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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ARTICHOKE JOE'S, et al., Plaintiffs, v. GALE NORTON, Secretary of Interior, et al., Defendants.	Case No. CIV.S-01-0248 DFL GGH BRIEF OF AMICUS CURIAE CALIFORNIA NATIONS INDIAN GAMING ASSOCIATION (Proposed) Date: October 19, 2001 Time: 9:00 a.m. Courtroom 7: Hon. David F. Levi

I. Introduction: The California Tribes Are Necessary and Indispensable Parties That Cannot Be Joined

This action seeks to void existing contractual agreements between the State of California and 61 federally-recognized Indian tribes located in California, as well as the State constitutional authorization for those agreements. Yet plaintiffs have failed to name any of the tribes as

defendants. Each of the 61 tribes has a direct stake in the adjudication of agreements they negotiated and signed. The 48 California tribes that have not signed compacts are expressly named as third party beneficiaries under the existing agreements, such that they too have a vested interest in the adjudication of the compacts.

The existing defendants cannot adequately represent each of the 109 federally recognized tribal governments in California because of a host of conflicts of interest. Each of the 109 tribes is a necessary party, but cannot be joined by reason of its sovereign immunity. For these reasons, each of the tribes is an indispensable party and thus this action must be dismissed pursuant to Federal Rule of Civil Procedure 19(b).[1]

II. Legal Standard Under Federal Rule of Civil Procedure 19

The Ninth Circuit applies a two-part analysis to a suggested dismissal under Rule 19. *See Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999); *Kescoli v. Babbitt*, 101 F.3d 1304, 1309 (9th Cir. 1996). "First, we determine whether an absent party is 'necessary'." *Daley*, 173 F.3d at 1167; *Kescoli*,101 F.3d at 1309; *see also* Fed. R. Civ. P. 19(a). "If the absent party is necessary and cannot be joined, we then decide whether the absent party is 'indispensable'." *Daley*, 173 F.3d at 1167 ; *Kescoli*,101 F.3d at 1309 (*citing Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990)).

[1]This case's factual background is adequately noted in the existing record and will not be repeated here. *See, e.g.*, Memorandum of Points and Authorities in Support of State Defendants' Joint Motion to Dismiss Complaint at 2-7; Federal Defendants' Opposition to Plaintiffs' Motion For Summary Judgment, and Federal Defendants' Cross-Motion For Summary Judgment at 7-8; State Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of State Defendants' Cross-Motion for Summary Judgment, at 2-6.

III. California Tribes are Necessary Parties Under Rule 19(a)

> Under Rule 19(a), the California tribes are necessary parties and must be joined if: (1) in the [tribes'] absence complete relief cannot be accorded among those already parties, or (2) the [tribes] claim[] an interest relating to the subject of the action and [are] so situated that the disposition of the action may (i) as a practical matter impair or impede the [tribes'] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claim interests.

Fed. R. Civ. P. 19(a). "Satisfying the requirements of either subparagraph establishes necessary party status." *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999).

Thus Rule 19(a) provides three distinct grounds upon which an absent party may be necessary. California tribes are necessary parties for all three reasons, as the following discussion demonstrates.

A. In the Tribes' Absence Complete Relief Cannot Be Accorded Among the Existing Parties

As the Ninth Circuit noted in *Clinton v. Babbitt*, "a district court cannot adjudicate an attack on the terms of a negotiated agreement without jurisdiction over the parties to that agreement." *Id*. at 1088 (*citing Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325-26 (9th Cir. 1975)). *See also Pit River Home and Agric. Coop. Ass'n v. United States* 30 F.3d 1088, 1099 (9th Cir. 1994) ("[E]ven if the Association obtained its requested relief in [a dispute over which group of Indians were beneficial owners of a certain parcel of real property], it would not have compete relief, since judgment against the government would not bind the [other group of Indians], which could assert its right to possess the [property]"); *Confederated Tribes of the*

Chehalis Indian Reservation v. Lujan, 928 F.2d 1496, 1498 (9th Cir. 1991) (judgment against federal officials in case challenging an agreement between the United States and the Quinault Nation would not bind the Nation).

It is undisputed that this case attacks the terms of a negotiated agreement, namely, the Tribal-State Gaming Compacts negotiated by the State of California and the 61 signatory tribal governments.[2] Compacts are, by statutory mandate, "negotiated." *See* 25 U.S.C. § 2710(d)(3).[3] Plaintiffs' Complaint directly attacks these negotiated agreements. For example, the Complaint seeks a declaration that "the Tribal-State Gaming Compacts violate" federal law and an injunction against the State defendants' administration of the Compacts. Complaint, Prayer for Relief at ¶ (b). Plaintiffs' motion for summary judgment confirms that the case challenges "Proposition 1A and the Tribal-State Compacts that rest upon it ...." Plaintiff's Motion for Summary Judgment at 1:6-7. Plaintiffs also acknowledge that they seek to enjoin "implementation of compacts the governor already has signed and the Federal Defendants have approved, which give various California Indian Tribes exclusive Class III gaming rights." Complaint at ¶ 8. In addition to the relief noted above, the prayer for relief also seeks to "set[] aside the [federal] approvals ... of the Tribal-State Gaming Compacts" as violative of federal law.

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[2]There are 61 tribal-state compacts currently in effect between the State of California and tribal governments. *See* California Legislative Analyst's Office Analysis of the 2001-02 Budget Bill, California Gambling Control Commission (0855) ("Currently, there are 61 approved tribal-state compacts"); 65 Fed. Reg. 31189 (May 16, 2000) ("Notice of approved Tribal-State Compacts" listing 60 California tribal compacts).

[3]The federal statutory scheme regulating the field of Indian gaming expressly provides that any Indian tribe seeking a compact "shall request the State in which such [tribal] lands are located to enter into *negotiations* for the purpose of entering in to a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State *shall negotiate* with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A) (emphasis added). The federal statute further provides that "Any Tribal-State compact *negotiated* under subparagraphs (A) may include provision relating to" a host of expressly enumerated subjects. *Id*. at § 2710(d)(3)(C) (emphasis added).

See Complaint, Prayer for Relief, at ¶ (a).

Where such an attack is made, as it is here, "[i]n the Tribe's absence, complete relief may not be afforded between the parties to this action." *Clinton*, 180 F.3d at 1088.

Thus the 61 California tribal governments that negotiated and signed Compacts are necessary parties to this action pursuant to Rule 19(a)(1). As an independent ground, the tribes are also necessary under Rule 19(a)(2), as the following discussion demonstrates.

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B. The Tribes Have Multiple Interests Relating to the Subject of the Action

Rule 19(a)(2) only requires the absent party to "claim" an interest. Fed. R. Civ. P. 19(a)(2). The absent party does not need to establish an interest with certainty: "the finding that a party is necessary to the action is predicated only on that party having a *claim* to an interest ...." *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) (emphasis in original). Rule 19's use of the phrase "legally protected interest" only excludes those claimed interests that are "patently frivolous." *Id*. at 1318. *See Davis v. United States*, 192 F.3d 951, 958-59 (10th Cir. 1999).

"Just adjudication of claims requires that courts protect a party's right to be heard and to participate in adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment of that party." *Shermoen*, 982 F.2d at 1317. The joinder rule "is to be applied so as to preserve the right of the parties 'to make known their interests and legal theories.'" *Id.* (*quoting Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 775 (D.C. Cir. 1986)).

As noted above, plaintiffs' squarely aimed this lawsuit at invalidating existing agreements between California and 61 federally recognized tribal governments, as well as enjoining their federal approval and their implementation. *See* Complaint at ¶ 8; *id*., Prayer for Relief at ¶ (a).

Plaintiffs seek a declaration that "the Tribal-State Gaming Compacts violate" federal law, an injunction against the State defendants' administration of the Compacts, and an injunction prohibiting the Governor from executing similar compacts. *Id*. at ¶ (b). *See also* Plaintiffs' Motion for Summary Judgment at 1:6-7.

Each of the 61 Indian tribal governments that negotiated and executed the Tribal-State Gaming Compacts at issue in this case, ratified by California Government Code section 12012.25 and federally-approved at 65 Fed. Reg. 31189 (May 16, 2000), obviously have an "interest relating to the subject of the action." Fed. R. Civ. P. 19(a)(2).

The tribes also have a substantial interest relating to the subject of the action in addition to their fundamental interest as signatories to the agreements at issue here. The Compacts authorize the tribes to engage in certain forms of gambling "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). *See* 25 U.S.C. § 2710(d)(1)(C); Compact at Preamble ¶ A.[4] As IGRA's legislative history noted, "the income [from tribal gaming] often means the difference between an adequate governmental program and a skeletal program that is totally dependant on federal funding." S. Rep. No. 446, 100th Cong., 2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 3071, 3072. Tribal governmental interests at stake under the Compacts and in this case "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

[4]An exemplar of a Tribal-State Compact is included in the State Defendants' Appendix of Authorities Cited, Ex. 1, and is available on the Governor's official web site at http://www.governor.ca.gov/state/govsite/gov_homepage.jsp (the text of the Compact may be located by following this series of selections on the Governor's site: "press room," "press releases," "September, 1999," "09/10/99 Governor Davis Signs Historic Tribal Gaming Compacts With Indian Tribes," "Tribal State Gaming Compact"). For these reasons, and in the interest of minimizing duplicative paperwork, CNIGA has elected to cite to relevant Compact sections and to not file an additional Compact exemplar with this brief.

economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders." *Id.* at 3083. Gaming revenues, Congress noted, "have enabled tribes, like lotteries and other games have done for State and local governments, to provide a wider range of government services to tribal citizens and reservation residents than would otherwise have been possible." *Id*. at 3072. The 48 tribes that have not signed the Compacts are third-party beneficiaries under the Compacts' Revenue Sharing Trust Fund. *See* Compact § 4.3.2.1(a)(i) ("Non-Compact Tribes shall be deemed third party beneficiaries of this and other

compacts identical in all material respects").[5] Thus each of the 48 tribes also has a vested interest in the subject matter of this action.

Should plaintiffs obtain the relief they seek herein, tribal rights under these existing, effective Compacts will be extinguished. Thus all 109 California tribes have an interest in this case because they "will lose their rights" under the Compacts if the plaintiffs prevail. *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999).

In addition, here as in *Shermoen*, "the absent tribes have an interest in preserving their own sovereign immunity, with its concomitant 'right not to have [their] legal duties judicially determined without consent.'" *Shermoen*, 982 F.2d at 1317 (*quoting Enterprise Mgt. Consultants*

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[5]It is a matter of federal law that there are 109 federally-recognized tribes in California. See 65 Fed. Reg. 13298 (March 13, 2000) (listing 107 federally-recognized California tribes); H.R. 5528, Omnibus Indian Advancement Act (Pub. L. 106-568, 114 Stat. 2868) (Graton Rancheria, California); Findings of Assistant Secretary of Interior, December 29, 2000, http://www.doi.gov/bia/news/tribesaffirm (Lower Lake Rancheria of California). As noted above at n. 1, only 61 of these 109 California tribes currently have compacts in effect.

v. U.S. ex rel. Hodel, 883 F.2d 890, 894 (10th Cir. 1989)). Thus again here, as in *Shermoen*, "the absent tribes have an indisputable interest in the outcome of [this] suit." *Id*. at 1318.

This is the quintessential situation to which Rule 19 applies: "No procedural principle is more deeply embedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." *Virginia Sur. Co. v. Northrop Gruman Corp*, 144 F.3d 1243, 1248 (9th Cir. 1998).[6] *See also Fluent v. Salamanca*, 928 F.2d 542, 547 (2nd Cir. 1991); *McClendon v. United States*, 885 F.2d 627, 633 (9th Cir. 1989)); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975).

In *Kickapoo Tribe v. Babbitt*, 43 F.3d 1491 (D.C. Cir. 1995), the tribe sued the Secretary of the Interior seeking a declaration that the gaming compact between Kansas and the tribe was approved under IGRA, and requesting a writ of mandamus directing the Secretary to comply with IGRA and publish notice of the approval of the compact in the Federal Register. The tribe moved for summary judgment and the Secretary moved to dismiss, or in alternative for summary judgment. The district court entered summary judgment for the Secretary, and the tribe

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[6] "[A] congressionally approved compact is both a contract and a statute." *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n. 5, 111 S.Ct. 2281, 2289 n. 5 (1991) (*citing Texas v. New Mexico*, 482 U.S. 124, 128, 107 S.Ct. 2279, 2283-84 (1987) ("a compact when approved by Congress becomes a law of the United States")). *See also New York v. Hill*, 528 U.S. 110, 111, 120 S.Ct. 659, 662 (2000) (a compact "is a federal law subject to federal construction"); *Carchman v. Nash*, 473 U.S. 716, 719, 105 S.Ct. 3401 (1985); *Cuyler v. Adams*, 449 U.S. 433, 442, 101 S.Ct. 703 (1981); *Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481, 484-85 (9th Cir. 1998);*Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1055-56 (9th Cir. 1997); *Santa Ana v. Kelly*, 104 F.3d 1546, 1556 (10th Cir. 1997). The Compacts at issue here are congressionally-sanctioned. *See* 25 U.S.C. § 2710(d)(1) & (3).

appealed.

The Court of Appeals reversed, holding that the State of Kansas was a necessary and indispensable party. "Clearly, as the district court assumed, the State of Kansas has an interest in the validity of a compact to which it is a party, and this interest would be directly affected by the relief that the Tribe seeks. Thus, Kansas is a necessary party under Rule 19(a)." Kickapoo Tribe, 43 F.3d at 1495 (citations omitted).

Indian tribes have routinely been deemed necessary parties to actions attacking the validity of their contractual interests. See, e.g., *Manybeads v. United States*, 209 F.3d 1164, 1165 (9th Cir. 2000) (Hopi Tribe was a necessary party where relief sought included "undoing the ... Agreement" to which the tribe was a party); *Clinton*, 180 F.3d at 1088-89 (Tribe was a necessary party under Rule 19(a)(1) because as an absent party to the contract at issue, "complete relief may not be afforded between the parties to this action", as well as under Rule 19(a)(2) because the absent tribe's interests under the agreement would necessarily be impaired); *Kescoli*, 101 F.3d at 1309-12 (Navajo Nation and Hopi Tribe, as parties to contract at issue, were necessary parties to an individual Navajo tribal member's challenge to a term of a settlement agreement among a coal mining company, the United States, and the tribes under Rule 19(a)(2)(i)); *Fluent*, 928 F.2d at 547 ("no doubt" that Indian nation that is party to lease agreement is necessary to an adjudication involving the lease); *McClendon*, 885 F.2d at 633 (breach of lease case against United States dismissed because Tribe was a party to the lease and thus was necessary to case because "[a]ny judgment in favor of McClendon will adversely affect the Tribe's interests, and because the relief sought by McClendon relates to the activities of the Tribe, any relief obtained in the Tribe's absence would be inadequate"); Enterprise Mgt. Consultants, Inc., 883 F.2d at 893 (Indian tribe is a necessary party to an action seeking to validate a contract with the tribe); Jicarrilla Apache Tribe

v. Hodel, 821 F.2d 537, 540 (10th Cir. 1987) (tribe necessary in dispute over oil and gas leases on tribal lands); *Lomayaktewa*, 520 F.2d at 1325 (suit challenging contract between tribe and mining company dismissed because Hopi Tribe was indispensable party).

The same reasoning applies to the 48 tribes that have not signed Compacts, but are third party beneficiaries of the Revenue Sharing Trust Fund. *See Wichita & Affiliated Tribes of Oklahoma*, 788 F.2d at 774 (Indian tribe's beneficiary interest in a trust makes it a necessary party to an action by a minority tribe seeking to obtain redistributions of future income).

For all of these reasons, each of the 109 federally recognized California Indian tribes has an interest in the subject matter of this action.

1. The Recent Arizona District Court Opinion Supports Dismissal Under Rule 19: Unlike This Case, It Did Not Threaten to Nullify Existing Compacts

The United States District Court for the District of Arizona recently filed an Order in the matter of *American Greyhound Racing, Inc. v. Hull*, No. CIV 00-2388 PHX-RCB (D. AZ July 3, 2001) (hereinafter "Ariz. Order"), that addressed, among other issues, the question of whether Indian tribes in Arizona were necessary and indispensable parties to an action challenging the governor's authority to negotiate and bind the State to Class III compacts allowing forms of gaming not authorized by state law. A true and correct copy of that opinion is Exhibit A to the Request for Judicial Notice filed herewith. The plaintiffs sought "to enjoin the Governor from entering new, renewed or modified gaming compacts that would allow Indian tribes in Arizona to conduct" various forms of gaming. Ariz. Order at 2:6-10. Following a lengthy analysis, the court concluded that the Arizona tribes were not necessary and indispensable parties, but only

because the action did not challenge the validity of existing compacts. Thus that court's reasoning, applied here, would compel dismissal.

The Arizona court properly recognized the "legal presumption that compacts are treated like contracts," *id* at 40:9-10, and that generally when the legality of a contract is challenged, "all parties to the contract are necessary parties ...." *Id*. at 40: 12-14. In that case, the complaint only sought "prospective relief," that "effects changes only going forward and *does not undermine existing obligations*." *Id*. at 42:24-26 (emphasis added). In other words, "*the plaintiffs do not seek to change the State's duties or rights under the existing compacts*, but rather challenge how the State decides what duties or rights are appropriate for prospective compacts." *Id*. at 43:18-21 (emphasis added). Because of the *exclusively prospective* relief sought in the Arizona case, "a verdict here in the Plaintiffs' favor would not implicate the rights IGRA guarantees the tribes." *Id*. at 48:22-23.

On August 14, 2001, the Arizona district court entered another Order, which appears to be a final judgement, in the case that makes its reasoning clearer still. *See American Greyhound Racing, Inc. v. Hull*, No. CIV 00-2388 PHX-RCB (D. AZ Aug. 14, 2001), a true and correct copy of which is submitted as Exhibit B to the Request for Judicial Notice filed herewith. The court explained that "[t]his judgment does not invalidate any existing compact or affect the conduct of gaming under any existing compact during its current term." *Id.* at ¶ 5.

The Arizona case is distinguishable on these grounds. Unlike the relief sought in the Arizona case, the Complaint in this case seeks to invalidate *existing* compacts that are in effect. *See generally* Complaint at Prayer for Relief. Specifically, plaintiffs seek a judicial declaration that the Compacts violate numerous federal laws. *See id.* at ¶ (b). Plaintiffs also seek a judgment "setting aside" the federal defendants' approvals of the

Tribal-State Gaming Compacts. *Id* at ¶ (a). Without federal approval, the Compacts are not effective. *See* 25 U.S.C. § 2710(d)(3)(B) (a "compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register"). Here, as in *Clinton* and *Shermoen* , the tribes have vested rights in the existing Compacts, whereas in the Arizona case the "tribes' interest in renewal [of their compacts] is contingent on the Governor's exercise of limitless discretion." AZ Order at 46:27-28 (Exhibit A).

For these reasons, the Arizona case's reasoning supports a finding here that the tribes are indispensable.

C. The Tribes' Ability to Protect Their Interests Will Be Impaired

The next step in the necessary party analysis under Rule 19(a)(2)(i) asks whether the absent party "is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest ...." Fed. R. Civ.. P. 19(a)(2)(i). The prejudicial effect of non-joinder need only be such that the action may detrimentally affect the non-party's rights. *See Shermoen*, 982 F.2d at 1317-18.

Impairment exists when parties to a contractual agreement are not joined in a lawsuit seeking to invalidate the contract. *See, e.g.*, *Clinton*, 180 F.3d at 1089; *Kescoli*, 101 F.3d at 1309-10. Impairment also exists when existing parties cannot adequately represent the interests of the absent parties. *See, e.g.*, *Shermoen*, 982 F.2d at 1318. As the following discussions demonstrate, both reasons apply in this case, rendering the California tribes necessary parties.

1. Impairment Exists When Contracting Parties Are Not Joined in a Lawsuit Seeking to Invalidate the Contract

As noted above, Indian tribes have routinely been deemed necessary parties to actions

attacking the validity of their contractual interests. *See, e.g., Manybeads*, 209 F.3d at 1165; *Clinton*, 180 F.3d at 1088-89; *Kescoli*, 101 F.3d at 1309-12; *Fluent*, 928 F.2d at 547; *McClendon*, 885 F.2d at 633; *Enterprise Mgt. Consultants, Inc.*, 883 F.2d at 893; *Jicarrilla Apache Tribe*, 821 F.2d 537; *Lomayaktewa*, 520 F.2d at 1325. Impairment is obvious when parties to a contractual agreement are not joined as parties to a lawsuit seeking to invalidate the contract. *See Clinton*, 180 F.3d at 1089; *Kescoli*, 101 F.3d at 1309-10. This reason alone renders compacted tribes necessary to this action.

2. The Federal Defendants Cannot Adequately Represent the Interests of Each of the 109 California Indian Tribes

"Impairment may be minimized if the absent part[ies are] adequately represented in the suit." *Shermoen*, 982 F.2d at 1318. The Ninth Circuit generally determines "whether an absent party is adequately represented by an existing party," by considering these factors:

> whether "the interests of a present party to the suit are such that it will undoubtedly make all" of the absent party's arguments; whether the party is "capable of and willing to make such arguments"; and whether the absent party would "offer any necessary element to the proceedings" that the present parties would neglect.

Daley, 173 F.3d at 1167 (*quoting Shermoen*, 982 F.2d at 1318). These factors weigh heavily against the existing defendants' ability to adequately represent the interests of all 109 California Indian tribes.

In the context of the United States' ability to adequately represent Indian tribal interests, the Ninth Circuit focuses its consideration of these traditional factors on an evaluation of whether a potential conflict exists, either between the United States and tribal governments, or among tribes themselves. *See, e.g., Daley*, 173 F.3d 1167 (no conflict between the United States and

tribes); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) ("potential intertribal conflicts meant the United States could not represented all of them"). Thus where a conflict exists between existing federal defendants and absent Indian tribes, or among absent tribes, there cannot be adequate representation.

While the Ninth Circuit has not precisely articulated the standard governing such a conflict analysis, the broadly accepted rules of conflict analysis found in the California Rules of Professional Conduct supply a reasonable standard. Subsections (C) and (E) of Rule 3-310 are particularly relevant. Subsection (C) provides in part that:

> A member shall not, without the informed written consent of each client:
>
> (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; ...
>
> (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

Cal. R. Prof. Conduct. 3-310(C). *See generally* American Bar Association Model Rules of Professional Conduct, 1.7-1.10 (2001 ed.).[7] Subsection (E) provides that "A member shall not,

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[7]ABA Model Rule 1.7 sets forth the general rule regarding "Conflict of Interest":
(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.
(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation . When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.8(b) provides that: "A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3."

without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment." *Id.* at Rule 3-310(E).

Viewed in terms of these conflict standards, the United States and its officials cannot adequately represent the interests of all 109 California Indian tribes. For example, the United States has a civil enforcement action presently pending against a California Indian tribe seeking to shut down its casino. *See United States v. Coyote Valley Band*, No. 01-15253 (9th Cir.) *appeal filed* Feb. 7, 2001. Under Rule 3-310(C)(3), the United States cannot adequately represent the interests of Coyote Valley (and any potentially similarly situated California tribes) in this case while at the same time in *United States v. Coyote Valley Band* represent interests adverse to one or more tribes' interests here. *Cf.* Indeed, if the federal defendants were to lose this case and the Compact were held invalid, it might well aid the United States' position in its pending civil enforcement case against the Coyote Valley Band.

Rule 1.9, regarding conflicts of interest with former clients, provides that:
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation .
(b) A lawyer shall not knowingly represent a person in the same or substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client, (1) whose interests are materially adverse to that person; and (2) about whom the lawyer has acquired information protected by Rule 1.6 and 1.9(c) that is material to the matter; unless the former client consents after consultation.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or 3.3 would permit or require with respect to a client, or when the information has become generally known ; or (2) reveal information relating to the representation except as Rule 1.6 or 3.3 would permit or require with respect to a client.

The federal defendants also appear to have a conflict of interest in relation to the landless Lytton Band of Pomo Indians. Plaintiffs focus a significant part of their case on the Lytton Band's efforts to obtain tribal lands in San Pablo, California on which the tribe could have a casino.[8] See Complaint at ¶ ¶ 52-57, 82-84, Prayer for Relief at ¶ (C). See also Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 10:11-12:14; 14:21-23 ("The card club plaintiffs are particularly concerned with the prospect of a new Indian casino offering Class III gaming in San Pablo in the Bay Area"); 55:1-61:8. In a July 24, 2001 letter to plaintiffs' attorney,[9] counsel for the federal defendants agreed that the Bureau of Indian Affairs would, *without the need for an injunction*, cease its acquisition of the San Pablo land in trust for the Lytton Band. This agreement was "premised on" plaintiffs' filing of a new lawsuit to stop the Lytton fee-to-trust transfer, and plaintiffs' agreement *in this case*, "to

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[8]The Department of the Interior was directed to accept those lands in trust for Lytton pursuant to Section 819 of the Omnibus Indian Advancement Act of 2000. On July 9, 2001, the Bureau of Indian Affairs issued its final determination to do so. Lytton must have land in trust before it can engage in gaming under IGRA. See 25 U.S.C. § 2703(4) (defining "Indian lands"), § 2710(d)(1) (class III gaming activities are only authorized on "Indian lands").

[9]See Letter from Edward J. Passarelli, Senior Counsel, U.S. Department of Justice, to James Hamilton, Esq., dated July 24, 2001 (Exhibit A to the Declaration of Anthony Cohen, filed herewith).

a three-week extension of time to file briefs ...." [10] The federal defendants appear thereby to have gained more time to brief *this case* by trading away Lytton's statutory right to have the BIA proceed unless enjoined. Without any showing that plaintiffs are entitled to it, and without requiring that plaintiffs post a bond, federal defendants functionally granted to plaintiffs a portion of the preliminary injunctive relief they seek in this case, namely preventing the Lytton Band from acquiring trust lands and obtaining a compact for an undetermined length of time. *See* Complaint, Prayer for Relief at ¶ (c). In light of this conflict, the federal defendants cannot adequately represent the Lytton Band's interests, or those of any potentially similarly situated tribes, in this case. *See* Cal. R. Prof. Conduct 3-310(C)(3).

The federal defendants here also have a conflict as a result of prior litigation brought by the United States against numerous California Indian tribal governments. One such example is the case of *United States v. Santa Ynez Band of Chumash Indians of the Santa Ynez Reservation, Agua Caliente Band of Cahuilla Indians, Cabazon Band of Mission Indians; Cahuilla Band of Mission Indians, Morongo Band of Mission Indians, Pechanga Band of Luiseno Indians, San Manuel Band of Serrano Indians, Soboba Band of Mission Indians, Twenty-Nine Palms Band of Mission Indians*, 983 F. Supp. 1317 (C.D. Cal. 1997), *vacated* No. 98-56790 (9th Cir. Nov. 13, 2000). In that case, the United States sought to enjoin numerous tribal governmental gaming operations. *See id*. at 1318 ("The United States has brought this civil action seeking injunctive relief against nine defendant Indian tribes ... [which] are alleged to operate gambling machines

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[10] On August 7, 2001, Plaintiffs filed a new action (CIV.S-01-1530 LKK PAN) seeking to enjoin the Bureau of Indian Affairs from accepting the San Pablo land in trust for Lytton.

and engage in other forms of gambling which are illegal"). Rule of Professional Conduct 3-310(E) prevents the federal defendants from adequately representing the interests of the nine tribes in this case that were defendants in *United States v. Santa Ynez*.

Another example of past litigation between the federal government and California tribes is *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633 (D.C. Cir. 1994) ("*Cabazon II*"). In *Cabazon II*, eight Indian tribes, including three from California, sued the Secretary of Interior in his official capacity, among other federal officials, challenging federal regulations concerning the use of gaming devices in Indian casinos. Several States, including California, intervened on the side of the federal defendants and adverse to the tribes. Again, Rule of Professional Conduct 3-310(E) prevents the federal defendants from adequately representing in this case the interests of tribes that were adverse in *Cabazon II*.

Finally, the federal defendants have a fundamental conflict that results from the United States' role as the exclusive enforcers of state gambling laws made applicable to Indian lands under 18 U.S.C. § 1166. Specifically, section 1166(d) provides that "The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian county," unless an Indian tribe consents in a compact to State enforcement of such laws. 18 U.S.C. § 1166(d). *See United States v. E.C. Investments*, 77 F.3d 327, 330 (9th Cir. 1996) (Section 1166 "grants the federal government exclusive jurisdiction over California's gambling laws regarding Class III gaming conducted on Indian lands without a Tribal-State compact"); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 538 (9th Cir.1994) (same).

Thus should plaintiffs succeed in this case in invalidating the Compact, the United States will then be in a position of enforcing California state gambling laws against California Tribes. This possibility would discourage the type of free and open exchange of information and ideas between the federal defendants and the tribes that would be necessary in order for the federal

defendants to adequately represent the tribes' interests here. *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682 (1981) (purpose of attorney client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice"); *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577 (1976) (purpose of attorney client privileges requires that clients be free to "make full disclosure to their attorneys" of past wrongdoings); *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 127 (1888) (client's freedom to fully disclose all information is essential in order that the client may obtain "the aid of persons having knowledge of the law and skilled in its practice"). One or more of the 109 tribes might reasonably be inhibited from sharing its legal opinions and other privileged information with the same United States Department of Justice lawyers who will be charged with the duty of enforcing California's gaming laws against the tribes if the Compact is invalidated.

The federal attorneys representing the federal defendants in this case might well have concerns of their own in this regard. They cannot be free to engage in a thorough and free discussion with tribes concerning the issues raised here, for fear they will be disqualified from fulfilling the United States' exclusive jurisdictional of enforcing California state gaming laws against tribes in the future, should the Compact be invalidated. *See* Cal. R. Prof. Conduct 3-310(E) (prohibiting bar members from "accept[ing] employment adverse to the ... former client where, by reason of the representation of the ... former client, the member has obtained confidential information material to the employment"). In addition, tribes need to be concerned that their communications with federal officials are not privileged under the Freedom of Information Act, 5 U.S.C. § 552. *See Department of Interior v. Klamath Water Users Protective Ass'n*, 121 S.Ct. 1060, 1067, 2001 D.A.R. 1268 (2001).

For all of these reasons, the federal defendants cannot adequately represent the interests of all 109 California Indian tribes

3. The State Defendants Cannot Adequately Represent the Interests of Each of the 109 California Indian Tribes

The State defendants here have multiple conflict that prevent them from adequately representing the interests of all California tribes. For example, in *Coyote Valley Band of Pomo Indians v. California*, No. 01-16283 (9th Cir.) (appeal filed June 28, 2001), the Tribe alleges that the Compact at issue herein is unlawful. The Coyote Valley Band's claims are based in part on at least one argument that is the same as made by plaintiffs here. Specifically, Coyote Valley challenges the Compact's revenue sharing provisions, *see* Compact §§ 4-5, an issue that plaintiffs here have raised. *See* Complaint at ¶¶ 44-47; Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 38:15-42:26.

It is a matter of public record that the Coyote Valley Band has not executed the Compact at issue here in, and is therefore absent from the list of compacts ratified by the California Legislature, *see* Cal. Gov't Code § 12012.25, and absent from the Federal Register notice of federally approved compacts. *See* 65 Fed. Reg. 31189 (May 16, 2000) (notice of approved Tribal-State compacts in California). Thus Coyote Valley is in a position that materially differs from the 61 tribes that have signed the Compact and support its revenue sharing provisions. Because the State is adverse to the Coyote Valley Band, it cannot represent that tribe's interests in this case under rule of Professional Conducts 3-310(C)(3) (attorney "shall not ... [r]epresent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter"). Also, because many CNIGA member tribes have ratified the Compacts, the State cannot simultaneously represent those tribes' interests and the interests of tribes that believe the Compacts are unlawful, such as Coyote Valley. *See* Cal. R. Prof. Conducts 3-310(C)(1) (attorney shall not represent "more than one client in a matter in which the interests of the clients potentially conflict"). The

same set of conflicts exist by virtue of another bad faith case that challenges the Compact, namely *Big Lagoon Rancheria v. Davis*, No. CV 97-4693 (N. D. Cal.) (hearing on cross-motions for summary judgment presently set for November 2, 2001).

Yet another set of conflicts exist related to Compact's process for resolving disputes between the State and a tribal signatory. Specifically, section 9 of the Compact provides for a series of steps, beginning with meeting and conferring, followed by voluntary arbitration, and then litigation to resolve Compact disputes. The defendant Governor is the designated officer on the State's behalf to receive the formal notice required by this dispute resolution process. *See* Compact at § 13 ("Notices"), 9.1(a) (requiring written notice). The State defendants, including the Governor and Attorney General, cannot sit across the table from tribal governments engaged in a dispute resolution process concerning the Compacts, and simultaneously purport to adequately represent the interests of those same tribes in this case, free from conflict. *See* Cal. R. Prof. Conduct 3-310(C)(3).

An additional conflict exists by virtue of the defendant Governor's announcement of a unilateral moratorium on execution of tribal-state gaming compacts. *See* Letter from Shelley Anne W. L. Chang, Chief Deputy Legal Affairs Secretary, Office of the Governor, to James Hill, dated May 1, 2001 (Exhibit 1 to Hill Dec.). There are some 48 tribal governments in California that have a federal right under IGRA to compacts, *see* 25 U.S.C. § 2701(5) & 2710(d)(3), and yet the State's designated officer for negotiating and executing compacts – the defendants governor – has refused to do so. *See* Cal. Gov't Code § 12012.25(c)&(d). For this reason, those four dozen tribal governments cannot rely on the State defendants to adequately represent their interests in this case. *See* Cal. R. Prof. Conduct 3-310(C)(3).

Conflicts also exist by virtue of the long history of adversarial litigation between the State, its officials, and the tribes concerning Indian gaming issues. *See* Cal. R. Prof. Conduct 3-310(E). For example, in *California v. Cabazon Band*, 480 U.S. 202 (1987), the State sought

to impose its bingo laws on tribally operated bingo facilities. In *Rumsey Indian Rancheria of Wintun Indians v. Pete Wilson*, 64 F.3d 1250 (9th Cir. 1994), *amended* 99 F.3d 321 (1996), a number of tribes and the Governor disputed the scope of gaming that could properly be included in tribal-state gaming compacts under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21. In *Cabazon v. Wilson*, 37 F.3d 430 (9th Cir. 1994), *appeal after remand*, 124 F.3d 1050 (9th Cir. 1997), several tribes and the State litigated the applicability of state taxation to gaming activities on Indian reservations under IGRA.

A number of cases were litigated between tribes and the State concerning the State's good faith or lack thereof in refusing to negotiate gaming compacts as mandated by IGRA. *See, e.g., Pit River Indian Tribe v. Pete Wilson*, CV F 98-6259 AWI SMS (E.D. Cal. 1998); *Berry Creek Rancheria v. Pete Wilson*, CV F 98-5636 AWI SMS (E.D. Cal. 1998); *San Manuel Band of Serrano Indians v. Pete Wilson*, CV F 98-6291 AWI SMS (E.D. Cal. 1998); *Pechanga Band of Luiseno Indians v. Pete Wilson*, CV F 98-6292 AWI SMS (E.D. Cal. 1998); *Tule River Indian Tribe v. State of California*, CV F 98-58-26 AWI SMS (E.D. Cal. 1998); *Susanville Indian Rancheria v. State of California*, CV F 98-5827 AWI SMS (E.D. Cal. 1998); *Bishop Paiute Tribe v. State of California*, CV F 98-5570 AWI SMS (E.D. Cal. 1998). And in *State of California v. National Indian Gaming Commission*, No. CV S 96-797 (E.D. Cal. 1996), California's Attorney General sued the National Indian Gaming Commission seeking to compel closure of tribal casinos in California.

Perhaps no prior litigation between a tribe and the State highlights the conflict problem more than a lawsuit brought by the Big Lagoon Rancheria, a federally-recognized Indian tribe located in Trinidad, California, against the State of California and the Trustee of the Revenue Sharing Trust Fund (created by the Compacts), for injunctive and declaratory relief holding the Compact unlawful. *See Big Lagoon Rancheria v. California*, C001663 SC (N.D. Cal.) (Complaint, filed May 10, 2000). A true and correct copy of the Big Lagoon Complaint is

Exhibit C to the Request for Judicial Notice filed herewith.

As the Complaint in that case noted, the Compacts provide for a statewide cap on the number of gaming devices that may be licensed by Indian tribes in California. *See* Compact § 4.3.2.2(a)(1); *Big Lagoon* Complaint, at ¶ 20 (Exhibit C). Big Lagoon sought a declaration that the Compact's "license allocation provision is unlawful and therefore void and unenforceable." *Id*. at ¶ 23. The Tribe also sought an injunction "prohibiting Defendants from allocating gaming licenses in violation of IGRA or the California State Constitution." *Id*. at ¶ 26. The Tribe sought these forms of relief because, allegedly, "the license allocation provision found in the September 1999 Compact will not allow Plaintiff to acquire gaming licenses," and because, allegedly, the Compact's "'statewide cap' on gaming licenses may prevent Plaintiff and other otherwise qualified federally recognized Indian tribes from acquiring licenses in violation of federal and state law ...." *Id.* at ¶¶ 23, 26.

Given that the State was adverse to Big Lagoon in that case, litigating the legality of the same Compact at issue here, the State defendants cannot adequately represent the Big Lagoon Tribe here. *See* Cal. R. Prof. Conduct 3-310(E).

In all of these cases, the California Attorney General represented clients that were "adverse" to the same tribes that he would need to adequately represent in this case in order to satisfy Rule 19's requirements. California Rules of Professional Conduct 3-310(C)(3) & (E) preclude him from so doing.

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4. Divergent Tribal Positions Prevent the Existing Parties from Representing Each of the 109 California Tribes

While the vast majority of federally-recognized Indian tribal governments in California

support the validity of the Compacts at issue here, not all 109 California tribes necessarily share that view. For example, as noted above, the Coyote Valley Band of Pomo Indians, a federally-recognized Indian tribe, is challenging the Compact's validity in litigation presently pending before the United States Court of Appeals for the Ninth Circuit in the case of *Coyote Valley Band of Pomo Indians v. California*, No. 01-16283 (9th Cir.).

That lawsuit challenges the Compacts' provisions under which Compact tribes would share revenue with Non-Compact tribes and with the State to fund gambling addiction programs and to offset the costs of regulation and impacts of tribal casinos on local governments. *See* Compact § 4.3.2 ("Revenue Sharing with Non-Gaming Tribes"); *id*. at § 5 ("Revenue Distribution"); *id*. at § 5.2 ("State's share of the Gaming Device revenue shall be placed in the Special Distribution Fund, available for appropriation by the Legislature for the following purposes ... [gambling addiction programs, offsetting state and local governments impacted by tribal gaming, and reimbursement for State regulatory costs among other purposes]). The suit also challenges the Compacts' provisions related to labor relations. *See* Compact § 10.7 .

> Specifically, the tribe alleges that:
> Among other failures to negotiate in good faith, the State by and through Governor Davis and his representatives, has demanded and continues to demand, as a term of any Class III gaming compact, that Coyote Valley pay a tax to the State and others in violation of the IGRA. 25 U.S.C. § 2710(d)(7)(B)(iii)(II). Additionally, the State did not negotiate in good faith when it insisted, both as a precondition to negotiations and as an improper term of any Class III gaming compact, that any compact reached between Coyote Valley and the State would be "null and void" unless Coyote Valley submitted to a collective bargaining agreement.

First Amended and Supplemental Complaint for Declaratory and Injunctive Relief, at 10:11-22 (Exhibit D to Request for Judicial Notice filed herewith).

In contrast to Coyote Valley, the 61 tribes that have signed the Compact have adopted those same revenue sharing and labor provisions. Because of these divergent tribal positions, the interests of all 109 California Indian tribes cannot be adequately represented by the existing

parties. *See* California Rule of Professional Conduct 3-310 ("Avoiding the Representation of Adverse Interests"). The same issue arises as a result of *Big Lagoon Rancheria v. California*, C001663 SC (N.D. Cal.) (Complaint, filed May 10, 2000). Given the potential conflict between tribes, such as Big Lagoon, that find various Compact provisions inconsistent with its tribal interests and tribes that have ratified these provisions by signing Compacts, the existing parties cannot adequately represent the interests of all California tribes in this case. *See Cal. R. Prof. Conduct 3-310(C)(1); Makah Indian Tribe v. Verity, 910 F.2d 555, 559 (9th Cir. 1990) ("the federal government could not protect the interests of the absent tribes because those interests conflict[ed] among themselves").*

Big Lagoon is not necessarily unique in this regard. As noted above, there are approximately 48 federally-recognized tribes in California that are not signatories to the Compact. *See* nn. 1 & 5, *supra*. Those tribes, like Big Lagoon, may be in a position adverse to the tribes with Compacts in effect are thus not capable of representation by the existing parties.

Given these divergent positions among the 109 Indian tribal governments in California, the existing parties cannot possibly assure the court that they: (1) will "undoubtedly make all" of the absent 109 tribes' arguments; (2) are "capable of and willing to make such arguments"; and (3) that the absent 109 tribal governments would not "offer any necessary element to the proceedings" that the present parties would neglect. *Daley*, 173 F.3d at 1167 (*quoting Shermoen*, 982 F.2d at 1318). *See also County of Fresno v. Andrus*, 622 F.2d 436, 438-39 (9th Cir. 1980).

For all of these reasons, the existing defendants are not capable of adequately representing the interests of the 109 federally recognized Indian tribes located in California.

D. The Existing Defendants Will Face a Substantial Risk of Incurring

Multiple Obligations

The second part of Rule 19(a)(2), sub-part (ii), also applies here. Any relief granted to plaintiffs would surely be opposed by most, if not all, California Tribes. If one or more California Tribes (or the State) were to file new lawsuits related to the Compacts' validity, in addition to the lawsuits pending in the Ninth Circuit and Northern District of California discussed above, this court's decision would not serve as a bar, because the Tribes are not parties hereto. A separate action raising the same issues could be initiated by one or more California Tribes (perhaps even in a different Circuit), raising the prospect of a differing view of the merits and a differing judicial outcome. *Cf. Blonder-Tounge Laboratories v. University of Ill. Found.*, 402 U.S. 313, 323-24, 91 S.Ct. 1434, 1440-41 (1971) (elements of res judicata). Given the stakes for tribal governments and the large number of tribes in California, such multiple actions would appear very likely to be brought should plaintiffs prevail here. Thus, the federal defendants are existing parties that are subject to a substantial risk of inconsistent obligations or judgments. *See Kickapoo Tribe of Oklahoma v. Luian*, 728 F. Supp. 791, 796 (D.D.C. 1990) ("if the Band is not present to represent its own interests in this lawsuit and the plaintiffs succeed, the Secretary would face the probability of another lawsuit, brought this time by the Texas Band") (*citing* Fed. R. Civ. P. 19(a)(2)(ii)).

The State defendants will also face the possibility of multiple obligations. For example, tribes entitled to distributions from the Revenue Sharing Trust Fund may well sue one or more of the State defendants in this case to compel payment of dollars already deposited into that Trust

Fund. See Compact § 4.3.2 & 4.3.2.1 (obligating the California Gambling Control Commission to make payments "to Non-Compact Tribes ... quarterly and in equal shares out of the Revenue Sharing Trust Fund"). Yet plaintiffs here seek a judgment that would "permanently enjoin[] participation by the ... Chair and Members of the California Gambling Control Commission in the administration of Compacts." Complaint, Prayer for Relief, at ¶ (b). The potential for the State defendants to face multiple obligations is very real.

For all these reasons, the elements of Rule 19(a) are satisfied here. The California Tribes are necessary parties to this litigation.

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IV. Each California Tribe is an Indispensable Party That Cannot Be Joined

Rule 19(b) provides that "[i]f a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." The Tribes are necessary parties under Rule 19(a) and, as the following discussion demonstrates, are indispensable under Rule 19(b).

A. The Tribes Cannot Be Joined By Virtue of their Sovereign Immunity

It is well settled that "[s]uits against Indian tribes are ... barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Com'n v. Citizen Band Potawatomi*, 498 U.S. at 509, 111 S.Ct. at 909 (*citing Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677 (1978)). Tribal governments therefore cannot be joined absent their consent. *See Clinton*, 180 F.3d at 1090 (relying on "the Hopi Tribe's interest in

maintaining its sovereign immunity" in affirming district court's finding that the Tribe was an indispensable party that could not be joined); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459 (9th Cir. 1994) (tribe could not be joined, and deferring to "a tribe's interest in maintaining its sovereign immunity"). Here, there is no evidence that any tribe has waived its immunity as to this action, nor has Congress abrogated tribal immunity in this context.

The Ninth Circuit has recognized that where "the necessary party is immune from suit, there may be 'very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor.'" *Kescoli*, 101 F.3d at 1311 (*quoting Confederated Tribes v. Lujan*, 928 F.2d 1496, 1499 (9th Cir.1991)). *See also Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (same); *Fluent*, 928 F.2d at 548; *Enterprise Mgmt. Consultants, Inc.*, 883 F.2d at 894 (when an indispensable party is "immune from suit, there is very little room for balancing of other factors' set out in Rule 19(b), because immunity may be viewed as one of those interests 'compelling by themselves"); *Wichita & Affiliated Tribes of Oklahoma*, 788 F.2d at 777 n. 13 (same).

"The rationale behind the emphasis placed on immunity in the weighing of Rule 19(b) factors is that the case is not one 'where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.'" *Fluent*, 928 F.2d at 548 (*quoting Wichita*, 788 F.2d at 777).

A. In Equity and Good Conscience, the Case Should be Dismissed

Given that the tribes cannot be joined by virtue of their sovereign immunity, Rule 19(b) next directs the court to examine whether in equity and good conscience the case should be dismissed. Four factors are relevant to this determination:

first, to what extent a judgment rendered in the person's absence might be

> prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).

As noted above, there is little need for balancing Rule 19(b) factors because tribal immunity itself is a compelling factor. *See Kescoli*, 101 F.3d at 1311; *Quileute Indian Tribe*, 18 F.3d at 1460; *Confederated Tribes*, 928 F.2d at 1499; *Fluent*, 928 F.2d at 548; *Enterprise Management Consultants, 883 F.2d at 894; Wichita and Affiliated Tribes of Oklahoma*, 788 F.2d at 765, 768, & n. 13.

As parties to existing Compacts that are presently in effect, the 61 tribal signatories obviously will be substantially prejudiced by an adverse judgment in this case. The same is trust as to the 48 non-signatory tribes that are third party beneficiaries of the Compact's Revenue Sharing Trust Fund. *See* Compact at §§ 4.3.2 & 4.3.2.1. As the Ninth Circuit has held, "[n]o procedural principle is more deeply embedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." *Virginia Sur. Co.*, 144 F.3d at 1248. In *Manybeads* the Ninth Circuit noted that "a judgment in Manybeads' favor would upset two agreements, long and carefully worked out, by which a balance was struck between the interests of the Navajo Nation and the Hopi Tribe ...." *Manybeads*, 209 F.3d at 1166. Similarly here, a judgment in plaintiffs' favor would upset 61 agreements, also "long and carefully worked out," by which a balance was struck to promote the interests of federally recognized Indian tribes and the State of California. *Id*. *See* Compact Preamble, at ¶ ¶ A-F. *See also* Senate Report at 3083 ("States and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe[s]

and States. This is a strong and serious presumption that must provide the framework for negotiations").

Here, as in *Manybeads*, the relief plaintiff seeks "would be the undoing of the Agreements to the substantial prejudice of the ... Tribe[s]." *209 F.3d at 1166.* Thus where a tribal government has "an interest in the litigation by virtue of" being party to a contract at issue in the case, "the first factor weights in favor of dismissal." *Kescoli*, 101 F.3d at 1311. *See also Quileute*, 18 F.3d at 1460 (first factor under 19)(b) involves the same analysis as the impaired interest analysis); *Confederated Tribes*, 928 F.2d at 1499 ((tribe prejudiced when judgment in favor of plaintiff would "alter the [tribe's] existing authority").

The second Rule 19(b) factor also weighs in favor of dismissing the action. It would be impossible for this Court to shape the relief plaintiffs seek in order to lessen the potential prejudice to the Tribes. Plaintiffs seek a declaration that the existing Compacts, now in effect, violate various federal laws. *See* Complaint, Prayer for Relief at ¶ (b)(1). They seek to prevent implementation of existing Tribal-State Compacts. *See id*. ¶ (b)(2). Where the plaintiff seeks to "undo" agreements to which an absent Tribe is a signatory, "No remedy or relief would lessen the prejudice." *Manybeads*, 209 F. 3d at 1166. *See also Clinton*, 180 F.3d at 1090 ("In the absence of the Tribe, there is no relief or remedy that would lessen the prejudice"); *Kescoli*, 101 F.3d at 1311 ("potential prejudice to the Navajo Nation and Hopi Tribe could not be effectively minimized because relief for Kescoli could not be effectively shaped, in their absence, to avoid prejudice to their interests"); *Lomayaktewa*, 520 F.2d at 1326 (where plaintiffs sought to deprive the absent Tribe "of benefits under the lease ... there is ... no way that the prejudice to the Tribe can be lessened or avoided by protective provision in the judgment shaping relief or, indeed, any other measure") (internal quotations omitted). The tribes' theoretical ability to seek to intervene is not a factor that lessens prejudice because it would require a waiver of tribal sovereign immunity. *See Makah Indian Tribe*, 910 F.2d at 560.

The third factor also weighs in favor of dismissal, because no adequate remedy can be awarded without the absent tribes. In *Clinton*, the Ninth Circuit recognized that when a plaintiff seeks to invalidate an agreement to which a tribe is a signatory and the tribe is not named as a party to the lawsuit, no "adequate relief to the plaintiffs" can be granted. *Clinton*, 180 F.3d at 1090. Similarly, in *Manybeads*, the Ninth Circuit held that "[n]o judgement in the Hopi Tribe's absence will be adequate." *Manybeads*, 209 F.3d at 1166.

In addition to these considerations, these defendants are not capable of providing the remedy plaintiffs seek. Enjoining the State defendants from their roles in implementing the Compact and participating in the regulation of tribal governmental gaming operations would not necessarily cause the cessation of those tribal activities. Instead, it would merely terminate the State's bargained-for role in regulating Indian gaming. California's tribes successfully regulated their own governmental gaming operations, together with the National Indian Gaming Commission, for more than a decade without any State involvement whatsoever, and are fully capable of doing so in the future if need be.

The crux of plaintiffs' complaint is that they are suffering from allegedly unfair competition from Indian casinos: "Plaintiffs' charitable bingo and card games cannot compete with casinos and other gaming establishments owned by various Indian Tribes located throughout California, if the Tribes are allowed to offer Class III games." Complaint at ¶ 9. *See also* Complaint at ¶¶ 58-70 (alleging "Plaintiffs' Injury" purely in terms of competition with tribal gaming); Plaintiffs' MSJ at 3:8-10 ("the ... games that this Tribe and other Tribes offer or will offer -- particularly slot machines -- are far more lucrative and appealing to some customers than the card and bingo games plaintiffs may conduct. Plaintiffs thus are or will be placed at a severe competitive disadvantage that threatens their business operations"); 12:16-15:3 (discussing the "Competitive Advantage of Class III Gaming"). But the relief plaintiffs seek against the State defendants will simply not address the competition issue.

Similarly, the relief plaintiffs seek against the federal defendants will not provide plaintiffs with meaningful relief. Plaintiffs ask the Court to set aside the federal defendants' approval of the Compact. *See* Complaint, Prayer for Relief at ¶ (a). Again, that remedy would not necessarily bring an end to tribal gaming activities. Tribes operated gaming facilities in California for years prior to federal approval of the Compact at issue here. *See, e.g.*, *Sycuan Band of Mission Indians v. Roache*, 788 F.Supp. 1498, 1500-01, 1509 (S.D. Cal. 1992), *aff'd* 54 F.3d 535 (9th Cir. 1994) (enjoining State criminal prosecutions of individuals involved in gaming operations on three Indian reservations in San Diego County). Moreover, IGRA provides for a process by which tribes can engage in Class III gaming under procedures prescribed by the defendant Secretary of Interior, and without a Compact. *See* 25 U.S.C. § 2710(d)(7)(B)(vii) ("the Secretary shall prescribe, in consultation with the Indian tribe, procedures ... under which Class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction"). Thus again, even if plaintiffs obtained the judgment and declaratory relief they seek against the federal defendants, it would not provide meaningful relief from the harm plaintiffs allege.

Finally the potential lack of an alternative forum does not prevent dismissal. Although the plaintiffs may lack an alternative federal judicial forum if this case is dismissed, this factor carries little weight here. Numerous courts have held that when an indispensable party is immune from suit, there is very little room for balancing of other factors' set out in Rule 19(b), because immunity is itself a compelling interest. *See Clinton*, 180 F.3d at 1090 ("Although no alternative forum exists for the plaintiffs to seek relief, we conclude that the Hopi Tribe's interest in maintaining its sovereign immunity outweighs the interest of the plaintiffs in litigating their claim"); *Quileute*, 18 F.3d at 1460-61 ("A plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity [because] society has consciously opted to shield Indian tribes from suit without congressional or tribal consent")

(citations and internal quotations omitted); *Confederated Tribes*, 928 F.2d at 1500 ("Courts have recognized that a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity"); *Makah Indian Tribe*, 910 F.2d at 558 ("Sovereign immunity may leave a party with no forum for its claims"); *Enterprise Mgt. Consultants*, 883 F.2d at 894 ("dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent"). *See also Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119 (1968); *Citizen Potawatomi Nation*, 248 F.3d at 1011 (*quoting Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1999) (expressing a "strong policy favoring dismissal when a court cannot join a tribe because of sovereign immunity.").

Where, as here, a plaintiff's grievance is essentially a political one, courts weigh in favor of dismissal, notwithstanding lack of an alternative judicial forum. *Fluent*, 928 F.2d at 547-48 ("The only branch with the ability to provide a forum for resolution of the issues involved here is Congress. Without a clear congressional mandate . . . we cannot grant the relief sought by Appellants."). [11]

Finally, the so-called "public rights exception" to federal procedural joinder rules can only apply in cases "insofar as the 'adjudication[] do[es] not destroy the legal entitlements of the

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[11]Plaintiffs may in fact have alternative forums in which to raise their concerns, including by way of example, State and federal legislative processes as well as tribal dispute resolution processes. *See, e.g., San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 555, 105 S.Ct. 1005, 1020 (1985) (citing "the national political process" as a remedy to alleged constitutional injuries).

Both tribal courts and tribal councils are "competent adjudicatory forums." *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312-13 (10th Cir. 1984). *See Santa Clara Pueblo*, 436 U.S. at 66, 98 S.Ct. at 1681 ("nonjudicial tribal institutions have also been recognized as competent law applying bodies") (*citing United States v. Mazurie*, 419 U.S. 544, 95 S.Ct. 710 (1975)). *See also Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 32 F. Supp. 2d 497, 505 (D. R.I. 1999) *vacated on other grounds*, 207 F. 3d 21 (1st Cir. 2000).

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absent parties.'" *Shermoen*, 982 F.2d at 1319 (*quoting Conner v. Burford*, 848 F.2d 1441, 1459 (9th Cir. 1988)). *See also Clinton*, 180 F.3d at 1090-91. Given that the 61 tribes have vested legal entitlements under the Compacts at issue here, the public rights exception has no application here.

V. Conclusion

For all of these reasons, the absent 109 federally recognized Indian tribal governments located in California are both necessary and indispensable parties to this case. Because the tribes posses sovereign immunity from unconsented suit, they cannot be joined. Therefore, in equity and good conscience, this case must be dismissed.

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