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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CHICKEN RANCH RANCHERIA OF MEWUK 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' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** Date: December 16, 2019 Time: 1:30 p.m. Courtroom: 2, 8th floor United States Courthouse, 2500 Tulare Street, Fresno, CA Judge: Honorable Anthony W. Ishii Trial Date: None Set Action Filed: 1/4/2019

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INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants, Governor Gavin Newsom and the State of California (collectively, State or State Defendants), submit the following opposition to the Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment (Plaintiffs' Motion) demonstrating that State Defendants have not violated the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2710-2712, 18 U.S.C. §§ 1166-1167. Specifically, State Defendants request that the Court, taking into account IGRA's cooperative federalism model established by Congress, deny the Plaintiff Tribes' Motion for four reasons.

First, based on the Joint Record of Negotiations (Record), Plaintiffs' Motion should be denied because over the course of two gubernatorial administrations, State Defendants have negotiated in good faith and at length with the Compact Tribes Steering Committee (CTSC), of which Plaintiff Tribes were members. The Record demonstrates 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 twenty-eight 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 State Defendants, made a "take-it-or-leave-it" compact demand and terminated ongoing negotiations. Based on this history of active and willing engagement in negotiations, State Defendants have not negotiated in bad faith under IGRA.

Second, Plaintiffs' Motion should be denied because State Defendants never demanded that either the CTSC or the Plaintiff Tribes include in their new compacts topics that are unlawful. 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, State Defendants never issued a "take-it-or-leave-it" demand, or

otherwise insisted that they must be included in new compacts. Nor did State Defendants otherwise demand that a final version of the compact must include these subjects, or that the tribes must agree to State Defendants' version of these proposals. Instead, the Record demonstrates that State Defendants have been flexible on these issues and continue ongoing negotiations with CTSC.

Third, Plaintiffs' Motion should be denied 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 non-gaming 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). Further, during compact negotiations State Defendants have not sought any jurisdiction-shifting compact provisions or impermissible fees. 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 State Defendants—terminated ongoing negotiations. As a result, to the extent that the State may have sought to include a specific issue, the State was denied the opportunity to offer the meaningful concessions or otherwise negotiate alternate terms necessary to resolve these remaining disputes.

Finally, the Plaintiffs' Motion mistakenly relies on United States Department of the Interior (Department) letters that explain departmental decisions regarding other tribal compacts. These letters regarding different tribes and compacts are not part of this case's Record, and therefore, may not serve as evidence of bad faith negotiations by State Defendants.

ARGUMENT

I. THE PLAINTIFFS' MOTION SHOULD BE DENIED BECAUSE IT CONTRAVENES IGRA'S COOPERATIVE FEDERALISM MODEL

To succeed in the manner intended by Congress, IGRA requires a spirit of cooperation between states and tribes, and not conflict. Conflict over gaming on Indian lands and the need for proper regulation, after all, is why Congress originally established IGRA. *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 Compacts. 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), *aff'd*, 353 F.3d 712 (9th Cir. 2003). 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. As the Ninth Circuit explained, "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." *Coyote Valley II*, 331 F.3d at 1096.

A state government exercises its role through IGRA's cooperative federalism model by participating in compact negotiations. Under IGRA states are provided "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. In implementing this cooperative federalism model for the proper regulation of Indian gaming, Congress adopted the compacting process as the "best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises." S. Rep. No. 100-446, at 13 (1988), 1988 U.S.C.C.A.N. 3071. Tribal governmental interests include "raising revenue to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety," and developing "economic self-sufficiency and Indian self-determination." *Id.* Congress also recognized that during IGRA negotiations state governments could, "with respect to class III gaming on Indian lands," negotiate over their own sovereign interests. *Id.* These state government interests include "the interplay of [class III gaming on Indian lands] with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens." *Id*.

In consideration of the broad tribal and state government interests at stake in class III gaming on Indian lands, Congress recognized that under IGRA, compacts between tribes and the states "may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and State, etc." S. Rep. No. 100-446, at 14 (1988), 1988 U.S.C.C.A.N. 3071. As such, Congress broadly permitted 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 IGRA compacts under 25 U.S.C. § 2710(d)(3)(C)(i)-(vii), and how they are interpreted, is crucial for recognizing why the Plaintiff Tribes' proposed narrow interpretation should be rejected. Federal courts that have examined the scope of 25 U.S.C. § 2710(d)(3)(C)(i)-(vii) 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)). One central tool 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 (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)).

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 class III 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.*, ___ U.S. ___, 137 S.Ct. 734, 740 (2017)).
- 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 Revenue Sharing Trust Fund (RSTF) with non-gaming tribes (*Coyote Valley II*, 331 F.3d at 1110-13), 3) provisions for payments to the State Distribution Fund (SDF) that can be used for several purposes, including mitigation payments to local governments (*id.* at 1113-15), and 4) provisions requiring tribes to adopt

labor-relations protections covering employees at tribal gaming facilities (*id.* at 1115-16).

Given the Ninth Circuit's broad interpretation of IGRA's compacting process and possible negotiation topics, the Plaintiffs' Motion should be denied because it contravenes the cooperative federalism model Congress endorsed through IGRA. As explained below, the Record shows that the Plaintiff Tribes—not State Defendants—made a "take-it-or leave-it" offer. Further, the Plaintiff Tribes backed away from previously negotiated compact positions, and ultimately abandoned ongoing discussions. Based on the Record described below, State Defendants, who remain willing to negotiate and compromise on the complex public policy issues surrounding the ongoing CTSC negotiations, have not negotiated in bad faith under IRGA.

A. Consistent with IGRA's Cooperative Federalism Model, State Defendants Maintained Ongoing Good-Faith Negotiations with CTSC Through Two Gubernatorial Administrations

The Record demonstrates that State Defendants have not violated IGRA because over the course of two gubernatorial administrations, they have negotiated in good faith and at length with CTSC, including Plaintiff Tribes. In several respects, this IGRA case is similar to the negotiation history reviewed by the federal courts in both *In re Indian Gaming Related Cases v. State of California,* 147 F. Supp. 2d 1011 (N.D. Cal. 2001) (*Coyote Valley I*) and *Coyote Valley II*. In the district court and the Ninth Circuit decisions, the courts examined the history of ongoing IGRA compact negotiations spanning the time-period between the gubernatorial administrations of Governors Pete Wilson and Gray Davis.

At the district court in *Coyote Valley I*, the plaintiff tribe argued that during 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." *Id.* 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 the circumstances found not to constitute bad faith in *Coyote Valley I* and *Coyote Valley II*, the Plaintiff Tribes cannot show bad-faith negotiations by State Defendants here. Indeed, the Record demonstrates the good-faith negotiation history by both the Brown and the Newsom administrations.

1. The Brown Administration's Good-Faith Negotiations with CTSC

The Record shows that active negotiations took place between the Brown administration and CTSC. Specifically, twenty-eight days of negotiations were held between these parties from January 2015 through the end of 2018. State Defendants' Separate Statement of Undisputed Facts[1] (Defendants' Undisputed Facts) Nos. 7, 11-14. In addition to the main negotiation sessions, the Parties held subcommittee meetings to negotiate over specific sections of the compact. *Id.* at No. 22. For example, the "Off-Reservation" subcommittee met approximately fourteen times over three years to address off-reservation environmental impacts. *Id.* The Record further reflects that to assist the State and CTSC in moving these negotiations forward, prior to negotiation sessions the parties exchanged many documents, including proposed language for certain compact sections, background information, and proposed draft compacts. *Id.* at 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. *Id.* at No. 16.

While the negotiations between the Brown administration and CTSC 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.

[1] State Defendants filed this pleading on November 12, 2019 in support of their motion for summary judgment (Doc. 38-2).

Defendants' Undisputed Facts No. 18. These included compact definitions for the terms 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. *Id.*

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. Defendants' Undisputed Facts No. 19. These included compact sections entitles 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. *Id.*

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. The State documented this reality when it sent a letter to CTSC on July 16, 2018, noting that the parties could no longer conclude compacts capable of timely legislative ratification prior to the Brown administration's conclusion. 15 Joint Record of Negotiations (RON) 7951.[2] This letter emphasized that during the CTSC negotiations from 2015 to 2018, the State had successfully concluded compacts with over twenty California tribes, including some former CTSC members. *Id.* Consistent with IGRA's spirit of cooperative federalism, the letter discussed the State's commitment to continued group negotiations, while also recognizing that smaller bilateral meetings might "allow for a discussion of each tribe's circumstances and to ensure active engagement by all participants." *Id.* While the State's July 16, 2018 letter acknowledged uncertainty over how the parties could most effectively use the limited remaining time prior to the transition to the next gubernatorial administration, it also acknowledged that each CTSC member

[2] The parties' twenty-three volume RON was filed with the district court on November 4, 2019 (Doc. 34-1 through 34-24). When citing to the RON, the first number will reference the volume, and the second number will reference the page.

could nonetheless continue operating gaming establishments under their existing compacts into 2022. *Id.*[3]

Including with and following the State's July 16, 2018 letter, active negotiations between the Brown administration and CTSC continued through October 2018. These negotiation efforts included the State providing CTSC with new draft compacts on July 16, 2018 (15 RON 7672-7806), September 7, 2018 (16 RON 8526-8661), and October 12, 2018 (16 RON 9022-9157). The State also participated in CTSC compact negotiation sessions on July 25, 2018 (15 RON 8260-72), September 11 and 12, 2018 (16 RON 8682-8719), and October 15, 2018 (16 RON 9181-95).

Near the end, on October 13, 2018 the State transmitted a list of the CTSC compact issues that were still unresolved. Defendants' Undisputed Facts No. 20. This list included the following issues: The definitions for the terms 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 (TNGF); 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). *Id.* at No. 21.

These facts show that, while the CTSC negotiations were not concluded under the Brown administration, the parties made significant progress. Throughout this time, "the State remained willing to meet with the tribe for further discussions." *Coyote Valley II*, 331 F.3d at 1110. Further, State Defendants during the Brown administration never made a take-it-or-leave-it compact proposal to CTSC, and remained willing to negotiate compact terms with CTSC either

[3] Two weeks later, on July 30, 2018, the Brown administration sent letters to each of the twenty-one tribal members of CTSC offering to conduct bilateral talks. 13 RON 5593-5613.

individually or collectively. In short, the Record shows that though the end of 2018, State Defendants had not violated their duty to negotiate in good faith under IGRA.

2. The Newsom Administration's Continued Good-Faith Negotiations with CTSC

State Defendants continued good-faith negotiations with CTSC when Governor Newsom took office in January 2019. The following facts are beyond dispute. After being appointed Governor Newsom's Tribal Negotiations Advisor, Anna Naimark met with CTSC tribal leaders on April 9, 2019. Defendants' Undisputed Facts No. 23. A compact-negotiation session was held on June 5, 2019. *Id.* at 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. *Id.* at No. 25. This negotiation session was held on July 16, 2019, *id.* at No. 30, and CTSC provided the State with a revised draft compact on September 3, 2019. *Id.* at 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. *Id.* at No. 32. This negotiation session was held on September 19, 2019. *Id.* at No. 33. CTSC and the State also planned for the next negotiation session on a mutually convenient date in late October or November, 2019. *Id.* at No. 34. These undisputed facts show that similar to the Brown administration, the Newsom administration conducted, and continues to actively participate in, ongoing negotiations with the CTSC tribes. State Defendants are not violating IGRA because they remain willing "to meet with the tribe[s] for further discussions." *Coyote Valley II*, 331 F.3d at 1110.

Moreover, unlike the Plaintiff Tribes, the Newsom administration has not engaged in negotiation tactics that violate IGRA's spirit of cooperative federalism. For example, the Record documents that during ongoing negotiations in 2019, CTSC stalled progress by rolling back on compact provisions on which the parties had reached consensus during the Brown administration. This rollback occurred when CTSC provided the State with a revised draft compact for discussion at the negotiation session scheduled for July 16, 2019. Defendants' Undisputed Facts No. 27. CTSC's July 1, 2019 draft compact contained many changes to compact provisions on which the parties had reached consensus as of the October 2018 draft. *Id.* at No. 28.

Some of CTSC's July 1, 2019 draft compact changes from consensus provisions previously reached by the parties included changes to the definitions of Gaming Employee, Gaming Facility, and Project; the addition of a provision allowing the operation of any future class III game not yet authorized for play in the state; the removal of a limitation on the number of authorized Gaming Facilities; a complete restructuring of section 11.0 Off-Reservation Environmental Impacts; removal of a requirement for a tribal ordinance addressing employment discrimination and harassment; a reduction in the amount of insurance coverage required for general liability insurance; a change in the scope of liability coverage; changes in the time periods related to renegotiation of a new compact; and the addition of a provision extending the compact by default for an additional twenty-five years. Defendants' Undisputed Facts No. 29. While the Newsom administration was willing to maintain the progress achieved in the Brown administration through the consensus language and sought to move compact discussions forward, CTSC was plainly attempting to disrupt progress towards a final agreement.

After rolling back previous consensus compact topics, the Plaintiff Tribes proceeded to walk away from negotiations with State Defendants. Once again, the following facts in the Record cannot be disputed. On September 26, 2019, the Plaintiff Tribes sent a letter to CTSC and the State notifying them that the Plaintiff Tribes were withdrawing from CTSC. Defendants' Undisputed Facts No. 35. On September 30, 2019, the Plaintiff Tribes served a take-it-or-leave-it compact demand on State Defendants. *Id.* at No. 36.

Consistent with CTSC's rollback compact proposal of July 1, 2019, the Plaintiff Tribes' take-it-or-leave-it demand on September 30, 2019, further rolled back consensus topics. Most notably, the Plaintiff Tribes' take-it-or-leave-it compact offered no payments into the RSTF, regardless of the number of Gaming Devices in operation (compared to CTSC's proposed tiered RSTF payments). 23 RON 10,042-43 (Section 5.0 of Plaintiffs' Compact). The Plaintiff Tribes' compact also failed to include the CTCS proposed "RSTF II" as an alternative to the TNGF. *Id.* Their compact depleted the process for environmental review and mitigation of off-reservation impacts set forth in section 11.0 by removing the definitions of Categorical Exemptions, Initial Study, Mitigated Negative Declaration, Negative Declaration, Significant Effect(s) on the Off-

Reservation Environment, and narrowing the definition of Project. Section 2.0 Definitions at 23 RON 10,025-30; section 11.0 and Project definition at 11 RON 10,098-100. And as a final roll-back example, the Plaintiff Tribes' September 30, 2019 compact extended the initial term of the compact from 25 to 30 years. Section 14.2 at 23 RON 10,111-12. However, because the compact included unrealistic conditions for non-automatic-renewal of successive 30-year terms, the proposal essentially called for class III gaming compacts in perpetuity.[4] Section 14.2 (a) requiring a constitutional amendment at 23 RON 10,111 and section 14.2 (b) requiring a two-thirds vote of the Legislature at 23 RON 10,112.

In regard to their September 30, 2019 take-it-or-leave-it demand, the Plaintiff Tribes stated that they would not consider any counteroffers, and that their compact demand must be accepted seven days later by midnight on October 7, 2019. Defendants' Undisputed Facts No. 37. On October 2, 2019 the State responded, stating that—despite the Plaintiff Tribes' ultimatum to accept the take-it-or-leave-it compact—the State remained willing to continue good-faith negotiations with the Plaintiff Tribes either individually or collectively. *Id.* at No. 38.

These negotiation tactics by CTSC and the Plaintiff Tribes show that if any party negotiated in bad faith under IGRA, and violated the statute's principles of cooperative federalism, it was not State Defendants. Rather, during the course of negotiations with the Newsom administration the Plaintiff Tribes rolled back previous consensus topics, made a take-it-or-leave-it demand, and ended further negotiations. Similar to the negotiation history reviewed by the federal courts in *Coyote Valley I* and *Coyote Valley II*, the Plaintiff Tribes cannot show bad-faith negotiations by State Defendants. 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 Tribal Negotiations Advisor, these meaningful negotiations continued. Under these facts, even if—and State Defendants dispute that any exist—the Plaintiff Tribes could show any previous bad-faith

[4] The Ninth Circuit recently ruled that "IGRA's plain language permits durational limits on compacts," so that it is not required under IGRA that compacts run indefinitely. *Chemehuevi Indian Tribe v. Newsom* (9th Cir. 2019) 919 F.3d 1148, 1154.

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. This Record shows that the State—and not the Plaintiff Tribes—fully participated in IGRA's cooperative federalism process adopted by Congress. Accordingly, because the Newsom administration has been, and remains, committed to good-faith negotiations, the Plaintiffs' Motion should be denied.

B. During Ongoing Compact Negotiations State Defendants Never Insisted on Provisions Categorically Forbidden by IGRA

1. State Defendants Never Issued a Take-it-or-Leave-It Compact Demand

Given the Record's documentation of sustained and ongoing good-faith negotiations during the Brown and Newsom administrations, the Plaintiffs' Motion, not surprisingly, focuses on repeated claims that State Defendants violated IGRA because they "insisted on" or "demanded" certain compact provisions during the negotiation process.[5] However, none of these claims supports a finding of bad-faith negotiations by State Defendants because they all ignore the important distinction between a compact proposal and a "hard-line" or take-it-or-leave-it demand.

In *Rincon Band of Luiseno Mission v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010) (*Rincon*), the Ninth Circuit discussed the circumstances when a hard-line or take-it-or-leave-it bargaining demand by a state might constitute evidence of bad-faith negotiations under IGRA. *Rincon* recognized that during negotiations a state may at times take hard-line stances during negotiations and "insist on certain provisions." *Rincon*, 602 F.3d at 1038-39, (citing *Coyote Valley II*, 331 F.3d at 1116). As an example, *Rincon* cited favorably to the State's insistence "on

[5] See Plaintiffs' Motion at page 11, ["State has *insisted on* compact provisions" regarding state tort law] emphasis added; *id.* at 12 [the State made a "*demand* that the Tribes adopt blanket provisions of California environmental law"] emphasis added; *id.* at 17, n.10 ["the State *demanded* that the intergovernmental agreement provisions be included in the Compact in the first full proposed compact . . . ."] emphasis added; *id.* at 20 ["the State has also consistently *demanded* that the Tribes include a provision in their compacts that would require the Tribes to recognize and enforce State spousal and child support orders"] emphasis added; *id.* at 22 ["the State has *insisted* that the Tribes include in their replacement compacts a provision that requires the Tribes to comply with the State minimum wage laws"] emphasis added; *id.* at 23 ["the State has *demanded* that the Tribes adopt ordinances incorporating into tribal law . . . federal law standards prohibiting discrimination in the Tribes' gaming facilities"] emphasis added; and *id.* at 24 ["the State *demanded* that the Tribes include amended labor provisions in their replacement compacts"] emphasis added.

a particular labor standards provision" in *Coyote Valley II*. *Rincon*, 602 F.3d at 1038-39. In reaching this conclusion, *Rincon* held that a state's "'hard-line' stance is not inappropriate so long as the conditions insisted upon are related to legitimate state interests regarding gaming and the purposes of IGRA." *Id.* at 1039. Under this standard, IGRA prevents states from taking hard-line negotiation positions "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." *Id.*

The Ninth Circuit's recognition of the defined circumstances regarding when hard-line or take-it-or-leave-it bargaining by a state violates IGRA forecloses summary judgment in the Plaintiff Tribes' favor. Simply put, none of the so-called *demands* identified in the Plaintiffs' Motion constitute either hard-line or take-it-or-leave-it mandates by State Defendants. The Newsom Administration remains willing to negotiate with both CTSC and the Plaintiff Tribes, either individually or collectively, regarding all of these compact topics. Defendants' Undisputed Facts No. 38. And significantly, the Record is clear that State Defendants never made any take-it-or-leave-it demands regarding these proposals. Indeed, there should be no dispute that the only take-it-or-leave-it demand in this Record was made by the Plaintiff Tribes. *Id.* at No. 36. Moreover, the Plaintiff Tribe's—and not the State—terminated ongoing negotiations by withdrawing from CTSC and declaring that they would consider no counteroffers to their take-it-or-leave-it demand. *Id.* at Nos. 35 & 37.

Because the State did nothing more than assert its authority under IGRA to make compact proposals, the Record shows no bad faith. Under IGRA's cooperative federalism model, a state can promote its legitimate sovereign interests during IGRA compact negotiations by offering compact proposals on topics ranging from protecting gaming facility patrons, advocating for basic employment rights for Gaming Facility employees, combating unlawful discrimination, and minimizing gaming facility off-reservation environmental impacts. Such proposals were offered for discussion under this Record, and they represented topics that generally fall within matters that "might affect legitimate State interests." *Coyote Valley II*, 331 F.3d at 1097. As such, these

proposals, which were never presented as take-it-or-leave-it demands by State Defendants, do not constitute bad-faith bargaining under IGRA.

2. State Defendants Continue to Show Flexibility in Ongoing Compact Discussions

The Record further reflects that during 2019 the Newsom administration continued to show flexibility regarding the ongoing CTSC compact negotiations, including the topics that the Plaintiff Tribes identify as impermissible. The Record shows the Newsom administration's willingness, for example, to consider alternative proposals over the compact definition for "Gaming Facility." CTSC and the State reached consensus during the Brown administration on this definition as of August 8, 2017. 13 RON 40804. Subsequently, CTSC documented this consensus in its draft compacts of October 2018 (16 RON 8737) and July 2019 (17 RON 9379). However, in a letter dated August 19, 2019, from CTSC Chairman Daniel Salgado to Governor Newsom, CTSC changed this consensus. 19 RON 9660. In response, State Defendants suggested, during a compact negotiation session on September 19, 2019, that the parties could return to the Gaming Facility definition used in the 1999 Compacts. 23 RON 10,007. CTSC then proposed another revised Gaming Facility definition, and the State agreed to consider this revised language. *Id.*

Similar to the ongoing discussions regarding the definition of the term Gaming Facility, State Defendants also showed flexibility in negotiations concerning off-reservation environmental impacts. Draft compacts between State Defendants and CTSC have included mitigation measures for the off-reservation environmental impacts caused by Gaming Facilities in compact section 11.0. During the Brown administration, the parties reached consensus on this issue. 15 RON 8487-16 RON 8502. This consensus was reflected by CTSC in its September 2018 draft compact, which contained a detailed appendix on the proposed off-reservation environmental impact analysis that the tribes would follow, along with the categorical exemptions they would receive. *Id.* Given their significant consensus on section 11.0, CTSC and the State went on the record during the September 12, 2018 compact-negotiation session to document that while there

were some remaining non-substantive edits to be made, the parties "have consensus on the remainder of section 11." 16 RON 8709-8710.

Unfortunately, CTSC backed away from this consensus on section 11.0 following the Newsom administration's first compact negotiation session with CTSC on June 5, 2019. In their July 2019 proposed compact, CTSC drastically changed section 11.0. 17 RON 9449-18 RON 9464. For example, instead of the previous two-tiered system for Tribal Environmental Impact Documents (TEID) and Tribal Environmental Impact Reports (TEIR), CTSC's newly revised section 11.0 provided for only TEIDs. *Id.* The State documented this CTSC position change in its September 2019 draft compact, where the State noted "[a]s the State and CTSC have not had the opportunity to discuss the changes to this section made in the July 2019 CTSC draft, the State would like to better understand CTSC's deletion of the consensus TEIR process." 21 RON 9891, Comment A33. After discussion of CTSC's revisions to section 11.0 at the September 19, 2019 compact negotiation meeting, the State indicated that while it "continues to support the former consensus version of section 11.0, the State "will take the discussion today into consideration moving forward." 23 RON 10,009.

In addition to the ongoing discussions regarding off-reservation environmental impacts and the compact definition for the term Gaming Facility, the Newsom administration has also shown its willingness to consider new revenue sharing concepts. In response to State Defendants' TNGF proposal, CTSC offered an alternative revenue sharing trust fund called the "RSTF II" in its draft compact proposal of July 16, 2019. 19 RON 9649. State Defendants responded in their September 2019 compact that they were "open to exploring the concept of an 'RSTF II.'" 19 RON 9649, Comment A17. State Defendants' response further noted that they needed additional information from CTSC about its RSTF II proposal, and that the State would ask more detailed questions during the September 19, 2019 compact negotiation. *Id.* The parties subsequently discussed CTSC's RSTF II proposal at that compact meeting. 23 RON 10,005-06. During the negotiation, the State's Tribal Negotiations Advisor stated on the record that it had "not taken a final position on the inclusion of the TNGF in the CTSC compact" and was "considering the [RSFT II] proposal." *Id.* at 10,006.

Finally, the Record documents that under the Newsom administration, the parties continue to actively discuss issues surrounding tribal payment of minimum wages to tribal Gaming Facility employees. In the draft compact for the September 19, 2019 negotiation session, State Defendants clarified that the minimum wage language the State had been proposing required tribes to comply only with the federal Fair Labor Standards Act, except for the State's minimum wage rate for non-tipped workers. 21 RON 9926, Comment A36.

The Record demonstrates that the Newsom administration remains committed to good-faith negotiations, and that—rather than insisting on or demanding any specific compact proposals categorically forbidden by IGRA—the State remains flexibile in attempting to resolve the final compact issues. Accordingly, under this Record, the Plaintiffs' Motion should be denied.

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 Plaintiffs' Motion lists seven compact topics that they argue are not proper subjects under IGRA. As described by the Plaintiff Tribes, those topics are state tort law, state environmental laws, subjecting tribes to local government jurisdiction, recognition and enforcement of state spousal and child support orders, state minimum wage laws, state anti-discrimination laws, and state labor laws. Plaintiffs' Motion at 8-26. State Defendants dispute the accuracy and applicability of this list to the actual negotiations that have taken place between the parties. Further, as previously discussed, the Record shows that State Defendants are not demanding that any or all of these topics be included in a final compact. For that reason alone, the Plaintiffs' Motion should be denied. But even if the parties were to finalize compacts that include provisions regarding these topics, which, as provided in the Plaintiffs' Motion do not all accurately represent the content of the negotiations, there would be no violation of IGRA for the following reasons.

1. The Federal Courts have Previously Ruled that Most of these Subjects are Permissible under IGRA

The Plaintiffs' Motion should be denied because federal courts have already permitted most of the compact topics the Plaintiff Tribes find objectionable. For example, in *Coyote Valley II* the

Ninth Circuit affirmed that tribal revenue sharing and off-reservation environmental impact payments to local governments are 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 the SDF. *Id.* at 1104-05. The RSTF distributes monies to tribes that conducted no, or limited, class III gaming. *Id.* at 1105. The SDF uses 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* 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 had 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)." *Id.* at 1116. Moreover, the Ninth Circuit held that courts can, under IGRA, "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." *Id.* (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 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.

2. State Defendants did not Insist Upon Any Jurisdiction-Shifting Demands

The Plaintiffs' Motion argues that class III gaming compacts cannot impose state tort law on tribal courts. Plaintiffs' Motion at 8-12. They support this argument by relying, in part, on two cases outside the Ninth Circuit: *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254 (D.N.M. 2013) (*Pueblo*) and *Navajo Nation v. Dalley*, 896 F.3d 1196, 1203 (10th Cir. 2018) (*Navajo Nation*). *Id.* But neither case supports the Plaintiff Tribes' position because State Defendants have not demanded any jurisdiction-shifting compact provisions.

In *Pueblo*, a district court held that IGRA failed to authorize the allocation of jurisdiction regarding a personal injury claim from tribal court to state court. *Pueblo*, 972 F. Supp. 2d at 1263-67. Because the personal injury claim at issue did not involve a licensing and regulated gaming activity under IGRA, the district court held that the state court possessed no jurisdiction to hear the personal injury claim against the tribe. *Id.* at 1264-67. Similar to *Pueblo*, in *Navajo Nation*, the Tenth Circuit held that "it is axiomatic that absent clear congressional authorization, state courts lack jurisdiction to hear cases against Native Americans arising from conduct in Indian country." *Navajo Nation*, 896 F.3d at 1204. As a result, "congressional approval is necessary—i.e., it is a threshold requirement that must be met—before states and tribes can arrive at an agreement altering the scope of a state court's jurisdiction over matters that occur on Indian land. *Id.* at 1205 (citing *Kennerly v. Dist. Court of Ninth Judicial Dist. of Mont.*, 400 U.S. 423, 427 (1971)). The Court held in *Navajo Nation* that such congressional approval was not present

because IGRA did "not authorize tribes to allocate to states jurisdiction over tort claims . . . ." *Id*, 896 F.3d at 1218.

The central problem with the Plaintiff Tribes' reliance on *Pueblo* and *Navajo Nation* is not whether this Court should rely upon case law outside the Ninth Circuit for determining the legality of jurisdiction-shifting compact provisions under IGRA. Rather, *Pueblo* and *Navajo Nation* are inapplicable to this case because State Defendants neither demanded nor proposed any jurisdiction-shifting compact provisions. For example, Plaintiffs' Motion contends that the State's tort law compact proposal provided, in part, a state-law legal standard for tribal courts to apply when adjudicating personal injury claims relating to the operation of their Gaming Operation, Gaming Facility, or Gaming Activities. Plaintiffs' Motion at 9 (citing proposed section 12.5). But this proposed tort law legal standard for tribal courts *does not* involve shifting the adjudication of these claims from tribal courts to state courts. As such, *Pueblo* and *Navajo Nation* provide no basis for showing bad-faith negotiations by State Defendants under IGRA.

3. State Defendants did not Demand any Impermissible Taxes under IGRA

The list of permissible negotiation topics under IGRA in 25 U.S.C. § 2710(d)(3)(C) is limited by the statute's prohibition against impermissible taxes. Specifically, IGRA provides that:

> Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subdivision, nothing in this section shall be interpreted as conferring upon a State . . . authority to impose any tax, fee, charge, or other assessment upon an Indian tribe . . . . No State may refuse to enter into the negotiations . . . based upon the lack of authority in such State . . . to impose such a tax, fee, charge, or other assessment.

25 U.S.C. § 2710(d)(4).

The Plaintiff Tribes argue that State Defendants violated IGRA by demanding impermissible taxes. Specifically, the Plaintiff Tribes contend that the State's proposal for tribal payments into the TNGF constitutes a demand for an impermissible "tax." Plaintiffs' Motion at 27-28 (citing proposed compact section 5.1(b)). Under the TNGF contribution proposal, certain

California class III gaming tribes would be required to make designated payments into a fund that would then make distributions to Non-Gaming and Limited Gaming Tribes. *Id.*

The TNGF fund, currently established in part under California Government Code section 12019.35, distributes and awards "moneys received by the state from Indian tribes pursuant to the terms of tribal-state gaming compacts." Cal. Gov't § 12019.35(a). As provided under the law, this "fund reflects a vision of facilitating tribal self-governance and improving the quality of life of tribal people throughout the state." *Id.* The recipients of these TNGF awards are decided by the Tribal Nation Grant Fund Panel, comprised of nine elected officials of federally recognized tribes that represent the diversity of tribes in California. *Id.* at 12019.60(c)(1). The TNGF is administered by a state agency acting as a limited trustee to distribute monies paid into the fund by certain gaming tribes. *Id.* at 12019.35(b). These monies are then distributed to Non-Gaming Tribes and Limited Gaming Tribes pursuant to submitted applications "for purposes related to effective self-governance, self-determined community, and economic development." *Id.* No provision in this law permits any transfers of TNGF funds into the State's general fund. *Id.* Indeed, under existing California law the State "shall not exercise discretion or control over the approval or disapproval of grant applications or the use of grants or other distributions from the fund by eligible tribes." Cal. Gov't § 12019.50(b).

Citing to *Coyote Valley II* and *Rincon*, the Plaintiff Tribes argue that the Court should find that the proposed TNGF is evidence of bad-faith negotiations by State Defendants. Plaintiffs' Motion at 28. The Plaintiff Tribes compare the proposed payments to be made into the TNGF to the State's demand for general fund payments in *Rincon*, and argue that the proposed TNGF payments fail to "meet the *Coyote Valley II* criteria." *Id.* at 29. The Plaintiff Tribes appear to claim that the proposed TNGF payments constitute an impermissible tax under *Coyote Valley II* because 1) the fees were not proposed by the tribes, 2) the fees would fund purposes not directly related to gaming, 3) the fees do not fulfill a purpose under IGRA, and 4) the State failed to offer meaningful concessions in return for the proposed fee. *Id.* at 28-30.

The Plaintiff Tribes' claimed standard for what constitutes an impermissible tax under IGRA is contrary to the Ninth Circuit's holding in *Rincon*. *Rincon's* specific application of *Coyote Valley II* in regard to revenue sharing noted as follows:

> *Coyote Valley II* thus stands for the proposition that a state may, without acting in bad faith, request revenue sharing *if* the revenue sharing provision is (a) for uses "directly related to the operation of gaming activities" in § 2710(d)(3)(C)(vii), (b) consistent with the purposes of IGRA, and (c) not "imposed" because it is bargained for in exchange for a "meaningful concession."

Rincon, 602 F.3d at 1033. The Ninth Circuit found in *Rincon* that "the State insisted that [the tribe] pay at least 10% of its net profits into the State's general fund." *Id.* at 1029. Given those undisputed facts, the Ninth Circuit held that "no amount of semantic sophistry can undermine the obvious: a non-negotiable, mandatory payment of 10% of net profits into the State treasury for unrestricted use yields public revenue, and is a 'tax'." *Id.* at 1029-30.

The Plaintiff Tribes' arguments regarding the TNGF proposal should be rejected for several reasons. First, unlike in *Rincon*, the State's TNGF proposal is not "non-negotiable." *Rincon*, 602 F.3d at 1029. As previously noted, the State agreed to discuss CTSC's proposed RSTF II proposal as an alternative to the TNGF. Accordingly, this proposal has not been imposed by the State on any tribe. Second, even if State Defendants were found to have imposed the TNGF on CTSC, the Plaintiff Tribes could request removal of this provision from their compacts because they do not intend to operate a number of slot machines in their gaming establishments to any degree that would require TNGF payments. Third, unlike the tribal payment reviewed in *Rincon*, none of the monies collected for the TNGF would be allocated to the State's general fund. Finally, to the extent that the Plaintiff Tribes contend that State Defendants failed to offer meaningful concessions in exchange for either the TNGF or any other compact proposal, it remains clear in the Record that it is the Plaintiff Tribes—and not the State—that have terminated ongoing negotiations. As such, the State was foreclosed from offering any meaningful concessions to the Plaintiff Tribes for any topics—revenue sharing or otherwise—that may have arguably been required by IGRA. Accordingly, the Plaintiffs' Motion should be denied.

D. The Department of the Interior Letters Issued under the Federal Approval Process do not Constitute Evidence of Bad Faith in Negotiations

Under IGRA, the Secretary of the United States Department of the Interior (Secretary) may approve or disapprove a proposed compact within forty-five days of its submission by the tribe. 25 U.S.C. § 2710(d)(8). If the Secretary does not approve or disapprove the proposed compact within 45 days, the compact is approved by operation of law, "but only to the extent the compact is consistent with the provisions of [IGRA]." 25 U.S.C. § 2710(d)(8)(C). The compact takes effect upon publication of notice in the Federal Register. 25 U.S.C. § 2710(d)(3)(B); 25 C.F.R. § 293.15(a). For some of these so-called "deemed approved" compacts, the Secretary issues a letter "explaining [the Department's] concerns about the compact." Kevin Washburn,[6] Recurring Issues in Indian Gaming Compact Approval, Gaming Law Review and Economics, Vol. 20, No. 5, 388, 390 (2016) (Washburn). Not all compacts approved by operation of law generate decision letters from the Secretary.[7] *Id.* For example, the 2016 compact between the Agua Caliente Band of Cahuilla Indians and the State of California was approved by operation of law, and notice that the compact was in effect was published in the Federal Register.[8] 81 Fed. Reg. 75,427-01 (Oct. 31, 2016).

The Secretary must disapprove a compact if it violates IGRA, any other federal law, or if it violates the United States' trust obligations to Indians. 25 U.S.C. § 2710 (d)(8)(B); 25 C.F.R. § 293.14. But if items in a compact give the Secretary "significant concern," the "'deemed approval' approach allows the compact to take effect, but withholds the Department's

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[6] Kevin Washburn is a former Assistant Secretary of Indian Affairs for the United States Department of the Interior and the author of four of the seven Departmental letters of which the Plaintiffs have asked the Court to take judicial notice of. See Exhibits 3, 4, 6 and 7 to Plaintiffs' Request for Judicial Notice (Doc. No. 36). Keven Washburn's article is available at http://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1505&context=law_facultyscholarship (last visited Nov. 23, 2019).

[7] "Thus, in practice, the Department has three options with it reviews a gaming compact: approval, disapproval, or "deemed approval" with or without comment." Washburn, at 390.

[8] On the same day, the Department approved two amended compacts for California tribes, the Yurok Tribe and the Jackson Band of Miwuk Indians. 81 Fed. Reg. 75,427-01-02 (Oct. 31, 2016).

endorsement of problematic terms." Washburn, at 391. From the Secretary's decision letters on disapprovals and deemed approvals, tribes and states can glean an "understanding of the issues at play in federal review" of gaming compacts. *Id.* at 389. The Department reviews each compact on a case-by-case basis.

Despite the statutory and regulatory requirements for the Secretary's approval of a compact, Plaintiff Tribes assert—with no supporting evidence—that the Secretary has developed the practice of merely deeming approved gaming compacts that contain provisions in violation of IGRA. Plaintiffs' Motion 37. According to the Plaintiff Tribes, the Secretary follows this practice due to the holding in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), that IGRA did not waive states' sovereign immunity, and if a compact is affirmatively disapproved, tribes may not force states back to the negotiation table. *Id.* There are three problems with this assertion. First, if the Secretary was in fact allowing compacts with violations of IGRA to take effect by operation of law, the Department would be violating the requirements of 25 U.S.C. § 2710(d)(8)(B) and 25 C.F.R.§ 293.14. The Secretary does not have the authority to "deem approved" compacts that violate IGRA. *Amador Cty., Cal. v. Salazar*, 640 F.3d 373, 381 (D.C. Cir. 2011). "And just as the Secretary has no authority to affirmatively approve a compact that violates any of [25 U.S.C. § 2710] subsection (d)(8)(B)s criteria for disapproval, they may not allow a compact that violates subsection (d)(8)(C)'s caveat to go into effect by operation of law." *Id.*

Second, California law contains a waiver of the State's sovereign immunity for certain IGRA suits. The still operative portion of Government Code section 98005 provides:

> Without limiting the foregoing, the State of California also submits to the jurisdiction of the courts of the United States in any action brought against the state by any federally recognized California Indian tribe asserting any cause of action arising from the state's refusal to enter into negotiations with that tribe for the purpose of entering into a different Tribal-State compact pursuant to IGRA or to conduct those negotiations in good faith, the state's refusal to enter into negotiations concerning the amendment of a Tribal-State compact to which the state is a party, or to negotiate in good faith concerning that amendment, or the state's violation of the terms of any Tribal-State compact to which the state is or may become a party.

Cal. Gov't Code, § 98005.[9]

Third, the Secretary has affirmatively disapproved compacts for California tribes after issuance of the *Seminole* decision. The Secretary disapproved two compacts submitted for review in 2010 specifically on the basis that each compact violated IGRA. See August 31, 2011 letter to Habematolel Pomo of Upper Lake, p. 5; (Doc. 36-2, Ex. 2 to Plaintiffs' Request for Judicial Notice); February 9, 2012 letter to Pinoleville Pomo Nation, p. 5 (Doc. 36-5, Ex. 5 to Plaintiffs' Request for Judicial Notice). Both of these tribes then returned to negotiations with the State and successfully concluded compacts. *Id.* Accordingly, the Plaintiffs Tribes' theory that the Secretary is approving compacts that violate IGRA, and doing so because of the inability of tribes to negotiate with the State of California is not borne out by the facts.

There remains a final, and even more fundamental, reason why the Plaintiff Tribes' reliance on the Department's letters is irrelevant to their motion. These letters are not part of the Record. This was made clear in in *Rincon*, where the State sought to show it had negotiated in good faith with the Rincon Band of Luiseno Mission Indians (Rincon Tribe) by pointing to the Secretary's approval of other compacts with provisions similar to the ones being challenged in the lawsuit. *Rincon*, 602 F.3d at 1041. In response, the Ninth Circuit held that "good faith should be evaluated objectively based on the record of negotiations" and that "the State therefore could not reasonably have relied on the Department of the Interior's approval of certain other compacts as proof that its demands to Rincon were lawful." *Id.* at 1041-42. The Department's letters that have accompanied some compacts deemed approved discuss potential problems or concerns with the compact being addressed in the individual letters. However, those letters are not analyzing the proposed compacts that are the subject of this lawsuit. The letters regarding other concluded compacts with other California tribes are not part of the objective record of negotiations in this matter.[10] The Department's letters certainly provide insight into its current interpretation of the

[9] This sentence is the only part of Proposition 5 that wasn't invalidated by the California Supreme Court in *Hotel Employees and Restaurant Employees Intern. Union v. Davis*, 21 Cal.4th 585 (1999).

[10] See State Defendants' Objection to Plaintiffs' Request for Judicial Notice, filed concurrently with the State Defendants' Opposition to Plaintiffs' Motion for Summary Judgment.

statutory and regulatory requirements for compact approval, and may offer parties in compact negotiations guidance on problematic terms that "can lead to disapproval" of a gaming compact. Washburn, at 389. But the Department's concern about how a provision in *another* tribe's compact "could be misconstrued"[11] does not represent objective proof that the State's offers, even if similar to those causing concern in the reviewed compact, constitute bad faith under IGRA.

CONCLUSION

For all of the above reasons and authorities, State Defendants respectfully request this Court deny the Plaintiffs' Motion for summary judgment.

Dated: December 2, 2019

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[11] The letters that Plaintiff seeks judicial notice of contain language that illustrate the Department's individualized evaluation of the tribe's submitted compact, for example:

> "We are confident that the revenue sharing provisions in this Compact, *for this Tribe*, comply with applicable law." July 13, 2012 letter to Federated Indians of Graton Rancheria, p. 8 (Doc. 36-1, Ex. 1 to Plaintiffs' Request for Judicial Notice) (italics added).
>
> "We have set forth an explanation of our concerns below." August 31, 2011 letter to Habematolel Pomo of Upper Lake, p. 1; (Doc. 36-2, Ex. 2 Plaintiffs' RJN). "Therefore, neither the State of California nor any other state should assume that this Compact's revenue sharing structure may be applied to other tribes in a manner consistent with IGRA. *It is also important to note that we review each proposed compact on a case-by-case basis*." *Id*. at p. 6 (italics added).