Case No. 07-55536

IN THE

# UNITED STATES COURT OF APPEALS

## FOR THE NINTH CIRCUIT



**SAN PASQUAL BAND OF MISSION INDIANS, a federal recognized Indian Tribe,**

*Plaintiff/Appellant,*

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/Appellees.*

On Appeal From The U.S. District Court For The Southern District of California, Case No. 06-CV-0988 LAB AJB, Honorable Larry A. Burns, Judge.

# BRIEF AMICI CURIAE OF THE CALIFORNIA TRIBAL BUSINESS ALLIANCE AND THE RUMSEY BAND OF WINTUN INDIANS IN SUPPORT OF DEFENDANTS/APPELLEES AND FOR AFFIRMANCE.

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**SAN PASQUAL BAND OF MISSION INDIANS,**

*Plaintiff/Appellant,*

VS.

**STATE OF CALIFORNIA, ET AL.,**

*Defendants/Appellees.*

## QUESTION PRESENTED

Are sovereign Indian tribes who are signatories to tribal-state gaming compacts "indispensable" parties to a lawsuit that seeks to increase the ceiling for the number of slot machine licenses available to *all* tribes by judicial construction of an identical provision common to the compacts and, if so, does the inability to join absent compacting tribes due to their immunity warrant dismissal of the lawsuit?

The district court, consistent with two previous rulings on the same issue by other district courts, answered "yes"; and amici agree.

## INTEREST OF AMICI

The California Tribal Business Alliance (CTBA)[1] is an association whose members are exclusively federally recognized Indian tribes,[2] including four of the first five tribes to enter into amended gaming compacts in 2004 with then newly elected Governor Arnold Schwarzenegger and one of the 61 tribes to sign original gaming compacts in 1999 with Governor Gray Davis. The four CTBA tribes with amended gaming compacts are the Pala Band of Mission Indians,[3] the Pauma Band of Mission Indians,[4] the United Auburn Indian Community[5] and the Viejas Band of Kumeyaay Indians.[6] The Paskenta Band of Nomlaki Indians[7] is a CTBA member tribe with a 1999 tribal-state compact. The Rumsey Band of Wintun

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[1] http://www.caltba.org

[2] Labeling an Indian tribe as federally recognized is a function of the executive branch. *United States v. John*, 437 U.S. 634, 652-653 (1978). Congress, in turn, has mandated that the executive branch publish an official list of all federally recognized tribes in the Federal Register. 25 U.S.C. § 479a-1. Appearance on the list grants the tribes immunities and privileges, including immunity from unconsented suit, by virtue of their relationship with the United States. 67 Fed. Reg. 46,328 (July 12, 2002). "[Tribal] immunity extends to entities that are arms of the tribes . . .." Felix Cohen, *HANDBOOK OF FEDERAL INDIAN LAW* (2005 ed.) § 7.05 [1][a], pp. 636.

[3] http://www.palatribe.com

[4] http://www.ics.uci.edu/~aisi/97_aisics/people/ctoledo/luiseno1.html

[5] http://www.auburnrancheria.com

[6] http://www.viejasbandofkumeyaay.org

[7] http://www.rollinghillscasino.com/

Indians (Rumsey),[8] the fifth tribe to enter into amended compacts with the State in 2004, joins CTBA in this brief.

CTBA and Rumsey contend that tribes who are signatories to the original 1999 and 2004 amended compacts are "necessary and indispensable" parties to this lawsuit. Their indispensability arises from the relief appellant seeks: a declaratory judgment that the State agency responsible for determining the aggregate size of the "pool" from which available slot machine licenses are dispersed to tribes with gaming compacts has *erred* in making that determination, an "error" appellant wants "corrected" by court order substantially increasing that pool size.

Should appellant prevail, tribes with existing compacts who relied on the existence of a finite, "capped" license pool set by an independent state agency, will face impairment of their compact interests. That makes them indispensable parties to this action, but their sovereign immunity prevents their joinder and warrants dismissal of this case in accordance with "equity and good conscience." (F.R.C.P. 19.) Indeed, the indispensable party rule itself,[9] long a shield for protecting the interests of absent sovereigns from lawsuit abuse, will be substantially weakened to the detriment to all tribes if appellant is permitted to

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[8] http://www.rumseyrancheria.org

[9] F.R.C.P. 19.

prosecute this case.

The district court agreed with our position and stated why this litigation threatens to impair our interests:

> *[A]mici* explain [that] Rumsey and certain other tribes renegotiated and amended their Gaming Compacts with the State in 2004, in reliance on the State's determination under the 1999 Compact formula an overall aggregate limit of 32,151 licenses were available to most of the Gaming Tribes, who continue to operate under the 1999 Compacts. They contend they relied on that figure for purposes, among others, of calculating how much each renegotiating tribe felt it was able and willing to pay the State for additional licenses.
>
> * * * * *
>
> The Rumsey *amicus* brief defeats any argument that San Pasqual can represent the tribal interests of all the tribes who entered 1999 Compacts. Although the tribes who subsequently renegotiated their [compacts] may no longer be bound by the aggregate limit calculated under the 1999 Compact formula, they relied on the aggregate limit figure applicable to the 1999 Compacts to make their decisions about the number of additional licenses they would pursue and the consideration they were willing to pay to exceed those limitations. Permitting San Pasqual, or any other of the 1999 Compact tribes, to unilaterally obtain a judgment declaring a different aggregate maximum number of licenses would impair or impede other tribes' bargains and material assumptions.[10]

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[10] Excerpt of Record 57-58; *San Pasqual Band of Mission Indians v. State of California*, S.D. Cal., Slip Opinion, 2007 WL 935578, * 11.

## BACKGROUND FACTS UNDERSCORING IMPORTANCE OF ISSUE[11]

This is the third appeal before this Court where an Indian tribe seeks to reverse the decision of a district court denying that tribe's attempt to increase the overall ceiling on the number of slot machine licenses available from a finite, "capped" pool.

Appellant, the San Pasqual Band of Mission Indians (San Pasqual), seeks by this appeal to increase the size of the license pool by 33%, for a total of 42,700 machines. Another tribe, the Rincon Band of Luiseño Indians, seeks through its appeal to expand the aggregate number of licenses available to 55,951 or 64,283, an increase of more than 100 percent.[12] A third tribe, the Cachil Dehe Band of Wintun Indians of Colusa Indian Community, asks in its appeal that the Court add 24,800 more licenses to the "pool," for a total of 56,951.[13] From these various

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[11] This Court sets forth the background negotiations between tribes and the State of California in *Indian Gaming Related Cases (Coyote Valley)*, 331 F.3d 1094, 1098-1107 (9th Cir. 2003). Accordingly, amici abstain from repeating this information or from taking issue with differing details of same found in the briefs of the parties and amicus curiae, California Nations Indian Gaming Association (CNIGA), but add to their accounts with facts pertinent to our indispensability as parties immune from suit, unwilling to consent thereto and, thus, unable to be joined.

[12] *Rincon Band of Luiseño Mission Indians of the Rincon Reservation v. Schwarzenegger*, 9th Cir. No. 06-55259, pending appeal by plaintiff Rincon from dismissal due to indispensability of other immune tribes with compacts.

[13] *Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. State of California*, 9th Cir. No. 06-16145.

lawsuits seeking different orders that would conflict on the size of the license-pool ceiling, one begins to sense the very problem the necessary and indispensable party rule is designed to prevent.

Appellant couches its claim as one to determine the "correct" number of gaming device licenses authorized by law, but its real purpose, as with that of the other tribes in their lawsuits, is to obtain more machines for itself at the expense of other tribes, such as amici, whose compacts would be impaired by *ad hoc* and inconsistent obligations imposed by different courts as to the maximum size of the aggregate license pool.

The principle of a ceiling on the total number of slot machine licenses available from a finite "pool" – a lid set by an independent state agency in accordance with fair procedures and uniformly enforced as to all tribes – is an essential aspect of California's tribal gaming jurisprudence. The original 1999 compacts expressly recognize both a *per tribe* limit of not more (and in many instances less) than 2,000 machines, and an overall aggregate limit for *all tribes* arrived at by a mathematical formula that takes into consideration several factors, including the number of "compacting" and "non-compacting" Indian tribes in the state.[14]

The state agency responsible for determining the overall size of the license

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[14] Model 1999 Compact, § 4.3.2.2.

pool,[15] the California Gambling Control Commission (CGCC), determined that number to be 32,151. It reached this decision several years ago based upon a reasoned interpretation of the 1999 model tribal-state compact, specifically section 4.3.2.2(a)(1); and it did so fully aware that "the statewide limit on gaming devices remains one of the most contentious issues of interpretation affecting the [1999] Tribal-State Gaming Compacts."[16] In fact, CGCC staff reported to the Commission that "the language of Compact section 4.3.2.2(a)(1) [the formula and criteria defining the size of the license pool] is sufficiently obscure that, undoubtedly, agreement among all the parties to the Compacts can only be achieved in the *renegotiation* . . .."[17]

When tribes represented by amici herein *renegotiated* their amended compacts in 2004, both the existence of an overall limit and the actual "limit" number of 32,151 available licenses were established legal "facts" indisputably

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[15] See, e.g., Executive Order D-31-01, Governor of the State of California, August 29, 2001 (California Gambling Control Commission "shall ensure that the allocation of machines among California Indian Tribes does not exceed allowable number of machines as provided in the Compacts . . ."); Model Compacts (1999-2000), §§ 4.3.2.1 through 4.3.2.2; Cal. Gov. C. § 12012.75; Budget Act, Stats. 2000, ch. 52, Item 0855-101-0366.

[16] Report of the Staff, California Gambling Control Commission, June 19, 2002 Hearing, pp. 3-7. The court may, on its own, judicially notice an official and public report of a state agency such as this one. Federal Rule of Evidence 201(b)(2). See, e.g., *United States v. Baychild*, 357 F.2d 1082, 1098 (9th Cir. 2004); *Lathrop v. Donohue*, 367 U.S. 820, 845 (1961).

[17] *Id.*

material to any reasonable calculation about *how much* each tribe felt it was able and willing to pay the State in return for licenses beyond the maximum ceiling per tribe prescribed by the 1999 compacts.[18] That amount, according to the Governor's announcement heralding the amended compacts as a "new partnership between the State of California, local communities and certain Indian tribes,"[19] is expressed in a "graduated scale of progressively higher annual fees for additional slot machines above the current limit . . . per tribe, reaching up to $25,000 per additional machine. The fees represent approximately 15% of the net win of the additional machines on average and are estimated to provide as much as $150-$200 million in annual revenue to the state over time from these tribes alone."[20]

Moreover, the amended compacts yield a one-time $1 billion payment to the state, to be financed by a bond repaid over 18 years. "Upon repayment of the bond, the compacting tribes will make annual payments to the state for the duration of the compact, expected to total an additional $700 million. The one-time payment is based on $100 million annual payments by the tribes over 18

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[18] Model Tribal-State Class III Gaming Compact Between 61 Sovereign Indian Governments in California and the State of California as of August 22, 2001, Sec. 4.3.2.1(a)(3)(iv)-(v).

[19] http://www.governor.ca.gov/state/govsite/gov. Press Release GAAS:253:04, dated June 21, 2004: "Governor Schwarzenegger Signs Renegotiated Gaming Compacts with Five Indian Tribes."

[20] *Id.*

years, which is at least 10% of the tribes' current slot machine net win and in some cases represents more than 18% of net profits."[21]

From new revenue tribes hope to gain as a result of their amended compacts, they are obligated to make "increased annual payments of $2 million per tribe for a total of $10 million annually to the Revenue Sharing Trust Fund for non-gaming tribes and those with lesser operations."[22]

Appellant, recognizing the obvious difficulty of prosecuting this case without all other compacting tribes "on board," asked tribes, including amici, to submit friend of the court briefs supporting its position; and further asked each tribe to "indicate by resolution that the tribe has no objection to the court's adjudication [as] to the number of licenses authorized by the compacts without [the] tribes' actual participation as parties in the lawsuit."[23] Amici declined appellant's invitation and instead appeared below and now here to argue just the opposite – tribes who are parties to the 1999 and 2004 amended compacts are "necessary and indispensable" to this litigation and, because they are immune as tribal governments and do not waive their immunity, this suit should be dismissed.

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[21] *Id.*

[22] *Id.* The amended compacts impose other obligations on the tribes thereto beyond what the 1999 compacts provide, including, *inter alia*, improved rights for workers and consumers at the tribal casinos.

[23] Letter to California Tribal Chairs from San Pasqual Tribe, dated August 10, 2006, p. 2.

## SUMMARY OF ARGUMENT

Tribes who are parties to existing compacts, both the original "model" signed in 1999 and the amended compacts of 2004, have an "interest" in maintaining an overall cap on slot machine licenses that is uniformly enforced as to all tribes, and not subject to the vicissitudes of individual tribal demands by lawsuit. Their "interest" makes them indispensable parties to this case because, should appellant prevail, the value of their compacts will be impaired and it will make it difficult, if not impossible, for them to fulfill their obligations thereunder.

Amici are indispensable because a judgment rendered in their absence would prejudice them, there is no form of relief to lessen that prejudice, and appellant cannot (and should not) obtain an adequate remedy in their absence. (Fed. R. Civ. P. 19.) Neither the tribal members of CTBA nor Rumsey can be joined, however, because of their sovereign immunity, which they decline to waive. That appellant may have problems in obtaining the relief it seeks if this Court affirms dismissal of the case cannot be gainsaid; but when, as here, tribal sovereignty is at stake, the absence of a judicial forum is outweighed.

## LEGAL DISCUSSION

### I. THIS LAWSUIT SHOULD BE DISMISSED BECAUSE *AMICI*, AS SIGNATORY TRIBES TO EITHER THE ORIGINAL 1999 "MODEL" OR THE 2004 AMENDED COMPACTS, ARE IMMUNE FROM SUIT BUT INDISPENSABLE TO ITS RESOLUTION.

That amici are "necessary and indispensable"[24] parties to any lawsuit which seeks to expand the total number of gaming devices collectively available to all tribes in California by interpreting a provision common to all the gaming compacts has been clear since *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) and *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002). That tribal immunity prohibits their joinder without their consent and requires dismissal of this lawsuit, is the consequence of the indispensable party rule and the due process principle upon which it rests. We begin with a discussion of the principle and proceed next to Rule 19 and pertinent case authorities limning its application.

#### A. The Indispensable Party Rule is Premised on the Guarantee to Due Process.

The principal purpose of the indispensable party rule, as codified in Rule 19, is to assure that courts do not unknowingly work an injustice upon those who should be parties to litigation. Central to this objective is making sure those

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[24] Since the determination of whether a party is "necessary and indispensable" is a two-step analysis that begins with the "necessity" prong, reference to an "indispensable" party includes the predicate determination that the party meets the "necessity" criterion.

affected by a pending action are informed about it and afforded an opportunity to respond. Indeed, notice to indispensable parties is premised on due process.[25] As *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950) states:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice* reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an *opportunity* to present their objections.[26]

Official comments to Rule 19 underscore the importance of due process to the "necessary" and "indispensable" party concept, stating that this doctrine "continues a judicial tradition that goes back to 1789 . . . [T]he . . . concept of indispensability remains with us, for basically it is part of *due process and fair*

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[25] See, e.g., Comment, *The Litigant and the Absentee in Federal Multiparty Practice* (1968) 116 *U. PA. L. REV.* 531; Pamela J. Stephens, *Manipulation of Procedural Rules in Pursuit of Substantive Goals: A Reconsideration of the Impermissible Collateral Attack Doctrine* (1992) 24 *ARIZ. ST. L.J.* 1109, 1125.

[26] Emphasis added. See also, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (before absent class member's right of action can be extinguished, he must "receive notice plus an opportunity to heard in the litigation."); *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 665 (1999)(due process requires "at the very minimum, that a student facing suspension be given some kind of notice and afforded some kind of hearing."); and *United States v. James Daniel Good Real Property*, 510 U.S. 43, 46 (1993) (Due Process Clause of the Fifth Amendment prohibits the government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard.).

*administration.*"[27] "[One] legal scholar would treat the [indispensable party] rule as a 'statement of policy, not unrelated to considerations of *due process*, in the light of which the court may seek to do maximum justice.' [citation] We think of the rule as a creature of equity jurisprudence and as a reliable and practical guide for the appropriate exercise of . . . equity jurisdiction, in accordance with the fundamentals of *due process*."[28]

### B. *Amici* Tribes are, as Governmental Sovereigns, Immune from this Lawsuit.

Due process rights of absent parties become even more important when their joinder is resisted by assertion of their immunity as sovereigns.

Federal law has long recognized Indian tribes as separate sovereigns. Indeed, "[a]t the time of European discovery of America, . . . tribes were sovereign by nature and necessity; they conducted their own affairs and depended on no outside source of power to legitimize their acts of government."[29] For all practical purposes, the European settlers and the British Crown treated the Indians as

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[27] *MOORE'S FEDERAL PRACTICE, Rules Pamphlet Comments, Prior Principles Controlling* § 19.5, p. 221 (1990 ed.) (emphasis added).

[28] *Britton v. Green*, 325 F.2d 377, 382 (10th Cir. 1963)(emphasis added).

[29] Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty* (2002) 37 *TULSA L. REV.* 661, 683.

sovereigns possessing full ownership rights to the American lands.[30] "Early in [our] nation's history, the . . . United States . . . recognized [tribes] as separate sovereigns whose existence necessitated nation-to-nation diplomacy and treaty-making."[31] Thus, as self-governing peoples whose presence in America pre-existed the drafting of the Constitution, Indian tribes enjoy inherent sovereignty provided by their pre-constitutional establishment of self-government.

An essential attribute of sovereignty – whether federal, state or tribal – is immunity from suit. "Indian tribes enjoy broad sovereign immunity from lawsuits . . .." (*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978).) Indeed, courts have defined the nature of tribal sovereign immunity as immunity from process. (See, e.g., *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *Turner v. United States*, 248 U.S. 354, 357-58 (1919).) This immunity applies unless clearly and expressly waived by a tribe (*Santa Clara Pueblo*, *supra*, 436 U.S. at 58), which indisputably none of the compacting tribes herein waives with respect to this litigation. "A waiver of sovereign immunity cannot be implied but must be unequivocally expressed." (*United States v. Mitchell*, 445 U.S. 535, 539 (1983) (internal quotations and citation omitted).)[32]

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[30] *Id.* at 684.

[31] *Id.*

[32] See also *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. (continued...)

The absent tribes have not, as appellant and its amicus argue, waived their immunity by entering into compacts, thereby permitting them to be joined in this lawsuit. The plain language of the sovereign immunity waiver provision in section 9.4(a)(3)[33] of the 1999 compacts expressly limits its application to suits between the State and each signatory tribe. The compact waiver provision is a mutually exclusive term applicable only between the State and the individual tribe. It differs from the mutually interdependent aggregate slot machine license provision that applies equally to the State and all signatory tribes. Amici and other absent tribes have not, by signing compacts, affirmatively waived their immunity or consented to representation by appellant.

While the indispensable party rule recognizes the due process rights of parties to full participation in litigation that directly affects them, the conflation of that rule with the sovereign immunity of such parties effectively erects a *jurisdictional* bar. "When a sovereign is the absent party, the case transforms into

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[32](...continued)
751, 754 (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.").

[33] This provision reads: "No person or entity other than the Tribe and the State is party to the action, unless failure to join a third party would deprive the court of jurisdiction; provided that nothing herein shall be construed to constitute a waiver of the sovereign immunity of either the Tribe or the State in respect to any such third party."

a case about sovereign immunity, which is a jurisdictional question."[34] As Wright and Miller note, "In many instances, a ruling that [a governmental sovereign] is an indispensable party is the equivalent in substance of a statement that sovereign immunity bars the suit."[35]

There are unflattering historical reasons underscoring why the indispensable party rule should be given particular force and effect when it comes to the due process rights of sovereign Indian tribes:

> There is a long history of adjudication of the rights and responsibilities of Indians and Indian tribes in their absence. . . Non-Indians used legal processes to divest [tribal members] from their rights to . . . land. Often, non-Indian land speculators and settlers waited until . . . Indian families left . . . to harvest crops critical to their livelihood. In their absence, legally savvy non-Indians would appear in [state] courts and argue that the Indians had abandoned their lands. Notice was rarely given to Indians, few of whom were knowledgeable in Euro-American legal practice, or notice was intentionally delivered to an incorrect address. The local

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[34] Matthew L.M. Fletcher, *The Comparative Rights of Indispensable Sovereigns* (2004) 40 *GONZ. L. REV.* 1, 10, citing Kirsten Matoy Carlson, *Towards Tribal Sovereignty and Judicial Efficiency: Ordering the Defenses of Tribal Sovereign Immunity and Exhaustion of Tribal Remedies* (2002) 101 Mich. L. Rev. 569, 580-87.

[35] Charles Alan Wright et al., 7 *FEDERAL PRACTICE AND PROCEDURE* note 35, § 1617, at 254 (3rd ed. 2001). "Although holdings under Rule 19 do not affect the doctrine of tribal immunity *per se*, they do affect whether a party may be able to pursue a judicial remedy against anyone involved in a disputed action where a Tribe would also be a party but for its immunity." Andrea M. Seielstad, *supra*, 37 *TULSA L. REV.* 661, 703-704.

> courts, literally in league with the plaintiffs, would proceed in the absence of the Indians who normally resided on the parcel at issue. The courts would declare, summarily, that the Indians had broken the treaties by leaving their homes and abandoning their homestead. Titles would be granted to the non-Indian plaintiffs. When the Indians returned from their traditional and seasonal harvest, their land no longer belonged to them – it belonged to non-Indian plaintiffs. . . . This history is not specific to lower courts. Many fundamental United States Supreme Court decisions defining tribal civil and criminal regulatory and adjudicatory jurisdiction and Indian rights, were decided without the presence of Indian tribes.[36]

Development of the indispensable party rule – premised on the fundamental right to due process – and coupled with the sovereign immunity of tribes, served to end these predations. San Pasqual would have this Court take a backward slide from the protection of tribal interests by carving an exception into the indispensable party rule for its benefit at the expense of other tribes with separate but related compacts. The better course is to avoid a decision that would condemn us to repeat these kinds of unfortunate historical excesses.

### C. *Amici* Tribes are "Necessary" Parties to this Litigation.

Whether a tribe is a "necessary" party is determined by examining if, as an absent party, it "claims an interest relating to the subject of the action and is so situated that the disposition of the action in [its] absence *may . . . as a practical matter impair* or impede [its] ability to protect that interest." (*Id.*; emphasis

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[36] Fletcher, *supra*, 40 *GONZ. L. REV.* at 4.

added.) The "interest" referenced in Rule 19(a)(2) must be one that can be "legally protected," which means that must be more than a mere financial stake and more than speculation about a future event. (*Makah, supra*, 910 F.2d at 558.) Whenever a court is asked to adjust a fixed fund or finite amount of resources like the statewide "pool" of gaming device licenses at issue herein, a protectable interest that inheres to the beneficiaries of the fund or pool is threatened. (*Id.*; citing *Wichita & Affiliated Tribes of Oklahoma v. Hodel,* 788 F.2d 765, 774 (D.C.Cir.1986).)

Interests arising from the construction of standard terms in bargained contracts are also subject to legal protection so long as the relief sought would, if granted, render "the compacts less valuable to the tribes" and thereby "impair" the tribes' interests in them. (*American Greyhound, supra*, 305 F.3d at 1023. See also *Kescoli v. Babbitt,* 101 F.3d 1304, 1310 (9th Cir.1996) (where plaintiff's action would affect agreements to which tribes were parties, tribes were necessary pursuant to Rule 19(a)(2)(i)).)

Whether one is indispensable to a lawsuit is a *threshold* inquiry, the earlier raised the better, to make sure a claim to a protected interest is not decided in one's absence. *American Greyhound* clarified that when a court makes this threshold determination its proper focus is on whether "the tribes are entitled to be heard" on the issue of whether their compacts are "permitted by state law;" and

heard as *parties*, not amici.[37] To allow the ultimate substantive issue about the correct size of the fixed license pool influence the indispensable party determination is misguided "circular" reasoning; it smacks of the tail wagging the dog. "We have rejected this kind of circularity in determining whether a party is necessary."[38] As *American Greyhound* correctly concluded: "It is the party's *claim* of a protectible interest that makes its presence necessary."[39] Since here, as in *American Greyhound*, "the interest of the tribes arises from terms in bargained contracts, and the interest is substantial" (*id.* at 1023), the tribes are "necessary" parties.

**D. The Tribes Represented by Amici are "Indispensable" Parties.**

Once it is determined that a party qualifies as "necessary" to litigation, courts must then determine whether that party is also "indispensable." (*Dawavendewa v. Salt River Proj. Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1161 (9th Cir. 2002).) Significantly, however, "[i]n virtually all cases in which courts have declared an absent tribe a necessary party, the courts have also declared the tribe indispensable."[40]

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[37] *American Greyhound, supra*, 305 F.3d at 1024.

[38] *Id.*, citing to *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992).

[39] *Id.*; emphasis original.

[40] *Id.* at 1161-1162; see also, Nicholas V. Merkley, *Compulsory Party* (continued...)

The traditional notion that a party to a contract is "indispensable" to litigation that threatens to impair it was – at least with respect to tribal governments who enter into gaming compacts with states – resoundingly reaffirmed by *American Greyhound*, *supra*, 305 F.3d 1015. In that case, disgruntled gambling competitors (horse and dog track owners) challenged on constitutional grounds tribal gaming compacts with the State of Arizona. *American Greyhound* was first filed in state court but removed to federal court where the district judge ruled in favor of plaintiffs, rejecting the contention that the case should be dismissed because the compacting tribes not named in the lawsuit were indispensable parties under Rule 19 who could not, due to their immunity, be joined.

On appeal this Court reversed, concluding that the compacting tribes were "indispensable" and "the case must be dismissed because the tribes enjoy sovereign immunity . . . and have not consented to be sued." (305 F.3d at 1022.) In reaching this conclusion, the appellate court analyzed the language of Rule 19, explaining that the "proper approach" to indispensable party issues is first to decide whether the tribes are, in traditional terminology, "necessary" parties "who should normally be joined . . .." If the tribes are "necessary" parties, the court

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[40](...continued)
*Joinder and Tribal Sovereign Immunity: A Proposal to Modify Federal Courts' Application of Rule 19 to Cases Involving Absent Tribes as "Necessary Parties"* (2003) 56 *OKLA. L. REV.* 931, 947.

must next determine whether they are "indispensable," that is, "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed." (*Id.*) In ascertaining "indispensability" courts must balance four factors: (1) the prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum.

### 1. *The Tribes Represented by Amici are Prejudiced by this Litigation and that Prejudice is Not Lessened Because Amici and the State Agree this Case Should be Dismissed.*

Turning to the first factor, the *prejudice* to amici "stems from the same legal interest that makes [the tribes] a necessary party to the action." (*Quileute Indian Tribe v. Babbit*, 18 F.3d 1456, 1499 (9th Cir. 1994), citing *Confederated Tribes of Chehalis Indian Reservation v. Luhan*, 928 F.2d 1496, 1499 (9th Cir. 1991) (noting that Rule 19(b)'s "prejudice" test is essentially the same as Rule 19(a)'s "legal interest" test.).) "Not surprisingly, the first factor of prejudice, insofar as it focuses on the absent party, largely duplicates the consideration that made a party necessary under Rule 19(a): a protectable interest that will be impaired or impeded by the party's absence." (*American Greyhound, supra*, 305 F.3d at 1024-1025.) This "prejudice" is lessened, of course, when a properly joined party can adequately represent the interest of the absent and legally immune party. That is

not this case, however, as amici and the State do not have identical interests in the renegotiated compacts, nor does the State, in contrast to the federal government, have any trust or fiduciary responsibility to the tribes.

Mere contract formation does not automatically create identical legal interests in the parties to the contract. To the contrary, contracts create separate and distinct interests that each party independently possesses and will seek to protect. "In the making of a contract, the *conflicting interests* of two or more parties are involved . . .."[41] This divergence of interests between the compacting parties is not just theoretical, but expressly acknowledged in the compacts themselves.[42] It is also recognized as a matter of law by *American Greyhound*: "[T]he Governor could not adequately represent the interests of the absent tribes. . . . [T]he State and the tribes have often been adversaries in disputes over gaming, and the State *owes no trust duty* to the tribes."[43]

### 2. *No Relief Can be Shaped to Lessen Prejudice to the Absent Tribes.*

The second factor asks whether the relief can be "shaped" to lessen any prejudice. (Fed. R. Civ. P. 19(b).) The short answer is, No. If appellant is successful here, amici would suffer a devaluation of their compacts and a

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[41] Austin W. Scott & Willliam F. Fratcher, 5A *THE LAW OF TRUSTS* §553, p. 110-111 (4th ed. 1987)(emphasis added).

[42] See *Compact Preamble*, subd. D.

[43] 305 F.3d at 1023, fn. 5 & 1024; emphasis added.

decreased ability to maintain the economic stability necessary to meet their obligations under them. As this Court stated in *Quileute*, "No partial remedy can be fashioned that would not implicate those interests or would eliminate the prejudice to the [tribes]."[44] Because the relief appellant requests would be detrimental to absent tribes, there is no way for the court to shape it to lessen or avoid that prejudice. (See *Makah*, *supra*, 910 F.2d at 560.)

*Makah* underscores the pertinence of the indispensable party rule to this case. *Makah* involved two separate actions: one by which the tribe challenged federal regulations that implemented a settlement in litigation involving the allocation of the tribal ocean harvest of Columbia River salmon; and another in which the tribe challenged the regulations promulgated by the Secretary of Commerce to implement the settlement. The Makah Tribe sought by its first action to alter the salmon allocation to its benefit. However, the allocation was from a fixed fund, meaning that for the Makah to prevail, another tribe would necessarily lose out on the salmon allocation. The Ninth Circuit agreed that the other tribes involved in the settlement were necessary parties and that "any share that goes to the Makah must come from [the] other tribes." (*Makah*, *supra*, 910 F.2d at 559).

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[44] *Supra*, 18 F.3d at 1460.

However, the *Makah* opinion found the other tribes were not necessary parties to challenge the regulations, reasoning that "[t]he absent tribes would not be prejudiced because all of the tribes have an equal interest in an administrative process that is lawful." (*Id.*) Applying Rule 19, the Ninth Circuit held that the absent tribes were indispensable parties as to the broader issue, the one analogous to the issue presented here:

> We agree with the [district] court's analysis . . .. The district court found that prejudice was inevitable since "any relief would be detrimental to the other tribes"; the absent tribes had no proper representative because potential intertribal conflicts meant the United States could not represent all of them. The court held that there was no way to shape relief because the [particular] harvest was a limited resource and any relief would be detrimental to either the Makah or the absent tribes. Similarly, the only "adequate" remedy would be at the cost of the absent parties because the Makah request at a minimum an equitable adjustment [of the allotment amount] by the Secretary. Allowing input from all the tribes would require their participation and was therefore unacceptable.[45]

One problem with attempting to shape relief that would lessen prejudice to the absent tribes is that of multiple and inconsistent obligations. Rule 19 is "concerned with . . . precluding multiple lawsuits on the same cause of action." (*Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir.1983) (citing Advisory Committee's Note, Fed.R.Civ.P. 19 (1966)).) Its text

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[45] *Id.* at 560. See also *Wilbur v. Locke*, 423 F.3d 1101, 1113-1114 (9th Cir. 2005).

specifies that when "a person who claims an interest relating to the subject of the action . . . is so situated that . . . disposition of the action in the person's absence may . . . leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistence obligations by reason of the claimed interest," then the absent person is "necessary" to the litigation. (F.R.C.P. 19(a)(ii).) That, again is this case.

San Pasqual seeks relief similar to that sought by two other tribes in separate lawsuits against the same state defendants. If all three appeals were to decided in favor of appellants, then the CGCC would be subject to multiple orders or judgments imposing the very kinds of *obligations* Rule 19 seeks to avoid.[46] If the courts or different panels of this Court were to disagree on the merits of what the aggregate size of the license pool must be, then the CGCC would be subjected to multiple, inconsistent obligations. Future suits by other tribes seeking to boost or reduce the size of the aggregate slot machine license pool increases the risk of multiple and inconsistent judicial obligations upon the CGCC. "Any disposition in the [amended compacting tribes'] absence threatens to leave [CGCC] subject

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[46] There is, as a matter of law, no principled distinction between an adjudication and an obligation directed at the same defendant when it comes to the "multiple and inconsistent" language of Rule 19. A court order creates an obligation to obey upon the party to whom it is directed. See *Walker v. City of Birmingham*, 388 U.S. 307, 314 (1967) (court order entered by court with subject-matter and personal jurisdiction over case gives rise to a plain *duty to obey* until order is stayed, vacated, or reversed).

to substantial risk of incurring multiple or inconsistent obligations." (*Dawavendewa, supra*, 276 F.3d at 1157.)

### 3. *No Adequate Relief is Available in the Absence of Other Compacting Tribes.*

The third factor – whether adequate relief is available in amici's absence – cuts against San Pasqual. The relief sought by plaintiff plainly prejudices tribes who are parties to the challenged compacts. (See *Dawavendewa v. Salt River Proj. Agr. Imp. & Power Dist., supra*, 276 F.3d at 1157 ("We reaffirm the fundamental principle [that] . . . a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract.").)

Neither, as already noted, is the opportunity for absent tribes to be heard as amici an adequate substitute for their "presence." While amici briefs may serve to inform the court about issues presented, they are no substitute for being named as a party:

> If the opportunity to brief an issue as a non-party were enough to eliminate prejudice, non-joinder would never be a problem since the court could always allow the non-joinable party to file amicus briefs. Being a party to a suit carries with it significant advantages beyond the amicus' opportunities, not the least of which is the ability to appeal an adverse judgment.

(*Wichita & Affiliated Tribes of Oklahoma v. Hodel, supra*, 788 F.2d at 775.) Amici are indispensable parties regardless of whether they are allowed to

participate herein as friends of the court.

### 4. *There are Alternate Fora Available to Appellant, but Even if Not, this Lacunae Does Not Warrant Proceeding Without the Absent Tribes.*

Fourth and finally, there is the criterion of an alternate forum. Amici submit that the proper fora for challenges to these compacts are the Legislature, the Governor and the CGCC itself, but not federal district court in the absence of amici and other affected tribes. In numerous cases this Court has determined that the inability to join tribes as parties because of their immunity leaves plaintiff "without an alternative forum to air [its] grievances," but nonetheless found "the absent Indian Tribe[s] . . . indispensable and dismissed the case." (*Dawavendewa v. Salt River Proj. Agr. Imp. & Power Dist.*, *supra*, 276 F.3d at 1162.) "[T]he tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs." (*American Greyhound*, *supra*, 305 F.3d at 1025.) "The principle of tribal sovereign immunity is so important that motions to dismiss [on indispensable party grounds] are granted in those cases, even though failure to join the tribal indispensable party results in a remedy being denied the plaintiff against the non-tribal party."[47]

Appellant's belief that the size of the fixed license pool should be expanded may well be deserving of determination in some forum, but the indispensable party

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[47] Felix Cohen, *supra*, *HANDBOOK OF FEDERAL INDIAN LAW* at § 7.05[1][c], p. 644.

rule is designed to free federal courts from having to decide the merits of issues directly affecting those who cannot, as a matter of law, be joined in the litigation.

## CONCLUSION

The indispensable party rule prevents a court from adjudicating the rights to immunity of any sovereign – federal, state or tribal – in its absence and without its consent. Adjudicating the compact rights of tribes without their presence and over their objection is a back-door attempt to abrogate their sovereign immunity. This Court should not permit this to happen here, but instead affirm the well-reasoned decision of the lower court and dismiss this case.

Respectfully submitted,

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Dated: October 9, 2007

## CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), Fed. R. App. P. 29(d) and 9th Cir. R. 32-1the foregoing amici brief is proportionally spaced, has a typeface of 14 points and contains 6,894 words.

Dated: October 9, 2007

Fred J. Hiestand
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 9, 2007 I caused true and correct (two) copies of the foregoing BRIEF AMICI CURIAE OF THE CALIFORNIA TRIBAL BUSINESS ALLIANCE and THE RUMSEY BAND OF WINTUN INDIANS IN SUPPORT OF DEFENDANTS/APPELLEES AND FOR AFFIRMANCE to be deposited in the United States Mail, first class postage prepaid, addressed to:

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