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; JAY INSLEE, Governor of Washington, in his official capacity; and DAVID TRUJILLO, Director of the Washington State Gambling Commission, in his official capacity,

Defendants.

APPELLANT'S REPLY BRIEF

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

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Tulalip's Opening Brief sets forth the reasons, grounded in the plain language of the MFT clause and other express terms of the Compact, that the district court's judgment should be reversed. The State's response devotes, in total, *one conclusory sentence* to the meaning of the express language of the MFT clause. *See* Brief of Defendants-Appellees ("Response") at 23. The State instead relies on a range of extra-textual arguments, both factual and legal, some of which are raised for the first time on appeal. As demonstrated below, each of those arguments is without merit.

I. The District Court Erred in Failing to Consider the Parties' Cross Motions Separately.

Tulalip argued that in conflating the parties' cross motions for summary judgment, the district court failed to hold the State to its summary judgment burden. *See* Appellant's Brief ("Opening Br.") at 47-51. *See also Fair Hous. Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (each cross motion must be considered separately "*in accordance with the Rule 56 standard*" (emphasis added)). The State responds only by asserting that the court "considered all the materials filed by the parties" and found that "the State had met its summary judgment burden, but Tulalip had not." Response at 21. This in no way addresses the detailed and specific arguments raised by Tulalip.

Beyond this basic procedural error, the district court committed numerous substantive errors requiring reversal and a grant of summary judgment in Tulalip's favor.

II. The State Has Abandoned Any Defense of the District Court's Determination Based on the Effective Date of Appendix X2.

The district court determined that Tulalip had no MFT rights in effect when the State agreed to Appendix Spokane. In doing so, it ignored the MFT language in Appendix X and erroneously determined that applying Appendix X2 would give it impermissible "retroactive effect." ER 007 (Order). *See* Opening Br. at 20-23. The State does not defend the district court's holding on this point. Indeed, its "statement of the issues" does not reference it. *See* Response at 3. Instead, it seeks to transform the district court's holding on this point into one about waiver. *See id.* at 24-25. While Tulalip addresses waiver below, the important point here is that the State does not, and cannot, defend the court's holding on its own terms.[1]

The State's representations here (and below, *see*, *e.g.*, Opening Br. at 21-22) instead assume that the MFT language common to Appendix X and X2 reflects a single, uninterrupted right. *See*, *e.g.*, Response at 23 (quoting common MFT

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[1] Nor does the State dispute that (1) the district court lacked the power to grant summary judgment on this point sua sponte, giving Tulalip neither notice nor opportunity to respond, *see* Opening Br. at 48; or (2) Spokane's combined TAP/ITF mechanism that Tulalip seeks to adopt did not come into effect until after Appendix X2 went into effect. *See id.* at 23.

language of Appendices X and X2 with citation to *both* provisions and explaining that "[*t*]*his* most-favored-tribe provision" applies when the State agrees to terms "more favorable than those found in Tulalip's . . . Appendices X and X2" (emphasis added)). "A party abandons an issue when it has a full and fair opportunity to ventilate its views with respect to an issue and instead chooses a position that removes the issue from the case." *BankAmerica Pension Plan v. McMath*, 206 F.3d 821, 826 (9th Cir. 2000); *Greenawalt v. Ricketts*, 943 F.2d 1020, 1027 (9th Cir. 1991) (party "concede[d]" issue "by his failure to argue" it); *Chubbuck v. Indust. Indem*., 953 F.2d 1386, at *1 (9th Cir. 1992) (unpublished) ("By failing to respond to this argument, we conclude [party] has indeed conceded the point").[2]

This Court should accordingly conclude, consistent with the parties' unified position, that Tulalip's MFT rights were in effect at all relevant times.[3]

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[2] Proposed Amicus Curiae, the Samish Tribe ("Samish"), claims Tulalip raises a "new" argument here, relying solely on Appendix X. *See* Proposed Amicus Br. of Samish Tribe at 16. Tulalip's arguments have consistently relied on both appendices and treated the MFT language in both as a single, sustained right. *See, e.g.*, ER 177 (Complaint ¶¶ 39, 43).

[3] Samish attempts to salvage the district court's conclusion by arguing that the phrase "nothing herein shall restrict the Tribe from exercising any provision in its Compact not covered by this Appendix X2," means, by negative implication, that "only those provisions of Appendix X . . . that are not covered by Appendix X2 may be exercised by the Tribe." Proposed Amicus Br. at 17. This argument, not referenced by the State or district court, is meritless. *Every* provision of Appendix X is "covered" by Appendix X2. *Compare* Supplemental ER 001-004 (Appendix

III. The State's Arguments Contradict the Plain Language of the Compact.

1. The State Agreed to More Favorable Terms with Spokane

The State denies agreeing with Spokane to "more favorable TLS terminal allocation terms than those" in Appendix X2. Response at 27. *See also id*. at 23 (denying same). This position is untenable. As noted, *see* Opening Br. at 23-26, if Tulalip is unable to obtain terminal rights from other tribes under the TAP Procedure, the Compact provides no additional means to obtain such rights. By contrast, the State admits that it "agreed to provide an alternative mechanism, known as an Inter-Tribal Fund, for the Spokane Tribe to obtain TLS terminals in the event the Spokane Tribe was unable to acquire allocations from other

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X Table of Contents) *and* Supplemental ER 005-008 (Appendix X2 Table of Contents). Samish's argument, then, is that Appendix X2 *superseded* Appendix X entirely. This conclusion is irreconcilable with the other sentence quoted by Samish, Proposed Amicus Br. at 17, which acknowledged the continuing applicability of "the requirements of Appendix X." *See* ER 076. It is likewise irreconcilable with Appendix X2's recognition that prior amendments remain "in full force and effect," ER 074 (second Whereas clause), and that Appendix X was merely "supplemented by further amendment known as Appendix X2," *id*. (fourth Whereas clause). These are not terms of supersession. And as demonstrated above, the State itself understands the MFT language common to Appendix X and X2 to be a single sustained right, *see* Response at 23, and explained below that "[a]s the [MFT] language of the appendices [X and X2] is virtually identical, the State will only cite to Appendix X2." ER 040. The latter statement would make no sense if the State understood the MFT of Appendix X to have been extinguished by Appendix X2. *See Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1076 (9th Cir. 2010) (rejecting interpretation of gaming compact provision "at odds . . . with an interpretation . . . agreed upon by both parties").

Washington tribes[.]" Response at 9-10. *See also* ER 002 (Order ("[T]he State agreed to an Inter-Tribal Fund to provide an alternative mechanism for the Spokane Tribe to obtain [terminals] in case other tribes did not lease to them."). A second allocation mechanism is a more favorable allocation term.[4]

2. The MFT Clause Does Not Require Tulalip to Adopt Terms in Addition to More Favorable Terminal Allocation Terms

The State asserts that "Tulalip cannot select its preferred compact provisions from Appendix Spokane without the other concomitant restrictions[.]" Response at 27. Its discussion on this point, *see* Response Br. at 27-31 (Part VII.C.3), avoids all reference to the language of the MFT clause or other language in the Compact. But "[w]e search for intent through the objective manifest *language of the contract itself*." *Navlet v. Port of Seattle*, 194 P.3d 221, 234 (Wash. 2008) (emphasis added). Thus, while the State adopts the district court's "cherry-picking" rhetoric, it offers *no* argument as to how the phrase "more favorable terms" can reasonably be interpreted to encompass terms that are *not* more favorable, let alone those that are *less* favorable.

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[4] That Spokane has not yet accessed its ITF, *see* Response at 26 n.7, does not alter this conclusion. Spokane still benefits – *e.g.*, in terms of its own financial planning – from the security of a guaranteed means to obtain terminals above its base allocation. Tulalip enjoys no such security.

Tulalip further cited Compact provisions showing that when the parties intended to condition Tulalip's most-favored rights with an obligation to accept additional terms, they manifested that intent expressly. *See*, *e.g.*, ER 103 (Appendix X2 § 15.2.4 (Tulalip may adopt more favorable wagering limits "*in conformity with the terms and conditions so permitted the other tribe*" (emphasis added)). *See also* Opening Br. at 33-36 and n.6-7 (citing additional examples). The State does not acknowledge this argument.

3. The State's Arguments Regarding the Exclusivity of the TAP Procedure are Meritless

The State asserts that "no part of Appendix X2 contemplates allowing a tribe to operate outside the bounds of" the TAP Procedure. Response at 28. *See also* Samish Proposed Amicus Br. at 2 n.2. However, the TAP provisions of Appendix X2 neither preclude other means for tribes to obtain terminal rights nor impose the majority-approved plan requirement on any such other means. Section 12.2 authorizes the Tribe to acquire and transfer terminal rights in exchanges with other tribes subject to certain conditions, including Section 12.2.2's requirement of a majority-approved plan. *See* ER 099. Thus, Section 12.2.2 simply requires a majority-approved plan *as a condition on the inter-tribal exchanges authorized by Section 12.2* – not as a condition on other means by which a tribe may agree with the State to obtain terminal allocation rights. Indeed, Spokane is fully subject to sections 12.2. and 12.2.2 of Appendix X2, *see* ER 145, yet may acquire terminal

rights through its ITF outside of those provisions and without a majority-approved plan. ER 120-22 (Appendix Spokane § 7).

Moreover, Appendix X2 contains several provisions expressly permitting the State and a tribe to bilaterally agree to alternative terms. *See* Opening Br. at 52 n.9. The State responds to these provisions only by arguing that "Appendix X2 can only be amended upon certain circumstances . . . [and] [n]one . . . are applicable here." Response at 29 n.8 (citing ER 102 (Appendix X2 § 15.2)). But this is not so. Section 15.2 states (in language replaced by the State with ellipses, *see id.*), that its list of amendments is "without prejudice to any other provision(s) of this Compact or this Appendix[.]" ER 102. And Section 15.1.2 provides that "[n]othing in this section shall diminish the right of either party to amend the terms and conditions of this Compact by mutual agreement, as otherwise provided in this Compact." *Id*.

Consistent with these provisions, Section 15.2 lists circumstances that "may" constitute a basis for amendment. ER 102. Thus, its list of amendments is not exclusive. *See Radici v. Associated Ins. Cos.*, 217 F.3d 737, 742 (9th Cir. 2000) (finding listed remedy not exclusive because the "provision utilizes the permissive term 'may,' as opposed to the stronger 'shall,' which, had it been employed, might have implied the exclusivity of the . . . remedy"). Nor, in light of the permissive "may," is amendment mandatory under Section 15.2. Hence, should one of the

listed circumstances come to pass, some tribes could seek to amend, while others might not – resulting in differing Appendix X2 terms among tribes, the very result decried by the State as impermissible and a basis for denying relief to Tulalip.

IV. The State Does Not Meaningfully Defend the District Court's Ruling Based on the Purportedly "Less Favorable Limitations" of Appendix Spokane.

1. Reasonable Efforts Under the TAP Procedure

Before accessing its ITF, Spokane must first exhaust reasonable efforts under the TAP Procedure. *See* ER 120, 145. This feature ensures that the ITF will have no deleterious impact on the continuing viability of the TAP Procedure. The State does not dispute that Tulalip's proposed ITF fully incorporates this feature. *See* Opening Br. at 28-29.

2. Inter-Tribal Negotiation

The State asserts that inter-tribal negotiation is a "necessary" requirement "in order for the Spokane Tribe to use its Inter-Tribal Fund[.]" Response at 29. First, this assertion is irrelevant as the language of the MFT clause does not encompass such additional terms. *See Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095 (9th Cir. 2006) (discussed below). Second, the assertion is incorrect. Section 6.A. of Appendix Spokane places no conditions on Spokane's right to access its ITF upon the effective date of the compact. *See* ER 119. The inter-tribal negotiation provision of Section 6.B. was of no effect until three years after the

effective date of the compact, and even then the language does not indicate a precondition to continued access of the ITF. *See id.* And the record contains no suggestion that this purported prerequisite was ever met, while Spokane remains entitled to its ITF. And as noted, Tulalip has never objected to participating in such negotiations. *See* Opening Br. at 28.

3. The Numerical Limits of Section 6 of Appendix Spokane

The MFT clause uses the disjunctive "or" to categorically distinguish between a tribe's numerical allocation (*e.g.*, as in Section 6 of Appendix Spokane), and the more favorable terms by which that allocation may be achieved (*e.g.*, the Spokane TAP/ITF mechanism). *See, e.g.,* ER 101 (Appendix X2 § 12.4). Tulalip argued that the district court therefore erred in conflating more favorable allocation terms and the numerical limits of Appendix Spokane. *See* Opening Br. at 30-32. The State does not acknowledge this argument, but grounded as it is in the plain language of the Compact, it disposes of the State's argument that numerical conditions should attach to Tulalip's entitlement to a more favorable allocation mechanism.

In fact, the State offers *only* the following in defending the district court's reasoning regarding the numerical allocations of Section 6:

> [B]y imposing a numerical restriction upon the Spokane Tribe's invocation of the Inter-Tribal Fund, the State limited that tribe's ability to obtain an advantage over other tribes by operating a large

> number of TLS terminals obtained outside the existing framework of the statewide Tribal Lottery System.

Response at 30.

This argument is irrelevant under the MFT clause (which imposes no obligation to accept additional restrictions), and lacks both factual and textual support. Beginning three years after the effective date of Appendix Spokane, Section 6.B. permitted Spokane to obtain 3000 terminals (equal to all but three other tribes) entirely through its ITF – *i.e.,* "outside of the existing framework." ER 119-20. That number is now 3500 terminals, which is *higher* than all but three tribes. *Id*. Thus, the suggestion that the numerical limits of Section 6 were intended to safeguard other tribes from Spokane's use of its ITF, even if relevant, is not supported by the plain terms of Appendix Spokane. The requirement that Spokane must exhaust all reasonable efforts to lease terminals from those tribes before accessing its ITF accomplishes that safeguard; a feature Tulalip has fully incorporated into its proposed ITF.

V. The State Cannot Agree with Another Tribe to Limit Tulalip's Rights.

Finding no support in the language it negotiated with Tulalip, the State claims to have agreed *with Spokane* that Tulalip must accept less favorable conditions as part of its MFT rights. According to the State:

> [T]he Preamble [to Appendix Spokane] specifically "conditioned [the parties'] respective approvals of [the] Appendix on their specific mutual agreement that *all* of the provisions of [the] Appendix are

> interrelated and interdependent and, as such, that *they are not divisible from each other for any purpose*." ER 15 (emphasis added). In addition, the State and Spokane Tribe agreed that "any attempted use or interpretation of individual provisions of [the] Appendix must incorporate, apply and give full consideration to every other term contained in the Appendix as a condition of any such attempted use or interpretation." *Id*.

Response at 34-35.

First, this argument ignores the plain language of Tulalip's Compact and asks the Court to focus on the intent of parties to a different compact. Idaho made the same argument in *Shoshone-Bannock*:

> The District court . . . should have construed the Shoshone-Bannock Compact in light of the terms of the . . . other Tribes' Compact Amendments, which were the basis of the Shoshone-Bannock Tribes' assertions of [its MFT] rights[.]

Appellant's Brief at *24, *Shoshone-Bannock*, 465 F.3d 1095 (No. 04-35636), 2005 WL 1912073. This Court rejected that argument, stating that "we do not need to consider the other tribes' gaming compacts to evidence the intent of the parties to this Compact[.]" 465 F.3d at 1100.

Second, the Preamble cannot condition Tulalip's "use or interpretation" of Appendix Spokane in invoking its own MFT rights because Tulalip is not party to

Appendix Spokane and thus not bound by its terms and conditions. *See* Opening Br. at 42. The State offers no response to this argument.[5]

Third, Appendix Spokane limits gaming to Spokane land. *See* Opening Br. at 43. Thus, if "[a]ny attempted use or interpretation" of Appendix Spokane "must incorporate [and] apply every . . . term contained in the Appendix," then Appendix Spokane is immune to the MFT rights of all tribes because no other tribe can operate a facility on Spokane land. *See id.* at 43-44. The Preamble is a transparent attempt to nullify the MFT rights of Tulalip and other Washington tribes.

The State's only response to this point is that it is "not well taken." Response at 34 n.11. Yet the State offers no other explanation and has effectively conceded that the Preamble was intended to thwart other tribes' MFT rights. *See*

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[5] Nor can the State assert that *it* is bound by the Preamble from honoring Tulalip's contractual rights. *See*, *e.g.*, *W.R. Grace and Co. v. Local Union 759*, 461 U.S. 757, 770 (1983) (party entering conflicting contracts was "cornered by its own actions" and not entitled to escape its contractual obligations by virtue of the conflict); *White v. Nat'l Steel Corp.*, 938 F.2d 474, 486 (4th Cir. 1991) (party faced "dilemma of [its] own making, by voluntarily committing itself contractually to conflicting duties. . . . It should not now be heard to complain that it has the responsibility of making good upon valid contractual commitments"); *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 436 (2nd Cir. 1993) ("[t]he fact that appellee bound itself in conflicting contracts should not work to penalize appellant"); *Mech. Contractors Ass'n Indus. Promotion Fund v. GEM Indus.*, 2008 WL 222284, *6 (E.D. Mich. 2008) ("conflicting obligations under [multiple contracts] . . . do not relieve Defendant of its commitments under each contract. To hold otherwise would allow a party to avoid its contractual obligations simply by entering into a second, conflicting contract with a different party").

id. at 26 (Preamble necessary because State and Spokane "recognized [the Spokane ITF] was a departure" from existing lottery system); ER 015-16 (Day Decl. at ¶¶ 12-14) (when negotiating Appendix Spokane and Preamble, State was aware of "possibility that other tribes would request the same negotiated provisions in their compact."). It is impossible to read the Preamble and discern a plausible intent other than to thwart other tribes' MFT rights. This intent is inconsistent with the duty of good faith and fair dealing implicit in "every contract." *See Badgett v. Security State Bank*, 807 P.2d 356, 360 (Wash. 1991) (en banc); *Scribner v. Worldcom, Inc.*, 249 F.3d 902, 910 (9th Cir. 2001) ("evasion of the spirit of the bargain" violates duty of good faith and fair dealing (quotations omitted)).

At their core, the MFT clauses of the Washington compacts are the State's solemn promise to refrain from offering to any one tribe what it is unwilling to offer others. If the State was unwilling to agree to an ITF with any other tribe because of its purported potential to impact the existing leasing system, then it should not have entered such an agreement with Spokane. Whether the State can escape its MFT obligations by simply wrapping the Spokane agreement in the MFT-nullifying language of the Preamble is one of the central questions (and precedential implications) of this case and the State has offered no reason, other than merely quoting the Preamble, as to why that question should be resolved in its favor. The Court should enforce Tulalip's MFT clause as agreed to by the parties.

VI. The State's Position Was Rejected in *Shoshone-Bannock*.

In *Idaho v. Shoshone Bannock*, a gaming compact MFT clause provided that if Idaho agreed to compact terms with another tribe authorizing class III games not authorized in the Shoshone-Bannock compact, the Shoshone-Bannock would be entitled to operate the same additional games. *See* 465 F.3d at 1099-1101. Because the MFT clause did not expressly require the Tribe to adopt numerical and other restrictions agreed to by other tribes, this Court held that Shoshone-Bannock could adopt the additional games without the restrictions. *See id*. *Shoshone-Bannock* is controlling precedent, yet the State's entire argument regarding the case (after reciting its facts and holdings) is as follows:

> [T]he *Shoshone-Bannock* decision does not allow tribes to pick and choose favorable terms and reject those interrelated terms deemed unfavorable. . . . Rather, the decision holds the State and the Tribe to the plain language of their agreement. In this case, the plain language of the "most favored tribe" provision only allows Tulalip the *same* more favorable allocation terms permitted to other tribes. It does not . . . allow the Tribe allocation terms that are different than, and superior to, those allowed other tribes.

Response at 33.

As the State notes, *Shoshone-Bannock* held the state and tribe to the express terms of their MFT clause; but the clause there, *as here*, contained no language requiring the tribe to adopt numerical limitations or other terms, and the absence of such language was the linchpin of the Court's reasoning. *See* 465 F.3d at 1100-01. Indeed, *Shoshone-Bannock* stands *precisely* for the principle that absent such

conditioning language a tribe may adopt terms expressly referenced by an MFT clause and, in the State's terms, "reject those interrelated terms deemed unfavorable." Response at 33. In fact, Idaho invoked (and this Court rejected) the same reasoning the State invokes here:

> The Shoshone-Bannock Tribes' exercise of its [MFT] rights . . . necessarily depended upon an incorporation of another Tribe's or Tribes' Compact Amendment terms . . . . The District court *selectively chose among those terms* . . . *rather than taking them as a whole*.

Appellant's Brief, *supra* pg. 11 at *24 (emphasis added).

Further, Idaho "never agreed" to the additional games without the concomitant limitations. *See* Opening Br. at 45-46 (discussing same). Idaho argued, as the State does here, that its agreement with the other tribes

> was a conditional offer [and other tribes] . . . accepted the offer with its regulatory conditions. The Shoshone-Bannock Tribes argue that they are entitled to the benefit of the offer accepted by Idaho's other compacted Tribes without the regulatory conditions when no other compacted Tribe operates . . . without those conditions.

Appellant's Brief, *supra* pg. 11 at *31. Yet because the MFT clause (as here) made no reference to numerical or other restrictions, Shoshone-Bannock could adopt the beneficial terms without the restrictions. This was so even though its resulting compact would differ from those of other tribes, placing it "in a technically better position than the other tribes," because such an outcome was "purely a function of the terms of the Compact [the parties] voluntarily entered into." 465 F.3d at 1101.

In sum, the State's arguments were rejected in *Shoshone-Bannock* and should meet the same fate here.

VII. Speculative Economic Consequences Are an Invalid Basis to Deny Relief to Tulalip.

The State speculates (without citation to evidence) that a Tulalip ITF would "impact and impair the other tribes' machine leasing abilities[.]" Response at 31. Samish speculates that a Tulalip ITF "will eviscerate" and "throw the inter-tribal leasing system into chaos." Proposed Amicus Br. at 6-7, 19

First, these assertions have no relevance to the MFT language at issue. Moreover, the speculation is groundless. Tulalip's proposed amendment (like the Spokane ITF) affirmatively prevents Tulalip from utilizing its ITF without first exhausting all reasonable efforts to obtain terminal rights from other tribes under the TAP Procedure:

> Any Player Terminals that [Tulalip] chooses to operate in excess of its Allocation of 975 . . . must be acquired by securing the allocation rights for such terminals from other Eligible Tribes pursuant to the terminal allocation acquisition and transfer procedures under Appendix X2, Section 12.2.2. *Provided*, that in the event the Tribe is unable, after making reasonable efforts, to acquire allocation rights for some or all of such additional Player Terminals by the procedures set forth in Appendix X2, Section 12.2.2, and the Chairman of the Tribe details and certifies such facts to the State Gaming Agency in writing, the Tribe may obtain some or all of such additional Player Terminal allocation rights by making payments into the Inter-Tribal Fund as set forth in Section 12.2.5.2, below.

See ER 180.[6]

Neither the State nor Samish acknowledges this aspect of Tulalip's proposed relief nor explains how the TAP system would be impaired or eviscerated by a Tulalip ITF when those consequences have not followed the Spokane ITF, which contains the same requirement to first exhaust reasonable efforts under the TAP Procedure.

The State next speculates that

> *[i]f* every compacting tribe were to also amend their compacts to add new terms identical to those sought by the Tulalip, the total number of machines that *could* be operated in Washington State *could* increase threefold from the current ceiling of 27,300 machines under X2 to 87,000 machines.

Id. at 31 and n.10 (emphasis added). This also is pure speculation and nothing in the Compact renders it relevant to determining the scope of Tulalip's MFT rights.

Even if relevant, the argument rests on the false premise that the compacting tribes could all reach their respective total operating ceilings. As the State knows, only a small fraction of Washington tribes have ever operated at even half of that level, and the majority operate well below their base allocations of 975. A central purpose of the TAP Procedure is to redistribute revenues among tribes by allowing those with little or no access to a viable gaming market to lease their allocation

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[6] Whether Tulalip has undertaken "reasonable efforts" under the TAP Procedure is subject (on terms derived directly from Appendix Spokane) to challenge by the State under the dispute resolution procedures of the Compact. *See id.*

rights to others. The State's argument assumes that all tribes would operate the maximum number of terminals (3000 for most tribes), thus paying many millions of dollars per year in leasing and ITF fees with few or no patrons showing up to play. The State's argument is premised on an illusion.

Finally, even if the State's arguments were more than speculation, *the State*, not Tulalip, introduced the ITF concept into the Washington tribal lottery system with full knowledge of the MFT rights of other tribes. It should not now be heard to complain that Tulalip seeks to "foist" or "force" an ITF onto the State and thereby disrupt the status quo.

VIII. The State's Claim that Tulalip Abandoned its MFT Rights in Entering Appendix X2 is Waived and Meritless.

The State argues for the first time on appeal that Tulalip and other tribes intentionally waived their MFT rights regarding Appendix Spokane:

> When Tulalip incorporated Appendix X2 into its compact, it did so with *full knowledge* of the agreement the State had entered into with the Spokane Tribe. *See* ER 16-17 at ¶¶ 19, 22. In fact, Tulalip *specifically agreed with the other Appendix X2 negotiating tribes to reject the Inter-Tribal Fund* approach in favor of the joint acquisition and transfer plan set forth in Appendix X2. ER 17 at ¶ 22. Thus, by incorporating Appendix X2 into its compact after Appendix Spokane had already gone into effect, Tulalip abandoned any "most favored tribe" rights to reach back into Appendix Spokane for additional terms.

Response at 24-25 (emphasis added).

First, "contractual waiver is an affirmative defense." *Local Joint Exec. Bd. of Las Vegas v. N.L.R.B.*, 540 F.3d 1072, 1079 (9th Cir. 2008). *See also* Fed. R. Civ. P. 8(c)(1). Affirmative defenses not raised in a party's first responsive pleading "are deemed waived," *Morrison v. Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005), and "cannot be raised for the first time on appeal," *Roberts v. College of the Desert*, 870 F.2d 1411, 1414 (9th Cir. 1989). The State asserted no such defense in its Answer, *see* ER 167, or elsewhere below. *See also Jensen v. Wash. State Dep't of Corr.*, 2013 WL 5739460, at *1 (9th Cir. Oct. 23, 2013) (unpublished) ("We do not consider issues raised for the first time on appeal.").

Second, the parties expressly agreed to forego factual discovery on the basis that this case could and should be decided as a matter of law and on the plain language of the Compact. *See* Docket No. 9 ¶ 5. The State should be estopped from raising factual matters on appeal that Tulalip, in reliance on this agreement, did not factually develop in the record below.

Third, the State cites no Compact language or other legal authority supporting its waiver defense. *See* Response at 24-25. *See also Kaiser Found. Hosp's. v. Sebelius*, 649 F.3d 1153, 1157 n.2 (9th Cir. 2011) ("As [party] provides no supporting authority for this contention, we will not discuss it further.").

Finally, the defense is factually untenable. "Waiver is the intentional abandonment . . . of a known right [and] . . . must be shown by unequivocal acts . .

. inconsistent with any intention other than to waive." *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 177 P.3d 755, 763 (Wash. Ct. App. 2008). "A court should not infer waiver from ambiguous factors. The facts and circumstances relied upon must be unequivocal[.]" *Landover Corp. v. Bellevue Master, LLC*, 252 Fed. App'x. 800, *2 (9th Cir. 2007) (unpublished) (citations and quotations omitted). The State's waiver defense rests solely on paragraphs 19 and 22 of the Declaration of Rick Day. Yet neither paragraph suggests that Tulalip or the other tribes were aware, much less had "full knowledge," of and "specifically agreed . . . to reject" the terms of the Spokane ITF when they entered Appendix X2. *See* ER 016-17 ¶¶ 19, 22. Mr. Day's declaration makes only vague reference to discussions of an "inter-tribal or pooling approach[.]" ER 017 ¶ 22. Merely discussing an unspecified "inter-tribal or pooling approach" does not establish ("unequivocally" or otherwise) that the tribes knowingly rejected the Spokane ITF, much less the combined TAP/ITF that Tulalip seeks here. For example, the 1999 California gaming compacts established an inter-tribal pooling approach to allocate gaming machine rights and distribute revenues among all California tribes that bears scant resemblance to the Spokane ITF. *See Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. Calif.*, 547 F.3d 962, 966-72 (9th Cir. 2008).

The State's waiver defense is further undermined by Mr. Day's account of the negotiations for Appendices Spokane and X2. Those negotiations took place

"concurrent[ly]," ER 017-18 ¶ 23, and separately, *id.* ¶ 21, and they concluded simultaneously, *id.* ¶ 23 (Appendix X2 negotiations were "finalized" in February 2007 and executed in March 2007, at which point State had "*just finished* concurrent negotiations" for Appendix Spokane (emphasis added)). The State, then, claims that 27 sovereign governments intentionally waived important contractual rights by "specifically . . . reject[ing]" the Spokane ITF, the terms of which were in "concurrent" development when those tribes were negotiating Appendix X2, and where the record contains no evidence they evaluated those specific terms when the alleged waiver occurred, and instead contains compelling evidence that they could not have done so. Indeed, the State's assertion that Tulalip "incorporate[ed] Appendix X2 into its compact *after* Appendix Spokane had already gone into effect," Response at 25 (emphasis added), exemplifies the strained factual premise of its waiver defense. Appendix Spokane went into effect on April 30, 2007, when notice of it was published in the Federal Register. *See* ER 016 ¶ 17). Tulalip and the State formally executed Appendix X2 the month before, in March of 2007. *See* ER 075.

In sum, the State's waiver defense lacks factual and legal support and was neither pled nor argued below. It merits no consideration.[7]

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[7] Samish's similar waiver argument, *see* Proposed Amicus Br. at 11-14, is likewise meritless and barred.

IX. Tulalip's Requested Relief Does Not Implicate the State's Sovereign Rights.

The State asserts that Tulalip's requested relief would interfere with its sovereign rights by forcing it to accept Compact terms without its express consent. Response at 34. This dispute concerns the scope of Tulalip's entitlement under the MFT clause. Whatever that scope is deemed to be, the State has already expressly consented to all relief, including injunctive relief, within the powers of the federal courts to grant. *See* Opening Br. at 2. This argument is a diversion.

X. Other Tribes Have No Legally Protected Interest Under Rule 19.

The 27 other tribes have no legally protected interest under Rule 19 that "actually arises from terms in" their own compacts. *Cachil Dehe Band*, 547 F.3d at 971 (quotations omitted). Appendix X2 instead precludes a conclusion that other tribes have a legal right against Tulalip and the State amending Appendix X2 or agreeing to alternative provisions. *See* ER 102 (§ 15.1.2 (parties may mutually amend Compact at any time)); ER 101 (§ 12.4 (acknowledging that State may bilaterally agree with a tribe to "terms which are more favorable[] than as set forth" in Appendix X2)); ER 097-98 (§ 11 ("the [State] and Tribe may agree on alternative provisions to those set forth herein")).

The State nevertheless conclusorily asserts that "[a]ny amendment . . . to Appendix X2 necessarily affects the rights and obligations" of other tribes and that Tulalip's requested relief "will significantly and necessarily affect [those tribes']

bargained-for agreement of a globally-applicable transfer and acquisition plan under Appendix X2." Response at 38, 40.

However, if Tulalip is granted the relief it seeks, every tribe will remain free to lease terminals to or from other tribes (including Tulalip) under the TAP Procedure and to fully exercise all other rights set forth in their compacts – just as they are unhampered in doing so by the existence of the Spokane ITF. The State has provided no evidence or nonspeculative argument to the contrary. *See Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) ("The moving party has the burden of persuasion in arguing for dismissal" under Rule 19). The State's entire Rule 19 argument in this regard is that

> allowing Tulalip to acquire TLS terminals outside the parameters of the joint leasing plan *could* lessen the other tribes' abilities to acquire and transfer their rights to TLS terminals as a major TLS terminal operator – Tulalip – would no longer be in the leasing market. Moreover, Tulalip's proposal *could* significantly decrease the value of those tribes' inter-tribal leases by imposing a specific price at which Tulalip could obtain additional terminals.

Response at 40 (emphasis added).

The State fails to explain how such purported risks justify denying an ITF to Tulalip but not to Spokane. More fundamentally, the State's arguments (like Samish's) are simply speculation about financial harm. However, "[a] *crucial* premise of mandatory joinder . . . is that the absent tribes possess an interest . . . . [that is] *more than a financial stake, and more than speculation* about a future

event." *Cachil Dehe Band*, 547 F.3d at 970 (emphasis added) (quotations omitted). As this Court has explained, in terms irreconcilable with the State's and Samish's arguments here:

> [T]he State . . . repeatedly characterizes the absent tribes' interest at stake as the preservation of their "market share" within California's gaming industry. . . . [T]he respective advantages that various tribes may enjoy . . . are an economic incident of their market positions under a common licensing regime.
>
> *The mere fact that the outcome of Colusa's litigation may have some financial consequences for the non-party tribes is not sufficient to make those tribes required parties, however.*

Id. at 971 (emphasis added).

Even if the State's arguments were more than speculation about financial harm, they are still unpersuasive. No language in Appendix X2 guarantees to any tribe a set position, price or degree of bargaining leverage in the terminal leasing market. And the suggestion that other tribes have a right to Tulalip remaining "in the leasing market," Response at 40, is demonstrably wrong. Participation in that market, and hence withdrawal from it, is expressly discretionary. *See* ER 099 (§ 12.2) ("The Tribe *may*" lease terminal rights from other tribes (emphasis added)).

It is also not true that with an ITF, Tulalip "would no longer be in" that market. Response at 40. Tulalip's proposed relief affirmatively prohibits it from utilizing its ITF without first exhausting reasonable efforts under the TAP

Procedure – *i.e.*, *maximizing* its reasonable participation in the leasing market. *See* ER 180 (quoted *supra* at 16).

In sum, other tribes have no legally-protected interest in this case requiring their joinder.

XI. Samish's Laches Argument is not Cognizable by This Court and Lacks Merit.

As a threshold matter, Samish's arguments rely heavily on the declaration of Thomas D. Wooten. This document is not part of the record below and should be disregarded. *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 978 n.3 (9th Cir. 2007) (stating that "an amicus may not generally introduce new facts at the appellate stage" and recognizing exception inapplicable here); *Ministry of Def. of the Islamic Repub. of Iran v. Gould*, 969 F.2d 764, 773 (9th Cir. 1992) ("We decline to go outside the record to consider new facts submitted by a non-party at this stage of the proceedings."); *Sierra Club v. Union Oil Co. of Calif.*, 853 F.2d 667, 671 (9th Cir. 1988) ("We are not willing to address factual matters not considered by the district court").

Samish's claim of laches also is not properly before the Court. Laches is an affirmative defense, *see* Fed. R. Civ. P. 8(c), and the State did not plead it below. *See College of the Desert*, 870 F.2d at 1414 (affirmative defenses "cannot be raised for the first time on appeal"). Moreover, this Court does "not consider arguments raised solely by an amicus, particularly when they were not considered by the

district court[.]" *Golden Gate Rest. Ass'n v. City & Cnty of San Francisco*, 546 F.3d 639, 653 (9th Cir. 2008). *See also Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 719 n.10 (9th Cir. 2003) (absent exceptional circumstances, "we do not address issues raised only in an amicus brief"); *Russian River Watershed Protection Committee v. City of Santa Rosa*, 142 F.3d 1136, 1141 and n.1 (9th Cir. 1998) (stating same and that because "Appellee did not adopt" the amicus' argument "the issue has been waived").

If Samish wanted to plead laches and ensure that its factual materials were part of the record, it could have moved to intervene. It chose not to. *See Preservation Coalition, Inc., v. Pierce*, 667 F.2d 851, 862 (9th Cir. 1982) ("Had [amicus] wished to raise the issue properly in this case, it could have intervened instead of appearing as amicus. It did not. Therefore, the issue is not properly before us."); *Miller-Wohl Co. v. Comm'r of Labor and Indus. of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982) (refusing to grant "party prerogatives" to amici that "never attempted to intervene").

Instead Samish chose (here and below) to seek participation as an amicus. Samish is attempting to maintain the benefits of full immunity as an amicus – indeed, to *end* the case based on that immunity, *see* Proposed Amicus Br. at 9 – but also to litigate with all the prerogatives of a party. This Court should reject such an attempt.

Samish's laches argument also fails on substance. Samish contends that Tulalip "unreasonably waited five years" to file suit. Proposed Amicus Br. at 19. First, a moratorium on amendments related to lottery system terminals was in effect until June 30, 2009. ER 102 (Appendix X2 § 15.1).

Second, the laches period begins with the accrual of the claim. *See Evergreen Safety Council v. RSA Network, Inc.*, 697 F.3d 1221, 1226 (9th Cir. 2012). Tulalip's claim is the State's breach of the MFT clause, which accrued when the State declined to amend the Compact pursuant to Tulalip's September 14, 2010 request to do so. Tulalip brought suit eighteen months later, a period during which it engaged in active dispute resolution with the State under the procedures of the Compact. *See* ER 148-51 (Decl. of Bell ¶¶ 2-13).

Additionally, laches is determined "with reference to the limitations period for the analogous action at law." *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir. 2002). Washington's analogous limitations period is six years. *See* Wash. Rev. Code § 4.16.040. "If the Plaintiff filed suit within the analogous limitations period, the *strong presumption* is that laches is inapplicable." *Jarrow Formulas*, 304 F.3d at 835 (emphasis added).

Finally, Samish alleges that "[s]erious financial decisions . . . have been taken in reasonable expectation that the current settled leasing arrangement will continue unchanged[.]" Proposed Amicus Br. at 18. Samish cites no evidence to

support this claim. *See In re Beaty*, 306 F.3d 914, 927-28 (9th Cir. 2002) (party asserting laches must "make a particularized showing of prejudice," and "conclusory . . . [and] generic claims . . . do not suffice"). As noted, Appendix X2 contains several provisions acknowledging that Tulalip and the State may bilaterally amend their agreement. *See supra* at 22. Thus, Samish's purported expectation that the statewide status quo was set in concrete was patently *un*reasonable.

XII. Conclusion.

Tulalip respectfully requests that this Court reverse the district court and remand with instructions to enter summary judgment in its favor 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 6980 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 December 27, 2013, I electronically filed this Brief and the Supplemental 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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