HFM | HIGGS FLETCHER & MACK LLP®

401 West A Street, Suite 2600
San Diego, CA 92101

PHONE (619) 236.1551
FAX (619) 696.1410

www.higgslaw.com

Phillip C. Samouris
Partner
samouris@higgslaw.com

July 14, 2015

Chief Justice Tani Gorre Cantil-Sakauye and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Cosentino v. Fuller, et al.*
Fourth District Court of Appeal, Division 3, Case No. G050923
Request For Depublication (Cal. Rules of Court, Rule 8.1125)

To The Chief Justice and Associate Justices:

A. Introduction and Statement of Interest.

The Court of Appeal certified for publication its decision in *Cosentino v. Fuller*, No. G050923 ("*Cosentino*") (**Ex. A**).[1] *Cosentino* holds that the federal doctrine of tribal sovereign immunity does not bar Mr. Cosentino's claim for damages against members of an Indian tribe's gaming commission for voting to revoke his gaming license on the theory that the commissioners abused their authority under the Indian Gaming Regulatory Act (25 U.S.C. § 2701, *et seq.*; IGRA), the applicable tribal-state compact and the applicable tribal gaming ordinance. The upshot of this ruling is that ***private citizens may summon tribal gaming commissioners to court to attack the way they voted on the commission and seek monetary damages against them personally for voting to revoke their tribal gaming license.***

Now, on behalf of the Viejas Band of Kumeyaay Indians – a federally recognized Indian tribe in San Diego County that owns and operates a casino in San Diego County which it regulates through its gaming commission – we respectfully request depublication of the *Cosentino* decision. It fails to analyze and departs drastically from governing federal Indian law, undermines federal policies of tribal self-governance – policies that are exclusively Congress' to shape – and may spawn a rash of avoidable and unmeritorious complaints against Indian tribes and tribal officials throughout the state. California's courts and Indian Tribes will have to deal with these unmeritorious complaints which should be dismissed based on authority that *Cosentino* failed to consider. Such far reaching claims and adjudications will undermine Indian tribes' sovereign immunity and right to self-determination in violation of federal law and policy and further clog the courts with unmeritorious complaints.

[1] **Ex. A** includes the opinion and two orders modifying the opinion.

B. Factual Background.

Benedict Cosentino was a table games dealer at a casino in Riverside County owned by the Pechanga Band of Luiseño Indians. Mr. Cosentino filed suit in Riverside Superior Court against every member of the tribe's gaming commission, asserting claims for intentional and negligent interference with prospective economic advantage and related claims, because they allegedly voted to revoke his tribal gaming license without cause.[2]

The commissioners moved to dismiss the complaint based on the federal doctrine of tribal sovereign immunity, which the trial court granted. However, the Court of Appeal *reversed*, holding that the commissioners were *not immune* because they (supposedly) exceeded the scope of their authority under the IGRA, the tribal-state compact and the tribal gaming ordinance by voting to revoke Cosentino's gaming license without cause. (**Ex. A**, p. 17.)

In the process, the panel stated that its focus was "on the standards for determining whether a tribal official acted in his or her official capacity and within the scope of his or her official authority to determine whether Defendants are entitled to sovereign immunity protection" **(Ex. A**, p. 31**)** and noted that its inquiry was not "limited to whether defendants had the authority to revoke Cosentino's gaming license, but also includes the circumstances under which defendants may exercise their authority and whether those circumstances existed." **(Ex. A, p. 16.)** Critically, as summarized above, the decision allows commissioners to ***be summoned to court to defend the way they voted on the commission and to be held personally liable for voting to revoke a tribal gaming license.***

C. Discussion.

As discussed below, *Cosentino* (1) ignores and runs afoul of well-established, controlling federal law, (2) undermines federal policies of tribal self-governance – policies that are exclusively Congress' to shape, and (3) may erroneously spawn a rash of avoidable and unmeritorious complaints against Indian tribes and their officials throughout the state.

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[2] Cosentino also filed a Petition to Compel Arbitration against the Pechanga Band and its Gaming Commission in the United States District Court, Central District of California, Eastern Division, Case No. 5:13-cv-00912-R-OP. The Court granted defendants' Motion to Dismiss on the grounds of tribal sovereign immunity. (**Ex. B.**) Mr. Cosentino's appeal from that decision is pending in the Ninth Circuit Court of Appeals.

1. ***Cosentino* Fails to Analyze and Runs Afoul of Well-Established, Controlling Federal Law.**

Cosentino did not consider crucial issues and controlling federal law which shows that Mr. Cosentino's claims lacked merit as a matter of law and renders *Cosentino* incomplete. As discussed in this section, *Cosentino* failed to consider: (a) whether Mr. Cosentino had a private right of action under the relevant authorities; (b) whether the Gaming Commission had the authority to revoke Mr. Cosentino's license without cause as part of the Tribe's inherent sovereign authority over tribal gaming licenses and, most importantly, (c) the most analogous and controlling federal cases. Instead, *Cosentino* focused on a misguided reading of California law, despite the fact that the doctrine of tribal immunity is exclusively a federal doctrine subject to federal law.

a. Cosentino *Did Not Consider Whether Plaintiff Had a Private Right of Action*

Cosentino holds that the commissioners are not immune because they allegedly exceeded the scope of their authority under the IGRA, the tribal-state compact between California and the Pechanga Band (the "Tribal-State Compact") and the Pechanga Gaming Act of 1992 (the "Pechanga Gaming Ordinance"). (**Ex. A, p. 17**.) *Cosentino,* however, did not consider the threshold issue of whether Congress and/or the tribe granted Mr. Cosentino a private right of action under those authorities because this argument was not made at the trial court level and because it is supposedly an affirmative defense that may not be considered at this stage of the case. (**Ex. A, p. 20**.) Had the panel analyzed this threshold issue, it would have concluded that Mr. Cosentino did not have a private right of action as a matter of law, as discussed below. And, if no right of action exists, then *Cosentino's* standards for determining whether a tribal official acted in his or her official capacity in this context are moot. Worse yet, *Cosentino* may mistakenly spawn a rash of unmeritorious complaints.

As the Supreme Court has observed, "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Touche Ross & Co. v. Redington* (1979) 442 U.S. 560. The Supreme Court has also held that "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *AMTRAK v. Nat'l Assoc. of R.R. Passengers* (1974) 414 U.S. 453, 458.

With respect to the IGRA, the Ninth Circuit has expressly held that the "IGRA provides no general private right of action . . . .", noting that Congress created a comprehensive regulatory scheme and provided for particular remedies under the IGRA and that, in such circumstances, courts should not create new private rights of action or otherwise undermine the regulatory

scheme. *Hein v. Capitan Grande Band of Diegueno Mission Indians* (9th Cir. 2000) 201 F.3d 1256, 1260. Likewise, the California Court of Appeal in *Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1424-1425 expressly held that federal law has preempted the field of Indian gaming, such that the state court had no jurisdiction over a claim filed by a gaming manager against the Indian tribe ***and its officials*** arising out of the cancellation of his management contract.

Indeed, the circuits that have analyzed this issue have come to the same conclusion, including the Eighth, Tenth and Eleventh Circuits. *See In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litigation* (8th Cir. 2003) 340 F.3d 749, 766 ("IGRA provides no general private right of action"); *Hartman v. Kickapoo Tribe Gaming Comm'n* (10th Cir. 2003) 319 F.3d 1230, 1233 ("we hold that IGRA contains no implied private right of action in favor of an individual seeking to enforce compliance with the statute's provisions"); and *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians* (11th Cir. 1995) 63 F.3d 1030, 1049 (finding no implied private right of action in favor of management contractor to enforce licensing provisions of IGRA).

Likewise, the Tribal-State Compact here is only in enforceable by the tribe and the state. And the Pechanga Gaming Ordinance contains numerous bars against Mr. Cosentino's claims, including the express bar of any claims related to employment at the casino. (Pechanga Gaming Ordinance Section 5(h).)

b. Cosentino *Did Not Consider Whether the Gaming Commission Had The Authority To Revoke Mr. Cosentino's License Without Cause As Part Of The Tribe's Inherent Sovereign Authority*

Respondents contended in a Petition for Rehearing that the Gaming Commission had authority to revoke Mr. Cosentino's license without cause as part of the Tribe's inherent sovereign authority over tribal gaming licenses. *Cosentino*, however, declined to consider this important issue because it was raised for the first time in a rehearing petition. (**Ex. A,** p. 32, fn. 4.) (*Cosentino* also denied the Application To File Amicus Curiae Brief In Support Of Respondent's Petition For Rehearing which was filed by numerous Indian tribes in California.)

c. Cosentino Did Not Consider the Most Analogous and Controlling Federal Cases

Cosentino ignored the most analogous and controlling federal cases, including *Imperial Granite Company v. Pala Band of Indians* (9th Cir. 1991) 940 F.2d 1269, an opinion written by William C. Canby, Jr., the author of *American Indian Law* (6th Edition 2015) – a treatise that

has been cited by the U.S. Supreme Court and Mr. Cosentino's counsel in this case. (See, *infra*, at p. 6.) There, Imperial filed suit against tribal officials who voted as members of the tribe's governing body against permitting Imperial to use a road across the tribe's property. The district court dismissed Imperial's claims against the individual tribal board members on sovereign immunity grounds, which the Ninth Circuit affirmed, stating, "***it is difficult to view this suit against the officials as anything other than a suit against the Band. The votes individually have no legal effect; it is the official action of the Band, following the votes, that caused Imperial's alleged injury***." (Id. at 1271 [emphasis added].) See also *Hardin v. White Mountain Apache Tribe* (9th Cir. 1985) 779 F.2d 476 (held that sovereign immunity barred the plaintiff from litigating a case against high-ranking tribal council members seeking to hold them individually liable for voting to eject the plaintiff from tribal land).[3]

Likewise, in this case, it is difficult to view Mr. Cosentino's claims against the individual commissioners as anything other than a suit against the tribe and its gaming commission. The commissioners' individual votes have no legal effect; it is the official action of the *commission*, following the votes, that caused Mr. Cosentino's alleged injury. Yet, the decision incorrectly permits Mr. Cosentino's claims against the commissioners, *personally*, to proceed, thus circumventing tribal immunity and potentially recognizing for the first time that immunity does not bar a private right of action against a tribal board member for the way that official voted in his or her sovereign capacity.

Instead of following federal law, *Cosentino* repeatedly states that its ruling is based on the California Court of Appeals' opinion in *Turner v. Martire* (2000) 82 Cal.App.4th 1042, where the plaintiff was physically assaulted by a tribal officer. (**Ex. A,** pp. 19, 31-32 and fn. 5.) In *Turner*, the California court concluded that the officer exceeded his authority when he assaulted the plaintiff. The *Turner* case is clearly distinguishable from the instant case because the tribal officer in *Turner* could personally commit assault apart from any action of the tribe. Here, however, Mr. Cosentino sued each and every member of the Gaming Commission for voting to revoke his tribal gaming license – an act that was necessarily (and only) within each commissioner's tribal authority. Stated differently, only the Tribe, acting through its Gaming Commission, could possibly revoke Plaintiff's license. By mistakenly allowing Mr. Cosentino to attack such a sovereign act, *Cosentino* undermines important federal Indian policies which are exclusively Congress' to shape, as discussed in the following section.

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[3] The Ninth Circuit has recently reaffirmed the ruling in *Hardin*, cautioning against "individual capacity" claims that are in reality "official capacity" claims because they seek to hold individual tribal board members personally liable for the way they voted. See *Pistor v. Garcia* (9th Cir. 2015) Case No. 12-17095 at p. 14, citing *Maxwell v. County of San Diego* (9th Cir. 2013) 708 F.3d 1075, 1089.

2. *Cosentino* Undermines Federal Policies of Tribal Self-Governance – Policies That Are Exclusively Congress' To Shape.

As the Supreme Court has observed, "tribal immunity is a matter of federal law and is not subject to diminution by the states." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 756. While Congress has always been free to limit – or even abrogate – tribal sovereign immunity, it has "consistently reiterated its approval of the immunity doctrine." *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 510 (1991). That approval reflects the desire of Congress to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Id., citing, California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 216.

In the most recent U.S. Supreme Court decision impacting tribal sovereign immunity, the Court reaffirmed judicial respect for Congress' primary role in defining the contours of tribal sovereignty and noted that the courts cannot and should not undermine that sovereignty by diminishing immunity to permit a state's right of action simply because the court believes the end result would otherwise be improper. (See *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024 (2014) ("[A] fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty . . . . Having held in *Kiowa* that this issue is up to Congress, we cannot reverse ourselves because some may think its conclusion wrong....").

Indeed, in his recent opposition to the Lytton tribe's request to depublish *Cosentino*, Mr. Cosentino's attorney, Andrew W. Twietmeyer, stresses that the regulation of Indian tribes *and their officials* is exclusively left to Congress:

> "Lytton fails to comprehend a basic tenant of Tribal Sovereignty jurisprudence. Namely, that Congress has plenary and exclusive authority over Indian affairs. *See U.S. v. Lara* (2004) 541 U.S. 193, 200 (summarizing the "exceptionally great powers of Congress to regulate and modify the status of tribes") (*quoting* Canby, American Indian Law 2 (3d ed. 1998)... In other words, ***Congress has the absolute authority to legislate the conduct of Indian Tribes, and their officials***. *See* United States Constitution, Art. 1 § 8. Congress did exactly that when it enacted IGRA.

> Thus, IGRA preempts both state and Tribal law in the event of a conflict...." [Emphasis added.]

(See *Opposition to the Request of the Lytton Rancheria to Depublish*, June 26, 2015, p. 9.)

Consistent with the U.S. Supreme Court, many federal courts have recognized the unique policy considerations implicit in cases dealing with tribal sovereign immunity. See *U.S. v. Oregon* (9th Cir. 1982) 657 F.2d 1009, 1013 ("Indian tribes enjoy immunity because they are sovereigns pre-dating the constitution, and immunity is thought necessary to preserve autonomous tribal existence"); and *Chemehuevi Indian Tribe v. Cal. State Bd. Of Equalization* (9th Cir. 1985) 757 F.2d 1047, 1051 ("[tribal] immunity is necessary to preserve the autonomous political existence of the tribes...and to preserve tribal assets").

The California Supreme Court in *Boisclair v. Superior Court* (1990) 51 Cal.3d 1140, likewise noted that the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the United States' history and is based upon federal preemption and internal sovereign rights of Indian tribes.

Given those unique policy considerations, the U.S. Supreme Court has noted that civil claims may be brought against Indian tribes, their officials, and their employees only in very limited circumstances. For example, in *Santa Clara Pueblo,* the Supreme Court addressed whether a plaintiff may assert a private right of action against an individual tribal officer based on an alleged violation of the Indian Civil Rights Act. The Supreme Court observed that "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area" required it to "tread lightly" in in the absence of clear Congressional intent. *Santa Clara Pueblo,* 436 U.S. at 60. The Supreme Court concluded that – unlike civil rights statutes applicable to state officers – Congress declined to expose tribal officials to actions for damages, because such lawsuits would "undermine the authority of tribal forums," and would impose a financial burden that Indian tribes typically cannot afford. *Id.* at 64, 70. Thus, the Court ruled that the plaintiff's sole remedy for violation of the Indian Civil Rights Act was a petition for *habeas corpus*.

Here, similarly, Congress has not passed a statute abrogating immunity to permit individuals to pursue tort claims against tribal employees for revocation of a tribal gaming license. In light of the foregoing, California courts should follow the lead of the U.S. Supreme Court and "tread lightly" in assessing whether Mr. Cosentino may seek damages against members of the tribal gaming commission for voting to revoke his tribal gaming license. Judicial restraint is especially proper in the instant case, given that Mr. Cosentino is pursuing claims against the Pechanga Band and its gaming commission in federal court where these issues will be fully

analyzed and especially given that Cos*entino* may erroneously spawn unmeritorious complaints against Indian tribes and tribal officials, as discussed in the following section.

3. The Opinion May Erroneously Spawn a Rash of Avoidable and Unmeritorious Complaints Against Indian Tribes And Their Officials

If the decision remains certified for publication, then individual members of Indian tribes' gaming commissions and other governing boards may improperly be summoned to court by numerous, disgruntled former employees and others who claim that the tribal officers acted without authority. Moreover, as stated in *Cosentino*, judicial review would not be limited to whether the individuals had the authority to take the action which is the subject of the claim, "but also includes the circumstances under which defendants may exercise their authority and whether those circumstances existed." (**Ex. A, p. 16**.) California's courts and Indian Tribes will have to deal with these unmeritorious complaints which should be dismissed based on authority that *Cosentino* failed to consider. Such far reaching claims and adjudications will undermine Indian tribes' sovereign immunity and right to self-determination in violation of federal law and policy and further clog California courts with unmeritorious complaints.

D. CONCLUSION

Cosentino did not consider crucial issues and controlling federal law which shows that Mr. Cosentino's claims lacked merit as a matter of law and renders *Cosentino* incomplete. If California supports the creation of a private right of action by casino employees against tribal officials for improperly revoking tribal gaming licenses, and a corresponding abrogation of immunity to permit such suits, then California may attempt to negotiate for such a right in tribal state compacts or lobby Congress to create such a private right of action, which Congress may create, after considering all important policy implications. A panel of the California Court of Appeal, however, should not undermine federal Indian law and policy and incorrectly seek to create such a claim on its own. For the reasons set forth above, and in the record, the Viejas Band respectfully requests that the Court depublish *Cosentino*.

Respectfully submitted,

PHILLIP C. SAMOURIS
of
HIGGS FLETCHER & MACK LLP

Attachments

Cosentino v. Fuller, et al.
Fourth District Court of Appeal, Division 3, Case No. G050923

PROOF OF SERVICE

I, Lori Holland, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within-entitled action; my business address is 401 West "A" Street, Suite 2600, San Diego, California 92101-7913. On July 14, 2015, I served the within documents, with all exhibits (if any):

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Executed on July 14, 2015, at San Diego, California.

LORI HOLLAND

Cosentino v. Fuller, et al.
Fourth District Court of Appeal, Division 3, Case No. G050923

SERVICE LIST

Andrew W. Twietmeyer Law Office of Andrew W. Twietmeyer 10780 Santa Monica Boulevard Suite 401 Los Angeles, California 90025	*Attorney for Plaintiff and Appellant*
Frank Lawrence Law Office of Frank Lawrence 578 Sutton Way No. 246 Grass Valley, California 95945	*Attorney for Defendant and Respondent*
California Solicitor General State of California Department of Justice Office of the Attorney General 1300 "I" Street Sacramento, California 95814-02919	
California Court of Appeal Fourth Appellate District Division Three 601 W. Santa Ana Boulevard Santa Ana, California 92701	
Clerk of the Court Riverside Superior Court 4050 Main Street Riverside, California 92501	