No. 21-15751

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHICKEN RANCH RANCHERIA OF ME-WUK INDIANS, CHEMEHUEVI INDIAN TRIBE, BLUE LAKE RANCHERIA, HOPLAND BAND OF POMO INDIANS, AND ROBINSON RANCHERIA,

Plaintiffs-Appellees,

v.

GAVIN NEWSOM, Governor of California, and STATE OF CALIFORNIA,

Defendants-Appellants.

On Appeal from the United States District Court
For the Eastern District of California,
Case No. 1:19-cv-00024-AWI-SKO
The Honorable Anthony W. Ishii, Judge

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INTRODUCTION

This appeal offers this Court an opportunity to clarify the boundaries of the Indian Gaming Regulatory Act's permitted topics of negotiation, which it addressed in *In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003) ("*Coyote Valley II*") and *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1041 (9th Cir. 2010) ("*Rincon*"), in light of the Supreme Court's decision in *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014) ("*Bay Mills*").

For five years, the Governor and State of California ("State") attempted to extend California's regulatory reach over the on-reservation activities of the Appellee Tribes ("Tribes") by insisting that provisions addressing topics that are not permitted topics of negotiation in the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. ("IGRA") be included in the Tribes' gaming compacts. The State also refused to offer any meaningful concessions for those provisions. The State's negotiation strategy was designed to force the Tribes to agree to the State's terms, using the approaching termination date of the Tribe's compacts and the resulting loss of the lion's share of their governmental revenue to place the Tribes under extreme duress.

Pursuant to IGRA's remedial provisions, the Tribes sued the State for failing to negotiate in good faith. The district court concluded that the provisions challenged by the Tribes either constituted bad faith per se, or required that the State provide meaningful concessions and the State failed to do so. The State challenges the district court's decision based on a facially erroneous interpretation

of the plain language of IGRA and an interpretation of the meaningful concession exception that conflicts with *Coyote Valley II*, *Rincon*, and *Bay Mills*.

The State's appeal is meritless and the district court's decision should be affirmed.

ISSUES PRESENTED

A. Did the State fail to negotiate in good faith by demanding that the Tribes agree to compact provisions that were not negotiable subjects allowed by the IGRA and did not fall within the meaningful concession exception created by this Court in *Coyote Valley II*, 331 F.3d 1094 (9th Cir. 2003) and *Rincon*, 602 F.3d at 1041?

B. Is the "meaningful concession" test limited to State demands for the payment of fees?

C. Does the Supreme Court's definition of "gaming activities" in *Bay Mills*, 572 U.S. 782, narrow the application of the meaningful concession exception?

STATEMENT OF THE CASE

Pursuant to IGRA, the Tribes conduct class III gaming activities on their Indian lands under 1999 compacts ("1999 Compacts"). 1-SER-178, 180-181, 188, 191-192, 201-202, 208-210, 215, 217-218. From 2014 to 2019, the Tribes, through a coalition of California tribes called the Compact Tribes Steering Committee ("CTSC"), negotiated with the State for a replacement compact. 1-SER-182, 192, 202, 210, 218; 2-SER-302-328, 332-335.

From 2015 through 2019, CTSC and the State held 28 in-person negotiation sessions, in addition to numerous subcommittee meetings regarding the compact. 2-ER-034-035; 1-SER-229. Throughout negotiations, the State insisted on the inclusion of provisions that would require the Tribes to: (1) adopt state tort law ("Tort"); (2) be subjected to state environmental regulatory laws ("Environmental"); (3) enter agreements with local governments regarding the construction of off-reservation improvements ("Local Government"); (4) to enforce state court spousal/child support orders ("Support Orders"); (5) adopt federal standards on employment discrimination ("Employment"), carry insurance and create remedies in money damages for violations; (6) comply with state minimum wage laws ("Wage"); (7) adopt a new discriminatory Tribal Labor Relations Ordinance ("TLRO") ("Labor"); and (8) pay a fee to fund a State grant program ("TNGF") (collectively "Prohibited Provisions"). 1-SER-183-184, 194-195, 203, 210-211, 219-220. Additionally, throughout the negotiations, the State insisted on defining "Gaming Facility" and "Gaming Operation" in a manner that would make these Prohibited Provisions applicable to tribal employees with little or no connection to the operation of gaming activities and would regulate areas of the Tribes' reservations in which no gaming activities occur. 8-SER-2109.[1]

Throughout the negotiations, the Tribes objected to the Prohibited Provisions because they are not directly related to gaming activities and also

[1] *See, e.g.*, 8-SER-2221 (tribe must "recognize and enforce tribal or state court child or spousal support judgments entered against any person employed at the Gaming Operation or Gaming Facility. . . .").

because the TNGF was an impermissible tax.[2] 1-SER-184, 195, 203-204, 211, 220, 241-242; 3-SER-651-652; 4-SER-919-920, 923, 938-940, 1085-1087, 1136, 1138, 1142-1145, 1156-1159; 5-SER-1265-1270, 1293-1296, 1322-1324, 1623-1624, 1631-1632; 7-SER-1939-1944, 2087, 2090-2092l; 8-SER-2235-2245, 2394-2395; 3-ER-300-303; 9-SER-2438-2439. CTSC agreed to negotiate over the Prohibited Provisions, including having such provisions within compact drafts, in explicit anticipation of the State offering meaningful concessions that (1) were of significant value, (2) were not subjects the State was required to negotiate under IGRA, and (3) fulfilled IGRA's purposes. 1-SER-184, 195, 204, 220; 3-SER-919-920, 923, 939, 951-954, 1156-1159; 5-SER-1292-1296, 1322-1324; 6-SER-1631-1632; 7-SER-1939-1940; 3-ER-300-303, 309. The State never offered any meaningful concessions in exchange for the Prohibited Provisions. 1-SER-184, 195, 204, 220; 6-SER-1631; 8-SER-2235-2236.

From 2015 to 2019, the State proffered twelve draft compacts, plus one pre-draft and one revision, all of which included the Prohibited Provisions. 1-SER-183; 2-SER-339-597; 3-SER-653-784, 788-900; 4-SER-902-918, 955-1083, 1160-1200; 5-SER-1202-1263, 1346-1500; 6-SER-1502-1589, 1663-1799, 1800; 7-SER-1802-1938, 1947-2085, 2095-2100; 8-SER-2102-2234, 2252-2392. From 2014 on, the State insisted on the Prohibited Provisions via numerous exchanged documents and communications. *E.g.*, 2-SER-329-330, 336-338; 4-SER-924-936, 1089-1134; 5-SER-1273-1288, 1299-1317, 1327-1345; 6-SER-1593-1621, 1626-1628, 1633-

[2] The California Nations Indian Gaming Association also opposed the State's TNGF Provision for the same reasons as CTSC. 4-SER-1139-1140.

1662; 8-SER-2246-2251, 2394-2400; 9-SER-2402-2436; 3-ER-304-308. The State's position on the Prohibited Provisions remained unchanged after a gubernatorial election and changed administration, despite the parties reaching consensus on most proper subjects under IGRA. 6-SER-1629-1630; 7-SER-1945-1946; 3-ER-300-303.

Consequently, the Tribes withdrew from CTSC; rejected the State's offers; and offered a final compact. 1-SER-185, 194, 205, 212, 221; 2-ER-53-158, 159-162. The State rejected the Tribes' offered compact. 2-ER-051-052.[3]

On January 5, 2019, the Tribes filed this action. 1-ER-003. The parties filed cross-motions for summary judgment, 1-ER-003, and on March 31, 2021, the district court granted the Tribe's motion and denied the State's motion ("Order"), finding that the State had negotiated in bad faith *per se* by demanding Support Provisions because those provisions are totally unrelated to the operation of gaming activities. 1-ER-014-015. The district court held that the State was not in bad faith *per se* by proposing the Employment, Wage, Labor, Tort, Environmental, and Local Government Provisions, but that the State was obligated to provide meaningful concessions in exchange for demanding these Provisions and had failed to show it had done so. 1-ER-002, 007-021. The Order initiated IGRA's remedial process under § 2710(d)(7)(B). 1-ER-022.

[3] On April 30, 2020, the Depart of Interior's Office of Indian Gaming provided technical assistance, providing comments and concerns regarding this compact. 1-SER-53-63.

The State moved to stay the district court's order, which both the district court, 2-ER-024, and this Court denied. Dkt. 33.

Without a compact, the Tribes' current gaming activities will have to cease on June 30, 2022, causing the loss of thousands of jobs, millions of dollars in tribal revenue and the discontinuation of vital tribal governmental programs that persons living, working, and visiting the Tribes' reservations desperately need. 1-SER-10-20, 28-34, 44-49, 185, 196, 205, 212.

SUMMARY OF ARGUMENT

IGRA limits the subjects that may be included in a Compact to the issues enumerated in 25 U.S.C § 2710(d)(3)(c)(i)-(vii). This Court, in *Coyote Valley II* and *Rincon*, created a narrow exception to this rule. *Rincon*, 602 F.3d at 1033-1040.

For five years, the State demanded the Tribes include seven provisions not authorized by IGRA, and the Tribes rejected them because they were either not "directly related to the operation of gaming activities" as defined by *Bay Mills*, *Rincon*, and *Navajo Nation v. Dalley*, 896 F.3d 1196 (10th Cir. 2018) ("*Dalley*"), or did not meet all of the three criteria established in *Coyote Valley II*, as clarified by *Rincon*, to qualify for the exception, including offering the Tribes "meaningful concessions" in exchange for inclusion of the seven provisions.

As a result, the State failed to negotiate in good faith in violation of IGRA.

ARGUMENT

I. IGRA PROHIBITS STATES FROM USING NEGOTIATIONS TO IMPOSE STATE JURISDICTION ON INDIAN TRIBES.

a. Federal Indian Law and Tribal Sovereignty.

Courts have long recognized that Congress has "plenary and exclusive authority" over Indian affairs. *Bay Mills*, 572 U.S. at 788-90. This exclusive authority is rooted in the Indian Commerce Clause (art. I, § 8, cl. 3) and the Supremacy Clause (art. VI, cl. 2) of the Constitution, which gives Congress "the exclusive and absolute power to regulate commerce with the Indian tribes, -- a power as broad and as free from restrictions as that to regulate commerce with foreign nations." *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876); *Worcester v. Georgia* 31 U.S. 515, 551-57, 558-60 (1832); *Seminole Tribe v. Fla.*, 517 U.S. 44, 62 (1996) ("This is clear enough from the fact that the States … have been divested of virtually all authority over Indian commerce and Indian tribes."); *United States v. Kagama*, 118 U.S. 375, 383-384 (1886) (Indian tribes "owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.").

Pursuant to this plenary authority, Congress and the Supreme Court have adhered to the general principle first articulated in *Worcester*: a state may not regulate the conduct of tribes in Indian country. *Rice v. Olson* 324 U.S. 786, 789 (1945). Consequently, the states have no such authority absent an act of Congress.

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-171 (1973) ("State laws are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state laws shall apply."). Likewise, local laws cannot be enforced on reservations absent Congressional authorization. *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 658-659 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977) ("*Santa Rosa*").[4]

Based upon the trust responsibility owed to tribes by the United States, courts presume when Congress legislates on Indian affairs that its intent towards the tribes is benevolent and federal statutes that arguably would abrogate or abridge tribal rights to self-government are narrowly construed in favor of the tribes retaining them. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). For this reason, the Supreme Court has adhered to "the general rules that statutes passed for the benefit of the dependent Indian tribes…are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Id.* Applying these canons of construction in *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987) ("*Cabazon*"), the Supreme Court held that California had no authority to enforce its gambling laws against Indian tribes. *Cabazon*, 480 U.S. at 221-222. Thus, prior to IGRA, California had no authority to regulate gaming on reservations.

b. IGRA and the Policies that Underlie it.

[4] For example, the Tribes can build multi-facility sports arenas on tribal lands without any State or local involvement or approvals.

Congress enacted IGRA in the wake of *Cabazon* to "balance the states' interest in regulating high stakes gambling within their borders and the Indians' resistance to state intrusions on their sovereignty." *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1289 (D.N.M. 1996). IGRA established a statutory framework for the regulation of Indian gaming which "'expressly pre-empts the field of governance of gaming activities on Indian lands.'" *Id.*, quoting S. REP. No. 100-446 at 6.

> The primary purposes of IGRA are –
>
> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting economic development, self-sufficiency, and strong tribal governments; (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players.

25 U.S.C. § 2702(1)-(2).

Thus, IGRA's primary purpose is the Tribes' economic development, not the states' public policy. Indeed, states are not mentioned in IGRA's purpose clause.

IGRA's legislative history makes clear that Congress did not authorize, nor intend to allow, a state's use of the compact negotiating process as a means to impose broad state regulation on tribes. Rather, Congress intended to "restrain aggression by powerful states" by setting limits on their involvement. *See* S. REP. No. 100-446 at 33 (1988) (statement of Sen. McCain), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3103; 134 Cong. Rec. at S12654 (statement of Sen. Evans).

In this regard, the Senate Report succinctly states: "[T]he Committee is strongly opposed to the application of the jurisdictional elections authorized by this bill to any other economic or regulatory issue that may arise between tribes and States in the future." S. REP. No. 100-446 at 14, reprinted in 1988 U.S.C.C.A.N. 3071, 3084. More specifically, Senator Inouye stated:

> There is no intent on the part of Congress that the compacting methodology be used in such areas such as taxation, water rights, environmental regulation, and land use. . . . The exigencies caused by the rapid growth of gaming in Indian country and the threat of corruption and infiltration by criminal elements in class III gaming warranted the utilization of existing State regulatory capabilities in this one narrow area.

134 Cong. Rec. S12643-01 at S12651 (1988).

Similarly, Representative Coelho remarked:

> It is important to make clear that the compact arrangement set forth in this legislation is intended solely for the regulation of gaming activities. It is not the intent of Congress to establish a precedent for the use of compacts in other areas, such as water rights, land use, environmental regulation or taxation. Nor is it the intent of Congress that States use negotiation of gaming compacts as a means to pressure Indian tribes to cede rights in any other area.

134 Cong. Rec. H8155 (Sept. 26, 1988).

Accordingly, "[t]he only state interests mentioned in § 2702 are protecting against organized crime and ensuring that gaming is conducted fairly and honestly" and State regulation is **limited to this one narrow area**. *Rincon*, 602 F. 3d at

1029. Congress, therefore, gave states a limited role in regulating class III gaming through tribal-state compacts.

"[T]o ensure that tribal-state compacts cover only those topics that are related to gaming and are consistent with IGRA's stated purposes," *Id.*, at 1028-29, and "to prevent compacts from being used as subterfuge for imposing State jurisdiction on tribes concerning issues unrelated to gaming," *Coyote Valley II*, 331 F.3d at 1111, IGRA recognizes only seven permissible subjects of negotiation for a tribal-state compact governing class III gaming. 25 U.S.C. § 2710(d)(3)(C). IGRA also precludes states from imposing "any tax, fee, charge, or other assessment upon an Indian tribe . . . to engage in a class III activity." *Id*. at § 2710(d)(4).

The seventh of these subjects has been described as a catchall for "any other subjects that are directly related to the operation of gaming activities." *Id*. States have relied upon it to justify expanding regulatory jurisdiction over tribes or tribal lands. For instance, in *Coyote Valley II*, the State relied on the catchall to justify a "demand[] that tribes meet with labor unions to negotiate independently a labor ordinance. . . . ." *Id*., at 1116.[5]

However, this Court revisited the scope of the seventh subject in *Rincon* and reaffirmed that Congress did not intend "that the compacting methodology be used in such areas such as taxation, water rights, **environmental regulation**, and **land use**," *Rincon*, 602 F.3d at 1029 n.10 (emphasis added), and rejected the State's

[5] Unlike this case, in *Coyote Valley II*, "the State did not demand that tribes adopt a specific set of legal rules governing general employment practices on tribal lands." *Id*.

argument that promoting the State's general economic interest through revenue sharing was consistent with IGRA. The Court clarified the meaning of "directly related to gaming activities" and rejected as circular reasoning the State's contention that imposing a general fund fee to operate slot machines was "directly related" to the operation of gaming activities because the money was paid out of the income from gaming. *Id*. at 1033-34.

Accordingly, *Rincon* significantly narrowed the scope of the unenumerated topics a state can request to negotiate under § 2710(d)(3)(C)(vii) where the interest sought to be protected is anything other than a state's interest in "protecting against organized crime and ensuring that gaming is conducted fairly and honestly." *Id*. at 1019. What compelled "a limited reading of the permitted topics is the canon of construction obligating [the Court] to construe a statute abrogating tribal rights narrowly and most favorably towards tribal interests." *Id*. at 1028 fn. 9.

The Department of Interior ("Interior"), likewise, reads § 2710(d)(3)(C)(vii) narrowly "against [the] backdrop" of the "legislative history of IGRA [which] indicates that compacts [should not] be used as subterfuge for imposing state jurisdiction on tribal lands." 1-SER-132-133.

> In the context of applying the "catch-all" category, we do not simply ask, 'but for the existence of the Tribe's class III gaming operation, would the particular subject regulated under a compact provision exist?' Instead, we must look to whether the regulated activity has a direct connection to the Tribe's conduct of class III gaming activities.

1-SER-133.

In fact, since 2005, Interior has reviewed 50 California compacts that were submitted to the Secretary of the Interior and, except for a minor amendment, refused to affirmatively approve any of those compacts out of Interior's concerns that the compacts violate IGRA by including topics that are not directly related to gaming activities. *E.g.*, 1-SER-116-176. Thus, Interior has adopted *Rincon's* narrowed interpretation of § 2710(d)(3)(C)(vii) and rejected using a "but for the casino," approach to understanding the proper scope of the seventh subject. Rather, Interior looks to whether the regulated activity actually has a direct connection to the playing of a class III game. The Court should give deference to Interior's interpretation. *U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Finally, if there was ever any doubt as to what "directly related to the operation of gaming activities" means, the Supreme Court dispelled it in *Bay Mills*, holding that "'class III gaming activity' means just what it sounds like—the stuff involved in playing class III games . . . [It] is what goes on in a casino—each roll of the dice and spin of the wheel. . . [T]he gaming activity is the gambling in the poker hall." *Id*. 572 U.S. at 792. Thus, *Bay Mills* significantly narrowed the scope of § 2710(d)(3)(C)(vii), limiting it to topics directly related to the actual playing of a class III game.

Federal appellate court decisions in the wake of *Bay Mills* have applied the Supreme Court's understanding of "gaming activities" to define the limits of IGRA's catch-all provision. For example, in *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928 (8th Cir. 2019) ("*Flandreau*"), the tribe urged the Eighth

Circuit to adopt an expansive definition of "gaming activities" to include the casino's gift shop, hotel, food and beverage services, and live entertainment. The tribe argued that such amenities would not exist but for its casino, nor could the casino operate without the amenities; thus, the amenities were "directly related to the operation of gaming activities." *Id*. 938 F.3d at 934-935. But the Eighth Circuit rejected that argument as contrary to IGRA's plain meaning: "First, and most obviously, amenities such as a gift shop, hotel, and RV park are not directly related to Class III gaming activity as defined by the Supreme Court in *Bay Mills* – 'what goes on in a casino – each roll of the dice and spin of the wheel.' 'Directly related to the operation of gaming activity' is narrower than 'directly related to the operation of the Casino.'" *Id*. at 935.

Similarly, the Tenth Circuit relied on *Bay Mills* to limit the scope of compact subjects that are permissible under § 2710(d)(3)(C)(vii). *Dalley*, 896 F.3d at 1207. "The Court's analysis in *Bay Mills*" led the Tenth Circuit "to the clear conclusion that 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 inextricably intertwined with, the betting of chips, the folding of a hand, or suchlike." *Id; see also id.* at 1208 ("if individuals are not participating in class III gaming activities on Indian lands – as *Bay Mills* understands them – … we are hard-pressed to see how tort claims arising from their activities could be 'directly related to, and necessary for, the licensing and regulation' of class III gaming activities."). In order for a provision to survive scrutiny under § 2710(d)(3)(C)(vii), therefore, it must relate to "the actual playing of the casino game." *Id*.; *see also id.*

at 1207-1209 ("[W]hether a casino employee is negligent in cleaning up spilled water on the floor which results in a patron falling has nothing to do with the actual regulation or licensing of Class III gaming, *viz.*, each roll of the dice and spin of the wheel."). The Tenth Circuit found this conclusion "ineluctable when the plain statutory text is viewed through the prism of *Bay Mills*." *Id.*

c. IGRA's Enforcement Mechanism.

Despite the above-described limitations, Congress nevertheless recognized that "the compact requirement skews the balance of power over gaming rights in favor of states by making tribes dependent on state cooperation." *Rincon*, 602 F.3d at 1027. Thus, IGRA imposes on states the concomitant obligation to negotiate compacts in good faith and authorizes tribes to enforce this obligation in federal court. 25 U.S.C. § 2710(d)(7)(B)(iii). Upon a tribe's introduction of evidence that a state did not negotiate a compact in good faith, the burden of proof shifts to the state to prove otherwise. 25 U.S.C. § 2710(d)(7)(B)(ii). In determining whether a state has negotiated in good faith, a court:

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

25 U.S.C. § 2710(d)(7)(B)(iii).

Whether a state has negotiated in good faith is "evaluated objectively based on the record of negotiations" and "a state's subjective belief in the legality of its

requests is not sufficient to rebut the inference of bad faith created by objectively improper demands." *Rincon*, 602 F.3d at 1041; *accord Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1033 (2d Cir. 1990) ("*Mashantucket*") ("The statutory terms are clear, and provide no exception for sincere but erroneous legal analyses.").

If the court finds that the state failed to negotiate in good faith, it thereafter orders the parties to begin the remedial procedures set forth in 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii).

II. THE STATE NEVER OFFERED THE TRIBES MEANINGFUL CONCESSIONS FOR FEE AND NON-FEE RELATED COMPACT PROVISIONS AS REQUIRED IN *RINCON*.

The State's assertion that the district court erred in finding that the State failed to negotiate with the Tribes in good faith is based on two fundamental but flawed arguments. First, meaningful concessions are required only when a state requests revenue sharing provisions. Second, all other compact provisions are proper under IGRA if a state maintains that they are directly related to gaming. This second argument hangs precariously on the State's misuse of the phrase, "directly related to the operation of the gaming activities" in *Coyote Valley II*.

Both arguments fail. The first fails because *Coyote Valley II* actually applied a meaningful concessions test to labor provisions, not just the revenue sharing provisions. The second fails because *Coyote Valley II* and *Rincon* established a narrow exception to IGRA. Those cases did not, as the State applies them, open the proverbial floodgates and allow anything that is arguably related to gaming to be

shoehorned into IGRA's catchall provision. The State is trying to avoid meeting the required elements of the meaningful concession test established in *Coyote Valley II* as clarified in *Rincon* ("*Rincon* exception"), while simultaneously trying to escape the restrictions imposed by Section 2710(d)(3)(C). Simply put, the State is attempting to create a second exception to Section 2710(d)(3)(C) or render it surplusage. As demonstrated herein, the State's interpretation of the *Rincon* exception and Section 2710(d)(3)(C) is wrong and, as a result, the foundation of the State's assertion that it negotiated in good faith is fatally flawed.

In *Coyote Valley II*, this Court first addressed whether provisions that (1) do not fall within IGRA's enumerated topics of negotiation (Section 2710(d)(3)(C)) or (2) fail to comply with IGRA's prohibition of the imposition of a tax upon an Indian tribe to engage in a class III activity (Section 2710(d)(4)) could be included in a compact without violating a state's obligation to negotiate in good faith. The Court's analysis grew out of the unique history of California compact negotiations. *See Rincon*, 602 F.3d at 1032 ("*Coyote Valley II* is an exceptional case . . . .").[6] The most crucial aspects of that history were: (1) the State offered the tribes valuable concessions it was not compelled to offer in exchange for the challenged provisions of the 1999 Compact; and (2) **both** the State and the California gaming tribes wanted to include provisions that went beyond IGRA's seven proper subjects of negotiation in the 1999 Compact.

[6] A comprehensive narrative of the relevant history is set forth in *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 716-18 (9th Cir. 2003).

In *Rincon*, this Court described the difficulty in reconciling the limited nature of IGRA compact negotiations with the permissibility of the mutually desired provisions at issue in *Coyote Valley II*:

> [N]either tribes nor states enter IGRA negotiations "voluntarily" . . . . IGRA negotiations are therefore distinguishable from regular contract negotiations. When private parties, or independent sovereign entities, commence contract negotiations, they generally do so because each has something of value the other wants, and each side has the right to accept or reject an offer made . . . . If negotiations fail, neither party has a right to complain. Not so in IGRA negotiations. In IGRA, Congress took from the tribes collectively whatever sovereign rights they might have had to engage in unregulated gaming activities, but imposed on the states the obligation to work with tribes to reach an agreement under the terms of IGRA . . . . If IGRA negotiations break down . . . because the state does not come to the bargaining table in good faith, IGRA specifically provides that courts, and the Secretary of the Interior, can intervene to impose a gaming arrangement without the affected state's approval.

Rincon, 602 F.3d at 1030.

In *Coyote Valley II*, the parties wanted to exchange provisions that were outside the scope of Section 2710(d)(3)(C) and Section 2710(d)(4)—they wished to engage in something closer to normal contract negotiations than what IGRA contemplates. Recognizing that both parties wanted their provisions included in the compact and that they were not imposed on the tribes by the State, this Court created *an exception to IGRA*. It enabled the parties to include their provisions in the compact, while not rendering Section 2710(d)(3)(C) superfluous.

Coyote Valley II was decided early in California bad faith litigation without the benefit of relevant legal precedent and the court created its own nomenclature

for its IGRA analysis. The *Coyote Valley II* court could not have foreseen the many complicated and subtle issues that have arisen from the *Rincon* exception analysis.

a. *Coyote Valley II* and *Rincon* Did Not Restrict the Meaningful Concession Analysis to Revenue Sharing Provisions.

Although the meaningful concession analysis in *Coyote Valley II* and *Rincon* primarily addressed revenue sharing provisions, neither decision stated—or even implied—that the meaningful concession analysis is restricted to revenue sharing provisions. *Coyote Valley II* concluded that provisions of the 1999 Compact relating to both labor and revenue sharing, were permissible concessions from the tribes in return for the significant concessions offered by the State. *Coyote Valley II*, 331 F.3d at 1116 ("Given that the State offered *numerous concessions* to the tribes in return for the Labor Relations provision . . . it did not constitute bad faith for the State to insist that this interest be addressed in the *limited way* provided in the provision.") (emphasis added).[7]

Therefore, there is no support, and the State has offered none, for the State's assertion that the *Rincon* exception applies exclusively to revenue sharing provisions.

[7] That the *Rincon* meaningful concession exception is applicable to provisions beyond revenue sharing has subsequently been recognized by federal district courts in California. *Big Lagoon Rancheria v. California*, 759 F. Supp. 2d 1149, 1162 (N.D. Cal. 2011) ("[T]o negotiate for environmental mitigation measures in good faith, the State must offer a meaningful concession in exchange.").

b. The State's Assertion that All the Non-Revenue Sharing Provisions Are Directly Related to Gaming Is Inconsistent with IGRA and Applicable Case Law.

If the Court accepts the State's argument that the *Rincon* exception only applies to revenue sharing provisions, then most of the State's proposed compact provisions would be prohibited for failure to comply with Section 2710(d)(3)(C)(i)-(vii). Obviously, this is problematic for the State. The State avoids the problem by exploiting *Rincon*'s use of the phrase "directly related to the operation of gaming activities," as an element of the *Rincon* exception. *Rincon*, 602 F.3d at 1033. Stripping the phrase of context, the State argues that all provisions proposed by the State fall within Section 2710(d)(3)(C)(vii). The rationale is that the provisions are permissible, because the phrase used in *Coyote Valley II* and *Rincon* mirrors the catchall provision of IGRA, and because there is, arguably, some connection, however remote, between each proposed provision and tribal gaming. As discussed below, the State's argument is an application of the "but-for" analysis, which has been rejected by *Rincon* and Interior.[8]

The *Rincon* exception requires: (1) the State's provision is not imposed; (2) that provisions are consistent with the purposes of IGRA; and (3) that provisions be closely related to the operation of the gaming activities. *Rincon*, 602 F.3d at 1033-36. Unfortunately, *Coyote Valley II* uses the phrase "directly related to the operation of the gaming activities," which mirrors Section 2710(d)(3)(C)(vii). *Id.*,

[8] The State, in fact, uses the phrase. *See* Opening Brief, p. 53 (" . . .but for a Tribe conducting Gaming Activities . . .").

at 1033; *Coyote Valley II*, 331 F.3d at 1111, 1114. Using this phrase muddles the boundaries of the *Rincon* exception and the meaning of the phrase as stated in IGRA. If a topic falls within the "directly related to the operation of gaming activities" category, it qualifies as a permissible topic of negotiation. No exception is needed; no other factors or circumstances are necessary. If a topic qualifies as an exception to the negotiation topics, it cannot also—without contradiction—fall within those topics; it must meet each element of the *Rincon* exception.

The *Rincon* court acknowledged the attenuated relationship between IGRA's permissible subjects of negotiation and the revenue sharing provisions that the *Coyote Valley II* court found merited an exception:

> Crucially, in *Coyote Valley II* we did not conclude that § 2710(d)(3)(C)(vii) authorized the RSTF and SDF because "revenue sharing" is a subject directly related to gaming. Rather, we held that fair distribution of gaming opportunities and compensation for the negative externalities caused by gaming are subjects directly related to gaming, and the RSTF and SDF were the means chosen by the parties to the 1999 compacts to deal with those issues.

Rincon, 602 F.3d at 1033.

The struggle to articulate this contradictory framework is evident from both courts' characterization of the task. "Although these provisions do not fit comfortably within paragraph (3)(C)(iii), it cannot seriously be doubted that each are 'directly related to the operation of gaming activities.'" *Coyote Valley II*, 331 F.3d at 1114. "In *Coyote Valley II* we construed the meaning of subjects 'directly related to the operation of gaming' in § 2710(d)(3)(C)(vii) broadly to include revenue sharing because the Revenue Sharing Trust Fund ("RSTF") is consistent

with the plain language of § 2702 (listing tribal economic self-sufficiency as one of IGRA's purposes)." *Rincon,* 602 F.3d at 1034. The *Rincon* court did not, however, "read § 2710(d)(3)(C)(vii) broadly . . . to include general fund revenue sharing because none of the purposes outlined in § 2702 includes the State's general economic interests. The only state interests mentioned in § 2702 are protecting against organized crime and ensuring that gaming is conducted fairly and honestly." *Id*. Thus, the *Rincon* exception focused on whether the subject of negotiation was substantially consistent with IGRA. If the exception were to evaluate whether the subject directly related to gaming, the remainder of the three-part analysis would have been unnecessary.

IGRA restricts the topics that may be included in a gaming compact to six enumerated topics, and to topics that are "directly related to the operation of the gaming activities." Section 2710(d)(3)(C). The catch-all provision of IGRA was designed to allow for the inclusion of topics that Congress did not enumerate but that, nevertheless, would fall within the narrow confines of IGRA. The catch-all provision does not permit a broader interpretation that would render the previous six topics surplusage. On the contrary, Congress drafted the catch-all provision to ensure that it would be narrowly construed. The topic must be "directly related," not arguably or somewhat related to gaming. The direct relationship is to the operation of the gaming activities, that is, the actual, practical conducting of gaming activities, not to gaming as a general concept or to activities that support or are made possible by gaming, as argued by the State. *See*, *e.g.*, Opening Brief, p. 53.

This strict interpretation of Section 2710(d)(3)(C) is underscored by Congress's articulation of what it intended the compacting process to encompass. "Section [2710](d)(3)(C) describes the issues that may be the subject of negotiations between a tribe and a State in reaching a compact. . . . The Committee does not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands." S. REP. 100-446 at 14 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3084.[9]

In clarifying *Coyote Valley II*, the *Rincon* court emphasized that Section 2710(d)(3)(C) must be interpreted strictly and narrowly. *Rincon*, 602 F.3d at 1028 n.9. The *Rincon* court also explained **why** Section 2710(d)(3)(C) topics are limited: "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 . . . ." *Id.* at 1028-29.

Furthermore, as set forth in Section I, above, *Bay Mills* eliminated any doubts raised by *Coyote Valley II* and *Rincon* by unambiguously stating the narrow meaning of what is "directly related" to a "class III gaming activity." "'[C]lass III gaming activity' is what goes on in a casino—each roll of the dice and spin of the wheel." *Bay Mills*, 572 U.S. at 792. Other appellate courts, moreover, have stressed *Bay Mills'* narrow interpretation. *Dalley*, 896 F.3d at 1207; *accord*, *Flandreau*, 938 F.3d at 944.

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[9] See, also, Senator Inoye's statement on Congress' intent to limit the topics to be addressed in the gaming compacts, 134 Cong. Rec. S12643-01 at S12651 (1988), quoted on page 9, above.

Notwithstanding the foregoing, the State insists that the Prohibited Provisions are "directly related to the operation of the gaming activities" and, therefore, permissible without the State being required to offer meaningful concessions. Opening Brief, pp. 37-55. The State's analytical sleight of hand is based on the argument that, but for the gaming, the issues addressed by the Prohibited Provisions would not exist and, therefore, they are **directly related to the operation of the gaming activities**. *See, e.g.*, Opening Brief, p. 53.

While there is some language in *Coyote Valley II* that might allow for such an interpretation, *Id*. at 1116, the *Rincon* court pointedly rejected it:

> The State's argument that general fund revenue sharing is "directly related to the operation of gaming activities" because the money is paid out of the income from gaming activities is circular.
>
> * * *
>
> Whether revenue sharing is an authorized negotiation topic under § 2710(d)(3)(C)(vii) . . . depends on the *use* to which the revenue will be put, not on the mere fact that the revenue derives from gaming activities.

Rincon, 602 F.3d at 1033. (Emphasis original).

Other circuit courts have rejected the "but for" analysis. In *Flandreau*, the court stated, "the district court erred in concluding that casino construction and renovation falls within and is preempted by the catchall provision simply because, 'without the construction project, the Tribe would be unable to operate its gaming activities.'" 938 F.3d at 944. In *Dalley*, the court stated, "if individuals are not participating in Class III gaming activities on Indian land—as *Bay Mills* understands them—when they are allegedly harmed by a tortfeasor, we are hard-

pressed to see how tort claims arising from their activities could be 'directly related to, and necessary for, the licensing and regulation' of Class III gaming activities." 896 F.3d at 1207-1208.

Crucially, the Opening Brief is silent on *Bay Mills* and its definitive ruling on the interpretation of "directly related" to the "operation of a class III gaming activity." *Id.* 572 U.S. at 792. Clearly, the State cannot incorporate *Bay Mills* because it contradicts its argument for insisting on the Prohibited Provisions.

Hence, the State's two fundamental arguments fail, leaving its appeal lacking a foundation. *Rincon*'s admonitions that "*Coyote Valley II* is an exceptional case whose facts are readily distinguishable from those in this case," and the "State's reliance . . . on its interpretation of our decision in *Coyote Valley II* . . . is misplaced," are equally applicable here. The State's negotiating tactics here are a continuation of its tactics in *Rincon*. For the last eleven years, the State has consistently demanded the inclusion of provisions that violate IGRA based on *Coyote Valley II*, while refusing to demonstrate that their demands fall within the narrow exception articulated in *Coyote Valley II* and *Rincon*. The State's unrelenting attempt to create a second exception to IGRA that renders the *Rincon* exception superfluous and § 2710(d)(3)(C)(i)-(vi) surplusage must be rejected.

The State's untenable position that the State **did not** and **did** offer meaningful concessions reveals the flaw in the State's understanding of *Coyote Valley II*, *Rincon*, and § 2710(d)(3)(C)(vii). *See* Opening Brief, pp. 37, 55-56. Previously, the State claimed it could not offer meaningful concessions for topics that were arguably beyond IGRA's scope. 1-SER-114-115. Now, the State claims

that "concessions came in the give-and-take process generally applicable when negotiating on IGRA-permissible topics." Opening Brief, p. 55. Meaningful concessions are only offered in exchange for compact provisions beyond the scope of IGRA that qualify for the *Rincon* exception. Either the State offered meaningful concessions to include provisions beyond IGRA's scope or it was negotiating over provisions within IGRA's scope. Both cannot be true.

When the foregoing analysis is applied to each of the provisions that the district court found did not meet the good faith standard, it becomes clear that the district court's judgment must be affirmed.[10]

III. THE STATE NEGOTIATED IN BAD FAITH BY INSISTING ON COMPACT PROVISIONS NOT DIRECTLY RELATED TO THE OPERATION OF GAMING ACTIVITIES.

a. Enforcement of State Court Support Orders Has Nothing to Do with Gaming.

The enforcement of state court child and spousal support orders has nothing to do with "gaming activities," as defined by *Bay Mills*. No matter how broadly § 2710(d)(3)(c)(vii) is interpreted, withholding a casino employee's wages pursuant to state court support orders, while worthy goals, has nothing to do with the actual playing of class III games. *Dalley*, 896 F.3d at 1207. Therefore, the State negotiated in bad faith.

[10] This Court need only find that one of the Prohibited Provisions violates the IGRA to uphold the district court's finding of bad faith. 25 U.S.C. § 2710(d)(7)(B)(iii).

The State demanded the Support Orders provision in its first full compact, 2-SER-437, and continued to demand and expand that provision through negotiations. *See* 8-SER-2221-2222. The Support Orders provision is not a proper subject of negotiation under IGRA. Enforcing Support Orders is wholly unrelated to regulating the playing of games to ensure their fairness, keeping criminals from being involved in the gaming operation, generating more revenue for the Tribes, promoting reservation-based economies, or strengthening the ability of the Tribes to govern themselves. 25 U.S.C. § 2702.

Even if the Support Orders provision were related to gaming, the State's demand that the Tribes agree to it is still bad faith because the State never offered a meaningful concession in exchange for the Tribes agreeing to the provision. *Rincon*, 602 F.3d at 1034-41.

The State's demand is an attempt to impose state law and public policy on the Tribes and their reservations. The Tribes' rejection of the Support Orders provision, however, is not a rejection of the merits of the policy, but rather a stand against using compact negotiations for this purpose. Recognition of the Support Orders would require internal decision-making by each tribe. *See, e.g.*, Tribal Child Support Enforcement Programs, 69 Fed. Reg. 16,638, 16,661 (Mar. 30, 2004). The State cannot force the decision on the Tribes as a condition to concluding a compact.

The State argues that the Support Orders provision is a proper subject of negotiation because, (1) "but for" the casino, there would be no employee wages to garnish, and (2) garnishment of wages protects State economic interests. *Rincon*

rejects both arguments: (i) "The State's argument that general fund revenue sharing is 'directly related to the operation of gaming activities' because the money is paid out of the income from gaming activities is circular." *Id.*, at 1033; and (ii) "It is one thing to ask the tribes to contribute funds so the State is not bearing the costs for gaming related expenses; it is quite another to ask tribes to help fix the State's budget crisis. The State is therefore incorrect that pursuit of state general economic interests is consistent with IGRA's purposes." *Id*. at 1035.

Moreover, each of the Tribes has a tribal court[11] that may recognize and enforce Support Orders under principles of comity. *See* 1-SER-185, 196, 212, 221; 9-SER-2453-2461. Thus, the inclusion of the Support Orders provision in the compacts is unnecessary because the Tribes already have laws, procedures and rules for the recognition and enforcement of Support Orders.

The Support Orders provision is not a proper subject of negotiation under IGRA because it has nothing to do with each "roll of the dice and spin of the wheel" and it frustrates, rather than promotes, the purposes for which IGRA was enacted, which is to strengthen Tribal self-government.

b. The State's Demand for a Tort Liability Ordinance and Remedies for Injuries Unrelated to Gaming Activities Constituted Bad Faith.

The State consistently demanded a compact provision through which the Tribes would be required to subject themselves to California tort law beginning

[11] The Chicken Ranch Rancheria is in the process of establishing its tribal court. *See* 1-SER-205.

with its first full proposed compact, *see* 2-SER-432-435, and throughout the course of negotiations. *See* 8-SER-2216-2219. The provision requires that the Tribes adopt state tort law for injury claims. 8-SER-2216-2217. This provision is not a permitted subject of negotiation under IGRA because it is not directly related to the operation of gaming activities, as defined in *Bay Mills*.

Even if the tort provisions were generally related to the operation of a gaming facility, the State's insistence on it constituted a failure to negotiate in good faith because it is not directly related to the operation of gaming activities, consistent with the purposes of the IGRA, and was not negotiated in exchange for a meaningful concession. *Rincon*, 602 F.3d at 1033-41.

Furthermore, the State's tort provisions are too broad, covering injuries merely "connected with" or "relating to the operation of the Gaming Operation, Gaming Facility, or the Gaming Activities," including injuries sustained "on a road accessing the Facility"—regardless of whether the claimant intended to play or played a class III game. Given that the State's definition of Gaming Facility includes structures on the reservation where no gaming activities occur, the State would have the Tribes assume liability for injuries having at best indirect or even no connection whatsoever to gaming activities. Rather, the compact provision proposed by the State does not require that an injury subject to the tort provisions "stem from the actual playing of a casino game." *Dalley*, 896 F.3d at 1207-08.

This is not what Congress intended. Congress' repeated use of "gaming activity" in IGRA evidenced its intention to restrict provisions to matters with a close connection to class III gaming activity; the "directly related" requirement in

the catch-all provision reinforced this notion, as did the numerous statements in IGRA's legislative history conceiving of a narrow role for states. Given the plain language of IGRA, and the unambiguous legislative history, the State failed to negotiate in good faith by insisting upon the tort claim provisions.

Additionally, as discussed in Section I, the State's insistence on these tort provisions conflicts with multiple court decisions holding that a state cannot use the compacting process to impose state tort law upon tribes *via* compact provisions that shift jurisdiction to state court. *Id.*, at 1207-1208 ("[A]ctions 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."); *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254, 1264 (D.N.M. 2013).

The State's demand that the Tribes "adopt as tribal law, provisions that are the same as California tort law to govern," rather than the outright jurisdiction shifting that took place in *Dalley* and *Nash*, is irrelevant to the analysis of whether the State's tort provisions violate IGRA. While there might be a theoretical distinction between a provision that requires a tribe to have cases litigated in a state forum and a provision that requires a tribe to have its cases governed by state law, it is a distinction without a difference, as both provisions involve the imposition of state jurisdiction—**i.e.,** authority. Requiring that the Tribes adopt and apply California law subjects the Tribes to State legal decisions and policy choices, thereby extending State authority to tribal lands just as surely as if the personal injury claim were decided in a state courthouse. Thus, if IGRA does not

contemplate the shifting of jurisdiction from a tribal to state forum in personal injury matters, it does not permit the imposition of State tort law either.

The State's demand to replace tribal tort law with State law is a subterfuge to impose the State's regulatory jurisdiction and public policy in violation of IGRA. The State's demand is overly broad, not directly related to the playing of class III games, and constitutes a failure by the State to negotiate in good faith.

c. Extending the State's Environmental Law to the Tribe's Gaming Operations to Fund Local Government Improvements Constitutes Bad Faith.

The State's insistence that the Tribes adopt as tribal law the California Environmental Quality Act, Public Resources Code § 21000, et seq. ("CEQA") constituted bad faith. The State's CEQA demand appeared in its first full draft, *see* 2-SER-415-423, and was expanded in every draft compact thereafter as evidenced by its October 15, 2018 compact which included 27 pages of environmental regulations. *See* 8-SER-2179-2206. "[S]ection 11.0 . . . will be interpreted and applied consistent with . . . (CEQA) and [NEPA]." 8-SER-2179. Section 11.2 requires the Tribes to enact a "Tribal Environmental Protection Ordinance" ("TEPO") that incorporates CEQA into tribal law: "The Tribe shall adopt [the TEPO]. In fashioning the [TEPO], the Tribe will incorporate . . . NEPA and CEQA consistent with legitimate governmental interests of the Tribe and the State, as reflected in section 11.0." 8-SER-2180. The "Off-Reservation Environmental Impact Analysis Checklist," included as Appendix B, 9-SER-2462-2470, and "List of Categorical Exemptions," included as Appendix C, 9-SER-2471-2477, are

substantially the same form checklist for CEQA compliance used by State agencies for the former, and as the categorical exemptions set forth in CEQA for the latter. 9-SER-2471.

The imposition of CEQA is compounded by the State's definitions of "Project" and "Gaming Facility," which encompass activities and facilities unrelated to the conduct of gaming. The definition for "Project" includes "construction of a new Gaming Facility," "renovation, expansion or modification of an existing Gaming Facility," and any "other activity involving a physical change to the reservation environment." 8-SER-2112. The definition of "Gaming Facility" includes any building in which "business records, receipts, or funds of the Gaming Operation are maintained . . . **which may include parking lots, walkways, rooms, buildings, and areas that provide amenities to Gaming Activity patrons** . . . ." 8-SER-2109 (emphasis added). Under *Bay Mills*, the State's environmental provisions are not directly related to the Tribes' gaming activities. Interior came to the same conclusion. *See*, 1-SER-136-143.

Applying CEQA broadly to a "Project" relating to a "Gaming Facility," as defined by the State, also does not further any of the purposes for which IGRA was enacted. On the contrary, it would divert gaming revenues from on-reservation activities to State and local governments' off-reservation activities and supplant tribal law with state law. Furthermore, federal law requires that tribal law control here. 28 U.S.C. § 1360(c) ("Any tribal ordinance . . . adopted by an Indian tribe . . . in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect . . . ."). The

State's attempt to impose CEQA, in fact, conflicts with Congress' explicitly expressed intent. 134 Cong. Rec. S12643-01, at S1265.

The State's position also conflicts with federal court precedent. Tribes' interest in managing their environmental affairs on their reservations is "controlling." *Wash., Dep't of Ecology v. United States EPA*, 752 F.2d 1465, 1472 (9th Cir. 1985); *accord Nance v. Envtl. Prot. Agency*, 645 F.2d 701, 714 (9th Cir. 1981) (tribes can set their own reservation air quality standards pursuant to their, not state, authority).

The State's environmental provisions are not directly related to gaming and do not fulfill the purposes of IGRA. The State has offered no meaningful concession in exchange for the provisions. The State's attempt to impose CEQA on the Tribes' on-reservation activities must, therefore, be considered bad faith.

d. Insisting that the Tribes Execute Agreements with Local Governments as a Precondition to Engaging in Gaming Violates IGRA.

The State demanded an intergovernmental agreement provision in its first full compact, 2-SER-420-421, and continued to include and expand that provision throughout the negotiations. *See* 8-SER-2202-2204. This was a bad faith attempt to use the environmental impact mitigation process to subject the Tribes' casino development projects to the decisions of local jurisdictions.

Like the environmental provisions, and for many of the same reasons, the State's attempt to impose a requirement that the Tribe enter into intergovernmental agreements with local governments contradicts the requirements of *Rincon* and the

definition of gaming activities articulated in *Bay Mills*. The State's compact prohibits the Tribes from beginning construction on a gaming facility or on any areas that provide amenities to gaming activity patrons until such agreements are executed. "The Tribe shall not commence a Project until the intergovernmental agreement(s) with the County and the City specified in subdivision (a) . . . are executed by the parties or are effectuated pursuant to section 11.16." 8-SER-2203. If impasse were to occur, the Tribe would be compelled to waive its sovereign immunity and engage in binding arbitration. 8-SER-2204-2205.[12]

Agreements relating to off-reservation environmental mitigations are not directly related to "what goes on in a casino—each roll of the dice and spin of the wheel . . . ." *Bay Mills*, 572 U.S. at 935. Congress never intended that tribes be required to conclude agreements with (or arbitrate disputes with) local governments to engage in gaming. *See* 25 U.S.C. § 2710(d)(4). Had Congress intended to include local jurisdictions in the compacting process, it would have explicitly said so. Moreover, such a requirement would infringe on the Tribes' sovereignty and interfere with tribal self-government. *See, e.g., Santa Rosa*, 532 F.2d at 658-659.

Under IGRA, a tribe is authorized to engage in class III gaming if it has met the requirements of Sections 2710(d)(1)(A)-(B) and conducts class III "gaming activities" in "conformance with a Tribal-State compact entered into by the Indian tribe and the State[.]" 25 U.S.C. § 2710(d)(1)(C). Section 2710(d)(3)(A) provides

[12] The intergovernmental agreement provision does not include a requirement that local jurisdictions bargain in good faith.

that "the *State* shall negotiate with the Indian tribe in good faith to enter into such a compact;" it does not state or otherwise contemplate that a tribe would be compelled to negotiate an agreement with a city, county, or political subdivision of the State to engage in gaming. This interpretation is consistent with Congress's intent that the compact process is between tribes and states as co-equal sovereigns. S. REP. No. 100-446 at 13 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3083.

The State's demand for local government-tribal agreements is not a topic directly related to the operation of the gaming activities, consistent with IGRA's purposes, and a subject the State offered a meaningful concession in exchange for. It is further evidence that the State failed to negotiate in good faith.

e. The State's Insistence that the Tribes Comply with California's Minimum Wage Laws Constituted a Failure to Negotiate in Good Faith.

Beginning with its first compact, 2-SER-431, and throughout negotiations, the State insisted that the Tribes include a provision requiring the Tribes to comply with the Fair Labor Standards Act and implementing regulations, California Labor Code section 1182.12, and State Department of Industrial Relations regulations implementing State minimum wage laws. 8-SER-2214. The State's demand for the inclusion of its minimum wage laws and regulations constitutes a failure to negotiate in good faith. The State's minimum wage laws are not directly related to the playing of a class III game, so they are not a proper subject of negotiation. Even if they are considered generally related to gaming, furthermore, the State failed to fulfill the requirements of the *Rincon* exception.

However worthy the State's minimum wage laws and underlying policies are, § 2710(d)(3)(C)(vi) and (vii) do not authorize their extension to the Tribes. Subsection (vi) authorizes negotiation over "standards for the operation of [class III gaming activities] and maintenance of the gaming facility." Employee compensation does not fall within the ambit of this provision. Instead, Congress had in mind "agreements on days and hours of operation, wage and pot limits, types of wagers, and size and capacity of the proposed facility." S. REP. No. 100-446, at 14, reprinted in 1988 U.S.C.C.A.N. at 3084.

Nor does the State's minimum wage proposal fit within § 2710(d)(3)(C)(vii) because it is overly broad applying equally to all persons employed in the Gaming Operation, not just to those employees responsible for the playing of class III games and accounting of gaming revenue. The Tribes would, therefore, be required to pay State minimum wage to janitors, cooks, food and beverage handlers, and all other persons employed in the Gaming Facility. Those activities have nothing to do with the playing of class III games and are not, therefore, directly related to operation of the gaming activities.

If the minimum wage provision were a proper subject of negotiation under IGRA's catch-all provision, nothing would prevent the State from imposing more mandates that are typically left to management or would be the subject of collective bargaining. The State could, for example, require that all Gaming Operation employees be given two months of vacation each year, or that they be offered no-deductible health insurance. Nothing in IGRA entitles the State to dictate the details of tribal wages, hours, and working conditions if the tribe

complies with applicable federal laws. To interpret employee wages as a proper subject of negotiation is to allow the compacting process to be used as a subterfuge for the imposition of State broad regulatory jurisdiction on tribes—precisely what Congress proscribed.

The State's demand also does not qualify for the *Rincon* exception. It is inconsistent with the purposes of IGRA. IGRA's primary purposes are to promote tribal economic development, self-sufficiency, and strong tribal governments. 25 U.S.C. § 2710(1). Extending State employment standards to the Tribes' gaming operations undermines tribal self-sufficiency by subjecting the Tribes to another sovereign's economic policies. The State's demand was also not accompanied by an offer of a meaningful concession.

The State's attempt to impose State minimum wage law constituted bad faith.

f. The State's Insistence that the Tribes Create Money Damages Remedies for Workplace Discrimination, Harassment and Retaliation Constituted a Failure to Negotiate in Good Faith.

Congress expressly excluded tribes from the definition of "employer" in the two most significant federal laws governing workplace discrimination: Title VII, 42 U.S.C. § 2000e(b), and the Americans with Disabilities Act, 42 U.S.C. § 12111(5)(B). Throughout the negotiations, the State demanded that the Tribes adopt ordinances that incorporate into tribal law standards no less stringent than federal law standards prohibiting discrimination, harassment, and retaliation in the

Tribes' gaming facilities and establish a complex and intrusive procedure for the adjudication of such claims. *See, e.g.*, 2-SER-425-430; 8-SER-2207-2214.

The State also required: (1) that the Tribes carry at least $3 million in employment practices liability insurance, 8-SER-2208; (2) that the Tribes expressly waive their sovereign immunity to claims by persons seeking money damages for such prohibited practices, as well as the immunity of the insurer, 8-SER-2208-2209; (3) that the ordinance apply to "claim[s] arising out of the employment of persons to work or working for, in connection with, or relating to the operation of, the Gaming Operation, Gaming Facility or Gaming Activities," regardless of whether the claimant's job has any direct involvement in the playing of a class III game, 8-SER-2208; and (4) that discovery in such a dispute "be governed by procedures comparable to section 1283.05 of the California Code of Civil Procedure," 8-SER-2211.

Throughout the negotiations, the Tribes objected to the State's demands because a money damage remedy for workplace discrimination is not directly related to and necessary for the regulation and licensing of gaming activities. It is also not directly related to the operation of gaming activities, particularly because the State made its demand applicable to employees with little to no connection to the playing of a class III game. The Tribes also objected because tribes specifically are excluded from the definition of "employer" in Title VII and the Americans with Disabilities Act ("ADA"), and because federal courts consistently have held that Congress has not abrogated tribal sovereign immunity to private damage actions under the ADA and other federal statutes dealing with workplace

discrimination, harassment, and retaliation. 5-SER-1138, 1142-1143; s*ee Williams v. Poarch Band of Creek Indians*, 839 F.3d 1312 (11th Cir. 2016); *Boricchio v. Chicken Ranch Casino,* 2015 U.S. Dist. LEXIS 75264 (E.D. Cal. June 9, 2015).

Thus, the State was using the compacting process to negotiate over a subject that is outside IGRA's scope and which broadly applied to employees that do not have a direct relationship to the gaming activities. Even if the anti-discrimination provisions were generally related to the operation of a gaming facility, the State's insistence on them nevertheless constituted a failure to negotiate in good faith, as the State again failed to meet the three elements of the *Rincon* exception. Accordingly, State's insistence on the inclusion of the anti-discrimination provisions constituted a failure of the State to negotiate in good faith.

IV. THE STATE'S INSISTENCE ON A NEW TLRO CONSTITUTED A FAILURE TO NEGOTIATE IN GOOD FAITH.

The State failed to negotiate in good faith by demanding that the Tribes accept new labor provisions ("New TLRO") in their compacts as a condition of the State entering into a compact with the Tribes.[13] The State's reliance on *Coyote Valley II* is misguided here because: (1) in light of *Bay Mills*, the New TLRO impermissibly extends its reach to tribal employees that have little to no connection to the operation of gaming activities; (2) the State refused to negotiate regarding the terms of the New TLRO; (3) the New TLRO infringes on the Tribes'

[13] The New TLRO was in the State' first full proposed compact, 2-SER-438, and appeared throughout the course of negotiations thereafter. *E.g.*, 8-SER-2222-2223.

rights as sovereign governments; (4) the origins of the 1999 TLRO are different than those of the New TLRO; (5) the State offered no meaningful concessions; and (6) the National Labor Relations Act ("NLRA") preempts the New TLRO.

a. *Bay Mills* Prohibits the Application of the New TLRO to Employees that have no Connection to Gaming Activities.

The narrow definition of "gaming activities" in *Bay Mills* prohibits the State from conditioning its agreement to a compact upon the Tribes' acceptance of a New TLRO that broadly applies to employees of a gaming operation regardless of whether the employees duties are directly related to, and necessary for, the operation of the gaming activities. As discussed in Sections I and II, above, unless the Tribes agree otherwise in exchange for meaningful concessions, labor provisions in a compact must be limited to employees whose duties involve the actual operation of "Gaming Activities" as defined in *Bay Mills*, which was decided long after this Court's decision in *Coyote Valley II*. When applied here, *Bay Mills* clarifies that the State did not act in good faith when it conditioned its agreement to a compact on the inclusion of its New TLRO.

b. The State's Refusal to Negotiate the Terms of the New TLRO Constituted a Failure to Negotiate in Good Faith.

The State never negotiated, nor proposed to negotiate, with the Tribes about the New TLRO. Nor did the State present the New TLRO to the Tribes for negotiations with organized labor groups. Instead, the State presented the New TLRO with its first draft compact and never wavered on its inclusion or on any of its terms. 2-SER-438, 448-464. The Tribes presented several detailed

counterproposals and explanatory memoranda. *See, e.g.*, 6-SER-1631-1632; 1-SER-222, 230, 234, 239-240, 246-247, 250, 252, 259-260, 262-264, 267-270, 272, 274-276. The State never offered a substantive response to the Tribes' counterproposals to the New TLRO. 4-SER-1087; 5-SER-1270, 1462-1478; 1-SER-247-248, 250-251, 265.

The State's actions here conflict with *Coyote Valley II*, where "the State did not demand that tribes adopt a specific set of legal rules governing general employment practices on tribal lands." *Coyote Valley II*, 331 F.3d at 1116. Here, the State unilaterally imposed a specific set of legal rules on the Tribes on a take-it-or-leave-it basis. The distinctions between the negotiations here and those in *Coyote Valley II* could not be more stark.

The State's outright refusal to negotiate regarding substance of the New TLRO constituted a take-it-or-leave-it offer that was not made in good faith.

c. The New TLRO Infringes on the Tribes' Right of Self-Government.

While the 1999 TLRO confers "only modest organizing rights to tribal gaming employees and contains several provisions protective of tribal sovereignty," *Coyote Valley II*, 331 F.3d at 1116, the New TLRO is a vast overreach that has no other objective than to radically tilt the scales in favor of unions and against the Tribes. While the 1999 TLRO granted union organizers the right to access gaming employees in non-working areas closed to the public, it imposed no hindrances on tribal free speech, vested a tribal forum with a

meaningful role in resolving a wide array of disputes, and prohibited picketing on the Tribes' sovereign lands.

In sharp contrast, the New TLRO would grant to unions and the Tribe's "Gaming Operation" employees significantly greater rights than are allowed under the NLRA. The Tribes would have to disclose information about the composition of their workforce, abandon their government role in resolving disputes, and then be subject to binding interest arbitration to resolve disputes – a mandate that the State may not lawfully impose on its own subdivisions. *County of Riverside v. Superior Court*, 30 Cal. 4th 278, 291 (2003); 5-SER-1472-1474. Concomitantly, the New TLRO would deprive Tribes of rights allowed under the NLRA and available to other California employers, including competing State-licensed card rooms.

Thus, through the New TLRO, the State is imposing legal obligations on the Tribes that are not imposed on State subdivisions and State-licensed competitors. This constitutes a failure to negotiate in good faith.

d. The Origins of the 1999 TLRO are Distinctly Different than Those of the New TLRO.

When the 1999 TLRO was proposed, "the UTCSC, of which Coyote Valley was a member, met with union representatives and participated in the shaping of the TLRO;" the State had no role in those negotiations. *Coyote Valley II*, 331 F.3d at 1117. Here, the Tribes did not participate in drafting the New TLRO, nor did the State request the Tribes' input. Instead, the State presented a complete draft in 2015. Not one word changed after five years of negotiations. Additionally, in 1999,

the National Labor Relations Board ("NLRB") had declined for decades to exercise jurisdiction over tribal employers in Indian country. Since then, this Court upheld the NLRB's jurisdiction over tribal casinos. *Casino Pauma v. NLRB*, 888 F.3d 1066 (9th Cir. 2018) ("*Casino Pauma*"). This Court's approval of the 1999 TLRO cannot, therefore, serve as a basis to countenance the New TLRO.

e. The State Offered no Meaningful Concession in Return for the New TLRO.

In *Coyote Valley II*, this Court determined that the State had not acted in bad faith by insisting on the 1999 TLRO because the State offered meaningful concessions in return. *Coyote Valley II*, 331 F.3d at 1116. As set forth in Section VI, below, the State did not offer any meaningful concessions in return for the Tribes' acceptance of the State's new TLRO. Therefore, the State failed to negotiate in good faith.

f. The NLRA Preempts the New TLRO.

Pursuant to *Casino Pauma*, the NLRB's administrative law judge held that the NLRA preempts the TLRO. *Pauma Casino and United HERE International Union*, 2015 NLRB LEXIS 889 ("*Pauma*").

Pauma places the Tribes in an untenable position. If they comply with the TLRO, they violate the NLRA. If they follow the NLRA, instead of the TLRO, they are in violation of their compacts.

Regardless, the Tribes need to know which law applies to their gaming operations by this Court resolving this apparent conflict.

V. THE STATE'S DEMAND THAT THE TRIBES PAY A FEE TO FUND THE STATE'S TRIBAL NATIONS GRANT PROGRAM AND OFF-RESERVATION IMPROVEMENTS ARE PROHIBITED TAXES UNDER IGRA.

The State admits that the TNGF is a revenue sharing provision but argues that a meaningful concession in exchange is unnecessary because it falls within IGRA's catch-all provision. The State's argument is that, since the RSTF was found to be permissible in *Coyote Valley II*, and since the TNGF is an extension of the RSTF, "the TNGF falls within the broad catchall scope of 25 U.S.C. § 2710(d)(3)(C)(vii)." Opening Brief, p. 49. The State's logic is flawed. The TNGF is a fund that unilaterally modifies the RSTF to use "surplus" RSTF money for grants, subject to restrictions and requirements by a State-created administrative body that would award grants on a competitive basis, without input from Tribes that pay into the RSTF. The State cannot smuggle the TNGF through the *Rincon* exception here by claiming that it is an extension of the RSTF.

Below, the Tribes demonstrate that the TNGF is not analogous to the RSTF, does not survive the *Rincon* exception, and does not fall within the scope of IGRA's catch-all provision considering *Bay Mills*. Since the TNGF is a demand for revenue sharing not covered under the *Rincon* exception, it is a tax and must be considered *per se* bad faith.

a. The State's TNGF Fee is not Related to the Operation of Gaming Activities.

Whether a state's demand for a fee is a proper subject of negotiation because it is "directly related to the operation of gaming activities," "depends on the use" of the revenues, not the fact that the revenues are derived from gaming. *Rincon,* 602 F.3d at 1033.

In *Coyote Valley II*, this Court upheld the RSTF and Special Distribution Fund ("SDF") because those funds implemented policies of fair distribution of gaming opportunities and compensation for the negative externalities caused by gaming, subjects the Court found were directly related to gaming. *Coyote Valley II*, 331 F.3d at 1111-1114.

By contrast, the TNGF cannot be used for gaming or any gaming related activity. The State Legislature created the TNGF with the enactment of Government Code §§ 12019.30, *et seq.*, which provides: "A grant shall not be used to pay . . . an investment in **a purpose or project related to any gaming operation or activity**. Cal. Gov. Code § 12019.40(d) (emphasis added). Because the TNGF fee cannot be used for "any purposes or project related to any gaming operation" it is not "directly related to the operation of gaming activities" and fails to meet the first criterion under the *Rincon* exception. *Rincon*, 602 F.3d at 1033.[14]

[19.] Likewise, because the TNGF cannot be used for "any purpose or project related to any gaming operation," it cannot be used to defray any of the State's costs incurred to regulate the Tribes gaming operations, 25 U.S.C. § 2710(d)(3)(c)(iii), which the State has the right to demand.

b. The TNGF Fee Conflicts with the Purposes of IGRA.

IGRA was enacted to provide a statutory basis for regulating "the operations of **gaming** by Indian tribes," "promoting tribal economic development, self-sufficiency, and strong tribal governments," ensuing "that the Indian tribe is the primary beneficiary of the **gaming** operations," assuring "that the **gaming** is conducted fairly," and establishing an independent "federal regulatory authority for **gaming** on Indian lands." 25 U.S.C. § 2702 (1)-(3) (emphasis added).

The TNGF payment to the State furthers none of these goals. The TNGF has nothing to do with gaming. As such, it cannot possibly further any of the gaming-related goals enumerated in § 2702. The State argues that the TNGF furthers the goal "of promoting tribal economic development, self-sufficient, and strong tribal governments." Opening Brief, p. 49. But this argument also fails.

Under the State's proposal, the TNGF would be funded by "surplus" revenue that the Tribes are *required* to pay into the RSTF. The State would administer the funds, under state law, through an administrative board appointed by the State. Non-gaming tribes may apply through the State. Grants are competitive. The State, in its sole discretion, approves the grants subject to various restrictions and audit requirements. Cal. Gov. Code §§ 12019.30-12019.40.

This program neither promotes tribal economic development nor strengthens tribal self-government. First, the TNGF erodes Tribal self-government by subjecting the Tribes to the jurisdiction and laws of the State. It is the State, not the Tribes, that makes all decisions about how the gaming revenues are spent and who gets the money.

Second, unlike the RSTF and SDF, which the tribes first proposed to the State, the State proposed the payment of the TNGF fee to the Tribes after its enactment by the State. Throughout the Tribes' five years of negotiations, the State made twelve compact offers to the Tribes and each one of them included the TNGF,[15] even though the Tribes categorically objected to its inclusion.[16]

Third, the payment of the TNGF fee deters tribal economic development by taking RSTF funds away from the non-gaming tribes and putting it under the exclusive control of the State. If—as the parties agreed in 1999—the funds remained in the RSTF, the funds would be distributed on a per capita basis to all non-gaming tribes, not just one or a few; the Tribes, not the State, would have sole discretion over expenditure of the funds to best promote the tribal economic and government programs; and oversight would be conducted pursuant to tribal law, by tribal committees, not State law, by State appointees.

Finally, under state law, a TNGF grant recipient can use the funds for purposes that neither promote the tribe's economy nor strengthen its government. For example, a grant could be awarded to a tribe to publish a tribal language dictionary or restore the reservation with native plants for traditional basket weaving. While both are worthwhile goals, neither program promotes economic

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[15] *See* , *e.g.*, 1-SER-183; 2-SER-339-597; 3-SER-653-784, 788-900; 7-SER-1802-1938, 1947-2085, 2095-2100; 8-SER-2102-2234, 2252-2392.

[16] *See* , *e.g.*, 1-SER-184, 195, 203-204, 211, 220, 241-242; 3-SER-651-652; 4-SER-1136 ("[T]he 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"); 7-SER-1939-1944, 2087, 2090-2092l; 8-SER-2235-2245, 2394-2395; 3-ER-300-303; 9-SER-2438-2439.

development or generates revenue that a tribe can use to fund essential government programs.

Thus, the State's demand for the TNGF fee does not meet the second prong of *Rincon* because it deters rather than promotes economic growth on the reservation and directly interferes with the ability of the Tribes to govern themselves under their laws on their reservations.

c. The TNGF Fee was "Imposed" by the State Because the State Offered the Tribes no Meaningful Concession in Exchange for the Payment of the Fee.

Assuming, *arguendo*, the TNGF is "directly related" to the Tribes' gaming operations and fulfilled the purposes for which IGRA was enacted, it would still constitute an illegal tax or fee under IGRA because the State never offered the Tribes any meaningful concession in exchange for the payment of the fee.

Under *Rincon*, a state's demand for the payment of a fee is not imposed if the State offers a meaningful concession in exchange. *Rincon*, 602 F.3d at 1036. To constitute a meaningful concession, the State must offer the Tribes something of value that is not a proper subject of negotiation under IGRA. Offering additional games, gaming locations, meaningful concessions previously given, or longer compact terms, are not meaningful concessions. *Id.*, at 1041.

Throughout the negotiations, the Tribes repeatedly requested that the State offer them something of "value" as a meaningful concession. 4-SER-919-920; 1-SER-245 (¶78), 246-247, 274 (¶192); 4-SER-951, 954, 1085-1087, 1156-1159; 6-SER-1631; 7-SER-1939-1941; 8-SER-9256. Each time, the State responded by

offering the Tribes nothing beyond the exclusivity the Tribes already possessed and routine gaming activities, offers prohibited by *Rincon*. *Id.*, at 1040. Such a take it or leave it, "hard line" position in IGRA negotiations constitutes bad faith. "[W]here, as here, the State demands significant taxes and *fails to offer any "meaningful concessions" in return*, a finding of bad faith is the only reasonable conclusion." *Id.*, at 1036 (original emphasis).

For the foregoing reasons, the TNGF does not fall within and, therefore qualify for, the *Rincon* exception. As argued in Section (a), the TNGF is not directly related to gaming, as understood by *Bay Mills*, and does not satisfy the catch-all provision of IGRA. Since the State failed to offer meaningful concessions, the TNGF fee was imposed in violation of IGRA which is bad faith *per se*, notwithstanding the district court's decision to the contrary.

d. The Intergovernmental Agreements are a Hidden Tax.

The State's demand that the Tribes execute agreements with local governments is nothing more than an IGRA prohibited tax in disguise. The purpose of the agreements is to require the Tribes to pay for off-reservation public works projects like road expansion, signalization, bridge construction and the like to mitigate off-reservation gaming impacts. A fee that goes directly into a city or county general fund to pay for improvements is a "classic example of a tax."

Because these fee and projects have nothing to do with the playing of the games, keeping criminals out of the gaming operation or strengthening tribal economics or self-government, they do not fall within IGRA's catch-all provision

and constitute a prohibited tax, particularly whereas here, the State offered no meaningful concession in exchange for the tax. *Id*., at 1036.

VI. NONE OF THE STATE'S PURPORTED CONCESSIONS CONSTITUTE MEANINGFUL CONCESSIONS UNDER *RINCON*.

The State asserts that it offered a number of meaningful concessions in exchange for the Prohibited Provisions in the course of compact negotiations. Opening Brief, pp. 55-64. There is no support for this claim in the record of negotiations. It also contradicts the State's position before the district court.

The State now claims that "concessions were offered in negotiations for IGRA-permitted topics." Opening Brief, p. 56. That is not true.[17] The Record contains nothing to support the assertion that the State offered any such concession. During negotiations, the Tribes repeatedly informed the State that they would not agree to negotiate over Prohibited Provisions unless the State offered a meaningful concession.[18] The Tribes even proposed an explicit meaningful concession provision to the State in the Tribes' draft compacts 11 times,[19] but the State unwaveringly rejected the provision.[20] The only explicit statement on

[17] *See, e.g.*, 4-SER-919-920; 6-SER-1631-1632; 7-SER-1940; 8-SER-2242; 1-SER-204, 212, 220.
[18] 4-SER-919-920; 1-SER-245 (¶78), 246-247, 274 (¶192); 4-SER-951, 954, 1085-1087, 1156-1159; 6-SER-1631; 7-SER-1939-1941; 8-SER-9256.
[19] *See, e.g.*, 1-SER-245 (¶78), 253 (¶116); 4-SER-954, 1159.
[20] *See, e.g.*, 1-SER-250 (¶101).

concessions made by any State representative during the course of negotiations was that there were no meaningful concessions that the State could offer.[21]

The State has, moreover, waived the argument that it offered such concessions. Generally, the scope of appellate review is limited to issues raised below. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Davis v. City of Las Vegas*, 478 F.3d 1048, 1058 (9th Cir. 2007) ("A party abandons an issue when it has a[n] . . . opportunity to ventilate its views . . . and instead chooses a position that removes the issue from the case."). The State failed before the district court below to raise *any* argument or cite to *any* evidence in the record to show that it offered meaningful concessions to the Tribes. Rather, the State argued that it "was foreclosed from offering any meaningful concessions . . . for any topics that were arguably beyond IGRA's scope." 1-SER-114.

Furthermore, to the extent the state included things in its reply brief that it called "concessions," the State's arguments regarding these "concessions" are waived for the purposes of this appeal because the State made these arguments for the first time in its reply brief. *Padilla v. Garland*, 854 Fed. Appx. 127. Docx (9th Cir. Jul. 23, 2021), citing *Martinez-Serrano v. INS,* 94 F.3d 1256, 1259-60 (9th Cir. 1996) (issues not specifically raised and argued in a party's opening brief are waived) and *Bazuaye v. INS,* 79 F.3d 118, 120 (9th Cir. 1996) (per curiam) ("Issues raised for the first time in the reply brief are waived.").

[21] 9-SER-2479 (¶ 3).

None of the State's newly unearthed concessions, furthermore, would constitute meaningful concessions under *Rincon*. They include: a licensing pool (*i.e.*, number of slot machines a tribe can offer), the Special Distribution Fund (*i.e.*, the assessment by the State to defray the costs of regulating gaming activities), adding an extra five years to the compact duration, and an increase in number of facilities. Opening Brief, pp. 59-64. These are all routine "gaming activities" authorized by IGRA, § 2710(d)(3)(C). They cannot constitute meaningful concessions because they are "gaming rights that tribes are entitled to negotiate for under IGRA. . . ." *Rincon*, 603 F.3d at 1039.

The State's argument also fails because a state does not "make[] 'meaningful concessions' whenever it offers a bundle of rights more valuable than the status quo," *Id.*, 602 F.3d at 1040, and are of no value to the Tribes. For example, the State proposed eliminating the statewide Gaming Device License Pool created by the 1999 Compacts, but it abandoned enforcement of the pool when it agreed to compact amendments allowing some tribes to operate unlimited numbers of Gaming Devices in 2004.[22] Since then, the State has agreed to numerous other compacts allowing tribes to operate increased numbers of gaming devices without obtaining licenses from the pool.[23]

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[22] *See* June 21, 2004 Amendment agreed to by five tribes, http://www.cgcc.ca.gov/?pageID=compacts.

[23] *See, e.g.*, August 8, 2006 amendment to the Agua Caliente Band of Mission Indians' compact; June 22, 2016 amendment to the Barona Band of Capitan Grande Mission Indians' compact. http://www.cgc.ca.gov/?pageID=compacts.

Finally, whatever benefits the Tribes might derive from these "concessions" are eclipsed by the concessions demanded from the Tribes on such issues as increased liability insurance limits, creation of money damage remedies for claims of workplace discrimination from which Tribes are exempted under federal law, and extensive new obligations to assess and mitigate impacts on the off-reservation environment.

The State's argument that it offered the Tribes meaningful concessions, thus, fails both legally and factually.

VII. THE STATE ENGAGED IN BAD FAITH NEGOTIATIONS FOR FIVE YEARS

a. The State Never Changed Positions on the Prohibited Provisions in Five Years of Negotiations.

The State must negotiate with the Tribes in good faith. 25 U.S.C. § 2710(d)(3)(A). Good faith requires a willingness to compromise. *Sparks Nugget, Inc. v. N.L.R.B.*, 968 F.2d 991, 995 (9th Cir. 1992). Regardless of a state's intent, "the manifest purpose of the statute [IGRA] is to move negotiations toward a resolution where a state either fails to negotiate, or fails to negotiate in good faith, for 180 days after a tribal request to negotiate." *Mashantucket*, 913 F.2d at 1033. The court evaluates good faith "objectively based on the record of negotiations." *Id.* In its review, this Court "should consider the totality of [the] State's actions when engaging in the fact-specific good-faith inquiry IGRA generally requires." *Coyote Valley II*, 331 F.3d at 1112.

Compact terms unaligned with the purposes of IGRA must be interpreted narrowly under § 2710(d)(3)(C)(vii). *Rincon*, 602 F.3d at 1034. An attempt by a state to negotiate regarding a topic that is not directly related to gaming is "strong, if not determinative, evidence of bad faith." *Fort Indep. Indian Cmty. v. California*, 679 F. Supp. 2d 1159, 1172 (E.D. Cal 2009).

The record of negotiations clearly shows that the State acted in bad faith by demanding inclusion of the Prohibited Provisions in the compact, while refusing to offer any meaningful concessions in return.[24] Order at 4, 7-11, 14-20. The parties began negotiations on or about May 14, 2014. 1-SER-328. During the succeeding twenty-eight negotiation sessions over five years, the State repeatedly demanded that the Tribes accept terms prohibited under §§ 2710(d)(3)(C) and 2710(d)(4). *E.g.*, 2-SER-329-330, 336-338; 4-SER-924-936, 1089-1134; 5-SER-1273-1288; *Rincon*, 602 F.3d at 1030. The State included the Prohibited Provisions in the first draft compact sent to the Tribes. 2-SER-339-464. The terms remained in the State's compact drafts through the course of the negotiations. 4-SER-955-1083; 3-ER-164-299.

Notwithstanding the State's insistence on including the Prohibited Provisions in the compact, the Tribes remained at the negotiating table for five years in the hope the State would offer meaningful concessions in return. *See, e.g.*, 4-SER-919-920; *see also, e.g.* 7-SER-1939-1944; 8-SER-2393-2395. The State

[24] *See, e.g.*, 1-SER-184, 195, 204, 220; 2-SER-336-338; 6-SER-1631; 8-SER-2235-2236.

never offered any meaningful concession in exchange for any Prohibited Provisions.

The State's rigid adherence to the Prohibited Provisions reveals that the State had no intention to compromise on those provisions and would not agree to a compact without them. *See NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 485 (1960); *NLRB v. Mar-Len Cabinets, Inc.*, 659 F.2d 995, 999 (9th Cir. 1981) (per curiam) ("*Mar-Len*"); *Sparks Nugget, Inc.*, 968 F.2d at 994-95 (9th Cir. 1992); *Reichhold Chemicals, Inc.*, 288 N.L.R.B. 69, 70 (1988). This was not "hard-line" negotiating, but, rather, a calculated decision to run down the clock on the termination date of the Tribes' 1999 Compacts. *See Rincon*, 602 F.3d at 1038. Its strategy was intended to force the Tribes to accept the Prohibited Provisions, or risk losing their principal source of revenue. *See Id.* at 1039. Even viewed through a favorable lens, the State's refusal to compromise and its insistence on the inclusion of the Prohibited Provisions support the district court's decision that the State acted in bad faith. 968 F.2d at 995; *Flandreau Santee Sioux Tribe v. South Dakota*, 2011 U.S. Dist. LEXIS 68531, at *8-9 (D.S.D. June 27, 2011).

b. *Pauma II* is Distinguishable from this Case.

The State relies heavily on *Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation v. Cal.*, 973 F.3d 953 (9th Cir. 2020) ("*Pauma II"*) in asserting that it "cannot be held to be in violation of IGRA's good-faith standard." *Id.*, at 965-66. *Pauma II* is factually, procedurally, and substantively distinguishable from this case.

During its compact negotiations, Pauma requested new forms of class III gaming. *Id.* at 959-60. Pauma refused to respond to the State's requests for details about the new games. *Id.* at 960; 962-63. Pauma met with the State only three times. *Id.* at 960-61. Pauma failed to provide a draft compact to the State. *Id.* at 965. Pauma never responded to the State's proposed compact. *Id.* at 961. Pauma never objected to the State's proposals or draft compact, but simply filed suit after only two meetings with the State. *Id.*, at 964. Those facts bear no similarity to the facts of this case.

The procedural history of *Pauma II* also stands in stark contrast to this case. Negotiations were brief and incomplete. *Id.*, at 962. Pauma terminated negotiations years before expiration of their compact would have threatened its interests. *Id.*, at 961, 965. Pauma's approach to negotiations was demanding, yet nonresponsive and uncooperative, and Pauma changed its position on significant issues. *Id.*, at 961-964. The State was cooperative and flexible with Pauma. *Id.*, at 960-65.

Substantively, this case again differs dramatically from *Pauma II*. Pauma and the State never reached impasse, as happened here. *Id.* at 964. The State did not engage in surface bargaining with Pauma, whereas here, the State clearly did. *Id.* at 962. Pauma's surface bargaining claim was related exclusively to gaming. Here, none of the Prohibited Provisions relate to gaming. *Id.* at 959. In *Pauma II*, the State did not "manipulate the terms of the compact to advance a self-serving agenda," whereas in this case, the State persistently attempted to advance State law and policy goals antithetical to the Tribes' interests. *Id.* at 965. Pauma wanted to add new lottery games not authorized by state law, but refused to make offers that

would allow it to do so. *Id.* at 962, 964. Here, the Tribes made no unreasonable demands. Instead, the Tribes requested simply that the Prohibited Provisions be removed or that meaningful concessions be offered in exchange pursuant to IGRA and case law. Finally, the bad faith arguments raised by Pauma were wholly unsupported by the record and the law. The Tribes' arguments are supported by a vast record, the plain language of IGRA, and federal precedent.

Pauma II is not applicable to this case.

c. The State, Not the Tribes, Created the Impasse.

The State's myopic focus on the Tribes' final offer is smoke and mirrors to avoid the full record which clearly shows the State created an impasse in negotiations. The Tribes' final offer was the first step to remedy the impasse and the State's failure to negotiate in good faith. *See Stand Up for California! v. U.S. Department of the Interior*, 959 F.3d 1154, 1163 (9th Cir. 2020) (IGRA's remedial scheme ensures good-faith negotiation by states); *Big Lagoon*,789 F.3d at 950. It was not a take-it-or-leave-it offer.

The State is misapplying "take it or leave it" to the Tribes' final offer. First, under IGRA, the State, not the Tribes, must negotiate in good faith. *Big Lagoon*,789 F.3d at 950 (citing § 2710(d)(3)(A)). The State introduced over sixty separate topics over five years, many of which remained in dispute throughout the negotiations. *See, e.g.*, 6-SER-1631-1632. The State never wavered from its position that the Prohibited Provisions be included in the compact. *See, e.g.*, 9-SER-2449 (State notified Tribes they had to accept the Prohibited Provisions

immediately or wait for the new administration to resume compact negotiations with no guarantee as to prior negotiations or the resumption of negotiations).

Notwithstanding, the Tribes continued negotiating for five years, relying on the State's representations that it would offer meaningful concessions in return for the Prohibited Provisions. This never happened and is consistent with surface bargaining. With the negotiations at an impasse, coupled with the looming expiration of the Tribes' 1999 Compacts, the Tribes were vulnerable with no viable alternatives and under pressure to act. This suit resulted but may have been filed too late to obtain a final compact or Secretarial Procedures before June 30, 2022. Certainly, had the Tribes continued negotiations, they would be in a far worse position.

The State unjustifiably expressed concern that the Tribes' final offer "would require the State to act unlawfully." Opening Brief, p. 35. The Tribes did not request to play unauthorized games. Rather, the Tribes proposed that if the State Constitution were amended to authorize additional class III games, the Tribes could play those approved games without having to amend their compacts through further compact negotiations with the State. 2-ER-70. IGRA allows tribes to operate any class III game the State permits any person, organization, or entity to play if included in its compact. 25 U.S.C. § 2710(b)(1), (d)(1).

The State's argument that the Tribes' last offer did not contain any funding to the RSTF is equally unfounded. The Tribes' last offer includes an RSTF funding provision. 2-ER-070-071.

Congress intended for gaming negotiations to be expedited. *Rincon,* 602 F.3d at 1041. The Tribes were on firm ground when they sued the State after five years of impasse. 25 U.S.C. § 2710(d)(7)(B)(i); *Big Lagoon,* 789 F.3d at 950 (citing § 2710(d)(7)(A)(I)). The Tribes had to choose either to accept the Prohibited Provisions against their interests in violation of § 2710(d)(3)(C) and (d)(4), continue "negotiating" and thereby risk extinguishing their principal source of revenue through the closure of their casinos, or sue under IGRA's remedial scheme enacted specifically for this purpose. *see also Rincon,* 602 F.3d at 1039. Justifiably, the Tribes sued the State, but only after five years of negotiations and reckoning with the State's refusal to remove the Prohibited Provisions or offer meaningful concessions.

The Tribes, each small,[25] were the first five of the CTSC tribes to sue the State. Multiple CTSC tribes have since sued the State in related cases, because the State continued its inflexible bargaining position demanding the same or similar Prohibited Provisions as those at issue here. The Tribes' final offer was the first step in IGRA's remedial process.

CONCLUSION

For all of the reasons stated above, this Court should: (1) affirm the district court's order finding that the state negotiated in bad faith; (2) reverse the district court on the single issue that the TNGF was not an illegal tax under the IGRA, and (3) remand the case to the district court for the purpose of entering a final judgment

[25] All are small tribes and receive the RSTF subsidy except Blue Lake Rancheria because it operates more than 349 machines.

against the State and in favor of the Tribes that all of the Prohibited Provisions violated IGRA.

Dated: September 10, 2021

Respectfully Submitted

RAPPORT AND MARSTON

By: */s/ Lester J. Marston*
LESTER J. MARSTON, Attorney for Appellees Chicken Ranch Rancheria, Chemehuevi Indian Tribe, Robinson Rancheria and Hopland Band of Pomo Indians

DEHNERT LAW, PC

By: /s/ *David B. Dehnert*
DAVID B. DEHNERT
Attorney for Plaintiff and Appellee Blue Lake Rancheria

STATEMENT OF RELATED CASES

The undersigned, counsel of record for Appellees, is not aware of any related cases.

Dated: September 10, 2021

Respectfully Submitted

RAPPORT AND MARSTON

By: */s/ Lester J. Marston*
LESTER J. MARSTON, Attorney for Appellees Chicken Ranch Rancheria, Chemehuevi Indian Tribe, Robinson Rancheria and Hopland Band of Pomo Indians

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s): 21-15751

I am the attorney or self-represented party.

This brief contains _____ words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature /s/ *Lester J. Marston* **Date** September 10, 2021

*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Dated: September 10, 2021 Respectfully Submitted

By: */s/ Ericka Duncan*