ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5322

MARILYN VANN, et al.,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,
Defendants-Appellees,

On Appeal from the United States District Court for the District of Columbia
No. 1:03-cv-01711, The Hon. Henry H. Kennedy, Jr.

BRIEF OF FEDERAL APPELLEES

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July 19, 2012

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) **Parties and Amici**. The Opening Brief of Appellants identifies all parties, intervenors and amici appearing before the District Court and in this Court.

(B) **Rulings under Review**. Appellants seek review of the District Court's rulings: (1) granting the Principal Chief of the Cherokee Nation's Motion to dismiss, and (2) denying the Plaintiffs' Motion for Leave to File Fifth Amended Complaint. Both rulings appear in the district court's order of September 30, 2011.

(C) **Previous Appeal and Related Cases**. This case was the subject of a previous appeal to this Court, Case No. 07-5024. Additionally, a related case, *Cherokee Nation v. Raymond Nash*, is currently pending before the Northern District of Oklahoma, Case No. 4:11-cv-00648 TCK-TLW. That case was originally filed in Oklahoma, transferred to the District Court of the District of Columbia, and then transferred back to Oklahoma in the district court's September 30, 2011 order now the subject of this appeal.

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GLOSSARY

	Acronym
Administrative Procedure Act	APA
Federal Rule of Civil Procedure 19	Rule 19

JURISDICTIONAL STATEMENT

The United States agrees with Appellants that this Court has jurisdiction pursuant to 28 U.S.C. § 1291 over Appellants' appeal from the judgment entered on September 30, 2011, and that Appellants timely filed their Notice of Appeal.

Appellants' jurisdictional statement incorrectly implies, however, that the district court had jurisdiction over all of Appellants' claims. In fact, as set out in the United States' partial motion to dismiss, appellant's complaint contains numerous jurisdictional defects. For the reasons stated in Section III, *infra* at 30, if this Court reverses the district court's Rule 19 ruling, it should remand the matter to the district court to rule on the United States' defenses, including its jurisdictional defenses, in the first instance.

STATEMENT OF THE CASE

Appellants brought six causes of action, each composed of multiple sub-claims, asserting that the United States and the Principal Chief of the Cherokee Nation violated the treaty between the Cherokee Nation and the United States, as well as Appellants' statutory and constitutional rights. Most of these claims are improper, for reasons differing from claim to claim. The United States accordingly filed a partial motion to dismiss in the district court, setting out in detail the numerous defects in Appellants' complaint.

Although the United States continues to believe that much of Appellants' complaint should be dismissed, it recognizes that this dismissal should be based on the correct legal grounds. This brief explains why the district court erred in dismissing the complaint in its entirety under Federal Rule of Civil Procedure 19. But the United States believes that on remand, the defendants should have an opportunity to demonstrate the numerous other defects in Appellants' claims, which the district court did not reach in ordering dismissal entirely on Rule 19 grounds.

STATUTES AND REGULATIONS

Rule 19. Required Joinder of Parties

(a) Persons Required to Be Joined if Feasible.

(1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) Joinder by Court Order. If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) Venue. If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) Pleading the Reasons for Nonjoinder. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) Exception for Class Actions. This rule is subject to Rule 23.

STATEMENT OF THE ISSUES

Did the district court properly dismiss Appellants' fourth amended complaint under Federal Rule of Civil Procedure 19 on the ground that the Cherokee Nation was a necessary party that could not be joined in the litigation, even though both the United States and the Cherokee Nation's Principal Chief, sued in his official capacity, were already parties to the litigation?

STATEMENT OF FACTS

Appellants' opening brief adequately explains the factual background of this dispute, but some additional explanation of this case's procedural history may be helpful to the Court.

Appellants Marilyn Vann, *et. al.* ("Vann") brought this action against the Secretary of the Interior and the United States Department of the Interior ("Federal Defendants" or "United States") and the Principal Chief of the Cherokee Nation ("Principal Chief") in his official capacity, alleging various claims that the Defendants had violated Federal law and engaged in arbitrary and capricious conduct. (*See* A-001-11).

This Court previously held in a prior appeal in this same case that while the Cherokee Nation was protected by tribal immunity, the

Principal Chief could be brought into this suit in his official capacity under *Ex parte Young*, 209 U.S. 123 (1908). *Vann v. Kempthorne*, 524 F.3d 741 (D.C. Cir. 2008). The Court ordered that on remand the district court should consider whether the action need be dismissed under Rule 19(b), also stating that it had not reviewed the district court's Rule 19(a) determination. *Id.* at 756, 756 n.6.

On remand before the district court, Vann amended her complaint, leaving six causes of action pending:

1. "Violation of the United States Constitution/Federal Law," against all defendants, in which Vann alleged violations of the United States Constitution, the Act of 1970, the Cherokee Constitution, the Treaty Between the United States and the Cherokee Indians of 1866, and the Indian Civil Rights Act. Dist. Ct. Dkt. No. 115 at 29-30;
2. "Judicial Review of Agency Action Under the APA" against the Federal defendants;
3. A cause of action against the Cherokee Defendants for "implementing policies denying Plaintiffs the right to vote;"
4. An equal protection claim against the Federal Defendants;

5. A challenge to the Federal Defendants' failure to provide the Cherokee Freedmen with Certificate of Degree of Indian Blood ("CDIB") cards; and
6. A second equal protection claim against the Federal Defendants based specifically on the failure to provide CDIB cards.

The Principal Chief's motion to dismiss the amended complaint centered on his argument that the entirety of this case should be dismissed on Rule 19 grounds because the Cherokee Nation was a necessary party that could not be joined due to sovereign immunity. The Federal Defendants, by contrast, filed a partial motion to dismiss the amended complaint agreeing in part with the Principal Chief by arguing that part of Vann's action should be dismissed on Rule 19 grounds, but arguing that most (but not all) of Vann's action should be dismissed on other grounds. For example, the United States explained that Vann did not have a private right of action under either the Thirteenth Amendment or the Treaty of 1866, that she had failed to state a claim under the Fifteenth Amendment or the Administrative Procedure Act, that the United States had no trust duty to intervene on Vann's behalf, and that portions of Vann's APA claim were moot. The

district court granted the Principal Chief's motion to dismiss the entire amended complaint on Rule 19 grounds. Because granting the motion resulted in dismissal of all of Vann's claims, the district court denied as moot the United States' partial motion to dismiss.

STANDARD OF REVIEW

This Court reviews Rule 19(a) determinations *de novo*. *See W. Md. Ry. Co. v. Harbor Ins. Co.*, 910 F.2d 960, 963 n.6 (D.C. Cir. 1990). It reviews Rule 19(b) determinations for abuse of discretion. *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1495 (D.C. Cir. 1995) (citation omitted).

SUMMARY OF ARGUMENT

This Court should reverse the district court's entry of judgment against Vann and remand the case for the district court to adjudicate the United States' partial motion to dismiss.

The district court dismissed Vann's fourth amended complaint under Federal Rule of Civil Procedure 19 on the ground that the Cherokee Nation was a necessary party that could not be joined in the litigation. Although the district court is correct that the Cherokee Nation cannot be joined due to sovereign immunity, it is incorrect that the inability to join the Cherokee Nation required dismissal under Rule

19. The United States and the Principal Chief are already parties to this suit, and in these circumstances their presence is adequate to protect the Cherokee Nation's interests.

The United States' presence alone is sufficient to safeguard the Cherokee Nation's interests with respect to most of the claims in this litigation. Vann's causes of action against the United States appear to raise claims, if at all, under the Administrative Procedure Act. An otherwise valid APA claim against the United States need not be dismissed under Rule 19 solely because the challenged Federal action relates to the United States' obligations towards an Indian tribe that cannot be joined due to sovereign immunity. When the United States is defending a federal agency's actions, it is generally capable of adequately protecting the interests of all nonparties that share an interest in seeing the action upheld.

As to parts of Vann's first two causes of action, however, the presence of the United States in this suit does not protect the Cherokee Nation's interests. In these two causes of action, Vann alleges in part that the United States and the Principal Chief have violated the Treaty of 1866 between the United States and the Cherokee Nation. To prevail

on these claims, Vann must persuade the district court to agree with her interpretation of the scope of the Cherokee Nation's rights and obligations under that treaty. As a treaty signatory, the United States' interests in interpreting the treaty do not necessarily align with those of the Cherokee Nation, and in fact are likely adverse. The United States, therefore, does not adequately represent the interests of the Cherokee Nation on these two claims.

But this fact does not require dismissal of those claims because the Principal Chief, who has been named as a defendant under *Ex parte Young*, is also a party to this lawsuit in his official capacity. The Principal Chief has a strong interest in defending himself in this suit, and his defenses can be expected to be the same as those available to the Cherokee Nation if it were a party. If this case is adjudicated on the merits, the Principal Chief can be expected to argue that his office's actions were lawful and consistent with the Cherokee Nation's rights. And he can be expected to raise any viable defense against Vann's interpretation of the Cherokee Nation's rights and obligations under Federal law. Thus, the Principal Chief's presence, as a practical matter, adequately protects the Cherokee Nation's interests in this suit.

Because the district court granted the Principal Chief's motion to dismiss, it denied the United States' partial motion to dismiss as moot. This case should be remanded to the district court to rule on that motion.

ARGUMENT

This Court should reverse the district court's dismissal of Vann's complaint and remand the case to the district court to adjudicate the United States' partial motion to dismiss.[2] The United States argued below, and continues to believe, that most of Vann's claims contain jurisdictional or other defects and ought to be dismissed. But it is cognizant of the fact that this dismissal should be based on appropriate legal grounds. Rule 19 does not provide a proper basis for dismissing Vann's claims.[3]

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[2] Although the United States is advocating reversal of the district court, the United States is an appellee in this case because the district court's judgment below was in its favor. The United States' response brief is due on the same day as the Principal Chief's response brief. This concurrent due date will deprive the tribe of an opportunity to respond to the United States' position. For that reason, the United States suggests that the Principal Chief be given leave to file a supplemental response addressing arguments raised in this brief.

[3] The United States' position in this appeal differs in an important respect from the position it took before the district court. There, the United States briefed the question of whether the presence of the

The Cherokee Nation is not a required party to this suit because the United States and the Cherokee Nation's Principal Chief who is sued in his official capacity, are already parties, and their presence ensures that the Cherokee Nation's interests in this suit will be protected.

The district court relied on Federal Rule of Civil Procedure 19 in dismissing the complaint. Its analysis was mistaken, for two reasons:

First, the Cherokee Nation is not a person required to be joined if feasible under Rule 19(a). Assuming that the Cherokee Nation "claim[s] an interest relating to the subject matter of the action," the presence of the United States and the Principal Chief ensures that "as a practical matter," the interest will not be impeded in the Cherokee Nation's absence.

United States in this lawsuit adequately protects the Cherokee Nation's interests in this suit, and, for reasons discussed *infra* at 17-23, argued that its presence protects the Nation's interests as to most, but not all, of Vann's causes of action. Although the United States continues to believe that this position is accurate, it now believes that it should have taken the further step of analyzing whether the Principal Chief's presence in the suit is adequate to protect the Cherokee Nation's interests as to the remaining causes of action. Because the Principal Chief's presence is adequate, the United States believes that Rule 19 does not require dismissal of any of the claims in the suit.

Second, even if the Cherokee Nation were a required party under Rule 19(a), Rule 19(b) would not necessitate dismissal of Vann's complaint. Rule 19(b) requires courts to determine whether "in equity and good conscience" the action can proceed among the existing parties or should be dismissed. Fed. R. Civ. P. 19. The suit can proceed under that standard.

Although Rule 19 does not bar this suit, many of Vann's causes of action have procedural or other defects, which the United States identified in its partial motion to dismiss. For that reason, this Court should reverse the district court's decision and remand to rule on the other grounds for dismissal that it did not previously reach.

I. THE CHEROKEE NATION IS NOT A PERSON REQUIRED TO BE JOINED IF FEASIBLE UNDER RULE 19(A).

The Cherokee Nation is not a "required party" within the meaning of Rule 19(a). Rule 19(a)(1) reads as follows:

> (1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of

> the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Neither subsections 19(a)(1)(A) nor 19(a)(1)(B)(i) are implicated here.[4]

A. Rule 19(a)(1)(A) is not implicated because relief can be afforded among the current parties to the lawsuit.

Subsection 19(a)(1)(A) does not apply here because all of the relief Vann requested is against the current parties to the lawsuit, and because no defendant is asserting a claim for indemnity, contribution, or the like against an absent party. *See also Thomas v. United States*, 189 F.3d 662, 668 (7th Cir. 1999) (rejecting argument that a tribe is necessary within the meaning of Subsection 19(a)(1)(A) because it might refuse to abide by the legal consequences of a judgment against the United States). Thus the Cherokee Nation is a required party, if at all,

[4] No party has asserted that Vann's claims implicate Rule 19(a)(1)(B)(ii). None of the claims implicate that provision because neither the United States nor the Principal Chief face a substantial risk of conflicting obligations from an adverse judgment.

under Subsection 19(a)(1)(B).

B. Rule 19(a)(1)(B) is not implicated because, if the Cherokee Nation has an interest in the subject matter of the lawsuit, the presence of the other parties to this lawsuit adequately protects that interest.

Vann's claims do not implicate 19(a)(1)(B) either. As an initial matter, it is questionable whether the Cherokee Nation "claims an interest relating to the subject of the action." Fed. R. Civ. P. 19(a)(1)(B). Doubtless, the Cherokee Nation has a strong "interest" in the outcome of this litigation as the term "interest" is used colloquially. But cases finding that a tribe is an indispensible party have ordinarily interpreted Rule 19 to address only legally-protected interests of a tribe that would be directly affected by a judgment, such as cases seeking to invalidate a settlement involving a tribe, *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999); seeking to invalidate a lease signed by a tribe, *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975); or seeking to contest a tribal treaty right, *Keweenah Bay Indian Community v. Michigan*, 11 F.3d 1341 (6th Cir. 1993); *see also Liberty Mutual Insurance Company v. Treesdale, Inc.*, 419 F.3d 216, 230 (3rd Cir. 2005) (quoting *Special Jet Services, Inc. v. Federal Ins. Co.*, 83 F.R.D. 596, 599 (W.D. Pa. 1979) (quoting 3A, J. W. Moore's Federal Practice, Sect. 19.07-1(2) (3d. ed.

1997). With the exception of Vann's claim arising under the Treaty of 1866, discussed *infra* at 20-23, it does not appear that adjudication of Vann's causes of action would directly implicate the Cherokee Nation's legally-protected interests.

This Court need not resolve that question, however, because even if those claims did implicate an "interest" as that term is used in 19(a)(1)(B), disposing of the action would not "as a practical matter impair or impede the [Cherokee Nation's] ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i). This Court has held that "[i]f the nonparties' interests are adequately represented by a party, the suit will not impede or impair the nonparties' interests, and therefore the nonparties will not be considered 'necessary.'" *Ramah Navajo School Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996) (citing *Makah*). In this sense then, the Cherokee Nation's interest will not be impaired by its absence because both the United States and the Principal Chief are already parties to this suit and, by defending themselves against Vann's charge that they engaged in unlawful action, will as a practical matter safeguard the Cherokee Nation's interests.

1. The United States' presence in this suit protects most of the Cherokee Nation's interests.

a. The Cherokee Nation's interest in seeing Federal action upheld will be protected by the United States' presence in this suit.

Although couched in various ways in Vann's amended complaint, Vann's causes of action as to the United States raise claims, if at all, under the APA, as they assert either that unlawful action was taken by the United States or the United States unlawfully failed to act. The nature of an APA suit should inform the Court's consideration of the Rule 19 issues here. In particular, Congress waived the United States' sovereign immunity as to suits properly brought under the APA in part to allow persons who are aggrieved as a result of agency action to appeal to the courts. As a general matter, it would contradict this goal to allow the Rule 19 analysis to effectively preclude judicial review of agency actions.

An otherwise valid APA claim against the United States need not be dismissed under Rule 19 solely because the challenged Federal action relates to the United States' obligation toward an Indian tribe. *See Washington v. Daley*, 173 F.3d 1158, 1168 (9th Cir. 1999). When the United States is defending a federal agency action, its presence in the

suit ordinarily will as a practical matter protect the interests of third persons who also seek the Federal action to be upheld. *Id.* For that reason, to the extent that any of Vann's claims meet the requirements of the APA, she generally should be able to proceed with them even in the absence of the tribe.

Important policy considerations also support the conclusion that the Nation is not a required party. If this Court were to hold that a tribe's general interest in a particular federal action would be practically impaired in the tribe's absence within the meaning of Rule 19(a), all final decisions by the Bureau of Indian Affairs (and many other federal actions involving land use or natural resources) would become effectively unreviewable in Federal court because of inability to join the tribe, despite Congress' enactment of the Administrative Procedure Act. And, outside the tribal context, countless persons who are currently limited to the possibility of permissive intervention under Federal Rule of Civil Procedure Rule 24(b) could, in theory, gain intervention of right status under Rule 24(a) in any Federal action affecting their interests. *Cf. Shermoen*, 982 F.2d 1312, 1318 (9th Cir. 1992) (noting parallel language in Rule 19 and Rule 24). The United

States has never advocated such a broad reading of Rule 19(a)(1)(B), nor have the Federal courts adopted one. Instead, the Courts of Appeal have generally found that Indian tribes are not required defendants to APA actions, except where there is a conflict between the interests of the United States and the interests of the tribe. *See Ramah*, 87 F.3d at 1338; *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 775 (D.C. Cir. 1986).

Here, the Cherokee Nation's interest in most of Vann's claims are adequately represented by the presence of the United States as defendant in this lawsuit. *See Ramah*, 87 F.3d at 1351. Disposing of the action therefore will not, as a practical matter, impair or impede the Cherokee Nation's ability to protect its interests. *See* Fed. R. Civ. P. 19(a). In each claim, Vann asserts that the Federal Defendants have acted arbitrarily and capriciously or otherwise violated Federal law. The Federal Defendants have at least the same interest, if not stronger, in defending against this charge. For example, in the second cause of action, Vann has asserted that by taking several actions favorable to the Cherokee Nation, the United States has acted arbitrarily and capriciously. Assuming that the Cherokee Nation has an interest in this

cause of action, it is in the Federal Defendants' actions being upheld against a charge of arbitrary and capricious conduct, an interest that is identical to that of the United States. Similarly, Vann's fourth cause of action alleges that the United States has acted illegally in failing to distribute particular funds to the Cherokee Freedmen on the same basis as other members of the Cherokee Nation. Dist. Ct. Dkt. No. 115 at 33. Again, if the Cherokee Nation has an interest in the outcome of this cause of action, it is in seeing the Federal Defendants vindicated. The same logic applies to the Fifth and sixth causes of action, which address whether the United States should have distributed CDIB cards to the Cherokee Freedmen. If the Cherokee Nation has an interest, it is in the federal action being upheld, and it is adequately protected by the presence of the United States in the lawsuit.

b. The presence of the United States does not adequately protect the Cherokee Nation's interest in the Cherokee Nation's rights and obligations under the Treaty of 1866.

In one narrow respect, the Cherokee Nation's interest in the claims raised in this case differs from that of the United States. For Vann to prevail on portions of her first two causes of action, she would need to obtain a ruling that the Cherokee Nation's actions depriving

Vann and other Freedmen of their citizenship in the Nation violate the Treaty of 1866. Disposing of these claims could directly affect the scope of the Cherokee Nation's rights and obligations under this treaty, and the presence of the United States does not adequately protect the Nation's interest in that one aspect of those claims.

Although the legal basis of Vann's first cause of action is difficult to decipher from the complaint, the Federal Defendants understand that Vann intends to be asserting, in part of that claim, a direct right of action under the Treaty of 1866. Meanwhile, one portion of Vann's second cause of action, though couched in APA terms, appears to call for a judicial determination limiting the Cherokee Nation's rights under the Treaty of 1866. These two claims present unique considerations. Assuming Vann has a cause of action, to resolve either of them in Vann's favor, the district court would have to rule that the Treaty of 1866 precludes the Cherokee Nation from disenfranchising the Cherokee Freedmen.

An adjudication of the Cherokee Nation's treaty rights in their absence could potentially implicate Rule 19. *See Keweenah Bay Indian Community*, 11 F.3d 1341 (6th Cir. 1993). Whether Rule 19 bars a claim

rests on an analysis of the vital interests actually at stake for the tribe in a particular case. As the Supreme Court explained in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), "[w]hether a person is 'indispensible'. . . can only be determined in the context of particular litigation," and "decisions must be made on the basis of practical considerations," because "[t]here is no prescribed formula for determining in every case whether a person . . . is an indispensible party." *Id.* at 117-18 & nn. 12, 14.[5]

Here, several factors suggest that disposing of this action by interpreting the Treaty of 1866 would directly affect the Cherokee Nation's interests. First, it is well-established law that parties to a contract are generally necessary parties to suits seeking to interpret that contract. *See Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1495 (D.C. Cir. 1995); *see also Lomayaktewa v. Hathaway*, 520 F.2d

[5] This brief addresses the narrow question of whether, in these specific circumstances, the Cherokee Nation is a required party and is not intended to mean that either a treaty tribe or the United States will always be a required party to a dispute that involves the interpretation of a treaty between a tribe and the United States. For example, this brief does not address whether, in a dispute over a reservation boundary that turns in part on interpretation of a treaty term, either the tribe or the United States would necessarily be a required party for purposes of Rule 19.

1324, 1325 (9th Cir. 1975). Second, this principle applies with even greater force where each party has a sovereign interest in the agreement. *Cf. Republic of Phillipines v. Pimentel*, 128 S.Ct. 2180, 2190-91 (2008) (affirming that a party's sovereign status should be a compelling factor in the Rule 19 analysis). Finally, of particular importance here is that the treaty terms at issue address the membership and composition of the Cherokee Nation, and as such, how those treaty terms are interpreted is of unusually high importance to the tribe. *Cf. Kickapoo Tribe of Oklahoma v. Lujan,* 728 F. Supp. 791, 797 (D.D.C. 1990).

Unlike Vann's other causes of action, the United States' presence in the suit does not adequately protect the Cherokee Nation's treaty interests with respect to these particular claims. As a signatory of the Treaty of 1866, the United States' interests in interpreting that treaty do not necessarily align with those of the Cherokee. In fact, they appear to be adverse, as, since this appeal was filed, the United States has filed a counterclaim against the Cherokee Nation in a related action in Oklahoma seeking to enforce the terms of the 1866 Treaty. *See* Cherokee Nation v. Nash (July 2, 2012, No. 11-cv-648 N.D.Okla).

2. The Principal Chief's presence in this suit protects the Cherokee Nation's interests with respect to all of the causes of action.

Although the United States cannot protect all of the Cherokee Nation's interests in this suit, the Principal Chief of the Cherokee Nation is also a party to the suit in his official capacity, and the presence of the Principal Chief as a practical matter adequately represents the Nation's interests in this suit.[6] Dismissal under Rule 19 was therefore not appropriate.

As an initial matter, it is not clear that this Court should engage in any inquiry into whether the Principal Chief will represent the Cherokee Nation's interests as a practical matter. It may well follow directly from the fact that the Principal Chief is the elected head of the

[6] In the Principal Chief's motion to dismiss, he suggested that the Cherokee Election Board, and not he, might be a more appropriate entity to be present in the suit. Dist. Ct. Dkt. No. 23 at 7-9. That suggestion could be addressed on remand. We proceed here on the assumption that the Principal Chief is the proper tribal defendant to be sued in his official capacity. We also note that there is a dispute among the parties as to which version of the Cherokee Nation's constitution is properly in force and effective. Dist. Ct. Dkt. No. 115 at 20-22. That issue is significant, but not one critical to resolution of the Rule 19 issues at this stage of the litigation. The Cherokee Nation recognizes its current Principal Chief as duly elected. Thus, this case does not present a circumstance in which there is an actual conflict between the interests of a sovereign and its official sued under *Ex parte Young*.

tribal government that his presence necessarily is adequate in an *Ex parte Young* action. Principal Chief Act, P.L. 91-495, 84 Stat. 1091 (0ct. 22, 1970).

This Court need not address that question, because the Principal Chief has presented no reason why his presence in this case is insufficient, as a practical matter, to safeguard the interests of the Cherokee Nation. *See* Fed. R. Civ. P. 19(a). If this case reaches an adjudication on the merits, the Principal Chief, who has been sued in his official capacity, can be expected to argue that his actions were lawful and consistent with the Cherokee Nation's sovereign rights. And he can be expected to raise any viable defense against Vann's interpretation of the Cherokee Nation's rights and obligations under Federal law.[7] Indeed, the Attorney General of the Cherokee Nation is defending the Principal Chief in this suit. Because the Principal Chief's defenses to his official actions will be the same defenses that the Cherokee Nation itself would offer if it were a party to this suit, there is no reasonable basis for doubting that, on the facts of this case, the

[7] Although the Principal Chief is not a defendant as to the second cause of action, he will need to raise any treaty defense available to the Cherokee Nation in response to cause of action one.

Principal Chief's presence in this suit will adequately protect the Cherokee Nation's interests.

Indeed, holding that a tribe is a necessary party even where its chief executive officer is already a defendant to a suit would create an incorrect asymmetry between how, under *Ex parte Young* and the APA, this Court treats tribal officials and how it treats officials of other sovereigns. Litigants regularly sue state and federal officials to enjoin ongoing violations of Federal law, and in only a small fraction of cases, largely where plaintiffs have sought affirmative relief such as the disbursement of tax revenue, has this Court held that a state's or the United States' sovereign immunity bars the suit.[8] *See, e.g. George v. Mitchell*, 282 F.2d 486, 490 (D.C. Cir. 2012). Given that this Court has already held that Vann is not impermissibly seeking affirmative relief, there is no reason for this Court to require joinder of the Cherokee Nation.

For these reasons, other circuits have held that a tribe is not a necessary party where tribal officials have been sued in their official

[8] In fact, Congress has expressly codified that the United States is not an indispensible party in actions against Federal officers that, prior to the passage of the Administrative Procedure Act, would have been brought as an officer suit.

capacity. Recently the Ninth Circuit explained: "We hold today that the tribe is not a necessary party because the tribal officials can be expected to adequately represent the tribe's interests in this action and because complete relief can be accorded among the existing parties without the tribe. This lawsuit for prospective injunctive relief may proceed against the officials under a routine application of *Ex parte Young*." *Salt River Project Agr. Imp. And Power Dist. v. Lee* 672 F.3d 1176, 1177 (9th Cir. 2012). Likewise, the Tenth Circuit has held that a tribe is not a necessary party where both the United States and tribal officials were already parties to the suit. *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001).

II. EVEN IF THE CHEROKEE NATION IS A REQUIRED PARTY UNDER RULE 19(A), THIS ACTION NEED NOT BE DISMISSED UNDER RULE 19(B).

In this Court's prior ruling in this case, it stated that "[o]n remand, the district court must determine whether 'in equity and good conscience' the suit can proceed with the Cherokee Nation's officers but without the Cherokee Nation itself." *Vann*, 534 F.3d at 756. Although this language could arguably be read as establishing as law of the case that the Cherokee Nation is a required party under Rule 19(a), this

Court strongly suggested otherwise. It stated: "We do not review the district court's Rule 19(a) determination because the parties have not raised the issue on appeal." *Id.* at 756 n.6. In the prior appeal, which was interlocutory, Vann was an appellee and was under no obligation to re-argue Rule 19(a) in this Court. The United States therefore understands this Court's prior opinion to mean that the parties remain free to address whether the Cherokee Nation is a required party under Rule 19(a). *See also McCowen v. Jamieson*, 724 F.2d 1421, 1424 (9th Cir. 1984) (explaining that Rule 19(a) can be raised "at any stage of the proceedings.") (citation omitted).

In any event, for the same reasons that the Cherokee Nation is not a required party under Rule 19(a), this case need not be dismissed under Rule 19(b). Rule 19(b) instructs that the district court inquire into whether in equity and good conscience the matter must be dismissed in the absence of a third party. The four factor test it sets out is as follows:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
> (A) protective provisions in the judgment;

(B) shaping the relief; or
(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).

Although there is a strong presumption that Rule 19(b) dismissal is appropriate where the absent party is a sovereign, *see Enterprise Management Consultants, Inc. v. United States*, 883 F.2d 890, 894 (10th Cir. 1989), none of the Rule 19(b) factors favor dismissal here. The Cherokee Nation faces minimal risk of prejudice because of the United States' and the Principal Chief's presence in this suit, suggesting that the first two factors do not require dismissal. Nor does the third factor support dismissal, because a judgment rendered under the APA or under an *Ex parte Young* theory will be enforceable against the United States and against whomever holds the position of Principal Chief of the Cherokee Nation. And the fourth factor, the adequacy of plaintiff's alternative remedies, if anything favors permitting the action to proceed. *See also Cunningham v. Municipality of Metropolitan Seattle*, 751 F. Supp. 885, 896 (W.D.Wash. 1990) (finding that where the

appropriate state official can be named as a defendant under *Ex parte Young*, Rule 19(b) does not require dismissal for inability to join the state).

III. THIS CASE SHOULD BE REMANDED FOR A RULING ON THE FEDERAL DEFENDANTS' PARTIAL MOTION TO DISMISS.

Because the district court granted the Cherokee Defendants' motion to dismiss in full, it denied the Federal Defendants' partial motion to dismiss as moot. That motion presented numerous jurisdictional and substantive bases for dismissing most of Vann's remaining claims. Remand is appropriate here because the United States has raised a large number of defenses, the district court has not yet ruled on the merits in the first instance, and the other parties to this appeal have not briefed those issues before this Court. Accordingly, the United States requests that this Court remand this case to the district court to adjudicate its partial motion to dismiss in the first instance.

CONCLUSION

For the foregoing reasons, the district court's order dismissing Vann's complaint should be reversed and the case remanded for the district court to rule on the Federal Defendants' partial motion to dismiss.

Respectfully submitted,

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July 19, 2012
90-2-4-11049

CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION

This brief complies with the type volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting the portions described in Circuit Rule 32(a)(1), the brief contains 5,826 words.

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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