UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

THE TULALIP TRIBES OF WASHINGTON

Plaintiff,

v.

STATE OF WASHINGTON; WASHINGTON STATE GAMBLING COMMISSION; CHRISTINE GREGOIRE, Governor of Washington, in her official capacity; and RICK DAY, Director of the Washington State Gambling Commission, in his official capacity.

Defendants.

No. 2:12-CV-688 - RAJ

PLAINTIFF'S REPLY ON MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO CROSS MOTION FOR SUMMARY JUDGMENT

In its cross-motion and response to Tulalip's motion for summary judgment, the State has offered a litany of reasons it should be allowed to escape the plain terms of its most-favored-tribe promises to the Tulalip Tribes ("Tulalip" or "Tribe"). As demonstrated below, each of those reasons is without merit. Instead, by the plain terms of the Compact, no genuine issue of material fact exists and Tulalip is entitled to judgment as a matter of law.

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1. This Court Has Jurisdiction

The State's most sweeping attempt to escape its Compact promises to Tulalip is to repudiate them all. The State contends that *none* of the promises it made to Tulalip in the Compact, including the most-favored-tribe ("MFT") promises of Appendices X and X2, are enforceable by this Court. According to the State, "a federal district court only has jurisdiction over causes of action initiated by an Indian tribe arising from the failure of the state to conduct compact negotiations in 'good faith.'" *See* Response to Motion for Summary Judgment ("Response") at 20-22 (citing 25 U.S.C. § 2710(d)(7)(A)(i) (authorizing tribes to sue states for failure to conduct tribal-state compact negotiations in "good faith")).

This argument boils down to the notion that, under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 – 2721, so long as a state has negotiated a gaming compact in good faith, it may thereafter determine to treat all of its compact promises as empty promises without the affected tribe having any recourse under federal law. This notion has been addressed and rejected emphatically by the Ninth Circuit in a case the State nowhere grapples with, much less even mentions, in its brief.

In *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050 (9th Cir. 1997), a group of tribes had sued the State of California to, as here, enforce the terms of a class III gaming compact. The State there, as here, challenged the district court's jurisdiction on the grounds that, because the suit was not a "good faith" suit, IGRA did not authorize it. The Ninth Circuit rejected the State's arguments in terms directly applicable here:

> [This suit] is based on an agreement contained within the Compacts and entered into by the parties, during their IGRA negotiations . . . . The State's obligation to the Bands thus originates in the Compacts. The Compacts quite clearly are a creation of federal law . . . . We conclude that the Bands' claim to enforce the

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> Compacts arises under federal law and thus that we have jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362.
>
> The State argues that IGRA confers federal jurisdiction over only the three causes of action specified in 25 U.S.C. § 2710(d)(7)(A)(i)-(iii) [including "good faith" claim] . . . . We believe that the State construes both federal question jurisdiction and IGRA too narrowly and underestimates the federal interest at stake. . . . The district court recognized the federal interest at stake here and the importance of the enforcement of Tribal-State compacts in the federal courts:
>
> > It would be extraordinary were [IGRA] to provide jurisdiction to entertain a suit to force the State to negotiate a compact yet provide no avenue of relief were the State to defy or repudiate that very compact. Such a gap in jurisdiction would reduce the elaborate structure of IGRA to a virtual nullity since a state could agree to anything knowing that it was free to ignore the compact once entered into. IGRA is not so vacuous.
>
> We agree that Congress, in passing IGRA, did not create a mechanism whereby states can make empty promises to Indian tribes during good-faith negotiations of Tribal-State compacts, knowing that they may repudiate them with immunity whenever it serves their purpose. IGRA necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements contained therein.

Id. at 1055-56 (citation omitted).

In sum, the State's jurisdictional arguments are an invitation for this Court to commit a clear error of law.

2. The State Has Waived its Immunities

The State additionally attempts to evade its Compact promises to Tulalip by asserting that because IGRA did "not abrogate the states' sovereign rights," this Court lacks the power to enforce the Compact against the State without its express consent. *See* Response at 21. This argument directly contradicts the State's own statutory enactments and the express terms of the Compact itself.

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The State of California made the same argument in *Cabazon*. *See* 124 F.3d at 1056-57. The Ninth Circuit rejected California's argument by noting that Section 2710(d)(3)(C)(v) of IGRA contains "express authorization of a compact to provide remedies for breach" and "invites the tribe and the state to waive their respective immunities and consent to suit in federal court." *Id*. at 1056. Because California had done so there, it was not immune from the suit to enforce the compact. *Id*. at 1057. The same applies here.

The State has unquestionably waived its immunity from this suit, and its contrary assertion to this Court is beyond baffling. The State first waived its immunity by its own statute:

> The state consents to the jurisdiction of the federal courts in actions brought by a tribe pursuant to the Indian gaming regulatory act of 1988 *or seeking enforcement of a state/tribal compact* adopted under the Indian gaming regulatory act, conditioned upon the tribe entering into such a compact and providing similar consent. This limited waiver of sovereign immunity shall not extend to actions other than those expressly set forth herein.

Wash. Rev. Code § 9.46.36001 (emphasis added). The Tribe provided its similar consent in Section 12(e)(i) of the Compact. *See* Compact § 12(e)(i) (Eighth Amendment), p. 249-50.

The State reiterated and expanded its waiver of immunity in Section 12(e)(ii) of the Compact:

> The State and the State Gaming Agency agree, represent and acknowledge that the State has waived its immunity from those suits set forth in RCW . . . 9.46.36001. In addition to said statutory waivers of immunity, the State hereby further agrees to and makes a limited waiver of its sovereign immunity and its immunity to suit in federal court under the Eleventh Amendment to the U.S. Constitution, and consents to be sued for the sole purpose, and no other purpose, to the suits specified in Sections 12(b)(iii), 12(c)(ii), 12(c)(vii) *and 12(d) of this Compact*[.].

Compact § 12(e)(ii) (Eighth Amendment) (emphasis added), p. 250.

Section 12(d) of the Compact, expressly encompassed in the State's waiver of immunity, provides that either party to the Compact "may initiate litigation in an appropriate United States

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district court *seeking resolution of any Dispute, and for any relief or remedy the United States district court is empowered to grant* [excepting monetary damages]." Compact § 12(d) (Eighth Amendment) (emphasis added), p. 249. Section 12(a) defines "Dispute," in relevant part, as "any disagreement or dispute relating to . . . compliance with the terms, provisions and conditions of this Compact[.]" *Id*. at § 12(a), p. 242.

The State's remarkable willingness to disavow its clear, affirmative and express consent to this suit is, as demonstrated in the sections that follow, matched by its willingness to disavow the plain language of its promises under the Compact.

3. The State Has Agreed to More-Favorable Terminal Allocation Terms with the Spokane Tribe

The State agrees that "the plain language of the 'most favored tribe' provision in Appendix X2 . . . allows the Tulalip the same more-favorable allocation terms permitted to other tribes." Response at 19. However, the State denies having agreed to terminal allocation terms with the Spokane Tribe that are more favorable than those set forth in Tulalip's Appendix X2. Notably, the State makes only one argument on this decisive point, and that argument is immaterial. According to the State, because all Eligible Tribes remain subject to Appendix X2 as originally executed and Appendix Spokane did not "alter[] the terms set forth in Appendix X2," the terms of Appendix Spokane therefore fall outside the scope of the State's MFT promise to Tulalip:

> [N]o other Washington Tribe, including the Spokane Tribe, receives an allocation of TLS machines that are on terms more favorable than those set forth in Appendix X2. Rather, each of the 28 Washington Tribes receives an allocation for an equal portion of the allowed TLS machines in the State. Appendix X2 at § 12.1, p. 225. Moreover, each of the 28 Washington Tribes is permitted to acquire additional TLS machines . . . from any other Washington Tribe's unused

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> allocation. Appendix X2 at §§ 12.2 and 12.2.1, p. 226.
>
> *Nothing in Appendix Spokane alters the allocation terms set forth in Appendix X2.*

Response at 17 (emphasis added).

This argument is a diversion. Whether Appendix Spokane "alters" the allocation terms set forth in Appendix X2 is not material under the plain terms of the MFT provisions at issue. Nothing in those terms restricts Tulalip's entitlement to only those more-favorable terms achieved as a result of changes to the terms of Appendix X2. Rather, the MFT language plainly entitles Tulalip to *any* terminal allocation terms the State has agreed to with another tribe that are more favorable than those set forth in Appendix X2:

> [I]n the event the State agrees . . . to permit an allocation of Player Terminals to a tribe which is greater, or is on terms which are more favorable, than as set forth herein, the Tribe shall be entitled to such greater Allocation or more favorable terms.

Appendix X2, § 12.4, p. 227; *see also* Appendix X, § 12.5 (same), p.154.

This language unambiguously encompasses more-favorable terms that come about either by amendment to Appendix X2, by agreement to provisions separate from Appendix X2 or by other means. The State is seeking to escape its MFT obligations to Tulalip by asking this Court to rewrite the Compact to impose a restriction that the plain language does not support. *See Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wash. 2d 654, 670 (Wash. 2003) ("This court cannot rewrite a contract to force a bargain that the parties never made.").

The only relevant question under the plain terms of Tulalip's MFT provisions is whether the Spokane Tribe enjoys terminal allocation terms more favorable than Tulalip enjoys under Appendix X2 – and the Spokane Tribe certainly does enjoy such terms. As explained in Tulalip's Motion for Summary Judgment, Doc. No. 13 at 12-13, under Tulalip's Compact,

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Tulalip may only acquire additional allocation rights for Player Terminals from other Washington tribes, and pursuant to a plan approved by a majority of those tribes. If Tulalip is unable to meet its needs by this procedure, it may pursue no other options under the Compact. *See* Appendix X2, §§ 12.2 and 12.2.2, p. 226. By contrast, the State's agreement with the Spokane Tribe includes these very same provisions of Appendix X2, but *further* provides:

> In the event that the Tribe is unable, after making reasonable efforts to do so, to acquire allocation rights for . . . additional player terminals from other Washington tribes, . . . the Tribe may obtain some or all of such additional player terminals by making payments into the Inter-Tribal Fund for each of the player terminals operated in excess of its Allocation . . . in accordance with Section 7 of this Appendix Spokane[.]

Appendix Spokane, § 6(A), p. 301.

With this provision augmenting its existing rights under Appendix X2, the Spokane Tribe unambiguously enjoys terminal allocation terms more favorable than Tulalip, which is restricted to the provisions of Appendix X2. Nothing in the State's Response rebuts or otherwise undermines this decisive fact. The State simply declined to address it, and there is no reasonable counter to it.

4. The Circumstances of the State's Agreement with the Spokane Tribe are Immaterial under the Plain Terms of the MFTs

The State next attempts to escape its clear MFT obligations to Tulalip by asserting that:

> Appendix Spokane reflected the conditions of the Tribal Lottery System when the State and the Spokane Tribe were negotiating for a gaming compact prior to the existence of Appendix X2. At that time, the Spokane Tribe was being asked to participate in an existing Tribal Lottery System where no machines were actually available to lease, and the Spokane Tribe felt other tribes would not be willing to lease to them because of past differences.

Response at 17-18 (citation omitted).

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This assertion is immaterial under the plain terms of the MFTs. First, it is unclear what the State intends to establish by asserting that it and the Spokane Tribe negotiated their Compact "prior to the existence of Appendix X2." Appendix X contains an MFT clause and terminal acquisition and transfer provisions substantively identical to those contained in Appendix X2. *See* Appendix X, §§ 12.4.1 and 12.5, pp. 152-53. The State agreed to Appendix Spokane in 2007 and the Spokane Tribe's Appendix X2 in 2008. The MFT and terminal acquisition and transfer provisions of Appendix X had already been in effect for Tulalip since 1998, when Appendix X took effect.

Likewise, the State's agreement to permit the Spokane Tribe to operate an Inter-Tribal Fund ("ITF") based on the fact that the Spokane Tribe "felt other tribes would not be willing to lease to them because of past differences," Response at 18, is wholly immaterial under the plain terms of the MFTs. Nothing in the language of the MFTs requires *or even permits* an inquiry into the circumstances or subjective beliefs of other tribes with whom the State enters into more-favorable terms in order to determine Tulalip's entitlement to such terms. Instead, the terms of the MFTs are straightforward and simple: if the State agrees to more-favorable terms, Tulalip "shall be entitled" to those terms.[1]

5. The State Cannot Retroactively Negate Tulalip's MFT Rights by Agreement with Another Tribe

The State next attempts to escape its MFT obligations to the Tulalip by arguing that it "never agreed to" the Spokane ITF "without the associated conditions and limitations set forth in

[1] The State's assertion that an unspecified statewide "pooling approach" was discussed at the inter-tribal negotiations of Appendix X2 but "did not move forward," Response at 6, is likewise immaterial. The State has pointed to nothing in the plain terms of the MFTs that suggests such a circumstance would negate or in any way affect Tulalip's rights or the State's obligations under those terms.

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the other provisions of that Appendix." Response at 18. Instead, according to the State, as reflected in the Preamble to Appendix Spokane:

> the State and the Spokane Tribe specifically "conditioned their respective approvals of [the] Appendix on their specific mutual agreement that *all* of the provisions of [the] Appendix are interrelated and interdependent and, as such, that *they are not divisible from each other for any purpose*." . . . In addition, the parties agreed that "any attempted use or interpretation of individual provisions of [the] Appendix must incorporate, apply and give full consideration to every other term contained in the Appendix as a condition of any such use or interpretation."

Response at 18 (quoting Preamble to Appendix Spokane).

As an initial matter, the Spokane Preamble was a transparent attempt by the State to thwart the MFT rights of all Washington tribes by tethering the Spokane ITF to Spokane-specific terms that cannot possibly be adopted by any other tribe. For example, Appendix Spokane authorizes gaming facilities on Spokane Territory. *See* Appendix Spokane, § 1(A), p. 298. If its terms "are not divisible from each other for any purpose," then no term of Appendix Spokane, no matter how patently "more favorable," is susceptible to adoption by any other tribe via MFT because no tribe could possibly operate a gaming facility on Spokane Territory; nor would the terms of Appendix Spokane as a whole be subject to adoption by MFT, for the same reason. This attempt by the State to evade and vitiate the bargained-for MFT rights of all Washington tribes is hardly compatible with its obligations of good faith and fair dealing to the tribes. *See Badgett v. Sec. State Bank*, 116 Wash. 2d 563, 569 (Wash. 1991) ("There is in every contract an implied duty of good faith and fair dealing . . . [that requires] that the parties perform in good faith the obligations imposed by their agreement.").

This patent attempt by the State to shield the Spokane ITF from adoption by Tulalip or any other tribe fails for a fundamental reason. The Preamble to Appendix Spokane purports to

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establish requirements governing the "use or interpretation" of the individual provisions of Appendix Spokane. The notion that Tulalip or any other tribe could be bound by such requirements is absurd. As a non-party to the State's agreement with the Spokane Tribe, Tulalip cannot possibly be regarded as bound by its terms. *See E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty."). Nothing in the plain language of the MFTs – much less any conceivable principle of contract law – would permit the State to retroactively impair or otherwise alter Tulalip's preexisting rights under the Tulalip Compact by a subsequent separate agreement with another tribe. To hold otherwise would allow a party to avoid its existing contractual obligations simply by entering into a second, conflicting agreement with a different party. Tulalip's entitlement under the MFTs is unqualified by any language suggesting a unilateral right of the State to determine which subsequent more-favorable agreements with tribes will be susceptible to MFTs and which will not. Again, the terms of Tulalip's MFTs are straightforward and clear: if the State agrees to more-favorable terms, Tulalip "shall be entitled" to those terms.

6. Tulalip is Not Required to Accept Terms That are Not More Favorable

As noted, the State asserts that it "never agreed to" an ITF without the restrictions and conditions on its operation agreed to by the Spokane Tribe. Response at 18. If the State is implying that Tulalip is required to accept such restrictions (*e.g.*, restrictions on the number of operable player terminals below what is currently authorized in Appendix X2) along with the more-favorable terms of the Spokane ITF, this implication is contradicted by the plain language of Tulalip's MFTs. The language of the MFTs quite plainly entitles Tulalip to "terms *which are* more favorable[.]" Appendix X2, § 12.4, p. 227 (emphasis added); *see also* Appendix X, § 12.5, p. 154 (same). That phrase simply does not encompass terms which are *not* more favorable. *See*

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Idaho v. Shoshone-Bannock Tribes, 465 F.3d 1095, 1099 (9th Cir. 2006) ("Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself.").

If the State had wished to condition Tulalip's MFT rights on the requirement that Tulalip accept other terms in addition to more-favorable terms, it could have bargained for such a condition with Tulalip. The State did not do so, even as it did bargain for such conditions on other most-favored provisions in the Tulalip Compact. For example, in Section 15.2.4 of Appendix X2, the State and Tulalip agreed that if any other compacting tribe in Washington is permitted to offer higher maximum wagers to patrons, then Tulalip "may likewise do so *in conformity with the terms and conditions so permitted the other tribe*." Appendix X2, § 15.2.4, p. 235 (emphasis added).[2]

Similarly, the MFT provisions of the 1999 California gaming compacts expressly condition the beneficiary tribe's entitlement to "more favorable provisions" on the requirement that the tribe also accept *all* other terms agreed to with the other tribe. *See* September 10, 1999

[2] Section 12.4 (the MFT) itself places one – and only one – qualification on the otherwise absolute nature of the entitlement with the preface, "*Except as specifically provided in Section 12.2.1 of this Appendix . . . .*" Appendix X2, § 12.4, p. 227 (emphasis added). Other provisions of the Compact demonstrate that the parties understood how to qualify or condition most-favored rights and did so expressly. *See, e.g.,* Compact § 15(d)(ii)(cc) (Third Amendment), p. 98 (provided for mandatory renegotiation of scope of permitted Class III gaming when another compacting tribe is allowed greater scope of Class III games, "*provided however, that if the other tribe is located East of the Cascade Mountains then [Tulalip] must also demonstrate that the greater level or activities have resulted in an adverse economic activity upon the Tribe's Class III gaming operations*" (emphasis added) (condition eliminated by later amendment)); Appendix X, § 15.1.3, pp. 159-60 (establishing exception to three-year amendment moratorium when any other tribe is permitted any type or allocation of Class III gambling device different from that authorized in Tulalip's Compact, and stating that "[i]n such event the Tribe *shall be entitled* to use such equipment or increase their allocation to a like number, *subject to* good faith negotiations with the State regarding the use and regulation of such equipment" (emphasis added)).

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Quechen Indian Nation Compact at § 15.4 ("If . . . the State enters into a Compact with any other tribe that contains more favorable provisions with respect to any provisions of this Compact, the State shall, at the Tribe's request, enter into the preferred compact with the Tribe *as a superseding substitute for this Compact*." (emphasis added)).[3]

The principle and practice that any conditions on most-favored rights must be set forth expressly adheres in other contexts as well. *See, e.g., Studiengesellschaft Kohle, M.B.H. v. Hercules, Inc.*, 105 F.3d 629, 631 (Fed. Cir. 1997) (involving most-favored clause that entitled party to more-favorable rates "'provided, however, that [party] shall not be entitled to such more favorable rate or rates without accepting any less favorable terms that may have accompanied such more favorable rate or rates'"); *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 11 (2d. Cir. 1997) (involving most-favored clause that entitled party to lower rates, "'but only if [party] also agrees to accept any other terms and conditions of such other license'").[4]

In sum, Tulalip's most-favored rights as set forth in Appendix X, § 12.5 and Appendix X2, § 12.4 are not qualified by any requirement that Tulalip accept terms other than those "which *are* more favorable." That lack of express qualification or condition, which contrasts with the

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[3] Available at http://www.nigc.gov/Reading_Room/Compacts.aspx. *See also, e.g.*, September 14, 1999 Agua Caliente Band of Cahuilla Indians Compact at § 15.4 (same); December 9, 1999 Bishop Paiute Tribe Compact at §15.4 (same). Available at same.

[4] *See also, e.g., Toshiba Corp. v. Am. Media Int'l, LLC*, 2012 WL 3822759, at *1 (S.D.N.Y. Sept. 4, 2012) (involving most-favored clause providing that "'Licensee also agrees to be bound by any terms and conditions under which such more favorable royalty rates are made available to such other party'"); *Applera Corp. v. MJ Research, Inc.*, 2004 WL 5683983, at *11 n.23 (D. Conn. Dec. 17, 2004) (same, "'conditioned on [party's] acceptance of all the same conditions, favorable or unfavorable'"); *Phillips Petroleum Co. v. U.S. Steel Corp.*, 566 F. Supp. 1093, 1099 (D. Del. 1983) (same, "'subject to the same conditions under which such more favorable terms shall be available to said third party'").

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approach taken by the parties to other most-favored provisions in the Compact, clearly reflects their intent.

The Ninth Circuit addressed and upheld this very point in *Idaho v. Shoshone-Bannock Tribes*. There, an MFT clause in a tribal-state gaming compact provided that if another tribe in the state were permitted to operate additional Class III games not authorized in the Shoshone-Bannock compact, then the Shoshone-Bannock Tribes would be entitled to conduct "'those same additional games.'" *Id*. at 1098. Other tribes subsequently agreed with the State to a statutory package of amendments to their compacts to provide for additional Class III games not included in the Shoshone-Bannock compact. Those amendments included restrictions on the number of the new games that could be operated and a school funding requirement to which the tribes had agreed as conditions for being allowed to operate the new games. *Id*. at 1100-02.

The State argued that the Shoshone-Bannock Tribes were required to accept the limitations and restrictions to which the State had agreed with the other tribes as a condition on those tribes' ability to operate the new games. The Court rejected the argument. As Judge Canby explained, the plain terms of the Shoshone-Bannock Tribes' MFT clause made no reference to the Shoshone-Bannock Tribes' obligation to accept any such restrictions or other terms. *See id*. at 1100-01. This conclusion was unaffected by the fact that, as the State argues here, the restrictions were integral components of the State's agreements with the other tribes:

> The other tribes agreed to accept the statutory package of amendments in return for benefits offered by those amendments that were not included in their existing compacts. The Shoshone-Bannock Tribes, however, . . . chose instead to rely on their Compact's existing [MFT] provisions to confer the necessary permission to operate the video gaming machines. This the Tribes were entitled to do, and they may not be subjected to the number limitations of the state statutory package that would have applied had the Tribes agreed to amend under [the statute]. The fact that the [Shoshone-Bannock] Tribes may now be in a technically better position than the other tribes is purely a function of the terms of the Compact that Idaho and the [Shoshone-Bannock] Tribes voluntarily entered into.

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> . . . The fact that other tribes have accepted a package of benefits and burdens when they voluntarily amended their compacts does not change the terms of the Compact between the [Shoshone-Bannock] Tribes and Idaho.

Id. at 1101-02.

This principle applies equally here. The fact that the Spokane Tribe agreed to restrictions on its access to its ITF does not change the terms of the MFT agreed to between Tulalip and the State. Those terms entitle Tulalip to terminal allocation terms "which *are* more favorable" and say nothing at all requiring Tulalip to accept other terms of the State's agreement with another tribe. Again, had the State wished to condition its MFT promise to Tulalip in this fashion, it could have sought to strike such a bargain.

7. Tulalip's Requested ITF Does Not Violate the Terms of Appendix X2

The State next asserts that Tulalip's proposed ITF violates Appendix X2, reasoning as follows:

> The Tulalip's proposed amendment . . . violates Appendix X2's requirement of a multi-tribe acquisition and transfer plan. . . . The proposed plan would . . . permit the Tulalip to obtain TLS machines outside the agreement and without the approval of the other tribes. This is directly contrary to the terms of Appendix X2 and should not be permitted.

Response at 20 (footnote omitted).

This argument is meritless for several fundamental reasons. First, it finds no support in the plain terms of the provisions at issue. Section 12.2 authorizes Tulalip to transfer and acquire terminal allocation rights in transactions with other tribes. Section 12.2.2 is a subsection of Section 12.2 and imposes the condition that the specific terminal allocation transactions among tribes authorized by Section 12.2 must be accomplished "only" pursuant to a plan approved by a majority of Eligible Tribes. *See* Appendix X2, §§ 12.2 and 12.2.2, p. 226. However, nothing in

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the plain terms of Section 12.2 imposes that condition on terminal allocation mechanisms *other* than that provided for in Section 12.2 to which the State and a tribe may agree, and the ITF is just such a mechanism. This fact is demonstrated by Appendix Spokane itself.

The Spokane Tribe is subject to the terms of Appendix X2. Yet, as the State has acknowledged, the ITF to which the State agreed with the Spokane Tribe allows that tribe to obtain player terminals by a mechanism alternative to that provided in Appendix X2. *See* Response at 5 ("The State . . . agreed to provide an alternative mechanism for the Spokane Tribe to obtain TLS machines . . . ."). That alternative mechanism – the Spokane ITF – also unquestionably places *no* obligation on the Spokane Tribe to utilize it according to a plan approved by a majority of other tribes. *See* Appendix Spokane, § 7, pp. 302-04. Yet these are the very aspects of Tulalip's requested amendment that the State derides as "directly contrary to the terms of Appendix X2[.]" Response at 20. The State cannot have it both ways. Either the State, having agreed to Appendix Spokane, is currently in breach of the Appendix X2 rights of all Eligible Tribes in the State, or permitting a tribe to operate a terminal allocation mechanism alternative to that provided for in Appendix X2 and without the requirement of a majority-approved plan (as with Appendix Spokane) does not violate the terms of Appendix X2. The State concedes elsewhere in its briefing that the latter is the case, and the plain language of the Compact compels this conclusion. *See* Response at 17 ("Nothing in the Appendix Spokane alters the allocation terms set forth in Appendix X2.").

The second fundamental flaw in the State's argument that Appendix X2 forbids the State from bilaterally agreeing to permit Tulalip (as it permitted Spokane) to operate an ITF on terms different from those set forth in Appendix X2 is that Appendix X2 expressly contemplates and permits such agreements. All of the terms of Appendix X2 involving the Tribal Lottery System

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are expressly subject to provisions allowing those terms to be altered or affected by independent bilateral agreement between the State and the signatory tribe. The State nowhere acknowledges this in its Response.

For example, Section 15 of Appendix X2 explicitly acknowledges that Tulalip may seek "amendments to this Appendix *with respect to the subject matter of Tribal Lottery System Terminals*" after a moratorium that expired on June 30, 2009. Appendix X2, § 15.1, p. 234 (emphasis added). Section 15 also expressly preserves the State's and Tulalip's rights to mutually "amend the terms and conditions" of the Compact at any time. *Id*. at § 15.1.2, p. 234. Similarly, Section 11 provides that "[n]otwithstanding anything in this Appendix to the contrary, *the [State] and Tribe may agree on alternative provisions to those set forth herein*, provided such provisions adequately preserve and protect the integrity and security of any game or gaming system or component, or accounting or auditing system or component, affected thereby." *Id*. at § 11, pp. 224-25 (emphasis added). The MFT itself unambiguously recognizes that the State may bilaterally agree with another tribe to change the Player Terminal allocation terms of Appendix X2. *Id.* at § 12.4, p. 227 (recognizing that State may "agree[] . . . to permit an allocation of Player Terminals to a tribe which is greater, or is on terms which are more favorable, than as set forth herein.").

Nothing in these provisions exempts the terminal acquisition and transfer provisions of Section 12.2 from their reach except the amendment moratorium set forth in Section 15.1, wherein Tulalip agreed not to seek amendment of Appendix X2 with respect to "the subject matter of Tribal Lottery System Terminals" until after June 30, 2009. Tulalip honored that moratorium. Had the parties intended to set the Tribal Lottery System provisions of Appendix X2 in concrete beyond June 30, 2009, they could have done so. The fact that they agreed to a

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finite moratorium on amendments expresses their intent that upon expiration of that moratorium, the provisions of the Appendix relating to "the subject matter of Tribal Lottery System Terminals" were open to amendment. Far from violating Appendix X2, Tulalip's asserted right to seek amendment of its terms – a right shared by all Eligible Tribes – is expressly safeguarded by Appendix X2.

8. The Timing of Tulalip's Request for an ITF

The State faults Tulalip for bringing this suit "over five years" after the Appendix X2 negotiations in 2006-07. Response at 20. This is specious. To begin with, Tulalip was prevented from requesting an amendment pursuant to the MFT until June 30, 2009 by the moratorium established in Section 15 of Appendix X2. Tulalip approached the State about an ITF amendment in September of 2010. *See* Declaration of Bell at ¶ 3.

Much more fundamentally, the timing of Tulalip's choice to seek the amendment is immaterial under the plain terms of the MFTs. Those terms say nothing to limit the duration of Tulalip's entitlement or otherwise require it to request more-favorable terms under a given timeline. Instead, the terms of the MFTs are absolute: if the State agrees to more-favorable terms with another tribe, "the Tribe shall be entitled" to such terms. Again, had the State desired to place a limitations period on Tulalip's rights under the MFTs, it could have bargained for one. *See, e.g., Toshiba*, 2012 WL 3822759, at *1 (involving most-favored clause that placed express deadline on party to assert most-favored rights).

The Samish Tribe likewise takes issue with the timing of Tulalip's assertion of its rights. The Samish Tribe asserts that the MFT of Appendix X2 to Tulalip's Compact does not apply to Appendix Spokane because Appendix Spokane predated Appendix X2. Proposed Amicus Br. at

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12. This assertion is immaterial. Tulalip's MFT entitlements had been in full effect for nearly eight years when Appendix Spokane took effect. *See* Appendix X, § 12.5, p. 154.[5]

The Samish Tribe's suggestion that Tulalip's suit is barred by laches is equally groundless. According to the Samish Tribe:

> Tulalip knew of the Spokane Compact language at that time, and did nothing to complain about it. . . .
>
> The Tulalip Tribes has waited five years to bring its present lawsuit complaining about the absence of Spokane's Compact language in its Compact. . . .
>
> . . . Tulalip has unreasonably waited five years to bring the present action while knowing that the other 26 tribes to Compact amendment X2 would take actions in the interim that would result in prejudice to them if Appendix X2 is changed or abrogated. These settled expectations and adverse consequences were reasonable, and Tulalips' lawsuit must be considered in light of the doctrine of laches.

Proposed Amicus Br. at 12-13.

First, to be clear, Tulalip did not "complain" about Appendix Spokane when it took effect because it had no complaint with that agreement; nor has it raised any complaint whatsoever about Appendix Spokane in this suit. Tulalip is simply invoking its rights under its MFTs in light of the State's permissible and more-favorable agreement with the Spokane Tribe. This suit stems from the State's refusal to amend Tulalip's compact, not from any assertion that the State's agreement with the Spokane Tribe was somehow impermissible.[6]

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[5] The assertion is also incorrect. Tulalip executed Appendix X2 on March 13, 2007. *See* Tulalip Compact, Signature Page (Seventh Amendment), p. 186. Appendix Spokane did not take effect until April 30, 2007. *See* Response at 5-6. And the Spokane Tribe did not become permitted to operate under the terms of Appendix X2 along with its ITF until October 24, 2008. *See id*. at 7. But again, these matters are altogether irrelevant under the plain terms of the MFTs.

[6] Tulalip's cause of action accrued by operation of the Compact on November 14, 2011, when 20 days had passed since the Tribe provided its Section 12(b) notification to the State. *See* Compact § 12(d) (Eighth Amendment), p. 248. In any case, it is the Samish Tribe, not Tulalip, that complains about an ITF accessible by other than a majority-approved plan and yet waited an

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Second, the Samish Tribe's assertion that it and the other tribes had settled and reasonable expectations that "the current settled leasing arrangement" of Appendix X2 "will continue unchanged," Proposed Amicus Br. at 13, is belied by the plain language of Appendix X2. As noted above, all of the tribes that collectively negotiated Appendix X2 agreed that (1) its terms could be amended at any time by mutual agreement between the State and any individual tribe, Appendix X2, § 15.1.2, p. 234; (2) its terms relating "to the subject matter of Tribal Lottery System Terminals" were subject to amendment at the signatory tribe's request after June 30, 2009, *id*. at § 15.1, p. 234; (3) the State could permissibly agree "to permit an allocation of Player Terminals to a tribe . . . on terms which are more favorable, than as set forth herein," *id*. at § 12.4, p. 227; and (4) "[n]otwithstanding anything in this Appendix to the contrary, the [State] and Tribe may agree on alternative provisions to those set forth herein," *id*. at §11, pp. 224-25. Thus, the Samish Tribe's expectation that the terms of Appendix X2 would "continue unchanged" was certainly not "reasonable." Indeed, in light of the very terms of Appendix X2 that the Samish Tribe agreed to, that expectation was eminently unreasonable.

9. Conclusion

For the reasons stated above, the Tulalip Tribes respectfully request that the Court grant its Motion for Summary Judgment and deny the State's Cross Motion for Summary Judgment.

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unexplained five years (after Appendix Spokane introduced those very elements into tribal gaming in Washington) to raise its complaint.

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Respectfully submitted,

Dated: December 17, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2012, I electronically filed this Reply on Motion for Summary Judgment and Response to Cross Motion for Summary Judgment with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to all parties registered in the CM/ECF system for this matter.

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