**Docket No. 11-17996**

# IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRIENDS OF AMADOR COUNTY, BEA CRABTREE, and JUNE GEARY,
*Plaintiffs-Appellants*,

*v.*

KENNETH SALAZAR, Secretary of the United States Department of the Interior, NATIONAL INDIAN GAMING COMMISSION, and GEORGE SKIBINE, Acting Chairman of the National Indian Gaming Commission,
*Defendants-Appellees*,

THE BUENA VISTA RANCHERIA OF ME-WUK INDIANS,
*Movant Below*.

*Appeal from a Decision of the United States District Court for the Eastern District of California, No. 2:10-cv-00348-WBS-CKD, Honorable William B. Shubb, United States District Judge*

## ANSWER BRIEF OF BUENA VISTA TRIBE, MOVANT BELOW

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## LIST OF ABBREVIATIONS

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|---|---|
| "APA" | Administrative Procedures Act |
| "Compact" | The 1999 Tribal-State gaming compact |
| "Compact Amendment" | The 2004 amendment to the Tribal-State gaming compact |
| "FOAC" | Friends of Amador County |
| "IGRA" | Indian Gaming Regulatory Act |
| "NIGC" | National Indian Gaming Commission |
| "NIGC Opinion" | NIGC Indian Lands Opinion dated June 30, 2005 |
| "Plaintiffs" | FOAC, June Geary, and Bea Crabtree |
| "Rancheria" | The Buena Vista Rancheria |
| "Rule 19" | Federal Rule of Civil Procedure 19 |
| "Rule 59" | Federal Rule of Civil Procedure 59 |
| "Rule 60" | Federal Rule of Civil Procedure 60 |
| "Termination Act" | California Indian Rancheria Act of 1958 |
| "Tribe" | The Buena Vista Rancheria of Me-Wuk Indians |
| "1983 Stipulation" | The 1983 Stipulation in *Tillie-Hardwick* |
| "1987 Stipulation" | The 1983 Stipulation in *Tillie-Hardwick* |

## INTRODUCTION

Plaintiffs' complaint against the State of California and the United States directly challenged the absent Tribe's fundamental interests—its existence as a federally-recognized Indian tribe and the Indian lands status of its reservation. The Government was and is conflicted from adequately representing the Tribe's interests in the litigation and the District Court properly dismissed under Rule 19. The Plaintiffs filed a lengthy and confusing Opening Brief, substantially devoid of relevant issues. Despite the brief, the only questions this honorable Court must address are whether the District Court's dismissal for failure to join the Tribe as a required party under Rule 19 or its denial of the motion for reconsideration pursuant to Rule 59 or 60 was abuse of discretion.

Plaintiffs' Opening Brief largely rehashes arguments the District Court twice rejected, fails to legitimately raise Rule 19 concerns relevant to this appeal, and improperly asks this Court to rule on a set of hypothetical issues and concerns that are not implicated here.

The District Court below dismissed the Plaintiffs' complaint on Rule 19 grounds and thus never reached its own jurisdiction to adjudicate the underlying claims. The District Court would lack jurisdiction over those claims as IGRA fails to provide private individuals, such as Plaintiffs here, with a private right of action. The District Court held exactly this in its granting of the State of

California's motion to dismiss—which the United States noticeably did not join or make on its own.

The Plaintiffs' allegations constituted a straightforward and substantial attack on the already-settled and non-justiciable federally-recognized status of the Tribe and the Rancheria as Indian lands. The United States as the Defendant here cannot and has not adequately represented the absent Tribe's interests in this litigation, as it has a conflict of interest. The District Court's Rule 19 dismissal was not in error because, in a comprehensive and well-reasoned order, it found the Tribe was a required party under Rule 19(a), that the United States' interests conflict with the Tribe in this case, and that, pursuant to Rule 19(b), in equity and good conscience the action could not proceed in the Tribe's absence. The District Court's reasoned and supported denial of Plaintiffs' request for reconsideration under Rules 59 or 60—which found that Plaintiffs "demonstrate a lack of understanding of the concept of a required party under Rule 19"—was similarly not in error. Plaintiffs' appeal is another attempt to rehash arguments soundly rejected twice below.

The District Court was not required to accept as true Plaintiffs' allegations against the status of the Tribe and its Rancheria because those were non-meritorious and conclusory allegations contradicted by the Plaintiffs' own pleadings and by several judicially noticeable facts.

This Court should affirm the District Court's dismissal and denial of reconsideration.

## JURISDICTIONAL STATEMENT

The District Court did not have jurisdiction to adjudicate Plaintiffs' claims below and it never definitively identified its basis for jurisdiction as the case was dismissed for failure to join the Tribe as a required party. On the State of California's motion, the District Court earlier dismissed the State from the suit finding it had Eleventh Amendment immunity. ER1050-1051.[1] The District Court further concluded that, although two claims against the Governor could not be dismissed under Eleventh Amendment immunity because of the *Ex Parte Young* doctrine, those two claims would be dismissed because IGRA does not provide individuals, including these Plaintiffs, a private cause of action. ER1053-1056. The United States did not join the State's motion to dismiss. ER16 at n.2. The case was then dismissed in its entirety on the Tribe's motion for failure to join the Tribe and State as required parties under Rule 19. ER23. Thus, the District Court has never explicitly reached the question of its jurisdiction to adjudicate the Plaintiffs' claims. However, just as with the claims against the Governor, the

[1] Citations to the record will be identified by their page number within the Excerpts of Record submitted by Appellants and abbreviated as ER[page number].

District Court here would lack subject matter jurisdiction because IGRA does not provide a private right of action to Plaintiffs.

To the extent Plaintiffs appeal a final order of the District Court, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court properly dismissed Plaintiffs' complaint under Rule 19 because (a) the absent Buena Vista Tribe's substantial rights were directly implicated in the suit and would otherwise have been adjudicated in its absence and without its consent and (b) the federally-recognized Buena Vista Tribe, restored to recognition by U.S. District Court Order in 1983, could not be joined in the litigation due to its sovereign immunity from suit.
2. Whether the District Court properly denied Plaintiffs' motion for reconsideration because it failed to demonstrate clear error in granting the Tribe's motion to dismiss.

## STATEMENT OF THE CASE

Plaintiffs filed a complaint in the United States District Court for the Eastern District of California on February 10, 2010. ER1068-1119. It named the State of California, the Governor, and the United States and various federal actors as defendants. On June 22, 2010, the State moved to dismiss the complaint because of, among other things, the State Defendants' Eleventh Amendment immunity and

failure to join the Tribe under Rule 19. ER1049-1051, 1056 at n.5. On October 18, 2010, following arguments on October 12, 2010, the District Court released the State of California on Eleventh Amendment immunity grounds and released the Governor of California finding that IGRA, upon which the claims against him were based, does not provide individuals a private cause of action. ER1050-1051, 1053-1056. The Court declined to address the State's argument that the complaint should be dismissed for failure to join the Tribe under Rule 19. ER1056 at n.5.

On August 16, 2011, the Tribe requested permission to appear specially to present a motion to dismiss based on failure to join a required party under Federal Rule of Civil Procedure 19. ER973-1010. On October 4, 2011, following arguments held before the Court on September 26, 2011, the District Court dismissed the case for failure to join the Tribe, a required party under Rule 19 whose sovereign immunity prevented its joinder. ER23. The United States did not join the State's or the Tribe's motions to dismiss. ER16 at n.2, ER 973-974. On October 31, 2011, Plaintiffs filed a motion to reconsider, amended on November 1, 2011.[2] ER313-314, 259-312; *see also* ER29. The District Court denied the motion on December 9, 2011. ER1-12.

[2] The original motion was titled Motion to Vacate Judgment or Order Dismissing Plaintiff's Complaint and the supporting brief was titled 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. Rules 59 & 60] [sic]; upon its

Plaintiffs filed a Notice of Appeal on December 16, 2011. ER26. After delay and missed deadlines by Plaintiffs, this Court ordered a compliant Opening Brief filed by July 16, 2012.[3]

Undersigned counsel has twice contacted attorneys for the Defendant-Appellee United States and has twice been informed that the United States will not participate in this appeal.

## STATEMENT OF THE FACTS

The following facts are relevant to this appeal. The Tribe is a federally-recognized Indian tribe. The United States includes the Tribe on its official, statutorily-mandated list of federally-acknowledged Indian tribes. *Indian Entities*

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amendment (as ordered by the court), the motion was titled Motion to Reconsider, Vacate, Amend or Modify the Order of Dismissal Entered by the Court on 4 October 2011. *See* 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, Document 70, filed Nov. 1, 2011, omitted from Excerpts of Record.

[3] Appellants' Opening Brief was due March 26, 2012. Time Schedule Order, Dec. 19, 2011. On March 23, 2012, Appellants moved for a 45-day extension to file their Opening Brief. At the close of that 45-day period, on the extended Opening Brief due date of May 10, 2012 as ordered by the Court, Appellants moved for a second extension of time of ten days to file their Opening Brief. On May 22, 2012, and without the Court's granting of the earlier motion, Appellants moved for another extension of time of one day to file their Opening Brief and additionally moved to exceed the word limit imposed by F.R.A.P. 28.1(e)(2)(i). On June 20, 2012, undersigned counsel filed a Motion for Clarification, which the Court granted on July 2, 2012. 7.2.2012 Order (requiring a length-compliant brief to be filed within fourteen days of the order).

*Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 77 Fed. Reg. 47868, 47869 (August 10, 2012) (published pursuant to Section 104 of the Act of November 2, 1994, Pub. L. 103–454; 108 Stat. 4791, 4792, and in exercise of authority delegated to the Assistant Secretary—Indian Affairs under 25 U.S.C. 2 and 9 and 209 DM 8). The Tribe has historically occupied and currently occupies a small, 67-acre Indian reservation known as the Buena Vista Rancheria, which is located in Amador County, California.

The United States Department of the Interior, through its NIGC, Office of General Counsel, determined more than seven years ago, in a published decision in which the Office of the Solicitor, Department of the Interior, concurred, that the Rancheria is an "Indian reservation" under federal law and, for that reason, is gaming-eligible "Indian lands" under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. *See* NIGC Opinion, ER448-460. The NIGC Opinion stands as the Government's formal statement on the "Indian lands" status of the Buena Vista Rancheria and has not been disturbed.

As the NIGC Opinion itself explains, since prior to 1900, Me-Wuk Indians have lived on a piece of land in rural Amador County they called Buena Vista. Pursuant to federal appropriation acts permitting the purchase of land for Indian reservations in California, in 1927 the United States purchased and held this land for the benefit of the Me-Wuk Indians. In 1935, the Me-Wuks—then known as the

Buena Vista Rancheria of Me-Wuk Indians of California—voted to accept the terms of the 1934 federal Indian Reorganization Act, 25 U.S.C. § 476. As a result, as early as 1935 the Buena Vista Rancheria's status as a federally-recognized Indian tribe was confirmed, although the Government and Tribe's dealings prior to 1935 further evidence the Tribe's recognized status.

The United States terminated the Tribe and the Rancheria, together with numerous other California Indian tribes and rancherias, pursuant to the federal California Indian Rancheria Act of 1958. P.L. 85-671, 72 Stat. 619 (Aug. 18, 1958). The Act severed the Tribe's government-to-government relationship with the United States and Tribal members were no longer treated as Indians under federal law. Pursuant to a 1961 distribution plan implemented under the Termination Act, the 67-acre parcel that comprises the Rancheria was converted from federal Indian trust lands to fee lands. The Rancheria was conveyed to the Tribal member occupants of the Rancheria.

In 1979, the seventeen Indian Rancherias (including the Tribe) affected by the Termination Act, together with the affected Indian individuals, sued the United States in the U.S. District Court for the Northern District of California challenging their termination on grounds the Secretary had failed to satisfy certain pre-termination conditions. *Tillie Hardwick v. United States*, No. C79-1710-SW (U.S.D.C. N.D. Cal. 1983). In 1983, as between themselves (although the

Government and other Tribal plaintiffs reached many similar settlements, which remain intact today), the Buena Vista Tribe and the United States settled the litigation by stipulation, which the U.S. District Court entered as a judgment. ER565-568.

The 1983 Stipulation expressly restored the federally-recognized status of the seventeen plaintiff Indian tribes, including the Buena Vista Tribe. ER566. It further required the United States to add such tribes, including the Tribe, to the Bureau of Indian Affairs' Federal Register list of recognized Indian tribes. ER566.[4] Additionally, the Stipulation required that the restored Indian tribes "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." ER566. The Stipulation

[4] The Federally Recognized Indian Tribe List Act of 1994, PL 103–454, November 2, 1994, 108 Stat 4791, provides, as relevant here, that: " . . . (3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations . . . or by a decision of a United States court; (4) a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress; .(5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated; (6) the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes; (7) the list published by the Secretary should be accurate, regularly updated, and regularly published, since it is used by the various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States . . ."

also restored the individual Indian plaintiffs to their status as Indians under federal law. ER566. The Government added the "Buena Vista Rancheria of Me-Wuk Indians of California" to the Federal Register list of Indian tribes. *See* 50 Fed. Reg. 6055-02 (1985). The Tribe has not been terminated by Act of Congress and remains on the list today. *See List of Indian Entities*, 77 Fed. Reg. at 47869 (August 10, 2012; the latest list).

Leaving the Tribe federally-recognized but devoid of a federally-protected land base (*i.e.*, a reservation), the 1983 Stipulation held in abeyance the matter of the Rancheria's boundaries, a matter over which the court reserved jurisdiction. Four years later and under the same case, the Tribe and the Amador County tax collector, County Assessor, and County Board of Supervisors entered into a second *Hardwick* stipulation, ER579-584. The 1987 Stipulation restored the Buena Vista Rancheria boundaries.

Under the 1987 Stipulation, the U.S. District Court declared that the Rancheria was "never and [is] not now lawfully terminated" because the Government failed to satisfy Termination Act conditions. ER582. The Stipulation ordered the Rancheria's original boundaries "hereby restored," and further declared that "all land within these restored boundaries is declared to be 'Indian country'" (defined there to mean "Indian country" as defined by 18 U.S.C. § 1151). ER582. The 1987 Stipulation further required Amador County and the

United States to treat the Rancheria "as any other federally recognized Indian Reservation, and all of the laws of the United States that pertain to federally recognized Indian Tribes and Indians" shall apply to the Rancheria. ER582.

Pursuant to its restored federally-recognized status and those rights affirmed in the IGRA, the Tribe entered into a tribal-state gaming compact with the State of California in 1999, which the Secretary affirmatively approved on May 15, 2000. 65 Fed. Reg. 31,189 (May 16, 2000); *see also* ER158. The Secretary's May 5, 2000 letter approving the Compact (publicly available from the NIGC website at www.nigc.gov) stated that "the Compact provides that gaming will be located on the Tribe's 'reservation land, which is located in Amador County of California.'" ER158. On September 25, 2001, the NIGC approved the Tribe's site-specific gaming ordinance (an ordinance required by IGRA), and published such approval in the Federal Register on August 26, 2002. 67 Fed. Reg. 54,823-54,825 (2002); *see also* ER155. The NIGC-approved Tribal gaming ordinance specifically identified the Buena Vista Rancheria as the site of the planned gaming activities and therefore constituted recognition by the NIGC that the Buena Vista Rancheria is "Indian lands" under IGRA.

In August of 2004, the Tribe and the State entered into a Compact amendment, which was submitted to the Secretary as required by IGRA. As IGRA expressly provides, the Secretary allowed 45 days to elapse from the time the Tribe

submitted the Compact Amendment for approval, without taking specific action. Pursuant to IGRA, therefore, the Compact Amendment was deemed approved to the extent consistent with IGRA, and the Secretary published notice of the Compact Amendment's approval in the Federal Register on December 20, 2004. 69 Fed. Reg. 76,004 (2004).[5]

On June 30, 2005, in response to the Tribe's request for a formal determination on the matter, the NIGC issued a written opinion confirming the Rancheria's "Indian lands" (*i.e.*, gaming-eligible) status under IGRA. ER448-460. The NIGC Opinion reviewed the history of the Buena Vista Rancheria, the Termination Act, and the 1983 and 1987 Stipulations restoring the Tribe and

[5] On April 1, 2005, despite its settlement in the 1987 Stipulation, the County sued the United States seeking to challenge the Compact Amendment's validity, arguing that the Buena Vista Rancheria is not "Indian lands" under IGRA. *Amador County, California v. Kempthorne, et al.*, 592 F.Supp.2d 101 (D. D.C. 2009). On January 8, 2009, the District Court dismissed the case for failure to state a claim (holding that the Secretary's "no-action" approval was committed to agency discretion by law) and the County appealed. The Court of Appeals for the D.C. Circuit remanded the case on February 25, 2011, holding the Secretary's "no-action" approval of the Compact Amendment reviewable, and the mandate issued June 22, 2011. *Amador County, Cal. v. Salazar, et al.*, 640 F.3d 373 (D.C. Cir. 2011). On November 4, 2011, the Tribe moved the District Court to intervene for the limited purpose of moving to dismiss the case pursuant to Rule 19 for failure to join the absent Tribe as a required party. *See Amador County, Cal. v. Salazar, et al.*, No. 05:658-RWR (D. D.C.) (pending). The County opposed the Tribe's motion, the Tribe replied on November 23, 2011, and the County moved for leave to file a sur-reply on December 6, 2011, which the court granted on March 21, 2012. *Id*. No further action has been taken and the parties and Tribe await the court's order.

Rancheria. It concluded that the Rancheria parcel falls within the limits of an Indian reservation and therefore "meets the definition of Indian lands under IGRA, 25 U.S.C. § 2703(4)(A)." ER459. The Department of the Interior, Office of the Solicitor, concurred in the determination.[6] ER460.

More than six years after the Compact Amendment,[7] FOAC, Bea Crabtree, and June Geary brought the action below in the United States District Court for the Eastern District of California, apparently arising out of their objections to the Tribal-State Compact and the Compact Amendment allowing the construction of a casino by the Tribe on its Rancheria. The complaint apparently takes issue with

[6] In a 2001 appropriations act, Congress clarified that the authority to determine reservation status was delegated to the Secretary:

> Sec. 134. Clarification of the Secretary of the Interior's Authority Under Sections 2701-2721 of Title 25, United States Code. The authority to determine whether a specific area of land is a 'reservation' for purposes of sections 2701-2721 of title 25, United States Code, was delegated to the Secretary of the Interior on October 17, 1988 * * *.

115 Stat. 414, 442-43 (Nov. 5, 2001).

[7] This six year gap likely means Plaintiffs are time-barred in any case from brining a claim under the APA, given the general six-year statute of limitations applied to APA claims. *See* 28 U.S.C. § 2401(a).

the Compact Amendment because, as Plaintiffs seemingly assert, the Tribe is not an Indian tribe or the Rancheria is not "Indian lands" under IGRA.[8]

## SUMMARY OF THE ARGUMENT

Despite the Opening Brief's unfocused and confusing Issues Presented, the only questions this honorable Court must address are the District Court's (1) dismissal of the case for failure to join the Tribe—which is protected by sovereign immunity from suit—as a required party under Rule 19 and (2) denial of Plaintiffs' motion for reconsideration pursuant to Rule 59 or 60. However, rather than providing legitimate arguments related to the District Court's purported error in applying Rules 19, 59, and 60, Plaintiffs' Opening Brief presents irrelevant and hypothetical questions and APA and IGRA concerns far beyond the limited scope of this appeal. Plaintiffs' allegations in the complaint below constituted a direct attack on the status of the Tribe as a federally-recognized tribe and the Rancheria as Indian lands. It is for these reasons that a Rule 19 dismissal was proper here. The District Court, however, was not required to accept as true Plaintiffs' allegations against the status of the Tribe and its Rancheria, given that the

[8] FOAC has attempted in other settings to slow or stop the Tribe's development plans: it has filed an opposition to the EPA's issuance of a wastewater discharge permit to the Tribe for this project; it has filed a protest to the State's issuance of a liquor license to the planned facility; and its only known member, Jerry Cassessi, has urged the County to sell the Tribe's Indian reservation land for the non-payment of property taxes.

complaint refers to documents and actions of the United States and State of California evidencing the federally-recognized status of the Tribe and the Indian lands-status of the Rancheria and that these facts are also judicially noticeable. The District Court's Rule 19 was not an abuse of discretion because, in a well-supported order, it found that the Tribe was a required party under Rule 19(a), that the United States' interests conflict with the Tribe in this case, and that, pursuant to Rule 19(b), in equity and good conscience the action could not proceed in the Tribe's absence. The District Court's reasoned and supported denial of Plaintiffs' request for reconsideration under Rules 59 or 60 was similarly not in error. Plaintiffs' appeal is another attempt to rehash arguments soundly rejected twice below.

Thus, this Court must only address the Rule 19 issues raised by the Plaintiffs' appeal—which are strikingly few. This Court should affirm the District Court's dismissal and denial of reconsideration.

## ARGUMENT

### I. Introduction

Plainiffs' six "Issues Presented" are far beyond the scope of this appeal, include hypothetical questions to this Court, and are not determinable here. Plainly, the Opening Brief's lengthy and unfocused discussion regarding Plaintiffs' claims, if any, nominally against the United States under the APA or IGRA, does

not amount to an appeal of the District Court's dismissal on Rule 19 grounds—nor could it. The District Court never ruled on the Plaintiffs' claims (or, for that matter, the court's jurisdiction to hear such claims). This appeal can only concern dismissal under Rule 19 and the denial of a request for reconsideration of the Rule 19 dismissal.

The general policy concern over cases being dismissed for failure to join as a required party an affected tribe that is protected by sovereign immunity—a concern that is also not appealable because it is unmoored from any case or controversy—is not implicated here. The District Court below determined that the Plaintiffs' complaint directly impacts this Tribe in particular by challenging its very existence as a Tribe and the Indian lands status of its Rancheria. Despite Plaintiffs' arguments twice below and as repeated at length here, the Tribe's federally-recognized status and the Rancheria's status as Indian lands are settled matters;[9]

[9] Plaintiffs seem to largely rest their allegations pertaining to the Tribe's and its Rancheria's status on the Declaration of William Miles Wirtz, January 12, 2004, from *El Dorado County v. United States*, Case NO. Civ.S-02-1818 (E.D. Cal. 2004), ER235-249, which is irrelevant to this litigation and, in any event, is the purported statement of one individual formerly employed by the BIA, but is in no way the expression of federal policy Plaintiffs' repeated citations seem to suggest it to be. In addition, the Declaration concerns another tribe and its related litigation (the Shingle Springs Band of Miwok Indians) and nowhere mentions the Buena Vista Tribe or any other Indian tribe restored to federal recognition by way of the stipulated judgments in *Tillie Hardwick v. United States* (Shingle Springs is not a *Tillie Hardwick* tribe).

however, Plaintiffs' challenge to those already-determined facts in the absence of the Tribe threatens to impair the Tribe's interests in precisely the same manner against which Rule 19 is meant to protect.[10] It is these direct challenges, together with the United States' failure to adequately represent the Tribe's interests (which failure continues into the immediate appeal), that required dismissal of the suit under Rule 19 and that make this case unique from other APA suits only indirectly or arguably affecting an absent tribe.

Therefore, the sole issues before this Court are whether the District Court abused its discretion by dismissing the case pursuant to Rule 19 for failure to join the Tribe and by denying Plaintiffs' motion for reconsideration pursuant to Rules 59 and 60. The District Court's actions were not abuses of discretion because it did not commit a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. Further, the Plaintiffs' arguments at the District Court and on appeal demonstrate a central misunderstanding of Rule 19 (but also

[10] Plaintiffs' suit below appears to be, at least in part, a back-door attempt at a Tribal membership challenge, a subject reserved to the sole discretion of the Tribe. *See, e.g.*, *Lewis v. Norton*, 424 F.3d 959 (9th Cir. 2005) (action filed against federal defendants pertaining to gaming revenues dismissed because "the IGRA and its related provisions do not constitute a broad waiver of sovereign immunity covering an intra-tribal membership dispute."). *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51–52 (1978). Only the Tribal government may entertain membership disputes.

Rules 59 and 60, and the Federal Rules of Appellate Procedure and Ninth Circuit Rules).

## II. Standard of Review

A district court's decision under Rule 19 is reviewed for an abuse of discretion. *Pit River Home & Agr. Co-op. Ass'n v. United States*, 30 F.3d 1088, 1098 (9th Cir. 1994); *cf. Republic of the Philippines v. Pimentel*, 553 U.S. 851, 864 (2008) (declining to address the standard of review for Rule 19(b) decisions). "Under [the abuse of discretion] standard, a reviewing court cannot reverse unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Barona Group of Capitan Grande Band of Mission Indians v. Am. Mgmt. & Amusement, Inc.*, 824 F.2d 710, 724 *opinion amended on denial of reh'g*, 840 F.2d 1394, 1408 (9th Cir. 1987). To the extent that a district court's determination whether a party's interest is impaired by failure to join it involves a question of law, *de novo* review is appropriate. *Pit River Home*, 30 F.3d at 1098.

The District Court's determination below that the Tribe's interests would have been impaired if the litigation had continued in its absence did not involve a question of law. As the District Court found:

> This suit implicates several of the Tribe's legally protected interests that will be impaired or impeded if the suit continues. … Plaintiffs seek to invalidate the Compact and enjoin the Tribe from engaging in

> class III gaming. This impairs the Tribe's substantial gaming-related interests …. The Tribe also has a substantial interest in the already-determined 'Indian lands' status of its Rancheria, its ability to govern that land, its ability to enforce its laws, its status as a federally-recognized Indian tribe, the two stipulated judgments that restored the Tribe and Rancheria, and its sovereign immunity not to have its interests adjudicated without its consent.

ER19-20. The District Court's Rule 19 dismissal was therefore based on the collection of facts before it—the federally-recognized status of the Tribe, the restoration by stipulated judgment of the Tribe in 1983, the restoration by stipulated judgment of the Rancheria in 1987, the Interior Department's 2005 Indian lands determination, and the Tribe's noticeable absence in the litigation—as those facts relate to or were challenged by the several allegations made in the Plaintiffs' complaint. Indeed, no legal determination was required for the District Court to find that the complaint's allegations threatened to impair the most fundamental interests of the Tribe: its status as an Indian tribe and the Indian lands status of its Rancheria. *See Pit River Home*, 30 F.3d at 1099 (concluding that the district court did not abuse its discretion on facts demonstrating that absent party "clearly has a legal interest in the litigation," including its interest in the subject property, its interest in sovereign immunity, and the danger of multiple or inconsistent obligations).

The Tribe further disagrees with Plaintiffs' assertion of *de novo* review, as the dismissal here was pursuant to Rule 19 rather than judgment on the pleadings.

*See Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 883 (9th Cir. 2011) ("We review judgments on the pleadings made under Rule 12(c) de novo.").

## III. Plaintiffs' Issues Presented are Hypotheticals Not Determinable in This Case

Plaintiffs' Issues Presented are in no way grounded in fact or law and amount to hypotheticals in that they assume as true assertions of fact that are, in fact, false, frivolous, or that have not been litigated, determined, or accepted by any forum or body. This Court should not and cannot decide this case on such hypothetical questions. *See, e.g.*, *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) ("The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy. [A] federal court['s] … judgments must resolve 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937)) (internal citation omitted).

By way of example, the first Issue Presented states:

> Where federal agencies, have erroneously approved a tribal gaming ordinance for an ineligible Indian tribe and approved a tribal-state compact to engage in class III gambling on ineligible fee land in Amador County in violation of the I.G.R.A., 25 U.S.C. 2710 (d), then the citizens and communities bearing the burdens and negative impacts of the resulting gambling casino in their midst, have prudential standing to challenge those approvals of the regulatory agencies under the A.P.A. That standing and the right of review,

> created by 25 U.S.C. 2714 cannot be defeated by procedural rules of joinder and common law doctrines of tribal sovereign immunity.

Opening Brief, p. 7. This Issue Presented, however, contains a hypothetical and is irrelevant to the present case, as, among other things, the Tribe is not an "ineligible Indian tribe." Further, the District Court did not rule on Plaintiffs' standing, and the question whether the APA's right of review can be "defeated" by joinder and sovereign immunity was not before the District Court and is not on appeal here. Similarly, the fourth Issue Presented states:

> When a putative Indian tribe, whose legitimacy and federal agency actions acknowledging and recognizing them, is called into question in a lawsuit under the A.P.A. and I.G.R.A. 25 U.S.C. 2703 [5], the tribe is not entitled to claim tribal immunity from lawsuit or they are indispensable parties who must be joined under F.R.C.P. rule 19, then refuse to join in that lawsuit and move for dismissal of the action against agencies, claiming "Indian tribal immunity" from lawsuit. They would, therefore, be able to hide the very illegal, arbitrary and capricious actions of those federal agencies, free from any legal challenge or review by hiding behind Indian tribal immunity.

Opening Brief, p. 8-9. Again, as further explained in the following subsection IV, the Tribe's "legitimacy" is inviolable and Plaintiffs' having alleged otherwise is directly contradicted in their complaint and the briefing.[11] And, as with the first

[11]Plaintiffs' final Issue Presented admits that the "complaint contained clear allegations the putative Buena Vista Rancheria of Me-Wuk Indians was never a lawfully organized Indian tribe. The District Court not only did not understand tribal existence was challenged in the lawsuit but failed to treat those specific allegations in the complaint as true, as required." Opening Brief, p. 10-11. However, as explained below, the Opening Brief admits that the State has

Issue Presented, the question of APA review being precluded by a purported tribe "hiding behind" sovereign immunity is not before this Court, where the federally-recognized Tribe whose status as a tribe and the Indian lands status of its Rancheria are directly implicated by this lawsuit has not and cannot be joined because of sovereign immunity.

Most obviously, the already-determined status of the Tribe as a tribe is non-justiciable. "'[T]he action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review.'" *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1275-76 (9th Cir. 2004) (internal citations omitted).

## IV. The District Court Was Not Required To Accept as True the Plaintiffs' Conclusory Allegations Concerning the Recognized Status of the Tribe and the Rancheria

Plaintiffs' Opening Brief suggests the District Court was required to take as true the complaint's allegation that the Tribe is not a tribe. Although on a motion to dismiss, the court must accept the plaintiff's factual allegations in the complaint as true, the court is "not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint." *Steckman v. Hart*

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recognized the Tribe through the Compact and the United States has recognized the Tribe through its recognition of the Compact, other approvals, and the fact of the Tribe's inclusion on the list of federally-recognized tribes.

*Brewing Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998). *See also In re VeriFone Sec. Litig.*, 11 F.3d 865, 868 (9th Cir. 1993) (conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim). Additionally, "[t]he court need not … accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 *opinion amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001).

In *Sprewell*, *id.*, a professional basketball player brought suit on, among other things, a claim of racial discrimination. The Ninth Circuit upheld the district court's dismissal of the claim pursuant to Fed. R. Civ. P. 12(b)(6) because the Circuit Court's:

> examination of the pleadings confirms that Sprewell's attachment of the arbitration award to his complaint justified both the district court's consideration in connection with a Rule 12(b)(6) motion of the factual findings contained therein as well as the conclusion the court drew from it. *See Branch v. Tunnell*, 14 F.3d 449, 453–54 (9th Cir.1994) ('[W]e hold that documents whose contents are alleged in a complaint and whose authenticity no party questions ... may be considered in ruling on a Rule 12(b)(6) motion to dismiss.').

*Sprewell*, 266 F.3d at 988.

Just as Sprewell "ple[]d himself out of a claim," *id.*, Plaintiffs below pled themselves out of application of Rule 19. Here, the complaint asserts the unquestioned federally-recognized status of the Tribe by reference to, among other

things: the Tribe's having executed a Compact and Compact Amendment with the State (ER1100-1101); the State's further recognition of the Tribe as a tribe, for example by distributing to it revenues from the Indian Tribal Revenue Sharing Trust Fund (ER1102); the United States' "approv[al of] the operation of class III gaming" on the Tribe's Rancheria (ER1076, 1097-1098); and the United States' recognition of the Tribe as a tribe in other contexts (ER1106-1107) (United States' "determination to allow" construction and operation of gaming on the Rancheria, approval of the Tribe's gaming ordinance, NIGC letter decision of June 30, 2005, approval of the Tribal-State Compact and Compact Amendment).

Moreover, publication in the Federal Register of the Tribe's federally-recognized status is judicially noticeable pursuant to 44 U.S.C. § 1507 ("contents of the Federal Register shall be judicially noticed"). *See Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Com'n*, 366 F.3d 692, 702 (9th Cir. 2004) (granting motion to take judicial notice of EPA Proposed Rule published in the Federal Register). *See also BGA, LLC, et al. v. Ulster County, N.Y.*, No. 1:08-CV-149, 2010 WL 3338958 at n.11 (N.D.N.Y. Aug. 24, 2010) (unpublished) (the Federal Register list "is generally dispositive evidence of whether a tribe is federally recognized."). The District Court, then, need not have accepted as true Plaintiffs' allegation that the Tribe is not a tribe because the Tribe's recognition is judicially-noticeable. *See Sprewell*, 266 F.3d at 988 ("[t]he court need not …

accept as true allegations that contradict matters properly subject to judicial notice").

The court below also need not have accepted as true Plaintiffs' assertion that the Buena Vista Rancheria is not "Indian lands," as that assertion is a conclusory allegation that is contradicted by documents referred to in the complaint. For instance, the complaint refers to the following: the 2005 Interior Department Indian lands determination holding expressly and emphatically that the Rancheria is an Indian reservation and therefore constitutes "Indian lands" within the meaning of IGRA (ER1095); the 1983 *Tillie Hardwick* Stipulation restoring the Tribe to federal recognition (ER1070); the site-specific 1999 Compact between the Tribe and the State of California (ER1089); and the site-specific 2004 Compact Amendment between the Tribe and the State of California (ER1092). In addition, these documents are judicially noticeable. *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (a court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue") (internal quotations omitted). *See also* Fed.R.Evid. 201(b)(2) (a court may take judicial notice of a fact that is "not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); *Lynch v. RKS Mortgage, Inc.*, 588 F.Supp.2d 1254,

1256 n.2 (E.D.Cal.2008) (granting defendant banks' request for judicial notice of loan documents when plaintiff homeowner had not challenged the documents' authenticity and had referred to them throughout his complaint).

Finally, as a practical matter, Plaintiffs cannot make conclusory and demonstrably false misstatements of fact in the complaint that would defeat the application of Rule 19 under the requirement to accept as true all allegations in the complaint. For example, in a case where a corporation's interests are directly implicated but that corporation was not joined, a plaintiff should not be able merely to allege that the corporation is not a corporation—despite the existence of the Secretary of State's certification that the entity is a corporation—simply to defeat Rule 19. Such a result is irrational and contravenes Rule 19's protective nature.

Because the dismissal here was pursuant to Rule 19, Plaintiffs' allegations as to the federally-recognized status of the Tribe and the Indian lands status of the Rancheria—which were directly contradicted by statements in the complaint indicating the United States' and State's recognition of the Tribe as a tribe and the lands as Indian lands—went directly to the Tribe's most fundamental interests, interests meant to be protected by Rule 19. Thus, the District Court was not required to accept as true Plaintiffs' conclusory allegations concerning the recognized status of the Tribe and the Rancheria.

## V. The District Court's Rule 19 Determination was not an Abuse of Discretion

The District Court found that the Tribe is a required party under Rule 19(a) and that it could not proceed in equity and good conscience with the existing parties under Rule 19(b). ER22-23. The District Court's findings were amply supported by the facts here, and the District Court's thorough order demonstrates that it did not abuse its discretion in dismissing the case under Rule 19. The District Court summarized Plaintiffs' two claims that remained at the time of the Rule 19 motion as follows: the first cause of action alleged "that both the Federal and State Defendants violated IGRA by approving class III gaming on ineligible lands" and the third cause of action purported to challenge agency decision-making under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 500-596. ER15-16.

However, as explained in the Tribe's Memorandum of Points and Authorities in Support of Motion to Dismiss, the relief sought by Plaintiffs demonstrated clearly that the suit was, in reality, not a challenge to the standards by which the Secretary approved the Amended Compact or gaming ordinance. ER986-987. Rather, the lawsuit was a challenge by unrelated third parties to the validity of the Compact Amendment and the *Tillie Hardwick* Stipulations to which the Tribe, County, and United States have agreed to be bound; a challenge to the status of the Rancheria as Indian country pursuant to 18 U.S.C. § 1151 and as

"Indian lands" as IGRA defines that term; and a challenge to the federally-recognized status of the Tribe itself. *Id*. Plaintiffs Crabtree and Geary also made claims to Tribal membership in the Complaint. *See* ER1070, 1114-1115.

On appeal, in the Argument section of the Opening Brief Plaintiffs mention Rule 19, or make assertions seemingly related to Rule 19, only four times (at pages 52-54, 60-61, 64, 66-68). None of these assertions demonstrate or even properly allege error by the District Court, and all appear to be an attempt to rehash arguments the District Court comprehensively considered and rejected—two times.[12]

In another of its hypotheticals posed to this Court, Plaintiffs suggest—without citation to the record or to any authority—that this case illustrates how any Indian tribe indirectly affected by an APA suit against the United States could effectuate dismissal under Rule 19 simply by alleging some interest in the suit. But that is not the question here where Plaintiffs directly challenged the Tribe's restored status as an Indian tribe under federal law and contested the status of its federally-restored reservation, among other fundamental interests. As the District Court explained in its dismissal order, the Tribe far overcame the low threshold applied to an absent party's claims of interest in a suit:

[12] Plaintiffs' Rule 19 assertions are addressed below, as they relate to the District Court's relevant Rule 19 findings.

> Under Rule 19(a)(1)(B), a party need only 'claim' an interest, not establish it with certainty. The court may only exclude claims of interest that are patently frivolous. This suit implicates several of the Tribe's legally protected interests that will be impaired or impeded if the suit continues.

ER19 (citation omitted). Thus, the District Court's dismissal means the Tribe's claims of interest in the suit were meritorious. The direct nature of Plaintiffs' challenges to several of the Tribe's fundamental interests, together with the District Court's finding of conflict between the Government and the Tribe's interests, makes this case exceptional. Any concern over this case leading to the ability of Indian tribes generally to cause the dismissal of cases that only indirectly affect their interests is wholly unwarranted.

Rules 19 (a) and (b) govern the joinder of persons needed for a suit's just adjudication. Rule 19 requires that a court dismiss an action if (1) an absent party is required to be joined in the matter, (2) it is not feasible to join that party, and (3), if joinder is not feasible, the action should not proceed in equity and good conscience. *Republic of Philippines*, 553 U.S. at 855-57; *E.E.O.C. v. Peabody W. Coal Co.*, 610 F.3d 1070, 1077 (9th Cir. 2010).[13] The inquiry is a "practical, fact-

[13] As the District Court explained, "When Rule 19 was amended in 2007, the word 'necessary' was replaced by 'required' and the word 'indispensable' was removed. The changes were intended to be 'sylistic only' and 'the substance and operation of the Rule both pre- and post-2007 are unchanged." ER17 at n.1 (quoting *Republic of Philippines v. Pimental*, 553 U.S. 851, 855-56 (2008)) (internal citation omitted).

specific one." *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1154 (9th Cir. 2002).

**A. The District Court Properly Found the Tribe is a Required Party**

Under Rule 19(a)(1), a party is required if (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) the 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 interest. Rule 19.

In its brief in support of the motion to dismiss, the Tribe argued that if the Court granted Plaintiffs' requested relief, the order would fail to bind the Tribe and would, therefore, not provide Plaintiffs "complete" relief. ER989-990.[14] *See*

[14] The Tribe's brief to the District Court explained, among other things, that "complete relief would not obtain here because, even if the Court granted Plaintiffs' requests . . . the Tribe, not being bound by such judgment, may proceed with its development plans or, alternatively, pursue class III gaming under the 1999 Compact. The Tribe could also pursue class II gaming on its Rancheria without any compact. ER990. Additionally,

> [T]he Compact Amendment is prominently at issue in this lawsuit. But because third parties may not seek relief under the Compact Amendment, as previously explained by State Defendants' counsel and the Court, any relief sought by Plaintiffs may not extend to the validity of the Compact Amendment. Any judgment entered by the

*Dawavendewa*, 276 F.3d at 1157 (court cannot provide litigation parties complete relief where requested remedy, if granted, would fail to bind all absent parties who are in position to act in direct contravention of that remedy); *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999) (in the Hopi Tribe's absence, plaintiffs could not be given complete relief "since judgment against the government would not bind the [other tribe], which could assert [contrary rights].").

The District Court agreed. It found that Rule 19(a)(1)(A) was satisfied because:

> In this case, the Tribe is not a party to the lawsuit, so it would not be bound by any judgment in favor of plaintiffs. … The Tribe could therefore act contrary to the judgment, preventing the court from according complete relief to the plaintiffs.

ER19 (citations omitted).

On appeal, Plaintiffs assert that *Dawavendewa*, 276 F.3d at 1150, and *Pit River*, 30 F.3d 1088, are inapplicable here because "[i]f the current gambling licenses and approvals were voided, nothing prevents the tribe from correcting the defects to comply with the law." Opening Brief, p. 61. But this argument fails to recognize, as the District Court recognized, that the Tribe's absence could prevent the Plaintiffs from achieving complete relief. *See* ER19.

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> Court that pertained to the Compact Amendment's validity would fail to bind the only two parties to that contract.

ER991.

The Tribe also argued that numerous of its legally-protected interests were threatened by Plaintiffs' suit. The Tribe's briefing below explained that the Tribe's gaming-related interests were directly implicated by the complaint because the suit directly sought to invalidate the Compact Amendment, "which is a contract between the State and the Tribe by which both such sovereigns obtained legally protected interests." ER992. *See American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002) ("[t]he interests of the tribes in their compacts are being impaired and, not being parties, the tribes cannot defend those interests."). The briefing also explained that because Plaintiffs' complaint appeared to argue that the Rancheria was ordinary fee land outside an Indian reservation, and it would therefore fall under State and County, rather that Tribal, jurisdiction, the Tribe's legally protected interests in engaging in gaming under IGRA and in otherwise exercising its governmental authority over its reservation, and in being free of State and County jurisdiction, were implicated. ER994. *See, e.g., Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1458-59 (9th Cir. 1994). Related, as explained in the Tribe's brief below, the complaint's request that the District Court reverse the NIGC's approval of the Tribe's gaming ordinance similarly implicated the Tribe's legally protected interests. ER995. *See Dawavendewa*, 276 F.3d at 1157 ("[u]ndermining the Nation's ability to negotiate contracts also undermines the Nation's ability to govern the reservation effectively and efficiently")

(collecting cases to demonstrate the Nation's "multiple economic and sovereign interests … which may be impaired in its absence."). And the Tribe's briefing identified that the complaint, by asking the District Court to find that the Tribe does not legally exist and reverse the Indian lands status of its Rancheria, directly threatened to impair the Tribe's most fundamental legally-protected interests—the Tribe's existence, its reservation, and its sovereign immunity—in addition to the Plaintiffs' challenge to the validity of the two *Tillie Hardwick* Stipulations in the Tribe's absence and without its consent. ER995-996.

The District Court again agreed. It found that Rule 19(a)(1)(B) is satisfied because, under subsection (i), here:

> This suit implicates several of the Tribe's legally protected interests that will be impaired or impeded if the suit continues.
>
> Plaintiffs seek to invalidate the Compact and enjoin the Tribe from engaging in class III gaming. This impairs the Tribe's substantial gaming-related interests, including its right under federal law to engage in class III gaming. [Citations omitted.] Plaintiffs argue that the Tribe does not have a legally protected interest because it only has an economic interest stemming from the approval of the Compact. Unlike cases in which non-parties have indirect economic interests that do not qualify as 'legally protected interests,' the Tribe is a party to the Compact and has a direct, and legally protected, interest in its approval.
>
> The Tribe also has a substantial interest in the already-determined 'Indian lands' status of its Rancheria, its ability to govern that land, its ability to enforce its laws, its status as a federally-recognized Indian tribe, the two stipulated judgments that restored the Tribe and Rancheria, and its sovereign immunity not to have its interests

> adjudicated without its consent. [Citation omitted.] The Tribe's ability to protect these legal interests would be impeded and impaired if this action continues.

ER19-20. Plaintiffs' conclusory hypothetical in the Opening Brief, at p. 64, that "[i]f they were not a lawfully acknowledged Indian tribe they had no … protectable interest there entitling them to claim they were either necessary or indispensable," does not demonstrate the District Court's abuse of discretion in finding that the Tribe has legally protectable interests because the hypothetical is based on the untrue assertion that the Tribe is not a tribe.

### B. The District Court Properly Found the Tribe's and Government's Interests Conflict

Although impairment of an absent party's interests may be minimized if those interests are adequately represented in the suit, the Tribe demonstrated and the District Court found that the United States was not adequately representing the Tribe's interests in this litigation. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) ("The United States may adequately represent an Indian tribe unless there is a conflict of interest between the United States and the tribe.").

The District Court concluded that a conflict of interest between the United States and the Tribe had been demonstrated:

> The Federal Defendants' litigation policy in this case appears to favor judicial review and to avoid taking positions that may conflict with its national Indian policy. Their failure to move this court to dismiss this case and their refusal to take a position on this motion [Fn 2] appears

> to conflict with the Tribe's interest in protecting their tribal status and not having their interests litigated in their absence. …
>
> When asked if the United States represents the interests of the Tribe, counsel responded that "[i]t depends on what claims are being asserted" and that "the United States is in the position of having to balance" the interests. … This balancing presents a conflict of interest with the Tribe and suggests that its legal interests may not adequately be protected if it remains an absent party. Accordingly, the Tribe is a required party in this suit.
>
> [Fn 2] The Federal Defendants' counsel was questioned at length during oral arguments regarding the United States' position on the Tribe's Rule 19 motion. Her only position was that the United States has no position on the outcome of this motion.

ER21-22 (citations omitted.).[15]

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[15] As to the question of conflict, the Tribe's briefing to the District Court argued that a conflict was evidenced, in part, by the fact that the Government failed to move to dismiss the Plaintiffs' complaint despite several grounds being available to do so (*e.g.*, lack of standing, lack of jurisdiction as to Tribal membership claims, lack of jurisdiction for non-existence of federal waiver of sovereign immunity under the Administrative Procedure Act, the non-justiciability of a tribe's federally-recognized status, the failure of IGRA to provide a private right of action, failure to state a claim upon which relief can be granted, etc.) and failed to itself use Rule 19 or even to take a position on the Tribe's Rule 19 motion. The Tribe's briefing further argued, at ER997-1002, that:

> Although the United States has a generic trust responsibility toward Indian tribes, that obligation nowhere includes a general statutory duty to represent the specific interests of an Indian tribe in the context of litigation . . . Further, the United States' trust responsibility to Indian tribes, or its internal policy and inter-agency considerations, may conflict with the unique position of one Indian tribe regarding matters raised in litigation, as it does here. The Tribe makes its special and limited appearance primarily because it believes the United States in fact has not vigorously or adequately represented its interests in this

Plaintiffs' arguments here in no way demonstrate an abuse of discretion on the part of the District Court in finding a conflict between the Tribe and the Government's interests. In fact, the United States'—the Defendant here—failure to participate in the immediate appeal further evidences such conflict and the Government's continuing inability and unwillingness to represent the Tribe's interests in this litigation.

### C. The District Court Properly found that Sovereign Immunity Prevented Joinder of the Tribe and that, in Equity and Good Conscience, the Action Could Not Proceed in the Tribe's Absence

Tribes enjoy sovereign immunity from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58; *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751 (1998). A waiver of sovereign immunity must be unequivocal. *See American Greyhound Racing, Inc.*, 305 F.3d at 1027. "If the necessary party is immune from suit, there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor." *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (internal quotations omitted). In determining whether the action may proceed in the absence of a party required to be joined if feasible, Rule 19(b) provides that courts should consider the following:

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litigation, and the Tribe should have the right to choose its own counsel.

(1) the extent to which judgment rendered in the person's absence might prejudice that person; (2) the extent to which the prejudice could be lessened or avoided by protective provisions, shaping the relief, or other measures; (3) whether judgment in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

The District Court found that "[t]he Tribe is federally recognized, and neither the Tribe nor Congress has consented to its being in this action, therefore the Tribe cannot be joined because it is immune from civil suit." ER22. Plaintiffs' citation at page 46 of the Opening Brief to *Kiowa Tribe of Oklahoma*, 523 U.S. 751, for the assertion that tribal sovereign immunity "had become a largely legal anachronism" is irrelevant to the scope of this appeal, and directly counter to the firmly established precedent upholding the immunity, as explained by the Supreme Court in that case. *See Kiowa Tribe of Oklahoma*, 523 U.S. at 756 ("[T]he doctrine of tribal immunity is settled law and controls this case[.]").

Based on an analysis of the four factors that courts consider when deciding whether equity and good conscience demand that a suit be dismissed under Rule 19(b), the District Court then determined that the action could not proceed in the Tribe's absence. Although stating that, "[b]ecause the Tribe has sovereign immunity, little balancing of these factors is required," the District Court went on to analyze the four factors and conclude that, "[m]oreover, the factors, taken

together, weigh in favor of finding that the Tribe is an indispensable party." ER22-23. In its analysis of the four factors, the Court found:

> The first factor in the Rule 19(b) analysis is essentially the same as the legal interest test in the 'necessary party' analysis. *See, e.g., Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994). Accordingly, the prejudice prong is met here as the Tribe's absence might prejudice several of its legally protected interests. The potential prejudice to the Tribe cannot be effectively minimized under the second factor of Rule 19(b) because no adequate relief for plaintiffs can be shaped such that the Tribe would not be prejudiced. Any adjudication of the Federal Defendants' review of the Compact or the Tribe's federal status would prejudice the Tribe's interests. The consideration of the final two prongs is not necessary where the Tribe will be prejudiced by a judgment rendered in its absence and there is no way the court can avoid the prejudice. *See Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1498 (D.C. Cir. 1995). Accordingly, the court cannot proceed in equity and good conscience with the existing parties.

ER23. Nothing about the District Court's analysis suggests abuse of discretion.

## VI. The District Court's Denial of Plaintiffs' Request for Reconsideration Under Rules 59 and 60 was Not an Abuse of Discretion

Plaintiffs also apparently appeal the District Court's denial of their motion to "reconsider, vacate, amend, or modify"[16] the court's October 4, 2011 Order dismissing the case. ER2-12.

[16] As Plaintiffs' title of this motion varied from the first notice to the amended notice and the memorandum of points and authorities, this version of the title is quoted from the December 9, 2011 Order denying the motion. ER3.

Reconsideration is an "extraordinary remedy," *Kona Enter., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000), that should only be granted in "highly unusual circumstances," *Sch. Dist. No. 1J, Multonomah Cnty. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). "[A] motion for reconsideration should not be granted, 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." *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir.1999). *See also 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."). 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. *FDIC v. United Pac. Ins. Co.*, 152 F.3d 1266, 1272 (10th Cir.1998); *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir.1991). *See also San Luis & Delta-Mendota Water Auth. v. U.S. Dept. of Interior*, 624 F. Supp. 2d 1197, 1208 (E.D. Cal. 2009) *aff'd sub nom. San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676 (9th Cir. 2012) ("[M]otions to reconsider are not vehicles permitting the unsuccessful party to 'rehash' arguments previously presented[.]") (internal citation omitted).

> The District Court found that in their motion to reconsider:
>
> > Plaintiffs do not present the court with newly discovered evidence, nor do they present any new caselaw that would constitute an intervening change in controlling law. For the purposes of this motion, all but one of plaintiffs' claims rests on allegations that the court made a 'clear error' or a 'mistake' in its prior order . . .
> >
> > The majority of plaintiffs' arguments in support of their motion simply restate their original positions opposing the motion to dismiss and do not raise any new issues or identify errors that would justify reconsideration of the court's Order. The first twenty pages of plaintiff's motion rehash their version of the historical events leading up to the present suit, … and another thirteen pages reiterate arguments already repeatedly discussed and decided by the court . . .

ER4-5 (citations omitted).

The Order then identified three new issues that Plaintiffs raised in their reconsideration motion. First, Plaintiffs raised the Rule 19 public rights exception, as articulated in *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990). The District Court found that, although Plaintiffs had waived the argument for failure to raise it prior to the motion for reconsideration, it was nonetheless inapplicable here. ER6-7. Although Plaintiffs again raise the public interest exception in its appeal, they introduce no new arguments and do not demonstrate any abuse of discretion on the part of the District Court. Opening Brief, p. 66-68. Plaintiffs' restatement of the public interest exception, despite the District Court's well-supported conclusion that the argument had been waived, and nonetheless was

inapplicable here, in no way demonstrates an abuse of discretion on the District Court's part in denying the motion for reconsideration.

Second, the District Court considered Plaintiffs' allegations of six alleged misrepresentations, but found that:

> The six alleged misrepresentations made by the Tribe concern issues that go to the very heart of the litigation in this matter. The Tribe's representations regarding the legal status of the Tribe, the tribal lands, or the general legal issues in the case are no fraudulent statements under Rule 60(b). The statements are argumentative positions taken by the Tribe and have been disputed by plaintiffs since the complaint was filed. Plaintiffs were not prevented from presenting their defense, nor were they unable to discover that the Tribe's statements could be disputed prior to their motion for reconsideration.

ER8. Third, the District Court explained that Plaintiffs' motion:

> briefly present[ed] six alternative procedural mechanisms that they claim the court could have used to avoid the outright dismissal of the case due to failure to join a necessary and indispensable party. These alternative mechanisms were not previously presented to the court, despite the fact that they are directly relevant to the Tribe's motion to dismiss based on Rule 19.

ER8-9. The District Court deemed these arguments waived for failure to present them in response to the Tribe's motion to dismiss, but reached the merits nonetheless. The District Court then disposed of these "proposals" as follows:

> Plaintiffs' first, fifth, and sixth proposals require either forced joinder of the Tribe or assume that at some later date the Tribe would voluntarily choose to join the litigation . . .
>
> Similarly, to the extent that plaintiffs rely on the Tribe deciding to voluntarily join the litigation at some point in the future, what

> plaintiffs are really asking the court to do is to assume that the Tribe will cede its sovereign immunity, a decision that the Tribe is under no obligation to make. A viable alternative in a Rule 19 motion cannot stand on such uncertain ground.
>
> … Splitting the claims or ruling on plaintiffs' summary judgment motion in the Tribe's absence would prejudice the Tribe's protected legal interests and is not an adequate alternative to dismissal under Rule 19.
>
> Plaintiffs' third proposal … also fails to inform the court exactly what this alternative procedure would entail, why plaintiffs would be unable to pursue this alternative after their claims have been dismissed, or how it would protect the Tribe's interests.
>
> Finally, plaintiffs' fourth proposal … in no way serves to protect the Tribe's legal interests, rather it is a merely a way in which the court could have potentially avoided deciding the Rule 19 motion.

ER10-11. The District Court then concluded that "Plaintiffs' proposed alternative procedural mechanisms demonstrate a lack of understanding of the concept of a required party under Rule 19. None of plaintiffs' proposed alternatives would lessen the prejudice that the Tribe would suffer while providing plaintiffs adequate relief." ER10-11 (emphasis added). Thus, here the District Court did not abuse its discretion because it was not presented with newly discovered evidence, it did not committed clear error, and there was not an intervening change in the controlling law.

## VII. Plaintiffs' Failure to Comply with the Rules Provides Further Reason for Affirmance

The majority of the Opening Brief is irrelevant to the limited issues before this Court. Plaintiffs' Notice of Appeal identified that this appeal was "from the final judgment and order dismissing their case on October 4, 2011 and the denial of their Motion to Reconsider, Vacate or Amend the Order Dismissing their case entered in this action on the 9th day of December, 2011." ER26. But the Opening Brief far exceeds the scope of the Rule 19 dismissal and denial of reconsideration: the Opening Brief is apparently just ten words shy of the 14,000 word limit of F.R.A.P. 32(a)(7)(B)(i). Opening Brief, Certificate of Compliance, p. 71. Plaintiffs' seventeen-page "Statement of the Case and Brief Summary of the Relevant Somewhat Complicated [sic] Facts to be Considered on this Appeal" nowhere mentions Rules 19, 59, or 60, or any facts related to the District Court's findings as to those rules. Similarly, the Opening Brief fails to provide record cites to where Rules 19, 59 and 60 were raised and ruled on below as required by Circuit Rule 28-2.5, perhaps because so little of the brief addresses the facts, law, or findings related to these rules.[17]

[17] Related, Plaintiffs provide only a limited number of citations to the record within the argument section of their brief. Either this is in violation of Circuit Rule 28-2.8, which requires "[e]very assertion in briefs regarding matters in the record [to be] be supported by a reference to the location in the excerpts of record where the matter is to be found," or is the result of their failure to make legitimate, substantive, and supported arguments on appeal. *See Mitchel v. General Elec. Co.*, 689 F.2d 877, 879 (9th Cir. 1982) ("Mitchel's failure to refer to the record works a hardship not only on this court, but also on the opposing litigants.").

## CONCLUSION

For the foregoing reasons, the Tribe requests this Court affirm the District Court's dismissal of the case pursuant to Rule 19 and its denial of reconsideration under Rules 59 or 60.

Respectfully submitted,

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August 15, 2012

## CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This brief complies with the type volume limitation set forth in Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure. Excepting the portions described in Circuit Rule 32(a)(7)(B)(iii), the brief contains 11,271 words.

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# ADDENDUM OF PERTINENT AUTHORITIES

## Rule 19. Required Joinder of Parties

**(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; 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 interest.

**(2)** ***Joinder by Court Order.*** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

**(3)** ***Venue.*** If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

**(b) When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

**(1)** the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

**(2)** the extent to which any prejudice could be lessened or avoided by:

**(A)** protective provisions in the judgment;

**(B)** shaping the relief; or

**(C)** other measures;

**(3)** whether a judgment rendered in the person's absence would be adequate; and

**(4)** whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

**(c) Pleading the Reasons for Nonjoinder.** When asserting a claim for relief, a party must state:

**(1)** the name, if known, of any person who is required to be joined if feasible but is not joined; and
**(2)** the reasons for not joining that person.

**(d) Exception for Class Actions.** This rule is subject to Rule 23.

Fed. R. Civ. P. 19

## Rule 59. New Trial; Altering or Amending a Judgment

**(a) In General.**
**(1)** ***Grounds for New Trial.*** The court may, on motion, grant a new trial on all or some of the issues--and to any party--as follows:
**(A)** after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or
**(B)** after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.
**(2)** ***Further Action After a Nonjury Trial.*** 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.

**(b) Time to File a Motion for a New Trial.** A motion for a new trial must be filed no later than 28 days after the entry of judgment.

**(c) Time to Serve Affidavits.** When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

**(d) New Trial on the Court's Initiative or for Reasons Not in the Motion.** No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

**(e) Motion to Alter or Amend a Judgment.** A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Fed. R. Civ. P. 59

## Rule 60. Relief from a Judgment or Order

**(a) Corrections Based on Clerical Mistakes; Oversights and Omissions.** The court may correct a clerical mistake or a mistake arising from oversight or

omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

**(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.** 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;

**(4)** the judgment is void;

**(5)** the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

**(6)** any other reason that justifies relief.

**(c) Timing and Effect of the Motion.**

**(1)** ***Timing.*** A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

**(2)** ***Effect on Finality.*** The motion does not affect the judgment's finality or suspend its operation.

**(d) Other Powers to Grant Relief.** This rule does not limit a court's power to:

**(1)** entertain an independent action to relieve a party from a judgment, order, or proceeding;

**(2)** grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

**(3)** set aside a judgment for fraud on the court.

**(e) Bills and Writs Abolished.** The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

Fed. R. Civ. P. 60

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 15, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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