09-16942

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY, a federally recognized Indian Tribe, Plaintiff-Appellee, **v.** STATE OF CALIFORNIA; CALIFORNIA GAMBLING CONTROL COMMISSION, an agency of the State of California; ARNOLD SCHWARZENEGGER, Governor of the State of California, Defendants-Appellants, PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, a federally recognized Indian Tribe, Plaintiff- Intervenor-Appellee.	

On Appeal from the United States District Court
for the District of California

No. 04-2265 FCD KJM
Honorable Frank C. Damrell, Jr., Judge

APPELLANTS' OPENING BRIEF

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INTRODUCTION

In 1999, the Cachil Dehe Band of Wintun Indians of the Colusa Indian Community (Colusa), and the Picayune Rancheria of Chukchansi Indians (Picayune), along with 55 other California Indian tribes, executed substantively identical class III gaming compacts with the State (1999 Compacts or Compacts) that became effective after the passage of Proposition 1A in 2000, and consequent enactment of article IV, section 19(f) of the California Constitution, which authorized the governor to negotiate and enter into compacts with California tribes permitting certain forms of gaming, including slot machines,[1] on Indian lands subject to the Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166-1168, 25 U.S.C. §§ 2701-2721 (IGRA). Each 1999 Compact contains an identical term, section 4.3.2.2(a)(1) (E.R. 406, 466) that was intended by Governor Gray Davis to limit the total number of slot machines that could be operated statewide under the particular terms of the 1999 Compacts (E.R. 182-183). Section 4.3.2.2(a)(1) was intended to authorize the operation of all existing tribal slot machines, to authorize non-gaming compact tribes to operate up to 350 slot machines, and to provide a

[1] Slot machines are referred to as "Gaming Devices" in the compacts. (E.R. 402, 462.)

limited pool of licenses that tribes could obtain in order to operate slot machines in addition to their respective initial entitlements.[2]

This appeal arises from the district court's erroneous summary adjudication of the claim of Colusa and Picayune (Plaintiff Tribes) that the number of licenses in the pool established by section 4.3.2.2(a)(1) was greater than that calculated by defendant California Gambling Control Commission (Commission),[3] and that because of the greater size of the pool, the Plaintiff Tribes were entitled to the opportunity to secure additional licenses to operate slot machines. The district court erroneously determined that the pool consisted of 42,700 licenses by impermissibly resolving the factual conflicts in the evidence before it on summary

[2] Each 1999 Compact Tribe is authorized to operate the greater of the number of machines it operated on September 1, 1999, or 350 machines, without acquiring licenses from the pool.

[3] Although challenged by the Plaintiff Tribes in their pleadings, the correctness of the Commission's calculation of 32,151 licenses in the license pool is not in issue in this appeal from summary judgment. The Commission is the state agency authorized by the 1999 Compacts and state law to issue Gaming Device licenses from the pool. (E.R. 7, 12, 14, 60-62.) It came into existence some years after the Compacts were executed. The Commission's calculation of the size of the license pool, which occurred on June 19, 2002, resulted from disagreements that arose after the 1999 Compacts were executed concerning the number of licenses in the pool, and occurred after the tribes, through a private entity, had caused to be issued 5,000 more licenses than Governor Davis understood the 1999 Compacts to authorize. (E.R. 182-184, 214-218, 388.)

judgment concerning the Parties'[4] intent at the time of execution and whether there had been arms-length negotiation against the State, drawing inferences from that evidence against the State. This appeal also challenges the district court's unprecedented and unauthorized extension of injunctive relief in favor of forty[5] 1999 Compact Tribes that are not parties to this action by ordering the Commission to open the "draw" for licenses from the newly enlarged pool awarded to Colusa and Picayune to all eligible Compact tribes.[6] The Parties' dispute over the size of the license pool under the Plaintiff Tribes' Compacts came before the district court on cross-motions for summary judgment.[7] The Parties, and the district court,

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[4] All references to "the Parties" are to the parties to this litigation.

[5] Sixty-one tribes eventually signed a 1999 Compact. Twelve of these tribes have subsequently entered into amended compacts and no longer operate under a 1999 Compact. (*See* Motion to Take Judicial Notice (MJN) filed concurrently herewith.) Of the remaining forty-nine tribes, seven were already authorized to operate 2000 slot machines as of the date of the license draw ordered by the district court. Accordingly the license draw ordered by the district court was open to Colusa, Picayune, and forty non-party tribes.

[6] An "eligible" Compact tribe is a tribe operating fewer than 2000 slot machines (the maximum allowable for any tribe under a 1999 Compact).

[7] The district court required the Parties to tender all "legal issues" to the court in dispositive motions or risk issue preclusion at trial. (E.R. 103-104.) The occurrence of cross-motions therefore does not denote a conviction on the part of all parties that the size of the license pool was amenable to summary adjudication. On the contrary, while the State Defendants presented evidence of the methodology the Commission utilized in its calculation of the size of the license pool, their motion for partial summary judgment did not request judicial

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agreed that section 4.3.2.2(a)(1) was ambiguous. (E.R. 70, 199-201.) The ambiguity arises from the arithmetic formula used to specify the size of the pool, the terms of which are susceptible to multiple interpretations (*see infra*, at 34.) The Parties' cross-motions presented the district court with directly conflicting evidence concerning the understandings and intentions of Colusa and the State as to the meaning of section 4.3.2.2(a)(1) when the Compacts were signed. Picayune, which joined in Colusa's motion, offered no evidence at all of what its understanding was in 1999.[8] Faced with conflicting evidence, under the rules applicable to summary judgment, the district court was required to take the evidence of the State Defendants—as the collective non-moving party—as true, and to extend all reasonable favorable inferences from it in opposition to the motion. The State Defendants' evidence clearly established the existence of genuine issues of fact as to whether the Parties shared a common understanding of the meaning of section 4.3.2.2(a)(1) in 1999.

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confirmation of the Commission's calculation, but rather contended that the Plaintiff Tribes could not prevail upon their claim of a larger pool, and opposed summary judgment on that claim based upon the existence of material factual issues concerning the Parties' intent and understanding with respect to the pool's size.

[8] Picayune was permitted to intervene in this action after the other parties' cross-motions had been filed and were pending for hearing—no discovery was exchanged with Picayune.

However, instead of denying the Plaintiff Tribes' motion on the ground that a triable issue of fact existed as to whether the Parties' had a mutual understanding of the size of the license pool provided by section 4.3.2.2(a)(1) when the Compacts were executed, the district court made the factual finding that there had been no meeting of the minds in 1999, and then went on to select one of the numbers proffered by the Plaintiff Tribes as the correct size of the pool. In so doing, the court in effect tried the case on the Plaintiff Tribes' motion, thus improperly denying the State Defendants the opportunity at trial to cross-examine, to impeach the credibility of Colusa's evidence concerning its understanding of the size of the license pool when it entered the Compact, to inquire into what Picayune's contemporaneous understanding of the size of the pool might have been and to demonstrate that negotiation had in fact occurred between the State and the Plaintiff Tribes concerning this Compact provision. In so doing, the court construed the language of section 4.3.2.2(a)(1) without regard to the Parties' intentions, and adopted a new interpretation not urged by any party until January of 2009—more than nine years after the Compacts were signed—clearly construing the evidence against, rather than in favor of the State Defendants, as the collective non-moving party, holding the ambiguity of section 4.3.2.2(a)(1) against the State, as the ostensible drafter of an ambiguous contractual provision.

In addition, after erroneously determining the size of the license pool, the district court issued injunctive relief requiring the Commission to conduct a draw[9] open not only to Colusa and Picayune, but to all eligible[10] 1999 Compact Tribes, despite the fact that the other 1999 Compact Tribes are not parties to this action and were never certified as a class bound by the court's judgment, and without making any finding that it was necessary for the court to extend relief to the non-party tribes in order to provide full relief to Colusa and Picayune. This extension of injunctive relief to non-parties directly conflicts with existing Ninth Circuit and other authority concerning the scope of relief a district court may grant, and is neither authorized, nor required, by this Court's decision in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. State of California*, 547 F.3d 962 (9th Cir. 2008) (*Colusa I*), under which this action was permitted to go forward without joining the other 1999 Compact Tribes. Unless reversed, this extension of relief to non-party tribes will provide to all eligible 1999 Compact Tribes, including three tribes[11] seeking this very relief in separately pending

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[9] A "draw" is the procedure specified in section 4.3.2.2(a)(3) of the Compacts for the issuance of licenses from the statewide pool.

[10] *See* n.6, *supra.*

[11] *Tuolumne Band of Me-Wuk Indians v. State of California, et al.* (No. 2:09-cv-02263-JAM-EFB) (E.D. Cal.); *Rincon Band of Luiseno Mission Indians v. Arnold Schwarzenegger, et al.* (No. 04CV1151 WMc) (S.D. Cal.); *San Pasqual*

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lawsuits, two of which are filed in the Southern District of California, and in which the State is opposing summary judgment on the basis of evidentiary records that are different than the record in this case. The district court's extension of relief to non-party tribes deprives the State of its right to litigate these other cases on their particular merits, and improperly extends relief to the non-party tribes, both those engaged in and not engaged in litigation, on the basis of facts specific to Colusa and Picayune.

The district court's August 19, 2009 Judgment in a Civil Case and untitled memorandum of decision and order (collectively, the August 19, 2009 Judgment) as to the size of the license pool should be reversed and remanded for further proceedings to allow for resolution, after full discovery and trial, of the factual disputes established by the evidence presented by the Parties in support and opposition to the cross motions for summary judgment. In addition, the district court's judgment should be reversed to the extent that it grants injunctive relief to non-party tribes, with a finding by this Court that any licenses issued to a non-party tribe on the basis of the court's order in this matter are null and void.

(…continued)
Band of Mission Indians v. State of California, et al. (No. 06CV0988 LAB (AJB)) (S.D. Cal.). (*See* MJN.)

STATEMENT OF JURISDICTION

In *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997), this Court ruled that federal courts have jurisdiction over a suit seeking to enforce the terms of a tribal-state gaming compact pursuant to 28 U.S.C. §§ 1331 and 1362. The district court therefore had jurisdiction over Colusa's second claim for relief, and Picayune's joinder therein, in which Colusa and Picayune seek resolution of a dispute regarding the size of the statewide license pool under section 4.3.2.2(a)(1) of their 1999 Compacts. This Court has jurisdiction over the present appeal pursuant to 28 U.S.C. § 1292(a)(1) because the State Defendants filed this appeal on September 2, 2009, within 30 days of the district court's entry of judgment on August 19, 2009, which judgment is a final judgment as to Colusa's and Picayune's license pool claim.

ISSUES PRESENTED

1. In construing an ambiguous contractual term upon which the evidence of the parties on cross motions for summary judgment is in conflict as to its meaning, and as to the existence of a common understanding of the term at the time of execution, is the district court at liberty to find that there was no meeting of the minds of the parties on that term, or is the district court required to treat the evidence submitted by the non-moving party on each motion as establishing a genuine issue of material fact requiring denial of summary judgment?

2. In ruling upon a motion for summary judgment, if the district court finds, on the basis of conflicting evidence of the parties' understanding of a material contractual term, that no meeting of the minds was reached as to that term at the time of execution, may the court, without first ascertaining whether each party would have entered into the agreement in the absence of such a meeting of the minds, impose on the term an interpretation different from what the evidence, construed in favor of the party opposing the supplied term, demonstrates the parties understood the term to mean?

3. In an action against State Defendants by two tribes that were parties to the 1999 Compact, where no class consisting of any of the other 1999 Compact Tribes was certified under Federal Rule of Civil Procedure 23 (Rule 23), and the two Plaintiff Tribes lacked standing to assert any claim on behalf of the non-party tribes, and where full relief to the Plaintiff Tribes did not depend on extension of relief to the non-parties, did the district court err in requiring the State Defendants to open a slot machine license draw to "all eligible Compact tribes," including, but not limited to, tribes currently engaged in separate litigation against the State, seeking the same relief upon different facts?

STANDARD OF REVIEW

The question whether the district court erred in granting Colusa's and Picayune's motion for summary judgment as to the size of the license pool is

reviewed de novo by this Court. *Conn v. City of Reno*, 572 F.3d 1047, 1054 (9th Cir. 2009) (citing *McDonald V. Sun Oil Co.*, 548 F.3d 774, 778 (9th Cir. 2008)). The question whether the district court erred in extending relief to the non-party 1999 Compact tribes is likewise a question of law and is thus also reviewed de novo by this Court. *Diamond v. City of Taft*, 215 F.3d 1052, 1055 (9th Cir. 2000).

STATEMENT OF THE CASE

On October 25, 2004, Colusa filed this action, asserting five claims for relief. (E.R. 360-379.) In its second claim for relief, Colusa sought a declaration that the license pool consists of "more than 62,000 Gaming Device licenses," and "enjoining the State . . . from declining immediately to issue 377 Gaming Device licenses to [Colusa]." (E.R. 373, 377.)

On May 16, 2006, the district court, on the State Defendants' motion, dismissed Colusa's complaint on the ground that all other 1999 Compact Tribes were necessary and indispensible parties to Colusa's action in that insofar as the second claim for relief was concerned, issuance of the relief sought would impair the opportunity of the absent tribes to acquire those licenses for themselves. (E.R. 117-118.)

On August 8, 2008, this Court reversed the district court's ruling, holding that the 1999 Compact Tribes that were not parties to this action had no legally protected interest in the subject matter of Colusa's complaint for declaratory and

injunctive relief concerning the interpretation of its Compact, and thus were not required parties within the meaning of Federal Rule of Civil Procedure 19, and Colusa's action could proceed without them. The State Defendants sought reconsideration, and this Court issued its decision, amended in minor respects, on October 24, 2008. *Colusa I*, 547 F.3d 962. This case was then remanded to the district court for further proceedings, where it was consolidated with a second action that Colusa had filed in 2007 during the pendency of its appeal of the dismissal of this case. (E.R. 97.) The second Colusa case contained three claims that are not at issue in this appeal. (E.R. 349-359.)

On January 22, 2009, the district court granted Picayune's motion for leave to intervene as a plaintiff in this action. (E.R. 93-96.) Colusa's, and the State Defendants' respective dispositive motions had been filed on January 20, 2009, and were then pending. (E.R. 238.) Picayune did not file its own dispositive motion, but instead joined in Colusa's motion for summary judgment as to Colusa's license pool claim. (E.R. 235-236.) Oral argument was heard on February 20, 2009, after which supplemental briefing was submitted by the parties concerning the size of the statewide license pool. (E.R. 185, 210-211.)

The district court issued its untitled memorandum and order (April 22, 2009 Order), ruling on the Parties' dispositive motions, holding in favor of Colusa and Picayune on their motion for summary judgment as to the size of the license pool,

concluding that the pool consisted of 42,700 licenses. The court also held in favor of Colusa on its claim concerning the Commission's method of assigning tribes to priority tiers for license draws (which is not at issue in this appeal); and held in favor of the State Defendants as to four of Colusa's other claims (also not at issue), leaving pending a separate claim by Colusa alleging failure to negotiate in good faith upon a requested compact amendment. (E.R. 33-92.)

Colusa and Picayune then filed motions for entry of partial final judgment as to the size of the license pool and method of assigning priority tiers for license draws. (E.R. 161-165, 166-173.) The State Defendants asserted in opposition that the judgment requested by Colusa was overbroad in that it extended relief to the non-party tribes. (E.R. 156-158.) The State Defendants also opposed entry of judgment only as to the license pool and tier ranking claims and urged the district court to enter judgment as to all six adjudicated claims, if it entered judgment as to any. (E.R. 159-160.)

While the motions for entry of judgment were pending, the State Defendants sought reconsideration of the district court's ruling on the Plaintiff Tribes' license pool claim, requesting the court to vacate its ruling and allow discovery limited to the knowledge of the Parties with regard to the State's intended meaning of Compact section 4.3.2.2(a)(1) at the time the 1999 Compacts were executed. (E.R.

129-141.) On August 11, 2009, the court, proceeding without oral argument, denied the State Defendants' motion for reconsideration. (E.R. 15-32.)

The district court, again proceeding without oral argument, issued the August 19, 2009 Judgment on all six claims adjudicated by the court's April 22, 2009 Order. (E.R. 3-14.) The August 19, 2009 Judgment incorporated the court's April 22, 2009 Order by reference, and ordered State Defendants to "schedule and conduct a draw of all available gaming device licenses, in accordance with the court's April 22 Order, and in which all eligible Compact Tribes may participate." (E.R. 13)

On September 2, 2009, the State Defendants filed a Notice of Appeal from the district court's judgment as to Colusa's and Picayune's license pool claim, which declared the size of the pool to be 42,700 licenses, and required the Commission to open the mandated license draw to all non-party tribes eligible for licenses under the 1999 Compact. (E.R. 1-2.)

Following unsuccessful motions for stay pending appeal in both the district court and this Court, on October 5, 2009, the Commission conducted a license draw pursuant to the August 19, 2009 Judgment, at which it issued, in the aggregate, 1878 licenses to Colusa, Picayune, and eight "eligible Compact Tribes" that are not parties to this action. (*See* MJN.)

STATEMENT OF FACTS

1. Beginning in April of 1999, California Governor Gray Davis, through his Special Counsel, Retired Judge William A. Norris, began to negotiate the terms of a tribal-state class III gaming compact with representatives of a large number of federally recognized California Indian tribes. (E.R. 179-180, 325-326.) Negotiations between the Governor's representatives and representatives of California tribes continued from April through September of 1999. (E.R. 179-181.) During the compact negotiations in August and September of 1999, Governor Davis' negotiators made themselves available to meet with every tribal representative who wanted to participate in the ongoing negotiations, and met with all the participating tribes as a group. (E.R. 180.)

2. Colusa's Chairman, Wayne R. Mitchum, was Colusa's representative in negotiations concerning the terms of what would become Colusa's 1999 Compact. (E.R. 325.) As such, Chairman Mitchum attended an April 1999 meeting in Los Angeles, at which Judge Norris was introduced as the head of Governor Davis' negotiating team. (*Id.*.) During the summer of 1999, several negotiating sessions were held between Governor Davis' negotiators and various groups of tribes. (E.R. 326.) The largest group consisted of about sixty tribes, including Colusa, and became known as the United Tribes Compact Steering

Committee (UTCSC).[12] (E.R. 175-176.) Colusa's general legal counsel, George Forman, was one of the UTCSC's principal negotiators. (E.R. 326.) Other negotiating sessions between Governor Davis' negotiators and the UTCSC were held, and Chairman Mitchum attended each of them. (*Id.*)

3. 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, Governor Davis' negotiators presented a definitive proposal to impose a statewide limit on how many slot machine licenses would be authorized and prescribe how to calculate the authorized number. (E.R. 327.)

4. The State Defendants' evidence showed that during the nearly constant meetings of various sizes with various tribal representatives that occurred from August 23, 1999, to September 9, 1999, Judge Norris repeatedly advised the tribes and their attorneys that a statewide cap of 44,798 on the number of slot machines could not be exceeded. (E.R. 182.)

5. The State Defendants' evidence further showed that in the closing weeks of negotiations, an apparent impasse developed concerning how to implement the statewide cap without effectively rewarding tribes that already, and unlawfully, operated large numbers of slot machines, while penalizing those that

[12] Colusa's evidence states the size of the UTCSC as either sixty or eighty tribes. (E.R. 326, 179.)

had lawfully refrained from doing so (E.R. 182); that several days before the conclusion of negotiations it occurred to Judge Norris to propose a "pooling" concept which would allow the entitlements of tribes that would likely not elect to operate slot machines to be drawn upon by tribes that wished to operate more than their basic entitlement of 350 machines without increasing the statewide cap of 44,798 (E.R. 183); that Judge Norris presented this idea to a gathering of tribal attorneys and representatives, who found the concept acceptable (*id.*); and that Judge Norris and fellow negotiator Deputy Legal Affairs Secretary (now Judge) Shelleyanne W.L. Chang (Judge Chang) therefore prepared a draft of section 4.3.2.2, including section 4.3.2.2(a)(1) which created a statewide license pool (E.R. 255). The evidence also showed that on September 9, 1999, Judge Norris and Judge Chang presented the draft to a group of tribal attorneys who had played key roles in the negotiating process, for their comments (*id.*); that later on the same day, several tribal representatives requested a modification of section 4.3.2.2, which Governor Davis' negotiators then made (*id.*); that no request was made for any modification of section 4.3.2.2(a)(1) (*id.*); and that Judge Norris was certain that, at that time, it was widely and commonly understood amongst the tribal participants in the negotiations that the compact would, in the aggregate, authorize no more than 44,798 slot machines statewide, including existing machines (*id.*).

6. Later on September 9, 1999, Judge Norris presented the entire draft compact to the assembled representatives of the California Indian tribes for approval. (E.R. 183.) No questions were asked concerning the number of slot machines that would be authorized under the compact. (*Id.*) No questions were asked concerning the size of the license pool established by section 4.3.2.2(a)(1). (*Id.*) At no time did Governor Davis' negotiators refuse to answer questions concerning the meaning of section 4.3.2.2(a)(1). (E.R. 183-184.)

7. In marked contrast to the State Defendants' evidence, Colusa's evidence, consisting of a declaration by its Chairman, Wayne Mitchum, indicated that Governor Davis' negotiators met with the assembled representatives of the tribes on the evening of September 9, 1999 (E.R. 328); that Chairman Mitchum attended on Colusa's behalf (*id.*); that at this meeting, the Davis negotiators presented, for the first time, their proposed formula for determining the total number of slot machine licenses to be permitted statewide—section 4.3.2.2(a)(1) of Colusa's Compact (*id.*); that this provision was drafted without any involvement or input by Colusa's representatives or legal counsel, and that Colusa had no chance to negotiate separately about the content of that provision (*id.*). Colusa's evidence also indicated that when Governor Davis' negotiators presented the draft of what would become section 4.3.2.2(a)(1) of the 1999 Compacts, Chairman Mitchum heard tribal leaders and other representatives ask them to explain its meaning, and

Chairman Mitchum heard the negotiators refuse to explain it (*id.*); that, therefore, Chairman Mitchum and the other assembled tribal leaders and attorneys had to try to figure out what the proposed language meant by reading it themselves (*id.*); that Chairman Mitchum then participated in an extensive discussion with other tribal leaders and attorneys concerning how many slot machine licenses the proposed compact language would actually allow (E.R. 329); and that based on these discussions, Chairman Mitchum understood that the proposed compact would authorize the issuance of approximately 56,000 slot machine licenses (*id.*).

8. On September 9, 1999, the State received approximately fifty-seven signed letters of intent by various tribes to enter into the Compacts. (E.R. 181.)

9. In the early hours of September 10, 1999, Chairman Mitchum signed Colusa's letter of intent to enter into its 1999 Compact. (E.R. 328.)

10. On or about September 10, 1999, the Governor's Press Office prepared a press release on the occasion of the signing of the Compact. (E.R. 256.) Soon thereafter, the Governor's Office received many inquiries from the news media concerning the number of slot machines that would, in the aggregate, be permitted in California under the terms of the Compacts. (*Id.*) At the request of the Press Office, Judge Chang prepared an information sheet entitled "Total Possible Number of Slot Machines Statewide Under the Model Tribal-State Gaming Compact Negotiated By Governor Davis and California Indian Tribes."

(*Id.*) This information sheet, which was made available to the media, described the intent of section 4.3.2.2 of the Compact to authorize 44,448 slot machines statewide, including both slot machines already in operation, and 23,450 additional machines that could be put into operation by tribes by their acquisition of slot machine licenses from a pool consisting of that number of licenses. (E.R. 256-257.) This information sheet accurately describes the logic and intended meaning of section 4.3.2.2(a)(1) of the Compact as understood by the Governor's Office when the Compact was executed in 1999. (E.R. 257.) After the press release described above was issued, to the best of Judge Chang's knowledge, no complaints or comments from any California Indian tribe were received concerning the accuracy of the information contained in the press release, including the accuracy of its statement of the maximum aggregate number of slot machines that would be permitted under the Compact. (*Id.*) The absence of indications in the media of disagreement by tribes with Governor Davis' press release was confirmed by research conducted in 2009. (E.R. 259-261.)

11. After the 1999 Compacts were executed, the 1999 Compact Tribes engaged the Sides Accountancy Corporation to issue slot machine licenses. (E.R. 214.) Up to the time the Commission assumed the administration of the statewide license pool in 2001, the Sides Accountancy Corporation issued a total of 29,398 licenses. (E.R. 388.)

12. After assuming the administration of the license pool in 2001, the Commission evaluated the contentions that had by that time been made by various parties concerning the size of the pool and calculated that section 4.3.2.2(a)(1) of the 1999 Compacts authorized a license pool consisting of 32,151 licenses, which was sufficient to accommodate all of the licenses that had previously been issued by the Sides Accountancy Corporation, acting as a common agent for all Compact Tribes, prior to the Commission's assumption of its duties under the terms of the 1999 Compacts. (E.R. 388-395.) Under this calculation, after the "Sides" licenses were exchanged for Commission-issued licenses, 2753 licenses remained available to be drawn from the pool. (*Id.*)

SUMMARY OF ARGUMENT

The district court erred in granting summary judgment in favor of Colusa and Picayune on the size of the license pool. The district court erroneously held that no meeting of the minds had occurred between the Parties in 1999 as to the size of the license pool under section 4.3.2.2(a)(1). The district court made this determination after evaluating extrinsic evidence without extending required evidentiary presumptions in favor of the non-moving party. The district court should have construed the State Defendants' evidence as establishing, in opposition to summary judgment, that Governor Davis' negotiators had made it clear to the tribes that section 4.3.2.2(a)(1) was intended to authorize 44,798 slot

machines statewide, including both those machines already in operation and those to be licensed from the pool, and that the tribes expressed no disagreement with this interpretation in 1999. Although Colusa's evidence disclosed that its Chairman had understood the section to authorize 56,000 slot machines in addition to those already existing, the district court was required to give precedence to the State Defendants' evidence on this disputed point, and could not grant summary judgment to Colusa either directly or indirectly on the basis of Chairman Mitchum's statement. The district court erred by holding, on the basis of Chairman Mitchum's statement that no meeting of the minds had occurred in 1999. This determination led directly to the court's abandonment of any further consideration of the Parties' intentions and understandings in 1999, and to its analysis of the admittedly ambiguous language of section 4.3.2.2(a)(1), adoption of an "alternative formulation" of the section proposed by Colusa and Picayune, without making any determination whether the Parties would have entered into the Compacts at all, if there had been no mutual understanding of the size of the license pool in 1999. Moreover, the court, in adopting the Colusa and Picayune "alternative formulation," adopted a calculation methodology that was in direct conflict with the understanding that the evidence before the court demonstrated the Parties actually had with respect to section 4.3.2.2(a)(1)—which was that any

factual inputs to the arithmetic formula would be based on facts in existence as of September 1, 1999, and not on what might happen subsequently.

In adopting its "alternative formulation," the court failed to extend required evidentiary presumptions to the State Defendants concerning the extent of Colusa's and Picayune's involvement in the negotiation of section 4.3.2.2(a)(1), which the State Defendants' evidence indicated had been drafted in consultation with key tribal representatives, presumptively including representatives of Colusa and Picayune. On the basis of this error, the court invoked the doctrine of contra proferentem to justify construing the ambiguity of section 4.3.2.2(a)(1) against the State Defendants.

The district court additionally erred in ordering the Commission, in its August 19, 2009 Judgment, to open the mandated license draw to tribes that were not parties to the action. Under Ninth Circuit authority, a district court may grant injunctive relief to a non-party when it is necessary to do so in order to provide full relief to a named party, or when the non-party is a member of a class certified under Federal Rule of Civil Procedure 23. In this case, the non-party tribes, held not to be required parties by this Court's decision in *Colusa I*, were never certified as a class under Rule 23, nor did they join conventionally under Rule 20. Nothing precluded the district court from granting relief, in the form of the availability of licenses from an expanded pool, to Colusa and Picayune alone, as neither Plaintiff

Tribe had any legally cognizable interest in whether any of the non-party tribes received licenses from the pool.

This Court's *Colusa I* holding that non-party tribes were not required parties for purposes of Rule 19 was squarely predicated upon the proposition that they had no legally protected interest in the outcome of Colusa's case. The *Colusa I* decision indicates that this Court made this determination on the basis that the outcome of Colusa's case would affect the non-party tribes only incidentally, if at all. *Colusa I* thus cannot reasonably be construed to either authorize or require the district court to grant injunctive relief to the non-party tribes. On the contrary, the extension to non-party tribes of the relief to which the district court held Colusa and Picayune entitled is at odds with the very rationale of *Colusa I*.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING COLUSA'S AND PICAYUNE'S MOTION FOR SUMMARY JUDGMENT ON THE SIZE OF THE STATEWIDE LICENSE POOL.

The issue before the district court on Colusa's and Picayune's motion for summary judgment was whether, based on undisputed facts in the record before it, any of the Plaintiff Tribes' proffered figures purporting to represent the number of licenses in the pool created by section 4.3.2.2(a)(1) of the 1999 Compacts constituted the size of the pool agreed upon by the parties to the Compacts. Having previously alleged various interpretations of section 4.3.2.2(a)(1) yielding

pools of 55,951 (E.R. 192), 58,450 (E.R. 230), "more than 62,000" (E.R. 373), and 64,293 (E.R. 230) licenses, Colusa's and Picayune's joint motion for summary judgment ultimately settled upon an entirely new interpretation that Colusa's counsel first characterized as a "middle ground," which yielded a pool of 42,700 licenses (E.R. 64, 210).

Colusa submitted evidence that when its Chairman signed Colusa's Compact in 1999, he understood section 4.3.2.2(a)(1) to authorize 56,000 licenses in addition to the slot machines already in operation. (E.R. 329.) Picayune submitted no evidence of its understanding in 1999. The State Defendants submitted evidence that when Governor Davis' negotiators drafted section 4.3.2.2(a)(1) after some consultation with tribal representatives, they made it clear to the tribes that Governor Davis would not sign a compact that authorized a total of more than 44,798 slot machines statewide, including existing machines. (E.R. 182-183.) Accordingly, the evidence before the district court created an unmistakably genuine issue of material fact concerning whether the Parties had a mutual understanding of the meaning of section 4.3.2.2(a)(1) when they executed the Compacts in 1999. Nonetheless, the district court granted summary judgment in favor of Colusa and Picayune.

A. The District Court Failed to Draw Inferences to Which the State Defendants Were Entitled From the Evidence Before It, and Failed to Give Precedence to the State Defendants' Evidence in Direct Conflict With the Moving Parties' Evidence.

Under Federal Rule of Civil Procedure 56, summary judgment is appropriate if the pleadings, the discovery, disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2). In making this determination, the inquiry performed " 'is the threshold inquiry of determining whether there is the need for trial—whether, in other words, "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.' " *Leslie v. Grupo ICA*, 198 F.3d 1152, 1157 (9th Cir. 1999) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). "When the moving party has the burden of proof at trial, that party must carry its initial burden at summary judgment by presenting evidence affirmatively showing, for all essential elements of its case, that no reasonable jury could find for the non-moving party." *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1438 (11th Cir. 1991 (en banc); *see also E.E.O.C. v. Union Independiente De La Authoridad De Acueductos Y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55 (1st Cir. 2002) (if "party moving for summary judgment bears the burden of proof on an issue, he cannot prevail unless the evidence that he provides on that issue is conclusive").

In making this inquiry, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Liberty Lobby,* 477 U.S. at 255. The rule is no different when the court is ruling on cross-motions for summary judgment, as it was in this case.

> This court reviews de novo a district court's decision on cross-motions for summary judgment. We view the evidence in the light most favorable to the nonmoving party and determine whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law.

Levine v. City of Alameda, 525 F.3d 903, 905 (9th Cir. 2008) (citations omitted).

Further, " '[i]f direct evidence produced by the moving party conflicts with direct evidence produced by the nonmoving party, the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact.' " *Leslie v. Grupo ICA,* 198 F.3d at 1158 (quoting *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626 (9th Cir. 1987)). Finally, the court may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000).

This case turns upon the interpretation of section 4.3.2.2(a)(1) of Colusa's and Picayune's respective 1999 Compacts, which defines the size of the statewide pool from which the tribes may draw licenses to operate additional slot machines. (E.R. 406, 466.) Compacts are subject to the general principles of contract interpretation. *See State of Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095,

1098 (9th Cir. 2006). The Ninth Circuit has applied California contract law in circumstances where, as here, there is no difference between state and federal law on the particular contract principles in question. *FDIC v. New Hampshire Ins. Co.*, 953 F.2d 478, 481-82 (9th Cir. 1986). In a case applying California law, this Court has found:

> As with any contract, our goal is to give effect to the mutual intent of the parties. Mutual intent is determined by "the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties."

In re: Imperial Credit Industries, Inc., 527 F.3d 959, 966 (9th Cir. 2008) (quoting *Wolf v. Superior Court*, 114 Cal. App. 4th 1343 (2004)) (citations omitted); *see also Northrop Grumman Corp. v. Factory Mutual Ins. Co.*, 563 F.3d 777, 783 (9th Cir. 2009) ("The interpretation of a contract must "give effect to the 'mutual intent' of the parties . . . at the time the contract was formed"). "Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself." *Shoshone-Bannock Tribes*, 465 F.3d at 1099. Here, however, it is undisputed that the language of section 4.3.2.2(a)(1) is unclear. (E.R. 70.)

The parol evidence rule permits the admission of extrinsic evidence only when a contract provision is ambiguous. *See In re Bennett*, 298 F.3d 1059, 1064

(9th Cir. 2002). Apart from the characterization provided by the parties, a contract is ambiguous if it is susceptible to two or more reasonable interpretations. *Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 692 (9th Cir. 1992). In ruling whether a contract term is ambiguous,

> the court provisionally receives . . . all credible evidence concerning the parties' intentions to determine "ambiguity," i.e., whether the language is "reasonably susceptible" to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is "reasonably susceptible" to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract.

Winet v. Price, 4 Cal. App. 4th 1159, 1165 (1992).

The district court's April 22, 2009 Order recites a lengthy selection of the extrinsic evidence that was submitted by the Parties[13] (E.R. 65-69), and then indicates that the court found section 4.3.2.2(a)(1) sufficiently ambiguous to meet the threshold for admission of extrinsic evidence to aid in interpreting the Compacts. (E.R. 69-70.) Then, however, the district court held that:

> the circumstances under which the Compact was entered into does not aide [sic] the court in discerning the parties' intent. Indeed, the submissions of the parties reveal 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.

[13] The district court made no specific rulings on the Parties' various evidentiary objections. (E.R. 34.)

(E.R. 71.) It is here that the district court committed its primary error. While this finding could properly be made at trial, it was impermissible for the court to make this finding when presented with directly conflicting evidence on summary judgment, and then, on that basis, to proceed to interpret the Compacts as a matter of law.

A court may interpret a contract as a matter of law when there is no conflict in the extrinsic evidence. "It is solely a judicial function to interpret a written instrument *unless the interpretation turns upon the credibility of extrinsic evidence.*" *Parsons v. Bristol Development Co.*, 62 Cal. 2d 861, 865 (1965) (emphasis added). "[W]hen . . . ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury." *Wolf v. Walt Disney Pictures and T.V.*, 162 Cal. App. 4th 1107, 1127 (2008).

Moreover, summary judgment is "appropriate only if the contract or the contract provision in question is unambiguous." *Castaneda v. DuraVent Corp.*, 648 F.2d 612, 619 (9th Cir. 1981). Here, the district court found section 4.3.2.2(a)(1) ambiguous, but nonetheless granted summary judgment.

The district court failed to extend to the State Defendants' evidence the favorable effect to which it was entitled, and by construing the evidence otherwise,

found that there had been no meeting of the minds between the Parties in 1999 as to the meaning of section 4.3.2.2(a)(1).

The extrinsic evidence before the district court in support of and in opposition to the cross-motions for summary judgment may be summarized as follows:

The State Defendants' evidence in opposition to Colusa's and Picayune's joint motion for summary judgment, with the reasonable inferences that must be drawn from it, establish that: 1) Governor Davis' negotiators made it clear to the participants in the negotiations that the State would not enter into a compact that would authorize more than 44,798 slot machines statewide (E.R. 182-183); 2) the Governor's negotiators discussed the concept of the license pool concept with a group of tribal representatives before drafting section 4.3.2.2 (E.R. 183); 3) the Governor's negotiators later presented a draft of Compact section 4.3.2.2, including subdivision (a)(1), to a group of tribal attorneys for comment, and modified the section at the request of several tribal representatives prior to presenting the language to the assembled tribal leaders on the evening of September 9, 1999 (*id.*); 4) the assembled tribal leaders asked no questions about the meaning of section 4.3.2.2(a)(1) after receiving the text (*id.*); and 5) Colusa, Picayune, and fifty-five other tribes then entered into the 1999 Compacts (E.R. 181). The State Defendants' evidence also includes Judge Chang's declaration that

6) describes the issuance of a press release and information sheet immediately after the 1999 Compacts were executed, stating that the Compacts would authorize a total of 44,448 slot machines statewide, including machines already being operated by tribes as well as machines to be licensed from the pool (E.R. 256-257), and 7) notes that no disagreement or complaints from the tribes about that statement were received by the Governor's Office in response (E.R. 257). The absence of disagreement or complaint after publication of the State's interpretation of section 4.3.2.2(a)(1) was confirmed by research. (E.R. 259-261.)

The State Defendants' evidence also included a declaration by Gary Qualset, a former California Gambling Control Commission official, that described: 1) how the tribes retained the Sides Accountancy Corporation to conduct draws for slot machine licenses prior to the Commission's assumption of its duties as trustee of the Revenue Sharing Trust Fund and administrator of the license pool (E.R. 214); 2) the dispute that ensued between the State and the Sides Accountancy Corporation (E.R. 215-219); and 3) that the Commission undertook to replace "Sides" licenses with licenses issued by the Commission (E.R. 218). The State Defendants also submitted documents evidencing the issuance of 29,398 licenses by the Sides Accountancy Corporation, the Commission's analysis of section 4.3.2.2(a)(1) and the Commission's adoption, in 2002, of 32,151 as the size of the license pool. (E.R. 388-395.)

Colusa's evidence in support of its motion for summary judgment consisted of Colusa Chairman Mitchum's declaration stating that: 1) Colusa had nothing to do with drafting section 4.3.2.2(a)(1) (E.R. 328); 2) when the State presented the draft of what would become section 4.3.2.2(a) to the assembled tribal leaders on September 9, 1999, Chairman Mitchum heard various tribal leaders ask Governor Davis' negotiators to explain its meaning, and he heard the latter refuse to do so (*id*); 3) Chairman Mitchum and the tribal leaders and attorneys had to try to figure out what the State's language meant by looking at the language itself (*id.*); 4) after participating in a meeting with the tribal leaders, Chairman Mitchum believed that the proposed compact language would in fact authorize the issuance of licenses for approximately 56,000 machines in addition to the existing slot machines that would be permitted to continue in operation unlicensed (E.R. 329); and 5) on the basis of the foregoing, Chairman Mitchum signed a letter of intent on behalf of Colusa to enter into a 1999 Compact (E.R. 328). Chairman Mitchum also: 6) detailed his participation in the negotiation process (E.R. 325-329); and 7) described Colusa's general counsel as a principal negotiator for the UTCSC, a group consisting of 80 tribes (E.R. 326). Colusa also submitted supporting declarations from Leonard Bowman, Chairman of the Bear River Band of the Rohnerville Rancheria (E.R. 344-348), and from Wanda D. Balderama, Chair of the Hopland Band of Pomo Indians (E.R. 340-343), neither of which appears to be

based upon personal knowledge of the negotiation of those tribes' Compacts in 1999.

Picayune submitted no evidence concerning its understanding of the meaning of section 4.3.2.2(a)(1) when its representative signed Picayune's Compact in 1999.

The record contains no evidence whatsoever concerning the non-party tribes' understandings of the meaning of section 4.3.2.2(a)(1) when their representatives signed their respective Compacts in 1999. The non-party tribes, as strangers to the litigation, of course submitted no such evidence, and neither Colusa nor Picayune submitted any such evidence attributable to any non-party tribes, except to the extent that the Bowman and Balderama declarations may be so construed with regard to the tribes to which those declarants belonged.

When ruling upon a motion for summary judgment, a district court is required to deny the motion if, when accepting the non-moving party's evidence as true, giving precedence to the non-moving party's evidence whenever in direct dispute with the moving party's evidence, and drawing all reasonable inferences favorable to the non-moving party, the evidence establishes the existence of a genuine dispute as to a material fact. "A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-

moving party." *Conn v. City of Reno*, 572 F.3d 1047, 1054 (9th Cir. 2009) (quoting *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006)).

Although Judge Norris's declaration does not expressly state that he communicated the State's intent with regard to section 4.3.2.2(a)(1) specifically to Colusa or Picayune, Judge Norris does state that during and up to the conclusion of the negotiations, he repeatedly advised the participants in the negotiation that a cap of 44,798 slot machines could not be exceeded (E.R. 182), and that at the time he and Judge Chang presented the draft of section 4.3.2.2 to a group of tribal attorneys for comment, he had no doubt whatsoever that it was widely and commonly understood amongst the tribal participants that the compact would, in the aggregate, authorize no more than 44,798 slot machines statewide, including existing machines. (E.R. 183.) On the basis of this evidence, which controverted Colusa's evidence and which, for purposes of the Plaintiff Tribes' motion was required to be accepted as true, the district court was required to draw the reasonable inference that when Colusa's Compact was signed by its Chairman in 1999, the tribe—through the self-described participation of its Chairman (E.R. 325-329), and of its general counsel as a principal negotiator for the eighty-tribe UTCSC (E.R. 326)—was either directly or indirectly aware that the State intended the language of section 4.3.2.2(a)(1) to authorize only 44,798 slot machines

statewide.[14] The district court was also required to draw the inference that Picayune was similarly aware of the State's understanding in 1999,[15] and that all other 1999 Compact tribes were also aware of the State's understanding and intent. Moreover, neither Picayune, nor any other 1999 Compact Tribe, submitted any evidence of any understanding contrary to the State's understanding in 1999.

Significantly, there is no evidence that the tribes' purported understanding that section 4.3.2.2(a)(1) would authorize 56,000 licensed machines in addition to existing slot machines already in operation (E.R. 329) was communicated to the State either before the tribes signed their letters of intent, or in response to Governor Davis' nearly contemporaneous press release describing a much smaller pool. Chairman Mitchum's expectation of a 56,000-license pool therefore constituted, at best, only an unexpressed subjective belief on the part of Colusa, and is immaterial to the bargain struck in 1999. *See Winet v. Price*, 4 Cal. App. 4th at 1166.

On the basis of the foregoing, by weighing the credibility of the witnesses at trial, a trier of fact could reasonably conclude that Colusa and Picayune signed

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[14] Indeed, Chairman Mitchum never denied knowing that the State intended section 4.3.2.2(a)(1) to establish a pool sufficient to allow a total of 44,798 slot machines statewide, including existing machines.

[15] Picayune offered no evidence concerning its understanding in 1999. Both Colusa and Picayune were members of the UTCSC. (E.R. 176.)

their respective Compacts fully aware that the State intended and believed that section 4.3.2.2(a)(1) authorized a combined total of only 44,798 slot machines, without indicating any differing understanding or belief, and that Colusa's and Picayune's assertions in this lawsuit do not reflect the actual contractual understanding of the Parties in 1999, but instead are an after-the-fact effort to increase the number of licenses in the statewide pool based on the facial ambiguity of section 4.3.2.2(a)(1). Interpreted as required for purposes of summary judgment, the evidence in dispute established the existence of a genuine issue of material fact as to the mutual understanding of the Parties when the 1999 Compacts were signed. *Conn v. City of Reno*, 572 F.3d at 1054. Instead of denying the Plaintiff Tribes' motion for summary judgment, the district court, departing from the evidentiary rules applicable to summary judgment, concluded that the Parties' extrinsic evidence did not assist the court in determining the Parties' intentions in 1999, and held that no meeting of the minds had occurred as to the size of the statewide license pool.[16] For purposes of summary judgment, the district court was required to draw from the State Defendants' evidence the reasonable inference that when Colusa and Picayune signed their respective 1999

[16] The district court's erroneous logic is self-evident—the court obviously *had* to rely upon, and was thus assisted by, the extrinsic evidence in order to make the finding that there had been no meeting of the minds, which was, therefore, a finding of fact made upon conflicting evidence, and thus an impermissible basis for summary judgment.

Compacts, they did so knowing that the State intended section 4.3.2.2(a)(1) to establish a license pool authorizing operation of a combined total of 44,798 slot machines, including those already in operation.

The gravity of the court's error in failing to accord the State Defendants' evidence the treatment required under the rules applicable to summary judgment is underscored by evidence the State Defendants would have been entitled to adduce at trial relevant to the negotiations directed to section 4.3.2.2(a)(1) and the understanding of the Parties concerning that term. This evidence includes a letter to Judge Norris from Scott Crowell, a tribal attorney who directly participated in the negotiations, expressing dissatisfaction on behalf of the Rincon Band of Mission Indians with a license pool proposal voted on by no less than fifty-eight tribes, the day *prior* to the date Colusa claimed the tribes first heard of the State's proposal. (E.R. 143-147.) This evidence also controverts Colusa's claim that the license pool had been put to the tribes without negotiation, as a take it or leave it proposition.[17] Moreover, as earlier indicated to this Court, additional evidence available for development in anticipation of trial suggests that the negotiating tribes had specifically determined not to oppose the State negotiators' license pool

[17] The letter was before the district court on the State Defendants' motion for reconsideration of the court's ruling on the Plaintiff Tribes' motion for summary judgment. (E.R. 129-141.)

formula to conceal an alternative interpretation of the formula that they believed would yield a larger number of licenses.[18]

On the basis of the evidence before it, the district court could conclude that Colusa and Picayune disputed the Commission's calculation of the size of the license pool *now*—but could not properly conclude that there had been no meeting of the minds between the Parties in 1999 as to the size of the license pool. Unable to determine that no meeting of the minds had occurred upon the basis of undisputed extrinsic evidence, the district court was required to deny Colusa's and Picayune's motion for summary judgment.

B. The District Court Erred in Applying the Doctrine of Contra Proferentem to Construe the Ambiguity of Section 4.3.2.2(a)(1) Against the State.

Under the doctrine of contra proferentem, the ambiguity of a contractual provision drafted by one party without negotiation or input from the other party is

[18] The evidence of a deliberate choice by negotiating tribes not to oppose the license pool formula in order to benefit from the availability of an alternative interpretation of its terms was a statement attributed to Richard Milanovich, Chairman of the Agua Caliente Band of Cahuilla Indians. This evidence was not before the district court on the Plaintiff Tribes' motion for summary judgment, and was brought to this Court's attention in support of the State Defendants' application for stay pending appeal. (*See* Decl. Randall A. Pinal in Supp. State's Emerg. Mot. for Stay Pend. App. ¶¶ 7, 23, DktEntry 7064530, 3-4, 9; First Supp. Decl. of Randall A. Pinal In Supp. State's Emerg. Mot. for Stay Pend. App. ¶4, Exh. C, DktEntry 7067654, at 3.) It is concretely demonstrative of the prejudicial effect the district court's failure to apply the rules governing summary judgment will have upon the State Defendants unless the judgment is reversed.

construed against the drafting party. The district court invoked the doctrine as a further rationale for granting summary judgment in favor of Colusa and Picayune.

The doctrine of contra proferentem applies only when "none of the canons of construction succeed in dispelling the uncertainty." *Oceanside 84, Ltd. v. Fidelity Federal Bank*, 56 Cal. App. 4th 1441, 1448 (1997). Such was not the case before the court on summary judgment. The record before the court plainly disclosed the existence of a genuine issue of material fact as to the Parties' understanding in 1999, requiring the Plaintiff Tribes' motion for summary judgment to be denied without ever reaching the last resort doctrine of contra proferentem.

Instead, invoking the doctrine, the district court ignored, rather than accepting as true, the State Defendants' evidence concerning the negotiation of section 4.3.2.2(a)(1)— including evidence that Governor Davis' negotiators had actually modified a portion of section 4.3.2.2 at the request of negotiating tribes. (E.R. 183.) In doing so the court of course failed to draw any reasonable inference from the State Defendants' evidence that Colusa and Picayune were, through their representatives, either directly or indirectly involved in negotiating section 4.3.2.2(a)(1), and instead exclusively credited the Plaintiff Tribes' evidence in support of their own motion that they were not involved in the negotiations and that section 4.3.2.2(a)(1) was put to them with no prior notice. (E.R. 328.)

The rule of construing an ambiguity against the drafter does not apply when the terms have been arrived at in an arms-length transaction by parties with equivalent leverage and negotiating power. *Eley v. Boeing Co.*, 945 F.2d 276, 280 (9th Cir. 1991). Under California law, the rule does not apply when the provision in question has been negotiated between the parties. *See Indenco, Inc. v. Evans*, 201 Cal. App. 2d 369, 375 (1962). Similarly, "[i]n California, where an agreement is actively negotiated . . . this "preparer" principle is not applied against either party." *Herring v. Teradyne*, 256 F. Supp. 2d 1118, 1126 (S.D. Cal. 2002). On the basis of the evidence properly before it concerning the development and negotiation of section 4.3.2.2 (E.R. 183-184, 255), the district court was precluded from applying the doctrine of contra proferentem for purposes of ruling on the Plaintiff Tribes' motion for summary judgment.

C. The District Court Erred By Supplying a "Missing" Term Without First Finding that a Binding Agreement Nonetheless Existed Between the Parties.

After erroneously concluding that no meeting of the minds had occurred in 1999 as to the size of the statewide license pool, the district court proceeded to interpret section 4.3.2.2(a)(1) without any regard for the Parties' intent. By doing so, the district court undertook to supply what had become, by virtue of the court's own erroneous analysis, a *missing* term.

The Restatement provides:

> When the parties *to a bargain sufficiently defined to be a contract* have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.

Restatement (Second) of Contracts § 204 (1981) (emphasis added). However, the district court took no steps at all to confirm that the Compacts—*without* an agreement as to the size of the license pool—constituted bargains sufficient to constitute binding contracts into which the court could now insert a "reasonable" term not based upon the intentions of the Parties at the time of contracting.

With no evidentiary basis before it for finding binding agreements in the absence of an agreed license pool, the district court adopted Colusa's latter-day "alternative formulation," thereby creating a new contract between the Parties that now contains a key material term (a license pool consisting of 42,700 licenses) that none of the Parties contemplated in 1999, derived by a methodology that none of the Parties contemplated in 1999, and that is inconsistent with what the Parties *did* agree upon in 1999—that the size of the license pool would be a knowable and fixed number when the 1999 Compacts were signed.[19]

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[19] All of the interpretations previously urged by the Parties are based on variables that were fixed as of September 1, 1999, and that yielded a license pool of fixed size. The "alternative formulation" adopted by the district court involves a factual component that was not known at that time—the number of tribes that would ultimately sign 1999 Compacts. Accordingly, had the alternative formulation been used in 1999, the size of the license pool would not have been known at the time Colusa and Picayune signed their Compacts.

The assumption that the Parties would have entered into a binding agreement that did not define their understanding of the license pool's size is specifically inconsistent with the Parties' evidence. The State Defendants' evidence established that Governor Davis made it clear to his chief negotiator that the 1999 Compacts could not authorize in the aggregate more than 44,798 slot machines statewide, including existing machines. (E.R. 182.) Colusa's evidence established that the number of slot machines that would be authorized under the 1999 Compacts was a matter of great concern and much discussion amongst the tribes, both before and after the text of the proposed compact had been presented to the assembled tribes on September 9, 1999. (E.R. 237, 239.) The evidence before the district court therefore would have precluded it from finding the existence of a binding contract without a specification of the size of the license pool, had the court attempted to do, and, thus, should have precluded the court from interpreting the language of section 4.3.2.2(a)(1) without reference to the intentions and understandings of the Parties in 1999, and thereby imposing an altogether new material term upon them. The district court's order regarding the size of the statewide license pool under section 4.3.2.2(a)(1) should be reversed and remanded for further proceedings.

II. THE DISTRICT COURT ERRED IN EXTENDING INJUNCTIVE RELIEF TO NON-PARTY 1999 COMPACT TRIBES.

After erroneously adjudicating the size of the license pool in favor of Colusa and Picayune and thus enlarging it by 10,549 licenses, the district court took the unprecedented step of ordering the Commission to open the draw for those newly available licenses not only to Colusa and Picayune, but also to forty other 1999 Compact Tribes that are not parties to, nor are in any way bound by, this action. (E.R. 13.) The district court expressly based this extension of relief on an interpretation of the Ninth Circuit's decision in *Colusa I* (E.R. 10-12), in which this Court relieved Colusa of the necessity of joining the other 1999 Compact Tribes as required parties to this action, thus allowing Colusa to litigate the terms of its Compact with the State. The district court's extension of relief to the non-party tribes is erroneous as a matter of law and should be reversed.

A. Because Relief to Other 1999 Compact Tribes Was Not Necessary in Order to Grant Colusa and Picayune the Relief Sought, and No Class Was Certified Under Federal Rule of Civil Procedure 23, No Cognizable Basis Existed for the District Court to Extend Relief to Non-Party Tribes.

Except in very limited circumstances, a district court may not extend relief to parties that are not before the court and possessed of the rights and liabilities of named parties. The two primary exceptions to this rule are when non-parties have been brought before the court for a limited purpose by accepting membership in a class certified under Federal Rule of Civil Procedure 23, and when relief cannot be

provided to the named parties without incidentally benefiting non-parties. Neither circumstance is present in this case.

As this Court has held, "[a] federal court may issue an injunction if it has personal jurisdiction over the parties . . . it may not attempt to determine the rights of persons not before the court." *Zepeda v. United States I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983). "The district court must, therefore, tailor the injunction to affect only those persons over which it has power." *Id.* Further, "[a]n injunction 'should be no more burdensome to the defendant than necessary to provide complete relief to plaintiffs.'" *Id.* at 728 (quoting *Califano v. Yamasaki*, 443 U.S. 682, 702); *see also Gregory v. Lytton Systems, Inc.*, 472 F.2d 631, 634 (9th Cir. 1972) (vacating injunctive relief that was neither incidental nor necessary to the resolution of the pending litigation). Other circuits are in accord. *See McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) (holding "[n]either declaratory nor injunctive relief can directly interfere with the enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs"); *Prof. Assn. of College Educators v. El Paso County Comm. College Dist.*, 730 F.2d 258, 273-74 (5th Cir. 1984) (partially vacating an overbroad injunction, while noting the exception to the general rule by observing that "[a]n injunction . . . is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—*if such*

breadth is necessary to give prevailing parties the relief to which they are entitled") (emphasis added)).

Colusa and Picayune sued the State Defendants contending that they were denied slot machine licenses as a result of the Commission's erroneous calculation of the size of the license pool under section 4.3.2.2(a)(1). (E.R. 230, 372-374.) Both tribes sought declaratory relief as to the size of the pool, and injunctive relief compelling the Commission to issue additional licenses. (E.R. 232-233, 377.) Although Picayune included the non-party 1999 Compact Tribes in the prayer of its complaint-in-intervention,[20] neither tribe argued, nor can either credibly argue, that it has a cognizable legal interest in whether *other* 1999 Compact Tribes obtain additional licenses as a result of this litigation. Indeed, as this Court noted in its *Colusa I* decision, the acquisition of licenses by other tribes increases competition within the gaming marketplace. *Colusa I*, 547 F.3d 962, 971-72. Accordingly, it was not only unnecessary for the district court to extend the benefit of the enlargement of the license pool to the non-party 1999 Compact Tribes in order to provide Colusa and Picayune with complete relief, it was at least marginally harmful to the named plaintiffs to do so. The extension of relief to the non-party tribes cannot be justified on the ground that it was necessary to do so in order to

[20] Colusa did not seek relief for any tribe other than itself in its complaint, but did seek relief for the non-party Compact Tribes in its motion for entry of final judgment. (E.R. 164-165)

afford Colusa and Picayune relief they sought for themselves. For the same reasons, neither Colusa nor Picayune has a cognizable interest in the acquisition of licenses by any other tribes, and therefore neither has standing to seek relief on their behalf. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (describing requirements for standing under article III of the United States Constitution). Accordingly, Colusa's and Picayune's claims for relief cannot provide a basis for the district court's extension of relief to non-party tribes.

Further, no effort was made to certify a class consisting of the absent 1999 Compact Tribes. Plaintiffs have the burden of showing that they represent a class. *Davis v. Romney*, 490 F.2d 1360, 1366 (3d Cir. 1974). Relief cannot be granted to a class before an order is entered determining that class treatment is proper. *Id.* The non-party tribes do not constitute a certified class, and are not eligible for relief. "Because a class has not been certified, the only interests at stake are those of the named plaintiffs." *Baxter v. Palmigiano*, 425 U.S. 308, 310 n.1 (1976).

Finally, although the State Defendants submitted evidence concerning the communication of the State's understanding and intent with respect to the size of the license pool in 1999 (E.R. 182-183), and evidence of several meetings with a number of tribal representatives specifically concerning section 4.3.2.2 and the size of the pool (E.R. 183), no evidence was submitted concerning the contemporaneous understanding of any of the non-party tribes. Under these

circumstances, relief could not have been granted by summary judgment to the absent tribes—even if they had been parties.

B. *Colusa I* Neither Requires, Nor Authorizes, the Extension of Relief to the Non-Party Tribes.

The district court expressly based its extension of relief to the non-party tribes upon its interpretation of this Court's *Colusa I* decision. (E.R. 11.) For the reasons set forth below, and because the inferences in *Colusa I* that the court relied upon are both objectively marginal and inconsistent with the legal principles and authority provided above, the district court's reliance upon *Colusa I* for granting relief to the non-party tribes was erroneous.

The only issue before the Court in *Colusa I* that is relevant to this appeal[21] was whether the absent 1999 Compact Tribes were necessary and indispensible parties to Colusa's action within the meaning of Federal Rule of Civil Procedure 19 (Rule 19), in whose absence the case could not in fairness and equity go forward. (E.R. 109-128.) The holding of *Colusa I* is that the absent 1999 Compact Tribes had no legally protected interest in the outcome of Colusa's case sufficient

[21] *Colusa I* also concerned the question of whether Colusa had exhausted its administrative remedies before filing its fifth claim for relief (bad faith failure to negotiate an amended compact). Colusa reasserted this claim in its second complaint, and this claim is still pending before the district court.

under Rule 19 to make them necessary and indispensible parties[22] to the action, and that this action could therefore proceed without them.

In *Colusa* I the Court's only explicit provisos concerning the remedies available upon remand are clearly intended to prohibit remedies that would create a legally protected interest in an absent tribe, such as one that would divest it of licenses previously issued to it, and that would thus invalidate the basis of the Court's holding that the absent tribes were not required parties. For example, the Court stated that relief granted to Colusa on its tier-ranking claim must be prospective only and thus not prejudicial to the absent tribes' legally protected interests in their existing licenses. *Colusa I*, 547 F.3d at 974. Similarly, when the Court reversed the lower court's dismissal of Colusa's claim concerning the Commission's authority to administer the license pool, it did so "albeit with the proviso that, were Colusa to prevail on the merits, no existing license may be invalidated at the remedial stage." *Id.* at 977.

The district court, however, purported to discern in this Court's observation that the outcome of Colusa's case "would have an incidental effect on other 1999 Compact tribes," (E.R. 11-12) an intention that the non-party tribes should benefit

[22] The motion that was the subject of the *Colusa I* decision was brought under the former version of Federal Rule of Civil Procedure 19, which employed the terms "necessary" and "indispensible," rather than "required," in identifying absent parties.

from an increase in the size of the license pool, thus requiring the district court to order the Commission to open the draw for licenses from the enlarged pool to the non-party tribes. The court based this interpretation on the observations made in *Colusa I* that: 1) "those tribes 'who intend to expand their gaming [operations] will gladly accept an increase in the size of the license pool created by the 1999 Compacts'" (E.R. 2, 12) " 'the outcome of Colusa's litigation may have some financial consequences for the non-party tribes' " (*id.*); and 3) "the state could be subject to 'inconsistent obligations' should the district courts reach inconsistent conclusions with respect to the size of the license pool . . . which could be resolved on appeal to the Ninth Circuit" (*id.*).

The district court also concluded, without citation, that this Court contemplated that a ruling as to the specific Compacts between individual tribes and defendants would likely have an effect on administration of the license system as a whole." (E.R. 11.) This conclusion appears to arise by inference from this Court's occasional references in *Colusa I* to *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990), a case that involved a statutory administrative procedure that was *necessarily* equally applicable to all tribes subject to it, rather than separate bilateral contracts litigated on facts specific to the named parties.

The district court's opinion, extracting this Court's observations in the *Colusa I* decision from their respective contexts, impermissibly broadened their

apparent meanings. The cornerstone of the court's conclusion that the Ninth Circuit intended the outcome of Colusa's claim concerning the size of the license pool to apply to all 1999 Compact Tribes is this Court's suggestion that the outcome of Colusa's case might have an "incidental effect" on the non-party tribes. (E.R. 12.) In fact, the only reference to an "incidental effect" occurs within a discussion distinguishing the facts of *Colusa I* from those of *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002). The Court observed that "unlike the plaintiff in *American Greyhound Racing*, Colusa does not seek to invalidate compacts to which it is not a party . . . . On the contrary, Colusa seeks to enforce a provision of its own Compact which may affect other tribes only incidentally." *Colusa I*, 547 F.3d 962, 972. In context, this reference to an incidental effect cannot reasonably mean that the difference between *American Greyhound Racing* and *Colusa I* is that the absent tribes *can only benefit* from the outcome of this case. The import of the phrase is that the absent tribes will be little affected, if at all, by its outcome, since, as the Court pointed out, the outcome of Colusa's case would not prejudice the rights of the absent tribes either by invalidating their compacts, or divesting them of licenses they had already acquired. *Id.* at 972, 974, 977.

Similarly, this Court's reference to "financial consequences" in *Colusa I* occurs in the course of its discussion of the nature of a legally protected interest,

relating specifically to a cited text from *Makah*—"[the] interest must be more than a financial stake." *Colusa I*, 547 F.3d at 971 (quoting *Makah*, 910 F.2d at 558). "The mere fact that the outcome of Colusa's litigation may have some financial consequences for the non-party tribes is not sufficient to make those tribes required parties." *Id.* In context, "financial consequences" referred to a potential financial detriment—not a benefit—the Court acknowledging the financial detriment to some tribes arising from the acquisition of more licenses by other tribes, and concluding that the possibility of such financial detriment did not constitute a legally protected interest under *Makah*. It is overreaching to construe this reference to "financial consequences" as requiring the district court to extend the benefit of the enlarged license pool to the non-party tribes.

In like manner, this Court's statement that some tribes "will gladly accept an increase in the size of the statewide license pool created by the 1999 Compacts," *Colusa I* at 971, occurs within its discussion of whether a tribe's interest in its competitive position vis-à-vis other tribes, potentially affected by the issuance of licenses, is a legally protected interest under Rule 19. The Court's observation appears to have been offered to illustrate one of the two ends of the spectrum of potential interest in the size of the pool, i.e., the "respective advantages that various tribes may enjoy under a more generous or restrictive interpretation of the pool provision," *id.* at 972, in a discussion leading to its conclusion that "[t]he interest

of some of the absent tribes in avoiding competition does not 'arise . . . from terms in bargained for contracts,' and is accordingly not legally protected under the circumstances of this case." *Id*. (quoting *American Greyhound Racing*, 305 F.3d at 1023). This Court's particular illustration of the varying interests of the tribes in the size of the license pool is insufficient to either require or authorize the district court to depart from longstanding general principles and authority concerning the extension of relief to non-parties.

This Court's reference to "inconsistent obligations" arises in a footnote dismissing the State Defendants' contention that allowing this action to go forward without the other 1999 Compact Tribes could expose the State to inconsistent obligations. *Colusa I* at 972 n.12. The Court's conclusion that inconsistent outcomes in different districts as to the size of the license pool "could be resolved in an appeal to this court," *id.*, indicates that the Ninth Circuit did *not* expect the outcome of Colusa's case to benefit other 1999 Compact Tribes, rather that other tribes would litigate the terms of their Compacts separately, possibly leading to inconsistent outcomes that could, if necessary, be resolved on appeal—for example, by a declaration that the State's obligations arising from a particular case were owed only to the plaintiff(s) in that case and to no other tribes.

Moreover, when construing Colusa's Compact with regard to its claim for refund of pre-paid license fees, the Ninth Circuit adopted the approach in *Delgado v.*

Plaza Las Americas, Inc., 139 F.3d 1, 3 (1st Cir. 1998), distinguishing between inconsistent obligations and inconsistent adjudications, and noting that the possibility that the State may have to refund Colusa's pre-payment fees "*while adhering to a different interpretation of the Compact in its dealings with some other tribes* does not, without more, rise to the level of creating a 'substantial risk' of incurring inconsistent obligations." *Colusa I*, 547 F.3d at 976 (citing Fed. R. Civ. P. 19(a)(1)B)(ii)) (emphasis added).

A reading of *Colusa I* more consistent with earlier Ninth Circuit authority than that accorded it by the district court is that the Court reversed the dismissal of Colusa's complaint on Rule 19 grounds and permitted Colusa's action to go forward without the absent tribes because the Court understood and intended, as evidenced by its prescription of prospective relief only, that the absent tribes would not be much affected by its outcome because Colusa would be litigating only the terms of its own Compact. This is consonant with the Court's observation that Colusa was only seeking to enforce provisions of its own Compact, which might affect other tribes only incidentally, *Colusa I*, 547 F.3d at 972, and with the Court's observation, in connection with Colusa's pre-payment fee claim, that "[t]he mutuality-of-party requirement of res judicata and defensive collateral estoppel ensures that the similarly situated absent tribes will not be prejudiced if

and when they decide to challenge the Commission's interpretation of the refund provision of the 1999 Compacts," *id.* at 976.

This Court also indicated its contemplation that whatever relief was obtained by Colusa would be for Colusa alone in its response to the State Defendants' contention in *Colusa I* that any relief that might be granted to Colusa upon its tier ranking claim would require use of a formula not available to other tribes. The Court specifically did *not* state that the formula urged by Colusa would also apply to the absent tribes, but instead stated that "the 1999 Compacts do not create a legally protected interest in either freedom from competition . . . or a specific place in line for future draws," *id.* at 974 n.13, thus further indicating that other tribes would not share in the relief obtained by Colusa in this case.

C. Extension of Relief to the Non-Party Tribes Will Deprive the State of Its Right to Litigate the Size of the License Pool Under Different Facts in Other Pending and Future Cases.

Colusa I clearly contemplated that if tribes other than Colusa chose to litigate the size of the license pool, they would be at liberty, and required, to do so on the basis of their particular circumstances and their cases' particular merits. *Colusa I* thus understood that any tribe that is a party to the 1999 Compact might be a potential plaintiff in an action challenging the State's calculation of the pool. While the fact that relatively few of the Compact Tribes have chosen to litigate suggests an absence of serious disagreement over the pool's size as calculated by

the Commission, pending litigation brought by the Rincon Band, San Pasqual Band, and, more recently by the Tuolumne Band of Me-Wuk Indians (Tuolumne) against the State on precisely this issue demonstrates the untoward impact of the district court's extension of relief to non-party tribes in this case. As the State Defendants advised the district court in opposition to Colusa's and Picayune's motions for entry of partial judgment, the State was then, and remains, also in litigation with Rincon and San Pasqual[23] over the size of the license pool, and was opposing summary judgment in those cases on the basis of different facts that pertain to those tribes. On August 17, 2009, two days before judgment was entered in this case, the Tuolumne Band filed suit in the Eastern District seeking to establish that the license pool consists of either 55,971 or 42,700 licenses.[24]

By extending relief to non-party tribes, the district court deprived the State of the right to litigate the issue presented based on the strengths and weaknesses of the evidence in those specific cases.[25] As a result of the court's acceptance, as true, of Colusa's evidence of non-participation in negotiations, its disregard of the effect

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[23] *See supra*, n.11.

[24] *See supra*, n.11.

[25] As indicated *ante*, substantial evidence exists in the *Rincon* litigation that Governor Davis' negotiators and tribal representatives met and negotiated over section 4.3.2.2 and that negotiating tribes developed a strategy with respect to acceptance of that section, prior to September 9, 1999. (*See ante*, at 44.)

it was required to give the State Defendants' evidence, and its extension of relief to non-party tribes, the Rincon Band—a tribe that participated actively on its own behalf in the 1999 negotiations—has been accorded the full relief sought by it in its own independent action pending in the Southern District of California. The same is true of the San Pasqual Band, a plaintiff in another case brought on the same issue in the Southern District, and of the Tuolumne Band, now a plaintiff in separate litigation in the Eastern District of California. The cases brought by these tribes have, in effect, now been adjudicated without opportunity for trial on the basis of their facts, by a court lacking jurisdiction over at least two of them. All three of the tribes that are plaintiffs in these cases obtained licenses from the October 5, 2009 draw ordered by the district court in this action. (*See* MJN.)

The relief granted in this case is inconsistent with this Court's prior characterization of the 1999 Compacts as bilateral agreements that may be litigated separately without the necessity of joining all other 1999 Compact Tribes. The State Defendants urge the Court to make it clear under *Colusa I* that any tribe may litigate the terms of its Compact with the State without the necessity of joining all other 1999 Compact Tribes precisely because such litigation does not affect the rights or interests of any other tribe, all of which remain free to litigate the terms of their own Compacts should they wish to do so, and that any tribe wishing to join in an action brought by another tribe must do so in compliance with Federal Rules of

Civil Procedure 20 or 23, thereby ensuring that all parties will be subject to the obligations, and afforded the rights and protections described therein, including the doctrines of res judicata and collateral estoppel.

The district court's judgment extending injunctive relief in favor of the non-party 1999 Compact Tribes by requiring the Commission to open the mandated license draw to those tribes, is impermissibly overbroad and should be reversed with a finding that any licenses issued to non-party tribes by reason of the October 5, 2009, or any subsequent draw held under the August 19, 2009 Judgment, are to be deemed null and void.

CONCLUSION

The district court's August 19, 2009 Judgment finding the license pool to consist of 42,700 licenses should be reversed and remanded to the district court for further proceedings and the portion of the judgment ordering the Commission to conduct a license draw open to the non-party 1999 Compact Tribes should be reversed with a finding that any licenses issued to non-party 1999 Compact Tribes as a result of any draw conducted under the August 19, 2009 Judgment are null and void.

Dated: November 20, 2009

Respectfully submitted,

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STATEMENT OF RELATED CASE

There are currently no related cases within the meaning of 9th Circuit Rule 28-2.6 pending before this Court. The following case is a case previously heard in this Court which concerns the present case and which is referred to herein as stating the law of the case being briefed:

06-16145	***Cachil DeHe Band of Wintun Indians, et al v. State of California, et al.***

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Respectfully submitted,

November 20, 2009

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Deputy Attorney General

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Case Name: **Cachil Dehe Band of Wintun Ind., et al. v. State of California, et al.** No. **09-16942**

I hereby certify that on November 20, 2009, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLANTS' OPENING BRIEF

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

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Linda Thorpe	/s/ LINDA THORPE
Declarant	Signature