

**SOVEREIGNS OR POTTED PLANTS?
TRIBAL NATIONS, POLICY PREFERENCES, AND RULE 19**

**Federal Bar Association
38th Annual Indian Law Conference
April 11-12, 2013**

Paul E. Frye
FRYE LAW FIRM, P.C.
10400 Academy Rd. NE #310
Albuquerque, NM 87111

My Civil Procedure course was taught by Professor Arthur Miller. However, the lecture on Rule 19 was one that Professor Miller would leave to a Teaching Assistant to handle. It is not an entertaining rule. But for cases involving tribal interests, Rule 19 may play an important role in preserving tribal decision making, reducing commercial uncertainty, and avoiding the expense and distraction of litigation. Whether it will appear to depend on the policy preferences of federal judges and the importance these judges place on tribal sovereignty. If the courts apply the Supreme Court's *Pimentel*¹ Rule 19 principles to cases involving tribal nations, tribal sovereignty should prevail over other considerations. If courts see tribal sovereignty and sovereign immunity simply as anachronistic barriers to the administration of justice and the effectuation of other federal interests,² then the court will view *Pimentel* as inapplicable and find ways to decide the merits.

I. THE TEXT OF RULE 19

The pertinent parts of Rule 19 are as follows:

(a) Persons Required to Be Joined if Feasible

¹ *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008).

² See *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998) (expressing doubt about the vitality and origin of tribal sovereign immunity); *Montoya v. United States*, 180 U.S. 261, 265 (1901) (“In short, the word ‘nation’ as applied to the uncivilized Indians is so much of a misnomer as to be little more than a compliment.”).

(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.

...

(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.

* * *

Rule 19 is best read slowly. For example, one condition of the applicability of the rule is that

the party be subject to service of process. Rule 19(a). That determination requires application of Rule 4, which has territorial and time restrictions, and which expressly provides for service on the federal government, and states and local governments, but not Indian tribes. The absent party must “claim[] an interest relating to the subject of the action,” and need not, for example, have a property or contract interest that others are contesting. Rule 19(a)(1)(B). And the factors that a court must consider in deciding whether to dismiss if joinder is not feasible “include” the four listed in Rule 19(b); those factors are not exclusive. *See Salt River Project Agr. Impr. and Power Dist.*, No. CV 08-8028-PCT-JAT, 2010 WL 4977621 (D. Az. Dec. 2, 2010), at *4, *rev’d on other grounds*, 672 F.3d 1176 (9th Cir. 2012).

II. GENERAL RULE 19 STANDARDS AND PRINCIPLES

The following are generally accepted standards and principles for Rule 19 adjudications.

A. The seminal decision in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), remains the touchstone for Rule 19 jurisprudence. Rule 19 prescribes a three-step inquiry: (1) whether the absent person should be joined, (2) whether, under principles of jurisdiction and venue, the absent person can be joined, and (3) if the person cannot be joined, whether the court should dismiss the case or continue it without that person. *E.g., id.*; *Keweenaw Bay Indian Comm. v. State*, 11 F.3d 1341, 1347 (6th Cir. 1993); *Western Md. Ry. Co. v. Harbor Ins. Co.*, 910 F.2d 960, 961 (D.C. Cir. 1990) (Thomas, J.).

B. When feasible, a person should be joined if, in its absence, the likelihood that the court can provide justice for those already parties is materially reduced or continuation of the suit would be detrimental to the absent person itself. *E.g., Hammond v. Clayton*, 83 F.3d 191, 195 (7th Cir. 1996). Because, for example, the possible impairment of the absent person’s interests is not

simply a legal question but is a “practical” one, *id.*, the inquiry of whether an absent person should be joined is highly fact-specific, *e.g.*, *United States ex rel Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 481 (7th Cir. 1996).

C. Because of their sovereign immunity from unconsented-to suit, Indian nations usually cannot be joined. *E.g.*, *Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977). This is a “jurisdictional truth[].” *Dine’ Citizens Against Ruining Our Environment v. OSM*, (“*Dine’ CARE II*”), No. 12-cv-1275-AP, 2013 WL 68701 (D. Colo. Jan. 4, 2013), at *2. The same is true when the absent party is the United States, *e.g.*, *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732 (8th Cir. 2001), *cert. denied*, 535 U.S. 988 (2002), or a State, *e.g.*, *Seneca Nation of Indians v. New York*, 383 F.3d 45 (2d Cir. 2004) (easement for New York Thruway), *cert. denied*, 547 U.S. 1178 (2006); *Hood ex rel. Mississippi v. City of Memphis, Tenn.*, 570 F.3d 625 (6th Cir. 2009) (water rights); *Pueblo of Sandia v. Babbitt*, 47 F.Supp. 2d 49 (D.D.C. 1999) (gaming compact validity). States, like Indian nations, are considered “quasi-sovereign” entities. *See State of Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907); *see also Springer v. Government of the Philippine Islands*, 277 U.S. 189, 203 (1928) (regarding “quasi-sovereign” status of Philippine government under its Organic Act).

D. “The careful balancing of Rule 19 criteria in suits in which it is claimed that the United States must be joined is exemplified in the considerable litigation that has been brought raising the question of the federal government’s role in actions involving Indian lands.” Wright & Miller, *Federal Practice and Procedure*, Civ. § 1617 (3d ed. 2010) (footnote to collected cases omitted). Two early Tenth Circuit decisions establish the general rule in Indian cases. If the tribe sues other parties to protect tribal interests, the United States is generally not considered indispensable; if third parties sue tribes challenging a tribal interest, the United States is

indispensable. *See Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456 (10th Cir. 1951), *cert. denied*, 343 U.S. 919 (1952); *Jackson v. Sims*, 201 F.2d 259 (10th Cir. 1953).

E. The difficulty of obtaining evidence in the absence of a person is not a factor under Rule 19. *Johnson v. Smithsonian Inst.*, 189 F.3d 180, 188 (2d Cir. 1999).

F. There is no “precise formula” for making the determination of whether an absent person is required to be joined under Rule 19(a). *Knutzen v. Eben Ezer Lutheran Hous. Ctr.*, 815 F.2d 1343, 1356 (10th Cir. 1987); *see generally Provident Tradesmens*, 390 U.S. at 111.

G. Under Rule 19(a)(1)(A), which focuses on the interests of the existing parties, an absent party is required to be joined if, in its absence, complete relief cannot be afforded to those parties already joined. *E.g., Yashenko v. Harrah’s NC Casino Co., LLC*, 446 F.3d 541 (4th Cir. 2006) (tribal gaming dispute); *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861 (9th Cir. 2004).

H. Rule 19(a)(1)(B) focuses primarily on the interests of the absent persons, and its application protects the interests of absent tribes. *See, e.g., Dawavendewa v. Salt River Project Agr. Imp. and Power Dist.* (“*Dawavendewa II*”), 276 F.3d 1150, 1153 (9th Cir.), *cert. denied*, 537 U.S. 820 (2002); *Manybeads v. United States*, 209 F.3d 1164, 1165 (9th Cir. 2000), *cert. denied*, 532 U.S. 966 (2001); *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (10th Cir. 2001), *modified*, 257 F.3d 1158 (10th Cir. 2001).

I. The “interest” of the absent party under Rule 19(a)(1)(B) need not require possession of an “actual” interest. It must merely be a “claim” of an interest related to the litigation that is not “patently frivolous.” *Citizen Potawatomi; Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993).

J. To qualify as an interest that would trigger a requirement that an absent party be joined, the absent person's interest under Rule 19(a)(1) must be subject to impairment "as a practical matter." See generally *Picciotto v. Continental Cas. Co.*, 512 F.3d 9 (1st Cir. 2008); *Schutten v. Shell Oil Co.*, 421 F.2d 869, 874 (5th Cir. 1970).

K. The classic case implicating Rule 19(a)(1)(B)(ii) principle of protecting an existing party from a "substantial risk" of inconsistent obligations is where a party, no matter what the outcome of the main litigation, would be stuck between a "rock and a hard place." See *EEOC v. Peabody Western Coal Co.*, 610 F.3d 1070, 1078 (9th Cir. 2010) (citation omitted), *cert. denied*, 132 S.Ct. 91 (2011) .

L. More generally, where the validity, construction or operation of a contract (including a lease of tribal trust property) is at issue, all parties to the contract are considered indispensable. *Dawavendewa II*, 276 F.3d at 1156-57; *Schutten*, 421 F.2d 869; *Tucker v. National Linen Serv. Corp.*, 200 F.2d 858, 863 (5th Cir.), *cert. denied*, 346 U.S. 817 (1953); *Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians*, 862 F.Supp. 995 (W.D.N.Y. 1994), *aff'd*, 94 F.3d 747 (2d Cir. 1996).

M. If an absent person should be joined, Rule 19(b) is used to determine if the case should be dismissed or not. The standard to be employed by the trial court is whether "in equity and good conscience, the action should proceed." That standard results in a deferential, abuse-of-discretion, standard of appellate review of Rule 19 decisions. *Clinton v. Babbitt*, 180 F.3d 1081, 1086 (9th Cir. 1999); see *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir.) (reversal under abuse of discretion standard generally is reserved for cases where the appellate court is "convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances"), *cert.*

denied, 531 U.S. 1038 (2000).

N. The analysis of the potential prejudice to the absent person under Rule 19(b)(1) is analogous to the issue posed by Rule 19(a)(1)(B)(I), whether continuation of the suit may “as a practical matter impair or impede the person’s ability to protect [its] interest.” *See Enterprise Mgmt. Consultants, Inc. v. United States*, 883 F.2d 890, 894 (10th Cir. 1989); *Gardiner v. Virgin Islands Water & Power Auth.*, 145 F.3d 635, 641 n.4 (3d Cir. 1998). However, Rules 19(b)(1) and 19(b)(2), together, mean that even a demonstrated potential impairment to an interest may be negated or lessened by protective provisions in the judgment or other forms of shaping the relief, so long as the final judgment does not grant hollow relief to the existing parties. *Center for Biological Diversity v. Pizarchik*, 858 F.Supp. 2d 1221, 1228-29 (D. Colo. 2012) (in case brought under Endangered Species Act to enjoin coal mining on Indian lands, prejudice could not feasibly be extenuated because “Congress removed from the courts their traditional equitable discretion in balancing the parties’ competing interests”) (internal quotation marks and citation omitted), *on appeal*, No. 12-1200 (10th Cir.); *cf. Manygoats*, 558 F.2d at 558-59 (prejudice to tribe could be lessened by shaping relief under NEPA); *Schutten, supra*; 421 F.2d at 875 (“Any attempt to fashion a judgment which would lessen this harm would result in a meaningless decree.”).

O. It is typically relevant that the absent party may have a right to intervene, but that general rule does not apply when the absent party is a sovereign entity. *Compare Thunder Basin Coal Co. v. Southwestern Public Serv. Co.*, 104 F.3d 1205, 1208 (10th Cir. 1997), with *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir. 1995) (“Failure to intervene is not a component of the prejudice analysis where intervention would require the absent party to waive sovereign immunity.”).

P. The third factor of Rule 19(b), whether a judgment in the absence of a person who cannot be joined will be “adequate” concerns the social interest in the efficient administration of justice and the avoidance of multiple litigation. *See Provident Tradesmens*, 390 U.S. at 111. The force of this factor is substantially lessened if the case has already gone to trial and the Rule 19 issue is first addressed on appeal. *E.g., Sac and Fox Nation of Mo. v. Pierce*, 213 F.3d 566, 581 n.11 (10th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001).

Q. If no alternative forum exists for the plaintiff, dismissal under Rule 19(b)(4) disfavors dismissal for inability to join a necessary absent person, but, again, this principle is largely inapplicable when the absent person has sovereign immunity. *Compare Rishell v. Jane Phillips Episcopal Mem’l Med. Ctr.*, 94 F.3d 1407 (10th Cir. 1996), *cert. denied*, 520 U.S. 1166 (1997), *with Manybeads*, 209 F.3d at 1166, *and Dawavendewa II*, 276 F.3d at 1161; *see generally Wichita and Affiliated Tribes v. Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986) (court finds dismissal “less troublesome” in case where no alternative forum exists in case where tribes were absent and could not be joined, because “the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent”).

R. An undeveloped and unclear exception to Rule 19 is the so-called “public rights exception.” Cases addressing it are found in *Kickapoo*, 43 F.3d at 1500. If there is such an exception, it should not apply where the suit “threatens [tribes’] sovereignty by attempting to disrupt their ability to govern themselves and to determine what is in their best interests.” *Kescoli v. Babbitt*, 101 F.3d 1304, 1311-12 (9th Cir. 1996).

S. As shown by the above, an absent party’s sovereign immunity tilts the scales toward dismissal if its interests are or may be affected by continuation of a suit. *See generally Wichita*.

T. There is a split in the Circuits as to whether the plaintiff must have a claim directly against the absent party in order for Rule 19 to permit joinder. *Compare EEOC v. Peabody Western Coal Co.*, 400 F.3d 774, 781 (9th Cir. 2005) (plaintiff need not have a claim against absent person in order for absentee to be joined under Rule 19), *cert. denied*, 546 U.S. 1150 (2006), and *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988), with *Vieux Carre Prop. Owners v. Brown*, 875 F.2d 453 (5th Cir. 1989) (plaintiff must have a claim directly against absent person in order for absentee to be joined under Rule 19), *cert. denied*, 493 U.S. 1020 (1990), and *Davenport v. International Bhd. of Teamsters*, 166 F.3d 356 (D.C. Cir. 1999) (same).

U. A party in the case may raise (and, occasionally, courts will raise *sua sponte*) the issue of whether a tribe's absence should result in dismissal of an action. The potentially affected tribe should consider intervening for the sole purpose of asserting its indispensability and immunity from joinder; otherwise, tribal interests may be inadequately explained or supported, to the long-term detriment of the tribe. *See Dine' Citizens Against Ruining our Environment v. Klein* ("Dine' CARE I"), 676 F.Supp. 2d 1198, 1215 (D. Colo. 2009) ("The Federal Defendants . . . produced no evidence [to satisfy its burden under Rule 19] in their opening brief, and scant evidence in their reply after Plaintiffs challenged them on this point in opposition to this motion."), and compare *Pizarchik*, 858 F.Supp. 2d 1221 at (in action concerning operation of same mine as in *Dine CARE I*, Navajo Nation demonstrated the "potentially devastating" effect of the suit on the Nation).

III. PRE-PIMENTEL RULE 19 DECISIONS INVOLVING TRIBAL INTERESTS - SUMMARY

A. United States as Indispensable

The cases follow fairly closely the general rule discernable from the Tenth Circuit's decisions in *Jackson* and *Seitz*. That is, when Native Americans sue to protect their interests to resources held

in trust for them by the United States, the complaints will not be dismissed for inability to join the United States. But the United States *is* indispensable when third parties sue to obtain rights to such property.

1. U.S. Not Indispensable When Tribal Nations or Individuals Sue to Protect Indian Interests.

Decisions holding that the United States is not indispensable in cases where Native nations sue to protect their interests in trust property are as follows: *Choctaw and Chickasaw Nations*, 193 F.2d 456; *Skokomish Indian Tribe v. France*, 269 F.2d 555, 560 (9th Cir. 1959); *Puyallup Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984); *Narragansett Tribe of Indians v. Southern R.I. Land Dev. Corp.*, 418 F.Supp. 798 (D.R.I. 1976). If the rule were otherwise, the intent of Congress in enacting 28 U.S.C. § 1362 would be frustrated. *Idaho v. Andrus*, 720 F.2d 1461, 1469-70 (9th Cir. 1983), *cert. denied*, 469 U.S. 824 (1984); *see Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135 (8th Cir. 1974) (§ 1362 intended to authorize tribes to bring suits in federal court to protect their federally derived property rights when United States has declined to act); *Fort Mohave Tribe v. LaFollette*, 478 F.2d 1016 (9th Cir. 1973) (same).

The rule regarding allotment owners is the same, although based on different considerations. *See Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968) (basing ruling in part of overwhelming burden placed on United States to protect thousands of individual allotments); *Begay v. Albers*, 721 F.2d 1274 (10th Cir. 1983); *Barber v. Simpson*, No. 2:05-cv-2326, 2006 WL 1867643 (E.D. Cal. July 6, 2006) (because United States is not indispensable in action by allottee to protect property interests, tribal court had jurisdiction over action by allottee to evict defendant claiming aboriginal rights to same land).

Of course, the United States has the authority to bring an action to protect allottee interests

regardless of whether the allottee has done so. *Heckman v. United States*, 224 U.S. 413 (1912).

2. U.S. Indispensable when Tribal Interests Are Challenged.

It is well established that the United States is an indispensable party in suits by third parties challenging tribal property interests. *E.g.*, *Minnesota v. United States*, 305 U.S. 382 (1938); *Carlson v. Tulalip Tribes of Wash.*, 510 F.2d 1337, 1339 (9th Cir. 1975); *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614 (9th Cir. 1959); *Jackson v. Sims*, 201 F.2d 259 (10th Cir. 1953). This protection was thought to be buttressed by the Indian lands exception in the federal Quiet Title Act (“QTA”) retaining federal sovereign immunity with respect to any challenge to title to Indian lands, *see, e.g.*, *Neighbors for Rational Dev. v. Norton*, 379 F.3d 956 (10th Cir. 2004); *Metropolitan Water Dist. of So. Cal. v. United States*, 830 F.2d 139, 143-44 (9th Cir. 1987) (*per curiam*), *aff’d*, 490 U.S. 920 (1989); *Florida Dept. of Bus. Regulation v. Department of the Interior*, 768 F.2d 1248, 1253-55 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986), but that protection was largely eliminated by the Court in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 132 S. Ct. 2199 (2012), which permitted an end-around of the QTA via the Administrative Procedures Act (“APA”), which – contrary to the QTA – does waive federal sovereign immunity.

Even if the United States is a required party and cannot be joined under Rule 19, it has been held that the case will not be dismissed if the absent party can be joined by a defendant under Rule 14. *See EEOC v. Peabody Western Coal Co.*, 610 F.3d 1070 (9th Cir. 2010), *cert. denied*, 132 S.Ct. 91 (2011). That holding illogically assumes that a defendant who presumably wants the case to be dismissed will either voluntarily implead the absent party (thereby defeating the defendant’s own motion to dismiss) or can be compelled to implead the absent party, in violation of the plain language of Rule 14 and established case law, which holds that impleader is a voluntary procedural

mechanism. *See, e.g., Fernandez v. Corporacion Insular De Seguros*, 79 F.3d 207, 210 (1st Cir. 1996); *City of Gretna v. Defense Plant Corp.*, 159 F.2d 412, 413 (5th Cir. 1947); *Mennen Co. v. Atlantic Mut. Ins. Co.*, No. CIV 93-5273 (WGB), 1996 WL 257147 at *5 (D.N.J. Jan. 29, 1996) (courts may not compel defendants to implead indispensable third party; using Rule 19 principles to augment Rule 14 “would undermine the system of impleader set forth in Federal Rule of Civil Procedure 14(a)”), *aff’d*, 147 F.3d 287 (3d Cir. 1998).³

B. Indian Nations as Indispensable

1. Tribes Indispensable when Third Party’s Suit Jeopardizes Tribal Interests

Generally, a case threatening tribal property or sovereign interests will be dismissed if the affected tribe cannot be joined. The decisions in this regard concern rights to land, tribal membership disputes, and claims that may affect tribal rights under contract, including mineral leases and gaming compacts. *See, e.g., Davis v. United States*, 343 F.3d 1282 (10th Cir. 2003) (tribal membership), *cert. denied*, 542 U.S. 937 (2004); *Citizen Potawatomi Nation*, 248 F.3d 993 (formula for dividing federal funds among several tribes); *Clinton v. Babbitt*, 180 F.3d 1081 (land issue); *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996) (challenge to review of tribal settlement agreement with coal company approved by Interior); *Enterprise Mgmt. Consultants*, 883 F.2d at 894 (gaming); *Dawavendewa II, supra* (indirect challenge to tribal employment laws).⁴

2. Federal courts have rationalized proceeding without Indian nations whose

³ The *EEOC* ruling violates Rule 14 in other ways. *See, e.g., Texas Indus., Inc. v. Radcliffe Mat’ls, Inc.*, 451 U.S. 630 (1981) (impleader proper only if federal statute on which claim is based confers a right of contribution); *Northwest Airlines, Inc. v. Transport Workers U. of Am.*, 451 U.S. 77, 90-99 (1981) (Title VII – the statute at issue in the *EEOC* case – confers no right of contribution).

⁴ *See generally* Wright & Miller, *Federal Practice and Procedure* Civ. § 1617 at n.18 (3d ed. 2010) (collecting cases).

interests appear to be threatened in actions by third parties in several ways. Occasionally, a court will rule that the United States (as a pre-existing party in the suit) could adequately represent and protect tribal interests. *Connecticut ex rel. Blumenthal v. Babbitt*, 899 F.Supp. 80 (D. Conn. 1995); *contra Enterprise Mgmt. Consultants, Inc.*, 883 F.2d at 894; *Manygoats*, 558 F.2d at 558; *Pizarchik*, 858 F.Supp. 2d at 1227 n.8 (“an alleged *alignment* of interests is a far cry from an *identity* of interests”) (emphasis in original). Other courts reason that dismissing in particular instances would have “anomalous results,” such that, for example, dismissing a NEPA action related to tribal minerals would exempt federal actions in Indian country from APA review. *Manygoats*, 558 F.2d at 559. This kind of “anomalous result” is hardly unique to NEPA or tribal interests: the dismissal of any case under Rule 19 results in some claim, often premised on a federal statute, being left adjudicated. *Cf. Pimentel*, 553 U.S. at 872 (“that result is contemplated under the doctrine of foreign sovereign immunity”; “Pimental class, which has waited for years now to be compensated for grievous wrongs, [has] no immediate way to recover its judgment”). This result obtains in Indian cases because “society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.” *Wichita and Affiliated Tribes*, 788 F.2d at 777 (footnote omitted); *accord Kescoli*, 101 F.3d at 1311; *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1461 (9th Cir. 1994).

Other courts justify proceeding in the absence of the potentially affected tribe by improperly conflating the Rule 19 analysis with the merits of the case. *E.g., Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990) (permitting procedural challenge to process leading to fishing quotas, because “all of the tribes have an equal interest in an administrative process that is lawful”); *Dine’ CARE II*, 2013 WL 68701 at *4 n.3 (referring to the suit as “champion[ing] the *shared* national interest in environmental procedural compliance) (emphasis added); *contra Citizen Potawatomi*

Nation, 248 F.3d at 998 (rejecting *Verity*). Or the court will find an implicit abrogation of tribal sovereign immunity, contrary to the rule that congressional abrogation must be clear and explicit. *Vann v. Kempthorne*, 467 F.Supp. 2d 56 (D.D.C. 2006), *rev'd*, 534 F.3d 741 (D.C. Cir. 2008). Tribal interests are also adjudicated in the tribes' absence using the *Ex Parte Young*⁵ fiction. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154-56 (10th Cir. 2011) (collecting cases).

In addition, the Ninth Circuit has adopted a rule that a tribe may be joined as a "Rule 19 Defendant" notwithstanding its immunity from suit and the inability of the plaintiff to state a claim against it, so long as the plaintiff does not seek relief from the tribe. *EEOC v. Peabody Western Coal Co.*, 400 F.3d 774 (9th Cir. 2005), *cert. denied*, 546 U.S. 1150 (2006). This is the "tribe-as-potted-plant" theory of Rule 19. It apparently does not apply to the United States, as the same court felt compelled to resort to Rule 14 to involve the United States in the case. *EEOC v. Peabody Western Coal Co.*, 610 F.3d 1070 (9th Cir. 2010), *cert. denied*, 132 S.Ct. 91 (2011). Finally, courts have used the ill-defined public rights exception to Rule 19 to justify adjudicating tribal interests without tribal joinder. *Dine' CARE II*, 2013 WL 68701 at *5; *contra Pizarchik*, 858 F.Supp. 2d at 1230 n.11. Using this exception to defeat tribal sovereign immunity appears to be applying a square peg to a round hole, under the accepted formulation of the "public rights" doctrine. *See Kickapoo Tribe of Indians*, 43 F.3d at 1500 (exception "generally applies where what is at stake are essentially issues of public concern and the nature of the case would require joinder of a large number of persons").

IV. PIMENTEL'S RATIONALE; SUBSEQUENT DECISIONS INVOLVING TRIBAL INTERESTS

Pimentel underscores the importance of sovereign immunity in the Rule 19 analysis. Even before *Pinemtel*, sovereign immunity often trumped other concerns and policy implications. *See*,

⁵ 209 U.S. 123 (1908).

e.g., Wichita and Affiliated Tribes; Davis; Kescoli. Indeed, it is said that “[t]he question of when the United States must be joined is closely connected with the doctrine of sovereign immunity. In many instances, a ruling that the United States is an indispensable party is the equivalent in substance of a statement that sovereign immunity bars the suit. No doubt because of the sovereign immunity concept, the application of Rule 19 in cases involving the government reflects a heavy emphasis on protecting its interests.” Wright & Miller, *Federal Practice and Procedure*, Civ. § 1617 (footnotes omitted)

Pimental underscores that principle. Citing *Minnesota*, 305 U.S. 382 (involving Indian interests), the Court ruled “that where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.” 553 U.S. at 867. The case involved a foreign sovereign, but neither the rationale nor the ruling relied on this fact. Similarly, the case involved a fund of money subject to claims by various persons, including the Republic of the Philippines, but the Court did not limit its ruling to that particular circumstance, or disturb the general rule that the absent person must, under Rule 19(a)(1)(B), merely “claim[] an interest relating to the subject of the action” in order to qualify as a required party, if that interest might be “impaired as a practical matter.”

Cases involving Native American interests after *Pimentel* have usually applied its principles and dismissed cases involving interests of absent tribes. *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272 (10th Cir. 2012), dismissed one tribe’s suit challenging certain state taxes because a second interested tribe could not be joined, relying in part on *Pimentel*. 697 F.3d at 1283.⁶

⁶ *Northern Arapaho* did distinguish that case from ones involving “public rights,” and described those cases as including cases seeking “the prevention of unfair labor practices or

Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida, 692 F.3d 1200 (11th Cir. 2012), *cert. denied*, No. 12,372, 2013 WL 57128 (U.S. Jan. 7, 2013), held that the tribe’s removal of an action from state to federal court did not waive its sovereign immunity, not mentioning *Pimentel* but analogizing tribal immunity to foreign sovereign immunity and relying on language in *Kiowa* for that analogy. 692 F.3d at 1206-07 (“the similarities between foreign sovereign immunity and tribal immunity are nonetheless considerable”).

In *Lyon v. Gila River Indian Comm.*, 626 F.3d 1059 (9th Cir. 2010), the court distinguished *Pimentel* in refusing to dismiss a tribe’s claim seeking to protect its property interests for its failure to join the United States. That holding was correct under the rule that the United States is not an indispensable party when a tribe sues to protect its own interests. *See* 626 F.3d at 1071.⁷ Other post-*Pimentel* decisions avoid the Rule 19 issue and invoke the *Ex Parte Young* fiction. *Vann v. United States Dep’t of the Interior*, 701 F.3d 927 (D.C. Cir. 2012);⁸ *Salt River Agr. Impr. and Power Dist. v. Lee*, 672 F.3d 1176, 1180 (9th Cir. 2012). Finally, *United Keetoowah Band of Cherokee Indians v. Kempthorne*, 630 F.Supp. 2d 1296 (E.D. Okla. 2009), mentions *Pimentel*, but grounds the decision primarily in the rule that the absent tribe was a party to a contract being challenged, the absentee was therefore a required party, and on a standard analysis of the Rule 19(b) factors, concluding with the observation that under *Wichita* and *Davis* (but not expressly under *Pimentel*), society’s decision to

administrative compliance with environmental protection statutes and regulations.” 697 F.3d at 1280.

⁷ Another case that acknowledged *Pimentel* rejected a Government motion to dismiss in a case involving contract support costs. *Three Affiliated Tribes of the Fort Berthold Indian Res. v. United States*, 637 F.Supp. 2d 25 (D.D.C. 2009).

⁸ *See also Vann v. Kempthorne*, 534 F.3d 741 (D.C. Cir. 2008) (upholding tribal sovereign immunity in Freedman case, but permitting suit to proceed under *Ex Parte Young*).

shield tribes from suit made dismissal “less troublesome.” 630 F.Supp. 2d at 1305.

One case not dismissing a complaint challenging tribal interests and distinguishing *Pimentel* is *Dine CARE II*, a NEPA case, which reasons that *Pimentel* concerned a foreign sovereign and the sovereign’s interest in a property rather than process, noted that an alternative forum was available to the plaintiffs in that case, and relied on the “public rights” exception. 2013 WL 68701 at *4.

V. CONCLUSION

With the exception of *Dine CARE II*, the federal courts have to date treated tribal sovereigns as the Court treated a foreign sovereign in *Pimentel*. It appears that the courts will apply Rule 19 principles even-handedly, with due regard for tribal sovereignty, unless the judge (or panel) discerns some special social value in the claim, including the desire to reach a substantive resolution to civil rights claims brought by a federal agency or the desire to make sure environmental laws are effectuated with no Indian country void. In some of those cases, the court will create what Peabody has described as a “Rube Goldberg civil procedural mechanism,”⁹ in violation of not only Rule 19, but also, in that case, Rule 14. Other courts will lean heavily on the *Ex Parte Young* fiction in cases where a tribe’s underlying position on the merits offends the court. The “public rights” exception will also be utilized to defeat a motion to dismiss under Rule 19, notwithstanding its doubtful applicability to most cases involving only one absent (tribal) party.

Pimentel’s progeny will either treat tribes as sovereigns or will, as in the *EEOC* case, relegate tribal interests in preserving its immunity under Rule 19 to potted plant status. The current state of the law is generally true to Rule 19 principles and to principles of tribal sovereign immunity, but advocates for Native nations must be wary of possible erosion of tribal sovereignty in Rule 19 cases

⁹ Petition for a Writ of Certiorari, *Peabody Western Coal Company v. EEOC*, No. 10-986 (U.S. filed Jan 31, 2011) at 26.

through expanded use of the *Ex Parte Young* fiction, elevation of the value of access to the courts over tribal interests as in *Patchak*, use of the “public rights” exception, and other juridical manipulations, all set before the backdrop of *Kiowa*, which only begrudgingly upheld the concept of tribal sovereign immunity.

* * *