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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

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' 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**

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Federal Cases**

**United States Codes**

**California Codes**



**Federal Regulations**



**Other Authorities**

## INTRODUCTION

In their Cross Motion for Summary Judgment ("Opening Brief"), the defendants ("State") argue that a Termination Provision is a proper subject of negotiation under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*. ("IGRA") because it is directly related to the operation of gaming activities as defined by the IGRA and because the Assistant-Secretary for Indian Affairs ("Secretary") has affirmatively approved compacts containing termination provisions which, the State alleges, is a finding that the provisions are consistent with the IGRA. The State further argues that the Secretary's approval is entitled to deference by this Court under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) ("*Chevron*").

In making these arguments, the State has attempted to disconnect the interpretation of the IGRA's provisions from Congress' purposes in enacting the IGRA, the evolution of court interpretations of the IGRA, the history of Indian gaming, and the significant effect of the Court's interpretation upon the Chicken Ranch Rancheria of Me-Wuk Indians and the Chemehuevi Indian Tribe ("Tribes") and their members. The Court must not accept the State's invitation to address the legal issues in this case in the abstract, without regard for the purposes for which the statute was enacted, the legal and historical context in which the IGRA has been interpreted and implemented, or the profound real-life impact that a Termination Provision has had on the ability of the Tribes to engage in gaming.

Indian gaming is now commonplace in most of the United States. It is possible to forget that, in the early years of the implementation of the IGRA, the focus of Indian tribes, which were almost universally mired in poverty, was on the prospect of establishing a viable tribal economy—a goal that just years before would have been unattainable. Before the Supreme Court issued the decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), tribes that did not possess extractable natural resources on their reservations were almost entirely dependent on federal

programs and funding in order to function as independent governments. The passage of IGRA provided, for the first time, the possibility of the development of a reliable revenue base for most tribes and the ascent of tribal members out of poverty. Tribes were understandably eager to enter into compacts and begin gaming. Neither tribes, nor states, nor agencies of the federal government had any basis for predicting how the implementation of the IGRA would work in practice or what legal issues would arise.

Litigation regarding the meaning of the IGRA, and statutes that affected the implementation of the IGRA (e.g. 25 U.S.C. § 81), began almost immediately after the IGRA was enacted and has continued to this day. See, e.g. *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994); *Cabazon Band of Mission Indians v. National Indian Gaming Comm'n*, 14 F.3d 633 (D.C. Cir. 1994); *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *United States v. Santa Ynez Band of Chumash Mission Indians*, 983 F. Supp. 1317 (C.D. Cal. 1997); *Chemehuevi Indian Tribe v. Wilson*, 987 F. Supp. 804 (N.D. Cal. 1997); *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084 (E.D. Cal. 2002) ("*Artichoke Joe's*"). Through both efforts to conduct gaming pursuant to the IGRA and the litigation relating to the interpretation of the IGRA, legal issues arose that Congress, the Department of the Interior, Indian tribes, and States had never anticipated. Federal court, Secretarial, and National Indian Gaming Commission ("NIGC") interpretations of the IGRA's provisions evolved in response to the shifting landscape.[1]

In California, the prospect of tribes conducting gaming was met with efforts by then-Governor Wilson to stop or drastically limit the development of tribal gaming. In response, a number of frustrated tribes began to conduct gaming without compacts. The compact negotiation process contemplated by Congress quickly devolved into litigation

[1] *See, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 59-75 (1996) ("*Seminole*") [enforcement mechanism for the compacting process struck down by the Supreme Court].

relating to what games the tribes would be permitted to conduct, California's authority to stop tribal gaming, and California's obligation to negotiate. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1994), amended 99 F.3d 321 (9th Cir. 1996); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994). The federal government responded to non-compacted gaming by filing enforcement actions to shut down the tribal gaming. 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"), ¶¶82-83. Even after newly elected Governor Davis indicated that he was willing to cooperate with the tribes to reach agreement on Class III compacts, efforts to enter into compacts and conduct gaming in conformity therewith were met with resistance from labor unions and other groups opposed to Indian gaming. *Hotel Employees & Restaurant Employees International Union v. Davis*, 21 Cal. 4th 585 (1999). See, *Artichoke Joe's* at 1094-1097.

The final negotiations that produced the original California compacts took place under threat of federal injunctions and extreme time constraints. SOF, ¶81-83. Desperate, impoverished Indian communities had no choice but to take what was offered. They could not afford to wait. Given a chance to conduct gaming in conformity with federal law and with no room for negotiation, the California tribes took the State's take it or leave it offer and entered into the 1999 Compacts. *Id.* The fact that the model 1999 compact contained a termination provision, to the degree that it was considered at all, never rose to the level of a topic of negotiation. *Id.*

While the peak of litigation arising from Indian gaming has perhaps passed, the interpretation of the IGRA and the regulations implementing the IGRA by courts and the federal agencies continues to evolve. See, e.g. *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007); *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F. 3d 134 (D.C. Cir. 2006); Kevin Washburn, "Recurring Issues in Indian Gaming Compact

Approval," Research Paper No. 2016-02, Legal Studies Research Paper Series, University of New Mexico School of Law, p. 4 ("Washburn Paper"). This case is part of that ongoing evolution.

As the State points out, this is a case of first impression. No court has ever specifically addressed the question of whether a termination provision violates the IGRA. Nor has the Secretary ever issued an interpretation that directly addressed the present issue. In the tangled history of the interpretation of the IGRA, this issue has never come up. As the IGRA's history reveals, it is not unusual for an issue to bubble to the surface years after the enactment of the statute. In the course of conducting gaming and attempting to expand that gaming, the Tribes came to realize that the Termination Provision in the 1999 Compact has led to unintended consequences that reveal that the Termination Provision is in conflict with the IGRA. That is why this complaint was filed.

Given the evolving nature of the interpretation of the IGRA, any analysis of specific provisions of the statute must be performed with great weight given to the explicitly stated purposes of the IGRA. Whether those purposes have been achieved can only be judged on the material reality of gaming on tribal lands—the practical impact of the interpretation of the IGRA. In its Opening Brief, however, the State does not include any discussion of how the Termination Provision is consistent with the purposes of the IGRA and affirmatively rejects the relevance of the impacts of the Termination Provision on the Tribes. The State's Opening Brief is replete with assumptions, leaps of logic, and unsupported conclusions based on the absence of specific legal authority addressing the issue before the Court. For these reasons, and for the reasons and arguments set forth in the remaining portions of this brief, none of the State's arguments in support of its Opening Brief have merit.

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## I.

## NEITHER THE PARTIES' AGREEMENT NOR THE SECRETARY'S AFFIRMATIVE APPROVAL MAKES THE TERMINATION PROVISIONS VALID UNDER THE IGRA.

In support of its position that the Termination Provision in the 1999 Compacts ("Compacts") is valid, the State cites to the Secretary's prior affirmative approval of the Compacts under the IGRA. The State's reliance on the Secretary's affirmative approval is misplaced.

First, the IGRA and its implementing regulations do not state that the Secretary **may approve a compact** only if each compact provision is consistent with, and does not violate, the IGRA. Instead, the IGRA provides that "[t]he Secretary **may disapprove a compact**…only if such compact violates—(i) any provision of this chapter, (ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or (iii) the trust obligations of the United States to Indians." 25 U.S.C. § 2710 (d)(8)(B). *See* 25 C.F.R. § 293.14. The IGRA does not state that the Secretary **shall disapprove a compact** if it violates the IGRA. The plain wording of the statute thus permits the Secretary to approve a compact even if clear violations of the IGRA are contained therein—something the Secretary has done numerous times in recent years. *See Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49, 51, 56-57, fn. 7. Accordingly, prior Secretarial approval of compacts that contain Termination Provisions, including the 1999 Compacts, does not demonstrate that the provision is lawful.

Second, nothing in the Federal Register Notice ("Notice") approving the Compacts suggests that the Secretary gave the Termination Provision any thought. No approval letter discussing the Termination Provision or explaining why the Termination Provision would be consistent with the IGRA accompanied the Notice.

Third, as set forth in Section III, mere approval of the Compacts by the Secretary in the Federal Register Notice, without an approval letter explaining why the Secretary believed a Termination Provision is consistent with the IGRA, is not entitled to deference by this Court under *Chevron*.

Fourth, it is well settled that parties to a contract cannot make a provision that violates overriding federal law valid by simply agreeing to the provision. Thus, the parties' agreement on a Termination Provision, even with the Secretary's approval, cannot make the Termination Provision valid if it violates the IGRA. *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."]. *See also, Holt v. Winpisinger*, 811 F.2d 1532, 1541 (D.C. Cir. 1987); *Spirides v. Reinhardt*, 613 F.2d 826, 832 (D.C. Cir. 1979).

Fifth, the final determiner of federal law is the federal courts, not the Secretary. If the Secretary's interpretation of a federal statute was conclusive, there would have been no need for Congress to enact the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*., which grants federal courts the authority to set aside a decision of the Secretary as agency action that is "not in accordance with law…." 5 U.S.C. § 706.

Sixth, Secretarial decisions affirmatively approving compacts and compact amendments have been overturned when a provision of an approved compact violated the IGRA. In 2004, for example, five Indian tribes, along with the Rincon Band of Luiseño Indians, sought an amendment to their 1999 compacts to increase the number of slot machines that they could operate. *See* Fed. Reg. Vol. 69, No. 170, p. 53773, September 2, 2004. All of the tribes, except the Rincon Band, entered into compact amendments with the State increasing the number of slot machines in exchange for agreeing to a provision that required the tribes to pay increased fees into the State's general fund. Rather than agree to pay the fee, the Rincon Band sued the State for bad faith negotiations under the IGRA, which resulted in the Ninth Circuit Court of Appeals

holding that the State's demand for a fee violated the IGRA and constituted bad faith negotiations under the IGRA. *Rincon Band of Luiseño Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F. 3d 1019 (9th Cir. 2010) ("*Rincon*"). While *Rincon* did not expressly address the validity of the other five tribes' amended compacts, it is clear from the holding in *Rincon* that the provision in their compacts that required the payment of a fee for an increased number of slot machines violated the IGRA, even though the compacts were affirmatively approved by the Secretary. *Rincon*, 602 F. 3d at 64-65.

Finally, a review of the Secretary's deemed approved letters makes it clear that the law in this area is evolving. The Secretary has expressly acknowledged that compact provisions that the Secretary once thought were valid under the IGRA have been determined by federal courts to violate the IGRA and are, therefore, invalid. As the former Assistant Secretary–Indian Affairs has explained, "[F]ederal interpretations of the statutory and regulatory requirements have not remained static; they have developed over time. While all of the requirements are at least implicit in the statute and regulations, discretion and nuance play a role in interpretation by the Department." Washburn Paper, p. 4.[2]

For example, the Secretary affirmatively approved the 1999 Compacts in which the term "Gaming Facility" was defined as "any building …, a **principal purpose** of which is to serve the activities of the Gaming Operation…." 1999 Compact, Section 2.8

[2] For a discussion of the impermissible subjects in compacts, *see* Letter to Chairman Greg Sarris, Federated Indians of the Graton Rancheria, from Del Laverdure, Acting Assistant Secretary-Indian Affairs (July 13, 2012), *available at* http://www.bia.gov/cslgroupslxoigl documentsltextlidcl-02688S.pdf. *See also* Letter to Deval Patrick, Governor, Commonwealth of Massachusetts, from Kevin K. Washburn, Assistant Secretary-Indian Affairs (October 12, 2012) *available at* http://www.bia.gov/cs/groups/webteam/documents/text/idc 1-028222.pdf.

(Emphasis added). The Secretary subsequently concluded, in reviewing a later compact, that this wording violated the IGRA:

> Likewise, the State claims that the definition of a Project has been modified to comply with IGRA because its "**principal purpose** [must] serve the Gaming Facility rather than provide that facility with an incidental benefit. **We are not persuaded.** While the limiting phrases are a welcome change, **the definitions remain broader than IGRA's requirement that compacts may regulate only those activities that are "directly related to the operation of gaming activities."**

October 16, 2015 Letter from Assistant Secretary – Indian Affairs Kevin K. Washburn to the Jackson Band of Miwuk Indians ("Jackson Letter"), p. 5, SOF, ¶ 85, Exhibit 65 (Emphasis added).

Thus, affirmative approval of the Termination Provision does not mean that the Secretary will not find that the provision violates the IGRA in the future.

## II.

## THE TERMINATION PROVISION CONFLICTS WITH THE IGRA.

The State asserts that the plain language of the IGRA authorizes the inclusion of a termination provision in a compact:

> [T]he 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).

Opening Brief, p 11.

The State offers no legal support for the assertion that the topics of negotiation are to be interpreted broadly. Both topics of negotiation cited by the State concern "gaming activities." Remarkably, the State makes no reference to the Supreme Court's definitive interpretation of that phrase in *Michigan v. Bay Mills Indian Community*, __ U.S. __, 134 S. Ct. 2024 (2014) (*"Bay Mills"*). In *Bay Mills*, the Supreme Court explicitly stated that the phrase "class III gaming activity" must be narrowly interpreted and not expanded to include everything that is arguably related to gaming.

> [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.

*Id.*, 134 S. Ct. at 2032-2033.

The Supreme Court's clear statements, "'class III gaming activity' means just what it sounds like--the stuff involved in playing class III games . . . . 'class III gaming activity' is what goes on in a casino--each roll of the dice and spin of the wheel," leave no room for an interpretation of the IGRA concluding that a termination provision, which does not address any specific aspect of the conduct or operation of the gaming at the Tribe's casinos, constitutes "standards for the operation of such activity and maintenance of the gaming facility, including licensing" (25 U.S.C. §

2710(d)(3)(C)(vi)) or is "directly related to the operation of gaming activities" (25 U.S.C. § 2710 (d)(3)(C)(vii)).

The State's assertion that a termination provision could fall within Section 2710(d)(3)(C)(vi) is unsupported and unsupportable. No court has ever interpreted Section 2710(d)(3)(C)(vi) as a vague category relating to a wide array of topics touching upon Indian gaming. The unambiguous language of that provision must be construed to mean what it says, standards for the operation of the gaming conducted at tribal gaming facilities. The standards for the operation of a gaming activity relate to the specific standards for *how* the gaming activity is to be conducted at the gaming facility, not the date upon which that facility must stop gaming operations. As the State points out, examples of standards of operation are "days and hours of operation, wage and pot limits, types of wagers, and size and capacity of the proposed facility." S. REP. NO. 100-446, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084 (Senate Committee Report).

Even if the plain meaning of Section 2710(d)(3)(C)(vi) was ambiguous and open to interpretation, the *Bay Mills* decision erased any doubt that "standards for the operation of such activity and maintenance of the gaming facility, including licensing" does not include a termination provision. A termination provision cannot be understood to create or qualify as a standard for the operation of "the stuff involved in playing class III games" or "what goes on in a casino--each roll of the dice and spin of the wheel." The *Bay Mills* court rejected the notion that the administration and licensing constituted "gaming activities" by suggesting that the State of Michigan "plug in those words and see what happens." *Bay Mills*, 134 S. Ct. at 2033. Applying the Supreme Court's test makes it clear that the "standards for the operation of 'playing class III games'" does not include a date certain when the gaming must end.

The State's argument that a termination provision fits within Section 2710 (d)(3)(C)(vii), "any other subjects that are directly related to the operation of gaming

activities" is also definitively in conflict with *Bay Mill*, as well as the decisions of Federal Courts of Appeal interpreting 25 U.S.C. § 2710(d)(3)(C)(vii), in particular *In Re: Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003) ("*Coyote Valley*"), *Rincon*, and *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254, 1265 (D.N.M. 2013) ("*Santa Ana*").

Clearly, under *Bay Mills*, a termination provision is not a subject that is directly related to the operation of "the stuff involved in playing class III games" or "what goes on in a casino--each roll of the dice and spin of the wheel." Rather, applying the *Bay Mills* test, the State's interpretation would lead to the absurd result, "any other subjects that are directly related to the operation of the termination (or duration) of the compact."

The State argues that the *Coyote Valley* decision supports its position because the Court in that case did not find the State's insistence on including the Revenue Sharing Trust Fund and Special Distribution Fund, and certain labor-related provisions to demonstrate bad faith. But the State fails to acknowledge that the Court's willingness to allow those provisions was based on a finding that those provisions were directly related to the operation of the gaming activities, because they were granted in exchange for meaningful concessions from the State, and because they were consistent with the purposes of the IGRA. *Coyote Valley*, 331 F.3d at 1111-1114; *Rincon* 602 F.3d at 1032-1033. Here, the State offers only a facile assertion that the Termination Provision is directly related to the operation of gaming activities because it determines the time period within which the gaming is permitted, but does not offer a demonstration that the Termination Provision is *directly* related to the *operation* of the playing of the class III games. Moreover, the State has not and cannot demonstrate that the Termination Provision was granted in exchange for a meaningful concession, since it was never even discussed in the course of the negotiations. SOF, ¶¶ 81-83. Finally, as will be discussed below, the State fails entirely to demonstrate that the Termination Provision is consistent with the stated purposes of the IGRA.

The State's only other discussion of the line of cases interpreting 2710(d)(3)(C)(vii) is the statement "the *Rincon* court allowed that the duration of a compact is a routine subject for negotiation under IGRA." Opening Brief, p. 12. That statement is both inaccurate and misleading. The discussion in the *Rincon* decision referred to by the State arose from the Court's analysis of why revenue sharing provisions do not fall within the listed topics of negotiation. In the course of that analysis, the Court cited to an unidentified statement by the Assistant Secretary -- Indian Affairs that refers to "duration" as among "compact terms that are routinely negotiated by the parties as part of the regulation of gaming activities." That cited language was not a statement of a conclusion on the part of the Court relating to duration/termination provisions. At most, it is a statement by the Assistant Secretary made in an unknown context that was cited by the Court addressing a different issue.

Significantly, in offering an interpretation of Section 2710(d)(3)(C)(vi) and (vii) that is at odds with federal court interpretations of those provisions, the State fails to address how its interpretation squares with the IGRA's explicitly stated purposes. Congress enacted the IGRA to promote tribal economic development, to regulate the gaming, to shield tribal gaming operations from organized crime, to ensure that the tribes are the primary beneficiaries of the gaming operation, to ensure that the gaming is conducted fairly and honestly, and to establish an independent federal agency to protect such gaming as a means of generating tribal revenue. 25 U.S.C. § 2702 (1)-(4). *See Rincon, supra*, *Coyote Valley*. The Termination Provision frustrates these purposes by halting the gaming, preventing tribes from developing their economies, and benefitting from the gaming. SOF, ¶¶ 45-80, 86.

A termination provision, moreover, does not further any legitimate interest that the State has a right to assert. The IGRA limits the interests of the states to making sure that the games are played fairly, preventing organized crime from being involved in the gaming, ensuring that gaming revenue is properly counted and accounted for, and in

ensuring that gaming revenue is spent to fund tribal governmental programs. The Termination Provision furthers none of these goals or interests. The Termination Provision does not ensure that the games are fair, keep organized crime out of the gaming, facilitate the counting of the money or the auditing of the revenue, or guarantee that the gaming revenue is spent to provide essential tribal programs.

Rather than discuss Congress' goals and the state interests that are relevant to the IGRA, the State argues that a termination provision promotes the goals of the IGRA by providing a mechanism for addressing changed circumstances. Nothing in the statement of Congress' purposes in Section 2702 supports the assertion that "allowing the parties to reassess" the compact was a goal of Congress in enacting the IGRA. Section 2702 does not make any reference to the States' interests or the compacting process. To the extent that "allowing the parties to reassess" is indirectly related to Congress' intent in imposing the compacting requirement, the need to address changed circumstances is protected by other provisions of the Compact. *See* Exhibits 8, 11, Sec. 12.1-12.2; Sec. 4.3.3(b), and Sec. 4.3.1- 4.3.3.

The Termination Provision, therefore, cannot be reconciled with the plain wording of the IGRA, the purposes of the IGRA, or the Federal Court cases interpreting the IGRA.

## III.

## THERE HAS BEEN NO AGENCY ACTION TO WHICH THIS COURT COULD AFFORD CHEVRON DEFERENCE.

The State argues that the Secretary has interpreted the IGRA as permitting termination provisions in tribal-state gaming compacts through prior Secretarial approval of compacts with termination provisions and promulgation of IGRA's implementing regulations. The State further contends that the Secretary's alleged interpretation should be given deference by this Court under *Chevron* because, if the IGRA is silent or ambiguous, the Court should "look to the enforcing agency's application and construction of IGRA…." Opening Brief, p. 14. The State is wrong

because: (1) the Secretary's actions do not carry the force of law and do not, therefore, qualify for *Chevron* deference; (2) the IGRA is not ambiguous—a termination provision is not a proper subject of negotiation and is contrary to the express purposes of the IGRA; and (3) the Indian canons of statutory construction, not *Chevron*, control the interpretation of the IGRA and require this Court to interpret any ambiguous provisions in the IGRA in favor of the Tribes.

### A. The Secretary Has Not Interpreted the IGRA in a Manner That Is Entitled to *Chevron* Deference.

Before a court can determine whether an agency interpretation can be afforded deference, it is first required to determine whether the agency action is entitled to analysis under *Chevron*. *U.S. v. Mead Corp.*, 533 U.S. 218 (2001). Only precedential orders that bind third parties can "qualify for *Chevron* deference because they are made with a lawmaking pretense." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (9th Cir. 2009)(internal citations omitted). "Our cases applying *Mead* treat the precedential value of an agency action as *the* essential factor in determining whether *Chevron* deference is appropriate." *Alvarado v. Gonzales*, 449 F.3d 915, 922 (9th Cir. 2006) (Emphasis in original). "Interpretations such as opinion letters, policy statements, agency manuals and enforcement guidelines lack the force of law and do not warrant *Chevron*-style deference." *Citizens Against Casino Gambling v. Kempthorne*, 471 F. Supp. 2d 295, 320-321 (W.D.N.Y. 2007), *citing* *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

Moreover, as a judge in the Eastern District of California has already held, Secretarial approval of a compact by letter and publication in the Federal Register is not entitled to *Chevron* deference. In *Fort Independence Indian Cmty. v. California*, 679 F. Supp. 2d 1159, 1177 (E.D. Cal. 2009), the Court specifically addressed this issue and rejected the position advocated by the State in this case. The "Department of Interior's decisions to approve individual State-Tribal Gaming Compacts appear not to have a

precedential effect that binds third parties…." *Id.* "The Department's approvals result from a relatively informal procedure, under which the State and Tribe submit a copy of the compact and documents indicating their approval thereof to the Secretary, who notifies the parties in writing of his decision within 45 days." *Id.* While the "[f]ormality of procedures is not determinative," it is "one indication that an interpretation has the force of law." *Id.*, *citing Mead* at 230. "[N]othing indicates that the agency's approval of one compact establishes a precedent that binds the agency in future cases, and thus also binds third parties. Instead, the agency is apparently able to change its interpretation of IGRA, subject to the ordinary restraints on agency action." *Id*. Accordingly, the Court "conclude[d] that the agency's approval of individual compacts, and the implicit interpretation of section 2710 (d)(3)(C) [of the IGRA] as applied to revenue sharing contained therein, does not bind third parties, and is therefore not entitled to deference under *Chevron*." *Id., citing Marmolejo-Campos*, 558 F.3d at 909. Thus, the Secretary's prior approval of tribal-state gaming compacts that contain termination provisions is not an agency interpretation of the IGRA to which this Court can afford *Chevron* deference.

The State, aware that the Eastern District of California has specifically held that Secretarial approval of a Tribal-State gaming compact is not entitled to *Chevron* deference, now retreats to the position that *Skidmore* weight is appropriate. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Under *Skidmore*, "weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. Here, however, the Secretary has never specifically addressed whether a termination provision is a proper subject of negotiation under the IGRA in an approval letter or by any other means. Without the agency's logic, reasoned expertise, and direct consideration of the issue, this Court has nothing it can review to determine whether the agency's interpretation can be afforded greater weight

under *Skidmore*. As a result, Secretarial approval of compacts with termination provisions is not entitled to any weight under *Skidmore* because it does not set forth the reasoning pursuant to which the Secretary approved the compact and the termination provision.

The Secretary's approval of compacts with termination provisions is also an unreliable source for establishing the agency's interpretation because the Secretary has, on numerous occasions, approved compacts or allowed compacts to be approved by operation of law while acknowledging that provisions of the compacts violate the IGRA. *See Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49, 51, 56-57, fn. 7 (D.D.C. 1999)[The Secretary "considered the revenue sharing and regulatory fee provisions [in a compact] illegal, and yet he declined to disapprove the compacts."]; Jackson Letter, SOF, ¶ 85, Exhibit 65 [approving compact by operation of law even though "the Compact contains a…provision that may result in an unlawful tax under IGRA" and "appears to include provisions involving non-gaming activities that may exceed the lawful scope of State authority in gaming compacts under IGRA."].

The regulations promulgated by the Secretary to implement the IGRA also do not support the conclusion that the Secretary has interpreted the IGRA to permit termination provisions. Nothing in 25 C.F.R. Part 293, "Class III Tribal State Gaming Compact Process," speaks to whether a tribal-state compact shall or may include a termination provision. The State argues that references to "extensions" and "timeframes" in 25 C.F.R. §§ 293.2 and 293.5 indicate that the agency interprets the IGRA to authorize termination provisions. Opening Brief, p. 15. Yet, whether an extension to an existing compact requires Secretarial approval is irrelevant to whether the Secretary believes that a compact may include a fixed termination date.[3]

[3] In a number of states, because the *Seminole* decision effectively voided the bad faith litigation provisions by finding the waiver of state sovereign immunity invalid, *Seminole*, 517 U.S. at 59-75, tribes had no choice but to accept compacts imposed by

Significantly, the regulations governing Secretarial procedures, 25 C.F.R. Part 291, include a specific reference to the time period in which the procedures will remain in effect. If the Secretary had intended to include regulations regarding termination provisions in 25 C.F.R. Part 293, the regulations would address that issue.[4]

The fact that termination is contemplated by 25 C.F.R. Part 291, which governs Secretarial procedures (gaming in the **absence** of a tribal-state compact), after a judicial finding of State bad faith and failure of mediation, does not support the conclusion that the Secretary affirmatively agrees that the inclusion of a termination provision in gaming compacts is authorized by the IGRA. The purposes of, and process for promulgating, Secretarial procedures are significantly different from the purposes of, and requirements for, compact negotiation, agreement, and approval. *Cf.* 25 U.S.C. § 2710 (d)(3)-(4) with 25 U.S.C. § 2710(d)(7). The inclusion of a duration provision in Secretarial procedures provides states with an opportunity to consider the effects of the gaming under the procedures at the end of the term. It provides states an incentive to

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the state that included provisions that are not proper subjects of negotiation if they wanted to conduct gaming. The Assistant Secretary, as a result, has approved compacts or allowed compacts to be approved by operation of law that contain provisions that are inconsistent with the IGRA, because disapproval of a compact would result in a tribe not being able to conduct class III gaming. Exhibit 67, p. 2. ("Our concern is highlighted by our understanding that neither the Compact nor the Revenue-Sharing Agreement were the result of a true bi-lateral tribal-state negotiation process.") Given that some of those compacts include termination provisions, the Secretary is compelled to recognize that some compacts will require extensions. Under those circumstances, it makes sense that the Secretary would promulgate regulations that address timeframes or extension of compacts. That does not constitute an affirmative conclusion on the part of the Assistant Secretary that termination provisions are consistent with the language and purposes of the IGRA.

[4] It is also worth noting that nothing in 25 C.F.R. Part 293 **requires** the Secretary to disapprove a compact if it includes provisions that violate the IGRA. *See* 25 C.F.R. § 293.14 ["The Secretary **may** disapprove a compact or amendment only if it violates: (1) Any provision of the Indian Gaming Regulatory Act…."] (Emphasis added).

reach agreement on a compact, the mechanism Congress intended to be the primary and preferred means of authorizing and regulating Class III gaming. It also permits a tribe to continue Class III gaming if a state remains unwilling to enter into a compact. Part 291 is not applicable to the review of tribal-state gaming compacts under Part 293.

Finally, the Secretary has acknowledged that Secretarial procedures may include provisions that violate the IGRA, but that tribes have accepted such provisions as a compromise. *See*, Exhibit 68, ["We note…that the procedures [for North Fork Rancheria] we issue today do not draw bright lines for future compacts. . . . In many respects, we understand that the Mediator's submission to the Department reflects compromises the Tribe agreed to make rather than compromises that the Tribe was required to make under the IGRA."].

**B. The IGRA Is Not Ambiguous—A Termination Provision Is Unlawful.**

Under *Chevron*, if the agency that has been tasked to administer a statute interprets the statute in a manner that has the force of law (*e.g.* formal notice and comment rule-making), courts should defer to the agency's interpretation unless: (1) the plain language of the statute (using standard statutory construction principles) is unambiguous and contrary to the agency's interpretation; or (2) the agency's interpretation of an ambiguous or silent statute is unreasonable or if it is not based on a permissible construction of the statute. Here, the IGRA is unambiguous—a termination provision is not among the express topics permitted for inclusion in a compact. *See* Section II. Thus, even if it were assumed that the Secretary has interpreted the IGRA to allow termination provisions, the Court need not follow that interpretation because the IGRA is unambiguous—a term provision is unlawful because it is not a proper subject of negotiation and frustrates the purposes for which the IGRA was enacted.

**C. The Indian Canons of Statutory Construction Control the Court's Interpretation of the IGRA.**

The State argues that if § 2710(d)(3)(C) is ambiguous as to whether a termination provision is permissible in a tribal-state compact, "the deference accorded administrative construction of a statute under *Chevron* trumps the Indian canon of construction" established by *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Opening Brief, p. 15. That may be the case, at least in the Ninth Circuit, if *Chevron* deference is warranted, but Secretarial "approval of individual compacts…is…not entitled to deference under *Chevron*." *Fort Independence Indian Cmty. v. California*, 679 F. Supp. at 1177 (Emphasis added).[5] Thus, because Secretarial approval of compacts with termination provisions does not carry the force of law (and is not, therefore, entitled to *Chevron* deference), the Indian canons control this Court's interpretation as to whether a termination provision is a permissible topic of negotiation under 28 U.S.C. § 2710(d)(3)(C).[6]

## IV.

## THE TRIBES' INABILITY TO EXPAND THEIR GAMING FACILITIES AND INCREASE THEIR GAMING REVENUE IS DIRECTLY RELEVANT TO THE ISSUE OF WHETHER THE TERMINATION PROVISION VIOLATES THE IGRA.

The State argues that the Tribes' inability to obtain financing to expand their gaming facilities and increase revenue from gaming is irrelevant to the issue of whether a Termination Provision violates the IGRA because the Tribes have failed to show by way of IGRA's legislative history "that Congress intended IGRA to ensure sufficient

[5] *Cf. Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997), *with* *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997)["We therefore conclude, for the purposes of this case, that the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes."] and *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991)[same].

[6] Also, the Indian canons should certainly trump any deference afforded under *Skidmore*.

revenue from tribal gaming or the availability of funding to finance tribal gaming operations." Opening Brief, p. 18.

While it is true that nothing in the IGRA or its legislative history indicates that Congress intended to guarantee tribes a minimum level of income from gaming, Congress intended that tribes be allowed to generate as much money as possible from their gaming operations with the goal being that the income would be sufficient to fund the tribes' essential governmental programs and provide sufficient services to their members. The very purpose of the IGRA was to promote "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Compact provisions that would impede or frustrate that goal violate the IGRA. *California v. Zook*, 336 U.S. 725, 729 (1949)["But whether Congress has or has not expressed itself, the fundamental inquiry, broadly stated, is the same: does the state action conflict with national policy?"].

Gaming revenue is the main subject of the IGRA. The purpose of the IGRA is for tribes to make money. The IGRA comprehensive regulates the revenue. It specifies how it is to be counted, accounted for, and spent by the Tribes. 25 U.S.C. §2710 (b)(2)(B). It is a "subject" "directly related to the operation of gaming activities" within the meaning of 25 U.S.C. § 2710(d)(3)(C)(vii). Thus, a Compact provision that prevents the Tribes from being able to obtain the financing that would otherwise allow them to be able to expand their gaming facilities and thereby be able to make the money necessary to provide additional governmental programs and increase services to their members "conflicts with the national policy" of promoting "tribal economic development, self-sufficiency, and strong tribal governments." There is no subject that is more directly relevant to the issue of whether the Termination Provision prevents the Tribes from achieving IGRA's goals than what effect the Termination Provision actually has on the Tribes' ability to achieve IGRA's goals of generating profit from gaming operations.

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## V.

## THE COURT IS NOT COMPELLED TO VOID THE COMPACT.

The State asserts, without elaboration, that "[t]he 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." Opening Brief, p. 19. The State argues that if the Termination Provision is found to be unlawful, the entire 1999 Compact would be void under Cal. Civ. Code § 1608. Opening Brief, p. 16-17

As an initial matter, there is no basis for concluding that the State believed that the inclusion of the Termination Provision constituted separate consideration for the concessions made by the State to the Tribes. SOF, ¶ 81-83. The State acknowledges that the question of whether the Termination Provision is valid under the IGRA is one of first impression. The parties never considered that inclusion of the Termination Provision was a topic of negotiation. *Id.* The Termination Provision was never even negotiated by the parties but rather was presented to the tribes on a take it or leave it basis. *Id.* at ¶ 81.

Moreover, on its face, Cal. Civ. Code § 1608 does not apply to the issues before the Court. Section 1608 states, "[i]f 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." The Compact involves numerous objects, such as the scope and nature of permissible gaming and the methods of regulation of the gaming, and numerous forms of consideration from the Tribes, such as payments into the Revenue Sharing Trust Fund and the Special Distribution Fund and the agreement to labor-related provisions and provisions relating to protection of patrons. The nature and scope of the 1999 Compact simply does not fit within the contours of Section 1608, which addresses single consideration for one object or multiple considerations for a single object.

The relevant provision of California law is Cal. Civ. Code § 1599, which provides that "[w]here a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter **and valid as to the rest**." (Emphasis added). Here, the 1999 Compact has many objects, only one of which is unlawful: the agreement to cease gaming on a date certain. A finding that the Termination Provision is contrary to the IGRA does not require the Court to void the other lawful provisions of the Compact. "'[W]hen any matter, void even by statute, be mixed up with good matter, which is entirely independent of it, the good part shall stand and the rest be held void.'" *Ulene v. Jacobson*, 209 Cal. App. 2d 139, 142 (1962) *citing Jackson* v. *Shawl*, 29 Cal. 267, 272 (1865)["The general and more liberal principle now is, that when any matter, void even by statute, [is] be mixed up with good matter, which is entirely independent of it, the good part shall stand and the rest be held void."]; *Jackson v. Shawl*, 29 Cal. at 272["When the transaction is of such a nature that the good part of the consideration can be separated from that which is bad, the Courts will make the distinction, for the common law doth divide according to common reason; and having made that void that is against law, lets the rest stand."].

Finally, to the extent that the Termination Provision constituted an element of the consideration for entering into the 1999 Compact, the interest that the State claims the Termination Provisions provides, a method to allow the parties to negotiate new compact provisions in response to changed circumstances, is protected by the provisions of the 1999 Compact that authorize the compact to be amended at any time by "mutual agreement of the parties", Sec. 12.1; when the tribe wishes to engage in other forms of gaming, Sec. 12.2, when either party requests renegotiations over the number of gaming devices the tribe can operate, Sec. 4.3.3(b) and Sec. 4.3.1, or the amount of the fee paid by the tribe into the Revenue Sharing Trust Fund, Sec. 4.3.3 and Sec. 4.3.2.[7]

[7] The State asks the Court not to mute the State's "voice in the compacting process." Opening Brief, p. 19. The State's voice in the compacting process could not be louder.

## CONCLUSION

The Termination Provision in the Tribes' Compacts has prevented the Tribes from expanding their gaming facilities and generating revenue necessary to fund essential governmental programs and services. It also threatens to terminate the Tribes' current gaming operations, which would have a devastating effect on the Tribes' economies and governments. The IGRA's primary purpose was to allow the Tribes to engage in gaming. The Termination Provision impedes that purpose and thereby runs afoul of both the express language of the IGRA and the purposes for which the IGRA was enacted. The Termination Provision is, therefore, invalid.

The Tribes respectfully request that the Court deny the State's cross-motion for summary judgment.

Dated: February 16, 2017

Respectfully Submitted,

RAPPORT AND MARSTON

By: */s/ Lester J. Marston*
Lester J. Marston, Attorney for Chicken Ranch Rancheria of Me-Wuk Indians and the Chemehuevi Indian Tribe

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The State wrote the 1999 Compact. The State presented the 1999 Compact to the Tribes on a take-it or leave-it basis under the threat of criminal sanctions, with only a few hours to decide whether to accept or reject the compact. SOF, ¶81-83. The Tribes are merely seeking to retain the Compact that was forced upon them by the State in 1999, in order to avoid imposition of even more onerous provisions in an amended compact.

## CERTIFICATE OF SERVICE

I am employed in the County of Mendocino, State of California. I am over the age of 18 years and not a party to the within action; my business address is that of Rapport & Marston, 405 West Perkins Street, Ukiah, CA 95482.

I hereby certify that I electronically filed the below listed documents with the Clerk of the United States District Court for the Central District of California by using the CM/ECF system on February 16, 2017.

1. PLAINTIFFS' OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT; and

2. PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE;

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; executed on February 16, 2017, at Ukiah, California.

*/s/ Brissa De La Herran*
BRISSA DE LA HERRAN