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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CHICKEN RANCH RANCHERIA OF ME-WUK INDIANS, BLUE LAKE RANCHERIA, CHEMEHUEVI INDIAN TRIBE, HOPLAND BAND OF POMO INDIANS, and ROBINSON RANCHERIA, Plaintiffs, **v.** **GAVIN NEWSOM, Governor of California, and STATE OF CALIFORNIA,** Defendants.	1:19-cv-00024-AWI-SKO **STATE DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** Date: December 16, 2020 Time: 1:30 p.m. Courtroom: 2, 8th floor Judge: Honorable Anthony W. Ishii Trial Date: None Set Action Filed: 1/4/2019

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INTRODUCTION

Defendants, Governor Gavin Newsom and the State of California (collectively, State Defendants), submit the following points and authorities in support of State Defendants' Motion for Summary Judgment in their favor and against Chicken Ranch Rancheria of Me-Wuk Indians, Blue Lake Rancheria, Chemehuevi Indian Tribe, Hopland Band of Pomo Indians, and Robinson Rancheria (collectively, Plaintiff Tribes). The Plaintiff Tribes allege in their Second Amended Complaint for Declaratory and Injunctive Relief (SAC) that the State Defendants violated the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2710-2712, 18 U.S.C. §§ 1166-1167. Specifically, the Plaintiff Tribes allege that during class III gaming compact negotiations the State Defendants insisted that they agree to include subjects in their new compacts that violate IGRA.

Based on the Joint Record of Negotiations (Record) and the State Defendants' Separate Statement of Undisputed Facts (Undisputed Facts), the Plaintiff Tribes inaccurately assert that the State acted in bad faith. Respectfully, the State Defendants request summary judgment for three reasons. First, the State Defendants are not in bad faith procedurally because over the course of two gubernatorial administrations, they have kept negotiating in good faith and at length with the Compact Tribes Steering Committee (CTSC). Second, the Record shows that the State Defendants are not in bad faith because they have never demanded that either the CTSC or the Plaintiff Tribes include in their new compacts topics that are unlawful. Third, the Plaintiff Tribes' so-called "Improper Subjects of Negotiation" are not unlawful. These subjects, which include provisions for revenue sharing with non-gaming tribes, mitigation payments to local governments, and protections for basic labor rights, are all proper IGRA negotiation topics. Moreover, even if any of the topics exceeded IGRA's scope, the State could lawfully negotiate and offer the Plaintiff Tribes meaningful concessions to include them in new compacts.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 authorizes summary judgment where the movant shows there is no genuine dispute as to any material fact and he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The court must construe the evidence and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *T.W. Elec. Serv., Inc. v.*

Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987). Where the issue before the court involves the proper interpretation of statutes and regulations, and the parties agree on the "material" facts, the matter may be resolved as a matter of law on summary judgment. *See Edwards v. Aguillard*, 482 U.S. 578, 594-95 (1987); *Shishido v. SIU-Pac. Dist.-PMA Pension Plan*, 587 F.Supp. 112, 114 (N.D. Cal. 1983).

SUMMARY OF ARGUMENT

The State Defendants request this Court to grant summary judgment in their favor for three reasons. The State Defendants are not in bad faith procedurally because over the course of two gubernatorial administrations, they have kept negotiating in good faith and at length with CTSC. The Record demonstrates the State Defendants' good faith attempt to complete IGRA negotiations for new compacts that would succeed the CTSC tribes' 1999 compacts. During the gubernatorial administration of Governor Brown, CTSC and the State held 26 days of negotiations from 2015 through the end of 2018. To assist the State and CTSC in moving these negotiations forward, the negotiating parties often exchanged proposed draft compacts. As a result of these negotiations, CTSC and the State reached consensus on a series of important agreements on compact provisions near the end of the Brown administration. These serious negotiations continued when the Newsom administration took office at the beginning of 2019, and they remain ongoing. However, the Plaintiff Tribes, and not the State Defendants, made a "take-it-or-leave-it" demand and terminated ongoing negotiations. Based on this history of active and willing engagement in negotiations by the State, the State Defendants have not negotiated in bad faith under IGRA

In addition to demonstrating ongoing good faith negotiations, the Record shows that the State Defendants are not in bad faith because they have never demanded that either the CTSC or the Plaintiff Tribes include in their new compacts topics that are unlawful. The State Defendants have not demanded that any of the Plaintiff Tribes' so-called improper subjects under IGRA must be included in new compacts. While many of these topics were discussed during ongoing negotiations, the State Defendants never issued a "take-it-or-leave-it" demand, or otherwise insisted that they must all be included in new compacts. Nor did the State Defendants otherwise

demand that a final version of the compact must include these subjects, or that the tribes must agree to the State Defendants' version of these proposals. Instead, the Record demonstrates that the State Defendants continue to discuss and negotiate about these topics in ongoing negotiations.

The State Defendants are also entitled to summary judgment because the negotiation topics that the Plaintiff Tribes call improper are not unlawful. Federal courts have already ruled that most of these subjects, such as revenue sharing with nongaming tribes, off-reservation impact payments to local governments, and basic labor provisions are all permissible under IGRA's catch-all provision in 25 U.S.C. § 2710(d)(3)(C)(vii). While the parties disagree on the legal issue of whether these compact topics fall outside of IGRA's permissible scope, there is no dispute that the Plaintiff Tribes, and not the State Defendants, terminated ongoing negotiations. As a result, the State could not offer any meaningful concessions to resolve such a dispute. Rather than seeking to engage in meaningful negotiations, the Plaintiff Tribes are instead essentially seeking an improper advisory opinion regarding the inclusion of certain class III gaming topics in IGRA compacts.

ARGUMENT

I. THE HISTORY OF TRIBAL GAMING AND IGRA IN CALIFORNIA

In re Indian Gaming Related Cases, 331 F.3d 1094 (9th Cir. 2003) (*Coyote Valley II*) recounts extensively the events leading to IGRA's passage, and the subsequent compact negotiations between California and dozens of Indian tribes resulting in the original 1999 Compact. The need for IGRA became paramount in 1987, when the United States Supreme Court held that California lacked the authority to enforce on Indian reservations its civil-regulatory gambling laws in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). As a result, gambling on tribal lands was subject only to federal regulation or state criminal prohibitions. *Artichoke Joe's v. Norton*, 216 F.Supp.2d 1084, 1091-92 (E.D. Cal. 2002). To address concerns regarding the regulation of gambling on tribal lands, Congress passed IGRA in 1988 as a "compromise solution to the difficult questions involving Indian gaming." *Id.* at 1092. IGRA provides "a statutory basis for the operation of gaming by Indian tribes" and 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." *Id*.

IGRA's cooperative federalism role for state governments is found in its compacting requirement. This IGRA provision accords states "the right to negotiate with tribes located within their borders regarding aspects of class III tribal gaming that might affect legitimate State interests." *Coyote Valley II*, 331 F.3d at 1097. Class III gaming "includes the types of high-stakes games usually associated with Nevada-style gambling. Class III gaming is subject to a greater degree of federal-state regulation than either class I [social games] or class II [bingo and certain non-banked card games] gaming." *Id.* at 1097.

This federal statutory scheme makes class III gaming lawful on tribal lands only if such activities are: 1) authorized by an ordinance or resolution adopted by the governing body of the Indian tribe and approved by the Chairman of the National Indian Gaming Commission; 2) located in a state that permits such gaming for any purpose by any person, organization, or entity; and 3) conducted in conformance with a tribal-state compact entered into by the Indian tribe and the state and approved by the Secretary of the United States Department of the Interior (Secretary). 25 U.S.C. § 2710(d)(1) & (d)(3)(B). An Indian tribe is not authorized to operate class III gaming on its lands located in California absent a negotiated compact between the State and the tribe that is approved by the Secretary, or the implementation of "procedures" by the Secretary following a finding of bad-faith negotiating by the State. *Coyote Valley II*, 331 F.3d at 1097-98.

Some of the challenges that can face tribes and a state during IGRA compact negotiations were highlighted in California when, in 1999, Governor Gray Davis commenced compact negotiations with a group of tribes. *Coyote Valley II*, 331 F.3d at 1102. A California Supreme Court decision, released while these negotiations were underway, invalidated a statutory initiative that purported to require the Governor to enter into a model tribal-state gaming compact on the ground that the initiative violated article IV, section 19(e) of the California Constitution. *Hotel Emp. & Rest. Emps. Int'l Union v. Davis*, 21 Cal. 4th 585 (1999); *Coyote Valley II*, 331 F.3d at 1101, 1103. In response, Governor Davis "proposed an amendment to Section 19 of Article IV of

the California Constitution that would exempt tribal gaming from the prohibition on Nevada-style casinos, effectively granting tribes a constitutionally protected monopoly on most types of class III games in California." *Coyote Valley II,* 331 F.3d at 1103. This proposed amendment became Proposition 1A, and its adoption by the California voters in 2000 authorized the governor to negotiate compacts for casino-style gambling on Indian lands in California. The State and approximately sixty Indian Tribes then entered into the 1999 Compact. Cal. Gov't Code § 12012.25(a) & (b); "Notice of Approved Tribal-State Compacts," 65 Fed. Reg. 95, p. 31189 (May 16, 2000).

A. The Relevant Factors for Determining Good Faith under IGRA Are Based Upon the Record

IGRA provides that any eligible Indian tribe "shall request the State . . . to enter into negotiations for the purpose of entering into a Tribal-State compact . . . ." 25 U.S.C. § 2710(d)(3)(A). The State "shall negotiate with the Indian tribe in good faith to enter into [a tribal-state] compact." *Id*. But negotiations are, of course, a two-way street. A state's ability to negotiate in good faith to reach a mutually acceptable compact assumes that a tribe shares the same goal.

While IGRA requires "good faith" negotiations, the statute does not define this important term. *In re Indian Gaming Related Cases v. State of California,* 147 F.Supp.2d 1011, 1020 (N.D. Cal. 2001) (*Coyote Valley I*); *see* 25 U.S.C. § 2710(d)(3)(A). In making this good-faith determination, the court "may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities," and "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). Reported cases that have analyzed a state's good faith are usually adjudicated on motions for summary judgment or motions to dismiss based on the written record. *Wisconsin Winnebago Nation v. Thompson,* 22 F.3d 719, 723 (7th Cir. 1994) (question of bad faith negotiations under IGRA decided on cross-motions for summary judgment); *Cheyenne River Sioux Tribe v. State of South Dakota,* 830 F.Supp. 523, 527 (D. S.D. 1993) (issue of good faith negotiation under IGRA

should be decided on the basis of the transcripts of the negotiations). The reason for such treatment is that negotiation histories between states and tribes is not a subject-matter that lends itself to much dispute. The proposals, counter-proposals, letters, and other documents that are part of the negotiations constitute the evidence that courts will consider when determining good faith.

In regard to the 1999 Compacts, after reviewing the record of negotiations between the State and the tribes, both the district court and the Ninth Circuit rejected a tribe's numerous procedural and substantive complaints that the State failed to negotiate in good faith under IGRA. *Coyote Valley II,* 331 F.3d at 1107-17; *Coyote Valley I*, 147 F.Supp.2d at 1021-22. In doing so, the courts identified several relevant factors to consider when determining, based on the record of negotiations, whether a state negotiated in good faith. These factors include the following:

- Did the State remain "willing to meet with the tribe for further" compact negotiations? *Coyote Valley II,* 331 F.3d at 1110 (Ninth Circuit finding that the negotiation history showed that the State "actively negotiated with Indian tribes").
- Are the tribe's "challenged provisions" the result of negotiations or "unilateral demands by the State"? *Coyote Valley I*, 147 F.Supp.2d at 1021 (district court finding that the challenged "Tribal Labor Relations Ordinance" was not a "unilateral" State demand).
- Was it the tribe, and not the State, that "declined to engage in further negotiations"? *Coyote Valley I*, 147 F.Supp.2d at 1021-22 (district court finding that during negotiations the tribe "apparently [had] not contacted the State to arrange any further IGRA negotiations"].
- Are the challenged provisions "categorically forbidden by the terms of IGRA"? *Coyote Valley II,* 331 F.3d at 1110-17 (Ninth Circuit holding that the State did not negotiate in bad faith by refusing to enter into a compact without the Revenue Sharing Trust Fund (RSTF), the Special Distribution Fund (SDF), and the Tribal Labor Relations Ordinance).

As shown below and in the Record, an examination of these factors with respect to the negotiations between CTSC and the State demonstrates the State Defendants' good faith.

B. IGRA's Good Faith Standard and Permissible Compact Topics

Since Proposition 1A's passage, the State has negotiated numerous compacts under IGRA with tribes across California. These compacts include a wide range of topics, consistent with IGRA's mandate, permitting that tribal-state gaming compacts "may include provisions relating to" the following seven subject areas:

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

25 U.S.C. § 2710(d)(3)(C)(i)-(vii).

The scope of these seven subject areas in 25 U.S.C. § 2710(d)(3)(C)(i)-(vii), and how they are interpreted, is one of the principal legal issues presented in the Plaintiff Tribes' bad faith IGRA claim against the State Defendants. This dispute raises the question of the meaning of 25 U.S.C. § 2710(d)(3)(C)(i)-(vii), and how federal courts have applied the "traditional tools of statutory construction" when interpreting this IGRA statutory provision. *Chemehuevi Indian Tribe v. Newsom*, 919 F.3d 1148, 1151 (2019), citing *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257 (9th Cir. 1994.) Central to resolving this dispute is the plain meaning rule, which requires courts to first look to the text of the law. *Chevron U.S.A., Inc.*

v. NRDC, 467 U.S. 837, 842-44, 104 S. Ct. 2778 (1984). When Congress's will "has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) (internal quotation marks omitted); *accord Chevron*, 467 U.S. at 843. If the language is clear and unambiguous, there is "no need to look beyond the plain meaning in order to derive the 'purpose' of the statute." *Tang v. Reno*, 77 F.3d 1194, 1196 (9th Cir. 1996). In discerning the plain meaning of a statutory provision, a court "must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *Rainero v. Archon Corp.*, 844 F.3d 832, 837 (9th Cir. 2016) (quoting *King v. Burwell*, ___ U.S. ___, 135 S. Ct. 2480, 2489 (2015)).[1]

In applying this plain meaning rule to IGRA, several courts have already analyzed 25 U.S.C. § 2710(d)(3)(C)(i)-(vii) to determine what topics may be included in tribal-state gaming compacts. These cases have established the following helpful principles of interpretation:

- The catch-all categories in paragraphs (3)(C)(vi)-(vii) "are broader than the more specific topics enumerated in paragraphs (3)(C)(i)-(v)." *Chemehuevi*, 919 F.3d at 1152.
- Because the catch-all categories in 25 U.S.C. § 2710(d)(3)(C)(vi)-(vii) are interpreted more broadly, they can include topics that are not expressly enumerated in IGRA. This interpretation avoids rendering the catch-all categories meaningless, and instead "favor[s] an interpretation that gives meaning to each statutory provision." *Chemehuevi*, 919 F.3d at 1153 (citing *Life Techs. Corp. v. Promega Corp.,* 137 S.Ct. 734, 740 (2017)).

[1] Although application of the "plain meaning rule" to 25 U.S.C. § 2710(d)(3)(C)(i)-(vii) begins, and may well end, with the plain meaning of the language of the statute, the rule permits, but does not require, a court to consult legislative history as an aid to statutory interpretation, even when the statute's meaning seems clear on its face. *Church of Scientology v. United States Dep't of Justice*, 612 F.2d 417, 421-22 (9th Cir. 1979). Likewise, the rule permits a court to look to the object and policy behind the statutory scheme if instructive or as lending support to a court's plain language analysis. *Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 728 (9th Cir. 2011).

- Given their broad nature, the Ninth Circuit has interpreted the catch-all categories in 25 U.S.C. § 2710(d)(3)(C)(vi)-(vii) to not "categorically forbid" several important compact provisions. These permissible compact provisions under the catch-all categories include 1) durational limit provisions (*Chemehuevi*, 919 F.3d at 1152), 2) provisions requiring the sharing of gaming revenues through the RSTF with non-gaming tribes (*Coyote Valley II*, 331 F.3d at 1110-1113), 3) provisions for payments to the SDF that can be used for several purposes, including mitigation payments to local governments (*id.* at 1113-1115), and 4) provisions requiring tribes to adopt labor relations protections covering employees at tribal gaming facilities (*id.* at 1115-1116).

II. THE RECORD SHOWS THAT THE STATE DEFENDANTS NEGOTIATED IN GOOD FAITH WITH THE PLAINTIFF TRIBES UNDER IGRA

A tribe that brings an action under 25 U.S.C. § 2710(d)(7)(A)(i), must show that 1) no tribal-state compact has been entered and 2) the state either failed to respond to the tribe's request to negotiate or did not respond to the request in good faith. 25 U.S.C. § 2710(d)(7)(B)(ii)(II). At that point, the burden then shifts to the state to prove that it did in fact negotiate in good faith. *Id.*; *see Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 50 (1996). Based on the Record, summary judgment should be granted in the State's favor on the Plaintiff Tribes' IGRA complaint for the following three reasons.

A. The State Defendants Maintained an Ongoing Commitment Through Two Gubernatorial Administrations to Good-Faith Negotiations with the Plaintiff Tribes

The Record demonstrates that the State Defendants are not in bad faith procedurally because over the course of two gubernatorial administrations, they have kept negotiating in good faith and at length with the CTSC. Certain critical facts are beyond dispute. First, during the gubernatorial administration of Governor Brown, CTSC and the State held 28 days of negotiations from 2015 through the end of 2018. Undisputed Fact Nos. 7, 11-14. To assist the State and CTSC in moving these negotiations forward, prior to negotiation sessions the Record reflects that the negotiating parties exchanged many documents, including proposed language for

certain compact sections, background information and proposed draft compacts. Undisputed Fact No. 15. During the course of negotiations, the State proffered at least twelve full draft compacts to CTSC, and CTSC proffered approximately fourteen to the State. Undisputed Fact No. 16. While these negotiations were at times challenging, the negotiation sessions and draft compact exchanges resulted in significant progress. Near the end of the Brown administration in 2018, the State and CTSC had reached consensus, subject to approval of a final compact, on a series of important compact terms. These included compact for Applicant, Categorical Exemption, Gaming Activity, Gaming Employee, Gaming Facility, Gaming Operation, Initial Study, Mitigated Negative Declaration, Negative Declaration, Project, and Significant Effect(s) on the Off-Reservation Environment. Undisputed Fact No. 18.

In addition to the above compact definitions, near the end of the Brown administration in 2018, the State and CTSC had also reached consensus, subject to approval of a final compact, on a series of important compact sections. These included compact sections for Scope of Class III Gaming Authorized, Approval and Testing of Gaming Devices, Patron Disputes, Tribal Gaming Facility Standards Ordinance, Insurance Coverage and Claims, Emergency Services Accessibility, Alcoholic Beverage Service, Possession of Firearms, Court Resolution, Arbitration Rules for the Tribe and the State, Effective Date and Term of Compact, and Renegotiations. Undisputed Fact No. 19.

Even though consensus had been reached on the above compact definitions and sections by the end of the Brown administration, a significant amount of work remained subject to further negotiation. Specifically, on October 13, 2018 the State transmitted a list of the compact issues that were still unresolved. Undisputed Fact No. 20. This list included the following issues: The definitions of Gaming Device and New Win, the authorized number of gaming devices and gaming facilities, the payments into and the use of the SDF, the available remedies related to the loss of tribal exclusivity for the operation of slot machines, the provisions relating to the RSTF and the Tribal Nation Grant Fund, the employee harassment and discrimination complaint process, the minimum wage issue, the withholding of tax issue, the enforcement of family support orders, finalization of the language related to the parties' waivers of sovereign immunity, the

provision regarding force majeure, tribal representations regarding the tribes' execution of the compact, a description and map of tribal land eligible for gaming as of the date of compact execution, and the Tribal Labor Relations Ordinance (TLRO). Undisputed Fact No. 21.

To address the unresolved compact issues, Compact negotiations between the State and CTSC continued after Governor Newsom took office in January 2019. Anna Naimark, Governor Newsom's Tribal Negotiations Advisor, met with CTSC tribal leaders on April 9, 2019. Undisputed Fact No. 23. A compact negotiation session was held on June 5, 2019. Undisputed Fact No. 24. On July 3, 2019, the State sent CTSC a revised draft compact for discussion at the negotiation session scheduled for July 16, 2019. Undisputed Fact No. 25. This negotiation session was held on July 16, 2019, Undisputed Fact No. 30, and CTSC provided the State with a revised draft compact on September 3, 2019. Undisputed Fact No. 31. On September 9, 2019, the State provided CTSC a draft compact and other materials for discussion at the negotiation session scheduled for September 19, 2019. Undisputed Fact No. 32. This negotiation session was held on September 19, 2019. Undisputed Fact No. 33. CTSC and the State also planned for the next negotiation session on a mutually convenient date in late October or November, 2019. Undisputed Fact No. 34.

Based on this history of ongoing negotiations, the State submits that it has negotiated in good faith with both CTSC and the Plaintiff Tribes. In several respects, this IGRA case is similar to the negotiation history reviewed by the federal courts in *Coyote Valley I* and *Coyote Valley II*. In both the district court and the Ninth Circuit decisions, the courts examined the history of ongoing IGRA compact negotiations that spanned the time-period between the gubernatorial administrations of Governors Pete Wilson and Gray Davis. At the district court, the plaintiff tribe argued that during the several years of compact negotiations, the Wilson and Davis administrations negotiated in bad faith under IGRA because they both "unreasonably delayed the initiation of negotiations, and repeatedly refused timely to meet with tribal representatives." *Coyote Valley I*, 147 F.Supp. at 1015. In rejecting this argument, the district court observed that arguments concerning the previous Wilson administration carried "little weight" when determining good faith because "common sense dictates that a State that has, in the recent past,

negotiated in good faith should not be compelled to submit to the procedures set forth in 25 U.S.C. § 2710(d)(7)(B)(iii) and (iv) based on its conduct in the more distant past." In regard to the Davis administration, the district court held that "Any delays that may have been caused by the State do not rise to the level of bad faith." *Id.* On appeal, the Ninth Circuit affirmed, holding that the record reflected active negotiations by the Davis administration, and that "the State remained willing to meet with the tribe for further discussions." *Coyote Valley II*, 331 F.3d at 1110.

Similar to *Coyote Valley I* and *Coyote Valley II*, the Plaintiff Tribes cannot show bad-faith negotiations by the State. The Record shows that the Brown administration actively negotiated with CTSC in good faith, and that consensus was reached on many important provisions for new compacts. After the Newsom administration named Ms. Naimark as the Tribal Negotiations Advisor, these meaningful negotiations continued. Under these facts, even if the Plaintiff Tribes could show any previous bad-faith negotiations by the Brown administration, such actions would carry "little weight" to support their present injunctive relief claim under IGRA against the Newsom administration. *Coyote Valley I*, 147 F.Supp.2d at 1015. Accordingly, because the Record shows that the Newsom administration is continuing good-faith negotiations, the State Defendants are entitled to summary judgment.

B. The State Defendants Never Acted in Bad Faith by Insisting on Compact Provisions Categorically Forbidden by IGRA

Given the Record's documentation of sustained and ongoing good-faith negotiations by the State Defendants, the Plaintiff Tribes' SAC focuses on a narrow allegation that State Defendants violated IGRA by insisting on compact negotiations over subjects outside of IGRA's statutory scope. SAC ¶ 3. Specifically, the SAC pled that the State Defendants "insisted that the CTSC Tribes negotiate over, and agree to include in their respective new compacts," the following eight subjects that the Plaintiff Tribes claim are outside the scope of "proper subjects" under IGRA:

> (1) the CTSC Tribes recognize and enforce State court spousal support orders against all tribal employees; (2) the CTSC Tribes recognize and enforce State court child support orders against all tribal employees; (3) the CTSC Tribes comply with California's

> minimum wage law and regulations; (4) the CTSC Tribes fund a grant fund for other California tribes; (5) the CTSC Tribes assess, and provide for the negotiation of agreements with local governments to mitigate, impacts on the off-reservation environment caused by the construction and/or operation of facilities in which no class III gaming activities occur; (6) the CTSC Tribes, as a precondition to commencing the construction of a facility in which class III gaming will be conducted, negotiate and enter into binding and enforceable agreements with nearby local governments to mitigate a broad spectrum of perceived impacts and to submit to arbitration issues upon which the Tribes and local governments cannot agree; (7) the CTSC Tribes waive exemptions established by Congress that exempt Indian tribes from the requirements of federal discrimination laws and require the CTSC Tribes to adopt and enforce prohibitions against employment discrimination, retaliation and harassment, and establish money damages remedies against the CTSC Tribes for engaging in such prohibited conduct; and (8) the CTSC Tribes adopt and enforce tribal laws relating to employee working hours, wages and working conditions that have been preempted by the National Labor Relations Act and the rules promulgated by the National Labor Relations Board (collectively "Improper Subjects of Negotiation").

SAC ¶ 26.[2]

Based on the Record, the State Defendants are not in bad faith because they have never demanded that either the CTSC or the Plaintiff Tribes include in their new compacts topics that are unlawful. While many of these eight enumerated topics were discussed during ongoing negotiations, the State Defendants never issued a "take-it-or-leave-it" demand. Critically important, the State Defendants remained willing to further negotiate and compromise on the enumerated subjects that the Plaintiff Tribes deemed improper under IGRA. Moreover, while draft compacts from the State to CTSC did include versions of many of the Plaintiff Tribes' so-called "improper subjects," the State never demanded that final new compacts must include these subjects, or that the Plaintiff Tribes were required to agree to the State's specific language for these proposals.

In contrast to the incoming Newsom administration's open approach to continued negotiations, in 2019 the Plaintiff Tribes turned in a markedly different direction. CTSC

[2] The State Defendants dispute the Plaintiff Tribes' description of these categories and whether they were all discussed during ongoing compact negotiations with CTSC.

provided the State with a revised draft compact for the negotiation session scheduled for July 16, 2019, that contained many changes to compact provisions on which the parties had reached consensus as of October 2018. Undisputed Fact Nos. 27-29. On September 26, 2019, the Plaintiff Tribes sent a letter to withdraw from CTSC. Undisputed Fact No. 35. Four days later, on September 30, 2019, the Plaintiff Tribes issued to the State a "take-it-or-leave it" compact demand. Undisputed Fact No. 36. The Plaintiff Tribes stated that they would not consider any counter-offers, and that their demand must be accepted by midnight on October 7, 2019. Undisputed Fact No. 37. On October 2, 2019, the State Defendants responded, stating that despite the Plaintiff Tribes' ultimatum to accept the compact, the State remained willing to continue good-faith negotiations with the Plaintiff Tribes either individually or collectively. Undisputed Fact No. 38.

The Plaintiff Tribes never responded to the State's offer for continued negotiations. Their sudden departure from ongoing negotiations was surprising. During its short time in office, the Newsom administration had named its Tribal Negotiations Advisor, continued good faith negotiations with CTSC despite the Plaintiff Tribes ongoing bad faith litigation, exchanged draft compacts with CTSC, and planned for another negotiation session in October or November, 2019. Considering the Newsom administration's willingness to continue negotiations on the enumerated eight topics despite the Plaintiff Tribes reversal on agreed upon consensus terms, and the Plaintiff Tribes denying the State the opportunity to do so resulting from their sudden departure from negotiations, the State is entitled to summary judgment.

C. The Plaintiff Tribes' So-Called "Improper Topics" are Either Within IGRA's Scope, or Permissible Through the State's Offer of Meaningful Concessions

The eight so-called "improper topics" listed in the SAC generally fall within four broad categories. The Plaintiff Tribes complain about the State Defendants allegedly attempting to force them, through the adoption of new compacts, to provide the following: 1) tribal revenue sharing through the RSTF (topic four), 2) basic labor protections such as following state minimum wage laws and regulations (topic three), federal discrimination laws, (topic seven), and the enforcement of laws relating to employee working hours, wages, and working conditions that

have been preempted by the National Labor Relations Board (topic eight), 3) negotiated agreements with local governments regarding the mitigation of off-reservation environmental impacts through the SDF (topic five), and 4) enforcement of State court spousal and child support orders (topics one and two).

In addition to not having demanded that new compacts must contain any particular version of these topics, summary judgment is also proper in the State's favor because federal courts have previously ruled that most of these subjects are permissible under IGRA. For example, in *Coyote Valley II* the Ninth Circuit affirmed that tribal revenue sharing and off-reservation impact payments to local governments were permissible subjects under IGRA's catch-all provision in 25 U.S.C. § 2710(d)(3)(C)(vii). *Coyote Valley II*, 331 F.3d at 1111. Specifically, *Coyote Valley II* reviewed compact provisions for the RSTF and SDF. *Id.* at 1104-05. The RSTF distributes monies to tribes that conducted no, or limited, gaming. *Id.* at 1105. The SDF used contributed funds for a variety of purposes, including "grants for the support of state and local government agencies impacted by tribal gaming . . . ." *Id.* at 1106.

In reviewing the RSTF and SDF, the Ninth Circuit in *Coyote Valley II*, observed, "Congress sought through IGRA to 'promot[e] tribal economic development, self-sufficiency, and strong tribal governments." *Coyote Valley II*, 331 F.3d at 1111 (citing 25 U.S.C. § 2702(1)). In light of this congressional objective, *Coyote Valley II* held that tribal revenue sharing through the RSTF advanced this policy "by creating a mechanism whereby *all* of California's tribes—not just those fortunate enough to have land located in populous or accessible areas—can benefit from class III gaming activities in the State." *Id.*, citing Washburn 1 Wyo. L. Rev. 427, 435. Further, regarding the SDF, the Ninth Circuit noted that when California tribes originally submitted the Proposition 5 model compact to the voters in 1998, it provided for tribal gaming payments to municipal governments to address local needs. *Id.*, 331 F.3d at 1115. For the same reasons, this Court should reject the Plaintiff Tribes' attempt to forbid the State from negotiating for similar RSTF and SDF compact provisions. Consistent with *Coyote Valley II*, these compact topics fall within the broad catch-all scope of 25 U.S.C. § 2710(d)(3)(C)(vii).

For reasons similar to those applied to the RSTF and SDF, the Ninth Circuit in *Coyote Valley II* also affirmed the appropriateness under IGRA of basic labor provisions in tribal-state gaming compacts. *Coyote Valley II*, 331 F.3d at 1115. In support of these labor provisions, the State argued that "because thousands of its citizens are employed at tribal casinos, it is proper for the State to insist on some minimal level of protection for those workers" through the compacts." *Id.* The Ninth Circuit agreed, holding that such protections were "directly related to the operation of gaming activities" and thus permissible pursuant to 25 U.S.C. § 2710(d)(3)(C)(vii). Moreover, the Ninth Circuit held that courts can under IGRA, courts can "consider the public interest of the State when deciding whether it has negotiated in good faith," and the rights of ordinary people working at tribal casinos "is clearly a matter within the scope of that interest." *Coyote Valley II*, 331 F.3d at 1116 (citing 25 U.S.C. § 2710(d)(7)(B)(iii)(l)). Without question, the same holds true for protecting vulnerable workers from exploitation through the payment of wages below the State minimum wage, or denying these workers the basic protections of federal discrimination laws. Consistent with Congress's intent in passing IGRA, the public interest, and the Ninth Circuit's decision in *Coyote Valley II*, the State did not violate IGRA by pursuing negotiations relating to these broad topics.

Summary judgment in the State's favor is also proper because for all of the alleged "improper topics" in SAC, the Plaintiff Tribes fail to show that the State took any hardline negotiation positions. The Ninth Circuit in *Rincon* recognized that a "state may not take a 'hard line' position in IGRA negotiations when it results in a 'take it or leave it offer' to the tribe to either accept nonbeneficial provisions outside the permissible scope of [25 U.S.C.] §§ 2710(d)(3)(C) and 2710(d)(4), or go without a compact." *Rincon Band of Luiseno Mission v. Schwarzenegger*, 602 F.3d 1019, 1039 (9th Cir. 2010). While the parties dispute the legal issue of whether the compact topics listed in the SAC fall outside of IGRA's permissible scope, there should be no dispute that it was the Plaintiff Tribes—and not the State—that issued "a take-it-or-leave-it" offer. Moreover, there is no dispute that the Plaintiff Tribe's—and not the State—terminated ongoing negotiations. As such, the State was foreclosed from offering any meaningful concessions to the Plaintiff Tribes for any topics that were arguably beyond IGRA's scope.

Based on the Record, the Plaintiff Tribes show nothing more than the State setting forth compact proposals during ongoing negotiations. Because the State simply asserted the authority granted to it by IGRA to make such proposals, it did not negotiate in bad faith.

Finally, in light of these facts in the Record showing an ongoing commitment by the Newsom administration to good-faith negotiations since taking office in January 2019, the Plaintiff Tribes are essentially seeking from this Court an advisory opinion on whether certain class III gaming topics might be included in their new compacts. The Ninth Circuit follows the traditional rule that "Our role is neither to issue advisory opinions nor declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Thomas v. Anchorage Equal Rights Com'n*, 220 F.3d 1134, 1138 (9th. Cir. 2011). Here, given the Newsom administration's undisputed willingness to continue negotiations, there is no reason to provide any such advisory opinion regarding the claimed improper IGRA subjects. Accordingly, the State is entitled to summary judgment.

CONCLUSION

For all of the above reasons and authorities, State Defendants respectfully request this Court to grant summary judgment in their favor.

Dated: November 12, 2019

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