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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MORONGO BAND OF MISSION INDIANS, a federally recognized Indian Tribe,

Plaintiff,

v.

STATE OF CALIFORNIA, and GAVIN NEWSOM, In His Official Capacity As Governor Of California,

Defendants.

Case No.: 5:25-cv-01098-SSS-SP

PLAINTIFF MORONGO BAND'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Hearing Date: July 25, 2025
Hearing Time: 2:00 p.m.
Courtroom: 2
Judge: Hon. Sunshine S. Sykes

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I. INTRODUCTION

The State contends that the Morongo Band of Mission Indians ("Morongo") cannot state a claim for relief under either the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701–2721, or the parties' 2018 Compact because neither specifically creates a cause of action for the relief Morongo seeks. The State's position is untenable. The Compact expressly contemplates either party filing a federal court action "based on disputes between the State and the Tribe that arise under this Compact"—language that easily encompasses Morongo's suit challenging the State's interpretation and asserted enforceability of certain Compact provisions. That, by itself, compels the denial of the State's Motion. In addition, to not recognize a cause of action to challenge compact provisions that are not consistent with IGRA, and thus never were considered to have been approved, would subvert Congress's intent and the policies underlying IGRA, as well as make it impossible for the parties to ascertain which provisions of a "deemed-approved" Compact are enforceable and which are not. Congress could not have intended that result. The Court should deny the State's Motion.

II. BACKGROUND

A. Relevant Provisions of IGRA

IGRA authorizes federally recognized Indian tribes to conduct Class III gaming activities on their lands "in conformance with a Tribal-State compact entered into by the Indian tribe and the State" and approved by the Secretary of the Interior. 25 U.S.C. § 2710(d)(1) & (d)(3)(B); *see also* 25 C.F.R. § 501.2(a) (Class III gaming operations must be conducted in accordance with IGRA and its implementing regulations, tribal law, and the requirements of a compact or "procedures" prescribed by the Secretary). When a Class III gaming compact is submitted for Secretarial approval, IGRA gives the Secretary three options. First, the Secretary may affirmatively approve it. 25 U.S.C. § 2710(d)(8)(A). Second, the Secretary may affirmatively disapprove it. *Id.* § 2710(d)(8)(B); *Amador County v.*

Salazar, 640 F.3d 373, 381 (D.C. Cir. 2011). Third, if the Secretary neither approves nor disapproves a compact within forty-five days of its submission, IGRA declares that the compact "shall be considered to have been approved, but only to the extent the compact is consistent" with the provisions of IGRA; the compact, thus, takes effect by operation of law upon publication of a notice in the Federal Register of the Secretary's inaction. 25 U.S.C. § 2710(d)(8)(C).

B. Morongo's Compact Was "Considered Approved" But Only to the Extent Consistent with IGRA

In 2017, Morongo and the State concluded negotiation of a new gaming compact authorizing the Tribe's continued operation of Class III gaming under IGRA, replacing Morongo's original "1999 Compact" (which was subsequently amended in 2008). The parties submitted the Compact to the Secretary of the Interior for review and approval. On January 22, 2018, the Principal Deputy Assistant Secretary—Indian Affairs published the following notice in the Federal Register concerning various California compacts—including Morongo's—that had been submitted for review: "The Secretary took no action on the compacts within 45 days of their submission. Therefore, the compacts are considered to have been approved, but only to the extent the compacts are consistent with IGRA." *Indian Gaming; Tribal-State Class III Gaming Compacts Taking Effect in the State of California*, 83 Fed. Reg. 3015, 3015–3016 (Jan. 22, 2018).

That the Secretary did not affirmatively rule on Morongo's Compact's compliance with IGRA was not an aberration or in derogation of the Secretary's legal obligation; as noted above, that course of (in)action is expressly contemplated by IGRA. 25 U.S.C. § 2710(d)(8)(C).

C. The Parties Agreed to Litigate Disputes That "Arise Under" the Compact and to Remedy Issues "Arising Out of" the Compact

The parties anticipated the possibility that over the life of the Compact, disputes might arise between the parties. Section 13 of the Compact prescribes the

process by which "disputes that arise under [their] Compact" are to be resolved. Compact §§ 13.1 & 13.4(a). If informal methods of resolution fail, the parties agreed to submit the dispute to the appropriate federal district court (or state court if the federal courts decline jurisdiction). *Id*. § 13.1(e). "The disputes to be submitted to court action include, but are not limited to, claims of breach of this Compact. *Id*.

The parties also thought carefully about the relief available from a court. The "sole and exclusive remedies available to either party for *issues arising out of* this Compact" (*id*. [emphasis added]) are set out in section 13.4, and include "injunctive relief . . . and declaratory relief (limited to a determination of the respective obligations of the parties under the Compact)." *Id*. § 13.4(a). The parties "expressly waive[d] their respective rights to assert their sovereign immunity" from suits seeking such relief. *Id*. §§ 13.4(a), 13.4(e).

Though consenting generally to suits arising under their Compact, Morongo and the State also specifically agreed to litigate disagreements about the State's administration of the "pro rata share" regime governing Morongo's payments into the Special Distribution Fund, the purpose of which is to defray the State's Compact-related, IGRA-compliant regulatory costs.[1] To that end, section 4.3(c) of the Compact provides: "If the Tribe objects to the State's determination of the Tribe's pro rata share under section 4.3, or to the amount of the Appropriation as including matters not consistent with IGRA, the matter shall be resolved in accordance with the dispute resolution provisions of section 13.0."

III. ARGUMENT

In its Complaint, Morongo contends that seventeen provisions of its Compact are not enforceable, either entirely or in part, either because, under IGRA,

[1] The pro rata share provision in the 2018 Compact is *not*, however, designed to limit the State to recouping only it's actual and reasonable costs of regulating Morongo's class III gaming activities. Morongo challenges the provision on this ground as a violation of IGRA and its implementing regulations. Complaint ¶¶ 24–35 (Count Four).

they are not proper subjects of negotiation or impose an impermissible tax, fee, or other assessment. *See* 25 U.S.C. § 2710(d)(3)(C)(i)–(vii) & (d)(4). The State has moved to dismiss principally on the ground that Morongo has not brought a cognizable claim for relief/cause of action under either the Compact or IGRA. The State's Motion is also premised on the notion that Morongo's claims are barred by the State's sovereign immunity, because the State has not consented to suit except as to disputes that arise under or out of the Compact.

The State is wrong on all counts.

A. The Parties' Dispute Arises Under the Compact

In their Compact, Morongo and the State expressly agreed that either party could litigate disputes "that *arise under* this Compact." Compact §§ 13.1, 13.4(a). Likewise, the parties identified specific remedies "for issues *arising out of* this Compact." *Id*. § 13.1(e). Morongo's Complaint reflects just such a dispute, based on both the common understanding of "arise" and the case law interpreting similar language.

1. Morongo's Position is Consistent with the Accepted Meaning of the Word "Arise"

The dictionary defines "arise" to mean: "to begin to occur or to exist; to come into being or to attention . . . to originate from a source." Arise, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/arise (last accessed July 2, 2025). The Supreme Court has approved a nearly identical definition as "the common usage of the word." *Jones v. R.R. Donnelley & Sons Co*., 541 U.S. 369, 382 (2004) ("'[A]rise' . . . mean[s] 'come into being; originate' or 'spring up.'"). The Supreme Court also has rejected as "overly narrow" an interpretation "under which 'arising under' means something akin to 'based solely upon.'" *Id*. at 383.

In light of this accepted meaning, Morongo's dispute with State "arises under" the parties' Compact. Compact § 13.1(e). Morongo contends that various provisions and obligations in the parties' Compact never were considered approved

because they are inconsistent with IGRA, and thus are unenforceable, relieving Morongo from having to comply with these terms going forward. The dispute, therefore, "originates" or "springs up" from the Compact itself. This conclusion is not undermined by the fact that this Court's evaluation of Morongo's claims will *also* require reference to IGRA, its implementing regulations, or case law. After all, virtually all contract disputes require for their resolution reference to some external rule or principle. *Cf. R.R. Donnelley & Sons*, 541 U.S. at 392 (rejecting that "'arising under' means something akin to 'based solely upon'").

Likewise, Morongo seeks "remedies . . . for issues *arising out of* this Compact." Compact § 13.1(e). Morongo asks this Court to declare that the Tribe is not obligated to comply with the challenged compact provisions given that they are inconsistent with IGRA and, thus, never were considered approved. Morongo also asks this Court to enjoin the State from enforcing the challenged provisions. Injunctive and "declaratory relief (limited to a determination of the respective obligations of the parties under the Compact)" are among the remedies specifically authorized in the Compact.

In short, Morongo's claims and the relief sought originate from and are inextricably bound up in the challenged Compact provisions. The Court should hold that the disputes arises under the Compact.

2. Morongo's Position is Consistent with the Ninth Circuit's Interpretation of "Arise Under" in Class III Gaming Compacts and in Contractual Arbitration Clauses

Ninth Circuit case law interpreting "arising under" provides further support for Morongo's position.

a. The *Pauma Band v. California* Decision

Pauma Band of Luiseño Mission Indians of the Pauma & Yuima Reservation v. California, 813 F.3d 1155, 1162 (9th Cir. 2015), involved a suit by the Pauma Band against the State challenging the formation of amendments to the parties'

Class III gaming compact. The Ninth Circuit affirmed the district court's finding that had the State not misrepresented a material fact, Pauma never would have agreed to the amendments, which proved to be financially devastating to the Tribe. The Ninth Circuit ordered rescission of the compact amendments and restitution of $36 million dollars. *Id*. at 1167, 1169.

Of relevance to Morongo's suit, the State in the *Pauma* case raised a sovereign immunity defense. *Id*. at 1169–1170. The Ninth Circuit reviewed the dispute resolution language in the parties' compact, which provided in relevant part: "the State and the Tribe expressly consent to be sued [in federal court] and waive any immunity therefrom that they may have[,] provided that: The dispute is limited solely to issues arising under this Gaming Compact." *Id*. at 1169. Based on that language, the Court held that the State had waived its immunity. *Id*.

The dispute resolution in the State's compact with Pauma is materially identical to that in the Compact between the State and Morongo. If Pauma's cause of action for misrepresentation—which was based on representations made outside of the actual compact—fell within the State's waiver of immunity to disputes arising under that compact, so must Morongo's claims seeking a judicial declaration as to both the interpretation of certain Compact provisions and the Tribe's continuing performance obligations.

b. Ninth Circuit Decisions Interpreting "Arising Under" in Non-Tribal, Contractual Arbitration Clauses

The Ninth Circuit's interpretation of "arising under" outside the Class III gaming context provides further support for Morongo's position. For example, in *Mediterranean Enterprises v. Ssangyong Corp*., 708 F.2d 1458 (9th Cir. 1983), plaintiff MEI entered into a "Preliminary Agreement for the Formation of a Joint Venture" with Ssangyong with the aim of eventually jointly building housing projects in Saudi Arabia. The Preliminary Agreement contained an arbitration clause providing, in relevant part, for the arbitration of disputes "arising

hereunder." *Id*. 1461.

MEI and Ssangyong then entered into an Agency Agreement with a third-party, Trac, which would serve as the agent of the joint venture in Saudi Arabia. *Id*. at 1461. The joint venture never came to pass, and Ssangyong and Trac allegedly teamed up to pursue the projects. MEI sued Ssangyong in federal court alleging, among other things, breach of the Preliminary Agreement, breach of fiduciary duty, and conspiracy to breach the Agency Agreement.

The district court eventually ordered the breach of the Preliminary Agreement and breach of fiduciary duty claims to arbitration, but not the conspiracy to breach the Agency Agreement. Ssangyong appealed, contending that the district court interpreted the scope of arbitration too narrowly, but the Ninth Circuit affirmed. *Id*. 1460. Interpreting "arising hereunder" to mean "arising under the contract itself," the Ninth Circuit concluded that the phrase "was not intended to cover matters or claims independent of the contract or collateral thereto." *Id*. at 1463. Rather, the phrase only covered disputes "relating to the interpretation and performance of the contract itself." *Id*. at 1464. Thus, the counts in the complaint alleging breach of the Preliminary Agreement and breach of fiduciary duty were arbitrable because they involved the interpretation of and performance under the Preliminary Agreement.

By contrast, the count alleging conspiracy to breach the Agency Agreement was not arbitrable because the Agency Agreement was "a separate and distinct Agreement" from the Preliminary Agreement, and Ssanyong's alleged breach of the former "could have been accomplished even if the [latter] did not exist." *Id*. at 1464. Thus, the count "alleges activity and raises issues which are predominantly unrelated to the central conflict over the interpretation and performance of the [Preliminary] Agreement." *Id*.

In *Tracer Research Corp. v. National Environmental Services Co*., 42 F.3d 1292 (9th Cir. 1994), Tracer had entered into an agreement to license a chemical

process it had developed to the defendant (NESCO). The parties also entered into a nondisclosure agreement to guard against the unauthorized use and disclosure of Tracer's process. After the parties terminated their licensing agreement, NESCO allegedly continued to use trade secrets and confidential information it had obtained under the license agreement. Tracer sued for damages and injunctive relief based on NESCO's alleged unauthorized use of Tracer's trade secret; NESCO moved to compel arbitration of the dispute pursuant to the provision in the license agreement calling for arbitration of all disputes "arising out of this Agreement." *Id*. at 1295. The district court granted the motion, referring the entire case to arbitration. *Id*.

The Ninth Circuit reversed. The Court started from the proposition that an "arbitration clause that covered disputes 'arising under' an agreement. . . covered only those disputes 'relating to the interpretation and performance of the contract itself.'" *Id*. 1295 (quoting *Mediterranean Enters*., 708 F.2d at 1464). Though Tracer's misappropriation of trade secret action—a tort claim—would not have arisen if not for the underlying licensing agreement, NESCO's alleged misappropriation was an "independent wrong from any breach of the licensing and nondisclosure agreements." *Id*. at 1295. Thus, resolution of Tracer's claims "does not require interpretation of the contract."

Cape Flattery Ltd. v. Titan Maritime, LLC, 647 F.3d 914 (9th Cir. 2011) is to the same effect. Cape Flattery retained Titan Maritime to salvage the plaintiff's vessel that had run aground. The parties' agreement contained an arbitration clause that provided: "Any dispute arising under this Agreement shall be settled by arbitration . . . ." *Id*. at 916. Titan succeeded in removing Cape Flattery's vessel but the reef was badly damaged. *Id*. Cape Flattery was potentially liable to the federal government for the damage under the federal Oil Pollution Act of 1990, but that same law authorized Cape Flattery to bring a "civil action for contribution" against a "any other person who is liable for potentially liable" for damage caused in rendering assistance in removing vessels. *Id*. Cape Flattery filed such an action

against Titan based on the damage to the reef allegedly caused by Titan. *Id*. at 916–17. Titan sought to compel arbitration, thus teeing up for judicial determination the scope of the "arising under" language in the arbitration clause.

The district court held that the dispute was not arbitrable, and the Ninth Circuit affirmed. The Court started with the principle from the *Mediterranean Enterprises* line of cases that "arising under the Agreement" encompassed "only those [disputes] relating to the interpretation and performance of the contract itself." *Id*. at 922. Applying that rule to Cape Flattery's suit against Titan, the Court concluded that the suit was not arbitrable because the dispute was based solely on the Oil Pollution Act. Because the Act's statutory provisions established each of the parties' duties and potential liabilities, the Court held that the dispute "does not turn on an interpretation of any clause in the contract," nor "does the dispute turn on Titan's performance under the contract." *Id*. at 924. Instead, "the dispute involves a tort claim based on Hawaii and maritime tort law, incorporated as part of the Oil Pollution Act of 1990." *Id*. Thus, Cape Flattery's claims did not arise under the parties' contract.

Based on the principles set forth in *Mediterranean Enterprises*, *Tracer Research*, and *Cape Flattery*, Morongo's claims inescapably arise under the Compact. Morongo's Complaint raises claims and matters that can only be resolved by interpreting the Compact in light of it having been considered approved, but only to the extent consistent with IGRA. Moreover, the dispute reflected in Morongo's Complaint goes directly to its performance obligations under the Compact—specifically, whether the challenged provisions are unlawful under IGRA and, thus, whether Morongo must continue to comply with those provisions.

Unlike MEI's conspiracy claim against Ssangyong, Morongo's claims against the State are not "independent of [its Compact] or collateral thereto." Whereas Ssangyong's alleged breach of the Agency Agreement was not arbitrable because the breach could have been accomplished even if the underlying

Preliminary Agreement did not exist, Morongo's claims against the State depend entirely on the existence of the Compact (and its unlawful terms).

Unlike Tracer's misappropriation of trade secrets claim against NESCO that was based on an "independent wrong from any breach" of those parties' underlying agreements, the unlawfulness targeted in Morongo's Complaint is inextricably bound up in the Compact. Whereas resolution of Tracer's claims "does not require interpretation of the contract," Morongo's claims cannot be resolved without interpreting the Compact.

Unlikely Cape Flattery's claims against Titan, which could be resolved by reference to a federal law without regard to the parties' underlying contract, Morongo's claims require that this Court interpret the challenged provisions of the Compact to determine whether they are legal and, thus, whether Morongo must comply with them.

If, before the parties had even commenced negotiations for a compact, Morongo had sued the State for a declaration that various hypothetical compact provisions would or would not be consistent with IGRA, the State might have a point. That's not this case. In this case, the dispute between Morongo and the State "arises under" the 2018 Compact because Morongo's claims directly relate to and require the interpretation of the 2018 Compact and Morongo's obligations thereunder.

B. <u>The State Has No Persuasive Arguments That the Parties' Dispute Does Not "Arise Under" the Compact</u>[2]

The State offers several reasons for finding that Morongo's claims do not "arise under" the Compact, but none are persuasive.

[2] The State's Motion is directed at the "arise under" language in section 13 of the Compact, which Morongo contends authorizes every count in its Complaint. Regardless, the Compact also expressly authorizes Morongo to challenge its continued payments into the Special Distribution Fund pursuant to the "pro rata share" system. Compact § 4.3(c). This provides a separate basis for concluding that Morongo can maintain an action premised on Court Four of its Complaint.

First, the State cites *United States v. Park Place Associates, Ltd.*, 563 F.3d 907 (9th Cir. 2009) and *North Side Lumber Co. v. Block*, 753 F.2d 1482 (9th Cir. 1985) to argue for a finding that Morongo's claims arise under a statute (IGRA) rather than a contract (the 2018 Compact). But even a cursory reading of the cited passages of these cases show they are inapposite. In both cases, the Ninth Circuit was focused on determining the jurisdictional scope of the Administrative Procedure Act and the Tucker Act. Neither *Park Place* nor *Block* addressed the meaning of "arise under" in a contractual dispute resolution provision, much less how to interpret the scope of such language.

Second, the State argues that "arise under" must be construed more narrowly than when joined with phrases such as "connected with" or "related to." Even if the parties could have drafted section 13 of the Compact more broadly, the fact remains, as explained above, that Morongo's claims do "arise under" the Compact, based on the ordinary meaning of that phrase as well as the Ninth Circuit decisions construing it in a related context. The State offers no argument or evidence for a contrary interpretation.

In a related argument, the State argues that "arise under" must be construed narrowly because it determines the scope of the parties' mutual waivers of sovereign immunity, and such waivers must be construed narrowly. This reasoning ignores the plain language of the section, which "narrows" the parties' respective waivers of sovereign immunity by limiting the relief that may be sought or awarded in a dispute arising under the Compact. The relief sought in Morongo's Complaint is exactly the relief authorized in the 2018 Compact, and thus is well within the scope of the State's waiver of its sovereign immunity. As explained above, the dispute reflected in Morongo's Complaint arises under the Compact, under either the ordinary meaning of that phrase or the interpretation given under Ninth Circuit case law.

Next, the State contends that IGRA itself counsels against a broad reading of

the parties' dispute resolution provision. Doing so, the State argues, "risks disrupting IGRA's own careful framework governing compact negotiations and related litigation." Motion p. 7. The State's argument is baseless, because the alleged risks are not implicated.

As an initial matter, Morongo is not seeking a "broad reading" of the section 13 of the Compact, just a reasonable one based on the text of the document. Furthermore, a ruling that Morongo has stated a claim deserving of judicial review would vindicate IGRA's framework, not undermine it. IGRA specifies a limited and exhaustive list of subjects that states and tribes may address in a Class III compact. 25 U.S.C. § 2710(d)(3)(C)(i)–(vii). IGRA also prohibits the State from imposing "any tax, fee, charge, or other assessment upon an Indian tribe." *Id*. § 2710(d)(4).

Congress included these compacting limitations to prevent states from using their advantage in the compacting process as subterfuge for engaging in regulatory overreach (*Chicken Ranch Rancheria v. California*, 42 F.4th 1024, 1035 (9th Cir. 2022)). In turn, these carefully considered restrictions serve IGRA's overarching purposes of "promoting tribal economic development, self sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

If, as the State argues, states and tribes are not permitted to challenge the legality of provisions in a compact that has been considered approved, but only to the extent consistent with IGRA, the likely result is that either or both parties will continue to bear the burden of obligations that Congress never intended. As Morongo's Complaint shows, allegedly unlawful—and thus unapproved—compact provisions can cost a tribe tens of millions of dollars annually, hundreds of millions of dollars over the life of a compact. It is inconceivable that Congress envisioned IGRA foreclosing either party from addressing such a situation.

The State also argues that allowing challenges to the lawfulness of compact provisions that are inconsistent with IGRA will destabilize the compacting process

and invite subsequent judicial modifications of compact terms that are untethered to actual negotiations. Again, these concerns are overblown. No party to a Class III gaming compact has an incentive to bring a frivolous challenge—litigation is expensive, time-consuming, and fraught with uncertainty—and Morongo has not done so here. In addition, no party to a gaming compact has a legitimate interest in enforcing provisions that are contrary to IGRA, and thus never were considered approved. That goes for Morongo as well as for the State. If misguided compact negotiations or subsequent developments in the law result in a compact provision that is (or may be) illegal and unenforceable, a party ought to have the benefit of a judicial determination on that issue, especially when a compact is considered to have been approved only to the extent consistent with IGRA. How else, other than through this action brought pursuant to the dispute resolution provisions of section 13 of the Compact, can a state or a tribe ascertain which provisions are enforceable and which are not?

Moreover, if this Court rules that a compact provision is inconsistent with IGRA, and thus never was considered to have been approved, only the portion of the provision that is inconsistent with IGRA need be severed, thus avoiding disturbing the parties' legitimate reliance interests or the working of the compact as a whole. In any event, parties can raise their concerns with the courts and with each other on a case-by-case or provision-by-provision basis.

Finally, the State argues that IGRA may not even allow a compact to include a dispute resolution provision permitting challenges to the legality of compact provisions. This notion is wrong for three reasons. First, as noted, Congress took great pains to specify the only subjects a compact may address. Thus, even if IGRA were entirely silent on whether a party may challenge whether a provision of its compact was considered to have been approved, allowing such actions would be entirely consistent with Congressional policy to limit compacts as described in 25 U.S.C. § 2710(d)(3)(C) & (d)(4).

Second, and more importantly, IGRA is not silent on this issue. The Act strongly implies that Congress contemplated such challenges. Recall that if the Secretary does not affirmatively approve or disapprove of a compact within 45 days of its submission, the compact "shall be considered to have been approved . . . *but only to the extent the compact is consistent*" with the provisions of IGRA. 25 U.S.C. § 2710(d)(8)(C) (emphasis added). The necessary inference is that provisions that are inconsistent with IGRA are not considered to have been approved. But for this to have any practical effect, there must be a way for the parties to resolve a dispute over provisions that a party contends are not consistent with, and thus not enforceable under, IGRA. That is exactly what Morongo's lawsuit seeks to accomplish.

Third, insofar as IGRA is regarded as silent about whether a tribe may challenge the allegedly unlawful provisions of a compact, that silence must be resolved in favor of Morongo. As the Ninth Circuit has held, "[IGRA] is a statute affecting Indian tribes. As such, we are obligated to construe ambiguities in the statute most favorably towards tribal interests . . . ." *Rincon Band of Luiseño Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1031 n.14 (9th Cir. 2010); *see also Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (holding that the "eminently sound and vital canon" instructs "that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians").

C. Morongo's Claims Are Not Barred By the State's Sovereign Immunity

The State contends that its unwaived sovereign immunity bars Morongo's claims because the waiver extends only to claims arising under the Compact, and, the State says, Morongo's claims don't. Morongo has already explained why its claims do "arise under" the Compact, under both ordinary meaning of that phrase and this Circuit's case law of this Circuit. *See* Section III-A-1 & A-2, *supra.* As the

State unambiguously waived its immunity to such claims (Compact § 13.4(a)), its immunity is no bar to this Court issuing a decision on the merits.

Policy reasons also compel this result. If accepted, the State's interpretation of the Compact would create a patently unfair asymmetry in power between the parties: *i.e.*, while the State contends that Morongo may not rely on Compact §§ 13.1(e) and 13.4(a) and (e) to invoke this Court's jurisdiction to resolve the parties' dispute about whether specific provisions of the 2018 Compact are inconsistent with IGRA and to that extent enforceable, the State undoubtedly would not hesitate to invoke this Court's jurisdiction to stop Morongo from violating any of those provisions. Indeed, the logical extension of the State's argument is that in such an action, Morongo could not assert as a defense that the specific provision(s) at issue, being inconsistent with IGRA, never were considered to have been approved, and thus are not enforceable.

D. The State's Arguments About the Compact Definitions and the "Labor Provisions" Have Nothing to Do with Whether Morongo States a Cognizable Claim for Relief

The State argues that Morongo's challenge to certain compact definitions must fail because the definitions cannot be severed from the Compact and, separately, do not violate IGRA. These arguments go to the merits of Morongo's arguments concerning these provisions, not to whether Morongo's claims arise under the Compact in the first instance.

The same problem undercuts the State's arguments concerning the so-called "labor regulation provisions." The State contends that these provisions are all consistent with IGRA, but whether they are or not is beyond the scope of the State's Motion to Dismiss. Again, the only issue for decision is whether Morongo's challenges to these provisions arise under the Compact. As explained above, the only defensible answer is "yes."

E. The State's Assertion That Morongo Should be Content to Comply With Unlawful Compact Provisions Ignores the State's Long History of Violating IGRA to the Detriment of Tribes

The State chides Morongo for "ask[ing] this Court to revisit decisions that Morongo made in negotiations more than seven years ago and, in so doing, to alter a bargain from which Morongo has benefited ever since." Motion p. 1:2–3. According to the State, the parties have an "obligation to adhere to a compact they negotiated years ago." Motion p. 2:17–18. The State's position has more than a whiff of "tribes should be content with what they have." The State's desire to maintain the status quo no matter its legality under IGRA reflects its longstanding practice of pursuing every opportunity to limit tribes' gains under IGRA even when contrary to IGRA or tribal compacts.

It must be remembered that the era of gaming compacts in California has been marked repeatedly by State overreach and obstinance. Just a few of the many examples:

- The State contractually agreed to pay tribes license fees related to their operation of simulcast wagering facilities, only to renege, forcing the tribes to sue (successfully). *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050 (9th Cir. 1994).
- The State insisted on compact provisions requiring that tribes make payments into the State's General Fund until the Rincon Band sued, and the Ninth Circuit confirmed this practice was unlawful. *Rincon Band of Luiseño Mission Indians v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010).
- In the early aughts, the State assumed responsibility for administering the finite pool of gaming device licenses available to tribes operating under the original 1999 compacts, but massively undercalculated the number of licenses available, thus creating an artificial scarcity.

Unable to obtain licenses to operate as many gaming devices as they should have, many tribes were forced to negotiate amended compacts. *See e.g.*, *Pauma Band*, 813 F.3d at 1161. Eventually, other tribes sued the State for breach of their compacts, with the Ninth Circuit finally vindicating the tribes' position. *Cachil Dehe Band of Wintun Indians v. California*, 618 F.3d 1066 (9th Cir. 2010);

- For years, over the objection of many tribes, the State conditioned its willingness to enter into compacts on tribes agreeing to abide sprawling state law-based environmental protection provisions, burdensome state law-based customer tort claim processes, and various other provisions that are not directly related to a tribe's operation of gaming activities. When five tribes finally sued, the Ninth Circuit held that the State had failed to negotiate in good faith because it insisted on compact provisions that are unlawful under IGRA. *Chicken Ranch Rancheria v. California*, 42 F.4th 1024 (9th Cir. 2022).
- Despite the clear principles announced in the *Chicken Ranch* decision, the State has unreasonably refused to interpret the case as standing for anything beyond the disapproval of the four provisions addressed in that case. As a result, tribes have been forced to continue to sue (and prevail) merely to maintain the basic rights that IGRA affords them. *See, e.g.*, *Augustine Band of Cahuilla Indians v. California*, Case No. 5:23-cv-00620-SSS-DTBx (C.D.Cal. July 23, 2024) (granting in part and denying in part summary judgment to the tribe).

Finally, the "bargain" that Morongo has supposedly benefited from for more than 7 years has resulted in Morongo paying to the State tens of millions of dollars annually pursuant to provisions that never would be approved of today by Interior because they are unlawful under IGRA (as construed by court decisions) and its implementing regulations. It is that Compact, and the unjust diversion of

Morongo's governmental revenues and the unwarranted infringement on Morongo's sovereign prerogatives, that the State seeks to perpetuate in its Motion to Dismiss.

IV. CONCLUSION

Morongo's claims challenging the legality of various Compact provisions arise under the Compact. Therefore, the Court should deny the Motion. If the Court is inclined to grant the Motion, it should also grant Morongo leave to amend its Complaint.

Dated: July 3, 2025

RESPECTFULLY:

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for the Morongo Band of Mission Indians, certifies that this brief contains 5,484 words, which:

_X complies with the word limit of L.R. 11-6.1.

__ complies with the word limit set by court order dated [date].

Dated: July 3, 2025

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