LESTER J. MARSTON
California State Bar No. 081030
RAPPORT AND MARSTON
405 West Perkins Street
Ukiah, California 95482
Telephone: 707-462-6846
Facsimile: 707-462-4235
Email: marston1@pacbell.net

*Attorney for Plaintiffs Chemehuevi Indian Tribe, Chicken Ranch Rancheria, Hopland Band of Pomo Indians, and Robinson Rancheria*

DAVID B. DEHNERT
California State Bar No. 214243
DEHNERT LAW, PC
475 Washington Blvd.
Marina Del Rey, California 90292
Telephone: 310-822-3222
Facsimile: 310-577-5277
Email: david@dehnertlaw.com

*Attorney for Plaintiff Blue Lake Rancheria*

**UNITED STATES DISTRICT COURT**

**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.

Case No.: 1:19-CV-00024-AWI-SKO

**PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Date: December 16, 2019
Time: 1:30 p.m.
Courtroom: 2, 8th Floor
Judge: Honorable Anthony W. Ishii
Action Filed: January 4, 2019

[Oral Argument Requested]

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## INTRODUCTION

In their opposition to the Plaintiff Tribes' ("Tribes") motion for summary judgment ("State's Opposition"), the State Defendants ("State") attempt to reverse the roles of the parties. The State implies that it is the Tribes, not the State, who have failed to negotiate in good faith. That is so, the State maintains, because the State has remained at the negotiation table, while the Tribes and other CTSC tribes have taken actions that the State characterizes as "take-it-or-leave-it" demands or "rollback" bargaining.

The State's Opposition depends on a misleading and selective recitation of facts—it does not acknowledge that the State included, in each and every one of its compact proposals, provisions that the Tribes maintain violated the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq*. ("IGRA"), that it never agreed to remove or substantively modify any of those provisions, and that it never offered a meaningful concession in exchange for any of those provisions. Likewise, it does not recognize that the joint record of negotiations demonstrates that, on more than 30 distinct occasions, the Tribes objected to those provisions on the basis that they were not directly related to gaming activities and were not, therefore, proper subjects of negotiation.[1] Neither does it acknowledge that, on more than 21 distinct occasions, the Tribes objected to the illegal tax provision.

The State's arguments also depend on an interpretation of the requirements of the IGRA that is not consistent with the plain wording of the statute or the case law interpreting it. As demonstrated herein, none of the State's arguments have rebutted the presumption that the State failed to negotiate with the Tribes in good faith in violation of the IGRA.[2]

[1] Such provisions are herein collectively referred to as the "Disputed Provisions."

[2] The Tribes have previously argued at length that the Disputed Provisions are not directly related to gaming. Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment, pp. 8-24 ("Tribes' Motion"); Plaintiffs' Opposition to the State Defendants' Motion for Summary Judgment ("Tribes' Opposition"), pp. 23-32. Those arguments will not be

## ARGUMENT

### I. COOPERATIVE FEDERALISM UNDER THE IGRA IS ONLY RELEVANT TO THE LIMITED STATE INTERESTS IDENTIFIED IN THE IGRA AND DOES NOT REQUIRE THE TRIBES TO ACCEPT COMPACT PROVISIONS THAT ARE NOT PROPER SUBJECTS OF NEGOTIATION.

The State repeatedly references the term "cooperative federalism" in attempting to frame the Tribes' conduct as bad faith negotiation. State's Opposition, pp. 6, 8, 10, 12-14. The State's implication is that the Tribes' interests in negotiating a compact must be balanced against those of the State and that the Tribes' efforts to restrict the scope of negotiations to the topics identified in the IGRA fail to properly take into account state interests and public policy.

"Cooperative federalism" is not the touchstone for the IGRA good faith analysis. The phrase was used by the district court in *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084 (E.D. Cal. 2002) in its background description of the IGRA, which was cited in *Coyote Valley Band of Pomo Indians v. Cal. (In re Indian Gaming Related Cases Chemehuevi Indian Tribe)*, 331 F.3d 1094, 1112-1115 (9th Cir. 2003)("*Coyote Valley II*") in its background description of the IGRA. "IGRA is an example of 'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme." *Artichoke Joe's*, 216 F. Supp. 2d at 1092 (E.D. Cal. 2002). Neither court discussed the term in the context of IGRA's good faith negotiation requirement.

IGRA was indeed intended to balance the interests of tribes, the federal government, and the states, and to give each a role in the regulation of tribal gaming. However, IGRA was designed to balance only the specific interests of

repeated here, but rather, the Tribes' Motion and Opposition are hereby incorporated by reference as if set forth here in full.

tribes, the federal government, and state governments that are identified in the statute and to restrict their regulatory authority to only those interests. The state interests are: to shield Indian gaming "from organized crime and other corrupting influences, . . . and to assure that gaming is conducted fairly and honestly by both the operator and players." 25 U.S.C. § 2702 (2). The interests of tribes identified in the IGRA are far broader: to regulate the operation of "gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. § 2702(1); "to ensure that the Indian tribe is the primary beneficiary of the gaming operation," 25 U.S.C. § 2702(2); and "to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3). The interests identified by Congress weigh heavily in favor of the tribes and their interest in conducting Indian gaming. They also leave only a limited role for state regulation. "The Committee does not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands." S. REP. 100-446, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084.

The limited interest of states as compared with those of Indian tribes, and the limited nature of the role that Congress intended states play in the regulation of Indian gaming are reflected in the specific enumeration of the topics that may be included in a class III gaming compact between tribes and states, 25 U.S.C. § 2710(d)(3)(C)(i)-(vii), and IGRA's prohibition of the imposition of state taxes and fees. 25 U.S.C. § 2710(d)(4).

The State asserts that the seven identified topics of negotiation must be interpreted broadly, citing *Chemehuevi Indian Tribe v. Newsom*, 919 F.3d 1148, 1151 (9th Cir. 2019). The Tribes question whether the *Chemehuevi* court's interpretation is as broad as the State asserts, given the *Rincon* court's conclusion that "IGRA limits permissible subjects of negotiation in order to ensure that tribal-state compacts cover *only those topics that are related to gaming* and are consistent with IGRA's stated purposes." *Rincon v. Schwarzenegger*, 602 F.3d

1019, 1028-1029 (9th Cir. 2010) (emphasis added) ("*Rincon*"). Even if the State's interpretation of the *Chemehuevi* court's decision is accepted, the interpretation of whether topics of negotiation fit within the seven categories is still limited by the Supreme Court's narrow definition of "gaming activity" in *Bay Mills*, "gaming activity is what goes on in a casino—each roll of the dice and spin of the wheel." *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 792 (2014).[3] The IGRA must also be interpreted pursuant to the Indian canons of construction: "[W]e, like the *Coyote Valley II* court, consider relevant the Congressional directive to construe ambiguities related to the issues covered by IGRA most favorably to tribal interests." *Rincon*, 602 F.3d at 1028 n. 9, *citing Coyote Valley II*, 331 F.3d at 1103.

Thus, a state's role in the regulation of class III gaming was intentionally limited, because Indian gaming was intended to benefit tribes, not states, and because the gaming was intended to be regulated primarily by tribes, not states. To the degree that the concept of cooperative federalism is relevant to the analysis of a tribe's claim that a state had not negotiated in good faith, a tribe's cooperation with a state is not in the context of equal partners with equal stakes in the tribe's gaming. A tribe's cooperation is only relevant to a state's interest in shielding the tribe's gaming from the influence of organized crime and in ensuring that the gaming is conducted fairly.

In contrast, the State's notion of how cooperative federalism applies to the IGRA is that the Tribes must cooperate with the State by subjecting themselves to

[3] Examples of the unenumerated topics that are, unlike the provisions at issue here, "directly related" to the playing of the games include: rules of the games, locations where the games will be played, hours of operation, minimum internal control standards, surveillance and security, criminal background checks of employees, accounting standards, and laws and regulations that protect the state interests identified by Congress in the IGRA. *Rincon*, 602 F.3d at 1028 n. 9; 25 C.F.R. § 542. Neither party disputes that topics, such as minimum internal control standards, are proper subjects of negotiation under the IGRA. This explains why the parties reached consensus on Sections 6, 7, and 8 of the proposed replacement compacts. RON 9685 (August 19, 2019 CTSC Letter to Governor Newsom) ("Over the past four years, the CTSC Tribes and the State's negotiators have reached consensus on almost all of the issues that IGRA provides may be included in a compact.").

fruitless negotiations so long as the State does not terminate negotiations, accepting compact provisions demanded by the State even though the Tribes regard those provisions as improper topics of negotiation, and taking no action to address what the Tribes regard as the State's failure to negotiate in good faith:

> [T]he 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.

State's Opposition, p. 6.

The State's interpretation of the how cooperative federalism should be applied to the determination of whether a state has negotiated is in conflict with the provisions of the IGRA and the court decisions interpreting IGRA. In attempting to reverse the good faith requirement, the State also chooses to ignore the IGRA's good faith requirement itself. "Upon receiving such a request [to engage in compact negotiations], *the State* shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A)(emphasis added). The good faith requirement is directed to states, not tribes. The IGRA's good faith enforcement provisions authorize only tribes to bring actions based on a state's failure to negotiate in good faith. "The United States district courts shall have jurisdiction over—**(i)** any cause of action *initiated by an Indian tribe* arising from *the failure of a State* to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith." 25 U.S.C. § 2710(d)(7)(A)(i)(emphasis added).

The only focus of the good faith analysis under the IGRA is whether the State negotiated in good faith. The State's attempt to reverse the parties' roles must be rejected and the Court's attention must remain focused on the State's conduct.

In addition, the State, in arguing that it has negotiated in good faith because it has remained at the negotiating table, has again entirely mischaracterized the

history of the compact negotiations at issue in *Indian Gaming Related Cases v. California*, 147 F. Supp. 2d 1011 (N.D. Cal. 2001) ("*Coyote Valley I*") and *Coyote Valley II*. As was discussed in the Tribes' Opposition, pp. 19-23, the course of negotiations between the Wilson and Davis administrations are diametrically different from those of the Brown and Newsom administrations. The Wilson and Davis administrations took entirely different approaches to compact negotiations and it was for that reason that the *Coyote Valley I* court concluded that the Wilson negotiations were irrelevant to evaluating whether the State negotiated in good faith under the Davis administration. *Coyote Valley I*, 147 F. Supp. 2d at 1015.

The State also attempts to have it both ways with regard to this issue. Having asserted that the Brown administration's negotiations should not be considered, based on the State's erroneous interpretation of *Coyote Valley I* and *II*, the State proceeds to argue that the protracted negotiations under the Brown administration are evidence of the State's good faith. State's Opposition, pp. 7-10. The Tribes agree with the State's second position, that the Brown administration's actions must be evaluated in determining whether the State negotiated in good faith for the purposes of this case.

As will be addressed in the next section, the record of negotiations in this case reveals that the State's insistence on the inclusion of the Disputed Provisions through every proposed draft compact and every negotiation session amounts to a failure to negotiate in good faith.

## II. THE STATE'S CONDUCT REVEALS THAT THE STATE DID NOT NEGOTIATE IN GOOD FAITH.

Throughout its opposition, the State describes the history of the negotiations with the Tribes by simply stating that negotiation sessions took place on certain dates over the course of five years and that the parties exchanged draft compacts and compact provisions and then discussed those materials. The State asserts that, during the Brown administration, the State "remained willing to negotiate compact

terms with CTSC" and that, "similar to the Brown administration, the Newsom administration conducted, and continues to actively participate in, ongoing negotiations with the CTSC tribes." State's Opposition, pp. 9-10. During both administrations, the State claims, the "State Defendants never made any take-it-or-leave-it demands regarding these proposals." *Id*. at p. 14. From the State's perspective, the fact that the State was always willing to negotiate and never used the words "demand" or "take-it-or-leave-it," is sufficient to demonstrate that the "State Defendants had not violated their duty to negotiate in good faith under IGRA." *Id*. at 9-10.

Yet, the State's discussion of how the negotiations unfolded fails to recognize that, during the course of the negotiations, the parties engaged in an ongoing dispute with respect to the Disputed Provisions and whether a meaningful concession was necessary in order to negotiate over them. When those facts are taken into account, it is clear that the State's position (*i.e.*, that the IGRA only requires a willingness to show up and negotiate) is insufficient to meet the good faith negotiation burden the IGRA places on the State.

Based on a detailed analysis of the record of negotiations, the State's failure to negotiate in good faith can be demonstrated in three distinct ways. First, the State does not actually need to use the word "demand" or to state that a particular draft compact (or compact provision) is offered on a "take-it-or-leave-it" basis. Rather, based on the totality of the circumstances, it is evident that the State failed to negotiate in good faith by repeatedly including the Disputed Provisions in its compact proposals, notwithstanding the same objections repeated by the Tribes. Second, even if a demand by the State was required to trigger a finding of bad faith, under the applicable law, the State's conduct constituted a demand and its offers were take-it-or-leave-it offers. Third, the State's conduct, when measured against good faith standards used in labor/collective bargaining case law, constituted a failure to negotiate in good faith.

### A. The Totality of the Circumstances Demonstrates That the State Failed to Negotiate in Good Faith.

In evaluating the Tribes' claims that the State failed to negotiate in good faith, "courts should consider the totality of that State's actions when engaging in the fact-specific good-faith inquiry IGRA generally requires." *Coyote Valley II*, 331 F.3d at 1112. The "IGRA's legislative history also makes clear that the good faith inquiry is nuanced and fact-specific, and is not amenable to bright-line rules." *Id*. at 1113. Even if "the State [does] not violate an express provision of the IGRA . . . its behavior (refusal to negotiate for additional gaming devices) still may violate its duty to negotiate in good faith." *Flandreau Santee Sioux Tribe v. South Dakota*, 2011 U.S. Dist. LEXIS 68531, at *8-9 (D.S.D. June 27, 2011). Thus, in some circumstances, "a more subjective test is necessary for a good faith determination." *Id*. "Accordingly, courts must consider the totality of the circumstances when undertaking the 'fact-specific' good faith inquiry required by IGRA." *Fort Indep. Indian Cmty. v. California*, 2008 U.S. Dist. LEXIS 108870, at *10-11 (E.D. Cal. Sep. 10, 2008), *citing Coyote Valley II*, 331 F.3d at 1112.

Here, regardless of whether the State remained continuously "ready and willing to engage" in negotiations, and never stated explicitly that a particular compact draft was a take-it-or-leave-it offer, a review of the totality of the State's conduct demonstrates that the State failed to negotiate in good faith by uncompromisingly including the Disputed Provisions in its draft compacts.

At the beginning of the negotiations, the Tribes requested that the State renegotiate a limited number of topics in their compacts, all of which were direct related to gaming:

> The Chicken Ranch Rancheria of Me-Wuk Indians of California writes this letter in response to your request for a list of the issues that the Tribe would like to address in discussions and/or negotiations for amendments to their existing Class III gaming compact and/or successor compact. Attached is a list of those issues. **Chicken Ranch Rancheria of Me-Wuk Indians of California**

> **sees no need to change other provisions of the existing compact that are not identified on this list of issues.**
>
> ***
>
> The Compact Tribes Steering Committee hereby submits the following list of issues to be discussed/negotiated in connection with an amended and/or successor Class III Gaming Compact: 1. **Deletion of provisions unrelated to the regulation and/or licensing of Class III gaming**; 2. Definition of "Gaming Facility" [intended to restrict existing definition]; 3. Definition of "Net Win"; 4. Scope of gaming – including new games and simulcast wagering on horse racing; 5. Revenue Sharing: Reimbursement of the State's actual, reasonable and necessary regulatory costs; maintaining the solvency of the RSTF; Special Distribution Fund; 6. Regulation of Financial Sources; 7. Manner in which Incidents are recorded; 8. Gaming Regulators' Association; 9. Definition of "Project" [intended to restrict existing definition]; 10. Compact Term and termination for breach; 11. Effect of the Loss of Tribal Exclusivity; 12. Most Favored Tribe Provision.

RON 210-211 (emphasis added).

In contrast, the first act of the State was a vast overreach. RON 34-36. The State attempted to dramatically extend State jurisdiction over reservation activities by seeking to negotiate new provisions that went far beyond the 1999 compact—a compact that has, by most accounts, worked as intended by "promoting tribal economic development, self-sufficiency, and strong tribal governments" and shielding the gaming "from organized crime and other corrupting influences." 25 U.S.C. §§ 2702 (1)-(2). The State's requested modifications to the 1999 compact were significant. The State sought to negotiate over at least 60 separate topics, many of which remained in dispute throughout the entire course of negotiations and are the subjects of the Tribes' claims here.[4]

[4] *See* RON 34-36 (State's Non-exhaustive List of Topics for Negotiations) ("Cost Reimbursement and Mitigation to Local Governments. Exclusivity. Revenue Sharing With Non-Gaming and Limited-Gaming Tribes. Payments to the Revenue Sharing Trust Fund or the Tribal Nation Grant Fund . . . . Patron Disputes. Off-Reservation Environmental and Economic Impacts. Tribal Environmental Impact Report. Notice of Preparation of Draft TEIR. Notice of Completion of Draft TEIR. Issuance of Final TEIR. Cost Reimbursement to County. Failure to Prepare Adequate TEIR. Intergovernmental Agreement. Arbitration. Public and Workplace Health, Safety, and Liability. General Requirements. Tobacco Smoke. Health and Safety

The Tribes could have walked away at that time and filed suit; instead, the Tribes stayed at the table and negotiated over the State's new provisions, relying on their understanding that the State would offer the Tribes a meaningful concession in return. The Tribes spent vast amounts of time and money negotiating over the State's provisions, even though they believed them to be unlawful, waiting for the State to either remove or substantially change those provisions or, at the very least, offer meaningful concessions in return. Yet, from beginning to the end, the State never moved from its position that the Disputed Provisions should be included in the Tribes' compacts and never offered the Tribes any meaningful concessions in return.

Specifically, through over four years of negotiations, the following course of conduct constitutes, in the aggregate, a failure on the part of the State to negotiate in good faith:

- The State included the Disputed Provisions in 12 draft compacts proffered to the Tribes.[5]
- Beginning on at least April 17, 2015, the Tribes communicated to the State that they believed that the State was seeking to include various compact provisions that were not directly related to gaming activities and were not, therefore, proper subjects of negotiation under the IGRA.[6]

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Standards . . . . Participation in State Statutory Programs Related to Employment . . . . Labor Relations.").

[5] Plaintiffs' Statement of Undisputed Facts ("SUF") (in which fact paragraphs cite to supporting evidence found in the record of negotiations), ¶¶ 48, 56, 65, 87, 103, 125, 135, 155, 167, 172, 189, 200. In some draft compacts, like the compact described in SUF 103, the environmental regulation provisions were removed for the purpose of negotiating those provisions separately from the rest of the compact in a subcommittee. The environmental regulations were never removed from the State's draft compact for any other purpose (*e.g.*, because the State agreed to change its position).

[6] RON 580 (April 17, 2105 Memorandum from CTSC to Joginder Dhillon Re: Definition of Gaming Facility, Definition of Project and Licensing of the Gaming Facility) ("Consistent with the Department of Interior guidance on this matter, the definition has been revised to emphasize the fact that the areas defined as 'Gaming Facility' must be directly related to the operation of Gaming Activities . . . .").

- Throughout the negotiations, the Tribes asserted the Disputed Provisions were not directly related to gaming activities and were not, therefore, proper subjects of negotiation under the IGRA, at least 30 times.[7]
- The Tribes communicated to the State that they considered the TNGF to be an illegal tax that they did not want it to be included in their compacts from at least January 8, 2016.[8]
- The Tribes repeated their objections to the TNGF on at least 19 additional occasions.[9]

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[7] *See, e.g.*, RON 2200 (Labor Relations) ("MR. DHILLON: We discussed the issue of the Tribal Labor Relations Ordinance. No consensus was reached . . . . MR. FORMAN: And we will continue our proposal to maintain the existing TLRO, even as it is the CTSC position that proposing a further modification of the existing TLRO is not an appropriate subject for negotiation."); RON 2950-2951 (May 25, 2016 Letter from CTSC to Joginder Dhillon Re: CTSC Section 10) ("As you may already know, [CTSC] member Tribes contend that many of the provisions contained in the State's proposed Compact are not among the subjects that the [IGRA] permits to be included in a Compact, and thus are not proper subjects of negotiation . . . ."); RON 2998 (Environmental Regulations); RON 3699 (Environmental Regulations); RON 3791 (All Disputed Provisions); RON 3876 (All Disputed Provisions); RON 4162 (Employment Laws); RON 4164 (Labor Relations); RON 4705 (Employment Laws); RON 4705 (Minimum Wage Laws); RON 4806-4809 (Employment Laws, Minimum Wage Laws, and Labor Relations); RON 4899 (All Disputed Provisions); RON 4914-4915 (Environmental Regulation, Tort Law, and Labor Relations); RON 4994 (All Disputed Provisions); RON 5339-5344 (October 25, 2017 Negotiation Session); RON 5346 (Labor Relations); RON 5641 (Minimum Wage); RON 5727, 5742-5743, 5826 (CTSC Draft Provisions Referencing Disputed Provisions); RON 5942-5943 (Minimum Wage); RON 7169 (Minimum Wage); RON 7205 (Disputed Provisions, generally, and Labor Relations); RON 7321 (Disputed Provisions, generally, and Labor Relations); RON 8276 (Labor Laws); RON 8314-8319 (Labor Laws); RON 8694, 8710-8712 (Environmental Regulations, Employment Laws, Minimum Wage, Support Orders); RON pp. 9189-9191 (Environmental Regulations, Employment Laws, Minimum Wage, Support Orders); RON 9249-9259 (All of the Disputed Provisions); RON 9650 (Labor Relations); RON 9658-9661 (All of the Disputed Provisions).

[8] *See* RON 2134-2141 (first CTSC draft compact excluding the TNGF provision), May 25, 2016. *See also* RON 2950 (first letter from CTSC to Joginder Dhillon setting forth objections to the Disputed Provisions); RON 4689 (first negotiation transcript in which the Tribes, through Mr. Forman, stated that "[w]e talked about the State's proposal for the tribal nation gran[t] fund[] and the CTSC position with respect to the TNGF is that we do not wish that to be in our compact because we do not believe that it is an appropriate subject for negotiation under IGRA, as well as having some other philosophical issues with the proposal.").

[9] RON 3475, RON 3781-3880, RON 4889-4999, RON 5427-5538, RON 5717-5832, RON 6102-6219, RON 6630-6740, RON 6853-6982, RON 7177, RON 7449-7584, RON 8338-8486, RON 8694, RON 8721-8865, RON 9258, RON 9366-9488, RON 9649, RON 9658-9661, RON 9667-9789, RON 10005-1006.

- On at least 16 occasions, the Tribes informed the State that they would not agree to negotiate or include in their renegotiated compacts the Disputed Provisions unless the State offered a meaningful concession in return.[10]
- The Tribes proposed a meaningful concession provision to the State in the Tribes' draft compacts 11 times,[11] but the State never accepted the provision.[12]
- By the end of the negotiations (with both the Brown and Newsom administrations), the State still included all of the Disputed Provisions and the TNGF in its draft compact.[13]

Considering the foregoing, it is irrelevant whether the State expressly made a demand or a take-it-or-leave-it offer. The State's refusal to change its positions or respond to the Tribes repeated requests for meaningful concessions is sufficient to find that the State failed to negotiate in good faith.

Moreover, under the totality of the circumstances, the State's conduct cannot be observed in a vacuum. While the disputes regarding the Disputed Provisions were unfolding, the State enjoyed the benefit of a particularly coercive force—the term provision of the Tribes' current compacts. With the termination of their current compacts in sight, the Tribes were (and are) under pressure to execute a replacement compact in order to avoid having to shutter their casinos. The State has nothing to lose, and much to gain, by remaining "ready and willing to

[10] RON 2950; RON 2998; RON 3699; RON 3791; RON 3876; RON 3805-3806 (*See* SUF 85); RON 4161-4162; RON 4899; RON 4914-4915; RON 4994; RON 7205; RON 7321; RON 8314-8316; RON 8503; RON 9256; RON 9659.

[11] RON 3699; RON 4994; RON 3791; RON 3876; SUF ¶ 85; RON 5437; RON 5452-5453; RON 5532; RON 5727; RON 5742-5743; RON 5826.

[12] *See, e.g.*, RON 5047-5048; RON 5061; RON 5135; RON 5149; RON 5268.

[13] SUF ¶¶ 189, 200. This also demonstrates that the State's claim that "the Newsom administration continued to show flexibility regarding the ongoing CTSC compact negotiations," State's Opposition, p. 15, is false.

negotiate" but never changing its position. As a result, the State does not need to issue a formal demand or make a formal take-it-or-leave-it offer to subject the Tribes to the choice of either accepting provisions that are outside the permissible scope of the IGRA and are adverse to the Tribes' interests, or going without a Class III compact altogether. *See Rincon*, 602 F.3d at 1039. This is not simply hard line bargaining on the part of the State—it is a failure to negotiate in good faith.

The State also pressured the Tribes to accept the State's draft compacts that included the Disputed Provisions by encouraging CTSC tribes to negotiate individually with the State, rather than through CTSC, to eliminate the benefits the Tribes received from collectively bargaining with the State.[14] These efforts by the State provide further evidence that the State failed to negotiate in good faith.

In light of the foregoing, it is clear that the Tribes do not need to demonstrate that the State made an express demand or a take-it-or-leave-it offer to demonstrate that the State failed to negotiate in good faith—a description of the State's substantive conduct is enough. When the totality of the circumstances are

[14] *Compare* RON 2210 (March 1, 2016 Letter from Joginder Dhillon to CTSC) ("As more tribes leave CTSC, and other tribes move closer to concluding compacts, the State will need to revisit our past practice of dedicating two days to CTSC negotiation sessions. The State welcomes a constructive and solution-oriented discussion about the reasons why so many tribes are concluding that the CTSC process is not working and preferring instead to negotiate directly with the State.") *with* RON 2358 (March 8, 2016 Letter from CTSC to Joginder Dhillon) ("The CTSC is unaware of 'more tribes [leaving] CTSC.' The CTSC has consistently been comprised of approximately 30 tribes."). *See also* RON 520 (April 17, 2015 Letter from Joginder Dhillon to CTSC) ("Some Tribes moved in a different direction, perhaps because they grew impatient with the pace of progress at developing consensus within CTSC or for other reasons. The State is equally committed to engaging tribes outside the CTSC framework in a respectful manner intended to further the same fundamental goals of these negotiations."); RON 5594 (December 12, 2017 Letter from Joginder Dhillon to Lloyd Mathiesen, Chairman, Chicken Ranch Rancheria of Me-Wuk Indians) ("One of the most meaningful components of our successful bilateral negotiations with tribal governments over the last few years has been discussions regarding each tribe's unique circumstances, challenges, programs and plans . . . . In an effort to move our negotiations forward to a successful and effective resolution, we respectfully request the opportunity to meet with you to discuss issues of importance to your Tribe.") (This letter was sent to every CTSC tribe. See RON 5593-5613); RON 7951 (July 16, 2018 Letter from Joginder Dhillon to CTSC) ("We have effectively pushed the negotiations towards greater use of smaller negotiating groups and unsuccessfully encouraged discussion in a bilateral context to allow for a discussion of each tribe's circumstances and to ensure active engagement by all participants. It is unclear how far we can or should continue with negotiations in light of the upcoming elections and the transition to a new Administration.").

considered under a fact-intensive analysis that takes into account the conditions under which the Tribes negotiated, there is sufficient evidence in the record of negotiations to demonstrate that the State failed to negotiate with the Tribes in good faith.

### B. Even if, Under Rincon, a "Demand" by the State is a Necessary Prerequisite to a Finding of Bad Faith, the State's Conduct Constituted a Demand as That Term is Understood in the Context of IGRA.

Throughout its opposition, the State argues that it cannot be found to have failed to negotiate in good faith because the "State Defendants have not demanded that any of the Plaintiff Tribes' so-called improper subjects under IGRA must be included in new compacts." State's Opposition, p. 1. This argument is misguided because, during compact negotiations, a state can make a demand, as that term is used in *Rincon*, without expressly stating that a particular provision *must* be included in a compact. When analyzed through the proper lens, it is clear that the State did, in fact, demand that the Disputed Provisions must be included in the Tribes' compacts.

In *Rincon*, the Ninth Circuit cited to Webster's Third New International Dictionary 598 (2002) to define "'demand' as 'to call for as useful, necessary, or requisite: make imperative.'" *Rincon*, 602 F.3d at 1030. There, the Ninth Circuit found that the State had made a demand through "repeated and forceful insistence on" a compact provision. *Id*. The Ninth Circuit did not provide any further analysis with respect to the State's actual negotiation conduct that led to the *Rincon* case.

The district court in *Rincon* did, however, describe the State's negotiation conduct. During the compact negotiations between Rincon and California, on November 4, 2005, "the parties attended a settlement meeting in San Francisco." *Rincon Band of Luiseno Indians v. Schwarzenegger*, United States District Court for the Southern District of California Case No. 3:04-cv-1151, "Order: Denying in

Part and Granting in Part Cross Motions for Summary Judgment," Docket No. #197, p. 7. At that meeting, "the State made an offer to Rincon to enter into an amendment to the existing Compact." *Id*. The compact offered to Rincon at that meeting contained a tax provision (which was later found to be improper in the Ninth Circuit's ruling). *Id*. Rincon then sent two counter-offers to the State that removed the illegal tax. The State rejected both counter-offers. *Id*. at pp. 8-9. On October 5, 2006, the State "extended a revised offer to Rincon by letter indicating that '[t]he terms of this proposal are similar to those accepted by the Pauma and Pala Bands . . . .'" *Id*. at p. 9. In that offer, the State again included the illegal tax. Finally, on October 31, 2006, "the State submitted an alternative proposal to Rincon in response to an email inquiry made by Rincon . . . ." *Id*. at p. 10. That alternative proposal was the State's last offer to Rincon and it, like its previous proposals, again contained the illegal tax. *Id*.

Thus, the State's conduct in the *Rincon* case, which was described by the Ninth Circuit as "repeated and forceful insistence," amounted to no more than the State offering, over Rincon's objections, three compact proposals that each contained a provision that violated the IGRA over the course of one year. The State never used the word "demand" or stated that a particular proposal was offered on a "take-it-or-leave-it" basis. Nevertheless, both the district court and the Ninth Circuit in *Rincon* concluded that the State had made a "demand."

Here, the State has submitted 12 compact offers to the Tribes over the course of four years. Each of the compacts proposed by the State has included the Disputed Provisions. The Tribes consistently communicated their strong opposition to the Disputed Provisions, but the State unremittingly continued to offer the provisions in its draft compacts. If the State's negotiations in *Rincon* constituted a "demand" that Rincon agree to the tax provisions, then the State's conduct in the negotiations at issue here unquestionably constitutes a demand that the Tribes agree to compacts that include the Disputed Provisions. By demanding that the

Disputed Provisions be included in the Tribes' compacts, the State has failed to negotiate in good faith.

### C. Principles from Labor Law Demonstrate That the State's Negotiating Tactics and Insistence on Unreasonable Terms Signal the State's Refusal to Negotiate in Good Faith.

The State's repeated insistence on inclusion of the Disputed Provisions, despite its stated willingness to participate in negotiations, indicates the State is merely going through the motions of bargaining, without intending to reach an acceptable common ground on the removal of or substantial revisions to the Disputed Provisions. *See Gen. Elec. Co.*, 150 N.L.R.B. 192, 194 (N.L.R.B. December 16, 1964), *quoting NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 155 (1956) ("[G]ood-faith bargaining means more than "going through the motions of negotiating"); *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 485 (1960) ("Collective bargaining is something more than the mere meeting of an employer with the representatives of his employees; the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground. . . .").

Not only does the State's repeated insistence on inclusion of the Disputed Provisions reflect a take-it-or-leave-it posture, it signals its refusal to negotiate in good faith. After 28 negotiation sessions, and despite the Tribes' numerous requests, the State has refused to remove or substantially modify the Disputed Provisions. The State must make *some* reasonable effort in *some* direction to adjust its differences and to reach an acceptable common ground with the Tribes. *See NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 135 (1st Cir. 1953); *NLRB v. General Elec. Co.*, 418 F.2d 736, 757 (2d Cir. 1969).

The State's insistence on inclusion of the Disputed Provisions coincides with its refusal to furnish the Tribes with the legal reasoning necessary to reach common ground. The State maintains that the Disputed Provisions are permitted

under the IGRA, yet it has never thoroughly explained its legal positions. *NLRB v. Truitt Manufacturing Co.*, 351 U.S. at 152-53 ("Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. [] If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy."). Nor has the State ever stated on the record whether it would be willing to take any or all of the Disputed Provisions off of the table, which would at least "narrow the issues, making the real demands of the parties clearer to each other . . . and may encourage an attitude of settlement through give and take." *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. at 488. In addition, if meaningful concessions could render the Disputed Provisions permissible,[15] the State failed to provide the Tribes with facts and terms of any meaningful concessions.

The State's repeated insistence on the inclusion of the Disputed Provisions is also unreasonable considering the record of strong tribal objections to them. The Disputed Provisions were so consistently unpalatable to the Tribes, because they infringe on tribal sovereignty by taking away the Tribes' right to make their own laws and be ruled by them, that the State's insistence on their inclusion supports a conclusion that the State failed to negotiate in good faith. *See NLRB v. Mar-Len Cabinets, Inc.*, 659 F.2d 995, 999 (9th Cir. 1981); *NLRB v. A-1 King Size Sandwiches*, 732 F.2d 872, 873 (11th Cir. 1984) (holding that a company's insistence on proposals that were so unusually harsh and unreasonable that they were predictably unworkable was sufficient evidence to establish bad faith.). The

[15] In the State's Opposition, the State fails to respond to the Tribes' argument, *see* Tribe's Motion, pp. 32-35, that a meaningful concession cannot be exchanged for the inclusion of provisions that fall outside of the scope of the seven permissible compact subjects identified in 25 U.S.C. § 2710(d)(3)(C). The State's failure to oppose this argument amounts to a concession that the argument has merit. *Hall v. Mortgage Investors Group*, No. 2:11-CV-00925-JAM-GGH, 2011 U.S. Dist. LEXIS 105999, *5 (E.D. Cal. Sept. 16, 2011) (failure to oppose argument amounts to a concession as to the truth of the argument). As such, if any of the Disputed Provisions are found to exceed the scope permitted by the IGRA because they are not directly related to gaming activities, then the State has failed to negotiate in good faith.

State's insistence on including the Disputed Provisions in the compacts is detrimental to the interests of the Tribes. *See Pub. Serv. Co. v. NLRB*, 318 F.3d 1173, 1178 (10th Cir. 2003) ("rigid adherence" and insistence on proposals to detriment of union was not meaningful bargaining.). The State's rigid adherence to the Disputed Provisions presupposes the State has no intention to compromise on these provisions and will not reach agreement without these provisions included in the compact. *See NLRB v. Ins. Agents' Int'l Union*, 361 U.S. at 485; *Regency Serv. Carts, Inc.*, 345 N.L.R.B. 671, 671 (N.L.R.B. August 27, 2005).

The State's use of these tactics and their effect are clear evidence that the State had no intention to conclude a compact with the Tribes that does not include the Disputed Provisions. The State was simply going through the motions of negotiation, waiting for the Tribes to capitulate to the Disputed Provisions, as other tribes have done (as the State readily points out). The Tribes have no intention of doing the same.

## III. THE DISPUTED PROVISIONS ARE NOT DIRECTLY RELATED TO GAMING.

The State claims that the Disputed Provisions may be negotiated and included in class III gaming compacts because: (1) the Ninth Circuit in *Coyote Valley II* has already ruled that most of these provisions fall within the "catch all" provision of the IGRA, 25 U.S.C. § 2710(d)(3)(C)(vii); and (2) they do not contain any language shifting enforcement jurisdiction from tribal to state court, language which the Tenth Circuit in *Navajo Nation v. Dalley*, 896 F.3d 1196 (10th Cir. 2018) held was prohibited under the IGRA. The State's arguments, however, fail because, unlike the fee and labor provisions at issue in *Coyote Valley II*, the Disputed Provisions are *not* directly related to "gaming activities" as that term is defined by the Supreme Court in *Bay Mills*. Additionally, regardless of which court enforces the Disputed Provisions, the Disputed Provisions still shift the applicable regulatory law from tribal law to state law on subjects that have either nothing to

do with the playing of class III games or are only indirectly related to the playing of the games.

*Coyote Valley II* never held that the application of essentially all state taxes and labor laws fell within the purview of § 2710(d)(3)(C)(vii). Instead, its holding was limited to the specific Revenue Sharing Trust Fund/Special Distribution Fund ("RSTF/SDF") provisions and Tribal Labor Relation Ordinance ("TLRO") provisions at issue in that case *and* the unique facts that pertained to the inclusion of those provisions in the 1999 Compact. *See Rincon*, 602 F.3d at 1037. For instance, in *Coyote Valley II*, the tribe, not the State, proposed the RSTF/SDF, the State offered the tribes a meaningful concession in exchange for paying those fees and all limited and non-gaming tribes participated equally in the RSTF. Furthermore, the local city and county governments were not granted veto authority over the tribe's gaming projects as part of the payment of SDF funds and the payment of the fees promoted the purposes for which the IGRA was enacted, *i.e.* the fee provided gaming revenue *in equal shares* to limited and non-gaming tribes for governmental services and provided for the off-reservation construction of improvements that benefited the on-reservation gaming projects. *Rincon*, 602 F.3d at 1032-1033.[16]

None of these facts are present in this case. The State proposed the TNGF. RON 34. It offered the Tribes no meaningful concessions in exchange for the payment of the tax. RON 9659. Only those few tribes that are fortunate to be awarded a grant will participate in the TNGF and the TNGF, as evidenced by Government Code § 12019, *et seq*. has nothing to do with gaming.

Moreover, unlike the SDF fund at issue in *Coyote Valley II*, the State's environmental proposal makes essentially all of the provisions of the California

[16] Likewise, *Coyote Valley II* upheld the TLRO because casino employees were necessary in order for the tribe to be able to offer the games for play and, therefore, was "directly related" to the playing of the games.

Environmental Quality Act applicable to the Tribes' projects and grants local governments the unbridled authority to veto the Tribes' projects unless or until the Tribes agree to pay for a mitigation plan acceptable to the city or county.

Furthermore, the *Coyote Valley II* court's analysis of the legitimacy of the TLRO was conducted prior to various Court of Appeals decisions holding the National Labor Relations Act ("NLRA") applied to the Tribes, *Casino Pauma v. NLRB*, 888 F.3d 1066 (9th Cir. 2018); *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007), and therefore, preempted the TLRO. *Casino Pauma*, 363 N.L.R.B. No. 60 (Dec. 3, 2015). The TLRO at issue here is not a proper subject of negotiation because it violates the NLRA and is illegal. *See Local 1367, Int'l Long Shoremens Association*, 148 N.L.R.B. 897, 899-900 (N.L.R.B. September 11, 1964) (holding that, " . . .there may be situations in which terms proposed for bargaining may not be prohibited by the Act, but are illegal because they contravene other state or federal laws."). Thus, these holdings render the *Coyote Valley II* analysis inapposite.

In addition, the State minimum wage, workplace anti-discrimination, and enforcement of state court child and spousal support provisions have nothing, whatsoever, to do with the "gaming activities," as that term is defined by *Bay Mills*. No matter how broadly § 2710(d)(3)(C)(vii) is interpreted, the amount of wages paid to casino employees (which is covered by the NLRA), the elimination of the Tribes' exemption from federal discrimination laws, and enforcement of state court child and spousal support orders, while worthy goals, have absolutely nothing to do with the actual playing of class-III games. *Navajo Nation v. Dalley*, 896 F. 3d 1196, 1207 (10th Cir. 2018) ("…class III gaming activity relates only to activities actually involved in the *playing* of the game, and not activities occurring in proximity to, but not extricable intertwined with, the betting of chips, the folding of a hand, or suchlike.")(emphasis in original).

Finally, the fact that the Disputed Provisions do not contain the type of "jurisdiction shifting" provisions at issue in *Dalley* does not make the Disputed Provisions "directly related" to "gaming activities." The *Dalley* court struck down the provisions at issue in that case because there was no federal law, including the IGRA, that expressly granted the state court jurisdiction over the Navajo Tribe on its reservation. *Dalley*, 896 F. 3d at 1204 ("[C]onsequently, 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 [a] matter that occurs on Indian land").[17] That analysis was distinct from the analysis of whether the tort provision in the compact was directly related to gaming.

Separately, the *Dalley* court had to decide whether the compact provision granting New Mexico courts with jurisdiction to enforce state tort law on the Navajo Reservation was authorized under the IGRA. The court held that personal injury or tort claims were not "directly related" to the playing of the games and,

[17] States have no authority to enforce their laws against tribes or Indians on their reservations absent a federal statute that expressly and explicitly grants the states such authority. *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 170-71 (1973) ("State laws generally are not applicable to tribal Indians on a Indian reservation except where Congress has expressly provided that state laws shall apply."). In *Dalley*, the plaintiff sought enforcement in state court of the state's tort laws governing personal injury on the reservation. Here, the State seeks to enforce a full array of state regulatory laws, including environmental laws, tort laws, labor laws, family laws, and anti-discrimination laws, which either have nothing to do with gaming or are "not inextricably intertwined with, the betting of chips, the folding of the hand, or suchlike." *Dalley*, 896 F. 3d at 1207. In doing so, the State seeks to relegate the Tribes in the manner it would a local government (and even subject on-reservation development to local city and county veto authority, instead of dealing with the Tribes as an equal sovereign), a result Congress never intended and that is contrary to the purposes for which the IGRA was enacted. 25 U.S.C. § 2702. *See also*, *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 664 (9th Cir. 1975) ("But more critically, subjecting the reservation to local jurisdiction would dilute if not altogether eliminate Indian political control of the timing and scope of the development of reservation resources, subjecting Indian economic development to the veto power of potentially hostile local non-Indian majorities. Local communities may not share the usually poorer Indian's priorities, or may in fact be in economic competition with the Indians and seek, under the guise of general regulations, to channel development elsewhere in the community. And even when local regulations are adopted in the best of faith, the differing economic situations of reservation Indians and the general citizenry may give the ordinance of equal application a vastly disproportionate impact.").

therefore, did not grant state courts jurisdiction to enforce the state's tort laws against the Nation.

> And, even assuming that tort law is a form of "regulation" of "the operation of gaming activities," . . . actions arising in tort in circumstances similar to this one are not "directly related to, and necessary for, the licensing and regulation of such activity," § 2710(d)(3)(c)(i), because they do not stem from the actual playing of the casino game.

*Id*. at 1207.

Accordingly, the fact that the State has not sought to shift jurisdiction over tort claims to State court is irrelevant. The State is still seeking to apply its substantive and procedural tort law to the Tribes' on-reservation activities in a manner that does not directly relate to gaming.

Thus, the Disputed Provisions are not proper subjects of negotiation because, like the state tort law at issue in *Dalley*, they do not stem from the actual playing of a class III game, namely, "each roll of the dice and spin of the wheel." *Bay Mills*, 572 U.S. at 792. The State, therefore, failed to negotiate in good faith.

## IV. THE TNGF FEES ARE IMPERMISSIBLE AND WERE DEMANDED BY THE STATE.

Every compact offer the State made to the Tribes included, over the Tribes' objections, a provision that required the Tribes pay a fee to fund the State's TNGF program. *See* Plaintiffs' SUF ¶¶ 48, 56, 65, 87, 103, 125, 135, 155, 167, 172, 189, 200. The IGRA is clear and unambiguous, it precludes states from imposing a fee on Indian gaming. 25 U.S.C. § 2710(d)(6) (" . . . 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 . . .")(emphasis added).

Nevertheless, the State argues that it has not "imposed" the TNGF fee on the Tribes because: (1) none of the fee goes into the State's general fund; (2) the Tribes, under the State's proposal, could avoid paying the fee by reducing the number of gaming devices they offered for play in their casinos; and (3) the State

was considering the Tribes' RSTF II proposal when the Tribes withdrew from CTSC. State's Opposition, pp. 21-22. Under *Coyote Valley II* and *Rincon*, all of these arguments fail.

In *Coyote Valley II*, the Ninth Circuit held the RSTF/SDF payments were proper subjects of negotiation under 25 U.S.C. § 2710(d)(3)(C)(vii) because they were "directly related to the operation of gaming activities," were proposed by the tribes, and were bargained for in exchange for a meaningful concession, exclusivity, from the State.

> The SDF was clearly "directly related" to gaming because all uses of SDF funds were earmarked for gaming-related purposes. *Coyote Valley II*, 331 F.3d at 1114. The RSTF funds similarly were related to gaming because, by redistributing gaming funds from gaming to non-gaming tribes, they are entirely consistent with the IGRA goal of using gaming to foster tribal economic development. *Id*. at 1111. Notably, we expressly declined to decide if the RSTF or SDF were "taxes," because they were decidedly not "imposed" in bad faith. Rather, the tribes themselves suggested them, and were willing to pay into them in exchange for the "meaningful concession" of constitutional exclusivity.

*Rincon*, 602 F.3d at 1032-33. *See also Coyote Valley II*, 331 F.3d at 1112-15.

Thus, *Coyote Valley II* "involved exceptional circumstances and turned on the specialized, limited uses of the revenue" and the "exclusivity" the state offered, which was "*exceptionally valuable* and *bargained for*." *Rincon*, 602 F.3d at 1037 (emphasis in original).

Unlike *Coyote Valley II*, none of the "exceptional circumstances" are present in this case. The State, not the Tribes, proposed the TNGF. As soon as the State proposed it, the Tribes objected and informed the State that they would not agree to it. RON 2134-2141; RON 2950. Unlike the RSTF/SDF fees, the fees are not distributed equally to non-gaming tribes but instead are limited to those tribes that are fortunate enough to be awarded a TNGF grant. But more importantly, the TNGF has nothing to do with gaming. The implementing State legislation prohibits

the TNGF payments from being used by tribes for any gaming related purpose. Government Code § 12019.40(d). Finally, even if all of the above criteria were met, the TNGF would still constitute an illegal tax or fee because the State never offered the Tribes a "meaningful concession" in exchange for the payment of the fee.

> Unlike in *Coyote Valley II*, in which the tribes proposed the revenue sharing provisions, [citation omitted], Rincon did not suggest revenue sharing; indeed Rincon has consistently objected to it. Additionally, the State has not offered any "meaningful concessions."

*Rincon*, 602 F.3d at 1036.

Moreover, the fact that the State was considering the RSTF II proposal does not make the TNGF legal. The RSTF II is still a State "imposed" fee because the State has not offered the Tribes any meaningful concession in exchange for paying the fee. *Id*. ("But, 'where . . . a State offers meaningful concessions in return for fee demands, it does not exercise' authority to impose anything.").

Finally, the fact that, under the State's proposal, the Tribes could reduce their number of gaming devices and thereby avoid paying the TNGF fee, illustrates—rather than cures—the State's bad faith conduct. To put the Tribes in the untenable position of either paying an illegal tax or forgo the maximum amount of revenue that could be generated from the maximum number of gaming devices that the Tribes' gaming market could bear would run afoul of and frustrate the very purposes for which the IGRA was enacted: "promoting tribal economic development, self-sufficiently and strong tribal governments . . ." 25 U.S.C. § 2702. Instead, it would place the State's interests ahead of the Tribes' interests in raising revenue to fund essential governmental programs and services for their members on their reservations.

Through its repeated proposals, the State has sought to "impose" the TNGF fee upon the Tribes. Such proposals are "evidence that the State has not negotiated

in good faith," 25 U.S.C. § 2710(d)(7)(B)(iii), and none of the State's arguments rebut this presumption.

## V. THE SECRETARY OF THE INTERIOR'S DEEMED APPROVED LETTERS ARE PART OF THE RECORD OF NEGOTIATIONS AND SUPPORT THE TRIBES' CLAIMS THAT THE STATE FAILED TO NEGOTIATE IN GOOD FAITH.

In their motion for summary judgment, the Tribes demonstrated that the Secretary of the Interior's deemed approved letters reveal that the State is consistently using the compact negotiation process as a means to improperly extend its regulatory authority over California tribes' on-reservation activities. *See* Tribes' Motion, pp. 36-44. The State's response, State's Opposition, pp. 23-26, is primarily designed to distract the Court from the fact that, over the past 15 years, the Department of the Interior ("DOI") has refused to affirmatively approve all of the compacts that the State is negotiating and executing with California's tribes.[18]

Despite the fact that one can simply look at the deemed approved letters and see that the DOI has consistently been of the opinion that California's Indian gaming compacts contain provisions that violate the IGRA, the State claims that cannot be the case because the State has waived its immunity from suit in California Government Code Section 98005 and, therefore, the Secretary would not need to deem-approve compacts that violate the IGRA because tribes can sue the State for bad faith negotiations. State's Opposition, pp. 24-25. The State also argues that the Secretary cannot "deem approve[] compacts that violate the IGRA," *id*. at p. 24, and that, "even more fundamental[ly]," the deemed approved letters "are not part of the record." *Id*. at 24-25. The State is wrong on each point.

[18] The only approval, Request for Judicial Notice, Ex. 3, involved review and approval of a minor technical amendment to a compact—not the entire compact.

The waiver of the State's immunity in California Government Code Section 98005 does not support the argument that the Secretary's deemed approved letters do not demonstrate that the State sought to include provisions that violate the IGRA in the Tribes' compacts. The letters themselves contain the opinions of the DOI, the agency tasked by federal law with the duty to review Indian gaming compacts, regarding the exact compact provisions at issue in this case. The State's attempt to write them off as irrelevant because the State has waived its immunity from suit is ineffective.[19]

Likewise, the State's argument that the "Secretary does not have the authority to 'deem approved' [*sic*] compacts that violate IGRA," State's Opposition, p. 24, misses the point. Regardless of the D.C. Court of Appeals' ruling *Amador Cty., Cal. v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011), the undisputed facts demonstrate that the Secretary has expressly found "that Section 12.3(a),(b) of the Compact attempts to regulate activities outside the scope of those prescribed under 25 U.S.C. § 2710(d)(3)(C)" and that "[w] cannot approve a tribal-state compact that . . . regulates certain activities in a manner that only indirectly relates to tribal gaming operations," but nevertheless allowed the compact to be approved by taking no action. Letter from Donald E. Laverdure, Acting Assistant Sec'y for Indian Affairs, U.S. Department of the Interior, to the Hon. Greg Sarris, Chairman, Federated Indians of Graton Rancheria (Jul. 13, 2012), RJN, Ex. 1, pp. 11-12.[20] Whether the Secretary can or cannot take such an action is purely an academic question. As a matter of fact, over the course of the last 15 years the Secretary has

[19] There is a particular irony to the State's argument on this point. Throughout the negotiations, the State's drafts have consistently included a provision that would require the Tribes to waive any right to assert California Government Code Section 98005 as a waiver of the State's immunity and thereby give up a right the Tribes have under State law. *See* RON 1597 (State's proposed complete draft for CTSC for January 2016 discussion) ("Except as stated herein or elsewhere in this Compact, no other waivers or consents to be sued are granted by either party, whether in state statute or otherwise, including but not limited to Government Code section 98005.").

[20] The D.C. Court of Appeals' statement on this point in *Amador Cty.* was also dicta.

deemed approved all of California's compacts while consistently expressing the agency's opinion that California's compact provisions, many of which are at issue in this case, violate the IGRA.

It is also important to address that, in the context of the deemed approval of a compact, "it is not the agency that issued the (no-action) approval; the approval was ordered by Congress, and it is essentially congressional action, not agency action, that gives the compact legal effect." Kevin Washburn, Agency Pragmatism in Addressing Law's Failure: The Curious Case of Federal "Deemed Approvals" of Tribal-State Gaming Compacts, University of Iowa, College of Law, Number 19-01, Vol. 52:1 (January 2019), p. 75. The deemed approved *letters*, as opposed to the actual act of approving a compact, are not required by the IGRA and remain as independent sources of the agency's views regardless of whether the Secretary can take no action on a compact that the agency considers to include provisions that violate the IGRA.[21] Addressing the agency's concerns regarding provisions that violate the IGRA through a deemed approved letter issued at the time a compact is deemed approved (by Congress) is logical because the compact is considered to be approved "only to the extent the compact is consistent with the provisions of this chapter." 25 U.S.C. § 2710(d)(8)(C).

Finally, the State's "even more fundamental[] reason why the Plaintiff Tribes' reliance on the Department's letters is irrelevant to their motion"—that they are "not part of the Record"—fails for an "even more fundamental" reason: the letters are in the Record and were used by the parties during the negotiations. *See* Plaintiffs' Reply to the State Defendants' Opposition to Plaintiffs' Request for Judicial Notice. On a variety of occasions, the parties discussed and exchanged the deemed approved letters to provide support for their negotiation positions.

[21] The Secretary also made very clear in *Amador Cty., Cal.* that he certainly believes he has the discretion to deem approved a compact that violates the IGRA.

For instance, when the "CTSC Tribes and the State . . . met on the San Pasqual Indian Reservation for the purpose of negotiating . . . Sec. 2.12 of the State's Proposed Tribal-State Compact[,] . . . [i]n support of the CTSC Tribes' position that 'hotels' must be excluded from the definition of 'Gaming Facility,' the CTSC Tribes' [*sic*] alerted the State to two deemed approved letters of the Assistant Secretary—Indian Affairs in which the Assistant Secretary found that state regulation of on-reservation hotels in which gaming activities are not conducted is unlawful because such regulation is not 'directly related to the operation of gaming activities' and, therefore, not subject to regulation through a tribal-state compact." RON 4788-4792 (Memorandum from Daniel Salgado, Chairman, Compact Tribes Steering Committee to Joginder Dhillon, Senior Advisor for Tribal Negotiations, Office of the Governor (Jul. 28, 2017)). In response, the State "communicated that its position on the inclusion of 'hotels' with Sec. 2.12 remained unchanged and, in doing so, implied that the letters of the Assistant Secretary ought not to be given any weight." *Id.*

In another example, the State discussed the deemed-approved letters in the record of negotiations:

> [W]e have reached agreement with several tribes on compacts that are currently in effect and which enable those tribes to operate responsible and successful gaming facilities that fulfill the promise of IGRA . . . . *Notwithstanding efforts to lobby the Office of Indian Gaming to reject the compacts, they were deemed approved in letters that briefly raised two issues.* While we do not agree with the OIG analysis on those issues, the State has continued to discuss and refine the relevant compact language.

RON 2210 (Letter from Joginder Dhillon, Senior Advisor for Tribal Negotiations, Office of the Governor to Dale Miller, Chairman, Compact Tribes Steering Committee (Mar. 1, 2016)(emphasis added).

Additionally, as early as April 17, 2015, a memorandum from CTSC to Joginder Dhillon included references to the deemed approved letters and used them

for guidance in the negotiations. RON 580 (April 17, 2105 Memorandum from CTSC to Joginder Dhillon Re: Definition of Gaming Facility, Definition of Project and Licensing of the Gaming Facility) ("Consistent with the Department of Interior guidance on this matter, the definition has been revised to emphasize the fact that the areas defined as 'Gaming Facility' must be directly related to the operation of Gaming Activities . . . .").

Thus, the State's argument that the deemed approved letters are not a part of the Record fails. Rather, the parties discussed the deemed approved letters during the negotiations and the Tribes sent the State copies of the letters with memoranda analyzing the effect of the deemed approved letters on the negotiations. *See* RON 4788-4792. The State's argument that they are not part of the Record and/or are irrelevant is mistaken.

For all of these reasons, the Secretary's deemed approved letters objectively demonstrate that the compact provisions the State offered to the Tribes during their negotiations impermissibly exceed IGRA's scope because they attempt to regulate activities that are not directly related to gaming. As such, the State failed to negotiate with the Tribes in good faith.

## CONCLUSION

For all of the foregoing reasons, the Tribes respectfully request that the Court grant their motion for summary judgment and order the State and the Tribes to conclude a compact within 60 days.

DATED: December 9, 2019

Respectfully Submitted,

RAPPORT AND MARSTON

By: /s/ *Lester J. Marston*
LESTER J. MARSTON, Attorney for the Chicken Ranch Rancheria of Me-Wuk Indians, the Chemehuevi Indian Tribe, the

Hopland Band of Pomo Indians, and the Robinson Rancheria

DATED: December 9, 2019

DEHNERT LAW, PC

By: /s/ *David Dehnert*
DAVID DEHNERT, Attorney for the Blue Lake Rancheria

## CERTIFICATE OF SERVICE

I am employed in the County of Mendocino, State of California. I am over the age of 18 years and not a party to the within action; my business address is that of Rapport & Marston, 405 West Perkins Street, Ukiah, CA 95482.

I hereby certify that I electronically filed the foregoing:

**PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

with the Clerk of the United States District Court for the Eastern District of California by using the CM/ECF system on December 9, 2019, which generated and transmitted a notice of electronic filing to CM/ECF registrants.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; executed on December 9, 2019, at Ukiah, California.

*/s/ Ericka Duncan*
Ericka Duncan