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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA, EASTERN DIVISION

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

Plaintiffs,

v.

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

Defendants.

5:16-cv-1347 JFW (MRWx)

DEFENDANTS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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

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

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INTRODUCTION

Defendants, Governor Edmund G. Brown Jr. and the State of California (collectively, State Defendants), submit this reply in support of a judgment in their favor and against Plaintiffs the Chicken Ranch Rancheria of Me-Wuk Indians (Chicken Ranch) and the Chemehuevi Indian Tribe (Chemehuevi) (collectively, Plaintiffs) in connection with the parties' cross-motions for summary judgment.

ARGUMENT

I. IF CONGRESSIONAL INTENT IS CLEAR FROM THE PLAIN MEANING OF THE STATUTE, THE COURT NEED NOT LOOK FURTHER FOR GUIDANCE

This case turns on whether the topic of duration falls within any of the categories of permissible subjects of negotiation set forth in IGRA. When seeking to resolve disputes over the meaning of a statute, the court first looks to the text of the law. *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984) (*Chevron*). If congressional intent is clear from the plain meaning of the statute, that is the end of the matter. *Id.* at 843. Here, the parties agree that the Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166-1168; 25 U.S.C. §§ 2701-2721 (IGRA), is clear and unambiguous with regard to the issue of duration as a subject for compact negotiation. (See Pls.' Opp'n to Defs.' Cross Mot. Summ. J., p. 18.) They disagree, however, on the outcome of the "plain meaning" analysis.

Both sides point to two provisions in IGRA as being key to resolving the matter. IGRA at 25 U.S.C. § 2710(d)(3)(C)(vi) provides that tribal-state class III gaming compacts may contain provisions relating to "standards for the operation of" gaming activity, "maintenance of the gaming facility" and "licensing." Title 25 U.S.C. § 2710(d)(3)(C)(vii) provides that compacts may address "any other subjects that are directly related to the operation of" gaming activities. Plaintiffs' rationale for excluding duration as a negotiation topic is straightforward: IGRA does not enumerate duration as a permissible topic of negotiation. But the absence in IGRA of the word "duration" or "term" does not end of the inquiry, because 25

U.S.C. § 2710(d)(3)(C)(vi) and (vii) does not list any particular topics at all, rather, the referenced subsections describe categories that may incorporate multiple topics pertaining to "standards for the operation of" gaming activity, "licensing," and "other subjects directly related to the operation of" gaming activity. Thus, the question becomes whether IGRA may be construed to authorize duration of a compact as a topic for negotiation despite duration not being expressly enumerated as a topic.

Neither tribal revenue sharing, tribal-labor relations, or additional time for a compact are expressly delineated in IGRA, yet the Ninth Circuit has viewed those issues, and other topics, as falling within the meaning of subsections (vi) and (vii), at least in the context of bad faith litigation. *See Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1039, n.20, n.21 (9th Cir. 2010) (*Rincon*); *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1111, 1115-16 (9th Cir. 2003). Although *Rincon* did not involve a challenge to a duration provision within a proposed gaming compact, in finding that the State could not require general fund revenue sharing in exchange for "basic gaming rights" such as "more devices or time," the Ninth Circuit clearly viewed compact duration being within the permissible scope of 25 U.S.C. § 2710(d)(3)(C)(vi). *Rincon*, 602 F.3d at 1030, 1039, n.20.[1] Thus, Plaintiffs' assertion that State Defendants are offering an interpretation of subsections (vi) and (vii) "that is at odds with federal court interpretations of those provisions" is incorrect. (Pls.' Opp'n to Defs.' Cross Mot. Summ. J., p. 12.)

State Defendants' interpretation is supported by IGRA's legislative history.[2] After recognizing states' and tribes' "significant governmental interests in the

[1] It is clear that *Rincon's* reference to "time" was an extension to the duration of the Rincon Band's then-current compact. *Id.*

[2] The "plain meaning rule" permits a court to consult legislative history even if the statute's meaning seems clear on its face. *Church of Scientology v. United States Dep't of Justice*, 612 F.2d 417, 421-22 (9th Cir. 1979).

conduct of class III gaming," Congress expressly determined that negotiable "issues under clause (vi) may include agreements on days and hours of operation, wage and pot limits, types of wagers, and size and capacity of the proposed facility." (Defs.' Req. Jud. Not. (RJN), ex. 69, p. 14 (Senate Report).) Plaintiffs' attempt to distinguish between congressionally recognized interests in licensing matters, such as "days and hours of operation" or "size and capacity of the proposed facility" on the one hand, and timeframes within which gaming activities may be conducted pursuant to the terms of a compact, on the other, doesn't hold up. The duration of time that gaming activities may be conducted under a compact relates no less to "how" gaming activity is conducted than the days and hours gaming activities may be offered or the permissible size and capacity of a gaming facility. Besides, Congress plainly regarded compact duration as being among the issues that states and tribes could agree on. Senate Report at 15 ("Compacts may, of course, provide for additional renewal terms."); *id.* at 13 (noting with approval the "issues addressed by" a compact between Nevada and the Fort Mojave Tribe, which included the matter of a term); see Defs.' RJN, ex. 70. Conversely, the legislative history lacks any support for the notion that Congress intended to exclude duration as a subject for compact negotiations. Congress left it up to the compacting parties to determine what compact timeframe, if any, would best serve their public policy, regulatory and economic interests.[3]

Finally, the Supreme Court's discussion of the meaning of the phrase "gaming activity" in *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2034, n.6 (2014) (*Bay Mills*) in the context of the issues that Court considered does not carry the day on the question before this Court. *Bay Mills* concerned whether Michigan

[3] Duration clauses favor IGRA's goals of furthering strong government-to-government relationships, allowing the parties to reassess, sufficiently before the compact's termination date, whether a compact's terms remain in accord with their interests or whether changed circumstances necessitate renegotiation of the terms and standards applicable to the operation of ongoing or planned gaming activities. (See Defs.' Cross Mot. Summ. J., p. 13.)

could employ 25 U.S.C. § 2710(d)(7)(A)(ii) to enjoin class III "gaming activities" occurring off Indian lands or whether tribal sovereign immunity barred Michigan's efforts. The Court did not expand its textual analysis to include the phrases "standards for the operation of" gaming activity or "any other subjects that are directly related to the operation of" gaming activity, or the meaning or scope of "licensing" in 25 U.S.C. § 2710(d)(3)(C)(vi) and (vii). Furthermore, *Bay Mills'* restrictive definition of "gaming activity," if read into subsections (vi) and (vii) but disregarding 25 U.S.C. § 2710(d)(3)(C)'s particular purpose and language, would fly in the face of Congress's express recognition that subsections (vi) and (vii) encompass subjects beyond the rules for playing class III games.

IGRA authorizes negotiations over the duration of a gaming compact. A plain meaning analysis of 25 U.S.C. § 2710(d)(3)(C)(vi) and (vii) supports this conclusion, and it is reinforced by the relevant case law and IGRA's legislative history.

II. THE COURT LOOKS TO AGENCY CONSTRUCTION OF A STATUTE ONLY IF IT DEEMS THE STATUTE AMBIGUOUS OR SILENT AS TO A MATTER

A court may look to agency interpretation when it deems a statute ambiguous or silent as to a particular matter. If this Court deems IGRA's plain language clear, either on its face or in conjunction with an examination of congressional intent, then there is no need to look for guidance from the administrating agency. Plaintiffs mischaracterize State Defendants' position with respect to the appropriate deference to be given an enforcing agency's application and construction of a statute. The State does not contend that the Assistant Secretary of Indian Affairs' approval of gaming compacts containing duration provisions is, alone, entitled to *Chevron* deference. It is the agency's authorization of implementing rules, specifically and most notably 25 C.F.R. §§ 293.2(b)(3) and 293.5, which refer, respectively, to "timeframes" and "extensions" for compacts, and which, therefore, reflect the agency's view that IGRA authorizes timeframes for compacts, that is

entitled to considerable deference under *Chevron*. The agency's consistent practice of approving compacts with duration provisions (including affirmatively approving the 1999 Compact) in an area within its expertise is itself entitled to the lesser traditional deference under *Skidmore v. Swift & Co*., 323 U.S. 134 (1944), due, in part, to the agency's specialized experience in matters relating to Indian gaming.[4]

Plaintiffs recognize that the canon of construction allowing that a statute enacted for the benefit of Indian tribes is to be interpreted in light of that aim is applicable only when the provision at issue is ambiguous. The parties agree that 25 U.S.C. § 2710(d)(3)(C)(vi) and (vii) are unambiguous. But even if this Court deemed 25 U.S.C. § 2710(d)(3)(C)(vi) and (vii) ambiguous with respect to duration clauses as a subject of negotiations, resort to the applicable case law, congressional intent as expressed in IGRA's legislative history, and agency construction through its implementing regulations will determine this matter long before the Court finds itself having to decide whether *Skidmore* deference to agency practice alone clarifies the ambiguity, and thus grappling with the relationship between *Skidmore* and the Indian canon of construction. One court has noted, however, that "several cases decided prior to *Chevron* held, without citing *Skidmore*, that similar forms of agency deference precluded application of the canon favoring tribes." *Fort Indep. Indian Cmty. v. California*, 679 F. Supp. 2d 1159, 1179 n.17 (E.D. Cal. 2009), citing *Shields v. United States*, 698 F.2d 987, 991 (9th Cir. 1983). That makes particular sense where, as here, the agency whose deference is at issue has a special focuses on, and holds expertise in, matters involving laws passed for the benefit of

[4] The Assistant Secretary of Indian Affairs' expressly determined that the 1999 Compact "does not violate the Indian Gaming Regulatory Act of 1988 (IGRA), federal law, or our trust authority." (SOF ¶¶ 19, 25, & exs. 9, 12.) While the Assistant Secretary's approval may not be entitled to *Chevron* deference because it is not authoritative, it is still entitled to more than minimal weight, particularly given its longstanding existence and its consistency with the agency's later actions of affirmatively approving and deeming approved compacts containing duration provisions of various lengths. (*See e.g.*, SOF ¶ 40, ex. 22 [twenty-five year term], ex. 34 [five month extension], ex. 36 [ten-year term].)

Indians.[5] Finally, the Indian cannon would not be applicable where, as here, the statutory interpretation suggested by Plaintiffs would not benefit other tribes who have determined that their self-interest is furthered by a compact with a specific duration. *Redding Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015)

III. IGRA'S PURPOSES ARE NOT THWARTED BY COMPACT-DURATION PROVISIONS

Plaintiffs argue that their actual inability to obtain financing to expand their gaming operations is prima facie evidence that the duration clause violates IGRA's purpose of promoting tribal economic development, self-sufficiency and strong tribal governments. (Pls.' Opp'n to Defs.' Cross Mot. Summ. J., p. 20.) This argument lacks merit. Plaintiffs have benefitted from IGRA as Congress intended. Both entered into class III gaming compacts, obtained financing during the term of the 1999 Compact, opened class III gaming casinos, and continue to operate those facilities sixteen-plus years after entering into the 1999 Compact. This is a result just as IGRA intended. It goes too far to say that Plaintiffs' inability to *expand* their operations violates IGRA's purposes. IGRA affords tribal governments an opportunity to generate revenue rather than a guarantee of generating desired amounts of revenue. IGRA was not intended to insulate gaming tribes from market forces or other factors that allow some tribes to become more successful than others.

IV. IF THE DURATION CLAUSE IS ILLEGAL, THE ENTIRE 1999 COMPACT IS VOID

Plaintiffs cite California Civil Code section 1599 in arguing that if the duration provision is deemed unlawful, it should be severed from the 1999 Compact, with the remainder of the agreement remaining in place. (Pls.' Opp. to Defs.' Cross

[5] *See* https://www.bia.gov/WhoWeAre/index.htm (last visited Feb. 23, 2017) ("The Bureau of Indian Affairs (BIA) mission is to: '. . . enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes, and Alaska Natives.'")

Mot. Summ. J., p. 21.) However, California Civil Code section 1599 applies only where the "object" of the contract is found to be unlawful. See Cal. Civ. Code § 1595 ("The object of a contract is the thing which is it agreed, on the part of the party receiving the consideration, to do or not to do.") The 1999 Compact's "object" is set forth at section 1.0, which includes within the 1999 Compact's "purposes and objectives" the intent to "develop and implement a means of regulating Class III gaming." (SOF ¶¶ 17, 20, 1999 Compact § 1.0(b).) The duration clause is not an object of the 1999 Compact but is more in the nature of consideration. As Plaintiffs admit, the tribe-drafted model gaming compact in Proposition 5 (which the 1999 Compact is based on) [6] lacked an expiration date, and the duration provision was introduced during negotiations for the 1999 Compact within the same draft that introduced a provision allowing "for the first time" tribes to operate "actual slot machines, house-banked and percentage card games and games [authorized to] the California Lottery." (Decl. of Forman, ¶¶ 17, 19.)[7] Section 4.1 of the 1999 Compact, which provides that Plaintiffs are authorized to conduct specified activities "under the terms and conditions set forth in this Gaming Compact," and section 15.4, which expressly reserves the duration provision if a tribe opts to trigger the "most favored tribe" clause and enter into a subsequently-entered compact, further support characterization of the duration clause as consideration. Accordingly, California Civil Code section 1599 is inapplicable.

Those same 1999 Compact provisions also permit no doubt that the duration provision is inextricably intertwined into the whole of the 1999 Compact, and this, together with the absence of a severability clause, supports a determination that the

[6] *See In re Indian Gaming Related Cases*, 331 F.3d at 1100, 1002-03, 1113, 1115.

[7] *In re Indian Gaming Related Cases* describes this offer as a "major concession" from the State. 331 F.3d at 1104.

duration provision, if deemed unlawful, is not severable from the 1999 Compact. *See Endicott v. Rosenthal*, 216 Cal. 721, 728 (1932) (quoting *Pacific Wharf & Storage Co. v. Standard Am. Dredging Co.*, 184 Cal. 21, 24 (1920) ("Whether a contract is entire or separable depends upon its language and subject matter, and this question is one of construction to be determined by the court according to the intention of the parties.") Accordingly, the duration provision, if determined to be unlawful, results in voiding the entire agreement. Cal. Civ. Code § 1608; see *Keene v. Harling*, 61 Cal. 2d 318, 324 (1964) ("[Civil Code section 1608] was intended to state the result where the court otherwise determines that a partially illegal contract is not severable.").

CONCLUSION

This Court should find that IGRA's plain language permits tribes and states to negotiate terms establishing the duration of a gaming compact. This interpretation is supported by the plain language of 25 U.S.C. § 2710(d)(3)(C)(vi) and (vii). Subsections (vi) and (vii) authorize negotiations over duration because the timeframe within which gaming activities may be operated under the terms of a negotiated compact is a "standard[] for the operation of" those gaming activities, a "licensing" issue and a "subject[] directly related to the operation of" gaming activities within the meaning of IGRA. This conclusion is buttressed by IGRA's legislative history and case law discussing and interpreting 25 U.S.C. § 2710(d)(3)(C)(vi) and (vii). Interpreting IGRA in this manner does not violate the statute's purpose of providing a means for tribes to promote tribal economic development, self-sufficiency, and strong tribal governments through gaming.

Even if this Court deems IGRA's language not sufficiently clear on its face to permit it to find that duration is a permissible subject of negotiation, resort to the legislative history compels the conclusion that in enacting IGRA, Congress intended states and tribes to be free to negotiate over the duration of a compact.

If this Court deems IGRA ambiguous or silent on the question of duration as a subject of negotiations, it should defer to the administrating agency's interpretation of IGRA as authorizing negotiations for the duration of a compact, as evidenced by the administrating agency's implementing regulations and its long-standing practice of approving gaming compacts that include duration provisions.

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

Dated: February 23, 2017

RESPECTFULLY SUBMITTED,

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