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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

YOCHA DEHE WINTUN NATION; VIEJAS BAND OF KUMEYAAY INDIANS; and SYCUAN BAND OF THE KUMEYAAY NATION,

Plaintiffs,

v.

GAVIN C. NEWSOM, GOVERNOR OF CALIFORNIA; STATE OF CALIFORNIA,

Defendants.

Case No. 2:19-cv-00025-JAM-AC

PLAINTIFFS' OPPOSITION TO THE CALIFORNIA GAMING ASSOCIATION'S MOTION TO INTERVENE

Judge: Hon. John A. Mendez
Date: April 16, 2019
Time: 1:30 p.m.
Place: 501 I. St.
Sacramento, CA 95814
Courtroom 6, 14th Floor

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1. INTRODUCTION

This is a contract dispute between sovereign governments through which plaintiffs (the "Tribes") seek to compel the State of California (the "State") to fulfill its agreement that the Tribes would have the right to operate banked card games exclusive of competition on non-Indian lands. This is not a regulatory action, nor do the Tribes seek to change California law. The California Gaming Association (the "CGA") is neither a party to, nor a beneficiary of, any of the contracts at issue. The CGA thus lacks any protectable interest under the contracts and cannot show that this contract action may impair or impede its ability to protect its interests. The State may choose to enforce current law and regulations against the cardrooms at any time, independent of this lawsuit or its outcome. That has been and will continue to be a risk for the CGA's members. They will, however, have the opportunity to defend their interests if and when enforcement occurs. Moreover, the CGA could seek to intervene in a pending state lawsuit that directly attacks its members' interests, but to date, it has declined to do so.

As with any other contract action, the contracting parties here are the only ones who can represent all contractual interests at stake, as their understandings and intent are the only ones that matter. It is both improper and unnecessary for the CGA, which neither had a role in the negotiation or execution of the contracts, nor is a beneficiary to them, to interlope as a defendant in this action and provide unsolicited opinions on contract terms and related claims. The Tribes and State are already unduly burdened with increased legal fees opposing the CGA's baseless intervention motion.

Finally, each government granted a specific limited waiver of sovereign immunity to have this contract dispute heard before this Court. The immunity waivers expressly apply solely to the other governmental party and do not extend to third parties such as the CGA. The sovereign immunity waivers must be strictly construed, and clearly do not permit the CGA's intervention.

The Court should deny the CGA's motion. The Tribes and State are entitled to resolve this contract dispute as they intended – without the improper, needless, and unduly burdensome intrusion by the CGA or any other third party.

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2. ARGUMENT

A. The CGA Failed To Prove Its Right To Intervene In This Contract Dispute

The Tribes do not dispute the timeliness of the CGA's intervention motion. The CGA, however, failed to meet the requirements of the other three prongs of the test for intervention as of right under Rule 24(a)(2). The bottom line here is that the CGA has cited, and the Tribes have found, *no case* allowing a party to intervene in a private contract action where, as here, that party is neither a signatory to, nor beneficiary of, that contract.

i. The CGA Lacks A Significant Protectable Interest In This Contract Action

While the CGA is correct that Rule 24's requirements are broadly interpreted in favor of intervention, there are important limitations applicable here. As the Ninth Circuit has explained, a party seeking intervention as of right must have a "'direct, non-contingent, substantial and legally protectable' interest" in the action. *Southern California Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002). The CGA lacks such an interest.

There is simply no way to transmogrify this action into anything other than a private contract dispute between the Tribes and the State. The complaint asserts only two claims. The first is for breach of the compact between the parties. In that claim, the Tribes assert that (1) they entered into the compacts with the State, (2) under those compacts, "the State promised [the Tribes] the rights to conduct certain Class III games, specifically including any banking or percentage card game, exclusive of non-Indian competition," and (3) the State "breached its promise." (Complaint, Dkt. No. 1, ¶¶ 125-128.)

The complaint's second claim, for breach of the implied covenant of good faith and fair dealing, is to the same effect. There the Tribes allege that they complied with all the terms of the compacts, but the State "engaged in conduct in bad faith," intending to deprive the Tribes "of their benefits and rights under the Tribal-State Compacts" by failing to "enforce California law that prohibits banked games played with cards" and in some respects "facilitat[ing] such banked gaming in violation of California law and in breach of its contractual obligations." (Complaint, ¶¶ 132-134.) This "facilitation" is demonstrated by, among other things, the State continuing to allow the cardrooms to play illegal games pursuant to the infamous "Lytle letter" though the State

long ago concluded that letter's highly sordid provenance required that it be "suspended." (Complaint, ¶¶ 47-52, 97-98, 101, 109.) Similarly, though the State (through the Bureau of Gambling Control) approved cardrooms playing games such as Pure 21.5 Blackjack and 21st Century Blackjack, it subsequently acknowledged those games are in fact illegal, but still allows cardrooms to play them. (Complaint, ¶¶ 61, 118.)

The nature of this action is understandably problematic for the CGA's attempt to establish a "significant protectable interest." Consequently, the CGA tries in various ways to re-characterize the action as one involving, and challenging the existence of, the CGA's members. For example, the CGA's motion claims:

- The action "attacks the cardroom industry head on, seeking to force the State of California to legislate or regulate many cardroom games out of existence" (memorandum in support of motion to intervene ("Motion"), Dkt. No. 11-1, 1:6-7);
- The Tribes are "challenging the regulatory scheme that governs the profession" (Motion, 5:11-13);
- The cardrooms have a "due process interest in their existing licenses to conduct their business activity" (Motion, 5:25-26);
- The "central objective of this suit is to ban many of the games cardrooms currently offer." (Motion, 6:17-18.)

This case, however, has nothing to do with attacking the cardroom industry "head on," challenging the gaming "regulatory scheme," or invalidating the cardroom's "existing licenses." That the case is predicated on a breach of contract dispute between the State and Tribes is evident from the CGA's own memorandum in support of the CGA's proposed motion to dismiss. (Dkt. No. 11-5.) The first argument in that brief is that the "Complaint fails to state a claim for the relief it seeks," because "the State has not breached an enforceable promise in the Tribes' compacts" and, "even if that were not so, the Tribes' claims nevertheless fail because the only relief the Tribes' seek is unavailable." (*Id.* 8:3-21.) Whether the State has breached compact provisions and whether the compacts provide the remedy the Tribes seek are questions as to which the CGA can provide no input. *See, e.g., Gantman v. United Pac. Ins. Co.*, 232 Cal. App.

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3d 1560, 1566 (1991) ("Someone who is not a party to a contract has no standing to enforce the contract."); *Societe D'equipments Internationaux Nigeria, Ltd, v. Dolarian Capital, Inc.*, 2016 WL 128464, *5 (E.D. Cal. 2016) (aggregating authority for the proposition). The CGA therefore has no "'direct, non-contingent, substantial and legally protectable' interest" here.

The authority upon which the CGA relies in its motion also does not assist it in meeting its burden to prove a "protectable interest." As an initial matter, the CGA acknowledges that to be allowed to intervene it must, among other things, show an "interest that is protected under some law." (Motion, 4:28-5:1.) Notably absent from the motion is the citation to any particular law that protects any interest of the CGA's members. That omission is understandable, because the laws the Tribes believe the State has failed to enforce – and which have led to the breach of the contracts – *prohibit*, rather than *protect*, some of the activities of the CGA's members. As noted above, even the State has acknowledged this fact with respect to the "Lytle letter" (which allowed the cardrooms to bypass the actual rotation requirements of Penal Code section 330.11) and the play of at least two blackjack games (which are prohibited by Penal Code section 330).

Skipping the important preliminary step of proving a protectable interest, the CGA's motion claims that where such an interest exists in favor of some members of an association, "'the association likewise has such interest.'" (Motion, 5:6-8.) While the Tribes take no issue in general with the proposition that an association can intervene on behalf of its members, the cases the CGA cites do not assist its position here. In *Ellis v. Bradbury*, the court found a "sufficiently protectable interest" because some members of the association at issue "hold registrations that plaintiffs, by the instant action, are challenging." 2013 WL 4777201, *1 (N.D. Cal. 2013). The decision in *Southwest Center for Biological Diversity v. Berg* is to the same effect. There the court found a substantial interest in favor of intervention, because one of the proposed intervenors "made a prima facie showing" that he was a "third-party beneficiary of the assurances and approval process" in certain agreements that were being challenged, and, as the court noted, "[c]ontract rights are traditionally protectable interests." 268 F.3d 810, 820 (9th Cir. 2001). Here, by contrast, the Tribes seek to invalidate no "registrations," licenses, permits or contract rights any cardroom has – they simply want the State honor its contractual obligations to the

Tribes by enforcing existing gaming laws (and the State Constitution) to protect the exclusivity for which the Tribes bargained.

The CGA next argues that the Bureau of Gambling Control "approved the rules" for the games the cardrooms play, and their "operations are subject to constant regulatory oversight." (Motion, 5:17-18.) Even if true, those facts do not excuse the State's violation of its contractual obligations to the Tribes to protect their gaming exclusivity. The same is true of the notion that the cardrooms are entitled to due process with respect to any attempt to revoke their licenses. (Motion, 5:23-28.) The Tribes do not dispute the premise, it is just inapplicable to this contractual dispute.

Based on these flawed premises, the CGA concludes that this "case thus falls in the long line of cases in which courts have held that a prospective intervenor has a protectable interest when it seeks to defend a government action that benefits it." (Motion, 6:4-8.) There are two problems with this assertion. First, there is no "government action" here, and certainly none that "benefits" the cardrooms or the CGA. Second, the CGA cites only two cases in this "long line," and neither is applicable. The first case is *Berg* in which, as noted above, the proposed intervenors were third party beneficiaries to contracts being challenged. The second is a Fifth Circuit decision, *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Commission*, where Wal-Mart challenged the constitutionality of a licensing and regulatory scheme governing the sale of alcoholic beverages in Texas. 834 F.3d 562, 564-65 (2016). Wal-Mart alleged the "system is a protectionist scheme enacted for the benefit of existing permit holders." *Id.* The court found the association representing the permit holders had an interest in the action significant enough to merit intervention, because Wal-Mart aimed to take down the regulatory system, "including the licenses held by the Association's members." *Id.*, at 565-66. Here, however, the Tribes challenge no regulatory system, much less one set up for the benefit of the cardrooms and that would jeopardize their licenses if dismantled. Thus, *Berg* and *Wal-Mart* add nothing to the inquiry before this Court.

Finally, the CGA argues, with emphasis, that the result here should be the same as in *Berg* and *Wal-Mart*, because "*tribes* have intervened to defend government actions necessary for *tribal*

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gaming." (Motion, 6:8-12 (emphasis in original.) The CGA is correct that tribes have intervened in cases challenging the government's decision to take land into trust for the benefit of *those very tribes*. Viewing the matter through the prism of the Ninth Circuit's *Lynch* decision, it is difficult to conceive of a more "'direct, non-contingent, substantial and legally protectable' interest" than a sovereign nation's defense of a decision to take land into trust for the benefit of the nation's people. 307 F.3d at 803. By contrast, the potential that the State's enforcement of its laws to comply with its contractual obligations might result in some effect on the illegal gaming in California cardrooms is, viewed through the same prism, "'an undifferentiated, generalized interest in the outcome of an ongoing action" that is therefore "too porous a foundation on which to premise intervention as of right."[1] *Id.*

ii. <u>The CGA Cannot Show This Action Will Impair Or Impede Its Interests</u>

The CGA's claim that, absent intervention, its interests will be impaired or impeded is based on an incorrect premise: That the "central objective of this suit is to ban many of the games cardrooms currently offer." (Motion, 6:17-18.)

As detailed above, the suit's "central objective" is to establish the State's breach of the compacts' gaming exclusivity promises by failing (or in some cases refusing) to enforce its own existing gaming laws. It is important to keep in mind that the applicable standard is whether disposing of the action without the CGA may, "as a practical matter," impair or impede its "ability to protect its interest." Fed. R. Civ. Proc. 24(a)(2). The resolution in this case will in no way prevent the CGA from protecting its interests and those of its members. At this point, no one knows how this case will be resolved. Thus, the notion that any protectable interest will be impeded is pure speculation. That aside, if the case results in a determination that the State violated the compacts by not enforcing one or more of its gaming laws, and that conclusion in

[1] There *is* a pending action where the CGA might have a significant legal interest to protect, thereby meriting intervention. The Rincon and the Chumash tribes have sued a number of cardrooms in San Diego County Superior Court. (Request for Judicial Notice ("RJN"), Ex. A.) Unlike the action here, the Southern California case is a *direct challenge* to the illegal games being played in cardrooms. The CGA's website demonstrates that it represents many cardrooms besides those named in that action, and, as such, it likely can establish a right to intervene to represent those other cardrooms (www.californiagamingassociation.org/membership/members/).

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turn results in some future enforcement action by the State against the cardrooms, the CGA can sue the State for declaratory relief to challenge that action. There are also other avenues available to the CGA, including the previously mentioned intervention in the San Diego Superior Court action, which does, in the words of the CGA's memorandum, "attack the cardroom industry head on." Thus, even if this action affected the CGA's interests, they would not be impaired, because it has "other means by which" it may "protect its interests." *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004).

iii. Adequate Representation Is Not At Issue In This Action

Analyzing Rule 24(a)'s adequacy requirement presents a logical conundrum. As this Court has recognized, and the CGA admits, "the most important factor in determining the adequacy of representation is how the interest compares with the interest of the existing parties." *United States v. State of California*, 2018 WL 2688129, *4 (E.D. Cal. 2018); *see also* Motion, 7:2-3. The CGA, however, *has* no interest in this private breach of contract action, not to mention one that is *legally protectable*. This is not a situation where the federal government sued a state to enjoin the application of a particular state law (as this Court faced in *United States v. California*) or where environmental groups sued federal agencies to challenge the measures the agencies took to protect endangered species (as in *Southwest Center for Biological Diversity v. Berg*) or even where a private business sued a state agency to challenge a licensing scheme (as in *Wal-Mart v. Texas Alcoholic Beverage Commission*). In each of those cases, the proposed intervenors, whether or not they prevailed, at least could state an *actual interest* in the dispute as to which the courts could apply the Rule 24 analysis. Here, as its proposed motion to dismiss evinces, the CGA would like to opine that the State has not breached the contracts between it and the Tribes. The CGA's opinion on that subject is impermissible.

Thus, it is difficult to analyze whether the State will adequately represent the CGA's interests without accepting the notion that the CGA has those interests in the first place. That, however, is not the only analytical flaw in the CGA's motion – it also misstates what is at issue here to analogize the situation to the intervention cases it cites. It is important to remember that the Tribes did not sue the State because it interpreted some law or regulation in favor of the

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cardrooms. Rather, it sued the State for its failure (or refusal) to enforce its own laws in violation of its contractual obligations to the Tribes.

Thus, there is no "government regulators' action" that the Tribes are challenging in this case. (Motion, 7:10-12.)[2] Indeed, it is the *inaction* by the *State* that the Tribes challenge. Similarly, the CGA is incorrect in asserting the right to intervention because the "State and the Governor – as a law enforcement matter – may take a different view from the Association as to what kinds of games are lawful." (Motion, 7:12-14.) The fact is, regardless of the Tribe's suit, the Bureau of Gambling Control can, *at any time*, initiate an enforcement action against the cardrooms by interpreting and applying the State's gaming laws. If that were to happen, the remedy for the cardrooms (and presumably the CGA) would be to file an administrative or declaratory relief action to stop the enforcement action. The same is true with respect to the CGA's arguments regarding the Governor and State as "regulators" or "political actors." (Motion, 7:15-20.)

In a further bit of misdirection, the CGA argues the State's "position on approved games *may* change" and therefore "this Court cannot even assume that California will mount a vigorous defense of cardroom game approvals as they exist today." (Motion, 7:21-8:3.) This assertion suffers from at least two flaws. First, the premise is incorrect. The Tribes' suit challenges no aspect of "cardroom game approvals as they exist today." Second, the CGA cites *absolutely nothing* in the way of evidence to support this flawed notion. Even assuming the burden to show inadequate representation is "minimal," the CGA still has to cite to *some* evidence that would prove the State's intentions relative to the (irrelevant) game approvals. *Stevenson v. Rominger*, 905 F. Supp. 836, 841 (E.D. Wash. 1995) (finding that numerous discussions with an agency, rejection of a proposed policy, and "differences of opinion regarding implementation" constituted

[2] As the CGA notes, government regulators, the Bureau of Gambling Control, are currently engaging in a rule making process in which the CGA and cardrooms are actively engaged. (Motion, 2:18-23; Kirkland Declaration (Dkt. No. 11-2), ¶ 8, Ex. 5.) The CGA claims the Tribes' complaint "asks this Court to address the same questions affecting the cardroom industry that the Bureau . . . is already examining." (Motion, 2:21-23.) Not exactly. The Bureau's regulatory process deals only with the "rotation of the player-dealer position." (Kirkland Declaration, Ex. 5.) The Tribes' complaint raises broader, and different, contractual issues. Moreover, as the complaint explains, the regulatory process is unnecessary. (Complaint, Dkt. No. 1, ¶ 109.)

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"a showing sufficient to sustain [intervenor's] minimal burden").

With respect to the level of showing necessary, the CGA contends that "*CBU* is especially instructive." (Motion, 8:15.) According to the CGA, that decision – *Citizens for Balanced Use v. Montana Wilderness Association* – proves the CGA need not meet the "compelling showing" of inadequacy of representation. (Motion, 8:15-24.) *Citizens for Balanced Use*, however, is completely inapplicable here. In that case, the intervenors *proved* they and the Forest Service did not share the same "ultimate objective" in defending an "Interim Order" the Forest Service issued as a result of an adverse decision in an underlying case. 647 F.3d 893, 898-99 (9th Cir. 2011). As the *Citizens for Balanced Use* court explained, the intervenors established their desire to defend the Interim Order as it existed, while the Forest Service only "reluctantly adopted" the restrictions in that order because it was compelled to do so by the underlying ruling, and "the Forest service now seeks to overturn on appeal the very court decision that forced it to adopt the Interim Order." *Id.*, at 899. Here, by contrast, the CGA has proven nothing with respect to the State's intentions (or those of the CGA or the cardrooms, for that matter) with respect to any gaming law. Instead, the CGA's memorandum is replete with conclusory assertions about what "may" happen. (Motion, 7:12-13 (the State "may take a different view . . ."), 7:15 (the State "may be unconcerned . . ."), 7:17 (the State "may be unwilling . . ."), 8:22-23 (the CGA's members "may well desire . . .").) The CGA has therefore failed to carry its burden on the adequacy of representation issue.[3]

B. <u>The CGA Also Cannot Meet The Elements For Permissive Intervention</u>

The Court should also not grant the CGA permissive intervention. Other than timeliness, the CGA cannot establish the Ninth Circuit's threshold requirements for permissive intervention. Specifically, the CGA cannot prove it has independent grounds for jurisdiction or that there is a question of law or fact in common between the CGA's position and the Tribes' action against the State. *Lynch*, 307 F.3d at 803-04 (setting forth elements). Rule 24(b)(3) also requires courts to

[3] The CGA argues it would have even met the "compelling showing" standard. (Motion, 8:25-9:10.) The only support for this statement is the CGA's assertion that at "bottom, this case challenges the state regulators' policies and enforcement decisions concerning the Association's members." That is just another conclusory assertion (and one which proves nothing), not a fact.

"consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). "Even if an applicant satisfies those threshold requirements, the district court has discretion to deny permissive intervention." *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998).

i. The CGA Cannot Show Independent Grounds For Jurisdiction

According to the CGA, the jurisdictional requirement "drops away" when the proposed intervenor brings no new claims. (Motion, 9:19-22). This cursory analysis, however, ignores that in its proposed answer, the CGA raises defenses beyond the scope of the Tribes' complaint. Those defenses amount to new claims and thus require the CGA to establish an independent jurisdictional basis. *United States v. Dunifer*, 997 F. Supp. 1235, 1239 (N.D. Cal. 1998) ("[W]here the defendant asserts an affirmative defense requiring the litigation of issues not encompassed in the plaintiff's case-in-chief, the defendant must establish standing because he or she is in a similar situation on those issues to a plaintiff who is invoking the jurisdiction of the court."). As just one example, in its proposed answer, the CGA raises an affirmative defense that the compacts between the Tribes and the State are "illegal contracts" under the "United States Constitution and the Indian Gaming Regulatory Act" and that it intends to argue that the Ninth Circuit "wrongly decided" *Artichoke Joe's v. Norton*. (Dkt. No. 11-6, Fifth Affirmative Defense.) The Tribes' complaint does not put at issue the legality of the compacts under federal law, nor does it test the propriety of the *Artichoke Joe's* decision.[4]

In a footnote, the CGA seems to suggest *Cabazon Band v. Wilson*, though incorrectly decided, gives it standing to intervene here, because it "controls the jurisdictional analysis." (Motion, n.1.) If that is in fact what the CGA meant, it is incorrect. *Cabazon* cannot help the CGA meet its burden to provide an independent jurisdictional basis. In *Cabazon* the Ninth Circuit found jurisdiction over "the [Tribes]' action seeking to enforce the Tribal-State Compacts," because "[t]he State's obligation to the [Tribes] originates in the Compacts." 124

[4] This affirmative defense – a collateral attack on contracts as to which the CGA is neither a party nor a beneficiary – further highlights that the CGA has no interest in this dispute and therefore cannot intervene as of right.

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F.3d 1050, 1056 (9th Cir. 1997). *Cabazon* does not extend beyond those facts because the Ninth Circuit conditioned its ruling on the parties to the compact dispute. *Id.* n.2 ("if the federal courts lack jurisdiction to enforce Tribal-State compacts, then both *tribes* and *states* may be left with no forum in which to enforce compacts, given the sovereign immunity of each.") (emphasis added).

Thus, the CGA failed to meet its burden to establish an independent jurisdictional basis for intervention.

ii. The CGA Failed To Demonstrate A Common Question Of Law Or Fact

The CGA claims to have established a common question of law or fact with a lone sentence: "it will advance defenses that are responsive to the challenges the Tribes raise against the games offered by the Association's cardroom members." (Motion, 10:24-26.) That sentence, however, is neither "law" nor a "fact." Rather, it is the same type of conclusory assertion devoid of support that appears throughout the CGA's memorandum.

If that were not enough, the case law the CGA cites does not support its assertion that it met the common question factor. In *Kootenai Tribe of Idaho v. Veneman*, the Ninth Circuit explicitly considered the "unusual procedural setting" where "the federal government no longer contests the plaintiffs' positions and the court's ruling, [and thus focused on whether] interested persons as intervenors [may] defend the challenged government processes." 313 F.3d 1094, 1107 (9th Cir. 2002). In that posture, the Ninth Circuit found the "intervenors asserted defenses of the [administrative rule being challenged] directly responsive to the claim for injunction." *Id.* at 1110-11. Here, the State is actively contesting the Tribes' position, as evinced by its motion to dismiss. (Dkt. No. 17-1.) Thus, this case does not present *Kootenai*'s "unusual procedural setting." And in *Conservation Nw. v. Rey*, the district court made only a conclusory statement that the putative intervenor's stance was "at least as strong as" *Kootenai*, without analyzing the procedural posture or whether the questions of law and fact were common, much less responsive, to the plaintiff's claims. 2008 WL 11344657, *2 (W.D. Wash. 2008). Thus, the case law the CGA cites does not support its position nor help it fulfill its burden.

Because the CGA failed to make any showing beyond a bald assertion of "responsive[ness]," it has failed to show any common question of fact or law.

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iii. The CGA's Intervention Will Cause Prejudice

Finally, intervention by CGA will decidedly prejudice the Tribes, if no other party. As just one example, the CGA has filed a 26 page memorandum in support of its proposed motion to dismiss (though the Court has already denied the request to file an over-long brief). (Dkt. No. 11-5.) As noted above, the main thrust of the CGA's motion to dismiss is the same as the State's motion – to prove the Tribes can state no claim under the compacts. Setting aside the burden on the Court to have to deal with two motions to the same end, the Tribes should not have to incur the expense and time to respond to duplicative motions, particularly where the CGA has no right to opine about whether the State breached its contracts with the Tribes. *See, e.g., Green Fitness Equip. Co., LLC v. Precor Inc.*, 2018 WL 3036699, *2 (N.D. Cal. 2018) (finding prejudice and denying permissive intervention that would "undermine the efficiency of the litigation process" and stating that "allowing intervention would unnecessarily complicate this litigation's case management") (quoting *Donnelly*, 159 F.3d at 412); *United States v. California*, 2018 WL 1993937, *3 (E.D. Cal. 2018) (finding prejudice because the intervenor's "interests are adequately represented by the [government]," and that "[j]udicial economy is certainly not advanced by a putative intervenor who fills the Court's docket with duplicative pleadings and briefs").

C. Sovereign Immunity Precludes Intervention In This Contract Dispute

It is well-established that Indian tribes exercise "inherent sovereign authority," which includes "common-law immunity from suit traditionally enjoyed by sovereign powers." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014). Absent specific abrogation by Congress, "[n]othing short of an express and unequivocal waiver can defeat the sovereign immunity of an Indian nation." *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379 (8th Cir. 1985); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). "Because a waiver of immunity 'is altogether voluntary on the part of [a tribe], it follows that [a tribe] may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted.'" *Missouri River Servs., Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852 (8th Cir. 2001) (internal citations omitted). "[A]ny

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conditional limitation [a tribe] imposes on that consent must be strictly construed and applied." *Id.* at 852; *see also, Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, 813 F.3d 1155, 1170 (9th Cir. 2015) (analyzing the scope of the limited waiver of sovereign immunity by the State of California under a gaming compact).

The CGA bears the burden of establishing that the limited sovereign immunity waivers set forth in the compacts permit its participation as a party in this intergovernmental contract dispute. *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685-86 (8th Cir. 2011). It cannot meet that burden. Indeed, the CGA's moving papers failed to address the limited immunity waivers at issue. Compact section 13.4 (a), which sets forth the parties' sovereign immunity waivers, limits the waivers solely to compact-specific disputes and specifically excludes the application of those waivers to third parties. (RJN, Exs. B-D.) Compact section 18.1 communicates a similar limitation by rejecting any right of third parties to bring a compact action. (*Id.*)

The CGA's argument that intervention is appropriate because it can cite cases where "private actors" have been permitted to intervene in "actions between sovereign states" or to "defend a tribe's suit against another sovereign" (Motion, 10:1-5) lacks merit, because those cases are factually and legally inapposite. *South Carolina v. North Carolina* concerned intervention under the Supreme Court's original jurisdiction (28 U.S.C. § 125), rather than Rule 24. 558 U.S. 256, 267 (2010). *Battle Mountain Band v. United States Bureau of Land Management*, in turn, involved intervention into a tribe's action against the BLM under the National Historical Preservation Act of 1966 and the Religious Freedom Restoration Act and does not discuss jurisdiction under Rule 24(b).[5] *Cabazon*, 124 F.3d 1050, concerned an attempted intervention by third parties into a compact dispute between four tribes and the State of California.

The *South Carolina* and *Battle Mountain* courts did not address whether intervention is warranted in an intergovernmental contract dispute and the *Cabazon* court denied intervention on

[5] To the extent *Battle Mountain Band* finds a significant protectable interest in its analysis under Rule 24(a)(2), the interest was "vested property rights" arising from "a permit decision" which were "protected under federal law." *See Battle Mountain Band v. United States Bureau of Land Management*, No. 16-cv-268, ECF No. 55 at 3:25-4:6 (D. Nev. June 1, 2016). The CGA has identified no such interest it possesses.

timing grounds. The *South Carolina*, *Battle Mountain*, or *Cabazon* courts also did not consider intervention in the context of a limited sovereign immunity waiver, which must be strictly construed and applied. The plain language of sections 13.4(a) and 18.1 expresses the clear intent of the Tribes and the State to limit their sovereign immunity waivers to each other, and thereby prevent meddlesome third parties, such as the CGA, from interfering in disputes concerning the interpretation and enforcement of the parties' intergovernmental contract rights.

The CGA might be tempted to argue in its reply that section 13.4 of each compact specifically references intervention by a third party and therefore its own status as a third party is not a bar to intervention. The CGA would be mistaken. The third party language in section 13.4 is simply a recognition that there are certain parties who *might* be able to demonstrate an interest in a compact dispute and thus *might* be allowed to intervene. Even then, though, the compacts provide that such intervention is *not* to be construed as a sovereign immunity waiver. Examples of third parties who might be able to demonstrate a protectable interest are:

- The National Indian Gaming Commission, which could potentially seek intervention to ensure an outcome consistent with the Indian Gaming Regulatory Act;
- "Gaming Resource Suppliers" or "Financial Sources" under compact sections 6.4.4 and 6.4.5, which could potentially seek to intervene in a compact dispute related to the licensing or use of gaming resource suppliers or financial sources; and
- A County under compact section 11 could try to intervene to protect its interests under a tribal environmental impact review process for a covered project.

As explained in detail above, the CGA has no such interest. Even if it did, though, it would not constitute a waiver of the Tribes' sovereign immunity for the CGA's benefit.

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3. CONCLUSION

Understandably, no court appears to have allowed a third party to intervene in a private contract dispute where the proposed intervenor is neither a signatory to, nor a beneficiary of, the contract. This Court should not be the first and should therefore deny the CGA's motion to intervene.

Dated: April 2, 2019

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