No. 07-55536

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN PASQUAL BAND OF MISSION INDIANS,
a federally recognized Indian Tribe,
Plaintiff and Appellant,

v.

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 and Appellees,

APPEAL FROM
THE UNITED STATES DISTRICT COURT
SOUTHERN DIVISION OF CALIFORNIA
HONORABLE LARRY ALAN BURNS
DISTRICT COURT CASE NO. 06CV0988 LAB AJB

PLAINTIFF-APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

JURISDICTIONAL STATEMENT

Plaintiff/Appellant, the San Pasqual Band of Mission Indians (hereinafter "San Pasqual" or "Tribe"), is a federally recognized Indian tribe whose claim arose under the Indian Gaming Regulatory Act (25 U.S.C. § 2701, *et seq.*, 18 U.S.C. §§1166-88) ("IGRA") and its Class III Gaming Compact with the State of California that was executed in September 1999, approved by the Secretary of the Interior pursuant to IGRA in May 2000, and as a matter of federal law allocates jurisdiction over Class III gaming on San Pasqual's Indian lands. Therefore, the District Court had original jurisdiction over this action under 28 U.S.C. § 1331 and 1362.

In its March 20, 2007 Order, the District Court dismissed San Pasqual's one claim for relief for failure to join indispensable parties. Excerpts of Record ('ER") 64.

San Pasqual timely filed its notice of appeal on April 17, 2007. ER 61. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291.

INTRODUCTION

Many Native Americans were mired in the worst poverty and despair this nation has ever known – with no end in sight. After decades of failures to elevate the standard of living on Native American Reservations, Congress

took steps in enacting the Indian Gaming Regulatory Act to codify tribes' rights to conduct Indian gaming as a viable means of promoting "tribal economic development, tribal self sufficiency and strong tribal governments." 25 U.S.C. §2701(4). The District Court's ruling is a step backwards from those goals.

From San Pasqual's perspective, this case is a continuation of a historical relationship between the Tribe and the State that is one-sided, dictatorial, uneven and blatantly unfair to the clearly manifested detriment of San Pasqual's people.

In disregard of controlling precedent laid down by this Court, the District Court impermissibly expanded the plain meaning of Rule 19 -- holding that absent Indian tribes have a right to prevent San Pasqual from obtaining judicial review of the State's unilateral interpretation of its Compact merely because these tribes have a financial stake in the outcome of this litigation.

The prejudice to San Pasqual is not the loss of some abstract right to have its day in court. By issuing a number of Gaming Device licenses well below that agreed upon by the parties, the State deprives San Pasqual of its most significant economic resource to promote tribal economic development, self-sufficiency, and strong tribal government.

In short, the District Court committed a prejudicial abuse of discretion by relying on mere speculation about possible prejudice to these absent tribes' *financial interest*, rather than taking, as is required by Rule 19, a closer look at the real probability of whether a *legally protected interest* of the absent tribes will be prejudiced by continuation of San Pasqual's case.

If the argument espoused by the State and adopted by the District Court becomes the law under Rule 19, a court must dismiss every claim for breach of a standard auto insurance contract if a plaintiff could not join every insured with similar contracts. An insurance company, like State Farm, could unilaterally dictate the terms of its 40 million contracts[1] and avoid judicial review by arguing that it might be subject to differing interpretations of its form contract by different courts. It is axiomatic that a party cannot avoid judicial review of its unilateral interpretation of an agreement when the other party to the agreement has a bargained-for right to such review. *See Los Angeles Paper Bag Co. v. Printing Specialties and Paper Products Union*, 345 F.2d 757, 759 (9th Cir. 1965) (holding that an Employer cannot "emasculate the arbitration provision of the contract" in order to unilaterally interpret the contract).

[1] http://www.statefarm.com/_pdf/2005_yearinreview.pdf stating that State Farm has 40 million auto insurance policies.

This Court cautioned against such a result in Indian Gaming holding "Congress in passing IGRA [Indian Gaming Regulatory Act] did not create a mechanism whereby states can make empty promises to Indian Tribes during good faith negotiations in Compacts, knowing they may repudiate them with immunity whenever it serves their purpose." *Cabazon v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997). The Ninth Circuit's conclusion was "bolstered by IGRA's express authorization of a compact to provide remedies for breach of contract" and invitation to "the tribe and the state to waive their respective immunities and consent to suit in federal court." *Id.* at 1056; *see* 25 U.S.C. § 2710(d)(3)(C)(v).

But here, the imbalance that Congress sought to avoid, the District Court threatens to accomplish by holding that despite the dispute resolution provision set forth in San Pasqual's Compact, where both the State and San Pasqual waived their respective sovereign immunities, Rule 19 forecloses San Pasqual from challenging the State's unilateral interpretation and alleged breach of its bilateral Compact.

Nearly a half century ago, Supreme Court Justice Hugo Black wrote *"Great nations like great men should keep their word." FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142, (1960) (Black, J., dissenting) (emphasis added). Those words ring true today for the San Pasqual Tribe, which has

no other remedy to vindicate its Compact rights and avail itself of the judicial remedy it bargained for, other than this appeal.

STATEMENT OF THE ISSUES

1. Did the District Court err by including absent parties in its determination of whether "complete relief may be accorded to all parties" under Rule 19(a) in light of the Ninth Circuit's holding that a district court may only consider the relationship between those already a party to the action in its analysis of this part of Rule 19?

2. Did the District Court err in concluding that absent tribes were necessary parties under Rule 19(a) even though these same tribes had notice of this lawsuit and affirmatively chose not to claim an interest, given that conferring necessary party status under Rule 19 is contingent upon an absent party "claiming" an interest in the litigation?

3. Did the District Court err in concluding that absent Indian tribes were indispensable under Rule 19(b) even though these same tribes amended their gaming compacts to delete the provision at issue in this case?

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STATEMENT OF THE CASE

San Pasqual maintains that § 4.3.2.2(a)(1) of *its* Tribal-State Gaming Compact authorizes at least 42,700 Gaming Device licenses statewide, and the Defendants, through their erroneous interpretation, breached the Compact by refusing to issue all Gaming Device licenses authorized by the Compact.

As required by the Compact, San Pasqual and the Defendants met in San Diego on March 15, 2006 to "meet and confer" regarding the Defendants' alleged breach of the Compact. No agreement was reached during this "meet and confer" session. San Pasqual filed suit in the United States District Court Southern District of California on May 3, 2006 as expressly authorized by Section 9.1(d) of the Compact. ER 73.

Thereafter, San Pasqual filed a Second Amended Complaint containing one claim for relief requesting the District Court to make a judicial determination of Section 4.3.2.2(a)(1) of the Compact, commonly referred to as the "State Aggregate Limit" formula. Defendants moved for judgment on the pleadings contending that other signatory tribes to the 1999 Model Compact were necessary and indispensable parties under Fed. R. Civ. Proc. 19, and requested San Pasqual's action be dismissed because sovereign immunity precludes San Pasqual from joining these other tribes.

The District Court granted the motion for judgment on the pleadings and dismissed San Pasqual's action. ER 64.

STATEMENT OF FACTS

A. Background On Indian Gaming In California

Congress enacted the Indian Gaming Regulatory Act (IGRA) in 1988 in response to the United States Supreme Court decision in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), which recognized the rights of Indian tribes to engage in certain kinds of gaming within California. Under IGRA, a federally recognized Indian tribe in California may offer Class III gaming (e.g., slot machines) on its tribal lands pursuant to a gaming compact with the State of California. 25 U.S.C. §2710(d)(1)(C).

In September 1999, San Pasqual executed the bilateral Compact with the State authorizing San Pasqual to operate Gaming Devices (slot machines). ER 45.

At the same time, the State signed virtually identical compacts with 60 other California tribes. ER 45. All 61 of these 1999 Compacts (hereinafter collectively referred to as the "1999 Compacts") took effect on May 16, 2000, when notice of the Assistant Secretary of the Interior's approval of them was published in the Federal Register.

San Pasqual is a sovereign nation, and therefore the State has no right to regulate San Pasqual's gaming activities absent express waiver in the bilateral Compact. 25 U.S.C. § 2701(5). The State is not entitled to the usual deference afforded a governmental entity, but instead must be held to the strict adherence standard that every party to a compact, or contract, is held to by a court of law. *See Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (stating that "[a] Compact is, after all, a contract.").

Shortly after the 1999 Model Compacts were signed, a group of Signatory Tribes including San Pasqual, contracted with the Sides Accountancy Group to oversee the issuance of Gaming Device licenses pursuant to the license draw process outlined in the 1999 Model Compacts. ER 20-26. In 2002, the State seized control over the process for issuing Gaming Device licenses, and unilaterally declared the State Aggregate Limit. ER 8.

San Pasqual contends the State, through its unilateral and erroneous interpretation of § 4.3.2.2(a)(1) of San Pasqual's Tribal-State Gaming Compact, has unfairly restricted San Pasqual from obtaining the economic self-sufficiency the United States Congress envisioned when it enacted IGRA. Despite the dispute resolution process set forth in Section 9.1 of the Compact, the State now contends that San Pasqual cannot challenge the

State's unilateral interpretation of a crucial provision. San Pasqual contends this is not the "good will and cooperation" and "mutually respectful government-to-government relationship" the State agreed to when it entered into the Compact with San Pasqual. ER 5.

B. The Gaming Device License Draw Process

The Compact authorizes San Pasqual to operate 350 slot machines as a matter of right. ER 5-6. In order to operate more than 350 slot machines, San Pasqual is required to acquire a Gaming Device license. ER 6. For each Gaming Device license obtained, San Pasqual must pay the applicable fees to be deposited into the Revenue Sharing Trust Fund. ER 6. Currently, San Pasqual holds 1,222 Gaming Device licenses that, in addition to the 350 permitted by right, enable San Pasqual to operate 1,572 slot machines. ER 6.

San Pasqual may obtain a Gaming Device license by voluntarily participating in the Gaming Device License Draw Process set forth by the Compact. ER 7. San Pasqual will then be placed into one of five categories of priority based upon the number of slot machines it operates and whether it previously participated in the draw process. ER 7. Each priority category has a specific limit on the number of Gaming Device licenses a tribe in that category may acquire in one round of the draw process. The draw continues

until all participating tribes have received their requested number of Gaming Device licenses or there are no further Gaming Device licenses to award, whichever occurs first.

The 1999 Model compacts impose two limitations on the numbers of slot machines a tribe may operate. First, no tribe may operate more than 2,000 slot machines. ER 47. Second, there is a limit as to the total number of Gaming Device licenses available to all California tribes in the aggregate. ER 47. This limit is commonly referred to as the "State Aggregate Limit" formula, is at the center of this litigation and is set forth in Section 4.3.2.2(a)(1) of the Compact, stating as follows:

> "The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be a sum equal to 350 multiplied by the number of Non-Compact tribes as of September 1, 1999, plus the difference between 350 and the lesser number authorized under Section 4.3.1."

After signing the 1999 Model Compacts, the State issued several different conclusions for the number of Gaming Device licenses authorized by the 1999 Model Compact, ranging from as few as 23,000 to as many as 60,000. ER 8.

San Pasqual contends that, in breach of the Compact, in or around June 2002, the State unilaterally and erroneously determined the State Aggregate Limit to be only 32,151 Gaming Device licenses, barely more than half as many Gaming Device licenses as it once stated were authorized. ER 8. Prior to filing this lawsuit, San Pasqual requested Gaming Device licenses from the State through the draw process, but was informed by the State that, under its interpretation of the State Aggregate Limit, there are no more Gaming Device licenses available and was denied its requested Gaming Device licenses. ER 47.

C. The Amendments To The 1999 Compacts

In 2004, seven tribes amended their 1999 Model Gaming Compacts to delete the two restrictions on the number of slot machines a tribe may operate. Whereas the Non-Amended tribes are restricted by the limit on the number of gaming device licenses available statewide, these Amended Tribes are no longer required to obtain a license to operate an additional Gaming Device. Additionally, without the 2,000 Gaming Device per tribe cap, Amended Tribes may now operate an unlimited number of gaming devices. ER 49-50.

SUMMARY OF ARGUMENT

The decision of the District Court is contrary to controlling Ninth Circuit precedent, and if upheld, will result in an unprecedented expansion of Rule 19. Upholding the decision of the District Court would deprive San Pasqual of its only ability to seek redress against the State's unilateral, self-serving and incorrect interpretation of the Compact. Moreover, if upheld, the absurd outcome in this case will be that a handful of competing gaming tribes (without anything more than a financial stake in this lawsuit and none of which have the disputed provision at issue in this case in their amended compacts) can use Rule 19 in order to block competition from another tribe seeking to expand its gaming operation. Upholding the lower court's decision will also mean that a district court may confer necessary party status on an absent party despite the fact that the absent party affirmatively chose not to "claim" an interest in this lawsuit after being provided written notice of the case.

To understand the flaw in the District Court's analysis, this Court must be apprised that there are two distinct groups of Indian gaming tribes the lower court found to be indispensable—for different reasons. The first group is composed of tribes operating under the original 1999 Model Compacts (hereafter the "Non-Amended Tribes") and includes San Pasqual.

Each of the Non-Amended Tribes continues to be bound by the "State Aggregate Limit" formula (the disputed provision in this matter) and the per tribe cap of 2,000 Gaming Devices.

The second group of tribes (hereinafter "Amended Tribes") are seven signatories to the 1999 Model Compact that in 2004 amended their compacts to delete the two restrictions on the number of slot machines a tribe may operate. Whereas the Non-Amended Tribes are restricted by the limit on the number of gaming device licenses available statewide, these Amended Tribes are no longer required to obtain a license to operate an additional Gaming Device. Additionally, without the 2,000 Gaming Device per tribe cap, Amended Tribes may now operate an unlimited number of Gaming Devices. ER 49-50.

San Pasqual gave all signatory tribes to the 1999 Model Compact, including both the Non-Amended and Amended Tribes, written notice of the lawsuit. ER 38-43. After receipt of this notice, not a single Non-Amended Tribe claimed an interest in this litigation, ER 38-43 & 44-64, which this Court has held is a prerequisite to conferring necessary party status and "the best evidence" that an absent party is not a necessary or indispensable party under Rule 19. *United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 908 (9th Cir. 1994) (holding that an absent party's

disclaimer of interest in a lawsuit is "the best evidence' that the party is not necessary under Rule 19). In disregard of this Court's prior holdings, the District Court glossed over this prerequisite to consideration of necessary party status and concluded these tribes were necessary parties to this action. ER 59-60.

With respect to the Amended Tribes[2], the lower court held that these tribes relied on the State's interpretation of the State Aggregate Limit formula and that the "bargains and material assumptions" of these tribes in amending their compacts would be impaired by a favorable judgment to San Pasqual. In sum, without any evidentiary support, the lower court speculated that the Amended Tribes' compacts with the State would become less advantageous for those tribes. Even if true, the absent Amended Tribes' financial stake is not a legally protected interest as required for conferment of necessary party status. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). The flaws in the lower court's reasoning become more obvious since the amended compacts do not even contain the provision at issue in this case. Additionally, the lower court also failed to recognize that if a tribe may simply amend its compact to operate an unlimited number of Gaming Devices, then a lawsuit seeking a declaration that more Gaming

[2] Five of the seven Amended Compact tribes filed *amicus* briefs with the District Court opposing San Pasqual's claim for relief for a judicial determination of the State Aggregate Limit.

Device licenses are authorized to be issued will not impair or impede any right that could actually be protected by the Amended Tribes.

The District Court also failed to properly apply the law concerning whether "complete relief may be accorded amongst all parties." This Court's holdings limit a district court's analysis of this part of Rule 19 strictly to the relationship between those already a party and require a district court to disregard all absent parties. *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 662 F.2d 534, 537 (9th Cir. 1981). In considering the relationship between the State and the absent tribes, the District Court committed a prejudicial abuse of discretion by analyzing the wrong relationship in determining whether complete relief could be accorded between San Pasqual and the State. *Eldredge*, 662 F.2d at 537.

In sum, San Pasqual is entitled to a forum in which it can resolve disputes with the State over the meaning of its Compact. "[D]ismissal is a drastic remedy ... which should be employed only sparingly" and only when in "in equity and good conscience" the action must be dismissed. *Teamsters Local Union No. 171 v. Keal Driveaway Co.*, 173 F.3d 915, 918 (4th Cir. 1999). Contrary to the District Court's ruling, Rule 19 does not mandate dismissal of San Pasqual's claim, where as here, no other tribe claimed a

legally protected interest that will be prejudiced if this case continues, and dismissal now—with nowhere else for San Pasqual to go—terminates San Pasqual's claim forever.

STANDARD OF REVIEW

The District Court's conclusion that a party is indispensable is to be reviewed for abuse of discretion. *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022 (9th Cir. 2002). However, if the district court's decision involves a legal determination, then that decision is reviewed *de novo*. *Id.* A court abuses its discretion "when the findings it does make are clearly erroneous," or "when it bases its ruling on an erroneous view of the law." *United States v. Juvenile*, 451 F.3d 571, 574-75 (9th Cir. 2006). Because the District Court granted the State's motion to dismiss on the pleadings, this Court must accept as true all factual allegations in San Pasqual's complaint and construe them in the light most favorable to San Pasqual. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

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GENERAL PRINCIPLES GUIDING THE RULE 19 INQUIRY

In determining whether to dismiss a claim for relief pursuant to Rule 19, a court must engage in a rigorous two-part analysis. *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999). First, a court must determine if the absent party is "necessary to the suit" as outlined in Rule 19(a)(1) and (a)(2). If the absent party is deemed "necessary to the suit" and cannot be joined, then the court must determine, by balancing the guiding factors of Rule 19(b), whether the absent party is "indispensable" such that "in equity and good conscience the suit should be dismissed." *Id.* (citations omitted).

Rule 19(a) consists of two separate and distinct parts:

> **RULE 19:**
> **(a) Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if:
>
> (1) in the person's absence complete relief cannot be accorded among those already parties, or
>
> (2) the person claims an interest relating to the subject of the action and 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 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 claimed interest.

The first part, Rule 19(a)(1), is whether complete relief can be accorded amongst those already a party. As will be discussed in detail below, for this part of the analysis a court must restrict its analysis solely to the relationship between those persons already a party and cannot consider the possible effect of an absent party. *Elderdge*, 662 F.2d at 537.

If an absent party is given notice of a lawsuit, Rule 19(a)(2) requires that absent party to affirmatively "claim" a legally protected interest will be prejudiced by the lawsuit in order to be deemed a necessary party. *Altmann v. Republic of Austria*, 317 F.3d 954, 971 (9th Cir. 2002). Additionally, this Court has held that to achieve the status of a "legally protected interest," a party must claim more than just a financial interest at stake in the litigation. *Makah Indian Tribe*, 910 F.2d at 558. If an absent party fails either to "claim" an interest after being provided notice or if that claimed interest is not a legally protected interest, then a court's inquiry ceases under Rule 19(a)(2) and the party is not deemed necessary.

If and only if an absent party "claims" a legally protected interest, should a court inquire whether the lawsuit may, as a practical matter, impair or impede the absent party's ability to protect that interest. F.R.C.P. 19. Also, if and only if an absent party "claims" a legally protected interest may a court inquire whether a party would be subject to a substantial risk of

incurring inconsistent obligations. F.R.C.P. 19.

ARGUMENT

I. 19(a)(1): THE DISTRICT COURT ABUSED ITS DISCRETION IN CONSIDERING ABSENT TRIBES WHEN DETERMINING WHETHER COMPLETE RELIEF CAN BE ACCORDED AMONGST SAN PASQUAL AND THE STATE

The District Court erred in including absent tribes in its analysis of whether complete relief could be accorded between San Pasqual and the State. *Eldredge*, 662 F.2d at 537. In *Eldredge*, this Court made clear that Rule 19(a)(1)'s mandate that "complete relief be accorded among those already parties" is limited only to "relief as between the persons already parties, *not as between a party and the absent person whose joinder is sought*." *Id.* (emphasis added).

The lower court abused its discretion in determining that "complete relief" could not be accorded the parties because the State may be exposed to inconsistent obligations should tribes other than San Pasqual seek and obtain a different aggregate number ruling. ER 55-56. The determination of whether a party may face inconsistent obligations is only appropriate under Rule 19(a)(2) and only after an absent party claims a legally protected interest in the litigation – not under Rule 19(a)(1).

Had the District Court performed the proper analysis of Rule 19(a)(1), it would have been required to hold that complete relief can be accorded between San Pasqual and the State. San Pasqual seeks only a judicial determination of its bilateral Compact with the State. A court's determination will be binding on the only two parties to San Pasqual's Compact because both parties would be before the District Court. No additional parties are necessary to afford both San Pasqual and the State complete relief. *Eldredge*, 662 F.2d at 537; *see Northrop Corp.*, 705 F.2d at 1044.

In considering the relationship between the State and the absent tribes, the District Court committed a prejudicial abuse of discretion by analyzing the wrong relationship in determining whether complete relief could be accorded between San Pasqual and the State. *Eldredge*, 662 F.2d at 537. Therefore, this Court must reverse the District Court's Order.

II. TRIBES FOUND TO BE INDISPENSABLE BY THE DISTRICT COURT

In the instant matter, the lower court held two distinct and separate groups of tribes to be indispensable parties. The first group is composed of Non-Amended Tribes which are gaming tribes that each have the disputed provision, the State Aggregate Limit, remaining in their compact. After

receiving written notice of San Pasqual's lawsuit, not a single Non-Amended Compact tribe claimed an interest in this case.[3] ER 38-43 & 44-64. The second group contains the gaming tribes that amended their compacts to delete Section 4.3.2.2, the provision at issue in this case. As a result, these Amended Compact Tribes are no longer subject to the limit on the number of Gaming Device licenses statewide, nor the 2,000 Gaming Device per tribe cap. Thus, these tribes' amended compacts permit those tribes to operate an unlimited number of slot machines.[4]

A. 19(a)(2): NO TRIBE WITH THE DISPUTED COMPACT PROVISION REMAINING IN ITS COMPACT HAS CLAIMED AN INTEREST IN THIS LAWSUIT AND THEREFORE THE NON-AMENDED TRIBES ARE NOT NECESSARY PARTIES

Unlike prior suits by signatory tribes to the 1999 Compact, San Pasqual provided written notice of its lawsuit to each signatory tribe to the 1999 Model Compact. ER 39. After receipt of this notice, each tribe with the disputed Compact provision remaining in its compact chose not to claim an interest in this case. ER 38-43 & 44-64. "This is the best evidence that [a party's] absence would not impair or impede [its] ability to protect [its]

[3] In fact, thirty-eight non-amended tribes belong to the California Nations Indian Gaming Association, which voted unanimously to support San Pasqual's lawsuit to receive adjudication on the merits, and therefore submitted an *amicus* brief to the district court asserting that no tribe, other than San Pasqual, is an indispensable party to a lawsuit concerning a judicial determination of San Pasqual's Compact.

[4] Additionally, two amended compact tribes, the Ewiiaapaayp Band of Kumeyaay Indians and the Buena Vista Rancheria of Me-Wok Indians, belong to the California Nations Indian Gaming Association.

interest." *Morongo Band of Mission Indians*, 34 F.3d at 908.

This distinction from prior lawsuits considering the 1999 Model Compact is significant and unfortunately was overlooked by the lower court. This Court has held repeatedly that conferring necessary party status under Rule 19 is "contingent upon an initial requirement that the absent party *claim* a legally protected interest relating to the subject matter of the action," and "[w]here a party is aware of an action and chooses not to claim an interest, the district court does not err by holding that joinder was 'unnecessary.'" *Altmann*, 317 F.3d at 971. Because each Non-Amended Tribe chose not to claim an interest, the lower court should have concluded its analysis and determined that each was not a necessary party. *United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999) (citing *Northrop Corp.*, 705 F.2d at 1043-44).

The rationale behind the requirement that an absent party "claim" an interest is simple: "Rule 19(a) is intended 'to protect a party's right to be heard and to participate in adjudication of a claimed interest.'" *In Re Republic of Philippines*, 309 F.3d 1143, 1152 (9th Cir. 2002) (citing *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992)). This Court has criticized the use of Rule 19 to avoid adjudication on the merits, holding that where an absent party does not "claim" an interest, "it is

inappropriate for one defendant to attempt to champion an absent party's interest." *Morongo Band of Mission Indians*, 34 F.3d at 908.

In fact, because many other tribes recognized the importance of preserving the judicial remedy bargained for in the 1999 Model Compact, the only response by tribes with the disputed provision remaining in their compacts was to support the continuation of this case. ER 58. To wit, the California Nations Indian Gaming Association, the umbrella organization for a majority of California's gaming and non gaming tribes, was authorized by a unanimous vote of its tribal members to submit an *Amicus Curiae* brief to the District Court opposing the State's Motion to Dismiss. ER 58. That none of the Non-Amended Tribes claimed an interest in this case proves the State's purported concern for these tribes is nothing more than an improper attempt to hide behind Rule 19 to avoid adjudication on the merits of San Pasqual's claim.

Each Non-Amended Tribe chose not to claim an interest after being provided notice of this litigation. By definition, these tribes cannot be necessary parties. F.R.C.P. 19; *Altmann*, 317 F.3d at 971. The lower court expanded the breadth of Rule 19 and abused its discretion in determining that the Non-Amended Tribes were necessary parties. *Bowen*, 172 F.3d at 689.

B. 19(a)(2): THE AMENDED COMPACT TRIBES DO NOT HAVE A LEGALLY PROTECTED INTEREST IN THE INTERPRETATION OF COMPACT TERMS THEY ARE NO LONGER BOUND BY, AND THEREFORE ARE NOT NECESSARY PARTIES

The District Court abused its discretion in concluding that the amended tribes have a legally protected interest because each "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." ER 59.

The District Court clearly erred because, at most, the Amended Tribes have a financial stake in this litigation because of increased competition they may face from 1999 Compact tribes that choose to participate in future gaming device license draws if San Pasqual were to obtain its requested relief. But, the Ninth Circuit has made clear that for purposes of the Rule 19 inquiry, a legally protected interest "must be more than a financial stake and more than speculation about a future event." *Makah*, 910 F.2d at 558 (citing *Northern Alaska Environmental Center v. Hodel*, 803 F.2d 466, 468 (9th Cir. 1986)); *Northrop Corp.*, 705 F.2d at 1046 (holding "[s]peculation about the occurrence of a future event ordinarily does not render all parties potentially affected by that future event necessary or indispensable parties under Rule 19."). The lower court's error is even more apparent when

reminded that the Amended Tribes affirmatively amended their compacts to delete the disputed provision at issue from their compacts.

In fact, "[i]t is generally recognized that a person does not become indispensable to an action to determine rights under a contract simply because that person's rights or obligations under an entirely separate contract will be affected by the result of the action." *Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Center, Inc.*, 564 F.2d 816, 820 (8th Cir. 1977); *see Northrop Corp.*, 705 F.2d. at 1044. This rule is not made inapplicable merely because an absent party happens to be a government. *Northrop Corp.*, 705 F.2d. at 1044. As this Court observed in *Disabled Rights*, an absent party is not a necessary party even if it "stands to lose a valuable source of income – not an insubstantial consideration." *Disabled Rights Action Committee v. Las Vegas Events, Inc.* , 375 F.3d 861, 883 (9th Cir. 2004).

Moreover, the District Court's reasoning ignores the fact that the State, at any time, could reinterpret the terms of the 1999 Compacts in a manner different than that purportedly relied upon by the Amended Tribes when they pursued their compact amendments. The Amended Tribes' business decision to pay more money to the State in order to delete the 1999 Model Compact's restrictions on gaming devices does not vest these tribes

with a legally protected interest to prevent another tribe from seeking a judicial interpretation of a provision these Amended Tribes affirmatively chose to delete from their compacts. This Court's prior holdings make clear that Rule 19 should not be used to avoid business competition, yet that will be the result in this case if this Court does not reverse the lower court's holding.

III. *MAKAH* CONTROLS THE ANALYSIS OF THIS CASE

A. THE STATE AGGREGATE LIMIT FORMULA FOR GAMING DEVICE LICENSES IS NOT A "FIXED FUND" GIVING RISE TO A LEGALLY PROTECTED INTEREST

The District Court erred by ignoring this Court's holdings that it is not simply the existence of a fixed fund but the requested allocation of a fixed fund that would necessarily take something away from an absent party that creates a legally protected interest. ER 59. Although this Court held in *Makah* that the allocation of a fixed fund "may create a protectable interest in beneficiaries of the fund," the reasoning in that case only confirms that no absent tribes have a legally protected interest that may be prejudiced in this case. *Makah*, 910 F.2d at 558 (emphasis added).

In *Makah,* this Court reviewed the district court's dismissal for failure to join all indispensable parties to the plaintiff-tribe's action concerning the government's allocation of a salmon harvest amongst twenty-four Indian tribes, each with treaty-based rights to share in the salmon harvest. *Id.* at 557. The district court in *Makah* likened the harvestable portion of the salmon run, which had been scientifically quantified through a rigorous statutory administrative process, to a fixed fund. *Id.* The district court further determined that other treaty tribes were necessary parties because increasing the Makah Tribe's share of the harvest would necessarily reduce the number of salmon available for harvest by the other tribes in violation of these other tribes treaty rights to share in the fixed fund of salmon. *Id.*

Moreover, before concluding that other treaty tribes with treaty rights to share in the fishery were indispensable, the District Court in Makah engaged in a rigorous analysis wholly lacking in this case. As the District Court in Makah noted:

> "Simply because a number of parties harbor an interest in a specific quantity of pie, does not necessarily mean that their claims are conflicting. There may be more than enough pie to satisfy all of the claims and the interests are therefore *not always* mutually exclusive.... But when, as in this case, the parties' interest is in a specific percentage of the pie, and the combined request of the parties exceed 100% of the pie, the court cannot afford one relief without affecting the rights of the

> others. In that instance, the claims are mutually exclusive, and the problem of indispensability of an absent party is accentuated."
>
> *Makah Indian Tribe v. Verity*, Not Reported in F.Supp., 1998 WL 144137, 21 (W.D. Wash. 1998).

In short, the State Aggregate Limit of Gaming Device licenses is not a fixed fund creating a legally protected interest because San Pasqual is not asking the court to allocate or reallocate anything. Unlike the finite natural resource of salmon in *Makah,* San Pasqual does not seek the allocation or reallocation of any Gaming Device licenses (its salmon) to itself or any other tribe. *Makah* emphasized the importance of considering not just whether any absent party may have a protectable interest in the subject matter of the action, but also whether that interest would, in fact, be prejudiced by a ruling in the party's absence.

Here, San Pasqual's requested relief would only add additional Gaming Device licenses to the statewide licensing pool, resulting in an increase of Gaming Devices operated statewide. Any tribe can accomplish that same result by amending its compact or signing a new compact with the State, and therefore this lawsuit will not prejudice any interest that could be protected. Additionally, participation in future license draws (and payment of license fees) is purely voluntary. This action would not invalidate any other tribes' licenses and no tribe has a specific percentage interest in the

Gaming Device license pool. Thus, no 1999 Compact tribe has the sort of legally protected interest in the fixed fund of salmon that the treaty tribes had in *Makah.*

B. SAN PASQUAL'S CLAIM FOR PROSPECTIVE RELIEF MAY BE ADJUDICATED WITHOUT THE PRESENCE OF OTHER TRIBES

The District Court erred in concluding that the relief sought by San Pasqual is not prospective. The District Court declared that San Pasqual's lawsuit was retroactive because San Pasqual wishes "to overturn the State's 2002 calculation of the aggregate Gaming Device license limit and increase that limit as it applies to San Pascal [sic]." ER 63-64. The District Court abused its discretion by failing to distinguish between retroactive relief that necessarily would take something away from the absent tribes and the prospective relief that San Pasqual seeks to ensure that the State will abide by the terms of the Compact going forward.

In *Makah*, the plaintiff-tribe made two types of claims for relief. *Makah*, 910 F.2d at 557. The first type of claim for relief sought prospective declaratory and injunctive relief regarding the government's failure to act in compliance with the controlling federal regulations. *Id.* As to these types of claims for relief, this Court held that "[t]o the extent that [a plaintiff] seek[s]

relief that would affect only the future conduct of the administrative process, the claims ... are reasonably susceptible to adjudication without the presence of other tribes." *Makah*, 910 F.2d at 559. For the second type of claim for relief, the Makah tribe sought retroactive injunctive relief that would have taken away salmon from other tribes and given those salmon to the Makah tribe. *Id.*

This Court reasoned in *Makah* that claims seeking prospective injunctive relief were "reasonably susceptible to adjudication without the presence of the other tribes,...[who] would not be prejudiced because all of the tribes have an equal interest in an administrative process that is lawful." *Id.* This prospective type of claim is similar to San Pasqual's request for a declaration of the true number of Gaming Device licenses authorized by its Compact so that the State will conduct all future draws properly.

This Court's holding regarding the first type of claims for prospective relief is controlling in the instant matter. San Pasqual does not seek the reallocation of previously issued Gaming Device licenses (its salmon). San Pasqual is simply requesting declaratory relief as to the number of Gaming Device licenses authorized in the aggregate by San Pasqual's Compact. Because San Pasqual seeks limited prospective "relief that would affect only the future conduct of the administrative process," the other tribes that signed

the 1999 Model Compact are not necessary parties as defined in Rule 19. *Makah*, 910 F.2d at 559.

IV. ASSUMING *ARGUENDO* THAT ABSENT TRIBES HAVE A LEGALLY PROTECTED INTEREST, THE DISTRICT COURT RELIED SOLELY ON SPECULATION THAT PREJUDICE WOULD RESULT

Assuming *arguendo* that the absent tribes have a legally protected interest in the interpretation of San Pasqual's Compact, the District Court abused its discretion in relying on pure speculation about possible prejudice to absent parties, rather than taking, as is required by Rule 19, "a closer look at the real probability and severity of prejudice caused by nonjoinder." 4 Moore's Federal Practice ¶19.05[1][a] (2006).

The District Court assumed, without any competent evidence, that absent gaming tribes would be prejudiced if San Pasqual's requested relief were granted and additional gaming device licenses were made available to Non Amended 1999 Compact Tribes. ER 59-60. But there is simply no competent evidence in the record to support this assumption. There was no evidence before the District Court that the availability of additional gaming device licenses would saturate or otherwise affect any other tribal gaming operation. Moreover, even if some tribe, somewhere, might oppose the expansion of another tribe's gaming operation, that "fact" would be

irrelevant for purposes of Rule 19's necessary party analysis because the relevant inquiry under Rule 19(a) is not whether an absent party has a financial interest at stake, but "whether the absent party has a *legally protected interest* in the suit." *Makah Indian Tribe*, 910 F2d. at 558 (emphasis added).

The lower court compounded its error when it struck a declaration from gaming expert, I. Nelson Rose, establishing that no prejudice would occur to tribes if the State Aggregate Limit is increased as requested by San Pasqual. ER 11-19. The District Court erred in concluding that the only relevance of the Rose Declaration was to the merits of San Pasqual's substantive claim for relief. ER 52. However, the Rose Declaration goes to the heart of the lower court's obligation to take "a closer look at the real probability and severity of prejudice caused by nonjoinder." 4 Moore's Federal Practice ¶19.05[1][a] (2006). Instead, the District Court merely assumed that prejudice would occur, despite the Rose Declaration establishing that the slot machine market in California could support a substantial increase in the number of slot machines (ER 19) and the fact that seven tribes amended their compacts to permit the operation of an unlimited number of slot machines -- strong evidence that the California market can support a large increase in the number of slot machines.

In striking the Rose Declaration, the District Court abused its discretion by refusing to even consider the only competent evidence before it regarding the "real probability of prejudice" to the absent tribes, and instead relied on nothing but uninformed, unfounded and speculative assertions of prejudice by the State and its *Amici* Tribes. Therefore, San Pasqual respectfully requests this Court to reverse the Order dismissing San Pasqual's lawsuit.

V. ABSENT PARTIES DO NOT BECOME INDISPENSABLE TO SAN PASQUAL'S ACTION TO DETERMINE ITS RIGHTS UNDER ITS COMPACT SIMPLY BECAUSE THE ABSENT PARTIES' RIGHTS UNDER A SEPARATE COMPACT MAY BE AFFECTED BY THE OUTCOME OF THIS ACTION

If the decision of the District Court is allowed to stand, Rule 19 will become a potent weapon by absent parties to prevent litigation when their financial obligations under a separate contract may be affected. But that is not, and should not be the law under Rule 19. In fact, it is generally recognized that a nonparty to a contract is not a necessary party to an adjudication of rights under the contract simply because the nonparty's rights or obligations under a separate contract may be affected by the result of the action. *Northrop Corp.*, 705 F.2d at 1044. This rule is not made

inapplicable merely because an absent party happens to be a government. *Id.*

The lower court does not just widen the scope of Rule 19's definition of a legally protected interest – it drives a truck right through it. Citing to *American Greyhound*, the District Court asserts that "[i]nterests arising from terms in bargained contracts are also legally protectable, so long as the relief sought would, if granted, render 'the compacts less valuable to the tribes' and thereby 'impair' tribal interests in them." ER 57 (quoting *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002). But the District Court's reliance on *American Greyhound* is misplaced because the plaintiffs in that case sought the termination of absent Indian tribes gaming compacts – a result not possible in this matter under the relief requested by San Pasqual.

In *American Greyhound*, plaintiffs sought to stop Arizona's governor from permitting the automatic renewal of the gaming compacts with the tribes. *American Greyhound*, 305 F.3d at 1020. This Court looked at the severity of the prejudice to the tribes and concluded that the absent Indian tribes were necessary and indispensable because the plaintiffs sought to end Indian Gaming in Arizona. *Id.* at 1025. Because termination of their compacts was the requested relief in *American Greyhound*, this Court held

that the prejudice to the tribes was enormous. *Id.* In the instant matter, the District Court looked at the result in *American Greyhound*, but ignored the thrust of this Court's concern (automatic termination) and instead focused on dicta describing the effect of the automatic termination.

Similar to the reasoning in *American Greyhound*, this Court's decisions in *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999) and *Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2000), affirmed dismissal where absent tribes could not be joined, but only when the plaintiffs sought to set aside or enjoin performance of those absent tribes' contracts. Because the plaintiffs requested the most severe actions with respect to the absent tribes contracts, "equity and good conscience" demanded dismissal of those lawsuits.

Both *Clinton* and *Manybeads* were decided on the same fact pattern: the absent party found to be indispensable, the Hopi Tribe, was *an actual signatory* to the leases the plaintiffs requested the court to nullify. In *Clinton*, the Ninth Circuit held that the Hopi Tribe was a necessary party because the Hopi Tribe would be prohibited from "fulfilling its obligations under the Settlement Agreement to enter into such leases and would deprive the Tribe of substantial compensation from the United States." *Clinton*, 180 F.3d at 1089. In *Manybeads*, the Ninth Circuit again held the Hopi Tribe to

be "indispensable" because the plaintiffs' requested relief would cause "the undoing of the Agreements to the substantial prejudice of the Hopi Tribe." *Manybeads*, 209 F.3d at 1166.

In sum, the absent tribes were found to be indispensable in *American Greyhound*, *Clinton* and *Manybeads* under the general rule that "all parties who may be affected by a suit to set aside a contract must be present." *Northrop Corp.*, 705 F.2d at 1044; *American Greyhound*, 305 F.3d at 1020; *Clinton*, 180 F.3d at 1089; *Manybeads*, 209 F.3d at 1166. However, the courts' concern was not just some impact, but the *termination* of the absent party's contract. *Id.* But in an action like San Pasqual's that does not seek to set aside or enjoin performance of any tribal-state gaming compact, this rule is inapplicable. *Disabled Rights Action Committee*, 375 F.3d 882 (declaring that a party is not necessary to a "suit that does not threaten to destroy [its] contract nor [its] bargained-for rights.").

Moreover, this Court has made clear that absent parties do not become indispensable to an action like San Pasqual's to determine rights under a contract, simply because the absent parties rights under a separate contract may be affected by the outcome of the action. *Northrop*, 705 F.2d at 1044. In *Northrop Corp.*, a defense contractor sued an aircraft manufacturer arising out of a teaming agreement entered into at the Government's request

to develop military aircraft. *Id.* The Court found that the U.S. Government was not a necessary party because neither the defense contractor's allegations or claims for relief sought to invalidate or enjoin performance under any contract between the U.S. Government and the defendant aircraft manufacturer. *Id.*

Additionally, in *Disabled Rights Action Committee*, this Court held the Nevada State University System was not a necessary party to an advocacy group's action against the sponsor and presenter of a rodeo held in arena owned by the University System. *Disabled Rights Action Committee*, 375 F.3d at 881-83. The plaintiff-advocacy group sought to cease the operation of the rodeo at the University System's arena. *Id.* at 879. This Court further reasoned that although the requested relief may cause the Rodeo Presenter to breach the licensing agreement with the University System, that contract would remain legally binding and therefore the University System was not a necessary party. *Disabled Rights Action Committee*, 375 F.3d at 881-83.

In sum, "dismissal is a drastic remedy ... which should be employed only sparingly" and only when in "in equity and good conscience" the action must be dismissed. *Teamsters Local Union No. 171 v. Keal Driveaway Co.*, 173 F.3d 915, 918 (4th Cir. 1999). Because no tribe is a signatory to San

Pasqual's Compact and because granting the limited relief requested by San Pasqual would not set aside or enjoin performance of any other compact, the District Court erred in concluding that continuation of this case will prejudice another tribe's *legally protected interest. Northrop Corp.*, 705 F.2d at 1044; *Disabled Rights Action Committee*, 375 F.3d 881-83.

VI. 19(a)(2)(ii): THE ADJUDICATION OF SAN PASQUAL'S CLAIM WILL NOT SUBJECT THE STATE TO "INCONSISTENT OBLIGATIONS"

This appeal presents an issue of first impression for the Ninth Circuit. While this Court has never ruled on the difference between an "inconsistent obligation," as required by Rule 19, and an inconsistent adjudication, the First Circuit Court of Appeal, the Central District Court of California and the District Court of Massachusetts have written persuasive decisions outlining the difference between the two terms. Additionally, San Pasqual did not find any conflicting cases nor has the State or the *Amicus* tribes presented any contrary case law.

While it was unnecessary for the District Court to conduct this part of Rule 19 analysis because no absent party claimed a legally protected interest, it is abundantly clear that the lower court misconstrued the definition of an "inconsistent obligation" for purposes of Rule 19 and

wrongly asserts that Rule 19 applies because "other tribes [may] seek and obtain a different aggregate number ruling." ER 56. However, that a party "might obtain different results in different cases *does not establish a basis for Rule 19 joinder.*" *Blumberg v. Gates*, 203 F.R.D. 444, 447 (C.D. Cal. 2001) (emphasis added).

"Inconsistent adjudications are not the same as inconsistent *obligations*." *Id.* at 446 (emphasis in original). Inconsistent obligations occur when a party must breach one court's order to comply with another court's order concerning the same incident. *Delgado v. Plaza Las Americas, Inc.*, 139 F.3d 1, 3 (1st Cir. 1998). It is for this reason that inconsistent obligations are "typically created by allocation of a limited fund to which absent parties are entitled." *Morongo Band of Mission Indians*, 34 F.3d at 908. The reason being is that a defendant cannot allocate a limited fund in two different ways at the same time without breaching at least one court's order.

In contrast, inconsistent adjudications occur when two separate courts arrive at two separate results. *Delgado,* 139 F.3d at 3. The distinction between "inconsistent obligations" and "inconsistent adjudications" is of critical importance to the instant matter.

Additionally, Rule 19 requires a finding by a court that a party would

be "subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations *by reason of the claimed interest.*" F.R.C.P. 19 (Emphasis added). Every tribe that amended its compact to permit the operation of unlimited gaming devices deleted the State Aggregate Limit from its compact. Therefore, the *Amicus* tribes did not and could never bring a lawsuit for a judicial determination of the State Aggregate Limit and thereby subject the State to inconsistent adjudications by reason of their claimed interest. The District Court abused its discretion and improperly expanded the scope of the law when it failed to limit the substantial risk of inconsistent obligations to those that arise "by reason of the claimed interest."

The District Court also improperly applied the law when it summarily assumed that the State would be exposed to inconsistent obligations, without evidence that any other reasonable interpretation besides San Pasqual's existed. Rule 19 requires more than a risk that inconsistent obligations may arise; it requires a "substantial risk." The District Court improperly expanded the scope of Rule 19 by assuming a "substantial risk" of conflicting rulings without knowledge of the interpretations. San Pasqual still asserts that conflicting rulings by courts would create, at most, inconsistent adjudications and not "inconsistent obligations" as required by

Rule 19. However, the lower court committed reversible error by assuming a "substantial risk" of multiple interpretations in the infancy of the litigation before any evidence before the Court on the ultimate issue. *Northrop Corp.*, 705 F.2d at 1046 (holding "[s]peculation about the occurrence of a future event ordinarily does not render all parties potentially affected by that future event necessary or indispensable parties under Rule 19.").

Additionally, assuming *arguendo* there exists a substantial risk that the State would be subject to inconsistent obligations, the State assumed that risk when it waived its sovereign immunity for breach of compact claims and signed sixty-one separate and distinct bilateral compacts with sixty-one different tribes that could assert sovereign immunity against one another. *See Brown v. American International Group, Inc.*, 339 F.Supp.2d 336, 343 (D. Mass. 2004) (holding that insureds were not indispensable parties because the risk of inconsistent obligations was due to the terms of the form insurance contract itself and not because of absent parties). Thus, the risk of inconsistent obligations is due not to the absence of other tribes, but to the terms of the 1999 Model Compacts that the State drafted. *See id.*

For all these reasons, the District Court abused its discretion in concluding that "inconsistent obligations," as defined by Rule 19, would result from this Court's adjudication of San Pasqual's claim for relief.

VII. ASSUMING *ARGUENDO* THAT OTHER TRIBES ARE DEEMED NECESSARY, THEY ARE NOT INDISPENSABLE. A NECESSARY PARTY IS NOT ALWAYS AN INDISPENSABLE PARTY

If an absent party is deemed "necessary to the suit" and cannot be joined, then the court must determine, by balancing the guiding factors of Rule 19(b), whether the absent party is "indispensable" such that "in equity and good conscience the suit should be dismissed." *Clinton*, 180 F.3d at 1088. The demands of equity and good conscience "can only be determined in the context of particular litigation." *Provident Tradesmen Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118 (1968).

Despite the overlapping considerations between the two analyses, "indispensability must meet a higher standard than necessity." *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. ENC Corp.*, 464 F.3d 885, 891 (9th Cir. 2006). This more searching inquiry demands "a closer look at *the real probability* and severity of prejudice caused by nonjoinder," thus requiring the court to "determine whether nonjoinder actually will result in the kind of prejudice hypothesized" under Rule 19(a). 4 Moore's Federal Practice ¶19.05[1][a] (emphasis added).

In making this determination, the Court must apply a four-part factor test, and decide (1) whether there is any 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. *Makah Indian Tribe,* 910 F.2d. at 559.

Similar to the analysis in determining whether an absent party is necessary, the prejudice determined in the first factor must impair a legally protected interest. *American Greyhound Racing*, 305 F.3d at 1024-25. For all of the reasons stated before, no tribe claimed a legally protected interest that, as a practical matter, would be impaired by this lawsuit.

As for the second and third factors, the Court should shape the relief to lessen any prejudice, and at the same time could craft an adequate remedy in the absence of the tribes with separate but similar compacts. San Pasqual seeks a judicial declaration that its Compact authorizes at least 10,549 more Gaming Device licenses than the State's interpretation. As a court's jurisdiction extends only to the parties in this case, any such judicial interpretation would only be binding upon San Pasqual. As San Pasqual is limited by its Compact to the operation of only 2,000 Gaming Devices, San Pasqual may only obtain 428 additional Gaming Device licenses. ER 48. San Pasqual's additional 428 Gaming Devices pales in comparison to the unlimited Gaming Devices that each of the seven tribes with amended compacts are permitted to operate, and thus minimizes any potential

prejudice.

The fourth factor under the Rule 19 inquiry weighs heavily against dismissal because no alternative forum exists for San Pasqual. If dismissal is upheld by this Court, San Pasqual has no remedy from the State's unilateral interpretation of its Compact and no way to receive a neutral judicial determination of the total number of Gaming Device licenses authorized in the aggregate by its Compact.

The prejudice to San Pasqual is not just the loss of some abstract right to have its day in court. By unfairly restricting the number of Gaming Device licenses that may be issued in the aggregate, the State deprives San Pasqual of its most significant economic resource. San Pasqual negotiated its Compact with the State in good faith and reasonably counted on the bargained-for opportunity to obtain and operate a total of 2,000 Gaming Devices, the proceeds of which are necessary to fund a myriad of programs that benefit the tribe, its members and surrounding community. San Pasqual also bargained in good faith for the opportunity to seek judicial review of the Compact in the event of a dispute as to its terms.

The State's contention, and now the District Court's decision that San Pasqual has an appropriate remedy in negotiating a new compact or an amendment to its existing Compact to operate additional gaming devices is

condescending – at best. *First,* the State is unfairly limiting the number of Gaming Devices licenses authorized under its Compact with San Pasqual. *Second,* the State now contends that despite the dispute resolution process set forth in § 9.1 of the Compact, San Pasqual cannot challenge the State's unilateral interpretation of a crucial provision in the Compact. *Third,* a new or amended compact would force San Pasqual to pay far more money to the State in exchange for the right to operate additional machines – a right San Pasqual already has under its current Compact.

VIII. THE DISTRICT COURT'S RULING PERMITS THE STATE TO CONTINUE TO DICTATE THE TERMS OF THE COMPACT, AND IF UPHELD NO TRIBE WILL EVER BE ABLE TO CHALLENGE THE STATE'S BREACH OF THE COMPACT

The District Court's holding that all Compact tribes must be joined to this lawsuit in order for San Pasqual to enforce its rights under the Compact will make illusory the Compact provisions that explicitly created a judicial remedy for breaches of the Compact by the State. Under this Court's recent holding in *Marceau v. Blackfeet*, 455 F.3d 974, 982-83 (9th Cir. 2006), a party to a contract cannot sign a contract with a plaintiff that contains judicial remedies, bind the plaintiff into fulfilling obligations, and then present an argument that would cause the contractual remedies to be

illusory. This Court stated that such actions would be "repugnant to the American theory of sovereignty." *Id.* at 982.

Yet, the State, and now the lower court, have done exactly that in this case. Compact § 9.1(d) specifically permits that "claims of breach or violation of this Compact" may be "resolved in the United States District Court where the Tribe's Gaming Facility is located" after a party adheres to the other provisions of §9.1.

In explicit and detailed terms, the Compact contains a waiver of both San Pasqual's and the State's sovereign immunity in the event that a dispute arises under the Compact. This waiver of sovereign immunity was an extraordinary action bargained for to ensure that one party did not receive the "final word on the interpretation of the compact." *See Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1044 (9th Cir. 1996) (stating that "allowing [one party], through the Crow Tribal Gaming Commission, to have the final word on the interpretation of the compact would render this provision difficult to enforce against [that party]. The parties could not have intended this result."). The District Court has fundamentally altered the intent of the parties, preventing San Pasqual from ever seeking a judicial determination of this crucial and highly-debated provision of the Compact. This is not the "good will and cooperation" and "mutually respectful

government-to-government relationship" the State agreed to when it entered into a Compact with San Pasqual. ER 5.

The State argued and the District Court agreed that tribes with separate but similar compacts are indispensable parties because each has a legal and economic interest in a judicial construction of the 1999 Compact. But all breach of compact claims for relief would necessarily require a judicial construction of the provision alleged to be breached. Thus, the District Court's reasoning that the other tribes are necessary or indispensable parties when interpreting common provisions in the Compact would forever preclude the judicial review that San Pasqual bargained for in the Compact, and prevent San Pasqual or any compact tribe from challenging the State's unilateral interpretation – no matter how outrageous.

Again, this Court has long cautioned against such an imbalance of tribal-state governmental interest. *Cabazon v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997) (holding that in passing IGRA, Congress "did not create a mechanism whereby states can make empty promises to Indian Tribes during good faith negotiations in Compacts, knowing they may repudiate them with immunity whenever it serves their purpose."). Moreover, the Ninth Circuit in *Cabazon* expressly noted its agreement with the district court's recognition of the importance of enforcement of tribal-state gaming

compacts in federal courts:

> "It would be extraordinary were the statute to provide jurisdiction to entertain a suit to force the State to negotiate a compact yet provide no avenue of relief were the State to defy or repudiate that very compact. Such a gap in jurisdiction would reduce the very elaborate structure of IGRA to a virtual nullity since a state could agree to anything knowing that it was free to ignore the compact once entered into."

Cabazon v. Wilson, 124 F.3d at 1056 (citing district court order).

IX. THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO RULE ON WHETHER THE STATE SHOULD BE JUDICIALLY ESTOPPED FROM ARGUING THAT OTHER SIGNATORY TRIBES ARE INDISPENSABLE PARTIES TO AN ACTION SEEKING JUDICIAL INTERPRETATION OF A 1999 MODEL COMPACT

By way of background, shortly after the 1999 Model Compacts were signed, a group of signatory tribes established a system to administer the Gaming Device License Draw Process, including the collection of fees, issuance and governance of Gaming Device licenses and remittance of payments to the California Gambling Control Commission for deposit into the Revenue Sharing Trust Fund. The signatory tribes contracted with Sides Accountancy Corporation (hereinafter "Sides") for Sides to perform the draw administration duties outlined above. Thereafter, in 2001 the State via its administrative agency, Defendant-California Gambling Control Commission, filed a lawsuit in State Court against the tribe-appointed

License Draw Trustee, Sides Accounting. ER 20-27.

The 1999 Model Compact does not expressly state who is responsible for administering the Gaming Device License draw process, and the State has no authority over tribal gaming operations unless a tribe concedes that authority in the Compact. *Cabazon Band of Mission Indians*, 124 F.3d at 1059 (stating that "[t]he State, however, has no jurisdiction over gaming activities that are not the subject of a Tribal-State compact.").

In the Sides Accounting Lawsuit, the State asked the Sacramento County Superior Court to declare, under the terms of the 1999 Model Compacts, that the State, and not the tribe-appointed License Draw Trustee, "is the entity authorized to conduct draws for allocation of tribal gaming device licenses amongst California gaming Indian tribes." ER 25.

Thus, in the Sides Accounting Case, the State sought a judicial determination that it alone could administer the Gaming Device license draw process, under *all* sixty-one 1999 Compacts, and argued that no tribe was necessary or indispensable to the State's request for a judicial determination of *all* sixty-one 1999 Compacts. ER 20-27 & 28-31. A few tribes notified the superior court that, pursuant to California Code of Civil Procedure § 389, it was without jurisdiction to adjudicate the matter due to the State's failure and inability to join the Compact tribes. ER 32-35. It should be noted that

Rule 19 imposes an identical test for indispensability as California Code of Civil Procedure § 389. *Conrad v. Cal. Unemp. Ins. Appeals Board*, 47 Cal. App. 3d 237, 241 (1975). The State successfully asserted that the other tribes were not indispensable parties and received a temporary restraining order from the court. ER 36-37.

After the Sides Accounting Case, the State's sudden concern about the financial interest and sovereign rights of other tribes rings particularly hollow, and nothing more than a hypocritical attempt to hide behind Rule 19 to avoid adjudication on the merits of San Pasqual's claim. Again, this Court has made clear that Rule 19 should not be used to avoid adjudication on the merits, and where as here, no other tribe with the disputed compact provision has claimed an interest, "it is inappropriate for one defendant to attempt to champion an absent party's interest." *Morongo Band of Mission Indians*, 34 F.3d at 908.

Moreover, to prevent an abuse of the judicial process, the State should be judicially estopped from asserting that other tribes are indispensable parties to this action. Judicial estoppel prevents a party from asserting a claim in a legal proceeding that is "clearly inconsistent" with a claim taken by that party in a previous proceeding. *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 605 (9th Cir. 1996) (holding that "the

doctrine of judicial estoppel is not confined to inconsistent positions taken in the same litigation."). It is an equitable concept intended "to protect the integrity of the judicial process." *New Hampshire v. Maine*, 532 U.S. 742, 749 (U.S. 2001).

The factors courts rely upon in determining whether to apply judicial estoppel are met in this case. First, a party's later position must be "clearly inconsistent" with its earlier position. *Id.* at 750. Second, courts inquire whether that party was successful in asserting the earlier position. *Id.* at 750-51. Finally, courts consider whether the party seeking the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 751.

Clearly, these factors are satisfied and compel the conclusion the State should be judicially estopped from asserting that other tribes are indispensable to this action. But in failing to even rule on this issue, the District Court abused its discretion.

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CONCLUSION

For all the reasons set forth above, the District Court's judgment must be reversed and remanded with instructions to rule on the merits of San Pasqual's claim.

DATED: August 16, 2007 SOLOMON, SALTSMAN & JAMIESON

By: _____

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rule of Appellate Procedure 32 (a)(7)(c) and 9th Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 10,922 words.

DATED: August 16, 2007 SOLOMON, SALTSMAN & JAMIESON

By: _____

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STATEMENT OF RELATED CASES

Rincon Band of Luiseno Mission Indian of the Rincon Reservation v. Schwarzenegger, Court of Appeal No. 06-55259. This case also involves claims for relief arising from a gaming compact between a California Indian tribe and the State of California, including a request for a judicial determination of the State Aggregate Limit.

Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. State of California, Court of Appeal No. 06-16145. This case also involves claims for relief arising from a gaming compact between a California Indian tribe and the State of California, including a request for a judicial determination of the State Aggregate Limit.

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 426 Culver Boulevard, Playa Del Rey, California 90293.

On August 16, 2007, I served the foregoing document described as: **PLAINTIFF-APPELLANT'S OPENING BRIEF** on the interested parties in this action by placing a true copy thereof in an enclosed sealed envelope addressed as follows:

Randall Pinal, Esq. Office of the Attorney General 110 W "A" Street, #1100 San Diego, CA 92101 Randy.pinal@doj.ca.gov	Peter H. Kaufman, Esq. Office of the Attorney General 110 West "A" Street, #1100 San Diego, CA 92101 Peter.Kaufman@doj.ca.gov

[X] BY MAIL. I deposited such envelopes in the mail at Playa del Rey, California. The envelope was mailed with first class postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing of correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if the postal cancellation date or the postage meter date is more than 1 day after date of deposit for mailing in this Proof of Service.

Executed on August 16, 2007, at Playa del Rey, California.

[ ] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[X] (Federal) I declare under penalty of perjury that the above is true and correct.

Alexandria Alamango