No. 11–80

# In the Supreme Court of the United States

GILA RIVER INDIAN COMMUNITY,
*Petitioner,*
v.
G. GRANT LYON,
*Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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## QUESTION PRESENTED

This dispute began when the petitioner, a federally recognized Indian tribe, filed a proof of claim in a bankruptcy proceeding claiming that the debtors had trespassed over reservation land to access a parcel of non-Indian land located within the reservation borders. When the proof of claim led to an adversary proceeding in district court, the tribe argued that Federal Rule of Civil Procedure 19 prevented that court from deciding whether the debtors had legally accessed their property because the United States, the trustee of the reservation land where the alleged trespass occurred, could not be joined as a party. The Ninth Circuit and district court both rejected this argument, following the established principle that an Indian tribe may assert claims on its own behalf to protect interests in tribal lands without the United States' participation.

The question presented is whether in proceedings instituted by an Indian tribe for alleged trespass over tribal lands, the alleged non-Indian trespasser may respond by asserting its right of access over the tribal lands without joining the United States.

## RULE 29.6 STATEMENT

Respondent G. Grant Lyon, the former Chapter 11 Trustee for the Bankruptcy Estate of Michael Schugg and Debra Schugg, is not a corporation. The successors to G. Grant Lyon as Trustee, previously Alan A. Meda and currently Brenda Temerowski, are not corporations, either.

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# RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

Respondent G. Grant Lyon respectfully opposes the petition for a writ of certiorari.

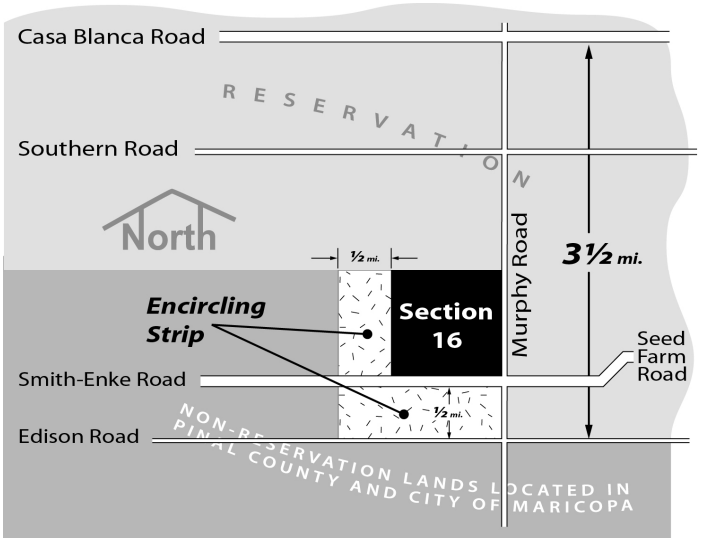
## STATEMENT OF THE CASE

This case concerns a dispute between a federally recognized Indian tribe, petitioner Gila River Indian Community, and the Trustee of a bankruptcy estate, respondent G. Grant Lyon, over access to a 657-acre parcel of non-Indian land known as "Section 16" in Pinal County, Arizona. [Appendix to the Petition for a Writ of Certiorari ("Pet. App.") 1a–2a] Although Section 16 has never been part of the Community's reservation, it is now encircled by reservation land. [Pet. App. 2a–3a]

1. The United States acquired Section 16 through the Gadsden Purchase in 1853 and transferred it in 1877 to the then-Territory of Arizona for the purpose of supporting Arizona's public schools. [*Id.*] The State of Arizona sold Section 16 to a private individual in 1929, and the parcel has been resold several times since then. [Pet. App. 3a–4a]

The Community's reservation was established in 1859. [Pet. App. 3a] The reservation did not abut Section 16 until 1883, however, when an executive order added the land directly north of Section 16 to the reservation. [*Id.*] In 1913, another executive order added the land directly to the south, east, and west of Section 16 to the reservation. [*Id.*] Since 1913, a half-mile strip of reservation land has separ-

ated Section 16 from other non-reservation land in Pinal County and the City of Maricopa. [*Id.*]




2. In 2004, the owners of Section 16, Michael and Debra Schugg, declared bankruptcy and listed Section 16 as their largest asset. [Pet. App. 4a] The bankruptcy court appointed respondent G. Grant Lyon as the Trustee of the estate. [*Id.*][1]

The Community filed a proof of claim in the bankruptcy court for the District of Arizona, claiming, among other things, a right to relief for alleged trespass over the half-mile strip of reservation land that separates Section 16 from the City of Maricopa. [*Id.*][2] In response, the Trustee filed an adversary

[1] G. Grant Lyon was succeeded as Trustee by Alan A. Meda, who was later succeeded by Brenda Temerowski. Ms. Temerowski is therefore the proper respondent.

[2] The Community's proof of claim also asserted that it had aboriginal title to and the right to zone Section 16. Because the Community is not seeking review of the aboriginal title or zoning issues, this opposition does not address those issues.

proceeding in the bankruptcy court, seeking a declaration of a legal right to access Section 16. [*Id.*] The adversary proceeding was transferred to the district court. [*Id.*]

3. In the district court, the Community moved to dismiss the Trustee's complaint on the ground that the United States was an indispensable party as it is a trustee over reservation lands. [Pet. App. 5a] The district court denied that motion without prejudice based on precedent that "allows an Indian or Indian tribe to sue without joining the United States." [Pet. App. 101a] The district court reasoned that the Community "really stands in the shoes of a plaintiff because it first sought relief in the bankruptcy court" with its proof of claim. [Pet. App. 102a]

The Community then filed counterclaims against the Trustee seeking a declaration of no legal access to Section 16, injunctive relief preventing access, and trespass damages. [Pet. App. 5a] The district court granted the Trustee summary judgment on his claim that the Community did not hold aboriginal title to Section 16, but ordered all other claims and counterclaims to proceed to trial. [Pet. App. 94a–95a]

The United States Bureau of Indian Affairs was aware of the dispute and expressed no interest in it. At the deposition of a BIA employee, the federal government's attorney made "clear for the record" that the government was there "as an accommodation to the parties in litigation, in which the United States is not a party, concerning a parcel of land [Section 16] in which the United States has no interest." [C.A. Supp. Excerpts of Record 253–55]

After a seven-day bench trial in September 2007, the district court issued detailed findings of fact and conclusions of law. Most relevant here, the district court held that Rule 19 of the Federal Rules of Civil Procedure did not prevent it from deciding the access question. [Pet. App. 59a–60a]

The district court concluded that the United States was a "required" party under Rule 19(a), but was not "indispensable" under Rule 19(b). [*Id.*] The district court's analysis was based on considerations of "equity and good conscience" and a balancing of the four "factors listed in Rule 19(b)(1)–(4)." [Pet. App. 60a] In particular, the district court reasoned that: (1) the Community had filed its own claims disputing access to Section 16; (2) "the Trustee would have no available forum within which to determine the legal access issue with regard to [the Community]" if the action was dismissed; (3) "a judgment rendered in the United State[s'] absence will not prejudice the United States because the United States will not be bound by the Court's judgment;" and (4) the Trustee had "urge[d]" the court to decide the access issue despite "the risk that the United States will hereafter contest such access." [Pet. App. 59a, 61a]

Having decided that the action could go forward without the United States, the district court held that legal access to Section 16 existed because Congress had conveyed implied easements when it granted Section 16 to Arizona as school trust land. [Pet. App. 69a] Given these easements, the district

court also rejected the Community's trespass counterclaim. [Pet. App. 74a][3]

4. On appeal, a unanimous panel of the Ninth Circuit (Wallace, J., joined by Kozinski, C.J., and Clifton, J.) affirmed in relevant part, holding that the district court did not legally err or otherwise abuse its discretion in holding that Rule 19(b) did not bar adjudication of the access issue. [Pet. App. 14a]

The court of appeals explained that "[a]lthough an action to establish an interest in Indian lands held by the United States in trust generally may not proceed without it, that rule does not apply where the *tribe* has filed the claim to protect its own interest." [Pet. App. 11a] In so holding, the circuit court followed its earlier decision in *Puyallup Indian Tribe v. Port of Tacoma*, which recognized that

> the rule is clear in this Circuit and elsewhere that, in a suit by an Indian tribe to protect its interest in tribal lands, regardless of whether the United States is a necessary party under Rule 19(a), it is *not* an indispensable party in whose absence litigation cannot proceed under Rule 19(b).

717 F.2d 1251, 1254 (9th Cir. 1983) (citations omitted). The court of appeals concluded that *Puyallup* applied to this case, explaining that "the Community effectively initiated this litigation by filing a proof of claim in the bankruptcy court contesting the Trustee's title and access rights to

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[3] At oral argument before the Ninth Circuit, the Community's counsel stated that the Community was not appealing the district court's rejection of its counterclaims.

Section 16." [Pet. App. 12a] In so doing, the court of appeals noted, the Community "had to know that there would be an objection which could be litigated only as an adversary proceeding with [it] named as the defendant." [Pet. App. 12a–13a] The circuit court thus "agree[d] with the district court: the Community 'really stands in the shoes of a Plaintiff' in this case." [Pet. App. 12a]

The court of appeals rejected the Community's argument that its filing of the proof of claim was a necessary defensive reaction to the Schuggs' bankruptcy filing, explaining that the bankruptcy "did not inherently raise issues regarding *access* to and *zoning* of Section 16." [Pet. App. 13a] "Such disputes," it noted, "were solely raised by the Community." [*Id.*]

The circuit court also found that "[n]one of the specific Rule 19(b) factors suggests that we should carve out an exception to the *Puyallup* exception in this particular case." [Pet. App. 14a] It noted that (1) "the government's interests are shared and adequately represented by the Community;" and (2) "this case presents significantly different circumstances than those in *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 128 S.Ct. 2180, 171 L.Ed.2d 131 (2008)," in which this Court held that a suit "could not go forward when it threatened to prejudice the interests of a foreign sovereign that had invoked sovereign immunity." [*Id.*][4]

[4] The Ninth Circuit also affirmed the district court's conclusions that (1) Rule 19 did not prevent adjudication of the access issue without the joinder of individual Indian allottees of allotments surrounding Section 16; and (2) the United States was not a "required" party under Rule 19(a) to an adjudication of the Community's aboriginal title claim to Section 16. [Pet.

5. The Community petitioned for rehearing en banc. The petition was denied without dissent. [Pet. App. 105a]

The Community obtained an extension of time to file its petition for rehearing en banc, representing that it needed more time "because the United States [had] informed the Community that it is reviewing the case and is considering seeking leave to participate at the rehearing stage as an *amicus curiae*." [9th Cir. No. 08–15570 Dkt. #41 at 2; 9th Cir. No. 08–15712 Dkt. #36 at 2] The United States elected not to participate, consistent with its behavior throughout the case.

## REASONS FOR DENYING CERTIORARI

The Community's petition challenges the Ninth Circuit's "*Puyallup* Rule," which allows Indian tribes to bring claims to protect alleged interests in land without joining the United States. The Community argues that under this Court's precedent, the United States is indispensable to such claims because of its trust obligations over tribal lands.

This Court has long recognized, however, the right of Indian tribes to assert claims on their own behalf to protect their interests in land. *See County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 236 (1985); *Creek Nation v. United States*, 318 U.S. 629, 640 (1943); *United States v. Candelaria*,

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App. 8a, 15a] Because the Community seeks review only of whether the access issue could be adjudicated without the joinder of the United States, these other aspects of the Ninth Circuit's Rule 19 analysis are irrelevant (as are *amicus* briefs of the Indian Land Working Group and Kennard B. Johns and Melva Enos).

271 U.S. 432, 442–43 (1926); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 112 (1919). These decisions would be meaningless if Rule 19 required dismissal of the Indian tribes' claims because the tribes cannot compel joinder of the United States.

The Community does not cite any authority from this Court to the contrary, as none of the decisions on which it relies involved a land dispute initiated by an Indian tribe. The Community instead relies on cases where this Court: (1) considered claims brought by a *non-Indian* to condemn an easement over Indian land, *Minnesota v. United States*, 305 U.S. 382 (1939); (2) determined that a *foreign* sovereign was indispensable to an interpleader action that did not involve Indian lands or an Indian tribe, and that arose under significantly different circumstances, *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008); and (3) did not even address Rule 19, *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011). None of these decisions casts any doubt on the *Puyallup* Rule, or its recognition of the importance of tribal sovereignty and self-determination.

The Community likewise cannot identify any conflicting circuit opinions. No circuit court has held that the United States is indispensable, because of its trust obligations over tribal lands, to claims brought by Indian tribes or allottees to protect their interests in these lands. In fact, the Eighth, Ninth, and Tenth Circuits have all concluded that such claims may proceed without the United States.

The absence of any conflicting authority leaves the Community no choice but to argue that the *Puyallup* Rule should not have been applied to the particular circumstances of this case. The Ninth

Circuit and district court both disagreed, however, finding that the Community's filing of a proof of claim in the bankruptcy court effectively initiated this litigation. The Community cannot credibly argue that this case-specific finding warrants review.

The Community's attack on the *Puyallup* Rule also fails to raise any important issue of enduring concern. The *Puyallup* Rule has existed for decades without any apparent harm to Indian tribes or the United States. Moreover, the Rule has been applied sparingly—in just four Ninth Circuit decisions since 1959, including this case. Indeed, the Rule arose here only because of this case's unique procedural background, in which an Indian tribe filed a proof of claim in bankruptcy court and a trespass counterclaim in district court to contest access to an island of non-Indian land within a reservation.

In any event, even if the *Puyallup* Rule were worthy of review, this case is a poor vehicle to grant certiorari because the United States has never expressed any interest in this litigation despite being well aware of it. The Community bases its argument on the supposed prejudice to the United States, yet the United States has never complained about being harmed by this action.

Certiorari should therefore be denied.

## ARGUMENT

### I. The *Puyallup* Rule Is Consistent with This Court's Decisions

The Community ignores the decisions of this Court involving land disputes initiated by Indian

tribes. The Ninth Circuit's decision is entirely consistent with these authorities, and with the Court's decisions involving Rule 19.

### A. This Court Has Long Recognized Indian Tribes' Right to Bring Actions Concerning Indian Lands

This Court has long recognized the right of Indian tribes to assert claims to protect their interests in land. *See Oneida Nation*, 470 U.S. at 236 (Indian tribe had the right to "maintain [an] action for violation of [its] possessory rights based on federal common law"); *Creek Nation*, 318 U.S. at 640 (Indian tribes have "as a general legal right … the power to bring actions on their own behalf" based on the unlawful seizure of their lands by railroad companies); *Candelaria*, 271 U.S. at 442–43 (an Indian tribe is "a juristic person and enabled to sue and defend in respect of its lands"); *Lane*, 249 U.S. at 112 (same).[5]

The Ninth Circuit's *Puyallup* Rule naturally follows from this Court's precedent. As the Tenth Circuit explained in applying the same rule as the Ninth Circuit, "[w]e cannot think the Supreme Court would have dealt so extensively with the mere capacity of the restricted Indians, the tribes, and pueblos to sue and defend in respect to their lands, if it regarded the United States as an indispensable party to the [tribe's] action." *Choctaw & Chickasaw Nations v. Seitz*, 193 F.2d 456, 459–60 (10th Cir.

[5] This Court has also held that Indian allottees may bring claims to protect their interests in their allotments. *See Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 372 (1968); *Heckman v. United States*, 224 U.S. 413, 433 (1912).

1951). "A holding that restricted Indians, tribes, or pueblos have capacity to prosecute or defend an action with respect to their lands would be of no avail to them, if the United States is an indispensable party to the action, since the joinder of the United States cannot be compelled." *Id.* at 460.

Indeed, without the *Puyallup* Rule, Indian tribes would be entirely dependent on the United States to bring claims to protect tribal lands or to consent to joinder to a tribe's claims. Such a paternalistic scheme cannot be reconciled with this Court's recognition that "Congress is committed to a policy of supporting tribal self-government and self-determination." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) (citations omitted).[6]

Of course, when an Indian tribe exercises its right to bring claims to protect its interests in land, it faces the same risk as any other litigant that the courts might reject its position. If an Indian tribe fails to prevail on claims it has initiated, it should not be heard to complain that those claims should not have been adjudicated without the United States.

### B. There Are No Conflicting Decisions from This Court

The Community does not cite any law questioning the line of cases from this Court recognizing the capacity of Indian tribes to bring actions to protect claimed interests in land. In fact, the Community

[6] Notably, Congress has also recognized the rights of Indian tribes to bring claims in federal court to protect their interests in land. *See* 25 U.S.C. § 194; 28 U.S.C. § 1362.

does not cite *any* decisions of this Court involving a land dispute initiated by an Indian tribe.[7]

The Community argues (at 14) that the Court's decision in *Minnesota v. United States* "[holds] that the United States' sovereign interest in Indian lands to which it holds title requires dismissal if sovereign immunity bars joinder of the federal government." In applying the *Puyallup* Rule, however, the Ninth Circuit correctly distinguished *Minnesota v. United States* as involving claims *instituted by a non-Indian* to condemn an easement over Indian land. [Pet. App. 11a–12a (citing *Puyallup*, 717 F.2d at 1255 n.1)] Such cases obviously raise different concerns than cases brought by Indian tribes.

Unable to cite authority involving a land dispute initiated by an Indian tribe, the Community argues that the *Puyallup* Rule conflicts with the Court's decisions in *Pimentel* and *Jicarilla*. Both contentions are incorrect.

In *Pimentel*, this Court held that Rule 19 required dismissal of a brokerage firm's interpleader action seeking judicial guidance regarding the distribution of assets of former Philippines President Ferdinand Marcos after one of the named defendants, the Philippine government, had invoked its sovereign immunity. The Community interprets *Pimentel* as requiring dismissal of this case because the United States also enjoys sovereign immunity.

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[7] For example, two of the cases cited by the Community—*Texas v. New Mexico*, 352 U.S. 991 (1957), and *Arizona v. California*, 298 U.S. 558 (1936)—involved disputes between States over water rights.

The Community's argument ignores that Rule 19(b) analysis "turn[s] upon factors that are case specific, which is consistent with a Rule based on equitable considerations." *Pimentel*, 553 U.S. at 862–63. Rule 19(b) and its considerations of "equity and good conscience" and four-part balancing test may have justified dismissal in *Pimentel*, but the district court and court of appeals acted well within their discretion in determining that dismissal was not warranted under the equally unique facts of this case. As the court of appeals recognized, *Pimentel* is readily distinguishable on numerous grounds:

- *Pimentel* did not involve claims by an Indian tribe to protect tribal lands.
- *Pimentel* did not involve a situation in which a party faced liability for trespass damages if precluded from proving its access rights.
- In *Pimentel*, the Philippine government invoked its sovereign immunity and objected to the suit going forward, *id.* at 868–69, whereas here the United States has never argued that this action should be dismissed.[8]

[8] Although the Court in *Pimentel* stated that "[a] case may not proceed when a required-entity sovereign is not amenable to suit" and "sovereign immunity is asserted," 553 U.S. at 867, the Court was simply describing the holding of two earlier cases: *Minnesota v. United States* and *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371 (1945). Neither of those cases involved claims asserted by an Indian tribe. In both of those cases, moreover, the plaintiff could not obtain effective relief after the United States had invoked its sovereign immunity, thus requiring dismissal. *See Mine Safety*, 326 U.S. at 375 (plaintiff seeking to restrain Navy official from stopping payment on defense contract); *Minnesota*, 305 U.S. at 386 (plaintiff seeking to condemn highway over land held in trust by United

- In *Pimentel*, the Court was concerned about the "more specific affront" to the Philippine government if property it claimed was "seized by the decree of a foreign court," 553 U.S. at 866, but no such concern is present here.
- *Pimentel* involved funds that would likely become unavailable to the Philippine government once distributed to other parties, while this land dispute does not raise that concern.
- In *Pimentel*, no other defendant was aligned with the Philippine government, whereas here the courts below found that "the [federal] government's interests are shared and adequately represented by the Community."

[Pet. App. 14a]

The Community also contends (at 13) that the decision below "unravels all of *Pimentel*'s protections" because it "leaves the United States no choice except either (i) to acquiesce in the court's grant of an easement across its land, or (ii) to multiply the litigation, surrender its immunity, and go to court to try to defend its legal interests." That argument misses the mark for multiple reasons.

As an initial matter, the Ninth Circuit did not "grant" any new easement across Community land. It instead recognized that easements had been conveyed by Congress before the reservation was expanded to encircle Section 16. [Pet. App. 17a–21a]

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States). Here, the United States has not voiced any objection to this litigation going forward, and the Trustee was able to obtain effective relief against the Community by preventing it from blocking access to Section 16 and recovering trespass damages.

Furthermore, the Community fails to show any prejudice to the United States. The United States could have appeared as a non-party and requested that this action be dismissed under Rule 19, had it so desired. The United States was aware of this case in both the district court and the court of appeals, yet it elected not to appear. Moreover, because the United States is not bound by the judgment, it may institute its own action against the Trustee if it believes that the Community did not represent its interests. [*See* Pet. App. 26a ("[T]he Trustee seeks only a declaration against the Community that he has legal access to Section 16, which will not bind the United States.")][9]

The Community's suggestion that these options are not enough, and that an action cannot proceed whenever the interests of the United States as trustee over tribal lands may be affected, would effectively deprive Indian tribes of the right to bring claims to protect their interests in their own lands.

As for *Jicarilla*, it did not even address Rule 19. The case instead addressed whether the Department of the Interior could withhold certain documents from an Indian tribe on the grounds of attorney-client privilege. The Community contends (at 22–23) that *Jicarilla* is momentous because the Court stated

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[9] The fact that the United States is not bound by the judgment also shows the irrelevance of 28 U.S.C. § 516, which is cited at 9–10 of the Indian Land Working Group's *amicus* brief. This statute "serves merely as a housekeeping provision which authorizes the Attorney General to bring an action where there is independent statutory authority." *United States v. Mattison*, 600 F.2d 1295, 1297 n.1 (9th Cir. 1979). The judgment here could not have intruded on the Attorney General's authority because the United States is not bound by it.

that the United States "'has often structured the [Indian] trust relationship to pursue its own goals.'" (quoting *Jicarilla*, 131 S. Ct. at 2324). But this statement just reinforces the need for the *Puyallup* Rule. Because the United States may be pursuing its own goals in its trustee role, Indian tribes need to have the ability to initiate claims on their own behalf to protect their own goals and policies concerning their lands.

## II. The *Puyallup* Rule Has Not Resulted in Any Inter-Circuit Conflict

The Community does not cite any court of appeals decision holding that the United States is indispensable to claims asserted by an Indian tribe because of its trust obligations over tribal lands. The Community instead suggests (at 22) there is an absence of authority on the issue, stating that "no other circuit has adopted the Ninth Circuit's *Puyallup* rule." Yet even that is not so.

The Tenth Circuit has held that "the inference must be drawn that the Supreme Court recognized the right of the restricted Indian, tribe, and pueblo to maintain … an action [concerning tribal lands] without the presence of the United States as a party." *Choctaw*, 193 F.2d at 460; *see also Jackson v. Sims*, 201 F.2d 259, 262 (10th Cir. 1953) (United States held not indispensable to a "suit … on behalf of the Indians to protect the title to the Indian lands against an attempted alienation.").

Similarly, the Eighth Circuit has held that trespass claims asserted by Indian allottees against non-Indian parties can proceed without the United States. *Bird Bear v. McLean County*, 513 F.2d 190,

191 n.6 (8th Cir. 1975); *see also Conroy v. Conroy,* 575 F.2d 175, 177–78 (8th Cir. 1978) (holding that the United States was not indispensable to a divorce action between tribal members, despite the potential division of land held in trust by United States).

Without any relevant circuit decisions to support its position, the Community defines the purported conflict as involving inconsistent applications of Rule 19. In particular, the Community argues (at 18) that the Ninth Circuit construed *Pimentel* as applying only to foreign sovereigns, while other circuits have applied it to domestic sovereigns. The Community fails to explain why this distinction deserves the Court's review. But in any event, the Ninth Circuit never stated that *Pimentel*'s reasoning applies only to foreign sovereigns. It instead concluded that *Pimentel* did not require dismissal of this action because the "particular suit" in *Pimentel* "present[ed] significantly different circumstances." [Pet. App. 14a] That conclusion was consistent with this Court's recognition in *Pimentel* that "the issue of joinder can be complex, and [Rule 19] determinations are case specific." 553 U.S. at 863.

The Community is also incorrect in suggesting (at 18–19) that the courts of appeals have issued conflicting opinions concerning "the importance of sovereign immunity interests in the Rule 19(b) analysis." Although the courts of appeals have acknowledged that sovereign immunity "may" be "compelling" in a Rule 19(b) analysis, they have still followed the text of that rule and balanced the four Rule 19(b) factors when a required sovereign cannot be joined. *See*, *e.g.*, *Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1999) ("Neither this court in *Enterprise Management*

nor the D.C. Circuit in *Wichita & Affiliated Tribes* held that immunity is so compelling by itself as to eliminate the need to weigh the four Rule 19(b) factors.").[10] This Court followed the same process in *Pimentel* by undertaking a detailed analysis of each of the four Rule 19(b) factors. *See* 553 U.S. at 865–72.

## III. The Ninth Circuit Correctly Applied the *Puyallup* Rule to the Facts of this Case

The Community not only attacks the *Puyallup* Rule, but also argues (at 20) that the Ninth Circuit improperly extended it "to cases where the Indian tribe is a defendant, hauled into court involuntarily and forced to litigate to protect its and the United States' existing interests in land." The district court and court of appeals both found, however, that the *Puyallup* Rule applied because the Community was the aggressor in this case. [Pet. App. 12a, 102a] The unique procedural background of this case supports this conclusion.

As the Ninth Circuit stated, the dispute over access to Section 16 was "solely raised by the Community" when it filed a proof of claim in the bankruptcy court, which "effectively initiated this litigation." [Pet. App. 12a–13a] The Trustee was forced to respond by "seek[ing] a declaration that will bind the Community, to defeat its assertion that the [debtors] have been trespassing on Reservation land." [Pet. App. 27a]

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[10] *See also Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 305–06 (6th Cir. 2009); *Kescoli v. Babbitt*, 101 F.3d 1304, 1310–11 (9th Cir. 1996); *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 774–78 (D.C. Cir. 1986).

The Community has never argued that Rule 19 prevented it from filing its proof of claim without the United States' participation. Nor could it, given this Court's longstanding recognition of the Indian tribes' right to bring claims to protect their interests in land. *See Oneida Nation,* 470 U.S. at 236; *Creek Nation*, 318 U.S. at 640; *Candelaria*, 271 U.S. at 442–43; *Lane*, 249 U.S. at 112. Moreover, Congress has contemplated that Indian tribes could file proofs of claim on their own behalf by providing for the waiver of sovereign immunity in these instances. *See* 11 U.S.C. § 106(b); *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1058 (9th Cir. 2004) ("Congress expressly abrogated the immunity of Indian tribes" in the Bankruptcy Code.).

The *Puyallup* Rule also applies to this action because the Community filed a trespass counterclaim. The Trustee defeated this counterclaim, and thus was not held liable for trespass damages, by proving that legal access to Section 16 existed. [Pet. App. 74a][11] Rule 19 could not have prevented the district court from hearing this defense because due process gave the Trustee the right to present its defenses to the Community's claims. *See Lindsey v. Normet,* 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense.") (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168, (1932)).[12]

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[11] As noted above, the Community did *not* appeal the district court's rejection of its counterclaims.

[12] The Community also contends (at 20 n.4) that the Ninth Circuit's application of the *Puyallup* Rule was improper because the Community was the named defendant in this action, and *Pimentel* holds that "formal party status controls in Rule 19(b)

Even though the Community was the aggressor in this litigation, the Community nevertheless argues that facts unique to this case made application of the *Puyallup* Rule inappropriate. For example, the Community emphasizes (at 16) that "the Ninth Circuit ruled that the easement [to Section 16] actually arose in 1877," when the land surrounding Section 16 was "owned directly and exclusively by the United States." But it was the Community, and not the United States, that asserted trespass claims against the Trustee in the bankruptcy and district courts. The policy behind *Puyallup* of allowing Indian tribes to assert claims to protect alleged interests in tribal lands thus applied to this case *regardless* of who owned the land surrounding Section 16 when the implied easements to this parcel were created.

The Community also argues (at 17) that application of the *Puyallup* Rule was inappropriate because the Trustee could have sought an easement across reservation land in accordance with 25 U.S.C. § 325 and 25 C.F.R. § 169. But that regulatory scheme only sets forth procedures for a party to purchase a *new* easement across Indian lands. As the Ninth Circuit explained, this scheme is irrelevant to the Trustee's claim that Congress conveyed implied easements *before* the reservation was expanded to

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analysis." But the Court in *Pimentel* was simply discussing one of the four Rule 19(b) factors: "whether the *plaintiff* would have an adequate remedy if the action were dismissed for non-joinder." 553 U.S. at 871 (emphasis added). Consistent with the plain language of Rule 19(b), the Court explained that this factor should only take into account the *plaintiff's* alternative remedies, even "in an interpleader action" where "the stakeholder is often neutral as to the outcome." *Id.*

encircle Section 16: "nothing in the scheme indicates that Congress, in creating procedures for obtaining *new* rights of way, intended to preempt all claims to *previously acquired* rights of way, such that holders of pre-existing easements would have to go through the new procedures." [Pet. App. 16a] Moreover, the procedures apply only after obtaining the consent of the affected Indian tribe or allottees (as well as the Secretary of the Interior), so it would hardly have been a viable option here even if the Trustee had been seeking a new easement.

## IV. This Case Raises No Important and Frequently Recurring Legal Issue

The Community argues (at 24) that the Ninth Circuit's decision will have "far-reaching implications for tribes and the United States." But the Ninth Circuit has recognized *since 1959* that Indian tribes may assert claims on their own behalf to protect their interests in land without joining the United States. *Skokomish Indian Tribe v. France*, 269 F.2d 555, 556–57 (9th Cir. 1959). The Community has not identified any "far-reaching" harm to Indian tribes or to the United States in the more than 50 years that the Ninth Circuit has applied this rule. In fact, the *Puyallup* Rule *benefits* Indian tribes because of the independence it confers.

The absence of any harm from the *Puyallup* Rule is also evident from the rarity of its application. Since 1959, the Ninth Circuit has issued just four reported decisions, including this case, holding that Rule 19 does not prevent an Indian tribe from asserting claims to protect tribal lands without joinder of the United States. *See Puyallup*, 717 F.2d

at 1254; *Fort Mojave Tribe v. LaFollette*, 478 F.2d 1016, 1017–18 (9th Cir. 1973); *Skokomish*, 269 F.2d at 556–57. The Tenth Circuit, which has adopted the same rule, has issued just two reported decisions under it—in 1951 and 1953. *See Choctaw*, 193 F.2d at 460; *Jackson*, 201 F.2d at 262.

Indeed, the limited reach of the decision below is apparent from the district court's recognition that this case arose out of a "unique procedural posture." [Pet. App. 101a] The Community does not suggest that Indian tribes commonly file proofs of claim in bankruptcy court contesting the legal access to a non-Indian parcel of land surrounded by an Indian reservation.

The Community also errs in arguing (at 17) that the Ninth Circuit has "charted … a path that is diametrically opposed to the principles of sovereign immunity and their role in [Rule 19] joinder analysis." The *Puyallup* Rule has existed for decades, yet the Ninth Circuit has dismissed several cases under Rule 19 when a required sovereign could not be joined and the particular facts of the case warranted dismissal. *See*, *e.g.*, *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024–25 (9th Cir. 2002) (holding that Indian tribes were indispensable parties); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1161–63 (9th Cir. 2002) (similar).

## V. This Case Is an Inappropriate Vehicle to Address the *Puyallup* Rule

Even if the Court were inclined to review the *Puyallup* Rule, this case presents a poor vehicle for doing so. Although the Community contends that the

lower courts' recognition of legal access to Section 16 prejudiced the United States, the United States has never voiced any objection to this litigation going forward despite ample opportunity to do so.

When this matter was before the district court, the United States indicated its neutrality. At a November 2006 deposition of a BIA employee, an attorney with the Office of the Solicitor for the United States Department of the Interior appeared on behalf of that employee and stated outright that the United States had "no interest" in the dispute:

> [The BIA is] here today as an accommodation to the parties in litigation, in which the United States is not a party, concerning a parcel of land [Section 16] in which the United States has no interest. I just wanted to make that clear for the record.

[C.A. Supp. Excerpts of Record 253–55]

The United States also declined to participate in the court of appeals. When seeking rehearing *en banc*, the Community sought an extension because it was trying to encourage the Solicitor General to file an *amicus* brief in support of its position. The Solicitor General declined the Community's invitation.

Finally, this case also presents an inappropriate vehicle for review of the *Puyallup* Rule because this Court's review would not disturb the district court's rejection of the Community's trespass counterclaim, which rested on the ground that the Trustee had proven legal access to Section 16. [Pet. App. 74a] At the oral argument before the Ninth Circuit, the Community's counsel stated that the Community

was *not* appealing the district court's rejection of its counterclaims. Thus, even if the Court vacated the Ninth Circuit's decision, the Community would still be bound by a judicial determination that legal access to Section 16 exists.

## CONCLUSION

The Community's petition for a writ of certiorari should be denied. The Court should likewise deny the Community's requests for summary reversal and for vacatur and remand in light of *Jicarilla*.

Respectfully submitted,

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