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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; State of California, Defendants.	No. 04cv1151 (WMc) **RINCON'S MOTION FOR PARTIAL SUMMARY JUDGMENT** Date: July 30, 2009 Time: 2:00 p.m. Courtroom: C Judge: The Honorable William McCurine, Jr.

Plaintiff Rincon San Luiseno Band of Mission Indians hereby moves this Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. This motion is based on the ambiguous provisions in the Rincon Tribal-State gaming compact that establish the formula to determine the amount of licenses in the state-wide license pool and the State's incorrect interpretation of those provisions. This motion is supported by the accompanying Memorandum of Points and Authorities, separate Statement of

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Facts, and documents referenced in that Statement of Facts and filed with a Notice of Lodgement.

DATED this 12th day of June, 2009.

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By /s/ Kimberly A. Demarchi
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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2009, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Peter H. Kaufman Peter.Kaufman@doj.ca.gov

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 12, 2009, at Phoenix, Arizona.

Kimberly A. Demarchi
Declarant

s/ Kimberly A. Demarchi
Signature

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UNITED STATES DISTRICT COURT

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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; State of California, Defendants.	No. 04cv1151 (WMc) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON DECLARATORY CLAIM** Date: July 30, 2009 Time: 2:00 p.m. Courtroom: C Judge: The Honorable William McCurine, Jr.

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I. Introduction.

The Rincon Band is one of fifty-seven tribes that signed identical compacts with the State of California (the "Proposition 1A Compacts") in 1999. The Proposition 1A Compacts, which were written by the State, provide for a statewide pool of gaming device licenses from which the signatory Tribes may draw. The exact meaning of the provisions setting the number of licenses in that pool has been in dispute ever since the compacts were signed.

The Rincon Band filed a declaratory action to resolve this ongoing confusion. Now that the Ninth Circuit has addressed Rule 19 concerns and this Court has resolved the State's procedural motions, the issue is ripe for summary judgment, as the meaning of the compact language is a legal question to be resolved by this Court based on the language itself and applicable canons of construction.

II. Factual Background.

A. Pre-Compact Tribal Gaming in California.

The history of Tribal-State relations in California over the issue of gaming is a complex and contentious one. California tribal gaming – and the State's effort to quash it – gave rise to the seminal U.S. Supreme Court decision holding that states that do not prohibit gaming outright may not regulate gaming by Tribes on Tribal lands located within the exterior boundaries of the state. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987). After the passage of IGRA and its establishment of a compact requirement for Tribal Class III gaming, attempts to negotiate a compact failed. *See* 25 U.S.C. § 2710(d)(1) (compact requirement for Class III gaming); *Artichoke Joe's Calif. Grand Casino v. Norton*, 353 F.3d 712, 716-18 (9th Cir. 2003) (summarizing history of California compact negotiations).

California's voters stepped in during the summer of 1997, passing a statutory initiative (Proposition 5) that directed the State to enter into a compact allowing slot machines and house-banked card games for each requesting, qualified Tribe. *Hotel*

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Employees & Restaurant Employees Int'l Union v. Davis ("H.E.R.E."), 981 P.2d 990, 999-1000 (1999). A group of commercial card rooms and a labor union challenged Proposition 5, contending that it violated California's constitutional prohibition on gambling. *Id.* The Secretary of the Interior did not approve gaming compacts entered in the form prescribed by Proposition 5 because the validity of the compacts was pending before the California Supreme Court. *Id.* at 590-91.

Meanwhile, Governor Davis notified California Tribes on March 25, 1999 that he would negotiate with the Tribes over a possible Tribal-State compact. (Statement of Facts ("SOF") at ¶ 5.) On May 4, 1999, Rincon and 41 other Tribes submitted a letter to Governor Davis requesting an executed compact containing the same terms as those approved in Proposition 5. (SOF at ¶ 6.) The Tribes requested that the State identify any portions of the Proposition 5 Compact to which it was unwilling to agree so that they could meet with the Governor's representative to work out any issues. (*Id.*) Talks between the Davis Administration and the Tribes broke down when it became apparent that the Tribes wanted a compact modeled after Proposition 5 and the Davis Administration wanted to negotiate other terms. *See Chemehuevi Indian Tribe v. California (In re Indian Gaming Related Cases)*, 331 F.3d 1094, 1103 (9th Cir. 2003).

B. Negotiation of the Proposition 1A Compacts in the Wake of the State Supreme Court's Invalidation of Proposition 5.

On August 23, 1999, the California Supreme Court ruled that Proposition 5 was invalid under the California Constitution. *H.E.R.E.*, 981 P.2d at 612. The Court struck down all of Proposition 5 except the final sentence of Gov. Code § 98005, which waived the State's Eleventh Amendment immunity from suit in federal court for certain compact-related disputes. *Id.* at 614-15. Governor Davis immediately summoned interested gaming tribes to Sacramento with the promise of more negotiations. (SOF at ¶ 7.) The

next day, Governor Davis met with Tribal leaders and committed to negotiate a compact with all interested Tribes. (SOF at ¶ 8.)

Over the next three weeks, the State engaged in discussions with some Tribal representatives. (SOF at ¶ 9.) The Rincon Band was not represented in any of these discussions and raised its objections to the State's practice of negotiating with only some of California's 107 federally recognized Tribes. (*Id.*) Concerned that it was not represented, the Rincon Band sent a formal notice to the Governor's negotiator, Judge Norris, making clear that while the Tribe understood that he was meeting with some Tribal representatives, those individuals did not represent the Rincon Band. (*Id.*) During this brief period of time, the Governor's representative declined to meet with representatives of each interested Tribe, despite the fact that Tribal representatives had journeyed to Sacramento at their own expense to participate in such negotiations. (SOF at ¶ 10.)

At 8:00 p.m. on September 9, 1999, the Governor's negotiator, Judge Norris, delivered a form compact to the Tribal representatives present in Sacramento, telling them that they had to review and accept the State's offer that very evening. (SOF at ¶ 11.) Although John Currier, then the Chairman of the Rincon Tribal Council, expressly requested that the State's representatives stay and answer questions, none of the State's representatives would speak with the Tribes to answer any questions about the form compact. (SOF at ¶ 12.)

On September 10, 1999, fifty-seven tribes, including Rincon, signed letters of intent to enter the Tribal-State Gaming Compact tendered by Judge Norris on behalf of Governor Davis.[1] (SOF at ¶ 13.) The Compacts were then ratified by the Legislature and signed into law by the Governor. (SOF at ¶ 16.) The Compacts – commonly referred to as the Proposition 1A Compacts – were conditioned on voter approval of Proposition 1A, a

[1] Rincon also agreed to a subsequent modification of the Compact via addendum. (SOF at ¶ 14.) The addendum provisions are not relevant to the issues raised by this motion.

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measure that would amend the California Constitution to allow Class III gaming by federally recognized Indian tribes on Indian lands in California subject to a Tribal-State compact. (SOF at ¶ 15.) On March 7, 2000, California voters approved Proposition 1A, and on May 5, 2000, the Secretary of the Interior approved the Proposition 1A Compacts, making them effective upon their publication in the Federal Register on May 16, 2000. (SOF at ¶ 17-18.)

C. Compact Language Setting the Number of Available Gaming Device Licenses.

The Proposition 1A Compacts establish both per-tribe and statewide maximum numbers of gaming devices that can be operated by signatory Tribes. Devices fall into two categories – authorized and licensed:

(1) "Authorized" (Unlicensed) Gaming Devices: A Tribe may operate the larger of the following without drawing a gaming device license:

a. Any "grandfathered" gaming devices that a Tribe had in operation on September 1, 1999.

b. Up to 350 gaming devices as "entitlement" devices.

(2) "Licensed" Gaming Devices. In addition to any authorized gaming devices, a Tribe may acquire licenses to operate additional gaming devices up to a total of 2,000 gaming devices (authorized and licensed).

(SOF at ¶ 19-21 (Compact § 4.3.1, 4.3.2.2).)

Licenses to operate devices in addition to those "authorized" under the Compact must be drawn from a statewide pool. (SOF at ¶ 22 (Compact § 4.3.2.2).) The total number of licenses available to be drawn from the statewide pool by all Tribes that have signed Proposition 1A Compacts is set by an identical provision appearing in each Proposition 1A Compact:

> The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be a sum equal to 350

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> multiplied by the number of Non-Compact tribes as of September 1, 1999, plus the difference between 350 and the lesser number authorized under Section 4.3.1.

(SOF at ¶ 23 (Compact § 4.3.2.2(a)(1).)[2]

D. Dispute over the Number of Available Licenses.

Tribes interpreted this language to mean that sufficient licenses were available through the pool to meet current demand and allow for substantial future expansion. (SOF at ¶¶ 25-26, 29.) The California Legislative Analysts Office supported this interpretation. (SOF at ¶ 28.) However, the California Gambling Control Commission ("CGCC") calculated that that the license pool was quickly exhausted and that no more licenses were available for distribution.[3] (SOF at ¶¶ 31, 34.) The State adopted the CGCC's interpretation that no more licenses were available through the pool. (*Id*.) Despite its interpretation, the CGCC acknowledged the ambiguous nature of these compact sections in a report issued by the agency, stating, "[t]he language of the Compact section 4.3.2.2(a)(1) is sufficiently obscure that, undoubtedly, agreement among all the parties to the Compacts can only be achieved in the renegotiation that may be commenced under Compact section 4.3.3 in March of 2003." (SOF at ¶ 33; *see also* ¶ 40.) The State refused to conduct those negotiations to address the meaning of the license pool provisions, despite the Compact provisions mandating those negotiations.[4] (SOF at ¶¶ 37-39, 41-43.)

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[2] The Compact provides for licenses to be distributed to Tribes using a priority system based on the number of devices they were operating at the time of the license draw. (SOF at ¶ 24 (Compact § 4.3.2.2(a)(3).) The Rincon Band has not challenged the draw process in this action.

[3] The CGCC did not adopt the interpretation of the Governor's Office, which would have resulted in an even smaller pool of licenses. (SOF at ¶¶ 27, 30.)

[4] Indeed, the State's refusal to negotiate regarding the meaning of Section 4.3.2.2 formed an additional basis for Rincon's assertion that the State failed to negotiate in good faith. (SOF at ¶ 44.) Rincon's contention is that the State has maintained its interpretation of the number of devices available to manufacture leverage and improve its bargaining position to extract concessions from Rincon and other Tribes that amount to a tax in violation of IGRA. (SOF at ¶ 44.) This Court resolved the bad faith claim in Rincon's favor on another basis, and Rincon has preserved this alternative argument in its now-pending

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Rincon has asked to draw additional licenses from the statewide pool but its requests have been denied on the basis that the pool has been exhausted. (SOF at ¶ 35.)

E. Litigation to Date.

In this action, Rincon seeks a declaratory judgment regarding the aggregate maximum number of slot machine licenses available under the Proposition 1A Compacts. (SOF at ¶ 46.) At the outset of this case, Rincon's declaratory claim was dismissed for failure to join all other tribes who have signed similar compacts. (SOF at ¶ 47.) The U.S. Court of Appeals for the Ninth Circuit reversed, remanding for this Court to determine the size of the total license pool. (SOF at ¶ 48.)

III. Summary Judgment Standard.

Summary judgment is available when the moving party demonstrates entitlement to judgment as a matter of law in the absence of disputes of material fact. Fed.R.Civ.P.56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *McDonald v. Sun Oil Co.*, 548 F.3d 774, 778-79 (9th Cir. 2008). The issue presented by Rincon's declaratory judgment claim is a purely legal question of contract interpretation, without any underlying disputes of fact. Summary judgment on this claim is therefore appropriate.

IV. Applicable Canons of Contract Interpretation

A. The Compact's Language Is Paramount.

Tribal-State compacts are interpreted using generally applicable principles of contract interpretation. *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1098 (9th Cir. 2006). Contract interpretation begins with the language of the agreement itself, attempting to read that language using its ordinary meaning. *Id.* at 1099; *see also Tanadgusix Corp.*

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appeal before the Ninth Circuit. (SOF at ¶ 45.) Rincon has also preserved its argument that the licenses originally drawn from the statewide pool by those tribes that entered into compact amendments in 2004 have returned to the statewide pool and are eligible to be redrawn. (*Id.*)

v. Huber, 404 F.3d 1201, 1205 (9th Cir. 2005) (contract must be construed "by reading it as a whole and interpreting each part with reference to the entire contract")

Courts interpreting a contract must give effect to every word, so as to not render any part of the compact surplusage. *See Beal Bank v. Crystal Props., LTD*, 268 F.3d 743, 748 (9th Cir. 2001) (stating that a court must give effect to every word or term employed by the parties and reject none as meaningless or surplusage); *Cree v. Waterbury*, 73 F.3d 1400, 1405 (9th Cir. 1996).

B. Ambiguities in the Compact Must Be Construed in Favor of Rincon.

A contract is ambiguous when it is "reasonably susceptible" to at least two interpretations. *Hubbard v. Fidelity Federal Bank*, 91 F.3d 75, 78 (9th Cir. 1996). Longstanding federal Indian canons of interpretation require that ambiguous terms in a contract be construed in favor of Indian interests. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Antoine v. Washington*, 420 U.S. 194, 198 (1975) (the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice); *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003) (a doubt in the statute should benefit the Tribe, for ambiguities in federal law have been construed generously in order to comport with the traditional notions of sovereignty and with the federal policy of encouraging tribal independence.); *Guidiville Band of Pomo Indians v. NGV Gaming, LTD.*, 531 F.3d 767, 785 (9th Cir. 2008) (federal statutes relating to Indian tribes must be construed liberally in favor of the Indians.); *see also EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1032 (9th Cir. 2001) (applying statutory canons of construction to treaty and non-treaty issues). Because federal law governs the Compact, the Indian canons of construction should be used to interpret the ambiguities found therein. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (compact is created under federal law); *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095 (9th Cir. 2006) (federal contract law applies to Indian Gaming compacts entered into between an

Indian tribe and a state); *see also* S. Rep. 100-446, 1988 U.S.C.A.A.N. 3071, 3085 (noting "legal standard used by courts for over 150 years in deciding cases involving Indian tribes" that ambiguities are to be interpreted "in a manner that will be most favorable to tribal interests").

C. Ambiguities in the Compact Must Be Construed Against the State as the Drafter.

Even in the absence of the "Indian canon," ambiguities in contracts are also to be construed against the drafter. *See, e.g., Slottow v. Am. Cas. Co.*, 10 F.3d 1355, 1361 (9th Cir. 1993); *see also* Cal. Civ. Code § 1654 ("In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."). Given the State's precipitous termination of the Proposition 1A Compact negotiations, this rule is even more applicable to the Tribal-State Compacts at issue here. *See Circuit City Stores v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002) (discussing inferior bargaining power of party faced with a pre-drafted, take-it-or-leave-it contract of adhesion)*; Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 983 (9th Cir. 2007) (same); *Victoria v. Superior Court of Los Angeles County*, 40 Cal.3d 734, 742-43 (1985) (contracts of adhesion are subject to stricter construction against the party with the superior bargaining power).

V. Calculation of the Number of Gaming Devices Available in the License Pool

Interpretation of the Compact provision setting the size of the statewide license pool turns on the meaning of the two components of the calculation set forth in Section 4.3.2.2(a)(1): (1) 350 multiplied by "the number of Non-Compact Tribes as of September 1, 1999" plus (2) the difference between 350 and the "lesser number authorized under Section 4.3.1." (SOF at ¶ 23.) Each component of the calculation will be addressed in turn.

A. Part One: 350 Multiplied by "the Number of Non-Compact Tribes as of September 1, 1999"

Resolution of the first half of the formula depends on determining the number of Non-Compact Tribes as of September 1, 1999. The Compact defines a "Compact Tribe" as a Tribe "having a Compact with the State that authorized the Gaming Activities authorized by this Compact." (SOF at ¶ 49 (Compact § 4.3.2(a)(1).) The Compact also refers to "federally-recognized tribes that are operating fewer than 350 gaming devices" as "Non-Compact Tribes." (SOF at ¶ 50 (Compact § 4.3.2(a)(1).)

As of September 1, 1999, there were no Tribes operating under Proposition 1A Compacts, because the Proposition 1A Compacts were not approved and operative until May 2000. Thus, Rincon reads the Compact provisions to mean that each of California's 107 federally recognized Tribes was a "Non-Compact" Tribe as of that date, because none of them had an approved Proposition 1A Compact or other Compact permitting equivalent Gaming Activities.[5] (*See* SOF at ¶ 51.) That interpretation would make component one of the equation equal to **37,450** gaming device licenses (350 x 107).

A second interpretation, and the one adopted by the State, is that the 84 federally-recognized Tribes who were operating less than 350 gaming devices as of September 1, 1999 would be a Non-Compact Tribe within the meaning of Section 4.3.2(a)(1). (SOF at ¶ 54-56.) That interpretation results in a component one number of gaming device licenses of **29,400** (350 x 84).

The State would prefer "Non-Compact Tribes" to be afforded the definition given in the Compact while Rincon interprets the term to mean all Tribes in California who did not have a Gaming Compact with the State. The State errs by looking at the term "Non-Compact Tribe" in isolation, when it should be viewed in context of the entire agreement.

[5] Alternatively, the five Tribes that had signed compacts permitting operation of off-track betting facilities only could be excluded from the definition of "Non-Compact Tribes", making component one equal to **35,700** (102 x 350). (SOF at ¶ 52.)

The State's narrow reading fails to account for the date of September 1, 1999, specified in the definition. On September 1, 1999, no Tribe had signed the Proposition 1A compacts. On September 1, 1999, the Proposition 1A Compacts were not effective. On September 1, 1999, or any time prior to September 9, 1999 — the deadline given to the Tribes to sign the proposed Gaming Compact — the term "Non-Compact Tribe" meant a Tribe that did not have a gaming compact with the State.

The State accuses Rincon of disregarding the definition found in Compact section 4.3.1(i), which states that a "Non-Compact Tribe" is a tribe operating less than 350 gaming devices. However, the State disregards the date of September 1, 1999, found in section 4.3.2.2(a)(1). The interpretation must give effect to every word in the compact, so as to not render any part of the compact surplusage. *See Beal Bank v. Crystal Props., LTD*, 268 F.3d 743, 748 (9th Cir. 2001) (court must give effect to every word or term employed by the parties and reject none as meaningless or surplusage); *see also Cree v. Waterbury*, 73 F.3d 1400, 1405 (9th Cir. 1996). The State is seeking a definition of a "Non-Compact Tribe" that is most financially advantageous to it, but by doing so it is asking the court to ignore the language that the State itself drafted and render the date in the compact provision surplusage. Rincon reads the section giving import to both the date and the term "Non-Compact Tribe". On and before September 1, 1999, the definition of "Non-Compact Tribe" was a tribe that did not have a Gaming compact with the State. Thus, the first component of the calculation, properly understood, results in **37,450** gaming device licenses for the statewide pool.

B. Part Two: "The Difference Between 350 and the Lesser Number Authorized under Section 4.3.1."

The second component requires the determination of "the difference between 350 and the lesser number authorized under Section 4.3.1." (SOF at ¶ 23 (Compact § 4.3.2.2(a)(1)).) This component serves to add to the base gaming device license pool

established through the first component of the calculation, a number of additional device licenses available for statewide use equal to the number of devices "authorized" by the Compact that were not actually in operation as of September 1, 1999.

Consideration of how the formula applies on a Tribe-by-Tribe basis illustrates this purpose. For each signatory Tribe, Section 4.3.1. authorizes the greater of a) the number of devices being operated by the Tribe on September 1, 1999; or b) 350 Gaming Devices. (SOF at ¶ 20 (Compact § 4.3.1).) For a Tribe operating more than 350 gaming devices on September 1, 1999, the lesser number authorized by this provision is 350. The difference between 350 and that lesser number (350) is zero, adding no additional licenses to the statewide pool. But for a Tribe operating less than 350 gaming devices on September 1, 1999, the "lesser number authorized" by Section 4.3.1 is the actual number of gaming devices in operation on that date. The difference between the actual number of gaming devices that Tribe had in operation and 350 is the unused capacity of "authorized" devices that the formula then adds to the statewide pool.

The fundamental disagreement between the State and Rincon concerning this calculation involves the treatment of a Tribe that was operating no devices on September 1, 1999. Rincon and other Tribes take the position that for each Tribe operating zero devices on September 1, 1999, another 350 devices must be added to the statewide pool, because the difference between 350 and the "lesser number authorized" by Section 4.3.1 for each of those Tribes (zero) is a full 350. The State's own Legislative Analysts also supported this position, but the State insists that zero is not a number and refuses to apply the formula in this way. (SOF at ¶¶ 28, 30, 56.) The State therefore includes only the 16 Tribes who were operating at least 1 but less than 350 licenses into the second component of the calculation, coming up with a number of **2,751** additional gaming device licenses to add to the statewide pool. (SOF at ¶ 31, 56.) If all 68 Tribes that operated no devices on

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September 1, 1999, are included (*see* SOF at ¶ 56), the number of devices to be added in component two of the equation is **26,551.**

In an order entered April 22, 2009, the U.S. District Court for the Eastern District of California adopted an alternative way of reading the Compact provisions at issue in a declaratory action filed in that District by two other signatory Tribes. (SOF at ¶ 58-60.) That Court reads the second component of the calculation to be conducted by determining the number of devices authorized statewide under Section 4.3.1(a), comparing that number to the number of devices authorized statewide under Section 4.3.1(b) and subtracting 350 from the lesser of those two numbers. (SOF at ¶ 60.) Applying that interpretation, the Court found that 16,156 devices were authorized statewide under Section 4.3.1(a), while 13,650 were authorized statewide under Section 4.3.1(b).[6] (SOF at ¶ 61.) The Court then calculated the difference between 350 and the lesser number – 13,650 – resulting in a component two number of **13,300** device licenses.[7] (SOF at ¶ 62.)

Rincon's interpretation of the Compact is the one most consistent with its purpose. If the second half of the pool calculation was designed to add to the pool all unused, "authorized" devices, then there is simply no reason to ignore the unused capacity of the 68 Tribes that were operating no devices but were authorized to operate up to 350 devices. Nor can the plain language of the Compact be twisted as the State suggests – because Section 4.3.1 expressly the Compact authorizes operation of up to 350 devices for any Tribe signing the Compact, regardless of whether that Tribe was already operating devices, then those devices are "authorized" within the plain meaning of the Compact and

[6] The Court reached the 16,156 number by calculating the total number of devices in operation on September 1, 1999 by the 23 signatory Tribes operating more than 350 devices. (SOF at ¶ 61.) The Court calculated the 13,650 number by reasoning that each of the 39 other signatory Tribes who were operating less than 350 devices (including those operating zero devices) were authorized to operate 350 devices under the Compact, and therefore multiplied 350 by 39 to reach 13,650. (*Id.*)

[7] The component one number was not disputed in the Colusa litigation. (SOF at ¶ 63.)

must be included in the calculation. *See also* Cal. Gov't Code § 12012.25(b)(1) (legislation ratifying the Proposition 1A Compacts and providing that any California Tribe is entitled to enter into a materially identical compact). Moreover, the Compact's language itself does not support any distinction between a Tribe operating one device and a Tribe operating zero devices, as both 1 and 0 are numbers less than 350.

The interpretation adopted by the Eastern District Court does not do violence to the Compact's language, unlike that offered by the State, and it is thus a more reasonable interpretation than the one offered by the State. However, the Eastern District Court's interpretation makes less sense than Rincon's interpretation in the context of the Compact as a whole, because simply subtracting 350 once from the total number of authorized gaming devices does not serve the intended function of returning unused capacity to the statewide pool for the use of other Tribes. Because 350, in context, is a per-Tribe number of licenses, it should be subtracted from each individual Tribe's allotment as Rincon would do, rather than simply subtracted from the total pool once as the Eastern District Court would do.

The plain language of the Compact requires adoption of Rincon's interpretation. The remaining canons of construction likewise support Rincon's interpretation. As set forth above, any ambiguity in the Compact must be construed in favor of Rincon, as a Tribe, as well as against the State, as the drafter. Thus, the appropriate conclusion is that component two of the equation is **26,551**.

VI. Conclusion.

For the foregoing reasons, this Court should grant the Rincon summary judgment on its declaratory claim and find that the total number of gaming device licenses available statewide to signatories of the Proposition 1A Compacts is **64,001** or, in the alternative, **42,700** as determined by the Eastern District of California. This Court should further

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order that the State proceed to conduct a license pool draw in accordance with the provisions of the Compact to distribute any additional available licenses.

RESPECTFULLY SUBMITTED this 12th day of June, 2009.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 12, 2009, at Phoenix, Arizona.

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Declarant

s/ Kimberly A. Demarchi
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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; State of California, Defendants.	No. 04cv1151 (WMc) **SEPARATE STATEMENT OF FACTS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON DECLARATORY CLAIM** Date: July 30, 2009 Time: 2:00 p.m. Courtroom: C Judge: The Honorable William McCurine, Jr.

I. Negotiation of the Proposition 1A Compacts.

1. On November 3, 1998, voters in the State of California voted on and approved Proposition 5, a statewide ballot measure that authorized the Governor of California to enter into a Tribal-State Gaming Compact with any federally recognized Tribe in California that wished to game under the Indian Gaming Regulatory Act (IGRA). (Text of Proposition 5, attached as Exhibit 1 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim, at 85.)

2. Proposition 5 passed by a vote of 62.4% (5,090,452) in favor and 37.6% (3,070,358) opposed. (Results of California State Ballot Measures in 1998, attached as Exhibit 2 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim.)

3. On December 4, 1998, the Supreme Court of California entered an order staying the implementation of Proposition 5 until it ruled on the merits of a writ of mandate filed by the Hotel and Restaurant Employees International Union. (*Hotel Employees and Restaurant Employees International Union v. Davis*, 981 P.2d 990, 1011 (1999). The Union challenged the legality of Proposition 5. (*Id.*)

4. The Secretary of the Interior did not approve Proposition 5 Gaming Compacts because the validity of the compacts was pending before the Supreme Court of California. (*Id.*)

5. While the legality of Proposition 5 was before the Supreme Court, on March 25, 1999, then-Governor Davis notified California Tribes that he would begin to negotiate with the Tribes over a possible Tribal-State compact. (Mar. 25, 1999 letter from Governor Gray Davis to John Currier, Tribal Chair, Rincon Band of Mission Indians, attached as Exhibit 3 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim.)

6. On May 4, 1999, Rincon and 41 other Tribes submitted a letter to Governor Davis requesting an executed compact containing the same terms as those approved in Proposition 5. (May 4, 1999 letter from 42 Tribal leaders to Governor Gray Davis, attached as Exhibit 4 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim.) The Tribes requested that the State identify any portions of the Proposition 5 Compact to which it was unwilling to agree so that they could meet with the Governor's representative to work out any issues. (*Id.*)

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7. When the California Supreme Court issued its opinion in the *H.E.R.E.* case on August 23, 1999, Governor Davis immediately summoned interested gaming tribes to Sacramento with the promise of more negotiations. (Declaration of Gilbert Parada, attached as Exhibit 27 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim, at ¶ 3.)

8. The next day, Governor Davis met with Tribal leaders and committed to negotiate a compact with all interested Tribes. (Parada Declaration, Exhibit 27, at ¶ 4.)

9. Over the next three weeks, the State engaged in negotiations with some Tribal representatives. The Rincon Band was not represented in many of these negotiations and raised its objections to the State's practice of negotiating with only some of California's 107 federally recognized Tribes. Concerned that it was not represented, the Rincon Band sent a formal notice to the Governor's negotiator, Judge Norris, making clear that while the Tribe understood that he was meeting with some Tribal representatives, those individuals did not represent the Rincon Band. (Sept. 8, 1999, hand-delivered letter from Scott Crowell on behalf of Rincon Band and four other Tribes, to Hon. Gray Davis and Hon. Bill Norris, attached as Exhibit 5 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim.) In that letter, the Rincon Band expressed its specific proposition to the proposal by those individuals to create a statewide license pool. (*Id.*)

10. During this brief period of time, the Governor's representative declined to meet with representatives of each interested Tribe, despite the fact that Tribal representatives had journeyed to Sacramento at their own expense to participate in such negotiations. (Sept. 2, 1999, hand-delivered letter from 67 Tribal leaders to Governor Gray Davis, attached as Exhibit 6 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim.)

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11. At 8:00 p.m. on September 9, 1999, the Governor's negotiator, Judge Norris, delivered a form compact to the Tribal representatives present in Sacramento, telling them that they had until 10:00 p.m. to review and accept the State's offer. (Sept. 9, 1999 letter from Judge Norris to Honorable Tribal Chairs, attached as Exhibit 7 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim; Executed Tribal-State Gaming Compact between the Rincon Band and the State of California (hereinafter the "Compact"), attached as Exhibit 8 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim; Parada Declaration, Exhibit 27, at ¶ 9; *see also Chemehuevi Indian Tribe v. California (In re Indian Gaming Related Cases)*, 331 F.3d 1094, 1104 (9th Cir. 2002).)

12. Although John Currier, then the Chairman of the Rincon Tribal Council, expressly requested that the State's representatives stay and answer questions, none of the State's representatives would speak with the Tribes to answer any questions about the form compact or to negotiate regarding its provisions. (Parada Declaration, Exhibit 27,at ¶ 8.)

13. On September 10, 1999, fifty-seven tribes, including Rincon, signed letters of intent to enter the Tribal-State Gaming Compact tendered by Judge Norris on behalf of Governor Davis. *Chemehuevi Indian Tribe v. California (In re Indian Gaming Related Cases)*, 331 F.3d 1094, 1104 (9th Cir. 2002). The Compacts entered by the Tribes are herein referred to as the Proposition 1A Compacts; the particular Compact between Rincon and the State is referred to as the Compact.

14. Rincon also agreed to a subsequent modification of the Compact via addendum. (Compact, Exhibit 8, at Addendum A.)

15. The Proposition 1A Compacts were conditioned on voter approval of Proposition 1A, a measure that would amend the California Constitution to allow Class III gaming by federally recognized Indian tribes on Indian lands in California subject to a

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Tribal-State compact. (Compact, Exhibit 8, at Section 11.1(c); *see also Chemehuevi Indian Tribe v. California (In re Indian Gaming Related Cases)*, 331 F.3d 1094, 1107 (9th Cir. 2002).)

16. In September 1999, the California Legislature ratified the Proposition 1A Compacts subject to the condition that Proposition 1A was approved by the voters, and the Governor signed the ratification into law. (Cal. Gov't Code § 12012.25; *Chemehuevi Indian Tribe v. California (In re Indian Gaming Related Cases)*, 331 F.3d 1094, 1107 (9th Cir. 2002).)

17. On March 7, 2000, California voters approved Proposition 1A. (*Chemihuevi Indian Tribe v. California (In re Indian Gaming Related Cases)*, 331 F.3d 1094, 1107 (9th Cir. 2002).)

18. On May 5, 2000, the Secretary of the Interior approved the Proposition 1A Compacts, making them effective upon their publication in the Federal Register on May 16, 2000. (65 FR 31189-01 (May 25, 2000), attached as Exhibit 9 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim; *see also Chemihuevi Indian Tribe v. California (In re Indian Gaming Related Cases)*, 331 F.3d 1094, 1104 (9th Cir. 2002).)

II. Compact Language Setting the Number of Available Gaming Device Licenses.

19. The Proposition 1A Compacts establish both per-tribe and statewide maximum numbers of gaming devices that can be operated by signatory Tribes. (Compact, Exhibit 8, at § 4.0.)

20. A Tribe may operate the larger of the following without drawing a gaming device license: (a) Any "grandfathered" gaming devices that a Tribe had in operation on September 1, 1999 or (b) up to 350 gaming devices as "entitlement" devices. (Compact, Exhibit 8, at § 4.3.1.)

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21. In addition to any authorized gaming devices, a Tribe may acquire licenses to operate additional gaming devices up to a total of 2,000 gaming devices (authorized and licensed). (Compact, Exhibit 8, at § 4.3.2.2; *see also* 2004 California State Auditor Report, attached as Exhibit 10 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim, at 12.)

22. Licenses to operate devices in addition to those "authorized" under the Compact must be drawn from a statewide pool. (Compact, Exhibit 8, at § 4.3.2.2.)

23. The total number of licenses available to be drawn from the statewide pool by all Tribes that have signed Proposition 1A Compacts is set by an identical provision appearing in each Proposition 1A Compact:

> The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be a sum equal to 350 multiplied by the number of Non-Compact tribes as of September 1, 1999, plus the difference between 350 and the lesser number authorized under Section 4.3.1.

(Compact, Exhibit 8, at § 4.3.2.2(a)(1).)

24. Tribes were permitted to draw licenses from the pool in an order determined by the number of devices they were operating as of September 1, 1999. (Compact, Exhibit 8, at § 4.3.2.2(a)(3).)

III. Confusion over the Number of Available Licenses.

25. The language of the Proposition 1A Compacts gave rise to disagreements over the number of gaming device licenses available in the statewide pool and the appropriate process for allocation of those licenses. (Auditor Report, Exhibit 10, at 20.)

26. Confusion over the number of licenses that would be available in the statewide pool began during the negotiations themselves. The Governor's negotiator, Judge William Norris, has testified that he informed tribal representatives that the total number of gaming devices that would be operated statewide (including both authorized and licensed devices) could not exceed 44,798, including any gaming devices already in

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operation in the State. (Declaration of William A. Norris, attached as Exhibit 11 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim, at ¶ 15.) Tribal representatives involved in the negotiations recall having a different understanding of the draft provisions, with a specific understanding that the compact would authorize approximately 56,000 gaming device licenses in addition to those already in operation. (Declaration of Chairman Wayne R. Mitchum, attached as Exhibit 12 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim, at ¶ 17.)

27. On September 10, 1999, the Governor's Office distributed an information sheet indicating that a total of 44,448 slot machines could be operated under the new Proposition 1A Compacts once in effect, or enough for 23,450 in addition to those already in operation. (Information Sheet, attached as Exhibit 13 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim.)

28. On November 9, 1999, the Office of Legislative Analysts issued an opinion that the Proposition 1A Compacts allow for as many as 113,000 devices to be operated on Indian lands, 60,000 of which are available through the license pool. (November 9, 1999 Opinion of Elizabeth Hill, Office of Legislative Analysts, attached as Exhibit 14 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim.)

29. The Tribal Alliance of Sovereign Indian Nations ("TASIN") similarly maintains that 64,283 licenses are available through the license pool. (Auditor Report, Exhibit 10, at 21.)

30. In response to the Office of Legislative Analysts' letter, the Office of the Governor issued an opinion that the Office of Legislative Analysts was wrong and that the Proposition 1A Compacts allow for no more than 44,798 gaming devices to be operated on Indian lands, 23,000 of which are available through the license pool. (December 3, 1999

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letter from William Norris to Elizabeth Hill, attached as Exhibit 15 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim.)

31. The California Gambling Control Commission (CGCC) adopted neither the view of the Office of Legislative Analysis nor of the Governor's Office, instead maintaining that 32,151 licenses are available in the statewide pool under the Proposition 1A Compacts. (June 19, 2002 Report of the California Gambling Control Commission, attached as Exhibit 16 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim, at 8; Auditor Report, Exhibit 10, at 21.)

32. The CGCC was created by Executive Order to assist the California Department of Justice, Bureau of Gambling Control with the regulation of tribal gaming operations. (Cal. Bus. & Professions Code § 19800 *et seq.*; Executive Orders D-29-01 and D-31-01, attached as Exhibit 17 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim.) The CGCC falls within the Compact's definition of a "State Gaming Agency" and serves as trustee of the trusts into which license fees are paid under the Proposition 1A Compacts. (Compact, Exhibit 8, at § 2.18)

33. The CGCC acknowledged the ambiguous nature of these compact sections in a report issued by the agency, stating, "[t]the language of the Compact section 4.3.2.2(a)(1) is sufficiently obscure that, undoubtedly, agreement among all the parties to the Compacts can only be achieved in the renegotiation that may be commenced under Compact section 4.3.3 in March of 2003." (CGCC Report, Exhibit 16, at p.5.)

34. The CGCC maintains that the license pool has been exhausted and that the only means by which new licenses may become available is through the termination of a license for non-payment of fees or by a Tribe or Tribes relinquishing licenses to revert back to the pool. (CGCC Report, Exhibit 16, at 7; Auditor Report, Exhibit 10, at 13.)

35. Rincon has asked to draw additional licenses from the statewide pool but its requests have been denied on the basis that the pool has been exhausted. (June 16, 2004,

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letter from Paul Dobson, Chief Deputy Legal Affairs Secretary to Scott Crowell, attached as Exhibit 18 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim, at 3.)

36. As early as July 26, 2001, a number of Tribes, including Rincon, sent a request to meet and confer pursuant to Section 9.1 of the Compacts. (July 26, 2001 letter from 10 Tribes to Governor Gray Davis, attached as Exhibit 19 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim; Compact, Exhibit 8, at § 9.1.) The Tribes sought clarification that the November 9, 1999 opinion of the Legislative Counsel for California that there were 113,000 licenses available was the State's official position. (July 2001 letter, Exhibit 19, at 4.)

37. Rincon submitted a formal request to renegotiate Compact sections 4.3.1 and 4.3.2 on March 8, 2003, in compliance with the March 2003 deadline set by the Proposition 1A Compacts for such a request to be made. (March 8, 2003 letter from Chairman Currier to Governor Davis, attached as Exhibit 20 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim; *see also* Compact, Exhibit 8, at § 4.3.3.)

38. On February 26, 2004, the Rincon Band again requested to meet and confer over a variety of issues, one of which was the number of gaming device licenses. (February 26, 2004 letter to Governor Arnold Schwarzenegger from Chairman John Currier, attached as Exhibit 21 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim.) In that letter, the Rincon Band noted that it recognized two reasonable interpretations of the number of available gaming devices, which would result in either 64,293 or 58,450 licenses available in the pool. (*Id.*)

39. On June 16, 2004, the State asserted that it was adopting and adhering to the position of the CGCC that only 32,151 licenses were available in the statewide pool. (June 2004 letter, Exhibit 18, at 4.)

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40. In June 2004, the California State Auditor published a report that found that the "meaning of key terminology" in the formula for the calculation of the number of licenses was "unclear" and had caused a variety of different interpretations and confusion. (Auditor Report, Exhibit 10, at 22.)

41. During negotiation sessions on August 9, 2006, September 12, 2006, and October 5, 2006, Rincon again raised the issue of interpreting the Proposition 1A Compact provisions governing the number of gaming device licenses in the statewide pool. (October 23, 2006 letter from Andrea Lynn Hoch, Legal Affairs Secretary, to Chairman Currier, attached as Exhibit 22 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim.)

42. On September 25, 2006, Rincon's lawyers sent the State a memorandum providing a detailed analysis of the issues with respect to the calculation of the number of available gaming device licenses. (September 23, 2006 memo to Andrea Hoch, attached as Exhibit 23 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim.)

43. On October 23, 2006, the State acknowledged that multiple interpretations of section 4.3.2.2 were possible, but concluded that it would continue to follow the CGCC's interpretation of the number of gaming device licenses. (October 2006 letter, Exhibit 22, at 5-6.)

44. The State's refusal to negotiate regarding the meaning of Section 4.3.2.2 formed an additional basis for Rincon's assertion that the State failed to negotiate in good faith. (Docket no. 173.) Rincon's contention is that the State has maintained its interpretation of the number of devices available to manufacture leverage and improve its bargaining position to extract concessions from Rincon and other Tribes that amount to a tax in violation of IGRA. (*Id.*)

45. This Court resolved the bad faith claim in Rincon's favor on another basis, and Rincon has preserved this alternative argument in its now-pending appeal before the Ninth Circuit. (Docket no. 197; Rincon Band's Answering Brief on Appeal and Opening on Cross-Appeal (excerpt), attached as Exhibit 24 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim.) Rincon has also preserved its argument that the licenses originally drawn from the statewide pool by those tribes that entered into compact amendments in 2004 have returned to the statewide pool and are eligible to be redrawn. (*Id.*)

IV. Litigation to Date

46. In this action, Rincon seeks a declaratory judgment regarding the aggregate maximum number of slot machine licenses available under the Proposition 1A Compacts. (Docket no. 1.)

47. At the outset of this case, Rincon's declaratory claim was dismissed for failure to join all other tribes who have signed similar compacts. (Docket no. 37.)

48. The U.S. Court of Appeals for the Ninth Circuit reversed in both this case and a similar case filed in the Eastern District of California, remanding for the parties to litigate the size of the total license pool. (Docket no. 239; *see also Cachil Dehe Band of Wintun Indians of the Colusa Indian Reservation v. State of California*, 547 F.3d 962 (9th Cir. 2008).)

V. Calculation of the Number of Gaming Devices Available in the License Pool

49. The Compact defines a "Compact Tribe" as a Tribe "having a Compact with the State that authorized the Gaming Activities authorized by this Compact." (Compact, Exhibit 9, at § 4.3.2(a)(1).)

50. The Compact also refers to "federally-recognized tribes that are operating fewer than 350 gaming devices" as "Non-Compact Tribes." (Compact, Exhibit 8, at § 4.3.2(a)(1).)

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51. As of September 1, 1999, there were 107 federally-recognized Tribes with Tribal lands located within the exterior boundaries of the State of California. (Auditor Report, Exhibit 10, at 22.)

52. As of September 1, 1999, thirty-eight Tribes that were operating a total of 19,005 grandfathered devices. (Auditor Report, Exhibit 10, at 60.)

53. As of September 1, 1999, five Tribes had compacts with the State that permitted them to run off-track betting facilities (National Gambling Impact Study Commission Report, Appendix 8, attached as Exhibit 25 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim.)

54. 84 of the federally recognized Tribes in the State of California were operating less than 350 gaming devices on September 1, 1999. (Auditor Report, Exhibit 10, at 22.)

55. The State of California has interpreted Section 4.3.2.2's reference to "Non-Compact Tribes" to refer to the 84 federally recognized Tribes that were operating less than 350 gaming devices on September 1, 1999. (Auditor Report, Exhibit 10, at 22.)

56. The State declines to include the California Tribes that were operating zero gaming devices on September 1, 1999 in the number of Tribes to be included in the second part of the calculation required by Section 4.3.2.2. Instead, the State includes only the 16 Tribes that were operating at least 1 but less than 350 licenses as of September 1, 1999. (Auditor Report, Exhibit 10, at 22.)

57. Another 68 Tribes were operating no devices on September 1, 1999. (Auditor Report, Exhibit 10, at 22.)

58. There is an action currently pending in the U.S. District Court for the Eastern District of California in which the number of gaming device licenses available in the statewide pool created by Section 4.3.2.2 of the Proposition 1A Compacts is at issue. (April 22, 2009 Order in *Cachil Dehe Band of Wintun Indians of the Colusa Indian*

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Community v. State of California, No. Civ. S-04-2265, attached as Exhibit 26 to Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim, at 10-11.)

59. On April 22, 2009, the Court in that case issued a summary judgment ruling interpreting Section 4.3.2.2. (*Id.*)

60. In that Order, the District Court adopted a way of reading Section 4.3.2.2 that differs from the way the State and Rincon have discussed reading that provision. (*Id.* at 30-43.) Specifically, that Court reads the second component of the calculation to be conducted by determining the number of devices authorized statewide under Section 4.3.1(a), comparing that number to the number of devices authorized statewide under Section 4.3.1(b) and subtracting 350 from the lesser of those two numbers. (*Id.* at 40-43.)

61. Applying that interpretation, the Court found that 16,156 devices were authorized statewide under Section 4.3.1(a), while 13,650 were authorized statewide under Section 4.3.1(b). (*Id.* at 41.) The Court reached the 16,156 number by calculating the total number of devices in operation on September 1, 1999 by the 23 signatory Tribes operating more than 350 devices. (*Id.*) The Court calculated the 13,650 number by reasoning that each of the 39 other signatory Tribes who were operating less than 350 devices (including those operating zero devices) were authorized to operate 350 devices under the Compact, and therefore multiplied 350 by 39 to reach 13,650. (*Id.*)

62. The Court then calculated the difference between 350 and the lesser number – 13,650 – resulting in a component two number of 13,300 device licenses. (*Id.* at 41-42.)

63. The component one number was not disputed in the Colusa litigation. (*Id.* at 31:7-8.)

DATED this 12th day of June, 2009.

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Stephen Hart
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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2009, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Peter H. Kaufman Peter.Kaufman@doj.ca.gov

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 12, 2009, at Phoenix, Arizona.

Kimberly A. Demarchi
Declarant

s/ Kimberly A. Demarchi
Signature

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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; State of California, Defendants.	No. 04cv1151 (WMc) **DECLARATION OF KIMBERLY A. DEMARCHI IN SUPPORT OF RINCON'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON DECLARATORY CLAIM** Date: July 30, 2009 Time: 2:00 p.m. Courtroom: C Judge: The Honorable William McCurine, Jr.

I, Kimberly A. Demarchi, declare:

1. I am a partner at Lewis and Roca, LLP, on of the firms that is counsel of record for Plaintiff, Rincon Band of Luiseno Mission Indians ("Rincon"). This declaration is based on my review of the documents exchanged by the parties in this litigation and/or publicly available documents and is true and correct to the best of my personal knowledge.

2. Attached as Exhibit 1 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of the text of California State Ballot Measure Proposition 5, dated 1998.

3. Attached as Exhibit 2 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of the Results of California State Ballot Measures in 1998.

4. Attached as Exhibit 3 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of a letter from Governor Gray Davis to John Currier, Tribal Chair, Rincon Band of Luiseno Mission Indians, dated March 25, 1999.

5. Attached as Exhibit 4 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of a letter submitted to Governor Davis from 42 Tribal leaders, dated May 4, 1999.

6. Attached as Exhibit 5 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of a letter from Scott Crowell on behalf of Rincon and four other Tribes, to the Hon. Gray Davis and Hon. Bill Norris, dated September 8, 1999.

7. Attached as Exhibit 6 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of a letter from the 67 Tribal leaders to Governor Gray Davis, dated September 2, 1999.

8. Attached as Exhibit 7 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of letter a from Judge William Norris to the 67 Tribal Chairs, dated September 9, 1999.

9. Attached as Exhibit 8 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of

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the executed Tribal-State Gaming Compact between Rincon and the State of California and its Addendum.

10. Attached as Exhibit 9 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of the Federal Register, dated May 16, 2000, publishing the Secretary of the Interior's approval of the Proposition 1A compacts on May 5, 2000.

11. Attached as Exhibit 10 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of the 2004 California State Auditor Report of the California Gambling Control Commission.

12. Attached as Exhibit 11 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of the Declaration of Judge William A. Norris.

13. Attached as Exhibit 12 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of the Declaration of Wayne R. Mitchum, Chairman of the Cachil Dehe Band of Wintun Indians.

14. Attached as Exhibit 13 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is an information sheet released by the State to the media, entitled "Total Possible Number of Slot Machines Statewide Under the Model Tribal-State Gaming Compact Negotiated by Governor Davis and California Indian Tribes".

15. Attached as Exhibit 14 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of a letter from Elizabeth Hill, from the California Office of Legislative Analysts, to the Hon. Bruce Thompson, State Assembly member, dated November 9, 1999.

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16. Attached as Exhibit 15 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of a letter from Judge William Norris to Elizabeth Hill, dated December 3, 1999.

17. Attached as Exhibit 16 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of a report of the California Gambling Control Commission, dated June 19, 2002.

18. Attached as Exhibit 17 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of Executive Orders D-29-01 and D-31-01.

19. Attached as Exhibit 18 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a letter from Paul H. Dobson, Chief Deputy Legal Affairs Secretary, to Scott Crowell, dated June 16, 2004.

20. Attached as Exhibit 19 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of a letter from 10 Tribes, including Rincon, to Governor Gray Davis, dated July 26, 2001.

21. Attached as Exhibit 20 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of a letter from Chairman Currier to Governor Davis, dated March 8, 2003.

22. Attached as Exhibit 21 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of a letter from Chairman John Currier to Governor Arnold Schwarzenegger, dated February 26, 2004.

23. Attached as Exhibit 22 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of a letter from Andrea Lynn Hoch, Legal Affairs Secretary to Chairman John Currier, dated October 23, 2006.

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24. Attached as Exhibit 23 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of a letter to Andrea Hoch from Rincon's Attorneys, dated September 23, 2006.

25. Attached as Exhibit 24 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of Docket no. 197; Rincon's Civil Appeals Docketing Statement on Cross-Appeal.

26. Attached as Exhibit 25 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of Appendix 8 to the National Gambling Impact Study Commission Report.

27. Attached as Exhibit 26 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of the Court's Order in Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. State of California, No. Civ. S-04-2265.

28. Attached as Exhibit 27 to the Notice of Lodgment in Support of Rincon's Motion for Partial Summary Judgment on Declaratory Claim is a true and correct copy of the Declaration of Chairman John Currier.

Executed this 12th day of June, 2009 at Phoenix, Arizona.

/s/ Kimberly A. Demarchi
Kimberly A. Demarchi

LEWIS AND ROCA LLP LAWYERS

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2009, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Peter H. Kaufman Peter.Kaufman@doj.ca.gov

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 12, 2009, at Phoenix, Arizona.

Kimberly A. Demarchi	s/ Kimberly A. Demarchi
Declarant	Signature