NO.13-35464

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE TULALIP TRIBES OF WASHINGTON,

Plaintiff-Appellant,

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-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

No. 2:12-CV-000688-RAJ
The Honorable Richard A. Jones, United States District Court Judge

BRIEF OF DEFENDANTS-APPELLEES

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I. INTRODUCTION

Plaintiff-Appellee, the Tulalip Tribes of Washington ("Tulalip" or "the Tribe"), asks this Court to reverse the district court and order the State of Washington to amend an appendix to Tulalip's tribal-state gaming compact to add terms that the State has never agreed to with any other tribe. Relying on the "most favored tribe" clause found within its compact, the Tribe contends that it can "cherry pick" certain provisions contained in the Spokane Tribe's compact with the State and ignore other dependent and interrelated restrictions found within the Spokane Tribe's compact. However, acceptance of Tulalip's request would fundamentally alter the State's existing Tribal Lottery System without the State's agreement.

Under their proposal, Tulalip could obtain additional Tribal Lottery System gaming terminals without being bound by the attendant conditions that all other compacting tribes are constrained by within the State. Not only could the Tribe's proposal impact and interfere with the other tribes' terminal leasing abilities under the statewide Tribal Lottery System, but it could also substantially increase the current limits to the maximum number of gaming terminals operating within the State. Like the district court, this Court should find that nothing in the plain language of Tulalip's compact, including its

appendices, authorizes Tulalip's demand for terms that are different from and less restrictive than those agreed to by the State and the Spokane Tribe.

Accordingly, the State respectfully asks this Court to affirm the district court's denial of summary judgment to Tulalip and its corresponding grant of summary judgment to the State.

II. STATEMENT OF JURISDICTION

Tulalip sought declaratory and injunctive relief against the Defendants State of Washington, *et al.* (collectively "the State") in the United States District Court based on the State's alleged breach of its tribal-state gaming compact entered pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ER 169. Accordingly, the district court had jurisdiction to hear the matter under 28 U.S.C. §§ 1331 (federal question) and 1362 (Indian tribes).[1]

The district court issued its Order and Judgment denying Tulalip's motion for summary judgment and granting the State's cross-motion for

[1] Tulalip contends in its brief that the State disputed the district court's subject matter jurisdiction and asserted sovereign immunity from the lawsuit. Dkt. 15-1 at 9. It did not. Tulalip mistakenly conflates the State's argument below – that the Tribe's requested relief interferes with the State's sovereignty by forcing it to enter into specific compact terms to which it has never agreed – with a challenge to the district court's subject matter jurisdiction. *See* ER 43-45.

summary judgment on May 22, 2013. ER 1, 10. Tulalip timely appealed to this Court on May 24, 2013. ER 11. Accordingly, this Court has jurisdiction to hear this matter under 28 U.S.C. § 1291.

III. STATEMENT OF THE ISSUES

1. Did the district court commit procedural error in ruling on the parties' cross-motions for summary judgment when the court reviewed all materials submitted by the parties and issued one consolidated order denying Tulalip's motion and granting the State's?

2. Does the "most favored tribe" clause in Tulalip's compact allow the Tribe to force the State to incorporate one select provision from the Spokane Tribe's compact while rejecting other dependent and inter-related provisions?

3. Should Tulalip's complaint be dismissed based on the Tribe's failure to join the 27 other Washington tribes who negotiated alongside Tulalip and reached a joint tribal lottery agreement with the State when Tulalip's requested relief would undermine that agreement to the detriment of the other tribes?

IV. STATEMENT OF THE CASE

A. Federal Authority For Tribal Gaming

In 1988, Congress passed the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, which provides the statutory basis for the operation

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

> (1) the tribe has authorized the class III gaming by ordinance or resolution;
> (2) the class III gaming is located in a state that permits such gaming for any purpose by any person, organization or entity; and
> (3) the class III gaming is conducted in conformity with a Tribal-State compact that is in effect.

25 U.S.C. § 2710(d)(1).

B. Class III Gaming In Washington State

IGRA and Wash. Rev. Code § 9.46.360 govern the negotiation process for tribal gaming compacts in Washington. Pursuant to these statutes, tribes that are 1) located in the State, 2) recognized by the Department of the Interior, and 3) have jurisdiction over the federal Indian lands upon which they intend to conduct class III gaming, may ask the State, via the Governor, to enter into negotiations for gaming compact. *See* 25 U.S.C. § 2710(d)(3)(A); Wash. Rev. Code § 9.46.360. Once the Governor agrees that the State should negotiate, the Governor refers the request to the Washington State Gambling Commission ("Commission") for negotiations. ER 14. Pursuant to Wash. Rev. Code § 9.46.360(2), the Commission's Executive Director is statutorily authorized to conduct such negotiations on behalf of the State. Upon reaching a tentative agreement with a tribe, the Director is then required to forward a copy of the proposed compact to the Commission. Wash. Rev. Code § 9.46.360(3). By law, the Commission must, within forty-five days of receiving the proposed compact, vote on whether to return the proposed compact to the Director with instructions for further negotiation or to forward the proposed compact to the Governor for review and final execution. Wash. Rev. Code § 9.46.360(6); ER 14 at ¶ 6. Once the Governor and the tribe execute the

compact, it must then be reviewed and approved by the United States Secretary of the Interior. 25 U.S.C. § 2710(d)(3)(B). The final tribal-state compact cannot go into effect in the State until notice of the Secretary-approved compact has been published in the Federal Register. *Id.*

C. Compact Negotiation Dispute With Tulalip

In September 2010, the Tribe requested negotiations with the State for a ninth amendment to its compact. ER 18. As the basis for its request, the Tribe cited the "most favored tribe" clause in its compact and requested that it be provided a method to acquire additional Tribal Lottery System player terminals similar to an alternative mechanism set forth in an appendix to the Spokane Tribe's tribal-state gaming compact ("Appendix Spokane"). ER 19. The State disagreed with Tulalip's interpretation of both the "most favored tribe" clause and Appendix Spokane, but indicated it was willing to negotiate a different amendment addressing the Tribe's concerns. *Id.*

After sixteen months of negotiations and without responding to the State's last counter-proposal, Tulalip filed a Complaint for Declaratory and Injunctive Relief in the district court. ER 18-23. Tulalip asserted that the State was in breach of the compact and asked the district court to order the State to add the Tribe's specific proposed terms to the compact. *See* ER 18-23; 169.

The Tribe moved for summary judgment. ER 188 (D.Ct. Dkt. 13). The State responded with a motion to dismiss based on Tulalip's inability to join required parties and a cross-motion for summary judgment. ER 188 (D.Ct. Dkt. 20).

After the parties completed briefing on their respective motions, the district court entered its Order and Judgment. ER 190 (D.Ct. Dkt. 39, 40). The district court denied Tulalip's motion and granted the State's. ER 9. Specifically, "giving the terms of the [compact] the ordinary, usual and popular meaning, and reading the [compact] as a whole," the lower court found:

> [T]here is only one reasonable interpretation: the 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 9.

Tulalip then appealed to this Court. ER 11-12.

V. STATEMENT OF FACTS

A. Washington's Tribal Lottery System

Washington State currently has class III gaming compacts with

28 of the 29 federally-recognized tribes located in the State.[2] Each of those tribes, including Tulalip, compacted with the State to participate in what is known as the Tribal Lottery System, whereby tribes are authorized to offer electronic scratch tickets and conduct on-line lottery games in their casinos. *See* ER 46 (Tulalip's Appendix X). Pursuant to these agreements, which were appended to each tribal-state compact as Appendix X, the individual tribes are entitled to operate a specific allocation of Tribal Lottery System player terminals ("TLS terminals"). ER 69 at § 12.1. Moreover, if they meet certain requirements listed in Appendix X, the tribes may operate additional TLS terminals – up to a certain maximum number set by the appendix – by acquiring allocation rights from other compacting tribes with similar gaming rights. ER 70 at § 12.4. The tribes agreed, however, that any acquisition or transfer of these terminals would be made pursuant to a plan approved by no less than a majority of the eligible tribes and that the State would have no role in forming, implementing, or enforcing the plan. *Id.* at § 12.4.1. The State agreed that, in the event it permitted an allocation of TLS terminals to a tribe, including Tulalip, that was greater or on terms more favorable than those

[2] *See* http://www.wsgc.wa.gov/docs/tribal/tribe_update.pdf (last accessed October 24, 2013).

provided in Appendix X, the tribes would be entitled to the greater allocation or the more favorable terms. ER 71 at § 12.5.

B. Washington's Gaming Compact With The Spokane Tribe

In 2004, the Spokane Tribe, a non-party to this matter, entered into negotiations with the State for a compact that would allow it to conduct class III gaming in the State. ER 14 at ¶ 8. In 2005, the Spokane Tribe and the State's negotiating team publicized their proposed agreement. *Id.* at ¶ 9. However, in 2006, at the request of former Governor Christine Gregoire, the proposed compact was returned for further negotiations in order to address certain state concerns regarding expansion of gambling, state and tribe revenue sharing, and the Spokane Tribe's off-reservation gaming facility. ER 15 at ¶ 10. The State and the Spokane Tribe continued negotiations, but were forced to account for new issues that had arisen during the delay. *Id.* at ¶ 11. These issues included the fact that few, if any, TLS terminals were available to be leased by the Spokane Tribe under the State's Tribal Lottery System set forth in Appendix X. *Id.*

To address these concerns, the State suggested revisions to the proposed compact regarding the scope and operation of the Spokane Tribe's gaming facilities and TLS terminals. ER 15 at ¶ 13. The State also 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 Washington tribes; however, this agreement came with conditions on the Spokane Tribe's ability to invoke that alternative mechanism. ER 119-22 (Appendix Spokane §§ 6 and 7). Specifically, pursuant to Section Six of Appendix Spokane, the Spokane Tribe was required to make reasonable efforts to obtain the necessary terminals from other tribes consistent with Appendix X. ER 119 at §§ 6, 6.A. The Spokane Tribe also had to commit to participate with other tribes in additional negotiations to establish a revised statewide framework for tribal gaming. *Id.* at § 6.B. Finally, the Spokane Tribe was required to operate fewer total TLS terminals than otherwise allowed under its compact. ER 119-20 at § 6.B.[3]

Once it exercised the provisions in Section Six, then the Spokane Tribe could establish and maintain an Inter-Tribal Fund set forth in Section Seven. ER 120 at § 7. Under the Inter-Tribal Fund, the Spokane Tribe would pay into

[3] If the Spokane Tribe invoked the Inter-Tribal Fund option, it would be entitled to its allocation of 900 terminals and could obtain an additional 600 TLS terminals from the fund during the first three years. ER 119 at § 6.A. After three years, the Spokane Tribe could obtain an additional 1,500 terminals from the fund for a combined maximum operating total of up to 3,000 terminals. *Id.* at § 6.B. If the Spokane Tribe did not invoke the Inter-Tribal Fund, it could operate a total of 4,700 TLS terminals by obtaining the allocation rights from other tribes pursuant to the terms of Appendix X. *Id.* at § 6.

the fund $10 per TLS terminal per day[4] for each terminal to be operated above the Spokane Tribe's base allocation under Appendix X and up to the limitations set forth in Section Six. ER 119-20 at §§ 6.A, 6.B and 7.B. The payments would then be distributed on a quarterly basis to other Washington tribes operating less than 675 TLS terminals on their gaming floor. ER 121 at § 7.F.

When negotiating Appendix Spokane, the State made clear that all the provisions were interdependent, that the State would not agree to any individual provision in Appendix Spokane without the others, and that without each of the requirements in Appendix Spokane the entire agreement was not valid. ER 15-16 at ¶ 14. This intent was explicitly stated and repeated throughout the Appendix. *See*, *e.g.*, ER 115 (Preamble Statement of Conditions and Limitations); ER 120 at § 7 (linking Spokane Tribe's ability to invoke the Inter-Tribal Fund only upon satisfying §§ 6.A and 6.B).

In early 2007, the State's negotiating team and the Spokane Tribe announced their final agreed-to compact. ER 16 at ¶ 16. The Spokane compact, including Appendices Spokane and X, was subsequently signed by Governor Gregoire on February 16, 2007. *Id*. On April 30, 2007, the Bureau

[4] This rate would increase over a set period of time. ER 121 at § 7.C.

of Indian Affairs, Department of the Interior, published its approval of the tribal-state compact between the Spokane Tribe and the State. *See* Addendum 005; ER 16 at ¶ 17.

C. Appendix X2 Negotiations

Shortly after the initial, 2005 Spokane Tribe compact was publically announced, the other 27 federally recognized tribes of Washington with gaming compacts, including Tulalip, asked the State to enter into a joint negotiation for a compact appendix that would address issues with the State's then-current Tribal Lottery System under Appendix X. ER 16-17 at ¶¶ 19- 20. These issues included the maximum number of terminals available to the tribes, each tribe's base TLS terminal allocation, and the procedures for participating tribes to obtain additional TLS terminals up to an agreed maximum operating ceiling. ER 17 at ¶ 20. This joint negotiation process resulted in Appendix X2. *Id*.

During the negotiations for Appendix X2, the State and the tribes discussed an Inter-Tribal Fund similar to that set in Appendix Spokane as a means for the tribes to obtain sufficient TLS terminals and to distribute revenues to more rural and non-gaming tribes. ER 17 at ¶ 22. The Inter-Tribal Fund concept, however, did not move forward. *Id.* Instead, the joint

negotiating tribes continued with an acquisition and transfer plan similar to that set forth in Appendix X. *See* ER 17 at ¶ 24; ER 98-99.

Specifically, under Appendix X2 as agreed upon by the State and the tribes, each compacting tribe, including Tulalip, is entitled to a base allocation of 975 TLS terminals. ER 98 at § 12.1. Upon meeting certain conditions, each tribe may acquire additional terminals – up to a certain maximum number – from any other tribe that has a compact with Washington that authorizes the Tribal Lottery System. ER 98-101 at §§ 12.1.1 through 12.2.4. While most of the negotiating tribes may operate no more than 3,000 TLS terminals under Appendix X2, Tulalip is one of three tribes specifically listed in Appendix X2 that is permitted to operate 4,000 terminals. ER 99 at § 12.2.1. As with Appendix X, the tribes agreed that their acquisitions and transfers of TLS terminals shall be made only pursuant to a plan approved by no less than a majority of the tribes eligible for transfers at the time the plan was adopted. ER 99 at § 12.2.2. Similarly, the State was to have no responsibility for the creation, implementation, or enforcement of the plan. *Id.* Instead, "the entire responsibility" for the acquisition and transfer plan would be upon the eligible tribes. *Id.* As with Appendix X, the State agreed that, in the event it permitted a tribe to have an allocation of TLS terminals that is greater or on terms more

favorable than that set forth in Appendix X2, the tribes would be entitled to the greater allocation or more favorable terms. ER 101 at § 12.4 ("most favored tribe" clause).

Finally, the State and the tribes agreed to a moratorium on amendments to Appendix X2. ER 102-03 at § 15. Specifically, the tribes agreed not to seek additional amendments with respect to TLS terminals prior to June 30, 2009 unless they involved technical changes or were by mutual agreement with the State. ER 102 at § 15.1. After June 30, 2009, the State and tribes agreed that the following conditions "may constitute a basis for the Tribe to seek an amendment" of Appendix X2:

> (1) the federal or state law is amended to authorize any gambling devices currently prohibited in the State;
> (2) a federal or state court issues a final, unappealable decision permitting any person to use a gambling device not authorized by the State;
> (3) any Washington tribe is authorized to use any type or number of Class III gambling equipment which is materially different from or allows a greater quantity per location than currently authorized in Appendix X2; or
> (4) any Washington tribe actually offers to patrons higher maximum wagers pursuant to a compact or compact amendment, or extends credit.

ER 102-03 at §§ 15.2 – 15.2.4.

The State and the tribes finalized the joint tribal negotiations for Appendix X2 in early 2007. ER 17-18 at ¶ 23. Chairman Stanley Jones signed

the agreement for Tulalip on March 13, 2007, and Governor Gregoire signed it on March 30, 2007. *Id.* However, as with all the participating tribes, Tulalip's Appendix X2 was not effective until certain conditions were met, namely that (1) all of Washington's tribes, except for the Spokane Tribe and Cowlitz Tribe, had approved and signed identical X2 appendices, and (2) the notice of approval by the Secretary of the Interior was published in the Federal Register. ER 104 at § 18. On May 31, 2007, the Bureau of Indian Affairs, Department of the Interior, published its approval of the X2 amendments for all of the 27 joint negotiating tribes, including Tulalip. Addendum 006; ER 18 at ¶ 25. Appendix X2 became the seventh amendment to Tulalip's tribal-state gaming compact. ER 74-75.

Over one year later, on October 24, 2008, the Department of the Interior approved the State and Spokane Tribe's first compact amendment to add Appendix X2. Addendum 007. As part of that agreement, the Spokane Tribe's right to lease out its TLS terminals to other tribes was conditioned upon it not invoking the Inter-Tribal Fund option in Appendix Spokane. ER 143 at ¶ 5. Specifically, if the Spokane Tribe ever invoked the Inter-Tribal Fund, all of its leasing agreements under Appendix X2 would be terminated. *Id.* To date, the Spokane Tribe has never invoked the Inter-Tribal Fund option under Appendix

Spokane and, instead, operates under Appendix X2 with the other tribes including Tulalip. ER 16 at ¶ 18.

More than three years later, in September 2010, Tulalip requested negotiations with the State for a compact amendment similar to that found in Appendix Spokane. ER 18-19 at ¶ 26. However, while Tulalip asked for the Inter-Tribal Fund set in Section Seven of Appendix Spokane, it specifically disavowed the conditions and restrictions on the use of that fund set in Section Six. ER 19 at ¶ 26. When the State disagreed during negotiations that Tulalip could obtain such an amendment, Tulalip filed the instant lawsuit. *See* ER 18-23, 169.

VI. SUMMARY OF ARGUMENT

During Appendix X2 negotiations, Tulalip jointly agreed with 27 other Washington tribes to a global Tribal Lottery System whereby each of the tribes could acquire and transfer TLS terminals pursuant to a plan approved by no less than a majority of the tribes eligible to make such acquisitions and transfers. During those negotiations, rather than adopting a plan similar to that found in Appendix Spokane, Tulalip jointly agreed with all the negotiating tribes to continue with the existing system. Over five years later, under the guise of a "most favored tribe" claim, Tulalip sought an amendment to

Appendix X2 that would contain select words and phrases from Appendix Spokane, but not the concomitant conditions and restrictions contained in that Appendix.

Nothing in the Tulalip compact requires the State to enter into such an amendment. The Tulalip compact entitles Tulalip to amend its compact if the State agrees to TLS allocation terms with another tribe that are more favorable than those provided in Tulalip's Appendix X and X2. However, as evidenced by the actual terms of Appendix Spokane and Appendix X2, Tulalip seeks to amend their agreement with terms that are different from and less restrictive than those ever agreed to by the State. Thus, contrary to Tulalip's assertions, no tribe – including the Spokane Tribe – has obtained an allocation of TLS terminals on more favorable terms than that received by Tulalip. Not only is Tulalip's proposed amendment directly contrary to the terms and conditions of the State's Tribal Lottery System under Appendix X2, but it is an attempt to force the State into a scheme that departs from the terms of all other compacts agreed to by the State.

For these reasons, the district court's grant of summary judgment to the State should be affirmed.

VII. ARGUMENT

A. Standard Of Review

This Court reviews the grant or denial of a summary judgment motion *de novo* applying the same standard used by the trial court under Rule 56 of the Federal Rules of Civil Procedure. *See Prison Legal News v. Lehman*, 397 F.3d 692, 698 (9th Cir. 2005). As such, this Court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

Interpretation of language in a compact is a question of law that is reviewed *de novo* "based on the plain meaning that adheres closest to the contract language." *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 618 F.3d 1066, 1070 (9th Cir. 2010). And as the Tribe noted, this Court looks to Washington contract law in interpreting the tribal-state compact. *See id.* at 1073 (applying California contract law to interpret California compacts).

As observed by the district court, Washington courts follow the objective manifestation theory of contracts. ER 5 (citing *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wash. 2d 493, 503, 115 P.3d 262, 267 (2005)).

As such, the courts "attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." *Hearst Commc'ns*, *Inc.*, 154 Wash. 2d at 503. The words in the contract are given their "ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent." *Id.* at 504.

B. The District Court Properly Considered The Parties' Cross-Motions For Summary Judgment And Did Not Commit Procedural Error By Addressing Both Motions In A Single Order.

In denying a motion for summary judgment, a court may grant summary judgment against a moving party if that party has had a "full and fair opportunity to ventilate the issues involved in the matter." *Gospel Missions of America et al. v. City of Los Angeles*, 328 F.3d 548 (9th Cir. 2003), citing *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir. 1982). Here, Tulalip had every opportunity to "explore and expound upon the issues surrounding its request for relief" before the district court. *See Cool Fuel*, 685 F.2d at 312.

Nevertheless, Tulalip asserts that the district court failed to consider its motion for summary judgment separately from the State's cross-motion. *See* Dkt. 15-1 at 27-28. Relying on this Court's opinion in *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 248 F.3d 1132 (9th Cir. 2001),

Tulalip asserts that the district court must have separately set forth its reasoning for each of the motions and its failure to do so here was an error of law. *Id.* Contrary to Tulalip's assertions, the district court did not err when it considered all the parties' memoranda, supporting documents, and the case record to deny Tulalip's motion and grant the State's.

In *Fair Housing Council*, the parties had filed simultaneous motions for summary judgment. 249 F.3d at 1134. In response to the defendants' motion, plaintiffs did not submit additional evidence but instead relied on the evidence they had submitted in support of their own cross-motion. *Id.* at 1135. The district court found that the plaintiffs had not submitted admissible evidence in opposition, granted the defendants' motion, denied plaintiffs' motion as moot, and dismissed the matter. *Id.* Plaintiffs appealed, asserting that the district court erred by failing to review the evidence submitted in support of their own motion as evidence in opposition to the defendants' motion. *Id.* This Court agreed, holding "that, when simultaneous cross-motions for summary judgment on the same claim are before the court, the court must consider the appropriate evidentiary material identified and submitted in support of both motions, and in opposition to both motions, before ruling on each of them." *Id.* at 1134.

Unlike the situation in *Fair Housing Council*, the district court here did not disregard the evidence submitted in the parties' cross-motions for summary judgment. Instead, the district court in this case considered all the materials filed by the parties in support of their cross-motions to find that the State had met its summary judgment burden, but Tulalip had not. ER 1-2. Simply because the district court did not delineate each and every argument made by the parties does not mean that it did not consider Tulalip's case.[5] Consequently, Tulalip's argument that the district court committed a procedural error in simultaneously denying Tulalip's motion for summary and granting the State's motion lacks merit.

C. Tulalip's "Most Favored Tribe" Compact Provision Does Not Entitle The Tribe To "Cherry Pick" Select Provisions From Appendix Spokane Without The Associated Conditions And Restrictions.

Relying on the plain language of Tulalip's compact and Appendix Spokane, the district court found that Tulalip could not prevail in its quest to force compact terms onto the State that were different from and less restrictive than those agreed to by the State and the Spokane Tribe. Tulalip nevertheless claims that the district court erred in concluding that the "most favored tribe"

[5] Even though it did not separate out the parties' respective cross-motions, the district court referred to the parties' respective arguments and supporting materials for those motions throughout its Order. *See*, *e.g.*, ER 1, 6.

provision of the Tribe's compact did not allow the Tribe to "cherry-pick" those provisions in Appendix Spokane that it deems favorable while simultaneously rejecting other provisions that it deems less favorable. *See* Dkt. 15-1 at 34-48. Contrary to Tulalip's claims, the district court's decision was correct as a matter of law as nothing in Tulalip's compact, Appendix Spokane, or the relevant authority requires the State to submit to Tulalip's one-sided demands.

1. **The plain language of Tulalip's compact does not permit Tulalip to obtain more favorable TLS terminal allocation terms than those obtained by other Washington tribes.**

As noted previously, when construing a contract, Washington courts adhere to the objective manifestation theory of contracts. *Hearst Commc'ns*, 154 Wash. 2d at 503. Under this theory, the courts impute an intent to the parties that corresponds to the reasonable meaning of the words used within the contract. *Id*. Further, the contract language is to be read as a whole and given a reasonable interpretation, not one that would produce absurd results. *See Allstate Ins. Co. v. Hammonds*, 72 Wash. App. 664, 670, 865 P.3d 560 (1994); *see also United States v. Irvine*, 756 F.2d 708, 710 (1985). Here, a reasonable reading of Tulalip's compact shows that the plain language of the "most favored tribe" clause only allows Tulalip the *same* more favorable

allocation terms permitted to other tribes. It does not, as Tulalip contends, allow the Tribe *different* allocation terms.

In both Appendices X and X2 to Tulalip's compact, after specifying the TLS terminal acquisition and operation conditions for the statewide Tribal Lottery System, the State agreed, in relevant part, 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***.

See ER 71 (Appendix X § 12.5); ER 101 (Appendix X2 § 12.4) (emphasis added). This "most favored tribe" provision entitles Tulalip to receive an allocation of TLS terminals on the same terms as received by another tribe when those terms are more favorable than those found in Tulalip's compact under Appendices X and X2. However, no other Washington Tribe, including the Spokane Tribe, received an allocation of TLS terminals that are on terms more favorable than those set forth in Appendix X2.

Under Appendix X2, each of the 28 Washington tribes, including Tulalip and Spokane, receives an initial, equal allocation of 975 TLS terminals

for use within the State.[6] ER 98 at § 12.1 (Tulalip Appendix X2); ER 144 at § 12.1 (Spokane Appendix X2). Moreover, a tribe can acquire additional TLS terminals – up to a total maximum operating ceiling set in the appendix – from any other Washington tribe's unused allocation. ER 99 at § 12.2; ER 145 at § 12.2. Further, all participating tribes may obtain such additional TLS terminals only in accordance with the acquisition and transfer plan set up by the eligible tribes. ER 99-100 at § 12.2.2; ER 145 at § 12.2.2. Nothing in Appendix Spokane provides more favorable TLS terminal allocation terms than those described here.

2. **The State never agreed to more favorable TLS terminal allocation terms than those already received by Tulalip.**

As an initial matter, Tulalip erroneously claims that the district court disregarded their "most favored tribe" rights when it stated: "Appendix Spokane became effective before Appendix X2. There is no indication in X2 that the parties intended it to have retroactive effect." *See* Dkt. 15-1 at 29 (quoting the district court's order at ER 7). Tulalip, however, significantly misconstrues the district court's highlighting of the timing of Appendix Spokane and Appendix X2. When Tulalip incorporated Appendix X2 into its

[6] As cited in the Statement of Facts, Appendix X contains similar provisions and terms as Appendix X2 but with fewer TLS terminals for allocation among the tribes.

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. The district court correctly recognized the significance of this timing when it made its notation in the order. ER 7.

Further, Appendix Spokane reflected the conditions of the State's Tribal Lottery System prior to Appendix X2's existence. At the time that the Spokane Tribe and the State were in final negotiations for a tribal-state compact, few – if any – TLS terminals were available to lease under Appendix X. ER 15 at ¶ 11. The State and the Spokane Tribe, therefore, agreed to an Inter-Tribal Fund by which the Spokane Tribe could obtain TLS terminals if it was unable, after making reasonable efforts, to acquire additional TLS terminals from other Washington tribes under Appendix X. ER 119-20 at §§ 6, 7. However, if the Spokane Tribe wished to invoke the Inter-Tribal Fund under Section Seven, the tribe was required under Section Six to: (1) make

reasonable efforts to obtain the additional terminals under the framework allowed in Appendix X; (2) negotiate with other tribes for a revised statewide framework for allocating TLS terminal acquisitions; and (3) limit their operation to fewer total TLS terminals than otherwise allowed. ER 16 at ¶ 15; ER 119-20 at §§ 6, 7.

The State and the Spokane Tribe recognized this agreement was a departure from Appendix X and that it was necessary to preserve the existing Tribal Lottery System structure and economic benefit for all tribes. ER 15 at ¶ 11. Therefore, the State and the Spokane Tribe expressed their intent in the appendix that (1) all the provisions of Appendix Spokane were interdependent; (2) that the State would not agree to any individual provision in Appendix Spokane without the others; and (3) that, without each of the requirements in Appendix Spokane, the entire agreement was not valid. *See* ER 16 at ¶ 14 (Day Decl.); ER 115 (Statement of Conditions and Limitations); ER 120 (Appendix Spokane § 7).[7]

[7] To date, the Spokane Tribe has never invoked this option; instead, it operates its tribal lottery leasing under Appendix X2 along with all the other tribes. ER 16 at ¶ 18. In fact, if the Spokane Tribe were ever to invoke the Inter-Tribal Fund option, certain of its leasing rights under Appendix X2 would be terminated. ER 143.

Tulalip asserts that Appendix Spokane provides more favorable TLS terminal allocation terms by guaranteeing the Spokane Tribe an ability to acquire TLS terminals that Tulalip does not have. *See* Dkt. No. 15-1 at 33. However, contrary to the Tribe's assertions, the Spokane Tribe does not have more favorable TLS allocation terms than Tulalip. Rather, under Appendix Spokane, the Spokane Tribe merely obtained an alternative mechanism to obtain its TLS terminal allocations; a mechanism that came with certain conditions and restrictions on its TLS terminal operations. Thus, Tulalip ignores the concomitant restrictions located in Section Six of Appendix Spokane on the Spokane Tribe's ability to invoke the Inter-Tribal Fund in Section Seven. And, as the district court found and as shown here, the State has never agreed to an Inter-Tribal Fund without the associated restrictions found within the Spokane Tribe's compact. ER 9. As such, nothing in Appendix Spokane provides more favorable TLS terminal allocation terms than those set forth in Tulalip's Appendix X2.

3. Tulalip cannot select its preferred compact provisions from Appendix Spokane without the other concomitant restrictions found in that agreement.

Nevertheless, Tulalip contends throughout its brief, that the "most favored tribe" clause of its compact confers upon it the right to "more

favorable terms" without any obligation to accept other inter-dependent terms or conditions. *See, e.g.*, Dkt. 15-1 at 41. In making its argument, Tulalip fails to acknowledge that the State's agreement with the Spokane Tribe is comprised of the entire Appendix Spokane, not just selective words and phrases found within it. And, contrary to Tulalip's repeated assertion, all of those words and phrases are integral to the State and Spokane Tribe's intent in agreeing to Appendix Spokane but only to all of Appendix Spokane. ER 115.

While Tulalip dismisses Appendix Spokane's restrictions as unnecessary (*see* Dkt. 15-1 at 35-38), Tulalip provides no evidence that the parties to the Appendix Spokane ever intended to separate out the terms or that the State would have agreed to the terms of the Inter-Tribal Fund without the other dependent-upon and interrelated restrictions set forth in the remainder of Appendix Spokane. ER 15 at ¶ 14. For instance, contrary to Tulalip's assertion (Dkt. 15-1 at 36), the joint negotiation for Appendix X2 does not nullify the condition that the Spokane Tribe participate with other tribes in a new negotiation for a revised allocation system in order to invoke its Inter-Tribal Fund. Every other gaming tribe jointly negotiated and agreed to the allocation system of Appendix X2, and no part of Appendix X2 contemplates allowing a tribe to operate outside the bounds of those provisions to obtain

TLS terminals.[8] Instead, each tribe's participation in operating, acquiring and transferring TLS terminals under the collectively-agreed-upon Appendix X2 is integral to the system as a whole. Under the plain language of Appendix Spokane, in order for the Spokane Tribe to use its Inter-Tribal Fund, global negotiations for a revised statewide framework would again be necessary to preserve a structure beneficial for all tribes.

Further, Tulalip's interpretation of the numerical limitations found in Appendix Spokane contradicts the purpose of those limitations. *See* Dkt. 15-1 at 37-38. As previously noted, Appendix Spokane reflected the conditions of the Tribal Lottery System at the time when the State and the Spokane Tribe were negotiating for a gaming compact prior to the existence of Appendix X2. ER 14-15 at ¶¶ 9-13. At that time, the Spokane Tribe was being asked to participate in the existing Tribal Lottery System under Appendix X where no machines were actually available to lease, and the Spokane Tribe felt other tribes would not be willing to lease to them because of past differences. *Id.* The State, therefore, agreed to provide the Spokane Tribe with the Inter-Tribal

[8] That is why, Appendix X2 can only be amended upon certain circumstances occurring that affect all tribes globally. *See* ER 234 ("Upon the expiration of the [Amendment] Moratorium, the following circumstances may constitute a basis for the Tribe to seek an amendment…"). None of those circumstances are applicable here.

Fund to obtain additional TLS terminals, as long as the Spokane Tribe could not operate its total maximum operating ceiling via the fund.[9] ER 15-16 at ¶¶ 13-15. Thus, by 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.

In contrast, the amendment Tulalip seeks to foist upon the State contains no restrictions. By selectively choosing specific provisions of Appendix Spokane and ignoring others, Tulalip attempts to force a compact amendment that gives it a means to acquire additional TLS terminals that no tribe has, not even the Spokane Tribe. In fact, it attempts to force the State to create a scheme that is a significant departure from the existing Tribal Lottery System and the terms of all tribal-state compacts. For instance, under their proposal, Tulalip could obtain additional machines without being bound by the

[9] Tulalip is correct that, under the Spokane Tribe's Appendix X2, that tribe's maximum operating ceiling is 4,700 compared to Tulalip's 4,000. *See* ER 143 (incorporating Appendix Spokane maximum operating ceiling into Spokane's Appendix X2). However, Tulalip is not asking for the Spokane Tribe's greater operating ceiling. Instead, they want a similar Inter-Tribal Fund, but without the restrictions that are placed on the Spokane Tribe for using that fund. If the Spokane Tribe were to now invoke the Inter-Tribal Fund, the numerical limitations in Appendix Spokane would take effect. *See* ER 119, 143.

concomitant conditions that all other compacting tribes are bound by under Appendix X2. *See* ER 180-83. Not only would the Tulalip's proposed means to acquire additional machines impact and impair the other tribes' machine leasing abilities, it could substantially increase the current agreed-upon limits to the maximum number of TLS machines operating within the State.[10] Therefore, rather than availing themselves of the "most favored tribe" clause as they purport to be doing, Tulalip seeks to compel the State to enter into a wholly new amendment to Appendix X2 that is contrary to the terms thereof and would give Tulalip terms that are superior to every other tribe's TLS allocation terms. Tulalip's compact does not authorize such a result.

4. **This Court's decision in *Shoshone-Bannock* does not support Tulalip's claimed right of cherry picking select compact provisions.**

In support of Tulalip's insistence that it is only entitled to what it deems as "favorable terms," the Tribe relies on this Court's decision in *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095 (9th Cir. 2006). Dkt. 15-1 at 45-48,

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

52-54. In that case, Idaho and the Shoshone-Bannock Tribes had entered into a gaming compact that stated that, if Idaho permitted any other tribe to conduct any class III games in Idaho that were in addition to those allowed by the Shoshone-Bannock's compact, the Shoshone-Bannock Tribe's compact "shall be amended to permit the Tribes to conduct *those same additional games*...." *Shoshone-Bannock*, 465 F.3d at 1098 (emphasis added). Idaho later adopted an initiative authorizing tribes to conduct gaming using "tribal video gaming machines," allowing tribes to amend their gaming compacts to include such gaming, and limiting those amending tribes to a certain number of gaming machines, as well as requiring community contributions. *Id.* at 1097. Three tribes chose to amend their compacts to include those terms set forth in the initiative. *Id.* at 1098.

When the Shoshone-Bannock Tribes sought to amend their compact to allow tribal video gaming machines, Idaho insisted that they renegotiate their compact to require the other terms agreed to by the three tribes. *Id.* Applying the plain language of the Shoshone-Bannock's compact allowing "those same additional games," this Court held such renegotiation was not required. *Id.* at 1099. It also rejected the contention that a limitation on the number of gaming machines for the other tribes necessitated the Shoshone-Bannock Tribes to also

agree to those provisions. "The plain meaning of 'same additional games' refers to the games themselves and not the number of machines." *Id.* at 1100. This Court found significant that the Shoshone-Bannock Tribes had not agreed to amend their compact per the Idaho initiative, but chose instead to rely on their compact's existing language to confer automatic permission to operate video gaming machines. *Id.* at 1101.

Contrary to Tulalip's assertion, the *Shoshone-Bannock* decision does not allow tribes to pick and choose favorable terms and reject those interrelated terms deemed unfavorable. *See* Dkt. 15-1 at 45-55. 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, as Tulalip contends, allow the Tribe allocation terms that are different than, and superior to, those allowed to other tribes. The district court was correct to reject Tulalip's argument to the contrary.

5. Appendix Spokane must be read as a whole to give effect to the State's intent.

Finally, Tulalip argues that this Court should reject reading Appendix Spokane as a whole because it would render the Tribe's "most favored tribe"

rights inoperable. *See* Dkt. 15-1 at 48-54.[11] Tulalip's argument, however, is contrary to standard contract interpretation principles and would interfere with the State's sovereign rights. As the United States Supreme Court has long recognized, "[c]ourts have no power to make new contracts or to impose new terms upon parties to contracts without their consent." *City of New Orleans v. New Orleans Waterworks Co*., 142 U.S. 79, 91 (1891). To do so would, in fact, interfere with the State's sovereign rights as states may not be ordered to enter into compacts or forced to accept specific compact terms without their express consent. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73-76 (1996).

Here, as evidenced by the Preamble of Appendix Spokane, the State and the Spokane Tribe intended the Appendix to be read as a whole. In fact, the Preamble 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 115 (emphasis added). In

[11] Tulalip's argument that the State drafted Appendix Spokane's Preamble to make an "end-run around" Tulalip's compact rights is not well taken. Dkt. 15-1 at 52. Tulalip had the option of incorporating provisions of Appendix Spokane when it participated in negotiating Appendix X2 with the State and the other tribes. *See* ER 17 at ¶ 22. During negotiations, it chose to eliminate that option from further discussion. *Id.*

addition, the State and the 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.* Thus, relevant to the current matter, Appendix Spokane Section Seven, which sets out the terms of the Inter-Tribal Fund, is completely dependent upon and inter-related with Appendix Spokane Section Six, which sets the TLS terminal allocation restrictions and conditions. *See* ER 120 at § 7. More importantly, the State never agreed to Appendix Spokane Section Seven without the associated conditions and limitations set forth in the other provisions of that Appendix. *See* ER 15-16 at ¶¶ 14-15.

Tulalip, however, asks this Court to ignore the State and the Spokane Tribe's express intent that the terms contained in Appendix Spokane are indivisible and that its provisions cannot operate independent of each other. It also is asking this Court to isolate one provision of the contract without giving effect to the remaining provisions as a whole. In essence, Tulalip asks this Court to force the State to agree to terms that it has never agreed to with any other tribe. Because Tulalip cannot obtain its requested relief, this Court – like the district court before it – should reject Tulalip's argument.

D. Tulalip Cannot Obtain Their Requested Relief Of An Amended Appendix X2 Without Joining The 27 Other Washington Tribes.

Having found that the unambiguous language of Tulalip's compact did not permit the Tribe to an order forcing terms upon the State to which it has never agreed, the district court did not address the parties' remaining arguments, including the State's argument that the Tribe cannot amend Appendix X2 without the participation and agreement of all of the tribes who signed that agreement. *See* ER at 9. For the same reasons, this Court likewise need not reach the arguments. Nevertheless, if this Court were to reverse the grant of summary judgment, this Court should remand the matter to the district court for a determination that, under Fed. R. Civ. P. 19, Tulalip cannot obtain its requested relief because it cannot join the 27 other Washington tribes who are required in this matter, but cannot be joined due to their sovereign immunity.[12]

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

Appendix X2's development was a departure from the normal

[12] Federally recognized tribes enjoy sovereign immunity and may not be sued absent an express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity from Congress. *See Dawavendewa v. Salt River Project Agr. Imp. and Power Dist.*, 276 F.3d 1150, 1159 (9th Cir. 2002).

compacting process between the State and Washington tribes. *See* ER 16-17 at ¶¶ 19-20, 24. In the past, it had been the State's experience that the tribes, as sovereign governments, expected the State to negotiate individually with each tribe. ER 16 at ¶ 19. However, with Appendix X2, the participating tribes agreed that the negotiation needed to be between the State and all of the tribes collectively in order to adequately and fairly address issues with the State's then-existing Tribal Lottery System. ER 17 at ¶ 20. Specifically, the tribes sought changes to the maximum number of TLS terminals available to the tribes, each tribe's base TLS terminal allocation, *and* the procedures for participating tribes to obtain additional TLS terminals above their base allocation. ER 17 at ¶ 22. In order for the system to work, every participating tribe had to agree to and sign identical X2 appendices so that operation of the State's Tribal Lottery System would be uniform among the tribes. *See, e.g.,* ER 18 at ¶ 24.

Therefore, contrary to Tulalip's contentions (Dkt. 15-1 at 60-62), the 27 other Washington tribes' relation to this matter is not simply that the tribes entered into compact amendments identical to that of Tulalip. Rather, their importance and necessity to this case rests on the fact that the compact amendment that Tulalip seeks to alter – Appendix X2 – defines the boundaries

and requirements for all of the tribes' ability to operate and obtain TLS terminals under the State's Tribal Lottery System. The tribes jointly negotiated and agreed to the provisions of the entire Appendix X2, and no part of Appendix X2 contemplates allowing Tulalip or any other tribe to operate outside the bounds of those provisions to obtain TLS terminals. Instead, each tribe's participation in operating, acquiring and transferring TLS terminals under the collectively-agreed-upon Appendix X2 is integral to the system as a whole. Any amendment to one tribe's Appendix X2 necessarily affects the rights and obligations of all tribes operating under the Tribal Lottery System.

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

Relying on the this Court's decision in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962 (9th Cir. 2008), Tulalip nevertheless contends that 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. Dkt. 15-1 at 61. The Tribe is wrong. While Tulalip cites *Cachil* for broad propositions, Tulalip ignores the specific facts on which that decision was based. And comparing

the issues presented in *Cachil* with those presented here demonstrates that the decision is inapplicable.

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

Reversing the district court, this Court held that the other tribes were not necessary to the Colusa Indian Community's breach of compact claims. *Id.* In reaching this decision, the Court of Appeals held that the tribes did not have a legally protected interest in the Colusa Indian Community's claims as (1) the compacts did not purport to establish an overarching limit on the number of gaming licenses (547 F.3d at 971); (2) the Community's placement in a

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

Here, Tulalip is not trying to simply enforce its rights under Appendix X2; rather, it is trying to expand and fundamentally alter the means by which it may presently acquire additional TLS terminals under the State's Tribal Lottery System. Unlike the breach of compact issues in *Cachil*, Tulalip seeks to add new compact terms to the Tribal Lottery System, which will significantly and necessarily affect the 27 other Washington tribes' bargained-for agreement of a globally-applicable transfer and acquisition plan under Appendix X2. For instance, allowing 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. And neither consequence of Tulalip's proposed plan is

part of the bargain that any of the 27 other Washington tribes agreed to when they entered into the multi-lateral terms of Appendix X2.

Because Tulalip cannot obtain its requested relief of an amendment to Appendix X2 without joining the 27 other Washington tribes, dismissal of its lawsuit would be appropriate.

VIII. CONCLUSION

For these reasons, the State respectfully requests that this Court affirm the district court's order on summary judgment.

DATED this 15th day of November, 2013.

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STATEMENT OF RELATED CASES

Pursuant to FRAP 28-2.6, the State is not aware of any related cases pending in this Court.

DATED this 15th day of November, 2013.

/s/ Callie A. Castillo
CALLIE A. CASTILLO
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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(B) and Ninth Circuit Rule 32-1, the attached Brief of Defendants-Appellees is proportionately spaced, has a typeface of 14 points and contains 8,380 words.

DATED this 15th day of November, 2013.

/s/ Callie A. Castillo
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CERTIFICATE OF BRIEF IN PAPER FORMAT

9th Circuit Case Number: 13-35464

I, CALLIE A. CASTILLO, certify that this brief is identical to the version submitted electronically on November 15, 2013.

DATED this 15th day of November, 2013.

/s/ Callie A. Castillo
CALLIE A. CASTILLO
Assistant Attorney General
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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury under the laws of the state of Washington, that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 15, 2013.

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

DATED this 15th day of November, 2013.

/s/ Jeanette Baluyut
JEANETTE BALUYUT
Legal Assistant