Case No. 13-57113

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BENEDICT COSENTINO,
Petitioner and Appellant,

v.

PECHANGA BAND OF LUISENO MISSION INDIANS and
PECHANGA GAMING COMMISSION,
Respondents and Appellees

Appeal from the United States District Court
for the Central District of California
Case No. 5:13-cv-00912-R-OP

APPELLEES' ANSWERING BRIEF

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I. INTRODUCTION

Benedict Cosentino ("Mr. Cosentino") petitioned the district court for an order compelling the Pechanga Band of Luiseno Indians (“Tribe”) and the Pechanga Gaming Commission (“Commission”) to arbitrate tort claims under a tribal law. But that tribal law – the Tort Claims Ordinance – clearly and expressly bars Mr. Cosentino's claims on several grounds. First, it expressly prohibits claims against the Tribe or the Gaming Commission. Instead, it permits claims only against the Tribe's Casino enterprise, the Pechanga Resort & Casino. Second, the Ordinance expressly bars claims when the claimant has filed for relief in another forum arising from the same incident, which Mr. Cosentino concedes he has done. Third, it expressly bars claims that relate to a claimant's employment at the Tribe's casino, which Mr. Cosentino's claims plainly do. Fourth, it expressly reserves the Tribe’s and Gaming Commission’s sovereign immunity.

Faced with these insurmountable hurdles, Mr. Cosentino is left to argue that the Tribe's Ordinance must be ignored because it violates the Tribe's Gaming Compact with the State of California (“Compact”) and because it violates the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21. However, neither the Compact nor IGRA abrogate or waive the Tribe's sovereign immunity (or that of the Commission) for private, third party suits such as this. Mr.

Cosentino lacks a private right of action to assert a breach of the Compact or IGRA. Similarly, he lacks standing to assert a breach of the Compact or IGRA. Moreover, to the extent Mr. Cosentino seeks to litigate or arbitrate the Compact's terms, the State of California – as a signatory to that agreement – is a required party that cannot be joined in this action, requiring dismissal under Federal Rule of Civil Procedure 19.

For each of these reasons, the District Court did not err in granting the Tribe's and Commission's motion to dismiss. The Tribe and Commission respectfully request that this Court affirm.

II. BACKGROUND

A. The Parties

The Pechanga Band of Luiseño Mission Indians is a federally recognized tribal government. *See* 78 Fed. Reg. 26384, 26387 (May 6, 2013); Petition to Compel Arbitration ("Pet.") ¶ 14 (Appellant's Excerpts of Record ("AER"), at p. 51). The Tribe's Reservation was formally established by Executive Order of the President of the United States on June 27, 1882. *See* Felix S. Cohen, *Handbook of Federal Indian Law*, at 299-302 (U.S. Government Printing Office 1941) (reprinted by W.S. Hein Co. 1988) (discussing Executive Order Reservations). The respondent Pechanga Gaming Commission ("Gaming Commission") is a

governmental agency of the Tribe. *See* 25 U.S.C. § 2713(d); Compact §§ 2.20, 6.4.1; Pet. ¶¶ 15, 31 (AER at p. 51); Pechanga Gaming Act of 1992 (Appellant's Addendum ("AA") at pp. 113-30).

Mr. Cosentino is a former employee of the Tribe's governmental gaming enterprise, the Pechanga Resort & Casino. *See* Pet. ¶ 13 (AER at p. 51).

B. The Indian Gaming Regulatory Act

Congress enacted the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21, in 1988, authorizing tribes to engage in governmental gaming to "promot[e] tribal economic development, self-sufficiency and strong tribal government[]." *Id.* at § 2702. IGRA divides tribal governmental gaming into three categories: (1) class I – traditional and ceremonial games; (2) class II -- bingo and related games; and (3) class III -- all other forms of gaming. *See id.* at § 2703. IGRA requires that class III gaming be conducted pursuant to a negotiated intergovernmental agreement called a tribal-state gaming compact. *See id.* at § 2710(d)(1)(C). Tribal government gaming may only occur on each tribe's federal Indian lands. *See id.* at § 2710(d)(1). Tribal gaming net revenues may only be used for the governmental purposes enumerated in IGRA. *See id.* §§ 2710(b)(2)(B), 2710(b)(3).

C. The Tribal-State Gaming Compact

In 1999, the Tribe, along with 60 other California tribes, entered into a gaming compact with the State of California (the "1999 Compact"), *see* AA at pp. 4-64, which was ratified by the California Legislature on October 10, 2000. *See* Cal. Gov't Code § 12012.5(a)(31). The 1999 Compact became effective in 2000 upon federal approval. *See* 25 U.S.C. § 2710(d)(8)(D); 65 Fed. Reg. 31189, 31189 (May 16, 2000). In 2006 the Tribe and State amended the Compact (the "2006 Amendment"). *See* 72 Fed. Reg. 71939, 71939 (Dec. 19, 2007) (AA at pp. 66-111).

D. The Pechanga Gaming Facility Tort Liability Act

Mr. Cosentino petitioned the district court for an order compelling arbitration of his alleged tort claims under a tribal law, the Pechanga Gaming Facility Tort Liability Act of 2008 ("Ordinance"). *See* Pet. at Prayer for Relief ¶ 2 (AER at p. 80); Notice of Claims (AER at pp. 28-38) (alleging tort claims). The Tribe adopted the Ordinance in compliance "with Section 10.2(d) of the ... Compact." Ordinance § 2 (AA at p. 132) (Statement of Purpose). Mr. Cosentino also sought to compel arbitration of the Ordinance's compliance with the Compact

and IGRA. *See* Pet. at ¶ 2 (AER at p. 48).

The Ordinance contains a number of provisions that are relevant to Mr. Cosentino's petition, which are discussed in turn.

1. The Ordinance Only Permits Claims Against the Pechanga Resort & Casino

The Ordinance:

> ***does not constitute a waiver of Tribal sovereign immunity*** except as specifically set forth herein below. This Act is to be strictly construed to provide a process for the consideration and evaluation of claims brought by persons claiming to have suffered injury or damage, and ***applies only to those activities undertaken by the Tribe's Gaming Operation*** or its employees which occur in the Gambling Facility or in connection with the Tribes Gaming Operation.

Ordinance § 2 (AA at p. 132) (emphasis added).

The Ordinance expressly precludes claims against the Tribe or the Gaming Commission: "***No claim of any kind is authorized under this Act against the Pechanga Band, [or] the Pechanga Gaming Commission*** ...." *Id.* § 5(b) (AA at p. 134) (emphasis added).

2. The Ordinance Provides that Duplicative Claims Are Abandoned

The Ordinance provides that "No claim shall be pursued or sustained pursuant to this Act if a concurrent or alternative action seeking damages for an injury ***arising from the same incident*** has been filed in any other forum or venue."

Ordinance § 5(d) (AA at p. 134) (emphasis added). If such an action is filed in another forum or venue, "the claim pursuant to this Act is and shall be considered to have been abandoned and shall not be eligible thereafter for an award of any kind. Abandoned claims shall not be eligible for arbitration." *Id.*

3. The Ordinance Bars Claims Related to Casino Employment

The Ordinance bars employment-related claims. ***"Employment-related claims of any kind by employees or former employees*** of the Gaming Operation ... may only be brought under the grievance procedures of the employing entity ***and shall in no case be cognizable under this Act***. Employee workplace injuries occurring at the Gaming Facility are subject to the Pechanga Workers Compensation Ordinance and are not cognizable under this Act." Ordinance § 5(h) (AA at p. 135) (emphasis added).

4. The Ordinance's Arbitration Provision Excludes Jurisdictionally Defective and Abandoned Claims

The Ordinance's arbitration process provides that "[c]laims ... for which the Notice of Claim was ***jurisdictionally defective***, or which have been ***abandoned*** under the terms of this Act, ***shall not be eligible for arbitration***. The limited

waiver of the Tribe's sovereign immunity expressed in this Act shall not apply to such claims." Ordinance § 12(a) (AA at p. 139) (emphasis added).

5. The Ordinance Expressly Reserves the Tribe's and Commission's Sovereign Immunity

The Ordinance further provides that "[t]he limited waiver of sovereign immunity of this Act provides for awards against the Gaming Operation but in no circumstances against the Tribe, agencies of the Tribal Government [such as the Commission] or Tribal officials." Ordinance § 6(c) (AA at p. 135) (emphasis added).

III. DISCUSSION

A. Standards of Review

1. The District Court's Decision is Presumed to be Correct

Federal appellate courts generally presume that district court decisions are correct. Mr. Cosentino has the burden of overcoming this presumption. *See Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006)*; Parke v. Raley*, 506 U.S. 20, 29 (1992). By statute, this Court must disregard district court "errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111; *see Obrey v. Johnson*, 400 F.3d 691, 699 (9th Cir. 2005). This Court may affirm on any ground supported by the record. *See Wood v. City of San Diego*, 678 F.3d 1075, 1086 (9th

Cir. 2012). Thus, for example, in a case where the district court erred in finding an Indian tribal casino to be a citizen of California for diversity jurisdiction purposes, this Court affirmed the district court's dismissal because the tribal corporation was protected by sovereign immunity. *See Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 723-724, 726 (9th Cir. 2008).

2. *De Novo* Review

This Court applies the *de novo* standard of review to purely or predominantly legal issues. *See Acosta v. City of Costa Mesa*, 694 F3d 960, 970 (9th Cir. 2012). In conducting *de novo* review, this Court does not defer to the district court's ruling, but independently considers the matter. *See Voigt v. Savell*, 70 F3d 1552, 1564 (9th Cir. 1995). A defendant's claim of immunity presents a legal question that is reviewed *de novo*. *See Linneen v. Gila River Indian Community*, 276 F3d 489, 492 (9th Cir. 2002) (tribal sovereign immunity). *See also Elder v. Holloway*, 510 US 510, 516 (1994) (qualified immunity); *Porter v. Osborn*, 546 F3d 1131, 1136 (9th Cir. 2008) (same); *Alfrey v. United States*, 276 F3d 557, 561 (9th Cir. 2002) (U.S. sovereign immunity). A district court's conclusions regarding the interpretation and application of federal statutes are also reviewed *de novo*. *See City of Los Angeles v. United States Dept. of Commerce*,

307 F3d 859, 868 (9th Cir. 2002). Similarly, a district court's interpretation of foreign law raises a question of law reviewed *de novo*. *See Brady v. Brown*, 51 F3d 810, 816 (9th Cir. 1995).

3. Mr. Cosentino Bears the Burden of Establishing Jurisdiction

As the party invoking federal jurisdiction, Mr. Cosentino bears the burden of proving that the court has jurisdiction. *See Kokkenen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Data Disc, Inc. v. Sys. Tech. Associates, Inc*., 557 F.2d 1280, 1285 (9th Cir. 1977). He also "bears the burden of showing a waiver of tribal sovereign immunity." *Ingrassia v. Chicken Ranch Bingo and Casino*, 676 F.Supp.2d 953, 956 (E.D. Cal. 2009). *See Miller v. Wright*, 705 F.3d 919, 923 (9th Cir. 2013) (affirming district court's grant of "the Tribe's motion to dismiss, explaining that [plaintiffs] 'failed [to meet their] burden of showing that sovereign immunity has been waived and that [the district court] has jurisdiction to hear the matter'").

In adjudicating motions challenging jurisdiction under Rule 12(b), the court is not restricted to allegations in the petition but may consider materials outside the pleadings. *See Data Disc, Inc.*, 557 F.2d at 1289 & fn. 5; *Jobe v. ATR Marketing, Inc.,* 87 F3d 751, 753 (5th Cir. 1996). While usually 12(b)(6) motions

are decided based on the complaint and its attachments alone, the Court may consider material that the plaintiff properly submitted as part of the complaint or, even if not physically attached to the complaint, material that is not contended to be inauthentic and that is necessarily relied upon by the plaintiff's complaint. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). Also, under Federal Rule of Evidence 201, a court may take judicial notice of matters of public record. *See Holder v. Holder*, 305 F.3d 854, 866 (9th Cir. 2002).

B. The Ordinance Presents Numerous Bars Mr. Cosentino's Petition

The Tribe's Ordinance poses several insurmountable hurdles, any one of which alone requires affirmance and which taken together make clear that the district court correctly granted the motion to dismiss with prejudice.

First, as Mr. Cosentino's petition candidly admits, the Ordinance only authorizes claims against the Pechanga Resort & Casino, not against the Tribe and Commission. *See* Pet. ¶¶ 3, 39-47 (AER pp. 48, 62-65). *See also* Ordinance § 6(c) (AA at p. 135).

Second, the Ordinance deems duplicative claims to be abandoned. Mr. Cosentino candidly concedes, as he must, that he did in fact file an alternative action for damages in Riverside Superior Court for his alleged injury arising from

the same incident. *See* Pet. ¶ 78-81 (AER at pp.70-71). In the district court, Mr. Cosentino filed a Notice of Pendency of Other Action ("Notice") as required by Local Rule 83-1.4.1, identifying *Cosentino v. Fuller*, Riverside Sup. Ct. civil case number MCC 1300396. *See* AER at pp. 44-46. That Notice states that the "state civil action materially relates to the subject matter of Mr. Cosentino's Petition to Compel Arbitration because the facts and causes of action stated against the Defendants in the state civil action are the are the [sic] same facts and causes of action that Mr. Cosentino seeks to arbitrate against Respondents" Pechanga Band and Gaming Commission in this federal case. *Id.* at p. 45, lines 16-20. Mr. Cosentino's Notice further states that "Were it not for the doctrine of sovereign immunity, Mr. Cosentino would have named both of the Respondents as Respondents in the [state court] Civil Action." *Id.* at p. 46, lines 2-4. Thus Mr. Cosentino's Notice demonstrates that his claims are independently barred under Ordinance section 5(d) and have been abandoned thereunder. Indeed, the Notice and Opening Brief's statements arguably are judicial admissions that the state case arises from the same underlying incidents as does this case. *See Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226-27 (9th Cir. 1988)
(holding "that statements of fact contained in a brief may be considered admissions of the party" in the court's discretion); *see also Ferguson v.*

Neighborhood Housing Services., 780 F.2d 549, 551 (6th Cir.1986) ("[U]nder federal law, stipulations and admissions in the pleadings are generally binding on the parties and the Court. Not only are such admissions and stipulations binding before the trial court, but they are binding on appeal as well"); *White v. Arco/Polymers, Inc.*, 720 F.2d 1391, 1396 (5th Cir.1983) (Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them)

Mr. Cosentino's opening brief argues that Ordinance section 5(d) should not bar his petition because he named different defendants in the state case than he did here. Specifically, he notes that the State case named the members of the Commission individually, whereas this case named the Commission and the Tribe. *See* Opening Brief at pp. 34-35. But that is a distinction without a difference.

The Ordinances bars claims "arising from the same incident ...." Ordinance § 5(d) (AA at p. 134). Mr. Cosentino has conceded that both cases arise from the same incident. Thus his belated argument that he sued nominally different defendants in the two cases simply misses the point: Ordinance § 5(d) bars duplicative claims that arise from the same incident, such as this case.

Third, the Ordinance bars claims related to employment at the Casino. Mr. Cosentino's petition plainly alleges that "Mr. Cosentino is a former employee of

the Pechanga Casino where he worked as a table games dealer until the Commission revoked his Class A Gaming license, thereby compelling the Pechanga Casino to terminate Mr. Cosentino's employment in the spring of 2011." Pet. ¶ 13 (AER at p. 51). Mr. Cosentino's alleged claims all "relate" to his employment at the Casino. For example, the petition alleges that "But for the operation of the Gaming Facility and Gaming Activities, Mr. Cosentino could never have been employed as a table games dealer by the Pechanga Band." Pet. ¶ 83 (AER at p. 71). It further alleges that "But for the operation of the Gaming Facility and the Gaming Activities, the Commission would not exist." *Id*. at ¶ 84 (AER at p. 72). The petition then alleges that "Accordingly, each of Mr. Cosentino's claims of injury inflicted by the Commission arises out of, is connected with, and relates to the operation of the Gaming Facility," where Mr. Cosentino was employed as a dealer. *Id.* at ¶ 85 (AER at p. 72). Thus Mr. Cosentino's claims relate to his employment at the Casino and, as such, Ordinance section 5(h) provides yet another independent bar to his petition.

Fourth, the Ordinance's arbitration provision excludes "jurisdictionally defective" and "abandoned" claims, and expressly provides that the Ordinance's limited sovereign immunity waiver "shall not apply to such claims." Ordinance § 12(a) (AA at p. 139). As noted above, Mr. Cosentino "abandoned" his claim

under the Ordinance by filing another lawsuit in State court that arises out of the same incident. *See* Notice of Related Cases, docket no. 5 (AER at pp. 44-46); Ordinance § 5(d) (AA at pp. 134-35). Moreover, his Notice of Claim is jurisdictionally defective because, as discussed above, it (1) names the Tribe and Gaming Commission rather than the Casino, and (2) arises out of Mr. Cosentino's employment at the Casino.[1]

In sum, it is undisputed in this case that Mr. Cosentino's petition is prohibited by a number of Ordinance provisions. Faced with these obstacles under the Ordinance, Mr. Cosentino is forced to argue that the Ordinance itself must be ignored because it purportedly is in breach of the Tribe's Compact with California. Additionally, he argues, because the Ordinance violates the Compact, it also violates IGRA. *See* Appellant's Opening Brief at pp. 3-4 ("Statement of Issues Presented for Review" assert that Ordinance conflicts with the Compact and IGRA). But Mr. Cosentino lacks the capacity to make such a challenge. To address those arguments, however, we first briefly examine the nature and scope

[1]The fact that Mr. Cosentino's claims are not cognizable under the Ordinance was noted in two letters from the Casino Risk Management Director to Mr. Cosentino's counsel: "... this matter is not cognizable under the Gaming Facility's Tort Liability Act ... your submission requesting compensation via the Tribal Dispute Resolution Process provided by the Gaming Facility's Tort Liability Act is not eligible to be filed as a Claim ...." Twietmeyer Dec. Ex. E (AER at p. 39). *See also id.* at Ex. G ("since your client's grievances are not related to nor allege any tortious actions on the part of The Pechanga Resort & Casino ... this matter is not cognizable under the Gaming facility's Tort Liability Act") (emphasis in original) (AER at p. 42).

of tribal sovereign immunity.

C. Tribal Sovereign Immunity May Only Be Waived by Express and Unequivocal Terms. Waivers May not be Implied, are Narrowly Construed, and Limitations on Waivers Are Strictly Enforced

Absent an express waiver of sovereign immunity, courts may not exercise jurisdiction over federally recognized Indian tribes. *See Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 172 (1977); *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1015-16 (9th Cir. 2007). "Suits against Indian tribes are ... barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (*citing Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58-59 (1978)). *See also Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 789 (9th Cir. 1986). Tribal sovereign immunity extends to tribal agencies. *See Kiowa*, 523 U.S. at 755; *Marceau v. Blackfeet Hous. Auth*., 455 F.3d 974 (9th Cir. 2006); *American Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1100 (9th Cir. 2002).

"There is a strong presumption against waiver[s] of tribal sovereign immunity." *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001).

Because preserving tribal resources and autonomy are vital matters of federal Indian policy, the Supreme Court has repeatedly stated that a waiver of tribal sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58-59; *see United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. King*, 395 U.S. 1, 4 (1969). *See also Kescloli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996). Thus, federal courts lack jurisdiction over the Tribe unless the Tribe grants an express and unequivocal waiver. *See Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 921 (9th Cir. 1995); *Pit River Home and Agr. Co-op Ass'n v. U.S.*, 30 F.3d 1088, 1100 (9th Cir. 1994); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459 (9th Cir. 1994); *In re Greene*, 980 F.2d 590, 592 (9th Cir. 1992); *McClendon v. U.S.*, 885 F.2d 627, 629 (9th Cir. 1989).

Sovereign immunity is a jurisdictional bar "irrespective of the merits of the claim." *Chemehuevi Indian Tribe v. California Bd. of Equalization*, 757 F.2d 1047, 1051 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9 (1985). *See also Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989); *California ex rel. Dep't of Fish and Game v Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979). Sovereign immunity bars actions, like this one, based on an alleged violation of a tribal-state gaming compact. *See Allen v. Gold*

Country Casino, 2005 WL 6112668, No. S-04-322, slip op. at * 2 (E.D. Cal. Feb. 8, 2005), *aff'd* 464 F.3d 1044 (9th Cir. 2006) ("The Tribal-State Gaming Compact … does not give consent for suits against the Tribe").

Sovereign immunity also bars claims, such as this one, by former tribal employees. "[I]t is well established precedent that claims by former tribal employees against the Tribe are barred by tribal sovereign immunity." *Hill v. Rincon Band of Luiseno Indians*, 2007 WL 2429327, No., 06CV2544, slip op. at * 5 (S.D. Cal. Aug. 22, 2007). *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1048 (9th Cir. 2006); *see also Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1187 (9th Cir. 1998); *Baker v. United States*, 817 F.2d 560, 562 (9th Cir. 1987).

Sovereign immunity is jurisdictional in nature. *See Puyallup Tribe*, 433 U.S. at 172-73; *Quechan Tribe*, 595 F.2d at 1154-55. Thus the Supreme Court has expressly rejected applying equitable considerations in the context of tribal sovereign immunity. *See Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 893 (1986). *See also McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989). "[S]overeign immunity is not a discretionary doctrine that may be applied as a remedy depending upon the equities of a given situation." *Chemehuevi*, 757 F.2d at 1052 n.6. "Sovereign immunity involves a right which

courts have no choice, in the absence of a waiver, but to recognize." *Pit River Home and Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1100 (9th Cir. 1994).

Thus "the requirement that a waiver of tribal immunity be 'clear' and 'unequivocally expressed' is not a requirement that may be flexibly applied or even disregarded based on the parties or the specific facts involved." *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998). When, as here, a tribe does not expressly waive its immunity, courts lack jurisdiction over the tribe regardless of the specific facts involved in the lawsuit. Accordingly, even if Mr. Cosentino's extravagant allegations were factually accurate (which the Tribe emphatically disputes), it would not defeat the Tribe's sovereign immunity.

Where a tribe does expressly waive its sovereign immunity, any limitations on that waiver are strictly enforced. *See Ramey Construction v. Apache Tribe of Mescalero Reservation,* 673 F.2d 315, 320 (10th Cir. 1982). A waiver of sovereign immunity "will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Peña*, 518 U.S. 187, 192 (1996). *See Sossamon v. Texas,* __ U.S. __, 131 S. Ct. 1651, 1662 (2011); *Block v. North Dakota*, 461 U.S. 273, 287 (1983); *Harger v. Dep't of Labor*, 569 F.3d 898, 903 (9th Cir. 2009).[2]

[2]The other Circuits are in accord. *See, e.g., Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 90 (2d Cir. 2001); *Missouri River Services v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852 (8th Cir. 2001); *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995); *Fed. Nat'l Mortg. Ass'n v. LeCrone*, 868 F.2d 190, 193 (6th Cir. 1989); *Terrell v. United States*, 783 F.2d

Thus, a court may exercise jurisdiction over a tribal government only pursuant to a clear statement from the tribal government "waiving [its] sovereign immunity . . . together with a claim falling within the terms of the waiver." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (emphasis added). *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) ("A State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued") (emphasis in original); *Minnesota v. United States*, 305 U.S. 382, 388 (1939); *United States v. Shaw*, 309 U.S. 495, 501 (1940); *Montana v. Gilham*, 133 F.3d 1133, 1138 (9th Cir. 1998).

This principle is of particular relevance here, for while the 1999 Compact does contain a limited immunity waiver, it does not inure to Mr. Cosentino's benefit, as the following discussion demonstrates.

D. The Compact is Enforceable by the State and Tribe, But Not by Private Third Parties Such as Mr. Cosentino

Having effectively conceded that he lacks a cognizable claim under the Ordinance, Mr. Cosentino is left to argue that the Tribe's Tort Ordinance violates Compact. Specifically, he argues that the Ordinance violates Compact section

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1562, 1565 (11th Cir. 1986); *McDonald v. Illinois*, 557 F.2d 596, 601 (7th Cir. 1977).

10.2(d)(ii) because, while allowing tort claims against the Pechanga Resort & Casino, the Ordinance bars claims against the Tribe and Gaming Commission. *See* Pet. ¶¶ 3, 39-47 (AER 48, 62-65).

The problem for Mr. Cosentino, however, is that the Compact is only enforceable by the Tribe and the State. Mr. Cosentino is neither a party to, nor a named third-party beneficiary of, the Compact. He lacks the right and ability to seek to enforce the Compact. There is no express and unequivocal waiver of sovereign immunity in the Compact that allows a private third party, such as Mr. Cosentino, to sue the Tribe to compel arbitration of a claim of alleged breach of Compact.

The Compact expressly addresses the process by which an alleged breach of Compact is to be resolved. Compact Section 9 provides the "DISPUTE RESOLUTION PROVISIONS" for resolving alleged Compact breaches. Compact § 9.0 (AA at p. 33). “In recognition of the government-to-government relationship of the Tribe and the State,” the Compact requires the parties to “make their best efforts to resolve disputes that occur under this Gaming Compact by good faith negotiations whenever possible.” *Id*. at § 9.1 (AA at p. 33). The Compact establishes a “threshold requirement that disputes between the Tribe and the State first be subjected to a process of meeting and conferring in good faith ....” *Id.* The

purpose of this meet-and-confer dispute resolution requirement is "to foster a spirit of cooperation and efficiency in the administration and monitoring of performance and compliance by each other with the terms ... of this Gaming Compact ...." *Id*. The meet-and-confer process includes notice and informal discussions seeking to resolve any dispute arising under the Compact. *See id.* at § 9.1(a)-(b) (AA at p. 33). Unresolved disputes may proceed to voluntary arbitration if both parties agree. *See id.* at § 9.1(c) (AA at p. 34). If a Compact dispute still remains unresolved, then either the State or Tribe may sue in court for "claims of breach or violation of this Compact ...." *Id*. § 9.1(d) (AA at p. 34).

The Compact contains a limited waiver of sovereign immunity of both the Tribe and the State of California. Section 9.4(a) provides that "In the event that a dispute is to be resolved in federal court ..., the State and the Tribe expressly consent to be sued therein and waive any immunity therefrom that they may have provided that" certain conditions exist. *Id*. § 9.4(a) (AA at p. 35).

Significant conditions limit that mutual sovereign immunity waiver, however, including that "***[n]o person or entity other than the Tribe and the State is a party to the action***, unless failure to join a third party would deprive the court of jurisdiction; provided that ***nothing herein shall be construed to constitute a waiver of the sovereign immunity of either the Tribe or the State in respect to***

any such third party." *Id*. § 9.4(a)(3) (AA at p. 35) (emphasis added).

Moreover, the Compact provides that "[i]n the event of intervention by any additional party into any such action [seeking to enforce Compact provisions] without the consent of the Tribe and the State, ***the waivers of either the Tribe or the State provided herein may be revoked***, unless joinder is required to preserve the court's jurisdiction; provided that ***nothing herein shall be construed to constitute a waiver of the sovereign immunity of either the Tribe or the State in respect to any such third party***." Compact § 9.4(b) (AA at p. 35) (emphasis added). In addition, the compact's limited immunity waiver is premised on the condition that "[n]either side makes any claim for monetary damages ...." Compact § 9.4(a)(2).

Finally, but importantly, Compact section 15.1 provides that "[e]xcept to the extent expressly provided under this [Compact], this [Compact] is not intended to, and ***shall not be construed to, create any right on the part of a third party to bring an action to enforce any of its terms***." *Id.* § 15.1 (AA at p. 43) (emphasis added). The Compact expressly makes "non-compact tribes" third party beneficiaries of the revenue sharing trust fund created thereunder. *See* Compact § 4.3.2(a)(i) (AA at p. 12) ("Federally recognized tribes that are operating fewer than 350 Gaming Devices are 'Non-Compact Tribes.' Non-Compact Tribes shall

be deemed third party beneficiaries of this and other compacts identical in all material respects"). By contrast, the Compact does not make tribal casino employees, or former employees such as Mr. Cosentino, third party beneficiaries.

Reading the Compact's dispute resolution provisions as a whole, it is clear that allegations of breach of Compact may be resolved as between the State and the Tribe under Compact section 9, but not by private third-parties such as Mr. Cosentino.

Thus, for example, in *Allen v. Gold Country Casino*, a former tribal casino employee sued, alleging wrongful termination. *See Allen v. Gold Country Casino*, 2005 WL 6112668, No. S-04-322, slip op. at * 1 (E.D. Cal. Feb. 8, 2005), *aff'd in relevant part*, 464 F.3d 1044 (9th Cir. 2006). The employee alleged that "The Tribe waived its immunity by virtue of 'employment rights allowed or referred to (sic) by defendants in numerous documents and signed state-tribal gaming compacts.'" *Id*. at *2. The court noted that to "waive its sovereign immunity, a tribe must expressly and clearly state such intent." *Id.* It explained that the "Tribal-State Gaming Compact (hereinafter Compact) ***does not, as plaintiff alleges, give consent for suits against the Tribe***. The Compact expressly states that 'nothing herein shall be construed to constitutes a waiver of the sovereign immunity of either the Tribe or the State in respect to any ... third party.'" *Id*.

(emphasis added).

Similarly, in *Keitt v. WCAB*, 2012 WL 1511707 (2012), *rev. den.* (Jun 13, 2012), the California Workers' Compensation Appeals Board ("Board") held that it did not have subject matter jurisdiction over a federally recognized Indian tribe. A tribal casino employee claimed an on-the-job injury, and the tribe denied her claim under its workers' compensation ordinance. Like Mr. Cosentino here, the employee argued that the tribal ordinance at issue failed to conform to the Compact, and that the tribe had waived its sovereign immunity in its Compact. Specifically, the employee contended "that the Compact ... allowed the Tribe to create its own workers' compensation system, but that the Tribe's setup of its system was procedurally flawed." *Id*. at *2. According to the employee "the Tribe failed to comply with the terms of the Compact, in that it failed to file its workers' compensation ordinance prior to the Compact's effective date and failed to obtain the Governor's signature." *Id.*

In response, the tribe argued that "only it and the State of California, as signatories to the Compact, could file suit to enforce or challenge the terms of the Compact; thus, Applicant lacked standing to challenge the Tribe's compliance with the terms of the Compact." *Id*. The workers compensation judge "found no intent on the part of the Tribe to" waive its sovereign immunity to allow a private third

party such as the employee to sue for an alleged breach of Compact:

> Although the Tribe expressly agreed with the State in the Compact to a limited waiver of sovereign immunity to allow either party to the Compact to bring suit against the other party, by its express language, the Compact stated that it should not be construed to effect a waiver of sovereign immunity with respect to any third party....

Id. The Board also noted that the tribe's ordinance had a controlling effect: "Further, it was clearly stated in the Tribe's 'Workers' Compensation Ordinance' that the ordinance provided the exclusive method of obtaining workers' compensation liability for injured Casino employees." *Id*. Thus the Board affirmed that "the WCJ lacked jurisdiction over Applicant's claim." *Id.* The Board denied reconsideration, and the California Court of Appeal denied the employee's petition for review. *See id.* at *2-3.

1. *Campo Band* Does Not Aid Mr. Cosentino

Mr. Cosentino cites *Campo Band v. Superior Court*, 137 Cal. App. 4th 175, 184-85 (2006), arguing that he can sue to enforce the Compact. *Campo* is of no help to Mr. Cosentino.

Campo involved a patron tort claim where the Tribe and patron disagreed about whether the patron had perfected a claim under the Tribe's Tort Ordinance: "The Tribe concluded that an injured patron failed to comply with the procedural

prerequisites to arbitration ...." *Id*. at 177. There was no question at all that the plaintiff was a casino patron whose claims for injuries sustained at the casino fell within the four corners of the tribe's tort ordinance. The court found that "[h]aving consented to waive its tribal sovereign immunity in the Compact [to patron tort claims], the Tribe cannot, in drafting Regulation 004 [the tribal tort ordinance], render its obligations totally illusory by retaining the sole and unfettered discretion to determine whether a claimant has complied with the procedural requirements set forth in its regulation." *Id.* at 185. However, the court disagreed with the trial court's order compelling arbitration of the merits of the patron's tort claim: "we direct the superior court to vacate its order compelling the Tribe to submit to arbitration of the merits of Bluehawk's claim ...." *Id*. *Campo* instead ordered the trial court to issue an order compelling arbitration of the question of whether the patron had complied with the tribal tort ordinance's procedural prerequisites.

Here, by contrast, there is no ambiguity or dispute about whether petitioner's claim falls within the Tribe's tort Ordinance: Mr. Cosentino's petition plainly concedes that it does not. *See* Pet. at ¶¶ 3, 39-47 (AER at 48, 62-65).

Campo's holding was qualified and explained in *Lawrence v. Barona Valley Ranch Resort & Casino*, 153 Cal. App. 4th 1364 (2007):

> As this court held in *Campo*, a tribe that enters into the Compact waives its sovereign tribal immunity as to suits by patrons for certain injuries suffered

> at its gaming facilities, to the extent of the insurance coverage the Compact requires it to obtain for such claims. Such a waiver, however, does not also constitute a tribe's consent to having such suits brought against it in state court.... Thus, in *Campo*, we concluded that although the tribe waived its sovereign immunity relating to certain patron claims, its waiver did not constitute a consent to suit in state court on those claims, rather, those claims had to be resolved in the forum specified in the tribe's tort claims ordinance.

Lawrence, 153 Cal.App.4th at 1369 (emphases added) (internal citations omitted).

Lawrence clarified that the Compact's patron tort claim Ordinance requirement is an incomplete immunity waiver because, *inter alia*, it does not specify the forum in which claims may be brought. *Id*. at 1369-70. *Campo* and *Lawrence* thus suggest that courts look to the tribe's tort claims ordinance before determining what forum, if any, may host claims against a tribe under the patron tort claims ordinance referenced in Compact section 10.2(d). Concluding that the state court lacked jurisdiction over the Barona Band, *Lawrence* found that the Tribe's limited waiver "did not constitute a consent to suit in state court . . . but instead specified that the Barona Tribal Court was the exclusive forum for the resolution of such claims." *Id*. at 1370.

Here, Pechanga's Ordinance does not waive sovereign immunity to compel arbitration against the Tribe or the Gaming Commission in any forum whatsoever. Nor does it waive immunity to allow Compact compliance suits such as this one:

> Tort claims against the Tribe which are cognizable under this Act ***shall be***

> ***brought against the Tribe's Gaming Operation*** and may be pursued solely through the Tribal Dispute Resolution process as outlined in this Act .... ***No claim of any kind is authorized under this Act against the Pechanga Band [or] the Pechanga Gaming Commission*** ....

Ordinance § 5(b) (AA at p. 134) (emphasis added). Unlike the procedural ambiguity in *Campo*, the Ordinance at issue here plainly and expressly precludes suits against the Tribe or Gaming Commission. Also unlike *Campo*, Mr. Cosentino's petition here admits this fact. *See* Pet. ¶¶ 3, 39-47 (AER at p. 48, 62-65).

As noted, the Compact expressly precludes suits by third parties to enforce the Compact's terms, and allows the Tribe to revoke the Compact's limited immunity waiver in any case in which a third party is present. *See* Compact §§ 9.4(a)(3), (b), 15.1 (AA at pp. 35, 43). That is the opposite of Mr. Cosentino's claim that the Compact requires that the Tribe waive its sovereign immunity, and that of its Commission, as to private third party claims of breach of Compact. Nothing in *Campo* supports Mr. Cosentino's claim that the Compact confers jurisdiction on federal courts to order the Tribe and Gaming Commission – not the Casino – to arbitrate the issue of whether the Tribe's Ordinance complies with the Compact.

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E. IGRA is Not Enforceable by Private Parties

Mr. Cosentino's petition also alleges that the Tribe's Ordinance violates IGRA, §§ 2710(d)(1)(C), (d)(2)(C), and (d)(3)(C)(5). *See* Pet. ¶ 45 (AER at p. 65). But just as with the Compact, there is no waiver or abrogation of tribal sovereign immunity that would allow a private third party such as Mr. Cosentino to seek judicial or arbitral enforcement of IGRA. Nor does IGRA provide private individuals with a general right of action to enforce the statute's provisions.

This Court has expressly held that ***"IGRA provides no general private right of action ...."*** *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 (9th Cir. 2000) (emphasis added). The Eighth, Tenth, and Eleventh Circuit's are all in accord. *See In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litigation*, 340 F.3d 749, 766 (8th Cir. 2003) ("IGRA provides no general private right of action"); *Hartman v. Kickapoo Tribe Gaming Comm'n*, 319 F.3d 1230, 1233 (10th Cir. 2003); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1049 (11th Cir. 1995) ("Tamiami's ... claim - that the Tribe, operating through its Gaming Agency, has refused to issue licenses in violation of the statute and regulations - fails because IGRA provides it no right to relief"). *See also Shobar v. California*, 2:03-cv-4530-R-CW, Amended Order of Dismissal With Prejudice (Document 24), at p. 2 (C.D. Cal.

Oct. 7, 2003) (noting that "plaintiffs lack standing under the Indian Gaming Regulatory Act to bring the subject action") (emphasis added), *aff'd* 134 Fed.Appx. 184 (9th Cir. June 14, 2005) ("We hold that the district court correctly dismissed appellants' claim because no private cause of action exists to enforce the state-tribal compact under either IGRA or the terms of the compact itself").[3] *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler*, 304 F.3d 616 (6th Cir. 2002) (no standing to sue in federal court under IGRA); *Frazier v. Turning Stone Casino*, 254 F. Supp. 2d 295 (N.D. N.Y. 2003) (no federal jurisdiction because IGRA does not allow a private right of action for individuals); *Jimi Development Corp. v. Ute Mountain Ute Indian Tribe*, 930 F. Supp. 493 (D. Colo. 1996) (no private right of action under IGRA). *See also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73-76 (1996) (refusing to allow an *Ex Parte Young* remedy for an alleged violation of IGRA because of "the carefully crafted and intricate remedial scheme set forth in § 2710(d)(7). Where Congress has

[3] *Shobar* interprets the same Compact that is at issue here. The 1999 Compact at issue here and in *Shobar* were negotiated together, approved together, and are identical except for the name of the tribe. *See In re Indian Gaming Related Cases*, 331 F.3d 1094, 1102 (9th Cir. 2003) (discussing history of 1999 compact negotiations); *Cachil Dehe Band of Wintun Indians v. California*, 649 F. Supp. 2d 1063, 1066-67 (E.D. Cal. 2009) *aff'd in part, rev'd in part*, 618 F.3d 1066 (9th Cir. 2010) (same); 65 Fed. Reg. 31189 (May 16, 2000) (simultaneously approving 58 identical California compacts including Pechanga's and Santa Ynez Band's at issue in *Shobar*); http://www.indianaffairs.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm#California (links to full text of all California compacts); Circuit Rule 36-3(c)(i).

created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary").

Thus even if Mr. Cosentino were somehow harmed by a violation of IGRA, which he was not, and even if IGRA did abrogate tribal sovereign immunity as to such claims, which is does not, Mr. Cosentino still would not have a private right of action to enforce the statute.

F. The State of California is a Required Party under Rule 19

It is well settled that a party to a contract, such as the Compact here, is a required party under Federal Rule of Civil Procedure 19 to an action seeking to interpret and enforce that contract. Where such a contracting party has sovereign immunity -- as the State of California does under the Eleventh Amendment to the United States Constitution -- the case must be dismissed in the required party's absence. But Mr. Cosentino has failed to the name the State as a party, nor could he do so given the State's Eleventh Amendment sovereign immunity. *See* U.S. Const. Amend. XI; *Seminole Tribe v. Florida*, 517 U.S. 44, 53-54 (1996).

For example, in *Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491 (D.C. Cir. 1995), an Indian tribe sued the

Secretary of Interior seeking a determination that a tribal-state gaming compact under IGRA was valid, even though the Kansas Supreme Court had held that Kansas' Governor lacked authority under State law to sign the compact. The D.C. Circuit held that the State of Kansas, as a party to the compact, was a necessary and indispensable party that could not be joined because of its sovereign immunity. The court noted that "while the absence of an alternative forum is properly weighed heavily against dismissal, the state's immunity counters against proceeding; even if the Tribe lacked an adequate remedy by which to vindicate its statutory rights, absence of an alternative remedy alone does not dictate retention of jurisdiction under Rule 19." *Id*. at 1499. *Cf. Seneca Nation of Indians v. New York*, 383 F.3d 45, 48-49 (2nd Cir. 2004) (State was party to easement agreement, rendering it a necessary and indispensable party that could not be joined because of its sovereign immunity, requiring dismissal); *Puerto Rico Aqueduct and Sewer Auth. V. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) ("Absent waiver, neither a State nor agencies acting under its control may be subject to suit in federal court"); *Friant Water Auth. v. Jewell*, 1:14-CV-000765-LJO, 2014 WL 2197993 (E.D. Cal. May 27, 2014) ("DWR, as an agency of the State of California, is protected by sovereign immunity").

In *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002),

racetrack owners and operators sued the Arizona Governor, challenging the legality of the Governor's actions in negotiating new compacts or extending existing compacts. The district court granted injunctive relief to the racetracks. On appeal, this Court vacated and remanded, concluding "that the district court abused its discretion in ruling that the tribes with existing compacts entered pursuant to A.R.S. § 5-601(A) were not necessary to this litigation." *Id*. at 1024. This Court held that the absent "tribes with gaming compacts ... are necessary and indispensable parties to this litigation." *Id*. at 1027. It found that the district court abused its discretion in ruling to the contrary. It noted that the "tribes are immune from suit, and they have not consented to be sued." *Id*. (*citing Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998)). The Court vacated the district court's decision and remanded with instructions to dismiss the action for failure to join indispensable parties.

Here, the State of California is a party to the Compact. *See generally* AA at pp. 4-50. As a contracting party, the State plainly has "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 ...." Fed. R. Civ. P. 19(a). *See Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975) (parties to a contract are indispensable). If Mr.

Cosentino's view of the Compact's sovereign immunity provisions were to prevail, it would open the State to a virtually unlimited range of lawsuits by private third parties over its role under the Compact. Moreover, if private third parties such as Mr. Cosentino were permitted to sue tribes to test their compact compliance, tribes would inevitably seek to renegotiate those compacts with the State, seeking all manner of remedies that would impact the State's interests.

Turning to the Rule 19(b) factors, "the first factor of prejudice, insofar as it focuses on the absent party, largely duplicates the consideration that made a party necessary under Rule 19(a): a protectable interest that will be impaired or impeded by the party's absence," and weighs in favor of finding the State a required party. *American Greyhound Racing, Inc.*, 305 F.3d at 1024-25 (*citing Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991); *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1162 (9th Cir. 2002)).

The second Rule 19(b) factor, the "extent to which any prejudice could be lessened" also weighs heavily in favor of finding the State a requirement party. Fed. R. Civ. P. 19(b)(2). For Mr. Cosentino to obtain the relief he seeks, a court would need to read out of the Compact the limitations discussed above, including the ability of the State and Tribe to limit their waivers to actions between the two

government parties, *see* Compact § 9.4(a)(3) (AA at p. 35), to revoke their limited sovereign immunity waivers, *see* Compact § 9.4(b) (AA at p. 35), and the prohibition against any damages whatsoever. *See* Compact § 9.4 (a)(2)

The third factor, "whether a judgment rendered in the person's absence would be adequate" may seem to favor Mr. Cosentino. Fed. R. Civ. P. 19(b)(3). But if his petition to compel arbitration were granted, the State would not be bound by that judgment, and could raise its status as an absent required party at any time, rendering an order compelling arbitration potentially inadequate.

"[S]ome courts have held that sovereign immunity forecloses in favor of tribes the entire balancing process under Rule 19(b), but we have continued to follow the four-factor process even with immune tribes." *American Greyhound Racing, Inc*., 305 F.3d at 1025 (*citing Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991)). "With regard to the fourth factor, however, we have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs." *American Greyhound Racing, Inc*., 305 F.3d at 1025 (*citing Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1162 (9th Cir. 2002)). *See also Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1102-03 (9th Cir.1994); *Clinton*, 180 F.3d at 1090.

This Court should conclude, therefore, that "in equity and good conscience" this action cannot proceed. Fed. R. Civ. P. 19(b). *See Clinton v. Babbitt*, 180 F.3d 1081, 1090 (9th Cir. 1999); *Enterprise Management Consultants, Inc. v. Hodel*, 883 F.2d 890 (10th Cir. 1989) (tribe was indispensable party to action seeking review of bingo management contracts); *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975) (parties to a contract are indispensable, and where they are governments possessing sovereign immunity, dismissal is required); *Dewberry v. Kulongoski*, 406 F.Supp.2d 113 (D. Or. 2005) (Indian tribe was indispensable party to suit challenging validity of its gaming compact with state); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 327 F.Supp.2d 995 (W.D. Wisc. 2004), *aff'd* 422 F.3d 490 (7th Cir. 2005) (State and Indian tribe who were parties to a gaming compact were indispensable parties which could not be joined as parties, requiring dismissal even though plaintiffs would have no remedy; parties to the compact had sovereign immunity and any judgment touching on the compact would be prejudicial to their interests).

Rule 19 provides an independent basis for dismiss this case with prejudice.

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IV. CONCLUSION

For all of these reasons, the respondents and appellees Tribe and Gaming Commission respectfully request that the Court affirm the district court's judgment dismissing this case with prejudice.

Dated: July 28, 2014

Law Office of Frank Lawrence

By _____/s/_____
Frank Lawrence
Attorneys for Appellees
PECHANGA BAND OF LUISENO MISSION INDIANS and PECHANGA GAMING COMMISSION

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,380 words, excluding the parts of the brief excepted by Rule 32(a)(7)(B)(iii).

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Dated: July 28, 2014 LAW OFFICE OF FRANK LAWRENCE

By _____/s/_____

Frank Lawrence
Attorney for Appellees
PECHANGA BAND OF LUISENO MISSION INDIANS and PECHANGA GAMING COMMISSION

PROOF OF SERVICE

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 July 28, 2014 I caused the foregoing document described as APPELLEES' ANSWERING BRIEF to be served on the interested parties in this action as follows:

[X] Electronic Service. Pursuant to Circuit Rule 25-5, the above-referenced document was electronically filed and thus served upon all interested parties via a "Notice of Electronic Filing" ("NEF") that is automatically generated by the CM/ECF System and sent by e-mail to all CM/ECF Users who have consented to receive service through the CM/ECF System. Service with this electronic NEF constitutes service pursuant to the Federal Rules of Appellate Procedure, and the NEF itself will constitute proof of service for individuals so served.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on July 28, 2014, at Nevada City, California.

___/s/_____
Frank Lawrence