No. 11-80

IN THE

Supreme Court of the United States

GILA RIVER INDIAN COMMUNITY,
Petitioner,

v.

GRANT LYON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* INDIAN LAND WORKING GROUP IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST [1]

The Indian Land Working Group is composed of individual Indians, or reservation-based associations of individual Indians, who own beneficial interests in land or funds held in trust for them by the United

[1] Pursuant to Rule 37.6, counsel for *amicus curiae* certifies that no part of this brief was authored by counsel for any party, and no person or entity other than *amicus curiae* or its members made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties received timely notice of *amicus curiae's* intent to file this brief and gave consent. Copies of the consent letters are on file with the Clerk of Court.

States. Virtually all Indian trust landowners today are descendants or heirs of the original allottees or patentees of these lands. The courts below have referred to the present-day Indian landowners as "allottees," however, and *amicus* adopts that terminology for convenience in this brief. Today, the U.S. Bureau of Indian Affairs reports that more than 10.5 million acres of land, http://www.bia.gov/FAQs/index.htm (last visited Aug. 16, 2011), or more than 15 times the land area of Rhode Island, are held in trust by the United States for individual Indians, primarily in the Western states. Considering the disproportionately large portion of all Indian trust lands (54%) that lie within the Ninth Circuit, Pet. 24, it is reasonable to presume that a similarly large proportion of the 10.5 million acres of individually owned Indian trust lands are also located within the Ninth Circuit.

The Indian Land Working Group was formed in 1991 out of the shared realization of Indian landowners that no collective or organized voice represented their concerns, although they shared common experiences throughout the country. From a small initial nucleus, the Indian Land Working Group has grown into a national organization that provides advice and technical assistance to individual landowners and reservation-based landowners' associations. In addition, the Indian Land Working Group has been sought out by Committees of Congress, Interior Department agencies, and national tribal organizations for consultation on land tenure and land use issues, as well as on federal legislative and regulatory initiatives.

The Indian Land Working Group has addressed such diverse matters as amending federal law to provide Indian landowners with access to data regarding their co-owners; assisting landowners to secure an accurate accounting of and payment for mineral production from their lands; assisting landowners with ending trespass uses; assisting landowners in achieving prices set in an open and competitive market for land transactions; and assisting landowners in seeking corrective action when practices such as collusive bidding are defeating measures designed to secure fair market value in real property transactions.

Amicus curiae, the Indian Land Working Group, is devoted to assisting Indian landowners in the protection and enjoyment of their private, real property estates which are held in trust for them by the United States. *Amicus* and its members believe that the institution of private property is fundamental to the American experience and central to the development of a private sector, middle-class economy on Indian reservations.

With only a scant nod toward considerations of notice, opportunity to be heard, and other elements of due process, the decision below in this case imposes a legal servitude on the privately owned, real property of some Indian landowners of the Gila River Indian Community, property that is held in trust by the United States. *Amicus curiae* respectfully suggests that, if allowed to stand, this decision will bind future panels of the Ninth Circuit to similarly "incongruous" results, just as the panel below explicitly acknowledged itself constrained by "our circuit's law." Pet. App. 12a.

STATEMENT

This Court has dealt repeatedly with cases that illustrate both the expanse and the value of lands that are held in trust for individual Indians. In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), for instance, this Court observed that a national policy grounded in the "belief that the Indians would benefit from private property ownership," led Congress to enact the General Allotment Act (Dawes Act) of 1887, 24 Stat. 388, that authorized the Secretary of the Interior to make individual allotments of reservation lands throughout the country (with certain exceptions not relevant here). On the Yankton Sioux reservation alone, more than 362,300 acres eventually were allotted to individual Indians. *Yankton, supra*, at 335-6.

This Court has dealt as well with the resentment among Indians and non-Indians alike of the considerable value that might accrue to some individual Indians from their allotments. In *Arenas v. United States*, 322 U.S. 419 (1944), the Court faced the Secretary's reluctance to divide the property of the Agua Caliente or Palm Springs Band of Mission Indians so as to transfer the valuable mineral springs to individual members of the tribe.

Today, the true value of allotted Indian lands and associated resources is often not readily apparent to either the Indian owner or to the trustee United States until the property is exposed to the market, or until a market develops for the Indian property. The Secretary is often called upon to resolve conflicts that

arise from some use or proposed acquisition of allotted Indian lands. In *Shirley Delgado v. Acting Anadarko Area Director, Bureau of Indian Affairs*, 27 IBIA 65 (Dec. 12, 1994), the Interior Board of Indian Appeals (IBIA) recited that an audit of a single Kickapoo Indian's oil and gas lease in Oklahoma had "resulted in the recovery of more than $1,023,000 in underpaid royalties and interest penalties." *Id.* at 69. In *Quinault Indian Nation and Anderson & Middleton Company v. Northwest Regional Director, Bureau of Indian Affairs*, 48 IBIA 186 (Dec. 30, 2008), the IBIA was faced with a tribe's claim that the American Indian Probate Reform Act (AIPRA), 25 U.S.C. § 2216(f) authorized it to purchase a family's allotments from the willing sellers for less than the $4,391,026 offered by a local timber company for the same parcels.

In all these and other instances dealing with the rights of Indians to lands allotted to them or their ancestors and held in trust by the United States, a single thread runs through them. That is the principle that no rights in lands held in trust for Indians can be acquired or enjoyed except with the participation of the United States. The Ninth Circuit alone among the federal judicial circuits has devised a doctrine that avoids this principle. In the case below, the Ninth Circuit panel considered itself to be bound, instead, by "the distinction established in our circuit . . . for determining indispensability under Rule 19(b)," Pet. App. 12a.

In so doing, the Ninth Circuit concluded below that both the tribe's and individual Indians' rights to lands set aside and held in trust for them by the United States can be invaded in a bankruptcy pro-

ceeding because the tribe itself, in challenging Respondent's claim to a property right in the Indians' property, "adequately represented" both the government's interests and the allottees' interests. Pet. App. 14a, 15a.

SUMMARY OF ARGUMENT

Amicus curiae respectfully suggests that the Ninth Circuit below has adopted a framework for applying Rule 19 of the Federal Rules of Civil Procedure in a manner that is not permitted by decisions of this Court and that avoids the unambiguous command of an applicable statute of the United States. In addition, *amicus* suggests that the Ninth Circuit's decision in this case results in a clear violation of the most basic due process rights embodied by rule 19 and even turns its own Ninth Circuit precedent on its head.

The Ninth Circuit reaches this concededly "anomalous" result by acknowledging that the government is a necessary party under Rule 19(a) because the United States "holds legal title to the Reservation lands" across which any right of way to Respondent's lands must pass. "The United States therefore *has an interest in the parties' right of way disputes because judicial recognition of an easement would impair the government's right.*" Pet. App. 9a (emphasis added). Notwithstanding this acknowledgement, the court below nevertheless concluded that the government is not an indispensable party without whose joinder the action would have to be dismissed.

The appeals court reached this conclusion by noting that an Indian tribe's own action to protect its interests in property might proceed in the govern-

ment's absence, and that in this case Petitioner in this Court, who was the defendant in the district court, "effectively initiated this litigation," Pet. App. 12a, and "really stands in the shoes of a plaintiff." *Id.* In addition, the Ninth Circuit adds in wholly conclusory fashion, that ". . . the government's interests are shared and adequately represented by the Community." Pet. App. 14a.

Amicus respectfully suggests the courts below have shoehorned this case into a contrived rubric for Rule 19 analysis that ignores the due process rights of the Indian allottees whose real property will be burdened with a servitude in favor of Respondent here without their participation, either personally or by their sovereign trustee United States; permits a result in this case that effectively reads 28 U.S.C. § 516[2] out of the United States Code; and stands its own Ninth Circuit precedent, *Washington v. Daley*, 173 F.3d 1158 (9th Cir. 1999), on its head.

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[2] "Except as otherwise provided by law, *the conduct of litigation in which the United States*, an agency, or officer thereof, is a party, or *is interested*, and securing evidence therefor, *is reserved to officers of the Department of Justice under the direction of the Attorney General*" (emphasis added).

ARGUMENT

I. THE NINTH CIRCUIT HAS IGNORED THE DUE PROCESS RIGHTS OF ALLOTTEES.

This Court has long held that the words of the Due Process Clause at a minimum "require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Without having "committed itself to any formula achieving a balance," *Id.* at 314, this Court has maintained the inviolability of that precept for more than half a century.

The record discloses no attempt whatsoever by the lower courts to provide the individual landowners, whose trust estates must necessarily be burdened if Respondent prevails here, with notice of the proceedings and an opportunity to be heard. *Amicus* respectfully suggests that the opportunity to appear and be heard involves far more than merely the right to initiate a *post hoc* challenge to Respondent's claim to an interest in the Indians' trust property.

Individual landowners would have been afforded the opportunity to determine the extent of any burden imposed on their lands. They would have had the opportunity to question whether and what responsibilities attended any rights Respondent might have in the burden imposed on their lands. The landowners might have requested that any burden on their lands be made a matter of record in the official Land Records and Title Office of the Bureau of Indian Affairs. The landowners might have requested a

determination of the respective responsibilities for such matters as weed control, fire prevention, environmental protection, fencing, and other public health and public safety matters.

By depriving the allottees of any opportunity at all to be heard in this case on these and any other concerns they might raise, the proceedings below have burdened the real property of affected allottees without due process required by the Constitution of the United States and embodied in Rule 19. *Amicus* respectfully suggests that the Ninth Circuit's rhetorical observation, Pet. App. 15a, that there is no reason to believe that the Community did not make all the arguments that would have been made by the individual allottees is clearly misplaced and cannot stand as a reasoned basis for the conclusion reached by that court.

II. 28 U.S.C. § 516 RESERVES REPRESENTATION OF THE INTERESTS OF THE UNITED STATES, EXCEPT AS SPECIFICALLY OTHERWISE AUTHORIZED BY LAW, TO OFFICERS OF THE JUSTICE DEPARTMENT.

The Ninth Circuit below determined that the Unites States is not an indispensable party to this litigation under Rule 19(b), at least in part, because, "For example, the government's interests are shared and adequately represented by the Community." *Amicus* respectfully suggests that this determination is not properly available to the court below because Congress has already made the determination that, "except as otherwise authorized by law," representation of the interests of the United States in litigation

is reserved to officers of the United States under the direction of the Attorney General. 28 U.S.C. § 516, *see* fn. 2, *supra.*

Rule 19(b) would require the joinder of the United States, as trustee and title holder of the real property which would be burdened, as an indispensable party to the action. The Quiet Title Act has preserved the sovereign immunity of the United States to actions involving Indian trust property. The courts below have avoided the effect of both the Quiet Title Act and Rule 19(b) by, *inter alia*, the fiction that the government's interests are "adequately represented by the Community." Pet. App. 14a.

Amicus respectfully suggests that 28 U.S.C. § 516, fn. 2, *supra*, expressly prohibits the conclusion reached by the Ninth Circuit.

III. THE NINTH CIRCUIT HAS IMPROPERLY INVERTED ITS OWN PRECEDENT TO FIND AUTHORITY FOR ITS PRESENT RULING THAT ALLOTTEES' INTERESTS HAVE BEEN ADEQUATELY REPRESENTED.

In concluding that the individual Indian landowners have been adequately represented by the Tribe in this case, the Ninth Circuit finds authority in one of its own precedents that is wholly inapposite to the proposition for which it is employed here. In *Washington v. Daley*, 173 F.3d 1158 (9th Cir. 1999), the circuit court below had found that certain fishing tribes were not indispensable parties under Rule 19 because their interests were actively and adequately represented by the United States. *Id.*, 1158. The

court below cites that case as authority for its holding here that the tribe has adequately represented the interests of allottees. Pet. App. 15a.

Amicus respectfully suggests that the cited fishing case offers no authority for the proposition for which it is cited below. In *Washington v. Daley*, the representation was provided not by an Indian tribe, but by the sovereign trustee United States. In that case, the court also found that the United States had at least two legal duties in the matter, as a co-manager of the fishery resource and as "the trustee of the Indian tribes' rights, including fishing rights." *Washington v. Daley, supra*, at 1168 (internal citations omitted).

In this case, the tribe has no legal duty nor any suggested legal authority to represent the interests of the allottees in this case.

CONCLUSION

Amicus curiae respectfully suggests that the Petition for Certiorari should be granted.

Respectfully submitted,

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