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The United States' Indispensability in Indian Land Claims: The Proper Application of Provident Tradesmens

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THE UNITED STATES' INDISPENSABILITY IN INDIAN LAND CLAIMS: THE PROPER APPLICATION OF *PROVIDENT TRADESMENS*

> "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith . . . ."[1]

I. INTRODUCTION

Indian tribes seeking to assert land claims in the United States face substantial hurdles. Many present land claims have sprung from alleged abuses and transactions that are over two hundred years old.[2] Matters of proof and the speculative nature of available testimony for these cases present significant challenges for plaintiffs. Records may be poor and there likely remain no witnesses to testify. While the passage of time makes it substantively difficult for Indians to prevail, procedural hurdles can make it impossible.

Due to the historical link between the federal government and Indian tribes, a significant number of Indian land claims implicate some action by the United States.[3] Where this is so, defendants may argue that the United States must be joined in the litigation since its acts are under scrutiny. Courts must then analyze whether the United States is a necessary or indispensable party.

A four-factor test set forth by the United States Supreme Court in *Provident Tradesmens Bank & Trust Co. v. Patterson*[4] guides this determination. First, a court must consider whether the nature of the litigation and the parties means the United States should be joined, if possible.[5] If the court makes such a determination, then the United States is a necessary party.[6] However, if the United States cannot be joined—perhaps due to its sovereign

1. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, v (1982).

2. *See, e.g.*, Miami Tribe of Okla. v. Walden, No. 00-cv-4142-JPG (S.D. Ill. filed June 2, 2000).

3. *See, e.g.*, Navajo Tribe v. New Mexico, 809 F.2d 1455 (10th Cir. 1987), discussed *infra* notes 161-200 and accompanying text.

4. 390 U.S. 102 (1968).

5. *See* FED. R. CIV. P. 19(a).

6. *See* Sokaogon Chippewa Cmty. v. Wisconsin, 879 F.2d 300, 305 (7th Cir. 1989) (declaring the United States a necessary, rather than indispensable, party).

immunity—the court must consider whether the suit can properly be adjudicated in the United States' absence. If the court determines the suit cannot be resolved without the United States' presence, then the United States is an indispensable party, and the suit must be dismissed.[7]

A number of Indian land claims have required a determination of whether the United States was an indispensable party. Four of these, *Navajo Tribe v. New Mexico*,[8] *Lee v. United States*,[9] *Nichols v. Rysavy*[10] and *Sokaogon Chippewa Community v. Wisconsin*,[11] are particularly significant. Although these cases were decided within only two years of each other, the courts used different processes to determine whether the United States was an indispensable party. In *Navajo Tribe*, *Lee* and *Nichols*, where the United States could not be joined, the courts ruled the United States was an indispensable party.[12] In *Sokaogon Chippewa*, however, where the United States also could not be joined, the court ruled the United States was not an indispensable party and the litigation was allowed to continue.[13] A case recently filed in the United States District Court for the Southern District of Illinois, *Miami Tribe of Oklahoma v. Walden*,[14] raised the issue of the United States' indispensability in Indian land claims once again.[15] These cases present an opportunity to evaluate the application of the *Provident Tradesmens* test.

This Comment analyzes the process applied in *Navajo Tribe*, *Lee*, *Nichols* and *Sokaogon Chippewa* for determining indispensability and offers a prediction of how the court might rule in *Miami*. It also serves as a general introduction to the substantial obstacles Indians face when pursuing land claims.

Part II provides a brief overview of the federal government's role in American Indian history, noting specifically policy that influenced Indian land rights over the past 200 years. Part III outlines the history and operation of the

7. *See, e.g.*, *Navajo Tribe*, 809 F.2d at 1471.

8. *Id*. at 1455.

9. 809 F.2d 1406 (9th Cir. 1987).

10. 809 F.2d 1317 (8th Cir. 1987).

11. 879 F.2d 300 (7th Cir. 1989).

12. *See Navajo Tribe*, 809 F.2d at 1472-73; *Lee*, 809 F.2d at 1411; *Nichols*, 809 F.2d at 1332-34.

13. *See Sokaogon Chippewa*, 879 F.2d at 305.

14. Miami Tribe of Okla. v. Walden, No. 00-cv-4142-JPG (S.D. Ill. filed June 2, 2000).

15. The author became familiar with the Miami's claim while working at Dankenbring, Greiman & Osterholt, L.L.P. (now Spencer, Fane, Britt & Browne, L.L.P.) from 2000 to 2001. The firm represented the Miami Tribe of Oklahoma at one point in the litigation. The views expressed herein are not necessarily those of Dankenbring Greiman & Osterholt, L.L.P., Spencer Fane Britt & Browne, L.L.P. or the Miami Tribe of Oklahoma. In June, 2001, the Miami dropped the suit.

rule on indispensable parties, set forth in the Federal Rules of Civil Procedure and interpreted by the Supreme Court in *Provident Tradesmens*.[16] Part IV introduces some of the guiding principles regarding the federal government's sovereign immunity, which are often raised as a barrier to Indian claims.

Part V presents cases that considered whether the United States was an indispensable party where sovereign immunity threatened the continuation of an Indian land claim.[17] The *Miami* claim is also presented in detail at Part V, and an analysis is set forth of how *Provident Tradesmens* might be applied to the facts in *Miami*.[18] Finally, Part VI offers a conclusion on the matters with which courts should most concern themselves when faced with an indispensability ruling in an Indian land claim.

II. THE HISTORIC LINK BETWEEN INDIANS AND THE FEDERAL GOVERNMENT

American Indians' history has been significantly impacted by the federal government's actions.[19] Occupying, as they do, a quasi-sovereign position in American federalism, somewhere between a State and a foreign nation, the courts and Congress have grappled with how to appropriately fashion Indian rights and remedies.[20] This struggle has produced conflicting decisions and backpedaling by Congress as the federal government moved from one policy to the next, attempting to determine how to treat the Indian within the American system.[21]

A familiar starting point in the history of the United States' relationship with Indians is the trilogy of opinions penned by Chief Justice John Marshall: *Johnson v. M'Intosh*,[22] *Cherokee Nation v. Georgia*[23] and *Worcester v. Georgia*.[24] These cases represent significant declarations of early Indian policy and prepared the foundation upon which subsequent Indian

16. *See* FED. R. CIV. P. 19(b).

17. *Sokaogon Chippewa*, 879 F.2d 300; *Navajo Tribe*, 809 F.2d 1455; *Lee*, 809 F.2d 1406; *Nichols*, 809 F.2d 1317.

18. Mark R. Scherer argues that more studies of the effects of government policy on individual tribes "are needed because only at the grassroots level can the tangible, human effects of the shifting tides of federal policy be truly assessed." *See* MARK R. SCHERER, IMPERFECT VICTORIES: THE LEGAL TENACITY OF THE OMAHA TRIBE 1945-1995 xi (1999).

19. Somewhat confusing, however, given their link with the federal government, is the considerable lack of access Indians have had to judicial remedies. *See, e.g.*, H. D. ROSENTHAL, THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION 12 (1990) (noting that from 1863-1881 the Court of Claims was closed to Indians, blocking their efforts to obtain redress for past injustices).

20. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); *infra* note 56.

21. *See* SCHERER, *supra* note 18, at xi.

22. 21 U.S. (8 Wheat.) 543 (1823).

23. *Cherokee Nation*, 30 U.S. 1.

24. 31 U.S. (6 Pet.) 515 (1832).

jurisprudence in the United States rests.[25] They provided the opportunity for Chief Justice Marshall to establish the extent of Indian land rights vis-a-vis the federal government's rights,[26] to rule on whether an Indian had standing to sue in federal court[27] and to determine the extent of a state's jurisdiction over tribal lands.[28]

United States Indian policy did not originate with these three cases, however. Just as Chief Justice Marshall analyzed the Indians' land rights in *Johnson* only after a review of the doctrine of discovery and colonial interactions with the Indians, a proper survey of the origins of the federal government's relationship with Indians begins with a review of colonial institutions and policies.[29]

A. The Colonial and Early National Years

The American colonies signed treaties with Indians beginning as early as Roger Williams' settlement of Rhode Island in 1636.[30] The practice of entering into treaties with Indians for land was based on three assumptions: first, that both parties were sovereigns;[31] second, that the Indians had some sort of transferable title and; third, that the transfer of Indian lands must be transacted by the government, rather than individuals.[32] These assumptions leant credibility to a process under which land was acquired from Indians only with their consent.[33]

In the early colonial years, it was important that Indians were dealt with prudently because, if for no other reason, they outnumbered the colonists.[34] Because of their desire to deal fairly with the Indians, the majority of lands the

25. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 382 (1886) (citing *Cherokee Nation* and *Worcester*).

26. *Johnson*, 21 U.S. at 604-05 (holding Indian transfer of real property to any party other than the United States was unenforceable).

27. *Cherokee Nation*, 30 U.S. at 20 (holding the Supreme Court did not have jurisdiction over Cherokee Indians since they were not a foreign nation).

28. *Worcester*, 31 U.S. at 595-96 (holding a person within the Cherokee reservation was not subject to the laws of Georgia).

29. *Johnson*, 21 U.S. at 572-603. This discussion compromises the bulk of the *Johnson* opinion.

30. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 47 (1945) [hereinafter COHEN FIRST ED.].

31. See generally Stephen B. Young, *Indian Tribal Sovereignty and American Fiduciary Undertakings*, 8 WHITTIER L. REV. 825 (1987), for a discussion of the necessity of recognizing a measure of sovereignty in the Indians.

32. COHEN FIRST ED., *supra* note 30, at 47. It was also Rhode Island where the potential abuse of individual colonists entering into unauthorized treaties with Indians for the purpose of purchasing their land first prompted a prohibition of such treaties in 1651. *Id.*

33. COHEN, *supra* note 1, at 53.

34. *Id.* at 55.

colonies obtained from them were through purchase, rather than treaty.[35] Later, during the French and Indian War, the British government assumed more control over dealings with the Indians.[36] Although the Crown played an important role in preserving peace between the Indians and border settlers, the colonies returned to negotiating with the Indians following the war.[37]

In *Worcester v. Georgia*, Chief Justice Marshall noted that after the Revolutionary War the United States continued the native-"potentate" relationship that the British had established.[38] After the war, the administration of the Articles of Confederation failed to grant the federal government the authority needed to effectively manage Indian affairs.[39] Upon ratification of the Constitution, however, the individual colonies transferred their authority to deal with Indians to the federal government.[40]

The Constitution establishes that Indian commerce is the exclusive domain of the federal government.[41] Apart from mention of Indians with respect to taxation and representation,[42] the "Indian Commerce Clause"[43] is the only reference to Native Americans in the original document.[44] Though it does not mention Indians, the treaty power[45] also provides authority for the federal

35. *Id*.

36. *Id.* at 57.

37. *Id*. at 57-58.

38. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 555 (1832).

> [T]he extinguishment of the British power . . . and the establishment of that of the United States in its place led naturally to the declaration, on the part of the Cherokees, that they were under the protection of the United States, and of no other power. They assumed the relation with the United States, which had before subsisted with Great Britain.

Id.

39. *See id.* at 558-59 (noting that "ambiguous phrases [following] the grant of power to the United States, were so construed by the states of North Carolina and Georgia as to annul the power [to regulate Indian commerce and affairs]").

40. *See id.* at 559. The Constitution

> confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian tribes*. These powers comprehend all that is required for the regulation of our intercourse with the Indiana [sic]. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded.

Id. (emphasis added); *see also* U.S. CONST. art. I, §§ 2, 8.

41. *Id.* § 8, cl. 3.

42. *Id.* § 2, cl. 3.

43. *See* COHEN, *supra* note 1, at 208. For a discussion of whether the Major Crimes Act of 1885 had its constitutional basis in the Indian Commerce Clause, see United States v. Kagama, 118 U.S. 375 (1886), discussed *infra* Part II.C.

44. *But see Kagama*, 118 U.S. at 378 (noting Indians mentioned in Fourteenth Amendment).

45. U.S. CONST. art. II, § 2, cl. 2. *See also* United States v. 43 Gallons of Whiskey, 93 U.S. 188, 197 (1876) (holding power to make treaties with Indians coextensive with that to make treaties with foreign nations).

government's actions with respect to Indians.[46] While it includes powers that the federal government might exercise over Indians, the Constitution provides a less-than-complete description of the proper *relationship* between the government and the Indians.[47] Thus the relationship, as it evolved early in the United States' history, was described as "an anomalous one, and of a complex character,"[48] and "marked by peculiar and cardinal distinctions which exist no where else."[49]

B. The Marshall Opinions

In *Cherokee Nation* and *Worcester*, Chief Justice Marshall had an opportunity to define the amorphous boundaries of the United States' relationship with Indians. These cases are recognized as the origins of the federal government's "trust relationship" or "guardian role" over Indians.[50] Before Chief Justice Marshall could develop this concept, however, he had to determine the status of Indian nations within the federalism sphere. He did so in *Cherokee Nation*.

Marshall noted the unique issues raised by the case,[51] but felt constrained to first address the matter of the Court's jurisdiction.[52] If the Cherokees were not a foreign nation, the Court had no jurisdiction to hear the case.[53] Finding that the Framers clearly separated Indians from foreign nations,[54] the Court

46. *See* COHEN, *supra* note 1, at 207-08.

47. Justice Miller observed that "[t]he constitution of the United States is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders." *Kagama*, 118 U.S. at 378.

48. *Id.* at 381.

49. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

50. *See, e.g.*, Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at Its Development and at How Its Analysis Under Social Contract Theory Might Expand Its Scope*, 18 N. ILL. U. L. REV. 115, 115-16 (1997); Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1213 (1975).

51. "If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined." *Cherokee Nation*, 30 U.S. at 15. The Cherokee Nation brought suit against the State of Georgia to enjoin it from enforcing its laws within lands designated to the plaintiffs under treaties with the United States. *Id*.

52. "Before we look into the merits of the case, a preliminary inquiry presents itself. Has this court jurisdiction of the cause?" *Id.* In other cases, Marshall chose to address the matter of the Court's jurisdiction only after discussing other issues. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

53. *See* U.S. CONST. art. III, § 2, cl. 1; *Cherokee Nation*, 30 U.S. at 15-16.

54. The Cherokee Nation's attorneys set forth the argument that the separation of Indian tribes from States and foreign nations in Article III was an attempt to clarify the federal government's power in the area, since the Articles of Confederation had conferred no such power, but not to separate them from "foreign nation" status. *Cherokee Nation*, 30 U.S. at 18. Marshall answered this by pointing out that the Framer's would have used language such as "to regulate

held "that an Indian tribe or nation within the United States [is] not a foreign state in the sense of the constitution, and cannot maintain an action in the courts of the United States."[55] The unique position the Indians occupied was not due solely to their status as something more than a State and less than a foreign nation, but also their dependency on the federal government.[56] The United States' guardian role developed from this recognition.[57]

To support the federal government's role as guardian from the States,[58] it was necessary to acknowledge that the Indians possessed some measure of sovereignty.[59] Without the recognition of Indian sovereignty, the exercise of power by the United States would be one of conqueror, rather than protector.[60] In *Cherokee Nation*, Chief Justice Marshall acknowledged the powerful position the Indians had once occupied in North America, but admitted that they had gradually sunk "beneath our superior policy, our arts, and our arms."[61] As a consequence, the Indians "yielded their lands by successive treaties, each of which contained a solemn guarantee of the residue . . . ."[62]

Once Marshall recognized a measure of sovereignty in the Indians, he could structure his description of the relationship of the federal government to the Indians in affirmative terms. The Indians "*acknowledge themselves* in their treaties to be under the protection of the United States; *they admit* that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs *as they think proper* . . . ."[63]

This language attributing sovereignty to the Indians was critical for the creation of the federal government's trust relationship with Indians. Without

commerce with foreign nations, *including the Indian tribes*, and among the several states." *Id.* at 19 (emphasis added).

55. *Id.* at 20.

56. Marshall observed that the Indians were neither a state nor a foreign nation: "In [the Indian Commerce Clause] they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the union." *Id.* at 18.

57. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 555 (1832).

58. *See infra* note 94.

59. *See generally* Young, *supra* note 31.

60. *But see* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (leaning heavily on the doctrine of discovery and concept of the sovereign conqueror). Ultimately the distinction between protector and conqueror can be viewed as one hinging on which entity derives the most benefit from the relationship.

61. *Cherokee*, 30 U.S. at 15.

62. *Id.* It was that residue which the Cherokee Nation sought to protect in its appearance before the Supreme Court. *Id.*

63. *Id.* at 17 (emphasis added). Moreover, as Marshall sorted through the argument that the Indians were not foreign nations, he phrased his description in a manner which recognized the Indians' sovereignty: "[T]he Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a *voluntary cession* to our government . . . ." *Id.* (emphasis added).

recognition of the inherent sovereignty of the Indians, there could be no legitimacy in the Indians yielding a portion of that sovereignty to the federal government.[64] To phrase it contractually, if the Indians had not yielded a portion of their sovereignty, then there was no consideration to support the United States' return promise of protection from the States.[65]

Just as the recognition of some measure of sovereignty in the Indians was necessary, so too was an explanation of the Indians' dependence on the United States.[66] In *Worcester*, Chief Justice Marshall explained that "[t]he Indian nations were, from their situation, necessarily dependent on some foreign potentate for the supply of their essential wants . . . ."[67] The relationship, he continued, was to be "that of a nation claiming and receiving the protection of one more powerful," rather than one of a nation "submitting as subjects to the laws of a master."[68] Thus, the guardian-ward relationship was established.[69] Although *Cherokee Nation* and *Worcester* created a foundation for the exercise of the federal government's power with respect to Indians, the exercise thereof would fundamentally change in subsequent years.

C. The Federal Government Increasingly Exercises Its Power Over Indians

In the second half of the nineteenth century, the transformation of the United States' relationship with the Indians from guardian to complete sovereign became increasingly noticeable.[70] In 1871, Congress discontinued

64. *See generally* Young, *supra* note 31.

65. Justice Thompson's dissent in *Cherokee* took issue with the concurrence of Justices Johnson and Baldwin, which emphasized the conquered status of the Cherokee people. Chambers, *supra* note 50, at 1216-17. Thompson's opinion "argued that the Cherokees were not a conquered people, but an unequal and inferior ally bound by a contractual arrangement (the treaty) to a more powerful protector nation." *Id.* at 1217.

66. Recognition of the dependence of the Indians is also used in *Kagama* as a justification for Justice Miller's expansion of the power of the federal government over Indians. *See infra* note 94 and accompanying text.

67. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 555 (1832). Here Marshall explained, *inter alia*, the articles of the Treaty of Hopewell between the United States and the Cherokees. *Id.* at 554-55.

68. *Id.* at 555.

69. *Worcester* further contributed to the establishment of a unique position for American Indians in its holding that ambiguous terms in a treaty should be interpreted as the Indians would have interpreted them. Chambers, *supra* note 50, at 1214 n.11.

70. Whether this was really a transformation of *power*, or just the outward expressions thereof, is discussed *infra* note 95. The first of the Marshall Trilogy, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), does not comport with the establishment of the federal guardian role over Indians as *Cherokee Nation* and *Worcester* do. In *Johnson*, a land dispute involving the sale of land by an Indian and the grant of the same land by the United States government presented the opportunity for the Court to rule on the enforceability of the transfer of land by an Indian to a private individual rather than the U.S. government. 21 U.S. at 571-72. Chief Justice Marshall

the practice of entering into treaties with Indians.[71] As a result, the exercise of the federal government's power with respect to Indians could no longer be tied to its treaty power[72] and increasingly the federal government's action was tied to the authority vested through the Indian Commerce Clause.[73]

United States v. Kagama,[74] which considered the application of the Indian Commerce Clause, has been cited as the most pronounced evidence of the transformation of the federal government's relationship with Indians.[75] In *Kagama*, the Court considered whether the federal courts had jurisdiction over an Indian committing murder against another Indian on an Indian reservation.[76] The Court had faced nearly identical facts just three years earlier in *Ex parte Crow Dog*.[77]

In *Crow Dog*, the Court ruled that the conviction of the accused was improper due to the Territory of Dakota District Court's lack of jurisdiction.[78] In the past, offenses "by Indians against each other were left to be dealt with by each tribe for itself, according to its local customs."[79] The Court noted that the "policy of the government in [this] respect has been uniform"[80] and that to uphold the jurisdiction of the district court in this situation "would be to reverse . . . the general policy of the government toward the Indians . . . from

outlined the doctrine of discovery and cited it as one source of federal dominance and sovereignty with respect to which transfer would be recognized. *Id.* at 572-86. Because *Johnson* justifies the exercise of the federal government's power with respect to Indians on the basis of the doctrine of discovery rather than the Indians' dependence, it is inappropriate to label all three cases of the Marshall Trilogy as support for the federal government's limited guardian role.

71. COHEN, *supra* note 1, at 208.

72. *See supra* note 45 and accompanying text.

73. U.S. CONST. art. I, § 8, cl. 3. *See supra* note 43 and accompanying text.

74. 118 U.S. 375 (1886).

75. *See, e.g.*, Aitken, *supra* note 50, at 116. It is notable that two of the most significant periods in the development of caselaw regarding the federal government's role with respect to American Indians, the early 1830's (*Cherokee Nation* and *Worcester*) and late 1860's through mid-1880's (General Allotment Act of 1877 and *Kagama*), coincided with times of vigorous discussion regarding States' Rights. The Nullification Crisis came quickly on the heels of *Cherokee Nation* and *Worcester* and the significance of *Kagama's* proximity to the Reconstruction Era Amendments should not be ignored. Whether a link can be formed between the expression of the government's role with respect to Indians and periods of federalism crisis remains to be explored elsewhere.

76. *Kagama*, 118 U.S. at 376.

77. 109 U.S. 556 (1883). There a Sioux Indian murdered another Sioux in Indian country. *Id.* at 557. For a definition of "Indian country," see COHEN, *supra* note 1, at 27-28.

78. *Crow Dog*, 109 U.S. at 572.

79. *Id.* at 571-72.

80. *Id.* at 572.

the beginning to the present time."[81] The Court declined to uphold federal jurisdiction in the absence of a clear expression of congressional intent.[82]

Congress made a clear expression of its intention in the three years between *Crow Dog* and *Kagama*. In 1885 the Major Crimes Act was passed, extending the federal courts' jurisdiction to all, regardless of race.[83] Indians were now subject to federal subject matter jurisdiction even if the crime they committed was against another Indian or on a reservation.[84] In *Kagama*, the Court was called upon to rule on the constitutionality of the Major Crimes Act.[85]

The Court, speaking through Justice Miller, began its analysis by searching for Constitutional authority on the matter of the federal government's relationship with Indians.[86] Miller observed that "[t]he constitution of the United States is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders."[87] Justice Miller further recognized the Indian Commerce Clause's instructive role with respect to the federal government's power over Indians.[88] Miller, however, quickly disposed of the possibility that the Major Crimes Act was founded upon the authority the Indian Commerce Clause granted Congress:

> [W]e think it would be a very strained construction of this clause that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for . . . [crimes,] *without any reference to their relation to any kind of commerce*, was authorized by the grant of power to regulate commerce with the Indian tribes.[89]

Following an explanation of the general sovereignty of the United States over those things within its borders,[90] the Court explained the significance of

81. *Id.*

82. *Id.*

83. *See* United States v. Kagama, 118 U.S. 375, 376-77 (1886). For a description of the Act, see COHEN, *supra* note 1, at 300-04.

84. *Kagama*, 118 U.S. at 376-77.

85. *Id.* at 376.

86. *Id.* at 378.

87. *Id.*

88. *Id. See supra* note 43 and accompanying text.

89. *Kagama*, 118 U.S. at 378-79 (emphasis added).

90. *Id.* at 380.

> [T]his power of congress to organize territorial governments, and make laws for their inhabitants, arises, not so much from the clause in the constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country in which the territories are, and the

the complex relationship between the United States and the Indians, using the opinions of Chief Justice Marshall in *Cherokee Nation* and *Worcester*.[91] Miller noted that "[i]n the opinions . . . [the Indians] are spoken of as 'wards of the nation;' 'pupils;' as local dependent communities."[92] His opinion declares the Major Crimes Act constitutional, concluding that "[t]he power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is seccesary [sic] to their *protection*, as well as to the safety of those among whom they dwell."[93] This statement, as well as others throughout the opinion, are evidence that the basis for the court's ruling was the Indians' dependency rather than the Indian Commerce Clause.[94]

D. An Attempt at Recognition of and Remedies for Past Injustices Visited Upon Indians: The Indian Claims Commission

With this newly defined power,[95] the potential for abuse was great.[96] The late nineteenth and early twentieth centuries witnessed some of the greatest injustices endured by Native Americans, including the Battle of Little Big Horn,[97] the Wounded Knee Massacre[98] and attempts at assimilation.[99]

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right of *exclusive sovereignty which must exist in the national government, and can be found nowhere else*.

Id. (emphasis added).

91. *Id.* at 382.

92. *Id.*

93. *Id.* at 384 (emphasis added).

94. *See, e.g.*, *Kagama*, 118 U.S. at 384-85.

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States,— dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

Id. (emphasis original). Basing the exercise of authority on the dependence of the Indians was an arguably broader basis upon which to legitimize the United States' action than the Indian Commerce Clause.

95. While it is tempting to describe the power as an altogether new one, some might argue that the federal government's plenary power always existed, but that it was just conceptualized in different ways. But see generally Aitken, *supra* note 50, and Chambers, *supra* note 50, for an argument that implies the actual power of the federal government, rather than the outward expressions thereof, was transformed over time.

96. See COHEN, *supra* note 1, at 127-43 for a general description of this period.

97. *See* ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 146-47 (3d ed. 1991).

98. *See generally* DEE BROWN, BURY MY HEART AT WOUNDED KNEE (1971).

99. Through assimilation the government hoped to "'civilize' the Indian by destroying his tribal society and forcing him to take his place in American society as an individual." ROSENTHAL, *supra* note 19, at 17.

Nonetheless, Indians were able to make a few modest advances. In 1879, a Nebraska federal district court established Indians to be "persons" for purposes of Fourteenth Amendment protections, and in 1881, a presidential commission reopened claims courts to Indians' suits.[100] Significant barriers remained, however. Although Indians petitioned Congress to allow them to bring their claims before the Court of Claims, the process brought much frustration, since "run[ning] a claim through the gauntlet of Congress and the bureaucracy was a tortuous, frustrating task and the results were meager."[101]

Eventually it was recognized that many Indians had legitimate legal claims for which there should be a remedy and that the process of forcing tribes to petition Congress for a special jurisdictional statute was ineffective. In 1946, Congress passed the Indian Claims Commission Act (ICCA),[102] which created a special jurisdiction to hear and dispense of these claims.[103] The Indian Claims Commission (ICC) provided an exclusive forum for Indian claims accruing against the United States prior to 1946.[104] If a tribe failed to bring its claims before the ICC in the five-year window provided by the ICCA, the claims were barred.[105]

The ICC's jurisdiction was extended beyond its original mandate as claims took longer to resolve than anticipated.[106] Eventually in 1978, the ICC's remaining docket was transferred to the Court of Claims.[107] Many of the cases

100. *Id.* at 15.

101. *Id.* at 13.

102. 25 U.S.C. § 70 (repealed 1978).

103. For a description of the Indian Claims Commission see generally MICHAEL LIEDER & JAKE PAGE, WILD JUSTICE (1997), ROSENTHAL, *supra* note 19, and IRREDEEMABLE AMERICA (Imre Sutton ed., 1985).

104. For a discussion of the remedies available under the ICCA, see *Sioux Tribe v. United States*, 8 Cl. Ct. 80, 88 (Cl. Ct. 1985) (holding that in creating the ICC, "Congress established a special tribunal capable of awarding only money damages as the appropriate measure of compensation."). *But see* Navajo Tribe v. New Mexico, 809 F.2d 1455, 1465-67 (10th Cir. 1987) (providing examples of the ICC or its successor, the Court of Claims, hearing cases seeking other than money damages, including declaratory judgment as to title to land); SCHERER, *supra* note 18, at 50 ("The [ICCA's] liberal jurisdictional provisions were significantly tempered, however, by the limitations of the actual remedial powers exercised by the ICC."). For a discussion of the significance of the decision to award money damages, rather than to return land, see generally Richard Allen Nielsen, *American Indian Land Claims: Land Versus Money as a Remedy*, 25 U. FLA. L. REV. (1973). Due to the limitation as to remedy, it may be argued that the ICC was not the place for a suit seeking something other than monetary damages to be brought against the United States. The Claims Court's response in *Sioux Tribe* and the Tenth Circuit comments in *Navajo Tribe*, however, demonstrate the opposition to this position. *See infra* note 183 and accompanying text.

105. *See Navajo Tribe*, 809 F.2d at 1469-70.

106. *See* ROSENTHAL, *supra* note 19, at 234.

107. *Id.* The Court of Claims has evolved into the present Court of Federal Claims.

initially filed in the five-year window ending in 1951 took over thirty years to resolve.[108] Nonetheless, what is most significant about the ICC is that it represented an opportunity for Indians to redress past injustices that had been denied them prior to 1946.

There are numerous, and perhaps more significant events and trends that punctuated the past two hundred years of Native American history. What is evident, however, from those briefly catalogued here, is the considerable control the federal government maintained over Indian affairs. This control, when combined with Indians' unique position within the federal system, closely links the protection of Indian rights to the United States' willingness to allow or become a party to litigation on the Indians' behalf.[109]

III. INDISPENSABLE PARTIES

Because of the historical interaction between the federal government and American Indians, the United States' indispensability is an issue that may frequently arise in Indian land claims. While a complete explanation of indispensable parties is beyond the scope of this Comment, the discussion below provides a brief introduction to the subject and may serve as the basis for an understanding of the significant challenge that the question of indispensability can raise for Indian litigants.

A. Origins of Indispensability

Questions of indispensability center around who must be present for adjudication and are governed by Federal Rule of Civil Procedure 19.[110] While the current wording has been in place since the 1966 amendment, the Rule's history extends even beyond the Federal Equity Rules of 1912.[111] The Supreme Court's 1855 decision in *Shields v. Barrow*[112] contributed much of the Rule's language:

> Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and

108. *See, e.g.*, *Sioux Tribe*, 8 Cl. Ct. 80 (1985).

109. *See generally* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

110. *See* FED. R. CIV. P. 19.

111. *See* 7 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1601, at 7-8 (3d ed. 2001) [hereinafter 7 WRIGHT].

112. 58 U.S. (17 How.) 130 (1854).

> final justice, without affecting other persons not before the court, the latter are not indispensable parties.[113]

The early wording of the Rule led to varying interpretations by lower courts and improper application of some of the Rules' vocabulary.[114] What resulted "was judicial concentration on 'an inward analysis of the nature of the rights asserted, rather than an outward assessment of the pros and cons of continuing with the particular case in the face of some incompleteness of dramatis personae.'"[115]

Among the criticisms of the Rule was the use of the terms "necessary" and "indispensable."[116] Some felt the "ready reliance on labels for solutions of particular cases" should not overshadow "a critical examination [of] the basic principles of required joinder."[117] Under the current Rule, courts are encouraged to reach decisions by balancing "pragmatic" considerations, an approach that is not inconsistent with *Shields*.[118] Ultimately, what the Advisory Committee sought to influence were not the results of earlier cases, but the process the courts employed in reaching them.[119]

B. The Interaction Between Rules 19(a) and 19(b)

Because it is important to understand the distinction between a "necessary" and an "indispensable" party, the interaction of subsections (a) and (b) of Rule 19 merits explanation. Rule 19(a) dictates that a person who may be joined without depriving the court of jurisdiction over the subject matter shall be joined if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or
>
> (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may

113. *Id.* at 139.

114. 7 WRIGHT § 1601, at 10 (noting improper interpretation of "separable" and "affecting").

115. *Id.* (citing Kaplan, *Continuing Work on the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 362 (1967)).

116. *See, e.g.*, Challenge Homes, Inc. v. Greater Naples Care Ctr., Inc., 669 F.2d 667, 669 (11th Cir. 1982).

117. 7 WRIGHT § 1601, at 11 (quoting Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 328-29 (1957)). "The factors now present in Rule 19 bear a strong resemblance to those suggested criteria." *Id.* at 13. *See infra* note 138 and accompanying text.

118. 7 WRIGHT § 1601, at 16.

119. *Id.* at 13. *See also* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119 (1968) (noting that a court cannot declare a party indispensable until it has examined the circumstances of the case).

> (i) as a practical matter impair or impede the person's ability to protect that interest or
>
> (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.[120]

The court does not need to proceed to the Rule 19(b) analysis if it is determined a party is not one who should be joined if feasible under Rule 19(a).[121] If, however, a party who should be joined if feasible cannot become a party because, *inter alia*, joinder would defeat the court's subject matter jurisdiction, then the court must decide whether "in equity and good conscience" the action should proceed.[122] If a party is labeled indispensable, it means the court has determined that, upon application of the "in equity and good conscience" standard to four factors, the action must be dismissed.[123]

Hence, a party is only declared indispensable if, after the consideration of the Rule 19 factors, the court determines the action cannot continue. If, on the other hand, the court concludes that the action may continue without the absent party, then the party is not indispensable, but necessary, and its absence is not fatal to the suit.[124] The proper application of the amended Rule's factors was set forth in *Provident Tradesmens Bank & Trust Co. v. Patterson*.

C. Provident Tradesmens

In *Provident Tradesmens Bank & Trust Co. v. Patterson*, the Supreme Court was faced with an early opportunity to interpret and apply the amended rule on indispensability.[125] The *Provident Tradesmens* litigation was the result of a car accident that occurred when Edward Dutcher's car, driven by Donald Cionci, crossed a median and collided with a truck.[126] Three people were

120. FED. R. CIV. P. 19(a). *See generally* 7 WRIGHT § 1604.

121. 7 WRIGHT § 1607, at 84.

122. FED. R. CIV. P. 19(b). An example of a jurisdiction-defeating circumstance would be the sovereign immunity of one of the parties, discussed *infra* Part III.A.

123. FED. R. CIV. P. 19(b).

> The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, 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; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id.

124. *See, e.g.*, Sokaogon Chippewa Cmty. v. Wisconsin, 879 F.2d 300 (7th Cir. 1989).

125. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).

126. *Id.* at 104.

killed and one was injured.[127] The court questioned whether Dutcher needed to be present for litigation between the respective insurance companies.[128]

In proceedings before the district court, Dutcher was limited in his testimony as to whether Cionci had permission to use the car due to Pennsylvania's "Dead Man Rule."[129] Under this rule, Dutcher could not testify against an estate if he had interests adverse to it.[130] Dutcher was allowed, however, to testify as to the living plaintiff, John Harris.[131]

The Third Circuit did not address the many state law issues raised on appeal,[132] but reversed on an alternative ground that had not been raised earlier.[133] This ground was that Dutcher was an indispensable party, and the court held that "the 'adverse interests' that had rendered Dutcher incompetent to testify under the Pennsylvania Dead Man Rule also required him to be made a party."[134]

The Supreme Court recognized that the lower court did not follow the provisions of Rule 19.[135] Labeling the lower court's approach "inflexible" and noting that the ruling "presented a serious challenge to the scope of the newly amended Rule 19" and "exemplifies the kind of reasoning that the Rule was designed to avoid," the Supreme Court granted certiorari.[136]

The Court emphasized that the purpose of examining the four factors was to determine whether "in equity and good conscience" a court could proceed without a party.[137] The Court analyzed the four factors, but, for convenience, presented them differently than the exact wording of the Rule.[138] The Court considered, first, the plaintiff's interest in the forum; second, the defendant's

127. *Id.*

128. *Id.* at 105-06.

129. *Id.*

130. *Provident Tradesmens*, 390 U.S. at 106.

131. *Id.*

132. The state law issues included "the fairness of submitting the question as to Harris to a jury that had been directed to find in favor of the two estates whose position was factually indistinguishable . . . ." *Id.* at 106 n.1.

133. *Id.* at 106.

134. *Id.*

135. *Provident Tradesmens*, 390 U.S. at 106-07.

136. *Id.* at 107.

137. *Id.* at 109.

138. *Id.* at 110 n.2. The Court noted that its list followed that presented in Reed, *supra* note 117, at 330. For a listing of the factors as contained in Rule 19, see *supra* note 123 and accompanying text. *See also* 7 WRIGHT § 1602, at 19-20 (pointing out that although *Provident Tradesmens* ordered the factors differently, courts are still required to take into account "much the same elements when deciding a compulsory-joinder question").

wish to avoid multiple litigation;[139] third, the interests of the "outsider" who may be indispensable; and fourth, the interest of the courts and the public in "complete, consistent, and efficient settlement of controversies."[140]

In its analysis, the Court paid particular attention to the third factor: the interests of the outsider who may be indispensable.[141] The Court explained that "since the outsider is not before the court, he cannot be bound by the judgment rendered," but that this did not mean "a court may never issue a judgment that, in practice, affects a nonparty."[142] The Court noted that, notwithstanding this, a court was obliged to consider the interests of nonparties.[143] The essential question, the Court explained, was whether a judgment in the absence of the party would "impair or impede" that party's ability to protect its interest in the subject matter.[144] Finally, the Court acknowledged that the Rule granted courts the flexibility to shape relief in a manner that would accommodate the interests articulated in the Rule's four factors.[145]

The Supreme Court rejected the Court of Appeal's contention that an indispensable party was a category defined by substantive law and that the definition could not be altered by rule.[146] It held that "whether a particular lawsuit must be dismissed in the absence of that person . . . can only be determined in the context of the particular litigation."[147] Because a court

139. For the second factor, the Court noted more specifically that it goes to the defendant's "wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another." *Provident Tradesmens*, 390 U.S. at 110.

140. *Id.* at 109-12. Throughout its discussion of the Rule 19 factors, the Court explained application at both the trial and appellate levels. *Id.*

141. *Id.* at 110-11.

142. *Id.* at 110.

143. *Id.*

144. *Provident Tradesmens*, 390 U.S. at 110.

145. *Id.* at 111. Justice Harlan noted that "[h]ad the Court of Appeals applied Rule 19's criteria to the facts of the present case, it could hardly have reached the conclusion it did." *Id.* at 112. In reversing, Justice Harlan particularly noted that the Court of Appeals could have fashioned appropriate relief if it was concerned with the threat to Dutcher. *Id.* at 115. The opinion also explained that, with respect to the fourth factor, once the litigation had reached the appellate stage, the influence of the preference for efficiency "had entirely disappeared: there was no reason then to throw away a valid judgment just because it did not theoretically settle the whole controversy." *Id.* at 116.

146. *Provident Tradesmens*, 390 U.S. at 116-17.

147. *Id.* at 118. The court further noted that there was no "prescribed formula for determining in every case" whether a party was indispensable. *Id.* at 118 n.14 (quoting Niles-Bement-Pond Co. v. Iron Moulders' Union Local No. 68, 254 U.S. 77, 80 (1920)). "The decision whether to dismiss . . .must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Id.* at 118-19.

cannot know "whether a particular person is 'indispensable' until it ha[s] examined the situation to determine whether it can proceed without him," a ruling on indispensability compels the court to consider the merits of the case.[148]

IV. FEDERAL SOVEREIGN IMMUNITY

The four factors of the indispensability analysis, as interpreted by the Supreme Court in *Provident Tradesmens*, provide a framework for considering a case's merits. One of the issues that may arise while engaging in an analysis of a case's merits with respect to indispensability is the federal government's sovereign immunity.

The United States' sovereign immunity protects it from being named a defendant without its consent.[149] Federal sovereign immunity has long been recognized, and draws its origins from England, where the King could do no wrong.[150] Although criticized for violating the principle that no one is above the law, sovereign immunity is justified on several grounds.[151] One such justification is that the government would be hindered were it subject to liability for every injury it caused.[152] Another justification is that sovereign immunity "furthers the separation of powers by limiting judicial oversight of executive conduct."[153]

The federal government may waive its sovereign immunity, but this waiver must be clear.[154] The waiver must take the form of federal legislation, for the executive branch may not consent to suit.[155] In Indian land claims, courts have been required to interpret statutes that govern the federal government's

148. *Id.* at 119.

149. Overton v. United States, 74 F.Supp.2d 1034, 1038 (D.N.M. 1999). *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 589-612 (3d ed. 1999).

150. *See* CHEMERINSKY, *supra* note 149, at 590.

151. *Id.* at 590-91.

152. *See* The Siren, 74 U.S. (7 Wall.) 152, 153-54 (1868), *cited in* CHEMERINSKY, *supra* note 149, at 590 n.8.

153. CHEMERINSKY, *supra* note 149, at 590. Chemerinsky notes Justice Oliver Wendell Holmes' justification for the United States' sovereign immunity: "[C]laiming a right to sue the government is 'like shaking one's fist at the sky, when the sky furnishes the energy that enables one to raise the fist.'" *Id.* at 591 (citing Kawananakoa v. Polybank, 205 U.S. 349, 353 (1907)).

154. *See generally* John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 4 WIS. L. REV. 771 (1995).

155. CHEMERINSKY, *supra* note 149, at 589-90. Such legislation has arisen in *Miami Tribe of Okla. v. Walden*, No. 00-cv-4142-JPG (S.D. Ill. filed June 2, 2000), discussed *infra* Part V.F. On February 28, 2001, Illinois Congressman Tim Johnson introduced a bill that would allow the Miami Tribe of Oklahoma to sue the United States in the Court of Federal Claims. H.R. 791, 107th Cong. (2001).

relationship with Indians to determine whether these statutes amount to a waiver of the United States' sovereign immunity.[156]

The United States' sovereign immunity plays a significant role when questions of joinder arise. Although a determination that the United States is a necessary party requires that it be joined if possible, sovereign immunity may make joinder impossible. If the court then determines the United States did not waive its sovereign immunity, the court must evaluate whether the federal government is indispensable.

The federal government's sovereign immunity is especially critical when considering the rights asserted by American Indians. Because their history is inextricably tied to the actions of the United States, many suits brought by Indians will implicate the interests of the United States.[157] These interests include present-day interests the United States might have in, for instance, real property,[158] or the United States' interest in not subjecting itself to liability for past actions.[159] Because of the barrier it presents for joinder, the federal government's sovereign immunity will often require courts to rule on whether the United States is indispensable.

V. FEDERAL SOVEREIGN IMMUNITY: A POTENTIALLY FATAL BLOW FOR INDIAN LAND CLAIMS

A number of cases have presented the issue of whether the United States is an indispensable party in litigation implicating Indian land interests. Four such cases, decided over a two-year period, provide examples of different approaches to the indispensability analysis and different results.[160]

A. Navajo Tribe v. New Mexico

In 1907 President Theodore Roosevelt added approximately 1.9 million acres to reservation lands of the Navajo Indians in Arizona and New Mexico.[161] President Roosevelt intended, however, for the reservation of these

156. *See, e.g.*, Nichols v. Rysavy, 809 F.2d 1317, 1325-26 (8th Cir. 1987) (determining Indian General Allotment Act was not waiver of United States' sovereign immunity).

157. *See supra* Part II.

158. *See, e.g.*, Navajo Tribe v. New Mexico, 809 F.2d 1455, 1472-73 (10th Cir. 1987) (noting "large holding of land claimed by the United States in this case").

159. *See, e.g.*, Sokaogon Chippewa Cmty. v. Wisconsin, 879 F.2d 300, 304 (7th Cir. 1989) ("[The United States] must not fear the consequences of a judgment in this suit.").

160. *Sokaogon Chippewa*, 879 F.2d 300; *Navajo Tribe*, 809 F.2d 1455; Lee v. United States, 809 F.2d 1406 (9th Cir. 1987); Nichols v. Rysavy, 809 F.2d 1317 (8th Cir. 1987).

161. *Navajo Tribe*, 809 F.2d at 1457. For a discussion of executive order reservations generally, see COHEN, *supra* note 1, at 127-28. *See generally* Note, *Tribal Property Interests in Executive-Order Reservations: A Compensable Indian Right*, 69 YALE L.J. 627 (1960).

lands to be temporary.[162] In keeping with the Indian policy du jour,[163] the land would be allotted to the Indians individually and then the surplus would be opened to the public domain.[164]

Soon after President Roosevelt designated the Navajo land, a New Mexico congressman introduced a joint resolution that would return all unallotted lands to the public domain.[165] The final version of the resolution provided that "whenever the President is satisfied that all the Indians in any part of the [Navajo reservation] . . . have been allotted, the surplus lands in such part of the reservation shall be restored to the public domain . . . by proclamation of the President."[166]

Near the end of 1908, President Roosevelt restored all unallotted lands within the Navajo reservation, with the exception of 110 unapproved allotments, to the public domain.[167] In 1911, President Taft restored additional lands within the reservation.[168] The United States thereafter issued patents on part of the restored lands to the State of New Mexico and others.[169]

In *Navajo Tribe v. New Mexico*, the plaintiff tribe sought to affirm its title to lands within its reservation.[170] The tribe sought a declaratory judgment that the United States had breached its fiduciary duty to the tribe by restoring reservation land to the public domain through President Roosevelt's actions of 1908 and 1911.[171] The tribe argued "that the Executive Orders were null and void, because they . . . [returned] the unallotted land to the public domain" before all the Navajos were first granted an allotment.[172]

The district court dismissed the suit against the United States, holding that the tribe's claims were barred because the tribe failed to pursue them under the ICCA.[173] The district court then held the suit could not proceed against the remaining defendants under Federal Rule of Civil Procedure 19(b) "in the absence of the United States as grantor of the patents" through which the remaining defendants derived title.[174]

162. *Navajo Tribe*, 809 F.2d at 1457-58.

163. *See supra* note 21 and accompanying text.

164. *Navajo Tribe*, 809 F.2d at 1458. For a discussion of allotment, see generally D.S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (1973).

165. *Navajo Tribe*, 809 F.2d at 1458.

166. *Id.* at 1459.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Navajo Tribe*, 809 F.2d at 1457.

171. *Id.* at 1462. In addition, the tribe sought "mesne profits and restitution of all rents, profits, and other income derived from the defendants' use of the land . . . ." *Id.*

172. *Id.*

173. *Id.* at 1462. See *supra* Part II.D for a discussion of the ICC.

174. *Navajo Tribe*, 809 F.2d at 1462-63.

On appeal, the tribe argued that their claim was not barred because the ICC could not hear suits brought for other than money damages.[175] The tribe challenged, *inter alia*, the dismissal of the suit against not only the United States, but also New Mexico and the private defendants.[176] After discussing the rationale behind the district court's holdings,[177] the court declined to decide whether the rationale was persuasive, and embarked upon an independent analysis.[178]

The court found the tribe's assertion that the ICC was "only empowered to hear controversies involving a 'taking' of land[179] where Indian title was concededly extinguished," a far too restrictive interpretation of the ICC's jurisdiction.[180] An analysis of the legislative history of the ICCA[181] and a pre-ICC case based on special Congressional jurisdiction[182] led the court to conclude that, although the tribe would have had to accept money damages,[183] the tribe's action to quiet title should have been brought before the ICC.[184] The court noted that the "restriction as to remedy represents a fundamental

175. *Id.* at 1463.

176. *Id.*

177. *Id.* at 1463-64.

178. *Id.* at 1464.

179. *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. United States*, 650 F.2d 140 (8th Cir. 1981), upon which "the district court relied chiefly," involved an alleged unconstitutional taking under the Fifth Amendment. *Navajo Tribe*, 809 F.2d at 1463.

180. *Navajo Tribe*, 809 F.2d at 1464.

181. *Id.* at 1465.

182. *Id.* at 1466. The court noted that in *Yankton Sioux Tribe v. United States*, the plaintiff tribe's claim "assert[ing] title to lands" was remedied by compensation, rather than the return of the land, since the lands had subsequently been open to settlement and were now in the possession of "innumerable innocent purchasers . . . ." *Navajo Tribe*, 809 F.2d at 1466-67 (citing Yankton Sioux Tribe v. United States, 272 U.S. 351, 357 (1926)). For criticism of the heavy reliance the *Navajo Tribe* court placed on *Yankton Sioux*, see Richard W. Hughes, *Indian Law*, 18 N.M. L. REV. 403, 412-18 (1988).

183. *Navajo Tribe*, 809 F.2d at 1467. The court further noted that "[b]y restricting the remedy, the [ICCA] forced the Indian to accept a post factum sale," and that "[i]t is well within Congress' power to provide a forum in which all Indian claims could be heard but to restrict the remedy available for such claims." *Id.* (quoting Note, *Indian Breach of Trust Suits: Partial Justice in the Court of the Conqueror*, 33 RUTGERS L. REV. 502, 516-17 (1981)). *But see* SCHERER, *supra* note 18, at 50 n.11 (noting that the limitation as to remedy was a decision of the Commission itself).

184. *Navajo Tribe*, 809 F.2d at 1467. The court dispensed with the unavailability of a remedy to return the land to the tribe by noting that the tribe "simply would have had to accept just monetary compensation if the [ICC] found their claim to title valid." *Id.* Tribes have refused to accept monetary awards, holding out, instead, for the land. *See, e.g.*, Sioux Tribe of Indians v. United States, 8 Cl. Ct. 80, 87-88 (1985). The *Sioux Tribe* court noted that "[a]n action seeking the return of their ancestral land must be maintained elsewhere," but failing to name an available forum. *Id.* at 88-89.

policy choice made by Congress out of sheer, pragmatic necessity that . . . land title . . . could not be disturbed because of the sorry injustices suffered by native Americans."[185]

In response to the tribe's assertion that affirming the dismissal would be "tantamount to finding that the ICCA 'extinguished by implication valid Indian titles' and that such a finding constitute[d] 'a backhanded assertion of eminent domain powers,'" the court noted that the ICCA provided a "long-overdue opportunity to litigate the *validity* of such titles and to be recompensed for Government actions inconsistent with those titles."[186] The court concluded the tribe's cause of action against the United States accrued prior to 1946 and, therefore, had to be dismissed.[187]

Following the affirmation of the dismissal of the claims against the United States, the court turned its attention to the district court's dismissal of the claims against the other defendants.[188] The court held it would examine the district court's ruling under an "abuse of discretion" standard.[189] The court found no such abuse and affirmed the dismissal based on the indispensability of the United States.[190]

In making this determination, the court adopted the trial court's reasoning as dispositive,[191] but briefly reviewed the four factors to be considered when ruling on indispensability.[192] The court used the four factors described in Rule 19(b), rather than the interpretation set forth in *Provident Tradesmens*.[193] Upon considering whether judgment in the absence of the United States would be prejudicial to it or those already parties, the court remarked that "we need not consider any possible prejudice to other parties" because "prejudice to the United States is clear" and "[a] finding . . . that title . . . is vested in the [t]ribe

185. *Navajo Tribe*, 809 F.2d at 1467. The court noted "a major collateral concern" of Congress addressed in the ICCA: calming uncertainties regarding title to land. *Id.* (citing Note, *supra* note 183, at 516-17).

186. *Id.* at 1469 (emphasis original). The court then noted criticisms of statutes of limitations, but concluded that "[t]hey represent a public policy about the privilege to litigate." *Id.* at 1470.

187. *Id.* at 1471.

188. *Id.* at 1470-71.

189. *Id.* at 1471. *But see* Sokaogon Chippewa Cmty. v. Wisconsin, 879 F.2d 300, 303-04 (7th Cir. 1989) (holding that due to "fell . . . consequences" of ruling on indispensability, "abuse of discretion" standard is improper and power of appellate court in this area should be plenary).

190. *Navajo Tribe*, 809 F.2d at 1471.

191. *Id.* at 1471.

192. *Id.* at 1472. See also *supra* Part III for a description of the four-factor test for indispensability.

193. *Navajo Tribe*, 809 F.2d at 1472. *See supra* note 123 and accompanying text; *see also supra* Part III.C for the factors as set forth in *Provident Tradesmens*.

when the United States claims title to much of that land undoubtedly prejudices the latter's interests."[194]

When considering the second factor, the extent to which the shaping of relief might ameliorate prejudice to the outside party, the court held that "prejudice could not be lessened or avoided either through protective provisions . . . or through the shaping of relief [because title to the reservation] . . . must be decided entirely or not at all."[195] With respect to the third factor, the adequacy of a judgment in the third party's absence, the court stated that due to the large holding of land claimed by the United States in the case, "a judgment rendered in its absence would not be adequate."[196]

Finally, when considering the fourth factor, whether the plaintiff would have an adequate remedy if the action was dismissed for nonjoinder, the court "concede[d] that the [t]ribe ha[d] no such remedy."[197] The court noted, however, that Rule 19(b) did not state the weight to be given to each factor, and that "the importance of each factor [must be determined] on the facts of each particular case and in the light of equitable considerations."[198] After this reference to its power of discretion, the court explained that if the tribe were allowed to "avoid the admittedly catastrophic effects under the ICCA of sleeping on its pre-1946 claim . . . the very intricate and exclusive remedial scheme that Congress created in the ICCA" would be undermined and the "interests of innocent, third-party grantees would . . . be disturbed."[199] The trial court's dismissal of the claim was affirmed because, the court noted, the action could not proceed "in equity and good conscience."[200]

B. Lee v. United States

Lee v. United States presented another opportunity to consider whether the United States was an indispensable party in an Indian land claim. There, the court faced a dispute over tracts of Alaskan land[201] patented to two Alaska Native corporations[202] pursuant to the Alaska Native Claims Settlement Act

194. *Navajo Tribe*, 809 F.2d at 1472.

195. *Id.*

196. *Id.* at 1472-73.

197. *Id.* at 1473.

198. *Id.*

199. *Navajo Tribe*, 809 F.2d at 1473.

200. *Id.*

201. The land at issue was located in the Eagle River Valley, near Anchorage. Lee v. United States, 809 F.2d 1406, 1407 (9th Cir. 1987).

202. *Id.* at 1408 (Eklutna, Inc. and Cook Inlet Region, Inc.).

(ANSCA).[203] The plaintiffs, three would-be homesteaders, asserted that the Native corporations were constructive trustees, holding the disputed land for their benefit.[204] In addition to the two corporations, the suit also named as defendants the United States, the Secretary of the Interior and the Director of the Bureau of Land Management.[205]

Prior to the lands being patented to the corporations in 1979, the Federal Power Commission set them aside in 1950 "as a possible site for future power projects."[206] Two years later, the Commission determined that the lands would not be adversely affected for the purpose of power development by entry into the public domain, but despite this determination, the land was never properly opened to the public domain by the Secretary of the Interior.[207] Government agencies made clear to the plaintiffs on numerous occasions that the land that they claimed was within the "powersite classification" and would not be patented to them.[208]

After dispensing with some other jurisdictional matters,[209] the court turned to whether to affirm the district court's dismissal of the claims against the other defendants due to the United States' indispensability.[210] The court ruled that the relief sought by the plaintiffs required the presence of the United States because establishing their own entitlement would require "direct proceedings against the United States."[211] It was not enough to show that the "patentee should not have received the patent; [the plaintiff] must also show that he . . . is entitled to it [instead]."[212] The court dismissed the suit.[213]

203. For a further description of ANSCA, see generally Marilyn J. Ward Ford and Robert Rude, *ANSCA: Sovereignty and a Just Settlement of Land Claims or an Act of Deception*, 15 TOURO L. REV. 479 (1999).

204. *Lee*, 809 F.2d at 1408.

205. *Id.* at 1406.

206. *Id.* at 1407.

207. *Id.*

208. *Id.* at 1407-08. The Secretary of the Interior responded to a 1959 letter from the plaintiffs, "pointing out that they were prevented from occupying . . ." the lands. *Id.* at 1407. The Bureau of Land Management rejected the homestead applications of the plaintiffs in 1961. *Id.* at 1407-08. In 1964 the United States patented all the lands not classified as powersites upon which the plaintiffs homesteaded to the plaintiffs in return for their "agreement to quit asserting claims to the classified lands." *Id.* at 1408. While the government argued that, in light of this "compromise," the plaintiffs should be estopped from claiming title to the classified tracts, the plaintiffs asserted there was no evidence indicating they entered into a compromise. *Id.* The court did not reach this issue directly on appeal. *Id.*

209. *See Lee*, 809 F.2d at 1410 (discussing plaintiffs' arguments that they were not barred by the Quiet Title Act's disclaimer of interest provision).

210. *See* Lee v. United States, 629 F. Supp. 721, 734 (D. Alaska 1985).

211. *Lee*, 809 F.2d at 1411.

212. *Id.* at 1410-11 (citing Kale v. United States, 489 F.2d 449, 454 (9th Cir. 1973)).

213. *Id.* at 1411.

In reaching its conclusion on indispensability, the court did not include a weighing of the Rule 19 factors in its analysis.[214] The court did not specify the basis for its ruling. The court did acknowledge, however, that upon different facts the United States might not have been indispensable.[215]

C. Nichols v. Rysavy

In *Nichols v. Rysavy*, the court ruled the United States was an indispensable party after considering the factors from *Provident Tradesmens*.[216] The plaintiffs claimed that the fee simple patents their ancestors acquired from the United States were illegally issued.[217] Due to the illegality of the patents, the plaintiffs argued, the subsequent transfers of the South Dakota property were void.[218]

The patents at issue were of land originally allotted by the General Allotment Act and held in trust by the federal government.[219] The Burke Act, passed by Congress in 1906, established a scheme under which Indians were presumed incompetent to hold the patents in fee until the Secretary of the Interior was "satisfied that [an] Indian allottee [was] competent and capable of managing his or her affairs."[220] The Burke Act shifted the burden of issuing fee patents from Congress to the Secretary of the Interior.[221] Furthermore, the Secretary could now issue the fee patents before the trust period expired.[222]

For the next ten years, Indians who applied and were deemed competent, "generally on the local Indian superintendent's recommendation,"[223] were granted fee patents before the trust period had fully run. In 1916, this policy changed, and "competency commissions" would visit reservations and issue fee patents to allottees they determined were competent, whether or not the allottees had applied for a patent.[224] This "forced fee patent" policy was

214. *Id.* (citing *Nichols v. Rysavy*, 809 F.2d 1317, 1331-34 (8th Cir. 1987)). *But see id.* ("See generally Fed.R.Civ.P. [sic] 19(b).").

215. *Id*.

216. *Nichols*, 809 F.2d at 1333-34.

217. *Id.* at 1320.

218. *Id.*

219. *Id.* at 1321. For a description of the Indian General Allotment Act, see COHEN, *supra* note 1, at 130-38.

220. *Nichols*, 809 F.2d at 1321.

221. *Id.*

222. *Id.* One explanation for the shift in responsibility was that the Secretary of the Interior and the Indian Department "[knew] best when an Indian ha[d] reached such a stage of civilization as to be able and capable of managing his own affairs." *Id.* at 1322. Another was that the Burke Act was "'intended to accelerate the assimilation of the Indians . . . .'" *Id.* (citing Nebraska v. Andrus, 586 F.2d 1212, 1219 (8th Cir. 1978)).

223. *Id.* at 1322.

224. *Id.*

intended to directly place the burden of independence on the Indians.[225] The burden was cast even more directly in 1917 and 1919 when Commissioner of Indian Affairs Cato Sells' declarations provided for the issuance of fee patents to adult Indians of the half-blood without investigation—their competence was presumed.[226]

Due to these policies, "[t]housands of Indians in the western United States received forced fee patents, with primarily harsh results."[227] One court noted:

> Abuses were rampant: it is clear from the historical evidence that many patents were issued to Indians obviously incapable of taking on the burdens of unrestricted property ownership in the midst of a more sophisticated white society. It is clear that some holders of these patents were cheated out of their land by speculators and merchants, and that some land was lost when the Indians sold or mortgaged it for money to pay state property taxes, taxes which could not be legally assessed . . . .[228]

Others became aware of the abuses. For example, Charles H. Burke, Commissioner of Indian Affairs of the incoming Harding Administration, abolished the forced fee and required application and competency examinations before patents would be issued.[229] Later Congressional action returned patented lands to trust status and extended the trust period indefinitely.[230]

After hearing these historical facts and wading through a number of jurisdictional statutes and analyzing whether the claim was barred due to a statute of limitations,[231] the court concluded that the United States could not be sued and turned its attention to whether the federal government was an indispensable party.[232] The court noted that in its ruling on indispensability it would be mindful of *Provident Tradesmens*[233] and acknowledged the Supreme Court's "reject[ion of] an inflexible and formulistic approach to joinder problems."[234]

225. *Nichols*, 809 F.2d at 1322.

226. *Id.*

227. *Id.*

228. *Id.* at 1322-23 (quoting Bordeaux v. Hunt, 621 F. Supp. 637, 640 (D.S.D. 1985)).

229. *Id.* at 1323.

230. *Nichols*, 809 F.2d at 1323. Ultimately less than 500 forced fee patents were returned to trust status under these statutes. *Id.*

231. The court considered, *inter alia*, 28 U.S.C. § 2401 (providing a six-year statute of limitations for suits against the United States), the Quiet Title Act and the Indian Claims Limitation Act of 1982. *Nichols*, 809 F.2d at 1323-31.

232. *Id.* at 1331-34.

233. *Id.* at 1332.

234. *Id.*

The court concluded that the plaintiffs' interest in the forum weighed heavily in favor of the tribe.[235] It noted that "'better joinder' in another forum would still be an impossibility regarding the United States," since the principles regarding sovereign immunity would still apply.[236] The court also considered the second and third *Provident Tradesmens* factors, regarding the defendant's wish to avoid multiple litigation and the interests of the outsider who might be joined.[237] While noting that "the government's liability cannot be tried 'behind its back'"[238] and pointing out circumstances where the United States did not need to be a party,[239] the court distinguished the case before it. It explained that the claim was based on the argument that the government wrongfully issued the patents and, as such, *directly* implicated the actions of the United States.[240] The court did not directly address the multiple liability threat to the defendants other than the United States.[241]

In its analysis of the fourth factor, the interest of the court and the public to complete, consistent and efficient settlement of controversies, the court considered the far-reaching effects of clouded real estate titles and the validity of fee patents issued by the United States: "If these fee patents can be successfully attacked, the entire United States title system is in jeopardy."[242] The court noted that title insurance companies might face financial ruin and that land would be removed from the local tax base.[243] In light of these catastrophic results, the court concluded that the fourth factor, as well as the combination of the other three, weighed in favor of dismissal.[244]

D. Sokaogon Chippewa Community v. Wisconsin

The Seventh Circuit was faced with the question of the United States' indispensability in an Indian land claim in *Sokaogon Chippewa v. Wisconsin*.[245] The plaintiff tribe's complaint was founded on two treaties that had been signed by the United States in 1842 and 1854.[246] The 1842 treaty ceded to the United States a large tract of land in return for "various promises

235. *Id.*

236. *Nichols*, 809 F.2d at 1332-33.

237. *Id.* at 1333.

238. *Id.* (quoting Mine Safety Appliances Co. v. Forrestal, 326 U.S. 371, 375 (1945)).

239. *Id.* (explaining that where an Indian allottee did not receive his bargained-for consideration or where it was alleged that allotments were transferred by forged deeds, the "dispute[s] did not appropriately involve the United States").

240. *Id.*

241. *See Nichols*, 809 F.2d at 1333.

242. *Id.*

243. *Id.*

244. *Id.*

245. 879 F.2d 300 (7th Cir. 1989).

246. *Id.* at 301.

and other consideration," including "the right of hunting on the ceded territory, *with the other usual privileges of occupancy*, until required to remove by the President of the United States."[247] The court concluded that the plan was to eventually move the tribe west of the Mississippi River.[248] Resistance to this plan, however, brought about a second treaty in 1854.[249] This treaty promised the tribe "substantial land east as well as west of the Mississippi, including land in Wisconsin."[250] The land disputed by the plaintiff tribe in *Sokaogon Chippewa* was allegedly included in the land granted by the 1854 treaty.[251]

Judge Posner, writing for the court, noted that the complaint alleged the United States "reneged on [its] promise" by not building a reservation for the tribe on the disputed tract.[252] Although the tribe did not allege exactly when the United States "reneged" on its promise, the tribe's complaint did claim that the Sokaogon lost possession of the tract within just a few decades of signing the treaties.[253] Apart from the apparent violation of the 1854 treaty,[254] because the United States did not satisfy a condition of the 1842 treaty, the tribe argued the right of occupancy conferred on the tribe never terminated.[255] The tribe's complaint also alleged the United States granted "mineral and other rights to various persons . . . in derogation of the tribe's rights."[256]

The court quickly disposed of the matter of whether the tribe could sue the United States. It held that because the tribe's "cause of action against the U.S. must certainly have accrued well before August 13, 1946," the critical date for claims brought before the ICC, it was too late to sue the federal government.[257]

247. *Id.* (emphasis original).

248. *Id.*

249. *Id.*

250. *Sokaogon Chippewa*, 879 F.2d at 301.

251. *Id.*

252. *Id.* at 301-02.

253. *Id.* at 302.

254. *See supra* text accompanying note 250.

255. *Sokaogon Chippewa*, 879 F.2d at 302. *See also supra* note 247 and accompanying text.

256. *Sokaogon Chippewa*, 879 F.2d at 302. One of the named defendants was Exxon Corporation, who, it was alleged, had been exercising mineral rights in the disputed tract. *Id.* at 301.

257. *Id.* at 302. The tribe was unsuccessful in arguing that the United States should be estopped from pleading the ICC's statute of limitations "because [the United States] interfered with the tribe's obtaining adequate legal representation." *Id.* The tribe's complaint alleged the Bureau of Indian Affairs "encouraged the 'agglomerating' of all Chippewa claims into a single claim for presentation to the [ICC] and that the law firm picked by the Bureau . . . unaccountably failed to include the [tribe's] claim." *Id.* The court noted that for estoppel to apply there had to be some misconduct. *Id.* This misconduct, it noted, was not commitment by the Bureau, whose desire to pool claims was "reasonable and sensible," but by the law firm. *Id.* (noting that there may have been no misconduct by the firm, either). The tribe was bound by the attorneys chosen

The tribe argued, however, that insofar as the 1842 treaty granted a right of use, rather than a right in fee simple, the cause of action did not accrue until 1976, when defendant Exxon began fencing the land.[258] The tribe further noted that the Quiet Title Act provided a twelve-year statute of limitations, which had not run when their suit was filed in 1986.[259]

The court dismissed this argument, however, noting that the statute of limitations had run because, the court assumed, the tribe had discovered prior to Exxon's activity on the land that the United States had asserted "in the tract inconsistent with the tribe's occupancy rights."[260] In support of this, the court noted the existence of vacation homes and other private residential buildings which should have been sufficient evidence to the tribe that the United States "may at some time have infringed the Indians' right of occupancy which had been reserved in the treaty."[261]

Finding that the district court had properly dismissed the United States, Judge Posner moved on to the issue of indispensability and whether the suit against the remaining defendants needed to be dismissed.[262] The court noted the lack of case law on the standard of appellate review of a Rule 19(b) determination, but stated that most cases, including *Provident Tradesmens*[263] and a number of Seventh Circuit decisions, "implicitly treat[ed] appellate review as plenary."[264] Because the "finding of indispensability [was] so fell in its consequences," the court declined to follow the narrow standard of review used in *Navajo Tribe*.[265]

After establishing the plenary power of review of a ruling on indispensability, the court ruled that "[u]nder any standard, the district court's determination that the U.S. is an indispensable party must be reversed . . . ."[266]

by the Bureau because "Indian tribes are not permitted to make contracts that are not approved by the [Bureau,] . . . including contracts with attorneys." *Id.*

258. *Id.* at 302-03.

259. *Id.* at 303. The court noted that the Quiet Title Act allowed the naming of the United States as a defendant in a real property dispute in which the government claimed an interest. *Id.*

260. *Id.*

261. *Sokaogon Chippewa*, 879 F.2d at 303.

262. *Id.*

263. *See supra* Part III.

264. *Sokaogon Chippewa*, 879 F.2d at 303. Judge Posner noted the Tenth Circuit's decision in *Navajo Tribe*, where the court stated that "since evaluation of indispensability 'depends to a large degree on the careful exercise of discretion by the district court,' we will only reverse a district court's determination for abuse of discretion." *Id.* (citing Navajo Tribe v. New Mexico, 809 F.2d 1455, 1471 (10th Cir. 1987)). *See also supra* Part V.A.

265. *Sokaogon Chippewa*, 879 F.2d at 304.

266. *Id.* The court noted that "none of the considerations listed in the rule and elaborated in *Provident Tradesmens* or other cases provides any support for the district court's determination." *Id.*

The court explained how its analysis of the four factors from *Provident Tradesmens* led it to this conclusion.[267] The plaintiff had "no other route for establishing its rights in the tract,"[268] and the remaining defendants were not at risk of multiple liability.[269] Furthermore, the court reasoned, the United States must not have feared the consequences of a judgment in the suit because it had "declined to take any position on its indispensability."[270] As for the fourth factor, the public's interest in resolution, the court ruled that "public interest favors where possible the resolution of legal questions on the merits" and that it "also favors repose, but [that] this aspect . . . is secured by statutes of limitation."[271] The court stated that if "the Sokaogon have a good claim to this land, they ought not be barred from prosecuting it by their inability to sue an entity perhaps only remotely involved in their dispute with Exxon and the other occupiers."[272]

267. *See supra* note 123 and accompanying text; *supra* Part III (describing the difference between the factors considered by the court in *Navajo Tribe* and those outlined in *Provident Tradesmens*).

268. *Sokaogon Chippewa*, 879 F.2d at 304.

269. The court found the contrary to be true, noting that the defendants would have the opportunity to bring suit against the United States if, in fact, the defendants did lose the suit. *Id.* The court expressed no view on the merits of such a charge against the United States but explained that because the nature of the Rule 19(b) inquiry involved a weighing of intangibles, the force of precedent was limited. *Id.*

At this point the court strayed a bit from the *Provident Tradesmen* factors. Here, the court examined the defendant's risk of multiple liability, whereas in *Provident Tradesmens*, the Court's second factor was the defendant's risk of multiple *litigation*. *See supra* note 139 and accompanying text. The difference is worth noting, since multiple litigation is a possibility in situations where the threat of multiple liability is not present.

270. *Sokaogon Chippewa*, 879 F.2d at 304.

271. *Id.* The court later noted the interests of amici American Land Title Association about a suit which could "unsettle titles throughout a large tract of land." *Id.* at 305. In response, the court stated that "many legal wrongs were done to the Indians, and the Supreme Court recently held that an Indian tribe could bring a suit to recover land conveyed to the State of New York almost two centuries ago." *Id.* (citing County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985)).

272. *Id.* at 304. The court noted:

> To exaggerate slightly . . . it is as if every time someone claimed that someone else was encroaching on his property he would have to sue not only the alleged encroacher (here Exxon) but also the alleged encroacher's predecessors in title right back to King James or Lord Baltimore (here in the U.S.). So far as can be determined . . . the relationship of the U.S. to the Indians' controversy with Exxon and the other occupiers of the land in derogation of the Indians' alleged occupancy rights is that of a predecessor in title (to Exxon), no more.

Id. at 304.

After distinguishing the case at bar from three cases holding the United States was indispensable,[273] the court placed much emphasis on the failure of the United States to disclaim indispensability.[274] While acknowledging the complaint's allegation that "the U.S. made grants in derogation of the plaintiff's treaty rights,"[275] the court noted that the record was unclear on when and to whom these grants were made and ruled that the district court would have to straighten out these matters on remand.[276] In the end, the court found the United States to be merely a necessary, rather than an indispensable party.

E. Reconciling the Circuit Split

Sokaogon Chippewa's outcome differs significantly from that in *Navajo Tribe*, *Lee* and *Nichols*. In *Sokaogon Chippewa*, the court recognized the precarious position in which Indian litigants are placed and applied the *Provident Tradesmens* process to reach an outcome that allowed the tribe's action to proceed.

The facts of the cases also provide some evidence of why there was a difference in outcomes. In *Sokaogon Chippewa*, the court noted what might be the most significant factor distinguishing these cases: the United States' interest.[277] In *Navajo Tribe*, the United States itself claimed the land in question.[278] The United States made no such claim to the disputed land in *Sokaogon Chippewa*. In *Lee* and *Nichols*, the government was subject to potential liability.[279] In *Sokaogon Chippewa*, Judge Posner noted that if the United States had any fear of liability it likely would have expressed an opinion regarding whether it was indispensable.[280]

It seems logical that the nature of the disputed land might have influenced the outcome of the cases. In *Navajo Tribe*, *Lee* and *Nichols* the disputed land was located in relatively desolate areas: New Mexico, Alaska and South Dakota.[281] The tract of land considered in *Sokaogon Chippewa*, however, was further east, in Wisconsin, where the population density was likely higher.

273. *Sokaogon Chippewa*, 879 F.2d at 304-05 (discussing *Navajo Tribe*, *Lee* and *Nichols*). The court distinguished these cases on the grounds that in two of the cases the United States was "clearly exposed to potential liability" and that in the third "property rights claimed by the U.S. were in jeopardy." *Id.*

274. *Id.* at 305.

275. *Id.* The *Sokaogon Chippewa* court's reasoning differs from the *Nichols* court's by holding that the "directness" of the claim regarding the United States' actions was not sufficient to merit finding the United States indispensable. *See supra* note 240 and accompanying text.

276. *Sokaogon Chippewa*, 879 F.2d at 305.

277. *See supra* note 273.

278. *See Sokaogon Chippewa*, 879 F.2d at 305.

279. *See id.*

280. *Id.*

281. The opinions in these cases give no description of the disputed land.

Furthermore, the presence of copper and zinc on the land made its value substantial.[282] Judge Posner directly confronted the concerns of the American Land Title Association regarding the ruling's potential effect on land titles throughout the region.[283] His dismissal of the Association's concerns demonstrated his willingness to look around the characteristics of the land to allow the tribe's litigation to continue. Ultimately, however, the outcomes defy common sense; the suit disputing title to the more valuable land was allowed to continue and those to the more desolate lands were halted.

The difference in these cases may also boil down to the strength of the interests the Indian-claimants held. In *Lee* and *Nichols*, the Indians claimed title through congressional enactments.[284] In *Navajo Tribe*, the plaintiffs' claim was based on executive orders.[285] In *Sokaogon Chippewa*, however, the claim was founded on treaties between the plaintiff tribe and the United States.[286] The court may have held the interests the tribe acquired through the treaty with the United States higher than those acquired through legislation or executive order. Unfortunately, the opinions shed little light on this score.

It is possible other factors contributed to the different rulings by the *Navajo Tribe*, *Lee*, *Nichols* and *Sokaogon Chippewa* courts. These decisions illustrate, however, that the four factors of the indispensability analysis leave courts ample room to entertain myriad considerations.

F. The Miami Claim

In 1795, the United States signed the Treaty of Greenville with a number of Indian tribes in the Northwest Territory.[287] The purpose of the treaty was "[t]o put an end to destructive war, to settle all controversies, and to restore harmony and a friendly intercourse" between the United States and the signatory tribes.[288] The treaty established "a boundary line between what would be considered United States lands to which Indian title had been relinquished and what would be considered remaining Indian lands, the title to

282. *Sokaogon Chippewa*, 879 F.2d at 301. Although the court recognized that the land was rural, it acknowledged the presence of "federal and state public lands . . . vacation homes, farms, and other private residences." *Id.*

283. *Id*. Title insurance companies filed amicus briefs with the court in *Nichols*, as well. *See* Nichols v. Rysavy, 809 F.2d 1317, 1320 (8th Cir. 1987).

284. *See generally supra* Part V.B, C.

285. *See supra* note 161 and accompanying text.

286. *See supra* note 246 and accompanying text.

287. Treaty with the Wyandots, 7 Stat. 49 (1795). Parties to this treaty included the Wyandots, Delawares, Shawanese, Ottawas, Chippewas, Pottawatomies, Miamis, Eel River, Weas, Kickapoos, Piankashaws, and Kaskaskia. *Id*.

288. *Id.*

which had been recognized and not relinquished."[289] In essence, the United States recognized that a great deal of the "Northwest" was the possession of Indians, but did not attempt to specifically recognize which tribe possessed which parcel of land until a later time.[290] In return for this recognition, the Indians ceded to the United States much of present-day Ohio.

The federal government signed the Treaty of Grouseland[291] with the Miami Indians ten years after the Treaty of Greenville to resolve the issue of which lands specifically belonged to the Miami.[292] The Miami claimed that in the Treaty of Grouseland the government recognized the Miami "as having exclusive title, ownership and right to possession of . . . the Wabash Watershed . . . ."[293] The language of the treaty appears to confirm this.[294] The tribe claimed that because the United States never "adopt[ed] a treaty or convention as federal law required," the tribe retains treaty-recognized title to the Wabash Watershed lands in Illinois.[295]

In June of 2000 the Miami filed suit in the United States District Court for the Southern District of Illinois against twenty-five landowners in fifteen different counties in east-central Illinois.[296] The tribe sought declaration of its treaty-recognized title to the land, possession of the land, and damages "for the period during which it was unlawfully deprived of possession."[297] The tribe claimed rightful title to the disputed land under the Greenville and Grouseland treaties.

289. Complaint for Possession of Indian Tribal Lands, Damages and Declaratory Judgment, Miami Tribe of Okla. v. Walden, No. 00-cv-4142-JPG, ¶6 (S.D. Ill. filed June 2, 2000) [hereinafter Miami Complaint].

290. *See id.*

291. Treaty of Grouseland, 7 Stat. 91 (1805).

292. *See* Miami Complaint ¶¶1, 7-8.

293. Miami Complaint ¶8.

294. Treaty of Grouseland, 7 Stat. 91, Art. IV (1805).

> [I]n order to quiet their minds on that head, the United States do hereby engage to consider them as joint owners of all the country on the Wabash and its waters, above the Vincennes tract, and which has not been ceded to the United States, by this or any former treaty; and they do farther engage that they will not purchase any part of the said country without the consent of each of the said tribes. *Provided always*, That nothing in this section contained, shall in any manner weaken or destroy any claim which the Kickapoos, who are not represented at this treaty, may have to the country they now occupy on the Vermillion river.

Id. at 91-92 (emphasis original). It is likely one of the disputed issues in the *Miami* litigation, should the case reach trial on the merits, will be the meaning of "the Wabash and its waters."

295. Miami Complaint ¶11.

296. *See id.* ¶¶1-3. The State of Illinois was not named a defendant.

297. Memorandum of Plaintiff in Opposition to Motion of the State of Illinois to Intervene for the Limited Purpose of Moving to Dismiss, Miami Tribe of Okla. v. Walden, No. 00-cv-4142-JPG (S.D. Ill. filed June 2, 2000) [hereinafter Plaintiff's Opposition to State's Intervention].

In August of 2000, the State of Illinois filed a Motion to Intervene for the Limited Purpose of Moving to Dismiss (State's Motion).[298] In the State's Motion, Illinois asserted that the suit threatened its "sovereignty and jurisdiction over, and thus its power to regulate and tax, activities on the tracts . . . ."[299] The State's Motion also noted that the Miami's complaint "attacks the actions of the United States government."[300] Illinois argued that the court lacked subject matter jurisdiction over the suit because of the sovereign immunity of the State and the federal government and that, because itself and the United States were indispensable parties, the suit must therefore be dismissed.[301] The United States did not assert a position with respect to its indispensability in the *Miami* litigation. On March 30, 2001 the State's Motion was granted and Illinois was allowed to intervene.

Had the suit not been dismissed, the court would have had to apply the *Provident Tradesmens* factors to determine whether the United States was, as Illinois argued, an indispensable party. The first factor, the plaintiff's interest in the forum, weighed heavily in favor of a ruling that the United States was *not* an indispensable party. The Miami had a great interest in the suit's proceeding in federal court since no other forum was available.

In the State's Motion, Illinois offered *Idaho v. Coeur d'Alene Tribe of Idaho*[302] as support for the argument that were the Miami to succeed and be granted title to the lands they seek, Illinois' sovereignty interests and Eleventh Amendment protections would be jeopardized.[303] In *Coeur d'Alene*, the Supreme Court acknowledged that "[s]tates have real and vital interests in preferring their own forum in suits brought against them . . . ."[304] Hence, the Court refused to allow the suit to continue under the *Ex parte Young*

298. *See* Motion of the State of Illinois to Intervene for the Limited Purpose of Moving to Dismiss, *Miami*, No. 00-cv-4142-JPG [hereinafter State's Motion to Intervene]. This motion also presented the issue whether Illinois could intervene in the suit without waiving its sovereign immunity. In an October 19, 2000 Order, the court invited Illinois to show cause why the court should not deny its motion to intervene for lack of subject matter jurisdiction.

299. State's Motion to Intervene ¶1. The State identified no property interest that was threatened by the suit. *See generally* State's Motion to Intervene.

300. State's Motion to Intervene ¶2.

301. *Id.*

302. 521 U.S. 261 (1997).

303. Motion of the State of Illinois to Dismiss for Lack of Subject Matter Jurisdiction, Miami Tribe of Okla. v. Walden, No. 00-cv-4142-JPG (S.D. Ill. filed June 2, 2000) [hereinafter State's Motion to Dismiss]. One of the potential confusions in the State's motion was its reference to "sovereign immunity" and "sovereign interests." "Sovereign immunity" likely refers to the Eleventh Amendment concerns, while "sovereign interests" implicated the State's alleged interests in taxing and regulating land within its borders. *See generally id.*

304. *Coeur d'Alene*, 521 U.S. at 274.

exception,[305] noting that the Idaho state courts would provided "an adequate judicial forum."[306]

Unlike the plaintiff tribe in *Coeur d'Alene*, the Miami had no alternative forum in their case. Although the Illinois state courts exercise general jurisdiction,[307] Illinois could not be made a party or defendant without its consent,[308] and the state had given its consent to suit only under very narrow circumstances, none of which opened the state courts to the Miami's claim.[309]

Apart from the question whether an alternative forum is available, however, is that of the proper method of analyzing the first factor. When the *Nichols* court considered the first of the *Provident Tradesmens* factors, access to an alternate forum, the court held that no other forum would provide for "better joinder."[310] Structuring the analysis in this manner—asking whether "better joinder" of the United States was available elsewhere, rather than whether any forum is available if the party is joined—limits the impact of this consideration when confronted with the potential joinder of the United States. Due to the federal government's sovereign immunity, which applies in all forums, there will be no forum for "better joinder."[311] The proper inquiry to make is whether the suit could be brought elsewhere. If the answer is no, the factor weighs against a ruling of indispensability. By altering the wording of the first factor, the *Nichols* court substantially tilted the balance in favor of an indispensability ruling.

The application of the first *Provident Tradesmens* factor differed significantly in *Sokaogon Chippewa* from that employed in *Nichols*. In *Sokaogon Chippewa*, Judge Posner explained that the plaintiff tribe had "no other route for establishing its rights . . . ."[312] Considering the first factor in this manner favors plaintiffs; where "better joinder" is possible, the suit may be refiled after dismissal. Where "better joinder" is not available, the factor weighs against a ruling of indispensability as it did in *Sokaogon Chippewa*.[313] Ultimately for the Miami, the unavailability of an alternative forum for the

305. *See generally* CHEMERINSKY, *supra* note 149, at 412-16.

306. *Coeur d'Alene*, 521 U.S. at 274.

307. The state courts may adjudicate any matter coming to them at common law, as well as those over which they are given jurisdiction by statute. In re Schauberger, 624 N.E.2d 863, 869 (Ill. App. Ct. 1993). *See* ILL. CONST. art. VI, § 9.

308. *See* ILL. CONST. art. XIII, § 4; 745 ILL. COMP. STAT. 5/1 (2000).

309. Actions may be brought against the State pursuant to the Illinois Public Labor Relations Act and the Court of Claims Act. *See* 745 ILL. COMP. STAT. 5/1 (2000).

310. *See supra* note 236 and accompanying text.

311. *See supra* Part IV.

312. *See supra* note 268 and accompanying text.

313. It can also be argued the failure of the United States to assert a position with respect to its indispensability played a significant role in the Seventh Circuit's holding. *See supra* note 270 and accompanying text.

plaintiff tribe would have weighed heavily in favor of a ruling that the United States was *not* an indispensable party.

The second and third *Provident Tradesmens* factors also would have counseled a ruling that the United States was not an indispensable party. Illinois had not identified any risk the defendant landowners faced for multiple litigation.[314] As for the interests of the party to be joined, the United States had not asserted a position with respect to its indispensability so, as Judge Posner noted in *Sokaogon Chippewa*, the United States "must not fear the consequences of a judgment in this suit."[315]

In considering the fourth factor, the interest of the courts and the public to complete settlement of controversies, the *Nichols* court noted the potential effect of clouded real estate titles, which would affect "real estate transactions, probate proceedings, and credit availability."[316] The significant amount of land at stake in *Miami* may have provided the court the leverage it needed to rule that the United States was an indispensable party based solely on this fourth factor. It is difficult to fathom, however, how a court could make an indispensability determination "in equity and good conscience," as demanded by Rule 19, without also considering, under the fourth factor, the historical injustices suffered by the Miami.[317]

Although there may be room to argue that a weighing of the *Provident Tradesmens* factors produces no clear result, the court may not have been forced to make such a determination. In the State's Motion, Illinois failed to allege facts and circumstances necessary for an indispensability ruling.[318]

In the State's Motion, Illinois argued that the court

314. *See* Memorandum in Support of the State of Illinois' Motion to Dismiss, Miami Tribe of Okla. v. Walden, No. 00-cv-4142-JPG (S.D. Ill. filed June 2, 2000). It is possible, however, that were the defendant landowners found liable, they might choose to proceed against the United States and Illinois.

315. Sokaogon Chippewa Cmty. v. Wisconsin, 879 F.2d 300, 304 (7th Cir. 1989).

316. Nichols v. Rysavy, 809 F.2d 1317, 1333 (8th Cir. 1987). Although the *Navajo Tribe* court considered a formulation of the indispensability analysis which left out the consideration of this factor, it was conscious of the "in equity and good conscience" standard under which the indispensability determination should be made. Navajo Tribe v. New Mexico, 809 F.2d 1455, 1473 (10th Cir. 1987).

317. In *Sokaogon Chippewa* the court was sensitive to the interests of the plaintiff tribe. Although it mentioned the potential disruption to real estate titles voiced by *amicus* American Land Title Association, it countered this by acknowledging that "on the other hand many legal wrongs were done to the Indians." Sokaogon Chippewa Cmty. v. Wisconsin, 879 F.2d 300, 305 (7th Cir. 1989).

318. The following analysis is based on the motion to dismiss filed with the State's Motion. *See* State's Motion to Dismiss. Illinois' motion to dismiss filed after its motion to intervene was granted was likewise deficient in its failure to address the indispensability factors as set forth in *Provident Tradesmens* and as applied in *Sokaogon Chippewa*.

> lacks subject matter jurisdiction because the [Miami's] complaint attacks the actions of the United States government. This Court has no jurisdiction to review the validity of those actions because the United States has sovereign immunity, and has not consented to be sued in this Court. The United States is therefore an indispensable party under Federal Rule of Civil Procedure 19, and the [Miami's] action cannot go forward against the existing defendants because the United States' conduct cannot be tried in its absence.[319]

Illinois further claimed that "[w]ithout the United States' participation as a defendant, the Miami's claims against the existing defendants in this case must be dismissed because the United States is a 'necessary' and 'indispensable' party to this action under [Rule 19]."[320] This conclusion is the result of an improper formulation of the process set forth in *Provident Tradesmens* for the proper determination of indispensability.

The equation argued by Illinois was that because 1) the suit implicates past federal action and 2) the United States cannot be sued, 3) the federal government is therefore an indispensable party.[321] A proper argument would have been that 1) the interests of the United States in this case are great and therefore 2) it is a necessary party who should be joined if possible, but 3) because of sovereign immunity they cannot be joined so 4) due to the overwhelming weight of the *Provident Tradesmens* factors, the United States is indispensable and the suit must be dismissed.

Illinois' argument represents the type of reasoning the Supreme Court sought to discourage by its holding in *Provident Tradesmens*.[322] The issue of sovereign immunity should not be raised until the court has determined that Illinois is a necessary party under Rule 19(a).[323] If the court concluded that the United States was a *necessary* party, then it would proceed to the indispensability analysis. Only in the context of considering indispensability would the court consider the acts of the federal government, whether the suit would amount to a review of its conduct and, finally, whether sovereign immunity bars joinder.

To declare that the federal government was indispensable merely because its actions were implicated and sovereign immunity protected it would be to ignore the process mandated by *Provident Tradesmens*. There, the Court noted that "whether a particular lawsuit must be dismissed in the absence of [a person] can only be determined in the context of [the] particular litigation."[324]

319. State's Motion to Intervene ¶2.
320. State's Motion to Dismiss ¶8.
321. *See id.*
322. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 118 (1968).
323. *See supra* Part III.B.
324. *Provident Tradesmens*, 390 U.S. at 118.

Illinois linked the Miami's claims to action of the federal government only briefly:

> [T]he United States entered into the Treaty of Grouseland with the Tribe, admitted the State of Illinois into the Union under its current borders in 1818, disposed of the claims urged by the Miami in treaties ratified after the Treaty of Grouseland, and issued federal fee patents to the land claimed by the Tribe.[325]

Illinois alleged no other basis, apart from the United States' sovereign immunity, upon which to base a ruling that the United States is indispensable.[326]

Illinois' suggestions ignored the four factors set forth in *Provident Tradesmens*. The State did not address the Miami's interest in the forum, the defendant landowners' potential for multiple litigation, the United States' failure to assert a position with respect to its indispensability, or the interests of the public regarding the settlement of this controversy.[327] Illinois' apparent belief that the mention of federal action coupled with the existence of federal sovereign immunity would be enough to trigger a declaration of indispensability ignores the fact that a court "does not know whether a particular person is 'indispensable' until it ha[s] examined the situation to determine whether it can proceed without him."[328]

VI. CONCLUSION

Courts seeking to apply *Provident Tradesmens* properly in Indian land claims should focus on the third and fourth factors: the interests of the United States and the interests of the public in complete, consistent and efficient settlement of controversies.[329] Courts should also be sensitive about the historical connection between the United States and Indians and should make an informed ruling that takes into account the circumstances in which Indians often involuntarily found themselves.

Questioning the United States' interests allows courts to evaluate whether the federal government would be harmed through joinder.[330] If the United States asserts its indispensability, and the court so rules, the Indian claimants may eventually be relegated to petitioning Congress for an express waiver of

325. State's Motion to Dismiss ¶8.

326. *See* State's Motion to Intervene.

327. *See supra* note 140 and accompanying text.

328. *Provident Tradesmens*, 390 U.S. at 119.

329. Indeed, these are the factors on which the *Sokaogon Chippewa* court focused primarily. *See supra* Part V.D.

330. The *Provident Tradesmens* court also focused on the third factor. *See supra* note 141 and accompanying text.

sovereign immunity or some other legislative action that can address the tribe's claim. Although this delays satisfaction,[331] or at least adjudication, of the tribe's claim, pursuing political avenues has produced results.[332] Where the United States expresses no opinion with respect to its indispensability, however, as in *Sokaogon Chippewa*, the court should recognize the United States' desire that it not block the plaintiff tribe's litigation. In this way the fourth factor, the public's concern for efficient adjudication, is also satisfied because the suit will proceed and move further toward resolution.

The fourth factor is also a proper one upon which courts should focus because it allows for the injection of the factual peculiarities of each case. This factor permits courts to consider general notions of fairness, as the *Sokaogon Chippewa* opinion acknowledged with respect to the great injustices visited upon American Indians.[333] Conversely, but equally important, this factor demands courts not ignore the interests of the current landowners.

A proper indispensability analysis should also lend appropriate weight to the United States' historically significant role in Indian affairs. The mere appearance of a connection between the United States' interests and the plaintiff tribe's litigation should not persuade courts to depart from a full analysis as required by *Provident Tradesmens*.[334]

The nexus between the plaintiff and third party that makes a typical third party indispensable may not, upon proper application of *Provident Tradesmens*, make the United States an indispensable party in an Indian land claim. This is so because *Provident Tradesmens* requires courts to consider the availability of another forum to the plaintiff. Thus, even where those arguing the United States is indispensable can show the necessary factual nexus between the United States and the plaintiff tribe, courts' analysis of the availability of another forum for the plaintiff may result in a ruling that the United States is not indispensable. When courts adhere to *Provident Tradesmens*, even in the face of significant links between the United States' interests and those of the litigants, the ruling on indispensability will be made properly.

While minimizing the harsh results procedural hurdles can produce in Indian land claims is a worthwhile goal, especially due to the often-overwhelming *substantive* challenges faced by the claimants, this alone is no basis to rule a party is not indispensable. Sensitivity to the concerns of Indian

331. This sort of delay produces unattractive results for others, as well. Landowners in the claim area may be confronted with significant frustration regarding the legitimacy of their title.

332. Lobbying of this sort was, after all, the catalyst for passage of the ICCA. *See supra* Part II.D (discussing the ICCA).

333. *See supra* note 271.

334. This was one of the deficiencies in the State's Motion to Intervene in *Miami*. *See supra* Part V.F.

land claimants, however, when combined with the potentially great unrest such a claim can cause surrounding landowners, favors the resolution of Indian land claims sooner rather than later. Courts that are faithful to *Provident Tradesmens* by making a proper indispensability analysis will not only settle unrest regarding these claims, but will also ensure that the courts are not responsible for yet another injustice to be borne by American Indians.

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