UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FLANDREAU SANTEE SIOUX TRIBE, a federally-recognized tribe,	)	**Civil No. 07-4040**
Plaintiff,	)	
v.	)	
STATE OF SOUTH DAKOTA,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF FLANDREAU SANTEE SIOUX TRIBE'S MOTION FOR JUDGMENT ON THE PLEADINGS AND REQUEST FOR ORDER REQUIRING THE DEFENDANT TO NEGOTIATE WITH THE PLAINTIFF PURSUANT TO 25 U.S.C. § 2710(d)(7)(B)(iii) AND (iv)

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COMES NOW the Flandreau Santee Sioux Tribe ("Tribe") and pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710(d)(7)(B)(iii) and (iv) or, alternatively, Fed. R. Civ. P. 12(c), and asks this Court to enter an order finding that Defendant State of South Dakota ("State") has failed to conduct negotiations for the purpose of entering into a Tribal-State Compact with the Tribe in good faith, and to order the State and Tribe to conclude a compact within a 60-day period in accordance with 25 U.S.C. § 2710(d)(7)(B)(iii). In the alternative, the Tribe moves for judgment on the pleadings on its claim that it has established a *prima facie* case that the State did not respond in good faith to the Tribe's request to conclude a Tribal-State Compact and find that, pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii), the burden of proof is on the State to prove that it has negotiated in good faith.

INTRODUCTION

Over the past five years, the Tribe has sought to enter into a Tribal-State Compact with the State. Based on the State's assertion that South Dakota public policy authorizes only limited gaming, the State has not agreed to negotiate a Tribal-State Compact with terms acceptable to the Tribe. Not only is this assertion immaterial under IGRA, it is more than dubious.

The provisions that were of the utmost importance to the Tribe were the length of term of the compact and the number of slot machines to be operated. (*See, e.g.,* Doc. 1, ¶ 31, at 6:9-11, 10:11-17, 6/20/06 Negotiation Tr.) As to the number of slot machines, for decades the State has been unwilling to agree to *any* increase whatsoever. (Doc. 1, ¶ 25.) Indeed, while the Tribe has been limited to operating 250 slot machines for decades, the number of gaming machines authorized or operated throughout the State has increased exponentially. Yet, throughout this latest round of negotiations, the State continually and unilaterally refused to negotiate any

increase from the decades-old number of gaming machines the Tribe is permitted to operate under the guise of the State's assertion that gaming in South Dakota is limited and, thus, that the Tribe's gaming must, concomitantly, be limited. As to the length of compact term, the State has offered to increase the term of the Compact from three years to six, despite recently executing a Tribal-State Compact with another Indian tribe for a ten-year term. (*See* Gaming Compact between the Standing Rock Sioux Tribe and the State of South Dakota at 11 (6/5/2009), attached to the Tribe's Request for Judicial Notice as "Exhibit A."[1]) The State's position is impermissible under IGRA, and is a mere subterfuge for the State's protection of State-licensed gaming enterprises, which is also unlawful under IGRA.

BACKGROUND

I. The Indian Gaming Regulatory Act

The United States Congress enacted the Indian Gaming Regulatory Act on October 17, 1988 to, *inter alia*, "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." (25 U.S.C. § 2702(1).) The impetus of IGRA was, arguably, the United States Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which involved the State of California's attempt to regulate gaming on Indian lands. In *Cabazon*, the Supreme Court invalidated the State of California's attempt to enforce the gambling provisions of its Penal Code against Indian tribes operating gaming facilities on Indian lands. (*Id.* at 204-05.) The Supreme Court based its decision on its determination that (under Pub. L. No. 83-280, 18 U.S.C. § 1162 and 28 U.S.C. § 1360 (1982 ed. and Supp. III)) only state gambling laws that were criminal/prohibitory in nature applied on Indian lands:

[1] The Tribe's Request for Judicial Notice is filed concurrently herewith and will hereinafter be referred to as "RJN."

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within [the state's] criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory . . . The shorthand test is whether the conduct at issue violates the State's public policy.

(*Cabazon*, 480 U.S. at 209.) Notably, the Court held that a state's enforcement of a regulatory gaming law with criminal sanctions does not render the law criminal/prohibitory. The Court then examined California's public policy and statutes, and determined that because the State permitted a State-licensed lottery, pari-mutuel horse race wagering, card clubs, and bingo, the State regulated gambling activity rather than prohibiting it. (*Id.* at 210.) Accordingly, the Court held that Indian tribes were permitted to operate the gaming activities at issue free from State interference. (*Id.* at 212.)

It was against this backdrop of struggle between states and Indian tribes over the regulation and conduct of gaming that the bill later codified as IGRA was introduced into Congress. The bill proposed to divide gaming on Indian lands into three "classes," with different regulations for each. (Indian Gaming Regulatory Act, S. Rep. No. 100-446 at 26 (1988) *as reprinted in* 1988 U.S.C.C.A.N. 3071, 1998 WL 169811.) Class III gaming, the type of gaming at issue in this case, includes such gaming as slot machines, casino games, horse and dog racing, pari-mutuel, and jai-alai. (*Id.*1998 WL 169811, at *3.) One hotly contested provision of this bill was the issue of who would have jurisdiction over and regulate Class III gaming. Indian tribes generally opposed the prospect that Congress would confer jurisdiction over gaming activities on their lands to the states. (*Id.)* However, the United States Department of Justice, concerned about the infiltration of organized crime in Indian gaming activities, advocated for state mechanisms to regulate Class III gaming activities, as some states were already engaged in such regulation. (*Id.* at *4.) Faced with these competing interests, and with the intent to maintain "the strong Federal interest in preserving the sovereign rights of tribal governments to regulate

activities and enforce laws on Indian land," the Select Committee on Indian Affairs proposed the mechanism for "facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian lands." (*Id.* at *6.) This mechanism is the Tribal-State Compact. (*Id.*)

Recognizing a practical problem with the Tribal-State Compact concept, that states have little incentive to negotiate with tribes in good faith, Congress granted tribes the right to sue a state if compact negotiations are not concluded. (*Id.* at **13-14.) With the "good faith standard as the legal barometer," Congress stated, the tribe "must show a *prima facie* case, [and] after doing so the burden will shift to the State to prove that it did act in good faith." (*Id.* at *14.) In making this determination, IGRA's legislative history provides courts with the following guidance:

> The Committee notes that it is States not tribes that have crucial information in their possession that will prove or disprove tribal allegations of failure to act in good faith. Furthermore, the bill provides that the court, in making its determination, may include issues of a very general nature and, and [sic] [of] course, trusts that courts will interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes.

(*Id.* *14; *see In re Indian Gaming and Related Cases*, 331 F.3d 1094, 1108 (9th Cir. 2003).)

Furthermore, IGRA's legislative history states that in enacting IGRA, Congress did not intend "that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands," *Id.* at *14, and that the compact requirement "not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes." (*Id.* at *13.)

Enacted on October 17, 1988, IGRA provides that upon an Indian tribe's request, a state must negotiate in good faith with the tribe to enter into a Tribal-State Compact for the operation of Class III (also referred to as casino-style) gaming. (25 U.S.C. § 2710(d)(3)(A).) IGRA

requires states to negotiate with Indian tribes over such Class III gaming that the state "permits ... for any purpose by any person, organization, or entity." (*Northern Arapaho Tribe v. Wyoming*, No. 00-CV-221, 2002 WL 31961497 (D.Wyo. 2002), *rev'd in part on other grounds*, 389 F.3d 1308 (10th Cir. 2004) (quoting 25 U.S.C. § 2710(d)(1)(B)).) If a compact is not concluded within 180 days of the tribe's request, the tribe may invoke federal court jurisdiction in a suit to compel the state to negotiate in good faith with the tribe for a compact. (25 U.S.C. § 2710(d)(7)(A).)

In bringing such an action, the tribe must make a *prima facie* case by establishing that "a Tribal-State compact has not been entered into" and that the state did not respond to the Indian tribes' request "in good faith." (25 U.S.C. § 2710 (d)(7)(B)(ii).) After the Indian tribe makes this *prima facie* showing, the burden of proof then shifts to the State "to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities." (*Id.*) If the State is unable to make such a showing, IGRA states that "the court shall order the State and the Indian tribe to conclude such a compact within a 60-day period." (*Id.* § 2710(d)(7)(B)(iii).) If the parties have failed to conclude a compact at the expiration of this sixty-day period, the parties must submit their last best offer for a compact to a court-appointed mediator and the mediator selects the appropriate compact, with the Secretary of the Interior charged with the ultimate authority to approve or disapprove such a compact. (*Id.* § 2710(d)(7)(B)(iv).)

After IGRA's enactment, conflicts arose between states and Indian tribes concerning whether a state "permitted" a certain type of gaming activity (thereby allowing Indian tribes to conduct the gaming activity) and, *inter alia*, whether the tribes must conduct the gaming in accordance with state law concerning wager limits and other constraints. (*See, e.g., United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990).) While courts employed

different analyses to make the determination of whether a state "permits" certain gaming activity, courts appeared to agree that the pertinent inquiry is the prohibitory/regulatory distinction laid out in the Supreme Court's decision in *Cabazon*. (*Northern Arapaho Tribe v. Wyoming*, 2002 WL 31961497 at *5 n.4.) As detailed further below, in *Mashantucket Pequot Tribe v. Connecticut*, 913 F.3d 1024 (2d Cir. 1990), the Second Circuit rejected the notion that where a state does not *prohibit* class III gaming, "an Indian tribe could nonetheless conduct such gaming only in accordance with, and by acceptance of, the entire state corpus of laws and regulations governing such gaming." (*Id.* at 1030-31.)

While IGRA does not expressly define the term "good faith," IGRA provides that certain provisions may be included in a compact, which are:

> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
>
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
>
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
>
> (v) remedies for breach of contract;
>
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
>
> (vii) any other subjects that are directly related to the operation of gaming activities.

(25 U.S.C. § 2710(d)(3)(C).) Courts have also looked to cases interpreting the National Labor Relations Act ("NLRA") for guidance in interpreting IGRA's good faith requirement. (*Fort Independence Indian Community v. California*, 679 F.Supp.2d 1159, 1171 (E.D. Cal. 2009)

(citing *Indian Gaming Related Cases v. California* (*Coyote Valley I*), 147 F.Supp.2d 1011, 1020-21 (N.D. Cal. 2001)).) Similar to IGRA, under the NLRA, employees and employers have an obligation to confer in good faith in respect to terms and conditions of employment. (*Fort Independence*, 679 F.Supp.2d at 1171.) However, the NLRA, unlike IGRA, delineates three categories of negotiation topics—mandatory, permissive, and prohibited. (*Id.*) "Mandatory" topics are those on which the parties are obligated to confer, and for these topics a party may insist on its position even if doing so leads to an impasse. (*Id.*) "Permissive" topics are, in general, all topics that are not enumerated as mandatory or prohibited. (*Id.*) As to such topics, the parties may bargain but may not "insist on a permissive subject to the point of impasse." (*Id.*)

A distinction between the NLRA and IGRA is that IGRA "limits permissible subjects of negotiation in order to ensure that tribal-state compacts cover only those topics that are related to gaming and are consistent with IGRA's stated purposes," as set forth in 25 U.S.C. § 2702. (*Rincon v. Schwarzenegger*, 602 F.3d 1019, 1028-29 (9th Cir. 2010).) Also unlike the NLRA, states and Indian tribes are not *required* to confer about certain subjects. (*Fort Independence*, 679 F.Supp.2d at 1171.) However, if a state or an Indian tribe requests to negotiate over one of the subjects contained in 25 U.S.C. § 2710(d)(3)(C) (which is an *exhaustive* list of allowable compact provisions), the other side *must* negotiate as to that subject. Any other result would lead to absurd results and would completely nullify the Tribal-State Compacting provisions of IGRA.

Finally, in making the good faith determination, courts must interpret "any ambiguities on these issues in a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for over 150 years in decided cases involving Indian tribes." (S.Rep. No. 100-446 at *15.) Indeed, the Supreme Court has made clear that "statutes [relating to Indian affairs] are to be construed liberally in favor of the Indians, with ambiguous provisions

interpreted to their benefit." (*Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *see generally, e.g.*, *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992).) IGRA is such a statute and, thus, any ambiguities in IGRA should be construed in the Tribe's favor. (*See City of Roseville v. Norton,* 348 F.3d 1020, 1032 (D.C. Cir. 2003) (applying the Indian cannon of statutory construction to ambiguous term contained in IGRA).) Also, the legislative history of IGRA states that "federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed" because IGRA "is intended to expressly preempt the field in the governance of gaming activities on Indian lands." (S.Rep. No. 100-446 at * 6.) Thus, here, any ambiguities contained in IGRA must be construed in the Tribe's favor without regard to any competing State interest.

II. The Tribe's Attempts to Negotiate A Tribal-State Compact with the State

The Flandreau Santee Sioux Tribe is a federally recognized Indian tribe that operates the Royal River Casino on its tribal lands in Flandreau, South Dakota pursuant to a Tribal-State compact originally negotiated in 1990. (Doc.[2] 1, ¶¶ 8, 25.) The original Tribal-State Compact terms, as pertinent, included a compact length of three years, and the maximum number of slot machines that could be operated was 180 machines. (Doc. 103-3, ¶¶ 8.5, 11.) After six (6) months, however, and upon meeting certain criteria, the maximum number of slot machines that the Tribe could operate would increase to 250 machines. (*Id.*)

The latest compact, made effective on March 13, 2000 ("2000 Compact"), likewise provided that the Tribe may operate only 250 slot machines at the Tribe's casino. (Doc. 1, ¶ 25.) As the compact term, it was likewise for a period of three years. (Doc. 1, ¶ 25.) In approximately May 2005, the Tribe asked the State to engage in negotiations with it concerning

[2] "Doc." refers to the docket sheet number assigned to a particular filing in this case.

the execution of a new Tribal-State Compact. (Doc. 1, ¶ 27.) From December 30, 2005 through January 11, 2007, the Tribe participated in six negotiation sessions with representatives of the Governor of the State of South Dakota. (Doc. 1, ¶ 28.) These representatives included members of the staff of South Dakota Attorney General Larry Long, and officials of and the Executive Director of the State of South Dakota Commission on Gaming, a division of the South Dakota Department of Commerce and Regulation, which is responsible for regulating the gaming industry in the State of South Dakota. (*See* Doc. 1, ¶¶ 10-12.)

Throughout the negotiations, the Tribe requested that the 2000 Compact be amended to increase the compact term and to increase the allowable number of slot machines. In order to support its request that these two provisions be modified, the Tribe submitted evidence to establish that while the Tribe is limited to 250 slot machines and has been since 1990, the number of slot machines operated in the State increased 374% from 1990 to 2007. (*See* RJN at Ex. B at 6-9, *State of South Dakota Commission Annual Report – FY2010, Recap of Commission Activity*.) Also, the number of video lottery terminals operated throughout the State has increased some 251% from 1990 to 2007 (as of 2007, approximately 8,500 video lottery terminals were operated throughout the State). (*See* RJN at Ex. C*, Video Lottery Establishments, Terminals Net Machine Income & Revenue Distribution*.) However, notwithstanding this reality, the State continually asserted throughout negotiations that South Dakota's public policy only authorizes limited gaming and that allowing the Tribe more than 250 slot machines would violate this public policy. Due to the massive increases in State-operated gaming and the State's declaration that it is lawful for a single gaming facility—Deadwood Resorts, LLC—to operate 360 slot machines in addition to the 3,000 slot machines than currently operated in Deadwood, the State's position is simply nonsensical, unsupportable, and unreasonable. (Doc. 1, ¶¶ 30, 31.)

The State also has refused to negotiate a Compact for a term longer than six years based upon its unsupported assertion that a Compact of a longer term is not "consistent with our public policy" because "the policy of this as far as state government has been concerned through four administrations is that no governor was willing to bind a future governor to something that the next governor couldn't address at some point during his or her term in office and that's why it's [the Compact length] been limited at four [years]." (Doc. 1, ¶¶ 28, 31; Doc. 1-9 at 44:5-11; and Doc. 1-11 at 5:6-7.) Contrarily, the State recently entered into a Tribal-State Gaming Compact with another Indian tribe wherein the compact term is ten (10) years. (*See* RJN at Ex. A at 11, *Gaming Compact between the Standing Rock Sioux Tribe and the State of South Dakota*.)

After more than two years of fruitless negotiation with the State, where the State refused to consider any of the Tribe's numerous Tribal-State Compact proposals, and, importantly, failed to negotiate *whatsoever* regarding the number of slot machines, the Tribe brought this action pursuant to 25 U.S.C. § 2710(d)(7)(A), seeking a determination that the State had failed to conduct negotiations in good faith. (*Id.* § 2710(d)(7)(A)(i).)

JUDGMENT ON THE PLEADINGS STANDARD/
ORDER REQUIRING STATE TO NEGOTIATE WITH IT
PURSUANT TO 25 U.S.C. § 2710(D)(7)(b)(iii) and (iv)

Federal Rule of Civil Procedure 12(c) allows a party to move for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial." (Fed. R. Civ. P. 12(c).) Like the standard governing motions to dismiss, "[a] grant of judgment on the pleadings is appropriate where no material issue of fact remains to be resolved and the movant is entitled to judgment as a matter of law." (*Clemons v. Crawford*, 585 F.3d 1119, 1124 (8th Cir. 2009) (internal quotations omitted).) In ruling on a motion for judgment on the pleadings, courts may consider exhibits to the pleadings and public records (as well as matters that are judicially noticeable), and accept as true all factual allegations in the complaint. (*See Mattes v. ABC*

Plastics, Inc. 323 F.3d 695, 698, 698 n.4 (8th Cir. 2003); *see also Stahl v. U.S. Dept. of Agriculture*, 327 F.3d 697(8th Cir. 2003) (a court may take judicial notice of public records and may thus consider them on a motion for judgment on the pleadings); *Stutzka v. McCarville*, 420 F.3d 757 (8th Cir. 2005) (a court may take judicial notice of judicial opinions and public records); *United States v. Eagleboy,* 200 F.3d 1137, 1140 (8th Cir.1999) (a court may take judicial notice of agency documents).)

Also, pursuant to IGRA, the Court may enter an Order requiring the Defendant State of South Dakota to negotiate with it in good faith pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii) and (iv).[3]

ARGUMENT

The Tribe is entitled to an order requiring the State to negotiate with it pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii) and (iv) or, alternatively, judgment on the pleadings on its Complaint in its entirety and respectfully requests that the Court enter judgment in its favor and order the parties to conclude a Tribal-State Compact within a sixty (60) day period. It is undisputed that the Tribe requested that the State negotiate a Tribal-State Compact pursuant to IGRA, 25 U.S.C. § 2710(d)(3)(A), and that more than 180-days have elapsed since the Tribe requested these negotiations. Furthermore, as explained herein, the Tribe's proposals have been uniformly rejected based on the State's illusory and irrelevant assertion that state-law limitations regarding its own gaming apply to the Tribe.

Alternatively, the Tribe is entitled to an order finding that it has made a *prima facie* showing that the State did not respond to the Tribe's request to negotiate such a compact in good faith and, thus, the Tribe asks that the Court order that the burden of proof is on the State to prove that it has negotiated in good faith in accordance with 25 U.S.C. § 2710(d)(7)(B)(ii). The

[3] "Courts have varied on their handling of motions to enforce IGRA's good faith obligation." *Fort Independence*, 679 F.Supp.2d at 1167.

undisputed facts establish that, since 1990 and more particularly during the period of negotiation commencing in 2005, the State has failed to negotiate in good faith as required by IGRA. This is evidenced by (1) the State's continual rejection of every one of the Tribe's proposed Tribal-State Compacts; (2) insistence that the number of tribal slot machines is limited by state law and policy; (3) refusal to agree to an increase in tribal slot machines while tacitly permitting state gaming in Deadwood and the Video Lottery to flourish; and (4) the State's general practice of surface bargaining.

I. THE STATE'S REFUSAL TO NEGOTIATE BEYOND WHAT IT ASSERTS ARE STATE LAW "LIMITS" DEMONSTRATES THAT THE STATE FAILED TO NEGOTIATE IN GOOD FAITH AND THE STATE CANNOT DEMONSTRATE TO THE CONTRARY

The Tribe is entitled to judgment on the pleadings on its Complaint in its entirety (and an order requiring the State and Tribe to conduct a compact within 60-days pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii)) because a review of the pleadings establishes that the State failed to negotiate in good faith, as follows:

(1) the Tribe requested that the State enter into negotiations with it for the purpose of entering into a Tribal-State Compact, 25 U.S.C. § 2710(d)(3)(A);

(2) more than 180-days have elapsed since the Tribe requested that the State enter into negotiations with it;

(3) the Tribe has made proposals to the State for the conduct of the type of gaming that is "located in a State that permits such gaming for any purpose by any person, organization, or entity," 25 U.S.C. § 2710(d)(1)(B);

(4) the State refused to negotiate beyond what it asserts are state law and policy limitations.

The State does not dispute the first two above-elements. (Doc. 24, ¶¶ 31, 51.) Instead, the dispute in this case concerns the State's refusal to negotiate as to the number of slot machines the Tribe may operate without regard to the State's asserted limitations of South Dakota law and policy, and whether this negotiation posture constitutes good faith negotiation. (Doc. 24, ¶ 35.)

A. The State's Reliance on (What It Asserts Are) State Law Limitations Establishes That the State Did Not Negotiate In Good Faith

As set forth above, throughout the negotiations, the State continually refused to negotiate regarding the Tribe's request to increase the number of slot machines it could operate. The State continually asserted that its refusal to modify the decades-long slot machine limit was that gaming in South Dakota was constitutionally limited:

> **Mr. Guhin:**[4] And so we think it is a consistent public policy. It's – it's – gambling is limited. And that's – that flows from our basis public policy that – under the constitution calling for limited slot machines and card games. We think – we think it all together is a consistent one.

(*E.g.*, Doc. 1-6,. at 17:11-16, 9/30/05 Negotiation Tr.) It is undeniable that slot machines are lawfully operated in the City of Deadwood, South Dakota. Clearly, a review of South Dakota law evinces that the State of South Dakota regulates, rather than prohibits slot machines and, thus, the State is required to negotiate with the Tribe concerning slot machine limits. (S.D.C.L § 42-7B-1; SD Admin R. 20:18:17 to 20:18:17:41.17; *Northern Arapaho Tribe v. Wyoming*, 389 F.3d 1308, 1312 (10th Cir. 2004).)

In determining the appropriate scope of negotiations between the Tribe and the State, a necessary inquiry is the scope of gaming permitted under the State of South Dakota law. (*See Northern Arapaho*, 389 F.3d at 1311.) Under South Dakota law, card games and slot machines are permitted as follows: "Limited card games and slot machines are hereby authorized, and may be operated and maintained, within the city limits of Deadwood, South Dakota . . . ." (S.D.C.L. § 42-7B-1.) Throughout the negotiations with the Tribe, the State continually

[4] Mr. John Guhin is employed by the South Dakota Attorney General's Office and represented the State of South Dakota at numerous negotiation sessions with the Tribe.

referenced its regulatory restrictions as somehow being applicable to the Tribe.[5] For example, the State has asserted that "the law as far as limits are placed on the number of video lottery machines in terms of 10 per building," and "Deadwood is limited to 30 machines per building." (Doc. 1-9 at 8:10-13, 6/20/06 Negotiation Tr.) Notwithstanding that such regulations are regulatory restrictions that do not bind the Tribe, these regulations appear to be maneuverable, because, as noted above, the State has approved a single entity operating 360 slot machines. (Doc. 1, ¶ 30.)

Throughout the negotiations, the Tribe requested that the Tribal-State Compact include a provision for the operation of more than 250 slot machines, and the State continually rejected every proposal and reiterated that any such increase would be contrary to state law, policy or regulations, as follows:

> **Mr. Guhin:** The state constitution in Article 3, Section 5 allows limited card games and slot machines in Deadwood. That is an indication, we think a strong indication, to people of South Dakota that our policy is limited gaming and I think the state's policy has been consistent for 15 years. (Doc. 1-6, at 05:24 -06:02; 09:1-2, 9/30/05 Negotiation Tr.)
>
> **Mr. Eliason:**[6] But it is the policy, the public policy of the State that gaming is to be limited. That's the language that's used in the constitutional amendment and that is the law as far as limits are placed on the number of video lottery machines in terms of 10 per building. Deadwood is limited to 30 machines per building. (Doc. 1-9 at 8:7-13, 6/20/06 Negotiation Tr.)
>
> **Mr. Guhin:** But I think the main things are clear enough on the record, and that is that the [Tribe's] proposal is an open-ended proposal. There are no limits on machines. And that is not consistent with the State's public policy on limited gaming, which is articulated in the constitution and the statutes. (Doc. 1-11 at 04:23-5:03, 7/26/06 Negotiation Tr.)

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[5] *See, e.g.*, Doc. 1-11 at 15:10-25, 18:7-19:13, 43:8-23, 8:4-6, 7/23/06 Negotiation Tr.; Doc. 1-13 at 31:7-36:20, 8/23/06 Negotiation Tr. However, there is no law limiting the number of slot machines that may be aggregately operated in Deadwood.[5]

[6] Mr. Larry Eliason is the Chairman of the South Dakota Commission on Gaming and represented the State of South Dakota at numerous negotiation sessions with the Tribe.

> **Mr. Guhin:** Limited gaming is the kind of gaming that tries to keep the state in a family-friendly, non-Las Vegas kind of place… The constitution provides for limited gaming – limited slot machines and card playing. (Doc. 1-11 at 15:04-10, 7/26/06 Negotiation Tr.)
>
> **Mr. Guhin:** Well, the basic public policy is limited gaming and that's the one that's in the constitution. (Doc. 1-11, at 22:18-20, 7/26/06 Negotiation Tr.)

Even assuming *arguendo* that South Dakota law only allows "limited" slot machines, a proposition that the Tribe vehemently disputes, IGRA, nonetheless, requires the State to negotiate with the Tribe without regard to any real or hypothetical limitations of South Dakota law. (*Northern Arapaho*, 389 F.3d at 1312-13.) IGRA provides that if gaming is ***permitted*** by the State for *any* purpose by any person, an Indian tribe has a preexisting and federal statutory right to conduct such gaming within the limits of its reservation (and on Indian lands within the Tribe's jurisdiction). (25 U.S.C. § 2710(d)(1)(B).)

In *Sycuan Band of Mission Indians v. Wilson*, 521 U.S. 1118 (1997), at the Supreme Court's invitation, the United States has formally expressed its views regarding the phrase "permits such gaming." In that case, the United States, through the Acting Solicitor General, submitted an *amicus* brief, which sets forth the United States' position on the scope of gaming allowed under IGRA, stating:

> That provision [25 U.S.C. § 2710(d)(1)(B)] **enables a Tribe to negotiate terms and conditions different (and more favorable) than those applicable to non-Indian gaming operators under State law for any Class III gaming activities that the State, after weighing its own public polices, *has not seen fit to outlaw entirely***. The IGRA compacting process thus deliberately affords a Tribe the potential for attaining a considerable competitive advantage with respect to **any forms of gaming that the State has not foreclosed**.

(*See* RJN at Ex. D at 10, *Amicus Brief, Acting Solicitor General of the United States*, *Sycuan Band of Mission Indians v. Wilson*, 521 U.S. 1118 (1997) (emphasis added).) The United States also stated that "[t]he relevant question [as to whether a State prohibits a distinct form of gaming or instead regulates the manner in which it should be played] in such a case is whether, in light of

traditional understandings and the text and legislative history of IGRA, the State has reasonably characterized the relevant State laws as ***completely prohibiting*** a distinct form of gaming." (*Id.* at 18 (emphasis added).)

Also, the United States and courts have reiterated that tribes are not required to conform to regulatory terms and conditions imposed by the state on permitted forms of gaming. (*Northern Arapaho*, 389 F.3d at 1312; *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 366-67 (8th Cir. 1990).) The United States has stated, "25 U.S.C. § 2710(d)(1)(B) does not require a Tribe to comply with a State's entire regulatory scheme for that form of [permitted] gaming." (RJN at Ex. D at 16, *Solicitor's Sycuan Brief*.) Also, courts, including the Eighth Circuit, have recognized that where a state regulates, as opposed to prohibits, a type of gaming, the state has a *duty* to negotiate beyond state law limitations. (*See Sisseton-Wahpeton*, 897 F.2d at 367-68; *Northern Arapaho*, 389 F.3d at 1313.)

In *Northern Arapaho*, the plaintiff Northern Arapaho Tribe brought an action against the State of Wyoming for failure to negotiate a Class III gaming compact in good faith pursuant to IGRA. (25 U.S.C. § 2710(d)(7)(B).) The State of Wyoming's statutes permitted "any game, wager or transaction," conducted "between persons with a bona fide social relationship," i.e., for "social purposes." (*Id.* at *9; Wyo. Stat. Ann. § 6-7-101(a)(iii)(A) and (E).) Accordingly, the plaintiff tribe proposed to operate various forms of gaming and gaming machines that fell within Wyoming's broad statutory authorization of "any game, wager or transaction." (*Id*. at *1.)

The State of Wyoming argued that because it only authorized casino-style gaming for "social purposes," as opposed to gaming for commercial purposes, the tribe did not have a right to operate such games under IGRA. (*Id.* at 1312.) The Tenth Circuit agreed with the Northern Arapaho Tribe, holding that because Wyoming permits gaming for social purposes, the Northern Arapaho Tribe has the right to operate such games under IGRA free from state restriction. (*Id.* at

1313.) The court also rejected the State's argument that it was only required to negotiate for gaming that strictly complies with the regulatory terms and conditions imposed by the State, stating:

> If the state's approach were correct, however, the compact process that Congress established as the centerpiece of the IGRA's regulation of Class III gaming would thus become a dead letter' there would be nothing to negotiate, and no meaningful compact would be possible. Furthermore, the legislative history of the IGRA reveals that Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law if the state law merely regulated, as opposed to completely barred, that particular gaming activity.

(*Id.* at 1312 (internal citations and quotation marks omitted).)

The Second Circuit has likewise determined that if a state allows Class III gaming for any purposes, IGRA gives Indian tribes the right to operate the same forms of gaming without complying with state regulatory limitations on the same forms of gaming. In *Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024, 1030-31 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991), the plaintiff Mashantucket Tribe sought to expand its gaming to include Class III games of chance, such as blackjack, poker, dice, money-wheels, roulette, and baccarat. (*Id.* at 1026.) Connecticut law permitted such gaming, but only for certain nonprofit organizations during "Las Vegas nights." (*Id.* (citation omitted).) Such "Las Vegas Nights" were only authorized for nonprofit purposes, and each organization could only host a "Las Vegas Night" four times per year, and wagers were also strictly limited. (Petition for Writ of Certiorari, *Connecticut v. Mashantucket Pequot Tribe*, No. 90-871, 1990 WL 10059085 at *6 (1990).) In response to the Mashantucket Tribe's request to operate these games, the State of Connecticut insisted that the Mashantucket Tribe was only allowed to conduct this type of gaming in accordance with the State of Connecticut's regulatory criteria for the operation of "Las Vegas Nights," as set forth in Conn. Gen. Stat. § 7-186a, *et seq*. (*Mashantucket,* 913 F.2d at 1026-27.)

The Second Circuit disagreed, finding that the limited nature of gaming allowed by state law was irrelevant under IGRA. (*Id*. at 1031.) The court held that the Mashantucket Tribe was not constrained by the state-law limitations because the limitations were regulatory, not prohibitive (i.e., the State did not "completely prohibit" this form of gaming). (*Id.*) Relying on IGRA's legislative history, the court rejected the notion that tribes were required to conduct a particular type of gaming in accordance with a state's regulatory scheme. (*Id.* at 1029-30.) The court stated that when a tribe seeks to operate forms of Class III gaming pursuant to IGRA "it does not necessarily follow that the Tribe is subject to the entire body of State law on gaming." (*Id.* at 1031.)

Like the States of Wyoming and Connecticut, because the State of South Dakota permits the type of gaming the Tribe has requested, the State is required to negotiate beyond the limits of its regulatory scheme. Thus, in this case, even assuming *arguendo* that the number of slot machines allowed under South Dakota law is limited, which the Tribe disputes, this is a regulatory restriction that does not bind the Tribe. The State had a duty to negotiate for terms beyond those that South Dakota law permits. "When a state refuses to negotiate beyond state law limitations concerning a game that it permits, the state cannot be said to have negotiated in good faith under the IGRA given the plain language of the statute." (*Northern Arapaho*, 389 F.3d at 1313.) Here, the State does not prohibit slot machines in Deadwood and, as such the State was required to negotiate beyond any State law limitations. The State's continual refusal to do so, predicated on the "limitations of state law," establishes that the State of South Dakota failed to negotiate in good faith.

B. The State Cannot Meet Its Burden to Prove That It Negotiated With the Tribe in Good Faith

Because the Tribe, as set forth above, has made a *prima facie* showing that the State of South Dakota has not negotiated in good faith, the burden of proof shifts to the State to establish that it negotiated in good faith. (25 U.S.C. § 2710(d)(7)(B)(ii).) This it cannot establish.

The State cannot prove that it negotiated in good faith because, contrary to IGRA, it used the compact negotiations to "protect 'other State-licensed gaming enterprises from free market competition with Indian tribes.'" (*In re Indian Gaming Related Cases* ("*Coyote Valley II*"), 331 F.3d 1094, 1115 (9th Cir. 2003) (*quoting* S. Rep. No. 100-446 at *12).) As set forth above, the legislative history of IGRA makes clear that states cannot use the compacting process to protect state-sponsored gaming. (S. Rep. No. 100-446 at *12.) Here, the State has maintained that its "consistent bargaining position has been that South Dakota's public policy allows only 'limited gaming,' and authorizing 'unlimited' slot machines to FSST [the Tribe] would undermine this public policy and adversely impact the State's economy." (Doc. 186, p 2; Doc. 1, ¶¶ 31-33, Docs. 1-6 through 1-22). In a letter to the Tribe dated May 27, 2005, the Governor wrote:

> **The State is also concerned with the adverse economic impact of expansion of gaming on existing gaming activities.** It is perfectly legitimate for the state to consider what adverse economic impact a new tribal gaming activity would have on other tribal casinos within the state, as well as the adverse economic impact on revenues to the state from taxes on the Deadwood machines or from the revenue from the video lottery. **As you know, the income derived from Deadwood and video lottery is vital to the state, especially now that the state is in a very difficult financial crunch.**

(Doc. 1-24 at 2 (emphasis added).)

Also, contrary to IGRA, the State has attempted to insulate State-sponsored gaming from free market competition from tribal gaming facilities. Interestingly, the State of South Dakota has seen fit to codify a statute to preserve and foster free economy and competition in the area of

gaming, which appears contrary to the positions the State has continually taken throughout its negotiations with the Tribe:

> The Legislature hereby finds, and declares to be the public policy of this state, that:
> (3) All establishments where gaming is conducted and where gambling devices are operated, and manufacturers, sellers, and distributors of certain gambling devices and equipment must therefore be licensed, controlled, and assisted to protect the public health, safety, morals, good order, and the general welfare of the inhabitants of the state, to foster the stability and success of gaming and to preserve the economy and policies of free competition of the State of South Dakota.

(SDCL § 42-7B-2.1 (emphasis added).)

However, while State operated gaming has been allowed to grow and prosper, as SDCL § 42-7B-2.1 intended, the same cannot be said of the Tribal-sponsored gaming. While the State has denied the Tribe an increase in the number of authorized slot machines under the guise of the State's policy of limited gaming, the number of slot machines in the City of Deadwood has now increased beyond 374% and the number of video lottery terminals in the State has increased beyond 251%. (RJN at Ex. B at 6-9, *State of South Dakota Commission Annual Report – FY2010, Recap Of Commission Activity*; RJN at Ex. C, *Video Lottery Establishments, Terminals Net Machine Income & Revenue Distribution*.) Since 1990, the State has authorized and encouraged an environment that has fostered significant growth in both Deadwood gaming and in the State video lottery.

At the same time, the State has protected its non-tribal gaming enterprises from competition by refusing to allow for similar growth in gaming conducted by the Tribe pursuant to IGRA. The State's intransigence prevents the Tribe from raising the capital necessary to develop high quality facilities sufficient to attract tourists and customers from areas beyond the borders of the State and denies the Tribe the economic benefits provided to all other citizens of the State. (*E.g.,* Doc. 1-11 at 48:15-50:25, 7/26/06 Negotiation Tr.) For example, the State's consultant, William Cummings, agrees that even a modest increase of 500 machines to the

State's Indian tribes would result in beneficial economic growth in form of "nearly a thousand new FTE jobs [among all of the tribes]" for the State. (Doc. 1-26 at 19.) The fact that the State continues to deny the Tribe any increase in slot machines serves only to cripple the Tribe's ability to stimulate much needed economic development.

Undeniably, the State has based its refusal to accept any of the Tribe's proposals on the State's illusory assertion that state-law limitations regarding state-licensed gaming apply to the Tribe. Further, by refusing to accept any of the Tribe's proposals, the State has favored state-licensed gaming to the detriment of the Tribe and has thereby failed to rebut the showing that it has not negotiated in good faith. Therefore, the Tribe is entitled to judgment on the pleadings.

II. ALTERNATIVELY, THE TRIBE HAS MADE A PRIMA FACIE SHOWING THAT THE STATE HAS NOT RESPONDED TO ITS REQUEST TO NEGOTIATE A TRIBAL-STATE COMPACT IN GOOD FAITH BECAUSE THE STATE ENGAGED IN "SURFACE BARGAINING"

Separate and apart from the State's failure to negotiate in good faith because of its reliance on (what it asserts) are State-imposed limitations on gaming, the State also has not negotiated in good faith because it has engaged in "surface bargaining." Thus, on this alternative basis, the Tribe is entitled to judgment on the pleadings on its claim that the Tribe has made a *prima facie* showing that the State did not negotiate in good faith, as follows:

(1) the Tribe requested that the State enter into negotiations with it for the purpose of entering into a Tribal-State Compact, 25 U.S.C. § 2710(d)(3)(A);

(2) more than 180-days have elapsed since the Tribe requested that the State enter into negotiations with it;

(3) the Tribe has made proposals to the State for the conduct of the type of gaming that is "located in a State that permits such gaming for any purpose by any person, organization, or entity," 25 U.S.C. § 2710(d)(1)(B);

(4) the Tribe's proposals were consistent with permissible subjects of negotiation under IGRA.

The first three above conditions are undisputed in this case. Nor, would the State likely dispute that the Tribe's proposals contained subjects—provisions for the number of slot machines and length of term of compact—that were permissible tribal-state negotiation topics. Indeed, were such provisions *not* permissible tribal-state negotiation topics, the State would not be allowed to include *any* such provisions in its compacts. (*See Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1028-29 (9th Cir. 2010).)

As set forth above, the State's continued refusal to execute a Tribal-State Compact providing for the operation of more than 250 slot machines predicated on its continued insistence that gaming in the State of South Dakota is limited by State law, constitutes bad faith. Even

aside from and in addition to this, the State's continued imposition of the same static number of gaming machines for *decades* and unwillingness to compromise whatsoever as to this provision demonstrates that the State has not negotiated in good faith because it has engaged in "surface bargaining."

Surface bargaining is defined as "'going through the motions of negotiating,' without any real intent to reach an agreement." (*See K-Mart Corp. v. NLRB*, 626 F.2d 704, 706 (9th Cir. 1980).) Such bargaining is difficult to detect because, as its definition indicates, such bargaining "may look like hard bargaining." (*Id.*) Indeed, good faith bargaining requires more than simply sitting at the negotiating table—it "requires more than a willingness to enter upon a sterile discussion of the parties' differences." (*Coyote Valley I*, 147 F.Supp.2d at 1020-21.) It requires that the parties "enter into discussion with an open and fair mind." (*Id.*) The State's conduct—merely sitting at the negotiation table—constitutes "surface bargaining" and, thus, is not good faith. (*See K-Mart*, 626 F.2d at 706.)

In determining surface bargaining in NLRA cases, courts also consider, *inter alia*, the regressive nature of wage proposals and have found that "an offer of little or no wage increase is an effort to decrease wages" and, in such a case, "the company was not bargaining seriously." (*Id.* at 707.) In this case, the State has admitted that the slot "machines are the key to the whole operation" (Doc. 1-19 at 60:25, 1/11/07 Negotiation Tr.; *cf. K-Mart*, 626 F.2d at 706-07 (finding that offering little or no wage increase constituted an effort to decrease wages, which supported the inference that the company was not bargaining seriously).) The State's refusal to present any counter-proposal and rejection of every one of the Tribe's proposals concerning this provision supports the inference that the State did not negotiate in good faith. *(Cf. K-Mart*, 626 F.2d at 706-07; *NLRB v. Stanislaus Implement and Hardware Co*., 226 F.2d 377, 381 (9th Cir. 1955)

(finding that, *inter alia*, refusal to bargain as to a certain provision supports the inference that the company did not bargain in good faith).)

Here, the bargaining history of the parties also supports the conclusion that the State was impervious to the Tribe's numerous, legitimate requests regarding gaming machine limits. Not only did the Tribe present the State with numerous different proposals, but the Tribe consistently asked the State what concession would be meaningful to it in exchange for an increase in gaming machines, to no avail. (Doc. 1-9 at 50:01-25, 6/20/06 Negotiation Tr.; *cf. Eastern Maine Medical Center v. NLRB*, 658 F.2d 1, 11 (5th Cir. 1981) (finding "unyielding stance" on issues foreclosed any meaningful negotiation).)

Since the inception of compact re-negotiations in 2005, the Tribe has unambiguously sought to eliminate the 250 slot machine limit imposed upon it by the State in 1990, and to extend the term of the compact for more than four years. (Doc. 1, ¶ 31; Doc. 24, ¶ 35.) The State rejected each of the Tribe's proposals and refused to negotiate *any* increase whatsoever. For example, in the September 30, 2005 negotiation session, the Tribe proposed a compact permitting 1,500 machines, as follows:

> **Mr. Jones:**[7] [B]y the close of business, Monday, October 3rd, can the Governor respond with a number he will accept because we made our offer?
>
> **Mr. Guhin:** Your offer is what?
>
> **Mr. Jones:** Was 1,500 machines. So where are we at between 250--.
>
> **Mr. Guhin:** That offer has been declined.

(Doc. 1-7 at 97:3-9, 9/30/2005 Negotiation Tr.)

> **Mr. Jones:** Is it good faith to see the 250 recede to zero?
>
> **Mr. Guhin:** I would – would suspect that if we offered zero, then there would be a good faith suit. I don't think we are going to offer zero. We are offering 250. . . .

[7] Mr. Chuck Jones was Vice-Chairman of the Flandreau Santee Sioux Tribe Executive Committee.

> Well, what is on the table is we will very likely accept 250. That is what is on the table.

(Doc. 1-8 at 104:21-105:4, 9/30/2005 Negotiation Tr.)

In the second session, the tribal negotiators again asked the State to consider a number greater than 250 machines, stating:

> **Mr. Peebles:**[8] With regard to the number of gaming devices, obviously, the unlimited [number of machines] was probably the easiest to draft. But, I mean if there's something the – if there's some number that you have in mind that would be acceptable, I mean it that gives you greater comfort, we would certainly like to talk with you about that.
>
> **Mr. Eliason:** Well, I don't have, you know, a number other than I guess the number we're talking about now is 250.

(Doc. 1 -9 at 36:08-14, 6/20/06 Negotiation Tr.)

Over the course of the next three sessions, the Tribe suggested that the number of machines be tied to capital investment, as follows:

> **Mr. Mark Allen**:[9] I asked if there was a proposal with the current number of devices.
>
> **Mr. Guhin:** [*Referring to 250 slot machines*] Same number as we have right now.

(Doc. 1-11 at 07:03-05, 7/26/06 Negotiation Tr.)

> **Mr. Guhin:** [*Responding to the capital investment proposal*] This would take us well beyond any kind of limited gaming, which is what the constitution allows, I think. I don't think we could do it. And I think what we are trying to say is – one thing we are trying to say, this runs against the principle that we have been trying to talk about here, is that South Dakota is a limited gaming state, limited in terms of kinds of gaming and also limited in terms of the volume of gaming and this takes us way beyond.

(Doc. 1-13 at 14:03-10, 8/23/06 Negotiation Tr.)

> **Mr. Peebles:** [*Referring to the capital investment proposal*] And quite frankly, it's about two issues. It's about the length of the compact and the number of

[8] Mr. John Peebles is a partner with Fredericks Peebles & Morgan LLP and represented the Tribe at numerous negotiation sessions.

[9] Mr. Mark Allen was President of the Flandreau Santee Sioux Tribe Executive Committee.

> gaming devices and about the development of a gaming facility here. And the issue we believe is that was a proposal made to the State and we wanted a response.
>
> **Mr. Guhin:** We cannot agree to that.

(Doc. 1-15 at 25:17-23, 9/8/06 Negotiation Tr.)

In the final session, on January 11, 2007, the State considered an earlier proposal by the Tribe for unlimited slot machines and a 20 year compact:

> **Mr. Guhin:** As I understand the present offer, there is the May 9, 2006 proposal. Is that proposal still on the table? That was the proposal for unlimited machines and 20-year compact.
>
> **Mr. Peebles:** I think the most recent proposal, which we are waiting for a response from you on, was the most recent one where we proposed an incremental increase in gaming devices based on capital investment.
>
> **Mr. Guhin:** That's the $34,000 and as we translated that out into – I think we actually have discussed this and rejected it, but that would amount to--.
>
> **Mr. Peebles:** Are you telling me you did reject that?
>
> **Mr. Guhin:** I will tell you right now what our position is. That's 500 machines today, with the construction you plan, it's another 500 machines, so it's a 1,000 machine proposal. And no, we are not able to accept that.
>
> **Mr. Peebles:** Why is that?
>
> **Mr. Guhin:** Why is that? It's not consistent with the state position with regard to Indian gaming.

(Doc. 1-18 at 29:13-30:06, 1/11/07 Negotiation Tr.)

Thus, the State's refusal to bargain as to the number of gaming devices and refusal to make a counter-proposal regarding this provision reveals that the State has engaged in surface bargaining, and therefore, has not negotiated in good faith.

CONCLUSION

By summarily rejecting each and every one of the Tribe's proposals to operate more than 250 slot machines and maintaining its continual, illusory assertion that state-law limitations

regarding state-licensed gaming apply to the Tribe, the State has not negotiated in good faith as required under federal law and, as such, the Tribe respectfully requests that judgment be entered in its favor.

Dated this 15th day of February 2011.

Respectfully submitted,

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