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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION

CHEMEHUEVI INDIAN TRIBE, and CHICKEN RANCH RANCHERIA OF ME-WUK INDIANS,

Plaintiffs,

v.

JERRY BROWN, Governor of California, and STATE OF CALIFORNIA,

Defendants.

5:16-cv-1347 JFW (MRWx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Date: March 13, 2017
Time: 1:30 p.m.
Courtroom: 7A
Judge: The Hon. John F. Walter

Pre-trial Conference: October 27, 2017
Trial Date: November 14, 2017
Action Filed: June 23, 2016

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INTRODUCTION

Defendants, Governor Edmund G. Brown Jr.[1] and the State of California (collectively, State Defendants), submit the following points and authorities in support of State Defendants' Cross-Motion for Summary Judgment in their favor and against Plaintiffs the Chicken Ranch Rancheria of Me-Wuk Indians (Chicken Ranch) and the Chemehuevi Indian Tribe (Chemehuevi) (collectively, Plaintiffs) on the sole cause of action in Plaintiffs' Complaint for Declaratory and Injunctive Relief (Complaint) for "[v]iolation of the Indian Gaming Regulatory Act, 25 U.S.C. 2701 et seq."

SUMMARY OF ARGUMENT

The Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166-1168; 25 U.S.C. §§ 2701-2721 (IGRA), establishes federal standards for gaming activity on Indian lands. Among those standards is the requirement that before a tribe may lawfully engage in class III gaming on Indian lands it must enter into a compact with the state in which the land is located.

In 1999, the State of California and each of the Plaintiff tribes negotiated and entered into a tribal-state class III gaming compact (1999 Compact) pursuant to IGRA. The 1999 Compact, in place now for almost seventeen years, includes a provision establishing an agreed-upon termination date of December 31, 2020, which is automatically extended to June 30, 2022 if an amendment or a new compact has not been entered by December 31, 2020. Plaintiffs' Complaint alleges that the duration provision in their 1999 Compacts is void because IGRA prohibits tribal-state class III gaming compacts from including a termination date. (Compl. ¶¶ 10, 41.) State Defendants contend that IGRA does not prohibit parties to tribal-state class III gaming compacts from agreeing to a termination date, and that the parties are bound by the term fixing the 1999 Compact's termination date.

[1] Governor Edmund G. Brown Jr. is sued in the Complaint as "Jerry Brown, Governor of California."

The question presented by Plaintiffs' Complaint is one of first impression. No court has ever held that a negotiated duration provision in a tribal-state class III gaming compact is void as violative of IGRA. Nor should this court find that such a provision violates IGRA. The express language of IGRA does not prohibit a tribe and a state from negotiating and agreeing to a duration provision in a gaming compact. IGRA authorizes tribes and states to negotiate provisions establishing "standards for the operation of [gaming] activity" and provisions "directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vi) & (vii). Standards for the operation of gaming activities and provisions directly related to the operation of gaming activities encompass the duration of such activities. *See Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1040 (9th Cir. 2010) (*Rincon*). The Secretary of the United States Department of the Interior (Secretary), the federal official charged with reviewing and approving gaming compacts negotiated under IGRA,[2] has affirmatively approved compacts with duration provisions and allowed many more compacts with duration provisions to go into effect by operation of law since the passage of IGRA in 1988. The Bureau of Indian Affairs (BIA)—an agency of the Department of the Interior charged with promulgating regulations to implement IGRA under the authority delegated to it by the Secretary[3]—has issued regulations construing IGRA as authorizing timeframes for the duration of a compact. "Class III Tribal State Gaming Compact Process," 25 C.F.R. §§ 293.2 & 293.5; 73 Fed. Reg. 235, p. 74004 (Dec. 5, 2008). The Secretary has never expressly disapproved any compact because it included a duration clause. The interested federal agencies

[2] 25 U.S.C. § 2710(d)(3)(B).

[3] Secretarial authority is conferred by 5 U.S.C. § 301 and 25 U.S.C. §§ 2, 9 and 2710. The Secretary's authority to promulgate regulations is delegated to the Assistant Secretary–Indian Affairs by Part 209 of the Departmental Manual (Departmental Manual Part 209) http://elips.doi.gov/ELIPS/DocView.aspx?id=802 (last visited Feb. 1, 2017).

are entitled to broad deference in their reasonable interpretations, and applications, of IGRA and its implementing regulations. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

State Defendants are entitled to summary judgment in their favor on Plaintiffs' Complaint because the duration clause in the 1999 Compact is lawful under IGRA.

A. NARRATIVE STATEMENT OF FACTS

In re Indian Gaming Related Cases, 331 F.3d 1094 (9th Cir. 2003) (*Coyote Valley*) recounts extensively the events leading to the passage of IGRA, and the subsequent negotiations pursuant to IGRA between California and dozens of Indian tribes resulting in the 1999 Compact. Some key historical facts will be detailed here.

In 1987, the United States Supreme Court held that California lacked the authority to enforce its civil-regulatory laws against gambling on Indian reservations in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (*Cabazon*). As a result, gambling on Indian lands was subject only to federal regulation or state criminal prohibitions. *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1091-92 (E.D. Cal. 2002). To address concerns about unregulated gambling on Indian lands, Congress passed IGRA in 1988 as a "compromise solution to the difficult questions involving Indian gaming." *Id.* at 1092. IGRA provides "a statutory basis for the operation of gaming by Indian tribes" and is an example of "'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme." *Id*.

IGRA includes a compact requirement that accords states "the right to negotiate with tribes located within their borders regarding aspects of class III tribal gaming that might affect legitimate State interests." *Coyote Valley*, 331 F.3d at 1097. Class III gaming "includes the types of high-stakes games usually associated with Nevada-style gambling. Class III gaming is subject to a greater degree of

federal-state regulation than either class I [social games] or class II [bingo and certain non-banked card games] gaming." *Id.* at 1096-97. IGRA makes class III gaming lawful on Indian lands only if such activities are: (1) authorized by an ordinance or resolution adopted by the governing body of the Indian tribe and approved by the Chairman of the National Indian Gaming Commission; (2) located in a state that permits such gaming for any purpose by any person, organization, or entity; and (3) conducted in conformance with a tribal-state compact entered into by the Indian tribe and the state and approved by the Secretary. 25 U.S.C. § 2710(d)(1) & (d)(3)(B). An Indian tribe is not authorized to operate class III gaming on its lands located in California absent a negotiated compact between the State and the tribe that is approved by the Secretary, or the implementation of "procedures" by the Secretary following a finding of bad faith negotiating by the State. *Coyote Valley*, 331 F.3d at 1097-98 (explaining that lawful class III tribal gaming is gaming conducted in conformance with a compact or conditions prescribed by the Secretary); *see* 25 U.S.C. § 2710(d)(7)(B)(vii).

In 1999, Governor Gray Davis commenced compact negotiations with a group of tribes. *Coyote Valley*, 331 F.3d at 1102. A decision by the California Supreme Court released while these negotiations were underway invalidated a statutory initiative that purported to authorize the Governor to enter into a model tribal-state gaming compact on the ground that the initiative violated article IV, section 19(e) of the California Constitution. *Hotel Emp. & Rest. Emps. Int'l Union v. Davis*, 21 Cal. 4th 585 (1999); *Coyote Valley*, 331 F.3d at 1101, 1103. In response, Governor Davis "proposed an amendment to Section 19 of Article IV of the California Constitution that would exempt tribal gaming from the prohibition on Nevada-style casinos, effectively granting tribes a constitutionally protected monopoly on most types of class III games in California." *Coyote Valley*, 331 F.3d at 1103. During the course of the negotiations, Governor Davis offered the tribes the "major concession" of the right "to operate real Las Vegas-style slot machines as well as

house-banked blackjack" plus the exclusive right to conduct those forms of class III gaming in the state, in exchange for revenue sharing provisions directed to specified funds. *Id.* at 1104-06, *citing* K. Alexa Koenig, *Gambling on Proposition 1A: The California Indian Self-Reliance Amendment*, 36 U.S.F. L. REV. 1033, 1043-44 (2002).

Plaintiffs are federally recognized Indian tribes. (Stipulated Statement of Facts and Supporting Evidence in Support of Cross-Motions for Summary Judgment (SOF) ¶¶ 1, 9.) Each entered into the 1999 Compact in September, 1999, and their compacts went into effect in May, 2000, after the passage of Proposition 1A authorized the governor of California to negotiate and conclude compacts pursuant to the state constitution, and upon their affirmative approval by the Assistant Secretary of the Interior (Assistant Secretary). Cal. Const. art. IV, § 19(f); "Notice of Approved Tribal-State Compacts," 65 Fed. Reg. 95, p. 31189 (May 16, 2000). (SOF ¶¶ 17-20, 23-26.)[4]

Chicken Ranch operated 224 class III slot machines in its casino before it entered into the 1999 Compact, as evidenced by the Preamble to its 1999 Compact and its inclusion on the list of 1999 Compact tribes paying into the Special Distribution Fund[5] (SDF).[6] Chicken Ranch operates class III Gaming Devices (the term used to describe class III slot machines in the 1999 Compact) in its casino

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[4] Plaintiffs' 1999 Compacts, which are substantively identical, are attached to the SOF as exhibits 8 and 11. For ease of reference, specific compact provisions are referred herein to as "1999 Compact" followed by the section number of the relevant provision.

[5] California Gambling Control Commission, http://www.cgcc.ca.gov/documents/Tribal/2016/List_of_tribes_required_to_make_compact_payments_11-8-16.pdf (last visited Feb. 1, 2017).

[6] The SDF is a fund available for appropriation by the California Legislature for gambling-related purposes. Cal. Gov't Code § 12012.85. A 1999 Compact tribe that operated at least 201 class III slot machines before the effective date of the 1999 Compact contributes to the SDF based on the number of Gaming Devices it operated on September 1, 1999. (1999 Compact § 5.1(a).)

under the terms of the 1999 Compact. (SOF ¶ 21.) Chemehuevi operated 100 slot machines in its casino before it entered into the 1999 Compact, as evidenced by the Preamble to its 1999 Compact, and thus does not presently pay into the SDF.[7] It also operates Class III Gaming Devices in its casino under the terms of its 1999 Compact. (SOF ¶ 27.)

On April 20, 2016, Plaintiffs wrote to Governor Brown's Senior Advisor for Tribal Negotiations, Joginder Dhillon, asking to meet and confer to attempt to resolve a dispute pursuant to the requirements of 1999 Compact section 9.1. (SOF ¶ 33.) In their correspondence, Plaintiffs argued, *inter alia*, that the duration clause in the 1999 Compact was *void ab initio* because it conflicted with the plain language of IGRA, and asked that the provision be stricken from the 1999 Compact. (*Id.*) The parties discussed the matter during an in-person meeting on May 3, 2016. (SOF ¶ 34.) On May 20, 2016, Mr. Dhillon wrote to Plaintiffs expressing the State's disagreement with Plaintiffs' reading of IGRA, and explained the reasoning underlying the State's position. (SOF ¶ 36.) This lawsuit followed. (SOF ¶ 37.)

B. THE 1999 COMPACT'S DURATION PROVISION

The 1999 Compact provides, in part, at section 11.2:

> Sec. 11.2. Term of Compact; Termination.
>
> Sec. 11.2.1. Effective. (a) Once effective this Compact shall be in full force and effect for state law purposes until December 31, 2020. No sooner than eighteen (18) months prior to the aforementioned termination date, either party may request the other party to enter into negotiations to extend this Compact or to enter into a new compact. If the parties have not agreed to extend the date of this Compact or entered into a new compact by the termination date, this Compact will automatically be extended to June 30, 2022, unless the parties have agreed to an earlier termination date.[8]

[7] *See also*, footnote 5.

[8] The duration clause was modified to add the last two sentences shortly after the parties executed the 1999 Compact, and the modified language is included in (continued…)

C. STANDARD OF PROOF

Federal Rule of Civil Procedure 56 authorizes summary judgment where the movant shows there is no genuine dispute as to any material fact and he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The court must construe the evidence and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987). Where the issue before the court involves the proper interpretation of statutes and regulations, and the parties agree on the "material" facts, the matter may be resolved as a matter of law on summary judgment. *See Edwards v. Aguillard*, 482 U.S. 578, 594-95 (1987); *Shishido v. SIU-Pac. Dist.-PMA Pension Plan*, 587 F. Supp. 112, 114 (N.D. Cal. 1983).

ARGUMENT

I. PLAINTIFFS MUST COMPLY WITH THE TERMS OF THEIR FEDERALLY-APPROVED 1999 COMPACT AS A CONDITION OF ENGAGING IN CLASS III GAMING ACTIVITIES

Federally-recognized Indian tribes in California have a right to regulate gaming activity on their eligible Indian lands, concurrently with the State, and subject to specified conditions. *See, e.g.*, 25 U.S.C. §§ 2701(5) & 2710(d)(5). The right of Indian tribes to engage in statutory class III gaming activities under IGRA is not absolute. Significantly, gaming activities on Indian lands must be conducted "in conformance with a Tribal-State compact entered into by the Indian tribe and the State and approved by the U.S. Secretary of the Interior." 25 U.S.C. § 2710(d)(1) & (d)(3)(B); *see also* 25 C.F.R. § 501.2(a) (noting that class III gaming operations must be conducted according to the requirements of IGRA and its implementing regulations, tribal law, and the requirements of a compact or "procedures" prescribed by the Secretary).

(…continued)
Addendum "A" thereto. (SOF, Exs. 8 and 11.)

Under 25 U.S.C. § 2710(d)(8)(A), the Secretary is authorized to affirmatively approve a submitted tribal-state gaming compact. The Secretary is authorized to disapprove a submitted compact only if he or she determines that it violates IGRA, federal law, or the United States' trust obligations to Indians. 25 U.S.C. § 2710(d)(8)(B). If the Secretary does not approve or disapprove a submitted compact before the expiration of forty-five days, it shall be considered to have been approved, and thus takes effect by operation of law, "but only to the extent the compact is consistent" with the provisions of IGRA. 25 U.S.C. § 2710(d)(8)(C).

State Defendants' review of the available tribal-state class III gaming compacts approved by the Secretary or Assistant Secretary since the passage of IGRA has revealed no occasion when the Secretary or Assistant Secretary either disapproved of a class III compact for the reason that it included a duration clause, or expressed doubts in an approval letter about the lawfulness of a compact because it included a duration clause.[9] Likewise, State Defendants have located no case law invalidating any gaming compact, in whole or in part, because of the inclusion of a duration clause.

Section 11.2.1 of the 1999 Compact clearly and unambiguously establishes a December 31, 2020 termination date, which is automatically extended to June 30, 2022 if the parties have not yet agreed to extend the date of the compact or entered into a new compact by December 31, 2020. (1999 Compact § 11.2.1(a).) The duration provision allows the parties to request to enter into compact negotiations beginning eighteen months prior to December 31, 2020. (*Id.*) Plaintiffs agreed to this provision when they executed the 1999 Compact. The 1999 Compact was determined to be lawful under IGRA when it was affirmatively approved by the

[9] The BIA maintains on its website copies of class III gaming compacts entered into between the several states and Indian tribes, along with the associated Secretarial approval letters and Federal Register notices. https://www.bia.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm (last visited Feb. 1, 2017).

Assistant Secretary, who, pursuant to his delegated authority, expressly concluded that the 1999 Compact "does not violate the Indian Gaming Regulatory Act of 1988 (IGRA), federal law, or our trust authority." (SOF ¶¶ 19, 25, & Exs. 9, 12.) The Assistant Secretary having affirmatively made the decision to approve the 1999 Compact, the agreement became effective upon its publication in the Federal Register and it is thus binding and carries the force of law. (SOF ¶¶ 20, 26; 25 U.S.C. § 2710(d)(8)(D).) Plaintiffs have the right to conduct gaming as long as they operate in conformance with IGRA and the terms of the 1999 Compact.

It is important to note that the 1999 Compact contains a renegotiation provision apart from the one set forth in the duration provision. Section 12.1 provides that the parties may enter into renegotiations for an amended or new compact at any time by mutual agreement. (1999 Compact §12.1). The parties to this suit are presently participating in mutually-agreed negotiations to conclude a compact. (SOF ¶ 35 & Ex. 15.) This fact belies any possible suggestion by Plaintiffs in their cross-motion that State Defendants would rely on the duration provision or use the compacting requirement to terminate Plaintiffs' ability to engage in gaming after June, 2022 without first attempting to conclude these good-faith negotiations. Plaintiffs' authorization to conduct class III gaming activities undoubtedly may continue beyond 2022 if an agreement is reached on an amendment or a new compact.[10] Further, 1999 Compact section 11.2.1 would not prohibit the parties from mutually agreeing to extend the expiration date for a period of time beyond June, 2002 if, for example, they were close to reaching an agreement on a new or amended compact, subject to Legislative ratification (Cal.

[10] From 2012 to the present, California has entered into and submitted to the Secretary at least thirteen tribal-state class III gaming compacts or amended compacts that are now in effect. (SOF ¶ 40.) The Secretary also prescribed "procedures" for California gaming tribes within that same time period. (SOF ¶ 41.) Each of these compacts and the Secretarial "procedures," a sampling of which are attached as exhibits to the SOF, include termination dates well beyond June, 2022. (SOF ¶¶ 40, 41.)

Const. art. IV, § 19(f)) and submission of the extension to the Secretary. If the parties ultimately fail to reach agreement on an amendment or a new compact, and a court later found that the State failed to conduct the negotiations in good faith, IGRA provides a remedial structure that would conclude in either a new compact or the imposition of Secretarial "procedures." 25 U.S.C. § 2710(d)(7). Thus, the 1999 Compact's renegotiation provisions and IGRA's protections make it extremely unlikely that Plaintiffs will need to forgo class III gaming activities beginning in June, 2022 as a result of the duration provision.

The 1999 Compact's duration provision is clear and unambiguous and was determined by the Assistant Secretary to comply with IGRA. The parties should be held to its terms. The lack of any authority supporting any interpretation other than the plain meaning of the 1999 Compact's duration provision, as affirmatively approved by the Assistant Secretary, is a compelling, if not dispositive, factor here.

II. THE PLAIN WORDING OF IGRA DOES NOT PROHIBIT GAMING COMPACTS FROM INCLUDING A DURATION PROVISION WITH A TERMINATION DATE

Plaintiffs allege that the timeframe for a compact is not a proper subject of compact negotiations because duration is not specifically mentioned in IGRA. (Compl. ¶ 10, 18, 41.) Although the duration of a compact is not expressly mentioned as a subject for negotiations in IGRA, the length of time class III gaming activities may occur is a permissible subject for negotiation because it qualifies as a "standard[] for the operation of [gaming] activity" within the meaning of 25 U.S.C. § 2710(d)(3)(C)(vi), and is "directly related to the operation of gaming activities" under 25 U.S.C. § 2710 (d)(3)(C)(vii).

"In construing a statute in a case of first impression, the courts look to the traditional signposts for statutory interpretation: first, the language of the statute itself; and second, its legislative history and the interpretation given it by its administering agency, both as guides to the intent of Congress in enacting the legislation." *Turner v. Prod*, 707 F.2d 1109, 1114 (9th Cir. 1983).

That every single topic related to the operation of the gaming activity is not mentioned in IGRA hardly makes the absence of a specific mention meaningful. In this regard, the absence in IGRA of a detailed list of each aspect of, and the types of standards applicable to, the operation of class III gaming activity is patently not required. Further, the permissible topics of negotiation expressed by the plain language of IGRA, such as the "standards for the operation of gaming activit[ies]" and "subjects that are directly related to the operation of gaming activities" are broad and general enough to encompass a timeframe for the operation of those activities pursuant to the terms of a negotiated tribal-state class III gaming compact. If Congress intended the permissible topics to be more narrow, it would not have utilized the broad language it did in 25 U.S.C. § 2710(d)(3)(C)(vi) and (d)(3)(C)(vii).

In *Coyote Valley*, the court found that proposed compact provisions requiring tribes to share gaming revenues with non-gaming tribes; requiring payments into the SDF for specified gaming-related purposes; and requiring tribes to adopt a labor relations ordinance covering employment at tribal casinos, were each sufficiently related to the operation of gaming activities to be authorized under IGRA, and did not give rise to a finding of bad-faith negotiations, although none of those subjects are specifically delineated in IGRA. *Coyote Valley*, 331 F.3d at 1116. In so holding, the court was guided in its interpretation of IGRA by IGRA's legislative history, which provided that the "terms of each compact may vary extensively" and,

> Section [](d)(3)(C) describes the issues that may be the subject of negotiations between a tribe and a State in reaching a compact. The Committee recognizes that subparts of each of the broad areas may be more inclusive. For example, licensing issues under clause vi may include agreements on days and hours of operation, wage and pot limits, types of wagers, and size and capacity of the proposed facility.

Id. at 1109, 1113 (brackets in orig.), *citing* S. REP. NO. 100-446, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084 (Senate Committee Report). The

Coyote Valley court recognized that Congress limited the proper topics for compact negotiations in IGRA to those bearing a direct relationship to the operation of gaming activities to prevent compacts from being used as a subterfuge for imposing state jurisdiction on tribes concerning issues unrelated to gaming. *Id.* at 1109, 1111.

The duration provision in the 1999 Compact establishes a time limit for the application of the compact's terms to the operation of Plaintiffs' class III gaming activities. It is difficult to conceive of a more direct relationship than the one between the operation of gaming activities and the duration of time those activities are authorized to be offered pursuant to the terms and conditions set forth in the applicable compact. The duration of a compact is analogous to those subjects within the Senate Committee Report acknowledged to be proper subjects of negotiation, such as the days and hours of operation, wage and pot limits, types of wagers, and the size and capacity of the proposed facility. As the duration of gaming activities is a standard for the operation of gaming activities and is directly related to the operation of those gaming activities, the duration of the compact that authorizes those activities must be seen as a proper subject of IGRA compact negotiations pursuant to 25 U.S.C. § 2710(d)(3)(C)(vi) and (vii).

The *Rincon* decision also supports this conclusion. In a case involving findings of bad-faith negotiating, the *Rincon* court allowed that the duration of a compact is a routine subject for negotiation under IGRA. *Rincon* 602 F.3d at 1039. In holding that IGRA requires the consideration for general fund revenue sharing to be more than for basic gaming rights, the court stated, "[w]e are . . . influenced by the fact that the Department of the Interior, the executive agency charged with approving gaming compacts, also interprets IGRA in this way," a conclusion it reached based on the Assistant Secretary of Indian Affairs' view that:

> [w]e have not . . . authorize[d] revenue-sharing payments in exchange for compact terms that are routinely negotiated by the parties as part of the regulation of gaming activities, such as

> duration, number of gaming devices, hour of operation, and wager limits.

Id.[11]

With respect to *Coyote Valley's* observation of congressional intent underlying IGRA's permissible subjects of negotiation, there is no contention in the Complaint that the duration provision is related to the imposition of state jurisdiction over Plaintiffs on matters unrelated to gaming so as to run afoul of that congressional concern. Rather, the duration provision serves to advance congressional goals of IGRA by allowing the parties to reassess, sufficiently before the compact's termination date, whether the 1999 Compact's terms remain in accord with their interests or whether changed circumstances necessitate renegotiation of the terms and standards applicable to the operation of gaming activities. For example, the manner in which the parties appropriately resolve issues related to size, hours, capacity, and pot limits can change over time as market conditions and technology and the needs and objectives of a tribal government evolve. It is inconsistent with both the language and policy objectives of IGRA to impose a limitation on the ability of the parties to agree to a mutually beneficial resolution short of perpetuity. In a strict perpetual compact lacking a renegotiation provision, neither side could oblige the other to negotiate. While State Defendants do not contend that a perpetual compact is precluded by IGRA, the parties here did not enter into a perpetual compact, and the duration provision at issue serves to protect the interests of both Plaintiffs and the State.[12]

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[11] *Coyote Valley* and *Rincon* agreed that California provided meaningful concessions in return for its demands in conjunction with the 1999 Compact. *Coyote Valley*, 331 F.3d at 1111-12; *Rincon*, 602 F.3d at 1036-37.

[12] If the duration provision were to be excised from the 1999 Compact, and the compact became perpetual, Plaintiffs would lose their right to seek a compact amendment or renegotiations for a new compact under the terms of excised section 11.2.1. As a result, all future requests to amend or renegotiate would exclusively fall under section 12.0, which requires the parties to mutually agree to enter into negotiations for an amendment, or, alternatively, under section 12.2, which limits the subjects of negotiation to those set forth therein. The resulting "perpetual" (continued…)

Accordingly, despite not being specifically listed in IGRA as a subject for negotiation, duration provisions clearly relate to standards for the operation of gaming activities under 25 U.S.C. § 2710(d)(3)(C)(vi) and are directly related to the operation of the gaming activities under 25 U.S.C. § 2710(d)(3)(C)(vi).

III. THE AGENCY CHARGED WITH ADMINISTERING IGRA CONSTRUES IT AS AUTHORIZING DURATION PROVISIONS AND ITS INTERPRETATION MUST BE ACCORDED CONSIDERABLE DEFERENCE UNDER *CHEVRON*

If statutory language admits of only one interpretation, that interpretation must be given effect. *Tang v. Reno*, 77 F.3d 1194, 1197 (9th Cir. 1996). As discussed above, State Defendants believe that duration provisions fall squarely within the general topics of negotiation expressly authorized by the plain language of IGRA because duration provisions directly relate to the operation of gaming activities and constitute an appropriate standard for such activities. Further, the intent of Congress, as expressed in IGRA's legislative history and as determined by the relevant case law, fully supports State Defendants' position. If this Court agrees that the intent of Congress is clear, that is the end of the matter. *Chevron*, 467 U.S. at 842.

If, however, the Court deems the plain language of IGRA, its legislative history, and case law interpreting the pertinent provisions insufficient to answer the question and, therefore, that IGRA is fully silent or ambiguous as to whether duration clauses are permissible subjects for negotiation, the next step in the Court's analysis is to look to the enforcing agency's application and construction of IGRA for further elucidation on its interpretation. *Chevron*, 467 U.S. 842-44. In doing so, the Court gives considerable deference to the implementing agency's considered judgment. *Id.* at 844 (considerable weight is accorded to an executive department's construction of a statutory scheme it is entrusted to administer).

(…continued)
compact would thus restrict Plaintiffs' right to seek good-faith negotiations for an amendment or a new compact as compared to the right currently afforded them by section 11.2.1.

Under *Chevron*, a federal agency's administrative implementation of a particular federal statutory provision qualifies for considerable deference when (1) Congress delegated authority to the agency generally to make rules carrying the force of law; (2) the agency interpretation was promulgated in the exercise of that authority; and (3) delegation of such authority is shown by, for example, the agency's power to engage in adjudication or "notice-and-comment" rulemaking, or by some other indication of comparable congressional intent. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (*Mead*).

Under the authority vested in the Secretary as delegated by Congress through 5 U.S.C. § 301, and 25 U.S.C. §§ 2, 9 and 2710, which authority is delegated to the Assistant Secretary pursuant to Departmental Manual Part 209, the BIA promulgated procedures for states and Indian tribes to follow when submitting class III gaming compacts and compact amendments to the Secretary. *See* 25 C.F.R. §§ 293 & 293.1. (SOF ¶ 42, ex. 39.) Notice in the Federal Register announcing the final rule establishing the Part 293 procedures makes clear that the BIA published notice of the proposed rule, provided for a public comment period, and discussed and responded to public comments before implementing the rule. See 73 Fed. Reg. 128, p. 37907 (July 2, 2008); 73 Fed. Reg. 235, p. 74004 (Dec. 5, 2008) (SOF ¶ 42, ex. 39.)

The "Class III Tribal State Gaming Process" set forth in Part 293 are those procedures applicable to tribal-state gaming compacts submitted to the Secretary for approval under 25 U.S.C. § 2710(d)(8). For purposes of Part 293's procedures governing the submission of class III gaming compacts, 25 C.F.R. § 293.1 defines the term "extensions" to mean "changes to the timeframe of the compacts or amendments." Additionally, 25 C.F.R. § 293.5 explains that "approval of an extension [of a compact] is not required if the extension of the compact does not include any amendment to the terms of the compact."

Clearly, the references to "extensions" and "timeframes" reflect the administrating agency's judgment that IGRA permits tribes and states to negotiate for timeframes applicable to gaming activities, as a subject involving a standard for, and directly related to, the operation of gaming activities. Under *Chevron*, the agency's interpretation of IGRA in connection with the very provision that is the subject of these proceedings should be afforded considerable deference.[13]

Plaintiffs may counter that under the Indian canon of statutory construction established by *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985), any ambiguity in IGRA should be resolved in favor of tribes. But 25 U.S.C. § 2710(d)(3)(C) is not ambiguous in regards to authorizing negotiations for a duration clause. At best, it is silent on the matter. Moreover, even if IGRA was considered to be ambiguous on this point, the deference accorded administrative construction of a statute under *Chevron* trumps the Indian canon of construction. The decision in *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997), explains the Ninth Circuit's view on the question:

> We regard [the Indian canon] as a mere "guideline and not a substantive law." *Shields v. United States*, 698 F.2d 987, 990 (9th Cir.1983); *see also Montana v. Blackfeet Tribe*, 471 U.S. 759, 770, 85 L. Ed. 2d 753 (1985), 105 S. Ct. 2399 (White, J., dissenting) ("this rule is no more than a canon of construction"). We have therefore held that the liberal construction rule must give way to agency interpretations that deserve *Chevron* deference because *Chevron* is a substantive rule of law. *See, e.g., Haynes v. United States*, 891 F.2d 235, 239 (9th Cir. 1989); *Shields*, 698 F.2d at 991.

Id. at 663 n.5.

[13] The fact that regulations applicable to Secretarial "procedures" *require* such procedures to include "the length of time the procedures will remain in effect" (25 C.F.R. § 291.4(j)(18)), provides further support for the position that duration provisions in compacts are authorized by IGRA. It makes no sense to require a duration clause in Secretarial "procedures" issued after a tribe and a state did not cooperatively enter into a compact, but to forbid a tribe and a state engaged in bi-lateral negotiations to negotiate for one.

Finally, even if the Court determines that IGRA's implementing regulations are not entitled to *Chevron* deference, the agency's construction of IGRA evidenced in Part 293, and its consistent and uniform practice of affirmatively approving compacts with duration provisions (including the 1999 Compacts) and considering approved other compacts with duration provisions, is entitled to traditional deference under *Skidmore v. Swift & Co.* 323 U.S. 134 (1944) (*Skidmore*). *Skidmore* holds that a federal agency administering its own statute merits deference where the agency has specialized experience, holds broader information that may be brought to bear on the question, and has shown consistency in its determinations. *Skidmore*, *Id.* at 139-40; *see also Mead*, 533 U.S. at 227-28, 234-35.

The Assistant Secretary affirmatively approved the 1999 Compact containing a duration provision, and has consistently over time either affirmatively approved or considered to be approved compacts with duration provisions between California and other Indian tribes, including numerous such compacts presented to the Secretary for approval since 2012.[14] (SOF ¶ 40) The Secretary and Assistant Secretary have also consistently approved or considered to be approved compacts between other states and tribes containing duration provisions. (SOF ¶ 40) Furthermore, the agency construes IGRA to not require Secretarial review and approval at all when a submitted compact contains *only* an date extension to an existing compact. 25 C.F.R. § 293.5. These agency determinations constitute compelling evidence that the agency charged with implementing IGRA and having specialized expertise in the relevant area construes IGRA as authorizing negotiations over timeframes for the operation of class III gaming activities. Its policies and standards are entitled to *Skidmore* deference.

[14] The California Gambling Control Commission maintains on its website copies of all tribal-state compacts entered into between California and Indian tribes and in effect. http://www.cgcc.ca.gov/?pageID=compacts (last visited Nov. 14, 2016).

IV. THE ALLEGED INABILITY OF PLAINTIFFS TO OBTAIN DESIRED FINANCING IS NOT MATERIAL TO THE QUESTION WHETHER IGRA AUTHORIZES DURATION PROVISIONS

Plaintiffs contend that the 1999 Compact's duration provision has the effect of preventing tribes from obtaining financing, thus impacting their ability to construct new or expanded gaming operations, which in turn impacts their ability to generate the revenues necessary to provide tribal government programs and services for their members (Compl. ¶ 39-40). Plaintiffs contend that these alleged effects of the 1999 Compact's duration provision frustrate and conflict with IGRA's purposes, and render it void. (*Id.*)

Where there is a question as to the interpretation of a statute, rules of statutory construction authorize resort to legislative history as an extrinsic aid to determine Congressional intent. *Cass v. United States*, 417 U.S. 72, 77 (1974).

That Congress passed IGRA to improve tribes' economic development opportunities is not in dispute. IGRA's express purpose is to provide a statutory basis for the operation of gaming "as a means of promoting" tribal economic development, self-sufficiency, and strong tribal governments, to shield tribal gaming from corrupting influences, and to protect tribal gaming "as a means of generating" tribal revenue. 25 U.S.C. § 2702. But IGRA's legislative history does not show that Congress intended IGRA to ensure sufficient revenue from tribal gaming or the availability of funding to finance tribal gaming operations. Moreover, there is nothing to support the idea that a perpetual compact would eliminate presumed external barriers to funding or promote the operation of a gaming enterprise generating sufficient revenues to meet tribal needs. Any difficulty Plaintiffs may be encountering in obtaining desired levels of funding for the development and expansion of their gaming operations more than sixteen years into the 1999 Compact is immaterial to the statutory construction analysis.

V. PLAINTIFFS' 1999 COMPACT SHOULD BE INVALIDATED IN ITS ENTIRETY IF THE DURATION PROVISION IS DEEMED VOID

State Defendants contend that the duration provision is consistent with the text of IGRA and its purposes. In the unlikely event the Court were to find in favor of Plaintiffs and hold that the duration provision is void as contrary to IGRA, the appropriate remedy is to invalidate the entire 1999 Compact between the parties. The 1999 Compact does not contain a severability clause specifying that if any provision is declared void, the remainder of the agreement is not affected. The timeframe for the duration of the 1999 Compact is integrated into the fabric of the entire agreement, and, like any end date to most any contract, constitutes an important part of the consideration underlying the parties' bargain. Under California law, if the consideration for a contract is contrary to an express provision of law or is contrary to the policy of an express law, the entire contract is void. Cal. Civ. Code §§ 1607, 1667 & 1608 ("If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void."). Moreover, it would thwart IGRA's policy of giving states a voice in the compacting process for Plaintiffs to secure a perpetual gaming compact with the State through a judicial voiding of the duration provision. *See Rincon*, 602 F.3d at 1030; *Dalton v. Pataki*, 835 N.E.2d 1180, 1189 (2005). If the 1999 Compact were invalidated in its entirety, Plaintiffs would still retain the right to request to enter into bi-lateral compact negotiations, and the State would be obliged to consent to such negotiations or risk facing a suit for failure to negotiate in good faith. Cal. Gov't Code § 98005.

CONCLUSION

For all of the above reasons and authorities, State Defendants respectfully request this Court to grant summary judgment in their favor and against Plaintiffs on the parties' cross-motions for summary judgment.

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Respectfully submitted,

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