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' REPLY TO STATE APPELLANTS' OPPOSITION TO 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

In its Opposition to the Tribes' motion for attorneys' fees, the State asserts that this litigation is a "pure federal question case." Opposition, p. 4. The Tribes, however, did not and could not have pursued this litigation based purely on federal law. *See Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996). This litigation was only possible because California law waives the State's sovereign immunity and Eleventh Amendment immunity to claims by California Indian tribes that the State failed to negotiate a class III gaming compact in good faith. The Tribes' motion for attorneys' fees is only possible because the California Legislature chose to grant successful litigants the right to seek attorneys' fees against the State pursuant to the private attorney general doctrine and waive the State's sovereign immunity to such claims. Even more fundamentally, this litigation arises from the State's insistence that California law be imposed on the Tribes' on-reservation activities beyond the gaming activities conducted by the Tribes pursuant to the Indian Gaming Regulatory Act ("IGRA"). State law is at the heart of every element of this case.

In this reply brief, the Tribes demonstrate that the State failed to rebut the Tribes' argument that the claims and circumstances of this litigation are sufficiently similar to *Independent Living Ctr. of Southern California, Inc. v. Kent*, 909 F.3d 272 (9th Cir. 2018) ("*Kent*"), to authorize the Court to award attorney fees under Cal. Code Civ. Proc. § 1021.5 ("Section 1021.5"). The Tribes further demonstrate that the State's sovereign immunity and Eleventh Amendment immunity do not bar the Tribes' claim for attorneys' fees pursuant to Section 1021.5. Finally, the Tribes show that the financial burden of private enforcement of

the requirements of IGRA and California law by the Tribes and the absence of a significant, direct, pecuniary benefit to the Tribes arising from this litigation make the award of attorneys' fees appropriate.

I. THIS LITIGATION REQUIRED THE COURT TO ADDRESS SIGNIFICANT ISSUES OF STATE LAW, SO THE TRIBES' MOTION FALLS WITHIN THE *KENT* EXCEPTION.

The State argues that attorneys' fees are not available to the Tribes under Section 1021.5 because the Tribes "exclusively litigated and prevailed under IGRA, a federal statute," and that there is no basis for a federal court to apply a state fee shifting statute if the court is not sitting in diversity jurisdiction or exercising supplemental jurisdiction over state law claims. Opposition, p. 7. The State's simplistic argument fails to address the Tribes' contention that the analysis and application of state law, particularly Cal. Gov. Code § 98005 ("Section 98005"), is at the very core of this case.[1] As demonstrated below, State law is

[1]Pursuant to FRCP Rule 8(a), the notice pleading standard only "requires that the allegations in the complaint 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Pac. Coast Fed'n of Fishermen's Ass'ns. v. Glaser*, 945 F.3d 1076, 1086 (9th Cir. 2019) (quoting *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006)). "A party need not plead specific legal theories in the complaint, so long as the other side receives notice as to what is at issue in the case." *Id*. (quoting *Am. Timber & Trading Co. v. First Nat'l Bank of Oregon*, 690 F.2d 781, 786 (9th Cir. 1982)). Cal. Const. art. IV § 19(f) and Cal. Gov. Code § 98005 incorporate IGRA and federal law by reference into state law, by placing a mandatory duty on the Governor to negotiate compacts with federally recognized Indian tribes "in accordance with federal law." Thus, even if the Tribes' Complaint had not asserted Section 98005 as a jurisdictional basis for bringing suit, the State had sufficient notice that its conduct constituted a violation of California law. *See Quiroz v. Horel*, 85 F. Supp. 3d 1115, 1150-51 (N.D. Cal. 2015) ("the facts related to [plaintiff's] state law claims are identical to

foundational to the Tribes' suit, which could not proceed in the absence of state law, and the case centered on whether, and to what extent, the State could force the Tribes to comply with State law via the compacting process. Under these circumstances, a federal court can apply a state law attorneys' fees statute to award fees to the prevailing party because the issues of state and federal law are inextricably intertwined.

As an initial matter, Section 98005 broadly waives the State's sovereign immunity and Eleventh Amendment immunity for claims "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 . . . pursuant to IGRA or to conduct those negotiations in good faith…." The waiver codified in Section 98005, while limited to violations of IGRA and gaming compacts, and the State's conduct relating to compacts and compact negotiations, is not limited to federal causes of action or the application of federal law. Rather, the statute expressly frames the waiver of immunity as applicable to "*any* cause of action arising from" bad faith conduct. The instant fee request is the logical and legal consequence of the Tribes' success in the underlying bad faith litigation. It is incidental to "*any* cause of action arising from" litigation compelling the State to conduct negotiations in good faith. This court, pursuant to the State's Section 98005 waiver, has the authority to award

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those stated in his federal law claims… As such, the court finds that defendants were fairly put on notice under the applicable liberal notice pleading standard set forth in [FRCP] 8(a)").

fees pursuant to Section 1021.5. This authority exists irrespective of whether the Tribes' complaint alleges a state law cause of action.

Asserting an underlying state law cause of action is often a predicate for awarding fees pursuant to a state fee-shifting statute where a federal court is exercising supplemental jurisdiction over state law claims. The Tribes are not, however, arguing, and need not argue, that this court asserted supplemental jurisdiction over violations of state law (although it is clear that the State's conduct violated both federal and state law). The Tribes' assertion that they are entitled to attorneys' fees is based on the fact that the Tribes' complaint specifically invoked Section 98005 as the jurisdictional basis for bringing suit and that the Court was compelled to address substantial and significant issues of state law, which brings the motion within the exception articulated in *Kent*.

The State's analysis of *Kent* is simplistic, and it misrepresents the *Kent* court's analysis. Opposition, p. 10 ("Ultimately, *Kent* held that the appellants' Section 1085 writ 'endured as a state law claim.' . . . This provided the appellants in *Kent* with a state-law basis to request attorneys' fees under Section 1021.5."). *Kent* originated in state court pursuant to a mandamus action, but the plaintiffs pleaded a purely federal claim. *Kent*, 909 F.3d at 279 ("The [State] argues that fees are unavailable pursuant to § 1021.5 because Appellants' claim was federal—a conclusion also reached by the district court."). In *Kent*, the State argued that Cal. Code Civ. Proc. § 1085 ("CCP § 1085") was not an independent cause of action, but a "remedial" or "procedural" mechanism. *See Kent*, 909 F.3d at 288 n.3 ("The State argued that § 1085 is only a procedural mechanism, not a cause of action.").

The *Kent* court held that "regardless of whether the § 1085 Writ is a procedural mechanism or a cause of action, its use to enjoin state action is well recognized." *Kent*, 909 F.3d at 280 n.1.

The Tribes' complaint in the underlying bad faith litigation is based on a similar state-law procedural mechanism. Although the language of Section 98005 is not comparable to CCP § 1085, in the context of compelling the State to conduct compact negotiations in good faith, the two statutes are functionally equivalent. Like CCP § 1085, Section 98005 is a state law "procedural" or "remedial" mechanism used to enjoin state action, specifically:

> the state's refusal to enter into negotiations with that tribe for the purpose of entering into a different Tribal-State compact pursuant to IGRA or to conduct those negotiations in good faith, the state's refusal to enter into negotiations concerning the amendment of a Tribal-State compact to which the state is a party, or to negotiate in good faith concerning that amendment, or the state's violation of the terms of any Tribal-State compact to which the state is or may become a party.

Cal. Gov. Code § 98005.

Like *Kent*, the Tribes moved according to a state statute that, post-*Seminole*, provides the only mechanism for enjoining the State's bad faith conduct. Like *Kent*, the State *voluntarily* submitted to "the jurisdiction of the courts of the United States" via Section 98005. Like *Kent*, the Tribes' complaint alleges federal causes of action. Like *Kent*, "a significant portion of Appellants' success was due to [this Court's] interpretation of state law," *Kent*, 909 F.3d at 281, since the Court had to determine the extent to which the State could use the compacting process to impose State law on the Tribes:

> California sought a provision that would require the Tribes to recognize and enforce state spousal and child support judgments against tribal gaming facility employees. California also requested that the Tribes agree to extensive [state] environmental regulations-devoting nearly 30 pages of detailed draft compact provisions to this topic alone. California also wanted the Tribes to adopt California tort law as tribal law that would apply in various situations disconnected from gaming activities, while insisting the Tribes waive sovereign immunity for tort claims and establish tort claims commissions. The Tribes maintained that these requests were insufficiently related to gaming, and that the State therefore could not negotiate for them under IGRA.

Chicken Ranch Rancheria of Me-Wuk Indians v. California, 42 F.4th 1024, 1030 (9th Cir. 2022).

Thus, the dispositive aspects of *Kent* are clearly analogous to the Tribes' underlying bad faith litigation.

When the State asserts that "a federal court **usually** applies state attorneys' fees statutes only where the federal court is sitting in diversity jurisdiction or is exercising supplemental jurisdiction over state law claims," it is correct that those are the normal circumstances under which a federal court applies a state fee-shifting statute. Opposition, p. 11 (emphasis added) (quoting *City of San Jose v. San Jose Police Officer's Ass'n*, 2013 WL 4806453, at *2 (N.D. Cal. 2013)). Like *Kent*, however, this litigation is highly unusual. The State ignores the fact that the Tribes are seeking fees based on **two** state statutes, Section 98005 and Section 1021.5. Section 98005 waives any immunity the State could assert to this Court's exercise of jurisdiction over any cause of action arising from the State's refusal to conduct compact negotiations in good faith. In the absence of Section 98005, the Tribes lack any federal mechanism to enforce the State's compliance with the good

faith requirements of the IGRA. Section 1021.5, in turn, is designed to reward plaintiffs for bringing an action against the State "which has resulted in the enforcement of an important right affecting the public interest." Section 1021.5, therefore, provides a State law mechanism for compensating the Tribes for successfully litigating a case that conferred substantial benefits on a large class of the population in California.

Thus, because state law issues were central and essential to this Court's analysis of the Tribes' claims, the Tribes are entitled to attorneys' fees under the rationale articulated in *Kent*.

II. THE TRIBES' REQUEST FOR ATTORNEYS' FEES PURSUANT TO § 1021.5 IS NOT BARRED BY ELEVENTH AMENDMENT IMMUNITY OR THE STATE'S SOVEREIGN IMMUNITY.

The State asserts that its sovereign immunity from suit and its Eleventh Amendment immunity bar the Tribes' claim for attorneys' fees.[2] The State argues that, because Cal. Gov. Code § 98005, section 19(f) of the California Constitution, Cal. Gov. Code 12012.25(d), the Tribes' 1999 compacts, and IGRA are silent as to attorneys' fees, they "fail to provide a waiver because the texts do not unambiguously waive sovereign immunity to attorneys' fees." Opposition, p. 9. The State also argues that the Tribes' claim for attorneys' fees is barred because none of these provisions constitutes "a state waiver of sovereign immunity to suits for damages." Opposition, p. 13. As set forth below, the State's arguments fail to

[2] The State uses the terms "sovereign immunity" and "Eleventh Amendment" interchangeably and thereby muddles its analysis of the waivers relevant to the Tribes' motion.

establish that sovereign immunity or Eleventh Amendment immunity bar the Tribes' motion for fees.

a. Cal. Code Civ. Proc. § 1021.5 Waives State Sovereign Immunity to Claims for Attorneys' Fees.

The State devotes ten pages of its Opposition to argue that Cal. Gov. Code § 98005, section 19(f) of the California constitution, Cal. Gov. Code § 12012.25(d), the Tribes' 1999 compacts, and IGRA do not contain a waiver of the State's sovereign immunity for the purpose of recovering attorneys' fees. The State's argument ignores a fundamental point: Section 1021.5 is a waiver of sovereign immunity that permits the recovery of attorneys' fees against the State.

Section 1021.5 provides that, "[w]ith respect to actions involving public entities, this section applies to allowances against . . . public entities…." Cal. Gov. Code § 811.2, in turn, defines "public entity" as "the state…." Thus, Section 1021.5 effectuates a waiver of the State's sovereign immunity regarding claims for attorneys' fees where the party seeking the fees from the State meets the requirements of Section 1021.5. "The Legislature has in the precise terms of Code of Civil Procedure Section 1021.5 waived sovereign immunity to the extent of authorizing attorney's fees against 'public entities' as a generic group provided the other preconditions are met." *Rhyne v. Municipal Court,* 113 Cal.App.3d 807, 827 (Cal. Ct. App. 1980). Courts routinely award attorneys' fees against the State, cities, counties, and State agencies under Section 1021.5. *See, e.g., Vasquez v. State of Cal.*, 45 Cal. 4th 243, 250-251 (2008); *Animal Prot. & Rescue League v. City of San Diego,* 237 Cal. App. 4th 99, 109 (2015); *San Bernardino Valley*

Audubon Soc'y v. Cty. of San Bernardino, 155 Cal. App. 3d 738 (1984); *Bahra v. Cty. of San Bernardino*, 2022 U.S. Dist. LEXIS 162519 (C.D. Cal. Sep. 7, 2022).

Thus, because the Tribes have met the elements of Section 1021.5, the State's sovereign immunity has been unequivocally waived for the purposes of the Tribes' request for attorneys' fees. No separate, specific, express, or implied waiver of immunity need be found in Cal. Gov. Code 98005, section 19(f) of the California constitution, Cal. Gov. Code 12012.25(d), the Tribes' 1999 compacts, or the IGRA.

b. The Waiver of Immunity in Cal. Gov. Code 98005 Encompasses Requests for Attorneys' Fees as Collateral Matters that are Incident to the Primary Cause of Action.

The State argues that "California Government Code Section 98005 provides only a limited immunity waiver for specific types of claims arising under IGRA, which are enumerated in Section 98005 and do not include attorneys' fees." Opposition, pp. 8-9. Therefore, the State asserts, there has been no explicit "waiver to claims for monetary damages." Opposition, p. 14. This argument misses the mark.

Section 98005 broadly waives the State's sovereign immunity for any claim based on the State's failure to negotiate a gaming compact in good faith. *Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation v. California*, 813 F.3d 1155, 1171 n.12 (9th Cir. 2015) ("California—unlike many states—has chosen to legislatively enact a broad statutory waiver of sovereign immunity for claims arising out of violations of IGRA."). The waiver in Section 98005 encompasses "**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 . . . or to conduct those negotiations in good faith . . . ." (Emphasis added). It also waives the State's Eleventh Amendment immunity to suit in federal court: "the State of California also submits to the jurisdiction of the courts of the United States in any action brought against the state by any federally recognized California Indian tribe…." *Id.* Section 98005 includes no limitation or caveat that would exclude costs and fees that are a legal and logical outgrowth of a judgment against the State where, as here, there is an applicable fee shifting statute.

Section 98005 encompasses claims for attorney's fees under Section 1021.5 because attorneys' fees are part of a "cause of action arising from the state's refusal to enter into negotiations . . . or to conduct those negotiations in good faith . . . ." Attorneys' fees are not a separate claim to which the State can assert sovereign immunity as a defense. "A statutory fee motion under section 1021.5 does not create a new cause of action. Instead, the motion is 'a collateral matter, ancillary to the main cause.'" *Maria P. v. Riles*, 43 Cal.3d 1281, 1289 (Cal. 1987) (quoting *Serrano v. Unruh*, 32 Cal.3d 621, 637 (Cal. 1982)). *See also Folsom v. Butte Cty. Ass'n of Gov'ts*, 32 Cal. 3d 668, 678 (1982) ("The same reasoning applies to attorney fees that are authorized solely by statute and hence are not a part of the cause of action.").

"Our courts have consistently distinguish[ed] between attorney's fees that are sought as the allowance … to the prevailing party as an incident to the principal cause of action, and those that are sought as part of the cause of action." *Monster,*

LLC v. Superior Court, 12 Cal. App. 5th 1214, 1228 (2017) (cleaned up). "When sought by the prevailing party … as an incident to [the] judgment, … attorney's fees may be properly awarded [as a form of cost] after entry of a … judgment." *Id.* (cleaned up).

The Tribe's request for attorneys' fees, thus, should be treated in the same manner as a request for costs arising from the litigation:

> Like costs, which may be assessed against the states, . . . attorney's fees are a necessary incident to the procurement of *prospective* compliance by state officials with federal law. Thus attorney's fees, unlike damage awards, are not a form of compensation for injuries suffered from past conduct of the state, but rather constitute, "a necessary consequence of compliance in the future with a substantive federal-question determination." *Edelman v. Jordan*, 415 U.S. at 668, 94 S. Ct. at 1358. "Both [costs and attorney's fees] are in a similar relationship to the main litigation and both should stand or fall together." *Souza v. Travisono*, 512 F.2d at 1140. *See also Fitzpatrick v. Bitzer*, 427 U.S. at 460, 96 S. Ct. at 2673 (Stevens, J., concurring) ("With respect to the fee issue, even if the Eleventh Amendment were applicable, I would place fees in the same category as other litigation costs. Cf. *Fairmont Co. v. Minnesota*, 275 U.S. 70 [48 S. Ct. 97, 72 L. Ed. 168].").

La Raza Unida v. Volpe, 440 F. Supp. 904, 913 (N.D. Cal. 1977).

Under California law, moreover, attorneys' fees that are authorized by statute, such as Section 1021.5, are awarded as costs to prevailing parties. *See* Cal. Code. Civ. Proc. § 1033.5(a)(10)(B). Eleventh Amendment immunity does not bar requests for costs against the states in federal court: "[A] federal court may treat a State like any other litigant when it assesses costs…." *Hutto v. Finney*, 437 U.S. 678, 693-697 (1978).

Thus, the Tribes' request for attorneys' fees under Section 1021.5 as the prevailing parties in this matter is incident to the principle cause of action, the

allegation that the State failed to negotiate in good faith under the IGRA and substantive state law.[3] As such, even if the State had not waived its immunity pursuant to Section 1021.5, the Tribes' request for attorneys' fees is encompassed by Section 98005 and no separate waiver of immunity that is specific to attorneys' fees would be necessary for the Court to award the Tribes their fees under Section 1021.5.

The State, nevertheless, argues that Section 98005's waiver "is not specific enough to constitute a waiver as to attorneys' fee claims," Opposition, p. 14, based largely on the Supreme Court's interpretation of a waiver provision at issue in *Sossamon v. Texas*, 563 U.S. 277 (2011). In *Sossamon*, the Supreme Court found the term "appropriate relief" was "open-ended and ambiguous about what types of relief it includes…." *Id.* at 286. The waiver provision in *Sossamon* is easily distinguishable from Section 98005.

"Appropriate relief" identifies an unspecified range of possibilities for relief, which conflicts with the requirement that waivers be unequivocally expressed. Unlike "appropriate relief," which is discretionary in nature, the waiver provision in Section 98005 is explicitly limited to conduct related to compact negotiations and compliance with the terms of compacts. *See Hotel Emps. & Rest. Emps.*

[3] Additionally, because Section 98005 prescribes an exclusive federal court remedy for redressing a violation of the Governor's duty to negotiate in good faith imposed by Cal. Const. art. IV § 19(f) and Cal. Gov. Code §§ 12012.25(d), it operates as a removal of IGRA based claims to federal court. Where a state removes an action to federal court, it waives its Eleventh Amendment immunity. *Embury v. King*, 361 F.3d 562, 564 (9th Cir. 2004) (citing *Lapides*, 535 U.S. at 619); *Walden*, 945 F.3d at 1094.

Internat. Union v. Davis, 21 Cal. 4th 585, 614 (1999) (the surviving portion of Section 98005 "concerns . . . the resolution of future disputes concerning the negotiation, amendment and performance of compacts 'different' from Proposition 5's model compact."). Hence, the scope of the waiver is limited and specific. Within the scope of the waiver, however, Section 98005 quantifies and qualifies the actions that can be brought by a federally recognized California Indian tribe broadly through the repeated use of the word "any."

Section 98005 uses the term "any" three times in describing the scope of the State's waiver: (1) "**any** action brought against the state," (2) "by **any** federally recognized California Indian tribe," and (3) "asserting **any** cause of action arising from the state's" conduct. (Emphasis added). The ordinary meaning of the adjective "any" is *at least one and possibly all*. *See, e.g.*, Any, Merriam-Webster, www.merriam-webster.com (last visited Nov. 2, 2022). "Any," therefore, encompasses attorneys' fees, so long as they are ancillary to a cause of action that falls within Section 98005.

The State seeks to have this Court rewrite Section 98005 in a way that would render the phrases "any action" and "any cause of action" meaningless. Under the State's theory, the State could never execute a broad waiver of immunity from suit, because such a waiver would then be "open-ended and ambiguous." *Sossamon*, 563 U.S. at 286. *Cf. Pauma*, 813 F.3d at 1171 (the State "legislatively enact[ed] a broad statutory waiver of sovereign immunity [in Section 98005]"). Instead, this Court should look to the plain, unambiguous language of Section 98005. *E.g.*, *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1128 (9th

Cir. 2015) ("In construing the provisions of a statute, we begin by looking at the language of the statute to determine whether it has a plain meaning."). That language encompasses the Tribes' claim for attorneys' fees under Section 1021.5. The Tribes brought an action in federal court against the State, pursuant to Section 98005, alleging violations of two provisions of IGRA. The Tribes prevailed in the district court and this Court. The litigation had a significant impact on the State's negotiation posture, important rights were enforced, and substantial benefits were conferred on a large class of the population in California. As a result, the Tribes are entitled to fees as a collateral matter, ancillary to the original action arising from the State's conduct. Accordingly, the waiver of State immunity in Section 98005 is independently sufficient to authorize the Court to award the Tribes attorneys' fees as the prevailing parties in this matter pursuant to Section 1021.5.

Finally, the prohibition on suits for "damages" in the 1999 compact is also not a bar to an award of attorneys' fees in this case. Prevailing party fees under Section 1021.5 are not damages and are not, therefore, circumscribed by the 1999 compact's limited waiver of State immunity. *Mabee v. Nurseryland Garden Ctrs.*, Inc., 88 Cal. App. 3d 420, 425 (1979) ("Attorney fees are not like the usual item of damages, for the court may allow a reasonable attorney fee in the judgment without hearing evidence or making a finding as to the amount of such fee."). For these reasons, the State's waiver of sovereign immunity in Section 98005 encompasses the Tribes' motion for fees under Section 1021.5.

c. The State Has Waived Its Immunity Through Its Conduct.

Even if the foregoing waivers of State sovereign immunity were insufficient, the State also constructively waived any remaining sovereign immunity through its litigation conduct. At no point in this litigation did the State assert sovereign immunity or the Eleventh Amendment as a bar to the Tribes' claims, including in the State's answer to the Tribes' Complaint (which specifically requested attorneys' fees in the prayer for relief). On the contrary, the State sought to avail itself of the opportunity to litigate the merits of the case and sought to have its interpretation of IGRA vindicated. The State exhausted all remedies to which it had a right by defending its interpretation of IGRA in the district court and filing an appeal in this Court. This Court issued a judgment against the State, the case has been remanded to the District Court, the time for filing a petition for writ of certiorari has passed, and the State is already complying with the judgment by participating in mandatory court-ordered IGRA mediation.

It is now too late in the litigation process to assert that this Court lacks subject matter or personal jurisdiction to award attorneys' fees.[4] *See, e.g.*, *Aholelei v. Department of Public Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007) ("immunity is an affirmative defense that must be raised 'early in the proceedings' to provide 'fair warning' to the plaintiff." (Quoting *Demshki v. Monteith*, 255 F.3d 986, 989 (9th Cir. 2001)); *In re Bliemeister*, 296 F.3d 858, 861 (9th Cir. 2002) (citing and quoting *Hill v. Blind Industries Serv., Maryland*, 179 F.3d 754, 758, 760 (9th Cir.

[4] And the State has been on notice since the filing of the Complaint that the Tribes intended to seek an award of attorneys' fees.

1999) ("Sovereign immunity is quasi-jurisdictional in nature. It may be forfeited where the state fails to assert it and therefore may be viewed as an affirmative defense… Express waiver is not required; a state 'waive[s] its Eleventh Amendment immunity by conduct that is incompatible with an intent to preserve that immunity.'").

For all the forgoing reasons, the State has waived its sovereign immunity for the purpose of the Tribes' request for attorneys' fees and the Eleventh Amendment is not a barrier to the Court's authority to award fees to the Tribes pursuant to Section 1021.5.

III. THE FINANCIAL BURDEN OF PRIVATE ENFORCEMENT TAKEN ON BY THE TRIBES, AND THE ABSENCE OF SIGNIFICANT DIRECT PECUNIARY BENEFIT, MAKE THE AWARD OF ATTORNEYS' FEES APPROPRIATE.

The State last argues that the Tribes "are not entitled to attorneys' fees because they cannot establish all three criteria for an attorneys' fees award under Section 1021.5." Opposition, p. 18. The State does not address the first two criteria required by Section 1021.5, thereby conceding that the Tribes' lawsuit vindicated an important right and conferred a significant benefit on a large class of persons. *LN Mgmt., LLC v. JPMorgan Chase Bank, N.A.*, 957 F.3d 943, 950 (9th Cir. 2020) ("Failure to respond meaningfully … to an appellee's argument waives any point

to the contrary.").[5] The State's only argument is that "the necessity and financial burden of private enforcement" are not "such as to make the award appropriate."

The State asserts that the financial burden on the Tribes is not out of proportion to their stake in the litigation, because they conduct gaming pursuant to IGRA-based class III gaming compacts and have received significant income from that gaming:

> Given the financial stakes in their 1999 Compacts, these Tribes all possess significant, and important, financial interests in obtaining new compacts that will permit continued and expanded gaming operations. The State applauds the Tribes' class III gaming financial success. However, the State respectfully submits that given the Tribes' obvious and ongoing financial interests, the Tribes cannot, based on this record, show that their 1999 Compacts and class III casinos are insufficient to encourage the litigation.

Opposition, p. 21.

The State, thus, asserts that the Tribes' sole or primary motivation in pursuing this litigation was to force the State to enter into a new compact so that the Tribes will be able to continue to receive revenue from class III gaming. That is false. The Tribes did not seek to force the State to enter into new compacts through this litigation. As this Court recognized, the Tribes sued in order to prevent the State from using the compacting process to extend its regulatory reach over activities on the Tribes' Indian lands that are not directly related to gaming: "Through its negotiating demands, California effectively sought to use the Class III

[5] Presumably, because the litigation did not involve an award of damages, the State does not address the final factor set forth in Section 1021.5, whether "such fees should not in the interest of justice be paid out of the recovery, if any."

contracting process as leverage to impose its general policy objectives on the Tribes, which a state may not do." *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th at 1029.

The State's attempt to portray this litigation as focused on the revenue from the gaming is misplaced. The focus of this litigation was not on the regulation of gaming or the revenue derived therefrom. It was on the State's efforts to regulate tribal activities *beyond gaming*. The State's attempts to use the negotiation process and the threat of the termination of the compacts before agreement on new compacts could be reached to force the Tribes to agree to provisions outside of the proper topics of negotiation unquestionably affected the equities of the case, but they were not central to the legal issues upon which the Court was asked to rule.

If the Tribes had been primarily interested in forcing the State to enter into a new compact, there was no need to file this lawsuit. The Tribes could have forgone litigation, accepted the State's terms as demanded, and received new compacts without further ado, as numerous other California tribes have. The Tribes instead sued the State to protect their tribal sovereignty by compelling the State to negotiate in good faith, thereby preventing the State from abusing the compacting process to commandeer aspects of tribal governmental functions and further the State's goal of expanding its regulatory authority in Indian country.

Prior to this suit, the Tribes spent five years negotiating with the State, attempting to resolve the issues that form the underlying bad faith litigation through the compacting process—at great expense to the Tribes. They were met with delay, surface bargaining, and an outright refusal to budge on all the

provisions that this Court ultimately found were clearly "far outside the bounds of permissible negotiation under IGRA." *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th at 1029. *See also id.* at 1030 ("CTSC operated on a parallel path and endeavored to negotiate the disputed topics 'in anticipation of the State offering meaningful concessions' of significant value … And California refused to accept any compact that did not include the challenged topics of negotiation. By the end of 2019, and after nearly five years of formal negotiations with the State, the plaintiff Tribes had seen enough.").

While the Tribes will receive substantial revenue from gaming once new compacts are agreed to or the Secretary of the Interior issues gaming procedures, the receipt of those revenues is not dependent on this litigation. What this litigation addressed, and the benefit that the Tribes and a large class of persons received though this Court's decision, was the non-pecuniary benefit of the preservation of tribal sovereignty. The Tribes—all small tribes who derive important, but limited, revenue from gaming—took on the State, at great expense. The far-reaching impact of this litigation on the native peoples of California is to prevent the State from regulating tribal activities where the State has no right to regulate. That impact, that benefit, is of great significance, but has little direct pecuniary impact on the Tribes.

For these reasons, the necessity and financial burden of private enforcement taken on by the Tribes and the absence of significant, direct pecuniary benefit make the award of attorneys' fees appropriate.

CONCLUSION

As Chairman Lodge stated in his declaration filed in support of the Tribes' motion for attorneys' fees, the Tribes "are not wealthy" tribes. Declaration of Glenn Lodge in Support of Appellees' Motion for Attorneys' Fees, p. 3, ¶ 5. They are small tribes whose limited gaming income provides little more than basic governmental services. The Tribes had to combine their financial resources to bring and litigate this case to defend their sovereignty.

The State violated federal and state law and caused the Tribes to expend limited financial resources to litigate this case, and the Tribes have demonstrated that they are eligible for and entitled to an award of attorneys' fees as prevailing parties pursuant state law. For all the forgoing reasons, the Tribes' respectfully request that the Court rule that they are entitled to fees under Section 1021.5.[6]

Dated: November 17, 2022 Respectfully submitted,

LAW OFFICES OF RAPPORT AND MARSTON

By: */s/ Lester J. Marston*

[6] The State argues in passing that the motion for attorneys' fees should be remanded to the District Court for adjudication. The motion should not be remanded for two reasons. First, the State has offered no rationale or legal basis for why this Court should forego exercising its authority to award fees for work performed on appeal and remand the issue of *fees on appeal* to the District Court. Second, in reaching its decision in this case, the Court substantially adopted the Tribes' legal position going all the way back to the compact negotiations. This Court, therefore, is in the best position to evaluate whether the Tribes' success warrants an award of fees under Section 1021.5.

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

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 November 17, 2022.

APPELLEES' REPLY TO STATE APPELLANTS' OPPOSITION TO 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 November 17, 2022, at Ukiah, California.

/s/ *Ericka Duncan*
ERICKA DUNCAN