

The Honorable David G. Estudillo

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

MAVERICK GAMING, LLC.

Plaintiff,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

NO. 3:22-cv-05325-DGE

STATE DEFENDANTS'
RESPONSE IN SUPPORT OF
SHOALWATER BAY TRIBE'S
MOTION TO DISMISS

I. INTRODUCTION

The State Defendants agree with the Shoalwater Bay Tribe that controlling Ninth Circuit precedent requires dismissal of this action under Federal Rules of Civil Procedure 12(b)(7) and 19. *See Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 934, 948 (9th Cir. 2022); *Diné Citizens Against Ruining Our Env't v. Bureau of Indian Affs.*, 932 F.3d 843, 861 (9th Cir. 2019). The Tribe's Motion to Dismiss should be granted.

II. BACKGROUND

Plaintiff Maverick Gaming, LLC challenges gaming compacts between Washington State and 29 Indian Tribes, which they entered in accordance with the Indian Gaming Regulatory Act (IGRA) and Washington law. *See generally* Dkt. #66 (First Amended Complaint, hereinafter "FAC"). The compacts provide a negotiated resolution to gambling disputes between Indian

1 Tribes, Washington State, and the federal government, an account of which the Shoalwater Bay
 2 Tribe provides in its motion. *See* Dkt. #85 (Mot.) at 5–6. In accordance with the compacts, Indian
 3 Tribes located in Washington State conduct certain permitted gambling activities on their
 4 sovereign land for profit. *See, e.g.*, Dkt. #67-6, AR 103–130 (describing amendments to the
 5 Shoalwater Bay Indian Tribe Gaming Compact permitting sports wagering). Each compact was
 6 evaluated by the U.S. Department of the Interior and found compliant with federal law. *See, e.g.*,
 7 Dkt. #67-9, AR 139-142 (letter from Bryan Newland, Assistant Secretary, approving of
 8 Shoalwater Bay Tribe compact amendments). Maverick seeks a Court order invalidating all 29
 9 compacts and the state laws that authorize them, and declaring that continued gaming in
 10 conformity with the compacts violates federal law. FAC ¶ 207. Maverick’s prayer for relief
 11 specifically seeks a declaration “that the Tribes’ class III gaming activities violate IGRA, 15
 12 U.S.C. § 1175, 18 U.S.C. § 1955, and 18 U.S.C. § 1166.” *Id.* ¶ 207(4).

13 This action was originally brought in the U.S. District Court for the District of Columbia.
 14 Dkt. #1. The State Defendants objected to personal jurisdiction in that venue and sought transfer
 15 to this Court. Dkt. ##30, 30-1. In an attempt to avoid transfer of venue, Maverick moved to
 16 amend its complaint to drop the State Defendants from the action. *See* Dkt. ##35, 37 at 3–5. The
 17 State Defendants objected to the proposed amendment because litigating this action in their
 18 absence would prejudice them, and because Maverick’s proposed amended complaint would
 19 have to be dismissed under Rule 19 and was therefore futile. Dkt. #41. The D.C. court, finding
 20 that it lacked personal jurisdiction over the State Defendants, transferred venue to this Court.

21 This Court then granted the Shoalwater Bay Tribe permission to intervene for the limited
 22 purpose of bringing a motion to dismiss under Rules 12(b)(7) and 19. Dkt. #84. The Tribe filed
 23 its motion to dismiss on October 3, 2022. Dkt. #85. The State Defendants agree with the Tribe
 24 that Ninth Circuit precedent requires dismissal pursuant to Rules 12(b)(7) and 19.

III. ARGUMENT

This Court should dismiss Maverick’s complaint under Rules 12(b)(7) and 19 because the Shoalwater Bay Tribe is a necessary party that cannot be joined to this litigation, and this case cannot justly proceed in its absence. As explained in the Tribe’s motion, Rule 19 sets out a three-step process to determine if dismissal is appropriate for failure to join a party. Mot. at 11–12. The Court must determine, first, if a party is “necessary” or “required” under Rule 19(a); second, whether the party may feasibly be joined to the action; and third, if the party cannot feasibly be joined, “whether, in equity and good conscience, the action should proceed among the existing parties or be dismissed.” *Id.*

A. The Shoalwater Bay Tribe Is a Necessary Party

At the first step, a party is necessary under Rule 19(a) where it “claims an interest relating to the subject of the action and is so situated that disposing of the action in the [party]’s absence may . . . as a practical matter impair or impede the [party]’s ability to protect that interest[.]” Fed. R. Civ. P. 19(a)(1)(B).¹ That standard is met here.

First, Maverick’s requests for a declaration that the Tribe’s compact with the State is invalid, FAC ¶ 207(1), and that the Tribe’s gaming activities violate federal law, FAC ¶ 207(4), directly implicate the Tribe’s interests. Mot. at 13–14; *see also* Dkt. #87-1 (Amicus Br.) at 9–10. Courts have repeatedly concluded that, where a plaintiff’s success on the merits would impact an absent Tribe’s proprietary or legal interests—including interests related to an IGRA compact—the Tribe is a necessary party under Rule 19(a). *See Diné Citizens*, 932 F.3d at 853 (finding Navajo Nation had legally protectable interests at stake in litigation where ruling on the merits “may have retroactive effects on approvals already granted for mining operations” to the Tribe); *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002) (holding that Tribe was a necessary party in litigation concerning the validity of gaming compacts under the

¹ Rule 19(a)(1)(B) is sufficient to establish necessary party status, and at this time, the State takes no position on the alternative basis under Rule 19(a)(1)(A).

1 IGRA); *Kescoli v. Babbitt*, 101 F.3d 1304, 1309–10 (9th Cir. 1996) (holding that Tribes were
 2 necessary parties to lawsuit affecting conditions under which tribal contractor could conduct coal
 3 mining, which in turn “could affect the amount of royalties received by [the Tribes] and
 4 employment opportunities for their members”). Here, the Shoalwater Bay Tribe validly claims
 5 legal, sovereign, proprietary, and economic-development interests in being able to continue its
 6 gaming operations pursuant to its compact with the State. Mot. at 13–14.

7 Second, as the Tribe argues, no current party to the litigation adequately represents the
 8 Tribe’s interests. Mot. at 18–23; see *Klamath Irrigation Dist.*, 48 F.4th at 944 (party is not
 9 necessary under Rule 19(a)(1)(B) where its interests will be “adequately represented by existing
 10 parties to the suit”). The Ninth Circuit has consistently held that governmental parties interested
 11 in fulfilling their legal obligations or defending their official actions cannot adequately represent
 12 a Tribe’s proprietary, economic, or sovereign interests. *Klamath Irrigation Dist.*, 48 F.4th at
 13 944–45 (federal government’s interest “differs in a meaningful sense from [the tribe’s] sovereign
 14 interest The Tribes’ primary interest is in ensuring the continued fulfillment of their reserved
 15 water and fishing rights, while [the Bureau of] Reclamation’s primary interest is in defending its
 16 Amended Proposed Action taken pursuant to the ESA and APA.”); *Diné Citizens*, 932 F.3d at
 17 855 (“[W]hile Federal Defendants have an interest in defending their own analyses that formed
 18 the basis of the approvals at issue, here they do not share an interest in the *outcome* of the
 19 approvals”); *White v. Univ. of Cal.*, 765 F.3d 1010, 1027 (9th Cir. 2014) (Tribe and State
 20 not aligned on issue of repatriation of aboriginal remains); *Manygoats v. Kleppe*, 558 F.2d 556,
 21 558 (9th Cir. 1977) (tribal and federal interests not aligned where Tribe had practical interest in
 22 the continued operation of a mine, while federal government had broader interests, including
 23 obligations under environmental laws). And the State, for its part, “owes no trust duty to the
 24 tribes.” *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 n.5 (9th Cir. 2002) (“the State
 25 and the tribes have often been adversaries in disputes over gaming”).
 26

Here, no other party shares the Shoalwater Bay Tribe's sovereign, proprietary, and economic interests in operating its own gaming business on its sovereign land. *See Friends of Amador Cnty. v. Salazar*, 554 Fed. App'x. 562, 564–65 (9th Cir. Jan. 29, 2014) (unpublished) (upholding determination that federal government could not represent Tribe's interests in challenge to IGRA gaming compacts). The Tribe is a necessary party here.

B. The Shoalwater Bay Tribe Cannot be Joined Due to Its Sovereign Immunity

At the second step, the Shoalwater Bay Tribe is protected by sovereign immunity, and may not be sued without its consent. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Ok.*, 498 U.S. 505, 509 (1991). Under controlling Circuit law, the Tribe's sovereignty is dispositive and requires dismissal under Rule 19.

In the Ninth Circuit, where a party is necessary under Rule 19(a), but cannot be joined due to tribal sovereign immunity, a “wall of circuit authority” dictates dismissal under Rule 19(b). *Diné Citizens*, 932 F.3d at 857. Although courts generally apply a four-factor balancing test, *see* Mot. at 11–12, “[t]he balancing of equitable factors under Rule 19(b) almost always favors dismissal when a tribe cannot be joined due to tribal sovereign immunity.” *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 998 (9th Cir. 2020); *see also Skokomish Indian Tribe v. Goldmark*, 994 F. Supp. 2d 1168, 1192 (W.D. Wash. 2014) (“[W]hen a necessary party is immune from suit, ‘there is very little room for balancing of other factors.’”) (quoting *Wichita & Affiliated Tribes of Ok. v. Hodel*, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986)). The Ninth Circuit has observed that “there is a ‘wall of circuit authority’ in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity—‘virtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether [an alternate] remedy is available, if the absent parties are Indian tribes invested with sovereign immunity.’” *Diné Citizens*, 932 F.3d at 857 (quoting *White*, 765 F.3d at 1028). This Ninth Circuit precedent dictates dismissal. *See Klamath Irrigation Dist.*, 48 F.4th at 948; *Diné Citizens*, 932 F.3d at 857.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IV. CONCLUSION

The State Defendants agree with the Shoalwater Bay Tribe that Ninth Circuit precedent requires dismissal of this action under Rule 19.

DATED this 24th day of October, 2022.

ROBERT W. FERGUSON
Attorney General of Washington

s/ Kristin Beneski

KRISTIN BENESKI, WSBA No. 45478
First Assistant Attorney General
BRIAN H. ROWE, WSBA No. 56817
WILLIAM MCGINTY, WSBA No. 41868
Assistant Attorneys General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744
kristin.beneski@atg.wa.gov
brian.rowe@atg.wa.gov
william.mcginty@atg.wa.gov

TERA HEINTZ, WSBA No. 54921
Deputy Solicitor General
1125 Washington Street SE
Olympia, WA 98504-0100
(360) 753-6200
tera.heintz@atg.wa.gov

Attorneys for State Defendants

DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

Theodore B. Olson, DCBA No. 367456
 Matthew D. McGill, DCBA No. 481430
 Lochlan F. Shelfer, DCBA No. 1029799
 Gibson, Dunn & Crutcher LLP
 1050 Connecticut Avenue, N.W.
 Washington, D.C. 20036
 (202) 955 – 8668
 tolson@gibsondunn.com
 mmcgrill@gibsondunn.com
 lshelfer@gibsondunn.com
Attorneys for Plaintiff

Thomas M. Brennan, WSBA No. 30662
 Brennan Legal, PLLC
 P.O. Box 1384
 144 Railroad Ave S., Suite 308
 Edmonds, WA 98020
 (425) 967-3550
 tom@brennanlegalpllc.com
Attorney for Plaintiff

Daron T. Carreiro, DCBA No. 983088
 Rebecca M. Ross, AZBA No. 028041
 United States Department of Justice
 Environment and Natural Resources
 Division
 P.O. Box 7611
 Ben Franklin Station
 Washington, D.C. 20044-7611
 (202) 305-1117
 daron.carreiro@usdoj.gov
 rebecca.ross@usdoj.gov
*Attorneys for United States of America,
 U.S. Dept. of the Interior, U.S. Secretary
 of the Interior Deb Haaland, and U.S.
 Assistant Secretary of the Interior for
 Indian Affairs Bryan Newland*

Scott Crowell, WSBA No. 18868
 Crowell Law Offices
 Tribal Advocacy Group
 1487 W. State Route 89A, Suite 8
 Sedona, AZ 86336
 (425) 802-5369
 scottcrowell@hotmail.com
Attorney for Shoalwater Bay Tribe

Timothy Woolsey, WSBA No. 33208
 Suquamish Tribe
 Office of the Tribal Attorney
 P.O. Box 498
 Suquamish, WA 98392
 (360) 394-8493
 twoolsey@suquamish.nsn.us

Keith M. Harper, DCBA No. 451956
 Leonard R. Powell, DCBA No. 1048832
 Jenner & Block, LLP
 1099 New York Avenue, Suite 900
 Washington, DC 20001
 (202) 639-6000
 kharper@jenner.com
 leonardpowell@jenner.com
 cc: docketing@jenner.com
Attorneys for Suquamish Tribe

1 DATED this 24th day of October 2022, at Seattle, Washington.

2
3 s/ Kristin Beneski

4 KRISTIN BENESKI, WSBA No. 45478

5 First Assistant Attorney General
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26