

DOCKET NOS. 14-56104 & 14-56105
PUBLISHED OPINION ISSUED OCT. 26, 2015
RICHARD C. TALLMAN AND MARY M. SCHROEDER, CIRCUIT JUDGES,
AND JOHN A. JARVEY, DISTRICT JUDGE

In the **United States Court of Appeals**
for the **Ninth Circuit**

**PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA &
YUIMA RESERVATION**, a/k/a PAUMA LUISENO BAND OF MISSION
INDIANS, a/k/a PAUMA BAND OF MISSION INDIANS, a federally-recognized
Indian Tribe,

Plaintiff & Appellee/ Cross-Appellant,

v.

**STATE OF CALIFORNIA; CALIFORNIA GAMBLING CONTROL
COMMISSION**, an agency of the State of California; and **EDMUND G. BROWN,
JR.**, as Governor of the State of California;

Defendants & Appellants/ Cross-Appellees.

District Court No. 09-01955 CAB-MDD (S.D. Cal.)

**PETITION FOR PANEL REHEARING AND SUGGESTION FOR
REHEARING *EN BANC* BY THE PAUMA BAND**

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GLOSSARY

PARTIES

CGCC	California Gambling Control Commission
Pauma/Tribe	Pauma Band of Luiseno Mission Indians
State	State of California

UNDERLYING STATUTE

IGRA	Indian Gaming Regulatory Act (25 U.S.C. § 2701 <i>et seq.</i>)
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BACKGROUND

1999 Compact	Form gaming compact entered into by the State and 63 tribes between the fall of 1999 and the spring of 2000
2004 Amendment	Amendment to the 1999 Compact that Pauma executed with the State in 2004
License Pool	Aggregate pool of gaming device licenses created by the formula in Section 4.3.2.2(a)(1) of the 1999 Compact

RELEVANT COURT DECISIONS

<i>Colusa II</i>	<i>Cachil Debe Band of Wintun Indians of Colusa Indian Cmty. v. California</i> , 618 F.3d 1066 (9th Cir. 2010)
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<i>Rincon II</i>	<i>Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger</i> , 602 F.3d 1019 (9th Cir. 2010)
<i>Rincon I</i>	<i>Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger</i> , 2008 WL 6136699 (S.D. Cal. 2008)

STATEMENT

This proceeding involves the exceptionally important question of whether a bad faith claim under the Indian Gaming Regulatory Act (“IGRA”), *see* 25 U.S.C. § 2701 *et seq.*, can occur after the execution (and subsequent rescission) of a compact induced by latent wrongdoing on the part of a state – a question our panel answered in the negative in apparent conflict with the majority and dissenting opinions in *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1042 (9th Cir. 2010) (“*Rincon IP*”).

INTRODUCTION

This petition deals with the issue of the remedies that are available to a tribe that is misled into executing an amended gaming compact under IGRA so a state can exponentially increase the amount of revenue sharing it receives under the agreement. On October 26, 2015, this panel issued an opinion affirming the decision of the district court, allowing the Pauma Band of Mission Indians (“Pauma” or “Tribe”) to get out of an amended compact and recoup the heightened payments that it made to the State of California (“State”) under the agreement. The remedial process stopped there, however, as the panel simply returned Pauma to an old agreement that will soon expire rather than issue the finding of bad faith against the State that would enable the parties to sit down and negotiate a successor compact under court supervision.

As the panel explained, its refusal to consider the bad faith issue arose not from a lack of evidence, but from the court predetermining the issue based on a stray piece

of dicta in the predicate case that disclosed that the State misrepresented the central license rights under Pauma's original compact. *See Cachil Debe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 618 F.3d 1066 (9th Cir. 2010) ("*Colusa IP*") (holding that the State unreasonably interpreted the number of gaming device licenses available under a model compact executed by sixty-plus California tribes in 1999). Yet, this prior case simply concerned the interpretation of a formula for calculating the total number of gaming device licenses available under the former compact, which the court did as a matter of law after deeming the parties' evidentiary submissions inadmissible. *Id.* at 1079. What this means is that the bad faith analysis in the present case disregarded the evidence and ultimately turned upon dictum in a prior opinion that itself disregarded the evidence. Thus, the bad faith inquiry is taking place in a vacuum, with the answer arising out of thin air rather than from such unreasonable and indisputable acts as the State limiting preexisting rights by upwards of 20% in order to resell them under an amended compact at 2,460% of their original cost.

The handling of the bad faith issue from a legal perspective is even more troubling than from the factual. This circuit has binding precedent on its books concerning the legality of revenue sharing demands in amended compact negotiations, a case that brands a 10-15% general fund revenue sharing demand that the State admits is modeled after the one in Pauma's amendment as "simply an impermissible demand for the payment of a tax by the tribe," and seemingly irrefutable evidence of bad faith. *Rincon II*, 602 F.3d at 1042. The authors of the majority and dissenting opinions contem-

plated that this decision would apply to past negotiation of concluded compacts to the same extent as future negotiations, with the central question being whether the tribe in question freely consented to the financial demand or was duped into executing the compact by a material misrepresentation or some other form of bad faith. *See id.* at 1037 n.17, 1073. Yet, this panel abandoned this inquiry and instead implemented an absolute bar prohibiting bad faith claims following the execution of a compact even though the rescission remedy has the effect of erasing the amended compact *en toto*, thus satisfying the text of IGRA and situating Pauma no differently than Rincon at the time it filed suit. *See Dow Chem. Co. v. United States*, 226 F.3d 1334, 1345 (Fed. Cir. 2000) (“Rescission has the effect of voiding a contract from its inception, *i.e.*, as if it never existed.” (citing 17B C.J.S. Contracts § 456 (1999))).

Issuing an opinion that overlooks the evidence and conflicts with *Rincon* has created a huge statutory gap in a statute that is becoming replete with them. Should it stand, this panel’s interpretation of IGRA will provide a remedy to a tribe who is confronted with the most obvious and patent bad faith tactics during negotiations, but not afford the same to those tribes faced with even more insidious latent bad faith conduct that does not appear until after the end of negotiations. For these unsuspecting tribes, a lawsuit will only confer partial relief and do the exact opposite of what IGRA intends by taking a compact away rather than providing the means to obtain a new one. Such an outcome will leave a tribe worse off than it was before a state engaged in its bad faith conduct, conflict with the plain language of IGRA, and

frustrate the plain purpose of IGRA to ensure the availability of some means for obtaining a new compact no matter how the State acts – a policy that the United States Department of the Interior reiterated earlier this year in a suit challenging the Secretary’s authority to promulgate regulations to cure the statutory gap created by *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). See *New Mexico v. U.S. Dept’ of Interior*, No. 14-2219, Doc. No. 01019393892 (10th Cir. Mar. 4, 2015) (“Whether a State negotiates in good faith, in bad faith, or not at all, Congress drew a map in which all roads lead to some kind of gaming procedures.”). Rather than add yet another hole to IGRA, this panel or the court sitting *en banc* should readdress the issue of whether a bad faith negotiation claim may be brought following the execution (and rescission) of a compact in order to rectify latent bad faith by a state.

PETITION FOR PANEL REHEARING

I. THE PANEL ERRED BY PREDETERMINING THE “BAD FAITH” ISSUE TO CLOSE OFF THE REFORMATIVE AND IGRA REMEDIES

A. A BAD FAITH OR FRAUDULENT MISREPRESENTATION CONSIDERS AWARENESS OF FALSITY AND NOT AWARENESS OF THE TRUTH AS THIS PANEL CONTENDS

The opinion placed Pauma into a Catch-22 position, with the panel concluding that the evidence of bad faith was irrelevant to the misrepresentation claim, but then that the Tribe could not obtain a reformatory remedy on account of the misrepresentation because it did not present any evidence of bad faith. Footnote six of the opinion explains that the panel refused to consider any evidence of “bad faith or... any

kind of evil intent” on the part of the State because “[n]othing in our decision in *Colusa II* suggests that the State *should have known* the correct number of licenses when negotiating with Pauma in 2003-2004.” Putting aside for now the fact that *Colusa II* involved a simple declaratory relief claim brought by a tribe that never amended its compact, the focus of the “fraudulent” misrepresentation test is on actual or presumed awareness of falsity, not awareness of the truth. *See* Restatement (Second) of Contracts § 162(1) (1981) (detailing three types of fraudulent misrepresentations, including that the maker “does not have the confidence that he states or implies in the truth of the assertion”). For instance, an illustration in the Restatement suggests that a party who dials down a car odometer to 18,000 from a much larger number is liable for the misrepresentation regardless of his awareness of the original and accurate total. *See* Restatement (Second) of Contracts § 159 illus. 1 (1981).

B. THE RECORD IN *COLUSA II* IS REplete WITH REFERENCES THAT THE STATE’S CONSTRAINED INTERPRETATION OF THE LICENSE POOL WAS UNREASONABLE

One of the more remarkable features of the evidentiary record and opinions in the license pool lawsuits is the number of times the courts explained that the State’s chosen number of 32,151 licenses was not reasonable before ultimately adopting a number that was between 8,050 and 23,800 larger. The panel of this court in *Colusa II* that excluded the parties’ evidence but nevertheless stated in dicta that the State arrived at its license pool number in good faith took a much different stance during

oral argument, explaining to State's counsel Neil Houston that *none* of the interpretations offered by the State tracked the language of the compact "in any respect":

Judge McKeowan: See the problem with that is the number... does not track the language [of the compact] in any respect. Or, is there a way to back that number into the formula?

Attorney Houston: Which number are you referring to now, your honor?

Judge McKeowan: Any of your numbers.

Oral Argument at 11:30, *Colusa II*, 618 F.3d 1066 (9th Cir. 2010).

These sentiments may have softened some in the six-and-a-half months between the oral argument and the filing date for the opinion, but Judge McKeowan still adhered to her stance that the "language of the License Pool Provisions is not reasonably susceptible to an interpretation that would produce a license pool of 32,151 licenses." *Colusa II*, 618 F.3d at 1079. Similar conclusions arose in the three district court opinions challenging the State's interpretation, with the district judge who originally presided over this suit jettisoning any careful phrasing and simply explaining that it "consider[ed] the Defendants' interpretation unreasonable" for multiple reasons. *See San Pasqual Band of Mission Indians v. California*, No. 06-0988, Doc. No. 97, 9:19 (S.D. Cal. Mar. 29, 2010).

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C. A PRIOR COMMENT ABOUT THE DUTIFULNESS OF AN INTERPRETATION THAT WAS DECLARED INADMISSIBLE AND NOT EVEN BEFORE THE COURT SHOULD NOT PREEMPT A REVIEW OF THE EVIDENCE

An unreasonable interpretation of self-drafted language that netted an unreasonable amount of new revenue for the State still receives a blanket grant of immunity, though. The inequity of extending any finding of good faith to the present matter becomes even clearer when one considers the differences between the two cases. The appeal in *Colusa II* strictly involved a question of contract interpretation, with the meat of the record on appeal consisting of little more than the compact language and the competing interpretations advanced by the various stakeholders involved in the suit. After all, the suit was simply concerned with the right answer, and not the reasons for the advancement of the wrong ones. The reason for this is the plaintiff tribe was still operating under the 1999 Compact and simply looking for a way to free-up its existing contract rights; Colusa was not one of the select few tribes like Pauma who amended its compact on the basis of the State's misrepresentation and thus needed to present a more detailed picture in order to show the sort of illicit conduct that would warrant restoring the old status quo and then holding the State accountable for its bad faith negotiating tactics that spurred the amendment. And yet, a limited record tailored to an extremely narrow claim became even more limited when the panel in *Colusa II* deemed the party's submissions about the supposed interpretation of the compact inadmissible:

In this case we never reach the question of what happens when the court is faced with conflicting admissible extrinsic evidence, because neither California's nor Colusa's evidence qualifies for admission in the first place.

Colusa II, 618 F.2d at 1077. The import of this statement is that the panel in *Colusa II* addressed the question of the State's supposed good faith in interpreting the license pool provision – which was not even an issue on appeal – without the benefit of the very interpretation upon which it was commenting.

The record on appeal was so limited in fact that it even gave the State pause about deciding the basic contract interpretation issue on summary judgment, an issue that is much less nuanced than deciding the dutifulness of one of the parties during compact negotiations. To wit, oral argument featured an exchange between Neil Houston and Judge David Campbell in which Mr. Houston argued in favor of remanding the matter for trial so the parties could paint a more complete picture of what the parties intended the license pool provision to mean in September 1999, and Judge Campbell inquiring whether that would produce a different result:

Campbell: So, if there... was a trial in this case, doesn't Judge Damrell do exactly in that trial what he did in the motions for summary judgment?

Houston: It is conceivable that that could happen, but we recognize that the evidence adduced at trial would be richer and more nuanced and probably more comprehensive than the evidence before the court on summary judgment. And a different outcome might be achieved in finding a common understanding by the parties in 1999.

Oral Argument at 28:40, *Colusa II*, 618 F.3d 1066 (9th Cir. 2010). Thus, even by the State's own admission, a record that is not as rich, nuanced, or comprehensive as it should be and was ultimately gutted when taken under submission cannot serve as a proxy for resolving an issue that was not even part of the prior appeal.

D. THE EVIDENCE IN THIS CASE SHOWS THAT THE STATE ENGAGED IN A SERIES OF UNREASONABLE ACTS TO RESELL PREEXISTING CONTRACT RIGHTS AT PRODIGIOUSLY INCREASED PRICES

The evidence missing from *Colusa II* and then some is now in hand, and this panel should consider it when determining whether the State engaged in bad faith conduct in *these* specific circumstances. The sheer amount of this evidence prohibits a full recitation, but highlighting a few key pieces will nevertheless show that the State engaged in the sort of objectively unreasonable conduct that is required to prove bad faith under either the Restatement or the test set forth in *Rincon II*. See, e.g., *Rincon II*, 602 F.3d at 1041 (“We therefore hold that good faith should be evaluated objectively based on the record of negotiations, and that a state’s subjective belief in the legality of its requests is not sufficient to rebut the inference of bad faith created by objectively improper demands.”).

First, every stakeholder in the process – from the State’s principal compact negotiator, to the initial chief of the California Gambling Control Commission (“CGCC” or “Commission”), to the signatory tribes – recognized that the trustee reference in Section 4.3.2.2(a)(3) of the 1999 Compact means that a neutral trustee was meant to oversee the license pool. [Doc. No. 23-3, SER180, SER193, SER207, SER214-215;

Doc. No. 23-4, SER265-267, SER 283] Despite this, the CGCC renounced its trust status after taking over administration of the pool and chose to unilaterally interpret a license pool provision it considered highly ambiguous rather than submit the issue to a federal court for resolution. [Doc. No. 23-4, SER289-290, SER304, SER307-309] At the end of this process, the CGCC stated that it chose a “conservative” and “low-end” figure for the total number of licenses and the tribes would simply have to renegotiate with the State if they desired more. [Doc. No. 23-4, SER301, SER309; SER314-315] Yet, the private procedures the CGCC created for administering the license pool completely undercut the Commission’s interpretation by explaining that the contested second component of the formula should include the tribes that operated zero devices in September 1999, just as this court later held in *Colusa II*. [Doc. No. 23-3, SER185-186; Doc. No. 23-4, SER328, § 4] Without the benefit of this information, Pauma entered into negotiations with the Office of the Governor to obtain licenses rights that should have been available under its 1999 Compact and saw its revenue sharing increase by 2,460%, a total that would include an amount of general fund revenue sharing that fits squarely in the middle of the range this court established in *Rincon II* for identifying an illegal tax that is all but conclusive evidence of bad faith. *See Rincon II*, 602 F.3d at 1042.

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E. EQUITABLE FRAUD SIMPLY REQUIRES ADVANTAGEOUS UNREASONABLE ACTIONS AND NOT AN EVIL MIND OR LEGAL FRAUD LIKE THE PANEL CONTENDS

This line of actions that encompasses unreasonably interpreting the license pool and exacting an unreasonable amount of revenue sharing afterwards easily satisfies the equitable conception of reformation on the basis of a fraudulent misrepresentation. It is worth noting that an explicit showing of fraud in the traditional sense is not required under this standard, however. Along with refusing to consider Pauma's evidence of bad faith, this panel committed a second error by interpreting the federal contract law authorities as requiring a showing of legal fraud in order to reform a contract in equity. The prevailing view that the Supreme Court adopted as early as 1963 in the case of *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 193-94 (1963), however, is that fraud in equity differs from legal fraud in that it does not require scienter and instead just looks at whether a party "obtained an undue advantage by means of some act or omission which is unconscientious or a violation of good faith," like a material misrepresentation. *Amara v. CIGNA Corp.*, 775 F.3d 510, 526 (2d Cir. 2014) (citing 3 John N. Pomeroy, *A Treatise on Equity Jurisprudence* § 873 (5th ed. 1941)). An abridgement of this standard is set forth in the leading case from this circuit for reforming a contract or trust under applicable federal law, *Skinner v. Northrop Grumman Ret. Plan B*, 673 F.3d 1162 (9th Cir. 2012). While this panel cites *Skinner* for the proposition that reformation is only permissible in cases of fraud, the "fraud theory" section of the *Skinner* opinion goes on to state that all that is required is a ma-

terial misrepresentation, which the plaintiff/appellant (unlike Pauma) failed to show in that matter. *See id.* at 1167.

Thus, the test for equitable fraud does not require a showing of legal fraud any more than the bad faith inquiry necessitates an evil intent. Rather, the key consideration in both of these analyses is simply an objectively and materially unreasonable act that resulted in an undue advantage for the other party. While this panel may be loath to consider the evidence in this case, an indisputable finding of bad faith arises simply on account of the *Colusa II* and *Rincon II* opinions that held that the State's interpretation of the license pool and the sheer amount of general fund revenue sharing it subsequently demanded from Pauma are both unreasonable. These two realities strip all meaning from the good faith dicta in *Colusa II* and warrant this panel reconsidering Pauma's entitlement to the reformatory or IGRA remedies that turn on considerations of good or bad faith.

SUGGESTION FOR REHEARING *EN BANC*

II. PROHIBITING BAD FAITH CLAIMS AFTER THE EXECUTION AND SUBSEQUENT RESCISSION OF A COMPACT PROCURED BY LATENT WRONGDOING CREATES YET ANOTHER STATUTORY GAP IN IGRA THAT UNDERMINES THE PURPOSE OF THE STATUTE TO ENSURE THE PROCESS RESULTS IN THE FORMATION OF A NEW COMPACT

A. THE PLAIN LANGUAGE OF IGRA SUPPORTS POST-EXECUTION BAD FAITH CLAIMS TO ADDRESS LATENT WRONGDOING

A second stopgap measure to prevent consideration of the bad faith evidence involved this panel interpreting IGRA in a way that will impact any number of tribes in

the future confronted with states that are becoming increasingly savvy in their pursuits to obtain revenue sharing under the compacts. The fundamental structure of the IGRA negotiation process has a tribe negotiating with a state over the terms of a compact pertaining to Class III games, such as house-banked card games, slot machines, and most other games that are commonly seen in Las Vegas and Atlantic City casinos. *See Rincon II*, 602 F.3d at 1027 (citing 25 U.S.C. § 2710(d)(3)(A)). A duty to negotiate these rights in good faith applies to the state during the negotiations, and a tribe is able to file suit in federal court to enforce this duty. *Id.* If a federal court finds that the State did not negotiate in good faith, it can trigger a tripartite remedial scheme that seeks to create a compact through renewed negotiations between the parties or subsequent processes that involve less and less participation from a recalcitrant state as time unfolds. *See* 25 U.S.C. § 2710(d)(7)(B)(iii).

The present case involves Pauma filing suit within months of the issuance of the district court opinion in the *Colusa* litigation to rescind its amended compact, obtain restitution of the heightened revenue sharing it paid under the agreement, and trigger the IGRA remedial process on account of the gross misrepresentations the State made about the Tribe's preexisting license rights during the negotiations which had just come to light. The statutory remedy was unavailable in the opinion of our panel, however, because the "plain language" of the statute requires a tribe to show that "a Tribal-State compact has not been entered into under [IGRA]" in order to prove a *prima facie* case of bad faith. *See* 25 U.S.C. § 2710(d)(7)(B)(ii)(I). Yet, one universally

accepted rule of contract law is that rescission wipes out a contract as if it never existed in the first place. *See, e.g., Monex Int'l, Ltd. v. CFTC*, 83 F.3d 1130, 1135 (9th Cir. 1996) (“[R]ecission of a contract extinguishes it as effectually as if it had never been made.”). While this argument and supporting case law was never acknowledged by our panel, it does show that the rescission remedy brings Pauma into strict compliance with the terms of the statute.

B. THE OPINION IN *RINCON II* STRONGLY SUGGESTS THAT POST-EXECUTION BAD FAITH CLAIMS ARE PERMISSIBLE

Concluding that the plain language of IGRA prohibits a bad faith claim following the rescission of a compact induced by latent wrongdoing not only overlooks these contract law principles but also creates a conflict with the opinion in *Rincon II*. This prior case concerned a neighboring tribe in San Diego County who entered into negotiations with the State on or about November 2005 – roughly sixteen months after Pauma executed its amended compact – and subsequently filed a bad faith claim solely on the basis of receiving a revenue sharing demand that the State admits was modeled after the one contained within Pauma’s amendment. *Rincon*, 2008 WL 6136699, *6 (S.D. Cal. 2008). In holding that the State’s financial demands were made in bad faith, Judge Milan Smith stated that the “demand for 10-15% of Rincon’s net win, to be paid into the State’s general fund, is simply an impermissible demand for the payment of a tax by the tribe.” *Rincon II*, 602 F.3d at 1042.

The ramifications of the holding seem as clear as the rule, with Judge Jay Bybee forewarning that the decision would call into question Tribal-State gaming compacts throughout the country and Judge Smith countering, not by holding that post-execution bad faith claims are barred, but by simply stating that “[t]hose tribe agreed that...the financial benefits they would receive from amending their 1999 compacts, were satisfactory to them.” *Rincon II*, 602 F.3d at 1037 n.17. Of course, the whole point of this suit is that the State’s unreasonable misrepresentation about the size of the license pool vitiated Pauma’s consent to the revenue sharing terms of the amendment no less than if the State applied some force that “fetter[ed] and obstruct[ed] [the will’s] free working.” Restatement (Third) of Restitution & Unjust Enrichment § 5 reporter’s note c (2011). Given that, the first and foremost bad faith opinion from this circuit would seemingly countenance the present bad faith claims and further require their resolution in Pauma’s favor.

C. THE PLAIN PURPOSE OF IGRA ALSO SUPPORTS POST-EXECUTION BAD FAITH CLAIMS, AS THE DEPARTMENT OF THE INTERIOR BELIEVES THE PROCESS IS SUPPOSED TO END WITH A NEW COMPACT

The apparent perception of the authoring judges in *Rincon II* that a tribe can bring a bad faith claim following the execution of a compact also vindicates the purpose of IGRA while making the statute wholly-functional. One of the more enduring and well-established canons of statutory construction is that “a court should go beyond the literal language of a statute if reliance on that language would defeat the plain

purpose of the statute.” *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983). This plain purpose of IGRA received quite a bit of attention earlier this year in the appellate briefing by the United States Department of the Interior in a lawsuit challenging the Secretary’s authority to promulgate regulations to cure the statutory gap created by the *Seminole* decision. The federal government minced no words in explaining that “Congress’s foremost goal was to ensure that tribes would have access to gaming procedures” whether “a State negotiates in good faith, in bad faith, or not at all.” *See New Mexico*, Doc. No. 01019393892, pp. 34, 36. Yet, the present outcome of this appeal will simply return Pauma to a compact that will soon expire, begging the misrepresenting party to act more dutiful during a second round of informal negotiations with no assurance that it will. The IGRA procedures would provide as much, and all the authorities suggest they should apply in these circumstances.

CONCLUSION

For the foregoing reasons, Pauma respectfully requests panel or *en banc* rehearing to address (1) the permissibility of post-execution bad faith claims in cases of latent wrongdoing, and (2) the indisputable bad faith involved herein.

RESPECTFULLY SUBMITTED this 9th day of November, 2015

By: /s/ Kevin M. Cochrane
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**CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 and 40-1**

I certify that pursuant to Circuit Rules 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

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Dated: November 9, 2015

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APPENDIX

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PAUMA BAND OF LUISENO MISSION
INDIANS OF THE PAUMA & YUIMA
RESERVATION, AKA Pauma Band of
Mission Indians, AKA Pauma
Luiseno Band of Mission Indians,
*Plaintiff-Appellee/
Cross-Appellant,*

v.

STATE OF CALIFORNIA; CALIFORNIA
GAMBLING CONTROL COMMISSION,
an agency of the State of California;
EDMUND G. BROWN, JR., as
Governor of the State of California,
*Defendants-Appellants/
Cross-Appellees.*

Nos. 14-56104
14-56105

D.C. Nos.
3:09-cv-01955-
CAB-MDD
3:09-cv-01955-
CAB-MDD

OPINION

Appeal from the United States District Court
for the Southern District of California
Cathy Ann Bencivengo, District Judge, Presiding

Argued and Submitted
July 10, 2015—San Francisco, California

Filed October 26, 2015

Before: Mary M. Schroeder and Richard C. Tallman,
Circuit Judges, and John A. Jarvey,* Chief District Judge.

Opinion by Judge Tallman;
Dissent by Chief District Judge Jarvey

SUMMARY**

Indian Law

Affirming the district court's summary judgment, the panel held that the Pauma Band of Luiseno Mission Indians was entitled to rescission of the 2004 Amendment to the 1999 Tribal-State Compact governing operation of Class III, or casino-style, gaming on Pauma's land.

The panel held that the interpretation of a Compact license pool provision in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. Cal.*, 618 F.3d 1066 (9th Cir. 2010), applied, such that the State of California would be deemed to have misrepresented a material fact as to how many gaming licenses were available when negotiating with Pauma to amend its Compact. The panel held that, unlike a change in judicial interpretation of a statute or law, the doctrine of retroactivity does not apply to contracts. Once there has been a final judicial interpretation of an ambiguous

* The Honorable John A. Jarvey, Chief United States District Judge for the Southern District of Iowa, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

contract provision, that is and has always been the correct interpretation from the document's inception. The panel held that the district court properly granted summary judgment on Pauma's misrepresentation claim.

The panel held that the district court awarded the proper remedy to Pauma by refunding \$36.2 million in overpayments, even though the district court mislabeled the remedy as specific performance, rather than rescission and restitution for a voidable contract. The panel held that this equitable remedy fell within the State's limited waiver of its sovereign immunity in the Compacts, and thus was not barred by the Eleventh Amendment.

On cross-appeal, the panel held that Pauma was not entitled to seek redress under the Indian Gaming Regulatory Act because the State and Pauma actually reached a gaming Compact.

Dissenting, Chief District Judge Jarvey wrote that the State did not commit the tort of misrepresentation by interpreting the Compact differently than a later court decision. He also wrote that, under the language of the Compact, the State did not waive its sovereign immunity with respect to this claim.

COUNSEL

Teresa Michelle Laird (argued), Deputy Attorney General; Kamala D. Harris, Attorney General of California; Sara J. Drake, Senior Assistant Attorney General; Neil D. Houston, Deputy Attorney General, San Diego, California, for Defendants-Appellants/Cross-Appellees.

Cheryl A. Williams (argued) and Kevin M. Cochrane, Williams & Cochrane, LLP, San Diego, California, for Plaintiff-Appellee/Cross-Appellant.

OPINION

TALLMAN, Circuit Judge:

Sixteen years ago more than sixty Native American tribes entered into Tribal-State Gaming Compacts with the State of California. Sadly, the long and tortured history leading to the culmination of these Compacts did not cease there. Rather, litigation based on ambiguous provisions as to the number of authorized gaming devices has ensued for most of the duration of these Compacts. *See In re Indian Gaming Related Cases*, 331 F.3d 1094, 1095–1107 (9th Cir. 2003) (detailing the entire history before and after the Compacts were enacted). Before us is yet another installment in this ongoing saga, this time between the Pauma Band of Luiseno Mission Indians (“Pauma” or “the Tribe”) and the State of California, the California Gambling Control Commission, and Governor Edmund G. Brown, Jr. (collectively “the State”).

Pauma sued the State based on our prior decision in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California* (“*Colusa II*”), 618 F.3d 1066 (9th Cir. 2010). We have been asked to determine (1) whether *Colusa II*’s interpretation of the Compacts’ license pool provision applies retroactively, such that the State would be deemed to have misrepresented a material fact as to how many gaming licenses were available when negotiating with Pauma to amend its Compact; (2) whether the district court awarded the proper remedy to Pauma by refunding \$36.2

million in overpayments; and (3) whether the State has waived its sovereign immunity under the Eleventh Amendment. We answer each question in the affirmative, although on alternative grounds supporting the relief awarded by the district court with respect to the remedy. On cross-appeal, Pauma also asks us to determine whether the State acted in bad faith under the Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. § 2710. We agree with the district court’s finding that IGRA is inapplicable here, and thus Pauma’s argument that the State acted in bad faith is irrelevant.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

We begin our journey with a quick overview of the weathered past between Native American tribes and the State of California, and then discuss the complicated procedural history that leads us here.

A

In 1988, Congress attempted to strike a delicate balance between the sovereignty of states and federally recognized Native American tribes by passing IGRA. The purpose of IGRA is well established:

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.” 25 U.S.C. § 2702(1), (2). 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 Cal. Grand Casino v. Norton, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002), *aff’d*, 353 F.3d 712 (9th Cir. 2003). IGRA creates three classes of gaming, with Class III gaming consisting of “the types of high-stakes games usually associated with Nevada-style gambling.” *In re Indian Gaming*, 331 F.3d at 1097. As a result, Class III gaming is subjected to the greatest degree of control under IGRA’s regulations. Class III gaming is lawful on Native American lands only if such activities are conducted pursuant to a Tribal-State Compact entered into by the tribe and a state that permits such gaming, and the Compact is approved by the Secretary of the Interior. *Id.* (citing 25 U.S.C. § 2710(d)(1), (3)(B)).

California did not immediately allow Indian gaming within its boundaries after the passage of IGRA. Some gubernatorial administrations were hostile to tribes conducting Class III gaming because it was then prohibited by California’s Constitution, and so the State refused to negotiate with the tribes to permit it. *See id.* at 1098–99. In 1998, the people of California spoke by passing the tribes’

ballot initiative—Proposition 5 (codified at Cal. Gov’t Code §§ 98000–98012). See *Hotel Emps. & Rest. Emps. Int’l Union v. Davis*, 21 Cal. 4th 585, 589 (1999). Proposition 5 contained a model compact purporting to effectuate IGRA’s provisions within California. *Id.* at 589–90. But the victory was short-lived. The California Supreme Court found all but one sentence of Proposition 5 unconstitutional.¹ *Id.* at 589, 615. Undeterred, the voters of California responded by amending the California Constitution on March 7, 2000, to create an exception for certain types of Class III Indian gaming notwithstanding the general prohibition on gambling in the State. *In re Indian Gaming*, 331 F.3d at 1103 & n.11.

In September 1999, several tribes began negotiating with the State to enter nearly identical Compacts to operate Class III, or casino-style, gambling (the “1999 Compact”). In April 2000, Pauma joined more than sixty other tribes who ultimately signed the 1999 Compact. The 1999 Compact contains a provision limiting the number of licenses²

¹ The sole surviving provision of Proposition 5 is the statutory waiver of sovereign immunity by the State for claims arising out of violations of IGRA. Cal. Gov’t Code § 98005. The California Supreme Court found this provision severable and recognized that the language was meant to effectuate IGRA since the U.S. Supreme Court had recently stripped the Act of its teeth in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). *Hotel Emps.*, 21 Cal. 4th at 614–15; see also *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1026 n.8 (9th Cir. 2010) (“California has waived its Eleventh Amendment immunity from such suits [brought by tribes under IGRA].”).

² Each license is the equivalent of one slot machine or electronic video gaming device, and each tribe was limited to a maximum of 2,000 licenses.

available statewide for tribes based on a formula.³ As we have previously observed, “[t]he License Pool Provisions that California and [the tribes] included in their Compact as a foundation for establishing Class III gaming in California are murky at best.” *Colusa II*, 618 F.3d at 1084. Due to the limited time the tribes had to negotiate with the State, the parties agreed to the 1999 Compact without ever discussing their radically different interpretations of how many licenses the statewide license pool formula actually produced. *See id.* at 1070–72; *In re Indian Gaming*, 331 F.3d at 1104. It required protracted litigation before we settled the number in *Colusa II*, 618 F.3d at 1082.

By December 2003, the State informed the tribes that the collective license pool had been exhausted—without stating the total number of licenses actually authorized—and Pauma received only 200 licenses in that draw instead of its requested 750. Thus several tribes, including Pauma, began negotiating with the State to amend their Compacts in order to abolish the license pool provision and gain access to an unlimited number of licenses. Since the State demanded

³ The formula, which has been the subject of much litigation, is found in section 4.3.2.2(a)(1) and reads:

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

Section 4.3.1 states tribes may not operate more gaming devices than “the larger of” “(a) A number of terminals equal to the number of Gaming Devices operated by the Tribe on September 1, 1999; or (b) Three hundred fifty (350) Gaming Devices.”

substantially more money per operable license during negotiations, only five tribes—including Pauma—ultimately concluded such amendments (“2004 Amendment”). *See id.* at 1072. At the time, Pauma was set to enter into a contract with Caesars to build a Las Vegas-style casino in place of Pauma’s tent facility near San Diego, but needed more gaming licenses to do so.⁴

Several lawsuits ensued. By 2009–2010, these suits had percolated in the district courts for several years, and culminated in dispositive opinions rendered by our court. *See Colusa II*, 618 F.3d at 1084; *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1026 (9th Cir. 2010) (holding that the State negotiated in bad faith by refusing to remove a provision from the proposed 2004 Amendment for 15% of Rincon’s net wins, which we declared an impermissible tax under IGRA). In *Colusa II*, we held that the State miscalculated the number of licenses in the common pool under the 1999 Compact. 618 F.3d at 1080.

⁴ For more detail on the unsuccessful deal with Caesars, see *Pauma Band of Luiseno Mission Indians v. Harrah’s Operating Co.*, No. D050667, 2009 WL 3069578 (Cal. Ct. App. Sept. 28, 2009). In summary, the Pauma and Rincon tribes are competitors whose casinos are only six miles apart in San Diego County. *Id.* at *2. The Rincon tribe had already paired with Harrah’s in building a Nevada-style casino, and was operating 1600 licenses when their negotiations with the State broke down over the proposed 2004 amendments. Pauma intended to enter its contract with Caesars to compete with Rincon, but then Caesars and Harrah’s merged in 2004. *Id.* Pauma knew the Rincon’s exclusivity agreement with Harrah’s would preclude it from building a competing casino and so Pauma backed out of the Caesars deal. *Id.* at *3–4. Pauma continued by negotiating with several other large gaming companies (Hardrock, Foxwood, etc.), but the economic recession of 2008 struck and no deal was ever completed. *Id.* Pauma has never been able to build a larger casino, and still operates its 1,050 licenses out of a tent facility.

We found that the formula in the 1999 Compact allows for a statewide total of 40,201 licenses, not the 32,151 that the State had originally calculated. *Id.* at 1082.

B

Shortly after the district court in *Colusa* rendered its decision holding that more licenses existed than the State had allowed, Pauma filed a complaint asserting eighteen claims attacking the formation of the 2004 Amendment under various theories, including mistake and misrepresentation. Pauma notes that it has remained at roughly 1,050 licenses since December 2003 when the State first asserted that the license pool had been depleted, while two neighboring tribes operate at least 2,000 gaming devices apiece. Pauma executed the 2004 Amendment because it needed to have at least 2,000 licenses in order to secure a viable deal with a Las Vegas-style operator. But after the putative deals fell through, Pauma continued paying California the exorbitantly expensive 2004 Amendment prices for the same machines it acquired under the 1999 Compact provisions. Under the original 1999 Compact, Pauma paid \$315,000 annually for the 1,050 machines. Under the 2004 Amendment, Pauma paid \$7.75 million annually. Pauma sought reformation, injunctive relief, rescission, and restitution.

In April 2010, the United States District Court for the Southern District of California granted Pauma's request for injunctive relief from the annual \$7.75 million payments, permitting Pauma to revert to the 1999 Compact rate. The State appealed. On the prior appeal, No. 10-55713, we left the injunction in place but remanded to the district court for reconsideration of the preliminary injunction factors in light of recent cases, including *Colusa II*. On remand, the case was

reassigned to three different district judges before the court finally ruled on the summary judgment motions, leaving the injunction in place.

Presently before us is the district court's summary judgment ruling in favor of Pauma on its misrepresentation claim. In light of our ruling in *Colusa II*, the district court found the State had misrepresented the number of licenses available in December 2003 when it told Pauma the pool was exhausted; in fact, there were 8,050 remaining. As a result, the district court rescinded the 2004 Amendment, allowed Pauma to return to the 1999 Compact's lower rate, and ordered as specific performance a refund of the difference in payment that Pauma had made as between the higher and lower rates for the 1,050 machines (totaling \$36,235,147.01). The district court also held that the State had waived its Eleventh Amendment sovereign immunity in a provision in the 1999 Compact, which the parties had left undisturbed in the 2004 Amendment. The court further held that the State was not entitled to a setoff for the profits Pauma made between 2004 and 2009 because Pauma should have been able to obtain the 1,050 machines under the correctly calculated license formula in the 1999 Compact.

The district court entered final judgment in December 2013, but was immediately asked by Pauma to vacate the order so it could request further relief. Pauma sought a ruling on two additional claims labeled "bad faith/violation of IGRA" so that the Tribe would be entitled to reformation rather than rescission. The district court denied the request as moot since it would not result in a remedy different from the one already provided to Pauma, and held it would fail on the merits in any event. This ruling triggered Pauma's mandamus petition, which we denied as premature earlier this

year.⁵ The State’s appeal and Pauma’s cross-appeal are now ripe for review.

II

We review a district court’s grant of summary judgment *de novo*. *Big Lagoon Rancheria v. California*, 789 F.3d 947, 952 n.4 (9th Cir. 2015) (en banc). “Summary judgment is appropriate if there is no genuine issue of material fact and, even making all reasonable inferences in favor of the nonmoving party, the moving party is entitled to judgment as a matter of law.” *Rincon*, 602 F.3d at 1026. We also review the following legal determinations *de novo*: interpretation of contracts based on the plain meaning, *Colusa II*, 618 F.3d at 1070; whether negotiations were conducted in good faith under IGRA, *Rincon*, 602 F.3d at 1026; and the applicability of Eleventh Amendment sovereign immunity, *Idaho v. Coeur d’Alene Tribe*, 794 F.3d 1039, 1042 (9th Cir. 2015). “General principles of federal contract law govern the Compacts, which were entered pursuant to IGRA.” *Colusa II*, 618 F.3d at 1073 (citation omitted). We “often look to the . . . Restatement when deciding questions of federal common law.” *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 93 n.6 (D.C. Cir. 2001). We may also rely on California contract law since there is no practical difference between state and federal law in this area. *Id.*

⁵ Pauma’s mandamus petition essentially challenged the district court’s decision to rule solely on its misrepresentation claim, and refusal to reach any of the other claims—such as the Tribe’s bad faith claims under IGRA. We allowed Pauma to assert such claims in its cross-appeal, and Pauma has chosen to do so. We address them below.

“We review the district court’s choice of remedy for abuse of discretion.” *Id.* at 1082. A misapplication of the correct legal rule constitutes an abuse of discretion. *United States v. Hinkson*, 585 F.3d 1247, 1261–62 (9th Cir. 2009) (en banc). Otherwise, we must “determine whether the trial court’s application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.” *Id.* at 1262 (internal quotations omitted).

III

The heart of the State’s argument before us focuses on whether there was a “fact in existence” that it misrepresented to Pauma during the 2004 negotiations. Thus, we review whether *Colusa II*’s holding that 40,201 licenses were available—meaning 8,050 remained in December 2003 when the State told Pauma that the license pool had been depleted—constitutes a “fact in existence” giving rise to liability under Pauma’s misrepresentation claim. We hold that, unlike a change in judicial interpretation of a statute or law, the doctrine of retroactivity does not apply to contracts. Once there has been a final judicial interpretation of an ambiguous contract provision, that is and has always been the correct interpretation from the document’s inception.

In order to establish its misrepresentation claim, Pauma must demonstrate: (1) the State made a misrepresentation about a fact in existence, (2) that was either fraudulent or material, (3) which induced Pauma to enter into the 2004 Amendment, and (4) Pauma was justified in relying on the State’s misrepresentation. *See* Restatement (Second) of Contracts § 164(1) (1981); *see also Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1137 (9th Cir. 2000) (adopting the

Restatement definition for misrepresentation). The outcome of this case hinges on the first prong. “A misrepresentation is an assertion that is not in accord with the facts” as they exist at the time the assertion is made. Restatement (Second) of Contracts § 159 & cmt. c. “Such facts include past events as well as present circumstances but do not include future events. An assertion limited to future events . . . may be a basis of liability for breach of contract, but not of relief for misrepresentation.” *Id.* § 159 cmt. c.

Furthermore, “an assertion need not be fraudulent to be a misrepresentation” so long as “it is material.” *Id.* § 159 cmt. a; *cf. Reliance Fin. Corp. v. Miller*, 557 F.2d 674, 680 (9th Cir. 1977) (referring to this version as “innocent misrepresentation”).⁶ A misstated fact is “material if it would be likely to induce a reasonable person to manifest his [or her] assent” to enter a contract. Restatement (Second) of Contracts § 162(2). “A misrepresentation induces a party’s manifestation of assent if it substantially contributes to his [or her] decision to” enter the contract. *Id.* § 167. Although a party must have justifiably relied upon the misrepresentation, “the requirement of justification is usually met unless, for example, the fact to which the misrepresentation relates is of

⁶ We note that the district court had before it Pauma’s claims for either innocent/material misrepresentation or fraudulent/negligent misrepresentation—and the court ruled for Pauma solely on the former. Thus, we refuse to consider any of Pauma’s assertions that the State knowingly acted in bad faith or with any kind of evil intent. The formula was confusing. We definitively resolved the issue in 2010. Nothing in our decision in *Colusa II* suggests the State *should have known* the correct number of licenses when negotiating with Pauma in 2003–2004, and we refuse to so hold now. We review only whether innocent misrepresentation was properly applicable.

only peripheral importance to the transaction” *Id.* § 164 cmt. d.

While both parties dispute whether the doctrine of retroactivity applies, that doctrine is a red herring because we are dealing with a contract provision. The State argues that our holding in *Colusa II* does not apply “retroactively.” In essence, the State asserts that the district court erred in granting summary judgment for Pauma because the license pool did not expand until mid-2009 when a district court first handed down its ruling in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California* (“*Colusa I*”), 629 F. Supp. 2d 1091 (E.D. Cal. 2009). In the State’s view, the number of available licenses changed when we handed down *Colusa II* in 2010. Thus, the State contends it could not have misrepresented an existing fact when it denied licenses to tribes beyond a total of 32,151. We reject this argument.

We find that the term “retroactive” is a misnomer in the realm of contract interpretation. Once a court has interpreted an ambiguous contract provision that is and has *always been* the correct interpretation from its formation. Although the cases discussing the retroactivity of judicial decisions interpreting statutes may be instructive, a contract is fundamentally different from a statute or a body of law. A contract is a private agreement formed between two parties to represent their mutual intent. *See* Restatement (Second) of Contracts § 3. Thus, a contract provision has only one true meaning—what it meant when written—even though the parties may later dispute the correct interpretation. By contrast, a statute is enacted by Congress and the

understanding of its provisions may evolve over time, often through judicial interpretations or legislative amendments.⁷

“[T]he fundamental goal of contract interpretation is to give effect to the mutual intent of the parties *as it existed at the time* of contracting.” *U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 934 (9th Cir. 2002) (emphasis added). This fundamental axiom is widely accepted and uncontested. *See, e.g., Colusa II*, 618 F.3d at 1073 (holding the “court gives effect to the mutual intention of the parties *as it existed at the time* the contract was executed” (emphasis added) (internal quotations omitted)); *Liberty Nat’l Bank & Trust Co. v. Bank of Am. Nat’l Trust & Sav. Ass’n*, 218 F.2d 831, 840 (10th Cir. 1955) (“[T]he basic rule of universal acceptance for the ascertainment of [the parties] intention is for the court, so far as possible, to put itself in the place of the parties when their minds met upon the terms of the agreement”); 11 Williston on Contracts § 31:9 (4th ed. 2015).

When dealing with interpretation of a contract there is no such thing as a “change in the law”—once a final judicial decision determines what the contested language supports, that is it. The State’s argument that *Colusa II* “changed” the number of licenses available under the license pool provision defies logic. As is typical in contract interpretation cases, the dispute was between the parties’ competing calculations. Once we decreed that 40,201 licenses were available under the formula provision based on a reasonable interpretation of

⁷ Therefore, the dissent’s reliance on *Curtin v. United Airlines, Inc.* is misplaced as it involves the judicial interpretation of a provision of the Warsaw Convention; a legislatively enacted document, similar to a statute, rather than a contract. *See* 275 F.3d 88, 96–97 & nn. 16–20 (D.C. Cir. 2001).

the contract language and the intention of the parties at the time it was formed, we resolved the dispute. *Colusa II*, 618 F.3d at 1081–82. Thus, the number of licenses never “changed” as the State asserts.

In *Colusa II*, we found that the State did not adequately explain why it had chosen 32,151 for the total available licenses since “the foundation for this . . . number is at odds with the plain language of the contract and with an interpretation of part of the formula that is now agreed upon by both parties.” *Id.* at 1076; *see also id.* at 1078 nn. 9 & 12. We calculated the correct number of licenses that “were authorized for distribution statewide through the license draw process,” to be 40,201, *id.* at 1082, and then we turned to the opinion’s prospective effect on other tribes. We recognized that “the remedy deprived the state of its right to litigate the size of the license pool under different facts in other pending and future cases” because we purposefully “anticipated that California would be liable for a single number of licenses in the statewide pool, *not separate numbers for separate litigants* based on their respective situations.” *Id.* at 1084 (emphasis added) (internal quotation marks omitted). In sum, our interpretation in *Colusa II* of the 1999 Compact’s license pool provision is the final word for all tribes, at all times.

The formula for calculating the license pool never changed—it just took over a decade to reach a final judicial interpretation which settled a longstanding dispute over the number of licenses it authorized. Innocent misrepresentation of a different number does not require a fraudulent or misleading intent. *See* Restatement (Second) of Contracts § 159 cmt. a. It simply requires a fact, which is material, to be false. *Id.* § 159 cmts. a, c. The formula stated in the 1999 Compact is a fact. The number of tribes with and without

Compacts as of the listed date (September 1, 1999) was an ascertainable, existing fact. *See Colusa II*, 618 F.3d at 1073. The number of licenses each tribe with a Compact had as of that date was also an existing fact. *Id.* at 1074. The State had all of the information it needed to calculate its own formula.⁸ The State simply miscalculated.

Understandably, the State “expresses a sense of unfairness engendered by the retrospective application of a new judicial interpretation of an [existing contract provision]. But the essence of judicial decisionmaking necessarily involves some peril to individual expectations.” *Morales-Izquierdo v. Dep’t of Homeland Sec.*, 600 F.3d 1076, 1090 (9th Cir. 2010) (internal quotation and alterations omitted). The State could have sought a declaratory judgment much earlier, but it did not. The State also could have simply used fixed numerals in the formula, but it did not. The fact that there was ambiguity in the formula’s language or that the State interpreted the total number of licenses in good faith is irrelevant to the analysis. We interpreted the total number of licenses in the license pool to be 40,201 based on a reasonable interpretation of the contract language. Therefore, in December 2003, the State misrepresented an existing fact to the tribes—including Pauma—that no further licenses were available when, in fact, there were 8,050 more licenses under the correct interpretation of the formula.

⁸ “[I]t is undisputed that the State’s negotiation team actually drafted [this provision] in the Compact.” *Colusa I*, 629 F. Supp. 2d at 1115. As such, general contract principles also indicate that any ambiguity in “the language of the contract should be interpreted strongly against the party who caused the uncertainty to exist’ [(i.e., the State drafters)].” *Id.* at 1113 (quoting *Buckley v. Terhune*, 441 F.3d 688, 695–96 (9th Cir. 2006)).

The State's remaining arguments regarding the misrepresentation claim warrant only brief discussion. First, the State's argument that the license pool provision was not material to the 1999 Compacts borders on the incredible. *See Colusa II*, 618 F.3d at 1069 ("Central to the Compacts is a formula to calculate the number of gaming devices California tribes are permitted to license."). Second, the State's argument that the limited number of licenses did not induce Pauma to enter the 2004 Amendment is equally absurd, considering procurement of more licenses (at least 2,000) was essential to its putative contract with Caesars, dependent on at least that many devices. Finally, Pauma justifiably relied on a fact that was entirely within the State's control (the total number of available licenses). Pauma has, therefore, established that no genuine issue of material fact remains as to its misrepresentation claim, and the district court properly granted summary judgment.⁹

IV

After granting summary judgment in favor of Pauma on its innocent misrepresentation claim, the district court turned to the appropriate remedy. Since the Compacts include a limited waiver of sovereign immunity that allows for suit seeking an equitable remedy, but not one seeking monetary damages, we must first decide what the correct remedy is. Then we determine whether that remedy is barred by the

⁹ We note that most tribes have already received their licenses under *Colusa II*, which approved the district court's remedy of re-opening the draw process for the remainder of the licenses. By contrast, Pauma is one of only five tribes who chose to amend its Compact and thus paid higher prices for licenses which it should have been able to obtain under the original 1999 Compact.

Eleventh Amendment or if it falls within the State’s limited waiver.

A

The district court erred in awarding Pauma \$36.2 million under the guise of “specific performance.” Specific performance is a remedy associated with breach of contract. Restatement (Second) of Contracts § 357; 81A C.J.S. *Specific Performance* § 4 (2015) (“[A] cause for specific performance ordinarily cannot lie until there has been a breach of the contract.”). “A party who has avoided a contract on the ground of . . . misrepresentation . . . is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.” Restatement (Second) of Contracts § 376; 1 Witkin, Summary of California Law, Contracts § 1022 (10th ed. 2005) (“A person who pays money under the mistaken belief that he or she is under a duty to do so may recover it.”). Furthermore, “[s]pecific performance . . . will not be granted unless the terms of the contract are sufficiently certain to provide a basis for an appropriate order.” Restatement (Second) of Contracts § 362.

Where, as here, no breach of a contract has been alleged, but rather a challenge to its formation—*i.e.*, Pauma would not have entered into the 2004 Amendment had it known additional licenses were available at the cheaper 1999 Compact rates—the contract is voidable and the appropriate remedy is rescission and restitution. *See* 1 Witkin, Summary of California Law, Contracts § 307 (10th ed. 2005) (noting innocent misrepresentation is grounds for rescission); *see also Reliance Fin. Corp.*, 557 F.2d at 680 (same); Restatement (Third) of Restitution §§ 52, 54 (2011); Dan B. Dobbs, *Law of Remedies* § 4.1(1) (2d ed. 1993) (“When the contract itself

is unenforceable, restitution is usually the *only* remedy available for benefits the plaintiff has conferred upon a defendant in part performance.” (emphasis in original)); *id.* § 9.2(2) (“A representation by the defendant, if believed by the plaintiff, would be the equivalent of a mutual mistake for which rescission would be granted.”); *id.* § 9.3(1).

Moreover, one cannot specifically perform something that is not a term in the contract. *Cf.* Restatement (Second) of Contracts § 362. The Compact did not contain a clause for dealing with overpayments. The sole option for returning Pauma to the *status quo ante* was equitable restitution. *Id.* § 376; *see Ambassador Hotel Co. v. Wei-Chuan Inv.*, 189 F.3d 1017, 1031 (9th Cir. 1999). Thus, the district court misapplied the law in labeling the remedy specific performance.

However, in this case, the district court’s error in mislabeling the remedy does not require reversal. Neither side disputes the calculation of \$36,235,147.01 as the difference between the higher 2004 Amendment payments and the lower 1999 Compact’s rates. Rather, the State challenges only whether it is entitled to a setoff for the profits Pauma gained from operating machines it would not have had absent the 2004 Amendment, and Pauma now alleges it is entitled to essentially reform the entire contract under the procedures outlined in IGRA. Since we reject both arguments, we affirm the district court’s calculation of the remedy on the alternative grounds of equitable rescission and restitution.

Under general contract principles, “[w]hen calculating restitution, we must offset the Plaintiffs’ award by the value of any benefits that Plaintiffs received from the [D]efendant

under the contract, so that only the actual, or net, loss is compensated.” *Republic Sav. Bank, F.S.B. v. United States*, 584 F.3d 1369, 1377–78 (Fed. Cir. 2009) (internal quotation omitted); *see, e.g., Cal. Fed. Bank v. Matreyek*, 8 Cal. App. 4th 125, 134 (1992) (holding restitutionary recovery inequitable where the bank would be able to retain both a benefit and a profit); Restatement (Second) of Contracts § 384; Dan B. Dobbs, *Law of Remedies* § 9.3(3) (2d ed. 1993). The State is not entitled to a setoff here because Pauma would have made the same profits by acquiring the same number of machines under the 1999 Compact that it now operates under the 2004 Amendment if the State had not miscalculated the number of available licenses.

The State argues that, although this would return Pauma to the *status quo ante* in theory, in reality it would unjustly enrich Pauma vis-à-vis the other tribes who were parties to the 1999 Compact because the other tribes were unable to obtain “unlimited” machines as Pauma could under the 2004 Amendment and thus did not earn additional profits. Essentially, the State argues that Pauma will receive a windfall of roughly \$16 million by sitting on the sidelines during the *Colusa* litigation.

However, the State’s argument depends on viewing the situation holistically, in contravention to general litigation principles. The district court correctly stated it must deal solely with the parties before it. *See, e.g., Boating Indus. Ass’n v. Marshall*, 601 F.2d 1376, 1382 n.7 (9th Cir. 1979) (“Remedy for this injury would depend upon actions of third parties not before the court in this action.”). Under this view, as between Pauma and the State, Pauma is not obtaining a “windfall” because it should never have had to pay the State the \$36.2 million in the first place, and it should have been

able to obtain the same number of licenses (a total of 1,050) for less money. Thus, the State's argument—to consider Pauma's position in comparison to the other tribes who were unable to obtain further licenses and the attendant profits—must fail. The district court correctly held that the State is not entitled to a setoff.

Pauma's argument for reformation meets a similar fate. On cross-appeal, Pauma requests reformation of the 2004 Amendment—rather than rescission—so that Pauma may keep the amended contract's extended term limit (expiring in 2030 instead of 2020) at the more favorable 1999 Compact price rates. “[H]owever, reformation is proper only in cases of fraud and [mutual] mistake.” *Skinner v. Northrop Grumman Ret. Plan B*, 673 F.3d 1162, 1166 (9th Cir. 2012); see Restatement (Second) of Contracts § 166 (referencing only fraudulent misrepresentation as giving rise to reformation as a remedy); Dan B. Dobbs, *Law of Remedies* § 9.5 (2d ed. 1993) (“Reformation is the appropriate remedy . . . for fraud or mistake in the written expression of the agreement.”). This case involves *innocent* misrepresentation, not *fraudulent* misrepresentation. Reformation is thus inappropriate here.

In sum, the district court erred in applying the law of contractual remedies by awarding Pauma specific performance rather than ordering rescission and restitution. But because neither side challenges the calculation of the remedy, only whether a setoff should be applied or reformation ordered as a superior remedy—both of which we reject—we affirm the district court's award to Pauma of \$36,235,147.01 under the equitable remedies of rescission and restitution.

B

Because the State must refund the \$36.2 million in overpayments, we next consider whether the district court correctly held that the State had waived its Eleventh Amendment sovereign immunity in this case to permit such relief.

“[T]he rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.” *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). The Supreme Court has extended this bar to suits brought by Native American tribes even though they are sovereigns in their own right. *See Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779–82 (1991). In *Edelman*, the Court made clear that a state’s sovereign immunity extends even to equitable judgments, particularly if “the award resembles far more closely the monetary award against the State itself . . . than it does the prospective injunctive relief . . .” 415 U.S. at 665. The Court specifically rejected an individual’s claims for “equitable restitution” based on the state’s wrongful withholding of benefits under a public aid program. *Id.* at 656, 665. Thus, the Court held only prospective, non-monetary relief against state officials is exempt from the Eleventh Amendment bar. *Id.* at 677.

“However, there are exceptions to this general bar.” *N.E. Med. Servs., Inc. v. Cal. Dep’t Health Care Servs.*, 712 F.3d 461, 466 (9th Cir. 2013). The Supreme Court discussed one such exception at length in *Edelman*—waiver. 415 U.S. at 671–74. *Edelman* recognized that Congress may abrogate a states’ sovereign immunity via a clear, express legislative statement, or a state may enter a “compact” by which the state

expressly and unequivocally waives its own immunity. *Id.* at 672. “In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.” *Id.* at 673 (internal quotation and alteration omitted).

Here, the State waived its Eleventh Amendment sovereign immunity through an explicit contractual waiver. The 1999 Compact contains a limited waiver of sovereign immunity on behalf of both the State and the Tribe, which the 2004 Amendment left undisturbed. It reads in relevant part:

Sec. 9.4. Limited Waiver of Sovereign Immunity.

(a) In the event that a dispute is to be resolved in federal court . . . , the State and the Tribe expressly consent to be sued therein and waive any immunity therefrom that they may have provided that:

(1) The dispute is limited solely to issues arising under this Gaming Compact;

(2) Neither side makes any claim for monetary damages (that is, only injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought);

This is an express waiver that falls within the exception to the Eleventh Amendment delineated in *Edelman*—but the parties dispute the scope of the waiver. We must determine whether the exclusion for monetary damages in Section 9.4(a)(2) includes authorization to seek the remedy of rescission and restitution.

We hold that the proper remedy here does not trigger the exclusion provision, and thus the State waived its sovereign immunity for Pauma’s misrepresentation claim. We begin by analyzing the language of the contract itself. *See Colusa II*, 618 F.3d at 1073. The contractual language establishes a clear dichotomy between claims for monetary damages—which are excluded and thus barred by sovereign immunity—and equitable relief. Although restitution may be considered a legal or equitable remedy, *see* Restatement (Third) of Restitution § 4(1); Dan B. Dobbs, *Law of Remedies* § 4.1(1) (2d ed. 1993), interpreting the contract as a whole demonstrates that restitution was contemplated by the parties as a potential remedy for which sovereign immunity was waived. Thus, we hold that restitution is included in the waiver “by such overwhelming implications from the text as will leave no room for any other reasonable construction.” *Edelman*, 415 U.S. at 673 (internal quotation and alteration omitted).¹⁰

¹⁰ The district court relied, as Pauma does on appeal, on *Bowen v. Massachusetts*, 487 U.S. 879 (1988), for the distinction drawn between monetary damages awards (meant to compensate for an injury) and specific monetary relief (meant to reinstate one to his or her original position). *Id.* at 893. But *Bowen* simply reaffirms two steadfast principles: (1) equitable relief, which may take the form of money, is different than monetary damages; and (2) when Congress has specifically provided a waiver of sovereign immunity in a statute that allows for equitable relief (there, the Administrative Procedure Act (“APA”)), that

“A written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations.” *Wapato Heritage, L.L.C. v. United States*, 637 F.3d 1033, 1039 (9th Cir. 2011) (internal quotation omitted); *see* Restatement (Second) of Contracts § 202(2). Here, reading the contract as a whole, the present restitutionary order falls well within the waiver. First, the waiver applies “provided that . . . [n]either side makes any claim for monetary damages (*that is*, only injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to one or another of the parties [which must mean either Pauma or the State of California], or declaratory relief is sought).” The parties’ choice of the phrase “that is” indicates a *non-exhaustive* list allowing for equitable and declaratory forms of relief.

Second, and more significantly, one of the listed examples of relief for which immunity is waived is “enforcement of a provision of this Compact requiring payment of money to one or another of the parties.” This clause envisions payment of

may occasionally involve specific relief in the form of money. However, those propositions do not answer the contractual interpretation question presented here.

We have already stated that *Bowen* does “not implicate Eleventh Amendment concerns” since it only analyzed the statutory language of the APA. *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1513 (9th Cir. 1994). Furthermore, although *Bowen* cited approvingly contract cases awarding specific performance, those cases all dealt with a *breach* of contract issue and enforcement of a *contract provision* to pay money—neither of which exist in the present case. Consequently, *Bowen* sheds light on the current case only to the extent it reinforces our conclusion that restitution of the money wrongfully paid by Pauma may still be awarded as an equitable remedy and is not a claim for monetary damages against the State.

money to *either* party, and yet the Compact does not contain any provisions requiring payment of money from the State to the Tribe.¹¹ If this clause did not contemplate the restitutionary remedy ordered by the district court and affirmed herein, then the provision would be operative only as to one party, not both. Excluding restitution as a remedy that the Tribe could seek under this waiver would render this clause null and void. *Cf.* 11 Williston on Contracts § 32:5 (4th ed. 2015) (“An interpretation which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless or inexplicable.”). Even if “that is” is construed to limit waiver only as to the remedies listed, as urged by the dissent, the restitution remedy ordered by the district court still falls within that restrictive interpretation. Thus, the district court properly held that restitution by the State of overpayments by the Tribe was included in the waiver.

In sum, the contractual waiver clearly envisions restitution as falling within its purview, and only actions for monetary *damages* or actions not arising from the Compact itself to be excluded. The proper remedy for Pauma due to the State’s misrepresentation of the number of licenses available under the 1999 Compact’s formula is rescission of the 2004 Amendment and restitution for the overpayments made. Therefore, the State contractually waived to this extent its Eleventh Amendment sovereign immunity and Pauma was

¹¹ The State itself asserts that no provision in the contract required it to pay Pauma money when arguing that specific performance was the wrong remedy. That argument cuts against the State here given the language of the agreement.

not barred from bringing its misrepresentation claim seeking rescission and restitution.¹²

V

On cross-appeal, Pauma asserts the district court erred by denying summary judgment on the Tribe's fifth and sixth claims for relief—styled as bad faith/IGRA violation claims. Pauma provides a lengthy and fact-intensive explanation why it thinks the State acted in bad faith with respect to the entirety of their course of dealings over the last fifteen years. The Tribe relies heavily upon our recent decision in *Rincon*, involving a different California tribe, that upheld a finding of bad faith under IGRA. However, in the process, Pauma ignores the explicit statutory language of IGRA under which it seeks relief. The district court held Pauma's IGRA claims were moot because rescission of the 2004 Amendment had already been granted,¹³ judicially estopped as inconsistent

¹² In any event, California—unlike many states—has chosen to legislatively enact a broad statutory waiver of sovereign immunity for claims arising out of violations of IGRA. *See* Cal. Gov't Code § 98005; *Hotel Emps.*, 21 Cal. 4th at 615. Because we find the contractual waiver to include the restitutionary remedy sought and recovered here, we need not reach whether the statutory waiver would also apply. We do note, however, that our ruling is supported by the California Supreme Court, which upheld the constitutionality of the waiver provision contained in the referendum by the people. *Hotel Emps.*, 21 Cal. 4th at 615.

¹³ Neither of the parties briefed this issue so we need not reach it, but we also note the district court's analysis is supported by our recent en banc decision in *Big Lagoon Rancheria*, 789 F.3d at 955 (holding the tribe's cross-appeal was moot regarding bad faith claim since the district court had ruled in the tribe's favor on other grounds).

with Pauma’s earlier position,¹⁴ and barred by the plain language of the IGRA statute. We affirm on the last ground.

The plain language of IGRA does not support Pauma’s argument. IGRA states that a Native American tribe “shall request” a state to enter into negotiations for the purposes of entering a Tribal-State Gaming Compact, and “[u]pon receiving such a request, the State *shall negotiate* with the Indian Tribe *in good faith* to enter into such a compact.” 25 U.S.C. § 2710(d)(3)(A) (emphasis added). In order to give effect to this language, the statute vests federal district courts with jurisdiction over “any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) *or* to conduct

¹⁴ Pauma’s claims are not inconsistent, as the district court found. Although Pauma did not use the words “bad faith” in the body of its complaint with respect to these IGRA claims, it relied heavily on *Rincon*’s holding that the State’s request for 15% of the tribe’s net wins in its proposed 2004 Amendment was an impermissible tax under IGRA and that the State thus negotiated in bad faith when it refused to remove that provision. *Rincon*, 602 F.3d at 1024–25, 1036, 1042. We did not express an opinion as to the validity of the provision for the five tribes, including Pauma, who successfully negotiated and obtained a 2004 Amendment because their Compacts “were satisfactory to them” and the tribes freely entered into the amendments. *Id.* at 1037 n.17. Since Pauma had the same provision in its 2004 Amendment that was at issue in *Rincon*, Pauma argues that the same result should be applied in its case.

The district court also found that Pauma was requesting different relief, but in fact Pauma had been requesting “reformation” based on IGRA claims five and six in the complaint from the beginning. Pauma merely requested “rescission” and “restitution” in addition, with claim ten (misrepresentation) providing a basis for such relief. Thus, Pauma’s claims in its complaint and summary judgment motion are not inconsistent.

such negotiations *in good faith*[.]” *Id.* § 2710(d)(7)(A)(i) (emphasis added).

The next subsection describes, in detail, the procedure a tribe must follow if a state does not adhere to these mandates. *Id.* § 2710(d)(7)(B). Specifically, the Native American tribe must first introduce evidence that “a Tribal-State compact *has not been entered into* under paragraph (3),” and “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[.]” *Id.* § 2710(d)(7)(B)(ii)(I), (II) (emphasis added). Then, IGRA provides a remedy if such an event should occur: “If . . . the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, 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) (emphasis added). This same section also lists factors a court may consider when determining whether a State has negotiated in good faith. *Id.*

The detailed procedures set forth in IGRA allow for redress by Native American tribes when a State refuses to negotiate or negotiates in bad faith for a gaming Compact. These procedures, by their own language, simply do not apply when the State and the Tribe have *actually reached a Compact*. See *id.* § 2710(d)(7)(B)(ii)(I). *Rincon* does not hold otherwise. Cf. 602 F.3d at 1026. The Rincon tribe (Pauma’s nearby competitor in San Diego) also entered into negotiations with the State in 2003 and 2004—but Rincon *refused to sign* an actual amended Compact with the State and filed suit instead. *Id.* at 1023, 1026; see also *Big Lagoon Rancheria*, 789 F.3d at 951–52; *In re Indian Gaming*, 331 F.3d at 1110 (holding the State did not negotiate in bad

faith with respect to the 1999 Compact's revenue provisions, which the tribe refused to sign). Pauma is thus in a very different position than the Rincon tribe because it actually agreed to the 2004 Amendment and did not challenge the negotiation process under IGRA.

Therefore, the district court correctly concluded: "Although [] IGRA may allow a court to reform or rescind an unlawful agreement (which is what Pauma wanted until now), it does not allow the Court to turn back the clock and compel re-negotiation of an agreement actually reached ten years ago, let alone one that has been rescinded and never would have been negotiated in the first place in light of the relief the Court has already granted in this case." The relief Pauma seeks in its cross-appeal is not available under the plain statutory language of IGRA, and we affirm the district court's denial of Pauma's summary judgment motion on this ground.

VI

In conclusion, we hold that once a court's judgment interpreting an ambiguous contract provision becomes final, that is and has always been the correct interpretation from its inception. As such, the State innocently misrepresented a material fact when it erroneously informed Pauma the 1999 Compact's license pool had been depleted based on its miscalculation of the formula. Since this misrepresentation induced Pauma to enter into the much more expensive 2004 Amendment, the Tribe is entitled to rescission of the amendment and restitution for the \$36.2 million in overpayments made to the State. The Eleventh Amendment does not bar this suit because the State contractually waived its sovereign immunity for claims arising out of the Compacts

seeking such relief. Finally, Pauma is not entitled on cross-appeal to seek redress under IGRA because the plain language of the statute precludes relief when the Tribe and the State actually enter into a Compact.¹⁵

AFFIRMED. Each party shall bear its own costs.

JARVEY, Chief District Judge, dissenting:

I agree with the majority's conclusion that courts determine contracting parties' intent as of the time the contract is executed. I disagree, however, that California committed the tort of misrepresentation by interpreting the Compact differently than a later court decision. The provision regarding the number of available licenses in the Compact was hopelessly ambiguous. California, the compacting tribes, the district court and this court all interpreted it differently. That this court's opinion differed from that offered by California does not establish that California made "an assertion that [was] not in accord with the facts" as they existed at the time the assertion was made. RESTATEMENT (SECOND) OF CONTRACTS § 159 & cmt. c.

The decision in *Colusa II* was not the result of any judicial fact finding. In fact, this court rejected the parties'

¹⁵ Pauma makes conclusory references to the claims it advanced in its mandamus petition, asking the court to vacate the magistrate judge's order denying Pauma's motion to compel discovery and to reassign the case to a different district court judge based on her handling of the IGRA claims. We deny both of these requests as moot in light of our holding foreclosing further pursuit of Pauma's claims under IGRA.

extrinsic evidence for contract interpretation purposes and determined the number of available licenses as a matter of law. Because extrinsic evidence was rejected and the number determined as a matter of law, all parties to the Compact were on equal footing with respect to their ability to interpret this ambiguous provision. The majority is correct when it notes that any party could have sued to get more clarity. The tribes in *Colusa II* did, but the plaintiff here chose instead to negotiate for the possibility of receiving more licenses than have ever been available under the 1999 Compact.¹

On the misrepresentation issue, *Curtin v. United Airlines, Inc.*, 275 F.3d 88 (D.C. Cir. 2001) is analogous and persuasive. *Curtin* involved a provision of the Warsaw Convention (a treaty) that established the compensation to be paid by a carrier when passengers' luggage was lost during international travel. The Warsaw Convention provided for a payment of \$9.07 per pound up to the maximum of a seventy pound bag, or \$635. United Airlines had a practice of paying the maximum amount (\$635) for lost international luggage rather than weighing the bags and paying the \$9.07 price per pound for the lost luggage. That practice had been interpreted by some courts as permissible, and by others as impermissible. Ultimately, the District of Columbia Circuit Court of Appeals rejected the practice, holding that the Warsaw Convention did not cap liability at \$635 where the carrier had failed to weigh the bags as required.

In *Curtin*, passengers who had settled their lost luggage claims for \$635 sued claiming, among other things, that the

¹ I find it more than ironic that Pauma has received monetary damages as a result of *Colusa II* that were denied to the tribes that won that decision. I find it inequitable.

settlement agreements were procured by United's misrepresentation of its obligation under the Warsaw Convention, as later determined by the Court of Appeals. However, the District of Columbia Circuit held that United did not make a misrepresentation by reasonably interpreting the Warsaw Convention differently than the later District of Columbia Court of Appeals decision. This decision is sensible, intuitive and analogous to what happened in the matter now before the court. Because I believe that the State's interpretation of this ambiguous contractual provision does not qualify under the common law definition of a material misrepresentation, I respectfully dissent.

I also do not believe that the State of California waived sovereign immunity with respect to this claim. The 1999 Compact waives immunity as follows:

Sec. 9.4. Limited Waiver of Sovereign Immunity.

(a) In the event that a dispute is to be resolved in federal court . . . , the State and the Tribe expressly consent to be sued therein and waive any immunity therefrom that they may have provided that:

(1) The dispute is limited solely to issues arising under this Gaming Compact;

(2) Neither side makes any claim for monetary damages (that is, only injunctive, specific performance, including enforcement of a provision of this Compact requiring

payment of money to one or another of the parties, or declaratory relief is sought);

With respect to subsection (a)(2), the majority finds that the words “that is,” when read together with the rest of the contract, demonstrate that the list of claims for which sovereign immunity has been waived is non-exhaustive.

The phrase “that is” is commonly thought of as a shorthand version of the phrase “that is to say.” It is used to preface a more specific delineation of the preceding contractual language. Here, to further clarify the limitation of the waiver, the parties stated, “that is, *only* injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought” (emphasis added). The use of the word “only” is routinely defined to mean alone, solely or exclusively. The monetary damages awarded here do not qualify as injunctive, specific performance or declaratory relief. Because the law demands that waivers of sovereign immunity ordinarily derive only from “the most express language” or “such overwhelming implications from the text as [will] leave no room for any other reasonable construction,” there can be no waiver found here. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (citation and internal quotation marks omitted) (alteration in original). I find no other implications from the text, and certainly not overwhelming implications, of sovereign immunity waiver.