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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FORT INDEPENDENCE INDIAN COMMUNITY, a federally-recognized tribe,

Plaintiffs,

v.

STATE OF CALIFORNIA; ARNOLD SCHWARZENEGGER, Governor of the State of California,

Defendants.

Case No. 2:08-CV-00432-LKK-KJM

PLAINTIFF FORT INDEPENDENCE INDIAN COMMUNITY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT, OR ALTERNATIVELY, PARTIAL SUMMARY JUDGMENT

Date: May 18, 2009
Time: 10:00 a.m.
Dept.: Courtroom No. 4 15th Floor
Judge: Hon. Lawrence K. Karlton

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Pursuant to Federal Rule of Civil Procedure 56(c), Fort Independence Indian Community ("Fort Independence" or "Tribe"), a federally-recognized tribe, hereby submits the following memorandum of points and authorities in support of its Motion for Summary Judgment, or Alternatively, Partial Summary Judgment.

I. INTRODUCTION

This action arises out of California's refusal to enter into a Tribal-State Compact with the Fort Independence Indian Community in violation of the Indian Gaming Regulatory Act ("IGRA"). California demanded as a condition for execution of a Tribal-State Compact that Fort Independence forfeit its rights as an express and intended third-party beneficiary under the 1999 Tribal-State Compacts, and agree to an illegal tax on revenue from the gaming facility. California's repeated demand for inclusion of these provisions represents a patent violation of IGRA, and is *per se* bad faith conduct under the statute.

California's actions in this regard violate both the spirit and express terms of the IGRA which mandate that the operation of a gaming facility on Fort Independence's land is to inure to its primary benefit, rather than the State of California. In short, because California has exacted requirements from Fort Independence which are prohibited by IGRA, the burden of proof lies with California to prove that it has acted in good faith in negotiating a Tribal-State Compact with Fort Independence. California cannot meet this burden, and therefore Fort Independence is entitled to summary judgment on its First Claim for Relief for Violation of IGRA.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

The following facts are set forth in the "Administrative Record" which constitutes the limited evidence in this case.

A. In 1999, California Entered Into Several Tribal-State Compacts With Other Federally-Recognized Tribes, Of Which, Fort Independence is an Intended Third-Party Beneficiary.

In 1999, California entered into sixty (60) Tribal-State Gaming Compacts with Indian tribes (sixty one compacts later received final federal approval; these compacts are hereinafter collectively referred to as "1999 compacts"). (Plaintiff Fort Independence Indian Community Undisputed

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Material Fact ("PUMF") No. 43.) The 1999 compacts define a "Compact Tribe" as "a tribe having a compact with the State that authorizes the Gaming Activities authorized by this Compact." (*Id.*) These compacts defined "Non-Compact Tribes" as "[f]ederally recognized tribes that are operating fewer than 350 gaming devices" and declare that "Non-Compact Tribes shall be deemed third party beneficiaries of this and other compacts identical in all material respects." (*Id.*) Per a state-created Revenue Sharing Trust Fund ("RSTF"), all Non-Compact Tribes in the State of California are entitled to receive "the sum of $1.1 million per year." (*Id.*) The Fort Independence Tribe is a "Non-Compact" Tribe under the 1999 Compacts, and receives funds, in the amount of $1.1 million dollars per year, from the RTSF. (*Id.*)

California, through negotiations with the current administration, executed a compact with the Yurok Tribe in 2007 on August 30, 2006, that was published in the Federal Register on January 2, 2007. This Compact allows the Yurok Tribe to operate ninety-nine Gaming Devices and to continue as an RSTF participant. (PUMF No. 42.) The current administration also recently entered into a compact with the Pinoleville Pomo Nation on March 24, 2009, that authorizes, the Tribe to operate up to 900 gaming devices. (PUMF No. 41.) The definition of Non-Compact tribe in the Pinoleville Pomo Nation Compact is the same as set forth in the 1999 Compact. (PUMF Nos. 41 and 43.) This Compact allows the Pinoleville Pomo Nation to continue to receive RSTF funding if they choose to operate less than 350 gaming devices. (PUMF Nos. 41 and 43.)

B. California Has Concluded Numerous Tribal-State Compacts That Preserve Third-Party Beneficiary Rights Under the 1999 Compacts and Allow Non-Compact Tribes to Continue to Receive RSTF Funding.

As of September 20, 2007, the following tribes had compacts with California and also receive RSTF payments (Gaming Device count, as of March 2006, contained parenthetically): Alturas Indian Rancheria (148); Bear River Band of Rohnerville Rancheria (3160; Big Sandy Rancheria (329); Bishop Paiut-Shoshone Indians (329); Cahto Indian Tribe; Cahuilla Band of Mission Indians (83);

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Chemehuevi Indian Tribe (230); Cher-Ae Heights Indian Community (341); Chicken Ranch Rancheria (255); Coyote Valley Band of Pomo Indians (280); Elk Valley Rancheria (342); Hoopa Valley Tribe (98); Sherwood Valley Rancheria (227); Smith River Rancheria (262); Susanville Indian Rancheria (221). (PUMF No. 41.) Also, as stated above, the State recently negotiated a compact with the Yurok Tribe that allows that tribe to operate ninety-nine Gaming Devices and to continue as an RSTF participant. (PUMF No. 42.)

C. Fort Independence Asks The State of California to Commence Negotiation of a Tribal-State Compact Under IGRA

On July 21, 2004, counsel for Fort Independence requested that the State of California commence negotiations on concluding a Tribal-State compact with it pursuant to the Indian Gaming Regulatory Act ("IGRA"). (PUMF No. 1.) On September 3, 2004, Daniel M. Kolkey, attorney for the State of California, agreed to enter into negotiations to conclude a Tribal-State compact with Fort Independence. (PUMF No. 2.) Between September and December of 2004 Fort Independence and Mr. Kolkey attempted to arrange an initial meeting concerning Tribal-State compact negotiations. (PUMF Nos. 3, 4 & 5.)

On December 16, 2004, counsel for Fort Independence forwarded to Mr. Kolkey a draft preamble for the proposed Tribal-State compact and requested that a draft compact be forwarded to Fort Independence by the meeting on December 21, 2004. (PUMF No. 6.) On December 16, 2004, Mr. Kolkey forwarded a draft Tribal-State compact to Fort Independence for purposes of the meeting scheduled for December 21, 2004. (PUMF No. 7.) The draft Tribal-State compact forwarded to Fort Independence on December 16, 2004 contained a provision at Section 4.3.1, which required the tribe to share revenue with the state in exchange for the right to operate Class III gaming in California. The percentage contribution ranged from 10% to 25% of net win. (PUMF No. 8.) The draft Tribal-State compact forwarded to Fort Independence on December 16, 2004, also contained a provision of Section 5.0 entitled "Revenue Sharing Trust Fund", and states "Open" (PUMF No. 9.).

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D. In 2005 and 2006, Fort Independence Objected To Provisions Regarding Discontinuation of RSTF Funding and Imposition of a State Tax or Assessment in California's Draft Tribal-State Compact As Prohibited By IGRA.

On August 30, 2005, John M. Peebles, counsel for Fort Independence requested a meeting with California to negotiate a Tribal-State Compact pursuant to the IGRA. (PUMF No. 10.) On September 1, 2005, counsel for the State confirmed receipt of the August 30, 2005 letter, and asked Mr. Peebles to contact Mr. Kolkey's office to schedule a meeting. (PUMF No. 11.) From then until January 18, 2006, Fort Independence and California continued to coordinate potential meeting dates. (PUMF Nos.11, 16 and 22 .) During this time period, Fort Independence continued to express its concerns and objections to the provisions of California's proposed Tribal-State Compact. (PUMF No. 17.)

On June 30, 2006, Mr. Peebles corresponded with Mr. Kolkey and objected to the provisions requiring Fort Independence to share a percentage of the net win of its gaming revenue with the State of California, and stated that Fort Independence would not agree to such a provision, since the IGRA prohibited any kind of tax, fee, charge or assessment to engage in Class III gaming. (PUMF No. 17) In addition, Mr. Peebles objected to the provision which required Fort Independence to forego its share of RTSF funding. (PUMF No. 17) On July 6, 2006, Fort Independence's Chairman, Carl Dahlberg, sent a letter to California Governor, Arnold Schwarzenegger, in which he noted that outstanding issues relating to the Tribal-State compact negotiations remained. (PUMF No.18.)

On July 14, 2006, Mr. Peebles corresponded with Andrea L. Hoch, Legal Affairs Secretary for Governor Schwarzenegger and requested further negotiations with California regarding the proposed Tribal-State Compact. (PUMF No. 19.) Mr. Peebles reiterated Fort Independence's objections to the proposed Tribal-State. (PUMF No. 19.) In that letter, Mr. Peebles also noted that, at a meeting held by Governor Schwarzenegger on July 6, 2006, the Governor had "assured tribes that he would consider the individual circumstances of each tribe, including the needs of smaller tribes, and the critical services that the RTSF provides to these smaller gaming tribes." (PUMF No. 19.) On August 9, 2006, in a letter addressed to various tribal chairpersons, including Mr. Dahlberg, Fort

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Independence's Chairman, Ms. Hoch advised that the Governor would not agree to enter into compacts with terms similar to those contained in the 1999 compacts. (PUMF No. 20.)

On November 11, 2006, Fort Independence commissioned Innovation Group to conduct a gaming marketing assessment which would estimate potential gaming revenues to be expected from the opening of a casino pursuant to the terms of the Tribal-State Compact under negotiation with California. (PUMF No. 29.) On December 5, 2006, Mr. Peebles provided a revised version of the proposed Tribal-State compact to the Governor's office for review. (PUMF No. 21.)

On February 20, 2007, Jack Duran, then counsel for Fort Independence, corresponded with Ms. Hoch, and enclosed a draft Tribal-State Compact for the Governor's review and consideration in preparation of negotiations with Fort Independence later in February 2007. (PUMF No. 23.) That revised draft Compact omitted the net win sharing provision at section 4.3.1(b) of the State's proposed Tribal-State Compact, and included a new section 5.0(b), stating: "In light of the Tribe's concomitant needs, and the limit on Gaming Devices specified in section 4.3.1, the Tribe will remain a Non-Compact Tribe, as defined in the 1999 Tribal-State Gaming Compact, and shall be entitled to Revenue Sharing Trust Fund distributions pursuant to Section 4.3.2.1 of the 1999 Tribal-State Gaming Compact provided that the Tribe shall not use any monies it receives from the Revenue Sharing Trust Fund for payment of any costs arising out of, connected with, or relating to any Gaming Activities." (PUMF No. 23.)

E. Negotiations Continue Into 2007, and the State Continues to Demand Terms From the Tribal-State Compact That Violate IGRA.

On February 27, 2007, California State Assemblyman Bill Maze, of the Thirty-Forth Assembly District, corresponded with the Governor's Office, and urged the Governor to negotiate a Tribal-State Compact with Fort Independence that permitted it to continue to receive RSTF funding. (PUMF No. 24.) Assemblyman Maze expressly noted that Fort Independence was remotely located tribe with serious socio-demographic issues that highlighted the need for continued RSTF funding. (*Id.*) Assemblyman Maze also noted that under the 1999 Compacts "both Non-Gaming tribes and tribes who held Compacts but operated 350 or fewer gaming devices (considered Non-Compact Tribes) were exempt from contributing into the RTSF but remained eligible to receive RSTF

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distributions." (*Id.*) On March 21, 2007, Ms. Hoch responded to Assemblyman Maze's correspondence of February 27, 2007, and stated: "[T]he Governor also does not believe that class III gaming should be subsidize [sic] by the RSTF. (PUMF No. 25.) Also, subsidizing tribes to develop casinos where they could not otherwise economically operate would not be consistent with the intent of the Indian Gaming Regulatory Act, which is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." (PUMF No. 25.)

On May 22, 2007, Mr. Peebles corresponded with Ms. Hoch and noted that negotiation meetings had occurred on December 6, 2006 and February 27, 2007. (PUMF No. 26.) Mr. Peebles proposed in this letter that the Tribal-State Compact include provisions that 1) allowed the Tribe to continue to receive funds from the RSTF pursuant to the terms of the 1999 Compact, and 2) any agreement for payments to the State from the Tribe's revenues be offset by the amount the Tribe pays for infrastructure development, local government mitigation costs, and gaming regulation. (*Id.*)

On July 17, 2007, Mr. Peebles corresponded with Ms. Hoch and noted that a negotiation meeting had occurred on July 11, 2007. In his letter, Mr. Peebles reiterated that "any 'net revenues' should be offset by the funds the Tribe provides to the local government through its MOU, and also by the cost to the Tribe of any project that the Tribe participates in that would be classified 'essential governmental functions.'" (PUMF No. 27.)

On August 15, 2007, Mr. Peebles corresponded with Ms. Hoch and in that letter, Mr. Peebles responded to California's proposed Compact terms. (PUMF NO. 28). Mr. Peebles asserted that California's offer of geographic exclusivity was meaningless in light of the fact that then existing California law already provided such exclusivity, and therefore no further substantial economic benefit to Fort Independence would result from inclusion of such a provision. (PUMF No. 28.) The Tribe also noted that requiring it to waive its third-party beneficiary rights to RSTF funding under the 1999 Compacts was not a mandatory subject of negotiation, and that no meaningful concessions were offered in return for the waiver of such rights. (PUMF No. 28.) In conclusion, Mr. Peebles proposed that Fort Independence make "no revenue sharing payments to the state" and it "will continue to receive funds from the RSTF pursuant to the terms set forth in the 1999 Compact." (PUMF No. 28.)

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On August 20, 2007, Darcie L. Houck, counsel for Fort Independence corresponded with Ms. Hoch via email regarding the status of ongoing negotiations. (PUMF No. 30.) In that email, Ms. Houck emphasized that the compensation requested by California was unreasonable, especially since the marketing assessment provided to Ms. Hoch, authored by Innovation Group, showed that the "net win" sharing proposal would cause the casino to operate at a loss, making it economically unviable. (*Id.*) Ms. Houck also emphasized that Fort Independence's third-party beneficiary rights under the 1999 compacts should not be a part of the negotiations as the "allocation of this funding is not directly related to casino operations." (*Id.*)

F. California Rejects Fort Independence's Position and Continues to Demand Revenue Sharing and Forfeiture of the Tribe's RSTF Disbursement in Violation of IGRA.

On August 30, 2007, Ms. Hoch corresponded with Mr. Peebles and Ms. Houck regarding Ms. Houck's August 20, 2007 email, and Mr. Peebles August 15, 2007 letter. (PUMF No. 31.) In her letter, Ms. Hoch rejected the notion that the 1999 Tribal-State Compacts governed the negotiations with Fort Independence concerning continued RSTF funding, and maintained California's position that RSTF funding to Fort Independence should discontinued as a condition to a conclusion of the Compact. (*Id.*) With respect to sharing in the Tribe's net wins, she continued to assert that California was entitled to revenue sharing with the Tribe under applicable law. (*Id.*)

On November 26, 2007, Mr. Peebles responded to Ms. Hoch's letter, dated August 30, 2007. (PUMF No. 32.) In that letter, Mr. Peebles rejected Ms. Hoch's position that continued RSTF funding and net win sharing with California were proper subjects of negotiation under IGRA, and stated that conditioning "the compact on agreement over the terms constitutes bad faith and violates IGRA." (PUMF No. 32.) On January 22, 2008, Ms. Hoch corresponded with Mr. Peebles responding to the November 26, 2007 letter, and noted that the State "construed the November 26, 2007 letter as a rejection of the state's proposed terms contained in Ms. Hoch's August 30, 2007 letter, "without making a counteroffer." (PUMF No. 33.)

On January 25, 2008, Mr. Peebles responded to Ms. Hoch's January 25, 2008 letter and noted that Fort Independence would not agree to the "proposed compact terms set forth in the State's

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August 30, 2007 letter because the State conditioned a compact on the Tribe's agreement to pay gaming revenues to the state and the further requirement that the Tribe withdraw from participation in the revenue sharing trust fund secured by the 1999 Compacts." (PUMF No. 34.)

After California refused to remove conditions from the proposed Tribal-State Compact that violated IGRA, Fort Independence filed the instant action alleging that California's conduct constituted bad faith negotiation of a Compact under IGRA. On July 31, 2008, California filed a motion for judgment on the pleadings, which was denied in part, and granted in part.

III. LEGAL ARGUMENT

A. Legal Standard Governing Summary Judgment Motions.

Under Federal Rule of Civil Procedure 56, summary judgment should be granted where a party is unable to show a genuine issue as to a material fact on which the party will bear the burden of proof at trial, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *See Beard v. Banks*, 548 U.S. 521, 529 (2006); *Dept. of Commerce v. U.S. House of Representatives*, 526 U.S. 316, 329 (1999); *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1999); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Importantly, where, as here, the non-moving defendant bears the burden of proof on a particular element of its claim or defense, it must carry the burden of proving that a genuine issue of fact remains for the fact-finder. *Wheeler v. Aventis Pharmaceuticals*, 360 F.3d 853, 857 (8th Cir. 2004). For the following reasons, there is no genuine issue of material fact as to whether California has engaged in bad faith negotiation of a Tribal-State Compact in violation of IGRA, and consequently, Fort Independence is entitled to summary judgment as a matter of law on its First Claim for Relief for Violation of IGRA.

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B. There Is No Genuine Issue of Material Fact As to Whether California Has Violated IGRA By Negotiating a Tribal-State Compact With Fort Independence in Bad Faith.

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As outlined below, California has engaged in bad faith negotiation by conditioning the execution of a Tribal-State Compact on Fort Independence's acquiescence to terms regarding discontinuation of RSTF funding and payment of taxes or assessments to California, in violation of IGRA. In addition, California has not made any meaningful concession to Fort Independence in conditioning its agreement to a Tribal-State compact on discontinuation of RSTF funding or payment of an impermissible tax or assessment, therefore Fort Independence is entitled to judgment as a matter of law on its IGRA bad faith claim.

C. Intent and Purpose of IGRA.

Congress enacted the IGRA, 25 U.S.C. section 2701, et seq., in response to the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), that held states had no authority to regulate gaming activities operated by Indian tribes on Indian lands. *Cabazon*, 480 U.S. at 213-14. "In 1988, Congress enacted the Indian Gaming Regulatory Act ("IGRA") '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.'" *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962, 966 (9th Cir. 2008), *quoting* 25 U.S.C. § 2702(1). The IGRA recognizes three classes of gaming and slot machines and similar gaming devices, which are the subject of this litigation, are Class III games. *See* 25 U.S.C. § 2703(7)(B)(ii), (8). Under the IGRA, a tribe may conduct class III gaming only "in conformance with a Tribal-State compact entered into by the Indian Tribe." 25 U.S.C. § 2710(d)(1)(C). "[E]ntering into a compact with state authorities is . . . a threshold requirement for Indian tribes wishing to develop Class III gaming operations." *Colusa Indian Community*, 547 F.3d at 973.

IGRA makes class III gaming lawful on Indian lands only if such activities are: (1) authorized by an ordinance or resolution adopted by the governing body of the Indian tribe and the Chairman of the NIGC; (2) located in a state that permits such gaming for any purpose by any person, organization, or entity; and (3) conducted in conformance with a Tribal-State Compact entered into by the Indian tribe and the State and approved by the Secretary of the Interior. 25 U.S.C. § 2710

(d)(1), (3)(B). IGRA's Tribal-State Compact requirement grants States the right to negotiate with tribes located within their borders regarding aspects of class III tribal gaming that might affect legitimate State interests. 25 U.S.C. § 2710(d)(3)(C). IGRA also imposes a mandatory obligation upon States to conduct those negotiations in good faith, (*See* 25 U.S.C. § 2710(d)(3)(A)), and grants tribes the right to enforce that obligation by way of federal suit (*See* 25 U.S.C. § 2710(d)(7)(A)).

IGRA provides for enforceability of the statutorily required Tribal-State Compact requirements by providing that if no compact has been entered 180 days after an Indian tribe has requested that the State enter into compact negotiations, the tribe may bring suit in federal court. 25 U.S.C. § 2710(d)(7)(A)(i), (B)(i). If the court concludes that the State has failed to conduct negotiations in good faith, it shall order the State and the tribe to conclude a compact within a 60-day period. 25 U.S.C. § 2710(d)(B)(iii). If the tribe and State fail to conclude a compact within this statutory time frame, they must each submit to a court-appointed mediator a proposed compact representing their last best offer. 25 U.S.C. § 2710(d)(7)(B)(iv). The mediator is required to choose between the two proposed compacts, and select the one that best comports with the terms and purposes of IGRA. 25 U.S.C. § 2710(d)(7)(B)(iv)-(v). If the State does not accept the mediator's chosen compact within 60 days, the Secretary of the Interior shall prescribe, consistent with the mediator's chosen compact and with the terms and purposes of IGRA, the conditions upon which the tribe may engage in class III gaming. 25 U.S.C. § 2710(d)(B)(vii).

"[T]he IGRA plainly requires a state to enter negotiations with a tribe upon request." *Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024, 1028 (2d Cir. 1990). "[T]he only condition precedent to negotiation specified by the IGRA is a request by a tribe that a state enter negotiations." *Id.* at 1028 The foregoing is compelled by section 2710(d)(3)(A) of the IGRA. Accordingly, once a tribal request is received, "the State [is] required to negotiate with the Tribe." *Mashantucket Pequot*, 913 F.2d at 1029.

"To ensure that states engage in negotiations with Indian tribes, the [IGRA] requires the states to negotiate in good faith with any tribes that request negotiation," *Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 770 F.Supp. 480, 488 (W.D. Wis. 1991), *citing* 25

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U.S.C. § 2710(d)(3)(A) and (7)(A). Where the "negotiations fail to achieve a compact and it is determined that the state did not negotiate in good faith," then the interests of the state and tribe must be reconciled "through the litigation and mediation process prescribed by section 2710(d)(7)(A) and (B). *Mashantucket Pequot*, 913 F.2d at 1030; *accord Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 770 F.Supp. 480, 487 (W.D. Wis. 1991). "If a state fails to negotiate in good faith the court may require it to conclude a compact within sixty days . . ., and shall appoint a mediator to conclude a compact if negotiations are not successful." *Lac du Flambeau Band of Lake Superior Chippewa Indians*, 770 F.Supp. *Id.* at 488 (W.D. Wis. 1991), *citing* 25 U.S.C. § 2710(d)(7)(B)(iii)-(iv); *see also Yavapai-Prescott Indian Tribe v. State of Arizona*, 796 F.Supp. 1292, 1298 (D. Ariz. 1992) (granting Plaintiff tribe's motion for summary judgment and ordering the resumption of negotiations and the conclusion of a tribal-state compact within sixty days, and to the extent such compact is not concluded, ordering parties to submit to a mediator).

"[T]he manifest purpose of the statute is to move negotiations toward resolution where the state . . . fails to negotiate in good faith, for 180 days after a tribal request to negotiate." *Mashantucket Pequot*, 913 F.2d at 1033. A tribe need not show that a state has acted maliciously to demonstrate bad faith. *Mashantucket Pequot*, 913 F.2d at 1033.

The Select Committee on Indian Affairs Report ("Report")[1] together with additional views for the Indian Gaming regulation Acts states:

> Section 11(d)(7) grants a tribe the right to sue a State if compact negations are not concluded. This section is the result of the Committee balancing the interests and rights of tribes to engage in gaming against the interests of States in regulating such gaming. Under this act, Indian tribes will be required to give up any legal right they may now have to engage in class III gaming if: (1) they choose to forgo gaming rather than to opt for a compact that may involve State jurisdiction; or (2) they opt for a compact and, for whatever reason, a compact is not successfully negotiated. In contrast, States are not required to forgo any State governmental rights to engage in or regulate class III gaming except whatever they may voluntarily cede to a tribe under a compact. Thus, given this unequal balance, the issue before the Committee was how best to encourage States to deal fairly with tribes

[1] The Select Committee on Indian Affairs Reports is attached to Fort Independence's Request for Judicial Notice in Support of its Motion for Summary Judgment, or Alternatively Partial Summary Judgment. (See PUMF No. 38.) Reference to the specific bates stamped page numbers will be made for the convenience of this Court and the parties.

> as sovereign governments. The Committee elected, as the least offensive option, to grant tribes the right to sue a State if a compact is not negotiated and chose to apply the good faith standard as the legal barometer for the State's dealings with tribes in class III gaming negotiations. While a tribe must show a prima facie case, after doing so the burden will shift to the State to prove that it did act in good faith. The Committee notes that it is the States not tribes that have crucial information in their possession that will prove or disapprove tribal allegations of failure to act in good faith. Furthermore the bill provides that the court, in making its determination, may consider any of the number of issues listed in this section, including the State's public interest and other claims. The Committee recognizes that this may include issues of a very general nature and, course, trusts that courts will interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes. (PUMF No. 38.)

In this case the State argues that the only evidence that should be considered is what it refers to as the "Administrative Record". This evidence proves that California has conditioned the entering of a compact on Fort Independence foregoing its intended third-party beneficiary right to continued RSTF funding, and submission to California's demand for a tax on Fort Independence's potential gaming revenue. The State can point to no good faith basis for making such demands, nor can it articulate any argument that IGRA makes these permissive areas of negotiation, nor can the State demonstrate that it has offered any meaningful concession in exchange for the Tribe giving up its third-party rights under a separate contract and acceding to California's demand for its gaming revenue, all of which IGRA legally requires if California makes such unilateral demands.

The only attempt that the State makes to justify the demand for the Tribe to forego its RSTF funding is set forth in a letter from Ms. Hoch dated March 21, 2007, stating:

> However, the Governor also does not believe that class III gaming should be subsidize [sic] by the RSTF. Also, subsiding tribes to develop casinos where they could not otherwise economically operate would not be consistent with the intent of the Indian Gaming Regulatory Act, which is to promote tribal economic development, tribal self-sufficiency, and strong tribal government.

(PUMF No. 25).

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This position is directly contrary to the position that California took in *In re Indian Gaming Related Cases,* in which California forcefully asserted that RSTF funding to non-compact tribes as defined in the 1999 Tribal-State Compacts was consistent with the terms and purposes of IGRA. *Id.* at 331 F.3d 1094, 1110-1114. However, even if this Court concludes that California's demands are permitted to be negotiated under IGRA, California still cannot insulate itself from a bad faith finding, because the concessions it has offered in exchange for demands that require Fort Independence to forego its RSTF payments, and accede to sharing its potential gaming revenue are patently unreasonable. This negotiating position is directly contrary to the purposes of IGRA, as demonstrated by California's negotiating Tribal-State Compacts with other tribes continuing RSTF funding, which tribes, nevertheless, are simultaneously permitted to operate less than 350 gaming devices. (PUMF Nos. 41 – 43.) It is undisputed that the Schwarzenegger administration has agreed to allow at least two tribes to continue receipt of RSTF payments while operating less than 350 gaming devices. (PUMF Nos. 35, 41, 42, 45-47.) This evidence suffices to carry Fort Independence's burden of making a *prima facie* showing that California has acted in bad faith by adopting an unlawful negotiating position, accordingly, the burden of proving that it acted in good faith is shifted to California, which cannot prove that it has acted otherwise.

Additionally, the Select Committee Report in referring to 2710(d)(4) states that this section "[c]larifies that this bill does not confer on any state any authority to tax or otherwise assess any Indian Tribe." (PUMF Nos. 38-40.) California, nor the record in this case, provides any justification or reasonable basis for the State's demand that the Tribe share revenue. This demand on its face is an attempt by California to assess a tax, fee or other charge upon Fort Independence in direct violation of IGRA. IGRA requires that the court "shall consider any demand by the State for direct taxation of the Indian tribe or any Indian lands as evidence that the State has not negotiated in good faith." On this score, Fort Independence has also met its burden in making a *prima facie* showing that California has negotiated in bad faith.

The IGRA creates a comprehensive regulatory scheme that attempts to balance tribal, federal, and state interests. 25 USC §§ 2700 *et seq.*; *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d

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536 (8th Cir. 1996); *Cabazon v. Wilson*, 124 F.3d 1050 (9th Cir.1997) and 37 F.3d 430 (1994); *New Mexico v. Mescalaro Apace Tribe*, 462 U.S. 324, 339 (9th Cir. 1983). California's unilateral attempt to impose an unlawful tax and demand that the Tribe forego its RSTF funding directly undermines the terms and purposes of IGRA, the California Constitution, as amended by the People of California by passing Proposition 1A, the terms and purposes of the 1999 Tribal-State Compacts, as well as Fort Independence's right to self-governance. The IGRA sets forth a comprehensive regulatory scheme that governs the rules for the two sovereigns, both California and Fort Independence, to enter into a Tribal-State Compact.

D. The IGRA Sets Forth Permissible Subjects of Negotiation for a Tribal-State Compact, and Prohibits California From Imposing a Tax, Fee, Charge, or Other Assessment on Fort Independence.

Permissible subjects of negotiation of a Tribal-State Compact under IGRA are set forth at 25 U.S.C. section 2710(d)(3)(C), and may include, *inter alia*, "taxation by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity [Class III gaming]." 25 U.S.C. § 2710(d)(3)(C)(iii). Pursuant to 25 U.S.C. section 2710(d)(3)(C)(i)-(vi), other topics of permissible negotiation include the following:

i. the application of criminal and civil laws and regulations of the Indian Tribe or the State that are directly related to and necessary for, the licensing and regulation of such activity;

ii. the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for enforcement of such laws and regulations;

iii. the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activities;

iv. remedies for breach of contract;

v. standards for the operation of such activity and maintenance of the gaming facility; and

vi. any other subjects that are directly related to the operation of gaming activities.

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The foregoing provisions define the permissible scope of provisions that can be negotiated as part of a Tribal-State compact, and States are statutorily prohibited from conditioning negotiation and execution of such a compact upon any provision not included in 25 U.S.C. section 2710(d)(3)(C). Consequently, while a State might request negotiations on subjects not included under the foregoing provisions, it may not require tribes to negotiate any provision beyond those subjects. In particular, States are prohibited from conditioning the negotiation and/or execution of a Tribal-State Compact upon the tribe's agreement to remit a tax, fee or any other charge to the State. 25 U.S.C. § 2710(d)(4).

California violated these provisions by: (1) conditioning the conclusion and execution of a Tribal-State compact on Fort Independence's agreement to forego its third-party beneficiary right to RSTF funding, a subject which is not a permissible subject of negotiation under IGRA; and (2) conditioning the execution of a Tribal-State compact on Fort Independence's agreement to a tax, charge, or other assessment in the form of a revenue sharing provision requiring it to share a percentage of net wins from the proposed gaming operation.

1. **Fort Independence's Third-Party Beneficiary Rights to RSTF Funding Under the 1999 Compacts Is Not a Proper Subject of Negotiation Under IGRA.**

Fort Independence has a right, independent from any agreement reached with the State to operate a gaming facility, as an express and intended third-party beneficiary under the 1999 Tribal-State Compacts to receive RSTF payments. Section 4.3.2(i) of the 1999 Tribal-State Compact provides:

> "A 'Compact Tribe' is a tribe having a compact with the State that authorizes the Gaming Activities authorized by this Compact. *Federally –recognized tribes that are operating fewer than 350 Gaming Devices are "Non-Compact Tribes." Non-Compact Tribes shall be deemed third party beneficiaries of this and other compacts identical in all material respects.*"

(PUMF No. 43.) (emphasis added).

Fort Independence will operate fewer than 350 gaming devices, and has specifically requested that the Compact limit the number of gaming devices to less than 350. (PUMF Nos. 21, 23 and 26.) As

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such, Fort Independence will remain a "Non-Compact Tribe" as defined in the 1999 Tribal-State Compacts. (PUMF No. 43.) The 1999 Tribal-State Compacts require certain payments to Non-Compact Tribes and entitle such tribes to these payments as third-party beneficiaries of the compacts. (PUMF No. 43.) These RSTF payments clearly fall outside the mandatory subjects of negotiation set forth in IGRA, as the RSTF payments are not directly related to Fort Independence's operation of gaming activities. The 1999 Compacts provide an entitlement to tribes, such as Fort Independence, meeting the definition of "Non-Compact Tribe." California simply cannot require Fort Independence to forego this entitlement as a condition of entering into a Tribal-State Compact when Fort Independence continues to meet the definition of a "Non-Compact Tribe."

California is attempting to alter the terms of the 1999 Compacts through the inclusion of terms in the proposed Tribal-State Compact with Fort Independence that are clearly contrary to the express terms of the 1999 Compacts. Furthermore, California has offered no concessions to Fort Independence in exchange for its demand that continued RSTF funding to Fort Independence be phased out. Moreover, California's demand here constitutes bad faith in that it appears to have punitive aspects since California has recently negotiated at least two other Tribal-State Compacts permitting those tribes to continue to receive RSTF funding while operating less than 350 gaming devices. (PUMF Nos. 41 and 42.) By virtue of the RSTF provisions included in the 1999 Compacts, those California tribes intended to pay a portion of their gaming revenue to more economically disadvantaged tribes in exchange for the privilege of operating more gaming devices (more than 350). (PUMF No. 43.) California is now seeking to defeat the contractual intent of those California tribes, signatories to the 1999 Compacts, by now attempting to assert some undefined interest in how those monies are now distributed by inserting conditions into the Tribal-State Compact it is negotiating with Fort Independence.

Additionally, several other California Indian tribes operate less than 350 gaming devices pursuant to Tribal-State Compacts and still receive RSTF payments. (PUMF No. _____.) In light of the specific language governing which tribes qualify as a "Non-Compact Tribe" under the 1999 Compacts, there is no question that California is negotiating in bad faith by requiring Fort

Independence to give up its rights as an intended contractual third-party beneficiary of those agreements, even though it gains no benefit, nor is it entitled to any of these funds, by the inclusion of such a provision in the proposed Tribal-State Compact between it and Fort Independence.

Accordingly, as an intended third-party beneficiary of the 1999 Tribal-State Compacts, California, as a party to that agreement, owes Fort Independence a duty of good faith and fair dealing with respect to Fort Independence's receipt of benefits, such as continued RSTF funding, pursuant to its provisions. *See Hand v. Famers Insurance Exchange*, 23 Cal.App.4th 1847, 1857 (Cal. Ct. App. 2 Dist. 1994) (holding that a party to an agreement owes an intended third-party beneficiary a duty of good faith and fair dealing); *see also Spinks v. Equity Residential Briarwood Apartments*, 171 Cal.App.4th 1004, 1034 (Cal. Ct. App. 6 Dist. 2009) ("Intended contract beneficiaries may 'possess the rights of parties to the contract . . . Those rights may include the benefits of the implied covenant of good faith and fair dealing in a proper case"). "The fundamental purpose of the implied covenant of good faith and fair dealing is 'that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.'" *Major v. Western Home Ins. Co.*, 169 Cal.App.4th 1197, 1209 (2009), *quoting Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 573 (1973). Because California's negotiating stance seeks to deprive Fort Independence of the benefits it is owed under the 1999 Tribal-State Compacts, this as an additional reason why California's conditioning the execution of a Tribal-State Compact on the injury of express third-party beneficiary rights constitutes bad faith under the IGRA. See also *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.*, 78 Cal.App.4th 847, 886 (2000). (Holding that an insurer acted in bad faith by conditioning settlement of a claim on a third party's waiver of its contractual beneficiary rights).

Finally, California's proposed terms cutting off RSTF funding to Fort Independence do not comply with public policy. In negotiating the definition of "Non-Compact Tribe" in the 1999 Tribal-State Compacts, California made a public policy decision as to what constituted a gaming operation that would receive a substantial economic benefit from California's concession to California Indian tribes of gaming exclusivity. Indeed, the Ninth Circuit has affirmed that:

> Congress sought through IGRA to 'promot[e] tribal economic development, self-sufficiency, and strong tribal governments.' The

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> RSTF provision advances this Congressional goal by creating a 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. *In re Indian Gaming Related Cases*, 331 F.3d at 1111 (9th Cir. 2003) (internal citations omitted).

California now attempts to turn this holding on its head and argue that receipt of these funds by California tribes not fortunate enough to have land located in populous or accessible areas should be deemed a barrier to entering into a compact. (PUMF Nos. 31 and 33.) The State has in effect conceded that these Tribes cannot operate a viable casino if the RSTF funding is discontinued, yet still demands that the Tribe forego its right to funding as a condition of entering into a compact, in direct violation of IGRA. (PUMF Nos. 31 and 33 .) And what is even more egregious, is the fact that the State also, in addition to demanding that Fort Independence forego its RSTF funding pay an illegal tax to the State of California as a condition of the State entering into a Tribal-State compact. (*Id.*) How can the State in all good faith take a position that it would be subsidizing gaming if the Tribe continues to receive RSTF funding, and then also exert an illegal tax from the Tribe that would force the gaming facility to operate at a loss? Thus, the State, not the Tribe, would be the primary economic beneficiary of the Tribe's gaming facility.

The provisions of the 1999 Tribal-State Compacts are clear – Tribes that operate less than 350 gaming devices fall within the definition of "Non-Compact Tribe," and "Non-Compact Tribes" are to receive payments from the RSTF in accordance with provisions set forth at Section 4.3.2 of the 1999 Tribal-State Compacts. (PUMF No. 43.) Forcing Fort Independence to give up its third-party beneficiary rights under the 1999 Tribal-State Compacts as a condition for conducting class III gaming activities would discriminate against it, as other tribes are receiving such funding while engaging in such activities. Accordingly, California cannot in good faith insist that Fort Independence agree to such a discriminatory provision.

2. <u>IGRA Prohibits Conditioning the Conclusion and Execution of a Tribal-State Compact on Inclusion of a Provision Which Permits California to Exact a Tax, Assessment or Other Charge on Gaming Revenue.</u>

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In *Northern Arapaho Tribe v. Wyoming*, 389 F.3d 1308 (10th Cir. 2004), the Tribe contended that the State had a duty to negotiate the full-scope of Class III gaming activities, because state law permitted non-profit corporations to conduct a subset of the type of gaming under certain circumstances. *Id.* at 1311. The State asserted, however, that the scope of negotiations only extended to the subset of gaming authorized under state law, and that IGRA mandated such a limitation. *Id.* at 1311-1312. The district court agreed with the Tribe that the State had not acted in good faith by refusing to negotiate a class of gaming expressly required to be the subject of negotiation under IGRA, and the Eighth Circuit affirmed. *Id.* at 1311. Accordingly, the *Northern Arapaho Tribe* decision stands for the principle that a state fails to negotiate in good faith where it fails to negotiate on subjects which are mandatory subjects of negotiation under the plain language of the IGRA. Conversely, it logically follows that a state also fails to negotiate in good faith where it insists on negotiating, or conditions execution of a Tribal-State Compact on a subject which is prohibited as a subject of negotiation under the plain language of the IGRA.

The plain language of the IGRA explicitly prevents the State from "imposing any tax, fee, charge or other assessment from an Indian tribe" and "[n]o State may refuse to enter into the negations…based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment."

Furthermore, where California has sought to impose such a prohibited tax, under IGRA, this Court "shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith." 25 U.S.C. § 2710(d)(7)(B)(iii)(II). Based on the plain language of the foregoing provision, a District Court must consider any demand by California for direct taxation of Fort Independence as evidence that California has not negotiated in good faith. Therefore, to the extent that California has sought direct taxation of Fort Independence during negotiation of the Tribal-State compact, a prima facie lack of good faith within the meaning of IGRA has been demonstrated.

As noted previously, California sought to impose such a tax on Fort Independence as a condition to the final execution of a Tribal-State Compact on numerous occasions. On December 16,

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2004, Mr. Kolkey, counsel for the Governor, sent a proposed compact which included the following provision at Section 4.3.1 of the draft compact:

> In consideration for the exclusive right to operate certain class III Gaming granted to the tribes by the California Constitution, from and after the first day of operation of the Gaming Activities, the Tribe shall pay to the State following percentages of its Net Win of the Gaming Activities, the Tribe shall pay to the State the following percentages of its Net Win generated from the operation of all Gaming Devices. . . (PUMF No. 8.)

The percentage of the required contribution ranged from 10% to 25% of the net win. (PUMF No. 8.)[2]

Throughout the negotiations, counsel for Fort Independence objected to the inclusion of the prohibited revenue sharing provision, and stated that Fort Independence would not agree to such a provision given IGRA's ban on any kind of tax, fee, charge or assessment to engage in Class III gaming. (PUMF Nos. 17, 18, 19, 21, 23, 27, 28, 30, 32 & 34.) In all of these communications, California was advised that IGRA did not permit the imposition of a direct charge, tax, or assessment as a condition for executing a Tribal-State compact. *(Id.)*

Notwithstanding Fort Independence's position concerning California's bad faith imposition of such a prohibited tax, assessment or charge, California persisted in its negotiating position. For example, Ms. Hoch corresponded with counsel for Fort Independence on August 30, 2007, and asserted that while remaining open to negotiating the scope of the impermissible tax, she nevertheless maintained that California was entitled to such revenue sharing, relying on her erroneous interpretation of California law. (PUMF No. 31.) On November 26, 2007, counsel for Fort Independence responded to Ms. Hoch exhaustively reiterating for a sixth time that such a tax was prohibited by IGRA. (PUMF No. 32.) Ms. Hoch, in turn, responded in correspondence dated January 22, 2008, stating that the "Tribe's assertion that the State's position on revenue sharing and continuation of RSTF payments to the Tribe constitute pre-conditions to negotiation of a compact is not accurate." (PUMF No. 33.) Ms. Hoch also refused to alter California's negotiating position,

[2] It is important to note that no where in this proposed compact, does California tie this revenue sharing provision to any subject which is a permissible topic of negotiation under IGRA, such as "defraying the costs of regulating" gaming activity. *See* 25 U.S.C. § 2710(d)(3)(C)(i)-(vi). This, in and of itself, is enough to distinguish the instant case from the Court's decision *In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003), in which the Ninth Circuit assumed that a Special Distribution Fund constituted a tax on the tribe, but was earmarked for purposes "directly related to tribal gaming." *Id.* at 1114-1115. Here, the proposed compact contains no enumeration of such purposes under the proposed provision authorizing a direct charge to the net win of the tribe's gaming revenue, and therefore the provision constitutes the imposition of an impermissible tax, assessment or other charge in violation of IGRA. (PUMF No. 8.)

while accusing Fort Independence of failing to make a counter-offer, even though Fort Independence's counter-offer had been exhaustively stated to be that California should cease its attempts to impose provisions that violate the IGRA. (PUMF No. 33.) After this last communication, Fort Independence interpreted California's "failure to respond as refusal to remove these conditions to the formation of compact." (PUMF No. 34.) At this point, Fort Independence concluded that further negotiations with California would be fruitless, as California had refused to remove the illegal provisions from the proposed Tribal-State Compact, notwithstanding Fort Independence's numerous counteroffers to the contrary.

Other District Courts have similarly concluded, on summary judgment, that California has violated IGRA's bad faith provisions where it adopts a similar negotiating position to the one it has taken in the instant case by conditioning the execution of a Tribal-State compact on the imposition of an impermissible tax. For example, in *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Arnold Schwarzenegger*, Case No. 04cv1151, WMc (S.D. Cal. April 29, 2008), "the state asked for an annual flat fee based on ten percent of gross gaming revenue on all gaming devices for fiscal year 2005 and an additional amount equal to 15 percent of the average net win for each gaming device over 1,600 machines." *Id.* at 21. (PUMF No. 44.) The court distinguished such a revenue sharing provision with other revenue sharing provisions that had been approved by courts in the past and noted that "the State has demanded Rincon pay a fee directly to the state that is unrelated to gaming and has no limitations on its use in return for a fee-reduction provision that has decidedly less value than the original exclusivity provision given to the tribes, which already provides a monopoly to tribal gaming interests." *Id.* at 22. The court stated that "[s]uch a fee falls outside the scope of 25 U.S.C. § 2710(d)(3)(C)(iii), which only allows assessments by the State in order to defray the costs of regulating gaming activity." *Id.*

The District Court further criticized California's rational for its improper revenue sharing provision, stating that "the State argues additional revenue sharing is warranted to balance the economic interests between the State and the Tribe because the State is foregoing revenue it could have obtained from non-Indian gaming operators, if such non-Indian operators were allowed to game

in California." *Id.* The District Court interpreted "the State's rationale for requiring such a large revenue sharing fee [as] another indication to [it] that the State's fee demands constitute an improper attempt to impose a tax on Rincon in lieu of being able to levy a tax on non-existent non-Indian gaming operators. It is difficult to regard the State's proposed plan as anything more than a tax when it functions as a tax."[3] *Id.*

The District Court also disapproved of California's tax demand without providing any evidence that such a demand was gaming related, to wit:

> [California] has not only refused to connect the new revenue sharing provision to gaming-related interests, but provides no evidence to show that it needs the proposed additional revenue needed to regulate gaming activity or mitigate adverse impacts therefrom. Instead, [California] argues additional revenue sharing is warranted to balance the economic interests between the [California] and the Tribe because [California] is foregoing revenue it could have obtained from non-Indian gaming operators, if such non-Indian operations were allowed to game in California. *Id.* at 22.

The District Court concluded as follows:

> Without an acceptable nexus between the fee demanded and the IGRA-sanctioned uses to which it is put, this Court finds that the revenue sharing insisted upon by the State violates the Section (d)(4), which prohibits states from taxing tribes. Accordingly, the Court finds that the State's insistence on payment of such a large fee to its general fund in return for concessions of markedly lesser value was in bad faith in light of the prohibition against taxation set forth in the IGRA and the parameters discussed in the Ninth Circuit's *Coyote Valley II* decision, which only approved limited and reasonable revenue sharing and made no decision as to the legality of placing revenue derived from tribal gaming into a state's general fund. *Id.* at 23, *citing In re Indian Gaming Related Cases (Coyote Valley II)*, 33 F.3d 1094, 1115, fn. 17 (9th Cir. 2003).

Thereupon, the District Court granted summary judgment in favor of the Tribe, holding that California had acted in bad faith by exacting such a tax on a Tribe as a condition to the execution of a Tribal-State compact constituted bad faith.

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[3] The court referenced the definition of "tax" in Black's Law Dictionary which is defined as a "monetary charge *imposed* by the government on persons, entities, transactions, or property to yield *public revenue*." Black's Law Dictionary 1496 (18th Ed. 2005) (emphasis added).

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California has taken the same position here as it did in *Rincon*, namely, that it does not exact a tax, fee, charge or other assessment when it demands revenue sharing provisions that are merely deposited into the State's general fund, without either tying such fees to the regulation of gaming, or making a meaningful concession in return for such fees that results in a substantial economic benefit to the Tribe. The history of the negotiations between California and Fort Independence bear this out. For example in the email from Darcie L. Houck, Counsel for Fort Independence to Ms. Hoch dated August 20, 2007, it was stated:

> During the meeting on August 16, 2007 the Tribe provided a copy of a market assessment study. This study demonstrates that the venture will not produce enough revenue to justify any revenue sharing payments to the State. In fact if the Tribe were to make such payments, based on anticipated revenues, it would be operating at a loss. The Tribe simply cannot afford to revenue share given its location, the small size of the proposed facility, and the cost that will be incurred to operate the facility. It is unreasonable for the State to require revenue sharing under these circumstances and inconsistent with agreements between the State and other tribes that meet the definition of a "Non-Compact Tribe" under the 1999 Compact. The Tribe is willing to discuss terms regarding environmental reviews, local mitigation, and internal control standards. However in order to make this project workable from a financial perspective the Tribe again proposes the following terms:
>
> 1) The Tribe would operate no more than 349 gaming devices, with no revenue sharing payments to the State;
> 2) The Tribe will continue to receive funds from the RSTF pursuant to the terms set forth in the 1999 Compact;
> 3) The Tribe will adopt minimum internal control standards for Class III gaming through its Tribal Gaming Ordinance (such standards will meet or exceed the requirements of the NIGC MICS, 25 CFR Part 542- as of October 1, 2006)
> 4) The Tribe will mitigate for off-reservation impacts as proposed by the State.
>
> (PUMF No. 30.)

The State found these terms unacceptable, yet offered no basis for its demand to require an illegal tax as a condition for concluding a Tribal-State compact with the Tribe.

E. California's Offer of Exclusivity is Meaningless, and Is Therefore Insufficient to Insulate California From its Bad Faith in Conditioning the Conclusion and Execution of A Tribal-State Compact on the Inclusion of Provisions Prohibited by IGRA.

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California continues to assert that its so called offer of exclusivity allows it to condition the execution of a Tribal-State compact on the inclusion of provisions that are prohibited by IGRA. In this case California's offer of exclusivity is meaningless, as the State Constitution already provides such exclusivity, and IGRA prevents the State from assessing any "tax, fee, charge, or other assessment" on a Tribe as a condition of entering into a compact. The State's demand here amounts to such an illegal assessment. Fort Independence is not required to negotiate for terms outside the permissible areas of negations. However, assuming that Fort Independence is willing to negotiate for revenue sharing provisions, in order to not violate the provisions of IGRA, California is required to provide meaningful consideration that results in a substantial economic benefit to the Tribe. California has not done so here.

The Ninth Circuit addressed this issue and has explained that

> [d]epending on the nature of both the fees demanded and the concessions offered in return, such demands might, of course, amount to an attempt to impose a fee, and therefore amount to bad faith on the part of a State. If, however, offered concessions by a State are real, § 2710(d)(4) does not categorically prohibit fee demands. Instead, courts should consider the totality of that State's actions when engaging in the fact-specific good-faith inquiry IGRA generally requires. *In re Indian Gaming Related Cases*, 331 F.3d 1094,1112 (9th Cir. 2003), *citing* 25 U.S.C. § 2710(d)(7)(B)(iii);

See also *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1101 (9th Cir. 2006) ("It is also true that, despite this statutory prohibition [Section 2710(d) in the IGRA], States and tribes have negotiated compacts that provided for payments by the tribes to the states. The theory on which such payments were allowed, however, was that the parties *negotiated* a bargain permitting such payments in return for meaningful concessions from the state (such as a conferred monopoly or other benefits). Although the state did not have *authority* to exact such payments, it could bargain to receive them in exchange for a quid pro quo conferred in the compact") (*Id.* emphasis in original).

In *Rincon, supra,* the District Court addressed the issue of whether California had offered a meaningful concession to a Tribe in exchange for exacting a tax, payment or other charge as part of Tribal-State Compact negotiations. *See Rincon Band of Luiseno Mission Indians of the Rincon*

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Reservation, 3:04-cv-01151-WMc (S.D. Cal. April 29, 2008) (PUMF No. 44.) There, California argued that "a meaningful concession is conveyed whenever the State offers a federally-recognized tribe the ability to provide additional games and machines for an extended period of time free from non-Indian competition." *Id.* at 16-17. The District Court rejected that argument, noting that "it is clear that the failure to offer meaningful concessions causes a State to exceed its authority to negotiate and is, in fact, an attempt to impose a tax." *Id.* at 19. In determining whether the State has made a meaningful concession, the district court stated that "the issue is whether, under the totality of the circumstances, the fees demanded in light of the concessions offered amount to the imposition of a fee." *Id.* at 20, *citing In re Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d at 1112.

Under the foregoing standards, California asserted that a meaningful concession had been made in exchange for a direct tax on the Tribe by offering: (1) an exclusivity provision providing that voided the revenue sharing provisions if a non-Indian Individual or entity is allowed to operate class III gaming within a specified market area; (2) ability to operate gaming devices in excess of the amount allowed under the 1999 compacts and (3) "a five-year extension of its current Compact term." *Id.* at 19-20. The Court expressly noted that, in light of the foregoing offer, "[t]he State has made some concessions. *Id.* at 20.

However, in spite of these concessions, the District Court rejected the State's argument for two reasons. First, the District Court noted "that the citizens of California would have to amend the State Constitution in order to allow non-Indian gaming" and finding that such a "scenario" is "speculative and unlikely given the State's established public policy against casino-style gambling." *Id.* at 20. Second, the concessions offered in light of the tax demanded was unreasonable since,

> [t]his substantial fee, 37 times greater than what Rincon receives, is unreasonable compared to the balance struck in the first compact negotiation between the tribes and the State where an actual monopoly was conferred in exchange for millions of dollars of fees to be funneled to gaming-related impacts covered by the RSTF and SDF. *Id.* at 21.

The District Court further characterized the unreasonableness of the demand, stating,

> [T]he State had demanded Rincon pay a fee directly to the state that is unrelated to gaming and has no limitations on its use in return for a fee-reduction provision that has decidedly less value than the original

> exclusivity provision given to the tribes, which already provides a monopoly to tribal gaming interests. *Id.* at 22.

This unreasonableness was bolstered by

> [California's] own expert, Professor William Eadington, [which concluded that] the State's October 23, 2006 offer allowing Rincon an additional 900 machines would provide the State with an unrestricted fee for use in its general fund of $37.9 *million dollars* while Rincon would make only *$1,716,000* from adding 900 machines to its current 1,600 machine operation. *Id.* at 21.

Moreover, the Secretary of the Department of the Interior, whom Congress has delegated authority to approve or disapprove Tribal-State Gaming Compacts (*see* 25 U.S.C. § 2710(d)(3)(B)), has reiterated time and again that IGRA does not allow states to condition approval of Tribal-State Compacts on revenue sharing provisions. (PUMF Nos. 36-37.) The Secretary has determined that the analysis as to whether a revenue sharing provision violates IGRA is as follows: (1) whether the State has made "meaningful and significant concessions" in exchange for revenue sharing; and (2) whether concessions "result in substantial economic benefit to the Tribe." In addition, IGRA does not allow states to "refuse to enter into negotiations" because states lack authority to impose taxes, fees, charges or other assessments upon tribes. *See* 25 U.S.C. § 2710(d)(4). (PUMF Nos. 36-37.) In sum, in determining whether California has made meaningful concessions in exchange for its revenue sharing demand, the District Court must inquire as to: (1) whether the concessions offered, under the totality of the circumstances are unreasonable in light of the tax, charge or assessment demanded; and (2) whether the concession offered amounts to a "substantial economic benefit." Under either prong of this test, California's concessions are unreasonable, and the revenue sharing demanded would destroy Fort Independence's ability to conduct economically viable gaming activities, and therefore, those concessions, put simply, do not serve to inoculate California from its' bad faith conduct in making its illegal demands.

California's concessions are unreasonable and do not result in a substantial economic benefit to Fort Independence since the imposition of the proposed share of net win would destroy the economic viability of Fort Independence's gaming establishment, since it would operate at a loss. The Innovations Group conducted a Gaming Market Assessment in June of 2006. (PUMP No. 29.)

Based on the Revenue Forecast and Casino Sizing Scenarios set forth in this Gaming Assessment, the Tribe would indefinitely operate in the red if required to forego its RSTF funding and pay the revenue sharing provisions demanded by the State. Thus, resulting in a scenario where the State would become the primary economic beneficiary of the Tribe's casino, not the Tribe. The State fails to account for; 1) the cost of operations; 2) Tribal, Federal, and State regulatory costs; 3) local mitigation costs; and for debt financing. California proposes to take 10-25% of the Tribe's revenue off the top, without accounting for any of these costs. In fact the State has not conducted any economic analysis to determine what a reasonable revenue sharing amount would be if it had offered a meaningful concession. In this case the only evidence before the Court concerning economic viability is the Gaming Market Study submitted by Fort Independence. (PUMP No. 29.) The information in this study demonstrates that if forced to accept California's terms, after payment of the items set forth above, nothing would be left for the Tribe. Therefore the State, not the Tribe, would be the primary economic beneficiary of the gaming operation. This is contrary to the intent and purpose of IGRA which is to promote tribal economic self-sufficiency.

In addition, to the foregoing, California's proposed exclusivity is also meaningless for the same reason the District Court in *Rincon* offered, to wit, the California Constitution already mandates exclusivity, and offering to do something that one is obligated to do offers no economic benefit to another party to a contract, much less a "substantial economic benefit."

F. California's Insistence On the Inclusion of Provisions Prohibited by IGRA is Evidence of Bad Faith Shifting the Burden to the State of California Requiring it to Prove it Acted in Good Faith During Tribal-State Compact Negotiations.

Upon the tribe's introduction of evidence that a Tribal-State compact has not been executed and that either the state did not respond to the Tribe's request to negotiate a compact or did not negotiate in good faith, the burden of proof is as follows:

> [T]he burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities. 25 U.S.C. § 2710(d)(7)(B)(ii).

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In addition, all of the California's bad faith negotiating conduct, as described herein, violates the standard of good faith set forth in the National Labor Relations Act. This Standard was referenced in *In re Indian Gaming Related Cases,* 147 F. Supp.2d 1011, 1021 (N.D. Cal. 2001) (this duty "requires" more than a willingness to enter upon a sterile discussion of" the parties' differences), quoting *N.L.R.B. v. American Nat'l Ins. Co.* 343 U.S. 395, 402 (1952); *see also* 29 U.S.C. Section 158(d).

All of the evidence above sets forth a prima facie case that California has acted in bad faith by seeking to destroy Fort Independence's third-party beneficiary rights, and exact a tax of its net wins. Therefore, the burden has shifted to California to prove that it has acted in good faith during its negotiations with Fort Independence. Accordingly, on summary judgment, California bears the burden of proving that it has acted in good faith during negotiations of the Tribal-State Compact, and cannot defeat summary judgment by making a mere showing that it has simply not acted in bad faith. In light of the foregoing, California simply cannot carry its burden of showing that it acted in good faith during Tribal-State Compact negotiations with Fort Independence, as a matter of law, and summary judgment should be entered in favor of Fort Independence.

IV. CONCLUSION

For all of the foregoing reasons, this court should grant summary judgment in favor of Fort Independence on its First Claim of Relief for Violation of IGRA and order California to conclude a Tribal-State Compact with Fort Independence within 60 days. To the extent that such a compact is not concluded within the 60 day period, this Court should appoint a mediator, to which both California and Fort Independence should be required to submit their proposed Tribal-State Compacts to.

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