

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 14 2026

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BRIAN HOLL; JULIE JORLETT; JOHN
SARVELA; MARILYN SARVELA;
DUSTIN LOUGHMAN; TIFFANI
LOUGHMAN,

Plaintiffs - Appellants,

v.

SHARON AVERY, in her official capacity
as Acting Chairwoman of the National
Indian Gaming Commission; NATIVE
VILLAGE OF EKLUTNA,

Defendants - Appellees.

No. 25-4618

D.C. No.

3:24-cv-00273-JLR

MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
James L. Robart, District Judge, Presiding

Submitted August 11, 2026**
Anchorage, Alaska

Before: CALLAHAN, BEA, and BUMATAY, Circuit Judges;
Concurrence by Judge BEA;
Concurrence by Judge BUMATAY.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Plaintiffs-Appellants (“Plaintiffs”) appeal the district court’s order, which dismissed their action for failure to join the Native Village of Eklutna (“NVE”) as a required party pursuant to Federal Rule of Civil Procedure 12(b)(7). Plaintiffs, residents of the Birchwood Spur Road neighborhood, filed a lawsuit under the Administrative Procedure Act against NVE and then-Acting Chairwoman of the National Indian Gaming Commission, Sharon Avery (“Avery”) (collectively “Defendants”) seeking to halt NVE’s gaming operations on the Ondola Allotment. The Ondola Allotment is located near the Birchwood Spur Road neighborhood.

The district court granted NVE’s motion to dismiss NVE from Plaintiffs’ action under Rule 12(b)(1) for lack of subject matter jurisdiction because the judge concluded that NVE was a federally recognized tribe and therefore was immune from suit. The district court then concluded that Plaintiffs’ action could not proceed without NVE in equity and good conscience and dismissed Plaintiffs’ action for failure to join a required party under Rule 12(b)(7).

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review whether the district court lacked subject matter jurisdiction because NVE had tribal sovereign immunity *de novo*. *Welsh v. Loudbear*, 178 F.4th 484, 488 (9th Cir. 2026). “We review a district court’s decision to dismiss an action for failure to join a required party for abuse of discretion, but we review its underlying legal conclusions de

novo.” *Diné Citizens Against Ruining Our Env. v. Bureau of Indian Affs.*, 932 F.3d 843, 851 (9th Cir. 2019) (citation modified).

1. The district court correctly granted NVE’s motion to dismiss NVE from Plaintiffs’ action for lack of subject matter jurisdiction under Rule 12(b)(1) because NVE, as a federally recognized tribe, is entitled to tribal sovereign immunity. *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.*, 276 F.3d 1150, 1159 (9th Cir. 2002). “Congress has the power, both directly and by delegation to the President, to establish the criteria for recognizing a tribe.” *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1276 (9th Cir. 2004) (quoting *Miami Nation of Indians of Indiana, Inc. v. U.S. Dep’t of the Interior*, 255 F.3d 342, 345 (7th Cir. 2001)). Congress has delegated such authority to the Department of the Interior. *See James v. U.S. Dep’t of Health and Hum. Servs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987) (finding that “Congress ha[d] specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations,” including federal recognition, via 25 U.S.C. §§ 2, 9).

Pursuant to its authority to recognize tribes, the Department of the Interior has published a list of federally recognized tribes, which has included NVE since at least 1982. 47 Fed. Reg. 53130, 53133–34 (Nov. 24, 1982); *see Kahawaiolaa*, 386 F.3d at 1273–74. Thus, the district correctly determined that NVE was a federally recognized tribe because, “[a]lthough somewhat circular, by definition, a federally

recognized tribe is one that is already on the list.” *Agua Caliente Tribe of Cupeño Indians of Pala Rsr. v. Sweeney*, 932 F.3d 1207, 1217 (9th Cir. 2019).

2. Plaintiffs’ action was rightly dismissed because NVE is a required party that cannot feasibly be joined under our precedent. NVE is a required party under Rule 19(a) because Plaintiffs’ action as a practical matter directly impairs or impedes NVE’s “legally protected economic and sovereign interests.” *Maverick Gaming LLC v. United States*, 123 F.4th 960, 972 (9th Cir. 2024). Like in *Jamul Action Comm. v. Simermeyer*, Plaintiffs’ claim and desired remedies, although couched in terms of challenging the agency’s decision, rest upon their “contention that [NVE] is not a [federally] recognized tribe and that its land therefore is not Indian land held in trust on its behalf by the federal government.” 974 F.3d 984, 997 (9th Cir. 2020). In this circumstance, the Federal Government cannot adequately represent NVE under our precedent since the Federal Government’s primary interest is in defending its action approving NVE’s gaming ordinance, whereas NVE’s primary interest is in defending the continued existence of its casino and federal recognition. *Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934, 944–45 (9th Cir. 2022); *Maverick Gaming LLC*, 123 F.4th at 974–75. But, as discussed above, joinder of NVE in Plaintiffs’ action is not feasible because NVE is protected from suit by tribal sovereign immunity. *Maverick Gaming LLC*, 123 F.4th at 978.

Since NVE is a required party and cannot be feasibly joined in this action, the

district court correctly determined that Plaintiffs’ action could not proceed without NVE in equity and good conscience because “[t]he balancing of equitable factors under Rule 19(b) almost always favors dismissal when a tribe cannot be joined due to tribal sovereign immunity.” *Deschutes River All. v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1163 (9th Cir. 2021) (quoting *Jamul Action Comm.*, 974 F.3d at 998). Therefore, the district court did not abuse its discretion. *See Diné Citizens Against Ruining Our Env.*, 932 F.3d at 857–58.

AFFIRMED.

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Holl v. Avery, 25-4618
BEA, Circuit Judge, concurring:

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I agree with Judge Bumatay’s concurrence that our current precedent raises serious practical concerns worth reevaluating because an Indian tribe will generally be able to prevent judicial review of “agency action [that] favors a tribe,” since a tribe is often a required party that cannot feasibly be joined due to its tribal sovereign immunity. Bumatay Concur. Mem. Disp. at 3. As it stands, unless a tribe waives its tribal sovereign immunity, such an action usually will be dismissed for failure to join a required party. However, I disagree with Judge Bumatay’s concurrence to the extent that it suggests an Indian tribe will never be a required party under Federal Rule of Civil Procedure 19(a)(1) because, “when challenging a government action involving tribal interests, the tribe’s interests will generally always be protected.” Bumatay Concur. Mem. Disp. at 2.

We have held that “[a]s a practical matter, an absent party’s ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit.” *Alto v. Black*, 738 F.3d 1111, 1127 (9th Cir. 2013) (quoting *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999)). But I have serious doubts that agency bureaucrats will always adequately represent an Indian tribe’s interests over the course of litigation.

To demonstrate my point, consider the Department of the Interior’s (“Department”) shifting view on whether Alaska Native allotments such as the Ondola Allotment are “Indian lands” eligible for tribal gaming operations. In 2024, the Department approved the Native Village of Eklutna’s (“NVE”) gaming ordinance based on the Department of Interior Office of the Solicitor’s (“SOL”) analysis of the Ondola Allotment. But while this very lawsuit was pending before this Court, the Department withdrew the Solicitor’s Opinion, which the Department and SOL had relied upon to approve NVE’s gaming ordinance. *See* Deputy Secretary of the Interior, Memorandum, “*Withdrawal of Solicitor Opinion M-37079, ‘Partial Withdrawal of Solicitor’s Opinion M-36975, ‘Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers,’ and Clarification of Jurisdiction Over Alaska Native Allotments*” (Sept. 25, 2025). In withdrawing the Solicitor’s Opinion, the Department itself instructed that “any Department action, including any action by the National Indian Gaming Commission, taken in reliance on Solicitor Opinion M-37079, should be reevaluated in accordance with this revocation.” *Id.* at 2. If the Department can reverse the very legal ground it stood on to approve NVE’s gaming ordinance while this suit was pending, it can hardly be presumed adequately to represent NVE’s interests in this suit. This case is as apt an illustration as any that perhaps a bureaucrat’s goodwill cannot always be relied upon to last.

Holl v. Avery, 25-4618
BUMATAY, Circuit Judge, concurring:

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I fully agree that we must defer to the Executive branch’s determination of who is a federally recognized tribe. But I write separately to highlight that our precedent on the joinder of federally recognized tribes under Federal Rule Civil Procedure 19 is wrong and needs correction. Under our precedent, when the government and a tribe “share an interest in the ultimate outcome of [a] case,” that isn’t enough to make the government an adequate representative of the tribe’s interest in the litigation. *See Maverick Gaming LLC v. United States*, 123 F.4th 960, 974–75 (9th Cir. 2024); *Dine Citizens Against Ruining Our Env’t v. Bureau of Indian Affs.*, 932 F.3d 843, 855 (9th Cir. 2019). Instead, rather than focus on the unity of outcome, our precedent requires us to peer into the interests of the tribe and the government and decide whether they want the same outcome for the *same exact reason*. Only then can the government adequately protect the tribe’s interest. *Maverick Gaming LLC*, 123 F.4th at 976; *see also Klamath Irrigation Dist. v. United States Bureau of Reclamation*, 48 F.4th 934, 945 (9th Cir. 2022) (“[A] unity of some interests does not equal a unity of all interests”).

The Ninth Circuit’s exacting inquiry into interests makes no sense in the context of Administrative Procedure Act (“APA”) litigation. Rule 19(a)(1) requires joinder of necessary parties when a party’s absence might “as a practical matter impair or impede the [party’s] ability to protect [its] interest” in the action. Fed. R.

Civ. 19(a)(1)(B)(i). But when challenging a government action involving tribal interests, the tribe's interests will generally always be protected. If tribal interests are adverse to the government, the tribe can bring its own actions against the government—tribal sovereign immunity won't bar that. But when a third party challenges a government action benefiting a tribe, both the tribe and the government want the government to prevail and so the government will litigate to protect the tribal interest. That should generally be enough under Rule 19(a)(1).

It's true, of course, that the tribe might have interests separate from the government's. But, as Judge Miller has explained, litigation under the APA only concerns whether the challenged agency action should be set aside. *See Maverick Gaming*, 123 F.4th at 984 (Miller, J., concurring); *see* 5 U.S.C. § 706(2)(A) ("The reviewing court shall . . . hold unlawful and set aside agency action . . . not in accordance with law[.]"). And the APA only authorizes relief against the agency. *See* 5 U.S.C. §§ 702, 706. So APA lawsuits are generally binary—the agency action will be upheld or it will set aside. Any tribal interest collateral to upholding the agency action cannot be adjudicated through APA challenges. So all the litigation can do is leave the tribe "no worse off than [it] would be had the agency not taken the challenged action in the first place." *Maverick Gaming*, 123 F.4th at 985 (Miller, J., concurring). Put differently, any tribal interest apart from the government's interest can't be vindicated in an APA action. Besides, an agency action can be

upheld only “on the rationale articulated by the agency itself[.]” *Maverick Gaming*, 123 F.4th at 984 (Miller, J., concurring); see *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). So the litigation is all about the *agency’s* choices and the *agency’s* rationale; naturally, then, it is the *agency* that is best suited to defend its action.

The result of our wayward precedent? The complete lack of judicial review for government actions going *in one direction*. If an agency action disfavors a tribe, the tribe may sue the government and the government action gets full judicial review. But if the agency action favors a tribe, third parties will be unable to challenge the government and the government action is insulated from judicial review. See *Maverick Gaming*, 123 F.4th at 985 (Miller, J., concurring) (observing that “[n]o one, except a Tribe, [can] seek review of agency actions affecting tribal interests” (quoting *Manygoats v. Kleppe*, 558 F.2d 556, 559 (10th Cir. 1977))). Our precedent thus “sound[s] the death knell for any judicial review of executive decisionmaking in the wide range of cases in which agency actions implicate the interests of Indian tribes.” See *id.* (simplified). This ultimately “frustrates Congress’s directive that a person adversely affected or aggrieved by agency action is entitled to judicial review[.]” *Id.* (quoting 5. U.S.C. § 702).

The Ninth Circuit’s required-parties approach thus badly misses the mark. And it conflicts with the Tenth and D.C. Circuits’ approaches. See *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1259–60 (10th Cir. 2001); *Ramah Navajo Sch.*

Bd., Inc. v. Babbitt, 87 F.3d 1338, 1350–52 (D.C. Cir. 1996). In an appropriate case, we should reconsider this line of precedent.