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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN PASQUAL BAND OF MISSION INDIANS, a federally recognized Indian Tribe, Plaintiff, vs. STATE OF CALIFORNIA, CALIFORNIA GAMBLING CONTROL COMMISSION, an agency of the State of California, and ARNOLD SCHWARZENEGGER, as Governor of the State of California, Defendants	CASE NO. 06 CV 0988 LAB AJB **AMICUS CURIAE BRIEF OF CALIFORNIA NATIONS INDIAN GAMING ASSOCIATION IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS (PROPOSED)** Date: January 22, 2007 Time: 10:30 a.m. Courtroom: 9 Judge: Hon. Larry A. Burns

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The California Nations Indian Gaming Association ("CNIGA") respectfully submits this amicus curiae brief in opposition to defendants' motion to dismiss.

Dismissal under Rule 19 is a "drastic remedy" of last resort. *Teamsters Local Union No. 171 v. Keal Driveaway Co.*, 173 F. 3d 915, 918 (4th Cir. 1999). The Court here has better options available to it to address the issues the State raises. CNIGA does not believe that tribes that signed the 1999 compacts are necessary parties. Moreover, even if the Court were to find those absent tribes "necessary," there are a number of options open to the Court for addressing the potential interests of those tribes without dismissing this case.

I. The Motion to Dismiss Must Be Adjudicated in the Context of the Indian Gaming Regulatory Act and the Central Role It Assigns to Tribal-State Compacts in Implementing Federal Indian Policy

It is important to understand the context in which the compact at issue here arose. Compacts play a central role in effectuating Congress' policy of promoting Indian tribal government gaming as the primary means of achieving the core federal Indian policies of tribal self-reliance and strengthened tribal sovereignty.

Congress has promoted a "longstanding policy of encouraging tribal self-government." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). Federal Indian policy "includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development,' " *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (*quoting White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)), and the Supreme Court has long recognized that tribal authority over on-reservation conduct must be "construed generously in order to comport ... with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe*, 448 U.S. at 144.

In 1987, the United States Supreme Court recognized the inherent right of Indian tribes to offer gaming on tribal lands. *See California v. Cabazon Band*, 480

U.S. 202 (1987). The following year, Congress enacted the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21, a comprehensive federal statutory structure that preemptively governs the field of gaming on Indian lands. *See* S.Rep. No. 100-446, at 6, 1988 U.S.C.C.A.N. at 3076 ("Senate Report") ("[IGRA] is intended to expressly preempt the field in the governance of gaming activities on Indian lands"). *See also Casino Resource Corp. v. Harrah's Entertainment, Inc.*, 243 F.3d 435, 437 (8th Cir. 2001) ("Congress, by enacting IGRA, has established the preemptive balance between tribal, federal, and state interests in the governance of gaming operations on Indian lands").

IGRA provides a statutory basis for the "creation and operation of Indian casinos to promote 'tribal economic development, self-sufficiency, and strong tribal governments.'" *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) (*quoting* 25 U.S.C. § 2702(1)). Thus tribal government gaming operations under IGRA are not "mere revenue-producing tribal business[es] ...." *Id.* Rather they are the primary means Indian tribes have of seeking to achieve the policy goals set by Congress for tribal self-reliance.

In enacting IGRA, Congress "balance[d] mutual and competing federal, state, and tribal interests in Indian gaming on Indian lands." *AT & T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 917 (9th Cir. 2002). The Report by the Senate Indian Affairs Committee reflects that IGRA was the "product of years of 'negotiations between gaming tribes, States, the gaming industry, the administration, and the Congress, in an attempt to formulate a system for regulating gaming on Indian lands' which simultaneously 'preserve[s] the right of tribes to self-government,' 'protect[s] both the tribes and the gaming public from unscrupulous persons,' and 'achieves a fair balancing of competitive economic interests.'" *Id.* (*quoting* Senate Report at 1-2, U.S.C.C.A.N. at 3071). Congress balanced the States' concerns with "strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands." Senate Report at 13,

U.S.C.C.A.N. at 3083. Congress recognized that "[a] tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders." *Id.*

Congress "concluded that the compact process is a viable mechanism for setting various matters between two equal sovereigns." *Id.* Congress determined that Tribes and States shall negotiate a "Tribal-State compact" to regulate tribal government casino gaming on Indian land. *Id.* § 2710(d). IGRA granted broad authority to tribes and states, by providing that "[a]ny Tribal-State compact ... may include provisions relating to – (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity; [and] (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations ...." *Id.* § 2710(d)(3)(C)(i)-(ii).

Thus Congress intended tribes to be able to obtain compacts and to benefit from tribal government gaming to advance federal Indian policy supporting tribal self-reliance, economic self-sufficiency, and strong tribal governments.

II. Settled Canons of Federal Indian Law Counsel in Favor of Denying Defendants' Motion to Dismiss

"[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe,* 471 U.S. 759, 766 (1985). Accordingly, the Supreme Court has developed Indian law canons of construction.

"Courts have uniformly held that treaties, statutes and executive orders must be liberally construed in favor of establishing Indian rights. Any ambiguities in

construction must be resolved in favor of the Indians." *Confederated Tribes of Chehalis Indian Reservation v. State of Wash.*, 96 F.3d 334, 340 (9th Cir. 1996) (*citing Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 (1985); *Parravano v. Babbitt,* 70 F.3d 539, 544 (9th Cir. 1995)). *See also Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003). In addition, agreements are to be construed as the Indians understood them, *see e.g. Choctaw Nation*, 318 U.S. at 432, and tribal sovereignty is preserved unless Congress's intent to the contrary is clear and unambiguous. *See United States v. Dion,* 476 U.S. 734, 738-39 (1986); F. Cohen, *Handbook of Federal Indian Law*, 119-20 (2005 LexisNexis) ("*Cohen*").[1] "These rules of construction 'are rooted in the unique trust relationship between the United States and the Indians.'" *Id.* (*quoting Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). *See also McClanahan v. Arizona Tax Comm'n,* 411 U.S. 164, 174 (1973); *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Cohen* at 119.

The first canon provides that when a court is "faced with ... two possible ... constructions, our choice between them must be dictated by a principle deeply rooted in [the Supreme] Court's Indian jurisprudence: '[s]tatues are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit.'" *County of Yakima v. Confederated Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (*quoting Blackfeet Tribe*, 471 U.S. at 766); *see City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003) ("ambiguities in federal

[1] *Cohen* is the leading treatise on the subject of federal Indian law, and has consistently and routinely been cited by the United States Supreme Court in federal Indian law cases since it was first published. *See, e.g., City of Sherrill, N.Y. v. Oneida Indian Nation of New York,* 544 U.S. 197, 204 (2005); *Oklahoma Tax Com'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 139 (1982); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978); *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 159 (1973); *Williams v. Lee*, 358 U.S. 217, 219 (1959); *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 325 n. 5 (1942).

statues are to be read liberally in favor of the Indians"). This canon is directly applicable to the compact at issue here because the compact is federal law.[2]

The second canon provides that absent clear congressional intent to diminish tribal sovereignty, courts must adopt interpretations that ensure that tribes retain their governmental authority. Inherent tribal sovereignty exists "at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers." *U.S. v. Wheeler*, 435 U.S. 313, 323 (1978) (*citing Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)). If a tribe's sovereign authority on its reservation "is to be taken away from them, it is for Congress to do it." *Williams v. Lee,* 358 U.S. 217, 223 (1959).

These canons of construction favor denial of defendants' motion to dismiss and allowing San Pasqual to reach the merits of its case.

III. The Absent Tribes and Neither Necessary Nor Indispensable Parties

CNIGA agrees with San Pasqual's argument that the absent tribes are neither necessary nor indispensable parties.

CNIGA will not repeat San Pasqual's arguments, but rather simply notes that despite the great diversity of the tribes it represents -- including tribes in situations

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[2] "[W]here Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause." *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). *See* U.S. Const. Art. 1, § 10, cl. 3. The Compacts Clause provides in relevant part: "No State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State, or with a foreign Power ...." U.S. Const. Art. 1, § 10, cl. 3. While Indian tribes are not States, they are, with respect to the States, "foreign powers" under the Constitution. Congress has "plenary and exclusive authority" over Indian affairs. *United States v. Lara*, 541 U.S. 193, 200 (2004); *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U.S. 463, 470 (1979). "The term 'exclusive' refers to the supremacy of federal over state law in this area." *Cohen* at 398.

the State speculates might result in "wide-ranging" positions that differ from San Pasqual, Defendants' Brief at 7: 20-21-- CNIGA's 68 member tribes voted ***unanimously*** to support San Pasqual's position in this case. Defendants' argument to the contrary is purely speculative and unsupported by the known facts.

No tribe to CNIGA's knowledge has claimed a legally cognizable interest in San Pasqual's compact.

CNIGA recognizes the basic principle that when an entity is not a party to a contract and has no rights or obligations under the contract, the absent party is not necessary or indispensable in a suit to determine obligations under the disputed contract. *See Davis Co. v. Emerald Casino, Inc.* 268 F.3d 477, 484 (7th Cir. 2001).

Compacts are bilateral agreements between an individual tribe and an individual State, not multi-party agreements between all tribes and the State. Congress recognized that compacts would be bilateral agreements between an individual tribe and a state: "To the extent tribal governments elect to relinquish rights in a tribal-state compact that they might have otherwise reserved, the relinquishment of such rights *shall be specific to the tribe* so making the election, and shall not be construed to extend to other tribes ...." Senate Report at 6, U.S.C.C.A.N. at 3076 (emphasis added). Each individual tribe's compact is reviewed and approved by the Assistant Secretary for Indian Affairs, U.S. Department of Interior, and notice of such approval published in the Federal Register. *See* 25 U.S.C. § 2710(d)(8)(D); *see, e.g.,* 65 Fed. Reg. 31189 (May 16, 2000). Each tribe's compact is a bilateral agreement with the State, and each tribe has the right to enforce its compact's terms.

Despite the distinct, bilateral quality of each tribal-state compact, all tribes with 1999 Compacts do share an interest in preserving the dispute resolution provisions of their individual compacts so that each Tribe can hold the State to its obligations, as the State seeks to do with each tribe. Thus to the extent that this Court denies the State's motion to dismiss and reaches the merits of the case, it

would serve, rather than impair, the interests of other tribes with 1999 compacts by affirming that the dispute resolution mechanism in those compacts provides a meaningful judicial remedy.

If any tribe with a 1999 compact for some unfathomable reason shared the State's view that the dispute resolution mechanisms are unworkable under Rule 19, that position is plainly adequately represented by the State. Since the 1999 compacts were negotiated, there is no evidence to CNIGA's knowledge of any tribe sharing the State's view that a tribe lacks the ability to enforce its compact against the state absent joining all tribes that signed compacts in 1999.

Indeed, the practical effect of the State's argument would be to nullify the express right of tribes to seek judicial remedies for state breaches of compact because if San Pasqual is barred from obtaining a judicial determination of its rights under its compact here, under the State's theory, that result may well obtain for other tribes seeking to enforce their compact rights.

That is not what each tribe with a 1999 compact bargained for. "'A written contract must be read as a whole and every part interpreted with reference to the whole. Preference must be given to reasonable interpretations as opposed to those that are unreasonable, or that would make the contract illusory.'" *Kennewick Irr. Dist. v. U.S.*, 880 F.2d 1018, 1032 (9th Cir. 1989) (*quoting Shakey's Inc. v. Covalt*, 704 F.2d 426, 434 (9th Cir. 1983)).

While the logical result of the State's position here might appear to leave it too without a judicial remedy for alleged tribal compact violations, that is not so as a practical matter. Compact section 11.2.1(c) gives the State the right to give notice of an alleged tribal compact violation, and a tribe must risk losing its entire compact if it chooses to contest the State's claim. Thus, so long as a tribe cannot, as a practical matter, risk having its compact invalidated, the State has a potent remedy for any alleged tribal compact breach which, under the State's theory here, tribes lack as against alleged State breaches. This is why the State does not

hesitate to make an argument that might appear to subvert its own interests. In fact, the State's argument is an attempt to secure for its self the unilateral ability to radically alter the meaning of compacts with tribes, insulated from judicial oversight.

IV. Even If Other Tribes Are Deemed Necessary Parties the Court Can Structure Relief So As To Lessen or Avoid Prejudice

Even if other tribes did claim a legal interest in this suit yet chose to not intervene, this Court could nevertheless shape relief to eliminate or reduce any prejudice.

For example, in a recent case a federal court adjudicated a claim by a tribal agency against the United States Department of Housing and Urban Development, challenging the validity of a HUD regulation regarding low income Indian housing. *See Fort Peck housing Authority v. U.S. Dept. of Housing and Urban Development*, 435 F. Supp. 2d 1125 (D. Colo. 2006). The court's decision striking down the HUD regulations was applied only to the individual tribe that brought the suit, "because this action was not certified as a class action and because other Indian tribes are not parties in this case and have had no opportunity to take a position with respect to the validity of the rule as it affects them ...." *Id.* at 1136.

Similarly, here, the Court could expressly limit the application of prospective, equitable relief to plaintiff San Pasqual. The State itself essentially acknowledges that similar language in other tribes' compacts need not necessarily hold the same legal meaning. *See* Defendants' Brief at 9:3-6 ("that the State entered into nearly identical compacts with 62 tribes does not automatically create identical legal interests").

"[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Here, prospective equitable relief could easily be shaped to

provide plaintiff San Pasqual with complete relief, with no need to extend statewide to all tribes. *Virginia Society for Human Life, Inc. v. Federal Election Com'n*, 263 F.3d 379, 393 (4th 2001) (nationwide injunction was "broader than necessary to afford full relief to" plaintiff).

V. Alternatively, the Court Could Direct Plaintiffs to Seek Class Certification, and Provide Tribes With an Opt Out Option

The State's position here, particularly regarding the alleged risk of varying adjudications, argues not for dismissal under Rule 19, but rather serious consideration of directing or offering as an alternative to plaintiff, seeking certification as a class action under Rule 23.

On its face, the case would appear to present a colorable claim for satisfying the mandatory prerequisites of Rule 23. Given that the potential class of plaintiffs consists of dozens of Indian tribal governments, joinder might be reasonably deemed "impracticable ...." Fed. R. Civ. P. 23(a). According to the State, there are "questions of law or fact common" to all the tribes. *Id.* San Pasqual's claims are, by all available evidence, typical of what most if not all tribes believe. And there can be little doubt that competent class representation is available.

With the prerequisites of Rule 23(a) appearing satisfied, Rule 23(b)(3)'s standards would also appear to be potentially met under these circumstances. The Court might reasonably find "that the questions of law or fact common to the ... [tribes] predominate over any questions affecting only individual [tribes], and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Id.*

While plaintiff San Pasqual has not sought class certification, if the Court were to share the State's concerns about the possibility of inconsistency, it might fairly afford plaintiff an opportunity to consider making a case for class certification. If plaintiff so moved and the Court found the matter appropriate for

class certification under Rule 23(b)(3), absent tribes would be entitled to chose to participate in this suit or alternatively to opt out. *See* Fed. R. Civ. P. 23 (c)(3) (class certified under Rule 23 (b)(3) includes opt-out option); *see also Cox. v. American Cast Iron Pipe Co.*, 784 F. 2d 1546, 1554 (11th Cir. 1986) (opt-out provision should be neutrally drafted by court); *cf. Smith v. Montgomery County*, 111 F.R.D. 372, 374 (D. Md. 1987) (class consists only of those persons who affirmatively express their intent to be included); *In re U.S. Fin'l Secur. Litig.*, 69 F.R.D. 24, 53-54 (S.D. Cal. 1975) (same).

At a minimum, the potential for class certification should be explored before the Court considers dismissing San Pasqual's action.

VI. Even if Other Compact Tribes Were Necessary Parties, They Might Be Joined in the Instant Litigation

Even if other compact tribes were necessary parties, this Court should not dismiss San Pasqual's Complaint because, contrary to the State's claims, the other 1999 compact tribes might well be joined to the present litigation.

Compact section 9.4 provides that a tribe waives its sovereign immunity and consents to suit in federal court if the following three elements are met: 1) the dispute is limited to issues arising under the Compact; 2) neither side makes a claim for monetary damages; and 3) only the tribe and State are parties to the suit, unless failure to join a third party would defeat jurisdiction, provided that neither the State nor tribe waives its sovereign immunity in respect to such third party. Compact § 9.4(a).

If the Court were to determine that absent tribes are in fact necessary parties, then all three of these factors would be satisfied. First, this dispute only concerns the State's breach of compact due to its unilateral interpretations of key compact provisions without obtaining the consent of the Tribe. *See, e.g.,* Second Amended Complaint at ¶ 8. Second, the only remedy sought in this suit is prospective

equitable relief, not money damages. *See id.* at prayer for relief, p. 10. Third, only the Tribe and State are parties to this suit.

The State's argument proves too much. If the State is correct, that the common language in the 1999 compacts renders all signatory tribes necessary parties here, then "equity and good conscience" suggest that each signatory tribe's immunity waiver should also apply and thus allow each to be joined in this action. Fed. R. Civ. P. 19(b).

The State's assertion that other tribes with 1999 compacts cannot be joined due to their sovereign immunity is therefore erroneous. Under Rule 19(a), this Court has the power to order the joinder of other compact tribes if they are deemed necessary: if a necessary party "has not been so joined, that court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff." Fed. R. Civ. P. 19(a).

Accordingly, if this Court were to determine that the other 1999 compact tribes are necessary parties under Rule 19(a), the Court can and should consider ordering that such parties be joined in the instant litigation, thereby making dismissal unnecessary.

VII. The State's Suggestion That the Tribe Renegotiate Its Compact Is a False Remedy and Undermines Congress' Intent in IGRA

The State suggests that San Pasqual has an alternative remedy, namely, renegotiating its compact. This is simply not a remedy for an alleged breach of the Tribe's existing compact. The State appears to be taking the position that if San Pasqual wants more gaming device licenses than it currently possess, it will need to renegotiate its compact and, plainly, pay the State higher amounts of revenue sharing than it does under its current compact. But San Pasqual's claim here is that it is entitled to obtain additional licenses under the existing compact, for the fees

already negotiated and agreed upon. Its claim of breach will simply be ignored if its sole remedy is to throw out its existing compact and negotiate a new one.

Moreover, the State's position contravenes Congress' intent in IGRA. As the Ninth Circuit recently recognized, "[o]ne of the principal purposes of the IGRA is 'to insure that the Indian tribe is the primary beneficiary of the gaming operation.'" *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) (*quoting* 25 U.S.C. § 2702(2)). IGRA's legislative history expressly provides that "[i]t is the [Senate Indian Affairs] Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes." Senate Report at 13, U.S.C.C.A.N. at 3083. Requiring plaintiff to renegotiate its compact rather than granting it the licenses to which it is entitled under its present compact would not serve the Tribe's interests, as IGRA requires, bur rather those of the State and perhaps "other State licensed gaming enterprises." *Id.*

VIII. Conclusion

For the foregoing reasons, amicus curiae CNIGA respectfully requests that the Court deny defendants' motion to dismiss.

Dated: January 8, 2007

HOLLAND & KNIGHT LLP

By_____
Frank R. Lawrence, Esq.

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PROOF OF SERVICE

STATE OF CALIFORNIA)
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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 633 West Fifth Street, 21st Floor Los Angeles, California 90071.

On **January 8, 2007**, I caused the foregoing document described as **AMICUS CURIAE BRIEF OF CALIFORNIA NATIONS INDIAN GAMING ASSOCIATION IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS (PROPOSED)** to be served on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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X (BY MAIL) I caused such envelope with postage thereon fully prepared to be placed in the United States mail at Los Angeles, California.

X (BY E-MAIL) Following ordinary business practices, I e-mailed the above listed document to the email addresses of the persons on the service list.

X (FEDERAL) I declare that I am employed in the office of a member of the Bar of this court at whose direction the service was made.

Executed on **January 8, 2007**, at Los Angeles, California.

Bobbette Mack