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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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CACHIL DEHE BAND OF WINTUN
INDIANS OF THE COLUSA INDIAN
COMMUNITY, a federally
recognized Indian Tribe,

Plaintiff,

PICAYUNE RANCHERIA OF THE
CHUKCHANSI INDIANS, a
a federally recognized Indian
Tribe,

Plaintiff
in Intervention,

v.

NO. CIV. S-04-2265 FCD KJM
(Consolidated Cases)

STATE OF CALIFORNIA;
CALIFORNIA GAMBLING CONTROL
COMMISSION, an agency of the
State of California; and
ARNOLD SCHWARZENEGGER,
Governor of the State of
California,

Defendants.

_____/_____
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1 This matter is before the court on defendants State of
2 California, California Gambling Control Commission (the
3 "Commission" or "CGCC"), and Governor Arnold Schwarzenegger's
4 (collectively, the "defendants") motion for judgment on the
5 pleadings against plaintiff Cachil Dehe Band of Wintun Indians of
6 the Colusa Indian Community ("Colusa"), defendants' motion for
7 partial summary judgment against Colusa, Colusa's motion for
8 summary judgment, defendants' motion to dismiss plaintiff-
9 intervenor Picayune Rancheria of the Chukchansi Indians'
10 ("Picayune") complaint, defendants' motion for summary judgment
11 against Picayune, and Picayune's joinder in Colusa's motion for
12 summary judgment. The court heard oral argument on the motions
13 on February 20, 2009.¹ The court allowed the parties to submit
14 supplemental briefing regarding the size of the statewide license
15 pool under the 1999 Compact, the last of which was filed on April
16 8, 2009.

17 **BACKGROUND²**

18 Plaintiff Colusa is an American Indian Tribe with a
19 governing body duly recognized by the Secretary of the Interior.
20 (Pl.s' Compl. ("Compl."), filed Oct. 25, 2004, ¶ 2). Plaintiff-
21

22 ¹ By Stipulation and Order, filed March 2, 2009, the
23 court allowed plaintiff Colusa and defendants to file additional
24 cross-motions on summary judgment regarding Colusa's claim for
25 Failure to Negotiate in Good Faith. (Stip. & Order [Docket #93],
26 filed Mar. 2, 2009; see Pl.'s First Am. Compl. [Docket #22 in
Case 2:07-cv-1069], filed Feb. 8, 2008). As such, the court does
not address herein the merits or the facts relating to this
claim.

27 ² Unless otherwise noted, the following facts are
28 undisputed. All parties have filed objections to various pieces
of evidence. Except where noted, such evidence is immaterial to
the court's analysis of the motions or the objections are
otherwise without merit.

1 intervenor Picayune is also a federally recognized Indian tribe.
2 (Compl. in Intervention, filed Jan. 29, 2009, ¶ 8). In April
3 1999, then-Governor Gray Davis ("Davis") invited Colusa and all
4 other federally-recognized tribes in California to a meeting in
5 Los Angeles, at which Davis announced his intention to negotiate
6 a compact allowing Class III gaming with California's tribes.
7 (Defs.' Resp. to Pl. Colusa's Stmt. of Undisp. Facts ("DUF")
8 [Docket #80-3], filed Feb. 6, 2009, ¶ 1). Colusa was part of a
9 group of approximately 80 tribes that participated in
10 negotiations with the team appointed by Davis. (Id. ¶ 2).
11 Colusa attended and was represented by legal counsel at all of
12 the negotiation meetings, the last of which took place in
13 Sacramento on September 9, 1999. (Id.)

14 Colusa and Picayune entered into Class III Gaming Compacts
15 (the "Compact") with the State of California (the "State") in
16 1999. (Id. ¶ 24; see Tribal-State Compact between Colusa Indian
17 Community and State of California ("Compact"), attached to
18 Stipulated Record of Documentary Evidence ("Stip. R.") [Docket
19 #62], filed Jan. 20, 2009). The Compact was ratified by the
20 Legislature on September 10, 1999, and both Colusa and Picayune's
21 Compact has been in effect since May 16, 2000. (See Pl. Colusa's
22 Resp. to Defs.' Stmt. of Undisp. Facts ("PUF") [Docket #79-3],
23 filed Feb. 6, 2009, ¶ 4; DUF ¶ 7; 65 Fed. Reg. 31189-01 (May 16,
24 2000)). 55 other tribes (the "Compact Tribes") also executed
25 virtually identical compacts with the State. (Compl. ¶ 24;
26 Letter, Hill to Burton, Stip. R., at 63; see Artichoke Joe's
27 California Grand Casino v. Norton, 353 F.3d 712, 717-18 (9th Cir.
28 2003); Artichoke Joe's California Grand Casino, 216 F. Supp. 2d

1 1084, 1094 (E.D. Cal. 2002)). At their core, these compacts
2 authorize Class III gaming pursuant to certain restrictions.

3 **1. Limitations on Gaming Device Licenses**

4 The Compact sets forth various provisions relating to the
5 number of Class III Gaming Devices a Compact Tribe may operate.
6 The Compact sets the limit of the amount of Gaming Devices
7 operated by each individual tribe at 2,000. (Compact §
8 4.3.2.2(a)). A tribe must obtain a Gaming Device license for
9 each device it seeks to operate in excess of the number of
10 terminals already operated as of September 1, 1999. (DUF ¶ 8;
11 Compact § 4.3.1).

12 The Compact also sets a statewide maximum on the number of
13 Gaming Devices that all Compact Tribes may license in the
14 aggregate. (Id.) This statewide maximum is determined by a
15 formula set forth in the Compact. (Id.; PUF ¶ 3.) Specifically,
16 the Compact provides:

17 The maximum number of machines that all Compact Tribes
18 in the aggregate may license pursuant to this Section
19 shall be a sum equal to 350 multiplied by the Number of
20 Non-Compact tribes as of September 1, 1999, plus the
difference between 350 and the lesser number authorized

21 (Compact § 4.3.2.2(a)(1)). Under defendants' calculation of the
22 formula, the license pool consists of 32,151 licenses. (DUF ¶
23 34). Plaintiffs assert that defendants' interpretation of the
24 Compact is incorrect and that more licenses are available under
25 the equation.

26 **2. The License Draw Tier System**

27 The Compact also provides that Gaming Device licenses are
28 distributed among all the 1999 Compact Tribes pursuant to the

1 license draw process. (Compact § 4.3.2.2). Tribes are awarded
2 licenses based upon the tribe's placement in one of five priority
3 tiers. (Id.) Specifically, the Compact provides:

4 Licenses to use Gaming Devices shall be awarded as
5 follows:

6 (i) First, Compact Tribes with no Existing Devices
7 (i.e., the number of Gaming Devices operated by a
8 Compact Tribe as of September 1, 1999) may draw up to
9 150 licenses for a total of 500 Gaming Devices;

10 (ii) Next, Compact Tribes authorized under Section
11 4.3.1 to operate up to and including 500 Gaming Devices
12 as of September 1, 1999 (including tribes, if any, that
13 have acquired licenses through subparagraph (i)), may
14 draw up to an additional 500 licenses, to a total of
15 1000 Gaming Devices;

16 (iii) Next, Compact Tribes operating between 501 and
17 1000 Gaming Devices as of September 1, 1999 (including
18 tribes, if any, that have acquired licenses through
19 subparagraph (ii)), shall be entitled to draw up to an
20 additional 750 Gaming Devices;

21 (iv) Next, Compact Tribes authorized to operate up to
22 and including 1500 gaming devices (including tribes, if
23 any, that have acquired licenses through subparagraph
24 (iii)), shall be entitled to draw up to an additional
25 500 licenses, for a total authorization to operate up
26 to 2000 gaming devices.

27 (v) Next, Compact Tribes authorized to operate more
28 than 1500 gaming devices (including tribes, if any,
that have acquired licenses through subparagraph (iv)),
shall be entitled to draw additional licenses up to a
total authorization to operate up to 2000 gaming
devices.

(Compact § 4.3.2.2(a)(3)). Defendants placed Colusa in the third
draw priority tier for its initial draw on September 5, 2002.

(DUF ¶¶ 11-12). Subsequently, it was placed in the fourth draw
priority tier and then the fifth draw priority tier. (DUF ¶¶ 17,
24). Colusa contends that it should have been placed in the
third draw priority tier for all draws.

/////

1 **3. Deposit in the Revenue Sharing Trust Fund**

2 In addition to authorizing Class III gaming, the Compact
3 also provides for revenue sharing with non-gaming tribes.
4 (Compact ¶ 4.3.2.1). The Revenue Sharing Trust Fund ("RSTF") is
5 a fund created by the Legislature and administered by the
6 Commission, as trustee, "for the receipt, deposit, and
7 distribution of monies paid." (Compact § 4.3.2). The revenue
8 sharing provisions of the Compact provide that Non-Compact Tribes
9 shall receive \$1.1 million per year, unless there are
10 insufficient funds, in which case, the available monies in the
11 RSTF shall be distributed in equal shares to the Non-Compact
12 Tribes.³ (Compact § 4.3.2.1).

13 As a condition of acquiring licenses to operate Gaming
14 Devices, the Compact requires that Colusa deposit in the RSTF "a
15 non-refundable one-time pre-payment fee in the amount of \$1,250
16 per Gaming Device being licensed." (Compact § 4.3.2.2(e)). The
17 Commission applies this pre-payment to a tribe's annual license
18 fees. However, a tribe does not owe annual license fees on any
19 of the first 350 licenses it obtains through the license draw
20 process. (DUF ¶ 51). Colusa has not been required to pay any
21 license fees as is has drawn a total of 323 Gaming Device
22 licenses through the draw process. (See DUF ¶ 52).

23 **4. The Conduct of the Parties**

24 Shortly after the conclusion of negotiations in September
25 1999, and in anticipation of the effectiveness of the 1999

26
27 ³ For purposes of revenue sharing, the Compact defines a
28 Compact Tribe as a tribe having a compact with the State
authorizing Class III Gaming; Non-Compact Tribes are defined as
federally-recognized tribes that are operating fewer than 350
Gaming Devices. (Compact § 4.3.2(a)(1)).

1 Tribal-State Compacts, many tribes acted pursuant to § 4.3.2.2 of
2 their respective compacts to create a system for issuing Gaming
3 Device Licenses. (DUF ¶ 40). The Sides Accounting Firm
4 ("Sides") administered this initial draw system (the "Sides
5 process"). (Id.) By letter to Sides dated May 10, 2000, Special
6 Counsel to the Governor and the Chief Deputy Attorney General
7 acknowledged that the California Indian Tribes had reached an
8 agreement on procedures for drawing machine licenses and
9 clarified the requirements for the draw system provided in the
10 compacts. (Letter to Sides, Stip. R., at 65-67). Specifically,
11 the letter noted the State's expectation that no more than the
12 available number of licenses would be issued through the Sides
13 process. (Id. at 66-67).

14 The first Sides process draw occurred on or about May 15,
15 2000. (DUF ¶ 40). Through the Sides process, 29,398 putative
16 gaming device licenses were issued to 38 tribes between May 15,
17 2000, and February 28, 2001. (Attachment A to Minutes of CGCC
18 meeting, Stip. R., at 80). Sides also collected the one-time
19 prepayment fees of \$1,250 for each license issued in the process
20 as well as some of the license fees that were due on a quarterly
21 basis. (Decl. of Gary Qualset ("Qualset Decl.") [Docket #75-3],
22 filed Feb. 6, 2009, ¶ 3).

23 However, defendants assert that although repeatedly asked,
24 Sides consistently refused to disclose the Compact Tribes that
25 had engaged it to conduct the draws. (Id. ¶ 4). Sides also
26 consistently refused to disclose the number of Gaming Device
27 licenses issued as well as the nature and source of the payments
28 he presented to go into the RSTF. (Id.)

1 On or about March 13, 2001, Gray Davis issued Executive
2 Order D-31-01, in which he declared that the Commission had
3 exclusive control over the issue of Gaming Device licensing under
4 the Compact. (DUF ¶ 42). By letter dated March 16, 2002, the
5 Chief Deputy Legal Affairs Secretary to the Governor and the
6 Chief Deputy Attorney General directed Sides to cease any further
7 Gaming Device license draws. (Qualset Decl. ¶ 6). The letter
8 noted that Sides' disclosure of the information relating to the
9 number of licenses issued was necessary for the Commission to
10 carry out its Compact duties as trustee of the RSTF. (Id.; Ex. B
11 to Qualset Decl.). Over the next months, defendants contend that
12 the Commission had difficulties administering the RSTF based upon
13 the lack of accurate and complete information from Sides or the
14 Compact Tribes relating to the licenses drawn and the fees
15 received. (Qualset Decl. ¶¶ 9-10). In August 2001, the
16 Department of Justice, Division of Gambling Control issued an
17 investigative subpoena for production of records relating to the
18 Sides process. (Id. ¶ 10).

19 However, in December 2001, Sides sent out an announcement
20 that a draw would be conducted on December 31, 2001. (Id. ¶ 13).
21 Sides refused to voluntarily halt the scheduled draw. (Id. ¶
22 15). Thus, the Commission sought a temporary restraining order
23 in Sacramento County Superior Court, which was granted on
24 December 28, 2001. (Id. ¶ 12; Ex. G to Qualset Decl.). Pursuant
25 to a settlement agreement effective January 7, 2007, Sides agreed
26 not to conduct further license draws, and the Commission
27 dismissed its action. (Id. ¶ 16; Ex. H to Qualset Decl.).

28

1 In June 2002, the Commission declared that the licenses
2 issued through the Sides process were invalid and that they would
3 be replaced by licenses issued by the Commission. (Attachment A
4 to Minutes of CGCC meeting, Stip. R., at 88). Subsequently, the
5 Commission assumed sole responsibility for the administration of
6 the license draw system. (DUF ¶ 10).

7 Colusa was operating 523 Gaming Devices as of September 1,
8 1999. (DUF ¶ 9). As such, it was placed in the third priority
9 tier for the first round of draws it participated in on September
10 5, 2002. (DUF ¶¶ 11-12). Colusa drew 250 licenses from the
11 third tier in the September 2002 draw. (DUF ¶ 14). Colusa
12 tendered a check in the amount of \$312,500 as the non-refundable
13 one-time pre-payment fee. (DUF ¶ 48). The Commission conducted
14 another round of license draws on December 19, 2003, and placed
15 Colusa in the fourth priority tier. (DUF ¶¶ 16-17). Colusa
16 requested 377 licenses, but received none because the Commission
17 determined that all available licenses had been issued to the
18 tribes drawing from the first three priority tiers. (DUF ¶¶ 19).
19 On October 21, 2004, the Commission conducted another round of
20 license draws and again placed Colusa in the fourth priority
21 tier. (DUF ¶¶ 20-21). Colusa requested 341 licenses and
22 deposited a pre-payment of \$471,200, but received only 73
23 licenses because too few licenses were available to satisfy
24 Colusa's full request. (DUF ¶¶ 22, 49). The Commission refunded
25 \$380,000, but retained \$91,250 in pre-payments for the licenses
26 actually received. In every draw subsequently administered, the
27 Commission has assigned Colusa to the fifth (and last) priority
28 tier, and Colusa has not been awarded any more licenses. (DUF ¶

1 24). Since the October 21, 2004 draw, Colusa has been authorized
2 to operate 846 Gaming Devices. (DUF ¶ 23). Colusa has made pre-
3 payments in the amount of \$403,750. (DUF ¶ 52). However,
4 because it has only drawn a total of 323 Gaming Device licenses
5 through the draw process, it has not owed annual license fees.
6 (See DUF ¶ 51).

7 By letter dated October 11, 2006, Colusa notified the
8 Commission of its desire to acquire additional licences and asked
9 for confirmation that the Commission would conduct a draw within
10 30 days of receiving the letter. (DUF ¶ 64). In August 2007,
11 Colusa repeated its request for a draw. (DUF ¶ 66). However, in
12 both instances the Commission declined to conduct a draw because,
13 under its calculations, no licences existed in the statewide
14 license pool at the time of the requests. (DUF ¶ 67; see DUF ¶
15 65). As such, conducting a draw "would be an empty and futile
16 act." (DUF ¶ 67). As of January 20, 2009, the statewide license
17 pool contained no available licenses under defendants'
18 interpretation of the maximum number of gaming devices authorized
19 under § 4.3.2.2(a)(1) of the Compact. (Defs.' Stmt. of Undisp.
20 Facts in Supp. of Mot. for Summ. J. on Picayune's Compl. ("DPUF")
21 [Docket #67-4], filed Jan. 28, 2009, ¶ 2).

22 **5. The Litigation**

23 On October 25, 2004, plaintiff filed a complaint in this
24 court, alleging violations of the Compact. Plaintiff asserts
25 that defendants violated the Compact by: (1) excluding the Tribe
26 from participating in the third priority tier in the December 19,
27 2003 round of draws; (2) unilaterally determining the number of
28 Gaming Device licenses authorized by § 4.3.2.2(a)(1) of the

1 Compact; (3) failing to refund money paid pursuant to the non-
2 refundable one-time pre-payment fee set forth in § 4.3.2.2(e) of
3 the Compact; (4) CGCC conducting rounds of draws of Gaming Device
4 licenses without authority; and (5) failing to negotiate in good
5 faith.⁴ On March 28, 2006, defendants filed a motion for
6 judgment on the pleadings, seeking to dismiss plaintiff's first,
7 second, third, and fourth claims for relief for failure to join
8 necessary and indispensable parties and plaintiff's fifth claim
9 for relief for failure to exhaust non-judicial remedies. By
10 order dated May 16, 2006 (the "May 16 order"), the court granted
11 defendants' motion.

12 Colusa appealed the court's May 16 order.⁵ The Ninth
13 Circuit reversed the court's ruling that Colusa's first four
14 claims required joinder pursuant to Rule 19 and remanded for
15 further proceedings consistent with its opinion. Cachil Dehe
16 Band of Wintun Indians of the Colusa Indian Cmty. ("Colusa") v.
17 California, 547 F.3d 962 (9th Cir. 2008). The Ninth Circuit's
18 mandate was filed in this court on November 14, 2008.

19 In the interim, on June 5, 2007, Colusa filed a second
20 action in this court, alleging that defendants violated the
21 Compact by (1) refusing to schedule and conduct a round of draws;
22 and (2) counting multi-station games as equal to the number of
23

24 ⁴ Plaintiff also asserts that the State is violating its
25 obligations under the Indian Gaming Regulatory Act of 1988
("IGRA") by failing to negotiate in good faith. (Compl. ¶ 58).

26 ⁵ The Ninth Circuit noted that while Colusa listed its
27 fifth cause of action - failure to negotiate in good faith -
among its grounds for appeal, it did not advance any argument in
28 support of reversing the court's order; thus, the Ninth Circuit
deemed the claim abandoned. Cachil Dehe Band of Wintun Indians
of the Colusa Indian Cmty. v. California, 547 F.3d 962, 968 n.3
(9th Cir. 2008).

1 terminals. (First Am. Compl. in Case No. 2:07-cv-1065 [Docket
2 #22], filed Feb. 8, 2008). Colusa also alleged that defendants
3 failed to negotiate in good faith in violation of both the
4 Compact and the Indian Gaming Regulatory Act, 25 U.S.C. § 2710.

5 On December 10, 2008, the court consolidated the two actions
6 and set a revised schedule for dispositive motions. On January
7 2, plaintiff-intervenor Picayune filed a motion to intervene in
8 the action, alleging that the Commission breached its Gaming
9 Compact with the State of California by miscalculating the total
10 number of licenses in the gaming device license pool. (Compl. in
11 Intervention). Defendants opposed the motion to intervene on the
12 sole ground that Picayune's claim was subject to dismissal under
13 Federal Rule of Civil Procedure 19 for failure to join
14 indispensable parties, the very argument rejected by the Ninth
15 Circuit's decision. The court granted Picayune's motion, but
16 maintained the existing schedule for the parties' dispositive
17 motions. (Order [Docket #63], filed Jan. 22, 2009).

18 **STANDARD**

19 **A. Motion to Dismiss**

20 On a motion to dismiss, the allegations of the complaint
21 must be accepted as true. Cruz v. Beto, 405 U.S. 319, 322
22 (1972). The court is bound to give plaintiff the benefit of
23 every reasonable inference to be drawn from the "well-pleaded"
24 allegations of the complaint. Retail Clerks Int'l Ass'n v.
25 Schermerhorn, 373 U.S. 746, 753 n.6 (1963). Thus, the plaintiff
26 need not necessarily plead a particular fact if that fact is a
27 reasonable inference from facts properly alleged. See id.

1 Nevertheless, it is inappropriate to assume that the
2 plaintiff "can prove facts which it has not alleged or that the
3 defendants have violated the . . . laws in ways that have not
4 been alleged." Associated Gen. Contractors of Cal., Inc. v. Cal.
5 State Council of Carpenters, 459 U.S. 519, 526 (1983). Moreover,
6 the court "need not assume the truth of legal conclusions cast in
7 the form of factual allegations." United States ex rel. Chunie
8 v. Ringrose, 788 F.2d 638, 643 n.2 (9th Cir. 1986).

9 Ultimately, the court may not dismiss a complaint in which
10 the plaintiff alleged "enough facts to state a claim to relief
11 that is plausible on its face." Bell Atlantic Corp. v. Twombly,
12 127 S. Ct. 1955, 1973 (2007). Only where a plaintiff has not
13 "nudged [his or her] claims across the line from conceivable to
14 plausible," is the complaint properly dismissed. Id. "[A] court
15 may dismiss a complaint only if it is clear that no relief could
16 be granted under any set of facts that could be proved consistent
17 with the allegations." Swierkiewicz v. Sorema N.A., 534 U.S.
18 506, 514 (2002) (quoting Hudson v. King & Spalding, 467 U.S. 69,
19 73 (1984)).

20 In ruling upon a motion to dismiss, the court may consider
21 only the complaint, any exhibits thereto, and matters which may
22 be judicially noticed pursuant to Federal Rule of Evidence 201.
23 See Mir v. Little Co. Of Mary Hosp., 844 F.2d 646, 649 (9th Cir.
24 1988); Isuzu Motors Ltd. v. Consumers Union of United States,
25 Inc., 12 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998).

26 **B. Motion for Judgment on the Pleadings**

27 Rule 12(c) of the Federal Rules of Civil Procedure provides,
28 "After the pleadings are closed - but early enough not to delay

1 trial - a party may move for judgment on the pleadings." In
2 considering a motion for judgment on the pleadings, the standard
3 applied by the court is virtually identical to the standard for
4 dismissal for failure to state a claim upon which relief can be
5 granted pursuant to Rule 12(b)(6). Fajardo v. City of Los
6 Angeles, 179 F.3d 698, 699 (9th Cir. 1999).

7 **C. Motion for Summary Judgment**

8 The Federal Rules of Civil Procedure provide for summary
9 judgment where "the pleadings, the discovery and disclosure
10 materials on file, and any affidavits show that there is no
11 genuine issue as to any material fact and that the movant is
12 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c);
13 see California v. Campbell, 138 F.3d 772, 780 (9th Cir. 1998).
14 The evidence must be viewed in the light most favorable to the
15 nonmoving party. See Lopez v. Smith, 203 F.3d 1122, 1131 (9th
16 Cir. 2000) (en banc).

17 The moving party bears the initial burden of demonstrating
18 the absence of a genuine issue of fact. See Celotex Corp. v.
19 Catrett, 477 U.S. 317, 325 (1986). If the moving party fails to
20 meet this burden, "the nonmoving party has no obligation to
21 produce anything, even if the nonmoving party would have the
22 ultimate burden of persuasion at trial." Nissan Fire & Marine
23 Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102-03 (9th Cir. 2000).
24 However, if the nonmoving party has the burden of proof at trial,
25 the moving party only needs to show "that there is an absence of
26 evidence to support the nonmoving party's case." Celotex Corp.,
27 477 U.S. at 325.

28

1 complaint may relate-back to the original complaint where the
2 statute of limitations has otherwise expired.⁷ Several courts
3 have held that, despite expiration of the applicable statute of
4 limitations, a complaint in intervention filed pursuant to Rule
5 24 may relate back to the date of an earlier complaint, provided
6 there is no prejudice to the defendant. See New York v.
7 Gutierrez, No. 08 cv 2503, 2008 WL 5000493 (E.D.N.Y. Nov. 20,
8 2008); Ross v. Patrusky, Mintz, & Semel, No. 90 Civ 1356, 1997 WL
9 214957 (S.D.N.Y. Apr. 29, 1997); Greater New York Health Care
10 Facilities Ass'n v. DeBuono, 91 N.Y.2d 716, 721 (1998) (applying
11 New York state law, holding that a party may be permitted to
12 intervene and relate its claim back to the original complaint
13 where (1) the claims are based on the same transaction or
14 occurrence, and (2) the proposed intervenor and the original
15 plaintiff are so closely related that the original plaintiff's
16 claim gave the defendant notice of the proposed intervenor's
17 claim, such that imposition of the intervenor's claim does not
18 prejudice the defendant); see also Cummings v. U.S., 704 F.2d
19 437, 439-40 (1983) (holding that the intervention of an insurer-
20 subrogee pursuant to Rule 24 was essentially a *pro tanto*
21 substitution of the real party in interest under Rule 17(a), and
22 thus relation-back was appropriate); In re JDS Uniphase Corp.
23 Sec. Lit., No. 02-1486, 2005 WL 2562621 (N.D. Cal. Oct. 12, 2005)
24 (holding that a motion to intervene in a class action suit was
25

26 ⁷ It is well-settled in the Ninth Circuit that a putative
27 member of a class action may intervene in the class action
28 proceeding despite expiration of the applicable statute of
limitations, as the intervenor's claim will be deemed to relate
back to the filing of the class action. See, e.g., Bantolina v.
Aloha Motors, Inc., 75 F.R.D. 26, 34 (D.C. Hawaii 1977).

1 timely despite expiration of the statute of limitations where the
2 intervenor did not seek to add new claims to the original
3 complaint).

4 Nevertheless, other courts have applied Rule 24 more
5 narrowly, holding that a complaint in intervention cannot relate-
6 back to the original complaint. Federal Rules of Civil Procedure
7 15(c) and 17(a), which concern amendments to pleadings and
8 substitutions of real parties in interest, respectively, both
9 contain explicit relation-back provisions. In contrast, Federal
10 Rule of Civil Procedure 24 does not. Some courts have
11 interpreted the lack of an explicit provision in Rule 24 as an
12 indication that the rule itself does not authorize relation-back.
13 See Ceribelli v. Elghanayan, No. 91 Civ 3337, 1994 WL 529853, *2
14 (S.D.N.Y. Sept. 28, 1994). Additionally, courts have been
15 reluctant to apply the relation-back doctrine where the
16 applicable statute of limitations has otherwise expired because
17 it would allow "the courts to start down a slippery slope of
18 permitting use of the rule as a tactical device to escape the
19 consequences of the intervenor's prior strategy" and "serve only
20 to frustrate the 'salutary purpose [of the statute of
21 limitations] to set stale claims at rest.'" Id. at *1-2.
22 According to the Tenth Circuit, those jurisdictions that have not
23 embraced the relation-back doctrine "have necessarily reasoned
24 that an intervening plaintiff should not be permitted to
25 'piggyback' on the claims of an earlier plaintiff in order to
26 escape the statutory bar that would normally shield a defendant
27 from liability as to the intervenor." Weber v. Mobil Oil Corp.,
28 506 F.3d 1311, 1315 (2007) (holding, however, that an

1 intervenor's claim related-back to the date of the original
2 complaint for purposes of a jurisdictional statute where the
3 plaintiff intervenor did not raise new claims or subject the
4 defendants to additional liability); see also Bantolina v. Aloha
5 Motors, Inc., 75 F.R.D. 26, 36 (D.C. Hawaii 1977) (stating, in
6 dicta, that intervention would not necessarily relate-back to the
7 filing of the original complaint where the complaint was filed as
8 an individual action and the statute of limitations had expired).

9 Generally, courts that have applied relation-back to a
10 complaint in intervention have only done so in narrow and limited
11 circumstances, such as where the underlying rationale of the
12 statute of limitations has otherwise been satisfied. In Ross,
13 the Southern District of New York held that relation-back was
14 appropriate despite expiration of the statute of limitations
15 where the defendants were not otherwise prejudiced by the
16 intervenor's delay in bringing suit. 1997 WL 214957 at *9. The
17 court found that other jurisdictions⁸ have held that a complaint
18 in intervention otherwise "barred by the statute of limitations
19 relates-back to the date the original complaint was filed where
20 no prejudice to the defendant would result." Ross, 1997 WL
21 214957 at *8 (citing Cummings, 704 F.2d at 440; Foster v.
22 Peddicord, 826 F.2d 1370, 1373 (4th Cir. 1987); Red Rock
23 Commodities Ltd. v. M/V Kopalnia Szombierki, No. 92 Civ. 6016,
24 1994 WL 440822 (S.D.N.Y. Aug. 15, 1994)). The court held that
25 relation-back was proper because the intervenor's motion for
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27 ⁸ The Ross court discussed the Ninth Circuit's decision
28 in Cummings, 704 F.2d 437, which held that the complaint in
intervention should relate-back because the policies of Rule 17
were implicated.

1 intervention had previously been deemed timely by the court, and
2 the intervenor promptly moved for intervention when it became
3 apparent that the plaintiffs could not adequately represent the
4 intervenor's interests. Id. at *9. In stressing the similarity
5 of the parties' claims, the court found that the motion for
6 intervention was essentially a motion for substitution due to the
7 commonality of interest between the intervenor and plaintiff.
8 Id.; see also Cummings, 704 F.2d at 440. Additionally, the court
9 held that the defendants would not be prejudiced by the
10 intervenor's delay in filing suit, and that allowing relation-
11 back under the "circumstances is consonant with the generally
12 permissive spirit of the Federal Rules." Id.⁹ In Gutierrez,
13 2008 WL 5000493 at *13, the Southern District of New York
14 clarified the reasoning of Ross, holding that a complaint in
15 intervention relates-back to the date of the original complaint,
16 despite expiration of the statute of limitations, where "(1) the
17 proposed intervenor is the real party in interest, or there is a
18 'community of interest' between proposed intervenor's and
19 plaintiff's claims; (2) intervenor's motion is timely within the
20 meaning of Rule 24; and (3) no prejudice to defendants would
21 result." 2008 WL 5000493 at *13.

22 Statutes of limitations are not designed to punish the
23 plaintiff, but rather protect the defendant from unfair
24 prejudice. As the Tenth Circuit explained in Weber, "The purpose

25
26 ⁹ The Ross court also distinguished a prior district
27 court decision from the Southern District of New York, Ceribelli
28 v. Elghanayan, 1994 WL 529853, because the Cerebelli court held
that intervention was untimely. As such, in Cerebelli, to allow
relation-back would have flouted the purposes of the statute of
limitation in preventing the adjudication of stale claims that
had not been pursued.

1 of the statute of limitations is 'to promote justice by
2 preventing surprises through the revival of claims that have been
3 allowed to slumber until evidence has been lost, memories have
4 faded, and witnesses have disappeared.'" 506 F.3d at 1315
5 (quoting Order of R.R. Tels. v. Ry. Express Agency, Inc., 321
6 U.S. 342, 348-49 (1944)). Where an intervenor raises the same
7 claim as the original plaintiff, and does not expose the
8 defendant to additional liability, the concerns for "surprise"
9 and "prejudice" are substantially mitigated. JDS Uniphase, 2005
10 WL 2562621; Ross, 1997 WL 214957 at *8; Gutierrez, 2008 WL
11 5000493 at *13.

12 According to defendants, by June 19, 2002, Picayune had
13 notice of defendants' alleged incorrect interpretation of the
14 total number of gaming devices permitted under the Compact.
15 However, Picayune did not file its Motion to Intervene until
16 January 2, 2009. (Compl. in Intervention). On January 22, 2009,
17 this court granted Picayune's Motion to Intervene. (Order
18 [Docket #63], filed Jan. 22, 2009). Defendants seek to dismiss
19 Picayune's complaint in intervention on the basis that California
20 Code Civil Procedure ("C.C.P.") Section 337, which establishes a
21 four-year statute of limitations for breach of contract actions,
22 bars the complaint. (Def.'s P. & A., 4:6-8.)

23 The court holds that in light of the policy reasons
24 underlying the relation-back doctrine and the unique
25 circumstances presented in this case, Picayune's complaint in
26 intervention relates-back to the date of Colusa's original
27 complaint. Significantly, the three requirements of Ross, which
28 the court finds persuasive, are satisfied. First, there is a

1 "community of interest" between Picayune's and Colusa's claims.
2 Picayune and Colusa seek the same relief through their respective
3 breach of contract claims: specifically, declaration of the
4 correct number of gaming device licenses available pursuant to
5 Section 4.3.2.2 of the Compact. (Compl., Prayer for 2d Claim for
6 Relief, ¶ 2; Compl. in Intervention, Prayer for Relief, ¶ 1.)
7 Colusa and Picayune executed nearly identical Compacts with
8 defendants; while Picayune does not have a legally protected
9 interest in Colusa's suit, Picayune and Colusa have a common
10 interest in the size of the license pool. Further, the
11 respective disputes over the license pool between the tribes and
12 defendants arose from the same occurrence: the State's alleged
13 inaccurate interpretation of the authorized number of gaming
14 device licenses available to the tribes.

15 Second, Picayune's motion for intervention was timely within
16 the meaning of Rule 24. (See Order [Docket #63], filed Jan. 22,
17 2009). In fact, while defendants objected to Picayune's Motion
18 to Intervene on the basis of Rule 19, they did not raise any
19 arguments or objections with respect to timeliness.

20 Finally, no prejudice to defendants will result if Picayune
21 is allowed to proceed on its complaint in intervention.
22 Defendants will not be subject to new liabilities if Picayune's
23 complaint is related back, for Picayune does not assert claims in
24 addition to those already raised by Colusa; defendants concede
25 that the proposed claim, "if not precisely identical, is very
26 similar to the second claim for relief" in plaintiff's complaint.
27 (See Order [Docket #63], filed Jan. 22, 2009). Picayune and
28 Colusa seek the same relief on this claim. Further, permitting

1 relation-back of Picayune's complaint in intervention would not
2 be prejudicial to defendants since Colusa's claim against
3 defendants was filed in October 2004, and thus defendants have
4 been aware of the legal and factual arguments upon which
5 Picayune's claim is based for four and a half years.¹⁰

6 In light of the unique circumstances presented in the
7 instant case, the court finds that Picayune's complaint in
8 intervention relates-back to the date of Colusa's October 2004
9 complaint. As such, Picayune's complaint in intervention is not
10 barred by the statute of limitations.¹¹ Therefore, defendants'
11 motion to dismiss is DENIED.

12 **II. Colusa and Picayune's Claims Against Defendants Arising out**
13 **of Interpretation of the Compact**

14 In 1998, Congress enacted the IGRA as a "compromise solution
15 to the difficult questions involving Indian Gaming." In re
16 Indian Gaming Related Cases, 331 F.3d 1094, 1096 (9th Cir. 2003)
17 (quoting Artichoke Joe's, 216 F. Supp. 2d at 1092). The
18 principal goal of federal Indian policy generally, and the IGRA
19 specifically is "to promote tribal economic development, tribal
20 self-sufficiency, and strong tribal government. 25 U.S.C. §§
21 2701(4), 2702(1). The IGRA also provides a statutory basis "to

22
23 ¹⁰ The court also notes that defendants filed a summary
24 judgment motion in May 2006 which asserted that all of the
25 Compact tribes were Rule 19 necessary and indispensable parties
26 to the Colusa suit. In light of defendants' own motion seeking
to join all of the Compact tribes, the court cannot conclude that
defendants will be prejudiced if Picayune, merely one of the
Compact tribes, is permitted to proceed with its complaint in
intervention.

27 ¹¹ Because the court concludes the Picayune's complaint in
28 intervention relates back to Colusa's original complaint, the
court does not reach the issue of what, if any, statute of
limitations applies to Picayune's claim.

1 shield [tribal gaming] from organized crime and other corrupting
2 influences, to ensure that the Indian tribe is the primary
3 beneficiary of the gaming operation, and to assure that gaming is
4 conducted fairly and honestly by both the operator and players.”
5 25 U.S.C. § 2702(2). Moreover, the IGRA serves as a means of
6 granting states some role in the regulation of Indian gaming.
7 Artichoke Joe’s v. Norton, 353 F.3d at 715. The “IGRA is an
8 example of ‘cooperative federalism’ in that it seeks to balance
9 the competing sovereign interests of the federal government,
10 state governments, and Indian tribes, by giving each a role in
11 the regulatory scheme.” Artichoke Joe’s, 216 F. Supp. 2d at 1092
12 (quoted in In re Indian Gaming Related Cases, 331 F.3d at 1096);
13 Artichoke Joe’s, 353 F.3d at 726 (noting that the legislative
14 history demonstrated that Congress looked to the compacting
15 process primarily as a means of balancing state and tribal
16 interests).

17 The IGRA creates three classes of gaming, each of which is
18 subject to a different level of regulation. Artichoke Joe’s, 353
19 F.3d at 715; see 25 U.S.C. § 2703(6)-(7) (defining “class I
20 gaming” and “class II gaming”). At issue in this case is class
21 III gaming, which includes “all forms of gaming that are not
22 class I gaming or class II gaming” and is the most heavily
23 regulated form of gaming. 25 U.S.C. § 2703(8); see In re Indian
24 Gaming Related Cases, 331 F.3d at 1097 (“[I]n short, it includes
25 the types of high-stakes games usually associated with Nevada-
26 style gambling . . . [and] is subject to a greater degree of
27 federal-state regulation than either class I or class II
28 gaming.”). Pursuant to the IGRA, class III gaming is lawful on

1 Indian lands only if such activities are, inter alia, "conducted
2 in conformance with a Tribal-State compact entered into by the
3 Indian tribe and the State . . . that is in effect." 25 U.S.C. §
4 2710(d)(1)(C).

5 The Tribal-State compact must be negotiated in good faith.
6 25 U.S.C. § 2710(d)(3). Moreover, state authority over class III
7 gaming is limited by the explicit terms of the applicable Tribal-
8 State compact. Cabazon Band of Mission Indians, 124 F.3d 1050,
9 1060 (9th Cir. 1997). However, the IGRA also provides that the
10 negotiated compact may include provisions that relate to issues
11 that might affect legitimate state interests, such as the
12 application and allocation of jurisdiction for criminal and civil
13 laws, assessment by the state, taxation by the Indian tribe,
14 remedies for breach of contract, and standards for the operation
15 of gaming facilities. In re Indian Gaming Related Cases, 331
16 F.3d at 1097; 25 U.S.C. § 2710(d)(3)(C). In California, after a
17 tribe and the Governor negotiate a compact, the Legislature must
18 ratify it. Cal. Const. art. IV, § 19(f); 25 U.S.C. § 2710(d)(8).
19 The Tribal-State compact becomes effective upon the approval of
20 the Secretary of the Interior. 25 U.S.C. § 2710(d).

21 General principles of contract interpretation apply to
22 Tribal-State compacts. Idaho v. Shoshone-Bannock Tribes, 465
23 F.3d 1095, 1098 (9th Cir. 2006).¹² "Contract interpretation

24
25 ¹² While general principles of federal contract law should
26 be used to construe a contract governed by federal law, in
27 Shoshone-Bannock, the Ninth Circuit applied Idaho contract law
28 because the parties relied on Idaho contract law and neither the
parties nor the court could discern a difference between Idaho
and federal contract law. 465 F.3d at 1098. In this case, the
parties fail to identify, nor can the court discern, any
provision of the Compact that explicitly provides what law is to
(continued...)

1 begins with the language of the written agreement." Coast Fed.
2 Bank, FSB v. United States, 323 F.3d 1035, 1038 (Fed. Cir. 2003)
3 (citing Foley Co. v. United States, 11 F.3d 1032, 1034 (Fed. Cir.
4 1993)). A contract must be construed "by reading it as a whole
5 and interpreting each part with reference to the entire
6 contract." Tanadgusix Corp. v. Huber, 404 F.3d 1201, 1205 (9th
7 Cir. 2005); Kennewick Irrigation Dist. v. Unites States, 880 F.2d
8 1018, 1032 (9th Cir. 1989). "Contract terms are to be given
9 their ordinary meaning, and when the terms of the contract are
10 clear, the intent of the parties must be ascertained from the
11 contract itself." Shoshone-Bannock, 465 F.3d at 1099 (citing Hal
12 Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542,
13 1549 (9th Cir. 1990); City of Idaho Falls v. Home Indem. Co., 126
14 Idaho 604 (1995). "The terms of the contract control, regardless
15 of the parties' subjective intentions shown by extrinsic
16 evidence." Tanadgusix, 404 F.3d at 1205; Winet v. Price, 4 Cal.
17 App. 4th 1159, 1166 (1992) ("It is the outward expression of the
18 agreement, rather than a party's unexpressed intention, which the
19 court will enforce.").

20 Where the terms of the contract are not ambiguous, there is
21 no genuine issue of material fact. Tanadgusix, 404 F.3d at 1205
22 "A contract is ambiguous if reasonable people could find its
23

24 ¹² (...continued)
25 be applied. However, the Compact does provide that it is entered
26 into pursuant to the IGRA and that it is intended to meet the
27 requirements of the IGRA. (See Compact § 14.) As such, the
28 contract is governed by federal law. See Shoshone-Bannock, 465
F.3d at 1098. However, the parties rely primarily upon
California contract law and Ninth Circuit opinions applying
California law. Because the parties fail to identify and the
court does not discern a difference between California and
federal contract law, it accepts that practice. Id.

1 terms susceptible to more than one interpretation." Id.
2 Extrinsic evidence may be admitted to construe a written contract
3 when the language is ambiguous. Winet v. Price, 4 Cal. App. 4th
4 at 1165. The determination of whether to admit extrinsic
5 evidence is a two step process. Id. First, the court considers,
6 without admitting, credible evidence concerning the parties'
7 intentions to determine whether the language is reasonably
8 susceptible to a party's interpretation. Id. Second, if the
9 language is reasonably susceptible to the party's interpretation,
10 the extrinsic evidence is admitted to aid in interpreting the
11 contract. Id. (citing Blumenfeld v. R.H. Macy & Co., 92 Cal.
12 App. 3d (1979)). "[A]mbiguities in a written instrument are
13 resolved against the drafter."¹³ Slottow v. Am. Cas. Co., 10
14 F.3d 1355, 1361 (9th Cir. 1993). If the language at issue is not
15 reasonably susceptible to the interpretation urged by the party,
16 extrinsic evidence should not be considered. Id. ("Further,
17 parol evidence is admissible only to prove a meaning to which the

18
19 ¹³ Colusa asserts that the canon of construction
20 applicable to the interpretation of statutes affecting Indian
21 tribes should be applied to the interpretation of the Compact.
22 In Montana v. Blackfeet Tribe of Indians, the Supreme Court
23 acknowledged that the canons of construction applicable in Indian
24 law require that "statutes are to be construed liberally in favor
25 of the Indians, with ambiguous provisions interpreted to their
26 benefit." 471 U.S. 759, 766 (1985) (citations omitted).
27 However, while the Compact was entered into by the parties
28 pursuant to the IGRA, there is no statutory interpretation issue
raised by Colusa's contract claims. Colusa fails to cite any
authority to support its assertion that the Blackfeet canon of
statutory construction applies to contracts. Cf. Artichoke
Joe's, 353 F.3d at 729 ("[T]he presumption applies only to
federal statutes that are passed for the benefit of dependant
Indian tribes.") (emphasis added) (internal quotation and
citation omitted). Moreover, in a recent Ninth Circuit decision
addressing the interpretation of provisions in a Compact enacted
pursuant to the IGRA, the Blackfeet canon was not applied. See
Shoshone-Bannock, 465 F.3d 1095. Accordingly, the court declines
to apply the Blackfeet canon to Colusa's contract claims.

1 language is 'reasonably susceptible,' not to flatly contradict
2 the express terms of the agreement.") (internal citations and
3 quotations omitted); see also Cabazon, 124 F.3d at 1058 (holding
4 that a strained interpretation of a clear compact provision does
5 not render it ambiguous for purposes of introducing extrinsic
6 evidence).

7 **A. The Commission's Authority Regarding the Draw Process**¹⁴

8 In its Fourth Claim for Relief in *Colusa I*, Colusa alleges
9 that "defendants have no authority under the Compact unilaterally
10 to assume control of the Gaming Device license draw process and
11 dictate . . . how and by whom the process will be implemented."
12 (Compl. ¶ 56.) Colusa also alleges that defendants' "usurpation
13 of control over that process" is a substantial violation of the
14 Compact. Defendants move for judgment on the pleadings on this
15 claim, and Colusa moves for summary judgment.

16 The parties agree that nothing in the Compact explicitly
17 provides any party or entity with the authority to conduct the
18 draw process. Colusa contends that because there is no express
19 provision conferring authority upon the State or the Commission
20 to exercise exclusive control over the calculation or
21 distribution of licenses, the Commission cannot vest itself with
22 such authority. Defendants argue that the provision of the
23 Compact that expressly names the Commission as the Trustee of the
24 RSTF implicitly grants the Commission the authority to administer
25 the statewide license pool.

26
27
28 ¹⁴ The court addresses this claim first as the parties
have acknowledged this to be a threshold issue at prior
appearances before the court.

1 A trustee is required to "administer the trust with
2 reasonable care, skill, and caution under the circumstances."
3 Cal. Prob. Code § 16040 (West 2009). A trustee also "has a duty
4 to take reasonable steps under the circumstances to take and keep
5 control of and to preserve the trust property." Cal. Prob. Code
6 § 16006 (West 2009). Moreover, a trustee is under a continuing
7 duty to keep accurate accounts of dealings with the trust
8 property, and to render an accounting to a beneficiary on demand.
9 See Cal. Prob. Code §§ 16060, 16062 (2009); In re De Laveaga's
10 Estate, 50 Cal. 2d 480, 487 (1958).

11 Pursuant to the Compact, the RSTF is funded by money
12 received for one-time pre-payment fees paid as a condition to
13 acquiring licenses and by fees relating to the number of Gaming
14 Devices operated by a tribe. (Compact §§ 4.3.2.2(e), 5.1).
15 Specifically, tribes are required to make a contribution of (1)
16 7% of the Average Gaming Device Net Win on terminals in excess of
17 200, up to 500 terminals; (2) 10% of the Average Gaming Device
18 Net Win on terminals in excess of 500, up to 1000 terminals; and
19 (3) 13% of the Average Gaming Device Net Win on terminals in
20 excess of 1000. (Compact § 5.1). The amount of money to be
21 contributed into the RSTF is based upon how many licenses are
22 drawn and upon how many Gaming Devices a tribe operates.

23 The court holds that the Commission's appointment as Trustee
24 of the RSTF carries with it the authority to administer the draw
25 process. The Commission must have accurate information with
26 respect to the number of licenses issued and to whom in order to
27 properly account for the money that should be deposited in the
28 RSTF. The need for accurate information implicitly requires that

1 the Commission assume responsibility over the distribution of the
2 licenses and the accompanying and subsequent collection of
3 fees.¹⁵

4 Moreover, the need for the Commission to assume
5 responsibility of the draw process in order to fulfill its duties
6 as a trustee is illustrated by the circumstances created by the
7 Compact Tribes' use of the Sides process in 2000-2001. The
8 Commission did not control the draw process and thus, was unable
9 to properly account for how many licenses were issued, how much
10 money should be in the RSTF, and how many licenses were given to
11 each tribe through the draw process for purposes of collecting
12 fees. Under these circumstances, the Commission could not
13 fulfill its duties to control, preserve, account, and report the
14 trust property.

15 Colusa argues that the collaborative process provided for in
16 § 8.4 of the Compact, which requires that State regulations to be
17 applied to a Tribe be developed through a consultative process,
18 should have been utilized prior to the Commission's exercise of
19 control over the draw process. However, § 8.4 applies only to
20 those matters "encompassed by Sections 6.0, 7.0, or 8.0," which
21 relate to the on-site operation of tribal gaming facilities.
22 (Compact § 8.4; see Compact §§ 6-8). The administration of the
23 draw process and the RSTF are set forth in Sections 4.0 and 5.0
24 of the Compact, sections notably absent from the provisions of §
25 8.4. Accordingly, Colusa's argument is without merit.

26
27 ¹⁵ The court notes that the authority to administer the
28 draw process does not give the Commission concomitant authority
to interpret the Compact. While interpretation issues may and
have arisen throughout the draw process, the Commission's role as
Trustee does not grant deferential review to its interpretation.

1 Therefore, with respect to Colusa's claim that the
2 Commission does not have authority to administer the draw
3 process, defendants' motion for judgment on the pleadings is
4 GRANTED, and Colusa's motion for summary judgment is DENIED.

5 **B. Number of Gaming Devices Authorized by the Compact¹⁶**

6 In its Second Claim for Relief in *Colusa I*, Colusa alleges
7 that the State of California and the Commission unlawfully
8 determined the number of Gaming Device licenses authorized by §
9 4.3.2.2(a)(1) of the Compact. (Compl. ¶¶ 42-48.) Specifically,
10 Colusa contends that the Compact authorizes more licenses than
11 defendants have determined. (Compl. ¶ 46.) Picayune's sole
12 Claim for Relief also alleges that the correct number of licenses
13 exceeds the number determined by defendants. (Intervenor Compl.
14 ¶¶ 58-59.) Defendants, Colusa, and Picayune have filed motions
15 for summary judgment on this claim.

16 The Compact provides, in relevant part:

17 The maximum number of machines that all Compact Tribes
18 in the aggregate may license pursuant to this Section
19 shall be a sum equal to 350 multiplied by the Number of
20 Non-Compact tribes as of September 1, 1999, plus the
difference between 350 and the lesser number authorized
under Section 4.3.1.

21 (Compact § 4.3.2.2(a)(1)). Section 4.3.1 provides that a tribe
22 "may operate no more Gaming Devices than the larger of . . . (a)
23 A number of terminals equal to the number of Gaming Devices
24 operated by the Tribe on September 1, 1999; or (b) Three hundred
25 fifty (350) Gaming Devices." For purposes of these sections, the
26 Compact defines "Non-Compact Tribes" as those "[f]ederally-

27
28 ¹⁶ The court also takes up this claim out of order as the parties conceded at oral argument that this issue is at the heart of the litigation.

1 recognized tribes that are operating fewer than 350 Gaming
2 Devices. (Compact § 4.3.2(a)(i)). On September 1, 1999, there
3 were 84 federally-recognized tribes in California operating fewer
4 than 350 Gaming Devices. (DUF ¶ 26). As such, the first
5 component of the formula, "350 multiplied by the Number of Non-
6 Compact tribes," is the product of 350 multiplied by 84, or
7 29,400. (DUF ¶ 27). The parties are in agreement as to this
8 number. (Id.)

9 The parties' disagreement centers on interpretation of the
10 second aspect of the equation, the difference between 350 and the
11 lesser number authorized under Section 4.3.1. In their original
12 submissions,¹⁷ defendants, Colusa, and Picayune¹⁸ agreed that in
13 order to adjust the equation to apply to all Compact tribes, 350
14 should be multiplied by a particular number and the resulting
15 number should be subtracted by the aggregate number of devices
16 operated by tribes who had less than 350 devices as of September
17 1, 1999. They also agreed that 2,849 was the aggregate number of
18

19 ¹⁷ Colusa raised its alternative theory in a footnote in
20 its original motion and expounded upon it in its reply and during
21 oral argument. The court allowed supplemental briefing on this
issue following the hearing.

22 ¹⁸ Picayune also argued that the only limitation on the
23 number of licenses, and thus devices, under the Compact is the
24 limit of 2000 per tribe. However, such an interpretation would
25 render meaningless §§ 4.3.1 and 4.3.2.2(a). As such, this
26 argument is without merit. Moreover, Picayune's reliance on the
27 State's more recent entry into amended compacts that allow for
28 unlimited gaming devices is irrelevant. Defendants' subsequent
conduct does not aid in the court's determination of the parties'
intent as set forth in the Compact. Furthermore, these amended
compacts also involve different financial terms, including
revenue sharing with the State, and contain far more demanding
environmental protection provisions, including the negotiation of
agreements with counties concerning the mitigation of off-
reservation impacts. (See Defs.' Additional Request for Judicial
Notice [Docket #88-2], filed Feb. 13, 2009).

1 devices operated by tribes who had less than 350 devices as of
2 September 1, 1999. As such, under these proposed formulations,
3 the number of gaming devices authorized by the Compact is equal
4 to $29,400 + (350x - 2,849)$. Defendants contend that the
5 appropriate multiplier is 16 because this reflects the number of
6 tribes that were operating less than 350, but more than zero,
7 devices as of September 1, 1999. (See DUF ¶¶ 29, 31-32).

8 Defendants contend that zero cannot be authorized, and thus,
9 tribes that were operating zero devices should not be counted.

10 This would render the total size of the pool at 32,151 licenses.

11 Colusa and Picayune contend that the appropriate multiplier is 84
12 because this reflects the number of tribes that were operating
13 less than 350 devices, including those tribes operating zero
14 devices, as of September 1, 1999. This would render the total
15 size of the pool at 55,951 licenses.

16 In their supplemental briefing, Colusa and Picayune submit
17 an alternative method for calculating the statewide license pool
18 (the "alternative formulation"). Under this formulation, in
19 order to determine the "lesser number authorized under Section
20 4.3.1," the first step is to calculate the total number of
21 licenses authorized under § 4.3.1(a) and then to calculate the
22 total number of licenses authorized under § 4.3.1(b); the smaller
23 number is the "lesser number authorized." Colusa and Picayune
24 contend that this number is 13,650, reached by multiplying 350 by
25 39, the number of tribes who signed compacts. (See Stip. R. at
26 67A-B). The difference between 13,650 and 350 is 13,300.
27 Therefore, under the alternative formulation, the total size of
28 the pool is $(29,400 + 13,300)$ 42,700 licenses.

1 **a. Factual Background Specific to the Claim**

2 After the April 1999 meeting between Davis and the federally
3 recognized tribes, three main groups of tribes coalesced for the
4 purpose of conducting compact negotiations with the State.

5 (Supp. Decl. of George Forman ("Supp. Forman Decl." [Docket #98],
6 filed Apr. 8, 2009, ¶ 5). Colusa and Picayune were part of the
7 largest group, the United Tribes Compact Steering Committee
8 ("UTCSC"), which consisted of more than 60 tribes located
9 throughout California. (Id.) Colusa's counsel, George Forman,
10 was one of the tribal attorneys designated to participate in
11 negotiations as a spokesperson for the UTCSC tribes. (Id. ¶ 6).
12 Judge William A. Norris ("Norris"), then Special Counsel to
13 Governor Davis for Tribal Affairs, acted as the lead negotiator
14 for California. (Decl. of William A. Norris ("Norris Decl.")
15 [Docket #95-3], filed Mar. 19, 2009, ¶ 2). Judge Shelleyanne
16 W.L. Chang ("Chang"), then Senior Deputy Legal Affairs Secretary
17 for the Office of Governor Gray Davis, assisted with
18 negotiations. (PUF ¶ 1).

19 Negotiations began in April 1999. (Id. ¶ 7). On May 26,
20 1999, Norris negotiated with the USTSC regarding a discussion
21 document prepared by the state and submitted to the tribes on May
22 21, 1999. (Id. ¶¶ 8-9). During this negotiation, Norris
23 conveyed the Governor's concern about limiting growth. (Ex. A to
24 Supp. Forman Decl. at 37:17-38:12). However, Norris agreed that
25 he, on behalf of the Governor, had "grave reservations, if not
26 opposition, to a cap in the aggregate." (Id. at 37:1-2).
27 Negotiations continued throughout the summer of 1999. (Norris
28 Decl. ¶¶ 9-10). Norris asserts that during the compact

1 negotiations in August and September 1999, the State's
2 negotiations team made itself available to meet with every tribal
3 representative who wanted to participate in the ongoing
4 negotiations. (Id. ¶ 10).

5 During the negotiating process, Norris asserts that he
6 repeatedly advised the tribes and their attorneys that a
7 statewide cap of 44,798 Gaming Devices, including those already
8 in operation by tribes, could not be exceeded. (Id. ¶ 15).

9 Wayne R. Mitchum, Chairman of the Colusa Indian Community Council
10 at all relevant times, concedes that the State's negotiating team
11 represented that the Governor was committed to imposing
12 reasonable limits on the expansion of gaming in California;
13 however, per-tribe and statewide limits on Gaming Devices was not
14 proposed until early September 1999. (Decl. of Wayne R. Mitcum
15 ("Mitchum Decl") [Docket #59-6], filed Jan. 20, 2009, ¶¶ 1, 10).
16 In order to address objections that the Compact inequitably
17 benefitted tribes who had unlawfully operated substantially more
18 than 350 Gaming Devices prior to entering into a compact, Norris
19 and Chang drafted § 4.3.2.2(a)(1), which sets forth an aggregate
20 pool of available licenses. (Norris Decl. ¶¶ 15-16). Meanwhile,
21 the USTSC held extensive internal discussions about fair and
22 appropriate minimum allocations of gaming devices, how to set
23 per-tribe maximum limits, and how to allocate a limited number of
24 gaming devices. (Mitchum Decl. ¶ 12).

25 On September 9, 1999, Norris and Chang presented the draft
26 of § 4.3.2.2 to a group of tribal attorneys who had played key
27 roles in the negotiating process. (Id. ¶ 17). While one of
28 these attorneys, Jerome Levine, was a tribal representative for

1 the USTSC, (Ex. A to Supp. Forman Decl. at 2), there is no
2 evidence that he was acting on behalf of the USTSC. Later that
3 evening, Norris presented the entire draft compact to the
4 assembled representatives of the California Indian tribes for
5 approval. (Norris Decl. ¶ 18). He asserts that no questions
6 were asked concerning the number of Gaming Devices authorized
7 under the compact. (Id.) Mitchum asserts that he heard tribal
8 leaders and other representatives ask the State's negotiators to
9 explain the meaning, but the State's negotiators refused to
10 explain it. (Mitchum Decl. ¶ 16). The State's negotiating team
11 announced that tribal representatives had until approximately
12 10:00 p.m. that evening to accept the proposal. (Mitchum Decl. ¶
13 13). This deadline was later extended until midnight. (Id.)

14 Once the State's negotiators left the room, Mitchum
15 participated in an extensive discussion with the other tribal
16 leaders and attorneys about how many Gaming Devices the proposed
17 compact allowed. (Id. ¶ 17). Mitchum understood the compact to
18 authorize approximately 56,000 Gaming Device licenses in addition
19 to those already being operated by tribes. (Id.) Mitchum signed
20 the required letter of intent on Colusa's behalf before
21 expiration of the deadline. (Id. ¶ 13).

22 On or about September 10, 1999, at the request of the
23 Governor's Press Office, Chang prepared an information sheet
24 entitled, "Total Possible Number of Slot Machines Statewide Under
25 the Model Tribal-State Gaming Compact Negotiated by Governor
26 Davis and California Indian Tribes." (PUF ¶ 5). The Information
27 Sheet was made available to the news media and described the
28 purported intent of § 4.3.2.2(a)(1) of the Compact to authorize a

1 total of 44,448 slot machines statewide, including those already
2 in operation. (See PUF ¶ 6). As such, the Compact allowed for
3 23,450 additional licenses. (PUF ¶ 6) Chang asserts that the
4 Governor's Office received no complaints or comments concerning
5 the accuracy of the press release. (PUF ¶ 8).

6 By letter dated November 9, 1999, Elizabeth G. Hill
7 ("Hill"), writing for the Legislative Analyst, determined that §
8 4.3.2.2(a)(1) authorized 60,000 machines in addition to those
9 already in operation, for a total in excess of 113,000 machines.
10 (Stip. R. at 60-62). Hill, however, cautioned that "different
11 interpretations of the language in the compact could result in
12 significantly different totals." (Stip. R. at 61).

13 Subsequently, by letter dated December 6, 1999, Hill determined
14 that the total amount of machines authorized statewide was
15 61,700, including those authorized under the Compact and those in
16 operation, based upon the proposed assumption that §
17 4.3.2.2(a)(1) applies only to 15 tribes.¹⁹ (Stip. R. at 64).

18 By a letter to Sides dated May 10, 2000, Norris and Peter
19 Siggins ("Siggins"), the Chief Deputy Attorney General, stated
20 that the total number of devices authorized statewide was 45,206,
21 and that 15,400 licenses were available under the Compact for the
22 draw. (Stip. R. at 65-67). However, between May 15, 2000 and
23 February 28, 2001, Sides issued 29,398 Gaming Device Licenses to
24 38 Compact tribes. (Stip. R. at 80).

25 By letter to Governor Davis, the Chairman of the Commission,
26 and the Attorney General, dated July 31, 2001, Picayune and other

27
28 ¹⁹ The parties agree that this number should be 16, not
15.

1 Compact tribes addressed the "need for confirmation that the
2 maximum number of machines that all Compact Tribes in the
3 aggregate may operate pursuant to the licenses issued per the
4 Tribal-State Compact § 4.3.2.2, is in excess of 113,000." In the
5 alternative, the letter stated that the parties needed to
6 otherwise determine the number of licenses available in the pool.
7 (Ex. O to Decl. of John Peebles ("Peebles Decl.") [Docket #70],
8 filed Jan. 28, 2009).

9 In June 2002, after reviewing various formulations including
10 those advanced by the Legislative Analyst, the Commission
11 determined that the license pool authorized by the Compact
12 authorizes 32,151 Gaming Devices. (Stip. R. at 87). The
13 Commission's report relies upon the same formulation relied upon
14 by defendants in this litigation. (Stip. R. at 86-87). However,
15 the Commission noted that a different formulation, advanced by
16 the Legislative Analyst, yielded a total pool of 55,951 Gaming
17 Devices and that yet another formulation, advanced by the Tribal
18 Alliance of Sovereign Indian Nations, yielded a total pool of
19 64,283 Gaming Devices. (Stip. R. at 87). In 2003, Colusa sought
20 to negotiate with the state regarding its interpretation of §
21 4.3.2.2. (Stip. R. at 92-94).

22 **b. Analysis**

23 "Contract terms are to be given their ordinary meaning, and
24 when the terms of the contract are clear, the intent of the
25 parties must be ascertained from the contract itself." Shoshone-
26 Bannock, 465 F.3d at 1099. "Although the intent of the parties
27 determines the meaning of the contract, the relevant intent is
28 objective - that is, the objective intent as evidenced by the

1 words of the instrument, not a party's subjective intent." Badie
2 v. Bank of Am., 67 Cal. App. 4th 779, 802 n.9 (1998) (internal
3 quotations and citation omitted). Extrinsic evidence may be
4 admitted to construe a written contract when the language is
5 ambiguous. Winet, 4 Cal. App. 4th at 1165.

6 Where the language is reasonably susceptible to the
7 interpretations offered by both sides, the court must apply the
8 appropriate canons of statutory construction. Badie, 67 Cal.
9 App. 4th at 800. The court must consider the contract as a whole
10 and may also "consider the circumstances under which an agreement
11 was made." Id. The court should "provide an interpretation that
12 will make an agreement lawful, operative, definite, reasonable,
13 and capable of being carried into effect, and must avoid an
14 interpretation that would make it harsh, unjust or inequitable."
15 Id. Words should be given their ordinary meaning. Id. If
16 ambiguity still remains, "the language of the contract should be
17 interpreted strongly against the party who caused the uncertainty
18 to exist." Buckley v. Terhune, 441 F.3d 688, 695-96 (9th Cir.
19 2006); see Badie, 67 Cal. App. 4th at 800.

20 The parties do not dispute that the meaning of § 4.3.2.2(a)
21 is unclear and susceptible to varying interpretations.
22 Defendants contend that their formulation is the most reasonable.
23 Colusa and Picayune also assert that their formulation is the
24 most reasonable and that such formulation is further supported
25 because persistent ambiguities must be construed against the
26 drafter, which in this case, was the State.

27 The court finds that Colusa and Picayune's alternative
28 formulation, which yields a total statewide pool of 42,700, is

1 supported by the contract language and the principles of contract
2 interpretation. First, the circumstances under which the Compact
3 was entered into does not aid the court in discerning the
4 parties' intent.²⁰ Indeed, the submissions of the parties reveal
5 that there was no clear consensus between the parties regarding
6 the maximum number of Gaming Devices allowed under the Compact at
7 the time the agreements were executed. Defendants present
8 evidence that the State's intention was to limit the aggregate
9 number of devices at approximately 45,000, including those
10 already in operation at the time the compacts were signed. As
11 such, only approximately 23,000 devices would be authorized under
12 the Compact.²¹ In contrast, Colusa presents evidence that its
13 Chairman understood the Compact to provide for approximately
14 55,000 additional licenses at the time he signed the Compact.

15 Furthermore, the evidence demonstrates that there was no
16 consistent course of conduct between the parties and that there
17 continued to be debate about the number of devices authorized
18 under the Compact. Hill, on behalf of the Legislative Analyst,
19 noted that the language could be interpreted to authorize up to
20 an additional 60,000 Gaming Devices or approximately 60,000

21
22 ²⁰ None of the parties proffer any evidence or argument
23 that other provisions in the Compact aid in the court's
interpretation of this provision.

24 ²¹ Significantly, no party proffers an interpretation of
25 the Compact that substantiates this number. Rather, the
26 Commission rejected Norris' interpretation of the Compact, which
27 assumed "that uncompacted tribes have permanently waived their
28 right under Compact § 4.3.1 to deploy up to 350 gaming devices
following entry into a Compact with the State." The Commission
noted that such an interpretation contradicts the express
language of § 4.3.1. (Stip. R. at 86). The court is not
persuaded that Commission's formulation is most reflective of the
parties' intent based upon its piecemeal reliance on Norris'
interpretations.

1 Gaming Devices total. Norris and Siggins informed Sides that
2 only approximately 15,000 licenses were available to be drawn as
3 of May 10, 2000. However, almost 30,000 licenses were ultimately
4 distributed to the tribes through the Sides process. Picayune,
5 among other tribes, sought clarification of the license pool
6 almost two years after entering into the Compact. Furthermore,
7 the Commission only clarified the State's current position with
8 respect to the license pool in June 2002, after considering two
9 other potential formulations that had been advocated by different
10 entities or individuals. Accordingly, the court finds that the
11 extrinsic evidence does not reveal a plain intent or meaning that
12 was either understood by the parties at the time the Compact was
13 executed or followed by the parties in their subsequent
14 relationships.²²

15 Second, the alternative formulation provides a lawful,
16 operative, definite, and reasonable interpretation of the
17 Compact. While it is clear that defendants believe that their
18 formulation is better, they have proffered no evidence that an
19 alternative interpretation is harsh, unjust, or inequitable.

20 Third, among the three calculations proffered by the
21 parties, the alternative formulation most accurately follows the
22 language of § 4.3.2.2(a)(1), giving the words their ordinary
23 meaning. As set forth above, the dispute between the parties
24

25 ²² The court also rejects defendants' assertion that
26 Colusa and Picayune accepted defendants' interpretation by
27 silence. As an initial matter, there is evidence that the
28 parties had conflicting understandings with respect to the
meaning of § 4.3.2.2.(a)(1) when the Compact was signed.
Furthermore, Colusa and Picayune's conduct, as set forth above,
in the face of the State's numerous and conflicting
interpretations cannot reasonably be characterized as silence
and/or acceptance.

1 arises out of the interpretation of the second part of the
2 equation, "the difference between 350 and the lesser number
3 authorized under Section 4.3.1." The alternative formulation
4 starts out with the basic determination of "the lesser number
5 authorized." Under § 4.3.1, tribes may not operate more than the
6 larger of (a) the number of devices they were operating on
7 September 1, 1999 or (b) 350 devices. It is undisputed that as
8 of September 1, 1999, 23 tribes were operating more than 350
9 devices, totaling 16,156 devices in the aggregate. As such, the
10 total number authorized under § 4.3.1(a) is 16,156. 39 other
11 tribes, which were operating less than 350 licenses, signed 1999
12 compacts. (See Stip. R. 67A-B).²³ By the plain language of the
13 Compact, all of these tribes were "authorized" to operate at
14 least 350 Gaming Devices. (Compact § 4.3.1). Therefore, the
15 total number of devices authorized under § 4.3.1(b) is 39
16 multiplied by 350, which results in 13,650. (See also Stip. R.
17 at 65). The lesser number authorized under § 4.3.1 is 13,650
18 because it is a smaller number than 16,156. Next, the Compact
19 calls for the difference between 350 and the lesser number
20 authorized.²⁴ The difference between 350 and 13,650 is 13,300.
21 That number is to be added to the formula's first part, which the
22 parties agree is 29,400. Therefore, the total number of Gaming
23

24
25 ²³ Defendants contention that Colusa has not submitted
26 admissible evidence that 39 tribes, which operated fewer than 350
27 devices, signed compacts is without merit. Pages 67A-B of the
28 Stipulated Record reflect that 23 Non-Gaming tribes signed
signed compacts and that 16 tribes that operated less than 350 devices
signed compacts. (See also Stip. R. at 65-66).

²⁴ The court notes that the language of the Compact does
not provide that a number must be subtracted from 350.

1 Devices authorized under § 4.3.2.2(a)(1) of the Compact is the
2 sum of 29,400 plus 13,300, which equals 42,700.

3 Both defendants' and plaintiffs' other formulations force a
4 more strained reading of the Compact language. Both of these
5 formulations require that 350 be multiplied to an undetermined
6 number, either 16 or 84. This multiplier is not provided for by
7 the language in § 4.3.2.2(a)(1). Under defendants'
8 interpretation, only the 16 tribes that were operating devices as
9 of September 1, 1999 were "authorized" to conduct Gaming Devices.
10 However, under the plain language of the Compact, any tribe that
11 signed a Compact was authorized to operate Gaming Devices. On
12 the other hand, Colusa and Picayune's original interpretation
13 sought to multiply 350 by 84, the number of non-Compact tribes
14 who operated less than 350 devices, even if many of those tribes
15 did not sign a compact. Because tribes who did not sign a
16 compact could not be "authorized" under that compact, this
17 interpretation also reads out an essential term.²⁵ In contrast,
18 the alternative formulation gives the term "authorized" its plain
19 meaning.

20 Moreover, the alternative formulation is supported by the
21 purpose of the latter half of the equation as clarified by
22 defendants' counsel at oral argument. (Hr'g Tr. at 70-71).
23 Defendants' counsel stated that the second part of the equation
24 relates to the "unused entitlement," referring to the devices
25

26 ²⁵ Moreover, the alternative formulation provides an
27 explanation for the different use of language in the first and
28 second parts of the equation. The first component requires that
all 84 Non-Compact tribes be considered, with or without a
compact, while the second component requires consideration of
only those tribes that have signed a compact.

1 that were authorized that were currently not being used by those
2 tribes operating less than 350 devices as of September 1, 1999.
3 Defendants' counsel explained that the second part of the
4 equation was meant to add those unused authorized devices into
5 the available pool.²⁶ (Hr'g Tr. at 70:15-71:2). However,
6 defendants' counsel did not explain either in the submissions or
7 at oral argument why only those who were operating some devices
8 should be counted for purposes of calculating the "unused
9 entitlement." Rather, in order to fully account for these unused
10 authorized devices, the equation should take into account those
11 tribes who signed a compact but were not operating any licenses.
12 The alternative formulation does.

13 Finally, the alternative formulation is consistent with the
14 principle that ambiguities in the Compact are to be construed
15 against the drafter. While the parties dispute the level of
16 negotiation and input that Colusa and Picayune had in the
17 formation of the Compact, it is undisputed that the State's
18 negotiation team actually drafted the language in the Compact.

19 Therefore, with respect to Colusa and Picayune's claim
20 regarding the number of Gaming Devices authorized under the
21 Compact, defendants' motion for summary judgment is DENIED, and
22 Colusa's and Picayune's motions for summary judgment are GRANTED.
23 The court concludes that the statewide license pool authorizes
24 42,700 Gaming Devices.

26 ²⁶ The court notes that this rationale appears to be
27 contrary to the Commission's finding in its June 2002 Report.
28 (Stip. R. at 86). However, even without this basis, the court
still concludes that the alternative formulation reflects the
intention of the parties as set forth by the language in the
Compact.

1 **C. Colusa's Priority in the Draw Process**

2 In its First Claim for Relief in *Colusa I*, Colusa alleges
3 that its placement in the fourth and fifth priority tiers was a
4 violation of § 4.3.2.2(a)(3) of the Compact. (Compl. ¶¶ 37-41.)
5 Defendants move for judgment on the pleadings on this claim, and
6 Colusa moves for summary judgment.

7 The Compact provides, in relevant part:

8 (i) First, Compact Tribes with no Existing Devices
9 (i.e., the number of Gaming Devices operated by a
10 Compact Tribe as of September 1, 1999) may draw up to
11 150 licenses for a total of 500 Gaming Devices;

12 (ii) Next, Compact Tribes authorized under Section
13 4.3.1 to operate up to and including 500 Gaming Devices
14 as of September 1, 1999 (including tribes, if any, that
15 have acquired licenses through subparagraph (i)), may
16 draw up to an additional 500 licences, to a total of
17 1000 Gaming Devices;

18 (iii) Next, Compact Tribes operating between 501 and
19 1000 Gaming Devices as of September 1, 1999 (including
20 tribes, if any, that have acquired licenses through
21 subparagraph (ii)), shall be entitled to draw up to an
22 additional 750 Gaming Devices;

23 (iv) Next, Compact Tribes authorized to operate up to
24 and including 1500 gaming devices (including tribes, if
25 any, that have acquired licenses through subparagraph
26 (iii)), shall be entitled to draw up to an additional
27 500 licenses, for a total authorization to operate up
28 to 2000 gaming devices.

 (v) Next, Compact Tribes authorized to operate more
than 1500 gaming devices (including tribes, if any,
that have acquired licenses through subparagraph (iv)),
shall be entitled to draw additional licenses up to a
total authorization to operate up to 2000 gaming
devices.

(Compact § 4.3.2.2(a)(3)). Colusa was originally placed in the
third priority tier for the first round of draws it participated
in because it was operating 523 Gaming Devices as of September 1,

1 1999.²⁷ Colusa drew 250 licenses from the third tier.
2 Defendants then placed Colusa in the fourth tier, where it
3 eventually received only 73 of the 341 licenses it requested.
4 Subsequently, Colusa has been placed in the fifth tier, where it
5 has not received any of the licenses it has requested.

6 Colusa contends that under the tier system, it should be
7 allowed to stay in tier three until it has drawn 750 licenses
8 from that tier. As such, it should not have to move into the
9 next tier until it has a total of 1,273 licenses. Defendants
10 contend that the parenthetical language in § 4.3.2.2(a)(3) is an
11 alternative basis for moving a tribe into the next tier. As
12 such, to the extent a tribe draws any licenses from the prior
13 tier, it must draw from the next tier in a subsequent draw.

14 The terms of a contract are to be given their ordinary
15 meaning and the intent of the parties are to be based upon the
16 words of the instrument. Shoshone-Bannock, 465 F.3d at 1099;
17 Badie, 67 Cal. App. 4th at 800. Furthermore, the contract must
18 be read as a whole and interpreted consistently with the other
19 terms in the contract. Tanadgusix, 404 F.3d at 1205.

20 The court concludes that Colusa's interpretation of §
21 4.3.2.2(a)(3) is the only reasonably susceptible interpretation
22 of the Compact that gives full effect to the language of the
23 provision. The description of the first three tiers begins with
24 a restriction based upon the number of devices that a tribe was
25 operating as of September 1, 1999. (Compact § 4.3.2.2(a)(3)(i-
26 iii)). The parenthetical language in the restriction serves to

27
28 ²⁷ Colusa does not take issue with its original placement
in the third tier.

1 clarify that a tribe could also get into that tier through
2 drawing in a prior tier. The latter part of the description for
3 each tier then provides the number of licenses a tribe may draw
4 from that tier. (Id.) Significantly, in tier three, the Compact
5 language provides that a tribe "shall be entitled to draw up to
6 an additional 750 Gaming Devices." (Compact §
7 4.3.2.2(a)(3)(iii)). The explicit language thus grants Colusa
8 the right to draw 750 Gaming Devices from the third tier. This
9 is consistent with the language describing the fourth and fifth
10 tier. The description of these tiers does not include a
11 numerical restriction based upon the number of licenses a tribe
12 held on September 1, 1999. (Compact § 4.3.2.2(iv-v)). Moreover,
13 they do not set forth a range of numbers. Rather, they allow a
14 tribe to draw in that tier so long as it has not exceeded the
15 threshold number. (Id.)

16 A review of how the tier system would work demonstrates how
17 Colusa's interpretation creates a lawful, operative, definite,
18 and reasonable implementation of the contract language. See
19 Badie, 67 Cal. App. 4th at 800. Under the facts provided by
20 Colusa's circumstances, a tribe would be initially placed in the
21 third tier because it had 523 licenses on September 1, 1999. It
22 would then be allowed to draw in the third tier until it has
23 drawn 750 total licenses. This may occur over numerous draws.
24 Once the tribe has drawn 1273 licenses, it would be placed in
25 tier four because it is authorized to operate up to and including
26 1500 devices.²⁸ It may then draw in tier four until it has drawn

27
28 ²⁸ Further, the parenthetical language in tier four would clearly apply because Colusa drew in tier three.

1 500 licenses. At that point, now in possession of 1773 licenses,
2 the tribe would draw in tier five, until it has reached the
3 Compact maximum of 2000 licenses.

4 In another hypothetical, a tribe could enter the draw system
5 with 775 devices as of September 1, 1999. That tribe would be
6 placed in tier three and allowed to draw until it had reached
7 1525 licenses. However, instead of moving to tier four, that
8 tribe would move directly to tier five because it was authorized
9 to operate more than 1500 devices.

10 Colusa's interpretation is also supported by the
11 circumstances under which the Compact was made. It is undisputed
12 that the tier system was implemented to "level the playing field"
13 between those tribes that operated several gaming devices as of
14 September 1, 1999 and those that operated few or none. (See
15 Defs.' P.&A. in Supp. of MJOP [Docket #60-3], filed Jan. 20,
16 2009, at 7; Pl.'s P.&A. in Opp'n to Def.'s MJOP [Docket #78],
17 filed Feb. 6, 2009, at 5). Allowing those tribes with less
18 licenses to have better draw priority until they obtained greater
19 parity to those tribes with more licenses serves this purpose.²⁹

20 Conversely, defendants' interpretation of § 4.3.2.2(a)(3) is
21 not supported by the principles of contract interpretation.
22 Their interpretation fails to accord words their plain and
23 ordinary meaning. For example, defendants contend that the
24 parenthetical language imposes a restriction separate and apart
25 from the number of devices a tribe is operating. However, a
26 parenthesis is defined as "an amplifying or explanatory comment

27
28 ²⁹ Furthermore, to the extent that the language is
ambiguous, such ambiguity should be construed against defendants
as drafter of the Compact.

1 inserted in a passage to which it may be grammatically
2 unrelated." Webster's Third New International Dictionary 1641
3 (1971). As an amplifying or explanatory term, it cannot function
4 as a wholly separate restriction. Further, defendants'
5 interpretation also equates the term "including" to "or." To
6 "include" is "to place, list, or rate as a part or component of a
7 whole or of a larger group, class, or aggregate." Id. at 1143.
8 However, defendants' seek to impose upon the term a meaning that
9 would allow it to introduce an alternative restriction, not one
10 potentially encompassed by the prior. Finally, defendants'
11 interpretation also wholly reads out the phrase "shall be
12 entitled." The term "shall" indicates a command and the term
13 "entitle" means to give a right. Id. at 758, 2085. The phrase,
14 in the context of the Compact, means that a tribe has a concrete
15 and explicit right to draw 750 licenses in the third tier, 500
16 licenses in the fourth tier, and 500 licenses in the fifth
17 tier.³⁰ (Compact § 4.3.2.2(a)(3)(iii-v)).

18 Further, defendants' interpretation also has the potential
19 for harsh and inequitable results. See Badie, 67 Cal. App. 4th
20 at 800. Theoretically, a tribe could draw one license in the
21 third tier, potentially because only one license was available
22 for draw, and then be forced to move into the fourth tier. As
23 such, through no fault of its own, a tribe would give up draw
24 priority for a de minimis benefit.

25 Moreover, defendants' interpretation does not serve the
26 purposes set forth by other provisions in the Compact. While
27

28 ³⁰ By its clear terms a tribe cannot exceed 2000 licenses
under any circumstance.

1 defendants argue that their interpretation encourages tribes to
2 reach parity as soon as possible, the hoarding of licenses that
3 their interpretation encourages is explicitly denounced by other
4 provisions in the Compact. Under § 4.3.2.2(e), the license for
5 any Gaming Device is cancelled if not placed in commercial
6 operation within twelve months of its issuance. Accordingly,
7 tribes cannot stockpile licenses and wait until it is financially
8 viable to put them into use. Rather, this section encourages
9 tribes to only obtain the amount of licenses that it can promptly
10 put to use. However, defendants' interpretation, which would
11 encourage tribes to obtain as many licenses as possible in a tier
12 so as not to lose draw priority and potentially the ability to
13 obtain any more licenses, directly contravenes the purpose
14 reflected in § 4.3.2.2(e).

15 Therefore, with respect to Colusa's claim regarding its
16 priority status in the draw process, defendants' motion for
17 judgment on the pleadings is DENIED, and Colusa's motion for
18 summary judgment is GRANTED. Colusa should have remained in the
19 third tier until it had drawn 750 licenses from that tier.

20 **D. Retention of Annual Gaming Device License Fees**

21 In its Third Claim for Relief in *Colusa I*, Colusa alleges
22 that it is entitled to a refund of its one-time prepayment of
23 \$1,250 for each Gaming Device license the Tribe draws during a
24 round of draws. (Compl. ¶¶ 50-52.) Defendants and Colusa both
25 move for summary judgment on this claim.

26 The Compact provides, in relevant part, that "[a]s a
27 condition of acquiring licenses to operate Gaming Devices, a non-
28 refundable one-time pre-payment fee shall be required." (Compact

1 § 4.3.2.2(e)). These fees are deposited in the RSTF. (Id.) The
2 Compact further provides that “[t]he Commission shall have no
3 discretion with respect to the use or disbursement of the trust
4 funds.” (Id. § 4.3.2.1(b)). Under the Compact, the Commission
5 is allowed only “to disburse [the funds] on a quarterly basis to
6 Non-Compact Tribes.” (Id.)

7 Colusa argues that because the prepayment fees are used as a
8 credit towards future annual license fees, and because Colusa
9 does not owe any such fees, defendants should refund the money
10 Colusa has paid into the RSTF. Defendants argue that the Compact
11 expressly provides that the prepayment fees paid into the RSTF
12 are non-refundable and that the Commission has no authority to
13 refund the unused fees to Colusa.

14 Contract terms must be given their ordinary meaning.
15 Shoshone-Bannock, 465 F.3d at 1099. The court’s objective in
16 analyzing the language in a contract “is to determine and to
17 effectuate the intention of the parties.” Winet, 4 Cal. App. 4th
18 at 1166. Parol evidence may be used to demonstrate that language
19 is susceptible to a particular meaning, but “not to flatly
20 contradict the express terms of the agreement.” Id. at 1167; see
21 Coast Fed. Bank, 323 F.3d at 1040 (holding that the plaintiff
22 could not rely on extrinsic evidence to contradict the plain
23 language of the agreement).

24 Colusa’s suggested interpretation of the Compact flatly
25 contradicts the express terms of the agreement. The Compact
26 expressly provides that the fee is *non-refundable*. Colusa has
27 not offered any extrinsic evidence that would render the term
28 non-refundable reasonably susceptible to an interpretation that

1 allows for a refund. Rather, the essence of Colusa's argument is
2 that it is unfair for the money to be kept in the RSTF fund if
3 Colusa does not owe any annual license fees for the money to be
4 credited towards. However, there is no provision in the Compact
5 that allows the Commission to disburse money back to a tribe
6 merely because it is not presently being used. Indeed, the
7 Commission has no discretion with respect to the disbursement of
8 the trust funds.

9 Therefore, with respect to Colusa's claim for a refund of
10 the one-time prepayment of \$1,250 for each Gaming Device license
11 drawn, defendants' motion for summary judgment is GRANTED, and
12 Colusa's motion for summary judgment is DENIED.

13 **E. Refusal to Schedule and Conduct a Round of Draws**

14 In its First Claim for Relief in *Colusa II*, Colusa alleges
15 that defendants materially breached the Compact by their refusal
16 to schedule and conduct a round of draws promptly after receiving
17 notice of Colusa's desire to acquire additional licenses. (Am.
18 Compl. ¶ 31.) Defendants and Colusa both move for summary
19 judgment on this claim.

20 Colusa argues that summary judgment should be granted
21 because it has requested rounds of draws that defendants refused
22 to conduct. In turn, defendants argue that summary judgment
23 should be granted because, under its interpretation of §
24 4.3.2.2(a)(1), there were no licenses to be issued and thus,
25 conducting a draw would be an "empty and futile" exercise.

26 By letter dated October 11, 2006, Colusa notified the
27 Commission that it wished to acquire Gaming Device licenses
28 through a properly conducted draw. (Stip. R. at 143-44). By

1 letter dated October 23, 2006, the Commission responded to this
2 letter, stating that the Commission "will continue to conduct
3 draws as licenses become available and will provide adequate
4 notice to all Tribes eligible to participate." (Stip. R. at 145-
5 46). Subsequently, by letter dated June 8, 2007, the Commission
6 notified Colusa that it would conduct a draw on August 10, 2007;
7 Colusa did not receive any licences. (Stip. R. at 162-64).
8 Thereafter, by letter dated August 14, 2007, Colusa again
9 notified the Commission that it wished to acquire Gaming Device
10 licenses through a properly conducted draw. (Stip. R. at 172-
11 73). By letter dated August 17, 2007, the Commission responded
12 that no licenses were available and therefore, conducting a draw
13 would be "an empty and futile act." (Stip. R. at 178-79).
14 However, the Commission also provided that it would promptly hold
15 another draw once licenses became available.

16 In this case, defendants were operating under the assumption
17 that they could not issue any more Gaming Device licenses based
18 upon their interpretation of the size of the pool under §
19 4.3.2.2(a)(1). As such, administration of the draw would have
20 been futile because no licenses were available. See Hackfeld v.
21 Castle, 186 Cal. 53, 57 (1921) ("[W]herever a contract requires
22 for its performance the existence of a specific thing . . . such
23 impairment of it as makes it unavailable, excuses the promisor
24 unless he has clearly assumed the risk of its continued
25 existence."). As set forth above, defendants were mistaken in
26 their interpretation. Through this litigation and this order,
27 the court has clarified that the statewide license pool
28

1 authorizes 42,700 Gaming Devices to 1999 Compact Tribes, more
2 than what was available under defendants' interpretation.

3 "The role of the courts is 'neither to issue advisory
4 opinions nor to declare rights in hypothetical cases, but to
5 adjudicate live cases or controversies.'" Maldonado v. Morales,
6 556 F.3d 1037, 1044 (9th Cir. 2009) (quoting Thomas v. Anchorage
7 Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000) (en
8 banc)). The court should avoid both premature adjudication and
9 entanglement in abstract disagreements. Abbott Labs. v. Gardner,
10 387 U.S. 136, 148 (1967) *overruled on other grounds by Califano*
11 *v. Sanders*, 430 U.S. 99, 105 (1977).

12 Colusa seeks to have this court interpret the Compact to
13 address an injury that it has yet to suffer. Plaintiff has
14 failed to present any evidence that defendants failed to promptly
15 conduct a draw, either sua sponte or by request, when it had
16 available licenses. Rather, the undisputed evidence demonstrates
17 that the Commission held draws promptly after licenses became
18 available. While defendants were mistaken in their belief that
19 no license were available, the ambiguities that led to this
20 mistake have been resolved through this order. As such, Colusa's
21 purported injury is both hypothetical and speculative.

22 Therefore, with respect to Colusa's claim that defendants
23 refused to schedule and conduct a round of draws, defendants'
24 motion for summary judgment is GRANTED, and Colusa's motion for
25 summary judgment is DENIED.

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1 **F. Counting Multi-Station Games as Equal to the Number of**
2 **Terminals**

3 In its Second Claim for Relief in *Colusa II*, Colusa alleges
4 that "under the Compact, a multi-station game is to be counted as
5 a single Gaming Device," and thus, defendants' policy of counting
6 multi-station games as equal to the number of their terminals is
7 contrary to the terms of the Compact. Defendants move for
8 judgment on the pleadings on this claim, and Colusa moves for
9 summary judgment.

10 Colusa argues that the definition of "Gaming Device" in the
11 Compact is ambiguous. As such, Colusa contends that the court
12 should apply the gaming industry-wide technical standard that
13 counts a multi-station game, in which a game outcome is
14 determined by a single random number generator, as a single
15 Gaming Device. Defendants argue that the Compact's definition of
16 "Gaming Device" is not ambiguous and includes each player
17 position or terminal of a multi-station game.

18 "Contract interpretation begins with the language of the
19 written agreement." Coast Fed. Bank, 323 F.3d at 1038. A
20 contract must be construed "by reading it as a whole and
21 interpreting each part with reference to the entire contract."
22 Tanadgusix, 404 F.3d at 1205. Extrinsic evidence is admissible
23 only to prove a meaning to which the language is reasonably
24 susceptible in the context of the entire integrated agreement.
25 Winet, 4 Cal. App. 4th at 1167.

26 Section 2.6 of the Compact provides, in relevant part

27 "Gaming Device" means a slot machine, including an
28 electronic, electrical, or video device that, for
 consideration, permits: individual play with or against
 that device or the participation in any electronic,

1 electromechanical, electrical, or video system to which
2 that device is connected

3 (Compact § 2.6). In some provisions, the Compact equates
4 terminals to Gaming Devices. For example, § 4.3.1 provides that
5 a Tribe may potentially operate no more than "[a] number of
6 terminals equal to the number of Gaming Devices" In
7 other provisions, the terms "Gaming Device" and "terminal" are
8 used interchangeably. For example, § 5.1(a), which sets forth
9 the schedule for revenue distribution, provides that
10 contributions shall be paid based upon "the number of Gaming
11 Devices operated by the Tribe." The chart following this
12 provision, however, refers to the number of "terminals" in lieu
13 of Gaming Devices. Similarly, § 5.3 provides that the amount of
14 contribution is based upon "the total number of all Gaming
15 Devices operated by a Tribe during a given quarter." The "Net
16 Win" is then "calculated by dividing the total Net Win from all
17 terminals." (Id.)

18 The court holds that under the unambiguous terms of the
19 Compact, each terminal of a multi-terminal game is to be counted
20 as a separate Gaming Device for licensing purposes. The
21 definition of "Gaming Device" in the Compact includes an
22 electronic device that permits individual play with or against
23 that device or the participation in any system to which that
24 device is connected. As such, the definition explicitly
25 contemplates that a Gaming Device is measured by the ability for
26 individual play through a terminal, either at a stand-alone unit
27 or at a multi-station unit. Further, such an interpretation is
28 supported by the contract as a whole. Throughout the Compact,

1 the term Gaming Device is equated to or used interchangeably with
2 the term terminal. Thus, in order to interpret each part of the
3 Compact with reference to the entire contract, the only
4 reasonable interpretation of the Compact language is to count
5 each terminal or player position as a "Gaming Device."

6 Colusa, relying upon definitions set forth by Gaming
7 Laboratories International ("GLI"), an independent gaming test
8 laboratory, contends that the Compact language is ambiguous and
9 thus, should be construed against defendants as the drafters.

10 Specifically, the GLI's definition provides that a Gaming Device
11 unit has only one random number generator, controlled by the
12 master terminal, but may have more than one player terminal.

13 (DUF ¶ 60). Colusa's expert, Richard H. Williamson

14 ("Williamson"), asserts that "California's uniform treatment of
15 all multi-station electronic games is both arbitrary and

16 incorrect, as it fails to consider distinct differences between"

17 the random number generators available and the interdependency of
18 patron play in electronic multi-station games. (Ex. A to Decl.

19 of Richard H. Williamson in Supp. of Pl.'s Mot. for Summ. J.

20 ("Williamson Decl") [Docket #59-9], filed Jan. 20, 2009, at 4).

21 However, Williamson also acknowledges that there is no

22 consistency across jurisdictions regarding how multi-station

23 games are categorized, counted, or reported for revenue purposes.

24 (Id. at 6). Rather, "the counting methodology applied in each

25 case is highly situational and driven more by the exigencies of

26 each jurisdiction than any applicable technical standard." (Id.)

27 Accordingly, Colusa's reliance on technical, industry definitions

28 does not render the plain language of the Compact, which focuses

1 on the number of terminals as opposed to random number
2 generators, ambiguous. Therefore, the extrinsic evidence
3 relating to GLI and Colusa's expert testimony is not relevant to
4 interpretation of the Compact.

5 Colusa also argues that in or around September 2001, then
6 Director of the Attorney General's Division of Gambling Control,
7 Harlan Goodson ("Goodson"), informed the Director of Tribal
8 Gaming Agency of the Morongo Band of Mission Indians ("Morongo")
9 that the State would not object to multistation games being
10 counted as single Gaming Device licenses so long as the game did
11 not have more player positions than would be found in the
12 traditional format of the same game. (Decl. of Jerry Schultze
13 ("Schultz Decl.") [Docket #59-5], filed Jan. 20, 2009, at 1-2.)
14 Assuming *arguendo* that these statements are admissible as
15 admissions attributable to defendants, they do not raise
16 ambiguity with respect to the plain language of the Compact.
17 Goodson's statements were not binding upon defendants. (See
18 Pl.'s Response to Def.'s Objections [Docket #86-2], filed Feb.
19 13, 2009, ¶ 10 ("Defendants' objection, that Goodson's statements
20 are not binding upon the State, even if a correct statement of
21 the law, goes to the weight of the evidence")); see also
22 Indep. Roofing Contractors v. Cal. Apprenticeship Council, 114
23 Cal. App. 4th 1330, 1338 (2003) (holding that the conduct of a
24 subordinate body could not give rise to estoppel); City of Long
25 Beach v. Mansell, 3 Cal. 3d 462, 493 (1970) ("[A]n estoppel will
26 not be applied against the government if to do so would
27 effectively nullify a strong rule of policy, adopted for the
28

1 benefit of the public.”).³¹ Furthermore, sometime between 2002
2 and 2003, the California Attorney General’s Office issued an
3 informal advisory opinion that provided that each player station
4 of a multi-station game should be counted as a separate Gaming
5 Device under the Compact. (Schultz Decl. at 2). Thus, Goodson’s
6 statements did not necessarily represent the position of
7 defendants at all relevant times. Moreover, there is no evidence
8 that Goodson or any other state actor ever made such
9 representations to Colusa. As such, to the extent that Colusa
10 contends that the subsequent course of conduct between the
11 parties lends credibility to its definition of a Gaming Device,
12 Colusa has failed to present evidence of its, as opposed to
13 Morongo’s, course of conduct with the state. Therefore, this
14 evidence also fails to render the language of the Compact
15 ambiguous.³²

16 Accordingly, because the plain and unambiguous language of
17 the Compact defines a Gaming Device as a single terminal or
18 player position, defendants’ motion for judgment on the pleadings
19 is GRANTED, and Colusa’s motion for summary judgment is DENIED.

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22 ³¹ The parties have presented evidence that, at the time
23 the Compact was negotiated, the State sought to limit the growth
24 of Class III gaming. (See Ex. A to Supp. Forman Decl. at 37:17-
25 38:12; Norris Decl. ¶ 15).

26 ³² Colusa also argues that any valid policy reasons for a
27 narrow reading of the definition of “Gaming Device” in the
28 Compact cease to exist because the State has entered into amended
compacts with other tribes that allow for unlimited devices.
However, in interpreting the language of a contract, the court
cannot rely upon changed conditions and policies that did not
exist when the parties entered into the contract. Moreover,
these amended compacts were accompanied with increased
restrictions and revenue sharing. (Defs.’ Request for Judicial
Notice [Docket #80-5], filed Feb. 6, 2009).

CONCLUSION


For the reasons stated above, the court makes the following orders:

- (1) Defendants' motion to dismiss Picayune's complaint in intervention is DENIED.
- (2) With respect to Colusa's First Claim for Relief in *Colusa I*, regarding Colusa's priority in the draw process, defendants' motion for judgment on the pleadings is DENIED, and Colusa's motion for summary judgment is GRANTED.
- (3) With respect to Colusa's Second Claim for Relief in *Colusa I* and Picayune's sole Claim for Relief, regarding the number of gaming devices authorized by the Compact, defendants' motion for summary judgment is DENIED, and Colusa's and Picayune's motions for summary judgment are GRANTED.
- (4) With respect to Colusa's Third Claim for Relief in *Colusa I*, regarding defendants' retention of license fees, defendants' motion for summary judgment is GRANTED, and Colusa's motion for summary judgment is DENIED.
- (5) With respect to Colusa's Fourth Claim for Relief in *Colusa I*, regarding the Commission's authority to administer the draw process, defendants' motion for judgment on the pleadings is GRANTED, and Colusa's motion for summary judgment is DENIED.
- (6) With respect to Colusa's First Claim for Relief in *Colusa II*, regarding defendants' refusal to schedule and conduct a round of draws, defendants' motion for summary judgment is GRANTED, and Colusa's motion for summary judgment is DENIED.

1 (7) With respect to Colusa's Second Claim for Relief in *Colusa*
2 *II*, regarding defendants' counting of multi-station games as
3 equal to the number of their terminals, defendants' motion
4 for judgment on the pleadings is GRANTED, and Colusa's
5 motion for summary judgment is DENIED.

6 IT IS SO ORDERED.

7 DATED: April 21, 2009.

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11 FRANK C. DAMRELL, JR.
12 UNITED STATES DISTRICT JUDGE
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