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-Appellee/Cross-Appellant, vs. ARNOLD SCHWARZENEGGER, Governor of California; STATE OF CALIFORNIA, Defendants-Appellants/Cross-Appellees.	Nos. 08-55809 08-55914 04-CV-1151 W (WMc) California (San Diego)

RINCON BAND'S REPLY BRIEF ON CROSS-APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Case **Page**

I. INTRODUCTION

Throughout this litigation, the Rincon Band has taken the position that the District Court should consider all evidence regarding the negotiations – both the statements made during the negotiations and the factual context in which those statements were made – so that the Band's claim of failure to negotiate in good faith could be accurately assessed in the totality of the circumstances. The Band therefore did not object to any factual information that the State sought to submit. In stark contrast, the State objected to any discovery at all from State officials regarding the negotiations, as well as to information submitted by the Band as part of the administrative record, even when the information sought or offered was evidence of representations made during negotiation sessions between the State and the Band.

Now that the State has lost, it attempts to simultaneously embrace the need for evidence – contending that the District Court should have considered its demand for an unlawful tax in the larger factual circumstances – while still denying the admissibility and discoverability of any less convenient facts when proffered by Rincon. The State should not be permitted to benefit from this attempt to impose a double standard.

As is evident from the District Court's order finding the State failed to negotiate in good faith, that court went to great lengths to consider all of the factual information submitted regarding the State's demand for "revenue sharing" constituting 96% of all the net revenue to be generated by the amended compact and amounting to an unlawful tax prohibited by IGRA. As set forth in detail in Rincon's answering brief, this Court has ample basis to affirm that determination on the record submitted. Additional evidence – whether developed through the discovery denied to Rincon or through the administrative record submissions rejected by the Court – would only bolster that conclusion, and if this Court is not inclined to affirm the District Court's finding of failure to negotiate in good faith then a remand for the further development of the record is required.

II. THE TOTALITY OF THE CIRCUMSTANCES SUPPORT A FINDING OF FAILURE TO NEGOTIATE IN GOOD FAITH

The State repeatedly invokes this Court's *Coyote Valley II* decision for the proposition that its demand for the general fund payments found by the District Court to be an unlawful tax must be viewed in the overall, fact-specific context of the negotiations, from which the State's good or bad faith is to be determined. (*See, e.g.*, State's Combined Answering and Reply Brief at 7, 26.) But when it is Rincon, and not the State, that attempts to draw the courts' attention to those negotiations and their context, then the State seeks to limit the evidence Rincon

may present and urges the Court to consider the State's particular actions in isolation. When the State's unlawful tax demand is viewed in the true context of negotiations – including the State's strategic delay of the onset of negotiations and its refusal to discuss the effects of the new Schwarzenegger Compacts on the existing litigation – then its failure to negotiate in good faith is evident and the District Court's finding of bad faith should be upheld.

Moreover, to the extent that the District Court precluded Rincon from developing and presenting information about the context of the negotiations and the information available to the State, the District Court wrongly interfered with Rincon's ability to present evidence in support of its claims. Entry of judgment against Rincon without an opportunity to correct the deficiencies in the record caused by the District Court's erroneous rulings on discovery and supplementation of the administrative record would be error.

A. The State's Unjustified, Strategic Delay in the Onset of Negotiations Bolsters Rincon's Contention that the State's Demand of Unlawful Taxation Constituted a Failure to Negotiate in Good Faith.

The State resorts to misdirection and finger-pointing in an effort to obscure the poisonous effect of its delay on the negotiation process as a whole. Rincon's procedural bad faith claim is not based on who called whom and when after negotiations actually commenced. That claim is instead based on the State's

admitted decision, when the Schwarzenegger administration took office, to focus its efforts on negotiating with a group of tribes that "brought forward a specific proposal that appeared most closely to meet the State's needs" and to ignore the requests of other tribes, including Rincon, to negotiate compact amendments, despite its contractual obligation to respond to those tribes' timely requests. (*See, e.g.*, CR12 at 4:24-26.) Only after the State had convinced that group of tribes to agree to its desired terms – including a demand for a substantial percentage of gross revenue from new gaming devices to be paid directly to the State's general fund for unrestricted expenditure – did the State began to respond to the compact negotiation requests of other tribes.

At that point, the negotiating options of the other tribes were severely limited. Once the State had the new compact model in place, it thereby obtained many of the arguments it is now using against Rincon in this litigation – namely, that because other tribes had agreed to the proposal, demanding the same level and type of "revenue sharing" from Rincon could not possibly be bad faith. (*See* State's Combined Answering and Reply Brief at 8-9, 16.) It is disingenuous for the State to rely on the execution and approval of the new Schwarzenegger Compacts as evidence that its negotiation stance with Rincon was not in bad faith, on the one hand, while denying that the consummation of those compacts before

beginning negotiations with Rincon had any effect on the Rincon negotiations. (*See* State's Combined Reply and Answering Brief at 9, 26.) If the execution and approval are evidence of good faith by the State, then the execution and approval matter to the State's possible negotiation position.[1] It is the State's refusal to comply with the ten-day Compact deadline to respond to Rincon's request that put the State in a position to attempt to make its taxation demands and pass them off as a good-faith negotiating position. (*See* ER1115 at § 9.1(b) (10-day deadline to respond to request to meet and confer), ER1142 at § 12.3 (negotiations to begin within 30 days of request).) Regardless of how much it protests that Rincon has not demonstrated any real effect from the delay, the State is caught in the trap of its

[1] This Court has rejected the argument that mere acceptance of a proposal by another tribe establishes that the proposal was made in good faith. *See Idaho v. Shoshone Bannock Tribes*, 465 F.3d 1095, 1102 (9th Cir. 2006). Likewise, this Court's *Coyote Valley II* decision does not stand for the proposition that a particular formula for the calculation of permissible revenue sharing can be extended far beyond the context in which it was approved to take 96% of the tribe's net revenue and spend it for whatever the State wants (rather than sharing it with non-gaming tribes). *See In re Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, 1114-15 (9th Cir. 2003). Indeed, it is untrue that the revenue sharing rates in the *Coyote Valley* decision would support the State's negotiating position here – the compact at issue in that case provided for graduated rates of revenue sharing, but with a *maximum* of 13% applied only to *pre-existing* gaming devices (of which few existed). *Id.* at 1105-06. In contrast, the State here has demanded a minimum of 10% revenue sharing on Rincon's 1600 existing gaming devices and 15% on every additional device, which it claims is supported by an "extension" of the exclusive tribal gaming provisions contained in California's constitution (and therefore removable only by a supermajority popular vote). (CR161, ER358; CR164, ER1064-77; CR165, ER118-80.)

own argument – either the acceptance of the new taxation provisions by other tribes does not bolster the State's argument that it acted in good faith, or the State's delay in responding to Rincon while negotiating those new compacts materially prejudiced Rincon. The State cannot have it both ways.

The obvious and pervasive effect of the new Schwarzenegger Compacts on the landscape of Indian gaming in California, and on the range of compact amendments available to Rincon through negotiations, is what distinguishes this case from the *Coyote Valley II* decision on which the State so heavily relies.[2] The *Coyote Valley II* Court did not hold, as the State suggests, that when the impasse in negotiations is substantive, procedural defects are always immaterial. Rather, the *Coyote Valley II* Court held that the real issue raised by the Tribe's complaint was that the Davis Administration's substantive posture in the negotiations constituted a failure to negotiate in good faith. Since the claim was substantive and not really

[2] This effect is also why Rincon filed suit when it did – not as a way of using negotiations to posture for litigation. Rincon's lawsuit as originally filed contained requests to declare the new compact amendments invalid because of their impairment of Rincon's existing compact with the State (by letting Rincon's nearest competitors, who are earlier stops on the highway from the nearest urban area, obtain unlimited gaming machines). (CR1, Counts 1 and 2.) Those claims were dismissed for failure to join indispensable parties, but it was the need to press that claim in a timely manner (before Secretarial approval and implementation) that drove Rincon's litigation conduct, not a refusal to negotiate meaningfully as the State intimates in its brief. (*See* State's Combined Reply and Answering Brief at 45.)

procedural, the Court declined to examine any delays in the negotiations. Unlike the *Coyote Valley II* case, here, the State was required by the express provisions of its existing compact to negotiate with Rincon on a set, short deadline, and its refusal to comply with those provisions boxed Rincon in, at the negotiating table, to only those compact amendments consistent with the new form compact adopted during the period that the State refused to talk to Rincon. A delay like this one – with clear consequences on the subsequent negotiations – constitutes powerful evidence of failure to negotiate in good faith, in addition to the illegitimacy of the State's taxation demand itself. *See Horsehead Resource Dev. Co. v. NLRB*, 154 F.3d 328 (6th Cir. 1998); *see also Kobell v. United Paperworkers Int'l Union, AFL-CIO, CLC*, 965 F.2d 1401 (6th Cir. 1992) (dilatory or evasive tactics are considered indicative of bad faith negotiation); *Storer Communi's, Inc.*, 297 N.L.R.B. 296, 298 (1989) (strategic delay cannot be remedied by further negotiations). And because no amount of subsequent negotiation could change the fact that the State had negotiated new form compacts and taken out substantial public bonds in reliance on those compacts, the State's subsequent negotiations with Rincon did not supersede the procedural claims here, as they did in *Coyote Valley II*. Instead, the State's delay provides additional, meaningful evidence in support of its claim

that the State's taxation demand constituted a failure to negotiate in good faith as required under IGRA.

B. To the Extent This Court Finds Rincon's Evidence of Failure to Negotiate in Good Faith Inadequate, Remand for Further Development of the Record Is Necessary.

It is in the context of Rincon's totality of the circumstances argument that the need for additional discovery and an expanded record is evident. While the State makes reference to purported privileges (as to which it provides not a single citation) in an attempt to avoid deposition of members of the negotiating team, it simultaneously advocates the adoption of a standard under which its good faith must be determined from its conduct throughout the negotiations as a whole. But what the State fails to address is how a court could possibly determine the good faith of the State's actions if the only documents available to the Court are the statements of the parties to each other during the mediation.[3] The State, in its briefs, repeatedly insists that a "nuanced" and "fact-specific" analysis of its good faith is required. (*See* State's Combined Reply and Answering Brief at 7 (citing

[3] The *Cheyenne* case – a South Dakota District Court case affirmed by another circuit without any discussion of the record issue – does not stand for any position contrary to Rincon's argument that examination of the entire context of negotiations, including oral communications and contextual information available to the parties, is necessary to resolve a bad faith claim. *See Cheyenne River Sioux Tribe v. South Dakota*, 830 F. Supp. 523 (D.S.D. 1993) (holding that good faith would be determined by looking at positions *actually taken in negotiations*, rather than on public posturing outside of the negotiations themselves).

Coyote Valley II, 331 F.3d at 1113.) If that is in fact the standard, then in the context of a case where the State is demanding that it receive 96% of the revenue to be generated by the new gaming devices, it is surely relevant to the "nuanced' and "fact-specific" analysis to know what information about the revenue stream was available to the State's negotiators from prior interactions with Rincon, the history of the State's prior interactions with the Tribe, and the handling of similar tax demands by the Secretary of the Interior. But the State blocked Rincon's access to, and presentation of, any of this kind of evidence, demanding instead that the administrative record for review consist of only the parties' written exchanges (and not even declarations regarding the discussion in in-person negotiation sessions or depositions of participants regarding what was said). (CR79, ER38-54; *see also* CR179, CR196.) IGRA's definition of lack of good faith need not be a subjective standard for Rincon to be entitled to obtain and present complete information about the content and context of the negotiations at issue, and entry of judgment against Rincon without providing that opportunity was erroneous.

III. RINCON IS NOT TRYING TO TAKE ANYONE'S GAMING DEVICE LICENSES AWAY – JUST TO DETERMINE WHETHER THE NEW COMPACTS EFFECT THE NUMBER OF DEVICE LICENSES AVAILABLE

In its brief, the State misconstrues Rincon's argument regarding the effect of the Schwarzenegger Compacts on the statewide pool of licenses. Rincon has made

two arguments – (1) that the gaming device licenses held by the Schwarzenegger Compact tribes under their old Proposition 1A Compacts should revert to the statewide license pool because they are no longer being held on terms consistent with those Compacts and (2) that the State was required to negotiate over the meaning of this term of the Compact.

Rincon does not claim that the reversion of the Proposition 1A Compact licenses held by signatories of the new Schwarzenegger Compacts means that those tribes will have to cease operating the once-licensed devices. Rather, Rincon contends that the gaming devices are no longer being operated under the Schwarzenegger Compact (which would not permit operation of the additional devices above the 2,000 per tribe ceiling) and that the licenses therefore revert to the Proposition 1A Compact pool for redistribution, given that the Schwarzenegger Compact tribes continue to operate their old gaming devices while paying the State under the terms of the new Compacts, rather than making payments pursuant to the terms of the Proposition 1A Compacts. (CR108.) Because the Schwarzenegger Compacts permit operation of licenses without compliance with the requirements of Proposition 1A, returning those tribes' Proposition 1A licenses to the Proposition 1A statewide pool would not result in the loss of that Tribe's ability to operate the gaming device in question. Therefore, the only possible interest the

absent Schwarzenegger Compact tribes could have would be an interest in not having to compete with Rincon or other tribes who obtained additional licenses that revert to the pool, and this Court has found that such an interest is not cognizable under Rule 19 as a bar to proceeding in absence of the party with that interest. *See Cachil Dehe Band of Wintun Indians v. California*, 536 F.3d 1034 (9th Cir. 2008).[4] The District Court therefore erred in refusing to consider this declaratory judgment claim on Rule 19 grounds.

The District Court also erred in refusing to consider, as part of the totality of the circumstances of the negotiations, the State's refusal to even consider the effect of the new Schwarzenegger Compacts on the size of the statewide pool (and thereby on what amendment to the compact would be necessary for Rincon to obtain additional gaming device licenses. While a declaratory action is certainly one method of obtaining relief, that does not erase the fact that the State was required to negotiate with Rincon in good faith over possible amendments to the number of device licenses available (ER1115 § 4.3.3; ER1142 § 12.3), and the State's rigid insistence on an erroneous legal understanding of how many licenses were in the statewide pool was just as much in bad faith as its rigid adherence to the demand for unlawful taxation of tribal gaming revenues. *See, e.g., Taylor*

[4] Rehearing of this panel decision was denied on October 24, 2008, with minor amendments to the decision that do not affect the application of its holding here.

Forge & Pipe works v. NLRB, 234 F.2d 227 (7th Cir. 1956) (erroneous view of the law does not entitle a negotiator to a good-faith defense)

IV. ENVIRONMENTAL ISSUE

The State acknowledges that Section 10.8.3 of the existing Compact permits it to obtain a cease and desist order against the tribe barring construction in the absence of an agreed-upon amendment to the environmental provisions of that section of the Compact. (State's Combined Answering and Reply Brief at 60.) The State further acknowledges that it triggered negotiations under Section 10.8.3, and that it abandoned those negotiations such that no amendment has been agreed-upon within the timeframe prescribed by the Compact. (*Id.* at 61.) Without an amendment either satisfying the 10.8.3 requirement or changing the date on which a cease and desist order may be sought, Rincon remains vulnerable to future enforcement by this or another administration.

The State's answer to this issue is to claim lack of a case or controversy on the basis that it has promised Rincon not to seek an order. (*Id.* at 61 ("the State withdrew its request for negotiations . . . and has disavowed any desire to seek an order under section 10.8.3(c)").) If the State wanted that promise to be binding, then it could either agree to a Compact amendment changing the cease and desist date or could consent to the entry of a declaratory judgment finding that it has

waived its enforcement right by unilaterally terminating the negotiations it triggered. It has done neither of those things, instead asking Rincon and this Court to rely on its "disavowal." This voluntary cessation of enforcement efforts that were themselves started and abandoned by a prior administration, without binding guarantee that those efforts will not be resumed by this or a future administration, is simply not enough to moot Rincon's declaratory claim or provide Rincon adequate relief. *See, e.g.*, *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1194 (9th Cir. 2000) (declaratory claim is not necessarily mooted, or otherwise "the defendant's mere voluntary cessation would compel the courts to leave the defendant free to return to his old ways" (internal citation and quotation omitted)). Rincon is entitled to a declaratory judgment in its favor on this issue.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's order finding that the State failed to conclude negotiations in good faith and ordering the IGRA remedy, should reinstate Rincon's declaratory claim regarding the effect of the new Schwarzenegger Compacts on the statewide license pool, and should order entry of a declaratory judgment that the State may not seek a cease and desist order under Section 10.8.3 now that it has unilaterally terminated negotiations. In the alternative, prior to entry of any judgment adverse to Rincon, Rincon should be

permitted to further develop and present the factual record regarding the context of the parties' negotiations.

RESPECTFULLY SUBMITTED this 6th day of November, 2008.

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Prior appeals, dismissed prior to argument or decision: 04-56396 & 05-06862.

Prior appeal, decided by panel, petition for rehearing pending: 06-55259.

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7) and Ninth Circuit Rule 32-1, the attached Answering Brief is proportionally spaced, has a typeface of 14 points or more and contains 3,305 words.

/s/ Kimberly A. Demarchi

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2008, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by First Class, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

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