UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

FLANDREAU SANTEE SIOUX TRIBE, a federally-recognized tribe, Plaintiff, v. STATE OF SOUTH DAKOTA, Defendant.	CIVIL NO. 07-4040 **DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Plaintiff Flandreau Santee Sioux Tribe ("FSST") and seven other federally-recognized Indian tribes ("Gaming Tribes") have entered into similar class III gaming compacts with the State of South Dakota.[1]

In this action against Defendant, FSST challenges the State's conduct during negotiations for an new gaming compact under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.* (Doc. 1). In general, the

[1] Under Federal Rule of Evidence 201, Defendant requests that the Court take judicial notice of the class III gaming compact entered into by FSST and the State in 1999 as amended. A copy of FSST's (now expired) compact is attached as "Exhibit 1" to Defendant's Request for Judicial Notice "Defendant's RJN" (Doc. 103-2).

The other seven federally-recognized Indian tribes that have class III gaming compacts with the State are the (1) Crow Creek Sioux Tribe; (2) Lower Brule Sioux Tribe; (3) Oglala Sioux Tribe; (4) Rosebud Sioux Tribe; (5) Sisseton-Wahpeton-Oyate Sioux Tribe; (6) Standing Rock Sioux Tribe; and (7) Yankton Sioux Tribe. These seven tribes will be collectively referred to as the "Gaming Tribes." Defendant also requests that the Court take judicial notice of the Gaming Tribes' individual compacts. A copy of each of these compacts is attached as "Exhibits 2-8" to Defendant's RJN, (Docs. 103-3-9).

State asserts that all areas of negotiation were specifically encompassed by IGRA and therefore FSST cannot demonstrate the negotiations were not done in good faith. Further, the State did not request or demand direct taxation from FSST evincing lack of good faith under IGRA. Moreover, FSST's failure to grant or offer concessions in exchange for the significant addition of slot machines and compact duration effectively stalled negotiations to the point of impasse. Given the arguments and authorities provided below, the State moves the Court for an Order of Summary Judgment on FSST's claim that the State of South Dakota failed to negotiate a Class III gaming compact under IGRA in good faith.

SUMMARY OF ARGUMENT

A. Background.

1. *Statement of the Case*

On March 19, 2007, FSST filed a Declaratory Judgment action against the State. (Doc. 1). FSST's Complaint contained two claims for relief. (Doc. 1) FSST's first claim for relief alleges the State failed to negotiate in "good faith" under IGRA. (Doc. 1). The second claim for relief alleged a violation of the equal protection laws . On April 13, 2007, the State filed its Answer, denying FSST's claims. (Doc. 24). Thereafter, on May, 23, 2008, the State filed a Motion for Judgment on the Pleadings. (Doc. 101) The Court granted, in part, the State's Motion dismissing Count Two of FSST's Complaint. (Doc. 147). The only remaining claim and the claim subject to this summary judgment motion is FSST's First Claim for Relief; whether the State negotiated in "good faith."

2. *Statement of the Facts*

FSST is a federally-recognized Indian tribe. (Doc. 1, ¶ 8). Since 1990, FSST and the State have entered into multiple gaming compacts under IGRA.[2] (Doc. 1, ¶ 25). The latest complete version of the compact was signed on December 27, 1999. (Doc. 1, ¶ 25). The December 27, 1999 Compact, effective for a three year term, with an automatic renewal provision, authorized FSST to operate 250 slot machines, pari-mutuel betting and unlimited blackjack tables.[3] (Doc. 1, ¶ 25; Defendant's RJN, Exhibit 1, Doc. 103-2). This compact was extended for an additional three-year term in 2002. (Defendant's RJN, Exhibit 1, Doc. 103-2). The compact was again subject to a minor amendment in 2004.[4] (See Amendment Doc. 103-2). FSST conducts its gaming operations at Royal River Casino ("Royal River") in Flandreau, South Dakota. (Doc. 1, ¶ 25; Defendant's RJN, Exhibit 1, Doc. 103-2).

Since September 2005, FSST and the State of South Dakota conducted six formal negotiating sessions for a new gaming compact. (Doc. 1, ¶¶ 27-28; Doc. 1, Exhibits 5-10). During these negotiating sessions, FSST has demanded (1) an "unlimited" or "market based" number of slot machines; and (2) a longer compact term. (Doc. 1, ¶¶ 39-41; Doc. 1, Exhibits 5-10). Conversely, the

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[2] A gaming compact is a written agreement between a state and an Indian tribe that governs the conduct of gaming activities. 25 U.S.C.A. § 2710(d)(3)(A).
[3] The 1990 Compact originally allowed 180 gaming devices with the prospect of increasing to 250 if certain financial conditions were met. In the 1990 Compact, card games counted against the total number of gaming devices allowed. The 1999 Compacted was amended to allow unlimited card games, freeing those numbers up to be used for additional slot machines.
[4] The 2004 amendment removed the prohibition of conducting pari-mutuel betting through the use of "runners."

State's consistent bargaining position has been, in part, that South Dakota's public policy allows only "limited" gaming, and authorizing "unlimited" slot machines to FSST would undermine this public policy and adversely impact existing gaming activities. (Doc. 1, ¶¶ 31-33, 41; Doc. 1, Exhibits 5-10; Doc. 24, ¶¶ 27, 46). To balance the request for additional machines, the State sought additional concessions from FSST including, among others, concessions on civil and criminal jurisdiction regarding gaming matters. Unfortunately, even though the State offered FSST a significantly longer compact along with other meaningful concessions, FSST offered no meaningful concessions in exchange for a significant increase in gaming machines and length of Compact.[5] (Doc. 1, Exhibits 5-10). As a result, no compact was entered and FSST initiated the current lawsuit.

B. The Indian Gaming Regulatory Act

1. Legislative History of IGRA

In 1987, the United States Supreme Court issued its decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). *Cabazon* held that the State of California could not regulate bingo in Indian country, and cast doubts upon whether states could regulate other forms of Indian gaming. In response to this decision, Congress passed IGRA in 1988.[6] IGRA

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[5] In June 2006, FSST's compact expired. (Doc. 24, ¶¶ 29-30). Therefore, since that date FSST has been operating un-compacted Class III gaming. (Doc. 24, ¶¶ 29-30).

[6] IGRA was enacted by Pub. L. No. 100-497, 102 Stat. 2467 (1988), and is codified at 25 U.S.C. §§ 2701-21 (1988) and 18 U.S.C. §§ 1166-68 (1988).

(continued . . .)

represents a compromise between the interests of the states, federal government, tribes, and gaming industry.

IGRA is intended to "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. IGRA is also designed to provide a basis for state involvement in regulating Indian gaming in order to shield it from organized crime and corruption, and to ensure fair and honest gaming. *Id.* As one federal court opined:

> IGRA was Congress' compromise solution to the difficult questions involving Indian gaming. The Act was passed in order to 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" and "to shield [tribal gaming] from organized crime and other corrupting influences to ensure that the Indian tribe is the primary beneficiary of the gaming operation. . . ." The IGRA is an example of "cooperative federalism" in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.

Artichoke Joe's v. Norton, 216 F.Supp.2d 1084, 1092 (E.D. Cal. 2002).

2. IGRA's Three "Classes" of Gaming

IGRA creates three "classes" of gaming, each subject to different levels of regulation. "IGRA evinces a general intent to impose greater constraints on the authority of tribes to control gambling on Indian lands as the class of gaming

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(. . . continued)
Responsibility for administering IGRA's substantive provisions is divided between the Secretary of the Interior and the National Indian Gaming Commission.

increases." Conference of Western Attorneys General, *American Indian Law Deskbook*, at 435 (2004) ("*American Indian Law Deskbook*").

Class I gaming includes "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations," and its regulation is retained exclusively within the jurisdiction of the Indian tribes. 25 U.S.C. § 2710; 25 U.S.C. § 2703(6).

Class II gaming includes bingo, lotto, and card games if played in conformity with state laws regarding limits on wagers, pot sizes, and hours of operation. 25 U.S.C. § 2703(7)(A). However, class II gaming excludes banking card games, slot machines, and electronic games of chance. 25 U.S.C. § 2703(7)(B). The regulation of class II gaming is also left within the jurisdiction of the tribes, but is subject to federal-state regulation as set forth in IGRA. 25 U.S.C. § 2710(a)(2).

At issue in this case is class III gaming. Class III gaming includes "all forms of gaming that are not [C]lass I gaming or [C]lass II gaming." 25 U.S.C. § 2703(8). In other words, class III gaming includes the types of games usually associated with "casino-style" or "Nevada-style" gambling.[7] Class III gaming is subject to a greater degree of federal-state regulation than either class I or class II gaming.

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[7] Pari-mutuel betting and casino gambling are the best-known examples of Class III gaming. Pari-mutuel betting is defined as a "form of betting on horses or dogs in which those who bet on [the] winner share total stakes less a small percentage to the management." BLACK'S LAW DICTIONARY 1115 (6th Ed. 1990).

Three conditions must be satisfied before Class III gaming may be conducted on Indian lands. First, the gaming must be authorized under a tribal ordinance approved by the National Indian Gaming Commission chairman. 25 U.S.C. § 2710(d)(1)(A)(iii). Second, the state in which the gaming activity is located must permit the gaming. 25 U.S.C. § 2710(d)(1)(B). And third, the gaming must be conducted in accordance with a valid tribal-state gaming compact.[8] 25 U.S.C. § 2710(d)(1)(C). In other words, class III gaming activities are subject to tribal laws and regulations, state laws and regulations, a tribal-state compact, and IGRA.

3. IGRA's Unique Negotiating Framework

IGRA is based on the legislative conclusion that class III gaming should only occur under a tribal-state compact. *American Indian Law Deskbook,* at 416. Under IGRA, a tribe and a state must negotiate a compact if the tribe wants to offer gaming operations other than traditional Indian games or bingo.[9] 25 U.S.C. § 2710(d).

Sections 2710(d)(7)(B)(ii)-(vii) of IGRA describe an elaborate remedial scheme designed to ensure the formation of a tribal-state compact. A federally-recognized tribe initiates the gaming compact process by making a formal request to enter into negotiations with a state. 25 U.S.C. § 2710(d)(3)(A).

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[8] This third condition has been described as "both novel and complex in approach." *American Indian Law Deskbook,* at 445.

[9] The Senate Report viewed the compact approach as the "best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises." S. Rep. No. 446, 100 Cong., 2d Sess., at 13.

Upon receiving the tribe's request, the state "shall negotiate with the Indian tribe in good faith to enter into such a compact." *Id.*

IGRA provides that if no compact has been entered into within 180 days after the tribe's request, the tribe may bring suit in federal court. 25 U.S.C. §§ 2710(d)(7)(A)(i), (B)(i). If the district court concludes that the state failed to conduct negotiations in good faith, it shall order the state and the tribe to conclude a compact within 60 days. 25 U.S.C. § 2710(d)(7)(B)(iii). If the tribe and the state fail to conclude the negotiations with the 60-day period, the court will appoint a mediator. Each party must then submit to the mediator a proposed compact representing their last best offer. 25 U.S.C. § 2710(d)(7)(B)(iv).

The mediator will then choose the compact that best comports with the terms of IGRA. 25 U.S.C. § 2710(d)(7)(B)(iv)-(v). If the state does not accept the mediator's chosen compact within 60 days, the Secretary of the Interior shall prescribe the conditions, consistent with the mediator's chosen compact and within the terms of IGRA, upon which the tribe may engage in class III gaming. 25 U.S.C. § 2710(d)(7)(B)(vii).

4. A Brief History of Gaming in South Dakota

Gaming in South Dakota (and particularly Deadwood) has a long and storied history. However, until approximately 20 years ago, the South Dakota Constitution actually prohibited gaming. *See* South Dakota Constitution, art. III, § 25.

In the 1980s, South Dakota began to incrementally authorize various forms of gaming. In 1986, "scratch and match tickets" were approved. In 1988, the "Deadwood Amendment" was passed. This constitutional amendment authorizes "*limited* card games and slot machines [i.e., "casino-style" gaming] within the city limits of Deadwood. . . ." South Dakota Constitution, art. III, § 25 (emphasis added). In 1989, the South Dakota Legislature authorized video lottery. Today, South Dakota permits *limited* state lotteries, video lottery, card games, slot machines, pari-mutuel dog and horse racing, and simulcasting.[10]

5. The Initial Gaming Compact Between the State and FSST

Since 1990, FSST and the State have entered into multiple Class III compacts under the IGRA. (Doc. 1, ¶ 25; Defendant's RJN, Docs. 103-2 and 3). On June 29, 1990, the State and FSST entered into the parties' first Class III compact ("Initial Compact").[11] (Defendant's RJN, Doc. 103-3). This Initial Compact provided that FSST could operate blackjack, poker, and slot machines at Royal River. (Defendant's RJN, Doc. 103-3). The Initial Compact also allocated 180 "gaming devices" to FSST for a three-year term. (Defendant's RJN, Doc. 103-3). These 180 "gaming devices" included *both* slot

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[10] "Simulcasting" is the accepting of bets in South Dakota for pari-mutuel dog and horse races that are being conducted in other states. This type of gaming is generally known as "Off Track Betting" or "OTB."

[11] Under Federal Rule of Evidence 201, Defendants request that the Court take judicial notice of the Initial Compact entered into by FSST and the State. A copy of this Initial Compact is attached as "Exhibit 1A" to Defendants' RJN, (Doc. 103-3).

machines and table games.[12] (Defendant's RJN, Doc. 103-3). The Initial Compact also provided FSST with the opportunity to increase its gaming devices to 250 if various conditions were satisfied. (Defendant's RJN, Doc. 103-3). FSST subsequently satisfied the conditions to operate 250 gaming devices. (Defendant's RJN, Docs. 103-2 and 3).

6. The Most Recent Gaming Compact Between the State and FSST

On December 27, 1999, the State and FSST entered into the parties' most recent class III compact ("Compact"). (Doc. 1, ¶ 25; Defendant's RJN, Doc. 103-2). This Compact encompassed a three-year term. (Doc. 1, ¶ 25; Defendant's RJN, Doc. 103-2). The 1999 Compact contained substantial modifications from the previous Compact. Specifically, the Compact changed the way in which FSST's 250 "gaming devices" were calculated. (Doc. 1, Exhibit 4, ¶ 9.5; Defendant's RJN, Doc. 103-2). The term "gaming devices" no longer included both slot machines and table games. (Doc. 1, Exhibit 4, ¶ 9.5; Defendant's RJN, Doc. 103-2). Instead, the term "gaming devices" was modified to include only slot machines. (Doc. 1, Exhibit 4, ¶ 9.5; Defendant's RJN, Doc. 103-2). Additionally, the 1999 Compact provided, should no party request modifications, for automatic renewal. This renewal process could extend the duration of the Compact indefinitely. (Doc. 1, Exhibit 4, ¶ 9.5; Defendant's RJN, Doc. 103-2). On December 27, 2002, this Compact was extended for an additional three years. (Defendant's RJN, Doc. 103-2).

[12] For example, if FSST operated two blackjack tables, it could also operate 178 slot machines.

As a result of the "gaming device" modification, FSST now operates 250 slot machines and *unlimited* blackjack and poker games subject to automatic renewal. (Doc. 1, Exhibit 4, ¶ 9.5; Defendant's RJN, Doc. 103-2). This change is significant in that the Initial Compact provided that FSST's 250 gaming devices included *both* slot machines and table games. (Defendant's RJN, Doc. 103-3). Finally, it is undeniable that this (now-expired) Compact has been extraordinarily lucrative for FSST.[13] (Doc. 1, Exhibit 14).

7. Recent Negotiations Between the State and FSST for an Amended Compact

In December 2005, FSST requested the Compact be renegotiated. In response to this request, the State and FSST conducted formal negotiating sessions on (1) September 30, 2005, (2) June 20, 2006, (3) July 26, 2006, (4) August 23, 2006, (5) September 8, 2006, and (6) January 11, 2007. (Doc. 1, Exhibits 5-10).

During the negotiations, FSST frequently contrasted its gaming operations to gaming operations in Deadwood, South Dakota and the operation of video lottery. (Doc. 1, Exhibits 5-10). FSST erroneously declared that it was being treated "differently" or "unfairly" when compared to Deadwood. (Doc. 1, Exhibits 5-10). As such, FSST demanded that the State accept two fundamental gaming compact amendments. (Doc. 1, Exhibits 5-10).

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[13] In June 2006, FSST's compact expired. (Doc. 24, ¶¶ 29-30). Therefore, since that date, FSST's has been operating un-compacted Class III gaming. (Doc. 24, ¶¶ 29-30).

First, FSST demanded an outright elimination of the 250 slot machine limit. (Doc. 1, Exhibits 5-10). In fact, FSST demanded that it be allowed to operate an *unlimited* number of slot machines. (Doc. 1, Exhibits 5-10). And second, FSST demanded a 20-year compact term. (Doc. 1, Exhibits 5-10). According to FSST, the State's capitulation to these two demands was necessary in order to counteract the "perceived inequity" with Deadwood and video lottery and to enable FSST to access the financial capital needed for an expansion project at Royal River, and compete with neighboring casinos in Minnesota. (Doc. 1, Exhibits 5-10).

FSST failed, however, to provide the State with any meaningful justifications or concessions for its extraordinary claims and demands. (Doc. 1, Exhibits 5-10). FSST also neglected to consider whether its demands were even permissible under IGRA. (Doc. 1, Exhibits 5-10). Instead, FSST's negotiating posture was that the State should simply capitulate to FSST's demands without FSST having to give anything in return. (Doc. 1, Exhibits 5-10). Unfortunately, because of FSST's negotiating posture, the parties have been unable to reach an agreement on a new Compact. (Doc. 24, ¶ 51).

In June 2006, FSST's compact expired. (Doc. 24, ¶¶ 29-30). FSST thereafter filed the instant lawsuit. (Doc. 1)

8. South Dakota's Public Policy of "Limited Gaming"

South Dakota's public policy on gaming allows the Legislature to authorize only "*limited* card games and slot machines" in Deadwood. South Dakota Constitution, art. III, § 25 (emphasis added). Likewise, state statute

authorizes only "*limited* card games and slot machines" in Deadwood. SDCL 42-7B-1 (emphasis added). Consistent with these constitutional and statutory principles, "casino-style" gaming in South Dakota is "limited" in two primary ways.

First, "casino-style" gaming is "geographically" limited. Deadwood is the only non-tribal location in South Dakota in which "casino-style" gaming, similar to FSST's class III gaming operations, can be conducted. South Dakota Constitution, art. III, § 25; SDCL § 42-7B-4(4)(providing that the "city limits" of Deadwood are those boundaries as they existed on January 1, 1989). As such, FSST's gaming operations at Royal River are shielded from competition because a private (non-tribal) gaming entrepreneur cannot operate a "casino-style" gaming facility in any other South Dakota city, county, municipality, or township (other than Deadwood). South Dakota Constitution, art. III, § 25. This "geographic" limitation provides FSST with an enormous economic advantage because Royal River does not compete with privately-owned "casino-style" gaming facilities located in population centers such as Aberdeen, Brookings, Pierre, Rapid City, Sioux Falls, and Yankton.

Second, "casino-style" gaming in South Dakota is "numerically" limited. Deadwood has $100.00 bet limits and its "casino-style" gaming establishments are restricted to a maximum of 30 "gaming devices" per building.[14] Also, no

[14] Unlike FSST's agreement with the State, "gaming devices" in Deadwood include *both* table games and slot machines.

individual is allowed to hold more than three retail gaming licenses.[15] Furthermore, a Deadwood operator's gaming license is reviewed (and potentially revoked) on an annual basis and its revenues are subject to various state taxes and fees. Conversely, FSST's compacts have always included multi-year durations and its gaming operations are not subject to any state taxes or fees. (Defendant's RJN, Exhibits 1 and 1A, Docs. 103-2 and 3).

The other type of gaming allowed in South Dakota is video lottery. "Nevada-style" or "casino-style" gaming is limited to Tribal gaming on reservations and the geographic boundaries of Deadwood. Video lottery is separately regulated as a specific type of gaming apart from the regulation of card games and slot machines. *See* South Dakota Constitution, art. III, § 25 (allowing a state lottery or video games of chance while limiting card games and slot machines to the City of Deadwood). Statutorily, the regulation of video lottery is found primarily in SDCL Chapter 42-7A. Video lottery is limited in several ways. First, a licensed video lottery establishment must be a bar or lounge. *See* SDCL § 42-7A-37.1. In order to maintain a bar or lounge the operator of the establishment must be licensed pursuant to SDCL § 35-4-2(4),(6),(11),(12),(13) or (16). Once the licensing of the establishment is

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[15] In Deadwood, one retail license enables a license holder to operate a maximum of 30 "gaming devices." Thus, if a Deadwood license holder possesses the maximum of three retail licenses, he/she may operate a maximum of 90 "gaming devices." Similarly, video lottery has bet limits ($2.00) and maximum payouts ($1,000.00). Video lottery establishments are also limited to 10 video lottery terminals per on-sale alcohol beverage license.

achieved, the games themselves limited to those specifically licensed by the South Dakota Lottery. SDCL § 42-7A-37.

In contrast to the bet limits in Deadwood and Tribal casinos of $100.000 with potentially unlimited payouts, video lottery limits wagers to $2.00 and payouts to a maximum of $1,000. SDCL § 42-7A-38. Further limiting the expansion of the video lottery is SDCL § 42-7A-44 which prohibits the placement of more than ten machines in any licensed establishment. While there is no specific statutory cap on the number of video lottery terminals that may be placed within the borders of South Dakota, these constraints act, in fact, to limit the frequency and size of video lottery establishments.

FSST agrees gaming is controlled and limited by statutory and regulatory framework. *See* Affidavit of William Golden, Attachment 2 (Allen Deposition at 65-66). The Tribe's only contention is there is the number of machines authorized for video lottery or Deadwood is not subject to a specific statutory cap. *Id.* at Allen Deposition at 66. The limitations acting on video lottery and Deadwood actually result in FSST's gaming operations not only being treated equally with but actually better than the general populous of South Dakota.

ISSUE

WHETHER THE STATE OF SOUTH DAKOTA ENGAGED IN COMPACT NEGOTIATIONS WITH FSST FOR CLASS III GAMING PURSUANT TO IGRA IN GOOD FAITH.

ARGUMENT

A. Summary Judgment Motion Standard

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment. Rule 56 provides that the Court,

> [S]hall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Fed.R.Civ.P. 56(a).

The Supreme Court has stated that Rule 56 summary judgment is mandated when the non-moving party fails to make a sufficient showing to establish the existence of an element which is essential to his case and upon which he will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). In order to survive a motion for summary judgment, FSST must make a prima facie case that the State failed to negotiate in good faith. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 50 (1996). If that determination is made by the Court the State may rebut the inference by showing that it did, in fact, negotiate in good faith. *Id.* Good faith determinations under IGRA are appropriate for summary judgment. *See generally, Rincon Band of Luiseno Mission Indians of the Rincon Reservation*, 602 F.3d 1019 (9th Cir. 2010); *Cheyenne River Sioux Tribe, v. State of South Dakota*, 3 F.3d 273 (8th Cir. 1993).

B. FSST's Complaint Fails to Allege a Prima Facia Case Against the State Under IGRA

1. *As pled, FSST's Complaint Itself Fails to Allege a Violation of IGRA's Requirement that the State Negotiate in Good Faith*

In the instant case, the sole surviving claim from FSST's Complaint is its First Claim for Relief under IGRA. FSST's Complaint avers as follows:

> FIRST CLAIM FOR RELIEF
>
> VIOLATION OF IGRA
> (AGAINST ALL DEFENDANTS)
>
> 48. The allegations of paragraphs 1-47 are re-alleged and incorporated by reference.
>
> 49. Under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, the State of South Dakota may not limit (or refuse to negotiate beyond a certain limit) the number of slot machines that the Plaintiff Tribe may operate under a gaming compact based on purported State public policy that gaming should be limited or based on other reasons grounded on State law, regulations, or policies.
>
> 50. To date, no Compact has been negotiated between the State and the Tribe.
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> 51. The Defendants failed to respond in good faith to the Plaintiff Tribe's request to renegotiate a Compact.
>
> 52. The Tribe has satisfied all prerequisites in 25 U.S.C. § 2710(d)(1) to lawfully conduct Class III gaming.
>
> 53. By limiting or refusing to negotiate beyond a certain limit the number of slot machines that a Plaintiff Tribe may operate under its gaming compacts based on purported State public policy that gaming should be limited and based on other reasons grounded on State law, regulations and policies, and refusing to negotiate regarding the length of the Compact, the Defendants have violated the rights of the Tribe under the Indian Gaming Regulatory Act.

See Complaint (Doc. 1, ¶¶ 48-53). The above is Plaintiff's entire claim against the State of South Dakota.

Paragraph 48 of Plaintiff's Complaint simply re-alleges the paragraphs of Plaintiff's Complaint found under the headings "Introduction", "Jurisdiction

and Venue", "Parties", "The Indian Gaming Regulatory Act", and "Factual Allegations" but provides no legal basis for the Cause of Action. (Doc. 1) The State admits that there is no compact in existence between the State and Tribe under paragraph 50. Paragraph 52 is irrelevant to the discussion of whether the State negotiated in good faith and Paragraph 51 is merely an unsupported and contested legal conclusion which the Court will ultimately decide. The only paragraphs which arguably could constitute the cause of action are paragraphs 49 and 53. The State asserts, however, that these paragraphs do not state a cause of action against the State of South Dakota.

Paragraph 49 alleges the State may not "limit (or refuse to negotiate beyond a certain limit) the number of slot machines that the Plaintiff Tribe may operate..." based on the State's policy of limited gaming. Paragraph 53 follows with the legal conclusion that in refusing to negotiate beyond "a certain limit the number of slot machines..." and "refusing to negotiate regarding the length of the Compact..." the "Defendants have violated the rights of the Tribe under the Indian Gaming Regulatory Act." Under its Complaint, the Tribe asserts that, 1) The State may not limit the number of slot machines and length of compact based on public policy[16] and 2) That this refusal violated the Tribe's rights under the Indian Gaming Regulatory Act. Essentially, the Tribe's Complaint asks the Court to find the State failed to bargain in good faith by not

[16] The Tribe also alleges that the State refused to negotiate the length of the compact. This, however, is not true. The Tribe admits that the State agreed to double the length of the gaming compact from three to almost six years. *See* Plaintiff Flandreau Santee Sioux Tribe's Responses to Defendant's Request for Admissions (First Set) at Request for Admission 16 (Exhibit 1, Attachment A).

compacting for an unlimited number of machines for an unlimited temporal duration.

As set out above, FSST's remaining claim fails, pursuant to IGRA, to demonstrate a lack of good faith in negotiations by the State. The ability of the State and the tribe to negotiate for reasonable regulations based on State policy is an integral part of IGRA. Rather than constituting a violation, IGRA contemplates the incorporation of state law and policy.

IGRA sets up a balancing scheme where the federal, state, and tribal interests were given a loose framework to negotiate the terms, law, regulations, and size of the gaming establishments that the Tribes would operate. The Senate report set forth the following:

> [T]here is no adequate Federal regulatory system in place for class III gaming, nor do tribes have such systems for the regulation of class III gambling currently in place. Thus a logical choice is to make use of existing State regulatory systems, although the adoption of State law is not tantamount to an accession to State jurisdiction. The use of State regulatory systems can be accomplished through negotiated compacts but this is not to say that tribal governments an have no role to play in regulation of class III gaming -- many can and will.
>
> The terms of each compact may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and State, etc. Section 11(d)(3)(C) describes the issues that may be the subject of negotiations between a tribe and a State in reaching a compact. The Committee recognized that subparts of each of the broad areas may be more inclusive.
>
> *For example, licensing issues under clause vi may include agreements on days and hours of operation, wage and pot limits, types of wagers, and size and capacity of the proposed facility.* A compact may allocate most or all of the jurisdictional responsibility to the tribe, to the State or to any variation in between. The Committee does not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands.

> The Committee does view the concession to any implicit tribal agreement to the application of State law for class III gaming as unique and does not consider such agreement to be precedent for any other incursion of State law onto Indian lands. Gaming by its very nature is a unique form of economic enterprise and the Committee is strongly opposed to the application of the jurisdictional elections authorized by this bill to any other economic or regulatory issue that may arise between tribes and States in the future.

Coeur d'Alene Tribe v. State of Idaho, 842 F. Supp. 1268, 1281 (1994) (citing the Senate Report on IGRA, S.Rep. No. 446, 100th Cong., 2nd Sess. (emphasis added)).

As stated above in the Senate report, it is unequivocally intended by Congress that the State's constitution, laws, and regulatory system, as well as state policy, would set the framework not only for compact negotiations, but for an acceptable system to regulate and control gaming on tribal land. *Coeur d'Alene Tribe,* 842 F.Supp. at 1283. A review of the specific IGRA statutes concerning compact negotiations not only refer to state's laws, regulation, and policy, but make them specifically the areas the State may negotiate in good faith under IGRA. *Id.* at 1285; 25 U.S.C. 2710(d)(3)(C) and (7)(B). For FSST to assert that the State may not base its bargaining position on State constitutional law or policy denies the stated purpose of IGRA.

IGRA allows the State and the Tribe to negotiate on any subject that is directly related to the operation of gaming activities. 25 U.S.C. § (d)(3)(C)(vii). The number of machines in the casino and the number of machines allowed in the Compact, as well as the duration of the Compact, clearly are directly related to the operation of gaming activities. Numerous cases and decisions have discussed the numbers and the limits that have been placed on Class III

machines in Compacts throughout the country. *See generally Coeur d'Alene Tribe,* 842 F.Supp. 1268; *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, (9th Cir. 2010); *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. State of California,* 629 F. Supp. 2d 1091 (E.D. Cal. 2009); *State of Idaho v. Shoshone-Bannock Tribes*; 465 F.3d 1095 (9th Cir. 2006); *American Greyhound Racing Inc. v. Hull,* D. Arizona 2001, 146 Supp.2d 1012 (D.Ariz 2001)(overruled on other grounds).

The Senate report specifically identified the size and capacity of the proposed facility as valid grounds for negotiations between the Tribe and the State. Further, the courts have recognized that the State has broad latitude in determining the State policy and its interests when negotiating a gaming compact.

> In light of our Tenth Amendment analysis, IGRA does not require the states to regulate Class III gaming by entering into tribal-state compacts. Instead, the only obligation on the state is to negotiate in good faith. The act of negotiating, however, is the epitome of a discretionary act. How the state negotiates; what it perceives to be is interests that must be preserved; where, if anywhere, that it can compromise its interests -- these all involve acts of discretion.

Ponca Tribe of Oklahoma v. State of Oklahoma, 37 F.3d 1422, 1436 (10th Cir. 1994)(overruled on 11th Amendment grounds). It is well established that the policy of the State will influence negotiations for Class III gaming compacts. *Coeur d'Alene Tribe,* 842 F.Supp. at 1277-1281.

The State is obligated to negotiate within the parameters of IGRA. Likewise, the State is bound to act in accordance with its public policy and authority. The Governor of South Dakota derives his power and duties from the South Dakota Constitution, art. IV, § 3. The Governor only may act within the confines of the authority granted by the Constitution of South Dakota or the Legislature. Art. IV, § 3.

When IGRA was introduced, Congress both preempted state law and expanded state jurisdiction concerning gaming and tribal land. *See generally, Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). For instance, IGRA grants the state the ability to ban all gaming within the confines of the state, which, in turn, includes the prohibition of Class III gaming on tribal land. *Coeur d'Alene Tribe,* 842 F.Supp. at 1275-1276. IGRA preempts state law by compelling the State to negotiate for "Nevada-style" where such gaming would otherwise be prohibited thus allowing tribal casinos. *Id.* At the same time, IGRA expands the Governor's powers by allowing the Governor to negotiate an extension of South Dakota law, regulations, and control onto tribal land. *See generally Coeur d'Alene Tribe*, F.Supp. 1268.

IGRA sets forth that the purpose of these compromises is to balance federal, state, and tribal needs by negotiating which rules, regulations, the size of the facility, civil and criminal jurisdictions which will apply to a gaming establishment on tribal trust land. *Id.* In this light, the State, acting through the Governor, must reflect the State's policies, laws, and regulations during the Compact negotiations. *See* SDCL § 1-1-23 (providing the sovereign power

of this State, otherwise known as its public policy, is expressed in part by statutes enacted by Legislature); *Veeder v. Kennedy*, 589 N.W.2d 610, 616 (S.D. 1999); *Breck v. Janklow*, 623 N.W.2d 449 (S.D. 2001)(providing the actions of the Governor are circumscribed by State law). The Governor, acting as the agent for the State, derives all of his powers and authorities from the constitution and state laws. Only because of the preemptions and the powers granted to the State under IGRA, is he able to negotiate policy rules and regulations concerning tribal gaming compact.

Governors who failed to comply with state policy, constitution, laws and regulations have faced civil suits challenging their authority during compact negotiations. *Florida House of Representatives v. Crist, 999 So.2d 601 (Fla. 2008)*; *Taxpayers of Michigan Against Casino v. State of Michigan*, 732 N.W.2d 487 (Mich. 2007); *Panzer v. Doyle,* 680 N.W.2d 666 (Wis. 2004)(overruled in party by *Dairyland*); *Dairyland Greyhound Park, Inc. v. Doyle,* 719 N.W.2d 408 (Wis. 2006); *New Mexico ex rel. Clark v. Johnson,* 904 P.2d 11 (N.M. 1995); *Kansas ex rel. Stephan v. Finney*, 836 P.2d 1169 (Kan. 1992); *Saratoga County Chamber of Commerce, Inc. v. Putaki*, 798 N.E.2d 1047 (N.Y. 2003); *Coeur d'Alene v. State of Idaho*, 742 F. Supp. 1268. It is clear IGRA allows states to bargain for the interests a set out in State constitutions, statutes and policies. The same state policies guide the conduct of the State, and in this case, the Governor.

Given this authority, FSST's claim that the State may not, under IGRA, limit the number of slot machines and the length of the Compact based on

State policy, law, and regulation must fail. Even when considering the allegations and facts in a light favorable to the Tribe, the Complaint does not allege the State failed to negotiate in good faith as contemplated under IGRA. Accordingly, the Tribe fails to demonstrate a prima facie case that the State failed to negotiate in good faith.

2. The State's positions during negotiations were within the guidelines provided for in IGRA, and therefore, the negotiations were by definition conducted in good faith

The State further asserts that FSST cannot show a prima facia case the State failed to negotiate in good faith because the positions taken by the State were specifically authorized within the statutory framework of IGRA. IGRA requires that with regard to State/Tribal compact negotiations the "State shall negotiate with the Indian tribe in good faith . . . ." 25 U.S.C. § 2710(d)(3)(A). The term "good faith" as used in IGRA is not per se defined by IGRA. *Coyote Valley Band of Pomo Indians v. California*, 147 F.Supp.2d 1011, 1120 (9th Cir. 2001)("*Coyote Valley I*"). "The question the Court must resolve is whether the State's negotiating position is so unreasonable that it can be said that the State has not negotiated in good faith." *Id.* In evaluating a State's good faith the 9th Circuit recently found that an objective analysis of the factors provided in IGRA is the relevant test. *Rincon*, 602 F.3d 1019 at 1041; *See also* Order on Motion to Quash Subpoena (Doc. 197)(Following *Rincon* and holding that an objective standard governs good faith determinations under IGRA). Accordingly, when a State limits its subjects of negotiation to those areas related to IGRA's specific

provisions, the presumption is the State negotiated in good faith. *Id.* at 1028-1029. Only when the Tribe proffers evidence that the State negotiated outside the parameters of IGRA does the burden of proof shift to the State to prove it negotiated in good faith. *Id.* at 1028-1030.

In enacting IGRA, Congress constructed a framework to allow tribes to conduct class III gaming on tribal land while reflecting the character and policies of the states they reside in. Courts have recognized Congress intended:

> A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impact on the State's regulatory system, including its economic interest in raising revenue for its citizens.

Coyote Valley Band of Pomo Indians, 331 F.3d 1094, 1109 (9th Cir. 2003)("Coyote Valley II")(citing S.Rep. 100-446, at 13-14 (1988), *reprinted in* U.S.C.C.A.N. 3071, 3083-84). To this end, IGRA provides a specific list of acceptable areas of negotiation. IGRA provides that any Tribal-State compact negotiated under 25 U.S.C. § 2710(d)(3)(C) *may* include provisions relating to:

> (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 [gaming] activity;
>
> (ii) the allocation of criminal and civil jurisdiction between the Sate 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 such amounts comparable to amounts assessed by the Sate 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) (emphasis added). IGRA further provides that, except for assessments to defray the costs of regulating gaming, the above section does not confer upon the State the authority to "impose any tax, fee, charge, or other assessment" upon the tribe in order to engage in Class III gaming. 25 U.S.C. § 2710(d)(4).

Once an Indian tribe introduces evidence that a compact has not been entered into as contemplated in 25 U.S.C § 2710(d)(3) and that the State did not "respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith..." the Court,

> (I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and
>
> (II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

25 U.S.C. § 2710 (d)(7)(B)(iii) *Coyote Valley II*, 331 F.3d at 1108.

As can been seen from the above citations, IGRA itself sets the parameters for negotiation. IGRA specifically permits negotiation regarding the seven categories found in 25 U.S.C. § 2710(d)(3)(A). IGRA also specifically

provides that certain topics, such as direct taxation of a tribe, are evidence that the State has not negotiated in good faith. 25 U.S.C. § 2710(d)(7)(B)(iii)(II). Conspicuously absent from FSST's claim for relief is any reference to the State failing to respond to the request to negotiate a compact. *See generally* (Doc. 1). Also lacking is any allegation that the State demanded concessions not specifically authorized by IGRA under 25 U.S.C. § 2710(d)(3)(A).[17]

Simply put, the Complaint does not contain any allegations the State negotiated for concessions or made demands outside of the acceptable parameters of good faith specifically provided by IGRA. In fact, no evidence has been produced by FSST showing the State breached the IGRA guidelines in a manner amounting to lack of good faith. For the Court to make further inquiry, the Tribe must make a prima facie showing of bad faith by the State. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 50 (1996). In this instance, FSST has failed to make that showing.

3. A specific analysis of the State's negotiating positions do not demonstrate that the State failed to negotiate in good faith.

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[17] FSST states in its Complaint that "In contravention of 25 U.S.C. § 2710 (d)(7)(B)(iii)(II), the State has impliedly conditioned approval of the Compact on remitting use taxes to the State." (DOC 1. at ¶ 43) The State disputes the assertion that approval of a compact was conditioned on remission of taxes. Even when taken as pled, as required for Summary Judgment, the factual allegation does not rise to evidence of bad faith. To be considered as evidence of bad faith, 25 U.S.C. § 2710(d)(7)(B)(iii)(II) requires a "demand" for "direct taxation." As pled, FSST's allegation fails to meet this standard. Moreover, as described later in this brief, FSST admits the state did not demand direct taxation.

As set forth above, the State asserts that Plaintiff must show the State took positions other than those authorized by IGRA in order for it to demonstrate a prima facie case that the State did not negotiate in good faith. The State further stresses that an analysis of the State's specific positions fails to illustrate that the State conducted negotiations in a manner other than good faith. As acknowledged in the Senate report the State is balancing numerous interests when negotiating a gaming compact. *See* Senate Report No. 100-446, 100th Cong. 2d Sess. 1988, U.S.C.C.A.N. 3071, 3076. (providing "S. 555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands. Consequently, federal courts should not balance competing federal, state, and tribal interests to determine the extent to which various gaming activities are allowed.") The State repeatedly explained what those interests were during the negotiations, and summed them up in a letter signed by then Governor M. Michael Rounds on March 27, 2005. *See* Affidavit of William Golden Attachment A, Exhibit A.

The State's positions remained consistent throughout negotiations. The State's expressed concerns included:

1) Maintaining a policy of limited gaming thereby preserving South Dakota as a family oriented state along with its Midwest lifestyle. The policy of limited gaming was followed in order to prevent a "Las Vegas" atmosphere from occurring in South Dakota. *See* State's RFA Nos. 26, 27 and answers thereto.

2) Addressing public safety, threats of criminality and problems with financial integrity as well as the deleterious effects of gambling. As a means to address these issues, the State sought concessions from the tribe with regard to gaming issues on civil and criminal jurisdiction. *See* State's RFA Nos. 12, 29 and answers thereto.

3) The adverse economic impacts the expansion of gaming would have on existing gaming activities. *See* State's RFA No. 30 and answer thereto.

4) The possibility that an expansion of gaming could potentially prompt the electorate, either through constitutional or statutory changes, to shut down various types of gaming or expand gaming to other areas. *See* State's RFA No. 32 and answer thereto.

5) The treatment of all tribes in an equal manner. If gambling were expanded in the manner requested by FSST, the State was concerned that the remaining Tribes would request a similar expansion thereby compounding the concerns already expressed by the State. *See* State's RFA No. 28 and answer thereto.

Paragraph 2, regarding the public safety, threats of criminality and problems with financial integrity as well as the deleterious effects of gambling may be addressed by allocation of both civil and criminal jurisdiction between the Tribe and the State. *See* 25 U.S.C. § 2710(d)(3)(C)(i) and (ii). Gaming has negative social and economic affects (divorce, bankruptcy, crime.) With an increase in gambling, one would reasonable expect to see an increase in the harms created by gaming. IGRA allows a state to address the negative effect of

gaming as one of the identified areas a state may in good faith negotiate to offset the social ills of gambling. 25 U.S.C. 2710(d)(3)(C); Aasved, Mikal, *The Sociology of Gambling)* (Charles C. Thomas, Publisher 2003) at 188-89, and Patrick A. Pierce and Donald E. Miller, *Gambling Politics-State Government and the Business of Betting, (*Lynne Rienner Publishers 2004) at 194.

The State also asserted that it was concerned about the effect the expansion of gaming could have on the electorate, under Paragraph 4, and adverse economic impacts on existing gaming, under Paragraph 3.[18] In order to investigate the potential effects of expanded gaming on existing gaming, the State commissioned the Cummings Report. *See* Cummings Report (Doc. 1, Exhibit 14, Docs. 1-26 and 1-27). The report highlights different tribal gaming options and their effect upon revenue produced by video lottery, tribal casinos and Deadwood. The Cummings Report clearly shows that the State, private individuals operating video lottery establishments and the remaining Tribal casinos would suffer losses in revenue of varying magnitudes based upon the number of class III machines allocated to the various tribes.[19] For example, the Cummings Report estimated that with an increase of 500 machines at each tribal casino, private parties and the State would each suffer over

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[18] These two concerns are somewhat intertwined. Depending on the situation, changes in the current status of gaming in South Dakota may prompt a response from the voters. Changes in the economic and social conditions now existing may prompt the electorate to either expand gaming outside Tribal boundaries or to eliminate or reduce gaming in South Dakota. In either situation the existing gaming activities would be affected.

[19] Pursuant to SDCL § 42-7A-63 the State's percentage of net machine income from video lottery is fifty percent. As such, the State's loss in revenue roughly equals the loss to private individuals operating video lottery machines.

$14,000,000.00 of lost video lottery revenue. *See* Cummings Report (Doc. 1 Exhibit 14, Doc. 1-27 at 10).

The Cummings Report also estimates that grants of slot machines to FSST alone negatively impact each of the remaining tribal casinos. (Doc. 1, Exhibit 14; Doc. 1-27 at 11). Given this result, and in order to maintain their income level, it is likely the expansion of gaming at FSST would prompt other Tribes to request additional machines and further expand "Nevada-style" gaming in South Dakota. Battles among Tribes for increasing machine numbers cut against the State's policy of limited gaming as expressed in Paragraph 1 above and thus further frustrates the State's ability to treat the Tribes in an equal manner as expressed in Paragraph 5.

As it relates to gaming, the Cummings Report shows the State had valid grounds to be concerned about the effect additional slot machines at Flandreau would have on State, private and Tribal gaming operations and revenue. IGRA contemplates precisely this type of calculation when the State is determining its interests. The State's concerns regarding adverse economic impacts on existing gaming, as expressed in Paragraph 3 above, is precisely the type of concern allowed to be taken into consideration during gaming compact negotiations. 25 U.S.C. 2710 (d)(7)(B)(iii)(I) (adverse economic impact).

With respect to the effect on the electorate, the State expressed concern that an expansion of Tribal gaming, as expressed above, may prompt others in the state to attempt an expansion of "Nevada-style" gaming outside tribal borders. Private individuals currently involved in gaming may attempt to offset

the financial loss caused by expanded tribal gaming by initiating a constitutional amendment to expand "Nevada style" or casino style gaming outside the borders of Tribal casinos and Deadwood. If such an amendment were to pass, one would expect entrepreneurial minded individuals to open "Nevada-style" casinos across the state.

The electorate may go the other way, however, and act to reduce or eliminate gaming in the State. If gambling were eliminated in total, the Tribes would lose the ability to compact for Class III gaming on the reservation. *Coeur d'Alene Tribe*, 842 F.Supp. 1268 at 1276. With regard to video lottery, it is undisputed that repeal would have substantial impact on State revenue as well as the investments and expectations of private individuals now operating in the field. Either of these results would have adverse economic impacts on existing gaming activities. Such concerns are specifically allowed to be addressed under IGRA. 25 U.S.C. § 2710(d)(7)(B)(iii)(I).

The State has myriad interests to balance. IGRA specifically allows the State to negotiate and consider all of the points under 25 U.S.C. § 2710 (d)(7)(B)(i-iv). The State's concerns as provided above fall directly in line with the guidelines provided in IGRA for the negotiation of Class III gaming. It is also undisputed that the State did not demand direct taxation of the Tribe as prohibited by IGRA. *See* 25 U.S.C § 2710(d)(7)(B)(iii)(II); RFA No. 24 and answer thereto. In order to mitigate the harmful effects the expansion of gaming, the State only sought concessions from FSST falling within IGRA.

Because the State only negotiated within the areas specifically permitted under IGRA it negotiated in good faith. *See* 25 U.S.C. 2710(d)(3)(C) and (d)(7)(B)(ii).

C. FSST's Negotiating Position Effectively Eliminated the Possibility of a State/Tribal Compact.

In the instant case, FSST demanded additional machines and a longer compact but failed to offer any meaningful concessions, as envisioned by IGRA, in return. FSST's first proposal was for 1,500 slot machines. *See* RFA No. 4 and answer thereto. Other proposals, although worded in several ways, arrived at an unlimited or marked driven number of slot machines. For instance FSST later proposed unlimited slot machines and blackjack tables and a twenty year compact or tying machine numbers to dollars of investment in the casino. *See* RFA No. 10; RFA No. 17 and answers thereto. FSST's proposals were all aimed toward obtaining as many machines as the market would bear. *See* Affidavit of William Golden, Attachment A, (Exhibit 2, Allen Deposition at 27-29).

The State, on the other hand, offered to enter into a new Compact with FSST under the same terms and conditions as the previous compact. *See* Affidavit of William Golden, Attachment A, (Exhibit 1, Plaintiff Flandreau Santee Sioux Tribe's Responses to Defendant's Requests for Admissions (First Set) "RFA" No. 3 and Answer thereto). Furthermore, and despite the fact FSST was offering noting in return, the State offered the additional concessions. The State was willing to alter the previous terms of the Compact to allow FSST to use the National Indian Gaming Commission standards. RFA No. 5 and answer

thereto. The State offered to streamline the arbitration progress. RFA No. 6 and answer thereto. The State agreed to clarify language allowing the Tribe to use gaming revenue to hire a legislative lobbyist. (August 23, 2006 Compact Exhibit 6, Doc. 1-14, at 34). The State offered to nearly double the Compact duration from three years to six years. RFA No. 16 and answer thereto. Additionally, the State offered to change the termination language of the Compact to automatically renew under the same terms and conditions if a new agreement could not be negotiated thus making, from the State's point of view, the Compact more bankable for FSST. RFA No. 21 and answer thereto and the Exhibit referenced (Attachment B).

With regard to additional machines, FSST admits the State never stated that a Compact for more than 250 slot machines would never be signed. *See* RFA No. 31 and Answer thereto. Rather, the State inquired into whether FSST was willing to make concessions on either criminal or civil jurisdiction. *See* RFA No. 12 and answer thereto. FSST, however, did not agree to relinquish any civil or criminal jurisdiction with regard to gaming issues. *See* RFA 8 and answer thereto. The State also requested a similar concession regarding waiving sovereign immunity in favor of State jurisdiction for tort actions arising from gaming activities. RFA No. 13 and answer thereto. FSST again refused to grant any jurisdiction to the State. RFA No. 14 and answer thereto. Simply put, FSST was unwilling to relinquish any jurisdiction regarding gaming issues to the State. With no willingness to make concessions in these areas, FSST was not negotiating, it was offering ultimatums.

South Dakota was well within the confines of IGRA to ask for concessions in order to agree to additional machines. As reasoned in *Rincon*:

> The State's next argument is that, at the very least, it is entitled to some new consideration in exchange for giving Rincon expanded gaming rights, and the increase revenue share it requested was the only possible new consideration it could seek.
>
> The State is correct that general contract principles dictate that new or additional consideration for a compact amendment is required.

Rincon, 602 F.3d at 1039.

While the FSST may consider the State's negotiating position to be rather firm, it is permissible for states to use even hard-line negotiating positions. The *Rincon* Court held the State could take a "hard line" stance so long as the conditions insisted upon are related to legitimate State interests regarding gaming and the purpose of IGRA. *Rincon*, 602 F.3d at 1038-1039 (only hard line positions resulting in a "take it or leave it offer" "outside the scope of § § 2710(d)(3)(C) and 2710(d)(4) are impermissible) . As provided above, the State's negotiating positions and requests fell well within the confines of IGRA. On point with the current situation, the *Rincon* Court noted,

> In order to obtain additional time and gaming devices, Rincon may have to submit, for instance, to greater State regulation of its facilities or greater payments to defray the costs the State will incur in regulating a larger facility.

Rincon, 602 F.3d at 1039. As noted above, FSST refused to provide additional concessions specifically authorized under IGRA. Accordingly, the State was not required to provide FSST with expanded gaming rights. *See also Coyote Valley*

I, 147 F.Supp.2d at 1021(State is allowed to reject a counter offer rejecting compact terms specifically authorized under IGRA).

CONCLUSION

Based on the above arguments and authorities, the State respectfully request that the Court find that FSST failed to make a prima facie case that the State failed to negotiate in "good faith" as required by IGRA. If the Court were to find that a prima facie case has been established, the State request that the Court apply the above facts, arguments and authorities and find that the State met its burden to prove that it did in fact negotiate in good faith. Accordingly, under either scenario, the State respectfully requests that its Motion for Summary Judgment be granted in total.

Dated this 15th day of February, 2011.

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CERTIFICATE OF COMPLIANCE

I certify that Defendant's Memorandum of Points and Authorities in Support of Motion for Summary Judgment is within the limitation provided for in D.S.D LR 7.1(B)(1) using bookman old style typeface in 12 point type. According to the word processing software, Defendant's brief contains 9,415 words.

Dated this 15th day of February, 2011.

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