ROB BONTA
Attorney General of California
T. MICHELLE LAIRD
Acting Senior Assistant Attorney General
JEREMY STEVENS, State Bar No. 313883
Deputy Attorney General
B. JANE CRUE, State Bar No. 210122
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7789
Fax: (916) 323-2319
E-mail: Jane.Crue@doj.ca.gov
Attorneys for State Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

AUGUSTINE BAND OF CAHUILLA INDIANS, a federally recognized Indian Tribe, Plaintiff, **v.** **STATE OF CALIFORNIA and GAVIN NEWSOM IN HIS OFFICIAL CAPACITY AS GOVERNOR OF CALIFORNIA,** Defendants.	5:23-cv-00620-SSS-KK **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** Date: February 23, 2024 Time: 2:00 p.m. Courtroom: 2 Judge: Hon. Sunshine Suzanne Sykes

TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. The Court Should Grant the Tribe's Motion as to the Environmental and Tort Provisions, and Grant the Tribe the Sole Remedy That Is Available under IGRA 3

II. All Other Provisions Are Consistent with IGRA and Ninth Circuit Precedent 6

A. Defining Gaming Facility, Gaming Operation, and Gaming Employee as the State Proposed Is Permissible Under IGRA 7

1. Definition of Gaming Facility is Specifically Authorized and Necessary for Regulation under IGRA 8

2. Regulation of Class III Gaming Under IGRA Necessarily Entails Defining the Gaming Operation 9

3. IGRA Permits the State's Definition of Gaming Employee. 11

B. The State's Proposed Check Cashing Provision is a Permissible Regulatory Provision 12

C. IGRA Permits The State's Proposed Regulatory Cost Recovery and Revenue Sharing Provisions 14

1. IGRA Permits the State to Negotiate for Reimbursement for the Tribe's Portion of the State's Regulatory Costs 17

2. IGRA Permits Negotiations Concerning Contributions to the RSTF and TNGF That Benefit Limited and Non-Gaming Tribes In Exchange for the Meaningful Concession of Tribal Exclusivity for an Additional Term of Years 21

D. IGRA Permits Negotiations Concerning Workplace Protections for Employees of Tribal Casinos 26

1. IGRA Permits Negotiations for a Tribal Labor Relations Ordinance 26

2. IGRA Permits Negotiations for Anti-Discrimination Protections for Gaming Facility Employees 30

3. IGRA Permits Negotiations for the Withholding of State Taxes from Non-Exempt Employees. 31

CONCLUSION 31

CERTIFICATE OF COMPLIANCE 33

TABLE OF AUTHORITIES

Page

CASES

Artichoke Joe's v. Norton
216 F.Supp.2d 1084 (9th Cir. 2002) 6

Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California
(9th Cir. 2010) 618 F.3d 1066 9

Cal. Valley Miwok Tribe v. Cal. Gambling Control Comm'n
231 Cal. App. 4th 885 (2014) 21

Casino Pauma v. NLRB
888 F.3d 1066 (9th Cir. 2018) 28, 29

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

Consul Ltd. v. Solide Enterprises, Inc.
(9th Cir. 1986) 802 F.2d 1143 9

Coyote Valley Band of Pomo Indians v. Cal.
331 F.3d 1094 (9th Cir. 2003) ..... *passim*

Dimdim, Inc. v. Williamson
2013 WL 12174134 (N.D. Cal. Jan. 22, 2013) 5

Family Trust Services LLC v. Coone
2019 WL 1128636 (M.D. Tenn. Apr. 1, 2019) 6

In re Richardson
97 B.R. 161,163 (Bankr.W.D.N.Y. 1989) 6

NLRB v. American Nat. Ins. Co.
343 U.S. 395 (1952) 29

NLRB v. Broadmoor Lumber Co.
578 F.2d 238 (9th Cir. 1978) 29

TABLE OF AUTHORITIES
(continued)

Page

Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger
602 F.3d 1019 (9th Cir. 2010) ..... *passim*

San Manuel Indian Bingo & Casino v. NLRB
475 F.3d 1306 (D.C. Cir. 2007) 28

T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n
809 F.2d 626 (9th Cir. 1987) 3

Unite HERE Local 30 v. Sycuan Band of the Kumeyaay Nation
35 F.4th 695 (9th Cir. 2022) 29

Vieux v. E. Bay Regl. Park Dist.
906 F.2d 1330 (9th Cir. 1990) 5

Yavapai-Prescott Indian Tribe v. Arizona
796 F. Supp. 1292 (D. Ariz. 1992) 5

STATUTES

18 United States Code
§ 1166 1
§ 1167 1

25 United States Code
§ 2701-2721 1
§ 2702 22
§ 2702(b) 7
§§ 2704-2706 10
§ 2710(vi) 9, 11, 12
§ 2710(vii) 12
§ 2710(d)(3)(C) 6, 15
§ 2710(d)(3)(C)(i)-(vii) ..... *passim*
§ 2710(d)(3)(C)(vii)(b) 16, 23, 25
§ 2710(d)(7)(A)(i) 6
§ 2710(d)(7)(B)(iii)-(vii) 1, 4, 5
§ 2710(d)(7)(B)(iii)(I) 13

TABLE OF AUTHORITIES
(continued)

Page

29 United States Code
§§ 151-169 28
§ 157 29
§ 158 29

California Business and Professions Code
§ 19841(q) 13

California Government Code
§ 12012.35 22
§ 12012.75 21
§ 12012.85 17
§ 12019.30 22
§ 12019.35(b) 22
§ 12019.35(c) 23
§ 12019.40(c) 22
§ 12019.60 23
§ 12019.60(c)(2) 23
§ 12019.65 23
§ 12019.85 23
§ 12019.90 22

CONSTITUTIONAL PROVISIONS

California Constitution Article IV
§ 19 14

COURT RULES

Federal Rules of Civil Procedure
Rule 56(a) 3

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

25 Code of Federal Regulations
§ 502.10 10
§ 559.1 8

65 Fed. Reg. 41,721 (July 6, 2000) 13

https://www.auditor.ca.gov/reports/recommendations/2021-102 19

S. Rep. 100-446, *reprinted in* 1988 U.S.C.C.A.N. 3071 ..... 7, 12, 13

Defendants, Governor Gavin Newsom and the State of California (collectively, State), submit the following opposition to the Motion for Summary Judgment (Motion) filed by Plaintiff Augustine Band of Cahuilla Indians (Augustine or Tribe).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is effectively resolved. The State admits that it failed to negotiate in good faith pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, 18 U.S.C. §§ 1166-1167, by seeking to negotiate for subjects that the Ninth Circuit subsequently decided in *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024 (9th Cir. 2022) (*Chicken Ranch*), were beyond the bounds of IGRA. This ends the controversy[1] and any additional analysis or conclusions amount to an advisory opinion. Yet, this is precisely what the Tribe seeks, namely, findings by this Court that broadly eclipse the issues already decided by the Ninth Circuit in *Chicken Ranch* and which would require this Court to ignore the existing precedent of *In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003) (*Coyote Valley II*).

Crucially, because the State concedes to have acted in bad faith by negotiating for topics addressed by *Chicken Ranch*, this Court should resist Augustine's invitation to opine on matters not necessary to grant the Tribe the exclusive remedy that it seeks and that IGRA provides in 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii). The most appropriate—and simpler—path is to conserve judicial resources and find that the State acted in bad faith under IGRA, as the State concedes, and to simply activate IGRA's remedial procedures. 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii).

[1] Augustine pleads a single cause of action, that the "State Failed to Negotiate in Good Faith by Demanding Compact Provisions That Either Are Not Proper Subjects of Negotiation Under IGRA, Or If Not Improper Per Se, Failing To Offer Meaningful Concessions." Complaint at 14.

Beyond these two topics, the Tribe alleges that the State failed to negotiate in good faith regarding eleven additional subjects. The Tribe seeks to revisit prior compact litigation involving the nature and amount of authorized fees and the State's ability to seek protections for patrons, visitors, and employees at the Tribe's casino. Many of these were previously challenged and upheld in *Coyote Valley II* as permissible topics of negotiation under IGRA. *Coyote Valley II*, 331 F.3d at 1105 (noting the three challenged provisions were the Special Distribution Fund (SDF), Revenue Sharing Trust Fund (RSTF), and labor relations provision). Other allegations range from minute details about the definitions of terms to the State's regulatory interest in the cashing of checks at the casino. These subjects are all within the scope of IGRA and Ninth Circuit precedent and the Court should deny the Tribe's request for summary judgment on these issues.

STATEMENT OF FACTS

Almost twenty-four years ago, California voters enacted a constitutional provision granting Indian tribes the exclusive right to operate Nevada-style casino gambling in California subject to a tribal-state compact. For over twenty years, Augustine has operated a Gaming Facility[2] pursuant to its existing tribal-state class III gaming compact with the State. Plaintiff's Statement of Uncontroverted Facts (SUF) Nos. 4-6 (ECF 57-2). Until the Tribe withdrew from negotiations and filed this lawsuit in October 2021, for several years the parties were involved in extensive negotiations, working to complete a new successor compact under IGRA. The parties exchanged more than ten draft compacts each and conducted eleven formal negotiation sessions. SUF Nos. 16-18. While progress was made, the parties did not reach agreement on several key issues.

The pertinent facts are established in the SUF and the Joint Record of Negotiation (RON) (ECF Nos. 40 & 41). "[T]he function of the good faith

[2] Terms that were proposed in the State's draft compacts, such as Gaming Facility, are capitalized in this brief.

requirement and judicial remedy is to permit the tribe to process gaming arrangements on an expedited basis, not to embroil the parties in litigation over their subjective motivations." *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1041 (9th Cir. 2010) (*Rincon*). In the event this Court elects to go beyond the *Chicken Ranch* topics (counts nine and twelve), as to which the State admits it failed to negotiate in good faith, then an objective review of the RON is necessary to evaluate the State's good faith negotiations under IGRA on the eleven remaining topics. The Court evaluates good faith "objectively based on the record of negotiations." *Id.*; *see also Coyote Valley II,* 331 F.3d at 1113 ("[T]he good faith inquiry is nuanced and fact-specific, and is not amenable to bright-line rules.").

STANDARD OF REVIEW

A court may grant a motion for summary judgment where the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Summary judgment may not be granted where the non-moving party "produces direct evidence of a material fact," which the court must take as true. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). The court must construe the evidence and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Id.* at 630-31.

ARGUMENT

I. THE COURT SHOULD GRANT THE TRIBE'S MOTION AS TO THE ENVIRONMENTAL AND TORT PROVISIONS, AND GRANT THE TRIBE THE SOLE REMEDY THAT IS AVAILABLE UNDER IGRA

Here, the State concedes that it failed to act in good faith in negotiating a tribal-state class III compact with specific reference to negotiating overly broad

environmental[3] and tort[4] provisions. There is no genuine dispute as to the material facts necessary and sufficient to support this legal conclusion.

Augustine's sole cause of action in this case alleges that the State violated IGRA by failing to negotiate a new compact in good faith. Complaint at 14. The Tribe then delineates thirteen topics arising during compact negotiations it alleges the State failed to negotiate in good faith.[5] Augustine's acknowledges that, "*Any one of these provisions evidences the State's failure to negotiate in good faith*, shifts the burden to the State to show otherwise, and ultimately supports the grant of summary judgment to Augustine." Motion at 12 (emphasis added). Augustine requests the only remedy available to the Tribe if its motion is granted – an order for the parties to enter into the statutorily prescribed remedial process under IGRA. Complaint at 25-26; Motion at 34; *see* 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii). The result for the Tribe is the same whether the State failed to act in good faith as to one topic or as to thirteen topics.

The State admits that the environmental and tort provisions included in the State's proposed compacts exceed the scope of IGRA's permissible topics of negotiation per *Chicken Ranch*. The State concedes that during negotiations it demanded compact provisions regarding environmental review and mitigation and broad tort claims coverage that were substantially similar to what the Ninth Circuit later examined in *Chicken Ranch*. SUF Nos. 28, 31; Motion, counts nine and twelve at 27-28, 31-32. The Ninth Circuit held these provisions to be beyond the scope of permissible compact negotiation topics authorized by IGRA. *Chicken Ranch*, 42 F.4th at 1034-1035. As a result of the State's admission, this case is effectively resolved and Augustine is entitled to the remedy prescribed by IGRA—

[3] Motion, count nine.

[4] Motion, count twelve.

[5] Motion, counts one through thirteen.

the remedial process outlined in 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii). This remedial process was designed to allow a tribe to "process [its] gaming arrangements on an expedited basis without the need for further litigation and delay.[6] *Rincon*, 602 F.3d 1019 at 1041.

Because this admission is sufficient to find for the Tribe, there is no longer a justiciable controversy presently before this Court. Litigating any further alleged violations of IGRA would not change the scope of the available remedy provided by Congress under this federal statute, and would amount to a request for an advisory opinion, which this Court has no jurisdiction to provide. *Vieux v. E. Bay Regl. Park Dist.*, 906 F.2d 1330, 1344 (9th Cir. 1990); *see Yavapai-Prescott Indian Tribe v. Arizona,* 796 F. Supp. 1292, 1297 (D. Ariz. 1992) (finding it was beyond the court's role as contemplated by IGRA to grant declaratory relief for a disputed issue prior to IGRA's 60-day remedial negotiation process). It would also require the Court to expend a significant amount of its valuable and limited judicial resources to prepare an advisory opinion that would not change the outcome with respect to the Tribe's remedy under 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii). Accordingly, this Court would be well within its discretion to avoid opining on Augustine's remaining claims. *See Chicken Ranch*, 42 F.4th at 1040, n. 4 (declining to rule on the Tribal Nations Grant Fund (TNGF) and certain labor provisions because the ruling on the family, environmental, and tort provisions were sufficient to find that that State violated its good-faith duty); *Dimdim, Inc. v. Williamson*, 2013 WL 12174134, at *1 (N.D. Cal. Jan. 22, 2013) (court denied a motion to strike because "it would be a poor use of judicial resources to render what

[6] While expedited, the remedial process in 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii) requires certain steps that the parties must complete. It first requires a sixty-day negotiation period. § 2710(d)(7)(B)(iii). If the parties cannot reach agreement on a compact during that time period, the parties must submit their last best compact offers to a mediator, who must select one. § 2710(d)(7)(B)(iv). The State then has sixty days to determine whether to consent to the selected compact. § 2710(d)(7)(B)(vi). If it does, then the compact must be ratified by the California Legislature and approved by the Department of Interior. *Id.* If it does not, then the mediator forwards the compact to the Department of the Interior who must prescribe procedures for the tribe to operate class III gaming. § 2710(d)(7)(B)(vii).

ultimately could be no more than an advisory opinion on the sufficiency of [the plaintiff's] allegations."); *Family Trust Services LLC v. Coone*, 2019 WL 1128636, at *2, n.3 (M.D. Tenn. Apr. 1, 2019) (following the court's determination to grant a motion to remand, the court held that any further action "would be little more than an advisory opinion, an exercise on which the Court is not inclined to spend its limited judicial resources."); *In re Richardson*, 97 B.R. 161,163 (Bankr.W.D.N.Y. 1989) (court declined to determine the value of a creditor's collateral because the valuation would serve no purpose, and would result in "no more than an advisory opinion" that was not within "the interest of judicial economy.").

Nonetheless, if the Court decides to undertake further analysis of these additional claims beyond the environmental review and tort provisions, it will find that these provisions are within the scope of IGRA and have been upheld by existing Ninth Circuit precedent.

II. ALL OTHER PROVISIONS ARE CONSISTENT WITH IGRA AND NINTH CIRCUIT PRECEDENT

IGRA sets forth a cooperative federalism framework, balancing the competing sovereign interests of the federal government, state governments, and Indian tribes regarding the regulation of tribal class III gaming. *Artichoke Joe's v. Norton,* 216 F.Supp.2d 1084, 1092 (9th Cir. 2002). Congress catalogs IGRA's cooperative federalism role for state governments in IGRA's compacting requirement, which requires that states negotiate in good faith and allows a tribe to sue a state in federal court for the state's failure to negotiate at all, or to negotiate in good faith. 25 U.S.C. § 2710(d)(7)(A)(i). IGRA controls state overreach by cabining the permissible topics that may be addressed in a class III tribal-state compact. 25 U.S.C § 2710(d)(3)(C). The provisions that Augustine challenges, other than the previously discussed environmental and tort provisions, fit within the scope of the topics IGRA permits.

A. Defining Gaming Facility, Gaming Operation, and Gaming Employee as the State Proposed Is Permissible Under IGRA

The State's definitions of Gaming Facility[7], Gaming Operation[8], and Gaming Employee[9] do not run afoul of IGRA's good faith requirement. Defining these terms as the State has is vital to effective regulation of the gaming in accordance with IGRA.

IGRA's purposes include providing "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(b). In implementing the cooperative federalism model for the proper regulation of Indian gaming, Congress adopted the compacting process as the "best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises." S. Rep. No. 100-446, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 3071. The State therefore has an interest in ensuring adequate regulation of the Gaming Activities run by tribal enterprises pursuant to a compact.

The State's proposed definitions of Gaming Facility, Gaming Operation and Gaming Employee are appropriately limited and comply with IGRA. In contrast, the Tribe alleges that based on the wording of these specific definitions the State attempts to regulate areas of a Gaming Facility in which no Gaming Activities are conducted as well as regulating tribal employees that have no or only a peripheral connection to Gaming Activities.[10] Motion at 21-23; RON Vol. 11 at 5148. A

[7] Motion, count four.

[8] Motion, count five.

[9] Motion, count thirteen.

[10] There is no dispute between the parties that "Gaming Activities" means the class III gaming activities authorized under the compact. *See* RON Vol. 11 at 5701 (establishing that the same definition appears in both parties' final compact offers).

review of the State's proposed definitions reveals that each is appropriately limited to the State's legitimate interest in ensuring well-regulated tribal gaming enterprises.

1. Definition of Gaming Facility is Specifically Authorized and Necessary for Regulation under IGRA

While IGRA does not directly address what language a tribe and state may use for defining terms in a compact, case law provides insight. The court in *Chicken Ranch* provided guidance as to how these definitions should be interpreted. In *Chicken Ranch*, the court emphasized that based upon IGRA's language and structure, the State may only negotiate over provisions that are within IGRA's enumerated compact topics, including those that are "directly related to the operation of gaming activities" 25 U.S.C, § 2710(d)(3)(C)(i)-(vii); *see also Chicken Ranch*, 42 F.4th at 1038. The State may not negotiate over topics or provisions that have a minimal or peripheral connection to the operation of Gaming Activities. Augustine does not dispute that the definition of a Gaming Facility is an appropriate topic for negotiation under IGRA because IGRA specifically contemplates addressing gaming facility standards. *See* 25 U.S.C. § 2710(d)(3)(C)(vi) (providing that standards for the operation of maintenance of the gaming facility is an appropriate topic); *see also* 25 C.F.R. § 559.1 (National Indian Gaming Commission (NIGC) licensing required for "each place, facility or location" where class III gaming will occur).

While the State's proposed definition of Gaming Facility evolved during the parties' negotiations (*see* SUF No. 23), the State's last compact proposal limited the definition to any building in which Gaming Activities occur or the buildings that contain the records of the Gaming Operation. RON Vol. 11 at 5149. Other buildings are included if, and only if, their principal purpose is to serve the activities of the Gaming Operation and Gaming Facility rather than provide them with an incidental benefit. *Id*. Even though Augustine brushes off this carefully

crafted qualifier (Motion at 21-22), it is an important constraint on the State's proposed definition. A compact is interpreted based on federal law principles and should be read to comply with governing law to render it lawful. *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California* (*Cachil Dehe Band*) (9th Cir. 2010) 618 F.3d 1066, 1073; *Consul Ltd. v. Solide Enterprises, Inc.* (9th Cir. 1986) 802 F.2d 1143, 1149. The State's proposed definition must be interpreted narrowly to comply with the *Chicken Ranch* decision. The State agrees that areas such as hotels, parking lots, and walkways that are not a part of the building or structure in which Gaming Activities or Gaming Operations occur would not appropriately fall within the Gaming Facility definition in light of the reasoning in *Chicken Ranch*. The definition itself and *Chicken Ranch* limit its application beyond the building or structure where class III gaming occurs. Clearly the parties could not agree on the definition, but mere disagreement, without more, does not equal bad faith under IGRA, particularly in reference to a permissible topic of negotiation. The State certainly has a legitimate interest in the regulation and public safety of the facility where class III gaming occurs.

2. Regulation of Class III Gaming Under IGRA Necessarily Entails Defining the Gaming Operation

As with the definition of Gaming Facility, the State's proposed definition of Gaming Operation evolved during the natural give-and-take of the negotiation process. SUF Nos. 24, 32. Defining the entity that conducts the class III gaming is directly related to and necessary for licensing and regulating class III Gaming Activities and thus is within the bounds of 25 U.S.C. § 2710(d)(3)(C) (i) & (vi). Intuitively, it is difficult to imagine how a state could have an effective regulatory role without a voice on these specific definitions during the negotiation process. The proposed definition of Gaming Operation interacts in a straight line, direct manner with the definition of Gaming Activity covering class III gaming activities. The proposed Gaming Operation definition means "the business enterprise that

offers and operates Gaming Activities" but explicitly does not include business activities unrelated to the operation of the Gaming Facility, which is limited to the building where the Gaming Activities occur. RON Vol. 11 at 5149; *see also* SUF No. 24. This is narrower than the regulatory definition applied by the NIGC.[11] The NIGC defines Gaming Operation to encompass the economic entities operating the games and receiving gaming revenue. 25 C.F.R. § 502.10. The NIGC definition, unlike the State's proposed definition, would encompass governmental or business activities of the tribal entity conducting the gaming that are unrelated to operating the Gaming Facility.

The State's proposed Gaming Operation definition could not apply to anything but a business enterprise offering and operating Gaming Activities. This is sufficiently limited under IGRA and, notably, is narrower than the definition of Gaming Operation the State and Tribe agreed to in the Tribe's current compact. *See* Pl.'s RJN Exh. 1 at 4, § 2.9 (Tribal-State Compact Between The State of California and the Augustine Band of Mission Indians, March 15, 2000). Importantly, the State proposed to the Tribe the same definition of Gaming Operation that is present within the Tribe's current compact—and the Tribe rejected it. *Compare id*. *with* RON Vol. 1 at 431. Even after the State added the additional limitations to the definition that are not in the Tribe's current compact, Augustine alleges the State did not go far enough because of the definition's application to the Gaming Facility instead of "the actual operation of Gaming Activities" Motion at 22. In the Tribe's view, even though the definition is limited to the entity running the class III gaming activities, it is not limited enough because it references the casino building. No precept in law or equity, no language in IGRA, and no case

[11] IGRA establishes the NIGC and empowers it to, generally, regulate and monitor certain aspects of tribal gaming and to, among other things, bring enforcement actions against tribal gaming entities violating IGRA. *See* 25 U.S.C. §§ 2704-2706.

law requires that the State must accept the additional clause the Tribe requested, or risk being found in bad faith. Nor does the Tribe offer any binding authority.[12]

3. IGRA Permits the State's Definition of Gaming Employee

Augustine's chief objection to the State's proposed definition of Gaming Employee regards its interplay with the Tribe's own Gaming Code which requires licensure of all employees in the Gaming Facility. Motion at 33. Again, the Tribe does not argue that the scope of which employees fit under the definition of a Gaming Employee is an inappropriate topic for negotiation under IGRA. Nor could it as IGRA specifically authorizes negotiating provisions addressing the licensing and regulation of gaming activities, which necessarily includes licensing for those with gaming activity duties. 25 U.S.C. § 2710(d)(3)(C)(i) & (vi). Instead, the Tribe objects because the State would not agree to exclude those required by Augustine's tribal gaming law to be licensed. The Tribe admits that all employees in its Gaming Facility are required to obtain a tribal gaming license, but argues that the State has no ability to include those individuals as "Gaming Employees" for purposes of the compact. Motion at 33; Pl.'s Exh. 8 to the Dec. of George Forman at 22 (Augustine's Tribal Gaming Code). If the Tribe considers an employee sufficiently important to be licensed pursuant to its tribal gaming law, there is no explanation as to why the State should not have a similar interest under IGRA to ensure their licensure under 25 U.S.C. § 2710(d)(3)(C)(i) & (vi). Notably, the State did not seek state licensing for this subset of Gaming Employees, only to ensure they would be licensed by the Tribe. RON Vol. 11 at 5173-5174, § 6.4.3(a)-(b) (requiring all Gaming Employees to have a tribal gaming license, but only requiring

[12] Augustine is asking this Court to inject itself into the granular details of years of compact negotiations, alleging that the State's rejection of a single clause preferred by the Tribe amounts to bad faith. This is unprecedented given the holistic approach favored by *Coyote Valley II*, *Rincon*, and *Chicken Ranch*. Augustine's argument is, effectively, that the State's failure to accede to Augustine's proposal on a topic properly subject to negotiation is "bad faith." Such an outcome would stretch the concept of what a negotiation is beyond all bounds of how that term is reasonably understood, and should be rejected.

those on the Compact Key Employee Position List to also have a finding of suitability from the State Gaming Agency). To allow otherwise would prevent the State from having a regulatory interest in employees as to whom a tribe grants licenses pursuant to its own gaming code. This is not what IGRA's cooperative federalism framework intends. The State advanced its valid regulatory interests under IGRA by its proposed limited definitions of Gaming Facility, Gaming Operation and Gaming Employee. Augustine cannot establish that the State failed to act in good faith based upon the State's proposals.

B. The State's Proposed Check Cashing Provision is a Permissible Regulatory Provision

The State's proposed check cashing provision[13] is also soundly within the framework of IGRA's permissible negotiation topics as a regulatory provision. IGRA's legislative history notes "the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands where, with few exceptions, such laws and regulations do not now apply." S. REP. 100-446, at 13, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083.

During compact negotiations, the State requested a provision preventing the gambling enterprise from cashing "any check drawn against a federal, state, county, or city fund, including but not limited to, Social Security, unemployment insurance, disability payments, or public assistance payments." SUF No. 26. This is a regulatory provision that falls within 25 U.S.C. § 2710(d)(3)(C)(i), (vi) & (vii) as it is a standard relating to the regulation of Gaming Activity and the maintenance of the Gaming Facility, and is also directly related to the operation of Gaming Activities. The use of cash, after conversion into chips, to place bets is necessary to the operation of the Gaming Activities and the Gaming Facility. Gaming Activities would not operate without the flow of cash into the Gaming Facility as there is little

[13] Motion, count seven.

dispute that cash is necessary before casino patrons can place bets. Regulations limiting the use of government entitlements for gambling is therefore within the scope of the regulatory standards that may be established within the Gaming Facility and directly related to the operation of Gaming Activities.

Additionally, the State has an interest in protecting the solvency of public assistance programs and ensuring consistent regulation with non-tribal gambling enterprises in the State. This provision has a clear corollary in state law governing non-tribal gambling enterprises. California Business and Professions Code section 19841(q) bars these gambling enterprises from cashing checks drawn against federal, state, or county funds. IGRA specifically contemplates a good faith determination considering the State's public interest and concern for the financial integrity of public support programs. 25 U.S.C. § 2710(d)(7)(B)(iii)(I). Prohibiting a State from negotiating for a provision such as this runs contrary to IGRA's goals of allowing a State to protect its interest in the "impacts to the State's regulatory system" as well as the public policy and public safety through the compacting process. *See* S. REP. 100-446, at 13, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083.

A substantially similar version of this provision appears in the Tribe's current compact which was affirmatively approved by the Department of the Interior. Pl.'s RJN Exh. 1, at 1-3, 30 (§ 10.2(h)); *see also* 65 Fed. Reg. 41,721 (July 6, 2000). The version the State proposed during compact negotiations has one key difference: it exempts tribal members. Thus, the provision proposed by the State allows the Tribe to set its own standards for its tribal members and this serves the purpose of promoting tribal self-sufficiency and recognizes tribal sovereignty. It is more narrowly tailored to the purposes of IGRA than the version within Augustine's current compact. Augustine cannot establish that the State did not act in good faith by requesting a check cashing provision that is even more limited than a similar provision within the Tribe's current compact.

C. IGRA Permits The State's Proposed Regulatory Cost Recovery and Revenue Sharing Provisions

IGRA authorizes the State to negotiate for reimbursement of its regulatory costs. 25 U.S.C. § 2710(d)(3)(C)(i). Ninth Circuit precedent permits a state and a tribe to negotiate over revenue sharing provisions. Here, in exchange for the State being reimbursed for its regulatory costs through the SDF[14] and the Tribe contributing a modest portion of tribal casino revenue in support of the RSTF[15] and the TNGF[16], Augustine would be authorized to conduct class III gaming exclusive of non-tribal operators for an additional term of years. The State offered tribal exclusivity as a meaningful concession that is "exceptionally valuable." *Rincon*, 602 F.3d at 1037; *see also Coyote Valley II*, 331 F.3d at 1114-1115 (recognizing the exclusive right to conduct class III gaming in the most populous State in the country as valuable consideration).

Proposition 1A granted tribes in California the exclusive right to offer certain forms of class III gaming in the state. Cal. Const. art. IV, § 19. In 1999, the State and numerous tribes entered into tribal-state compacts with revenue sharing addressed through the RSTF and the SDF. The basic bargain struck between the State and tribes in the 1999 compacts established the SDF and the RSTF in exchange for the State granting tribes in California the exclusive right to operate Las Vegas-style, class III slot machines and banked card games free from non-tribal competition.

The underlying premise of the RSTF, which was a tribe-drafted and tribe-sponsored effort, was for gaming tribes with access to lucrative markets to share gaming revenue with federally recognized California tribes that did not game or operated less than 350 gaming devices. *Coyote Valley II*, 331 F.3d at 1105, 1113.

[14] Motion, count one.

[15] Motion, count two.

[16] Motion, count three.

It was funded through a progressive fee structure based on the number of gaming devices a tribe secured the right to operate. *Id.* at 1105. The RSTF redistributes slot machine gaming profits to other Indian tribes; it does not put tribal money in the pocket of the State. *Id*. at 1113. The 1999 compacts established the SDF as the mechanism to reimburse the State for its regulatory costs, to provide grants to local governments to mitigate impacts of tribal gaming, and to ensure that the RSTF had sufficient funds to disburse $1,100,000 annually to each Non-Gaming and Limited-Gaming Tribe in California. *Coyote Valley II*, 331 F.3d at 1114.

The Ninth Circuit has already placed its imprimatur of approval on both funds. In *Coyote Valley II*, the Ninth Circuit held that the RSTF and the SDF fell within, respectively, subsections (vii) and (iii) of 25 U.S.C. § 2710(d)(3)(C). *Coyote Valley II*, 331 F.3d at 1111, 1114. The Court held that by offering the meaningful concession of exclusivity, the State did not "impose" a tax, fee, charge, or other assessment as IGRA prohibits. *Id.* at 1111-12 (RSTF), 1113-1115 (SDF). With respect to the RSTF, the Court observed, "That provision does not put tribal money into the pocket of the State. Rather, it redistributes gaming profits to other Indian tribes." *Id.* at 1113. The principal, and only, meaningful concession discussed in *Coyote Valley II* was "to grant a monopoly to tribal gaming establishments and to offer tribes the right to operate Las Vegas-style slot machines and house-banked blackjack." *Coyote Valley II*, 331 F.3d at 1113 (RSTF); *see also id.* at 1114-1115 (SDF). Given that concession, the Court concluded in *Coyote Valley II* that the State did not engage in bad-faith negotiations by insisting on the RSTF and the SDF. Neither *Chicken Ranch* nor *Rincon* disturbed this crucial finding.

Here, in exchange for Augustine's contributions to the SDF and the RSTF under its compact proposals, the State offered an extended term of twenty-five years of this exclusivity. *See*, *e.g.*, RON Vol. 11 at 5255. This was adequate consideration for the State's fee demands in *Coyote Valley II*, and it is adequate

consideration here. Because the State has not demanded "fees" that would be used for any purpose apart from those analyzed in *Coyote Valley II*, this offer of exclusivity for an additional term of years remains valid consideration for these same purposes. In short, *Coyote Valley II*, 331 F.3d at 1113, 1115, rejected the same challenge to the SDF and RSTF that the Tribe now makes. Additionally, even when presented with the opportunity, *Chicken Ranch*, 42 F. 4th at 1040, n. 4, did not overrule this established precedent.

In *Rincon*, unlike in *Coyote Valley II*, the State sought payments to its general fund. *Rincon*, 602 F.3d at 1024. Under the State's demands, "Rincon stood to gain $2 million in additional revenues" while the "State stood to gain $38 million." *Id.* at 1025-26. "No amount of semantic sophistry," opined the Court, could "undermine the obvious: a non-negotiable, mandatory payment of 10% of net profits into the State treasury for unrestricted use yields public revenue, and is a 'tax.'" *Rincon*, 602 F.3d at 1029. The Ninth Circuit distinguished the SDF and the RSTF contributions that it approved in *Coyote Valley II* because the "nature of the revenue sharing and the constitutional exclusivity obtained in consideration for it were primarily motived by a desire to promote *tribal* interests." *Id.* at 1023-24 (citing *Coyote Valley II*, 331 F.3d at 1110-15). "*Coyote Valley II* thus stands for the proposition that a state may, without acting in bad faith, request revenue sharing *if* the revenue sharing is (a) for uses 'directly related to the operation of gaming activities' in § 2710(d)(3)(C)(vii), (b) consistent with the purposes of IGRA, and (c) not 'imposed' because it is bargained for in exchange for a 'meaningful concession.'" *Rincon*, 602 F.3d at 1033.

Here, the Tribe's claims regarding the SDF, RSTF, and the TNGF focus on IGRA-permitted topics as to which the State has offered an "exceptionally valuable" concession, *Rincon*, 602 F.3d at 1037, and the State's ostensible insistence here that any future class III compact between the Tribe and the State contain provisions related to these funds does not demonstrate bad faith.

1. IGRA Permits the State to Negotiate for Reimbursement for the Tribe's Portion of the State's Regulatory Costs

The gaming compacts that the State entered into with gaming tribes in 1999 and 2000, among them a class III compact with Augustine, established the SDF as the mechanism to accomplish three things. First, to reimburse the State for its regulatory costs; second, to provide grants to local governments to mitigate impacts of tribal gaming; and third, to ensure that the RSTF had sufficient funds to disburse $1.1 million annually to each Non-Gaming and Limited-Gaming tribe in California. *Coyote Valley II*, 331 F.3d at 1114. The SDF's purposes, codified at California Government Code section 12012.85, restrict the use of SDF funds, and all such uses fall within the permissible scope of compact topics under IGRA. *Coyote Valley II*, 331 F.3d at 1114. *Coyote Valley II* expressly rejected the claim that the SDF was an impermissible tax precisely because "the terms of the compact restrict what the State can do with the money it receives from the tribes pursuant to the SDF provision, and all of the purposes to which such money can be put are directly related to tribal gaming." *Id.* at 1114. The contributions the tribes must make to the SDF were negotiated in exchange for a significant benefit: "the exclusive right to conduct class III gaming in the most populous State in the country." *Id.* at 1115. These same purposes remain today and are backed by the consideration of an additional term of "exceptionally valuable" exclusivity. *Rincon*, 602 F.3d at 1037.

In this case, the State's SDF proposal to Augustine is more constrained than the SDF approved of by *Coyote Valley II*. Now, importantly, section 4.3 of the State's proposed draft compact would require Augustine to contribute to the SDF based on a pro rata formula that is specifically tied to the State's 25 U.S.C. § 2710(d)(3)(C)(iii) regulatory costs. SUF No. 20; RON Vol. 11 at 5155-5157. IGRA explicitly provides that a State is able to negotiate for these costs during compact negotiations as a tribal-state compact may include "the assessment by the State of such [gaming] activities in such amounts as are necessary to defray the

costs of regulating such [gaming] activity." 25 U.S.C. § 2710(d)(3)(C)(iii). These State regulatory costs comprised one component of the SDF the Ninth Circuit analyzed in *Coyote Valley II*, determining that these costs fell well within the scope of permissible topics of negotiation. *Coyote Valley II,* 331 F.3d at 1114. The State's proposed formula is based upon the number of Gaming Devices the Tribe operates as a share of the total Gaming Devices operated by all gaming tribes in the State.

The State's requested SDF payment now goes exclusively to Augustine's share of these regulatory costs. SUF No. 20. In the State's proposals, the Tribe's pro rata share is applied as a percentage to a legislative Appropriation[17] that comprises the State's regulatory costs. *See*, *e.g.*, RON Vol. 11 at 5155-5156. This is different from how the SDF share is calculated in Augustine's current compact, which was a limited revenue sharing provision requiring that the Tribe pay a percentage of its Net Win to the SDF based on the number of slot machines that it operated on September 1, 1999. *See* Pl.'s RJN, Exh. 1 at 9, § 5.1(a); *see also Coyote Valley II*, 331 F.3d at 1105, 1115. The State's regulatory costs include the cost of conducting background checks for gaming license suitability determinations, administering funds like the RSTF and TNGF that benefit non-gaming and limited gaming tribes, and supporting problem gambling prevention and treatment programs. *See* Pl.'s RJN Exhibit 3 at 8-10 (SDF Audit) (describing the State entities receiving funds from the SDF appropriation and the work that those entities perform to regulate tribal gaming). These are costs that the State incurs regulating tribal gaming and, under the pro rata approach, are costs shared

[17] The Appropriation consists of the costs of the State's "performance of all its duties under this Compact, the administration and implementation of tribal-state Class III Gaming compacts and Secretarial Procedures, and funding for the Office of Problem Gambling, as determined by the monies appropriated in the annual Budget Act each fiscal year to carry out those purposes." RON Vol. 11 at 5155.

and apportioned among the more than 60 gaming tribes in California based on the scale of Gaming Devices each operates.[18]

Contrary to the Tribe's allegation, any SDF surplus that occurs in the aggregate is not evidence that the State's proposed SDF pro rata formula amounts to an impermissible tax under IGRA. Because a number of tribes like Augustine continue to operate under the Net Win formula approved in the 1999 Compacts, the State currently collects more from tribes in SDF fees than it spends on its regulatory costs, leading to a significant reserve. *See* SDF Audit at 24. This results from these compacts treating the SDF as a revenue-sharing provision using a Net Win formula. The SDF payments *Coyote Valley II* reviewed and approved provided for tribal payments to the SDF varying between 0% to 13% of Net Win, depending upon the number of gaming devices in operation.[19] *Coyote Valley II*, 331 F.3d at 1105-06. There, a tribe's contribution to the SDF from the first 200 terminals in operation would be zero, but would increase to "7% of the net win for the next 300 terminals, 10% of the net win for the next terminals, and 13% of the net win for any additional terminals above 1,000." *Id.* In the State's proposed language, Augustine's SDF contributions are calculated on a pro rata formula determined by the Tribe's share of the total number of Gaming Devices operated in the State applied to the State's regulatory costs under 25 U.S.C. § 2710(d)(3)(C)(iii). *See* SDF Audit at 23-25. The SDF audit recognized that the pro rata formula "is a reasonable metric for [a] tribe's proportional share of regulatory costs" and that the Net Win formula did "not have a direct relationship to regulatory costs." *See id.* at 24.

---

[18] Augustine argues that the Legislature's appropriation of funds is arbitrary and points to the SDF Audit in speculating that Augustine "almost certainly" would have to pay more than is necessary. Motion at p. 13. Importantly, while the SDF Audit notes inappropriate charges, the California State Auditor recognized that the improper uses "are not likely to have significantly affected the amount of [SDF] fees individual tribes have paid." SDF Audit at 21. The California State Auditor reports that the State has fully implemented the majority of the audit findings requiring reimbursement of funds. *See* https://www.auditor.ca.gov/reports/recommendations/2021-102.

[19] In contrast, the State's RSTF proposals are now calculated using a Net Win formula.

Thus, the State's proposed compact section 4.3, employing the pro rata formula, would ensure that the Tribe contributes to the SDF an amount proportionate to its share of the State's regulatory costs. Under these facts, any surplus in the SDF, attributable in large part to those tribes still operating under the SDF Net Win formula, does not transform a permissible topic of negotiation into an impermissible topic of negotiation. It runs contrary to any reasonable understanding of "bad faith" to suggest that the State's attempt to negotiate a term that *more accurately* reflects each tribe's pro rata share of costs than the structure included in prior compacts (with Augustine and other tribes) simply because the prior construct resulted in a surplus of fees relative to costs. Augustine offers no legal authority that would support such a contrary, and illogical, conclusion.

Additionally, Augustine fails to present any binding authority demonstrating that the contributions of other tribes prevents the State from negotiating for Augustine to reimburse the State for its share of regulatory costs. The purpose of the State's SDF proposal is appropriate as IGRA and existing case law explicitly allow a state to negotiate for amounts necessary to defray its regulatory costs. 25 U.S.C. § 2710(d)(3)(C)(iii); *Coyote Valley II*, 331 F.3d at 1114 ("[A]ssessments on tribes designed to cover the State's costs of regulating Indian gaming are clearly appropriate, and by demanding such assessments the State does not act in bad faith."). Given the State's interest in ensuring that its regulatory costs are reimbursed, and that the pro rata formula is a reasonable calculation of its costs to perform its duties under the proposed compact, the Tribe cannot establish that the State did not act in good faith by proposing a pro rata formula for calculating such costs.

Yet if this Court were to view the SDF pro rata provision as revenue sharing and not as a provision limited to the State's regulatory costs, the State's insistence on including it is nonetheless proper under IGRA. *Coyote Valley II,* 331 F.3d at 1115, expressly so held in light of the State's grant of statewide gaming exclusivity.

As the *Rincon* court observed,

> The value of a monopoly is obvious, and the value of a monopoly that cannot be altered except by the extraordinary act of further constitutional amendment is even greater. Such a benefit was well beyond anything IGRA *required* the State to offer. . . . Indeed, in a rare example of generosity to tribes, the State conferred a valuable economic right on the tribes in exchange for a program under which all of the significant *benefits* of the compact were to be enjoyed by the *tribes* themselves.

Rincon, 602 F.3d at 1037 (emphasis in original); *see also Coyote Valley II*, 331 F.3d at 1105, 1115 (treating the SDF Net Win formula as a form of limited revenue sharing and upholding its authorized uses).

2. IGRA Permits Negotiations Concerning Contributions to the RSTF and TNGF That Benefit Limited and Non-Gaming Tribes In Exchange for the Meaningful Concession of Tribal Exclusivity for an Additional Term of Years

Created by statute[20] in 1999 as part of the initial compacts, the RSTF "redistributes gaming profits to other Indian Tribes." *Coyote Valley II*, 331 F.3d at 1113. It is therefore a "revenue-sharing mechanism under which tribes that operate fewer than 350 gaming devices" receive an annual $1.1 million distribution. *Cal. Valley Miwok Tribe v. Cal. Gambling Control Comm'n*, 231 Cal. App. 4th 885, 888-90 (2014). No portion of the RSTF is available to the State for its own use. *Coyote Valley II*, 331 F.3d at 1113.

The underlying premise of the RSTF, which, as described above, began as a tribe-drafted and tribe-sponsored effort, was for gaming tribes with access to lucrative gaming markets to share gaming revenue with federally recognized California tribes that did not offer gaming or operated less than 350 Gaming Devices. *Coyote Valley II,* 331 F.3d at 1105, 1113. The RSTF was funded through a progressive fee structure based on the number of gaming devices a tribe secured

[20] Cal. Gov't Code § 12012.75.

the right to operate. *Id*. at 1105. The RSTF distributes gaming profits to other California tribes; it does not put any tribal money in the State's pocket. *Id*. at 1113.

The RSTF provides for annual payments of $1,100,000 for each Non-Gaming Tribe and Limited-Gaming Tribe in California. RON Vol. 11 at 5162-5163. The RSTF falls within the scope of 25 U.S.C. § 2710(d)(3)(C)(vii) and advances IGRA's goals of promoting tribal economic development, self-sufficiency, and strong tribal governments for tribes. *Coyote Valley II*, 331 F.3d at 1111; *see also Rincon*, 602 F.3d at 1034 (describing the RSTF as "consistent with the plain language of [25 U.S.C.] § 2702"). To the extent the RSTF lacks sufficient funding for the full $1,100,000 annual payout to each eligible tribe, a prioritized use of the SDF is to make up for any shortfall. RON Vol. 11 at 5162-5163. RSTF funds in excess of the amount required for the annual disbursements to Non-Gaming Tribes and Limited-Gaming Tribes are available for transfer to the TNGF. RON Vol. 11 at 5163.

The TNGF is an extension of the RSTF in that it distributes funds to Non-Gaming Tribes and Limited-Gaming Tribes in support of federal policies of self-determination and self-governance. The RSTF and TNGF work side-by-side to ensure that tribal gaming in California benefits all California tribes, not just those with access to large gaming markets.

The California Legislature approved the creation of the TNGF in 2014, and it is administered pursuant to California Government Code sections 12012.35 and 12019.30 through 12019.90. TNGF distributions are awarded pursuant to grants upon application by eligible tribes for "purposes related to effective self-governance, self-determined community, and economic development" for certain eligible purposes and projects, such as promotion of tribal language or cultural curricula and public health investments. Cal. Gov't Code §§ 12019.35(b), 12019.40(c). The TNGF does not collect new funds but serves as a mechanism to distribute surplus RSTF funds to deserving tribes. No portion of the TNGF is

available to the State for its use. Cal. Gov't Code § 12019.85. The TNGF is governed by a panel of tribal leaders and others, who make the decisions on grant applications. Cal. Gov't Code § 12019.60(c)(2). Money is deposited into the TNGF only after the California Gambling Control Commission determines that the RSTF has sufficient funds to make all RSTF distributions and after the TNGF panel determines it is appropriate. Cal. Gov't Code §§ 12019.35(c), 12019.60, 12019.65.

The TNGF complements and is consistent with the use and purposes of the RSTF as analyzed by the Ninth Circuit in *Coyote Valley II*, 331 F.3d at 1111-13. The exclusivity granted by the State provides ongoing value for the types of revenue sharing originally contemplated in the 1999 compacts. In these ways, the TNGF accords with *Rincon's* interpretation of *Coyote Valley II*: "that a state may, without acting in bad faith, request revenue sharing *if* the revenue sharing is (a) for uses 'directly related to the operation of gaming activities' in § 2710(d)(3)(C)(vii), (b) consistent with the purposes of IGRA, and (c) not 'imposed' because it is bargained for in exchange for a 'meaningful concession.'" *Rincon*, 602 F.3d at 1033.

Both Augustine and the State proposed that the Tribe would contribute funds to the RSTF as a percentage of the Tribe's Net Win from its Gaming Devices. *Compare* RON Vol. 10 at 4358-4359 (§ 5.2(a), Augustine's final proposal) *with* RON Vol. 11 at 5164 (§ 5.2(a), State's final proposal). Augustine proposed contributing 1.2% of Net Win from the operation of Gaming Devices over 1,200, RON Vol. 10 at 4358-4359, while the State proposed the Tribe contribute 6% of Net Win from the operation of Gaming Devices over 350, but only when the Tribe operates more than 1,200 Gaming Devices. RON Vol. 11 at 5164. Moreover, the State offered various proposals to reduce the effective rate.

Throughout negotiations, the State offered a variety of compact terms to try to find compromise with the Tribe. *Compare* RON Vol. 1 at 445 *with* RON Vol. 11 at 5164, *compare* RON Vol. 1 at 446-448 *with* RON Vol. 11 at 5165-5166. At one

point, the State proposed that Augustine would not pay *any* money to these funds if it operated under 1,200 slot machines, which still represented an expansion over the Tribe's current Gaming Operation. RON Vol. 11 at 5298 (Comment A143). The State then proposed a number of provisions that would allow the Tribe to credit sums otherwise payable to the RSTF by diverting monies to various specified purposes including, among other things, to support local governments, charitable organizations, and other tribes, or the general health and welfare of non-tribal members of its neighboring community or members of other tribes. *See*, *e.g.*, RON Vol. 11 at 4650-4653. Augustine and its members may also be the beneficiaries of these credited contributions, even though this decreases the amount the Tribe would otherwise contribute to the RSTF and the TNGF. Augustine's use of the available credits against its payment obligation benefits the Tribe by reducing its payments, and, importantly, would be *entirely voluntary*.

If the Tribe spent funds on these purposes, it could reduce its payment obligation significantly. For example, in the State's July 2021 proposal, the State proposed a 70% credit if Augustine operated greater than 1,200 Gaming Devices but less than 1,800, a 1.8% Net Win effective contribution rate, or a 60% credit if the Tribe operated greater than 1,800 Gaming Devices, a 2.4% Net Win effective contribution rate. RON Vol. 11 at 4650-4651.[21] When compared to the Tribe's proposed 1.2% Net Win contribution rate, these proposals demonstrate that the parties were not far apart. These revenue-sharing contributions are much less than the SDF formula approved of in *Coyote Valley II*, which required a tribe to contribute up to 13% of its Net Win. It is also in stark contrast to the facts in *Rincon*, in which the State sought at least 10% of that tribe's net profits for contribution to the State's general fund for unrestricted use. *Rincon*, 602 F.3d at 1029-30. If the Tribe foregoes applying any credits, then it would be obligated to

[21] Consistent with other State proposals, the Tribe had no payment obligation to the RSTF or TNGF if it operated less than 1,200 Gaming Devices. RON Vol. 11 at 4650.

contribute a maximum of 6% of its Net Win into the RSTF. Regardless of whether the Tribe elects to use the credits, the credit system ensures that California tribes—either individually or as a whole—are the primary beneficiaries of class III gaming.[22]

Similarly, the TNGF accords with *Rincon's* interpretation of *Coyote Valley II*: "that a state may, without acting in bad faith, request revenue sharing *if* the revenue sharing is (a) for uses 'directly related to the operation of gaming activities' in § 2710(d)(3)(C)(vii), (b) consistent with the purposes of IGRA, and (c) not 'imposed' because it is bargained for in exchange for a 'meaningful concession.'" *Rincon*, 602 F.3d at 1033. Here, the RSTF provision is the same RSTF provision that was backed by the Ninth Circuit in *Coyote Valley II*. The TNGF is an extension of this provision and does not result in any additional cost to the Tribe as its sole funding is excess RSTF funds.

The State has a responsibility to ensure that adequate funds are available for the RSTF. The solvency of this fund requires larger Gaming Operations to contribute greater amounts than smaller Gaming Operations. It is logical that the State would therefore negotiate for higher payment as a tribe's Gaming Operation expands. Any excess in the RSTF then goes to the TNGF and continues to benefit tribes in the State and does not go into the State's coffers to be used for its own purposes. The State made several proposals to Augustine, which included the option that the Tribe not contribute any money to either fund as long as it operates below 1,200 Gaming Devices. Augustine cannot show that the State did not act in good faith by demanding adequate funding of the RSTF and TNGF, whose monies benefit tribes and not the State.

[22] The State alternatively proposed that the Tribe could use any amount paid to the SDF to offset any amounts owed to the RSTF or TNGF for the first five years of the compact regardless of the number of Gaming Devices it operated, plus an additional annual credit of $50,000 it paid towards any government agency with impacts from, or providing services in connection with, the Tribe's Gaming Activities. RON Vol. 11 at 5165-5166.

D. IGRA Permits Negotiations Concerning Workplace Protections for Employees of Tribal Casinos

IGRA and the Ninth Circuit recognize that during compact negotiations a state can seek protections for its citizens employed at tribal casinos. A state's concern for the rights of its citizens is clearly within scope of interests contemplated by IGRA. *Coyote Valley II*, 331 F.3d at 1116 (citing S. Rep No. 100-446, at 13, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083) ("A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests . . ."). In *Coyote Valley II*, the Ninth Circuit affirmed the appropriateness under IGRA for the State negotiating over basic labor provisions in class III gaming compacts. *Coyote Valley II*, 331 F.3d at 1115. As the State has consistently maintained, "because thousands of its citizens are employed at tribal casinos, it is proper for the State to insist on some minimal level of protection for those workers" through the compacts. *Id.* The Ninth Circuit agreed, holding that protections extending to "Class III Gaming Employees and other employees associated with the Tribe's Class III gaming enterprise, such as food and beverage, housekeeping, cleaning, bell and door services, and laundry employees at the Gaming Facility" were "directly related to the operation of gaming activities" and thus permissible topics of negotiation pursuant to 25 U.S.C. § 2710(d)(3)(C)(vii). *Id.* at 1116. *See also Chicken Ranch,* 42 F.4th at 1036, n.2 (noting that labor at casinos is necessary to the operation of gaming activities and associated regulation is directly related to the operation of gaming activities under 25 U.S.C. § 2710(d)(3)(C)(vii)).

1. IGRA Permits Negotiations for a Tribal Labor Relations Ordinance

In compact negotiations with Augustine, the State requested inclusion of a Tribal Labor Relations Ordinance (TLRO).[23] *See* SUF Nos. 37-39. This request is

[23] Motion, count eleven.

directly within the bounds of *Coyote Valley II*, 331 F.3d at 1115-1116. The inclusion of a TLRO has been approved by the Ninth Circuit as a proper subject of negotiation with a direct relationship to the conduct of class III gaming. Specifically, in *Coyote Valley II*, the Ninth Circuit reviewed a proposed section 10.7, the same section 10.7 in Augustine's current compact (Pl.'s RJN Exh. 1 at 32), requiring the negotiation of a labor ordinance addressing organizational rights of employees at tribal casinos and related facilities. *Coyote Valley II*, 331 F.3d at 1116. The provision at issue in *Coyote Valley II* extended to "employees of tribal casinos and related employees" and "Gaming Employees and other employees associated with the . . . gaming enterprise." *Id.*

The Ninth Circuit held that this compact term was within IGRA's residual provision and directly related to the operation of gaming activities under 25 U.S.C. § 2710(d)(3)(C)(vii). *Id.* It further noted that the State's concerns for the rights of its citizens employed at a tribal gaming establishment fall clearly within the State's public policy interests. *Id.* Because jobs subject to the labor relations ordinance would not exist without the operation of gaming activities and because labor at casinos is necessary and inseparable from gaming, regulation of the labor element of a gaming operation is directly related to the operation of gaming activities. *See Chicken Ranch*, 42 F.4th at 1036, n.2 (*citing Coyote Valley II*, 331 F.3d at 1116).

The TLRO proposed by the State provides organizational rights at tribal gaming facilities with more than 250 employees, not to include Augustine's tribal members, and is tailored to the unique circumstances of a tribal gaming operation. RON Vol. 11 at 4990. It is a standing offer to a union enacted under tribal law that, if accepted, provides benefits to both the Tribe and a union, facilitating a more harmonious organizing process. This includes provisions protecting tribal interests, such as an agreement that it is an unfair labor practice for a union to attempt to influence the outcome of a tribal governmental election (*id.* at 4993), and the right for tribal gaming operations to grant employment preferences to Native Americans

(*id*. at 4997). It also places strict limits upon a union's right to strike, and completely prohibits picketing on Indian lands. *Id*. at 4993. Beneficial provisions to a union include access to eligible employees in break rooms and locker rooms during non-work time (subject to tribal licensing) (*id*. at 4996), as well as the right to engage in collective bargaining if the union becomes the exclusive collective bargaining representative by winning an election. *Id.* at 4998-4999.

Critically important, the State's proposed TLRO *is no more* extensive in its application than the labor ordinance approved in *Coyote Valley II*. When compared to the labor ordinance approved by the Ninth Circuit in *Coyote Valley II*, the State's proposed TLRO to Augustine maintains the same definitions for tribal casinos and related facilities. *Compare* Pl's RJN Exh. 1 at 60 *with* RON Vol. 11 at 4990. Both ordinances apply to the same set of employees, namely, any person employed within a tribal casino or related facility, with certain exceptions. *Compare* Pl's RJN Exh. 1 at 60-61 *with* RON Vol. 11 at 4991. The TLRO addresses the State's public policy interest in protecting the rights of its citizens employed in tribal Gaming Facilities and the Tribe's sovereign authority to regulate labor relations on and control access to its Indian lands. It falls within existing Ninth Circuit precedent as a proper subject of negotiation and is directly related to Augustine's operation of class III gaming activities under IGRA. *See Chicken Ranch,* 42 F.4th at 1036, n.2.

The Tribe's allegation that the TLRO is unnecessary because the Tribe's casino employees are under the jurisdiction of the National Labor Relations Board (NLRB) lacks merit. The National Labor Relations Act (NLRA) is the primary federal law applicable to labor relations. 29 U.S.C. §§ 151-169. There is no dispute that Tribes are subject to the NLRA and the corresponding jurisdiction of the NLRB. *Casino Pauma v. NLRB*, 888 F.3d 1066, 1075 (9th Cir. 2018) (*Casino Pauma*); *see also San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007) (a tribe operating a commercial gaming enterprise is an employer under the NLRA). The NLRB regulates the employment relationship between

tribes and employees at tribal casinos and related facilities, and includes jurisdiction to adjudicate unfair labor charges against a tribal enterprise. *Casino Pauma*, 888 F.3d at 1077.

The State's TLRO is complementary to and maintains the rights established in the NLRA. In *Casino Pauma*, the plaintiff tribe argued that the provisions of IGRA implemented through the labor relations ordinance included under its 1999 compact conflicted with the NLRA. *Id.* at 1079-80. The Ninth Circuit, however, found no conflict between the NLRA and IGRA implemented through the 1999 compact and attendant labor law provisions. *Id*. at 1079. IGRA does not state an intent to displace the NLRA or other federal labor or employment laws. *Id.* at 1079. The State's compact and the TLRO have the goal, as does the NLRA, of facilitating labor relations between the Tribe, as employer, and its employees. The TLRO and the NLRA may approach these goals in different ways, but are not in conflict. The NLRA in section 7 creates certain rights, and in section 8 prohibits specific actions. 29 U.S.C. §§ 157, 158. The TLRO provides modest organizing rights to tribal gaming employees. *See Coyote Valley II*, 331 F.3d at 1116 (discussing the TLRO under the 1999 compacts). It establishes a mechanism by which a labor organization may, if it agrees to be bound by certain limitations, accept a tribe's offer through the TLRO to form a contract with the tribe establishing procedures for the potential organization of workers. *See Unite HERE Local 30 v. Sycuan Band of the Kumeyaay Nation*, 35 F.4th 695, 703 (9th Cir. 2022). The NLRA encourages these types of private contracts governing relations between unions and employers. *NLRB v. American Nat. Ins. Co.,* 343 U.S. 395, 401-02 (1952); *NLRB v. Broadmoor Lumber Co.,* 578 F.2d 238, 241 (9th Cir. 1978).

The State's request for a TLRO is a legitimate topic of negotiation under IGRA and established case law. Given this precedent, Augustine cannot establish that the TLRO was outside the permissible compact topics envisioned by IGRA. While the parties did not reach agreement on the specific terms of a TLRO, this

failure to reach consensus does not evidence bad faith given the propriety of the topic within 25 U.S.C. § 2710(d)(3)(C)(vii) per *Coyote Valley II*. In fact, the RON illustrates that it was Augustine, not the State, who refused to negotiate the terms of the TLRO further. *See* SUF No. 39.

2. IGRA Permits Negotiations for Anti-Discrimination Protections for Gaming Facility Employees

The State sought to include in its proposed compacts basic protections for Augustine's employees directly connected to tribal Gaming Activities. In addition to the TLRO, these basic protections for employees include workplace protections against discrimination and harassment[24] (RON Vol. 11 at 5236-5243), and minimum wage protections[25] for those employees (RON Vol. 11 at 5243).

The Ninth Circuit has directed that under IGRA, courts can "consider the public interest of the State when deciding whether it has negotiated in good faith," and protecting the rights of ordinary people working at tribal casinos "is clearly a matter within the scope of that interest." *Coyote Valley II*, 331 F.3d at 1116 (citing 25 U.S.C. § 2710(d)(7)(B)(iii)(l)). Without question, the same holds true for protecting vulnerable workers against receiving wages below the State's minimum wage, and ensuring those workers basic anti-discrimination protections and an effective mechanism to seek redress for violations. The State's proposals limited these protections to the labor workforce at the Gaming Facility consistent with Congress's intent in passing IGRA, the public interest, and the court's decision in *Coyote Valley II*. Thus, the State did not violate IGRA by pursuing negotiations relating to these important topics.

[24] Motion, count six.

[25] Motion, count eight.

3. IGRA Permits Negotiations for the Withholding of State Taxes from Non-Exempt Employees

A functional corollary to a state's legitimate interest in regulating the wages an employee earns from a Gaming Operation or Gaming Facility, and similarly permissible under IGRA, is the State's request that the Tribe withhold amounts due to the State under the California taxation code.[26] SUF No. 29; RON Vol. 11 at 5249-5250. Significantly, this provision does not apply to tribal members exempt from paying these taxes under state tax law. Similar to minimum wage, regulation of the work employees perform at the Gaming Operation and Gaming Facility, and the wages they earn for that work, directly relate to the operation of the Tribe's Gaming Activities. *See Coyote Valley II*, 331 F.3d at 1116; *see also Chicken Ranch,* 42 F.4th at 1036, n.2.

Here, the withholding provision is narrowly tailored to effect only the wages of those who work at the Gaming Operation and Gaming Facility, and serves a valid public policy interest of the State. IGRA recognizes the State's ability to protect this interest through the compacting process. By asking that Augustine withhold this income tax, the State ensures that it receives the appropriate amounts and also provides a benefit to workers who otherwise would have to self-report and pay income taxes directly.

CONCLUSION

For the reasons stated above, Augustine's motion for summary judgment should be granted and the Tribe awarded the requested relief based solely on the State's admission of failing to negotiate in good faith as to the environmental and torts provisions (Motion, counts nine and twelve) of its proposed compact. If the Court decides to go beyond counts nine and twelve, Augustine's motion for summary judgement on the remaining 11 counts should be denied.

[26] Motion, count ten.

Dated: February 2, 2024

Respectfully submitted,

ROB BONTA
Attorney General of California
T. MICHELLE LAIRD
Acting Senior Assistant Attorney General
JEREMY STEVENS
Deputy Attorney General

/s/ B. Jane Crue

B. JANE CRUE
Deputy Attorney General
Attorneys for State Defendants

SA2021304988

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for State Defendants, certifies that this brief contains 32 pages, which complies with the page limit set by court order dated August 2, 2023.

Dated: February 2, 2024

Respectfully submitted,

ROB BONTA
Attorney General of California
T. MICHELLE LAIRD
Acting Senior Assistant Attorney General
JEREMY STEVENS
Deputy Attorney General

/s/ B. Jane Crue

B. JANE CRUE
Deputy Attorney General
Attorneys for State Defendants