No.

In The Supreme Court of the United States

JAMUL ACTION COMMITTEE, JAMUL COMMUNITY CHURCH, DARLA KASMEDO, PAUL SCRIPPS, and GLEN REVELL,

Petitioners

v.

E. SEQUOYAH SIMERMEYER,
Chairman of the National Indian Gaming Commission; et al.,

Respondents

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMUL ACTION COMMITTEE; JAMUL COMMUNITY CHURCH; DARLA KASMEDO; PAUL SCRIPPS; GLEN REVELL; WILLIAM HENDRIX,
Plaintiffs-Appellants,

v.

E. SEQUOYAH SIMERMEYER, Chairman of the National Indian Gaming Commission; DAVID BERNHARDT, Secretary of the U.S. Department of the Interior; TARA KATUK MAC LEAN SWEENEY, Assistant Secretary - Indian Affairs, U.S. Department of the Interior; PAULA L. HART, Director of the Office of Indian Gaming, Bureau of Indian Affairs; U.S. DEPARTMENT OF THE INTERIOR; NATIONAL INDIAN GAMING COMMISSION; RAYMOND HUNTER, Chairman, Jamul Indian Village; CHARLENE CHAMBERLAIN; ROBERT MESA; RICHARD TELLOW; JULIA LOTTA; PENN NATIONAL, INC.; SAN DIEGO GAMING VILLAGE, LLC; C.W. DRIVER, INC.; UNITED STATES OF AMERICA,
Defendants-Appellees.

No. 17-16655

D.C. No. 2:13-cv-01920-KJM-KJN

OPINION

APPENDIX A

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, Chief District Judge, Presiding

Argued and Submitted November 13, 2019
San Francisco, California

Filed September 8, 2020

Before: William A. Fletcher and Bridget S. Bade, Circuit Judges, and Barry Ted Moskowitz,* District Judge.

Opinion by Judge W. Fletcher

SUMMARY**

Tribal Matters

The panel affirmed the district court's dismissal for failure to join a required party in an action challenging the Jamul Indian Village's efforts to build a casino.

In 1981, a small group of Kumeyaay Indians living on land in Rancho Jamul, California organized under the Indian Reorganization Act as the Jamul Indian Village. The Bureau of Indian Affairs ("BIA") approved the Village's constitution,

* The Honorable Barry Ted Moskowitz, United States District Judge for the Southern District of California, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

and the Village has appeared on the BIA's published list of federally recognized Indian tribes ever since.

Two community organizations and several of their members (collectively "JAC") contend that the Village is not a federally recognized Indian tribe.

The panel held that the distinction JAC urges between historic tribes and other tribal entities organized under the Indian Reorganization Act was without basis in federal law. The panel held further that the Jamul Indian Village is a federally recognized Indian tribe with the same privileges and immunities, including tribal sovereign immunity, that other federally recognized Indian tribes possess. The Village's tribal sovereign immunity extends to its officers in this case.

Because the Village was protected by tribal sovereign immunity, the panel agreed with the district court that the Village cannot be joined in this action and that the action cannot proceed in equity and good conscience without it. The panel therefore affirmed the dismissal for failure to join a required party.

COUNSEL

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Department of Justice, Washington, D.C.; Matthew Kelly, Office of the Solicitor, United States Department of the Interior, Washington, D.C.; Austin T. Badger, Office of the General Counsel, National Indian Gaming Commission, Washington, D.C.; for Federal Defendants-Appellees.

Frank Lawrence (argued) and Zehava Zevit, Law Office of Frank Lawrence, Nevada City, California, for Tribally-Related Defendants-Appellees.

OPINION

W. FLETCHER, Circuit Judge:

Since at least 1912, a small group of Kumeyaay Indians have lived on a two-acre plot of land in Rancho Jamul, California, deeded to the Roman Catholic Diocese of Monterey and Los Angeles for use as an Indian cemetery. In 1981, the families residing there organized under the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 5101 *et seq.*, as the Jamul Indian Village. The Bureau of Indian Affairs ("BIA") approved the Village's constitution, and the Village has appeared on the BIA's published list of federally recognized Indian tribes ever since. *See* 84 Fed. Reg. 1,200, 1,202 (Feb. 1, 2019); 83 Fed. Reg. 34,863, 34,864 (July 23, 2018); 82 Fed. Reg. 4,915, 4,916 (Jan. 17, 2017); 81 Fed. Reg. 26,826, 26,828 (May 4, 2016); 80 Fed. Reg. 1,942, 1,944 (Jan. 14, 2015); 79 Fed. Reg. 4,748, 4,750 (Jan. 29, 2014); 78 Fed. Reg. 26,384, 26,386 (May 6, 2013); 77 Fed. Reg. 47,868, 47,870 (Aug. 10, 2012); 75 Fed. Reg. 60,810, 60,811 (Oct. 1, 2010); 74 Fed. Reg. 40,218, 40,220 (Aug. 11, 2009); 73 Fed. Reg. 18,553, 18,554 (Apr. 4, 2008); 72 Fed. Reg. 13,648, 13,649 (Mar. 22, 2007); 70 Fed. Reg. 71,194, 71,195

(Nov. 25, 2005); 68 Fed. Reg. 68,180, 68,181 (Dec. 5, 2003); 67 Fed. Reg. 46,328, 46,329 (July 12, 2002); 65 Fed. Reg. 13,298, 13,300 (Mar. 13, 2000); 63 Fed. Reg. 71,941, 71,943 (Dec. 30, 1998); 62 Fed. Reg. 55,270, 55,272 (Oct. 23, 1997); 61 Fed. Reg. 58,211, 58,212 (Nov. 13, 1996); 60 Fed. Reg. 9,250, 9,252 (Feb. 16, 1995); 58 Fed. Reg. 54,364, 54,367 (Oct. 21, 1993); 53 Fed. Reg. 52,829, 52,830 (Dec. 29, 1988); 51 Fed. Reg. 25,115, 25,116 (July 10, 1986); 50 Fed. Reg. 6,055, 6,056 (Feb. 13, 1985); 48 Fed. Reg. 56,862, 56,863 (Dec. 23, 1983); 47 Fed. Reg. 53,130, 53,132 (Nov. 24, 1982).

This case concerns the Village's status as a federally recognized Indian tribe. In a suit challenging the Village's efforts to build a casino, two community organizations and several of their members (collectively, "JAC") contend that the Village is not a federally recognized Indian tribe. Instead, JAC contends that the Village is only a community of adult Indians, not a historic tribe with inherent sovereign authority. Therefore, according to JAC, the Village may not use its lands for gaming and is not protected by tribal sovereign immunity.

No tribunal has accepted this argument. But that has not deterred litigants, including JAC and other members of the plaintiff organizations, from pressing similar claims in myriad actions before administrative agencies, state courts, and federal courts around the country since the early 1990s. In an opinion that we hope will finally put an end to these claims, we hold as follows. The distinction JAC urges between historic tribes and other tribal entities organized under the IRA is without basis in federal law. Jamul Indian Village is a federally recognized Indian tribe with the same privileges and immunities, including tribal sovereign

immunity, that other federally recognized Indian tribes possess. The Village's tribal sovereign immunity extends to its officers in this case.

Because we hold that the Village is protected by tribal sovereign immunity, we agree with the district court that the Village cannot be joined in this action and that the action cannot proceed in equity and good conscience without it. We therefore affirm the district court's judgment dismissing JAC's claims for failure to join a required party.

I. Background

A. The Jamul Indian Village

In 1912, the Coronado Beach Company deeded a small parcel in Rancho Jamul, San Diego County, California, to the Roman Catholic Diocese of Monterey and Los Angeles for use as an Indian cemetery. No more than a portion of the land has ever been used as a burial ground. On the remainder of the parcel, with the acquiescence of the Diocese, several families of Kumeyaay Indians have made their home for generations.

Beginning in the early 1970s, the families residing on the parcel sought to organize under the IRA. The Diocese and a local family transferred about six acres to the United States, including the greater part of the Indian cemetery and an adjoining parcel of private land, which the government accepted into trust for the benefit of the Jamul Indians. After the United States took this land into trust, the Superintendent of the Southern California Agency for the BIA recommended federal recognition of the Village and its inclusion on the list of recognized tribal entities published in the Federal Register.

The BIA authorized a constitutional election. After a majority of eligible voters cast ballots in favor, the BIA approved the Village's constitution under the IRA on July 7, 1981. The tribal constitution limited membership to those with one-half or more California Indian blood.

B. Leadership Dispute and Subsequent Litigation

Trouble began for the Village in the early 1990s with a series of disputes about the Village's membership and leadership. Faced with the prospect of declining membership as the Village's initial members died, the Village began considering reducing the blood quantum requirement for membership. At about the same time, some members of the Village sought to recall officers elected in the Village's 1992 election. *See Rosales v. Sacramento Area Dir.* (*Rosales I*), 32 IBIA 158, 159–63 (1998). Those members held a recall election, which the BIA determined did not comport with the Village's constitution and declined to recognize. *Id.* at 161. The Village's BIA-recognized government and its opponents held separate elections in 1995. The Interior Board of Indian Appeals ("IBIA") ultimately reinstated the officers elected in the 1992 elections. *Id.* at 167.

Meanwhile, the Village obtained authorization from the BIA to hold an election to amend its constitution to reduce the blood quantum requirement for membership from one-half to one-quarter. The election approved the amendment in 1996. The BIA rejected a challenge to the amendment brought by the tribal members opposed to the Village's government. *See Rosales v. Sacramento Area Dir.*, 34 IBIA 50 (1999). However, some members continued to dispute the amendment's validity. They challenged every tribal election in which individuals of less than one-half Indian blood were

allowed to vote and held separate elections in 1997, 1999, and 2001. *Rosales v. United States* (*Rosales II*), 477 F. Supp. 2d 119, 124 (D.D.C. 2007) (holding that individuals who were not registered voters in the 1996 election lacked standing to challenge its results), *aff'd*, 275 F. App'x 1 (D.C. Cir. 2008).

Central to the arguments raised by the opponents of the Village's BIA-recognized tribal government in these suits was the theory that the Village was no more than a community of adult Indians created by the Department of the Interior and therefore was not a federally recognized Indian tribe with the same privileges and powers as a properly recognized historic tribe. Plaintiffs advanced this theory in challenges to tribal elections, to the beneficial ownership of the parcels held in trust by the United States for the Village, and to the Village's more recent efforts to build and operate a casino. *See, e.g.*, *Rosales II*, 477 F. Supp. 2d at 129; *Rosales v. United States*, 73 F. App'x 913 (9th Cir. 2003); *Rosales v. United States*, 477 F. Supp. 2d 213 (D.D.C. 2007). In a 2009 opinion holding that a claim by opponents of the Village's tribal government to a personal beneficial interest in the Village's trust land was time-barred, the Court of Federal Claims identified "no fewer than fourteen legal actions brought before tribal tribunals, administrative boards, and federal courts in California and the District of Columbia, all without success," presenting "these same and related issues." *Rosales v. United States*, 89 Fed. Cl. 565, 571 & n.2 (2009). Since then, both individuals and organizations affiliated with JAC have continued to press similar claims in both state and federal courts. *See, e.g.*, *Rosales v. Dep't of Transp.*, No. D066585, 2016 WL 124647 (Cal. Ct. App. Jan. 12, 2016) (unpublished); *Jamulians Against the Casino v. Dep't of Transp.*, No. C077806, 2016 WL 1253586 (Cal. Ct.

App. Mar. 30, 2016) (unpublished); *Rosales v. Dutschke*, 787 F. App'x 406, 407 (9th Cir. 2019).

C. Procedural History

JAC filed this action challenging continued construction and operation of a casino on the Village's federal trust land. JAC's operative complaint invokes a host of state and federal statutory and constitutional provisions, but the gravamen of its claim is that the parcel on which the casino sits does not qualify as Indian land eligible for gaming under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.*, because the Village is only a community of adult Indians and not a federally recognized Indian tribe. The complaint also alleges that the federal government failed to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, in approving the Village's gaming ordinance and management contract. JAC named as defendants the Department of the Interior, the National Indian Gaming Commission, several federal officials at those agencies, five council members or officials of the Jamul Indian Village, and two contractors involved in construction of the casino. The complaint seeks relief including an injunction against further construction of the casino and a declaration that the Village's land is not "trust land under [tribal] government control" and is therefore "[in]eligible for tribal gaming."

Shortly after filing its operative complaint, JAC moved for a writ of mandate directing the federal defendants to complete a supplemental environmental impact statement and for a preliminary injunction. The district court denied the motion, and JAC appealed.

We heard argument in JAC's interlocutory appeal and affirmed. In a published opinion, we held that IGRA's mandatory deadline for approving a tribe's gaming ordinance displaced NEPA's default requirement that agencies conduct environmental review before undertaking major federal action. *Jamul Action Comm. v. Chaudhuri*, 837 F.3d 958 (9th Cir. 2016). In an accompanying memorandum disposition, we held that JAC had not shown a likelihood of success on the merits of its other claims and that any challenge to the federal government's decision to take land into trust for the benefit of the Village was foreclosed by this court's opinion in *Big Lagoon Rancheria v. California*, 789 F.3d 947 (9th Cir. 2015) (en banc). *See Jamul Action Comm. v. Chaudhuri*, 651 F. App'x 689 (9th Cir. 2016).

After our resolution of JAC's interlocutory appeal, the federal and tribal defendants moved to dismiss. The district court dismissed all claims for failure to join a required party, with the exception of JAC's NEPA claim related to the gaming management contract. While that NEPA claim was still pending, JAC filed another interlocutory appeal, which we dismissed for lack of jurisdiction. *See Jamul Action Comm. v. Chaudhuri*, No. 16-16442, 2017 WL 3611433 (9th Cir. June 15, 2017) (mem.). The district court granted summary judgment in favor of the federal defendants on JAC's remaining NEPA claim and entered judgment. JAC again appealed. That appeal is now before us.

Because JAC presents no argument on appeal related to its NEPA claim, we deem that issue waived and limit our analysis to the district court's dismissal of JAC's other claims for failure to join a required party. *See Christian Legal Soc. Chapter of Univ. of Cal. v. Wu*, 626 F.3d 483, 485 (9th Cir. 2010) ("We review only issues that are argued specifically

and distinctly in a party's opening brief." (alterations and citation omitted)).

II. Standard of Review

"We review a Rule 19 dismissal for abuse of discretion and underlying legal conclusions de novo." *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1179 (9th Cir. 2012). "Issues of tribal sovereign immunity are reviewed de novo." *Burlington N. & Santa Fe Ry. v. Vaughn*, 509 F.3d 1085, 1091 (9th Cir. 2007).

III. Discussion

A. Tribal Sovereign Immunity

We first address whether the tribal defendants—five current or former elected officers of the Village—are protected by tribal sovereign immunity in this suit. Because the answer to that question depends on whether the Village itself enjoys tribal sovereign immunity, we begin there.

1. Sovereign Immunity of the Jamul Indian Village

"Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (citations omitted). Tribal sovereign immunity extends to both the governmental and commercial activities of a tribe, whether undertaken on or off its reservation. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751,

754–55 (1998); *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008).

The scope and applicability of tribal sovereign immunity lie within the plenary control of Congress. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014); *see Kiowa Tribe of Okla.*, 523 U.S. at 759 ("Like foreign sovereign immunity, tribal immunity is a matter of federal law."). As a matter of federal law, federal recognition of a tribe "affords important rights and protections to Indian tribes, including limited sovereign immunity." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004). "Federal recognition may arise from treaty, statute, executive or administrative order, or from a course of dealing with the tribe as a political entity." *Id.* (quoting William C. Canby, Jr., *American Indian Law in a Nutshell* 4 (4th ed. 2004)). When the political branches of the federal government decide to recognize an Indian tribe, courts are obligated to respect that decision. *See United States. v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865).

The Jamul Indian Village was recognized by the BIA in 1981, which authorized and oversaw its constitutional election. The Village has appeared on every list of federally recognized tribes that the agency has published since then. The Village maintains a government-to-government relationship with the United States, which has dealt with the Village as a political entity and provided it services reserved for federally recognized tribes.

JAC nonetheless contends that the Village is not a federally recognized tribe with the same privileges and immunities as other federally recognized Indian tribes. In the view of JAC, the BIA did not recognize the Village as a historic tribe that exercised inherent sovereign authority.

Instead, in its view, the BIA recognized the Village only as a created tribe—a community of adult Indians organized under the provisions of the IRA allowing the provision of benefits to individuals with one-half or more Indian blood. *See* 25 U.S.C. § 5129. JAC contends that because the Village is only a creation of the federal government, not an entity with inherent sovereign authority, it is not protected by tribal sovereign immunity. JAC is wrong.

JAC principally relies on a 1993 letter sent by Carol Bacon, then Director of Tribal Services for the BIA, to the Chairman of the Village. The letter responded to the Village's request to hold a Secretarial election to amend its constitution to allow membership of individuals with less than one-half Indian blood (an election that the Secretary of the Interior ultimately authorized in 1996). Director Bacon threatened that the Village might lose its recognition status if it allowed broader membership. According to Director Bacon, some "tribes" that the federal government allowed to organize under the IRA were not really tribes. Some, like the Village, were only "communities of adult Indians" who "had no historical existence as self-governing units." Because these "created tribes" were not inherently sovereign, she wrote, they "possess[ed] only those powers set forth in their IRA constitution." Therefore, she wrote, a change in the Village's membership criteria "could jeopardize the Village's continued right to Federal recognition."

In the years leading up to Director Bacon's letter to the Village, the BIA had relied on this distinction between "created" and "historic" tribes when other recognized tribal entities had sought to change their membership criteria. One of these tribes was the Pascua Yaqui Tribe of Arizona, and its conflict with the BIA over its membership caught the

attention of Congress. Like the Village, the Pascua Yaqui Tribe received a letter from (then Acting) Director Bacon in 1991 when the Tribe sought approval for a constitutional amendment to expand its membership rolls. *See To Amend the Act Entitled "An Act to Provide for the Extension of Certain Federal Benefits, Services, and Assistance to the Pascua Yaqui Indians of Arizona, and for Other Purposes: Hearing on H.R. 734 Before the Subcomm. on Native Am. Affs. of the H. Comm. on Nat. Res.*, 103d Cong. 80–96 (1993) (Exhibit J to statement of Albert Garcia, Chairman, Pascua Yaqui Tribe of Arizona). The letter explained that it was the BIA's position that because the Indians who lived on the Pascua Yaqui reservation were not always a "historic tribal unit," the group did not possess the same rights and powers as historic tribes. *Id.* at 83, 88. Citing a 1936 opinion from the Solicitor of the Interior, Director Bacon wrote that such adult Indian communities could exercise only a narrow set of delegated powers that did not include setting their own membership criteria. *See id.* at 81–85.

When Director Bacon presented this position to Congress, she met considerable resistance. *See, e.g., id.* at 15–20 (questioning by Rep. Richardson, following statement of Carol Bacon); 140 Cong. Rec. 11,377 (1994) (statement of Rep. Richardson). Her testimony triggered a flurry of legislative activity. Within a year, Congress eliminated the distinction between "created" and "historic" tribes, both as to the Pascua Yaqui Tribe specifically and as to other "adult Indian communities" organized under the IRA. *See* Act of Oct. 14, 1994, Pub. L No. 103-357, § 1, 108 Stat. 3418, 3418 (declaring the Pascua Yaqui to be a historic tribe); Act of May 31, 1994, Pub. L. No. 103-263, § 5, 103 Stat. 707, 709 (codified as amended at 25 U.S.C. § 5123(f)–(g)) (forbidding classifications among federally recognized tribes). Congress

also enacted further reforms to limit the BIA's ability to withdraw federal recognition or limit the rights of a recognized tribe. *See* Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791. These reforms were designed, in large measure, to ensure that Indian tribal entities, once federally recognized and included on the published list of recognized tribes, were not treated differently based on whether they were "created" or "historic" tribes. *See* H.R. Rep. No. 103-781, at 3–4 (1994) ("[T]he BIA indicated that it intended to differentiate between federally recognized tribes as being 'created' or 'historic.' . . . Because this dichotomy ran so clearly counter to the intent of Congress and was outside the Department's authority, Congress quickly enacted legislation prohibiting the distinction." (footnote omitted) (citing Act of May 31, 1994)).

The Act of May 31, 1994, prohibits any agency decision under the IRA "that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." *See* 25 U.S.C. § 5123(f)–(g). The purpose and effect of the Act was to eliminate the distinction between "created" and "historic" tribes. *See Rosales I*, 32 IBIA at 165 ("[T]he amendment was intended to end the distinction which had been drawn since at least 1936 between the powers of 'historic' and 'created' tribes."). That is precisely the distinction JAC urges here.

Even if the BIA intended the Village to have only a different and lesser status when the Village was first included on the list of recognized tribes, federal law no longer permits this distinction. Today, the Village enjoys the same

privileges and immunities as other federally recognized Indian tribes, including tribal sovereign immunity.

2. Sovereign Immunity of the Tribal Defendants

We next turn to whether the tribal officers sued in this case are protected by the Village's sovereign immunity. Although tribal sovereign immunity generally does not bar claims for prospective injunctive relief against tribal officers, we hold that in the circumstances of this case, the Village is the real party in interest. JAC's claims against the officers are therefore barred by the sovereign immunity of the Village.

Tribal sovereign immunity extends to tribal officers when "the sovereign entity is the 'real, substantial party in interest.'" *Cook*, 548 F.3d at 727 (quoting *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997)); *see Lewis v. Clarke*, 137 S. Ct. 1285, 1290–91 (2017). "In making this assessment, courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Lewis*, 137 S. Ct. at 1290; *see also Maxwell v. County of San Diego*, 708 F.3d 1075, 1089 (9th Cir. 2013) (stating that it is the "remedy sought" that determines whether a suit against tribal officers may proceed). That a suit implicates a tribal officer's official duties does not by itself establish that the tribe is the real party in interest. *Maxwell*, 708 F.3d at 1088.

In suits for damages, "the general rule [is] that individual officers are liable when sued in their individual capacities." *Id.* at 1089; *see, e.g.*, *Lewis*, 137 S. Ct. at 1291 (rejecting argument that tribal employee was protected by sovereign immunity because he was acting within the scope of his

employment). Suits that seek to recover funds from tribal coffers or establish vicarious liability of a tribe for damages, on the other hand, are barred by tribal sovereign immunity even when nominally styled as against individual officers. *See Maxwell*, 708 F.3d at 1088 (citing *Cook*, 548 F.3d at 727).

Suits seeking prospective injunctive relief ordinarily may proceed against tribal officers sued in their official capacities under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). *Bay Mills Indian Cmty.*, 572 U.S. at 796. "That doctrine permits actions for prospective non-monetary relief against state or tribal officials in their official capacity to enjoin them from violating federal law, without the presence of the immune State or tribe." *Salt River*, 672 F.3d at 1181 (citing *Ex parte Young*, 209 U.S. 123). Declaratory relief may issue against tribal officers in the same circumstances. *See Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 847–48 (9th Cir. 2002).

For *Ex parte Young* to apply, a plaintiff must point to threatened or ongoing unlawful conduct by a particular governmental officer. The doctrine does not allow a plaintiff to circumvent sovereign immunity by naming some arbitrarily chosen governmental officer or an officer with only general responsibility for governmental policy. *Ex parte Young*, 209 U.S. at 157 ("In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.").

There are also limits to what sort of relief a plaintiff may seek under *Ex parte Young* without making the sovereign the real party in interest. The Supreme Court has disallowed attempts to use the doctrine discussed in *Ex parte Young* to quiet title to a sovereign's property, to compel a governmental official to pay a sovereign's past legal obligation, or to obtain specific performance of a sovereign's contract. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ex parte Ayers*, 123 U.S. 443 (1887). These remedies, which disturb a sovereign's title to property or reach into its coffers, lie directly against the sovereign even when styled as a claim for injunctive relief against an individual governmental officer.

In *Coeur d'Alene*, the Supreme Court held that state sovereign immunity barred a suit in which the Coeur d'Alene Tribe of Idaho claimed ownership of submerged lands within its reservation. The Tribe brought a trespass suit in an attempt to establish the boundary between reservation land and land owned by the State of Idaho. The Tribe sought an injunction prohibiting named state officers "from regulating, permitting, or taking any action in violation of the Tribe's rights of exclusive use and occupancy, quiet enjoyment, and other ownership interest in the submerged lands" and a declaration that the Tribe held the exclusive right to their use and regulation. *Coeur d'Alene*, 521 U.S. at 265. The Tribe contended that its suit was not barred by the State's sovereign immunity because, like in *Ex parte Young*, the Tribe sought only prospective injunctive and declaratory relief against state officers engaged in trespassing conduct that the Tribe contended violated its rights under federal law. The Court disagreed. Although the Tribe had named state officers, not the State itself, the Court held that the suit was "the

functional equivalent of a quiet title action" and implicated Idaho's sovereign interests in its regulatory authority over the land in question. *Id.* at 281–82; *see also id.* at 289 (O'Connor, J., concurring in part). The State, not its officers, was the real party in interest, and so the suit was barred by the State's sovereign immunity.

JAC's suit falls outside the class of suits allowed under *Ex parte Young*. It is clear that the Village, not the named tribal officers, is the real party in interest. That is so both because JAC has named only an arbitrary collection of tribal policymakers as a substitute for the Village and because the suit seeks to extinguish or otherwise diminish the Village's beneficial interest in its federal trust land.

First, JAC fails to articulate any connection between the particular named tribal officers and any allegedly unlawful conduct. In its operative complaint, JAC named five tribal officers as defendants. JAC describes those individuals only as "council members or officials of the [Village]" in its description of the parties to the suit. It does not explain what responsibility any of those individuals have or had for the acts it contends are unlawful—specifically, construction of the casino—beyond their general role in the formulation of tribal policy. None of these individuals is mentioned elsewhere in the complaint, with the exception of former Chairman Hunter, who the complaint alleges signed management and development contracts for the casino on behalf of the Village. JAC's briefing to this court provides little further detail. It does not mention any of the named tribal officers except former Chairman Hunter, who it claims signed an easement deed allowing the federal government to take a portion of the Village's fee land into trust.

In essence, JAC has simply named Village officials as stand-ins for the tribal council. It is telling that the only specific conduct JAC identifies on the part of any named tribal officer is the signing of a contract and a deed on behalf of the Village. The object of JAC's suit is not to restrain future unlawful activity by particular tribal officers, but to call into question the status of the Village's property and the validity of its contracts.

Second, and more fundamentally, JAC's suit seeks a remedy that goes to the heart of the Village's sovereign and proprietary interests. JAC's complaint contends that the Village is "not a tribal government"; that it "never had powers of inherent sovereignty"; that it "is not a federally recognized tribe"; and that its land "is neither trust land, restricted Indian land nor reservation land" but is instead "property owned [in fee] by the United States." It seeks a declaration that the Village's land "is [not] trust land under [the Village's] government[al] control" and an injunction against further construction by the Village of a casino. Although the complaint also seeks equitable remedies against the federal defendants, those remedies rest on its contention that the Village is not a federally recognized tribe and seek to prevent the federal government from affording it the benefits to which recognized tribes are entitled.

The remedies JAC seeks here are at least as invasive of the Village's sovereign and proprietary interests as those sought against Idaho in *Coeur d'Alene*. As the plaintiffs did there, JAC challenges the Village's title in its land. The plaintiffs in *Coeur d'Alene* sought a declaration that submerged lands were reservation land rather than State land, and were thus not subject to the regulatory authority of the State. The Court held that the suit was barred by the State's

sovereign immunity. Here, JAC seeks a declaration that the Village's federal trust land is not part of its reservation and is not subject to the regulatory authority of the Village. JAC's suit does not stop at contesting the Village's ownership and authority over its land—it goes a step further still and challenges the Village's existence as a federally recognized tribe. It disputes not only the geographical extent of the Village's sovereignty, but the very fact of its sovereignty.

In these circumstances, we have no trouble concluding that the Village, rather than the five council members and other officials JAC has named as defendants, is the real party in interest here. We therefore hold that JAC's claims against the tribal defendants are barred by tribal sovereign immunity.

B. Dismissal for Failure to Join a Required Party

Federal Rule of Civil Procedure 19(a) requires joinder of parties whose presence is necessary to ensure complete and consistent relief among the existing parties or whose interests would be impeded were the action to proceed without them. When a required party cannot be joined, Rule 19(b) requires dismissal when the action cannot proceed in equity and good conscience in the absence of the required party.

We have held that Rule 19 requires a three-step inquiry. *See Salt River*, 672 F.3d at 1179. We first determine whether an absent party is a required party; then whether joinder is feasible; and finally whether the case can fairly proceed in the party's absence.

Rule 19(a) requires a party to be joined if feasible in three circumstances, but only one is relevant here: when an absent party claims an interest in the subject matter of the litigation

that would be impeded were the suit to proceed without it. *See* Fed. R. Civ. P. 19(a)(1)(B)(i). We hold that under this standard, the Village must be joined if feasible in this action.

To come within the bounds of Rule 19(a)(1)(B)(i), the interest of the absent party must be a legally protected interest and not merely some stake in the outcome of the litigation. *See Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs.*, 932 F.3d 843, 852 (9th Cir. 2019); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). "[A]n absent party has no legally protected interest at stake in a suit merely to enforce compliance with administrative procedures." *Dine Citizens*, 932 F.3d at 852 (alteration in original) (quoting *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 971 (9th Cir. 2008)).

When dealing with claims challenging federal actions that alter tribal rights, we have distinguished between those that would have "retroactive effects" on rights already enjoyed by a tribe and those "relat[ing] only to the agencies' future administrative process." *Id.* at 852–53. Accordingly, we have held that a tribe has an interest for purposes of Rule 19(a)(1)(B)(i) in a suit challenging a federal agency decision to reauthorize mining by the tribe, because the suit, if successful, would impair the tribe's existing lease, rights-of-way, and surface mining permits. *See id.* at 853. In other cases, we have found protected interests in challenges to existing tribal gaming licenses, but not those to the issuance of future licenses; and in suits seeking reallocation of past harvests, but not those seeking to change the procedures for future allocations. *See Cahil Dehe Band*, 547 F.3d at 974; *Makah*, 910 F.2d at 559.

Here, the Village has a protected interest in the trust status of its land and in its status as a federally recognized tribe. Although JAC couches some of its claims as challenges to prospective agency decisions—such as the government's approval of the Village's gaming ordinance—the basis for its claims is its contention that the Village is not a recognized tribe and that its land therefore is not Indian land held in trust on its behalf by the federal government. As in *Dine Citizens*, these challenges to prospective agency decisions would have far-reaching retroactive effects on the Village's existing sovereign and proprietary interests.

We also hold that these interests would be impeded were this action to proceed in the Village's absence. *See* Fed. R. Civ. P. 19(a)(1)(B)(i). Both tribal officers and federal agencies may, in some circumstances, adequately represent the interests of an absent tribe. When tribal officers are properly sued in their official capacities under *Ex parte Young*, their interests align with those of the tribe, and they may adequately represent the tribe's interests. *See Salt River*, 672 F.3d at 1180. Here, however, the tribal defendants are immune from suit, and so, like the Village, they cannot be joined.

Nor can the federal defendants adequately represent the Village's interests in this case. We have held that the United States, based on its trust relationship with Indian tribes, generally may "adequately represent an Indian tribe unless there exists a conflict of interest between the United States and the tribe." *Sw. Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1154 (9th Cir. 1998) (per curiam); *see also Ramah Navajo School Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996) ("the United States may adequately represent that interest as long as no conflict exists between

the United States and the nonparty beneficiaries"). Applying that standard, we have held that federal defendants would not adequately represent an absent tribe where their obligations to follow relevant environmental laws were in tension with tribal interests, *see Dine Citizens*, 932 F.3d at 855, or where individual Indians challenged a federal decision concerning the status of tribal land, *see Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999). This case, like *Clinton*, concerns the status of tribal lands that JAC contends are owned by individual Indians rather than the Village, thus calling into question the government's ability to adequately represent the Village's interests were the case to proceed. Because the Village has protected interests in this litigation that no existing party would adequately represent, Rule 19(a) requires its joinder.

Having concluded that the Village is a party required to be joined if feasible, the remaining steps of the Rule 19 analysis are straightforward. We have already held that the Village is protected by tribal sovereign immunity; its joinder in this action is therefore infeasible. The balancing of equitable factors under Rule 19(b) almost always favors dismissal when a tribe cannot be joined due to tribal sovereign immunity. *See Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996); *see also Dine Citizens*, 932 F.3d at 857 ("[T]here is a 'wall of circuit authority' in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity—'virtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether [an alternate] remedy is available, if the absent parties are Indian tribes invested with sovereign immunity.'" (alteration in original) (quoting *White v. Univ. of Cal.*, 765 F.3d 1010, 1028 (9th Cir. 2014)).

This case, where JAC's claims go directly to the Village's most important interests, is no exception. Equity and good conscience do not permit an action disputing the Village's status as a federally recognized tribe and its ownership of land in a suit in which the Village cannot be joined. We agree with the district court that the action should be dismissed for failure to join a required party.

Conclusion

The Jamul Indian Village is protected by tribal sovereign immunity, just as is every other federally recognized Indian tribe. That immunity bars a suit like this one, attacking the Village's title in land and its status as a sovereign entity, from proceeding in its absence. We therefore affirm the district court's judgment dismissing the action for failure to join a required party.

AFFIRMED.

FILED

NOV 23 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMUL ACTION COMMITTEE; et al., Plaintiffs-Appellants, v. E. SEQUOYAH SIMERMEYER, Chairman of the National Indian Gaming Commission; et al., Defendants-Appellees.	No. 17-16655 D.C. No. 2:13-cv-01920-KJM-KJN Eastern District of California, Sacramento ORDER

Before: W. FLETCHER and BADE, Circuit Judges, and MOSKOWITZ,* District Judge.

Plaintiffs/Appellants filed a petition for rehearing en banc on October 23, 2020 (Dkt. Entry 55). Judges W. Fletcher and Bade have voted to deny the petition for rehearing en banc, and Judge Moskowitz so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing or rehearing en banc is **DENIED**.

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* The Honorable Barry Ted Moskowitz, United States District Judge for the Southern District of California, sitting by designation.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMUL ACTION COMMITTEE, et al., Plaintiffs, v. JONODEV CHAUDHURI, et al., Defendants.	No. 2:13-cv-01920-KJM-KJN ORDER

The plaintiffs in this action are a group of individuals, a non-profit association, and a community church from Jamul, California. For convenience, in this order the court refers to them together as the Jamul Action Committee (JAC), the first plaintiff named in the caption. In this lawsuit the JAC asks the court to stop construction of a casino on the Jamul Indian Village's land, among related requests for declaratory relief. In short, the JAC alleges the casino is illegal because it is being constructed on land that federal law does not make eligible for gambling.

The defendants, who include federal officials, members of the Jamul Indian Village, and private corporations tasked with the construction and eventual management of the casino, move to dismiss the case on a number of jurisdictional and other grounds. The Jamul Indian Village itself is not a party. The court held a hearing on April 22, 2016. Kenneth Williams appeared for the JAC; Barbara Marvin, Judith Rabinowitz, and Vicki Boesch appeared

for the federal defendants; and Frank Lawrence appeared for the defendants associated with the Jamul Indian Village. The motions to dismiss are granted in part, as explained below.

I. ALLEGATIONS AND CLAIMS

As a preliminary matter, although the JAC alleges the Jamul Indian Village is not a federally recognized Indian tribe, Second Am. Compl. (SAC) ¶ 44, ECF No. 51,[1] the court has in previous orders decided the opposite is true, Order on Prelim. Inj. at 2, ECF No. 93; Order on Mot. Dismiss at 7, ECF No. 50. This court is not the only one to have reached this conclusion. *See Jamul Action Comm. v. Chaudhuri*, ___ F.3d ___, 2016 WL 3910597, at *1 (9th Cir. June 9, 2016); *Rosales v. United States*, 89 Fed. Cl. 565, 571–72 & nn.2–3 (2009); *Rosales v. United States*, No. 07-0624, 2007 WL 4233060, at *5 & n.4 (S.D. Cal. Nov. 28, 2007). The court therefore refers to the Jamul Indian Village as "the Tribe" in this order.

The JAC filed this lawsuit after the National Indian Gaming Commission (NIGC) published a notice in the Federal Register in April 2013, which stated that the NIGC would prepare a statement on the environmental impacts of an agreement between the Tribe and defendant San Diego Gaming Ventures, LLC (SDGV). 78 Fed. Reg. 21,398 (Apr. 10, 2013);[2] *see also* SAC ¶ 2. According to the NIGC's notice, SDGV would manage a casino the Tribe planned for construction outside Jamul, California. *See* 78 Fed. Reg. 21,399. The notice also explained that the casino would be constructed "on the Tribe's Reservation." *Id.* In a previous notice published in the Federal Register more than a decade earlier, the NIGC and Bureau of Indian

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[1] At hearing, the JAC's counsel argued it would not seek to prove that the Tribe lacks federal recognition. This assertion directly contradicts the allegations of the operative complaint. *See, e.g.*, SAC ¶¶ 31–32 ("In 1978 the DOI adopted regulations outlining 'Procedures for Establishing that an American Indian Group Exists as an Indian Tribe.' These procedures are currently codified at 25 C.F.R. §§ 83.1-83.13. The JIV has not filed a Part 83 petition to become a federally recognized tribe. Nor could the JIV meet the requirements of Part 83. . . ."); *id.* ¶ 44 ("The JIV is not a federally recognized tribe.").

[2] The court takes judicial notice of the NIGC notice and the other entries in the Federal Register cited in this order. *See* 44 U.S.C. § 1507; *United States v. Woods*, 335 F.3d 993, 1001 (9th Cir. 2003). A more detailed description of the NIGC's notice and the relevant statutory and regulatory regime may be found in this court's previous order. *See* Order on Prelim. Inj. 2–8.

1 Affairs had not referred to this land as the Tribe's "Reservation." *See* Notice of Intent, 67 Fed.
2 Reg. 15,582 (Apr. 2, 2002); *see also* Notice, 68 Fed. Reg. 1,475 (Jan. 10, 2003).
3 The JAC understood the NIGC's April 2013 notice as a formal declaration that the
4 Tribe "has a Reservation that qualifies as 'Indian lands' eligible for gaming" under the Indian
5 Gaming Regulatory Act (IGRA). SAC ¶ 2. In the JAC's view, this determination runs counter to
6 federal law, because although the Tribe may have a beneficial interest in the land in question, that
7 land "is not a reservation or trust land" as defined by IGRA. SAC ¶ 72; *see also id.* ¶ 35 (citing
8 25 U.S.C. § 2703(4)[3]). Rather, the JAC alleges the Tribe is not a federally recognized Indian
9 tribe. *See id.* ¶¶ 31–38, 40–46. It argues the land the NIGC referred to as a "Reservation" cannot
10 be a reservation because it is not one of the few areas so denominated and specifically established
11 by federal law, *id.* ¶¶ 26–28, and an Indian tribe may not unilaterally create a reservation, *id.*
12 ¶ 73. It also alleges the federal government never took the land into trust for the Tribe's benefit
13 under the procedures adopted by the United States Department of the Interior. *See id.* ¶¶ 27–38.
14 In July 2013, Tracie Stevens, the NIGC's chairperson at the time, approved a
15 gaming ordinance for the Tribe's proposed casino that allowed "Class III" gaming, i.e., casino
16 gambling. *Id.* ¶ 67; *see also* 25 U.S.C. § 2710 (IGRA provisions on the approval of an Indian
17 tribe's gaming ordinances); *Michigan v. Bay Mills Indian Cmty.*, ___ U.S. ___, 134 S. Ct. 2024,
18 2028–29 (2014) (describing Class III gaming under IGRA). NIGC also allegedly approved a
19 contract between the Tribe and SDGV before January 2014, SAC ¶ 68, and construction began in
20 January 2014, *id.* ¶ 69. In fact, however, it appears a gaming management contract still has not
21 been approved. *See* Order on Prelim. Inj. at 7–8; Status Order Nov. 4, 2015, at 7, ECF No. 115.
22 The JAC asserts six claims for relief. First, it challenges the casino's construction
23 because the Tribe is not a federally recognized Tribe and the real property on which the casino
24 will sit is not "Indian lands." SAC ¶ 75. The JAC's briefing and argument at hearing clarified
25
26 [3] This subsection defines "Indian lands" as "(A) all lands within the limits of any Indian
reservation; and (B) any lands title to which is either held in trust by the United States for the
27 benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to
restriction by the United States against alienation and over which an Indian tribe exercises
28 governmental power." 25 U.S.C. § 2703(4).

1 this first claim is asserted against NIGC under the Administrative Procedure Act (APA). Opp'n
2 Tribe Defs.' Mot. 7, ECF No. 143; Opp'n Fed. Defs.' Mot. 4, ECF No. 144. It claims the NIGC
3 arbitrarily and capriciously (1) defined the Tribe's land as a "Reservation" or land otherwise
4 designated "Indian lands," (2) approved the gaming ordinance, and (3) approved the gaming
5 management and other contracts. It seeks an order enjoining construction of a casino on the
6 Tribe's land. SAC ¶¶ 83–84. It asks the court to reverse the NIGC's approvals. *Id.* ¶ 85.

7 In its second claim, the JAC asserts construction of a casino will violate the Indian
8 Reorganization Act of 1934 (IRA) because the Tribe did not exist in 1934 when that legislation
9 was passed. *See id.* ¶ 91. In its opposition briefing and at hearing, the JAC clarified that it brings
10 this claim against the U.S. Department of the Interior and Bureau of Indian Affairs under the
11 APA. *See* Opp'n Tribe Defs.' Mot. at 8–9; Opp'n Fed. Defs.' Mot. at 5. It claims these agencies'
12 "efforts and actions" to take the land into trust were arbitrary, capricious, and illegal, Opp'n Tribe
13 Defs.' Mot. at 8–9; Opp'n Fed. Defs.' Mot. at 5, and requests an order enjoining the casino's
14 construction.

15 Third, the JAC asserts a constitutional claim, alleging the various defendants'
16 collective decision to approve construction of a casino and begin construction "is an
17 unconstitutional infringement on private land titles and on [California's] plenary power to
18 regulate its citizenry." SAC ¶ 106. It also alleges the defendants give unconstitutional preference
19 to the Tribe and its members without justification. *See id.* ¶112. In its opposition briefing, the
20 JAC clarified this claim is founded on principles of federalism and the Equal Protection Clause.
21 Opp'n Tribe Defs.' Mot. at 9–10; Opp'n Fed. Defs.' Mot. at 6.

22 Fourth, the JAC alleges the casino's construction violates the California
23 constitution and public nuisance law, which permits gambling operations only by federally
24 recognized Indian tribes on Indian lands. SAC ¶¶ 117–23. The JAC asserts this claim against the
25 individual defendants and the three corporate defendants affiliated with the Tribe. *Id.* ¶ 116.

26 In its fifth claim, the JAC alleges that by deciding the Tribe's land was a
27 "Reservation" and approving the gaming ordinance and the management and development
28 /////

contracts without first preparing an environmental assessment, the defendants violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* SAC ¶ 127.

Finally, in its sixth claim, the JAC alleges the defendants' actions violated the compact between the Tribe and the State of California. *Id.* ¶¶ 144–51. Under IGRA, a tribe may conduct gaming on Indian lands only under a compact it has negotiated with the surrounding State. *Bay Mills*, 134 S. Ct. at 2028–29 (citing 25 U.S.C. § 2710(d)(1)(C), among other provisions). The JAC alleges that under the compact, the Tribe may not construct a gaming facility on its lands after January 1, 2005. SAC ¶ 148. It alleges that despite California's request, the compact was not amended, the 2005 date was unchanged, and therefore the casino's construction violates the compact. *Id.* ¶ 149. In addition, the compact authorizes gaming on only "Indian lands" as defined by IGRA, so the JAC alleges that because the land in question does not qualify as "Indian lands," the casino's construction would violate the compact regardless of any amendment. *Id.* ¶ 150.

II. PROCEDURAL HISTORY

The JAC's original complaint was filed in September 2013. ECF No. 1. The federal defendants moved to dismiss in February 2014, ECF No. 12, and the JAC filed an amended complaint in response, ECF No. 15. The defendants, including Raymond Hunter, the Tribe's chairman, moved to dismiss again, ECF Nos. 20, 23, and the Tribe requested leave to file an *amicus curiae* brief in support of those motions, ECF No. 22.

In August 2015, the court granted the defendants' motions to dismiss and granted the Tribe's motion to file an amicus brief. ECF No. 50. As noted above, the court found "[t]he Jamul Indian Village is a federally recognized tribal entity entitled to tribal sovereign immunity." *Id.* at 7. The court granted defendant Hunter's motion to dismiss because the JAC had not alleged any facts to show he acted in an individual capacity rather than in his capacity as the Tribe's chairman, and in his capacity as chairman, he was entitled to sovereign immunity. *Id.* at 20. In addition, the court found the doctrine described by the Supreme Court in *Ex Parte Young*, 209 U.S. 123 (1908), did not apply because the plaintiffs had not alleged adequately that Hunter violated any federal law. *Id.* Similarly, the court found the plaintiffs had stated no cognizable

1 APA claim against him. *Id.* at 20–23. As for the federal defendants, the court concluded the case
2 could not proceed without the Tribe, whose property and contract interests the JAC directly
3 attacked. *Id.* at 23–27.[4] Because the Tribe's sovereign immunity prevented its joinder, and
4 because the complaint stated no claim against Hunter, the complaint was dismissed. *Id.* The JAC
5 was allowed leave to amend. *Id.* at 28.

6 The JAC filed the Second Amended Complaint, which remains operative. ECF
7 No. 51. In January 2015 it moved for a preliminary injunction and a writ of mandate on its NEPA
8 claim. ECF No. 60. It sought an order enjoining construction of the casino until the defendants
9 completed a review under NEPA. *Id.* The court denied the motion in May 2015. ECF No. 93. It
10 found (1) the JAC had not identified a "major agency action" to set any NEPA process into
11 motion, *id.* at 9–12; (2) the JAC did not have standing because it was unclear whether the
12 defendants would have authority to comply with the order the JAC sought, which would have
13 directed the defendants to halt construction of the casino, *id.* at 13–14; and (3) none of the four
14 factors identified by the Supreme Court in *Winter v. Natural Resources Defense Council, Inc.*,
15 555 U.S. 7 (2008), supported the JAC's motion for a preliminary injunction, *id.* at 14–18.

16 The JAC filed an interlocutory appeal. ECF No. 94. The Ninth Circuit affirmed,
17 on grounds different in part than those this court had relied on, holding (1) the defendants did not
18 violate NEPA when they approved the Tribe's gaming ordinance without preparing an
19 environmental impact statement because NEPA's provisions are fundamentally irreconcilable
20 with IGRA, *Jamul Action Committee*, *supra*, 2016 WL 3910597; and (2) the plaintiffs had not
21 otherwise shown they were likely to succeed on the merits of their claims, *Jamul Action*
22 *Committee v. Chaudhuri*, ___ F. App'x ___, 2016 WL 3219593 (9th Cir. June 9, 2016)
23 (unpublished).
24
25

26 [4] At hearing, the JAC's counsel asserted incorrectly that this court had not previously
found the Tribe to be necessary and indispensable. *See* Order on Mot. Dismiss 25–27 (finding (1)
27 "[t]he Tribe is a necessary party to this action"; (2) "it is not feasible to join the Tribe in this
action"; and (3) the four factors identified in Federal Rule of Civil Procedure 19(b) resolved in
28 favor of dismissal).

The defendants moved to dismiss in December 2015. *See* Tribe Defs.' Mot. Dismiss, ECF Nos. 123 & 125; Fed. Defs.' Mot. Dismiss, ECF No. 127. They challenge the court's jurisdiction, argue the Tribe is a necessary and indispensable party that cannot be joined, and argue the JAC lacks standing. Because the JAC's interlocutory appeal was pending at the time the motions were filed, it argued this court lacked jurisdiction to address them. The resolution of their appeal makes this argument moot. The JAC has otherwise opposed both defense motions, ECF Nos. 143, 144, and the defendants have replied, Tribe Defs.' Reply, ECF No. 145; Fed. Defs.' Reply, ECF No. 146.

III. DISCUSSION

The JAC's first, second, third, fourth, and sixth claims must be dismissed because the Tribe is a necessary party and has not been joined. The JAC's fifth claim must be restricted to its allegation that the federal defendants approved the Tribe's gaming ordinance without conducting the review procedure required by NEPA.

A. Required Joinder: Rules 12(b)(7) and 19

Rule 12(b)(7) allows a litigant to request dismissal for "failure to join a party under Rule 19." Fed. R. Civ. P. 12(b)(7).[5] "Federal Rule of Civil Procedure 19 imposes a three-

[5] Rule 19 provides, in relevant part, as follows:

(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.

. . .

(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 step inquiry:" (1) "Is the absent party . . . required to be joined if feasible . . . under Rule 19(a)?"
2 (2) "If so, is it feasible to order that the absent party be joined?" (3) "If joinder is not feasible, can
3 the case proceed without the absent party, or is the absent party indispensable such that the action
4 must be dismissed?" *Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1179
5 (9th Cir. 2012) (footnote and citation omitted omitted). At the third step, the court considers the
6 demands of "equity and good conscience." Fed. R. Civ. P. 19(b).

7 The inquiry is fact-specific and practical. *N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d
8 466, 468 (9th Cir. 1986); *Camacho v. Major League Baseball*, 297 F.R.D. 457, 460–61 (S.D. Cal.
9 2013). For this reason, it may be necessary to review evidence beyond the pleadings. *Camacho*,
10 297 F.R.D. at 461 (quoting *McShan v. Sherrill*, 283 F.2d 462, 464 (9th Cir. 1960)). The
11 defendants, who are the moving parties, "bear the burden in producing evidence in support of the
12 motion." *Id.* (quoting *Biagro W. Sales Inc. v. Helena Chem. Co.*, 160 F. Supp. 2d 1136, 1141
13 (E.D. Cal. 2001)).

14 Here, the defendants argue the Tribe is a necessary party because the JAC alleges
15 (1) the Tribe is not a federally recognized Indian tribe and enjoys no sovereign immunity; (2) the
16 lands the Tribe purports to hold in beneficial interest are not "Indian lands" as defined by IGRA;
17 and (3) the Tribe's state compact is invalid. *See* Tribe Defs.' Mot. at 18–29; Fed. Defs.' Mot.
18 at 26. Defendants argue the Tribe cannot be joined because it has not waived its sovereign
19 immunity, and this case cannot be litigated in the Tribe's absence, in equity and good conscience.
20 The court reached the same conclusion in its previous order, Order on Mot. Dismiss at 23–27, and
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23 (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
24 (2) the extent to which any prejudice could be lessened or avoided by:
25 (A) protective provisions in the judgment;
(B) shaping the relief; or
26 (C) other measures;
27 (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
28 for nonjoinder.

makes the same decision now in light of the parties' current arguments and the pleadings articulated in the complaint.

1. Whether the Tribe Is Necessary

"[A] person is necessary if he has an interest in the action and resolving the action in his absence may as a practical matter impair or impede his ability to protect that interest." *Salt River*, 672 F.3d at 1179 (citing Fed. R. Civ. P. 19(a)(1)(B)(i)). Here, the JAC challenges the Tribe's identity, its immunity, its sovereignty, and the extent of its interest in real property. These are "legally cognizable interests" or "legally protected interests" within Rule 19's scope. *See Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 880, 882–83 (9th Cir. 2004); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). If this action were to proceed in the Tribe's absence, including if based on the Tribe's independent decision not to seek intervention, it would not be in a position to file motions or take discovery to protect its sovereignty and property interests.

In addition, the JAC attempts to prove in this action that gaming on the Tribe's land would violate its tribal-state compact, a contract between the Tribe and the State of California. The Ninth Circuit has "repeatedly held that '[n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable.'" *E.E.O.C. v. Peabody W. Coal Co.*, 610 F.3d 1070, 1082 (9th Cir. 2010) (quoting *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975)) (alteration in *Peabody*); *see also Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1157 (9th Cir. 2002) ("[A] party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract."); *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999) ("[A] district court cannot adjudicate an attack on the terms of a negotiated agreement without jurisdiction over the parties to that agreement.").

The JAC does not actually argue the Tribe has no legally protected interests in this litigation; instead it argues these interests are adequately represented by others. *See* Opp'n Tribe Defs.' Mot. at 17–19; Opp'n Fed. Defs.' Mot. at 24–26. The JAC suggests that the individually

named tribal officials would adequately represent the Tribe's interests in this litigation, citing the Ninth Circuit's decision in *Salt River*, *see* 672 F.3d at 1181–82, and the *Ex Parte Young* doctrine, *see* 209 U.S. 123. In this respect, the JAC's arguments are nearly identical to those it advanced in opposition to the defendants' previous motions under Rule 12(b)(7). *See* Opp'n Fed. Defs.' Mot. Dismiss at 15–17, ECF No. 31. As before, having carefully reviewed the instant record, the court concludes these authorities do not apply to this case:

> The *Ex parte Young* doctrine "permits actions for prospective non-monetary relief against state or tribal officials in their official capacity to enjoin them from violating federal law, without the presence of the immune State or tribe." In other words, in cases where courts found Tribal officials were not immune, the officials themselves engaged in acts that violated federal law.

Order on Mot. Dismiss 26, ECF No. 50 (quoting *Salt River*, 672 F.3d at 1181). Here, although the JAC characterizes its case as one against the Tribal officials in their individual capacities, the JAC targets actions the defendants undertook in their official capacities: planning, approving, and initiating construction of the casino. "Tribal sovereign immunity 'extends to tribal officials when acting in their official capacity and within the scope of their authority.'" *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 727 (9th Cir. 2008) (quoting *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002)). "[A] plaintiff cannot circumvent tribal immunity by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity." *Id.* (citation and quotation marks omitted). The second amended complaint does not allow the court to draw a reasonable interference that the tribal officials themselves violated federal law. *See* Order on Mot. Dismiss at 22–23.

2. Whether the Tribe Can Be Joined and Whether the Tribe Is Indispensable

The Tribe is a federally recognized Indian tribe entitled to sovereign immunity. It has not waived that immunity. Its joinder is therefore not feasible. *See, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59 (1978); *Cook*, 548 F.3d at 727; Order on Mot. Dismiss at 25.

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Rule 19 lists several specific considerations the court should weigh when joinder of a necessary party is not feasible:

> (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.

Fed. R. Civ. P. 19(b). The court's decision on this question is an exercise of discretion. *Salt River*, 672 F.3d at 1179.

The court once again concludes this action cannot proceed in the Tribe's absence. *See* Order on Mot. Dismiss at 25–27. First, the Tribe's interests in its status, its sovereignty, its beneficial interests in real property, and its contractual interests cannot be adjudicated without its formal presence. Any ruling in the JAC's favor would also practically impair the Tribe's sovereign power to negotiate a compact with California. *See Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002). Second, the court cannot lessen prejudice to the Tribe by customizing relief, receiving amicus briefs, or allowing the Tribe's officials to litigate on its behalf. It is impossible, for example, for the JAC to prove the Tribe is not entitled to sovereign immunity without depriving the Tribe of a central aspect of that sovereignty, immunity from suit, regardless of any caveat or limitation this court might impose. No party has proposed any such limitation. Third, a judgment would also prove inadequate. Whatever this court were to order, given the Tribe's likely continued assertions of immunity in any future litigation or actions to enforce, the conflict would be unchanged, if not more chaotic. Fourth, the "lack of an alternative forum does not automatically prevent dismissal of a suit." *Makah*, 910 F.2d at 560. "[T]his result is a common consequence of sovereign immunity," and as applicable here, "the [Tribe's] interest

1 in maintaining [its] sovereign immunity outweighs the [JAC's] interest in litigating [its] claims."
2 *Am. Greyhound*, 305 F.3d at 1025.

3 Finally, this reasoning applies equally to all claims but the fifth claim against the
4 federal defendants under NEPA. In each of the other five claims, the JAC alleges that the Tribe is
5 not a federally recognized Indian tribe, that the real property on which the casino will be built is
6 not "Indian lands" as defined by IGRA, or that the casino's construction and operation would
7 violate the Tribe's state compact. *See* SAC ¶¶ 75, 77, 87, 89, 91–95, 101–06, 118–19, 150. The
8 JAC asks the court to declare in effect that the Tribe is not an Indian tribe, that its land is not its
9 own, and that it violated its compact with California. The Tribe is a necessary party, it cannot be
10 joined, and its absence prevents this case from going forward.

11 Because the defects identified in this order are the same as those identified in the
12 court's previous order, the court is not persuaded that plaintiffs should be allowed to amend
13 claims one, two, three, four and six. *See, e.g.*, *Cafasso, U.S.* ex rel. *v. Gen. Dynamics C4 Sys.,*
14 *Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011) (futility may support a district court's decision to
15 dismiss without leave to amend). Moreover, "the district court's discretion to deny leave to
16 amend is particularly broad where plaintiff has previously amended the complaint." *Id.* (citation,
17 quotation marks, and alteration omitted). Leave to amend these claims is denied.

18 B. The Fifth Claim under NEPA

19 As summarized above, the JAC alleges the federal defendants decided the Tribe's
20 land was a "Reservation" and approved the Tribe's gaming ordinance and the management and
21 development contracts without first conducting the review required by NEPA. SAC ¶ 127.

22 First, to the extent the JAC alleges the federal defendants violated NEPA by
23 approving the Tribe's gaming ordinance without preparing an environmental impact statement,
24 the Ninth Circuit's decision on the interlocutory appeal, issued since the hearing in this court,
25 requires dismissal. *See* 2016 WL 3910597, at *6 ("Contrary to JAC's arguments, NIGC's
26 approval of the Tribe's gaming ordinance without conducting a NEPA environmental review did
27 not violate NIGC's obligations under NEPA because where a clear and unavoidable conflict in
28 statutory authority exists, NEPA must give way." (citation and quotation marks omitted)).

1 Second, the Tribe's construction of a casino on its land is not a major federal
2 action. *See* Order on Prelim. Inj. at 14. Neither was the casino's construction subject to the
3 federal defendants' approval. *See id.* at 10; *accord* 2016 WL 3219593, at *1. The court cannot
4 order the federal defendants to halt construction of the casino. *See* Order on Prelim. Inj. at 14; *cf.*
5 Second Am. Compl. at 31 (requesting this relief).
6 Third, "[t]o the extent plaintiffs contend that the land on which the Jamul casino is
7 being built is not Indian land, circuit precedent forecloses that argument." 2016 WL 3219593,
8 at *1 (citing *Big Lagoon Rancheria v. California*, 789 F.3d 947, 953 (9th Cir. 2015) (en banc)
9 ("[A] challenge to the BIA's decision to take land into trust is a garden-variety APA claim. Such
10 claims assert merely that the Secretary of the Interior's decision to take land into trust violates a
11 federal statute. . . . [P]arties cannot use a collateral proceeding to end-run the procedural
12 requirements governing appeals of administrative decisions." (citations, quotation marks, and
13 alterations omitted))).
14 This leaves the JAC's claim that the federal defendants did not prepare an
15 environmental impact statement in compliance with NEPA when they approved the Tribe's
16 gaming management contract. The Tribe is not a necessary party to this claim; it has no legally
17 protectable interest in the federal defendants' execution of a NEPA review. The fifth claim may
18 therefore proceed on the JAC's request for declaratory relief against the federal defendants only.
19 When the NEPA question was tested in the context of JAC's motion for a
20 preliminary injunction, the federal defendants responded with evidence showing they had not in
21 fact approved a gaming management contract, contrary to the JAC's allegation. *See* Order on
22 Prelim. Inj. at 7–8. Later, in a status order, the court ordered the parties to give notice within
23 seven days of any action by the NIGC Chairman on the Tribe's gaming management contract.
24 Status Order Nov. 4, 2015, at 7, ECF No. 115. No notice has been filed. The court therefore
25 gives notice of its intent to convert the federal defendants' motion with respect to the fifth NEPA
26 claim into one for summary judgment under Federal Rule of Civil Procedure 12(d) and consider
27 evidence that a gaming management contract has not in fact been approved. *See* Fed. R. Civ. P.
28 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented

to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.").

IV. CONCLUSION

The tribally affiliated defendants' motion to dismiss is GRANTED without leave to amend. The federal defendants' motion is GRANTED IN PART without leave to amend as to claims one, two, three, four and six. This order resolves ECF Nos. 123 and 125.

The court GIVES NOTICE of its intent to convert the federal defendants' motion to dismiss claim five into one for summary judgment on the same claim under Federal Rule of Civil Procedure 12(d) to allow consideration of evidence on the limited question of whether the Tribe's gaming management contract has been approved. Within thirty days of the date this order is filed, any party may file a response addressing whether summary judgment should be granted to the federal defendants in this respect. Briefing shall not exceed five pages and may be accompanied by any relevant evidence permitted by Federal Rule of Civil Procedure Rule 56 and the corresponding Local Rules of this District.

IT IS SO ORDERED.

DATED: August 5, 2016.

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20245

In Reply Refer To:
Tribal Government Services

November 7, 1975

To: Sacramento Area Director
Acting Deputy
From: Commissioner of Indian Affairs

Subject: Jamul Indians, Entitlement of Certain Bureau Services

We appreciate your September 19, 1974, response to our June 3, 1974 memorandum. In that communication we asked about the basis for your earlier determination that the Jamul Indians constituted a federally recognized entity. Based on our review of further research on the matter, we can understand the position taken in your September 10, 1974, memorandum i.e., that your files lack sufficient information to recommend extending Federal recognition to such group.

In response to our further request, via telephone, you have on April 23, provided us with information showing the blood quantum of the twenty-three Indian who reside in the Jamul Community. We note that twenty of them possess on-half or more degree Indian blood.

Pursuant to Section 19 of the Indian Reorganization Act of 1934, 25 USC 479, certain benefits of that Act are available to persons of one-half or more Indian blood even though they lack membership in a federally recognized tribe. Included is the right, under Section 5 and 7 to request the Secretary to take land in trust status and proclaim it a reservation.

Such persons do not now constitute a federally recognized entity, neither do they possess a land base. However, they are entitled to services provided by this Bureau to individual Indians pursuant Section 19 of the IRA.

We are asking that assistance be given to those individuals in their effort to secure, in trust status, the tract of land on which they now reside. We understand the San Diego Diocese, in a March 22, 1974 letter concurred in considering the granting of a deed for such land to the United States in trust for the Jamul Indians.

If a land base materializes, the adult Indians residing on such trust land would then be entitled to organize pursuant to Section 16 of the IRA. Until that time, those

persons may continue to conduct their affairs under their 1971 Articles of Association or adopt a more comprehensive non-IRA governing document.

s/ Theodore Krenzke

Acting Deputy Commissioner

Tribal Operations
060 Jamul *#35*

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

Southern California Agency
5750 Division Street, Suite 201
Riverside. California 92506

April 10, 1979

Memorandum

To: Acting Deputy Commissioner

Through: Area Director, Sacramento Area *NLS for William Finch*

From: Superintendent, Southern California Agency

Subject: Federal Recognition of Jamul Band

On December21, 1978, the Acting Area Director, Sacramento Area Office, accepted a gift of land from Donald E. Daley and Lawrence A. Daley to be held by the United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate. (Copy enclosed).

It is requested that action be initiated by your office to have the Jamul Band recognized as being eligible for programs administered by the Bureau of Indian Affairs and that such acknowledgement be published in the Federal Register pursuant to the provisions of 25 CFR 54.6(b).

Prompt attention to this request is urged so as not to cause undue delay of services to the Jamul Indians.

s/ *Jerome F. Tomhave*
Jerome F. Tomhave
Superintendent

APPENDIX E

CONSTITUTION
OF THE
JAMUL INDIAN VILLAGE
SAN DIEGO CALIFORNIA
JAMUL, CALIFORNIA

PREAMBLE

We the half blood members of the Jamul Indian Village, in order to form a better community government, to establish a formal organization, to promote our common welfare, and to secure the privileges and powers of the Indian Reorganization Act of June 18, 1934 (48 Stat. 986) do hereby ordain and establish this constitution and bylaws.

ARTICLE I – NAME

The name of this organization shall be the Jamul Indian Village, hereafter referred to as the 'village".

ARTICLE II – TERRITORY

The jurisdiction of Jamul Indian Village shall extend to all lands now within the confines of the Jamul Indian Village and to such other lands as may hereafter be added thereto.

ARTICLE III – MEMBERSHIP

Section 1. The members of the Jamul Indian Village shall consist of those persons who file applications for membership with and are found qualified by executive committee under one of the following categories:

(a) Persons of ½ or more degree of California Indian Blood who filed as Jamul Indians and were listed on the September 21, 1968 Judgement Roll of Certain Indians of California.

APPENDIX F

(b) Persons of ½ or more degree of California Indian blood who reside in the Jamul Indian Village, Jamul California, at the time of the adoption of this constitution.

(c) Persons of ½ or more degree of total California Indian blood whose ancestors meet the requirements of Sections 1(a) or 1(b) regardless of whether the ancestors are living or deceased.

(d) Persons who have been adopted by the village in accordance with an adoption ordinance approved by the Secretary of Interior or his authorized representative. Provided they are not less than ½ degree Indian blood.

Section 2. No person shall be a member of the Jamul Indian Village if he:

(a) Has been allotted on another reservation or on the public domain.

(b) Is officially enrolled with or has received a land use assignment or payments by reason of membership in another tribe, band, rancheria or village. Land or money received through inheritance shall not be a bar to enrollment as a member of the Jamul Village.

(c) Has relinquished in writing his membership in the Jamul Indian Village.

(d) Is less than one-half (1/2) degree Indian blood.

Section 3. The governing body shall adopt an enrollment ordinance, subject to approval by the Secretary of Interior, governing loss of membership and enrollment of new members and prescribe rules and procedures by which the membership roll shall be prepared and thereafter kept current.