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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BEAR RIVER BAND OF ROHNERVILLE RANCHERIA, a federally recognized Indian Tribe,

Plaintiff,

v.

STATE OF CALIFORNIA, and GAVIN NEWSOM IN HIS OFFICIAL CAPACITY AS GOVERNOR OF CALIFORNIA,

Defendants.

1:20-cv-01539-AWI-SKO

STATE DEFENDANTS' REPLY TO BEAR RIVER BAND'S OPPOSITION TO STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Date:	August 9, 2021
Time:	1:30 p.m.
Dept:	2, 8th Floor
Judge:	Honorable Anthony W. Ishii
Trial Date:	N/A
Action Filed:	8/12/2020

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Defendants, Governor Gavin Newsom and the State of California (State) (collectively, State Defendants), submit the following reply to the Memorandum of Points and Authorities in Support of Opposition to State Defendants' Motion for Summary Judgment (Opposition) by Plaintiff Rohnerville Band of Bear River Rancheria (Bear River or Tribe).

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2000, California voters enacted a constitutional provision giving Indian tribes the exclusive right to operate Nevada-style casino gambling in California. Bear River entered into a tribal-state class III gaming compact (1999 Compact) with the State and operates a Gaming Facility[1] pursuant to those terms.

Chronicling more than five years of extensive negotiations, the record of negotiations (Record) between the parties shows that the State has negotiated in good faith under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, 18 U.S.C. §§ 1166-1167, for a new successor compact. The Record documents how the State improved upon Bear River's existing 1999 Compact during these negotiations. The State offered Bear River the opportunity for a new twenty-five-year compact with no contributions, under the scope of its current operations, to either the State's regulatory costs or towards revenue sharing with other California tribes. In addition to these economic concessions, the Record documents the many non-economic concessions offered by the State, including a compact with improved renegotiation terms. Finally, the Record shows that Bear River would be authorized to offer the public, pursuant to the State's proposed compact and the State's Constitution class III gaming with 2,000 Gaming Devices at three Gaming Facilities, increasing the number of authorized facilities

Despite these improved terms and the State's willingness to further negotiate, Bear River insisted the State was negotiating in bad faith because it was entitled to an even better deal. The Tribe suddenly withdrew from negotiations and filed suit. The Record in support of the State Defendants' Memorandum of Points and Authorities in Support of Motion for Summary Judgment (State's Motion), which Bear River largely does not dispute, shows how the State

[1] Terms that are defined in Bear River's 1999 Compact, or terms that were proposed in the State Defendants' draft compacts to the Compact Tribes Steering Committee (CTSC), such as Gaming Facility, are capitalized in this brief.

Defendants negotiated in good faith under IGRA.

The State significantly improved Bear River's 1999 Compact, did not demand negotiation topics outside of IGRA's scope, provided meaningful concessions, and maintained a willingness to further discuss and flexibly negotiate over disagreements. This Record, displaying the State's ongoing willingness to support tribal gaming and participate in IGRA's cooperative federalism process, shows that the State has negotiated in good faith. If Bear River desired a different compact proposal from that negotiated in the multilateral CTSC setting, then it should have pursued that request in separate bilateral negotiations with the State.

ARGUMENT

I. THE STATE DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD BE GRANTED BECAUSE THE RECORD SHOWS THE STATE'S GOOD FAITH IN OFFERING BEAR RIVER MEANINGFUL CONCESSIONS

Bear River's Opposition continues to argue that the State Defendants failed to negotiate in good faith, and did not offer the Tribe meaningful economic concessions during CTSC compact negotiations. The Record shows otherwise. On economic topics that included the elimination of the license pool, and the opportunity to operate contribution-free Gaming Facilities under the scope of the Tribe's current operations, Bear River completely fails to dispute critical facts showing the State Defendants' good faith.

A. The State Defendants' Economic Concessions Are More Favorable than Bear River's 1999 Compact

The State's Motion describes in detail a number of economic concessions designed that make the State's economic proposals more favorable than Bear River's existing 1999 Compact. The centerpiece of these proposals focuses on the State's offer of a compact with no Revenue Sharing Trust Fund (RSTF) and Special Distribution Fund (SDF) contributions.

Significantly, Bear River does not dispute the key facts regarding the State's economic proposals. Under the terms of the State's March 2020 economic offer, and in conjunction with a statute sponsored by the former Brown Administration, if Bear River continues to operate fewer than 350 Gaming Devices, its SDF obligation will likely be zero. DUF 10, 32. Every year that California Government Code section 12012.96 has been in effect, for all tribes operating fewer

than 350 Gaming Devices that have the provision offered Bear River in its compact, their SDF obligations were eliminated. DUF 32. The Tribe does not dispute these facts.

The State Defendants' proposed compact would further allow Bear River to make no RSTF contributions for its current operations, and permit the Tribe to expand its Gaming Facility to operate up to 1,200 Gaming Devices with no required RSTF contributions. DUF 28. In contrast, if Bear River expanded to 1,200 Gaming Devices under its current 1999 Compact, the Tribe would be required to contribute $555,000 to the RSTF annually based on the 1999 Compact RSTF formula. DUF 25, 27.

In addition to making no RSTF or SDF contributions, under the State's offer, as long as Bear River operates fewer than 350 Gaming Devices, the Tribe will continue to receive a $1.1 million annual RSTF disbursement. DUF 10, 30-31. The Tribe will also be entitled to grants pursuant to the TNGF. This is possible due to the creation of the TNGF, and the TNGF provision contained in other tribal-state compacts. In fact, from 2019 through 2021, in addition to its RSFT grants, Bear River has also received $743,445 from the TNGF. DUF 33. Again, the tribe does not dispute these RSTF and TNGF facts regarding the State's economic proposals.

Rather than challenging the economic benefits contained in the State's new proposals, Bear River objects to comparing these offers to its existing 1999 Compact. According to Bear River, this comparison is improper because the 1999 Compact will soon expire. Opp'n at 38:9-12. Also, the State may not waive SDF contributions in the future, making this benefit speculative. *Id*. at 39:14-16.

This argument is unpersuasive. First, the State is not obligated to offer a compact that does not require a tribe to make contributions towards the State's regulatory costs under IGRA. This is particularly true in this case, given that the Ninth Circuit affirmed SDF contributions as permissible in *In re Indian Gaming Related Cases v. State of California*, 331 F.3d 1094, 1111-14 (9th Cir. 2003) (*Coyote Valley II*). Using simple logic, if the 1999 Compact's economic proposals were found to be in good faith, then State Defendant's better economic offer should also not violate IGRA. Given the undisputed facts and law, the State's CTSC proposals were made in good faith.

Second, in regard to Bear River's claimed concern that it might be required in the future to make RSTF or SDF contributions (Opp'n at 39:9-27), the Tribe could have pursued this matter in bilateral negotiations with the State. The importance of this issue was highlighted by the Ninth Circuit in *Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation v. California,* 973 F.3d 953 (9th Cir. 2020) (*Pauma II*). *Pauma II* reaffirmed that when determining good faith, courts can consider whether the State remained willing to meet when the plaintiff tribe filed its IGRA lawsuit. *Id.* 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.") In rejecting the plaintiff tribe's claim that the State was engaged in "surface bargaining" over lottery games, the Ninth Circuit noted the State did not engage in bad faith in when it requested from the tribe "specific language to prevent inadvertent approval of unlawful lottery games." *Id.* Due to the plaintiff tribe's failure "to respond to the State's position, the parties did not further explore each other's views on this issue." *Id.* Based on that record of negotiations, the Ninth Circuit held that "[w]e abstain from inserting ourselves into *incomplete negotiations*." *Id.* (emphasis added).

Similar to the plaintiff tribe in *Pauma II,* if Bear River had seriously desired a compact offer that addressed any concerns about the Tribe making future SDF or RSTF contributions, then it could have addressed this matter with the State in bilateral negotiations. Specifically, Bear River could have accepted the State's offer made in a letter dated July 15, 2020, to enter into bilateral negotiations prior to commencing litigation. JUF 203. The State's offer for bilateral negotiations was repeated in another letter to Bear River on July 31, 2020. As the letter advised, these bilateral negotiations would provide the State and Bear River with the opportunity to focus on provisions to accommodate Bear River's specific economic challenges. JUF 205. But because Bear River failed to do so, these alleged concerns about possible future RSTF or SDF contributions went unaddressed. Under *Pauma II*, this Record supports summary judgment in favor of the State, and not Bear River.

Finally, if Bear River truly wants a compact proposal that ignores the 1999 Compact, the Tribe would not necessarily receive all the generous benefits contained in either its 1999 Compact

or the State's proposals to CTSC. For example, Bear River would not necessarily receive a proposal to avoid Gaming Device license fees. The Tribe would have no authorization to operate three Gaming Facilities rather than one. And the total number of authorized Gaming Devices might be significantly less than 2,000. All of these subjects would be open for negotiation under 25 U.S.C. § 2710(d)(3)(C)(vi)-(vii), and the compromises between the parties could look dramatically different if, going forward, Bear River really wants to no longer consider the 1999 Compact as a proper comparison.

B. Bear River's Arguments Regarding Economic Savings Fail To Negate the State's Good Faith in Negotiations

In addition to arguing against its 1999 Compact as a reference point, the Tribe also attempts to show the State's alleged bad faith in negotiations, in part, by minimizing the value of the State's proposed SDF and RSTF economic savings. Based on the undisputed Record, these arguments are without merit.

1. The Undisputed Facts Show that the State Negotiated in Good Faith Regarding the SDF

Faced with undisputed savings, Bear River attempts to minimize those savings by claiming that the State's SDF demands would still require excessive contributions that "would expose the Tribe to payments far beyond the State's actual costs of regulation." Opp'n, 13:17-18. According to Bear River, its "'pro rata' share of the State's regulatory costs would not be based on what the State actually spends regulating the Tribes Gaming Activities," but instead upon "whatever the Legislature may appropriate for the portion of the State Gaming Agency's budget related to tribal gaming . . . ." *Id.* at 13:19-14:1. Bear River claims that because "[t]here is no reason to believe" that this legislative appropriation process constitutes "an accurate proxy for the State's actual costs of regulation[,]" this demanded SDF system violates IGRA's prohibition on taxes under 25 U.S.C. §2710(d)(4). *Id.* at 14:2-6.

These arguments do not stand up to examination under this case's Record and undisputed facts. The arguments fail to show any bad-faith negotiations by the State for five reasons. First,

the SDF is a proper subject of negotiation. IGRA provides that compacts may include provisions like the SDF for assessments to cover the State's costs of regulating tribal gaming. 25 U.S.C. § 2710(d)(3)(C)(iii). The SDF was created by statute in 1999 as part of the 1999 Compacts and remains in place today. Cal. Gov't Code § 12012.85. The SDF is to be used for grants to address gambling addiction, grants to support state and local governments impacted by tribal gaming, and to compensate the State for the regulatory costs incurred "in connection with the implementation and administration of tribal-state compacts." Cal. Gov't Code § 12012.85(a)-(c). The "priority use" of the SDF is to cover any shortfalls in the RSTF. Cal. Gov't Code § 12012.85(d). Except for these specific purposes denominated in the statute, the SDF is not available to the State for its use. *Coyote Valley II*, 331 F.3d at 1114 (noting that "the terms of the compact restrict what the State can do with the money it receives from the tribes pursuant to the SDF provision, and all of the purposes to which such money can be put are directly related to tribal gaming"). Given this authority to seek contributions for regulatory costs under IGRA, the State's proposal to not require these contributions is a meaningful concession.

Second, Bear River's argument that the State is demanding excessive contributions for regulatory costs wrongfully implies that the State's current SDF requests are broader than the Tribe's 1999 Compact. In fact, permitted SDF spending under both Bear River's existing 1999 Compact and the State's proposal remain firmly restricted. As discussed above, SDF spending is controlled by the compacts, state law, and Ninth Circuit precedent. Cal. Gov't Code § 12012.85(a)-(d); *Coyote Valley II*, 331 F.3d at 1114. Nothing in the State's current SDF proposal expands upon these prescribed limited uses. And critically important, Bear River does not, and cannot, dispute that the Ninth Circuit previously approved the State's proposed SDF with these limitations under IGRA's catch-all provision in 25 U.S.C. § 2710(d)(3)(C)(vii). *Coyote Valley II*, 331 F.3d at 1111.

Third, the State Defendants' proposal to offer a SDF and RSTF contribution-free compact, with generous expansion opportunities, is particularly significant in light of the exclusivity for compacting tribes to operate certain forms of class III gaming. The Ninth Circuit in *Rincon* held that the State's continued offer of exclusivity constitutes "a benefit [that] was 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). The Ninth Circuit described exclusivity as "a rare example of generosity" because the State offered this monopoly to the tribes "in exchange for a program under which all of the significant *benefits* of the compact were to be enjoyed by the *tribes* themselves." *Id.* While *Rincon* observed that "the State cannot use exclusivity as new consideration for new types of revenue sharing" (*id.*), the State Defendants made no such new revenue demands on Bear River during the CTSC negotiations.

In contrast to *Rincon*, where the State attempted to seek new revenue sharing from the tribe for the State's general fund, here the State Defendants offered to Bear River, based on the number of Gaming Devices that it currently operates, a contribution-free compact. Accordingly, this Record does not show the need for new consideration in exchange for new revenue sharing. Rather, the Record documents the State's good-faith effort to offer a new compact permitting Bear River to continue participating in the offering of exclusive forms of class III gaming while also making no contribution to either the SDF or RSTF. The ongoing value of this exclusivity as a continued meaningful concession in California compacts has been repeatedly acknowledged by the United State Department of the Interior.

Fourth, all of Bear River's complaints regarding revenue sharing, including both the SDF and the RSTF, ignore the Ninth Circuit decision in *Pauma II*. If Bear River had serious concerns after receiving the State's economic proposals regarding specific SDF or RSTF obligations, the Tribe could have, and should have, addressed this matter with the State in bilateral negotiations. JUF 205. Because Bear River failed to do so and filed suit instead, the Tribe's alleged concerns regarding revenue sharing could not be addressed.

Fifth, while Bear River criticizes the California Legislature's role in appropriating funds under the SDF, this process is identical to Bear River's 1999 Compact. Equally important, it is the same SDF process that was approved by the Ninth Circuit in *Coyote Valley II* and *Rincon*. And while Bear River's Opposition points to one instance involving a 2019 legislative audit that found certain SDF funds were improperly spent on employee time at the Department of Justice, Bureau of Gambling Control (Bureau) on card room-related activities rather than the regulation of

tribal casinos (Opp'n, 14:7-12), this misallocation of SDF monies does not equate to evidence of bad-faith negotiations by the State. To the contrary, both Bear River's existing compact and the State's proposals provide for an existing breach-of-compact remedy to deter and prevent any such misspending. Indeed, the California Legislature's audit process cited to by Bear River demonstrates that the Legislature plays a valuable role in preventing and curing any misspending of appropriated SDF monies.[2]

Accordingly, the lack of any current obligation to make a SDF contribution, the current statutory and compact restrictions on SDF spending, along with the California Legislature's audit functions that enforce these restrictions, are sufficient to ensure that Bear River will not be charged any "excessive" SDF contributions for the State's regulatory costs. The State has not negotiated in bad faith under IGRA regarding the SDF.

2. The Undisputed Facts Show that the State Negotiated in Good Faith Regarding the RSTF

Bear River attempts to minimize the importance of its current lack of any requirements to make RSTF contributions by claiming that the State's demanded excessive RSTF contributions.[3] Opp'n, 15-16. These attempts fail in light of the undisputed facts.

Bear River ignores IGRA's goal of tribal self-sufficiency to attack proposals focused on achieving that goal. Bear River criticizes the State's RSTF proposal by attacking the new RSTF credit system. Opp'n, 15-16. Specifically and inaccurately, the Tribe claims that the State's proposal would permit the Tribe to "divert up to either 60% or 80%" of its contributions "from the RSTF to other expenditures that the State would have the right to approve in advance and review and potentially disallow after the fact." *Id.* at 15:14-17. Bear River complains that

[2] In fact, when the California State Auditor determined that the Bureau had misallocated to the SDF some expenditures that should have been allocated to the State's Gambling Control Fund, the Bureau corrected the issue immediately and created a policy to ensure the issue did not recur. *See* State Defendants' Request for Judicial Notice in Support of Opposition to Tribe's Motion for Summary Judgment (State Opposition RJN), Ex. A. The issue was resolved in 2019.

[3] The Tribe also notes that it currently operates fewer than 350 Gaming Devices, but might operate more than 1,200 Gaming Devices at some point in the next 25 years. Opp'n, 15, n.10. It is worth noting that in the 20 years since the RSTF's inception, Cahuilla has never operated more than 349 Gaming Devices and has received the maximum RSTF distribution. State Opposition RJN, Ex. B, 3:3.

allowing this alleged diversion of RSTF funds, while "taking away" the Tribe's discretion regarding how it should spend tribal funds, is inconsistent with IGRA's purpose of promoting tribal economic development and self-sufficiency. *Id.* at 15:18-23.

Following the same vein, the Tribe complains that an RSTF system that relies on credits is excessive because it demands more than what is required to fund the RSTF, and exceeds the "reasonable payments into the RSTF" that were approved by the Ninth Circuit in *Coyote Valley II*, 331 F.3d at 1112-13. Opp'n, 16:11-15. Finally, the Tribe argues that the RSTF credit system is a revenue sharing demand. *Id*. at 40:19-21.

However, when analyzed under this case's undisputed facts, none of these arguments or complaints shows that the State's RSTF proposals amounted to bad-faith negotiations under IGRA. Instead, Bear River's assertions mischaracterize the RSTF credit system and demonstrate the Tribe's refusal to understand the State's proposal.

First, Bear River is mistaken in characterizing the State's proposed RSTF credit system as an effort to "divert" funds from the RSTF. Under this proposed system no funds are transferred out of the RSTF and sent back to tribes that are claiming the credits. Rather, tribes that are obligated to make RSTF contributions under their compacts are permitted to reduce their RSTF contribution by claiming credits. Specifically, for a tribe operating more than 1,200 Gaming Devices, this system would offset a large portion of the tribe's RSTF obligations with certain categories of tribal expenditures, covering a wide range of suggested available offsets. They include many expenditures that clearly benefit tribes. *See* State's Mot., 18:4-16 (listing examples); *see also* DUF 11.[4]

[4] Under the RSTF credit process in the State's March 2020 draft compact proposal to CTSC, the tribe first shares with the State its budget for planned expenditures in the credit categories for the upcoming year. Add'l RON, Vol. 1, pp. 430-32. Section 5.3(e) contains the credit review process and the draft credit categories are listed in section 5.3(a) through (d). *Id*. The State then reviews the proposed credits, with the opportunity to request clarification from the tribe. If the State does not object to the planned expenditures within ninety days, the planned expenditures may be utilized as a credit against the total amount of the tribe's contribution to the RSTF and the State may not later seek to disallow those expenditures. *Id*. (§ 5.3(e).) As stated in the draft compact, "[t]he State's intent is to encourage the Tribe to make full use of the credits as specifically defined and articulated under this section 5.3." *Id*. If a tribe finds that it cannot take

As is clear from the State's proposal, rather than *divert* funds from the RSTF, the credit system permits donor tribes to *reduce* their RSTF contributions. For tribes that make RSTF contributions, unlike Bear River, the State's proposed credit system represents part of a plan to reduce compact contributions on an annual basis. It shows the State's good-faith negotiations under IGRA.

Next, the Tribe's misunderstanding of the RSTF credit system is shown by its argument that the State is taking away tribal discretion. To the contrary, the RSTF credit system is neither an effort to undermine tribal self-sufficiency by removing from tribes the discretion on how to spend tribal funds, nor an attempt to increase any tribe's RSTF contributions. In fact, even if Bear River made RSTF contributions, the State's proposal does not mandate that Bear River participate at all in this credit system or require funds to be used in a particular manner. The total tribal contribution under the compact would be the same. If a tribe takes allowable credits, its actual contribution to the RSTF is reduced in proportion to the credits. It if does not take those credits, the RSTF compact contribution is the amount negotiated.

Further, Bear River's complaint mischaracterizes a key component of the State's proposal. Rather than forcing tribes to spend funds on unnecessary, unimportant, or wasteful projects, this

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the full amount of the credits pursuant to section 5.3, the State is required to renegotiate the amount of credits. *Id*.

Section 5.3 also provides that the tribe can carry forward any excess RSTF payment credits until they are exhausted. Add'l RON, Vol. 1, pp. 430-32. (§ 5.3(e).) This provision allows a tribe to receive RSTF payment credits for a large qualifying expenditure, perhaps the construction of a tribal health clinic, where the construction costs are far larger than the tribe's authorized annual credits. With the carry forward provision, the tribe can elect to take the total amount of the expenditure (the clinic construction costs) as credits against its RSTF contribution over time. For example, if the health clinic's total construction cost was $25 million, the tribe could take credits against its RSTF obligation each year until the $25 million amount is fully expended as a credit. To further illustrate, if the tribe's total RSTF contribution based on the compact-specified percentage of its Net Win was $6 million, and the tribe was entitled under the compact to take 60% of that amount as a credit, its RSTF annual credit amount would be $3.6 million (60% x $6 million = $ 3.6 million). Credits for the tribe's $25 million costs could be spread over almost seven years because each year the tribe would take its full $3.6 million credit and carry over the credit balance to the next year. In year one, a $3.6 million credit is taken and the balance of $21.4 million is carried forward; in year two, a $3.6 million credit is taken and the balance of $17.8 million is carried forward, etc., until the entire $25 million cost of the health clinic has been taken as credits against the tribe's RSTF contribution obligations.

credit system recognizes tribes for investing in a broad scope of projects that clearly promote tribal self-sufficiency and economic development. The credit system recognizes the participating tribes' investment in critically important areas including tribal health care, education, housing, public transit and public safety with a commensurate reduction to their RSTF contributions. DUF 11 and 28. Incentivizing tribes to invest in these broad areas with lower RSTF contributions advances IGRA's goal to strengthen tribal governance, economic development, and self-sufficiency. The proposal is certainly not evidence of bad faith.[5]

Finally, the State Defendants are disappointed by Bear River's argument that the proposed credit system is "taking away the Tribe's discretion whether, for what purposes and in what amounts it should spend its own money" in violation of IGRA. Opp'n, 15:19-20. This claim is simply inconsistent with the Record, which documents the extremely broad RSTF credit categories offered by the State and the voluntary nature of the credits. DUF 11 & 28. Rather than reducing tribal sovereignty by "taking away" tribal discretion on how to spend funds, this Record highlights the cooperative federalism approach adopted by the State in an effort to provide a voluntary process for reducing RSTF contributions. And if Bear River believed that it required sovereign-to-sovereign negotiations to develop a credit system that was further tailored to its specific tribal economic interests, then the Tribe should have accepted the State's offer for bilateral negotiations.[6]

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[5] The State acknowledges the accuracy of Bear River's statement that the actual costs to the Tribe of these expenditures to obtain credits would reduce the overall total annual RSTF and SDF savings estimated by the State. But two points are worth noting. First, these expenditures, which no doubt constitute important investments in the Tribe's human and capital infrastructure, will possess great value to Bear River. Second, the RSTF credit system is designed broadly to permit tribes to obtain RSTF credits for vital expenditures they are already making or are likely to make under any circumstances.

[6] Bear River uses the declaration of Jay Shapiro in support of its argument that the State has entered into compacts containing a "crazy-quilt of percentages of Net Win and credit offsets, ranging from as little as 4.5% of Net Win before credits, and credits of as much as 80% (for an effective RSTF contribution rate of 1.2%)" and that the "State's demand persisted throughout the Tribe's negotiations." Opp., 40:27-41:2. The Shapiro declaration attaches a table with various tribes listed, the year a tribe's compact was successfully renegotiated, the percentage of annual Net Win or Gross Gaming Revenue (GGR) on which a tribe's RSTF contribution is based, the credit formula, and the percentage of Net Win or GGR after credits. As noted in the State's objection to the Tribe's opposition evidence, the compacts speak for themselves and the State has not verified the Tribe's math. However, the State does not dispute that each of the twenty-one

3. The Undisputed Facts Show that the State Negotiated in Good Faith Regarding the TNGF

Similar to its SDF and RSTF complaints, Bear River's arguments that the State failed to negotiate in good faith over the TNGF are not supported by the Record. Bear River complains that the TNGF (1) is State created, (2) uses subjective criteria for distributing grants, (3) prohibits per capita distributions, (4) does not permit grants for gaming-related purposes, (5) is subject to audits, and (6) fails to distribute grants equally to all tribes. Opp'n, 16-18. Bear River further complains that the State engaged in "surface bargaining by failing to timely respond to the RSTF II" counterproposal. *Id*. at 18:27-19:8.

Bear River's TNGF assertions misinterpret the proposal. Analogous to the RSTF, the TNGF is another method of sharing tribal revenues with other tribes in California. 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 and consistent with IGRA's goals, 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

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tribes listed has an individual compact tailored to its specific needs and circumstances, including economic terms. Among the 78 gaming tribes in California, some are large and some are small. Some only recently built their first class III Gaming Facility; some have been operating class III games for decades. Some have favorable locations for casinos, located close to major population centers that support more Gaming Devices; some are located in rural areas far away from major population centers. The commonality among all of these tribes—including the eight former CTSC member tribes on the list (DUF 1)—is that they negotiated bilaterally with the State for compacts tailored to their individual circumstances. Bear River, on the other hand, refused bilateral negotiations.

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 and eligible tribes, who make the decisions on grant applications. Cal. Gov't Code § 12019.60(c)(2). Money is deposited into the TNGF only after the California Gambling Control Commission (Commission) determines that the RSTF has sufficient funds to make all RSTF distributions and after the panel of tribal leaders determines the 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 there is indeed a surplus that is appropriate to be transferred, as determined by the tribal leader panel.

Critically important and consistent with its support of eligible tribes, no portion of the TNGF is available to the State for its use. Cal. Gov't Code § 12019.85. While the Ninth Circuit has not specifically reviewed the TNGF, its statutory 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 (citing 25 U.S.C. § 2702(1)).

Additionally, in *Chicken Ranch Rancheria, et al., v. State of California, et al.,* Case No. 1:19-cv-00024-AWI-SKO (*Chicken Ranch*), this Court's Order Re: Cross Motions for Summary Judgment, filed March 31, 2021 (Order) confirmed that the TNGF is a proper subject of negotiation under IGRA. Order, 18. In reaching its ruling, this Court observed that in *Coyote Valley II* the Ninth Circuit held that "requiring Indian tribes to fund the RSTF and SDF was within the scope of Section 2710(d)(3)(C)(vii) and that the state offered 'meaningful concessions' in exchange for that funding. *Coyote Valley II*, 331 F.3d 1094, 1111-14." Based on the Record, this Court rejected the argument that the TNGF was an impermissible tax under IGRA, concluding that "the purpose of TNGF appears to be similar to the RSTF." Order, 18:16-17. Narrow factual distinctions between how the RSTF and TNGF distribute revenues to tribes do not change this outcome.

Finally, the State did not fail to negotiate in good faith with Bear River regarding the SDF, the RSTF, and the TNGF because it remained willing to further negotiate with the Tribe. If Bear River wanted to discuss specific proposals related, or tailored, to its circumstances, the Tribe could have accepted the State's offer to enter into bilateral negotiations. JUF 89, 205; *see also Pauma II*, 973 F.3d at 962. Considering that Bear River receives funds from the RSTF and TNGF, and does not pay into them under the State's proposals, it is difficult to appreciate what additional benefits Bear River may have requested.

Bear River's complaint about the State's handling of CTSC's RSTF II counterproposal also is unfounded when examined in light of the Record. In its Opposition, Bear River asserts that its concerns and those of other CTSC tribes led to the RSTF II counterproposal. But the Record does not support Bear River's complaint that the State's response to this counterproposal constituted "surface bargaining." Opp'n, 18:27-19:8. Rather, the Record shows that CTSC first proposed the RSTF II in its July 2019 compact draft, which was submitted over four years after CTSC negotiations began. RON, Vol. 17, pp. 9396-98. The proposal consisted of adding a definition identical to the existing definition of RSTF. RON, Vol. 17, p. 9383 (Sec. 2.33 "Revenue Sharing Trust Fund II"). The CTSC proposal was that CTSC tribes contribute only to the RSTF II, not the RSTF, yet the RSTF would continue to make the annual $1.1 million dollar distributions. RON, Vol. 17, pp. 9396-98.

The Record further shows that the parties discussed the RSTF II proposal at the September 2019 negotiation session. RON, Vol. 23, pp. 10005-06. These discussions highlighted the State's significant concerns regarding the proposal. For example, the State noted that new legislation would be needed; the statute cited in the CTSC proposal as establishing the repository fund for the RSTF II applies only to the RSTF. *See* Cal. Gov't Code § 12012.75. In its January 2020 compact draft, the State noted regarding the RSTF II proposal: "Following the discussions regarding the RSTF II, the State is open to the concept of an RSTF II, but has significant concerns with its implementation in its current form. It is not currently viable and would require legislative change." Add'l RON, Vol. 1, p. 105, Comment [A18]. At the January 2020 negotiation session, the parties discussed the proposal further, and the State noted again it

was continuing to consider the RSTF II proposal but had "ongoing concerns with how they've presented it in its current form." Add'l RON, Vol. 1, p. 241. At the April 2020 meeting, CTSC said it would "develop and present a further refinement of the CTSC's [RSTF II] proposal" to address the State's concerns regarding the need for legislation or an alternative repository. Add'l RON, Vol. 1, pp. 735:25-736:1. This was the last meeting before Bear River withdrew from the CTSC.

Similar to its complaints regarding the SDF and RSTF, if Bear River wanted to seriously pursue the RSTF II counterproposal as an alternative to the TNGF, then it should have agreed to the State's offer of bilateral negotiations or proposed a compromise that addressed the concerns raised by the State as a part of the CTSC negotiations. But because Bear River failed to do so, under *Pauma II*, this Record does not support Bear River's bad-faith negotiation claim regarding the TNGF.

C. In Addition to Economic Concessions, the State Offered Valuable Non-Economic Concessions

During CTSC negotiations, the State Defendants agreed to a number of new "non-economic" compact terms that Bear River now argues are not material concessions (Opp'n, 41-44), despite their inclusion in the Tribe's "last, best offer" compact. These provisions included: tribal court resolution of various claims (JUF 209); a new process for curing material breach (JUF 210); a longer compact term (JUF 211); an additional Gaming Facility (DUF 16); a new requirement for the State to renegotiate with the Tribe based on changed conditions (JUF 212, DUF 17); and a force majeure clause (JUF 213).

All of these were meaningful concessions, *per se*, because they were improvements for Bear River—with the State gaining nothing from them specifically—over the 1999 Compact that the Ninth Circuit found within IGRA's scope in *Coyote Valley II*. Every one of these provisions provided Bear River with increased economic certainty, more flexibility, and greater sovereignty. They were of no benefit to the State, and the State was not required to add new terms. *See, e.g.,* Opp'n 41, n.34.

The Tribe's statement on the State's meaningful concession of an additional Gaming Facility undercuts its entire case. The Tribe notes:

> the State never offered a rationale for its demand that the Tribe limit the number of Gaming Facilities that it may operate on its Indian lands, nor did it link its offer of an additional Gaming Facility to any specific demands it made of the Tribe. Indeed, the arbitrary nature of the State's imposition of a three-facility limit is demonstrated by the fact that the State has agreed to allow other Tribes to operate more than three Gaming Facilities and 5,000 Gaming Devices (see Agua Caliente Compact, viewable at http://www.cgcc.ca.gov/?pageID=compacts).

Opp'n, 43:9-13.

This statement raises three issues, each of which is fatal to Bear River's assertion that the State's non-economic concessions were not material. First, the Tribe repeats throughout its briefing that "the State never offered a rationale for" this or that negotiation request. The State was not required to under Ninth Circuit precedent. *See Pauma II*, 973 F.3d 953, 964-65. Two, the State was not required to link an additional Gaming Facility to any specific concession or offer. This was not a general fund revenue demand from the Tribe under *Rincon*. Instead, the set of measures constitute a meaningful concession that provides for more economic opportunity than Bear River has under its 1999 Compact. *Rincon*, 602 F.3d at 1039 ("In order to obtain additional time and gaming devices, Rincon may have to submit, for instance, to greater State regulation . . . or greater payments to defray the costs the State will incur"). Three, the third Gaming Facility was part of the proposed compact between the State and all members of CTSC, not just Bear River. If Bear River wished to have more than a third facility and/or more devices like the Agua Caliente Band of Cahuilla Indians, to whose compact the Tribe cites as an example of a tribe with those terms, it could have engaged in bilateral negotiations with the State, as the State suggested repeatedly.

Based on the undisputed Record, the State clearly provided significant meaningful concessions—on both economic and non-economic issues—despite not requesting additional general fund revenue sharing.

II. THE RECORD REFLECTS THE STATE DEFENDANTS' GOOD FAITH IN CONTINUING NEGOTIATIONS FOR PERMISSIBLE IGRA TOPICS, DESPITE THE CHALLENGING NATURE AND HISTORY OF NEGOTIATIONS WITH CTSC

A. The Tribe Mischaracterizes the History of CTSC Negotiations

Section III of Bear River's Opposition (pp. 44-49) represents a version of the CTSC compact negotiations that is not supported by the Record. Before August 2019, there were only three issues that CTSC, or some of its members, objected to as beyond the scope of IGRA during the ongoing negotiations: (1) the TLRO; (2) the TNGF; and (3) paying the state minimum wage.

Meanwhile, as detailed in the State's Motion (pp. 8-13), the overwhelming majority of the topics over which the Tribe now sues were never objected to by CTSC as impermissible topics under IGRA until August 2019, when CTSC pulled back from consensus. This is clear in the Record. Using the National Labor Relations Act by analogy, the "[w]ithdrawal of a proposal by an employer without good cause is evidence of a lack of good faith bargaining by the employer" under the statute "where the proposal has been tentatively agreed upon or acceptance by the Union appears to be imminent." *TNT USA, Inc. v. NLRB*, 208 F.3d 362, 366 (2d Cir. 2000). The State Defendants negotiated in good faith for five years with the Tribe as part of CTSC. If the State had bad intentions all along, it would not have successfully concluded compacts with fourteen former CTSC member tribes. DUF 1.

The Tribe argues that the State engaged in bad faith by refusing to: (1) allow CTSC to meet with Governor Newsom directly; (2) agree to a compact extension with an amendment to provide the Tribe with the State's pro rata SDF proposal; and (3) while the extension was in effect, engage in "friendly litigation" over various compact terms. Opp'n, 47. None of these arguments is persuasive.

First, under the protocols pursuant to which the State and CTSC agreed to operate in negotiations, CTSC and the State each would have its representatives, with the primary spokespersons being the Chairperson of CTSC and the Governor's Senior Advisor for Tribal Negotiations. JUF 14. Demanding to meet directly with the Governor was not required under the protocols. JUF 14, 69.

Second, agreeing to the proposed 1999 Compact extension on the Tribe's terms would require the State to give up a core part of its compact proposal in exchange for nothing—other than being sued. The Tribe describes this as "eliminat[ing] the inequity of a few Tribes with 1999 Compacts having to pay a disproportionately large share of the State Gaming Agency's budget . . . ." Opp'n, 47:13-15. What the Tribe leaves out is: it agreed to the 1999 Compact SDF formula; it would be receiving the majority of the financial benefit of reduced SDF contributions without the other compact updates to which other tribes agreed; it does not pay SDF; and this so-called "inequity" was the result of various tribes operating illegal slot machines in 1999 before it was legal under IGRA or the State's laws. DUF 23; 1999 Compact, Preamble ¶ C and § 5.1(a). Meanwhile, other tribes with more-recently ratified compacts agreed to the provisions the Tribe now is suing over in consideration for, among other things, the new pro rata SDF formula. JUF 198-99. Effectively, the Tribe was trying to get what it wanted without agreeing to anything the State wanted. That does not constitute a government-to-government negotiation.

Finally, the Tribe likens *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994) (*Cabazon v. Wilson*) and *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1994) to the present situation—arguing that its suit over the fourteen issues it contends were beyond the scope of IGRA is similar to the facts of those cases. But those cases were much more limited. Neither of those cases involved challenges to more than a dozen different and often interconnected issues scattered throughout a compact.

Misstating the applicable current law, the Tribe also argues that the State was not precluded from accepting its "last, best" offer compact that contained section 3.0(d) which would have required the State Defendants' automatic authorization of class III games that have not yet been authorized in California. Opp'n, 48:6-23. The Tribe again cites *Cabazon v. Wilson* for the contention that the Governor can negotiate compacts providing for class III gaming beyond "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" explicitly allowed by article IV, section 19(f) of the California Constitution. *Id*. at 48:21-23. *Cabazon v. Wilson* was a 1994 case. Article IV, section 19(f) was added to the California

Constitution by Proposition 1A in 2000. Its limitation on the Governor's authority did not exist in 1994.

B. The State Did Not Act in Bad Faith By Negotiating Over Compact Definitions, Basic Gaming Activity-Related Labor Provisions, Off-Reservation Environmental Impacts, Consumer Protections, and Similar Issues

As noted in more detail in the State's Motion (pp. 42-44), the State Defendants were not required to offer additional concessions for non-revenue sharing demands that were permissible IGRA negotiation subjects. However, despite this, as noted above and in prior briefing, the State *did* offer meaningful concessions.

1. Using Narrower Definitions of Gaming Facility, Gaming Operation, and Gaming Employee Than the 1999 Compact Definitions Demonstrates the State's Good Faith and Flexibility

The 2018 consensus definitions of Gaming Facility, Gaming Operation, and Gaming Employee are narrower than the 1999 Compact definitions. State Defendant's Opposition to Plaintiff Rohnerville Band of Bear River Rancheria's Motion for Summary Judgment (State Opp'n to Tribe's MSJ), 16-20. For Gaming Operation and Gaming Employee, the State Defendants stayed with the consensus definitions in their March 2020 draft compact proposal prior to the Tribe's July 2020 withdrawal from CTSC, and for Gaming Facility the State Defendants used the 1999 Compact definition. The 1999 Compact definitions were examined by the Ninth Circuit and found to be within IGRA's scope in *Coyote Valley II*.

The State maintained flexibility and negotiated in good faith on these issues. For example, when CTSC raised an issue with the 1999 Compact definition of Gaming Operation in August 2017—over two-and-a-half years after negotiations commenced—the State Defendants accommodated CTSC's issue, accepting its proposed language that narrowed the definition from the 1999 Compact definition. JUF 126-126, RON, Vol. 11, p. 3921, Vol. 16, p. 8737. Despite this, the Tribe now argues that the State Defendants' use of definitions that are more favorable to the Tribe than those 1999 Compact definitions is evidence of bad faith. This is illogical and incorrect. If anything, narrowing these definitions beyond what the Ninth Circuit determined was

permissible is evidence of good faith, flexibility, and a meaningful concession by the State. The Tribe's Opposition offers similar arguments to its Memorandum of Points and Authorities in Support of Motion for Summary Judgement (Tribe's Motion) regarding the allegedly impermissible breadth of these terms (Opp'n, 19-22, 36-37). The Court should not be swayed. These three definitions are narrower than—or, in the case of Gaming Facility that the State returned to in March 2020, identical to—the 1999 Compact definitions that the Tribe operates under now and the Ninth Circuit found within the scope of IGRA.

2. Negotiating for Employee Protections Is Within IGRA's Scope and Did Not Constitute Bad Faith

As the Ninth Circuit noted in *Coyote Valley II*, negotiating over basic labor provisions and employee protection is within the scope of IGRA. 331 F.3d at 1115. In its Opposition, the Tribe claims the State went beyond permissible topics when negotiating over money damages for employment discrimination (Opp'n, 22-23), compliance with California's minimum wage law (*id.* at 24-26), withholding of state unemployment and income taxes (*id.* at 29-30), and a new tribal labor relations ordinance (TLRO) (*id.* at 31-33).

Regarding the employee discrimination and harassment provision, negotiations over this provision constituted an attempt to draft a broadly similar, but more detailed, version of the 1999 Compact provision. Most of this provision was in consensus before the Tribe pulled back from that consensus. Though the enforcement language in the form of adding money damages was new, the State provided a concession, among others discussed above, by having this provision governed only by federal law rather than both federal and state law as in the 1999 Compact. JUF 134-136.

Similar to employee discrimination, negotiations regarding a TLRO and a tax-withholding provision were attempts to fill in more general language in the 1999 Compact versions. In its argument regarding the TLRO, nowhere does the Tribe note that the vast majority of provisions in the State-proposed TLRO were in the 1999 Compact TLRO, with the exception of including the binding arbitration provision and making general language in section 7 regarding free speech

more express. 1999 Compact, TLRO; RON, Vol. 5, pp. 2324-40. The 1999 Compact included a tax-withholding provision for Gaming Facility employees as well. 1999 Compact, § 10.3(c). In short, these were not impermissible subjects of negotiation, the State was asking for little more than what was negotiated in 1999, and, as noted repeatedly above and in the State Defendants' other briefs, to the extent the State requests went farther than the 1999 Compact, the State provided meaningful concessions.

Finally, the minimum wage provision was not in the 1999 Compact and was an active negotiation topic throughout negotiations. However, as noted elsewhere, the State provided significant concessions in both economic and non-economic terms. Further, the State showed continued flexibility on the issue, including a proposed amendment to clarify that the state minimum wage did not apply to overtime or create a private cause of action, and only applied to non-tipped employees. JUF 145, 167. Finally, this topic raises significant equity issues. If the Tribe is allowed to pay non-tribal employees below the state minimum wage, it makes these employees more likely to participate in state-sponsored public assistance programs like food stamps. The result would be the Tribe profiting by offering employees poverty wages that are indirectly subsidized through state and federal government benefits. The State does not violate IGRA's good-faith standard when it seeks through negotiations to avoid this inequitable outcome.

3. Mitigation of Off-Reservation Environmental Impacts Is a Permissible IGRA Negotiation Topic

This Court held in its *Chicken Ranch* order that mitigation of off-reservation environmental impacts is a permissible subject of negotiation under IGRA. Order, 14-17. The Tribe disagrees with that holding. Opp'n, 33-36. As noted in State Defendants' Opposition, the consensus version of section 11.0—painstakingly negotiated over several years—was similar to the off-reservation environmental mitigation provision in the 1999 Compact, though it was more comprehensive. Notably, the Tribe's argument apparently assumes that a Project will necessarily have an effect on the off-reservation environment that will necessarily need to be mitigated. Opp'n, 33:15-16 ("and then mitigate those Effects"). However, the consensus version of section

11.0 at issue here establishes an environmental review process, but not specific mitigation. *Cf. Big Lagoon Rancheria v. California*, 759 F. Supp. 2d 1149, 1155 (N.D. Cal. 2010) (requiring explicit and specific "Development Conditions"). In fact, under the tribal environmental review process in section 11.0, a given Project possibly would have no required mitigation because it has no Significant Impacts on the Off-Reservation Environment. Add'l RON, Vol. 1, 485-512. As a result, the State recognized that a tribe may have no obligation to mitigate for a given Project.

Similar to the minimum wage issue, a significant equity issue is at play here too. A tribe's Gaming Facility may have undeniable impacts on the off-reservation environment. Some Gaming Facilities generate traffic congestion on state roads, and that traffic generates air pollution unaffected by boundary lines on a map. Without mitigation, the oil from vehicles in Gaming Facility parking lots could potentially run off into creeks and rivers, and the resulting downstream water pollution becomes the responsibility of other public and private entities to clean consistent with applicable state and federal laws. Because IGRA's cooperative federalism model did not place states and tribes in such an inequitable situation, the State did not violate IGRA's good-faith requirements when negotiating over section 11.0.

4. Negotiating Over Basic Consumer Protections Regarding Torts and Check Cashing Is Permissible Under IGRA

As noted in the State's Motion, the Tribe's 1999 Compact included a provision for tort claims and one barring cashing government checks. The State Defendants compromised on these provisions throughout negotiations, even after CTSC walked away from consensus. The Tribe's Opposition repeats similar arguments as are in the Tribe's Motion—that is, these issues are not permitted by IGRA or directly related to the operation of Gaming Activities (Opp'n, 23, 26-29)—while failing to acknowledge that versions of these provisions were included in its 1999 Compact and they were previously in consensus during CTSC negotations. This Court found the tort provision to be a permissible IGRA topic in its *Chicken Ranch* Order. Order, 8-11.

To decide otherwise would subject consumers to inequitable outcomes. Under the Tribe's version of the tort provision, in combination with objecting to the definition of Gaming Facility, if

due to the Tribe's negligence a customer suffered a slip-and-fall-style accident on the sidewalk outside the Tribe's casino while walking into the casino, the customer would have no recourse. Whereas if a similar injury occurred inside the casino, the patron *might* have recourse if the Tribe decides to waive its sovereign immunity from suit. The Tribe implies that such potential protections should be left to the Tribe's discretion as a "sound business practice." Opp'n, 26:17-19. But unfettered tribal discretion over basic customer protections is not the prescribed IGRA standard, and the State can negotiate over these protections without violating IGRA's good-faith requirement to ensure protection of patrons. After all, the tort provision addresses potential injuries that are directly related to Gaming Activities—that is, but for the Tribe's Gaming Activities, these potential injuries would not exist.

So too with the restriction on government check cashing. A check cashing provision is in the Tribe's 1999 Compact and is directly related to Gaming Activities because customers use the cash and chips for which the checks are exchanged to gamble in the Tribe's Gaming Facility. If this important consumer protection provision were removed, customers would more readily be able to gamble away their social security checks, unemployment checks, and the other public assistance funds. Problem gambling and gambling addiction should not be further encouraged by prohibiting the State from negotiating for these commonsense protections under IGRA.

5. Honoring Spousal and Child Support Orders for Gaming Activity-Related Employment Is Permissible Under IGRA

The State Defendants recognize that this Court's *Chicken Ranch* Order held that the State's effort to negotiate over tribal recognition and enforcement of spousal and child support orders fell outside the permitted scope of negotiation topics under IGRA. Order, 12-14. The Tribe obviously agrees with this. Opp'n, 30-31. However, the State Defendants respectfully disagree. Using the Ninth Circuit's rationale in *Coyote Valley II*, wages affected by the off-reservation spousal and child support orders would not exist without the operation of Gaming Activities; nor, conversely could tribal gaming activities operate without offering these wages to their employees. 331 F.3d at 1116. Further, the Ninth Circuit 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. *Id.* at 1111, 1115. Here, the State has a vested interest in ensuring that spouses and parents cannot duck their responsibilities by seeking employment beyond the reach of state judgments and thereby increasing the likelihood of their dependents relying on state programs for survival. Last, at no time did the State Defendants demand that this subject must be included in a final compact. As the Court noted, throughout the negotiation process the State Defendants continued to negotiate over the scope of proposed compact language regarding spousal and child support orders. Order, 12. At the very least, the State should have been provided with an opportunity to compromise on this important proposal through bilateral negotiations, or withdraw it if such compromise proved impossible.

CONCLUSION

Unlike Bear River, the State has never walked away from the compact negotiations between the parties. And in contrast to Bear River, the State has not withdrawn from previous consensus positions and remains willing to negotiate. Because the Record shows the State's good faith, the State defendants respectfully request this Court to grant summary judgment in their favor.

Dated: July 22, 2021

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BEAR RIVER BAND OF ROHNERVILLE RANCHERIA, a federally recognized Indian Tribe, Plaintiff, **v.** **STATE OF CALIFORNIA, and GAVIN NEWSOM IN HIS OFFICIAL CAPACITY AS GOVERNOR OF CALIFORNIA,** Defendants.	1:20-cv-01539-AWI-SKO **STATE DEFENDANTS' EVIDENTIARY OBJECTIONS TO DECLARATIONS IN SUPPORT OF PLAINTIFF BEAR RIVER BAND OF ROHNERVILLE RANCHERIA'S OPPOSITION TO STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Date: August 9, 2021 Time: 1:30 p.m. Dept: 2, 8th Floor Judge: Honorable Anthony W. Ishii Trial Date: N/A Action Filed: 8/12/2020

Defendants the State of California (State) and Gavin Newsom, Governor of the State of California (collectively, State Defendants) object as follows to the evidence offered by Plaintiff Bear River Band of Rohnerville Rancheria (Plaintiff, Bear River, or Tribe) in support of its Opposition (Doc. No. 55) to the State Defendants' Motion for Summary Judgment.

I. Objections to the Declaration of Jay Shapiro (Doc. No. 55-1)

A. General Objections

State Defendants object to the entirety of the Declaration of Jay Shapiro in Opposition to Defendants' Motion for Summary Judgment (Shapiro Declaration) on the ground that most of the matters stated therein are irrelevant and inadmissible with regard to the question of whether State Defendants failed to negotiate with Plaintiff in good faith. The Federal Rules of Evidence provide that evidence is relevant if it has a tendency to make a fact that is of consequence in determining the action either more or less probable, and that, subject to certain exceptions, relevant evidence is admissible, and irrelevant evidence is inadmissible. *See* Fed. R. Evid. 401 & 402.

B. Specific Objections to Paragraphs 3 through 7

Paragraphs 3 through 7 and Exhibit 1 purport to contain information regarding the economic terms and Revenue Sharing Trust Fund (RSTF) calculations of certain post-1999 class III gaming compacts between the State of California and various federally recognized Native American tribes. In addition to their general objections to the Shapiro Declaration, State Defendants object to paragraphs 3 through 7 on several grounds. The documents characterized, to the extent they are relevant to provide background information, speak for themselves; Mr. Shapiro's statements are not the best evidence of the documents' contents. The State Defendants have not had sufficient time to verify that Mr. Shapiro's calculations are correct. However, the State Defendants do not dispute that each of these compacts is different and contains varying terms tailored to the unique needs of each tribe.

II. Objections to the Declaration of Crystal Sweaney (Doc. No. 55-2)

A. General Objections

State Defendants object to the entirety of the Declaration of Crystal Sweaney in Support of Opposition to State's Motion for Summary Judgment (Sweaney Declaration) on the ground that the matters stated therein are irrelevant and inadmissible with regard to the question of whether State Defendants failed to negotiate with Plaintiffs in good faith.

The Federal Rules of Evidence provide that evidence is relevant if it has a tendency to make a fact that is of consequence in determining the action either more or less probable, and that, subject to certain exceptions, relevant evidence is admissible, and irrelevant evidence is inadmissible. *See* Fed. R. Evid. 401 & 402. However, in the specialized context of an action for bad faith negotiation under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 – 2721, 18 U.S.C. §§ 1166-1167, the well-established principle is that good faith is evaluated "objectively based on the record of negotiations." *Rincon Band of Luiseno Indians v. Schwarzenegger*, 602 F.3d 1019, 1041 (9th Cir. 2010) (*Rincon*). To that end, Bear River and the State Defendants submitted a Joint Record of Negotiations (Record). The Record speaks for itself.

State Defendants also generally object to Director Sweaney's lay opinions as inadmissible. Fed. R. Evid. 701. To the extent that the Sweaney Declaration purports to offer expert opinion, the Tribe never disclosed him as an expert. *See* Fed. R. Civ. Proc. 26(a)(2)(A). The Tribe never provided an expert report from Director Sweaney *See* Fed. R. Civ. Proc. 26(a)(2)(B).

The Court, therefore, should sustain State Defendants' objections and strike the Sweaney Declaration.

B. Specific Objections to Paragraphs 6 and 7

Paragraphs 6 and 7 contain information about alleged State Gaming Agency actions at the Tribe's casino. In addition to their general objections to the Sweaney Declaration, State Defendants object to paragraphs 6 and 7 on several grounds. Director Sweaney's factual contentions are outside the scope of the objective evaluation of the Record that *Rincon*, 602 F.3d at 1041, requires. Accordingly, Director Sweaney's statements in paragraphs 6 through 7 are irrelevant and inadmissible. *See* Fed. R. Evid. 401 & 402.

Further rendering them irrelevant and inadmissible is their apparent use to support the implication that the State must provide some specific reasoning for its bargaining positions in IGRA negotiations. However, the Ninth Circuit recently held this argument to be wholly unsupported. *Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation v. California*, 973 F.3d 953, 964-65 (9th Cir. 2020) (*Pauma II*) ("Pauma cites no authority that

failing to substantiate a bargaining position constitutes bad faith under IGRA. So long as the bargaining position itself does not violate IGRA, the obligation to negotiate in good faith does not require states, in every circumstance, to furnish specific reasons for every position taken during negotiations.").

Even if the matters contained in paragraphs 6 and 7 are deemed relevant, the probative value of Director Sweaney's statements is substantially outweighed by a danger of unfair prejudice, confusing the issues, causing undue delay, wasting time, or needlessly presenting cumulative evidence. Therefore, paragraphs 6 and 7 should be excluded. *See* Fed. R. Evid. 403 & 701; *United States v. Epperson*, 528 F.2d 48, 50 (9th Cir. 1975) ("Information will be excluded when its probative effect is outweighed by its prejudice to the opposing party.").

III. Objections to the Declaration of Mary Ann Andreas (Doc. No. 55-3)

A. General Objections

State Defendants object to the entirety of the Declaration of Mary Ann Andreas re: Origins of the Revenue Sharing Trust Fund and Tribal Nations Grant Fund (Andreas Declaration) on the ground that the matters stated therein are irrelevant and inadmissible with regard to the question of whether State Defendants failed to negotiate with Plaintiffs in good faith.

The Federal Rules of Evidence provide that evidence is relevant if it has a tendency to make a fact that is of consequence in determining the action either more or less probable, and that, subject to certain exceptions, relevant evidence is admissible, and irrelevant evidence is inadmissible. *See* Fed. R. Evid. 401 & 402. However, in the specialized context of an action for bad faith negotiation under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 – 2721 (IGRA), the well-established principle is that good faith is evaluated "objectively based on the record of negotiations." *Rincon*, 602 F.3d at 1041. The Record speaks for itself.

State Defendants also generally object to Ms. Andreas's lay opinions as inadmissible. Fed. R. Evid. 701. To the extent that the Andreas Declaration purports to offer expert opinion, the Tribe never disclosed her as an expert. *See* Fed. R. Civ. Proc. 26(a)(2)(A). The Tribe never provided an expert report from Ms. Andreas. *See* Fed. R. Civ. Proc. 26(a)(2)(B).

The Court, therefore, should sustain State Defendants' objections and strike the Andreas Declaration.

B. Specific Objections

In addition to their general objections to the Andreas Declaration, State Defendants object to the admissibility of various statements made therein for other reasons as stated below.

1. Paragraphs 1 through 12

Paragraphs 1 through 12 contain information about Ms. Andreas and various legal and factual characterizations regarding the history and background of tribal gaming in the 1990s. The State objects to these paragraphs as irrelevant, improper legal argument, and an improper lay opinion. Fed. R. Evid. 701. This factual and legal argument does not constitute evidentiary facts, and is inherently outside the scope of the objective evaluation of the Record that *Rincon*, 602 F.3d at 1041, requires. Even if such argument is deemed relevant, the probative value of Ms. Andreas's legal and factual conclusions and arguments is substantially outweighed by a danger of unfair prejudice, confusing the issues, causing undue delay, wasting time, or needlessly presenting cumulative evidence. Therefore, paragraphs 1 through 12 should be excluded. *See* Fed. R. Evid. 403; *United States v. Epperson*, 528 F.2d at 50 ("Information will be excluded when its probative effect is outweighed by its prejudice to the opposing party.").

2. Paragraph 13 and 14

Paragraphs 13 and 14 consist of Ms. Andreas's legal and factual conclusions and arguments concerning the substance and import of the negotiations between the Morongo Band of Mission Indians (Morongo Band) and the State. Ms. Andreas's legal and factual conclusions and arguments do not constitute evidentiary facts, and are inherently outside the scope of the objective evaluation of the Record that *Rincon*, 602 F.3d at 1041, requires. Accordingly, the information contained in paragraphs 13 and 14 concerns matters outside the scope of evidence that is admissible in this case. Ms. Andreas's legal and factual conclusions and arguments in paragraphs 13 and 14 are irrelevant and inadmissible. *See* Fed. R. Evid. 401 & 402.

Further rendering them irrelevant and inadmissible is their apparent use to support the implication that the State must provide some specific reasoning for its bargaining positions in

IGRA negotiations. However, the Ninth Circuit recently held this argument to be wholly unsupported. *Pauma II*, 973 F.3d at 964-65.

Even if the matters contained in paragraphs 13 and 14 are deemed relevant, the probative value of Ms. Andreas's legal and factual conclusions and arguments is substantially outweighed by a danger of unfair prejudice, confusing the issues, causing undue delay, wasting time, or needlessly presenting cumulative evidence. Therefore, paragraphs 13 through 14 should be excluded. *See* Fed. R. Evid. 403 & 701; *United States v. Epperson*, 528 F.2d at 50 ("Information will be excluded when its probative effect is outweighed by its prejudice to the opposing party.").

Finally, Ms. Andreas characterizes confidential tribal-state compact negotiations between the Morongo Band and the State. Those negotiations are not in front of this Court. Ms. Andreas does not purport to have been nominated by the Morongo Band to speak on its behalf or waive its compact right to confidentiality, and the State has not been authorized by the Morongo Band to breach the confidentiality of negotiations to respond to Ms. Andreas's representations.

CONCLUSION

For the foregoing reasons, State Defendants respectfully request that the Court sustain the State Defendants' objections to the Shapiro Declaration, Sweaney Declaration, and Andreas Declaration.

Dated: July 22, 2021

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