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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, et al., Defendants.	2:10-cv-00348-WBS-KJM **TRIBE'S OPPOSITION TO PLAINTIFFS' "MOTION TO RECONSIDER, MODIFY, CORRECT AND/OR VACATE JUDGMENT AND ORDER OF DISMISSAL [F.R.C.P. RULES 59 & 60]"** Date: December 5, 2011 Time: 2:00 p.m. Courtroom: 5 Judge: The Honorable William B. Shubb Trial Date: None Set Action Filed: February 10, 2010

I. Introduction

The Buena Vista Rancheria of Me-Wuk Indians (the "Tribe") submits this Opposition to Plaintiffs' "Motion to Reconsider, Modify, Correct and/or Vacate Judgment and Order of Dismissal [F.R.C.P. Rules 59 & 60]" ("Plaintiffs' Motion").

On October 4, 2011, on the Tribe's motion, the Court dismissed Plaintiffs' action for failure to join the Tribe as a required party pursuant to Fed. R. Civ. P. 19 ("Rule 19"). As Plaintiffs' Rule 59 and 60 arguments necessarily pertain to the Court's dismissal and the Tribe's earlier Rule 19 motion

and motion for special appearance, the Tribe opposes Plaintiffs' Motion in a special and limited capacity.[1]

On October 31, 2011, Plaintiffs filed a Notice of Motion and Motion to Vacate Judgment or Order Dismissing Plaintiff's [sic] Complaint (Docket 64); a Memorandum of Points and Authorities in Support of Motion to Reconsider, Modify, Correct and/or Vacate Judgment and Order of Dismissal [F.R.C.P. 59 & 60] (Docket 65) ("Plaintiffs' Memorandum"); a Declaration of Counsel; and the transcript of the September 26, 2011 hearing on the Tribe's Special Appearance Motion to Dismiss. On November 1, 2011, Plaintiffs filed an Amended Notice of Motion and Notice of Hearing of Plaintiffs [sic] Motion to Reconsider, Vacate, Amend or Modify the Order of Dismissal Entered by the Court on 4 October 2011 (Docket 70) to correct the noticed hearing date, which is now set for December 5, 2011.

II. Plaintiffs' Motion Fundamentally Misapprehends Rules 59 and 60—Neither Of Which Apply Here

Plaintiffs' Motion and Memorandum demonstrate a fundamental misunderstanding of both the express language of Rules 59 and 60 and the concerns underlying those rules. Although the titles of the motion and the supporting memorandum differ, Plaintiffs appear to request the Court "to Reconsider, Modify, Correct and/or Vacate Judgment and Order of Dismissal" pursuant to Rules 59 and 60. Plaintiffs' Memorandum specifically cites Rules 59(a)(1)(B), 59(a)(2), and 60(b)(1)-(3) and (6). However, Rule 59 is inapplicable because, as there has been no trial, there can be no new trial, and Rule 60(b) is inapplicable because Plaintiffs have utterly failed to meet the intended "high-hurdle" of that rule. This Court should deny Plaintiffs' motion.

A. On Its Face, Rule 59 Does Not Apply Because There Has Been No Trial

[1] The Tribe expressly does not consent to intervention or appearance generally or exceeding the limited scope of consideration of the instant opposition.

Rules 59(a)(1)(B) and 59(a)(2) both provide an avenue for a new trial.[2] However, as this action was dismissed pursuant to the Tribe's motion to dismiss, there was no initial trial, and so the Court may not now order a new trial under Rule 59. *See Alexander v. Skolnik*, 3:10-CV-0584-LRH-VPC, 2011 WL 4404061, *1 (D. Nev. Sept. 21, 2011) ("Rule 59(e) allows the Court to grant a new trial for various reasons. However, because there was no trial in this instance, the motion shall be construed and decided as one for relief from judgment under Rule 60(b)").[3] *See also Crane-McNab v. County of Merced*, 773 F. Supp. 2d 861, 873-74 (E.D. Cal. 2011). Hence, Rule 59 is unavailable to Plaintiffs here.

B. Plaintiffs' Motion Wholly Fails to Satisfy Rule 60(b)'s Heavy Burden

Rule 60(b) relief is available only in exceptional circumstances. "Judgment is not properly reopened absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Weeks v. Bayer*, 246 F.3d 1231, 1236 (9th Cir. 2001) (internal quotations omitted). One district

[2] Rule 59(a)(1)(B) ("The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows: … after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court."); Rule 59(a)(2) ("After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.").

[3] Plaintiffs nowhere cite Rule 59(e) in their motion. *See Harrington v. City of Chicago*, 433 F.3d 542, 546 (7th Cir. 2006) (affirming district court's decision to treat appellant's motion as one under 60(b) but not 59(e) because Rule 59(e) was not cited in the motion: "If a litigant wants the benefit of whatever lower threshold of proof Rule 59(e) may offer, it behooves him to indicate that his motion is under Rule 59(e)."). Instead, Plaintiffs specifically cite only subsections 59(a)(1)(B) and 59(a)(2). Although Plaintiffs nowhere cite to Rule 59(e) in their motion or brief, they request—without authority—"amendment" of the order. Such amendment is properly asserted only under Rule 59(e). In any event, Plaintiffs have not met the higher burden warranting relief under Rule 59(e) here. *See* Wright & Miller, 11 *Fed. Prac. & Proc. Civ.* § 2810.1 (2d ed.) ("There are four basic grounds upon which a Rule 59(e) motion may be granted. First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. Serious misconduct of counsel may justify relief under this theory. Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law. The Rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.") (citations omitted). Plaintiffs' motion fails to meet the standards for Rule 59(e) relief.

court has explained that only in "exceptional circumstances" will a Rule 60(b) motion be granted, and:

> [a]s such, parties may not use reconsideration as a tool to rehash previously presented arguments already considered and rejected by the Court, nor can it be used to present new arguments based upon law or facts that existed at the time of the original argument. Parties seeking relief under Rule 60(b) must overcome a high hurdle because such a motion "is not a substitute for appeal."

Hammoud v. Wands, 10-CV-00635-DME-KLM, 2010 WL 5094034, *1 (D. Colo. Dec. 8, 2010) (internal citations omitted). *See also Maraziti v. Thorpe*, 52 F.3d 252, 254-55 (9th Cir. 1995) (where plaintiff's Rule 60(b) motion "merely reiterated the arguments he has already presented to the district court, the motion was properly denied.").

Rule 60(b) motions are consistently rejected where the motion merely attempts to re-litigate matters already determined—as Plaintiffs' motion plainly does. *See, e.g., Taylor v. Knapp*, 871 F.2d 803, 805 (9th Cir. 1989); *Mastini v. American Telephone and Telegraph Co.*, 369 F.2d 378, 379 (2d Cir. 1966), *cert. denied*, 387 U.S. 933 (1967); *Ctr. for Biological Diversity v. Norton*, 304 F. Supp. 2d 1174, 1178 (D. Ariz. 2003); *Alexander v. Skolnik*, 2011 WL 4404061, *1. Additionally, arguments raised for the first time in a Rule 60 motion are deemed waived. *389 Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999) (a district court did not abuse its discretion where it declined to address an issue raised for the first time in a motion for reconsideration). *See also United States v. Bell*, 79 F. Supp. 2d 1169, 1176 (E.D. Cal. 1999); *Sphouris v. Aurora Loan Services*, 2:10-CV-00298-KJD, 2011 WL 5007300, *2 (D. Nev. Oct. 20, 2011) (collecting cases).

Plaintiffs' Memorandum, however, devotes a majority of its time doing exactly what it is not supposed to—restating, at length, rejected arguments and explaining why this Court's October 4 decision erred (a matter for an appellate court). Pages 2-20 and 25-31 simply restate facts and arguments repeatedly discussed or used in Plaintiffs' earlier complaint and other filings. In pages 20-25, 28, and 31-37 of the Memorandum, Plaintiffs raise the Rule 19 argument upon which this Court

has already ruled. However, Plaintiffs' Rule 19 argument cites little, if any, authority, misconstrues the Rule 19 analysis, and adds nothing meaningful or relevant concerning the Tribe's Motion to Dismiss.[4] Relitigation of the Rule 19 arguments is unavailable to Plaintiffs under Rule 60(b). *See, e.g., Taylor*, 871 F.2d at 805.

Section C of the Memorandum (pages 37 to 42) comprises Plaintiffs' arguments in support of their Motion; as explained above, the Memorandum's preceding pages merely reassert Plaintiffs' version of the facts and Plaintiffs' Rule 19 arguments and it is only in Section C that Plaintiffs present any argument attempting to support relief under Rules 59 or 60. (As discussed above, the cited subsections of Rule 59 are unavailable to Plaintiffs because there has been no trial.) Plaintiffs cite Rule 60(b) subsections (1)-(3) and (6) as grounds for relief. Those subsections provide:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; …
> (6) any other reason that justifies relief.

These subsections are taken in turn below.

1. Plaintiffs Have Failed to Allege Any "Mistake" Under Rule 60(b)(1).

A Rule 60(b)(1) request for relief due to mistake is available only in two instances: "(1) when a party has made an excusable litigation mistake or an attorney in the litigation has acted without authority; or (2) when a judge has made a substantive mistake of law or fact in the final judgment or order." *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999). As this Court has explained:

[4] Plaintiffs were allowed to argue at the hearing on the motion and Plaintiffs' Opposition to the Tribe's Motion to Dismiss (Docket 36) was not stricken.

> Rule 60(b)(1), which applies to "mistake, inadvertence, surprise, or excusable neglect," permits a court to correct its own inadvertence, mistakes of fact, *Kingvision Pay-Per-View Ltd. v. Lake Alice Bar*, 168 F.3d 347, 350 (9th Cir. 1999), or mistakes of law, *Liberty Mut. Ins. Co. v. E.E.O.C.*, 691 F.2d 438, 440-41 (9th Cir. 1982). However, a Rule 60(b)(1) reconsideration motion should not merely present arguments previously raised, or which could have been raised in the original briefs. *See Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985) (motion properly denied where it "presented no arguments that had not already been raised in opposition to summary judgment."). "[M]otions to reconsider are not vehicles permitting the unsuccessful party to 'rehash' arguments previously presented ... Nor is a motion to reconsider justified on the basis of new evidence which could have been discovered prior to the court's ruling.... Finally, 'after thoughts' or 'shifting of ground' do not constitute an appropriate basis for reconsideration." *Westlands*, 134 F.Supp.2d at 1130…. "These relatively restrictive standards reflect district courts' concern for preserving dwindling resources and promoting judicial efficiency." *Id.*

San Luis & Delta-Mendota Water Auth. v. U.S. Dept. of Interior, 624 F. Supp. 2d 1197, 1208 (E.D. Cal. 2009).

Plaintiffs fail to clearly assert that any such "mistake" was made here. (Plaintiffs' only apparent mention of "mistake" is found at page 42, where Plaintiffs cite two efforts by undersigned counsel to articulate to the Court the Plaintiffs' arguments or requests for relief as "incorrect and a mistake" or "mistaken.") Such unsupported assertions fall far short of Rule 60(b)(1)'s rigorous demands, particularly given that Plaintiffs' use of the term "mistake" is not in line with the meaning or intent of the Rule.

2. Plaintiffs Have Failed to Allege or Demonstrate the Existence of Newly Discovered Evidence Under Rule 60(b)(2).

Plaintiffs cite but do not appear to make any credible argument under Rule 60(b)(2)'s provision for "newly discovered evidence." Plaintiffs' assertion (at page 38) that the Tribe "fail[ed] to include and furnish Plaintiff with their Exhibits 2 and 3 to their memorandum" is remarkable, given that those exhibits were filed through CM/ECF with all other documents filed by the Tribe on August 16, 2011, and have been, to undersigned counsel's knowledge, available through PACER since that time. Additionally, it appears that all documents filed by Plaintiffs as part of the

Declaration of Counsel in Support of Motion to Reconsider, Modify and/or Vacate Order and Judgment of Dismissal (Dockets 66 and 67) have been submitted to the Court previously and can in no way be construed as "newly discovered evidence."

3. As to Rule 60(b)(3), Plaintiffs Have Failed to Allege and Cannot Show by Clear and Convincing Evidence Any Intentional (or Other) "Misrepresentation" that Prevented Plaintiffs from Presenting Their Defense.

The bulk of Plaintiffs' Rule 60 argument focuses on what Plaintiffs erroneously term "misrepresentations" made by undersigned counsel. Undersigned counsel has engaged in no misrepresentations at all to this Court—and, in fact, Plaintiffs' counsel alleges no misrepresentations. Rather, Plaintiffs' allegations pertain solely to the Tribe and undersigned counsel's argumentation and, as such, provide no relief to Plaintiffs under Rule 60(b). It goes without saying, then, that Plaintiffs have presented no "clear and convincing evidence" (the required burden of proof, as discussed below) of undersigned counsel having made any misrepresentations.

"Rule 60(b)(3) is aimed at judgments which were unfairly obtained, not at those which are factually incorrect." *De Saracho v. Custom Food Mach., Inc.*, 206 F.3d 874, 880 (9th Cir. 2000) (internal quotations omitted). Black's Law Dictionary defines misrepresentation as "[t]he act of making a false or misleading assertion about something, usually with the intent to deceive." *Black's Law Dictionary* (9th ed. 2009). This definition conforms to what the language and context of Rule 60(b)(3) suggest regarding misrepresentation—that the alleged act must rise to the level of "fraud" or "misconduct." As the Sixth Circuit has explained:

> Fraud cannot be unintentional, and the use of the prefix "mis" in both "misrepresentation" and "misconduct" also suggests that the moving party under the rule must show that the adverse party committed a deliberate act that adversely impacted the fairness of the relevant legal proceeding question.

Jordan v. Paccar, Inc., 97 F.3d 1452, *6 (6th Cir. 1996) (unpublished).

To prevail on a Rule 60(b)(3) motion, therefore,

> the moving party must prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct and the conduct complained of prevented the losing party from fully and fairly presenting the defense. [Rule] 60(b)(3) require[s] that fraud ... not be discoverable by due diligence before or during the proceedings.

Casey v. Albertson's Inc., 362 F.3d 1254, 1260 (9th Cir. 2004) (internal citations and quotations omitted). *See also De Saracho*, 206 F.3d at 880; *Zoccoli v. Ladbroke Racing Michigan, Inc.*, 85 F.3d 630, *1 (6th Cir. 1996) (unpublished) ("subsection (3) is inapplicable because [plaintiff] did not allege that any fraud occurred").

Here, all of the "misrepresentations" that Plaintiffs purport to identify are arguments or positions taken by the Tribe and its counsel in the ordinary course of litigation, or statements based on veritable or eminently reasonable readings of documents, court decisions or agency interpretations (such as the National Indian Gaming Commission's June 30, 2005 determination (the "ILO") that the Tribe's Rancheria constitutes an Indian reservation under federal law and therefore qualifies as gaming-eligible "Indian lands" under the Indian Gaming Regulatory Act). For example, Plaintiffs allege as a Rule 60(b)(3) misrepresentation undersigned counsel's position that the 1983 Tillie Hardwick stipulated judgment restored the affected tribes. Plaintiffs' allegation borders on the absurd. The 1983 stipulation expressly required the Interior Secretary to restore the affected tribes:

> The Secretary of the Interior shall ***recognize*** the Indian Tribes, Bands, Communities or groups of the seventeen Rancherias listed in paragraph 1 as Indian entities ***with the same status as they possessed prior to distribution of the assets of these Rancherias*** under the California Rancheria Act, and said Tribes, Bands, Communities or groups ***shall be included on the Bureau of Indian Affairs' Federal Register list of recognized tribal entities*** [and such] Tribes, Bands, Communities or groups shall be deemed entitled to any of the benefits or services provided or performed by the United States for Indian Tribes, Bands, Communities or groups because of their status as Indian Tribes, Bands, Communities or groups.

NIGC ILO, Docket 13-2, at 3-4 (emphasis added). Further, Plaintiffs challenge a statement regarding the fact of the United States' acquisition of the Buena Vista Rancheria for the Tribe.

However, the NIGC explained that "[t]he Tribe has occupied the area known as Buena Vista since at least 1817. Tribal members have continuously occupied the Rancheria from as early as 1905," and that the government acquired the Rancheria lands in 1927 "for the use of the Me-Wuk Indians settled at Buena Vista." *Id.* at 1-2. Plaintiffs' charges are entirely unsupported.

But more to the point of Rule 60(b)(3), Plaintiffs nowhere assert, nor can they show, that the Tribe or its counsel somehow withheld evidence, intended to defraud this Court, or otherwise prevented Plaintiffs from fully and fairly presenting their arguments and evidence. Thus, Rule 60(b)(3) provides no relief to Plaintiffs.

Even more, none of Plaintiffs' specific allegations of misrepresentation are at all relevant to the Rule 19 basis upon which its complaint was dismissed. In other words, none of the allegations relate to the simple fact that Plaintiffs' suit implicated the Tribe's fundamental interests, that the Tribe was absent, and that the Tribe cannot be involuntarily joined because it has sovereign immunity from suit. These—and not Plaintiffs' baseless allegations—are the reasons the suit was dismissed.

4. Plaintiffs Have Neither Alleged Nor Demonstrated The Extraordinary Circumstances Required By Rule 60(b)(6).

"A motion brought under 60(b)(6) must be based on grounds other than those listed in the preceding clauses [because] [c]lause 60(b)(6) is residual, [] must be read as being exclusive of the preceding clauses …. [and] is reserved for extraordinary circumstances." *LaFarge Conseils et Etudes, S.A. v. Kaiser Cement*, 791 F.2d 1334, 1338 (9th Cir. 1986) (internal quotations omitted). Rule 60(b)(6) is therefore "used sparingly as an equitable remedy to prevent manifest injustice." *Lehman v. United States*, 154 F.3d 1010, 1017 (9th Cir. 1998) (internal quotations omitted). Therefore, "[f]or Rule 60(b)(6) relief, the moving party must show both injury and that circumstances beyond its control prevented timely action to protect its interests. Neglect or lack of diligence is not to be

remedied through Rule 60(b)(6)." *San Luis & Delta-Mendota Water Auth.*, 624 F. Supp. 2d at 1208 (internal quotations and citations omitted). *See also Zoccoli*, 85 F.3d 630 ("a claim of simple legal error, unaccompanied by extraordinary or exceptional circumstances, is not cognizable under Rule 60(b)(6).").

Other than citing to Rule 60(b)(6), Plaintiffs present no arguments in support of their assertion that such relief is warranted here. Absent any such argument, and even in light of Plaintiffs' other Rule 60(b) arguments, Rule 60(b)(6) is not available here.

III. Plaintiffs Waived the Public Interest Exception Argument And, In Any Event, It Does Not Apply Here

Plaintiffs' Memorandum attempts to introduce—*for the first time*—a public interest exception to the Court's application of Rule 19 here. Plaintiffs' Memorandum at pp. 24-25. However, Plaintiffs' failure to raise the issue prior to their instant Rule 60 motion renders the argument waived. *See, e.g., 389 Orange Street Partners*, 179 F.3d at 665.

Even so, the exception is inapplicable here. The public rights exception to Rule 19 provides that when litigation seeks to vindicate a public right or raises matters that transcend the litigant's interests, potentially affected third persons are not required. *See Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1500 (D.C. Cir. 1995) (quoting *National Licorice Co. v. NLRB*, 309 U.S. 350, 362 (1940)). The exception is applicable when the matters at stake "are essentially issues of public concern and the nature of the case would require the joinder of a large number of persons." *Id.* But here, the interests at stake are those of the Tribe (i.e., *the Tribe's* federal recognition, the status of *its* reservation, and *its* gaming compact, etc.) and specific to the merits of Plaintiffs' action. *See Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (concluding that plaintiffs' claim was "private in nature" and "focused on the merits of [plaintiffs'] dispute") (internal quotations omitted). More, this litigation does not "transcend the private interests of the

litigants." *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1026 (9th Cir. 2002). And even where the public rights exception operates, it is only acceptable so long as the "adjudication does not destroy the legal entitlements of the absent parties." *Shermoen v. U.S.*, 982 F.2d 1312, 1319 (9th Cir. 1992) (internal quotations omitted).

Plaintiffs provide little, if any, argument supporting their assertion of the public rights exception. In fact, the exception is unavailable here for several reasons: at issue is not joinder of a large number of third parties but, rather, lack of joinder of the Tribe (i.e., the basis upon which this Court dismissed the action); the interests at stake here—including their federal recognition and ability to develop gaming on their Rancheria—are private to the Tribe; and, as discussed in the Rule 19 briefing, adjudication of these matters in the absence of the Tribe would threaten multiple of the Tribe's fundamental legal entitlements.

IV. Plaintiffs' "Other Procedural Mechanisms" Are Out of Place and Entirely Irrelevant

Plaintiffs' final suggestion of "some other procedural mechanisms that were available to avoid the outright dismissal" of Plaintiffs' action (section D, pp. 42-45 of Plaintiffs' Memorandum) demonstrates their fundamental misunderstanding of Rule 19 and especially 19(b) and also typifies Plaintiffs' failure to support their arguments with authority.

In section D, Plaintiffs assert possible alternative determinations the Court apparently could have made. In addition to the substantial dubious procedural posture by which Plaintiffs may propose amendments to the Court's ruling, such proposals utterly misunderstand the concept of a required party under Rule 19, as demonstrated by Plaintiffs' suggestions that the Court determine some dispositive issues before (perhaps forcibly) requiring joinder or intervention of the Tribe. This reasoning defies Rule 19. Moreover, Plaintiffs' late (and now waived) assertion regarding a public interest exception is irrelevant to its (sparse) Rule 60 claims.

V. Conclusion

Plaintiffs' motion should be denied. Rule 59 does not apply because there has been no trial, and Plaintiffs' reference to Rule 59 should not be construed beyond its express terms. Plaintiffs have also failed to overcome—or even approach—the high hurdle of Rule 60(b), especially as to their allegations of misrepresentation. Such Rule 60 relief is reserved for fraud or other deliberate misrepresentations that prevent a party from defending its position; no misrepresentations have been made here—deliberate or otherwise—and Plaintiffs have had every opportunity to defend their position.

Even more, Plaintiffs' motion challenges this Court's Rule 19 dismissal but profoundly misses the Rule 19 mark and, instead, continues to re-hash, at length, stale and irrelevant arguments. Only allegations germane to Rule 19 considerations (e.g., that the Tribe is not a tribe today, or that it does not enjoy sovereign immunity, etc.) can be counted. All of Plaintiffs' charges concerning mistake and misrepresentation are not only untrue but are, worse, utterly impertinent to Rule 19.

Finally, the Tribe requests the Court decide Plaintiffs' Motion on the record and briefs. LCvR 230(g) ("the motion may be submitted upon the record and briefs on file if the parties stipulate thereto, or if the Court so orders, subject to the power of the Court to reopen the matter for further briefs or oral arguments or both."); *see also* Fed. R. Civ. P. 78(b).

DATED: November 21, 2011

Respectfully submitted,

/s/ PADRAIC I. MCCOY

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