UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **ED CV 16-1347-JFW (MRWx)** Date: March 30, 2017

Title: Chemehuevi Indian Tribe, et al. -*v*- Jerry Brown, et al.

PRESENT:
HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly
Courtroom Deputy

None Present
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
None

ATTORNEYS PRESENT FOR DEFENDANTS:
None

PROCEEDINGS (IN CHAMBERS): **ORDER GRANTING STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT [filed 2/2/17; Docket No. 80]; and**

ORDER DENYING PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT [filed 2/2/17; Docket No. 81]

On February 2, 2017, Defendants Jerry Brown[1] ("Governor Brown") and the State of California (the "State") (collectively, the "State Defendants") and Plaintiffs Chemehuevi Indian Tribe ("Chemehuevi") and Chicken Ranch Rancheria of MeWuk Indians ("Chicken Ranch") (collectively, "Plaintiffs" or "Tribes") filed Cross-Motions for Summary Judgment. On February 16, 2017, the State Defendants and Plaintiffs filed their respective Oppositions. On February 23, 2017, the State Defendants and Plaintiffs filed their respective Replies. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found the matter appropriate for submission on the papers without oral argument. The matter was, therefore, removed from the Court's March 13, 2017 hearing calendar and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Factual and Procedural Background[2]

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

[2] The facts in this case were largely stipulated to by the parties. To the extent any of these facts are disputed, they are not material to the disposition of this motion. In addition, to the extent

The Tribes, which are federally recognized Indian tribes, operate casinos pursuant to 1999 gaming compacts (the "Compacts") with the State which contain identical provisions that establish an agreed upon date for the termination of the Compacts, unless extended by the parties.[3] The resolution of this action depends on the Court's answer to a question of first impression – namely, whether the duration provision of their Compacts violates the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"), and, therefore, is invalid and void. In order to answer this question, it is necessary to explain the history of Indian gaming in California, the IGRA, and the 1999 Compacts.

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

The IGRA divides gaming into three classes. Class III gaming, which is at issue in this case, "includes the types of high-stakes games usually associated with Nevada-style gambling. Class III gaming is subject to a greater degree of federal-state regulation than either class I [social games] or class II [bingo and certain non-banked card games] gaming." *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1097 (9th Cir. 2003) ("*Coyote Valley*").

Under the IGRA, a tribe may conduct Class III gaming only in "conformance with a Tribal-State compact entered into by the Indian Tribe and the State and approved by the Secretary of the Interior."[4] *Id.* at 1097 (explaining that lawful Class III tribal gaming is gaming conducted in conformance with a compact or conditions prescribed by the Secretary); *see also* 25 U.S.C. § 2710(d)(7)(B)(vii). In addition, the IGRA makes Class III gaming lawful on Indian lands only if such activities are: (1) authorized by an ordinance or resolution adopted by the governing body of the Indian tribe and approved by the Chairman of the National Indian Gaming Commission; (2) located

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that the Court has relied on evidence to which the parties have objected, the Court has considered and overruled those objections. As to the remaining objections, the Court finds that it is unnecessary to rule on those objections because the disputed evidence was not relied on by the Court. Moreover, the Court grants the State Defendants' unopposed Request for Judicial Notice in Opposition to Plaintiffs' Cross-Motion for Summary Judgment [Docket No. 82-3] and Plaintiffs' unopposed Request for Judicial Notice [Docket No. 83-1].

[3] Plaintiffs' 1999 Compacts are substantively identical. Chicken Ranch and Chemehuevi currently operate Class III Gaming Devices (the term used to describe Class III slot machines in the 1999 Compact) in their respective casinos under the terms of their respective 1999 Compacts.

[4] Such gaming must also comply with certain other conditions not relevant in this case. *Id.*

in a state that permits such gaming for any purpose by any person, organization, or entity; and (3) conducted in conformance with a tribal-state compact entered into by the Indian tribe and the state and approved by the Secretary. 25 U.S.C. § 2710(d)(1) and (d)(3)(B).

The IGRA's compact requirement gives States "the right to negotiate with tribes located within their borders regarding aspects of class III tribal gaming that might affect legitimate State interests." In addition, the IGRA sets out the provisions that may be properly included in a compact governing Class III gaming. Specifically, Section 2710(d)(3)(C) provides:

> Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to–
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> > (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)(i-vii).

In 1999, Governor Gray Davis commenced compact negotiations with a group of tribes. *Coyote Valley*, 331 F.3d at 1102. A decision by the California Supreme Court published while these negotiations were underway invalidated a statutory initiative that purported to authorize the Governor to enter into a model tribal-state gaming compact on the ground that the initiative violated Section 19 of Article IV of the California Constitution. *See Hotel Emp. & Rest. Emps. Int'l Union v. Davis*, 21 Cal. 4th 585 (1999); *Coyote Valley*, 331 F.3d at 1101, 1103. In response, Governor Davis "proposed an amendment to Section 19 of Article IV of the California Constitution that would exempt tribal gaming from the prohibition on Nevada-style casinos, effectively granting tribes a constitutionally protected monopoly on most types of class III games in California." *Coyote Valley*, 331 F.3d at 1103. During compact negotiations, Governor Davis offered the tribes a "major concession" granting them the right "to operate real Las Vegas-style slot machines as well as house-banked blackjack" plus the exclusive right to conduct those forms of Class III gaming in the state, in exchange for revenue sharing provisions directed to specified funds. *Id.* at 1104-06 (*citing* K. Alexa Koenig, *Gambling on Proposition 1A: The California Indian Self-Reliance Amendment*, 36 U.S.F. L. Rev. 1033, 1043-44 (2002)).

Each of the Tribes entered into a compact in September 1999, and their compacts went into effect in May 2000, after the passage of Proposition 1A authorized the governor of California to

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negotiate and conclude compacts pursuant to the state constitution, and upon their affirmative approval by the Assistant Secretary of the Interior ("Assistant Secretary").[5] *See* Subsection 19(f) of Article IV of the California Constitution; *see also* Notice of Approved Tribal-State Compacts, 65 Fed. Reg. 95, p. 31189 (May 16, 2000). In approving the 1999 Compacts, the Assistant Secretary of Indian Affairs' expressly determined that the 1999 Compacts do "not violate the Indian Gaming Regulatory Act of 1988 (IGRA), federal law, or our trust authority."

The Tribes have successfully operated their respective casinos without any major dispute with the State until April 20, 2016 when the Tribes wrote to Governor Brown's Senior Advisor for Tribal Negotiations, Joginder Dhillon ("Dhillon"), requesting a meet and confer to attempt to resolve a dispute pursuant to the provisions of Section 9.1 of the 1999 Compacts, entitled "Voluntary Resolution; Reference to Other Means of Resolution." In their correspondence, Plaintiffs claimed for the first time that the duration provision in Section 11.2.1(a) of the 1999 Compacts was void *ab initio* because it conflicted with the plain language of the IGRA, and that this provision should be stricken from the 1999 Compacts. The parties discussed the issue during an in-person meeting on May 3, 2016. On May 20, 2016, Dhillon advised Plaintiffs in writing that the State disagreed with Plaintiffs' interpretation of the IGRA, and provided the Plaintiffs with a full explanation of the State's position.

On June 23, 2016, Plaintiffs filed a Complaint against Defendants, alleging a single claim for relief for violation of the IGRA. In their Complaint, Plaintiffs allege that the duration provision in Section 11.2.1(a) of the 1999 Compacts is void because the duration provision violates the IGRA. On August 2, 2016, Defendants filed their Answer.

II. Legal Standard

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Once the moving party meets its burden, a party opposing a properly made and supported motion for summary judgment may not rest upon mere denials but must set out specific facts showing a genuine issue for trial. *Id.* at 250; Fed. R. Civ. P. 56(c), (e); *see also Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) ("A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data."). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "An issue of fact is not enough to defeat summary judgment; there must be a genuine issue of material fact, a dispute capable of affecting the outcome of the case." *American International Group, Inc. v. American International Bank*, 926 F.2d 829, 833 (9th Cir. 1991) (Kozinski, dissenting).

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[5] Secretarial authority is conferred by 5 U.S.C. § 301 and 25 U.S.C. §§ 2, 9 and 2710. The Secretary's authority to promulgate regulations is delegated to the Assistant Secretary – Indian Affairs by Part 209 of the Departmental Manual.

An issue is genuine if evidence is produced that would allow a rational trier of fact to reach a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248. "This requires evidence, not speculation." *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1225 (9th Cir. 1999). The Court must assume the truth of direct evidence set forth by the opposing party. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 507 (9th Cir. 1992). However, where circumstantial evidence is presented, the Court may consider the plausibility and reasonableness of inferences arising therefrom. *See Anderson*, 477 U.S. at 249-50; *TW Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir. 1987). Although the party opposing summary judgment is entitled to the benefit of all reasonable inferences, "inferences cannot be drawn from thin air; they must be based on evidence which, if believed, would be sufficient to support a judgment for the nonmoving party." *American International Group*, 926 F.2d at 836-37. In that regard, "a mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997).

III. Discussion

In their Motion for Summary Judgment, the State Defendants argue that the duration provision set forth in Section 11.2.1(a) of the 1999 Compacts is lawful under the IGRA and the parties are bound by the term fixing the 1999 Compacts' termination date. Plaintiffs argue that the duration provision conflicts with the plain wording of the IGRA and Congress's purposes in enacting the IGRA. Specifically, Plaintiffs argue that a fixed termination date is contrary to Congress's intention that the compacting requirement in the IGRA not be used to prevent Indian tribes from conducting gaming on their Indian lands because the duration provision grants the State the power to terminate Class III gaming and, thus, is void and unenforceable.

A. Negotiations and Approval of the 1999 Tribal-State Compacts Pursuant to the IGRA.

Federally-recognized Indian tribes in California have a right to regulate gaming activity on their eligible Indian lands, concurrently with the State, and subject to specified conditions. *See, e.g.*, 25 U.S.C. §§ 2701(5) & 2710(d)(5). However, gaming activities on Indian lands must be conducted "in conformance with a Tribal-State compact entered into by the Indian tribe and the State and approved by the U.S. Secretary of the Interior." 25 U.S.C. § 2710(d)(1) & (d)(3)(B); *see also* 25 C.F.R. § 501.2(a) (noting that Class III gaming operations must be conducted according to the requirements of the IGRA and its implementing regulations, tribal law, and the requirements of a compact or "procedures" prescribed by the Secretary).

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

In this case, the 1999 Compacts were determined to be lawful under the IGRA when they

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were affirmatively approved by the Assistant Secretary, who, pursuant to his delegated authority, expressly concluded that the 1999 Compacts did "not violate the Indian Gaming Regulatory Act of 1988 (IGRA), federal law, or our trust authority." Once the Assistant Secretary affirmatively made the decision to approve the 1999 Compacts, the agreements became effective upon publication in the Federal Register. Thus, Plaintiffs have the right to conduct gaming as long as they operate in conformance with the IGRA and the terms of the 1999 Compacts.

Notwithstanding the affirmative approval of the 1999 Compacts by the Assistant Secretary, Plaintiffs contend that the time frame is not a proper subject of compact negotiations because the subject of a compact's duration was not specifically identified or mentioned in the IGRA and is neither a "standard for the operation . . . of the gaming facility, including licensing" or "directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vi) and (vii).

B. The Plain Language of the IGRA, the Legislative History, and the Case Law Supports the Conclusion That Section 11.2.1(a) Does Not Violate the IGRA.

As explained above, the parties disagree as to whether the IGRA permits a duration provision such as Section 11.2.1(a) in compacts negotiated between the State and Indian tribes. Specifically, Section 11.2.1(a) of the 1999 Compacts provides:

> Once effective this Compact shall be in full force and effect for state law purposes until December 31, 2020. No sooner than eighteen (18) months prior to the aforementioned termination date, either party may request the other party to enter into negotiations to extend this Compact or to enter into a new compact. If the parties have not agreed to extend the date of this Compact or entered into a new compact by the termination date, this Compact will automatically be extended to June 30, 2022, unless the parties have agreed to an earlier termination date.[6]

When seeking to resolve disputes over the meaning of a statute, the cases have established a three step process for "*Chevron*" interpretation. *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984) ("*Chevron*"); *Barnhart v. Walton*, 535 U.S. 212, 222 (2002); *United States v. Mead Corp*., 533 U.S. 218, 230 (2001) ("*Mead*"); *Wilderness Soc'y v. United States FWS*, 353 F.3d 1051, 1060 (9th Cir.2003) (*en banc*), *amended by* 360 F.3d 1374 (2004). First, the court must determine whether the statutory text is ambiguous. This determination is made with reference to ordinary textual tools of interpretation.[7] For example, when making this threshold

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[6] The duration provision was modified by adding the last two sentences shortly after the parties executed their 1999 Compacts, and the modified language is included in Addendum "A" to the 1999 Compacts. In addition, the 1999 Compacts contain a renegotiation provision separate and apart from the one set forth in Section 11.2.1(a). Specifically, Section 12.1 provides that the parties may enter into renegotiations for an amended or new compact at any time by mutual agreement. In fact, the parties are presently participating in mutually-agreed negotiations pursuant to Section 12.1.

[7] In this case, the parties agree that there are no cases deciding whether the duration of a compact is the proper subject of compact negotiations as either "standard for the operation . . . of

determination, "a reviewing court should not confine itself to examining a particular statutory provision in isolation." Rather, "[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context . . . It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) (*quoting FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000)) (internal citations omitted). Second, if the text is ambiguous, the court then determines whether the agency interpretation is of a type entitled to deference under *Chevron*. *Mead*, 533 U.S. at 229–30. If the agency interpretation is entitled to *Chevron* deference, the third step is to determine whether the agency interpretation is a reasonable interpretation of the statute. If it is, the court adopts it. If the agency interpretation is not entitled to deference under *Chevron*, it may nonetheless be entitled to a distinct form of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).[8] *See Marmolejo–Campos v. Holder*, 558 F.3d 903, 909 (9th Cir.2009) (*en banc*).

Although the parties agree that the text of the IGRA is clear and unambiguous, they disagree on the outcome of the "plain meaning" analysis of that statutory text. Specifically, Plaintiffs argue the duration of a compact is not the proper subject of compact negotiations because duration is not specifically mentioned in the IGRA and the State Defendants argue that duration is a proper subject of compact negotiations even though it is not specifically mentioned in the IGRA.

Although the Court agrees with Plaintiffs' observation that the IGRA does not mention "duration" in the IGRA as a proper subject for compact negotiations, the Court concludes that the duration, or the length of time Class III gaming activities may occur, is a permissible subject for negotiation because it qualifies as either a "standard for the operation . . . of the gaming facility" under 25 U.S.C. § 2710 (d)(3)(C)(vi) or as "directly related to the operation of gaming activities" under 25 U.S.C. § 2710 (d)(3)(C)(vii). *See Cohen's Handbook of Federal Indian Law*, § 12.05[2], pp. 890-91 (Nell Jessup Newton ed., 2012) ("Tribal compacts often contain terms regarding duration. Where no such terms exists, the compact is presumed to run indefinitely and neither party may unilaterally terminate a compact"). It is undisputed that the IGRA does not contain a

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the gaming facility" or "directly related to the operation of gaming activities" under 25 U.S.C. § 2710 (d)(3)(C)(vi) or (vii). "In construing a statute in a case of first impression, the courts look to the traditional signposts for statutory interpretation: first, the language of the statute itself; and second, its legislative history and the interpretation given it by its administering agency, both as guides to the intent of Congress in enacting the legislation." *Turner v. Prod*, 707 F.2d 1109, 1114 (9th Cir. 1983); *Church of Scientology v. United States Dep't of Justice*, 612 F.2d 417, 421-22 (9th Cir. 1979) (holding that the "plain meaning rule" permits a court to consult legislative history even if the statute's meaning seems clear on its face).

[8] A second canon of interpretation requires that statutes passed to benefit tribes should be interpreted in light of this purpose. *See, e.g., Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). However, when *Chevron* deference is owed to an agency interpretation, Ninth Circuit authority provides that *Chevron* deference trumps application of the *Blackfeet* canon. *Confederated Salish & Kootenai Tribes v. United States*, 343 F.3d 1193, 1198 (9th Cir. 2003) (*citing Blackfeet Tribe*, 471 U.S. at 766).

detailed list of each aspect of, and the types of standards applicable to, the operation of Class III gaming activity. Instead, the permissible topics of negotiation expressed by the plain language of the IGRA, such as the "standard for the operation . . . of the gaming facility" and "subjects that are directly related to the operation of gaming activities" allow participants to negotiate duration provisions or a time frame for the operation of gaming activities in their compacts. The Court agrees with the State Defendants that if Congress intended the permissible topics set forth in Section 2710(d)(3)(C)(vi) and (vii) to be more narrowly construed, it would not have utilized the broad language it did in those sections.

For example, in *Coyote Valley*, the Court held that proposed compact provisions requiring tribes to share gaming revenues with non-gaming tribes, requiring payments into the SDF for specified gaming-related purposes, and requiring tribes to adopt a labor relations ordinance covering employment at tribal casinos, were each sufficiently related to the operation of gaming activities to be authorized under Section 2710(d)(3)(C)(vi), even though none of those subjects are specifically delineated in the IGRA. *Coyote Valley*, 331 F.3d at 1116. In reaching its decision, the Ninth Circuit relied on the IGRA's legislative history, which provides that the "terms of each compact may vary extensively" and states that Section 2710(d)(3)(C):

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

Id. at 1109, 1113 (*citing* S. Rep. No. 100-446, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084 (Senate Committee Report)). The *Coyote Valley* court also concluded that it was clear that Congress limited the proper topics for compact negotiations in the IGRA to those bearing a direct relationship to the operation of gaming activities because of Congressional concern that compacts would be used as a subterfuge for imposing state jurisdiction on tribes concerning issues unrelated to gaming. *Id.* at 1109, 1111. This concern is not present in this case.

Similarly, in a case involving findings of bad-faith negotiating, the *Rincon* court concluded that the duration of a compact is a routine subject for negotiation under the IGRA. *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1039 (9th Cir. 2010). In holding that requiring contribution to the State's general fund to be far too attenuated to be "directly related to the operation of gaming activities," the court stated, "[w]e are . . . influenced by the fact that the Department of the Interior, the executive agency charged with approving gaming compacts, also interprets IGRA in this way," a conclusion it reached based on the Assistant Secretary of Indian Affairs' view that:

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

Id. Thus, although neither tribal revenue sharing, tribal-labor relations, or extending the duration of a compact are expressly delineated in the IGRA, the Ninth Circuit had no difficulty in holding that

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those issues, as well as others, fell within the meaning of clauses (vi) and (vii). *See, e.g.*, *Rincon*, 602 F.3d at 1039; *Coyote Valley,* 331 F.3d at 1115-16.

In addition, an interpretation that the IGRA allows the parties to negotiate for the establishment of a time limit for the compact's terms to the operation of Plaintiffs' Class III gaming activities is supported by the IGRA's legislative history. As the Ninth Circuit discussed in *Coyote Valley* and *Rincon*, such a provision is analogous to those subjects that the Senate Committee Report acknowledged to be proper subjects of negotiation, such as the days and hours of operation, wage and pot limits, types of wagers, and the size and capacity of the proposed facility. Moreover, Congress plainly regarded compact duration as being among the issues that states and tribes could agree on when it stated that "[c]ompacts may, of course, provide for additional renewal terms." The Court concludes that there is nothing in the legislative history that would support the notion that Congress intended to exclude duration as a subject for compact negotiations. Accordingly, it appears that Congress left it up to the compacting parties to agree to a compact time frame, if any, that would best serve their public policy, regulatory, and economic interests.

Because the Court concludes that the statutory language of Section 11.2.1(a) has only one interpretation, that interpretation must be given effect. *Tang v. Reno*, 77 F.3d 1194, 1197 (9th Cir. 1996). Section 11.2.1(a) falls squarely within the general topics of negotiation expressly authorized by the plain language of the IGRA because duration provisions directly relate to the operation of gaming activities. In addition, the intent of Congress, as expressed in the IGRA's legislative history and as determined by the relevant case law, fully supports this interpretation.

Accordingly, despite not being specifically listed in the IGRA as a subject for negotiation, the Court concludes that Section 11.2.1(a) is directly related to the operation of the gaming activities under 25 U.S.C. § 2710(d)(3)(C)(vii). *Chevron*, 467 U.S. at 842.

C. Under *Chevron*, the Secretary of the Interior's View That Section 11.2.1(a) Complies with the IGRA is Entitled to Deference.

Assuming *arguendo* that the plain language of the IGRA, its legislative history, and the relevant case law did not support a determination that duration provisions such as Section 11.2.1(a) are directly related to the operation of the gaming activities under 25 U.S.C. § 2710(d)(3)(C)(vii), and, thus, a permissible subject of negotiations pursuant to the IGRA, the next step in the Court's analysis under *Chevron* would be to look to the enforcing agency's interpretation and application of the IGRA. *Chevron*, 467 U.S. 842-44. Under *Chevron*, a federal agency's administrative implementation of a particular federal statutory provision is entitled to considerable deference when (1) Congress delegated authority to the agency generally to make rules that carry the force of law; (2) the agency interpretation was promulgated in the exercise of that authority; and (3) delegation of such authority is shown by, for example, the agency's power to engage in adjudication or "notice-and-comment" rulemaking, or by some other indication of comparable congressional intent. *Mead*, 533 U.S. at 226-27.

Under the authority vested in the Secretary as delegated by Congress through 5 U.S.C. § 301, and 25 U.S.C. §§ 2, 9 and 2710 (which authority is delegated to the Assistant Secretary pursuant to Departmental Manual Part 209), the Bureau of Indian Affairs promulgated procedures for states and Indian tribes to follow when submitting Class III gaming compacts and compact

amendments to the Secretary. *See* 25 C.F.R. §§ 293 & 293.1. Notice in the Federal Register announcing the final rule establishing the Part 293 procedures makes clear that the Bureau of Indian Affairs published notice of the proposed rule, provided for a public comment period, and discussed and responded to public comments before implementing the rule. *See* 73 Fed. Reg. 128, p. 37907 (July 2, 2008); 73 Fed. Reg. 235, p. 74004 (Dec. 5, 2008).

The "Class III Tribal State Gaming Process" set forth in Part 293 contain those procedures applicable to tribal-state gaming compacts submitted to the Secretary for approval under 25 U.S.C. § 2710(d)(8). For purposes of Part 293's procedures governing the submission of Class III gaming compacts, 25 C.F.R. § 293.1 defines the term "extensions" to mean "changes to the time frame of the compacts or amendments." In addition, 25 C.F.R. § 293.5 explains that "approval of an extension [of a compact] is not required if the extension of the compact does not include any amendment to the terms of the compact."[9]

The Court concludes that the references to "extensions" and "time frames" reflect the administrating agency's judgment that the IGRA permits tribes and states to negotiate for time frames applicable to gaming activities as a subject directly related to the operation of gaming activities. Under *Chevron*, the agency's interpretation of the IGRA in connection with the very provision that is the subject of these proceedings should be afforded considerable deference.[10]

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[9] Plaintiffs correctly point out that the Assistant Secretary of Indian Affairs' approval of gaming compacts containing duration provisions is not, by itself, entitled to *Chevron* deference. Instead, it is the agency's authorization of implementing rules, specifically 25 C.F.R. §§ 293.2(b)(3) and 293.5, which refer, respectively, to "time frames" and "extensions" for compacts, and which, therefore, reflect the agency's view that the IGRA authorizes time frames for compacts, that is entitled to considerable deference under *Chevron*. In addition, a review of all the available tribal-state Class III gaming compacts approved by the Secretary or Assistant Secretary since the passage of the IGRA demonstrates that the Secretary and Assistant Secretary have never disapproved of a Class III compact because it included a duration provision, or expressed any doubts or concerns in an approval letter about the propriety of a compact because it included a duration provision. It is significant that since 1998, the Department has reviewed more than 500 compacts. It has disapproved at least 20 and expressed concerns about more than 60 as reflected in "deemed approved" letters, but never because of a duration provision. The agency's consistent practice of approving compacts with duration provisions (including affirmatively approving the 1999 Compacts) in an area within its expertise is itself entitled to at least 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. Thus, although the Assistant Secretary's approval may not be entitled to *Chevron* deference because it is not authoritative, it is still entitled to substantial 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.

[10] Furthermore, the regulations applicable to Secretarial "procedures" require that such procedures include "the length of time the procedures will remain in effect." 25 C.F.R. § 291.4(j)(18). It would be illogical to require a duration provision in Secretarial procedures issued after a tribe and a state fail to cooperatively enter into a compact, but to forbid a tribe and a state

In this case, the Assistant Secretary affirmatively approved the 1999 Compacts containing the contested duration provision, and has consistently over time either affirmatively approved or "considered to have been approved" compacts with duration provisions between California and other Indian tribes, including numerous such compacts presented to the Secretary for approval since 2012. The Secretary and Assistant Secretary have also consistently approved or "considered to have been approved" compacts between other states and tribes containing duration provisions. In addition, the agency construes the IGRA to not require any Secretarial review and approval whatsoever when a submitted compact contains only a date extension to an existing compact. 25 C.F.R. § 293.5. These agency determinations constitute compelling evidence that the agency charged with implementing the IGRA and having specialized expertise in the relevant area construes the IGRA as authorizing negotiations over time frames for the operation of Class III gaming activities.

D. Section 11.2.1(a) Does Not Violate the Policies of the IGRA.

In their Complaint, Plaintiffs allege that Section 11.2.1(a) of the 1999 Compacts has the effect of preventing tribes from obtaining financing, which impacts their ability to construct new or expanded gaming operations, which in turn impacts their ability to generate the revenues necessary to provide tribal government programs and services for their members. In their Motion, Plaintiffs argue that their inability to obtain financing to expand their gaming operations is strong evidence that Section 11.2.1(a) violates the IGRA's purpose of promoting tribal economic development, self-sufficiency, and strong tribal governments.

The Court disagrees. It is undisputed that Congress passed the IGRA to improve tribes' economic development opportunities. In fact, the IGRA's express purpose is to provide a statutory basis for the operation of gaming "as a means of promoting" tribal economic development, self-sufficiency, and strong tribal governments, to shield tribal gaming from corrupting influences, and to protect tribal gaming "as a means of generating" tribal revenue. 25 U.S.C. § 2702. However, the IGRA's legislative history does not support Plaintiffs' argument that the IGRA was to ensure that Plaintiffs had the ability to expand their operations. In addition, Plaintiffs have enjoyed the full benefits of the IGRA and their Compacts consistent with Congressional intent. Both Tribes entered into Class III gaming compacts, successfully obtained financing, opened Class III gaming casinos, and have continued to operate those facilities for almost two decades. Moreover, Plaintiffs have failed to demonstrate that a perpetual compact would eliminate presumed external barriers to funding or promote the operation of gaming enterprise that would generate sufficient revenues to meet current and future tribal needs. Any difficulty Plaintiffs may be experiencing in obtaining funding for the additional development and expansion of their gaming operations more than sixteen years into the 1999 Compact is immaterial to the propriety of Section 11.2.1(a) and whether it is a proper subject of negotiations under the IGRA.[11]

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engaged in bilateral negotiations to negotiate for such a provision.

[11] In addition, Plaintiffs' argument that the State Defendants will rely on Section 11.2.1(a) to terminate Plaintiffs' ability to engage in gaming after June 2022 without first attempting to conclude the current good-faith negotiations is unfounded. Section 11.2.1(a) does not prohibit the parties

IV. Conclusion

For all the foregoing reasons, the State Defendants' Motion for Summary Judgment is **GRANTED** and the Plaintiffs' Motion for Summary Judgment is **DENIED**. The parties are ordered to meet and confer and prepare a joint proposed Judgment which is consistent with this Order. The parties shall lodge the joint proposed Judgment with the Court on or before **April 3, 2017**. In the unlikely event that counsel are unable to agree upon a joint proposed Judgment, the parties shall each submit separate versions of a proposed Judgment along with a declaration outlining their objections to the opposing party's version no later than **April 3, 2017**.

IT IS SO ORDERED.

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from mutually agreeing to extend the expiration date of the 1999 Compacts beyond the deadline of June 2022 if the parties were close to reaching an agreement on a new or amended compact, subject to certain requirements. If the parties ultimately fail to reach agreement on an amendment or a new compact, and a court later found that the State failed to conduct the negotiations in good faith, the IGRA provides a remedial structure that would result in either a new compact or the imposition of Secretarial "procedures." 25 U.S.C. § 2710(d)(7). Therefore, the 1999 Compacts' renegotiation provisions and the IGRA's protections make it extremely unlikely that Plaintiffs will be faced with the termination of their Class III gaming activities beginning in June 2022 as a result of Section 11.2.1(a).

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