

1 George Forman (SBN 047822)
Jay B. Shapiro (SBN 224100)
2 Margaret C. Rosenfeld (SBN 127309)
FORMAN & ASSOCIATES
3 4340 Redwood Highway, Suite E352
San Rafael, CA 94903
4 Telephone: (415) 491-2310
Facsimile: (415) 491-2313
5 E-mail: george@gformanlaw.com

6 Attorneys for Plaintiff

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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

10 CAHUILLA BAND OF INDIANS, a federally)
recognized Indian Tribe,)

11)
Plaintiff,)

12)
vs.)

13)
STATE OF CALIFORNIA, and GAVIN)
14 NEWSOM, IN HIS OFFICIAL CAPACITY AS)
GOVERNOR OF CALIFORNIA,)

15)
16)
Defendants.)

17

18

Case No.: 2:20-cv-01630-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

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1 **INTRODUCTION**

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

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

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

20 **ARGUMENT**

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

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

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

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

12 Federal appellate court decisions in the wake of *Bay Mills* have applied the Supreme Court's
13 understanding of "gaming activities" to define the limits of IGRA's catch-all provision. For example,
14 in *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928 (8th Cir. 2019), the Flandreau Santee Sioux
15 Tribe urged the Eighth Circuit to adopt an expansive definition of "gaming activities" to include the
16 Casino's gift shop, hotel, food and beverage services, and live entertainment. The Tribe argued that
17 such amenities would not exist but for its casino, nor could the casino operate without the amenities;
18 thus, the amenities were "directly related to the operation of gaming activities." *Id.* at 934-35. But
19 the Court of Appeals rejected that argument as contrary to IGRA's plain meaning: "First, and most
20 obviously, amenities such as a gift shop, hotel, and RV park are not directly related to Class III
21 gaming activity as defined by the Supreme Court in *Bay Mills* – 'what goes on in a casino – each roll
22 of the dice and spin of the wheel.' 'Directly related to the operation of gaming activity' is narrower
23 than 'directly related to the operation of the Casino.'" (*Id.* at 935). Thus, the catch-all provision
24 encompasses only "activities actually involved in the playing of the game, and not activities
25 occurring in proximity to, but not inextricably intertwined with, the betting of chips, the folding of a
26 hand, or suchlike." (*Id.*); *see, also, Navajo Nation v. Dalley*, 896 F.3d 1196, 1207 (10th Cir. 2018).
27 The Ninth Circuit's decision in *In re Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003) ("*Coyote*
28 *Valley II*") may have taken a more expansive view of what has a "direct relationship to the operation

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

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

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

14 **A. The State Must Offer Meaningful Concessions in Exchange for Payments by the**
15 **Tribe¹**

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

27 ¹ Except for payments to defray the State's actual costs of regulating the Tribe's gaming activities. See
28 §2710(d)(3)(C)(iii).

1 602 F.3d at 1033 (emphasis added). The State contends that *Coyote Valley II* and *Rincon* do not
2 control because its demands for revenue sharing over the last few years are nothing like the financial
3 demands it insisted upon when negotiating the 1999 Compact or the amendments at issue in *Rincon*.

4 How so? The State argues that,

5 The State Defendants' proposals offer a new compact that will allow
6 the Tribe to continue to operate up to 350 Gaming Devices while
7 making no contributions to the RSTF or SDF under the scope of its
8 current operations. Pursuant to the terms of the State's March 2020
9 economic offer, and in conjunction with a statute sponsored by the
 former Brown Administration, if Cahuilla continues to operate fewer
 than 350 Gaming Devices, the Tribe will most likely have no SDF
 obligation—saving the Tribe potentially hundreds of thousands of
 dollars.

10 DUF 10, 34; *see* Corrected State Defs.' Mem. P. & A. Supp. Mot. Summ. J. (ECF 35-1) filed on June
11 9, 2021 (State Defs.' Mot.) at 17:14-18:10, 45:4-16.

12 As shown in section III of this Memorandum, *infra*, the State's claim is at least potentially
13 false, and at best speculative, because it assumes that the Tribe never will operate more than 1,200
14 Gaming Devices over the 25-year life of a new compact, and that the State will waive SDF payments
15 in perpetuity; here, we will just focus on why the claim is legally confused.

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

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

25 The \$1 million payment in the preceding hypothetical could not constitute a meaningful
26 concession by the State, because the State is not *per se* entitled to any payment at all. Rather,
27 properly understood, the \$1 million payment is a State demand for revenue sharing that can be
28 justified, if at all, only if the payment satisfies *Rincon's* three-part test, including that the State must

1 offer a meaningful concession in return.²

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

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

19 Case law aside, the State refuses to acknowledge that failing to require meaningful
 20 concessions even for the State's so-called "non-economic" demands would undermine IGRA's
 21 primary purposes "of promoting tribal economic development, self-sufficiency, and strong tribal
 22 governments," without advancing any of IGRA's other purposes. §2702. IGRA's legislative history
 23 is replete with statements admonishing against powerful states using the compacting process to
 24 extend their jurisdiction within Indian Country beyond what is necessary to regulate the more

25
 26 ² As explained above, a truly new compact, as opposed to the mere extension of the term of an existing compact,
 27 is not a continuation of a previous compact, and any demand for tribal payments, now or in the future, would be new
 28 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.

1 sophisticated forms of gaming included in class III.

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

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

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

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

21 The State argues, in effect, that any provision to which it agrees that is more favorable to the
22 Tribe than a comparable provision in the Tribe's existing 1999 Compact necessarily constitutes a
23 meaningful concession, thus precluding a finding that the State failed to negotiate in good faith.
24 That is not the law. Because the State is obligated to negotiate over basic gaming terms as well as
25 ordinary contract provision, the State's agreement to garden-variety compact provisions is not a
26 concession and thus cannot serve as the predicate for demanding a concession from the Tribe.
27 *Rincon*, 602 F.3d at 1037, 1039.

28 For example, because the duration of a compact is part of the basic gaming rights to be

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

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

11 The entire premise of the State's argument that the Court should find that its "economic
12 proposals" qualify as granular meaningful concessions is that as long as the Tribe continues to
13 operate no more than 350 Gaming Devices, and as long as the State grants an annual waiver of
14 payment into the SDF on the basis of the Tribe's "pro rata share," the Tribe would pay less to the
15 SDF than it does today. This premise suffers from two fatal flaws.

16 First, the Tribe's 1999 Compact cannot be used as the benchmark for what is fair and
17 reasonable under current circumstances because the Tribe's current SDF payment obligation will
18 expire with the expiration of its 1999 Compact on June 30, 2022. Under the Ninth Circuit's decisions
19 in *Coyote Valley II* and *Rincon*, and this Court's order in *Chicken Ranch*, the State must
20 independently justify and offer meaningful concessions on a "granular level" in exchange for any
21 new demands for payments by the Tribe beyond what is necessary to defray the State's actual
22 regulatory costs, even if the payment obligation would be contingent on the occurrence of a
23 subsequent event, such as increasing the number of Gaming Devices operated by the Tribe, or a
24 decision by the State to not waive SDF fees in a given future year.

25 Second, the State knows full well that its economic proposal could result in the Tribe
26 spending *more, not less*, than what the Tribe already pays under its 1999 Compact. Specifically, if
27 the Tribe ever operates more than 1,200 Gaming Devices, the State would require the Tribe to
28 annually *spend* 6% of the Tribe's net win from Gaming Devices 351+, even though, under the State's

1 proposal, only 40% of the 6% actually must be paid into the RSTF. This amount does not include the
2 additional operating costs inherently associated with the other "non-economic" aspects of the State's
3 proposal for expenses such as new or increased liability insurance premiums, higher personnel and
4 administrative costs, and far more costly and detailed environmental assessment and mitigation
5 requirements.

6 Third, the State cannot justify the amounts it demanded that the Tribe pay into either the SDF
7 if the State declines to waive SDF payments or the Tribe ever operates more than 350 Gaming
8 Devices, or the RSTF if the Tribe ever operates more than 1,200 Gaming Devices. This compels the
9 conclusion that the State's intent is merely to force the Tribe to spend more than is needed to fully
10 fund either the SDF or the RSTF. extract as much money from the Tribe as it can. As shown by the
11 uncontroverted Declaration of Chairman Daniel Salgado and Exhibits S-1 and S-2 attached thereto,
12 there is a substantial surplus in the SDF fund balance, and the State projects that it will remain in
13 substantial surplus for years to come.

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

19 As for the RSTF, Chairman Salgado's uncontroverted Declaration shows that this fund also
20 has a substantial surplus, and is projected to continue in surplus for years to come. Moreover, the
21 very fact that the State would "allow" the Tribe to offset its payments into the RSTF by 60% of 6%
22 of the net win from Gaming Devices 351+ as long as the other 40% is spent for other prior
23 State-approved purposes (subject to subsequent State review and disallowance)³ proves that the State
24 cannot justify its demand that the Tribe must spend a total of 6% of its net win from Gaming Devices
25 351+ if it operates more than 1,200 Gaming Devices. The State's proposal amounts to "pay to play,"
26 which is not something IGRA permits.

27 _____
28 ³ State's Opening Memorandum, p. 19:12-17.

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

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

7 As noted in *Rincon*, IGRA obligates the State to negotiate over basic gaming provisions
8 (including ordinary contract provisions); the State cannot insist on concessions in return. 602 F.3d at
9 1037, 1039. In this litigation, the State has continued to do what it did throughout five years of
10 compact negotiations, and that this Court held in *Chicken Ranch* the State cannot do without failing
11 to negotiate in good faith: *i.e.*, lump together a number of provisions, characterize them as being
12 more favorable overall than comparable provisions of the Tribe's 1999 Compact, and claim that any
13 improvement over the *status quo* necessarily constitutes a meaningful concession. *Rincon* rejected
14 this approach (602 F.3d at 1040), as did this Court in *Chicken Ranch*.

15 The State makes much of its proposal to eliminate the statewide Gaming Device License Pool
16 created by the 1999 Compacts. As explained in the Tribe's Opposition to the State's Motion for
17 Summary Judgment (pp. 38-39), the pool will evaporate with the expiration of the Tribe's Compact
18 on June 30, 2022. Moreover, the State essentially had abandoned the concept of the statewide
19 License Pool starting in 2004, when it agreed to compact amendments allowing some tribes to
20 operate unlimited numbers of Gaming Devices.⁴ Since then, the State has agreed to numerous other
21 Compacts allowing Tribes to operate increased numbers of Gaming Devices without having to obtain
22 licenses from the pool.

23 While the Tribe continues to operate fewer than 350 Gaming Devices, it doesn't need any
24 Gaming Device licenses, and if it desired to increase its Gaming Device inventory, it wouldn't have
25 to pay annual license fees for its first 350 licenses. Thus, this aspect of the State's proposal is of no
26

27 ⁴ See, e.g., 6/21/2004 Compact Amendment of the Pala Band of Mission Indians, viewable at
28 <http://www.cgcc.ca.gov/?pageID=compacts>.

1 value to the Tribe, and is not a concession at all, much less a meaningful concession.

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

9 Similarly, provisions concerning remedies for material breaches, *force majeure*, an obligation
10 merely to negotiate about amendments to deal with changed circumstances, and other provisions
11 identified by the State as constituting "meaningful concessions" at best are nothing more than modest
12 improvements over the *status quo* that benefit both parties; they have no special benefit to the Tribe.
13 Moreover, whatever benefits accrue to the Tribe from these "concessions" are dwarfed by the
14 concessions demanded from the Tribe on such issues as increased liability insurance limits, creation
15 of money damage remedies for claims of workplace discrimination from which Tribes are expressly
16 exempted under federal law, imposition of a new and discriminatory TLRO, new administrative and
17 legislative obligations, increased personnel costs, and extensive new obligations to assess and
18 mitigate impacts on the off-Reservation environment from broadly-defined "projects."

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

27 To the extent that the State previously had agreed to provisions that were improvements over
28 the *status quo*, but that cost the State nothing, there was no reason for the Tribe to not include them

1 in its last, best offer. Likewise, the fact that the Tribe included some provisions that it contends are
2 not proper subjects of negotiation, or for which the State was required to offer meaningful
3 concessions but had not done so, simply demonstrated that the Tribe's last, best offer was a
4 good-faith, last-ditch effort to persuade the State to agree to a new compact by addressing issues of
5 concern to the State, but in ways that would be far more respectful of the Tribe's sovereign status and
6 needs.

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

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

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

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

25 There can be no dispute that over the course of five years, the State consistently proposed that
26 the Tribe adopt the provisions discussed in Counts One through Fourteen of the Tribe's Complaint.
27 Just as consistently the Tribes objected that these provisions, in part or in whole, exceeded what
28 IGRA permits to be proper subjects of negotiation, and that if the State wanted to include them, it

1 needed to offer meaningful concessions. Did the State explicitly ever say that these provisions must
2 be included in a new compact? No; although the Tribes repeatedly asked the State which of the
3 disputed provisions the State would insist be included in a new compact, the State refused to say,
4 thereby forcing the Tribes to guess and negotiate against themselves. *See, e.g.*, RON vol. *, pp. **.
5 This was classic "surface bargaining," by which the State cynically used the looming expiration date
6 of the Tribe's current compact in an attempt to coerce the Tribes into submission. *See NLRB. v. Big*
7 *Three Indus., Inc.*, 497 F.2d 43, 46 (5th Cir. 1974).⁵

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

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

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

24 As the State acknowledges, the negotiations between the State and the CTSC Tribes,
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26
27 ⁵ *See In re Indian Gaming Related Cases v. California*, 147 F.Supp.2d 1011, 1020-21 (N.D. Cal. 2001)
28 ("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).

1 including plaintiff Tribe, were conducted pursuant to a Protocol agreed to by the parties, paragraph
2 14 of which provided that, "All tentative agreements to be reduced to writing and contingent upon
3 negotiation of final agreement." JSUF ¶ 14. There is no dispute that during the Brown
4 Administration, the State and the CTSC Tribes reached consensus on numerous provisions that both
5 the State and the Tribes agreed were proper subjects of negotiation under IGRA; *e.g.*, licensing of
6 Gaming Facilities and gaming related personnel and vendors (Compact § 6); testing and
7 transportation of Gaming Devices (Compact § 7); State inspections of Gaming Facilities and Gaming
8 Operation books and records (Compact § 8); rules and regulations for operation of Gaming Activities
9 and maintenance of Gaming Facilities (Compact § 9); patron disputes (Compact § 10); many aspects
10 of public and workplace health, safety and liability (Compact § 12); dispute resolution (Compact §
11 13); amendments and renegotiation (Compact § 15); notices (Compact § 16); changes to IGRA
12 (Compact § 17); and several miscellaneous provisions (parts of Compact § 18). Those provisions are
13 not at issue in this action.

14 During the Brown Administration, the parties also had reached tentative consensus on the
15 *language* of many of the provisions that the Tribe contends are not proper subjects of negotiation
16 under IGRA; however, the CTSC Tribes and plaintiff Tribe repeatedly made clear that these
17 provisions were not proper subjects of negotiation under IGRA, but that they could be at least
18 considered if the State were to offer meaningful consideration in the form of substantial concessions
19 on issues about which the State otherwise was not required to negotiate. *See, e.g.*, JSUF ¶¶ 34, 36,
20 39, 40 50, 52, 60, 65, 66, 68 72, 74, 76 83, 85, 111.

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

28 As early as January, 2016, the CTSC Tribes and plaintiff Tribe made known-and explained in

1 detail—their objections to the State's proposed new TLRO. JSUF ¶¶ 36, 40. Notwithstanding those
2 objections, in May and September, 2018, the CTSC Tribes submitted proposed revisions to the State
3 drafted new TLRO, contingent on receiving meaningful concessions in return. Between December,
4 2015 and the Tribe's withdrawal from the CTSC in July, 2020, the State never provided a written
5 response to the Tribes' proposed revisions to the State's new TLRO, and never was willing to
6 negotiate about the substance of either the State's new TLRO or the Tribes' proposed alternative.
7 Moreover, as noted previously, the State's negotiator expressly and repeatedly refused to tell the
8 Tribes whether the State would insist upon including in new compacts the State's new TLRO or any
9 of the other provisions that the Tribes contended were not proper subjects of negotiation under
10 IGRA, and repeatedly refused to allow the Tribes to meet directly with Governor Newsom to hear
11 from him what he would and would not insist be included in new Compacts. Add'l RON, vol. 2, p.
12 719, pp. 783-824; JSUF, ¶ 85. With time running out on the term of the Tribe's 1999 Compact, the
13 Tribe could not continue guessing about what the State would and would not insist be included in a
14 new compact.

15 The State also never yielded on its demand that the Tribe pay more into the SDF than
16 necessary to defray the State's actual regulatory costs if the Tribe were to operate more than 350
17 Gaming Devices, and that the Tribe spend far more than necessary to fully fund the RSTF if the
18 Tribe were to operate more than 1,200 Gaming Devices. Indeed, other than to make one early change
19 to the percentage of net win tribes would be required to spend,⁶ offer the potential exemption from
20 SDF payments for Tribes operating fewer than 350 Gaming Devices, and setting the threshold for
21 RSTF liability at 1,200 Gaming Devices, the State never negotiated about the substance of either its
22 SDF or RSTF demands.

23 As of July, 2020, the State offered no indication it would make substantial changes to its core
24 negotiating demands, or agree to an extension of the Tribe's current Compact. Under these
25 circumstances, remaining at the negotiating table would have caused the Tribe to forfeit its right to
26 seek relief in this Court, and forced the Tribe to surrender to whatever terms the State might impose

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28 ⁶ RON vol. 4, pp. 1649-51; Add'l RON, vol. 1, pp. 430-432.

1 in order to avoid losing its right to conduct class III Gaming Activities. JSUF ¶¶ 196, 201.

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

10 As to the Tribe's first proposal, it bears repeating that the Tribe did not seek the present right
11 to operate any form of class III gaming that State law does not affirmatively authorize; rather, the
12 Tribe proposed only that if the State Constitution ever is amended to authorize additional forms of
13 what IGRA categorizes as class III gaming, the Tribe may operate that form of gaming (subject to
14 rules and regulations prescribed by the Gaming Regulators' Association) without having amend its
15 compact. Under IGRA, if state law affirmatively authorizes a form of class III gaming, the Tribe
16 would be entitled to operate it, as long as the Tribe does so pursuant to a Compact. As one example,
17 California's Constitution authorizes pari mutuel wagering on horse races, but is silent about the
18 Governor's authority to negotiate and the Legislature's authority to ratify compacts allowing Tribes to
19 operate off track wagering on horse racing. Nonetheless, the Governor has negotiated compacts
20 allowing Tribes to operate off track wagering facilities. *See, e.g., Cabazon Band of Mission Indians*
21 *v. Wilson*, 37 F.3d 430 (9th Cir. 1994).

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

1 against the Governor's authority to negotiate and the Legislature's authority to ratify a Compact that
2 would obligate the State to compensate tribes for the State's affirmative abrogation of the tribes'
3 exclusive gaming rights.

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

7 For five years, in compact draft after compact draft, the State continued to propose provisions
8 to which the Tribe objected as not being proper subjects of negotiation because they go beyond what
9 is directly related to and necessary for the regulation and licensing of Gaming Activities, or
10 otherwise are not directly related to the operation of Gaming Activities. As explained in section II of
11 this Memorandum, *supra*, as well as in the Tribe's Memoranda in Support of its Motion for
12 Summary Judgment and in Opposition to the State's Motion for Summary Judgment, the State's
13 insistence on extending the provisions of a new compact to tribal employees, facilities and areas of
14 the Tribe's Reservation not directly involved in the actual operation of the Tribe's class III Gaming
15 Activities no longer was defensible after the Supreme Court's decision in *Bay Mills* provided the
16 definitive interpretation of "gaming activities" as that term is used in IGRA.⁷

17 The State's Opposition to the Tribe's Motion for Summary Judgment does not directly refute
18 the Tribe's contention; indeed, the State's Opposition Memorandum does not even mention *Bay*
19 *Mills*, much less discuss its significance in defining the permissible scope of compact negotiations.
20 Instead, the State attempts to avoid the issue by asserting that it never "insisted" on the inclusion of
21 any provisions at all; rather, the State refused to tell the Tribe what must be included in a new
22 compact, and claimed that everything remained open to negotiation. Add'l RON, vol. 1, p. 719; vol.
23 2, pp. 783-824; vol. 3, pp. 992-993; JSUF, ¶ 85.

24 To the extent not already addressed in this Reply Memorandum, the Tribe will rely on the
25 Memoranda it submitted in support of its own Motion for Summary Judgment and in Opposition to
26 the State's Motion for Summary Judgment to refute the State's contentions regarding the definitions

27 ⁷ In any event, as shown in section III of this Memorandum, the State failed to offer the requisite meaningful
28 concessions in exchange for these demands.

1 for Gaming Employees, Gaming Facility and Gaming Operation, excessive demands for payments
2 into the SDF and RSTF, withholding and remittance of state income taxes, honoring State court
3 support orders, tort liability, check cashing, and the State's attempt to impose CEQA and other
4 environmental constraints on the Tribe's ability to engage in class III Gaming Activities. Instead, this
5 Memorandum will focus on the State's contention that its demand to include the State's new TLRO
6 and the State-created TNGF, and that the Tribe carry \$3 million in employment practices liability
7 insurance and enact a tribal ordinance prohibiting workplace discrimination and creating remedies
8 for money damages, any or all of which would support a finding that the State failed to negotiate in
9 good faith.

10 **A. The State's New TLRO.**

11 The State characterizes its new TLRO—which the State first proposed in 2015, and for the
12 next five years refused to negotiate about—as little more than "the same basic labor relations
13 provision that the Ninth Circuit found consistent with IGRA and the public interest" in *Coyote Valley*
14 *II*. What's more, the State contends that no meaningful concessions were required. State's
15 Opposition Memorandum, pp. 22:23-27, 23:1-5.

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

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

1 collective bargaining impasse, and prohibited picketing on the Tribe's Indian lands. *See* Joint
2 Request for Judicial Notice, Exh. A, §§ 11, 13.

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

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

- 12 • the Tribe must allow union organizers to come into areas of its casino that are not open
13 to the public in order to engage in organizing activity, access that the U.S. Supreme
14 Court has held can constitute a Fifth-Amendment taking of an employer's property rights
15 under most circumstances.⁸ The record is devoid of any justification for this provision,
16 given that union organizers have free access to tribal employees outside of the
17 workplace;⁹
- 18 • the State's new TLRO would set unrealistically short deadlines for the Tribe to respond
19 to a union's information requests, for appointment of an election officer, and for
20 conducting representation elections;
- 21 • a union may unilaterally limit the Tribe's right to free speech by serving a Notice of
22

23 ⁸ "California's access regulation appropriates a right to invade the growers' property and therefore constitutes a
24 *per se* physical taking. Rather than restraining the growers' use of their own property, the regulation appropriates for the
25 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).

26 ⁹ "As a rule, then, an employer cannot be compelled to allow distribution of union literature by nonemployee
27 organizers on his property. As with many other rules, however, we recognized an exception. Where "the location of a
28 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).

1 Intent to Organize ("NOIO") and agreeing not to strike, giving the union a year to make
 2 the 30% showing of interest necessary to trigger a secret-ballot election, limit collective
 3 bargaining for a new contract to no more than 120 days, and require that collective
 4 bargaining impasses be resolved by binding interest arbitration, – a mandate that the
 5 State may not lawfully impose on its own subdivisions.¹⁰

6 Second, as discussed in the Tribe's Opening Memorandum (pp. 41-46), and again in its
 7 Memorandum in Opposition to the State's Motion for Summary Judgment (pp. 31-33), *Coyote Valley*
 8 *II* was decided in an entirely different legal context regarding labor relations in Indian country than
 9 now exists. *Coyote Valley II* upheld State's insistence on inclusion of the original TLRO at a time
 10 when the National Labor Relations Board had declined for decades to exercise jurisdiction over
 11 tribal employers in Indian country. Since *Coyote Valley II* was decided, various federal appellate
 12 courts have expressly upheld the NLRB's jurisdiction over tribal casinos. *See, e.g., Casino Pauma v.*
 13 *NLRB*, 888 F.3d 1066 (9th Cir. 2018); *San Manuel Indian Bingo & Casino v NLRB*, 475 F.3d 1306
 14 (D.C. Cir. 2007). Thus, the State no longer can claim that the TLRO is needed to give tribal casino
 15 employees the same organizational and representational rights that the State's public policy¹¹ protects
 16 for all other Californians working for employers subject to the NLRB's jurisdiction.

17 Third, the origins of the State's new TLRO are completely different than that of the Tribe's
 18 State-approved 1999 TLRO. Back then, "the UTCSC, of which Coyote Valley was a member, met
 19 with union representatives and participated in the shaping of the TLRO;" the State had no role in
 20 those negotiations. *Coyote Valley II*, 331 F.3d at 1117. Flash forward to 2015, and neither the
 21 plaintiff Tribe nor any of the other CTSC Tribes had any involvement whatsoever in drafting the
 22 State's new TLRO. Rather, the State presented it fully formed in 2015, and despite repeated requests
 23

24 ¹⁰ "The county argues that in enacting Senate Bill 402, the Legislature has impermissibly delegated to a private
 25 body--the arbitration panel--the power to interfere with county money (by potentially requiring the county to pay higher
 26 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).

27 ¹¹ Cal. Labor Code § 923 declares the State's public policy to be, "that the individual workman have full
 28 freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms
 and conditions of his employment"

1 for changes from the Tribe, not one word had changed by mid-July, 2020, when the Tribe withdrew
2 from the CTSC and presented its last, best offer to the State.

3 Fourth, despite the State's assignment of great importance to including the new TLRO in a
4 new Compact, and its pervasive recurrence over the span of five years, the State consistently
5 declined to engage in substantive negotiations about the content of the State's new TLRO, and
6 refused to respond to multiple tribal counter-proposals and explanatory memoranda between May,
7 2018 and July, 2020. RON vol. 15, pp. 8268-69; Add'l. RON vol. 1, pp. 45-47, 80, 221, JSUF ¶¶ 36,
8 40, 46, 50, 52, 56, 76, 78, 84, 101, 156, 157, 171, 189. Essentially, the State is asking the Court to
9 hold that the State did not fail to negotiate in good faith when it consistently refused to negotiate
10 about the substance of a major concession the State sought from the Tribe. The Court should decline
11 that request.

12 Fifth, unlike the extremely valuable, and thus meaningful concessions that *Coyote Valley II*
13 found that the State had offered the Tribe in return for accepting the State-approved 1999 TLRO,¹²
14 and as this Court found in *Chicken Ranch*, the State failed to offer the Tribe any new meaningful
15 concessions in return for the Tribe's acquiescence in the State's new TLRO.

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

20 **B. The TNGF.**

21 The State contends that, "Similar to the RSTF, the TNGF is another method of sharing
22 revenues with other tribes in California." Opposition Memorandum, p. 12:1-2. The State also
23 contends that this Court's order in *Chicken Ranch* held that the State's demand to include the TNGF
24 in a new compact did not constitute bad faith *per se*. In fact, as explained in the Tribe's Memoranda
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26
27 ¹² *I.e.*, negotiating at all about class III games that the State did not yet affirmatively permit; and agreeing to
28 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.

1 in support of its Motion for Summary Judgment and in Opposition to the State's Motion for
2 Summary Judgment, the only similarities between the TNGF and the RSTF are that the money in the
3 TNGF comes from the RSTF, and that the RSTF and TNGF both use the same basic eligibility
4 criterion: *i.e.*, eligibility is limited to California tribes that operate up to 350 Gaming Devices,
5 including tribes that do not operate any Gaming Devices.

6 *Coyote Valley II* approved the RSTF as a proper subject of negotiation because the tribes
7 proposed it, the RSTF's purpose was consistent with IGRA's goal of strengthening tribal
8 governments and promoting economic development, and the tribes received extremely valuable State
9 concessions in return. By contrast, the State, not the Tribe, kept proposing the TNGF over the
10 Tribe's repeated objections; the State never responded to the Tribe's proposed alternative of the
11 RSTF II in lieu of the TNGF; the State unilaterally established a grant system designed to ensure that
12 a State-created body would be able to pick winners and losers through a competitive grant process;
13 and unlike the RSTF, which allows recipient tribes to decide for themselves how and when to use the
14 money received from that fund, the State would impose external standards, spending restrictions and
15 audit requirements on recipients of TNGF grants – the antithesis of strengthening sovereign tribal
16 governments and maximizing the potential for tribal economic development. *See* Calif. Gov't Code
17 § 12019.30, *et seq.*; JSUF, ¶ 115.

18 If the State ever had any intention of deviating from its insistence on including the TNGF in a
19 new compact, it had five years in which to manifest that intent. It did not, revealing that the State
20 was engaged in surface bargaining on this issue, and thus failed to negotiate in good faith.¹³

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

23 In the Tribe's Memoranda in support of its Motion for Summary Judgment and in opposition
24 to the State's Motion for Summary Judgment, the Tribe demonstrated that because federal law
25 exempts tribes from the definition of "employer" under the ADA and Title VII, and because the
26

27 ¹³ Just as the State never engaged in substantive negotiations over the inclusion and structure of the TNGF,
28 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, 39 78.

1 federal courts consistently have held that tribes are not subject to private suit under those and other
2 federal laws dealing with workplace discrimination, harassment and retaliation, the State negotiated
3 in bad faith by intransigently insisting that the Tribe not only prohibit workplace discrimination,
4 harassment and retaliation (something the Tribe was willing to do), but also carry \$3 million in
5 employment practices liability insurance and enact an ordinance creating remedies in money
6 damages for persons claiming to have suffered discrimination, harassment or retaliation (including
7 pre-hiring). Throughout the negotiations, the State insisted that the Tribe purchase \$3 million in
8 employer liability insurance and create remedies in money damages for any Gaming Operation
9 (broadly defined) employees claiming to have suffered from workplace discrimination, harassment
10 or retaliation. *See* RON, vol. 4, pp. 1580-1585.

11 To be clear, the Tribe does not practice or tolerate workplace discrimination, harassment or
12 retaliation, but because federal workplace anti-discrimination laws expressly exclude the Tribe from
13 the definition of "employer" or have been construed as not subjecting the Tribe to private damage
14 actions under such laws, the Tribe contends that requiring it to carry insurance and create money
15 damage remedies for workplace discrimination is not a proper subject of negotiation under IGRA's
16 catch all provision or otherwise; rather, it is an attempt by the State to evade the exemptions that
17 federal law confers on the Tribe.¹⁴

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

23 The fact that federal workplace anti-discrimination laws expressly exclude tribes from the
24

25 ¹⁴ In *Chicken Ranch*, 2021 U.S. Dist. LEXIS 63102, at *14, this Court held that the workplace discrimination
26 provisions are within the scope of 25 U.S.C. § 2710(d)(3)(C)(vii). However, the same reasons that the minimum wage
27 and tort law provisions are not authorized by clause (vii) apply to the application of the State's workplace discrimination
28 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.

1 definition of "employer" distinguishes the State's demands on this issue from the State-approved
2 TLRO that *Coyote Valley II* found was a proper subject of negotiation.¹⁵ In *San Manuel* and *Casino*
3 *Pauma*, federal appellate courts noted that IGRA is silent about the issue of labor relations, and
4 because the National Labor Relations Act is a statute of general application that does not, by its
5 terms, exclude tribes from its application, tribal casinos are subject to the NLRA. Because Title VII
6 and the ADA both expressly exclude the Tribe from the definition of "employer," the State's demand
7 that the Tribe carry \$3 million in employment practices liability insurance and create remedies in
8 money damages for claims of workplace discrimination, etc., was a blatant attempt to nullify the very
9 exemption Congress has conferred on the Tribe. In short, the State's insistence that the Tribe carry
10 insurance and consent to the creation of money damage remedies pursuant to federal standards from
11 which Tribes otherwise are expressly exempt is not merely inconsistent with IGRA's stated goals of
12 tribal economic development, self sufficiency and strong tribal governance; it affirmatively
13 undermines those goals without advancing any countervailing policy endorsed by IGRA.¹⁶

14 CONCLUSION

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

20 For all of the reasons set forth above, the Court should grant the Tribe's Motion for Summary
21 Judgment, deny the State's Motion for Summary Judgment, and because so little time remains on the

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23 ///

25 ¹⁵ Assuming, without conceding, that the Ninth Circuit would have ruled as it did in *Coyote Valley II* if the
26 NLRB already had asserted jurisdiction over tribal casinos.

27 ¹⁶ If the State did not act in bad faith *per se* by demanding that the Tribe enact its own law prohibiting
28 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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2 term of the Tribe's current 1999 Compact, order the parties immediately to commence negotiations
3 pursuant to IGRA's remedial processes.

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5 Dated: July 22, 2021

Respectfully submitted,

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

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