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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FORT INDEPENDENCE INDIAN COMMUNITY, a federally-recognized tribe, Plaintiff, **v.** **STATE OF CALIFORNIA; ARNOLD SCHWARZENEGGER, Governor of the State of California; JERRY BROWN, Attorney General of the State of California,** Defendants.	2:08-CV-00432-LKK-KJM **DEFENDANTS' POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, OR ALTERNATIVELY PARTIAL SUMMARY JUDGMENT** Date: May 18, 2009 Time: 10:00 a.m. Dept: 4 Judge The Honorable Lawrence K. Karlton Trial Date 11/10/2009 Action Filed: 2/26/2008

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Defendants the State of California, and Arnold Schwarzenegger, the Governor of the State of California (collectively, State Defendants[1]) submit the following memorandum in opposition to Plaintiff the Fort Independence Indian Community's (Tribe) motion for summary judgment.

INTRODUCTION

The parties filed cross motions for summary judgment on the issue of whether the State Defendants negotiated with the Tribe for purposes of entering into a class III gaming compact in good faith, pursuant to the Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166-1168, 25 U.S.C. §§ 2701 - 2721 (IGRA). The parties' separate statements of undisputed facts establish the record of the negotiations. The record of the negotiations show that the parties engaged in serious negotiations. The negotiations were ongoing for almost four years before the Tribe brought suit. The Tribe contends the State Defendants "preconditioned" the negotiations on the Tribe's acceptance of two compact provisions. The Tribe alleges those compact provisions are categorically forbidden by the terms of IGRA and the State's insistence on the compact provisions is conclusive of a lack of good faith.

What the Tribe does not explain is that the Tribe itself opened negotiations offering to accept compact terms it now claims are categorically forbidden by IGRA. Nor does the Tribe explain why it continued to negotiate for years after the State had allegedly "preconditioned" the negotiations on these provisions. The Tribe does not explain why it is bad faith for the State to negotiate for compact provisions the Tribe itself stated its willingness to negotiate. The record establishes that during the course of the negotiations, the parties negotiated these provisions—the State made offers and the Tribe responded with counter-offers. The parties had not reached impasse in the negotiations, but merely had not reached an agreement on the compact provisions when the Tribe filed suit. Although the Tribe may exercise its sovereign right to decline the State's offered terms for a compact, the Tribe's refusal to accept that compact does not by that fact alone denote "bad faith" by the State in its negotiations with the Tribe. The State negotiated

[1] Defendant California Attorney General Jerry Brown was dismissed by the Court's September 10, 2008, Order.

in good faith with the Tribe in accordance with the provisions of IGRA. The Tribe's motion for summary judgment should be denied and summary judgment granted in favor of the State Defendants.[2]

ARGUMENT

THE RECORD OF COMPACT NEGOTIATIONS ESTABLISH THAT THE STATE NEGOTIATED IN GOOD FAITH

The record of the negotiations does not support the Tribe's claim that the State did not negotiate in good faith because it allegedly preconditioned negotiations on provisions forbidden by IGRA. The record establishes that the State negotiated potential revenue sharing provisions (as initially suggested by the Tribe) and the possible discontinuance of the Tribe's RSTF contributions pursuant to the 1999 Compacts if and when the Tribe were to enter into a separate compact with the State. The record shows that the Tribe also negotiated these provisions, contrary to its assertion that it insisted throughout the negotiations that the provisions were "patently unreasonable." (Plaintiff's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment (Tribe's Memo) at p. 3.) The Tribe and the State continued compact negotiations until the Tribe unilaterally stopped negotiations by initiating this lawsuit.

IGRA was intended to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" and to provide a basis for state involvement in regulating Indian gaming to shield it from organized crime and corruption, to prevent exploitation for non-Indian profit, and to ensure fair and honest gaming. 25 U.S.C. § 2702(1), (2). IGRA provides that a tribe may conduct certain gaming activities only if authorized pursuant to a valid compact between the tribe and the state. 25 U.S.C. § 2710(d)(1)(C). If a tribe requests that a state negotiate over gaming activities that are permitted in that state, the state is required to negotiate in good faith toward the formation of a compact. 25 U.S.C. § 2710(d)(3)(A).

[2] State Defendants incorporate herein by reference the State Defendants' Memorandum of Points and Authorities in Support of their Motion for Summary Judgment, filed on January 17, 2009.

In determining whether a state has negotiated in good faith, a court may consider "the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities." 25 U.S.C. § 2710(d)(7)(B)(iii)(I).

I. IGRA PERMITS NEGOTIATIONS OVER A BROAD RANGE OF SUBJECTS AND THE CHALLENGED COMPACT PROVISIONS ARE WITHIN THAT RANGE.

IGRA authorizes a tribe and a state to negotiate over a broad range of issues, provided they all directly relate to the tribe's class III gaming activities. 25 U.S.C. § 2710(d)(3)(C)(vii). IGRA's text and legislative history clearly demonstrate that Congress intended to allow tribes and states to negotiate as "equal sovereigns" and to define for themselves the manner and degree to which jurisdiction over a broad array of class III gaming-related issues would be shared. IGRA's Select Committee Report provides insight into the meaning of section 2710(7)(B) in the context of IGRA generally. The Select Committee "recognize[d] that [section 1270(7)(B)(iii)(I)] may include issues of a very general nature ...." S. REP. NO. 100-446 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, at 15.

The Select Committee Report indicates a congressional understanding that "both State and tribal governments have significant governmental interests in the conduct of class III gaming." S. Rep. No. 100-446, at 13. It identifies a state's governmental interests in the context of compact negotiations as including "the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens." *Id*.

Finally, the Select Committee Report indicates that Congress also intended to create a regulatory scheme that would "achieve a fair balancing of competitive economic interests." *Id*., at 1. While no precise definition of "competitive economic interests" is provided either in IGRA's text or its legislative history, it is obvious that myriad issues affect the parties' competing economic interests, including the issues challenged here as inappropriate subjects of bargaining: revenue sharing provisions and the possible discontinuance of the Tribe's receipt of annual $1.1 million RSTF payments.

A state may not use the compact provision as a "subterfuge" for a wholesale imposition of State jurisdiction on tribal lands related to "any other economic or regulatory issue that may arise between tribes and states in the future." *See* S. Rep. No. 100-446, at 14; *Coyote Valley Band of Pomo Indians v. State of California (Coyote Valley II)*, 331 F.3d 1094, 1112 (9th Cir. 2003). That California did not violate this principle is illustrated by what the State did not seek in negotiations. For example, the State did not seek regulatory jurisdiction over all land use decisions, over nongaming-related enterprises, or over civil matters unrelated to tribal gaming activities. Nor did the State seek any form of direct taxing jurisdiction. Had the State insisted upon the inclusion of such provisions, such conduct might have been determined to evince a lack of good faith. The provisions the State did seek are directly related to some aspect of tribal gaming and are, therefore, proper. The Tribe attempts to stop the State from pursuing legitimate bargaining options by characterizing them as "a patent violation of IGRA and *per se* bad faith." (Tribe's Memo, p. 1:6-7.)

However, because the State has offered to allow the Tribe to conduct forms of class III gaming that are prohibited to all others in the State—slot machines and banked and percentage card games (e.g. blackjack)—it is entitled to seek something in return for this major financial monopoly. *Artichoke Joe's v. Norton*, 216 F.Supp 2d 1084, 1130 (E.D. Calif. 2002)("There is no dispute that by permitting tribes to exercise gaming rights on Indian land free from non-tribal competition, they are provided with a valuable economic benefit.") The Tribe offered the State no consideration for the right to conduct class III gaming. The Tribe's last compact negotiation offer was:

It would operate 349 class III gaming devices;

It would contribute no revenue from the devices to the State;

It would continue to receive its $1.1 million RSTF payment.

Plaintiff's Separate Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment (PSUF), at ¶ 28.)

In essence, the Tribe's sought a class III gaming compact without offering any consideration to the State in return for the State's offer of a gaming monopoly.

A. Revenue Sharing Is a Permissible Subject for Compact Negotiation

1. The Tribe Opened Negotiations Offering To Revenue Share With The State.

The Tribe itself opened negotiations offering to share its gaming revenues with the State. In July 2004, the negotiation process began with the Tribe's formal request to begin negotiations. (PSUF 1) In its request to begin negotiations, the Tribe stated:

> The Fort Independence Tribe agrees with the Governor's belief that Indian Tribes should provide compensation to the state in recognition of the unique privilege and benefit that gaming provides.

Id. The Tribe also stated "[w]e estimate that the approximately 80 gaming devices the Tribe is seeking would generate a win per day of about $80 per machine" (*Id.*) This data provided by the Tribe is relevant to revenue sharing and had to have been provided solely as a starting place for discussing revenue sharing with the State. The fact that the Tribe opened negotiations with this offer negates its claim that negotiations over the provision are a violation of IGRA. It also negates its claim that the State "preconditioned" negotiations on a revenue sharing provision.

The State agreed to meet with the Tribe in accordance with its representations; the parties met for several negotiation sessions in the Fall of 2004. (PSUF 2, RN, Ex. B) In December 2004, the Tribe drafted a compact preamble. In this preamble, the Tribe expressly recognized the benefits it would gain from its monopoly and that that the State's grant of that monopoly was a "meaningful concession" offered in good faith for revenue sharing:

> Whereas, the State and the Fort Independence Paiute Tribe recognize that the *exclusive rights* that the tribe will enjoy under this Compact *create a unique opportunity* for the Tribe to operate a Gaming Facility *in a economic environment free from competition* from Class III Gaming on non-Indian lands in California and that *this unique economic environment is of great value to the Tribe*; and
>
> Whereas, *the Tribe in consideration of the exclusive rights* enjoyed by the Tribe, the right to operate the desired numbers of Gaming Devices, *and other meaningful concessions offered by the State in good faith negotiations, agrees to make a fair revenue contribution to the State*, to enter into arrangements to mitigate to the extent possible the off-reservation environmental and direct fiscal impacts on the local community and local governments, and to offer consumer and employee protections."

(PSUF 6) (emphasis added).

The State negotiator incorporated the Tribe's preamble into a draft compact that included terms upon which the parties had reached agreement during the negotiation sessions, including revenue sharing. (PSUF 8.) But the draft compact left open other issues upon which agreement had not been reached—exclusivity and Revenue Sharing Trust Fund (RSTF) payments. (PSUF 9.) The parties met to discuss the draft compact on December 21, 2004. (SUF ¶ 13.)

There was no negotiation activity for the next eight months, from the December 21, 2004, meeting until August 30, 2005. On August 30, 2005, a new lawyer[3] for the Tribe requested a meeting "to discuss the formation" of a compact. This request made no mention of any prior disagreement between the parties or disputed preconditions, in fact it used language as if this were the first request for negotiations. (PSUF 10, SUF ¶ 14). The parties met on January 26, 2006. (SUF ¶ 18).

Five months after that negotiation session, on June 30, 2006, the Tribe wrote to discuss its concerns with the December 2004, draft compact. (PSUF 17.) Two weeks later, on July 14, 2006, the Tribe wrote again to discuss its concerns with the December 2004, draft compact. (PSUF 19.) The next negotiation session was held on December 5, 2006, and the Tribe provided a draft compact at that session. (PSUF 21, 31.) The draft compact contained handwritten provisions expressly addressing exclusivity and the RSTF payments that had been left "open" in the December 2004, draft compact. (PSUF 21.) From this history, and the additional negotiation history detailed later, it is incontrovertible that over the course of the negotiations, the Tribe made proposals regarding the provisions it now contends the State unilaterally demanded in bad faith.

2. The Request to Revenue Share was not a forbidden topic for compact negotiations under IGRA

Revenue sharing is not categorically forbidden as a compact provision by IGRA. IGRA provides a list of allowable subjects. 25 U.S.C. § 2710(d)(3)(C). Except for assessments agreed to under section 2710(d)(3)(C)(iii), the State may not impose a direct tax. However, if meaningful concessions are offered as consideration for the request for revenue sharing it is not a

[3] The firm remained the same law firm that had begun negotiations, it a different attorney from the prior negotiation activity.

direct tax. The Tribe argues that the exclusivity offered by the State through a gaming compact is "meaningless" because the State constitution already provides it with gaming exclusivity. The Tribe argues that because the State has nothing meaningful to give through a compact, the State's request to revenue share equals a direct tax and *per se* bad faith. (Tribe's Memo, p. 1). But even if the State's request were determined by a court to be an attempt to impose a direct tax, it is not conclusive proof of bad faith. *Coyote Valley II*, 331 F.3d at 1113. IGRA provides that an attempt to impose a direct tax on a tribe is "evidence" that the state failed to negotiate in good faith, not conclusive proof. (*Id.*) The good faith inquiry must be fact specific to the individual situation. (*Id.*)

a. A Tribe's Authorization to Conduct Class III Gaming is Conferred Exclusively Through a Tribal-State Compact

Nothing in IGRA authorizes the Tribe to conduct class III gaming in the absence of a tribal-state compact. IGRA was enacted by Congress in 1988 in order to create a framework for regulating gambling activity on Indian lands. For tribes and state governments that choose to follow the IGRA process, the statute creates three separate gaming categories with different levels of governmental regulation. The Tribe argues that the exclusivity to offer slot machines and banked and percentage card games conferred by the compact is actually already conferred by the state constitution. But the ability to conduct class III game *requires* a compact. *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp.1292, 1294 (D. Ariz. 1992) ("If a tribe wishes to conduct class III gaming, it must first enter into a compact with the State governing the conduct of gaming activities with the State in which the gaming will be located.")

Class I gaming consists of "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Tribes have exclusive jurisdiction over the regulation of class I gambling. 25 U.S.C. § 2710(a)(1). Class II gaming provides a broader scope of gambling that includes bingo games and non-banked card games that are consistent with state law. 25 U.S.C. § 2703(7). Tribes are responsible for licensing and regulating class II gaming without input from the states. However, a tribe may operate this form of gaming only if:

(1) it is permitted in the state where the tribe is located; (2) the tribe adopts an ordinance or resolution to conduct and regulate class II gaming; and (3) the resolution is approved by the Chairman of the NIGC. 25 U.S.C. § 2710(b). Class III games are all other forms of gambling that are not included in the definitions of the previous two classes. 25 U.S.C. § 2703(8).

Under IGRA, class III gaming on Indian lands is lawful only if: (1) the tribe adopts a resolution to approve and regulate these gambling activities, which is approved by the Chairman of the National Indian Gaming Commission (NIGC); (2) the tribe is located in a state that allows the proposed gambling to any person; and (3) "*conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State*." 25 U.S.C. § 2710(d) (emphasis added).

In addition to the plain language of 25 U.S.C. § 2710(d)(1)(C), the Ninth Circuit has stated that "[a]t the very least, a 'person of ordinary intelligence' would have known that operating class III games in Indian country without a Tribal-State compact violated IGRA." *U.S. v. E.C. Investments, Inc*., 77 F.3d 327, 332 (9th Cir. 1996).

b. Nothing In the California Constitution Or IGRA Compels the State To Enter Into a Compact

The Tribe essentially argues that the State cannot ask the Tribe for consideration in return for granting the Tribe a gaming monopoly. (Tribe's Memo. at p. 20.) The Tribe reasons that IGRA imposes a duty on the State to give it a compact by which it may conduct class III gaming. Further, because, under the California Constitution, only Indian tribes may negotiate for compacts, the Tribe argues that the State has a legal obligation to give the Tribe a class III gaming monopoly. (*Id*. at 24.)

The Tribe's assertions confuse an obligation to negotiate in good faith to conclude a compact with a duty to actually complete or conclude such negotiations. The Tribe's interpretation of IGRA and California's constitution fails to account for the possibility of a negotiation impasse. Inherent in any good faith negotiation is the chance that the parties may not be able to come to an agreement on terms – irrespective of their good faith. *NLRB v. Tomco Commc'ns, Inc*., 567 F.2d 871, 884 (9th Cir. 1978); *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 232 (D.C. Cir. 1996). Nothing in IGRA or the California Constitution indicates an

intent to alter this common understanding of the nature of good faith negotiation. Indeed, the express terms of those laws confirm that the common meaning of good faith negotiation was intended. As a result, under established principles regarding the award of a franchise or monopoly, because the State is not obligated to agree to any compact, it may insist upon the receipt of consideration in return for agreeing to what a tribe seeks from a compact. 37 C.J.S., Franchises § 12, at 146 (2008).

c. Article IV, Section 19(f) of the California Constitution Does not Compel the Governor to Negotiate – Much Less Execute – a Compact

In March 2000, California voters approved Proposition 1A which created a tribal gaming exception to the prohibitions in the California Constitution. Article IV, section 19(f) provides:

> Notwithstanding subdivisions (a) and (e) [prohibiting lotteries and New Jersey and Las Vegas style casino gambling] and any other provisions of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.

Under this provision, the Governor is merely authorized to negotiate to conclude a compact. Nothing in that provision compels the Governor to negotiate or to otherwise execute a compact with any tribe that requests negotiations. Further, that constitutional provision expressly states that any tribal right to conduct class III gaming is dependent upon the existence of a compact. As a result, contrary to the Tribe's suggestion, the California Constitution does not grant any tribe the *right* to conduct class III gaming. It merely provides tribes with the unique *opportunity to negotiate* with the Governor for a compact that, if agreement is reached, could result in the tribe's legal ability to conduct such gaming if the Legislature were to ratify that compact and if the Secretary of the Interior were to approve it.

d. Nothing in the California Constitution Compels the Legislature to Ratify Any Compact Executed by the Governor

Nothing in the California Constitution imposes any duty upon the California Legislature to ratify any compact executed by the Governor. Nothing in the State's constitution imposes any duties or obligations upon the Legislature with respect to compact ratification.

e. Nothing In IGRA Compels a State to Execute a Compact Where the State Has Negotiated in Good Faith

Nothing in IGRA compels a state to actually execute a compact where the state has negotiated in good faith. IGRA in 25 U.S.C. § 2710(d)(3)(A) merely provides:

> Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

Thus, IGRA does not compel the State to enter into a compact upon receipt of a tribal request to negotiate. Rather, it requires the State to enter into negotiations. Indeed, IGRA does not permit a tribe to pursue an action against a state simply on the basis that a compact has not been entered into within 180 days after the tribe made its negotiation request. Rather, the tribe is required to show that a compact has not been entered into and that the state either "did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such a request in good faith." 25 U.S.C. §§ 2710(d)(7)(A)(i); 2710(d)(7)(B)(ii). Similarly, the only basis upon which a court may order a state to actually conclude compact negotiations with a tribe is if the court finds that a state has either failed to enter into negotiations or has failed to conduct such negotiations in good faith. 25 U.S.C. § 2710(d)(7)(B)(iii).

f. The District Court's Order in *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*

The Tribe cites the district court's order in the case *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger (Rincon*) as support for the position that the State acted in bad faith by requesting revenue sharing. (Tribe's Memo., pp. 21-23.) There are

essential differences between the negotiations in *Rincon* and the negotiation in this case. Foremost, the Rincon tribe is already conducting class III gaming pursuant to a compact and the parties were negotiating for an *amendment* to Rincon's compact. Fort Independence, on the other hand has been negotiating an initial compact to allow it to *commence* class III gaming. The court in *Rincon* in large part based its holding on the conclusion that the State could not use the same consideration it had offered in the original compact (the exclusive right to conduct certain forms of gaming) as consideration for the enhanced revenue sharing in the compact amendment.

The State disagrees with the *Rincon* decision and has appealed the district court's order to the Ninth Circuit.[4] The district court concluded that the revenue sharing requested by the State in *Rincon* was not sufficient consideration for the right to operate additional gaming devices because it was allegedly out of proportion to the consideration offered under the tribe's original compact. The district court also concluded that the State could not seek a percentage of Rincon's net win to go into the State's general fund under the amendment because the State did not seek similar terms under Rincon's original compact. The court erred in concluding that the State's attempt to impose a direct tax was conclusive proof of its lack of good faith. An attempt to impose a direct tax is evidence of a lack of good faith, not conclusive proof. *Coyote Valley II*, 331 F.3d at 1113. A court must then examine the entire record of the negotiations and conduct a good faith inquiry is that is "nuanced and fact-specific." *Id.*

g. It was not bad faith for the State to seek terms approved in other compacts by the Secretary of the Interior

The Secretary of the Interior has approved compacts and compact amendments negotiated by the Schwarzenegger administration which included provisions for revenue sharing and distribution of the revenue sharing into the general fund. Pursuant to 25 U.S.C. § 2710(d)(8)(B)(i), the Secretary of the Interior is authorized to disapprove a compact if that compact "violates any provision of [IGRA]." The Secretary's approval of the compacts constitutes a determination that they did not violate any provision of IGRA. The Tribe cites to

[4] Ninth Circuit Court of Appeals, Case No. 08-55914. Briefing is complete and awaiting the scheduling of oral argument.

letters by the Secretary that set out the Secretary's policy of not approving revenue sharing provisions that do not offer a meaningful economic benefit to the tribes. (Tribe's Memo., p. 26.) That the Secretary has approved compacts and compact amendments negotiated by the Schwarzenegger administration supports the State's position that revenue sharing is an allowable subject for negotiation under IGRA and the State offered meaningful consideration in return for the request.

h. The economic feasibility of the Tribe's gaming facility is not a factor in the determination of the State's good faith

The Tribe cites to the Market Assessment it commissioned for the claim that the State's request for revenue sharing would cause the facility to operate at a loss. (Tribe's Memo., p. 27.) The Market Assessment does not provide any information other than the projected revenue the Tribe could expect with 120 and 150 gaming devices. (PSUF 29.) The Market Assessment projects first year revenue of approximately $5.5 million and $6.9 million respectively. The Market Assessment provides no information regarding the operating costs, debt servicing or management contract terms. In the negotiations, the Tribe sought to more than double (349) the number of gaming devices discussed in the Market Assessment (120/150). But the Tribe claimed that *any* revenue sharing would mean the facility would operate at a loss. (PSUF 30.) The Tribe has not produced any facts in support of that claim. The statement of undisputed fact refers to a statement made in a letter (PSUF 30), there is no information other than the projected revenue from gaming in the Marketing Assessment. (PSUF 29.) If the ten percent of net win sought by the State would cause the gaming facility to operate at a loss, the gaming facility was inherently economically infeasible. The Tribe also claims without supporting facts that the ten percent revenue sharing requested by the State would make the State the primary beneficiary of the gaming facility. (Tribe's Memo., p. 18.)

The percentage sought by the State was not unreasonable. The Yurok Compact provides for the same revenue sharing schedule that the State proposed to the Tribe. The Yurok Tribe operates only ninety-nine slot machines but shares ten percent of its revenue with the State.

3. Revenue Sharing Funds May Be Utilized For A Non-Gaming Related Purpose Where, As Here, That Use Results In The Fulfillment Of An IGRA Objective – Increased Tribal Gaming Revenues.

The Tribe argues that revenue sharing funds may not be utilized for a non-gaming related purpose – specifically, they may not be deposited into a state's general fund. The Tribe principally relies upon the fact that in *Coyote Valley II*, 331 F.3d at 1115, the court specifically refused to rule on whether revenue sharing trust funds could be placed into a state's general fund (*id*. at n.13) and utilized the fact that Special Distribution Fund (SDF) money would not go into the State's "pocket" as a basis for approving that form of revenue sharing. *Id*. at 1115. The Tribe also points to the district court order in the *Rincon* case. From this, the Tribe argues that the placement of revenue sharing funds into the State's general fund is impermissible and constitutes bad faith on the part of the State.

The Tribe's assertions ignore the fact that in *Coyote Valley II*, 331 F.3d at 1111-14, the court specifically approved revenue sharing in the form of the RSTF. RSTF funds distributed to Non-Compact Tribes need not be utilized for gaming-related purposes. Instead, they may be used without restriction by those tribes for any purpose. The Ninth Circuit approved that form of revenue sharing because it had the effect of increasing tribal revenues from gaming. *Coyote Valley II*, 331 F.3d at 1111.

Allowing states to deposit revenue sharing monies into their general funds provides a necessary incentive for states to grant tribes the monopolies on class III gaming that vastly increase tribal gaming revenues – thereby fulfilling one of IGRA's objectives. The inability of the State to obtain general fund revenue sharing in return for granting tribes a monopoly on class III gaming could result in the loss of the additional gaming revenue that a monopoly provides tribes.

In *Coyote Valley II*, 331 F.3d at 1115, the Ninth Circuit recognized that states are entitled to negotiate in furtherance of their economic interests when engaged in compact negotiations and that a state's governmental interest with respect to class III gaming on Indian lands includes "its economic interest in raising revenue for its citizens." *Id*. As a result, the mere fact that a state's

revenue sharing proposal places funds in a state's general fund is not inconsistent with IGRA as long as that result furthers an IGRA objective, such as an increase in tribal gaming revenue.

Quoting from 25 U.S.C. § 2710(d)(7)(B)(iii)(1), the court in *Coyote Valley II*, 331 F.3d at 1115, noted that IGRA allows a reviewing court to look at a state's "financial integrity" as well as any "adverse economic impacts on [the State's] existing gaming activities" in deciding whether a state has *negotiated* in bad faith. *Id.* Thus, as the court found, IGRA contemplates that a state's legitimate negotiation interests involve more than an interest in protecting its existing gaming activities and can involve the state's overall financial integrity. *Id.*

B. The Tribe's $1.1 million RSTF payment is a permissible subject for compact negotiations.

The Tribe argues that the State's suggestion that it agree to discontinue its receipt of the $1.1 million RSTF payment in return for the right to engage in class III gaming is a forbidden subject for compact negotiations under IGRA. In the *Coyote Valley* case, that tribe argued that the compact provision requiring it to contribute to the RSTF was a forbidden compact provision. As explained in *Coyote Valley II*, the RSTF advances the goals of IGRA to promote "tribal economic development, self-sufficiency, and strong tribal governments." *Id*. at 1111. The RSTF is mechanism "whereby all of California's tribes-not just those fortunate enough to have land located in populous or accessible areas-can benefit from class III gaming activities in the State." *Id*. Thus, the State's request that a tribe contribute to the RSTF for the benefit of other tribes has been held to be related to gaming and to be authorized by IGRA. *Id.*

The Tribe argues that the State's request to discontinue receipt of the $1.1 million RSTF payment was in bad faith because it violates a duty the Tribe alleges that the State owes it. The Tribe alleges that the State owes the Tribe, as a third party beneficiary of the 1999 compacts, a duty of good faith and fair dealing. (Tribe's Memo., p. 17.) The cases cited by the Tribe deal with insurance companies and the insurer's bad faith refusals to pay judgments and the affected rights of third parties and do not apply to the 1999 Compact. Under the express terms of the 1999 Compact, the Tribe has no standing to enforce any of the terms of the compact. Section 5.1 (c) provides: "Third Party Beneficiaries. Except to the extent expressly provided under this Gaming

Compact, this Gaming Compact is not intended to, and shall not be construed to, create any right on the part of a third party to bring an action to enforce any of its terms." The clear intent of the 1999 Compact is to allow only the compacting tribes and the State to enforce the compacts. The Tribe has no standing to enforce the terms of the compact and is only an incidental beneficiary of the 1999 compacts. Its status as a third party beneficiary of the 1999 Compact does not operate as a bar to the State's request that it agree to discontinue receiving its RSTF payments.

With no class III gaming devices, the Tribe has been benefitting from receipt of the annual $1.1 million RSTF payment. This money comes from payments made by other California tribes conducting class III gaming pursuant to their compacts. The Governor considered the Tribe's continued receipt of the $1.1 million RSTF payment after it started operating class III gaming devices to, in effect, constitute the subsidization of the Tribe's casino by other tribes. (PSUF 25.) If the Tribe's casino was in effect being subsidized, it was not moving the Tribe toward self sufficiency, and therefore not meeting the goal of IGRA and the Tribe's stated goal of desiring to reach self-sufficiency. The Tribe's opening letter stated that the gaming facility would "enable its community to eventually be self-sufficient." (PSUF 1.) The Tribe stated in its draft preamble that the facility would "enhance tribal economic development and self-sufficiency." (PSUF 6.)

The RSTF has regularly experienced shortfalls, and these shortfalls are made up by deductions from the SDF. Cal. Govt. Code § 12012.90(e). The State negotiated for the Tribe to stop or phase out its RSTF payments. This would increase the amount of money available to pay other tribes receiving RSTF payments, reduce the amount of money required to be backfilled by the SDF, and increase the amount of money available to programs funded by the SDF. As in *Coyote Valley II*, 331 F.3d at 1111, compact terms regarding RSTF payments made to other tribes is an allowable subject for compact negotiations. The State has a legitimate economic interest in increasing the amount of money available in the RSTF and SDF, and its request regarding the Tribe's RSTF payments was also related to that interest. Those interests are the same the Ninth Circuit held were in furtherance of IGRA in *Coyote Valley II*. (*Id.*)

The State did not unilaterally impose a demand that the Tribe discontinue receiving the RSTF payments. During the course of negotiations, the Tribe proposed a phase out of its RSTF

payments. (PSUF 26.) During compact negotiations with the Yurok Tribe, the State also sought a discontinuation of the tribe's RSTF payments. (PSUF 17 [references Yurok negotiations].) Ultimately, the final compact reached with the Yurok Tribe allowed that tribe to continue to receive the RSTF payments, and a final compact with the Tribe here might have also reached the same result. (PSUF 42.) During the course of these negotiations, the State moved during from requesting a complete stop of RSTF payments to proposing a gradual phase out over time. This movement in position is not a precondition or inflexible demand, merely the result of give and take during negotiation over a compact provision. The Yurok compact shows that the State's final position may have been different had the Tribe allowed the negotiations to continue. The State's negotiation over the continuance of this provision did not constitute a failure to negotiate in good faith.

Further, the RSTF payment provision was interconnected with the revenue sharing provision. The compact negotiations on these two provisions were part of a total package of negotiation terms. The State was attempting to forge an agreement that was of mutual benefit to both parties—not just one. That the Tribe made proposals during the negotiations regarding the RSTF payments is significant. Those proposals include: 1) retaining RSTF payments, but limiting their use to non-gaming purposes (PSUF 23 [Tribe's February 2007 draft compact]), and 2) discontinuing the receipt RSTF payments upon reaching a certain revenue threshold. (PSUF 26 [May 2007 letter from John Peebles]). For its part, the State moved its position from asking for a complete discontinuation of the Tribe's receipt of RSTF payments upon commencing gaming to a gradual phase-out over twelve years. The final Yurok compact shows State could have eventually conceded the point altogether. The Yurok compact also shows that the State did not have a "take it or leave it" approach to its request to discontinue receiving RSTF payments.

But the Tribe ended negotiations by filing suit. The State's position at the time negotiations were ended was not necessarily the State's final position. The State's last correspondence indicated that it was willing to continue to negotiate. (August 30, 2007 letter from Andrea Hoch, PSUF 31.)

II. AN EXAMINATION OF THE RECORD OF NEGOTIATIONS SHOW THE STATE NEGOTIATED IN GOOD FAITH.

The Tribe argues that because the State negotiated over revenue sharing and the discontinuation of RSTF payments, it constitutes *per se* bad faith. There is no *per se* bad faith under IGRA. Even if the two contested provisions were determined to be an attempt to impose a direct tax, it would only constitute evidence the State failed to negotiate in good faith. 25 U.S.C. § 2710(d)(7)(B)(iii)(II). The court must then conduct a "nuanced and fact-specific" examination of the entire record of the negotiations. *Coyote Valley II*, 331 F.3d at 1113. The Tribe contends that a finding that a state has sought to impose an impermissible tax upon a tribe is sufficient, in and of itself, to support the legal conclusion that the state has thereby negotiated in bad faith. This argument was rejected by the court in *Coyote Valley II*, 331 F.3d at 1113. The court responded to the same contention and found that the mere fact a state is found to have demanded direct taxation of a tribe does not constitute "conclusive proof" of the state's bad faith, but rather is merely "evidence" of bad faith negotiation. *Id*. Moreover, the court held that a good faith inquiry is fact-specific, nuanced and not amenable to bright-line rules. *Id*. Such an inquiry plainly involves more than the recitation of a legal conclusion and, in fact, requires an examination of the record of negotiations. Thus, a court is required to do more than simply conclude a state has sought to impose an impermissible tax. Instead, it must examine the objective record, including the tribe's negotiation positions, before it may conclude that the state has negotiated in bad faith.

Examination of the record shows that during the course of negotiations, the Tribe stated that: 1) "Despite these outstanding issues, we believe that all matters can be resolved to both the Tribe and the State's mutual satisfaction." (July 6, 2006, letter from Chairman Dahlberg to Governor Schwarzenegger, PSUF 18); 2) "Despite the outstanding issues referenced above, we believe that a mutually agreeable Compact can be negotiated in the very near future." (July 14, 2006, letter from John Peebles to Andrea Hoch, PSUF 19); 3) "We continue to believe that a mutually agreeable Compact can be negotiated in the very near future." (May 22, 2007, letter from John Peebles to Andrea Hoch, PSUF 26); and 4) "We appreciated the productive nature of

the meeting and look forward to our next discussion." (July 17, 2007, letter from John Peebles to Andrea Hoch, PSUF 26). The Tribe now contends that it insisted throughout the negotiations that the compact provisions were forbidden by IGRA and that the State was not negotiating in good faith. But despite starting negotiations in July 2004, the Tribe only indicated in November 2007— over three years after negotiations began— that it felt the State was not negotiating in good faith. The impasse in negotiations was the creation of Tribe. The State's last correspondence with the Tribe indicates the State's continuing desire to negotiate. The record demonstrates that the State engaged the Tribe in good faith negotiations for a class III gaming compact, but was unable to complete the negotiations because, ultimately, the Tribe chose to file suit over continuing negotiations.

CONCLUSION

The record simply does not support a finding that the State of California failed to negotiate in good faith. The record affirmatively demonstrates that the State negotiated in good faith. Therefore, the Tribe's motion for summary judgment should be denied.

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Respectfully Submitted,

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