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-Appellant, vs. STATE OF CALIFORNIA; CALIFORNIA GAMBLING CONTROL COMMISSION, an agency of the State of California; and ARNOLD SCHWARZENEGGER, Governor of the State of California, Defendants-Appellees.	No. 06-16145 United States District Court Eastern District of California No. CV-04-02265-FCD

BRIEF OF AMICUS CURIAE, RINCON BAND OF LUISENO MISSION INDIANS OF THE RINCON RESERVATION IN SUPPORT OF PLAINTIFF/APPELLANT, THE CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY AND SUPPORTING REVERSAL OF THE DISTRICT COURT'S ORDER

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I. IDENTITY AND INTEREST OF AMICUS

Amicus Curiae, the Rincon Band of Luiseno Mission Indians ("Rincon") is a federally recognized California Indian Tribe operating gaming facilities on its Indian lands pursuant to a bilateral Class III gaming compact ("1999 Compact") entered into with the State of California ("State"). In September 1999, the State entered into materially identical, yet individual and legally distinct compacts with fifty-seven California tribes, including Rincon and the Cachil Dehe Band of Wintun Indians of the Colusa Indian Community ("Colusa"). The 1999 Compacts were approved by the Assistant Secretary of Interior and became effective in May 2000.

While Rincon's 1999 Compact is a bilateral agreement, legally distinct from Colusa's 1999 Compact, the provisions of the two compacts are materially identical. Consequently, even though Rincon technically would not be bound by the District Court's dismissal of Colusa's claims, the State would rely on this Court's affirmance of that decision to foreclose any similar action brought by Rincon concerning its own 1999 Compact with the State.

Furthermore, Rincon has a similar appeal pending before this Court (*Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, No. 06-55259) wherein the District Court dismissed Rincon's claims, in relevant

part, under Rule 19. This Court's determination in this case can conceivably impact its determination in Rincon's appeal. Accordingly, Rincon has an interest in this appeal. *See* FRAP 29(c)(3).

II. SUMMARY OF THE ARGUMENT

The District Court dismissed Colusa's claims against the State for violations of Colusa's 1999 Compact under Rule 19 of the Federal Rules of Civil Procedure. The District Court concluded that every tribe with a 1999 Compact was necessary and indispensable to the adjudication of Colusa's claims and it dismissed Colusa's claims because the other 1999 Compact Tribes could not be joined because of their sovereign immunity.

While as a legal matter this holding is binding only on the parties to this suit, as a practical matter the District Court's decision and reasoning renders the 1999 Compacts' dispute resolution provisions ineffective for all 1999 Compact Tribes, including Rincon. Requiring any 1999 Compact Tribe attempting to obtain adjudication of its compact rights to join all other 1999 Compact Tribes effectively deprives each 1999 Compact Tribe of any judicial remedy and gives the State unfettered ability to unilaterally interpret the 1999 Compacts without any meaningful judicial oversight.

The other California Tribes with gaming compacts are not necessary and indispensable parties to Colusa's claim – just as the other 1999 Compact Tribes are not necessary and indispensable to the adjudication of Rincon's compact claims against the State. No party to a form contract is required to gather all other signatories to similar, but separate, contracts just to get a judicial determination of the contract's meaning. All of the 1999 Compact Tribes, including Colusa, are entitled to a forum in which they can resolve disputes with the State over the meaning of the language in their Compact with the State. Rule 19 should not be applied in a manner that deprives these Tribes of the very remedy agreed upon as a material part of their Compacts with the State.

III. FACTUAL BACKGROUND

Colusa, Rincon, and fifty-five other tribes signed materially identical, yet legally separate and distinct, bilateral compacts with the State authorizing those tribes to conduct Class III gaming on their Indian lands. *See* 1999 Model Tribal-State Gaming Compact, § 9.1 (d), *available at* www.cgcc.ca.gov/enabling/tsc.pdf; 65 Fed. Reg. 31189 (May 16, 2000) (approval of 1999 Compacts, including Rincon's).

While each compact is a legally separate and distinct agreement between the signatory tribe and the State, the 1999 Compacts entered into by both Colusa and

Rincon, as offered by the State on a take-it-or-leave-it basis, without opportunity for discussion or negotiation, are materially identical to those contemporaneously signed by fifty-five other tribes.[1] *See* Model Compact, *supra*; *see also Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1995) (describing the history of California compact negotiations); *see also Hotel Employees & Restaurant Employees Int'l Union v. Davis ("H.E.R.E.")*, 21 Cal. 4th 585, 596-98, 981 P.2d 990, 999-1000 (1999). These compacts authorize the compacting Tribes to engage in Class III gaming on their Tribal lands under the Indian Gaming Regulatory Act, which provides "a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702.

The 1999 Compacts that the Tribes signed were conditioned on voter approval of Proposition 1A, a constitutional amendment to address the California Supreme Court's ruling in *Hotel Employees*. On March 7, 2000, California voters overwhelmingly approved the constitutional amendment. CAL. CONST. art. IV §

[1] Subsequently, an additional eight compacts were signed by other tribes. Five were signed and submitted along with the fifty-seven 1999 Proposition 1A Compacts to the Legislature for ratification. Three others, ratified in the final days of the Davis Administration, differ in some respects from the 1999 Proposition 1A Compacts but contain the per-tribe and statewide device license limits as the Proposition 1A Compacts.

19(f). The Secretary of the Interior approved the 1999 Compacts on May 5, 2000, and they became effective on publication in the Federal Register on May 16, 2000. 65 Fed. Reg. 31189 (May 16, 2000).

The compacts are comprehensive, setting forth the manner in which gaming will be allowed and regulated on a compacting Tribe's Indian lands, including provisions dealing with the scope of class III gaming authorized, the number of gaming devices authorized to be operated, the number of gaming devices available to each tribe, the process by which such gaming licenses could be acquired, the fees associated with the acquisition and maintenance of gaming devise licenses, and the process by which compact related disputes are to be resolved. (Model Compact, *supra.*)

Each 1999 Compact establishes per-tribe limits and a limited statewide pool of licenses. (Model Compact, *supra*, at § 4.3.) The compact sets forth a complex formula for the allocation of licenses from this pool, permitting tribes seeking entry to secure licenses first, then smaller operations, and last the larger operations that had engaged in gaming prior to the signing of the 1999 Compacts. (*Id.*) Once a license has been issued, the Compact mandates that the license be placed into commercial operation within one year. (*Id.* at § 4.3.2.2(e).)

Of particular importance to the issues before this Court, the 1999 Compacts provides a process by which a Compact Tribe and the State are to resolve disputes that arise under their agreement. Under the dispute resolution provisions of the 1999 Compact, if a dispute is not resolved through the requisite meeting and conferring, either party may seek injunctive and/or declaratory relief in federal district court, or in the California superior court. (Model Compact, *supra*, § 9.1.)

Since the effective date of the 1999 Compacts, the State has made several unilateral determinations regarding the meaning of various 1999 Compact provisions that have had a detrimental effect on Colusa's, Rincon's, and the other Compact Tribes' rights under their respective 1999 Compacts. For example, in February of 2001, the State, by executive order, unilaterally assumed exclusive control of the 1999 Compacts' process for issuing gaming device licenses by determining that that only the California Gaming Control Commission had the authority to issue device licenses and invalidating all licenses previously issued.[2]

The dispute between Colusa and the State in this suit arose after the Colusa Tribe met and conferred with the State as provided for in section 9 of the compact over several issues in dispute, including the State's interpretation of the provisions

[2] This is just one of the State's unilateral determinations that Rincon argues is in violation of its 1999 Compact at issue in its appeal currently pending before this Court.

of the 1999 Compact governing the operation of gaming device lisences and the manner in which licenses are obtained. *See* 1999 "Model Compact" § 4.3.3. The meet-and-confer failed to resolve the disputed issues and Colusa filed this action in federal court seeking equitable relief for the violations of the 1999 Compact unsuccessfully addressed in the meet-and-confer.

The District Court, however, dismissed Colusa's claims for failure to join indispensable parties under Rule 19, holding that all California tribes with 1999 Compacts had a legally protected interest in the adjudication of Colusa's claims and that such an interest would likely be prejudiced in their absence from the litigation. Because the absent tribes' sovereign immunity prevented their joinder, the District Court therefore dismissed Colusa's claims under Rule 19.

IV. ARGUMENT

A. The District Court Erred in Holding that the Other Tribes Who Signed 1999 Compacts Were Indispensable to Colusa's Suit Seeking Declaratory and Injunctive Relief.

The District Court erred in dismissing Colusa's claims for failure to join necessary and indispensable parties pursuant to FED. R. CIV. P. 19. The current parties' adequately represent any interest that the absent Compact Tribes may have in Colusa's action seeking interpretation and enforcement of its agreement with the State. Joining the other 1999 Compact Tribes is therefore not necessary to

resolution of Colusa's claims. The District Court's concern that the State might be subject to different interpretations of the compact provisions in different districts if other Tribes sued cannot serve as a bar to resolution of this issue. Not only would this rule eliminate all access to the courts for signatories of form contracts, but the State cannot be permitted to exclude all Compact Tribes from any forum for resolution of disputes over the meaning of Tribal-State form compacts by insisting that all Compact Tribes be joined.

The District Court held that Colusa would have to join all of the other Tribes who signed 1999 Compacts in order to get the declaratory and/or injunctive relief that it sought under its 1999 Compact. Because those Tribes are sovereigns immune from suit by another Tribe, the Court ordered that Colusa's claims be dismissed. The District Court's decision deprives Colusa, and by potential further application of the District Court's reasoning, Rincon and the other Compact Tribes, of a fundamental right under their individual 1999 Compacts: the right to seek a judicial remedy for the State's violations of compact promises.

If the District Court's analysis were the rule, then no party to a form contract could ever make a claim involving interpretation of that provision, whether a declaratory claim or a claim for breach of contract, without joining every other party who had signed a copy of the same form contract. That is not the meaning of

Rule 19's protections of "necessary" parties. The opportunity for those Tribes to have participated as *amici* also undercuts the conclusion that they are necessary and indispensable. Furthermore, even if the other 1999 Compact Tribes were "necessary" with interests at stake and potentially prejudiced by Colusa's claims, the District Court could have fashioned a remedy that would have mitigated any prejudice. Additionally, and of primary importance, the need for an effective remedy and the strong public policy behind IGRA in providing Tribes with enforceable agreements with State governments compel an application of Rule 19 that permits Tribes to obtain judicial interpretation of their compacts even in the absence of other Tribes with similar agreements.

1. The Rule 19 Standard.

Under Rule 19, if an absent party is necessary, cannot be joined, and is indispensable, then dismissal of a suit is appropriate. *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022 (9th Cir. 2002); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1458 (9th Cir. 1994). Rule 19 requires a two-step analysis.

A party is "necessary" if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii)

> leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

FED. R. CIV. P. 19(a). If a party is necessary under this definition, but cannot be joined in the action, then the court must determine if the absent party is "indispensable" to just resolution of the dispute:

> If a person as described in subdivision (a)(1) – (2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

FED. R. CIV. P. 19(b).

The Rule 19 inquiry is a practical one and rests in the sound discretion of the trial court. *Heinrich v. Goodyear Tire & Rubber Co.*, 532 F. Supp. 1348, 1359 (D. Md. 1982). Dismissal of a case for nonjoinder is a drastic remedy, however, and should be employed sparingly. *Nat'l Union Fire Ins. Co. v. Rite Aid of South Carolina, Inc.*, 210 F.3d 246, 250 (4th Cir. 2000). Generally dismissal is only ordered when the resulting defect cannot be remedied and prejudice or inefficiency

will certainly result from continuing with the action without the absent defendant. *Owens-Illinois, Inc. v. Meade,* 186 F.3d 435, 441 (4th Cir. 1999) (citing *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118 (1968)).

2. The Other Tribes Who Signed 1999 Compacts Are Adequately Represented by the Existing Parties to this Action.

Where the interests of an absent party are adequately represented by a party to the litigation, the absent party is not "necessary" within the definition of Rule 19. "As a practical matter, an absent party's ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit." *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1118 (E.D. Cal. 2002) (Secretary of Interior adequately represented interest of absent Tribes) (internal citation omitted), *aff'd*, 353 F.3d 712 (9th Cir. 2003); *see also Am. Greyhound*, 305 F.3d at 1026; *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990).

While the other Tribes who have signed 1999 Compacts certainly have an interest in the manner in which gaming device license draws are conducted and the State's calculation of the total gaming devices available for draw, their interest is adequately represented by Colusa. Colusa's declaratory claims raise a simple question of contract interpretation – the interpretation of a license draw process

and the application of a formula identical in all 1999 Compacts to identifiable numbers and the calculation of the resulting draw priority and number of available licenses. There is no reason that the State and Colusa cannot present all available facts and all possible positions on this issue.

Moreover, the other Tribes have the opportunity to participate as *amici* in this litigation. Many courts have recognized that the option to participate as an *amicus*, even where that option has not been exercised, weighs against finding that a party is indispensable under Rule 19. *See Am. Soc'y of Cataract & Refractive Surgery v. Shalala*, 94 F. Supp. 2d 914 (N.D. Ill. 2000); *Thomas v. United States*, 189 F.3d 662, 669 (7th Cir. 1999); *Arthur v. Starrett City Assocs.*, 89 F.R.D. 542 (E.D.N.Y. 1981); *Wisconsin v. Baker*, 464 F. Supp. 1377, 1384-85 (W.D. Wis. 1978).

For these reasons, the absent 1999 Compact Tribes are not necessary under the established law of this Circuit, and the dismissal of Colusa's claims was improper.

3. The State Cannot Be Permitted to Use the Identical Provisions It Insisted on as a Shield to Avoid Judicial Interpretation of Its Agreement with Colusa or any other 1999 Compact Tribe.

Even more vital to Colusa's, Rincon's, and the other 1999 Compact Tribes' ability to enforce their rights under their respective compacts, the District Court's

dismissal of Colusa's claims under Rule 19 effectively leaves the Compact Tribes without any judicial oversight of identical compact provisions that the State itself insisted on. The District Court reasoned, in part, that permitting Colusa to proceed without the joinder of the other 1999 Compact Tribes would expose the State to the risk of inconsistent obligations if other Tribes filed suit in different districts and got different interpretations of the Compact provisions. In effect, the State is able to shield itself from judicial scrutiny because of the heavy handed manner in which it presented the form compacts to the Tribes in a take-it-or-leave-it basis, without the benefit of any actual discussion or negotiation with the individual signatory tribes.

If the principle espoused by the District Court were the law under Rule 19, then no party to a form agreement would ever be able to make a claim requiring interpretation of a provision in the agreement. Insurance providers, rental car companies, architects, builders, and a host of other commercial actors use form agreements with hundreds and thousands of different customers, many located in different jurisdictions. For example, if one insured files suit seeking a declaratory judgment about the meaning of a policy provision or alleging a breach claim the resolution of which would require interpretation, the insurance company cannot avoid the action by claiming that the insured must join every other insured who has coverage under the same policy, lest the company be subject to differing

interpretations of the policy by different courts. *See, e.g., UTI Corp. v. Fireman's Fund Ins. Co.*, 896 F. Supp. 389, 393-94 (D.N.J. 1995) (other insurer using the same form agreement was not necessary party to action requiring interpretation of the agreement). The mere fact that a case may establish "persuasive precedent" that might affect other cases involving other parties is insufficient to make the other parties necessary. *Id.*; *see also Janney Montgomery Scott, Inc. v. Shephard Niles, Inc.*, 11 F.3d 399, 407 (3d Cir. 1993). This is the recognized rule when multiple parties sign identical or even interdependent contracts. *See* 7 Charles A. Wright, et al., FEDERAL PRACTICE AND PROCEDURE § 1613, at 197 (3d ed. 2001) ("When a person is not a party to the contract in litigation and has no rights or obligations under that contract, even though the absent party may be obligated to abide by the result of the pending action by another contract that is not at issue, the absentee will not be regarded as an indispensable party in a suit to determine obligations under the disputed contract"); *see also Francis Oil & Gas, Inc. v. Exxon Corp.*, 661 F.2d 873 (10th Cir. 1981) (hundreds of other signatories to Unit Agreement establishing rights to shares in an oil field were not necessarily indispensable in action between one unit owner and purchasing company, despite possible effect on purchaser's obligations to other unit owners); *Updegrave v. Reliance Nat'l Investors Corp.*, 337 F.2d 604 (9th Cir. 1964) (other parties to stock

exchange agreement were not indispensable to suit for rescission). The State can no more avoid the interpretation of its form Compacts with various Tribes on Rule 19 grounds than any other party offering form agreements could.

Moreover, public policy does not permit the State to avoid adjudication in these circumstances. The State contends that Colusa cannot obtain any judicial remedy involving interpretation of the 1999 Compacts unless it joins all 57 of the compacting Tribes, each of which has sovereign immunity. As Rule 19 recognizes, the lack of an alternative forum is an important factor to be considered in determining whether, in the interests of justice, litigation may proceed despite the absence of an interested party. FED. R. CIV. P. 19(b); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1162 (9th Cir. 2002) (court must be extra cautious when dismissing claims for which there is no alternative forum); *Makah Indian Tribe*, 910 F.2d at 560.

The District Court's analysis directly contravenes the analysis of this Court in *Cabazon Band of Mission Indians v. Wilson:*

> The district court recognized the federal interest at stake here and the importance of the enforcement of Tribal-State compacts in the federal courts. It would be extraordinary were the statute to provide jurisdiction to entertain a suit to force the State to negotiate a compact yet provide no avenue of relief were the State to defy or repudiate that very compact. Such a gap in jurisdiction would reduce the elaborate structure of IGRA to a virtual

> nullity since a state could agree to anything knowing that it was free to ignore the compact once entered into. IGRA is not so vacuous. We agree that Congress, in passing IGRA, did not create a mechanism whereby states can make empty promises to Indian tribes during good-faith negotiations of Tribal-State compacts, knowing that they may repudiate them with immunity whenever it serves their purpose.

124 F.3d 1050, 1056 (9th Cir. 1997) (internal citations omitted). Although that case was in the context of California asserting Eleventh Amendment immunity to avoid its contractual obligations under Tribal-State compacts negotiated with the Deukmejian Administration for the regulation of off-track betting, the analysis is equally applicable here. There is not just a private interest[3] at stake - there are the strong public interests Congress recognized in enacting IGRA. To interpret Rule 19 to allow the State of California to act with judicial oversight contravenes the very public interests embedded in the enactment of IGRA and would reduce the elaborate structure of IGRA to a virtual nullity. *See also United States v. Bay Mill Indian Community*, 692 F. Supp. 777, 780-81 (W.D. Mich. 1988), *vacated by stipulation,* 727 F. Supp. 1110 (W.D. Mich. 1989) ("in an equitable proceeding, the

[3] This case is about a Tribe seeking enforcement of a compact that was negotiated pursuant to a federal statute specifically intended to further the federal public policy of promoting tribal economic development, tribal self-sufficiency, and strong tribal government. *See* 25 U.S.C. § 2701(4).

court must consider the public interest . . . Certainly the well established federal interest in promoting tribal economic self-sufficiency would be thwarted").

Many courts facing similar challenges that Tribes are necessary and indispensable parties, that are immune from suit have recognized that the public interest requires proceeding without the absent Tribes. *See Panzer v. Doyle*, 680 N.W.2d 666, 682-83 (Wis. 2004); *Dairyland Greyhound Park, Inc. v. McCallum*, 655 N.W.2d 474, 481-84 (Wis. App. 2003); *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 798 N.E.2d 1047, 1058-59 (N.Y. 2003); *State ex rel. Johnson v. Clark*, 904 P.2d 11, 19 (N.M. 1995); *State ex rel. Stephan v. Finney*, 836 P.2d 1169 (Kan. 1992); *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001); *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1259-60 (10th Cir. 2001); *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996).

If the District Court's order is affirmed and the State's argument prevails, then every Tribe that has signed a 1999 Compact, including Colusa and Rincon, will be without any forum in which they can obtain judicial relief that would involve interpreting the form Compact. The Compact will be reduced to a nullity of empty promises. The State will be free to embrace unilateral interpretations and act with impunity. Justice cannot permit such a result.

V. CONCLUSION

In order to ensure that the dozens of California Tribes who have signed identical Compacts with the State are not deprived of the very remedy for which they contracted – the opportunity to enforce that Compact in the courts – the Rincon Tribe urges this Court to vacate the District Court's order dismissing Colusa's claims and to remand for the Colusa Tribe to have its claims heard and adjudicated on their merits.

RESPECTFULLY SUBMITTED this 6th day of November, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2006, I caused two copies of the foregoing Amicus Brief to be served, postage prepaid, to:

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In addition, the original and 15 copies of the foregoing Amicus Brief were filed by first-class mail, postage prepaid, this 6th day of November, 2006, to:

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CERTIFICATE OF COMPLIANCE

I certify that:

1. Pursuant to FRAP 29(d), 32(a)(7) and Ninth Circuit Rule 32-1, the attached Answering Brief is proportionally spaced, has a typeface of 14 points or more and contains 4,001 words.

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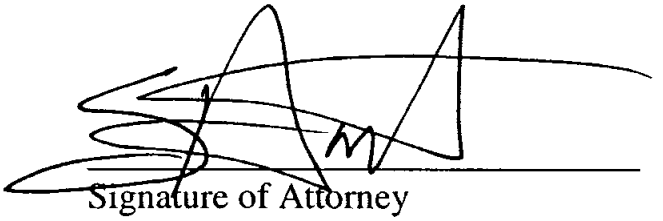
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