21-15751

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

v.

STATE OF CALIFORNIA; GAVIN NEWSOM, Governor of California,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of California

No. 1:19-cv-00024-AWI-SKO
Honorable Anthony W. Ishii, Judge

APPELLANTS' OPENING BRIEF

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INTRODUCTION

This appeal presents issues that this Court has not expressly decided regarding negotiations for tribal-state class III gaming compacts under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, 18 U.S.C. §§ 1166-1167. Those issues are whether non-revenue sharing compact provisions require meaningful concessions and whether specific concessions must be tied to specific provisions. The district court concluded that Governor Gavin Newsom and the State of California (State) (collectively, State Appellants) failed to negotiate in good faith with appellees the Chicken Ranch Rancheria of Me-Wuk Indians (Chicken Ranch), the Blue Lake Rancheria (Blue Lake), the Chemehuevi Indian Tribe, the Hopland Band of Pomo Indians, and the Robinson Rancheria (Robinson) (collectively, Tribes). While acknowledging the lack of circuit precedent, the district court held that the State negotiating for certain non-revenue sharing compact topics without giving meaningful concessions constituted bad faith under IGRA. This Court's decisions neither support nor presage that holding, and State Appellants request the Court to reverse it.

In 2000, California voters enacted a constitutional provision giving Indian tribes the exclusive right to operate Nevada-style casino gambling in the state. This Court observed that this was generous and "well beyond anything IGRA required the State to offer." *Rincon Band of Luiseno Mission Indians of the Rincon*

Reservation v. Schwarzenegger, 602 F.3d 1019, 1037 (9th Cir. 2010) (*Rincon*). By 2019, tribal gaming revenues in California were approximately $9.5 billion, which is more than twenty-seven percent of the total tribal gaming revenues nationwide.[1] This success is the result of the cooperative efforts of the gaming tribes and the State, with sixty-four tribal gaming casinos[2] operating in California pursuant to tribal-state class III compacts.

Those cooperative efforts, however, have not guaranteed that all negotiations for tribal-state class III compacts are successful. Here, the Tribes terminated negotiations and made a take-it-or-leave-it demand that assured a lawsuit. In the district court, the Tribes alleged that the State negotiated in bad faith regarding a new tribal-state class III compact to succeed their existing compacts signed in 1999 (1999 Compacts).

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[1] The National Indian Gaming Commission reported tribal gaming revenues to be $9,680,300,000 in its Sacramento Region and $34,578,542,000 nationally. The Sacramento Region covers California and Northern Nevada. Only one tribal casino operates in Northern Nevada. *See* https://www.nigc.gov/images/uploads/2019_GGR_Charts_by_Region.pdf.

[2] The California Gambling Control Commission (CGCC) lists sixty-six tribal casinos presently operating in California. Of those sixty-six, two operate pursuant to secretarial procedures. http://www.cgcc.ca.gov/documents/Tribal/2020/List_of-Casinos_alpha_by_casino_name.pdf.

Contrary to the Tribes' allegations, the State negotiated in good faith. It offered substantial benefits to the Tribes over their 1999 Compacts. The State offered the opportunity for a new twenty-five year compact with no contributions for the State's regulatory costs or problem gambling at four of the Tribes' current levels of operations.[3] Moreover, the State offered the Tribes a compact in which they would contribute nothing towards revenue sharing with other tribes for their current operations. In fact, as Limited-Gaming Tribes[4] that operate fewer than 350 Gaming Devices,[5] four of the Tribes receive funds every year from the Revenue

[3] Blue Lake advertises that it offers more than 600 slot machines. State Appellants' Req. Jud. Not. (RJN), Ex. A. The four other Tribes offer less than 350 slot machines.

[4] Terms that are defined in the 1999 Compacts, or terms that were proposed in the State Appellants' draft compacts to the Compact Tribes Steering Committee (CTSC), such as Limited-Gaming Tribes, are capitalized in this brief.

[5] As used in the brief, the phrase "Gaming Devices" refers to devices that are consistent with the scope of slot machines authorized under the California constitution. Cal. Const. art. IV, § 19(f).

Sharing Trust Fund (RSTF).[6] Those four Tribes also have received distributions from the Tribal Nation Grant Fund (TNGF).[7]

In return for offering the Tribes the right to operate their Gaming Facilities fully or partially contribution-free as well as other improvements over their 1999 Compacts, the State asked for compact provisions to protect employees and patrons, to provide for other Indian tribes, and to mitigate environmental impacts on local communities. The State asked for no tax and nothing for its general fund. The Tribes ultimately refused to negotiate further with the State and delivered a "last, best and final offer" compact. That take-it-or-leave-it offer included demands for a provision that violated the California Constitution and—totally new to the negotiations—no revenue sharing with other tribes. In short, the State offered the Tribes the opportunity for a compact that was more generous than their

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[6] The RSTF or "Indian Gaming Revenue Sharing Trust Fund" was created by statute in 1999 as part of the 1999 Compacts and remains in place today. Cal. Gov't Code § 12012.75. The RSTF "redistributes gaming profits to other Indian tribes." *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1113 (9th Cir. 2003) (*Coyote Valley II*). The RSTF is 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, 888–89 (2014). No portion of the RSTF is available to the State for its use. *Coyote Valley II*, 331 F.3d at 1113.

[7] Like the RSTF, the TNGF provides funds to Non-Gaming and Limited-Gaming Tribes. No portion of the TNGF is available to the State for its use. Cal. Gov't Code § 12019.85. The TNGF is discussed *infra* in Section IV, C.

1999 Compacts, but the Tribes issued an ultimatum to the State and terminated further negotiations.

Despite facts showing State Appellants' good faith and continuing efforts to negotiate, the district court erroneously found that the State failed to negotiate in good faith. Despite no detailed arguments by the parties on the issue, the district court expanded this Court's decision in *Rincon* to require meaningful concessions for non-revenue sharing requests and to require the State to tie a specific concession to each specific request.

This expansion is contrary to IGRA. No published appellate decision has done what the district court did here. Therefore, State Appellants respectfully request that the Court reverse the district court's Order Re: Cross Motions for Summary Judgment (Order).

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362. By its Order entered March 31, 2021, the district court granted the Tribes' motion for summary judgment, denied State Appellants' motion for summary judgment, and ordered the parties to begin IGRA's remedial process. 1-ER-002.

This Court has jurisdiction pursuant 28 U.S.C. § 1291. *Te-Moak Tribe of Western Shoshone v. U.S. Dept. of Interior*, 608 F.3d 592, 596 n.3 (9th Cir. 2010).

State Appellants filed a timely notice of appeal on April 23, 2021. 3-ER-310; Fed. R. App. P. 4(A)(1).

ISSUES PRESENTED

This appeal presents the following four issues:

1. Whether State Appellants can be held to violate IGRA's good-faith requirement when the Tribes terminated negotiations for class III gaming compacts preventing further negotiations;

2. Whether IGRA requires meaningful concessions in negotiations over non-revenue sharing requests;

3. If meaningful concessions are required for non-revenue sharing requests, whether they are required on a this-for-that basis; and

4. Whether State Appellants negotiated over topics not permitted by IGRA.

An addendum containing pertinent constitutional and statutory provisions is bound with this brief.

STATEMENT OF THE CASE

After more than five years of negotiations for tribal-state class III gaming compacts to succeed their 1999 Compacts, the Tribes terminated negotiations with the State. They presented a take-it-or-leave-it compact requiring the State's unconditional acceptance in seven days. Even though the State remained willing to

negotiate collectively or individually with the Tribes, they filed suit in the district court. Specifically, they claimed that State Appellants failed to engage in good-faith negotiations as required by IGRA by seeking compact provisions on the following topics: (1) worker protections for Gaming Facility employees, such as state minimum wage and federal anti-discrimination requirements; (2) environmental mitigation for off-reservation impacts on local communities; (3) agreement to the TNGF; (4) tort remedies and protections for Gaming Facility patrons; (5) adoption and maintenance of a Tribal Labor Relations Ordinance (TLRO); and (6) recognition and enforcement of spousal and child support orders issued by the State's courts against Gaming Facility employees. The Tribes claimed that IGRA does not permit negotiations with respect to each of those topics.

Deciding the parties' cross-motions for summary judgment, the district court granted the Tribes' motion. The district court correctly rejected the Tribes' assertions that IGRA did not permit negotiating over the topics of worker protections, environmental mitigation for off-reservation impacts, the TNGF, tort remedies and protections for Gaming Facility patrons, and a TLRO. However, agreeing with the Tribes, the district court incorrectly found that IGRA did not permit negotiating over recognition and enforcement of spousal and child support orders. Irrespective of the topics' permissibility under IGRA, the district court

required State Appellants to show they offered meaningful concessions for each topic of negotiation, except the TNGF, and "specifically what concessions were offered in exchange for what topics." 1-ER-020; *see also id*. at 021 ("link specific concessions as being offered in return for specific topics"). The district court found that State Appellants had not made the required showing with respect to meaningful concessions and, therefore, had not shown they negotiated in good faith.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. STATE APPELLANTS AND THE TRIBES NEGOTIATED FOR MORE THAN FIVE YEARS FOR SUCCESSOR COMPACTS

The jointly compiled record of negotiations is more than 10,000 pages. It shows, and provides substantial detail of, more than five years of negotiations over compacts to succeed the 1999 Compacts. For purposes of this appeal, however, only a select and small portion of that extensive record is important.

A. The Tribes Were Members of the Compact Tribes Steering Committee (CTSC)

In August 2014, CTSC, a coalition of twenty-eight[8] federally recognized California Indian tribes with 1999 Compacts, informed the State of CTSC's

[8] This number decreased over time as many former CTSC tribes withdrew from the coalition and successfully negotiated their own bilateral class III gaming compacts with the State. The fourteen former CTSC tribes that followed this path, and concluded compacts with the State from 2015 to 2020, include Big Valley Band of Pomo Indians of the Big Valley Rancheria, Cabazon Band of Mission

formation and its desire to begin the negotiation process for a new class III gaming compact to succeed the 1999 Compacts. 2-ER-033. The negotiation process between CTSC and the State began in December 2014. 2-ER-033. The negotiations straddled two gubernatorial administrations. The Tribes were members of CTSC until withdrawing from it on September 26, 2019. 2-ER-033, 43. Each of the Tribes has a 1999 Compact. 2-ER-032.

B. Brown Administration: Significant Progress with Many Issues Resolved

During former Governor Jerry Brown's administration, CTSC and the State held thirty-nine days of negotiations from 2015 through the end of 2018, in addition to numerous subcommittee meetings for discrete issues. 2-ER-034-35. To assist the State and CTSC in moving these negotiations forward, the negotiating parties exchanged many documents, including proposed compact language, background information, and proposed complete draft compacts. 2-ER-035. During the course of negotiations under the Brown administration, the State

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Indians, Elk Valley Rancheria, Hoopa Valley Tribe, Jamul Indian Village of California, La Jolla Band of Luiseno Indians, Mooretown Rancheria of Maidu Indians of California, Paskenta Band of Nomlaki Indians of California, San Pasqual Band of Diegueno Mission Indians of California, Susanville Indian Rancheria, Sycuan Band of Kumeyaay Nation, Tolowa Dee-ni' Nation, Tule River Indian Tribe of the Tule River Reservation, and Twenty-Nine Palms Band of Mission Indians of California. Cal. Gov't Code §§ 12012.69, 12012.77, 12012.88, 12012.89, 12012.93, 12012.95, 12012.97, 12012.98, 12012.100, 12012.101.

proffered at least twelve full draft compacts to CTSC, which provided approximately fourteen drafts to the State. 2-ER-035.

The negotiation sessions and draft compact exchanges resulted in significant progress. Near the end of the Brown administration in 2018, and subject to approval of a final compact, the State and CTSC had reached consensus on many compact provisions. A significant amount of work remained however, and the State transmitted a list of unresolved compact issues to CTSC. 3-ER-304.

C. Newsom Administration: State Appellants' Continued Willingness To Negotiate

Compact negotiations with CTSC continued after Governor Gavin Newsom took office in January 2019. After meeting in April 2019, CTSC and the State resumed compact-negotiation sessions in June 2019 and exchanged revised draft compacts in July 2019. 2-ER-039-41.

D. CTSC Retreats from Progress Made

On August 19, 2019, CTSC sent a letter to Governor Newsom regarding the status of compact negotiations. 3-ER-300. In this letter, CTSC recognized that during its four years of negotiations with the State, the parties had "reached consensus on almost all of the issues that IGRA provides may be included in a compact." 3-ER-301. While the letter also conceded that the CTSC had reached "tentative consensus" with the Brown administration on some issues that CTSC believed were not "proper subjects for negotiation," CTSC stated that any

consensus reached had been contingent upon a final agreement and the State providing "material concessions." 3-ER-301. The letter then set forth topics that CTSC believed the State could not demand for inclusion in a final compact. 3-ER-302. CTSC followed the letter with a revised draft compact on September 3, 2019 (2-ER-042), which clearly showed the retreat from many of the compromises and consensus provisions reached by the parties.

Despite CTSC's retreat from the progress made over the prior four plus years, the State continued its efforts to negotiate and conclude the compacts. The State responded to CTSC's August 19, 2019 letter with a plan for negotiating. The State followed through quickly on that plan, providing a draft compact on September 9, 2019. 3-ER-163. CTSC and the State held another compact negotiation session on September 19, 2019. 2-ER-042-43.

II. THE TRIBES LEAVE CTSC NEGOTIATIONS, ISSUE A "LAST, BEST AND FINAL" DEMAND, AND REFUSE BILATERAL NEGOTIATIONS

The Tribes then walked away from negotiations with State Appellants altogether. On September 30, 2019, the Tribes delivered a take-it-or-leave-it compact demand on State Appellants, giving the State seven days to unconditionally accept the compact. 2-ER-053.

For the first time in five years of negotiations, the Tribes' take-it-or-leave-it demand excluded any contributions to the RSTF, regardless of the number of

Gaming Devices in operation. *See* 2-ER-081-82. The Tribes also sought to extend the initial term of the compact from twenty-five to thirty years. 2-ER-150.

However, the Tribe's demand also provided for automatic renewal that could only be avoided under unrealistic conditions for the State, including a constitutional amendment prohibiting all forms of class III gaming before the State could terminate, or a two-thirds vote of the legislature for the State to not renew, the compact. The demand effectively created class III gaming compacts in perpetuity.[9] And even if those prerequisites were met, the compact would remain in effect until the Tribes' "repayment of any outstanding debt owed . . . for construction or operation of any . . . Gaming Facilities and any hotel adjacent thereto." 2-ER-150-51.

The Tribes' demand was non-negotiable, and they would not consider any counteroffers. 2-ER-053. On October 2, 2019, the State responded by stating that—despite the Tribes' ultimatum to accept the take-it-or-leave-it compact or face suit—the State remained willing to continue good-faith negotiations with the Tribes either individually or collectively. 2-ER-051.

[9] The Tribes made their perpetuity-term demand despite this Court ruling six months earlier that "IGRA's plain language permits durational limits on compacts" and does not require that compacts run indefinitely. *Chemehuevi Indian Tribe v. Newsom*, 919 F.3d 1148, 1154 (9th Cir. 2019) (*Chemehuevi*).

III. THE TRIBES FILE SUIT, AND THE DISTRICT COURT GRANTS THEIR MOTION FOR SUMMARY JUDGMENT

After withdrawing from CTSC and making their "last, final and best" demand, the Tribes filed suit in the United States District Court for the Eastern District of California. The Tribes requested that the court order the parties to IGRA's remedial process under 25 U.S.C. § 2710(d)(7)(B). They claimed the State failed to negotiate in good faith under IGRA by seeking compact provisions for: (1) worker protections for Gaming Facility employees, such as the State's minimum wage and federal anti-discrimination requirements; (2) environmental mitigation for off-reservation impacts on local communities; (3) agreement to the TNGF; (4) tort remedies and protections for Gaming Facility patrons; (5) adoption and maintenance of a TLRO; and (6) recognition and enforcement of spousal and child support orders issued by state courts against Gaming Facility employees.

The parties filed cross-motions for summary judgment. The Tribes argued that the State failed to negotiate in good faith because it sought to negotiate over the six enumerated topics. The Tribes argued that even though the State could offer meaningful concessions so that a tax or fees would not be "imposed" under IGRA, meaningful concessions could not make any other non-permitted topic appropriate. In opposition to State Appellants' cross-motion for summary judgment, the Tribes argued, among other things, that the State had conceded nothing.

In support of their cross-motion for summary judgment, State Appellants argued that they had negotiated in good faith and remained willing to negotiate even though the Tribes terminated negotiations. State Appellants also argued that the topics over which they sought to negotiate were allowed by IGRA. State Appellants further argued that the Tribes' termination of negotiations prevented the State from offering any meaningful concessions. In response to the Tribes' opposition, State Appellants set forth a partial list of concessions the State made in the negotiations.

The district court took the cross-motions for summary judgment under submission without oral argument. On March 31, 2021, it granted the Tribes' motion and denied State Appellants' motion. 1-ER-002. The court concluded State Appellants had not negotiated in good faith with the Tribes. To reach this conclusion, the court found: (1) the State had negotiated with respect to topics that IGRA permitted, except for the recognition and enforcement of spousal and child support orders; (2) the topics were "at the edge" of permissible negotiations; and (3) despite meager briefing on the subject by any party, the State had not shown that it offered specific concessions linked to each specific topic. 1-ER-020.

In its Order, the district court noted that no decision by this Court required either meaningful concessions outside the context of a state seeking taxes or fees from a tribe or that specific concessions be linked to specific negotiation topics.

Accordingly and with no in-depth briefing by the parties, the district court relied on another district court decision to expand the requirement of meaningful concessions to topics of negotiation other than fee demands. 1-ER-009 n.1. The district court initiated IGRA's remedial process under 25 U.S.C. § 2710(d)(7)(B). 1-ER-022.

State Appellants moved for an order staying the effectiveness of the Order. The district court issued a stay through August 31, 2021, to allow State Appellants to seek a stay from this Court. 2-ER-024. The State Appellants' motion for a stay is pending with this Court. Dkt. 10-1, 11-1.

SUMMARY OF ARGUMENT

The State negotiated in good faith and remained willing to negotiate. The Tribes, however, terminated their participation in the CTSC multilateral negotiations and delivered a non-negotiable "last, best and final" compact. That take-it-or-leave-it demand included provisions that the State could not possibly accept and regressed from previous offers. It was patent surface bargaining, intending not to reach a compact. *See Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 995 (9th Cir. 1992) (*Sparks Nugget*). The State cannot be held to be in violation of IGRA's good-faith standard on that record. *Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation v. Cal.*, 973 F.3d 953, 958, 965-66 (9th Cir. 2020) (*Pauma II*).

This Court has not ruled previously on whether, or what, concessions are required in negotiations outside the context of revenue sharing. 1-ER-009 n.1; *see Rincon*, 602 F.3d at 1029 (percentage of net win payable to the State's general fund); *Coyote Valley II*, 331 F.3d at 1110-15 (contributions to the Special Distribution Fund (SDF) and the RSTF); *cf. Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1100-02 (percentage of net win payable to the state for educational uses). Here, the State negotiated on topics that did not include payment of taxes or fees deposited into its general fund or put to its unrestricted use. Instead, the negotiation topics focused only on basic issues directly related to gaming. *See Rincon*, 602 F.3d at 1039-40. Contrary to the district court's holding, no separate concession or consideration was required as the negotiations involved what IGRA contemplates and identifies in 25 U.S.C. § 2710(d)(3)(C). *Id*. at 1040 n.23.

The State negotiated regarding IGRA-permitted topics. The district court agreed with the State and correctly held that IGRA permits negotiations on all of the topics, except for the recognition and enforcement of spousal and child support orders. As to that topic, the district court erred for two reasons. First, the focus of the negotiation was within IGRA's catchall provision, 25 U.S.C. § 2710(d)(3)(C)(vii). *See Coyote Valley II*, 331 F.3d at 1116. Second, the Tribes terminated negotiations preventing the issue to ripen to assess the State's good faith or bad faith. *Pauma II*, 973 F.3d at 965-66.

If this Court concludes for the first time that concessions are required for non-tax requests, the State offered substantial economic and non-economic concessions to the Tribes compared to their 1999 Compacts. Despite the evidence of concessions, the district court incorrectly required the State to show concessions on a this-for-that basis. 1-ER-020-21; *see Rincon*, 602 F.3d at 1039; *see also id*. at 1040 n.23. Because the Tribes never sought specific concessions and terminated negotiations preventing concessions, the district court incorrectly held State Appellants in bad faith. *Pauma II*, 973 F.3d at 965-66.

STANDARD OF REVIEW

This Court reviews de novo a district court's order on cross-motions for summary judgment. *Pauma II*, 973 F.3d at 961. The Court evaluates each motion separately giving the nonmoving party the benefit of all reasonable inferences. *Id*. "Summary judgment is appropriate if, after viewing the evidence in the light most favorable to the nonmoving party, no genuine issue of material fact exists." *Id*. "Whether the negotiations [under IGRA] were conducted in good faith is a mixed question of law and fact that we review de novo." *Rincon*, 602 F.3d at 1026 (citing *Coyote Valley II*, 331 F.3d at 1107).

ARGUMENT

I. IGRA OVERVIEW—COOPERATIVE FEDERALISM, DETERMINING GOOD FAITH, AND PERMISSIBLE TOPICS FOR NEGOTIATION

Coyote Valley II recounts extensively the events leading to IGRA's passage, and the subsequent compact negotiations between the State and dozens of Indian tribes resulting in the original 1999 Compacts. 331 F.3d at 1095-1106. IGRA provides "a statutory basis for the operation of gaming by Indian tribes" and is an example of "'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme." *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002), aff'd, 353 F.3d 712 (9th Cir. 2003).

IGRA's cooperative federalism role for state governments is found in its compacting requirement. IGRA accords states "the right to negotiate with tribes located within their borders regarding aspects of class III tribal gaming that might affect legitimate State interests." *Coyote Valley II*, 331 F.3d at 1097. Class III gaming "includes the types of high-stakes games usually associated with Nevada-style gambling. Class III gaming is subject to a greater degree of federal-state regulation than either class I [social games] or class II [bingo and certain non-banked card games] gaming." *Id.*

IGRA's compacting requirement examines a state's good faith in negotiating. A tribe that brings an action under 25 U.S.C. § 2710(d)(7)(A)(i), must

show that (1) no tribal-state compact has been entered and (2) the state either failed to respond to the tribe's request to negotiate or did not respond to the request in good faith. 25 U.S.C. § 2710(d)(7)(B)(ii)(II). But negotiations are, of course, a two-way street. A state's ability to negotiate in good faith to reach a mutually acceptable compact assumes that a tribe shares the same goal. *Cf. Sparks Nugget*, 968 F.2d at 995.

While IGRA requires "good faith" negotiations, the statute does not define this important term. *See Pauma II*, 973 F.3d at 957; 25 U.S.C. § 2710(d)(3)(A). In making a good-faith determination, the court "may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities," and "shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith." 25 U.S.C. § 2710(d)(7)(B)(iii).

This Court identifies several relevant factors to consider when determining, based on the record of negotiations, whether a state negotiated in good faith. These factors include the following:

- Did the State remain "willing to meet with the tribe for further" compact negotiations? *Coyote Valley II,* 331 F.3d at 1110 (negotiation history showed that the State "actively negotiated with Indian tribes").

- Are the challenged provisions "categorically forbidden by the terms of IGRA"? *Coyote Valley II,* 331 F.3d at 1110-17 (the State did not negotiate in bad faith by refusing to enter into a compact that lacked the RSTF, the SDF, and a TLRO).
- Did the State propose terms in a draft compact demonstrating an effort "to move negotiations toward the finish line"? *Pauma II*, 973 F.3d at 965.
- Did the State remain willing to meet when the tribe filed its lawsuit under IGRA? *Pauma II*, 973 F.3d at 962 ("the state of negotiations at the commencement of a lawsuit is certainly a relevant factor for courts to consider when analyzing bad faith claims under IGRA").
- Did the tribe fail to respond to a State's proposal prior to litigation? *Pauma II*, 973 F.3d at 962 ("We abstain from inserting ourselves into incomplete negotiations.").

IGRA also sets forth seven subject areas or topics that compacts "may include." Five are specific. *See* 25 U.S.C. § 2710(d)(3)(C)(i)-(v). Two are considered catchall categories:

> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
>
> (vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C)(vi)-(vii).

To determine what topics fall within these catchall categories for inclusion in class III gaming compacts, this Court established the following helpful principles:

- The catchall categories in 25 U.S.C. § 2710(d)(3)(C)(vi)-(vii) "are broader than the more specific topics enumerated in paragraphs (3)(C)(i)-(v)." *Chemehuevi*, 919 F.3d at 1152.
- Because the catchall categories in 25 U.S.C. § 2710(d)(3)(C)(vi)-(vii) are interpreted more broadly, they can include topics that are not expressly denominated in IGRA. This interpretation avoids rendering the catchall categories meaningless, and instead "favor[s] an interpretation that gives meaning to each statutory provision." *Chemehuevi*, 919 F.3d at 1153 (citing *Life Techs. Corp. v. Promega Corp.,* 137 S.Ct. 734, 740 (2017)).

Given their broad nature, this Court has interpreted the catchall categories in 25 U.S.C. § 2710(d)(3)(C)(vi)-(vii) to not "categorically forbid" several important compact provisions. These permissible compact provisions under the catchall categories include: (1) durational limit provisions, *Chemehuevi*, 919 F.3d at 1152; (2) provisions requiring the sharing of gaming revenues through the RSTF with non-gaming tribes, *Coyote Valley II*, 331 F.3d at 1110-13; (3) provisions for

payments to the SDF that can be used for several purposes, including mitigation payments to local governments, *id.* at 1113-15; and (4) provisions requiring tribes to adopt labor relations protections covering employees at tribal gaming facilities, *id.* at 1115-16.

The Tribes here claimed that the State sought to negotiate topics beyond the scope of 25 U.S.C. § 2710(d)(3)(C)(i)-(vii). Relying in part on *Coyote Valley II*, *Chemehuevi*, and *Rincon*, the district court correctly concluded that five of the disputed topics were permissible topics of negotiation. As to the sixth—recognition and enforcement of spousal and child support orders—the district court was incorrect. *See infra* Section IV, F.

II. STATE APPELLANTS NEGOTIATED IN GOOD FAITH AND REMAINED WILLING TO NEGOTIATE

The record demonstrates that State Appellants were not in bad faith due to a lack of negotiations or an unwillingness to negotiate. Rather, during both the Brown and Newsom administrations, the State actively pursued compact negotiations with CTSC to reach compacts. With respect to the Tribes, those efforts came to an abrupt halt when the Tribes delivered their "last, best and final" offer that included terms that the State could not accept. The Tribes had shut the door on any ability for the State to negotiate in good faith. *Pauma II*, 973 F.3d at 965-66.

A. State Appellants Negotiated in Good Faith with CTSC

The CTSC negotiations during the Brown administration were ongoing and comprehensive. From 2015 through 2018, State Appellants and CTSC held thirty-nine days of negotiations. 2-ER-034-35. Equally important, State Appellants proffered at least twelve full draft compacts to CTSC, which provided approximately fourteen drafts to the State. 2-ER-035. These serious negotiations produced concrete results, with the parties reaching consensus on a wide range of issues. 2-ER-035. While not every issue was resolved, near the end of 2018 State Appellants candidly recognized the remaining disagreements by transmitting a list of these unresolved compact issues to CTSC. 3-ER-304. But the State clearly remained "willing to meet with" CTSC for continued negotiations. *Pauma II*, 973 F.3d at 958 (quoting *Coyote Valley II,* 331 F.3d at 1110).

The Newsom administration continued these good-faith negotiations only to be obstructed when CTSC rolled back the prior negotiations' progress. In its August 19, 2019 letter to Governor Newsom and subsequent September 2019 draft compact, CTSC abandoned many of the parties' previously achieved compromises. Despite CTSC's retreats, State Appellants remained committed to good-faith negotiations under IGRA by providing a draft compact to and meeting with CTSC. The State remained "willing to meet with" CTSC to resolve their differences. *Pauma II*, 973 F.3d at 958 (quoting *Coyote Valley II,* 331 F.3d at 1110).

B. The Tribes' "Last, Best and Final" Compact Demand Shut the Door on the State's Continuing Good-Faith Negotiations

Negotiations for successor compacts with the Tribes came to an abrupt halt when they delivered their "last, best and final" compact demand. They made their take-it-or-leave-it posture clear: "the Tribes will not consider any counter-offer"; and the offer must be "unconditionally accepted." 2-ER-053. Despite the Tribes' shutting the door on further negotiations, the State responded that it was "committed to negotiating a compact on a government-to-government basis either collectively or individually." 2-ER-051. The State remained "ready and willing to engage in the good-faith negotiation process . . . and to negotiate possible compromises." 2-ER-051; *see Coyote Valley II,* 331 F.3d at 1110. Rather than engage in bilateral negotiations, the Tribes filed suit and inserted the court into the negotiations. *See Pauma II*, 973 F.3d at 965-66.

C. The State Could Not Accept the Tribes' Take-it-or-leave-it Demand

The Tribes' demands were both lawfully and practically unacceptable. Not only had the Tribes shut the door on continued negotiations, but their demand also guaranteed non-acceptance. Under these circumstances, the State Appellants' response—a willingness to negotiate—demonstrates good faith.

The Tribes' demand contained a number of "poison pills" that would prevent the State's acceptance. For example, the Tribes' demand would require the State

to act unlawfully. Specifically, the demand provided for State Appellants' automatic authorization for the Tribes to offer class III games not yet authorized in California. 2-ER-070. This provision disregarded article IV, section 19(f) of the California Constitution, which limits the class III games that tribes may operate. The State's constitution only empowers the Governor "to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of *slot machines* and for the conduct of *lottery games and banking and percentage card games* by federally recognized Indian tribes on lands in California in accordance with federal law." Cal. Const. art. IV, § 19(f) (emphasis added). As this Court held in *Pauma II*, State Appellants are not in bad faith when they refuse to agree to compact terms requiring that the Governor and the legislature exceed their authority under the California Constitution. *See Pauma II*, 973 F.3d at 962-63.

Another poison pill was that the Tribes' demand did not include *any* contribution to the RSTF.[10] *See* 2-ER-081. But their demand allowed operating up to 3,000 Gaming Devices at an unlimited number of Gaming Facilities. 2-ER-070-71. Importantly, every other class III gaming compact in California provides for contributions to the RSTF based on certain conditions. RSTF contributions "are

[10] The Tribes' demand provided for annual payments of $1.1 million from the RSTF. 2-ER-081. Under their demand, four of the Tribes would be recipients of the payments, as they presently are. *See* 2-ER-068 (defining Non-Gaming Tribe).

redistributed to tribes who choose not to, or are unable to, conduct their own gaming" or who limit their gaming. *Rincon*, 602 F.3d at 1023. As a practical matter, neither the Governor nor the State's legislature could agree to treat the Tribes differently in derogation of every other gaming tribe in California.[11] *See Coyote Valley II*, 331 F.3d at 1113.

The State responded to the Tribes' clearly unacceptable demand by expressing its willingness to negotiate. 2-ER-051. That response was not bad faith under IGRA.

D. The State Remained Willing To Negotiate and Had Negotiated in Good Faith

Here, over five years, State Appellants remained engaged and welcomed further negotiations—multilateral or bilateral—notwithstanding CTSC's retreats from prior consensus positions and the Tribes' take-it-or-leave-it demand. This illustrates the State's good faith that the Tribes thwarted by terminating all negotiations.

State Appellants' engagement in and willingness to continue negotiations contrast sharply with negotiating tactics that do not meet the good-faith standards

[11] Even though the Tribes would not contribute at all to the RSTF, their take-it-or-leave-it demand required the State to pay a portion of its revenues from non-tribal Gaming Activities to make up for lost RSTF contributions if non-tribal persons or entities were permitted to operate Gaming Devices or banked or percentage card games. 2-ER-081.

of the National Labor Relations Act (NLRA). Within the Ninth Circuit, district courts have looked to NLRA case law for guidance in interpreting the State's good faith under IGRA, while pointing out that the NLRA's good-faith provision should not be applied "wholesale" to the context of IGRA negotiations. *See In re Indian Gaming Related Cases v. Cal.,* 147 F. Supp. 2d 1011, 1020-21 (N.D. Cal. 2001); *Fort Indep. Indian Cmty. v. Cal.*, 679 F. Supp. 2d 1159, 1171 (E.D. Cal. 2009).

Under the NLRA, good-faith bargaining "necessarily requires that claims made by either bargainer should be honest claims." *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149, 152 (1956). "[O]bstructionist intransigence" is not good faith. *NLRB v. Big Three Indus., Inc*., 497 F.2d 43, 47 (5th Cir. 1974). "[T]he duty to bargain in good faith requires that the parties negotiate in a manner which lends itself to the possibility of reaching an accord." *NLRB v. Indus. Wire Prods. Corp.*, 455 F.2d 673, 677 (9th Cir. 1972); *see also NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943); *NLRB v. Int'l Furniture Co.*, 212 F.2d 431, 433 (5th Cir. 1954) ("The respondent's reversal of position, its withdrawal of previous agreements, and its insistence upon substituting terms that had once been discarded, are indicative of a lack of good faith."). Going through the motions of negotiation without any real intent to reach an agreement is not good faith. *Sparks Nugget*, 968 F.2d at 995.

The application of these NLRA good-faith principles to CTSC and the Tribes' abandonment of previously reached consensus positions and the Tribes' regressive take-it-or-leave-it demand highlights State Appellants' good faith. While IGRA does not impose on tribes a duty to negotiate in good faith, the statute's "cooperative federalism" framework requires that tribes, at the very least, not engage in negotiation tactics that lead to a breakdown in good-faith talks. *See United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1302 (9th Cir. 1998) (preliminary injunction by United States may be appropriate on "evidence that it was the Tribe that had failed to bargain in good faith"). That is what occurred in these compact negotiations when CTSC withdrew from critical consensus positions followed by the Tribes' demand. Based on facts here, faced with a partner negotiating backwards rather than forwards and disregarding the State's proposals, State Appellants did not fail to negotiate in good faith. *Pauma II*, 973 F.3d at 965-66.

III. UNDER IGRA, STATE APPELLANTS WERE NOT REQUIRED TO OFFER MEANINGFUL CONCESSIONS FOR NON-REVENUE SHARING REQUESTS

Neither this Court nor any other federal appellate court has decided expressly whether IGRA requires meaningful concessions in compact negotiations where, as here, a state does not seek a tax, fees, or new revenue sharing. As set forth *infra* in Section IV, the Tribes' claims focus on the State's effort to negotiate on IGRA-permitted topics. No other published case is factually or conceptually

similar to this case, which has no tax or fee component. *Coyote Valley II* and *Rincon* effectively limit meaningful concessions to demands for revenue sharing, and this Court now should expressly confirm that limitation.

The district court erroneously held that meaningful concessions were required from the State when negotiating certain IGRA-permitted topics other than taxes or fees. Acknowledging that "[t]he Ninth Circuit has only discussed 'meaningful concessions' in the context of fee demands," the district court relied on a decision from another district court for the "*expansion* of the requirement [for meaningful concessions] to other topics of negotiation." 1-ER-009 n.1 (emphasis added). This was an improper expansion of this Court's precedent that the Court should reverse.

A. This Court Has Required Meaningful Concessions in Compact Negotiations Only When a State Seeks a Tax, Fee, or Revenue Sharing

This Court never has required meaningful concessions outside of a case involving a tax or fee component.[12] In *Coyote Valley II*, the Court 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 (RSTF), 1114 (SDF). The

[12] This Court also discussed meaningful concessions in *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1100-02. There, the Court observed that IGRA prohibits taxation, but states and tribes have negotiated compacts providing for payments by the tribes to the states. *Id*. at 1101 (citing *Coyote Valley II*).

Court held that by offering meaningful concessions, 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. . . . Every other compacting tribe in California has agreed to the provision." *Id*. at 1113.

In *Coyote Valley II*, the principal, and only, meaningful concession discussed 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 1112 (RSTF); *see also id*. at 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 SDF.[13]

In *Rincon*, the State sought payments to its general fund. *Rincon*, 602 F.3d at 1024. The Court described the net effect of the State's demand: "according to the State's expert, Rincon stood to gain $2 million in additional revenues if it accepted the amendment. In contrast, the State stood to gain $38 million." *Id*. at 1025-26. This Court distinguished the RSTF and SDF contributions that it approved in *Coyote Valley II* because the "the nature of the revenue sharing and

[13] In *Rincon*, this Court observed that concession was "well beyond anything IGRA *required* the State to offer." *Rincon*, 602 F.3d at 1037.

the constitutional exclusivity obtained in consideration for it were primarily motivated by a desire to promote *tribal* interests." *Id*. at 1023-24 (citing *Coyote Valley II*, 331 F.3d at 1110-15).

In *Rincon*, this Court concluded the State demanded a tax. "No amount of semantic sophistry can 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 Court described *Coyote Valley II* as follows: "*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.'" *Id*. at 1033. The Court analyzed each of the three factors, finding the State failed to meet the requirements.

In examining those three factors in *Rincon*, this Court recognized the difference between negotiations for taxes and fees, which IGRA generally prohibits, and negotiations for IGRA's permissible topics. The State argued that the Court should analyze compact negotiations as a whole. This Court rejected that argument as to the State's revenue-sharing demands and noted that consideration for revenue sharing is independent of other negotiating topics:

> Although we do not inquire into the adequacy of consideration as a general rule, when the consideration *must necessarily be divided into two parts*—that which IGRA contemplates and that which is outside of IGRA—we cannot bundle the rights being negotiated and compare the whole to the status quo as our method for determining whether the concessions are meaningful. *The consideration in exchange for the revenue sharing must be independently meaningful* in comparison to the status quo, i.e. not illusory (or illegal) if standing alone.

Rincon, 602 F.3d at 1040 n.23 (emphasis added).

With respect to IGRA's permissible non-revenue sharing topics, this Court recognized a give-and-take process: "In order to obtain additional time and gaming devices, [the tribe] may have to submit, for instance, to greater State regulation of its facilities or greater payments to defray the costs the State will incur in regulating a larger facility." *Rincon*, 602 F.3d at 1039 (citing 25 U.S.C. § 2710(d)(3)(C)(i), (iii)). Earlier in its analysis, the Court explained, "the only conceivable way a state could 'impose' something during negotiations is by insisting, over tribal objections, that the tribe make a given concession—*a concession beyond those specially authorized by § 2710(d)(3)(C)* and contrary to the tribe's sovereign interests—in order to obtain a compact." *Id*. at 1031 (emphasis added). In other words, negotiations over IGRA's permissible topics involve a package of rights, privileges, and obligations. That package is separate from the consideration the parties may exchange for revenue sharing with the State's general fund. *See id.* at 1039.

Thus, both *Coyote Valley II* and *Rincon* reviewed under what circumstances a state must offer meaningful concessions to tribes.[14] This Court made clear that the concept of meaningful concessions arises from IGRA's prohibition against a state's attempt "to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity." *Rincon*, 602 F.3d at 1036 (citing 25 U.S.C. § 2710(d)(4)). That attempt requires separate, independent consideration. Here, the State did not seek anything IGRA prohibits. *See infra* Section IV.

B. The District Court Erred in Requiring Meaningful Concessions Because the State Did Not Seek a Tax or Fees

None of the State's negotiating topics at issue in this case was a tax or fee demand. None of those negotiating topics sought payments to the State's general fund or for its unrestricted use. Instead, they were topics within the permissible scope of 25 U.S.C. § 2710(d)(3)(C) and (d)(4). *See infra* Section IV; *see also Rincon*, 602 F.3d at 1039. Accordingly, the district court misapplied the Court's meaningful concessions analysis, which squarely is based upon IGRA's prohibition against taxation. *Id.* at 1036.

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[14] Two district courts in the Ninth Circuit discussed meaningful concessions. Both involved a tax component in the form of the State demanding a percentage of net win for its general fund. *Big Lagoon Rancheria v. Cal.*, 759 F. Supp. 2d 1149, 1155 (N.D. Cal. 2010) (*Big Lagoon*); *Fort Indep. Indian Cmty. v. Cal.*, 679 F.Supp. 2d 1159, 1164-65 (E.D. Cal. 2009).

Of the disputed negotiating topics, only the TNGF even relates to revenue sharing. But this does not make it a new revenue-sharing demand. An examination of the TNGF establishes that *Rincon*'s meaningful concessions analysis does not apply. The TNGF is merely a means for distributing surplus RSTF funds to Non-Gaming and Limited-Gaming Tribes. 3-ER-188. Like the RSTF, the TNGF aims to promote tribal interests. This Court approved the RSTF in *Coyote Valley II*: "we hold that § 2710(d)(3)(C)(vii) authorizes the RSTF provision and that the State did not lack good faith when it insisted that Coyote Valley adopt it as a precondition to entering a Tribal-State compact . . . ." *Coyote Valley II*, 331 F.3d at 1094; *see also Rincon*, 602 F.3d at 1023-24.

Not only did State Appellants not make a general fund revenue-sharing demand, they also proposed substantially reducing the RSTF contributions called for in the Tribes' 1999 Compacts. The State's September 9, 2019 proposal allowed the Tribes to expand up to 1,200 Gaming Devices without contributing anything to the RSTF. 3-ER-189. Under *Rincon*, this Court should not consider reducing compact contributions to be a tax that requires meaningful concessions. *See Rincon*, 602 F.3d at 1029 (tax is a charge imposed by the government to yield public revenue).

C. The District Court's Reliance on *Big Lagoon* Was Misplaced

Despite this Court's distinguishing between revenue-sharing demands and the give-and-take process inherent in negotiations over IGRA-permitted topics, the district court expanded the requirement for meaningful concessions beyond revenue-sharing requests. The district court relied on *Big Lagoon* as authority for this expansion. 1-ER-009 n.1. That reliance was misplaced.

Factually, *Big Lagoon* is distinct from this case. First, unlike this case, *Big Lagoon* involved negotiations in which the State demanded a tax or money for its general fund. *Big Lagoon*, 759 F. Supp. 2d at 1154-56. Second, in contrast to this case, the State repeatedly demanded restrictions on where the tribe's gaming facility would be located, what that facility would entail, and how it would be developed. *Id*. Those repeated demands led the court to require the State to offer meaningful concessions. *Id*. at 1161-62. Here, nothing the State requested rises to the level of the restrictions that it demanded in *Big Lagoon*. *See infra* Section IV. *Big Lagoon* thus is distinguishable and does not support the district court's expanding this Court's meaningful concessions decisions beyond the tax and fees context.

In sum, the district court misapplied this Court's meaningful concessions requirement that arises from IGRA's prohibition against taxation. *Rincon*, 602 F.3d at 1036 (citing 25 U.S.C. § 2710(d)(4)). No facts supported that

misapplication, and this Court should reverse the district court's bad-faith determination.

IV. THE STATE NEGOTIATED REGARDING IGRA-PERMITTED TOPICS

The Tribes' bad-faith lawsuit claimed that the State failed to negotiate in good faith because it sought to negotiate compact provisions on topics that IGRA does not permit. However, IGRA permits negotiations regarding all of the topics the State sought to include.

Specifically, the State sought to negotiate compact provisions on the following topics: (1) worker protections for Gaming Facility employees, such as the State's minimum wage and federal anti-discrimination requirements; (2) environmental mitigation for off-reservation impacts on local communities; (3) agreement to the TNGF; (4) tort remedies and protections for Gaming Facility patrons; (5) adoption and maintenance of a TLRO; and (6) recognition and enforcement of spousal and child support orders issued by the State's courts against Gaming Facility employees. While the district court correctly held that IGRA permits negotiations as to five of these topics, it erred in holding that IGRA does not permit negotiation regarding the recognition and enforcement of spousal and child support orders.

A. IGRA Permits Negotiations for Worker Protections for Gaming Facility Employees

The State sought basic protections for the Tribes' Gaming Facility employees who are directly linked to tribal Gaming Activities. In its negotiations and its September 9, 2019 proposal, the State sought minimum wage protections and workplace discrimination provisions. 3-ER-272 (discrimination), 279-80 (minimum wage). Through its negotiations, the State sought to ensure an appropriate minimal level of labor protections for employees of the Tribes' Gaming Operations and Gaming Facilities that are consistent with those for other workers in California. IGRA does not mandate otherwise.

Rather, as the district court correctly decided, worker protection certainly is a permissible topic for negotiations. 1-ER-009. In *Coyote Valley II*, this Court 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. In support of such labor provisions, the State argued: "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.* This Court agreed, holding that such protections were "directly related to the operation of gaming activities" and thus permissible pursuant to 25 U.S.C. § 2710(d)(3)(C)(vii). *Id.* at 1116.

Moreover, this Court held 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 from exploitation through the payment of wages below the State's minimum wage, or denying those workers the basic protections of anti-discrimination laws. Consistent with Congress's intent in passing IGRA, the public interest, and this Court's decision in *Coyote Valley II*, State Appellants did not violate IGRA by pursuing negotiations relating to these important topics.

B. IGRA Permits Negotiations for Environmental Mitigation of Off-reservation Impacts on Local Communities

To protect the public's interest in the environment, the State included environmental protection provisions in its September 9, 2019 proposal. 3-ER-244. Those provisions related only to mitigation of off-reservation impacts arising from Gaming Facilities and Gaming Operations. 3-ER-177. After analyzing the negotiations through the prism of *Big Lagoon*, 759 F. Supp. 2d at 1153-54, and *Rincon*, 602 F.3d at 1033, the district court correctly concluded that "[a]s part of the overall negotiation to renew the 1999 Compact, [environmental protection] can be said to be consistent with the promotion of tribal development." 1-ER-018; s*ee also Coyote Valley II*, 331 F.3d at 1111, 1114.

Consistent with the district court's conclusion that environmental mitigation issues are IGRA-permitted topics, both their 1999 Compacts[15] and the Tribes' take-it-or-leave-it demand included environmental protection provisions. Both required consultation and for a tribe to make "good faith efforts to mitigate any and all such significant adverse off-Reservation environmental impacts." *See* 1999 Compact, § 10.8 (RJN Ex. B); 2-ER-138. Under both their 1999 Compacts and the Tribes' demand, the Tribes agreed to prepare an environmental protection ordinance, and in so doing "to make a good faith effort to incorporate the policies and purposes of the National Environmental Policy Act and the California Environmental Quality Act consistent with the Tribe's governmental interests." 1999 Compact, § 10.8.1 (RJN Ex. B); 2-ER-37.

C. IGRA Permits Negotiations for the Tribal Nation Grant Fund

To assure that tribal gaming continues to benefit all California tribes, the State proposed and negotiated to include the TNGF in compacts succeeding the 1999 Compacts. The State's proposal was that any contributions for the benefit of Non-Gaming and Limited-Gaming Tribes be used for current or future RSTF

[15] The 1999 Compacts' relevant sections are identical for each of the Tribes. Each compact is publicly available on the CGCC's website. http://www.cgcc.ca.gov/?pageID=compacts. For purposes of State Appellants' argument in this Section IV and *infra* in Section V, pertinent sections of Chicken Ranch's compact are reproduced as exhibits to State Appellants' Request for Judicial Notice.

distributions with overflows—i.e., any surplus—available for TNGF distributions. When reviewing the RSTF, this Court in *Coyote Valley II* observed, "Congress sought through IGRA to 'promot[e] tribal economic development, self-sufficiency, and strong tribal governments.'" *Coyote Valley II*, 331 F.3d at 1111 (citing 25 U.S.C. § 2702(1)). Consistent with *Coyote Valley II*, the TNGF falls within the broad catchall scope of 25 U.S.C. § 2710(d)(3)(C)(vii). It is a permissible topic for negotiation.

The TNGF was not a request for new or additional contributions. Rather, it was a proposal for allocating surplus RSTF funds for the same purposes as the RSTF—i.e., promoting tribal economic development, self-sufficiency, and strong tribal governments of Non-Gaming and Limited-Gaming Tribes. This fund was created by statute in 2015, codifying a provision first included in tribal-state class III gaming compacts in 2012. Cal. Gov't Code § 12012.95, amended as § 12019.35. Additional legislation in 2018 provides for the administration of the TNGF. Cal. Gov't Code §§ 12019.30-12019.90. Like the RSTF, the TNGF defines an "eligible tribe" as a tribe operating fewer than 350 Gaming Devices. Cal. Gov't Code § 12019.30(d).

Expanding upon the RSTF, 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." Cal. Gov't

Code § 12019.35(b). Eligible purposes or projects may include, but are not limited to, development of curricula in a tribal language or culture, housing, vocational training, investments in tribal schools and colleges, investment in public health, information technology, renewable energy, water conservation, cultural preservation or awareness, educational programs, or scholarships. Cal. Gov't Code § 12019.40(c).

The TNGF is governed by a panel of tribal leaders from both contributing gaming and non-contributing tribes, who make the decisions on grant applications. Cal. Gov't Code § 12019.60(c)(2). Money is deposited into the TNGF from the RSTF only after the CGCC determines that the RSTF has sufficient funds to make all RSTF distributions and after the tribal leaders panel determines deposit is appropriate. Cal. Gov't Code §§ 12019.35(c), 12019.60, 12019.65. The TNGF does not collect new funds but is a methodology for distributing surplus RSTF funds if a surplus exists that is appropriate to be transferred as determined by the tribal leaders panel. Critically important, no portion of the TNGF is available to the State for its use. Cal. Gov't Code, § 12019.85. While this Court has not specifically reviewed the TNGF, its purposes of promoting tribal self-governance and tribal economic development are clearly aligned with IGRA's purpose of promoting "tribal economic development, self-sufficiency, and strong tribal governments." *Coyote Valley II*, 331 F.3d at 1111.

Unlike some worker and environmental protections, the Tribes did not include a provision for the TNGF in their take-it-or-leave-it demand. In fact, they did not even include a provision for contributing to the RSTF, which this Court approved in *Coyote Valley II*. Irrespective of this and given the Court's *Coyote Valley II* holding, the TNGF clearly was a permissible topic for negotiation under IGRA.

D. IGRA Permits Negotiations for Tort Remedies and Protections for Gaming Facility Patrons

To provide protections for Gaming Facility patrons who suffer property damage or injury, the State sought standards for tort liability and insurance in its negotiations with CTSC. The State's September 9, 2019 proposal included those standards. 3-ER-281.

The district court concluded that the State's proposal was appropriate under 25 U.S.C. § 2710(d)(3)(C)(vii). 1-ER-012. Consistent with the district court's conclusion regarding IGRA's scope of permissible topics, tort remedies and protections for Gaming Facility patrons were included in the 1999 Compacts and the Tribes' take-it-or-leave-it demand. 1999 Compact, § 10.2(d) (RJN Ex. C); 2-ER-141.

E. IGRA Permits Negotiation for a Tribal Labor Relations Ordinance

In *Coyote Valley II*, this Court held that a TLRO is a permissible topic under IGRA, finding it consistent with IGRA and the public interest. *Coyote Valley II*, 331 F.3d at 1116. In fact, the Tribes' take-it-or-leave-it demand included a provision for a TLRO. 2-ER-144. In light of this Court's holding in *Coyote Valley II* and the Tribes' inclusion of a TLRO, a TLRO provision certainly was a permitted topic for negotiation under IGRA, as the district court correctly decided.

F. IGRA Permits Negotiation for Recognition and Enforcement of Spousal and Child Support Orders Issued Against Gaming Facility Employees, and the State's Requests Were Not Bad Faith

To assist Californians and in the name of comity, the State sought a provision for the recognition and enforcement of spousal and child support orders issued by its courts against Gaming Facility employees. The district court's conclusion that negotiation of this topic was not permitted by IGRA was incorrect because the focus of the negotiations was within IGRA's catchall provision, 25 U.S.C. § 2710(d)(3)(C)(vii), and the Tribes' decision to terminate negotiations prevented the issue from ripening to a point where a court could assess the State's good faith or bad faith.

The topic falls within IGRA's catchall provision, which allows compact provisions on "any other subjects that are directly related to the operation of

gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii). It is a permissible topic for negotiation for three reasons. First, a clear nexus to class III gaming exists between the Tribes' Gaming Operations and the State's proposal for the employees of Gaming Operations and Gaming Facilities to comply with child and spousal support orders. State Appellants simply seek to have those employees honor important family support orders with income earned from jobs that would not exist but for a Tribe conducting Gaming Activities. In this way, the State's request is not different from its other employment-related compact topics.

Similar to the minimum wage provision, the income affected by spousal and child support is only that earned in Gaming Activity-related employment. Without the operation of Gaming Activities, the wages affected by the off-reservation spousal and child support orders would not exist; "nor, conversely, could Indian gaming activities operate without" offering these wages to their employees. *Coyote Valley II*, 331 F.3d at 1116. Accordingly, because the source of the employee income to satisfy these important family support obligations is directly tied to Gaming Activities, this negotiation topic falls within the scope of IGRA's catchall provision. 25 U.S.C. § 2710(d)(3)(C)(vii).

Second, this Court has held that states are not required to "ignore their economic interests when engaged in compact negotiations" and a court may take into account the "financial integrity of the state" in deciding whether a state has

engaged in good-faith negotiation. *Coyote Valley II,* 331 F.3d at 1111, 1115. A "State's governmental interests with respect to class III gaming on Indian lands include . . . its economic interest in raising revenue for its citizens." S. Rep. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083. Certainly, the State's "economic interests" and "financial integrity" are broad enough to encompass interests in recovering funds from adults who owe child or spousal support to Californians. Otherwise, some adults may purposely seek employment at Gaming Facilities to avoid these financial obligations. In such situations, the child or former spouse may end up relying upon social programs funded by state and local governments.

Third, IGRA does not categorically designate support provisions as evidence of bad faith; nor does IGRA state categorically that support provisions are outside the scope of proper topics. Given the nexus to the operation of Gaming Activities, the topic falls within 25 U.S.C. § 2710(d)(3)(C)(vii).

Even if the topic is not permitted under IGRA, State Appellants' request to include it during negotiations was not bad faith. State Appellants' negotiations with the Tribes were ongoing when the Tribes terminated the negotiations, delivered their take-it-or-leave-it demand, and refused bilateral talks. At no time did State Appellants demand that this subject must be included in a final compact. At the very least, the State should have been provided with an opportunity to either

compromise on this important proposal through ongoing negotiations, or withdraw it if such compromise proved impossible. Under the circumstances, the record is inconclusive to establish whether State Appellants were acting in bad faith, and the Court should not insert itself into incomplete negotiations. *See Pauma II*, 973 F.3d at 962, 965-66

V. EVEN THOUGH NOT REQUIRED UNDER THIS COURT'S DECISIONS, STATE APPELLANTS OFFERED MEANINGFUL CONCESSIONS DURING COMPACT NEGOTIATIONS

If this Court concludes for the first time that concessions are required for non-tax requests, it still should reverse the district court's summary judgment in favor of the Tribes. State Appellants offered substantial economic and non-economic concessions to the Tribes compared to their 1999 Compacts. Because the negotiations did not involve taxes, fees, or new revenue sharing, those concessions came in the give-and-take process generally applicable when negotiating on IGRA-permissible topics. *See Rincon*, 602 F.3d at 1039.

The district court, however, did not recognize those concessions. The district court required State Appellants to tie each specific concession to each specific topic of negotiation—i.e., make a "granular argument." 1-ER-020. That requirement is contrary to the negotiating process IGRA contemplates. *See Rincon*, 602 F.3d at 1039.

Importantly, the Tribes never sought specific concessions. Rather, CTSC's proposed "meaningful concessions" proposals combined—and did not separate—concessions for supposedly impermissible topics. 3-ER-309. And instead of seeking concessions for themselves, the Tribes delivered their take-it-or-leave-it demand and terminated negotiations. That effectively prevented State Appellants from offering specified concessions for any specified topics. *Pauma II*, 973 F.3d at 965-66.

A. The District Court Erred by Requiring Specific Concessions Tied to Specific Topics

The State's concessions were part of the give-and-take process when negotiating IGRA-permissible topics. *See Rincon*, 602 F.3d at 1039. The State's concessions constituted consideration "which IGRA contemplates" and did not need to be independent from those authorized by 25 U.S.C. 2710(d)(3)(C). *Id*. at 1040 n.23. The concessions were part of what would be expected in good-faith negotiations, and no separate consideration was required. *Id*. The concessions were offered in negotiations for IGRA-permitted topics. *See infra* Section IV.

Further demonstrating that the State's concessions were consistent with any standard negotiating process, the Tribes never sought specific concessions tied to specific topics. During the negotiations, CTSC proposed a "meaningful concessions" provision that lumped together all concessions for topics CTSC considered outside of IGRA's scope:

> In consideration for the Tribe agreeing to Sections __, __, __, and __ ("Sections) which the Tribe contends address matters that are not a [sic] proper subjects of negotiation under the Indian Gaming Regulatory Act, the State agrees to provide the Tribe with _____, the parties hereto acknowledge are matters about which the Tribe otherwise is not obligated to negotiate, and the Tribe deems to thus constitute, *in the aggregate*, sufficient and valuable consideration for the Tribe's agreement to the Sections.

3-ER-309 (emphasis added).

The district court disregarded the reality of the negotiation process and this Court's distinctions between negotiations over IGRA-permissible topics as opposed to taxes. Despite having no detailed briefing on concessions and the Tribes' position that concessions cannot support non-revenue-sharing provisions, the district court concluded that State Appellants "have not provided granular argument concerning meaningful concessions." 1-ER-020. The district court also stated that State Appellants did not satisfy their burden, purportedly arising under *Rincon*, "to link specific concessions as being offered in return for specific topics." 1-ER-021. The district court further found that State Appellants "have to explain in detail how much a benefit the concessions actually would provide to the Tribal Plaintiffs." 1-ER-021.

The district court's conclusions and findings were incorrect under existing Ninth Circuit authority. *Rincon* suggested the opposite when discussing negotiations regarding IGRA's permissible topics: "In order to obtain additional

time and gaming devices, [the Tribe] may have to submit, for instance, to greater State regulation of its facilities or greater payments to defray the costs the State will incur in regulating a larger facility." *Rincon*, 602 F.3d at 1039. Notably, this Court did not require this-for-that concessions in *Coyote Valley II* when it regarded approvingly the tribes' operation of slot machines and house-banked blackjack as state-granted concessions to support the RSTF (331 F.3d at 1111-12), the SDF (*id*. at 1115), and the TLRO then at issue (*id*. at 1116).

The district court also disregarded the specific facts of this case in requiring specific concessions tied to specific topics. Not only did the Tribes never seek specific concessions tied to specific topics, but they also shut the door on negotiations. They issued their take-it-or-leave-it demand, expressly told State Appellants not to submit a counteroffer, and required an unconditional acceptance of that patently unacceptable demand. Under these circumstances, State Appellants were stymied from offering specified concessions tied to specified topics. *See Pauma*, 973 F.3d at 965-66.

B. State Appellants Offered Many, Meaningful Concessions—Both Economic and Non-economic—for a Compact More Favorable to the Tribes Than Their 1999 Compacts

Prior to the Tribes' take-it-or-leave-it demand and refusal to engage in further or bilateral negotiations, the State offered meaningful concessions that were significant improvements over the 1999 Compacts. These concessions included,

among others, the following that are contained in the State's September 9, 2019 proposal.

1. Compact with No Licensing Pool

The State's September 9, 2019 proposal eliminated the 1999 Compacts' mandatory and capped license pool that requires tribes on a statewide basis to apply and compete for a limited number of Gaming Device licenses, and to pay for those licenses even if a Gaming Device is not in operation. The payments were to the RSTF and continued throughout the 1999 Compacts' terms.

The State's proposal and concession would allow the Tribes flexibility to change the number of Gaming Devices in operation as demand for Gaming Devices fluctuates, up to the compact cap amount, without obtaining or paying for a license or making annual RSTF contributions as they do under their 1999 Compacts. 1999 Compact, § 4.3.2.2 (RJN Ex. D). This concession was significant enough that the Tribes excluded the license pool from their take-it-or-leave-it compact.

2. Compact with No Special Distribution Fund Contributions as Four of the Tribes Currently Operate

Currently, four of the Tribes operate less than 350 Gaming Devices under the 1999 Compacts. *See* RJN Ex. G. Under the terms of the State's September 9, 2019 proposal, and in conjunction with a statute sponsored by the former Brown Administration, if each of the four Tribes continues to operate fewer than 350

Gaming Devices, its SDF obligation effectively may be eliminated. 3-ER-181. Every year that Government Code section 12012.96 has been in effect, all tribes that have the provision offered in the State's proposal and operate fewer than 350 Gaming Devices have had their SDF obligations eliminated. The Tribes' 1999 Compacts do not include this SDF provision. 1999 Compact, § 5.0 (RJN Ex. E). This concession was significant enough that the Tribes included it in their take-it-or-leave-it compact. 2-ER-072.

In addition to likely making no SDF contributions under the State's offer, as long as each of the Tribes operates fewer than 350 Gaming Devices, those four Tribes will continue to receive a $1.1 million annual RSTF disbursement. 3-ER-190. Those four Tribes will also be entitled to grants pursuant to the TNGF. In fact, each of the Tribes—other than Blue Lake—has already benefited from the TNGF—receiving grants since December 2019, totaling between $400,000 and $745,000. RJN Exs. F, G, H. This was possible due to the creation of the TNGF, and the TNGF provision contained in other tribal-state compacts.

3. Compact that Permits Substantial Expansion with Zero Revenue Sharing Trust Fund Contribution

The State's September 9, 2019 proposal offered the Tribes no RSTF contributions for their current operations, by eliminating RSTF payments for tribes that operate up to 1,200 Gaming Devices. 3-ER-189. The 1999 Compacts require annual RSTF payments based upon the number of Gaming Device licenses a tribe

obtains above and beyond the number of Gaming Devices it was operating when it signed its 1999 Compact. 1999 Compact § 4.3.2.2(a) (RJN Ex. D). Annual RSTF contributions are graduated depending on the number of licenses acquired.[16] In contrast, if each of the Tribes chose to increase the number of its Gaming Devices to 1,200, its RSTF contribution would be zero under the State's September 9, 2019 proposal. *See* 3-ER-189.

4. Compact with a Revenue Sharing Trust Fund Credit System

Under the State's September 9, 2019 proposal, when a tribe operates more than 1,200 Gaming Devices, a new credit system would offset a large portion of its RSTF obligations with certain categories of tribal expenditures. 3-ER-190. The credit categories cover a wide range of suggested available offsets to promote a tribe's building infrastructure and serve the needs of tribal members, Indians, and non-Indians. 3-ER-191. The 1999 Compacts do not include any credit system.

5. Compact with a Method for Curing Material Breaches

The State's September 9, 2019 proposal provided the Tribes with a new, more fulsome process for curing material breaches of the compact before a breach would result in termination of the compact. Most importantly, this section

[16] At its current operating level, Blue Lake contributes to the RSTF pursuant its 1999 Compact. The State's proposal would eliminate those RSTF contributions.

provided that compact termination must be ordered by a court as a remedy for an uncured material breach. 3-ER-292. Under the 1999 Compacts, either party can unilaterally terminate the compact upon the declaration by a court that a party had materially breached the compact. 1999 Compact § 11.2.1(c) (RJN Ex. I). This concession was significant enough that the Tribes included it in their take-it-or-leave-it demand. 2-ER-149.

6. Compact with an Extended Durational Limit

The State's September 9, 2019 proposal included a twenty-five-year term plus additional time to renegotiate a successor compact, rather than the twenty-year term in the 1999 Compacts. *Compare* 3-ER-293 *with* 1999 Compact, § 11.2.1(a) (RJN Ex. I). The State has no obligation to offer even another twenty-year compact. *See Chemehuevi*, 919 F.3d at 1154. The State's concession on an extended duration was significant enough that the Tribes included what effectively is a term in perpetuity in their take-it-or-leave-it demand. 2-ER-150.

7. Compact with an Additional Gaming Facility

The Tribes' 1999 Compacts permit each of the Tribes to operate only two Gaming Facilities. 1999 Compact, § 4.2 (RJN Ex. J). The State's September 9, 2019 proposal would permit each to operate a total of three Gaming Facilities. 3-ER-179. This concession was significant enough that the Tribes not only increased the number of Gaming Facilities each would be allowed to operate under the

Tribes' take-it-or-leave-it demand, but they made that number unlimited. 2-ER-071.

8. Compact with Required Renegotiation Provisions

The State's September 9, 2019 proposal would *require* the State to renegotiate upon a tribe showing changed conditions that "either (i) materially and adversely affect the Tribe's Gaming Operation such that the Tribe no longer enjoys the benefits otherwise provided by this Compact and the Tribe's obligations under this Compact therefore become unduly onerous or (ii) create new opportunities to expand its gaming operation beyond the limitations on Gaming Devices or Gaming Facilities of this Compact." 3-ER-294. No such provision exists in the Tribes' 1999 Compacts.

Under their 1999 Compacts, if any of the Tribes requested that the State renegotiate the compact, but that request was not within the time window for mandatory renegotiations, the State is under no obligation to meet with that Tribe until 18.5 years after that compact went into effect, irrespective of the Tribe's circumstances. 1999 Compact, § 12.3 (RJN Ex. K). Under the 1999 Compacts, except under limited, express circumstances, the State has discretion whether to agree to renegotiate, while under the State's September 9, 2019 proposal, renegotiation would become mandatory at any point during the compact's term that a tribe's market conditions changed—either for the better or worse.

This concession was significant enough that the Tribes included it in their take-it-or-leave-it demand. 2-ER-152.

9. Compact with a Force Majeure Clause

The State's September 9, 2019 proposal addressed natural disasters and related events that may cause a tribe's Gaming Operation or Gaming Facility to "be inoperable or operate at significantly less capacity." 3-ER-297. This provision is not in the 1999 Compacts. As evidenced by the COVID-19 pandemic and the devastating fires of the last five years, this provision provides more protection for the Tribes if such tragic events impact any of their Gaming Facilities. In fact, this concession was significant enough that the Tribes included it in their take-it-or-leave-it offer demand. 2-ER-155.

CONCLUSION AND SUMMARY OF REQUESTED RELIEF

For the reasons set forth above, State Appellants respectfully request that the Court reverse the district court's Order granting summary judgment for the Tribes and remand the case to the district court with directions to:

1. vacate the Order initiating IGRA's remedial process; and
2. alternatively, either (a) grant summary judgment for State Appellants or (b) determine whether the State provided sufficient meaningful concessions in accordance with this Court's decision.

Dated: August 2, 2021

Respectfully submitted,

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21-15751

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

v.

STATE OF CALIFORNIA; GAVIN NEWSOM., Governor of California,

Defendants-Appellants.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: August 2, 2021

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

25 U.S.C. §§ 2710(d)(3)(A) & (C)

(d) Class III gaming activities; authorization; revocation; Tribal-State compact.

(3)

(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

***

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(4)

(d) Class III gaming activities; authorization; revocation; Tribal-State compact.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

25 U.S.C. § 2710(d)(7)(A) & (B)

(d) Class III gaming activities; authorization; revocation; Tribal-State compact.

(7)

(A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)

(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

> (I) a Tribal-State compact has not been entered into under paragraph (3), and
>
> (II) the State did not respond to the request of the Indian tribe to negotiate such compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian [t]ribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

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

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one

which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this Act, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

California Constitution, article IV, Section 19(f)

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

California Government Code § 12012.75

There is hereby created in the State Treasury a special fund called the "Indian Gaming Revenue Sharing Trust Fund" for the receipt and deposit of moneys received by the state from Indian tribes pursuant to the terms of tribal-state gaming compacts for the purpose of making distributions to eligible recipient Indian tribes. Moneys in the Indian Gaming Revenue Sharing Trust Fund shall be available to the California Gambling Control Commission, upon appropriation by the Legislature, for the purpose of making distributions to eligible recipient Indian tribes, in accordance with distribution plans specified in tribal-state gaming compacts.

California Government Code § 12012.96

(a) On or before December 15, 2018, and on or before December 15 of each fiscal year thereafter, the Department of Finance, in consultation with the California Gambling Control Commission, shall determine if total revenues estimated for the Indian Gaming Special Distribution Fund in the current fiscal year are anticipated to exceed estimated expenditures, transfers, reasonable reserves, or other adjustments from the fund for the current fiscal year. As determined by, and within the discretion of, the Department of Finance, if the estimated revenues to the fund, along with any prior year excess revenues, exceed the estimated expenditures, transfers, reasonable reserves, or other adjustments from the funds, the California Gambling Control Commission, upon approval by the Department of Finance, shall apply the amount of funds directed by the Department of Finance to reduce, eliminate, satisfy, or partially satisfy, on a proportionate basis, the pro rata share payments required to be made to the fund by limited gaming tribes, as defined in class III gaming compacts.

(b) This section shall apply to each limited gaming tribe for the period in which the limited gaming tribe has a compact obligation to contribute to the fund, as specified in the limited gaming tribe's compact, regardless of any action taken pursuant to subdivision (a).

California Government Code § 12019.30

Unless the context requires otherwise, for purposes of this article, the following terms shall have the following meanings:

(a) "Advisor" means the Governor's Tribal Advisor.
(b) "Bureau" means the Bureau of Gambling Control within the Department of Justice.
(c) "Commission" means the California Gambling Control Commission.
(d) "Eligible tribe" means a nongaming or limited-gaming federally recognized tribe in California as defined in applicable tribal-state gaming compacts.
(e) "Fund" means the Tribal Nation Grant Fund established by Section 12019.35.
(f) "Grant" means an amount of money paid to an eligible tribe from the fund awarded by the panel through a competitive process pursuant to this article.
(g) "Panel" means the Tribal Nation Grant Panel established by Section 12019.60.
(h) "Program" means the Tribal Nation Grant Fund Program established by this article.

California Government Code § 12019.35

(a) There is in the State Treasury the Tribal Nation Grant Fund for the receipt and deposit of moneys received by the state from Indian tribes pursuant to the terms of tribal-state gaming compacts. The fund reflects a vision of facilitating tribal self-governance and improving the quality of life of tribal people throughout the state.

(b) The Tribal Nation Grant Fund shall be administered by the California Gambling Control Commission, which shall act as the limited trustee as provided under the terms of applicable tribal-state gaming compacts and shall not be subject to the duties and liabilities provided in the Probate Code, common law, or equitable principles. Moneys in the fund shall be available, upon appropriation by the Legislature, for the discretionary distribution of funds to nongaming tribes and limited-gaming tribes upon application of those tribes for purposes related to effective self-governance, self-determined community, and economic development.

(c) The California Gambling Control Commission shall deposit money into the fund only after it determines there are sufficient moneys in the Indian Gaming

Revenue Sharing Trust Fund to distribute the quarterly payments described in Section 12012.90.

California Government Code § 12019.40

(a) There is in state government the Tribal Nation Grant Fund Program whereby the panel is authorized to award grants from available moneys within the fund and make other distributions from the fund to eligible tribes as set forth in this article.

(b) A request for a grant shall be made by submitting an application to the commission on a form approved by the panel and provided by the commission. Unless prohibited by a tribal-state gaming compact or the panel, an eligible tribe may apply for more than one grant, but shall submit a separate application for each grant proposal. Two or more eligible tribes may apply for one grant by submitting a joint application.

(c) A grant shall be used to fund a specifically described purpose or project generally relating to self-governance, developing a self-determined community, and economic development in the application. Eligible purposes or projects may include, but are not limited to, development of curricula in a tribal language or culture, housing, support for compliance with the federal Indian Child Welfare Act, vocational training, community development, investments in tribal schools and colleges, support of tribal government institutions and tribal courts, nongaming economic diversification, or investment in public health, information technology, renewable energy, water conservation, cultural preservation or awareness, educational programs, or scholarships.

(d) A grant shall not be used to pay a per capita distribution to tribal members or an investment in a purpose or project related to any gaming operation or activity.

California Government Code § 12019.85

The activities authorized and required by this article, including, but not limited to, the administrative and procedural support services provided by the commission, its staff, and the advisor, the costs and compensation of members of the panel, and the costs of audits, are regulatory costs in connection with the implementation and administration of responsibilities imposed by tribal-state gaming compacts, and shall be funded by moneys in the Indian Gaming Special Distribution Fund, and shall not be funded from the Indian Gaming Revenue Sharing.

California Government Code § 12019.90

Actions taken under this article shall be consistent with the provisions of tribal-state gaming compacts.

CERTIFICATE OF SERVICE

Case Name: ***Chicken Ranch, et al., v. Edmund G. Brown, Jr., et al.*** Case No. **21-15751**

I hereby certify that on August 2, 2021, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- **APPELLANTS' OPENING BRIEF;**
- **APPELLANTS' REQUEST FOR JUDICIAL NOTICE; AND**
- **APPELLANTS' EXCERPTS OF RECORD INDEX, AND VOLUMES 1, 2 AND 3**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on August 2, 2021, at Sacramento, California.

PAULA CORRAL	*s/ Paula Corral*
Declarant	Signature