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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY, a federally recognized Indian Tribe,

Plaintiff,

vs.

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

Defendants.

Case No.: 2:20-cv-01585-AWI-SKO

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REPLY TO STATE DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Date: August 9, 2021
Time: 1:30 p.m.
Courtroom: 2, 8th Floor
Judge: Honorable Anthony W. Ishii
Trial Date: N/A
Action Filed: August 18, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Codes

Other Authorities

INTRODUCTION

The State's Opposition to the Tribe's Motion for summary judgment, like its other filings in this and the *Chicken Ranch Rancheria of Me-Wuk Indians v. Newsom*, No. 1:19-CV-0024 AWI SKO, 2021 U.S. Dist. LEXIS 63102 (E.D. Cal. Mar. 31, 2021) case, is notable in two respects. First, the State makes no attempt to grapple with the plain language of IGRA's catch-all provision, which is conspicuous because that statutory language should govern whether the disputed subjects were proper for compact negotiation. Second, the State's filings reveal a total misunderstanding of when meaningful concessions are required, as well as fundamental confusion over what constitutes a concession, meaningful or otherwise. Indeed, what the State repeatedly trumpets as its so-called concessions in fact are demands for concessions by the Tribe, for which the State must offer meaningful concessions to avoid being found in bad faith.

Also notably absent from the State's filings is any mention of the undisputed fact that for the entire five years of negotiations between the Tribe and the State, the State would not actually negotiate about the substance of the State's new TLRO, its proposed TNGF, or, with one early exception, the amount the Tribe must spend in addition to what would be paid into the RSTF, along with the State's proposed "credits" scheme.

As shown below, none of the State's contentions have merit, and thus the Court should grant the Tribe's Motion for Summary Judgment, deny the State's Motion for Summary Judgment, and order the parties immediately to commence negotiations pursuant to IGRA's remedial procedures.

ARGUMENT

I. THE STATE MAKES NO ATTEMPT TO SHOW THAT THE DISPUTED COMPACT PROVISIONS WERE "DIRECTLY RELATED TO THE OPERATION OF GAMING ACTIVITIES"

The State argues that the disputed compact provisions were permissible subjects of negotiation under IGRA's catch-all provision, but makes no effort to demonstrate that those subjects are "directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii). That is no accident, for the State urges an interpretation of IGRA that is divorced from the law's plain language. This Court must reject such an atextual approach, just as the Supreme Court did in *Bay Mills* (a case that the State conspicuously fails even to mention in any of its briefs): "This Court has no roving

license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that (in Michigan's words) Congress 'must have intended' something broader." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014); *see, also, Chemehuevi Indian Tribe v. Newsom*, 919 F.3d 1148, 1153 (9th Cir. 2019) ("In conducting [a plain meaning] analysis, we are not vested with the power to rewrite the statutes, but rather must construe what Congress has written.") (internal quotations omitted) (revision in original).

The starting point of this Court's analysis must be the language of the statute. *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006). If there ever was any doubt what "gaming activities" means in IGRA, the Supreme Court dispelled it in *Bay Mills*: class III gaming activity" in IGRA means just what it sounds like–the stuff involved in playing class III games. . . . [It] is what goes on in a casino–each roll of the dice and spin of the wheel. 572 U.S. at 792.

Federal appellate court decisions in the wake of *Bay Mills* have applied the Supreme Court's understanding of "gaming activities" to define the limits of IGRA's catch-all provision. For example, in *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928 (8th Cir. 2019), the Flandreau Santee Sioux Tribe urged the Eighth Circuit to adopt an expansive definition of "gaming activities" to include the Casino's gift shop, hotel, food and beverage services, and live entertainment. The Tribe argued that such amenities would not exist but for its casino, nor could the casino operate without the amenities; thus, the amenities were "directly related to the operation of gaming activities." *Id.* at 934-35. But the Court of Appeals rejected that argument as contrary to IGRA's plain meaning: "First, and most obviously, amenities such as a gift shop, hotel, and RV park are not directly related to Class III gaming activity as defined by the Supreme Court in *Bay Mills* – 'what goes on in a casino – each roll of the dice and spin of the wheel.' 'Directly related to the operation of gaming activity' is narrower than 'directly related to the operation of the Casino.'" (*Id.* at 935). Thus, the catch-all provision encompasses only "activities actually involved in the playing of the game, and not activities occurring in proximity to, but not inextricably intertwined with, the betting of chips, the folding of a hand, or suchlike." (*Id.*); *see, also, Navajo Nation v. Dalley*, 896 F.3d 1196, 1207 (10th Cir. 2018). The Ninth Circuit's decision in *Coyote Valley II* may have taken a more expansive view of what has a "direct relationship to the operation of gaming activities" than is contemplated under *Bay Mills*, but

Coyote Valley II was decided eleven years before *Bay Mills*, and thus did not have the benefit of *Bay Mills*' definitive interpretation of IGRA. Insofar as *Coyote Valley II* decided issues identical to ones raised in this case, then of course this Court must follow the Ninth Circuit's lead. But to the extent that this case raises issues not squarely controlled by *Coyote Valley II*, this Court must apply *Bay Mills* and should look to decisions such as *Noem* and *Dalley* for guidance.

II. THE STATE WAS OBLIGATED TO OFFER MEANINGFUL CONCESSIONS FOR REVENUE AND NON-REVENUE RELATED COMPACT PROVISIONS, AND DID NOT.

The State appears to argue that it was not obligated to offer meaningful concessions in exchange for any concession demanded of the Tribe, whether revenue or non-revenue related. (State Opp. at 7:25-8:22.) This position is remarkable not merely because it is wrong, but because it conflicts directly with *Coyote Valley II* and *Rincon Band of Luiseño Indians v. Schwarzenneger*, 602 F.3d 1019 (9th Cir. 2010), not to mention this Court's ruling in *Chicken Ranch*.

A. The State Must Offer Meaningful Concessions in Exchange for Payments by the Tribe[1]

Coyote Valley II held that the State was not guilty of negotiating in bad faith over the RSTF and SDF in part because the State had offered "exceptionally valuable and bargained for" concessions (*Rincon*, 602 F.3d at 1037) (a Constitutional amendment granting tribes exclusive gaming rights) in exchange for fee demands that were deemed directly related to the Tribe's gaming activities. *Coyote Valley II*, 331 F.3d at 1112-1115. Insofar as there was any doubt about the essential nature of meaningful concessions in exchange for revenue demands, *Rincon* laid that to rest: "*Coyote Valley II* thus stands for the proposition that a state may, without acting in bad faith, request revenue sharing if the revenue sharing provision is (a) for uses 'directly related to the operation of gaming activities' in § 2710(d)(3)(C)(vii), (b) consistent with the purposes of IGRA, and (c) not 'imposed' *because it is bargained for in exchange for a 'meaningful concession*.'" *Rincon*, 602 F.3d at 1033 (emphasis added). The State contends that *Coyote Valley II* and *Rincon* do not

[1] Except for payments to defray the State's actual costs of regulating the Tribe's gaming activities. *See* §2710(d)(3)(C)(iii).

control because its demands for revenue sharing over the last few years are nothing like the financial demands it insisted upon when negotiating the 1999 Compact or the amendments at issue in *Rincon*. How so? The State argues that,

> Through the combination of removing the capped license pool and changing the way the SDF contribution is calculated, the State Defendants have offered Colusa a compact that will reduce the Tribe's overall SDF and RSTF contribution by more than $566,545 on an annual basis.

See Corrected State Defs.' Mem. P. & A. Supp. Mot. Summ. J. (ECF 35-1) filed on June 9, 2021 (State Defs.' Mot.) at 17:17-19, 45:20-22.

As shown in section III of this Memorandum, *infra*, the State's claim is factually false,[2] because it assumes that the Tribe never will operate more than 1,200 Gaming Devices over the 25-year life of a new compact, although before the Tribe closed its casino between mid-March, 2020 and June 8, 2020, the Tribe operated an average of 1,243 Gaming Devices; here, we will just focus on why the claim is legally confused.

Evidently, the State thinks (hypothetically) that if the Tribe pays $1 million annually under the 1999 Compact, and the State proposes to have the Tribe pay $500,000 annually under a new compact, the State has offered a meaningful concession in exchange for which it can extract something meaningful from the Tribe. This reflects confusion on a large scale.

The parties' respective rights and obligations under the 1999 Compact will cease to exist when that Compact expires on June 30, 2022. Thus, the State is no more automatically entitled to receive $1 million under a new Compact than the Tribe automatically would be entitled to pay nothing. Negotiations over provisions for payments by the Tribe, as with every other compact provision, must start from scratch and proceed in accordance with IGRA's limitations.

The $1 million payment in the preceding hypothetical could not constitute a meaningful concession by the State, because the State is not *per se* entitled to any payment at all. Rather, properly understood, the $1 million payment is a State demand for revenue sharing that can be

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[2] The State also assumes, incorrectly, that the Tribe pays into the SDF based on the net win from 519 Gaming Devices. Under the Tribe's current Compact, the Tribe only pays into the SDF on 319 of the 519 Gaming Devices it operated on September 1, 1999.

justified, if at all, only if the payment satisfies *Rincon*'s three-part test, including that the State must offer a meaningful concession in return.[3]

B. Meaningful Concessions Also Are Required in Exchange for the Tribe's Agreement to Non-Revenue Sharing Provisions

The State contends that IGRA does not require it to offer meaningful concessions in exchange for demands that the Tribe agree to compact provisions that do not directly require revenue sharing. That position is contrary both to case law in this Circuit and to common sense. As an initial matter, *Coyote Valley II* found it significant that the State offered meaningful concessions for the Tribe's adoption of, *inter alia*, the TLRO. 331 F.3d at 1116 ("Given that the State offered numerous concessions to the tribes in return for the Labor Relations provision . . ., it did not constitute bad faith for the State to insist that this interest be addressed in the limited way provide in the [compact]."). The significance of that holding was not lost on the district court in the *Big Lagoon* litigation, in which Judge Wilken held that "to negotiate for environmental mitigation measures in good faith, the State must offer a meaningful concession in exchange." *Big Lagoon Rancheria v. California*, 759 F. Supp. 2d 1149, 1162 (N.D.Cal. 2010) (citing *Coyote Valley II*, 331 F.3d at 1116-1117); *see, also*, *N. Fork Rancheria of Mono Indians v. California*, No. 1:15-cv-00419-AWI-SAB, 2015 U.S. Dist. LEXIS 154729, at *30 n.19 (E.D. Cal. Nov. 13, 2015) (recognizing that the State would need to offer a meaningful concession in exchange for refusing to negotiate over the location of a tribal gaming facility on a certain parcel of gaming-eligible land).

Case law aside, the State refuses to acknowledge that failing to require meaningful concessions even for the State's so-called "non-economic" demands would undermine IGRA's primary purposes "of promoting tribal economic development, self-sufficiency, and strong tribal governments," without advancing any of IGRA's other purposes. §2702. As demonstrated in the Tribe's Memoranda in support of its Motion for Summary Judgment and Opposition to the State's

[3] As explained above, a truly new compact, as opposed to the mere extension of the term of an existing compact, is not a continuation of a previous compact, and any demand for tribal payments, now or in the future, would be new payments whether or not they have historical antecedents. In exchange for such payments, the State must offer new concessions, *i.e.*, something of value to which the Tribe is not already entitled, and about which the State is not already obligated to negotiate. See *Rincon*, 602 F.3d at 1036.

Motion for Summary Judgment, IGRA's legislative history is replete with statements admonishing against powerful states using the compacting process to extend their jurisdiction within Indian Country beyond what is necessary to regulate the more sophisticated forms of gaming included in class III.

So why would IGRA require that states offer meaningful concessions in exchange for demands of tribal revenue, but not require that states provide anything at all in exchange for non-monetary demands, when those demands can be just as costly financially, and are at least as–if not sometimes even more–intrusive into tribal sovereignty and self-governance? Simply put, it does not.

Insisting, as does the State, that the Tribe adopt the State's laws regarding minimum wage, tort liability, environmental standards and review procedures, workplace discrimination policies and other standards that are otherwise inapplicable, or the discriminatory new State-dictated TLRO, etc., would unquestionably impose higher operating costs on the Tribe's Gaming Operation, and subordinate the Tribe to the State's notions of public policy on matters far beyond what is necessary for and directly related to the regulation and licensing of class III Gaming Activities or otherwise is directly related to the operation of the Tribe's Gaming Activities.

In so doing, the State proves that Congress was prescient in anticipating, and attempting to protect tribes against, the State's improper exploitation of its disproportionate leverage in the compacting process. If the State is correct that the Tribe can be subject to these significant burdens at all, surely the Tribe must be entitled to meaningful concessions in exchange. Otherwise, IGRA's purposes could be easily circumvented and undermined.

III. THE STATE HAS NOT SHOWN, AND CANNOT SHOW, THAT IT OFFERED THE TRIBE MEANINGFUL CONCESSIONS IN RETURN FOR EACH OF THE CONCESSIONS IT DEMANDED FROM THE TRIBE.

The State argues, in effect, that any provision to which it agrees that is more favorable to the Tribe than a comparable provision in the Tribe's existing 1999 Compact necessarily constitutes a meaningful concession, thus precluding a finding that the State failed to negotiate in good faith. That is not the law. Because the State is obligated to negotiate over basic gaming terms as well as ordinary contract provision, the State's agreement to garden-variety compact provisions is not a

concession and thus cannot serve as the predicate for demanding a concession from the Tribe. *Rincon*, 602 F.3d at 1037, 1039.

For example, because the duration of a compact is part of the basic gaming rights to be addressed in a compact, the State is not entitled to a meaningful concession from the Tribe for agreeing that the compact term will be 25 – or even 50 – years, rather than the 20-year term endorsed by California's voters when they amended California's Constitution to grant exclusive gaming rights to California's Tribes. The State might be entitled to reimbursement for any increased regulatory costs it would incur, and it might be appropriate for the State to negotiate for greater regulatory oversight, but the State could not insist that the Tribe agree to more burdensome environmental mitigation measures or to increased revenue sharing (apart from defraying the State's actual regulatory costs) in exchange for a longer compact term.

A. The State's "Economic Meaningful Concessions" Were Neither Meaningful Nor Concessions.

The entire premise of the State's argument that the Court should find that its "economic proposals" qualify as granular meaningful concessions is that as long as the Tribe continues to operate no more than 1,200 Gaming Devices, the Tribe's aggregate payments into the SDF and RSTF would be lower than the payments the Tribe is making under its 1999 Compact. This premise suffers from three fatal flaws.

First, the Tribe's 1999 Compact cannot be used as the benchmark for what is fair and reasonable under current circumstances because the Tribe's current SDF and RSTF payment obligations will expire with the expiration of its 1999 Compact on June 30, 2022. Under the Ninth Circuit's decisions in *Coyote Valley II* and *Rincon*, and this Court's order in *Chicken Ranch*, the State must independently justify and offer meaningful concessions on a "granular level" in exchange for any new demands for payments by the Tribe beyond what is necessary to defray the State's actual regulatory costs.

Second, the State knows full well that its economic proposal could result in the Tribe having to spend *more, not less*, in the aggregate than what the Tribe already pays under its 1999 Compact. Specifically, as shown in the Declaration of Bonnie Pullen lodged herewith, prior to closing its

casino between mid-March and June 8, 2020 due to the COVID-19 pandemic, the Tribe and operated an average of 1,243 Gaming Devices, and after reopening, the Tribe took every other Gaming Device out of service for health and safety purposes. Under the State's proposal, when the Tribe returns to its former level of operations, its SDF payments would decline (although the Tribe contends that the State's "pro rata share" formula still greatly overstates the State's actual IGRA regulatory costs), but its RSTF payments would increase dramatically, such that the aggregate cost to the Tribe of the State's proposal would be approximately $1.7 million per year *more* than what the Tribe now pays under its 1999 Compact. Pullen Declaration, ¶ 4.

This is because the State would require the Tribe to annually *spend* 6% of the Tribe's net win from Gaming Devices 351+, even though, under the State's proposal, only 40% of the 6% actually must be paid into the RSTF. This amount does not include the additional operating costs inherently associated with the other "non-economic" aspects of the State's proposal for expenses such as new or increased liability insurance premiums, higher personnel and administrative costs, and far more costly and detailed environmental assessment and mitigation requirements.

Third, the State cannot justify the amounts it demanded that the Tribe pay into either the SDF or the RSTF. As shown by the uncontroverted Declaration of Hazel Longmire and Exhibits L-1 and L-2 attached thereto, there is a substantial surplus in the fund balances of both the SDF and the RSTF, and the State projects that those funds will remain in substantial surplus for years to come. This compels the conclusion that the State's intent is merely to force the Tribe to spend more than is needed to fully fund either the SDF or the RSTF.

Thus, even the State's "pro rata share" formula, which is based not on what the State reasonably and actually spends on regulatory activities directly or indirectly related to the Tribe's Gaming Activities, but on whatever the Legislature may choose to appropriate for the State Gaming Agency's budget from year to year, cannot be justified as necessary for and directly related to the regulation and licensing of the Tribe's class III Gaming Activities.

As for the RSTF, Hazel Longmire's, the liaison between the Tribe's elected Executive Committee and the Community Council, uncontroverted Declaration shows that this fund also has a substantial surplus, and is projected to continue in surplus for years to come. Moreover, the very fact

that the State would "allow" the Tribe to offset its payments into the RSTF by 60% of 6% of the net win from Gaming Devices 351+ as long as that money spent for other prior State-approved purposes (subject to subsequent State review and disallowance)[4] proves that the State cannot justify its demand that the Tribe must spend a total of 6% of its net win from Gaming Devices 351+ if it operates more than 1,200 Gaming Devices. The State's proposal amounts to "pay to play," which is not something IGRA permits.

In sum, even if the State's SDF and RSTF proposals could somehow be seen as a concession rather than a demand for prospective revenue sharing, the total cash expenditures demanded of the Tribe would exceed what the Tribe pays now. That is no one's idea of a concession, much less a meaningful one.

B. The State's "Non-Economic Concessions" Were Neither Concessions Nor Meaningful.

As noted in *Rincon*, IGRA obligates the State to negotiate over basic gaming provisions (including ordinary contract provisions); the State cannot insist on concessions in return. 602 F.3d at 1037, 1039. In this litigation, the State has continued to do what it did throughout five years of compact negotiations, and that this Court held in *Chicken Ranch* the State cannot do without failing to negotiate in good faith: *i.e.*, lump together a number of provisions, characterize them as being more favorable overall than comparable provisions of the Tribe's 1999 Compact, and claim that any improvement over the *status quo* necessarily constitutes a meaningful concession. *Rincon* rejected this approach (602 F.3d at 1040), as did this Court in *Chicken Ranch*.

The State makes much of its proposal to eliminate the statewide Gaming Device License Pool created by the 1999 Compacts. As explained in the Tribe's Opposition to the State's Motion for Summary Judgment (pp. 38-39), the pool will evaporate with the expiration of the Tribe's Compact on June 30, 2022. Moreover, the State essentially had abandoned the concept of the statewide License Pool starting in 2004, when it agreed to compact amendments allowing some tribes to

[4] State's Opening Memorandum, p. 19:12-17.

operate unlimited numbers of Gaming Devices,[5] even as it fought the Tribe tooth and nail in resisting the Tribe's efforts to obtain additional Gaming Device licenses. Since then, the State has agreed to numerous other Compacts allowing Tribes to operate increased numbers of Gaming Devices without having to obtain licenses from the pool.

If the Tribe desires to increase its Gaming Device inventory during the remainder of the term of its current Compact, it could draw additional licenses from the pool for fees far lower than 6% of the net win from the additional Gaming Devices. Conversely, if the Tribe has more licenses than it needs, it could return them to the pool and be relieved of an equivalent number of annual license fee payments. Thus, this aspect of the State's proposal is of no value to the Tribe, and is not a concession at all, much less a meaningful concession.

As the Department of the Interior's Office of Indian Gaming noted in a May 29, 2020 letter to attorney Lester Marston (Add'l. RON, vol. 2, p. 756), and consistent with *Rincon* (602 F.3d at 1039), issues such as Compact duration, number of Gaming Facilities and Gaming Devices are normal components of compact negotiations about which the State is obligated to negotiate, and thus cannot constitute meaningful concessions. Thus, the State's agreement that the Tribe could operate three Gaming Facilities, rather than the two permitted under the Tribe's 1999 Compact, cannot constitute a meaningful concession.

Similarly, provisions concerning remedies for material breaches, *force majeure*, an obligation merely to negotiate about amendments to deal with changed circumstances, and other provisions identified by the State as constituting "meaningful concessions" at best are nothing more than modest improvements over the *status quo* that benefit both parties; they have no special benefit to the Tribe. Moreover, whatever benefits accrue to the Tribe from these "concessions" are dwarfed by the concessions demanded from the Tribe on such issues as increased liability insurance limits, creation of money damage remedies for claims of workplace discrimination from which Tribes are expressly exempted under federal law, imposition of a new and discriminatory TLRO, new administrative and

[5] *See, e.g.*, 6/21/2004 Compact Amendment of the Pala Band of Mission Indians, viewable at http://www.cgcc.ca.gov/?pageID=compacts.

legislative obligations, increased personnel costs, and extensive new obligations to assess and mitigate impacts on the off-Reservation environment from broadly-defined "projects."

The State contends that the fact that the Tribe included many of what the State characterizes as its "meaningful concessions" in the Tribe's last, best offer of a new compact proves that the Tribe agreed that these "concessions" were meaningful, and thus that the State negotiated in good faith. Once again, the State is wrong. As the Tribe made abundantly clear in the letter that accompanied its last, best offer, with the term of the Tribe's 1999 Compact nearing expiration, and given the State's unwillingness to consider extending the term of the Tribe's 1999 Compact, the Tribe's intent was to secure the State's agreement to a new compact through a compromise, rather than having to resort to litigation.

To the extent that the State previously had agreed to provisions that were improvements over the *status quo*, but that cost the State nothing, there was no reason for the Tribe to not include them in its last, best offer. Likewise, the fact that the Tribe included some provisions that it contends are not proper subjects of negotiation, or for which the State was required to offer meaningful concessions but had not done so, simply demonstrated that the Tribe's last, best offer was a good-faith, last-ditch effort to persuade the State to agree to a new compact by addressing issues of concern to the State, but in ways that would be far more respectful of the Tribe's sovereign status and needs.

In summary, the State would have the Court hold that any offer by the State that is decent or fair should be deemed *per se* to be a meaningful concession. Nothing in IGRA's plain language or legislative history supports such a conclusion.

IV. THE STATE, NOT THE TRIBE, CREATED THE NEGOTIATING IMPASSE THAT FORCED THE TRIBE TO FILE THIS ACTION.

The State claims it never insisted that a new compact must include provisions that the Tribe contends are not proper subjects of negotiation. Thus, the State argues, the Tribe created a negotiating impasse by withdrawing its consensus on various provisions, presenting a last, best offer that the State could not accept, and then refusing to negotiate further when the State claimed to remain willing to continue negotiating. This contention is inconsistent with the record of

negotiations.

For five years, the State insisted on including provisions to which the Tribe objected as not being proper subjects of negotiation under IGRA (even as the Tribe had tentatively agreed to language of various provisions, it consistently insisted that the State had not yet offered the meaningful concessions required by IGRA). For five years, the State failed to offer meaningful concessions. And for five years, the State refused to engage in substantive negotiations about the TLRO and the TNGF, two issues so important to the State that they were included in the State's very first proposals in 2015. Addt'l RON, vol. 2, p. 719, pp. 783-824; JSUF, ¶ 85.

There can be no dispute that over the course of five years, the State consistently proposed that the Tribe adopt the provisions discussed in Counts One through Fourteen of the Tribe's Complaint. Just as consistently the Tribes objected that these provisions, in part or in whole, exceeded what IGRA permits to be proper subjects of negotiation, and that if the State wanted to include them, it needed to offer meaningful concessions. Did the State explicitly ever say that these provisions must be included in a new compact? No; although the Tribes repeatedly asked the State which of the disputed provisions the State would insist be included in a new compact, the State refused to say, thereby forcing the Tribes to guess and negotiate against themselves. *See, e.g.*, Addt'l RON, vol. 2, p. 719, pp. 783-824; JSUF, ¶ 85. This was classic "surface bargaining," by which the State cynically used the looming expiration date of the Tribe's current compact in an attempt to coerce the Tribes into submission. *See NLRB. v. Big Three Indus., Inc.*, 497 F.2d 43, 46 (5th Cir. 1974).[6]

To allow more time for negotiations to continue, the Tribe repeatedly asked the State to agree to a modest extension of the term of its existing Compact. The State repeatedly refused, even as it refused to negotiate about the substance of some of the most controversial issues (*i.e.*, the TLRO, the TNGF, excessive RSTF payments, excessive SDF payments, and compliance with California's Minimum Wage Law).

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[6] *See In re Indian Gaming Related Cases v. California*, 147 F.Supp.2d 1011, 1020-21 (N.D. Cal. 2001) ("*Coyote Valley I*"), affirmed by *Coyote Valley II*, 331 F.3d 1094 (cases interpreting the NLRA provide guidance in interpreting IGRA's good faith provisions); *Fort Independence Indian Community v. California*, 679 F. Supp. 2d 1159, 1171 (E.D. Cal. 2009) (also looking to NLRA cases).

The Tribe proposed a "friendly" lawsuit to resolve the disputed issues, a process to which the State twice previously had agreed. The State refused, erroneously claiming that there was no Ninth Circuit precedent for such a procedure even after the Tribe brought the State's previous agreements to the State's negotiating team. Add'l RON, vol. 2, pp. 726-728. Instead, the State chose to use the looming expiration of the Tribe's 1999 Compact to coerce the Tribe into acquiescing to the State's demands on those and other issues.

The Tribe eventually submitted its last, best offer because the State had given it no other choice. In response, the State contends that the negotiations would have succeeded if the Tribe had not "retreated" from the tentative consensus the parties previously had reached on most of the issues now in dispute, and that the Tribe made a final offer that contained provisions that the State was constitutionally barred from accepting. Neither of those contentions is accurate.

As the State acknowledges, the negotiations between the State and the CTSC Tribes, including plaintiff Tribe, were conducted pursuant to a Protocol agreed to by the parties, paragraph 14 of which provided that, "All tentative agreements to be reduced to writing and contingent upon negotiation of final agreement." JSUF ¶ 14. There is no dispute that during the Brown Administration, the State and the CTSC Tribes reached consensus on numerous provisions that both the State and the Tribes agreed were proper subjects of negotiation under IGRA,: *e.g.*, licensing of Gaming Facilities and gaming related personnel and vendors (Compact § 6); testing and transportation of Gaming Devices (Compact § 7); State inspections of Gaming Facilities and Gaming Operation books and records (Compact § 8); rules and regulations for operation of Gaming Activities and maintenance of Gaming Facilities (Compact § 9); patron disputes (Compact § 10); many aspects of public and workplace health, safety and liability (Compact § 12); dispute resolution (Compact § 13); amendments and renegotiation (Compact § 15); notices (Compact § 16); changes to IGRA (Compact § 17); and several miscellaneous provisions (parts of Compact § 18). Those provisions are not at issue in this action.

During the Brown Administration, the parties also had reached tentative consensus on the *language* of many of the provisions that the Tribe contends are not proper subjects of negotiation under IGRA; however, the CTSC Tribes and plaintiff Tribe repeatedly made clear that these

provisions were not proper subjects of negotiation under IGRA, but that they could be at least considered if the State were to offer meaningful consideration in the form of substantial concessions on issues about which the State otherwise was not required to negotiate. *See, e.g.*, JSUF ¶¶ 34, 36, 39, 40 50, 52, 60, 65, 66, 68 72, 74, 76 83, 85, 111.

As early as January, 2016, the Tribes had made known to the State that they opposed the State created TNGF, and instead proposed that any surpluses in the RSTF be distributed annually to eligible Tribes in equal shares. JSUF ¶¶ 34, 43. In Compact draft after Compact draft, the State rejected this proposal by continuing to include the TNGF. Finally, in July, 2019, the CTSC Tribes and plaintiff Tribe devised and proposed the RSTF II as the mechanism for implementing their alternative to the State created TNGF. JSUF ¶¶ 114, 116. By July, 2020, the State still had not substantively responded to the Tribes' RSTF II proposal.

As early as January, 2016, the CTSC Tribes and plaintiff Tribe made known-and explained in detail–their objections to the State's proposed new TLRO. JSUF ¶¶ 36, 40. Notwithstanding those objections, in May and September, 2018, the CTSC Tribes submitted proposed revisions to the State drafted new TLRO, contingent on receiving meaningful concessions in return. Between December, 2015 and the Tribe's withdrawal from the CTSC in July, 2020, the State never provided a written response to the Tribes' proposed revisions to the State's new TLRO, and never was willing to negotiate about the substance of either the State's new TLRO or the Tribes' proposed alternative. Moreover, as noted previously, the State's negotiator expressly and repeatedly refused to tell the Tribes whether the State would insist upon including in new compacts the State's new TLRO or any of the other provisions that the Tribes contended were not proper subjects of negotiation under IGRA, and repeatedly refused to allow the Tribes to meet directly with Governor Newsom to hear from him what he would and would not insist be included in new Compacts. Addt'l RON, vol. 2, p. 719; pp. 783-824; JSUF, ¶ 85. With time running out on the term of the Tribe's 1999 Compact, the Tribe could not continue guessing about what the State would and would not insist be included in a new compact.

The State also never yielded on its demand that the Tribe pay more into the SDF than necessary to defray the State's actual regulatory costs if the Tribe were to operate more than 350

Gaming Devices, and that the Tribe spend far more than necessary to fully fund the RSTF if the Tribe were to operate more than 1,200 Gaming Devices. Indeed, other than to make one early change to the percentage of net win tribes would be required to spend,[7] offer the potential exemption from SDF payments for Tribes operating fewer than 350 Gaming Devices, and setting the threshold for RSTF liability at 1,200 Gaming Devices, the State never negotiated about the substance of either its SDF or RSTF demands.

As of July, 2020, the State offered no indication it would make substantial changes to its core negotiating demands, or agree to an extension of the Tribe's current Compact. Under these circumstances, remaining at the negotiating table would have caused the Tribe to forfeit its right to seek relief in this Court, and forced the Tribe to surrender to whatever terms the State might impose in order to avoid losing its right to conduct class III Gaming Activities. JSUF ¶¶ 196, 201.

Finally, the State contends, without citing any controlling authority, that it could not lawfully accept the Tribe's last, best offer for two purported reasons. First, the State claimed that the Tribe's proposal that it be permitted to offer any new forms of class III gaming the State might authorize in the future would exceed the Governor's negotiating authority under Article IV, § 19(f) of the California Constitution. Second, the State claimed that it could not agree to the Tribe's proposal that if the State were to abrogate the Tribe's exclusive gaming rights, the State would have to share with tribes a portion of the State's revenues from newly-authorized non-tribal gaming. Neither contention is sound.

As to the Tribe's first proposal, it bears repeating that the Tribe did not seek the present right to operate any form of class III gaming that State law does not affirmatively authorize; rather, the Tribe proposed only that if the State Constitution ever is amended to authorize additional forms of what IGRA categorizes as class III gaming, the Tribe may operate that form of gaming (subject to rules and regulations prescribed by the Gaming Regulators' Association) without having amend its compact. Under IGRA, if state law affirmatively authorizes a form of class III gaming, the Tribe would be entitled to operate it, as long as the Tribe does so pursuant to a Compact. As one example,

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[7] RON, vol. 4, pp. 1649-51; Add'l RON, vol. 1, pp. 430-432.

California's Constitution authorizes parimutuel wagering on horse races, but is silent about the Governor's authority to negotiate and the Legislature's authority to ratify compacts allowing Tribes to operate off track wagering on horse racing. Nonetheless, the Governor has negotiated compacts allowing Tribes to operate off track wagering facilities. *See, e.g.*, *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994).

As to the Tribe's proposal that it be compensated for the State's abrogation of exclusive tribal gaming rights out of the State's revenues from non-tribal gaming, the State's grant to the Tribe of the exclusive right to operate slot machines and banked/percentage card games was the "exceptionally valuable" State concession received by California's tribes in return for the numerous tribal concessions in their 1999 Compacts. *Rincon*, 602 F.3d at 1037. Therefore, loss of the Tribe's exclusive gaming rights would constitute a failure of the consideration for which the Tribe made major concessions to the State. The State has not cited any constitutional or statutory prohibition against the Governor's authority to negotiate and the Legislature's authority to ratify a Compact that would obligate the State to compensate tribes for the State's affirmative abrogation of the tribes' exclusive gaming rights.

V. THE STATE INSISTED ON INCLUDING PROVISIONS THAT ARE NOT DIRECTLY RELATED TO THE OPERATION OF GAMING ACTIVITIES, AND THUS ARE NOT PROPER SUBJECTS OF NEGOTIATION.

For five years, in compact draft after compact draft, the State continued to propose provisions to which the Tribe objected as not being proper subjects of negotiation because they go beyond what is directly related to and necessary for the regulation and licensing of Gaming Activities, or otherwise are not directly related to the operation of Gaming Activities. As explained in section II of this Memorandum, *supra*, as well as in the Tribe's Memoranda in Support of its Motion for Summary Judgment and in Opposition to the State's Motion for Summary Judgment, the State's insistence on extending the provisions of a new compact to tribal employees, facilities and areas of the Tribe's Reservation not directly involved in the actual operation of the Tribe's class III Gaming Activities no longer was defensible after the Supreme Court's decision in *Bay Mills* provided the

definitive interpretation of "gaming activities" as that term is used in IGRA.[8]

The State's Opposition to the Tribe's Motion for Summary Judgment not only fails to directly refute the Tribe's contention, it does not even mention *Bay Mills*, much less discuss its significance in defining the permissible scope of compact negotiations. Instead, the State attempts to avoid the issue by asserting that it never "insisted" on the inclusion of any provisions at all; rather, the State refused to tell the Tribe what must be included in a new compact, and claimed that everything remained open to negotiation. Addt'l RON, vol. 2, p. 719; pp. 783-824; vol. 3, pp. 995-996; JSUF, ¶ 85.

To the extent not already addressed in this Reply Memorandum, the Tribe will rely on the Memoranda it submitted in support of its own Motion for Summary Judgment and in Opposition to the State's Motion for Summary Judgment to refute the State's contentions regarding the definitions for Gaming Employees, Gaming Facility and Gaming Operation, demands for excessive payments into the SDF and RSTF, withholding and remittance of state income taxes, honoring State court support orders, tort liability, check cashing, and the State's attempt to impose CEQA and other environmental constraints on the Tribe's ability to engage in class III Gaming Activities.

Instead, this Memorandum will focus on the State's contention that its demand to include the State's new TLRO and the State-created TNGF, and that the Tribe carry $3 million in employment practices liability insurance and enact a tribal ordinance prohibiting workplace discrimination and creating remedies for money damages, any or all of which would support a finding that the State failed to negotiate in good faith.

A. The State's New TLRO.

The State characterizes its new TLRO–which the State first proposed in 2015, and for the next five years refused to negotiate about–as little more than "the same basic labor relations provision that the Ninth Circuit found consistent with IGRA and the public interest" in *Coyote Valley II*. What's more, the State contends that no meaningful concessions were required. State's

[8] In any event, as shown in section III of this Memorandum, the State failed to offer the requisite meaningful concessions in exchange for these demands.

Opposition Memorandum, pp. 22:23-27, 23:1-5.

In fact, the TLRO is radically and materially different from its predecessor, and for at least five reasons, it is an improper subject of negotiation. Moreover, even if it is a proper subject of negotiation under IGRA's catch-all provision, under *Coyote Valley II* the State was required – but failed – to offer meaningful concessions in return.

First, *Coyote Valley II* accorded great significance to the fact that the 1999 TLRO, "provides only modest organizing rights to tribal gaming employees and contains several provisions protective of tribal sovereignty." 331 F.3d at 1116. The 1999 TLRO, although modeled on the National Labor Relations Act, struck a delicate balance between union organizing rights and the sovereign rights of the Tribe's government. While the 1999 TLRO granted union organizers the right to access Gaming Operation employees in non-working areas closed to the public, it imposed no hindrances on union, employee or tribal free speech, vested a tribal forum with a meaningful role in resolving a wide array of disputes arising both before and after a union has been recognized as the representative of a bargaining unit of "Eligible Employees," preserved the union's right to strike in the event of a collective bargaining impasse, and prohibited picketing on the Tribe's Indian lands. *See* Joint Request for Judicial Notice, Exh. A, §§ 11, 13.

By contrast, the State's new TLRO would give unions and all of the Tribe's Gaming Operation employees (not just employees whose duties are directly related to Gaming Activities) not just the "modest" rights approved in *Coyote Valley II*, but far greater rights than those conferred by the National Labor Relations Act. At the same time, the State's new TLRO would discriminate against the Tribe by depriving it of some of the rights that the National Labor Relations Act confers on other California employers – including competing State-licensed card rooms – subject to the NLRB's jurisdiction.

Here are just three examples of the disparate treatment of the Tribe under the State's new TLRO:

- the Tribe must allow union organizers to come into areas of its casino that are not open to the public in order to engage in organizing activity, access that the U.S. Supreme Court has held can constitute a Fifth-Amendment taking of an employer's property rights

under most circumstances.[9] The record is devoid of any justification for this provision, given that union organizers have free access to tribal employees outside of the workplace;[10]

- the State's new TLRO would set unrealistically short deadlines for the Tribe to respond to a union's information requests, for appointment of an election officer, and for conducting representation elections;
- a union may unilaterally limit the Tribe's right to free speech by serving a Notice of Intent to Organize ("NOIO") and agreeing not to strike, giving the union a year to make the 30% showing of interest necessary to trigger a secret-ballot election, limit collective bargaining for a new contract to no more than 120 days, and require that collective bargaining impasses be resolved by binding interest arbitration, – a mandate that the State may not lawfully impose on its own subdivisions.[11]

Second, as discussed in the Tribe's Opening Memorandum (pp. 41-46), and again in its Memorandum in Opposition to the State's Motion for Summary Judgment (pp. 31-33), *Coyote Valley II* was decided in an entirely different legal context regarding labor relations in Indian country than now exists. *Coyote Valley II* upheld State's insistence on inclusion of the original TLRO at a time when the National Labor Relations Board had declined for decades to exercise jurisdiction over tribal employers in Indian country. Since *Coyote Valley II* was decided, various federal appellate

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[9] "California's access regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking. Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties (here union organizers) the owners' right to exclude." *Cedar Point Nursery v. Hassid*, 2021 U.S. LEXIS 3394, *3, 141 S. Ct. 2063 (2021).

[10] "As a rule, then, an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property. As with many other rules, however, we recognized an exception. Where "the location of a plant and the living quarters of employees place the employees beyond the reach of reasonable union efforts to communicate with them," *ibid.*, employers' property rights may be "required to yield to the extent needed to permit communication of information on the right to organize[.]" [Internal citations omitted]. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533-34, 112 S. Ct. 841, 846 (1992).

[11] "The county argues that in enacting Senate Bill 402, the Legislature has impermissibly delegated to a private body--the arbitration panel--the power to interfere with county money (by potentially requiring the county to pay higher salaries than it chooses) and to perform municipal functions (determining compensation for county employees). Again, we agree. This constitutional provision expressly denies the Legislature the power to act in this way." *Cty. of Riverside v. Superior Court*, 30 Cal.4th 278, 291 (2003).

courts have expressly upheld the NLRB's jurisdiction over tribal casinos. *See, e.g.*, *Casino Pauma v. NLRB*, 888 F.3d 1066 (9th Cir. 2018); *San Manuel Indian Bingo & Casino v NLRB*, 475 F.3d 1306 (D.C. Cir. 2007). Thus, the State no longer can claim that the TLRO is needed to give tribal casino employees the same organizational and representational rights that the State's public policy[12] protects for all other Californians working for employers subject to the NLRB's jurisdiction.

Third, the origins of the State's new TLRO are completely different than that of the Tribe's State-approved 1999 TLRO. Back then, "the UTCSC, of which Coyote Valley was a member, met with union representatives and participated in the shaping of the TLRO;" the State had no role in those negotiations. *Coyote Valley II*, 331 F.3d at 1117. Flash forward to 2015, and neither the plaintiff Tribe nor any of the other CTSC Tribes had any involvement whatsoever in drafting the State's new TLRO. Rather, the State presented it fully formed in 2015, and despite repeated requests for changes from the Tribe, not one word had changed by mid-July, 2020, when the Tribe withdrew from the CTSC and presented its last, best offer to the State.

Fourth, despite the State's assignment of great importance to including the new TLRO in a new Compact, and its pervasive recurrence over the span of five years, the State consistently declined to engage in substantive negotiations about the content of the State's new TLRO, and refused to respond to multiple tribal counter-proposals and explanatory memoranda between May, 2018 and July, 2020. RON vol. 15, pp. 8268-69; Add'l. RON vol. 1, pp. 45-47, 80, 221, JSUF ¶¶ 36, 40, 46, 50, 52, 56, 76, 78, 84, 101, 156, 157, 171, 189. Essentially, the State is asking the Court to hold that the State did not fail to negotiate in good faith when it consistently refused to negotiate about the substance of a major concession the State sought from the Tribe. The Court should decline that request.

Fifth, unlike the extremely valuable, and thus meaningful concessions that *Coyote Valley II*

[12] Cal. Labor Code § 923 declares the State's public policy to be, "that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment"

found that the State had offered the Tribe in return for accepting the State-approved 1999 TLRO,[13] and as this Court found in *Chicken Ranch*, the State failed to offer the Tribe any new meaningful concessions in return for the Tribe's acquiescence in the State's new TLRO.

Thus, even under *Coyote Valley II*, the State's insistence on the Tribe's acquiescence in the State's new TLRO, the State's refusal to negotiate about its substance for five years or respond to the Tribe's counter-proposals, and the State's failure to offer meaningful concessions in return, all compel a finding that the State failed to negotiate in good faith.

B. The TNGF.

The State contends that, "Similar to the RSTF, the TNGF is another method of sharing revenues with other tribes in California." Opposition Memorandum, p. 12:1-2. The State also contends that this Court's order in *Chicken Ranch* held that the State's demand to include the TNGF in a new compact did not constitute bad faith *per se*. In fact, as explained in the Tribe's Memoranda in support of its Motion for Summary Judgment and in Opposition to the State's Motion for Summary Judgment, the only similarities between the TNGF and the RSTF are that the money in the TNGF comes from the RSTF, and that the RSTF and TNGF both use the same basic eligibility criterion: *i.e.*, eligibility is limited to California tribes that operate up to 350 Gaming Devices, including tribes that do not operate any Gaming Devices.

Coyote Valley II approved the RSTF as a proper subject of negotiation because the tribes proposed it, the RSTF's purpose was consistent with IGRA's goal of strengthening tribal governments and promoting economic development, and the tribes received extremely valuable State concessions in return. By contrast, the State, not the Tribe, kept proposing the TNGF over the Tribe's repeated objections; the State never responded to the Tribe's proposed alternative of the RSTF II in lieu of the TNGF; the State unilaterally established a grant system designed to ensure that a State-created body would be able to pick winners and losers through a competitive grant process;

[13] *I.e.*, negotiating at all about class III games that the State did not yet affirmatively permit; and agreeing to amend the State Constitution so as to authorize the Governor to negotiate and the Legislature to ratify compacts under which only Tribes with Indian lands may operate slot machines, banked and percentage card games, and lottery games that otherwise only the State Lottery could operate.

and unlike the RSTF, which allows recipient tribes to decide for themselves how and when to use the money received from that fund, the State would impose external standards, spending restrictions and audit requirements on recipients of TNGF grants – the antithesis of strengthening sovereign tribal governments and maximizing the potential for tribal economic development. *See* Calif. Gov't Code § 12019.30 *et seq.*; JSUF, ¶ 115.

If the State ever had any intention of deviating from its insistence on including the TNGF in a new compact, it had five years in which to manifest that intent. It did not, revealing that the State was engaged in surface bargaining on this issue, and thus failed to negotiate in good faith.[14]

C. Money Damage Remedies for Workplace Discrimination, Harassment and Retaliation.

In the Tribe's Memoranda in support of its Motion for Summary Judgment and in opposition to the State's Motion for Summary Judgment, the Tribe demonstrated that because federal law exempts tribes from the definition of "employer" under the ADA and Title VII, and because the federal courts consistently have held that tribes are not subject to private suit under those and other federal laws dealing with workplace discrimination, harassment and retaliation, the State negotiated in bad faith by intransigently insisting that the Tribe not only prohibit workplace discrimination, harassment and retaliation (something the Tribe was willing to do), but also carry $3 million in employment practices liability insurance and enact an ordinance creating remedies in money damages for persons claiming to have suffered discrimination, harassment or retaliation (including pre-hiring). Throughout the negotiations, the State insisted that the Tribe purchase $3 million in employer liability insurance and create remedies in money damages for any Gaming Operation (broadly defined) employees claiming to have suffered from workplace discrimination, harassment or retaliation. *See* RON, vol. 4, pp. 1580-1585.

To be clear, the Tribe does not practice or tolerate workplace discrimination, harassment or retaliation, but because federal workplace anti-discrimination laws expressly exclude the Tribe from

[14] Just as the State never engaged in substantive negotiations over the inclusion and structure of the TNGF, from 2016 on the State also never deviated from its demand that the Tribe spend 6% of its net win from Gaming Devices 351+, only 40% of which actually had to go into the RSTF. JSUF ¶¶ 32, 9, 78.

the definition of "employer" or have been construed as not subjecting the Tribe to private damage actions under such laws, the Tribe contends that requiring it to carry insurance and create money damage remedies for workplace discrimination is not a proper subject of negotiation under IGRA's catch all provision or otherwise; rather, it is an attempt by the State to evade the exemptions that federal law confers on the Tribe.[15]

In its Opposition Memorandum, the State lumps its demands regarding workplace discrimination together with its other demands concerning all Gaming Operation employees, including the TLRO, but utterly ignores the Tribe's contentions about the effect of the federal anti-discrimination laws that either expressly exclude the Tribe from the definition of "employer," or that have been held to not be enforceable against the Tribe through private damage actions.

The fact that federal workplace anti-discrimination laws expressly exclude tribes from the definition of "employer" distinguishes the State's demands on this issue from the State-approved TLRO that *Coyote Valley II* found was a proper subject of negotiation.[16] In *San Manuel* and *Casino Pauma*, federal appellate courts noted that IGRA is silent about the issue of labor relations, and because the National Labor Relations Act is a statute of general application that does not, by its terms, exclude tribes from its application, tribal casinos are subject to the NLRA. Because Title VII and the ADA both expressly exclude the Tribe from the definition of "employer," the State's demand that the Tribe carry $3 million in employment practices liability insurance and create remedies in money damages for claims of workplace discrimination, etc., was a blatant attempt to nullify the very exemption Congress has conferred on the Tribe. In short, the State's insistence that the Tribe carry insurance and consent to the creation of money damage remedies pursuant to federal standards from

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[15] In *Chicken Ranch*, 2021 U.S. Dist. LEXIS 63102, at *14, this Court held that the workplace discrimination provisions are within the scope of 25 U.S.C. § 2710(d)(3)(C)(vii). However, the same reasons that the minimum wage and tort law provisions are not authorized by clause (vii) apply to the application of the State's workplace discrimination laws, particularly as the State would extend those laws to all Gaming Operation employees, not just to employees who work directly with gaming activities. Moreover, because clauses (i) and (ii) deal with the application of state and tribal law and jurisdiction, accepted rules of statutory construction weigh heavily against reading clause (vii) to also cover the application of state or tribal law. *See Navajo Nation*, 896 F.3d at 1212 1216.

[16] Assuming, without conceding, that the Ninth Circuit would have ruled as it did in *Coyote Valley II* if the NLRB already had asserted jurisdiction over tribal casinos.

which Tribes otherwise are expressly exempt is not merely inconsistent with IGRA's stated goals of tribal economic development, self sufficiency and strong tribal governance; it affirmatively undermines those goals without advancing any countervailing policy endorsed by IGRA.[17]

CONCLUSION

For more than five years, the Tribe has been seeking a new compact that will enable it to continue generating the revenues needed to maintain and strengthen its government, develop and diversify its economy, enhance the health, safety and welfare of its citizens and surrounding non-tribal communities, and otherwise fulfill IGRA's objectives. Only through this Court's prompt grant of the relief sought in this action can those objectives be attained.

For all of the reasons set forth above, the Court should grant the Tribe's Motion for Summary Judgment, deny the State's Motion for Summary Judgment, and because so little time remains on the term of the Tribe's current 1999 Compact, order the parties immediately to commence negotiations pursuant to IGRA's remedial processes.

Dated: July 22, 2021

Respectfully submitted,

By: /s/ George Forman
George Forman
FORMAN & ASSOCIATES
Attorneys for Plaintiff

[17] If the State did not act in bad faith *per se* by demanding that the Tribe enact its own law prohibiting workplace discrimination and creating a remedy in money damages, the record of the negotiations is devoid of any offer by the State of a meaningful concession in return for that demand, rendering the State in bad faith.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY, a federally recognized Indian Community,

Plaintiff,

vs.

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

Defendants.

Case No.: 2:20-cv-01585-AWI-SKO

DECLARATION OF BONNIE PULLEN IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Bonnie Pullen declares as follows:

1. I was the Chief Financial Officer for the Cachil Dehe Band of Wintun Indians of the Colusa Indian Community ("Community") until March 2021, and in my current capacity as a special advisor to the Colusa Indian Community Council have personal knowledge of the Community's Casino's total annual Gaming Device net win for the third and fourth quarters of 2019 and the first and second quarters of 2020, and the Community's payments for those periods into the Indian Gaming Special Distribution Fund ("SDF") and Indian Gaming Revenue Sharing Trust Fund ("RSTF"). I make this declaration on the basis of that knowledge.

2. I have reviewed the unredacted Declaration of Rachelle Ryan lodged in support of the State's Motion for Summary Judgment in this action, in which she calculates that for fiscal

Years 2018/2019 and 2019/2020, the Community paid a combined total of between approximately $1,638,947 and $660,000, respectively, into the SDF and the RSTF.

3. Based on my review of the State's filings in this action, I understand the State to be asserting that under the "economic" terms that State proposed in compact negotiations with the Community, the Community's payments into the SDF would be based on an annual fee of approximately $440 per Gaming Device per year, reducing the Community's SDF payment obligation by about 43%, and if the Community operates no more than 1,200 Gaming Devices, the Community's payments into the RSTF would be reduced to zero, "saving" the Community about $565,000 compared to what the Community now pays into the SDF and the RSTF under its current Compact. However, under the State's proposal, if the Community were to operate more than 1,200 Gaming Devices, it would be required to annually spend 6% of the net win from Gaming Devices 351+, of which at least 40% would be paid into the RSTF, and the remaining 60% must be spent on various State-approved purposes.

4. Before the Community closed its casino in mid-March, 2020 due to the pandemic, the Community operated an average of 1,243 Gaming Devices. When the Community re-opened to the public on June 8, 2020, it made roughly half of those Gaming Devices available for play for health and safety purposes. Under the State's proposal for SDF and RSTF payments (and not including any other additional costs associated with other aspects of the State's compact proposal, such as increased insurance premiums, increased litigation costs, increased personnel costs, increased costs for environmental reviews and mitigation agreements), if the Community were to continue operating 1,243 Gaming Devices, the actual combined cost to the Community would be approximately $1.7 million *more* than what the Community now pays, because in calculating what the Community would "save" under the State's proposal, the State has not included the total amount that the Community would be required to spend, only the 2.4% of net win from Gaming Devices 351+ that must be paid into the RSTF after allowing the Community to take "credits" against its RSTF payments of up to 60% of 6% of the net win from Gaming Devices 351+.

I declare under penalty of perjury that the foregoing is true and correct of my own knowledge, and that this Declaration was executed at the Colusa Indian Reservation, Colusa

County, California on July 22, 2021.

Bonnie Pullen