EDMUND G. BROWN JR.
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General
SYLVIA A. CATES
Deputy Attorney General
JENNIFER T. HENDERSON, State Bar No. 206231
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5366
Fax: (916) 327-2319
E-mail: Jennifer.Henderson@doj.ca.gov
Attorneys for Defendants, State of California and Governor Arnold Schwarzenegger

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRIENDS OF AMADOR COUNTY, BEA CRABTREE, JUNE GEARY, Plaintiffs, **v.** **KENNETH SALAZAR, SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, United States Department of Interior, THE NATIONAL INDIAN GAMING COMMISSION, GEORGE SKIBINE, Acting Chairman of the National Indian Gaming Commission, THE STATE OF CALIFORNIA, Arnold Schwarzenegger Governor of the State of California,** Defendants.	2:10-cv-00348-WBS-KJM **STATE DEFENDANTS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS** Date: October 12, 2010 Time: 2:00 p.m. Dept: 5 Judge The Honorable William B. Shubb Trial Date Action Filed: 2/10/2010

INTRODUCTION

Defendants Governor Arnold Schwarzenegger (Governor) and the State of California (State) (collectively State Defendants) reply to Plaintiffs' the Friends of Amador County, Bea Crabtree, and June Geary's (Plaintiffs) opposition to State Defendants' motion to dismiss for

failure to state a claim upon which relief can be granted and failure to join a necessary party (Opposition). Plaintiffs' Opposition centers on the status of the Buena Vista Rancheria of Me-Wuk Indians' (Tribe) land and attempts to prove, through the use of voluminous exhibits,[1] that the Tribe's land "is not now and never has been eligible Indian lands." (Opp. at 48.) In addition to challenging the federal determination on the status of the Tribe's land, Plaintiffs contend that the Tribe is not a required party to the action. Plaintiffs have failed to substantively respond to the merits of the State Defendants' arguments concerning the State's Eleventh Amendment immunity and Plaintiffs' failure to join the Tribe as a required party.

ARGUMENT

I. THE ELEVENTH AMENDMENT BARS PLAINTIFFS' CLAIMS FOR RELIEF AGAINST THE STATE DEFENDANTS

In response to the State Defendants' argument that the claims for relief against the State Defendants are barred by the Eleventh Amendment, Plaintiffs quote at length from the holding in *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084 (E.D. Cal. 2002) *aff'd*, 353 F.3d 712 (9th Cir. 2003). In *Artichoke Joe's*, however, the plaintiffs alleged that various state and federal officers, including the Governor and the Secretary of the Interior, violated IGRA and the Fifth and Fourteenth Amendments to the United States Constitution by creating a tribal monopoly on Las Vegas style gaming. *Id*. at 1090. Here, Plaintiffs do not allege that the State Defendants violated the United States Constitution, rather they allege that the State Defendants violated IGRA and the California Constitution by entering into a class III gaming compact with a tribe that was purportedly ineligible to have a compact due to its tribal status and the status of its land. (Compl. ¶ 37.) Where no violation of the United States Constitution is plead, the *Ex parte Young* doctrine is inapplicable and the State's sovereign immunity bars Plaintiffs' claims for relief. The State has not consented to waive its immunity to suit in federal court brought by individuals alleging that the State violated the California Constitution or IGRA, and the *Ex parte Young* doctrine does not apply to the Governor in this case. Contrary to Plaintiffs' assertions, the Eleventh Amendment

[1] Please see State Defendants' separately filed Objection to Plaintiffs' Request for Judicial Notice.

also bars suits brought against a state by its own citizens. *Broughton Lumber Co. v. Columbia River Gorge Com'n*, 975 F.2d 616, 618 (9th Cir. 1992). Therefore, the Eleventh Amendment bars Plaintiffs' claims against the State Defendants.

Plaintiffs repeatedly claim that the Governor acted *ultra vires* in executing the August 23, 2004 amended Compact (Compact) with the Tribe because the Tribe's land was not eligible for gaming. (Opp. at 40.) Plaintiffs claim that the Governor's approval was outside the powers granted by the California Constitution or IGRA, but this is not an *ultra vires* act for purposes of the *Ex parte Young* doctrine. A state officer may be said to act *ultra vires* only when he acts "without any authority whatever." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 102 n.11 (1984) (citations omitted). "As the Court in *Larson* [*Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 699 (1949)] explained, an *ultra vires* claim rests on 'the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient.'" *Id*. Contrary to Plaintiffs' claims that the Governor committed an "illegal and *ultra vires* act" by entering into the Compact with the Tribe, the Governor fully complied with the California Constitution and IGRA.

The Tribe is a federally recognized tribe, with a gaming ordinance approved by the National Indian Gaming Commission (NIGC), and land determined by the federal government to be eligible for gaming under IGRA. (State Defendants' request for judicial notice (Defs.' RJN) filed with their motion to dismiss, Ex. A, B, C, D, E, F, & G). The California Constitution authorizes the Governor to enter into compacts for the operation of gaming activities by "federally recognized Indian tribes on Indian lands in California in accordance with federal law." Cal. Const., art. IV, § 19(f). IGRA authorizes class III gaming on Indian lands only if such activities are: (1) authorized by an ordinance or resolution adopted by the governing body of the Indian tribe and the Chairman of the NIGC; (2) located in a state that permits such gaming for any purpose by any person, organization, or entity; and (3) conducted in conformance with a tribal-state compact entered into by the Indian tribe and the state and approved by the Secretary of the Interior. 25 U.S.C. §§ 2710(d)(1), (3)(B). Plaintiffs seek to invalidate the Compact here

because it authorizes gaming to be conducted on land Plaintiffs allege is not "Indian land." However, the Compact does not authorize gaming on ineligible land.

The Compact simply allows the Tribe to conduct gaming on Indian lands located within the Rancheria boundaries that existed on July 1, 2004. (Defs.' RJN, Ex. L, Compact § 4.3.5.[2]) Thus, it does not stray from the requirement that gaming may only occur on lands that qualify as Indian lands under IGRA. (Defs.' RJN, Ex.L, Compact §§4.3.5, Compact § 10.8.7(b).[3]) Nor does the Compact make a determination on as to whether any land located within the Rancheria boundaries is in fact eligible for gaming under IGRA. Instead, it simply allows the Tribe to conduct gaming on land that qualifies as Indian lands under IGRA. Therefore, the Governor has not negotiated a compact that allows the Tribe to conduct gaming on lands that do not meet IGRA's Indian lands requirement, and Plaintiffs have not demonstrated any *ultra vires* act. Therefore, the claims for relief against the State Defendants are barred by the Eleventh Amendment and should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

II. THERE IS NO PRIVATE RIGHT OF ACTION UNDER IGRA AND THERE IS NO THIRD PARTY STANDING UNDER THE COMPACT

The complaint alleges a violation of IGRA due to the approval of class III gaming on ineligible lands. Plaintiffs' Opposition does not address the fact that there is no private right of action under IGRA. Only Indian tribes, the federal government, and, in limited circumstances, states, are authorized to bring a claim for a violation of IGRA. 25 U.S.C. § 2710(d)(7)(A). As discussed in the State Defendants' memorandum of points and authorities in support of their motion to dismiss, the Ninth Circuit has already established that IGRA provides no private causes of action. *See Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 (9th Cir. 2000); *see also Hartman v. Kickapoo Tribe Gaming Com'n*, 319 F.3d 1230, 1232 (10th Cir. 2003) (holding that individual plaintiff's claims against state gaming agency and tribe premised on alleged violation of IGRA must be dismissed because "IGRA provides no private

[2] Compact section 4.3.5 provides in relevant part: "the Tribe may operate any and all Gaming Devices only on Indian lands within the boundaries of its Rancheria existing as of July 1, 2004."

[3] Section 10.8.7 defines "project" as "any activity occurring on Indian lands."

right of action against the Tribe, the State, the federal government or any official or agency thereof" (citing *Hartman v. Kickapoo Tribe Gaming Comm'n*, 176 F. Supp. 2d 1168, 1175 (D. Kan. 2001))). No private right of action exists in IGRA that allows Plaintiffs to argue their claims in federal court.

Because no private right of action exists under IGRA, to the extent Plaintiffs' claims arise under IGRA, this action must be dismissed under Federal Rule of Civil Procedure 12(b)(1) because Plaintiffs lack standing to enforce IGRA.

While the district court has jurisdiction to enforce the Compact's terms as between the State and the Tribe, *see Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997), without the Tribe's express waiver of sovereign immunity, it does not have jurisdiction to hear the Plaintiffs' third-party beneficiary claims regarding the Revenue Sharing Trust Fund or any other obligation arising under the Compact. The Compact specifically limits third-party beneficiary rights in section 15.1, stating that "[e]xcept to the extent expressly provided ... this Gaming Compact is not intended to, and shall not be construed to, create any right on the part of a third party to bring an action to enforce any of its terms." (Defs.' RJN, Ex. H, 1999 Compact § 15.1.)

To the extent this action is brought under IGRA, there is no provision within IGRA for a private cause of action. The Compact itself expressly prohibits third party actions to enforce its provisions. As a result, this action must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

III. THE COMPLAINT MUST BE DISMISSED UNDER FEDERAL RULES OF CIVIL PROCEDURE 12 AND 19 FOR PLAINTIFFS' FAILURE TO JOIN A REQUIRED AND INDISPENSIBLE PARTY

Plaintiffs' Opposition states that the gravamen of their complaint is that the Tribe's land "is not eligible for gaming at all by anyone, was never a reservation, has never been placed in trust and is nothing but a parcel of fee simple land owned over the years by various people." (Opp. at 6:6-10.) Plaintiffs' challenge to the status of the Tribe's land as Indian lands and to the ability of the Tribe to conduct gaming on that land under IGRA is a matter in which the Tribe has the utmost interest. The Tribe has more than a "mere" legal or financial interest in the question of the

status of its land, this matter goes to the territorial component of the Tribe's sovereignty. Yet Plaintiffs claim that the Tribe is not a required party. (Opp. at 45.) Plaintiffs do not deny that they have failed to join, and because of sovereign immunity are not able to join, the Tribe.

An analysis of whether an action must be dismissed under Rule 12(b)(7), must determine if (1) an absent party is required, (2) it is not feasible to join the absent party and (3) it is determined "in equity and good conscience" that the action should not proceed among the existing parties. *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991).

Here, the Tribe is a required party under Rule 19(a)(1). Although Plaintiffs claim that the Tribe is not a required party to the case (Opp. at 47), this claim is contrary to the law. The Compact is a contract between two sovereigns—the State and the Tribe. In cases involving challenges to a contract, courts have consistently held that both parties to a contract must be joined in the action in order to afford complete relief. *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999). As the Ninth Circuit stated in *Lomayaktewa v. Hathaway*, "no procedural principle is more deeply imbedded in the common law that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensible." *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975); *see also Kescoli v. Babbitt*, 101 F.3d 1304, 1309 (9th Cir. 1996) (tribes required party to action seeking challenge of settlement agreement regarding approval of coal lease on tribes' reservations); *McClendon v. U.S.*, 885 F.2d 627, 633 (9th Cir. 1989) (tribe is a necessary party to an action seeking to enforce lease agreement signed by tribe); *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1495 (D.C. Cir. 1995) (state of Kansas has "an interest in validity of a compact to which it is a party, and this interest would be directly affected by the relief" sought, so "as a necessary party, Kansas should have been joined in the litigation if such joinder was feasible").

The Tribe is a required party that should be joined, but is unavailable to be joined, and under the factors in Rule 19(b), in "equity and good conscience," the action should be dismissed. The Tribe has a legally protected interest in this action and the Tribe's absence will impair the Tribe's ability to protect that interest. In *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456 (9th Cir.

1994), for example, one tribe brought an action to challenge the transfer of land to another tribe under the Indian Land Consolidation Act. The court held that the absent tribe was a required[4] party to the action because "complete relief would implicate" the absent tribe's governing status over the land. *Id*. at 1458-59; *see also Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) ("absent tribes have an interest in preserving their own sovereign immunity, with its concomitant right not to have their legal duties determined without their consent").

Plaintiffs mistakenly assert that "merely having a legal or financial interest in the outcome of litigation does not make one a required party" (Opp. at 46) and cite as support *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990). Instead of supporting Plaintiffs' position, however, this case substantiates the State Defendants' claim for dismissal. In *Makah*, a tribe sued the federal government for misallocating the salmon harvest among twenty-four tribes with treaty fishing rights. *Makah*, 910 F.2d at 557. The tribe advanced two claims for relief: one for prospective declaratory and injunctive relief challenging the government's failure to comply with controlling regulations by setting harvest quotas outside the administrative process, and one for retroactive injunctive relief on a substantive claim that the tribe's harvest quota in a given year should have been higher. *Id*. The Ninth Circuit held that the absent tribes were not required for *Makah's* "narrow" procedural claim for prospective relief, because all tribes have an interest in a lawful administrative process. *Id*. at 559. The court, however, held the absent tribes were required for the claim seeking retroactive relief and reallocation of the salmon harvest. *Id*. at 559-60.

Here, in contrast, the Plaintiffs seek to have the Tribe's Compact with the State declared invalid, which is purely substantive and retroactive. Plaintiffs do not seek injunctive relief requiring the State to follow a particular process in the future. *Makah* does not support Plaintiffs' assertion that the Tribe's legal and financial interest in the outcome of this litigation does not make it a required party.

[4] This case was decided before Rule 19 was amended in 2007 to replace the word "necessary" with "required." For consistency, the word "required" will be used in place of "necessary" when addressing Rule 19 case law.

Rather, here, as in *American Greyhound Racing, Inc. v. Hull (American Greyhound)*, 305 F.3d 1015 (9th Cir. 2002), third parties are attempting to litigate over a tribal-state gaming compact without the implicated tribe being able to defend its interests. In *American Greyhound*, the Ninth Circuit held that "the interests of the tribes in their compacts are being impaired and, not being parties, the tribes cannot defend those interests." *Id*. at 1023. If this case is not dismissed, the interest of the Tribe in its Compact, and possibly even the interest of the Tribe in its status as a federally recognized tribe, will be litigated without the Tribe being able to defend its interests.

Plaintiffs' claim that there is no conflict between the interests of the State and Federal Defendants and the Tribe, and that therefore the State and Federal Defendants are capable of adequately representing the interests of the Tribe is unavailing. (Opp. at 46.) The court in *American Greyhound* addressed a similar claim—the state's ability to adequately represent the interests of a tribe with respect to a compact. *American Greyhound*, *supra*, 305 F.3d at 1023 n.5. The court provided two reasons why the state could not adequately represent the tribes' interests. First, the state could not sufficiently represent the tribes' interests because "the State owes no trust duty to the tribes." *Id*. Second, the "Governor's and the tribes' interests under the compacts are potentially adverse." *Id*. Here, compact negotiations between the Tribe and the State have been concluded, but that fact does not impose a trust responsibility upon the State to the Tribe. Moreover, disputes can and do arise regarding the interpretation of compacts.[5] Indeed, the court's language in *American Greyhound* makes it clear that when the court was referring to adverse interests of the tribes and the governor, it was not referring to negotiations but rather to the compacts then in existence –"the Governor's and the tribes' interests under the compacts are potentially adverse." *Id*.

The Federal Defendants also cannot adequately represent the Tribe's interests in its Compact with the State. The compact process was intended by Congress to be a bilateral

[5] *See, e.g., Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Arnold Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010); *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. State of California*, ___ F.3d ___, 2010 WL 3274490 (9th Cir. 2010).

negotiation between two sovereigns that gives effect to the relationship between them. *Artichoke Joe's California Grand Casino v. Norton, supra,* 353 F.3d at 734 ("The very nature of a Tribal-State compact is political; it is an agreement between an Indian tribe, as one sovereign, and a state, as another."). For this reason, the Federal Defendants cannot adequately represent the Tribe's interests in its Compact with the State.

The absent Tribe is a required party to this action and it is not feasible due to the Tribe's sovereign immunity to join the Tribe. This action should not proceed among the existing parties. Therefore, under Federal Rules of Civil Procedure 12(b)(7) and 19, this action must be dismissed.

CONCLUSION

Plaintiffs have failed to substantively respond to the merits of the State Defendants' arguments concerning the State's Eleventh Amendment immunity and the Plaintiffs' failure to join the Tribe as a required party. Moreover, the principal argument advanced by the Plaintiffs' opposition papers—that the Governor lacked authority to enter into a gaming compact with the Tribe because the Tribe's land is ineligible for gaming—is without merit. This action should be dismissed for failure to join the Tribe as a necessary party and for failure to state a claim upon which relief can be granted.

Dated: October 5, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General
SYLVIA A. CATES
Deputy Attorney General

/s/ JENNIFER T. HENDERSON

JENNIFER T. HENDERSON
Deputy Attorney General
Attorneys for Defendants, State of California and Governor Schwarzenegger