UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FLANDREAU SANTEE SIOUX TRIBE, a federally-recognized tribe, Plaintiff, v. STATE OF SOUTH DAKOTA; MICHAEL ROUNDS, Governor of the State of South Dakota; SOUTH DAKOTA COMMISSION ON GAMING; LARRY LONG, South Dakota Attorney General, Defendants.	)	CIVIL NO. 07-4040 **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS** **[Fed.R.Civ.P. 12(c)]**

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INTRODUCTION

Plaintiff Flandreau Santee Sioux Tribe ("FSST") and seven other federally-recognized Indian tribes ("Gaming Tribes") have entered into virtually identical Class III gaming compacts with the State of South Dakota.[1]

In this action against Defendants (collectively referred to as "the State"), FSST challenges the State's conduct during negotiations for an amended gaming compact under the

[1] Under Federal Rule of Evidence 201, Defendants request that the Court take judicial notice of the Class III gaming compact entered into by FSST and the State in 1999. A copy of FSST's (now expired) compact is attached as "Exhibit 1" to Defendants' Request for Judicial Notice ("Defendants' RJN").

The other seven federally-recognized Indian tribes that have Class III gaming compacts with the State are the (1) Crow Creek Sioux Tribe; (2) Lower Brule Sioux Tribe; (3) Oglala Sioux Tribe; (4) Rosebud Sioux Tribe; (5) Sisseton-Wahpeton-Oyate Sioux Tribe; (6) Standing Rock Sioux Tribe; and (7) Yankton Sioux Tribe. These seven tribes will be collectively referred to as the "Gaming Tribes." Defendants also request that the Court take judicial notice of the Gaming Tribes' individual compacts. A copy of each of these compacts is attached as "Exhibits 2-8" to Defendants' RJN.

Indian Gaming Regulatory Act ("the IGRA"), 25 U.S.C. §§ 2701 et seq. (Doc. 1). FSST also alleges some form of constitutional claim and requests a judicial order "enjoin[ing] State from taking actions which violate the United States Constitution and the State of South Dakota Constitution under the authority and color of the State of South Dakota." (Doc. 1).

At this time, the State moves the Court as follows:

1. For an Order dismissing FSST's entire complaint under Fed.R.Civ.P. 12(c) for failure to join all required parties under Fed.R.Civ.P. 19;

or in the alternative,

2. For an Order dismissing FSST's Second Claim for Relief ("Violation of Equal Protection of the Laws") under Fed.R.Civ.P. 12(c) on the grounds that this claim fails to state a claim for which relief can be granted. (Doc. 1, ¶¶ 54-61); and

3. For an Order dismissing Governor Michael Rounds, the South Dakota Commission on Gaming, and Attorney General Larry Long under Fed.R.Civ.P. 12(c) on the grounds that FSST fails to state a claim for which relief can be granted against these Defendants.

SUMMARY OF ARGUMENT

The State's motion for judgment on the pleadings should be granted because FSST has failed to include the seven other Gaming Tribes as named defendants in this lawsuit. FSST's demands for "unlimited" gaming devices and an extended compact duration will significantly affect FSST's, the State's, and the Gaming Tribes' gaming operations because of the State's unique and well-documented history of negotiating nearly identical compacts with all of South Dakota's Indian tribes.

Holding in FSST's favor will result in greater market competition among FSST and the Gaming Tribes. Conversely, holding in the State's favor will result in the Gaming Tribes' interests being substantially impacted. Therefore, the Gaming Tribes are required parties under Rule 19 and FSST's entire complaint should be dismissed in their absence.

In the alternative, the State requests that the Court dismiss FSST's Second Claim for Relief ("Violation of Equal Protection of the Laws") because it fails to state a claim upon which relief can be granted. Additionally, the Court should dismiss Governor Michael Rounds, the South Dakota Commission on Gaming, and Attorney General Larry Long because FSST has failed to state a claim upon which relief can be granted against these named Defendants.

BACKGROUND

A. *Facts*

FSST is a federally-recognized Indian tribe. (Doc. 1, ¶ 8). Since 1990, FSST and the State have entered into multiple gaming compacts under the IGRA.[2] (Doc. 1, ¶ 25). The latest compact was signed on December 27, 1999. (Doc. 1, ¶ 25). This compact authorized FSST to operate 250 slot machines and unlimited blackjack tables, and was effective for a three-year term. (Doc. 1, ¶ 25; Defendants' RJN Exhibit 1). This compact was extended for an additional three-year term in 2002. (Defendants' RJN Exhibit 1). FSST conducts its gaming operations at Royal River Casino ("Royal River") in Flandreau, South Dakota. (Doc. 1, ¶ 25; Defendants' RJN Exhibit 1).

Since September 2005, FSST and the State have conducted six formal negotiating sessions for an amended compact. (Doc. 1, ¶¶ 27-28; Doc. 1, Exhibits 5-10). During these negotiating sessions, FSST has demanded (1) an "unlimited" or "market based" number of slot machines; and (2) a longer compact term. (Doc. 1, ¶¶ 39-41; Doc 1, Exhibits 5-10). Conversely, the State's consistent position has been that South Dakota's public policy allows only "limited" gaming and authorizing "unlimited" slot machines to FSST would undermine this

[2] A gaming compact is a written agreement between a state and an Indian tribe that governs the conduct of gaming activities. 25 U.S.C. § 2710(d)(3)(A).

public policy and adversely impact the State's economy. (Doc. 1, ¶¶ 31-33, 41; Doc. 1, Exhibits 5-10; Doc. 24, ¶¶ 27, 46). Unfortunately, even though the State offered FSST a significantly longer compact duration, these negotiating sessions did not result in an amended compact.[3] (Doc. 1, Exhibits 5-10).

On March 19, 2007, FSST filed this declaratory judgment action against the State. (Doc. 1). FSST's core action is brought pursuant to the IGRA and alleges that the State has not conducted itself in "good faith" during the multiple negotiating sessions. (Doc. 1). On April 13, 2007, the State filed its answer, denying FSST's claims. (Doc. 24).

For purposes of the State's motion for judgment on the pleadings, it is imperative to note that for the past two decades, the State has entered into a series of separate, but nearly identical, compacts with FSST and the other Gaming Tribes. (Doc. 1, ¶¶ 22, 25; Defendants' RJN Exhibits 1-8). These compacts authorize FSST and the Gaming Tribes to collectively operate 2,000 slot machines (250 slot machines for FSST and 250 slot machines for each of the Gaming Tribes). (Doc. 1, ¶ 22; Defendants' RJN Exhibits 1-8). These compacts also contain either a two-year term, three-year term, or four-year term. (Defendants' RJN Exhibits 1-8).

B. *The Indian Gaming Regulatory Act*

1. *Legislative History Of The IGRA*

In 1987, the United States' Supreme Court issued its decision in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987). *Cabazon* held that California could not regulate bingo in Indian country, and cast doubt upon whether states could regulate other forms of Indian

[3] In June 2006, FSST's compact expired. (Doc. 24, ¶¶ 29-30). Therefore, since that date, FSST's gaming operations at Royal River have been conducted in direct violation of the IGRA. (Doc. 24, ¶¶ 29-30).

gaming. In response to this decision, Congress passed the IGRA in 1988.[4] The IGRA represents a compromise between the interests of the states, federal government, tribes, and gaming industry.

The IGRA is intended to "provide 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 IGRA is also designed to provide a basis for state involvement in regulating Indian gaming in order to shield it from organized crime and corruption, and to ensure fair and honest gaming. *Id.* As one federal court recently opined:

> [The] IGRA was Congress' compromise solution to the difficult questions involving Indian gaming. The Act was passed in order to provide "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" and "to shield [tribal gaming] from organized crime and other corrupting influences to ensure that the Indian tribe is the primary beneficiary of the gaming operation. . . ." The IGRA is an example of "cooperative federalism" in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.

Artichoke Joe's v. Norton, 216 F.Supp.2d 1084, 1092 (E.D. Cal. 2002).

2. *The IGRA's Three "Classes" Of Gaming*

The IGRA creates three "classes" of gaming, each subject to different levels of regulation. "[The] IGRA evinces a general intent to impose greater constraints on the authority of tribes to control gambling on Indian lands as the class of gaming increases." Conference of Western Attorneys General, *American Indian Law Deskbook*, at 435 (2004) ("*American Indian Law Deskbook*").

[4] The IGRA was enacted by Pub. L. No. 100-497, 102 Stat. 2467 (1988), and is codified at 25 U.S.C. §§ 2701-2721 (1988) and 18 U.S.C. §§ 1166-1168 (1988). Responsibility for administering the IGRA's substantive provisions is divided between the Secretary of the Interior and the National Indian Gaming Commission.

Class I gaming includes "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations," and its regulation is retained exclusively within the jurisdiction of the Indian tribes. 25 U.S.C. § 2710; 25 U.S.C. § 2703(6).

Class II gaming includes bingo, lotto, and card games if played in conformity with state laws regarding limits on wagers, pot sizes, and hours of operation. 25 U.S.C. § 2703(7)(A). However, Class II gaming excludes banking card games, slot machines, and electronic games of chance. 25 U.S.C. § 2703(7)(B). The regulation of Class II gaming is also left within the jurisdiction of the tribes, but is subject to federal-state regulation as set forth in the IGRA. 25 U.S.C. § 2710(a)(2).

At issue in this case is Class III gaming. Class III gaming includes "all forms of gaming that are not [C]lass I gaming or [C]lass II gaming." 25 U.S.C. § 2703(8). In other words, Class III gaming includes the types of games usually associated with "casino-style" or "Nevada-style" gambling.[5] Class III gaming is subject to a greater degree of federal-state regulation than either Class I or Class II gaming.

Three conditions must be satisfied before Class III gaming may be conducted on Indian lands. First, the gaming must be authorized under a tribal ordinance approved by the National Indian Gaming Commission chairman. 25 U.S.C. § 2710(d)(1)(A)(iii). Second, the state in which the gaming activity is located must permit the gaming. 25 U.S.C. § 2710(d)(1)(B). And

[5] Pari-mutuel betting and casino gambling are the best-known examples of Class III gaming. Pari-mutuel betting is defined as a "form of betting on horses or dogs in which those who bet on [the] winner share total stakes less a small percentage to the management." BLACK'S LAW DICTIONARY 1115 (6th Ed. 1990).

third, the gaming must be conducted in accordance with a valid tribal-state gaming compact.[6] 25 U.S.C. § 2710(d)(1)(C). In other words, Class III gaming activities are subject to tribal laws and regulations, state laws and regulations, a tribal-state compact, and the IGRA.

3. *The IGRA's Unique Negotiating Framework*

The IGRA is based on the legislative conclusion that Class III gaming should only occur under a tribal-state compact. *American Indian Law Deskbook,* at 416. Under the IGRA, a tribe and a state must negotiate a compact if the tribe wants to offer gaming operations other than traditional Indian games or bingo.[7] 25 U.S.C. § 2710(d).

Sections 2710(d)(7)(B)(ii)-(vii) of the IGRA describe an elaborate remedial scheme designed to ensure the formation of a tribal-state compact. A federally-recognized tribe initiates the gaming compact process by making a formal request to enter into negotiations with a state. 25 U.S.C. § 2710(d)(3)(A). Upon receiving the tribe's request, the state "shall negotiate with the Indian tribe in good faith to enter into such a compact." *Id.*

The IGRA provides that if no compact has been entered into within 180 days after the tribe's request, the tribe may bring suit in federal court. 25 U.S.C. § 2710(d)(7)(A)(i), (B)(i). If the district court concludes that the state failed to conduct negotiations in good faith, it shall order the state and the tribe to conclude a compact within sixty (60) days. 25 U.S.C. § 2710(d)(7)(B)(iii). If the tribe and the state fail to conclude the negotiations with the 60-day period, the court will appoint a mediator. Each party must then submit to the mediator a proposed compact representing their last best offer. 25 U.S.C. § 2710(d)(7)(B)(iv).

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[6] This third condition has been described as "both novel and complex in approach." *American Indian Law Deskbook*, at 445.

[7] The Senate Report viewed the compact approach as the "best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises." S. Rep. No. 446, 100 Cong., 2d Sess., at 13.

The mediator will then choose the compact that best comports with the terms of the IGRA. 25 U.S.C. § 2710(d)(7)(B)(iv)-(v). If the state does not accept the mediator's chosen compact within 60 days, the Secretary of the Interior shall prescribe the conditions, consistent with the mediator's chosen compact and within the terms of the IGRA, upon which the tribe may engage in Class III gaming. 25 U.S.C. § 2710(d)(7)(B)(vii).

C. *A Brief History Of Gaming In South Dakota*

Gaming in South Dakota (and particularly Deadwood) has a long and storied history. However, until approximately twenty years ago, the South Dakota Constitution actually prohibited gaming. South Dakota Constitution, Article III, § 25.

In the 1980s, South Dakota began to incrementally authorize various forms of gaming. In 1986, "scratch and match tickets" were approved. In 1988, the "Deadwood Amendment" was passed. This constitutional amendment authorizes "*limited* card games and slot machines [i.e., "casino-style" gaming] within the city limits of Deadwood. . . ." South Dakota Constitution, Article III, § 25 (emphasis added). In 1989, the South Dakota Legislature authorized video lottery. Today, South Dakota permits *limited* state lotteries, video lottery, card games, slot machines, pari-mutuel dog and horse racing, and simulcasting.[8]

D. *The Initial Gaming Compact Between The State And FSST*

Since 1990, FSST and the State have entered into multiple Class III compacts under the IGRA. (Doc. 1, ¶ 25; Defendants' RJN Exhibits 1 and 1A). On June 29, 1990, the State and

[8] "Simulcasting" is the accepting of bets in South Dakota for pari-mutuel dog and horse races that are being conducted in other states. This type of gaming is generally known as "Off Track Betting" or "OTB."

FSST entered into the parties' first Class III compact ("Initial Compact").[9] (Defendants' RJN Exhibit 1A). This Initial Compact provided that FSST could operate blackjack, poker, and slot machines at Royal River. (Defendants' RJN Exhibit 1A). The Initial Compact also allocated 180 "gaming devices" to FSST for a three-year term. (Defendants' RJN Exhibit 1A). These 180 "gaming devices" included *both* slot machines and table games.[10] (Defendants' RJN Exhibit 1A). The Initial Compact also provided FSST with the opportunity to increase its gaming devices to 250 if various conditions were satisfied. (Defendants' RJN Exhibit 1A). FSST subsequently satisfied these conditions to operate 250 gaming devices. (Defendants' RJN Exhibits 1 and 1A).

E. *The Most Recent Gaming Compact Between The State And FSST*

On December 27, 1999, the State and FSST entered into the parties' most recent Class III compact ("Compact"). (Doc. 1, ¶ 25; Defendants' RJN Exhibit 1). This Compact encompassed a three-year term. (Doc. 1, ¶ 25; Defendants' RJN Exhibit 1). A substantial modification was made to the Compact during this time. Specifically, the Compact changed the way in which FSST's 250 "gaming devices" were calculated. (Doc. 1 – Exhibit 4, ¶ 9.5; Defendants' RJN Exhibit 1). The term "gaming devices" no longer included both slot machines and table games. (Doc. 1 – Exhibit 4, ¶ 9.5; Defendants' RJN Exhibit 1). Instead, the term "gaming devices" was modified to include only slot machines. (Doc. 1 – Exhibit 4, ¶ 9.5; Defendants' RJN Exhibit 1). On December 27, 2002, this Compact was extended for an additional three years. (Defendants' RJN Exhibit 1).

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[9] Under Federal Rule of Evidence 201, Defendants request that the Court take judicial notice of the Initial Compact entered into by FSST and the State. A copy of this Initial Compact is attached as "Exhibit 1A" to Defendants' RJN.

[10] For example, if FSST operated 2 blackjack tables, it could also operate 178 slot machines.

As a result of the "gaming device" modification, FSST now operates 250 slot machines and *unlimited* blackjack and poker games. (Doc. 1 – Exhibit 4, ¶ 9.5; Defendants' RJN Exhibit 1). This change is significant in that the Initial Compact provided that FSST's 250 gaming devices included *both* slot machines and table games. (Defendants' RJN Exhibit 1A). Finally, it is undeniable that this (now-expired) Compact has been extraordinarily lucrative for FSST.[11] (Doc. 1 – Exhibit 14).

F. *Recent Negotiations Between The State And FSST For An Amended Compact*

In December 2005, FSST requested that the Compact be renegotiated. In response to this request, the State and FSST conducted formal negotiating sessions on (1) September 30, 2005, (2) June 20, 2006, (3) July 26, 2006, (4) August 23, 2006, (5) September 8, 2006, and (6) January 11, 2007. (Doc. 1, Exhibits 5-10). The parties also agreed that certified transcripts of these six negotiating sessions would be maintained for future reference. (Doc. 1, Exhibits 5-10).

During the negotiations, FSST frequently contrasted its gaming operations to gaming operations in Deadwood, South Dakota. (Doc. 1, Exhibits 5-10). FSST erroneously declared that it was being treated "differently" or "unfairly" when compared to Deadwood. (Doc. 1, Exhibits 5-10). As such, FSST demanded that the State accept two fundamental gaming compact amendments. (Doc. 1, Exhibits 5-10).

First, FSST demanded an outright elimination of the 250 slot machine limit. (Doc. 1, Exhibits 5-10). In fact, FSST demanded that it be allowed to operate an *unlimited* number of slot machines. (Doc. 1, Exhibits 5-10). And second, FSST demanded a 20-year compact term. (Doc. 1, Exhibits 5-10). According to FSST, the State's capitulation to these two demands was

[11] In June 2006, FSST's compact expired. (Doc. 24, ¶¶ 29-30). Therefore, since that date, FSST's gaming operations at Royal River have been conducted in direct violation of the IGRA. (Doc. 24, ¶¶ 29-30).

necessary in order to counteract the "perceived inequity" with Deadwood, enable FSST to access the financial capital needed for an expansion project at Royal River, and compete with neighboring casinos in Minnesota. (Doc. 1, Exhibits 5-10).

However, FSST failed to provide the State with any meaningful justifications for its extraordinary claims and demands. (Doc. 1, Exhibits 5-10). FSST also neglected to consider whether its demands were even permissible under the IGRA. (Doc. 1, Exhibits 5-10). Instead, FSST's negotiating posture was that the State should simply capitulate to FSST's demands. (Doc. 1, Exhibits 5-10). Unfortunately, because of FSST's negotiating posture, the parties have been unable to reach an agreement on an amended compact. (Doc. 24, ¶ 51).

In June 2006, FSST's compact expired. (Doc. 24, ¶¶ 29-30). However, since that time, FSST has continued to conduct its gaming operations without a valid compact and has collected millions of dollars in illegal gaming revenues. (Doc. 24, ¶¶ 29-30). By deliberately proceeding in this manner, FSST is in clear violation of the IGRA. (Doc. 24, ¶¶ 29-30).

G. *South Dakota's Public Policy Of "Limited Gaming"*

South Dakota's public policy on gaming allows the Legislature to authorize only "*limited* card games and slot machines" in Deadwood. South Dakota Constitution, Article III, § 25 (emphasis added). Likewise, state statute authorizes only "*limited* card games and slot machines" in Deadwood. SDCL 42-7B-1 (emphasis added). Consistent with these constitutional and statutory principles, "casino-style" gaming in South Dakota is "limited" in two primary ways.

First, "casino-style" gaming is "geographically" limited. Deadwood is the only non-tribal location in South Dakota in which "casino-style" gaming, similar to FSST's Class III gaming operations, can be conducted. South Dakota Constitution, Article III, § 25. As such, FSST's gaming operations at Royal River are shielded from competition because a private (non-

tribal) gaming entrepreneur cannot operate a "casino-style" gaming facility in any other South Dakota city, county, municipality, or township (other than Deadwood). South Dakota Constitution, Article III, § 25. This "geographic" limitation provides FSST with an enormous economic advantage because Royal River does not compete with privately-owned "casino-style" gaming facilities located in population centers such as Aberdeen, Brookings, Pierre, Rapid City, Sioux Falls, and Yankton.

Second, "casino-style" gaming in South Dakota is "numerically" limited. Deadwood has $100.00 bet limits and its "casino-style" gaming establishments are restricted to a maximum of thirty (30) "gaming devices" per building.[12] Also, no individual is allowed to hold more than three (3) retail gaming licenses.[13] Furthermore, a Deadwood operator's gaming license is reviewed (and potentially revoked) on an annual basis and its revenues are subject to various state taxes and fees. Conversely, FSST's compacts have always included multi-year durations and its gaming operations are not subject to any state taxes or fees. (Defendants' RJN Exhibits 1 and 1A). Once again, these "numerical" limitations result in FSST's gaming operations not only being treated equally, but actually better than, Deadwood's gaming operations.

[12] Unlike FSST's agreement with the State, "gaming devices" in Deadwood include *both* table games and slot machines.

[13] In Deadwood, one retail license enables a license holder to operate a maximum of thirty (30) "gaming devices." Thus, if a Deadwood license holder possesses the maximum of three retail licenses, she may operate a maximum of ninety (90) "gaming devices." Similarly, video lottery has bet limits ($2.00) and maximum payouts ($1000.00). Video lottery establishments are also limited to ten (10) video lottery terminals per on-sale alcohol beverage license.

ARGUMENT

FSST's FAILURE TO JOIN THE GAMING TRIBES REQUIRES DISMISSAL OF FSST'S COMPLAINT.

FSST seeks declaratory relief against the State for violation of the IGRA. (Doc. 1). However, in reality, this suit simply furthers FSST's independent desire to immediately operate unlimited slot machines for an extended duration. (Doc. 1). FSST's suit entirely disregards the various interests of the other Gaming Tribes. (Doc. 1). In fact, this suit attempts to place FSST's sovereign interests above the sovereign interests of the State and the Gaming Tribes.

As stated previously, the most recent compact between FSST and the State is in all material respects nearly *identical* to the compacts the State has entered into with the Gaming Tribes. (Defendants' RJN Exhibits 1-8). As such, any determination made by the Court regarding whether the State has acted in "good faith" while negotiating the issues of additional slot machines and an extended compact duration with FSST, will have direct business, economic, and cultural impacts on the Gaming Tribes.

The State requests that the Court dismiss FSST's complaint because FSST has failed to join the other Gaming Tribes that have clear interests in the resolution of this case. The Gaming Tribes are required parties to this lawsuit because they have a legally protected stake in this litigation that will, as a practical matter, be directly impacted by any favorable or unfavorable judgment for FSST. A disposition in FSST's favor would likely subject the State to inconsistent obligations. A disposition in the State's favor would directly impact the Gaming Tribes' future negotiations with the State for amended compacts.

A. *Standard of Review*

When a party needed for just adjudication has not been included in an action, a party may move for dismissal. Fed.R.Civ.P. 19. At this time, the State moves for dismissal of

FSST's complaint under Rule 12(c) for failure to join the Gaming Tribes as "required" parties under Rule 19.[14]

A Rule 12(c) motion for judgment on the pleadings is treated the same as a motion to dismiss under Rule 12(b)(6). *Westcott v. City of Omaha,* 901 F.2d 1486, 1488 (8th Cir. 1990). In reviewing a motion for judgment on the pleadings under Rule 12(c), a court will "accept as true all facts pleaded by the non-moving party and grant all reasonable inferences from the pleadings in favor of the non-moving party." *United States v. Any & All Radio Station Transmission Equip.*, 207 F.3d 458, 462 (8th Cir. 2000). However, a court cannot "blindly accept the legal conclusions drawn by the pleader from the facts." *Westcott,* 901 F.2d at 1488. "Judgment on the pleadings is appropriate where no material issue of fact remains to be resolved and the movant is entitled to judgment as a matter of law." *Faibisch v. University of Minnesota,* 304 F.3d 797, 803 (8th Cir. 2002).

When considering a motion for judgment on the pleadings, a court generally must consider only those materials in the pleadings. *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999). However, a court may consider materials that are part of the public record and do not contradict the pleadings, as well as those materials that are necessarily embraced by the pleadings. *Id*. at 1079; 5A Wright & Miller, *Federal Practice and Procedure*: Civil 2d § 1357, at 299 (1990) ("matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint" may be considered by the court in a motion for judgment on the pleadings).

[14] Under Fed.R.Civ.P. 12(h)(2) a party (even after it has filed an answer) may preserve a defense for failure to join a "required" party by a motion under Rule 12(c).

B. The Gaming Tribes Are Required Parties Under Rule 19

Rule 19 governs compulsory party joinder in federal courts. Rule 19's primary purpose affords absent parties the opportunity to join a lawsuit that could have a potentially detrimental effect on their legal interests.[15] *See Lincoln Property Co. v. Roche*, 546 U.S. 81, 90 (2005) ("Rule 19 provides for the joinder of parties who should or must take part in the litigation to achieve a '[j]ust [a]djudication.'"). A Rule 19 analysis requires three steps:

Step 1. *The Gaming Tribes Are Required For Just Adjudication*

The first step is to determine whether the absentee party should be joined. Rule 19(a)(1) prescribes three situations in which the absentee party will be found necessary and meet the Rule's definition of a "required" party. Rule 19(a). First, under the "complete relief" clause of Rule 19(a)(1)(A), the absentee party is necessary if without joinder "the court cannot accord complete relief among existing parties." Second, under the "impair or impede" clause the absentee party must claim "an interest relating to the subject of the action." Rule 19(a)(1)(B)(i). The absentee party is necessary if it is so situated that nonjoinder may "as a practical matter impair or impede the person's ability to protect the interest." *Id.* And third, the "multiple liability" clause recognizes that the absentee's nonjoinder may result in an existing party (almost invariably the defendant) sustaining "a substantial risk of incurring double, multiple, or otherwise inconsistent obligations. . . ." Rule 19(a)(1)(B)(ii). "Satisfying the requirements of

[15] Although Rule 19 no longer refers to the term "necessary party," it is the term that counsel and judges historically use. However, as restyled in December of 2007, Rule 19 suggests that the proper term should be "required party." Fed.R.Civ.P. 19(a)(1). Consistent with the restyled language of Rule 19, the State will use the term "required" in its analysis.

either subparagraph establishes [required] party status." *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999).

In this case, the Gaming Tribes satisfy Rule 19(a)'s "required" party designation. The Gaming Tribes are required parties to this action because they have a legal and economic interest in a judicial construction of their respective gaming compacts that would be practically impaired by the relief sought by FSST. Moreover, neither FSST nor the State are adequate legal representatives of the Gaming Tribes varied interests. Generally, absent parties should have "an opportunity to present their objections," but tribal sovereign immunity precludes joinder in this instance. Given FSST's failure to join the Gaming Tribes, this action should be dismissed without leave to amend.

Each Gaming Tribe has an interest in the fair determination of the gaming device limitation and the compact duration. The State has negotiated an equal number of gaming devices that FSST and the Gaming Tribes may receive under their respective compacts. (Defendants' RJN Exhibits 1-8). Each Gaming Tribe has committed substantial resources and has made organizational, governmental, and business decisions based upon the State's history of treating each Indian tribe nearly identically. For instance, each Gaming Tribe has analyzed its appropriate casino size, location, profit margin, and the efficacy of non-gaming business ventures based on the parties' previous conduct. In reality, FSST demands that the State acquiesce to an amended compact that, although nominally bilateral, would clearly impact the other Gaming Tribes.

What each Gaming Tribe considers "fair" will vary depending on that Gaming Tribe's particular situation. Some Gaming Tribes, particularly those operating under its current compact, may not welcome a flood of additional gaming devices into its market area. It is undisputed that Gaming Tribes located in close proximity to Royal River will likely experience a

negative impact and diluted market value if hundreds (or thousands) of new gaming devices are awarded to FSST. (Doc. 1, Exhibit 14).

While some Gaming Tribes may agree with FSST that additional gaming devices should be made available, they may disagree with FSST's demand for an "unlimited" or "market-based" number of slot machines. However, what is clear is that the Gaming Tribes have a due process right to participate in any judicial proceeding that could impact the number of gaming devices granted by the State.

As such, adjudicating FSST's claim that the State has failed to negotiate in "good faith" for not capitulating to FSST's demand for "unlimited" slot machines and an extended compact duration, has the unavoidable effect of impacting every other Gaming Tribe's compact and potentially readjusting the gaming dynamics amongst the State, FSST, and the Gaming Tribes. If the Court adjudicates the issues raised by FSST without the Gaming Tribes, it would foreclose those Gaming Tribes' abilities to protect their interests.

The wide range of potential tribal positions also confirms that the State cannot adequately represent the Gaming Tribes' divergent interests. *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002) ("The district court correctly ruled that the Governor could not adequately represent the interests of the absent tribes"). In fact, the State and the Gaming Tribes have often been adversaries in disputes over gaming, and the State owes no trust duty to the Gaming Tribes. *See e.g., Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993).

Similarly, because each Gaming Tribe has a unique interest in the number of gaming devices allowed, FSST also cannot adequately represent the interests of the Gaming Tribes. It simply cannot be presumed that the Gaming Tribes agree with FSST's position regarding the appropriate number of gaming devices. In fact, such a presumption is highly unlikely, given that

the issue in this lawsuit involves an increased number of gaming devices and there is patent competition among FSST and the Gaming Tribes for gaming profits. (Doc. 1, Exhibit 14). Given these facts, FSST cannot assure the Court that (1) it will "undoubtedly make all" of the Gaming Tribes' arguments; (2) it is "capable of and willing to make such arguments"; and (3) the Gaming Tribes would not "'offer any necessary element to the proceedings' that the present parties would neglect." *Washington v. Daley,* 173 F.3d 1158, 1167 (9th Cir. 1999).

Finally, the relief sought by FSST, if granted, could leave the State subject to a substantial risk of inconsistent obligations. Although the gaming compact at issue here is a bilateral agreement between FSST and the State, it is virtually identical to the other Gaming Tribes' compacts. (Defendants' RJN Exhibits 1-8). FSST's claims may very well result in the State performing in one manner under FSST's compact and in a different manner under the Gaming Tribes' compacts. For example, a decision in this case would not preclude another Gaming Tribe located within South Dakota, but outside the District of South Dakota's Southern Division, from seeking similar relief on the same claims against the State. This could potentially present conflicting district court decisions, subjecting the State to inconsistent obligations.

In sum, just because the State has entered into nearly identical gaming compacts with FSST and the Gaming Tribes does not automatically create identical legal interests. To the contrary, each gaming compact creates separate and distinct interests that each Gaming Tribe independently possesses. As such, the Gaming Tribes are required parties to this action.

Step 2. *Joinder Of The Gaming Tribes Is Not Feasible*

If an absentee party is required under any of the three tests in the first step, the next question is whether joinder of the absentee is feasible. Joinder will not be feasible if it destroys subject-matter jurisdiction or if the Court cannot exercise personal jurisdiction over the absentee

party. Rule 19(a)(1). If joinder is not feasible for any of these reasons, the Court must proceed to the third step, which essentially is whether the absentee party is indispensable.

The State has established that the Gaming Tribes are required parties in this action. The State also asserts that the Gaming Tribes cannot be joined because of tribal sovereign immunity. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Marinez,* 436 U.S. 49, 58 (1978). The Gaming Tribes cannot be compelled to join this action without their consent. *Clinton v. Babbitt,* 180 F.3d at 1090. While tribes may waive sovereign immunity, "such waivers must be 'expressed unequivocally' and cannot be implied." *Quileute Indian Tribe v. Babbitt,* 18 F.3d 1456, 1459 (9th Cir. 1994).

The Gaming Tribes have not waived immunity from suit, have not consented to this suit, and the IGRA does not waive the Gaming Tribes' sovereign immunity. In this case, the Gaming Tribes cannot be joined as parties.

Step 3. ***Because Joinder Of The Gaming Tribes Is Not Feasible, The Court Should Dismiss This Action***

Once an absentee's joinder is found infeasible, the Court has only two options: to proceed or to dismiss. Rule 19(b) instructs the Court to make this determination, in "equity and good conscience," guided by four enumerated factors. These four factors are (1) prejudice to any party or to the absent party resulting from a judgment; (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 the plaintiff would have an adequate remedy if the action were dismissed for non-joinder. Rule 19(b)(1-4). This inquiry is made on a case-by-case basis. *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968).

The first factor deals with the extent to which a judgment rendered without the absentee party might be prejudicial. For the reasons discussed above, the Gaming Tribes will likely be substantially prejudiced by any decision in this action.

The second factor requires the Court to consider the extent to which any prejudice could be lessened or avoided through the shaping of relief. Rule 19(b)(2). This factor also dictates dismissal of this matter. FSST may assert that the prejudice to the Gaming Tribes will be lessened or avoided because FSST is simply seeking a "good faith" determination or that it does not seek a "specific" allocation or reallocation of gaming devices to itself or any other Gaming Tribes. However, this narrow approach ignores the nearly identical gaming compacts that the State has historically entered into with FSST and the Gaming Tribes. To permit FSST to proceed with this action and possibly obtain economic benefits for itself, without obtaining similar benefits for the Gaming Tribes, would significantly prejudice those Gaming Tribes' (and the State's) interests.

Third, no matter how the Court shapes relief, if FSST succeeds in this action, some of the Gaming Tribes will undoubtedly suffer prejudice from a decrease in the market share or diluted gaming device value. (Doc. 1, Exhibit 14). For example, the most obvious detriment would flow to the Gaming Tribes currently operating under the 250 slot machine limit. The Gaming Tribes would certainly be harmed if the Court determines – as FSST requests – that it be provided with "unlimited" gaming devices. Because any such relief would be detrimental to the Gaming Tribes, there is no way to shape the relief to lessen or avoid prejudice. The only adequate remedy would be at the cost of the Gaming Tribes' privileges, sovereign immunities, and due process rights, which they have not waived and the Court cannot ignore.

Finally, FSST has an adequate remedy if its action is dismissed for non-joinder. FSST's gaming compact indicates that its terms may be amended by the parties' mutual and written

agreement. Here, FSST is free to continue negotiating an amended gaming compact with the State. It is irrelevant that this remedy may leave FSST without a judicial forum as the "lack of an alternative forum does not automatically prevent dismissal of a suit." *Quileute Indian Tribe*, 18 F.3d at 1460. Therefore, a balance of the four-factor analysis supports the determination that this matter should be dismissed under Rule 19(b).[16]

At least three district courts have agreed with the State's position in actions involving similar issues. First, in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. State of California*, 2006 WL 1328267 (E.D. Cal. – Civ. 04-2265), the tribe entered into a Class III gaming compact with the State of California ("California").[17] At the same time, 56 other tribes also executed virtually identical compacts with California. *Id.* at *1. The compact limited the number of gaming devices operated by each individual tribe at 2,000 and set a statewide maximum on the aggregate number of gaming devices that all tribes may receive. *Id.*

The tribe brought various claims against California, including a claim for failure to negotiate in "good faith" under the IGRA. *Id.* at *2. California moved for judgment on the pleadings, alleging that the tribe failed to join the other compact tribes under Rule 19. *Id.* In granting California's motion to dismiss, the district court provided a thorough Rule 19 analysis and opined that the other compact tribes were "indispensable parties." *Id.* at *3-7.

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[16] FSST also fails to identify the Gaming Tribes or discuss why they are not joined in this action. When, as here, all parties required to be joined under Rule 19 are not included as plaintiffs or defendants, the complaint must state the names of those not joined and the reasons why they are not joined. Rule 19(c). FSST's failure to do so also subjects this action to dismissal.

[17] Under Federal Rule of Evidence 201, the State requests that the Court take judicial notice of the tribe's complaint, California's motion for judgment on the pleadings, and district court's memorandum and order in *Colusa*. A copy of these documents is attached as "Exhibit 9" to Defendants' RJN.

The district court first found that "[a]n order to issue any additional [gaming] licenses to [the Colusa Tribe] would necessarily and practically impair the rights of the other [c]ompact [t]ribes who would be deprived of [gaming] licenses or the opportunity to obtain those licenses." *Id.* at *4. The district court also found that without the other gaming tribes being included in the lawsuit, California would be left "subject[ed] to a substantial risk of inconsistent obligations." *Id.* at *5.

Next, the district court found that the other gaming tribes were "immune from suit under the common law doctrine of tribal sovereign immunity." *Id.* (citing *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998)) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity"). Finally, in determining whether "in equity and good conscience the action should proceed," the district court held that "a balance of the four factor analysis supports the determination that the [c]ompact [t]ribes . . . are indispensable parties pursuant to Rule 19(b)." *Id.* at *6.

Second, in *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Arnold Schwarzenegger* (S.D. Cal. - Civ. 04-1151), Rincon was one of the federally-recognized Indian tribes that signed a gaming compact with California.[18] Rincon's gaming compact was materially identical to the other tribes' compacts, including a per-tribe cap on the number of gaming devices available.

Similar to the claim in *Colusa*, Rincon asserted that California failed to negotiate in "good faith" under the IGRA. Rincon also alleged that California's negotiating conduct violated

[18] Under Federal Rule of Evidence 201, the State requests that the Court take judicial notice of the tribe's complaint, California's motion to dismiss, and district court's orders in *Rincon*. A copy of these documents is attached as "Exhibit 10" to Defendants' RJN.

Rincon's constitutional rights. California moved to dismiss, alleging that Rincon failed to join other compact tribes under Rule 19. In granting California's motion to dismiss, the district court opined that the other compact tribes were indeed "indispensable parties."

First, the district court found that the absent tribes "have an interest 'relating to the subject of this action.'" In fact, "this suit's disposition unquestionably impairs the [absent tribes'] ability to protection [its] interest[s]." Next, the district court held that California could not "adequately represent the [absent] tribes' interests." Finally, the district court stated that the absent tribes' sovereign immunity precluded joinder and that applying the four factor test resulted in a finding that the absent tribes were "necessary and indispensable parties to this litigation."

Finally, in *San Pasqual Bank of Mission Indians v. State of California*, 2007 WL 935578 (S.D. Cal. – Civ. 06-0988), San Pasqual sought a determination, under the IGRA, regarding the correct number of Class III gaming devices authorized under its gaming compact. *Id.* at *1.[19] California asserted that the complaint should be dismissed because San Pasqual failed to join approximately 60 other tribes who executed individual gaming compacts nearly identical to San Pasqual's. *Id.*

In granting California's motion to dismiss under Rule 19, the district court used an analysis similar to the decisions in *Colusa* and *Rincon*, and held that failing to include the other gaming tribes was improper because (1) complete relief could not be granted without the absent tribes; (2) California would be exposed to inconsistent obligations; (3) the absent tribes had a legally protected interest that would be impaired without joinder; (4) the absent tribes could not

[19] Under Federal Rule of Evidence 201, the State requests that the Court take judicial notice of the tribe's second amended complaint and district court's order in *San Pasqual*. A copy of these documents is attached as "Exhibit 11" to Defendants' RJN.

be joined; and (5) the absent tribes were indispensable. *Id.* at *6-14. The *San Pasqual* Court concluded its decision by stating:

> At bottom, this case represents an attempt by a single Indian tribe to have this Court place that tribe's sovereign interests above the sovereign interests of [California] and at least 61 other federally recognized tribes . . . *without input from those other tribes. The law does not countenance such action*."

Id. at *9 (emphasis added).

In this case, the Court should follow the decisions of the district courts in *Colusa, Rincon,* and *San Pasqual* and dismiss FSST's complaint for failure to join the Gaming Tribes as required parties under Rule 19.

IN THE ALTERNATIVE,

FSST'S SECOND CLAIM FOR RELIEF ("VIOLATION OF EQUAL PROTECTION OF THE LAWS") FAILS TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED.

A. *The IGRA Provides The Exclusive Remedy In This Action*

FSST's "Second Claim for Relief" ("Violation of Equal Protection of the Laws") alleges violations of equal protection and privileges and immunities under the Fourteenth Amendment to the United States Constitution[20] and Article VI, Section 18 of South Dakota's Constitution.[21]

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[20] Article XIV, § 1 of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States; nor shall any State deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws.

(emphasis added).

[21] Article VI, § 18 of the South Dakota Constitution provides, "No law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same (continued . . .)

(Doc. 1, ¶¶ 54-61). FSST's "Request for Relief" then seeks an Order from the Court "[p]ermanently enjoin[ing] the State from denying [FSST] equal protection of the laws, or granting special privileges and/or immunities to casino/gaming operators or other similarly situated persons or entities." (Doc. 1, ¶ 4 – Relief Requested). This "Second Claim for Relief" should be dismissed because the IGRA provides the exclusive remedy in this matter.

Any IGRA-related claim must be restricted to the remedies outlined in § 2710(d)(7). FSST's "Second Claim for Relief," although couched in terms of "equal protection and privileges and immunities," is merely an alternative (and improper) method of compelling the State to increase the number of FSST's slot machines. FSST's complaint references no other remedy for the State's alleged "equal protection" violations. (Doc. 1). Particularly illustrative of this point is Paragraph 44 of FSST's complaint which states:

> The [State's] failure to negotiate fairly with [FSST], its failure to engage in the fair balancing of competitive economic interests, its persistence in engaging (for over sixteen (16) years) in a sterile discussion of the parties' differences and its refusal to enter into discussions with an open and fair mind and a sincere purpose to find a basis for agreement has prevented [FSST] from raising the capital necessary to develop high quality facilities sufficient to attract tourists and customers from areas beyond the borders of the State and denies [FSST] equal protection of the law.

(Doc. 1, ¶ 44).

In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the United States Supreme Court held that the *Ex parte Young* doctrine may not be used to enforce § 2710(d)(3) against a state official. *Id.* at 73-74. The *Ex parte Young* doctrine allows a suit against a state official to go forward, notwithstanding the Eleventh Amendment's jurisdictional bar, where the suit seeks prospective injunctive relief in order to end a continuing federal law violation. *Id.* However,

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(. . . continued)
terms shall not equally belong to all citizens or corporations."

"[w]here Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary." *Id.* at 74 (citing *Schweiker v. Chilicky,* 487 U.S. 412, 423 (1988)).

The *Seminole* Court further opined that the "intricate procedures" set forth in § 2710(d)(7) show that "Congress intended not only to define, but also to limit significantly, the duty imposed by § 2710(d)(3)." *Id.* The IGRA mandates only a "modest set of sanctions" against a state, culminating in the Secretary of the Interior prescribing gaming regulations where an agreement is not reached through negotiation or mediation. *Id.* at 75.

The Supreme Court also noted that an *Ex parte Young* action "would expose [a state official] to the full remedial powers of a federal court, including, presumably, contempt sanctions." *Id.* "If § 2710(d)(3) could be enforced in a suit under *Ex parte Young,* § 2710(d)(7) would [be] superfluous [for] it is difficult to see why an Indian tribe would suffer through [§ 2710(d)(7)'s] intricate [enforcement] scheme when more complete and more immediate relief would be available under *Ex parte Young.*" *Id.* The Supreme Court concluded its analysis of this issue by stating:

> [W]e [are not] free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that §2710(d)(7) was beyond its authority. If that effort is to be made, it should be made by Congress, and not by the federal courts. We hold that *Ex parte Young* is inapplicable to petitioner's suit against the Governor of Florida, and therefore that suit is barred by the Eleventh Amendment and must be dismissed for a lack of jurisdiction.

Id. at 76.

State-Tribal gaming compacts are mandated by the IGRA. The IGRA provides the exclusive remedy when negotiations do not result in a valid compact. Any relief sought by FSST regarding gaming compact terms is subsumed by the IGRA and subject to the Supreme Court's

holding in *Seminole*. FSST cannot "plead its way around" the confines of the IGRA by invoking this Court's injunctive powers.

Congress intended disputes over the terms of gaming compact negotiations to be conducted exclusively under the "intricate enforcement scheme" of the IGRA. Here, as in *Seminole*, FSST should be restricted to the remedies encompassed by the IGRA and its "Second Claim for Relief" should be dismissed.

B. *FSST Is Not A "Person" For Purposes Of The Equal Protection Clause*

FSST's "Second Claim for Relief" should also be dismissed because FSST is not a "person" entitled to bring a claim under the Equal Protection Clause of the Fourteenth Amendment. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any *person* within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (emphasis added).

The Supreme Court has stated, "In common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it." *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 668 (1979). And although this presumption is not a "hard and fast rule of exclusion . . . it may be disregarded only upon some affirmative showing of statutory intent to the contrary." *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 781 (2000).

Indian tribes have been described as ". . . unique aggregations possessing attributes of sovereignty over both their members and their territory" and "'a separate people' possessing 'the power of regulating their internal and social relations. . . .'" *U.S. v. Antelope*, 430 U.S. 641, 645 (1977) (rejecting an equal protection claim rooted in the Fifth Amendment based on the unique status of Indians).

Similarly, in *Inyo County, Cal. v. Paiute-Shoshone Indians of the Bishop Community*, 538 U.S. 701 (2003), the Supreme Court decided the issue of whether a tribe qualifies as a "person within the jurisdiction" of the United States under 42 U.S.C. § 1983. In *Inyo*, the Supreme Court held that a tribe is not a "person" qualified to sue under § 1983. *Id*. at 712. In reaching this decision, the Supreme Court recognized that a single tribal member is a "person" that could bring such a claim, however a tribe bringing a claim asserting its "sovereign" status cannot. *Id*. The Supreme Court reasoned that in cases where a tribe brings a claim, and the claim is based upon its status as a political entity, it is not a "person." Rather, when a tribe's claim invokes its unique status, it falls under the general rule that a sovereign is not a person. *Id*. at 711-713.[22]

In this case, FSST asserts that the State is giving "preferential treatment to a narrow group of persons or entities (gaming and/or casino operators or entities) by providing standards other than those that are applied to [FSST] for the operation of gaming." (Doc. 1, ¶ 57). FSST is not alleging that the State denies *individual tribal members* the right to participate in gaming. Indeed, an individual tribal member may apply for and receive a gaming license in precisely the same manner as a non-tribal members. An individual tribal member may also conduct her gaming operations in precisely the same manner as non-tribal members.

It is interesting to note, and even ironic, that the State actually provides FSST with *special treatment* regarding Class III gaming. FSST is granted a right that no other individual, corporation, partnership, non-tribal member, tribal member, or statutory entity is granted – the ability to conduct Class III gaming outside the city limits of Deadwood. *See* Art. III § 25 of the South Dakota Constitution (allowing limited card games and slot machines within the city limits

[22] Using similar logic, the Supreme Court previously held a state is likewise not a "person" subject to suit under § 1983. *See generally Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989).

of Deadwood). Additionally, nothing prevents FSST from opening a casino in Deadwood under the same conditions that every other operator in Deadwood must follow. However, FSST has shown no interest in operating a Deadwood casino, presumably because of the stringent conditions placed on Deadwood's operators. (Doc 1, Exhibits 5-10).

This special treatment cannot be granted unless FSST *itself* (not individual tribal members) and the State enter into a gaming compact that complies with the IGRA. *See* 25 U.S.C. § 2710(d) (providing that a Tribal-State compact must be entered into before tribal gaming may commence); 25 U.S.C. § 2703(5) (defining the term "Indian tribe" for the purposes of the IGRA). It is solely because of FSST's unique status as a tribe, not as a person, that it is allowed to enjoy this enormous economic advantage.

FSST brings its claim from a position that can only be obtained by asserting its political distinction. Therefore, FSST cannot submit that it is operating as a "person" entitled to bring suit under the Fourteenth Amendment's Equal Protection Clause. As such, FSST's "Second Claim for Relief" should be dismissed.

C. *Because FSST's Federal Constitutional Claims Must Be Dismissed, FSST's State Constitutional Claims Must Also Be Dismissed Because The Court Lacks Supplemental Jurisdiction Over These Remaining State Law Claims*

Because FSST's equal protection claim under the Fourteenth Amendment is deficient, the Court must also dismiss the claims premised on state law and Article VI, § 18 of the South Dakota Constitution. FSST's complaint relies on 28 U.S.C. § 1343(3) and 28 U.S.C. § 1362 to provide federal jurisdiction. (Doc. 1, ¶¶ 3-4).[23] For federal jurisdiction to attach, both of these

[23] 28 U.S.C. § 1343 provides in pertinent part: "(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by (continued . . .)

sections require the cause of action to arise under either the Constitution of the United States or an act of Congress.

FSST attempts to assert supplemental jurisdiction under paragraph 5 of its complaint for state law claims as follows:

> With regard to the claims in the Complaint arising under the laws of the State of South Dakota, such claims are so related to [FSST's] claims arising under the Constitution and laws of the United States that such claims form part of the same case or controversy under Article III of the United States Constitution. Accordingly, this [c]ourt has supplemental jurisdiction over those claims in this [c]omplaint arising under the laws of the State of South Dakota pursuant to 28 U.S.C. § 1367(a).

(Doc. 1, ¶ 5).

The dismissal of FSST's equal protection claim based on the Fourteenth Amendment eliminates the jurisdictional foundation of the remaining state law claims. Under 28 U.S.C. § 1367, absent original jurisdiction, the Court lacks supplemental jurisdiction over any state claims. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (discussing the mandatory dismissal of supplemental state claims for lack of federal jurisdiction with the discretion available in dismissing supplemental state claims in failure to state a claim actions); *Myers v. Richland County*, 429 F.3d 740, 747-749 (8th Cir. 2005). As such, there is no jurisdictional basis for the state law claims and these claims should be dismissed.

(. . . continued)
any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

28 U.S.C. § 1362 states, " The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

D. *FSST's State Law Claims Must Also Be Dismissed Because They Do Not Share "A Common Nucleus of Operative Fact" With The IGRA.*

FSST cannot allege that the state law claims are supplemental to the IGRA claims because these claims do not share a "common nucleus of operative fact." *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 936 (7th Cir. 2008). In *Ho-Chunk*, the Seventh Circuit Court of Appeals addressed the jurisdiction of state claims added to an IGRA claim under the authority of 28 U.S.C. § 1367(a). *Id.* at 935-938. The circuit court considered whether the IGRA could provide the requisite original jurisdiction in federal court to allow supplemental jurisdiction over state claims based on the "good faith" requirement in compact negotiations and claims involving negotiated terms in the state-tribal gaming compact. *Id*. at 935. Supplemental jurisdiction was recognized to maintain a claim for a declaratory judgment of whether the state negotiated in "good faith" under the IGRA and other claims which pertained to the ". . . same set of circumstances at issue in the federal claim under 25 U.S.C. § 2710(d)(7)(A)(ii)." *Id.* at 936. The supplemental claims centered on "the Nation and State's attempts to ascertain and resolve the impact the Wisconsin Supreme Court's decisions have on their gaming compact." *Id.*

In *Ho-Chunk*, the supplemental claims directly related to gaming negotiations and terms of the compact negotiated for under the IGRA. However, in this case, FSST's claims of equal protection and privileges and immunities are not related to a specific IGRA provision nor are they aimed at clarification or enforceability of compact provisions. It cannot be claimed that FSST's state law claims are "so related to the federal claim" that it forms a part of "the same case or controversy." *Id*. at 936. There is simply an insufficient connection between the IGRA and FSST's state law claims. Given these facts, FSST has failed to satisfy the standard needed to exercise supplemental jurisdiction.

E. *FSST's State Law Claims Must Be Dismissed Because The State Has Asserted Eleventh Amendment Immunity*

The Court should also grant the State's motion because the State has properly asserted Eleventh Amendment immunity regarding FSST's "Second Claim for Relief." (Doc. 24, ¶ 3).

"The Eleventh Amendment bars federal court jurisdiction over state law claims against unconsenting states or state officials when the state is the real, substantial party in interest, regardless of the remedy sought . . . [t]his constitutional bar applies with equal force to pendent state law claims." *Cooper v. St. Cloud State University*, 226 F.3d 964, 968 (8th Cir. 2000) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984)).

For supplemental claims involving alleged violations of state law, the doctrine of *Ex parte Young* does not apply. *Pennhurst*, 465 U.S. at 106 ("it is difficult to think of a greater intrusion on state sovereignty then when a federal court instructs state officials on how to conform their conduct to state law"). With the State's assertion of Eleventh Amendment immunity, FSST's "Second Claim for Relief" is barred.

GOVERNOR MICHAEL ROUNDS, THE SOUTH DAKOTA COMMISION ON GAMING, AND ATTORNEY GENERAL LARRY LONG SHOULD BE DISMISSED FROM THIS ACTION FOR FAILURE TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED.

In filing this lawsuit, FSST named not only the State of South Dakota as a defendant, but also Governor Michael Rounds, the South Dakota Commission on Gaming, and Attorney General Larry Long. (Doc. 1). Not only must FSST's "Second Claim for Relief" be dismissed, but these named defendants must also be dismissed as FSST has not alleged any specific action taken by these defendants that may be remedied in this action.

In *Seminole*, the Supreme Court also addressed the scope of claims brought and persons subject to suit under the IGRA. In *Seminole*, the tribe brought an action under the IGRA alleging

the State of Florida ("Florida") failed to negotiate a state-tribal gaming compact in good faith. *Seminole*, 517 U.S. at 44. Florida defended by raising its Eleventh Amendment immunity. In response, the tribe argued that jurisdiction may be exercised over the Governor of Florida under the *Ex parte Young* doctrine.[24] *Id*. at 77-74.

The *Seminole* Court examined the intricate procedures provided by Congress in the IGRA. In reaching its decision, the Supreme Court relied on the principle that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Id*. at 74.

The Supreme Court determined that Congress intended to limit the remedies available under the IGRA to those found in § 2710(d)(7). Such remedies did not include imposing obligations, other than those found in § 2710(d)(7), upon state officers. *Id*. at 75. Ultimately, the Supreme Court refused to apply the *Ex parte Young* doctrine and dismissed the claim against Florida's governor.

Unlike *Seminole*, in this case, the State has waived its Eleventh Amendment immunity with regard to the IGRA claims. While this waiver does not change the legal analysis with regard to dismissal of individuals other than the State of South Dakota, it does allow FSST to avail itself of the remedies found in § 2710(d)(7). Similar to *Seminole*, there is no waiver by the State of FSST's non-IGRA claims. It is clear from the statutory framework of the IGRA and the *Seminole* case that individual defendants are improperly named in FSST's claims. The IGRA provides no cause of action against any person or entity other than the State of South Dakota.

[24] *Ex parte Young*, 209 U.S. 123 (1908) allows, in some cases, jurisdiction to be asserted against a state official when the remedy requested is prospective injunctive relief despite the fact that Eleventh Amendment immunity is raised as a defense.

Under the provisions of the IGRA, and in accordance with *Seminole*, this Court is without jurisdiction to hear claims against any named defendant other than the State of South Dakota. As such, Governor Michael Rounds, the South Dakota Commission on Gaming, and Attorney General Larry Long should be dismissed from this action.

CONCLUSION

The State requests that its motion for judgment on the pleadings be granted and FSST's entire complaint be dismissed. In the alternative, the State requests that (1) FSST's "Second Claim for Relief" be dismissed; and (2) Governor Michael Rounds, the South Dakota Commission on Gaming, and Attorney General Larry Long be dismissed from this lawsuit.

Dated this 23rd day of May, 2008.

STATE OF SOUTH DAKOTA, et al.,
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/s/ Richard M. Williams

/s/ Meghan N. Dilges

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