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United States District Court

for the Eastern District of California

JAMUL ACTION COMMITTEE and the JAMUL COMMUNITY CHURCH, DARLA KASMEDO, PAUL SCRIPPS, GLEN REVELL and WILLIAM HENDRIX

Plaintiffs,

vs.

JONODEV CHAUDHURI, Acting Chairman of the National Indian Gaming Commission, DAWN HOULE, Chief of Staff for the National Indian Gaming Commission, SALLY JEWELL, Secretary of the United States Department of the Interior, KEVIN WASHBURN, Assistant Secretary - Indian Affairs, U.S. Department of the Interior, PAULA L. HART, Director of the Office of Indian Gaming, Bureau of Indian Affairs, AMY DUTSCHKE, Regional Director, Bureau of Indian Affairs, JOHN RYDZIK, Chief, Division of Environmental, Cultural Resources Management and Safety of the Bureau of Indian Affairs, and U.S. DEPARTMENT OF THE INTERIOR, NATIONAL INDIAN GAMING COMMISSION, and RAYMOND HUNTER, Chairman, Jamul Indian Village,

Defendants.

Case No. 2:13-cv-01920-KJM-KLN

AMICUS CURIAE BRIEF OF THE JAMUL INDIAN VILLAGE IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS (PROPOSED)

Date: May 23, 2014
Time: 10:00 a.m.
Judge: Hon. Kimberly J. Mueller

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I. Introduction

This case is a recent – though not the latest[1] – attack in a two-decade-long war waged against the Jamul Indian Village ("Tribe" or "Village") by a handful of its neighbors who will say and do virtually anything to attempt to stop the Tribe from exercising its federal right to develop a tribally-owned gaming enterprise on its Indian lands. Congress codified that tribal right in order to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2702(1). Contrary to this express federal policy, plaintiffs and their allies have filed at least 19 legal actions over the past two decades, all aimed at killing the Tribe's plans to benefit from tribal government gaming as Congress intended. None of these efforts have succeeded, but Plaintiffs and their allies continue to file case after case, year after year, without regard to their lack of merit, the cumulative abuse of the judicial process they entail, or the deprivation of the Tribe's federal rights they cause.

This case, like all of its predecessors, must be dismissed. Plaintiffs are collaterally estopped from re-litigating three core issues: (1) the Tribe's beneficial ownership of its Indian lands; (2) the accrual date for claims attacking the status of those lands; and (3) the Tribe's absence as a Required party that cannot be joined due to its sovereign immunity under Federal Rule of Civil Procedure 19. A federal court has already held that the Indian land at issue here "is held by the United States in trust for the benefit of the Jamul Tribe." *Rosales v. United States* ("*Rosales VII*"), Case No. 01-951 (S.D. CA 2001) (Order Granting Defendants' Motion for Summary Judgment, Docket no. 35, at p. 14:14-15), RJN Ex. 9. A federal court has also already

[1] *See, e.g., Jamulians Against the Casino v. Cal. Dept. of Transp*., Case No. 34-2014-80001752 (Sacramento Superior Court Feb. 3, 2014), and *Rosales v. California,* Case No. 37-2014-00010222-CU-Po-CTL (San Diego Superior Court April 7, 2014).

held that claims seeking to challenge the Tribe's beneficial ownership of its Indian lands arose when the parcels were taken into trust and the Tribe's Constitution was federally approved. *See Rosales v. United States* ("*Rosales X*"), 89 Fed. Cl. 565, 578 (Fed. Cl. 2009). Finally, several federal courts – including the Ninth Circuit -- have already held that the Tribe is required party under Rule 19 which cannot be joined due to its sovereign immunity and in the absence of which the beneficial ownership of its federal Indian lands cannot be litigated. In *Rosales v. U.S.*, 73 Fed. Appx. 913, 915 (9th Cir. 2003), the Ninth Circuit held that "the Village is a necessary and indispensable party, without whom this action cannot proceed." *See also Rosales v. U.S.* ("*Rosales IX*"), No. 3:07-cv-624 (S.D. CA 2007) (Order granting motion to dismiss with prejudice, Docket no. 47), RJN Ex. 10; *Rosales X*, 89 Fed. Cl. at 581 ("plaintiffs could not dispute the ownership of that land in the absence of the Village, whose ownership interest was directly implicated, and whose joinder was barred by sovereign immunity"). In short, the doctrine of issue preclusion bars adjudication of Plaintiffs' claims.

Moreover, even if these threshold, dispositive issues had not already been adjudicated with Plaintiffs' privies, the First Amended Complaint ("FAC") would nevertheless be subject to dismissal because it fails to join the Tribe which is a required party under Rule 19. The FAC seeks to strip the Tribe of its Indian lands that the United States has held in trust for over 35 years. It seeks to effectively terminate the Tribe's laws enacted and federally approved to regulate activities on its federal trust lands, the Tribe's Compact and its contract with its development partner. Yet despite attacking the Tribe's core sovereign interests in its lands, its governmental authority, its power to regulate activities on its Indians lands, and its contractual and inter-governmental agreements, Plaintiffs have failed to name the Tribe as a party hereto. The Tribe possesses sovereign immunity from unconsented suit, and therefore cannot be joined. In equity and good conscience, the case must therefore be dismissed with prejudice. *See* Fed. R. Civ. P. 19.

For all of these reasons, the Tribe respectfully requests that the Court dismiss this lawsuit with prejudice.

II. Discussion

A. Plaintiffs Are Collaterally Estopped from Re-Litigating the Tribe's Beneficial Ownership of its Federal Trust Indian Lands, the Accrual of Such Claims, and its Absence Under Rule 19

"[O]nce the court has finally decided an issue, a litigant cannot demand that it be decided again." *Warthen v. United States,* 157 Ct. Cl. 798, 798 (1962). Collateral estoppel "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 & n. 5 (1979). It upholds a "fundamental precept of common-law adjudication," namely, that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit ...." *Montana v. United States,* 440 U.S. 147, 153 (1979).

> Collateral estoppel bars a party or its privy from relitigating an issue previously decided if: "(1) there was a full and fair opportunity to litigate the issue in the previous action; (2) the issue was actually litigated in that action; (3) the issue was lost as a result of a final judgment in that action; and (4) the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action."

IRS v. Palmer, 207 F.3d 566, 568 (9th Cir. 2000). Each of these elements is present here.

1. Plaintiffs Had a Full and Fair Opportunity to Litigate these Issues

Jamulians opposed to the Tribe's plans exercise its federal rights under IGRA have had numerous opportunities to litigate the issues of the Tribe's beneficial ownership of its federal trust Indian lands, when such claims accrued, and the Tribe's absence as a party under Rule 19. Legal actions aimed at stopping the Tribe from developing a governmental gaming project began at least as early as 1995, and have continued through this action and at least two additional lawsuits filed after this action commenced. *See* Tribe's Motion for Leave, at pp. 3-19; fn. 1 *supra*.

Jamulians knew that the Tribe had land taken into federal trust for its beneficial ownership when the deeds were recorded in the San Diego County Recorder's Office in 1978 and 1982. *See* FAC ¶ 46, Ex. D; *Rosales X*, 89 Fed Cl. at 574. The U.S. approved the Tribe's Constitution in 1981. *See* FAC Ex. G; *Rosales v. Sacramento Area Director, BIA* ("*Rosales 1*"), 32 IBIA 158, 159-60 (April 22, 1998). In 1982, the U.S. included the Tribe on the federally recognized tribes list, *see* 47 Fed. Reg. 53130, 53132 (1982), and has listed it every year since. *See, e.g.,* 79 Fed. Reg. 4748-02, 4750 (January 29, 2014). Congress enacted IGRA in 1987, giving Plaintiffs notice that federally recognized Indian tribes could game on their then-existing trust lands. *See* 25 U.S.C. §§ 2701-21. The Tribe enacted its first Gaming Ordinance in 1993, with the IGRA-mandated federal approval of that ordinance occurring in 1994, *see* http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/ gamingordinances/jamulindianvillage/jamul010494.pdf, as published in the Federal Register. *See* 64 Fed. Reg. 4722, 4723 (Jan. 29, 1999).

In 1999, the Tribe negotiated a gaming compact with California, pursuant to IGRA, federal approval of which was published at 65 Fed. Reg. 31189 (May 16, 2000). California entered into and ratified the Tribe's Compact as a matter of State law. *See* Cal. Gov't Code § 12012.25(22) (ratifying "The compact between the State of California and the Jamul Indian Reservation, executed on September 10, 1999"). California's Gambling Control Commission publishes the Tribe's Compact on its official governmental web site. *See http://www.cgcc.ca.gov/documents/compacts/original_compacts/Jamul_Compact.pdf.* The National Indian Gaming Commission also publishes the Tribes Compact. *See http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/Jamul%20Indian% 20Village/jamulindiancomp5.5.00.pdf.*

Having been congressionally authorized and federally approved, the Compact is both federal law and a contract, for "where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject

for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause." *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). "Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined." *Id*. at 441. Thus the Tribe's Compact is federal law under the Compacts Clause of the Constitution because Congress authorized its negotiation and execution in advance and subsequently approved it, both under IGRA. *See* 25 U.S.C. §§ 2710(d)(1)(C); *id*. at § 2710(d)(3); *see also Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997).

Plaintiff Jamul Action Committee was organized in 1993. *See* http://kepler.sos.ca.gov/ ("Entity Number: C1842958"). Plaintiff Jamul Community Church was organized in 1982. *See* http://kepler.sos.ca.gov/ ("Entity Number: C1122991"). Patrick Webb began filing legal actions against the Tribe's interests as early as 1995. *See Jamul Indian Village v. Hunter*, No. 95-131 (S.D. Cal. 1995), RJN Ex. 3. Plaintiffs' web site provides a "synopsis" of "the last twenty years" of "this community's involvement is stopping a casino in Jamul." http://jacjamul.com/the-history/. Plaintiffs' website also states that "In 1992, the Jamul Indian Village announced the building of a casino. The community reacted with a unified voice that a casino was unacceptable in Jamul." *Id.* Thus by Plaintiffs' own admission, they have had actual notice that the Tribe had the right, legal capacity and the intention to develop a governmental gaming enterprise under IGRA for more than two decades. As the following discussion demonstrates, Plaintiffs have had more than a full and fair opportunity to litigate the issues presented here.

a. The Tribe's Beneficial Ownership of its Federal Indian Lands

Plaintiffs have had numerous full and fair opportunities to litigate the Tribe's beneficial ownership of its Indian lands. For example, in *Rosales v. Kean Argovitz Resorts*, No. 00-cv-1910 (S.D. CA 2000), – a suit against predecessors in interest to the Tribe's current development

partner – Mr. Webb sought a judgment declaring that none "of the land under the control of JAMUL meets the definition of Indian lands under the Indian Gaming Regulatory Act." *Id.*, Docket No. 1, prayer for relief, ¶ 3, RJN Ex. 6. Similarly, in *Rosales VII*, No. 01-951 (S.D. CA 2001), Mr. Webb alleged that the Tribe was not the beneficial owner of the 1978 trust parcel. *Id.*, Docket No. 35 at P. 3:13-16 (Order Granting Defendants' Motion for Summary Judgment), RJN Ex. 9. In *Rosales IX*, No. 3:07-cv-624 (S.D. CA 2007), Mr. Webb once again attacked the Tribe's land status, alleging that "'there has never been an Indian reservation for Jamul Indians," and that the parcel is not tribal land under federal law. *Id.*, Docket No. 2-1 at ¶¶ 12-13 (FAC) (internal quotations omitted), RJN Ex. 11. Mr. Webb further alleged that "No Federally recognized Indian tribe ever exercised governmental power over parcel ... 04," *id.* ¶ 30, and that the Tribe "has never had jurisdiction over, nor exercised governmental power over" the subject land. *Id.* ¶ 33. And in *Rosales X*, No. 1:08-cv-512, 89 Fed. Cl. 565 (Ct. Fed. Cl. 2008), Mr. Webb once again alleged that "Parcel ... 04, was not acquired for an Indian tribe, and has never been recognized by the federal government as being a parcel over which the subsequently federally recognized entity, known as the Jamul Indian Village, exercises governmental power. Nor has it ever been lawfully subject to the exercise of any tribal governmental power." *Id.*, Complaint ¶ 14 (filed July 15, 2008), RJN Ex. 12.

During the period these cases were filed and litigated, 2000 through 2010, plaintiffs had numerous full and fair opportunities to litigate the Tribe's beneficial ownership of its federal trust Indian lands.

b. Claims Against the Tribe's Beneficial Ownership of its Federal Trust Indian Lands Accrued When the Lands Were Taken Into Trust and its Constitution was Federally Approved

In *Rosales X,* Mr. Webb's claims were governed, in part, by the Tucker Act, which has the same six-year statute of limitations as does the APA here. *See Rosales X*, 89 Fed. Cl. at 577; 28

U.S.C. § 2501; *cf.* 28 U.S.C. § 2401(a). *See also P & V Enterprises v. U.S. Army Corps of Engineers*, 466 F. Supp. 2d 134, 149 (D.D.C. 2006) *aff'd*, 516 F.3d 1021 (D.C. Cir. 2008) ("The language of § 2401(a) [APA's 6-year limitations period] ... is not substantively different from the language of 28 U.S.C. § 2501 [Federal Court of Claims' 6-year limitations period]"). Both statutes effectuate limited waivers of the U.S.'s sovereign immunity and thus both are jurisdictional. *See Rosales X*, 89 Fed. Cl. at 577. For these reasons, they are often applied as one. *See Boye v. United States*, 90 Fed. Cl. 392, 403-04 (Fed. Cl. 2009) *aff'd*, 413 F. App'x 239 (Fed. Cir. 2011). Under both statutes, the test is the same: "A claim first accrues within the meaning of the statute of limitations when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *Id.* at 404 (internal quotation marks omitted).

The *Rosales X* court examined settled rules of claims accrual and concluded that "Plaintiffs' claims all arise out of defendant's recognition of the Village as the beneficial owner of Parcels 04 and 05," 89 Fed. Cl. at 578, and that "Plaintiffs' claims accrued in 1981 [when the Tribe's Constitution was federally approved] and 1982, as to Parcels 04 and 05, respectively. The six-year limitations period ... thus expired no later than 1988, nearly two decades before plaintiffs filed their original complaint in *Rosales X,* on July 15, 2008." *Id*. at 580

The court also considered and rejected Mr. Webb's arguments for "continuing claims" and "accrual suspension" exceptions. The court held that "any ongoing grading, excavation, or other construction activity conducted by the Village ... flows from the Village's exercise of beneficial ownership of these parcels. While this construction activity may represent further injury to plaintiffs, and may be the 'most painful' yet of the consequences of defendant's acts, it is irrelevant to setting the accrual date for plaintiffs' claims." *Rosales X*, 89 Fed. Cl. at 578 (*quoting Del. State Coll. v. Ricks,* 449 U.S. 250, 258 (1980)).

Thus Jamulians against the Tribe's casino project have had numerous full and fair opportunities to litigate the claims accrual issue.

c. The Tribe's Indispensability Under Rule 19

Plaintiffs also have had several full and fair opportunities to litigate the Tribe's indispensability under Rule 19. In *Rosales VII*, 73 Fed. App'x 913 (9th Cir. 2003), the Ninth Circuit found that "[t]he Village has claimed jurisdiction over the parcel of land at issue in this action since at least 1981. This interest would be impaired if Appellants were declared to be the beneficial owners of the land." *Id*. at 914. It further held that "[t]he Village would be prejudiced if Appellants were granted beneficial ownership of the parcel of land, and relief cannot be shaped to avoid this prejudice. While Appellants do not appear to have another adequate remedy, the tribe's interest in maintaining [its] sovereign immunity outweighs the plaintiffs' interest in litigating their claims." *Id*. at 914-15 (internal quotations and citations omitted). Given the Tribe's sovereign immunity, the court concluded that the Tribe "is a necessary and indispensable party, without whom this action cannot proceed." *Id*. at 915.

Similarly, *Rosales X* held that the Tribe's "absence as a party to this litigation is a sufficient, independent ground for dismissal." *Rosales X*, 89 Fed. Cl. at 580. "Over the course of the labyrinthine history of these disputes, other courts have determined that plaintiffs cannot maintain any claims that assert, explicitly or implicitly, beneficial ownership of tribal land, such as Parcels 04 and 05, without joining the Village, a 'necessary and indispensable' party. The doctrine of issue preclusion bars plaintiffs from challenging that determination." *Rosales X*, 89 Fed. Cl. at 580-81 (*quoting Rosales VII Affirmance* at 914–15; *Rosales IX* at *5–*6). "The *Rosales IX* court held that plaintiffs could not dispute the ownership of that land in the absence of the Village, whose ownership interest was directly implicated, and whose joinder was barred by sovereign immunity." *Id.* "[T]he *Rosales IX* court refused to allow its plaintiffs to 'make an end

run around tribal sovereign immunity by suing the United States' and litigating the ownership status of Parcel 04 without the Village." *Id.* (*quoting Rosales IX* at *5-*6). *Rosales IX* held that, pursuant to Rule 19, the Tribe was a "'necessary and indispensable' party to any such litigation; the court granted, with prejudice, the government's motion for dismissal." *Id*. at 581-82 (*quoting Rosales IX* at *10). "Significantly, that court denied plaintiffs leave to amend their complaint," noting that any amendment asserting that the land at issue is other "than tribal, would be futile." *Id.* (*citing Rosales IX* at *10).

Thus Plaintiffs have had many full and fair opportunities to litigate the Tribe's absence as a party in litigation attacking the status of its federal Indian lands.

2. The Status of the Tribe's Indian Lands, the Statute of Limits on Claims Attacking that Status, and the Tribe's Absence Under Rule 19 Were All Actually Litigated

The issue of the Tribe's Indian lands was actually litigated in both *Rosales IX* and *X.* In both those cases, Plaintiffs' claimed that the Tribe was not the beneficial owners of the Tribe's federal Indian lands. *See Rosales X*, 89 Fed. Cl. at 581 (*citing Rosales IX* at *2, *8–*10). Plaintiffs' claims depended "upon the foundational assumption" that the Tribe is not the "rightful beneficial owners" of the Tribal lands at issue. *Rosales X*, 89 Fed. Cl. at 581. "Adjudication of their claims thus requires, as a first step, a determination of the ownership status of these two parcels." *Id*. That question was directly at issue in *Rosales IX* and *Rosales X*. *See id*. In both those cases, Plaintiffs' claimed that the Tribe was not the beneficial owners of the Tribe's federal Indian lands. *See id.* (citing *Rosales IX* at *2, *8–*10).

Rosales X also actually adjudicated the accrual of, and statute of limits on, Plaintiffs' claims arising "out of defendant's recognition of the Village as the beneficial owner of Parcels 04 and 05," 89 Fed. Cl. at 578. As noted above, the court held that "Plaintiffs' claims accrued in 1981 [when the Tribe's Constitution was federally approved] and 1982, as to Parcels 04 and 05,

respectively. The six-year limitations period ... thus expired no later than 1988, nearly two decades before plaintiffs filed their original complaint in *Rosales X,* on July 15, 2008." *Id*. at 580

Finally, the Tribe's absence as a necessary and indispensable party under Rule 19 was actually litigated in *Rosales VII, IX* and *X*. *See Rosales VII*, 73 Fed. App'x. 913 (9th Cir. Aug. 11, 2003); *Rosales IX*, *6-10, RJN Ex. 10, pp. 7-11 of 18; *Rosales X*, 89 Fed. Cl. at 586.

3. The Tribe's Opponents Lost All Three Issues in Final Judgments

Jamulians opposed to the Tribe's gaming project lost their challenges to the Tribe's beneficial ownership of its federal trust Indian lands in final judgments in both *Rosales IX* and *X*. *See Rosales X*, 89 Fed. Cl. at 581 (*citing Rosales IX* at *2, *8–*10, RJN Ex. 10 at pp. 3, 9-11 of 18). "[T]he parcel is held by the United States in trust for the benefit of the Jamul Tribe." *Rosales VII*, No. 01-951 (S.D. CA 2001) (Order Granting Defendants' Motion for Summary Judgment, Docket no. 35, at p. 14:14-15), RJN Ex. 9.

Rosales X expressly held that "as to Parcel 05, plaintiffs' claims accrued on July 27, 1982, when defendant accepted that parcel in trust for the Village. As to Parcel 04, plaintiffs' claims accrued some time in 1981, when the Jamul Indian Village was formed, and began exercising jurisdiction over that parcel." *Rosales X*, 89 Fed. Cl. at 579 (*citing* 73 F. App'x at 914) (internal citations omitted).[2]

Similarly, Jamulians opposed to the Tribe's gaming project lost, in final judgments, the issue of the Tribe's status as a necessary and indispensable party under Rule 19 in *Rosales VII, IX* and *X*. *See Rosales VII*, 73 Fed. App'x. 913 (9th Cir. Aug. 11, 2003); *Rosales* IX, *9-10, RJN Ex. 10 pp. 10-11 of 18; *Rosales X*, 89 Fed. Cl. at 586.

[2]The Tribe notes that even if plaintiffs were not collaterally estopped, the statute of limitations expired many years ago as to plaintiffs' claims against the Tribe's beneficial ownership of its federal trust Indian lands.

4. Plaintiffs Here Were in Privity With Plaintiffs in the Prior Actions

The "doctrine of privity extends the conclusive effect of a judgment to nonparties who are in privity with parties in an earlier action." *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980). "Privity is a legal conclusion designating a person so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved." *U.S. v. Bhatia*, 545 F.3d 757, 759 (9th Cir. 2008).

The Ninth Circuit has held that "one who ... ***assists*** in the prosecution or defense of an action ***in aid of some interest of his own ... is as much bound ... as he would be if he had been a party to the record***." *In re Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997) (emphasis added). "[F]ederal courts will bind a non-party ***whose interests were represented*** adequately by a party in the original suit." *Id*. (emphasis added). In addition, "privity has been found where there is a substantial identity between the party and nonparty ... and where the ***interests of the nonparty and party are so closely aligned*** as to be virtually representative." *Id*. (internal quotations and citations omitted) (emphasis added). When a third party "has had the ***opportunity to present proofs and argument***, he has already had his day in court even though he was not a formal party to the litigation." *Taylor v. Sturgell*, 553 U.S. 880, 895 (2008) (internal quotations omitted) (emphasis added).

Jamulians opposing the Tribe's development of a government gaming project have been in privity with each other throughout all of the litigation discussed above. Plaintiffs here have worked hand in hand with those who prosecuted the past litigation, throughout this nearly-20-year history of frivolous legal attacks on the Tribe. Plaintiffs here are local community groups comprised of residents, and four individual residents, of the hamlet of Jamul, California that oppose the Tribe's development of a government gaming facility. *See* Compl. at ¶¶ 11-13. As noted above, plaintiff Jamul Action Committee was formed over two decades ago with the

express purpose of stopping the Tribe from developing a casino. Its web site documents its long history of fighting the Tribe's self-determination plans. *See* www.jacjamul.com ("Jamul Action Committee - Jamulians Against the Casino", "NO CASINO, NOT NOW, NOT EVER", "We will not stop fighting", and the Tribe's "land does not qualify for gaming"). Plaintiffs here originally, and in the past cases, share the same attorney, who himself is also a Jamul resident: "A local Jamul resident and attorney Patrick Webb ... agreed to represent [Mr. Rosales and Ms. Toggery] pro bono to give them a voice. Mr. Webb still is fighting for their rights." http://jacjamul.com/the-history/. Plaintiff's website reported that plaintiff "held a fund raiser to help Walter [Rosales] and Karen [Toggery] and provided housing. The community vowed to continue to stop a casino." *Id*.

Mr. Webb has acted in his own self-interest in these cases, going far beyond the role of a lawyer taking a pro bono case. His own interests as a Jamulian opposed to the Tribe's development plans were, and are, the same interests of his named clients, including plaintiffs here in the original complaint[3] as well as Mr. Rosales and Ms. Toggery in much of the prior litigation discussed above. Thus, for example, in one case Mr. Webb wrote to the BIA demanding, apparently on his own behalf, that it not hold a tribal election. "Interestingly, Webb's letter [to the BIA] did not identify his 'clients.'" *Rosales v. United States*, 477 F. Supp. 2d 119, 127 (D.D.C. 2007).

Plaintiff's website includes extensive digital archives, documenting its decades-long fight against the Tribe. Many of these reports republished by plaintiff JAC make clear the privity between plaintiffs, Mr. Webb, Ms. Toggery and Mr. Rosales. For example, a *San Diego Union Tribune* ("*Union*") article dated March 2, 2002 which Plaintiff has re-published, very clearly lays

[3]Indeed, the only discernable difference between the original complaint in this case, docket no. 1, and the second complaint, docket no. 7, is that Mr. Webb's name was removed as counsel for plaintiffs.

out the unity of interest and effort between Plaintiff and the Plaintiffs in the *Rosales* litigation:

> To her tribe, Karen Toggery is considered a traitor. ***To the off-reservation group fighting the tribe's casino plans, she's a godsend***. Toggery ... has been a lead plaintiff in a string of failed lawsuits over the past seven years.... She has sued the U.S. government, the Bureau of Indian Affairs, [and] the tribe's casino development firm. ***And it hasn't cost a cent. Seven suits and six administrative challenges have all been prepared and filed, free of charge, by attorney Patrick Webb, an area resident aligned with Jamulians Against the Casino. Toggery and the group want the same thing*** .... Webb was admonished in 1999 for a case that wound through San Diego's federal court and was dismissed, only to be refiled in the Los Angeles District. Two years later it was back before the same San Diego Judge, John Rhoades. Rhoades convened a hearing to consider sanctions. Likening the litigation to a vampire repeatedly rising from the coffin, he stopped short of fining Webb but scolded his "procedural tactics and maneuvering." ... [T]he judge asked: "What do I have to do to kill this thing? Do I have to get a wooden stake, or a mirror?" ... ***As for his clients and the opposition group, he said, "It's not unknown for neighbors to get together and support one another, or to be pursuing the same goal ....***"

http://jacjamul.com/wp-content/uploads/2012/04/UT20020302.pdf (emphasis added), RJN Ex. 13. *See also* http://jacjamul.com/wp-content/uploads/2013/06/SDReader07032002.pdf (*San Diego Reader* July 3, 2002), RJN Ex. 14 ("Patrick Webb, a Jamulian attorney who has waged ... war against the Jamul band's casino plans .... has filed seven lawsuits advocating Rosales's and Toggery's claims.... All of Webb's suits have been dismissed ...."); http://jacjamul.com/ wp-content/uploads/ 2012/04/UT20051028.pdf (*San Diego Union* October 28, 2005), RJN Ex. 15 ("Attorney Patrick Webb told the crowd [at a JAC meeting] he might seek an injunction against the tribe if the groundbreaking occurs"); http://jacjamul.com/wp-content/uploads/2012/04/ UT20061001.pdf (San Diego Union October 1, 2006), RJN Ex. 16 ("Members of Jamulians Against the Casino have been fighting incarnations of the project since 1993, when the tribe signed on with the first of two corporate partners to develop a casino on its six-acre reservation...."); http://jacjamul.com/ wp-content/uploads/2012/04/UT20000407.pdf (*San Diego Union* April 7, 2000), RJN Ex. 17; http://jacjamul.com/wp-content/uploads/2012/04/ UT20010707.pdf (*San Diego Union* July 7, 2001), RJN Ex. 18.

The link between Plaintiffs here, Mr. Webb and Plaintiffs in the *Rosales VII, IX* and *X* cases continued in 2006, as Mr. Rosales and Ms. Toggery refused to vacate Tribal lands slated for development, even when served with lawful court orders to do so. The *Union* reported on October 30, 2006, that:

> For more than 15 years ... ***Walter Rosales and Karen Toggery*** have been a thorn in the side of successive administrations of the Jamul Indian band.... And like the ***off-reservation neighbors who consider them heroes***, they insist they can keep the region's most fiercely contested Indian casino out of Jamul. "...I don't think the casino's ever going to be here," said Toggery .... "This is our property," said Rosales.... if the [casino project's environmental] report is approved, a community opposition group, ***Jamulians Against the Casino***, is seeking to hire an attorney to contest it. "***We're going to go to court if we have to," said Marcia Spurgeon, a leader of the group***.

http://jacjamul.com/wp-content/uploads/2012/04/UT20061030.pdf (emphasis added), RJN Ex. 19.

On January 18, 2007, NBC news reported that:

> The Jamul Indian band has moved to evict the two last remaining occupants off its reservation, ***both of whom oppose the tribe's plans to build a casino***.... ***Rosales and Toggery have also joined a local community group that opposes the tribe's plans*** to build a $200 million casino on the 6-acre reservation in a semi-rural area about 35 miles east of San Diego....

http://jacjamul.com/wp-content/uploads/2013/06/KNBC01182007.pdf (emphasis added), RJN Ex. 20.

The following day, January 19, 2007, the *Union* reported that "Rosales and Toggery... ***have become close allies of a community group that has battled the tribe's casino proposals for more than a decade.... Their attorney, Patrick Webb***, said he intends to fight the evictions in the tribal court and/or Superior Court." http://jacjamul.com/wp-content/uploads/2012/04/UT20070119.pdf (emphasis added), RJN Ex. 21.

Plaintiff JAC's President authored an opinion piece published by the *Union* on March 22, 2007, arguing that "serious obstacles stand in the way of [the Tribe's] casino." http://jacjamul.com/wp-content/uploads/2012/04/UT20070322boped.pdf, RJN Ex. 22. Among

the obstacles he listed were Mr. Webb's "State and federal lawsuits that ***challenge the ownership of the land*** [that] ... must be resolved before any casino can be built." *Id*. (emphasis added). Discussing Mr. Rosales and Ms. Toggery by name and in some detail, he argued that "[t]heir lawsuits challenge ... ***the rightful deeded ownership of the property*** ...." *Id.* (emphasis added). A December 17, 2007, *Union* article, discussed the beginning of construction of a driveway on the Tribe's lands. The article notes that:

> "***Walter Rosales and Karen Toggery ...*** asked [U.S. District Judge] Gonzalez to prevent construction on the land 20 miles east of downtown San Diego. ***Key among the claims that their lawyer, Patrick Webb, pursued in years of litigation is that*** [the Tribe's] ... ***land isn't a reservation.***"

http://www.utsandiego.com/uniontrib/20071217/news_1m17casino.html (linked from http://jacjamul.com/ "In the News - 2007") (emphasis added), RJN Ex. 23.

Mr. Webb continues to represent the Plaintiff JAC in its anti-tribal efforts even after taking his name off of the complaint in this case. *See* http://jacjamul.com/jamul-community-members-in-sacramento/, RJN Ex. 24 (*Jamul Shopper* December, 2013) ("Jamul Delegation Visits Sacramento to Discuss the Proposed Casino" .... "[a]rriving in Sacramento were ... Pat Webb ... representing Jamul Action Committee (JAC)").

The history of litigation aimed at stopping the Tribe from developing a casino on its Indian lands, together with plaintiffs own documented history (only a small percentage of which is outlined above in this brief)[4] paints a clear picture. Jamulians against the Tribe's project, led by Mr. Webb, Ms. Toggery and Mr. Rosales, have worked together in a coordinated, organized persistent campaign over 20 years and through at least 19 legal actions. It is beyond doubt that plaintiffs here have "assist[ed]" Mr. Webb, Mr. Rosales and Ms. Toggery "in the prosecution ... of an action in aid of some interest of [its] own ...." *In re Schimmels*, 127 F.3d at 881. Thus, as the

[4] *See* www.jacjamul.com for the massive amount of materials collected and republished by Plaintiffs.

Ninth Circuit has taught, plaintiffs are "as much bound" by *Rosales VII, IX*, and *X* among other prior cases "as [they] would be if [they] had been a party to the record" in those prior cases. *Id.* Plaintiffs' "interests" in stopping the Tribe's project "were represented adequately by a party in the original suit[s]." *Id.* The plaintiffs' interests here and those of Mr. Webb, Ms. Toggery and Mr. Rosales "are so closely aligned as to be virtually representative." *Id.* Plaintiffs had every "opportunity to present proof and argument" through Mr. Webb, Ms. Toggery and Mr. Rosales, and had every opportunity to influence or affect litigation strategy in the prior cases. *Taylor*, 553 U.S. at 895.

In sum, "[t]he doctrine of issue preclusion bars plaintiffs from" once again attempting to re-litigate the Tribe's beneficial ownership of its federal trust lands, the accrual date for claims attacking the status of the Tribe's Indian lands, and the Tribe's absence as a required party that cannot be joined due to its sovereign immunity under Rule 19. *Rosales X*, 89 Fed. Cl. at 580-81. For these reasons, this case should be dismissed with prejudice.

B. The Case Must Be Dismissed Because Plaintiffs Failed to Join the Tribe as a Party

Even if Plaintiffs are not collaterally estopped from bringing this action, Rule 19 nevertheless requires that the Court dismiss this lawsuit because plaintiffs failed to join a party that is both required and not feasibly joined. A party is "required" [formerly "necessary"] when it has a "legally protected interest" in the subject of the suit. *See Shermoen v. U.S.*, 982 F.2d 1312, 1317 (9th Cir. 1992).

The Ninth Circuit has held that a "***public entity*** has an interest in a lawsuit that could result in the invalidation or modification of one of its ***ordinances***, rules, regulations, or practices." *E.E.O.C. v. Peabody W. Coal Co.*, 610 F.3d 1070, 1082 (9th Cir. 2010) (emphasis added). The Ninth Circuit includes Indian Tribes among "public entities" for purposes of this Rule 19 analysis. *See Peabody W. Coal Co.*, 610 F.3d at 1082. A related Tribal interest is "the sovereign power of the tribes to negotiate compacts" which would be impaired by the relief Plaintiffs seek here. *Am.*

Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1024 (9th Cir. 2002). In addition, the Ninth Circuit has held that "a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract." *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1157 (9th Cir. 2002) (reaffirming *Lomayaktewa v. Hathaway,* 520 F.2d 1324, 1325 (9th Cir.1975).

Here, the Tribe has a fundamental sovereign interested in its beneficial ownership of, and governmental authority over, the federal trust lands. *See Rosales VII*, 73 Fed. Appx. at 914-15. *See also* FAC, Prayer for Relief at ¶¶ A-B, E (seeking a judgment that, *inter alia*, the Tribe's lands are not federal trust Indian lands). The Tribe also has an interest here because the relief Plaintiffs seek could result in the invalidation or modification of one of its ordinances, namely, its federally approved gaming ordinance. *See* http://www.nigc.gov/LinkClick.aspx?fileticket= 2BUFQ25 ofs4%3d& tabid=909 (Jamul Gaming Ordinance 13-05, approved by NIGC Chair Tracey Stevens July 1, 2013). *See also* FAC, Prayer for Relief at ¶¶ A-B, E (attacking status of Tribe's Indian lands); 25 U.S.C. § 2710(d)(1) (class III gaming lawful only on Tribe's Indian lands). IGRA provides for tribal gaming ordinances that are "adopted by the government body of the Indian tribe having jurisdiction over such lands ...." 25 U.S.C. § 2710(d)(1)(A)(i). Without Indian lands over which the Tribe exercises jurisdiction, the Tribe's Gaming Ordinance would effectively be invalidated. *See Peabody W. Coal Co.*, 610 F.3d at 1082.

In addition, the Tribe has contractual interests that are directly at stake, including both its Compact with the State of California and its contract with its business development partner. The FAC expressly seeks an order "enjoining Defendants from approving or implementing any aspect of the proposed Gaming Management Contract." FAC, Prayer for Relief, ¶ G. The Compact authorizes the Tribe to operate a gaming facility "only on [its] Indian lands ...." Compact § 4.2.

The Ninth Circuit has "found that tribes are necessary parties to actions that might have the result of directly undermining authority they would otherwise exercise." *Peabody W. Coal Co.*, 400 F.3d at 780 (*citing Pit River Home v. United States*, 30 F.3d 1088, 1092 (9th Cir.1994) (Pit River Tribal Council was a necessary party in suit challenging its designation by the Secretary

of Interior as the beneficiary of reservation property); *Confederated Tribes of Chehalis Reservation v. Lujan*, 928 F.2d 1496, 1497 (9th Cir. 1991)).

Even if a tribe is a required party, it cannot be involuntarily joined "due to [the tribe's] sovereign immunity." *Shermoen,* 982 F.2d at 1318. Therefore, a court must determine whether the tribe is an indispensable party, and if so, dismiss the lawsuit. *Id.* To determine whether a party is indispensable, courts generally examine four factors: (1) "to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties"; (2) "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided"; (3) "whether a judgment rendered in the person's absence will be adequate"; and (4) "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." *Id.* at 1318-19 (*citing* Fed. R. Civ. P. 19(b)). All four factors weigh in favor of dismiss with prejudice here.

When a necessary party is immune from suit there is little need for balancing the Rule 19(b) factors because "immunity itself may be viewed as the compelling factor." *Confederated Tribes of the Chehalis Indian Reservation*, 928 F.2d at 1499. "In many cases in which we have found that an Indian tribe is an indispensable party, tribal sovereign immunity has required dismissal of the case." *Peabody W. Coal Co.*, 400 F.3d at 781 (*citing Dawavendewa*, 276 F.3d at 1163; *Am. Greyhound Racing, Inc.*, 305 F.3d at 1027. While this result leaves Plaintiffs without a judicial remedy, "the tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims." *Id.* at 1025.

Here, the prejudice to the Tribe "stems from the same impairment of legal interests that makes the Nation a necessary party under Rule 19(a)(2)(i)." *Dawavendewa*, 276 F.3d at 1162 (*citing Clinton v. Babbitt*, 180 F.3d 1081, 1090 (9th Cir. 1999) (determining prejudice test under Rule 19(b) is essentially the same as the inquiry under Rule 19(a) *(citing Confederated Tribes*, 928 F.2d at 1499)). "The relief sought in this case ... would prevent the absent tribe[] from exercising sovereignty over the reservation[]" lands. *Shermoen*, 982 F.2d at 1320. "It is difficult to imagine a more 'intolerable burden on governmental functions.'" *Id.* (*quoting State of*

Washington v. Udall, 417 F.2d 1310, 1318 (9th Cir.1969)). *See also Clinton v. Babbitt*, 180 F.3d 1081, 1090 (9th Cir. 1999).

Moreover, "[a] decision rendered in this case prejudices the [Tribe's] economic interests in the [Compact and contract with its development partner], namely its ability to provide employment and income for the reservation." *Dawavendewa*, 276 F.3d at 1162. A decision rendered in the Tribe's absence would "prejudice the [Tribe's] sovereign interests in negotiating contractual obligations and governing the reservation...." *Id.* It is important to note that "Amicus status is not sufficient" to ameliorate prejudice to the absent Tribe, "nor is ability to intervene if it requires waiver of immunity." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990).

There are no "protective provisions" that could lessen the prejudice to the Tribe. *Shermoen,* 982 F.2d at 1318. "No relief mitigates the prejudice. Any decision mollifying [Plaintiffs] would prejudice the [Tribe] in its contract with [California and its development partner] and its governance of the [T]ribe [and its Indian lands]. This factor weighs in favor of dismissal." *Dawavendewa*, 276 F.3d at 1162.

A judgment rendered in the Tribe's absence cannot be "adequate" because it would not bind the party that has beneficial ownership of the lands that are the subject of the FAC and Plaintiffs' intended judgment. "No partial relief is adequate. Any type of injunctive relief necessarily results in the above-described prejudice to [the Tribe]." *Dawavendewa*, 276 F.3d at 1162.

The final factor, asking "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder," *Shermoen,* 982 F.2d at 1319, has limited application when the absent, required Tribe has sovereign immunity. *See Am. Greyhound Racing, Inc.,* 305 F.3d at 1025 ("the tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims"). As the Ninth Circuit observed in *Dawavendewa*, "in *Lomayaktewa, Confederated Tribe, Shermoen, Pit River Home, Quileute Indian Tribe, Kescoli,* and *Clinton*, we determined that the plaintiff would be without an alternative forum to air his grievances.

Nevertheless, in each case, we determined that the absent Indian Tribe was indispensable and dismissed the case." *Dawavendewa*, 276 F.3d at 1162. The lack of an alternative forum does not "prevent dismissal of a suit. Sovereign immunity may leave a party with no forum for its claims." *Makah Indian Tribe*, 910 F.2d at 560.

The Tribe is required party. It has legally protected interests in the status of its land, its governmental authority over that land, and in its Compact and development contract, all of which are threatened by Plaintiffs' First Amended Complaint. *See* FAC, Prayer for Relief ¶¶ A-B, E. It cannot be joined due to its sovereign immunity. *See Shermoen,* 982 F.2d at 1318.

III. Conclusion

For all of these reasons, the Tribe respectfully requests that the Court grant the defendants' motions to dismiss with prejudice.

Dated: April 25, 2014

Law Office of Frank Lawrence

By /s/
Frank Lawrence
Attorney for (Proposed) Amicus Curiae

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF NEVADA)

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 578 Sutton Way, No. 246, Grass Valley, California 95945. On April 25, 2014 I caused the foregoing document described as **AMICUS CURIAE BRIEF OF THE JAMUL INDIAN VILLAGE IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS (PROPOSED)** to be served on the interested parties in this action, identified below, by electronic filing and service pursuant to Local Rule 135 (Fed. R. Civ. P. 5), Case Management / Electronic Case Files docketing and file system of the above referenced court:

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Executed on April 25, 2014, at Nevada City, California.

s
Frank Lawrence