

1 JOHN M. PEEBLES, ESQ. (BAR No. 237582)
DARCIE L. HOUCK, ESQ. (BAR No. 196556)
2 A. ROBERT RHOAN, ESQ. (BAR No. 231949)
FREDERICKS PEEBLES & MORGAN LLP
3 1001 Second Street
Sacramento, California 95814
4 Telephone: (916) 441-2700
Facsimile: (916) 441-2067

5 Attorney for Plaintiff,
6 FORT INDEPENDENCE INDIAN COMMUNITY

7
8 **IN THE UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**

10
11 FORT INDEPENDENCE INDIAN COMMUNITY,
a federally-recognized tribe,

12 Plaintiffs,

13
14 v.

15 STATE OF CALIFORNIA, ARNOLD
SCHWARZENEGGER, Governor of the State of
16 California

17 Defendants.

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

**PLAINTIFF'S REPLY TO
DEFENDANT'S POINTS AND
AUTHORITIES IN SUPPORT OF
OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT, OR ALTERNATIVELY
PARTIAL SUMMARY JUDGMENT**

18 Dept.: 4
Judge: Hon. Lawrence K. Karlton
Action Filed: February 26, 2008
Hearing Date: May 18, 2009

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. IGRA’S Plain Language Restricts The Range of Subjects Which May Be Negotiated As Part of a Tribal-State Compact Where the State Offers No Meaningful Concessions That Result in a Substantial Economic Benefit to the Tribe.....	3
A. IGRA Prohibits California From Demanding That Fort Independence Share Its Gaming Revenue As Part of Negotiations of a Tribal- State Compact	3
B. The Tribe’s \$1.1 Million RSTF Payment is Not A Permissible Subject for Compact Negotiations....	10
II. An Examination of the Record of Negotiations Shows The State Did Not Negotiate in Good Faith	12
CONCLUSION	15

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

<i>Beard v. Banks</i> , 548 U.S. 521 (2006)	2
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	2
<i>Dept. of Commerce v. U.S. House of Representatives</i> , 526 U.S. 316 (1999)	2
<i>In re Indian Gaming Related Cases (Coyote Valley I)</i> , 147 F.Supp.2d 1011 (N.D. Cal. 2001)	9
<i>In re Indian Gaming Related Cases (Coyote Valley II)</i> , 331 F. 3d 1094 (9th Cir. 2003)	8, 9
<i>Nebraska v. Wyoming</i> , 507 U.S. 584 (1999)	2
<i>Rincon Band of Luiseno Mission Indians of the Rincon Reservation v.</i> <i>Arnold Schwarzenegger</i> , Case No. 04cv1151, WMc (S.D. Cal. April 29, 2008)	8, 9
<i>Wheeler v. Aventis Pharmaceuticals</i> , 360 F.3d 853 (8th Cir. 2004)	2

STATUTES

25 U.S.C. § 2710	passim
Fed. R. Civ. P. 56	2

1 Plaintiff, Fort Independence Indian Community ("Fort Independence" or the "Tribe") submits
2 the following memorandum of points and authorities in support of its reply to Defendants, the State of
3 California, and Arnold Schwarzenegger, the Governor of the State of California (collectively, the
4 "State" or "California") opposition to the Tribe's motion for summary judgment ("Defendants
5 Opposition").

6 INTRODUCTION

7 The parties in this matter have filed cross motions for summary judgment concerning whether
8 California's demand to share in Fort Independence's gaming revenues, and for the Tribe to forego its
9 right to receive revenue sharing trust fund (RSTF) payments under the 1999 Tribal-State Compacts
10 (1999 Compacts) as a condition for California's execution of a Tribal-State Compact in violation of
11 the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §2701 *et. seq.* provisions requiring a State to
12 negotiate in good faith. The parties' individual statements of undisputed facts comprise the record
13 relied upon by both parties for purposes of the cross motions for summary judgment. This record
14 demonstrates that California has insisted on conditioning the execution of a Tribal-State Compact on
15 the Tribe's acceptance of a tax on its gaming revenue and waiver of the Tribe's right under the 1999
16 Tribal-State Compacts (1999 Compacts) to continued RSTF funding, both of which violate IGRA.

17 Throughout its pleadings, California repeatedly asserts that the Tribe agreed to revenue
18 sharing provisions merely because Fort Independence stated a willingness to discuss the concept of
19 compensation for the benefit of gaming as part of negotiations. However, contrary to these
20 assertions, it is undisputed that there is no support for California's contention that Fort Independence
21 "agreed" to any proposed revenue sharing provisions, or that the Tribe "agreed" to remit payments to
22 the State that fall outside the permissible scope of gaming related payments under IGRA. In addition,
23 it is undisputed that California's revenue sharing proposals are unilateral demands for an unlawful
24 tax, fee, charge or other assessment (in the amount of 10-25% of the Tribe's net win) in violation of
25 IGRA, and California's condition that the Tribe forego its third party rights under the 1999 Compact
26 are beyond the permissible subjects of negotiation under IGRA. Fort Independence's willingness to
27
28

1 negotiate does not represent an agreement to such terms as the Tribe has consistently maintained that
2 California's demands violate IGRA.

3 Furthermore, it is also undisputed that the record contains no evidence that California made
4 meaningful concessions that would result in a substantial economic benefit to the Tribe. Therefore,
5 both demands are *prima facie* evidence of California's bad faith in negotiating a Tribal-State
6 Compact with Fort Independence thereby shifting the burden to California to rebut this evidence by
7 proving by a preponderance of the evidence that it has acted in good faith. The undisputed facts in
8 the record demonstrate that California cannot carry its burden of demonstrating that there is any
9 genuine issue of material fact as to California's bad faith negotiations of a Tribal-State Compact
10 under IGRA.¹

11 ARGUMENT

12 Under Federal Rule of Civil Procedure 56, summary judgment should be granted in favor of
13 the Plaintiff where the Defendant is unable to demonstrate that a genuine issue of material fact exists
14 on any issue, claim or defense which the Defendant will bear the burden of proof at trial, and Plaintiff
15 is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *See Beard v. Banks*, 548 U.S. 521,
16 529 (2006); *Dept. of Commerce v. U.S. House of Representatives*, 526 U.S. 316, 327 (1999); *Nebraska*
17 *v. Wyoming*, 507 U.S. 584, 589 (1999); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Here,
18 because the undisputed material facts constitute *prima facie* evidence of bad faith, California bears the
19 burden of proof as to its claim/defense that it negotiated for a Tribal-State Compact with Fort
20 Independence in good faith, and that a genuine issue of fact remains for the fact-finder as to this issue.
21 *Wheeler v. Aventis Pharmaceuticals*, 360 F.3d 853, 857 (8th Cir. 2004). Because there is no evidence
22 in the record which would suffice to carry California's burden, there is no genuine issue of material
23 fact as to whether California has engaged in bad faith negotiation of a Tribal-State Compact in
24 violation of IGRA, therefore, Fort Independence is entitled to summary judgment as a matter of law.
25 25 U.S.C. § 2710 (d)(7)(B)(iii)(II).

26
27 ¹ Fort Independence incorporates herein by reference Plaintiff's Memorandum of Points and Authorities in Support of its Opposition to Defendants'
28 Motion for Summary Judgment, filed with the Court on May 1, 2009. Fort Independence also notes that Defendants' Opposition incorporates by reference
the arguments set forth in Defendant's Memorandum of Points and Authorities in Support of their Motion for Summary Judgment ("Defendants'
Memo."), filed on January 17, 2009 [sic]. Plaintiff believes Defendants intended to incorporate Defendants' Memo, filed on April 17, 2009. In
responding to arguments set forth in Defendants' Opposition, Plaintiff addresses such arguments contained in Defendant's April 17, 2009 memorandum
as the docket does not reflect that any memorandum of points and authorities was filed by the Defendants in this matter on January 17, 2009.

I. IGRA's Plain Language Restricts The Range of Subjects Which May Be Negotiated As Part of a Tribal-State Compact Where the State Offers No Meaningful Concessions That Result in a Substantial Economic Benefit to the Tribe.

A. IGRA Prohibits California From Demanding That Fort Independence Share Its Gaming Revenue As Part of Negotiations of a Tribal-State Compact.

Fort Independence asserts, and California has conceded as undisputed that it demanded, as a condition of executing a Tribal-State Compact, that Fort Independence: (1) pay to the State 10-25% of its gaming device net win as revenue sharing; and (2) forego its RSTF payments. (*See* Fort Independence Indian Community's Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment, or Alternatively, Partial Summary Judgment [Document No. 56] ("PUMF") Nos. 8, 17, 25-28, 30-32; Defendants' Opposition to Plaintiff's Statement of Undisputed Facts in Support of Plaintiff's Motion for Summary Judgment, or Alternatively, Partial Summary Judgment [Document No. 69-2] ("Opp. DUMF") Nos. 8, 17, 25-28, 30-32.) It is undisputed that none of California's draft proposed revenue sharing provisions ever tied receipt of such funding to any gaming related purpose as required by IGRA. (*Id.*) In exchange for these demands, California offered limited geographic exclusivity from non-Indian gaming and the right to operate 150 gaming devices. (PUMF Nos. 8; Opp. DUMF No. 8.)

As exhaustively discussed in the parties' moving and opposing papers, California is required to negotiate with Fort Independence in good faith to enter into a Tribal-State Compact, and IGRA sets forth a range of permissible subjects which the parties may negotiate as a part of a Tribal-State Compact ("mandatory subjects of negotiation") at 25 U.S.C. § 2710(d)(C). A cursory review of IGRA's statutory language shows that the revenue sharing and RSTF provisions demanded by the State do not fall within any of the categories of mandatory subjects of negotiation. *See* 25 U.S.C. § 2710(d)(C). California recasts the Tribe's argument that IGRA only permits certain subjects to be negotiated as advocating that certain "forbidden" topics may not be negotiated at all. However, Fort Independence is not asserting that these provisions are "forbidden" but that they fall outside these mandatory subjects of negotiations, and therefore are only permitted subjects of negotiation if the

1 parties (1) agree to discuss areas outside the permissible topics of negotiation and (2) the State offers
2 meaningful concessions that result in a substantial economic benefit to the Tribe.

3
4 In addition to defining permissible topics of negotiation, IGRA also prohibits the State from
5 imposing a tax on the Tribe's gaming activity. 25 U.S.C. § 2710(d)(4). California has attempted to
6 impose such a tax by demanding that Fort Independence share its gaming revenue with it. Such a
7 demand is *prima facie* evidence of bad faith and the State can only rebut the presumption of bad faith
8 through demonstrating that it has met the requirements of the United States Department of the
9 Interior's ("Interior") two prong test. This test requires the State to demonstrate that: (1) it has first
10 offered meaningful concessions to the Tribe in exchange for a request to share in the Tribe's gaming
11 revenue, and (2) the concessions offered result in a substantial economic benefit to the Tribe. The
12 California's offer of limited exclusivity, and 150 gaming machines does not meet the required test,
13 especially in light of the terms of other compacts, in which California has already made these
14 concessions without making the demands it has made of Fort Independence.²

15 The State asserts that the provisions it demands are directly related to some aspect of tribal
16 gaming and are, therefore proper. The State also argues that the "Tribe attempts to stop the State
17 from pursuing legitimate bargaining options by characterizing them as "a patent violation of IGRA
18 and *per se* bad faith." Def. Opp at pg. 4. Yet, the State fails to offer any support from the record for
19 its position that these demands are directly related to gaming, and do not constitute an illegal tax as
20 set forth in IGRA at 25 U.S.C. § 2710(d)(4). The State has demanded payment by the Tribe of 10-
21 25% of its net win, and such funds are to go directly to the State's general fund with no restrictions as
22 to the use of such funds. This demand, as set forth in the Rincon case constitutes a tax. See *Rincon*
23 *Band v. Schwarzenegger*, No. 04CV1151, at pp. 18-19 (S.D. Cal., April 24, 2008). The burden has
24 shifted to California to demonstrate that it has not attempted to impose such an illegal tax,

25
26 ² The State argues that the Court must look to terms of other compacts when making its determination as to whether the State negotiated in good faith.
27 However, the State points to no compact with a tribe similarly situated to Fort Independence that requires the same demands for revenue sharing. It is
28 undisputed that thirty-two (32) other tribes in California may operate 349 or less gaming devices without sharing gaming revenue and continuing to
receive RSTF funds. (PUMF No. 43, 47; see also California Gambling Control Commission's list of RSTF recipients, updated March 4, 2009 located at
[www.cgcc.ca.gov/Tribal/2009/RSTF_Recipient_Tribes_03-04-09_WEBSITE_\(2\).pdf](http://www.cgcc.ca.gov/Tribal/2009/RSTF_Recipient_Tribes_03-04-09_WEBSITE_(2).pdf); Opp. DUMF Nos. 43, 47.) The Tribal-State Compact with the Yurok
Tribe is the only compact that the Schwarzenegger administration has negotiated that is similar to the Tribal-State Compact proposed by California. In
that Compact, the Yurok Tribe is permitted to offset the amount of revenue shared with California by costs the Tribe incurs in local mitigation costs
(PUMF No. 42, 46; Opp. DUMF. No. 42, 46.) The Yurok Tribe also continues to receive its RSTF payments as a Non-Compact Tribe. (*Id.*)

1 assessment, charge, or other fee on the Tribe. In order to demonstrate otherwise the State must prove
2 that it has offered meaningful concessions that result in a substantial economic benefit to the Tribe.

3 The State argues that by allowing the Tribe to operate class III gaming such as slot machines
4 it is entitled to something. However, IGRA requires that the State negotiate in good faith, and allow
5 the Tribe to operate such gaming as others in the State are allowed to operate such gaming.
6 California amended its Constitution in 2000 by adopting Prop 1A which allows Indian tribes to
7 operate class III gaming on Indian lands. Tribes throughout California operate up to 350 gaming
8 devices without revenue sharing with the State, and without foregoing RSTF payments. It is the State
9 that is required to negotiate a Tribal-State compact with the Tribe in good faith. The legislative
10 history of IGRA is clear that this provision was included to avoid the exact circumstance that exist
11 here, the State has a significant advantage over the Tribes, and should not be allowed to force tribes
12 to pay unreasonable fees in exchange for the ability to operate class III gaming. (PUMF Nos. 38-40;
13 Opp. DUMF Nos. 38-40.) It is the State that cannot exact a tax, fee, charge, or other assessment from
14 the Tribe. It is also the State that must demonstrate that it offered meaningful concessions that result
15 in a substantial economic benefit to the tribe in order to seek any revenue sharing provisions. (PUMF
16 Nos. 36, 37; Opp. DUMF Nos. 36, 37.) The State attempts to turn this argument on its head by
17 asserting that it is the Tribe that some how must provide consideration outside the permissible scope
18 of topics for negotiation set forth in IGRA. This is not what IGRA requires.

19 Revenue sharing not directly related to gaming is not a permissible subject for Tribal-State
20 Compact negotiations when the Tribe does not agree to discuss revenue sharing and the State offers
21 no meaningful concessions that result in a substantial economic benefit to the Tribe. Even if the
22 Tribe is willing to discuss revenue sharing, this does not eliminate the need for California to provide
23 meaningful concessions that results in an economic benefit to the Tribe. In this case the Tribe was
24 very clear that it could not forgo its RSTF payments, and that based on the current economic studies it
25 could not afford the revenue sharing provisions demanded by the State of 10-25% of the Tribe's net
26 win. (PUMF Nos. 8, 17, 26, 28- 30; Opp. DUMF Nos. 8, 17, 26, 28-30.) The State has not offered
27
28

1 any evidence to support its position that such terms are not a tax, fee, charge, or other assessment in
2 violation of IGRA.

3 Both IGRA and the California State Constitution compel the State to negotiate in good faith
4 with the Tribe for a Tribal-State Compact. The State argues it has no duty to enter into negotiations
5 with the Tribe for a Tribal-State Compact, and therefore any discussions it has with the Tribe would
6 demonstrate good faith without a showing of more. This is contrary to the law; IGRA, the California
7 Constitution and the 2 prong test set forth by Interior in determining whether a revenue sharing
8 provision is allowable under IGRA. The State continues to demand unrestricted funds from the
9 Tribe, for something it is compelled under the law to do; negotiate in good faith with the Tribe for a
10 class III Tribal-State Compact. (PUMF Nos. 31, 33; DUMF Opp. Nos. 31, 33.)

11 The State argues that *Coyote Valley* supports its this position, however the compacts at issue
12 in the *Coyote Valley* cases provided for terms similar to what Fort Independence has requested.
13 These terms allowed "Non-Compact Tribes" such as Fort Independence to operate 350 or less gaming
14 devices and continue to receive RSTF payments. These 1999 Compacts also did not require or allow
15 for demands of unrestricted funds by the State. The 1999 Compacts required the State to utilize funds
16 for specific gaming related purposes, and do not allow for the revenue sharing provisions demanded
17 by the State of Fort Independence here. (PUMF No. 28, 31, 33, 43; Opp. DUMF Nos. 28, 31, 33, 43.)

18 The record does not reflect any rationale for the State's demand that Fort Independence agree
19 to pay 10-25% of its revenue to the State for something that other Tribes in the State are permitted to
20 do without paying such fees. The Tribe has however offered to agree to more stringent
21 environmental protection provisions, adoption of the State's proposed minimum internal control
22 standards, and provisions requested by the State that protect patrons rights. (PUMF No. 26, 28;
23 DUMF Opp. Nos. 26, 28.) The Tribe has moved significantly in its position on these matters that
24
25
26
27
28

1 California represents as being of critical importance to the State. The record is absent of any basis for
2 the State to make its revenue sharing and RSTF demands of Fort Independence.
3

4 The State's argument as to its demand for terms approved in other compacts demonstrating
5 good faith also fails, as the State has not provided any meaningful concessions here for its demand to
6 include such terms and the State demands go well beyond the concession made. Additionally, the
7 State makes much of the Tribe's reference in a July 2004 letter to providing "compensation to the
8 state in recognition of the unique privilege and benefit that gaming provides," and to a preamble that
9 the Tribe submitted to California that states the Tribe "agrees to make a fair revenue contribution to
10 the State." (emphasis added). These vague statements without context are not enough for the State to
11 overcome its burden in demonstrating good faith negotiations. This same July 2004 letter states that
12 the Tribe hopes to "come to a reasonable, fair, and mutually-acceptable agreement between the Tribe
13 and state." (PUMF No. 1; Opp. DUMF No. 1.) This statement does not conclude anything as the
14 State being able to demand an illegal tax. The record is clear that the Tribe has continually opposed
15 unfair revenue sharing provisions in violation of IGRA. (PUMF Nos. 17, 19, 26- 28, 30, 32, 34; Opp.
16 DUMF Nos. 17, 19, 26- 28, 30, 32, 34.)
17
18

19 The State continues to assert that its offer of limited exclusivity of 55 miles (PUMF No. 31;
20 Opp. DUMF No. 31.) constitutes a meaningful concession that allows for a demand of unrestricted
21 revenue sharing. Yet, the State produces no evidence that this offer of limited exclusivity would
22 result in substantial economic benefits to the Tribe if required to make revenue sharing payments, and
23 forego its RSTF payments. The Tribe has a right to operate class III gaming devices under both
24 Federal and California law. The Tribe's willingness to discuss fair compensation with the State for
25 the ability to operate a class III gaming facility does not equate to giving the State a free license to
26 demand an illegal tax, fee, charge, or other assessment in violation of IGRA. *See In re Indian*
27 *Gaming Related Cases (Coyote Valley II)*, 331 F. 3d 1094, 1112 (9th Cir. 2003), *Rincon Band v.*
28 *Schwarzenegger*, No. 04CV1151 (S.D. Cal., April 29, 2008). The State attempts to cloud the record

1 by referring to a draft compact submitted by the Tribe which the State infers included revenue sharing
2 provisions. However, the record reflects that the Tribe only provided one draft compact to the State.
3 This compact was attached to a February 20, 2007 letter. Section 4.0 of this compact does not
4 include the State's revenue sharing provisions, and section 5.0 allows for the Tribe to continue its
5 RSTF payments. (PUMF No. 23; Opp. DUMF No. 23.) The other compact which the State refers to
6 as the Tribe's draft compact is actually the State's proposed compact with handwritten notes by the
7 Tribe's attorney dated December 2006. There is no evidence that these handwritten notes, or the
8 record from this December meeting where the Tribe provided the notes represent any agreement as to
9 revenue sharing provisions by the Tribe. (PUMF No. 21; Opp. DUMF No. 21.) In fact the Tribe's
10 June 30, 2006 letter raises several issues with the State's draft compact, including the two provisions
11 at issue in this case; revenue sharing, and foregoing RSTF payments. The Tribe's draft compact
12 submitted in February 2007 also clearly eliminates California's proposed revenue sharing provisions,
13 and allows for continued RSTF payments. (PUMF No. 17, 23; Opp. DUMF No. 17, 23.) The record
14 does not reflect any indication that California was misled by the Tribe into believing it would make
15 unrestricted payments to its general fund without meaningful concessions that resulted in a substantial
16 economic benefit to the Tribe. To the contrary the record is very clear that the Tribe has opposed the
17 State's current revenue sharing demand as unreasonable, unfair and outside the permissible topics of
18 mandatory negotiation throughout the negotiation process. (PUMF Nos. 17, 19, 26-28, 30, 32, 34;
19 Opp. DUMF Nos. 17, 19, 26-28, 30, 32, 34.)

20 The State must demonstrate that there will be a substantial economic benefit to the Tribe for
21 any revenue sharing terms included in the compact. The only authority offered by the State for its
22 position is *Coyote Valley*. However, the holding in this case does not support the State's position as
23 unrestricted revenue sharing was not at issue in that case. The *Rincon* case is more on point, yet the
24 State dismisses this case by stating that it disagrees with the Court's holding. The Rincon Court held
25 that the revenue sharing demanded there, which is the same demand as in this case, is a tax in
26 violation of IGRA. See *Rincon v. Schwarzenegger*, No. 04CV1151 at pp. 18-19 (S.D. Cal; Apr. 29,
27 2008).
28

1 The economic feasibility of the Tribe's gaming facility must be a factor in the determination
 2 of the State's good faith, as without meaningful concessions that result in a substantial economic
 3 benefit to the Tribe revenue sharing and forgoing RSTF payments are impermissible topics of
 4 negotiation that the State cannot require as a condition to execution of a Tribal-State Compact. The
 5 State however would have this court find that the mere willingness to discuss a topic opens the door
 6 for the State to demand unauthorized fees from a Tribe without any proof demonstrating the State
 7 provided a meaningful concession that will result in a substantial benefit to the Tribe. The State
 8 argues that it need not consider the economic feasibility of the Tribe's gaming facility when
 9 determining good faith negotiations. See Defendants' Opposition at 12. However, to not consider the
 10 economic feasibility of the facility would be to ignore the second prong of Interior's test. It is not the
 11 Tribe that has the burden in demonstrating that the test is met, but the State.

12 The State cannot demand a share of the Tribe's revenue without both offering a meaningful
 13 concession, and having that meaningful concession result in a substantial economic benefit to the
 14 Tribe. The State has offered no evidence in this case that would demonstrate its demand for 10-25%
 15 of the Tribe's revenue is either fair or reasonable given the Tribe's specific circumstances. The State
 16 appears to argue that it is entitled to a flat percentage of all gaming revenue without consideration of
 17 any circumstances. This is contrary to *Coyote Valley*, the terms of the 1999 Compact³ and the State's
 18 own representations as to its position on Tribal-State Compact negotiations. California sets forth a
 19 position contrary to that of the *In re Gaming* cases in a March 21, 2007 letter by stating that it
 20 believes RSTF payments to tribes operating any gaming devices are contrary to IGRA's purpose of
 21 promoting tribal economic development and self sufficiency. The State then goes on to assert that it
 22 appreciates that each tribe is unique and will negotiate compacts based on each tribe's particular
 23 circumstances. The State further asserts that it will "work with each tribe to develop compact
 24 provisions that will serve the tribe's needs and which are consistent with the Administration's
 25 policies." (PUMF No. 25; Opp. DUMF No. 25.)

26 ///

27
 28 ³ In their moving papers, the State has argued that the Court should look to other compact provisions, and tribes in similar situations

Despite this representation to consider each tribe's circumstances, the State has continued to demand a flat percentage of the Tribe's net win. California does not offer any concessions beyond those that tribes with 1999 Compacts have received, yet demands an unrestricted fee, a tax of the tribe for 10-25% of its net win. This demand is not based on Fort Independence's unique circumstance, nor did the State work with the Tribe to develop provisions that would serve the Tribe's individual needs (PUMF Nos. 31-35; Opp. DUMF Nos. 31-35.) There is no evidence in the record that the State based its demand on anything but a determination of a flat rate (tax). A flat rate (tax) that the majority of the tribes in the State that operate class III gaming do not have to pay for the same benefits requested of Fort Independence here.⁴ Revenue sharing funds used for non-gaming purposes constitute an illegal tax in violation of IGRA unless 1) The State and Tribe agree to discuss such provisions; and 2) California offers meaningful concessions that result in a substantial economic benefit to the Fort Independence.

B. The Tribe's \$1.1 Million RSTF Payment is Not a Permissible Subject for Compact Negotiations.

The State continues to assert that the Court in *Coyote Valley I & II* authorizes it to demand Fort Independence forego its RSTF payments. This position is also inconsistent with all other compacts negotiated by the State. California so much as concedes its arguments as to the RSTF payments in its opposition to the Tribe's summary judgment motion. See Defendants Opposition at pg. 16. The State agrees that it is an undisputed fact that no other tribe, has been required to forgo RSTF payments that they are otherwise qualified to receive. The State also says it's "position at the time negotiations were ended was not necessarily the State's final position." California continued to demand that the Tribe forgo these payments over 4 years of negotiations. (PUMF No. 8, 31; Opp. DUMF Nos. 8, 31.) If the State intended to act in good faith it would have offered something more than that set out in its August 30, 2007 letter. (PUMF No. 31; Opp. DUMF No. 31.) This letter was the State's last offer and the

⁴ The State attempts to compare the Yurok compacts revenue sharing provisions to those demanded here. However, the State fails to mention that the Yurok compact allows for offsets as to local mitigation which the State has refused to allow for Fort Independence. The Yurok Compact also allows the tribe to continue its RSTF payments as a Non-Compact Tribe (PUMF Nos. 42, 46; Opp. DUMF Nos. 42, 46.) Additionally, any acceptance of revenue sharing provisions by the Yurok Tribe does not mean such demands are allowable under IGRA, or that a Tribe must discuss unrestricted revenues or forego a compact where other tribes in the state operate class III under the same terms requested by Fort Independence.

1 State, despite continued attempts by the Tribe to reach an agreement and explain why this term was
2 unacceptable, refused to move from this offer, even after the Tribe filed suit in February 2008.
3 (PUMF No. 32-35; Opp. DUMF No. 32-35.)
4

5 California has offered no evidence to support its position that its demand for the Tribe to forgo
6 RSTF payments was not a "take it or leave it" position. The State sent correspondence informing the
7 Tribe that the Governor believes continued receipt of such funding, even by tribes meeting the
8 definition of a Non-Compact Tribe, is in essence subsidizing gaming contrary to IGRA (PUMF No.
9 25; Opp. DUMF No. 25.) Yet, California at the same time concedes that *Coyote Valley II* explained
10 that "the RSTF advances the goals of IGRA to promote 'tribal economic development, self-
11 sufficiency, and strong tribal governments.'" *Id* at 1111. California negotiated the definition of a
12 "Non-Compact Tribe" and that definition allows for a Tribe to operate up to 350 gaming devices and
13 continue to receive RSTF payments. Until receipt of Defendant's Opposition the Tribe believed the
14 State's last offer was its final offer. If the State is willing to enter into compact terms as set forth in
15 either the Tribe's May 22, 2007 letter or November 26, 2007 letter the Tribe is willing to agree to such
16 terms and valuable resource for both the Tribe and State need not continue to be expended on
17 litigation.
18
19

20
21 Rather than providing any evidence that proves what is required here- meaningful concessions
22 that result in a substantial economic benefit to the Tribe, the State continues to assert that the mere
23 discussion of the mandatory topics of negotiation with the Tribe constitutes good faith. This is not the
24 test. The State cannot demand as a condition to execution of a Tribal-State Compact something
25 outside the permissible areas of negotiation set forth in IGRA unless 1) the Tribe agrees to discuss
26 such provisions; and 2) the State offers a meaningful concession that results in a substantial economic
27 benefit to the Tribe. The Tribe has continually informed the State that it is unwilling to forego its
28

1 RSTF payments. (PUMF No. 17, 19, 26-28, 30, 32, 34; Opp. DUMF Nos. 17, 19, 26-28, 30, 32, 34.)
 2
 3 The State has not set forth any evidence to the contrary. The State's entire argument rests on the
 4 premise that if the Tribe had continued negotiations, for some indefinite time, the State "might have
 5 also reached the same result' as it did with the Yurok Tribe." This argument in itself is disingenuous
 6 as the Tribe has continually asserted its position, while the State has continued to assert that this
 7 demand to forego such entitlement must be met as a condition of executing a Tribal-State Compact.
 8

9 The State must offer meaningful concessions that result in a substantial economic benefit to the
 10 Tribe. The State has not offered any principled basis for its demand that Fort Independence, and Fort
 11 Independence alone, forego its RSTF payments as a condition for execution of a Tribal-State
 12 Compact. California attempts to divert the Court's attention from the standard of good faith in IGRA
 13 to factors that shed no light on the basis for its demands. The State's sole argument as to its good faith
 14 in making this demand is that it was continuing discussions and that someday it might have conceded
 15 its position and allowed the Tribe to continue receipt of its RSTF payments if the Tribe had continued
 16 to negotiate long enough. Defendants Opposition at pg 16. This argument fails as it does not make
 17 the requisite showing required to demonstrate good faith. The State offers no facts, only speculation,
 18 as to its position. Even the speculative arguments made by California support the Tribe's position that
 19 California acted in bad faith, given the State's concessions that it is likely the Tribe is entitled to
 20 continue to receive RSTF payments.
 21
 22

23 **II. An Examination of the Record of Negotiations Shows the State Did Not Negotiate in** 24 **Good Faith.**

25 The record demonstrates that the State has attempted to impose a direct tax on the Tribe. The
 26 State concedes once it has been determined that such a direct tax is demanded of the Tribe that it
 27 constitutes evidence that the State failed to negotiate in good faith. 25 U.S.C. §§ 2710(d)(4),
 28

1 2710(d)(7)(B)(iii)(II). The Court then must conduct a “nuanced and fact-specific” examination of the
2 entire record of the negotiations. *Coyote Valley II*, 331 F.3d at 1113. An objective examination of the
3 record shows that the State has demanded a direct tax in violation of IGRA, has not offered
4 meaningful concessions that result in a substantial economic benefit to the Tribe. California has
5 offered no evidence for the court to reach a conclusion other than the State has not negotiated in good
6 faith. Therefore the Tribe’s summary judgment motion should be granted.
7

8 The record demonstrates that 1) the Tribe has requested negotiations for a Tribal-State Compact;
9 2) no Tribal-State Compact has been entered between the State and Tribe; 3) the Tribe and State have
10 been in negotiations for many years with the State continuing to demand a portion of the Tribe’s
11 revenue for the State’s general fund with no request that the funds be used for gaming related
12 expenses; 4) The State has not offered a meaningful concession that will result in a substantial
13 economic benefit to the Tribe; 5) the State has asserted that other compact provisions should carry
14 weight in this analysis yet fails to explain how at least 32 other tribes can operate class III gaming
15 devices under provisions less stringent than those Fort Independence has proposed for the same
16 benefits; 6) that no other tribe meeting the definition of a Non-Compact Tribe has been required as a
17 condition to execution of a Tribal-State Compact to forego its RSTF payments; and 7) the Tribe has
18 continued to attempt to meet many of the State’s demands such as provisions concerning
19 environmental protection and regulatory matters; and 8) The Tribe cannot agree to provisions that
20 would make the State, rather than the Tribe the primary economic benefit of the gaming operation.
21

22 The record demonstrates bad faith on the State’s part. The Defendants’ argue that if the Tribe
23 would have negotiated longer the State may have conceded as to the RSTF provision as California’s
24 last offer likely wasn’t its final offer. The Tribe is at a loss as to why the State would not have
25 proposed its final offer after being served with the complaint in this litigation, rather than go to court if
26 it believed such a final offer was acceptable and reasonable. As to the revenue sharing provisions the
27
28

1 only portions of the record that the State seems to be able to cite for support, are vague formalities
2 included in the correspondence from the Tribe to the State such as "Despite our outstanding issues
3 referenced above, we believe that a mutually agreeable Compact can be negotiated in the very near
4 future." (PUMF No. 19; Opp. DUMF No. 19.) "We continue to believe that a mutually agreeable
5 Compact can be negotiated in the very near future." (PUMF No. 26; Opp. DUMF No. 26.) The Tribe
6 continued to hope that the State would address the concerns set forth during years of compact
7 negotiations. Each of these concerns is set forth in the record. The Tribe continually asserted its
8 position as to these issues in hope that the State would consider the Tribes specific and unique
9 circumstances in relation to the unacceptable demands for revenue sharing and foregoing RSTF
10 payments. The Tribe seriously considered the State's concerns as to off reservation environmental
11 impacts, local mitigation, and regulation of gaming activities. In doing so the Tribe demonstrated its
12 willingness to accept such terms and address the State's legitimate issues in accordance with IGRA.
13 The State however, continued to assert its demands for revenue sharing and forgoing the RSTF
14 without conducting any economic analysis, without considering the information provided by the Tribe
15 as to the economic impact such demands would have on its ability to provide services to tribal
16 members, and without explanation as to why it was making demands of Fort Independence that it has
17 not made of any other tribe. The State cannot point to a single piece of evidence that supports its
18 demand for unrestricted revenue sharing or forcing the Tribe to forego its RSTF payments.
19
20
21

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

CONCLUSION

The record demonstrates that the State has attempted to impose a direct tax on the Tribe, and such a demand is evidence of bad faith. The State has not met its burden to prove otherwise. Therefore the Tribe's motion for summary judgment should be granted.

Dated: May 11, 2009

FREDERICKS PEEBLES & MORGAN LLP

John M. Peebles

Darcie L. Houck

A. Robert Rhoan

By: 

Darcie L. Houck

Attorneys for Plaintiffs

Fort Independence Indian Community