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 REPLY BRIEF

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I. INTRODUCTION

Rule 19 requires a fact specific inquiry but the State's strained attempt to construe absent tribes' financial stake in the outcome of this litigation as a legally protected interest ignores the limited relief requested by San Pasqual and begs the question: What, as a practical matter, will happen if San Pasqual's requested relief is granted? The answer to this question is straightforward and certainly not the parade of horribles asserted by the State.

If granted, San Pasqual's requested relief would make approximately 10,000 more gaming device licenses available through the statewide license draw process established in San Pasqual's Gaming Compact with the State. Thereafter, tribes like San Pasqual who operate less than 2,000 Gaming Devices under a non-amended 1999 Compact may choose to voluntarily participate in the license draw process by paying applicable licensing fees into the Revenue Sharing Trust Fund that is disbursed to California's non-gaming tribes. Not a single 1999 Compact tribe authorized to participate in this draw process chose to claim an interest in this case after being given written notice of San Pasqual's lawsuit. Regardless, no tribe, amended or non-amended, has a legally protected interest at stake in San Pasqual's action to receive a judicial determination of its bilateral Compact with the

State.

A handful of tribes, however, that bargained to eliminate the gaming device license provisions from their respective compacts have asserted an interest in this case, claiming their amended compacts will be "less valuable" if San Pasqual's requested relief is granted. There is not a shred of evidence in the record to support such speculation, but even if true, the claimed interest of these amended compact tribes is irrelevant because the required inquiry under Rule 19(a) is not whether an absent party has a financial interest in the "value" of their compact, but whether a legally protected interest of the absent party will be prejudiced by continuation of the suit.

If the arguments espoused by the State and adopted by the District Court become the law under Rule 19, (1) 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 the lawsuit after being provided written notice of the case; and (2) an absent party with a competing economic interest against a plaintiff can use Rule 19 to block competition if the value of an absent party's separate contract may be affected by the result of the action. Both results are contrary to the express prior holdings of this Court.

II. SUMMARY OF ARGUMENT

The District Court committed multiple reversible errors by failing to adhere to the specific analysis required by Rule 19. The argument espoused by the State and adopted by the District Court puts the cart before the horse in concluding the State will be prejudiced by multiple lawsuits without first establishing the threshold requirement that an absent tribe "claims" a legally protected interest in this particular action. While the State fails to show "inconsistent obligations" as required by Rule 19 and only asserts multiple lawsuits, the Court need not even examine the multiple lawsuit issue as no tribe has "claimed" a legally protected interest. Because no legally protected interest of another tribe is at stake in this lawsuit, the State improperly couches its multiple lawsuits argument under the Rule 19(a)(1) "complete relief" requirement to avoid the initial requirement that an absent party first claim a legally protected interest. This is improper, and the District Court's application of this erroneous standard is prejudicial error.

The District Court further erred with regard to the necessary party analysis by ignoring Rule 19(a)(2)'s express provision that an absent party must "claim" an interest. Instead, the District Court abused its discretion in conferring necessary party status on absent tribes that affirmatively chose not to claim an interest after receiving written notice of the action.

Additionally, no tribe, amended or non-amended, has a legally protected interest in the outcome of San Pasqual's action for a judicial determination of its bilateral Compact with the State. While only amended tribes have expressed their financial interest based upon the speculative argument that their amended compacts will become "less valuable," case law is clear that a financial interest in the "value" of a compact is not a legally protected interest.

Therefore, San Pasqual respectfully requests that this Court reverse the District Court's decision and permit San Pasqual to have its day in court.

III. 19(a)(1): THE DISTRICT COURT ERRED IN CONFERRING NECESSARY PARTY STATUS ON ABSENT TRIBES BECAUSE UNDER THIS COURT'S PRIOR HOLDINGS ABSENT PARTIES DO NOT BECOME NECESSARY, FOR PURPOSES OF THE "COMPLETE RELIEF" ANALYSIS, TO AVOID THE POSSIBILITY OF MULTIPLE LAWSUITS

The District Court erred by holding that "complete relief" could not be afforded under Rule 19(a)(1) because the State could be subject to multiple lawsuits from absent tribes. In doing so, the lower court skipped over Rule 19(a)(2)'s prerequisite that before a court considers whether a party may be subjected to inconsistent obligations, the absent party must "claim" a legally protected interest. *Northrop Corp. v. McDonnell Douglas*

Corp., 705 F.2d 1030, 1043 (9th Cir. 1983) (stating that Rue 19(a)(2)'s "[s]ubparts (i) and (ii) are contingent, however, upon an initial requirement that the absent party claim a legally protected interest relating to the subject matter of the action."). The "claim" requirement ensures that only an entity likely to become involved in litigation on this exact matter would be considered necessary. By shifting the analysis of inconsistent obligations from 19(a)(2) into 19(a)(1), the District Court committed reversible error by sidestepping the initial requirement that the absent party claim a legally protected interest and is therefore reversible error. F.R.C.P. 19.

This Court confirmed in *Disabled Rights* that "complete relief" could be accorded despite the recognition that the adjudication of the matter before the court, with only those parties present, would likely cause future disputes. *Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 880 (9th Cir. 2004). In *Disabled Rights*, the plaintiff was a non-profit organization that advocated for the rights of people with disabilities, and therefore sued a rodeo promoter and a rodeo sponsor to prevent the rodeo going forward until the venue was in compliance with the Americans with Disabilities Act *Id.* at 865-66. The rodeo was to be held at an arena owned by the University System of Nevada, pursuant to the contract between the rodeo promoter and the University System. *Id.* at 866. This Court

acknowledged that a ruling in favor of plaintiff could cause the rodeo promoter to breach its contract with the University System because such a ruling could prevent the rodeo going forward at that venue. *Id.* at 880. Despite this, the Court held the plaintiff "would still be able to obtain its objective of having the Rodeo presented at an accessible location," and therefore the "district court abused its discretion in concluding that absent University System, no meaningful relief is possible, so that University System in a necessary party under Rule 19(a)(1)." *Id.* This Court in *Disabled Rights* clearly cemented that the "complete relief" analysis under Rule 19(a)(1) concerns whether the plaintiff may receive "meaningful relief." In the instant case, San Pasqual will certainly receive "meaningful relief" as between itself and the State with a judicial determination of the bilateral Compact between the parties.

This Court's focus in *Disabled Rights* on meaningful relief under the Rule 19(a)(1) analysis is consistent with its holdings in *Northrop,* a case the *Disabled Rights* court relied upon as precedent. In *Northrop*, this Court addressed the similarity between the "necessary" analysis under Rule 19(a) and the "indispensable" analysis under Rule 19(b). *Northrop*, 705 F.2d at 1043 n. 15. In doing so, this Court noted that the "risk of leaving a defendant exposed to inconsistent obligations (19(a)(2)(ii)) is similar to the

prejudice to the defendant factor under (b); and whether complete relief can be accorded (19(a)(1)) is similar to the adequacy of relief under (b)." *Id.* Again, this Court acknowledged that the "complete relief" analysis is focused on whether plaintiff can receive an adequate remedy. *Id.* And again, no other party is required for San Pasqual to obtain adequate and meaningful relief.

In reliance on the above Ninth Circuit cases as precedent, several district courts have also held that the "complete relief" analysis under Rule 19(a)(1) centers on whether the plaintiff will receive an adequate remedy, and does not consider whether the defendant may face a future lawsuit from an absent party. For instance, in *Friends of the East Lake*, the district court stated "[t]he purpose of the 'complete relief' clause is to avoid duplicative litigation. [citation omitted]. It is to be interpreted narrowly, which is to say that the concern is in rendering complete justice among those already joined, *not in finding an absentee is necessary simply to avoid multiple litigation.*" *Friends of the East Lake Sammamish Trial v. City of Sammamish*, (2005) 361 F.Supp.2d 1260, 1271 (W.D. Wash 2005) (emphasis added) (citing *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir.)).

Similarly, in *County of Santa Clara*, the County of Santa Clara alleged that drug manufacturers overcharged the County. *County of Santa Clara v. Astra USA, Inc.*, 401 F.Supp.2d 1022, 1024 (N.D. Cal. 2005). Concerned that a verdict against the drug manufacturers would not be effective against drug distributors, the County requested the district court to join the drug distributors to the action in order to avoid future lawsuits between the County and the distributors. *Id* at 1031. In applying Rule 19(a)(1), the district court held that "[t]he Court's inability to issue such orders absent joinder does not preclude complete relief among the parties already present. *It only prevents complete relief as between Santa Clara and the wholesale distributors [the absent parties]. This argument therefore collapses*." *Id.* at 1032 (emphasis added).

Because San Pasqual and the State will receive complete relief between themselves, the District Court committed prejudicial error in holding that other tribes are necessary parties to this action. *See Disabled Rights*, 375 F.3d at 880. Thus, because no tribe is a necessary party under Rule 19(a)(1)'s "complete relief" analysis, this Court must now analyze whether an absent tribe is necessary under the claimed interest requirement of Rule 19(a)(2). If no tribe is deemed necessary after applying the multi-

step analysis of Rule 19(a)(2), then this Court must reverse the lower court's decision. F.R.C.P. 19.

IV. 19(a)(2): AFTER ALL COMPACT TRIBES RECEIVED PROPER NOTICE, NO TRIBE, INCLUDING COLUSA OR RINCON, CLAIMED AN INTEREST IN THIS LAWSUIT CONCERNING SAN PASQUAL'S BILATERAL COMPACT WITH THE STATE AND, IN FACT, RINCON EXPRESSLY DISCLAIMED AN INTEREST

The State's argument concerning the adequacy of San Pasqual's notice of this litigation to other tribes is a red herring. Unlike other lawsuits brought concerning a 1999 Compact, San Pasqual sent written notice of its lawsuit to all other 1999 Compact tribes to permit those tribes to claim an interest if, in fact, those tribes wished to claim an interest. Excerpts of Record (hereinafter "ER"), p.38-43. As stated in Appellant's Opening Brief, notice was proper on all tribes, and more than sufficient to provide the tribes with ample information of the issues contested herein. To wit, the November 13, 2006 letter to all Compact tribes states:

> "San Pasqual's Second Amended Compact alleges that the State has breached the Compact be refusing to make all Gaming Device licenses authorized by the Compact available through the Gaming Device license draw process. San Pasqual's sole claim for relief seeks only a judicial determination from the Court as to the correct number of Gaming Device licenses authorized in its Compact with the State." ER 43.

The real issue is that the State seeks to avoid judicial review of its unilateral interpretation of a key compact provision and substitute its "judgment" for the tribes. Every tribe, except those wishing to prevent increased competition from San Pasqual – an interest that is not a legally protected interest – have either voiced their support for San Pasqual's lawsuit to go forward or chosen not to claim an interest after being provided written notice of this action. The State's purported concern for the absent non-amended tribes' interests rings hollow and further confirms the *amici* tribes have nothing more than a financial stake in this litigation, not a legally protected interest that will be prejudiced by a favorable judgment to San Pasqual.

Moreover, the State's absurd argument that Colusa and Rincon claimed an interest in this matter is simply untrue as neither Colusa nor Rincon have done so. In fact, Rincon expressly urged this Court to reverse the lower court's decision and permit San Pasqual to receive adjudication on the merits of the case as a member of the *amicus* California Nations Indian Gaming Association (CNIGA). Moreover, Colusa received written notice of this action and affirmatively chose not to claim an interest in this lawsuit. Again, the State is wrongly attempting to substitute its biased "judgment" for the judgment of the tribes themselves.

V. 19(a)(2): AMENDED COMPACT TRIBES ARE NOT NECESSARY SIMPLY BECAUSE THEIR SEPARATE COMPACTS MAY BE "LESS VALUABLE" AS A RESULT OF THIS ACTION BECAUSE A FINANCIAL INTEREST IN THE OUTCOME IS NOT A LEGALLY PROTECTED INTEREST

The State's argument that a legally protected interest is created because a compact may become "less valuable" is contrary to established law that a financial interest does not create a legally protected interest. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). There is no evidentiary basis in the record to conclude the Amended Tribes' compacts will be "less valuable," but even if true, that fact is irrelevant under the Rule 19 because the absent Amended Tribes' financial stake is not a legally protected interest as required for conferment of necessary party status. *Id.* A correct determination that no absent tribe's legally protected interest is at stake in this matter concludes a court's Rule 19 analysis, and this Court should reverse the district Court's decision.

The State wrongly contends that *American Greyhound Racing, Inc. v. Hull,* 305 F.3d 1015 (9th Cir. 2002), supports its unfounded argument that when a ruling would render an absent party's compact "less valuable," a legally protected interest is created. In its Opening Brief, San Pasqual already addressed the true concern of this Court in *American Greyhound*, as well as *Clintonv. Babbitt*, 180 F.3d 1081 (9th Cir. 1997), and *Manybeads v.*

United States, 209 F.3d 1164 (9th Cir. 2000), namely that the absent party's contract would be decimated and not just possibly impaired. Each of these cases were decided under the "general rule" that "all parties to a contract are necessary in litigation seeking to 'decimate' that contract." *Wilbur v. Locke*, 423 F.3d 1101, 1114 (9th Cir. 2005). The Ninth Circuit has made clear that this rule is inapplicable to an action like San Pasqual's, which does not seek to set aside or enjoin performance of any other tribal-state gaming compact. *See Northrop Corp.*, 705 F.2d at 1044; *Disabled Rights Action Committee*, 375 F.3d at 881-83.

This general rule against "decimation" and not just mere impairment is consistent with the Committee Advisory Notes of Rule 19 that state:

> "[i]t is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but *they do not themselves negate the court's power to adjudicate as between the parties who have been joined.*"

Thus, in enacting Rule 19, Congress did not seek a *per se* ban of lawsuits proceeding in the absence of parties impaired by the action, but instead directed the courts to perform an equitable assessment of the very

serious harms of prohibiting a plaintiff from receiving an adjudication of a claim against the harm to an absent party by permitting the lawsuit to go forward. Correctly, this Court's holdings on the subject matter require a harm much greater than the "less valuable," i.e. a financial interest, standard proposed by the State.

VI. 19(a)(2): THE STATE CANNOT ESTABLISH THAT COMPETING ECONOMIC INTERESTS OF ABSENT INDIAN TRIBES RISE TO THE LEVEL OF A LEGALLY PROTECTED INTEREST IN THIS CASE

Throughout its brief, the State attempts to alchemize a legally protected interest from other tribes' financial interests in limiting the number of slot machines available to California Indian tribes. These attempts are unavailing. Instead, the State leads the Court down a tortuous path of unpersuasive ramblings in an effort to construe the competing economic interest of the amended compact tribes as anything but a financial interest. Those arguments finally give way to a moment of clarity on page 45 of its Answer Brief.

To wit, the State argues "San Pasqual's suggestion that awarding it 428 licenses 'pales in comparison to the unlimited Gaming Devices that each of the seven tribes with amended compacts are permitted to operate' *ignores the additional consideration* those tribes provided to the State in exchange

for the right to operate unlimited Gaming Devices." (Emphasis added). The interest claimed by the amended tribes is the difference in the amounts paid to the State to operate slot machines, i.e., "Who has a better deal?". The interest claimed by the amended tribes is they do no want to pay a higher amount to the State than San Pasqual will if it is successful in this action. While this is comparing apples to oranges as San Pasqual cannot operate more than 2,000 slot machines and each amended tribe can operate an unlimited amount of slot machines, the fact remains that their interest is purely financial and does not rise to a legally protected interest so as to prevent San Pasqual from having its day in court.

The State also admits in its Answer Brief on page 8 that "the 2004 Amended Compacts expressly repealed section 4.3.2.2 of the 1999 Compact – which had limited the total number of Gaming Device licenses available statewide and restricted each tribe to no more than 2,000 Gaming Devices." Despite acknowledging that the amended tribes no longer have the disputed provision in their contracts, the State concocts an argument that the amended tribes have a legally protected interest because their amended compacts require them to "maintain and continue paying fees to the State for all licenses previously obtained under the 1999 Compact." San Pasqual's lawsuit will not take away any licenses previously issued to a tribe; it could

only add licenses to the pool. Thus, San Pasqual's lawsuit could never prevent an amended tribe from maintaining the licenses.

VII. 19(a)(2): ASSUMING *ARGUENDO* THAT RENDERING A COMPACT "LESS VALUABLE" IS NOT A FINANCIAL INTEREST BUT A LEGALLY PROTECTED INTEREST, THE DISTRICT COURT COMMITTED PREJUDICIAL ERROR BECAUSE THERE WAS NO EVIDENCE TO SHOW THE AMENDED COMPACTS WOULD BECOME "LESS VALUABLE" AND STRUCK EVIDENCE TO THE CONTRARY

In response to San Pasqual's argument that the State provided no competent evidence to support the "less valuable" argument, the State argues that San Pasqual never provided the requisite standard for "competent evidence." This belabors the point. The simple truth is there is no evidence to support the State's argument. Neither the State nor the amended tribes submitted evidence that prejudice would occur, and therefore the District Court's determination that prejudice would result was based entirely on speculation.

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. Thus, if a tribe made $100 per slot machine before the

additional 10,549 slot machines were added to the license pool then that tribe would make $100 after the slot machines were added. There would be no effect on the value of any compacts. The District Court however improperly struck this evidence from the record. ER 52.

Moreover, the State's argument that tribes have a legally protected interest is an argument that, at best, is just form over substance. There is no interest that can be protected if any tribe can do exactly what the amended tribes have done and amend their compacts to have an unlimited number of slot machines. As a practical matter, there is no benefit in preventing 10,549 slot machines if the amended tribes may operate an infinite amount. Additionally, the State produced no fact and San Pasqual is aware of none that would prevent the State from re-interpreting the State Aggregate Limit in its self-anointed position of Gaming Device License draw administrator. Thus, there is no true expectation that the number of Gaming Devices or even Gaming Device licenses would ever remain the same.

Because no tribes, amended or non-amended, have a legally protected interest in this matter, this Court's analysis under 19(a)(2) must cease and its is respectfully requested that this Court reverse the decision of the district court.

VIII. 19(a)(2): UNLIKE THE DISTRICT COURT IN THE COLUSA CASE, THE LOWER COURT IN THIS MATTER DID NOT FIND THAT SAN PASQUAL REQUESTED THE ALLOCATION OF GAMING DEVICE LICENSES, AND THEREFORE THE LOWER COURT MISAPPLIED THE HOLDING OF *MAKAH*

San Pasqual does not request the court to allocate a Gaming Device license. ER 3. Despite this undisputed fact, the State repeatedly argues that this Court's holding in *Makah* that "[a] fixed fund which a court is asked to allocate may create a protectable interest in beneficiaries of the fund" is controlling in this matter. Answer Brief, p. 21, citing *Makah Indian Tribe* v. *Verity*, 910 F.2d at 558. This argument is irrelevant because a court is not being asked to allocate a license, and therefore the *Makah* "fixed fund" holding is irrelevant.

Because San Pasqual does not request the allocation of licenses, the State wrongly compares the instant matter to the Colusa case. In the district court decision for Colusa, that district court found that Colusa requested the allocation of 377 Gaming Device licenses to itself. Def's Supplemental Excerpt of Record p. 16. The lower court in this matter did not find that San Pasqual requested an allocation of gaming device licenses, as San Pasqual expressly states it does not want an allocation in the operative complaint,

paragraph 8. ER 3. Thus, these two cases are materially different and require separate analysis under the fact-specific review required by Rule 19.

San Pasqual does not seek the allocation of a single gaming device license to itself or any other tribe. San Pasqual's lone claim for relief seeking a judicial determination of the State Aggregate Limit is identical to the "narrow" procedural claim for prospective relief that this Court held did not impair a legally protected interest of the other tribes in *Makah*. *Makah*, 910 F.2d at 559. The lower court in this matter abused its discretion when it held that *Makah* mandated that other tribes be deemed necessary, when just the opposite is true. *Id.* Because no legally protected interest is at stake, a court's analysis ceases under for Rule 19(a)(2). As such, the District Court clearly abused its discretion and San Pasqual respectfully requests this Court reverse the lower court's decision on the matter.

IX. 19(a)(2): THE STATE'S DETERMINATION OF THE STATE AGGREGATE LIMIT IS CONTINUALLY EFFECTIVE AND A PROSPECTIVE REQUEST TO CORRECT THAT DETERMINATION FROM THIS DAY FORWARD IS MATERIALLY DIFFERENT THAN THE RETROACTIVE RELIEF SOUGHT IN *MAKAH* WHEREIN THE MAKAH TRIBE SOUGHT TO OVERTURN AN EXPIRED SALMON HARVEST QUOTA

San Pasqual states unequivocally that it does not request, nor will it request, a court to overturn any prior license draw or to have a single previously issued license revoked or reallocated. ER 3. Assuming San

Pasqual is successful on the merits, San Pasqual merely requests a new license draw immediately after the court declares the correct number of gaming device licenses. All previously issued licenses shall remain intact, and the only licenses to be available through that draw will be the new licenses added by the district court's decision, i.e. the difference between the number determined by the district court and the 32,151 argued by the State.

The difference between *Makah* and the instant matter is the effective period of the determinations being challenged. In the instant matter, the State's determination occurred in 2002 and carries forward each year for the remainder of the Compact's term, which is the year 2020 at minimum. In *Makah* a new harvest quota was set every year that determined how many salmon were appropriated to a tribe for that year. *Makah*, 910 F.2d at 557 (stating "the PFMC recommends yearly harvest rates to the Secretary of Commerce"). It is in the difference between the lengths of effective period that distinguishes San Pasqual's requested prospective relief from the requested relief in *Makah*. By the time this Court rendered its 1990 decision in *Makah*, the challenged 1987 quota determination in Makah had ceased being operative and was supplanted by the 1988, 1989 and 1990 quotas. Granting the Makah tribe's requested relief would have been retroactive

because one cannot in 1990 go back and re-fish those waters as if it were 1987.

In contrast, the State's 2002 determination still controls the draw process today, and unless changed by the State, will continue to be the operative determination until at least 2020. Thus, San Pasqual's relief is prospective because changing the State Aggregate Limit determination today will effect the operative and controlling determination from this day forward. All previously issued licenses shall remain valid, effective and in the possession of the tribe that previously was awarded said licenses.

The State posits that San Pasqual does not disagree with the procedures the State followed to determine the aggregate Gaming Device limit; it simply disagrees with the result. Answer Brief, p. 30. This is untrue. San Pasqual asserts that the State ignored the express terms of the Compact in Section 4.3.2.2, and unilaterally set an artificially low State Aggregate Limit. Had the State followed the proper procedures in interpreting the Compact, i.e. follow the express terms of the Compact, the State would have arrived at the proper result.

Because San Pasqual only asks for prospective relief on the procedural follies of the State, the district court erred in holding that other tribes were necessary parties to this action.

X. 19(a)(2): THIS COURT'S DECISION IN *MAKAH* WAS NOT BASED ON THE PUBLIC RIGHTS EXCEPTION AND THE STATE'S ARGUMENT TO THE CONTRARY IS A MISREPRESENTATION

Makah was not decided on the public rights exception, and it is a misrepresentation to argue so to this Court. *Makah*, 910 F.2d at 559. First, it is very telling that the State asserts the *Makah* "holding" was based on the public rights exception and then cites to a footnote in the decision for the purported "holding." To then review that footnote, which is the only location in the entire decision that the "public rights exception" is referenced, it is clear that the Court's holding that the absent parties were not necessary was not based on this exception and could never be as the public rights exception only applies after a court's determination that an absent party is necessary to determine whether an absent party is then indispensable. *Id.* Because this Court held "that the absent tribes are not necessary to the Makah procedural challenges, [this Court] conclude[d] that those claims should not have been dismissed and need not inquire further." *Makah*, 910 F.2d at 559.

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XI. 19(a)(2): THE AMENDED COMPACTS PERMITTING THE OPERATION OF UNLIMITED GAMING DEVICES PROVE THAT NO TRIBE HAS A LEGALLY PROTECTED INTEREST IN PRESERVING ITS MARKET SHARE OF GAMING REVENUES, NOR ANY REASONABLE EXPECTATION THAT THE NUMBER OF GAMING DEVICES STATEWIDE WILL REMAIN CONSTANT

The State misconstrues San Pasqual's argument when it states that San Pasqual suggests absent signatory tribes can avoid prejudice that may result from San Pasqual's suit by simply signing new or amended compacts. Answer Brief, page 46. Rather, San Pasqual points out the State's flawed arguments that a legally protected interest of the absent tribes will be prejudiced if additional gaming device licenses are made available in the voluntary draw process. The amended compacts confirm that no California tribe has a legally protected right to prevent another tribe from expanding its gaming operation, whether pursuant to amending its 1999 Model Compact to allow the operation of unlimited Gaming Devices as at least seven tribes have done, or from obtaining licenses to operate additional Gaming Devices as San Pasqual desires to do under the terms of its Compact. As each of the amended tribes proves, any tribe can amend a compact to operate an unlimited number of gaming devices, and therefore there is no possibility the amended tribes, or any other tribe, could truly expect the number of gaming

devices to remain constant. Rule 19 requires an analysis of the practical effects of the lawsuit. *Disabled Rights*, 375 F.3d at 878.

In practice, whether San Pasqual receives additional licenses from the State through this lawsuit or from amending its compact, as the amended tribes and the State advocate, the effect will be the same upon the amended tribes' purported interest in maintaining the number of gaming devices constant. In fact, because San Pasqual may only operate an additional 428 Gaming Devices under its current Compact as compared to an unlimited amount under a new compact, the State and the amended tribes' advocacy for San Pasqual to amend in its compact is contrary to their argument regarding a purported interest in maintaining the number of Gaming Devices operated, so as to protect the "value" of the amended compacts.

XII. 19(a)(2)(ii): BECAUSE THIS LAWSUIT SEEKS ONLY A JUDICIAL DETERMINATION OF THE BILATERAL COMPACT BETWEEN SAN PASQUAL AND THE STATE, THE STATE COULD NEVER INCUR AN INCONSISTENT OBLIGATION BECAUSE NO OTHER TRIBE COULD EVER REQUEST A DETERMINATION OF SAN PASQUAL'S COMPACT

In the instant matter, San Pasqual is only requesting a judicial determination of its Compact. ER 3. If another tribe sought a judicial interpretation of its compact, then that determination would be limited to

that tribe's compact. Thus, the State would never face inconsistent obligations or even inconsistent rulings because each ruling would be limited to the parties before the Court.

The State's argument that adjudicating San Pasqual's claim will cause the reinterpretation of every other 1999 Compact is simply not true and contrary to basic contract law. The meaning of every contract is determined by a court's determination of the intent and understandings of the parties. *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1091 (9th Cir. 2005) (stating that "[t]he intent of the parties is the governing notion of contract law.").

Furthermore, the State's argument that multiple litigation would "virtually guarantee the state exposure to inconsistent rulings" suggest the State itself is not assured of the validity of its own interpretation, further evidencing the need for an impartial judicial determination of a key compact term. Additionally, to the extent the State is concerned about resolving a dispute between itself and another tribe about the interpretation of the State Aggregate Limit, the State itself has the ability to initiate a lawsuit with all other tribes regarding the correct interpretation of the State Aggregate Limit. ER 7.

XIII. THE STATE MUST BE JUDICIALLY ESTOPPED FROM ASSERTING THAT ABSENT TRIBES ARE INDISPENSABLE PARTIES TO THIS ACTION AFTER THE STATE ARGUED IN THE *SIDES* CASE THAT ABSENT TRIBES WERE NOT INDISPENSABLE FOR A JUDICIAL DETERMINATION OF THEIR 1999 MODEL COMPACTS DESPITE THOSE TRIBES' CLAIMED INTERESTS

Without any evidentiary basis, the State argues that "[t]he State's administration of the Gaming Device license draw process described in Compact section 4.3.2.2(a)(3) is distinctly different from a determination of the number of Gaming Device licenses authorized in the aggregate by the formula set forth in Compact section 4.3.2.2(a)(1)." The *Sides* case was about resolving whom the Model Compacts designated as the administrator of the draw process, and therefore required a judicial determination of all sixty-one 1999 Model compacts.

Several Indian tribes with 1999 Model Compacts claimed an interest in the *Sides* litigation based upon the State's request for a judicial determination of their compacts. ER 32-35. Despite these tribes' claimed interest and because it was in the State's best interest at that time, the State argued that not a single tribe was a necessary party to an action to interpret every Model Compact. ER 28-31.

San Pasqual only seeks a determination of its Compact and no other

tribes' compact, and therefore does not believe any other tribe is a necessary party in this matter. To ensure fairness, the State must be judicially estopped from asserting other tribes are necessary parties in order to prevent the State from arguing an inconsistent position from which it would derive an unfair advantage and impose an unfair detriment on San Pasqual. *See New Hampshire v. Maine*, 532 U.S. 742, 751 (U.S. 2001).

XIV. 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: October 31, 2007 SOLOMON, SALTSMAN & JAMIESON

By: _____

Stephen Warren Solomon
Stephen Allen Jamieson
R. Bruce Evans
Ryan M. Kroll
Attorneys for Plaintiff-Appellant, San Pasqual Band of Mission Indians

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 reply brief is proportionately spaced, has a typeface of 14 points or more, and contains 5,512 words.

DATED: October 31, 2007 SOLOMON, SALTSMAN & JAMIESON

By: _____

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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 October 31, 2007 I served the foregoing document described as: **PLAINTIFF-APPELLANT'S REPLY BRIEF** on the interested parties in this action by placing two true copies 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	Peter H. Kaufman, Esq. Office of the Attorney General 110 West "A" Street, #1100 San Diego, CA 92101
Frank R. Lawrence Holland & Knight 633 West Fifth Street, 21st Floor Los Angeles, CA 90071	Fred J. Hiestand Counselor at Law 1121 L. Street, Suite 404 Sacramento, CA 95814

[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 October 31, 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