No. 17-16967

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER ROSALES, *et al.*,

Plaintiffs-Appellants,
v.
AMY DUTSCHKE,
Regional Director, BIA, *et al.*,

Defendants-Appellees

On Appeal from the United States District Court
for the Eastern District of California
Hon. Kimberly J. Mueller, No. 2:15-cv-01145 KJM

TRIBALLY-RELATED DEFENDANTS'-APPELLEES' ANSWERING BRIEF

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, defendant Penn National Gaming, Inc., hereby certifies that it has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock. Defendant San Diego Gaming Ventures LLC hereby certifies that it is a limited liability company with a sole member which is defendant Penn National Gaming, Inc. Defendant C.W. Driver, Inc. certifies that it is a wholly owned subsidiary of C.W. Driver Holdings, Inc. and there is no publicly held corporation that owns 10% or more of its stock.

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I. INTRODUCTION

The Jamul Indian Village ("Tribe" or "JIV") is a federally-recognized Indian tribe. Long ago, the U.S. Bureau of Indian Affairs ("BIA") recognized that plaintiffs/appellants Walter Rosales and Karen Toggery ("plaintiffs") were ***not*** tribal members eligible to vote in the Tribe's elections. *See Rosales v. Sac. Area Director,* 32 IBIA 158, 160 fn. 3 (1998) (listing "23 individuals found eligible to vote" which list excluded appellants); *Rosales v. Sac. Area Director*, 34 IBIA 50, 53 (July 29, 1999) ("None of the four individuals recognized as Plaintiffs in this appeal are original members of the [Jamul Indian] Village. Therefore, none of the present would be 'qualified voters'").

Yet Mr. Rosales and Ms. Toggery, aided by attorney Patrick Webb, have persisted in a decades-long legal crusade attempting to wrest control of the Tribe's government, its lands, its sovereignty, and its hopes for self-determination and self-sufficiency.[1]

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[1]*See, e.g. JIV v. Hunter,* No. 95-0131 (S.D. Cal. 1995) (Attorney Webb misleadingly sued in the Tribe's name claiming Mr. Rosales and Ms. Toggery were tribal leaders when they were not even enrolled members; dismissed); *JIV v. JIV Executive Committee*, No. 699070 (S.D. Sup. Ct. 1996) (Attorney Webb manufactured a fictitious "tribal court" appointing Ms. Toggery as "judge";

(continued...)

[1](...continued)
dismissed); *Rosales v. Sacramento Area Director, BIA,* 32 IBIA 158 (1996) (Attorney Webb claimed that BIA should have recognized Mr. Rosales and Ms. Toggery as tribal leaders; IBIA affirmed BIA's decision finding that Mr. Rosales and Ms. Toggery were not even tribal members, much less tribal leaders); *Rosales v. Sacramento Area Director, BIA*, 34 IBIA 50 (1996) (Attorney Webb attempted to re-litigate 32 IBIA 158; dismissed), *aff'd* 477 F. Supp. 2d 119 (2007), 278 Fed. Appx. 1 (2008); *Rosales v. Hunter,* No. 97-cv-769 (SD. Cal. Nov. 20, 1998) (Attorney Webb re-filed the dismissed complaint from *JIV v. Hunter,* No. 95-0131 (S.D. Cal. 1995) in the C.D. Cal.; venue transferred back to S.D.; OSC re sanctions; case dismissed); *Rosales v. Sacramento Area Director, BIA*, 34 IBIA 125 (1999) (Attorney Webb again challenged a tribal election arguing that Mr. Rosales and Ms. Toggery should be deemed tribal leaders when they were not even enrolled in the Tribe; dismissed); *Rosales v. Kean Argovitz Resorts*, No. 00-cv-1910 (S.D. Cal. 2001) (Attorney Webb attempted to raise claims under the Tribe's gaming Compact with California against the Tribe's then-management contractor; dismissed); *Rosales v. U.S.*, No. 01-951 (S.D. Cal. 2002) (Attorney Webb sued federal agencies arguing Mr. Rosales and Ms. Toggery were entitled to the Tribe's lands; district court entered summary judgment for defendant U.S., holding ***"the parcel is held by the United States in trust for the benefit of the Jamul Tribe***") (emphasis added), *aff'd* 73 Fed. Apx. 913 (9th Cir. 2003) (***Tribe was a necessary and indispensable party under Rule 19***), *cert. den*. 541 U.S. 936 (2004); *Rosales v. U.S.,* No. 1:03-cv-01117 (Dist. D.C. 2003) (Attorney Webb yet again fraudulently sued in the Tribe's name along with Mr. Rosales and Ms. Toggery, yet again challenging a Tribal election; dismissed), *aff'd* No. 07-5140 (D.C. Cir. March 27, 2008); *Rosales v. Pacific Regional Director,* 39 IBIA 12 (March 4, 2003) (Attorney Webb yet again challenged a tribal election; dismissed); *Rosales v. California*, No. GIC878709 (S.D. Sup. Ct. March 20, 2007) (Attorney Webb yet again falsely claimed he represented the Tribe along with Mr. Rosales and Ms. Toggery, seeking to enjoin construction on the Tribe's reservation claiming disturbance of human remains, without any evidence whatsoever; dismissed, Tribe was an indispensable party); *Rosales v. U.S.,* No. 07-624, 2007 WL 4233060 (S.D. CA Nov. 28, 2007) (Attorney Webb yet again fraudulently sued in the Tribe's name along with Mr. Rosales and Ms. Toggery, essentially re-filing the S.D.

(continued...)

These plaintiffs have consistently failed in these efforts to undermine the Tribe, and have been admonished by several courts for their actions, but for now they and their attorney Patrick Webb – a neighbor of the Tribe acting effectively *in propria persona* – remain undeterred.[2]

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[1](...continued)
Superior Court case cited above in federal court, again making unsupported NAGPRA claims against federal officials; case again dismissed under Rule 19), *appeal dism'd for failure to prosecute*, No. 08-55027 (9th Cir. Aug. 12, 2009); *Rosales v. U.S.*, 477 F. Supp. 2d 119 (D.D.C.) (Attorney Webb again challenged a Tribal election; case dismissed), *aff'd* 275 Fed. Appx. 1 (D.C. Cir. 2008); *Rosales v. U.S.*, No. 98-860, 89 Fed. Cl. 565 (Fed. Ct. Cl. 2009) (Attorney Webb sued yet again under NAGPRA, to invalidate tribal elections and to wrest from tribal government beneficial ownership of two parcels of land; case dismissed), *aff'd*, No. 2010-5028, *cert. den.* 131 U.S. 2882 (2011); *Rosales v. Off Duty Officers*, No. 37-2009-00092322 (S.D. Sup. Ct) (Attorney Webb again sued claiming, without supporting evidence, disturbance of human remains; case dismissed because Tribe was a necessary and indispensable party), *appeal dism'd*, 4th Dist. Ct. App. No. D064058 (7/30/2013); *Rosales v. Caltrans,* No. 37-2014-00010222 (S.D. Sup. Ct.) (Attorney Webb once again alleged, without supporting evidence, mistreatment of human remains and funerary objects and attacking Tribe's beneficial interest in Reservation; case dismissed because Tribe is a necessary and indispensable party), *aff'd* 2016 WL 124647 (Cal. 4th DCA 2016).

[2] A California Court of Appeal that recently adjudicated Attorney Webb's appeal of Rosales and Toggery's claims almost identical to those raised here. The Court noted that "appellants [Rosales and Toggery] have been in a decades-long dispute with members of the JIV for control and management of the Tribe and its land. The dispute between Rosales and Toggery and the Tribe has involved seemingly endless litigation, with commensurate negative results for appellants. Yet, appellants remain undeterred.... Although appellants maintain that their claims [regarding the alleged disinterment of alleged familial remains] are against
(continued...)

This case directly challenges actions taken by the Jamul Indian Village on its federal Indian trust lands. In 2014 the Tribe commenced construction of a Tribal casino on its reservation under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* ("IGRA"). Plaintiffs allege that in constructing the casino, the Tribe disinterred and removed ashes – human and funerary remains of plaintiffs' families that had allegedly been scattered throughout the Jamul Reservation – from the land.

It is worth noting that ***no human remains or funerary objects were ever uncovered during construction***, despite careful cultural monitoring of all construction activity. *See* SER at 11-12 (Pinto Dec. ¶ 17);[3] ER 5 ("In the course of

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[2](...continued)
Caltrans, it is clear ... that this action is but yet another attempt to derail the JIV as part of the long-standing dispute between appellants [Rosales and Toggery] and the leadership of the JIV that has led to litigation in a variety of forms for more than 20 years." *Rosales v. Caltrans,* 2016 WL 124647 *1 (4th DCA 2016). The Court admonished Rosales, Toggery and attorney Web for their litigation tactics which "border on being frivolous." *Id.* * 10. In *Rosales v. United States,* 89 Fed. Cl. 565, 571-572 (Fed. Cl. 2009), the federal court similarly admonished Rosales, Toggery and Webb for their tactics and misuse of the judicial system.

[3]Plaintiffs included an illegible copy of Tribal Chairperson Pinto's Declaration in their Excerpts of Record ("ER"), at pages 145-50. Tribally-Related Defendants include a legible copy in their Supplemental Excerpts of Record ("SER") at pages 8-13.

my monitoring of this undertaking, there were no human remains, funerary objects, or items of significant cultural value identified"). It is also important to understand that the Tribal cemetery "is located outside the boundaries of the Tribe's federal Indian trust land," that "[c]onstruction of the Tribe's gaming facility occurred exclusively within the Tribe's federal Indian trust land," and that "***[n]o construction occurred on the Tribal cemetery***, which is located on the opposite side of the Tribe's federal Indian trust land from the gaming facility." SER 12 (Pinto Dec. ¶¶ 18-20) (emphasis added). Because of plaintiffs' incessant inflammatory and misleading argumentation, the point bears repeating: no human remains or funerary objects were ever uncovered during construction, and no construction occurred in the Tribal cemetery.

Although plaintiffs' alleged dispute is with the Tribe, plaintiffs did not sue the Tribe because it is immune. Instead, they sought to circumvent the Tribe's immunity by suing three Tribal government officials (Chairwoman Erica Pint, and Tribal Council members Carlene Chamberlain and Kenny Meza), the Tribe's development partners Penn National Gaming, Inc. ("Penn") and San Diego Gaming Ventures LLC, and the Tribe's general contractor C.W. Driver, Inc.

(collectively, "Tribally-Related Defendants"). Plaintiffs also sued two federal officials.[4]

Contrary to their misleading argument here, plaintiffs' Third Amended Complaint ("TAC") alleged that: (1) the Tribe is not a federally-recognized Tribe; (2) the land at issue in this suit, on which construction occurred, is not the Tribe's federal Indian trust land; and (3) the Tribe's actions and those of the defendants violated section 10.8 of the Tribal-State Gaming Compact between the Tribe and the State of California. *See* ER 40:22--41:3, 46:26 (TAC ¶¶ 12, 33).

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[4]This case raises allegations and arguments that are essentially identical to those plaintiffs and attorney Webb made against a different set of defendants in at least two prior cases. *See Rosales v. Caltrans,* No. D066585, 2016 WL 124647 (4th Dist. Ct. App. Div. 1 Jan. 12, 2016) (dismissal upheld on grounds that the Tribe was a necessary and indispensable party in an action collaterally attacking the Tribe's status and the status of Tribal lands); *Rosales v. United States*, No. 07-cv-0624 (S.D. Cal. Nov. 28, 2007) (Attorney Patrick Webb claimed to represent Mr. Rosales, Ms. Toggery and the Tribe in suing federal officials claiming violations of NAGPRA, claimed discovery of human remains with no supporting evidence, and seeking to enjoin construction on the Tribe's reservation; case dismissed). Both of those cases made the very same allegations against Caltrans - based on the same state and federal statutes - made against defendants here. The California Court of Appeal's opinion in the latter of those two cases, while not technically binding here because different defendants were named, is directly on point and thus instructive. It also collaterally estopps Plaintiffs from re-litigating whether the statutes cited in the TAC apply. SER 35 (Tribally-Related Defendants' memorandum, arguing collateral estoppel); SER 3:20-24 (Reply arguing same).

The TAC directly challenged the Tribe's federal recognition, its reservation land on which the Tribe constructed its casino, which completed construction and opened to the public on October 10, 2016, and the Tribe's interests in its Tribal-State compact with the State of California. The TAC also collaterally challenged the Tribe's status and the status of its lands by arguing that California regulatory law applied to the Tribe's actions because the Tribe is not actually federally recognized, and that California regulatory law applied on Tribal lands because the Tribe's lands are not actually federal Indian trust lands. ER 40:22--41:3 (TAC ¶ 12). Plaintiffs' arguments against the federal defendants similarly challenged the Tribe's status and the status of Tribal lands.[5]

The TAC sought remedies directed against, and that would harm, the Tribe and its fundamental interests. Plaintiffs sought, among other remedies, to enjoin

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[5]*See* ER 40-41 (TAC paragraph 12 arguing that the federal government never lawfully acquired land for the Tribe and that the Secretary of the Interior's listing of the Tribe as a federally-recognized Tribe is beyond the scope of the Secretary's authority and not in accordance with the law); ER 162 (Plaintiffs' Memorandum in Opposition to Federal Defendants' motion to dismiss) at ER 169:17 (arguing that the federal government's taking of land into trust for the Tribe was a void real property transaction); ER 175:17-19 (arguing that the federal government erroneously determined that the Tribe's land is federal Indian trust land and illegitimately approved the tribe's Gaming Ordinance); ER 176:4-6 (arguing that plaintiffs' NAGPRA claims arise because of the federal government's decisions regarding the status of the Tribe's lands and Gaming Ordinance).

further construction on the Tribe's Indian lands, to require a written plan of action regarding the earth the Tribe had excavated while constructing the casino, and to require "repatriation" of the ash allegedly removed during construction onto the Tribe's federal Indian trust lands. ER 53-54 (TAC pp. 16-17). Those remedies, if granted by the court, would directly impact fundamental Tribal interests including its sovereignty, sovereign immunity, property, governmental revenue, and its use of its federal trust lands. Those remedies were clearly directed against the Tribe, for only the Tribe could permit, control and effect construction on its land, the handling of any Tribal excavated earth, and any supposed "repatriation" of ashes on Tribal lands.

Further, plaintiffs' State law claims would require a threshold adjudication that State civil regulatory law applied to the Tribe and its lands. State civil/regulatory law does *not* apply to Indian tribes on Indian lands. *See California v. Cabazon Band*, 480 U.S. 202 (1987); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Gobin v. Snohomish County*, 304 F.3d 909 (9th Cir. 2002); *Santa Rosa Band v. Kings County*, 532 F.2d 655 (9th Circ. 1976). Plaintiffs argued that State laws applied here because the Tribe is not federally recognized and its lands are not federal Indian trust lands. ER 40-41 (TAC ¶ 12). Thus, the TAC collaterally

attacked the Tribe's status and that of its lands. The District Court would have to rule on these matters in order to adjudicate the complaint.[6]

The District Court correctly dismissed the TAC, finding that the Tribe is a necessary and indispensable party to a lawsuit attacking – both outright and collaterally – the Tribe's federal status, that of its lands, and its Tribal-State Compact. Because the Tribe is federally-recognized and could not be joined as a defendant due to its sovereign immunity, the lawsuit could not proceed.

The District Court thoroughly analyzed the Rule 19 factors and found the Tribe to be both necessary and indispensable. The Tribe was necessary because the TAC had "directly challenge[d] the JIV's identity as a recognized tribe and the

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[6]The California Court of Appeal, which dismissed a complaint filed by Attorney Patrick Webb on behalf of Mr. Rosales and Ms. Toggery that was similar in all relevant respects to the one at issue here, held in *Rosales v. Caltrans*: "Plaintiffs contend that they are the rightful owners of their ancestors' "remains" that they claim were deposited on the property, unlawfully removed from that property, and moved to the Caltrans Project site. These claims are dependent on the property in question not being Tribal property and the JIV not having a superior right to control over the soil and any objects contained in the soil... It is readily apparent that the vast majority of the statutes on which plaintiffs rely as the basis for their requested relief are dependent on the JIV and its land being subject to California state law. In order to effectively address plaintiffs' claims, the trial court would necessarily have to determine the status of the JIV and its lands. Thus, the JIV could suffer prejudice if the court were to conclude, in the JIV's absence, that it is not in fact a federally recognized tribe or that the land in question is not land held in trust for the tribe." 2016 WL 124647 at 10-11.

extent of its interest" in Tribal lands. ER 14:14-15. "JIV's identity and interest in property are 'legally cognizable interests' or 'legally protected interests' within Rule 19's scope." ER 14:17-18. The TAC also alleged a "violat[ion] the tribal-state Compact between the JIV and the State of California. The Ninth Circuit has 'repeatedly held that '[n]o procedural principle is more deeply imbedded in the common law than that in an action [challenging the terms of] a contract, all parties who may be affected by the determination of the action are indispensable.'" ER 15:4-8 (citations omitted). All of these tribal interests were legally cognizable and the TAC's challenge to them rendered the Tribe a necessary party.

The District Court recognized (as had numerous courts before it, and as this Court has held) that the Tribe is federally recognized, and that it had not waived its immunity from suit. "It's joinder is therefore not feasible." ER 15: 18-19.

Although the Tribally-Related Defendants extensively briefed the Rule 19 issue in their motion to dismiss, ***plaintiffs failed to address it at all in their opposition***. *See* ER 219-248. Having conceded the issue in the District Court, plaintiffs should be precluded from raising new objections for the first time on appeal. *See Williby v. Aetna Life Ins. Co.*, 867 F.3d 1129, 1136-1137 (9th Cir. 2017); *Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011); *Komatsu, Ltd.*

v. States S.S. Co., 674 F.2d 806, 812 (9th Cir. 1982).

Next, the District Court properly considered the Rule 19(b) factors. ER 16-17. The Court concluded that the Tribe is an indispensable party, the case cannot proceed without it, and "because JIV cannot be joined, this case cannot proceed on the operative complaint." ER 17: 9-10.

The District Court also correctly dismissed the TAC as against the three Tribal official defendants on additional grounds. Their actions with regard to the construction at issue were taken in their official capacities and within the scope of their official authority. Thus the Court correctly found that these Tribal officials were immune. *See* ER 12:1–13:14 (*citing Cook v. AVI Casino Enters. Inc.*, 548 F.3d 718, 727 (9th Cir. 2008); *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1091-92 (9th Cir. 2007).

The Court distinguished *Ex Parte Young,* 209 U.S. 123 (1908) and *Salt River Project Agr. Imp. & Power Dist. V. Lee,* 672 F.3d 1176, 1181 (9th Cir. 2012), because those cases only permitted actions for prospective injunctive relief against government officials when a plaintiff alleges the officials violated the federal Constitution, a federal statute, or federal common law. ER 11 (Order 6: 20-27). In all other circumstances Tribal officials are immune from suit. Here, the District

Court correctly found that "Plaintiffs' allegations are vague and conclusory. Plaintiffs do not specify which defendants intentionally or inadvertently excavated and removed the [alleged] human remains. Where tribal defendants' immunity hinges on the nature of their specific conduct, plaintiffs must allege more before the court can assume on a motion to dismiss that Meza, Chamberlain or Pinto excavated or removed any familial remains, and thus are not immune." ER 12 (Order 7: 21-28).[7]

As to plaintiffs' assertion that they could sue the Tribal officials in their individual capacities for damages, the Court correctly found that the real party in interest in the TAC is the Tribe, not the individuals. "[T]he complaint does not allege Meza, Chamberlain or Pinto took action outside their capacities as JIV officials." ER 13: 6-7. Plaintiffs "'cannot circumvent tribal immunity by the

[7] The TAC fails to describe any specific acts leading to the harms alleged or to link any of the Tribally-Related Defendants to any specific alleged wrong. It also fails to describe with any specificity the location on which the alleged acts occurred, referring only to land that is on "the government's portion of the Jamul Indian cemetery." But the Jamul Indian cemetery is off the Tribe's reservation, set apart from the Jamul Casino construction, and remains fully intact. No construction has ever occurred on the cemetery nor have any of the defendants taken any action with regard to the cemetery in any way related to the allegations in the TAC. SER 12-13, 26 (Pinto Dec. ¶¶ 18-21, and Exhibit 8). Thus, there are no specific allegations against any of the Tribal officials.

simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity.'" ER 13: 8-10 (*quoting Cook v. AVI Casino Enters., Inc.,* 548 F.3d 718, 727 (9th Cir. 2008)).

Plaintiffs now cite *Lewis v. Clarke*, 137 S.Ct. 1285 (2017), arguing that officials Meza, Chamberlain and Pinto lack immunity from suit simply because the TAC sought, among other remedies, monetary damages. Plaintiffs misconstrue *Lewis,* which undermines their argument and supports affirmance. The District Court correctly dismissed the Tribal officials, both because the Tribe was an indispensable party, and also because they are immune.

Dismissal was further warranted because plaintiffs lacked Article III standing, and because the TAC failed to state a claim upon which relief may be granted. Most of the statutory provisions the TAC cites – other than that for conversion – would not on their own terms apply to the Tribally-Related Defendants, and plaintiffs failed to allege sufficient facts to state a claim for conversion. Even if plaintiffs had pled a conversion claim, the Tribe's absence precludes adequate relief for presumably if any artifacts had been discovered during construction on the Tribe's reservation, they would be in the Tribe's

possession. Because the Tribe is not a party hereto, no relief could be fashioned as against the Tribe.

The District Court properly dismissed the TAC which was fatally flawed in numerous ways. Now, on appeal, plaintiffs vainly seek to retreat from their complaint and re-cast its allegations and requested remedies. Their attempt to ignore the TAC's fatal arguments and allegations must fail. This Court should affirm.

II. JURISDICTIONAL STATEMENT

Plaintiffs' Opening Brief failed to articulate the basis of both the District Court's and this Court's jurisdiction, in violation of Fed. R. App. P. 28(a)(4) and 9th Cir. Rule 28-2.2. The District Court lacked jurisdiction for the reasons set out in defendants' motions to dismiss, *see* SER 30-49, and in the District Court's Order dismissing the case. *See* ER 6-18.

The District Court's Order dismissing the TAC with prejudice was filed on August 30, 2017. ER 6-18. Plaintiffs noticed this appeal on September 27, 2017. ER 3. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because the appeal is from a final order disposing of all claims.

III. STATEMENT OF ISSUES

1. Whether the District Court abused its discretion in finding the Tribe a required party and dismissing the TAC.

2 Whether the District Court correctly dismissed the TAC as against defendants Pinto, Chamberlain and Meza on the independent grounds of immunity.

IV. STATEMENT OF THE CASE

A. Factual Background[8]

The Tribe's efforts to exercise its federal rights to construct and operate a tribal casino under the Indian Gaming Regulatory Act ("IGRA") commenced more than 25 years ago. In 1993, the Tribe adopted a Gaming Ordinance that was subsequently federally reviewed and, in 1999, approved under IGRA. *See* 64 Fed.

[8] Plaintiffs' brief includes a section entitled "Statement of the Facts." Opening Brief ("Br.") 17-33. Pages 17-23 include some alleged "facts" – most of which lack specificity and are thus generally unintelligible as to the Tribally-Related Defendants – and some legal argument disguised as fact. Pages 23-33 include legal argument – lifted from the TAC – that does not even attempt to disguise itself as fact. Tribally-Related Defendants/Appellees hereby object to all of these alleged "facts".

Reg. 4722, 4723 (Jan. 29, 1999); SER 10 (Pinto Dec. ¶ 8). Also in 1999, the Tribe negotiated and entered into a Tribal-State Compact with California under IGRA. The Compact was approved by the Department of the Interior on May 5, 2000, *see* 65 Fed. Reg. 31189-01 (May 16, 2000), and ratified by the California Legislature. Cal. Gov't Code § 12012.25(a)(22); SER 10 (Pinto Dec. ¶ 9.)

In 2011, pursuant to Compact section 10.8.1 which gives the Tribe jurisdiction over the environmental review process for an on-reservation tribal gaming project,[9] the General Council (the Tribe's governing body) adopted a Tribal Gaming Project Environmental Review Ordinance. SER 10-11 (Pinto Dec. ¶ 11). The Environmental Ordinance provided for conducting an environmental review of potential casino impacts. The Tribe circulated its draft Environmental Impact Evaluation to State and local entities for public review and comment, including a public meeting for public comment. SER 11 (Pinto Dec. ¶ 12). The Tribe then incorporated all public comments and responses thereto in a Final Tribal Environmental Impact Evaluation, which it subsequently approved. *Id.* The Tribe also entered into agreements with Penn National Gaming, Inc. and its wholly

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[9]*See* Addendum, *infra*, pages 72-85; http://www.cgcc.ca.gov/documents/compacts/original_compacts/Jamul_Compact.pdf.

owned LLC, San Diego Gaming Ventures, to finance, develop, construct and manage the Tribe's casino. *Id.* (Pinto Dec. ¶ 15).

The Tribe commenced construction of its casino in early 2014. *Id.* (Pinto Dec. ¶16). During the entire excavation phase of construction, the Tribe had a cultural monitor closing observing all construction activities to ensure that if any cultural items or human remains were inadvertently discovered, they would be handled properly. *Id.* (Pinto Dec. ¶ 17); ER 35 (Meza Dec. ¶ 20). No such items or remains were ever discovered. SER 12 (Pinto Dec. ¶ 18); ER 35 (Meza Dec. ¶ 19: "We have located no remains and no culturally significant artifacts during the [casino's] construction"). All construction occurred on the Tribe's federal Indian trust land on a site located on the *opposite side* of the Tribe's land from the Tribal cemetery, which cemetery is *not* on the Tribe's reservation. SER 12, 26 (Pinto Dec. ¶¶18-21 and Ex. 8). Indeed, under federal law, the Tribe's casino can *only* be located on its federal Indian land. *See* 25 U.S.C. § 2710(d)(1). Plaintiffs' opening brief (like the TAC) misleadingly refers to the construction site as "the U.S. government's portion of the Indian cemetery in Jamul" (e.g., Br. 17), ***however no construction was performed on the Tribal cemetery***, which remains entirely undisturbed from the casino construction. SER 12, 28-29 (Pinto Dec. ¶ 20-21, Ex.

9). Construction occurred exclusively within the Tribe's federal Indian trust land, outside the bounds of the nearby cemetery. SER 12, 26-29 (Pinto Dec. ¶ 20-21, Exs. 8-9). The Tribe employed an on-site monitor to determine whether any remains were present in the soil, but no human or cultural remains were found in the course of construction. SER 11-13 (Pinto Dec. ¶ 17, 28); Er 34-35 (Meza Dec. ¶¶ 18-19).

B. Procedural Background

Plaintiffs filed their original Complaint on May 27, 2015. ECF 1. They filed a First Amended Complaint on May 20, 2016. ECF 50. Defendants moved to dismiss the First Amended Complaint (ECF 32, 33) which the District Court granted on May 3, 2016. ECF 49. Plaintiffs filed a Second Amended Complaint on May 23, 2016. ECF 52. Defendants again moved to dismiss. ECF 62, 63. Before defendants' motions to dismiss could be heard, plaintiff's yet again amended the complaint, filing the TAC at issue here (without leave of Court in violation of Fed. R. Civ. P. 15(a)(2)), on July 5, 2016. The District Court then construed the pending motions to dismiss as responding to the TAC. ECF 66. The motions to dismiss were heard on October 7, 2016.

On August, 30, 2017, the District Court dismissed the TAC with prejudice. This appeal followed.

V. SUMMARY OF ARGUMENT

This Court should affirm the District Court's dismissal under Rule 19. Although plaintiffs filed a 20-page opposition to Tribally-Related Defendants' motion to dismiss, they failed entirely to argue against dismissal on the grounds of Rule 19. *See* ER 9 (Order dismissing TAC: "Plaintiffs' opposition does not address the second [Rule 19] argument"); *see* ER 219-48 (Plaintiffs' Opposition). Plaintiffs thus waived the issue on appeal. *See Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991) ("Failure to raise or brief an issue in a timely fashion may constitute waiver of the issue on appeal") (*citing In re Riverside-Linden Investment Co.*, 945 F.2d 320, 324-25 (9th Cir. 1991)).

Dismissal was proper under Rule 19. The TAC alleges that the Tribe is not federally-recognized and attacks the status of the Tribe's federal Indian lands and its Tribal-State Compact with the State of California. It seeks injunctions that would operate against the Tribe, its laws, its governmental policies and actions, its intergovernmental agreements and contracts, and its federal trust Indian lands. The

Tribe is thus a necessary party to the action.

The Tribe is also indispensable and thus required under Rule 19(b). The District Court correctly considered each of the Rule 19 factors and found the Tribe to be a necessary and indispensable party. ER 15-17 (Order 10-12). The District Court did not abuse its discretion in finding the Tribe to be an indispensable party, and its dismissal should therefore be affirmed.

Dismissal as against specially-appearing Tribally-Related Defendants Pinto, Chamberlain and Meza was also warranted because they are Tribal officials who were sued for actions taken in their official capacities and authority, and were therefore immune from suit. Plaintiffs failed to allege with any specificity that these defendants had violated any particular federal statutes, and plaintiffs failed to name these individuals as defendants in their official capacities, so that the doctrine of *Ex Parte Young* did not apply to permit suit for prospective injunctive relief against them. Plaintiffs' reliance on *Lewis v. Clarke* similarly misses the mark. *Lewis* involved claims and remedies directed exclusively against an individual tribal employee. But when, as here, the action and remedies would operate against a sovereign Tribe, the Tribe is the real party in interest and the sovereign's immunity extends to its officials. Further, *Lewis* is distinguishable because it dealt

with a low level tribal employee – a vehicle driver -- acting off of the reservation, not – as is the case here – to Tribal government officials acting in their official capacities within the Tribe's Reservation. Finally, *Lewis* recognizes that official immunity defenses may immunize Tribal government officials.

Dismissal was warranted for additional reasons as well. As argued below, the TAC failed to state a claim because it was based on alleged violations of statutory provisions that either do not apply do not provide plaintiffs a cause of action. SER 32-45. Dismissal was warranted because plaitniffs were collaterally estopped from re-litigating whether the Tribe is a required party in an action attaching the Tribe's status and lands. SER 35. Finally, dismissal was also warranted because plaintiffs lacked Article III standing. SER 7.

This Court should affirm.

VI. ARGUMENT

A. Having Failed to Oppose Rule 19 Dismissal in the District Court, Plaintiffs Should Not Be Permitted to Argue Against It For the First Time On Appeal

Plaintiffs' Opposition to Tribally-Related Defendants' motion to dismiss is included in its entirety at ER 219-48. Although Tribally-Related Defendants' lead

argument for dismissal was Rule 19 (*see* SER 31-35), plaintiffs' opposition below did not contest the Tribe's indispensability. *See* ER 219-248. Plaintiffs ignored Rule 19 altogether, thereby waiving any argument against it.[9] Having failed to oppose Rule 19 dismissal below, this Court should not allow plaintiffs to do so now on appeal. *See Williby*, 867 F.3d at 1136-1137; *Baccei*, 632 F.3d at 1149; *Komatsu, Ltd.*, 674 F.2d at 812 (party waived issue where it "relied ... exclusively" on other arguments below). *Compare Conservation Northwest v. Sherman*, 715 F.3d 1181, 1188 (9th Cir. 2015) (argument forfeited where mentioned but "buried in the middle of a section" addressing different issues); *Moreno Roofing Co., Inc. v. Nagle*, 99 F.3d 340, 343 (9th Cir. 1996) (counsel's remarks during oral argument on motion for summary judgment did not sufficiently raise and preserve matter for appeal); *Murrelet v. Babbitt*, 83 F.3d 1060, 1063 (9th Cir.1996) (Ninth Circuit generally will not consider "an issue raised for the first time on appeal"); *In re Wind Power Sys., Inc.*, 841 F.2d 288, 292 n.1 (9th Cir. 1988) ("As a general rule, the court of appeals does not consider issues raised for the first time on appeal").

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[9]In a flawed, mis-named, and procedurally delinquent "motion to continue the hearing date," Plaintiffs belatedly and inappropriately tried to argue against Rule 19 dismissal. ECF 72-1. The District Court admonished Plaintiffs for their tactics and unauthorized additional argumentation, and struck that so-called "motion," including its unauthorized argumentation, from the docket. ECF 86.

B. The District Court Correctly Dismissed the TAC for Failure to Join the Tribe as a Necessary and Indispensable Party

1. Standard of Review

This Court reviews a district court's dismissal under Rule 19. *Ward v. Apple, Inc.*, 791 F.3d 1041, 1047 (9th Cir. 2015). Plaintiffs must overcome the presumption that the district court's decision is correct. *See Walsh v. Centeio,* 692 F.2d 1239, 1244 (9th Cir. 1982) (deferring to district court's discretion in analyzing abuse of discretion under Rule 19). Moreover, plaintiffs' claimed error must implicate substantial rights, and this Court must disregard any district court "errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111. This Court may affirm on any ground with support in the record, whether or not relied on by the district court. *See, e.g., Wood v. City of San Diego*, 678 F.3d 1075, 1086 (9th Cir. 2012).

2. Rule 19 Substantive Standards

Under Rule 19, the court first determines whether an absent party is "required" and, if so, "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19.

A party is "required" (formerly "necessary") under Rule 19(a) when it has a "legally protected interest" in the subject of the suit. *Shermoen v. U.S.,* 982 F.2d 1312, 1317 (9th Cir. 1992). 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). This Court includes Indian Tribes among "public entities" for purposes of Rule 19. *See Peabody W. Coal Co.*, 610 F.3d at 1082. Another interest under Rule 19 is "the sovereign power of the tribes to negotiate compacts." *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002). Also, "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).

Rule 19(b) prescribes four considerations in determining whether a case should be dismissed when a required party cannot be joined: (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by protective provisions in the judgment, shaping the relief, or other measures; (3) whether a judgment rendered in the persons absence will be

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

3. The District Court Was Within its Discretion in Finding the Tribe a Necessary and Indispensable Party

Plaintiffs argue that the Tribe has no protected interest in this case because it has no interest in plaintiffs' families' remains. Br. 34-36. Then they argue that the Tribe has no interest in the action because plaintiffs "only seek remedies against the non-federal Appellees." Br. 37. And *then* they argue that the Tribe's interests are represented in this case because the Tribe is represented "by the Appellee executive council members." Br. 37. As explained below, plaintiffs' arguments completely miss the point of Rule 19.

Plaintiffs also claim, incredibly, that even though their TAC explicitly challenges the Tribe's status, the status of Tribal lands, and the Tribe's Tribal-State Compact, those matters are not actually at issue in this case. Br. 38-41. Plaintiffs conveniently forget that the Tribe's federal recognition was so central to their case that they sought to continue defendants' motions to dismiss in order to conduct discovery regarding the Tribe's federal recognition, filing an unauthorized twenty-page brief on the question. Dkt. 72-1. Plaintiffs ignore that the TAC's remedies

directly implicate the Tribe's sovereignty, its lands and use thereof, and the implementation of the Compact.

After arguing the Tribe is not a necessary party, Plaintiffs baldly assert – with no argument – that the Tribe is not an indispensable party because a judgment in favor of Plaintiffs would not prejudice the Tribe and would be adequate as to existing parties, and because Plaintiffs would have no adequate remedy if the action were dismissed for non-joinder. Br. 45. These arguments are both unsupported and wrong.

a. The Tribe is a Necessary Party Because Significant Tribal Interests Are At Issue Here and Those Interests Are Not Represented by Individual Defendants

The first prong of plaintiffs' argument alleges that the Tribe lacks any protected interest in this case because the Tribe has no interest in Plaintiffs' families' remains (Br. 34-36), because their own alleged rights to their families' human remains are individual rights (Br. at 36), and because Plaintiffs "only seek remedies against the non-federal Appellees." Br. at 37. These arguments are based on an erroneous understanding of Rule 19.

What matters for purposes of Rule 19 is not whether the absent party is (or could be) subject to the same claims as the named defendants, whether the absent party has a specific interest in the personal property at issue in the lawsuit, or whether the remedies sought operate directly against the absent party. Rather, what matters is whether the absent party claims an interest that is at stake in the litigation. *Shermoen,* 982 F.2d at 1317 ("Under [Rule 19], the finding that a party is necessary to the action is predicated only on that party having a claim to an interest."). Here, the Tribe clearly has an interest in this case's outcome. Indeed, the Tribe's stakes in this litigation are high. Plaintiffs' claims and requested remedies would require the Court to adjudicate the Tribe's status and that of its lands as threshold questions, as well as implicating its laws and contracts.

The TAC directly attacks the Tribe and its lands:

> "[The Tribe] did not exist, and was not, in 1934, and is not now, a federally recognized tribe under the Indian Reorganization Act... It has never ... lawfully acquired or exercised, governmental power over the government's portion of the cemetery or any reservation. Nor has any land been lawfully acquired for the JIV by the United States. JIV has no sovereign immunity ... Any purported listing of the JIV as a tribe ... is beyond the scope of the Secretary [of the Interior's] authority..."

ER 40-41 (TAC ¶12.)

The TAC also directly attacks the Tribe's Compact and its concomitant relationship with the State, ER 46:26 (TAC ¶ 33), which implicates other Tribal laws. SER 10 (Pinto Dec. ¶ 11). The TAC's remedies attack all three: the Tribe's status and sovereignty, the Tribe's lands and its control and use thereof, and the Tribe's Compact and ability to operate thereunder and comply therewith.

The TAC indirectly attacks the Tribe and its lands, as explained further below, because it is entirely premised on the mistaken proposition that California civil/regulatory law applies to the Tribe acting on the Jamul reservation – a proposition that could only be true if Plaintiffs' allegations that the Tribe is not federally recognized and its land not Indian trust land were found to be accurate.

In light of the TAC's attacks on the Tribe and its lands, the Tribe has numerous fundamental interests at stake in this action, which only it can represent. First and foremost, the Tribe has a fundamental interest in its very existence as a federally-recognized tribe. Without being federally recognized, the Tribe cannot partake in essential government programs including housing, health care, and education, which are available only to federally-recognized Tribes. *See, e.g.,* 25 U.S.C. § 450a; 25 U.S.C. § 450f; 25 U.S.C. § 1601.

Second, the Tribe has a fundamental sovereign interest in its beneficial ownership of, and governmental authority over, its federal Indian lands. *See Rosales,* 73 Fed. App'x. at 914-15.

Third, without Indian lands over which the Tribe exercises jurisdiction, the Tribe's Compact, Gaming Ordinance, and other related Tribal laws would effectively be invalidated and the Tribe would lose the right to operate a governmental gaming enterprise under IGRA. *See* 25 U.S.C. § 2702(3); *id.* § 2703(4); *id*. § 2710(d)(1); Compact § 4.2. *See Peabody W. Coal Co.,* 610 F.3d at 1082.

Fourth, the Tribe clearly "has an interest in [this] lawsuit that could result in the invalidation or modification of one of its ordinances, rules, regulations, or practices." *Peabody W. Coal Co.,* 610 F.3d at 1082. Rosales and Toggery's action could result in the invalidation or modification of the Tribe's federally-approved Tribal-State Compact, Gaming Ordinance, Environmental Ordinance, and other Tribal laws, all of which are contingent upon the existence of a federally-recognized tribe with federal Indian trust lands. For example, 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). IGRA

also requires that Tribal-State compacts be executed and implemented by "[a]ny Indian tribe having jurisdiction over the Indian lands upon which" gaming is to be conducted. 25 U.S.C. § 2710(d)(3)(A). The Tribe's Compact authorizes the Tribe to operate a gaming facility "only on [its] Indian lands ...." SER 15 (Compact § 4.2, Pinto Dec. Ex. 2). The Tribe's ordinances and gaming compact are thus at stake in this litigation.

Fifth, the Tribe has contractual interests that are at stake here. The Compact itself is a contract. *See Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1098 (9th Cir. 2006). Further, the Tribe entered into agreements for the management, construction and operation of its gaming facility. SER 11 (Pinto Dec. ¶ 15). To the extent findings made in the course of adjudicating the TAC would enjoin the Tribe from conducting construction on its federal Indian trust land, plaintiffs' action could potentially undermine the Tribe's ability to conduct gaming under the Compact and invalidate or modify the Tribe's contracts with its partners. *Id.*; *Dawavendewa*, 276 F.3d at 1157.

Sixth, the Tribe has an interest in regulating its governmental activity and the activity of others on its Tribal lands. An order affecting construction activity on Tribal lands would undermine this sovereign right. Similarly, an order

requiring "repatriation" on Tribal lands would also undermine this sovereign right. These interests are paramount and render the Tribe a required party. *See, e.g., Rosales,* 73 Fed. App'x. at 914-15; *JAC v. Chaudhuri,* 2014 WL 3853148 ** 16-18; *Rosales,* 2007 WL 4233060 *6; *Rosales v. CalTrans*, 2016 WL 124647 **10-12.

Finally, in order for this Court to adjudicate the merits of plaintiffs' claims, it would need to pass judgment on Plaintiffs' attack against the Tribe's status and the status of the Tribe's lands. ER 3-4 (TAC ¶ 12). The case depends on the Court's finding that the various statutes cited in the complaint, such as California's Health and Safety Code, apply to the land and Tribal governmental actions at issue. But in order to determine whether the statutes apply the Court would have to first determine whether the land is federal Indian land and whether the Tribe is federally recognized. Thus, fundamental Tribal interests are at issue here.

In short, the District Court correctly found that the TAC "directly challenge[s] the JIV's identity as a recognized tribe and the extent of its interest in the [land on which construction occurred, which Plaintiffs have named the] Jamul Indian Cemetery." ER 14 (Order 9:14-15). And it correctly concluded that these interests are "legally cognizable" within Rule 19's scope. ER 14:17-18. The

District Court also correctly found that the TAC alleges "defendants' excavation and construction activities violate the tribal-state Compact between the JIV and the State of California," ER 15:4-6, and it correctly concluded that "'in an action [challenging the terms of] a contract, all parties who may be affected by the determination of the action are indispensable.'" ER 15:7-8.

Plaintiffs next argue that even if significant Tribal interests are implicated in this case, those interests are represented by the three individual defendants – Pinto, Chamberlain, and Meza – who are sued in their personal capacities.[10] Specifically, Plaintiffs argue that the Tribe's interests are represented "by the Appellee executive council members." Br. at 37, 45.

However, the Tribal officials named as defendants in the TAC are sued in their "personal" capacities. ER 40 (TAC ¶ 11). As such, the only interests they can represent in this lawsuit are their personal interests, which clearly differ from any interests the Tribe may have. Individuals in their individual capacities cannot

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[10] The California Court of Appeal rejected these identical arguments and plaintiffs are collaterally estopped from repeating them. *Rosales v. Caltrans,* 2016 WL 124647, at *13 ("if named in their individual capacities, these individuals could represent only their own personal interests, and not the interests of the JIV. The JIV's interests would therefore remain unaddressed in this action, and the JIV would thus remain an indispensable party.").

and do not represent the Tribe's interests, which can only be represented by the Tribe, given its core governmental, sovereignty, jurisdictional, territorial and contractual interests at stake.

Plaintiffs' reliance on *Michigan v. Bay Mills Indian Community,* 132 S.Ct. 2024, 2035 (2015) is unhelpful. That case does *not* hold that a Tribe is not an indispensable party if the Tribe's government officials are sued in their personal capacities. The case is simply irrelevant. Plaintiffs' citation to *Salt River Project Ag. Improvement and Power Dist. v. Lee,* 672 F.3d 1176 (9th Cir. 2012)[11] at Br. 37 and 45 is also misguided. Plaintiffs there sued individual tribal officials in their *official* capacities. *Id.* at 1179-81. Tribal officials sued in their *official* capacities *may* be able to represent their Tribe's interests. However, Tribal officials sued in their *individual* capacities – as is the case here – cannot do so.

The Jamul Indian Village has paramount interests at stake in this litigation. Its very existence as an Indian tribe is threatened. Various Tribal laws are challenged here, the Tribe's Compact is under attack, and the Tribe's sovereign use

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[11] Plaintiffs mistakenly refer to this case as *Salt River Project Ag. Improvement and Power Dist. v. Headwaters Resources Inc*., however the quotes they attribute to this case on pages 37, 42 and 45 of their brief indicate that in fact they are citing the case known as *Salt River Project Ag. Improvement and Power Dist. v. Lee,* 672 F.3d 1176 (9th Cir. 2012).

of its federal Indian trust lands is challenged. None of these interests are, or can be, represented by any of the named defendants.

b. The Tribe is a Necessary Party because the TAC Would Require the Court to Adjudicate Core Tribal Interests

The second prong of Plaintiffs' argument alleges that the Tribe is not a necessary party because issues relating to the Tribe's federal recognition status, the status of Tribal lands, and the Tribe's Tribal-State Compact are not actually at issue in this case. Br. 38-41. This argument is absurd.

The TAC directly challenges the Tribe's status and the status of Tribal lands. ER 40-41 (TAC ¶12). This challenge is the foundation for every one of the TAC's claims for relief. In order to grant plaintiffs' requested relief, the District Court would have to first determine whether the Tribe is a federally-recognized tribe and whether the lands at issue in the TAC are federal Indian trust lands. Plaintiffs' entire case depends on the Court's first finding that the various statutes cited in the TAC, such as California's Health and Safety Code and Public Resources Code, apply to the land and Tribal governmental actions at issue.

If the land is federal Indian trust land, however, and if the actions at issue are Tribal governmental actions, the statutes on which plaintiffs' case rests do not

apply. *See California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 208 (1987) (California lacks civil/regulatory authority over Tribes on Indian lands); *Bryan v. Itasca County,* 426 U.S. 373, 390 (1976) (States lack civil/regulatory jurisdiction on Indian lands).

Further, the TAC explicitly argues that its claims arise under 25 U.S.C. § 465, *see* ER 42 (TAC ¶ 17), which authorizes the Secretary of the Interior to take land into trust for the benefit of federally-recognized Indian tribes. This provision is relevant because Plaintiffs challenge the status of JIV's Tribal lands, maintain the Tribe is not federally-recognized, and assert that the Secretary lacked authority to take land into trust for the Tribe under 25 U.S.C. 465. ER 40-41 (TAC ¶ 12). Thus, by Plaintiffs' own admission, the issues are necessarily implicated in their complaint.

Plaintiffs now belatedly claim that the TAC's explicit attacks on the Tribe's status and the status of the Tribe's trust lands, at TAC ¶ 12, are not integral to their lawsuit, and are offered merely as factual "historical context" Br. at 42. Plaintiffs' last-minute disavowal of the foundation of their Complaint is unavailing. The supposed "historical facts" at issue include legal argumentation – not fact – about why, in plaintiffs' opinion, the Jamul Indian Village is not a federally recognized

tribe and why its lands are not in trust for the Tribe. TAC ¶ 12. This is not mere background. Those two points – while erroneous – are fundamental to plaintiffs' claims and desired relief. Plaintiffs' lawsuit cannot be adjudicated unless the Court first determines whether the land is federal Indian trust land and whether the actions at issue were taken by a federally recognized Tribe. *See Cabazon,* 480 U.S. at 208; *Bryan v. Itasca County,* 426 U.S. at 390.

These necessary inquiries – into whether the Tribe is federally recognized and whether its actions occurred on Tribal trust land – obviously impact fundamental Tribal interests, as explained above. The Tribe's participation in federal programs in areas such as health care, education and housing – available only to federally-recognized tribes – is also at stake. *See, e.g.,* 25 U.S.C. §§ 450a, 450f; 25 U.S.C. § 1601. The inquiry would also jeopardize the Tribe's existing Gaming Compact with the State of California and its federally-approved Gaming Ordinance, both of which depend on the Tribe's being federally-recognized and having jurisdiction over its federal Indian trust land. *See, e.g.,* 25 U.S.C. § 2710(d)(1)(A)(1); *Dawavendewa,* 276 F.3d at 1157 ("a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation" potentially impairing the contract). The inquiry would also impact the Tribe's "sovereign

power to negotiate compacts," a power that is available only to federally-recognized tribes. *Am. Greyhound Racing, Inc. v. Hull,* 305 F.3d 1015, 1024 (9th Cir. 2002). And the inquiry would impact all existing laws and regulations passed by the Tribal government to date.

Plaintiffs' repeated protestations that the Tribe has no interests here and that the TAC does not explicitly seek to invalidate Tribal law, contracts or property rights, miss the point. *See, e.g.,* Br. at 35-37. The Tribe is a required party under Rule 19(b) because it has a "cognizable interest in the outcome of [this] litigation," *EEOC v. Peabody Western Coal Co.,* 610 F.3d 1070, 1082 (9th Cir. 2010), and numerous "legally protected interest[s]" in the subject of the suit. *Shermoen,* 982 F.2d at 1317. "[A] plaintiff's inability to state a direct cause of action against an absentee" is not relevant for purposes of Rule 19 joinder analysis. *EEOC,* 610 F.3d at 1081.

In short, the Tribal interests necessarily implicated here include the Tribe's federal recognition, land base, sovereignty, jurisdiction, laws and contracts, all of which go to the very core of Tribal existence and governance. These interests render the Tribe a required party, as numerous courts have previously found in plaintiffs' numerous prior cases. *See, e.g., Rosales v. United States,* 73 Fed. App'x

913, 914-15 (9th Cir. 2003); *JAC v. Stevens* 2014 WL 3853148 * 16-18 (E.D. Cal. Aug. 5, 2014); *Rosales v. U.S.,* 2007 WL 4233060 *6 (S.D. Cal. 2007); *Rosales v. CalTrans,* 2016 WL 124647 *10-12 (4th DCA Jan. 12, 2016).

c. The Tribe is an Indispensable Party Under Rule 19(b)

Plaintiffs next assert that the Tribe is not indispensable under Rule 19(b) because a judgment in favor of Plaintiffs would not prejudice the Tribe and would be adequate as to existing parties, and because Plaintiffs would have no adequate remedy if the action were dismissed for non-joinder. Br. 42-45. Plaintiffs are wrong.

Dismissal is warranted here under the four Rule 19(b) factors. First, all of the fundamental Tribal interests noted above would be severely prejudiced by an adverse judgment. Given the relief the TAC seeks – including cessation of construction activities on Tribal lands, and "repatriation" of alleged remains on tribal lands, based on finding that the Tribe is not a tribe, its Reservation is not a reservation, and it has violated its Compact with the State of California – the full impact of this prejudice would be immediately felt.

Plaintiffs devote several pages to arguing that *Thorpe v. Borough of Jim Thorpe,* 2011 WL 5878377 (M.D. Pa. 2011) stands for the proposition that an Indian Tribe is not a necessary party in a NAGPRA case relating to the remains of a member of that tribe. However *Thorpe* is distinguishable and Plaintiffs' argument again misses the point. *Thorpe* is distinguishable because the actions challenged in that case were taken by an alleged museum subject to NAGPRA's repatriation procedures, such that the Tribe whose members' ancestors' remains were allegedly at issue was not indispensable to the case. Here, however, no remains exist, and the alleged the actions at issue were allegedly taken by the Tribe itself on its Indian trust lands. Unlike *Thorpe*, plaitniffs here now disclaim repatriation of any items, rendering the NAGPRA repatriation procedures irrelevant. Br. 33. Further, the Tribe is an indispensable party here because plaintiffs' TAC reaches far beyond NAGPRA to challenge the Tribe's federal status, the status of Tribal lands, the Tribal-State Compact, and, indirectly, Tribal laws and ordinances, agreements, and related matters. None of those anti-tribal claims were at issue in *Thorpe,* which focused exclusively on repatriation of actual remains under NAGPRA. *Thorpe* is inapplicable. When, as here, a complaint challenges a Tribe's actions, existence, land, laws and agreements, the Tribe is

indispensable.

As to the second Rule 19(b) factor, it is not possible to lessen this prejudice to the Tribe. Plaintiffs TAC would require the Court to make findings about the Tribe's status and the status of its lands and its Compact that would undermine the Tribe's very existence and its Tribal Gaming and Environmental Review ordinances, and its interests in existing contracts. Such findings would also impede the Tribe's exercise of sovereignty and jurisdiction over governmental action on its Indian lands.

Plaintiffs TAC also seeks to "repatriate" ashes on Tribal lands (although their opening brief disclaims that remedy). An injunction ordering someone other than the Tribe to bury something on Tribal land, which is what the TAC seeks, would similarly impede the Tribe's exercise of sovereignty and jurisdiction over its land. None of this prejudice can be lessened.

In what amounts to an attempt to amend their TAC by this appeal, plaintiffs now deny that they seek to "enjoin any excavation, construction, or governmental activities." Br. 41. They misleadingly allege that all they want are "monetary damages and an injunction to maintain their families remains 'in place' in order to compensate the Plaintiffs for their severe emotional distress..." Br. 33. They

discuss their NAGPRA claims and remedies extensively, and ignore the fact that their TAC actually alleges claims and demands remedies under numerous California regulatory statutes as well.

Plaintiffs cannot amend their TAC at this late stage. Plaintiffs concede that they have known since at least "the end of 2015" – i.e., more than two years ago – that circumstances may have warranted new remedy requests. Br. 40. They filed four complaints in this case over the past three years, but with each amendment they elected to continue to seek remedies and assert claims that would directly impact the Tribe and its core interests. Plaintiffs cannot, at this late stage in the proceedings, after years of litigation and after their TAC has been dismissed with prejudice, amend their complaint through their appellate brief. The second factor under Rule 19(b) is fully satisfied.

With regard to the third Rule 19(b) factor, a judgment rendered in the Tribe's absence would not be adequate because only the Tribe has authority over construction and/or other actions on its Indian lands and over its property. No defendant has such authority. Thus, even if the District Court were to issue the injunctions sought in the TAC, defendants would be unable to carry them out and the Tribe would likely assert its immunity in any further action brought to enforce

against them. Accordingly, issuance of the remedies sought in the TAC would not resolve the dispute at issue.

Finally, although plaintiffs will not have an alternate forum following dismissal, "Courts have recognized that a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity." *Confederated Tribes of Chehalis Indian Reservation v. Lujan,* 928 F.2d 1496, 1500 (9th Cir. 1991) (citations omitted); *see Quileute Indian Tribe v. Babbitt,* 18 F.3d 1456, 1460-61 (9th Cir. 1994). The District Court correctly concluded that the Tribe's interest in its sovereign immunity far outweighs the lack of an alternative forum. ER 17:3-8.

4. The District Court Correctly Held that the Tribe Cannot be Joined Because It is Immune from Suit

The Tribe is federally recognized. *See* 82 Fed. Reg. 4915-16 (Jan. 17, 2017). This Court, like others before it, has acknowledged the Tribe's federal recognition. *See Jamul Action Comm. v. Chaudhuri*, 837 F.3d 958, 960 (9th Cir. 2016); *Rosales v. U.S.*, 89 Fed.Cl. 565, 571-72 & nn. 2-3 (2009); *Rosales v. U.S.,* 73 Fed. Appx. 913 (9th Cir. 2003)*; Rosales v. U.S.*, No. 07-0624, 2007 WL 4233060, at *5 & n. 4 (S.D. Cal. Nov. 28, 2007). Federal recognition carries with

it sovereign immunity. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *U.S. v. Salish Kootenai Coll., Inc.*, 862 F.3d 939, 943 (9th Cir. 2017). Thus, the Tribe is a necessary and indispensable party that cannot be joined. The District Court properly exercised its discretion to dismiss under Rule 19.

C. The District Court Correctly Dismissed the TAC As Against the Tribal Official Defendants on the Independent Grounds that They Are Immune from Suit

Dismissal of Tribal officials Pinto, Chamberlain and Meza was additionally warranted, because they were sued for actions taken in their official capacities and authority, the TAC as a whole is aimed against the Tribe, many of the remedies sought would operate against the Tribe, and the Tribal officials therefore share the Tribe's immunity from suit.

1. Standard of Review

"Issues of tribal sovereign immunity are reviewed de novo." *Burlington N. & Santa Fe Ry. v. Vaughn,* 509 F.3d 1085, 1091 (9th Cir. 2007).

2. The Tribal Official Defendants are Immune from this Action

"[T]ribal immunity extends to tribal officials acting in their representative capacity and within the scope of their authority." *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983). *See Marceau v. Blackfeet Hous. Auth*, 455 F.3d 974 (9th Cir. 2006); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985). Erica Pinto is Chairwoman of the Tribe and its Executive Committee (also known as the Tribal Council), and at all times relevant to the TAC has served as a duly elected member of the Executive Committee. SER 8-9 (Pinto Dec. ¶ 1). Carlene Chamberlain is, and at all relevant times has been, a duly elected member of the Executive Committee/Tribal Council. SER 13 (Pinto Dec. ¶ 27). Kenny Meza is currently Vice-Chairman of the Executive Committee/Tribal Council, a position to which he was elected on June 20, 2015. SER 13 (Pinto Dec. ¶ 26). These Tribal governmental officials acted, with regard to construction of the Tribe's federally-authorized gaming facility, in their official capacities and within the scope of their authority under applicable law. *See* SER 9-11 (Pinto Dec. ¶¶ 5-7, 11, 15); 25 U.S.C. § 2710§(d)(1)(A); SER 15 (Compact § 4.2). *See also* ER 40 (TAC ¶ 11) ("[e]ach individual Defendant has acted ... under the color of governmental authority").

Attempting to circumvent these Tribal officials' sovereign immunity, plaintiffs named them as defendants in their "personal capacities." ER 40 (TAC ¶ 11). But none of these officials acted in their individual capacities when they took action to approve and effect construction of the Tribe's casino. The TAC was correctly dismissed as to defendants Meza, Chamberlain and Pinto under Rule 12(b)(1) because the actions at issue were, and could only have been, taken by the Tribe acting by and through its Tribal officials in their official capacities. These officials were therefore immune from suit.

That this case is actually against the Tribe, and not against the named Tribal officials as individuals, is evidenced by the fact that the injunctive remedies plaintiffs seek – e.g., cessation of construction activities on the Tribe's lands, "repatriation" on the Tribe's lands, and transfer to Plaintiffs of custody of dirt dug on Tribal lands – could only apply to Tribal government defendants acting in their official capacities. These remedies do not and cannot apply to Pinto, Chamberlain, and Meza in their individual capacities because as individuals they lack authority to take any action on behalf of the. *See*, e.g. *Miller v. Wright,* 705 F.3d 919, 927-28 (9th Cir. 2012); *White Mountain Apache Tribe,* 779 F.2d at 480. Even in their official capacities, the Tribal official defendants can only act collectively as the

Executive Committee, carrying out the General Council's directives. *See* 9-10 (Pinto Dec. ¶¶ 5-7). Accordingly, although the TAC names them as "individuals" rather than "officials," it in fact attacks the Tribe they serve.

That the actions at issue here were official actions, taken in defendants' official capacities and within the scope of their legal authority, is further evidenced by the statutes that authorized them. IGRA authorizes tribes to "regulate gaming activity on Indian lands…", 25 U.S.C. § 2701(5) and provides that "the Indian tribe will have the sole proprietary interest and responsibility for" its Indian gaming, 25 U.S.C. § 2710(b)(2)(A). Only tribes may "exercis[e] regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction" consistent with IGRA. *Id.* at § 2713(d). Federal law thus vests the Tribe, acting through its officials, with authority to own, construct and regulate the construction of its gaming facility. Actions that officials take as Tribal government officials pursuant to IGRA are undertaken in their official capacities and within the scope of their official authority.

The Compact similarly vests the Tribe, acting through its officials, with authority to establish a casino on its Indian lands, § 4.2, to license Tribal gaming facilities, § 6.4.2(a), and to adopt building and safety codes governing casino

construction, § 6.4.2(b).[12] The Tribal Gaming Agency inspects and certifies the casino for occupancy, § 6.4.2(c), and conducts on-site regulation and investigations and can impose sanctions for non-compliance with the Compact. *Id.* §§ 7, 10. In short, the Compact grants the Tribe, and only the Tribe, authority over construction, operation and regulation of its casino.

Tribal law also authorizes the Tribe to engage in, and control, construction of its casino. Gaming Ordinance §12 creates Tribal standards for "the construction and maintenance of any Gaming Facility." SER 23-24 (Pinto Dec. Ex. 6). The Tribal Gaming Project Environmental Review Ordinance establishes the procedure for environmental review relating to construction and delegates authority to the Executive Committee (also referred to as the Tribal Council) to "take all action required under this Ordinance and to comply with the Compact," and provides that "[t]he Tribal Council makes a final decision as to whether and under what conditions to proceed with an on-Reservation [casino] project. The determination of the Tribal Council is final and conclusive." SER 17 (Pinto Dec. Ex. 4). In Resolution 2013-03 the Tribe elected to proceed with construction of the casino, SER 19-21 (Pinto Dec. Ex. 5 [pp. 90-93 of 148), and under the Tribe's

[12] *See* Addendum, *infra*, pages 78-85.

Constitution, the Executive Committee was required to take action, on behalf of the Tribe, to do so. *See* SER 9-10 (Pinto Dec. ¶¶ 5-7). In accordance with this legal authority the Executive Committee entered into agreements with Penn, SDGV and Driver for the construction and operation of a gaming facility. SER 11 (Pinto Dec. ¶ 15). Thus, the actions the Tribal officials took relating to construction of the Tribe's casino were official actions taken within the scope of their authority under applicable law.

The Tribe's officials possess sovereign immunity from suit for actions taken within their official capacities and scope of authority. *See Marceau*, 455 F.3d at 974; *Hardin,* 779 F.2d at 479-80; *Snow,* 709 F.2d at 1321; *Imperial Granite Co. v. Pala Band*, 940 F.2d 1269, 1271 (9th Cir. 1991); *Davis v. Littell*, 398 F.2d 83, 84 (9th Cir. 1968). Thus, as a matter of federal law, officials Pinto, Chamberlain and Meza are immune from this unconsented suit.

Plaintiffs first erroneously assert that if a Tribal government official takes action that turns out to have violated an applicable statute, then, by definition, that action cannot have been taken by the official in his or her official capacity. Br. 46-49. Plaintiffs claim that because they allege that the Tribal official defendants violated federal and/or state laws, they cannot, by definition, have acted within

their official capacities. The officials, plaintiffs argue, are thus not immune from suit with regard to such actions. Br. 46-49. Plaintiffs' argument is wrong and has been explicitly rejected by the courts. *See, e.g, Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 693-695 (1949).

An inquiry into tribal official sovereign immunity does not focus, as plaintiffs erroneously suggest, on determining whether the official's action was lawful. Rather, it begins with an inquiry into the *capacity* in which the official took the action, and the scope of *authority* she had in that capacity. When a tribal official acts within her official authority that official is immune from suit relating to such action *even if the action turns out to have been unlawful*. *See, e.g., Larson*, 337 U.S. at 695; *Linneen v. Gila River Indian Community,* 276 F.3d 489, 492 (9th Cir. 2002); *Boiseclair v. Superior Court,* 51 Cal. 3d 1140, 1157 (1990).

Here, plaintiffs attacked the Tribal official defendants for actions relating to the Tribe's construction of its federally-authorized gaming facility. The Tribal officials *could not have taken these actions in their personal capacities* because the actions plaintiffs attack are *actions of the Tribe*. When the Tribal officials took these actions they were acting in their representative capacities and within their authority as officers of the Tribe. The Tribal laws authorizing these actions --

including the Compact, Environmental Review Ordinance, Gaming Ordinance, and Draft and Final Environmental Impact Evaluations – expressly required and/or permitted the Tribe's Officials to act. *See* SER 8-13, 15, 17, 19-21, 23-24 (Pinto Dec. ¶¶ 1-17, 23 and Exs. 2, 4-6); ER 13:6-7 (District Court found that "the complaint does not allege Meza, Chamberlain or Pinto took action outside their capacities as JIV officials"). When, as here, tribal officials act within their official capacity and authority, they are immune from suit relating to such actions. *Miller v. Wright,* 705 F. 3d 919, 927-28 (9th Cir. 2012); *Cook v. AVI Casino Ent., Inc.,* 548 F. 3d 718, 727 (9th Cir. 2008).

Next, plaintiffs challenge the District Court's conclusion that the exception to official immunity established in *Ex Parte Young,* 209 U.S. 123 (1908), is inapplicable. Br. 49-50. The District Court correctly explained that "[f]or the *Ex Parte Young* doctrine to apply, a plaintiff must allege officials violated the federal Constitution, a federal statute or federal common law. *Salt River Project,* 672 F.3d at 1181." ER 11:25-27. The District Court then analyzed whether the TAC had made the requisite allegations against the Tribal officials. It found the TAC's allegations:

> "vague and conclusory. Plaintiffs do not specify which defendants intentionally or inadvertently excavated and removed the [alleged] human

> remains. Where tribal defendants' immunity hinges on the nature of their specific conduct, plaintiffs must allege more before the court can assume on a motion to dismiss that Meza, Chamberlain or Pinto excavated or removed any familial remains, and thus are not immune. *See Wimmemem Wintu Tribe v. U.S. Dep't of Interior,* 725 F. Supp. 2d 1119,1145 (E.D. Cal. 2010) (given 'vague and conclusory' allegations, 'plaintiffs fail to state ... a violation of NAGPRA by any defendant.'); *cv. Solis v. Cty. Of Stanislaus,* No. 14-0937, 2014 WL 7178175, at *3 (E.D. Cal. Dec. 16, 2014) (dismissing complaint where plaintiff 'lumps all defendants together' without differentiation); *Grant v. WMC Mortg. Corp.,* No. 10-1117, 2010 WL 2509415, at *3 (E.D. Cal. June 17, 2010) (same). Plaintiff has not adequately alleged NAGPRA violations against Meza, Chamberlain or Pinto." ER 12-13 (Order 7:21-8:4).

Plaintiffs now try to salvage their amorphous allegations by citing various paragraphs in the TAC that supposedly contain specific assertions against specific defendants. Br. 49-50. But even a cursory reading of the paragraphs Plaintiffs cite demonstrates their ambiguity.

The cited paragraphs contain general allegations regarding vague actions asserted against all of the defendants - federal, Tribal, individual, governmental, and corporate – together. Not a single one of the paragraphs plaintiffs now cite in their opening brief names any particular Tribal official or describes any specific action any one of them may have taken.

Further, plaintiffs now inappropriately seek to amend their TAC here by citing paragraphs contained in a completely different and, for purposes of this appeal, irrelevant document. Br. at 50 (citing ER pages 184, 185, 189, 194, 202,

203, 204). Specifically, the brief cites paragraphs that were included in defective and irrelevant declarations submitted by Mr. Rosales and Ms. Toggery with their opposition to defendants' motion to dismiss *the First Amended Complaint*. That complaint was dismissed, plaintiffs never appealed its dismissal, and the dismissal became final. *See* SER 50-55 (Order dismissing First Amended Complaint). The declarations plaintiffs now misleadingly cite as though they were part of the TAC are thus *not even a part of the record* for purposes of appeal of the dismissal of the TAC.

Further, Tribally-Related Defendants filed extensive objections to those declarations, which were replete with legal argument, conclusory allegations, assertions of events allegedly occurring decades before either declarants' birth, statements lacking personal knowledge, containing hearsay, lacking foundation, asserting lay opinion, and addressing irrelevant matters, among other defects. SER 56-107. Plaintiffs never responded to these objections in the District Court and as noted above, the District Court dismissed the First Amended Complaint over plaitniffs' objections based on those defective declarations. *See* SER 50-55. This Court should not consider, much less rely, on defective declarations that were not a part of the record upon which the District Court based its dismissal of the TAC

with prejudice. *See Lowry v. Barnhart*, 329 F3d 1019, 1024 (9th Cir. 2003) (party generally may not add to or enlarge the record on appeal to include material that was not before the district court); *Morrison v. Hall*, 261 F3d 896, 900, fn. 4 (9th Cir. 2001). Plaitniffs' defective declarations offered in their unsuccessful attempt to avoid dismissal of their First Amended Complaint is irrelevant in this appeal of the District Court's dismissal of the Third Amended Complaint. Those earlier-filed declarations cannot amend the Third Amended Complaint at issue here, which remains hopelessly amorphous and vague, and fails to include the allegations required for *Ex Parte Young* to apply.

The District Court's conclusion that *Ex Parte Young* does not apply here was also correct for additional reasons not stated by the District Court. First, *Young* applies when government officials are named in their *official* capacities; not when, as here, they are ostensibly named in their personal capacities. *Cardenas v. Anzai,* 311 F.3d 929, 934-35 (9th Cir. 2002) (*Ex parte Young* allows a "suit for prospective relief against a state official in his official capacity"). Second, *Young's* narrow exception to immunity does not apply where, as here, plaintiffs request monetary relief, nor does it apply where the injunctive relief sought actually runs against a government and not just the official. *Rounds v. Or. State Bd. Of Higher*

Ed., 166 F.3d 1032, 1036 (9th Cir. 1999) ("*Young* provided a narrow exception to Eleventh Amendment immunity for certain suits seeking declaratory and injunctive relief against unconstitutional actions taken by state officers"); *Shermoen,* 982 F.2d at 1320 ("Although the amended complaint names individual tribal council members as defendants, it is clear from 'the *essential nature and effect' of the relief sought* that the *tribe 'is the real, substantial party in interest*'") (emphasis added). Suits that are actually against the government, not just a government official, are not permitted under *Ex Parte Young.* "[A] suit is against the sovereign if judgment would ... interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Shermoen*, 982 F.2d at 1320. "[I]f the relief sought will operate against the sovereign, the suit is barred." *Dawavendewa,* 276 F.3d at 1160.

Here, Plaintiffs' requested relief, including injunctions relating to uses of Tribal land and determinations the TAC would require the Court to make about the Tribe's status and the status of Tribal lands, ER 40-41 (TAC ¶ 12), would run against the Tribe, "restrain the [Tribal] Government from acting" with respect to its sovereign interests and Indian lands and "interfere with the [Tribe's] public administration" of its Indian lands and the laws related thereto. *Shermoen,* 982

F.2d at 1320. This relief is clearly not directed against any individual person. Accordingly, *Ex Parte Young* does not apply.

Plaintiffs' final argument against immunity is based on *Lewis v. Clarke,* 137 S.Ct. 1285 (2017), *Pistor v. Garcia,* 791 F.3d 1104 (9th Cir. 2015), and *Maxwell v. County of San Diego,* 708 F.3d 1075 (9th Cir. 2013). Plaintiffs argue that the doctrines established in these cases support the conclusion that the Tribal official defendants lack immunity. Br. 46, 52-58. Plaintiffs are wrong, however, both because they misconstrue those cases and because they again misrepresent their TAC.

In *Lewis v. Clarke* a limousine driver employed by the Mohegan Tribe's casino caused a collision while driving patrons on a State highway off the reservation. The Lewises were injured and sued the driver, Clark, for damages. Clarke argued that he was immune from suit because he was an employee of the Mohegan tribe and, accordingly, shared the tribe's immunity from suit.

Lewis provided guidance for determining when a tribal employee is immune: "courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." *Lewis,* 137 S.Ct. at 1290. Plaintiffs can sue a tribal employee in their individual capacity only if the

individual, not the tribe, is the real party in interest. "The critical inquiry" in determining the real party in interest is "who may be legally bound by the court's adverse judgment." *Lewis*, 137 S.Ct. at 1292-93. The plaintiff's claim is "an official-capacity claim," rather than an individual capacity claim, "[if] the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself." *Id.* at 1291. "In making this assessment, courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Id.* at 1290. If the remedy operates against the tribe rather than the individual, the claim is not truly against the individual and it is typically barred by the tribe's sovereign immunity. *Id*. at 12911.

Plaintiffs cling desperately to the fact that in addition to seeking multiple injunctions which would effectively operate against the Tribe, the TAC also sought damages. They maintain that the fact that the TAC sought monetary damages (in addition to various injunctions) renders their action a personal capacity action rather than an action against the Tribe. Br. 52-58. Plaintiffs are wrong.

The TAC implicates the Tribe at every turn. The TAC directly and explicitly attacks the Tribe, Tribal Lands, and the Tribal-State Compact. ER 3-4,

46 (TAC ¶¶ 12,33). It indirectly attacks, and would require the District Court to adjudicate, the Tribe's status as a federally recognized tribe, and the status of its federal trust Indian lands. It would require the District Court to determine whether the Tribe may implement Tribal law and agreements, including the Tribe's Constitution, Compact, Environmental Ordinance, Gaming Ordinance, Draft and Final Tribal Environmental Evaluations and numerous agreements with defendants Penn, SDGV, C.W. Driver. SER 9-13 (Pinto Dec. ¶¶ 5-15, 23); ER 262-295. And it explicitly asks the District Court to issue injunctions that would interfere with the use of Tribal lands, and its ordinances, and contracts. Applying *Lewis* here, the Tribe is a real party in interest in the TAC. "The identity of the real party in interest dictates what immunities may be available." *Lewis.* 137 S.Ct. at 1291. When, as here, the Tribe is a real party in interest, individual official defendants may assert sovereign immunity. *Id.*

Plaintiffs cite *Pistor* and *Maxwell* repeatedly, arguing that these cases stand for the proposition that any complaint that purports to sue defendants in their "personal" capacities seeking monetary damages is automatically a "personal capacity" suit, thereby stripping tribal officials of their sovereign immunity. Br. 54, 57. Plaintiffs misconstrue those cases. Neither *Maxwell* nor *Pistor* holds that

plaintiffs' characterization of the issues controls, or that courts must defer to plaintiffs' characterization of the parties in the complaint in determining whether a Tribe is a real party in interest. Indeed, the Supreme Court in *Lewis* expressly warned that: "In making this assessment [as to whether a Tribe is a real party in interest], ***courts may not simply rely on the characterization of the parties in the complaint***, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Id.* at 1290 (emphasis added). Thus, the mere fact that plaintiffs named Tribal officials in their personal capacities is irrelevant. What matters is that the TAC as a whole is directed against the Tribe.

Similarly, Plaintiffs cannot deprive Tribal officials of their sovereign immunity simply by requesting, among other injunctive remedies that would affect the Tribe, monetary damages. Again, *Lewis* instructs courts to review the complaint as a whole to determine whether it implicates the Tribe. And both *Maxwell* and *Pistor*, like the Supreme Court in *Lewis,* require courts to look at the totality of allegations and remedies in the complaint. When, as here, the complaint as a whole directly and detrimentally implicates the Tribe and seeks remedies that affect it, the Tribe is a real party in interest and sovereign immunity bars the suit against Tribal officials even if the complaint also seeks monetary damages.

Unlike the plaintiffs in *Lewis, Pistor*, and *Maxwell*, the plaintiffs here directly attacked the Tribe, its federal recognition, its land, and its Compact in their complaint, ER 40-41 (TAC ¶ 12), asserted claims that would require the court to adjudicate the status of tribal lands, and sought remedies that would directly impact the Tribe's sovereignty, land use, agreements, internal laws, and Compact. Thus, unlike the plaintiffs in those other cases, the plaintiffs here are barred by sovereign immunity.

Further, in *Lewis, Pistor*, and *Maxwell*, the individual defendants were lower-level employees of the Tribe (a driver, police officers, and paramedics, respectively). In contrast, plaintiffs here sued the elected Tribal Chairperson and Tribal officials who are and were members of the Tribe's Executive Committee, the Tribe's governing body. SER 8-13 (Pinto Dec. ¶¶ 1, 4-7, 9, 17, 26-27); ER 40 (TAC alleging the Tribal official defendants "are current and/or former officials" of the Tribe). When, as here, elected Tribal government officials are sued for actions taken in their official capacity and within the scope of their authority, and when the remedies sought would operate against the Tribe, *Lewis, Pistor*, and *Maxwell* are distinguishable.

In short, the District Court correctly dismissed the TAC as against Chairperson Pinto, Mr. Meza, and Ms. Chamberlain on the alternative grounds of sovereign immunity, in addition to its dismissal under Rule 19.

D. Dismissal Was Also Appropriate Because Plaintiffs Lacked Article III Standing, Because Plaintiffs Are Collaterally Estopped, and Because the TAC Fails to State a Claim Since None of the Statutory Provisions It Cites Applies to The Tribally-Related Defendants

Even if the Tribe were not a required party with sovereign immunity under Rule 19 and the Tribal officials were not also immune, this Court should still affirm because plaintiffs lack Article III standing, are collaterally estopped from attacking the Tribe's federal recognition and land status, and because the TAC fails to state a claim against the Tribally-Related Defendants. SER 38-49; SER 2-7.

Plaintiffs lack Article III standing because their alleged injury is not likely to be redressed since the District Court cannot enjoin the non-party Tribe from construction-related activities on the Tribe's lands. No named defendant has authority under Tribal law to take such action on the Tribe's Reservation.

Moreover, construction was completed long ago, with the Tribe's casino having opened to the public on October 10, 2016.[13]

Plaintiffs are collaterally estopped from relitigating the Tribe's federal recognition and the status of its federal trust Indian lands. *See Rosales v. United States*, 2007 WL 4233060 *1 (S.D. Cal. Nov. 28, 2007) (Tribe is federally recognized and is a necessary and indispensable party in NAGPRA claims on its land). *See also Rosales v. State*, 2016 WL 124647 *7-8 (4th DCA. Jan. 12, 2016) ("the JIV is a federally recognized tribe"); *Rosales v. State*, No. GIC 878709) (S.D. Sup. Ct. 2007) (Tribe is federally recognized; its land is trust land; Tribe is necessary and indispensable party; case dismissed) (*see Rosales v. State,* 2016 WL 124647 *3 n. 5 (4th DCA Jan. 12, 2016); *Rosales v. U.S.*, No. 01-951 (S.D. Cal. 2002) (summary judgment for defendants: "the parcel is held by the United States

[13]*See* SER 13 (Pinto Dec. ¶ 24: "The Tribe's gaming facility is essentially complete" in June, 2016); https://news.worldcasinodirectory.com/hollywood-casino-jamul-san-diego-celebrates-grand-opening-today-35724; https://www.sec.gov/Archives/edgar/data/921738/000110465916151205/a16-20219_1ex99d1.htm (SEC filing dated October 20, 2016 reporting on "refinancing related to the recently opened Hollywood Casino Jamul ..."). This Court may take judicial notice of the fact that the Tribe's casino opened long ago because it "is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *see Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003).

in trust for the benefit of th Jamul Tribe") (emphasis added), *aff'd* 73 Fed. Apx. 913 (9th Cir. 2003) (affirming, holding that the Tribe was a necessary and indispensable party pursuant to Rule 19).

Finally, plaintiffs' TAC failed to state a claim upon which relief may be granted. Plaintiffs previously cited the same statutes cited in the TAC in both federal and California courts, in actions very similar to this one, and were told by both California and federal courts that those statutes do not apply and, further, that they cannot serve as a predicate for a tort claim as alleged here. The same outcome is warranted here. SER 2-7, 38-49.

VII. CONCLUSION

For the foregoing reasons, the Tribally-Related Defendants respectfully request that the Court affirm the District Court's Dismissal.

Dated: April 6, 2018

Law Office of Frank Lawrence

By /s/
Frank Lawrence

Attorney for Tribally-Related Defendants

STATEMENT OF RELATED CASES

This case is related to *JAC et al. v. Chaudhuri et al.*, No.17-16655, currently pending before this Court. The District Court related the two cases. *See* SER 108-109 (Related Case Order.)

The *JAC* appeal and this appeal ("*Rosales*") are related in that the issues raised in both appeals are essentially identical, the cases involve some of the same underlying facts and raise many of the same questions of law, the plaintiffs are linked, and attorney Patrick Webb is counsel of record for plaintiffs in both cases.

The complaint in this *Rosales* case, like the complaint in *JAC*, challenges and turns on the status and lands of the Jamul Indian Village, a federally-recognized Indian tribe ("Tribe"). Plaintiffs in *Rosales* claim that certain activities that occurred on the Tribe's Indian lands violated state and federal law that do not normally apply to the actions of Indian tribes taken on tribal trust land, but that these statutes apply to the Tribe here because, plaintiffs allege, the Tribe is not a federally-recognized tribe and its land is not federal Indian trust land. *See* ER 40-41 (TAC ¶ 12). These same allegations – regarding the Tribe's status and the status of Tribal lands – are squarely at issue in the related *JAC* appeal. The *JAC* plaintiffs, like those here in *Rosales*, claim that the Tribe is not federally

recognized and lacks sovereign immunity, and that its lands are not federal Indian trust lands. Both cases focus on the Jamul Indian Village, its status under federal law, and the status of its lands.

Further, in both cases the same District Court dismissed both complaints under Rule 19 because, the court held, the Tribe is a necessary and indispensable party in actions that will, upon adjudication, directly affect the Tribe's status and lands. Thus, the issues raised on appeal are essentially the same in both cases. Both appeals raise the question of whether the Tribe is a necessary and indispensable party in a legal action that challenges the Tribe's federal status and the status of its trust Indian lands.

In addition, the two leading plaintiffs in this Rosales case, Walter Rosales and Karen Toggery, have for many years operated in conjunction with the Jamul Action Committee and the Jamul Community Church, which are the primary plaintiffs in the related JAC case, in initiating litigation. The relationship between plaintiffs in *Rosales* and in *JAC* – and the fact that both cases are part of a decades long coordinated effort against the Tribe – is evident on JAC's website. *See* http://jacjamul.com/news/20151008.html, which describes this *Rosales* case as a component of JAC's strategy in opposing the Tribe.

The defendants/appellees in this *Rosales* case are also essentially identical to those in the *JAC* case. Amy Dutschke, Regional Director of the United States Department of the Interior's Bureau of Indian Affairs, and John Rydzik, Chief of the Division of Environmental, Cultural Resources Management and Safety of the Bureau of Indian Affairs are defendants/appellees in both actions. Penn National Gaming Inc., San Diego Gaming Ventures, LLC (mistakenly called San Diego Gaming "Village," LLC in the *JAC* action), and C.W. Driver are also defendants/appellees in both cases. Similarly, both actions name as defendants/appellees members of the Tribe's governing body. All of these individuals, as officers of a Tribal government, are immune from suit. The issues raised by their inclusion as defendants, and the legal questions posed by their sovereign immunity, are identical in both cases.

Finally, attorneys for all of the Tribally-Related Defendants in both cases are identical. Similarly, the attorney who represents the plaintiffs in this *Rosales* case – Patrick Webb – also filed the initial complaint in the *JAC* case, though his name was removed from subsequent complaints. Mr. Webb never formally withdrew as counsel of record for plaintiffs in *JAC*. Mr. Webb also represented Rosales and Toggery in their failed attempt to file an amicus brief in the *JAC* case

(Dist. Ct. Docket entry # 75 in that case) and filed, on behalf of Rosales and Toggery, an opposition to the notice of related case in *that* case. ER 391 in *JAC v. Chaudhuri* (Dist. Court Docket entry # 113). Further, Mr. Webb filed an amicus brief on behalf of Rosales and Toggery (plaintiffs in the *Rosales* case) in an interlocutory appeal in the *JAC* case before this Court. *See* Case No. 15-16021, ECF 16-1. He also filed an un-authorized post-hearing letter brief in the interlocutory appeal in the *JAC* case. Case no. 15-16021, ECF 52. Plaintiffs Rosales and Toggery, and their attorney Mr. Webb, have thus been involved repeatedly in the related case of *JAC v. Chaudhuri*.

Given the identity of issues in both appeals, the essential identity of plaintiffs and defendants, partial identity of attorneys, Tribally-Related Defendants believe that assigning both appeals to the same panel would conserve judicial resources.

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

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,786 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: April 6, 2018

By /s/ Frank Lawrence

Attorney for Tribally-Related Defendants

STATUTORY AND REGULATORY ADDENDUM

Addendum Contents

RELEVANT PROVISIONS OF THE INDIAN REORGANIZATION ACT

25 U.S.C. § 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

* * *

FEDERALLY RECOGNIZED INDIAN TRIBES LIST ACT

25 U.S.C. § 479a

For the purposes of this title:

(1) The term "Secretary" means the Secretary of the Interior.

(2) The term "Indian tribe" means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.

(3) The term "list" means the list of recognized tribes published by the Secretary pursuant to section 479a-1 of this title.

25 U.S.C. § 479a-1. Publication of list of recognized tribes

(a) Publication of list. The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(b) Frequency of publication. The list shall be published within 60 days of November 2, 1994, and annually on or before every January 30 thereafter.

* * *

RELEVANT PROVISIONS OF THE INDIAN GAMING REGULATORY ACT

25 U.S.C. § 2701. Findings

The Congress finds that –

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. § 2702. Declaration of policy

The purpose of this chapter is --

(1) 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;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2710. Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity.

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts.

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if –

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman. A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

***

(d) Class III gaming activities; authorization; revocation; Tribal-State compact.

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are –

(A) authorized by an ordinance or resolution that --

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2) (A)If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that --

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title. Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

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RELEVANT PROVISIONS OF TRIBAL-STATE GAMING COMPACT

Section 1.0. PURPOSES AND OBJECTIVES.

The terms of this Gaming Compact are designed and intended to:

(a) Evidence the goodwill and cooperation of the Tribe and State in fostering a mutually respectful government-to-government relationship that will serve the mutual interests of the parties.

(b) Develop and implement a means of regulating Class 111 gaming, and only Class I11 gaming, on the Tribe's Indian lands to ensure its fair and honest operation in accordance with IGRA, and through that regulated Class 111 gaming, enable the Tribe to develop self-sufficiency, promote tribal economic development, and generate jobs and revenues to support the Tribe's government and governmental services and programs.

(c) Promote ethical practices in conjunction with that gaming, through the licensing and control of persons and entities employed in, or providing goods and services to, the Tribe's Gaming Operation and protecting against the presence or

participation of persons whose criminal backgrounds, reputations, character, or associations make them unsuitable for participation in gaming, thereby maintaining a high level of integrity in tribal government gaming.

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§ 3.0 CLASS I11 GAMING AUTHORIZED AND PERMITTED.

The Tribe is hereby authorized and permitted to engage in only the Class III Gaming Activities expressly referred to in Section 4.0 and shall not engage in Class III gaming that is not expressly authorized in that Section.

§ 4.1. Authorized and Permitted Class III gaming. The Tribe is hereby authorized and permitted to operate the following Gaming Activities under the terms and conditions set forth in this Gaming Compact:

(a) The operation of Gaming Devices.

(b) Any banking or percentage card game.

(c) The operation of any devices or games that are authorized under state law to the California State Lottery, provided that the Tribe will not offer such games through use of the Internet unless others in the state are permitted to do so under state and federal law.

(e) Nothing herein shall be construed to preclude negotiation of a separate compact governing the conduct of off-track wagering at the Tribe's Gaming Facility.

§ 4.2. Authorized Gaming Facilities. The Tribe may establish and operate not more than two Gaming Facilities, and only on those Indian lands on which gaming may lawfully be conducted under the Indian Gaming Regulatory Act. The Tribe may combine and operate in each Gaming Facility any forms and kinds of gaming permitted under law, except to the extent limited under IGRA, this Compact, or the Tribe's Gaming Ordinance.

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§ 9.0. DISPUTE RESOLUTION PROVISIONS.

§ 9.1. Voluntary Resolution; Reference to Other Means of Resolution. In recognition of the government-to-government relationship of the Tribe and the State, the parties shall make their best efforts to resolve disputes that occur under

this Gaming Compact by good faith negotiations whenever possible. Therefore, without prejudice to the right of either party to seek injunctive relief against the other when circumstances are deemed to require immediate relief, the parties hereby establish a threshold requirement that disputes between the Tribe and the State first be subjected to a process of meeting and conferring in good faith in order to foster a spirit of cooperation and efficiency in the administration and monitoring of performance and compliance by each other with the terms, provisions, and conditions of this Gaming Compact, as follows:

(a) Either party shall give the other, as soon as possible after the event giving rise to the concern, a written notice setting forth, with specificity, the issues to be resolved.

(b) The parties shall meet and confer in a good faith attempt to resolve the dispute through negotiation not later than 10 days after receipt of the notice, unless both parties agree in writing to an extension of time.

(c) If the dispute is not resolved to the satisfaction of the parties within 30 calendar days after the first meeting, then either party may seek to have the dispute resolved by an arbitrator in accordance with this section, but neither party shall be required to agree to submit to arbitration.

(d) Disagreements that are not otherwise resolved by arbitration or other mutually acceptable means as provided in Section 9.3 may be resolved in the United States District Court where the Tribe's Gaming Facility is located, or is to be located, and the Ninth Circuit Court of Appeals (or, if those federal courts lack jurisdiction, in any state court of competent jurisdiction and its related courts of appeal). The disputes to be submitted to court action include, but are not limited to, claims of breach or violation of this Compact, or failure to negotiate in good faith as required by the terms of this Compact. In no event may the Tribe be precluded from pursuing any arbitration or judicial remedy against the State on the grounds that the Tribe has failed to exhaust its state administrative remedies. The parties agree that, except in the case of imminent threat to the public health or safety, reasonable efforts will be made to explore alternative dispute resolution avenues prior to resort to judicial process.

§ 9.2. Arbitration Rules. Arbitration shall be conducted in accordance with the policies and procedures of the Commercial Arbitration Rules of the American Arbitration Association, and shall be held on the Tribe's land or, if unreasonably inconvenient under the circumstances, at such other location as the parties may

agree. Each side shall bear its own costs, attorneys' fees, and one half the costs and expenses of the American Arbitration Association and the arbitrator, unless the arbitrator rules otherwise. Only one neutral arbitrator may be named, unless the Tribe or the State objects, in which case a panel of three arbitrators (one of whom is selected by each party) will be named. The provisions of Section 1283.05 of the California Code of Civil Procedure shall apply; provided that no discovery authorized by that section may be conducted without leave of the arbitrator. The decision of the arbitrator shall be in writing, give reasons for the decision, and shall be binding. Judgment on the award may be entered in any federal or state court having jurisdiction thereof.

§ 9.3. No Waiver or Preclusion of Other Means of Dispute Resolution. This Section 9.0 may not be construed to waive, limit, or restrict any remedy that is otherwise available to either party, nor may this Section be construed to preclude, limit, or restrict the ability of the parties to pursue, by mutual agreement, any other method of dispute resolution, including, but not limited to, mediation or utilization of a technical advisor to the Tribal and State Gaming Agencies; provided that neither party is under any obligation to agree to such alternative method of dispute resolution.

§ 9.4. Limited Waiver of Sovereign Immunity.

(a) In the event that a dispute is to be resolved in federal court or a state court of competent jurisdiction as provided in this Section 9.0, the State and the Tribe expressly consent to be sued therein and waive any immunity therefrom that they may have provided that:

(1) The dispute is limited solely to issues arising under this Gaming Compact;

(2) Neither side makes any claim for monetary damages (that is, only injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought); and

(3) No person or entity other than the Tribe and the State is 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.

(b) In the event of intervention by any additional party into any such action without the consent of the Tribe and the State, the waivers of either the Tribe or the State provided for 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.

(c) The waivers and consents provided for under this Section 9.0 shall extend to civil actions authorized by this Compact, including, but not limited to, actions to compel arbitration, any arbitration proceeding herein, any action to confirm or enforce any judgment or arbitration award as provided herein, and any appellate proceedings emanating from a matter in which an immunity waiver has been granted. Except as stated herein or elsewhere in this Compact, no other waivers or consents to be sued, either express or implied, are granted by either party.

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§ 7.0. COMPLIANCE ENFORCEMENT.

§ 7.1. On-Site Regulation.

It is the responsibility of the Tribal Gaming Agency to conduct on-site gaming regulation and control in order to enforce the terms of this Gaming Compact, IGRA, and the Tribal Gaming Ordinance with respect to Gaming Operation and Facility compliance, and to protect the integrity of the Gaming Activities, the reputation of the Tribe and the Gaming Operation for honesty and fairness, and the confidence of patrons that tribal government gaming in California meets the highest standards of regulation and internal controls. To meet those responsibilities, the Tribal Gaming Agency shall adopt and enforce regulations, procedures, and practices as set forth herein.

§ 7.2. Investigation and Sanctions.

The Tribal Gaming Agency shall investigate any reported violation of this Gaming Compact and shall require the Gaming Operation to correct the violation upon such terms and conditions as the Tribal Gaming Agency determines are necessary. The Tribal Gaming Agency shall be empowered by the Tribal Gaming Ordinance to impose fines or other sanctions within the jurisdiction of the Tribe against gaming licensees or other persons who interfere with or violate the Tribe's gaming

regulatory requirements and obligations under IGRA, the Tribal Gaming Ordinance, or this Gaming Compact. The Tribal Gaming Agency shall report significant or continued violations of this Compact or failures to comply with its orders to the State Gaming Agency.

§ 7.3. Assistance by State Gaming Agency.

The Tribe may request the assistance of the State Gaming Agency whenever it reasonably appears that such assistance may be necessary to carry out the purposes described in Section 7.1, or otherwise to protect public health, safety, or welfare. If requested by the Tribe or Tribal Gaming Agency, the State Gaming Agency shall provide requested services to ensure proper compliance with this Gaming Compact. The State shall be reimbursed for its actual and reasonable costs of that assistance, if the assistance required expenditure of extraordinary costs.

§ 7.4. Access to Premises by State Gaming Agency; Notification; Inspections.

Notwithstanding that the Tribe has the primary responsibility to administer and enforce the regulatory requirements of this Compact, the State Gaming Agency shall have the right to inspect the Tribe's Gaming Facility with respect to Class III Gaming Activities only, and all Gaming Operation or Facility records relating thereto, subject to the following conditions:

§ 7.4.1. Inspection of public areas of a Gaming Facility may be made at any time without prior notice during normal Gaming Facility business hours.

§ 7.4.2. Inspection of areas of a Gaming Facility not normally accessible to the public may be made at any time during normal Gaming Facility business hours, immediately after the State Gaming Agency's authorized inspector notifies the Tribal Gaming Agency of his or her presence on the premises, presents proper identification, and requests access to the non-public areas of the Gaming Facility. The Tribal Gaming Agency, in its sole discretion, may require a member of the Tribal Gaming Agency to accompany the State Gaming Agency inspector at all times that the State Gaming Agency inspector is in a non-public area of the Gaming Facility. If the Tribal Gaming Agency imposes such a requirement, it shall require such member to be available at all times for those purposes and shall ensure that the member has the ability to gain immediate access to all non-public areas of the

Gaming Facility. Nothing in this Compact shall be construed to limit the State Gaming Agency to one inspector during inspections.

§ 7.4.3. (a) Inspection and copying of Gaming Operation papers, books, and records may occur at any time, immediately after notice to the Tribal Gaming Agency, during the normal hours of the Gaming Facility's business office, provided that the inspection and copying of those papers, books or records shall not interfere with the normal functioning of the Gaming Operation or Facility. Notwithstanding any other provision of California law, all information and records that the State Gaming Agency obtains, inspects, or copies pursuant to this Gaming Compact shall be, and remain, the property solely of the Tribe; provided that such records and copies may be retained by the State Gaming Agency as reasonably necessary for completion of any investigation of the Tribe's compliance with this Compact.

(b)(i) The State Gaming Agency will exercise utmost care in the preservation of the confidentiality of any and all information and documents received from the Tribe, and will apply the highest standards of confidentiality expected under state law to preserve such information and documents from disclosure. The Tribe may avail itself of any and all remedies under state law for improper disclosure of information or documents. To the extent reasonably feasible, the State Gaming Agency will consult with representatives of the Tribe prior to disclosure of any documents received from the Tribe, or any documents compiled from such documents or from information received from the Tribe, including any disclosure compelled by judicial process, and, in the case of any disclosure compelled by judicial process, will endeavor to give the Tribe immediate notice of the order compelling disclosure and a reasonable opportunity to interpose an objection thereto with the court.

(ii) The Tribal Gaming Agency and the State Gaming Agency shall confer and agree upon protocols for release to other law enforcement agencies of information obtained during the course of background investigations.

(c) Records received by the State Gaming Agency from the Tribe in compliance with this Compact, or information compiled by the State Gaming Agency from those records, shall be exempt from disclosure under the California Public Records Act.

§ 7.4.4. Notwithstanding any other provision of this Compact, the State Gaming Agency shall not be denied access to papers, books, records, equipment, or places where such access is reasonably necessary to ensure compliance with this Compact.

§ 7.4.5. (a) Subject to the provisions of subdivision (b), the Tribal Gaming Agency shall not permit any Gaming Device to be transported to or from the Tribe's land except in accordance with procedures established by agreement between the State Gaming Agency and the Tribal Gaming Agency and upon at least 10 days' notice to the Sheriff's Department for the county in which the land is located.

(b) Transportation of a Gaming Device from the Gaming Facility within California is permissible only if: (i) The final destination of the device is a gaming facility of any tribe in California that has a compact with the State; (ii) The final destination of the device is any other state in which possession of the device or devices is made lawful by state law or by tribal-state compact; (iii) The final destination of the device is another country, or any state or province of another country, wherein possession of the device is lawful; or (iv) The final destination is a location within California for testing, repair, maintenance, or storage by a person or entity that has been licensed by the Tribal Gaming Agency and has been found suitable for licensure by the State Gaming Agency.

(c) Gaming Devices transported off the Tribe's land in violation of this Section 7.4.5 or in violation of any permit issued pursuant thereto is subject to summary seizure by California peace officers.

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§ 10.0. PUBLIC AND WORKPLACE HEALTH, SAFETY, AND LIABILITY.

§ 10.1. The Tribe will not conduct Class III gaming in a manner that endangers the public health, safety, or welfare; provided that nothing herein shall be construed to make applicable to the Tribe any state laws or regulations governing the use of tobacco.

§ 10.2. Compliance. For the purposes of this Gaming Compact, the Tribal Gaming Operation shall:

(a) Adopt and comply with standards no less stringent than state public health standards for food and beverage handling. The Gaming Operation will allow inspection of food and beverage services by state or county health inspectors, during normal hours of operation, to assess compliance with these standards, unless inspections are routinely made by an agency of the United States government to ensure compliance with equivalent standards of the United States Public Health Service. Nothing herein shall be construed as submission of the Tribe to the jurisdiction of those state or county health inspectors, but any alleged violations of the standards shall be treated as alleged violations of this Compact.

(b) Adopt and comply with standards no less stringent than federal water quality and safe drinking water standards applicable in California; the Gaming Operation will allow for inspection and testing of water quality by state or county health inspectors, as applicable, during normal hours of operation, to assess compliance with these standards, unless inspections and testing are made by an agency of the United States pursuant to, or by the Tribe under express authorization of, federal law, to ensure compliance with federal water quality and safe drinking water standards. Nothing herein shall be construed as submission of the Tribe to the jurisdiction of those state or county health inspectors, but any alleged violations of the standards shall be treated as alleged violations of this Compact.

(c) Comply with the building and safety standards set forth in Section 6.4.

(d) Carry no less than five million dollars ($5,000,000) in public liability insurance for patron claims, and that the Tribe provide reasonable assurance that those claims will be promptly and fairly adjudicated, and that legitimate claims will be paid; provided that nothing herein requires the Tribe to agree to liability for punitive damages or attorneys' fees. On or before the effective date of this Compact or not less than 30 days prior to the commencement of Gaming Activities under this Compact, whichever is later, the Tribe shall adopt and make available to patrons a tort liability ordinance setting forth the terms and conditions, if any, under which the Tribe waives immunity to suit for money damages resulting from intentional or negligent injuries to person or property at the Gaming Facility or in connection with the Tribe’s Gaming Operation, including procedures for processing any claims for such money damages; provided that nothing in this Section shall require the Tribe to waive its immunity to suit except to the extent of the policy limits set out above.

(e) Adopt and comply with standards no less stringent than federal workplace and occupational health and safety standards; the Gaming Operation will allow for inspection of Gaming Facility workplaces by state inspectors, during normal hours of operation, to assess compliance with these standards, unless inspections are regularly made by an agency of the United States government to ensure compliance with federal workplace and occupational health and safety standards. Nothing herein shall be construed as submission of the Tribe to the jurisdiction of those state inspectors, but any alleged violations of the standards shall be treated as alleged violations of this Compact.

(f) Comply with tribal codes and other applicable federal law regarding public health and safety.

(g) Adopt and comply with standards no less stringent than federal laws and state laws forbidding employers generally from discriminating in the employment of persons to work for the Gaming Operation or in the Gaming Facility on the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability; provided that nothing herein shall preclude the tribe from giving a preference in employment to Indians, pursuant to a duly adopted tribal ordinance.

(h) Adopt and comply with standards that are no less stringent than state laws prohibiting a gaming enterprise from cashing any check drawn against a federal, state, county, or city fund, including but not limited to, Social Security, unemployment insurance, disability payments, or public assistance payments.

(i) Adopt and comply with standards that are no less stringent than state laws, if any, prohibiting a gaming enterprise from providing, allowing, contracting to provide, or arranging to provide alcoholic beverages, or food or lodging for no charge or at reduced prices at a gambling establishment or lodging facility as an incentive or enticement.

(j) Adopt and comply with standards that are no less stringent than state laws, if any, prohibiting extensions of credit.

(k) Provisions of the Bank Secrecy Act, P.L. 91-508, October 26, 1970, 31 U.S.C. § 5311-5314, as amended, and all reporting requirements of the Internal

Revenue Service, insofar as such provisions and reporting requirements are applicable to casinos.

§ 10.2.1. The Tribe shall adopt and, not later than 30 days after the effective date of this Compact, shall make available on request the standards described in subdivisions (a)-(c) and (e)-(k) of Section 10.2 to which the Gaming Operation is held. In the absence of a promulgated tribal standard in respect to a matter identified in those subdivisions, or the express adoption of an applicable federal statute or regulation in lieu of a tribal standard in respect to any such matter, the applicable state statute or regulation shall be deemed to have been adopted by the Tribe as the applicable standard.

§ 10.3 Participation in state statutory programs related to employment. (a) In lieu of permitting the Gaming Operation to participate in the state statutory workers' compensation system, the Tribe may create and maintain a system that provides redress for employee work-related injuries through requiring insurance or self-insurance, which system must include a scope of coverage, availability of an independent medical examination, right to notice, hearings before an independent tribunal, a means of enforcement against the employer, and benefits comparable to those mandated for comparable employees under state law. Not later than the effective date of this Compact, or 60 days prior to the commencement of Gaming Activities under this Compact, the Tribe will advise the State of its election to participate in the statutory workers' compensation system or, alternatively, will forward to the State all relevant ordinances that have been adopted and all other documents establishing the system and demonstrating that the system is fully operational and compliant with the comparability standard set forth above. The parties agree that independent contractors doing business with the Tribe must comply with all state workers' compensation laws and obligations.

(b) The Tribe agrees that its Gaming Operation will participate in the State's program for providing unemployment compensation benefits and unemployment compensation disability benefits with respect to employees employed at the Gaming Facility, including compliance with the provisions of the California Unemployment Insurance Code, and the Tribe consents to the jurisdiction of the state agencies charged with the enforcement of that Code and of the courts of the State of California for purposes of enforcement.

(c) As a matter of comity, with respect to persons employed at the Gaming Facility, other than members of the Tribe, the Tribal Gaming Operation shall withhold all taxes due to the State as provided in the California Unemployment Insurance Code and the Revenue and Taxation Code, and shall forward such amounts as provided in said Codes to the State.

§ 10.4. Emergency Service Accessibility. The Tribe shall make reasonable provisions for adequate emergency fire, medical, and related relief and disaster services for patrons and employees of the Gaming Facility.

§ 10.5. Alcoholic Beverage Service. Standards for alcohol service shall be subject to applicable law.

§ 10.6. Possession of firearms shall be prohibited at all times in the Gaming Facility except for state, local, or tribal security or law enforcement personnel authorized by tribal law and by federal or state law to possess fire arms at the Facility.

§ 10.7. Labor Relations.
Notwithstanding any other provision of this Compact, this Compact shall be null and void if, on or before October 13, 1999, the Tribe has not provided an agreement or other procedure acceptable to the State for addressing organizational and representational rights of Class III Gaming Employees and other employees associated with the Tribe's Class III gaming enterprise, such as food and beverage, housekeeping, cleaning, bell and door services, and laundry employees at the Gaming Facility or any related facility, the only significant purpose of which is to facilitate patronage at the Gaming Facility.

§ 10.8. Off-Reservation Environmental Impacts.
§ 10.8.1. On or before the effective date of this Compact, or not less than 90 days prior to the commencement of a Project, as defined herein, the Tribe shall adopt an ordinance providing for the preparation, circulation, and consideration by the Tribe of environmental impact reports concerning potential off-Reservation environmental impacts of any and all Projects to be commenced on or after the effective date of this Compact. In fashioning the environmental protection ordinance, the Tribe will make a good faith effort to incorporate the policies and

purposes of the National Environmental Policy Act and the California Environmental Quality Act consistent with the Tribe's governmental interests.

§ 10.8.2. (a) Prior to commencement of a Project, the Tribe will:
(1) Inform the public of the planned Project;

(2) Take appropriate actions to determine whether the project will have any significant adverse impacts on the off-Reservation environment;

(3) For the purpose of receiving and responding to comments, submit all environmental impact reports concerning the proposed Project to the State Clearinghouse in the Office of Planning and Research and the county board of supervisors, for distribution to the public.

(4) Consult with the board of supervisors of the county or counties within which the Tribe's Gaming Facility is located, or is to be located, and, if the Gaming Facility is within a city, with the city council, and if requested by the board or council, as the case may be, meet with them to discuss mitigation of significant adverse off-Reservation environmental impacts;

(5) Meet with and provide an opportunity for comment by those members of the public residing off-Reservation within the vicinity of the Gaming Facility such as might be adversely affected by proposed Project.

(b) During the conduct of a Project, the Tribe shall:

(1) Keep the board or council, as the case may be, and potentially affected members of the public apprized of the project's progress; and

(2) Make good faith efforts to mitigate any and all such significant adverse off-Reservation environmental impacts.

(c) As used in Section 10.8.1 and this Section 10.8.2, the term "Project" means any expansion or any significant renovation or modification of an existing Gaming Facility, or any significant excavation, construction, or development associated with the Tribe's Gaming Facility or proposed Gaming Facility and the term

"environmental impact reports" means any environmental assessment, environmental impact report, or environmental impact statement, as the case may be.

§ 10.8.3.

(a) The Tribe and the State shall, from time to time, meet to review the adequacy of this Section 10.8, the Tribe's ordinance adopted pursuant thereto, and the Tribe's compliance with its obligations under Section 10.8.2, to ensure that significant adverse impacts to the off-Reservation environment resulting from projects undertaken by the Tribe may be avoided or mitigated.

(b) At any time after January 1, 2003, but not later than March 1, 2003, the State may request negotiations for an amendment to this Section 10.8 on the ground that, as it presently reads, the Section has proven to be inadequate to protect the off-Reservation environment from significant adverse impacts resulting from Projects undertaken by the Tribe or to ensure adequate mitigation by the Tribe of significant adverse off-Reservation environmental impacts and, upon such a request, the Tribe will enter into such negotiations in good faith.

(c) On or after January 1, 2004, the Tribe may bring an action in federal court under 25 U.S.C. § 2710(d)(7)(A)(i) on the ground that the State has failed to negotiate in good faith, provided that the Tribe's good faith in the negotiations shall also be in issue. In any such action, the court may consider whether the State's invocation of its rights under subdivision (b) of this Section 10.8.3 was in good faith. If the State has requested negotiations pursuant to subdivision (b) but, as of January 1, 2005, there is neither an agreement nor an order against the State under 25 U.S.C. § 2710(d)(7)(B)(iii), then, on that date, the Tribe shall immediately cease construction and other activities on all projects then in progress that have the potential to cause adverse off-Reservation impacts, unless and until an agreement to amend this Section 10.8 has been concluded between the Tribe and the State.

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§ 15.1. Third Party Beneficiaries. Except to the extent expressly provided under this Gaming Compact, this Gaming 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.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 6, 2018.

Participants in the case are all registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Frank Lawrence

Frank Lawrence