Case No. 13-35464

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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.

APPELLANT'S BRIEF

Appeal from the United States District Court for the Western District of Washington

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I. JURISDICTIONAL STATEMENT

1. Basis for the District Court's Jurisdiction

The Tulalip Tribes of Washington ("Tulalip" or "Tribe"), a federally recognized Indian tribe, commenced this suit against the State of Washington ("State") to enforce the plain terms of a Tribal-State Gaming Compact entered into pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"). While the State disputed the district court's subject matter jurisdiction below (in an argument that the court did not address), the court enjoyed jurisdiction pursuant to 28 U.S.C. §§ 2201 (declaratory judgment action), 1331 (action raising federal question) and 1362 (civil action brought by Indian tribe raising federal question). Federal courts have jurisdiction over suits to enforce the terms of an IGRA gaming compact because such suits are:

> based on an agreement contained within the Compacts and entered into by the parties, during their IGRA negotiations . . . . The Compacts quite clearly are a creation of federal law . . . . [A Tribe's] claim to enforce the Compacts arises under federal law and thus . . . we have jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362 . . . . IGRA necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements contained therein.

Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050, 1055-56 (9th Cir. 1997). In sum, the State's claim that the district court lacked subject matter jurisdiction was without basis.

The State also argued below (again in an argument unaddressed by the district court) that it enjoyed sovereign immunity from the suit. That was a remarkable contention, because the State has expressly waived its sovereign immunity from actions such as this by statute:

> The state consents to the jurisdiction of the federal courts in actions brought by a tribe pursuant to the Indian gaming regulatory act of 1988 or seeking enforcement of a state/tribal compact adopted under the Indian gaming regulatory act, conditioned upon the tribe entering into such a compact and providing similar consent. This limited waiver of sovereign immunity shall not extend to actions other than those expressly set forth herein.

Addendum at 1 (Wash. Rev. Code § 9.46.36001).[1] The State expressly reiterated and expanded its waiver of immunity in Section 12(e)(ii) of the Compact:

> [T]he State has waived its immunity from those suits set forth in RCW . . . 9.46.36001. In addition to said statutory waivers of immunity, the State hereby further agrees to and makes a limited waiver of its sovereign immunity and its immunity to suit in federal court under the Eleventh Amendment to the U.S. Constitution, and consents to be sued for the sole purpose, and no other purpose, to the suits specified in Sections . . . 12(d) of this Compact[.]

ER at 113.[2] In sum, the State's claim of immunity, like its other claims going to the district court's jurisdiction, was groundless.

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[1] Tulalip has provided the requisite similar consent in the Compact at issue here. *See* Excerpts of Record ("ER") at 112-13 (Compact § 12(e)(i)).

[2] Section 12(d) of the Compact provides that either party to the Compact "may initiate litigation in an appropriate United States district court seeking resolution of any [compact] Dispute, and for any other relief or remedy the United States district court is empowered to grant [excepting monetary damages]." ER at 112.

2. Basis for the Ninth Circuit's Jurisdiction

The Tribe appeals a decision of the district court denying its motion for summary judgment and granting summary judgment to the State. The district court's decision was a final decision appealable as a matter of right. *See* 28 U.S.C. § 1291. *See also Comsource Indep. Foodservice Cos. v. Union Pac. R.R. Co.*, 102 F.3d 438, 442 (9th Cir. 1996) ("[A] denial of a summary judgment order is appealable after the entry of a final judgment").

3. Timeliness of Appeal

The district court entered judgment on May 22, 2013. ER at 010. The Tribe timely filed its notice of appeal two days later. ER at 011. *See* Fed. R. App. P. 4 (a)(1).

4. Judgment Disposing of All Claims

The district court's May 22, 2013 judgment disposed of all parties' claims and is a final decision within the meaning of 28 U.S.C. § 1291.

II. ISSUES PRESENTED FOR REVIEW

(1) Whether the district court erred as a matter of law in conflating the parties' cross-motions for summary judgment rather than considering them separately and consequently granting summary judgment to the State without holding the State to its summary judgment burden;

(2) Whether the district court erred as a matter of law in concluding *sua sponte* that the Tribe's rights under a most-favored-tribe clause in its Gaming Compact with the State were not implicated because those rights came into existence after the effective date of the Spokane Tribe's more favorable agreement with the State, when in fact those rights had been in effect for eight years prior to that date;

(3) Whether the district court erred as a matter of law in interpreting the most-favored-tribe clause to require Tulalip to accept not only more favorable terms agreed to by the State with the Spokane Tribe, but other terms as well, in the absence of any Compact language requiring acceptance of the latter;

(4) Whether the district court erred as a matter of law in concluding that the State had "never agreed" to more favorable terms with the Spokane Tribe because its compact with that tribe also contained other terms; and

(5) Whether the State is correct that the suit should have been dismissed for failure to join other Indian tribes where the Compact sets forth no reciprocal obligations between Tulalip and those other tribes.

III. ADDENDUM

An addendum containing the text of pertinent statutory and regulatory provisions is attached at the end of this brief.

IV. STATEMENT OF THE CASE

1. Nature of the Case

The Tribe and the State are parties to an IGRA Gaming Compact that sets forth the terms under which the Tribe may conduct Class III gaming on its reservation. Among other matters, the Compact plainly provides that if the State agrees with another Indian tribe to an allocation of video lottery player terminals greater, or on terms more favorable, than those set forth in the Compact, then "the Tribe shall be entitled" to that greater allocation or those more favorable terms. The State has agreed to more favorable allocation terms with the Spokane Tribe but has disavowed its promise that Tulalip should accordingly be able to incorporate those terms in its own Compact. Tulalip seeks a declaration that the State is in breach of its clear contractual promise and an injunction requiring the State to execute an amendment to the Compact honoring that promise.

2. The Course of Proceedings

The Tribe filed its Complaint in the United States District Court for the Western District of Washington on April 20, 2012. *See* ER at 169. The State filed its Answer on June 21, 2012. *See* ER at 161. The Tribe filed a motion for summary judgment on October 25, 2012. *See* ER at 188 (Docket #13). The State filed a cross-motion for summary judgment and a motion to dismiss based on lack of jurisdiction, sovereign immunity and failure to join required persons on

November 19, 2012. ER at 024. The Samish Indian Nation of Washington and the Sauk-Suiattle Indian Tribe filed motions to appear as amicus curiae. *See* ER at 189 (Docket #24 and #26).

3. The Disposition Below

After denying Tulalip's request for oral argument, the district court issued its Order and Judgment on May 22, 2013 denying the Tribe's motion for summary judgment and granting the State's cross-motion for summary judgment. ER at 001-2, 010. The district court did not reach the State's motion to dismiss, *id.* at 009 (Order at 9 n.7), and denied the two motions to appear as amicus curiae, *id.* (Order at 9).

V. FACTUAL BACKGROUND

1. The Tulalip Compact and the Tribal Lottery System

On August 2, 1991, the Tribe and the State executed "The Tribal-State Compact for Class III Gaming between the Tulalip Tribes of Washington and the State of Washington." ER at 172 (Complaint ¶ 15).[3] The parties have since executed eight amendments to the Compact. *Id*. (Complaint ¶ 17).

[3] Congress enacted IGRA in 1988 "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments[.]" 25 U.S.C. § 2702(1). IGRA recognizes three classes of gaming. 25 U.S.C. § 2703(6), (7) and (8). Class III gaming includes casino-style games and lotteries and is the type of gaming at issue in this suit. Under IGRA, a tribe may conduct Class III gaming activities only in

In November 1998, the parties executed their fourth amendment to the Compact ("Appendix X"), authorizing the Tribe to operate a Tribal Lottery System as part of its Class III gaming offerings and setting forth the rules governing its operation. *See* ER at 046. The terms of Appendix X were collectively negotiated between the State and twelve Indian tribes in Washington, including Tulalip, each of which thereafter independently executed the terms of Appendix X with the State as an amendment to its own compact. *See* ER at 172 (Complaint ¶ 18). Tulalip's Appendix X became effective on January 28, 1999. *See* Addendum at 4 (64 Fed. Reg. 4,460-04).

In 2007, the parties executed a seventh amendment to the Compact ("Appendix X2") as a supplement to Appendix X. *See* ER at 074. Appendix X2 was collectively negotiated between the State and twenty-seven Indian tribes in Washington, including Tulalip. Those negotiations were finalized in February of 2007. ER at 017-18 (Decl. of Rick Day ¶¶ 20 and 23). Each tribe thereafter independently executed the terms of Appendix X2 with the State as an amendment to its own compact. *See* Addendum at 6 (72 Fed. Reg. 30,392-01). Tulalip and the State executed Appendix X2 in March of 2007, *see* ER at 075 (signature page), and

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conformance with a Tribal-State compact entered into by the tribe and the state. 25 U.S.C. § 2710(d)(1)(C).

it became effective on May 31, 2007, *see* Addendum at 6 (72 Fed. Reg. 30,392-01).

The Tulalip Lottery System operates within the Tribe's two gaming facilities and utilizes stand-alone electronic player terminals with video displays that allow patrons to purchase chances to play electronic scratch-ticket lottery games. *See* ER at 172-73 (Complaint ¶ 20). In appearance and play, the terminals resemble video slot machines.

The Tribe's Lottery System began operation in 1999 and has been vital to the Tribe's successful efforts to strengthen its tribal government and generate economic benefits for its members, surrounding communities and the State of Washington. *See id*. (Complaint ¶¶ 20-21). *See also* 25 U.S.C. § 2702(1) (purposes of IGRA include "promoting tribal economic development, self-sufficiency, and strong tribal governments").

2. Player Terminal Allocation Under the Compact and the TAP Procedure

Section 12 of the original Appendix X set forth the terms governing the number of player terminals the Tribe was authorized to operate. It authorized an allocation of 675 player terminals after the first year of operation ("base allocation"), ER at 069 (Appendix X § 12.2), which the Tribe could increase as follows:

> [T]he Tribe may increase the number of Player Terminals it is authorized to operate above the number of Terminals in its Allocation,

> up to a maximum of 1500 Player Terminals per facility, by acquiring allocation rights from any tribe which has entered into a compact authorizing operation of a Tribal Lottery System consistent with this Appendix ("Eligible Tribe"), or may transfer some or all of its Allocated Player Terminals to an Eligible Tribe, subject to [certain] conditions[.]

ER at 070 (Appendix X § 12.4).

Under this provision, Eligible Tribes that do not operate a Tribal Lottery System, or Eligible Tribes that do so utilizing less than their full base allocation of player terminals, may transfer their unused allocation rights to a tribe such as Tulalip that wishes to operate a number of terminals in excess of its base allocation. *Id.*[4] The price and other terms for obtaining such rights are negotiated bilaterally between the two tribes involved in the transaction.

Appendix X2 supplemented but did not supersede Appendix X. *See* ER at 074 (fourth Whereas clause, stating that Appendix X would "be supplemented by further amendment known as Appendix X2"). Section 12 of Appendix X2 contained provisions essentially identical to those of Appendix X set forth above, except that it raised the Tribe's base allocation from 675 to 975 terminals, raised its facility limits and established an overall limit ("Total Operating Ceiling") of 4000

[4] Acquisitions and/or transfers of terminal allocation rights under Section 12.4 "shall be made only pursuant to a plan approved by no less than a majority of the tribes that were Eligible Tribes at the time such plan was adopted." ER at 070-71 (Appendix X § 12.4.1). Such a plan has been developed and approved. ER at 164 (Answer ¶¶ 22-24)).

terminals for all of the Tribe's facilities. *See* ER at 098-99 (Appendix X2 §§ 12.1, 12.2.1).

The mechanism established by Appendix X and continued in Appendix X2 for acquiring/transferring terminal allocation rights pursuant to a Terminal Allocation Plan ("TAP") is hereafter referred to as the "TAP Procedure" and is the sole mechanism under the Compact by which Tulalip may obtain terminal allocation rights in excess of its base allocation.

3. The Compact's Most-Favored-Tribe Clause

Section 12.5 of Appendix X includes a Most-Favored-Tribe ("MFT") clause, by which the State promised:

> [I]n 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.

ER at 071. Appendix X2, which, as noted, supplemented but did not supersede Appendix X, reiterated that promise verbatim. *See* ER at 101 (Appendix X2 § 12.4). The MFT clause is the key Compact promise at issue in this suit. It went into effect in 1999 when Appendix X became operative and continued in effect with the adoption of Appendix X2 in 2007. ER at 074 (Appendix X2, second Whereas clause, stating that prior amendments remain "in full force and effect").

4. The Spokane Inter-Tribal Fund

As noted, the Appendix X2 negotiations were finalized in February of 2007. ER at 017-18 (Day Decl. ¶ 23). While the State and Tulalip (and other tribes) were negotiating the terms of Appendix X2, the State engaged in separate concurrent compact negotiations with the Spokane Tribe, which negotiations likewise concluded in February of 2007. *Id*. On February 16, 2007, the State and the Spokane Tribe executed an IGRA compact, *id*. at 016 (Day Decl. ¶ 16), that included an appendix ("Spokane Appendix X") authorizing a Tribal Lottery System similar to that authorized in the Tulalip Compact as described above (except that neither the Spokane Compact nor Spokane Appendix X included a TAP Procedure for obtaining terminal allocation rights from other tribes). ER at 125-141 (Spokane Appendix X). That compact became effective on April 30, 2007. *See* Addendum at 5 (72 Fed. Reg. 21,284-03).

In July of 2008, the State and the Spokane Tribe agreed to the terms of Spokane Appendix X2, including the TAP Procedure, as the first amendment to their compact. *See* ER at 144-45 (Spokane Appendix X2 §§ 12.1 and 12.2). That amendment became effective on October 24, 2008. *See* Addendum at 7 (73 Fed. Reg. 63,503-02). The Spokane Compact as amended, like Tulalip's, permits the Spokane Tribe to operate a base allocation of up to 975 terminals and to increase

that allocation by recourse to the TAP Procedure. ER at 144-45 (Spokane Appendix X2 §§ 12.1 and 12.2).

However, the amended Spokane Compact, unlike the Tulalip Compact, also permits the Spokane Tribe to acquire terminal rights above its base allocation by a mechanism in addition to the TAP Procedure. Another appendix ("Appendix Spokane"), *see* ER at 115, sets forth that additional mechanism. Under Appendix Spokane, if the Spokane Tribe is unable to acquire additional allocation rights from other tribes through the TAP Procedure after making reasonable efforts to do so, it may obtain such rights unilaterally by making quarterly payments into an Inter-Tribal Fund ("ITF"). *See* ER at 120-22 (Appendix Spokane § 7). The payments are based on a set dollar amount per day for each terminal allocation right obtained via the ITF. *See id.* at 120-21 (Appendix Spokane §§ 7.B.-C.). The monies in the ITF are distributed quarterly among qualifying tribes by a formula set forth in Appendix Spokane. *See id*. at 121-22 (Appendix Spokane §§ 7.E.-F.).

Under Tulalip's Compact, Tulalip may acquire terminal allocation rights in excess of its base allocation only by acquiring those additional rights through the TAP Procedure. *See* ER at 099 (Appendix X2 § 12.2). If Tulalip is unable to meet its terminal needs by that procedure, no other terminal allocation terms exist to enable it to do so.

5. The Current Dispute

On September 14, 2010, Tulalip notified the State of its view that the Spokane Compact contains terminal allocation terms that are more favorable than those found in the Tulalip Compact. Tulalip requested that its Compact be amended to permit it to acquire additional terminals by paying into an ITF when it is unable to acquire those rights from other tribes under the TAP Procedure after making reasonable efforts to do so. The Tribe invoked the MFT clause contained in Appendices X and X2. *See* ER at 148-49 (Decl. of Douglas L. Bell ¶¶ 1-3).

The parties engaged in negotiations and dispute resolution procedures over the course of the ensuing sixteen months. *See id.* at 149-50 (Bell Decl. ¶¶ 3-8. They were ultimately unable to reach agreement and this lawsuit followed. *See id.* at 150-51 (Bell Decl. ¶¶ 9-13).

VI. SUMMARY OF THE ARGUMENT

This dispute centers on the unambiguous terms of the Compact. Tulalip's MFT clause provides that if the State agrees with another tribe to terminal allocation terms that are "more favorable" than those in Tulalip's Compact, then "the Tribe shall be entitled" to those more favorable terms. The State has agreed to such terms with the Spokane Tribe, and its refusal to amend the Compact to reflect Tulalip's entitlement to those terms is a clear Compact breach. There exist no genuine issues of fact and Tulalip is entitled to judgment as a matter of law.

The district court nevertheless granted summary judgment to the State in a decision that is both perfunctory and replete with procedural and substantive errors. Procedurally, the court failed to consider the parties' cross-motions for summary judgment separately on their own merits, as is mandatory in this Circuit. And it based its decision in significant part on an argument that had not been briefed by either party. This, in conjunction with the court's refusal to hold oral argument, meant that the Tribe had no notice of or opportunity to respond to the argument, in violation of Rule 56 and controlling Circuit precedent. Each of these procedural errors is grounds for reversal.

On the merits, the district court first determined, *sua sponte*, that the Compact's MFT clause did not apply because it post-dated the State's more favorable agreement with the Spokane Tribe. The district court's premise was flatly incorrect. As is clear from the Compact and the State's own papers below, the MFT clause took effect eight years prior to the State's agreement with the Spokane Tribe.

The district court further determined that Tulalip was not entitled to any relief because the MFT clause did not permit Tulalip "to pick and choose which portions of the Inter-Tribal Fund provision are most favorable to it while rejecting the less favorable limitations within the same provision." The court's assertion does not remotely support the denial of summary judgment to Tulalip or the grant

of the same to the State, for three independent reasons. First, the district court's premise is again flatly incorrect, and bafflingly so, as Tulalip nowhere sought to reject terms within the Spokane ITF provision. Second, to the extent the district court was suggesting that Tulalip's MFT clause required it to accept limitations on the number of player terminals found elsewhere in Appendix Spokane, its reasoning contradicts the language of the MFT clause, which expressly distinguishes a numerical allocation from the terms by which an allocation can be achieved and entitles Tulalip to adopt more favorable provisions from either category without conflating the two. Third, the MFT clause expressly entitles Tulalip to accept "more favorable" terms in the Spokane compact, without any reference to an obligation to also accept less favorable or other terms. The court's conclusion to the contrary is irreconcilable with the express language of the clause and surrounding Compact provisions and conflicts directly in this regard with this Court's decision in *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095 (9th Cir. 2006).

The district court also determined that Tulalip was entitled to no relief because the State "never agreed" to permit the Spokane Tribe to operate an ITF. Instead, according to the court, the State agreed "only to all of Appendix Spokane" and not to its individual provisions. This patently strained interpretation of Tulalip's MFT rights renders those rights illusory, runs roughshod over basic

principles of contract interpretation and, again, is irreconcilable with this Court's reasoning in *Shoshone-Bannock.*

In sum, Tulalip carried its summary judgment burden. The Compact language is unambiguous and its application in this case is clear. Tulalip is entitled to summary judgment as a matter of law. The district court's decision reveals no basis to support its denial of judgment to Tulalip or its grant of judgment to the State and should be reversed in its entirety.

Finally, the State argued below for dismissal under Federal Rule of Civil Procedure 19 for failure to join other tribes. Tulalip addresses that argument briefly here in the event the State proffers it in support of the judgment below. The argument, not addressed by the district court, lacked all merit because other tribes have no legally protected interest at stake in the suit.

VII. ARGUMENT

A. THRESHOLD ISSUES

1. Standard of Review

Summary judgment is appropriate "where the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1016 (9th Cir. 2012) (internal quotation marks omitted). This Court reviews de novo the district court's grant of summary judgment to the State and its denial

of summary judgment to the Tribe. *Shelley v. Green*, 666 F.3d 599, 604 (9th Cir. 2012) (grant of summary judgment reviewed de novo); *Cal. Dep't of Toxic Substances Control v. Neville Chem. Co.*, 358 F.3d 661, 665 (9th Cir. 2004) (denial of summary judgment reviewed de novo). The district court's interpretation of the compact provisions at issue is likewise reviewed de novo. *See Conrad v. Ace Prop. & Cas. Ins. Co.*, 532 F.3d 1000, 1004 (9th Cir. 2008) ("district court's grant of summary judgment on a contract claim is reviewed *de novo*, as is its interpretation and meaning of contract provisions" (citations omitted)); *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009) ("Contract interpretation is a question of law that we review *de novo*."). Accordingly, this Court interprets the compact provisions at issue "with no deference accorded to the decision of the district court." *United States v. 1.377 Acres of Land in City of San Diego*, 352 F.3d 1259, 1264 (9th Cir. 2003).

2. Applicable Principles of Compact Interpretation

IGRA gaming compacts are governed by federal law and subject to general principles of contract interpretation. *See Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1073 (9th Cir. 2010); *Shoshone-Bannock*, 465 F.3d at 1098. In interpreting an IGRA compact, state law rules of contract interpretation of the state in which the compact was formed are applicable if those rules do not differ from federal common law. *See id.* The Tribe discerns

no relevant difference between Washington and federal rules of contract interpretation. In the proceedings below the district court agreed, and the State did not dispute, that no such difference exists. *See* ER at 005 (Order at 5 and n.4).

In Washington, "the touchstone of the interpretation of contracts is the intent of the parties." *Contractors Equip. Maint. Co. v. Bechtel Hanford, Inc.*, 514 F.3d 899, 903 (9th Cir. 2008) (quoting *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 844 P.2d 428, 432 (Wash. 1993)). The parties' intent is "'determined from the actual words used.'" *Id*. (quoting *Hearst Commc'ns, Inc. v. Seattle Times, Co.*, 115 P.3d 262, 267 (Wash. 2005)). Courts impute to the parties an intention that corresponds with the plain, ordinary meaning of the words used in the contract unless the entirety of the contract clearly demonstrates a contrary intent. *Hearst*, 115 P.3d at 267; *Mattingly v. Palmer Ridge Homes, LLC*, 238 P.3d 505, 514 (Wash. Ct. App. 2010) ("When [courts] construe contracts, the words used 'must be given their usual and ordinary meaning.'" (quoting *Honeywell, Inc. v. Babcock*, 412 P.2d 511, 514 (Wash. 1966))). *See also Shoshone-Bannock*, 465 F.3d at 1099 ("Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself."). Courts interpret a contract "as an average person would, giving it a practical and reasonable meaning, not a strained or forced meaning that leads to absurd results." *Certain Underwriters at Lloyd's London v. Travelers Prop. Cas.*

Co. of Amer., 256 P.3d 368, 375 (Wash. Ct. App. 2011). Finally, "courts do not have the power, under the guise of interpretation, to rewrite contracts the parties have deliberately made for themselves. Courts may not . . . substitute their judgment for that of the parties to rewrite the contract[.]" *McCormick v. Dunn & Black, P.S.*, 167 P.3d 610, 619 (Wash. Ct. App. 2007) (citation omitted). *See also Pub. Employees Mut. Ins. Co. v. Sellen Constr. Co.*, 740 P.2d 913, 915 (Wash. Ct. App. 1987) ("The court cannot ignore the language agreed upon by the parties, or revise or rewrite the contract under the guise of construing it.").

B. THE DISTRICT COURT ERRED IN DENYING THE TRIBE'S MOTION FOR SUMMARY JUDGMENT

1. The District Court Committed Basic Procedural Error that, by Itself, Warrants Reversal

It is not possible to determine from the district court's opinion the specific bases on which it denied the Tribe's motion for summary judgment because, in contravention of basic procedural law in this Circuit, the court failed to consider the Tribe's motion separately from the State's cross-motion. "[W]hen parties submit cross-motions for summary judgment, each motion must be considered on its own merits. . . . The court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the [Federal] Rule [of Civil Procedure] 56 standard." *Fair Hous. Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir.

2001) (internal quotation marks and citations omitted); *see also* Fed. R. Civ. P. 56. Instead, the district court set forth its reasoning without reference to the separate motions and then simply denied the Tribe's motion and granted the State's motion "[f]or all the foregoing reasons." ER at 009 (Order at 9). This was basic error that by itself requires reversal. *See Fair Hous. Council*, 249 F.3d at 1134, 1136.

But the court's errors were more than just procedural. As the following sections demonstrate, Tulalip is entitled to summary judgment as a matter of law on the merits and the district court's denial of the Tribe's motion was premised on patent legal errors. This Court should accordingly reverse the district court's denial of Tulalip's summary judgment motion and remand with instructions to enter judgment in favor of Tulalip. *See Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1030 (9th Cir. 2012) (reversing denial of summary judgment to party and remanding with instructions to enter judgment in favor of that party); *Aceves v. Allstate Ins. Co.*, 68 F.3d 1160, 1168 (9th Cir. 1995) (same).

2. The District Court Erred in Concluding that Tulalip's MFT Rights Do Not Apply to Appendix Spokane Based on the Effective Date of Appendix X2

As discussed above, both Appendix X and Appendix X2 of the Tulalip Compact contain an MFT clause providing that:

> [I]n 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.

ER at 071 (Appendix X § 12.5) and 101 (Appendix X2 § 12.4). In seeking declaratory and injunctive relief, Tulalip simply seeks enforcement of the plain terms of this provision. In rejecting this effort, the district court first determined, *sua sponte*, that Tulalip's MFT rights do not apply to Appendix Spokane because, according to the court, "Appendix Spokane became effective before X2 became effective. There is no indication in X2 that the parties intended it to have retroactive effect." ER at 007 (Order at 7).

The State did not make this argument to the district court, and for good reason. The MFT guarantee at issue originated in Section 12.5 of Appendix X, not in Appendix X2 as apparently assumed by the district court, and has thus been in effect uninterrupted since January 28, 1999, *see* Addendum at 4 (64 Fed. Reg. 4,460-04), more than eight years prior to the April 30, 2007 effective date of Appendix Spokane, *see* Addendum at 5 (72 Fed. Reg. 21,284-03).

The parties executed Appendix X2 in March of 2007, *see* ER at 075, as a supplement to Appendix X. *See* ER at 074 (fourth Whereas clause, stating that Appendix X was to be "supplemented" by Appendix X2). The supplementation centered primarily on raising the initial player terminal base allocations and facilities limits established by Appendix X and establishing the Total Operating Ceiling (an overall numerical limit on player terminals applicable to all of the

Tribe's facilities), a term not included in Appendix X. ER at 098-101 (Appendix X2 § 12). Nothing in Appendix X2 suggests that it was intended to interrupt, supplant or in any other way alter the ongoing effectiveness of the State's MFT promise first set forth in Section 12.5 of Appendix X.

To the contrary, Section 12.4 of Appendix X2 reproduced *verbatim* the operative MFT promise that appeared in Appendix X in 1999. *See* ER at 071 (Appendix X § 12.5) and 101 (Appendix X2 § 12.4). Moreover, Appendix X2 expressly describes all preceding amendments to the Compact – including Appendix X – as being "in full force and effect." ER at 074 (second Whereas clause). And the State has conceded the ongoing effectiveness of the MFT clause contained in Appendix X. *See* ER at 164 (Answer ¶¶ 22-24 ("Defendants admit that *Section 12 of Appendix X and Section 12 of Appendix X2 govern* acquisition and transfer of Tribal Lottery System player terminals in excess of the Tribe's base allocation of 975 player terminals." (emphasis added))); ER at 040 (State's Cross-Motion at 17 and n.7 (reproducing the MFT language from Section 12.4 of Appendix X2 and stating that "[a]s the [MFT] language in the appendices [X and X2] is virtually identical, the State will only cite to Appendix X2, which is the most recent provision"). In spite of all this, the district court failed even to acknowledge the existence of Appendix X, much less to explain why the MFT clause contained therein does not apply to Appendix Spokane.

Even setting aside the undisputed ongoing effectiveness of the MFT clause in Appendix X, the court's reasoning is still in error because the MFT clause of Appendix X2 need not have "retroactive" effect to apply in this case. The Spokane Tribe became authorized to obtain terminals under the combined TAP and ITF procedures – *i.e.*, the more favorable terms Tulalip seeks to adopt – when the State and the Spokane Tribe added the TAP Procedure by their first amendment to the Spokane Compact, which went into effect on October 24, 2008. *See* ER at 144-47 (Spokane Appendix X2 § 12); 73 Fed. Reg. 63,503-02. At that point, Tulalip's Appendix X2, including the Section 12.4 MFT clause, had been in effect for more than a year. *See* Addendum at 6 (72 Fed. Reg. 30,392-01) (May 31, 2007).

In sum, the district court's first stated basis for denying Tulalip's motion for summary judgment amounts to no basis at all.

3. Tulalip is Entitled to the "More Favorable" Terminal Allocation Terms Agreed to by the State and the Spokane Tribe

Tulalip's MFT clause, quoted above at pages 20-21, is straightforward and unambiguous. It provides that Tulalip "shall be entitled" to a greater allocation of player terminals agreed to between the State and another tribe, or to terms pertaining to the allocation of player terminals that are "more favorable" than such terms found in the Tulalip Compact. That this language reflects the parties' intent is undisputed. The State acknowledged below that "[t]he 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." ER at 040 (State's Cross-Motion at 17).

The State has plainly agreed to terminal allocation terms with the Spokane Tribe more favorable than those found in the Tulalip Compact. To begin with, each tribe is party to an Appendix X2 agreement with the State and thus may operate a base allocation of 975 terminals, and each may attempt to increase that allocation by purchasing allocation rights from other Eligible Tribes under the TAP Procedure. *See* ER at 098-100 (Appendix X2 §§ 12.1-12.2) and 144-46 (Spokane Appendix X2 §§ 12.1-12.2). Obtaining terminal allocation rights from other tribes – who are not bound to agree to any specific terms or to negotiate at all – is not a guaranteed means to obtain such rights. Appendix Spokane explicitly reflects this fact by acknowledging that the tribe may be "unable" to obtain terminal allocation rights from other tribes after making "reasonable efforts to do so." ER at 119 (Appendix Spokane § 6.A.).

It is in this event that the terms of the Tulalip and Spokane compacts materially differ. If Tulalip is unable to meet its terminal needs by negotiating directly with other tribes under the TAP Procedure, those needs will go unmet because the Compact does not provide an additional means to obtain terminal allocation rights. By contrast, Appendix Spokane provides such a means in its Section 7, which sets forth the terms for the Spokane ITF. ER at 120-22. In

contrast to the TAP Procedure, Section 7 does not require Spokane to obtain terminal allocation rights through bilateral negotiations with another tribe. Instead, under Section 7, if the Spokane Tribe is unable, after making reasonable efforts, to obtain needed additional terminal allocation rights by the "alternative acquisition methods" set forth in Sections 6.A. and 6.B. (*i.e.*, by bilateral negotiations with other tribes), it may obtain those rights unilaterally by depositing monies quarterly into its ITF. *Id*. at 120-21 (Appendix Spokane §§ 7.A.-D.).

Thus, the Spokane Tribe's ability to obtain additional needed terminals is *guaranteed* by the terminal allocation terms to which it and the State agreed in Section 7 of Appendix Spokane. Terminal allocation rights are beneficial rights. In a finite and competitive market for such rights, having access to a second and guaranteed means to obtain them – resulting in absolute certainty that they can be obtained – is more favorable than having just one uncertain means as provided for in the Tulalip Compact.

Accordingly, there exists no genuine issue of material fact that the State agreed with the Spokane Tribe to a terminal allocation "on terms which are more favorable" than those contained in the Tulalip Compact. Under the unambiguous and undisputed MFT language at issue, Tulalip "shall be entitled to such . . . more favorable terms," ER at 101 (Appendix X2 § 12.4), and is therefore entitled to judgment as a matter of law. As discussed in the following sections, none of the

district court's sparsely stated assertions in opposition to this conclusion withstand the slightest scrutiny. Accordingly, this Court should reverse the decision of the district court and remand with instructions that the court grant summary judgment to Tulalip and order its Compact amended to include the operative ITF provisions found in Section 7 of Appendix Spokane, as reflected in Tulalip's proposed amendment.

4. The District Court's Unfounded Assertion that Tulalip Seeks to "Cherry-Pick" Only Certain Provisions of Section 7 Provides No Basis for the Denial of Summary Judgment to Tulalip

In denying summary judgment to Tulalip, the district court claimed that the Tribe "apparently" sought "to pick and choose which portions of the Inter-Tribal Fund provision are most favorable to it while rejecting the less favorable limitations within the same provision." ER at 008 (Order at 8). *See also id*. at 009 (Order at 9 (Tulalip "wishes to cherry-pick [select portions] out of the Inter-Tribal Fund provision without the corresponding limitations")). This assertion is entirely incorrect. As described above, the ITF provisions of Appendix Spokane are found in Section 7. Tulalip's proposed amendment to its Compact, submitted by Tulalip to the district court in support of its request for injunctive relief, makes patently clear that Tulalip has in no way sought to "reject[] the less favorable limitations" within that section or to "cherry-pick" only certain terms from it. Rather, Tulalip has sought to adopt all of the operative provisions of Section 7 of Appendix

Spokane, including the term requiring the Tribe to first attempt to meet its additional terminal allocation needs by negotiating with other tribes through the TAP Procedure before it may access its ITF. *See* ER at 180-83 (Complaint Attachment 1). The district court's conclusion that Tulalip sought to reject less favorable limitations "within the same [ITF] provision" rests on a demonstrably erroneous premise that cannot operate to defeat Tulalip's entitlement to summary judgment.

5. The Negotiation and Reasonable Efforts Requirements of Appendix Spokane Provide No Basis to Deny Tulalip the Allocation Terms Found in Section 7

While the district court nowhere substantiated its "cherry-picking" assertions, it mentioned in its "Background" discussion three "requirements negotiated before the Spokane Tribe could use the Inter-Tribal Fund mechanism." ER at 002 (Order at 2). To the extent the court had these requirements in mind in making its later claim about "cherry-picking," these too provide no basis for denying summary judgment to Tulalip.

The three requirements, according to the district court, are:

> (1) the Spokane Tribe had to first commit to participating with other tribes in additional negotiations to establish a revised statewide framing for tribal gaming, including Tribal Lottery System allocations; (2) the Spokane Tribe had to make reasonable efforts to obtain the necessary machines from other tribes; and (3) the Spokane Tribe had to limit their operation to fewer total machines than other tribes.

ER at 002-3 (Order at 2-3).

The first requirement refers to the provision in Section 6.B. of Appendix Spokane wherein the tribe agreed "to participate with other Washington tribes in additional negotiations relating to establishing a revised statewide framework for tribal gaming that addresses player terminal allocation and other issues." ER at 119. This requirement is a nullity with respect to Tulalip because, unlike the Spokane Tribe when it adopted Appendix Spokane, Tulalip has already fully participated in the inter-tribal negotiations over the "revised statewide framework for tribal gaming that addresses terminal allocation and other issues" that resulted in Appendix X2. The district court indeed made express reference to these omnibus negotiations in its Background discussion of the case. ER at 003 (Order at 3). And Tulalip has never expressed any objection to participating in such negotiations again in the future.

The second of the district court's requirements (that the Spokane Tribe must first attempt to obtain additional terminal allocation rights from other tribes) is contained within Section 7 of Appendix Spokane. That provision conditions the Spokane Tribe's access to its ITF on first attempting to exercise the "alternative acquisition methods" in section 6.A. and 6.B., which require the Tribe to make reasonable efforts to obtain terminal allocation rights from other Washington tribes. ER at 119-120 (Appendix Spokane §§ 6A.-B., 7). The Spokane Tribe is

authorized to obtain such rights under the TAP Procedure. *See* ER at 145-46 (Spokane Appendix X2 § 12.2). Far from "rejecting" this term, Tulalip has, as discussed above, fully incorporated it into its proposed amendment. ER at 180 (Complaint Attachment 1 § 12.2.5.1).

6. The Existence of Inapposite Numerical Limitations Elsewhere in Appendix Spokane Provides No Basis to Deny Tulalip the Allocation Terms Found in Section 7

The third ostensible requirement identified by the district court is that "the Spokane Tribe had to limit [its] operation to fewer total machines than other tribes." ER at 003 (Order at 3). While the district court did not elaborate, the reference appears to be to Section 6.A. of Appendix Spokane, which permitted the tribe a total operating ceiling of 1500 terminals *for the first three years of gaming under its compact*. ER at 119.[5] This provision – which exists outside of Section 7's ITF provisions and does not operate as a condition on the Spokane Tribe's access to its ITF – is likewise an invalid basis to deny summary judgment to Tulalip for at least three distinct reasons.

First, the 1500 terminal limitation applied only for the first three years of the Spokane Tribe's gaming operations under its then-new compact. It has no

[5] After the first three years, Spokane's total operating ceiling increases to between 3000 and 4700 terminals, depending on various factors, *see* ER at 119-20 (Appendix Spokane § 6.B.), a range that in fact *exceeds* the total operating ceiling of 3000 terminals applicable to most Washington tribes, *see* ER at 099 (Appendix X2 § 12.2.1).

apparent relevance to a mature gaming operation like Tulalip's, which has been in place for 21 years, and it no longer even pertains to Spokane's own operations. Nowhere did the district court explain how such an inapposite provision might bear on Tulalip's rights under its MFT clause, and an unreasoned factor such as this cannot operate to defeat Tulalip's entitlement to summary judgment.

Second, the plain language of Tulalip's MFT clause precludes any argument that, for MFT purposes, a limitation on the number of player terminals, even if extant, bears on the "terms" under which that allocation may be obtained. The clause entitles Tulalip to any "allocation of Player Terminals which is greater *or* is on terms which are more favorable" than those presently enjoyed by Tulalip. ER at 101 (Appendix X2 § 12.4 (emphasis added)). Under this disjunctive phrasing, an "allocation of Player Terminals" and the more favorable "terms" under which a tribe may achieve its allocation are categorically distinct. To the extent the district court read Tulalip's entitlement to the more favorable terms by which the Spokane Tribe obtains its allocation of player terminals – *i.e.*, the combined TAP/ITF mechanism – to also require Tulalip to adopt Spokane's specific numerical allocations, it erroneously conflated the number of terminals allocated with the "terms" by which that allocation may be obtained. The express disjunctive language of the MFT clause precludes such a conflation. *See Corns v. Laborers Int'l Union of N. Am.*, 709 F.3d 901, 910 (9th Cir. 2013) ("[T]he word 'or' . . . is a

disjunctive particle indicating that the various members of the sentence are to be taken separately." (internal quotation marks omitted)).

The reasons for the distinction drawn by the MFT clause between a numerical allocation and the terms under which an allocation can be attained are well exemplified in the present case. Tulalip is among the few Washington tribes whose total operating ceilings are recognized as unique to their particular circumstances. The MFT clause of every tribe's Appendix X2 expressly references Section 12.2.1 of Appendix X2 as an exception to its terms. Section 12.2.1 acknowledges that the three tribes in the State of Washington with the largest-scale gaming operations – the Tulalip, Puyallup and Muckleshoot tribes – are entitled to higher total operating ceilings (4000) than other tribes (though not Spokane, whose present ceiling is 4700) and provides that other tribes may not adopt those higher ceilings under their own MFT provisions. *See, e.g.*, ER at 099 and 101 (Appendix X2 §§ 12.2.1 and 12.4).

This tribe-specific treatment is consistent with the fundamental purpose of the inter-tribal TAP Procedure, which is to redistribute portions of tribal gaming revenue from tribes such as Tulalip that are able to generate more such revenues to tribes with lesser or no opportunity to do so. Thus, it would make little sense to apply the MFT clause to impose restrictive numerical limitations on a tribe such as Tulalip, which the State and every tribe signatory to Appendix X2 has expressly

agreed is a tribe whose particular total operating ceiling is warranted by its own special circumstances. In fact, the same is true for the Spokane Tribe. The first amendment to the Spokane Compact (adopting the terms of Appendix X2) exempts the Spokane Tribe from Section 12.2.1's statewide total operating ceilings, allowing the Spokane Tribe to retain the numerical limitations set forth in Appendix Spokane. *See* ER at 142-43 (Spokane First Amendment at 1-2, items 3-4). And the Preamble to Appendix Spokane states that the "numerical limitations" contained therein "reflect and address circumstances unique to the Spokane Tribe." ER at 115. In sum, the numerical limitations set forth elsewhere in Appendix Spokane are an invalid basis to deny summary judgment to Tulalip.

Third, even if the district court was somehow justified in ignoring the MFT clause's clear distinction between numerical limitations and allocation mechanisms, it committed separate reversible legal error to the extent it determined that the provision requires Tulalip to accept any terms from Appendix Spokane other than more favorable ones. The plain language of the MFT clause again compels this conclusion.

Under the clause, if the State agrees with another tribe to terminal allocation terms "which are more favorable" than those in the Tulalip Compact, Tulalip "shall be entitled to such . . . more favorable terms." ER at 101 (Appendix X2 § 12.4) and 071 (Appendix X § 12.5). The common, ordinary meaning of that language

does not reasonably encompass terms that are *not* more favorable, let alone those terms that are *less* favorable, than the terminal allocation terms in Tulalip's Compact. *See Shoshone-Bannock*, 465 F.3d at 1099 ("Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself."); *Mattingly*, 238 P.3d at 514 ("When [courts] construe contracts, the words used 'must be given their usual and ordinary meaning.'" (quoting *Honeywell*, 412 P.2d at 514)).

The phrase "the Tribe shall be entitled to such . . . more favorable terms" is not qualified in any way. It is straightforward and unambiguous, conferring an entitlement to "more favorable" terms and saying nothing whatsoever about any obligation to accept other terms or conditions. If the State had wished to qualify Tulalip's MFT rights with the requirement that Tulalip adopt such other terms, it could have bargained for such a qualification with Tulalip and readily included it as an express term.

Indeed, the State understood how to qualify MFT rights and did so in express terms when that is what it bargained for and intended. For example, as discussed above, the MFT language in Section 12.4 of Appendix X2 (as independently executed by other signatory tribes) expressly qualifies the rights of those tribes by exempting the higher total operating ceilings of the Tulalip,

Muckleshoot and Puyallup tribes from adoption by other tribes under their own MFT clauses. *See* ER at 101.

Other provisions of Appendix X2 likewise demonstrate that the State and Tribe well understood how to condition the Tribe's MFT rights with an obligation to accept other terms and conditions and did so expressly when that is what they intended. For example, the MFT clause in Section 15.2.4 of Appendix X2 provides that if any other compacting tribe in Washington is permitted to offer higher maximum wagers to patrons, then Tulalip "may likewise do so *in conformity with the terms and conditions so permitted the other tribe*." ER at 103 (emphasis added). This condition, expressly included by the parties in Section 15.2.4, is the same condition that the district court assumed was implicit in the MFT clause at issue here.

In making its assumption, the district court committed basic legal error. The express inclusion of such a condition on the Tribe's MFT rights in Section 15.2.4, coupled with the omission of a similar express condition in the Section 12 MFT clauses before this Court, instead evidences the parties' intent that no such condition was to be attached to the latter. *See, e.g., Weight Loss Healthcare Ctrs. of Am., Inc. v. Office of Pers. Mgmt.*, 655 F.3d 1202, 1209-10 (10th Cir. 2011) (declining to interpret contract provision as implicitly including language parties explicitly included in other provisions and stating that "[w]hen the drafters so

clearly knew how to express one meaning, their failure to do so implies that the meaning was not intended" (*citing Russello v. United States*, 464 U.S. 16, 23 (1983), which stated that where drafters include "particular language in one section of a statute but omit[] it in another section . . . it is generally presumed that . . . the disparate inclusion or exclusion" was intentional (internal quotation marks omitted)). By adopting the contrary conclusion, the district court impermissibly rewrote the Compact to add a term not agreed to by the parties. *See Pub. Employees Mut. Ins. Co.*, 740 P.2d at 915 ("The court cannot ignore the language agreed upon by the parties, or revise or rewrite the contract under the guise of construing it."); *McCormick*, 167 P.3d at 619 ("[C]ourts do not have the power, under the guise of interpretation, to rewrite contracts the parties have deliberately made for themselves").[6]

[6] Beyond Appendix X2, other provisions of the Compact also demonstrate that the parties understood how to place conditions on most-favored rights and did so expressly when that is what they sought to accomplish. *See, e.g.*, ER at 158-59 (Tulalip Third Amendment § 15(d)(ii)(cc) (providing for amendment when another tribe is allowed greater levels of wagering, hours of operation or scope of Class III games, "*provided however*, that if the other tribe is located East of the Cascade Mountains then [Tulalip] *must also demonstrate* that the greater level or activities have resulted in an adverse economic activity upon the Tribe's Class III gaming operations" (emphases added) (condition eliminated by later amendment)); ER at 159 (§ 15 (d)(vii) (same)). *See also, e.g.*, ER at 072-73 (Appendix X § 15.1.3) (providing that when any other tribe is permitted any type or allocation of Class III gambling device different from that authorized in Tulalip's Compact, "the Tribe shall be entitled to use such equipment or increase their allocation to a like number, *subject to good faith negotiations with the State regarding the use and regulation of such equipment*" (emphasis added)).

The MFT clause in the California 1999 Model Gaming Compacts provides another example of how the State could readily have bargained to condition Tulalip's entitlement to "more favorable" terms on the requirement that the Tribe also accept all other terms agreed to with another tribe, favorable and unfavorable alike. That clause provides that "[i]f . . . the State enters into a Compact with any other tribe that contains more favorable provisions with respect to any provisions of this Compact, the State shall, at the Tribe's request, enter into the preferred compact with the Tribe *as a superseding substitute for this Compact*[.]" *See, e.g.*, September 14, 1999 Agua Caliente Band of Cahuilla Indians Compact § 15.4 (emphasis added).[7]

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[7] *Available at*: http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/Agua%20Caliente%20Band%20Indians/aguacalientecomp050500.pdf (last visited September 28, 2013). Most-favored clauses in other contexts likewise demonstrate that the State could readily have bargained for such qualifications on Tulalip's MFT rights. *See, e.g.*, *Studiengesellschaft Kohle, M.B.H. v. Hercules, Inc.*, 105 F.3d 629, 631 (Fed. Cir. 1997) (involving most-favored clause entitling party to more favorable rates "'provided, however, that [party] shall not be entitled to such more favorable rate or rates without accepting any less favorable terms that may have accompanied such more favorable rate or rates'"); *Applera Corp. v. MJ Research, Inc.*, 2004 WL 5683983, at *11 n.23 (D. Conn. Dec. 17, 2004) (same, "'conditioned on [party's] acceptance of all the same conditions, favorable or unfavorable'"); *United Techs. Corp. v. Chromalloy Gas Turbine Corp.*, 105 F. Supp. 2d 346, 349 (D. Del. 2000) (same, "'provided [Party] is able to fulfill all other terms and conditions of such other agreement'"); *Toshiba Corp. v. Am. Media Int'l, LLC*, 2012 WL 3822759, at *1 (S.D.N.Y. Sept. 4, 2012) (same and providing that "'Licensee also agrees to be bound by any terms and conditions under which such more favorable royalty rates are made available to such other party'"); *Epic Sys. Corp. v. Allcare Health Mgmt. System, Inc.*, 2002 WL

In sum, the district court impermissibly wrote an implied term into the Tribe's MFT rights that is nowhere to be found in the plain meaning of the bargained-for language, whether read alone or in light of the Compact as a whole.

7. The District Court's Reasoning is Irreconcilable with this Court's Decision in *Idaho v. Shoshone-Bannock Tribes*

In *Shoshone-Bannock*, 465 F.3d 1095 (9th Cir. 2006), this Court addressed and rejected a similar attempt by the State of Idaho to graft implied limitations – including, as here, numerical limitations on class III games – onto the express terms of an MFT clause in an IGRA compact. The Shoshone-Bannock MFT clause provided:

> In the event any other Indian tribe is permitted by compact or final court decision to conduct any Class III games in Idaho in addition to those games permitted by this Compact, this Compact shall be amended to permit the Tribes to conduct those same additional games[.]

465 F.3d at 1098. Three other tribes subsequently agreed with the State to a statutory package of amendments to their compacts to provide for additional Class III games not included in the Shoshone-Bannock compact. Those amendments included limitations on the number of the new games that could be operated and a

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31051023, at *3 (N.D. Tex. Sept. 11, 2002) (same, if party "'also substitutes those terms which are not more favorable'"); *Phillips Petroleum Co. v. U.S. Steel Corp.*, 566 F. Supp. 1093, 1099 (D. Del. 1983) (same, "'subject to the same conditions under which such more favorable terms shall be available to said third party'").

school funding requirement to which the tribes had agreed as conditions for being allowed to operate the additional games. *Id*. at 1100-02.

Idaho argued that (1) the amendment authorized by the MFT clause was subject to negotiation and (2) the Tribe was required to accept the limitations on the number of new games and the school funding requirement as a condition of its entitlement to operate the new games. *Id*. at 1099-1100. This Court rejected both arguments because neither was supported by the express language of the MFT clause, which, like the MFT language at issue here, made no reference to renegotiation, numerical limitations or other qualifications or conditions on the Tribe's entitlement. With regard to Idaho's assertion that the MFT clause obligated the Shoshone-Bannocks to engage in renegotiation, the Court explained:

> We reject . . . the State's contention that section 24.d requires renegotiation of the Tribes' Compact in order to arrive at the necessary amendment. Section 24.d provides that, when any other tribe is permitted by compact to conduct class III games not permitted by the Tribes' Compact, the Compact "*shall be amended* to permit the Tribes to conduct those same additional games. . . ." (Emphasis added). *This plain language leaves no room for negotiation; it mandates an amendment to permit one thing – the operation of the same games conducted by other tribes under their compacts.* Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself.

Id. at 1099 (second emphasis added).

The district court failed to demonstrate the fidelity to the express terms of the MFT clause called for by this Court in *Shoshone-Bannock*. Rather than

vindicating Tulalip's right to the more favorable TAP/ITF mechanisms agreed to by the State and the Spokane Tribe, the court sought to saddle that entitlement with conditions finding "no room" within the four corners of the Tulalip MFT provision.

Moreover, as discussed above, some MFT clauses in the Tulalip Compact (*e.g.*, ER at 103 (Appendix X2 § 15.2.4)) expressly require Tulalip to accept other "terms and conditions" in addition to the more favorable ones, whereas the MFT clause at issue here contains no such express condition. This Court found a similar distinction in the Shoshone-Bannock Compact to be indicative of the parties' intent:

> If Idaho wanted to condition section 24.d amendments on renegotiating the Compact, it should have bargained for that term as it appears to have done with regard to Section 11 [imposing express renegotiation requirement].

465 F.3d at 1100 & n.6. *See also, e.g.*, *Weight Loss Healthcare Centers*, 655 F.3d at 1210 ("When the drafters [of a contract] so clearly knew how to express one meaning [in one provision], their failure to do so [in other provision] implies that the meaning was not intended" in the latter).

This Court similarly rejected Idaho's argument that the Tribe was required to accept the limitations on the numbers of additional games agreed to by other tribes as a condition to operating those games itself. As the Court explained, the express

terms of the MFT made no reference to the Shoshone-Bannock Tribes' obligation to accept any such restrictions:

> Idaho asks this Court to define "those same additional games" in section 24.d to include the limitations on numbers of gaming machines and the requirement of school payments that the other tribes have adopted in return for authorization to operate video gaming machines.
>
> We reject the State's contention that a limitation on the number of gaming machines necessarily inheres in the Compact's language entitling the Tribes "to conduct those same additional games." The plain meaning of "same additional games" refers to the games themselves and not the number of machines.

465 F.3d at 1100.

The same principles apply here. The ordinary meaning of the phrase "the Tribe shall be entitled to such . . . more favorable terms" leaves no room to imply a requirement that the Tribe must also accept *less* favorable or *un*favorable terms or any other terms agreed to by the State and the Spokane Tribe. In ignoring the plain terms of Tulalip's MFT clause and this Court's teachings in *Shoshone-Bannock*, the district court committed reversible legal error.

8. The District Court's Assertion that the State "Never Agreed" to the More Favorable ITF Terms of Appendix Spokane Defies Text and Logic and Provides No Basis for the Denial of Summary Judgment to Tulalip

The district court's final stated basis for rejecting Tulalip's entitlement to an ITF based on the more favorable ITF terms of Appendix Spokane was that the State "never agreed" to those terms. According to the court:

> The plain language of the compact provides that if the State agrees . . . to permit an allocation of Player Terminals to a tribe on terms that are more favorable, [Tulalip] shall be entitled to such more favorable terms . . . . However, the State has agreed to Appendix Spokane, but only to all of Appendix Spokane. This fact is most clearly expressed in the preamble to Appendix Spokane:
>
> > Agreement by the State to each of the individual numerical limitations and other provisions contained in this Appendix is expressly conditioned upon agreement by the Tribe to each and every other provision contained in the Appendix. Absent such agreement by the Tribe, the State would not, and does not, agree to the individual numerical limitations and other conditions contained in this Appendix.
> >
> > * * *
>
> . . . [T]he State must have agreed to the same more favorable allocation terms permitted to other tribes. *Since the State has never agreed to the allocation terms plaintiff seeks to force onto the State by declaratory and injunctive relief*, plaintiff is not entitled to an order forcing those terms on the State.

ER at 008-9 (Order at 8-9 (quoting ER at 115 (Preamble to Appendix Spokane))) (footnote omitted) (emphasis added).

The district court's conclusion that the State "never agreed" to the more favorable ITF terms that Tulalip seeks to adopt is plainly incorrect. Those terms form a part of Appendix Spokane, which was duly executed by both the State and the Spokane Tribe, and they enjoy operative force to this day. The district court's conclusion is precisely the sort of "forced" and "strained" interpretation of a contract that courts must avoid. *See Certain Underwriters at Lloyd's London*, 256

P.3d at 375 (Courts interpret a contract "as an average person would, giving it a practical and reasonable meaning, not a strained or forced meaning").

The court's counterintuitive conclusion was based on the fact (expressed in the Preamble to Appendix Spokane) that the State and the Spokane Tribe conditioned their respective agreement to the individual provisions of the Appendix on their agreement to "each and every other provision contained in the Appendix." ER at 008-9 (Order at 8-9). Such a condition is, of course, implicit in all contracts and would negate the operation of any most-favored contract clause if given the effect attributed to it by the district court. It is indisputable that Appendix Spokane consists of numerous discrete terms. *See, e.g.*, ER at 115 (Preamble to Appendix Spokane) (referring to "every *other term* in the Appendix" and "every *other term* contained in the Appendix" (emphases added)). And it is indisputable that the State agreed to these terms individually. *See id.* (referring to the "*[a]greement by the State to each of the individual . . . provisions* contained in this Appendix" (emphasis added)). That the State and the Spokane Tribe further contractually agreed that the terms of Appendix Spokane "are not divisible from each other for any purpose," *id.*, has no legal bearing whatsoever on Tulalip's MFT rights, as Tulalip is a nonparty to that agreement and to Appendix Spokane as a whole. *See E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty.").

The unmistakable consequence of the district court's conclusion that the State only agreed "to all of Appendix Spokane" is that Appendix Spokane *in its entirety* would be rendered immune from Tulalip's MFT rights (and those of all Washington tribes). This is so because Appendix Spokane contains Spokane-specific terms that cannot possibly be adopted by any other tribe. For example, Appendix Spokane authorizes the operation of gaming facilities on the Spokane Tribe's own sovereign territory, something only the Spokane Tribe can undertake. *See* ER at 116 (Appendix Spokane § 1.A.). If this Court affirms the district court's reasoning, the State will have license to vitiate all of its existing most-favored promises to Washington tribes simply by couching any subsequent more favorable tribe-specific agreement in language, such as that used in the Preamble to Appendix Spokane, declaring the terms of the subsequent agreement "not divisible from each other for any purpose." ER at 115 (Preamble to Appendix Spokane). Tulalip could not reasonably have expected its bargained-for MFT rights to be so readily subject to unilateral negation at the hands of the State. *See Forest Mktg. Enters., Inc. v. State Dep't of Natural Res.*, 104 P.3d 40, 44 (Wash. Ct. App. 2005) (Courts "adopt the contract interpretation that best reflects the parties' reasonable expectations").[8]

[8] *See also, e.g., Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 925 F. Supp. 193, 197 (S.D.N.Y. 1996) (rejecting argument that under most-favored clause, party "may freely evade its duty to offer comparable terms to

As interpreted by the district court, the Spokane Preamble constitutes an end-run around the State's pre-existing, bargained-for MFT promises to Tulalip (and other Washington tribes). What the State attempted to accomplish by declaring the terms of Appendix Spokane "not divisible from each other for any purpose" was the imposition, *ex post facto*, of a restriction on the MFT rights in Tulalip's Compact (and in those of other tribes) that the State failed to bargain for in the first place. The district court's ruling missed the mark badly in vindicating this strategy. *See Pub. Employees Mut. Ins. Co.*, 740 P.2d at 915 ("The court cannot ignore the language agreed upon by the parties, or revise or rewrite the contract under the guise of construing it.").

Moreover, in reaching its conclusion, the district court once again ran afoul of this Court's decision in *Shoshone-Bannock*. First, the court erred in looking to the State's agreement with the Spokane Tribe to interpret the plain terms of Tulalip's Compact. *See Shoshone-Bannock*, 465 F.3d at 1100 ("Because the Compact is clear, we do not need to consider the other tribes' gaming compacts to

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SMC simply by making any more favorable arrangement extended to another licensee contingent upon a condition which is inapplicable to SMC") (*vacated on unrelated grounds*, 103 F.3d 9 (2d. Cir. 1997)); *Motion Picture Projectionists v. RKO Century Warner Theatres, Inc.*, 1998 WL 477966, *8 (S.D.N.Y. Aug. 14, 1998) (rejecting argument that subsequent more favorable agreement "must be incorporated exactly as written," including entity-specific geographic terms, because that requirement "has the potential for vitiating the [most-favored] clause altogether. . . . This would allow the Union to insulate itself from the obligation, which it arguably assumed, to provide more favorable terms to defendant").

evidence the intent of the parties to this Compact"). More fundamentally, in *Shoshone-Bannock*, the numerical limits on additional games and the school funding requirement were also inseparable components of Idaho's agreements with the other tribes. The statute that authorized those agreements provided that any tribe party to an IGRA compact "may amend its compact . . . to incorporate *all of the following terms*," Addendum at 2 (Idaho Code § 67-429C(1) (emphasis added)), which terms included the numerical limits and school funding commitment, *id*. (Idaho Code § 67-429C(1)(b), (c)). Thus (under the district court's logic), Idaho "never agreed" to permit the other tribes to operate additional games without the corresponding limitations. Yet this Court nevertheless rejected Idaho's argument that the Shoshone-Bannock Tribes therefore also had to accept the same limitations when invoking their own MFT:

> The other tribes agreed to accept the statutory package of amendments in return for benefits offered by those amendments that were not included in their existing compacts. The Shoshone-Bannock Tribes, however, . . . chose instead to rely on their Compact's existing [MFT] provisions to confer the necessary permission to operate the video gaming machines. This the Tribes were entitled to do, and they may not be subjected to the number limitations of the state statutory package that would have applied had the Tribes agreed to amend under [the statute]. The fact that the [Shoshone-Bannock] Tribes may now be in a technically better position than the other tribes is purely a function of the terms of the Compact that Idaho and the [Shoshone-Bannock] Tribes voluntarily entered into.
>
> . . . .

> . . . The fact that other tribes have accepted a package of benefits and burdens when they voluntarily amended their compacts does not change the terms of the Compact between the [Shoshone-Bannock] Tribes and Idaho.

465 F.3d at 1101-02.

This reasoning applies equally here. Whether the Spokane Tribe agreed to certain conditions and restrictions in exchange for the benefits of Appendix Spokane does not change the plain meaning of the terms of the MFT agreed to between Tulalip and the State. Those terms specifically entitle Tulalip to terminal allocation terms "which are more favorable" and say nothing at all requiring Tulalip to accept other terms of the State's agreement with the Spokane Tribe.

In sum, *Shoshone-Bannock* is again directly on point and controls here. There, as here, an MFT clause contained no language requiring the tribe to accept restrictions or other terms in addition to the beneficial terms that were the express subject of the most-favored entitlement. There, as here, a state entered subsequent more favorable agreements with other tribes expressly conditioned on the other tribes' acceptance of "all of the . . . terms" of the agreement, including restrictions on the beneficial terms. This Court ruled that this express conditioning did not obligate Shoshone-Bannock to likewise accept the restrictions, because the plain language of its MFT made no reference to any such obligation. The same fidelity to the plain language that dictated judgment for the tribe in *Shoshone-Bannock* should do so here. The district court erred in ruling to the contrary.

9. Conclusion

The district court's denial of Tulalip's summary judgment motion is replete with procedural and substantive errors any one of which, standing alone, would warrant reversal. Its conclusion runs directly counter to the plain terms of the Compact and to controlling Circuit precedent, and is premised on a patent misunderstanding of the relief sought by Tulalip. As demonstrated above, there exists no genuine issue of material fact that the State agreed to terminal allocation terms with the Spokane Tribe more favorable than those found in the Tulalip Compact. Under the plain language of Tulalip's MFT clause, Tulalip is "entitled to such . . . more favorable terms" and hence to judgment as a matter of law. The Court should accordingly reverse the district court's denial of Tulalip's summary judgment motion and remand with instructions to enter judgment in favor of the Tribe. *See Karuk Tribe*, 681 F.3d 1006 (reversing denial of summary judgment to party and remanding with instructions to enter judgment in favor of that party); *Aceves*, 68 F.3d 1160 (same).

C. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE STATE

In addition to denying Tulalip's summary judgment motion, the district court went further and granted summary judgment to the State. As discussed above, the district court erroneously failed to consider the State's motion separately from the Tribe's motion, and nowhere detailed how the State met its summary judgment

burden. This procedural error alone warrants reversal of the summary judgment grant. *See Fair Hous. Council*, 249 F.3d at 1136 (cross-motions for summary judgment must be evaluated separately on their own merits). And as a substantive matter, the sparse reasoning set forth in the district court's opinion does not remotely justify the grant.

As noted above, the first basis for the district court's generalized opinion had to do with the timing of the MFT clause in Appendix X2 in relation to Appendix Spokane. For the reasons previously discussed, this holding lacks any substantive merit. Moreover, the argument was not raised by the State, and the district court did not hold oral argument; thus, Tulalip did not have reasonable notice of this argument or an opportunity to respond before the court ruled, as required by Rule 56. "A district court that does not comply with the advance notice and response provisions of Rule 56(c) has no power to enter summary judgment." *Norse v. City of Santa Cruz*, 629 F.3d 966, 972 (9th Cir. 2010) (internal quotation marks omitted) (reversing grant of summary judgment). *See also* Fed. R. Civ. P. 56(f)(2) (only "[a]fter giving notice and a reasonable opportunity to respond" may a court grant summary judgment "on grounds not raised by a party").

Tulalip did have notice of the district court's second stated basis for its ruling, namely that

> [t]he State has never agreed to the select portions that plaintiff wishes to cherry-pick out of the Inter-Tribal Fund provision without the

> corresponding limitations. . . . Since the State has never agreed to the allocation terms plaintiff seeks to force onto the State . . . plaintiff is not entitled to an order forcing those terms on the State.

ER at 009 (Order at 9) (footnote omitted). But for the many reasons discussed above, *see supra* Part VII.B.(4)-(8), this reasoning is flatly contrary to the plain language of the Compact and to this Court's decision in *Shoshone-Bannock*. As such, it was a wholly invalid ground on which to grant summary judgment to the State. This Court should accordingly reverse the district court's grant of summary judgment to the State and remand with instructions to enter judgment in favor of Tulalip. *See Barnes-Wallace v. City of San Diego*, 704 F.3d 1067 (9th Cir. 2012) (reversing grant of summary judgment to party and remanding with instructions to enter summary judgment in favor of other party). *See also Charry v. California*, 13 F.3d 1386, 1388 (9th Cir. 1994) ("This court will reverse a grant of summary judgment if . . . the district court erroneously applied the relevant law.").

Moreover, the district court's reasoning, *even if correct*, would still not justify summary judgment for the State. Tulalip alleged in its Complaint that the Spokane Tribe's terminal allocation terms providing for both TAP and ITF procedures were "more favorable" than those in Tulalip's Compact, ER at 175 (Complaint ¶¶ 31-32), and sought a declaration that the State's unwillingness to amend the Compact "to reflect Tulalip's entitlement to terminal allocation terms based on th[ose] more favorable allocation terms" was a breach of the Compact,

id. at 177 (Complaint ¶¶ 42-43). The Complaint included a "proposed" ITF that incorporated the operative terms and conditions of the ITF contained in Section 7 of Appendix Spokane but did not include terms from elsewhere in that appendix. ER at 180 (Complaint Attachment 1). The district court's conclusion that the MFT clause requires Tulalip to accept terms or conditions extending beyond those found in Section 7 leaves unanswered whether the Spokane ITF provision, even with additional terms or conditions, would still be "more favorable" than the terms found in Tulalip's Compact and thus within the ambit of Tulalip's express MFT rights to adopt.

Critically, the district court did not undertake this additional inquiry, which goes to the heart of the State's summary judgment burden. Instead, the court appears to have mistakenly *assumed* that its rejection of the Tribe's summary judgment argument and proposed injunction established *as a matter of law* that the State had carried its own summary judgment burden with respect to the Tribe's Complaint and request for declaratory relief. This was a basic error of law. The denial of one cross-motion does not as a matter of law justify granting the other. *See Fair Hous. Council*, 249 F.3d at 1136 ("[E]ach [cross] motion must be considered on its own merits." (internal quotation marks omitted)); *Parks v. LaFace Records*, 329 F.3d 437, 444-45 (6th Cir. 2003) (cross motions for summary judgment do "not constitute an agreement that if one is rejected the other is

necessarily justified" (internal quotation marks omitted)); *Resource Invs., Inc. v. United States*, 85 Fed. Cl. 447, 467 (Fed. Cl. 2009) ("[R]ejecting one [cross motion] does not mean that the other is justified.").

The district court's reasoning was a failure of logic as well. The court in effect concluded, paradoxically, that the mere existence of additional conditions brought the Spokane ITF outside of the very MFT language that, according to the district court, required Tulalip to accept those same additional conditions. Under this illogical interpretation, Tulalip's MFT rights are a self-negating illusion. *See Taylor v. Shigaki*, 930 P.2d 340, 344 (Wash. Ct. App. 1997) (Courts "will not give effect to interpretations that would render contract obligations illusory" (*citing Kennewick Irr. Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir. 1989))); *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 209 P.3d 863, 871 (Wash. 2009) ("Courts should not adopt a contract interpretation that renders a term ineffective or meaningless."). The court's conclusion that Tulalip's MFT rights to a combined TAP/ITF procedure are implicitly qualified, even if correct (which it demonstrably is not), was a patently inadequate basis to conclude as a matter of law that Tulalip has no such rights at all. Yet that is precisely the premise and effect of the district court's grant of summary judgment to the State. For this and the foregoing reasons, that grant should be reversed.

D. OTHER TRIBES IN WASHINGTON WERE NOT REQUIRED PARTIES UNDER RULE 19

The State moved for dismissal under Federal Rule of Civil Procedure 19 for failure to join required persons. *See* ER at 034 (State's Cross-Motion at 11). It argued that because 26 other Indian tribes in Washington have an Appendix X2 as part of their own compacts, each has a legally protected interest in how Tulalip's Appendix X2 is interpreted and whether it is amended. *Id*. at 034-36 (State's Cross- Motion at 11-13). The argument, not reached by the district court, is without merit.

While the terms of Appendix X2 were cooperatively negotiated between the State and numerous Washington tribes, Tulalip, like the other tribes, subsequently executed Appendix X2 in an independent bilateral agreement with the State. Nothing in Appendix X2 confers any right on other tribes precluding the State from amending the terms of the State's separate bilateral Appendix X2 agreement with Tulalip. In fact, the terms of Appendix X2 are directly to the contrary.[9]

[9] Section 15 of Appendix X2 expressly acknowledges that Tulalip may seek "amendments to this Appendix with respect to the subject matter of Tribal Lottery System Terminals" after an amendment moratorium ending on June 30, 2009, and that the parties may mutually agree to do so at any time. *See* ER at 102 (Appendix X2 §§ 15.1 and 15.1.2). Section 12.4 of Appendix X2 expressly recognizes that the State may "agree[] . . . to permit an allocation of Player Terminals to a [different] tribe which is . . . on terms which are more favorable, than as set forth" in Appendix X2 as originally executed. *Id.* at 101 (Appendix X2 § 12.4). Finally, Section 11 provides that "[n]otwithstanding anything in this Appendix to the

Reciprocal obligations among non-party tribes in IGRA compacts are found, if at all, in express terms. *See Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 547 F.3d 962, 976 n.18 (9th Cir. 2008) (finding reciprocal obligations among tribes created by language in a provision of the 1999 California model compacts stating that "*the Tribe agrees with all other Compact Tribes* . . . that each Non-Compact Tribe in the State shall receive the sum of $1.1 million per year," but finding no reciprocal obligations in the absence of such language of agreement among tribes (emphasis added)). No such language of inter-tribal reciprocal obligation appears in Appendix X2.

Moreover, the mere fact that other tribes are parties to their own bilateral agreements with the State with similar, or even identical, terms does not establish a legally protected interest under Rule 19. This Circuit confirmed this point emphatically in *Cachil Dehe Band*, where approximately 60 tribes had collectively negotiated and separately entered "virtually identical bilateral compacts" with the State of California in 1999. 547 F.3d at 966. One tribe ("Colusa") subsequently sued the State regarding several issues under the compact without joining the other tribes. California moved for dismissal under Rule 19, arguing – precisely as the State argued below – "that Colusa's success . . . would impair the [other] Compact

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contrary, *the [State] and Tribe may agree on alternative provisions to those set forth herein*[.]" *Id*. at 097-98 (Appendix X2 § 11) (emphasis added).

Tribes' ability to protect their interest in 'the 1999 Compact's interpretation and the fulfillment of its terms by all 1999 Compact tribes.'" *Id*. at 976. This Court rejected the argument in terms directly applicable here:

> Nothing in the Compact establishes any obligation towards the other Compact Tribes insofar as the [provision at issue is] concerned. With respect to [that] provision, the 1999 Compacts are quintessentially bilateral. *Accordingly, the Compact Tribes' relevant Rule 19 interest must arise, if at all, from the bare fact that the Compact Tribes are simultaneously parties to identical bilateral compacts with the State. We have never held that the mere coincidence of parallel and independent contractual obligations vis-a-vis a common party requires joinder of all similarly situated parties.*

Id. (footnote omitted) (emphasis added). In sum, the 26 other tribes have no legally protected interest at stake requiring their joinder.

VIII. CONCLUSION

For the reasons stated above, the Tribe respectfully requests that the Court reverse the district court and remand with instructions to enter summary judgment in favor of Tulalip for the declaratory and injunctive relief set forth in its Complaint.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,472 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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STATEMENT OF RELATED CASES

There are no known related cases pending in this Circuit.

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2013, I electronically filed this Brief and the Excerpts of Record with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to all parties registered in the CM/ECF system for this matter.

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