FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC RECORDS

FROM: Mary W. Dove M.W. for
Acting Secretary of the Commission

DATE: December 8, 1999

SUBJECT: COMMENT: PROPOSED AO 1999-32

Transmitted herewith is a timely submitted comment by William C. Oldaker on behalf of the Tohono O'odham Nation.

Proposed Advisory Opinion 1999-32 is on the agenda for Thursday, December 9, 1999.

Attachment:

20 pages

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December 8, 1999

Mr. Lawrence Noble
General Counsel
Federal Election Commission
999 E Street, NW
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RE: Proposed Advisory Opinion 1999-32

Dear Mr. Noble:

On behalf of the Tohono O'odham Nation ("the Nation"), we want to provide further clarification of our Advisory Opinion request.

This request for an Advisory Opinion asks the Commission to once again address the unique status of Indian tribes within the political and jurisdictional framework of the United States. As the United States Supreme Court recognized long ago in the case of *United States v. Kagama*, 118 U.S. 375, 381-81 (1886):

> "The relation of the Indian Tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex nature...They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as Nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."

The Nation believes that the question presented is a case of first impression. Although federal and state courts have from time to time analyzed the status and relationship between tribes and tribal entities, the specific focus or those inquiries was not the issue presented here. Rather, courts have decided, for example, (i) whether tribal entities are to be considered the same as tribes for purposes of invoking federal court jurisdiction under 28 U.S.C. § 1362; (ii) whether tribal entities are imbued with tribal sovereign immunity; and (iii) whether tribal entities are subject to state taxation.

However, no court or federal agency has yet addressed the specific issue presented here: whether the commercial transactions of the Nation's subordinate economic enterprise, the Tohono O'odham Utility Authority ("TOUA"), in providing utility service to federal agencies located within the Nation's lands, preclude the tribal government of the Nation from making campaign contributions.

Nevertheless, the judicial analysis is instructive to determining the question presented.

It is a well settled principle of federal Indian law that "subordinate, semi-autonomous tribal entities...should not be viewed as a tribe for purposes of [federal court jurisdiction under 28 U.S.C. § 1362]." *Navajo Tribal Utility Authority v. Arizona Department of Revenue*, 608 F.2d 1228, 1231 (9th Cir. 1979). The issue presented in that case was whether the federal statue in question, 28 U.S.C. § 1362, authorized federal court jurisdiction of a suit brought by the tribal utility authority against the Arizona Department of Revenue. There, the Ninth Circuit Court of Appeals analyzed the organization and structure of the Navajo Tribal Utility Authority ("NTUA"), finding:

> "It is true, as NTUA and the United States argue, that NTUA acts for the Tribe in providing electric power to the Navajo reservation. There is obviously a substantial relationship between the Tribe and NTUA, and the Tribal leadership does exercise some measure of control over NTUA. Additionally, NTUA has not been incorporated pursuant to Arizona or other state law. Yet, "(i)t is intended that control and operation of (NTUA) shall be patterned as closely as is feasible on the lines of a chartered public service corporation of similar magnitude with a Management Board comparable to a Board of Directors of such a corporation." 21 Navajo Tribal Code s 6. NTUA is thus expected to exercise a substantial degree of autonomy. Moreover, as NTUA concedes, three of its seven directors are not members of the Tribe. The Board of Directors is not synonymous with the Tribal Council or even a committee thereof. Rather it is a somewhat, although not a completely, independent entity. Certainly NTUA exercises independent judgment, as it apparently did in its decision to bring suit here. There is no suggestion that the Tribal Council or its advisory committee even considered, much less authorized, NTUA's litigation which is now before us. Nor has there been any suggestion that there is any requirement that NTUA seek such approval."

608 F.2d at 1232 (citations omitted). The Ninth Circuit Court of Appeals concluded that the separate status of NTUA precluded federal court jurisdiction. However, where the tribal government itself joins suit with its enterprise, federal jurisdiction under 28 U.S.C. § 1362 has been allowed. *See Tohono O'odham Nation v. Schwartz*, 837 F. Supp. 1024 (D.Ariz. 1993); *accord White Mountain Apache Tribe v. Williams*, 810 F 2.d 844 (9th Cir. 1984), *cert. denied* 479 U.S. 1060 (1987)(Fletcher, J., dissenting at page 868).

The Ninth Circuit's analysis of the relationship between the tribal enterprise and the Navajo tribe is instructive to this case. The Tohono O'odham Utility Authority is structured much the same as the Navajo Tribal Utility Authority, as is evident from TOUA's plan of operation. However, TOUA exercises even greater autonomy from the tribal government of the Tohono O'odham Nation than is apparent from the court's description of NTUA's structure. Unlike NTUA, here only three of the seven members of the TOUA management board are required to be members of the Tohono O'odham Nation. [Restated Plan of Operation at § 9(B) at page 8.] Moreover, no member of the Tohono O'odham Legislative Council (the tribe's governing body) may be a member of the TOUA management board. [*Id.*] Therefore, a similar conclusion should be reached here: TOUA is a separate legal entity from the governing body of the Tohono O'odham Nation.

That conclusion is consistent with the conclusion of the United States District Court for the District of Arizona with respect to the Nation's Housing Authority (*Tohono O'odham Nation v. Schwartz*, 837 F. Supp. 1024 (D.Ariz. 1993) issue of sovereign immunity) and with respect to the Nation's Gaming Authority (*State of Arizona v. Tohono O'odham Nation*, CIV 96-737 TUC-FRZ, slip op. March 4, 1997 at page 5 "Gaming Authority is a separate legal entity [for purposes of party status under Rule 24(a)]").

The dissenting opinion in *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir. 1984), *cert. denied* 479 U.S. 1060 (1987), presents a detailed analysis of the unique status of Indian tribes and the methods by which tribes engage in commercial activity. 810 F.2d at 865-69. One method (as used by the White Mountain Apache Tribe) is through the formation of an incorporated business entity under Section 17 of the Indian Reorganization Act, 25 U.S.C. § 477. In that case, the Court quoted a 1958 report of the Solicitor of the Department of Interior to draw a distinction between the incorporated business entity under Section 17 and the political body formed under a constitution pursuant to Section 16 of the IRA, 25 U.S.C. § 476:

> "' The purpose of Congress is enacting Section 17 of the Indian Reorganization Act was to empower the Secretary to issue a charter of business incorporation to such tribes to enable them to conduct business through this modern device, which charter cannot be revoked or surrendered except by Act of Congress. This corporation, although composed of the same members as the political body, is to be a separate entity, and thus more capable of obtaining credit and otherwise expediting the business of the tribe, while removing the possibility of federal liability for activities of that nature. As a result, **the powers, privileges and responsibilities of these tribal organizations materially differ.**'"

(Emphasis in original.) The conclusion is obvious: the Section 17 corporate entity is separate and distinct from the political body of the tribe, even where the corporation and the political body are composed of the same members.

The Tohono O'odham Nation has not formed a Section 17 entity. The management board of TOUA is not composed of the same members as the Nation's political body. Moreover, federal law does not require the formation of Section 17 corporate entities in order for tribes to engage in commercial transactions. Rather, tribes may charter subordinate economic enterprises, as the Nation has done in creating its Utility Authority, as well as its Housing Authority, Gaming Authority and Farming Authority. Each is formed as a separate legal entity, responsible for its own operations, debts and obligations. [*See, e.g.*, TOUA Plan of Operation at Sections 6 and 7(A).] In our case, the Tohono O'odham Utility Authority truly is a separate entity from the tribal government: it has its own bank account, hires its own employees, establishes its own personnel policies and employee benefits, purchases and sells its own personal property and hires and directs its own legal counsel (*see, e.g., Papago Tribal Utility Authority v. Federal Energy Regulatory Commission*, 776 F.2d 828 (9th Cir. 1985)).

The Commission has determined that unincorporated Indian tribes are "persons" within the meaning of federal election laws. [FEC Advisory Opinion 1978-51.] The Commission has also determined that a tribally chartered but unincorporated commercial venture that operates as a subordinate economic enterprise of the tribe is not a corporation. [FEC Advisory Opinion 1993-12.] For the reasons presented, the Nation believes the Commission should conclude that a tribally chartered but unincorporated commercial venture that operates as a subordinate economic enterprise of the tribe is a separate "person" from the governing body of the tribe within the meaning of federal election laws.

Should the Commission determine that TOUA is not a separate "person," then the Nation believes the unique nature of the relationship between the federal government and an Indian tribe in light of the particular transaction at issue here must be considered. As previously presented, TOUA is the sole provider of utility services on the Reservation. Neither the Nation's residents, nor the federal agencies in questions, have access to other utility service providers. If the TOUA did not service the federal agencies on the Reservation, these agencies would be without utilities and left with no option to seek them elsewhere. Either party could choose to terminate the agreement at any time, therefore the government agencies are merely paying for the services they have used and are not contracting for future services. Contracts are generally understood to have some binding future relationship between the parties. This relationship would seem to lack those elements. Therefore, it would seem that the relationship as put forth in our Advisory Opinion request should not be covered under 2 U.S.C. § 441c.

We appreciate your consideration of these issues. If I can answer any questions, please don't hesitate to contact me.

Sincerely,

William C. Oldaker

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

STATE OF ARIZONA,

Plaintiff,

vs.

TOHONO O'ODHAM NATION,

Defendant.

No. CIV 96-737 TUC-FRZ

ORDER

I. Background

Two motions are before the Court. The Tohono O'odham Nation has filed a Motion to Dismiss for Failure to Join an Indispensable Party, pursuant to Rule 19, FED.R.CIV.P. In addition, the Tohono O'odham Gaming Authority has moved to intervene pursuant to Rule 24(a)(2), FED.R.CIV.P. or, alternatively, pursuant to Rule 24(b). Rule 19 and 24, FED.R.CIV.P., are related and similar in language, though not identical. The State opposes both motions.

II. Gaming Authority's Motion to Intervene under Rule 24

A. Legal Framework

Rule 24, FED.R.CIV.P., reads:

> Upon timely application, anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
> Upon timely application anyone may be permitted to intervene in an action ... (2) when an applicant's claim or defense and the main

> action have a question of law or fact in common ... In exercising its discretion, the court shall consider whether the intervention shall unduly delay or prejudice the adjudication of the rights of the original parties.

Accordingly, a three part test is used under 24(2)(a)(2) to determine if a person who has timely motioned to intervene can do so as a matter of legal right. First, the applicant must claim an interest "relating to the property or transaction which is the subject of the action." Second, the applicant must show that his ability to protect his interest may be impaired, as a practical matter, by the outcome of the litigation. Finally, the applicant must show that representation of his interest by present parties is inadequate.

In this case, the inquiry of the Court is focused upon two main areas: 1) whether the Gaming Authority has any legally protectable interest and, 2) assuming the Authority does have an interest, whether the interests will be adequately represented by the Nation.

Rule 24 creates a tension between the goal of judicial economy (which is furthered by one adjudication of all the interests in an action) *vis a vis* the interest of the original parties to control their litigation. The Ninth Circuit interprets the rule broadly in favor of intervention. Forest Conservation Council v. U.S. Forest Service, 66 F.3d 1489, 1493 (1995) citing Sierra Club v. United States EPA, 995 F.2d 1478, 1481 (1993). Judge Friendly's description best sums up what the commentators and judges have written on the topic:

> The various components of the rule are not bright lines, but ranges—not all "interests" are of equal rank, not all impairments are of the same degree, representation by existing parties may be more or less adequate, and there is no litmus paper test for timeliness. Application of the rule requires that its provisions be read not discreetly, but together. A showing that a very strong interest exists may warrant intervention upon a lesser showing of impairment or inadequacy of representation. Similarly, where representation is clearly inadequate, a lesser interest may suffice as a basis for intervention ... The requirements for intervention embodied in Rule 24(a)(2) must also be read in the context of the particular statutory scheme that is the basis for the litigation with an eye to the posture of the litigation at the time the motion is decided. Finally, although the Rule does not say so in terms, common sense demands that consideration also be given to matters that shape a particular action or type of action.

United States v. Hooker Chemicals & Plastics, Inc., 749 F.2d 968, 983 (2d Cir. 1984).

B. Analysis

1. Does the Gaming Authority Claim a Legally Protected Interest which May be Impaired by the Outcome of the Litigation?

The State argues that the Gaming Authority has no "interest" separate from that of the Nation. At the hearing on Motion to Intervene and Motion to Dismiss, held February 13, 1997, the Court demanded a clear articulation of what "interest" the Gaming Authority held in the outcome of this action separate and apart from the Nation's interest. The Court also questioned whether the Nation was a capable advocate of any "interest" in the action shared by the Gaming Authority and the Nation.

The Gaming Authority lists, as interests which could be impaired by the outcome of this action, as well as evidence of the Authority's autonomy from the Nation, the following things acquired in the name of the Gaming Authority: debts, physical and financial assets, contracts with vendors, contracts with employees, investments, and interests in legal actions. (Tohono O'odham Gaming Authority's Motion to Intervene at 6-7; Transcript of Hearing on Motion to Intervene at 10, 11, 13-16). Furthermore, because the State alleges that the Gaming Authority violated the Compact, the Gaming Authority argues that it must be made a party to defend itself against these charges.

The State counters that, since all revenues are to go to the Nation, the only real interest the Gaming Authority has is to meet operational expenses. Thus, the only interest assertable by the Gaming Authority is a "right to exist." Further, the State alleges that there is no need to have the Gaming Authority defend in the action because the Nation will do so adequately.

If the "right to exist" or any of the things which the Gaming Authority lists as "interests" are protectable by law then there is a protectable interest. "It is generally enough that the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." Sierra Club, 995 F.2d at 1484. The Court has carefully explored whether the Gaming Authority claims a legally protectable interest entitling it to intervention as of right.

Rule 24 requires that an intervenor claim "an interest relating to the property or transaction which is the subject of the action." Thus, in Forest Service, the Ninth Circuit found that Arizona had an "interest" where the state trust lands of Arizona adjacent to national forest lands would be affected by an increased likelihood of fire and disease as a result of litigation involving the Forest Service. Id. at 1492. The Ninth Circuit observed that a finding of sufficient interest is a threshold inquiry for which "[n]o specific legal or equitable interest need be established." Id. quoting Greene v. United States, 996 F.2d 973, 976 (9th Cir. 1993) citing Portland Audubon Society v. Hodel, 866 F.2d 302 (9th Cir.) cert. denied 492 U.S. 911, 109 S.Ct. 3229, 106 L.Ed. 2d 577 (1989). However, the movant must demonstrate a "significantly protectable interest." Id.

Accordingly, where the State argues that neither the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq. ("IGRA") nor the Compact created any private interest in Class III gaming which can be owned by the Gaming Authority, the argument strikes the wrong target. The inquiry is more broad. Just as Arizona's interest in state lands bordering national forest lands gave rise to an "interest" in the management of the forest lands, the Gaming Authority may have some interests arising from Class III gaming rights.

The State asserts that a mere economic interest cannot support a motion to intervene. As a general rule, this is correct. However, economic interests suffice for Rule 24 purposes where they are legally protected. Donaldson v. United States, 400 U.S. 517, 531, 91 S.Ct. 534, 542, 27 L.Ed.2d 580 (1971) (Taxpayer cannot intervene to challenge the IRS' subpoena of documents it needs to enforce tax laws against him. Despite the fact that he obviously has an economic interest, that interest is not legally protectable); Portland Audubon (The only proper defendant in an action to compel compliance with the National Environmental Policy Act is the federal government, even though the future "private" interests of a logging company or mining operation may be impaired by declaration of endangered habitat, etc., by the issuing of an environmental impact statement. No legal "right" against the impact statement exists). The Gaming Authority claims it has more than a mere economic interest

in the outcome of the litigation and that its interest is protected by both federal and Tohono O'odham law. (Motion to Intervene at 5; Transcript of Hearing on Motion to Intervene at 5, 15).

Although the State correctly states that any interest in Class III gaming cannot be assigned by the Nation, the Ninth Circuit has found that an interest may arise where the regulated entity owns real property and the rights are "connected" to it. In Sierra Club, an Arizona citizen and the Sierra Club sued the EPA, seeking to enjoin that agency to act under the Clean Water Act and to regulate toxic discharges into Arizona rivers. The City of Phoenix's motion to intervene was denied upon the district court's finding that the city had no legally protectable interest. The Ninth Circuit reversed, stating:

> The City of Phoenix ... owns the wastewater treatment plants and the permits. These interests are rights connected with the City's ownership of real property and its status as an EPA permittee. Such rights are among those traditionally protected by law ... The lawsuit seeks relief which would require changes in the City's permits, making them more restrictive of city discharges from the plants.

Sierra Club, 995 F.2d at 1482. In fact, the court observed that "In some contexts, we have determined that interests less plainly protectable by traditional legal doctrines sufficed for intervention of right." Id. (Collecting cases). The Gaming Authority claims to own assets which stand to lose value as a result of this litigation. (Transcript of Hearing on Motion to Intervene at 10, 11).

The Gaming Authority urges the Court to recognize it's alleged legal interests in or arising out of Class III gaming which it states include its interest in contracts with employees, and with vendors, assets which it owns, and an interest in generating millions of dollars of revenue with Class III gaming. These interests are redundant to those of the Nation. The Gaming Authority is a legal entity which was created by the Nation for the sole purpose of generating revenue for the Nation. Upon dissolution, its assets would be returned to the Nation. Therefore, although its identity for purposes of this action is technically distinguishable from that of the Nation, as a practical matter its interests are subsumed by the Nation. Nevertheless the Gaming Authority is a separate legal entity and, as such, it

claims legally protectable interests which satisfy Rule 24(a). See Hannah Mining Co. v. Minnesota Power and Light Co., 573 F. Supp. 1395, 1399 (Substantially identical interests held by subsidiary and parent compels joinder), affirmed 739 F.2d 1368 (8th Cir. 1984).

In addition, the Gaming Authority has argued that it has a separate interest in protecting its reputation against an adverse adjudication of the charges against it which would become settled legal facts under the doctrine of stare decisis. (Transcript of Hearing on Motion to Intervene at 27-30). This argument overlaps with the inquiry into whether there is adequate representation by existing parties and so is considered below.

2. Will Gaming Authority's Interest be Adequately Represented by Existing Parties?

The Court may not conclude its analysis under Rule 24 with a finding that a claim is made of a legally protectable interest; there is a second step. Rule 24(a) provides for intervention as of right "*unless the applicant's interest is adequately represented by existing parties.*" The Court finds that the Nation will adequately represent the interests of the Gaming Authority and is therefore compelled to deny the Gaming Authority's Motion to Intervene.

The Gaming Authority argues that because the Nation is charged with regulating the activity of the Gaming Authority, there is a divergence of interests between them and therefore, the Nation cannot adequately represent the Gaming Authority. The State responds that the Nation has the incentive to defend the Gaming Authority because 1) the Nation receives all the revenues generated by Class III Gaming, 2) the Nation's interests are the same as the Gaming Authority, and 3) the Nation is responsible for regulating the Gaming Authority, and thus, has an interest in defending and arguing for the Gaming Authority.

The Gaming Authority cites persuasive authority holding that the standard for showing inadequacy is minimal. Trbovich v. United Mine Workers of America, 404 U.S. 528, 538, 92 S.Ct. 630, 636, (1972); Forest Conservation Council v. U.S. Forest Service, 66 F.3d at 1499. Although the burden is minimal, representation of the applicant's interest is

often held adequate, and intervention of right denied, when the applicant for intervention and an existing party have the same interests or ultimate objectives in the litigation. If the existing parties demonstrate sufficient motivation to vigorously litigate the action, and will raise all the claims and contentions that would be asserted by the applicant, representation is adequate, even though the applicant may have a different motive for litigating, or disagrees with the approach to the litigation taken by the existing party. See 3b Moore's Federal Practice 24.07[4] (2d ed. 1996).

In this case, the Nation and the Gaming Authority share the same goal: defeating the State's efforts to revoke the Class III Gaming Compact. Merely stating that there is some conflict of interest in theory does not lessen the fact that, in this litigation, the result sought by the Gaming Authority and the Nation is the same.

The Court probed the Gaming Authority and the Parties at the hearing to find what true potential for a divergence of interests exists in this action. The Gaming Authority generally repeated and emphasized the argument that it is a regulated entity which the Nation regulates. The Gaming Authority argues that there is an inherent conflict in having the regulator (the Nation) defend charges of wrongdoing made against the regulated entity (the Gaming Authority).

The Gaming Authority also argued that stare decisis would make any finding of the Gaming Authority's wrongdoing a binding fact, determined without opportunity for the Gaming Authority to defend. These arguments presuppose that the Nation would offer a less zealous defense than the Gaming Authority would. The record contradicts this premise. Throughout the prior proceedings, the Nation has zealously defended the Gaming Authority's acts and denied that it violated any part of the Compact.

The Gaming Authority has listed four examples of the State's allegations directly charging the Gaming Authority, as opposed to the Nation, with violations of the Compact. These include employing persons in violation of Section 5(d) of the Compact, purchasing gaming supplies in excess of $10,000 each month from uncertified vendors, failing to comply

with internal controls in Section 11 of the Compact, and failing to comply with Appendix C to the Compact. (Motion to Intervene at 8).

All of these allegations against the Gaming Authority were directly addressed and refuted by the Nation in its Response to the State of Arizona's Application for a Temporary Restraining Order filed December 26, 1996. (Id. at pages 8-20). At the December 27, 1996 hearing on the State's Motion for a Temporary Restraining Order, January, 1997, the Nation's attorney unequivocally denied any wrongdoing by the Gaming Authority. At that time, the Nation thoroughly defended each and every one of the charges which the Gaming Authority has listed in its Motion to Intervene. (See Transcript of Hearing on Temporary Restraining Order, December 27, 1996, Nation denying allegations against Gaming Authority at pages 63-68, regarding violations of Section 5(d); at pages 68-73, regarding internal control requirements; at pages 76-81, 85-97, regarding technical standards and Appendix C; at pages 83-85, regarding violations of Sections 4 and 5 of the Compact.)

In light of the overwhelming similarity in interests between the Nation and the Gaming Authority, the Nation's great economic stake in the litigation, and the Nation's previous defense of the Gaming Authority against the charges in this action, the Court is convinced that the Nation has sufficient incentive and ability to adequately protect the interests of the Gaming Authority. Any strategic or philosophical difference as to how that defense would be approached by the Gaming Authority, as opposed to the Nation, appears negligible in theory and inconsequential in application, as evidenced by the Nation's defense thus far. Rather, the Court is persuaded that the interests of the Nation are such that it will undoubtedly make all of the absent party's arguments, that it is capable and willing to make these arguments, and that the Gaming Authority has nothing additional to offer the proceedings. Shermoen v. United States, 982 F.2d 1312, 1318 (9th Cir. 1992) citing County of Fresno v. Andrus, 622 F.2d 436, 439 (9th Cir. 1980) (In finding a necessary party under Rule 19, Fed.R.Civ.P. the court applied these three factors). Accordingly, the Court will deny the Motion to Intervene.

3. Should the Gaming Authority be Granted the Right to Permissibly Intervene?

Under Rule 24(b), when an applicant's claim or defense and the main action have a question of law or fact in common, permissive intervention may be granted. In exercising its discretion, the court shall consider whether the intervention shall unduly delay or prejudice the adjudication of the rights of the original parties.

A motion under Rule 24(b) may be granted or denied according to the court's sound discretion. The State opposes, arguing that intervention is unnecessary, unhelpful, and would cause delay and confusion. These considerations are all relevant to the Court's decision. The Supreme Court has noted, "To permit a multitude of (permissive) interventions may result in accumulating proofs and arguments without assisting the court." Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137, 64 S.Ct. 90588 L.Ed. 1188 (1944). One district court described the problem thus:

> It is easy enough to see what are the arguments against intervention where, as here, the intervenor merely underlines issues of law already raised by the primary parties. Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions, and the like ... Where he presents no new questions, a third party can contribute usually most effectively and most expeditiously by a brief amicus curiae and not by intervention.

Crosby Steam Gage & Valve Company v. Manning Maxwell & Moore, Inc., 51 F. Supp 972 (D. Mass, 1943) quoted in 3b Moore's Federal Practice 24[10]4 (2d ed. 1996). In the instant case, the Court finds that the Gaming Authority cannot intervene as a matter of right. For purposes of judicial economy, the Court will also deny the Motion to Intervene under Rule 24(b).

4. Statutory Framework

This Court has also considered the Gaming Authority's Motion to Intervene from the perspective of the statutory framework this action is based upon. In the instant case, that is the IGRA. It does not appear to have been Congress' intent, in creating the enforcement provisions of the IGRA, that a State should be required to join a Tribal Agency or Entity

which claims a stake in Class III gaming whenever an enforcement action is brought under the Act for violation of a Compact. Contrarily, the compact device was seen as a solution involving two parties—an Indian Nation and a State--who were co-equal sovereigns. S.Rep. No. 446, 100th Cong. 2d Sess. 4 (1988) reprinted in 1988 U.S.C.C.A.N. 3071-3083. To permit intervention by a third party that was considered neither equal in right nor in privity with the two parties to the Compact runs contrary to this "statutory scheme." This observation is made without regard to the question whether the Gaming Authority has some independent interest as a result of the compact. It is presented as an independent factor which the Court has weighed in exercising its discretion.

III. Motion to Dismiss under Rule 19

A. Legal Framework

Rule 19, Fed.R.Civ.P., reads, in relevant part:

> (a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the actions shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been joined, the court shall order that the person be named a party . . .
>
> (b) If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of the relief or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy or the action is dismissed for nonjoinder.

B. Argument

The Nation has moved for dismissal under Rule 19, arguing, 1) that the Gaming Authority is a necessary party and, 2) that the State has refused to join the Gaming Authority. The Nation's assertion that the Gaming Authority is indispensable is predicated on the position that the Gaming Authority "claims an interest" related to the action within the meaning of Rule 19. The Nation describes this interest as a "right to conduct its Class III gaming business." (Motion to Dismiss at 4-21).

The State opposes this position on the same grounds it opposes the Motion to Intervene, arguing that the Gaming Authority does not have any "right" in Class III gaming. However, the Gaming Authority may simultaneously lack a "right" in Class III gaming pursuant to IGRA or the Compact and possess a "claim to an interest" sufficient to support their joinder in the action pursuant to Rule 19, FED.R.CIV.P.

1. Gaming Authority has a "Claim" to an Interest in the Action but is Adequately Represented

In Shermoen v. U.S., 982 F.2d 1312 (9th Cir. 1992), the legality of the Hoopa-Yurok Settlement Act was called into question. The United States filed a motion to dismiss on the grounds that the Hoopa and Yurok (Indian Nations) were not named as parties and were indispensable to the action. The district court dismissed the case and the Plaintiffs appealed, arguing that the action had called into question the Act and the very existence of the absent tribes' "interests" depended on the legality of the Act. The Ninth Circuit wrote:

> The language of Rule 19 ... forecloses such an analysis. Under that rule, the finding that a party is necessary to the action is predicated only on that party having a claim to an interest ... Just adjudication of claims requires that courts protect a party's right to be heard and to participate in adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment of that party ... Thus, the joinder rule is to be applied so as to preserve the right of parties "to make known their interests and legal theories." ... We do not hold, of course, that a district court would be required to find a party necessary based on patently frivolous claims made by that party.

982 F.2d at 1317, citing Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765,

775 (D.C. Cir. 1986).

As the foregoing analysis under Rule 24 demonstrated, the Gaming Authority can make several non-frivolous arguments supporting their *claim* to an interest, even if they lack a right *per se* in Class III gaming. However, to the extent that the Authority bases its claim on a "right" to conduct Class III gaming, the argument is contrary to the IGRA and the terms of the Compact, which confer that right on the Nation alone. 25 U.S.C. § 2701 et seq.; Compact § 3(g).

The Nation cites authority holding that in circumstances where one entity is to be held liable for the acts of a subsidiary, the subsidiary is a necessary party to the litigation. Freeman v. Northwest Acceptance Corp., 754 F.2d 553, 559 (5th Cir. 1985). This rule is consistent with the purpose and language of Rule 19, to the extent that complete relief might not be afforded in the absence of that entity or that the entity might be prejudiced by its exclusion from the action. However, it should be clear that this proposition is not a black letter rule, but rather an interpretation of Rule 19 which is dependant on the facts of each case.

Nevertheless, even if the Court finds that the Gaming Authority has a claim to a protectable interest under Rule 19, the Gaming Authority does not instantly become a "necessary party." Rather, the rule calls for a second step. The person claiming an interest relating to the subject action must be "so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." This leads back to the inquiry of whether or not the Nation adequately represents the interests of the Gaming Authority.

The Court has determined that the Nation will adequately protect those interests and, therefore, the absence of the Gaming Authority from the proceedings will not practically impair its interests. Furthermore, the Nation can not be exposed to inconsistent obligations

since it regulates and directs the Gaming Authority. In this case, any relief granted the State would be in the form of an order commanding the Nation and it would be unnecessary or superfluous to also command the Gaming Authority which the Nation controls. Therefore, the Court finds that the Gaming Authority is not a necessary party.

2. Sovereign Immunity and Rule 19(b) Analysis

The Court is further persuaded that the Gaming Authority should not be found a necessary party in light of the question of that entity's sovereign immunity. The State argues that the Gaming Authority is not amenable to service of process because it is entitled to sovereign immunity which has not been waived in this action.

Where joinder of a party appears necessary and the party may not be amenable to service of process, Rule 19(b) commands that the court consider a list of four other factors before dismissing the action. In the Ninth Circuit, "the most relevant of the four" Rule 19(b) factors are: 1) whether a judgment rendered in the person's absence would be adequate and, 2) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Greenspun v. Del E. Webb Corp., 634 F.2d 1204 (9th Cir. 1980) citing Anrig v. Ringsby United, 603 F.2d 1319, 1325-26 (9th Cir. 1978).

In considering these two factors, this Court finds that 1) in this case, the plaintiff would not have a remedy if the case were dismissed for nonjoinder and, 2) given the parallel interests of the Nation and the Gaming Authority and the fact that the Nation has oversight over the Gaming Authority, it is more likely than not that complete relief may be had in the absence of the Gaming Authority. Accordingly, the Court rejects the Nation's argument that the Gaming Authority must be joined under the Freeman analysis and finds that under Rule 19(b), the Gaming Authority should not be joined.

The State argues that if the Gaming Authority is found to be a necessary party, the end result could be dismissal of the action if the Gaming Authority chose to invoke its sovereign immunity. Tribal sovereign immunity may be waived by the Nation or by

Congress. Puyallup Tribe v. Department of Game, 433 U.S. 165, 173 (1977). The Court raised this issue directly at the hearing, querying both the Nation and the Gaming Authority as to whether sovereign immunity had been waived in this case. Neither the Nation nor the Gaming Authority directly stated that the Gaming Authority had waived its sovereign immunity. Instead, both the Nation and the Gaming Authority referred the Court to the IGRA provisions which grant the Court jurisdiction to enforce the IGRA or to enjoin violations of a Compact. The IGRA provides that the United States District Courts shall have jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact ... " 25 U.S.C.A. § 2710(d)(7)(A)(ii). It is undisputed that the Gaming Authority is not a party to the Compact.

A the hearing on Motion to Intervene, the Nation argued that the grant of jurisdiction in § 2710(d) is effective over the Gaming Authority "because the Gaming Authority has no greater immunity than the Nation. If the Nation's (immunity) has been waived, then so has every aspect of the Nation's operations." (Transcript of Hearing on Motion to Intervene at 72-2, 3).

Similarly, the Gaming Authority stated "... [I]t is plain that the Nation did not expressly waive in the Gaming Authority's charter sovereign immunity from a suit like this, but I think that the question is did Congress waive that immunity in enacting the Indian Gaming Regulatory Act which expressly states that the district courts have jurisdiction to hear and consider suits to enjoin gaming ..." (Id. at 23-7).

Thus, the Nation and the Gaming Authority declined to expressly waive the Gaming Authority's sovereign immunity in this action but, instead, indicated a belief that Congress has waived the Gaming Authority's sovereign immunity in enacting the IGRA.

In regard to the IGRA's waiver of sovereign immunity of the states, the Supreme Court has very recently held that Congress did not pay adequate respect to the Eleventh amendment and therefore exceeded its authority in enacting § 2710(d)(7). Seminole Tribe

of Florida v. Florida, 116 S.Ct. 1114, 1133 (1996) ("... Congress does not have authority under the Constitution to make the State suable in federal court under § 2710(d)(7)."). The waiver of tribal sovereign immunity by Congress is based on a different relationship; the various Indian Nations are "dependent domestic nations" whose sovereign immunity exists at the pleasure of Congress. U.S. v. Red Lake Band of Chippewa Indians, 827 F.2d 380, 383 (8th Cir. 1987). Nevertheless, any Congressional waiver of tribal sovereign immunity must be unequivocal and may not be implied. Kescoli v. Babbitt, 101 F.3d 1304 (9th Cir. 1996). The Ninth Circuit has narrowly construed the waiver of Indian sovereign immunity by Congress in another statutory context. Evans v. McKay, 869 F.2d 1341 (9th Cir. 1989).

The Court need not now decide that the Gaming Authority is subject to this Court's jurisdiction or that the Nation is not. However, the Nation's hesitance to straightforwardly express a waiver of immunity provides the Court with further reason to decline joining the Gaming Authority to this action.

IV. Conclusion

The Gaming Authority and the Nation have encountered great difficulty in defining and distinguishing the legal interest of the Gaming Authority arising from Class III Gaming. While it appears that such an interest may arguably be held by the Gaming Authority, the problematic nature of distinguishing the interest from that of the Nation underscores why the Gaming Authority's Motion to Intervene and the Nation's Motion to Dismiss must fail.

The parallel interests of the Nation and Gaming Authority lead to the inevitable conclusion that the Nation can and will adequately defend the interests of the Gaming Authority in this action. This determination is further buttressed by the fact that the Nation has already provided an effective defense for all of the interests claimed by the Gaming Authority. This finding is fatal to the motions made under both Rule 19 and Rule 24, Fed.R.Civ.P. The sole parties to this action will remain those parties who entered into the

Compact pursuant to the IGRA, namely the State and the Tohono O'odham Nation. Accordingly,

IT IS ORDERED that the Motion to Intervene is DENIED.

IT IS FURTHER ORDERED that the Motion to Dismiss is DENIED.

IT IS FURTHER ORDERED that the Stay on Discovery is LIFTED.

DATED this 4th day of March, 1997.

FRANK R. ZAPATA
United States District Court Judge