

EDMUND G. BROWN JR.
Attorney General of the State of California
ROBERT L. MUKAI
Senior Assistant Attorney General
SARA J. DRAKE
Supervising Deputy Attorney General
PETER H. KAUFMAN, State Bar No. 52038
Deputy Attorney General
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2020
Fax: (619) 645-2012
Email: peter.kaufman@doj.ca.gov

Attorneys for Defendants Governor Arnold
Schwarzenegger and the State of California

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

**RINCON BAND OF LUISENO MISSION INDIANS
OF THE RINCON RESERVATION, a/k/a RINCON
SAN LUISENO BAND OF MISSION INDIANS
a/k/a RINCON BAND OF LUISENO INDIANS,**

Plaintiff,

v.

**ARNOLD SCHWARZENEGGER, Governor of
California; WILLIAM LOCKYER, Attorney
General of California; STATE OF CALIFORNIA,**

Defendants.

04-CV-1151 W (WMc)

**STATE DEFENDANTS'
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

Date: August 13, 2007

Time: 9:30 a.m.

Courtroom: C

Judge: William McCurine

INTRODUCTION

This case stems from the Rincon Band of Luiseno Mission Indian's ("Rincon" or "Band") dissatisfaction with its existing tribal-state class III gaming compact ("Compact"). Even though the casino authorized by that Compact provides this Band of roughly 600 members with annual gross gaming revenues of more than \$242 million, primarily from the operation of 1,600 slot machines, the Band is not content with this agreement. Rincon's discontent persists despite the fact that, due to the efforts of its casino manager Harrah's Entertainment-the largest casino operator in the world-Rincon's slot machines averaged \$381 in net win per day in 2005 (more than three and one-half times the net win for machines in Las Vegas). As a result, Rincon asked Governor Arnold Schwarzenegger and the State of California (collectively "Governor")^{1/} to agree to changes that would allow the Band, as a federally recognized tribe with an effective compact, to enlarge its exemption from California's constitutional prohibition against casino-style gambling. Specifically, Rincon has asked for an amendment that would authorize it to operate up to 900 additional slot machines, with the potential to gross the Band an additional \$125,158,500 or more a year.

The First Amended Complaint ("Complaint") is an outgrowth of that request and more than two years of compact amendment negotiations between the Governor and the Band. The stated premise of the suit is that the Governor has breached Rincon's Compact by failing to negotiate an amendment to that agreement in good faith. The Band considers the Governor to be negotiating in bad faith because he: (a) continues to maintain a legal position this Court upheld when it dismissed Rincon's fourth claim for relief; (b) has refused to agree to allow Rincon to insert extremely beneficial (to the Band) financial and other terms from its existing Compact into an amended compact; and (c) has asked the Band instead to accept terms similar to those that have been offered to and accepted by nineteen other California tribes.

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1. Under article IV, section 19(f) of the California Constitution, the Governor is the only state official authorized to negotiate compacts with federally recognized tribes. Thus, the Governor and the State are one and the same insofar as the negotiation of compacts is concerned.

1 In this regard, unlike compacts in other states and more recent California compacts
2 approved by the Secretary of the Interior, which require tribal general fund payments of up to 25
3 percent of the net win from class III gaming activities, Rincon's Compact requires no payments
4 to the State whatsoever in return for its ability to operate 1,600 slot machines and other class III
5 gaming free from non-Indian competition. Pursuant to section 4.3.2 of the Compact, such
6 payments as the Band makes are deposited into the Revenue Sharing Trust Fund ("RSTF").
7 Instead of being utilized as a modest substitute for general fund payments the State might have
8 received (absent California's prohibition on non-Indian class III gaming) from non-Indian
9 gambling enterprises for the general welfare of Californians and as mitigation for the adverse
10 impacts of such gambling, RSTF funds are paid to other federally recognized tribes operating no
11 Gaming Devices (slot machines) or fewer than 350 Gaming Devices. Further, under the
12 percentages set forth in Compact section 4.3.2.2 (a)(2), Rincon's current RSTF payments amount
13 to no more than \$1,335,000 which constitutes less than half of 1 percent of its more than
14 \$242,000,000 in gross gaming revenues.

15 Rincon's bad faith negotiation suit includes irrelevant accusations regarding negotiation
16 delays and tactics (first claim for relief), a moot claim regarding an alleged breach of Compact
17 section 10.8.3 (fifth claim for relief), and a rather quixotic plea for Gaming Device licenses
18 possessed by other tribes that is barred under Rule 19 (third claim for relief). The heart of the
19 dispute between the parties, however, is whether Rincon is entitled to obtain 400 hundred more
20 slot machine licenses from the State under the same terms set forth in its existing Compact or, if
21 not, whether, as part of compact amendment negotiations, the Band can obtain authorization to
22 operate between 400-900 additional slot machines free from non-Indian competition without
23 offering the State meaningful concessions in return.

24 The dispute over the 400 slot machines involves the total number of Gaming Device
25 licenses available to all compacting tribes under section 4.3.2.2 of the Compact. Rincon asserts
26 that the number is large enough to give the Band the 400 additional slot machine licenses it seeks
27 and, therefore, that the Governor negotiated in bad faith by asking for additional concessions for
28 something the Band views as a legal entitlement. Under the State's interpretation of the

1 Compact, however, there are no more licenses available. The State's interpretation is no longer
2 at issue in this proceeding because the Court dismissed Rincon's fourth claim for relief
3 challenging the State's construction. Thus, the Governor is entitled to ask for concessions in
4 return for an authorization to operate those 400 additional gaming devices.

5 The disagreement the parties have over the permissible scope of amendment negotiations
6 involves the extent of the State's ability: (a) to request an increase in the amount of revenue the
7 Band would be required to share with the State in return for Rincon's ability to operate 400 to
8 900 additional slot machines free from non-Indian competition; and (b) to exercise its
9 prerogative as a sovereign to determine how those funds will be spent.

10 Rincon argues that under Ninth Circuit precedent and article IV, section 19(f) of the
11 California Constitution, once the State allowed a specific number of slot machines to be operated
12 free of non-Indian competition without any payment to the State, the State precluded itself from
13 negotiating payments in return for the ability to operate a greater number of slot machines free
14 from non-Indian competition. In addition, the Band asserts that even if the State may negotiate
15 for payments from a tribe, such payments cannot be utilized for the purpose of raising revenue
16 for the general welfare of its citizens.

17 Rincon's interpretation of the California Constitution is unsupported by the plain
18 language of that provision which provides that any tribal right to operate any single slot machine
19 in California free from non-Indian competition depends upon the existence of an effective
20 compact or amendment authorizing that specific slot machine. The Band's construction is also
21 contradicted by Ninth Circuit precedent which specifically permits states to negotiate for revenue
22 payments in return for offering a substantial concession such as the right to operate a slot
23 machine free from non-Indian competition. Finally, Rincon's notion that states are precluded in
24 compact negotiations from seeking to raise revenue for their citizens is contradicted by the
25 legislative history of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. ("IGRA")
26 which demonstrates that Congress viewed a "State's governmental interests with respect to class
27 III gaming on Indian lands include... its economic interest in raising revenue for its citizens." S.
28 Rep. No. 100-446, at 12 (1988) *reprinted in* 1988 U.S.C.C.A.N. 3071, 2083.

1 In this case, the parties have reached a negotiation impasse because they cannot agree on
2 the applicable law. The Court should break that impasse by dismissing the Complaint and
3 finding that the State is entitled to ask for revenue sharing contributions to the State's general
4 fund in return for Rincon's ability to increase, by twenty-five to fifty-six percent, its
5 authorization to conduct class III gaming in California free from non-Indian competition.

6 STATEMENT OF FACTS

7 1. In September 1999, then Governor Gray Davis executed Rincon's existing
8 Compact. (Compl., ¶¶ 37-38.) The terms of that Compact are in all significant respects identical
9 to the terms contained in compacts executed by Governor Davis and more than 60 other tribes.
10 (*Id.* at ¶¶ 39, 44, 45.) With respect to the number of Gaming Devices (slot machines) the tribes
11 would be authorized to operate, the compacts guarantee each tribe only 350 (or the number that
12 tribe operated on the date the compacts were executed) (Compact § 4.3) but allow tribes to
13 obtain licenses to operate additional slot machines from a statewide pool administered by the
14 California Gambling Control Commission ("Commission") (Compact § 4.3.2.2). The compacts,
15 however, limit the size of the license pool and limit the maximum number of slot machines a
16 tribe can operate, both with and without licenses, to 2,000. (*Id.*)

17 2. The compacts do not set forth a specific number for the size of the license pool.
18 Instead, they provide a formula for calculating that number. (Compact § 4.3.2.2(a)(1).) In June
19 2002, in order to be able to implement its duties and responsibilities with respect to the
20 administration of the license pool, the Commission interpreted the compacts and established the
21 size of the license pool. (Joint Stipulated Administrative Record ("JSAR"), Ex. 40, at 00975-
22 976; 00984-988.) Thereafter, on the basis of that interpretation, the Commission began issuing
23 licenses to tribes pursuant to a draw process that is also set forth in the compacts. (JSAR, Ex.
24 32, at 00892.)

25 3. Though Rincon at one time possessed sufficient licenses to operate 2,000 slot
26 machines at its casino, for financial reasons it chose to return 400 of those licenses to the license
27 pool and did so, in August 2002. (JSAR, Ex. 32, at 00892.) Those 400 licenses were then issued
28 to other tribes under procedures specified in the Compact. By the time Governor Arnold

1 Schwarzenegger was elected in November 2003, the licensing pool was essentially exhausted.
2 As a result, tribes such as Rincon that desired additional licenses were unable to obtain them
3 from the pool. (Compl. ¶ 62.)

4 4. At this point, tribes in Rincon's position that wished to operate additional slot
5 machines had two choices. Either they could negotiate amendments to their compacts that
6 allowed them to obtain slot machines outside of the licensing pool, or they could pursue the
7 argument as Rincon has chosen to do, that the Commission's interpretation of the size of the pool
8 was erroneous, and file suit seeking a judicial declaration that would increase the number of
9 available licenses in the pool sufficiently to enable them to operate additional slot machines
10 without first amending their compacts. (JSAR, Ex. 41, at 00991.)

11 5. A group of five tribes ("Five Tribes") determined to obtain authorization to
12 operate additional slot machines by negotiating amendments to their compacts. The amendments
13 those tribes negotiated provided them with authority to operate additional slot machines without
14 having to depend on the exhausted licensing pool or being subject to the 2,000 per tribe limit and
15 extended the duration of their compacts by 10 years. (JSAR, Ex. 10, at 00033-35, 63; Ex. 11, at
16 00066-68, 96; Ex. 12, at 00099-101, 129; Ex. 13, at 00132-135, 162; Ex. 14, at 00164-166, 194.)
17 In return for these concessions by the State, those tribes agreed to certain revenue sharing
18 provisions, changes to the environmental protection provisions of the compacts, and inclusion of
19 certain other provisions designed to provide increased protection for patrons and employees of
20 the casinos, as well as to clarify ambiguous provisions of the compacts. (*Id.*, Exs. 10-14, at
21 00032-194.) The Five Tribes agreed in their amended compacts to retain and maintain through
22 the required payment into the RSTF, their existing licenses in the pool. (*Id.* at § 4.3.1(a)(ii).)
23 The amendments were ratified by the Legislature and approved by the Secretary of the Interior
24 as consistent with the requirements of IGRA. 69 Fed. Reg. 53733 (Aug. 27, 2004).

25 6. Rincon, on the other hand, chose to pursue both options simultaneously. Thus,
26 while preparing to litigate the Commission's interpretation of the size of the license pool, Rincon
27 also pursued compact amendment negotiations intended to accomplish the same result.

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1 7. Rincon initially pursued a negotiation path with Governor Schwarzenegger. On
2 November 21, 2003, it requested compact amendment negotiations in a joint letter with ten other
3 tribes. (JSAR, Ex. 2, at 00003.) The Governor's Office acknowledged receipt of that letter on
4 December 16, 2003. (*Id.*) On January 7, 2004, the Governor appointed Daniel M. Kolkey as the
5 State's compact negotiator and commenced negotiations with the Five Tribes and other tribes
6 that had contacted Mr. Kolkey directly. (JSAR, Ex. 9, at 00024.)

7 8. Instead of contacting Mr. Kolkey after his appointment as negotiator to request a
8 meeting date as had other tribes, Rincon sent a meet and confer letter to the State pursuant to
9 Compact section 9.1 asserting that the State had breached the Compact among other things by
10 failing to properly interpret the size of the licensing pool and failing to negotiate an amendment
11 to the Compact in good faith. (JSAR, Ex. 3, at 0004-7.) While documents requested by the State
12 were being compiled for the purposes of that meet and confer session, Rincon participated in
13 compact amendment negotiations with the Five Tribes and the State's negotiator by attending a
14 negotiation session on April 7, 2004. (*Id.*, Ex. 9, at 00028.)

15 9. On April 21, 2004, the Band requested separate compact negotiations. (JSAR, Ex.
16 9, at 00028-29.) Before that compact amendment negotiation session was held, a meet and
17 confer session regarding the State's alleged Compact violations was held on June 2, 2004. (*Id.*,
18 Ex. 7, at 00013.) The meet and confer ended without either party changing its legal positions.
19 (*Id.* at Ex. 7, at 00013-20.)

20 10. Thereafter, on June 4, 2004, at the first separate negotiation session between the
21 Band and Mr. Kolkey, Rincon stated that what it wanted from a compact amendment were
22 provisions that would allow it to obtain 400 more slot machines outside of the licensing pool,
23 while paying the same fee it would have paid if the authorization to operate those machines had
24 come from the licensing pool. Moreover, instead of paying those fees to the RSTF for Non-
25 Compact tribes as would be required for pool licenses, the Band wanted the fees for these
26 devices to be earmarked for local projects that benefitted Rincon. (JSAR, Ex. 9, at 00029-30;
27 Compl. ¶ 118.) At the conclusion of that negotiation session, Rincon requested a further meeting
28 in July, 2004. (JSAR, Ex. 9, at 31.) The State's negotiator agreed to a July 1, 2004, session on

1 the condition that the Band provide him with its negotiation proposals two weeks in advance.
2 (*Id.*) The session was canceled because Rincon failed to provide any negotiation proposals
3 whatsoever. (*Id.*)

4 11. Five days after the June negotiation session, instead of providing the State with a
5 compact amendment negotiation proposal, Rincon chose to file suit on June 9, 2004, asserting
6 among other things that the State's license pool interpretation was incorrect and that the State
7 had failed to negotiate a compact amendment in good faith.

8 12. On March 22, 2005, this Court dismissed Rincon's license pool claim for relief
9 based on Rincon's failure to join the Five Tribes. (Compl. ¶ 8; Order Granting in Part &
10 Denying in Part Req. for Recons. Mar. 22, 2005.)

11 13. Unable to obtain the 400 additional slot machines it sought through a direct
12 challenge to the Commission's interpretation of the size of the statewide licensing pool, the Band
13 sought to acquire authority to operate additional slot machines indirectly through continued
14 compact amendment negotiation and its "bad faith negotiation" claim for relief. Seventeen
15 months after the parties' last negotiation session, the Band returned to the table for another
16 compact amendment negotiation session with the State's negotiator, on November 4, 2005.
17 (Compl. ¶ 139.)

18 14. However, instead of providing the State with a compact amendment proposal, as
19 the State's negotiator had requested earlier on June 4, 2004, the Band insisted that the State make
20 another offer first. The State, though not required to do so, obliged the Band and made a new
21 offer. (JSAR, Ex. 16, at 00250-252.) The terms of the State's offer were substantively similar to
22 the terms that had been agreed to by the Five Tribes and approved by the Secretary of the
23 Interior as consistent with IGRA. (Compare, JSAR, Exs. 10-14 to Ex.16.) The State's proposal
24 also reduced the revenue share requirement contained in its June 4, 2004, proposal. Instead of
25 asking for 15 percent of net win on all slot machines operated by the Band, the State's November
26 4, 2005, proposal asked for only 15 percent of the Band's average net win on its slot machines in
27 operation in 2004 (a fixed sum) and 15 percent of the average net win on any additional slot

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1 machines (a sum that would fluctuate depending on the new machines' performance). Rincon
2 did not make a counter proposal at that meeting.

3 15. More than twenty-six months after it requested compact amendment negotiations
4 with the Schwarzenegger Administration on November 21, 2003, seventeen months after the first
5 negotiation session between the parties on June 4, 2004, and nearly three months after the State's
6 November 4, 2005, proposal, on January 25, 2006, Rincon made its first written compact
7 amendment offer. The Band's proposal offered to pay the same fee per slot machine (\$4,350)
8 that it would have had to pay if the machines were authorized by licenses from the compact
9 licensing pool-not only for the 400 additional slot machines that would allow the Band to operate
10 2,000 gaming devices (the maximum under the Compact) but for an additional 500 slot
11 machines. (Compl. ¶ 144; JSAR, Ex. 19, at 00479-480; 00473-478.) The Band's proposal thus
12 sought to increase its slot machine authorization to 2,500 machines by paying the same per-
13 machine fee on the additional 900 machines as it was paying under the unamended Compact.

14 16. On January 27, 2006, the State rejected the Band's proposal on the grounds that it
15 offered nothing to the State in return for allowing Rincon to operate additional slot machines and
16 was actually worse than the Band's oral proposal that the State had rejected during the
17 negotiation session in June 2004. (JSAR, Ex. 20, at 00481- 84.) The State requested that the
18 Band reconsider its proposal. (*Id.* at 484.)

19 17. More than three months later, on May 5, 2006, the Band submitted another
20 proposal. (Compl. ¶ 147; JSAR, Ex. 21.) By this proposal, Rincon offered to pay the same fee
21 per slot machine (\$4,350) that it would have had to pay if the machines were authorized by
22 licenses from the compact licensing pool for the right to operate 400 additional slot machines.
23 (*Id.*, at 00487.) In return for the right to operate an additional 500 more slot machines, the Band
24 offered to pay \$6,000 per additional device over a total of 2,000 slot machines. (*Id.*) These fees,
25 however, could only go to programs approved by Rincon. (*Id.*) Submitted with Rincon's
26 proposal were certain financial information and legal analysis that Rincon asserted demonstrated
27 that the State's prior proposals were not acceptable from a legal or financial standpoint. (Compl.
28 ¶ 146.)

1 18. In July 2006, Governor Schwarzenegger's Legal Affairs Secretary Andrea Hoch
2 succeeded Mr. Kolkey as the State's negotiator for compacts and compact amendments.
3 (Compl. ¶ 158.)

4 19. After Ms. Hoch's appointment as negotiator, three meetings took place between
5 the Band and the State on August 9, 2006, September 12, 2006, and October 5, 2006. (Compl. ¶
6 161.) At these meetings, the Band did not make any compact amendment proposals. Instead,
7 Rincon focused its efforts on an attempt to convince Ms. Hoch that the Band's political makeup,
8 geographic location, and competitive market made the State's prior offers financially
9 unacceptable. (JSAR, Exs. 29-33.) Rincon urged Ms. Hoch to change the Commission's
10 interpretation of the number of Gaming Device licenses available under Compact section
11 4.3.2.2(a)(1). (*Id.*, at Ex. 30.) The Band also asked that the State require the Five Tribes to
12 return their Gaming Device licenses to the licensing pool for Rincon's benefit. (*Id.*, at Ex. 33.)

13 20. After a hearing on September 6, 2006, this Court set the date of November 3, 2006
14 as the close of compact amendment negotiations between Rincon and the State for the purposes
15 of this litigation. (Sept. 13, 2006, Order.)

16 21. Because Rincon had not made any compact amendment proposals at the August 9,
17 September 12, or October 5, 2006, negotiations between the parties, the State asked the Band to
18 provide it with a statement regarding what the Band wanted in a compact amendment. In a letter
19 dated October 12, 2006, the Band stated that it "wanted to protect the value of the 1999 Compact
20 deal, which is for 2000 machines at the fee schedule set forth in Section 4." (JSAR, Ex. 34, at
21 00908.) Rincon also announced that the only basis upon which it would consider more than a
22 "modest" expansion were if it were to develop a "second full service resort (on reservation)," if
23 the State were to agree to allow it to develop a casino at "a site with better market opportunity",
24 or if "significant access and/or roadway improvements" were provided. (*Id.*)

25 22. On October 23, 2006, the State made yet another compact amendment offer.
26 (JSAR, Ex. 35, at 00915-916.) In return for agreeing to grant Rincon geographic exclusivity, for
27 allowing the Band to operate up to an additional 900 slot machines and for awarding Rincon a
28 Compact extension of five years, the State requested a revenue share of 10 percent of the average

1 net win from the slot machines in operation at the Band's casino in 2005 and 15 percent of the
2 average net win from any additional slot machines. The State also requested that the Band agree
3 to essentially the same non-economic terms to which the Band's nearest competitors had agreed
4 in their amended compacts. (*Id.*)

5 23. In the letter in which the State's October 23, 2006, offer was made, Ms. Hoch
6 declined to repudiate the Commission's interpretation of the statewide limit on the number of
7 Gaming Devices or to require the Five Tribes to return the Gaming Device licenses to the
8 licensing pool. (JSAR, Ex. 35, at 00916-918.) In addition, though the State's offer to Rincon
9 was for up to 900 additional slot machines and a five year extension, Ms. Hoch's letter indicated
10 that, if the Band were interested, the State would be willing to make a proposal limited to an
11 increase of 400 additional devices with no Compact extension. (*Id.* at 0916.)

12 24. On October 24, 2006, Rincon's counsel advised the State that though the Band's
13 May 5, 2006, offer was still what it was interested in, the Band was also interested in seeing a
14 proposal from the State that involved an increase of 400 slot machines without a Compact
15 extension. (JSAR, Ex. 36.)

16 25. The parties met again on October 26, 2006. (Compl. ¶ 164.) Rincon made no
17 counter-offer at that meeting.

18 26. On October 31, 2006, the State responded to Rincon's request and made an offer
19 that limited the Band to 400 additional slot machines with no Compact extension. (JSAR, Ex. 37,
20 at 00923-924.) The State also provided the Band with an economic analysis of the financial
21 implications of the State's October 23rd and October 31st offers. (*Id.* at 00926-936.) That
22 analysis, conducted by Professor William Eadington, demonstrated that Rincon was
23 outperforming the average win per unit per day of its immediate competitors (\$369 per day for
24 Rincon versus an average of \$336 for its competitors) (*id.*, at 00935) and that it would likely do
25 better by taking the State's offers than by rejecting them. (*Id.*, at 00935-936; 00928-929.) The
26 State requested that the Band reply to its proposals by November 2, 2006, so that the State would
27 have adequate time to prepare a response before the Court-ordered negotiation record cut-off on
28 November 3, 2006. (*Id.* at 00924.)

27. On November 3, 2006, Rincon rejected both the State's October 23, 2006, offer and the State's October 31, 2006, offer. In rejecting those offers, the Band asserted that the State had failed to offer the Band a "meaningful concession" in return for any payments requested by the State. (JSAR, Ex. 38, at 00957; Compl. ¶ 165.) Rincon claimed that the State's offer of additional slot machines and a Compact extension provided it with nothing of value because it did not want an extension, the State constitution already granted it exclusivity, and its "Compact already entitles Rincon to an additional four hundred (400) gaming devices." (Compl. ¶ 165.)

28. On December 4, 2006, Rincon filed the Complaint.

29. On December 15, 2006, the State filed its answer.

SUMMARY OF ARGUMENT

Rincon's Complaint contains four claims for relief, each of which asserts that the State has breached the Compact. Rincon's first claim for relief asserts a procedural violation and alleges that the State breached the Compact by failing to comply with the requirement to negotiate an amendment to the Compact in good faith. Plaintiff's second claim for relief alleges, apparently in the alternative, that despite the fact the State has negotiated with the Band, the State's substantive proposals to Rincon breached the Compact because they were not lawful proposals under IGRA. Rincon's third claim for relief asserts that the State breached the Compact by not taking Gaming Device licenses from five other tribes and making them available to Rincon. The Band's fifth claim for relief asserts that the State breached the Compact when the State withdrew its request for Compact amendment negotiations under Compact section 10.8.3(b) and thereby excused Rincon from an obligation it otherwise would have had to negotiate an amendment to Compact section 10.8 by January 1, 2005.^{2/}

Rincon's first claim for relief should be dismissed because it fails to state a claim upon which relief may be granted. The thrust of this claim is that compact amendment negotiations

2. The Complaint's fourth and sixth claims for relief are not part of the Governor's motion because the Court has already dismissed those claims for relief and because Rincon alleges in paragraph 8 of the Complaint that it is not seeking reconsideration or clarification of the Court's ruling.

1 should have been concluded before Governor Davis was recalled and that this compact violation
2 was compounded by: (a) the failure to conclude a compact amendment during the transition
3 between the Davis administration and the administration of Governor Schwarzenegger; (b) the
4 current administration's preference to negotiate amendments with other tribes that are different
5 from those that Rincon would prefer; and (c) Governor Schwarzenegger's refusal to negotiate a
6 change in the State's interpretation of the number of slot machine licenses available under the
7 terms of the Compact.

8 These allegations provide no basis for a claim that the State has breached its Compact
9 obligation to negotiate in good faith. First, there is no dispute that the parties have engaged in
10 compact amendment negotiations. Second, the Ninth Circuit decision in *In re Gaming Related*
11 *Cases (Coyote Valley)*, 331 F.3d 1094 (9th Cir. 2003) as well as the district court decision in that
12 case (*In re Gaming Related Cases*, 147 F. Supp.2d 1011, 1015 (N.D. Calif. 2001), make it clear
13 that once negotiations have occurred, a party cannot pursue a claim regarding any alleged past
14 failures to negotiate. Third, to the extent delay in conducting negotiations is an issue, Rincon
15 itself has often been more than tardy in either pursuing its own proposals or in responding to
16 proposals made by the State. Finally, good faith negotiation does not require that a party
17 negotiate against its own legal position.

18 Rincon's second claim for relief should be dismissed because it, likewise, fails to state a
19 claim upon which relief may be granted. This claim asserts that the State's substantive compact
20 amendment proposals are barred by IGRA because they fail to offer Rincon a meaningful
21 concession in return for an increase in the revenue sharing provisions of the Compact. However,
22 Rincon misstates the issue in a bad faith suit. The issue is not whether the State's concessions
23 are ultimately determined to be sufficient or insufficient. Rather, it is whether at the time the
24 State offered those concessions, it could conclude that they were consistent with IGRA. Here,
25 this Court's judgment of dismissal of the fourth claim for relief, the Ninth Circuit's rulings and
26 the Secretary of the Interior's approval of compact amendments with similar concessions and
27 revenue sharing provisions preclude any finding that the State's offers were made in bad faith.
28 Because it is not bad faith to negotiate on the basis of a viable legal position, until there is a final

1 disposition of Rincon's claims, the parties are at an impasse for which there is no remedy under
2 the Compact. In the alternative, because this Court has already dismissed Rincon's fourth claim
3 for relief, Rincon is no longer negotiating from a viable legal position and, thus, is itself
4 negotiating in bad faith.

5 Rincon's third claim for relief should be dismissed because the Band has patently failed
6 to join necessary and indispensable parties – the Five Tribes with amended class III gaming
7 compacts that would lose their Gaming Device licenses if Rincon were granted the relief it
8 requests. While the Band asserts that this claim asks only that the Court interpret the Band's
9 own Compact, the impact of adopting Rincon's interpretation would be to deprive the absent
10 parties of the benefit of their bargain with the State. It could also result in the State facing
11 conflicting obligations.

12 Rincon's fifth claim for relief should be dismissed because it presents no case or
13 controversy. Section 10.8.3 of the Compact lays out a general requirement for continued
14 dialogue between Rincon and the State regarding the environmental provisions of the Compact
15 and a specific set of provisions dealing with time limits for a certain request by the State for a re-
16 negotiation of the Compact's environmental provisions. Under Compact section 10.8.3(b), if the
17 State had timely made such a request, Rincon would have had specific Compact obligations.
18 Though the State, in fact, made a request, the State withdrew it and advised the Band that it no
19 longer had any obligations under section 10.8.3(b). The State's withdrawal of its request for re-
20 negotiation under section 10.8.3(b) has relieved Rincon of any obligation under that provision.
21 Thus, there is nothing for this Court to adjudicate.

22 ARGUMENT

23 I.

24 THE STATE HAS MET THE COMPACT'S AMENDMENT 25 NEGOTIATION REQUIREMENTS WHILE RINCON HAS NOT.

26 Rincon's first claim for relief asserts a procedural violation and alleges that the State has
27 breached the Compact by failing to comply with the requirement to negotiate an amendment to
28 the Compact in good faith pursuant to the provisions of sections 12.3 and 4.3.3. The thrust of

1 this claim is that compact amendment negotiations should have been concluded before Governor
2 Davis was recalled and that this Compact violation was compounded by: (a) the failure to
3 conclude a Compact amendment during the transition between the Davis administration and the
4 administration of Governor Schwarzenegger; (b) the current administration's preference to
5 negotiate amendments with other tribes that are different from those preferred by Rincon; and (c)
6 the State's refusal to negotiate a change in its legal interpretation of the Compact.

7 This claim should be dismissed because: (a) there is no dispute that Governor
8 Schwarzenegger has negotiated with the Band for a Compact amendment; (b) any purported
9 delay in the commencement of negotiations is irrelevant once negotiations have commenced; (c)
10 Rincon is precluded by its own conduct from complaining of negotiation delay; and (d) a party
11 does not engage in bad faith negotiation when it asserts a valid legal position.

12 Under Compact section 4.3.3, if requested to do so by either party between March 7,
13 2003, and March 31, 2003, the parties to the Compact are required to "promptly commence
14 negotiations in good faith" concerning "any matters encompassed by Sections 4.3.1 and Section
15 4.3.2, and their subsections." Pursuant to section 12.3, "all matters involving negotiations or
16 other amendatory processes under Section 4.3.3(b) and this Section 12.0 shall be governed,
17 controlled, and conducted in conformity with the provisions and requirements of IGRA including
18 those provisions regarding the obligation of the State to negotiate in good faith and the
19 enforcement of that obligation in federal court." As conceded by Rincon, in open court, in
20 reviewing a tribe's claim that the State has failed to negotiate a Compact amendment in good
21 faith, the Court may consider the tribe's good faith as well as the good faith of the State. (Tr.,
22 Sept. 6, 2006, Hr'g., at 14-15, lines 17-4, attached hereto and incorporated by reference herein as
23 Ex. 1.)

24 In this case, there is no dispute that Rincon timely requested negotiations under section
25 4.3.3 to amend the Compact. (JSAR, Ex. 7, at 00014.) Likewise, there is no dispute that
26 negotiation sessions have taken place between the Band and the State and no dispute as to when
27 those sessions took place. (Statement of Facts, *supra*, ¶¶ 8, 10, 13, 21, 25.) Similarly, there is no
28 dispute that the State has made three written Compact amendment proposals to Rincon and that

Rincon in turn has made two written counter-proposals to the State. (*Id.* at ¶¶ 14, 22, 26.) There is also no dispute as to the terms of each party’s proposal. (*Id.*)

Though, as the Ninth Circuit recognized in *In re Gaming Related Cases (Coyote Valley)*, there is “scant authority interpreting or applying IGRA’s good faith requirement,” *id.* at 1108, the reported cases on this issue have typically been decided on motions for summary judgment or motions to dismiss. *See, Wisconsin Winnebago Nation v. Thompson*, 22 F.3d 719 (7th Cir. 1994); *Cheyenne River Sioux Tribe v. State of S.D.*, 830 F. Supp. 523 (D.S.D. 1993), *aff’d*, 3 F.3d 273 (issue of good faith negotiation could only be decided on the basis of the transcripts of the negotiations). The reason for such treatment has been that the state of the negotiations between the parties is not a subject matter that lends itself to much dispute. Moreover, where as in *In re Indian Gaming Related Cases*, there were minor disputes as to the state of negotiations, the court, with the consent of the affected party, may choose to utilize one party’s version for purposes of reaching a decision. (*Id.* at 1107.)

Given that there is no dispute about the existence of negotiations, the timing of negotiations, or the offers and counter-offers made, the only questions for decision relating to Rincon’s first claim for relief are ones of law – whether Rincon may pursue a claim based on past delays in the conduct of negotiations, if so, whether Rincon rather than the State has been responsible for any delays that have occurred, and whether the State’s refusal to alter its legal interpretation of the Compact constitutes a bad faith refusal to negotiate.

On the question of past negotiation delay, case law demonstrates that such delay does not support a bad faith negotiation claim under IGRA. Those cases provide that in deciding whether a state has negotiated in “good faith,” courts are to look at the latest conduct of the state and essentially ignore prior state conduct, whether it be of a prior governor or the same governor at an earlier point in time.

As the court concluded in *In re Indian Gaming Related Cases*, 147 F. Supp.2d 1011, 1015:

Any delays in negotiations do not constitute bad faith. First, the Court accords the arguments concerning the Wilson Administration little weight. Although IGRA does not specify the time period that should be evaluated in determining whether a

1 State negotiated in good faith, common sense dictates that a State that has, in the
2 recent past, negotiated in good faith should not be compelled to submit to the
3 procedures set forth in 25 U.S.C. § 2710(d)(7)(B)(iii) and (iv) based on its conduct
4 in the more distant past.

5 On appeal, the Ninth Circuit confirmed the district court's legal conclusion when it
6 determined that the "gravamen of Coyote Valley's complaint," notwithstanding the complaint's
7 allegations against the Wilson administration, is that the "Davis Administration, rather than the
8 Wilson Administration, has refused to negotiate in good faith; and it is against the Davis
9 Administration that Coyote Valley seeks injunctive relief." *In re Gaming Related Cases (Coyote*
10 *Valley)*, 331 F.3d at 1110. As a consequence, the Ninth Circuit focused its analysis on the
11 conduct of the Davis, as opposed to the Wilson, administration. In this case, it is against the
12 Schwarzenegger administration that Rincon seeks relief, not the Davis administration. Simply
13 put, relief under IGRA for a failure to negotiate in "good faith" is not designed to "punish"
14 conduct. Rather, its purpose is to provide a cure. Inasmuch as any cure for a failure to negotiate
15 in "good faith" would be against the current State administration, it is only that administration's
16 conduct that is relevant.

17 If there has been delay in the negotiation of a Compact amendment, the blame for such
18 delay rests upon Rincon, not the State. Rincon, in a joint letter with nine other tribes made a
19 request for negotiations with the Schwarzenegger administration's November 3, 2003. (JSAR,
20 Ex. 2.) That request was acknowledged on December 16, 2003 (*id.*) and in January 2004, the
21 Governor appointed a compact negotiator. (*Id.* at Ex. 9, at 00024.) That negotiator was
22 contacted immediately by tribes that wished to negotiate both amendments and new compacts.
23 (*Id.* at 00024-25.) Rincon did not avail itself of this opportunity. (*Id.* at 00025.) Instead of
24 contacting the State's negotiator, Mr. Kolkey, the Band threatened litigation. Then Rincon chose
25 to participate in a negotiation session between the Five Tribes and the State. (*Id.* at 00028.)
26 After that session, one of the Band's attorneys, in an April 21, 2004, conversation with Mr.
27 Kolkey about another matter indicated that Rincon would like to engage in Compact amendment
28 negotiations separate from the Five Tribes. (*Id.* at 00028-29) June 4, 2004, was chosen for that
session. (*Id.* at 00029.) The State agreed to conduct another session on July 1, 2004, and

1 requested that the Band provide it with a written proposal. (*Id.* at 0031.) When the Band failed
2 to make such a proposal, the session was canceled. (*Id.*) No further Compact amendment
3 negotiations occurred until the fall of 2005, when a negotiation session was set for November 4th
4 of that year. (*Id.*, Ex. 16, at 00250-252.) The State made an oral Compact amendment proposal
5 at that meeting which it confirmed in writing on November 10, 2005. (*Id.*) The Band, however,
6 did not respond to that proposal until January 25, 2006, when it made a counter-proposal.
7 (JSAR, Ex. 19.) The State replied to that counter-proposal with an immediate rejection on
8 January 27, 2006, and a request for a more reasonable proposal from the Band. (*Id.* at Ex. 20.)
9 The Band did not reply to that request until May 5, 2006. (*Id.*, Ex. 21.) In July 2006, Mr.
10 Kolkey was succeeded, as compact negotiator, by Legal Affairs Secretary Andrea Hoch.
11 (Compl. ¶ 158.) That negotiator met with the Band in August, September and twice in October
12 2006. (*Id.* at ¶161.) Ms. Hoch also submitted two alternative Compact amendment proposals on
13 October 23rd and 31st of that year. (JSAR, Exs. 35, 37.)

14 This history of negotiations demonstrates that such delays as have occurred in
15 negotiations were caused by Rincon's conduct, not the State's. For example, once Governor
16 Schwarzenegger appointed a State compact negotiator, it was Rincon alone among interested
17 tribes that failed to immediately contact the negotiator to set up a meeting. Second, it was
18 Rincon that failed to provide a requested written proposal for the State's consideration that
19 resulted in a gap of nearly seventeen months between the June 4, 2004, negotiation session and
20 the next one on November 4, 2005. Likewise, it was Rincon that waited nearly three months to
21 respond to the State's November 4, 2005, Compact amendment proposal with its January 25,
22 2006, response. And, again it was another three months from the State's request for a more
23 reasonable proposal on January 27, 2006, before Rincon chose to respond with its May 5, 2006,
24 proposal. As a result, if delay is an issue, then Rincon should be found to have acted in bad
25 faith, not the State.

26 Finally, it is not bad faith for the State to have refused to negotiate over the Band's
27 request that the State change its position on the number of licenses available under the Compact.
28 In the labor relations context, courts have determined that good faith negotiation does not

1 compel a party to make concessions or yield a position fairly maintained. *Continental Ins. Co. v.*
 2 *NLRB*, 495 F.2d 44, 47 (2nd Cir. 1974) citing *NLRB v. American National Insurance Co.*, 343
 3 U.S. 395, 404, 72 S. Ct. 824, 96 L. Ed. 1027 (1952); *NLRB v. Patent Trader*, 415 F.2d 190 (2d
 4 Cir. 1969), *modified*, 426 F.2d 791 (2d Cir. 1970); *NLRB v. General Electric Co.*, 418 F.2d 736,
 5 756 (2d Cir. 1969), *cert. denied*, 397 U.S. 965, 90 S. Ct. 995, 25 L. Ed.2d 257, *reh'g denied*, 397
 6 U.S. 1059, 90 S. Ct. 1352, 25 L. Ed.2d 680 (1970). In this case, Rincon's challenge to the
 7 State's interpretation of the Compact was dismissed by this Court. As a result, the State's
 8 position in the negotiations that it would not alter its Compact interpretation was "a position
 9 fairly maintained."

10 II.

11 **IGRA DOES NOT PRECLUDE A STATE FROM REQUESTING** 12 **REASONABLE REVENUE SHARING WHERE, AS HERE, RINCON** 13 **SEEKS A COMPACT AMENDMENT THAT WOULD ENLARGE THE** **14 **BAND'S AUTHORIZATION TO OPERATE SLOT MACHINES BY**** **15 **FROM TWENTY-FIVE TO FIFTY-SIX PERCENT****

14 Rincon asserts that because the State has requested revenue sharing from the Band in
 15 return for a Compact amendment allowing the Band to increase the number of slot machines it is
 16 authorized to operate, the State's offer amounts to a tax that IGRA prohibits. As a consequence,
 17 the Band suggests, the State's proposal constitutes bad faith negotiation. Acknowledging, as it
 18 must, the Ninth Circuit's conclusion in *Coyote Valley*, 133 F.3d 1094 in which the court ruled
 19 that the revenue sharing is not a tax where a State offers a tribe a substantial concession, Rincon
 20 argues nevertheless that the State has offered the Band nothing of value because: (a) its
 21 authorization to operate slot machines free of non-Indian competition comes from article IV,
 22 section 19 (f) of the California Constitution and thus may not be counted as a compact
 23 concession; (b) it neither wants nor needs the enhanced remedy the State offered for any loss of
 24 its protection from non-Indian competition; and (c) the amount of revenue share requested by the
 25 State is unreasonable.

26 Rincon mis-perceives the concept of good faith negotiation when it suggests that the
 27 State has negotiated in bad faith if it is determined after the fact that a position the State
 28 reasonably believed was consistent with IGRA is not. Likewise, it fundamentally mis-construes

the Ninth Circuit's decision in *Coyote Valley*, 331 F.3d 1094 when Rincon suggests that the exemption afforded federally-recognized Indian tribes from the prohibition on the operation of slot machines in article IV, section 19(f) of the California Constitution is independent of compact negotiation. Lastly, the Band's view that the State's revenue sharing proposal is unreasonable is not only at odds with the Secretary of the Interior's conclusion (in the exercise of the Secretary's trust responsibility to the tribes) that the requested revenue share is reasonable, it is at odds with the assessment of Rincon's nearest competitors as well.

A. Good Faith is a State of Mind Determined by What a Party Reasonably Believed Was Legally Permissible During Negotiations

Rincon's position on what constitutes good faith negotiation operates from the premise that states are strictly liable for any error of law made in the negotiation process. Thus, notwithstanding a state's reasonable belief that its legal interpretation of IGRA is correct, upon a subsequent judicial determination that the law is other than the state supposed, the state will be forced into mandatory mediation with a tribe. While it is to the Band's advantage to take this position because it could make a state more reluctant to dispute a tribe's interpretation of IGRA (inasmuch as the risk of an erroneous legal interpretation would fall disproportionately on the state), the Band's preference mis-perceives the law.

In the labor relations context, courts have made it clear that good faith is a state of mind determined by the objective facts surrounding a negotiation as gleaned from the record of the negotiations. *Seattle-First National Bank v. National Labor Relations Board*, 638 F.2d 1221, 1226 (9th Cir. 1981); *NLRB v. Fitzgerald Mills Corporation*, 313 F.2d 260, 266 (2nd Cir. 1963). Thus, the inquiry is always about the motives and intentions of the party as evidenced by the record. Moreover, in the absence of a contrary statutory intent, a statutory obligation to negotiate in good faith does not compel agreement. *National Labor Relations Board v. Tomco Communications, Inc.*, 567 F.2d 871, 884 (9th Cir. 1978) ("But the obligation to bargain collectively 'does not compel either party to agree to a proposal or require the making of a concession.'") Thus, good faith negotiation contemplates the possibility of an impasse. *Serramonte Oldsmobile, Inc. v. National Labor Relations Board*, 86 F.3d 227, 232 (D.C. Cir.

1 1996). An impasse temporarily suspends the duty to negotiate until changed circumstances
2 indicate that an agreement may be possible. *Id.*

3 Here, there is an impasse between the parties caused by their conflicting interpretations
4 of both IGRA and the Compact. That impasse will be broken once there is a final adjudication
5 of the parties' disparate legal interpretations. That impasse-breaking adjudication, however,
6 does not compel a finding of bad faith against the party that erroneously construed the law.
7 Instead, it only compels the parties to resume negotiations.

8 As the court put it in *National Labor Relations Board v. Tomco Communications, Inc.*,
9 567 F.2d. at 884:

10 While the parties' freedom of contract is not absolute under the Act, allowing the
11 Board to compel agreement when the parties themselves are unable to agree
12 would violate the fundamental premise on which the Act is based, private
bargaining under governmental supervision of the procedure alone, without any
official compulsion over the actual terms of the contract.

13 Moreover, in the case of bargaining between sovereign governments, a limitation on the court's
14 role to that of an impartial guarantor of the procedure is dictated by the separation of powers
15 doctrine compelling courts to avoid usurpation of the independent political powers of the
16 executive branch of government. *New York v. U.S.*, 505 U.S. 144 (1992).

17 Judicial review of compact negotiations under IGRA implicates both respect for the
18 negotiation process and respect for the political status of the negotiating parties. In this regard,
19 IGRA envisions that tribes and states will be left free to negotiate political solutions to their
20 competing governmental interests in the same way labor and business are left to negotiate their
21 own agreements. While the judiciary obviously has a duty to rule on the law, a court's role in
22 reviewing IGRA negotiations is only to assure that each side has negotiated in good faith. Thus,
23 to the extent a party has made a good faith error in assessing IGRA's requirements, a court is not
24 authorized to compel a negotiation conclusion any more than it would have the authority to
25 compel either the executive or legislative branches to exercise their discretion in a particular
26 way. Rather, its role is to advise the governmental entity of its error and allow negotiations to
27 resume on the basis of that instruction. If, after that instruction, the parties are negotiating in
28 good faith, a court is not authorized to intervene or to compel binding mediation. This is

1 precisely how the court in *Big Lagoon Rancheria v. State of California*, No. C 99-04995 (N.D.
2 Calif. 2002) acted in ruling on a summary judgment motion in that case. There the court had
3 ruled previously that the State could negotiate over environmental issues directly related to the
4 operation of a tribe's casino. Subsequently, the court found that the State had overstepped its
5 authority in asking that the tribe comply with all state environmental laws in the construction and
6 operation of its casino project. The court found, however, that it would not find the State in bad
7 faith because it concluded that the State could reasonably have concluded that it had the
8 authority to do so, given the court's earlier ruling. (March 18, 2002, Order, at pp. 19-20, attached
9 hereto as Ex. 2.) The court ruled as follows:

10 While it appears that the State has not negotiated with the Tribe in good faith thus
11 far, a final determination of bad faith is premature at this time due to the novelty
12 of the questions at issue regarding good faith bargaining under IGRA. Further,
13 this Court's March 22, 2000 Order gave the State reason to believe that it could
14 negotiate on environmental and land use issues. [Citation omitted.] While the
15 Tribe is correct that this was dicta, and the issue was not briefed by the parties at
16 the time, this dicta nevertheless provided the State with a reasonable basis for its
17 belief that it could negotiate environmental and land use issues with the Tribe in
18 good faith. The Court's ruling today provides the State with guidance in further
19 negotiations with the Tribe.

20 *Id.*

21 As a result, it is not per se bad faith should a court conclude that a party to the
22 negotiations has misconstrued the law. Rather, the court must determine if the party could
23 reasonably have construed the law in the manner it did. Only where there was no reasonable
24 basis for a party's interpretation of the requirements of IGRA could a court conclude that bad
25 faith negotiation had occurred. Here, the State's interpretation of IGRA is reasonably based on
26 not only the Ninth Circuit's decision in *Coyote Valley*, 331 F.3d 1094, but the Secretary of the
27 Interior's approval of compact amendments with essentially the same terms for tribes located in
28 Rincon's market area.

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B. IGRA Permits States to Negotiate Over Any Subject Directly Related to a Tribe's Gaming Activity and Recognizes that States are Entitled to Negotiate on the Basis of Their Legitimate Financial Interests, Including Raising Revenue for Their Citizens

Rincon contends that IGRA, in return for the right to operate additional slot machines, does not permit a state to negotiate for any fee other than a fee that is used for the specific purpose of defraying regulatory costs or environmental impacts resulting from Indian gaming. (JSAR, Ex. 38, at 00957-958) because a fee for any other purpose is a tax specifically precluded by 25 U.S.C. § 2710(d)(4). Alternatively, Rincon suggests that even if the funds are to be utilized for a purpose other than to defray regulatory costs or the environmental impacts of gaming, a state in requesting such fees can only prove they do not constitute both a tax and evidence of bad faith negotiation within the meaning of 25 U.S.C. § 2710(d)(7)(B)(iii)(II) if the state has offered a substantial or meaningful concession. (*Id.* at 00957.) Finally, the Band argues that even if a state offers a meaningful concession and even if the fee requested by a state is directly related to the operation of gaming activities such as the number of slot machines authorized, IGRA precludes a state from depositing that fee into that state's general fund where it might be appropriated by a state legislature for a purpose other than alleviating an adverse gaming impact or fulfilling an IGRA-related purpose. (*Id.*)

1. States May Negotiate for Fees Other Than Those Designed to Cover The State's Regulatory Costs

Assuming arguendo, Rincon is correct that where a state has offered a tribe nothing more than the right to operate slot machines, IGRA precludes that state from requesting fees from a tribe in compact negotiations for purposes other than the cost of regulating the tribe's gaming activities, the Band errs when it suggests that a state may not negotiate for fees designed to cover other matters.

Contrary to Rincon's suggestion, the Ninth Circuit's decision in *Coyote Valley*, 331 F.3d at 1111, makes clear that a state may ask for fees in compact negotiations other than those necessary to defray regulatory costs associated with a tribe's gaming activities. In that case, the tribe challenged the State's request for tribal payments to the RSTF. That fund does not support the State's regulation of tribal gaming activities. Rather, it makes distributions to "Non-

Compact Tribes” in California.^{3/} The tribe in *Coyote Valley* argued, as Rincon does here, that a state may only request fees that are necessary to defray the cost of regulation. The court rejected that contention. It found that the requested payments to the RSTF were justified because they were not a subterfuge for asserting jurisdiction over tribes concerning issues unrelated to gaming but rather involved a subject directly related to one of IGRA’s goals and objectives—the advancement of tribal financial well being (and thus a permissible subject for negotiation under 25 U.S.C. § 2710(d)(3)(C)(vii)). *Id.* at 1112.

The court also found the State’s request consistent with IGRA because it was not a tax imposed by the State but rather a payment requested in return for a meaningful concession the State had provided only to federally recognized tribes—an exemption from the State’s prohibition on slot machine operation upon the execution, ratification and federal approval of a compact. *Id.* Thus, the State is not precluded by IGRA from requesting the payment of fees that are not related to the regulation of the tribe’s gaming activities when the State has provided a meaningful concession.

2. States May Negotiate for General Fund Fees

Rincon also errs when it asserts that IGRA bars states from negotiating for fees to be deposited in that state’s general fund.

In *Coyote Valley*, the Ninth Circuit reviewed IGRA’s legislative history and concluded that Congress not only intended that states take into consideration their own economic interests when engaging in compact negotiations, but that one of those legitimate interests is the raising of revenue for the state’s citizens. As the court put it:

Congress also did not intend to require that States ignore their economic interests when engaged in compact negotiations. [Citation omitted.] (“An [objective inherent in any government regulatory scheme is to achieve a fair balancing of competitive economic interests.”). Indeed, § 2710(d)(7)(B)(iii)(I) expressly provides that we may take into account the “financial integrity” of the State and “adverse economic impacts on [the State’s] existing gaming activities” when deciding whether the State has acted in bad faith, and IGRA’s legislative history explains that a “State’s governmental interests with respect to class III gaming on Indian lands include ... its economic interest in raising revenue for its citizens.” S.

3. Under Compact section 4.3.2(a)(i), a “Non-Compact Tribe” is one that operates no Gaming Devices or less than 350 such devices.

1 Rep. No. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083.
2 *Coyote Valley*, 331 F.3d at 1115. Thus, in compact negotiations, the State is entitled to raise
3 revenue for its citizens by having the requested funds placed in the State's General Fund if in
4 requesting that revenue it has provided the tribe with a meaningful concession and if the request
5 is not a subterfuge for obtaining jurisdiction over the tribe unrelated to the tribe's gaming
6 activities. In this case, the State has offered the tribe a substantial concession in the form of a
7 tribal exemption from the State's constitutional prohibition on certain forms of class III gaming
8 once an effective compact is in place. Further, the State's request is not a subterfuge for
9 attaining improper jurisdiction over the Band. Under 25 U.S.C. § 2710(d)(3)(C)(vii), the State is
10 entitled to negotiate with the Band over "any other subjects that are directly related to the
11 operation of gaming activities." If the State does that, under the court's decision in *Coyote*
12 *Valley*, 331 F.3d at 1111, it is not engaging in a subterfuge. Here, requesting fees for the
13 operation of additional slot machines and for the right to operate all its slot machines for an
14 additional period of time is directly related to the operation of the Band's gaming activity. As
15 the Ninth Circuit pointed out in *Coyote Valley*, the tribe was being granted the "exclusive right to
16 conduct class III gaming in the most populous State in the country." *Id.* at 1115. Directly
17 related to that right was the State's request for fees for the operation of those slot machines.

18 While it is true that the Court in *Coyote Valley*, 331 F.3d 1094, did not determine that a
19 state could request fees that would be deposited in that state's general fund (*Id.* at 1115, fn. 17),
20 the court had no occasion in that case to reach this point because the State had not requested
21 funds for that purpose in *Coyote Valley*. Notwithstanding that fact, however, the Ninth Circuit
22 recognized that IGRA contemplates compact negotiations designed to "achieve a fair balancing
23 of competitive economic interests" between the State and a tribe. *Id.* at 1115. IGRA also
24 recognizes a state's legitimate interest in "raising revenue for its citizens." *Id.* In this case, the
25 State, by granting, solely to Indian tribes, the opportunity for an exemption from the
26 constitutional prohibition on slot machines and banking and percentage card games, was thereby
27 foregoing revenue it could have obtained from non-Indian gaming operators. Moreover, those
28 funds could have been placed in the State's General Fund for the general welfare of California's

1 citizenry. Thus, a fair balancing of the financial interests of the tribes and the State as they
 2 relate to revenue derived from class III gaming dictates that some of the funds derived from
 3 tribal class III gaming activities should go to tribal general welfare and another amount should
 4 go towards fulfilling the general welfare needs of the State. Put another way, unlike the federal
 5 government, the State has no trust responsibility to California Indian tribes. The State is charged
 6 instead with considering the well-being of all its citizens, Indian and non-Indian alike. In the
 7 language of IGRA's legislative history, the State was paying close attention to its own economic
 8 interests while negotiating with the Band and, consistent with its rights under IGRA, was
 9 negotiating for its legitimate economic interests when it sought to gain revenue for its citizens in
 10 asking for a revenue share that required the payment of those monies into the State's General
 11 Fund.

12 **C. Rincon Misconstrues Both the Ninth Circuit's *Coyote Valley* Decision and the**
 13 **California Constitution When It Implies That a Twenty-five to Fifty-six Percent**
 14 **Enlargement of its Exemption to Operate Slot Machines Is not a Substantial**
 15 **Concession For a Compact Amendment**

16 Rincon asserts that, even if the State were entitled to request payments into the State's
 17 General Fund, those payments are barred by IGRA because the State did not, in fact, offer the
 18 Band a substantial concession in return. Rincon's argument misconstrues both *Coyote Valley*,
 19 331 F.3d 1094, and article IV, section 19(f) of the California Constitution. The Band's assertion
 20 is premised on the notion that the Band already has an exemption from California's
 21 constitutional prohibition on slot machines and banking and percentage card games and, thus,
 22 that any exchange of value between the Rincon and the State for that exemption has already
 23 occurred. (JSAR, Ex. 38, at 00957-958; Compl. ¶ 148.) In other words, the Band suggests either
 24 that the exemption it already possesses to operate 1,600 slot machines is independent of its
 25 Compact, or that the State, having obtained revenue sharing for the operation of 1,600 slot
 26 machines on the basis of that exemption (in Rincon's case for contributions to the RSTF), is
 27 foreclosed from seeking additional revenue sharing for the operation of slot machines not

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1 currently authorized by its Compact.^{4/} Rincon's interpretation misreads both the California
 2 Constitution and the *Coyote Valley* decision and conflicts with the Secretary of the Interior's
 3 finding that the revenue sharing provisions in the amended compacts of its nearest competitors
 4 were justified by the same concessions the State offered the Band.

5 **1. A Tribe's Right to Benefit from the Exception to the Prohibition on the**
 6 **Operation of Slot Machines in California's Constitution Depends On That**
 7 **Tribe's Possession of an Effective Compact**

8 Rincon's belief that the tribal exemption from California's prohibition on the operation of
 9 casinos in California stems from a self-executing provision in the California Constitution is
 10 completely unfounded. Article IV, section 19(f) of the California Constitution provides that
 11 notwithstanding the constitutional prohibitions against the operation of slot machines, lotteries
 12 and banked and percentage card games in California:

13 the Governor is authorized to negotiate and conclude compacts, subject to
 14 ratification by the Legislature, for the operation of slot machines and for the
 15 conduct of lottery games and banking and percentage card games by federally
 16 recognized Indian tribes on Indian lands in California in accordance with federal
 17 law. Accordingly, slot machines, lottery games, and banking and percentage card
 18 games are hereby permitted to be conducted and operated on tribal lands subject
 19 to those compacts.

20 Thus, any exemption a federally-recognized California Indian tribe might have to operate a slot
 21 machine on its Indian lands in California comes not from a self-executing provision in the
 22 California Constitution but rather from the California Legislature's ratification of a compact
 23 negotiated by the Governor and approved, pursuant to federal law, by the Secretary of the
 24 Interior. As a result, whenever the State negotiates a compact or compact amendment with a
 25 federally recognized California tribe it is providing that tribe with something the tribe does not
 26 yet have - the ability to operate, free from non-Indian competition, slot machines or additional
 27 slot machines, lotteries and banking and percentage card games. Therefore, this exemption is

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26 4. Rincon also contends that no revenue sharing is justified at all in return for the 400 slot
 27 machines it claims it is already entitled to operate under its Compact. (JSAR, Ex. 38, at 00960.)
 28 This assertion is premised on the Band's fourth claim for relief (that the State has misconstrued the
 number of slot machine licenses available from the statewide pool). The Court dismissed that claim
 for relief. Thus, Rincon's contention in this regard provides no valid basis for its position.

1 always an issue in any compact the State negotiates and ratifies and is the substantial value the
2 State offers in exchange for a revenue sharing request.

3 Moreover, the fact the State obtained revenue sharing in the form of contributions to the
4 RSTF in the Band's existing Compact does not bar the State from asking for a different form of
5 revenue sharing in return for agreeing to Rincon's request for a new or amended compact
6 authorizing the operation of additional slot machines for an increased period of time. The State
7 can require revenue sharing in consideration of the Band's request for a changed agreement
8 because the Band has no exemption from a new agreement until it is executed and ratified. In
9 other words, when the Band requested a change in the existing agreement, it put the whole
10 agreement at issue again. This is especially the case where, as here, the Band has requested a
11 Compact extension of up to 50 years. (JSAR, Ex. 22, at 00582.)

12 Rincon suggests, however, that the only reason the State could require revenue sharing
13 (RSTF contributions) under its existing Compact is because at the time the Compact was
14 executed and ratified, article IV, section 19(f) had not yet been approved by the voters. (JSAR,
15 Ex. 38, at 00958.) The Band thus implies that when this provision of the State's constitution was
16 enacted, the State was forever foreclosing itself from obtaining any revenue share from any
17 California Indian tribe in compacts negotiated from that day forward. Thus, in Rincon's view,
18 when the Band's existing Compact expires, the State will not even be able to require the Band to
19 continue to contribute to the RSTF.^{5/}

20 The Band's perception is inconsistent with the plain language of *Coyote Valley*, where
21 the court made it clear that the tribal exemption was the product of a negotiated compact:

22 We do not hold that the State could have, *without offering anything in return*,
23 taken the position that it would conclude a Tribal-State compact with Coyote
24 Valley only if the tribe agreed to pay into the RSTF. Where, as here, however, a
25 State offers meaningful concession in return for fee demands, it does not exercise
"authority to impose" anything. Instead, it exercises its authority to negotiate,
which IGRA clearly permits.

26 *Id.* at 1112. The Ninth Circuit's decision in *Coyote Valley*, was entered in 2003. Article IV,

27
28 5. Further, under Rincon's view, the State is precluded from asking for any revenue sharing
from any federally-recognized tribe that does not yet have a compact.

section 19(f), however, became effective in 2000. Thus, the Ninth Circuit ruled that the State was entitled to request revenue sharing in compact negotiations on the basis of article IV, section 19(f) well after that constitutional provision was enacted. Consequently, the exception to the prohibition on slot machines available to Indian tribes through a negotiated compact or compact amendment as a result of article IV, section 19(f) is the meaningful concession the State has to offer tribes in return for revenue sharing.

Rincon's view is also inconsistent with the Ninth Circuit's explanation of *Coyote Valley* in *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1101 (9th Cir. 2006). As the court put it in explaining the decision in *Coyote Valley*:

It is also true that, despite this statutory prohibition [25 U.S.C. § 2710(d)(4)], states and tribes have negotiated compacts that provided for payment by the tribes to the states [citing *Coyote Valley*]. The theory on which such payments were allowed, however, was that the parties negotiated a bargain permitting such payments in return for meaningful concessions from the state (such as a conferred monopoly or other benefits). *See Id.* Although the state did not have *authority* to exact such payments, it could bargain to receive them in exchange for a quid pro quo conferred in the compact.

Id. (underlined emphasis added).

Moreover, the Band's notion is similarly inconsistent with the Secretary of the Interior's interpretation of the amended compacts of Rincon's nearest competitors. In approving the revenue sharing provisions contained in those amended compacts, the Secretary of the Interior found that they were consistent with IGRA because the compacts provided the tribes with the same exclusivity the State has offered Rincon in this instance. 69 Fed. Reg. 53733 (Aug. 22, 2004); 69 Fed. Reg. 76004 (Dec. 20, 2004); 72 Fed. Reg. 2007-8 (Jan. 17, 2007).

2. The Enhanced Remedies the State Offered Rincon For the Potential Loss of the Band's Freedom From Non-Indian Competition Represents a Further Meaningful Benefit

In addition to the exemption the State offered to make available to the Band through an amended compact providing Rincon with the right not only to operate additional slot machines but to operate all of its Gaming Devices and banking and percentage card games for an additional period, the State also offered to enhance the remedies available to the Band should the State, in the exercise of its police powers, determine to eliminate the protection against non-

Indian competition California Indian tribes enjoy upon the execution, ratification and Secretarial approval of a compact. This enhanced remedy had already been accepted by other California tribes who regarded that offer as providing them with a substantial benefit.^{6/}

Rincon argues that the enhanced remedies offered by the State constitute bad faith negotiation because they do not represent a substantial benefit to the Band. (JSAR, Ex. 38 at 00958.) First, the Band states that it did not ask for and does not want these additional remedies. (Compl. ¶ 148.) Second, it claims that the remedies it possesses in its existing Compact for the loss of the Band's monopoly are better.

Rincon's contention that the enhanced remedy the State offered constitutes bad faith because Rincon did not ask for and does not want the enhanced remedy the State has offered is premised on the notion that a party negotiates in bad faith when it fails to offer the other side what that side wants. This is simply not the law.

As the Ninth Circuit explained in *National Labor Relations Board v. Tomco Communications, Inc.*, 567 F.2d at 883-84, a party's good faith is not determined by what the other side wants. Where, as here, the State has offered the Band a provision that the State has offered to other tribes, the State's offer constitutes a good faith proposal. *Id.* at 884, fn. 13 (terms offered to and accepted by others constitute a shield against bad faith). Moreover, the acceptance by those other tribes of these remedies is a clear indication of their value. Another indicator is the Secretary of the Interior's approval of compacts and compact amendments containing those remedies on the grounds the geographic exclusivity offered in return for revenue sharing represented a meaningful benefit. *See*, Secretarial approval of the compacts for the Rumsey Band of Wintun Indians, the Fort Mojave Indian Tribe and the Quechan Tribe of the

6. The State offered to negotiate for the same type of geographic exclusivity that had been offered to and accepted by other tribes in compacts and amended compacts. The State's offer, in this regard, did not provide specific terms because the State has agreed to a variety of different formulations with different tribes. Generally, however, these geographic exclusivity provisions provide that if a non-Indian individual or entity is allowed to operate class III gaming within a specified market area the adversely affected tribe would be excused from specific revenue sharing requirements in the amended Compact. (*See, e.g.* examples in the compacts of Quechan (JSAR, Ex. 15, at 00202-03), Big Lagoon (JSAR, Ex. 18, at 00377-79), and Coyote Valley, Ex. 55, at 01346.)

Fort Yuma Indian Reservation at 69 Fed. Reg. 53733; 69 Fed. Reg. 76004; 72 Fed. Reg. 2007-8 in which the Secretary approved “annual payments to the State in exchange for geographical exclusivity.”

Further, Rincon’s notion that the remedy in its existing Compact for the loss of its protection against non-Indian competition is better than the State’s Compact amendment proposal is unsupported by the record. A review of the language of the remedy in Rincon’s Compact versus the remedies offered in the State’s Compact amendment proposal demonstrates that the amendment remedy is superior to the existing Compact remedy.

Addendum A to Rincon’s Compact contains a modification to section 12.4. It provides that:

In the event the exclusive right of Indian tribes to operate Gaming Devices in California is abrogated by the enactment, amendment, or repeal of a state statute or constitutional provision, or the conclusive and dispositive judicial construction of a statute or the state Constitution by a California appellate court after the effective date of this Compact, that Gaming Devices may lawfully be operated by another person, organization, or entity (other than an Indian tribe pursuant to a compact) within California, the Tribe shall have the right to: (i) termination of this Compact, in which case the Tribe will lose the right to operate Gaming Devices and other Class III gaming, or (ii) continue under the Compact with an entitlement to a reduction of the rates specified in Section 5.1(a) following conclusion of negotiations, to provide for (a) compensation to the State for actual and reasonable costs of regulation, as determined by the state Department of Finance; (b) reasonable payments to local governments impacted by tribal government gaming; (c) grants for programs designed to address gambling addiction; (d) and such assessments as may be permissible at such time under federal law.

(JSAR, Ex. 42, at 01039-40.) Thus, the remedy provided in the existing Compact merely allows the Band either to suffer the loss of its protection against non-Indian competition while still being bound to pay into the RSTF or to terminate the Compact and forgo class III gaming altogether at least until such time as the State and the Band have concluded a new compact.^{7/}

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7. While the existing Compact also provides for a reduction (but not total elimination) of Special Distribution Fund (“SDF”) payments under Compact section 5.1(a), that section does not apply to Rincon because the Band does not pay anything to the SDF inasmuch as it was not conducting class III gaming before September 1, 1999.

1 The State's Compact amendment proposal regarding geographic exclusivity, on the other
 2 hand, does not impose such consequences on the Band should its protection against non-Indian
 3 gaming be lost. First, the Band never loses the ability to conduct class III gaming. Second, the
 4 State's amendment proposal provides for specific reductions in the revenue share the Band
 5 would otherwise be required to pay.

6 The advantages of the State's proposal over the Band's existing remedies is manifest. If
 7 its protection against non-Indian gaming is lost, it is not required to forgo class III gaming until a
 8 new compact is negotiated (if the termination option is chosen) or to continue making its full
 9 RSTF payments while a new compact is being negotiated should it choose to proceed under its
 10 Compact. Under the Governor's proposal, if the Band did not choose to terminate the Compact,
 11 there would be no need for further negotiation because there would be a pre-determined
 12 reduction in the fees the Band would have to pay. Thus, the State's offer of enhanced remedies
 13 for the loss of its protection against non-Indian gaming provides substantial benefits to the Band.

14 **D. The Secretary's Approval of Compacts and Compact Amendments With Similar**
 15 **Terms Not Only Demonstrates the State's Good Faith But Also is Support for the**
 16 **Proposition That Those Terms are Consistent With IGRA**

17 The Secretary of the Interior has approved eight compacts and compact amendments
 18 previously executed by the State that contain revenue sharing provisions substantially the same
 19 as those the State has offered Rincon. (See JSAR, Exs.10-15, 54 & 56.) In offering Rincon
 20 what the Secretary has approved, the Governor has negotiated in good faith. Moreover, the
 21 Secretary's approval of these compact terms strongly supports the proposition that these compact
 22 terms are consistent with IGRA.

23 **1. The Secretary's Prior Compact Approvals are Evidence of the State's Good**
 24 **Faith**

25 At the time the State was making Compact amendment proposals to Rincon, the
 26 Secretary of the Interior had approved or would approve eight compacts and compact
 27 amendments that contain substantially the same revenue sharing provisions offered to the Band.
 28 To the extent there are any differences between those agreements and what the State offered the
 Band, Rincon was entitled to request a substitution. Each of those compacts made available to

1 the tribe the exemption for tribal class III gaming permitted by California's constitution, as well
2 as the ability to continue class III gaming with a greatly reduced revenue sharing contribution
3 should its protection against non-Indian gaming be lost in its specific market area. The Secretary
4 of the Interior approved these compacts because of the exclusivity offered and because the
5 required revenue share would be reduced if that exclusivity were lost. *See e.g.*, 69 Fed. Reg.
6 53733; 69 Fed. Reg. 76004; 72 Fed. Reg. 2007-08.

7 To paraphrase the court's ruling in *Big Lagoon Rancheria v. State of California*, No. C
8 99-04995, where a party to a negotiation has reasonably construed a prior administrative or
9 judicial determination to support its negotiation position, that party is negotiating in good faith
10 when it insists on that position. (*Id.*, March 18, 2002, Order, at 19-20.) The Secretary of the
11 Interior has approved compacts and compact amendments for eight tribes. As in the case of the
12 State's offer to Rincon, each of these agreements allowed the tribe to operate additional slot
13 machines for an additional period of time or was the initial agreement between the State and the
14 tribe. Further each agreement required the tribe to make payments to the State's general fund up
15 to 25 percent of the tribe's net win (JSAR, Ex. 15, at 00198; Ex. 54, at 01224) or per slot
16 machine fees of up to \$25,000 per machine. (JSAR, Ex. 10, at 00034; Ex. 11, at 00067; Ex. 12, at
17 00100; Ex. 13, p. 00133; Ex. 14, at 00165.) In return, the State provided the tribe with
18 protection against non-Indian gaming operators for its new or additional slot machines, an
19 extended compact duration and geographic exclusivity provisions that allow the tribe the option
20 of continuing its class III gaming activities under the same terms, but with reduced revenue
21 sharing contributions if its protection against non-Indian gaming were lost. (*Id.* at Ex. 10, at
22 00039-40, 00063; Ex. 11, at 00072-73, 00096; Ex.12, at 00105-106; 00129; Ex. 13, at 00138-39,
23 00162; Ex. 14, at 00170-71, 00194; Ex. 15, at 00202-03, 00227; Ex. 54, at 01262-63.)

24 Pursuant to 25 U.S.C. § 2710(d)(8)(B)(i), the Secretary of the Interior is authorized to
25 disapprove a compact or compact amendment if that compact "violates any provision of
26 [IGRA]." As an official charged with implementing the provisions of IGRA, the Secretary's
27 interpretation of that statute's terms is generally accorded deference unless that construction is
28 plainly erroneous or inconsistent with the regulation. *Thomas Jefferson Univ. v. Shalala*, 512

1 U.S. 504, 512 (1994); *Stinson v. United States*, 508 U.S. 36, 45 (1993). Thus, just as a court may
2 rely on the Secretary's construction of a statute, the State may rely upon the Secretary's
3 construction of IGRA to support its conclusion that its compact negotiation position is consistent
4 with that statute. Here, the Secretary's approval of eight other compacts with substantially
5 similar provisions establishes that the State was negotiating in good faith when it offered Rincon
6 the same terms.

7 **2. The Secretary Did Not Approve California Compacts Because Tribes in**
8 **Other States Lacked Negotiating Power**

9 At various times in this proceeding and in a memorandum ordered withdrawn by the
10 Court, the Band has intimated that the Secretary did not approve these compacts because they
11 were consistent with IGRA but rather because tribes in other states had weaker negotiating
12 positions. Rincon has suggested that the Secretary was forced to approve compacts with revenue
13 sharing not contemplated by IGRA because tribes in other parts of the country have been placed
14 in a bad negotiating position because (given the decision in *Seminole Tribe of Florida v. Florida*,
15 517 U.S. 44 (1996) holding that, absent a waiver of immunity, the states' Eleventh Amendment
16 immunity precludes tribes from suing states for bad faith negotiation) there is no enforcement
17 mechanism to require states to negotiate in good faith.

18 This argument comes propelled by no rational force. In California, tribes have the right
19 to bring bad faith suits inasmuch as the State has statutorily waived its Eleventh Amendment
20 immunity against suits asserting that the State has negotiated compacts in bad faith. Cal. Gov't.
21 Code § 98005. Thus, even if the Secretary were inclined to approve compacts elsewhere, he was
22 not compelled to do so in California. As Rincon has here, tribes in California may bring bad
23 faith negotiation lawsuits against the State. The eight tribes with approved compacts could have
24 brought the very same lawsuit that the Band is now litigating had they believed the State was
25 negotiating in bad faith. Therefore, the Secretary was in no way compelled to approve compacts
26 executed by California tribes because those tribes had a weak negotiation position.

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28 ///

1 **3. Congress' Failure to Pass Legislation Repudiating the Ninth Circuit's *Coyote***
 2 ***Valley* Decision Supports the Conclusion that State's May Request Revenue**
 Contributions From Tribes

3 In that same withdrawn memorandum, Rincon has also contended that, even if the
 4 Secretary determined that these eight compacts were consistent with IGRA, the Secretary erred.
 5 In this regard, the Band asserts that, apart from the grounds discussed in the previous portions of
 6 this brief, these revenue sharing provisions violate IGRA because Congress did not pass
 7 legislation in 2004 that would have amended IGRA to answer the question of whether revenue
 8 sharing payments were permissible and to what extent.

9 Relying upon the decision in *Marcy v. Delta Airlines*, 166 F.3d 1279, 1284 (9th Cir.
 10 1999), where the court found persuasive the fact that a state legislature had not incorporated
 11 certain language in a statute the court was construing, Rincon argues that the failure of Congress
 12 to enact a provision stating that revenue sharing was permissible must mean that it is not. Thus,
 13 concludes Rincon, IGRA is ambiguous on this point and any such ambiguity should be construed
 14 in the tribe's favor under the Indian canon of construction.

15 The Band's reliance upon *Marcy v. Delta Airlines* is misplaced. In that case, the court
 16 was asked to read into a statute a good faith requirement where the legislature had specifically
 17 rejected legislation that would have added such a provision. Here, the State is not asking the
 18 court to read into IGRA a revenue sharing authorization because the Ninth Circuit has already
 19 held that such authorization is presently contained within IGRA. Simply put, Rincon's belief
 20 that IGRA is ambiguous on the question of revenue sharing has been thoroughly repudiated by
 21 the Ninth Circuit's decisions in *Coyote Valley* and *Shoshone-Bannock Tribes*, 465 F.3d at 1101,
 22 in which the court made clear that revenue sharing is permissible under IGRA.

23 Moreover, given the fact that *Coyote Valley* (entered on June 11, 2003) was decided
 24 before Congressional hearings on an amendment to IGRA regarding revenue sharing in July
 25 2003, and March 2004 (see S. Hr'g. 108-475, March 24, 2004; S. Hr'g. 108-67, July 9, 2003),
 26 the rule enunciated in *Marcy* is more properly applied against the Band's position. Congress is
 27 presumed to know of judicial decisions interpreting federal statutes. As the court held in
 28 *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S. Ct. 866, 870, 55 L. Ed.2d 40 (1978), "Congress is

1 presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that
 2 interpretation when it re-enacts a statute without change.” Thus, the fact that Congress, in the
 3 face of the *Coyote Valley* decision, failed to repudiate that decision or modify IGRA in any way
 4 is evidence that Congress was satisfied with the Ninth Circuit’s decision and that IGRA was not
 5 ambiguous on a state’s authority to negotiate for a compact that provided revenue sharing to a
 6 state.

7 **E. The State’s Refusal to Give Rincon an Amended Compact With the Same**
 8 **Extraordinary Financial Benefits the Band Possesses in Its Existing Compact Is Not**
 9 **Bad Faith Negotiation**

10 Finally, Rincon argues that the State’s proposal should be considered bad faith
 11 negotiation because Rincon’s acceptance of the State’s proposal would be a poor economic
 12 option for the Tribe. (JSAR, Ex. 38, at 00955-56.) To support its view that the State’s offer
 13 does not provide the Band with enough financial incentive to agree to an amendment, Rincon
 14 refers to an analysis prepared by one of the advisors to the State’s negotiator that looked at the
 15 economic impact of the State’s offer on the Band. (*Id.*)

16 Rincon offers no authority for the proposition that it is bad faith for a party in a
 17 negotiation to fail to provide the other side with what it wants. Indeed, the Ninth Circuit has
 18 made it clear in the labor negotiation context that “the obligation to bargain collectively ‘does
 19 not compel either party to agree to a proposal or require the making of a concession.’” *National*
 20 *Labor Relations Board v. Tomco Communications, Inc.*, 567 F.2d at 884.

21 Nevertheless, a review of the economic analysis by Professor William Eadington to
 22 which Rincon refers, demonstrates that the Band’s acceptance of the State’s offer would result in
 23 a profit of almost \$60,924,000 from gross revenues ^{8/} of \$460,268,000 (a profit margin of
 24 approximately 13 percent) while rejecting the offer and operating on its existing Compact would
 25 result in a profit of \$59,208,000 on gross revenues of \$294,571,000 (profit margin of
 26 approximately 20 percent). (JSAR, at Ex. 37, at 935-36.) Thus, while the Band would actually
 27 make more money under the State’s proposal than it would if it rejected the amendment, Rincon

28 8. The term “gross revenues” refers to revenue from the Band’s casino as well as from hotel,
 food and beverage, and other revenue generators related to the casino operation.

1 complains that it would make even more money if it could get 20 percent of the \$460 million an
 2 amended Compact containing the Band's preferred terms would provide (its terms being
 3 essentially the same terms as its existing Compact, only with more authorized slot machines).
 4 As a result, Rincon's contention reduced to its essence is that the State's proposal constitutes bad
 5 faith because the Band's profit margin would not be as great under an amended Compact as it
 6 has been under its existing Compact.

7 While it is understandable that Rincon would want to maintain in perpetuity the
 8 extraordinary profit margin it has been receiving under its existing Compact, it is not bad faith
 9 for the State to request terms that may not perpetuate that profit margin. As Professor
 10 Eadington's figures demonstrate, Rincon's claims that its geographic location prevents it from
 11 competing effectively with tribal operators who have already agreed to similar terms is belied by
 12 the facts. For example, Rincon's \$369 net win per day for each slot machine it operates is
 13 greater than the \$336 average net win per day for its competitors. (JSAR, at Ex. 37, at 935.)
 14 That hardly indicates that Rincon is unable to compete favorably with its three closest
 15 competitors. Moreover, Rincon's net win per day is extraordinary when compared with the net
 16 win per day for casinos in Nevada where the range is between \$70 to \$169 per day. (*Id.* at 932.)
 17 Further, in terms of the nation as a whole, Rincon's projected gross gaming revenues^{9/} of \$378
 18 million from an amended Compact (up from its 2005 gross of \$242 million) would make it one
 19 of the top 21 casinos in the country. (*Id.*)

20 As the court noted in *Artichoke Joe's v. Norton*, 216 F. Supp.2d 1084,1101 (E.D. Calif.
 21 2002), the State is not required to provide Rincon with the same 1999 compact to which it
 22 previously agreed. After the experience of operation under that compact, the State is entitled to
 23 insist on changes that reflect the State's legitimate needs and concerns when a tribe seeks an
 24 accommodative amendment authorizing more slot machines. As Judge Levi found in denying a
 25 request for injunctive relief that would bar the State from entering into further compacts:

26 ///

27
 28 9. The term "gross gaming revenues" refers to revenue from the Band's casino operation alone.

1 The substantive legal issues presented in this lawsuit, and the greater policy and
 2 empirical issues that lie behind this litigation, are of such magnitude and
 3 complexity that it cannot be assumed that a responsible state officer would
 4 automatically continue to enter into further, identical compacts no matter the
 accumulation of experience, the pressures against permitting urban tribal gaming
 establishments, public opinion, and other potentially relevant economic and legal
 developments.

5 *Id.*

6 The Ninth Circuit recognized that the State's legitimate needs include the necessity of
 7 obtaining more revenue for its citizens. *Coyote Valley*, 331 F.3d at 1115. While Rincon points to
 8 the fact that under Professor Eadington's analysis the State will receive \$37 million more from
 9 Rincon as a result of the Amended Compact while the Band's profit would only be increased by
 10 \$1,716,000 per year, the Band fails to note that under the existing Compact it receives \$59,
 11 208,000 and the State receives nothing. As a result, the amended Compact would redress the
 12 imbalance between the State and the Band as envisioned by IGRA. In *Coyote Valley*, 331 F.3d
 13 1094, the Ninth Circuit recognized that IGRA contemplates compact negotiations designed to
 14 "achieve a fair balancing of competitive economic interests" between the State and a tribe and
 15 that a state has a legitimate interest in "raising revenue for its citizens." *Id.* at 1115. The State's
 16 proposal was designed in part with the idea of redressing the economic imbalance in the existing
 17 Compact.

18 III.

19 **RINCON'S THIRD CLAIM FOR RELIEF SHOULD BE DISMISSED FOR** 20 **FAILURE TO JOIN NECESSARY AND INDISPENSABLE PARTIES**

21 In its third claim for relief, Rincon alleges that 6,120 Gaming Device licenses held by the
 22 Five Tribes that negotiated amended compacts in 2004 should not be considered for purposes of
 23 determining the aggregate limit on the statewide license pool. (Compl. at ¶¶ 195-196.) This
 24 claim should be dismissed pursuant to Rule 19 of the Federal Rules of Civil Procedure for failure
 25 to join necessary and indispensable parties. The amended compacts obligate the Five Tribes to
 26 maintain existing licenses issued under the 1999 Compact and obligate the State to count them
 27 towards the statewide limit on Gaming Device licenses. The relief requested by Rincon would
 28 directly affect the Five Tribes' legally protected interests in their amended compacts and expose

the State to inconsistent obligations. Previously, this Court dismissed Rincon's challenge to the terms of the Five Tribes' amended compacts on the grounds that those tribes were necessary and indispensable parties to any suit challenging the validity of the terms of those amended compacts. (Sept. 9, 2004, Order, at 5-13.) This claim for relief, likewise, affects the validity of provisions of those amended compacts. As a result, for the same reasons this Court previously dismissed Rincon's claims affecting terms of the Five Tribes' amended compacts and for the reasons this Court dismissed the Band's fourth claim for relief on March 22, 2005, (the Band's failure to join the Five Tribes in its challenge to the State's construction of the license pool limit in the Compact), the Court should dismiss Rincon's third claim for relief as well.

The amended compacts implicated in Rincon's third claim for relief clearly specify the Five Tribes' rights and obligations for continued operation of Gaming Devices those tribes operated before the compact amendments took effect. Specifically, the amended compacts repealed and replaced Compact section 4.3.1 with, in pertinent part, the following:

(a) The Tribe is entitled to operate the following number of Gaming Devices pursuant to the conditions set forth in Section 4.3.3:

(i) [x number] Gaming Devices, *which were operated on September 1, 1999*; and

(ii) [x number] Gaming Devices *operated pursuant to licenses issued in accordance with former Section 4.3.2.2 of the 1999 Compact, which licenses shall be maintained during the term of this Amended Compact* pursuant to Section 4.3.2.2 herein.

(*See e.g.* JSAR, Ex. 12, p. 00099 (emphasis added).) The amended compacts also repealed Compact section 4.3.2.2 and replaced it with the following:

(a) The Tribe *shall maintain its existing licenses* to operate Gaming Devices by paying to the State Gaming Agency for deposit into the RSTF the following fee within 30 days of the end of each calendar quarter: [\$]

(*Id.* at 00101 (emphasis added).)

Thus, the amended compacts—as approved by the Governor, the Five Tribes, the Legislature and the Secretary of the Interior—obligate each of the Five Tribes to maintain the licenses for all Gaming Devices in operation before the compact amendments took effect. As a

condition of maintaining such licenses, the Five Tribes are required to pay quarterly fees into the RSTF. The amended compacts do not require or permit the Five Tribes to return their 6,120 license to the Commission for redistribution through the license draw process. Instead, the Five Tribes still retain, own and pay fees for the previously issued licenses. As such, the licenses must continue to be included within the statewide limit, and are therefore unavailable for distribution to other tribes pursuant to their 1999 Compacts.

To award Rincon the relief sought by it here would: (a) require the State to breach the amended compacts; (b) deprive the Five Tribes of a bargained-for benefit; and (c) potentially subject the State to inconsistent obligations. Rincon, in effect, has asked this Court to interpret the Compact in a manner that directly affects an express requirement in the amended compacts of the Five Tribes. This plainly adversely affects the legally protected contract rights of the Five Tribes. Second, the relief requested by the Band could subject the State to inconsistent obligations. To obey an order to ignore the licenses possessed by the Five Tribes in calculating the total number of licenses available for issuance to Compact tribes would constitute a breach of the State's compact obligations to the Five Tribes. Thus, by complying with such an order, the State would expose itself to the possibility of a conflicting order compelling it to count those licenses towards the statewide limit.

For these reasons, the Court should dismiss the third claim for relief for failure to join necessary and indispensable parties.

IV.

RINCON'S FIFTH CLAIM FOR RELIEF SHOULD BE DISMISSED BECAUSE IT PRESENTS NO CASE OR CONTROVERSY

Rincon's fifth claim for relief seeks a declaration that the provisions of Compact section 10.8.3(c) that would bar the Band from continuing with construction and other activities in progress on or before January 1, 2005, based on the absence of an agreement amending Section 10.8, is of no force and effect vis a vis the Band. This claim for relief should be dismissed because it presents no case or controversy. The State has repeatedly told the Band that the State will not enforce the provisions of section 10.8.3(c) against the Band because the State

1 withdrew its request for negotiations made pursuant to Compact section 10.8.3(b). (JSAR, Ex. 7,
2 at 00015; Ex. 8, at 00022.) Thus, there is no dispute between the parties on this point that
3 requires judicial resolution.

4 Section 10.8.3 of the Compact lays out a general requirement for continued dialogue
5 between Rincon and the State regarding the environmental provisions of the Compact and a
6 specific set of provisions dealing with a time certain request by the State for a re-negotiation of
7 the Compact's environmental provisions. Under Compact section 10.8.3(b):

8 [If]At any time after January 2, 2003, but not later than March 1, 2003, the State
9 [requests] negotiations for an amendment to this Section 10.8 on the ground that,
10 as it presently reads, the Section has proven to be inadequate to protect the off-
11 Reservation environment from significant adverse impacts resulting from Projects
undertaken by the Tribe or to ensure adequate mitigation by the Tribe of
significant adverse off-Reservation environmental impacts and, upon such a
request, the Tribe will enter into such negotiations in good faith.

12 Section 10.8.3(c) then provides that the tribe that has received such a request from the
13 State may bring an action in federal court after January 1, 2004, asserting that the State has failed
14 to negotiate in good faith. The section further provides that if the State has requested
15 negotiations between January 1, 2003, and before March 1, 2003, and no agreement on an
16 amendment to Compact section 10.8, or an order finding the State in bad faith has been made
17 then the tribe:

18 shall immediately cease construction and other activities on all projects then in
19 progress that have the potential to cause adverse off-Reservation impacts, unless
20 and until an agreement to amend this Section 10.8 has been concluded between
the Tribe and the State.

21 While the Davis administration timely requested negotiations pursuant to Compact
22 section 10.8.3(b) (Compl. ¶ 201), it also rescinded that request prior to January 1, 2004 (JSAR,
23 Ex. 1; Compl. ¶ 202). Further, the State specifically advised Rincon that the Band had no
24 obligations under Compact section 10.8.3(b) to negotiate further pursuant to the State's request
25 and hence that the provisions of section 10.8.3(c) that are premised on such a request and would
26 preclude further construction on projects in progress prior to January 1, 2005, were no longer
27 binding on the Band. The State said the following in this regard to Rincon in a June 15, 2004,
28 letter:

The State agrees that, inasmuch as its previous request for renegotiation of the provisions of Section 10.8 were [sic] withdrawn by former Governor Davis, the State will not require the Band to cease construction and other activities on projects in progress pursuant to Compact Section 10.8.3(c), on the ground that no agreement amending Section 10.8 has been concluded by the Band by January 1, 2005, as provided by that section.

(JSAR, Ex. 7, at 00015.)

The State reiterated its position in another letter dated June 24, 2004, when it said:

The State has also agreed that it will not seek cessation of construction underway on January 1, 2005, based on absence of an agreement between the Band and the State amending Section 10.8 of the Compact.

(*Id.*, Ex. 8, at 00022.) Thus, there is nothing for the Court to adjudicate. The State has disavowed any intent, interest or right to prevent the Band from completing construction on a project in progress on January 1, 2005, on the basis of the failure of the parties to conclude negotiations over an amendment to Compact section 10.8 based on a request made pursuant to Compact section 10.8.3(b).

The plain purpose of Compact sections 10.8.3(b) and (c) is to provide the State with a remedy for a tribe's failure to conclude negotiations on an amendment to section 10.8 if the State has requested those negotiations within a specific time frame, as long as the State itself has been negotiating in good faith. The Davis administration concluded that, given the transition between administrations, it was not in the State's interest to pursue an amendment of section 10.8 on the basis of section 10.8.3(b). (JSAR, Ex. 1.) Instead, the State would simply rely on the provisions of Compact sections 10.8.3(a)^{10/} and 12.3 (establishing a procedure for compact amendments) with respect to any modifications of section 10.8. Though the State would, therefore, be

///

10. Section 10.8(a) provides that:

The Tribe and the State shall, from time to time, meet to review the adequacy of this Section 10.8, the Tribe's ordinance adopted pursuant thereto, and the Tribe's compliance with its obligations under Section 10.8.2, to ensure that significant adverse impacts to the off-Reservation environment resulting from projects undertaken by the Tribe may be avoided or mitigated.

1 foregoing the remedy afforded by section 10.8.3(c) in the event the parties were unable to agree
2 on any such modifications, the State was willing to accept that consequence.

3 **CONCLUSION**

4 For the foregoing reasons, Defendants respectfully request that this Court dismiss the
5 Complaint with prejudice.

6 Dated: June 1, 2007

7 Respectfully submitted,

8 EDMUND G. BROWN JR.
Attorney General of the State of California

9
10 ROBERT L. MUKAI
Senior Assistant Attorney General
11 SARA J. DRAKE
Supervising Deputy Attorney General
12

13
14
15 s/Peter H. Kaufman
PETER H. KAUFMAN
Deputy Attorney General
Attorneys for Defendants
16

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