The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE TULALIP TRIBES OF WASHINGTON, Plaintiff, v. STATE OF WASHINGTON; WASHINGTON STATE GAMBLING COMMISSION; CHRISTINE GREGOIRE, Governor of Washington, in her official capacity; and RICK DAY, Director of the Washington State Gambling Commission, in his official capacity, Defendants.	NO. 2:12-CV-00688-RAJ DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION TO DISMISS

I. MOTION AND REQUEST FOR RELIEF

Defendants State of Washington *et al*. (collectively "the State") request an Order dismissing with prejudice Plaintiff the Tulalip Tribes of Washington's (hereinafter "the Tulalip" or "the Tribe") Complaint For Declaratory and Injunctive Relief under Fed. R. Civ. P. 19(a) and (b) ("Rule 19"). In the alternative, the State requests that the Tulalip's motion for summary judgment be denied and, instead, summary judgment be entered on behalf of the State dismissing this action with prejudice.

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II. INTRODUCTION

In its Complaint for Declaratory and Injunctive Relief, the Tribe seeks to force the State to amend an appendix to its Tribal-State Gaming Compact to add terms that the State never agreed to with any other tribe and without joining the 27 other federally-recognized tribes of Washington who jointly negotiated, agreed to, and are integral to that appendix. Because the Tribe failed to join required parties and the Court cannot grant their requested relief, the State respectfully requests that this Court dismiss the Tribe's complaint with prejudice.

III. EVIDENCE RELIED UPON

The State relies on the declaration of Rick Day, all exhibits attached thereto, and all of the pleadings in this case.

IV. STATEMENT OF THE CASE

A. Federal Authority For Tribal Gaming.

In 1988, Congress passed the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, which provides the statutory basis for the operation and regulation of gaming by Indian tribes in the various states. 25 U.S.C. § 2702. Under this statutory scheme, tribes may conduct gaming activities on Indian lands only if the gaming activity is not specifically prohibited by federal law and is conducted within a state that does not, as a matter of criminal law and public policy, prohibit the specific gaming activity. 25 U.S.C. § 2701(5). Moreover, the statutory scheme grants tribes varying degrees of jurisdiction over three classes of gaming, with class I games (*e.g.* social games for prizes of minimal value) being within the exclusive province of the tribe, and class III games (*e.g.* slot machines or blackjack) being subject to both tribal and state control. *See* 25 U.S.C. §§ 2710(a), (b), and (d). Under IGRA, a tribe may conduct class III gaming only if the following conditions are met:

(1) the tribe has authorized the class III gaming by ordinance or resolution;

(2) the class III gaming is located in a state that permits such gaming for any purpose by any person, organization or entity; and

(3) the class III gaming is conducted in conformity with a Tribal-State compact that is in effect.

25 U.S.C. § 2710(d)(1).

B. Class III Gaming In Washington State.

IGRA and Wash. Rev. Code § 9.46.360 govern the negotiation process for tribal gaming compacts in Washington. Pursuant to these statutes, tribes that are located in the State, recognized by the Department of the Interior, and having jurisdiction over the federal Indian lands upon which they intend to conduct class III gaming, may ask the State, via the Governor, to enter into negotiations for a compact that governs the conduct of the gaming activities in the State. *See* 25 U.S.C. § 2710(d)(3)(A); Wash. Rev. Code § 9.46.360; Declaration of Rick Day ("Day Decl."), ¶ 4. Once the Governor agrees that the State should negotiate, the Governor refers the request to the Washington State Gambling Commission ("Commission") for negotiations. Day Decl., ¶ 5. Pursuant to Wash. Rev. Code § 9.46.360(2), the Director of the Commission is statutorily authorized to conduct such negotiations on behalf of the State.[1] Upon reaching a tentative agreement with a tribe, the Director is required to forward a copy of the proposed compact to the Commission. Wash. Rev. Code § 9.46.360(3). By law, the Commission must, within forty-five days of receiving the proposed compact, vote on whether to return the proposed compact to the Director with instructions for further negotiation or to forward the proposed compact to the Governor for review and final execution. Wash. Rev. Code § 9.46.360(6); Day Decl., ¶ 6. Once the Governor and the tribe execute the compact, it must then be reviewed and approved by the United States Secretary of the Interior. 25 U.S.C. § 2710(d)(3)(B). The final Tribal-State

[1] Rick Day has been the Director of the Commission since August 2001. Day Decl., ¶ 2.

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compact cannot go into effect in the State until notice of the Secretary-approved compact has been published in the Federal Register. *Id.*

1. Washington's Tribal Lottery System.

Washington State currently has class III gaming compacts with 28 of the 29 federally-recognized tribes located in the State.[2] Each of those tribes, including the Tulalip, compacted with the State to participate in what is known as the Tribal Lottery System, whereby tribes are authorized to offer electronic scratch tickets and conduct on-line lottery games in their casinos. *Id; see also* Dkt. No. 15 (Appendix X, attached to Giampetroni Decl. as Attachment 1, pp. 108-60). Pursuant to these agreements, which were appended to each Tribal-State Compact as Appendix X, the individual tribes are each entitled to a specific allocation of Tribal Lottery System machines ("TLS machines") to operate in the State. *See, e.g.* Appendix X at § 12.1, p. 151. Moreover, if they meet certain requirements listed in Appendix X, the tribes may operate additional TLS machines – up to a certain maximum number set by the Compact – by acquiring allocation rights from other compacting tribes with similar gaming rights. *Id.* at § 12.4, p. 152. The tribes agreed, however, that any acquisition or transfer of these machines would be made pursuant to a plan approved by no less than a majority of the eligible tribes and that the State would have no role in forming, implementing, or enforcing the plan. *Id.* at § 12.4.1, p. 152. The State agreed that, in the event it permitted an allocation of TLS machines to a tribe that was greater or on terms more favorable than those provided in Appendix X, the tribes would be entitled to the greater allocation or the more favorable terms. *Id.* at § 12.5, p. 154.

2. Washington's Gaming Compact with the Spokane Tribe.

In 2004, the Spokane Tribe, a non-party to this litigation, entered into negotiations with the State for a compact that would allow it to conduct class III gaming in the State. Day Decl., ¶ 8. In 2005, the Spokane Tribe and the State's negotiating team reached a proposed

[2] *See* http://www.wsgc.wa.gov/docs/tribal/tribe_update.pdf (last accessed 11/16/2012).

Compact. Day Decl., ¶ 9. However, in 2006, at the request of Governor Christine Gregoire, the proposed Compact was returned for further negotiations in order to address certain state concerns regarding expansion of gambling, State and tribe revenue sharing, and the Spokane Tribe's off-reservation facility. Day Decl., ¶ 10. The State and the Spokane Tribe continued negotiations, but were forced to account for new issues that had arisen during the delay. Day Decl., ¶ 11. These issues included the fact that few, if any, TLS machines were available to be leased by the Spokane Tribe. *Id.*

To address its concerns, the State suggested revisions to the proposed Compact concerning the scope and operation of the Spokane Tribe's gaming facilities and its use of TLS machines. Day Decl., ¶ 13. The State also agreed to provide an alternative mechanism for the Spokane Tribe to obtain TLS machines in the event other tribes would not lease to them, but placed conditions on the Spokane Tribe's ability to invoke the Inter-Tribal Fund option. *See* Dkt. No. 15 (Appendix Spokane §§ 6 and 7, attached to Giampetroni Decl. as Attachment 2, pp. 301-04). Specifically, the Spokane Tribe was required to make reasonable efforts to obtain the necessary machines from other tribes. *Id.* at § 6(A), p. 301. The Spokane Tribe also had to first commit to participate with other tribes in additional negotiations to establish a revised statewide framework for tribal gaming, including revisions to the TLS machine allocations under Appendix X. *Id.* at § 6(B), pp. 301-02. Finally, if it exercised the Inter-Tribal Fund option, the Spokane Tribe was required to operate fewer total TLS machines than other tribes are allowed. *Id.*

In early 2007, the Commission and the Spokane Tribe announced an agreed Compact. Day Decl., ¶ 16. The entire Spokane Compact, including Appendix Spokane, was subsequently signed by Governor Gregoire on February 16, 2007. *See* Day Decl., ¶ 16; Dkt. No. 15 (Spokane Compact, attached to Giampetroni Decl. as Attachment 2, pp. 255-382). On April 30, 2007, the Bureau of Indian Affairs, Department of the Interior, published its

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approval of the Tribal-State Compact between the Spokane Tribe and the State. *See* Notices, 72 Fed. Reg. 21284-85 (April 30, 2007); Day Decl., ¶ 17.

3. Appendix X2 negotiations.

Shortly after the initial, proposed Spokane Tribe Compact was publically announced, the other 27 federally recognized tribes of Washington with gaming compacts, including the Tulalip, asked the State to enter into a joint negotiation for a compact appendix that would address issues with the State's then-current Tribal Lottery System under Appendix X. Day Decl., ¶ 20. These issues included the maximum number of machines available to the tribes, each tribe's base TLS machine allocation, and the procedures for participating tribes to obtain additional TLS machines up to an agreed maximum operating ceiling. *Id.*[3] During the negotiations for Appendix X2, the discussion included an inter-tribal or pooling approach as a means of obtaining sufficient machine authorizations and fairly distributing revenues to more rural and non-gambling tribes. Day Decl., ¶ 22. The Inter-Tribal Fund concept, however, did not move forward. *Id.* Instead, the joint negotiating tribes continued with an acquisition and transfer plan similar to that set forth in Appendix X. *See* Dkt. No. 15 (Appendix X2 at § 12.2.2, attached to Giampetroni Decl. as Attachment 1, p. 226); Day Decl., ¶ 24, Ex. 1.

Specifically, under Appendix X2, each compacting tribe, including the Tulalip, is entitled to a base allocation of 975 TLS machines. Appendix X2 at § 12.1, p. 225. Upon meeting certain conditions, each tribe may acquire additional machines – up to a certain maximum number – from any other tribe that has entered into a Compact with Washington that authorizes the Tribal Lottery System. *Id.* at §§ 12.1.1 through 12.2.4, pp. 225-27. While most of the negotiating tribes may operate no more than 3,000 TLS machines under Appendix X2, the Tulalip is one of three tribes specifically listed in Appendix X2 that is

[3] While the Spokane Tribe initially participated in the negotiations, they were asked to leave shortly after the process began. Day Decl., ¶ 21.

permitted to operate 4,500 machines. Appendix X2 at § 12.2.1, p. 226. As with Appendix X, the tribes agreed that their acquisitions and transfers of TLS machines shall be made only pursuant to a plan approved by no less than a majority of the tribes eligible for transfers at the time the plan was adopted. *Id.* at § 12.2.2, p. 226. Similarly, the State was to have no responsibility for the creation, implementation, or enforcement of the plan. *Id.* Instead, "the entire responsibility" for the acquisition and transfer plan would be upon the eligible tribes. *Id.* Finally, as with Appendix X, the State agreed that, in the event it permitted a tribe to have an allocation of TLS machines that is greater or on terms more favorable than that set forth in Appendix X2, the tribes would be entitled to the greater allocation or more favorable terms. *Id.* at § 12.4 ("most favored tribe" clause), p. 227.

The State and the tribes finalized the joint tribal negotiations for Appendix X2 in early 2007. Day Decl., ¶ 23. Chairman Stanley Jones signed the agreement for the Tulalip on March 13, 2007, and Governor Gregoire signed it on March 30, 2007. *Id.* However, as with all the participating tribes, the Tulalip's Appendix X2 was not effective until certain conditions were met; namely that (1) all of Washington's tribes, except for the Spokane Tribe and Cowlitz Tribe, had approved and signed identical X2 appendices and (2) the notice of approval by the Secretary of the Interior was published in the Federal Register. Appendix X2 § 18, p. 236. On May 31, 2007, the Bureau of Indian Affairs, Department of the Interior, published its approval of the X2 amendments for all of the 27 joint negotiating tribes, including the Tulalip. Notices, 72 Fed. Reg. 30392 (May 31, 2007); Day Decl. at ¶ 25. Appendix X2 became the Seventh Amendment to the Tulalip's Tribal-State Gaming Compact. *See* Appendix X2 at pp. 185-86.

Over one year later, on October 24, 2008, Appendix X2 became effective for the Spokane Tribe. Notices, 73 Fed. Reg. 63503 (October 24, 2008). To date, the Spokane Tribe has never invoked the Inter-Tribal Fund option under its Appendix Spokane and, instead, operates under Appendix X2 with the other tribes. Day Decl., ¶ 18.

4. Negotiations with the Tulalip Tribes for a Ninth Compact Amendment.

More than three years later, on September 21, 2010, the Tribe sent a letter to the State requesting negotiations for a Ninth Amendment to its Compact.[4] Day Decl., ¶ 26, Ex. 2. One month later, on October 19, 2010, Commission Director Day, as well as other members of the State negotiating team, met with the Tribe. Day Decl., ¶ 28. During the meeting, the Tribe's representatives cited the "most favored tribe" clause and requested that it be provided a method to acquire additional TLS machines similar to that set forth in Appendix Spokane. Day Decl., ¶ 28. The State explained that it disagreed with the Tribe's interpretation of the most favored tribe clause and that it could not amend the Compact on that basis. *Id.* However, the State expressed its willingness to negotiate a new amendment with the Tribe. *Id.*

The parties subsequently scheduled a meeting for January 24, 2011. Day Decl., ¶ 29. However, on January 21, 2011, the State held a teleconference with the Tribe in which the State explained that the State's fiscal crises and focus on the current legislative session made it very difficult to participate in negotiations at that time. *Id.* The State requested that the meeting be rescheduled after the legislative session concluded. *Id.* The State also reminded the Tribe that the State considered their negotiation request to be for a new provision, not a "most favored tribe" amendment. *Id.* The State explained that the proposal would affect other tribes, and that feedback from those tribes would impact the discussions. *Id.* Finally, the State advised the Tribe that it was working on a number of items that the State would be requesting as part of the negotiations. The Tribe agreed to reschedule the meeting. *Id.*

The State met with the Tribe on August 10, 2011, to discuss the Tribe's proposal for a mechanism to acquire additional TLS machines. Day Decl., ¶ 32. The State disagreed that

[4] The State and the Tulalip Tribes had previously entered an eighth amendment to the Tribe's Compact revising several provisions unrelated to the Tribal Lottery System. *See* Dkt. No. 15 (Eighth Amendment, Giampetroni Decl., Attachment 1, pp. 237-53).

the Tribe's proposal could move forward as a "most favored tribe" provision from the Spokane Compact. *Id.* The State acknowledged, however, that only a limited number of machines were available via the Tribal Lottery System. *Id.* The State told the Tribe that it would follow up with the Governor's Office after the end of August and discuss the issue of the number of player terminals. *Id.* Although the parties agreed to set a tentative meeting for September 7, 2011, the State had no new information by September 2, 2011, so the meeting was not held. Day Decl., ¶ 33.

On October 27, 2011, the Tribe invoked the dispute resolution procedures set out in their Compact. Day Decl., ¶ 34, Ex. 5. The parties met on November 7, 2011. Day Decl., ¶ 35. At that meeting, the Tribe expressed frustration that it had not received the State's written response to its proposed amendment. *Id.* The State indicated that it needed additional input from its policy makers, the Governor and the Commissioners, and committed to provide a written response to the Tribe by December 5, 2011. *Id.* Both parties agreed to continue discussions, and subsequently agreed to meet again on December 14, 2011. *Id.*

On December 5, 2011, the State sent its counter-proposal to the Tribe. Day Decl., ¶ 36, Ex. 6. In addition to other provisions, the State's counter-proposal contained a provision requiring the Tribe to consult with other Washington State tribes to create a plan and pricing structure for accessing an Inter-Tribal Fund. *Id.* When the parties met on December 14, the State primarily addressed the Tribe's questions regarding the need to involve the other Washington tribes in creating an Inter-Tribal Fund process. Day Decl., ¶ 36. The State explained that an Inter-Tribal Fund option would impact the acquisition and transfer provisions contained in Appendix X2 for all tribes, not just the Tulalip. *Id.* At the conclusion of the meeting, the Tribe said that it would weigh its options and provide the State with a written response by January 17, 2012. *Id.*

On January 17, 2012, the Tribe sent a letter revising its proposed amendment. *See* Dkt. No. 14 (Bell Decl., Attachment 3). The Tribe requested that the State respond by

January 31. Day Decl., ¶ 37. The State responded on January 25, 2012, explaining that it could not meet with its policy makers and respond within the two-week deadline. Day Decl., ¶ 38, Ex. 7. The State asked the Tribe to provide a response to its amendment proposals, which included Keno standards, revised Compact definitions, and other revisions to Appendices A and X2. *Id.* The Tribe responded on January 27, 2012, reiterating their 14-day response deadline, which was extended to February 7, 2012. Day Decl., ¶ 39. The State replied on February 3, 2012, stating that it had not agreed to a 14-day deadline, and that the Tribe's January 17, 2012, revision constituted a new proposed amendment. Day Decl., ¶ 40, Ex. 8. The State again asked for a response to the State's December 5 proposal, and indicated that it would provide a response to the Tribe's new proposed amendment by the end of February. *Id.*

On February 10, 2012, the Tribe sent the State an e-mail, advising that the 14-day deadline at issue referred to the timeframe originally provided in its January 17, 2012 letter, enclosing the new proposal. Day Decl., ¶ 41, Ex. 9. The Tribe further stated that it did not believe its proposal to be a new one, but rather a revised one, resulting from the December 14, 2011, dispute resolution meeting. *Id.* It also indicated that it did not anticipate controversy over the State's proposed documents, and thought them to be unrelated to the Inter-Tribal Fund negotiations. *Id.*

On February 29, 2012, the State sent its counter-proposal to the Tribe's January 17, 2012 draft amendment. Day Decl., ¶ 42, Ex. 10. The letter (a) referenced prior discussions, where the State had explained that the Tribe's Inter-Tribal Fund proposal would impact the current Tribal Lottery System acquisition and transfer structure; (b) explained that the Appendix X2 negotiations had been a collaborative process at the request of all the Washington tribes; (c) noted that although the Tribe's proposal incorporated some concepts from Appendix Spokane, the proposal did not include the limitations set out in that appendix; and (d) indicated the State's willingness to negotiate an appendix with an Inter-Tribal Fund

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mechanism, provided that it also included limitations similar to Appendix Spokane. *Id.* The State's counter-proposal also included provisions for working with other tribes on a plan for the fund, as well as conditions for accessing the fund, a pricing structure, and an arbitration process. *Id.* The Tribe never responded to the State's counter-proposal. Day Decl., ¶ 43. Instead, on April 24, 2012, the Tribe filed the instant lawsuit asking this Court to require the State to agree to their specific proposed Compact terms. Dkt. No. 1 (Tulalip Complaint).

V. ARGUMENT

A. The Tulalip's Complaint Must Be Dismissed For Failure To Join The 27 Other Washington Tribes Who Are Parties To Appendix X2.

The Tulalip styled its lawsuit against the State as one for breach of compact; yet it seeks an order from this Court requiring the State to amend the Tribe's Appendix X2 to add terms that would unilaterally affect the 27 other Washington tribes who jointly agreed to and are integral to that Appendix. As the 27 Washington tribes are required parties under Rule 19, but cannot be joined because of sovereign immunity, the Tulalip's lawsuit must be dismissed on principles of equity and good conscience. Fed. R. Civ. P. 19(b).

1. Twenty-seven Washington Tribes are required parties to this action because they may claim a legally protected interest in the terms of their bargained-for Compact.

Rule 19(a) requires joinder of a party to a lawsuit if the person claims an interest relating to the subject of the action and is so situated that disposing of the action in that person's absence may (1) as a practical matter impair or impede the person's ability to protect the interest or (2) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of that interest. Fed. R. Civ. P. 19(a)(1)(B). Application of this rule requires a "practical" and "fact-specific" inquiry. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962, 970 (9th Cir. 2008). However, the rule is to be applied so as to "preserve the right

of parties to make known their interests and legal theories." *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) (internal quotations removed).

On multiple occasions, the Ninth Circuit has analyzed the application of Rule 19(a)(1)(B)(i) in cases involving Indian tribes who were not made party to actions that would potentially impact the tribes' legal interests. In all but one of the cases, the Court of Appeals found that preservation of the tribes' claimed interests mandated joinder of the tribes. *See, e.g.*, *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002) (tribal interest in entering new, renewed, or modified gaming compacts); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150 (9th Cir. 2002) (tribal interest in contract rights); *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999) (tribal interest in fulfilling obligation under agreement to enter into leases); *Shermoen*, 982 F.2d at 1312 (tribal interest in division of reservation land); *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496 (9th Cir. 1991) (tribal interest in representation in tribal negotiations with U.S. government); *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990) (tribal interest in allocation of treaty fishing rights); *but see Cachil Dehe Band of Wintun Indians of the Colusa Indian Community*, 547 F.3d at 970 (9th Cir. 2008) (no *per se* tribal interest in express or implied protection against competition).

For instance, in *American Greyhound Racing, Inv. v. Hull*, the Ninth Circuit was asked to determine whether Arizona tribes with gaming compacts were necessary parties to a challenge from non-tribal interests seeking to enjoin the State from entering, modifying, or renewing tribal gaming compacts. *American Greyhound Racing, Inc.*, 305 F.3d at 1021-22. The Court of Appeals found that the compact provisions allowing for automatic renewal was "an integral part of the existing compacts, and was part of the bargain that the tribes entered with the State." *Id.* at 1023. As such, the Court of Appeals held that the tribes were necessary parties because, regardless of the litigation's outcome, they could *claim* a substantial interest arising from the terms in their bargained-for compacts. *Id.* at 1023-24.

Similar to the tribes in *American Greyhound Racing* and the other cases cited above, the 27 other Washington Tribes operating under Appendix X2 in this State have a claimed interest in preserving and protecting the terms of their agreement. Each of the tribes, including the Tulalip, agreed that their acquisitions and transfers of additional TLS machines would be made *only* pursuant to plan approved by no less than a majority of the eligible tribes. *See* Appendix X2, ¶ 12.2, p. 226. The tribes also agreed that the "entire responsibility" for all aspects of the plan would be upon the tribes. *Id.* Now, the Tulalip seeks a court ordered amendment to their Appendix X2 that will alter the tribes' joint agreement. Without being joined in this lawsuit, the 27 other Washington Tribes are prevented from having a say and are foreclosed from preserving their legal interests in their bargained-for agreement. Fed. R. Civ. P. 19(a)(1)(B)(i).

In addition, if in the absence of the 27 other Washington Tribes, this Court were to enter a declaratory judgment granting the Tulalip's requested relief, the State almost surely would be subject to further litigation with the other tribes to enforce the terms of Appendix X2 with respect to their TLS machine allocations and acquisition abilities. Such litigation, if decided adversely to the State, would leave it exposed to "double, multiple, or otherwise inconsistent obligations" by reason of the tribes' interests in this litigation. Fed. R. Civ. P. 19(1)(B)(ii). The Tulalip's lawsuit, therefore, cannot continue without joining the 27 other Washington Tribes who are a party to Appendix X2. However, due to the doctrine of sovereign immunity, the tribes cannot be joined absent an express waiver of that immunity. *See, e.g.*, *Dawavendewa*, 276 F.3d at 1159. Thus far, none of the 27 other Washington Tribes have waived their sovereign rights.

2. Out of equity and conscience, the matter should be dismissed because the 27 other Washington Tribes cannot be joined.

If the party required by Rule 19 cannot be joined, the court must determine whether in equity and good conscience the action should proceed among the existing parties or be

dismissed. Fed. R. Civ. P. 19(b). To make this determination, the court must balance the following factors: (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 (A) protective provisions in the judgment, (B) shaping the relief, or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder. *Id.*

In analyzing the first factor identified in Rule 19(b), the court performs the same analysis as under Rule 19(a) to see if a protectable interest may be impaired or impeded by the party's absence. *American Greyhound Racing, Inc.*, 305 F.3d at 1024. As shown above, the 27 other Washington Tribes have a substantial legal interest in preserving their bargain under Appendix X2 of an acquisition and transfer plan that is agreed to and enforced by all of the eligible tribes.

Application of the second factor listed in Rule 19(b) requires analyzing whether the court could minimize prejudice to the absent party by shaping the requested relief. The Supreme Court has encouraged shaping relief to avoid dismissal. *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111-12 (1968). In this case, however, there is no possible way to shape the relief to minimize the impact on the 27 other Washington Tribes. The only relief sought by the Tulalip is an amendment to Appendix X2 that would allow it a means of acquiring additional TLS machines that is separate from the tribes' joint-acquisition and transfer plan under Appendix X2. Such relief would undoubtedly have a substantial impact on the other Washington Tribes who are a party to Appendix X2 and would also severely prejudice their interests.

The third factor listed in Rule 19(b), whether an adequate remedy can be provided to a party in the absence of the non-joined party, also requires analyzing the potential remedies. If a court can provide an adequate remedy, even if that remedy is incomplete, then

an action may proceed. *See Makah Indian Tribe*, 910 F.2d at 560. Here, however, the relief sought by the Tulalip is issuance of a compact amendment that substantially alters the acquisition and transfer plan under Appendix X2. Adequate relief cannot be provided in this matter without joining the 27 other Washington Tribes who contracted for Appendix X2.

The fourth and final factor listed in Rule 19(b), "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder," is analyzed and weighed differently by the courts when the party not joined is an Indian tribe that has not expressly waived its sovereign immunity. *See American Greyhound Racing, Inc.*, 305 F.3d at 1025. The Ninth Circuit has consistently held that "the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs." *Id*. (citing *Dawavendewa*, 276 F.3d at 1162). Accordingly, the Tulalip's lack of judicial remedy[5] in this case does not outweigh the 27 other Washington Tribes' interests in "preserving their own sovereign immunity, with its concomitant right not to have their legal duties judicially determined without consent." *Shermoen*, 982 F.2d at 1317.

Based on the foregoing authority and analysis, application of the four Rule 19(b) factors requires that the 27 other Washington Tribes be found to be indispensable to this matter. Because this matter should not proceed in the Tribes' absence, dismissal is appropriate.

B. The Tulalip Tribes' Complaint Must Be Dismissed As It Is Not Entitled To An Amended Appendix X2.

Even if this Court proceeds in this matter without the 27 other Washington Tribes, the Tulalip still cannot prevail. The Tribe seeks summary judgment based on its contention that the State is in breach of the "most favored tribe" provision of Appendix X2 for allegedly giving the Spokane Tribes more favorable TLS machine allocation terms than that provided to the Tulalip. Dkt. No. 13 at 12-14. As evidenced by the actual terms of Appendix Spokane

[5] As discussed extensively below in § C, Tulalip has an alternative remedy set forth in IGRA.

and Appendix X2, however, that is not the case. Rather, the Tulalip seeks to amend their Appendix X2 with terms that are different from and less restrictive than those agreed to by the State and the Spokane Tribe. Moreover, the terms that the Tulalip seeks are in direct violation of the jointly negotiated agreement between it, Washington State, and the 27 other Washington Tribes who have also entered into Appendix X2. Because nothing in the Tulalip's Compact requires such an amendment, its motion for summary judgment must fail and its Complaint must be dismissed.

1. Summary judgment standard.

A court "shall grant summary judgment only if the movant shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). In denying a motion for summary judgment, a court may grant summary judgment against a moving party if that party has had a "full and fair opportunity to ventilate the issues involved in the matter." *Gospel Missions of America et al. v. City of Los Angeles* 328 F.3d 548 (9th Cir. 2003), citing *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir. 1982). There are no genuine issues of material fact in this matter that would prevent the Court from entering summary judgment to dismiss this action.

2. Washington State has never agreed to more favorable TLS machine allocation terms than those set forth in Appendix X2.

The Tribe claims that its proposed amendment reflects the "more favorable operational terms" of the agreement between the State and the Spokane Tribe in Appendix Spokane. Dkt. No. 13 at 13. Relying on the Ninth Circuit's decision in *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095 (9th Cir. 2006), it contends that it does not have to accept any "unfavorable" terms contained in Appendix Spokane. Dkt. No. 13 at 14. However, a reasonable reading of the plain language of Appendix X2, Appendix Spokane, and the *Shoshone-Bannock* decision belies the Tulalip's claims.

The Tulalip relies on the "most favored tribe" provision set forth in Appendices X and X2 in an attempt to force the State to agree to an Inter-Tribal Fund without the concomitant conditions placed on such a fund in Appendix Spokane. However, the "most favored tribe" provision in these appendices does not authorize such an amendment. After specifying TLS machine acquisition and operation conditions,[6] Appendix X2 states:

> Except as specifically provided in Section 12.2.1 of this Appendix, in the event the State agrees (or is required by law or a court ruling to agree) *to permit an allocation of Player Terminals to a tribe which* is greater, or *is on terms which are more favorable,* ***than as set forth herein,*** *the Tribe shall be entitled to such greater Allocation or more favorable terms.*

Appendix X2 at § 12.4, pp. 227 (emphasis added).[7] The plain language of this "most favored tribe" provision entitles the Tulalip to an allocation of TLS machines that are on terms more favorable than those provided in Appendix X2. However, no other Washington Tribe, including the Spokane Tribe, receives an allocation of TLS machines that are on terms more favorable than those set forth in Appendix X2. Rather, each of the 28 Washington Tribes receives an allocation for an equal portion of the allowed TLS machines in the State. Appendix X2 at § 12.1, p. 225. Moreover, each of the 28 Washington Tribes is permitted to acquire additional TLS machines – up to 4,000 for the Tulalip Tribes, Muckleshoot Tribe, and Puyallup Tribe and up to 2,500 for all other tribes – from any other Washington Tribe's unused allocation. Appendix X2 at §§ 12.2 and 12.2.1, p. 226.

Nothing in the Appendix Spokane alters the allocation terms set forth in Appendix X2. Rather Appendix Spokane reflected the conditions of the Tribal Lottery System when the State and the Spokane Tribe were negotiating for a gaming compact prior to the existence of Appendix X2. *See* Day Decl., ¶¶ 9-13. At that time, the Spokane Tribe was being asked to participate in an existing Tribal Lottery System where no machines were actually available

[6] The acquisition and operation conditions are identical for all 27 other Washington Tribes who agreed to Appendix X2, including the Spokane Tribe. *See, e.g.*, Spokane Tribe Appendix X2 § 12, pp. 424-27.

[7] As the language in the appendices is virtually identical, the State will only cite to Appendix X2, which is the most recent provision.

to lease, and the Spokane Tribe felt other tribes would not be willing to lease to them because of past differences. *Id.* As such, the State and the Spokane Tribe created a means by which the Spokane Tribe could obtain additional TLS machines if it met certain conditions and requirements, including negotiating with other tribes and limiting their operation to fewer total TLS machines. Appendix Spokane, §§ 5, 6, and 7, pp. 299-303; Day Decl., ¶ 15.

In fact, as stated in the Preamble of Appendix Spokane, the State and the Spokane Tribe specifically "conditioned their respective approvals of [the] Appendix on their specific mutual agreement that *all* of the provisions of [the] Appendix are interrelated and interdependent and, as such, that *they are not divisible from each other for any purpose*." Appendix Spokane, Preamble, p. 297 (emphasis added). In addition, the parties agreed that "any attempted use or interpretation of individual provisions of [the] Appendix must incorporate, apply and give full consideration to every other term contained in the Appendix as a condition of any such attempted use or interpretation." *Id.* Therefore, relevant to the current matter, Appendix Spokane § 7, which sets out the terms of the Inter-Tribal Fund, is completely dependent upon and inter-related with Appendix Spokane § 6, which sets the TLS machine authorization limits. Finally, the State never agreed to the Inter-Tribal Fund set forth in Appendix Spokane without the associated conditions and limitations set forth in the other provisions of that Appendix. *See* Day Decl., ¶¶ 13-14.

The Tulalip, however, ignores these facts and insists that it is entitled to only what it deems as "favorable terms" set forth in Appendix Spokane § 7. Dkt. No. 13 at 14. The Tribe's reliance on *Shoshone-Bannock* for this proposition is misplaced. In *Shoshone-Bannock*, Idaho and the Shoshone-Bannock Tribes had entered into a gaming compact that stated that, if Idaho permitted any other Indian tribe to conduct any class III games in Idaho that were in addition to those allowed by the Shoshone-Bannock's Compact, the Shoshone-Bannock Tribe's Compact "shall be amended to permit the Tribes to conduct *those same additional games*…." *Shoshone-Bannock*, 465 F.3d at 1098 (emphasis added). Idaho later

adopted an initiative authorizing Indian tribes to conduct gaming using "tribal video gaming machines," allowing tribes to amend their gaming compacts to include such gaming, and limiting those amending tribes' to a certain number of gaming machines, as well as requiring community contributions. *Id.* at 1097. Three tribes chose to amend their compacts to include those terms. *Id.* at 1098.

When the Shoshone-Bannock Tribes sought to amend their compact to allow tribal video gaming machines, Idaho insisted that they renegotiate their compact to require the other terms agreed to by the three tribes. *Id.* Applying the plain language of the Shoshone-Bannock's Compact allowing "those same additional games," the Ninth Circuit held such renegotiation was not required. *Id.* at 1099. The Court of Appeals also rejected the contention that a limitation on the number of gaming machines for the other tribes necessitated the Tribes also agreeing to those provisions. "The plain meaning of "same additional games" refers to the games themselves and not the number of machines." *Id.* at 1100. The Court of Appeals found significant that the Shoshone-Bannock Tribes had not agreed to amend their Compact per the Idaho initiative, but chose instead to rely on their Compact's existing language to confer automatic permission to operate video gaming machines. *Id.* at 1101. Therefore, contrary to the Tulalip's assertion, the *Shoshone-Bannock* decision does not allow tribes to pick and choose favorable terms and reject those deemed unfavorable. Rather, the decision holds the State and the Indian tribes to the plain language of their agreement.

In this case, the plain language of the "most favored tribe" provision in Appendix X2 only allows the Tulalip the same more favorable allocation terms permitted to other tribes. Appendix X2 § 12.4, p. 227. And, as shown, the State has never permitted another Washington Tribe more favorable allocation terms than those allowed to the Tulalip. The Tulalip must be held to its agreement in Appendix X2, and its argument to the contrary fails.

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3. The Tulalip's proposed amendment violates the Tribes' agreement in Appendix X2.

The Tulalip's proposed amendment also violates Appendix X2's requirement of a multi-tribe acquisition and transfer plan. As described previously, under Appendix X2, each of the tribes may only acquire and transfer TLS machines pursuant to a plan approved by no less than a majority of the tribes eligible to make such acquisitions and transfers. Appendix X2 at § 12.2.2, p. 226. During Appendix X2 negotiations, rather than adopting a plan similar to Appendix Spokane, the Tulalip jointly agreed with all the negotiating tribes to continue with the existing system. Day Decl., ¶ 22. Now, over five years later, it seeks an amendment to Appendix X2 that is directly contrary to the terms and conditions of that system. As evidenced by the Tribe's proposed amendment, it is attempting to force the State to create a scheme that is a departure from the existing Tribal Lottery System and the terms of all other compacts agreed to by the State. *See* Dkt. No. 15 (Proposed Amendment to Section 12 of Appendix X2, attached to Giampetroni Decl. as Attachment 3). The proposed plan would also permit the Tulalip to obtain TLS machines outside the agreement and without the approval of the other tribes.[8] *Id.* This is directly contrary to the terms of Appendix X2 and should not be permitted.

C. Even If The Tulalip Tribes' Compact Interpretation Is Correct, IGRA And Washington's Sovereign Immunity Bars Their Requested Relief.

Finally, even if the Tulalip is correct in its interpretation of Appendix Spokane and Appendix X2, the Tribe still may not obtain the requested relief of an order requiring the State to enter into specific compact terms. Instead, the Tribe's only relief is that set forth in the IGRA, 25 U.S.C. § 2701 et seq., which as described above sets forth the statutory process for entering into and amending Tribal-State compacts.

[8] As noted previously, even the Spokane Tribe is subject to and operating under the same terms as Appendix X2. Day Decl., ¶ 18.

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IGRA strikes a finely-tuned balance between the interests of the states and the tribes. *U.S. v. Spokane Tribe of Indians*, 139 F.3d 1297, 1301 (9th Cir. 1998). It sets forth the only means whereby an Indian tribe may operate class III gaming, as well as the compacting process to allow the operation and regulation of such gaming in a state. *See* 25 U.S.C. § 2710(d). IGRA also dictates the manner in which negotiations may proceed between a tribe and a state and provides a process for the resolution of disputes between the two parties. *See* 25 U.S.C. §§ 2710(d)(3), (7). The dispute process under IGRA, however, only provides the federal courts with jurisdiction in certain instances. *See* 25 U.S.C. § 2710(d)(7)(A).

Relevant to this matter, a federal district court only has jurisdiction over causes of action initiated by an Indian tribe arising from the failure of the state to conduct compact negotiations in "good faith." 25 U.S.C. § 2710(d)(7)(A)(i). If the district court finds that the state failed to negotiate in "good faith," then the court may only order the state and tribe to conclude a compact negotiation within a 60-day period. 25 U.S.C. § 2710(d)(7)(B)(iii). If the state and tribe fail to conclude negotiations within that period, then the parties must submit their respective positions to a court-appointed mediator who shall select the position that best conforms to IGRA. 25 U.S.C. § 2710(d)(7)(B)(iv)-(v). If the state still does not consent, then the matter is referred to the Secretary of the Interior who shall prescribe the terms under which the tribe may conduct the gaming. 25 U.S.C. § 2510(d)(7)(B)(vii).

As shown, IGRA does not abrogate the states' sovereign rights. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Thus, while states may be held to "good faith negotiations" with the tribes, they may not be ordered to enter into compacts or forced to accept specific compact terms without their express consent. *Id.* at 73-76. Here, the Tribe has not alleged that the State failed to conduct "good faith" negotiations over their proposed amendment, and indeed, such a conclusion is not supported by the record. *See* Dkt. 1; Day Decl., ¶¶ 26-43. Rather, the Tribe seeks to fundamentally alter the negotiation and amendment process set forth in IGRA by asking this Court to order specific compact terms

between the Tribes and the State. *Id.* This the Tulalip cannot do, and it must be held to the requirements of IGRA. Because the Tulalip cannot obtain its requested relief, its Complaint must be dismissed.

VI. CONCLUSION

For the reasons set forth above, the State respectfully requests that the Tulalip's Complaint for Declaratory and Injunctive Relief be dismissed with prejudice.

DATED this 19th day of November, 2012.

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