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 **REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS** **[Fed.R.Civ.P. 12(c)]**

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
ARGUMENT	2
I. THIS CASE SIMPLY FURTHERS FSST'S INDEPENDENT DESIRE TO OPERATE AN INCREASED NUMBER OF SLOT MACHINES FOR AN EXTENDED DURATION.	2
II. FSST'S FAILURE TO JOIN THE GAMING TRIBES REQUIRES DISMISSAL OF FSST'S COMPLAINT UNDER RULE 19.	3
A. "*Complete Relief" May Not Be Accorded In The Gaming Tribes' Absence*	4
B. *The Gaming Tribes Are Not Required To Affirmatively "Claim" A Legally Protected Interest In This Action*	5
C. *The Gaming Tribes Have A Legally Protected Interest That Will Be "Impaired or Impeded" By Not Joining Them As Required Parties*	7
D. *The State May Be Subjected To "Inconsistent Obligations" By Not Joining The Gaming Tribes As Required Parties*	10
E. *Joinder Of The Gaming Tribes Is Not Feasible Because Of Tribal Sovereign Immunity*	11
F. *The Court Should Dismiss This Action "In Equity and Good Conscience"*	12
G. *The District Courts' Decisions In* Colusa, Rincon, *and* San Pasqual *Reaffirm That The State's Motion Should Be Granted*	15

PAGE

IN THE ALTERNATIVE,

III. FSST'S SECOND CLAIM FOR RELIEF ("VIOLATION OF EQUAL PROTECTION OF THE LAWS") FAILS TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED. 16

A. *The United States Supreme Court's Decision In* Seminole Tribe *Is Applicable In This Matter* 16

B. *FSST Is Not A "Person" For Purposes Of The Equal Protection Clause* 18

C. *The State of South Dakota Has Not Waived Its Sovereign Immunity By Ratifying The United States Constitution* 20

D. *The Court Lacks Supplemental Jurisdiction Over FSST's Remaining State Law Claims Because These State Law Claims Do Not Share "A Common Nucleus Of Operative Fact" With The IGRA And The State Has Invoked Its Sovereign Immunity* 21

IV. GOVERNOR MICHAEL ROUNDS, THE SOUTH DAKOTA COMMISSION 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. 22

CONCLUSION 23

TABLE OF AUTHORITIES

CASES:	PAGE
American Greyhound Racing, Inc. v. Hull 305 F.3d 1015 (9th Cir. 2002)	8
Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. State of California 2006 WL 1328267 E.D. Cal. – Civ. 04-2265	15-16
City of Cleburne v. Cleburne Living Center 473 U.S. 432 (1985)	18
Clinton v. Babbitt 180 F.3d 1081 (9th Cir. 1999)	3, 12
Cooper v. St. Cloud State University 226 F.3d 964 (8th Cir. 2000)	22
Cory v. White 457 U.S. 85 (1982)	16
Harms v. Cigna Ins. Companies 421 F.Supp.2d 1225 (D.S.D. 2006)	15
Inyo County v. Paiute-Shoshone Indians 538 U.S. 701 (2003)	19
Jicarilla Apache Nation v. Rio Arriba County 440 F.3d 1202 (10th Cir. 2006)	19
Makah Indian Tribe v. Verity 1988 WL 144137 (W.D. Wash. 1988)	11
Makah Indian Tribe v. Verity 910 F.2d 555 (9th Cir. 1990)	7
Narragansett Indian Tribe v. NIGC 158 F.3d 1335 (D.C. Cir. 1998)	19

CASES—CONTINUED: **PAGE**

Pennhurst State School & Hospital. v. Halderman
465 U.S. 89 (1984) 22

Provident Tradesmens Bank & Trust Co. v. Patterson
390 U.S. 102 (1968) 13

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.
506 U.S. 139 (1993) 17

Queets Band of Indians v. State of Washington
765 F.2d 1399 (9th Cir. 1985) 19

Quileute Indian Tribe v. Babbitt
18 F.3d 1456 (9th Cir. 1994) 12, 14

Rincon Band of Luiseno Mission of Indians of the Rincon Reservation v. Arnold Schwarzenegger
S.D. Cal. – Civ. 04-1151 15-16

San Pasqual Band of Mission Indians v. State of California
2007 WL 935578 (S.D. Cal. – Civ. 06-0988) 2, 6-9,15-16

Santa Clara Pueblo v. Martinez
436 U.S. 49 (1978) 3, 12

Seminole Tribe of Florida v. Florida
517 U.S. 44 (1996) 17-18, 20-22

Skokomish Indian Tribe v. United States
410 F.3d 506 (9th Cir. 2005) 19-20

Virginia Office for Protection and Advocacy v. Reinhard
405 F.3d 185 (4th Cir. 2005) 19

Walton v. United States
415 F.2d 121 (Wyo. 1969) 6

Wichita & Affiliated Tribes of Oklahoma v. Hodel
788 F.2d 765, 774 (D.C. Cir. 1986) 8

CASES—CONTINUED: **PAGE**

Wilson v. Omaha Indian Tribe
442 U.S. 653 (1979) 18

Wisconsin v. Ho-Chunk Nation
512 F.3d 921 (7th Cir. 2008) 21

Yamaha Motor Corp., U.S.A. v. Ferrarotti
242 F.R.D. 178 (D.Conn. 2007) 6

STATUTES:

Federal Rules of Civil Procedure

Rule 12(c) 2

Rule 19 *passim*

Federal Rules of Evidence

Rule 201 15

25 U.S.C.

§ 2710 17, 22-23

MISCELLANEOUS:

Jean F. Rydstrom, *"Who Must Be Joined in Action as Person 'Needed For Just Adjudication' Under Rule 19(a), Federal Rules of Civil Procedure"*
22 A.L.R. Fed. 765, § 8 6

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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 Indian Gaming Regulatory Act ("the IGRA"). FSST also requests a judicial order "enjoin[ing] [the] 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).

[1] The other seven federally-recognized Indian tribes that have Class III gaming compacts with the State of South Dakota 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. (Doc. 103-4 to 103-10).

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.

ARGUMENT

I. THIS CASE SIMPLY FURTHERS FSST'S INDEPENDENT DESIRE TO OPERATE AN INCREASED NUMBER OF SLOT MACHINES FOR AN EXTENDED DURATION.

FSST seeks declaratory relief against the State for violating the IGRA and FSST's constitutional rights. (Doc. 1). FSST disguises its suit as a basic judicial determination of its rights under the IGRA. (Doc. 111, pages 15-16 of 33). However, in reality, this case simply furthers FSST's independent desire to immediately operate an increased (i.e, "unlimited" or "market based") number of slot machines for an extended duration. FSST's suit entirely disregards the various interests of the Gaming Tribes. In fact, this suit attempts to place FSST's sovereign interests above the sovereign interests of the State and the Gaming Tribes. The law does not permit such action. *See San Pasqual Band of Mission Indians v. State of California,* 2007 WL 935578 at *10. (S.D. Cal. – Civ. 06-0988).[2]

[2] A copy of the relevant pleadings and the district court's decision in *San Pasqual* has been provided for the Court's convenience. (Doc. 104-4).

As the State established in its previous submission (Doc. 102), the most recent gaming compact between FSST and the State is, in all material respects, virtually *identical* to the gaming compacts the State has entered into with the Gaming Tribes. (Doc. 103-2 to 103-10). As such, any determination made by the Court regarding whether the State has violated FSST's rights under the IGRA or the federal/state constitutions will have direct business, cultural, economic, and legal impacts on the Gaming Tribes.

II. FSST'S FAILURE TO JOIN THE GAMING TRIBES REQUIRES DISMISSAL OF FSST'S COMPLAINT UNDER RULE 19.

The Court must dismiss FSST's complaint because FSST has failed to join the Gaming Tribes in this action. The Gaming Tribes are "required" and "indispensable" parties under Rule 19 for the following reasons:

First, the Court cannot accord "complete relief" in the Gaming Tribes' absence. Fed.R.Civ.P. 19(a)(1)(A). Second, the Gaming Tribes have legally protectable interests and disposing of this action in their absence will "impair or impede" the Gaming Tribes' ability to protect those interests. Fed.R.Civ.P. 19(a)(1)(B)(i). And third, disposing of this action in the Gaming Tribes' absence may subject the State to incurring "inconsistent obligations."[3] Fed.R.Civ.P. 19(a)(1)(B)(ii).

Next, joinder of the Gaming Tribes is not feasible because of the Gaming Tribes' sovereign immunity. Fed.R.Civ.P 19(a)(2). "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). And finally, a balancing of the "equity

[3] It should be noted that the State is only required to satisfy *one* of these three subparagraphs under Rule 19(a) to establish "required" party status. *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999).

and good conscience" factors support the State's position that this matter should be dismissed.[4] Fed.R.Civ.P. 19(b).

A. *"Complete Relief" May Not Be Accorded In The Gaming Tribes' Absence*

FSST claims that the Court may accord "complete relief" in the Gaming Tribes' absence.[5] (Doc. 111, pages 15-16 of 33). Fed.R.Civ.P. 19(a)(1)(A). In essence, FSST alleges that the Gaming Tribes are not "required" parties because FSST seeks only a judicial determination of *its own rights* under *its own* bilateral gaming compact with the State. (Doc. 111, pages 15-16 of 33).

Unfortunately, this argument disregards the fact that the State has always treated FSST and the Gaming Tribes virtually *identical* regarding the manner in which Class III gaming is conducted in South Dakota. (Doc. 103-2 to 103-10). FSST also fails to acknowledge that a judicial determination in this case regarding the fundamental issues of alleged constitutional

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[4] FSST also fails to identify the Gaming Tribes or discuss why they are not joined in this action. (Doc. 1). When, as here, all parties required to be joined under Rule 19 are not included as defendants, the complaint must state the names of those not joined and the reasons why they are not joined. Fed.R.Civ.P. 19(c). FSST's failure to fulfill this requirement also subjects this action to dismissal.

[5] Federal Rule of Civil Procedure 19(a)(1)(A) provides:

> **(a) Persons Required to Be Joined if Feasible.**
>
> **(1) Required Party.** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> **(A)** in that person's absence, the court cannot accord *complete relief* among existing parties . . . .

(emphasis added).

violations, increased gaming devices, and a longer compact duration will certainly affect the Gaming Tribes.

FSST's characterization of this action as somehow "limited" only to its own gaming compact is not persuasive. (Doc. 111, pages 15-16 of 33). It is undisputed that the number of gaming devices available to FSST is *identical* to the number of gaming devices available to the Gaming Tribes. (Doc. 103-2 to 103-10). It is also undisputed that the duration of FSST's compact is *virtually identical* to the other Gaming Tribes' compacts. (Doc. 103-2 to 103-10). Any judicial determination that reviews the State's alleged constitutional violations, alters the number of Class III gaming devices available to FSST, or amends the duration of FSST's compact, will undoubtedly affect the Gaming Tribes. As such, the Court "cannot accord complete relief among existing parties" in the Gaming Tribes' absence. Fed.R.Civ.P. 19(a)(1)(A).

B. *The Gaming Tribes Are Not Required To Affirmatively "Claim" A Legally Protected Interest In This Action*

FSST also asserts that the State's motion should be denied because no Gaming Tribe has affirmatively "claimed an interest" in this action.[6] (Doc. 111, pages 14-15 of 33). Fed.R.Civ.P. 19(a)(1)(B). FSST reads the "claims an interest" clause too narrowly.

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[6] Federal Rule of Civil Procedure 19(a)(1)(B) provides:

> **(a) Persons Required to Be Joined if Feasible.**
>
> **(1) Required Party.** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: . . .
>
> **(B)** that person *claims an interest* relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> **(i)** as a practical matter impair or impede the person's ability

(continued…)

Rule 19(a)(1)(B) requires that a person be joined as a party in an action if he "claims an interest relating to the subject of the action . . . ." However, courts generally construe "claims an interest" as though it reads "has an interest," without a discussion of any practical difference. Jean F. Rydstrom, *"Who Must Be Joined in Action as Person 'Needed For Just Adjudication' Under Rule 19(a), Federal Rules of Civil Procedure,"* 22 A.L.R. Fed. 765, § 8. Since an absentee party obviously cannot make a "claim" in the action itself, the word no doubt refers to any "claim" he may make on the basis of the actual interests he has.[7] In other words, an absentee party must "have an interest" before he can "claim an interest." *Id.; See e.g., Yamaha Motor Corp., U.S.A. v. Ferrarotti*, 242 F.R.D. 178 (D.Conn. 2007); *Walton v. United States*, 415 F.2d 121 (Wyo. 1969) (suggesting that "claiming an interest" under Rule 19 is equivalent to "having an interest").

Also, FSST's contention that the State's motion should be denied because the Gaming Tribes have not affirmatively "claimed an interest" was rejected in *San Pasqual*. The *San Pasqual* Court opined:

> San Pasqual argued [that] *no other tribe has claimed an interest in the outcome of this litigation*, so the court should not find any absent party is "necessary" to afford . . . relief. San Pasqual represents each signatory tribe to the . . . compact was provided written notice of this lawsuit seeking a judicial determination of the

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(…continued)

> to protect the interest; or
>
> **(ii)** leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(emphasis added).

[7] FSST's assertion that the Gaming Tribes must affirmatively "claim an interest" under Rule 19 is also logically flawed because it would seemingly require the Gaming Tribes to surrender sovereign immunity as the price for avoiding the prejudice of non-joinder.

> number of Gaming Device licenses authorized in the aggregate by its Compact with the State, and as of the time the Opposition was filed, it received no response from any tribe claiming an interest in this case. . . .
>
> The court finds the absent parties have a legally protected interest in the suit, under either a "fixed fund" theory or under the theory that interests arising from terms in bargained compacts are protected interests, inasmuch as a determination of the maximum number of licenses available collectively to all the . . . [c]ompact tribes is uniformly applicable to all . . . . *Permitting San Pasqual, or any other of the . . . [c]ompact tribes, to unilaterally obtain a judgment declaring a different aggregate maximum number of [gaming device] licenses would impair or impede other tribes' bargains and material assumptions*.

San Pasqual, 2007 WL 935578 at *10-11 (emphasis added).

Therefore, the fact that none of the Gaming Tribes have (at this point) affirmatively "claimed an interest" does not foreclose the Court's ability to grant the State's motion.

C. *The Gaming Tribes Have A Legally Protected Interest That Will Be "Impaired or Impeded" By Not Joining Them As Required Parties*

A party is "required" when it has an "interest . . . [in] the action and is so situated that disposing of the action in the [party's] absence may . . . *impair or impede* that [party's] ability to protect [its] interest."[8] Fed.R.Civ.P. 19(a)(1)(B)(i). The "interest" referenced in Rule 19 must be a "legally protectable interest." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

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[8] Federal Rule of Civil Procedure 19(a)(1)(B)(i) provides:

> **(a) Persons Required to Be Joined if Feasible.**
>
> **(1) Required Party.** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: . . .
>
> **(B)** that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(continued…)

A finite amount of resources which a court is asked to allocate may create a protectable interest in the beneficiaries of the fund. *Id.* (citing *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 774 (D.C.Cir. 1986)). Interests arising from alleged constitutional violations and terms in a bargained contract (such as the maximum number of gaming devices and the duration of compacts), are certainly "legally protectable interests," so long as the relief sought would render "the compacts less valuable to the tribes" and thereby "impair" tribal interests in them. *See San Pasqual*, 2007 WL 935578 at *10; *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002).

In this case, each Gaming Tribe unquestionably has "legally protectable interests" in its gaming compacts. Each compact is one of eight virtually identical compacts that represent an integrated agreement amongst the State, FSST, and the Gaming Tribes regarding the scope and regulation of Class III tribal gaming in South Dakota. (Doc. 103-2 to 103-10). 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 virtually identically.

The Gaming Tribes' interests will be "practically impaired or impeded" by *either* a favorable or unfavorable decision for FSST. Adjudicating FSST's claims that the State has violated FSST's constitutional rights and failed to negotiate in "good faith" under the IGRA

(…continued)

> **(i)** as a practical matter *impair or impede* the person's ability to protect the interest . . . .

(emphasis added).

impacts every other Gaming Tribe's compact and potentially readjusts the gaming dynamics amongst the State, FSST, and the Gaming Tribes. (Doc 1 – Exhibit 14).

For instance, granting FSST's claims of alleged constitutional violations, issuing FSST additional gaming devices, or ordering an extended compact duration to FSST will "practically impair or impede" the rights of the Gaming Tribes. (Doc. 1, Exhibit 14). Conversely, denying FSST's claims of alleged constitutional violations, denying FSST additional gaming devices, or refusing to order an extended compact duration to FSST will "practically impair or impede" the rights of the Gaming Tribes. *See San Pasqual*, 2007 WL 935578 at *12 ("Permitting San Pasqual, or any other of the . . . [c]ompact tribes, to unilaterally obtain a judgment declaring a different aggregate maximum number of [gaming device] licenses would *impair or impede* other tribes' bargains and material assumptions") (emphasis added). In sum, adjudicating FSST's claims without the Gaming Tribes unquestionably "impairs or impedes" the Gaming Tribes' ability to protect their interests under Rule 19(a)(1)(B)(i).

FSST contends that "the State's assertion regarding the Gaming Tribes' positions is unreliable and speculative. . . ." (Doc. 111, Page 15 of 33). However, this theory was also rejected by the district court in *San Pasqual*:

> San Pasqual objects [to] Defendants lack evidence to support their assertion that "if San Pasqual succeeds in this action, some . . . Gaming Tribes will necessarily suffer prejudice in the form of a resulting decrease in market share or diluted license value." The court does not need to rely on the "market share" theory to find the prejudice element of the indispensable party analysis is satisfied.

San Pasqual, 2007 WL 935578 at *6.

The State's "impair or impede" assertions are also supported by FSST's own complaint. FSST's complaint actually includes a study of the impact enlarged gaming facilities will have on the Gaming Tribes and the State. (Doc. 1, Exhibit 14). This study, authored by Cummings

Associates of Arlington, Massachusetts, entitled "Analysis of the Current Market for Gaming in South Dakota, with Projections for the Likely Impacts of New or Enlarged Facilities" ("Cummings Report"), analyzes the impact of "expanded Native American gaming facilities in South Dakota." (Doc. 1, Exhibit 14). The Cummings Report contains actual projections regarding the negative impacts on the Gaming Tribes if additional slot machines are placed at FSST's Royal River Casino. (Doc. 1, Exhibit 14). Thus, *based upon FSST's own pleading,* the State's belief that FSST's claims will "impair and impede" the Gaming Tribes' interests is entirely reasonable and reliable.

D. *The State May Be Subjected To "Inconsistent Obligations" By Not Joining The Gaming Tribes As Required Parties*

A party is also "required" when it has an "interest . . . [in] the action and is so situated that disposing of the action in the [party's] absence may . . . *leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.*"[9] Fed.R.Civ.P. 19(a)(1)(B)(ii).

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[9] Federal Rule of Civil Procedure 19(a)(1)(B)(ii) provides:

> **(a) Persons Required to Be Joined if Feasible.**
>
> **(1) Required Party.** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: . . .
>
> **(B)** that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: . . .
>
> **(ii)** leave an existing party subject to a *substantial risk of incurring double, multiple, or otherwise inconsistent obligations* because of the interest.

(emphasis added).

The State may be exposed to inconsistent obligations if FSST is granted its requested relief. Because the State has historically bargained with FSST and the Gaming Tribes for an identical number of gaming devices and virtually identical compact durations, the State is entitled to have a judgment that includes all of the Indian tribes. If that cannot be accomplished, then "complete relief" will be denied to the State.[10]

A favorable decision for FSST could potentially bind the State in future compact negotiations or litigation with the Gaming Tribes. Likewise, an unfavorable decision for FSST could potentially bind the Gaming Tribes in future negotiations or litigation with the State. These potential "collateral estoppel" issues also weigh in favor of granting the State's motion under Rule 19.

In sum, adjudicating FSST's claim without the Gaming Tribes creates potential "inconsistent obligation" and collateral estoppel issues for the Gaming Tribes and the State under Rule 19(a)(1)(B)(ii). The law does not countenance such action.

E. *Joinder Of The Gaming Tribes Is Not Feasible Because Of Tribal Sovereign Immunity*

Because the Gaming Tribes are "required" parties under not just one, but all three prongs of Rule 19(a)(1), the next question is whether joinder of the Gaming Tribes is feasible. Clearly, joinder is not feasible because of the Gaming Tribes' sovereign immunity. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S. at 58. The Gaming Tribes cannot be

[10] *See Makah Indian Tribe v. Verity*, 1988 WL 144137 (W.D. Wash. 1988) ("The Tribe has not shown proof that notice of this action was served on the other tribes, nor that non-party tribes are willing to be bound by the result in this litigation. As a result, the State has no assurance that a favorable result in this suit will protect it from subsequent suits brought by other tribes on the same legal basis. For this reason alone, the non-party treaty tribes are indispensable to this litigation").

compelled to join this action without their consent. *Clinton v. Babbitt*, 180 F.3d 1081, 1090 (9th Cir. 1999). 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).

In this case, the Gaming Tribes have not waived immunity, have not consented to this suit, and the IGRA does not automatically waive the Gaming Tribes' sovereign immunity. As such, because of the Gaming Tribes' sovereign immunity, joinder under Rule 19 is not feasible.

F. *The Court Should Dismiss This Action "In Equity And Good Conscience"*

Because the Gaming Tribes' joinder is not feasible, the Court is left with two options: to proceed or to dismiss. Rule 19(b) instructs the Court to make this "indispensability" determination, in "equity and good conscience," guided by four enumerated factors. These four factors are (1) prejudice to any existing 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.[11] Fed.R.Civ.P. 19(b)(1-4).

Under the first factor, FSST appears to assert that the Court can limit the application for relief solely to FSST, and that none of the Gaming Tribes would be prejudiced. (Doc. 111, pages 15-16 of 33). Fed.R.Civ.P. 19(b)(1). However, were FSST to prevail, it would undoubtedly demand additional slot machines and a longer compact duration. (Doc. 1).

[11] It should be noted that when a "required" party is immune from suit, courts have found that there may be "very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor." *Quileute Indian Tribe,* 18 F.3d at 1460. Nonetheless, the State had provided the Court with an analysis of Rule 19(b)'s four factor review.

The State has previously articulated the adverse impacts that will accompany proceeding with this case in the Gaming Tribes' absence. FSST's narrow approach entirely ignores the Gaming Tribes' compacts, which permit each tribe to operate a maximum of 250 slot machines. This "slot machine compromise" was based upon, *inter alia*, a mutual understanding between the State and the Gaming Tribes that each tribe would be allocated a uniform number of slot machines. To permit FSST to proceed with this action and possibly obtain a significant benefit for itself, without the presence of the Gaming Tribes (some of whom are in direct competition with FSST), would significantly prejudice those Gaming Tribes' interests.

Under the second factor, it does not appear that the Court can somehow "shape relief" in a manner that addresses the Gaming Tribes' interests without ordering a Rule 19 dismissal. Fed.R.Civ.P. 19(b)(2)(B). It does not appear practical that the Court can shape relief in a manner that provides FSST with complete relief, without affecting the Gaming Tribes' various interests. FSST fails to appreciate that "unique relief" for itself cannot be ordered without materially impacting the Gaming Tribes.

Under the third factor, no adequate remedy can be rendered in the Gaming Tribes' absence. Fed.R.Civ.P 19(b)(3). This "adequacy" consideration looks to "the interest of *the courts and the public* in complete, consistent, and efficient settlement of controversies." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968) (emphasis added).

FSST wants its demand for "unlimited" or "market based" slot machines substituted in place of the maximum number of slot machines that the State has negotiated with the other Gaming Tribes. One obvious risk, if the Court were to reach this issue in the Gaming Tribes' absence, is that each Gaming Tribe could then propose a variant of that number and pursue

inconsistent declarations of a compact term that has been uniformly applicable to all Indian tribes in South Dakota. The remedy would also be "inadequate" because FSST appears to assume that all the Gaming Tribes support increasing the ceiling on the maximum number of slot machines. This assumption is highly unlikely based solely on the Cummings Report. (Doc. 1, Exhibit 14).

Additionally, FSST does not adequately explain how, even if its compact with the State is arguably "bilateral," any adjustment to the maximum number of slot machines to FSST can be reconciled with the other Gaming Tribes "bilateral" compacts. A judicial determination in this case that FSST should be granted a different number of slot machines would place the State in a potentially untenable and inconsistent position in future negotiations with the Gaming Tribes. This "adequacy" factor also leads to the conclusion that this case cannot proceed without the Gaming Tribes.

Finally, the fourth factor's "alternative forum" element is the only factor that arguably weighs in FSST's favor. Fed.R.Civ.P. 19(b)(4). Nevertheless, "lack of an alternative forum does not automatically prevent dismissal of a suit." *Quileute Indian Tribe,* 18 F.3d at 1460. Rather, "dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." *Id.* FSST's interest in litigating this case is outweighed by the Gaming Tribes' interest in maintaining its sovereign immunity.

In consideration of all the argument, evidence, and authority presented, this case should be dismissed for FSST's inability to join the Gaming Tribes under Rule 19. The Gaming Tribes are "required" parties. Fed.R.Civ.P. 19(a). The absence of the Gaming Tribes does not permit the Court to proceed in "equity and good conscience," and the Gaming Tribes cannot be joined because of tribal immunity. Fed.R.Civ.P. 19(b). As such, the Court should dismiss FSST's

entire complaint for failure to join the Gaming Tribes as "required and indispensable" parties under Rule 19.

G. *The District Courts' Decisions In* Colusa*,* Rincon*, And* San Pasqual *Reaffirm That The State's Motion Should Be Granted*

FSST asserts that the *Colusa, Rincon,* and *San Pasqual* decisions are inapplicable because "[t]he statutory scheme concerning Class III gaming in California is quite unlike that in South Dakota," given that California has a "statewide aggregate number of slot machines."[12] (Doc. 111, pages 18-19 of 33). In reality, FSST's "different statutory scheme" proposition could be made about any jurisdiction that has tribal-state gaming compacts because there are dozens of compact "statutory schemes." FSST fails to acknowledge that FSST and the Gaming Tribes are collectively subject to a 2,000 slot machine agreement (250 slot machines x eight (8) tribes). (Doc. 103-2 to 103-10). Perhaps most evident is that FSST fails to even acknowledge that the California district courts' respective decisions in *Colusa, Rincon,* and *San Pasqual* provide excellent analyses of the fundamental issue of Rule 19 joinder in the Indian gaming context.

FSST distinguishes the *Colusa* case by simply reciting the district court's analysis of why the other compact tribes were "necessary and indispensable" parties under Rule 19.[13] (Doc. 111, pages 19-20 of 33). FSST makes no real attempt to pragmatically differentiate *Colusa* from this case. FSST simply attempts to question the efficacy of *Colusa* by stating "[Colusa] appealed the

[12] Under Fed.R.Evid. 201, the State has requested that the Court take judicial notice of the relevant pleadings and district court decisions in *Colusa, Rincon,* and *San Pasqual.* (Doc. 104, 104-2 to 104-4). FSST alleges that the Court should not take judicial notice of these public documents. (Doc. 111, page 8 of 33, n.1). However, FSST's request lacks merit because judicial notice may be taken of public filings. *See e.g., Harms v. Cigna Ins. Companies,* 421 F.Supp.2d 1225, 1227 (D.S.D. 2006) ("The district court may take judicial notice of public records and may thus consider them on a motion to dismiss").

[13] In its previous submission, the State provides an analysis of the *Colusa* decision. (Doc. 102, pages 29-30 of 42).

district court's dismissal and that appeal is pending in the Ninth Circuit." (Doc. 111, page 19 of 33).

FSST distinguishes *Rincon* and *San Pasqual* using the same analysis.[14] (Doc. 111, pages 20-23 of 33). Once again, FSST questions the value of *Rincon* and *San Pasqual* by relying primarily on the fact that these decisions are both on appeal to the Ninth Circuit. (Doc. 111, page 21-22 of 33).

FSST's attempt to distinguish *Colusa, Rincon,* and *San Pasqual* fails. The Court should adopt the district courts' analyses in *Colusa, Rincon,* and *San Pasqual* and dismiss FSST's complaint for failure to join the Gaming Tribes under Rule 19.

IN THE ALTERNATIVE,

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

A. *The United States Supreme Court's Decision In* Seminole Tribe *Is Applicable In This Matter*

The State has claimed Eleventh Amendment immunity regarding FSST's Second Claim for Relief ("Violation of Equal Protection of the Laws").[15] (Doc. 24, ¶ 3; Doc. 102, page 40 of

[14] In its previous submission, the State also provides an analysis of the *Rincon* and *San Pasqual* decisions. (Doc. 102, pages 30-32 of 42).

[15] The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Supreme Court has also made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question of whether the suit is barred by the Eleventh Amendment. *Cory v. White*, 457 U.S. 85, 90 (1982) ("It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought"). *See also Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S.

(continued…)

42). FSST now asserts that the State's claim of immunity is ineffective and that the United States Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), does not apply to FSST's "Second Claim for Relief." (Doc. 111, pages 23-24 of 33). This passing effort does not withstand scrutiny.

In *Seminole Tribe*, the tribe attempted to invoke the *Ex parte Young* doctrine to circumvent Florida's claim of sovereign immunity. *Id.* at 73-76. However, in rejecting the tribe's assertion, the Supreme Court held that Congress intended the provisions of the IGRA to be the *exclusive remedy* for disputes involving Indian gaming. *Id.* at 74-76.

The *Seminole Tribe* Court relied upon 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). *Id.* at 74-75. Such remedies do not include imposing obligations, other than those found in § 2710(d)(7), upon state officers. *Id*. at 75.

In this case, FSST improperly attempts to invoke the *Ex parte Young* doctrine to combat the State's assertion of sovereign immunity. (Doc. 24, ¶ 3; Doc. 102, page 40 of 42; Doc. 111, pages 23-24 of 33). In an effort to thwart the ruling in *Seminole Tribe* and the IGRA's exclusive remedial scheme, FSST has alleged equal protection claims. (Doc. 1, ¶¶ 54-61).

In reality, the relief sought by FSST under its equal protection claims is an award providing FSST with a substantial number of new slot machines and a longer compact

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(…continued)
139, 146 (1993) (The Eleventh Amendment's fundamental purpose is to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties").

duration.[16] (Doc. 1). However, none of the named Defendants, other than the State of South Dakota, has the authority to enter into a gaming compact that provides FSST with this relief. Any increase in slot machines or compact duration must be negotiated and authorized by the State and commemorated with a state-tribal compact as envisioned by the IGRA.

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 Tribe.* FSST cannot "plead its way around" the confines of the IGRA. Here, as in *Seminole Tribe,* 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. "The Equal Protection Clause . . . 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, 667 (1979).

In opposing the State's assertion that FSST is not a "person" for equal protection purposes, FSST cites *Jicarilla Apache Nation v. Rio Arriba County,* 440 F.3d 1202 (10th Cir. 2006), *Narragansett Indian Tribe v. NIGC,* 158 F.3d 1335, 1336 (D.C. Cir. 1998), and *Queets*

[16] FSST's "Relief Requested" seeks no monetary damages against Defendants. (Doc. 1).

Band of Indians v. State of Washington, 765 F.2d 1399 (9th Cir. 1985). (Doc. 111, pages 25-26 of 33). FSST claims that these cases enable FSST to bring its equal protection claim. (Doc. 111, pages 25-26 of 33). And while equal protection claims appear to be allowed in these instances, none of the cases address the fundamental issue of whether (or when) an Indian tribe is a "person" for equal protection purposes.

In *Virginia Office for Protection and Advocacy v. Reinhard*, 405 F.3d 185 (4th Cir. 2005), the Fourth Circuit confronted the issue of treating "sovereigns" as "persons" by noting:

> [T]he Supreme Court has held that "person" should generally not be construed to include the sovereign. Though it is not a "hard and fast rule of exclusion," the presumption that "person" does not include the sovereign may be overcome only by an "affirmative showing of statutory intent to the contrary[.]" Whether a sovereign entity qualifies as a "person" also depends upon the "legislative environment" in which the word appears.

Id. at 189.

Employing similar reasoning, the Ninth Circuit in *Skokomish Indian Tribe v. United States*, 410 F.3d 506 (9th Cir. 2005), held that a tribe had no cognizable claim under § 1983 regarding treaty-based fishing rights. *Id.* at 515. In *Skokomish*, the tribe sued under § 1983 claiming that a hydroelectric power project impaired its treaty-based fishing rights. The circuit court held that in cases in which a tribe is not suing as an "aggrieved purchaser," or suing in any other capacity that resembles an action on behalf of a private person, a § 1983 suit is not proper. *Id*. at 514-515 (citing in part *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 708-712 (2003)). The circuit court concluded, "[s]ection 1983 was designed to secure private rights

against government encroachment as well as the longstanding interpretive presumption that 'person' does not include the sovereign."[17] *Id.* at 515.

This case is similar to *Skokomish*. FSST's equal protection claim seeks to redress the alleged disparity between *tribal* and *non-tribal* gaming. (Doc. 1). It is undeniable that FSST's ability to conduct Class III gaming is exclusively a product of the IGRA. However, FSST's authority to conduct Class III gaming is granted to FSST itself, *not to individual tribal members*. And in no way is FSST purporting to bring any part of this suit on behalf of its individual tribal members. (Doc. 1).

FSST brings its equal protection claim from a position that can only be obtained by asserting its distinction as a *sovereign political entity*. (Doc. 102, pages 27-29 of 42). In no way does FSST submit that it is operating as a "person." (Doc. 102, pages 27-29 of 42). As such, FSST's "Second Claim for Relief" should also be dismissed because FSST is not a "person" for equal protection purposes.

C. *The State Of South Dakota Has Not Waived Its Sovereign Immunity By Ratifying The United States Constitution*

FSST also makes the baseless and entirely unsupported assertion that by "ratif[ying] the [United States] Constitution, the states surrendered all sovereignty over the entire subject area of Indian affairs. This complete surrender of sovereignty included a surrender of the states' ability to assert sovereign immunity." (Doc. 111, pages 26-28 of 33).

The Supreme Court directly addressed this issue of state sovereign immunity under the IGRA in *Seminole Tribe*, 517 U.S. at 44. The *Seminole Tribe* Court definitively stated:

[17] The *Skokomish* Court's conclusion was formed in part by the fact that the tribe sought to enforce communal rather than individual rights. *Id*. at 515-516. This held true even when individual members would have received a benefit. *Id*.

> In overruling *Union Gas* today, we *reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce*, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, *the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States*. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. Petitioner's suit against the State of Florida must be dismissed for a lack of jurisdiction.

Id. at 72-73 (emphasis added).

FSST's assertion that by adopting the United States Constitution, the State of South Dakota somehow waived its sovereign immunity regarding claims by Indian tribes (Doc. 111, pages 26-27 of 33), is obtuse and admittedly unsupported by any rational analysis of the last three centuries of Supreme Court jurisprudence.

D. *The Court Lacks Supplemental Jurisdiction Over FSST's Remaining State Law Claims Because These State Law Claims Do Not Share "A Common Nucleus of Operative Fact" With The IGRA And The State Has Invoked Its Sovereign Immunity*

Dismissing FSST's federal equal protection claims eliminates the jurisdictional foundation for FSST's remaining state law claims. (Doc. 102, pages 37-39 of 42). First, FSST cannot allege that its state law claims are somehow "supplemental" to the IGRA claims. These divergent claims simply do not share the requisite "common nucleus of operative fact." *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 936 (7th Cir. 2008).

Second, even if the Court would somehow find a "common nucleus of operative fact," FSST's state law claims would still be barred by the State's invocation of sovereign immunity. "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)).[18]

In sum, the Court lacks supplemental jurisdiction over FSST's remaining state law claims because (1) these state law claims do not share "a common nucleus of operative fact" with the IGRA and (2) the State has properly invoked its sovereign immunity.

IV. 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.

FSST has named the State of South Dakota, Governor Michael Rounds, the South Dakota Commission on Gaming, and Attorney General Larry Long as defendants. (Doc. 1). FSST claims that it may proceed against these defendants under *Ex parte Young*. (Doc. 111, pages 30-31 of 33). However, FSST attempts to do exactly what *Seminole Tribe* prohibits – to impose liability on State officers under the *Ex parte Young* doctrine.

Seminole Tribe specifically addressed the issue of whether the IGRA authorized jurisdiction over the Governor of Florida using *Ex parte Young*. 517 U.S. at 73-77. In examining this claim, 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). And such remedies did not include imposing

[18] The *Ex parte Young* doctrine is also inapplicable to supplemental claims involving alleged violations of state law. *Pennhurst*, 465 U.S. at 106 ("it is difficult to think of a greater intrusion on state sovereignty that when a federal court instructs state officials on how to conform their conduct to state law.").

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 tribe's against the Governor of Florida.

In this case, the State has waived its Eleventh Amendment immunity regarding *only* FSST's IGRA claims. (Doc. 24). This waiver allows FSST to avail itself *only* of the remedies found in § 2710(d)(7). This waiver *does not* allow FSST to name state officers as defendants. Therefore, in accordance with the IGRA and *Seminole Tribe*, Governor Michael Rounds, Attorney General Larry Long, and the South Dakota Commission on Gaming should be dismissed from this lawsuit.

CONCLUSION

For these reasons and those previously set forth in the "State's Memorandum of Points and Authorities in Support of Motion for Judgment on the Pleadings" (Doc. 102), the State requests that FSST's entire complaint be dismissed without leave to amend under Rules 12(c) and 19.

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

Dated this 1st day of July, 2008.

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/s/ Richard M. Williams

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