NO. 13-35464

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TULALIP TRIBES OF WASHINGTON,

Plaintiff-Appellant,

v.

STATE OF WASHINGTON; WASHINGTON STATE GAMBLING COMMISSION; RICK DAY, Director of the Washington State Gambling Commission, in his official capacity; CHRISTINE GREGOIRE, Governor of the State of Washington, in her official capacity,

Defendants-Appellees,

On appeal from the United States District Court
Western District of Washington at Seattle
No. 2:12-cv-00688-RAJ
The Honorable Richard A. Jones
United States District Court Judge

AMICUS BRIEF OF THE SAMISH INDIAN NATION IN SUPPORT OF DEFENDANTS-APPELLEES STATE OF WASHINGTON, ET AL

Craig J. Dorsay
Lea Ann Easton
DORSAY & EASTON LLP
1 SW Columbia Street, Suite 440
Portland, OR 97258
503-790-9060

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulatory Material

Other Authorities

Comes now the Samish Indian Nation, by and through undersigned counsel, and submits an Amicus Brief in this appeal.

I. Introduction.

The Samish Indian Nation ("Samish Tribe") addressed its identity and interest in this case in its motion for leave to file an amicus curiae brief ("Samish Motion"). The Samish Tribe incorporates that discussion and argument into this amicus brief by reference. The Samish Tribe will discuss four separate topics in this amicus brief: 1. Samish Tribe's status as a required party under Fed. R. Civ. P. 19; 2. Samish Tribe's unique perspective on the Tulalip Tribes' appellate arguments; 3. Laches; and 4. Equitable considerations.

II. Argument.

a. State's Fed. R. Civ. P. 19 Motion.

As discussed in the Samish Tribe's amicus motion, 27 of the 29 Washington tribes are signatory parties to identical versions of the same Compact amendment agreed to by the State of Washington and Tulalip in 2007 pursuant to the Indian Gaming Regulatory Act (IGRA). Samish Motion, p. 4. This 2007 amendment is known as "Appendix X2." One provision of that Compact amendment, Section 12, is the focus of the amendment. It authorizes 975 Video Lottery "Player Terminals" for each signatory tribe, and addresses how each tribe can use, transfer or otherwise allocate its 975 Class III "Player Terminals," which are functionally

equivalent to slot machines. Section 12.2.2 of Appendix X2 in particular is of critical importance to tribes like the Samish Tribe, who under Section 12 of Appendix X2 do not operate their own casinos or do not use all authorized 975 Player Terminals in their own casinos. Declaration of Chairman Thomas D. Wooten ("Wooten Declaration"), Ex. 1 to Samish Motion, ¶ 11. Section 12.2.2 addresses how tribes that operate casinos can obtain Player Terminal allocation rights in addition to the 975 Player Terminals authorized under their own individual Compacts, and how tribes that wish to lease their Player Terminal Allocation rights instead of operating a casino can effectuate transfer of their Player Terminal allocation rights to tribes that do operate casinos.

Section 12.2.2 of Appendix X2 requires that there must be an inter-tribal "plan" authorizing transfer of Player Terminal rights between tribes that must be approved by the majority of tribes that are signatories to the Compact Amendment adding Appendix X2. The tribes must agree to follow such plan, and any changes to the plan must obtain the same majority approval.[1] *See* ER at 099-100. Tulalip

[1] Tulalip's opening brief claims that the Tulalip Tribes "already fully participated" in additional negotiations to establish a revised tribal gaming framework when it negotiated with other tribes leading up to Appendix X2 in 2007. Tulalip Brief at 28, *citing* § 6.B of Appendix Spokane; *see* App. X2, § 12.2.2. But all of the relevant language in these Compact appendices is forward looking, addressing negotiations after Appendix X2 and Appendix Spokane were adopted. It is the Samish Tribe's position that by approving Section 12.2.2 of Appendix X2, the Tulalip Tribes agreed that the exclusive avenue by which it could seek to establish the Inter-Tribal Pooling fund it is attempting to obtain approval for in this litigation

Tribes in this lawsuit seek to abrogate this Compact requirement and the Terminal Allocation Transfer Plan ("TATP") agreed to by the 27 Washington tribes, to obtain another, alternative option to operate additional Player Terminals in its casino(s) rather than obtaining such Player Terminals by lease pursuant to Appendix X2. Complaint, Dkt. # 1, ¶¶ 39-41, ER at 177.

If Tulalip is successful in this lawsuit, it will affect the Samish Tribe. It will overturn the Compact amendment agreed to by the Samish Tribe and the other 25 signatory tribes to Appendix X2. It will fundamentally alter the structure of how Player Terminals in the Tribal Lottery System are obtained and used under the current Compact. It will add a provision to the Compacts (since every other Compact Tribe would be entitled to the same option language under the same Compact provision cited by Tulalip) that was expressly considered and rejected by the 27 tribes during the negotiation process for Appendix X2. Wooten Declaration, *supra*, ¶ 12. It will undermine the economic bargain that "remotely located Washington tribes" negotiated with those tribes "with more advantageous geographical locations" as part of the Appendix X2 internal negotiation process among the tribes. *See* Appendix X2, *supra*, § 12.2 2 (Terminal Allocation

---

is to obtain the approval of a majority of the signatory tribes to Appendix X2 to change the existing Terminal Allocation Transfer Plan to incorporate such a pooling plan.

Transfer Plan is completely the responsibility of the tribes; State has no authority over or responsibility for the Plan).

The other 26 Appendix X2 Compact tribes were not named by the Tulalip Tribes as parties in this lawsuit. Most likely, this omission was because Tulalip knew it could not add them as parties because of their sovereign immunity. *E.g.*, *McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989). As the State argued below in its Rule 19 motion, the question is whether the other 26 tribes including Samish are required parties to this lawsuit and whether the suit may proceed in their absence. The Samish Tribe addresses this issue only for itself, from the perspective of a leasing tribe under the TATP. The Samish Tribe believes it is a required party under Fed. R. Civ. P. 19, and that the current action must be dismissed in its absence.

An important caveat must be noted before looking at the requirements of Rule 19 as applied to the present case. The Samish Tribe is not arguing that a tribe may never bring any Compact dispute against the State of Washington under the Compacts that currently exist as amended simply because all 27 tribes are parties to the identical Compact and because the other 26 tribes have not waived their sovereign immunity. *See, e.g., Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990)(tribes not necessary parties for every claim). But the Compact provision at issue in Tulalip's lawsuit is the heart of the Tribal Lottery System and TATP

authorized in Compact amendments in 1998 and 2007 as Appendices X and X2. Appendix X2 was specifically made contingent upon contemporaneous approval of all 27 tribes that participated in negotiation of the amendment. ER at 104, § 18 of App. X2. Section 12.2.2 of Appendix X2 specifically incorporates a terminal allocation transfer plan that requires the majority approval of the 27 signatory tribes to change. ER at 099-100.

The Samish Tribe and other leasing tribes would not have agreed to Compact amendment X2 without the specific language that Tulalip now seeks to dispense with, without the express approval of the Samish and other signatory tribes. Wooten Declaration, Ex. 1 to Samish motion, *supra*, ¶ 14. Tulalip's action in bringing this suit violates the consensus reached among the 27 tribes in agreeing to this amendment language, and violates the Compact amendment agreement the 27 tribes reached with the State of Washington in 2007.

Whether a case can proceed without a "required party" as defined by Fed. R. Civ. P. 19 requires three successive inquiries: (1) whether a non-party or absentee party should be joined in a lawsuit if possible; (2) if so, whether it is feasible to order the absentee party to be joined; and (3) if not, whether the case in equity and good conscience can proceed without the absentee party, or whether it should be dismissed. *E.E.O.C. v. Peabody W. Coal Co.*, 610 F.3d 1070, 1078 (9th Cir. 2010); *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 997 *opinion modified on*

reh'g, 257 F.3d 1158 (10th Cir. 2001). Each of these inquiries has sub-parts that must be addressed.

A two part alternative analysis is required. *Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony, Cal. v. City of Los Angeles*, 637 F.3d 993 (9th Cir. 2011)(citing *Yellowstone Cnty. v. Pease*, 96 F.3d 1169, 1172-73 (9th Cir. 1996)). First, the court must determine whether, in the absence of a party, the court can accord complete relief among the existing parties. Fed. R. Civ. P. 19(a)(1)(A). Second, the court must determine whether a person or party claims an interest relating to the subject matter of the action and is so situated that disposing of the action in the person's absence may as a practical matter impair or impede the person's ability to protect that interest, or leave an existing party subject to a substantial risk of incurring multiple or inconsistent obligations because of that interest. Fed. R. Civ. P. 19(a)(1)(B).

There is no precise formula for determining whether a party is a required party under Rule 19; that determination must be based on an evaluation of the facts and circumstances of each case. *E.E.O.C., supra*, 610 F.3d at 1081. The Rule requires only a claimed interest that is not frivolous. *Citizen Band Potawatomi, supra*, 248 F.3d at 998-99 (*citing Davis v. United States*, 192 F.3d 951, 959 (10th Cir. 1999)(Davis cites *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992) for this principle)). As discussed earlier, granting Tulalip's demand to

change the current Compact as amended will eviscerate the leasing transfer provision on which the Samish and other leasing tribes rely for governmental and economic survival. Samish will lose the opportunity to preserve that Compact provision if Tulalip succeeds in its claim against the State, since the State has a contract with the Samish Tribe that contains the same provision. Once the leasing provision is abrogated by one party, it is gone forever for everyone else. The State as a practical matter will be bound by this Court's decision on the specific Compact provisions at issue in this case, with regard to its separate contractual relationship with the Samish Tribe.

A decision in Tulalip's favor will also subject the State to multiple and inconsistent obligations since it will no longer have the benefit of the deal it insisted upon in agreeing to the amendments adding Appendix X2 to the Compact. The 27 Compacts will no longer be identical, as required in the approval provision of Appendix X2 at Section 18. ER at 104. The Samish Tribe's claim to an interest in this litigation is not frivolous.

The Samish Tribe is a party to a gaming Compact with the State of Washington that includes Appendix X2, which Tulalip seeks to change in this lawsuit. The Ninth Circuit has consistently held that parties to an agreement or contract are required parties under Rule 19. In *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1157 (9th Cir. 2002), the Court stated:

"Thus, today we reaffirm the fundamental principle outlined in *Lomayaktewa*: a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract." This is especially true if the requested relief in a lawsuit would alter the choices and balancing that an Indian tribe engaged in when it entered into an agreement such as Appendix X2: "In *Kescoli* [*v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996)], …[w]e determined that, because a judgment invalidating the challenged provision could cause the entire tapestry of the agreement to unravel, the Hopi Tribe had a legally protected interest in the lease term. *Id.* at 1310; *see also McClendon*[885 F.2d at 633]('Because the Tribe is a party to the lease agreement sought to be enforced, it is an indispensable party under [Rule] 19.')." 276 F.3d at 1156-57. In *Kescoli*, the Ninth Circuit also stated:

> Further, the Navajo Nation and the Hopi Tribe, by virtue of their sovereign capacity, have an interest in determining what is in their best interests by striking an appropriate balance between receiving royalties from the mining and the protection of their sacred sites. *See Pit River Home & Agr. Co-op. Ass'n v. United States*, 30 F.3d 1088, 1099, 1101 (9th Cir. 1994). In her action, Kescoli challenges the balance struck by the Navajo Nation and the Hopi Tribe.

101 F.3d at 1310. (Emphasis added). Tulalip's lawsuit would have a similar impact on the choices and balancing that factored into the Samish Tribe's approval of its Class III Gaming Compact with the State of Washington, as amended by Appendix X2.

If the determination is made that a party should be joined in a proceeding, the second inquiry is whether the party can be joined as a practical matter. *See* Fed. R. Civ. P. 19(a)(2)("court must order that the person be made a party"). The Samish Tribe and the other 25 Washington tribes with Appendix X2 in their Compacts cannot be joined because they have not waived their sovereign immunity from suit by other tribes. *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456 (9th Cir. 1994); *Makah Indian Tribe*, *supra*, 910 F.2d 555; *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496 (9th Cir. 1991). In addition, plaintiff in this case, the Tulalip Tribes, has not waived its sovereign immunity from suit by these other tribes, including Samish.

This brings us to the third and final stage of the Rule 19 inquiry. If a party is a required party under the Rule and cannot be joined, the Court must decide whether in good conscience and equity the case should proceed or be dismissed. The Samish Tribe will discuss later in this brief some equitable factors that should be considered in making this determination.

Tribal sovereign immunity has been a determining factor in deciding whether a lawsuit must be dismissed if a required party cannot be joined. The Ninth Circuit held in *Kescol*i that dismissal is warranted if necessary to protect tribal sovereignty:

> [W]e have "recognized that a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its

> sovereign immunity." *Confederated Tribes of Chehalis Indian Reservation*, 928 F.2d, 1500. If the necessary party is immune from suit, there may be "very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor." Id. at 1499.

101 F.3d at 1311.

Even applying the balancing factors set out at Fed. R. Civ. P. 19(b), dismissal is warranted in the present case. A judgment rendered in the Samish Tribe's absence in this case will likely prejudice the Samish and other leasing tribes under the Washington gaming Compacts. Prejudice cannot be lessened or avoided by shaping the relief, since any change in the current Compacts achieved by Tulalip automatically applies, under the amendment provisions of Section 12 of Appendix X2, to the other 26 tribes that have the same Compact.

The final factor – whether the plaintiff would have an adequate remedy if the action were dismissed – also warrants dismissal in this case. The Tulalip Tribes have alternative options to the present lawsuit. First, under Section 12.2.2, any plan addressing transfer or allocation of Player Terminal rights must be approved by a majority of the tribes with the same Compact amendments. Tulalip has ignored this required provision. Tulalip can (and should be required to) approach the other 26 Washington gaming Compact tribes and attempt to secure approval for the changes it recommends to the current terminal allocation transfer plan. Tulalip should have

attempted that option in any event.[2] Second, assuming Tulalip could meet the substantial burden of showing that there are not sufficient Player Terminals available for its casinos under the current Compact limits on numbers of machines – a showing Tulalip has not made – Tulalip can convince the other Washington tribes to re-approach the State and seek a higher limit in the number of Player Terminals allocated to each tribe in a new Compact amendment. This option would meet Tulalip's needs while preserving the current leasing system for those tribes which depend upon it. Tulalip has an adequate remedy outside this lawsuit. Tulalip's lawsuit should be dismissed pursuant to Fed. R. Civ. P. 19.

b. Samish Response to Tulalip's Principal Brief.

The Tulalip Tribes are asking this Court to replace Section 12 of Appendix X2 of the Gaming Compact between the Tulalip Tribes and the State or Washington with the "more favorable" provisions of "Appendix Spokane" to the 2007 Spokane Gaming Compact. Complaint, Dkt. # 1, ER at 177. ¶¶ 39-41. In making this demand, however, Tulalip has omitted critical facts.

The Spokane Gaming Compact with the more favorable Player Terminal allocation language was approved before the Tulalip Gaming Compact amendment was approved with Appendix X2 and the Player Terminal allocation and transfer

[2] Tulalip claims in its Brief that it has never expressed any objection to participating in such negotiations, Brief at 28, but Tulalip has not requested or scheduled negotiations on its proposed change to the TATP.

provision at Section 12.2.2. The Tulalip Tribes knew of the different language in the Spokane Compact when it agreed to and finalized the Appendix X2 Compact amendment.

The Tulalip Tribes could have demanded the allegedly more favorable Spokane Compact language when it negotiated the Compact amendment contained in Appendix X2, but it, in consensus with 26 other tribes, chose not to. The 27 Washington tribes that negotiated the Appendix X2 amendment in 2007 and entered into identical Compact amendments and Appendices X2 in their Compacts specifically discussed whether to negotiate for "pooling" language like that asked for by Spokane, and specifically decided not to. Wooten Declaration, *supra*, ¶ 12. It was only more than five years after the X2 Compact amendments were finalized in 2007 that the Tulalip Tribes - on its own behalf– decided unilaterally that it desired different Compact language.

The Spokane Compact amendment with the Appendix Spokane language was approved by the Department of Interior as required by the Indian Gaming Regulatory Act on April 30, 2007. 72 Fed. Reg. 21284-85. The Appendix X2 Gaming Compact amendment for the 27 tribes was approved by the Department of Interior on May 31, 2007. 72 Fed. Reg. 30392. The 27 Washington tribes, including Tulalip and Samish, were aware of the Spokane Compact amendment before their Appendix X2 Compact amendments were approved. *See* Letter dated

April 2, 2007 from WIGA Chairman W. Ron Allen to Secretary of Interior Dirk Kempthorne, p. 3, Ex. 1 to Wooten Declaration ("Allen Letter") ("As to the other two tribes, the Spokane Tribe delivered its first gaming compact to your office late last month."), attached as Exhibit 1 to Wooten Declaration, *supra*. The Tulalip Tribes clearly had the opportunity to negotiate for the Spokane Compact language it now wants before finalizing its Appendix X2 Compact amendment later in 2007, and chose not to. *See* District Court Order, Dkt. # 39, ER at 001-009 ("Appendix Spokane became effective before X2 became effective.").

Instead, the Tulalip Tribes expressly agreed to the Player Terminal allocation and transfer language of Section 12 of Appendix X2. As WIGA Chairman Allen stated in his cover letter transmitting the 27 Compact amendments and 27 Tribal Council resolutions to the Secretary of Interior in April 2007, the 2007 Compact amendments were "concluded . . . in good faith and with complete consensus." The Player Terminal inter-tribal leasing provisions first agreed to in 1998 in Appendix X were expressly preserved and restated in Appendix X-2:

> The existing contractual intertribal leasing agreements are preserved with X-2. The uniform amendment does not contain provisions to inhibit or prevent intertribal leasing agreements. Such agreements between casino operating tribes and those who either do not operate or cannot use their full allocation of TLS terminals have been successful. This practice has in the past, and will continue, in the future, to assist more remotely located Washington tribes to share in the prosperity of tribes with more advantageous geographical locations.

Allen Letter, *supra*, pp. 2-3. The Tulalip Tribes were aware of this statement by the Chairman of WIGA, and his summary of the bargain that all 27 tribes agreed to at the same time in Appendix X2. Tulalip voiced no objection to the omission of Spokane's pooling provision at that time from Appendix X2.

The language agreed to in Section 12.2.2 of Appendix X2 specifically requires that a majority of the signatory tribes agree to any changes in the current Terminal Allocation Transfer Plan. ER at 099-100. Tulalip agreed to this language in 2007 but did not comply with it before filing the present lawsuit. It is bound by that Compact provision.

The Tulalip Tribes has not even alleged that it needs this extra option, or that it cannot obtain all the Player Terminals it needs through the current TATP plan. It is the Samish Tribe's and other leasing tribes' belief that Tulalip seeks this new plan language only to reduce the lease prices it currently pays to those tribes from which it currently leases Player Terminal Allocation permits. This result would undermine the whole basis for Appendix X2, which was to establish a mechanism to route some gaming funding to tribes that are not in locations with a large gaming market share. The Samish Tribe believes that the payments it might theoretically receive from Tulalip's proposed "pooling" plan option, as prices are set out in the Spokane Appendix, would be substantially less than it and other leasing tribes

receive under the "direct" leasing agreements between "Eligible Tribes." *See* Complaint, ER at 173, ¶ 24.

Perhaps most importantly, Tulalip's unilateral attempt to change how it obtains additional Player Terminals seeks to abrogate how the Washington Tribes historically have obtained additional Player Terminals - by negotiating new Compact amendments with the State. The original Appendix X authorized a maximum of 625 Player Terminals per tribe. When that allocation proved to be insufficient for the Washington tribes, they went back and in Appendix X2 negotiated a new Player Terminal limit of 975 Player Terminals. If this current limit proves inadequate in the future, the Samish Tribe strongly believes the appropriate option is for the Washington Tribes to go back again to the State and negotiate a new, higher limit. Wooten Dec., *supra*, ¶ 13. This option protects the Samish Tribe and its governmental services and benefits. Tulalip's lawsuit completely ignores and avoids this option as an existing alternative.

Finally for this Section, the Compact language that Tulalip is relying upon to assert it has the right to add the Appendix Spokane provision as an additional Player Terminal acquisition option must be looked at. *See* Complaint, ER at 174, ¶ 26. That language, which appears at Section 12.4 of Appendix X2, states in relevant part: "[In] the event the State agrees . . . 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." (Emphasis added). The Samish Tribe has always understood the term "agrees" to be a tense that refers to changes after the date of approval of X2, to another Compact that subsequently provides more favorable terms. Wooten Declaration, *supra*, ¶ 15. It has never understood that term to apply to previously approved Compacts. *Id.* If it had, the Compact would have used the term "agreed" rather than "agrees." The district court agreed with this interpretation of Section 12.4. Order, ER at 007-009 ("There is no indication in X2 that the parties intended it to have retroactivie effect."). The Spokane Compact amendment was already in existence at the time the Tulalip Appendix X2 Compact amendment was finalized and approved , and the language of Section 12.4 of Appendix X2 on its face does not and was not intended to apply to the Spokane Compact Amendment, Appendix Spokane § 6.A.

In its Principal Brief, the Tulalip Tribes make an argument that it did not make in the district court on this issue. Tulalip asserts that it is not relying upon Section 12.4 of Appendix X2 to claim a right to the more favorable terms of Appendix Spokane (since that would be retroactive). Tulalip Brief at 9-10. Instead, it argues that it is relying on the identical language in Section 12.5 of Appendix X, because Appendix X pre-dated Appendix Spokane and its application is therefore not retroactive. *Id.* Tulalip relies on the fourth "Whereas" clause of the

Seventh Amendment (adopting Appendix X2) to its Compact for this argument, where it states that the parties have agreed to changes to the Tribal Lottery System "that require Appendix X to be supplemented by further amendment known as Appendix X2." ER at 074. Tulalip therefore argues that the language of Section 12.5 of Appendix X is still in effect because Appendix X2 "supplemented but did not supercede Appendix X." Tulalip Brief at 9-10.

The problem with this argument is that it is contradicted by the express language of Appendix X2 itself. In the first section of Appendix X2, "Overview," Appendix X2 states:

> Notwithstanding anything to the contrary herein, tribal lottery systems and player terminals approved pursuant to Appendix X prior to the effective date of this Appendix X2 may continue to be operated consistent with the requirements of Appendix X as they existed on the date this Appendix X2 became effective. Further, nothing herein shall restrict the Tribe from exercising any provision in its Compact not covered by this Appendix X2. (Emphasis added).

This quoted language states specifically what parts of Appendix X remain in effect and what parts are no longer in effect. In particular, only those provisions of Appendix X (a previous amendment to the Compact) that are not covered by Appendix X2 may be exercised by the Tribe. Section 12.4 of Appendix X2 clearly "covers" the provision at Section 12.5 of Appendix X under any reasonable definition of that term; the language is identical. Clearly, Section 12.5 of Appendix X was no longer in effect as of the effective date of Appendix X2. This result is

required by the clear language of Appendix X2 as well as being the only common sense application of duplicative contractual language in successive contracts. Tulalip's argument on this issue has no merit.

c. Laches.

The Tulalip Tribes agreed to the Compact amendment with the Appendix X2 inter-tribal leasing provisions in 2007. The Spokane Compact amendment with the additional Appendix Spokane Player Terminal acquisition language was already in existence and approved at the time the X2 amendment was approved for the 27 tribes on May 31, 2007. Tulalip knew of the Spokane Compact language at that time, and did nothing to complain about it. It expressly agreed to different language in Compact amendment X2.

The Tulalip Tribes waited five years to bring its present lawsuit complaining about the absence of Spokane's Compact language in its Compact. In the meantime the other 26 signatory tribes to the Appendix X2 Compact amendment have entered into long-term leasing arrangements based on the 2007 agreement reached by all 27 tribes, including Tulalip. Serious financial decisions, including acquisition of property, investments, and economic development decisions have been taken in the reasonable expectation that the current settled leasing arrangement will continue unchanged and that tribal lease revenues can be depended on. After waiting five years - with no explanation or reason for its delay

- the Tulalip Tribes seek to upset and overturn the settled expectations of the other 26 tribes and to throw the inter-tribal leasing system into chaos.

The doctrine of laches applies to a party that sits on its hands while knowing it has a legal claim while decisions are made by other persons or parties that will be affected. *See Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835-36 (9th Cir. 2002); *Danjaq LLC v. Sony Corp.*, 263 F.3d 942 (9th Cir. 2001). A party cannot sleep on its rights or unreasonably delay in bringing legal action where the delay results in prejudice to other parties. This is the situation in the present case. Tulalip has unreasonably waited five years to bring the present action while knowing that the other 26 tribes to Compact amendment X2 would take actions in the interim that would result in prejudice to them if Appendix X2 is changed or abrogated. These settled expectations and adverse consequences are the logical result of agreeing to Appendix X2, and Tulalips' lawsuit must be considered in light of the doctrine of laches.

d. Equitable Considerations.

Whether to proceed with an action under Fed. R.Civ. P. Rule 19(b) when a required party exists that cannot be joined is a matter of "equity and good conscience." In this case the Tulalip Tribes expressly agreed to a Compact amendment provision in Appendix X2 that did not include the additional Spokane Compact amendment provision even though it knew such provision already existed

and had been approved by the State. Tulalip signed on to a letter to the Secretary of Interior that expressly acknowledged that the inter-tribal leasing provision to which it had agreed in Appendix X2 had been successful in the past and would continue to be successful in the future. Tulalip knew this provision was included to protect remotely located tribes that would have difficulty operating their own profitable tribal casinos. The Tulalip Tribes expressly agreed to a Compact provision in Appendix X2 (Section 12.2.2) where it promised that it would not change the inter-tribal leasing provision to which it had just agreed without the approval of a majority of the other 26 Appendix X2 Washington Compact amendment tribes.

In the present action the Tulalip Tribes ignores or violates all of these representations and promises. Instead, it seeks a unilateral change in its Compact with the State of Washington designed to give only it a financial advantage, to the disadvantage of other Washington tribes. It is likely that this change, if approved by the Court, will result in financial, governmental and economic damage to other Washington tribes. The Samish Tribe does not believe this action or the summary judgment motion filed by Tulalip in this action constitutes equitable conduct, and as a result the factors necessary to continue with a case under Rule 19 are not met. *See, e.g.*, *Glaser v. Connell*, 266 F.2d 149 (9th Cir. 1958)(he who seeks equity must do equity; party that delays taking action may be denied right to later take such action).

III. Conclusion.

Based on the foregoing discussion, it is the position of amicus Samish Indian Nation that Fed. R. Civ. P. 19 is implicated in the present lawsuit. The Samish Tribe and the other 25 Appendix X2 Compact amendment tribes are required parties to this action by the Tulalip Tribes to abrogate the core provision of Appendices X and X2. Since they cannot be joined in this action and because any relief granted by the Court will result in prejudice to those tribes, this action should be dismissed by the Court. In addition, the Tulalip Tribes' claim to be entitled to the more favorable provisions of Appendix Spokane are not justified on the merits, and should be denied.

DATED this 20th day of November, 2013.

DORSAY & EASTON LLP

By s/ Craig J. Dorsay
Craig J. Dorsay

s/ Lea Ann Easton
Lea Ann Easton

DORSAY & EASTON LLP
1 S.W. Columbia Street, Suite 440
Portland, OR 97258-2005
Phone: (503) 790-9060
Fax: (503) 790-9068
E-Mail: craig@dorsayindianlaw.com
leaston@dorsayindianlaw.com
Attorneys for Amicus Samish Indian Nation

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitations, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☒ this brief contains 5,177 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii), *or*

☐ this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☒ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Times New Roman 14 Point Font, *or*

☐ this brief has been prepared in a monospaced spaced typeface using (*state name and version of word processing program)* _____ with (*state number of characters per inch and name of type style)*

_____.

Signature s/ Craig J. Dorsay

Attorney for Samish Indian Nation, Amicus

Date November 20, 2013

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I hereby affirm that there are no known related cases pending before this Court.

Dated this 20th day of November, 2013.

DORSAY & EASTON LLP

By s/ Craig J. Dorsay
Craig J. Dorsay

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 20, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: s/ Craig J. Dorsay

Craig J. Dorsay
DORSAY & EASTON LLP
1 S.W. Columbia Street, Suite 440
Portland, OR 97258-2005
Phone: (503) 790-9060
Fax: (503) 790-9068
E-Mail: craig@dorsayindianlaw.com