

1 ROB BONTA
 Attorney General of California
 2 SARA J. DRAKE
 Senior Assistant Attorney General
 3 T. MICHELLE LAIRD
 Supervising Deputy Attorney General
 4 TIMOTHY M. MUSCAT, State Bar No. 148944
 B. JANE CRUE, State Bar No. 210122
 5 Deputy Attorneys General
 1300 I Street, Suite 125
 6 P.O. Box 944255
 Sacramento, CA 94244-2550
 7 Telephone: (916) 210-7779
 Fax: (916) 323-2319
 8 E-mail: Timothy.Muscat@doj.ca.gov
Attorneys for State Defendants

9
 10
 11 IN THE UNITED STATES DISTRICT COURT
 12 FOR THE EASTERN DISTRICT OF CALIFORNIA
 13

14
 15 **ALTURAS INDIAN RANCHERIA, a**
federally recognized Indian tribe,
 16
 Plaintiff,
 17
 v.
 18
 19 **GAVIN NEWSOM, Governor of the State**
of California; and the STATE OF
 20 **CALIFORNIA,**
 21
 Defendants.

Case No. 2:22-cv-01486-KJM-DMC

**STATE DEFENDANTS’
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF THEIR
 MOTION TO DISMISS THE
 COMPLAINT’S SIXTH AND SEVENTH
 CLAIMS FOR RELIEF**

[FRCP 12(b)(6)]

Date: January 27, 2023
 Time: 10:00 am
 Dept: Courtroom 3
 Judge: The Honorable Kimberly L.
 Mueller
 Trial Date: None Set
 Action Filed: 8/22/2022

INTRODUCTION

22
 23
 24
 25
 26 Defendants the State of California (State), and Gavin Newsom, as Governor of the State of
 27 California (Governor) (collectively State Defendants), submit this memorandum of points and
 28 authorities in support of their motion to dismiss pursuant to Federal Rule of Civil Procedure

1 12(b)(6). By this motion, the State Defendants challenge the sixth and seventh claims for relief
2 set forth in the Complaint filed by plaintiff Alturas Indian Rancheria (Alturas or Tribe).

3 The Complaint's first five claims against the State Defendants all allege violations for
4 failing to negotiate in good faith for a class III gaming compact under of the Indian Gaming
5 Regulatory Act (IGRA) 18 U.S.C. §§ 1166-1168; 25 U.S.C. §§ 2701-2721.¹ The Complaint's
6 sixth and seventh claims, however, are based on alleged state-law violations of California
7 Government Code section 12012.25 (Section 12012.25). In the sixth claim, the Tribe alleges that
8 the State Defendants violated Section 12012.25 because the Governor "refused to negotiate a
9 Tribal-State compact that is materially identical to the Model Compact and submit it to the State
10 Legislature." Compl. at ¶ 219. The seventh claim alleges that since the State Defendants violated
11 Section 12012.25 by refusing to negotiate and submit a compact that is materially identical to the
12 Tribe's 1999 compact, the State Defendants failed to negotiate in good faith under IGRA. *Id.* at
13 ¶¶ 223-224.

14 Because Alturas is mistaken in its interpretation of Section 12012.25, the State Defendants
15 respectfully request this Court dismiss the Tribe's sixth and seventh claims for three reasons.
16 First, Alturas' Complaint fundamentally misconstrues Section 12012.25's limited scope, which
17 primarily describes the State's ratification process following the Governor's completion of
18 discretionary negotiations and execution of a tribal-state compact. Simply put, Section 12012.25
19 does not create an entitlement for the Tribe or obligatory duty for the Governor to negotiate and
20 execute what would effectively amount to an automatic IGRA compact. Rather, Section
21 12012.25, entitled "Ratification of tribal-state gaming compacts," ratified fifty-seven tribal-state
22 class III gaming compacts in 1999, and established a ratification process for additional tribes and
23 the State to enter into compacts that are materially identical to the compacts ratified by the statute.
24 Second, even if Section 12012.25 created a new state-law duty for the Governor to negotiate for
25 an automatic IGRA compact, this duty would be inapplicable to a tribe that already possessed a

26 ¹ State Defendants' answer to the first five claims in the Tribe's Complaint is tolled
27 because "[a] timely filed motion to dismiss which addresses only some of the claims tolls the time
28 to respond to the remaining claims under Rule 12(a)(4)." *Hernandez v. Avis Budget Group, Inc.*,
No. 1:17-cv-00211-DAD-EPG, 2018 WL 10323280, at *1 (E.D. Cal. Nov. 2, 2018) (citing *Ruiz v.*
Flores, No. 1:14-CV-00179-AWI, 2015 WL 3730793, at *3 (E.D. Cal. June 12, 2015)).

1 ratified 1999 Compact. Third, even supposing the sixth and seventh causes of action could be
2 construed to allege a claimed right by Alturas to *another* compact with an additional duration
3 period, any such a compact would not be “identical in all material respects” to the compacts
4 ratified in 1999, and the Governor would have no duty to provide the certification required for
5 ratification. See Cal. Gov’t Code § 12012.25(b)(1).

6 **FACTUAL ALLEGATIONS IN THE COMPLAINT’S SIXTH AND**
7 **SEVENTH CLAIMS FOR RELIEF**

8 In the Complaint’s sixth claim for relief, Alturas alleges that “[u]nder California
9 Government Code section 12012.25, Alturas is entitled to negotiate and enter into a Tribal-State
10 compact that is identical in all material respects to the Model Compact.” Compl. at ¶ 217. When
11 such a compact is requested, Alturas argues “the Governor lacks authority to renegotiate material
12 provisions.” *Id.* “Instead, following any negotiation of non-material provisions, the Governor
13 shall submit a copy of the executed compact to the Legislature, which then has the opportunity to
14 reject the compact by a supermajority vote” *Id.* The sixth claim further alleges that the
15 “State refused to enter into negotiations with Alturas for the purpose of entering into a Tribal-
16 State compact that is materially identical to the Model Compact, and refused to conduct such
17 negotiations in good faith. *Id.* at ¶ 218. Similarly, this claim alleges “the Governor refused to
18 negotiate a Tribal-State compact that is materially identical to the Model Compact and submit it
19 to the State Legislature.” *Id.* at ¶ 219.

20 Alturas’ seventh claim mostly repeats the above allegations. The seventh claim alleges that
21 the “Governor refused to negotiate and submit to the State Legislature a Tribal-State compact that
22 is materially identical to the 1999 Compacts in violation of State law.” Compl. at ¶ 223.
23 Likewise, the “State’s refusal to enter into a Tribal-State compact as required by State law is a
24 failure to negotiate in good faith in violation of IGRA.” *Id.* at ¶ 224.

25 Pursuant to the state-law violations alleged in the sixth and seventh claims, the Complaint’s
26 requested relief asks for a judgment “[d]eclaring that the Governor violated California
27 Government Code § 12012.25 by refusing to negotiate and submit to the State Legislature a
28 Tribal-State compact that is materially identical to the Model Compact.” Compl. at ¶ 229.

1 Further, the Tribe alleges that this same state-law violation also constituted a violation of the
2 State’s “duty under IGRA to conduct compact negotiations in good faith.” *Id.* at ¶ 230.

3 **STANDARD OF REVIEW FOR A MOTION TO DISMISS**

4 A Rule 12(b)(6) dismissal “is proper if there is a ‘lack of a cognizable legal theory or the
5 absence of sufficient facts alleged under a cognizable legal theory.’” *Conservation Force v.*
6 *Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (quoting *Balistreri v. Pacifica Police Dep’t*, 901
7 F.2d 696, 699 (9th Cir. 1988)). For a complaint to survive a motion to dismiss, “the non-
8 conclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly
9 suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962,
10 969 (9th Cir. 2009). A court need not accept as true legal conclusions cast in the form of factual
11 allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

12 **SUMMARY OF THE INDIAN GAMING REGULATORY ACT AND**
13 **CALIFORNIA GOVERNMENT CODE SECTION 12012.25**

14 In the context of this case, Alturas’s federal first through fifth claims must allege sufficient
15 facts showing a cognizable claim under IGRA. This law provides a federal “statutory basis for
16 the operation of gaming by Indian tribes” and is an example of “‘cooperative federalism’ in that it
17 seeks to balance the competing sovereign interests of the federal government, state governments,
18 and Indian tribes, by giving each a role in the regulatory scheme.” *Artichoke Joe’s v. Norton*, 216
19 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002), *aff’d*, 353 F.3d 712 (9th Cir. 2003). IGRA accords
20 states “the right to negotiate with tribes located within their borders regarding aspects of class III
21 tribal gaming that might affect legitimate State interests.” *In re Indian Gaming Related Cases v.*
22 *State of California*, 331 F.3d 1094, 1097 (9th Cir. 2003) (*Coyote Valley II*). Class III gaming
23 “includes the types of high-stakes games usually associated with Nevada-style gambling.” *Id.*
24 An Indian tribe is not authorized to operate class III gaming on its lands located in California
25 absent a negotiated compact between the State and the tribe that is approved or deemed approved
26 by the Secretary, or the implementation of “procedures” by the Secretary following a finding of
27 bad-faith negotiating by the State. *Coyote Valley II*, 331 F.3d at 1097-98.

1 A tribe bringing an action under 25 U.S.C. § 2710(d)(7)(A)(i), must show that no tribal-
2 state compact has been entered into, and the state either failed to respond to the tribe’s request to
3 negotiate or did not respond to the request in good faith. 25 U.S.C. § 2710(d)(7)(B)(ii)(II).
4 IGRA requires “good faith” negotiations. *In re Indian Gaming Related Cases v. State of*
5 *California*, 147 F. Supp. 2d 1011, 1020 (N.D. Cal. 2001) (*Coyote Valley I*); *see* 25 U.S.C. §
6 2710(d)(3)(A). It also provides some guidelines for a good-faith determination. A reviewing
7 court “may take into account the public interest, public safety, criminality, financial integrity, and
8 adverse economic impacts on existing gaming activities,” and “shall consider any demand by the
9 State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has
10 not negotiated in good faith.” 25 U.S.C. § 2710(d)(7)(B)(iii)(I) & (II). Reported cases that have
11 analyzed a state’s good faith are adjudicated on motions for summary judgment or motions to
12 dismiss based on the written record. *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*,
13 602 F.3d 1019, 1041 (9th.Cir. 2010) (good faith is “evaluated objectively based on the record of
14 negotiations”); *Wisconsin Winnebago Nation v. Thompson*, 22 F.3d 719, 723 (7th Cir. 1994)
15 (question of bad faith negotiations under IGRA decided on cross-motions for summary
16 judgment).

17 In contrast to IGRA and its federally required duty and guidelines for good-faith
18 negotiations, Section 12012.25 is a state statute that designates the Governor to negotiate and
19 execute compacts, and also establishes the California Legislature’s process for ratifying IGRA
20 compacts negotiated by the Governor with numerous tribes in 1999 and subsequent materially
21 identical compacts that the Governor may sign. Section 12012.25(d) designates the Governor as
22 the “state officer responsible for negotiating and executing” IGRA compacts with federally
23 recognized tribes in California. Cal. Gov’t Code § 12012.25(d). This statute is consistent with
24 the Governor’s state constitutional authority to “negotiate and conclude compacts” Cal.
25 Const., art. IV, § 19(f). In Section 12012.25(a), the California Legislature by statute ratified fifty-
26 seven tribal-state class III gaming compacts that the Governor negotiated and executed in 1999
27 (1999 Compacts). Cal. Gov’t Code § 12012.25(a)(1)-(57). This included Alturas’s 1999
28 Compact. Cal. Gov’t Code § 12012.25(a)(1). In addition to ratifying the 1999 Compacts, Section

1 12012.25(b), established a ratification process for additional compacts “identical in all material
2 respects” to the 1999 compacts and “executed after September 10, 1999” Cal. Gov’t Code §
3 12012.25(b). Such compacts are “hereby ratified” if they are “identical in all material respects to
4 any” of the 1999 Compacts as certified by the Governor, and the compacts are “not rejected by
5 each house of the Legislature” by a supermajority. Cal. Gov’t Code § 12012.25(b)(1) & (2). In
6 addition to the fifty-seven compacts explicitly ratified under Section 12012.25(a), in 2000 the
7 California Legislature ratified five additional compacts through Section 12012.25(b).²

8 Section 12012.25(c) recognizes the right of sovereign tribes to negotiate compacts that are
9 “materially different” from the 1999 Compacts. Cal. Gov’t Code § 12012.25(c). These
10 materially different compacts “shall be ratified by a statute approved by each house of the
11 Legislature” *Id.* “Following completion of negotiations conducted pursuant to subdivision
12 (b) or (c), the Governor shall submit” an executed compact to the California Legislature for
13 ratification, and shall submit a copy of the executed compact to the California Secretary of State.
14 Cal. Gov’t Code § 12012.25(e).

15 In addition to the above-described legislative ratification provisions, Section 12012.25
16 contains other provisions regarding the handling of class III gaming compacts. Section
17 12012.25(f) describes the California Secretary of State’s reporting requirements to the Secretary
18 of the United States Department of the Interior in accordance with IGRA. Finally, Section
19 12012.25(g) provides a project exemption under the “California Environmental Quality Act
20 (Division 13 (commencing with Section 21000) of the Public Resources Code).” Cal. Gov’t
21 Code § 12012.25(g).

22
23
24
25
26
27 ² The five additional compacts are identified by footnote 2 on the California Gambling
28 Control Commission’s (CGCC) chart displaying and making available for download all the class
<http://www.cgcc.ca.gov/?pageID=compacts>.

ARGUMENT

I. THE COMPLAINT’S SIXTH AND SEVENTH CLAIMS FAIL TO ALLEGE ANY COGNIZABLE CAUSE OF ACTION

Alturas’s Complaint alleges five claims for relief against the State Defendants under IGRA. Based on IGRA’s compacting process and the corresponding duty on states to negotiate in good faith, the State Defendants concede that these five claims allege facts sufficient to support cognizable causes of action under IGRA and the merits of those claims can be resolved through cross-motions for summary judgment based upon these parties’ written record of compact negotiations. However, unlike Alturas’s five federal IGRA claims, the Complaint’s sixth and seventh claims based on Section 12012.25 fail to allege any cognizable cause of action for the following three reasons.

First, there is no dispute that under IGRA, Congress set forth a statutory duty for states to negotiate in good faith. 25 U.S.C. § 2710(d)(7)(B)(ii)(II). IGRA provides for a detailed remedial process following a judicial determination that a state failed to negotiate in good faith. 25 U.S.C. § 2710(d)(7)(B)(iii-vii). Significant to this motion to dismiss, none of these statutory duties to negotiate are present in Section 12012.25, and the statute does not instruct the State Defendants in how to negotiate compacts. Rather than creating new or duplicate state requirements for negotiating compacts, Section 12012.25 formally grants the Governor the discretionary authority to negotiate and execute compacts and establishes a state-law compact-ratification process. Cal. Gov’t Code § 12012.25(a)-(d). While Section 12012.25’s plain language requires defined state-ratification procedures, the statute establishes no additional state negotiation requirements or restrictions beyond those set forth in IGRA. The California Legislature did not require the negotiation or execution of compacts materially identical to those ratified by Section 12012.25. Instead, the California Legislature established a process for ratification of subsequent 1999 Compacts, but only if the Governor exercised his discretion to negotiate, execute, and certify such a compact as materially identical. As such, the allegations in Alturas’s sixth and seventh claims regarding any state-law duty for the Governor to negotiate and

1 execute 1999 Compacts—twenty years later—fail to allege any cognizable claim under Section
2 12012.25.

3 Second, even if Section 12012.25 established some undefined duty or requirement on the
4 State or Governor to negotiate and execute tribal-state class III gaming compacts, nothing in the
5 statute would extend this duty to a tribe with a compact expressly ratified pursuant to the statute.
6 Here, there is no dispute that under Section 12012.25(a)(1), the California Legislature has already
7 ratified Alturas’ existing 1999 Compact. Cal. Gov’t Code § 12012.25(a)(1). Because Alturas
8 possesses a ratified 1999 Compact, there could not be any state-law duty on the State to negotiate
9 a duplicative 1999 Compact. Certainly, nothing in Government Code section 12012.25’s
10 ratification provisions mandate such a duplicative compacting process.

11 Third, to the extent that the sixth and seventh causes of action could be construed to allege
12 a claimed right to another 1999 Compact with an additional duration period, any such compact
13 would not be “identical in all material respects” to the 1999 Compacts. See Cal. Gov’t Code
14 § 12012.25(b)(1). Further, the ratification provisions apply only “if the Governor certifies [the
15 compact] is materially identical at the time the Governor submits it to the Legislature.” Cal.
16 Gov’t Code § 12012.25(b)(1). The Ninth Circuit has definitively held that a State has the right to
17 negotiate durational term limits in class III gaming compacts, and that durational term limits are
18 permissible subjects for negotiation under IGRA. *Chemehuevi Indian Tribe v. Newsom*, 919 F.3d
19 1148, 1154 (9th Cir. 2019).

20 For the same reason, Alturas could not amend its Section 12012.25 claims to allege that the
21 Governor had a ministerial duty to “renew” the Tribe’s existing 1999 Compact, or to certify to the
22 California Legislature that such a renewed compact would be materially identical. Under
23 California law, mandate may compel the performance of only a ministerial duty—“an obligation
24 to perform a *specific* act in a manner prescribed by law whenever a given state of facts exists,
25 without regard to any personal judgment as to the propriety of the act.” *People v. Picklesimer*, 48
26 Cal. 4th 330, 340 (2010), emphasis added. Where “the duty is not plain or is *mixed with*
27 *discretionary power* or the exercise of judgment,” mandate “will not issue.” *Mooney v. Garcia*,
28 207 Cal. App. 4th 229, 233 (2012). Here, because the Governor would retain, at the very least,

1 the discretionary power to negotiate over any renewed compact's duration beyond the date
2 provided for in the 1999 Compacts, this Court should not interpret Section 12012.25 to impose
3 any such ministerial duty on the Governor. Moreover, the Governor maintains the discretionary
4 authority under Section 12012.25(b)(1) whether to certify a compact with an additional or new
5 twenty-year term as materially identical. Accordingly, as a matter of law, Alturas' sixth and
6 seventh causes of action cannot support any cognizable claim that the Tribe possesses a state-law
7 right to a new or renewed 1999 Compact with an extended duration.

8 **CONCLUSION**

9 For all the forgoing reasons, the State Defendants request this Court to grant their motion to
10 dismiss the sixth and seventh claims in Alturas's Complaint.

11
12 Dated: November 14, 2022

Respectfully submitted,

13 ROB BONTA
14 Attorney General of California
15 SARA J. DRAKE
16 Senior Assistant Attorney General
17 T. MICHELLE LAIRD
18 Supervising Deputy Attorney General
19 B. JANE CRUE
20 Deputy Attorney General

21 */s/ Timothy M. Muscat*

22
23
24
25
26
27
28
TIMOTHY M. MUSCAT
Deputy Attorney General
Attorneys for State Defendants

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

CERTIFICATE OF SERVICE

Case Name: **Alturas Indian Rancheria v. Gavin Newsom, et al.** No. **2:22-CV-01486-KJM-DMC**

I hereby certify that on November 14, 2022, I caused to be electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**STATE DEFENDANTS’ MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT’S
SIXTH AND SEVENTH CLAIMS FOR RELIEF
[FRCP 12(b)(6)]**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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 November 14, 2022, at Sacramento, California.

Linda Thorpe
Declarant

/s/ Linda Thorpe
Signature