No. 09-16942

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY, a federally recognized Indian Tribe,

Plaintiff-Appellee,

v.

STATE OF CALIFORNIA; CALIFORNIA GAMBLING CONTROL COMMISSION, an agency of the State of California; ARNOLD SCHWARZENEGGER, Governor of the State of California,

Defendants-Appellants,

PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, a federally recognized Indian Tribe,

Plaintiff-Intervenor-Appellee.

AMICUS CURIAE BRIEF OF THE RINCON BAND OF LUISENO MISSION INDIANS IN SUPPORT OF PLAINTIFF-APPELLEE'S OPPOSITION TO THE DEFENDANTS-APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS

As a governmental party, the Rincon Band of Luiseno Mission Indians is not required to furnish a Certificate of Interested Persons. *See* Fed. R. App. P. 26.1(a) and Fed. R. App. P. 29(c).

I. Statement of Identity and Interest.

The Rincon Band of Luiseno Mission Indians is a federally recognized Tribe with reservation lands located in San Diego County. Rincon is a signatory to a Tribal-State Compact identical in form to the one between the Colusa Tribe and the State that is at issue in this case. The compacts signed by Rincon, Colusa, and more than sixty other California Tribes (the "1999 Compacts"), contractually obligate the State to permit signatory Tribes to draw from a statewide pool of available gaming device licenses with a size set by the 1999 compacts.

In June 2004, Rincon filed suit in the U.S. District Court for the Southern District of California seeking a declaratory judgment regarding the number of gaming device licenses available in the statewide pool and making other claims[1] regarding the State's failure to act in good faith. Rincon's declaratory claim has

[1] Because of entry of a Rule 54(b) judgment, the Rincon Band's claims have been separated such that Rincon's declaratory claim regarding the number of machines in the state-wide pool is pending upon remand of this Court. *See Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, No. 06-55259 (Aug. 8, 2008) (copy attached as Exhibit 1). The Rincon Band's remaining claim regarding the State's failure to negotiate in good faith is pending before this Court pursuant to the State's appeal. That matter is fully briefed and argument is scheduled for November 4, 2009. *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, Nos. 08-55809, 08-55914.

been fully briefed and argued on summary judgment and is awaiting decision by the Southern District of California.

On August 19, 2009, Judge Damrell of the Eastern District ordered the State to conduct a draw for 10,549 additional gaming device licenses. Rincon currently operates only 1,600 gaming device licenses and will be eligible to participate in the draw if it is held. In its emergency motion for stay, the State specifically cites to Rincon's pending litigation as a reason that the Eastern District judgment should be stayed. Rincon submits this amicus brief in opposition to the State's Motion for an Emergency Stay to provide the Court with information regarding the status of its pending litigation and the State's similar efforts to delay the result in that case, as well as to provide insight into the public and private interests that would be affected by the issuance of any stay.

II. Rincon's Litigation with the State and the State's Delay Tactics.

In the summer of 2004, Rincon filed suit seeking (1) a declaration regarding the number of licenses actually available under the 1999 Compacts and (2) a claim that the State had failed to negotiate with Rincon in good faith as required by IGRA. Five years later, Rincon remains without any of the requested relief, primarily due to the State's delay tactics.

In the winter of 2005, the State obtained the dismissal of Rincon's declaratory claim on Rule 19 grounds. That claim was reinstated by this Court last year. *See Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, No. 06-55259 (Aug. 8, 2008) (copy attached as Exhibit 1). In the past nine months alone, the State has filed three different motions seeking to stall consideration of Rincon's declaratory claim.[2] First, in January 2009, the State moved to sever Rincon's declaratory claim and transfer it to the Eastern District. State's Motion to Sever and Transfer to the Eastern District of California Plaintiff's Fourth Claim for Relief, *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, (S.D. Cal. Jan. 30, 2009) (No. 04cv1151, docket no. 243). The Southern District denied that motion and also denied the State's request to stay resolution of the licensing pool issue because the State could show no concrete hardships or inequities it would suffer. *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, No. 04cv1151

[2] The State has also attempted to delay this Court's consideration of the District Court ruling that the State failed to negotiate in good faith, contending for the first time in a motion filed after conclusion of the briefing that this Court should certify a question of state constitutional law to the California Supreme Court. State's Motion for Certification to California Supreme Court, *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger* (9th Cir. June 12, 2009) (Nos. 08-55809, 08-55914).

WMc, slip op. at 9 (S.D. Cal. Apr. 17, 2009) (attached as Exhibit 2). Then, in June 2009, the State filed a second motion to sever and transfer, this time asking the court to sever Rincon's declaratory claim and transfer it to a different judge in the Southern District. State's Motion to Sever and Transfer to the Honorable Larry Alan Burns Plaintiff's Fourth Claim for Relief, *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, (S.D. Cal. June 12, 2009) (No. 04cv1151, docket no. 254). The Southern District Court denied that motion as well, and Rincon was finally able to be heard on its motion for summary judgment on the declaratory claim. *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, No. 04cv1151 WMc (S.D. Cal. Aug. 3, 2009) (attached as Exhibit 3).

Undeterred, the State raised yet another procedural issue, this time claiming that the California Gambling Control Commission (a state agency operating under the direction of the Governor) was a necessary party to Rincon's declaratory claim, necessitating post-argument briefing and further delaying resolution of Rincon's declaratory claim. *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, No. 04cv1151 WMc (S.D. Cal. Aug. 10, 2009) (ordering post-argument briefing on Rule 19 issue).

Now the State has requested a stay of the license draw ordered by the Eastern District Court until this Court resolves the State's appeal, a process that will likely take at least two years to complete, if not longer due to the State's failure to seek expedited review of its appeal. This Court should deny the State's motion for stay and refuse to tolerate the State's ongoing attempts to subvert the judicial process and extort unlawful taxes from California's Indian Tribes.

III. The State's Arguments in Support of a Stay Are Disingenuous.

In support of its motion for stay, the State argues that proceeding with the draw will benefit the Rincon Band even though the State submitted evidence in the Rincon case that may lead to application of the "doctrine of unilateral mistake" precluding Rincon from obtaining additional gaming device licenses. (*See* State's Memorandum of Points and Authorities in Support of Motion to Stay at 16-17.) The State references a letter to Governor Davis where several tribes, including Rincon, informed the Governor that they do not support the concept of a state-wide pool for gaming device licenses, but that letter does not support the State's argument. The letter merely identifies that the Tribes were aware that a concept of a statewide pool was being discussed. The letter does nothing to suggest the Tribes were aware of the number or that the language unilaterally drafted by the State equated to any specific number or gaming device licenses. Further, the letter was

soundly rejected by the District Court in denying the State's Motion for Reconsideration. *Cachil Dehe Band of Wintun Indians v. State of California,* No. 04cv02265 (E.D. Cal. Aug. 11, 2009) (denying State's motion for reconsideration). The practical reality is that 42,700 is the lowest number presented by the Rincon Band, such that the Rincon litigation will likely result in the same or higher number declared as the correct interpretation of the 1999 Compacts. Any decision in the *Rincon* litigation will likely also be appealed to this Court and as identified by this Court in remanding the instant case, inconsistent judgments can be resolved on appeal. *Dehe Band of Wintun Indians v. State of California,* 547 F.3d 962, 972 n.12 (9th Cir. 2008).

In its motion for stay, the State also argues that the District Court's injunction "thwarts the 'meet and confer' requirement" of the 1999 Compacts. This argument is the height of hypocrisy. The State has repeatedly failed to timely respond to Rincon's numerous "meet and confer" requests and has refused to negotiate with Rincon in accordance with the provisions of the 1999 Compact. *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, No. 04cv1151 WMc, slip op. at 12-23 (S.D. Cal. Apr. 29, 2008) (currently on appeal to Ninth Circuit, case nos. 08-55809, 08-55914) (attached as Exhibit 4). When the State belatedly responds to Rincon's "meet and confer"

requests, the State has made unlawful demands, including demanding that Rincon make "revenue sharing" payments that amount to an unlawful tax on gaming revenues in violation of IGRA. *Id.* The Southern District Court found that these demands violated the State's duty to negotiate in good faith with Rincon. *Id.* The State has proven that it has no respect for the "meet and confer" requirements of the 1999 Compacts, accordingly, it should not be granted a stay of the Eastern District's order on the unsupported hope that it will finally negotiate in good faith with California's Tribes.

IV. Rincon and Other Compact Tribes Are Harmed by the State's Refusal to Conduct a Draw for Licenses Available in the State-Wide Pool Under the Terms of the 1999 Compacts.

Rincon and other Compact Tribes continue to suffer irreparable harm from the State's actions. A stay would only cause continued delay and generate further irreparable harm to the Rincon Band. The Rincon Band's inability to obtain gaming device licenses to which it is contractually entitled has resulted in the loss of millions of dollars in governmental revenue; Rincon will never be able to recover this lost revenue from the State. This loss of Tribal Government revenue translates into a loss of funding for tribal government programs and deprivation to the Tribe of the benefits intended by Congress. 25 U.S.C. §§ 2701(4), 2702(2),

2710(b)(2)(B). Over the course of the past 5 years, the State has successfully prevented Rincon from acquiring additional licenses under its 1999 Compact.

The Rincon Band will continue to suffer irreparable harm if the stay is granted. Permitting the State to continue its dilatory tactics will result in additional irreparable harm to the Rincon Band. Should the stay be granted, the Rincon Band would be deprived of revenues enabling it to provide vital services to care for the health and well-being of its tribal members. The Court has already ruled that the 1999 Compact does not allow for an action for money damages – accordingly money damages is not an available remedy. *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, No. 06-55259 (Aug. 8, 2008) (attached as Exhibit 1). In balancing the speculative harm to the State with the actual and continuing irreparable harm to the Rincon Band, it is clear that this Court should deny the State's motion for stay.

V. Conducting an Immediate License Draw Will Not Harm the State.

The State alleges that conducting an immediate draw while litigation is pending in other district courts may result in the State being required to conduct draws for an inconsistent number of licenses. However, due largely to the State's success in blocking other Tribes' efforts to obtain *any* final resolution of their declaratory claims, no conflicting orders exist.

The State's other argument is that once it issues licenses pursuant to this Court's order it will be unable to get those licenses back if it prevails on appeal. For the reasons that will no doubt be addressed by the parties to this suit, the State has little likelihood of prevailing on appeal. However, even if the State does prevail, this concern is without merit. First, the State could set up a license draw in which it expressly conditions the ongoing use of licenses drawn on affirmance by this Court. The CGCC has already informed Tribes that they would need to return the licenses drawn if this Court reverses or reduces the size of the pool below the pool used to conduct the draw. Second, the 1999 Compacts themselves provide for a limited waiver of sovereign immunity in litigation over the 1999 Compact that would permit the State to file suit against any Tribe that refused to return a license in excess of the pool size as determined by this Court. *See* Compact § 9.4.

The State also argues that a stay is appropriate because if this Court reverses the decision of the Eastern District, then the State will be unable "to recover unauthorized profits realized by the tribes that obtain licenses through the draw." This statement demonstrates the State's fundamental misunderstanding of IGRA and the 1999 Compacts. The State is NOT entitled to any portion of the gaming profits – authorized or unauthorized – that are realized by California's Tribes. Likewise, the State cannot tax the profits the Tribes' earn or demand that the

Tribes "share" their revenues with the State. *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, No. 04cv1151 WMc, slip op. at 12-23 (S.D. Cal. Apr. 29, 2008) (currently on appeal to Ninth Circuit, case nos. 08-55809, 08-55914). Rincon's Compact is valid until 2020 and permits Rincon to have up to 2,000 gaming device licenses (subject to availability in the statewide pool) without paying any "revenue sharing." The State is not harmed by the Eastern District's order requiring the State to give Rincon and other Compacting Tribes what the State promised to give them ten years ago when it signed the 1999 Compacts.

Finally, the State's motion for stay presents a classic contradiction – loss of state revenue (due to inability to coerce tribes into amended compacts) is a valid justification for the stay; on the other hand, the loss of *Tribal* revenue (due to the Tribe's inability to receive the licenses to which they are contractually entitled) is not a valid justification to deny the stay? Denial of the stay furthers the State's bad faith tactics in an effort to deprive Tribes of the intended benefits of IGRA.

VI. Conclusion.

For the aforementioned reasons, Rincon respectfully urges this Court to deny the State's Emergency Motion for Stay Pending Appeal.

RESPECTFULLY SUBMITTED this 22nd day of September, 2009.

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 29(c) and (d) and Circuit Rule 32-1 the undersigned certifies that the accompanying brief complies with those rules. The brief is double-spaced, utilizes 14-point proportionally spaced Times New Roman typeface, and contains 2,173 words. The brief does not exceed 10 pages, or one-half the length of the supported Opposition to the Defendants-Appellants' Emergency Motion For Stay Pending Appeal.

/s/ Jeff A. Siatta

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF System.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system

/s/ Jeff A. Siatta

EXHIBIT 1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RINCON BAND OF LUISENO MISSION INDIANS OF THE RINCON RESERVATION, a/k/a Rincon San Luiseno Band of Mission Indians a/k/a Rincon Band of Luiseno Indians, Plaintiff - Appellant, v. ARNOLD SCHWARZENEGGER, Governor of California; WILLIAM LOCKYER, Attorney General of California; STATE OF CALIFORNIA, Defendants - Appellees.	No. 06-55259 D.C. No. CV-04-01151-TJW MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Thomas J. Whelan, District Judge, Presiding

Argued and Submitted April 9, 2008
Pasadena, California

Before: CANBY, KLEINFELD, and BYBEE, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

The Rincon Band of Luiseno Mission Indians ("Rincon") brought this action against the governor of California[1] ("the State") seeking, *inter alia*, reliance damages and a declaratory judgment regarding the aggregate maximum number of slot machine licenses available to Indian tribes in California who were parties to approximately 60 essentially identical Indian Gaming Compacts between those tribes and the State. The district court dismissed several of Rincon's claims, including these two. It dismissed the declaratory judgment action for failure to join all other tribes with similar compacts, who were subject to the same licensing pool, as required parties under Federal Rule of Civil Procedure 19. It dismissed the claim for damages as barred by the Eleventh Amendment of the U.S. Constitution. A partial final judgment was entered on the dismissed claims pursuant to Federal Rule of Civil Procedure 54(b). Rincon brings this appeal to challenge the dismissal of the declaratory judgment and reliance damage claims. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm in part and reverse in part.

We review for abuse of discretion a dismissal under Rule 19 for failure to join a required party. *See Dawavendewa v. Salt River Project*, 276 F.3d 1150, 1154 (9th Cir. 2002). We review de novo legal conclusions underlying the court's

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[1] Originally, California Attorney General William Lockyer was also named as a defendant. Rincon conceded at the district court that Lockyer did not need to be a party to the litigation, and the district court dismissed the claims against him.

decision. *See Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 879 (9th Cir. 2004). De novo review may therefore extend to determinations of whether a third party's interests would be impaired within the meaning of the joinder rules, if that determination decided a question of law. *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022 (9th Cir. 2002). Immunity under the Eleventh Amendment presents questions of law reviewed de novo. *See Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004).

Rincon's declaratory judgment claim challenging the State's calculation of the maximum number of licenses in the 1999 Compact pool presents an issue identical to one addressed in *Cachil Dehe Band of Wintun Indians v. California*, No. 06-16145 (August 8, 2008), filed contemporaneously with this memorandum disposition. In *Cachil Dehe Band*, we held that an Indian tribe that is party to a 1999 Compact with California may proceed to litigate the size of the total license pool without joining other compacting tribes, because those tribes have no protectable interest in the size of the license pool that qualifies them as required parties within the meaning of Rule 19(a). That ruling controls the present appeal of Rincon's declaratory judgment claim. Accordingly, we reverse the decision of the district court and remand this claim for further appropriate proceedings.

We affirm the district court's dismissal of Rincon's action for reliance

damages against the State. A waiver of Eleventh Amendment immunity requires "the most express language or . . . overwhelming implications . . . as will leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (internal quotation marks, citations and alterations omitted). Rincon identifies no such waiver applicable here. The Compact does not waive the State's immunity from collateral damages actions. This damages action does not arise out of a breach of the Compact, so it falls outside the statutory waiver for actions "arising from . . . the state's violation of the terms of any Tribal–State compact to which the state is or may become a party." Cal. Gov't Code § 98005, *upheld by Hotel Employees & Restaurant Employees Int'l Union v. Davis*, 981 P.2d 990 (Cal. 1999). Therefore, the Eleventh Amendment bars the action. We affirm the district court's dismissal of this claim.

The parties shall bear their own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

EXHIBIT 2

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RINCON BAND OF LUISENO MISSION INDIANS OF THE RINCON RESERVATION, a/k/a RINCON SAN LUISENO BAND OF MISSION INDIANS a/k/a RINCON BAND OF LUISENO INDIANS,

Plaintiff,

vs.

ARNOLD SCHWARZENEGGER, Governor of California; WILLIAM LOCKYER, Attorney General of California; STATE OF CALIFORNIA,

Defendant.

CASE NO. 04cv1151 (WMc)

ORDER DENYING DEFENDANTS' MOTION TO TRANSFER, OR IN THE ALTERNATIVE STAY [DOC NO. 243.]

I. INTRODUCTION

On January 16, 2009, Defendants filed a motion to sever Plaintiff's fourth claim for relief and transfer it to the Eastern District of California or, in the alternative, to stay the claim to wait for guidance from the United States District Court for the Eastern District, which is presently considering similar licensing issues raised by the Colusa Tribe in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. State of California*, No. S-40-2265 FCD KJM (E.D. Cal.) ("*Colusa* I"). [Doc. No. 243 at 1:14-17.] Plaintiff filed an Opposition brief on January 30, 2009. [Doc. No. 244.] Defendants filed a Reply brief on February 5, 2009. After careful consideration of the parties' briefs, exhibits and declarations, the Court **DENIES** Defendants' motion to transfer or stay. As explained in detail below, Defendants have not met their burden of showing the inconvenience necessary to

warrant severance, transfer or stay of the licensing pool issue presented by Plaintiff's fourth claim for relief.

II. BACKGROUND

In September 1999, the State of California ("the State") and the Rincon Band ("Rincon or "the Tribe"") entered into a Compact to allow the Tribe to engage in Class III gaming. [Doc. No. 108, First Amended Complaint ("FAC"), paras. 35-38.] The Compact between the State and Rincon is materially identical to other compacts between the State and more than sixty federally recognized California Indian tribes. [Doc. No. 108, FAC, paras. 38-40, 44-50, 55-56.]

In Rincon's action against the State, it seeks a declaratory judgment regarding the aggregate maximum number of slot machine licenses available to California Indian tribes. At the outset of the case, the Honorable Thomas J. Whelan dismissed Rincon's declaratory judgment claim for failure to join all other tribes with similar compacts who were subject to the same licensing pool as required parties under Federal Rule of Civil Procedure 19. Rincon appealed the District Court's decision. The Ninth Circuit reversed the decision and remanded the license pool claim for further proceedings. [Doc. No. 239.]

In addition to reversing and remanding Rincon's case, the Ninth Circuit reversed and remanded two other actions which were similarly dismissed on Rule 19 grounds, including the *Colusa* I action. As explained in this Order's introduction section, *supra*, Defendants move to sever and transfer Rincon's licensing pool claim to the United States District Court for the Eastern District. Defendants propose Rincon's licensing pool claim be consolidated with the *Colusa* I action, which presents a similar licensing pool size question. [Doc No. 234-5, Defs' Request for Judicial Notice, Ex. B, paras. 42-48.]

III. DISCUSSION

Title 28 U.S.C. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it may have been brought." 28 U.S.C. § 1404(a). The courts undertake a two-step analysis to determine whether an action should be transferred. First, the court must determine whether the action "might have been brought" in the potential transferee court. *See Hoffman v. Blaski*, 363 U.S. 335,

343-44 (1960); *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir. 1985).

If the action might have been brought in the proposed transferee court, the court then balances several case specific factors including: "(1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof." *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000). Of the various factors, the plaintiff's choice of forum is given significant weight and will not be disturbed unless other factors weigh substantially in favor of transfer. *See* 28 U.S.C. § 1404(a). In addition, although not dispositive, "'a forum selection clause is determinative of the convenience to the parties and is entitled to substantial consideration.'" *Unisys Corp. v. Access Co.*, 2005 WL 3157457, *4-5 (N.D. Cal. 2005).

The movant bears the burden of justifying the transfer by a strong showing of inconvenience. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986). The motion may be denied if the increased convenience to one party is offset by the added inconvenience to the other party. *Id.*

A. The Compact Contains A Permissive Forum Selection Clause Which Allows The Action To Have Been Brought In The Eastern District of California

The State argues the Tribe's licensing pool claim may be severed and transferred under 28 U.S.C. s 1404(a) to the Eastern District of California to be consolidated with the *Colusa* I action. [Defs.' Motion at 5:5-13.] Further, the State contends the Compact regulating the conduct of the parties in the event of litigation only contains a permissive forum selection clause, which does not require this action be maintained in the Southern District. [Defs.' Motion at 5:23-6:8.]

The Rincon Band contends the Compact between the parties contains a mandatory forum selection clause which limits the location of this suit to the Southern District of California. [Plaintiff's Oppo. at 4:9-2.] Consequently, Rincon argues the Compact expressly precludes its licensing pool claim from being transferred to the Eastern District because the parties have consented, by the

Compact's terms, to the Southern District only. [Plaintiff's Oppo. at 4:27-5:16.]

Section 9.1(d) of the parties Compact states:

"Disagreements that are not otherwise resolved by arbitration or other mutually acceptable means as provided in Section 9.3 may be resolved in the United States District Court where the Tribe's Gaming Facility is located, or is to be located, and the Ninth Circuit Court of Appeals, (or if those federal courts lack jurisdiction, in any state court of competent jurisdiction and its related courts of appeal)."

[Doc. No. 13 at p. 20.]

In *Docksider, Ltd. v. Sea Technology*, the Ninth Circuit found the following language indicative of a mandatory forum selection clause:

"This agreement shall be deemed to be a contract made under the laws of the state of Virginia, United States of America, and for all purposes shall be interpreted in its entirety in accordance with the laws of said State. Licensee hereby agrees and consents to the jurisdiction of the courts of the State of Virginia. Venue of any action brought hereunder **shall be deemed to be in Gloucester County, Virginia**."

Docksider, Ltd. v. Sea Technology, 875 F.2d 762, 763 (9th Cir. 1989)(emphasis added).

In *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, however, the Ninth Circuit found the following language signaled a permissive forum selection clause:

"Buyer and Seller expressly agree that the laws of the State of California shall govern the validity, construction, interpretation and effect of this contract. **The courts of California, County of Orange,** shall have jurisdiction over the parties in any action at law relating to the subject matter of the interpretation of this contract."

Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 77 (9th Cir. 1987)(emphasis added).

To explain the difference between the permissive and mandatory effect of the two different clauses, the Ninth Circuit reasoned as follows:

"Hunt Wesson is distinguishable because the forum selection clause underlying this [the *Docksider*] action contains the additional sentence stating that '[v]enue of any action brought hereunder shall be deemed to be in ... Virginia.' This language requires enforcement of the clause

because Docksider not only consented to the jurisdiction of the state courts of Virginia, but further agreed by mandatory language that the venue for all actions arising out of the license agreement would be Gloucester County, Virginia. This mandatory language makes clear that venue, the place of suit, lies exclusively in the designated county."

Docksider, 875 F.2d at 764.

The wording of the forum selection clause at issue in this case lacks language indicating exclusivity, which was identified by the Ninth Circuit as a hallmark of mandatory forum selection clauses. Specifically, section 9.1(d) reads disagreements between the Tribe and the State ***"may"*** be resolved in a United States District Court where the Tribe's gaming facility "is located, or ***is to be*** located." The permissive effect of the word "may" in this clause, as well as the unidentified and potentially uncertain location of the district court where venue might be situated, indicate the clause is permissive. There is simply no language in section 9.1(d) of the Compact which indicates an intention on the part of the parties to exclusively restrict the filing of actions to the Southern District of California. Moreover, the clause provides if "federal *courts"* (plural) lack jurisdiction, "***any*** state court of competent jurisdiction" may hear the dispute. Unlike the forum selection clause at issue in *Docksider*, which clearly prohibited suits outside Gloucester County, Virginia, the clause in the parties' Compact does not require all actions to be brought exclusively in the Southern District. The clause at issue merely states jurisdiction can be had in the United States District Court for the Southern District of California.

As the controlling forum selection clause is permissive, the Court finds the action could have been brought in the United States District Court for the Eastern District Of California where Defendants reside and seek to transfer a portion of this action. *See* 28 U.S.C. s 1404(a) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought"; *see also* 28 U.S.C. 1391(b)(1) ("A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in a judicial district where any defendant resides, if all defendants reside in the same State.")

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B. The State Has Not Shown the Strong Inconvenience Necessary to Offset the Weight Given To Plaintiff's Choice Of Forum and Permissive Forum Selection Clause

Having concluded the action might have been brought in the potential transferee court by virtue of the permissive forum selection clause, this Court now evaluates the factors demonstrating inconvenience. It is imperative to note, however, that of the various factors to be balanced by the Court, Plaintiff's choice of forum is accorded significant weight and will not be disturbed unless other factors weigh substantially in favor of transfer. *See* 28 U.S.C. § 1404(a). Moreover, "a forum selection clause is determinative of the convenience to the parties and is entitled to substantial consideration." *Unisys Corp.,* 2005 WL 3157457, at *4. These principles indicate this action's current location in the Southern District of California is the preferred convenient forum. The State must make a strong showing of inconvenience to warrant upsetting the Tribe's choice of forum as well as the permissive forum selection clause which favors, but does not mandate, a venue where the Tribe's gaming facility is located.

1. Convenience of Parties

The State contends the convenience of the parties favors transfer because the state of California's administrative offices and records are located approximately 500 miles away in Sacramento. (Defs Motion at 7:25-28.) Defendants do concede, however, that the state also maintains significant and substantial offices in the southern district. (Defs Motion at 7:25-26.) The Tribe, on the other hand, does not have a presence in the Eastern District. (Plaintiff's Oppo. at 9:5.) The Court will not order a transfer merely to shift a minor inconvenience from Defendants to Plaintiff. *Decker Coal Co.*, 805 F.2d at 843. Moreover, the location of records alone is not sufficient to support a motion for transfer. *STX, Inc. v. Trik Stik, Inc.*, 708 F.Supp. 1551, 1556 (N.D.Cal. 1988). Accordingly, the convenience of the parties weighs against transfer to the Eastern District.

2. Convenience of Witnesses

The convenience of witnesses is one of the most important factors the courts consider when determining whether to grant a motion to transfer. *Fisher v. Las Vegas Hilton Corp.*, 47 Fed. Appx. 824, 827 (9th Cir. 2002). The party requesting transfer must show through declarations that it is more convenient for witnesses to attend trial in the Eastern District. *Cochran v. NYP Holdings, Inc.*, 58 F.

Supp. 2d 1113, 1119 (C.D. Cal. 1998) ("Rather than relying on 'vague generalizations' of inconvenience, the moving party must demonstrate, through affidavits or declarations containing admissible evidence, who the key witness will be and what their testimony will generally include.") In addition, special consideration is given to third party witnesses as opposed to employee witnesses, who could be compelled to testify. *STX*, 708 F.Supp. at 1556.

Here, the Defendants have specifically identified three individuals it may call to offer testimony regarding the license pool formula; (1) retired Ninth Circuit Judge William A. Norris, (2) Judge Shelleyanne Chang of the Sacramento County Superior Court, and (3) Peter F. Melnicoe, Esq.

Judge Norris is presumed to work in the Central District. The two remaining potential witnesses are presumed to work in the Eastern District. (Doc. No. 243-2, Pinal Decl. at 2:6-3:5.) Defendants also assert generally that they may call witnesses from the staff of the California Gambling Control Commission (CGCC), the Legislative Analysts' Office and the Sides Accountancy Corporation; all are located in the Eastern District. (Doc. No. 243-2, Pinal Decl. at 3:9-25.) Defendants contend the individuals and staff identified above might be called to testify regarding their intention in drafting the license pool formula and their understanding of the size of the licensing pool. (Doc. No. 243-2, Pinal Decl. at 3:18-27; 4:14-27.)

The Rincon Band contends witness testimony is unnecessary and a non-factor in this case in light of the fact that the Tribe's declaratory relief action hinges on the language of the Compact and, therefore, would be appropriate for summary judgment. (Doc. No. 244, Plaintiff's Oppo. at 9:24-10:2.) The Tribe also asserts, in the event witness testimony at trial even materializes, any potential testimony may be barred by parol evidence. (Doc. No. 244, Plaintiff's Oppo. at 10:3-4.) As for actual inconvenience, the Rincon Band notes only two out of the three potential witnesses Defendants specifically identify presumably reside in the Eastern District and argues the potential witnesses it may call, including representatives of the Rincon Band as well as members of other Southern District Tribes, would be equally inconvenienced by having to travel to the Eastern District were a transfer to be ordered. (Doc. No. 244, Plaintiff's Oppo. at 10:9-15.)[1]

[1]The Court is not presuming discovery would be allowed in any event.

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The Court finds Defendants have not met their burden of justifying a transfer through a strong showing of inconvenience to witnesses. *Decker Coal*, 805 F.2d at 843. Only three specific witnesses have been identified by Defendants, and their purported inconvenience in traveling from the Los Angeles or Sacramento area to San Diego County does not justify similarly inconveniencing the potential witnesses of the Rincon Band who would need to travel to travel from San Diego to the Sacramento area if the action were to be transferred. Indeed, Defendants' action differs from the typical transfer motion in that Defendants do not seek to transfer to an out-of-state forum, but merely to a different venue in California which is just as accessible to witnesses as the San Diego area. The State has not demonstrated the strong showing of inconvenience necessary to justify upsetting Plaintiff's choice of forum and thee parties' permissive forum selection clause. Accordingly, Defendants' motion to transfer is **DENIED.**

C. A Stay Of The Licensing Pool Claim Is Inappropriate At This Time

In the alternative, Defendants ask the Court to stay adjudication of the license pool claim pending: (1) a decision on the petition for writ of certiorari Defendants *intend* to file with respect to the Ninth Circuit's ruling on the license pool claim; or (2) a ruling on the State's authority to issue licenses by the District Court in *Colusa* I, in order to avoid inconsistent rulings and preserve resources of the parties and the court. (Doc. No. 243, Defs. Motion at 14:7-23.) The Rincon Band opposes a stay suggesting that any inconsistent rulings may be appealed and noting a ruling in *Colusa* I is not binding on the Court. (Doc. No. 244, Plaintiff's Oppo. at 13:10-20.) The Rincon Band also contends further delay of a decision on its license pool claim adversely impacts "an essential 'means of promoting tribal economic development'." (Doc. No. 244, Plaintiff's Oppo. at 13:18-20.)

The Ninth Circuit has explained "[a] trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings, which bear upon the case. This rule applies whether the separate proceedings are judicial, administrative, or arbitral in character, and does not require that the issue in such proceedings are necessarily controlling of the action before the court." *Leyva v. Certified Grocers of Cal. Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979).

In considering whether a stay is warranted, the court weighs varying interests that will be affected by its decision. "Among those competing interests are the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay. *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962).

Here, the Court finds proceeding with a determination on Plaintiff's license pool claim is in the interests of justice and outweighs the outcome implicated by a stay of indefinite length as proposed by Defendants. Plaintiff's action has been on file since 2004. Other than the specter of potentially inconsistent district court rulings, Defendants have raised no concrete hardships or inequities which would be suffered by the State if the parties simply pressed forward with this issue in the present venue. If the merits of the licensing pool claim was awaiting review with the Ninth Circuit, the Court would be more inclined to grant a stay. However, that is not the case here. No further appeal is currently pending and when Plaintiff's fourth claim was on appeal, the Ninth Circuit addressed only the procedural issue of whether other Compact-signatory tribes were required parties who could or could not be joined due to tribal sovereign immunity. [*See* Doc. No. 239, Ninth Cir. Mandate.] Accordingly, Defendants' motion to stay, in the alternative, is **DENIED**.

D. Request For Judicial Notice

In conjunction with its Motion for Transfer, the State filed a Request for Judicial Notice of Exhibits A through H to its Memorandum of Points and Authorities in Support of the Motion for Transfer. [Doc. No. 243-2.]

Judicial notice is governed by Federal Rule of Evidence 201 which concerns only judicial notice of adjudicative facts. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). "[A] party requesting judicial notice bears the burden of persuading the trial judge that the fact is a proper matter for judicial notice." *In re Tyrone F. Conner*

Corporation, 140 B.R. 771, 781 (United States Bankruptcy Court, E.D. California 1992). "To sustain its burden in persuading the trial judge that the adjudicative fact sought to be noticed is in fact proper for notice under Federal Rule of Evidence 201, the party must persuade the court that the particular fact is not reasonably subject to dispute and is capable of immediate and accurate determination by resort to a source 'whose accuracy cannot reasonably be questioned'...." *Id.* at 781. In other words, "the fact must be one that only an unreasonable person would insist on disputing." *United States v. Jones*, 29, F.3d 1549, 1553 (11th Cir. 1994).

Facts contained in public records are considered appropriate subjects of judicial notice. *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025 (9th Cir. 2006). Accordingly, documents that are part of the public record may be judicially noticed to show, for example, that a judicial proceeding occurred or that a document was filed in another court case, but a court may not take judicial notice of findings of facts from another case. *See Wyatt v. Terhune*, 315 F.3d 1108, 1114 & n. 5 (9th Cir. 2003); *Lee v. City of Los Angeles*, 250 F.3d 668, 698 (9th Cir. 2001); *Jones*, 29 F.3d at 1553. Nor may the court take judicial notice of any matter in dispute. *Lee*, 250 F.3d at 689-90; *Lozano v. Ashcroft*, 258 F.3d 1160, 1165 (10th Cir. 2001).

Here, the Court **GRANTS** Defendants' Request For Judicial Notice. Exhibits A through H consist of public records and court pleadings, which are the proper subject of judicial notice under the Federal Rules of Evidence, Rule 201(b). In addition, facts 1 through 6, which state the various locations of the State's principal business offices are also capable of accurate and ready determination. Fed. R. Evid. 201(b).

IV. CONCLUSION AND ORDER THEREON

For the foregoing reasons, **IT IS ORDERED:**

(1) Defendants' Motion to Transfer or Stay in the Alternative is **DENIED;** and

(2) Defendants' Request for Judicial Notice is **GRANTED.**

IT IS SO ORDERED.

DATED: April 17 , 2009

Hon. William McCurine, Jr.
U.S. Magistrate Judge, United States District Court

EXHIBIT 3

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RINCON BAND OF LUISENO MISSION INDIANS OF THE RINCON RESERVATION, a/k/a RINCON SAN LUISENO BAND OF MISSION INDIANS a/k/a RINCON BAND OF LUISENO INDIANS,

Plaintiff,

vs.

ARNOLD SCHWARZENEGGER, Governor of California; WILLIAM LOCKYER, Attorney General of California; STATE OF CALIFORNIA,

Defendant.

CASE NO. 04cv1151 (WMc)

ORDER DENYING DEFENDANTS' MOTION TO SEVER AND TRANSFER [DOC NO. 254.]

I. INTRODUCTION

On June 12, 2009, Defendants filed a motion to sever and transfer Plaintiff's fourth claim for relief to United States District Judge Larry A. Burns, who currently presides over the *San Pasqual Band of Mission Indians v. State of California*, et al., No. 06-cv-0988 LAB (AJB) (hereinafter "San Pasqual"). [Doc. No. 254.] Plaintiff filed an Opposition brief on July 24, 2009. [Doc. No. 269.] Defendants filed a Reply brief on July 31, 2009. [Doc. No. 272.]

After careful consideration of the parties' briefs and exhibits, the Court **DENIES** Defendants' motion to sever and transfer.

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II. BACKGROUND

On June 9, 2004, the Rincon Band ("Rincon" or "the Tribe") filed its complaint for breach of contract against the State of California. [Doc. No. 1, Complaint.] A First Amended Complaint was filed on December 4, 2006 ("FAC") [Doc. No. 108.] Claim four of Rincon's action against the State, seeks a declaratory judgment regarding the aggregate maximum number of slot machine licenses available to California Indian tribes. [Doc. No. 108, pp12-13.] At the outset of the case, the Honorable Thomas J. Whelan dismissed Rincon's fourth claim for relief for failure to join all other tribes with similar compacts who were subject to the same licensing pool as required parties under Federal Rule of Civil Procedure 19. Rincon appealed the District Court's decision. The Ninth Circuit reversed the District Court's decision explaining "In *Cachil Dehe Band*, we held that an Indian tribe that is a party to a 1999 Compact with California may proceed to litigate the size of the total license pool without joining other compacting tribes, because those tribes have no protectable interest in the size of the license pool that qualifies them as required parties within the meaning of Rule 19(a)." [Doc. No. 239, p. 4.] Accordingly, the Ninth Circuit remanded the license pool claim for further proceedings.

Defendants now move to sever and transfer Rincon's licensing pool claim under Rule 21 of the Federal Rules of Civil Procedure to the Honorable Larry A. Burns, arguing that the issue of available slot machine licenses should be resolved by one judge in order to maximize judicial efficiency. [Doc No. 254, p 4.] Defendants' motion to sever and transfer is based in part on its contention that the instant matter is similar to a later-filed case, *San Pasqual Band of Mission Indians v. State of California*, et al., No. 06-cv-0988 LAB (AJB), over which Judge Burns presides. In fact, on February 27, 2009, Defendants filed a notice of related case, attempting to relate the *Rincon* and *San Pasqual* cases under Local Civil Rule 40.1(e). [Doc. No. 62.] However, the San Pasqual Band of Mission Indians objected to Defendant's notice of related case as violative of: (1) Section 9.4(a)(3) of San Pasqual's Compact with the State and (2) the mandate of the 9th Circuit Court of Appeals holding in *Cachil Dehe Band* which rejected the "indispensable parties" line of reasoning. [Doc. No. 68.]

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III. DISCUSSION

A. Applicability of Federal Rule of Civil Procedure 21 / Civil Local Rule 40.1(d)

Rule 21 of the Federal Rules of Civil Procedure is entitled "Misjoinder and Non-Joinder of Parties" and states as follows: "Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party." Fed. R. Civ. P. 21. With respect to severance of claims, the Federal Civil Rules Handbook indicates Rule 21 "provides the court with the discretion to sever claims against a party for separate trials, or to order separate trials for joined parties, even if the joinder was otherwise appropriate." William M. Janssen. *Federal Civil Rules Handbook* (16th ed). Thomson/West 2008 at p. 526. The Court has broad discretion in determining whether to order severance under Rule 21. *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008, 1016 (7th Cir. 2000) (noting the district courts' "broad discretion" under Rule 21); *Brunet v. United Gas Pipeline Co.*, 15 F.3d 500, 505 (5th Cir. 1994) (stating "[t]he trial court has broad discretion to sever issues"); *Williams v. Felker*, 2006 WL 495994, at *1 (E.D. Cal. 2006) (explaining "courts have broad discretion regarding severance.") After considering the authorities discussing Rule 21, it is clear to this Court that Rule 21 is intended to remedy inappropriate joinder without dismissing an action.

Here, however, there has been no joinder at all, although Defendants previously and ultimately unsuccessfully argued for joinder of all compact tribes under Rule 19. By its motion, Defendants suggest utilizing Rule 21 not as a remedy for misjoinder or nonjoinder, but as an attempt to relate Rincon's case to San Pasqual's and essentially make an end run around its failed related-case notification under Local Civil Rule 40.1(e). Specifically, Defendants argue the Court should use its discretion to sever Rincon's fourth claim from its own appropriately independent action and transfer it to the same judicial officer presiding over the *San Pasqual* case so one judge may efficiently decide the licensing pool issue. The Court declines to use Rule 21 in this way to *de facto* sever and relate or join the cases of the Rincon and San Pasqual tribes as it ignores the Ninth Circuit's determination that joinder under Rule 19 is inapplicable to the various compact tribes.

In addition, the Court finds severing the license pool claim as proposed by Defendants would not serve the interests of justice as the San Pasqual tribe has indicated: (1) it objects to the

characterization of its case as related to Rincon's because each tribe has a separate and distinct understanding of its Tribal-State Compact; and (2) as a sovereign Indian Nation, San Pasqual bargained not to have any other person or entity as a party to its case under section 9.4(a)(3) of its Compact. [Doc. No. 68, pp. 5-6.] Moreover, the Rincon Tribe has indicated its interpretation of the compact provision at issue differs from the position taken by San Pasqual and includes an issue regarding the reversion of certain gaming devices to a statewide pool which has not been raised by San Pasqual's complaint. [Doc. No. 269, p. 4, fn. 4.] Accordingly, this Court finds that, because the claims of these two sovereigns differ in some respects, the duplication of judicial efforts is not a certainty and does not warrant severance and transfer to a single judge.

In addition, as part of its proposal to sever and then transfer Rincon's fourth claim for relief to the Honorable Larry A. Burns, Defendants argue the Low Number Rule Criteria set forth in Civil Local Rule 40.1 (d) should be applied essentially in reverse. In other words, Defendants' motion seeks to transfer a claim from an earlier-filed action to a later-filed one. As is the case with the State's unorthodox proposal to use Rule 21 to sever Rincon's licensing pool claim, the Court finds this suggestion procedurally improper and inappropriate. Rincon has the earlier filed case. Civil Local Rule 40.1(d) and its criteria are inapplicable here. Moreover, as Rincon persuasively notes, the efficiency argument that underlies the low-number rule, and which the State presses to effectuate transfer, is illusory in that Rincon's position on the license pool claims differs from San Pasqual's, is unrelated and must be decided separately. [Doc. No. 269, pp. 3-4.] As the Ninth Circuit has advised, "Should different district courts reach inconsistent conclusions with respect to the size of the license pool created under the 1999 Compacts, such inconsistencies could be resolved in an appeal to this court." *Cachil Dehe Band of Wintun Indians v. California*, 547 F.3d 962, 972 n.12 (9th Cir. 2008). Thus, Defendants' Motion to Sever and Transfer is **DENIED.**

B. Request For Judicial Notice

In conjunction with its Motion to Sever and Transfer, the State filed a Request for Judicial Notice of Exhibits A through C. [Doc. No. 254-3.]

Judicial notice is governed by Federal Rule of Evidence 201 which concerns only judicial notice of adjudicative facts. "A judicially noticed fact must be one not subject to reasonable dispute

in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). "[A] party requesting judicial notice bears the burden of persuading the trial judge that the fact is a proper matter for judicial notice." *In re Tyrone F. Conner Corporation*, 140 B.R. 771, 781 (United States Bankruptcy Court, E.D. California 1992). "To sustain its burden in persuading the trial judge that the adjudicative fact sought to be noticed is in fact proper for notice under Federal Rule of Evidence 201, the party must persuade the court that the particular fact is not reasonably subject to dispute and is capable of immediate and accurate determination by resort to a source 'whose accuracy cannot reasonably be questioned'...." *Id.* at 781. In other words, "the fact must be one that only an unreasonable person would insist on disputing." *United States v. Jones*, 29, F.3d 1549, 1553 (11th Cir. 1994).

Facts contained in public records are considered appropriate subjects of judicial notice. *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025 (9th Cir. 2006). Accordingly, documents that are part of the public record may be judicially noticed to show, for example, that a judicial proceeding occurred or that a document was filed in another court case, but a court may not take judicial notice of findings of facts from another case. *See Wyatt v. Terhune*, 315 F.3d 1108, 1114 & n. 5 (9th Cir. 2003); *Lee v. City of Los Angeles*, 250 F.3d 668, 698 (9th Cir. 2001); *Jones*, 29 F.3d at 1553. Nor may the court take judicial notice of any matter in dispute. *Lee*, 250 F.3d at 689-90; *Lozano v. Ashcroft*, 258 F.3d 1160, 1165 (10th Cir. 2001).

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Here, the Court **GRANTS** Defendants' Request For Judicial Notice. Exhibits A through C consist of court pleadings, which are the proper subject of judicial notice under the Federal Rules of Evidence, Rule 201(b).

IV. CONCLUSION AND ORDER THEREON

For the foregoing reasons, **IT IS ORDERED:**

(1) Defendants' Motion to Sever and Transfer is **DENIED;** and

(2) Defendants' Request for Judicial Notice is **GRANTED**.

IT IS FURTHER ORDERED that the August 7, 2009 hearing on Defendants' Motion to Sever and Transfer is **VACATED.**

DATED: August 3, 2009

Hon. William McCurine, Jr.
U.S. Magistrate Judge, United States District Court

EXHIBIT 4

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RINCON BAND OF LUISENO MISSION INDIANS OF THE RINCON RESERVATION, a/k/a RINCON SAN LUISENO BAND OF MISSION INDIANS a/k/a RINCON BAND OF LUISENO INDIANS,

Plaintiff,

vs.

ARNOLD SCHWARZENEGGER, Governor of California; WILLIAM LOCKYER, Attorney General of California; STATE OF CALIFORNIA,

Defendant.

CASE NO. 04cv1151 WMc

ORDER: DENYING IN PART AND GRANTING IN PART CROSS MOTIONS FOR SUMMARY JUDGMENT;[DOC. NOS. 173 and 176]

On June 1, 2007, the Rincon Band of Luiseno Indians ("Plaintiff" or "Rincon") and the State of California ("Defendant" or "State") filed cross motions for summary judgment. [Doc Nos. 173-183 and Doc. Nos. 186 and 187.] The parties each seek summary judgment with respect to breach of contract claims, both substantive and procedural, asserted in Plaintiff's First Amended Complaint.[1]

[1]The Federal District Court previously certified for interlocutory appeal the dismissal of two claims reasserted by Plaintiff in its First Amended Complaint solely for the purpose of "preserv[ing] these claims pending resolution at the Ninth Circuit Court of Appeals." [Doc. No. 108 at 4:3-12.] Accordingly, the Court does not consider Plaintiff's Fourth Claim (Declaratory Judgment - Cap of Gaming Device License) and Sixth Claim (Detrimental Reliance) for relief in its determination of the motions for summary judgment. In addition, Plaintiff's Third Claim for relief (Declaratory Judgment - Reversion of Licenses) is not under consideration by the Court as Judge Whelan previously ruled in this matter on

[Doc. No. 108.] Oral argument was held on August 13, 2007. [Minute Entry No. 184 on Docket.] On September 13, 2007, Rincon requested and received authorization to file supplemental briefing in support of its cross motion for summary judgment, and said supplemental briefing was filed on September 19, 2007. [Doc. No.186.] The State filed its reply to the supplemental brief on October 4, 2007. Doc. No. 187.] On February 22, 2008, the Court held a telephonic conference to request additional briefing from both parties regarding the impact, if any, of Propositions 94, 95, 96 and 97 on the issues presented in the parties' cross-motions for summary judgment. [Doc. No. 189.] The parties submitted briefing on the issue in accordance with the Court's request on March 7, 2008 and March 14, 2008.[2] [Doc. Nos. 190-195.]

For the reasons set forth below, Plaintiff's motion for summary judgment is granted in part and Defendant's motion for summary judgment is granted in part.

I.

FACTUAL AND PROCEDURAL BACKGROUND

A. Indian Gaming Regulatory Act: Class III Tribal-State Gaming Compacts

In 1988, Congress enacted the Indian Gaming Regulation Act ("IGRA" or the "Act"), which sets forth a statutory basis for Indian tribes to offer gaming as a way to encourage tribal economic development, tribal self-sufficiency, and strong tribal government. 25 U.S.C. § 2701(4). IGRA also grants states a role in the regulation of Indian gaming. *Artichoke Joe's v. Norton*, 353 F.3d 712, 715 (9th Cir. 2003). ("IGRA is an example of cooperative federalism in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.") (quoting *Artichoke Joe's v. Norton*, 216 F.Supp. 2d 1084, 1092 (E.D. Cal. 2002).

IGRA creates three classes of gaming. 25 U.S.C. § 2703(6)-(8). Class III gaming, at issue in

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September 21, 2004, that third-party tribes are necessary and indispensable parties to claims affecting other tribal compacts who cannot be joined due to sovereign immunity. [Doc No. 36 at 13:8.] The Court's prior Order is final and the law of the case "govern[ing] the same issue in subsequent stages of the same case." *Christianson v. Colt. Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)).

[2] After reviewing the supplemental briefing regarding Propositions 94, 95, 96 and 97 (the "Propositions"), the Court will not consider the outcome of the popular vote on the Propositions in the instant ruling. The Court finds that the Propositions are not a part of the administrative record and are irrelevant to the good faith determination to be made by the Court. Because of the Propositions' irrelevance to the determination of good faith, the Court further finds no need to expand the administrative record to include information concerning the Propositions.

the instant action, is the most heavily regulated. Under the Act, Class III gaming is lawful on Indian lands only if three conditions are met: (1) authorization by an ordinance or resolution of the governing body of the Indian tribe and the Chair of the National Indian Gaming Commission; (2) location in a state that permits such gaming for any purpose by any person, organization, or entity; and (3) the existence of a Tribal-State compact approved by the Secretary of the Interior. *Id.* at § 2710(d)(1).

IGRA's Tribal-State compact requirement allows states to negotiate with tribes within the state on issues presented by Class III gaming that affect state interests. *Id.* at § 2710(d)(3)©). IGRA also requires states to negotiate in good faith. *Id.* at § 2710(d)(3)(A). Tribes are allowed under the statute to enforce the state's obligation in federal court. *Id.* at § 2710(d)(7)(A)(I) and (B)(I).[3]

Under IGRA, the court, in determining whether a State has negotiated in good faith:

- *may* take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and
- *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.

Id. at § 2710(d)(7)(B)(iii)(I)-(II) (italics added).

If the court finds that the state has not negotiated in good faith, the court is required to order the State and the Indian tribe to conclude a compact within a 60-day period. *Id.* at § 2710(d)(7)(B)(iii). If the State and Indian tribe fail to conclude a compact within the 60-day period, the Indian tribe and the State shall each submit to a court-appointed mediator a proposed compact that represents their last best offer for a compact. The mediator will then select the compact which best comports with the terms of IGRA, Federal law and applicable court orders. *Id.* at § 2710(d)(7)(B)(iv).

B. Tribal-State Compact Approval Process

In September 1999, former California Governor Gray Davis entered into Tribal-State Compacts with approximately 57 federally recognized California Indian tribes - including Rincon. These materially similar Compacts allowed the Tribes, consistent with IGRA, to engage in Class III

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[3]The state of California has consented to such suits by waiving sovereign immunity expressly under California Government Code § 98005. ("[T]he state of California hereby . . . submits to the jurisdiction of the court of the United States in any action brought against the state by any federally recognized Indian tribe asserting any cause of action arising from the state's refusal to enter into negotiations . . . or to conduct those negotiations in good faith, the state's refusal to enter into negotiations concerning the amendment of a Tribal-State compact to which the state is a party, or to negotiate in good faith concerning that amendment . . . .") Cal. Gov't Code § 98005.

gaming. In order for the Compacts to become effective, voters had to approve Proposition 1A, a voter initiative to amend the California Constitution to address the California Supreme Court's constitutionality concerns articulated in *Hotel Employees and Restaurant Employees Int'l Union v. Davis*, 21 Cal. 4th 585 (1999).

On September 10, 1999, the California Legislature passed Proposition 1A. On March 7, 2000, California voters approved Proposition 1A, amending the California Constitution to provide:

> " . . . the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts."

Cal. Const. Art IV § 19(f); *see also* 25 U.S.C. § 2710(d)(8).

On May 5, 2000, the United States Secretary of the Interior approved the Compacts pursuant to 25 U.S.C. § 2710(d)(8)(A). The Compacts were then published in the Federal Register and took effect.[4] *See* Fed. Reg. 31189 (May 16, 2000); *See e.g. Indian Gaming Related Cases* (Coyote Valley II), 331 F.3d 1094, 1103 (9th Cir. 2003).

C. The Compact Amendment Process: Negotiations between the State and Rincon

Section 4.3.3 of Rincon's Compact with the State expressly states that either a Tribe or the State may request to renegotiate the Compact on the following issues: (1) the number of authorized gaming devices; (2) revenue sharing with non-gaming tribes; (3) the revenue sharing trust fund; and (4) the allocation of gaming device licenses. [Admin. Record, Exh. 42.]

On February 28, 2003, the Davis Administration sent a letter to Rincon and all the Tribes who were a party to the Tribal-State Class III gaming contracts in order to request negotiations to amend Section 10.8 of the Compact. Specifically, Section 10.8 [5] of the Compacts provides a mechanism for

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[4] An additional five compacts, also identical to the Proposition 1A Compacts, were executed before the Governor's submission of the Compacts to the Department of Interior for federal approval. *See* Federal Register March 16, 2000, July 6, 2000 and October 14, 2000.

[5] Section 10.8.3 of the Rincon Compact provides: "(a) The Tribe and the State shall, from time to time, meet to review the adequacy of this Section 10.8, the Tribe's ordinance adopted pursuant thereto, and the Tribe's compliance with its obligations under Section 10.8.2, to ensure that significant adverse impacts to the off-Reservation environment resulting from projects undertaken by the Tribe may be avoided or mitigated. (b) At any time after January 1, 2003, but not later than March 1, 2003, the State may request negotiations for an amendment to this Section 10.8 on the ground that, as it presently reads, the Section has proven to be inadequate to protect the off-Reservation environment from significant adverse impacts resulting from Projects undertaken by the Tribe or to ensure adequate mitigation by the Tribe of significant

the State and the Tribes to periodically address the adverse effects of off-reservation environmental impacts. [Admin. Record, Exhs. 42 and 44.]

Section 4.3.3 [6] of Rincon's Compact provides the state and the Tribe with a mechanism for renegotiating the Compact on the issues of the authorized number of gaming devices and revenue sharing. [Admin. Record, Exh. 42.] A request for negotiation under Section 4.3.3 had to be made between March 7, 2003 and March 31, 2003. *Id.* On March 8, 2003, Rincon made a formal request to the Davis administration under Section 4.3.3 to negotiate provisions concerning the authorized number of gaming devices, revenue sharing and the allocation of licenses for additional gaming devices. [Admin. Record, Exh. 43.] On March 28, 2003, the Davis Administration also formally requested renegotiation of its Compact with Rincon over a variety of issues, including revenue sharing with the State and the authorized number of gaming devices. [Admin. Record, Exh. 45.]

In October 2003, the California electorate recalled Governor Gray Davis and elected Arnold Schwarzenegger as Governor. Due to the change in administrations, the Davis Administration withdrew its request for renegotiation of Section 10.8 on November 14, 2003. [Admin. Record, Exh. 1.]

On November 21, 2003, Rincon and nine other tribes wrote to the Schwarzenegger Administration to express an interest in continuing the Compact renegotiations previously undertaken with the Davis Administration. [Admin. Record, Exh. 2.] On December 16, 2003, the State of California wrote to Rincon and the nine additional tribes to acknowledge receipt of the November 21, 2003, letter. *Id.*

On January 7, 2004, the Governor appointed Daniel M. Kolkey as the State's compact

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adverse off-Reservation environmental impacts and, upon such a request, the Tribe will enter into such negotiations in good faith. ©) On or after January 1, 2004 the Tribe may bring an action in federal court under 25 U.S.C. Sec. 2710(d)(7)(A)(I) on the ground that the State has failed to negotiate in good faith, provided that the Tribe's good faith in the negotiations shall also be in issue. In any such action, the court may consider whether the State's invocation of its rights under subdivision (b) of this Section 10.8.3 was in good faith. If the State has requested negotiations pursuant to subdivision (b) but, as of January 1, 2005, there is neither an agreement nor an order against the State under 25 U.S.C. Sec.2710(d)(7)(B)(iii), then, on that date, the Tribe shall immediately cease construction and other activities on all projects then in progress that have the potential to cause adverse off-Reservations impacts, unless and until an agreement to amend this Section 10.8 has been concluded between the Tribe and the State."

[6] Section 4.3.3 of the Rincon Compact provides: "If requested to do so by either party after March 7, 2003, but not later than March 31, 2003, the parties will promptly commence negotiations in good faith with the Tribe concerning any matters encompassed by Section 4.3.1 and Section 4.3.2, and their subsections."

negotiator. [Admin Record, Exh. 9.] Shortly after his appointment, Mr. Kolkey commenced negotiations on behalf of the State with a group of five tribes (the "Five Tribes"), *not including* Rincon. The Five Tribes contacted Mr. Kolkey directly and sought amendments to their Compacts. *Id.*

On February 26, 2004, Rincon sent a meet-and-confer letter to the State in accordance with Section 9.1 [7] of the Compact to address the timing of negotiations, Section 10 of the Compact, licensing pool issues and the potential for off-track betting on Rincon's land. [Admin. Record, Exh. 3.]

On April 7, 2004, Rincon attended a negotiation session between the State's negotiator, Mr. Kolkey, and a coalition of various tribes. [Admin. Record, Exh. 9.] However, the April 7, 2004 session was limited to the issue of non-economic modifications to the compacts. *Id.* On April 21, 2004, Rincon requested separate compact negotiations with the State's negotiator. *Id.*

On or about May 12, 2004, the State replied telephonically to Rincon's February 26, 2004 request to meet-and-confer and proposed an available date of June 2, 2004 on which to meet. [Admin. Record, Exh. 4.] On June 2, 2004, Rincon participated in a meet-and-confer session pursuant to Section 9.1 of its Compact with the State's Chief Deputy of Legal Affairs Secretary, Paul Dobson. [Admin Record, Exhs. 7 and 48.] During the session, Rincon discussed its concerns with regard to: (1) the State's alleged failure to comply with Compact Section 4.3.3; (2) the impact of the Davis

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[7] Section 9.1 of the Rincon Compact provides in pertinent part: "Voluntary Resolution; Reference to Other Means of Resolution. In recognition of the government-to-government relationship of the Tribe and the State, the parties shall make their best efforts to resolve dispute that occur under this Gaming Compact by good faith negotiations whenever possible. Therefore, without prejudice to the right of either party to seek injunctive relief against the other when circumstances are deemed to require immediate relief, the parties hereby establish a threshold requirement that disputes between the Tribe and the State first be subjected to a process of meeting and conferring in good faith in order to foster a spirit of cooperation and efficiency in the administration and monitoring of performance and compliance by each other with the terms, provisions, and conditions of this Gaming Compact as follows: (a) Either party shall give the other, as soon as possible after the event giving rise to the concern, a written notice setting forth, with specificity, the issues to be resolved. (b) The parties shall meet and confer in a good faith attempt to resolve the dispute through negotiation not later than 10 days after receipt of the notice, unless both parties agree in writing to an extension of time. c) If the dispute is not resolved to the satisfaction of the parties within 30 calendar days after the first meeting, then either party may seek to have the dispute resolved by an arbitrator in accordance with this section, but neither party shall be required to agree to submit to arbitration. (d) Disagreements that are not otherwise resolved by arbitration or other mutually acceptable means as provided in Section 9.3 may be resolved in the United States District Court where the Tribe's Gaming Facility is located, or is to be located, and the Ninth Circuit Court of Appeals, (or, if those federal courts lack jurisdiction, in any state court of competent jurisdiction and its related courts of appeal). The disputes to be submitted to court action include, but are not limited to, claims of breach or violation of this Compact , or failure to negotiate in good faith as required by the terms of this Compact. . . ."

Administration's withdrawal of the request to renegotiate Compact Section 10 .8; (3) the number of gaming device licenses available under the 1999 Compacts; (4) administration of the licensing pool and (5) off-track wagering.[8] [Admin. Record, Exh. 7.]

On June 4, 2004, Mr. Kolkey held a compact negotiation session with Rincon. [Admin. Record, Exh. 9.] A date of July 1, 2004 or July 2, 2004 was proposed for Rincon to attend a further compact negotiation session; however, the meeting ultimately did not go forward. *Id., see also* Admin. Record, Exh.8.] On June 9, 2004, Rincon filed its original complaint in federal court. [Doc. No. 1.]

In a letter dated June 16, 2004 in response to Rincon's concerns about the withdrawal of the Davis Administration's renegotiation request under Compact Section 10.8, the State confirmed that "[it] will not require the Band to cease construction and other activities on projects in progress pursuant to Compact Section 10.8.3©), on the ground that no agreement amending Section 10.8 has been concluded by the Band by January 1, 2005 as provided by that section." [Admin Record, Exh. 7.]

On November 4, 2005, the parties attended a settlement meeting in San Francisco. [Admin. Record, Exh. 16.] At that meeting, the State made an offer to Rincon to enter into an amendment to the existing Compact. The November 4, 2005 offer modified terms discussed at Rincon's first compact negotiation session with Mr. Kolkey on June 4, 2004. The new offer was as follows:

> "1. The State would agree to allow the Tribe to operate an additional 900 Gaming Devices outside of the licensing pool established in the Tribe's existing compact as long as the total number of Gaming Devices in operation by the Tribe do not exceed 2500 Gaming Devices;
>
> 2. The Tribe would be required to maintain its existing Gaming Device licenses, but the parties would negotiate over the amount of the contributions made by the Tribe to the Revenue Sharing Trust Fund in connection therewith;
>
> 3. The Tribe would pay annually to the State 15% of the average net win for each of the additional Gaming Devices outside of the licensing system that it operates pursuant to the compact amendment, provided that the average net win is calculated on the basis of all Gaming Devices operated by the Tribe;
>
> 4. The Tribe would pay to the State, for the duration of the compact term, an annual fee equal to 15% of the net win in Fiscal Year 2004 from the Gaming Devices in operation at the Tribe's casino;

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[8] Rincon is no longer asserting a claim based on an alleged failure of the State to negotiate a codicil to the Compact regarding off-track betting. [Doc. No. 108, 4:13-14.]

> 5. The term of the amended compact would be the same as that of the existing compact;
>
> 6. A portion of the Tribe's payment to the State could be designated for San Diego County and CalTrans, which amount would be negotiated between the Tribe and the State. Your letter to Mr. Kolkey suggests that those payments to San Diego County and CalTrans would be pursuant to an intergovernmental agreement with each governmental entity. Although not part of our offer, we are open to negotiating such an arrangement;
>
> 7. Except as set forth in paragraphs 5 and 8, the amendment would contain the same non-economic provisions as the Pala Compact Amendment;
>
> 8. The Tribe will be afforded an exclusivity provision, the terms of which will be subject to further negotiation. Your letter suggests that the exclusivity provisions would be 'similar' to the Pala compact amendment. While we did not specifically offer that, we are open to negotiations on that point."

[Admin. Record, Exhs. 16, 50.]

On January 25, 2006, Rincon responded to the State's offer proposing an increase in gaming machines from 1,000 up to 2,500 with a fee of $4,350 per device. [Admin. Record. Exhs. 19, 20, 50 and 51.] In addition, Rincon proposed that such fees paid be disbursed as follows:

> "First, a portion of the fee representing the Tribe's proportional share of all actual and reasonable regulatory costs (the CGCC budget and the DGC budget) shall be deducted and disbursed to the appropriate State agency.
>
> Second, the remaining fees shall be deposited into an escrow account from which disbursements may only be made pursuant to intergovernmental agreements between the Tribe and eligible local governments and State agencies.
>
> Disbursements can only be made for purposes directly related to mitigation or infrastructure development.
>
> Intergovernmental agreements shall also allow for payment for tribally provided services directly related to additional mitigation, infrastructure development and problem gambling related services."

[Admin. Record, Exh. 19.]

To the extent devices exceeded 2,500, Rincon similarly proposed a $4,350 fee per device with an ability on behalf of the State to renegotiate for a higher rate if such fees were inadequate to cover costs directly related to Rincon Tribal gaming. Rincon also proposed "[c]larifying amendments to Section 4 consistent with CGCC interpretations regarding licenses for devices 351 through 1600." *Id.*

On January 27, 2006, the State informed Rincon by detailed letter that it could not accept its January 25, 2006 proposal. [Admin. Record, Exh. 20.] On May 5, 2006, Rincon submitted a revised offer to the State in response to the State's January 27, 2006 letter. [Admin. Record, Exh. 21.] In the

letter, Rincon identified the differences between the May 5, 2006 offer and the previous January 25, 2006 offer, writing: "The major changes in the offer from the offer on January 25, 2006 are:

> - The request for machine 1,601 to 2,500 @ $4,350 per device has been replaced with two tiers: (1) machines 1,601 to 2,000 @ $4,350 per device per year; and (2) machines 2,001 to 2,500 @ 6,000 per device per year. . . .
>
> - The provision that allows for the funds to be used to pay for or reimburse the Tribe for Tribally funded improvements and programs has been removed.

[Admin. Record, Exh. 21.]

On July 28, 2006, Rincon provided a further letter to the State setting forth additional topics for discussion and resolution between the parties which included the following issues: (1) dispute resolution, (2) local government mitigation of off reservation impacts, (3) tort liability, (4) patron disputes, (5) health and safety, building codes and inspection, (6) financing flexibility, (7) labor, (8) term of the compact, and (9) gaming device testing. [Admin. Record, Exh. 22.]

On September 12, 2006, Rincon attended a compact negotiation session with the State. [Admin. Record, Exh. 29.] Rincon and the State met again on October 5, 2006. [Admin. Record, Exh. 31.] On October 23, 2006, the State extended a revised offer to Rincon by letter indicating that "[t]he terms of this proposal are similar to those accepted by the Pauma and Pala Bands (tribes, like Rincon, that face similar competitive constraints given their location and proximity to the Pechanga band's casino complex) . . . .": [Admin. Record, Exh.35.]

> "A. The State would agree to allow the Band to operate an additional 900 Gaming Devices outside of the licensing pool established in the Band's existing compact as long as the total number of Gaming Devices in operation by the Band does not exceed 2,500 Gaming Devices.
>
> B. The Band would be required to maintain its existing Gaming Device licenses, but the parties would negotiate over the amount of the contributions made by the Band to the RSTF in connection therewith.
>
> C. The Band would pay annually to the State 15% of the average net win for each of the additional Gaming Devices outside of the licensing system that it operates pursuant to the compact amendment, i.e., flat percentage, sliding scale based on the net win for certain numbers of devices, sliding scale based on levels of net win, etc. provided that the average net win is calculated on the basis of all Gaming Devices operated by the Band.
>
> D. The Band would pay to the State, for the duration of the compact term, an annual payment equal to approximately 10% of the net win in calendar year 2005 from the Gaming Devices in operation at the Band's casino.
>
> E. The term of the amended compact would be extended to December 31, 2025.
>
> F. The State would consider deducting from the Band's payment to the State a portion of such funds designated for San Diego County and/or the California Department of Transportation

for mitigation of off-reservation impacts, which amount would be negotiated between the Band and the State.

G. Except as set forth in paragraphs E and H, the amendment would contain non-economic provisions similar to those in the Pala Compact Amendment, with the understanding that the final terms of each provision shall be subject to negotiation by the Band and the State.

H. The Band would be afforded an exclusivity provision, the terms of which would be subject to further negotiation."

[Admin. Record, Exh.35.]

On October 31, 2006, the State submitted an alternative proposal to Rincon in response to an email inquiry made by Rincon on October 26, 2006. [Admin. Record, Exhs. 36 and 37.] The State offered:"[w]ith no extension of the term of the existing Compact and in consideration of the authorization to operate 400 additional Gaming Devices the Band is not authorized to operate under its existing Compact in order to assure the financial health of the RSTF, the Band would make a flat annual payment to the RSTF of $2,000,000 to maintain its existing 1,250 Gaming Device licenses. In addition, the Band would make an annual revenue sharing payment to the State of 25% of the net win on those 400 additional Gaming Devices." [Admin. Record, Exh. 37.] On November 3, 2006, Rincon informed the State by detailed letter that it could not accept its October 31, 2006 proposal. [Admin. Record, Exh. 38.]

II.

STANDARD: MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate under Rule 56 (c) where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as matter of law. *See* Fed. R. Civ. P. 56 (c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Freeman v. Apaio*, 125 F.3d 732, 735 (9th Cir. 1997). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party can satisfy this burden

in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *Id.* at 322-23. "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.)

"The district court may limit its review to the document submitted for the purpose of summary judgment and those parts of the record specifically referenced therein." *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001). Therefore, the court is not obligated "to scour the record in search of a genuine issue of triable fact." *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996) (citing *Richards v. Combined Inc. Co.*, 55 F.3d 247, 251 (7th Cir. 1995). If the moving party fails to discharge this initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

If the moving party meets this initial burden, the nonmoving party cannot defeat summary judgment merely by demonstrating "that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) (citing *Anderson*, 477 U.S. at 252) ("The mere existence of a scintilla of evidence in support of the nonmonving party's position is not sufficient.") Rather, the nonmoving party must "go beyond the pleadings and by her own affidavits or by 'the depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56 (e)).

When making this determination, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *See Matsushita*, 475 U.S. at 587. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] he [or she] is ruling on a motion for summary judgment." *Anderson*, 477 U.S. at 255.

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III.

DISCUSSION

A. Good Faith In Compact Amendment Negotiations - Procedural Issues

1. Delay In Responding To Rincon's Request To Meet-And-Confer

Rincon contends that, although it contacted the State to express an interest in negotiations in accordance with the procedure set forth in its Compact, the State was dilatory and cavalier in responding to Rincon even though the State initially acknowledged receipt of Rincon's request and indicated that a representative of the State would "contact you shortly to schedule a meeting." [Rincon Motion, 38-41; Rincon Opposition, 24:4-10; Admin. Record, Exh. 2.] During the period of delay, which lasted approximately three to four months, Rincon contends the landscape of gaming in California changed based on expansive compact amendments negotiated early on between the State and tribes with locations and markets unlike that of Rincon. (Rincon Motion, 38:15-21.)

2. Delay In Contacting The State And Responding To The State's Requests For Information

The State argues that Rincon is responsible for the delays in the negotiation process by failing to contact the State's newly appointed compact negotiator, failing to submit timely proposals and other information needed to hold a productive negotiation session and taking various three-month intervals in which to respond to the State's multiple offers. (State's Motion 16:16-17:25.)

3. No Procedural Breach Of The Duty To Negotiate In Good Faith

From a careful review of the total history of negotiations as documented by the joint administrative record, the Court does not find a procedural violation of the duty to negotiate in good faith. The record demonstrates that both parties were, at times, less than prompt in responding to each other as well as in providing background material to assist in the negotiations. Justifiable delays were caused in November and December of 2003 (a time when Rincon first made its request for negotiations to the Schwarzenegger Administration) due to the transition from the Davis Administration to the new regime. Moreover, Rincon's November 2003 request to negotiate, made under Section 4.3.3 of the Compacts, does not set forth a concrete time period in

which the parties must begin negotiations. Thus, although the Schwarzenegger Administration indicated in its December 16, 2003 letter that it would "shortly" schedule a negotiation meeting with Rincon and the other tribes who co-signed the November 21, 2003 request to negotiate, the Schwarzenegger Administration was under no specific deadline to respond. [Admin. Record, Exh. 2.]

With respect to Rincon's February 26, 2004 meet-and-confer letter to the State under Section 9.1 of the Compact, the State was required to respond to Rincon within 10 days, but apparently failed to do so until May 12, 2004. [Admin. Record, Exhs. 3-4.] From the joint administrative record, it appears the long delay resulted from the parties' mutual attempts to compile documents for the requested meet-and-confer session (Rincon's Motion, 7:5-9, State's Motion 6:7-14, Admin. Record, Exh. 47.) It is clear, however, that despite the delay, the parties did finally meet-and-confer on June 2, 2004. [Admin. Record, Exhs. 5-6.] Because the parties were able to meet and confer in June 2004, as well as meet with the state negotiator in the months and years thereafter, the Court does not find procedural bad faith on the part of the State.

Furthermore, there is no evidence to suggest that, even if the parties had met within 10 days of the February 26, 2004 request to meet and confer, their disagreements over the substantive issues that are the crux of the parties' present impasse would have been resolved. Indeed, because the heart of this litigation lies in the parties' failure to achieve agreement about substantive issues, the Court declines to find procedural bad faith based on the State's initial delay in responding to Rincon's meet-and-confer request under Section 9.1 of the Compact, especially when it appears from the Joint Administrative Record that the parties were communicating by telephone regarding the request and preparing materials necessary for the meet-and-confer session. [Admin. Record, Exh. 47.] *See e.g. Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094,1109-1110 (9th Cir. 2003) (declining to find procedural bad faith as a result of dilatory tactics where the substance of plaintiff's bad faith allegation lay in its objections to substantive compact provisions.)

B. Good Faith In Compact Amendment Negotiations - Substantive Issues

In determining whether a State has negotiated in good faith under IGRA, the Court: (1) *may* take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and (2) *shall* consider any demand by the State

for direct taxation of the Indian tribe or on any Indian lands as evidence that the State has not negotiated in good faith. 25 U.S.C. § 2710(d)(7)(B)(iii)(I)-(II).

1. The State's Insistence On Additional Revenue Sharing With Its General Fund

The primary argument advanced by Rincon is that the substance of the offers made by the State during compact re-negotiations amount to an attempt to assess an illegal tax on the Tribe expressly prohibited by Section 2710 (d)(4) of the IGRA. Specifically, Rincon contends the State's insistence on revenue sharing is in bad faith because the State knowingly failed to offer meaningful concessions in exchange for an increased share of the Tribe's gaming revenue. (Rincon's Motion, 25:22-27:11.) Specifically, Rincon argues the State cannot contend it is giving the Tribe exclusivity in Class III gaming in return for revenue sharing because such exclusivity was already conferred by the State in exchange for revenue sharing through the Revenue Sharing Trust Fund and Special Distribution Fund *Id.* at 14:13-25. Rincon also argues the added exclusivity the State offered is not a meaningful concession as the Tribe, in its current compact, already has the option of terminating or renegotiating its Compact with respect to revenue sharing in the event Class III gaming is made available to non-Indian enterprises. *Id.* at 16:25-17:4. Moreover, Rincon asserts that even if the State has made a meaningful offer warranting revenue sharing, such shared revenue may not be directed to the State's general fund under the IGRA. (Rincon's Reply, 9:8-16.)

2. The State's Offers

The State argues its offers do indeed include meaningful concessions. Specifically, the State contends its ability to provide Rincon with an amendment to its current compact is a meaningful concession because without a compact Rincon is not entitled to offer Class III gaming. (State's Motion, 26:20-27:2.) Moreover, the State contends it is not precluded from requesting revenue contributions to the State's general fund if meaningful concessions have been given. *Id.* at 27:3-11. As further evidence of its good faith and its offer of a meaningful concession, the State argues it offered Rincon enhanced remedies to protect the Tribe's exclusivity, including the benefit of being excused from specific revenue sharing requirements in the event non-Indian gaming is allowed in California. *Id.* at 28:24-29:3.

3. The State's Insistence On Revenue Sharing With Its General Fund Was In Bad Faith

In *Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, (9th Cir. 2003), the Ninth Circuit recognized the IGRA's legislative history provides guidance for courts determining whether a party has negotiated in good faith. It noted:

> "In the [Senate] Committee's view, both State and tribal governments have significant governmental interests in the conduct of class III gaming. State and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe and States. This is a strong and serious presumption that must provide the framework for negotiations. A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens."

Id. at 1108-09.

The joint administrative record reveals that both Rincon and the State have held fast to their positions during the course of the negotiations. Despite the exchange of offers and information during the negotiation process, these two equal sovereigns have not been able to strike the right balance between the amount or type of benefits to flow between them in exchange for an amended compact.[9] *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 735 (9th Cir. 2003) ("Congress created the mechanism of Tribal-State compacts to resolve the conflicting interests of the tribes and the states, which it acknowledged as "two equal sovereigns.") As explained in detail below, this Court finds the State's insistence on an exchange of revenue *earmarked for the State's general fund* in return for an amended compact with Rincon was in bad faith.

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[9]This Court finds the case law involving good faith in the collective bargaining context is not instructive and only marginally helpful in that none of the cases cited by the parties involve negotiations between sovereigns. Employers and unions are not sovereigns; rather they are persons/entities within the meaning of the law who are both subject to the same sovereign, namely, the federal government. In those cases, the sovereign defines the lawful parameters of the negotiations. Each party has redress to the sovereign if the other party tries to impose an unlawful condition. The IGRA is a complicated statutory scheme which recognizes that states and tribes are equally sovereign. Accordingly, one sovereign cannot impose a tax on another sovereign. 25 U.S.C. § 2710(d)(4). Even if similarly situated sovereigns accept the tax, the tax is not permitted under the IGRA for any tribe which objects to it. *See e.g. Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1102 (9th Cir. 2006) ("The fact that other tribes have accepted a package of benefits and burdens when they voluntarily amended their compacts does not change the terms of the Compact between the Tribes and Idaho [which retained the prohibition against taxes].")

a.) IGRA's Prohibition on Taxation, Directly or Indirectly

Section 2710 (d)(4) of the IGRA states in pertinent part: " Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity." *Id.* at § 2710(d)(4). The imposition of a tax by the State upon an Indian tribe engaged in gaming is a factor the Court may take into consideration when conducting its good faith inquiry. As the Ninth Circuit explained in *Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, "[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." *Id.* at 1112 (citing 25 U.S.C. § 2710(d)(7)(B)(iii)).

b.) A Meaningful Concession To Rincon Is Required In Return For An Amendment To The Current Compact Authorizing Revenue Sharing Directly With The State

A significant stumbling block for the parties has been each side's divergent interpretations of the effects of the exclusivity provision in the California Constitution which allows Class III gaming to be conducted by Indian Tribes on Indian lands. Rincon argues that the State cannot offer exclusivity as a meaningful concession for the grant of an amendment to the existing Compact because a monopoly over Class III gaming was already conveyed in exchange for the current Compact. (Rincon's Motion, 14:12-25.) In response, the State contends the constitutional exemption from California's prohibition on Class III gaming is not self-executing, but depends on the existence of a signed compact with the Governor and ratification by the legislature. Based on the fact that a compact is required before gaming may be conducted, the State argues 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. (State's Motion, 26:7-27:11.)

Section 19(f) of the California Constitution states in pertinent part, " . . . the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts." Cal. Const. Art. IV § 19(f). The plain language of the California Constitution makes clear that authorization is given to the governor of the state to negotiate and conclude tribal gaming compacts, and that tribal gaming may only be conducted *subject to* a compact. As the Court explained in *Artichoke Joe's v. Norton*, 216 F.Supp. 2d 1084, 1093 (E.D. Ca. 2002), "[t]he Tribal-State **compact is the key** to class III gaming under IGRA. Under such a compact, the federal government cedes its primary regulatory oversight role over class III Indian gaming, and permits states and Indian tribes to develop joint regulatory schemes through the compacting process. In this way, the state may gain the civil regulatory authority that it otherwise lacks, and a tribe gains the ability to offer class III gaming." *Artichoke Joe's v. Norton*, 216 F.Supp. 2d 1084, 1093 (E.D. Ca.. 2002) (emphasis added.).

Here, Rincon and the State already have an existing Compact that both Rincon and the State want to amend. Rincon seeks additional gaming machines and an extension of its Compact term by 25 years to year 2045, while the State seeks substantial revenue sharing directly from the Tribe to the State's general fund. The existing Compact does authorize revenue sharing. However, the shared revenue: (1) flows between gaming tribes and non-gaming tribes through the Revenue Sharing Trust Fund ("RSTF") and (2) is available for limited use by the state legislature through the Special Distribution Fund ("SDF") for gaming-related purposes including, (a) programs to address gambling addiction, (b) support for government agencies impacted by tribal gaming, ©) compensation for regulatory costs associated with the administration of the compact, (d) potential shortfalls in the RSTF and (e) other gaming related purposes identified by the legislature. *See Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, 1106 (9th Cir.2003). All these purposes clearly comply with the IGRA and promote its objectives. Thus, the

existing Compact does *not* authorize a revenue stream from gaming tribes directly to the State's general fund for the State's use unrelated to: (1) compensating the State for regulatory costs associated with Indian gaming, (2) mitigating adverse social impacts of gaming or (3) economically benefitting non-gaming tribes.

In order to come to terms with the two revenue sharing provisions in the current Compact, the State had to provide meaningful concessions to avoid the IGRA's prohibition on direct taxation. Specifically, the Ninth Circuit found that "[i]n return for its insistence on the RSTF provision" during the initial negotiations for the current Compact, the State of California made two meaningful and real concessions: (1) the "amend[ment] [of] its constitution to grant a monopoly to tribal gaming establishments" and (2) the "offer [to] tribes [of] the right to operate Las Vegas-style slot machines and house-banked blackjack." *Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, 1112. (9th Cir.2003) (explaining that "[a]s part of its negotiations with the tribes, the State offered to do both things.") Similarly, the Ninth Circuit found that the State's insistence on the inclusion of the SDF during negotiations for the current Compact was also in exchange for "an exclusive right to conduct class III gaming in the most populous State in the country." *Id.* at 1115. It is therefore clear that in exchange for revenue contributions to the RSTF and the SDF, which are provided for in the current Compact, the State has already given a monopoly to tribal gaming establishments, including Rincon. In light of the Ninth Circuit's analysis, this Court finds the consideration that was already given (exclusivity) for the mutual compact cannot be repeatedly reused as a basis for the State's desire for a new compact where the proposed terms of the new compact include an improper taxation to which the other sovereign (Rincon) objects. In this Court's view, the State has not offered exclusivity because exclusivity already exists. As discussed in detail below, the State has simply offered more devices and time in exchange for its revenue sharing request.

In order to amend the existing Compact to properly allow for the State's new revenue sharing proposal, the State must provide other meaningful concessions to Rincon. The need for

other meaningful concessions is not only required under basic contract law principles[10] governing modification, but required under the Ninth Circuit's interpretation of Section 2710(d). In short, the Ninth Circuit requires a meaningful concession in return for fee demands. *Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, 1112. (9th Cir.2003) ("We do not hold that the State could have, without offering anything in return, taken the position that it would conclude a Tribal-State compact with Coyote Valley only if the tribe agreed to pay into the RSTF. Where, as here, however, a State offers meaningful concessions in return for fee demands, it does not exercise authority to impose anything. Instead, it exercises its authority to negotiate, which the IGRA clearly permits."); s*ee 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. (citation omitted.) 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.")(Emphasis in original.) Building on that analysis, 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.

Although the State now argues in opposition to Rincon's motion that it could offer, for a second time, the exclusivity (already given in exchange for the RSTF and SDF) toward a *new* revenue sharing provision, it appears from the State's offers that the State was aware the monopoly it originally conferred could not again be considered a new and meaningful concession because the State offered Rincon a negotiable "exclusivity provision" in exchange for direct revenue sharing. [Admin. Record, Exhs. 16 and 35.] The additional exclusivity provision offered by the State did not have specific terms. However, the State explains in its motion that in general, the offered provision "provide[s] that if a non-Indian Individual or entity is allowed to operate class III

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[10] *See New York v. Oneida Indian Nation of New York*, 78 F. Supp.2d 49, 60-61 (N.D.N.Y. 1999) ("The Supreme Court has stated that a compact is akin to a contract. Thus, in interpreting the Compact, the Court is guided by ordinary principles of contract interpretation."); *See* 17A Am. Jur. 2d Contracts § 507 ("A valid modification of a contract must satisfy all the criteria essential for a valid original contract, including offer, acceptance, and consideration.")

gaming within a specified market area, the adversely affected tribe would be excused from specific revenue sharing requirements in the amended Compact." (State Opposition at 15, fn. 6.) The Court notes that the citizens of California would have to amend the State Constitution in order to allow non-Indian gaming.[11]

In conjunction with the modified exclusivity provision, the State offered Rincon: (1) the ability to provide more machines over and above the limit set in connection with the original Compact in furtherance of the State's public policy in favor of containing casino style gambling, and (2) a five-year extension of its current Compact term. [Admin. Record, Exhs. 16 and 35.] Other than the Ninth Circuit's pronouncement in *Idaho v. Shoshone-Bannock Tribes*, which found the grant of a "monopoly or other benefits" to be a meaningful concession, there is little authority available on the issue of what constitutes a meaningful concession. *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1101 (9th Cir. 2006). Thus, this Court is left to first decide whether the State's new offers of modified exclusivity, additional machines and a 5-year term extension constitute meaningful concessions. The State has made some concessions in that there is some benefit in the State's willingness to: (1) "lock in" reduced revenue sharing fees in advance of any future event that would erode the exclusivity presently enjoyed by gaming tribes; (2) expand the outlines of the State's long-standing public policy against casino-style gambling, and (3) provide Rincon with a longer Compact term, which gives the Tribe more time to operate its gaming facilities. However, 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. *Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, 1112 ("Depending 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.") (italics added.) When the amount and type of fees demanded by the State are added to the equation, this Court finds the fees constitute an attempt to impose a tax in violation of Section 2710 (d)(4) of the

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[11] In order for non-Indian tribes to operate gaming devices in California, a new state Constitutional Amendment would have to pass requiring one of three of the following events: (1) a legislative proposal supported by a supermajority vote of the Legislature and a majority vote of the citizenry, (2) a constitutional convention, or (3) an initiative petition signed by eight percent of the voters and then a majority vote of the citizens of California. Cal. Const. Art. II § 8(b), art. 18 §§ 1, 2, 3, 4.

IGRA.

Specifically, on October 23, 2006, the Stated 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. [Admin. Record, Exh. 35.] Under the analysis conducted by the State's own expert, Professor William Eadington, 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. [Admin. Record., Exh. 37 at p. 5 of Exhibit B; State's Motion at 21:813; Rincon's Motion, 27:1-6.] This 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.[12] In the parties' newest negotiations for an amendment to the current Compact, the State demands 10 to 15 percent of revenue from Rincon's existing gaming devices as well as from the 900 new devices sought. In exchange for this estimated revenue stream of $37.9 million dollars, Rincon would not receive a monopoly, but an agreement to reduce its fee payment in the future should gaming one day be opened up to non-tribal gaming establishments (a scenario the Court finds speculative and unlikely given the State's established public policy against casino-style gaming), 900 more machines and five additional years to operate under its Compact. [Admin. Record, Exh. 35.]

In holding that the Special Distribution Fund did not violate the IGRA's prohibition against taxation of tribes or tribal lands, the Ninth Circuit found that limited revenue sharing for specific purposes related to tribal gaming was a reasonable exchange for the exclusivity granted to tribes. *Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, 1115. ("We do not find it inimical to the purpose or design of IGRA for the State, under these circumstances, to ask for a reasonable share of tribal gaming revenues for the specific purposes identified in the SDF

[12] Rincon currently pays a fee of $1.335 million per year into the RSTF. [Joint Admin. Record, Exh. 21 at p. 7.] Rincon does not contribute to the SDF because it was not conducting Class III gaming before September 1, 1999. [Defendant's Opp'n, p. 16, fn. 7.]

provision.") Here, however, 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. Such a fee demand 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.[13] The State 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 revenues needed to regulate gaming activity or mitigate adverse impacts therefrom. Instead, the State argues additional revenue sharing is warranted to balance the economic interests between the Sate 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. (State's Opp'n at 10:19-11:5.) Furthermore, the State's rationale for requiring such a large revenue sharing fee is another indication to this Court 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.[14]

The Court also notes that the increased fee demanded by the State will not benefit non-gaming tribes. Indeed, under the State's last offer, the parties would negotiate over the amount of the contributions made by Rincon to the RSTF, and Rincon would simply be required to maintain its current contribution of $1.335 million per year into the RSTF. [Admin. Record, Exhs.21 and 35.]

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 Section (d)(4), which prohibits states from taxing tribes. Accordingly, the Court finds that the State's insistence on the payment of such a large fee to its general fund in return for concessions of

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[13] Section 2710(d)(3)(C)(iii) of the IGRA provides that any Tribal-State compact negotiated under Section 2710(d)(3)(A) may include provisions relating to: "the assessment by the State of such activities in such amounts in such amounts as are necessary to defray the costs of regulating such [gaming] activity."

[14] As defined by Black's Law Dictionary, a tax is 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).

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. *See Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, 1115, fn. 17, (9th Cir. 2003).

C. Negotiations On Non-Economic Issues Under Section 10.8 Of The Compact

1. Section 10.8 Negotiations Were Not Concluded

Rincon contends that the State has not concluded section 10.8 negotiations in good faith despite the fact that: (1) former Governor Gray Davis withdrew his administration's request to negotiate before Governor Schwarzenegger took office; and (2) the State warranted in writing that it would not enforce the cease and desist provisions of section 10.8. [Admin. Record, Exhs. 1, 7 and 8.] Rincon insists that despite the doctrine of equitable estoppel, the Davis Administration's November 14, 2003 rescission letter and the State's June 16, 2004 letter indicating that "the State will not require the Band to cease construction and other activities on projects in progress pursuant to Compact Section 10.8.3©)" are insufficient to protect it, should the State choose to disregard its statements. (Rincon Motion, 41:9-42:16.) Further, Rincon argues that because the State did not offer to: (1) amend the Compact to vacate the cease and desist date, or (2) stipulate to a judgment finding a failure to negotiate Section 10.8 in good faith, the State has revealed its bad faith. (*Id.* at 42:17-23.)

2. The Request for Negotiations Under Section 10.8 Were Not Concluded Because The Request Was Rescinded

The State argues there is nothing for the Court to adjudicate with respect to Section 10.8 of the Compact because: (1) the Davis Administration rescinded its request for negotiation, and (2) the Schwarzenegger Administration has repeatedly indicated in writing that it would not prevent Rincon from completing construction already in progress as of January 1, 2005 on the basis that the parties did not conclude negotiations triggered by Section 10.8. (State Motion, 41:10-20.) Further, the State contends that the Davis Administration's rescission and the State's agreement not to enforce the cease and desist provision of Section 10.8 are not evidence of bad faith negotiation in as far as the State has continued to negotiate and set forth offers with respect to non-

economic issues in its proposals of November 10, 2005, October 23, 2006 and October 31, 2006. (State's Reply Brief, 14:13-18; Admin. Record, Exhs. 16, 35 and 37.)

3. Failure to Conclude Negotiations On Non-Economic Issues Does Not Constitute Bad Faith On The Part Of The State

While the Court recognizes Rincon may be apprehensive about the future enforceability of the State's pronouncements that it will not act on the cease and desist provisions of Section 10.8, the Court finds the issue of whether estoppel would be applicable to prevent the State from invoking Section 10.8.3©) is not ripe for adjudication. As a general rule, "a federal court normally ought not resolve issues involving contingent future events that may not occur as anticipated, or indeed may not occur at all." *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996) (breach of contract claim presented no live case or controversy where the claim hinged on future conduct by a party to the contract.) Here, the Davis Administration rescinded its request for renegotiation of non-economic terms and there has been no attempt by the present administration to enforce Section 10.8.3©). The effectiveness of equitable estoppel to prevent the State from seeking to enforce the cease and desist provisions of Section 10.8.3©) is too hypothetical and abstract at this time for evaluation.

The Court further finds that in light of the past administration's rescission letter, the current administration's multiple assurances that it would take no action under Section 10.8.3©) and the State's willingness to continue to negotiate over non-economic impacts without the benefit of Section 10.8.3(c)'s cease-and-desist provision does not constitute bad faith on the part of the State.

IV.

CONCLUSION AND ORDER THEREON

In light of the foregoing, the Court **DENIES in part and GRANTS in part**, the parties' cross-motions for summary judgment. **It is hereby ordered,** pursuant to the Indian Gaming Regulation Act, 25 U.S.C. § 2710(d)(7)(B)(iii), that the State and Rincon shall conclude an amended compact within 60 days from the date of this Court's Order. If the State and Indian tribe fail to conclude a compact within the 60-day period, the Indian tribe and the State shall each submit a proposed compact to a court-appointed mediator that represents their last best offer for a compact. The mediator will then select the compact which best comports with the terms of IGRA,

Federal law and applicable court orders. *Id.* at § 2710(d)(7)(B)(iv).

It is further ordered that the Court will hold a Status Conference at the conclusion of the 60-day period on **July 1, 2008, at 2:00 p.m.** in the chambers of the Hon. William McCurine, Jr., United States Magistrate Judge, 940 Front St., San Diego, CA 92101.

IT IS SO ORDERED.

DATED: April 29, 2008

Hon. William McCurine, Jr.
U.S. Magistrate Judge
United States District Court

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ALL PARTIES AND COUNSEL OF RECORD