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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

WENDY KNOX and RICHARD DOTSON,	)
Plaintiffs,	) Case No. 4:09-CV-00162-BLW
v.	)
UNITED STATES DEPARTMENT OF INTERIOR, KENNETH LEE SALAZAR, Secretary of the Interior, and C.L. OTTER, Governor of the State of Idaho,	)
Defendants.	)

MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

INTRODUCTION

The United States Department of the Interior and Kenneth Lee Salazar, Secretary of the Interior (collectively, the "Federal Defendants"), hereby move to Dismiss Plaintiffs' Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1), Rule 12(b)(6), and Rule 12(b)(7). Plaintiffs, two individuals who state that they are compulsive gamblers, have requested that the Court issue judgment against the Secretary: (1) "setting aside" approvals of four Tribal-State compacts and amendments thereto; (2) "rescinding and voiding" the compacts, (3) declaring that the approvals and the gaming being conducted violate Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701, *et seq*., the Johnson Act, 15 U.S.C. §§ 1171, *et seq*., and the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706; and (4) requiring the United States "to comply with and enforce federal law prohibiting such gaming." Amended Complaint ("Am. Compl."), Wherefore ¶¶ 1, 3 (Doc. 4).

This Court should dismiss Plaintiffs' Amended Complaint for several reasons. First, with regard to the compact entered into by the Shoshone-Bannock Tribes of the Fort Hall Reservation ("SBT") and the State of Idaho, Plaintiffs have failed to identify a final agency action under the APA taken by the Secretary of the Interior pursuant to IGRA within the past six years, which is the generous statute of limitations period set out in 28 U.S.C. § 2401(a) for all civil actions. Second, the agencies that make enforcement decision are not before this Court, and even if they were, prosecutorial decisions are not subject to review under the APA because such decisions are committed to agency discretion. Third, Plaintiffs fail to establish standing to assert their claims with regard to any of the compacts. Finally, Plaintiffs fail to join several necessary and indispensable parties, namely the parties to the four challenged Tribal-State compacts: SBT, the Coeur d'Alene

Tribe, the Kootenai Tribe of Idaho and the Nez Perce Tribe of Idaho, as well as the State of Idaho. As all of these parties enjoy sovereign immunity, they cannot be joined to this lawsuit, and therefore Plaintiffs' Amended Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 19.

This Court should therefore grant the Federal Defendants' motion to dismiss Plaintiffs' Amended Complaint.

FACTUAL BACKGROUND

On February 18, 2000, SBT and the State of Idaho executed a Compact for Class III Gaming ("Compact"). *See* Exhibit 1. On September 8, 2000, the Secretary of the Interior published a notice in the Federal Register that the Compact was approved.[1/] 65 Fed. Reg. 54541-03 (Sept. 8, 2000). The Compact governs the "licensing, regulation and operation of Class III gaming conducted by the Tribes on Indian Lands. . . ." Compact, § 3(k). Under the Compact, SBT may conduct "any gaming activity that the State of Idaho 'permits for any purpose by any person, organization or entity' as the phrase is interpreted in the context of the Indian Gaming Regulatory Act." § 4(a). The Compact also states that "[i]n the event any other Indian tribe is permitted by compact or final court decision to conduct any Class III games in Idaho in addition to those games permitted by this Compact, this Compact shall be amended to permit the Tribes to conduct those same additional games." § 24(d).

In November 2002, the voters of Idaho approved Proposition One, which added two sections to the Idaho Code. *See Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1097 (9th Cir. 2006); Am. Compl., ¶ 14. Section 67-429B(1) allows Indian tribes "to conduct gaming using tribal video gaming machines pursuant to state tribal gaming compacts which specifically permit their use." *Id.*

[1/] Prior to approving the Compact, the Secretary recommended in an August 24, 2000 letter to SBT's Chairman that Section 25 of the Compact be amended to require that amendments to the Compact be submitted to the Secretary in accordance with IGRA. *See* Ex. 1 at 1.

Section 67-429C "authorizes tribes to amend their gaming compact to permit the use of tribal video gaming machines." *Id.* Section 429C also sets limits on the number of gaming machines authorized and requires tribes to contribute a portion of the gaming income to local schools. *Id.* Following this, three Indian tribes in Idaho, the Couer D'Alene Tribe, the Kootenai Tribe and the Nez Perce Tribe, amended their compacts, granting them the right to operate tribal video gaming machine.[2/] *Id.* at 1098; Am. Compl., ¶ 19. On January 8, 2003, the Secretary published notices in the Federal Register announcing that amendments to the compacts were approved. 68 Fed. Reg. 1068-02, 1068-03, 1068-04. To date, SBT has not requested approval of any amendment to the Compact by the Secretary pursuant to IGRA. *See* Declaration of Paula L. Hart, ¶ 3; Am. Compl., ¶ 21.

SBT's Compact has previously been the subject of litigation, including when SBT and the State filed suit before this Court in order to determine the scope of permissible Class III gaming allowed under the Compact. *See Shoshone-Bannock Tribes*, 465 F.3d at 1097. Following the passage of Proposition One, the Ninth Circuit found that the dispute between the two parties was narrowed to the question of whether the Compact had to be renegotiated before SBT could operate tribal video gaming machines. *Id.* at 1098. The Ninth Circuit found that while "an amendment of the Tribes' compact is required," SBT was not required to renegotiate the Compact in order to effectuate the amendment. *Id.* at 1099. Rather, SBT was only required to comply with Sections 23-25 of the Compact, which require SBT to provide notice to the Idaho State Gaming Agency and the Chairman of the Tribes' Business Council. *Id.* at 1100. The court concluded that SBT was "entitled to a mandatory amendment of the Compact stating that they are authorized to conduct tribal video gaming, as the other tribes have been permitted to do so." *Id.* at 1102.

[2/] The three compacts were approved by the Secretary prior to 2000. Am. Compl. ¶ 13.

The Idaho Supreme Court also recently dismissed a case brought by Plaintiffs challenging the constitutionality of the state statute authorizing the gaming on the basis of standing. *See Knox v. Idaho,* 223 P.3d 266 (2009).

STATUTORY BACKGROUND

"IGRA establishes a comprehensive scheme for state-tribal relations on the issue of gaming." *Pueblo of Sandia v. Babbit*, 47 F. Supp. 2d 49, 50 (D.D.C. 1999); 18 U.S.C. §§ 1166-68; 25 U.S.C. §§ 2701, *et seq*. IGRA's primary purpose is to allow for gaming "as a means of promoting tribal economic development, self-sufficiency and strong tribal governments." *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1018 (9th Cir. 2002), citing 25 U.S.C. § 2702. IGRA authorizes states and Indian tribes to enter into compacts for gaming and divides gaming into three classes. Class I gaming is regulated exclusively by the tribes and includes social and traditional games. Class II gaming includes bingo and related games, which may be played in a state that permits any such games by any person or organization. Class III gaming, which is regulated by the compacts entered into by states and tribes, includes all other games such as those played in casinos and slot machines.

IGRA provides that no Class III gaming activities are lawful unless: (1) the tribe has authorized the gaming by tribal ordinance or resolution; (2) the gaming is "located in a State that permits such gaming for any purpose by any person, organization or entity;" and (3) the gaming is "conducted in conformity with a tribal-state compact" entered into by the Indian tribe and the State and "that is in effect." *Am. Greyhound Racing*, 305 F.3d at 1019, quoting 25 U.S.C. § 2710(d)(1). Secretarial approval of a compact is governed by 25 U.S.C. § 2710(d)(8), which provides that the Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe. 25 U.S.C. § 2710(d)(8)(A). The Secretary may disapprove a compact only in three circumstances: (1) if it violates IGRA; (2) if it

violates any other federal law; or (3) if it violates the United States' trust obligations. *See* 25 U.S.C. § 2710(d)(8)(B). If the Secretary does not approve or disapprove a compact within 45 days, "the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of [IGRA]." 25 U.S.C. § 2710(d)(8)(C). "The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph." 25 U.S.C. § 2710(d)(8)(D). 25 C.F.R. part 293 sets forth the regulations governing the actions the Secretary may take regarding approval or disapproval of compacts, as well as amendments to compacts. All amendments to compacts, both substantive and technical, are subject to review and approval by the Secretary. 25 C.F.R. § 293.4.

The Johnson Act prohibits the possession or use of gambling devices on Indian reservations, punishable by up to a $5,000 fine and up to a two year term in prison. 15 U.S.C. §§ 1175(a), 1176. However, IGRA expressly states that this section of the Johnson Act shall not apply to "any gaming conducted under a Tribal-State Compact" that is in effect and has been entered into in a state where gambling devices are legal. 25 U.S.C. § 2710(d)(6).

STANDARD OF REVIEW FOR MOTION TO DISMISS

"Under Federal Rule of Civil Procedure 12(b)(1), a complaint must be dismissed if the Court lacks subject matter jurisdiction to adjudicate the claims. Once subject matter jurisdiction is challenged, the burden of proof is placed on the party asserting that jurisdiction exists." *Bedke v. Sec'y of Interior*, 2010 WL 2000052 at *3 (D. Idaho 2010), citing *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir.1986). "Accordingly, the Court will presume lack of subject matter jurisdiction until the plaintiff proves otherwise in response to the motion to dismiss." *Id.*, citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "In evaluating a Rule 12(b)(1) motion, the question of whether the Court must accept the complaint's allegations as true turns on whether

the challenge is facial or factual. A facial attack is one in which subject matter jurisdiction is challenged solely on the allegations in the complaint, attached documents, and judicially noticed facts." *Id.* (internal citation omitted); *see also Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1141 n.5 (9th Cir. 2003) ("[I]n ruling on a 12(b)(1) jurisdictional challenge, a court may look beyond the complaint and consider extrinsic evidence."). "In the case of a facial attack, the Court is required to accept as true all factual allegations. . . ." *Id.* (internal citation omitted).

A motion to dismiss under Rule 12(b)(6) must be granted if the complaint fails to state a claim upon which relief can be granted. "In a reviewing a complaint under this Rule, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Wang v. Chertoff*, 676 F. Supp.2d 1086, 1092 (D. Idaho 2009) (internal citation omitted). However, the factual allegations must be "enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* The Supreme Court recently affirmed the requirement for a complaint under Rule 8 to provide specific allegations to support the alleged violations of law or cause of action. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1940-41 (2009).

Rule 12(b)(7) allows for dismissal pursuant to Rule 19, a mandatory joinder rule, under which courts engage in an analysis to determine if an absent party must be joined for the suit to move forward, dismissing the case if the absent party cannot be joined. *See Pit River Home & Agric. Coop. Assoc. v. United States*, 30 F.3d 1088, 1098 (9th Cir. 1994).

ARGUMENT

I. PLAINTIFFS FAIL TO IDENTIFY ANY FINAL AGENCY ACTION TAKEN WITH REGARD TO SBT'S COMPACT BY FEDERAL DEFENDANTS SUBJECT TO REVIEW UNDER THE APA AND THEREFORE THEIR AMENDED COMPLAINT SHOULD BE DISMISSED

As sovereign, the United States and its agencies may be sued only when Congress has consented to suit. *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999); *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Absent a waiver, "sovereign immunity shields the Federal Government and its agencies from suit." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *accord*, *Orff v. United States*, 545 U.S. 596, 604 (2005); *Gallo Cattle Co. v. U.S. Dep't of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998) (APA provides limited waiver of sovereign immunity in suits seeking judicial review of agency action). Any waiver must be strictly construed in the government's favor and unequivocally expressed in the statutory text. *Orff*, 545 U.S. at 602; *Blue Fox*, 525 U.S. at 261 (citing cases). There is no "implied" waiver of sovereign immunity. *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985). Absent an express waiver, the court must dismiss the suit for lack of subject-matter jurisdiction.

The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Thus, a plaintiff "claiming a right to sue must identify some 'agency action' that affects him in the specified fashion; it is judicial review 'thereof' to which he is entitled." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990). Plaintiffs assert jurisdiction under the APA. Am. Compl., ¶ 2. However, Plaintiffs fail to identify any action taken within the last six years by the Secretary that qualifies as a final agency action within the meaning of the APA

with regard to SBT's Compact.[3/]

Instead, Plaintiffs attempt to argue that since other Idaho tribes amended their compacts in 2003 to allow tribal video gaming, and SBT's Compact contains a "most favored nations clause" that allows the Tribes to conduct any gaming otherwise allowed in Idaho, therefore, the Secretary somehow also acted with regard to SBT's Compact. *See* Am. Compl., ¶¶ 21-22. Specifically, the Plaintiffs state, with no support, that the Secretary allegedly failed to approve or disapprove an amendment to the Compact at some unnamed point in 2003, and thus an amendment allowing SBT to conduct the challenged Class III gaming was deemed approved. *See id.*, ¶ 22. The fatal flaw in this argument is that Plaintiffs offer no proof that SBT ever submitted any such amendment to the Secretary in 2003, and in fact, Plaintiffs readily admit that SBT never actually amended its Compact. *See id.*, ¶ 21. Indeed, the Department of the Interior has never received any amendment to the Compact from SBT for consideration. *See* Hart Declaration ¶ 3. Therefore, the Secretary has not, and could not, have taken any action, final or otherwise, with regard to any amendment to the

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[3/]All four state-tribal compacts were approved by 2000. Am. Compl., ¶ 13. To the extent that Plaintiffs are attempting to challenge the original approvals of the compacts, including SBT's Compact, they are time-barred. Under 28 U.S.C. § 2401(a), all civil actions against the United States must be filed "within six years after the right of action first accrues." The Ninth Circuit has held this limitation applies to actions brought pursuant to the APA. *See Wind River Min. Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991). A cause of action generally accrues when a plaintiff knew or should have known of the wrong and was able to commence an action based upon that wrong. *See Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364-65 (9th Cir. 1990). In *Shiny Rock*, the Ninth Circuit held that the statute of limitations period began once the plaintiff had constructive notice after the agency published a notice in the Federal Register. *Id.* at 1363. Plaintiffs have requested this Court find the original approvals, are void and be set aside. *See* Am. Compl., Wherefore ¶¶ 1, 3. However, those approvals, which were all published in the Federal Register, were given well in excess of six years ago. *See* 62 Fed. Reg. 27065-01; 60 Fed. Reg. 57246-03; 58 FR 8478-01. Thus, to the extent that Plaintiffs' Amended Complaint is a challenge to the original approvals, it is time-barred and must be dismissed.

Compact.[4/] As there is no final agency action by the Secretary to challenge with regard to SBT's Class III gaming, Plaintiffs' Amended Complaint should be dismissed regarding SBT's Compact.

II. ANY CLAIM PLAINTIFFS ASSERT REQUIRING THE UNITED STATES TO ENFORCE FEDERAL LAW PROHIBITING GAMING IS NOT SUBJECT TO JUDICIAL REVIEW IN THIS ACTION

Plaintiffs have requested that this Court order the United States to "enforce federal law" prohibiting the challenging gaming. Am. Compl., Wherefore ¶ 3. This request must be dismissed. The agencies that make enforcement decision are not before this Court, and even if they were, prosecutorial decisions not subject to review under the APA because such decisions are committed to agency discretion.

First, none of the agencies charged with enforcement of the Johnson Act or IGRA are parties before the Court. The Johnson Act is a criminal statute that the Attorney General of the United States has the authority to enforce. *See United States v. Int'l Union of Operating Engineers, Local 701*, 638 F.2d 1161, 1162 (9th Cir. 1979) ("In general, the 'conduct (of) federal criminal litigation . . . is 'an executive function within the exclusive prerogative of the Attorney General.'") (internal citations omitted). Likewise, the Attorney General and the National Indian Gaming Commission ("NIGC") are the federal agencies given the authority to take enforcement actions under IGRA. *See* 18 U.S.C. § 1166; 25 U.S.C. § 2713. It is the Chairman of the NIGC that has the sole authority to levy civil fines, issue notices of violation, or order a temporary closure of a casino facility. 25 U.S.C. §§ 2705, 2713(a), (b); 25 C.F.R. part 573. Neither the U.S. Department of Justice nor the NIGC is a party to this action. Nor have Plaintiffs named the Attorney General of the United States,

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[4/] Moreover, the Secretary is not expected under IGRA to resolve complex issues of state law within the 45 day period he has to approve or disapprove a compact or its amendments. *See Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997).

the United States Attorney for the District of Idaho, or any of the Commissioners of the NIGC as a party to this action.

Second, had any of the enforcement agents been parties to this action, decisions regarding whom and what to prosecute are committed to agency discretion. Enforcement decisions under civil and criminal laws are committed to the discretion of the enforcement agencies and are not subject to review under the APA. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (The "decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."); *Sierra Club v. Whitman,* 268 F.3d 898, 903 (9th Cir. 2001) (An agency's decision to not take an enforcement action is "typically committed to the agency's absolute discretion. . . ."). It is not the province of the judiciary to interfere with that exclusive decision-making process, and courts have long acknowledged, in both criminal and civil cases, the Attorney General's authority to control the course of the federal government's litigation is "presumptively immune from judicial review." *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1480 (D.C. Cir. 1995); *see Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) ("[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made"); *Lac Vieux Desert Band of Lake Superior Chippewa Indians of Mich. v. Ashcroft,* 360 F. Supp. 2d 64, 68 n.5 (D.D.C. 2004). Therefore, this Court should deny this request and dismiss Plaintiffs' Amended Complaint.

III. PLAINTIFFS FAIL TO ESTABLISH STANDING

Plaintiffs also lack standing to pursue their claims. A federal court's Article III jurisdiction over a case "depends on existence of [a] 'case or controversy.'" U.S. Const. art. III, § 2, cl. 1; *GTE Cal., Inc. v. FCC*, 39 F.3d 940, 945 (9th Cir. 1994). To limit federal jurisdiction to cases and

controversies, a plaintiff must demonstrate standing. *Nelson v. NASA*, 530 F.3d 865, 873 (9th Cir. 2008). A plaintiff has standing if: (1) she has suffered an injury that is concrete and particularized, and actual or imminent; (2) her injury is "fairly traceable" to the challenged action of the defendant and not the result of independent action by a third party not before the court; and (3) a favorable decision would "likely" redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). When the plaintiff is not herself the object of the government action or inaction she challenges, the indirectness of the injury make it "substantially more difficult" to establish that the asserted injury was caused by the defendant's actions, and that the demanded relief will redress the injury. *Id*. at 562; *Allen v. Wright*, 468 U.S. 737, 758 (1984); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44-45 (1976). Plaintiffs bear the burden of establishing standing. *Lujan*, 504 U.S. at 561.

Here, Plaintiffs fail to establish the second prong of the standing test with regard to their claims of standing to challenge SBT's compact because Plaintiffs' injury is the result of independent action of a third party, SBT, who is not before the Court. The Secretary did not cause the alleged injury because the Secretary has not approved an amendment to SBT's Compact.

Plaintiffs also fail to establish the third prong of the standing test because a favorable decision by this Court would not likely redress Plaintiffs' compulsive gambling. As just discussed, those charged with prosecutorial discretion to initiate civil and criminal enforcement actions are not before this Court. The Attorney General, the United States Attorney, and the Chairman of the NIGC have prosecutorial discretion, not subject to review under the APA, to initiate criminal and civil enforcement actions. In their absence from this suit, and given that there is no jurisdiction to review decisions not to prosecute, there is no certainty that any action would be taken against SBT.

This is especially true in light of the Ninth Circuit's ruling in *Shoshone Bannock Tribes*, 465 F.3d 1095, which characterizes that gaming as lawful. It appears that the Plaintiffs once again "fail to appreciate the conclusive effect of the decision in [*Shoshone-Bannock Tribes*]." *See* Knox, 233 P.3d at 278. Nor is it clear that if prosecution was undertaken that such an action would be successful. Thus, even if this Court were to somehow order the United States to prosecute SBT for engaging in Class III gaming, there is simply no guarantee that such prosecution would result in the removal of the machines. Moreover, as compulsive gamblers, Plaintiffs' addiction would not be redressed by simply removing video gaming machines from the Fort Hall Casino, or even from all Indian casinos in Idaho. This is because Plaintiffs would still have access to other forms of gambling that they could start to use compulsively, for example, accessing video gaming machines in out-of-state casinos or on the internet. Therefore, the removal of video gaming machines from Idaho casinos is unlikely to redress Plaintiffs' compulsive gambling because so many other similar forms of gambling would remain easily accessible. Indeed, Plaintiffs themselves recognize this in their Amended Complaint, stating that removal of the machines from Fort Hall Casino would make such gambling "much less readily available to Plaintiffs," not *entirely* unavailable. Am. Compl., ¶ 28(g).

With regard to the other three compacts, Plaintiffs assert standing *only* with regard to the SBT Compact, alleging that they "gamble almost exclusively at Fort Hall casino." *See* Am. Compl. ¶ 28(b); ¶ 5. Plaintiffs do not allege that they gamble at any of the other tribe's casinos. As Plaintiffs' Amended Complaint does not assert standing with regard to the other three compacts, it should be dismissed as far as it asserts claims requesting relief regarding those compacts.

IV. PLAINTIFFS CANNOT JOIN NECESSARY AND INDISPENSABLE PARTIES AND THEREFORE THEIR AMENDED COMPLAINT SHOULD BE DISMISSED

Given that there is no legitimate APA claim and that Plaintiffs do not have standing to pursue

any of their claims, this lawsuit represents a bold attempt to adjudicate the rights of the parties to the compacts in their absence. Plaintiffs' Amended Complaint also should be dismissed under Federal Rule of Civil Procedure 19 because the State of Idaho and the four tribes implicated in the Amended Complaint are necessary and indispensable parties that cannot be joined. Dismissal under Rule 19 involves three successive inquiries. *E.E.O.C. v. Peabody W. Coal Co.*, 400 F.3d 774, 779 (9th Cir. 2005). First, a court must determine whether an absent party is a "necessary" party requiring joinder.[5/] *See Am. Greyhound Racing*, 305 F.3d at 1022. If the absent party is "necessary," a court must then determine whether that party is "indispensable" to the court's resolution of the claims. *Id.* Finally, an action should be dismissed if "in equity and good conscience" the case should not proceed without the absent party. *Id.*

A. The Four Tribes and the State of Idaho Are Necessary Parties

1. The Tribes Are Necessary Parties

SBT, the Coeur d'Alene Tribe, the Kootenai Tribe and the Nez Perce Tribe are all necessary parties under Rule 19. Rule 19(a)(1) provides:

> 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; or
>
> (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 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

[5/] As amended in 1966, Rule 19 no longer uses the term "necessary party." Some courts, however, continue to use the term in describing the class of persons who must be joined, if feasible, under Rule 19(a). *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118 (1968).

interest.

Fed. R. Civ. Pro. 19(a)(1). Joinder is necessary if a non-party meets *any* of the three Rule 19(a)(1) factors. *See Am. Greyhound Racing*, 305 F.3d at 1022.

First, and foremost, the tribes are necessary parties under Rule 19(a)(1)(B)(i). The Ninth Circuit spoke to this issue in *American Greyhound Racing*, a case where racetrack owners and operators sued the governor of Arizona, alleging that the governor could not negotiate new gaming compacts or extend existing compacts. 305 F.3d at 1018. The Ninth Circuit dismissed the case under Rule 19, finding that the tribes that were parties to the compacts were "indispensable parties with sovereign immunity from suit." *Id.* Specifically, the Ninth Circuit found that any ruling that enjoined the governor from renewing existing compacts or entering into new compacts would "impair" the interests of the tribes in their compacts, and such interests were "substantial." *Id.* at 1023. The Ninth Circuit rejected as circular the district court's finding that the tribes had no legally protectable interest in gaming that the district court concluded was not permitted by state law, holding that "[i]t is the party's *claim* of a protectable interest that makes its presence necessary." *Id.* at 1024 (emphasis in original); *see Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.*, 276 F.3d 1150, 1155, n.5 (9th Cir. 2002); *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992). The Ninth Circuit also found problematic the district court's ruling that the challenge gaming violated IGRA because the order amounted to a declaratory judgment that the present gaming was illegal, and while the tribes were not bound by *res judicata* or collateral estopppel, the Ninth Circuit concluded that "their interests may well be *affected as a practical matter* by the judgment that its operations are illegal." *Id.* (emphasis in original).

Here too granting Plaintiffs their requested relief would result in the tribes' interests being "affected as a practical matter." Plaintiffs have requested that the Court issue judgment against the

Secretary "setting aside" approvals of the compacts and amendments thereto, "rescinding and voiding" the compacts, declaring that the approvals and the gaming being conducted violate IGRA, the Johnson Act and the APA, and requiring the United States "to comply with and enforce federal law prohibiting such gaming." Am. Compl., Wherefore ¶¶ 1, 3. This relief, if granted, would amount to more than just a declaratory judgment that the present gaming is illegal, as in *American Greyhound Racing*. Further, even if this Court were only to grant relief not sounding in mandamus, by not requiring the United States to enforce federal law (which as discussed above, the Court cannot do), it would still result in compacts that do not have approval by the Secretary, and therefore are not "in effect" under IGRA. *See Am. Greyhound Racing*, 305 F.3d at 1019, citing 25 U.S.C. § 2710(d)(1). Thus, the Court must find the four tribes to be necessary parties.

Similarly, the tribes are necessary parties under Rule 19(a)(1)(A). The Court cannot grant Plaintiffs the complete relief they seek without making a determination that effectively implicates the tribes' rights to engage in Class III gaming on their land, and then requiring the United States to prosecute the tribes. However, there is no guarantee that even if the United States undertook such a prosecution that it would be successful, and thus complete relief sought by Plaintiffs, which is for the machines to be removed from the Fort Hall Casino, *see* Am. Compl., ¶ 28(g), cannot be accorded in the absence of the tribes. The tribes are thus a necessary party under the first Rule 19(a) factor.

Finally, it would also leave the Secretary open to a substantial risk of incurring inconsistent obligations or multiple suits under Rule 19(a)(1)(B)(ii). Any relief granted to Plaintiff would surely be opposed by the tribes. If the tribes were to bring their own actions challenging the Secretary's actions related to the validity of the compacts, this Court's decision would not serve as a bar because they are not party to this lawsuit. Thus, the Secretary is an existing party who is subject to a substantial risk of inconsistent obligations or judgments. The elements of Rule 19(a)(2)(ii) are

plainly met under this scenario.

The Department of the Interior's general trust relationship with the tribes does not change that conclusion, as the Secretary is not aligned as a trustee with respect to Indian gaming responsibilities. IGRA "cannot be fairly interpreted as imposing fiduciary obligations." *Pueblo of Santa Ana*, 932 F. Supp. 1298 (D.N.M. 1996), *aff'd* 104 F.3d 1546 (10th Cir. 1996). "Nothing in [IGRA] indicates any intention by Congress to recognize or create a fiduciary duty. The Act does not create a situation in which the federal government holds resources in trust for the Indians." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States*, 259 F. Supp. 2d 783, 791 (W.D. Wis. 2003); *see United States v. 1020 Electronic Gambling Machines*, 38 F. Supp. 2d 1213, 1216 (E.D. Wa. 1998) ("there is no basis for imposing specific trust duties upon the United States due to the [Secretary's] role in Indian gaming.").

Nor could Plaintiffs suggest that the United States could adequately represent the tribes in this lawsuit. For example, with regard to SBT's Compact, as discussed above, the Secretary has not been asked to take any action with regard to any amendments. Therefore, the Secretary is not in a position at this time to advocate on the legality of the gaming being undertaken by SBT. Further, the tribes' "interest here in its sovereign right not to have its legal duties judicially determined without consent is an interest which the United States' presence in this suit cannot protect." *Enter. Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989).

2. The State of Idaho Is a Necessary Party

As Plaintiffs appear to recognize by attempting to name the governor of Idaho as a defendant, the State of Idaho, as a signatory to the challenged compacts, is also a necessary party to this action.[6/]

[6/] The Governor has moved to dismiss the case as against him. Doc. 8.

Just as with the tribes, the State, as a party to the compacts, has an interest in the compacts that would be impaired as a practical matter by ruling that the compacts are to be voided under Rule 19(a)(1)(B)(i). *See Kickapoo Tribe of Indians of the Kickapoo Reservation in Kan. v. Babbitt*, 43 F.3d 1491, 1495 (D.C. Cir. 1995); *Pueblo of Sandia*, 47 F. Supp. 2d at 52. The fact that the Governor is being sued does not eliminate concerns about the absence of the State of Idaho as a party. *See Kickapoo Tribe*, 43 F.3d at 1495-99. Additionally, any relief granted here would surely be opposed by the State, leaving open the Secretary to inconsistent obligations or multiple suits under Rule 19(a)(1)(B)(ii), just as with the tribes.

B. The Tribes and the State Cannot Be Joined Because of Sovereign Immunity

Joining the necessary tribes to Plaintiffs' suit is not feasible. Federally-recognized Indian tribes enjoy sovereign immunity from suit absent a clear consent to suit by the tribe or the United States Congress. *See Dawavendewa*, 276 F.3d at 1159 (internal citations omitted). The tribes are all federally-recognized Indian tribes. *See* 44 Fed. Reg 7235-37. Joining the tribes is therefore not only infeasible under Rule 19(a), but presently impossible. Plaintiffs have not attempted to join any of the tribes, nor provided any evidence that the tribes have waived their sovereign immunity. Nor can Plaintiffs invoke IGRA in an attempt to overcome the tribes' sovereign immunity. *See Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136, 1146 (D. Oregon 2005). Similarly, the State of Idaho cannot be joined to this action because of its sovereign immunity. *See Kickapoo Tribe*, 43 F.3d at 1496. The State is a sovereign entity in the federal system under the Eleventh Amendment to the U.S. Constitution. *Seminole Tribe of Fla. v. Fla.*, 116 S.Ct. 1114, 1122 (1996). Thus, the State of Idaho cannot be joined in this suit.

C. This Lawsuit Cannot Proceed "In Equity and Good Conscience" Without the Tribes and the State Because They Are Indispensable Parties

Rule 19(b) sets forth four factors to determine if the unjoinable necessary party is indispensable, requiring dismissal in "equity and good conscience." *See* Fed. R. Civ. Pro. 19(b). The four factors are: (1) prejudice caused to any party or the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy can be awarded without the absent party; and (4) whether there is an alternative forum for the plaintiff's claims. Fed. R. Civ. Pro. 19(b). Here, each of the four factors are met, and so Plaintiffs' Amended Complaint should be dismissed.

The first factor of considering prejudice caused to any party or the absent party largely reflects the Rule 19(a) examination into impairment of a protectable interest. *See Am. Greyhound Racing*, 305 F.3d at 1025; *Dawavendewa*, 276 F.3d at 1162. The SBT are currently engaged in Class III gaming on their land, and the other tribes, if not already engaged, have the authority to do so under their compacts, which as amended to allow for the challenged Class III gaming, have been approved by the Secretary. *See* 68 Fed. Reg. 1068-02, 1068-03, 1068-04; Am. Compl., ¶¶ 19-20, 28. Moving forward without the tribes to litigate their right to continue to engage in gaming pursuant to a compact would greatly prejudice their ability to protect that interest. *See Am. Greyhound Racing*, 305 F.3d at 1024-25; *see also Dawavendewa*, 276 F.3d at 1156 ("no procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or contract, all parties who may be affected by the determination of the action are indispensable.") (internal citation, quotation marks and brackets omitted).[7] Similarly, the State as a party to the

[7] The compacts at issue here are contracts. *Tex. v. New Mexico*, 482 U.S. 124, 129 (1987) (noting that a Tribal-State compact is a contract).

compacts would be prejudiced if the compacts were invalidated.

Under factor two, the prejudice to the tribes and the State cannot be avoided by shaping relief. The only "adequate" remedy from Plaintiffs' perspective would be to void the compacts and to have the United States "enforce federal law prohibiting such gaming," Am. Compl., Wherefore ¶ 3, which necessarily comes at a cost to the tribes, just as the Ninth Circuit found in *American Greyhound Racing*, as well as to the State. *See id.* at 1025 (holding termination of existing gaming compacts was the central question in challenge to State law governing the compacts). Similarly, factor three does not favor Plaintiffs, as the relief they request would impair the tribes' and the State's rights, and no partial relief is adequate. *See Dawavendewa*, 276 F.3d at 1162. Finally, factor four does not weigh in Plaintiffs' favor, as the tribes' interest in maintaining their sovereign immunity outweighs Plaintiffs' interest in litigating their claims. *See id*. Plaintiffs cannot use this action as a means to avoid the problems posed by the Tribe's sovereign immunity. *See Lewis v. Norton*, 424 F.3d 959, 963 (9th Cir. 2005) (holding that plaintiffs could not "do an end run around tribal immunity . . . by bringing suit against the government, rather than the tribe itself"). Likewise, the state's sovereign immunity "counters against proceeding." *Kickapoo Tribe*, 43 F.3d at 1499. Further, Plaintiffs have another forum in which to bring suit regarding the validity of the underlying state statute that allows for this gaming, as evidenced by their suit in state court. Simply because Plaintiffs were not successful does not mean another forum is not available.[8/]

[8/] Further, this case it does not fall within the "public rights" exception to the requirement of joinder of an otherwise indispensable party, which provides "that when litigation seeks vindication of a public right, third persons who could be adversely affected by a decision favorable to the plaintiff are not indispensable parties." *Kickapoo*, 43 F.3d at 1500. As the Ninth Circuit explained in *American Greyhound Racing*,"[a]lmost any litigation... can be characterized as an attempt to make one party or another act in accordance with the law." 305 F.3d at 1025-26. In that case, the court found that the litigation did not just "*incidentally* affect the gaming tribes in the course of enforcing some public right," but rather was "*aimed* at the

As the tribes and the State are necessary and indispensable parties that cannot be joined, Plaintiffs' Amended Complaint should be dismissed.

CONCLUSION

For the foregoing reasons, this Court should grant the Federal Defendants' motion to dismiss Plaintiffs' Amended Complaint.

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tribes and their gaming," and thus did not fall within this exception *Id.* at 102 (emphasis in original); *see also Kickapoo*, 43 F.3d at 1500 (exception does not apply unless "what is at stake are essentially issues of public concern and the nature of the case would require joinder of a large number of persons"). Here too, the litigation is clearly aimed at the tribes, and in particular at SBT, and will not just incidentally affect the tribes. In order to prevail, Plaintiffs must show the challenged gaming is unlawful, and their goal is to undo the compacts. Nor does this case require the joinder of a large number of parties or implicate a matter of transcending importance. *See Kickapoo*, 43 F.3d at 1500. Thus, this Court should find that the exception does not apply here.