ROB BONTA
Attorney General of California
T. MICHELLE LAIRD
Acting Senior Assistant Attorney General
B. JANE CRUE, State Bar No. 210122
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7789
Fax: (916) 323-2319
E-mail: Jane.Crue@doj.ca.gov
Attorneys for State Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ALTURAS INDIAN RANCHERIA, a federally recognized Indian tribe, Plaintiff, **v.** **GAVIN NEWSOM, Governor of the State of California; and the STATE OF CALIFORNIA,** Defendants.	2:22-cv-01486-KJM-DMC **STATE DEFENDANTS' POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** Date: November 3, 2023 Time: 10:00 a.m. Courtroom: 3, 15th Floor Judge: The Honorable Kimberly J. Mueller Trial Date: None Set Action Filed: 8/22/2022

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Defendants, Governor Gavin Newsom and the State of California (collectively, State), submit the following points and authorities in support of the State's summary judgment motion in their favor and against the Plaintiff Alturas Indian Rancheria (Alturas or Tribe), a federally recognized Indian tribe.

INTRODUCTION

Alturas's Complaint alleges that the State violated the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2710-2712, 18 U.S.C. §§ 1166-1167. Specifically, Alturas alleges that during tribal-state class III gaming compact negotiations the State conducted "surface" or "sham" bargaining and demanded that the Tribe agree to include terms in a new compact that were beyond IGRA's permissible scope. Based on these allegations, the Tribe claims the State failed to negotiate in good faith under IGRA.

The record in this case demonstrates that the parties were only beginning to discuss compact provisions and the process of negotiation was still in the early stages when Alturas prematurely commenced this litigation. Contrary to the Tribe's allegations in its Complaint, the Joint Record of Negotiation (JRON) and the Joint Statement of Undisputed Facts (JSUF) show that throughout the parties' limited compact negotiations the State actively negotiated, proposed and modified terms in response to negotiated issues, remained willing to continue meeting and negotiating with Alturas, and acted in good faith. *See Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation v. Cal.*, 973 F. 3d 953, 965 (9th Cir. 2020) (*Pauma II*) (holding that the State negotiated in good faith under IGRA when it agreed to negotiate, actively engaged in negotiations and remained willing to continue negotiations when litigation was filed). Specifically, this record demonstrates that the State is entitled to summary judgment for two reasons.

First, the State negotiated in good faith because it agreed to negotiate a new compact and sought to advance negotiations forward but never demanded that a final compact include provisions that were unlawful. The record shows the State's good faith negotiations. The State provided sample compacts for the Tribe's consideration, promptly offered and scheduled compact negotiation meetings, indicated a willingness to continue additional negotiations seeking compact

compromises, and offered substantial revisions to its proposed compact terms in response to newly issued Ninth Circuit precedent.

Second, Alturas's responses to the State's ongoing negotiation efforts further demonstrate that the State negotiated in good faith. Specifically, the Tribe engaged in delays totaling seventeen months out of a total of approximately twenty-three months of negotiations. Ultimately, Alturas returned to negotiations only to walk away again even though the State was willing to revisit key provisions at issue based on newly issued case law. Alturas now demands this Court insert itself into the incomplete negotiations Alturas caused. Under this record, the State did not violate its duty to negotiate in good faith under IGRA.

STATEMENT OF THE FACTS

I. ALTURAS'S EXISTING 1999 COMPACT AND THE TRIBE'S REQUEST FOR NEW NEGOTIATIONS

Alturas operates a class III gaming facility under IGRA pursuant to a tribal-state gaming compact with the State. This original compact was executed in October 1999 (1999 Compact). The 1999 Compact provided for a termination date of December 31, 2020, with an automatic extension to June 30, 2022, if the parties had not agreed to an extension or entered into a new compact by December 31, 2020. JRON Tab 70 at 1090, JRON Tab 57 at 973-974.[1]

In a letter by Phillip Del Rosa, Chairman of Alturas, dated May 7, 2020, the Tribe requested a meeting with the State to discuss a tribal-state compact. JRON Tab 1 at 2. The State responded in a letter dated October 5, 2020, apologizing that a mail sorting error had occurred causing delay in responding to the Tribe's request. JRON Tab 2 at 4. The letter advised that the State was willing to meet with the Tribe regarding a new tribal-state class III gaming compact as soon as possible. *Id*. The letter provided available meeting dates in late October. *Id*.

On October 27, 2020, representatives from the State and Alturas participated in a phone call to discuss holding compact negotiations, and on October 28, 2020, as requested by the Tribe, the State emailed Alturas copies of the tribal-state gaming compacts between the State and the Hoopa

[1] All references to the JRON cite to the Bates-stamped documents contained in the six volume Joint Record of Negotiations filed by the parties on July 7, 2023. ECF No. 45-1 through 45-6.

Valley Tribe (JRON Tabs 13-14 at 44-193) and the State and the Yurok Tribe (JRON 15 at 195-282) as examples the parties could work from. Also, on October 28, 2020, the State advised the Tribe that it welcomed scheduling a compact negotiation meeting and requested available dates from tribal representatives. JRON Tab 13 at 44.

After ten months of failing to receive a response from Alturas, on August 31, 2021, the State followed up with a letter that again offered to schedule a compact negotiation meeting. JRON Tabs 16-17 at 284-287. The State further notified Alturas that the 1999 Compact had been automatically extended to June 30, 2022, but that this left limited time to negotiate a new compact. *Id*. at 286. The State indicated that a new Tribal Negotiations Advisor, Nathan Voegeli, had been appointed. Mr. Voegeli stressed that the State was committed to working diligently with the Tribe to see that a new compact was in place before the current compact expired, and encouraged Alturas to schedule a tribal-state compact negotiating meeting. *Id*. at 286-287.

Almost two months later, on October 22, 2021, Alturas belatedly responded to the State advising that it would like to schedule a meeting with the State to "discuss a compact to replace the 1999 compact." JRON Tab 19 at 291. Following several email exchanges (JRON Tabs 21-25 at 295-308), representatives for the State and Alturas agreed upon a videoconference compact negotiation session for November 19, 2021. In an email dated October 27, 2021, the State explained that it wished to discuss the timing for achieving the necessary approvals for a new compact to ensure review and ratification before the Tribe's current compact expired on June 30, 2022. *Id*. at 295. The State explained that a new class III gaming compact required review and ratification by the California Legislature and a 45-day review by the U.S. Department of the Interior. *Id*. Based on the required approvals, the goal was to have a signed compact to the California Legislature in January 2022. *Id*. In order to meet this goal, the State suggested the parties work from a previously approved compact and make adjustments based on the Tribe's own circumstances. *Id*. The State reiterated that it had previously provided Alturas with compacts that the State had entered into with the Yurok Tribe and Hoopa Valley Tribe. *Id*. The State expressed its desire to know if the Tribe preferred to work from one of those compacts or

perhaps another recently ratified compact such as the one the State had entered into with Middletown Rancheria. *Id*. In particular, the State advised that it was critical for the State to learn the Tribe's preferred economic terms and approach regarding an environmental review process. *Id*.

II. THE PARTIES CONDUCT TWO COMPACT NEGOTIATION MEETINGS IN NOVEMBER AND DECEMBER, 2021, AND EXTEND THE TRIBE'S 1999 COMPACT

On November 19, 2021, the State and the Tribe held their first negotiation meeting via videoconference.[2] JRON Tab 25 at 308, JSUF 16.[3] The parties discussed various tribal-state class III gaming compacts in California, including the State's compacts with the Hoopa Valley Tribe, Middletown Rancheria, and Sherwood Valley Rancheria, and the differences among them. At the end of the discussion, Alturas indicated that it would review and choose a compact from which it preferred to work and the State agreed it would then provide a Microsoft Word version of the Tribe's selected compact. JRON Tab 21 at 295.

Following the compact negotiation meeting on November 19, 2021, the State and Alturas exchanged several emails. JRON Tabs 26-28 at 310-450. These emails included Alturas requesting and the State providing, on November 23, 2021, a copy of the tribal-state class III gaming compact between the State and the Sherwood Valley Tribe (Sherwood Valley Compact). *Id*. The parties scheduled another negotiation meeting for December 16, 2021. JRON Tab 27 at 314, JRON Tabs 29-31 at 452-462.

On December 13, 2021, in response to the State's requests, the Tribe stated that it anticipated sending a redlined draft of the Sherwood Valley Compact later that day. JRON Tabs 32-33 at 464-470. Alturas also informed the State that the delay in sending the redline draft was because they were considering the December 9, 2021 oral arguments that had been presented to the Ninth Circuit Court of Appeals in an IGRA case entitled *Chicken Ranch Rancheria of Me-Wuk Indians v. State of California*, 42 F. 4th 1024 (9th Cir. 2022) (*Chicken Ranch*). JRON Tab

[2] To facilitate scheduling, and due to the ongoing COVID-19 state of emergency, both compact negotiation meetings were held via videoconference.

[3] All references to the JSUF cite to the Joint Statement of Undisputed Facts.

33 at 470. On December 14, 2021, Alturas requested to postpone the December 16, 2021, negotiation meeting to December 30, 2021. The State agreed. JRON Tab 38 at 509.

On December 22, 2021, Alturas emailed the State a redlined draft of its proposed compact using the State's previously provided Sherwood Valley Compact. JRON Tabs 44-45 at 564-725. The parties subsequently held their second videoconference compact negotiation meeting on December 30, 2021. JRON Tab 41 at 539, JSUF 27. Less than three weeks later, on January 18, 2022, the State provided Alturas with detailed comments, explanations and questions in response to the Tribe's redline draft including several areas about which the State requested further discussions. JRON Tabs 50-51 at 787-938. In addition, the State asked the Tribe for potential dates for a third negotiation meeting. *Id*. at 787.[4]

On January 26, 2022, the Tribe responded to the State's January 18, 2022, proposal by letter. JRON Tab 53 at 946-955. After summarizing certain negotiation disputes between the parties, the Tribe advised that it now was "willing to consider moderate revisions to its current 1999 Compact." *Id.* In the letter's conclusion, the Tribe reiterated its desire to make revisions to its 1999 Compact rather than negotiate a new compact. The Tribe did not provide any further edits to the draft compact or propose dates for a future negotiation meeting. *Id.*

On February 17, 2022, the State responded to the Tribe's January 26, 2021 letter by providing a summary of the parties' compact negotiations to date. JRON Tabs 54-54a at 957-964. While the letter acknowledged the Tribe's concerns with some of the draft compact provisions, the State reiterated its belief that the issues could be resolved through changes to specific provisions in the draft compact. *Id.* The State reemphasized that at no point did it take the position that the State would not negotiate or discuss the Tribe's request for compact revisions. *Id.* Indeed, the letter specifically advised that "[t]he State invites the Tribe to provide

[4] In addition to completing two compact negotiation meetings with Alturas by the end of 2021, on January 26, 2022, the State tendered an offer and example amendment to the Tribe to extend Alturas' 1999 Compact for an additional year to June 30, 2023, subject to the Tribe's approval. JRON Tab 52 at 940-944. The State made this offer due to uncertainty created by the Assistant Secretary—Indian Affairs' disapproval in November 2021 of three class III gaming compacts ratified by the California Legislature, and a lack of confidence that the State and Tribe could negotiate a new compact for approval under IGRA prior to the expiration of its 1999 Compact. *Id.* at 940-941.

alternative language so that we can find a mutually agreeable approach to these issues protective of both the State's interests and the Tribe's concerns regarding its sovereign government." *Id.* The State's letter concluded by repeating prior requests to schedule another compact negotiation meeting. *Id.*

III. ALTURAS'S DELAYED RESPONSES AND TERMINATION OF THE PARTIES' ONGOING COMPACT NEGOTIATIONS

The State did not receive a response to its February 17, 2022, letter for five months.[5] On July 15, 2022, Alturas emailed the State indicating they would like to schedule a compact negotiation session. JRON Tab 68a at 1009. Between July 15, 2022, and July 18, 2022, the parties exchanged emails and agreed to a negotiation meeting to be held on August 30, 2022. JRON Tabs 68b-68e at 1012-1023.

On July 28, 2022, Alturas sent the State a twenty-three page letter with fifty-four exhibits totaling over two-thousand pages in response to the State's February 17, 2022, letter. JRON Tabs 69-123 at 1027-3153. The Tribe claimed that the delay in responding to the State's letter was due to the Tribe conducting research and monitoring developments in connection with other tribal compacts. *Id.* at 1027. Additionally, the Tribe stated it was monitoring pending litigation, including *Chicken Ranch*. *Id.* Significantly, the Tribe spent the bulk of its letter demanding a twenty-year extension of its 1999 Compact and declaring that successfully negotiating a new compact with the State was not possible. *Id.* at 1028-1048. Notably, the Tribe included an offer to continue negotiations with the State regarding "minor revisions to the 1999 Compact under which it has successfully operated for more than 20 years." *Id.* at 1048. In the letter's closing, the Tribe again made clear that its preference was to extend its 1999 Compact for an additional twenty years. *Id.* at 1048-1049. The Tribe further declared that if the State would not agree to extend the 1999 Compact for an additional twenty years then the State should execute a new

[5] During this time, the State sent Alturas two offers to extend the Tribe's 1999 Compact to December 31, 2023. JRON Tabs 55-56 at 966-967, 969-970. On April 20, 2022, the Tribe sent the executed documents for the compact extension. (JRON Tabs 58-60 at 977-986). On June 1, 2022, the State notified the Tribe of the extension's approval by the California Legislature. JRON Tab 64 at 995-996.

compact with the same material terms as the 1999 Compact for a term of twenty years. *Id.* at 1048. Along with the letter, the Tribe's attachments included a revised copy of the eighteen-month compact extension that had recently been ratified by the California Legislature with a proposed new termination date of December 31, 2043. *Id.* at 3151-3153.

The Ninth Circuit issued its decision in *Chicken Ranch* the same day as the Tribe's letter.

On August 5, 2022, the State responded to the Tribe's July 28, 2022 letter stating that due to the recent Ninth Circuit decision in *Chicken Ranch* the State was "re-evaluating its most recent compact offer" to the Tribe. JRON Tab 124 at 3155. The State explained that it would reach out to the Tribe to reschedule another negotiation meeting following a 45-day review period. *Id.*

In a letter dated August 8, 2022, Alturas responded to the State's August 5, 2022 letter advising the State that it did not agree to any review period following the issuance of *Chicken Ranch* and demanded that the State respond by August 12, 2022, to its request for the State to either "extend [the Tribe's] 1999 Compact for 20 years or execute a materially identical Model Compact as requested by Alturas on July 28, 2022." JRON Tab 125 at 3157-3158. The Tribe again stated that it did not believe there was any reason to continue negotiations with the State "regarding a materially different Tribal-State compact." *Id.*

The State responded to the Tribe's August 8, 2022, letter on August 12, 2022, reiterating that in light of *Chicken Ranch*, the State needed to evaluate its prior draft compact offer to Alturas. JRON Tab 126 at 3160. This evaluation process included considering "recent compact disapproval letters issued by the U.S. Department of the Interior." *Id.* The letter advised Alturas that "[t]he State is not able to accept the Tribe's proposal to extend its 1999 Compact or execute a materially identical compact at this time, but plans to provide an updated draft compact to the Tribe after completing its evaluation to facilitate negotiation of compact terms." *Id.* Further, the State reaffirmed its commitment to continuing negotiations and provide an updated draft compact for discussion. *Id.*

On September 19, 2022, less than 45 days after notifying the Tribe of its intentions, the State provided another update to Alturas. JRON Tabs 127-128 at 3162-3165. The State advised that it had completed its reevaluation process of the Ninth Circuit's decision in *Chicken Ranch*

1 and recent compact disapproval letters from the U.S. Department of the Interior. *Id*. at 3164.
2 Pursuant to that process, the State was prepared "to make significant changes to its previous
3 compact offer to the Tribe." *Id*. The State's letter detailed the following changes, while further
4 advising that additional changes were possible:

- Narrowing the definition of Gaming Facility to eliminate the need for an analysis of the principal purpose of a structure. Instead, the definition would be based on the building and structures in which class III gaming activity occurs.
- No longer requesting Tribal recognition of State spousal and child support orders for employees of the Gaming Operation and Gaming Facility.
- Streamlining tort standards specific to claims by patrons and others lawfully on the premises of the Gaming Facility. The tort requirements would allow the Tribe to adopt its own procedures for resolution in Tribal court.
- Eliminating the environmental review provisions and requirement to enter into an intergovernmental agreement with a neighboring jurisdiction. Further discussion will be needed regarding appropriate mitigation of impacts from the Gaming Facility on non-tribal governments.
- Simplifying standards and procedures for patron disputes and employment discrimination, harassment, and retaliation claims and providing the Tribe greater discretion in determining the process to address those claims consistent with fairness and due process.
- Removing the prohibition on tobacco sales to minors.
- Deleting arbitration provisions throughout the compact.

5 6 7 8 9 10 11 12 13 14 15 16 17

18 *Id.* at 3164-3165.
19 Although the State's September 19, 2022 letter concluded with an offer to discuss detailed
20 compact concessions (*Id.* at 3165), Alturas failed to respond regarding any of these proposed
21 compact changes. Instead, later the same day, the Tribe served its Complaint on the State
22 Defendants. JSUF 41.
23
STANDARD OF REVIEW

24 Federal Rule of Civil Procedure 56 authorizes summary judgment where the movant shows
25 there is no genuine dispute as to any material fact and the movant is entitled to judgment as a
26 matter of law. Fed. R. Civ. P. 56(a). The court must construe the evidence and all reasonable
27 inferences drawn therefrom in the light most favorable to the nonmoving party. *T.W. Elec. Serv.,*
28

Inc. v. Pac. Elec. Contractors Ass'n, 809 F. 2d 626, 630-31 (9th Cir. 1987). Where the issue before the court involves the proper interpretation of statutes and regulations, and the parties agree on the "material" facts, the matter may be resolved as a matter of law on summary judgment. *See Edwards v. Aguillard*, 482 U.S. 578, 594-95 (1987); *Shishido v. SIU-Pac. Dist.-PMA Pension Plan*, 587 F. Supp. 112, 114 (N.D. Cal. 1983). Under IGRA, a court will evaluate a State's good faith in negotiations objectively based on the record of negotiations. *Rincon Band of Luiseno Indians v. Schwarzenegger,* 602 F. 3d 1019, 1041 (9th Cir. 2010) (*Rincon*).

SUMMARY OF ARGUMENT

IGRA sets forth a cooperative federalism model that balances the competing sovereign interests of the federal government, state governments, and Indian tribes regarding the regulation of tribal class III gaming. *Artichoke Joe's v. Norton,* 216 F. Supp. 2d 1084, 1092 (9th Cir. 2002). IGRA's cooperative federalism role for state governments is found in its compacting requirement which requires that states negotiate in good faith, allowing a tribe to sue a state in federal court for the state's failure to negotiate in good faith. 25 U.S.C. § 2710(d)(7)(A)(i). During the last twenty years, federal courts in the Ninth Circuit have interpreted IGRA to identify several relevant factors to consider when determining, based on the record of negotiations, whether a state negotiated in good faith. These factors include the following:

- Whether the State remained willing to meet and continue negotiations with the tribe;
- Whether the challenged compact provisions are part of negotiations or a unilateral demand by the State;
- Whether the tribe declined to engage in further negotiations, and:
- Whether the tribe failed to respond to the State's proposal before commencing litigation.

Pauma II, 973 F. 3d at 962-965; *In re Indian Gaming Related Cases*, 331 F. 3d 1094 (9th Cir. 2003) (*Coyote Valley II*); *In re Indian Gaming Related Cases v. State of California*, 147 F. Supp. 2d 1011, 1020 (N.D. Cal. 2001) (*Coyote Valley I*).

Based on this case's record in conjunction with these judicially identified relevant good faith factors, the undisputed material facts establish that the State negotiated with Alturas in good faith for two reasons.

First, the State negotiated in good faith because it attempted to move the negotiations forward and never demanded that the final compact include compact provisions that the Tribe considered unlawful. The record shows the State's good faith negotiations, which included providing sample compacts for the Tribe's consideration, participating in phone calls, email exchanges and two substantive videoconference compact negotiation meetings, showing a willingness to continue additional negotiations to seek compromises on disputed matters, and detailing significant changes it was willing to make to its prior proposed compact offer as a result of the then-recent Ninth Circuit *Chicken Ranch* decision.

In these negotiations, the parties only exchanged one compact draft each. Alturas provided its redline compact draft to the State on December 22, 2021. JRON Tab 45 at 576-725. The State responded to this compact draft with its own redline compact draft on January 18, 2022. JRON Tab 51 at 802-938. The State's comments throughout its draft illustrate the common dialogue in an ongoing negotiation. The State accepted numerous edits from the Tribe, albeit some with modifications. *Id*. at 813, 816, 819, 820-821, 829-830, 831, 833, 838-839, 841, 846-847, 856-857. The State rejected other proposed edits, but indicated where possible, its reasoning or that it sought additional information from the Tribe in order to find compromise. *Id*. at 830, 837, 840, 844, 845, 858, 861, 862, 863, 926, 928. Even when not proposing edits in response to the Tribe's draft language, the State proposed multiple approaches to complex and difficult sections of the compact. *Id*. at 882 (proposing different approaches to environmental review provisions), 919 (stating willingness to consider edits to minimum wage, maximum hour, child labor, and overtime standards, but seeking information regarding Tribe's current practice and policy). At no point in the compact draft did the State indicate that its edits were a final demand or non-negotiable.

Second, Alturas's responses to the State's efforts to move the compact negotiations forward further substantiates that the State negotiated in good faith. Rather than seriously negotiating

through an exchange of proposed compact terms, the Tribe engaged in significant negotiation delays totaling seventeen months. In addition to these delays, Alturas played hardball by pivoting from the exchange of draft compacts to draw the parties closer to compromise to instead insisting that the State agree to extend by twenty years its prior 1999 Compact or enter a compact substantially identical to that compact. Ultimately, Alturas walked away from negotiations in the fall of 2022 after the State informed the Tribe it was reviewing its offer to account for the recent *Chicken Ranch* decision, and filed suit.

In short, the Tribe delayed negotiations, failed to propose revised terms for the State's consideration, and refused to engage in requested additional negotiations. Alturas now demands this Court insert itself into the incomplete negotiations it caused by its dilatory tactics.[6] Under this record, it is undisputed that the State complied with its duty to negotiate in good faith under IGRA.

ARGUMENT

I. THE STATE NEGOTIATED WITH ALTURAS IN GOOD FAITH IN COMPLIANCE WITH IGRA

A. IGRA and Class III Tribal Gaming in California

To address concerns regarding the regulation of gambling on tribal lands, Congress passed IGRA in 1988 as a "compromise solution to the difficult questions involving Indian gaming." *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1091-92 (E.D. Cal. 2002), aff'd, 353 F. 3d 712 (9th Cir. 2003). IGRA provides "a statutory basis for the operation of gaming by Indian tribes" and is an example of "'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme." *Id*. at 1092.

IGRA's cooperative federalism statutory scheme makes class III gaming lawful on tribal lands only if such activities are: (1) authorized by an ordinance or resolution adopted by the

[6] Alturas took these positions despite the State's offer, and the Tribe's agreement, to extend the 1999 Compact to December 31, 2023, in order to provide additional time to resolve uncertainty in negotiations due to compact disapprovals in November 2021 by the federal government.

governing body of the Indian tribe and approved by the chairman of the National Indian Gaming Commission; (2) located in a state that permits such gaming for any purpose by any person, organization, or entity; and (3) conducted in conformance with a tribal-state compact entered into by the Indian tribe and the state and approved by the Secretary of the United States Department of the Interior (Secretary). 25 U.S.C. § 2710(d)(1) & (3)(B). An Indian tribe is not authorized to operate class III gaming on its lands located in California absent a negotiated compact between the State and the tribe that is approved by the Secretary, or the implementation of "procedures" by the Secretary following a finding that a State failed to negotiate in good faith as required by IGRA. *Coyote Valley II*, 331 F. 3d at 1097-98.

IGRA's tribal-state compacting provision accords states "the right to negotiate with tribes located within their borders regarding aspects of class III gaming that might affect legitimate State interests." *Coyote Valley II*, 331 F. 3d at 1097. Class III gaming "includes the types of high-stakes games usually associated with Nevada-style gambling. Class III gaming is subject to a greater degree of federal-state regulation than either class I [social games] or class II [bingo and certain non-banked card games] gaming." *Id*. In 2000, California voters approved Proposition 1A authorizing tribes to operate class III slot machines, banked and percentage card games, and certain lottery games.[7] Cal. Const. Art. IV, § 19(f). As a result of Proposition 1A and subsequent tribal-state compacts, tribal gaming revenues in California by 2021 reached approximately $12 billion.[8] Today, sixty-seven tribal gaming casinos[9] operate pursuant to tribal-state class III compacts with the State.

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[7] *Coyote Valley II* recounts extensively the events leading to IGRA's passage, and the subsequent compact negotiations between California and dozens of Indian tribes resulting in the original 1999 Compact.

[8] The National Indian Gaming Commission reported tribal gaming revenues for 2022 to be $11.8 billion in its Sacramento Region and $40.9 billion nationally. The Sacramento Region covers California and Northern Nevada. Only one tribal casino operates in Northern Nevada. GGRFY22_071923_Final.pdf (nigc.gov)

[9] The California Gambling Control Commission lists sixty-seven tribal casinos presently operating in California. http://www.cgcc.ca.gov/documents/Tribal/2023/List_of-Casinos_alpha_by_casino_name.pdf.

B. The Relevant Factors for Assessing a State's Good Faith Negotiations Under IGRA

To prevail under 25 U.S.C. § 2710(d)(7)(A)(i), a tribe must show that (1) no tribal-state compact has been entered and (2) the state either failed to respond to the tribe's request to negotiate or did not respond to the request in good faith. 25 U.S.C. § 2710(d)(7)(B)(ii)(II). But negotiations are, of course, a two-way street. *See Pauma II*, 973 F. 3d at 963 (holding that a state's duty to negotiate in good faith does not compel blind negotiation). A state's ability to negotiate in good faith to reach a mutually acceptable compact assumes that a tribe works towards the same goal.

While IGRA requires "good faith" negotiations, the statute does not define this important term. *Coyote Valley I*, 147 F. Supp. 2d at 1020; *see* 25 U.S.C. § 2710(d)(3)(A). In making its good-faith determination, the court "may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities," and "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." 25 U.S.C. § 2710(d)(7)(B)(iii). Courts also enforce the requirement that "IGRA strictly limits the topics that states may include in tribal-state Class III compacts to those directly related to the operation of gaming activities." *Chicken Ranch*, 42 F. 4th at 1029. A state may be found to have failed to negotiate in good faith if it "insists on" or "demands" compact terms that are outside of the scope of IGRA. *Chicken Ranch,* 42 F. 4th at 1037-39. However, a state may take a hardline stance if it is in line with legitimate state interests related to gaming and IGRA's purposes. *Rincon*, 602 F. 3d at 1038; *see also Chemehuevi Indian Tribe v. Newsom*, 919 F. 3d 1148 (9th Cir. 2019) (holding that IGRA unambiguously permitted the negotiation and inclusion of durational limits in a compact).

A state's good faith is evaluated "objectively based on the record of negotiations." *Rincon,* 602 F. 3d at 1041. The reason for such treatment is that the negotiation history between states and tribes is not a subject matter that lends itself to much dispute. The proposals, counter-proposals, letters, and other documents that are part of the negotiations constitute the evidence that courts consider when determining good faith.

In regard to the 1999 Compacts, after reviewing the record of negotiations between the State and the tribes, both the district court and the Ninth Circuit rejected a tribe's numerous procedural and substantive complaints that the State failed to negotiate in good faith under IGRA. *Coyote Valley II*, 331 F. 3d at 1107-17; *Coyote Valley I*, 147 F. Supp. 2d at 1021-22. In doing so, the courts identified several relevant factors to consider when determining whether a state negotiated in good faith. These factors include the following:

- *Actively Negotiate*: Did the State remain "willing to meet with the tribe for further" compact negotiations? *Coyote Valley II*, 331 F. 3d at 1110 (Ninth Circuit finding that the negotiation history showed that the State "actively negotiated with Indian tribes").
- *Give and take*: Are the tribe's "challenged provisions" the result of negotiations or instead "unilateral demands by the State"? *Coyote Valley I*, 147 F. Supp. 2d at 1021 (district court finding that the challenged "Tribal Labor Relations Ordinance" was not a "unilateral" State demand).
- *Negotiation termination*: Was it the tribe, and not the State, that "declined to engage in further negotiations"? *Coyote Valley I*, 147 F. Supp. 2d at 1021-22 (district court finding that during negotiations the tribe "apparently [had] not contacted the State to arrange any further IGRA negotiations").
- *Unreasonable Terms*: Did the State insist on or demand provisions categorically forbidden by the terms of IGRA and not directly related to the operation of class III gaming activities? *Chicken Ranch*, 42 F. 4th at 1029, 1037-39 (Ninth Circuit holding that the State failed to negotiate in good faith by insisting on broad environmental, tort, and family law provisions that were not directly related to the operation of class III gaming activities); *see also Coyote Valley II*, 331 F. 3d at 1110-17 (Ninth Circuit holding that the State did not negotiate in bad faith by refusing to enter into a compact without the Revenue Sharing Trust Fund, the Special Distribution Fund, and the Tribal Labor Relations Ordinance, topics which the court found to be within the scope of IGRA).

In addition to the above factors, the Ninth Circuit further explored the meaning of IGRA's good-faith standard in a suit filed by the Pauma Band of Luiseno Indians of the Pauma & Yuima Reservation (Pauma) against the State of California and Governor Gavin Newsom (State) for allegedly failing to negotiate in good faith during IGRA compact negotiations.

In that case, in November 2014, Pauma sought an amendment to its 1999 compact to offer on-track horse racing and wagering and an expanded set of lottery games. *Pauma II*, 973 F. 3d at 959-960. The parties met twice and exchanged correspondence for approximately a year in relation to this request. *Id.* at 960. The State repeatedly expressed its willingness to negotiate over Pauma's request. *Id.* at 966. At the second meeting, in November 2015, Pauma indicated it wanted to negotiate an entirely new compact and not just the previously requested new types of gaming. *Id.* at 960. In January 2016, the State confirmed an agreement to renegotiate Pauma's 1999 compact in full and told Pauma that it "look[ed] forward" to receiving a draft compact from Pauma with Pauma's plans for on-track betting. *Id.* at 961. The State encouraged Pauma to circulate draft language so it could analyze the information and respond in writing. *Id.* at 960. Rather than propose a draft compact or disclose any information about the on-track facility, Pauma notified the State that it wanted to separately negotiate each item of the new compact. *Id.* at 961. Citing negotiating efficiency, limitations on the negotiation process and lack of a legal basis in IGRA, the State rejected Pauma's piecemeal negotiation approach and advised that it would send a "complete draft compact to guide our future discussions." *Id.* The subsequent 140-page draft compact sent to Pauma addressed a broad array of topics. *Id.* Pauma never responded but, like Alturas here, filed suit. *Id.*

In its de novo review of the record, the Ninth Circuit upheld summary judgment for the State because it actively participated in the negotiations and tried to advance the negotiations. *Id.* at 966. The Court noted that the record was replete with examples of the State's fruitless requests that Pauma provide specific details about its proposed new facility and the fact that Pauma never responded to the draft compact. *Id.* at 966.

The Ninth Circuit's *Pauma II* decision provides a roadmap to additional factors for a court to consider when determining whether a state negotiated in good faith:

- *Efforts Expended*: Does the record reflect an effort by the state to reach agreement rather than providing empty promises? *Pauma II*, 973 F. 3d at 962-63 (holding that the record reflected extensive efforts by the state to address tribe's interest in negotiating lottery games).
- *Tribal Proposal*: Did the tribe provide specific details about the terms it envisioned in response to state requests? *Pauma II,* 973 F. 3d at 963-64 (finding that a state's duty to negotiate in good faith does not compel blind negotiation).
- *State Proposal*: Did the state propose terms in a draft compact? *Pauma II*, 973 F. 3d at 965 (holding that "the State's decision to circulate a proposed draft compact for future discussions does not evidence bad faith . . . ." Rather, providing a draft compact "demonstrates a proper motivation: the State endeavored to move the negotiations toward the finish line").
- *Continuing Negotiations*: Did the state remain willing to meet when the tribe filed its lawsuit under IGRA? *Pauma II*, 973 F. 3d at 962 (holding that "the state of negotiations at the commencement of a lawsuit is a relevant factor for courts to consider when analyzing bad faith claims under IGRA").
- *Premature Litigation*: Did the tribe fail to respond to the state's proposal prior to litigation? *Pauma II*, 973 F. 3d at 962 ("We abstain from inserting ourselves into incomplete negotiations").

C. Applying the Good Faith Factors to this Case's Record Shows that the State Negotiated in Good Faith with Alturas

Alturas's Complaint attempts to plead several claims as to why the State failed to negotiate in good faith. The first claim alleges that the State demanded compact provisions that exceeded IGRA's permissible scope. Complaint, ECF No. 1 at 51–52. The second claim alleges that the State attempted to impose an unlawful tax, fee, charge or assessment. *Id.* at 52-53. The third claim charges that the State demanded the Tribe to enter into impermissible separate agreements with the County of Modoc and Caltrans. *Id.* at 53-54. The fourth claim contends that the State unlawfully insisted upon control over the Tribe's courts. *Id.* at 53-54. Finally, the fifth claim

argues that the State engaged in so-called sham or surface bargaining. *Id.* at 55-56.[10] But despite these allegations, this case's record demonstrates that the State made extensive efforts to move negotiations with Alturas forward despite the delays caused by the Tribe, and the State remained willing to continue meeting and actively sought to negotiate with Alturas on each of its claims at the time Alturas filed suit.

First, Alturas cannot prevail on any of its five IGRA claims because the record demonstrates that the State attempted to move the compact negotiations forward, and never demanded—much less insisted—that Alturas include any compact provisions that the Tribe considered unlawful. Rather, the State responded positively to the Tribe's initial request to renegotiate (JRON Tab 2 at 4), provided three sample compacts for the Tribe's consideration (JRON Tabs 14, 15, and 28 at 48-193, 195-282, and 319-450), and participated in an initial phone call on October 27, 2020 to discuss holding compact negotiations (JRON Tab 12 at 40-41). Further, the State participated in two substantive compact negotiation meetings on November 19, 2021 and December 30, 2021. After the State received Alturas's redlined proposed compact based upon the previously provided Sherwood Valley Compact (JRON Tabs 44, 45 at 564, 576-725), the State responded on January 18, 2022, with detailed comments, explanations, questions, and a request for a third negotiation meeting (JRON Tab 50, 51 at 787, 803-938). The State's proposed compact draft illustrated the natural give and take of a fluid negotiation process and not a take-it-or-leave-it position by the State.

Importantly, after the Ninth Circuit's decision in *Chicken Ranch* was issued, the State informed Alturas it was conducting a review of the decision and its prior proposed offer. JRON Tab 124 at 3155. The facts in the Ninth Circuit's *Chicken Ranch* case differ sharply from the facts in this case. In *Chicken Ranch*, the negotiations between the 60 tribes that made up the Compact Tribes Steering Committee, which included the plaintiff tribes, had been ongoing for years. *Chicken Ranch* 42 F. 4th at 1030. Between 2014 and 2019, the state and the plaintiff tribes held 39 days of in-person negotiation sessions, in addition to numerous smaller sessions

[10] Alturas' sixth and seventh claims in its Complaint also allege violations of California Government Code section 12012.25. Complaint, ECF No. 1 at 55–57. The Court granted the State's motion to dismiss these claims with prejudice on April 20, 2023. Order, ECF No. 38.

focused on discrete issues. *Id.* Over that time, the state provided at least twelve full draft compacts to the plaintiff tribes and the plaintiff tribes offered approximately fourteen drafts of their own. *Id.* In contrast to the negotiations with Alturas, in *Chicken Ranch* the state "refused to accept any compact that did not include the challenged topics of negotiation." *Id.* at 1029. In the case at hand, the negotiations had just begun. Further, the State advised Alturas that it was willing to compromise on key compact terms in light of both *Chicken Ranch* and the November 2022 compact disapproval letters from the U. S. Department of Interior. JRON Tab 127, 128 at 3162-3165. The State specifically identified changes it was willing to make to address the environmental, intergovernmental agreement, and tort provisions that are now raised in the Tribe's first, second, and third claims. *Id.* at 3165. These facts clearly reveal the State's extensive efforts to negotiate and reach agreement with Alturas on a new compact, up to and including, the day the State was served with Alturas's premature lawsuit. Additionally, by proposing substantial revisions to the draft compact, the State demonstrated a willingness to modify the compact terms and its motivation and desire to move the compact negotiations forward, all factors specified by the courts showing good faith.

This undisputed record shows that far from the allegation in Alturas's fifth claim for relief that the State engaged in surface or sham bargaining, the State was actively negotiating with Alturas and remained "willing to meet with the tribe for further" compact negotiations. *Coyote Valley II*, 331 F. 3d at 1110. And, contrary to Alturas's first, second, third, and fourth claims that the State was attempting to impose unlawful compact terms on Alturas, the State in fact demonstrated a willingness to discuss proposed compact language and to remain flexible. This is clearly illustrated by the State's comments and questions regarding Alturas's proposed redline compact, the State's request for a third negotiation meeting, and its continued willingness to further compromise following the issuance of *Chicken Ranch*. The record shows that the State was neither making "unilateral demands" nor declining to engage in further negotiations. *Coyote Valley I*, 147 F. Supp. 2d at 1021-22. Instead, the State sought "to continue the negotiations and move them forward – not wrap them up." *Pauma Band of Luiseno Mission Indians v. California*, 343 F. Supp. 3d 952, 975 (S.D. Cal. 2018). As the Ninth Circuit held in *Pauma II*, "[b]efore

litigating the substance of the State's bargaining position, [the Tribe] needed to at least raise its objections with the State." *Pauma II*, 973 F. 3d at 964. Similar to *Pauma II*, in this case the "State did not throw in the towel" regarding negotiations. *Id.* at 966. Alturas refused to allow the State 45 days to review its offer in light of the *Chicken Ranch* decision (JRON Tab 125 at 3157-3158) and refused to negotiate or discuss the State's proposed changes following the State's review of that decision. Instead, despite months of being nonresponsive during the negotiation period, it was the Tribe that refused to engage with the State any further and swiftly filed suit.

Second, Alturas's responses to the State's proactive efforts to move the compact negotiations forward further demonstrates why the State did not fail to negotiate in good faith. Rather than seriously negotiating through an exchange of proposed compact terms, the Tribe engaged in significant negotiation delays. These delays included a nearly one year delay, from October 28, 2020, to October 22, 2021, during which the Tribe failed to take action with respect to the State's stated willingness to engage in compact negotiations. The Tribe also delayed for over five months, from February 17, 2022, to July 28, 2022, responding to the State's request for further discussions to seek compromises on disputed compact provisions. Given the relatively short period of time of compact negotiations between the State and Alturas, these seventeen months of delay are significant. Moreover, these delays make Alturas's decision to walk away from negotiations particularly troubling. In short, Alturas delayed negotiations, refused to engage in requested additional negotiations to reach compromises following the *Chicken Ranch* decision, and prematurely sought relief before the parties had reached an impasse.

When Alturas left the negotiation process, there was plenty of time for the parties to explore compromises through negotiations consistent with recent developments in federal case law.[11] IGRA's cooperative federalism model supports this sovereign-to-sovereign negotiation approach, rather than Alturas's rush towards litigation. Accordingly, under this specific record, the State did not violate its duty to negotiate in good faith under IGRA.

[11] Alturas's negotiation gamesmanship was entirely unnecessary because the record shows that the parties extended Alturas's 1999 Compact to December 31, 2023. JRON Tabs 58, 59 and 60 at 977, 979, and 983-986.

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CONCLUSION

For all the above reasons and authorities, the State respectfully requests this Court to grant summary judgment in its favor.

Dated: August 11, 2023

Respectfully submitted,

ROB BONTA
Attorney General of California
T. MICHELLE LAIRD
Acting Senior Assistant Attorney General

/s/ B. Jane Crue

B. JANE CRUE
Deputy Attorney General
Attorneys for State Defendants

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CERTIFICATE OF SERVICE

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

I hereby certify that on August 11, 2023, I caused to be electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

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

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 August 11, 2023, at Sacramento, California.

Linda Thorpe	*/s/ Linda Thorpe*
Declarant	Signature