



**PARTY OR AMICUS?: SOME
PRELIMINARY
CONSIDERATIONS**

**PAUL SPRUHAN
LITIGATION UNIT
NAVAJO DEPARTMENT OF JUSTICE**



SOMEONE HAS FILED LITIGATION THAT AFFECTS TRIBAL INTERESTS: WHAT ARE MY OPTIONS?

- **Do nothing** affirmatively, but monitor case and maybe communicate with counsel for parties in the case.
- **Intervene at trial level** as a party, whether aligned as plaintiff or defendant, whether to litigate on the merits or to seek dismissal.
- **File amicus brief** at trial level.
- Do nothing at trial level, but maybe get involved at **appellate level**:
- **Intervene at appellate level**, either aligned with appellant or appellee.
- **File amicus brief** at initial three-judge panel stage, in the *en banc* proceeding, at cert. petition or petition for review/brief in opposition stages, and/or at merits stage.



PROS TO BEING A PARTY INSTEAD OF AMICUS

- Can engage in discovery, subject to limitations court may set if you intervene in case.
- Existing parties are required to seek your input on briefing, scheduling, oral argument participation, settlement discussions, etc.
- Can directly participate in hearings, present evidence, and give your own oral argument (though still might be contested by other aligned parties or other side).
- More likely court will read your briefs carefully.
- Have an independent right to appeal or seek further review of adverse decisions (e.g., *en banc* and cert/petition for review).



CONS TO BEING A PARTY INSTEAD OF AMICUS

- Submits the tribe to the power of the court, while amicus does not.
- May be waiving tribal sovereign immunity, particularly if intervening as defendant, as are agreeing to be sued and be bound by the judgment (but maybe not as plaintiff due to immunity from counter-claims).
- Bound by judgment (res judicata, collateral estoppel)
- May be subject to discovery, including potentially invasive inquiries into cultural and religious practices.
- May be more contested/litigated by other parties opposing your participation at intervention or merits phases (but can negotiate in advance to potentially overcome opposition).
- May involve more time and much more expense than amicus (though can pool briefing, etc. with aligned parties).



PROS OF BEING AMICUS INSTEAD OF A PARTY

- No waiver of immunity and are not bound by the judgment (res judicata, collateral estoppel).
- Can add facts and issues not controlled by the evidence, record, or issues raised by the parties.
- Less likely to be opposed by existing parties (many lawyers have standard consent policies for amici).
- Potentially less time commitment and potentially much less expensive.
- Can pool resources with other tribes/organizations by filing joint amicus briefs with other amici that can take the lead in drafting.



CONS OF BEING AMICUS INSTEAD OF A PARTY

- Cannot directly control litigation and are not directly involved in briefing, scheduling, discovery, oral argument, or settlement discussions.
- Cannot appeal or seek further review if parties give up litigating the case.
- Are required to seek permission of court and other parties to participate in oral argument, and such participation might be denied.
- Less likely your brief will be read carefully, particularly if there are a lot of amicus briefs filed.

HOW DO YOU BECOME A PARTY IF LITIGATION HAS ALREADY BEEN FILED?

- If Plaintiff-
- File your own complaint and seek consolidation (requires tribe to independently establish standing).
- Work with counsel for existing plaintiffs to amend complaint to add you as party (requires more direct collaboration with counsel for existing parties) (does not require tribe to independently establish standing).
- Intervene as mandatory or permissive intervenor (can be opposed by any party, including plaintiffs you are aligned with unless statute allows it) (can be denied if not timely, tribe can't show impairment to an interest, or if adequately represented by an existing party, or simply within court's discretion if permissive).

HOW DO YOU BECOME A PARTY IF LITIGATION HAS ALREADY BEEN FILED?

- **If Defendant-**
- **Intervene** as mandatory or permissive intervenor (same limitations as plaintiff intervenor) (can be opposed by existing parties, including existing defendants. *E.g.* US DOJ position on trustee “adequate representation” of tribes):
- Can **file answer** and participate on **the merits** aligned with existing defendants (*e.g.*, summary judgment motion).
- Can enter **special appearance** to file **motion to dismiss** for defect (e.g. Rule 12 defenses), including that your tribe is a required party under **Rule 19**.

WHEN CAN YOU INTERVENE?

- Subject to timeliness requirement:
- At beginning of case or at least during consideration of the merits.
- After final judgment you can intervene for purposes of filing an appeal (*see* FRCP 62.1 and “indicative ruling” if notice of appeal already filed (Fed. Dist Ct. can defer, deny, or state it would grant the motion if remanded or state motion raises a “substantial issue”)).
- On appeal (No FRAP rule, but allowed under Circuit precedent)



HOW DO YOU BECOME AMICUS?

- Check rules of court to see if they have rules allowing amicus participation, including timing requirements (federal, tribal, or state) (*E.g.*, Federal Rules of Civil Procedure do not include rule allowing amicus briefs).
- If generally allowed, check whether a motion is required, and any substantive criteria proposed amicus has to show to justify brief (Note: some disclaimers and disclosures may be required on who drafted the brief, etc.).
- If motion is required, file motion to participate as amicus and attach proposed brief (if required by rules).
- Can negotiate party consent in advance, and might be able to forego motion or at least an opposed motion.
- Sometimes Court itself may request your amicus participation.