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UNITED STATES DISTRICT COURT
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,)

vs.)

Arnold Schwarzenegger, Governor of)
California; State of California,)

Defendants.)

No. 04 CV 1151W (WMc)

**RINCON'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT**

Date: August 13, 2007
Time: 9:30 a.m.
Courtroom: C
Judge: Honorable William McCurine

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I. INTRODUCTION

Rincon's argument that the State of California violated the good-faith negotiation provisions of the Indian Gaming Regulatory Act ("IGRA") can be summarized in one sentence: the State stalled negotiations in order to gain a material advantage and then demanded a tax from Rincon in order for the Tribe to conduct additional gaming activities on its reservation.

IGRA was created to "provide 'a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.'" *See Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002). Congress was conscious of the fact that the income to tribes from gaming operations "often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding." S. Rep. 100-446, S. Rep. No. 446, 100TH Cong., 2nd Sess. 1988, 1988 U.S.C.C.A.N. 3071, 3072, 1988 WL 169811 at * 3 (Leg. Hist.). Congress was also aware of state governments' desire to ensure appropriate regulation at tribal casinos. *Id.* Against this backdrop, Congress drafted a bill that offered a compromise solution intended to balance the competing sovereign interests of the Indian tribes, the federal government and the state governments. *See Artichoke Joe's*, 216 F. Supp. 2d at 1092. As a part of the compromise solution, in order for Tribes to engage in Class III gaming they are required to enter into a tribal/state compact.

In creating this solution, Congress was concerned that requiring negotiations between two equal sovereigns, the tribes and the states, in order for the tribes to have the right to conduct Class III gaming, would leave the tribes without equal bargaining power. *See e.g.* S. Rep. 100-446, S. Rep. No. 446, 100TH Cong., 2nd Sess. 1988, 1988 U.S.C.C.A.N. 3071, 3072, 1988 WL 169811 at * 5 (Leg. Hist.). To create an incentive for the states to bargain fairly, therefore, Congress drafted enforcement provisions which require a state to conclude negotiations with tribes in good-faith within a 180 day period. *See* 25 U.S.C. § 2710(d)(7). Further to protect tribes, Congress placed provisions prohibiting states from imposing any tax, fee or other charge on tribes. 25 U.S.C. § 2710(d)(4). It is clear that IGRA was designed to not only balance the

1 interests of all the parties, but to give tribes a mechanism through which to force reluctant state
2 governments to the bargaining table and require them to conduct compact negotiations to
3 conclusion in good-faith. *See* 25 U.S.C. § 2710(d)(7).

4 In the instant matter, Rincon has been forced by the State's behavior to move this Court
5 to trigger the IGRA enforcement provisions. *Id.* Rincon first requested compact re-negotiations
6 with the State of California on March 8, 2003. Over 1,500 days have passed since Rincon's initial
7 request and a compact amendment has yet to be concluded. During that extensive period of time,
8 the State failed to negotiate in good-faith for a compact amendment with Rincon. As referenced
9 above, the State delayed negotiations to obtain a material advantage and then demanded a tax
10 from Rincon. Additionally, the State refused to bargain for a clarifying amendment concerning
11 ambiguities in the existing compact and failed to completely resolve a lingering issue concerning
12 the renegotiation of environmental provisions. Since the inception of negotiations, the State
13 failed to bargain with the required "open and fair mind and [a] sincere purpose to find a basis for
14 agreement." *In re Gaming Related Cases*, 147 F. Supp. 2d 1011, 1021 (N.D. Cal. 2001).

15 Congress specifically enacted provisions in IGRA to force state governments to conclude
16 negotiations in good-faith. Furthermore, IGRA placed the burden of proof on the State to prove it
17 negotiated in good-faith. 25 U.S.C. § 2710(d)(7)(B)(ii). In this case, the State has persistently
18 refused to negotiate within the parameters of IGRA for over four years and it cannot meet its
19 required burden of proof.¹ In the course of negotiations between the State and Rincon, the State
20 has engaged in the exact tactics the good-faith provisions of IGRA were designed to prevent. The
21 remedy of forced mediation between the parties is amply justified.

22
23
24 ¹ In this case, Rincon's discovery requests were denied and the Court determined it would decide
25 the case based on the parties cross-motions for summary judgment and a review of the
26 administrative record. A simple review of the uncontested facts found in the administrative record
reveals that the State failed to conclude compact amendment negotiations in good faith and as a
consequence Rincon is entitled to judgment as a matter of law.

II. BACKGROUND

A. Indian Gaming In California

After IGRA was passed in 1988, a number of California tribes attempted to obtain tribal/state gaming compacts with California. After much litigation and negotiation, tribes sought to have a ballot measure passed that would conclusively allow California to enter into a tribal/state gaming compact that was acceptable to the tribes. *See Hotel Employees and Restaurant Employees Int'l Union v. Davis*, 21 Cal. 4th 585, 590 (1999).

On November 3, 1998, Proposition 5 passed. Proposition 5 authorized the Governor of California to enter into a tribal/state gaming compact with any federally recognized tribe in California that wished to game under IGRA. Almost immediately, litigation from special interest groups ensued. *Id.* On August 23, 1999, the California Supreme Court ruled that Proposition 5 was invalid because it was inconsistent with the anti-casino provision of the California Constitution. The Court struck down all but the final sentence of Proposition 5 (found at Gov. Code § 98005), which provided the State's waiver of immunity with respect to suit in federal court for compact related disputes. *See Davis*, 21 Cal. 4th at 615.

Thereafter, Governor Davis and 67 federally recognized California tribes entered into compact negotiation sessions. *See* September 2, 1999, letter from 67 tribal nations to Governor Gray Davis (Exhibit 68²). Over the course of a three week period, several draft compacts were submitted to the tribes. *See Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, 1103 (9th Cir. 2003). On September 10, 1999, fifty-seven tribes, including Rincon, formally signed letters of intent to enter the tribal/state gaming compact ("Proposition 1A Compact") presented by the State as a take-it-or-leave-it final offer. *See Coyote Valley*, 331 F.3d at 1104. A few additional modifications were made to the Proposition 1A Compact and tribes were given the

² All Exhibit references are to the Joint Stipulated Administrative Record Exhibits 1 through 58, filed with the Court on March 13, 2007 and Exhibits 59 through 122 of Exhibit B to Rincon's Proposed Documents for Administrative Record filed with the Court on March 16, 2007. Rincon does not waive its position that all materials exchanged between the parties during this suit are also a part of the administrative record. Rincon has provided the Court with a compact disc containing images of all the documents it produced to the State in discovery.

option to adopt them as Addendums. Rincon formally adopted the modifications contained in Addendums A and B. *See* Executed Tribal/State Gaming Compact between the Rincon Band and the State of California at Addendum A (Exhibit 42).

The Proposition 1A Compacts were conditioned on voter approval of a constitutional measure that would amend Article IV, section 19, subdivision (e) of the California Constitution to allow Class III gaming by federally recognized Indian tribes on Indian lands in California subject to a tribal/state compact. *See, e.g., Coyote Valley*, 331 F.3d at 1107. In September 1999, the California Legislature ratified the Compacts. *Id.* On March 7, 2000, California voters approved Proposition 1A to provide Indian tribes a constitutional exception to the prohibition on Class III gaming. *Id.* On May 5, 2000, the Secretary of the Interior approved the compacts, which became effective on their publication in the Federal Register on May 16, 2000. *Id.* An additional five compacts, identical in all material respects to the Proposition 1A Compacts were executed prior to the Governor's submission of the Compacts to the Department of the Interior for federal approval. *See* Federal Register March 16, 2000, July 6, 2000, and October 14, 2000 (Exhibit 71).

B. Problems Developed Over The Interpretation Of The Proposition 1A Compact

The Proposition 1A Compacts established a per tribe maximum of 2000 gaming devices. Tribes could obtain licenses, in order to reach the 2000 gaming device limit, through a structured state-wide gaming device licensing pool. The structure for fees and licenses is exactly the same in each and every Proposition 1A Compact. *See* Exhibit 42 at § 4.3. The language of the Proposition 1A Compacts almost immediately gave rise to arguments concerning, among other things, issues related to the number of gaming device licenses available from the pool and the appropriate process for allocation of the available licenses. *See* June 2004 California State Auditor Report at p. 20 (Exhibit 72).

Multiple groups have interpreted the language in the Proposition 1A Compacts to provide vastly different numbers for available gaming device licenses. *See* November 9, 1999 Opinion of

Elizabeth Hill, Office of Legislative Analysts (Exhibit 73); December 3, 1999 letter from William Norris to Elizabeth Hill (Exhibit 74); *See* Exhibit 72 at p. 21. This disparity as well as other issues related to the interpretation and implementation of the Proposition 1A Compact gave rise to requests to meet and confer pursuant to Compact Section 9.1. *See* February 26, 2004 letter from John Currier to Governor Arnold Schwarzenegger (Exhibit 3); July 26, 2001 letter from ten tribes to Governor Gray Davis (Exhibit 75); and July 28, 2006 letter from John Currier to Governor Arnold Schwarzenegger (Exhibit 78). Proposition 1A Compact Section 9.1(b) provides that the parties shall meet and confer within ten days of receipt of notice in a good-faith attempt to resolve any disputes that occur. Proposition 1A Compact § 4.3.3 provides for renegotiation of provisions related to Revenue Sharing Trust Fund (“RSTF”), fees, the numbers of gaming devices, and the allocation of gaming devices.

C. History Of Negotiations Between Rincon and the State

1. Prefiling

On March 8, 2003, Rincon made a formal request, pursuant to Compact Section 4.3.3, for the State to negotiate provisions relating to the authorized number of gaming devices, the allocation of licenses for those devices and revenue sharing payments. *See* letter from John Currier to Governor Gray Davis (Exhibit 43). Unlike general requests to meet and confer, Section 4.3.3 provided a very narrow, twenty-four day time frame in March of 2003 within which a request for renegotiations could occur. Under this section, on request, the parties were to promptly commence the negotiations in good-faith concerning the matters encompassed by Sections 4.3.1 and 4.3.2 and their subsections. *See* Exhibit 42 at § 4.3. Rincon thereafter met formally twice with a negotiation team appointed by Governor Gray Davis and twice informally with one or more members of the negotiation team in an attempt to initiate a dialogue. *See* Affidavit of Vernon Wright (Exhibit 81).

In the midst of these negotiation sessions, California held a recall election on October 7, 2003. Once it was determined that a sufficient number of signatures to recall Governor Davis



1 were submitted to the State Secretary of State, the Davis Administration ceased to move forward
2 with the negotiations in process. *See* Exhibit 81.

3 On November 21, 2003, Rincon and nine other tribes wrote to the Schwarzenegger
4 Administration's transition team expressing the Rincon's desire to move forward with the
5 discussions requested under the Davis Administration. *See* December 16, 2003 letter from Peter
6 Siggins to Robert Rosette (Exhibit 2). On December 16, 2003, Peter Siggins, the Legal Affairs
7 Secretary sent a letter acknowledging receipt of the November 21, 2003 letter and stating that the
8 Schwarzenegger Administration looked forward to engaging in the compact negotiation process.
9 *Id.*

10 Rather than commence negotiations with Rincon or the collected tribes that submitted
11 proper notice, the State commenced negotiations with a small group of tribes ideally situated to
12 pay a tax to the State for the right to game. Those tribes had a relative advantage in location for
13 capturing large urban markets. As a consequence, those tribes could implement large numbers of
14 gaming devices and make large tax payments to the State without impeding their ability to operate
15 or fund governmental programs. Governor Schwarzenegger ran his election campaign on the
16 promise that tribes would "pay their fair share." *See* Arnold Schwarzenegger Ad Watch, the Los
17 Angeles Times, September 24, 2003 (Exhibit 98); Schwarzenegger rallies opposition to two
18 gambling initiatives, the Associated Press State & Local Wire, Michelle Morgante, October 14,
19 2004 (Exhibit 99). By negotiating with a select group of ideally situated tribes while pushing off
20 tribes such as Rincon, the Schwarzenegger Administration was maneuvering to recuperate the tax
21 he promised during his campaign.

22 Rincon heard rumors that the State was negotiating with a select group of tribes to allow
23 for unlimited number of gaming devices conditioned on greater revenue-sharing with the State.
24 Because Rincon had received no communication regarding its formal compact negotiations, it was
25 concerned. On February 26, 2004, Rincon provided formal notice to the State pursuant to
26 Compact Section 9.1 for the State to meet and confer with the Tribe over a number of issues. The
27
28



1 issues included the State's failure to continue negotiations pursuant to Section 4 over per-tribe
2 limits on the number of gaming devices, the state-wide cap on the number of gaming devices and
3 fees associated with the operation of gaming devices. *See* Exhibit 3. The State failed to respond
4 in a timely manner.

5 After repeated phone messages to the State's attorneys inquiring of the status, the Tribe
6 was told that the State's negotiator would not meet with the Tribe unless certain conditions were
7 met and copies of documents already presented to the Davis Administration were resubmitted to
8 the Schwarzenegger Administration. While, the Tribe objected to the conditions, it ultimately
9 complied in an effort to facilitate the meet and confer process. *See* April 21, 2004 letter from
10 Scott Crowell to Peter Kaufman (Exhibit 46); *see also* April 29, 2004 letter from Peter Kaufman
11 to Scott Crowell (Exhibit 47). It was not until the second week of May 2004, however, that the
12 Tribe received communication that it's request for a formal meet and confer session would be
13 granted. Even in that late communication, the State refused to meet prior to June 2, 2004, which
14 was more than 96 days after the Tribe's formal request. *See* May 14, 2004 letter from Stephen
15 Hart to Peter Kaufman (Exhibit 4); *see also* May 19, 2004 letter from Scott Crowell to Robert
16 Mukai (Exhibit 5); May 28, 2004 letter from Steve Hart to Robert Mukai (Exhibit 6).

17 The State finally scheduled sessions for June 2, 2004 and June 4, 2004. The Tribe met
18 with the State on those dates. *See* June 16, 2004 letter from Paul H. Dobson, Chief Deputy Legal
19 Affairs Secretary to Scott Crowell at p. 1 (Exhibit 7). Rincon pointed out the serious delays that
20 had occurred and the State responded by referencing a group negotiation session as evidence that
21 Rincon had not been pushed aside. *See* May 21, 2004 letter from Robert Mukai to Scott Crowell
22 at p. 2 (Exhibit 48). Another Tribe, not the State, invited Rincon to participate with several other
23 Tribes in a single negotiation session on April 7, 2004. However, as an express pre-condition of
24 its participation in that meeting, Rincon had to agree that it would not discuss any economic or
25 financial issues regarding compact section 4. *See* May 28, 2004 letter from Steve Hart to
26 Robert Mukai at p.1 (Exhibit 49). As a result, no Tribe in attendance discussed economic or
27

1 financial interests or Compact Section 4, the subject of Rincon's pending negotiation request. *See*
2 *id.*

3 During these same three months when the State was defying its contractual obligation to
4 meet and confer with Rincon within ten days and to promptly commence negotiations per
5 Compact sections 4.4.3, the State met with the "Dickstein Coalition"³ numerous times. *See id.*
6 During these meetings, the State negotiated new compacts that dramatically changed the
7 landscape of tribal gaming in California and significantly altered the underlying policies in the
8 Proposition 1A compacts. At the June 2004 sessions, the Tribe expressed its inability to formulate
9 an offer for any gaming devices beyond the existing 2,000 per-tribe cap because of numerous
10 reports that the Governor was soon to announce compact amendments allowing for unlimited
11 gaming. Rincon proposed that it receive the additional 400 machines under the rate structure it
12 was scheduled to pay under the Proposition 1A Compact. The Tribe indicated a willingness to
13 have those funds directed to mitigate off-reservation impacts or to improve infrastructure, rather
14 than to the RSTF. *See* January 27, 2006 letter from Peter Kaufman to Steve Hart and Scott
15 Crowell at p. 2 (Exhibit 104). In response, the State steadfastly refused to confirm that it had
16 entered into an agreement with the Dickstein Coalition. *See* Exhibit 81.

17 The State had already developed a new approach to tribal gaming in California that
18 worked for a select group of tribes, that approach required tribes to pay a tax to the State in order
19 to attain additional gaming devices. *See* 2004 Amendment to Tribal State Compact Between State
20 of California and the Pala Band of Mission Indians (Exhibit 10); 2004 Amendment to Tribal State
21 Compact Between the State of California and the Pauma Band of Luiseno Mission Indians
22 (Exhibit 11); 2004 Amendment to Tribal State Compact Between the State of California and the
23 Rumsey Band of Wintun Indians (Exhibit 12); 2004 Amendment to Tribal State Compact
24 Between the State of California and the United Auburn Indian Community (Exhibit 13); and 2004
25

26 ³ "Dickstein Coalition" refers to five tribes represented by attorney Howard Dickstein. The term
27 "Dickstein Coalition" was coined by the Schwarzenegger Administration's then chief negotiator,
28 Dan Kolkey.



1 Amendment to Tribal State Compact Between the State of California and the Viejas Band of
 2 Kumeyaay (Exhibit 14) (collectively the “Schwarzenegger Compacts”). At the June 2004
 3 sessions, Rincon expressed its concern that it would be adversely impacted by the State radically
 4 altering the 1999 Compact scheme limiting each tribe to 2,000 gaming devices. The State
 5 informed Rincon that it had no obligation to consider the interests of Rincon when negotiating
 6 with other tribes for fundamental changes to the provisions of the state-wide license pool and per-
 7 tribe caps. *See* June 16, 2004 letter from Paul H. Dobson to Scott Crowell at p. 2 (Exhibit 77).

8 At the June 2004 sessions, the State informed the Tribe, among other things, that in order
 9 for the Tribe to get an amendment to its Compact allowing additional machines, Rincon would
 10 have to pay the State fifteen percent (15%) of its net win per gaming device on both existing and
 11 new gaming devices annually. The State suggested that this “revenue-sharing” would be in
 12 exchange for a revised exclusivity provision. The State indicated that Rincon would also have to
 13 agree to a number of other amendments outside of Compact Section 4, but that Rincon would
 14 have to wait until the new Schwarzenegger Compacts were announced to learn the details of such
 15 amendments. *See* Exhibit 77.

16 The State’s proposal would have required the Tribe to pay in excess of twenty million
 17 extra dollars just for its already existing machines, notwithstanding the costs for the new
 18 machines. *See* May 5, 2006 letter from Chairman John Currier to Peter Kaufman at p. 4
 19 (Exhibit 21). Rincon conducted economic analysis and determined that the State’s offer was
 20 untenable given the reported expansion of gaming in Rincon’s market. *See* June 2004 Report by
 21 Business Research & Economic Advisors (Exhibit 101); Declaration of Jim Baum, Corporate
 22 Director Development for Harrah’s Operating Company, Inc (Exhibit 105); *see also* Report of
 23 Jonathan B. Taylor, The Taylor Policy Group, Inc. (Exhibit 102).

24 As a result of the State’s actions, Rincon filed its original Complaint on June 9, 2004. *See*
 25 June 9, 2004 Complaint in this matter. By letter dated June 16, 2004 the State claimed to absolve
 26

1 itself of its failure to comply with the contractual renegotiation provisions regarding Sections 4
2 and the meet and confer provisions in Section 9. *See* Exhibit 77 at p. 2.

3 2. Negotiations Post-filing

4 Between June 2004 and the filing of the amended Complaint in December 2006, the Tribe
5 and the State met on a number of occasions to attempt to negotiate a resolution while the litigation
6 was pending. *See* First Amended Complaint ¶¶ 124 -178. The meetings were not productive. *Id.*
7 The State, while it delayed meeting with Rincon, altered the landscape of gaming and from that
8 time forward refused to negotiate with Rincon for a compact amendment that was materially
9 different from what it forged with the ideally situated tribes. Further, the State refused to
10 negotiate a clarifying amendment concerning the number of available gaming device licenses in
11 the Proposition 1A License Pool. Additionally, the State failed to formally resolve the lingering
12 issue relating to renegotiation of environmental provisions. *See* First Amended Complaint ¶¶ 92 -
13 97.

14 During the negotiation sessions, the State maintained one compelling theme: no tax equals
15 no compact. This is amply illustrated by the State's offers. The State's offers to the Tribe had
16 three main financial components: (1) a flat fee on each of the Tribe's existing machines currently
17 in operation in an amount equaling approximately 10-15% of the Tribe's net win (gross gaming
18 remedies); (2) a 15% fee on all new gaming machines put into operation; and (3) a \$2 million flat
19 fee into the RTSF, which represents a \$900,000 increase over the Tribe's current payment into the
20 RTSF. *See* November 10, 2005 letter from Peter Kaufman to Scott Crowell at p. 2 (Exhibit 16);
21 November 3, 2006 letter from John Currier to Andrea Hoch (Exhibit 38); November 10, 2005
22 letter from Scott Crowell to Daniel Kolkey (Exhibit 50); and January 27, 2006 letter from Peter
23 Kaufman to Scott Crowell at p. 2-3 (Exhibit 104). Some of the details changed between June 4,
24 2004 and October 23, 2006, but the basic structure of the State's offers remained the same. *Id.* In
25 June 2004, the State did not provide details about the structure of the proposal, but stated
26 generally that it required the Tribe to pay 15 percent of the net win (gross gaming revenue) on all
27

gaming devices, which includes both the existing and any new gaming devices. In 2005, the State provided more detail and set forth terms to lock the 15 percent rate for existing gaming devices based on the Tribe's net win in 2004. *See* Exhibits 16, 50, 51.

After months of negotiations, the State moved only slightly in its position. On October 23, 2006,⁴ the State's offer was for a flat fee annually based on 10 percent of gross gaming revenue from fiscal year 2005, an additional amount equal to 15 percent of the average net win (gross gaming revenue) for each gaming device above the 1600 currently in operation, and a flat fee of \$2 million to be paid into the RSTF. *See* October 23, 2006 letter from Andrea Hoch to Chairman Currier (Exhibit 35).

With all offers, the State asserted that the Tribe should accept "additional exclusivity" in exchange for the additional fees. *See* May 5, 2006 letter from Chairman Currier to Peter Kaufman with attachments at p. 3 (Exhibit 21). The Tribe, however, never requested any such "additional exclusivity" – it already enjoyed the protection of the California Constitution, which limits gaming to tribes. *See id.*; *see also* April 21, 2006 Report of Jonathan B. Taylor (Exhibit 102); and November 3, 2006 Supplemental Report of Jonathan B. Taylor (Exhibit 113). Further, no additional "exclusivity" could remove Rincon from its current location, in the heart of one of the most saturated Indian gaming markets in the country, surrounded by thousands of machine games and several casino resorts within a few miles of its reservation. *See* Rincon's September 12, 2006 Power Point presentation to State (Exhibit 29).

During this same time, Rincon came to the State with its own proposals consistent with Proposition 1A Compact's scheme of fees. *See* January 25, 2006 letter from Rincon to State of California (Exhibit 19); May 5, 2006 letter from John Currier to Peter Kaufman (Exhibit 21); July 28, 2006 letter from John Currier to Peter Kaufman (Exhibit 22). Rincon offered to increase

⁴ For purposes of the instant motion, the Tribe's analysis is directed at the offers made by the State from June 4, 2004 through October 23, 2006. On October 31, 2006, days before the close of the administrative record, the State made an alternative offer to Rincon for 400 gaming devices above the 1600 currently in operation. *See* Exhibits 35, 37, 38. The Tribe would make a flat annual payment of \$2 million to the RSTF plus annual revenue-sharing payments to the State of 25 percent of the net win (gross gaming revenue) on the additional 400 gaming devices. (*Id.*)

the fees it paid for additional machines and to further increase such fees upon proof from the State that an increase was warranted, in accordance with the dictates of IGRA. *Id.* This offer was consistent with federal law prohibiting Rincon from paying the State or any of its political subdivisions any “tax, fee, charge, or other assessment” in order to conduct gaming. IGRA, 25 U.S.C. § 2710(d)(4). Rather than accept any of Rincon’s offers or to negotiate for an amendment in keeping with IGRA, the State demanded the tax in order for Rincon to obtain a compact amendment.

III. THE STATE DEMANDED A DIRECT TAX IN EXCHANGE FOR ADDITIONAL MACHINES

IGRA proscribes very limited circumstances in which an Indian tribe may make payments to the State in order to engage in gaming activities. In short, a tribe may provide an assessment to the State in such amounts as are necessary to defray the costs of regulating gaming activities. 25 U.S.C. § 2710(d)(3)(C). The State does not have the authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in class III activity. 25 U.S.C. § 2710(d)(4).

The Ninth Circuit has suggested that a state can *negotiate* for a payment from a Tribe in return for a meaningful concession from the state. *See Idaho v. Shoshone-Bannock Tribes*, 465 F.3d at 1095 (9th Cir. 2006) (holding that Idaho could not impose a 5% tax on tribe). By allowing a *negotiated* payment in exchange for a meaningful concession, the courts have found that the parties exchange value for value. However, courts have made it clear that the concession must be “real.” *Coyote Valley II*, 331 F.3d at 1112. Indeed, the exchange must be for something distinct from what the State is required to negotiate for under IGRA. *See Shoshone-Bannock Tribes*, 465 F.3d at 1095. Revenue-sharing payments may not be made to the State “in exchange for terms that are routinely negotiated by the parties as a part of the regulation of gaming activities, such as duration, number of gaming devices, hours of operation, and wager limits. *See* April 25, 2003 letter from Aurene Martin, Assistant Secretary of Indian Affairs to Gus Frank, Chairman of Forest

County Potawatomi Community at p. 3 (Exhibit 117). As the Court in *Coyote Valley II* recognized, “depending on the nature of both the fees demanded and the concessions offered in return, such demands might, of course, amount to an attempt to ‘impose’ a fee, and therefore amount to bad faith on the part of the state.” 331 F.3d at 1112.

A simple review of the administrative record reveals that the State has been attempting to impose an unlawful fee on Rincon in exchange for additional gaming devices, rather than to negotiate a mutual exchange of value. Consequently, the State has failed to negotiate in good-faith. *See Union of American Physicians and Dentists v. Los Angeles County Employee Relations Commission*, 131 Cal. App. 4th 386, 404 (Cal. App. 2005) (“To insist on implementing an unlawful policy easily qualifies as bad faith bargaining.”); *see also Keller v. City of Columbus*, 797 N.E.2d 964 (Ohio 2003) (negotiations on a subject that is illegal would constitute bad-faith negotiations).

A. The State Failed To Offer Meaningful Value In Exchange For The Demanded Revenue-Sharing Rate

Rincon has been willing to negotiate with the State for a flat per-device fee that is rationally connected to the regulatory and mitigation costs and any other impacts the additional gaming devices may generate to the State or local governments. *See* 25 U.S.C. § 2710(d)(3)(C)(iii); 25 U.S.C. § 2710(d)(4); Exhibit 21. The State, on the other hand, has been attempting from the outset to obtain fees disproportionate to the grant of additional gaming devices. The State purports to make this demand in exchange for three things (1) an increase in the number of slot machines Rincon would otherwise be authorized to operate; (2) an extension of the term of Rincon’s Compact; and (3) revised geographic exclusivity for Rincon’s casino. Additional gaming devices and the duration of the Compact are terms that are routinely negotiated by parties as a part of the regulation of gaming activities and those terms may not be used as the basis for revenue-sharing. *See* Exhibit 117 at p. 3. Consequently, the State’s position that it has offered something “meaningful” hinges entirely on its offer for revised geographic exclusivity. As discussed in detail

below, the State's offer of geographic exclusivity was not a "meaningful concession" pursuant to the IGRA.

1. The State Demanded That Rincon Accept Additional Exclusivity

In this case, the State has tried to force a revised exclusivity provision on Rincon so that it can mask its demand for taxation behind a "meaningful concession." Rincon did not want a revised exclusivity provision. The Tribe is satisfied with the exclusivity provision it currently enjoys. Courts have authorized a *negotiated* exchange for value. *See Shoshone-Bannock Tribes*, 465 F.3d at 1095. When one party does not want the item offered there can be no negotiation. The State's refusal to negotiate for terms such as an increase in the number of slot machines without *requiring* Rincon to accept a different geographic exclusivity provision alone reveals the State's lack of good-faith negotiation.

2. The California Constitution Already Secures Exclusivity

Further, Rincon has sufficient exclusivity set forth in the Proposition 1A Compact and Addendum A, which is backed by a Constitutional Amendment. Indeed, in order for non-Indian tribes to operate Gaming Devices in California, a new state Constitutional Amendment would have to pass. This would require one of three things: (1) a legislative proposal supported by a supermajority vote of the Legislature and a majority vote of the citizenry, (2) a constitutional convention, or (3) an initiative petition signed by eight percent of the voters and then a majority vote of the citizens of California. *See* Cal. Const. art. 2 § 8(b), art. 18 §§ 1, 2, 3, 4. The exchange of value between the Tribe and the State for exclusivity has already occurred, set forth in the highest law of the land, and was commemorated in the Proposition 1A Compacts. The State, therefore, cannot offer as consideration that which it has already conferred, let alone purport that it is offering additional value. *See, e.g.*, 4 WILLISTON ON CONTRACTS § 8:9 (4th ed.) ("something which has been given before the promise was made and, therefore, without reference to it, cannot, properly speaking, be legal consideration.").

3. The Exclusivity Provision Offered By the State Could Not Be Enforced

The revised exclusivity provision the State has demanded Rincon accept is illusory because the provision is unenforceable. *See* WILLISTON ON CONTRACTS § 7:7, at 88-89 (“Where an illusory promise is made, that is, a promise merely in form, but in actuality not promising anything, it cannot serve as consideration.”). The State claims that the revised exclusivity being offered is substantial because it offers the right to enjoin non-Indian Class III gaming as a *substantial impairment* of the Compact. *See, e.g.*, Exhibit 10 at [Pala Amendment Sec. 3.2]. The State’s promise – that Rincon would have the right to enjoin a Constitutional change – is illusory. The State cannot force a court to grant Rincon an injunction in the event that the voters of California amend the constitution to permit non-Tribal Class III gaming. All the State can do is agree that it will not oppose issuance of an injunction. However, the parties who favor non-tribal gaming, including future sponsors of the Constitutional amendment and the non-tribal entities who wish to conduct gaming activities, would surely intervene in any action Rincon brought to obtain the promised injunction, and would indeed have a right to do so. *See* Cal. Civ. Proc. Code §§ 387, 389.

The State’s promise not to oppose an injunction does not mean it would go unopposed or that the Court would not consider the issue *sua sponte*. The State’s statement that the Tribe suffers irreparable harm does not make it so. And the opponents would be able to argue that the Governor cannot bargain away the people’s right to amend the Constitution on a core issue of police power like the regulation of gaming. *See* Cal. Const. art. 2 § 1 (the people retain the right to alter the operation of government “when the public good may require”); *Calfarm Ins. Co. v. Deukmejian*, 28 Cal. 3d 805, 830 (1989) (contracts are subject to the reasonable exercise of the state’s police power); *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, 86 Cal. App. 4th 534, 554 (2001) (Contracts clauses of the U.S. and California Constitutions “must be interpreted to accommodate the inherent police power of the state”). *Sovereign* power – such as the power to amend the Constitution to alter the regulation of gaming – can only be contracted

away if done expressly and if done by the sovereign. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982); *Cal. Ass'n of Prof'l Scientists v. Schwarzenegger*, 137 Cal. App. 4th 371, 383-84 (2006). A constitutional amendment can only be approved by a majority vote of the electorate – the Governor cannot give that power away with the mere concurrence of a majority of the Legislature. *See* Cal. Const. art. 18, § 4. The provision purporting to give Rincon a “right” to an injunction could not be enforced, and is therefore without value.

Moreover, the proposed amendment includes a proposed alternative remedy that cripples the signing tribe’s ability to make a successful impairment argument. Under the terms of the proposed amendments, Rincon would be able to reduce its payments to the State if it could not stop non-tribal gaming through the injunction provision. Many impairment cases hold that, if the parties to a contract can foresee a change in the regulatory environment that would effect the benefits they expect to obtain from their agreement, then they cannot pursue an impairment claim if the regulatory environment does change. *See, e.g., Calfarm Ins. Co.*, 28 Cal.3d at 830. In fact, the State itself cited these cases in response to Rincon’s impairment claims in this litigation. (*See* Defendants’ Points and Authorities in Support of Motion to Dismiss at 16.) Because the State has included a contractual remedy for the loss of exclusivity, it has thereby provided any party opposing an injunction to the expansion of gaming with a built-in argument to defeat issuance of an injunction. The State’s offer for this type of exclusivity provision contains no value. The mere offer by the State of such an unenforceable provision is evidence of hidden agendas and bad faith.

4. The Proposition 1A Compact Provides A Contractual Remedy

In the Pala compact, the State offers a provision negating a portion of the revenue-sharing payments in the unlikely event that non-Indian Class III gaming is authorized in the Tribe’s core geographic market. *See* Exhibit 10 [Pala Amendment Sec. 3.2]. Rincon already has a similar, although in some respects broader, provision in the Proposition 1A Compact. *See* Exhibit 42 (Proposition 1A Compact, Addendum A, § 12.4). The Proposition 1A Compact provides that if any non-Indian entity *anywhere* within the State begins state authorized gaming pursuant to a

1 constitutional amendment or otherwise, then the tribe has the option of terminating the Compact
2 or entering into negotiations with the State for a new Compact which will not include revenue-
3 sharing and instead only include costs for regulation and other costs directly related to tribal
4 gaming. *Id.* In the Pala Amendment, identified by the State as being representative of the
5 exclusivity it offers to Rincon, the remedy being offered is only available in the tribe's *core*
6 geographic market and only excuses part of the fees.⁵ *See* Exhibit 10 [Pala Amendment Sec. 3.2].
7 The Proposition 1A Compact's terms provide greater protection, as it is triggered if non-Indian
8 Class III gaming occurs *anywhere* in the State. The provision in the Pala Amendment does not
9 provide meaningful additional value and is not worth the price the State is attempting to extract.

10 **5. Rincon's Proposals Included Fees To Defray The Costs Of Regulating** 11 **Gaming Activities**

12 While the State persisted in demanding exorbitant revenue-sharing rates without offering a
13 meaningful concession, Rincon consistently submitted written proposals and made verbal offers to
14 pay fees to the State in keeping with IGRA's requirement that the fees be that which is necessary
15 to defray the costs of regulating, or mitigate the impacts created by, tribal gaming activities. *See*
16 25 U.S.C. § 2710(d)(3)(C)(iii); 25 U.S.C. § 2710(d)(4). During the June 2004 meetings, Rincon
17 proposed that it receive the additional 400 machines under the rate structure it was scheduled to
18 pay under the Proposition 1A Compact. The Tribe indicated a willingness to have those funds
19 directed to mitigate off-reservation impacts or to improve infrastructure, rather than to the RSTF.
20 *See* Exhibit 104 at p. 2. Given the fact that under various interpretations of the Proposition 1A
21 Compact's language the Tribe could have to received the additional 400 gaming devices for that
22 exact fee, such an offer seemed a reasonable starting point for negotiations. The State, however,
23 was uninterested in negotiating based on the format of costs in the existing compact or for

24 ⁵ Ironically, three of the compact amendments negotiated by the Schwarzenegger Administration
25 (Pala, Pauma, and Pechanga) all have "core geographic markets" that are the same or nearly
26 identical to Rincon's. *See* Exhibits 100, 10-14 [the Schwarzenegger Compacts.] Accordingly,
27 even if the proffered "additional exclusivity" injunction were enforceable, one or more of those
28 Tribes would enforce it to the benefit of Rincon without any amendment of Rincon's current
Compact.



1 amounts necessary to defray the costs of regulating, or mitigating the impacts created by, tribal
2 gaming activities.

3 In January 2006, Rincon made a new proposal. Rincon's offer, in part, was to pay \$4,350
4 per gaming device for additional devices from 1,600 to 2,500; and to pay a higher fee for gaming
5 devices above 2,500, if the State certified in writing that \$4,350 per gaming device was
6 inadequate to cover regulatory costs, mitigation and infrastructure development, in which case the
7 parties would negotiate in good-faith for a higher fee for subsequent machines. *See* January 25,
8 2006 letter from Tribal Chairman John Currier to Peter Kaufmann (Exhibit 19). Again, the State
9 was uninterested in negotiating for additional gaming devices in exchange for a fee that would
10 reflect fees necessary to defray the costs of regulating, or mitigating the impacts created by, tribal
11 gaming activities. Indeed, the State never produced any economic analysis to show that Rincon's
12 proposal would not cover such costs. The State was uninterested in even negotiating from such a
13 context; rather, the State persisted in demanding excessive fees and demanding that Rincon accept
14 the exclusivity provision to justify the fees.

15 On May 5, 2006, Rincon again made a new offer to the State. This time, Rincon attached
16 information for the State to review that supported its position of a viable offer, including
17 economic information about Rincon's casino, economic projections concerning the effect of the
18 State's persistent position, and expert analysis of the State's offers. *See* May 5, 2006 letter with
19 enclosures from Tribal Chairman John Currier to Peter Kaufman (Exhibit 21). Rincon proposed
20 that it would maintain its existing gaming device licenses under the Proposition 1A Compact,
21 would operate up to an additional 400 machines at a fee of \$4,350 to be used for regulatory costs,
22 mitigation and infrastructure development; would pay to operate up to an additional 500 machines
23 for a fee of \$6,000 per device to be used for regulatory costs, mitigation and infrastructure
24 development; and would pay to operate additional machines above 2,500 through a fee which may
25 be in excess of \$6,000 if the State certified that additional fees were necessary to cover regulatory
26 costs and mitigation. *See* Exhibit 21. Consistent with the history of negotiations, the State was
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1 uninterested in negotiating with Rincon for a compact amendment that would comport with
2 IGRA. Even though Rincon submitted economic analysis and detailed reasoning behind why it
3 did not want the exclusivity provision being offered, the State refused to negotiate unless it could
4 include in the amendment an exclusivity provision that would purportedly justify the revenue-
5 sharing rates the State was demanding. *See* Exhibit 21 at p.3.

6 The fact that the State was never willing to negotiate in the realm of added assessments
7 that would be necessary to defray the costs of regulating, or mitigating the impacts created by,
8 tribal gaming activities for the additional machines, reveals the State's lack of good-faith
9 bargaining. *See, e.g.*, 25 U.S.C. § 2710(d)(3)(C)(iii); 25 U.S.C. § 2710(d)(4). Rincon all along
10 informed the State that it wanted to negotiate per the provisions in the compact for an amendment
11 to Section 4.3 and was willing to negotiate fees that would cover regulatory costs and mitigation.

12 Rather than negotiate pursuant to IGRA, the State adhered to a political agenda created
13 during the Schwarzenegger campaign:

14 Their casinos make billions, yet they pay no taxes and virtually nothing to the
15 state. Other states require revenue from Indian gaming, but not us. It's time for
16 them to pay their fair share. All the other major candidates take their money and
pander to them. I don't play that game. Give me your vote and I guarantee you
things will change.

17 *See* Exhibits 98, 99. In Schwarzenegger's campaign promise to tax the tribes, he neglected to
18 mention to the voters that federal law prohibits the State or any of its political subdivisions from
19 imposing any "tax, fee, charge, or other assessment upon an Indian tribe" and that negotiations for
20 compact amendments "are to be conducted according to Federal law, not State law." *See* IGRA,
21 25 U.S.C. § 2710(d)(4); *Yavapai-Prescott Indian Tribe*, 796 F. Supp. 1292, 1296 (D.Ariz. 1992).

22 In sharp contrast to Rincon's offers, the State insisted that the new tax revenues be spent as
23 directed by the State, in its sole and unbridled discretion. Even the authority the State contorted to
24 support the imposition of the tax, *Coyote Valley II*, rejected the notion that the State's revenue can
25 be used for purposes unrelated to regulation or impacts. 331 F.3d at 1111-1112. The *Coyote*
26 *Valley II* court stated that "it is clear from the legislative history that by *limiting* the proper topics
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for compact negotiations to those that bear a direct relationship to the operation of gaming activities, Congress intended to prevent compacts from being used as subterfuge for imposing State jurisdiction on tribes concerning issues unrelated to gaming.” *See Coyote Valley*, 331 F.3d at 1111, *quoting* S. Rep. No. 100-446, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083 (emphasis added). Unfortunately, the State has been rigid in its adherence to Schwarzenegger’s political agenda and as a consequence, the required good-faith negotiations never took place.

B. The State Has Failed to Negotiate in Good Faith

As reflected above, the State has attempted to exact a tax from Rincon without offering anything of substantial or meaningful value in exchange. The State has recently argued that even if its position in negotiations has been for an illegal tax, it has still been negotiating in good-faith because it did not *knowingly* demand a tax. The State argues that it could rely on the fact that DOI approved the Schwarzenegger Compacts with the revised exclusivity provision to justify its negotiation stance. First, the State’s reliance on the actions of DOI in approving the Schwarzenegger Compacts is inappropriate given that DOI itself has questioned the legality of revenue-sharing. *See* Statement of George T. Skibine, acting Deputy Assistant Secretary for Policy and Economic Development for the Department of the Interior, S. Hrg. 108-475 at p. 34. Second, the State was given ample warning by the Tribe that the exclusivity provision was illusory. Lastly, ignorance of the law will not meet the State’s burden to prove it negotiated in good-faith.

1. DOI Is Not Sure Whether Revenue-Sharing Is Legal

DOI has approved compacts between tribes and states that contain revenue-sharing provisions in limited circumstances where a state offers a valuable right such as substantial exclusivity, off-reservation casinos, or the transfer of state property. *See* Oversight Hearing on Indian Gaming Regulatory Act, Role and Funding of the National Indian Gaming Commission, Hearing before the Committee on Indian Affairs, United States Senate One Hundred Eighth Congress First Session, July 9, 2003, Part 2, at 2. DOI developed this policy in light of the

1 *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) decision holding that the states’
2 Eleventh Amendment immunity from suit did not permit an Indian tribe to force good-faith
3 negotiations by suing a state’s governor.⁶

4 Since the *Seminole* decision, tribes across the country have been placed in a difficult
5 negotiating position because there is no enforcement mechanism to require states to negotiate in
6 good faith. Thus, tribes have been signing compacts with revenue-sharing provisions that were
7 not contemplated by IGRA. In response, DOI developed an *informal* policy justifying these types
8 of provisions and approving compacts that contained them. However, DOI has conceded that
9 there is no statutory authority to allow these types of provisions. *See* S. Hrg. 108-67 Pt. 2 (July 9,
10 2003) (DOI representative stated that “there is no specific provision [in IGRA] that authorizes
11 revenue sharing”). Furthermore, DOI has itself has expressed concerns to Congress:

12 [T]he impact of the *Seminole* decision on revenue sharing has been to increase the
13 number of revenue-sharing provisions in compacts, and we have seen an increase
14 in the percentage that the tribes are required to pay. If the tribes do not sign these
compacts, there is very little remedy available.

15 S. Hrg. 108-475 at p. 44 (March 24, 2004). DOI’s informal policy of approving these types of
16 provisions appears to be a response to the reality that after *Seminole*, tribes are in a weakened
17 bargaining position with the states and would be unable to conduct Class III gaming if they did
18 not cede to whatever terms states are demanding.

19 On March 24, 2004, a hearing took place before the Senate Committee on Indian Affairs to
20 discuss a potential amendment to IGRA called the Indian Gaming Regulatory Act Amendments of
21 2003. *See* S. Hrg. 108-475 at p. 44 (March 24, 2004). The proposed amendments would have
22 authorized revenue-sharing with a state in exchange for substantial economic benefits, in certain
23 delineated circumstances, and in accordance with promulgated rules. *See* The Indian Gaming
24 Regulatory Act Amendments of 2003, S. 1529, 108th Congress. DOI stated to Congress that it

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26 ⁶ Because California waived its Eleventh Amendment immunity through Proposition 5, this Court
27 is uniquely able to make a determination of whether or not the revenue-sharing rates being
demanded by the State constitute an illegal tax.



1 welcomed the amendments, which would provide “a statutory basis for the inclusion of revenue-
 2 sharing provisions in Class III gaming compacts” and would “resolve all these doubts about
 3 whether you can or cannot make those revenue-sharing payments.” *See* Statement of George T.
 4 Skibine, acting Deputy Assistant Secretary for Policy and Economic Development for the
 5 Department of the Interior, S. Hrg. 108-475 at p. 34. The Indian Gaming Regulatory Act
 6 Amendments of 2003 however, did not become law. Consequently, DOI is still unsure whether
 7 revenue-sharing is legal and if so what rates are permissible.

8 While DOI’s informal policy is understandable given the harsh reality created by the
 9 *Seminole* decision, that does not mean the policy is lawful or that DOI’s approval of certain
 10 compacts means their provisions were in accordance with IGRA. An agency’s interpretive rule is
 11 only entitled to such deference as its “inherent persuasiveness commands.” *See Drake v.*
 12 *Honeywell, Inc.*, 797 F.2d 603, 607 (8th Cir.1986). DOI’s statements to the Committee on Indian
 13 Gaming makes it clear that even DOI is unsure whether what it is doing is authorized. S. Hrg.
 14 108-475 at p. 45 (March 24, 2004) (DOI “would prefer to see a clear direction in the bill [S. 1529]
 15 on what is allowable in terms of revenue-sharing payment and what the criteria are.”). Any
 16 deference to administrative agencies is especially suspect in the context of interpreting statutes
 17 that Congress intended for the benefit of Indian tribes, where the Indian Canon of Construction
 18 requires that all ambiguities in language should be interpreted in favor of the Tribe’s position.
 19 *See, e.g., Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003)
 20 (referencing established canon).

21 Further, DOI’s decisions with respect to the five Schwarzenegger Compact amendments
 22 are not comparable to the situation with Rincon. Those tribes agreed to the new exclusivity
 23 provision whereas Rincon has informed the State since the beginning that it does not want the
 24 provision. *See* Exhibits 19, 21. Further, because those tribes wanted the new Compacts to be
 25 approved, they did not provide the California Legislature, nor presumably DOI, with the detailed
 26 legal analysis of the issues with the new exclusivity provision. *See* June 30, 2004 Senate

1 Governmental Organization Committee at pp. 52-56⁷ (a copy attached hereto as Exhibit A).

2 Rather, all the analysis provided attempted to support the idea that the exclusivity agreement was
3 valuable. *Id.* Indeed, Howard Dickstein represented to the California legislature:

4 There was no exclusivity guarantee or is no exclusivity guarantee in the '99
5 Compacts. A loss of exclusivity simply results in the right of the tribe to drop out
6 of the compact, which is really no remedy at all, because without a compact
7 there's no right to even engage in these forms of gaming. So achieving
8 exclusivity was very important for the tribes. We have achieved it, we've done it
9 in an, in a, in an enforceable way that the, that the chairman inquired about
10 correctly, and it was done with all the laws in mind and impairment of contract
11 laws and the U.S. Constitution, and police powers and what we got was
12 exclusivity for this term with the right to stop any non-Indian gaming, but only in
13 the tribe's core geographic zone, which is in part done to make this enforceable
14 and in line with the Supreme Court cases on this point.

15 *Id.* at p. 53. Dickstein failed to raise concerns about the enforceability of the provision and failed
16 to inform the Legislature about Addendum A⁸ to the Compact at all. Assuming DOI was provided
17 a similar analysis by the tribes and the State, DOI may have actually thought the tribes were
18 getting something materially different from their existing Compact.

19 Additionally, the five DOI approved Schwarzenegger Compacts were structured in a
20 different manner, such that the actual tax was more difficult to ascertain. Instead of a stated
21 percentage on existing games, the compact amendments provide for sum certain amounts and,
22 instead of a stated percentage on new games, the compact amendments provide for a fee per
23 device on a graduated scale, such that the actual percentage on net win may be less than 1% or
24 greater than 100%, based on the actual circumstances of the tribe. In the State's offers to Rincon,
25 the tax is much more clearly set forth. Beyond all of that, the Dickstein Coalition tribes are in
26 materially different locations and are simply not comparable to Rincon, as discussed in greater
27 detail below. *See, e.g.,* September 12, 2006 Rincon Power Point Presentation to State (Exhibit

28 ⁷ While this document is not a part of the administrative record, the Committee meeting is a
publicly available download and the Court may take judicial notice of its content. For the Court's
convenience, Rincon had the download transcribed and has attached a copy hereto.

⁸ Provides that if any non-Indian entity *anywhere* within the State begins state authorized gaming
pursuant to a constitutional amendment or otherwise, then the Tribe has the option of terminating
the Compact or entering into negotiations with the State for a new Compact which does not
include revenue-sharing and instead only includes costs for regulation and other costs directly
related to tribal gaming.

29). For all of these reasons and more, the fact that DOI approved five Schwarzenegger
Compacts does not make the State's position in negotiations with Rincon reasonable.

2. Rincon Raised The Issue of the Illegality of the State's Position

Rincon informed the State that it did not want the new exclusivity provision offered to
Pala. As early as January 25, 2006, Rincon raised in writing the issue of the fundamental
problems with the exclusivity agreement being offered by the State. *See* Exhibit 19. Then again
on May 5, 2006, Rincon provided a detailed analysis of the issues with the State's position in
negotiations including economic analysis and expert reports. *See* Exhibit 21. The State failed to
address these issues and persisted in moving forward with its taxation stance well after Rincon
informed the State of the problem. It would be disingenuous for the State to now argue that it was
unaware that it could be demanding a direct tax in violation of IGRA.

3. IGRA Does Not Place A Scierter Requirement On Lack Of Good Faith Negotiation

The State has insisted that its belief that it was comporting with the law protects it from a
finding of bad faith. Whether or not the State *believed* it was offering something "meaningful" is
simply irrelevant. The State's negotiation position was consistently for a tax. An erroneous view
of the law will not entitle a negotiator to a good-faith defense. *See, e.g., Taylor Forge & Pipe
Works v. National Labor Relations Board*, 234 F. 227 (7th Cir. 1956).

IGRA itself states that in the context of a good-faith determination the court: "shall
consider *any* demand by the State for direct taxation of the Indian tribe or of any Indian lands as
evidence that the State has not negotiated in good-faith." IGRA § 2710(d)(7)(B)(iii) (emphasis
added). Under IGRA *any* demand for direct taxation will be evidence of bad faith, regardless of
the State's mental state. If Congress intended to limit the application of Section 2710(d)(7)(B)(iii)
to states that knowingly make a demand for direct taxation, Congress could have easily required
such a heightened standard.

Further, in the context of good-faith negotiation cases under IGRA, courts have never required that the state be aware that its position was unlawful in order to invoke the mediation provisions of IGRA. *See, e.g., Northern Arapaho Tribe v. Wyoming*, 389 F.3d 1308 (10th Cir. 2004) (finding that State failed to negotiate in good-faith when the State failed to negotiate for terms beyond those Wyoming law expressly permitted); *Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024 (2nd Cir. 1990) (“when a state wholly fails to negotiate . . . it obviously cannot meet its burden of proof to show that it negotiated in good faith.”); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 770 F. Supp. 480, 482 (W.D. Wis. 1991) (in ordering the State to conclude a tribal state gaming compact, the court found it was irrelevant what the negotiators thought that the statute required).

The State cannot excuse itself from meeting its burden of proof to show that it negotiated in good-faith by pointing to the fact that it thought its position was legal. *See, e.g., Taylor Forge & Pipe Works v. National Labor Relations Board*, 234 F. 227 (7th Cir. 1956). None of the offers proposed by the State were made pursuant to the requirements of IGRA. The State failed to negotiate for additional gaming devices in exchange for fees necessary to defray the costs of regulating gaming activities. 25 U.S.C. § 2710(d)(3)(C). From the State’s first offer for an amendment in June 2004 to its last proposal in October 2006, the State adhered to an unlawful negotiating position that required Rincon to pay a revenue-sharing in order to gain additional gaming devices. Consequently, the State failed to negotiate in good-faith.

C. Even Assuming The State Offered Something Of Value, It Demanded Excessive Revenue-Sharing Rates

As discussed above, the State failed to offer anything of meaningful value, which would authorize revenue-sharing with the State. However, even assuming the exclusivity provision the State offered had some additional value, the rates demanded by that State far exceeded an amount proportionate to any added value offered. Consequently, the State’s position still constituted a tax.

1. Economics Of State's Offers Reveal Extortionate Fees

In June 2004, the State asked Rincon for 15 percent of net win for all gaming devices operated by the Tribe. *See* Exhibits 104 at p.2. On November 10, 2005, the State made a new 15 percent offer with Rincon paying 15 percent of net win (gross gaming revenue) for new gaming devices, and 15 percent of net win (gross gaming revenue) for existing gaming devices based on net win for those devices in fiscal year 2004. *See* Exhibits 16, 50, 51. On October 23, 2006, the State asked for a flat fee annually based on ten percent of gross gaming revenue on all gaming devices for fiscal year 2005 and an additional amount equal to 15 percent of the average net win for each gaming device above 1,600. *See* Exhibit 35. On October 31, 2006 the State made an alternative offer for 400 additional machines for a flat annual payment of 2 million dollars to the RSTF and annual revenue sharing payments to the State of 25 percent net win on the additional gaming devices. *See* Exhibit 37. Even the best offer made by the State is not in accordance with IGRA.

Per the State's demand, to obtain additional machines above 2000, the Tribe would have to readjust the fees it pays not only for additional gaming devices, but also for its existing 1600 gaming devices. In the best case scenario, the Tribe would be required to pay an annual fee equal to 10 percent of its net win (gross gaming revenue) in Fiscal Year 2005 for the gaming devices already in operation at the Tribe's Casino. Additionally, under the State's offer the Tribe would also pay annually to the State 15 percent of the average net win (gross gaming revenue) for each of the additional gaming devices above 1600 that it operates. *See* Exhibit 35. This percentage was not tied to the Fiscal Year 2005 revenues, but varies based on the average net win (gross gaming revenue) per device for each year. *Id.* These funds would be paid into the State General Fund to be used at the discretion of the State Legislature, without any restriction that the funds be used to defray regulatory costs or environmental impacts resulting from Indian gaming. *See* Exhibits 37, 38.

The State's own expert witness, William Eadington, analyzed the State's October 23, 2006 offer and found that under the State's proposal, the State would collect fees of \$37.9 million dollars while Rincon would make an additional \$1,718,000. *See* William R. Eadington, Observations for the Rincon Negotiations at p. 3 (Exhibit 112). Under this scenario, the State retains 96% of the alleged additional value an increase in gaming devices would create.⁹ *See* Exhibit 113 at p. 4. This exorbitant extraction of value is not the product of good-faith bargaining. Indeed, by way of comparison, the corporate tax rate in California is a mere 8.84% for C corporations other than banks and financial corporations and that percentage is levied on corporations' net income rather than on their gross revenue. *See* California Revenue and Tax Code § 23151. The State has demanded an egregious tax in order for Rincon to obtain additional gaming devices.

2. DOI Policy Suggests That The State's Demanded Revenue-Sharing Rates Were Unreasonable

Although DOI has stated that it is unsure whether revenue-sharing is permissible or what rates are allowable, to the extent DOI has authorized such agreements, it has made it clear that any revenue-sharing agreement must be in exchange for a benefit that is worth the payment the tribe would make, otherwise the revenue-sharing agreement constitutes an impermissible tax. *See* S. Hrg.108-475 March 24, 2004, Statement of George Skibine. In this case, the State has made a demand that would give the State 96% of any additional value. The revenue-sharing rates being proposed by the State are significantly out of proportion to the meager value being offered.

In this case, a demand for revenue-sharing in the amount sought by the State is simply unreasonable. This is particularly true given Rincon's location in the most saturated Indian gaming market in the country. *See* Exhibit 29. The State's offers have all been excessive. The

⁹ For the purpose of argument, Rincon has accepted Eadington's assumptions as true, including the assumption that there will be no growth in the number of machines operated by Rincon's immediate competitor, Pauma, even though Pauma has entered into an amendment to gain additional machines and announced a partnership with Foxwoods, the operator of the world's largest casino.

exchange requested by the State has not been worth the payment demanded and constitutes in impermissible tax in violation of IGRA.

3. The State Failed To Consider Differences Between Differently Situated Tribes

The State has pointed to prior Compacts entered into with gaming tribes in premier locations to show that the percentage of revenue-sharing it demanded from Rincon was lawful. Disregarding the fact that the State did not offer a meaningful concession, its demand for the same fees it exacted from the best located tribes neglects to account for the differences between different tribes in California. As the court in *Coyote Valley II* addressed, not all of California's tribes are "fortunate enough to have land located in the populous or accessible areas." 331 F.3d at 1111. "Not surprisingly, the most successful gaming operations are located in close proximity to large urban areas. A handful of tribes blessed by geography and demographics have been fabulously successful." *Id. quoting* Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 435 (2001). A one-size-fits-all revenue-sharing rate, therefore, is not appropriate in California.

Even DOI has recognized that different tribes have different economic issues. As recently as January 2007, DOI let the Quechan Compact take effect by the passage of time, rather than expressly approving the Compact. *See* Federal Register January 17, 2007 (Volume 72, Number 10). Consequently, the Compact only took effect to the extent it comports with IGRA. 25 U.S.C. § 2710(d)(3)(B). At issue in DOI's analysis was the dramatic fees demanded by the State of California. *See* December 8, 2006 letter from acting Deputy Assistant Secretary of Policy and Economic Development to Governor Arnold Schwarzenegger¹⁰ (attached hereto as Exhibit B). Quechan is not in a position to generate the type of revenue the five urban tribes were projecting. Still, the State of California demanded exorbitant fees and Quechan compromised. DOI raised significant concerns and ultimately only approved the Compact to the extent it

¹⁰ This document was not a part of the Administrative Record, but is a public document subject to judicial notice. We have attached a copy hereto for the Court's convenience.

1 complies with IGRA. The Quechan Compact, therefore, raises significant issues regarding
2 whether such tax rates are permissible.

3 Additionally, the State's theory that these provisions worked with other tribes doesn't
4 account for the fact that Rincon is not required to make a bad deal just because other tribes have
5 agreed to do so. *See, e.g., Shoshone-Bannock Tribe*, 465 F.3d at 1102 (holding that the fact that
6 some tribes voluntarily amended their compacts to take on additional burdens did not mean that
7 other tribes were required to do the same). Further, the State's repeated use of Connecticut and
8 New York as an example of acceptable revenue-sharing rates is completely inappropriate here.
9 Two Connecticut and four New York tribes enjoy a unique monopoly on the large population in
10 the surrounding urban areas. Meanwhile, Rincon is located in the most saturated Indian gaming
11 market in the country. For example, there are currently 18 federally recognized Indian tribes
12 within San Diego County, 14 of which have gaming compacts with the State. *See Exhibit 29 at*
13 *pp. 23-30*. Demanding revenue-sharing rates equal to those paid in Connecticut and New York
14 reveals the State's complete lack of consideration concerning the issues that are relevant to good-
15 faith negotiations, including an analysis of the type of gaming and the location of the tribe. *See*
16 *Coyote Valley II*, 331 F.3d at 1113. The State has adhered to an intractable position demanding
17 Rincon pay an excessive revenue-sharing rate that would be unlawful even if the State had offered
18 a meaningful concession to other tribes.

19 **IV. THE STATE REFUSED TO NEGOTIATE WITH RESPECT TO RETURNING**
20 **GAMING DEVICES TO THE LICENSE POOL**

21 From the inception of negotiations through the close of the administrative record, the State
22 sought to extract value from Rincon in exchange for releasing a capacity constraint it created on
23 the number of gaming devices available in California. Loosening a constraint on the number of
24 gaming devices does not constitute the type of valuable privilege that justifies a bargained-for
25 payment of revenue-sharing. *See Exhibit 117 at p. 3*. However even if it did, the State's
26 negotiation position entirely failed to account for the existing issues with respect to interpretation
27

of the number of available gaming devices licenses under the Proposition 1A compact. In so doing, the State disregarded its duty to renegotiate Section 4.3.2 and its subsections in good-faith. *See* Proposition 1A Compact, Exhibit 42 at § 12.3.

A. The Compact Requires The State To Negotiate Over The Number Of Licenses Available In The Pool

The Proposition 1A Compact contains specific provisions for the amendment and renegotiation of certain Sections of the Compact. *See, e.g.*, Exhibit 42, at §§ 4.3.3 and 10.8.3(b). One of the Sections open for renegotiation was Section 4, which sets forth the authorized number of gaming devices, the revenue sharing provisions, and the allocation of gaming device licenses.

Id. at § 4.3.3. Section 4 states:

If requested to do so by either party after March 7, 2003, but not later than March 31, 2003, the parties will promptly commence negotiations in good-faith with the Tribe concerning any matters encompassed by Sections 4.3.1 and Section 4.3.2, and their subsections.

Id.

Compact Section 4.3.1 permits the tribes to operate the number of gaming devices operated by the tribe prior to September 1, 1999 or an initial 350 gaming devices. *Id.* at § 4.3.2. Section 4.3.2 entitles the tribes to draw additional licenses out of a combined license pool, but limits the tribes to an aggregate total of 2,000 gaming devices each. *Id.* The formula for determining the number of gaming devices available in the license pool is set forth in Section 4.3.2.2(a)(1). *Id.*

Ambiguity in the language of the Compact quickly gave rise to arguments concerning issues related to the number of gaming device licenses available from the pool and the appropriate process for allocation of the available licenses. Representatives of the State and varying tribal organizations issued written opinions with dramatically different calculations of the number of licenses available through the pool. The California Gaming Control Commission (“CGCC”) took an arbitrary interpretation of the Compact and opined that the license pool was dry. *See*

Exhibit 72 at pp. 20-23. Other State agencies and tribes interpreted the Compact to authorize thousands of additional licenses for distribution. *See* Exhibits 72 at p. 20-23, 73, 74. A June 19, 2002 Report from the CGCC acknowledged the severity of the problem: “[t]he language of Compact section 4.3.2.2(a)(1) is sufficiently obscure that, undoubtedly, agreement among all the parties to the Compacts can only be achieved in the renegotiation that may be commenced under Compact section 4.3.3 in March of 2003.” *See* Exhibit 76 at p. 5. In June 2004, the California State Auditor published a report and found that the “meaning of key terminology” in the formula for the calculation of the number of licenses was “unclear” and had caused a variety of different interpretations and confusion. *See* Exhibit 72 at Appendix 22.

Rincon, itself confused by the ambiguous language of Section 4, submitted its formal request to the State to renegotiate Compact sections 4.3.1 and 4.3.2 on March 8, 2003. *See* Exhibit 43. After almost a year passed without the requested renegotiations, Rincon requested a meet and confer session with the State pursuant to Section 9.1 of the Compact. *See* Exhibit 3. The meet and confer request outlined, among other things, the failure of the State to negotiate over the number of gaming device licenses available in the pool. *Id.* In June 2004, when the State finally agreed to meet with Rincon, the State refused to negotiate over the number of available licenses in the pool. *See, e.g.,* Exhibit 77 at p. 3.

During the entire course of negotiations, from the initial request in March 2003 through the close of the administrative record in November 2006, the State has refused to negotiate over the meaning of Compact Section 4.3.2.2(a)(1) and would only negotiate with Rincon for additional gaming devices from the premise that the gaming device license pool is dry. *See* September 25, 2006 memo to Andrea Hoch (Exhibit 30); October 23, 2006 letter from Andrea Hoch to John Currier (Exhibit 35); June 16, 2004 letter from Paul Dobson to Scott Crowell at p. 3 (Exhibit 77); and July 28, 2006 letter from John Currier to Governor Arnold Schwarzenegger (Exhibit 78). Given that the State itself issued multiple interpretations of the numbers of gaming device licenses available in the pool, and that the CGCC acknowledged that the Compact

language was so obscure that agreement among all the parties would only be possible through the renegotiation contemplated by Section 4.3.3, the State's failure to negotiate over the number of gaming device licenses available in the pool constitutes bad faith. Indeed, the State has taken a negotiation position that "is so unreasonable that it can be said the State has not negotiated in good-faith." *Gaming Related Cases*, 147 F. Supp. 2d at 1020.

B. There are Multiple Interpretations of the Number Of Gaming Device Licenses Available In The Pool

The State has acknowledged that there are multiple interpretations of the meaning of Section 4.3.2.2(a)(1). *See* Exhibit 35 at p. 6. The Compact states that "the maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section" is "a sum equal to 350 multiplied by the number of Non-Compact tribes as of September 1, 1999, plus the difference between 350 and the lesser number authorized under Section 4.3.1." *See* Exhibit 42 § 4.3.2.2(a)(1)). Section 4.3.1 provides that a tribe may operate no more gaming devices than the larger of : (a) a number of terminals equal to the number of gaming devices operated by the Tribe on September 1, 1999; or (b) three hundred fifty (350) gaming devices. *Id.* at § 4.3.1.

The conflict between various agencies of the State and the tribes over the number of gaming devices available turns on an interpretation of the language in Section 4.3.2.2(a)(1). There are two components accounted for in the calculation of the number of licensed gaming devices authorized in Section 4.3.2.2(a)(1). The first component is 350 multiplied by the number of Non-Compact tribes as of September 1, 1999. *See* Exhibit 42 § 4.3.2.2(a)(1). There have been two interpretations of the first component. The first interpretation is that all Federally-recognized Indian tribes in California were Non-Compact tribes because the Proposition 1A Compacts had not been entered into on September 1, 1999. The second interpretation is governed by the definition of "Non-Compact Tribes" found in section 4.3.1, which provides "Federally-recognized tribes that are operating fewer than 350 gaming devices are Non-Compact Tribes." *See* Exhibit 42 § 4.3.1.



1 The second component of the calculation turns on the language “plus the difference
2 between 350 and the lesser number authorized under Section 4.3.1.” Section 4.3.1 authorizes
3 a) the number of terminals equal to the number of gaming devices being operated by the tribe on
4 September 1, 1999; or b) 350 gaming devices. *Id.* If a Tribe was operating between zero and 350
5 gaming devices on September 1, 1999, then pursuant to Section 4.3.1, the lesser number
6 authorized would be the number of devices being operated on September 1, 1999. To form the
7 calculation in 4.3.2.2(a)(1), one then subtracts the number of devices being operated on
8 September 1, 1999 from 350.

9 The State insists that in totaling the number in component two, the calculation should not
10 include tribes that were operating zero devices on September 1, 1999. *See* Exhibit 77. The State
11 argues that 4.3.2.2(a)(1) covers the lesser number “authorized by 4.3.1” and argues that zero
12 devices would not have needed authorization. *Id.* The tribes and, previously, the California
13 Office of Legislative Analysts interpret component two to include tribes that were operating zero
14 gaming devices on September 1, 1999. They argue that Section 4.3.1(a) authorizes the number of
15 gaming devices being operated by a tribe on September 1, 1999 and if the number being operated
16 was zero, zero is a real number and zero is less than 350.

17 Given the dramatic differences in interpretations over the Compact’s terms, Rincon
18 properly requested the renegotiation of Compact Section 4.3.2 with the State. The State
19 meanwhile refused to negotiate over the meaning of Section 4.3.2.2(a)(1). Even though the State
20 acknowledged as late as October 23, 2006 that there are multiple possible interpretations of
21 Section 4.3.2.2(a)(1), the State still refused to negotiate a clarifying amendment. *See* Exhibit 35 at
22 pp. 6-7. The State takes the position that Rincon must pay additional fees through a Compact
23 amendment taking it outside the licensing pool to attain the licenses. *Id.* The State, therefore, is
24 attempting to use its arbitrary interpretation of Section 4.3.2.2(a)(1) to extract additional funds
25 from Rincon without providing Rincon with any equivalent exchange of value.

The degree of the State's lack of good-faith in this area is highlighted by the fact that the law of contract interpretation requires that questions of interpretation be resolved against the party who drafts or supplies the agreement. *See Interpetrol Bermuda Ltd. V. Kaiser Aluminum International Corp.*, 719 F.2d 992, 998 (9th Cir. 1984); *see also* Cal. Civ. Code § 1654 (in cases of uncertainty, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist). The State is responsible for the wording of the Proposition 1A Compacts. Having been responsible for the ambiguity in the agreement between Rincon and the State, it is bad faith for the State to refuse to even negotiate over Section 4.3.2.2.(a)(1)'s meaning. In any case, pursuant to the law of contract interpretation, Rincon's interpretation of the Compact would prevail. *Id.* Indeed, this is the case not only on the basis of contract law, but on the basis of case law in the area of tribal agreements. *See, e.g., U.S. v. Washington*, 235 F.3d 438 (9th Cir. 2000) (ambiguities in agreements with Native Americans are to be resolved in favor of the Native Americans). Just because the exact number of licenses available cannot be judicially resolved due to Rule 19 problems does not mean that the State's rigid adherence to its own interpretation is lawful or justified.

C. The Licenses Being Operated Under The Schwarzenegger Compacts Should Be Placed Back Into The Pool

Not only is the State's intractable position on the exhaustion of the license pool unreasonable based on its interpretation of Compact Section 4.3.2.2(a)(1), the State has refused to discuss how new Compacts entered into in 2004 effect the licensing pool. On July 28, 2006, Rincon formally requested that the State meet and confer pursuant to Section 9.1 of the Proposition 1A Compact concerning the State's failure to determine that licenses previously issued to tribes that have since executed Compact Amendments with the Schwarzenegger Administration should revert to the state-wide pool. *See* Exhibit 78. The State never responded to the Tribe's meet and confer request, rather it offhandedly dismissed the Tribe's position during negotiation sessions for a Compact amendment. *See* Exhibit 35.

On June 21, 2004, the State entered into amendments with five tribes: the Pala Band of Mission Indians, Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, Rumsey Band of Wintun Indians, United Auburn Indian Community and Viejas Band of Kumeyaay Indians. *See* Exhibits 10-14. These five compacts (“the Schwarzenegger Compacts”) allow the Tribes to operate an unlimited number of gaming devices on a graduated license fee schedule, conditioned on substantially greater revenue sharing with the State. *Id.* The Schwarzenegger Compacts allow the tribes to place a gaming device in operation at their discretion without the necessity of prior approval from the State; the tribes merely need to remit the requisite fee for the gaming device after they place it into operation. *Id.* The Proposition 1A Compacts require that the tribes wait until a gaming device license becomes available and then participate in a draw process with the other tribes to determine who will be allowed to place the available gaming devices licenses into operation. *See* Exhibit 42.

The Schwarzenegger Compacts take the tribes out of the gaming device licensing structure. Indeed, they pay a different amount for the gaming device licenses than the flat fee set out in the Proposition 1A Compacts and the fees are not tied to the Revenue Sharing Trust Fund. The Schwarzenegger Compacts eliminated the State aggregate gaming device limit from the Compact, they eliminated the 2,000 per-tribe gaming device cap, and they significantly altered the cost and length of the validity of the gaming device Licenses previously issued. *See* Exhibits 10-14. The Schwarzenegger Compacts are operating pursuant to an entirely different regulatory scheme where a limited pool of licenses is no longer viable. Consequently, the 6,120 gaming device licenses previously issued to tribes who are now operating pursuant to the Schwarzenegger Compact should be placed by default back into the Licensing pool for use by those tribes still operating under the Proposition 1A Compacts.¹¹

¹¹ Two of those tribes, the Pala Band and the Rumsey Rancheria, actually pay less into the RSTF under the Schwarzenegger Compact Amendments than would be required if they were operating under the Proposition 1A Compacts. Exhibits 10, 12. The Rincon Band’s Proposition 1A Compact expressly requires the State to cancel licenses when a tribe is more than two quarters in arrears on its fees under those Compacts. Exhibit 42. Accordingly, the gaming device licenses issued to these two tribes should be cancelled and returned to the statewide pool, from which they

At the September 12, 2006 negotiation session, Rincon again raised the issue of the reversion of the licenses to the pool and the State failed to address the issue. At the October 5, 2006 negotiation session, the State dismissed the Tribe's analysis concerning the reversion, but failed to acknowledge the Tribe's standing meet and confer request on the issue. *See* Exhibit 35 at pp. 6-8. The State took the erroneous position that it would have to amend the Schwarzenegger Compacts in order to send the gaming device licenses back to the licensing pool. *Id.* In actuality, however, no amendments to the new Compacts are necessary. The tribes that have amended Compacts will pay two million dollars each into the RSTF regardless of whether the licenses revert to the state-wide pool. Their ability to operate gaming devices, therefore, is not dependant upon a validly issued device license from the state-wide pool.

It is disingenuous for the State to take the position that the gaming device license pool is dry and to refuse to discuss issues or comply with their meet and confer duties with respect to the issues regarding the availability of licenses in the license pool, while allegedly negotiating with Rincon over Section 4.3.2 of the Compact.

D. A Resolution To The State's Failure To Conclude Negotiations In Good Faith With Rincon Does Not Create Rule 19 Issues

By filing the instant motion, the Tribe has not sought a declaration regarding the number of devices available nor has the Tribe attempted to circumvent this Court's prior Order regarding Rule 19. Rather, this motion involves the State's failure to negotiate a clarifying amendment to the Rincon Compact that would have eliminated the ambiguity. Additionally, it addresses the State's substantive lack of good-faith negotiation through the attempt to extract additional value for machines which should have been readily available. The relief sought is clearly provided by IGRA for failure to conclude negotiations for a compact amendment in good-faith. That remedy does not require resolving the meaning of the existing language or require interpretation of other Tribes' compacts. The remedy requested is only with respect to Rincon and Rincon's Compact.

may be issued to other tribes. There is no real consequence to these two tribes, because their Schwarzenegger Compacts no longer require licenses as a pre-requisite to commercial operation of gaming devices. *See* Exhibits 10-14.

1 In the recent case of *Wisconsin v. Ho-Chunk Nation*, --- F. Supp. 2d. ---, 2007 WL 734390
2 (W.D. Wis. 2007), the Court found that a decision which invalidated a provision in a similar
3 gaming compact with a different Indian tribe did not invalidate the provision with respect to the
4 compact in question, it merely made it likely that a challenge to the Tribe's compact would be
5 successful. Similar to the Wisconsin case, a finding in this case that the State failed to negotiate
6 in good-faith because it attempted to extract additional value by leveraging confusing language in
7 the Proposition 1A Compact to its advantage, knowing that it created the problem and has
8 judicially stopped a proper resolution, will not in any way invalidate the provisions of any other
9 Tribes' compacts with respect to the operation of the gaming device pool. Further, a finding that
10 the State failed to conclude negotiations in good-faith because it failed to negotiate for a clarifying
11 amendment to the Rincon Compact that would have eliminated the ambiguity with respect to the
12 number of available gaming device licenses will not invalidate or alter the provisions of any other
13 tribes' compacts.

14 Further, even if a finding that the State failed to conclude negotiations for a compact
15 amendment with Rincon in good-faith creates some precedent relating to the other Tribe's
16 interpretations of their own compact, such an outcome does not make those tribes necessary
17 parties. *See, e.g., UTI Corp. v. Fireman's Fund Ins. Co.*, 896 F. Supp. 389, 393-94 (D.N.J. 1995)
18 (other insurer using the same form agreement was not necessary party to action requiring
19 interpretation of the agreement); *see also Janney Montgomery Scott, Inc. v. Shephard Niles, Inc.*,
20 11 F.3d 399, 407 (3d Cir. 1993). Indeed, the fact that a case may establish "persuasive precedent"
21 that might affect other cases involving other parties is simply insufficient to make the other parties
22 necessary. *Id.* This is also the recognized rule when multiple parties sign identical or even
23 interdependent contracts. *See* 7 Charles A. Wright, et al., FEDERAL PRACTICE AND PROCEDURE
24 § 1613, at 197 (3d ed. 2001) ("When a person is not a party to the contract in litigation and has no
25 rights or obligations under that contract, even though the absent party may be obligated to abide
26 by the result of the pending action by another contract that is not at issue, the absentee will not be
27

regarded as an indispensable party in a suit to determine obligations under the disputed contract.”).

V. THE STATE’S PATTERN OF BREACHING ITS CONTRACTUAL OBLIGATIONS TO RINCON REGARDING PROTOCOL ENABLED THE STATE TO GAIN A MATERIAL ADVANTAGE

In addition to the fact that the State has adhered to an unlawful negotiating position throughout the entire relevant period and refused to negotiate a solution to the ambiguity in the Compact pool provisions, the entire process of negotiation was corrupted by the extensive delay and breaches of protocol engaged in by the State during the designated time frame for re-negotiations of Proposition 1A Compact Section 4.3. *See* First Amended Complaint ¶¶ 98-123. Rincon believes this pattern of breach, contrasted with the manner in which it treated the same rules when the State sought to advance its own compact agenda, provides clear and convincing evidence that the State’s tactics were deliberate. Even if the Court accepts as true, the State’s claims of exoneration, the State’s breaches of protocol compel a conclusion that the State has not concluded negotiations with Rincon in good-faith.

The Schwarzenegger Administration delayed meeting with Rincon while it met in secret with a few select tribes to unilaterally change the terms on which it would base compact amendment negotiations going forward. As a result of this delay, when the State finally met with Rincon to conduct negotiations there was no ability for good-faith negotiations to occur. *See, e.g., Storer Communications, Inc.*, 297 N.L.R.B. 296, 298 (1989) (finding there are circumstances where the nature of changes instituted before bargaining so undermine a bargaining position that good-faith bargaining could not thereafter take place).

The State has claimed in letters to Rincon that *Coyote Valley II*, 331 F.3d 1094 makes it clear that once negotiations have occurred, a party cannot pursue a claim regarding any alleged past failures to negotiate. The State’s analysis of *Coyote Valley II* is flawed. In *Coyote Valley II*, the court concluded that the gravamen of the tribe’s *amended* complaint was that the Davis Administration had failed to negotiate in good-faith. The court reviewed the record and

determined that the Davis administration had negotiated with the Tribe despite the fact that it had no obligation to do so. Consequently, the court determined what was really at issue was the substance of the negotiations not the procedural issues. This is distinctly different from a holding that no party can pursue a claim of lack of good-faith negotiation based on past failures to negotiate. Unlike the *Coyote Valley II* case, here, the State was required to negotiate with Rincon and required to meet and confer based on stringent deadlines. Consequently, the issue of delay can rise to the level of bad faith.

Moreover, this case is distinctly different from the original claims in *Coyote Valley* because Rincon claims that the delay was deliberate and was used to alter the bargaining process going forward. *See Horesehead Resource Dev't Co. v. NLRB*, 154 F.3d 328 (6th Cir. 1998); *see also Kobell v. United Paperworkers International Union, AFL-CIO, CLC*, 965 F.2d 1401 (6th Cir. 1992) (dilatory or evasive tactics are considered indicative of bad faith negotiation). A claim of evasive tactics used to obtain material advantage going forward is distinct from a claim of mere delay alone. Mere delay alone could potentially be remediated by subsequent negotiations. Delay used as an evasive tactic to gain material advantage cannot be remediated by subsequent negotiations because the landscape cannot be returned to its prior state. *See, e.g., Storer Communications, Inc.*, 297 N.L.R.B. 296, 298 (1989). This case is simply distinct from the factual scenario that took place in *Coyote Valley II*.

In the context of IGRA negotiations, a failure to negotiate has been considered to be evidence of a lack of good-faith even when the State had good reasons for failing to do so. *See Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024 (2d Cir. 1990) (when a state wholly fails to negotiate “it obviously cannot meet its burden of proof to show that it negotiated in good-faith”). Indeed, in *Mashantucket Pequot*, the court stated “the manifest purpose of the statute [IGRA] is to move negotiations toward a resolution where a state either fails to negotiate, or fails to negotiate in good-faith, for 180 days after a tribal request to negotiate. The delay is hardly ameliorated because the state’s refusal to negotiate is not malicious.” *Id.* at 1033.

1 In this case, the State had a legal duty to negotiate and yet delayed for an undue period of
2 time without any good reason for so doing. It is clear that the Schwarzenegger Administration
3 and its transition team did nothing to ensure that they would meet the State's pending obligations
4 to negotiate amendments to Section 4 with the tribes that had timely requested negotiations. Their
5 failure to do so resulted in a delay of almost a year from when the Administration took office,
6 during which time the State entered into negotiations for the Schwarzenegger Compacts and
7 altered the landscape of Indian Gaming in California.

8 The State subsequently used the Schwarzenegger Compacts as the cast for what must be
9 accepted by Rincon and pointed to the most favored nations clause and potential damage to the
10 Schwarzenegger Compacts as the reason it could not negotiate for the type of provisions Rincon
11 suggested. *See* Exhibits 16 at p. 2, 38 at p. 2.¹² The undue delay in holding negotiations with
12 Rincon undermined the bargaining process. By completing the Schwarzenegger Compacts prior
13 to dealing with Rincon, the State positioned itself to attempt to force those provisions on Rincon
14 as a template. This type of negotiating tactic is not good-faith negotiation.

15 The State's explanations for the delays do not exonerate the State. The Court is
16 encouraged to review the above summary of the factual history of these negotiations and to look
17 to the underlying correspondence in the Administrative Record. After the Schwarzenegger
18 Administration acknowledged Rincon's pending negotiations and promised in writing to resume
19 them in a timely manner, Rincon was ignored with the State's chief negotiator brushing off the
20 delay with the remark that the files had been sent to archives. *See* Declaration of Scott Crowell
21 (Exhibit 97). Even after Rincon formally triggered the mandatory ten-day 'meet and confer'
22 provision in the Compact, the State put off meeting with Rincon for an additional 90-plus days,
23 only to finally schedule a meeting on the very eve of announcing the new compacts.

24
25 ¹² Of course this is the opposite position from what the State took at the time of the initial
26 pleadings on the Tribe's motion for preliminary injunction wherein the State advocated it had no
27 obligation to consider Rincon's interests when negotiating with the Dickstein Coalition. *See*
28 Defendant's Memorandum of Points and Authorities in Opposition to Application for Temporary
Restraining Order (with Notice) Expedited Discovery and Preliminary Injunction (July 2, 2004).

Even assuming the State was not acting maliciously, it still refused to negotiate with Rincon while it changed the landscape of gaming in California. There was an impact to the delay that cannot be undone. The sea change in gaming Compacts created a context shift in negotiations that undermined any bargaining process moving forward. Rincon was asking to be heard by the State during the entire period the State was altering the landscape of gaming. The complete refusal to negotiate with Rincon that occurred while the State was completing the Schwarzenegger Compacts constitutes the type of procedural bad faith that warrants the IGRA remedy. *Cf. Mashantucket Pequot Tribe*, 913 F.2d at 1032.

VI. THE STATE TRIGGERED RENEGOTIATION PROVISIONS REGARDING ENVIRONMENTAL IMPACTS AND FAILED TO CONCLUDE NEGOTIATIONS

The State has not concluded Section 10.8 negotiations in good-faith. *See* First Amended Complaint ¶¶ 92-97. Governor Davis triggered the provisions for renegotiation of environmental impact provisions in the Proposition 1A Compact. *See* February 28, 2003 letter from Governor Gray Davis to John Currier (Exhibit 44); and January 16, 2003 Press Release (Exhibit 91). Rincon met with Governor Davis' negotiation team to discuss those provisions, but no environmental impact amendment proposal was made by the State. *See* Exhibit 81. Rather, on the eve of Governor Schwarzenegger taking office, Davis withdrew the request to negotiate. *See* November 14, 2003 letter from Governor Gray Davis to John Currier (Exhibit 1).

There is no provision for the withdrawal of the requests for renegotiation of Section 10.8 in the Compact. *See* Proposition 1A Compact, Exhibit 42 at § 10.8. Rincon takes the position that Governor Davis' rescission letter lends itself to a strong estoppel argument if the State were to enforce the January 5, 2005 cease and desist date, but relying on the possibility of protection through estoppel is insufficient in this case.

Indeed, Rincon has repeatedly been faced with the State altering its positions with respect to provisions in the Proposition 1A Compacts. For example, the State first took the position that Sides Accountancy could issue device licenses and then later opined that only the California Gaming Control Commission could do so. *See* May 10, 2000 letter from Office of the Governor



1 to Michael Sides (Exhibit 92); February 23, 2001 letter from Robert Mukai to Rene Stwora-Hail
2 (Exhibit 93); August 29, 2000 State of California Executive Order D-31-01 (Exhibit 94); and
3 December 1, 2004 Meeting Minutes of the California Gambling Control Commission
4 (Exhibit 95). The State first required that tribes return licenses that had not been placed in
5 commercial operation on separate devices within one year of the license and then reversed its
6 position so that a single machine could be used to put all the licenses drawn by a tribe into
7 commercial operation by simply assigning each license to that machine for a period of time but
8 not having all licenses in simultaneous commercial operation. *Id.* The Proposition 1A Compacts
9 themselves state a policy of limited gaming, but the State has insisted in this litigation that the
10 State has no such policy. The State has shifted course even during the course of this litigation –
11 while it has suggested in the pleadings that it is not seeking enforcement of the January 1, 2005
12 cease and desist date under Section 10.8, the State has resurrected its demands that the provisions
13 in Section 10.1 be renegotiated in order to secure amendments to Section 4. *See* Exhibit 19. In
14 the face of these repeated changes in course, a letter from the State that is not incorporated into or
15 envisioned by the Compact does not moot the issue or provide Rincon with the protection to
16 which it is entitled by the express terms of the Compact.

17 The Compact itself states that under a request to renegotiate Section 10.8, the cease and
18 desist date provided therein is only avoided if either a new agreement is reached or a court finds
19 the State has failed to negotiate in good-faith. *See* Proposition 1A Compact, Exhibit 42 § 10.8.
20 The State has not offered a simple amendment to the Compact vacating the cease and desist date
21 and has not offered a stipulated judgment concerning its failure to negotiate an amendment to
22 Section 10.8 in good-faith. Consequently, the Court should grant summary judgment and find that
23 the State has failed to negotiate an amendment to the Compact in good-faith.

VII. THE REMEDY FOR THE STATE'S LACK OF GOOD-FAITH NEGOTIATION IS MEDIATION

The remedy for actions to enforce a State to negotiate in good-faith was explained by this Court in its April 11, 2006 Order:

The lawsuit compels the parties to submit their separate proposals to the Mediator who will choose between the proposed compacts. If the State does not accept the Mediator's chosen compact within 60 days, the Secretary of the Interior shall prescribe, consistent with the Mediator's choice and with the terms of IGRA, the conditions upon which the tribe may engage in class III gaming.

See April 11, 2006 Order Granting Defendants' Motion for Protective Order at pp. 15-16 (internal quotations omitted)). In this case, the State's persistent demand for a tax, fee, or other assessment in exchange for a compact amendment, the State's refusal to negotiate a clarifying amendment concerning the number of available gaming devices under Rincon's Compact, and the State's intentional delay in negotiating in order to obtain a material advantage has created a context where the IGRA remedy is the only way to provide meaningful negotiations of the sort envisioned by IGRA.

The parties have reached an insurmountable impasse in negotiations. "If, after negotiation, the parties do not agree upon a compact within the time limits imposed, they shall submit to a mediator appointed by the Court their last, best offers for a compact." *See Yavapai-Prescott Indian Tribe*, 796 F. Supp at 1296. In *Yavapai-Prescott*, the court made it clear that the IGRA was "not merely a procedure to make the Tribe and the State jump through hoops." *Id.* at 1298. The court found that the IGRA procedures created a logical scheme for reconciling the many warring interests at stake. *Id.* Courts have considered the IGRA remedy providing for a sort of forced mediation between the parties to be a "quite modest set of sanctions," which limits the State's exposure for violations of the statute. *See Constantine v. Rectors and Visitors of George Mason University*, 411 F.3d 474, 497 (4th Cir. 2005) (quoting *Seminole Tribe*, 517 U.S. at 75, 116 S. Ct. 1114.) Given the history of negotiations between Rincon and the State, the quite modest



1 IGRA remedy for mediation should be triggered. This remedy is the logical scheme created by
 2 Congress to reconcile the differences.

3 **VIII. CONCLUSION**

4 For all of the above reasons, the State has failed to negotiate in good-faith. Consequently,
 5 Rincon respectfully requests that this Court enter summary judgment finding that the State has
 6 failed to conclude negotiations in good-faith as required by IGRA and order the remedy provided
 7 by IGRA, namely, a Court-appointed mediator. *See* U.S.C. 25 § 2710(d)(7)(A)(i)(B).

8 RESPECTFULLY SUBMITTED this 1st day of June, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2007, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 1, 2007, at Phoenix, Arizona.

Frederick R. Petti
Declarant

s/ Frederick R. Petti
Signature