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FORT INDPENDENCE INDIAN COMMUNITY

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 OPPOSITION TO PLAINTIFF'S MOTION FOR 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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Plaintiff FORT INDEPEDENCE INDIAN COMMUNITY ("Fort Independence") hereby submits the following Memorandum of Points and Authorities in Support of its Opposition to Plaintiff's Motion for Summary Judgment filed by Defendants STATE OF CALIFORNIA, and ARNOLD SCHWARZENEGGER, Governor of the State of California ("California").

I. INTRODUCTION

California filed a motion for summary judgment on April 17, 2009 requesting that this Court dismiss the Complaint filed by Fort Independence with prejudice. The Tribe filed its motion for summary judgment on April 20, 2009 requesting that this Court find that California has acted in bad faith in negotiating a Tribal-State Compact, and ordering California to conclude a Tribal-State Compact with Fort Independence within sixty (60) days as required by the Indian Gaming Regulatory Act ("IGRA").

II. FACTUAL BACKGROUND

In 1999, California entered into approximately sixty essentially identical Tribal-State Gaming Compacts ("1999 Compacts"). (PUMF No. 43.) The 1999 Compacts provide that "Non-Compact Tribes" (defined as "federally recognized tribes that are operating fewer than 350 gaming devices," a definition that includes Fort Independence) are "third party beneficiaries of this and other compacts identical in all material respects." (PUMF No. 43.) Pursuant to the 1999 Compacts, all Non-Compact Tribes are entitled to receive $1.1 million per year from the Revenue Sharing Trust Fund ("RSTF"). (PUMF No. 43.) Sixteen Indian tribes that currently have gaming compacts with California receive payments from the RSTF. (PUMF No. 41, 42.) The RSTF was created by the California Legislature and is administered by the California Gambling Control Commission. A trustee for the receipt, deposit and distribution of the monies paid into the RSTF. The RSTF is funded by the fees paid by Tribes for the purchase of licenses to operate gaming devises. Fort Independence is a Non-Compact tribe that receives $1.1 million dollars annually from the RSTF.

In July 2004, Fort Independence requested that California commence negotiations on a gaming compact. (PUMF Nos. 1-9.) The parties exchanged initial drafts in December 2004. (PUMF No. 6, 7.) California's initial draft compact required the tribe to share revenue with the state, at the

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rate of 10% to 25% of Net Win, as a contribution to engage in Class III gaming. (PUMF No. 8.) These terms were imposed by California, not the result of any agreement arising from prior negotiations. Fort Independence consistently objected to this provision on the grounds that the Indian Gaming Regulatory Act ("IGRA") prohibits any kind of state-imposed tax, fee, charge, or assessment to engage in Class III gaming. (PUMF No. 17.) California's initial draft also contained a Section 5.0, entitled "Revenue Sharing Trust Fund," that stated only, "Open." (PUMF No. 9.)

In August 2007, Fort Independence submitted a draft compact to California. (PUMF No. 23.) This draft did not include the State's net win sharing provision, and provided that Fort Independence would remain entitled to its full share of the RSTF distributions pursuant to the 1999 Compacts. (PUMF No. 23.) Subsequent proposals by Fort Independence provided that any revenue share to California be offset by the payment the Tribe would make to state and local governments for infrastructure, mitigation, and regulation costs. (PUMF No. 26, 27.) Having failed to reach an agreement with California, Fort Independence filed the instant action alleging that California's insistence on improper terms constituted bad faith negotiations of a compact under the IGRA.

III. LEGAL ARGUMENT

A. California Did Not Negotiate a Tribal-State Compact With Fort Independence in Good Faith.

California argues that it negotiated a Tribal-State Compact in good faith because the Ninth Circuit has purportedly held that the United States District Court, Northern District of California has ruled that "both revenue sharing contributions and RSTF [are] directly related to gaming." (*See* Defendant's Points and Authorities in Support of Motion for Summary Judgment ("Defendant's Memo."), at p. 12, lines 19-21.) From this premise, California argues that "inclusion of [such provisions] in a proposed gaming compact [with Fort Independence] could not be considered evidence of a lack of good faith." *Id.* However, this argument misconstrues both the District Court's holding and the Ninth Circuit decision concerning whether revenue sharing provisions may be demanded by a State during negotiations of a Tribal-State Compact under IGRA. Therefore, Fort Independence asserts that California's did not negotiate in good faith.

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First, as noted in Fort Independence's moving papers supporting its summary judgment, IGRA contains a limited number of subjects which may be the subject of the negotiation of a Tribal-State Compact. *See* 25 U.S.C. 2710(d)(3)(C)(i)-(vi). In addition, IGRA expressly prohibits States from conditioning the negotiation and/or execution of a Tribal-State Compact upon a Tribe's agreement to remit a tax, fee or any other charge to the state. 25 U.S.C. § 2710(d)(4). The case upon which Defendant's rely confirmed that a State may not negotiate beyond the foregoing subjects since the "State cannot insist that compacts include provisions addressing subjects that are only indirectly related to the operation of gaming facilities." *In re Indian Gaming Related Cases (Coyote Valley I)*, 147 F.Supp.2d 1011, 1018 (N.D. Cal. 2001). Accordingly, the only proper subjects for negotiating and concluding a Tribal-State Compact pursuant to IGRA are those which are "directly related to the operation of gaming activities." *Id.* at 1018.

Rather than address this issue within the factual context of this case, California argues that the District Court held that any revenue sharing contribution and RSTF payment provision could be the subject of Tribal-State Compact negotiations. The decision in *Coyote Valley I* does not stand for such a broad proposition. The Court merely held that the RSTF and revenue sharing provisions "directly related" to gaming could be the subject of negotiations. The court concluded that the RSTF provision, an otherwise improper subject of negotiation, was a proper subject of negotiation because its application was conditioned on a licensing scheme which is "directly related" to gaming. *Id.* at 1018. The court also concluded that the revenue sharing provision at issue in *Coyote Valley I* was a proper subject of negotiation, because the use of those revenues was limited to purposes "directly related" to gaming. *Id.* at 1018-1019.

In the instant matter, instead of demonstrating that its proposed RSTF and revenue sharing provisions are "directly related" to gaming, California simply argues that such provisions are *per se* proper subjects of negotiation under IGRA. This misapplies the court's decision in *Coyote Valley I,* and is contrary to the express provisions of IGRA.

The State's proposed Compact contains a revenue sharing provision which requires Fort Independence to share its net win with California, and it is undisputed that the State has not identified

any specific gaming (direct or indirect) related purpose for these funds. In fact these revenues would go directly to the State's general fund with no limitations on use. As the court noted in *Coyote Valley I*, provisions only "indirectly related" to the operation of gaming facilities are insufficient to make an improper subject of negotiation, a proper one. *Id.* at 1018. Here, the revenue sharing and RSTF provisions demanded by California are not even "indirectly related" to the operation of gaming facilities, and do not constitute proper subjects of negotiation as a matter of law.

It is undisputed (as California concedes) that Fort Independence is an express and intended beneficiary of the various 1999 Tribal-State Compacts. Therefore, as a matter of law, Fort Independence is contractually entitled to RSTF funding. However, rather than offering any substantive argument regarding why Fort Independence's third-party beneficiary rights are not relevant to the inquiry regarding California's lack of good faith, California merely asserts that "the Compact provides no right for third-party enforcement of its terms." [1] (Defendant's Memo., at p. 12, lines 25-28, fn. 7.) Notably, California does not cite any authority explaining why the lack of an enforcement provision matters, or alternatively, why these third-party beneficiary rights are irrelevant to the Court's inquiry regarding California's bad faith negotiating posture. Despite California's assertion to the contrary, these third-party beneficiary rights are relevant to the Court's good faith inquiry for several reasons.

As a fundamental matter, entitlement to RSTF funding under other Tribal-State Compacts is outside the permissive subjects of negotiation under IGRA, unless accompanied by other provisions that "directly relate" to gaming, such as a licensing provision. As with the revenue sharing provisions, the RSTF provisions which require Fort Independence to forego its revenue sharing payments contain no provisions that "directly relate" to gaming. Fort Independence's third-party beneficiary rights under the 1999 Tribal-State Compacts are not a permissive subject of negotiation as interpreted by various Courts including authorities cited by California in support of its argument.

[1] Section 4.3.2(a) (i) of the 1999 Compact expressly provides that "Non-Compact Tribes", such as Fort Independence are third party beneficiaries of the 1999 Compact. Section 15.1 of the same 1999 Compact states, "Third Party Beneficiaries. Except to the extent expressly provided under this Gaming Compact, this Gaming Compact is not intended to, and shall not be construed to, create any right on the part of a third party to bring an action to enforce any of its terms." This section although not explicit, clearly infers that where an express third party right is granted there is a right to bring an action to enforce such rights under the 1999 Compact by the third party beneficiary. This premise is supported by California contract law. (*Prouty v. Gores Technology Group, supra, 121 Cal. App. 4th at pp. 1232-1233, 18 Cal. Rptr. 3d 178).*

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In order to even discuss such terms the State would have to offer a meaningful concession that results in a substantial economic benefit to the Tribe. California has not done so here. Therefore, it follows that any efforts by California to demand negotiations over such provisions is indicia of bad faith under IGRA.

In addition, as outlined in Fort Independence's moving papers supporting its summary judgment motion, California appears to have imposed the RSTF funding provisions for punitive reasons, since California has recently negotiated two Tribal-State Compacts with other tribes that allow continued RSTF payments. Both of these Tribal-State Compacts contain similar terms to those that Fort Independence is seeking. These terms include maintaining the definition of a Non-Compact Tribe as set forth in all other Compacts entered into by the State, except for the provisions set out in the State's proposed Compact with Fort Independence. In doing so, California is seeking to alter the terms of the 1999 Tribal-State Compacts without seeking the permission of the other contracting parties to those agreements. Indeed, the proposed provision would defeat the intent of those other contractual parties in having RSTF funding distributed to eligible tribes like Fort Independence.

In addition, 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 may be negotiated under IGRA, California still cannot insulate itself from a bad faith finding, as its proposed terms are patently unreasonable. California's negotiating position is directly contrary to the purposes of IGRA, as demonstrated by California's negotiations with other tribes that continue to receive RSTF payments and 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, the burden of proving that it acted in good faith now shifts to California, a burden it cannot meet.

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B. It is Proper to Go Beyond the Record to Determine Good Faith, However, in This Case Bad Faith is Demonstrated on the Face of the Record.

The State argues that the Tribe "confuses" an obligation to negotiate in good faith with a duty to actually complete or conclude negotiations to enter into a compact. California relies heavily on the court's decision in *Coyote Valley* I which "looked for guidance" as to the interpretation of IGRA's good faith provisions by interpreting similar provisions in the National Labor Relations Act (NLRA), and notes that many cases dealing with IGRA's good faith provisions are dealt with on either summary judgment or motions to dismiss. The reason, as stated by California, is "the negotiations between the parties is not a subject matter that lends itself to much dispute. The proposals, counter-proposals, letters, and other documents that are part of the negotiations constitute the evidence the court will consider to determine the issue of good faith." Defendants Memo at pg.13. California provides 4 questions, citing to *Coyote Valley* II, 331 F.3d at 1094 and *Coyote Valley I*, 147 F. Supp. 2d at 1014, for the Court to consider in making a determination as to its good faith:

1. Did either party move its initial negotiating position towards the position of the other?

California spends a significant amount of time arguing that the Tribe's position as to the number of gaming devices changed during the course of negotiations. However, this is not the issue that is contested in this litigation, nor does it provide evidence as to any of the matters at issue in this case. The Tribe has attempted to work with the State in reaching agreement as to permissible subjects of negotiation; however, California continues to condition the execution of a Tribal-State Compact on the inclusion of terms that violate IGRA. Fort Independence is not required to negotiate terms that fall outside these permissible areas of negotiation, nor move towards the position of the State in a manner that would result in a Tribal-State Compact that includes such impermissible terms. (25 U.S.C. § 2710(d)(3)(C). The record demonstrates that Fort Independence has been willing to meet the State half way or more on permissible subjects of negotiation. Examples include the Tribe's willingness to accept California's terms as to mitigation of off reservation impacts, and the Tribe's willingness to adopt Minimum Internal Control Standards for Class III gaming. This is set out in the

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Tribe's letters to the State dated May 22, 2007 and April 15, 2007. (PUMF Nos. 26, 28). The Tribe is still willing to agree to the terms set forth in its May 22, 2007 and April 15, 2007 letters.

2. Were the parties proposals consistent with permissible subjects of compact negotiations under IGRA?

The record is clear that California has consistently conditioned the execution of a Tribal-State Compact on terms that fall outside the permissible subjects of negotiation set forth in IGRA. The State has conditioned the execution of the Tribal-State Compact on Fort Independence foregoing its entitlement to RSTF payments, and agreeing to revenue sharing that constitutes a tax, fee, charge or other assessment in violation of IGRA. (PUMF Nos. 8, 25, 31, 33).

3. Did either party offer the other meaningful concessions in return for its demands?

The State has not made any meaningful concessions that would result in a substantial economic benefit to Fort Independence in exchange for its demands of revenue sharing and foregoing the RSTF payments. California consistently cites to *Coyote Valley I* and *II* as authority that its proposal for exclusivity equates to a meaningful concession. However, it fails to recognize that the court's ruling in those cases specifically relied on the terms of the 1999 Compact, which were at issue in *Coyote Valley I* and *II*. The terms of the 1999 Compact are very different than the terms set out in California's proposed compact with Fort Independence. If the State would like to offer the same terms at issue in *Coyote Valley I* and *II*, Fort Independence would be more than willing to accept such terms. The time and resources being utilized in this litigation could then be better spent in finalizing a Tribal-State Compact that would benefit both the Tribe and the State.

California, however, continues to assert that exclusivity alone constitutes a meaningful concession. California ignores several factors in reaching this conclusion. First, as the Court points out in *Coyote Valley*, the State had no obligation to change its Constitution to allow for class III Indian Gaming in 2000. This was a major concession on the part of the State in exchange for the terms set forth in the 1999 Compacts. Second, the exchange was for RSTF payments to Non-Compact Tribes (such as Fort Independence), and for SDF payments to the State. The RSTF payments were based on the license system for gaming devices that benefited tribes in less

economically favorable geographic locations. The SDF funding went to the State, but was specifically earmarked for items that were directly or closely related to gaming activities. The California Constitution has been amended and the State has an affirmative obligation pursuant to IGRA to negotiate with tribes for class III gaming compacts. The California Constitution requires the State to provide this exclusivity to tribes. Even if this exclusivity is to be considered a meaningful concession, it cannot be worth more today, when the State is required to enter into negotiations with tribes for class III compacts, than it was in 2000 when the State had no obligation to amend its Constitution or enter into negotiations for class III gaming with Indian tribes. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F. 3d 1250 (9th Cir. 1994). (PUMF No. 28). Yet, the State asserts that it can demand more of Fort Independence than was required in 2000, while providing less. This is contrary to the intent and purpose of IGRA, as, the meaningful concession must provide a substantial economic benefit to the tribe. Here the State's demands for revenue sharing and foregoing RSTF payments would result in a situation where the State not the Tribe becomes the primary economic beneficiary of the gaming facility, contrary to the intent and purposes of IGRA. (PUMF No. 29). Therefore, the State has not offered any meaningful concession in return for its demands as shown by Fort Independence Gaming Market Study. Any concessions offered therefore would not result in a substantial economic benefit for the Tribe. The State seems to miss the point of this litigation, which is that the Tribe would like to operate a class III gaming facility to provide funding for tribal government operations, something it cannot do if the facility is operated at a loss, because all the profits from the facility must be given to the State.

4. Were the terms similar to those offered and accepted by other tribes that the Secretary of the Interior found consistent with IGRA?

California continues to assert that Fort Independence agreed to its terms for revenue sharing. Yet the record is clear, despite the States references to earlier letters between the State and tribe[2], that Fort Independence has consistently rejected the State's terms as being outside the permissible areas

[2] The State argues that these letters represent some sort of a concession by Fort Independence to revenue share with the State. However, no such concession has been made by Fort Independence. Fort Independence has continually asserted that any revenue sharing provisions not directly related to gaming activities are impermissible subjects of negotiation. Additionally the State makes several references to "the Tribe's draft compacts", however this draft compact is the State's draft compact that includes hand written notes submitted by the Tribe. This draft compact with the Tribe's notes also in no way constitutes any agreement to revenue share by the Tribe.

of negotiation pursuant to IGRA, and that the specific demands made by the State do not constitute meaningful concessions that would result in a substantial economic benefit to the Tribe. (PUMF Nos. 28, 30, 32). The State is the party that confuses a willingness to discuss terms with an agreement. The Tribe has never agreed to the State's revenue sharing terms, and the State has consistently demanded revenue sharing that goes beyond the scope of that allowed under IGRA. California also attempts to argue that its terms are the same as those offered to other tribes. However, the State is comparing apples to oranges. The State has entered into re-negotiated compacts with tribes that had 1999 Compacts. These re-negotiated compacts give the party tribes in many cases either rights to unlimited gaming devices, or gaming devices that go beyond what was the state-wide cap set out in the 1999 Compacts (meaning the party tribe may operate more than 350 gaming devices without having to acquire such a license through the draw system set out in the 1999 Compacts[3]) (See PUMF Nos. 41, 42, 43).

New compacts entered into by the State also allow for larger class III facilities, (over 350 gaming devices). The Yurok Compact is the only compact the State has entered into that specifically sets a cap for gaming devices under 350. This compact also specifically allows for offsets for local mitigation and regulatory costs, as well as confirmed receipt of RSTF payments with no phase out. (PUMF No. 42).

Fort Independence does not want unlimited licenses, nor does it want to acquire licenses that would otherwise be outside the Statewide cap, as this cap system accounts for each Non-Compact Tribe being entitled to 350 gaming devices without a license pursuant to section 4.3.2.2 of the Tribal-State compact. The revenue sharing provisions demanded by the State go well beyond the requirements of IGRA, particularly when the bargained for exchange amounts to much less for the Tribe in this case than that received by other Tribes.

As to the demand to forego RSTF payments, the State can point to no other Tribal-State Compact that has been negotiated between California and a California Indian tribe that requires either

[3] The State currently asserts that there are no more licenses left in the gaming device license pool system set out in Section 4.3.2.2 of the 1999 Compacts. A recent Federal Court decision states that California's interpretation of the number of state-wide licenses is not correct, and that there is in fact approximately 10,000 more licenses that should be available to 1999 Compact tribes. *Cachil Band of Wintun Indians of Colusa Indian Community v. California*, 2009 WL 1084830 pgs 18-19 (E.D. Calif. 2009).

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foregoing its entitlement to RSTF payments, or phasing out such payments. In fact, the only argument California presents as to its "good faith" in demanding such a term is that it proposed such a term to the Yurok Tribe in an initial draft compact. The Yurok Tribe rejected this provision. The State never entered into this version of the compact, but subsequently entered into a compact with the Yurok Tribe that specifically allowed the tribe to continue to receive its RSTF payments. Fort Independence would like the State to provide some basis for its demand that Fort Independence, and only Fort Independence be required to forego its third party entitlement under the 1999 Compact, while other similarly situated tribes meeting the definition of "Non-Compact Tribe" have not been required to forego such entitlements in order to enter a Tribal-State Compact. (PUMF Nos. 41, 42; Plts RJN, Exhibits 7 & 8, respectively). The State has remained silent on this matter.

Fort Independence agrees with the State that "good faith" presupposes a desire for an ultimate agreement, not a "take it or leave it" attitude. *Seattle-First Nat'l Bank v. NLRB*, 638 F.2d at 1227 n.9. The State however, continues to maintain its "take it or leave it attitude" despite the words it puts on paper regarding "no preconditions on negotiations". See Def. MSJ pg. 16. (PUMF No. 33). The State has made it very clear that it will not enter into compacts that do not include revenue sharing provisions in violation of IGRA. The negotiations clearly demonstrate, contrary to California's assertions, that is has approached these negotiations with a "take it or leave it" attitude as its demand for revenue sharing provisions and Fort Independence foregoing its RSTF payment entitlement are not negotiable. Therefore these demands constitute a *prima facie* showing of bad faith, shifting the burden to the State. California has not met its burden to demonstrate otherwise, and therefore the Court should grant the relief requested by Fort Independence.

C. California Did Not Offer Meaningful Concessions To Fort Independence.

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. Specifically, California argues that the mere negotiation of a Tribal-State Compact itself is a

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meaningful concession: "Because the state offered the meaningful concession of a class III gaming compact, it cannot be considered to have attempted to impose a direct tax on the Tribe by including compact provisions." (Defendant's Memo. at p. 19, lines 14-18.) California claims that the Ninth Circuit's decisions in *In re Indian Gaming Related Cases ("Coyote Valley II")*, 331 F.3d 1094 (9th Cir. 2003) and *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095 (9th Cir. 2006) support its position. However, as with other positions taken by California in its brief, a close examination of the cases relied on does not support these contentions.

IGRA prevents California 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 negotiations. 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 concessions that result 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." *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 basis for allowing such payments, 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 a recent case 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

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Tribal-State Compact negotiations. *See Rincon Band of Luiseno Mission Indians of the Rincon 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 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 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 were 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.

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.) Therefore the test to determine whether California has made a meaningful concession in exchange for revenue sharing is: (1) whether the concessions offered, under the totality of the circumstances are reasonable 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 demonstrate a *prima facie* showing of bad faith on the part of the State. California has not met its burden of demonstrating otherwise.

California's offer of exclusivity is meaningless, as the California Constitution does more than simply authorize the California Governor to negotiate a Tribal-State Compact with federally-recognized tribes, it specifically exempts tribes, and only tribes, from the Constitution's ban on certain types of class III gaming. In addition, IGRA expressly requires California, and therefore the Governor, to negotiate a Tribal-State Compact with Fort Independence, upon its request. *See* 25 U.S.C. § 2710(d)(3)(A) ("Upon receiving such a request, the State Shall negotiate with the Indian tribe in good faith to enter into such a compact"). Merely "offering a Tribal-State Compact" with an exclusivity provision cannot constitute a meaningful concession, since that is something that California is obligated to provide under both state and federal law.

In addition, 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. The Innovations Group conducted a Gaming Market Assessment in June of 2006. (PUMF 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 4) for debt financing. (PUMP No. 29.) The State has provided no support for its position that it has provided a meaningful concession, nor that such a concession would provide a substantial economic benefit to Fort Independence. The State merely asserts that exclusively in and of itself is a meaningful concession that allows it to demand a set portion of a tribe's revenue without considering the economic impacts of such a demand on the Tribe.

The State also argues that it may demand Fort Independence to forego its RSTF payments as a condition to the execution of a Tribal-State Compact. The basis for its argument, however is unclear and appears to be contrary to the position California took in the *In re Indian Gaming cases*. The State asserted in the *In re Indian Gaming cases* that the RSTF promoted the intent and purposes of IGRA by providing needed funds to tribes located geographically in isolated areas where gaming may not be as profitable. The RSTF fund would be limited to tribes operating less than 350 gaming devices. Now California asserts that allowing these tribes located in geographically isolated areas to have limited class III gaming (under 350 machines), and continue to receive the much needed RSTF funding "would not be consistent with the intent" of IGRA. (PUMF No. 25). The State negotiated the definition of a Non-Compact Tribe and made a determination in doing so that such tribes could receive these payments and operate less than 350 gaming devices consistent with the intent and purposes of IGRA. Now the State demands that Fort Independence forego this entitlement as a condition of entering into a Tribal-State Compact, despite continuing to meet the definition of a Non-Compact Tribe, without any additional concession that would result in a substantial economic benefit to the Tribe. This is contrary to the intent and purpose of IGRA which is to promote tribal economic self-sufficiency.

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IV. CONCLUSION

For all of the foregoing reasons, Fort Independence respectfully requests that this Court deny California's Motion for Summary Judgment.

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