John M. Peebles (Cal. Bar No. 237582)
Patrick R. Bergin (Cal. Bar No. 269672)
Michael A. Robinson (Cal. Bar No. 214666)
Tim Hennessy (Cal. Bar No. 233595)
Steven J. Bloxham (Cal. Bar No. 96384)
Curtis Vandermolen (Cal. Bar No. 338366)
PEEBLES KIDDER BERGIN & ROBINSON LLP
2020 L Street, Suite 250
Sacramento, California 95811
Telephone: (916) 441-2700
Fax: (916) 441-2067
Email: jpeebles@ndnlaw.com

Attorneys for Plaintiff
ALTURAS INDIAN RANCHERIA

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ALTURAS INDIAN RANCHERIA, a federally recognized Indian tribe, Plaintiff, vs. GAVIN NEWSOM, Governor of the State of California; and the STATE OF CALIFORNIA, Defendants.	Case No.: 2:22-cv-01486-KJM-DMC **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** DATE: November 3, 2023 TIME: 10:00 a.m. LOCATION: Courtroom 3, 15th Floor JUDGE: The Hon. Kimberly J. Mueller

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INTRODUCTION

Plaintiff Alturas Indian Rancheria ("Alturas" or the "Tribe") alleges that the Governor and the State (collectively, "State") failed to negotiate in good faith with Alturas for a Tribal-State compact governing the operation of class III gaming under the Indian Gaming Regulatory Act ("IGRA"), Pub. L. 100-497, 25 U.S.C. § 2701 *et seq*.

Last year, the Ninth Circuit decided that many of the State's similar demands made to other Indian tribes were unlawful. On those issues, this Court should grant Alturas' Motion for Summary Judgment ("Motion") without further analysis. Alturas further contends that the State's demands to control the Tribe's workforce, water quality, and food and beverage service are unlawful for the reasons articulated by the Ninth Circuit. The Motion should be granted concerning these claims.

Moreover, Alturas contends that the State unlawfully attempted to impose taxes, fees, charges, or other assessments on the Tribe in violation of IGRA. The State disregarded Ninth Circuit precedent that such taxes are unlawful and failed to offer Alturas any concessions to rebut the presumption that the State unlawfully attempted to impose the taxes on Alturas. This Court should grant Alturas' Motion on these claims.

As the remedy for the State's failure to negotiate with Alturas in good faith, IGRA requires the Court to order the State and Alturas to conclude a Tribal-State compact within sixty days. The Court's order should provide the State and Alturas with explicit direction regarding all of the claims and issues raised to encourage such cooperative resolution, and to ensure that if the Court appoints a mediator after the sixty-day period such mediator has a clear understanding of the law.

STATEMENT OF FACTS

The relevant facts of this case are set forth in the parties' Joint Statement of Undisputed Facts ("JSUF") and the Joint Record of Negotiations ("RON") filed in this action. Such facts will not be repeated here, but, rather, shall be incorporated by this reference and in the following analysis as if set forth here in full.

LEGAL STANDARD

A court shall grant a motion for summary judgement when there is no genuine dispute as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ.

P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In ruling on a motion for summary judgment, a court construes the evidence in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378-380 (2007).

ARGUMENT

The Joint Record of Negotiation ("RON," Doc. No. 45) provides evidence that the State failed to negotiate a compact in good faith. § 2710(d)(7)(B)(ii).[1] The burden of proof to defeat this Motion therefore shifts to the State "to prove that the State has negotiated with [Alturas] in good faith to conclude a Tribal-State compact governing the conduct of gaming activities." *Id.* The State must prove: (1) the entirety of each demand falls within the seven negotiable topics at § 2710(d)(3)(C); and, if so, (2) considering the good faith factors at 2710(d)(7)(B)(iii)(I) the State objectively negotiated in good faith. *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 1035-1037 (9th Cir. 2022) ("*Chicken Ranch*"). There is no dispute over the material facts regarding the State's demands, and these two conditions are questions of law.

If the State carries the foregoing burden, it must further prove for any revenue demand that either (1) the revenue is necessary to defray the State's cost of regulating Alturas' class III gaming activities, or (2) the State offered concessions that are meaningful to Alturas as an incentive to negotiate. §§ 2710(d)(3)(C)(iii) & 2710(d)(4); *Chicken Ranch*, 42 F.4th at 1045, 1047-1048.

In this case, the State is unable to meet its burden on any front. The State's demands were not within the seven exhaustive topics of negotiation authorized by IGRA and therefore the State did not negotiate in good faith as a matter of law. Even if all the State's demands were within the topics of negotiation, the State's conduct was not objectively in good faith, because the State refused to eliminate compact terms that were the subject of Secretarial disapproval and the State engaged in surface bargaining. Further, the State cannot introduce evidence that its revenue demands were tied to the cost of implementing Alturas' Compact and the State never offered

[1] All statutory references are to Title 25 of the U.S. Code unless otherwise indicated.

concessions for Alturas' consideration, let alone meaningful concessions. Therefore, the Court should grant summary judgment to Alturas on each claim.

I. The Indian Gaming Regulatory Act Limits the Topics the State can Negotiate and Requires the State to Negotiate in Good Faith.

IGRA limits the topics the State can negotiate to those expressly stated in § 2710(d)(3)(C). "This list of seven topics… is exhaustive. *Chicken Ranch*, 42 F.4th at 1034. The seven negotiable topics are:

> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
> (v) remedies for breach of contract;
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
> (vii) any other subjects that are directly related to the operation of gaming activities.

§ 2710(d)(3)(C). Every compact provision within these seven negotiable topics must be "directly related to the operation of gaming activities." *Chicken Ranch*, 42 F.4th at 1034, 1035-1036, 1038, 1046, & 1048 ("the preceding six topics are *themselves* 'directly related to the operation of gaming activities.'"). Such direct relationship is further limited by narrow construction of "[t]he referent phrase—'the operation of gaming activities.'" *Id.* at 1037. Compact provisions must directly relate "to the operations of the gaming activities themselves, not to anything that may happen on tribal lands simply because the tribe has endeavored to build a casino there." *Id.*; *see also Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 792 (2014) ("'gaming activity' is what goes on in a casino—each roll of the dice and spin of the wheel").

The State is required to negotiate with the Tribe in good faith. § 2710(d)(3)(A). State demands that go beyond the seven negotiable topics are *per se* not in good faith. §§ 2710(d)(3)(A) & 2710(d)(7)(A)(i); *Chicken Ranch*, 42 F.4th at 1034 ("We further hold that when… a state seeks to negotiate for compact provisions that fall well outside IGRA's permissible topics of negotiation,

1 the state has not acted in good faith."). The State's good faith justifications are not relevant to
2 whether the topic of negotiation is permitted by IGRA. The good faith factors,
3 § 2710(d)(7)(B)(iii)(I), apply only after the Court has determined that the State's demand is within
4 the seven negotiable topics. *Id.* at 1045-1046, 1048 ("we do not further analyze the good faith
5 factors in § 2710(d)(7)(B)(iii)(II) when it comes to off-list topics"). Demanding a provision outside
6 the seven negotiable topics is "definitive proof that a state did not fulfill its good-faith duty," and
7 no justification based on any consideration listed in § 2710(d)(7)(B)(iii)(I), changes that
8 conclusion. *Id.* at 1043.

9 The State cannot offer "meaningful concessions" to the Tribe to support demands that
10 exceed the seven negotiable topics. *Chicken Ranch*, 42 F.4th at 1045 ("a 'meaningful concessions'
11 analysis only applies within the context of § 2710(d)(4)…"), 1048 ("even when a state seeks to
12 negotiate a topic within § 2710(d)(3)(C), a meaningful concessions requirement still only applies
13 to demands for taxes, fees, or other revenue-sharing provisions."). Revenue demands call for a
14 two-step process where the Court first determines whether the demand is within the negotiable
15 topics and then, if so, determines whether the State offered meaningful concessions.

16 Every compact provision proposed by the State must be both directly related to the
17 operation of the Tribe's class III gaming activities, and completely within the seven negotiable
18 topics. Otherwise, the State failed to negotiate in good faith. Any State demand for payments as a
19 condition of gaming, except reimbursements for the State's necessary implementation and
20 oversight costs directly related to the Tribe's compact, must also be accompanied by State
21 concessions that are meaningful to Alturas.

22 **II. The Record of Negotiation Demonstrates that the State Did Not Respond to**
23 **Alturas' Request to Negotiate a Tribal-State Compact in Good Faith.**

24 The RON includes substantial evidence that the State did not negotiate with Alturas in good
25 faith. The State's lack of good faith can be categorized as (a) the State's demand that Alturas
26 negotiate provisions that exceed the limited topics of negotiation in § 2710(d)(3)(C), (b) the State's
27 demands for taxes, fees, charges, or other assessments that are prohibited by § 2710(d)(4), and (c)
28 the State's lack of good faith by surface bargaining.

a. <u>Unlawful Subjects of Negotiation.</u>

i. <u>The Court should grant summary judgment to Alturas on topics of negotiation decided by the Ninth Circuit that are not permitted by IGRA.</u>

The State demanded that Alturas negotiate topics that are the same as those the Ninth Circuit determined were outside the permissible topics of negotiation in § 2710(d)(3)(C). These demands are *per se* not in good faith. *Chicken Ranch*, 42 F.4th at 1034.

The State demanded that Alturas negotiate the following impermissible topics in each of its proposed Tribal-State compacts: (1) incorporating significant aspects of California environmental law as tribal law (RON Tab 51 ("State's Compact Draft") § 11.2, and Tabs 14, 15, and 28; *see Chicken Ranch* at 1037); (2) prohibiting Alturas from commencing any construction on a "Project," broadly defined, until environmental procedures and dispute resolution procedures are completed (State's Compact Draft §§ 2.27, 11.1; *see Chicken Ranch* at 1037-38); (3) requiring Alturas to prepare environmental reports on air quality, water resources, traffic, public services, hazardous materials, and noise (State's Compact Draft §§ 11.5-11.7 & 11.11-11.15; *see Chicken Ranch* at 1038); (4) requiring Alturas to consent to elaborate reporting requirements and dispute resolution mechanisms for disputes between Alturas and local governments (State's Compact Draft, *inter alia*, §§ 11.8-11.10, 11.16-11.18; *see Chicken Ranch* at 1038); (5) requiring Alturas to enter into intergovernmental agreements with local governments before commencing any Project (State's Compact Draft § 11.15; *see Chicken Ranch* at 1038); (6) requiring Alturas to follow State-prescribed tort law (State's Compact Draft § 12.5; *see Chicken Ranch* at 1038); and (7) requiring Alturas to waive its sovereign immunity for tort claims far beyond those directly related to the operation of class III gaming activities (State's Compact Draft § 12.5; *see Chicken Ranch* at 1038). The Ninth Circuit held that these impermissible topics of negotiation require the Court to decide that the State failed to negotiate in good faith. *Chicken Ranch* at 1045-46.

ii. <u>The Court should grant summary judgment to Alturas on topics of negotiation that are subject to the same reasoning applied by the Ninth Circuit in *Chicken Ranch*.</u>

The State demanded that Alturas negotiate other topics that are not permitted by IGRA, based on the reasoning in *Chicken Ranch*. Specifically, the State demanded that Alturas negotiate: (1) food and beverage standards based on California law for its restaurant facilities (State's

Compact Draft § 12.3(a)); (2) water quality standards set by California, including inspection by State workers, for its facilities (State's Compact Draft § 12.3(b)); (3) employment laws regarding anti-discrimination, anti-harassment, and anti-retaliation based on California law for employees that are performing work not directly related to the operation of class III gaming (State's Compact Draft § 12.3(f)); (4) unemployment and disability insurance based on California law for employees that are performing work not directly related to the operation of class III gaming (State's Compact Draft § 12.6); and (5) licensing of Alturas' employees who are not key gaming employees or primary management officials, and who are performing work not directly related to the operation of class III gaming (State's Compact Draft §§ 2.12, 6.4.1, & 6.4.3).

Like the State's demands that the Ninth Circuit decided were not permissible topics of negotiation, these provisions incorporate State law to control Alturas' business operations, including extending State law to employees that are not involved in the playing of class III games (gaming activities) such as janitors, parking lot attendants, and restaurant servers. In *Chicken Ranch*, the Ninth Circuit held that such broad regulation of an Indian tribe's business operations is not permitted under IGRA. These State demands are further grounds for the Court to decide that as a matter of law, the State failed to negotiate in good faith. *Chicken Ranch*, 42 F.4th at 1049.

b. <u>Unlawful Taxes, Fees, Charges, or Assessments.</u>

In determining whether taxes, fees, charges, or other assessments ("Payments") that the State demands violate IGRA, the Court must apply a two-step analysis. First, the Payments must fall within the seven negotiable topics under § 2710(d)(3)(C). *Chicken Ranch*, 42 F.4th at 1048 (the court is "careful to address meaningful concessions only *after* concluding that the disputed provisions fell within the scope of permissible negotiation subjects under § 2710(d)(3)(C)." [emphasis in original]). Then, for Payments that are directly related to the Tribe's class III gaming activities, the Court must evaluate whether the State's demand violates the express prohibition at § 2710(d)(4).

If the Payment is an assessment by the State of the Tribe's class III gaming activities "in such amounts as are necessary to defray the costs of regulating such activity," then it is permitted. § 2710(d)(3)(C)(iii). Otherwise, the "State or any of its political subdivisions [shall not] impose any tax, fee, charge, or other assessment…." §§ 2710(d)(4). Courts "shall consider any demand by

1 the State for direct taxation of the Indian tribe… as evidence that the State has not negotiated in
2 good faith." § 2710(d)(7)(B)(iii)(II). The State is presumed to have unlawfully imposed the
3 Payment, but it may "avoid 'imposing' such improper taxes" by offering meaningful concessions
4 to entice Alturas to negotiate with the State. *Chicken Ranch*, 42 F.4th at 1048-1049.

5 **i. The State's demands for Payment are not within the seven**
6 **negotiable topics.**

7 None of the Payments the State demanded from Alturas fall within the exception at
8 § 2710(d)(3)(C)(iii) or any other permissible subject of negotiation. There is no direct linkage
9 between any of the Payments and the "amounts as are necessary to defray the costs" of the State's
10 regulation of the Tribe's class III gaming activities. § 2710(d)(3)(C)(iii) (emphasis added). And
11 the State's proposed uses of the Payments are not directly related to the operation of the Tribe's
12 class III gaming activities. § 2710(d)(3)(c)(vii).

13 The State's demand for broad use of Alturas' Special Distribution Fund ("SDF") payments,
14 the State's historic misuse of SDF funds, and the lack of statutory controls on the State's use of
15 SDF funds all demonstrate that the SDF is a tax, fee, charge, or other assessment that violates
16 IGRA. The State's conversion of SDF funds for Revenue Sharing Trust Fund ("RSTF") purposes,
17 and its expansion of the State's role well beyond the limited administrative trustee of the RSTF as
18 established in the 1999 Compacts, makes the State's demand that Alturas pay into the SDF a tax,
19 fee, charge, or other assessment that violates IGRA. Finally, the State's establishment and control
20 over Tribal Nation Grant Fund ("TNGF") funds, and its conversion of SDF and RSTF funds for
21 TNGF purposes, is an unlawful tax, fee, charge, or other assessment that violates IGRA.

22 **Payments into the Special Distribution Fund.**

23 The Ninth Circuit previously decided that the State's SDF included permissible Payments
24 under § 2710(d)(3)(C)(iii) as one of the five elements constituting the SDF. *In re Indian Gaming*
25 *Related Cases* ("*Coyote Valley II*"), 331 F.3d 1094, 1114 (9th Cir. 2003). However, the SDF
26 provision analyzed in *Coyote Valley II* required payments for regulatory costs specifically related
27 to the compacting Indian tribe's gaming activities. *Id.*; 1999 Compact § 5.2 (RON Tab 70 at p.
28 1066) ("in connection with the implementation and administration of the Compact," where
Compact is defined as only Alturas' Tribal-State compact). That is no longer the case.

Instead, the State demanded that the Tribe pay for the aggregated costs of the State's regulation of all tribal gaming activities. *See* State Compact Draft § 4.3. Therefore, the entirety of the State's SDF Payment demands are no longer necessary for implementing the Tribe's Compact—they require the Tribe to pay for the State's regulation of other Indian tribes' gaming activities—and the entire SDF now falls outside of the statutory exception at § 2710(d)(3)(C)(iii). The State's demand that the Tribe pay into the SDF must instead fall within the catchall at § 2710(d)(3)(C)(vii) and be accompanied by meaningful State concessions. *See* § 2710(d)(4) (providing an exception only for Payments under § 2710(d)(3)(C)(iii)).

None of the Payments the State demanded that Alturas pay into the SDF are directly related to the operation of the Tribe's class III gaming activities. § 2710(d)(3)(C)(vii). Not only must the SDF itself be directly related to the operation of the Tribe's gaming activities, because the State has discretion to move funds from the SDF to the RSTF (State's Compact Draft § 4.4(d)) and from there to the TNGF (State's Compact Draft § 5.1(a)), the failure of any one fund to meet such requirement necessarily causes the failure of all funds to meet the requirement. See discussion of the RSTF and TNGF, *infra*.

The State's demand for Payments into the SDF is now based on an aggregate of State costs ostensibly related—in any way—to Indian gaming statewide. Three audits from the State Auditor, and findings by the Secretary of the Interior ("Secretary"), have conclusively demonstrated that the State has no internal controls to ensure that the Tribe's gaming revenues are properly used to defray the State's costs of administering its compact and to compensate local governments for the impacts of its gaming operation. State law establishing the SDF also provides evidence of the State's intent to use the Tribe's gaming revenues as a form of general fund, limited only to "any other purpose specified by law." Gov. Code § 12012.85(f). For more than fifteen years, according to the Auditor's reports, the State has only followed State law and has misused SDF funds. Despite these repeated findings that tribal gaming revenues in the SDF were misused, there is no evidence the State has ever repaid any of the unlawfully distributed funds to the SDF.

In 2007 the Auditor reported that half of the State's grants to local governments from SDF funds were misused. RON Tab 115, pp. 2, 22-26. The Auditor found that "there are no specific requirements that local governments must ensure that the funds are used for projects that directly

address an impact from the casinos." *Id*. at p. 2. The Auditor further found that local governments were holding SDF funds in accounts and were not using "interest earned on grants to pay expenses related to the projects for which the grants were intended, or for other casino mitigation projects." *Id.* at pp. 2, 29-31. Interest receipts were used for general fund purposes. Two-thirds of counties informed the Auditor that they disagreed with the Auditor's conclusion that SDF funds must be used for casino mitigation projects; four percent of counties did not submit reports on their use of funds at all. *Id*. at pp. 6, 17, 35-36.

In 2011 the Auditor again found that half of the State's grants to local governments from SDF funds were misused. RON Tab 116 at pp. 1 ("the local government either could not provide evidence of, or could not quantify, the impact of a local casino."), 21-28. The Auditor concluded that "the counties continue to have difficulty in complying with distribution fund grant requirements and with related laws." *Id*. The Auditor further noted that the State Department of Justice ("Justice") used SDF Funds for, *inter alia*, monitoring Indian gaming practices through the Division of Public Rights, and advising the Governor on "compact negotiations and Indian law issues." *Id*. at p. 13. These uses of SDF funds by Justice are not directly related to the regulation and oversight of any Indian tribe's Tribal-State compact or their class III gaming activity.

Last year, the Auditor issued a third report reviewing the SDF. Report 2021-102 (Aug. 2022).[2] The Auditor found, *inter alia*, "the State has allowed the distribution fund to accumulate an excessive reserve… [and] the State has not ensured that tribal payments align with its regulatory costs." *Id*. at pp. 1-2. The Auditor found that the State loaned money from the SDF for purposes not related to Indian gaming (to the Charity Bingo Mitigation Fund) in the 2008-2009 fiscal year and failed to repay $2 million plus interest over the following twelve years. *Id*. at p. 11. Adding to its earlier finding that Justice misused SDF funds, the Auditor found that "Justice had inappropriately charged the distribution fund for 27,000 hours of nontribal gaming enforcement activities… and that it has continued to inappropriately charge the distribution fund for a range of nontribal activities." *Id*. The hours Justice spent on nontribal activities were also underreported by as much as 26%. *Id*. at p. 18. Moreover, Justice staff were <u>instructed</u> to charge nontribal activities

[2] A Request for Judicial Notice of the August 2022 Auditor's report is submitted herewith, along with a copy of the report.

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to the SDF in some instances. *Id*. at p. 19. The State also could not justify its SDF expenditures on problem gambling programs and spent unreasonable amounts on expenses like catering services. *Id*. at pp. 21-22, 27-33.

The Secretary also found that the SDF provisions would require the Tribe to pay for all legislative appropriations related in any way to tribal gaming. *See* RON Tab 101 at p. 2148; State's Compact Draft §§ 4.3(a), (b). These appropriations include the State's costs for preventing Indian tribes from conducting gaming in the State and for compact negotiations, among other expenditures unrelated to the operation of class III gaming activities under existing compacts. *Id*. The State's litigation against other Indian tribes to prevent them from conducting gaming is not directly related to each roll of the dice and spin of the wheel in the Tribe's gaming operation.

The State's present demand that the Tribe broaden the allowable uses of SDF funds reinforces that the State will continue using SDF funds for purposes that are neither (1) necessary to defray its regulatory costs, § 2710(d)(3)(C)(iii), nor (2) directly related to the operation of gaming activities, § 2710(d)(3)(C)(vii). Therefore, absent appropriate controls, the State's demand that the Tribe make Payments into the SDF is a prohibited tax, fee, charge, or other assessment, § 2710(d)(4), and constitutes evidence that State did not negotiate in good faith, § 2710(d)(7)(B)(iii)(II).

SDF Transfers into the Revenue Sharing Trust Fund Invalidate Both Accounts.

Similarly, the State's revisions to the Revenue Sharing Trust Fund ("RSTF") change the nature of the RSTF as compared to the uses approved in *Coyote Valley II* and *Rincon*, and remove the RSTF from the permissible topics of negotiation. The Ninth Circuit stated, "[w]hether revenue sharing is an authorized negotiation topic under § 2710(d)(3)(C)(vii) thus depends on the *use* to which the revenue will be put…." *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1033 (9th Cir. 2010). A State demand that Alturas pay into the State's General Fund is impermissible because it "has undefined potential uses." *Id*. On the other hand, the "fair distribution of gaming opportunities… [is] directly related to gaming." *Id*., *citing Coyote Valley II*, 331 F.3d at 1111, 1114. When the Ninth Circuit found the RSTF to be directly related to gaming in 2003, the State was prohibited from using RSTF funds for any purpose other than providing $1.1 million annually (and equally) to all non-gaming and limited-gaming Indian tribes. *Coyote*

Valley II, 331 F.3d at 1111; 1999 Compact § 4.3.2.1(b) (RON Tab 70 at p. 1062-63) ("The Commission shall have no discretion with respect to the use or disbursement of the trust funds."). The State was merely a limited administrative trustee for a revenue sharing agreement between Indian tribes. The State received no benefit from the RSTF.

The State demanded that Alturas authorize the State to transfer funds from the RSTF into the newly created TNGF at its discretion—thereby granting the State control over the use of gaming revenues where it previously had none. Further, the TNGF does not fairly distribute gaming opportunities among all non-gaming Indian tribes (see below). Thus, the State's demands in negotiations with the Tribe would change the purpose and use of RSTF Payments, blurring the distinction between the State's role as limited trustee of the RSTF in an intertribal agreement, and the State's discretionary control over the same Payments deposited or transferred into the TNGF.

The RSTF provisions the State demanded are no longer within the seven negotiable topics at § 2710(d)(3)(C) and the State did not negotiate with Alturas in good faith.

RSTF Transfers into the TNGF Invalidate the SDF, RSTF, and TNGF.

The TNGF is a wholly new revenue sharing scheme created by the State without any input from Alturas which is not directly related to the operation of gaming activities. *Cf. Coyote Valley II*, 331 F.3d at 1113 (the origin of the RSTF was the "tribe-drafted and tribe-sponsored Proposition 5… Every other compacting tribe in California has agreed to the provision."). Unlike the original RSTF, the TNGF does not fairly and equally distribute gaming opportunities to support the economic development of non-gaming Indian tribes. *See id.* at 1111. Rather, the State has unilateral discretion to award funds from the TNGF to one (or more) Indian tribe(s) that the State determines meets State policy priorities for tribal governmental and economic development. *See* Gov. Code § 12019.35; RON Tab 121; State's Compact Draft § 5.1(b). General funding for a single Indian tribe's State-sanctioned development is not a fair distribution of gaming opportunities and is not directly related to Alturas' gaming activities or the purposes of IGRA to improve tribal sovereignty and self-sufficiency.

Whereas the RSTF was an agreement between Indian tribes, and proposed by the Tribes in 1999, the State created the TNGF on its own without any input or agreement from Alturas or even a majority of Indian tribes with gaming operations. The State controls the distribution of funds

1 from the TNGF. Gov. Code §§ 12019.35-12019.90. The State establishes application processes
2 for TNGF funding, decides which tribal applications fulfill the State's preferred purposes, appoints
3 individuals to evaluate tribal applications based on State criteria, and provides Indian tribes only a
4 "consultation" role in the use of TNGF funds. Like the State's demand for SDF payments, State
5 law does not limit the use of TNGF funds to payments (1) necessary to defray the cost of regulating
6 Alturas' gaming operation, or (2) directly related to the operation of gaming activities. Unlike the
7 RSTF as evaluated by the Ninth Circuit in *Coyote Valley II*, the TNGF does not fairly distribute
8 opportunities for all California Indian tribes to benefit from class III gaming activities.

9 Allowing the State to establish priorities and goals for tribal governments is a usurpation
10 of sovereignty, not in support of it. The State simply established a new system of paternalism and
11 colonialism under another moniker that invokes support for Indian tribes. The Ninth Circuit has
12 stated as much—the State cannot use Tribal-State compacts to impose its policy preferences for
13 tribal development on Indian tribes. *See Chicken Ranch*, 42 F.4th at 1029 ("Through its negotiating
14 demands, California effectively sought to use the Class III contracting process as leverage to
15 impose its general policy objectives on the Tribes, which the state may not do.").

16 As in *Rincon*, the State has nearly unlimited discretion to grant TNGF funds for undefined
17 potential uses. *Rincon*, 602 F.3d at 1033. In *Rincon*, the Ninth Circuit held that the State's broad
18 discretion over the use of revenue sharing funds made the State's demands unrelated to the tribe's
19 operation of class III gaming activities and therefore outside of the permissible topics of
20 negotiation. Although the State's use of TNGF funds is limited to allocations for Indian tribes to
21 implement the State's preferred programs, the potential uses of the TNGF are nearly as broad as
22 those the *Rincon* court decided are impermissible.

23 Put simply, tribal government activities are not synonymous with Indian gaming activities.
24 Alturas acknowledges that tribal governmental development has been possible (in part) because of
25 the revenues derived from class III gaming activities. But an Indian tribe's use of gaming revenues
26 to support governmental services to its citizens does not turn governmental activities into gaming-
27 related activities. Indeed, the Ninth Circuit has expressly disapproved of the State's effort to
28 establish just such a "but for" test. *See Chicken Ranch*, 42 F.4th at 1036 (citing *Rincon*, 602 F.3d

1032-1033). The Tribal Nation Grand Fund is not a permissible subject of negotiation under § 2710(d)(3)(C), and the State did not negotiate with Alturas in good faith.

ii. The State Attempted to Impose Taxes, Fees, Charges, or Other Assessments.

The State demanded that Alturas agree to Payments that violate IGRA's prohibition at § 2710(d)(4). The State demanded that Alturas pay into the SDF, and authorize the State to transfer SDF funds into the RSTF and TNGF. Even if the Court could decide that any one of those funds is a permissible topic of negotiation, the State imposed its demands on Alturas over its objections and without offering concessions that were meaningful to Alturas.

In *Chicken Ranch*, the Ninth Circuit reiterated that the State may defend its demands for payment by demonstrating that the State offered meaningful concessions to Alturas as enticement for the Tribe to negotiate revenue sharing payments. The question is whether the State "imposed" the Payments on Alturas. § 2710(d)(4). If Alturas objects to paying any tax, fee, charge, or other assessment, the State may not refuse to negotiate the permissible terms of a Tribal-State compact enumerated at § 2710(d)(3)(C). *Rincon*, 602 F.3d at 1028 ("No state may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority… to impose such a tax, fee, charge, or other assessment."); § 2710(d)(4).

The State imposed the payments on Alturas, because (1) the State did not offer meaningful concessions, and (2) the State continued to demand the payments after Alturas objected. The Court "shall consider any demand by the State for direct taxation of the Indian tribe… as evidence that the State has not negotiated in good faith." § 2710(d)(7)(B)(iii)(II). Nowhere in the RON is there any evidence that the State proposed meaningful concessions to Alturas as enticement for the Tribe to negotiate Payments. The lack of evidence is conclusive that the State did not negotiate in good faith by imposing taxes, fees, charges, or other assessments on Alturas.

The State continues to argue that exclusivity is a meaningful concession the State may offer the Tribe. But the Ninth Circuit already rejected the State's argument that "it would be unfair to permit [the tribe] to keep the benefit of exclusivity conferred by Proposition 1A without holding the tribe to an ongoing obligation to periodically acquiesce in some new revenue sharing demand." *Rincon*, 602 F.3d at 1037. Rather, the Ninth Circuit decided that the State's concession of

exclusivity is an integral part of the 1999 Compacts. Once those compacts expire, exclusivity cannot support further State demands for revenue sharing. *Id.* More specifically, the court stated that outside the context of the 1999 Compacts:

> "[E]xclusivity" is not a new consideration the State can offer in negotiations because the tribe already fully enjoys that right as a matter of state constitutional law. Moreover, the benefits conferred by Proposition 1A have already been used as consideration for the establishment of the RSTF and SDF in the 1999 Compact. [Citation]. It is elementary law that giving a party something to which he already has an absolute right is not consideration to support that party's contractual promise.

Id.

That, in 1999, the State bargained for what amounts to promoting a permanent change in its bargaining position is neither Alturas' fault nor material to future compact negotiations. *See id.* at 1037-1038. Now, without regard to the terms of a new compact, Alturas enjoys exclusive gaming rights under the State Constitution. *Id.* at 1037. Thus, any promise by the State to give the Tribe exclusivity is an illusory promise. The State cannot renew its promise to promote a constitutional amendment for tribal gaming exclusivity—such provision already exists. The State also cannot promise to not revoke such exclusivity, because the power of amendment rests exclusively with the people of the State. Because any change to the Tribe's constitutional right to exclusivity is "extremely unlikely," and by the people's consent, the State can make no binding promise regarding exclusivity in compact negotiations. *Rincon*, 602 F.3d at 1038.

There is no evidence in the RON that the State offered anything other than exclusivity to the Tribe. Regardless, even if the State could point to some evidence of meaningful concessions, the State continued to attempt to impose Payments on Alturas over its objections. The State's continued demands for Payment after the Tribe exercised its statutory right to object is evidence that the State did not negotiate in good faith. §§ 2710(d)(4) & 2710(d)(7)(B)(iii)(II).

III. Decisions by the Secretary of the Interior are Due Deference and Preclude the State from Relitigating Settled Issues with Alturas.

The Secretary has issued dozens of written decisions to the State describing which compact provisions are not within the seven negotiable topics under IGRA. Under the *Chevron* doctrine, the Court should defer to the Secretary's permissible interpretation of IGRA. Moreover, the State's

strategic choice to not request judicial review of the Secretary's decisions precludes it from now litigating those issues to Alturas' detriment.

a. <u>The Secretary's Reasoned Decisions are Due *Chevron* Deference.</u>

Under the *Chevron* doctrine, a federal court must accept an agency's construction of a federal statute "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001), "the statute is silent or ambiguous with respect to the specific issue, [and] the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984). Informal agency adjudications are likewise entitled to deference. *Barnhardt v. Walton*, 535 U.S. 212, 222 (2002); *see Hall v. United States Dep't of Agric.*, 984 F.3d 825 (9th Cir. 2020) (applying *Barnhardt* factors) and *Forest County Potawatomi Cmty. v. United States*, 330 F.Supp.3d 269, 281 (D.D.C. 2018) (applying *Barnhardt* factors, concluding *Chevron* deference applies to the Secretary's interpretation of IGRA in a Tribal-State compact Disapproval Letter). Finally, an agency's later interpretation of an ambiguous statute prevails over the court's prior decision. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). The Secretary's discretionary decisions regarding a specialized area of law where the Secretary has unique expertise satisfy all of the requirements for deference.

Congress charged the Secretary with the administration of Indian affairs generally, §§ 2 & 9, and the review of Tribal-State compacts under IGRA in particular, § 2710(d)(8). *See Mead* at 226-27. Exercising the authority granted by Congress, the Secretary reviews Tribal-State compacts for violations of IGRA, § 2710(d)(8)(B)(i), including whether the compact includes provisions beyond the scope of negotiable topics as set forth in § 2710(d)(3)(C). *Id.* Congress provided the Secretary with standards for review in § 2710(d)(3)(C) and left the interpretation of those standards to the Secretary by choosing not to define the phrase "directly related." *See Chevron* at 842-43 (*Chevron* Step 1 asks whether the statute is "silent or ambiguous with respect to the specific issue"). The Secretary's "Deemed Approved Letters" and "Disapproval Letters" are agency action that construes an ambiguous term in IGRA based on the statutory language, its purposes, its legislative history, and relevant considerations such as the Secretary's trust responsibility to Indian tribes. *Id.*

The Secretary's purposeful decision to rely on § 2710(d)(8)(C) results in the compact being "considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter" ("Deemed Approved"). *Id*. These "Deemed Approved" letters from the Secretary frequently identify and analyze provisions of the compact that do not comply with IGRA. *See*, *e.g.*, RON Tab 85, pp. 2035-36 ("caution[ing] the parties not to apply compact terms "in a manner that does not directly relate to the operation of gaming activities"); RON Tab 84, p. 2023 (determining that provisions regarding food and beverage service and water quality "attempt to regulate activities outside the scope of those prescribed under 25 U.S.C. § 2710(d)(3)(c)").

The Secretary's approval is required before a Tribal-State compact is effective. The Secretary's interpretation of § 2710(d)(3)(C) in these Deemed Approved decisions is central to this comprehensive and detailed regulatory scheme. The Secretary's interpretations inform the State and the Tribe of the lawful interpretation of IGRA's ambiguous provisions and are precedent for subsequent Secretarial decisions.

The frequent basis for the Secretary's decisions is that the statutory phrase "directly related to class III gaming activities" does not include other expansive tests such as "principal purpose" or "but for." The Secretary's determination is a permissible interpretation of the term "directly related." *Chevron*, *supra* (*Chevron* step 2 asks whether the agency's interpretation is permissible). Not only is the Secretary's interpretation permissible but it is also consistent with Congress' purposes in passing IGRA, IGRA's legislative history, the Secretary's trust responsibility, and the Ninth Circuit's reasoning and conclusion in *Chicken Ranch*. 42 F.4th at 1039-40. Under the *Chevron* doctrine, the Secretary's reasoned decisions must be given deference by the Court.

b. <u>The Secretary's 2022 Approvals Do Not Offer a Reasoned Explanation for the Secretary's Decision.</u>

After Alturas' Complaint was filed, the Secretary affirmatively approved two Tribal-State compacts between the State of California, and the Santa Rosa Indian Community and Tejon Indian Tribe. Those compacts include some of the unlawful provisions described in this Motion, but they have no interpretive or deferential effect on this litigation. The Secretary's November 2022 decisions are devoid of any substantive analysis and do not provide an alternative reasoned

interpretation of the statute that changes or refutes the Secretary's prior decisions. The 2022 letters are entirely conclusory, and their contents do not evince "careful consideration" of the issues. *See Barnhardt* at 222; *Hall*, 984 F.3d at 836; *Sierra Club v. Trump*, 929 F.3d 670, 693 (9th Cir. 2019). To the extent the Court requires further analysis of the potential effect of the Secretary's November 2022 approvals on the State's objective good faith at the time negotiations occurred, Alturas requests an opportunity to fully brief the Court.

c. <u>The State is Precluded from Litigating Secretarial Decisions.</u>

The State is bound by each reasoned Deemed Approval and Disapproval decision by the Secretary, absent a successful judicial challenge. *See Astoria Federal Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991) ("We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality."); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971) (abrogating mutuality of parties for issue preclusion, and approving of offensive collateral estoppel); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 (1979). To our knowledge, the State has chosen to not request judicial review of any Deemed Approval or Disapproval decision. The State is bound by the Secretary's prior decisions concerning the permissible subjects of negotiation under § 2710(d)(3)(C).

d. <u>Unlawful Compact Provisions Decided by the Secretary.</u>

The State demanded compact provisions that are nearly identical to provisions that the Secretary determined are not within the seven negotiable topics. The Secretary's reasoning is the same as the Ninth Circuit's decision in *Chicken Ranch*, which turned on whether the State's demands were "directly related to the operation of gaming activities." *Id*. at 1029, 1034, 1035-1037, 1038 ("these family, environmental, and tort law provisions are not 'directly related to the operation of gaming activities'"), 1040, 1046, 1048. The Ninth Circuit affirmed the Secretary's role in interpreting whether compact provisions are directly related to the operation of gaming activities. *Id*. at 1040 ("we find the reasoning in the Department's letters persuasive, and it coincides with our own."). Provisions identified by the Secretary as not directly related to the operation of gaming activities are:

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- The definitions of Gaming Facility, Gaming Operation, and Project which use relational tests broader than "directly related to the operation of gaming activities," together with provisions that are overbroad because they use these broadly defined terms, including provisions covering environmental impacts and tort claims. *See* nineteen Deemed Approved Letters listed in the Complaint ¶ 71 (including, e.g., RON Tabs 84, 96-100); five Disapproval Letters listed in Complaint ¶ 75 (RON Tabs 73, 74, 77, 78, 79); State's Compact Draft §§ 2.13, 2.14 & 2.27 (definitions), 11.0 (environmental impacts), & 12.5 (tort claims).
- The regulation of Alturas' food and beverages service. *See* RON Tab 84 p. 2023; State's Compact Draft § 12.3(a).
- The regulation of Alturas' water quality. *See* RON Tab 84 p. 2023; State's Compact Draft § 12.3(b).

The Court should defer to the Secretary's final decision(s) that these State demands are not within the permissible topics of negotiation. Therefore, the State did not negotiate with Alturas in good faith and the Tribe is entitled to summary judgment on these claims.

IV. The State's Surface Bargaining was not Negotiation in Good Faith.

Even if the foregoing State demands fall within the seven permissible topics of negotiation under IGRA, the State was still required to negotiate with Alturas in good faith. Courts look to the provisions of the National Labor Relations Act ("NLRA") for guidance. *See In re Indian Gaming Related Cases*, 147 F.Supp.2d 1011, 1020-1021 (N.D. Cal. 2001); *see also Fort Independence Indian Cmty. v. California*, 679 F.Supp.2d 1159, 1187 (E.D. Cal. 2009) (describing surface bargaining) and *Pauma Band of Mission Indians v. California*, 973 F.3d 953, 962 & n. 1 (9th Cir. 2020) (describing surface bargaining). If the State offers "[p]atently improbable justifications for [its] bargaining position," it is surface bargaining. *See N.L.R.B. v. Mar-Len Cabinets, Inc.*, 659 F.2d 995, 1000 (9th Cir. 1981). When the State fails to offer counterproposals to the fundamental issues of concern to Alturas, it is evidence of surface bargaining. *See Garcia ex rel. N.L.R.B. v. Fallbrook Hosp. Corp.*, 952 F.Supp.2d 952, 945-946 (S.D. Cal. 2013) (*citing N.L.R.B. v. Montgomery Ward & Co.*, 133 F.2d 676, 687 (9th Cir. 1943) and *N.L.R.B. v. Maywood Do-Nut Co., Inc.*, 659 F.2d 108, 109 (9th Cir. 1981). And when the State knows that the "entire spectrum of proposals put forward… is so consistently and predicably unpalatable" to the Tribe that agreement would be impossible, it is surface bargaining. *See Mar-Len Cabinets*, 659 F.2d at 999.

The State engaged in all of the above behaviors during negotiations with the Tribe. Alturas sent the State detailed letters evaluating whether its demands were permissible under IGRA (*see*,

e.g., RON Tab 53). As described above, the Secretary is the gatekeeper, vested with the authority to approve each compact. However, the State claimed that the Secretary's decisions were merely "meaningful guidance" and "informative," not controlling. RON Tab 54. Therefore, the State took a position that was both legally unsound, and also patently improbable to result in an approved compact. Further, the State refused to apply the Secretary's reasoning to any provision not expressly addressed by the Secretary, thereby creating a patently improbable position that the same legal reasoning does not apply to all provisions in the compact.

In responding to Alturas' analysis about licensing non-gaming employees, the State completely dodged the issue, declaring that it "believes regulation and licensing of the Tribe's gaming operation and gaming facility may be negotiated under any of these expressly allowed subjects to the extent applicable…." RON Tab 54 at p. 961 (emphasis added). The applicability of the topics of negotiation allowed by IGRA was the issue raised. Rather than address the State's inability to regulate non-gaming employees, it instead attempted to narrow the scope of the express compact language with the State's unexpressed intent. *Id.* at 961-62. The State has taken the same approach with the Secretary for more than a decade, and the State has been admonished by the Secretary for doing so in numerous Deemed Approved letters. *See*, *e.g.*, RON Tabs 97-100. The State utterly failed to justify its demands.

In the negotiation session held on December 30, 2021, the State explicitly conveyed its stance that it would not respond to any of Alturas' proposals to address the Secretary's disapproval of three compacts between the State and other Indian tribes in 2021. The State's January 18, 2022, draft compact repeatedly avoided edits to sections 2.12, 2.13, 2.14, 2.16, 2.17, 2.18. 2.21, 2.23, 2.27, 6.3 (by reference), 8.0, 12.2, 12.3, and 12.5, declaring: "Tribal edits are apparent response to DOI disapprovals; no response required at this time." RON Tab 51 at p. 803. The scope of State regulation was a fundamental concern for Alturas and the State offered no counterproposals.

Lastly, as discernible from Alturas' Complaint and reflected in this Motion, the State's January 18, 2022, compact proposals were so distinctly unappealing that the Tribe's negative reaction was predictable. In fact, the mere offering of the State's draft was a form of surface bargaining. The Tribe consistently objected to compact provisions that enabled the State to intrude unnecessarily into its governmental and business operations. The State never explained why its

demands that exceeded the highly successful 1999 Compact were necessary. But the State pressed its detailed regulation of Alturas' gaming operation despite the Tribe's objections and without an explanation that could bridge the gap in negotiation. By January 18, 2022, when the State sent its revised draft compact, the State objectively knew that its unjustified proposals would be unpalatable to the Tribe.

The foregoing evidence of the State's surface bargaining is substantial evidence that the State did not negotiate in good faith, and it is the State's burden to overcome that evidence based on the factors enumerated in § 2710(d)(7)(B)(ii). However, the Court should not consider *post hoc* rationalizations that the State never expressed to Alturas, because the Tribe never had an opportunity to consider such justifications during the course of negotiations.

V. The Court's Order Should Provide the Parties and a Mediator with Direction on All Issues.

Once the Court finds that the State failed to negotiate with Alturas in good faith, it is required to order the State and Alturas to conclude a lawful compact within sixty days. § 2710(d)(7)(B)(iii). If the parties are unable to conclude a compact within sixty days, the State and Alturas must each submit a proposed compact to a court-appointed mediator. *Id.* at § 2710(d)(7)(B)(iv). The mediator must select the proposal that (1) best comports with IGRA and federal law, and (2) best comports with the findings and order of the Court. *Id.*

Given the State's extensive history of ignoring prior federal decisions and their direct implications, this Court should exercise its authority to direct the State and the Tribe on each issue raised in this Motion. Not only will such direction improve the likelihood of the State and the Tribe reaching agreement on a Tribal-State compact during the sixty-day period for negotiations, but it will also provide a clear directive to a mediator as to which proposal best comports with IGRA.

CONCLUSION

For the foregoing reasons, this Court should grant Alturas' Motion for Summary Judgment. Further, this Court should provide clear direction to the State and Alturas in its order regarding the permissible subjects of negotiation under § 2710(d)(3)(C), and the permissibility of the State's demands for Payments under §§ 2710(d)(3)(C)(iii) and 2710(d)(4). To aid the Court, Alturas has attached a Proposed Order.

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2 Respectfully submitted this 11th day of August 2023,
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John M. Peebles
Patrick R. Bergin
Michael A. Robinson
Tim Hennessy
Steven J. Bloxham
Curtis Vandermolen
PEEBLES KIDDER BERGIN & ROBINSON LLP
2020 L Street, Suite 250
Sacramento, California 95811
Telephone: (916) 441-2700
Fax: (916) 441-2067
Email: jpeebles@ndnlaw.com

By: /s John M. Peebles
John M. Peebles
Attorneys for Plaintiff