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**UNITED STATES DISTRICT COURT**

**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.

Case No. 5:16-cv-1347-JFW-MRW

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT**

**Date: March 13, 2017**
**Time: 1:30 p.m.**
**Courtroom: 7A**
**Judge: Hon. John F. Walter**
**Action Filed: June 23, 2016**

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## I. INTRODUCTION

Plaintiffs, the Chicken Ranch Rancheria ("Chicken Ranch") and the Chemehuevi Indian Tribe ("Chemehuevi") (together, "Tribes"), operate casinos pursuant to gaming compacts with the State of California ("State"). The Tribes' compacts ("1999 Compact" or "Compacts") contain identical provisions that establish a fixed date upon which the Compacts will terminate ("Termination Provision"), thereby terminating each Tribe's right to engage in Class III gaming unless and until each Tribe and the State enter into a new or extended compact. The questions for the Court to resolve in this action are whether the Termination Provision: (1) violates the provisions of the Indian Gaming Regulatory Act, 25 U.S.C. §2710 et seq. ("IGRA"), and (2) frustrates the congressional purposes of the IGRA.

The answer to both of these questions is "yes." Inclusion of the Termination Provision in the Compacts: (1) is contrary to the plain wording of the IGRA, specifically 25 U.S.C. §2710(d)(3)(C); (2) frustrates the intent of Congress in enacting the IGRA, which is to allow the Tribes to engage in gaming to generate revenue to fund essential governmental programs and services; and (3) violates the purposes of the IGRA by dramatically shifting the balance of negotiating power in favor of the State in negotiations with the Tribes for new or extended Compacts. This case presents no disputed issues of material fact and the Tribes, therefore, are entitled to a judgment as a matter of law declaring that the Termination Provision in the Compacts is void.

## II. LEGAL STANDARD

A court shall grant a motion for summary judgment when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In ruling on a motion for summary judgment, a court construes the evidence in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378, 380 (2007).

## III. UNDISPUTED FACTUAL BACKGROUND

### A. The Indian Gaming Regulatory Act.

In *California v. Cabazon*, 480 U.S. 202, 221-222 (1987) ("*Cabazon*"), the Supreme Court held that California had no jurisdiction over gambling in Indian country. After *Cabazon*, California had no authority to regulate tribal gaming in Indian country. *See Sycuan Band v. Roache*, 54 F. 3d 535 (9th Cir. 1994).

Congress's primary purpose in enacting the IGRA was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments....", 25 U.S.C. §2702(1). Congress also intended to grant the states limited authority to regulate Class III gaming through a negotiated compacting process so states could protect their interests in ensuring that organized crime was not involved in the gaming activities and that the games were being played fairly. 25 U.S.C. § 2702(2). In order to achieve these purposes, Congress established three "classes" of gaming on Indian lands: Class I (ceremonial and social games); Class II (bingo, games similar to bingo, and non-banked card games if not prohibited by state law); and Class III (all other forms of gaming that are not Class I or Class II gaming, including slot machines of any kind). 25 U.S.C. §2703(6)-(8).

Under the IGRA, a tribe has the right to engage in Class III gaming on its Indian lands if: (1) the tribe enacts a gaming ordinance, that authorizes Class III gaming, which must be approved by the Chair of the National Indian Gaming Commission ("NIGC"); (2) the state in which the tribe's Indian lands are located permits any person, organization, or entity to play the games that the tribe is seeking to play; and (3) the tribe negotiates and enters into a tribal-state compact that authorizes Class III gaming.[1]

[1]There is one circumstance under which a tribe may conduct Class III gaming without a compact: where the state is determined by a Federal District Court not to have negotiated in good faith, the state has rejected a court-appointed mediator's selection of the tribe's last, best offer of a compact, and the Secretary of the Interior has prescribed "procedures" under which the tribe may conduct Class III gaming. 25 U.S.C. §2710 (d)(7)(B)(vii).

25 U.S.C. §2710(d)(3). In negotiating a compact with a tribe, a state is limited to negotiating over those subjects that are specifically enumerated in the IGRA and that are directly related to the gaming activities. 25 U.S.C. §2710(d)(3)(C). Any compact entered into between a tribe and a state must be approved, or deemed approved, by the Secretary of the Interior ("Secretary") and notice of such approval must be published in the Federal Register before the compact can take effect. 25 U.S.C. §2710(d)(1)(3)(b).

**B. The Chicken Ranch And Chemehuevi Compacts.**

Chicken Ranch and Chemehuevi entered into functionally identical compacts with the State in 1999.[2] The Compacts were executed by the parties and ratified by the California Legislature in September, 1999. Stipulated Statement of Facts and Supporting Evidence in Support of Cross-Motions for Summary Judgment and Plaintiffs' Statement of Uncontroverted Facts and Supporting Evidence in Support of Cross Motion for Summary Judgment ("SOF"), ¶¶ 17-27. The Compacts took effect on or about May 16, 2000, after California's voters approved an amendment to California's Constitution, Art. IV, §19(f), that specifically empowered the Governor to negotiate and conclude, and the Legislature to ratify, tribal-state compacts authorizing the operation of slot machines, banking and percentage card games and lotteries on Indian lands. Until the California Constitution was amended, the State was not obligated to negotiate with tribes about the operation of slot machines or banked or percentage card games, because California law prohibited such games. *Hotel Employees & Restaurant Employees International Union v. Davis*, 21 Cal. 4th 585, 611-616 (1999).

The 1999 Compact authorizes the Tribes to operate slot machines, banked and percentage card games and lotteries, and imposes various regulatory and other obligations on the Tribes. SOF,¶ 21; ¶ 27. The 1999 Compact also includes a

[2]Because the 1999 Compact was a model compact, the provisions of both Tribes' Compacts are identical. Any quote from or citation to a provision of the 1999 Compact is applicable to both Tribes' Compacts.

Termination Provision (§11.2.1), which provides: "Once effective this Compact shall be in full force and effect for state law purposes until December 31, 2020."[3] SOF, ¶ 29.

**C. Impacts Of The Termination Provision On Chicken Ranch And Chemehuevi.**

**1. Chicken Ranch.**

Chicken Ranch conducts Class III gaming at the Chicken Ranch Bingo and Casino ("Chicken Ranch Casino") pursuant to its 1999 Compact. SOF, ¶ 21. The Chicken Ranch Casino does not produce sufficient revenue to allow Chicken Ranch to develop government facilities that would enable Chicken Ranch to provide governmental programs and services to its members on the Chicken Ranch Rancheria ("Rancheria"). SOL, ¶ 45. The limited revenue from the Chicken Ranch Casino also does not allow for the creation of the infrastructure necessary to develop and utilize its trust and fee land. SOF, ¶ 46.

The only way that Chicken Ranch can significantly increase its governmental revenue is through the development of a larger casino and the creation of associated non-gaming commercial enterprises. SOF, ¶ 47. In 2012, Chicken Ranch developed a plan to build a new and larger casino, hotel, and other facilities on approximately 42 acres of trust land that are contiguous to the original Rancheria ("Project"). Chicken Ranch also developed a related plan to build housing and infrastructure on a portion of its fee land. SOF, ¶ 48.

A market study performed for Chicken Ranch concluded that the proposed new casino would produce approximately $100 million in gaming revenue in the first year of operation, 2015, with an additional $14.4 million in gaming revenue if Chicken Ranch built the proposed hotel. That would have represented a nearly five-fold increase in tribal revenue over Chicken Ranch Casino's actual 2015 revenue. Operation of the

[3]The Compact provides for an extension of the term until June 30, 2022, if negotiations for a replacement compact are in progress but have not been concluded by December 31, 2020.SOF, ¶ 30.

proposed hotel was estimated to produce approximately $11 million in non-gaming revenue in the first year and a proposed golf course was projected to produce $2.7 million in revenue in the first year. SOF, ¶¶ 50-52.

The architect's cost estimate prepared for the Project concluded that Chicken Ranch would need approximately $237,775,000 to construct the new casino, hotel, and related facilities. SOF, ¶ 53. When Chicken Ranch contacted Oak Valley Bank ("Bank"), the financial institution that has provided financing for Chicken Ranch's economic development projects in the past, seeking financing for the Project, the Bank informed Chicken Ranch that the Bank would not lend Chicken Ranch the funding necessary for the Project. SOF, ¶¶ 54.

The Bank refused to finance the Project because the financing would have to be secured by, and repaid from, the gaming revenues. SOF, ¶ 55. Due to the Termination Provision, there was inadequate time to generate the gaming revenues needed to repay the loan. Further, the Bank said it would not finance the Project even if the current term of the 1999 Compact were extended for 20 years (the length of the initial term), because the Bank's lending guidelines required that the casino revenues be available as security for a period greater than 25 years. SOF, ¶ 56.

**2. Chemehuevi.**

The Chemehuevi Indian Tribe conducts Class III gaming at the Havasu Landing Resort and Casino ("Havasu Landing Casino") pursuant to the 1999 Compact. SOF, ¶ 27.The revenue received from the operation of the Havasu Landing Casino is insufficient to allow the tribal government to resolve numerous problems that plague the tribal members residing on the Chemehuevi Indian Reservation ("Reservation"): poverty, lack of infrastructure, inadequate educational facilities, a high rate of alcohol and substance abuse, lack of sufficient medical and emergency services, and chronic power outages. SOF, ¶ 61.

In order to raise the standard of living for the majority of members of the tribe who are low-income and very low income, and in order to ensure that all tribal members have access to decent employment opportunities, housing, health care, education, properly maintained roads, and reliable electrical power, Chemehuevi has been engaged, for more than a decade, in efforts to significantly develop its Reservation economy and thereby increase its governmental revenue. SOF, ¶ 62.

Beginning in 2003, Chemehuevi, with financial assistance from the San Manuel Band of Mission Indians, created a master plan for the development of the southern portion of the Reservation ("Master Plan Project"). SOF, ¶ 63. The Master Plan Project included hotels, a casino, golf courses, tennis facilities, a spa/fitness center, a water park, an equestrian center, low density custom home parcels, spa villas, condominiums and time shares. SOF, ¶ 64.

Phase One of the Master Plan Project was budgeted for $314,937,241 in 2003, and, viewed in isolation, appeared to be financially viable. SOF, ¶ 65. However, the development of the Master Plan Project required $58,460,250 in infrastructure improvements. SOF, ¶ 65. Chemehuevi might have been able to find financial support for the Master Plan Project, based on the projected revenues from the project, but no financial institution or investor was willing to lend Chemehuevi the money required to make the infrastructure improvements to allow the Master Plan Project to go forward. SOF, ¶ 67.

The only viable way to finance the construction of the infrastructure improvements necessary to support the Master Plan Project would have been through 30-year bond financing paid for out of revenue generated by Chemehuevi's gaming operation and other commercial enterprises. SOF, ¶ 68. Chemehuevi's compact term, even if renewed for an additional term of 20 years, would not cover the entire 30-year period of the bond financing. SOF, ¶ 69. Without the certainty of income from Chemehuevi's gaming operation throughout the entire 30-year bond financing period,

no financial institution was willing to underwrite the necessary bond financing for the Master Plan Project. SOF, ¶ 70. Because of the Tribe's inability to obtain long term bond financing, the Master Plan Project was shelved in 2007. SOF, ¶ 72.

The Tribe has spent years working on a far less ambitious project, the construction of a new casino, hotel, and marina in the northern portion of the Reservation (the "H2O Project"). SOF, ¶ 73. The H2O Project has also been limited by the lack of funding. SOF, ¶ 74. Despite a market study projecting that the H2O Project would be economically feasible, four banks declined to fund the project because the Tribe was seeking 10-year financing and only had seven years remaining on its 1999 Compact. *Id.* Finally, in 2016, Chemehuevi obtained two loans from Great Western Bank ("GW Bank") totaling approximate $30,000,000 to finance the construction of a new hotel and casino. SOF, ¶ 75. The Bureau of Indian Affairs agreed to guarantee repayment of 90% of the hotel loan in the event that Chemehuevi defaults on the hotel loan. SOF, ¶ 75.

The loans that Chemehuevi received from GW Bank require that Chemehuevi pay off the loan in 10 years and granted GW Bank, as security, an interest in every significant asset owed by the Tribe, including, but not limited to, the income and assets of the Havasu Landing Casino, the Tribe's fee land located in Havasu City, Arizona, and the Tribe's ferry boat. SOF, ¶ 76. The increased revenue that the Tribe hopes to receive from the H2O Project will only be a small percentage of the anticipated revenues from the Master Plan Project. SOF, ¶ 77.The H2O Project will only allow the Tribe to engage in a much more limited and less diversified development project than it would have under the Master Plan Project. SOF, ¶ 77.

**3. Impacts of Termination Provision on the Tribes.**

The Termination Provision in the 1999 Compacts has had the effect of preventing the Tribes from obtaining financing, including both bank loans and long-term bond financing, for the construction of new or expanded gaming facilities, the infrastructure

improvements necessary to construct or expand those facilities, and other economic development projects. SOF, ¶ 78.

The inability of the Tribes to construct new or expanded gaming facilities prevents the Tribes from being able to finance, with increased gaming revenues from new or expanded gaming facilities, the infrastructure improvements on the Tribes' reservations that are necessary to develop new non-gaming businesses and tribal government facilities. SOF, ¶ 79.

The inability of the Tribes to construct new or expanded gaming facilities, to construct necessary infrastructure improvements, and to develop new non-gaming businesses, hinders the Tribes' ability to provide essential governmental programs and services to its members. SOF, ¶ 80.

If the Tribes' 1999 Compacts terminate, pursuant to the Termination Provision, the Tribes' economies will be devastated. All tribal programs and services will have to terminated or be drastically reduced. The Tribes will be forced to depend entirely on federal grants, limited Class II gaming revenue, and existing non-gaming enterprises for their governmental revenue. SOF, ¶ 86.

## IV. ARGUMENT

### A. The Termination Provision Violates The Plain Wording Of The IGRA.

The IGRA states that "Indian tribes have the exclusive right to regulate gaming activity on their Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. §2701(5).

The IGRA grants Indian tribes the absolute right to engage in Class III gaming so long as they meet three conditions:

> Class III gaming activities **shall be lawful** on Indian lands only if such activities are—
>
> (A) authorized by an ordinance or resolution that—

> (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
>
> (ii) meets the requirements of subsection (b), and
>
> (iii) is approved by the Chairman,
>
> (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and
>
> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

25 U.S.C. § 2710(d)(1). (Emphasis added).

The Tribes meet all of the requirements under the IGRA to conduct Class III gaming on their Indian lands. Each Tribe has enacted a gaming ordinance, which has been approved by the Chair of the NIGC, which authorizes the Tribes to play games authorized by California law. SOF ¶¶ 8, 14. California, where the Tribes' Indian lands are located, affirmatively permits Indian tribes to conduct Class III gaming consisting of slot machines (gaming devices), banked and percentage card games and lotteries on their Indian lands within the State. California Constitution, Art. IV, §19(f). SOF, ¶ 16. The Tribes and the State have entered into the 1999 Compacts, which permit the Tribes to conduct Class III gaming on their Indian Lands. SOF, ¶ ¶ 17-20, 23-26.

Thus, the Tribes have the absolute right to conduct gaming on their Indian lands: "Class III gaming activities *shall be lawful*…." 25 U.S.C. §2710(d)(1).

Contrary to the IGRA, the Termination Provision sets a date certain after which the Tribes would be prohibited from engaging in Class III gaming pursuant to the IGRA, even though the State permits Class III gaming to be conducted by other persons, organizations, and entities within the State without a termination date.[4] The Termination Provision would subject the Tribes' Class III gaming activities to federal enforcement of

[4] There is no termination date for pari-mutuel wagering on horse races or for the State Lottery. SOF, ¶ 43.

the IGRA's prohibition on Class III gaming without a compact once the Compacts expire. *See*, 18 U.S.C. §1166 [which assimilates into federal law all state gambling laws, except as to Class II gaming or gaming authorized by compact]. Terminating the Compacts on the expiration date violates the plain wording of the IGRA, because it denies the Tribes their absolute right to conduct Class III gaming on their Indian lands.

Significantly, the word "duration" is not used at all in the IGRA. The word "term," in the sense of a period of time, is used twice in the IGRA; in both cases, the word is used with reference to limitations on the permissible duration of management contracts. 25 U.S.C. §2711(b). If Congress had intended to limit the duration of gaming compacts or to ensure that term provisions were included among the proper topics of negotiation, it could have done so, since Congress included restrictions on the length of management contracts. Instead, Congress chose not to address the duration of the compacts at all in the IGRA. Revealingly, the Senate Select Committee on Indian Affairs, in its report on the IGRA, also did not use the word "duration" and used the word "term" exclusively in the context of management contracts. *See* Senate Report 100-446, pp. 8, 15. Evidently, Congress did not regard a termination provision as a necessary feature of gaming compacts.

Above and beyond the fact that the IGRA does not mention the words "term" or "duration", the State has no *legitimate* State interest in insisting that the Compact contain a termination provision. The State's only interest in including the Termination Provision is to gain undue leverage in negotiating a new or extended compact as the compact's fixed expiration date approaches.[5]

[5] To the extent that the State might be concerned that changed circumstances over time might warrant adjustments to the regulatory regime prescribed in the Compact, that concern already is addressed by the Compact's existing provisions for dispute resolution and negotiation of amendments of specific provisions upon showing of adequate justification. *See* Compact §9 (dispute resolution), §12 (amendments). (SOF, ¶17, Exhibits 8; ¶ 26, Exhibit 13.)

Finally, the only action that a state is authorized to take to stop a tribe from conducting Class III gaming is to entirely prohibit all Class III gaming "for any purpose by any person, organization, or entity" within the state, thereby making such gaming a violation of state criminal law. The State lottery would have to be terminated, and, as a result of Proposition 1A, the Constitution of the State of California would have to be amended in order to effectuate a prohibition on all forms of Class III gaming.

There is no question that Class III gaming is currently being conducted in California, both on and off of Indian lands, by Indian tribes, and the State. As a result, the State cannot prohibit the Tribes from gaming on their Indian lands, and any attempt to do so by the State would constitute a violation of the IGRA.

**B. A Termination Provision Is Not A Proper Subject Of Compact Negotiations Under The IGRA.**

The IGRA, lists the subjects that the State has a right to negotiate for in a tribal-state Class III compact:

> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
>
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
>
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
>
> (v) remedies for breach of contract;
>
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. §2710(d)(3)(C).

The subjects listed in Section 2710(d)(3)(C) are the *only* subjects that IGRA permits to be included in a compact. *Rincon Band of Luiseño Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1028-1029, n.9 (9th Cir. 2010) ("*Rincon*"); accord, *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1111 (9th Cir. 2003) ("*Coyote Valley II*"); *North Fork Rancheria of Mono Indians of California v. State of California*, 2015 U.S. Dist. LEXIS 154729, *29-30 (E.D. Cal. 2015) ("*North Fork*").

Manifestly, the Termination Provision does not fall within any of the six specific topics listed in Section 2710(d)(3)(C)(i)-(vi). The Termination Provision does not relate to the application of criminal and civil laws and regulations, the allocation of criminal and civil jurisdiction, the State's costs of regulating the Tribes' gaming, taxation of the gaming by the Tribes, remedies for breach of contract, or standards for the operation and maintenance of the Tribes' gaming facilities. A common sense interpretation of the final, "general" category, Section 2710(d)(3)(C)(vii) would compel the conclusion that the phase "other subjects that are directly related to the operation of gaming activities" also does not encompass the Termination Provision. There is, thus, no provision of Section 2710(d)(3)(C)(i)-(vii) that, on its face, purports to authorize inclusion of the Termination Provision in the Tribes' Compacts.

The State, nevertheless, contends that the Termination Provision is a proper subject of negotiation under Section 2710(d)(3)(C)(vii), on the theory that, under a broad reading of that subsection, the Termination Provision is a subject "directly related to the operation of gaming activities."

The term "gaming activities" is not defined in the IGRA or the Senate Report on the IGRA. It has, however, been the subject of detailed analysis by a number of Federal Courts of Appeal and District Courts. *See e.g.*, *Rincon*, 602 F.3d at 1033-1034; *Coyote*

*Valley II*, 331 F.3d at 1111-1114; *North Fork*, 2015 U.S. Dist. LEXIS 154729 at *32-39. In *Michigan v. Bay Mills Indian Community*, __ U.S. __, 134 S. Ct. 2024 (2014), ("*Bay Mills*") the Supreme Court gave the term a definitive, and definitively limited, meaning:

> [N]umerous provisions of IGRA show that "class III gaming activity" means just what it sounds like--the stuff involved in playing class III games. For example, §2710(d)(3)(C)(i) refers to "the licensing and regulation of [a class III gaming] activity" and §2710(d)(9) concerns the "operation of a class III gaming activity." Those phrases make perfect sense if "class III gaming activity" is what goes on in a casino--each roll of the dice and spin of the wheel. But they lose all meaning if, as Michigan argues, "class III gaming activity" refers equally to the off-site licensing or operation of the games. (Just plug in those words and see what happens.) See also §§2710(b)(2)(A), (b)(4)(A), (c)(4), (d)(1)(A) (similarly referring to class II or III "gaming activity"). The same holds true throughout the statute. Section 2717(a)(1) specifies fees to be paid by "each gaming operation that conducts a class II or class III gaming activity"--signifying that the gaming activity is the gambling in the poker hall, not the proceedings of the off-site administrative authority. And §§2706(a)(5) and 2713(b)(1) together describe a federal agency's power to "clos[e] a gaming activity" for "substantial violation[s]" of law--*e.g.*, to shut down crooked blackjack tables, not the tribal regulatory body meant to oversee them. Indeed, consider IGRA's very first finding: Many tribes, Congress stated, "have licensed gaming activities on Indian lands," thereby necessitating federal regulation. §2701(1). The "gaming activit[y]" is (once again) the gambling.

*Bay Mills*, 134 S. Ct. at 2032-33.

The Supreme Court's rejection of Michigan's efforts to broaden the meaning of "gaming activity" in *Bay Mills* leaves no room for the argument that a Termination Provision is "directly related to the operation of the gaming activities." Limiting the duration of a compact is far less directly related to the actual conduct of the Class III gaming in a tribal casino than were the licensing and administrative activities that the Supreme Court found did not qualify as gaming activities in *Bay Mills*. The Termination Provision is not directly related to "what goes on in a casino--each roll of the dice and spin of the wheel." *Bay Mills*, 134 S. Ct. at 2032-33; *accord, North Fork*, 2015 U.S. Dist. LEXIS 154729 at *28-38.[6]

**C. The Termination Provision Conflicts With Congress's Purposes In Enacting The IGRA.**

Congress's paramount purpose in enacting the IGRA was to protect the right of tribal governments to utilize gaming to raise revenues and attain economic self-sufficiency for tribal communities in ways that would assure that tribal government gaming is properly regulated and does not conflict with the public policies of the states in which Indian lands are located. 25 U.S.C. §2702 (2). ""Congress enacted [the IGRA] to provide a legal framework within which tribes could engage in gaming—an enterprise that holds out the hope of providing tribes with the economic prosperity that has so long eluded their grasp— while setting boundaries to restrain aggression by powerful states." *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1027 (9th Cir. 2010).

To comply with the IGRA, the Termination Provision would have to be consistent with these goals. *Rincon*, 602 F.3d 1019, 1034-37 (9th Cir. 2010); *Coyote Valley II*, 331

[6] The only, even indirect, reference in the IGRA to termination of Class III gaming on a tribe's Indian lands is found 25 U.S.C. §2710(d)(2)(D)(i) which authorizes tribes to revoke their gaming ordinances, thereby making Class III gaming illegal on the Indian lands of such Indian tribe. This language, when considered in the context of the language of the IGRA taken as a whole, compels the conclusion that the State may not insist that a compact include a termination date, or even propose such inclusion.

F.3d at 1111 (9th Cir. 2003). Instead, the Termination Provision directly conflicts with the purposes of the IGRA.

The mere existence of the Termination Provision in the 1999 Compact impairs the Tribes' ability to obtain financing for projects that would promote tribal economic development, including development of non-gaming economic development projects and the construction and expansion of tribal infrastructure. SOF ¶¶ 78-80. The loss of tribal revenue resulting from a termination of the Tribes' Compacts would have a devastating impact on all aspects of their governments, including tribal economic development, infrastructure improvements, and law enforcement, elder care, daycare, health care, social services, educational programs and student scholarship programs. SOF, ¶ 86.

These adverse impacts resulting from the Termination Provision are entirely inconsistent with Congress's intent that gaming conducted pursuant to the IGRA be "a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. §2702 (1). Terminating the Tribes' gaming operations would cripple tribal economic development and self-sufficiency, and weaken the Tribes' governments, which are almost entirely dependent on revenue from gaming. SOF, ¶ 86.

The Termination Provision is antithetical to Congress's intent to protect such tribal government "gaming activities on Indian lands as a means of generating tribal governmental revenue." 25 U.S.C. §2701(1). The threat of termination of the 1999 Compacts undermines the generation of tribal revenue by diminishing the Tribes' current incentives and ability to continue investing in the maintenance, improvement or replacement of existing gaming facilities. That, in turn, makes it more difficult for the Tribes to retain market share in the face of ever-increasing competition, to finance the development of Reservation infrastructure required for both gaming and non-gaming activities, and diversify the Tribes' economies. SOF, ¶ 86. In addition, the termination of the Tribes' Compacts and the resulting loss of the principal source of tribal revenue

would make long-term planning and procurement of advantageous financing arrangements extremely difficult, if not altogether impossible. SOF, ¶ 86.

Voiding the Termination Provision would leave the 1999 Compacts with a perpetual term, allowing the Tribes to make long-term plans for capital improvements, the establishment and maintenance of vital governmental services and programs, and the acquisition of long-term financing for gaming and non-gaming projects on terms comparable to those enjoyed by other governments.[7] Perpetual gaming compacts are the most efficient, predictable, and dependable way to ensure that tribes continue to develop their economies, their self-sufficiency, and governmental programs, and to strengthen their governmental institutions.

The primary purpose in enacting the IGRA was to ensure that Indian tribes engaging in gaming would be able to generate revenue to provide essential programs, benefits and services to their members. A Termination Provision requiring tribes to cease gaming is simply contrary to that purpose.

**D. The Termination Provision Conflicts With Congress's Intent That The Compacting Process Not Be Used To Prevent Tribes From Engaging In Gaming.**

In drafting the IGRA, Congress struck a careful balance between tribes' need to generate governmental revenue and state concerns that the introduction of forms of casino gaming not otherwise permitted by state law might attract criminal activity and conflict with state public polices. Congress did so through the mechanism of compacts.

[7] Under the Tribal Governmental Tax Status Act, 26 U.S.C. §7871, Tribes are able to issue tax-exempt bonds for certain purposes. Such bonds often are issued for 20 to 30 years, longer than terms for conventional loan financing. Lengthening the repayment period increases cash flow, making more money available for tribal governmental purposes. For example, if a tribe can only obtain a 5 year loan to construct the roads, water and sewer systems and other infrastructure improvements necessary to construct a gaming facility because it only has 5 years remaining on its compact the project may not be economically feasible or if feasible result in all of the Tribe's gaming revenue going to pay debt service, leaving the Tribes with no revenue to fund badly needed services.

There was a reason that Congress used the term "compact" as opposed to the word "contracts" to describe the types of agreements that states and tribes were required to enter into in order for the tribes to conduct Class III gaming. The Class III gaming compacts that are entered into between Indian tribes and states pursuant to the IGRA are not commercial contracts. Congress intended that the compacts be understood to be agreements *between sovereigns* to allocate jurisdiction that otherwise would be exclusively tribal or federal. The Senate Committee on Indian Affairs "concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises . . . ." Senate Report 100-446, p. 13 (1988).

In the IGRA, Congress intended that gaming compacts would give two sovereigns the right to work together to authorize and regulate Class III gaming activities—and only the Class III gaming activities themselves—of regulatory concern to both parties.[8] Congress anticipated the potential abuse of the compacting requirement by states and explicitly declared that the compacting process may not be used by states to prevent tribes from conducting gaming: "It is the Committee's intent **that the compact requirement for class III [gaming] not be used as a justification by a State for excluding Indian tribes from such gaming** . . . ." S. Rep. No. 100-446, at 13. (Emphasis added).

Congress did not intend that states have greater bargaining power than tribes or that states be able to use the compacting process to interrupt or terminate tribes' abilities

[8]Gaming compacts entered into under the IGRA are similar to interstate compacts in that they define the relationship between sovereigns and set forth each sovereign's obligations in addressing an on-going matter of significance to both sovereigns. Interstate compacts seldom include a fixed term provision. Rather, they commonly provide for negotiation of amendments or withdrawal from the compact in the event of changed circumstances. See, *e.g.* Tahoe Regional Planning Compact, Cal. Gov't Code § 66801d.

to conduct Class III gaming that is not prohibited by state law. If a gaming compact includes a termination provision and a tribe and a state do not successfully negotiate to renew or replace an existing compact, the compact would expire at the end of the term, and thereafter the tribe would be prohibited from engaging in Class III gaming, Section 2710(d)(1)(C), or face prosecution by the U.S. Department of Justice under, *inter alia*,18 U.S.C. §1166 and 15 U.S.C. §1175. These impacts are precisely what Congress intended to avoid.

For these reasons, the Compact's Termination Provision is fundamentally inconsistent with Congress's intent in imposing the compacting requirement in the IGRA.

**E. A Termination Provision Cannot Be Included In A Compact Even If It Was Agreed To By The Tribes In Exchange For A "Meaningful Concession."**

A state cannot condition its agreement to a Class III gaming compact upon the Tribes' acceptance of terms and conditions outside the scope of the proper subjects of negotiation permitted by the IGRA, 25 U.S.C. §2710(d)(3)(C)(i)-(vii), *i.e.*, terms that are not directly related to the regulation of the games themselves.

In *Coyote Valley II* and *Rincon*, the Ninth Circuit concluded that some compact provisions that do not fall within any of the listed proper subjects of negotiation may be valid if they were agreed to in exchange for a "meaningful concession" from the state. Accord, *Idaho v. Shoshone-Bannock Tribes* 465 F.3d 1095, 1101-1102 (9th Cir. 2006) ("*Shoshone-Bannock Tribes*"). The meaningful concession exception, however, only applies to provisions that, while not falling within the explicitly identified proper subjects of negotiation, meet the two criteria established in *Coyote Valley II*: the provisions must be "directly related to the operation of gaming activities" and they must be compatible with the purposes of the IGRA. *Rincon*, 602 F.3d at 1033.

Under the analysis set forth in *Coyote Valley II* and *Rincon*, a provision that is agreed to by a tribe in exchange for a meaningful concession from the state is not valid

if it violates the IGRA or another Federal law. *Rincon*, 602 F.3d at 1033-1034; *Coyote Valley II*, 331 F.3d at 1111-1112. Because a gaming compact is a creation of the IGRA and the IGRA determines and limits the compact's permissible scope, the negotiated terms of a compact cannot exceed what is prescribed by the IGRA.

Federal courts have consistently found that contract provisions that frustrate the purpose of a statute are invalid. See, *e.g.*, *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944) ("Whenever private contracts conflict with [the NLRB's] functions, they obviously must yield or the [National Labor Relations] Act would be reduced to a futility."); *Holt v. Winpisinger*, 811 F.2d 1532, 1541 (D.C. Cir. 1987) ("To allow employees to contract away ERISA's vesting provisions would frustrate the purpose of the statute**,** which was enacted to protect employees from just such unfair deprivations of pension benefits."); *Spirides v. Reinhardt*, 613 F.2d 826, 832 (D.C. Cir. 1979) ("[E]mployment contracts, no matter what the circumstances that justify their execution or what the terms, may not be used to waive protections granted to an individual under this [Title VII of the Civil Rights Act of 1964] or any other act of Congress.").

Furthermore, in analyzing the "meaningful concession" exception, the Ninth Circuit has made it clear that the exception is subject to the requirement that the concession not be inconsistent with the IGRA. *Rincon*, 602 F.3d at 1033; *Coyote Valley II*, 331 F.3d at 1111-1115.

The State may argue that, because the Secretary has approved compacts in the past that contain a termination provision, a termination provision is consistent with the IGRA.

In affirmatively approving a compact, the Secretary is required to find that the provisions of the compact do not violate the IGRA. 25 U.S.C. §2710(d)(8)(B). Previous approvals of compacts containing termination provisions should not, however, be cited as evidence that the Secretary takes the position that termination provisions do not violate the IGRA. The issue of whether a termination provision violates the IGRA has

never been addressed in a federal court decision, so the Secretary had no specific reason to consider, or had judicial guidance on, the issue. Likewise, up until now, no tribe or state has ever raised with the Secretary whether a termination provision violated the IGRA. Since its enactment, interpretations of the IGRA have continued to evolve. The Secretary, based on recent court decisions, has concluded that provisions of the compacts that the Secretary deemed approved even 5 years ago, now violate the IGRA. Kevin Washburn, "Recurring Issues in Indian Gaming Compact Approval," Research Paper No. 2016-02, Legal Studies Research Paper Series, University of Mexico School of Law, ("Washburn Paper") p. 4.

Similarly, a duration provision has been included in Secretarial procedures imposed after a finding of a failure on the part of the state to negotiate in good faith and is referenced in the regulations implementing the Secretarial procedures provisions of the IGRA. That should also not be interpreted to be a determination that a termination provision is a proper subject of negotiation as part of the compacting process. The purpose of, and procedures for establishing, Secretarial procedures are significantly different from the requirements for compact negotiation, agreement and approval. *Compare*, 25 U.S.C. §2710(d)(3)-(4) with 25 U.S.C. §2710(d)(7). The inclusion of a termination provision in the Secretarial procedures contemplates that states that have failed to negotiate in good faith will have an opportunity and an incentive to reconsider the effects of the gaming under the Secretarial procedures and, at the end of the term of the procedures, reach agreement on a compact, the mechanism Congress intended to be the primary and preferred means of authorizing and regulating Class III gaming.

By raising the issue in these proceedings, the Tribes are raising an issue of first impression before the Court. The Court's ruling in this case will bring the issue to the attention of the Secretary. Until the Secretary affirmatively addresses the issue, there is no reason to conclude that approvals of past compacts and inclusion of a termination

provision in Secretarial procedures are evidence that the Secretary has concluded that termination provisions are consistent with the IGRA.

Finally, on a number of occasions, the Secretary has concluded that a compact includes provisions that violate the IGRA, but has determined that disapproval of the compacts would cause the tribe great hardship.[9] Under those circumstances, the Secretary has allowed approval of the compact by operation of law, but appended a cover letter stating that the approval is only effective in so far as the provisions of the compact do not violate the IGRA or other federal law.[10] See, *Rincon*, 602 F.3d at 1041-1042.

As was demonstrated in detail in the previous sections, the Termination Provision violates both the plain wording and the purposes of the IGRA. The State could not, therefore, insist that the Tribes agree to a termination provision, even if the State offered a meaningful concession in exchange for the inclusion of the provision.

**F. A Perpetual Compact Is Consistent With The Plain Wording And The Purposes Of The IGRA.**

For the same reasons that the Termination Provision is in conflict with the purposes of the IGRA, a perpetual compact is consistent with the plain wording and purposes of the IGRA. A perpetual compact allows the states a role in the regulation of Class III gaming on Indian lands without granting the states the ability to terminate a tribe's authority to conduct the very gaming activities that the IGRA was enacted to

[9]Significantly, in the majority of states, Indian tribes are in the unfortunate position of having to take or leave the offers made by the State, because the States enjoy sovereign immunity from suit based on a claim that the state has refused to negotiate in good faith as a result of the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The Secretary has, therefore, allowed a number of compacts to be approved by operation of law, even if a provision of the compact appears to violate the IGRA, because the alternative would be that the Tribes would not be able to conduct gaming at all. See, e.g. *Pueblo of Sandia v. Babbitt*, 47 F.Supp.2d 49, 51, 56-57 (D.D.C. 1999).

[10]"Since 1998, the Department has reviewed more than 500 compacts. It has disapproved at least 20 and expressed concern about more than 60 as reflected in 'deemed approved' letters." Washburn Paper, p. 4.

ensure that tribes could conduct. It eliminates the possibility of states imposing unreasonable conditions on tribes' conduct of gaming by taking advantage of the economic duress arising from the threat of termination of the tribal gaming.

A perpetual compact creates the most stable environment for tribal economic development based on revenue from gaming. Without the threat of sudden reductions in tribal revenue arising from the suspension or termination of the compact, tribal programs can be planned and budgeted over longer periods of time Without the threat of termination, tribes will be able to obtain longer term and more favorable loans from financial institutions and other lenders and allow for longer term planning for both tribal gaming and non-gaming enterprises.

Consistent with the absence of any language in the IGRA authorizing the inclusion of a termination provision, seventy-one tribes in eleven states have entered into Class III gaming compacts of perpetual duration and are conducting gaming pursuant to those compacts.[11]

The long-term predictability of perpetual compacts also makes regulation by the tribes and the states easier and more effective. The parties are assured that the compact process will not lead to sudden or drastic changes in the conduct or regulation of the gaming based on the inability to reach agreement on a new or renewed compact. A provision in a compact allowing a state and a tribe to periodically address changed circumstances allows issues arising from future changed conditions to be addressed as well as, and perhaps more efficiently than, addressing changed conditions through compact negotiations that take place under the threat of termination of the gaming.

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[11]The States are Colorado, Connecticut, Idaho, Kansas, Minnesota, Oregon, Washington, Mississippi, Montana, New York, and Nevada. SOF, ¶44, Exhibits 45-55.

**G. Any Ambiguities In The IGRA Must Be Interpreted In Favor Of The Tribes.**

For over 180 years, the Supreme Court has adhered to "the general rules that statutes passed for the benefit of the dependent Indian tribes…are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 89 (1918). Accord, *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

There is no question that the Indian canons of construction apply to the IGRA. *Artichoke Joe's Grand Casino v. Norton*, 353 F.3d 712, 731 (9th Cir. 2003).[12] Analyzing the IGRA in the light most favorable to the Indians, it is clear that insistence by the State on the inclusion of the Termination Provision would frustrate the purposes of the IGRA and therefore, should be severed from the 1999 Compact. As discussed more thoroughly above, the IGRA provides tribes with a perpetual right to conduct Class III gaming activities so long as the conditions set forth in 25 U.S.C. §2710(d)(1) are met. Assuming 25 U.S.C. §2710(d)(1) is ambiguous, application of the Indian canons requires that provision to be read narrowly with regard to the ability of a state to prevent a tribe from engaging in Class III gaming activities *Rincon*, 602 F. 3d at 1029, n.9. The Indian canons also require that 25 U.S.C. §2710(d)(1) be read broadly with regard to protecting a tribe's right to engage in gaming in furtherance of the congressional policies set forth in 25 U.S.C. §2702.

**H. The State Entering Into A Compact With A Perpetual Term Would Not Violate California Law.**

Finally, it is beyond question that the State has the authority to enter into perpetual compacts, and there is nothing in Article IV, § 19(f) that would limit the authority of the Governor to execute, and the Legislature to ratify, a perpetual Class III

[12]In enacting the IGRA Congress presumed that federal courts would interpret any ambiguous provision in the IGRA in the tribes' favor. *Rincon*, 602 F.3d at 1027.

gaming compact. Indeed, California long ago entered into and the Department of the Interior approved perpetual Class III simulcast wagering compacts (off-track betting) with five California Tribes.[13] SOF, ¶ 43, Exhibits 40-44. California also is currently a party to 28 interstate compacts. Among the interstate compacts entered into by the State, only one, the National Association of State Directors of Teacher Education and Certification (NASDTEC) Interstate Agreement, even arguably contains a fixed date termination provision. The other 27 interstate compacts have no specific termination date. See, for example, Agreement on Detainers, Cal. Penal Code § 1389 *et seq*., Driver License Compact, Cal. Veh. Code § 15000 *et seq*., and the Interstate Compact on Licenses of Participants in Horse Racing with Pari-Mutuel Wagering, Cal. Bus. & Prof. Code §Secs. 19527–19528. The parties to those compacts can seek to amend or withdraw from the compacts, or the compacts may terminate under specific circumstances. As long as the parties choose to remain a party to the compacts, the compacts remain in effect. *See* Cal. Pen. Code § 1389, Art. VIII.

Thus, there is no constitutional or statutory barrier to the State agreeing to Class III gaming compacts with a perpetual duration provision or the implementation of the Tribes' Compacts if the Court declares the Termination Provision in the Compacts void.

## V. CONCLUSION

The Termination Provision in the Tribes' Compacts violates the plain wording of the IGRA and is inconsistent with the Congressional purposes and intent of the IGRA. For these reasons and the reasons set forth above, the Tribes respectfully request that the Court grant the Tribes' motion for summary judgment.

Dated: February 2, 2017 Respectfully Submitted,

[13] Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, Cabazon Band of Mission Indians, San Manuel Band of Mission Indians, Sycuan Band of the Kumeyaay Nation, Viejas Group of Capitan Grande Band of Mission Indians of the Viejas Reservation

RAPPORT AND MARSTON

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