No. 21-15751

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHICKEN RANCH RANCHERIA OF ME-WUK INDIANS, ET AL.,

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

APPELLEES' MOTION FOR ATTORNEYS' FEES

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

LESTER J. MARSTON
California State Bar No. 081050
LAW OFFICES OF RAPPORT AND MARSTON
405 West Perkins Street
Ukiah, California 95482
Telephone: (707) 462-6846
Facsimile: (707) 462-4235

Attorneys for Plaintiffs-Appellees

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INTRODUCTION

The Constitution of the State of California, CAL. CONST., art. IV, § 19(f), and California statutory law, Cal. Gov. Code §§ 12012.25 and 98005, authorize and obligate the Governor of the State of California to negotiate tribal-state gaming compacts in good faith, in accordance with the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, et seq. ("IGRA"). On January 5, 2019, the Plaintiff-Appellee Tribes ("Tribes") brought this action alleging that the Governor failed to conduct tribal-state compact negotiations in good faith, in violation of 25 U.S.C. §§ 2710(d)(3)(A) and 2710(d)(3)(C)(i)-(vii). On July 28, 2022, this Court held that the Governor failed to negotiate in good faith, finding that the Tribes prevailed on each of the causes of action alleged in their complaint. The Tribes now respectfully request an award of attorney fees pursuant to California's private attorney general statute, Cal. Code Civ. Proc. § 1021.5.

The Tribes are entitled to fees under the state private attorney general statute because the violations of federal law in this case are inextricably intertwined with violations of state law; in other words, the violations of federal law also constitute violations of the state laws that require the Governor to negotiate tribal-state gaming compacts in good faith. But for the amendment to the California Constitution authorizing the Governor to conclude gaming compacts with Indian tribes and requiring the California Legislature to ratify those compacts, and but for the waiver of California's Eleventh Amendment immunity from suit in California Government Code § 98005, the Tribes could not maintain a bad faith suit against the State of California. Furthermore, the results achieved through the litigation are precisely what the California Legislature intended in enacting Section 1021.5 of the California Code of Civil Procedure—important rights were enforced and substantial benefits were conferred on a large class of the population in California,

which includes California Indian tribes, their tribal members, and residents of and visitors to California Indian reservations.

In this Motion, the Tribes demonstrate that they are "successful parties" and that they meet each of the conditions set forth in Section 1021.5 of the California Code of Civil Procedure, entitling the Tribes to be fully compensated for enforcing the rights guaranteed to all California tribes, their tribal members, and residents of and visitors to California Indian reservations under federal and state law. Second, this Motion demonstrates that this Court has previously awarded attorney fees under Cal. Code Civ. Proc. § 1021.5 where the plaintiff only alleged federal claims in its complaint, because those claims were inextricably entangled with state law. The Tribes underscore the fact that state law, and violations thereof, are necessary conditions for bringing an action pursuant to 25 U.S.C. §§ 2710(d)(3)(C)(i)-(vii) and 2710(d)(3)(A), as set forth in California Government Code § 98005. Finally, this Motion demonstrates that the fees requested are reasonable and are supported by contemporaneous time records outlining the work performed by each attorney and clerk in achieving the "excellent" results from this Court.

Accordingly, for the reasons set forth below, the Tribes respectfully request that the Court make the Tribes whole for enforcing the rights of all California tribes, their tribal members, and residents of and visitors to California Indian reservations and for compelling the Governor to act in accordance with his obligation to negotiate gaming compacts in good faith, pursuant to both federal and state law.

I. THE TRIBES SATISFY THE REQUIREMENTS FOR AN AWARD OF ATTORNEY FEES UNDER CAL. CODE CIV. PROC. § 1021.5.

Under the American rule, each party normally bears its own attorney fees. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). One exception to the American

rule is the private attorney general doctrine, as codified in Cal. Code Civ. Proc. § 1021.5 ("Section 1021.5"). The private attorney general doctrine rests upon the "recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible." *Woodland Hills Residents Ass'n, Inc. v. City Council*, 23 Cal. 3d 917, 933 (1979).

Pursuant to Section 1021.5, the Court may award fees to a "successful party" in any action that:

> has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

As demonstrated below, all of these requirements are met in this case and the Tribes are therefore entitled to fees under the private attorney general statute.

a. The Tribes Are "Successful Parties" in the Litigation.

Under California law, the "critical fact" in determining whether a party is a "successful party" for purposes of Section 1021.5 "is the impact of the action, not the manner of its resolution." *Indep. Living Ctr. of S. Cal., Inc. v. Kent*, 909 F.3d 272, 283 (9th Cir. 2018), quoting *Maria P. v. Riles*, 43 Cal. 3d 1281, 1291 (1987); *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 566 (2004). The California Supreme Court takes a "broad, pragmatic view of what constitutes a 'successful party.'" *Graham*, 34 Cal. 4th at 565. A pragmatic view of the litigation "considers what the litigant seeking attorney fees actually did and what was actually achieved." *Vosburg v. Cty. of Fresno*, 54 Cal. App. 5th 439, 461 (2020). The court

"in its discretion 'must realistically assess the litigation and determine, from a practical perspective, whether or not the action served to vindicate an important right so as to justify an attorney fee award . . . .'" *Graham*, 34 Cal. 4th at 566. "The appropriate benchmarks in determining which party prevailed are: (a) the situation immediately prior to the commencement of suit, and (b) the situation today, and the role, if any, played by the litigation in effecting any changes between the two." *Maria P.*, 43 Cal. 3d at 1291, quoting *Folsom v. Butte Cty. Ass'n of Gov'ts*, 32 Cal. 3d 668, 685 n.31 (1982).

The California Supreme Court has construed Section 1021.5 broadly and applied it in a practical way, concluding that "the procedural device by which a plaintiff seeks to enforce an important right is not determinative of his or her entitlement to attorney fees under section 1021.5." *Id.* Thus, a plaintiff is a successful party "where an important right is vindicated 'by activating defendants to modify their behavior.'" *Id.* at 567, quoting *Westside Cmty. for Indep. Living, Inc. v. Obledo*, 33 Cal. 3d 348, 352-53 (1983). Importantly, Section 1021.5 does not limit fee awards to litigation in which a party prevails on state-law causes of action. Rather, it rewards parties to litigation that "resulted in the enforcement of an important right affecting the public interest . . . ." Cal. Code Civ. Proc. § 1021.5.

Through this litigation, the Tribes have enforced important rights affecting the public interest. In their second amended complaint, the Tribes requested that "the Court declare that the Improper Subjects of Negotiation, which the State[] insisted that the Tribes agree to include in their replacement compacts, do not fall within the permissible scope of 25 U.S.C. § 2710(d)(3)(C) and, therefore, the Tribes do not have to negotiate with the State over those subjects . . . ." 9-SER-2451. This Court held:

> We have little difficulty concluding that the disputed topics well exceed IGRA's bounds.
>
> ***
>
> And all the disputed provisions, we hasten to add, strike at core aspects of tribal sovereignty concerning the tribes' governance over their land and people and their decisions about how to structure entire areas of tribal law. This cannot be what Congress had in mind when it enacted statutory text that gave states modest authority to regulate tribal gaming operations through "a very specific exchange of rights and obligations."

Chicken Ranch Rancheria of Me-Wuk Indians v. California, No. 21-15751, 42 F.4th 1024, 2022 U.S. App. LEXIS 20839, at *26, *31-32 (9th Cir. Jul. 28, 2022) ("*Chicken Ranch*"), quoting *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1039 (9th Cir. 2010).

The Tribes requested that "the Court declare that the State, by insisting that the Tribes agree to include in their replacement compacts the Improper Subjects of Negotiation, did not negotiate with the Tribes in good faith, in violation of 25 U.S.C. § 2710(d)(3)(A)." 9-SER-2451. This Court held: "When a state, as here, seeks to negotiate for compact provisions that fall well outside IGRA's permissible topics of negotiation, the state does not act in good faith." *Chicken Ranch* at *35.

The Tribes requested that "the Court issue an order, pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii), directing the State and the Tribes to resume compact negotiations and conclude a replacement compact within 60 days of the date of the Court's order." 9-SER-2451, 2452. This Court held: "We therefore direct the parties to proceed to IGRA's remedial framework under the district court's continued supervision." *Chicken Ranch* at *57. Thus, the Court ruled in favor of the Tribes on each of their causes of action.

Furthermore, on August 18, 2022, Governor Newsom signed tribal-state gaming compacts between the State of California and the Tejon Indian Tribe and the Santa Rosa Indian Community of the Santa Rosa Rancheria,[1] in which the State appears to have significantly modified those compacts in light of the Court's *Chicken Ranch* decision.[2] Therefore, not only were the Tribes successful because they prevailed on each of their claims in the litigation, but the Tribes caused the State to immediately modify its behavior with respect to California tribes generally, vindicating their right to be free from the State's attempts to commandeer the tribal sovereignty of all California gaming tribes via the IGRA compacting process.[3]

b. The Litigation Resulted in Enforcement of Important Public Rights Affecting the Public Interest.

In addressing whether the right vindicated in a particular case is sufficiently "important" to justify a private attorney general fee award pursuant to Section 1021.5, the California Supreme Court has stated that "courts should generally realistically assess the significance of that right in terms of its relationship to the achievement of fundamental legislative goals." *Woodland Hills*, 23 Cal. 3d at 933.

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[1] *See* https://www.gov.ca.gov/2022/08/18/governor-newsom-signs-tribal-state-gaming-compacts-8-18-22/#:~:text=SACRAMENTO%20%E2%80%93%20Governor%20Gavin%20Newsom%20today,compact%20can%20be%20found%20here.

[2] For instance, the State completely removed the provisions concerning tribal enforcement of state court child and spousal support orders.

[3] By narrowing the application of state regulatory laws, such as tribal compliance with state environmental laws, the *Chicken Ranch* decision also reduces all California tribes' cost of regulation, making more money available to tribes to provide essential governmental services to their members and, in turn, benefiting all of the members of tribes that are dependent on those services for a better quality of life.

The statute "directs the judiciary to exercise judgment in attempting to ascertain the 'strength' or 'societal importance' of the right involved." *Id*. at 935. The California Supreme Court has recognized that the private attorney general doctrine may be applied to vindicate both constitutional and statutory rights. *Id*.

Here, the Court's decision in *Chicken Ranch* affirmed the right established by Congress (and by the people of the State of California with the enactment of Proposition 1A[4]) of Indian tribes to conduct class III gaming pursuant to a tribal-state compact—free from the imposition of state laws that are not directly connected to class III gaming activities. "Congress 'limit[ed] the proper topics for compact negotiations to those that bear a direct relationship to the operation of gaming activities . . .' because 'Congress intended to prevent compacts from being used as subterfuge for imposing State jurisdiction on tribes concerning issues unrelated to gaming.'" *Chicken Ranch* at *21, quoting *Coyote Valley Band of Pomo Indians v. Cal. (In re Indian Gaming Related Cases Chemehuevi Indian Tribe)*, 331 F.3d 1094, 1111 (9th Cir. 2003).

Judge Wardlaw's concurrence underscores the importance of the right of Indian tribes to conduct class III gaming pursuant to IGRA and the legislative goals considered by Congress when it enacted the IGRA:

> Congress enacted IGRA following the Supreme Court's ruling that California lacked . . . authority to regulate [gaming] on tribal lands in *California v. Cabazon* . . . . The *Cabazon* holding was itself rooted in "traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development."

Chicken Ranch at *60, quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987).

[4] CAL. CONST., art. IV, § 19(f).

Judge Wardlaw added that the "policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history," recognizing that, "[f]or centuries, states have been the 'deadliest enemies' of tribes . . . and the entities 'least inclined to respect' tribal sovereignty." *Id*. at *59, quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945); *United States v. Kagama,* 118 U.S. 375, 384 (1886); *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020). Thus, IGRA's "purpose in legalizing gaming on Indian lands was 'as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments,'" *Id*. at *60, quoting 25 U.S.C. § 2702, citing S. Rep. No. 100-446, at *1-2 (1988), and "to protect gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3).

As the majority opinion states, "to prevent states from using their compact approval authority to force regulations on tribes that the states would otherwise be powerless to enact, Congress in IGRA imposed important safeguards on compact negotiations." *Chicken Ranch* at *5.

> The central problem with California's approach was this: it for years demanded that the Tribes agree to compact provisions relating to family law, environmental regulation, and tort law that were unrelated to the operation of gaming activities and far outside the bounds of permissible negotiation under IGRA. Through its negotiating demands, California effectively sought to use the Class III contracting process as leverage to impose its general policy objectives on the Tribes, which a state may not do.

Id. at *6.

This litigation affirms and helps to protect the self-government and sovereignty rights of California Indian tribes, which enables them to engage in class III gaming to promote tribal economic development, self-sufficiency, and strong tribal governments, and to generate revenue to provide essential benefits and services to tribal members without state interference. It prevents the State of California from using the compacting process to impermissibly impose California

law on tribal governments and enforces the rights of California Indian tribes and their members to self-determination and to be free of state regulations. This litigation, thus, unquestionably resulted in the enforcement of important public rights.

c. The Litigation Conferred a Significant Benefit on California Indian Tribes, Their Members, and Residents of and Visitors to California Indian Reservations.

To support an award of attorney fees, Section 1021.5 requires that the underlying litigation yield a significant benefit that is "conferred on the general public or a large class of persons." To determine whether to award attorney fees under Section 1021.5, a court "should determine realistically the significance of the benefit, and the size of the class receiving the benefit, in light of all pertinent circumstances." *Baxter v. Salutary Sportsclubs, Inc.*, 122 Cal. App. 4th 941, 945 (2004).

California is "the state with the second largest Indian population," with a statewide Indian population of 281,374 recorded in 2013. *In re Abbigail A.*, 1 Cal. 5th 83, 91 (2016), citing U.S. Dept. of the Interior, BIA, 2013 American Indian Population and Labor Force Rep. (Jan. 16, 2014) p. 10. There are more Indian reservations in the State of California—121 in total—than in any other state.[5] California Indians clearly constitute a large class of persons for purposes of Section 1021.5. *See Press v. Lucky Stores, Inc.*, 34 Cal. 3d 311, 321 (1983) (finding that "approximately 3,000 persons" constitutes a "large class of people").

The significance of the benefit conferred by this litigation is four-fold. First, in the future, tribal members seeking to negotiate a class III gaming compact for their tribe with California will not have to endure persistent attempts to negotiate

[5] https://www.indianaffairs.gov/regional-offices/pacific.

over the application of California environmental law, family law, and tort law in Indian country, or any other subject that is similarly beyond the scope of IGRA.

> "[T]he good faith requirement exists" because "Congress anticipated that states might abuse their authority over compact negotiations to force tribes to accept burdens on their sovereignty in order to obtain gaming opportunities." *Rincon Band*, 602 F.3d at 1042. We hold that by negotiating for topics well outside § 2710(d)(3)(C)'s permitted list, California did not bargain in good faith.

Chicken Ranch at *57.

This impact of the litigation is evident from the fact that, within weeks of the issuance of the Court's decision, the State executed two tribal-state compacts that appear to significantly modify the provisions concerning environmental law, family law, and tort law, which were expressly identified by this Court as impermissible.

Second, tribes that have already entered compacts containing the environmental law, family law, and tort law provisions now have a basis for renegotiating their compacts based on this Court's decision. Thus, the success of the Tribes' litigation has already altered the State's position and strategy in current and future compact negotiations with tribes and provides a potential retroactive remedy for those tribes that desire to reduce the State's improper regulatory reach.

Third, one of the core purposes of IGRA is to enable tribes to generate revenue from gaming to fund the day-to-day operations of tribal governments and essential government programs, benefits, and services, such as safe and sanitary housing, potable water, sanitation facilities, child welfare support, day care, primary and secondary education grants, tribal police, tribal courts, fire departments, public transportation, emergency response, environmental protection, cultural preservation, and other government programs that directly benefit all persons who live, work, or visit their reservations. To the extent that the Tribes'

state-imposed regulatory costs are reduced, additional funds are available to the Tribes to provide those programs, benefits, and services, conferring a substantial benefit to tribal citizens, reservation residents, and visitors to tribal reservations. Declaration of Glenn Lodge in Support of the Appellees' Motion for Attorneys' Fees ("Lodge Declaration"), p. 10, ¶ 35; Declaration of Jason Ramos in Support of the Appellees' Motion for Attorneys' Fees ("Ramos Declaration"), pp. 9-10, ¶¶ 29-30. Finally, if tribal governments have more revenue available to them, they can help fund projects that benefit both people living on Indian reservations and in surrounding communities. *Id.*

d. The Tribes Should Not Bear the Financial Burden of Compelling the State to Comply with the California Constitution and Federal and State Statutory Law.

To be eligible for an award of attorney fees under Section 1021.5, the Tribes must show that "the necessity and financial burden of private enforcement . . . are such as to make the award appropriate." Cal. Code Civ. Proc. § 1021.5. "As to the first part of the requirement, in as much as the action proceeded against the only government agency which bears responsibility for the challenged practices, 'the necessity of private, as compared to public, enforcement [is] clear.'" *Slayton v. Pomona Unified Sch. Dist.*, 161 Cal. App. 3d 538, 552 (1984), quoting *Woodland Hills*, 23 Cal. 3d at 941. A substantial benefit, therefore, is conferred by any lawsuit that determines that state officials violated applicable federal or state law. *Woodland Hills*, 23 Cal. 3d at 939 ("Of course, the public always has a significant interest in seeing that legal strictures are properly enforced and thus, in a real sense, the public always derives a 'benefit' when illegal private or public conduct is rectified."). As to the second part of the requirement, "'the financial burden in this case is such that an attorney fee award is appropriate in order to assure the

effectuation of an important public policy.'" *Press*, 34 Cal. 3d at 321, quoting *Woodland Hills*, 23 Cal. 3d at 942; *Slayton*, 161 Cal. App. 3d at 552.

Here, the State of California is the government entity capable of policing the conduct of the Governor during compact negotiations. The Governor violated federal law and both California constitutional and statutory law by using the compacting process as a means of imposing state jurisdiction on tribes concerning issues unrelated to gaming. Public enforcement is impracticable because the State is the entity responsible for policing its behavior. Thus, a private action brought by tribes injured by the Governor's conduct was the only means of challenging the legality of the conduct and the practices of the Governor.

Likewise, the Tribes did not sue for money damages but sought to compel the Governor to act in accordance with the law. The litigation was initiated to ensure: (1) that the Tribes (and, by extension, all California tribes) could enter into compacts to conduct class III gaming in accordance with federal and state law, and (2) that the Governor fulfilled the obligation imposed upon him by state law to negotiate compacts in good faith. As stated above, the State has already executed compacts with the Tejon Indian Tribe and the Santa Rosa Indian Community that significantly modify the environmental law, family law, and tort law provisions this Court determined were not permitted by the IGRA. Mere weeks after this Court's opinion was issued, other California tribes and their members are already receiving the benefits of the Tribes' hard-fought and costly litigation.

Because the litigation has had an immediate, material effect on the State's negotiation conduct with tribes, and because the success of the underlying litigation benefits tribes and their members—in the future and retroactively—the Tribes should not bear the financial burden of policing the State's conduct, protecting tribal sovereignty, and ensuring that the highest ranking official of the State comply with federal and state law.

II. THIS COURT HAS JURISDICTION TO AWARD ATTORNEY FEES PURSUANT TO CAL. CODE CIV. PROC. § 1021.5.

The Court has jurisdiction to award attorney fees pursuant to Section 1021.5 because the resolution of state-law issues was an essential element of the resolution of the Tribes' IGRA claims and the federal and state laws at issue are inseparable. The Tribes' complaint alleges that this Court has jurisdiction over their IGRA-based federal claims pursuant to, *inter alia*, California Government Code § 98005. 9-SER-2442. ("The State has waived its sovereign immunity with regard to disputes between the State and the Tribes on the issue of whether the State engaged in good faith compact negotiations pursuant to California Government Code § 98005.").[6] California Government Code § 98005 provides, in relevant part:

> [T]he State of California . . . submits to the jurisdiction of the courts of the United States in any action brought against the state by any federally recognized California Indian tribe asserting any cause of action arising from the state's refusal to enter into negotiations with that tribe . . . pursuant to IGRA or to conduct those negotiations in good faith . . . .

The State's waiver of immunity contained in California Government Code § 98005 is a necessary condition for a California Indian tribe to prosecute a bad faith claim pursuant to Sections 2710(d)(3)(C)(i)-(vii) and 2710(d)(3)(A) of the IGRA. The Court's jurisdiction over the Tribes' causes of action is, thus, entirely

[6] "The sole surviving provision of Proposition 5 is the statutory waiver of sovereign immunity by the State for claims arising out of violations of IGRA. CGC § 98005. The California Supreme Court found this provision severable and recognized that the language was meant to effectuate IGRA since the U.S. Supreme Court had recently stripped the Act of its teeth in *Seminole Tribe of Florida . . . .*" *Pauma Band v. California*, 813 F.3d 1155, 1161 n.1 (9th Cir. 2015), *citing Hotel Emps. & Rest. Emps. Internat. Union v. Davis*, 21 Cal. 4th 585, 614 (1999).

dependent on state law. Bad faith litigation is generally unavailable to Indian tribes in other states, because California is the only state that has waived its sovereign immunity by statute[7] with regard to IGRA-based claims in the wake of *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (". . . § 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued.").

The Tribes' substantive claims are also dependent on the California Constitution. Article IV, Section 19(f) of the California Constitution provides:

> Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.

The Governor's authority to engage in compact negotiations is also authorized by California statutory law, including California Government Code § 12012.25(d):

> The Governor is the designated state officer responsible for negotiating and executing, on behalf of the state, tribal-state gaming compacts with federally recognized Indian tribes located within the State of California pursuant to the federal Indian Gaming Regulatory Act of 1988 (18 U.S.C. Sec. 1166 to 1168, incl., and 25 U.S.C. Sec. 2701 et seq.) for the purpose of authorizing class III gaming, as defined in that act, on Indian lands within this state.

[7] *See* Kathryn R.L. Rand and Steven Andrew Light, Defining the Scope of the State's Good Faith Duty: Permissible Topics in Tribal-State Gaming Compact Negotiations, Gaming Law Review, Aug 2021, p. 234 ("California stands out here as well, as the only state to waive its sovereign immunity from federal suit and willingly submit to litigation concerning tribal-state compact negotiations.").

The Governor's authority and obligation to conduct the negotiations from which the Tribes' claims arise is, therefore, dependent on state law, as is the legality of the class III gaming that the Tribes' conduct pursuant to their current compacts and intend to conduct pursuant to the new compacts that were the subject of the negotiations that resulted in this litigation.

Furthermore, Section 12.3 of the Tribal-State Gaming Compacts entered into by the Tribes and the State of California provides that:

> all matters involving negotiations . . . shall be governed, controlled, and conducted in conformity with the provisions and requirements of IGRA, including those provisions regarding the obligation of the State to negotiate in good faith and the enforcement of that obligation in federal court.

Taken together, the California Constitution, California statutory law, and the Tribes' current compacts can only be interpreted to authorize the Governor to negotiate *in good faith* to conclude a compact with Indian tribes, consistent with IGRA, and that a failure to negotiate in good faith violates both the California Constitution and California statutory law. To construe Article IV, Section 19(f) of the California Constitution any other way would run afoul of the explicit language in the Compacts, public policy, and the covenant of good faith and fair dealing implied in every contract. While IGRA, California Constitutional law, and California statutory law all point to federal district court as the forum for obtaining relief from violations of IGRA's good faith requirement, essential to the Tribes' IGRA claims is the underlying violation by the Governor of his obligation to negotiate gaming compacts in good faith under state law and the waiver of state sovereign immunity in California Government Code § 98005.

The existence and validity of the Tribes' current compacts and any future compacts is also dependent on the California Constitution, CAL. CONST., art. IV, § 19(f), and California Government Code § 12012.25, which require legislative

ratification of gaming compacts. *See* Cal. Gov. Code §§ 12012.25(a)(6) (Blue Lake), (a)(12) (Chemehuevi), (a)(13) (Chicken Ranch), (a)(20) (Hopland), and (a)(37) (Robinson).[8]

Thus, the resolution of the claims before the Court was based on the application and interpretation of state law as well as federal law.

III. CAL. CODE CIV. PROC. § 1021.5 IS APPLICABLE EVEN IF A STATE LAW CAUSE OF ACTION IS NOT EXPLICITLY ALLEGED IN THE COMPLAINT.

Generally, state fee-shifting statutes are inapplicable to lawsuits heard in federal courts pursuant to federal question jurisdiction. *See* 10 Fern M. Smith, Moore's Federal Practice Civil § 54.171 (2015) ("In cases within the district courts' federal-question jurisdiction, state fee-shifting statutes generally are inapplicable."); *Roach v. Tate Publ'g & Enters.*, No. 1:15-cv-00917-SAB, 2017 U.S. Dist. LEXIS 182884, at *21 (E.D. Cal. Nov. 2, 2017). However, under certain circumstances, this Court has applied Section 1021.5 to award fees where plaintiffs prevailed on principally federal law claims.

In *Indep. Living Ctr. of S. Cal., Inc. v. Kent*, 909 F.3d 272 (9th Cir. 2018), this Court awarded attorney fees to the plaintiffs under Section 1021.5, notwithstanding the fact that the action was not based on a state law cause of action. There, the California Legislature enacted Assembly Bill X3 5 ("AB 5"),

[8] In addition, this litigation required the district court to interpret aspects of California Government Code §§ 12019.30-12019.90, which relate to the Tribal Nation Grant Fund ("TNGF"), to determine whether the TNGF violated IGRA. *See Chicken Ranch Rancheria of Me-Wuk Indians v. Newsom*, 530 F. Supp. 3d 970, 985-88 (E.D. Cal. 2021). The district court was required to analyze whether the TNGF was sufficiently close in quality and character to the Indian Gaming Revenue Sharing Trust Fund, codified at California Government Code § 12012.75, in order to determine whether the TNGF was negotiated in good faith.

which reduced the Medi-Cal (California's Medicaid program) rate of reimbursement for healthcare providers by ten percent. *Id*. at 276. The plaintiffs filed a petition for a writ of mandamus against the California Department of Health Care Services ("DHCS") and its director in state court, pursuant to Cal. Code Civ. Proc. § 1085. *Id*. The plaintiffs alleged that California's ten percent reimbursement reduction created by AB 5 violated the "equal access" provision of the Medicaid Act, 42 U.S.C. § 1396a, thereby conflicting with federal law, and violating the Supremacy Clause. *Id*. The writ of mandamus sought injunctive relief and attorney fees under Section 1021.5. *Id*. at 276.

The director removed the case to federal court based on federal question jurisdiction and DHCS was dismissed. *Id*. The case was ultimately settled after appeal to this Court, a grant of a petition for certiorari, and remand by the U.S. Supreme Court, which vacated, but did not reverse, this Court's decision affirming a preliminary injunction issued in the case. *Id*. at 277. The settlement allowed the plaintiffs to move for attorneys' fees in the district court and the plaintiffs filed a motion for attorney fees pursuant to Section 1021.5. *Id*. The district court denied the motion, ruling that, because the case involved only federal law claims, it could not award attorney fees pursuant to a state-law fee-shifting statute. *Id*. at 277-78.

On appeal of the district court's denial of the attorneys' fees motion, this Court identified the "central question" as "whether Appellants brought a *state-law claim* or a *federal claim*, for the answer to that question will determine whether they are entitled to seek attorneys' fees pursuant to California's § 1021.5 in federal court." *Id*. at 278 (emphasis original). The Court held that, because the Supreme Court had determined that neither the Supremacy Clause nor the Medicaid Act, 42 U.S.C. § 1396a, created a cause of action, "Appellants' cause of action must be grounded in state law, if a cause of action is to exist under the circumstances

alleged." *Id*. at 279-80. The Court, therefore, found that the request for a § 1085 writ "endured as a state law claim." *Id*. at 280.

To bolster this conclusion, the Court stated that "it is clear that, under California law, § 1085 Writs may issue *to compel state agencies to comply with federal requirements*. That is the essence of Appellants' claim." *Id*. at 281 (emphasis added). The Court also emphasized that "a significant portion of Appellants' success was due to our interpretation of state law," specifically, a detailed analysis of California law to determine whether the director enjoyed sovereign immunity from suit. *Id*., citing *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 662 (9th Cir. 2009). The *Kent* Court held that Section 1021.5 could be applied, notwithstanding the fact that only federal causes of action were alleged in the complaint, because: (1) the initial state court action sought mandatory injunctive relief according to a state-law procedural mechanism, (2) the Court was required to address a substantial state law issue, and (3) the action ultimately enjoined the State of California from retaining the reimbursement funds. Thus, in determining whether attorney fees could be awarded pursuant to Section 1021.5, the *Kent* Court looked at the entanglement between the state and federal law issues that arose in the litigation and the effect that it had on the outcome of the litigation.

Here, like *Kent*, the face of the Tribes' complaint does not expressly allege a state law cause of action. Also, like *Kent*, resolution of this case was dependent on the interpretation and application of California law. Unlike *Kent*, the Court does not need to conceptually stretch a procedural mechanism like Cal. Code Civ. Proc. § 1085 to constitute a state cause of action to award fees under Section 1021.5. This is so for several reasons.

First, the Tribes' claims based on the good faith provisions of IGRA are only actionable because Article IV, Section 19(f) of the California Constitution negates

those portions of the California Constitution that prohibit Class III gaming ("Notwithstanding subdivisions (a) and (e), and any other provision of state law . . . ,") and because California Government Code § 98005 waives the State's immunity from suit in federal court. *See 19 (f)*, 517 U.S. 44. The Tribes explicitly alleged the State's waiver of its sovereign immunity as a basis for the Court's jurisdiction to address the claims in the complaint. 9-SER-2442.

Second, the Tribes' claim that the Governor failed to negotiate in good faith, a violation of IGRA, necessarily includes a violation of Cal. Const., art. IV, § 19(f) and Cal. Gov. Code § 12012.25. The Governor's authorization to negotiate and conclude compacts under the California Constitution and California Government Code § 12012.25 necessarily means "authorized to negotiate [*in good faith*] and conclude compacts." The Governor is not authorized under California law to conduct compact negotiations in bad faith.

Finally, the Tribes received the relief they sought, a declaration that the Governor failed to negotiate in good faith because he attempted to impose whole sections of California family law, environmental law, and tort law on the Tribes and thereby attempted to commandeer significant aspects of tribal sovereignty. "California demanded that the tribes enact ordinances granting their tribal courts jurisdiction over state spousal and child support orders for gaming facility employees." *Chicken Ranch* at *26. "California insisted upon nearly 30 pages of highly detailed environmental law provisions." *Id.* at *27. "Tribes would be required to adopt an ordinance incorporating as tribal law significant aspects of California's Environmental Quality Act . . . ." *Id.* "California insisted that the tribes broadly adopt California tort law as part of tribal law." *Id.* at *28-29.[9]

[9] The district court also had to analyze the TNGF, California statutory law relating to the RSTF, which is itself a creation of California statutory law, to determine

It cannot be the case that alleging a violation of the good faith provisions of the IGRA in federal court means that the state laws underlying those claims simply vanish. California laws lay the statutory foundation for bringing this lawsuit by authorizing class III gaming and providing a waiver of the State's sovereign immunity. The Court noted that "IGRA imposes . . . an obligation to engage in compact negotiations in good faith . . . [and that] obligation has teeth because a tribe may sue in federal court for a state's violation of its good-faith duty." *Id.* at *13. Part of the reason that "the obligation has teeth" is because California has, uniquely, waived its sovereign immunity for suits alleging a failure to negotiate a gaming compact in good faith. Cal. Gov. Code § 98005.

The State and the Governor violated state laws that mandate good faith negotiations with tribes over class III gaming and a state-law waiver allows Tribes to maintain a lawsuit against the State for its violations of state and federal law. The Tribes are, therefore, entitled to fees under Section 1021.5, even if the complaint does not explicitly allege state law causes of action. Finding otherwise would ignore the state law that forms much of the basis of the underlying lawsuit, the substance of the controversy, and the content of the law the State sought to impermissibly impose on the Tribes.

IV. THE ATTORNEYS' FEES CLAIMED BY THE TRIBES ARE REASONABLE.

Under California law, a court's assessment of "attorney fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent

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whether the TNGF was an allowable topic of negotiation under the meaningful-concession framework articulated and applied by the Ninth Circuit in *Coyote Valley Band of Pomo Indians v. Cal.*, 331 F.3d 1094, *Rincon Band v. Schwarzenegger*, 602 F.3d at1039 and their progeny. *See Chicken Ranch*, 530 F. Supp. 3d at 986-88; *Chicken Ranch* at *53-57.

and reasonable hourly compensation of each attorney . . . involved in the presentation of the case.'" *Ketchum v. Moses*, 24 Cal. 4th 1122, 1131-32 (2001) (quoting *Serrano v. Priest*, 20 Cal. 3d 25, 48 (1977)). The U.S. Supreme Court has emphasized that a "request for attorney's fees should not result in a second major litigation." *Hensley*, 461 U.S. at 437. As the successful party under Section 1021.5, the Tribes are entitled to all reasonable attorney fees.

a. The "Lodestar" Amount Requested by the Tribes is Reasonable.

The initial step in determining a reasonable award of attorney fees is to determine the proper "lodestar" amount. The "lodestar" amount is the product of the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Blum v. Stenson*, 465 U.S. 886, 888 (1984). The lodestar fee amount is presumed to be a reasonable amount. *Mendez v. Cnty. of San Bernardino*, 540 F.3d 1109, 1129 (9th Cir. 2008); *Blum*, 465 U.S. at 897.

b. The Rates Requested by the Tribes are Reasonable.

A reasonable rate is one that is "in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation." *Jordan v. Multnomah County*, 815 F.2d 1258, 1262-1263 (9th Cir. 1987); *Ketchum*, 24 Cal. 4th at 1131-1132 ("We expressly approved the use of prevailing hourly rates as a basis for the lodestar . . . [T]he lodestar is the basic fee for comparable legal services in the community . . . ."). This considers the "quality" of the attorneys' "performance" in the case. *Perdue v. Kenny A.*, 559 U.S. 542, 555 n.5 (2010) (a reasonable hourly rate reflects the "special skill and experience of counsel" and the "brilliant insights and critical maneuvers" in the case).

Here, statements demonstrating the expertise and experience of each attorney that performed work for Appellees in this appeal are set forth in full in the

Declarations of Lester J. Marston ("Marston Declaration"), pp. 1-3, ¶¶ 2-6, pp. 5-18, ¶¶ 13-45, and David B. Dehnert ("Dehnert Declaration"), pp. 1-2, ¶¶ 2-5, in Support of Appellees' Motion for Attorneys' Fees and are incorporated herein as if set forth here in full. As demonstrated in the Marston Declaration, ¶¶ 12, 16, 20, 30, 33, 37, 40, and 43, and the Dehnert Declaration, p. 3, ¶ 12, as well as in the Declarations of George Forman, pp. 1-3, ¶¶ 4-9, and Frank Lawrence, p. 4, ¶ 7, in Support of Appellees' Motion for Attorneys' Fees, the reasonable, prevailing market rates, in litigation of cases of comparable complexity, for the attorneys and law clerks that performed work on this appeal, are as follows: $980/hr for Lester J. Marston (45 years of experience); $850/hr for David B. Dehnert (29 years of experience) and Scott Johnson (28 years of experience); $775/hr for Darcy Vaughn (13 years of experience); $675/hr for Ashley R. Burrell (10 years of experience); $665/hr for Cooper M. DeMarse (9 years of experience); $615/hr for Kostan Lathouris (7 years of experience); $560/hr for Dr. Jeremiah Chin (5 years of experience); and $300/hr for law clerk Nicholas Marston.[10]

c. The Time Spent Litigating this Case Was Reasonable.

i. Plaintiff-Respondent Tribes Are Entitled to a Fully Compensatory Award for Time Spent on the Appeal.

The California Supreme Court has held that a statutory fee award under Section 1021.5 "should be fully compensatory." *Ketchum*, 24 Cal. 4th at 1133. The United States Supreme Court has made clear that the most critical factor

[10] *See also, e.g., McKibben v. McMahon*, 2019 U.S.Dist.LEXIS 34110, at *40-41 (C.D. Cal. Feb. 28, 2019) (stating adjusted lodestar rates for attorneys in a major metropolitan area in California are $887-$1230 per hour for attorneys with 26-49 years of experience, $738-$1220 per hour for attorneys with 23-33 years of experience, $603-$855 per hour for attorneys with 9-15 years of experience, and $336-$671 per hour for attorneys with 1-6 years of experience).

in determining the reasonableness of the time spent litigating a case is the result obtained. *Hensley*, 461 U.S. at 435-36; *see Graham*, 34 Cal. 4th at 566, quoting *Folsom*, 32 Cal. 3d at 685 ("In determining whether a plaintiff is a successful party for purposes of section 1021.5, '[t]he critical fact is the impact of the action, not the manner of its resolution.'").

As set forth above, the Tribes have demonstrated that they are successful parties under Section 1021.5, both because they have vindicated an important right in the public interest, thereby conferring a significant benefit to a large class of people, as well as because the Tribes prevailed on each of the causes of action alleged in their complaint. The Tribes, therefore, have achieved excellent results. *See Hensley*, 461 U.S. at 435 ("Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.").

ii. The Results Obtained Are "Excellent."

In their complaint, the Tribes requested that "the Court declare that the Improper Subjects of Negotiation, which the State insisted that the Tribes agree to include in their replacement compacts, do not fall within the permissible scope of 25 U.S.C. § 2710(d)(3)(C) and, therefore, the Tribes do not have to negotiate with the State over those subjects . . . ." 9-SER-2451. The Court held: "We have little difficulty concluding that the disputed topics well exceed IGRA's bounds." *Chicken Ranch* at *26.

The Tribes also requested that "the Court declare that the State, by insisting that the Tribes agree to include in their replacement compacts the Improper Subjects of Negotiation, did not negotiate with the Tribes in good faith, in violation of 25 U.S.C. § 2710(d)(3)(A)." 9-SER-2451. The Court held: "When a state, as here, seeks to negotiate for compact provisions that fall well outside IGRA's permissible topics of negotiation, the state does not act in good faith." *Id*. at *34.

Finally, the Tribes requested that "the Court issue an order, pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii), directing the State and the Tribes to resume compact negotiations and conclude a replacement compact within 60 days of the date of the Court's order." 9-SER-2451, 2452. The Court held: "We therefore direct the parties to proceed to IGRA's remedial framework under the district court's continued supervision." *Id*. at *57.

As was discussed above, after this Court's decision, the State executed two tribal-state compacts that appear to significantly modify or remove the environmental, family, and tort law provisions identified by this Court as improper. Accordingly, because the Court granted the Tribes all of the relief they requested in their Complaint, the result obtained by the Tribes' legal counsel is "excellent."

iii. The Hours Requested Are Reasonable.

Counsel has exercised billing judgment to eliminate time that is arguably excessive, redundant, or unnecessary by voluntarily reducing the hourly rate to 90% of the reasonable hourly rate in the locality of the litigation of each attorney and clerk that performed work on this appeal. Marston Declaration pp. 18-21, ¶¶ 48-57. *See Hensley*, 461 U.S. at 437 ("The [fee] applicant should exercise 'billing judgment' with respect to hours worked . . . .");[11] *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) (holding that "the district court can impose a

[11] *See also, Gonzalez v. City of Maywood*, 729 F.3d 1196, 1203, 1203 n.2 (9th Cir. 2013) ("Due to the associative property of multiplication [(A * B) * C = A * (B * C)], it makes no difference in terms of the final amount to be awarded whether the district court applies the percentage cut to the number of hours claimed, or to the lodestar figure."). This mathematical logic applies equally to a discretionary reduction in rate as it does to hours.

small reduction, no greater than 10 percent—a 'haircut'—based on its exercise of discretion . . . " to negate unnecessary duplicative hours).[12]

Appellees therefore request attorneys' fees at the following reduced rates: $882/hr for Lester J. Marston; $765/hr for David B. Dehnert and Scott Johnson; $697.50/hr for Darcy Vaughn; $607.50/hr for Ashley R. Burrell; $598.50/hr for Cooper M. DeMarse; $553.50/hr for Kostan Lathouris; $504/hr for Dr. Jeremiah Chin; and $270/hr for law clerk Nicholas Marston. Marston Declaration pp. 18-21, ¶¶ 48-57. Accordingly, as set forth in the Marston Declaration, p. 21, ¶ 58, the total requested for Appellees' reasonable attorneys' fees, based on the reduced rates set forth above and the number of hours billed, amounts to $1,130,678.57.

The time spent is reasonable considering the novelty, complexity, and difficulty of the case and the defenses raised by the State, including the State's unsuccessful motion for a stay pending appeal.[13]

V. THE TRIBES ARE ENTITLED TO FEES INCURRED IN BRINGING AND DEFENDING THIS MOTION.

If the Court grants the Tribes' Motion, the Tribes will submit a supplemental memorandum, supporting declarations, and exhibits setting forth the additional fees incurred in bringing and defending this motion. *See e.g.*, *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1210 (9th Cir. 2013) (holding that a court errs in

[12] As the *Moreno* court notes, "One certainly expects *some* degree of duplication as an inherent part of the process." *Moreno*, 534 F.3d at 1112. The dispositive issue is whether "it's *necessary* duplication." *Id.*

[13] In response to the State's appeal, the Tribes were also required to prepare a substantial supplemental excerpt of record, requests for judicial notice of the Department of Interior's disapproval letters, and an opposition to the State's request for an extension of time to file a petition for rehearing/rehearing en banc. The Tribes were also required to review and respond to two amicus briefs filed in support of the State.

summarily denying any recovery for time spent preparing fee motion); *Ketchum v. Moses*, 24 Cal. 4th at 1141 ("…an award of fees may include not only the fees incurred with respect to the underlying claim, but also the fees incurred in enforcing the right to mandatory fees…").

CONCLUSION

For all the foregoing reasons, the Court should award the Tribes their attorneys' fees as requested.[14]

Dated: September 26, 2022

Respectfully submitted,

LAW OFFICES OF RAPPORT AND MARSTON

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

LAW OFFICES OF DAVID DEHNERT

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

[14] This Motion is timely under Circuit Rule 39-1.6 (a), as it is filed not later than 14 days after the expiration of the period within which a petition for rehearing may be filed. *See* DktEntry: 71 ("Any petition [for rehearing] shall be filed on or before September 12, 2022."); Circuit Rule 39-1.6 (b)(3) ("All applications must include a statement that sets forth the application's timeliness.").

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the following document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system on September 26, 2022.

APPELLEES' MOTION FOR ATTORNEYS' FEES

I certify that all participants in the case are registered Appellate Electronic Filing users and that service will be accomplished by the Appellate Electronic Filing system.

Executed September 26, 2022, at Ukiah, California.

/s/ *Ericka Duncan*
ERICKA DUNCAN