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' REPLY TO PLAINTIFF'S RESPONSE TO STATE'S MOTION TO DISMISS AND CROSS MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff the Tulalip Tribes of Washington (hereinafter "the Tulalip" or "the Tribe") asks this Court to order the State of Washington to enter into proposed compact terms that the State has 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 the State's Tribal Lottery System developed under Appendix X2. Because the Tulalip cannot obtain their requested relief without the agreement of the State and the 27 other tribes, the Defendants State of Washington, *et al*. (collectively "the State") respectfully request that this

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Court dismiss the Tulalip's complaint with prejudice.

II. ARGUMENT IN REPLY

The Tulalip oppose the State's motion to dismiss on the grounds that the 27 other tribes of Washington who have jointly agreed to Appendix X2 do not have a legally protected interest in this suit. Specifically, the Tulalip argue that Appendix X2 represents a bilateral contractual agreement between the State and the Tulalip, and altering their version of Appendix X2 does not affect any concomitant rights of the other tribes. The Tulalips' arguments are in error. As described in the State's motion to dismiss and again below, altering any of Appendix X2's provisions for one tribe necessarily affects the 27 other Washington tribes operating under the Tribal Lottery System. More importantly, the proposal would fundamentally alter the State's existing system without the State's agreement, as well as interfere with the other tribes' existing rights and abilities under that system. Because the Tulalip cannot obtain their requested relief, dismissal of their lawsuit is appropriate.

A. The Tulalip Cannot Obtain Their Requested Relief Because 27 Other Washington Tribes Are Required Parties Who Cannot Be Joined Out Of Principles Of Sovereign Immunity.

In its response to the State's motion to dismiss under Fed. R. Civ. P. 19 ("Rule 19"), the Tulalip dispute the State's argument that the Tribe cannot amend Appendix X2 without the participation and agreement of all of the tribes who have signed the agreement. Specifically, the Tulalip contend that Appendix X2 is only a bilateral agreement between the Tribe and the State, and the other tribes do not have a legally protected interest in the Tulalip's agreement. *See* Dkt. No. 28, pp. 2-4. Their argument is without merit as Appendix X2 embodies the global agreement among the State, the Tulalip, and all other tribes participating in the Tribal Lottery System.

1. The Tulalip's requested relief would significantly alter the bargained-for agreement between the State and 27 other Washington tribes under Appendix X2.

Appendix X2's development was a departure from the normal compacting process

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between the State and Washington tribes. *See* Dkt. No. 21 (Day Decl.), ¶ 19-20; *see also* Day Decl., Exhibit 1 ("The high degree of intertribal cooperation and Tribal-State collaboration make this negotiation historic in its magnitude."). In the past, it had been the State's experience that the tribes, as sovereign governments, expected the State to negotiate individually with each tribe. Day Decl., ¶ 19. However, with Appendix X2, the participating tribes agreed that the negotiation needed to be between the State and all of the tribes collectively in order to adequately and fairly address issues with the State's then-existing Tribal Lottery System. Day Decl., at ¶ 20. Specifically, the tribes sought changes to the maximum number of Tribal Lottery System machines ("TLS machines") available to the tribes, each tribe's base TLS machine allocation, *and* the procedures for participating tribes to obtain additional TLS machines above their base allocation. Day Decl., at ¶ 22. In order for the system to work, every participating tribe had to agree to and sign identical X2 appendices so that operation of the State's Tribal Lottery System would be uniform among tribes. *See, e.g.*, Day Decl., at ¶ 24, Exhibit 1; Dkt. No. 15 (Appendix X2 at § 18, attached to Giampetroni Decl. as Attachment 1, p. 236).

Therefore, contrary to the Tulalip's contentions, the 27 other Washington tribes' relation to this lawsuit is not simply that the tribes entered into compact amendments identical to that of the Tulalip. Rather, their importance and necessity to this case rests on the fact that the compact amendment that the Tulalip seeks to alter – Appendix X2 – defines the boundaries and requirements for all of the tribes' ability to operate and obtain TLS machines under the State's Tribal Lottery System. The tribes jointly negotiated and agreed to the provisions of the entire Appendix X2, and no part of Appendix X2 contemplates allowing the State or any another tribe to operate outside the bounds of those provisions to obtain TLS machines.[1]

[1] That is why, contrary to the Tulalip's assertion, the Appendix can only be amended upon certain circumstances occurring that affect all tribes globally. *See* Appendix X2 § 15.2 – 15.2.4, pp. 234-35 ("Upon the expiration of the [Amendment] Moratorium, the following circumstances may constitute a basis for the Tribe to seek an amendment…"). None of those circumstances are applicable here.

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Instead, each tribe's participation in operating, acquiring and transferring TLS machines under the collectively-agreed Appendix X2 is integral to the system as a whole. Any amendment to one tribe's Appendix X2 necessarily affects the rights and obligations of all tribes operating under the Tribal Lottery System.

2. Unlike the claims presented in *Cachil Dehe Band of Wintun Indians*, the Tulalip's proposed amendment significantly interferes with the rights of 27 other tribes.

Relying on the Ninth Circuit's decision in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962 (9th Cir. 2008), the Tulalip nevertheless contend their proposed amendment "in no way affects the other tribes' abilities" under Appendix X2. Dkt. No. 28, p. 8-12. The Tulalip are wrong. While the Tulalip cite *Cachil* for broad propositions, the Tulalip ignore the specific facts on which that decision was based. And comparing the issues presented in *Cachil* with that presented here demonstrates that the decision is inapplicable.

In *Cachil*, the Colusa Indian Community challenged actions taken by the California Gambling Control Commission with respect to the Community's compact and the state's authority to unilaterally license electronic gaming devices. *See Cachil Dehe Band of Wintun Indians of the Colusa Indian Community*, 547 F.3d at 966, 968. Among other claims, the Colusa Indian Community asserted that California breached their compact by (1) unilaterally determining the aggregate number of licenses in the pool; (2) excluding the Community from a specific licensing tier; and (3) refusing to refund the Community's pre-paid license fees. *Id.* The State moved to dismiss the Colusa Indian Community's complaint for failing to join 62 other tribes with identical compacts. *Id.*

Reversing the district court, the Ninth Circuit held that the other tribes were not necessary to the Colusa Indian Community's breach of compact claims. *Id.* In reaching this decision, the Court held that the tribes did not have a legally protected interest in the Colusa Indian Community's claims as (1) the compacts did not purport to establish an overarching

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limit on the number of gaming licenses (547 F.3d at 971); (2) the Community's placement in a particular licensing tier did not affect any other tribe's placement or right to participate in the tiers (547 F.3d at 973-74); and (3) the compacts did not establish any obligation on the tribes with respect to the Community's payment or entitlement to the refund of licensing fees to California (547 F. 3d at 975-76). The Court's holding does not apply to the facts presented in this action.

Contrary to the Tulalip's assertions, the Tribe is not trying to simply enforce their rights under Appendix X2; rather, they are trying to expand and fundamentally alter the means by which they may presently acquire additional TLS machines under the State's Tribal Lottery System. Unlike the breach of compact issues in *Cachil*, the Tulalip seek to add new compact terms that will significantly and necessarily affect the 27 other Washington tribes' bargained-for agreement of a globally-applicable transfer and acquisition plan under Appendix X2. For instance, allowing the Tulalip to acquire TLS machines outside the parameters of the joint leasing plan would lessen the other tribes' abilities to acquire and transfer their rights to TLS machines under that plan. Moreover, as described by the Samish Tribe and Sauk-Suiattle Indian Tribes, the Tulalip's proposal would significantly decrease the value of those tribes' present and future inter-tribal leases by imposing a reduced price at which the Tulalip could obtain additional machines. And neither consequence of the Tulalip's proposed plan is part of the bargain that any of the 27 other Washington tribes agreed to when they entered into the multi-lateral terms of Appendix X2.

Because the *Cachil* decision does not support the Tulalip's argument, this Court should find that the 27 other Washington Tribes are required parties who cannot be joined out of principles of sovereign immunity and dismiss the matter under Rule 19.

B. The Tulalip Cannot Obtain Their Requested Relief Of An Amended Appendix X2.

In its response to the State's cross-motion for summary judgment, the Tulalip continue to demand that the State amend their Appendix X2 with provisions that allow the Tulalip the

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ability to acquire additional TLS machines in a manner that the State has never agreed to provide to any other tribe. The Tulalip's demand fails as nothing in the Tulalip's compact or the law requires such an amendment.

1. The Tulalip cannot force the State to agree to specific compact provisions that it has not agreed to for any other tribe.

Under the guise of asserting the most favored tribe provision in Appendix X2, the Tulalip continue to demand what they deem as more favorable "terms" of the Spokane Tribe's compact amendment without the associated, restrictive "terms" also placed on that tribe. *See* Dkt. No. 29, pp. 10-13. The Tulalip fail to acknowledge, however, that the State's agreement with the Spokane Tribe is comprised of the entire Appendix Spokane, not just selective words and phrases found within. *See* Dkt. No. 15 (Appendix Spokane, Preamble, attached to Giampetroni Decl. as Attachment 2, p. 297). As stated in the State's motion and repeated again here, the State has *never* agreed to the terms of an Inter-Tribal Fund, without the other completely dependent-upon and interrelated restrictions set forth in the remainder of Appendix Spokane. *See* Dkt. No. 20, p. 18; Day Decl., ¶¶ 14-15; Appendix Spokane §§ 5, 6, and 7, pp. 299-303. By cherry picking specific provisions of Appendix Spokane and ignoring others, the Tulalip attempt to force a compact amendment that gives them the ability to acquire additional TLS machines that no tribe, not even the Spokane Tribe, has. Therefore, rather than availing themselves of the most favored nation provision as they purport to be doing, the Tulalip seek to compel the State to enter into a wholly new amendment to Appendix X2 that is contrary to the terms thereof.

2. Appendix X2 does not permit the Tulalip's proposed amendment.

As explained previously in the State's motion, under Appendix X2, each of the 28 compacting tribes has a "total base allocation" of 975 TLS machines that the tribe can operate within the State of Washington. *See* Dkt. No. 20, p. 4; Appendix X2 at § 12.1, p. 225.

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Therefore, a total of 27,300 TLS machines are currently authorized for use in the State.[2] *Id.* However, within the confines of that 27,300 machine limit, each compacting tribe has the ability to acquire additional machines above and beyond their total base allocation, but only by acquiring machines from other tribes who are not presently operating their total base allocation, and only up to a total operating ceiling specified in Appendix X2.[3] Appendix X2 at §§ 12.2 – 12.2.4, pp. 225-27. Moreover, pursuant to the tribes' joint agreement, any tribe's transfer or acquisition of TLS machine rights must only be made pursuant to a plan approved by no less than a majority of the compacting tribes. Appendix X2 § 12.2.2, p. 226.

In this case, however, the Tulalip seek an amendment that would allow them to acquire allocation rights to TLS machines from a source that is outside the joint acquisition and transfer plan set forth in Appendix X2. *See* Dkt. No. 15 (The Tulalip's January 17, 2012 Proposed Compact Amendment, attached to Giampetroni Decl. as Attachment 3, pp. 437-41). Under their proposal, the Tulalip could obtain additional machines without being bound by the concomitant conditions that all other compacting tribes are bound by under Appendix X2. Not only would the Tulalip's proposed means to acquire additional machines impact and impair the other tribes' machine leasing abilities, it could substantially increase the current agreed-upon limits to the maximum number of TLS machines operating within the State.[4] Because neither the State, nor the 27 other Washington tribes has ever agreed to such an acquisition plan (*see* Dkt. No. 20, Def. Response and Mtn. Dismiss, pp. 16-20), the Tulalip's proposed amendment cannot proceed.

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[2] The 27,300 number is derived from multiplying the number of compacting tribes by the total base allocation of 975 TLS machines.

[3] For instance, the Tulalip may operate up to 4,000 of the 27,300 total TLS machines in the State. In order for them to reach that "ceiling," under Appendix X2, the Tribe must acquire the rights of those machines from other tribes' unused base allocation.

[4] For instance, without the 27,300 machine ceiling imposed under the joint transfer and acquisition plan of Appendix X2, 25 tribes could each operate a total of 3000 machines and 3 tribes could each operate a total of 4,000 machines in the State. If every compacting tribe were to also amend their compacts to add new terms identical to those sought by the Tulalip, the total number of machines that could be operated in Washington State could increase threefold from the current ceiling of 27,300 machines under X2 to 87,000 machines.

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3. The Tulalip's requested relief impermissibly interferes with other entities' ability to exercise political, legislative, and executive discretion.

Finally, the Tulalip significantly misconstrue the State's argument with respect to its sovereignty and this Court's ability to grant the Tulalip's requested relief. *See* Dkt. No. 29, pp. 2-3. Contrary to the Tulalip's argument, the State does not contend that this Court lacks jurisdiction to hear this matter. *See* Dkt. 20, pp. 21-22. Rather, the State asserts that this Court cannot grant the Tulalip's requested relief of amending the Tulalip's compact to add new terms. *Id*. As the United States Supreme Court has long recognized, "[c]ourts have no power to make new contracts or to impose new terms upon parties to contracts without their consent." *City of New Orleans v. New Orleans Waterworks Co*., 142 U.S. 79, 91 (1891).

Nevertheless, the Tulalip are asking the Court to do just that – order the parties to enter a new compact containing provisions to which the State does not and has not agreed. The Tulalip seek to fundamentally alter the negotiation and amendment process required by the federal Indian Gaming Regulatory Act ("IGRA") and Washington law. *See* 25 U.S.C. § 2710(d)(3)(B); Wash. Rev. Code § 9.46.360. Moreover, the Tulalip seek to inject judicial involvement in the compacting process, which is neither anticipated nor allowed by these laws. *See* Dkt. No. 20, pp. 21-22; 25 U.S.C. § 2701 *et seq.*; Wash. Rev. Code § 9.46.360. Before a Tribal-State compact can go into effect, the law requires that: the Gambling Commission vote to forward the proposed compact to the Governor for review; the Governor approve and execute the compact; and, finally the United States Secretary of the Interior approve the compact. 25 U.S.C. § 2710(d)(3)(B); Wash. Rev. Code § 9.46.360(6); Day Decl., ¶ 6. Accordingly, the relief sought by the Tulalip would necessarily require a court order directing the State Gambling Commission to forego its legislative discretion and approve the Tulalip's proposed Amendment. *See* Wash. Rev. Code § 9.46.360(6). Moreover, it would require an order directing the Governor of the State of Washington to forego her executive discretion and approve and execute the proposed Amendment. *Id.* And, finally, it would require an order

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directing the United States Secretary of the Interior to forego his executive discretion and approve the proposed Amendment. 25 U.S.C. § 2710(d)(3)(B). Because the Tulalip cannot compel such actions, their request relief cannot be granted and their suit must fail.

III. CONCLUSION

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

DATED this 21st day of December, 2012.

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