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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

SAN PASQUAL BAND OF MISSION
INDIANS, a federally recognized Indian
Tribe,

Plaintiff,

vs.

STATE OF CALIFORNIA, CALIFORNIA
GAMBLING CONTROL COMMISSION,
an Agency of the State for California, and
ARNOLD SCHWARZENEGGER, as
Governor of the State of California,

Defendants.

CASE NO. 06cv0988-LAB (AJB)

**ORDER DENYING MOTION TO
STRIKE; AND**

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

[Docket nos. 79, 86.]

Plaintiff seeks summary judgment of all claims in its second amended complaint ("SAC"). After full briefing was submitted, the Court took the motion under submission on August 19, 2009. That same day, the Eastern District of California issued its opinion in a factually related case ("*Colusa*"), *Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. California*, No. CIV S-04-2265, 2009 WL 2579051 (E.D.Cal. Aug. 19, 2009). On August 20, Plaintiff filed a new reply brief (the "Second Reply") including a request for judicial notice of the *Colusa* decision. Defendants moved to strike the Second Reply, pointing out it is procedurally irregular, arguing Plaintiff is judicially estopped from citing the decision in *Colusa*, and arguing the *Colusa* decision is irrelevant.

1 **I. Motion to Strike**

2 Under Fed. R. Evid. 201(b), the Court can take judicial notice of facts not subject to
3 reasonable dispute, including the existence orders and decisions by other courts. *Lee v. City*
4 *of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001). Under FRE 201(d), the Court must take
5 notice if requested by a party and if supplied with the necessary information.

6 Defendants object to the purposes for which Plaintiff asks the Court to take notice.
7 The August 19 order, and other orders in *Colusa* are relevant as persuasive authority.
8 Interpretation of written agreements is a question of law, *Operating Eng'rs Pension Trusts*
9 *v. B & E Backhoe, Inc.*, 911 F.2d 1347, 1351 (9th Cir. 1990), so the Eastern District's
10 interpretations of many of the same documents are relevant here. Because many of the
11 questions are so closely aligned with questions presented here, the Court would have cited
12 decisions in *Colusa* and considered their reasoning and holdings even if not requested.
13 However, the judgment in *Colusa* is on appeal and therefore has not been litigated to a final
14 decision, so Defendants are not collaterally estopped by findings or holdings there,
15 *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000), nor does the Court take
16 notice of facts as set forth in the August 19 decision or any other decision. *Lee*, 250 F.3d
17 at 689–90.

18 Defendants argue the reply, including the request for notice, was untimely. However,
19 the request for judicial notice could not have been made earlier, and pursuant to FRE 201(c)
20 the Court could, and would, take notice of orders issued in *Colusa* even if Plaintiff had not
21 requested it.

22 The Court does not agree that Plaintiff has taken such an inconsistent position with
23 regard to *Colusa's* relevance that it is now estopped from seeking judicial notice of orders
24 in that case. See *Johnson v. Oregon*, 141 F.3d 1361, 1369 (9th Cir.1998) (explaining that
25 a party can be judicially estopped only when its inconsistent position is “tantamount to a
26 knowing misrepresentation to or even fraud on the court”).

27 Defendants are correct that the Second Reply was filed late and exceeds the page
28 limit without leave. The Second Reply should properly have been filed simply as a

1 supplemental request for judicial notice, and the request could have included an explanation
2 of the relevance of the new decision. The Court will treat it as such, disregarding arguments
3 that could have been raised before the August 19 order in *Colusa* but considering Plaintiff's
4 explanation of the significance of the newly issued decision. Defendants have set forth their
5 position adequately in their motion to strike so no further briefing on these issues is needed.
6 Except as noted, the motion to strike is **DENIED**, and the request for judicial notice is
7 **GRANTED**.

8 Plaintiff has also requested judicial notice of numerous other documents, and the
9 Court will consider those requests as needed.

10 **II. Motion for Summary Judgment**

11 Plaintiff is a federally-recognized Indian tribe¹ that in 1999 entered into a compact with
12 the state of California (the "Compact")² for the licensing of gaming, pursuant to the Indian
13 Gaming Regulatory Act. The parties agree that the Compact, attached as an exhibit to the
14 SAC, was validly entered into, but disagree about its meaning. Under the Compact, Plaintiff
15 is entitled to a base number of gaming device licenses plus the opportunity to participate in
16 a draw from a statewide pool to obtain more. The licenses permit tribes with gaming
17 compacts to operate slot machines and other similar gaming devices, and a part of the
18 tribes' gaming revenue is distributed to other tribes and to the state and local governments.

19 Plaintiff argues that the Compact provides for a statewide pool of 42,700 gaming
20 device licenses from which it and other tribes with the same compact may draw. (SAC, ¶ 26.)

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22 ¹ Defendants question whether this is so, in light of a dispute over which governing
23 faction the Bureau of Indian Affairs would recognize. (Opp'n to MSJ, 23:14–24:3 and Exs.
24 E and F (letters concerning the dispute).) The second letter notes the dispute, but says the
25 elected council would be recognized pending the outcome of mediation. (Ex. F.) The parties
do not dispute that Plaintiff is on the list of Indian tribes published in the Federal register and
recognized as eligible to receive services from the B.I.A. (Jt. Stmt. of Undisputed Facts,
Docket no. 80-18.) The request for judicial notice of the actual list is therefore not required
and is **DENIED AS MOOT**.

26 ² The Compact attached to the SAC is a specific document identifying the compacting
27 parties as the San Pasqual Band of Mission Indians and the State of California. However,
28 Plaintiff and Defendants agree 38 other tribes signed compacts that are identical in every
relevant respect other than the identity of the compacting tribes. In other words, the
Compact is the agreement Plaintiff entered into with the state of California, as well as the
overall agreement entered into by the state with each of the 39 tribes.

1 Defendants contend the size of the pool is 32,151. The aggregate limit of 32,151 has
2 already been reached, so under Defendants' interpretation, Plaintiff cannot obtain any more
3 licenses in the draw. Under Plaintiff's interpretation, more licenses are available. Plaintiff
4 seeks a declaration that the statewide aggregate limit of gaming device licenses is at least
5 42,700, as well as costs and additional relief. (*Id.* at 10.) This would enable Plaintiff to
6 increase the number of its licenses from the current allowance, which it represents is 1,572
7 licenses, potentially up to the limit of 2,000 licenses per tribe.

8 The Eastern District of California recently issued two decisions in *Colusa* that are
9 relevant here. The first was issued April 22, 2009 and is published at 629 F. Supp. 2d 1091
10 (E.D.Cal. 2009) (*Colusa I*). The second was the decision of August 11, published at 649
11 F. Supp. 2d 1063 (E.D.Cal. 2009) (*Colusa II*). The third, issued September 11 and amended
12 September 14, is available at 2009 WL 2971547 (E.D.Cal., 2009) (*Colusa III*). Plaintiff's
13 motion for summary judgment ("MSJ") relies heavily on the holding of *Colusa I*. In particular,
14 Plaintiff cites 629 F. Supp. 2d at 1114 (construing identical language in the other tribe's
15 Compact as providing for a pool of 42,700 licenses). Plaintiff has requested that the Court
16 take notice of the decision in *Colusa I* and, for reasons set forth above, the request is
17 **GRANTED.**

18 **A. Legal Standards**

19 Federal Rule of Civil Procedure 56(c) empowers the Court to enter summary
20 judgment if the "pleadings, depositions, answers to interrogatories, and admissions on file,
21 together with the affidavits, if any, show that there is no genuine issue as to any material fact
22 and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).
23 A fact is material if it "might affect the outcome of the suit under governing law." *Anderson*
24 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). An issue is genuine "if the evidence is
25 such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248.
26 Therefore, "[f]actual disputes that are irrelevant or unnecessary [are] not counted." *Id.* at
27 248.

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1 Plaintiff, as movant, has the initial burden of demonstrating that there is no issue of
2 material fact and that summary judgment is proper. *Adickes v. S.H. Kress & Co.*, 398 U.S.
3 144, 157 (1970). If Plaintiff meets its burden, the burden then shifts to the non-movant to
4 show that summary judgment is not appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317,
5 325, 324 (1986).

6 General principles of contractual construction apply to tribal-state class III gaming
7 compacts such as the one at issue here. *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d
8 1095, 1098 (9th Cir. 2006). Although the contract is governed by federal law, *id.*, the parties
9 agree California contract law does not differ from federal law and under Ninth Circuit
10 precedent should therefore be applied. See *FDIC v. N.H. Ins. Co.*, 953 F.2d 478, 481–482
11 (9th Cir. 1991) (where state contract law would not conflict with federal law, applying state
12 law).

13 “Contract interpretation begins with the language of the written agreement.” *Colusa I*,
14 629 F. Supp. 2d at 1106 (quoting *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035,
15 1038 (Fed.Cir. 2003)). The Compact is to be construed “by reading it as a whole and
16 interpreting each part with reference to the entire contract.” *Tanadgusix Corp. v. Huber*, 404
17 F.3d 1201, 1205 (9th Cir. 2005).

18 Interpretation of a contract is a matter of law. *United States v. King Features*
19 *Entertainment, Inc.*, 843 F.2d 394, 398 (9th Cir. 1988). This includes the question whether
20 a contract is ambiguous. *Id.* A contract is ambiguous if its terms are reasonably susceptible
21 of more than one interpretation. *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009).
22 “That the parties dispute a contract’s meaning does not render the contract ambiguous. . . .”
23 *Id.*

24 Even if the parties’ agreement appears clear on its face, the Court must entertain
25 relevant extrinsic evidence that can prove a meaning to which the language of the contract
26 is reasonably susceptible. *King Features*, 843 F.2d at 398. If the Court finds the contract
27 is not reasonably susceptible of the asserted interpretation, extrinsic evidence cannot be
28 admitted in support of that interpretation. *Id.* Strained interpretations of contract provisions

1 are not reasonable and the Court does not entertain them. *Cabazon Band of Mission*
2 *Indians v. Wilson*, 124 F.3d 1050, 1058 (9th Cir. 1997).

3 “If, after considering the language of the contract and any admissible extrinsic
4 evidence, the meaning of the contract is unambiguous, a court may properly interpret it on
5 a motion for summary judgment.” *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 934 (9th
6 Cir. 1996).

7 **B. The Compact**

8 The *Colusa I* decision concerns itself with a number of alternate interpretations, most
9 of which are not advanced here. While the Compact’s provisions might appear at first blush
10 susceptible of other interpretations, the parties’ agree on the meaning of most of it, so the
11 Court treats those portions as unambiguous. See *Curry v. Moody*, 40 Cal.App.4th 1547,
12 1552 (Cal. App. 2 Dist. Dec. 12, 1995) (looking to the meanings urged by the parties to
13 determine whether contract terms are ambiguous).

14 Section 4.3.2.2(a)(1) of the Compact gives the formula for calculating the aggregate
15 limit (*i.e.*, the size of the pool):

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

19 Section 4.3.1 in turn provides:

20 The Tribe may operate no more Gaming Devices than the larger of the
21 following:³

22 (a) A number of terminals equal to the number of Gaming Devices operated
by the Tribe on September 1, 1999; or

23 (b) Three hundred fifty (350) Gaming Devices.

24 The equation is thus a sum of two numbers. The first number (“First Number”) is the product
25 of 350 and the number of Non-Compact tribes as of September 1, 1999. The parties agree

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28 ³ Section 4.3.1 is initially used to determine the base number of devices the tribe may
operate, before any more licenses are obtained in the draw.

1 there were 84 Non-Compact tribes and, as in *Colusa*, do not dispute that the product is
2 therefore 29,400. The disagreement arises over the second number (“Second Number”).

3 The parties agree the Second Number is determined by calculating the difference
4 between 350 and the lesser number authorized under section 4.3.1 with regard to all tribes
5 that signed a Compact (the 39 “Compact Tribes”). The phrase “authorized under Section
6 4.3.1” makes clear only Compact Tribes are of concern, because only Compact Tribes have
7 any authorization for devices under Section 4.3.1. See *Colusa I*, 629 F. Supp. 2d at
8 1114–15 (discussing the meaning of “authorized” in the Compact).

9 Because the “Compact” means Plaintiff’s own agreement, as well as the agreement
10 entered into by all the Compact Tribes, “Section 4.3.1” could refer to that section in Plaintiff’s
11 Compact, or to Section 4.3.1 in the Compact entered into by all 39 tribes. Therefore, “the
12 lesser number” could potentially refer to either the number for a single tribe only (here, the
13 lesser number for Plaintiff), or to a total (the number authorized for all Compact Tribes).
14 However, only the second construction is reasonable in light of the rest of the Compact,⁴ and
15 the parties agree the Compact concerns itself with a total number. Defendant, however,
16 argues the total is the sum of each lesser number tallied individually (along with further
17 calculations, discussed below), while Plaintiff argues the numbers are totaled and the lesser
18 is then selected.

19 The difference arises in how the parties argue the number should be totaled. Under
20 Plaintiff’s interpretation, the numbers for section 4.3.1(a) are to be totaled, then the numbers
21 for section 4.3.1(b) are to be totaled, and the lesser of those two is “the lesser number
22 authorized under Section 4.3.1,” bearing in mind that “number” means total number. The
23 difference between that number and 350 is therefore the Second Number. Plaintiff presents
24 evidence showing those Compact Tribes that were operating more than 350 devices on
25 September 1, 1999 operated a total of 16,156 devices. Using Plaintiff’s calculation method,

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27 ⁴ This term could more literally be read as saying the maximum is calculated by taking
28 the lesser of the two numbers Plaintiff (“the Tribe”) was authorized to operate under Section
4.3.1. However, this number would vary among the 39 tribes, producing as many as 39
different statewide maxima. The Compact contemplates a single maximum, however, so this
construction is unreasonable and must be rejected.

1 then, Section 4.3.1(a) of the Compact authorizes a total of 16,156 devices.⁵ Using Plaintiff's
2 method and relying on undisputed evidence, Section 4.3.1(b) authorizes a total of 39 times
3 350, or 13,650 gaming devices. The "lesser number authorized under Section 4.3.1" is
4 therefore 13,650. The difference between 350 and 13,650 is 13,300. Adding this number
5 to 29,400, the result is 42,700, the number of licenses Plaintiff argues should be available
6 in the statewide pool.

7 Plaintiff's interpretation requires the Court to construe "the lesser number authorized
8 under Section 4.3.1" to ignore what Section 4.3.1 actually does authorize, which is the larger
9 number, and instead focus on the two numbers potentially authorized under Section 4.3.1(a)
10 and (b), before the choice of the larger is required. But the "the lesser of" language in
11 Section 4.3.2.2(a)(1) necessarily contemplates a choice between two numbers, so it is a
12 reasonable construction. Plaintiff's interpretation then goes on to look at the Section 4.3.1(a)
13 number (*i.e.*, total) and the Section 4.3.1(b) number (*i.e.*, total) and select the lesser of the
14 two. Because "number" can mean "total," this is reasonable.

15 The Compact is reasonably susceptible of Plaintiff's interpretation, and Defendants
16 concede this calculation is reasonable. (Opp'n to MSJ, 12:9–11 ("For the limited purpose
17 of this opposition, State Defendants agree that San Pasqual's interpretation of section
18 4.3.2.2(a)(1) that 42,7000 licenses comprise the statewide license pool is not inherently
19 unreasonable."))⁶ Having determined Plaintiff's interpretation is reasonable, the Court must

21 ⁵ This number, which was used in *Colusa I*, may actually be too low. Section 4.3.1(a)
22 does not ask whether tribes were operating more or fewer than 350 devices on September
23 1, 1999, so it might be read as saying all devices the Compact Tribes were operating as of
24 that date should be totaled, which would bring the total to 19,005. This may result from the
25 interpretation of the definitions of "Contract Tribe" and "Non-Compact Tribe" given in Section
26 4.3.2, which could result in some Compact Tribes also being counted as Non-Compact
27 Tribes for calculation purposes. Neither party interprets the Compact this way, however, and
28 even if this is an error it makes no difference here, because either way the number
calculated under Section 4.3.1(a) is the greater, not the lesser number and is therefore
ignored.

⁶ Defendants then go on to argue this number is "inadmissible" because Plaintiff
cannot show this was its interpretation at the time the Compact was signed. (Opp'n to MSJ,
12:11–14.) The Court is not, however, admitting this number into evidence but construing
the Compact, which is done as a matter of law. As discussed below, no evidence needs to
be admitted.

1 decide whether the Compact is also reasonably susceptible of the construction Defendants
2 urge.

3 Under Defendants' interpretation, the "lesser number" is first calculated for each
4 Compact Tribe, that number is subtracted from 350, and the results are totaled. The result
5 is the Second Number. Under Section 4.3.1, if a tribe that was operating more than 350
6 devices on September 1, 1999, the "lesser number" is 350, and the difference between the
7 "lesser number" and 350 is zero. Therefore, only those tribes that were operating fewer than
8 350 devices have any impact on the Second Number.⁷ The parties did not provide the
9 numbers for each of the sixteen tribes that fall in this category, but they agree the total
10 number of licenses held by the sixteen tribes was 2,849. The total of the differences
11 between 350 and each of those sixteen tribes' "lesser numbers" is calculated as 350 times
12 sixteen (*i.e.*, 5,600) minus 2,849. Under this interpretation, the Second Number is therefore
13 2,751 and the total number of licenses available in the statewide pool is 32,151.

14 Another way to state Defendants' calculation method is that for each tribe the number
15 under Section 4.3.1(a) is compared with the number under Section 4.3.1(b), the lesser is
16 taken, and the totals of all the lesser numbers are subtracted from the product of 16 (the
17 number of tribes operating fewer than 350 devices) and 350. The effect of using
18 Defendants' method is that the number 350 in the equation has a multiplier of 16.⁸

19 The Court considers Defendants' interpretation unreasonable. To begin with, it
20 requires the Court to fill in provisions that are not present. For example, Defendants construe
21 the phrase "the difference between 350 and the lesser number authorized under Section
22 4.3.1" to mean "the product of the number of Compact Tribes multiplied by the difference
23 between 350 and the lesser number for each Compact Tribe authorized under Section
24 4.3.1." The problem is Section 4.3.2.2.(a)(1)'s First Number does contain a multiplier
25 ("multiplied by the number of Non-Compact tribes as of September 1, 1999"), but the Second

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27 ⁷ For this reason, Defendants omit these tribes from their calculation. Including them,
28 the "lesser number" would be 10,899, which would be subtracted from the product of 350
multiplied by 39, or 13,650. This yields the same result, 2,751.

⁸ Or 39, if the method outlined in note 7, *supra*, is used.

1 Number omits any multiplier. Defendants' interpretation is also unreasonable because it
2 requires the Court to interpret one or more singular words as plural, so the formula for the
3 Second Number is "the differences between 350 and [each of] the lesser numbers
4 authorized under Section 4.3.1," or "the differences between 350 and [each] . . . lesser
5 number authorized under Section 4.3.1."

6 The alternative explanation that imputes a multiplier of 16 into the Second Number
7 fares no better, because the language of Section 4.3.2.2(a)(1) does not mention or provide
8 for such a multiplier. The figure 350 unambiguously means 350, not 350 multiplied by some
9 other number. *Compare Colusa I*, 629 F. Supp. 2d at 1114 ("This multiplier is not provided
10 for by the language in § 4.3.2.2(a)(1).")

11 Defendants put forward the interpretation proffered by their negotiator that the total
12 of all licenses in the state "can be calculated by adding the number of existing Gaming
13 Devices authorized in section 4.3.1(a) of the Compacts to the number of new Gaming
14 Devices authorized in section 4.3.1(b)." (Opp'n, 10:25–27 (quoting Decl. of William Norris,
15 ¶ 14).) If this were what the Compact meant, however, the formula set forth in Section
16 4.3.2.2(a)(1) would be rather straightforward and not the more complex formula that was
17 actually set forth.

18 Because the Court finds Plaintiff's proffered interpretation reasonable and
19 Defendants' unreasonable, the Court concludes Section 4.3.2.2(a)(1)'s formula is
20 susceptible of only one reasonable interpretation and is thus unambiguous. *Tanadgusix*,
21 404 F.3d at 1205 ("A contract is ambiguous if reasonable people could find its terms
22 susceptible to more than one interpretation.") The Court does not admit extrinsic evidence
23 to construe unambiguous contracts. *King Features*, 843 F.2d at 398. Instead, the Court
24 holds the state to its word as embodied in the Compact. *Cabazon*, 124 F.3d at 1058.

25 The Court was presented with a different set of arguments from those presented to
26 the Eastern District in *Colusa*, and has reached its conclusion in a different way. This Court
27 has cited to portions of *Colusa I* as persuasive precedent, while recognizing that court's

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1 decision is not binding here. But it is worth noting this Court's construction of Section
2 4.3.2.2(a)(1) aligns with the Eastern District's.

3 **C. Defenses**

4 Defendants have raised a number of defenses to Plaintiff's claim for declaratory relief.
5 Because the disputed portion of the Compact is unambiguous, the Court does not reach the
6 evidence-based defenses, whether pertaining to the parties' intent or negotiating history, or
7 matters related to these. This includes the number of licenses in the pool, and what the
8 parties thought that number would be. Even if their calculations varied, their agreement as
9 to the formula for calculating this number was unambiguously embodied in the Compact.

10 Defendants argue that because the parties each have a different understanding of
11 the meaning of Section 4.3.2.2(a)(1), there was no "meeting of the minds," rendering the
12 Compact unenforceable. (Opp'n at 4:14–21.) The Court rejects this argument, because
13 later disagreements about the meaning of terms do not support a party's argument that the
14 minds never met. *Warehousemen's Union Local No. 206 v. Continental Can Co., Inc.* 821
15 F.2d 1348 (9th Cir. 1987).

16 Defendants also raise the defense of unclean hands. This doctrine applies when a
17 plaintiff has engaged in unconscionable, bad faith, or inequitable conduct in connection with
18 the matter in controversy. *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental,*
19 *Inc.*, 944 F.2d 597, 602 (9th Cir. 1991); *General Elec. Co. v. Superior Court*, 45 Cal.2d 897,
20 899-900 (1955). Here, Defendants argue the doctrine would provide a defense because
21 Plaintiff's representative at the negotiations may have heard that the chairman of another
22 tribe had a different interpretation of Section 4.3.2.2(a)(1) from the one Defendants had.
23 Defendants posit that Plaintiff's representative believed the other tribe's chairman, concluded
24 the size of the pool would be larger than the state's representative did, and failed to make
25 this known at the time to the state's representative. (Opp'n to MSJ at 18:15–19:12 and n.9.)
26 Even if Plaintiff's representative was involved in this, it falls far short of the showing required
27 for unclean hands.

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1 In discussing defenses generally, Defendants have mentioned several times a
2 purported cap of 44,798 licenses statewide. (Opp'n to MSJ, 2:5– 8, 11:1–4, 11:16–21,
3 18:9–13; Norris Decl. in Supp. of Opp'n to MSJ, ¶¶ 14–16.) They argue this is all the state's
4 negotiator was ever authorized to agree to. (Norris Decl. ¶ 15 (“During the negotiating
5 process, Governor Davis made it clear to me that the statewide cap of 44,798, which
6 included those Gaming Devices already in operation by gaming tribes, was not to be
7 exceeded.”)) This number supposedly represented the total number of available licenses.
8 They also charge that the tribes were repeatedly told the state would not agree to a larger
9 number.

10 To the extent Defendants are arguing the formula set forth in Section 4.3.2.2(a)(1) led
11 to a result they did not intend to agree to, they are in fact attempting to offer extrinsic
12 evidence to show the Compact has a meaning other than the unambiguous one the Court
13 has recognized. Extrinsic evidence is, of course, inadmissible for this purpose. Alternatively,
14 to the extent Defendants are arguing any number larger than 44,798 is void, they have not
15 shown why the governor's wish for a statewide cap would support any recognized defense
16 such as illegality or unconscionability. In either event, the number Defendants have argued
17 for in this action is higher than the cap they allege.⁹

18 Finally, Defendants argue Plaintiff has not shown it has any need for declaratory
19 relief, because Plaintiff has not shown it has not been provided the full benefit of the
20 Compact. (Opp'n to MSJ at 23:7–13.) The short answer to this argument is that a request
21 for declaratory relief requires only the showing of an actual and substantial controversy,
22 where “the adverse positions have crystallized and the conflict of interests is real and
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25 ⁹ The Norris Declaration says the statewide cap was to include the devices already
26 in operation at the time the Compact was adopted. (Norris Decl., ¶ 15.) Adding 16,156 (the
27 number of existing devices among tribes operating more than 350), 2,849 (the number of
28 devices operated by tribes operating 350 or fewer), and 32,151 (the number of licenses
Defendants now argue should be in the pool) yields a sum significantly greater than the
supposed cap. *Compare Colusa I*, 629 F. Supp. 2d at 1113 and n.21 (noting that if the cap
of approximately 45,000 licenses were applied, only 23,000 more licenses would be
authorized under the Compact, a number neither party's interpretation supported).

1 immediate.” *Societe de Conditionnement v. Hunter Eng’g Co., Inc.*, 655 F.2d 938, 943 (9th
2 Cir. 1981) (citation omitted). That requirement is met here.

3 **D. Other Considerations**

4 While the Court need not rely on any further evidence or principles of law, the
5 circumstances under which the Compact was drafted and entered into support the Court’s
6 judgment here. It is undisputed Defendants drafted the Compact and presented it to Plaintiff
7 and other tribes. Plaintiff and the other tribes were also given a rather short time to consider
8 and adopt the Compact, including Section 4.3.2.2. The Norris Declaration shows the state’s
9 negotiators first presented the draft of Section 4.3.2.2 to key tribal negotiators on September
10 9, 1999. (Norris Decl., ¶¶ 16–17.) Later that day, the entire draft was presented to the
11 assembled tribal representatives. (*Id.*, ¶ 18.) The Compact was signed the next day.
12 (Compact at 38.) While the Court need not and does not rely on these facts, and need not
13 apply the doctrine of *contra proferentem*, they inform and support the judgment.

14 This background also helps put into proper perspective Defendants’ suggestions that
15 Plaintiff and the other tribes were aware of and took inequitable advantage of the situation,
16 or that Plaintiff and the other tribes are bound by the result they thought on that day the
17 formula would yield. Even if Plaintiff had suspected a drafting error, there would be no way
18 in such a short time to confirm that suspicion and to determine its effect with any degree of
19 confidence. Defendants were, by comparison, far more responsible for the Compact’s
20 language, and it is therefore equitable to hold them to it.

21 **III. Conclusion and Order**

22 Defendants’ request to strike a portion of the MSJ is **DENIED**. Because the Court
23 need not reach other requests for judicial notice, they are **DENIED** as moot. Except as
24 noted above, the evidentiary objections are likewise moot and are therefore **OVERRULED**.

25 For reasons set forth above, Plaintiff’s MSJ is **GRANTED**. Plaintiff is directed within
26 14 calendar days to lodge a proposed order granting declaratory relief in substantially the

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1 same language as requested in the SAC.¹⁰ If Defendants object to wording of the proposed
2 order, they may do so within three court days of the date the proposed order is lodged,
3 instead of one business day as ordinarily permitted.

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IT IS SO ORDERED.

DATED: March 29, 2010


HONORABLE LARRY ALAN BURNS
United States District Judge

¹⁰ For instructions on lodging proposed orders electronically and objecting to lodged proposed orders, see this District's Electronic Case Filing Administrative Policies and Procedures Manual, § 2(h).