

**TIME TO RECOMMIT: THE DEPARTMENT
OF JUSTICE'S INDIAN RESOURCES
SECTION, THE TRUST DUTY, AND
AFFIRMATIVE LITIGATION**

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Since the 1970s, the Department of Justice has played an important role in protecting the rights and resources of Indian tribes and their members in federal court. The Department of Justice has been party to a number of the most important Indian law decisions of the past four decades.¹ Consonant with the federal government's trust obligation to federally recognized tribes,² the Department of Justice's (DOJs) Indian Resources Section takes up litigation at the request of the Department of the Interior (DOI), which can pass along the requests of tribal governments. The federal government's role has been important because of the Department of Justice's resources, the caliber of its attorneys, and the weight the United States brings to bear in the courtroom. Its role has been particularly important in the struggle against state governments, the historical adversaries of Indian tribes.

However, in the last two decades, the Indian Resources Section's affirmative litigation portfolio has markedly decreased. Attorneys representing tribal governments or members have an increasingly difficult time persuading the DOI to request affirmative litigation by the DOJ. When those requests do reach the DOJ, tribal governments often face significant delay as they wait for the DOJ to decide whether to take up the case. The DOJ's guidelines offer little insight as to the basis of its decision making.

Tribes have become increasingly sophisticated litigators in their own right.³ Still, from the tribes' perspective, the decline in the propensity of the DOJ to undertake affirmative litigation on their behalf has coincided with changes in the legal landscape that make DOJ involvement more important than ever. Just as tribal governments' capacity to protect and assert their rights in judicial fora has developed, the Supreme Court's new federalism has constricted the ability of tribal governments to litigate against state governments. Three Supreme Court decisions expanding state sovereign immunity have limited tribal options for bringing suit against states in federal courts. Because states cannot assert sovereign immunity against the United States government, the single most important remedy remaining for tribes, in many cases, is convincing the federal government to initiate or join in their litigation.

This article describes the contours of the legal landscape now facing would-be tribal litigants. It argues that the DOJ should modify its policies to better advance affirmative litigation requests from tribal governments. The Indian Resources Section should implement modest reforms to clarify and expand the range of instances in which it will take up affirmative litigation. Part I explains why the United States' in-

1. See, e.g., *Arizona v. California*, 373 U.S. 546 (1963); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

2. The trust doctrine is rooted in two foundational decisions by Chief Justice John Marshall. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

3. Charles Wilkinson, "Peoples Distinct from Others": *The Making of Modern Indian Law*, 2006 UTAH L. REV. 379, 382-84 (2006).

volvement as plaintiff in tribal litigation remains important for the vindication of tribal rights. In particular, it describes how the expansion of state sovereign immunity means that many important tribal legal claims cannot go forward without the participation of the United States as a party. Part II describes the DOJ's current policies for involvement in litigation on behalf of tribes. This section examines the executive branch's view of its role and the federal courts' validation of that view. Finally, Part III identifies several limitations in the DOJ's current policy and suggests reforms designed to recommit the DOJ's Indian Resources Section to a litigation portfolio that includes meritorious affirmative litigation. Without legislative or regulatory changes, the DOJ can update its policy to increase the transparency of its decision making and increase the Indian Resources Section's participation in litigation on behalf of tribal governments.

I. THE UNITED STATES ON OUR SIDE: WHY THE UNITED STATES' PARTICIPATION IN AFFIRMATIVE LITIGATION ON BEHALF OF TRIBAL GOVERNMENTS MATTERS

In the 1950s, Congress and the executive were committed to the assimilation of Native Americans and the termination of federal recognition for those tribes that enjoyed such status.⁴ Tribes survived by taking their future into their own hands. Native American activists and leaders promoted the concept of tribal self-determination and sovereignty. They challenged stereotypes of Indian culture, asserted the rights of tribal governments as sovereign entities, and lobbied to change perceptions in Congress. This activism recognized the importance of the courts as a forum in which to protect tribal lands, resources, and the rights of members.

Beginning in the 1960s, tribes took steps to train Indian lawyers to represent tribal interests.⁵ The Pre-Law Summer Institute for American Indians opened at the University of New Mexico Law School in 1968, and has educated over two thousand Native American lawyers.⁶ The Indian Law Resource Center and the Native American Rights Fund were founded in the late 1960s and early 1970s, with the purpose of representing tribes that lacked resources to hire private counsel.⁷ Starting with the Navajo Nation in the late 1970s, many tribes created offices of attorney general.⁸ Since the 1970s, the Indian bar has expanded significantly. Indian law practitioners increasingly specialize within the field of Indian law, and tribal governments are more sophisticated in directing their legal representation.⁹

4. *Id.* at 380–81.

5. *Id.* at 383.

6. *Id.*

7. *Id.* at 383–84 (citing Ralph W. Johnson, *Indian Tribes and the Legal System*, 72 WASH. L. REV. 1021, 1035–36 (1997)).

8. Wilkinson, *supra* note 3, at 384.

9. *Id.* at 384.

Tribal governments continue to innovate and improve their legal strategy. As the field of Indian law grew in the 1980s, the early years of close collaboration between members of the Indian law bar in selecting test cases to take to Supreme Court collapsed.¹⁰ After two particularly devastating decisions handed down in the Court's 2001 term, tribes and tribal organizations came together to create the Tribal Supreme Court Project.¹¹ The Tribal Supreme Court Project seeks "to coordinate and strengthen the advocacy of [tribal] interests before the Supreme Court."¹² The Project may ask tribes not to appeal or to settle certain cases to minimize the risk of unfavorable precedents from the Supreme Court.¹³ Thus, today there are more Indian law practitioners, increased specialization within the field, and greater sophistication among tribal governments than ever before.

The DOJ has played an important role in the Native American strategy of turning to the courts to protect their rights. When Washington State law enforcement officers began arresting Indians for taking fish guaranteed to them by treaty rights, tribal attorneys lobbied the DOI and then the DOJ to file suit as the trustee of the impacted tribes.¹⁴ The federal government eventually agreed, and filed a suit against the State of Washington.¹⁵ The landmark case reached the Supreme Court, where the Court agreed that the Washington tribes' treaty-based fishing rights remained in force.¹⁶ In 1975, the Indian Resources Section was created within the Environment and Natural Resources Division of the Department of Justice.¹⁷ It was established to "conduct litigation for the United States . . . as trustee for the protection of the resources and rights of federally recognized Indian tribes and members of such tribes."¹⁸ The Indian Resources Section performs two functions. First, it defends the legality of federal policies that benefit tribal governments.¹⁹ Second, it files affirmative lawsuits that seek to establish or protect tribal rights encompassed within the United States' trust responsibility.²⁰

Despite its salutary beginnings, Indian Resources has been criticized by some tribes and members of the Indian law bar. Indian Resources represents the interests of the United States, which was com-

10. *Id.*

11. Tracy Labin, *We Stand United Before the Court: The Tribal Supreme Court Project*, 37 NEW ENG. L. REV. 695, 695-96 (2002-2003).

12. *Id.* at 696.

13. Bethany R. Berger, *United States v. Lara as a Story of Native Agency*, 40 TULSA L. REV. 5, 19 (2004).

14. Wilkinson, *supra* note 3, at 386.

15. *Id.*

16. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

17. UNITED STATES DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 5-14.001 (1997) [hereinafter U.S. ATTORNEYS' MANUAL].

18. *Id.*

19. *Id.* § 5-14.100.

20. *Id.*

mitted to eradicating tribal governments just a half century ago.²¹ The critics view the DOJ as inherently constrained by conflicts between the interests of the tribes and those of the various other federal agencies that the DOJ also represents.²² At times, the DOJ has been viewed as a capricious or paternalistic ally, not always willing to present the arguments that the tribes believe are in their best interest.²³ Additionally, the DOJ may not be able to devote the time and resources believed to be necessary by the tribes in order for it to protect tribal interests.²⁴

Whatever the tensions between the view of the DOJ and that of tribal government, the DOJ remains a crucial ally for Indian tribes, particularly in the context of affirmative litigation. In fact, the growing scope of state sovereign immunity makes the United States government a necessary party if many lawsuits are to go forward at all. In this environment, the DOJ's failure to file or join in affirmative litigation increasingly serves a gate-keeping function, in effect denying tribes a chance to litigate their interests unless the DOJ decides to intervene on their behalf. This section explains the benefits the DOJ brings to the table as a litigator, and describes why the new terrain of state sovereign immunity makes the United States a necessary partner for many would-be tribal litigants.

A. The Department of Justice's Value as a Litigation Partner

For tribal governments seeking to litigate, the Indian Resources Section is a valuable ally. The DOJ has "substantial resources" to bring to bear in any lawsuit.²⁵ The federal government's financial resources to hire experts, work through discovery, and shoulder the other costs of litigation can make a crucial difference in the quality of the lawyering and outcome of the case, particularly for the many tribal governments that remain impoverished. The DOJ's Indian Resources Section consists of experienced litigators that exclusively practice Indian law. Indian Resources Section litigators often partner with field office U.S. Attorneys to take advantage of local insights into how federal courts tend to view Indian law cases.

The value of the DOJ's involvement can be measured by outcome. Due to the quality of the DOJ's attorneys, or the "sheer magnitude of power" the United States brings to bear as a litigant, the DOJ is remarkably successful in achieving favorable outcomes in litigation in

21. Dale White, a member of the St. Regis Mohawk Tribe and former Department of Justice employee states that when Indians work for the government, they "have to resolve within [themselves] that [they] are working for the U.S.-the Great White Father." Dale T. White, *Tribal Law Practice: From the Outside to the Inside*, 10 KAN. J.L. & PUB. POL'Y 505, 506 (2000).

22. See Matthew Fletcher, *The Comparative Rights of Indispensable Sovereigns*, 40 GONZ. L. REV. 1, 19 (2005).

23. *Id.*

24. *Id.*

25. FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.08[1] (Nell Jessup Newton ed., 2005).

which it is involved.²⁶ One study found that the DOJ realized an outcome in favor of the United States' position in eighty-three percent of civil suits in which it was a party.²⁷ There is little doubt that tribal governments benefit by having the United States government support their position in federal court.

B. The Expanded Scope of State Sovereign Immunity

There is an additional, crucially important advantage flowing from the federal government's participation in litigation. Specifically, because state governments are now immune from suit in many instances, tribal governments often cannot litigate without the participation of the United States. This is because, in many cases, states are immune from suit brought by Indian tribes, but state immunity does not bar suits by the United States. Thus, as the Supreme Court has expanded the scope of state sovereign immunity over the past two decades, the participation of the United States in affirmative litigation has become increasingly important.

The expanded view of state sovereign immunity is rooted in the Court's thematic reading of the Eleventh Amendment, led by former Chief Justice Rehnquist.²⁸ The Court's sovereign immunity jurisprudence has been subject to a growing body of scholarly criticism, which has concluded that the Court's Eleventh Amendment history is largely fictitious.²⁹ Other commentators have argued that an expanded sover-

26. H.W. Perry Jr., *Government Lawyering: United States Attorneys – Whom Shall They Serve?*, 61 LAW & CONTEMP. PROB. 129, 141 (1998).

27. *Id.*

28. The Justices expounding this view of the Eleventh Amendment have explained that the sovereign immunity doctrine is not confined to the plain text of the Eleventh Amendment, which limits immunity to suits by one state against another. U.S. CONST. amend XI. Rather, the sovereign immunity doctrine flows "from the structure of the original Constitution itself." *Alden v. Maine*, 527 U.S. 706, 728 (1999). Thus, "the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." *Id.* at 729. As commentators have noted, this airy view of the Eleventh Amendment is in tension with the originalist approach to constitutional interpretation otherwise espoused by the Court's conservative jurists. See Katherine H. Ku, Comment, *Reimagining the Eleventh Amendment*, 50 UCLA L. REV. 1031, 1038 (2003).

29. *Seminole Tribe v. Florida*, 517 U.S. 44, 155 (Souter, J., dissenting) (arguing that the balance of the historical evidence shows that the Framers expected the states to be "judicially accountable for violations of federal rights"); Katherine Florey, *Sovereign Immunity's Penumbra: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 768 (2008) (arguing that recent sovereign immunity jurisprudence "elides the judicial role in developing sovereign immunity doctrine," and has expanded the doctrine without consideration for rule-of-law concerns); Ku, *supra* note 28 (arguing that the Court's rationale for state sovereign immunity justifies an immunity regime limited to the states' core sovereign functions or, alternately, noncommercial activities); Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 4 (2002) (arguing that the Court's view of sovereign immunity is based on a "deeply flawed" historical account); John V. Orth, *History and the Eleventh Amendment*, 75 NOTRE DAME L. REV. 1147 (2000) (arguing that the *Seminole Tribe* Court's historical account of sovereign immunity ignores ambiguities in the historical record).

eign immunity doctrine undermines government accountability and the rule of law, since it blocks recourse for state violations of the law.³⁰ However, for tribal governments that must take the law as they find it, a frontal assault on the Court's Eleventh Amendment jurisprudence is likely not a viable path to relief. Finding a path around the expanded scope of state sovereign immunity is paramount to the security of tribal rights today. To understand the challenging sovereign immunity terrain facing Indian tribes, this section describes the Supreme Court decisions that have constricted the options for tribal litigation.

Three separate Supreme Court decisions have combined to limit the ability of tribal governments to bring suit against states. First, in *Blatchford v. Native Village of Noatak*, the Court ruled that states are immune from suits brought by tribal governments.³¹ Second, in *Seminole Tribe v. Florida*, the Court severely curtailed the ability of Congress to abrogate state sovereign immunity and authorize tribal suits.³² Finally, in *Idaho v. Coeur d'Alene Tribe*, the Court limited the scope of the *Ex parte Young* doctrine,³³ which had previously served as the most important means of overcoming state assertions of sovereign immunity.

1. *Blatchford v. Native Village of Noatak*

In *Blatchford*, the Supreme Court ruled that tribes, like foreign governments, cannot bring suit against states without their consent.³⁴ The Court rejected the argument that states surrendered their immunity to suits brought by tribes, just as they did to sister states, when they adopted the Constitution.³⁵ Despite the respondent's attempt to analogize Indian tribes' domestic status to that of the states, the Court ruled that "[w]hat makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession."³⁶ In other words, because the states cannot sue tribal governments without their consent, tribal governments are similarly constrained in suits against the States. The doctrine recognizing tribal sovereign immunity from suits brought by states also weighed heavily against ruling that states are not immune from tribal suit.³⁷

30. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1213–14 (2001).

31. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

32. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

33. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). For a discussion of the *Ex Parte Young* doctrine, see *infra* notes 47–48 and accompanying text.

34. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 780 (1991) (citing *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934)).

35. *Id.* at 781–82.

36. *Id.* at 782.

37. *Id.* at 780 (citing *Okla. Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)).

2. Seminole Tribe v. Florida

In *Seminole Tribe v. Florida*, the Supreme Court severely curtailed Congress's authority to abrogate state sovereign immunity.³⁸ The Court's holding was "a radical departure from prior Eleventh Amendment rules articulated since 1964."³⁹ Chief Justice Rehnquist penned the five-four decision, which held that Congress does not have authority under the Commerce Clause or the Indian Commerce Clause to restrict state sovereign immunity.⁴⁰ The decision ruled unconstitutional the portion of the Indian Gaming Regulatory Act permitting tribes to bring suit to force state officials to "negotiate [a gaming compact] with the Indian tribe in good faith."⁴¹

Rehnquist's *Seminole Tribe* decision explicitly overturned the plurality decision in *Pennsylvania v. Union Gas Co.*,⁴² which held that the Commerce Clause empowered Congress to abrogate state sovereign immunity in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).⁴³ Rehnquist characterized *Union Gas* as an aberration, unique in its holding that the Commerce Clause empowers Congress to abrogate state sovereignty.⁴⁴ However, "the fact is that *Union Gas* reaffirmed a quarter-century practice of allowing congressional waiver."⁴⁵

The effect of *Seminole Tribe* was to limit severely Congress's ability to authorize lawsuits against state governments in federal court. After *Seminole Tribe*, Congress cannot restrict state sovereign immunity unless it legislates pursuant to its powers under Section 5 of the Fourteenth Amendment or the Bankruptcy Clause of the Constitution.⁴⁶ The result, for tribal governments, is that Congress rarely possesses authority to abrogate state sovereign immunity when legislating in the area of tribal-state cooperation.

3. Idaho v. Coeur d'Alene Tribe

After *Blatchford*, the principal remedy for tribal governments seeking to bring suit against states was the *Ex parte Young* doctrine. *Ex*

38. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

39. Martha A. Field, *The Seminole Case, Federalism, and the Indian Commerce Clause*, 29 ARIZ. ST. L.J. 3, 4 (1997).

40. *Seminole Tribe*, 517 U.S. at 72–73.

41. *Id.* at 66.

42. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

43. *Id.*

44. *Seminole Tribe*, 517 U.S. at 65.

45. Field, *supra* note 39, at 8; *see also Union Gas*, 491 U.S. at 14 ("Though we have never squarely resolved this issue of congressional power, our decisions mark a trail unmistakably leading to the conclusion that Congress may permit suits against the States for money damages.")

46. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 378–79 (2006) ("The ineluctable conclusion, then, is that States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'" (internal citations omitted)).

parte Young allows suits seeking declaratory and injunctive relief against state officers acting in their individual capacity.⁴⁷ The Court's "fiction" that litigation requesting prospective relief and brought against individual state officers does not implicate a state's sovereign interests represents a judicial compromise:⁴⁸ federal courts are allowed to provide a remedy for state violations of federal law, but state liability for those violations is functionally limited.⁴⁹

In *Idaho v. Coeur d'Alene Tribe*, however, the Court imposed significant new limitations on the scope of the doctrine.⁵⁰ The Court held in that case that the Coeur d'Alene Tribe's request for an injunction preventing Idaho state officials from "taking any action in violation of the Tribe's rights of exclusive use and occupancy, quiet enjoyment and other ownership interest" in Coeur d'Alene Lake could not proceed under the *Ex parte Young* doctrine.⁵¹ The Court acknowledged that "[a]n allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction."⁵² However, the Court created a new restriction on *Ex parte Young*, holding that the doctrine does not apply in instances where injunctive relief would be the "functional equivalent of a quiet title action."⁵³ The Court held that Idaho's interest in controlling navigable waters was so integral to its sovereignty that the *Ex parte Young* exception did not apply.⁵⁴

The fractured nature of the Court's decision has complicated the lower courts' application of *Coeur d'Alene Tribe*. While five Justices agreed that the Tribe's suit could not proceed under *Ex parte Young*, the Court split on the rationale. Justice Kennedy and Chief Justice Rehnquist alone argued for a case-by-case balancing test to determine application of the doctrine.⁵⁵ However, three Justices concurred in the judgment but rejected Kennedy's "vague balancing test."⁵⁶ The concurrence agreed on the narrow holding that "[w]here a plaintiff seeks to divest the State of all regulatory power over submerged lands . . . it simply cannot be said that the suit is not a suit against the State."⁵⁷

In the immediate wake of *Coeur d'Alene Tribe*, several circuits read the decision as requiring an inquiry at each application of *Ex parte Young* as to whether a special sovereignty interest of the state would be

47. *Ex parte Young*, 209 U.S. 123 (1908). The Court's rationale was that when a state official acts in violation of federal law he is "stripped of his official or representative character and is subjected in his person to the consequence of his individual conduct." *Id.* at 160.

48. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984).

49. *Id.* at 104–05.

50. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997).

51. *Id.* at 265, 287–88.

52. *Id.* at 281.

53. *Id.*

54. *See id.* at 287–88.

55. *Id.* at 270–76.

56. *Id.* at 296 (O'Connor, J., concurring).

57. *Id.*

implicated.⁵⁸ The Supreme Court curtailed that broad interpretation in *Verizon Maryland Inc. v. Public Services Commission of Maryland*, in which it rejected a case-by-case approach to application of *Ex parte Young*. Instead, it clarified that O'Connor's concurrence in *Coeur d'Alene Tribe* remains the general rule: "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'"⁵⁹

Verizon Maryland made it clear that *Coeur d'Alene Tribe* is not broadly applicable outside the Indian law context, but only muddled what *Coeur d'Alene* means for tribal litigants.⁶⁰ The Court's decision in *Verizon Maryland* concerned Verizon's challenge to a state telecommunications ruling; it had nothing to do with Indian law.⁶¹ It remains unclear if *Coeur d'Alene* is limited to its facts, or if it creates a broader impediment to tribal governments seeking relief that is "close to the functional equivalent of quiet title" in boundary and resource disputes with state governments.⁶²

Not surprisingly, federal courts are still sorting out the scope of *Coeur d'Alene Tribe*. The Ninth Circuit interpreted the decision as narrowly applying to the facts of the case when it held that the Eleventh Amendment did not divest it of jurisdiction over a tribal challenge to California's attempt to tax a tribe-owned hotel.⁶³ The Ninth Circuit concluded that "[t]o interpret *Coeur d'Alene* differently would be to open a Pandora's Box as to the relative importance of various state powers or areas of state regulatory authority."⁶⁴ The Eighth Circuit also construed *Coeur d'Alene Tribe* narrowly in addressing a claim requesting injunc-

58. See *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1190 (10th Cir. 1998); *Bell Atl. Md. v. MCI Worldcom Inc.*, 240 F.3d 279, 294–95 (4th Cir. 2001), *rev'd Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 648 (2002).

59. *Verizon Md.*, 535 U.S. at 645 (quoting *Coeur d'Alene Tribe*, 521 U.S. at 296 (O'Connor, J., concurring in part and concurring in judgment)).

60. See *Osage Nation v. Oklahoma*, 260 Fed. App'x 13, 20 (10th Cir. 2007) (unpublished) ("It is not clear what is left of *Coeur d'Alene* following *Verizon Maryland*"); see also Justin Donoho, *Achieving Supreme Court Consensus: An Evolved Approach to State Sovereign Immunity*, 88 NEB. L. REV. 760, 765 (2010) (stating that *Coeur d'Alene Tribe* "may open the door to the Court finding other exceptions to *Ex parte Young* in situations where, as in *Coeur d'Alene*, relief would have a significant 'impact' on state government"); contra Marcia L. McCormick, *Solving the Mystery of How Ex parte Young Escaped the Federalism Revolution*, 40 U. TOL. L. REV. 909, 913 n.23 (2009) ("[*Coeur d'Alene Tribe*] may be a very narrow exception applicable only to disputes between states and Indian tribes over the territorial boundaries of both. The *Coeur d'Alene Tribe* context is one of the few land disputes that could raise a federal question, namely where land was reserved through a federal treaty with a tribe." (citation omitted)).

61. *Verizon Md.*, 535 U.S. at 647.

62. *Coeur d'Alene Tribe*, 521 U.S. at 282.

63. *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041 (9th Cir. 2000).

64. *Id.* at 1048.

tive relief regarding tribal hunting, fishing, and gathering rights.⁶⁵ The Tenth Circuit originally read *Coeur d'Alene Tribe* broadly, but has since adopted the Ninth Circuit's approach in the wake of *Verizon Maryland*.⁶⁶ The Fifth Circuit held that *Coeur d'Alene Tribe* extended to bar a tribal land claim, but has not revisited the issue in the wake of *Verizon Maryland*.⁶⁷ The Second Circuit, notwithstanding *Verizon Maryland*, ruled that *Coeur d'Alene Tribe* applied to tribal claims that reach areas of state sovereignty that the courts consider as weighty as Idaho's interest in submerged lands.⁶⁸

In sum, *Coeur d'Alene Tribe* has not proved the unmitigated disaster some commentators predicted immediately after the decision was released,⁶⁹ largely due to the ameliorative effect of *Verizon Maryland*. Nonetheless, the decision clearly precludes tribal litigation concerning submerged lands aimed at a state party defendant. Some circuits are likely to follow the Second Circuit's lead and conclude that tribes also cannot bring land claims litigation against the states under *Ex parte Young*.⁷⁰ *Coeur d'Alene Tribe* could also result in a patchwork of circuit court rulings in the important area of the scope of state taxation and regulatory authority in Indian country. Further, uncertainty over the application of *Coeur d'Alene Tribe* will likely impel tribal litigants to limit their requested relief in order to distinguish their claim.⁷¹

State sovereign immunity also casts a shadow on litigation beyond the traditional application of the doctrine.⁷² Under the Federal Rules of Civil Procedure, litigants must, where feasible, move to join a necessary party to an ongoing suit.⁷³ However, where a necessary party cannot be joined, the court must determine whether the party is indispensable. Under Rule 19, a party is indispensable when they have an "interest of

65. *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997).

66. *Compare* *Muscogee Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1232 n.9 (10th Cir. 2010) (application of *Ex parte Young* post-*Verizon Maryland*), *with* *ANR Pipeline Co.*, 150 F.3d 1178 (10th Cir. 1998) (application of *Ex parte Young* pre-*Verizon Maryland*).

67. *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281, 288–89 (5th Cir. 2000).

68. *W. Mohegan Tribe v. Orange Cnty.*, 395 F.3d 18, 23 (2d Cir. 2004) (holding tribal claim for Indian title to land analogous to quiet title relief sought by *Coeur d'Alene Tribe*).

69. *See, e.g.*, John P. LaVelle, *Sanctioning a Tyranny: The Diminishment of Ex parte Young, Expansion of Hans Immunity, and Denial of Indian Rights in Coeur d'Alene Tribe*, 31 ARIZ. ST. L.J. 786, 942 (1999) ("[R]eaders familiar with the role that the repression of Indian rights has played historically in American political life will discern in *Coeur d'Alene Tribe* many signs and portents warning of an impending paradigm shift in the *Young* doctrine that promises to afford States and state officials unprecedented 'enjoyment' in ignoring people's rights and violating federal law, unhampered by the prospect of federal court accountability.").

70. *See, e.g.*, *W. Mohegan Tribe & Nation*, 395 F.3d at 23 (holding that state sovereign immunity precluded the West Mohegan Tribe's land claim suit).

71. *See, e.g.*, *id.* at 22–23 (rejecting the tribal litigant's attempt to distinguish its request for recognition of aboriginal title from the relief requested by the *Coeur d'Alene* tribe).

72. Professor Katherine Florey describes this as "penumbral sovereign immunity." Florey, *supra* note 39, at 797.

73. FED. R. CIV. P. 19.

such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."⁷⁴ If the court determines that a missing party is indispensable, the suit cannot go forward.⁷⁵ Thus, when an entity possessing sovereign immunity from suit is deemed an indispensable party, the court must dismiss the suit. For tribes, this means sovereign immunity can become a barrier to litigation even when a tribe does not name the state as a defendant.

In some cases, the compulsory joinder rule protects tribal governments from adjudication that would affect their interests without their participation.⁷⁶ However, when the tribe is the plaintiff, a common tactic of private parties is to argue that the suit necessarily implicates the interests of the state government or federal government, and thus the litigation must be dismissed for failure to join an indispensable party.⁷⁷ Federal courts are often reluctant to dismiss a case on this basis and frequently allow the case to proceed.⁷⁸ For instance, in litigation where the United States is a party, courts often hold that the United States' participation is sufficient to represent the interests of the tribal government.⁷⁹ However, some commentators have identified a double standard. When a tribal government is the plaintiff, "the courts show no hesitation to dismiss" on the basis of failure to join a state government or the United States.⁸⁰ Thus, the expanded doctrine of state sovereign immunity impedes the ability of tribal governments to protect their interests through litigation, even when the tribe does not name a state party as a defendant.

As a consequence, state sovereign immunity limits the ability of tribal governments to hold states accountable in a federal forum for violations of federal law in several areas of crucial importance to tribes. In these areas, tribes are left with a limited set of options. One possibility, suggested by Justice Kennedy in *Coeur d'Alene Tribe*, is for tribes to pursue their claim in a state court forum.⁸¹ This path consigns Indian tribes to submitting claims of violation of federal law to the courts of the

74. *Shields v. Barrow*, 58 U.S. 130, 139 (1855); see FED. R. CIV. P. 19.

75. *Shields*, 58 U.S. at 145.

76. See, e.g., *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542 (2d Cir. 1991), *cert. denied*, 502 U.S. 818 (1991) (dismissing a suit seeking to compel renewal of private leases on tribal lands because the Seneca Nation was immune from suit, and a necessary party to the litigation).

77. See *Quapaw Tribe v. Blue Tee Corp.*, No. 03-CV-0846-CVE-PJC, 2010 U.S. Dist. LEXIS 105504 (N.D. Ok. Sept. 29, 2010) (denying a Motion to Dismiss for failure to join the state of Oklahoma in a tort suit against several mining companies).

78. Fletcher, *supra* note 22, at 10–12 (describing various ways in which the Supreme Court has worked around litigants' Rule 19 motions to dismiss); Florey, *supra* note 29, at 808 ("In general, courts are reluctant to dismiss an action entirely on the grounds that a party is indispensable, especially if there is no other forum in which the case can be brought.")

79. Fletcher, *supra* note 22, at 18.

80. *Id.* at 12.

81. *Coeur d'Alene Tribe*, 521 U.S. at 274–75.

state governments, which have a long history of exploiting tribes. The federal government's trust relationship evolved out of the Supreme Court's recognition of the necessity of protecting tribal governments from state governments.⁸² State courts are more likely to interpret federal law in a way that advantages state governments and denies Indian tribes relief.⁸³ John LaVelle describes the state court forum as the "congenitally biased courts of the Tribes' persistent historic and present-day adversaries."⁸⁴ Another limitation is that state governments must waive their immunity to suit even in their own courts.⁸⁵ Therefore, even if tribes are willing to litigate in state court, they may do so only when the state allows a suit to go forward.

The most important remaining limit on state sovereign immunity is that states cannot assert their sovereign immunity when they are sued by the United States government. In *United States v. Texas*, the Court held that the Constitution establishes that federal judicial power extends to all suits in which the United States is a party.⁸⁶ This aspect of sovereign immunity jurisprudence, at least, appears to have survived the Court's recent federalism revival.⁸⁷ Ironically, then, in an era in which the federal government's policy is to sponsor tribal self determination, tribal governments remain dependent on the United States for the vindication of their legal rights when states are the transgressors.

II. DEPARTMENT OF JUSTICE POLICY AND AFFIRMATIVE LITIGATION ON BEHALF OF INDIAN TRIBES

The DOJ's view of its role in litigation on behalf of tribes is animated by three principles. First, the DOJ's client is always the United States government, never a private party, even if that party is a sovereign. Thus, when the DOJ litigates, it is acting as the representative of the DOI, not the tribe itself. Second, the trust doctrine duty owed by the United States to federally recognized tribes does animate the DOJ's legal representation, even though the tribes themselves are not the DOJ's client. Third, the trust doctrine does not actually constrain or guide the DOJ's exercise of discretion. Though the DOJ may instigate, defend against, or join in litigation pursuant to the duty of trust the United

82. See *United States v. Kagama*, 118 U.S. 375, 383–84 (1886) ("They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.")

83. Lydia Hawkins, *An Old Doctrine Assaulted: Kennedy Attempts to Eviscerate Ex parte Young: Idaho v. Coeur d'Alene Tribe of Idaho*, 24 OHIO N.U.L. REV. 369, 383 (1998).

84. LaVelle, *supra* note 69, at 865.

85. *Alden v. Maine*, 527 U.S. 706, 745–48 (1999).

86. *United States v. Texas*, 143 U.S. 621, 643–45 (1892).

87. Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 233–34 (2006).

States owes to Indian tribes, the DOJ is not obliged to take any particular course of action in any individual case. The DOJ's view, which has largely been upheld by the courts, is that it retains full discretion to decide when it will bring the weight of the United States to bear on behalf of tribes. The Indian Resources Section exercises this discretion with surprising informality. No document identifies the criteria Indian Resources considers when evaluating a petition for litigation. Indian Resources attorneys are not bound to consider any particular criteria, nor are they advised which considerations are irrelevant.

This section describes the contours of DOJ's current policy in three parts. Part A details the legislation and executive branch documents that constitute the formal backdrop for the Indian Resources Section's exercise of discretion. Part B describes how the Indian Resources Section's decision making works in practice. Part C canvasses federal court cases where the DOJ's legal obligation on behalf of tribes has been at issue, and establishes that with only rare exceptions, the courts have upheld the DOJ's view of its unfettered discretion.

A. The Framework

The trust responsibility animates the DOJ's representation of tribal interests.⁸⁸ However, the DOJ's interpretation of its trust obligation does not impose any duty to respond directly to tribal requests for assistance.

First, the DOJ does not directly represent Indian tribes in litigation. Rather, the DOJ's position has long been that its client is the United States federal government.⁸⁹ Second, the DOJ takes the position that no statute limits its discretion to choose whether to adopt a tribe's position in litigation.⁹⁰ The DOJ's position is most clearly laid out in a letter written in 1979 by Attorney General Griffin Bell to Secretary of the Interior Cecil Andrus. The letter describes Attorney General Bell's "understanding of the legal principles governing [the DOJ's] conduct."⁹¹ Bell wrote that the duty of the DOJ was to litigate when necessary to "give full effect" to treaties, statutes, and Executive Orders designed to benefit Indian tribes.⁹² However, Bell emphasized that this obligation, absent a particular statutory requirement, did not limit the Department's discretion:

It is important to emphasize, however, that the Attorney General is attorney for the United States in these cases,

88. Letter from Griffin B. Bell, Attorney General, to Cecil D. Andrus, Secretary of the Interior (May 31, 1979), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title5/env00059.htm [hereinafter Bell Letter].

89. *Id.* ("[T]he Attorney General is attorney for the United States in these cases, not a particular tribe or individual Indian.")

90. *Id.*

91. *Id.*

92. *Id.*

not a particular tribe or individual Indian. Thus, in a case involving property held in trust for a tribe, the Attorney General is attorney for the United States as “trustee,” not the “beneficiary.” He is not obliged to adopt any position favored by a tribe in a particular case, but must instead make his own independent evaluation of the law and facts in determining whether a proposed claim or defense, or argument in support thereof, is sufficiently meritorious to warrant its presentation. This is the same function the Attorney General performs in all cases involving the United States; it is a function that arises from a duty both to the courts and to all those against whom the Government brings its considerable litigating resources.⁹³

The Bell Letter is still cited in the current United States Attorney’s Manual as “[g]uidance concerning the role of the Department of Justice in the conduct of Indian litigation,”⁹⁴ and is included in the Environment and Natural Resources Division’s Resource Manual.⁹⁵

Based on these legal principles, the U.S. Attorney’s manual sets out the parameters for the DOJ’s policy when representing tribal interests. Tribes cannot directly petition the DOJ to litigate on their behalf.⁹⁶ Instead, tribes must submit a formal memorandum to the DOI requesting the initiation of litigation.⁹⁷ The DOI, which houses the Bureau of Indian Affairs, is usually considered the “physical embodiment of the trustee.”⁹⁸ If one of the DOI’s regional solicitors decides to forward a request for representation to the DOJ, the Chief of the Indian Resources Section is then required to consult with the Attorney General before making any decision on the request.⁹⁹ A Regan-era policy directive requires that, before the DOJ files suit against a state government, they must provide written notice to the state government.¹⁰⁰ Ostensibly, the notice is intended to permit the state government to suggest a possible settlement and allow the state “to bring to the Department’s attention facts or issues relevant to whether the action or claim should be filed.”¹⁰¹

If Indian Resources is asked to intervene in litigation at the appellate level, or if it loses at the district court level and is contemplating an

93. *Id.*

94. U.S. ATTORNEYS’ MANUAL, *supra* note 17, at § 5-14.130.

95. Bell Letter, *supra* note 88.

96. If tribes do petition DOJ directly, the U.S. Attorneys’ Manual requires DOJ to refer the matter to the nearest DOI Regional Solicitor’s Office and to advise the requestor “that no action can be taken until the matter is reviewed by the Department of the Interior, and its recommendation is received.” U.S. ATTORNEYS’ MANUAL, *supra* note 17, at § 5-14.300(B).

97. *Id.*

98. Fletcher, *supra* note 22, at 19.

99. U.S. ATTORNEYS’ MANUAL, *supra* note 17, at § 5-14.300(C).

100. *Id.* § 4-6.240.

101. *Id.*

appeal, the DOJ's continued involvement in the litigation is subject to another level of internal review. By regulation, the DOJ is required to consult with the Office of the Solicitor General concerning any appeal.¹⁰² At the Supreme Court level, the Solicitor General herself is responsible for determining whether to petition for a writ of certiorari, and for litigating the government's case if the Court grants certiorari.¹⁰³

B. The DOJ's Policy in Practice

The U.S. Attorney's Manual describes the procedures for dealing with requests for litigation in general terms. Based primarily on interviews with current Indian Resources attorneys, this section describes more specifically the practices of the Indian Resources Section when considering requests for litigation.

Litigation may be at any stage when a request reaches the DOJ for assistance.¹⁰⁴ Increasingly, however, as the scope of sovereign immunity as a barrier to litigation has become clear, the litigant pushes for assistance before it even files a lawsuit.¹⁰⁵ Tribes initially send a formal memo to the DOI requesting assistance.¹⁰⁶ If Interior decides the case has merit, it will send a litigation request to the DOJ.¹⁰⁷ When requests for litigation are received from the DOI, they are assigned to an Indian Resources Section staff attorney for evaluation.¹⁰⁸ The staff attorney is responsible for drafting a memo analyzing the proposed litigation and its strengths and weaknesses.¹⁰⁹ The attorney ultimately makes a recommendation as to whether the Indian Resources Section should pursue the litigation.¹¹⁰ The memo and recommendation are subject to review by an Assistant Attorney General in charge of the Environment and Natural Resources Division.¹¹¹ If the DOJ does decide to litigate, the attorney responsible for writing up the recommendation is most likely to lead the litigation team.¹¹² Indian Resources attorneys are based in Washington, D.C.; Denver; and, San Francisco, but litigate throughout the country.¹¹³ They may collaborate with attorneys from the local U.S. Attorney's Office to take advantage of local knowledge of court procedures and the proclivities of the district court judge that is assigned the case.¹¹⁴ Indian Resources attorneys also frequently collaborate with co-parties, though

102. 28 C.F.R. § 0.20(b), (c) (2012).

103. *Id.* § 0.20(a).

104. Telephone Interview with Craig Alexander, Section Chief, Indian Resources Section (Nov. 11, 2010) [hereinafter Alexander Interview].

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

the nature and extent of cooperation may vary depending on the case and disposition of the particular attorney.¹¹⁵

This system leaves considerable discretion in the hands of the Indian Resources attorney assigned the task of assessing a request for litigation. There are, however, no formal criteria that guide the decision.¹¹⁶ Informally, Indian Resources attorneys are likely to consider a number of factors. The most influential may be the likelihood of success. One consequence of the DOJ's view of its role as the United States' attorney, rather than the tribe's attorney, is that it is concerned with the impact its decision to litigate will have on Indian law precedent in a broad sense.¹¹⁷ Thus, Indian Resources attorneys are concerned both with the strength of the case before them and the significance of the issue for other tribes. A strong case with import only for the tribe involved in the litigation may not arouse the interest of the Indian Resources Section. Counsel for Indian Resources also consider what is likely to happen if they do not get involved.¹¹⁸ The possibility of dangerous precedent that could be averted with U.S. involvement can compel intervention. The Indian Resources Section also recognizes that its involvement is more important in those cases where the tribe cannot go forward without the United States, either because of a state's assertion of sovereign immunity or tribal resource constraints.¹¹⁹ Finally, the time constraints faced by Indian Resources attorneys play a significant factor in determining whether they take up a litigation request. The section chief must decide how to allocate the Indian Resources' limited litigation resources.¹²⁰

In one important sense, the DOJ's practice does not conform to the procedure prescribed in the U.S. Attorney's Manual. The DOJ is involved in decision-making about litigation long before a litigation request is passed along from the DOI.¹²¹ The Indian Resources Section consults informally with DOI officials early in the course of most litigation requests.¹²² The Section's informal assessment of the strength of a tribe's request for litigation may thus influence the DOI's perception of the merit of the proposed litigation. Some tribal requests for assistance are therefore never formally passed along to the DOJ because Interior officials are persuaded that the case is not worth pursuing, or they realize that the DOJ will not take up the case even if the DOI passes it along.

115. *Environmental and Natural Resource Division: Our Partners*, UNITED STATES DEPT OF JUSTICE (last updated May 2011), <http://www.justice.gov/enrd/2969.htm> ("ENRD's Indian Resources Section represents the United States in its trust capacity for Indian tribes and their members, and routinely files and defends cases for the benefit of tribes. ENRD commonly collaborates with particular tribes as part of this work.")

116. Alexander Interview, *supra* note 104.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

The number of formal requests for litigation that reach the Indian Resources Section has decreased dramatically in the past two decades. For the first several decades of Indian Resources' existence, affirmative litigation was a significant and important part of its portfolio.¹²³ That has changed. During the eight years of the George W. Bush administration, only three or four formal requests for litigation were passed from the DOI to the DOJ.¹²⁴

The decline in litigation requests has several likely causes. First, DOI and DOJ attorneys are, more than ever before, overwhelmed with defensive litigation. State and local governments are increasingly well organized and funded to challenge federal government policies they perceive as impinging on their interests.¹²⁵ DOI solicitors are thus increasingly tied down in "white hat" defensive litigation in administrative courts, and Indian Resources attorneys are similarly occupied when state and local governments appeal administrative decisions to Article III courts. Second, the informal role Indian Resources plays in advising the DOI likely weeds out many litigation requests before they are formally passed along to the DOJ. Third, the past three decades have seen a shift in Supreme Court jurisprudence that is decidedly inimical to Indian interests.¹²⁶ The DOJ is a cautious, risk-averse litigator.¹²⁷ In this legal environment, tribes and Interior may be less likely to petition the Indian Resources Section for assistance, and Indian Resources may be more likely to discourage affirmative litigation as the request wends its way through the DOI.

C. Federal Courts and the DOJ's Duty to Tribes

The federal courts have largely supported the DOJ's interpretation of its obligation to tribes. First, the DOJ's view that it does not directly litigate on behalf of tribal governments was decisively embraced by the

123. See *supra* notes 1, 14–20, 105–20 and accompanying text.

124. Alexander Interview, *supra* note 104.

125. See Robert Yazzie, "Watch Your Six": An Indian Nation's Judge's View of 25 Years of Indian Law, Where We Are and Where We Are Going, 23 AM. INDIAN L. REV. 497, 500 (1999).

126. See Mathew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 935 (2009) (stating that since *California v. Cabazon Band of Mission Indians*, decided in 1987, tribal interests have lost 75 percent of their cases before the Supreme Court and that the Court has been far more likely to grant certiorari to cases challenging tribal rights than to petitions filed by tribes); Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. IND. L. REV. 391, 391 (2008) ("There is no question that in the last thirty years, the Supreme Court has presided over an unprecedented assault on the sovereignty of Indian tribes."); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280–81 (2001) (establishing that, when appearing before the Rehnquist Court, convicted criminal defendants were more successful than Indian tribes).

127. Neal Devins & Michael Herz, *Suing the Government: Velazquez and Beyond: The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 570 n.53 (2003).

Supreme Court in *United States v. Jicarilla Apache Nation*.¹²⁸ There the Court held that the attorney-client privilege did not require the government to turn over documents to the Jicarilla Apache Nation relating to the government's administration of trust resources on the tribe's behalf.¹²⁹ The Court rejected the tribe's argument that it was the "real client" as the beneficiary of the government-administered trust and that the government attorneys merely acted on its behalf.¹³⁰ Instead, the Court concluded that "the Government seeks legal advice in its sovereign capacity" rather than as a "full common-law trust[ee]."¹³¹

Second, the DOJ's position—that the trust relationship does not impose a judicially enforceable obligation on the federal government, absent affirmative duties created by particular statutes or executive orders—is well supported by Supreme Court precedent.¹³² There is federal law that commits the United States to represent the interests of tribes in litigation. Legislation enacted in 1893 requires that: "In all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity."¹³³ The long-standing position of the DOJ is that 25 U.S.C. § 175 does not limit its discretion to choose whether and how to litigate on behalf of tribal interests.¹³⁴

The courts have held that 25 U.S.C. § 175 does not create any statutory obligation that the DOJ participate in litigation on behalf of tribal governments. Though § 175 uses mandatory language ("the United States attorney *shall* represent [Indian tribes] in all suits at law and in equity"), courts have generally ruled that it is not detailed enough to create a legally binding duty under the trust doctrine. The leading case on the question is *Shoshone-Bannock Tribes v. Reno*, a case from the D.C. Circuit Court of Appeals. In *Shoshone-Bannock Tribes*, several federally recognized tribes in Idaho filed an action to compel the Attorney General to file claims in Idaho state court asserting tribal rights to water from the Snake River basin.¹³⁵ The court held that the Attorney General's power to supervise litigation is not subject to judicial review absent explicit constitutional or statutory restrictions.¹³⁶ The court ruled that § 175 was written too broadly to create "standards for judicial evaluation of the Attorney General's litigating decisions to pursue or not to pursue particular claims."¹³⁷ The U.S. Attorney's Manual quotes *Sho-*

128. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2318 (2011).

129. *Id.*

130. *Id.* at 2326.

131. *Id.*

132. *Id.* at 2325; *United States v. Mitchell*, 463 U.S. 206 (1983); Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 363–65 (2003).

133. 25 U.S.C. § 175 (2006).

134. U.S. ATTORNEYS' MANUAL, *supra* note 17, at § 5-14.300(A).

135. *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1477 (D.C. Cir. 1995).

136. *Id.* at 1480–81.

137. *Id.* at 1482.

shone-Bannock for the proposition that § 175 does not “withdraw discretion from the Attorney General.”¹³⁸

With the lonely exception of one district court,¹³⁹ other federal courts have agreed that § 175 does not constrain the discretion of the Attorney General.¹⁴⁰ Ultimately, Indian tribes are unlikely to succeed if they argue that the Attorney General is required to litigate on their behalf. The wide discretion that courts have afforded the Attorney General, however, makes it incumbent on the federal government to exercise that discretion in a responsible and transparent fashion.

III. RECOMMITTING THE INDIAN RESOURCES SECTION TO AFFIRMATIVE LITIGATION

A. The Risks of Unfettered Discretion

Innovation, flexibility, and conservation of resources are the hypothetical benefits of vesting unfettered discretion in the Attorney General in fulfilling trust doctrine obligations. However, in the affirmative litigation department, the Indian Resources Section has lost its rudder. A reformed expression of DOJ policy would address several significant shortcomings of the current system.

1. A Lack of Support

The Indian Resources Section should adopt a less discriminating standard when evaluating the strength of the proposed litigation. Indian Resources currently carefully screens for cases with sympathetic facts as the proper test cases to advance case law in a particular area.¹⁴¹ There are several problems with this approach. The Indian Resources Section’s position overemphasizes the risks of negative precedent, particularly when deciding whether to intervene at the district court level. At the trial level, the outcome of any particular case does not create binding precedent outside that district. If Indian Resources loses, its participa-

138. U.S. ATTORNEYS’ MANUAL, *supra* note 17, at § 5-14.300(A) (citing *Shoshone-Bannock Tribes*, 56 F.3d at 1482).

139. A federal magistrate judge in California held that § 175 obliged the federal government to sue the state of California on behalf of seven Indian tribes when California Governor Pete Wilson refused to negotiate gaming compacts with the tribes. *Chemehuevi Indian Tribe v. Wilson*, 987 F. Supp. 804 (N.D. Cal. 1997). The Court of Claims has also held that, where statutes and executive orders do create a trust duty obliging the U.S. to protect tribal resources, § 175 imposes a duty to on the federal government to represent their interests in an adequate fashion. *Ft. Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 426–27 (1991).

140. *Rincon Band of Mission Indians v. Escondido Mut. Water Co.*, 459 F.2d 1082, 1084–85 (9th Cir. 1972) (holding that the United States was not obliged to represent California tribes in a contract claim where doing so would have created a conflict of interest for the Attorney General); *Dowty v. Tarrell*, CIV. 04-5028-KES, 2005 U.S. Dist. LEXIS 12459 (D.S.D. May 27, 2005) (holding that § 175 applies only to disputes related to public lands); *Haudenosaunee Six Nations of Iroquois (Confederacy) of N. Am. v. Canada*, 98-CV-0112E(H), 1998 U.S. Dist. LEXIS 16265 (W.D.N.Y. Oct. 14, 1998).

141. Alexander Interview, *supra* note 104.

tion at the district court level does not oblige it to pursue an appeal of an unsympathetic case if it appears that the result would be the creation of adverse precedent for all tribes; in fact, it must reassess its position in consultation with the Solicitor General.¹⁴² If Indian Resources is successful, and an adversary appeals, Indian Resources is cast in the advantageous position of respondent.

Conversely, the Indian Resources' position undervalues the importance of individual court cases for the tribal governments or tribal members whose interests are implicated. For the tribe seeking a declaratory judgment recognizing a hunting or fishing right, or enjoining state attempts to exercise regulatory authority within its reservation, a successful lawsuit will have profound implications for the well-being of tribal members and the sovereignty of the tribe, even if it does not raise an important issue for all of Indian Country. The Bureau of Indian Affairs and the DOI often view their role in terms of providing service to individual tribes.¹⁴³ The DOJ's claim that its client is the federal agency requesting litigation rings hollow in light of the paramount significance it attributes to the test case factor. Of course, Indian Resources wants to maximize the impact of its limited resources by taking important cases. However, as suggested below, Indian Resources can stretch its resources by modulating its level of involvement within cases, based on the needs of the litigant. A primary benefit should be an increased Indian Resources commitment to a service-provision role. Indian Resources should give greater weight to the view of its client, the DOI, in evaluating requests that litigation be filed to protect tribal interests.

Finally, the Indian Resources Section's risk aversion can be paternalistic. Due to the expanded scope of state sovereign immunity, Indian Resources' decision whether to litigate increasingly serves a gate-keeping function.¹⁴⁴ Where state sovereign immunity prevents a case from going forward without Indian Resources' assistance, a refusal to accept a request for representation overrides the tribe's judgment that the proposed litigation is meritorious. Tribal governments are not naïve about the risks of litigation.¹⁴⁵ Nor are they ignorant about the risks of creating bad law and the importance of tribal coordination, as the Supreme Court Project demonstrates. Tribal organizations are involved in an ongoing debate about the proper strategic response to the Supreme Court's recent hostility to tribal interests.¹⁴⁶ After all, it is the tribes

142. 28 C.F.R. § 0.20(b) (2011).

143. Alexander Interview, *supra* note 104.

144. Devins & Herz, *supra* note 127, at 586–89.

145. See *supra* notes 5–14 and accompanying text.

146. See Kevin K. Washburn, *Tribal Sovereignty and United States v. Lara: Lara, Lawrence, Supreme Court Litigation, and Lessons From Social Movements*, 40 TULSA L. REV. 25, 43–44 (2004) (arguing that a lesson from other social movements is that tribes must continue to push sympathetic cases before the Supreme Court, as a means of educating the Justices); *contra* Steven Paul McSloy, *The Role of Jurisdiction in the Quest for Sovereignty: The "Miner's Canary." A Bird's Eye View of American Indian Law and Its Future*, 37 NEW ENG. L. REV. 733, 738 (2003) ("[T]aking Indian cases to the Supreme Court has been prima facie malpractice for the last twenty years.").

that have to live with the outcome of any negative ruling. Tribes, like any other aggrieved party, can have a valid interest in instigating litigation even where they think they are likely to lose on the merits. Litigation can be a tool to encourage settlement, preserve a claim for the future, or signal the inadequacy of judicial remedies to other political actors.

The Indian Resources Section does have an important screening role in evaluating requests for representation and consulting with the DOI. Resources Section attorneys should decline or discourage requests for representation where the tribe's or tribal member's interest in litigation appears to be based on an inaccurate expectation of success. Indian Resources may also face circumstances where an individual tribe is interested in pursuing high risk, high reward litigation. Indian Resources attorneys serve an important role in ensuring the interests of all tribes are factored into these litigation decisions. Outside of these circumstances, however, the Indian Resources Section should adopt a more deferential approach to tribal requests for litigation. Greater respect for tribal assessment of the desirability of litigation affords tribes credit for their capacity to make independent decisions and is consonant with the DOJ's policy of pursuing a government-to-government relationship with tribes.¹⁴⁷

2. Political Pressure

Protecting Native American resources and rights is often not a politically popular position. Vigorous representation of the rights of Indian tribes can raise the ire of powerful political actors. Executive agencies, including the DOJ, can face pressure to alter their position. Pressure can come from the executive branch or from Congress. For instance, in 2002, Karl Rove addressed the fifty most senior employees of the DOI, explicitly advising them on pending DOI decisions that could influence the upcoming midterm elections.¹⁴⁸ Rove noted that Republican Senator Gordon Smith, from Oregon, faced a difficult reelection.¹⁴⁹ At the time, the DOI was considering how much water farmers, a key portion of the GOP's political base in Oregon, would be allowed to use from the Klamath River.¹⁵⁰ Vice President Cheney called DOI scientists to pressure them to release additional water for agribusiness.¹⁵¹ In this case, high

147. Memorandum from Janet Reno, Attorney General, Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes (June 1, 1995), available at <http://www.justice.gov/ag/readingroom/sovereignty.htm>.

148. Tom Hamburger & Peter Wallsten, *Uproar Has Roots in Rove's Vast Reach; The architect of Bush's success, known for detail work, has kept close ties to the media*, L.A. TIMES, July 13, 2005, at A1, available at <http://articles.latimes.com/2005/jul/13/nation/na-rove13>.

149. *Id.*

150. *Id.*

151. Jo Becker & Barton Gellman, *Leaving No Tracks*, WASH. POST, June 27, 2007, at A1, available at http://blog.washingtonpost.com/cheney/chapters/leaving_no_tracks/.

ranking executive officials encouraged agency officials to alter federal policy to accommodate political interests.

Congress also sometimes exerts pressure on executive agencies. So-called ancient Indian land claims cases are particularly volatile politically. The uncertainty created by land claims litigation has encouraged Congress to seek the imposition of legislative solutions.¹⁵² In other instances, however, members of Congress have sought to pressure the DOJ to change tactics. Senator Charles Schumer lobbied the DOJ to dismiss a land claim suit against the state of New York brought on behalf of the Oneida Nation.¹⁵³ The DOJ's lack of guidance about the proper criteria for evaluating its role in litigation leaves Indian Resources Section attorneys more vulnerable to improper outside pressure.

3. Conflicts of Interest

The DOJ's official position is that it can simultaneously represent the interest of Indian tribes and the United States without any conflict of interest.¹⁵⁴ Whether or not conflicts of interest influence the DOJ to shortchange its trust responsibility obligations, the DOJ must navigate contradictory positions adopted by different executive agencies.¹⁵⁵ In a water case, for instance, limited water resources may be claimed by the Bureau of Indian Affairs on behalf of tribes and also by other agencies of the DOI.¹⁵⁶ The DOJ must defend against tribal claims for breach of trust at the same time it is tasked with litigating on behalf of tribes. Prior to the creation of the Indian Resources Section, the same attorney could have been assigned to litigate on behalf of a particular tribe, and also to defend the United States in a suit brought by that tribe.¹⁵⁷ The Indian Resources Section was created, in part, to divide the trustee and defense interests of the United States.¹⁵⁸

152. Editorial, *Western Shoshone Land Case Reveals Fundamental Injustice*, INDIAN COUNTRY TODAY, June 30, 2003 (describing the Western Shoshone Distribution Bill backed by the Nevada congressional delegation as a means of forcing the settlement of two tribal land claims in exchange for federal funds).

153. Press Release, Senator Charles Schumer, *Schumer Calls on Attorney General Reno to Drop All Justice Department Claims Against Oneida Landowners* Senator Demands Fairness for Oneida Landowners (April 6, 2000), available at http://schumer.senate.gov/new_website/record.cfm?id=324463&.

154. Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307, 1349–50 (2003).

155. Juliano describes three potential types of conflicts of interest: resource conflicts, where multiple agencies stake a claim to the same public property; case conflicts, where the DOJ must reconcile the positions of multiple agencies party to a particular case; and, preclusion conflicts, where the position taken by the DOJ in litigation may preclude it from adopting a particular position in future litigation. *Id.* at 1330–36.

156. Johnson, *supra* note 7, at 1028.

157. Juliano, *supra* note 154, at 1325–26.

158. *Id.*

B. Reforming Department of Justice Practice to Increase Affirmative Litigation

The DOJ has an important legacy in instigating and winning groundbreaking cases advancing tribal interests. Just as the DOJ is once again a crucially important ally for Indian law litigators, it has slipped from this role. The DOJ should rededicate itself to involvement in meritorious affirmative litigation on behalf of tribes. Some commentators have argued that the most effective way to improve federal representation of Native American interests is the creation of a separate litigation agency.¹⁵⁹ Whatever the merits of this proposal, it requires legislation by Congress and a radical restructuring of the DOJ's current responsibilities.¹⁶⁰ Modest reforms in DOJ policy, which can be accomplished without new laws or notice-and-comment rulemaking, can make a significant difference in improving the DOJ's representation.

1. Dedicating Indian Resources Section Resources to Affirmative Litigation

First, the Indian Resources Section should dedicate several attorneys to bringing affirmative litigation on behalf of tribal interests. Current Indian Resources attorneys are swamped with litigation challenging agency decisions in favor of tribes.¹⁶¹ There is little incentive to undertake time-consuming and controversial affirmative litigation for attorneys that already have an overflowing portfolio of cases. If the Attorney General were to designate a number of Indian Resources Section attorneys dedicated to affirmative litigation, it would solve this problem. Dedicated affirmative litigation attorneys would also ensure that litigation requests filter up from the DOI, because Section attorneys would have an incentive to encourage promising requests for representation to be passed along. Section attorneys' collaborative relationship with DOI solicitors would become a vehicle for ensuring meritorious litigation requests reach interested attorneys in the DOJ.

Second, the Indian Resources Section should adopt a policy of moderating its level of involvement in litigation to stretch its resources and maximize its impact. Many Indian tribes are now well represented and well funded.¹⁶² In cases where state sovereign immunity is a barrier to a lawsuit, but tribal litigants are otherwise well prepared to litigate their interests, the Indian Resources Section should consider intervening but allow the tribe to shoulder most of the cost and time burdens. Professors Choper and Yoo have suggested generally that the DOJ should consider adopting a supervisory role in partnership with private parties as a response to the expanded scope of state sovereign immunity:

159. See Juliano, *supra* note 154, at 1376–77.

160. See *id.* at 1385.

161. See *supra* Part II.B.

162. See *supra* Part I.

[S]ince there appears to be no constitutional impediment to the United States joining with private parties to pursue states that violate federal law, the executive branch could have them shoulder more (or most) of the burden. Government lawyers could initiate and oversee the case, while the outside attorneys conduct much of the actual litigation, although the burden of oversight by federal officials would not be insignificant.¹⁶³

This role is particularly appropriate in the Indian law context, because it allows the Indian Resources Section to aid tribes in consonance with the principles of the trust doctrine, while according tribal interests greater autonomy in their decision-making.

2. A New Statement of Policy Identifying Criteria for Involvement in Litigation on Behalf of Tribal Interests

The DOJ should also create a statement of policy clarifying when it will instigate or join litigation on behalf of tribal interests. This paper has argued that a new statement of policy should express a renewed Indian Resources Section commitment to affirmative litigation. However, even if the DOJ is opposed to changing its litigation portfolio, a statement of policy could increase transparency about what criteria will be considered, both for Indian Resources attorneys and for tribal governments. A simple statement of policy could read:

Pursuant to the United States' role as trustee of federally recognized tribes, the Department of Justice, on occasion, instigates or joins in litigation to protect the resources and rights of federally recognized Indian tribes and members of such tribes. In determining whether, and to what extent, the Department of Justice's Indian Resources Section will respond to a request for representation, it will consider the following factors:

1. The resources available to the Indian Resources Section. It is the policy of the Indian Resources Section to scale its participation in affirmative litigation to match the needs of the requestor and to maximize its limited resources.

2. The impact the Department of Justice's involvement will have on the likely outcome of the proposed litigation. The Department of Justice will prioritize meritorious claims that cannot go forward without the assistance of the United States.

3. The impact the Department of Justice's involvement will have on the development of precedent applicable to all federally recognized Indian tribes.

163. Choper & Yoo, *supra* note 87, at 234–35.

This policy is intended only to improve the internal management of the Department and is not intended to create any right enforceable in any cause of action by any party against the United States, its agencies, officers, or any person.¹⁶⁴

A memorandum to this effect would position the Indian Resources Section to fulfill its stated mission in an era of expanded state sovereign immunity. This proposed statement of policy makes clear that the Indian Resource Section should prioritize instances where state sovereign immunity would otherwise foreclose a lawsuit. It also allows Indian Resources to adopt a minimal role in litigation where the United States is needed for its sovereign status, but not necessarily its litigation expertise. The proposed policy does not dispense with the Indian Resources Section's expertise in assessing the strength of proposed litigation, but it shifts the focus to the impact the Section's contribution would make in the litigation. This approach is more consistent with a partnership-based, government-to-government vision of the trust doctrine.

A policy statement would serve to introduce clarity in the process for attorneys working for tribal governments. Increased DOJ transparency on its conception of its role, and the criteria it applies in evaluating requests for litigation would allow tribal counsel to make more informed strategic calculations. A statement of policy would also benefit the DOJ itself. A clearer policy would increase certainty within the Indian Resources Section about what factors attorneys should consider when tasked with evaluating a request for litigation. It would also allow Section attorneys to be more helpful when consulting informally with the DOI about whether a litigation request should be passed along to the DOJ. Finally, a transparent statement of policy factors should help insulate Section attorneys from outside political pressure. A list of factors that Section attorneys are required to consider should help shield them from improper pressure to consider the political impact of their decisions. Similarly, a transparent policy could be a vehicle to mitigate conflict of interest issues.

IV. CONCLUSION

In the past two decades, federal courts have sometimes been a font of disappointment for Indian tribes. There is no doubt, however, that litigation is an important tool in the continued campaign to protect tribal resources and culture. The DOJ has played a laudable role in repre-

164. This is boilerplate disclaimer language the DOJ often attaches to statements of policy. *See, e.g.*, Memorandum from the Attorney Gen. Eric Holder on Guidance Regarding Use of DNA Waivers in Plea Agreements to All Fed. Prosecutors (Nov. 2010), *available at* <http://www.justice.gov/ag/ag-memo-dna-waivers111810.pdf>. It is included to ensure the informality of any new policy. The DOJ would be less likely to commit to a statement of policy that creates a new cause of action for tribes under either the Administrative Procedure Act or the trust doctrine.

senting tribal interests in court. In an era of Supreme Court hostility to Indian interests, the DOJ must continue to evaluate how it can best fulfill its trust obligation duties. In doing so, the DOJ should consider modest reforms to recommit the Indian Resources Section to participation in affirmative litigation, and to assisting tribal litigants in overcoming barriers raised by an expanded doctrine of state sovereign immunity.