UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

The COMMONWEALTH OF MASSACHUSETTS, *Plaintiff*, and The AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC. (AGHCA) and TOWN OF AQUINNAH, *Intervenor/Plaintiffs*, v. The WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), The WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., and The AQUINNAH WAMPANOAG GAMING CORPORATION, *Defendants*.	No: 1:13-cv-13286-FDS

PLAINTIFF, COMMONWEALTH OF MASSACHUSETTS',
MEMORANDUM OF REASONS IN OPPOSITION TO
DEFENDANTS' MOTION PURSUANT TO FED.R.CIV.P. 19 TO DISMISS
WITH LEAVE TO AMEND FOR FAILURE TO JOIN A NECESSARY PARTY

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INTRODUCTION

The Commonwealth sued the Tribe[1] to enforce a decades-old Settlement Agreement between and among the Commonwealth, the Tribe, the Town of Aquinnah ("Town"), and the Aquinnah Gay Head Community Association ("AGHCA").[2] Those four parties negotiated the Settlement Agreement to end many years of litigation. The agreement resulted in transfer to the Tribe of equitable title to hundreds of acres of land in exchange for the Tribe's commitment that its use of those lands would be subject to the criminal, civil, and regulatory jurisdiction of the Commonwealth and Town, including the Commonwealth's laws regulating gaming.[3] The same four parties are now before this Court. All of the original interests that culminated in the Settlement Agreement are represented; all of the parties have resumed their seats at the table. But the Tribe would prefer that the Commonwealth had brought a different case: a claim against the National Indian Gaming Commission ("NIGC"), an agency of the United States, pursuant to the Administrative Procedures Act ("APA"), 25 U.S.C. §§ 2701, *et seq.* To achieve that end, the Tribe moves this Court to dismiss the Commonwealth's complaint, pursuant to Federal Rule of Civil Procedure 19 ("Rule 19"), seeking to compel the Commonwealth to sue the United States under the APA.

The Tribe's use of Rule 19 is improper. Just because the Tribe thinks the Commonwealth could sue the United States under a different set of claims does not mean that Rule 19 compels dismissal of the Commonwealth's current claims. Instead, properly applied, Rule 19 does *not*

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[1] References to the "Tribe" are to all three defendants. Citations to the Tribe's Memorandum of Points and Authorities in Support of its Motion Pursuant to Fed.R.Civ.P. 19 to Dismiss with Leave to Amend for Failure to Join a Necessary Party shall be in the form "Memo. at [page numbers]."

[2] The term "Settlement Agreement" refers to the "Joint Memorandum of Understanding Concerning Settlement of the Gay Head, Massachusetts Indian Land Claims," dated September 28, 1983, by and among the Commonwealth, Town of Gay Head (now Town of Aquinnah), Wampanoag Tribal Council of Gay Head, Inc. (now Tribe), and Taxpayer's Association of Gay Head, Inc. The Taxpayer's Association of Gay Head, Inc. entered into the Settlement Agreement and the AGHCA is the successor in interest to that Association.

[3] The United States holds legal title to those lands in trust for the Tribe's benefit.

compel dismissal of this case. The United States is not indispensable: the Tribe is perfectly capable of defending its own interests and there is no reason why entry of judgment by this Court would impair or impede any interests of the United States that are different from those of the Tribe. Indeed, the United States can move to intervene in this case if it determines that such interests need protecting.

At bottom, the Tribe's motion misses the mark because the Commonwealth may bring its own causes of action as it sees fit and its choice to bring a breach of contract claim in this case is sound. The Tribe asserts that there is an empty chair in this case belonging to the United States. But all four parties to the Settlement Agreement have appeared: there is no "empty chair." Congress's role in resolving the original dispute was limited to approving the Settlement Agreement. The United States never had a chair at the negotiating table and does not require one now. Moreover, should the United States wish to sit at this particular table, it is free to move to intervene. As further explained below, United States is neither necessary nor indispensable to this dispute.[4] This Court should deny the Tribe's motion.

BACKGROUND

A. Statutory and Regulatory Overview

As the Court is aware, prior litigation culminated in the Settlement Agreement, wherein the Commonwealth, Tribe, Town, and AGHCA agreed to the transfer of hundreds of acres of land on the condition that the Town and Commonwealth retained criminal, civil, and regulatory

[4] The terms "required" was inserted into the Rule in 2007. Before that time, the Rule used the term "necessary." Thus, much of the caselaw cited in this Memorandum with respect to Rule 19(a) analyzes whether a party is "necessary"; the analysis is identical to the analysis for whether a party is "required." *See* Fed. R. Civ. P. 19 Advisory Committee Notes (2007) ("The language of Rule 19 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. *These changes are intended to be stylistic only*.") (emphasis added).

Additionally, in 2007, the term "indispensable" was deleted from the Rule. Because that term is used by much of the case law, this Memorandum uses the term "indispensable" as shorthand to refer to the required analysis under Rule 19(b).

jurisdiction over those lands. *See generally* Settlement Agreement (Comp. Ex. A). The Massachusetts Legislature approved that contract in 1985, Mass. St. 1985, c. 277 (An Act to Implement the Settlement of the Gay Head Indian Land Claims), and Congress likewise approved the contract in 1987, 25 U.S.C. § 1771 (Massachusetts Indian Land Claims Settlement Act).

One year later, in 1988, the very same Congress passed the Indian Gaming Regulatory Act ("IGRA"), which, among other things, established the NIGC. 25 U.S.C. § 2704 (1988). NIGC is an "independent Federal regulatory authority," 25 U.S.C. § 2702(3), that serves two primary functions: (1) protecting tribal gaming revenues; and (2) ensuring the integrity of the tribal gaming industry. *See id.* § 2702(2), (3); Sandra J. Ashton,[5] *The Role of the National Indian Gaming Commission in the Regulation of Tribal Gaming*, 37 New Eng. L. Rev. 545, 547 (2003). Although located within the DOI, the NIGC is substantially independent. *See* 25 U.S.C. § 2704. NIGC is an expert gaming regulator concerned with overseeing tribal gaming, ensuring that revenues are properly distributed, and providing enforcement against violations of gaming law. *See id.* at 548-50; 25 U.S.C. § 2702(2), (3). A presidentially appointed Chair, subject to Senate confirmation, heads the three-member Commission. 25 U.S.C. §§ 2704(b)(1)(a), (4)(a). The NIGC is a small agency whose objective is to collaborate and assist Tribes in developing gaming on their lands. Ashton, *supra*, at 549.

Class II gaming—at issue in this case—is within a tribe's jurisdiction so long as IGRA applies to a tribe's lands (obviously disputed in this case), subject to two additional conditions. One of those conditions is a tribe's adoption of a gaming ordinance, which a tribe must submit to NIGC for the NIGC Chair's approval.[6] 25 U.S.C. §§ 2710(b)(2), 2712; *see* 25 C.F.R. pts. 522, 523. Approval of a tribe's class II gaming ordinance confers upon the tribe permission to self-

[5] At the time she wrote this article, Ms. Ashton was a member of NIGC's Office of General Counsel.

[6] The other condition is that the involved gaming must be "located within a State that permits such gaming for any purpose by any person, organization or entity." 25 U.S.C. § 2706(b)(1)-(2).

regulate by, among other things, issuing tribal licenses to entities to conduct gaming activities, subject to continuing NIGC oversight. 25 U.S.C. § 2710. IGRA mandates certain provisions in a gaming ordinance and specifies the grounds on which the Chair may approve an ordinance. *Id.* The Chair must approve or disapprove an ordinance within 90 days of its submission. *Id.* § 2710(e). Should the Chair fail to act within the prescribed time, an ordinance is "considered" approved "but only to the extent such ordinance or resolution is consistent with the provisions of [IGRA]." *Id.* IGRA expressly provides for judicial review of NIGC's approval or disapproval of a gaming ordinance. 25 U.S.C. § 2714. IGRA is silent, however, concerning judicial review of an opinion letter issued by NIGC or by DOI. *See generally* 24 U.S.C. § 2701, *et seq.*

B. Procedural and Factual History

On February 4, 2012, the Tribe passed a resolution (No. 2012-04) adopting a Tribal gaming ordinance (No. 2011-01). Compl. ¶ 49. Among other things, that ordinance would authorize the Tribe to issue licenses to conduct Class II gaming on "Settlement Lands" (which the Commonwealth asserts are subject to its civil jurisdiction governing gaming). Compl. ¶ 51.

The Tribe submitted its gaming ordinance to the NIGC Chair for review and approval. Compl. ¶ 54. By letter dated February 21, 2012, the NIGC informed the Tribe that its ordinance was approved under 25 U.S.C. § 2710(e). *Id.* Later, the Tribe re-submitted the ordinance to the NIGC, modified to specify on which lands the Tribe would conduct gaming and accompanied by a new Tribal resolution specifically identifying the Settlement Lands as a site for the Tribe's proposed gaming. Compl. ¶ 55. On August 29, 2013, the NIGC informed the Tribe that its ordinance was "considered" approved under 25 U.S.C. § 2710(e) "to the extent that it is consistent with the provisions of IGRA," because the NIGC Chair had failed to act on the Tribe's submission with the 90 days required under IGRA. Compl. ¶ 56.

The Tribe then asked NIGC for a legal opinion that the Tribe is authorized to conduct gaming activities on the lands specified in its resolution and ordinance (the Settlement Lands). Compl. ¶ 57. On October 25, 2013, NIGC furnished the Tribe with a letter stating that the Settlement

Lands are eligible for gaming. Compl. ¶ 57. As to legal analysis of the critical question in this lawsuit—whether the Settlement Agreement forecloses the Tribe from gaming on Settlement Lands—the NIGC cited a separate opinion letter from DOI, positing that, notwithstanding the Settlement Agreement, the Tribe may conduct gaming activities on the Settlement Lands. Memo. at 5 (citing Dkt. # 21, Att. 1, Ex. A). The NIGC incorporated DOI's opinion by reference into its own opinion letter. *Id.* Neither the NIGC's opinion nor DOI's opinion cited any provision of IGRA authorizing the issuance of such opinions, infusing any force of law to the conclusions reached therein, or setting forth a basis for judicial review. *See id.*

The Commonwealth filed this lawsuit on December 2, 2013, to enforce its contractual rights against the Tribe pursuant to the Settlement Agreement. *See generally* Compl. The Commonwealth does not seek to vacate the NIGC's approval of the Tribe's gaming ordinance but, rather, to obtain a declaration that, notwithstanding any Federal authorizations the Tribe may obtain, the Tribe has nonetheless contractually bound itself not to conduct gaming on this land. *See id.* Because the Commonwealth did not seek review of Federal agency action, the Commonwealth did not file its lawsuit against the United States as a party defendant. *See id.*

The Town and AGHCA subsequently moved to intervene in this case (motions that this Court allowed) and filed intervenor-complaints asserting substantially the same claims as the Commonwealth. *See* Dkt. ## 36 (motion to intervene of AGHCA), 38 (motion to intervene of the Town), 51 (order allowing intervention by both AGHCA and Town).

ARGUMENT

RULE 19 CANNOT BE USED TO REWRITE THE COMMONWEALTH'S COMPLAINT

Rule 19 is an exception to the normal rule that a plaintiff decides who shall be parties to a lawsuit. 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1602, 19 (3d ed. 2001). The Rule thus operates at odds with the bedrock legal principle that a plaintiff is master of his or her complaint, *see Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002), and is applied only where necessary to avoid

prejudicing the interests of an absent party or to avoid repetitious litigation. *See* Richard D. Freer, Civil Procedure 652 n.97 (2d ed. 2009).

Analysis under Rule 19 proceeds in three parts. First, the Court must determine if a party is "required" in a case. Rule 19(a). Second, if a party is "required," the Court must then determine if the party can feasibly be joined to the case. Rule 19(b); *Bacardi Intern. Ltd. v. Suarez & Co., Inc.*, 719 F.3d 1, 8-9 (1st Cir. 2013). Finally, if joinder is infeasible, the Court must determine if the "required" but absent party is indispensable to the case; *only* if the party is indispensable, may a court dismiss a complaint under Fed. R. Civ. P. 12(b)(7). *Id.* This Court must apply Rule 19 to the claims actually pending in this Court. *See* Rule 19. The Commonwealth's complaint is for breach of contract, premised on the Settlement Agreement, and it is against those claims that Rule 19 compulsory joinder must be assessed. *See id.* While the Tribe may prefer that the Commonwealth had brought an APA claim, that preference cannot substitute for application of Rule 19's proper analytical framework.

I. The United States is not a Required Party under Rule 19(a).

The Tribe advances three reasons why the United States is a required party under Rule 19(a): (1) complete relief among the parties requires the United States' presence; (2) the United States' absence will impair or impede the NIGC's (and therefore the United States') interests; and (3) the United States' absence could subject the Tribe to inconsistent obligations. Memo. at 7-10. The Tribe's arguments are flawed for a number of reasons. Foremost is the Tribe's reliance on speculative harms and its choice to ignore the United States' unexercised ability to choose to intervene in this case. As explained below, application of Rule 19(a) compels the conclusion that the United States' presence is not necessary to resolve this case.

A. The Tribe's Speculation that Future Litigation Could Ensue Involving the Commonwealth or United States Does Not Undermine this Court's Ability to Render Complete Relief with Respect to the Parties Before It.

The Tribe first argues that the United States is a necessary party to this lawsuit, pursuant to Rule 19(a)(1)(A), which specifies that a party is necessary where "in that person's absence, the

court cannot accord complete relief among existing parties." Memo. at 7-8. The Tribe's argument hinges on speculation: the Tribe posits that, should the Commonwealth lose, it would then initiate an APA action as a "second bite at the apple." *Id.* at 7. And, should the Commonwealth win, the Tribe speculates that the United States may litigate in the future to overturn that decision. *Id.* at 7-8.

None of that speculation establishes that the United States is a required party. Rule 19(a)(1)(A) concerns itself with the parties actually present in a case under the claims then brought; the Rule is not concerned with possible third parties who may also assert an interest, including through future litigation. 3A Moore's Federal Practice ¶ 19.07–1[1] at 93–98 (2d ed. 1989).[7] Moreover, Rule 19(a) does not require the absence of any possibility of future litigation.[8] Analysis under Rule 19(a)(1) thus focuses on the actual parties and claims before the court and whether complete relief can be entered with respect to those parties and claims.

The four parties presently involved in this case are the four signatories to the Settlement Agreement. The Plaintiffs seek to enforce the terms of the Settlement Agreement against the Tribe pursuant to a claim for breach of contract. As the pleadings currently stand, this Court is

[7] *MasterCard Int'l, Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 385 (2d Cir. 2006) ("While there is no question that further litigation [involving an absent party] is inevitable if MasterCard prevails in this lawsuit, Rule 19(a)(1) is concerned only with those who are already parties."); *Angst v. Royal Maccabees Life Ins. Co.*, 77 F.3d 701, 705 (3d Cir. 1996) ("Completeness is determined on the basis of those persons who are already parties, and not as between a party and the absent person whose joinder is sought."); *LLC Corp. v. Pension Benefit Guar. Corp.*, 703 F.2d 301, 305 (8th Cir.1983), *citing Morgan Guaranty Trust Co. v. Martin*, 466 F.2d 593, 598-99 (7th Cir. 1972) (determining that Rule 19(a)(1)(A) applies to current parties, "not [to] the speculative possibility of further litigation between a party and an absent person").

[8] *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 844 F.2d 1050, 1054 n.5 (3d Cir. 1988) ("We observe that the advisory committee note to Rule 19(a) indicates that the question of 'complete relief' may not denote final adjudications of all claims between the parties, so long as the relief actually afforded to the parties in the action is meaningful."); *Morgan Guar. Trust Co. of N.Y.*, 466 F.2d at 598 (courts focus on administering relief among the present parties "and not on the speculative possibilit[ies] of further litigation between a party and an absent person."); *see Angst*, 77 F.3d at 705 ("The possibility that the successful party to the original litigation might have to defend against a subsequent suit by the receiver does not make the receiver a necessary party to the action.").

capable of entering a judgment binding on all of those parties resolving whether the Settlement Agreement requires the Tribe to comply with the Commonwealth's gaming laws. Speculation that the outcome may prompt litigation by or against the Federal government in the future does not render the United States a necessary party under Rule 19(a)(1)(A).

B. The United States' Absence from this Litigation will not Impair or Impede the Interests of the NIGC.

The Tribe next argues that the United States is a necessary party under Rule 19(a)(1)(B)(ii) because entry of a judgment against the Tribe would impair or impede the NIGC's interests. Memo. at 8-9. This argument overstates the purported interest (if any) of the NIGC and assumes the United States cannot decide for itself whether its interests require intervention.

As a threshold matter, it is unclear what interest the NIGC has in this case other than interests that are identical to the Tribe's. The crux of this dispute concerns the Commonwealth's authority, under the Settlement Agreement, to regulate gaming on the Tribe's lands. NIGC's involvement is tangential to that dispute. NIGC approved the Tribe's gaming ordinance (to the extent that ordinance was consistent with the provisions of IGRA) and did so only by operation of law: because NIGC's Chair did not act, the ordinance is now "considered" approved. Thereafter, the Tribe asked for and received an "opinion" from NIGC concerning the Tribe's authority to conduct gaming on its lands. NIGC based its opinion that the Tribe could conduct gaming largely on another "opinion" received from DOI. Those letters were only opinions, reached without any adjudicatory process and, in fact, without notice to the Commonwealth. It is unclear how strong the NIGC's interests run with respect to defending such an opinion. In any event, the NIGC's interest—to the extent it exists—is likely indistinguishable from those of the Tribe, the actual party that seeks to conduct and benefit from the gaming in question.

This Court need not speculate as to the United States' interest. The Commonwealth has made the United States aware of this case. If the United States believes that its interests are in danger, it can move to intervene. To date, the United States has not chosen to seek intervention; that choice is instructive. *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S.

102, 114 (1968) (suggesting that alleged adverse effects on an absent party that has "purposely bypassed an adequate opportunity to intervene" should not be part of Rule 19 analysis).[9]

Indeed, sound jurisprudence weighs in favor of allowing the United States to choose, rather than be compelled, to intervene. The United States could recognize that sophisticated, capable counsel represent the Tribe and defer to such counsel to advance arguments in favor of the Tribe's interests, which are no different from the United States. *See Ohio Valley Envtl. Coal. v. Bulen*, 429 F.3d 493, 504–05 (4th Cir. 2005) (determining that absentees were not necessary parties when their interests were identical to those of existing parties who were capable of adequately representing the absentees' interests); *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992) ("Impairment may be minimized if the absent party is adequately represented in the suit."); *see Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996) (same). Moreover, the United States enjoys discretion as to where and how it litigates. *See Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1480-81 (D.D.C. 1995) (holding that the Attorney General has discretion to determine where and when the United States chooses to litigate). And, IGRA does not impose a duty on the United States to intervene to further the Tribe's interest in gaming. *See United States v. Mitchell*, 445 U.S. 535, 542 (1979) (describing the United States' trust relationship with Indian tribes as "limited"); *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1297 (D.N.M. 1996) (holding that IGRA does not impose a duty for

[9] *School District of City of Pontiac v. Secretary of the U.S. Dept. of Educ.*, 584 F.3d 253, 266 (6th Cir. 2009) ("Second, even if the States have a particular interest in this dispute, they had the opportunity to intervene to protect that interest but declined to participate."); *Jansen v. City of Cincinnati*, 904 F.2d 336, 342 (6th Cir. 1990) ("We join other circuits in holding that the possibility of adverse *stare decisis* effects provides intervenors with sufficient interest to join an action."); *United States v. Sabine Shell, Inc.*, 674 F.2d 480, 483 (5th Cir. 1982) ("Furthermore, the property owners themselves, patently aware of this litigation, never intervened either at the district or appellate court level. Presumably the property owners do not believe that the disposition of this suit will 'impair or impede' their ability to protect their interests."); *Helzberg's Diamond Shops, Inc. v. Valley W. Des Moines Shopping Ctr., Inc.,* 564 F.2d 816, 820 (8th Cir. 1977) ("In light of [the absent party's] decision not to intervene we conclude that the District Court acted in such a way as to sufficiently protect [that party's] interests."); *Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49, 54 n.3 (D.D.C. 1999) ("[I]f the State were so worried about protecting its interests, it certainly could waive its immunity and intervene in this action").

the United States to act to protect tribal gaming rights); *cf. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, 259 F. Supp. 2d 783, 790 (W.D. Wisc. 2003) (holding that IGRA does not create a special trust relationship). Thus, the United States should be permitted to choose whether to participate in this case.

C. Disposing of this Case in the United States' Absence will not Subject the Tribe to Multiple or Inconsistent Obligations.

The Tribe argues finally that disposing of this matter as it currently stands will subject the Tribe to inconsistent obligations within the meaning of Rule 19(a)(1)(B)(ii). Memo. at 9-10. The Tribe acknowledges that, if the Commonwealth prevails, the Tribe will be unable to conduct gaming on its lands without a gaming license from the Commonwealth. The Tribe speculates that, were it to obtain such a license and open a gaming facility, the NIGC could file an enforcement action against the Tribe, asserting that the Tribe had violated Federal law. Memo. at 10.

Placing aside the Tribe's speculation that it may someday obtain a State gaming license, the Tribe assumes that the NIGC and the United States would not accept a decision rendered by this Court. The Tribe can point this Court to no likelihood that its speculation will come to pass. As explained above, the United States is aware of this case and is capable of seeking to intervene. If it declines to do so, this Court should assume the United States has a reason. Furthermore, while IGRA requires the United States to regulate gaming, it does not impose upon the United States "the duty to ensure that Indian gaming continue under any circumstances." *Pueblo of Santa Ana*, 932 F. Supp. at 1298. Finally, the Tribe's counsel is perfectly able to represent the Tribe's interests, which are no different from those of the United States. For these reasons, it is speculative to assume that a judgment against the Tribe would so dissatisfy the United States that it would file future litigation to re-open that decision.

II. The Commonwealth Cannot Feasibly Join the United States to this Case.

All parties appear to agree that the United States cannot be joined to the claims the Commonwealth currently pursues in this case: claims for breach of contract. However, the Tribe suggests that the Commonwealth can easily fix that problem by simply rewriting its complaint to assert an APA claim. Memo. at 5-7. The Tribe's assertions are in conflict with both the reach of Rule 19 and the Commonwealth's right to advance claims of its own choosing. Rule 19 concerns whether a party is necessary and indispensable to the case then pending in a court. Here, the Commonwealth's complaint is to enforce the Settlement Agreement. If the Tribe believed that the Commonwealth's complaint was devoid of merit, it was free to move to dismiss that complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. But the Tribe did not do so—indeed, could not do so—thus conceding that the Commonwealth's current complaint states a valid claim.[10] Because the Commonwealth has stated a claim, it should be permitted to pursue that claim to resolution.

To be sure, the Tribe's argument concerning the possibility of an APA claim has a place in the analysis: as a factor to be considered under Rule 19(b)'s indispensability analysis. However, it is one factor of many and not dispositive. Moreover, it is far from clear that the Commonwealth could actually file a complaint against the United States under the APA because it is the DOI's opinion letter, and not the NIGC's approval of the Tribe's gaming ordinance, that addresses the legal issue that requires resolution. In any event, because the Commonwealth cannot feasibly join the United States to the claims it currently advances, this Court must proceed—as Rule 19 requires—to analyze whether the United States is an indispensable party prior to taking the drastic action of dismissing the Commonwealth's complaint. *See* Rule 19(b).

[10] The AGHCA explains in its Opposition to the Tribe's Motion to Dismiss Intervenor AGHCA's Complaint for Lack of Effective Waiver of Sovereign Immunity and Failure to State a Claim, the Settlement Agreement is a presently enforceable agreement, binding on the parties thereto.

III. Because The United States is Not an Indispensable Party, this Case May Proceed in Its Absence.

The second half of Rule 19, wholly unaddressed the Tribe, sets forth four factors to guide inquiry into whether a party is indispensable:

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

Rule 19(b). The indispensability analysis involves "the balancing of competing interests" and "must be steeped in pragmatic considerations." *In re Olympic Mills Corp.*, 477 F.3d 1, 9 (1st Cir. 2007). "[N]o set weight is afforded to any of the factors." *B. Fernandez & HNOS, Inc. v. Kellogg USA, Inc.*, 516 F.3d 18, 23 (1st Cir. 2008) (citing *Associated Dry Goods Corp. v. Towers Fin. Corp.*, 920 F.2d 1121, 1124 (2d. Cir. 1990)). "Moreover, the specified factors do not constitute an exhaustive canvass, and a court may take into account other considerations in determining whether or not to proceed without the absentee as long as they are relevant to the question of whether to proceed in 'equity and good conscience.'" *Id.* (quoting *In re Cambridge Biotech Corp.*, 186 F.3d 1356, 1369 (Fed. Cir. 1999) (citation omitted)).

As explained below, a number of courts have held that the United States is not an indispensable party to litigation concerning Tribal rights where, as here, the plaintiff does not seek to alienate Indian land. *See infra* Section III.A. Thus, it is unsurprising that application of Rule 19(b)'s factors to the facts of this case counsel the same result here. *See infra* Section III.B.

A. Relevant Caselaw Supports Application of Rule 19(b) to Conclude that the United States is not an Indispensable Party.

It has long been the law that Indian Tribes are perfectly capable of litigating their own interests, even in the United States' absence. *E.g., Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1254 (9th Cir. 1983); *Choctaw & Chickasaw Nations v. Seitz*, 193 F.2d 456, 458

(10th Cir. 1952); *Narragansett Tribe of Indians v. S. Rhode Island Land Dev. Corp.,* 418 F.Supp. 798, 812 (D.R.I. 1976). So long as a plaintiff does not seek to alienate Indian land—and the Commonwealth is not seeking that here—no bright line rule requires the United States' presence in a case. *Cf. State of Minnesota v. United States*, 305 U.S. 382, 386 (1939) ("A proceeding against property in which the United States has an interest is a suit against the United States."). Instead, in the words of the Tenth Circuit, when reflecting upon Supreme Court precedent in *Heckman v. United States*, 224 U.S. 413 (1912); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *Creek Nation v. United States*, 318 U.S. 629 (1943); and *United States v. Candelaria*, 271 U.S. 432 (1926):

> A holding that restricted Indians, tribes, or pueblos have capacity to prosecute or defend an action with respect to their lands would be of no avail to them, if the United States is an indispensable party to such an action, since the joinder of the United States cannot be compelled. We think the inference must be drawn that the Supreme Court recognized the right of the restricted Indian, tribe, and pueblo to maintain such an action without the presence of the United States as a party.

Choctaw & Chickasaw Nations, 193 F.2d at 460.

Consistent with this notion, several courts have applied the factors set forth in Rule 19(b) to conclude that the United States is not indispensable where a Tribe is fully able to protect its own rights and interests. In *Mescalero Apache Tribe v. State of New Mexico*, 131 F.3d 1379, 1383-84 (10th Cir. 1997), the Tenth Circuit held the United States not indispensable to a lawsuit concerning a negotiation of a State-Tribal compact under IGRA. In *Texas v. Ysleta Del Sur Pueblo*, 79 F. Supp. 2d 708 (W.D. Tex. 1999), *aff'd,* 137 F.3d 631 (2000), *cert. den'd,* 532 U.S. 1066 (2001), the district court held that the United States was not indispensable in a lawsuit brought by the State of Texas to enjoin illegal gaming on an Indian reservation. The tribe in that case moved to dismiss asserting (among other things) that the United States could eventually bring its own action against that tribe concerning the same gaming activities. *Id.* at 711. The court explicitly noted that the threat of future litigation does not necessitate joinder and that no

Supreme Court precedent mandates the United States' presence. *Id.* And, in *Forest County Potawatomi Community of Wisconsin v. Doyle*, 828 F. Supp. 1401 (W.D. Wisc. 1993), *aff'd*, 45 F.3d 1079 (7th Cir. 1995), the district court held that the United States was not indispensable in a lawsuit whose chief issue was the legal authority of an Indian tribe to conduct gaming on lands subject to NIGC regulation and governed by a State-Tribal compact. *Id.* at 1412-13.

Indeed, the United States Supreme Court and other courts have decided many cases involving tribal rights—including gaming rights—on Indian lands without the United States as a party. *E.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (holding, in absence of United States as a party to the case, that (prior to IGRA), states were proscribed from regulating gaming on Indian reservation lands).[11] Moreover, in prior litigation concerning the these same parties—*Weiner v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 223 F. Supp. 2d 346, 351 (D. Mass. 2002)—and concerning both the Settlement Agreement and the Town's jurisdiction over the Tribe on Settlement Lands, neither the parties nor the court raised any concern over the United States' absence from that case. Thus, the weight of caselaw pulls against the Tribe's argument that the United States is indispensable to this case.

B. Application of Rule 19(b) Factors to this Case Compels the Conclusion that the United States is not an Indispensable Party.

In light of the case law reaffirming the ability of Indian tribes to pursue their own interests in Federal court, it should be unsurprising that application of the Rule 19(b) factors compels the conclusion that the United States is not indispensable.

[11] *See also Lower Brule Sioux Tribe v. State of South Dakota*, 540 F. Supp. 276 (D. S.D. 1982) (holding United States not indispensable in an action concerning state jurisdiction over hunting and fishing rights on a reservation), *judgment rev'd on other grounds*, 711 F.2d 809 (8th Cir. 1983); *Eastern Band of Cherokee Indians v. Griffin*, 502 F. Supp. 924 (W.D.N.C. 1980) (holding United States not indispensable to an action seeking to enjoin individual Indians from remaining in possession of lands included in easement to State transportation department); *Narragansett Tribe of Indians*, 418 F. Supp. at 813 (holding that the United States not indispensable in lawsuit where an Indian Tribe claimed title to certain lands); *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899, 903 (D. Mass. 1977) (same).

1. The United States Will Not be Significantly Prejudiced by its Absence from this Case.

Factors (1) (prejudice to the absent party from a judgment) and (2) (potential to use protective measures in judgment to lessen prejudice) weigh heavily in the Commonwealth's favor. At bottom, this case concerns whether the Tribe may conduct Class II gaming on the Settlement Lands. The Commonwealth seeks to enforce contractual rights against the Tribe to prevent that gaming. The Commonwealth does not, however, seek any relief against the United States. It is therefore unlikely that this Court's judgment would prejudice the United States in a way that would be different from the Tribe's own interests, which are ably represented by counsel. Moreover, should the United States decline to intervene, it can be inferred that the United States does not believe that its own interests will be greatly harmed by such a judgment. Thus, Factor (1) weighs in the Commonwealth's favor. Further, the Commonwealth seeks only a limited remedy in this case—declaratory judgment—on a narrow legal issue. Factor (2) therefore also weighs in the Commonwealth's favor because the Commonwealth has structured its complaint to shape the requested relief narrowly, to avoid prejudice to the United States' interests.[12]

[12] This case is distinguishable from those in which courts noted potential prejudice to the interests of an unrepresented sovereign. *See, e.g.*, *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008) (remanding case to district court for dismissal because foreign sovereign was an indispensable party, not subject to joinder, out of respect for foreign sovereign's unrepresented and unasserted interests). Here, the United States' status as a sovereign has little bearing on the application of Rule 19(b). While this Court must be mindful of proceeding in the absence of a sovereign in many circumstances, the United States' interests are put at issue (at all) only by its relationship to Indian tribes. In other words, it is the Tribe's interests that are paramount in this case—it is the Tribe, and not the United States, that wants to open a Class II gaming facility. The Tribe has retained counsel capable of protecting those interests. The United States' absence creates no special concerns arising from unrepresented (and unasserted) sovereign interests.

2. Entry of Declaratory Judgment Would Sufficiently Resolve this Dispute by Binding All of the Original Parties to the Settlement Agreement.

As to Factor (3), a judgment rendered in the absence of the United States will be adequate to resolve the current dispute. Any judgment rendered in this case would, of course, bind all parties—the Commonwealth, Tribe, Town, and AGHCA. Those are the four parties to the Settlement Agreement and the four parties who have a demonstrated interest in the subject matter of this dispute through their participation in this case. Entry of a judgment binding the four parties to the Settlement Agreement, on a claim for breach of that agreement, is sufficient to resolve the dispute before this Court.

3. The Commonwealth's Purported Ability to File an APA Claim Against NIGC Does not Render the United States Indispensable.

What then of the Tribe's argument—placed in its proper context of Factor (4) of Rule 19(b)—that the Commonwealth would have available to it an alternative forum by a lawsuit under the APA? Certainly, this is true and the Commonwealth could sue the NIGC's approval of the Tribe's gaming ordinance under the APA, because IGRA specifically identifies such an approval as subject to judicial review. 25 U.S.C. § 2714; *see* 5 U.S.C. §§ 702. But the crux of this matter does not concern the ordinance. Rather, it concerns the subject matter of NIGC's opinion letter, incorporating DOI's opinion letter. The Tribe does not explain why those opinion letters would constitute final agency action reviewable under the APA; that remains an open question. *See* 5 U.S.C. § 704 ("A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."); *Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan v. Ashcroft*, 360 F. Supp. 2d 64, 68 (D.D.C. 2004) (NIGC General Counsel letter and letter from Department of Justice official not reviewable final agency actions); *Miami Tribe of Oklahoma v. United States*, 198 F. App'x 686, 690 (10th Cir. 2006) (unpublished) ("DOI Opinion Letter," sent at request of NIGC, "not final agency action" for APA purposes); *cf. State of Kansas v. United States*, 249

F.3d 1213, 1223 (10th Cir. 2001) (permitting judicial review of NIGC management-contract determination issued under Section 2711 of IGRA).[13]

Moreover, there is no reason the legal issue the Commonwealth asks this Court to decide must be resolved through an APA claim. NIGC is an expert gaming regulator: its statutory charge is to oversee gaming activities. NIGC is not an administrator of Indian lands and has no special expertise in interpreting the Settlement Agreement, the legislation approving that agreement, or the central legal issue to this case: the Commonwealth's contractual right to enforce the terms of the Settlement Agreement. Indeed, NIGC did not rule on those issues at all. Rather, it sought and received an "opinion" letter from DOI that did not result from any adjudicatory proceeding, with no right or opportunity for the Commonwealth to participate and make known its legal positions. The crux of this dispute is not any action the NIGC took or any discretion it exercised within the sphere of its specialized expertise and statutory authority. Factor (4) has little or no weight in the indispensability analysis. Thus, even if the Commonwealth can seek judicial review of the NIGC's approval of the Tribe's ordinance, that review would not yield a final resolution of the legal dispute among the parties. Judicial review under the APA is not a suitable alternative forum for adjudication of that issue.

[13] NIGC's own website clarifies that letters issued by its Office of General Counsel are not "agency action" subject to judicial review under the APA. http://www.nigc.gov/LinkClick.aspx?fileticket=Qo0rfkyDmMY%3d&tabid=959 (last visited Oct. 6, 2014).

CONCLUSION

For the reasons set forth above, the Commonwealth of Massachusetts respectfully requests that this Court enter an order DENYING the Defendants' Motion Pursuant to Fed.R.Civ.P. 19 to Dismiss with Leave to Amend for Failure to Join a Necessary Party.

Respectfully submitted,

THE COMMONWEALTH OF MASSACHUSETTS,

By and through its attorney,

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Dated: October 6, 2014

CERTIFICATE OF SERVICE

I, Bryan Bertram, hereby certify that, this October 6, 2014, I filed the foregoing document through the Electronic Case Filing (ECF) system and thus copies of the foregoing will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF); paper copies will be sent, via first-class mail, to those indicated as non-registered participants.

/s/ Bryan Bertram