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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY, a federally recognized Indian Tribe,

Plaintiff,

And

PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, a federally recognized Indian Tribe,

Plaintiff in Intervention,

v.

STATE OF CALIFORNIA; and CALIFORNIA GAMBLING CONTROL COMMISSION, an agency of the State of California,

Defendants.

AND RELATED CONSOLIDATED MATTER

2:04-cv-2265-FCD-KJM

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF STATE DEFENDANTS' MOTION FOR RECONSIDERATION OF RULING ON SIZE OF THE STATEWIDE GAMING DEVICE LICENSE POOL

Date: August 7, 2009
Time: 10:00 a.m.
Courtroom: 2

Judge The Honorable Frank C. Damrell, Jr.

Trial Date None set

Matters Consolidated December 10, 2008

Intervention Granted: January 22, 2009

INTRODUCTION

On April 22, 2009, this Court issued its rulings on the dispositive motions brought by the parties with respect to six of the seven claims alleged by the Cachil Dehe Band of Wintun Indians of the Colusa Indian Community (Colusa) in the complaints that have been referred to as *Colusa I* and *Colusa II*. Intervenor Picayune Rancheria of Chukchansi Indians (Picayune) participated in the dispositive motions only by joining in Colusa's motion for summary judgment as to the second claim for relief in *Colusa I* regarding the size of the statewide Gaming Device license pool under the 1999 Compact, to which both Colusa and Picayune are signatories.

The Court ruled in favor of Colusa and Picayune with regard to the license pool claim, finding that the extrinsic evidence offered by the parties concerning the formation of the Compact "does not aide the court in discerning the parties' intent" (Document 102, 39:3-4), and then adopting a new interpretation of the language of the Compact that was first advanced by Colusa in its memorandum of points and authorities in support of its motion for summary judgment, finding, on that basis, that the Compact provided for a pool of 42,700 licenses, rather than 32,151 as applied by the Commission since 2002, or no less than 56,000, as previously urged by Colusa and Picayune in this litigation.

Explaining its dismissal of the evidence submitted concerning the negotiation and execution of the Compact, and the intentions of the parties at the time, the Court acknowledged various assertions made by Colusa's chairman, Wayne Mitchum, and by Judge Norris, who served as Governor Davis's chief negotiator in 1999, and by Judge Shelleyanne W.L. Chang, who was Deputy Legal Affairs Secretary to Governor Davis at that time and assisted with compact negotiations. The descriptions of the final days of compact negotiations offered by the two sides differed significantly, thus, in part, leading to the Court's conclusion that the parties had no common understanding of the size of the license pool when the Compact was signed in 1999. The Court also apparently construed the evidence to indicate that the State, Colusa, and Picayune had not engaged in negotiations that would, under California law, preclude the application of the doctrine of *contra proferentum* to construe the admitted ambiguity of Compact section 4.3.2.2(a)(1) against the State.

On June 12, 2009, State Defendants received a previously unknown letter, dated September 8, 1999, that had been written by Scott Crowell, an attorney for five tribes during the 1999 Compact negotiations, to Governor Davis and Judge Norris concerning a meeting of more than 58 tribes that purportedly took place on that date for the purpose of discussing and voting upon "a pooling concept for dealing with the allocation of machines." The letter indicates that a number of tribes, including Crowell's clients, felt that the proposed license pool was inadequate. This evidence casts the extrinsic evidence so far offered by the State Defendants and Colusa in a new light by indicating that back and forth discussions between the State and tribes concerning the license pool were more extensive and inclusive than the earlier evidence would suggest, and that Judge Norris's assertion that "everybody" at the time was aware of the State's intention with regard to the size of the license pool is correct. This evidence also raises the question of why this obviously significant meeting was omitted from Colusa's description of the circumstances surrounding the negotiation and execution of the Compact, which otherwise contends that the license pool concept was first presented to the tribes on a take it or leave it basis on the evening of September 9, 1999, at which time State representatives refused to answer questions about it, leaving the assembled tribes to interpret it for themselves afterwards and under great time pressure. The Crowell letter indicates that this was not the case. To the extent that the parties' conflicting accounts of the negotiation and execution of the Compact prevented the Court from formulating a conclusion about the parties' intent as to the size of the license pool in 1999, the Crowell letter provides a basis for reconsideration. By indicating that greater negotiation of the license pool concept occurred between the State and tribes than the parties' earlier evidence indicated, the Crowell letter also calls into question the Court's reliance upon the doctrine of *contra proferentum* to construe the ambiguity of section 4.3.2.2(a)(1) of the Compact against the State.

For these reasons, and in light of the significant public interest in a correct ruling on the size of the statewide Gaming Device license pool, State Defendants request that the Court reconsider its ruling on the Second Claim for Relief in *Colusa I* and vacate its ruling to allow for limited discovery concerning Colusa and Picayune's participation in the September 8, 1999 meeting

described in the Crowell letter, and concerning Colusa and Picayune's actual knowledge of the State's intention with regard to the size of the license pool in 1999, followed by the opportunity to file new dispositive motions on the license pool claim.

FACTUAL BACKGROUND

I. COMPLIANCE WITH EASTERN DISTRICT RULE 78-230(K).

(1) The motions for summary judgment that are at issue in this motion for reconsideration were heard by Judge Frank C. Damrell, Jr., on February 20, 2009, after which the Court allowed the parties to submit supplemental briefing regarding the size of the statewide license pool under the 1999 Compact, the last of which was filed on April 8, 2009. The Court issued its ruling on the motions on April 22, 2009 (Document 102).

(2) The Court denied State Defendants' motion for summary judgment as to the Second Claim for Relief in *Colusa I* (size of statewide license pool), and granted Colusa's motion for summary judgment as to that claim, in which Picayune had joined. As of the date of this motion for reconsideration, no judgment has been entered thereon.

(3) The different facts or circumstances that are claimed to exist which were not shown upon the prior motions appear in the Crowell letter, which is described in detail elsewhere herein.

(4) As stated in the accompanying Declaration of Peter H. Kaufman in Support of State Defendants' Motion for Reconsideration of Ruling on Size of Statewide Gaming Device License Pool, the Crowell letter was unknown to State Defendants until June 12, 2009, when it was received as an exhibit offered by the Rincon Band in its litigation against the State in the Southern District. Accordingly, the Crowell letter could not be offered with regard to the dispositive motions that were decided by the Court on April 22, 2009, on the basis of oral argument and supplementary briefing that occurred prior to April 8, 2009, nor was it possible for State Defendants to conduct discovery based upon the Crowell letter prior to the hearing of the dispositive motions in this action.

II. THE COURT'S RULING.

On April 22, 2009, the Court issued its rulings on the parties' cross-motions for summary judgment. (Untitled, Document 102 (Doc. 102).) The rulings covered six of the seven claims in this consolidated action. Only the license pool claim (Second Claim for Relief in *Colusa I*), in which Picayune joined, is at issue in this motion. The Court's ruling on the license pool claim is based on the following conclusions: (1) that the circumstances under which the Compact was entered into did not aid the Court in discerning the parties' intent; (2) that there was no clear consensus between the parties regarding the maximum number of Gaming Devices allowed under the Compact at the time the agreements were executed; (3) that State Defendants presented evidence that the State's intention was to limit the aggregate number of devices to approximately 45,000, including those already in operation at the time the Compacts were signed, thus authorizing a pool of only approximately 23,000 licenses; and (4) that Colusa's Chairman understood the Compact to provide for approximately 55,000 additional licenses at the time he signed the Compact. (Doc. 102, 39:2-14.) The Court also observed that the evidence demonstrated no consistent course of conduct between the parties concerning the size of the license pool after the Compact was executed. (*Id.* at 39:15-40:14.)

On the foregoing factual basis, the Court then found that Colusa and Picayune's "alternative formulation," which was first offered by Colusa in a footnote in its memorandum of points and authorities in support of its motion for summary judgment, provided a lawful, operative, definite, and reasonable interpretation of the Compact, and that the alternative formulation "most accurately follows the language of section 4.3.2.2(a)(1), giving the words their ordinary meaning. (Doc. 102, 40:15-23.) Finally, the Court noted that:

[T]he alternative formulation is consistent with the principle that ambiguities in the Compact are to be construed against the drafter. While the parties dispute the level of negotiation and input that Colusa and Picayune had in the formation of the Compact, it is undisputed that the State's negotiation team actually drafted the language of the Compact.

(*Id.* at 43:13-18.) On this basis, the Court denied State Defendants' motion for summary judgment and granted Colusa and Picayune's motion for summary judgment as to the size of the license pool, concluding that the statewide license pool authorizes 42,700 Gaming Devices.[1] (*Id.* at 43:19-24.)

III. THE EVIDENCE SUBMITTED BY STATE DEFENDANTS IN OPPOSITION TO COLUSA AND PICAYUNE'S MOTION FOR SUMMARY JUDGMENT.

The evidence submitted by State Defendants2 included: (1) during Compact negotiations between August 23, 1999 and September 9, 1999, Judge Norris repeatedly advised the tribes and their attorneys that the statewide cap of 44,798, including devices then in operation by gaming tribes, could not be exceeded (Decl. of William A. Norris in Supp. of State Defendants' Supp. Brief re Size of Statewide License Pool Under the 1999 Compact (Norris Decl.), ¶ 15); (2) the statewide cap of 44,798 included existing devices plus an allotment of 350 devices for each tribe that then operated either no devices or fewer than 350 devices (*id.*); (3) in the closing weeks of negotiations, the statewide cap created an impasse because it limited tribes that had lawfully refrained from operating devices while permitting tribes that had been unlawfully operating larger numbers of devices to continue doing so (*id.*); (4) several days before the close of negotiations, Judge Norris realized that not all tribes would elect to operate devices, and the allotments of those tribes could be made available to tribes wishing to operate more than 350 devices through a "pooling" concept (id. ¶ 16); (5) Judge Norris presented the pooling idea to an informal gathering of tribal attorneys and representatives who advised him that the pooling idea would be acceptable (id.); (6) on the basis of the foregoing advice from the tribal attorneys and representatives, Judge Norris and Judge Chang prepared a draft of section 4.3.2.2, including section 4.3.2.2(a)(1) of the Compact for the purpose of creating a statewide license pool consisting of the overall number of devices within the cap of 44,798 that were not already in operation, from which tribes wishing to operate more than 350 devices could obtain licenses to do so until the pool of licenses had been

[1] Colusa and Picayune's "alternative formulation."

[2] The evidence described above is limited to matters implicated by the Crowell letter.

consumed (id.); (7) on September 9, 1999, Judges Norris and Chang presented their draft of section 4.3.2.2 to a group of tribal attorneys who had played key roles during the negotiating process for their comments; later on September 9, 1999, Judges Norris and Chang were approached by several tribal representatives who requested a modification of a portion of section 4.3.2.2, which was then made—no request was made for a modification of section 4.3.2.2(a)(1); Judge Norris has no doubt whatsoever that it was widely and commonly understood amongst the tribal participants at that time that the Compact would, in the aggregate, authorize no more than 44,798 Gaming Devices statewide, including existing devices (id. ¶ 17); and (8) later on September 9, 1999, Judge Norris presented the entire draft Compact to the assembled representatives of the California Indian tribes for approval; no questions were asked concerning the number of Gaming Devices that would be authorized under the Compact or concerning the size of the statewide license pool established by section 4.3.2.2(a)(1) (id. ¶ 18).

IV. EVIDENCE SUBMITTED BY COLUSA AND PICAYUNE IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

The evidence submitted by Colusa and Picayune[3] included: (1) in the last negotiating sessions, held throughout the days of September 8 and 9, 1999, and continuing into the early morning hours of September 10, the State presented its definitive proposal to create a system for issuing licenses that would allow tribes to operate more than a base number of Gaming Devices, impose a statewide limit on how many Gaming Devices would be authorized and prescribe how to calculate the authorized number of Gaming Device licenses (Decl. of Wayne R. Mitchum in Supp. of Plaintiff's Mot. for Sum. J. and Contingent Mot. to Sever Sixth and Seventh Claims (Mitchum Decl.) ¶ 12); (2) on the evening of September 9, 1999, the State's compact negotiators met at the Sacramento Convention Center with representatives of almost all of the tribes that had participated in the summer's negotiations (including Chairman Mitchum); in that meeting, the State's negotiating team presented what it described as the State's final Compact proposal, including, for the first time, its proposed formula for determining the total number of Gaming

[3] The evidence described above is limited to matters implicated by the Crowell letter.

Device licenses to be permitted statewide (id. ¶ 13); (3) section 4.3.2.2(a)(1) of the Compact was drafted without any involvement or input by Colusa's elected representatives or legal counsel, and Colusa had no chance to negotiate separately about the content of that provision (id. ¶ 15); (4) when the State presented its draft of what would become section 4.3.2.2(a) of the Compact, Chairman Mitchum heard tribal leaders and other representatives ask the State's negotiators to explain its meaning, and he heard the State's negotiator's refuse to explain it; therefore, Chairman Mitchum and the other assembled tribal leaders and attorneys had to try to figure out what the State's language meant by looking at the language itself (id. ¶ 16); after the State's negotiators left the room, Chairman Mitchum participated in an extensive discussion with the other tribal leaders and attorneys about how many Gaming Device licenses, and therefore the total number of Gaming Devices statewide, the State's proposed Compact language would actually allow; based upon a combination of those discussions, the proposed compact language, and the Governor's stated objectives to limit the uncontrolled expansion of gaming in California while providing meaningful revenues for both gaming and non-gaming tribes, Chairman Mitchum understood that the model Compact being offered to Colusa would authorize the issuance of approximately 56,000 Gaming Device licenses in addition to authorizing each tribe to operate the greater of 350 Gaming Devices or the number of Gaming Devices each tribe was operating on September 1, 1999 (id. ¶17).

V. THE CROWELL LETTER.

The Crowell letter, attached as Exhibit A to the accompanying Declaration of Peter H. Kaufman (Kaufman Declaration), is dated September 8, 1999, addressed to Governor Davis and to Bill Norris, and states, in part: (1) the five tribes represented by the Crowell Law Offices do not support the proposal floated by CNIGA[4] to engage in a pooling concept for dealing with the allocation of machines; (2) it is unfair for your office [Governor Davis] to encourage the development of a scheme that is sure to pit tribe against tribe; (3) the vote taken [at that

[4] California Nations Indian Gaming Association, an umbrella group to which most tribes interested in gaming belonged, including those that also belonged to specific negotiating groups such as the UTCSC.

morning's CNIGA meeting] was 30 to 28, with many other tribes abstaining, which supports the conclusion that the pooling scheme pits tribe versus tribe; and (4) if any limits are imposed on tribes, they must ensure parity for any one tribe to expand to the size of any other tribe's facility [and] it is unjust to deprive one tribe of the opportunity afforded to another tribe.

The Crowell letter was obtained by State Defendants on June 12, 2009, in the manner described in the Kaufman Declaration.

ARGUMENT

As State Defendants do not know whether the Court will hear this motion for reconsideration before or after the Court enters final judgment on the license pool and tier ranking claims, State Defendants bring this motion under Federal Rule of Civil Procedure (FRCP) 54(b) with respect to the Court's present interlocutory order granting partial summary judgment, and also under FRCP 60(b)(2) with regard to judgment in the event judgment is entered before this motion is heard.

In addition to providing that the Court may, under appropriate circumstances, enter final judgment as to one or more, but fewer than all claims or parties, FRCP 54(b) provides that any order or decision that adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before entry of a judgment adjudicating all the claims and all the parties rights and liabilities. As of the date this motion is filed, the Court has not entered partial final judgment with respect to any claim or party in this action. Under FRCP 54(b), the Court's decisions on the license pool and tier ranking claims may be revised at any time prior to the entry of final judgment, and that power is committed to the discretion of the district court. *American Canoe Assn. v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003). Motions for reconsideration of interlocutory orders are not subject to the strict standards applicable to motions for reconsideration of a final judgment. (*Id.* at 514.) Pursuant to Eastern District Rule 78-230, State Defendants bring this motion for reconsideration on the basis of the discovery of new evidence material to the grounds upon which the Court based its ruling on the size of the statewide license pool. The new evidence

was unknown to State Defendants until June 15, 2009,[5] and could not have been discovered through the exercise of reasonable diligence prior to that time because the occurrence of the CNIGA meeting described in the Crowell letter was entirely unknown to State Defendants.

State Defendants also bring this motion for reconsideration under FRCP 60(b)(2), which provides for relief from final judgment, on the ground that State Defendants obtained evidence on June 12, 2009, that could not have been obtained previously with reasonable diligence, and that is, for the reasons described elsewhere herein, material to the basis of the Court's ruling on the size of the statewide Gaming Device license pool. This motion for reconsideration is timely under FRCP 60(b) because it has been filed within one week of the discovery of the new evidence, and, if the Court enters final judgment between the time this motion is filed and when it is heard, no more than one year after the entry of the judgment to which it pertains. Fed. R. Civ. Proc. 60(c)(1).

The Court's decision on Colusa's motion for summary judgment as to the Second Claim for Relief in *Colusa I*, pertaining to the size of the statewide Gaming Device license pool under the 1999 Compact, and in which Picayune joined, was based upon the Court's interpretation of the language of the Compact, which the Court undertook after concluding that the extrinsic evidence submitted by the parties had not established the parties' intent at the time the Compact was signed in 1999, and did not establish that the parties had a common understanding of the size of the statewide license pool at that time. The Court also applied the doctrine of *contra proferentum* to construe the admitted ambiguity of section 4.3.2.2(a)(1) of the Compact against the State, which had admittedly drafted the provision. In order for the Court to construe the ambiguity of section 4.3.2.2(a)(1) against the State, the Court was required to find that the provision had not been negotiated between the parties, but instead had been imposed by the State on Colusa and Picayune.[6] Although the Court acknowledged disputed evidence concerning the extent of

[5] Although received by electronic service on June 12, 2009, State Defendants did not become aware of the contents of the Crowell letter until June 15, 2009. (Kaufman Declaration, ¶¶ 3-5.)

[6] (*See* State Defendants' Supplemental Brief re Size of Statewide Gaming Device License Pool Under 1999 Compact, 1:11-5:3.)

negotiations between the State and Colusa and Picayune concerning section 4.3.2.2(a)(1), the Court nonetheless construed the ambiguity of the section against the State, apparently concluding that even if true, the evidence submitted by State Defendants concerning the negotiation of section 4.3.2.2(a)(1) was insufficient to establish that the section had been negotiated between the parties rather than simply imposed by the State.

The Crowell letter establishes that the negotiation of the "pooling" concept embodied in section 4.3.2.2(a)(1) was much more extensive than did the evidence previously available to and submitted by State Defendants. Rather than having been the subject of a small meeting between Judges Norris and Chang with three tribal attorneys on September 9, 1999, only hours before the draft Compact was presented to the assembled tribes, the Crowell letter indicates that the pooling concept, which had been developed by Judge Norris in the closing days of negotiation, had obviously been communicated to the tribes generally by no later than September 8, 1999, and that a meeting had been held on the morning of September 8, 1999 by CNIGA, an umbrella group consisting of nearly all California tribes that were interested in gaming, for the purpose of discussing and voting on the concept. The meeting with the three tribal attorneys on September 9, 1999 that was described by Judge Norris, occurred the day after the CNIGA meeting, making it likely that concerns raised at the CNIGA meeting were communicated to Judges Norris and Chang on September 9th, and that substantial discussion about the pooling concept had occurred among the tribes before Judges Norris and Chang were asked to make certain changes to Compact section 4.3.2.2, though none to section 4.3.2.2(a)(1).

By clearly indicating that many tribes, including Crowell's clients, were unhappy with the pooling concept and believed it would "pit tribe against tribe," the Crowell letter strongly suggests that the license pool associated with the pooling concept discussed and voted on at the CNIGA meeting on September 8, 1999, was the pool of 23,000 licenses that Judge Norris had repeatedly communicated to the tribes during the closing days of negotiation, and not the larger 56,000 number purportedly understood by Colusa's Chairman when he signed Colusa's letter of intent on September 9, 1999. It is relevant to note that no evidence is before the Court that any

tribal representative ever asked Judges Norris and Chang to enlarge the size of the license pool during the final days of negotiation.

The Crowell letter also indicates that at least 58 tribes were represented at the CNIGA meeting on September 8, 1999. While the Court may have concluded that neither Colusa nor Picayune were represented at the meeting between Judges Norris and Chang and the *three* tribal attorneys on September 9, 1999, it requires a suspension of disbelief to assume that neither Colusa nor Picayune were represented at the vastly larger CNIGA meeting, or, at an absolute minimum, were aware of its subject matter and outcome.

Taken together with the evidence previously submitted by State Defendants concerning the understandings of the parties at the time the Compact was signed, and the degree of negotiation that occurred concerning section 4.3.2.2(a)(1), the Crowell letter makes it very likely that Colusa and Picayune were well aware, on September 9, 1999, that the State understood and intended that section 4.3.2.2(a)(1) created a pool of approximately 23,000 licenses, rather than 56,000 as Chairman Mitchum has contended.

CONCLUSION

The expansion of class III gaming that will be occasioned by the application of the Court's present ruling on the size of the statewide license pool is of public interest and concern because it will impose a variety of burdens upon the communities adjacent to Colusa and Picayune's gaming facilities. For this reason, it is important, if at all possible, to determine the intentions of the parties at the time the Compact was signed in 1999. The Crowell letter strongly suggests that the extrinsic evidence upon which the Court relied in reaching its conclusion that the parties had no common understanding of, or intent with regard to, the size of the license pool in 1999, which, along with construing the ambiguity of section 4.3.2.2(a)(1) against the State, led the Court to base its ruling upon a de novo reading of the language of the Compact rather than to effectuate the intentions of the parties, was incomplete, inaccurate, and failed to convey the extent to which the parties in fact *did* have a common understanding of the license pool that was intended in 1999.

For this reason, State Defendants request that the Court vacate its ruling on the size of the statewide license pool and reopen the issue for limited discovery in order to determine the full extent of Colusa and Picayune's awareness of the State's proposal and intentions with regard to the size of the license pool on September 9, 1999, and to determine the actual extent to which Compact section 4.3.2.2(a)(1) was a negotiated provision of the Compact and therefore not subject to the doctrine of *contra proferentum*, rather than going forward with a Compact interpretation that the evidence shows none of the parties contemplated when the Compact was signed.

Dated: June 19, 2009

Respectfully submitted,

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