial Branch website, www.isc.idaho.gov/tribal-state/tribal-benchbook. The Idaho Tribal State Court Forum is co-chaired by an Idaho state court judge and an Idaho tribal court judge who set an agenda on the pressing topics impacting both state and tribal court jurisdiction. For example, the next Idaho Tribal State Court Forum is set for March 20, 2013, with agenda topics including the enforcement of protection orders in state and tribal courts, the current issues involving the ICWA, and a review of the Tribal Law and Order Act of 2010. Attendees to the forums include tribal and state court judges, practitioners, academics, and citizens interested in fostering better relations across tribal and state judicial systems.

[18]*See* The University of Idaho College of Law's Native Law Program website at www.uidaho.edu/law/academics/areasofstudy/nativelaw.

[19]The Idaho statute accepting the federal delegation of authority under Public Law Number 280 is codified at I.C. 67-5101—State jurisdiction for civil and criminal enforcement concerning certain matters arising in Indian country. In 1953, the U.S. Congress passed legislation, commonly known as Public Law Number 280, to provide a process for delegating federal criminal authority in Indian Country to consenting states. Under 18 U.S.C. § 1162(a), six states immediately assumed federal criminal jurisdiction over all tribes and tribal lands within the state, unless a tribe was expressly exempted by the law. These six states were: Alaska, California, Minnesota, Oregon, and Wisconsin. Other states could pass legislation and accept the federal delegation as "optional states." Idaho is an optional Public Law Number 280 state passing legislation in 1963 to accept the federal delegation of authority. Public Law Number 280 also included a civil provision allowing access to state courts when a suit involved an Indian in Indian Country, 28 U.S.C. § 1360. The split of criminal authority in Indian Country between tribal, federal, and state governments has become increasingly complex with the addition of Public Law Number 280.