No. 85661-3

FAIRHURST, J. (dissenting)—Under a proper CR 19(b) analysis, the Indian tribes are indispensable parties and they will be severely prejudiced by a state court judgment rendered in their absence. Because the majority incorrectly holds that the tribes are not indispensable parties, it seriously undermines the doctrine of tribal sovereign immunity and weakens the law. I dissent.

ANALYSIS

The issue in this case is whether Automotive United Trades Organization (AUTO) may sue the State over gas tax compacts involving certain Indian tribes. As discussed by the majority, the tribes that are party to the compacts are necessary to the action under CR 19(a)(2)(A) and cannot be joined due to sovereign immunity. When a party is necessary to an action and cannot be joined, a court must determine whether the action should proceed without the party "in equity and good conscience" or be dismissed. CR 19(b). If the action must be dismissed, the absent

party is regarded as "indispensable." *Id*.

In determining whether an absent party is indispensable, a court must consider:

> (1) [T]he extent to which a judgment rendered in the party's absence might be prejudicial to that party or to those already parties; (2) the extent to which the prejudice can be lessened or avoided by protective provisions in the judgment, by shaping of relief, or other measures; (3) whether a judgment rendered in the party's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Mudarri v. State, 147 Wn. App. 590, 604-05, 196 P.3d 153 (2008). "These four factors are not rigid, technical tests, but rather 'guides to the overarching "equity and good conscience" determination.'" *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 774 (D.C. Cir. 1986) (quoting *Cloverleaf Standardbred Owners Ass'n v. Nat'l Bank of Wash.*, 699 F.2d 1274, 1279 n.11 (D.C. Cir. 1983) (quoting Fed. R. Civ. P. 19(b))).

As will be explained below, the tribes are clearly indispensable parties; a judgment rendered in the tribes' absence will prejudice their interest in the compacts, weaken their ability to negotiate for future contracts, impede their sovereign right to govern their reservations, and undermine their interest in tribal sovereign immunity. AUTO's interest in litigating its suit pales in comparison. The majority holds otherwise because it improperly focuses on only one CR 19(b)

factor, improperly narrows the tribes' interests, and improperly inserts the public into its analysis. As a result, the majority's decision undermines the principle of tribal sovereignty, erodes the doctrine of sovereign immunity, and weakens the law.

A. The Tribes Are Indispensable Parties

1. *A judgment rendered in the tribes' absence will severely prejudice the tribes*

CR 19(b)(1) requires a court to consider the extent to which a judgment rendered in the tribes' absence might prejudice the tribes or existing parties. In this case, the tribes have at least four interests that will be subject to severe prejudice. When the tribes' interests are fully considered, CR 19(b)(1) favors dismissal so strongly that it is nearly dispositive.

First, an unfavorable judgment would seriously prejudice the tribes' contractual interest in the compacts. If a court were to grant AUTO's requested relief, it would, in effect, declare the compacts unconstitutional and unenforceable. Although the tribes would not be bound by the court's ruling, the compacts would essentially disintegrate and the tribes would lose the fuel tax refunds to which they are entitled. In 2008 and 2009, approximately $37.3 million was disbursed to the tribes pursuant to the compacts. Clerk's Papers (CP) at 106. Accordingly, "[t]he amount of prejudice to the tribes from termination of existing compacts . . . would

be enormous." *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002).

Second, an unfavorable judgment would seriously prejudice the tribes' ability to negotiate for future contracts and compacts. *See Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1162 (9th Cir. 2002) (A decision rendered in the Nation's absence would "prejudice the Nation's sovereign interests in negotiating contractual obligations."); *Am. Greyhound Racing*, 305 F.3d at 1025 ("The amount of prejudice to the tribes from . . . inability to enter new [compacts] would be enormous."). The State and the Indian tribes located in Washington have a long history of contentious disputes regarding the State's authority to tax fuel sold by and to the tribes, and contract negotiation has been an important tribal tool. *See, e.g.*, CP at 315-16. A judgment favoring AUTO would make it much less likely that the tribes could negotiate for compacts in the future.

Third, an unfavorable judgment would seriously prejudice tribal sovereignty—the tribes' "inherent right or power to govern" their own reservations. William C. Canby, Jr., American Indian Law in a Nutshell 76 (2009). Under the compacts, refunds are made to the tribes, not tribal retailers, and are used for typical government projects—"[p]lanning, construction, and maintenance of roads, bridges,

and boat ramps; transit services and facilities; transportation planning; [and] police services." RCW 82.38.310(3)(b). Because these projects are at least partly funded through the compacts, a judgment against the State would substantially impede the tribes' sovereign ability to provide these vital services. *See Dawavendewa*, 276 F.3d at 1162 (A decision rendered in the Nation's absence would "prejudice the Nation's sovereign interests in . . . governing the reservation."). State courts should be particularly hesitant to diminish the sovereign status of tribes, which the United States Supreme Court recognized in response to states' infringement on tribal authority and which has endured despite repeated state challenges. Felix S. Cohen, Handbook of Federal Indian Law § 6.01[2] (2005) (tracing federal recognition of tribal independence from state jurisdiction to *Worcester v. Georgia*, 31 U.S. 515, 8 L. Ed. 483 (1832)).

Fourth, *any* judgment would "effectively abrogate the Tribe's sovereign immunity." *Enter. Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989). Tribal sovereign immunity is "[t]he principle that tribes enjoy the sovereign's common law immunity from suit." Canby, *supra*, at 101. As "a necessary corollary to Indian sovereignty and self-governance," *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890, 106

S. Ct. 2305, 90 L. Ed. 2d 881 (1986), the doctrine "recognizes the sovereignty of Indian tribes and seeks to preserve their autonomy [by protecting] tribes from suits in federal and state courts." *Wichita*, 788 F.2d at 771. "[T]ribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756, 760, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998) (reversing a state appellate court decision that Indian tribes were subject to suit in state court for breaches of contract that involved off-reservation commercial conduct).

Based on the doctrine, tribes have a "sovereign right not to have [their] legal duties judicially determined without consent." *Enter. Mgmt. Consultants*, 883 F.2d at 894. Accordingly, tribes enjoy sovereign immunity from lawsuits "even when other parties having an interest in the case *may* be brought before the court." Stephen L. Pevar, The Rights of Indians and Tribes 355 (2002). The issue in such cases is whether a tribe's interests will be "affected by the outcome." *Id*. As explained above, the tribes' contractual and sovereign interests will clearly be affected by the outcome of AUTO's suit. Therefore, a judgment rendered in the tribes' absence will undermine the tribes' sovereign immunity even if the judgment favors the State.

2. *Prejudice to the tribes cannot be lessened or avoided*

CR 19(b)(2) requires a court to consider the extent to which any prejudice could be lessened or avoided. This factor also strongly favors dismissal. Because AUTO seeks a declaratory judgment that the fuel tax remittances are unconstitutional and unenforceable, no shaping of the judgment could mitigate the prejudice to the tribes. AUTO's relief, if granted, would completely deprive the tribes of their right to a refund of the fuel tax revenues for which they bargained, hinder the tribes' ability to provide crucial government services, and undermine the tribes' ability to negotiate for future compacts. Even if the State prevails, the adjudication itself would abrogate the tribes' sovereign immunity.

3. *A judgment rendered in the tribes' absence will be inadequate*

CR 19(b)(3) requires a court to consider whether a judgment rendered in the tribes' absence will be adequate.[1] Because no other judicial forum is available for AUTO's suit, CR 19(b)(3) strongly favors dismissal. Our Court of Appeals has even found this factor dispositive under analogous facts. In *Mudarri*, 147 Wn. App. at 590, a private casino owner filed a declaratory judgment action against the State,

[1]In this context, adequacy involves "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968). We read this factor "to refer to this public stake in settling disputes by wholes, whenever possible, for clearly the plaintiff, who himself chose both the forum and the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them." *Id*.

seeking to invalidate a state-tribal compact granting the tribe the exclusive right to operate electronic scratch ticket games at its casino. The Court of Appeals found that the trial court could not adequately address the plaintiff's claims in the tribe's absence and held that the tribe was an indispensable party. The same principle applies in this case.

4. *If the case were dismissed, AUTO would not have a judicial remedy, but it could lobby the legislature to change the law*

Finally, CR 19(b)(4) requires a court to consider whether the plaintiff would have an adequate remedy if the action were dismissed. Because dismissal would deprive AUTO of a judicial forum, this factor opposes dismissal.

But an action should not proceed "solely because the plaintiff otherwise would not have an adequate remedy." 3A James Wm. Moore, Moore's Federal Practice ¶ 19.07-2[4], at 19-153 (2d ed. 1984). When the other CR 19(b) factors outweigh the plaintiff's interest in litigation, dismissal is the proper result. Accordingly, Washington and federal cases with analogous facts provide that dismissal is appropriate, even though the plaintiff may not have access to a judicial forum. *See, e.g., Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005) (tribe's interest in sovereign immunity outweighs plaintiffs' lack of remedy, even where plaintiffs sought to invalidate a state-tribal cigarette tax agreement), *abrogated on other grounds by Levin v. Commerce Energy, Inc.*, ___ U.S. ___, 130 S. Ct. 2323, 176 L. Ed. 2d 1131 (2010).

Further, as noted by the State, AUTO could lobby the legislature to change the law. Indeed, while AUTO was pursuing this case through the courts, a bill was

introduced that would have provided AUTO's requested relief. *See* H.B. 2013, 62d Leg., Reg. Sess. (Wash. 2011).[2] If the court dismissed AUTO's suit, AUTO would not necessarily be "divested of all possible relief." Majority at 18. Rather, AUTO would not have access to a judicial forum.[3]

5. *When properly balanced, the factors strongly favor dismissal*

When the parties' interests are properly balanced, AUTO's case should be dismissed. CR 19(b). As explained above, the first three factors strongly favor dismissal, and only one factor favors AUTO. Even if the factors were equally weighted, the first three factors, which favor dismissal, outweigh the fourth factor, which does not.

Further, CR 19(b)(1) favors dismissal so strongly that it is nearly dispositive. *See Wichita*, 788 F.2d at 777 n.13 (When a necessary party is immune from suit, "there is very little room for balancing of other factors."). In fact, sovereign immunity "may be viewed as one of those interests 'compelling by themselves.'" 3A Moore, *supra*, ¶ 19.15, at 19-266 n.6 (quoting *Provident Tradesmens*, 390 U.S. at

[2]In 2012, the bill was reintroduced and retained in its present status.

[3]The majority criticizes our assertion that AUTO could petition the legislature, asserting that it is "pure speculation whether such renegotiation would be achieved." Majority at 17. This criticism wrongly presupposes that the outcome of any review or lobbying process is somehow guaranteed. We do not suggest that AUTO is guaranteed to change the law, but that AUTO has an alternate forum to air its views. Additionally, our opinion does not depend on the possibility of legislative relief. Even if AUTO were unable to petition the legislature, AUTO's suit would still require dismissal due to tribal sovereign immunity.

119). When the tribes' interest in sovereign immunity is taken into account, dismissal is the only proper result.

While this result may seem harsh, it should not seem surprising; courts have long understood that the doctrine of sovereign immunity shields certain controversies from judicial review. In fact, dismissal "is a common consequence of sovereign immunity." *Am. Greyhound*, 305 F.3d at 1025. Based on this principle, the Ninth Circuit Court of Appeals has "regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs." *Id.* (citing *Dawavendewa*, 276 F.3d at 1162); *see also Clinton v. Babbitt*, 180 F.3d 1081, 1090 (9th Cir. 1999); *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996); *Pit River Home & Agr. Co-op v. United States*, 30 F.3d 1088, 1102 (9th Cir. 1994); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994); *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1326-27 (9th Cir. 1975). Two Washington Court of Appeals decisions have also dismissed challenges to state-tribal compacts: *Mudarri*, 147 Wn. App. at 590, and *Matheson v. Gregoire*, 139 Wn. App. 624, 161 P.3d 486 (2007).[4] To protect the tribes' historic interest in

[4]The majority acknowledges these cases without stating they were wrongly decided.

maintaining their sovereignty, we should likewise dismiss AUTO's challenge.

Majority at 14-15.

B. The Majority's Holding Undermines the Doctrine of Sovereign Immunity

The majority incorrectly concludes that the tribes are not indispensable parties for three reasons: it improperly focuses on only one CR 19(b) factor, it improperly frames the tribes' interests, and it improperly inserts the public into its CR 19(b) analysis. As a result, the majority seriously undermines the doctrine of sovereign immunity and weakens the law.

First, the majority improperly focuses on only one factor, CR 19(b)(4). The majority itself acknowledges that only CR 19(b)(4) favors AUTO, but it holds that this one factor outweighs *all of the other factors combined*. This approach is incorrect. A court must consider all factors in a balancing test, not just one. Further, authorities agree that an action should not proceed "solely because the plaintiff otherwise would not have an adequate remedy." 3A Moore, *supra*, ¶ 19.07-2[4], at 19-153. Because the majority is overly concerned that AUTO will not have access to a judicial forum, the majority misconstrues the joinder rule and "contravene[s] the established doctrine of indispensability." *Id*.

The majority not only improperly focuses on CR 19(b)(4) but also improperly narrows the tribes' interests. When balancing the CR 19(b) factors, the majority says, "The circumstances presented by this case . . . implicate the absentee's

contractual interests." Majority at 18. It then cites cases for the proposition "that potential prejudice to tribal contractual interests may be outweighed by the broader public interest in having important and potentially far-reaching issues resolved in court." *Id*. at 19. In other words, the majority characterizes the tribes' interest as a mere contractual interest and ignores the tribes' other substantial interests, including its sovereign interests. This approach is incorrect because, as noted above, the tribes have at least four crucial interests that will be subjected to severe prejudice.

Finally, the majority not only artificially narrows the tribes' interests, but also improperly broadens AUTO's interests to include the public interest. *See* majority at 19 n.4. ("Any meaningful analysis of the CR 19(b) factors necessarily includes consideration of the consequences to the public of denying a judicial forum to review the constitutionality of governmental conduct."). This approach is improper because CR 19(b) does not involve consideration of the broader public interest; it involves only the interests of the "parties" and the "absent person." The one factor that involves the plaintiff's interest, the fourth factor, specifically considers "whether the *plaintiff* will have an adequate remedy," it does not consider whether the *public* will be served. CR 19(b)(4) (emphasis added). The majority's approach is particularly puzzling because the State, not AUTO, represents the interests of the

people as expressed through the legislature. *See Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998) ("[T]he Legislature speaks for the people."). The legislature has specifically authorized the governor to enter into the agreements at issue here. *See* RCW 82.36.450. AUTO does not argue that the agreements lack legislative authorization, nor would such an argument have merit.[5] AUTO also does not argue that the State was not authorized to enter into agreements with tribes. Rather, AUTO complains that the agreements provide for the unlawful disbursements of funds, which "cause AUTO members to suffer an economic injury." CP at 3.

By inserting the public into its analysis, the majority essentially conflates CR 19(b) with the public rights doctrine. The public rights doctrine may provide an exception to CR 19 dismissal when a plaintiff is seeking to vindicate a public right. 3A Moore, *supra*, ¶ 19.07, at 19-100-01, 133-37 ("In actions involving public rights, for example, the fact that a third party may be adversely affected by the litigation is insufficient in itself to justify treating him as an indispensable party.").

But the public rights doctrine applies only when an action seeks to vindicate a

[5]For this reason, the majority's reliance on *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 820, 766 N.Y.S.2d 654, 798 N.E.2d 1047 (2003) and *Dairyland Greyhound Park, Inc. v. McCallum*, 2002 WI App, 258 Wis. 2d 210, 655 N.W.2d 474 (2002) is misplaced. Both cases involve challenges to an executive's authority to enter into agreements *without legislative approval*. Even AUTO concedes that the Washington State Legislature has expressly authorized the governor to enter into the challenged agreements. CP at 103.

public right, not a private interest. *Shermoen v. United States*, 982 F.2d 1312, 1319 (9th Cir. 1992); *Nat'l Licorice Co. v. Nat'l Labor Relations Bd.*, 309 U.S. 350, 60 S. Ct. 569, 84 L. Ed. 799 (1940). Although AUTO, an association of gas retailers, argues that it seeks to vindicate the public's interest, it has acknowledged in a more candid moment that it has a competitive business motive for trying to stop gas tax refunds to the tribes—to redress its own "economic injury." CP at 3. Even the majority acknowledges that this case is really about the cost of gas. *See* majority at 3 (AUTO "believes these compacts give tribal retailers an unfair competitive advantage and enable them to undercut nontribal retailers' fuel prices."). It also acknowledges that AUTO seeks to undermine the contracts and merely "characterizes" its interest as a constitutional interest. *Id*. at 7 ("AUTO characterizes its action as focusing on the State's authority and actions under the Washington State Constitution, but it effectively seeks to erode the contracts."). Because AUTO is truly seeking to vindicate its private economic interest, the public rights doctrine does not apply.[6]

Further, even if AUTO were truly seeking to vindicate a public right, the

[6]Today's decision is particularly troubling because it provides a blueprint for any allegedly aggrieved plaintiff to circumvent long established principles of tribal sovereign immunity. From this point forward, a plaintiff seeking to redress an economic injury need only *allege* that the State's conduct is unconstitutional. The plaintiff's interest then expands to include "the public interest in having the constitutionality of executive conduct addressed," and magically becomes "paramount." Majority at 20.

public rights doctrine is not available when the requested relief would deprive the absent party of its contractual rights. *Shermoen*, 982 F.2d at 1319 ("[T]he public rights exception to joinder rules is an acceptable intrusion upon the rights of absent parties only insofar as the 'adjudication[] do[es] not destroy the legal entitlements of the absent parties.'" (second and third alterations in original) (quoting *Conner v. Burford*, 848 F.2d 1441, 1459 (9th Cir. 1988)). Because the present litigation threatens the tribes' legal entitlements in the compacts, the public rights doctrine is not available. *Id*.

As a result of its improper analysis, the majority prejudices or potentially prejudices the tribes' substantial interests. The majority claims to accord "heavy weight" to the tribes' sovereign status, majority at 13, but by allowing a state court to determine the tribes' contractual rights without the tribes' consent, the majority effectively subjects the tribes to state court jurisdiction and undermines tribal sovereign immunity. This result is contrary to the basic principles of Indian law. *See Wichita*, 788 F.2d at 777 ("[S]ociety has consciously opted to shield Indian tribes from suit without congressional or tribal consent."). Courts have long understood that the consequence of recognizing any form of immunity is that some controversies are shielded from judicial review.

CONCLUSION

This case cannot proceed "in equity and good conscience." CR 19(b). The tribes' substantial interests far outweigh AUTO's much weaker interest in litigating its claim. By holding otherwise, the majority undermines the doctrine of sovereign immunity and weakens the law. I do not and cannot agree. I dissent.

AUTHOR:
Justice Mary E. Fairhurst

WE CONCUR:
Chief Justice Barbara A. Madsen

Justice Susan Owens

Justice Steven C. González