

1 JOHN M. PEEBLES, ESQ. (BAR No. 237582)
DARCIE L. HOUCK, ESQ. (BAR No. 196556)
2 A. ROBERT RHOAN, ESQ. (BAR No. 231949)
FREDERICKS PEEBLES & MORGAN LLP
3 1001 Second Street
Sacramento, California 95814
4 Telephone: (916) 441-2700
Facsimile: (916) 441-2067
5

6 Attorney for Plaintiffs,
Fort Independence Indian Community
7

8 **IN THE UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
10

11 FORT INDEPENDENCE INDIAN COMMUNITY,
a federally-recognized tribe,
12

13 Plaintiffs,
14

15 v.
16

17 STATE OF CALIFORNIA; ARNOLD
SCHWARZENEGGER, Governor of the State of
California,
18

19 Defendants.
20
21
22
23
24
25
26
27
28

Case No. 2:08-CV-00432-LKK-KJM

**PLAINTIFF FORT INDEPENDENCE
INDIAN COMMUNITY'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF ITS
MOTION FOR SUMMARY
JUDGMENT, OR ALTERNATIVELY,
PARTIAL SUMMARY JUDGMENT**

Date: May 18, 2009
Time: 10:00 a.m.
Dept.: Courtroom No. 4 15th Floor
Judge: Hon. Lawrence K. Karlton

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PAGE

TABLE OF CONTENTS..... i, ii

TABLE OF AUTHORITIES iii, iv, v

I. INTRODUCTION 1

II. STATEMENT OF UNDISPUTED MATERIAL FACTS..... 1

 A. In 1999, California Entered Into Several Tribal-State Compacts With
 Other Federally-Recognized Tribes, Of Which, Fort Independence
 is an Intended Third-Party Beneficiary 1

 B. California Has Concluded Numerous Tribal-State Compacts That
 Preserve Third-Party Beneficiary Rights Under the 1999 Compacts and
 Allow Non-Compact Tribes to Continue to Receive RSTF Funding 2

 C. Fort Independence Asks The State of California to Commence
 Negotiation of a Tribal-State Compact Under IGRA 3

 D. In 2005 and 2006, Fort Independence Objected To Provisions
 Regarding Discontinuation of RSTF Funding and Imposition of a
 State Tax or Assessment in California’s Draft Tribal-State Compact
 As Prohibited By IGRA 4

 E. Negotiations Continue Into 2007, and the State Continues to Demand
 Terms From the Tribal-State Compact That Violated IGRA 5

 F. California Rejects Fort Independence’s Position and Continues to
 Demand Revenue Sharing and Forfeiture of the Tribe’s RSTF
 Disbursement in Violation of IGRA 7

III. LEGAL ARGUMENT 8

 A. Legal Standard Governing Summary Judgment Motions..... 8

 B. There is No Genuine Issue of Material Fact As to Whether California
 Has Violated IGRA By Negotiating a Tribal-State Compact With
 Fort Independence in Bad Faith 8

 C. Intent and Purpose of IGRA..... 9

 D. The IGRA Sets Forth Permissible Subjects of Negotiations for a Tribal-State
 Compact, and Prohibits California From Imposing a Tax, Fee, Charge, or
 Other Assessment on Fort Independence 14

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PAGE

1. Fort Independence’s Third-Party Beneficiary Rights to RSTF Funding Under the 1999 Compacts Is Not a Proper Subject of Negotiation Under IGRA 15

2. IGRA Prohibits Conditioning the Conclusion and Execution of a Tribal-State Compact on Inclusion of a Provision Which Permits California to Exact a Tax, Assessment or Other Charge on Gaming Revenue 18

E. California’s Offer of Exclusivity is Meaningless, and Is Therefore Insufficient to Insulate California From its Bad Faith in Conditioning the Conclusion and Extension of a Tribal-State Compact on the Inclusion of Provisions Prohibited by IGRA 23

F. California Insistence On the Inclusion of Provisions Prohibited by IGRA is Evidence of Bad Faith Shifting the Burden to the State of California Requiring it to Prove it Acted in Good Faith During Tribal-State Compact Negotiations 27

IV. CONCLUSION 28

TABLE OF AUTHORITIES

PAGE

STATE CASES

1 Gruenberg v. Aetna Ins. Co.
 2 9 Cal.3d 566 (1973) 17
 3
 4 Hand v. Farmers Insurance Exchange
 5 23 Cal.App.4th 1847 (1994)..... 17
 6
 7 Major v. Western Home Ins. Co.
 8 169 Cal.App.4th 1197 (2009)..... 17
 9
 10 Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.
 78 Cal.App.4th 847 (2000)..... 17
 11
 12 Spinks v. Equity Residential Briarwood Apartments
 171 Cal.App.4th 1004 (2009)..... 17

FEDERAL CASES

13
 14
 15 Beard v. Banks,
 548 U.S. 521 (2006) 8
 16
 17 Cabazon v. Wilson,
 124 F.3d 1050 (1997)..... 13,14
 18
 19 Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California
 547 F.3d 962 (9th Cir. 2008)..... 9
 20
 21 California v. Cabazon Band of Mission Indians
 480 U.S. 202 (1987)..... 9
 22
 23 Celotex Corp. v. Catrett
 477 U.S. 317 (1986)..... 8
 24
 25 Dept. of Commerce v. U.S. House of Representatives,
 526 U.S. 316, 327 (1999)..... 8
 26
 27 Gaming Corp. of America v. Dorsey & Whitney,
 88 F.3d 536 (1996)..... 13
 28
 Idaho v. Shoshone-Bannock Tribes,
 465 F.3d 1095, 1101 (9th Cir. 2006)..... 24
 In re Indian Gaming Related Cases (Coyote Valley II),
 331 F.3d 1094, fn. 17 (9th Cir. 2003) Passim

TABLE OF AUTHORITIES

PAGE

1
2
3
4 Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin,
770 F.Supp. 480 (W.D. Wis. 1991)..... 11
5
6 Mashantucket Pequot Tribe v. State of Connecticut,
913 F.2d 1024 2d Cir. 1990) 10,11
7
8 Nebraska v. Wyoming,
507 U.S. 584 (1999)..... 8
9
10 N.L.R.B. v. American Nat’l Ins. Co.,
343 U.S. 395 (1952)..... 28
11
12 New Mexico v. Mescalero Apace Tribe,
462 U.S. 324 (1983)..... 14
13
14 Northern Arapaho Tribe v. Wyoming,
389 F.3d 1308 (10th Cir. 2004)..... 18,19
15
16 Rincon Band of Luiseno Mission Indians of the Rincon Reservation
v. Arnold Schwarzenegger,
Case No. 04cv1151, WMc (S.D. Cal. April 29, 2008) 21, 24
17
18 Wheeler v. Aventis Pharmaceuticals,
360 F.3d 853 (8th Cir. 2004)..... 8
19
20 Yavapai-Prescott Indian Tribe v. State of Arizona,
796 F.Supp. 1292 (D. Ariz. 1992)..... 11

STATUTES

21 Fed. R. Civ. P. 56(c)..... 1
22
23 25 U.S.C §§ 2700 13
24
25 25 U.S.C. § 2702(1) 9
26
27 25 U.S.C. § 2703(7)(B)(ii), (8) 9
28
29 25 U.S.C. § 2710 Passim
30
31 28 U.S.C. § 1746 26
32
33 29 U.S. C. §158 28

1 Pursuant to Federal Rule of Civil Procedure 56(c), Fort Independence Indian Community
2 (“Fort Independence” or “Tribe”), a federally-recognized tribe, hereby submits the following
3 memorandum of points and authorities in support of its Motion for Summary Judgment, or
4 Alternatively, Partial Summary Judgment.

5 **I. INTRODUCTION**

6 This action arises out of California’s refusal to enter into a Tribal-State Compact with the Fort
7 Independence Indian Community in violation of the Indian Gaming Regulatory Act (“IGRA”).
8 California demanded as a condition for execution of a Tribal-State Compact that Fort Independence
9 forfeit its rights as an express and intended third-party beneficiary under the 1999 Tribal-State
10 Compacts, and agree to an illegal tax on revenue from the gaming facility. California’s repeated
11 demand for inclusion of these provisions represents a patent violation of IGRA, and is *per se* bad
12 faith conduct under the statute.

13 California’s actions in this regard violate both the spirit and express terms of the IGRA which
14 mandate that the operation of a gaming facility on Fort Independence’s land is to inure to its primary
15 benefit, rather than the State of California. In short, because California has exacted requirements
16 from Fort Independence which are prohibited by IGRA, the burden of proof lies with California to
17 prove that it has acted in good faith in negotiating a Tribal-State Compact with Fort Independence.
18 California cannot meet this burden, and therefore Fort Independence is entitled to summary judgment
19 on its First Claim for Relief for Violation of IGRA.

20 **II. STATEMENT OF UNDISPUTED MATERIAL FACTS**

21 The following facts are set forth in the “Administrative Record” which constitutes the limited
22 evidence in this case.

23 **A. In 1999, California Entered Into Several Tribal-State Compacts With**
24 **Other Federally-Recognized Tribes, Of Which, Fort Independence is an**
25 **Intended Third-Party Beneficiary.**

26 In 1999, California entered into sixty (60) Tribal-State Gaming Compacts with Indian tribes
27 (sixty one compacts later received final federal approval; these compacts are hereinafter collectively
28 referred to as “1999 compacts”). (Plaintiff Fort Independence Indian Community Undisputed

1 Material Fact (“PUMF”) No. 43.) The 1999 compacts define a “Compact Tribe” as “a tribe having a
2 compact with the State that authorizes the Gaming Activities authorized by this Compact.” (*Id.*)
3 These compacts defined “Non-Compact Tribes” as “[f]ederally recognized tribes that are operating
4 fewer than 350 gaming devices” and declare that “Non-Compact Tribes shall be deemed third party
5 beneficiaries of this and other compacts identical in all material respects.” (*Id.*) Per a state-created
6 Revenue Sharing Trust Fund (“RSTF”), all Non-Compact Tribes in the State of California are entitled
7 to receive “the sum of \$1.1 million per year.” (*Id.*) The Fort Independence Tribe is a “Non-
8 Compact” Tribe under the 1999 Compacts, and receives funds, in the amount of \$1.1 million dollars
9 per year, from the RTSF. (*Id.*)
10

11 California, through negotiations with the current administration, executed a compact with the
12 Yurok Tribe in 2007 on August 30, 2006, that was published in the Federal Register on January 2,
13 2007. This Compact allows the Yurok Tribe to operate ninety-nine Gaming Devices and to
14 continue as an RSTF participant. (PUMF No. 42.) The current administration also recently entered
15 into a compact with the Pinoleville Pomo Nation on March 24, 2009, that authorizes, the Tribe to
16 operate up to 900 gaming devices. (PUMF No. 41.) The definition of Non-Compact tribe in the
17 Pinoleville Pomo Nation Compact is the same as set forth in the 1999 Compact. (PUMF Nos. 41 and
18 43.) This Compact allows the Pinoleville Pomo Nation to continue to receive RSTF funding if they
19 choose to operate less than 350 gaming devices. (PUMF Nos. 41 and 43.)
20
21

22 **B. California Has Concluded Numerous Tribal-State Compacts That**
23 **Preserve Third-Party Beneficiary Rights Under the 1999 Compacts and**
24 **Allow Non-Compact Tribes to Continue to Receive RSTF Funding.**

25 As of September 20, 2007, the following tribes had compacts with California and also receive
26 RSTF payments (Gaming Device count, as of March 2006, contained parenthetically): Alturas Indian
27 Rancheria (148); Bear River Band of Rohnerville Rancheria (3160); Big Sandy Rancheria (329);
28 Bishop Paiut-Shoshone Indians (329); Cahto Indian Tribe; Cahuilla Band of Mission Indians (83);

1 Chemehuevi Indian Tribe (230); Cher-Ae Heights Indian Community (341); Chicken Ranch
2 Rancheria (255); Coyote Valley Band of Pomo Indians (280); Elk Valley Rancheria (342); Hoopa
3 Valley Tribe (98); Sherwood Valley Rancheria (227); Smith River Rancheria (262); Susanville
4 Indian Rancheria (221). (PUMF No. 41.) Also, as stated above, the State recently negotiated a
5 compact with the Yurok Tribe that allows that tribe to operate ninety-nine Gaming Devices and to
6 continue as an RSTF participant. (PUMF No. 42.)

7 **C. Fort Independence Asks The State of California to Commence Negotiation**
8 **of a Tribal-State Compact Under IGRA**

9 On July 21, 2004, counsel for Fort Independence requested that the State of California
10 commence negotiations on concluding a Tribal-State compact with it pursuant to the Indian Gaming
11 Regulatory Act ("IGRA"). (PUMF No. 1.) On September 3, 2004, Daniel M. Kolkey, attorney for
12 the State of California, agreed to enter into negotiations to conclude a Tribal-State compact with Fort
13 Independence. (PUMF No. 2.) Between September and December of 2004 Fort Independence and
14 Mr. Kolkey attempted to arrange an initial meeting concerning Tribal-State compact negotiations.
15 (PUMF Nos. 3, 4 & 5.)

16 On December 16, 2004, counsel for Fort Independence forwarded to Mr. Kolkey a draft
17 preamble for the proposed Tribal-State compact and requested that a draft compact be forwarded to
18 Fort Independence by the meeting on December 21, 2004. (PUMF No. 6.) On December 16, 2004,
19 Mr. Kolkey forwarded a draft Tribal-State compact to Fort Independence for purposes of the meeting
20 scheduled for December 21, 2004. (PUMF No. 7.) The draft Tribal-State compact forwarded to Fort
21 Independence on December 16, 2004 contained a provision at Section 4.3.1, which required the tribe
22 to share revenue with the state in exchange for the right to operate Class III gaming in California.
23 The percentage contribution ranged from 10% to 25% of net win. (PUMF No. 8.) The draft Tribal-
24 State compact forwarded to Fort Independence on December 16, 2004, also contained a provision of
25 Section 5.0 entitled "Revenue Sharing Trust Fund", and states "Open" (PUMF No. 9.).

26 ///

27 ///

1 **D. In 2005 and 2006, Fort Independence Objected To Provisions Regarding**
2 **Discontinuation of RSTF Funding and Imposition of a State Tax or**
3 **Assessment in California's Draft Tribal-State Compact As Prohibited By**
4 **IGRA.**

5 On August 30, 2005, John M. Peebles, counsel for Fort Independence requested a meeting
6 with California to negotiate a Tribal-State Compact pursuant to the IGRA. (PUMF No. 10.) On
7 September 1, 2005, counsel for the State confirmed receipt of the August 30, 2005 letter, and asked
8 Mr. Peebles to contact Mr. Kolkey's office to schedule a meeting. (PUMF No. 11.) From then until
9 January 18, 2006, Fort Independence and California continued to coordinate potential meeting dates.
10 (PUMF Nos.11, 16 and 22 .) During this time period, Fort Independence continued to express its
11 concerns and objections to the provisions of California's proposed Tribal-State Compact. (PUMF
12 No. 17.)

13 On June 30, 2006, Mr. Peebles corresponded with Mr. Kolkey and objected to the provisions
14 requiring Fort Independence to share a percentage of the net win of its gaming revenue with the State
15 of California, and stated that Fort Independence would not agree to such a provision, since the IGRA
16 prohibited any kind of tax, fee, charge or assessment to engage in Class III gaming. (PUMF No. 17)
17 In addition, Mr. Peebles objected to the provision which required Fort Independence to forego its
18 share of RTSF funding. (PUMF No. 17) On July 6, 2006, Fort Independence's Chairman, Carl
19 Dahlberg, sent a letter to California Governor, Arnold Schwarzenegger, in which he noted that
20 outstanding issues relating to the Tribal-State compact negotiations remained. (PUMF No.18.)

21 On July 14, 2006, Mr. Peebles corresponded with Andrea L. Hoch, Legal Affairs Secretary
22 for Governor Schwarzenegger and requested further negotiations with California regarding the
23 proposed Tribal-State Compact. (PUMF No. 19.) Mr. Peebles reiterated Fort Independence's
24 objections to the proposed Tribal-State. (PUMF No. 19.) In that letter, Mr. Peebles also noted that, at
25 a meeting held by Governor Schwarzenegger on July 6, 2006, the Governor had "assured tribes that
26 he would consider the individual circumstances of each tribe, including the needs of smaller tribes,
27 and the critical services that the RTSF provides to these smaller gaming tribes." (PUMF No. 19.) On
28 August 9, 2006, in a letter addressed to various tribal chairpersons, including Mr. Dahlberg, Fort

1 Independence's Chairman, Ms. Hoch advised that the Governor would not agree to enter into
2 compacts with terms similar to those contained in the 1999 compacts. (PUMF No. 20.)

3 On November 11, 2006, Fort Independence commissioned Innovation Group to conduct a
4 gaming marketing assessment which would estimate potential gaming revenues to be expected from
5 the opening of a casino pursuant to the terms of the Tribal-State Compact under negotiation with
6 California. (PUMF No. 29.) On December 5, 2006, Mr. Peebles provided a revised version of the
7 proposed Tribal-State compact to the Governor's office for review. (PUMF No. 21.)

8 On February 20, 2007, Jack Duran, then counsel for Fort Independence, corresponded with
9 Ms. Hoch, and enclosed a draft Tribal-State Compact for the Governor's review and consideration in
10 preparation of negotiations with Fort Independence later in February 2007. (PUMF No. 23.) That
11 revised draft Compact omitted the net win sharing provision at section 4.3.1(b) of the State's
12 proposed Tribal-State Compact, and included a new section 5.0(b), stating: "In light of the Tribe's
13 concomitant needs, and the limit on Gaming Devices specified in section 4.3.1, the Tribe will remain
14 a Non-Compact Tribe, as defined in the 1999 Tribal-State Gaming Compact, and shall be entitled to
15 Revenue Sharing Trust Fund distributions pursuant to Section 4.3.2.1 of the 1999 Tribal-State
16 Gaming Compact provided that the Tribe shall not use any monies it receives from the Revenue
17 Sharing Trust Fund for payment of any costs arising out of, connected with, or relating to any
18 Gaming Activities." (PUMF No. 23.)

19 **E. Negotiations Continue Into 2007, and the State Continues to Demand**
20 **Terms From the Tribal-State Compact That Violate IGRA.**

21 On February 27, 2007, California State Assemblyman Bill Maze, of the Thirty-Forth
22 Assembly District, corresponded with the Governor's Office, and urged the Governor to negotiate a
23 Tribal-State Compact with Fort Independence that permitted it to continue to receive RSTF funding.
24 (PUMF No. 24.) Assemblyman Maze expressly noted that Fort Independence was remotely located
25 tribe with serious socio-demographic issues that highlighted the need for continued RSTF funding.
26 (*Id.*) Assemblyman Maze also noted that under the 1999 Compacts "both Non-Gaming tribes and
27 tribes who held Compacts but operated 350 or fewer gaming devices (considered Non-Compact
28 Tribes) were exempt from contributing into the RTSF but remained eligible to receive RSTF

1 distributions.” (*Id.*) On March 21, 2007, Ms. Hoch responded to Assemblyman Maze’s
2 correspondence of February 27, 2007, and stated: “[T]he Governor also does not believe that class
3 III gaming should be subsidize [sic] by the RSTF. (PUMF No. 25.) Also, subsidizing tribes to
4 develop casinos where they could not otherwise economically operate would not be consistent with
5 the intent of the Indian Gaming Regulatory Act, which is to promote tribal economic development,
6 tribal self-sufficiency, and strong tribal government.” (PUMF No. 25.)

7 On May 22, 2007, Mr. Peebles corresponded with Ms. Hoch and noted that negotiation
8 meetings had occurred on December 6, 2006 and February 27, 2007. (PUMF No. 26.) Mr. Peebles
9 proposed in this letter that the Tribal-State Compact include provisions that 1) allowed the Tribe to
10 continue to receive funds from the RSTF pursuant to the terms of the 1999 Compact, and 2) any
11 agreement for payments to the State from the Tribe’s revenues be offset by the amount the Tribe pays
12 for infrastructure development, local government mitigation costs, and gaming regulation. (*Id.*)

13 On July 17, 2007, Mr. Peebles corresponded with Ms. Hoch and noted that a negotiation
14 meeting had occurred on July 11, 2007. In his letter, Mr. Peebles reiterated that “any ‘net revenues’
15 should be offset by the funds the Tribe provides to the local government through its MOU, and also
16 by the cost to the Tribe of any project that the Tribe participates in that would be classified ‘essential
17 governmental functions.’” (PUMF No. 27.)

18 On August 15, 2007, Mr. Peebles corresponded with Ms. Hoch and in that letter, Mr. Peebles
19 responded to California’s proposed Compact terms. (PUMF NO. 28). Mr. Peebles asserted that
20 California’s offer of geographic exclusivity was meaningless in light of the fact that then existing
21 California law already provided such exclusivity, and therefore no further substantial economic
22 benefit to Fort Independence would result from inclusion of such a provision. (PUMF No. 28.) The
23 Tribe also noted that requiring it to waive its third-party beneficiary rights to RSTF funding under the
24 1999 Compacts was not a mandatory subject of negotiation, and that no meaningful concessions were
25 offered in return for the waiver of such rights. (PUMF No. 28.) In conclusion, Mr. Peebles proposed
26 that Fort Independence make “no revenue sharing payments to the state” and it “will continue to
27 receive funds from the RSTF pursuant to the terms set forth in the 1999 Compact.” (PUMF No. 28.)
28

1 On August 20, 2007, Darcie L. Houck, counsel for Fort Independence corresponded with Ms.
2 Hoch via email regarding the status of ongoing negotiations. (PUMF No. 30.) In that email, Ms.
3 Houck emphasized that the compensation requested by California was unreasonable, especially since
4 the marketing assessment provided to Ms. Hoch, authored by Innovation Group, showed that the “net
5 win” sharing proposal would cause the casino to operate at a loss, making it economically unviable.
6 (*Id.*) Ms. Houck also emphasized that Fort Independence’s third-party beneficiary rights under the
7 1999 compacts should not be a part of the negotiations as the “allocation of this funding is not
8 directly related to casino operations.” (*Id.*)

9 **F. California Rejects Fort Independence’s Position and Continues to**
10 **Demand Revenue Sharing and Forfeiture of the Tribe’s RSTF**
11 **Disbursement in Violation of IGRA.**

12 On August 30, 2007, Ms. Hoch corresponded with Mr. Peebles and Ms. Houck regarding Ms.
13 Houck’s August 20, 2007 email, and Mr. Peebles August 15, 2007 letter. (PUMF No. 31.) In her
14 letter, Ms. Hoch rejected the notion that the 1999 Tribal-State Compacts governed the negotiations
15 with Fort Independence concerning continued RSTF funding, and maintained California’s position
16 that RSTF funding to Fort Independence should discontinued as a condition to a conclusion of the
17 Compact. (*Id.*) With respect to sharing in the Tribe’s net wins, she continued to assert that
18 California was entitled to revenue sharing with the Tribe under applicable law. (*Id.*)

19 On November 26, 2007, Mr. Peebles responded to Ms. Hoch’s letter, dated August 30, 2007.
20 (PUMF No. 32.) In that letter, Mr. Peebles rejected Ms. Hoch’s position that continued RSTF
21 funding and net win sharing with California were proper subjects of negotiation under IGRA, and
22 stated that conditioning “the compact on agreement over the terms constitutes bad faith and violates
23 IGRA.” (PUMF No. 32.) On January 22, 2008, Ms. Hoch corresponded with Mr. Peebles
24 responding to the November 26, 2007 letter, and noted that the State “construed the November 26,
25 2007 letter as a rejection of the state’s proposed terms contained in Ms. Hoch’s August 30, 2007
26 letter, “without making a counteroffer.” (PUMF No. 33.)

27 On January 25, 2008, Mr. Peebles responded to Ms. Hoch’s January 25, 2008 letter and noted
28 that Fort Independence would not agree to the “proposed compact terms set forth in the State’s

1 August 30, 2007 letter because the State conditioned a compact on the Tribe's agreement to pay
2 gaming revenues to the state and the further requirement that the Tribe withdraw from participation in
3 the revenue sharing trust fund secured by the 1999 Compacts." (PUMF No. 34.)

4 After California refused to remove conditions from the proposed Tribal-State Compact that
5 violated IGRA, Fort Independence filed the instant action alleging that California's conduct
6 constituted bad faith negotiation of a Compact under IGRA. On July 31, 2008, California filed a
7 motion for judgment on the pleadings, which was denied in part, and granted in part.

8 **III. LEGAL ARGUMENT**

9 **A. Legal Standard Governing Summary Judgment Motions.**

10 Under Federal Rule of Civil Procedure 56, summary judgment should be granted where a
11 party is unable to show a genuine issue as to a material fact on which the party will bear the burden of
12 proof at trial, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c);
13 *See Beard v. Banks*, 548 U.S. 521, 529 (2006); *Dept. of Commerce v. U.S. House of Representatives*,
14 526 U.S. 316, 329 (1999); *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1999); *Celotex Corp. v. Catrett*,
15 477 U.S. 317, 322-23 (1986). Importantly, where, as here, the non-moving defendant bears the
16 burden of proof on a particular element of its claim or defense, it must carry the burden of proving
17 that a genuine issue of fact remains for the fact-finder. *Wheeler v. Aventis Pharmaceuticals*, 360 F.3d
18 853, 857 (8th Cir. 2004). For the following reasons, there is no genuine issue of material fact as to
19 whether California has engaged in bad faith negotiation of a Tribal-State Compact in violation of
20 IGRA, and consequently, Fort Independence is entitled to summary judgment as a matter of law on
21 its First Claim for Relief for Violation of IGRA.

22 ///

23 ///

24 ///

25 **B. There Is No Genuine Issue of Material Fact As to Whether California Has**
26 **Violated IGRA By Negotiating a Tribal-State Compact With Fort**
27 **Independence in Bad Faith.**

1 As outlined below, California has engaged in bad faith negotiation by conditioning the
2 execution of a Tribal-State Compact on Fort Independence's acquiescence to terms regarding
3 discontinuation of RSTF funding and payment of taxes or assessments to California, in violation of
4 IGRA. In addition, California has not made any meaningful concession to Fort Independence in
5 conditioning its agreement to a Tribal-State compact on discontinuation of RSTF funding or payment
6 of an impermissible tax or assessment, therefore Fort Independence is entitled to judgment as a
7 matter of law on its IGRA bad faith claim.

8 **C. Intent and Purpose of IGRA.**

9 Congress enacted the IGRA, 25 U.S.C. section 2701, et seq., in response to the Supreme
10 Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), that held
11 states had no authority to regulate gaming activities operated by Indian tribes on Indian lands.
12 *Cabazon*, 480 U.S. at 213-14. "In 1988, Congress enacted the Indian Gaming Regulatory Act
13 ("IGRA") 'to provide a statutory basis for the operation of gaming by Indian tribes as a means of
14 promoting tribal economic development, self-sufficiency, and strong tribal governments.'" *Cachil
15 Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962, 966 (9th
16 Cir. 2008), quoting 25 U.S.C. § 2702(1). The IGRA recognizes three classes of gaming and slot
17 machines and similar gaming devices, which are the subject of this litigation, are Class III games.
18 See 25 U.S.C. § 2703(7)(B)(ii), (8). Under the IGRA, a tribe may conduct class III gaming only "in
19 conformance with a Tribal-State compact entered into by the Indian Tribe." 25 U.S.C. §
20 2710(d)(1)(C). "[E]ntering into a compact with state authorities is . . . a threshold requirement for
21 Indian tribes wishing to develop Class III gaming operations." *Colusa Indian Community*, 547 F.3d
22 at 973.

23 IGRA makes class III gaming lawful on Indian lands only if such activities are: (1) authorized
24 by an ordinance or resolution adopted by the governing body of the Indian tribe and the Chairman of
25 the NIGC; (2) located in a state that permits such gaming for any purpose by any person,
26 organization, or entity; and (3) conducted in conformance with a Tribal-State Compact entered into
27 by the Indian tribe and the State and approved by the Secretary of the Interior. 25 U.S.C. § 2710
28

1 (d)(1), (3)(B). IGRA's Tribal-State Compact requirement grants States the right to negotiate with
2 tribes located within their borders regarding aspects of class III tribal gaming that might affect
3 legitimate State interests. 25 U.S.C. § 2710(d)(3)(C). IGRA also imposes a mandatory obligation
4 upon States to conduct those negotiations in good faith, (*See* 25 U.S.C. § 2710(d)(3)(A)), and grants
5 tribes the right to enforce that obligation by way of federal suit (*See* 25 U.S.C. § 2710(d)(7)(A)).

6 IGRA provides for enforceability of the statutorily required Tribal-State Compact
7 requirements by providing that if no compact has been entered 180 days after an Indian tribe has
8 requested that the State enter into compact negotiations, the tribe may bring suit in federal court. 25
9 U.S.C. § 2710(d)(7)(A)(i), (B)(i). If the court concludes that the State has failed to conduct
10 negotiations in good faith, it shall order the State and the tribe to conclude a compact within a 60-day
11 period. 25 U.S.C. § 2710(d)(B)(iii). If the tribe and State fail to conclude a compact within this
12 statutory time frame, they must each submit to a court-appointed mediator a proposed compact
13 representing their last best offer. 25 U.S.C. § 2710(d)(7)(B)(iv). The mediator is required to choose
14 between the two proposed compacts, and select the one that best comports with the terms and
15 purposes of IGRA. 25 U.S.C. § 2710(d)(7)(B)(iv)-(v). If the State does not accept the mediator's
16 chosen compact within 60 days, the Secretary of the Interior shall prescribe, consistent with the
17 mediator's chosen compact and with the terms and purposes of IGRA, the conditions upon which the
18 tribe may engage in class III gaming. 25 U.S.C. § 2710(d)(B)(vii).

19 “[T]he IGRA plainly requires a state to enter negotiations with a tribe upon request.”
20 *Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024, 1028 (2d Cir. 1990). “[T]he only
21 condition precedent to negotiation specified by the IGRA is a request by a tribe that a state enter
22 negotiations.” *Id.* at 1028 The foregoing is compelled by section 2710(d)(3)(A) of the IGRA.
23 Accordingly, once a tribal request is received, “the State [is] required to negotiate with the Tribe.”
24 *Mashantucket Pequot*, 913 F.2d at 1029.

25 “To ensure that states engage in negotiations with Indian tribes, the [IGRA] requires the states
26 to negotiate in good faith with any tribes that request negotiation,” *Lac du Flambeau Band of Lake*
27 *Superior Chippewa Indians v. State of Wisconsin*, 770 F.Supp. 480, 488 (W.D. Wis. 1991), *citing* 25
28

1 U.S.C. § 2710(d)(3)(A) and (7)(A). Where the “negotiations fail to achieve a compact and it is
 2 determined that the state did not negotiate in good faith,” then the interests of the state and tribe must
 3 be reconciled “through the litigation and mediation process prescribed by section 2710(d)(7)(A) and
 4 (B). *Mashantucket Pequot*, 913 F.2d at 1030; accord *Lac du Flambeau Band of Lake Superior
 5 Chippewa Indians v. State of Wisconsin*, 770 F.Supp. 480, 487 (W.D. Wis. 1991). “If a state fails to
 6 negotiate in good faith the court may require it to conclude a compact within sixty days . . . , and shall
 7 appoint a mediator to conclude a compact if negotiations are not successful.” *Lac du Flambeau Band
 8 of Lake Superior Chippewa Indians*, 770 F.Supp. *Id.* at 488 (W.D. Wis. 1991), citing 25 U.S.C. §
 9 2710(d)(7)(B)(iii)-(iv); see also *Yavapai-Prescott Indian Tribe v. State of Arizona*, 796 F.Supp. 1292,
 10 1298 (D. Ariz. 1992) (granting Plaintiff tribe’s motion for summary judgment and ordering the
 11 resumption of negotiations and the conclusion of a tribal-state compact within sixty days, and to the
 12 extent such compact is not concluded, ordering parties to submit to a mediator).

13 “[T]he manifest purpose of the statute is to move negotiations toward resolution where the
 14 state . . . fails to negotiate in good faith, for 180 days after a tribal request to negotiate.”
 15 *Mashantucket Pequot*, 913 F.2d at 1033. A tribe need not show that a state has acted maliciously to
 16 demonstrate bad faith. *Mashantucket Pequot*, 913 F.2d at 1033.

17 The Select Committee on Indian Affairs Report (“Report”)¹ together with additional views for
 18 the Indian Gaming regulation Acts states:

19 Section 11(d)(7) grants a tribe the right to sue a State if compact
 20 negotiations are not concluded. This section is the result of the
 21 Committee balancing the interests and rights of tribes to engage in
 22 gaming against the interests of States in regulating such gaming. Under
 23 this act, Indian tribes will be required to give up any legal right they
 24 may now have to engage in class III gaming if: (1) they choose to forgo
 25 gaming rather than to opt for a compact that may involve State
 26 jurisdiction; or (2) they opt for a compact and, for whatever reason, a
 compact is not successfully negotiated. In contrast, States are not
 required to forgo any State governmental rights to engage in or regulate
 class III gaming except whatever they may voluntarily cede to a tribe
 under a compact. Thus, given this unequal balance, the issue before the
 Committee was how best to encourage States to deal fairly with tribes

27 ¹ The Select Committee on Indian Affairs Reports is attached to Fort Independence’s Request for Judicial Notice in Support of its Motion for Summary
 28 Judgment, or Alternatively Partial Summary Judgment. (See PUMF No. 38.) Reference to the specific bates stamped page numbers will be made for
 the convenience of this Court and the parties.

1 as sovereign governments. The Committee elected, as the least
2 offensive option, to grant tribes the right to sue a State if a compact is
3 not negotiated and chose to apply the good faith standard as the legal
4 barometer for the State's dealings with tribes in class III gaming
5 negotiations. While a tribe must show a prima facie case, after doing
6 so the burden will shift to the State to prove that it did act in good faith.
7 The Committee notes that it is the States not tribes that have crucial
8 information in their possession that will prove or disapprove tribal
9 allegations of failure to act in good faith. Furthermore the bill provides
10 that the court, in making its determination, may consider any of the
11 number of issues listed in this section, including the State's public
12 interest and other claims. The Committee recognizes that this may
13 include issues of a very general nature and, course, trusts that courts
14 will interpret any ambiguities on these issues in a manner that will be
15 most favorable to tribal interests consistent with the legal standard used
16 by courts for over 150 years in deciding cases involving Indian tribes.
17 (PUMF No. 38.)

18 In this case the State argues that the only evidence that should be considered is what it refers
19 to as the "Administrative Record". This evidence proves that California has conditioned the entering
20 of a compact on Fort Independence foregoing its intended third-party beneficiary right to continued
21 RSTF funding, and submission to California's demand for a tax on Fort Independence's potential
22 gaming revenue. The State can point to no good faith basis for making such demands, nor can it
23 articulate any argument that IGRA makes these permissive areas of negotiation, nor can the State
24 demonstrate that it has offered any meaningful concession in exchange for the Tribe giving up its
25 third-party rights under a separate contract and acceding to California's demand for its gaming
26 revenue, all of which IGRA legally requires if California makes such unilateral demands.

27 The only attempt that the State makes to justify the demand for the Tribe to forego its RSTF
28 funding is set forth in a letter from Ms. Hoch dated March 21, 2007, stating:

However, the Governor also does not believe that class III gaming should be subsidize [sic] by the RSTF. Also, subsidizing tribes to develop casinos where they could not otherwise economically operate would not be consistent with the intent of the Indian Gaming Regulatory Act, which is to promote tribal economic development, tribal self-sufficiency, and strong tribal government.

(PUMF No. 25).

1 This position is directly contrary to the position that California took in *In re Indian Gaming*
2 *Related Cases*, in which California forcefully asserted that RSTF funding to non-compact tribes as
3 defined in the 1999 Tribal-State Compacts was consistent with the terms and purposes of IGRA. *Id.*
4 at 331 F.3d 1094, 1110-1114. However, even if this Court concludes that California's demands are
5 permitted to be negotiated under IGRA, California still cannot insulate itself from a bad faith finding,
6 because the concessions it has offered in exchange for demands that require Fort Independence to
7 forego its RSTF payments, and accede to sharing its potential gaming revenue are patently
8 unreasonable. This negotiating position is directly contrary to the purposes of IGRA, as
9 demonstrated by California's negotiating Tribal-State Compacts with other tribes continuing RSTF
10 funding, which tribes, nevertheless, are simultaneously permitted to operate less than 350 gaming
11 devices. (PUMF Nos. 41 – 43.) It is undisputed that the Schwarzenegger administration has agreed
12 to allow at least two tribes to continue receipt of RSTF payments while operating less than 350
13 gaming devices. (PUMF Nos. 35, 41, 42, 45-47.) This evidence suffices to carry Fort
14 Independence's burden of making a *prima facie* showing that California has acted in bad faith by
15 adopting an unlawful negotiating position, accordingly, the burden of proving that it acted in good
16 faith is shifted to California, which cannot prove that it has acted otherwise.

17 Additionally, the Select Committee Report in referring to 2710(d)(4) states that this section
18 “[c]larifies that this bill does not confer on any state any authority to tax or otherwise assess any
19 Indian Tribe.” (PUMF Nos. 38-40.) California, nor the record in this case, provides any justification
20 or reasonable basis for the State's demand that the Tribe share revenue. This demand on its face is an
21 attempt by California to assess a tax, fee or other charge upon Fort Independence in direct violation
22 of IGRA. IGRA requires that the court “shall consider any demand by the State for direct taxation of
23 the Indian tribe or any Indian lands as evidence that the State has not negotiated in good faith.” On
24 this score, Fort Independence has also met its burden in making a *prima facie* showing that California
25 has negotiated in bad faith.

26 The IGRA creates a comprehensive regulatory scheme that attempts to balance tribal, federal,
27 and state interests. 25 USC §§ 2700 *et seq.*; *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d
28

1 536 (8th Cir. 1996); *Cabazon v. Wilson*, 124 F.3d 1050 (9th Cir.1997) and 37 F.3d 430 (1994); *New*
2 *Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 339 (9th Cir. 1983). California's unilateral attempt
3 to impose an unlawful tax and demand that the Tribe forego its RSTF funding directly undermines
4 the terms and purposes of IGRA, the California Constitution, as amended by the People of California
5 by passing Proposition 1A, the terms and purposes of the 1999 Tribal-State Compacts, as well as Fort
6 Independence's right to self-governance. The IGRA sets forth a comprehensive regulatory scheme
7 that governs the rules for the two sovereigns, both California and Fort Independence, to enter into a
8 Tribal-State Compact.

9 **D. The IGRA Sets Forth Permissible Subjects of Negotiation for a Tribal-**
10 **State Compact, and Prohibits California From Imposing a Tax, Fee,**
11 **Charge, or Other Assessment on Fort Independence.**

12 Permissible subjects of negotiation of a Tribal-State Compact under IGRA are set forth at 25
13 U.S.C. section 2710(d)(3)(C), and may include, *inter alia*, "taxation by the State of such activities in
14 such amounts as are necessary to defray the costs of regulating such activity [Class III gaming]." 25
15 U.S.C. § 2710(d)(3)(C)(iii). Pursuant to 25 U.S.C. section 2710(d)(3)(C)(i)-(vi), other topics of
16 permissible negotiation include the following:

- 17 i. the application of criminal and civil laws and regulations of the
18 Indian Tribe or the State that are directly related to and
19 necessary for, the licensing and regulation of such activity;
- 20 ii. the allocation of criminal and civil jurisdiction between the
21 State and the Indian tribe necessary for enforcement of such
22 laws and regulations;
- 23 iii. the assessment by the State of such activities in such amounts as
24 are necessary to defray the costs of regulating such activities;
- 25 iv. remedies for breach of contract;
- 26 v. standards for the operation of such activity and maintenance of
27 the gaming facility; and
- 28 vi. any other subjects that are directly related to the operation of
gaming activities.

1 The foregoing provisions define the permissible scope of provisions that can be negotiated as
2 part of a Tribal-State compact, and States are statutorily prohibited from conditioning negotiation and
3 execution of such a compact upon any provision not included in 25 U.S.C. section 2710(d)(3)(C).
4 Consequently, while a State might request negotiations on subjects not included under the foregoing
5 provisions, it may not require tribes to negotiate any provision beyond those subjects. In particular,
6 States are prohibited from conditioning the negotiation and/or execution of a Tribal-State Compact
7 upon the tribe's agreement to remit a tax, fee or any other charge to the State. 25 U.S.C. §
8 2710(d)(4).

9 California violated these provisions by: (1) conditioning the conclusion and execution of a
10 Tribal-State compact on Fort Independence's agreement to forego its third-party beneficiary right to
11 RSTF funding, a subject which is not a permissible subject of negotiation under IGRA; and (2)
12 conditioning the execution of a Tribal-State compact on Fort Independence's agreement to a tax,
13 charge, or other assessment in the form of a revenue sharing provision requiring it to share a
14 percentage of net wins from the proposed gaming operation.

15 1. **Fort Independence's Third-Party Beneficiary Rights to RSTF**
16 **Funding Under the 1999 Compacts Is Not a Proper Subject of**
17 **Negotiation Under IGRA.**

18 Fort Independence has a right, independent from any agreement reached with the State to
19 operate a gaming facility, as an express and intended third-party beneficiary under the 1999 Tribal-
20 State Compacts to receive RSTF payments. Section 4.3.2(i) of the 1999 Tribal-State Compact
21 provides:

22 "A 'Compact Tribe' is a tribe having a compact with the State that
23 authorizes the Gaming Activities authorized by this Compact.
24 *Federally -recognized tribes that are operating fewer than 350*
25 *Gaming Devices are "Non-Compact Tribes." Non-Compact Tribes*
26 *shall be deemed third party beneficiaries of this and other compacts*
27 *identical in all material respects."*

28 (PUMF No. 43.) (emphasis added).

Fort Independence will operate fewer than 350 gaming devices, and has specifically requested that
the Compact limit the number of gaming devices to less than 350. (PUMF Nos. 21, 23 and 26.) As

1 such, Fort Independence will remain a “Non-Compact Tribe” as defined in the 1999 Tribal-State
2 Compacts. (PUMF No. 43.) The 1999 Tribal-State Compacts require certain payments to Non-
3 Compact Tribes and entitle such tribes to these payments as third-party beneficiaries of the compacts.
4 (PUMF No. 43.) These RSTF payments clearly fall outside the mandatory subjects of negotiation set
5 forth in IGRA, as the RSTF payments are not directly related to Fort Independence’s operation of
6 gaming activities. The 1999 Compacts provide an entitlement to tribes, such as Fort Independence,
7 meeting the definition of “Non-Compact Tribe.” California simply cannot require Fort Independence
8 to forego this entitlement as a condition of entering into a Tribal-State Compact when Fort
9 Independence continues to meet the definition of a “Non-Compact Tribe.”

10 California is attempting to alter the terms of the 1999 Compacts through the inclusion of
11 terms in the proposed Tribal-State Compact with Fort Independence that are clearly contrary to the
12 express terms of the 1999 Compacts. Furthermore, California has offered no concessions to Fort
13 Independence in exchange for its demand that continued RSTF funding to Fort Independence be
14 phased out. Moreover, California’s demand here constitutes bad faith in that it appears to have
15 punitive aspects since California has recently negotiated at least two other Tribal-State Compacts
16 permitting those tribes to continue to receive RSTF funding while operating less than 350 gaming
17 devices. (PUMF Nos. 41 and 42.) By virtue of the RSTF provisions included in the 1999 Compacts,
18 those California tribes intended to pay a portion of their gaming revenue to more economically
19 disadvantaged tribes in exchange for the privilege of operating more gaming devices (more than 350).
20 (PUMF No. 43.) California is now seeking to defeat the contractual intent of those California tribes,
21 signatories to the 1999 Compacts, by now attempting to assert some undefined interest in how those
22 monies are now distributed by inserting conditions into the Tribal-State Compact it is negotiating
23 with Fort Independence.

24 Additionally, several other California Indian tribes operate less than 350 gaming devices
25 pursuant to Tribal-State Compacts and still receive RSTF payments. (PUMF No. ____.) In light of
26 the specific language governing which tribes qualify as a “Non-Compact Tribe” under the 1999
27 Compacts, there is no question that California is negotiating in bad faith by requiring Fort
28

1 Independence to give up its rights as an intended contractual third-party beneficiary of those
2 agreements, even though it gains no benefit, nor is it entitled to any of these funds, by the inclusion of
3 such a provision in the proposed Tribal-State Compact between it and Fort Independence.

4 Accordingly, as an intended third-party beneficiary of the 1999 Tribal-State Compacts,
5 California, as a party to that agreement, owes Fort Independence a duty of good faith and fair dealing
6 with respect to Fort Independence's receipt of benefits, such as continued RSTF funding, pursuant to
7 its provisions. *See Hand v. Famers Insurance Exchange*, 23 Cal.App.4th 1847, 1857 (Cal. Ct. App. 2
8 Dist. 1994) (holding that a party to an agreement owes an intended third-party beneficiary a duty of
9 good faith and fair dealing); *see also Spinks v. Equity Residential Briarwood Apartments*, 171
10 Cal.App.4th 1004, 1034 (Cal. Ct. App. 6 Dist. 2009) ("Intended contract beneficiaries may 'possess
11 the rights of parties to the contract . . . Those rights may include the benefits of the implied covenant
12 of good faith and fair dealing in a proper case"). "The fundamental purpose of the implied covenant
13 of good faith and fair dealing is 'that neither party will do anything which will injure the right of the
14 other to receive the benefits of the agreement.'" *Major v. Western Home Ins. Co.*, 169 Cal.App.4th
15 1197, 1209 (2009), *quoting Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 573 (1973). Because
16 California's negotiating stance seeks to deprive Fort Independence of the benefits it is owed under the
17 1999 Tribal-State Compacts, this as an additional reason why California's conditioning the execution
18 of a Tribal-State Compact on the injury of express third-party beneficiary rights constitutes bad faith
19 under the IGRA. *See also Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.*, 78
20 Cal.App.4th 847, 886 (2000). (Holding that an insurer acted in bad faith by conditioning settlement of
21 a claim on a third party's waiver of its contractual beneficiary rights).

22 Finally, California's proposed terms cutting off RSTF funding to Fort Independence do not
23 comply with public policy. In negotiating the definition of "Non-Compact Tribe" in the 1999 Tribal-
24 State Compacts, California made a public policy decision as to what constituted a gaming operation
25 that would receive a substantial economic benefit from California's concession to California Indian
26 tribes of gaming exclusivity. Indeed, the Ninth Circuit has affirmed that:

27 Congress sought through IGRA to 'promot[e] tribal economic
28 development, self-sufficiency, and strong tribal governments.' The

1 RSTF provision advances this Congressional goal by creating a
2 mechanism whereby all of California's tribes-not just those fortunate
3 enough to have land located in populous or accessible areas-can benefit
4 from class III gaming activities in the State. *In re Indian Gaming
Related Cases*, 331 F.3d at 1111 (9th Cir. 2003) (internal citations
omitted).

5 California now attempts to turn this holding on its head and argue that receipt of these funds by
6 California tribes not fortunate enough to have land located in populous or accessible areas should be
7 deemed a barrier to entering into a compact. (PUMF Nos. 31 and 33.) The State has in effect
8 conceded that these Tribes cannot operate a viable casino if the RSTF funding is discontinued, yet
9 still demands that the Tribe forego its right to funding as a condition of entering into a compact, in
10 direct violation of IGRA. (PUMF Nos. 31 and 33 .) And what is even more egregious, is the fact
11 that the State also, in addition to demanding that Fort Independence forego its RSTF funding pay an
12 illegal tax to the State of California as a condition of the State entering into a Tribal-State compact.
13 (*Id.*) How can the State in all good faith take a position that it would be subsidizing gaming if the
14 Tribe continues to receive RSTF funding, and then also exert an illegal tax from the Tribe that would
15 force the gaming facility to operate at a loss? Thus, the State, not the Tribe, would be the primary
16 economic beneficiary of the Tribe's gaming facility.

17 The provisions of the 1999 Tribal-State Compacts are clear – Tribes that operate less than 350
18 gaming devices fall within the definition of “Non-Compact Tribe,” and “Non-Compact Tribes” are to
19 receive payments from the RSTF in accordance with provisions set forth at Section 4.3.2 of the 1999
20 Tribal-State Compacts. (PUMF No. 43.) Forcing Fort Independence to give up its third-party
21 beneficiary rights under the 1999 Tribal-State Compacts as a condition for conducting class III
22 gaming activities would discriminate against it, as other tribes are receiving such funding while
23 engaging in such activities. Accordingly, California cannot in good faith insist that Fort
24 Independence agree to such a discriminatory provision.

25 2. **IGRA Prohibits Conditioning the Conclusion and Execution of a**
26 **Tribal-State Compact on Inclusion of a Provision Which Permits**
27 **California to Exact a Tax, Assessment or Other Charge on**
28 **Gaming Revenue.**

1 In *Northern Arapaho Tribe v. Wyoming*, 389 F.3d 1308 (10th Cir. 2004), the Tribe contended
2 that the State had a duty to negotiate the full-scope of Class III gaming activities, because state law
3 permitted non-profit corporations to conduct a subset of the type of gaming under certain
4 circumstances. *Id.* at 1311. The State asserted, however, that the scope of negotiations only extended
5 to the subset of gaming authorized under state law, and that IGRA mandated such a limitation. *Id.* at
6 1311-1312. The district court agreed with the Tribe that the State had not acted in good faith by
7 refusing to negotiate a class of gaming expressly required to be the subject of negotiation under
8 IGRA, and the Eighth Circuit affirmed. *Id.* at 1311. Accordingly, the *Northern Arapaho Tribe*
9 decision stands for the principle that a state fails to negotiate in good faith where it fails to negotiate
10 on subjects which are mandatory subjects of negotiation under the plain language of the IGRA.
11 Conversely, it logically follows that a state also fails to negotiate in good faith where it insists on
12 negotiating, or conditions execution of a Tribal-State Compact on a subject which is prohibited as a
13 subject of negotiation under the plain language of the IGRA.

14 The plain language of the IGRA explicitly prevents the State from “imposing any tax, fee,
15 charge or other assessment from an Indian tribe” and “[n]o State may refuse to enter into the
16 negotiations...based upon the lack of authority in such State, or its political subdivisions, to impose
17 such a tax, fee, charge, or other assessment.”

18 Furthermore, where California has sought to impose such a prohibited tax, under IGRA, this
19 Court “shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian
20 lands as evidence that the State has not negotiated in good faith.” 25 U.S.C. § 2710(d)(7)(B)(iii)(II).
21 Based on the plain language of the foregoing provision, a District Court must consider any demand
22 by California for direct taxation of Fort Independence as evidence that California has not negotiated
23 in good faith. Therefore, to the extent that California has sought direct taxation of Fort Independence
24 during negotiation of the Tribal-State compact, a prima facie lack of good faith within the meaning of
25 IGRA has been demonstrated.

26 As noted previously, California sought to impose such a tax on Fort Independence as a
27 condition to the final execution of a Tribal-State Compact on numerous occasions. On December 16,
28

1 2004, Mr. Kolkey, counsel for the Governor, sent a proposed compact which included the following
2 provision at Section 4.3.1 of the draft compact:

3 In consideration for the exclusive right to operate certain class III
4 Gaming granted to the tribes by the California Constitution, from and
5 after the first day of operation of the Gaming Activities, the Tribe shall
6 pay to the State following percentages of its Net Win of the Gaming
7 Activities, the Tribe shall pay to the State the following percentages of
8 its Net Win generated from the operation of all Gaming Devices. . .
(PUMF No. 8.)

9 The percentage of the required contribution ranged from 10% to 25% of the net win. (PUMF No. 8.)²

10 Throughout the negotiations, counsel for Fort Independence objected to the inclusion of the
11 prohibited revenue sharing provision, and stated that Fort Independence would not agree to such a
12 provision given IGRA's ban on any kind of tax, fee, charge or assessment to engage in Class III
13 gaming. (PUMF Nos. 17, 18, 19, 21, 23, 27, 28, 30, 32 & 34.) In all of these communications,
14 California was advised that IGRA did not permit the imposition of a direct charge, tax, or assessment
15 as a condition for executing a Tribal-State compact. (*Id.*)

16 Notwithstanding Fort Independence's position concerning California's bad faith imposition of
17 such a prohibited tax, assessment or charge, California persisted in its negotiating position. For
18 example, Ms. Hoch corresponded with counsel for Fort Independence on August 30, 2007, and
19 asserted that while remaining open to negotiating the scope of the impermissible tax, she nevertheless
20 maintained that California was entitled to such revenue sharing, relying on her erroneous
21 interpretation of California law. (PUMF No. 31.) On November 26, 2007, counsel for Fort
22 Independence responded to Ms. Hoch exhaustively reiterating for a sixth time that such a tax was
23 prohibited by IGRA. (PUMF No. 32.) Ms. Hoch, in turn, responded in correspondence dated
24 January 22, 2008, stating that the "Tribe's assertion that the State's position on revenue sharing and
25 continuation of RSTF payments to the Tribe constitute pre-conditions to negotiation of a compact is
not accurate." (PUMF No. 33.) Ms. Hoch also refused to alter California's negotiating position,

26 ² It is important to note that no where in this proposed compact, does California tie this revenue sharing provision to any subject which is a permissible
27 topic of negotiation under IGRA, such as "defraying the costs of regulating" gaming activity. See 25 U.S.C. § 2710(d)(3)(C)(i)-(vi). This, in and of
28 itself, is enough to distinguish the instant case from the Court's decision *In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003), in which
the Ninth Circuit assumed that a Special Distribution Fund constituted a tax on the tribe, but was earmarked for purposes "directly related to tribal
gaming." *Id.* at 1114-1115. Here, the proposed compact contains no enumeration of such purposes under the proposed provision authorizing a direct
charge to the net win of the tribe's gaming revenue, and therefore the provision constitutes the imposition of an impermissible tax, assessment or other
charge in violation of IGRA. (PUMF No. 8.)

1 while accusing Fort Independence of failing to make a counter-offer, even though Fort
2 Independence's counter-offer had been exhaustively stated to be that California should cease its
3 attempts to impose provisions that violate the IGRA. (PUMF No. 33.) After this last
4 communication, Fort Independence interpreted California's "failure to respond as refusal to remove
5 these conditions to the formation of compact." (PUMF No. 34.) At this point, Fort Independence
6 concluded that further negotiations with California would be fruitless, as California had refused to
7 remove the illegal provisions from the proposed Tribal-State Compact, notwithstanding Fort
8 Independence's numerous counteroffers to the contrary.

9 Other District Courts have similarly concluded, on summary judgment, that California has
10 violated IGRA's bad faith provisions where it adopts a similar negotiating position to the one it has
11 taken in the instant case by conditioning the execution of a Tribal-State compact on the imposition of
12 an impermissible tax. For example, in *Rincon Band of Luiseno Mission Indians of the Rincon*
13 *Reservation v. Arnold Schwarzenegger*, Case No. 04cv1151, WMc (S.D. Cal. April 29, 2008), "the
14 state asked for an annual flat fee based on ten percent of gross gaming revenue on all gaming devices
15 for fiscal year 2005 and an additional amount equal to 15 percent of the average net win for each
16 gaming device over 1,600 machines." *Id.* at 21. (PUMF No. 44.) The court distinguished such a
17 revenue sharing provision with other revenue sharing provisions that had been approved by courts in
18 the past and noted that "the State has demanded Rincon pay a fee directly to the state that is unrelated
19 to gaming and has no limitations on its use in return for a fee-reduction provision that has decidedly
20 less value than the original exclusivity provision given to the tribes, which already provides a
21 monopoly to tribal gaming interests." *Id.* at 22. The court stated that "[s]uch a fee falls outside the
22 scope of 25 U.S.C. § 2710(d)(3)(C)(iii), which only allows assessments by the State in order to
23 defray the costs of regulating gaming activity." *Id.*

24 The District Court further criticized California's rationale for its improper revenue sharing
25 provision, stating that "the State argues additional revenue sharing is warranted to balance the
26 economic interests between the State and the Tribe because the State is foregoing revenue it could
27 have obtained from non-Indian gaming operators, if such non-Indian operators were allowed to game
28

1 in California.” *Id.* The District Court interpreted “the State’s rationale for requiring such a large
2 revenue sharing fee [as] another indication to [it] that the State’s fee demands constitute an improper
3 attempt to impose a tax on Rincon in lieu of being able to levy a tax on non-existent non-Indian
4 gaming operators. It is difficult to regard the State’s proposed plan as anything more than a tax when
5 it functions as a tax.”³ *Id.*

6 The District Court also disapproved of California’s tax demand without providing any
7 evidence that such a demand was gaming related, to wit:

8 [California] has not only refused to connect the new revenue sharing
9 provision to gaming-related interests, but provides no evidence to show
10 that it needs the proposed additional revenue needed to regulate gaming
11 activity or mitigate adverse impacts therefrom. Instead, [California]
12 argues additional revenue sharing is warranted to balance the economic
13 interests between the [California] and the Tribe because [California] is
14 foregoing revenue it could have obtained from non-Indian gaming
15 operators, if such non-Indian operations were allowed to game in
16 California. *Id.* at 22.

17 The District Court concluded as follows:

18 Without an acceptable nexus between the fee demanded and the IGRA-
19 sanctioned uses to which it is put, this Court finds that the revenue
20 sharing insisted upon by the State violates the Section (d)(4), which
21 prohibits states from taxing tribes. Accordingly, the Court finds that
22 the State’s insistence on payment of such a large fee to its general fund
23 in return for concessions of markedly lesser value was in bad faith in
24 light of the prohibition against taxation set forth in the IGRA and the
25 parameters discussed in the Ninth Circuit’s *Coyote Valley II* decision,
26 which only approved limited and reasonable revenue sharing and made
27 no decision as to the legality of placing revenue derived from tribal
28 gaming into a state’s general fund. *Id.* at 23, citing *In re Indian
Gaming Related Cases (Coyote Valley II)*, 33 F.3d 1094, 1115, fn. 17
(9th Cir. 2003).

29 Thereupon, the District Court granted summary judgment in favor of the Tribe, holding that
30 California had acted in bad faith by exacting such a tax on a Tribe as a condition to the execution of a
31 Tribal-State compact constituted bad faith.

32
33
34
35
36
37
38

³ The court referenced the definition of “tax” in Black’s Law Dictionary which is defined as a
“monetary charge imposed by the government on persons, entities, transactions, or property to yield
public revenue.” Black’s Law Dictionary 1496 (18th Ed. 2005) (emphasis added).

1 California has taken the same position here as it did in *Rincon*, namely, that it does not exact a
2 tax, fee, charge or other assessment when it demands revenue sharing provisions that are merely
3 deposited into the State's general fund, without either tying such fees to the regulation of gaming, or
4 making a meaningful concession in return for such fees that results in a substantial economic benefit
5 to the Tribe. The history of the negotiations between California and Fort Independence bear this out.
6 For example in the email from Darcie L. Houck, Counsel for Fort Independence to Ms. Hoch dated
7 August 20, 2007, it was stated:

8 During the meeting on August 16, 2007 the Tribe provided a copy of a market
9 assessment study. This study demonstrates that the venture will not produce enough
10 revenue to justify any revenue sharing payments to the State. In fact if the Tribe were
11 to make such payments, based on anticipated revenues, it would be operating at a loss.
12 The Tribe simply cannot afford to revenue share given its location, the small size of
13 the proposed facility, and the cost that will be incurred to operate the facility. It is
14 unreasonable for the State to require revenue sharing under these circumstances and
15 inconsistent with agreements between the State and other tribes that meet the
16 definition of a "Non-Compact Tribe" under the 1999 Compact. The Tribe is willing to
17 discuss terms regarding environmental reviews, local mitigation, and internal control
18 standards. However in order to make this project workable from a financial
19 perspective the Tribe again proposes the following terms:

- 16 1)The Tribe would operate no more than 349 gaming devices, with no
17 revenue sharing payments to the State;
- 18 2)The Tribe will continue to receive funds from the RSTF pursuant to the
19 terms set forth in the 1999 Compact;
- 20 3)The Tribe will adopt minimum internal control standards for Class III
21 gaming through its Tribal Gaming Ordinance (such standards will
22 meet or exceed the requirements of the NIGC MICS, 25 CFR Part
23 542- as of October 1, 2006)
- 24 4)The Tribe will mitigate for off-reservation impacts as proposed by the
25 State.
26 (PUMF No. 30.)

27 The State found these terms unacceptable, yet offered no basis for its demand to require an
28 illegal tax as a condition for concluding a Tribal-State compact with the Tribe.

29 **E. California's Offer of Exclusivity is Meaningless, and Is Therefore**
30 **Insufficient to Insulate California From its Bad Faith in Conditioning the**
31 **Conclusion and Execution of A Tribal-State Compact on the Inclusion of**
32 **Provisions Prohibited by IGRA.**

1 California continues to assert that its so called offer of exclusivity allows it to condition the
2 execution of a Tribal-State compact on the inclusion of provisions that are prohibited by IGRA. In
3 this case California's offer of exclusivity is meaningless, as the State Constitution already provides
4 such exclusivity, and IGRA prevents the State from assessing any "tax, fee, charge, or other
5 assessment" on a Tribe as a condition of entering into a compact. The State's demand here amounts
6 to such an illegal assessment. Fort Independence is not required to negotiate for terms outside the
7 permissible areas of negotiations. However, assuming that Fort Independence is willing to negotiate for
8 revenue sharing provisions, in order to not violate the provisions of IGRA, California is required to
9 provide meaningful consideration that results in a substantial economic benefit to the Tribe.
10 California has not done so here.

11 The Ninth Circuit addressed this issue and has explained that

12 [d]epending on the nature of both the fees demanded and the
13 concessions offered in return, such demands might, of course, amount
14 to an attempt to impose a fee, and therefore amount to bad faith on the
15 part of a State. If, however, offered concessions by a State are real, §
16 2710(d)(4) does not categorically prohibit fee demands. Instead, courts
17 should consider the totality of that State's actions when engaging in the
18 fact-specific good-faith inquiry IGRA generally requires. *In re Indian*
19 *Gaming Related Cases*, 331 F.3d 1094,1112 (9th Cir. 2003), *citing* 25
20 U.S.C. § 2710(d)(7)(B)(iii);

21 See also *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1101 (9th Cir. 2006) ("It is also true
22 that, despite this statutory prohibition [Section 2710(d) in the IGRA], States and tribes have
23 negotiated compacts that provided for payments by the tribes to the states. The theory on which
24 such payments were allowed, however, was that the parties *negotiated* a bargain permitting such
25 payments in return for meaningful concessions from the state (such as a conferred monopoly or
26 other benefits). Although the state did not have *authority* to exact such payments, it could bargain to
27 receive them in exchange for a quid pro quo conferred in the compact") (*Id.* emphasis in original).

28 In *Rincon, supra*, the District Court addressed the issue of whether California had offered a
meaningful concession to a Tribe in exchange for exacting a tax, payment or other charge as part of
Tribal-State Compact negotiations. See *Rincon Band of Luiseno Mission Indians of the Rincon*

1 *Reservation*, 3:04-cv-01151-WMc (S.D. Cal. April 29, 2008) (PUMF No. 44.) There, California
2 argued that “a meaningful concession is conveyed whenever the State offers a federally-recognized
3 tribe the ability to provide additional games and machines for an extended period of time free from
4 non-Indian competition.” *Id.* at 16-17. The District Court rejected that argument, noting that “it is
5 clear that the failure to offer meaningful concessions causes a State to exceed its authority to
6 negotiate and is, in fact, an attempt to impose a tax.” *Id.* at 19. In determining whether the State has
7 made a meaningful concession, the district court stated that “the issue is whether, under the totality of
8 the circumstances, the fees demanded in light of the concessions offered amount to the imposition of
9 a fee.” *Id.* at 20, citing *In re Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d at 1112.

10 Under the foregoing standards, California asserted that a meaningful concession had been
11 made in exchange for a direct tax on the Tribe by offering: (1) an exclusivity provision providing
12 that voided the revenue sharing provisions if a non-Indian Individual or entity is allowed to operate
13 class III gaming within a specified market area; (2) ability to operate gaming devices in excess of the
14 amount allowed under the 1999 compacts and (3) “a five-year extension of its current Compact
15 term.” *Id.* at 19-20. The Court expressly noted that, in light of the foregoing offer, “[t]he State has
16 made some concessions. *Id.* at 20.

17 However, in spite of these concessions, the District Court rejected the State’s argument for
18 two reasons. First, the District Court noted “that the citizens of California would have to amend the
19 State Constitution in order to allow non-Indian gaming” and finding that such a “scenario” is
20 “speculative and unlikely given the State’s established public policy against casino-style gambling.”
21 *Id.* at 20. Second, the concessions offered in light of the tax demanded was unreasonable since,

22 [t]his substantial fee, 37 times greater than what Rincon receives, is
23 unreasonable compared to the balance struck in the first compact
24 negotiation between the tribes and the State where an actual monopoly
25 was conferred in exchange for millions of dollars of fees to be funneled
26 to gaming-related impacts covered by the RSTF and SDF. *Id.* at 21.

27 The District Court further characterized the unreasonableness of the demand, stating,

28 [T]he State had demanded Rincon pay a fee directly to the state that is
unrelated to gaming and has no limitations on its use in return for a fee-
reduction provision that has decidedly less value than the original

1 exclusivity provision given to the tribes, which already provides a
2 monopoly to tribal gaming interests. *Id.* at 22.

3 This unreasonableness was bolstered by

4 [California's] own expert, Professor William Eadington, [which
5 concluded that] the State's October 23, 2006 offer allowing Rincon an
6 additional 900 machines would provide the State with an unrestricted
7 fee for use in its general fund of \$37.9 million dollars while Rincon
8 would make only \$1,716,000 from adding 900 machines to its current
9 1,600 machine operation. *Id.* at 21.

10 Moreover, the Secretary of the Department of the Interior, whom Congress has delegated
11 authority to approve or disapprove Tribal-State Gaming Compacts (*see* 25 U.S.C. § 2710(d)(3)(B)),
12 has reiterated time and again that IGRA does not allow states to condition approval of Tribal-State
13 Compacts on revenue sharing provisions. (PUMF Nos. 36-37.) The Secretary has determined that
14 the analysis as to whether a revenue sharing provision violates IGRA is as follows: (1) whether the
15 State has made "meaningful and significant concessions" in exchange for revenue sharing; and (2)
16 whether concessions "result in substantial economic benefit to the Tribe." In addition, IGRA does
17 not allow states to "refuse to enter into negotiations" because states lack authority to impose taxes,
18 fees, charges or other assessments upon tribes. *See* 25 U.S.C. § 2710(d)(4). (PUMF Nos. 36-37.) In
19 sum, in determining whether California has made meaningful concessions in exchange for its revenue
20 sharing demand, the District Court must inquire as to: (1) whether the concessions offered, under the
21 totality of the circumstances are unreasonable in light of the tax, charge or assessment demanded; and
22 (2) whether the concession offered amounts to a "substantial economic benefit." Under either prong
23 of this test, California's concessions are unreasonable, and the revenue sharing demanded would
24 destroy Fort Independence's ability to conduct economically viable gaming activities, and therefore,
25 those concessions, put simply, do not serve to inoculate California from its' bad faith conduct in
26 making its illegal demands.

27 California's concessions are unreasonable and do not result in a substantial economic benefit
28 to Fort Independence since the imposition of the proposed share of net win would destroy the
economic viability of Fort Independence's gaming establishment, since it would operate at a loss.
The Innovations Group conducted a Gaming Market Assessment in June of 2006. (PUMP No. 29.)

1 Based on the Revenue Forecast and Casino Sizing Scenarios set forth in this Gaming Assessment, the
2 Tribe would indefinitely operate in the red if required to forego its RSTF funding and pay the revenue
3 sharing provisions demanded by the State. Thus, resulting in a scenario where the State would
4 become the primary economic beneficiary of the Tribe's casino, not the Tribe. The State fails to
5 account for; 1) the cost of operations; 2) Tribal, Federal, and State regulatory costs; 3) local
6 mitigation costs; and for debt financing. California proposes to take 10-25% of the Tribe's revenue
7 off the top, without accounting for any of these costs. In fact the State has not conducted any
8 economic analysis to determine what a reasonable revenue sharing amount would be if it had offered
9 a meaningful concession. In this case the only evidence before the Court concerning economic
10 viability is the Gaming Market Study submitted by Fort Independence. (PUMP No. 29.) The
11 information in this study demonstrates that if forced to accept California's terms, after payment of the
12 items set forth above, nothing would be left for the Tribe. Therefore the State, not the Tribe, would
13 be the primary economic beneficiary of the gaming operation. This is contrary to the intent and
14 purpose of IGRA which is to promote tribal economic self-sufficiency.

15 In addition, to the foregoing, California's proposed exclusivity is also meaningless for the
16 same reason the District Court in *Rincon* offered, to wit, the California Constitution already mandates
17 exclusivity, and offering to do something that one is obligated to do offers no economic benefit to
18 another party to a contract, much less a "substantial economic benefit."

19 **F. California's Insistence On the Inclusion of Provisions Prohibited by**
20 **IGRA is Evidence of Bad Faith Shifting the Burden to the State of**
21 **California Requiring it to Prove it Acted in Good Faith During Tribal-**
State Compact Negotiations.

22 Upon the tribe's introduction of evidence that a Tribal-State compact has not been executed
23 and that either the state did not respond to the Tribe's request to negotiate a compact or did not
24 negotiate in good faith, the burden of proof is as follows:

25 [T]he burden of proof shall be upon the State to prove that the State has
26 negotiated with the Indian tribe in good faith to conclude a Tribal-State
27 compact governing the conduct of gaming activities. 25 U.S.C. §
28 2710(d)(7)(B)(ii).

1 In addition, all of the California's bad faith negotiating conduct, as described herein, violates the
2 standard of good faith set forth in the National Labor Relations Act. This Standard was referenced in
3 *In re Indian Gaming Related Cases*, 147 F. Supp.2d 1011, 1021 (N.D. Cal. 2001) (this duty
4 "requires" more than a willingness to enter upon a sterile discussion of" the parties' differences),
5 quoting *N.L.R.B. v. American Nat'l Ins. Co.* 343 U.S. 395, 402 (1952); *see also* 29 U.S.C. Section
6 158(d).

7 All of the evidence above sets forth a prima facie case that California has acted in bad faith by
8 seeking to destroy Fort Independence's third-party beneficiary rights, and exact a tax of its net wins.
9 Therefore, the burden has shifted to California to prove that it has acted in good faith during its
10 negotiations with Fort Independence. Accordingly, on summary judgment, California bears the
11 burden of proving that it has acted in good faith during negotiations of the Tribal-State Compact, and
12 cannot defeat summary judgment by making a mere showing that it has simply not acted in bad faith.
13 In light of the foregoing, California simply cannot carry its burden of showing that it acted in good
14 faith during Tribal-State Compact negotiations with Fort Independence, as a matter of law, and
15 summary judgment should be entered in favor of Fort Independence.

16 **IV. CONCLUSION**

17 For all of the foregoing reasons, this court should grant summary judgment in favor of Fort
18 Independence on its First Claim of Relief for Violation of IGRA and order California to conclude a
19 Tribal-State Compact with Fort Independence within 60 days. To the extent that such a compact is not
20 concluded within the 60 day period, this Court should appoint a mediator, to which both California and
21 Fort Independence should be required to submit their proposed Tribal-State Compacts to.

22 Dated: April 20, 2009

FREDERICKS PEEBLES & MORGAN LLP
John M. Peebles
Darcie L. Houck
A. Robert Rhoan

23
24
25 By: /s/ Darcie L. Houck
Darcie L. Houck
Attorneys for Plaintiff
FORT INDEPENDENCE INDIAN
26 COMMUNITY
27
28