

**EDITED WITHOUT NOTATION**

Alvin CLINTON et al. Plaintiffs-Appellants,

v.

Bruce BABBITT, Defendant-Appellee.

180 F.3d 1081 (9<sup>th</sup> Cir. 1999)DAVID R. THOMPSON, Circuit Judge:

Plaintiffs are members of the Navajo Nation living on the Hopi Partitioned Lands ("HPL"), a portion of northeast Arizona that has been determined to belong to the Hopi Tribe. Under a 1996 Settlement Act, HPL Navajos who wish to continue living on the HPL must enter into long-term leases with the Hopi Tribe.

The plaintiffs, dissatisfied with the terms of the leases approved by the 1996 Settlement Act, brought this action against Secretary of the Interior Bruce Babbitt. The district court determined that it lacked subject matter jurisdiction, that the plaintiffs' action was barred by sovereign immunity, that the Hopi Tribe was an indispensable party to the action, and that the plaintiffs failed to state a claim upon which relief could be granted.

We affirm the district court's judgment on the ground that the Hopi Tribe is an indispensable party.

**HISTORICAL BACKGROUND**

The plaintiffs' suit is the latest chapter in a more-than-a-century-old dispute between members of the Hopi Tribe and the Navajo Nation over the use of approximately 2.5 million acres in northern Arizona. This dispute has been the subject of extensive litigation and legislation, including at least eighteen opinions of this court.

Congress then directed the partitioning of the Joint Use Area in the Navajo and Hopi

Indian Land Settlement Act, [25 U.S.C. § § 640d et seq.](#) (1994)).

The 1974 Settlement Act required members of each tribe to move from lands partitioned to the other tribe by 1986 and created a commission to pay for the major costs of such relocations. [25 U.S.C. § § 640d-11, 640d-12, 640d-13, 640d-14.](#) About 50 to 100 Navajo families (the "HPL Navajos"), however, refused to leave the Hopi Partitioned Lands. *Id.* at 5.

the Hopi Tribe agreed to permit HPL Navajo families to remain on the HPL under the terms of 75-year leases ("accommodation leases"). The terms of the leases are standard terms embodied in an Accommodation Agreement negotiated by the Hopi Tribe, the Navajo Nation, and representatives of the HPL Navajos. Under the terms of the Accommodation Agreement, eligible HPL Navajo families are entitled to lease (at no cost) for 75 years a three-acre homesite and ten acres of farmland, to have grazing privileges, and to engage in traditional uses of other areas of the HPL. *Id.*

**PROCEDURAL HISTORY**

The plaintiffs, dissatisfied with the standard terms of the accommodation leases, filed a complaint alleging that the terms of those leases violated the equal protection clause of the Fifth Amendment. In their complaint, they requested an injunction prohibiting Secretary Babbitt from approving any accommodation leases pursuant to the 1996 Settlement Act. The district court dismissed the complaint because of lack of subject matter jurisdiction, sovereign immunity, and failure to join the Hopi Tribe, which the court concluded was an indispensable party.

## DISCUSSION

### Sovereign Immunity

The plaintiffs sued only Secretary Babbitt, a federal official. From the body of the complaint, it is obvious the claim is a claim against the United States. In such a case, a federal court lacks jurisdiction unless the plaintiff establishes that sovereign immunity has been waived. See *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1484 n. 3 (9th Cir.1985).

In 5 U.S.C. § 702, the United States expressly waived "sovereign immunity in non-statutory review actions for nonmonetary relief brought under 28 U.S.C. § 1331." *Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation*, 792 F.2d 782, 793 (9th Cir.1986). This is such an action. The plaintiffs seek only nonmonetary relief against the United States. Sovereign immunity does not bar their suit.

#### Failure to Join an Indispensable Party

Pursuant to Federal Rule of Civil Procedure 19, the district court dismissed this case because an absent party (the Hopi Tribe) was "indispensable." See Fed.R.Civ.P. 19(b). Our analysis proceeds in two steps:

We first ask whether the district court correctly determined that an absent party is "necessary to the suit." Fed.R.Civ.P. 19(a). If so, and if that party cannot be joined, we then must assess whether the district court correctly found the party "indispensable" so that in 'equity and good conscience' the suit should be dismissed." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir.1990) (quoting Fed.R.Civ.P. 19(b)). "The inquiry is a practical one and fact specific, and is designed to avoid the harsh results of rigid application. The moving party has the

burden of persuasion in arguing for dismissal." *Id.* (citations omitted).

*Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir.1992).

#### A. The Hopi Tribe as a Necessary Party

Under Rule 19(a), the Hopi Tribe is a necessary party and must be joined if:

(1) in the [Tribe's] absence complete relief cannot be accorded among those already parties, *or*

(2) the [Tribe] claims an interest relating to the subject of the action and is so situated that the disposition of the action may (i) as a practical matter impair or impede the [Tribe's] ability to protect that interest ...

Fed.R.Civ.P. 19(a) (emphasis added). The district court held that the Hopi Tribe was a necessary party under both subparagraph (1) and (2) of Rule 19(a). Satisfying the requirements of either subparagraph establishes necessary party status.

#### 1. Subparagraph (1)--Complete Relief Among the Parties

In the Tribe's absence, complete relief may not be afforded between the parties to this action. In *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir.1975), we held that complete relief could not be afforded in an action challenging a lease between the Hopi Tribe and Peabody Coal Company unless the Tribe was joined. As we explained in *Lomayaktewa*, a district court cannot adjudicate an attack on the terms of a negotiated agreement without jurisdiction over the parties to that agreement. *Id.* See also *Pit River Home and Agric. Coop. Ass'n. v. United States*, 30 F.3d 1088, 1099 (9th Cir.1994) ("[E]ven if the Association obtained its requested relief in [a dispute over which group of Indians are beneficial owners of a certain piece of property], it

would not have complete relief, since judgment against the government would not bind the [other group of Indians], which could assert its right to possess the [property]."); [Confederated Tribes of the Chehalis Indian Reservation v. Lujan, 928 F.2d 1496, 1498 \(9th Cir.1991\)](#) (noting that judgment against federal officials in an action challenging an agreement between the United States and the Quinault Nation would not bind the Nation).

## 2. Subparagraph (2)--Impairment of the Hopi Tribe's Interest

The plaintiffs argue that the 75-year accommodation leases between the Hopi Tribe and the HPL Navajos do not become effective until the leases are approved by Secretary Babbitt. None of the leases has been approved as yet. Therefore, according to the plaintiffs, the Tribe lacks a vested interest in the leases and lacking such an interest it has no legally protected interest that may be impaired or impeded by the present action. This argument misapprehends what is required to establish necessary party status under subparagraph (2) of [Rule 19\(a\)](#).

In [Kescoli v. Babbitt, 101 F.3d 1304, 1309-12 \(9th Cir.1996\)](#), we held that the Navajo Nation and the Hopi Tribe were necessary (and also indispensable) parties to a Navajo's challenge to a term of a settlement agreement among a coal mining company, the United States Department of Interior Office of Surface Mining ("OSM"), the Navajo Nation, and the Tribe. The agreement modified thirteen terms of a permit issued by OSM for the coal company's mining activities under lease agreements with the Navajo Nation and the Hopi Tribe. [Id. at 1307-08](#). Although the plaintiff insisted she was challenging only a single term of the settlement regarding

mining near burial sites and was not questioning the validity of the leases, we explained that pulling a single legal thread from the tapestry of the settlement could cause it to unravel and thereby impair the interests of absent parties:

The settlement of [the term at issue] affected the conditions under which [the coal company] may mine [at sites covered by the lease agreements]. In turn, this could affect the amount of royalties received by the Navajo Nation and the Hopi Tribe and employment opportunities for their members.

Further, the Navajo Nation and the Hopi Tribe, by virtue of their sovereign capacity, have an interest in determining what is in their best interests by striking an appropriate balance between receiving royalties from the mining and the protection of their sacred sites. In her action, [the plaintiff] challenges the balance struck by the Navajo Nation and the Hopi Tribe.

[Id. at 1309-10](#) (citations omitted).

Our decision in [Kescoli](#) governs this case. The plaintiffs seek, at a minimum, a declaration that Secretary Babbitt cannot constitutionally approve any individual leases between HPL Navajos and the Hopi Tribe that use the standard terms of the Accommodation Agreement. Such a declaration would prohibit the Tribe from fulfilling its obligations under the Settlement Agreement to enter into such leases and would deprive the Tribe of substantial compensation from the United States, which is conditioned on Secretary Babbitt's approval of certain numbers of such leases. The Hopi Tribe, therefore, has a legally protected interest relating to the subject of the action as defined by [Rule 19\(a\)\(2\)](#). See [Quileute Indian Tribe v. Babbitt, 18 F.3d 1456, 1459 \(9th Cir.1994\)](#) (Quinault Indian Nation is necessary party to action by

Quileute Indian Tribe against the United States, seeking to overturn the Department of Interior's decision that certain fractional property interests within the Quinault Reservation escheat to the Quinault Nation rather than to the Quileute Tribe); [Lomayaktewa, 520 F.2d at 1326](#) ("It seems perfectly obvious that a judgment rendered in the absence of the Hopi Tribe most surely would be prejudicial to it, for the royalties to be paid under the lease still amount to more than \$20 million and cancellation of the lease would eliminate the employment of many of the Hopis.").

The Hopi Tribe also has a legally protected interest in regaining jurisdiction over the Hopi Partitioned Lands. *See, e.g., Pit River, 30 F.3d at 1099* ("as the beneficial owner of the Ranch, the Council clearly has a legal interest in the litigation"); [Shermoen, 982 F.2d at 1318](#) (holding that "absent tribes have an indisputable interest in the outcome" of a challenge to statute partitioning land between tribes). Any relief accorded the plaintiffs will "as a practical matter impair or impede" the Tribe's ability to protect this interest in the HPL. ("The Accommodation Agreement ... is an integral and critical component of any settlement. Without the Accommodation Agreement, the Navajos on Hopi land would remain out of compliance and the threat of pending litigation could easily lead to more bitterness and distrust, more litigation, and no resolution of this long-standing problem.").

The district court correctly determined that the Hopi Tribe is a necessary party to this litigation.

#### B. The Hopi Tribe as an Indispensable Party

If the Hopi Tribe is an indispensable party,

the district court correctly dismissed the complaint under [Rule 19\(b\)](#) because the Hopi Tribe enjoys sovereign immunity and, as a result, it cannot be joined as a party without its consent. [Shermoen, 982 F.2d at 1318](#). It has not given that consent.

Determining whether the Hopi Tribe is an indispensable party requires the consideration of four factors:

- (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties;
- (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;
- (3) whether a judgment rendered in the person's absence will be adequate;
- (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

[\(Fed.R.Civ.P. 19\(b\)\)](#).

The district court determined that a judgment in favor of the plaintiffs rendered in the Hopi Tribe's absence would be highly prejudicial to the Tribe, that such a judgment could not be shaped to lessen the prejudice to the Tribe, and that in the absence of the Hopi Tribe, such a judgment would be inadequate between the parties. Although the district court recognized that "the absence of an alternative forum weighs in favor of" the plaintiffs, it concluded that "the other factors heavily outweigh this factor." We agree.

As discussed earlier, the Tribe will clearly suffer prejudice if the plaintiffs are successful in their action. *See Confederated Tribes, 928 F.2d at 1499* (prejudice stems from the same legal interests making someone a necessary party to the action). In the absence of the Tribe, there is no relief or remedy that would lessen the prejudice

(Cite as: 180 F.3d 1081)

the Hopi Tribe would suffer and still provide adequate relief to the plaintiffs. *See Shermoen, 982 F.2d at 1320* ("The relief sought in this case [a declaration that a statute which partitioned land between two tribes is unconstitutional] would prevent the absent tribes from exercising sovereignty over the reservations allotted them by Congress. It is difficult to imagine a more 'intolerable burden on governmental functions.' ") *see also Kescoli, 101 F.3d at 1310-11* (Hopi Tribe and Navajo Nation were indispensable parties to a challenge to a term of a settlement agreement between the tribes, a coal company, and a federal agency); *Pit River, 30 F.3d at 1101-03* (federally recognized governing body of Indian tribe was indispensable party to claims by group of Indian families to beneficial ownership of land held in trust by United States); *Shermoen, 982 F.2d at 1319* (absent tribes were indispensable parties to action brought by individual Indians challenging the constitutionality of a statute partitioning land between the tribes).

Although no alternative forum exists for the plaintiffs to seek relief, we conclude that the Hopi Tribe's interest in maintaining its sovereign immunity outweighs the interest of the plaintiffs in litigating their claim. *See Quileute, 18 F.3d at 1460-61* ("[A p]laintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity' [because] 'society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.'").

#### CONCLUSION

Because the district court did not abuse its discretion in concluding that the Hopi Tribe is a necessary and indispensable party which the plaintiffs failed to join, we affirm the district court's judgment dismissing the

action.

AFFIRMED.