06-16145

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY, 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, Governor of the State of California,

Defendants and Appellees.

On Appeal from the United States District Court for the Northern District of California
No. 04-2265 FCD KJM
Honorable Frank C. Damrell, Jr.

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INTRODUCTION

This appeal is from a judgment by the district court granting the motion of defendants Governor Schwarzenegger, the California Gambling Control Commission ("Commission"), and the State of California (collectively, the "State") for judgment on the pleadings. In its order on the motion, the district court found that the first four causes of action in the complaint filed by Appellant Cachil Dehe Band of Wintun Indians of the Colusa Indian Community ("Colusa") should be dismissed because the other 1999 Compact tribes and Non-Compact Tribes are necessary and indispensable parties, that cannot be joined because of their sovereign immunity. The fifth cause of action was dismissed by the district court for Colusa's failure to exhaust administrative remedies and failure to demonstrate that such exhaustion would be futile.[1/]

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1. Although Colusa briefly mentions its fifth cause of action for refusal to negotiate in good faith (Opening Brief, pp. 22-23), no separate argument as to the district court's ruling on that cause of action is asserted in Colusa's Opening Brief. Because Colusa has failed to provide legal precedent, analysis, and argument on the fifth claim for relief, the Court should treat this appeal as an appeal of the district court's ruling as to Colusa's first four causes of action only. Fed. R. App. P. 28; *see also Acosta-Huerta v. Estelle*, 7 F.3d 139, 143 (9th Cir. 1992) and cases cited therein.

To the extent the Court does entertain an appeal of the fifth claim for relief, the district court properly found that Colusa had failed to exhaust its (continued...)

Colusa asserts that the district court abused its discretion by dismissing, pursuant to Federal Rule of Civil Procedure 19, Colusa's first four claims for relief. In its first four claims of relief, Colusa seeks a reinterpretation of a significant portion of identical tribal-state class III gaming compacts ("1999 Compact") to which more than sixty[2/] federally recognized tribes, including Colusa, are signatories. Colusa contends that the other 1999 Compact tribes' and Non-Compact Tribes' interests are aligned either with Colusa or with the State, and that they are, therefore, not necessary parties to Colusa's lawsuit. However, even assuming Colusa were supported by one or more tribes in this litigation, Colusa presented no evidence to the district court that it has the support of all of the 1999 Compact tribes and Non-Compact

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1. (...continued)
administrative remedies, especially since Colusa admitted in its opposition that it had failed to do so, and, further, that Colusa had failed to allege that an attempt to do so would be futile. (ER 0088.) The failure to allege exhaustion of its administrative remedies is evident on the face of the complaint (ER 0014-0033), and the district court's ruling is not, therefore, an abuse of discretion.

2. The district court referred to fifty-six tribes in its judgment. (ER 0072.) According to section 12012.25 of the California Government Code, fifty-seven compacts were executed with federally recognized tribes in 1999. Five additional compacts identical to those executed in 1999 were subsequently approved. *Artichoke Joe's v. Norton*, 216 F.Supp.2d 1084, 1096 (E.D.Cal. 2002). Accordingly, the State will refer generally to the more than sixty 1999 Compact tribes when referring to the number of those tribes that are necessary and indispensable.

Tribes. Those absent tribes that do not support Colusa's position are without question necessary parties, whose interests will be impeded if this lawsuit is permitted to proceed.

Colusa also contends that the State can protect the interests of these absent tribes, despite the fact that the State has had previous adverse relationships with the tribes and has no trust obligation to them. This argument is clearly contrary to this Court's holding in *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1018 (9th Cir. 2002) in which the Ninth Circuit held that the Governor of Arizona could not adequately represent absent tribes against a challenge to the tribal-state compacts because of the prior adversarial relationship between the state and the tribes, and because unlike the federal government, the state owed no trust duty to the tribes. In addition, because Colusa's lawsuit seeks a reinterpretation of identical provisions in each of the 1999 Compacts, proceeding in the absence of the other 1999 Compact tribes and Non-Compact Tribes would leave the State subject to a substantial risk of inconsistent obligations. Accordingly, all of the 1999 Compact tribes and Non-Compact Tribes are necessary parties to one or more of the first four causes of action in this suit.

Further, the absent tribes are indispensable parties because, given the finite pool of licenses and the fact that Colusa seeks a "refund" from the Revenue Sharing Trust Fund ("RSTF"), a judgment favorable to Colusa would prejudice the absent 1999 Compact tribes and Non-Compact Tribes. The offers of mitigation neither negate nor lessen the prejudice and cannot be legally binding. No adequate remedy can be awarded in the absence of the other 1999 Compact tribes and Non-Compact Tribes. Finally, tribal immunity concerns outweigh the lack of a judicial forum, especially when there is an alternative forum in which Colusa can attempt to obtain what it seeks here—Colusa can renegotiate its 1999 Compact with the State.[3/] Accordingly, all of the 1999 Compact tribes and Non-Compact Tribes are indispensable parties to one or more of the first four causes of action in this lawsuit.

STATEMENT OF ISSUES

1. Did the district court abuse its discretion when it dismissed Colusa's first and second claims for relief seeking to substitute Colusa's interpretation of the 1999 Compact's Gaming Device license draw provisions

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3. A number of the other 1999 Compact tribes have, in fact, renegotiated their 1999 Compact with the State to permit the issuance of additional licenses outside the draw process at issue here. *See* Cal. Gov't Code §§ 12012.40 & 12012.45, as amended by Stats. 2006, ch. 527; Floor Analysis of Assembly Bill No. 687, as amended June 29, 2004, Cal. Assemb. Gov't Org., 2003-2004, 2nd Sess., at 3-4, (Cal. 2004).

for the interpretation and implementation utilized by the Commission and the other 1999 Compact tribes for the past five years because the other 1999 Compact tribes are necessary and indispensable parties, that cannot be joined because of their sovereign immunity?

2. Did the district court abuse its discretion when it dismissed Colusa's fourth claim for relief challenging the Commission's administration of the Gaming Device license draw because the other 1999 Compact tribes are necessary and indispensable parties, that cannot be joined because of their sovereign immunity?

3. Did the district court abuse its discretion when it dismissed Colusa's third claim for relief seeking a refund of its "non-refundable" prepayment fee because the other 1999 Compact tribes and Non-Compact Tribes are necessary and indispensable parties, that cannot be joined because of their sovereign immunity?

STATEMENT OF THE CASE

Through its lawsuit, Colusa seeks a reinterpretation of identical provisions in the 1999 Compact that provide for a Gaming Device license draw process. Under Colusa's reinterpretation of the 1999 Compact provisions, Colusa would be allocated 377 additional Gaming Device licenses from a finite

pool of such licenses, thereby shrinking the pool and depriving the other 1999 Compact tribes with less than 2,000 Gaming Devices of those licenses. Colusa's reinterpretation would also result in its being moved to a higher priority tier for Gaming Device license draws, competing with the tribes already in those higher tiers, and also invalidating prior license draws. Colusa further seeks to greatly increase the total number of available Gaming Device licenses, thereby flooding the market with those licenses and reducing the market share of gaming income to other 1999 Compact tribes, especially those in close proximity to Colusa.

Colusa also seeks a declaration that the Commission does not have jurisdiction over the Gaming Device license draw process, thereby invalidating prior draws conducted by the Commission, dismantling the draw process used and relied on by the Commission and the 1999 Compact tribes for the past five years, and leaving the draw process procedure provided for in the 1999 Compact in limbo. Finally, Colusa asks to have $403,750 refunded to it from the RSTF, to the detriment of the Non-Compact Tribes for which those monies are earmarked.

Recognizing Colusa's lawsuit implicates the other 1999 Compact Tribes' and Non-Compact Tribes' interests, the state moved for judgment on

the pleadings arguing the action should be dismissed, pursuant to Federal Rule of Civil Procedure 19, because the absent tribes are necessary and indispensable parties, that cannot be joined because of their sovereign immunity. The district court granted the State's motion and properly dismissed Colusa's lawsuit.

STATEMENT OF FACTS

The 1999 Compact set forth provisions related to the operation of class III[4] Gaming Devices.[5] Under the terms of the 1999 Compact, there is a statewide limit on the number of Gaming Device licenses that can be allocated amongst the 1999 Compact tribes. (ER 0072-0073.) The Gaming Device licenses authorized by the 1999 Compact are distributed pursuant to a Gaming Device license allocation process provided by the 1999 Compact. (ER 0073 [citing Compact § 4.3.2.2].) Gaming Device licenses are awarded based on a

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4. The Indian Gaming Regulatory Act defines class III gaming as "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. § 2703(8). Class I gaming is defined as "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Class II gaming is defined as: (i) bingo and other similar games; and "(ii) card games" that "are explicitly authorized" or "are not explicitly prohibited by the laws of the State . . . but only if such card games are played in conformity" with the state's laws and regulations. 25 U.S.C. § 2703(7).

5. "Gaming Device" is a 1999 Compact-defined term. (*See* 1999 Compact § 2.6; ER 0072, n.2 [taking judicial notice of the 1999 Compact].)

particular tribe's placement in one of five priority tiers as determined by the provisions in section 4.3.2.2(a)(3) of the 1999 Compact. (ER 0073.)

The 1999 Compact also provides for revenue sharing with Non-Compact Tribes.[6] (ER 0073.) The revenue sharing provisions of the 1999 Compact provide that Non-Compact Tribes shall receive annual distributions from the RSTF, a fund subsequently created by the state legislature and administered by the Commission. The RSTF is funded through payments from the 1999 Compact tribes. Specifically, as the district court explained, the 1999 Compact sets forth that "a tribe may acquire and maintain additional Gaming Device licenses by paying annual fees in accordance with a fee schedule and by paying, for each Gaming Device license, a 'non-refundable one-time pre-payment fee' in the amount of $1,250 for each Gaming Device being licensed." (ER 0073 [quoting Complaint ¶ 14].)

STANDARD OF REVIEW

Under the abuse of discretion standard of review applicable here (*see Am. Greyhound Racing*, 305 F.3d, at 1022), an appellate court must affirm the judgment below unless: (1) it has a definite and firm conviction that the district court committed clear error of judgment in the conclusion it reached

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6. Compact section 4.3.2(a)(1) defines "Non-Compact Tribes" as "[f]ederally-recognized tribes that are operating fewer than 350 Gaming Devices."

upon weighing the relevant factors; (2) the district court applied the wrong law; or (3) the district court rested its decision on clearly erroneous findings of material fact. *See United States v. Washington*, 394 F.3d 1152,1157 (9th Cir. 2006).

SUMMARY OF ARGUMENT

The district court's judgment on Colusa's first four claims for relief should be upheld. The absent 1999 Compact tribes are necessary parties to Colusa's first four claims for relief because: (1) a decision regarding the 1999 Compact provisions providing for a Gaming Device license draw process affects the other 1999 Compact tribes' interests in the terms of the 1999 Compact and the administration of that process; (2) neither the State nor Colusa can adequately represent the absent tribes' interests; and (3) proceeding in the absence of the other 1999 Compact tribes would leave the State subject to inconsistent obligations.

Colusa's reliance on *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990) to argue that this lawsuit involves or can be limited to purely prospective relief is misplaced and does not obliterate the necessary party status of the other 1999 Compact tribes. Similarly, the availability of allocations from the Special Distribution Fund does not eliminate the Non-

Compact Tribes or the other 1999 Compact tribes' necessary party status for Colusa's third claim for relief.

The absent 1999 Compact tribes are also indispensable parties to Colusa's first four claims for relief because: (1) the absent tribes would be prejudiced by a decision interpreting the 1999 Compact provisions; (2) relief cannot be shaped to avoid the prejudice to the absent 1999 Compact tribes ; (3) the only "adequate" remedy would be at the cost of the absent tribes; and (4) the impact to the absent tribes outweighs the fact that there is no alternative judicial forum. The Non-Compact Tribes are indispensable parties to Colusa's third claim for relief for similar reasons as those delineated for the 1999 Compact tribes.

Further, Colusa does not dispute that the absent 1999 Compact tribes and Non-Compact Tribes cannot be joined because of sovereign immunity. Accordingly, the district court's ruling should be upheld.

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ARGUMENT

I.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT CONCLUDED THAT THE 1999 COMPACT TRIBES AND NON-COMPACT TRIBES ARE NECESSARY PARTIES TO COLUSA'S FIRST, SECOND, THIRD, AND FOURTH CLAIMS FOR RELIEF.

Colusa's requested relief in its first four claims for relief would have required the district court to interpret the terms of Colusa's 1999 Compact related to the Gaming Device license draw provisions and reconfigure, and possibly dismantle, the common administration of those provisions among all of the 1999 Compact tribes. Colusa's request implicates the interests of all of other absent 1999 Compact tribes and Non-Compact Tribes. Under Rule 19 of the Federal Rules of Civil Procedure, a party is necessary and must be joined if: (1) in the party's absence complete relief cannot be accorded among those already parties, or (2) the absent party claims an interest relating to the subject of the action and is so situated that the disposition of the action as a practical matter would impair or impede the absent party's ability to protect that interest or leave any of the persons already parties subject to a substantial risk of incurring inconsistent obligations by reason of the claimed interests. "Satisfying the requirement of either subparagraph establishes necessary party

status." *Clinton v. Babbit*, 180 F.3d 1081, 1088 (9th Cir. 1999). The district court, applying the necessary party factors in Rule 19, correctly concluded that "all 1999 Compact Tribes are necessary parties to plaintiff's first four claims for relief." (ER 0082.)

Contrary to Colusa's assertions, the district court did not abuse its discretion in holding that other 1999 Compact tribes and Non-Compact Tribes were necessary parties to Colusa's first, second, third and fourth claims for relief. "[P]ulling a single legal thread from the tapestry," of the Gaming Device draw process established by the 1999 Compact, "could cause it to unravel and thereby impair the interests of absent parties." *Clinton v. Babbitt*, 180 F.3d at 1089. Accordingly, and as further demonstrated below,[7] the court's ruling was not a clear error of judgment, the correct law was applied, and there was no erroneous finding of fact. *See United States v. Washington*, 394 F.3d, at 1157.

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7. Because the first, second, and fourth claims for relief all involve the 1999 Compact provisions that address the Gaming Device license draw process, those claims will be addressed before proceeding to the third claim for relief seeking the return of the Colusa's "non-refundable" Gaming Device license prepayment fee.

A. The District Court Correctly Concluded That All the 1999 Compact Tribes Were Necessary Parties to Colusa's First and Second Claims Regarding the Gaming Device Draw Process.

Colusa asked the district court, in its first claim for relief, to declare that Colusa should not have been moved from the third to the fourth priority tier for the December 19, 2003, Gaming Device license draw and to declare that a tribe remains in the higher priority tier until it has received the maximum number of licenses possible in that tier. (ER 00030-00031.) In its second claim for relief, Colusa asked the court to declare that the Commission lacks authority to determine the statewide license cap and that the cap set by the State is void. In addition, Colusa asked the court to declare that the 1999 Compact authorizes, at a minimum, 62,000 Gaming Device licenses. (ER 0031.) Finally, pursuant to both the first and second claims for relief, Colusa requested an award of 377 additional licenses, as well as the number of licenses Colusa "would have" obtained if it had remained in the third priority tier for the October 21, 2004, draw. (ER 0031.)

1. The District Court Correctly Found That the Absent Tribes' Rights Would Be Impaired.

In evaluating Colusa's first and second claims for relief, the district court found that the license pool from which the 1999 Compact tribes

draw Gaming Device licenses is "finite." (ER 0080.) This fact is not disputed by either party.[8] In connection with this fact, the court found that issuing Colusa the additional licenses it sought "would necessarily and practically impair the rights of the other 1999 Compact tribes that would be deprived of those licenses." (ER 0080.) While the district court did not explicitly so state, it is implicit within its findings that elevating Colusa to a higher priority tier than it now occupies would result in the issuance of more licenses to Colusa than it would otherwise obtain.

There is no dispute between the parties that those tribes now in higher priority tiers have an advantage over those in lower tiers when it comes to obtaining available licenses in a given draw; in fact, this is Colusa's reason for desiring placement in a higher priority tier. (ER 0025.) Along with the 377 additional licenses that Colusa specifically requested be immediately awarded, Colusa could receive even more licenses—both by virtue of its movement to a higher priority tier and by a court declaration that Colusa should receive the licenses "it would have received" if it had not been moved to a lower priority tier. (ER 0030-0031.) These actions would necessarily prejudice and

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8. Colusa contends that the statewide limit on Gaming Device licenses is a much higher number than that determined by the State. This does not negate the fact that there is, nevertheless, a limit on the total number of licenses. Thus, it is a finite pool.

negatively impact the other 1999 Compact tribes with less than 2,000 Gaming Devices, which would not have an opportunity to obtain the additional licenses that would be awarded to Colusa. The district court found that a change in tier would also impact other 1999 Compact tribes by increasing Colusa's market share of gaming revenue and consequently lessening the market share of other tribes, especially those with casinos in close proximity to Colusa. (*See* ER 0084.) Therefore, the district court did not err when it refused to allow, in the absence of the other 1999 Compact tribes, Colusa's request for a declaration that Colusa should be moved to the third tier and awarded 377 additional licenses.

Colusa makes much of the fact that the district court's order does not specifically refer to the request to change tiers when finding that giving Colusa additional licenses would prejudice absent tribes. However, as discussed above, a finding that the absent tribes' interests would be impaired if Colusa's request for a change in tier priority is granted is implicit in the order. Moreover, the absence of explicit reference to the request does not render the court's ruling an abuse of discretion. Any reinterpretation of the licensing tier process, especially where a tribe requests to be placed in a higher tier (to obtain more licenses), would necessarily affect at least some of the other 1999

Compact tribes. In addition, the district court applied the correct law, i.e., Rule 19, and cases construing that Rule, to determine that the tribes were necessary. (ER 0078-0080.) The district court noted that the Ninth Circuit has consistently held that litigation concerning a finite pool of benefits makes all beneficiaries of that pool necessary parties to the litigation. (ER 0079.) Colusa presents no evidence or credible argument that the district court rested its decision on clearly erroneous findings of material fact.

Because the relief sought by Colusa is retrospective (*see* ER 0030-0031), it would require the undoing of all prior draws from which Gaming Device licenses have already been issued. Application of this interpretation of the uniform 1999 Compact language in the absence of affected tribes would thus severely prejudice tribes that have been issued licenses based on their prior tier placement, and put them at risk of losing the licenses awarded in the December 19, 2003, draw. Even if the district court had granted the relief on a prospective basis, the other 1999 Compact tribes, which have been placed in tiers based on the Commission's interpretation of the tier process, would nevertheless have suffered prejudice. Compact tribes' tier placement might well have changed as a result of the restructuring and/or other tribes might have been relegated to new tiers, thus affecting their ability to obtain licenses in

future draws and affecting their market share of business. Further, if the court were to grant prospective relief solely to Colusa, Colusa's tier placement would be determined by a formula not available to the other 1999 Compact tribes participating in the draw process—providing Colusa with an advantage when drawing Gaming Device licenses.

2. Colusa's Challenge to the Gaming Device License Draw Is Not Merely a Challenge to Procedure.

Colusa attempts to label the tier placement formula in the compacts as "procedure" and equate it with the administrative procedure in *Makah Indian Tribe*, 910 F.2d 555. This reliance on *Makah* is misplaced. In *Makah*, a tribe with treaty rights to harvest salmon made two claims. First, the tribe challenged the salmon allocation quota that it received in the previous year. *Id.* at 557. This Court upheld the district court's determination that other tribes with treaties were indispensable to the plaintiff's request for a higher allocation and that the district court did not abuse its discretion when it dismissed the claim.

> We agree that to the extent the Makah seek a reallocation of the 1987 harvest or challenge the Secretary's inter-tribal allocation decisions, the absent tribes have an interest in the suit. The district court's conclusion that they are necessary parties to

> an adjudication of those claims was not an abuse of discretion.

Id. at 559.

The *Makah* tribe's second claim, however, challenged only the administrative procedures that were to be used for future allocations under the treaties. *Id.* at 557. Specifically, the tribe sought prospective injunctive relief concerning the procedures followed in promulgating regulations concerning yearly harvest rates. The tribe contended that the quota amounts "'were the product of commitments made outside the administrative process'" and that "the Secretary adopted quotas set in secret negotiations, violated notice and comment requirements of the APA, and ignored a quota proposed by the Makah." *Id.* The Tribe also argued that the regulations promulgated were arbitrary and capricious, had no basis in the record, and failed to describe Indian treaty rights. *Id.* The Court held that the other tribes were not necessary to this claim, much less indispensable, for such prospective procedural relief "to the extent that the Makah seek relief that would affect only the future conduct of the administrative process . . . ." *Id.* at 559. The Court found that granting relief as to that process would not prejudice absent tribes. *Id.*

The "procedure" in the instant case is easily distinguishable from the one in *Makah*. The tribes here are placed in priority tiers by virtue of the

identical 1999 Compact to which they are legally bound. To move Colusa to a higher priority tier has the direct effect of depriving one or more other tribes of the benefit of their 1999 Compact, i.e., putting Colusa in direct competition with them for licenses. In *Makah*, changing the administrative procedure would not have had this effect. The changes requested there went to the legitimacy of the procedure for actually adopting the regulations. Here, the only "procedure" is a 1999 Compact-fixed formula for tier placement and license allocation, which, if altered in Colusa's favor, would directly impact other 1999 Compact tribes. In fact, the relief sought by Colusa would have to be applied to any similarly situated tribes, thereby entirely altering the tier placement, bestowing benefit on some tribes and detriment on others. There is no escaping the fact that the "procedure" is inextricably bound with the substantive outcome. Accordingly, unlike in *Makah*, the other 1999 Compact tribes are necessary parties with regard to the administration of the tier process in the 1999 Compact.

3. There Are No Measures That Can Adequately Mitigate the Impact to the Absent Tribes.

The various "mitigation measures" offered by Colusa do not negate the necessity of the other 1999 Compact tribes' presence. For example, Colusa suggests that the Court determine first whether an additional 24,800

Gaming Devices licenses should be made available to 1999 Compact tribes. Colusa concludes, with no analysis or evidence, that all of the tribes will benefit from that major infusion of licenses and Colusa would be all but guaranteed the ability to obtain the 377 additional licenses it seeks. *See* Opening Brief p. 34. Colusa simply assumes that all 1999 Compact tribes would desire that the market be flooded with more and more licenses, ignoring the fact that this infusion will directly impact the market share of other tribes. The district court rejected this mitigation proposition in its order by correctly holding that it "does not take into account the interests of Compact Tribes that may be opposed to the state's award of more Gaming Device licenses, specifically those in close geographical proximity to plaintiff, whose market share of class III gaming would be affected by the inundation of licenses." (ER 0084.)

Further, as the district court recognized (ER 0082), even if the Court could limit its interpretation of the Gaming Device license draw provisions solely to Colusa's 1999 Compact, Colusa would be permitted to do something under its compact that other tribes would not be permitted to do under their identical 1999 Compact. Moreover, it would no doubt lead to further litigation by other tribes against the State, giving rise to the likelihood

of inconsistent rulings. The district court correctly held that the other 1999 Compact tribes are necessary parties to Colusa's first and second claims for relief.

B. The District Court Did Not Err When it Concluded That All 1999 Compact Tribes Are Necessary Parties to Colusa's Fourth Claim Alleging the Commission Lacked Authority to Conduct Gaming Device License Draws.

In its fourth claim for relief, Colusa asked the district court to declare that the Commission lacked authority to conduct the Gaming Device license draws. (ER 0032.) The district court recognized that if it "were to grant [Colusa's] requested relief and declare the [Commission] lacked the authority to administer the Gaming Device license draws, the [Commission] would be unable to conduct further draws and all previously issued licenses would be invalidated." (ER 0081.) Accordingly, the district court, relying on *American Greyhound Racing*, 305 F.3d at 1024, concluded that the "interests of the other Compact tribes would be practically impaired by the relief sought by [Colusa]." (ER 0081.)

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1. Finding That the Commission Lacks Authority to Conduct Gaming Device License Draws Necessarily Voids All Licenses Issued, Adversely Impacting All 1999 Compact Tribes Holding Those Licenses.

Colusa asserts that the district court's conclusion that all previously issued licenses would be invalidated constitutes sheer conjecture and, therefore, is an improper basis for the court's holding. (Opening Brief, p. 45.) Contrary to Colusa's assertion, a declaration that the Commission lacked the authority to conduct Gaming Device license draws would necessarily invalidate all previous license awards. The facts of this case simply do not permit the Court to limit its declaration to the Commission's authority to conduct future Gaming Device license draws. This is not a situation in which an intervening change in the law has stripped an agency of its previously held authority, thus permitting the Court to make a declaration limited to the agency's current and future authority under the new law. The terms of the 1999 Compact, the procedure by which the draw has been conducted amongst all of the 1999 Compact tribes, and, most importantly, the participation of the other 1999 Compact tribes in the Gaming Device license draw process have not been altered during the past five years. Accordingly, any declaration now regarding the Commission's authority to conduct the Gaming Device license

draws would necessarily affect past as well as future Commission action. *See, e.g., Lockyer v. City and County of San Francisco*, 33 Cal.4th 1055, 1113 (Cal. 2004). Thus, the district court did not err in concluding that if it were to grant the relief requested by Colusa for its fourth claim for relief, all previously issued licenses would be invalidated, adversely impacting other 1999 Compact tribes.

2. Colusa's Challenge to the Commission's Authority to Conduct Gaming Device License Draws Is Not a Challenge to Procedure.

Colusa asserts that the analysis it applied to conclude that the other 1999 Compact tribes are not necessary parties for purposes of proceeding with Colusa's first two claims for relief applies equally to Colusa's fourth claim for relief. (Opening Brief, p. 44.) However, Colusa's analysis regarding the tribes' shared interest in the "process" similarly fails when it is applied to Colusa's fourth claim for relief asking the district court to declare that the Commission lacked authority to conduct the Gaming Device license draws. (ER 0032.) If the Court were to grant this relief, it would impact both the future operation and the past results of the current Gaming Device allocation process, adversely affecting the interests of all tribes that have relied upon it.

While each 1999 Compact tribe may have an interest in the lawfulness of the process, it is an interest tempered by each tribe's interests related to the operation and expansion of its own gaming operation, competition with other gaming tribes, and its associations with local and state governments. Any alteration of the draw process, including its invalidation, would directly prejudice one or more of the other 1999 Compact tribes that have relied on the process employed for the past five years. For these reasons, the district court correctly concluded that the other 1999 Compact tribes have an interest in the litigation that would be impaired if the lawsuit were permitted to proceed in their absence.

3. Colusa's Challenge to the Commission's Authority Subjects the State to a Substantial Risk of Inconsistent Obligations.

Colusa's argument fails to take into account that the district court's finding of necessary party status was not based solely on the fact that the other 1999 Compact tribes' interest will be impaired. Under Federal Rules of Civil Procedure, Rule 19(a), the other 1999 Compact and RSTF-eligible tribes are necessary parties and must be joined if (1) in the tribes' absence complete relief cannot be accorded among those already parties, **or** (2) the tribes claim an interest relating to the subject of the action and are so situated

that the disposition of the action as a practical matter would impair or impede the tribes' ability to protect that interest or leave any of the persons already parties subject to a substantial risk of incurring inconsistent obligation by reason of the claimed interests.

The district court's opinion recognized that at issue with each of the first four claims of relief was the proper "interpretation of the clauses set forth in § 4.3.2.2 of the Compact" (ER 0079) and that, although Colusa asserted "that the Compact between the Tribe and [State] is a bilateral contract, it is, in reality, one of many virtually identical compacts." (ER 0082; citing *Artichoke Joe's California Grand Casino*, 353 F.3d at 717.) Accordingly, the district court concluded that any interpretation of Colusa's 1999 Compact could require the State "to perform in one manner under plaintiff's contract and in a directly incongruous manner under the other virtually identical contracts." (ER 0082.) As a result, the State would be subject to inconsistent obligations. Accordingly, the district court was correct in concluding that all the other 1999 Compact tribes are necessary parties to Colusa's fourth claim for relief.

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C. The District Court Did Not Err When it Dismissed Colusa's Third Claim for Relief Seeking a Return of its "Non-Refundable" Prepayment Fee.

Colusa's third claim for relief seeks the return of the "non-refundable" pre-payment fee required by 1999 Compact section 4.3.2.2(e) for participation in the Gaming Device license draw process that is deposited into the RSTF. If the court had granted the requested relief, it would have altered the provisions in the 1999 Compact that provide for the funding of the RSTF (1999 Compact § 4.3.2.2(e)) through the "non-refundable" prepayment fee and would have reduced the RSTF payments by the amount "refunded" to Colusa. The district court did not err in dismissing Colusa's third claim for relief because the Non-Compact Tribes and other 1999 Compact tribes are necessary parties.

Colusa argues that the district court abused its discretion because complete relief can be obtained from the State based on the state legislature's ability to make up for the repayment to Colusa by taking funds from the Special Distribution Fund. The Special Distribution Fund was established pursuant to 1999 Compact section 5.0 and California Government Code section 12012.85. Pursuant to California Government Code section 12012.85, subdivision (d), monies can be appropriated from the Special Distribution Fund to reduce

shortfalls in the RSTF. The allocation provisions in Government Code section 12012.85, however, do not alleviate the possible prejudice to the Non-Compact Tribes' interests nor alter the other 1999 Compact tribes' status as necessary parties.

1. The Possibility of Special Distribution Fund Allocations Does Not Eliminate the Non-Compact Tribes' Necessary Party Status.

The Non-Compact Tribes have an interest in receiving timely annual payments from the RSTF as guaranteed by section 4.3.2.1(a) of the 1999 Compact. (*See* ER 0080-0081.) Colusa's argument that the absent Non-Compact Tribes' interests will not be impaired because complete relief can be obtained from the State through distributions from the Special Distribution Fund is flawed. The argument assumes that Special Distribution Fund monies are always available, immediately or otherwise, to eliminate shortfalls to the RSTF. There is no evidence that monies are currently available in the Special Distribution Fund to eliminate the shortfall that a refund to Colusa would create and, indeed, Colusa never asserted this contention, either in the court below or in its opening brief.

Colusa's argument also assumes that allocations from the Special Distribution Fund will be made, timely or otherwise, to ensure the Non-

Compact Tribes receive adequate RSTF payments despite a refund to Colusa. Transfers from the Special Distribution Fund to backfill RSTF shortfalls are permitted only after the Commission submits its determination of anticipated RSTF shortfalls to the legislature as part of the State's May budget revision. *See* Gov't Code § 12012.90(e)(1). Only after the Commission has submitted its anticipated shortfall is the legislature permitted to transfer funds to the RSTF. *Id.* Calculating the anticipated shortfall and ushering the determination through the legislative process to permit the transfer will delay the payments from the RSTF. Further, even with this process in place, as Government Code section 12012.90 anticipates, there is no guarantee that the anticipated shortfall amount determined by the Commission will ensure that sufficient funds are in the RSTF for distribution. *See* Gov't Code § 12012.90(e)(4) (providing for budget augmentation if the State's Department of Finance, after consultation with the Commission, submits a request to the legislature). Further, the state legislature, not the 1999 Compact, designated that the priority use of monies from the Special Distribution Fund is to backfill revenue sharing trust fund shortfalls. *See* Gov't Code § 12012.85. The state legislature may alter, at any time, the provisions in Government Code section 12012.85 that provide for the allocations from the Special Distribution Fund, leaving the Non-Compact

Tribes without a mechanism to recoup the funds lost as a result of the refund to Colusa. For these reasons, Colusa's proposed measure to eliminate the prejudice to the Non-Compact Tribes' interests should not be employed by this Court.

The district court reasoned as follows:

> The Compact provides that each Non-Compact Tribe shall receive distributions from the RSTF, either in the amount of $1.1 million per year, or if there are insufficient monies for this sum, any available monies in the RSTF shall be distributed to Non-compact Tribes in *equal shares*. (Compact § 4.3.2.1(a)). Any excess monies left in the fund after distribution remain in the RSTF for disbursement in future years. Id. Therefore, an award of a refund to [Colusa] will practically impair the rights of Non-Compact, RSTF-eligible Tribes because the return of any RSTF monies will lessen the amount of money in the fund for reimbursement to those other tribes.

(ER 0080; emphasis in original.) The availability of the Special Distribution Funds to recover the amount of money refunded to Colusa does not alter the district court's sound reasoning.

2. The Availability of Allocations from the Special Distribution Fund Does Not Eliminate the Other 1999 Compact Tribes' Necessary Party Status.

Colusa's argument challenging the district court's dismissal of its third claim for relief fails to recognize that the court's ruling was not limited to

a finding of necessary party status based solely on the court's inability to grant complete relief in the absence of the Non-Compact Tribes. The other 1999 Compact tribes are also necessary parties to Colusa's third claim for relief and, accordingly, there is an additional ground supporting the court's dismissal of Colusa's third claim for relief.

a. The Other 1999 Compact Tribes Are Necessary Parties Because Proceeding in Their Absence Would Subject the State to Inconsistent Obligations.

As previously stated, Federal Rule of Civil Procedure 19(a)(2) specifies that necessary parties include those that claim an interest related to the subject of the action and are so situated that the disposition of the action in their absence would leave a party to the action subject to a substantial risk of incurring inconsistent obligations by reason of the claimed interests. The district court concluded that any interpretation of Colusa's 1999 Compact could result in the State's "requirement to perform in one manner under plaintiff's contract and in a directly incongruous manner under the other virtually identical contracts." (ER 0082.) Here, if the Court were to grant Colusa's relief, the Commission would be required to refund Colusa's "non-refundable" pre-payment fee while continuing to apply the plain meaning of the 1999 Compact terms to the other 1999 Compact tribes. As a result, the State

would be subject to inconsistent obligations. Accordingly, even if this Court were to conclude that the Non-Compact Tribes are not necessary, the other 1999 Compact tribes are necessary parties, and, thus, the district court did not err when it dismissed Colusa's third claim for relief.

b. The Other 1999 Compact Tribes Are Necessary Parties Because Their Interest in the Terms of the 1999 Compact Will Be Practically Impaired If Colusa's Third Claim of Relief Is Permitted to Proceed.

Federal Rule of Civil Procedure 19(a)(2) also specifies that necessary parties include those that claim an interest related to the subject of the action and are so situated that the disposition of the action as a practical matter would impair or impede the absent party's ability to protect that interest. An interpretation of Colusa's 1999 Compact that differs from that governing administration of all of the other 1999 Compact tribes is inimical to the terms of the 1999 Compact establishing the joint funding of the RSTF through the "non-refundable" prepayment fees. Each 1999 Compact tribe and the State agreed to the terms of the 1999 Compact and, accordingly, has an interest in the 1999 Compact's interpretation and the fulfillment of its terms by all 1999 Compact tribes participating in the allocation of licenses. This Court has repeatedly held, "a district court cannot adjudicate an attack on the terms of a

negotiated agreement without jurisdiction over the parties to that agreement." *Clinton v. Babbitt*, 180 F.3d at 1088 (as party to agreement with the United States, complete relief impossible without Hopi Tribe); *see also Manybeads v. United States*, 209 F.3d 1164, 1165 (9th Cir 1975) (complete relief could not be afforded in an action challenging a lease between the Hopi Tribe and Peabody Coal Company unless the tribe was joined). This is especially true when the provisions at issue anticipate the mutual funding of a trust fund for the benefit of small and non-gaming Indian tribes by those receiving the opportunity to participate in a draw process for a finite number of Gaming Device licenses.

Colusa's argument assumes that the other 1999 Compact tribes that pay into the Special Distribution Fund do not have an interest in ensuring that the Special Distribution Fund is adequately funded for all its uses[9/] and that it is not shortchanged by an interpretation of the 1999 Compact that permits a refund of Colusa's "non-refundable" prepayment. Each 1999 Compact tribe had its own reasons for agreeing to the mutual funding of the RSTF pursuant to the terms of the 1999 Compact. If Colusa is permitted to proceed with its third

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9. Local and state agencies also receive monies from the Special Distribution Fund to mitigate the impacts of casino gambling (Cal. Gov't Code § 12012.85(b)) and have an interest in this litigation to the extent the Special Distribution Fund would be reduced to eliminate shortfalls to the RSTF. Arguably, these local and state agencies could be necessary parties.

claim for relief and Colusa's request for a refund is granted, that action would alter the terms of the 1999 Compact and strip the other 1999 Compact tribes of their bargained-for agreement that each 1999 Compact tribe would pay a "non-refundable" prepayment fee for the opportunity to obtain Gaming Device licenses. Because the other 1999 Compact tribes' interests will be practically impeded if the action is permitted to proceed, the district court's holding that the other 1999 Compact tribes are necessary parties to Colusa's third claim for relief was correct and cannot be deemed an abuse of discretion.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT CONCLUDED THAT THE OTHER 1999 COMPACT TRIBES AND NON-COMPACT TRIBES ARE INDISPENSABLE PARTIES.

Federal Rule of Civil Procedure 19(b) provides a four-part test that a court must apply to determine whether that party is indispensable. *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994).

> The district court is directed to balance the following factors: (1) 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.

Id. (citing *Confederated Tribes of the Chehalis Indian Reservation v. Lujan,* 928 F.2d 1496, 1499 (9th Cir. 1991)). The district court properly weighed the Rule 19(b) factors to determine the other 1999 Compact tribes are indispensable to this lawsuit.

In its analysis of the indispensability factors, the district court confirmed that "'the first factor of prejudice, insofar as it focuses on the absent party, largely duplicates the consideration that made a party necessary under Rule 19(a).'" (ER 0083, quoting *American Greyhound,* 305 F.3d at 1024-25.) As more fully discussed in Parts I, *supra,* the interests of more than sixty 1999 Compact tribes in the Gaming Device draw process would be prejudiced if this lawsuit were permitted to proceed in their absence. In addition, Colusa's third claim for relief would prejudice the interests of the other 1999 Compact tribes as well as the Non-Compact Tribes that receive payments from the RSTF. The district court correctly recognized the impact on these numerous other tribes' interests in its indispensability analysis. (ER 0083-0084.)

The district court also properly demonstrated why relief could not be shaped to avoid the prejudice to the absent parties' interests and that "the only 'adequate' remedy would be at the cost of the absent parties." (ER 0084.) Finally, the district court, when weighing the indispensability factors,

appropriately relied on authority from this Court, recognizing the importance of tribal sovereign immunity even when it may leave a party without a judicial forum for its claim. (ER 0085 [the court citing *Wilber v. Locke*, 423 F.3d 1101, 1115 (9th Cir. 2005), *Manybeads v. United States*, 209 F.3d at 1166; *Makah Indian Tribe*, 910 F.2d at 560].) Each of the Rule 19(b) factors weigh in favor of finding the other 1999 Compact tribes and Non-Compact Tribes indispensable.

A. The District Court Properly Considered and Weighed the Rule 19(b) Factors When it Determined the Absent 1999 Compact Tribes Are Indispensable Parties to Colusa's First and Second Claims Interpreting the Gaming Device Draw Process.

In its first two claims for relief, Colusa seeks an award of additional Gaming Device licenses. The district court, in its indispensability analysis, recognized that "[t]o the extent that plaintiff seeks the award of additional Gaming Device licenses, that award would come at the expense of the absent tribes because of the finite nature of the Gaming Devices that all tribes may license." (ER 0083.) Colusa's repetitive assertions regarding the lack of prejudice to the absent 1999 Compact tribes' interests in its indispensability analysis (Opening Brief, p. 34) fail for all the reasons previously discussed in Part I, *supra*.

1. The Other 1999 Compact Tribes' Interests Cannot Be Adequately Represented by Either the State or Colusa.

Colusa asserts that the district court's conclusion regarding the prejudice to the absent tribes was erroneous because "there has been no showing that the existing parties could not and would not adequately represent those common interests." (Opening Brief, p. 42.) The district court, however, properly recognized that "because of the potential intertribal conflicts over the rights to the limited number of Gaming Devices and licenses" (ER 0084), Colusa was not in a position to represent the absent tribes' interests. Given the potentially divergent positions among the 1999 Compact tribes, Colusa could not assure the district court that: (1) it would "undoubtedly make all" of the absent tribes' arguments; (2) it was "capable of and willing to make such arguments"; and (3) the absent tribes would not "offer any necessary element to the proceeding that the present parties would neglect." *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999) (quoting *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992)).

In addition, contrary to Colusa's assertions (Opening Brief, p. 42), the State is not in a position to protect the absent parties' interests in this lawsuit. The State has had previous adverse relationships with the tribes. As

the preamble to the 1999 Compact notes, the 1999 Compacts were created out of an adversarial relationship and were designed to settle litigation between the State and the tribes. In addition, the State has no trust obligations to the absent 1999 Compact tribes. This Court held under similar circumstances in *American Greyhound Racing, Inc.*, 305 F.3d at 1018, that the Governor of Arizona could not adequately represent absent tribes against a challenge to tribal compacts because "the State and the tribes have often been adversaries in disputes over gaming, and the State owes no trust duty to the tribes." Accordingly, the district court's conclusion that the interests of the other 1999 Compact tribes may be prejudiced by their absence was correct.

2. The District Court Could Not Shape the Relief it Awarded to Avoid the Prejudice to the Absent 1999 Compact Tribes' Interests.

Colusa's argument regarding the court's alleged ability to shape relief to avoid the severe prejudice to the absent tribes also lacks merit. Contrary to Colusa's claim, the district court could not avoid or mitigate the prejudice to the absent tribes' interests, "by limiting the judgment so as to have purely prospective effect, or simply by not requiring any other tribe surrender any licenses obtained in previous rounds of draws." (Opening Brief, p. 34.)

As discussed, *supra*, at pages 16-17, even if the court were to confine its relief to future draws, the other 1999 Compact tribes—which have been placed in tiers based on the Commission's interpretation of the tier process—would nevertheless suffer prejudice because their tier placement may well change as a result of the restructuring and/or other tribes may occupy new tiers, thus affecting their ability to obtain licenses in future draws and affecting their market share of business. Further, it would be impossible for the district court to award Gaming Device licenses to Colusa without requiring one or more of the absent 1999 Compact tribes to surrender their licenses. The pool from which licenses are awarded is "finite." (ER 0080; *see also supra* note 6 and accompanying discussion.)

Colusa's assertion that the district court missed several opportunities to use other means to avoid the prejudice to the absent tribes is circular and incorrect. Colusa suggests that the district court, to avoid any prejudice to the absent tribes, could have considered the merits of Colusa's claim regarding the calculation of the total number of Gaming Devices authorized by the 1999 Compact before addressing Colusa's other claims. (Opening Brief, p. 34.) Colusa's suggestion fails because it completely discounts the fact that the other 1999 Compact tribes may well have interests

that differ from Colusa's own interests. As the district court correctly deduced, Colusa's argument "does not take into account the interests of Compact Tribes that may be opposed to the state's award of more Gaming Device licenses, specifically those in close geographical proximity to [Colusa], whose market share of class III gaming would be affected by the inundation of licenses." (ER 0084.)

3. The District Court Was Correct in Concluding That There Is No Adequate Remedy That Can Be Fashioned to Negate a Finding of Indispensability.

Colusa wants to change its tier placement, increase the number of available Gaming Device licenses statewide and be awarded more licenses by reconfiguring the Gaming Device draw process employed for the past five years. Such a change would give Colusa an advantage over other 1999 Compact tribes that have relied on the current process to make business decisions regarding the operation and expansion of their gambling enterprises. Such a change would also give Colusa an advantage over other 1999 Compact tribes because Colusa would return to the third priority tier, rather than remain in the fourth tier, and be permitted to increase its market share of Gaming Devices. Such a change would prejudice other tribes' interests in limiting the number of available Gaming Devices to safeguard their market share.

Regardless of how it is fashioned, any change to the Gaming Device allocation process would affect all of the 1999 Compact tribes. There is simply no adequate remedy that can be fashioned to negate a finding of indispensability. Accordingly, the district court did not err when considering the third indispensability factor.

4. The Lack of a Judicial Forum Did Not Weigh in Favor of Concluding the Other 1999 Compact Tribes Were Indispensable Parties.

The district court correctly considered the fourth indispensability factor under Rule 19(b). Colusa makes much of the fact that the dismissal of its claims will leave it without a forum in which to address its concerns regarding the Gaming Device license draw process it agreed to in the 1999 Compacts. While Colusa will not have a judicial forum, as the district court recognized (ER 0084), the Tribe may request re-negotiation of its 1999 Compact with the State if it desires to change the way in which licenses are issued to it, or wishes to avoid a cap on the number of Gaming Devices that it

can operate. The 1999 Compact section 12.1 states:

> The terms and conditions of this Gaming Compact may be amended at any time by the mutual and written agreement of both parties.

Employing this alternative avoids the severe prejudice to the other tribes from the disruption to the Gaming Device license draw process that this lawsuit would cause and recognizes the importance of the other 1999 Compact tribes' interests.

Even if this alternative were not available, however, the other tribes' interests and tribal immunity weigh heavily in favor of dismissing Colusa's claims. As discussed, *supra,* at pages 3-5, this Court has repeatedly recognized the importance of tribal sovereign immunity. Considering all the factors and balancing the competing concerns, the indispensability factors support the finding of indispensability reached by the district court.

B. The District Court Properly Considered and Weighed the Rule 19(b) Factors When it Determined the Absent 1999 Compact Tribes Are Indispensable Parties to Colusa's Fourth Claim for Relief Alleging the Commission Lacked Authority to Conduct Gaming Device License Draws.

The district court was correct in concluding that the other 1999 Compact tribes are indispensable to Colusa's fourth claim for relief. Colusa incorrectly asserts that proceeding with its fourth claim for relief would not

prejudice any of the other 1999 Compact tribes "because relief could be shaped to ensure the licenses issued by [the Gaming Device license draw] process will continue in effect." (Opening Brief, p. 46.) Colusa further asserts that the licenses would remain in effect "pending joint development of a replacement process." (*Id.*)

As previously discussed in Part I(B)(1), *supra* at pages 22-23, Colusa's claim that the Gaming Device licenses issued by the Commission can remain effective even though the Court declares the Commission lacked authority is without merit. Similarly, Colusa's further notion that a replacement process could be developed amongst all the other 1999 Compact tribes lacks merit. Colusa argues that "[n]othing would preclude other 1999 Compact Tribes from participating in that developmental process." (Opening Brief, p. 46.) The fatal flaw in Colusa's argument is that, while nothing would preclude the other 1999 Compact tribes' participation, the tribes are under no legal obligation to participate in such an exercise, nor could the district court impose such an obligation.

Colusa also asserts that the other 1999 Compact tribes that believe the Commission possesses the authority to administer the 1999 Compact's Gaming Device license draw process "would be free to amend its Compact so

as to confer that authority." (Opening Brief, p. 46.) This assertion not only incorrectly assumes the Commission lacks the authority, it contemplates forcing more than sixty 1999 Compact tribes to amend their compacts to retain the status quo, thus demonstrating why those tribes are both necessary and indispensable to the present action. In essence, Colusa suggests that this Court permit a lawsuit conducted in the absence of the 1999 Compact tribes to strip those tribes of their bargained-for rights because, after all, they have the ability to repair the damage by again negotiating with the State.

Compact section 4.3.2.2(a) contemplates a Gaming Device license draw process that is conducted among all the 1999 Compact tribes. Further, at issue is a joint process that has been employed for the past five years and relied on by the other 1999 Compact tribes. Litigating any aspect of that process without all the 1999 Compact tribes contravenes those tribes' interests and tribal immunity. Even when a party is left without a forum, tribal immunity concerns weigh heavily in favor of finding absent tribes indispensable. *See Wilbur v. Locke*, 101 F.3d at 1311. Accordingly, the district court was correct in concluding that the absent 1999 Compact tribes are indispensable to Colusa's fourth claim for relief.

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C. The District Court Properly Considered and Weighed the Rule 19(b) Factors When it Determined the Non-Compact Tribes Are Indispensable Parties to Colusa's Third Claim for Relief Seeking a Return of its "Non-refundable" Prepayment Fee.

Colusa claims that the district court erred by treating the Rule 19(b) indispensability analysis for its third claim for relief in a cursory fashion. (Opening Brief, p. 57.) Contrary to that claim, the court identified the core reason weighing in favor of concluding that the Non-Compact Tribes are indispensable parties by stating that: "To the extent that plaintiff seeks a refund of its pre-payment, the relief would prejudice the RSTF-eligible Tribes because it would lessen the amount of money in the fund to be distributed on an equal basis." (ER 0083.) Further, Colusa's argument fails to acknowledge the district court's thoughtful and detailed discussion analyzing the impact upon the Non-Compact Tribes if the "non-refundable" prepayment were refunded to Colusa. (*See* ER 0080-0081.) This analysis of the impact, along with the detailed description of the revenue sharing provisions provided by the court (ER 0073-0074), demonstrates not only why the Non-Compact Tribes are necessary, but also why relief cannot be shaped to lessen the prejudice to them and why there is no other adequate remedy. The "non-refundable" prepayment fees are paid into one fund. (ER 0073.) If money is paid out of the fund, it is at

the expense of all the others that get a benefit from the fund. Colusa's third claim for relief seeks a refund. There is no alternative remedy that can be awarded without the absent tribes.

Colusa's argument also fails to acknowledge that the absent tribes' immunity weighed heavily against proceeding with any of the claims for relief. (ER 0084; *see also supra,* at pages 40-41.) It is evident from the district court's nineteen page opinion, that the court was fully aware of the impacts that would result if it were to allow Colusa to litigate the claims for relief, not only to Colusa, but to all the other tribes that have an interest in, or receive a benefit from, the 1999 Compact's Gaming Device license allocation process and revenue sharing provisions. The district court, recognizing that the interests of more than sixty 1999 Compact tribes and numerous Non-Compact Tribes interests are at stake, could not "in equity and good conscience" permit Colusa's lawsuit to proceed.

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CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court deny Colusa's appeal and sustain the district court's judgment dismissing Colusa's lawsuit.

Dated: November 28, 2006

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a) For Case Number 06-16145

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(A)(7)(B) because this brief contains 9609 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect, version 8.0 in 14 point Times New Roman.

Dated: November 28, 2006

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6(c), *Rincon Band of Luiseno Mission Indians v. Arnold Schwarzenegger, et al.*, United States Court of Appeals for the Ninth Circuit Case No. 06-55259, is a related case that is currently before the Ninth Circuit Court of Appeals. The cases are related because each case involves the California Gambling Control Commission's authority to conduct the Gaming Device license draws pursuant to the 1999 Compacts.

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CHRISTINE M. MURPHY
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Attorneys for Defendants and Appellees

DECLARATION OF SERVICE BY MAIL

I declare as follows:

I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1300 I Street, P.O. Box 944255, Sacramento, California, 94244-2550.

On November 28, 2006, I served the attached:

APPELLEES' ANSWER BRIEF

■ (BY MAIL) I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Sacramento, California. I am readily familiar with the practice of the Office of the Attorney General for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

George Forman (2 copies)
Forman & Associates
4340 Redwood Highway, Suite F228
San Rafael, CA 94903

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on November 28, 2006, at Sacramento, California.

PAULA CORRAL
Typed Name

Signature