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)
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 **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Date: November 3, 2023 Time: 10:00 a.m. Location: Courtroom 3, 15th floor Judge: Hon. Kimberly J. Mueller Trial date: Not Set Action Filed: Aug. 22, 2022

Plaintiff Alturas Indian Rancheria ("Alturas" or "Tribe") opposes the Motion for Summary Judgment filed August 11, 2023, by Defendants Gavin Newsom, Governor of the State of California, and the State of California (collectively referred to as the "State" or "Defendants") ("State's MSJ"). As more fully described by Alturas in its Motion for Summary Judgment filed on August 11, 2023 ("Tribe's MSJ"), this case does not hinge upon an evaluation of the good faith factors at 25 U.S.C. § 2710(d)(7)(B)(iii). The Ninth Circuit, in *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024 (9th Cir. 2022) ("*Chicken Ranch*"), held that the State's demand to negotiate topics outside of the seven topics of negotiation at 25 U.S.C. § 2710(d)(3)(C) is *per se* not in good faith. *Id*. at 1034. The Ninth Circuit did not hold that the State must demand such negotiation in a "final" version of the State's proposal. *See* State's MSJ, Memorandum of Points and Authorities ("State's MPA") p. 1:24-26 ("the State… never demanded that a final compact include provisions that were unlawful."). Rather, the State's proposal to negotiate off-list topics is, by itself, not in good faith. *Chicken Ranch* at 1043, 1045-1046, 1048.

The State attempts to downplay its request to negotiate unlawful topics by suggesting that Alturas' careful consideration of the State's unlawful demands delayed negotiations. The State also seeks to introduce evidence of communications on September 19, 2023 ("September Letter"), that occurred after the State's refusal to respond to Alturas, and after Alturas filed this litigation. This evidence is presented to suggest that the State might have made "significant changes" to its demands. The Court should disregard the State's post-negotiation communication as irrelevant to this action.

Ultimately, the State's MSJ should be denied because it has not proven the State negotiated in good faith. The State attempts to ignore federal court and Secretarial decisions that the State's proposal of certain topics of negotiation is *per se* unlawful. The State seeks to introduce inadmissible evidence as central to its claim for relief. The State fails to address numerous off-list topics of negotiation that violate IGRA. Moreover, the State attempts to distract the Court from its intractable surface bargaining.

ARGUMENT

I. The State's MSJ Fails to Address the Threshold Issue of Whether its Negotiations Were Beyond the Topics of Negotiation Permitted by IGRA.

The State encourages this Court to skip steps and go straight to the good faith factors at 25 U.S.C. § 2710(d)(7)(B)(iii). However, the Ninth Circuit has already addressed this issue and firmly held that the threshold question is whether the State demanded provisions that are beyond the seven topics listed at § 2710(d)(3)(C). *Chicken Ranch* at 1048 ("we do not further analyze the good faith factors… when it comes to off-list topics"). State demands that do not fall within those seven topics are *per se* not in good faith. The Court is not permitted to evaluate the good faith factors to determine whether the State's unlawful demands were objectively in good faith.

The State suggests that the Court can skip this threshold step because it "never demanded that a final compact include provisions that were unlawful." State's MPA p. 1:25-26. However, IGRA's limitation is on negotiation and is not predicated on whether the State issued a final demand. *See* 25 U.S.C. § 2710(d)(7)(B)(iii). IGRA authorizes Indian tribes to seek judicial intervention after only 180 days based on a state's bad faith conduct. 25 U.S.C. § 2710(d)(7)(B). Nothing in that provision limits the Tribe's action to circumstances where there is a final demand or proven impasse. *See Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation v. California*, 973 F.3d 953, 962 (9th Cir. 2020) ("*Pauma II*") ("The state of negotiations at the commencement of a lawsuit is certainly a relevant factor…" but an impasse is not required).

The State bemoans the Tribe's action by highlighting the "cooperative federalism model that balances the competing sovereign interests of the federal government, state governments, and Indian tribes…." State's MPA p. 9:9-10. When the State deliberately chooses to exceed IGRA's negotiation limits , it brings into alignment the principles of cooperative federalism, uniting tribal and federal interests in safeguarding the sovereign integrity of Indian tribes from the State's actions. Attempts by the State to impose policy priorities on Indian tribes through regulations that are not

directly related to class III gaming must be rebuffed at the threshold, before considering the State's purported good faith reasons.[1] *See Chicken Ranch* at 1029.

Ultimately, the State is not entitled to summary judgment because the State did not address the threshold issue of whether its demands fall entirely within the seven topics of negotiation at 25 U.S.C. § 2710(d)(3)(C). This predicate issue is fatal to the State's motion.

II. The September Letter is Not Admissible Evidence.

The State's argument that it negotiated in good faith primarily relies on the September Letter, which was delivered to Alturas after the State engaged in surface bargaining, after Alturas filed its Complaint, and on the day the State was served with this action.[2] However, the September Letter is irrelevant to the course of negotiations before Alturas sought judicial intervention as authorized by IGRA.

IGRA only imposes three minimal requirements on the Tribe when seeking judicial intervention. First, 180 days must have passed since the Tribe requested negotiations with the State. 25 U.S.C. § 2710(d)(7)(B)(i). Second, no compact must have been entered into between the Tribe and the State. 25 U.S.C. § 2710(d)(7)(B)(ii)(I). Third, the Tribe must provide evidence that the State did not negotiate in good faith. 25 U.S.C. § 2710(d)(7)(B)(ii)(II). The Tribe's burden is minimal because IGRA shifts that burden to the State once some evidence of the State's bad faith negotiation is presented. 25 U.S.C. § 2710(d)(7)(B)(ii)(II).

Alturas filed its complaint on August 22, 2022. At the time of filing, more than 180 days had passed since Alturas requested negotiations with the State, no compact had been entered into, and Alturas had introduced evidence of the State's failure to negotiate in good faith. Nothing more was required, and the record of negotiations relevant to the State's good faith should be considered closed on August 22, 2022.

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[1] Even if the State may have been willing to retract its off-list demands, it is not good faith negotiation to use unlawful subjects of negotiation to extract concessions from Alturas. *See Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1031 (9th Cir. 2010) ("*Rincon*"). Regardless, there is no evidence in the record that the State had any intent to withdraw all of its unlawful demands.

[2] Alturas preserved its evidentiary objection to Tabs 127 and 128 of the parties' Joint Record of Negotiations, ECF No's 45-1 to 45-6 ("RON"), pp. 3161-3165.

Alturas succeeded in serving the State with its Complaint on September 19, 2022. On that same day, possibly in an attempt to delay the Tribe's action, given the State's similar litigation with dozens of other Indian tribes, the State sent a vague letter to Alturas suggesting that it might reconsider some of the unlawful provisions in its compact proposals. This post-action communication is irrelevant to whether Alturas met the minimal burden imposed by IGRA on August 22, 2022, when it filed the action. Since irrelevant evidence is inadmissible, the Court should not allow the State to introduce the September Letter as evidence of its good faith negotiations with Alturas.

III. Regardless, the State Did Not Negotiate with Alturas in Good Faith.

IGRA places the burden of proof on the State to demonstrate that it negotiated with Alturas in good faith. 25 U.S.C. § 2710(d)(7)(B)(ii)(II) ("the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith…."). The State's MSJ fails to carry this burden for four primary reasons. First, the State did not address the fundamental question of whether its demands for negotiation extended beyond the seven topics of negotiation at 25 U.S.C. § 2710(d)(3)(C). Second, the State did not clarify whether its demands for taxes, fees, charges, or other assessments complied with either 25 U.S.C. § 2710(d)(3)(C)(iii) or 25 U.S.C. § 2710(d)(4), including the associated meaningful concessions analysis. Third, the State's surface bargaining precludes any meaningful assessment of the good faith factors. Lastly, even under the good faith factors, the State falls short of meeting its burden.

(a) The State Failed to Refute Alturas' Claims that its Negotiations Went Beyond the Topics of Negotiation Authorized by IGRA.

The State made no effort to address whether its demands were within the seven topics of negotiation authorized by IGRA. Once Alturas introduces some evidence that the State's demands were unlawful, the burden of proof shifts to the State. Alturas presented evidence that the State demanded negotiation on topics that the *Chicken Ranch* court found to be unlawful, and the State's MPA did not refute this evidence.[3] The State's MPA also failed to address its demands related to

[3] Even if the Court considers the September Letter, the State only indicated willingness to withdraw some of its unlawful demands. For others, the State made no proposal to limit negotiations to the topics at 25 U.S.C. § 2710(d)(3)(C). *See* State's MSJ p. 8:3-18.

regulating the Tribe's food and beverage standards, water quality, employment laws, unemployment and disability insurance requirements, or employee licensing. *See* Tribe's MSJ, Memorandum of Points and Authorities ("Tribe's MPA") section II(a)(ii). Additionally, the State's MPA did not address its demands for revenue sharing. *See* Tribe's MPA section II(b). By exclusively focusing on the good faith factors at 25 U.S.C. § 2710(d)(7)(B)(iii), the State failed to meet its burden, and it is not entitled to summary judgment. *See also Chicken Ranch* at 1048 (the court does not analyze good faith factors when the State's demands are not within the seven negotiable topics at 25 U.S.C. § 2710(d)(3)(C).).

(b) The State Did Not Address Its Revenue Demands.

Under IGRA, state demands for any payments from an Indian tribe must fall into one of two categories: (1) assessments for the necessary costs of regulating the compacting Indian tribe's class III gaming activities (25 U.S.C. § 2710(d)(3)(C)(iii)); or (2) taxes, fees, charges, or other assessments that are directly related to the Indian tribe's class III gaming activities (25 U.S.C. § 2710(d)(3)(C)(vii) & 25 U.S.C. § 2710(d)(4)). The State is permitted to demand that Alturas pay for the first category. However, the State cannot impose any payments on Alturas under the second category. 25 U.S.C. §§ 2710(d)(4); *Chicken Ranch* at 1048-1049. IGRA presumes a state has unlawfully imposed payments under the second category, 25 U.S.C. § 2710(d)(7)(B)(iii)(II), subject to the state's proof that it offered meaningful concessions to entice the Indian tribe to negotiate those payments. *Chicken Ranch* at 1048-1049.

Alturas presented evidence that none of the State's demands fall within the first category of permissible payments. *See* Tribe's MPA section II(b)(i); RON Tabs 70 at p. 1066, 115 at pp. 2, 6, 17, 22-26, 29-31, 35-36, 116 at pp 1, 13, 21-28, 101 at p. 2148, and 51 (State Compact Draft) at §§ 4.3, 4.4(d), 5.1(a)-(b). There is no evidence in the record that the State offered meaningful concessions as enticement for Alturas to negotiate payments under the second category. Therefore, the State cannot meet its burden of proving that its demands for payment were lawful and not imposed, including proving that it offered concessions that were meaningful to Alturas in exchange for permissible payments.

The State's MPA acknowledges that Alturas properly alleges the State attempted to "impose an unlawful tax, fee charge or assessment." State's MPA p. 16:24-25. However, instead of addressing whether the State's payment demands were lawful under either of the above-mentioned categories, the State asks the Court to skip steps and proceed directly to analyzing the good faith factors. In passing, the State points to *Rincon* and *Chemehuevi* as support for its claim that the State may take a "hardline stance if it is in line with legitimate state interests." State's MPA p. 13:20-23. However, as the State notes, that analysis only applies to non-tax issues like the "durational limits in a compact." *Id*.; *see Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1031 (9th Cir. 2010) (disapproving of a "hard-line stance" regarding taxation "as a condition of obtaining more gaming devices."). Negotiating the durational limit of a compact is inherently within the seven topics of negotiation, and IGRA does not presume such negotiations are not in good faith—unlike tax issues.

Therefore, the State has failed to meet its burden of proving that the payments it demanded from Alturas were in good faith. The State presented no evidence that any of the payments fell within the first category under 25 U.S.C. § 2710(d)(3)(C)(iii). The State presented no evidence that any of the payments are within the seven topics of negotiation and therefore (possibly) permitted by 25 U.S.C. § 2710(d)(4). Additionally, the State presented no evidence to rebut the presumption that it imposed the payments on Alturas. There is also no discussion of meaningful concessions in the State's MSJ. The State is not entitled to summary judgment.

(c) The State's Surface Bargaining Defeats its Attempt to Shift the Burden in Negotiations onto Alturas.

The Court may consider the good faith factors at 25 U.S.C. § 2710(d)(7)(B)(iii) only when the State requests to negotiate topics that are directly related to the conduct of class III gaming. *Chicken Ranch* at 1048. If the State had introduced evidence that its demands fell entirely within the permissible topics of negotiation at 25 U.S.C. § 2710(d)(3)(C), then the factors described in *Coyote Valley II* might apply. These factors include whether the State actively negotiated, whether the State terminated negotiations, whether the Tribe made specific requests, and whether the State remained willing to continue meeting. *See* State's MPA pp. 14:7-27, 16:1-17 (citing *In re Indian*

Gaming Related Cases, 331 F.3d 1094 (9th Cir. 2003) ("*Coyote Valley II*") and *Pauma II*). However, the State failed to meet its initial burden of showing it only negotiated permissible topics. Regardless, even under the *Coyote Valley II* and *Pauma II* tests, the State did not negotiate in good faith.

The State's purported willingness to continue negotiating is sharply undercut by its surface bargaining, a point discussed more comprehensively in the Tribe's MSJ. *See* Tribe's MPA section IV. In essence, the State put forward hardline positions on unlawful provisions that it knew were unpalatable to the Tribe, refused to justify its demands even after being confronted by thorough analysis by the Tribe, and refused to offer counterproposals to core compact issues. Based on this conduct, the State was not negotiating in good faith when the Tribe filed this action, and the State's expressed intent to continue negotiating in the same manner cannot change that conclusion.[4] The State bears the burden of proving it negotiated in good faith, and the State's actions belie its words.

(d) The State Did Not Carry its Burden Under the Good Faith Factors Analysis.

Setting aside the State's failure to provide evidence that its demands were in good faith, and disregarding the State's surface bargaining, the State's general conduct still falls short of good faith negotiation. Under the *Coyote Valley II* test as articulated by the State, the State failed to negotiate in good faith because it insisted on or demanded provisions that were not directly related to the operation of class III gaming activities. *See* State's MPA p. 14:18-20. As described herein, in the Tribe's Complaint, and in the Tribe's MSJ, the State insisted on numerous provisions that reached well beyond the permissible topics of negotiation and regulated numerous aspects of the Tribe's business unrelated to class III gaming activities. *See, e.g.,* Tribe's MPA sections II(a) & II(b)(i). The State failed to meet its burden of proving otherwise.

[4] Even if the Court considers the September Letter, the State's sudden change in position does not evidence good faith. The issues described in the September Letter were no different than those issues that Alturas had carefully considered and previously explained to the State why they were unlawful. RON Tabs 53 at pp. 946-953 & 69 at pp. 1027-1049. At the time this action was filed, the State had already refused to change those demands. RON Tabs 54 at pp. 956-962 & 124 at pp. 3154-3155, and 126 at pp. 3159-3160. Further, the State's September Letter only addressed a fraction of its unlawful demands, evidencing a continued intent to hold firm to other intrusive provisions that form the foundation of the State's surface bargaining.

Similarly, under the *Pauma II* test as articulated by the State,[5] the State failed to negotiate in good faith because Alturas provided specific details about the terms it preferred (RON Tabs 45 at pp. 576-725, 53 at pp. 945-955, and 69 at pp. 1026-1049), and the State did not propose new compact terms after the Tribe described in detail why its demands were unlawful. Rather, the State provided no justification or alternative terms. *See* State's MPA pp. 16:5-7, 8-12. Alturas carefully analyzed and responded to the State's January 18, 2022, draft compact and requested that the State justify its demands or change its negotiating tactics to comply with IGRA. The State did neither and simply pressured the Tribe to continue discussion about patently unlawful and unpalatable compact provisions.

The State's claim that it "never demanded—much less insisted—that Alturas include any compact provisions that the Tribe considered unlawful" is patently false based on the record of negotiations. State's MPA p. 17:7-9. Although the Tribe hoped to negotiate modest changes to its successful 1999 Compact, the State pressured it into beginning negotiations based on a recent compact the State had negotiated with another Indian tribe. When Alturas accepted the State's request, the Tribe provided the State with revisions that would bring most of the compact into compliance with IGRA's limits on the permissible topics of negotiation. *See* RON Tab 45 at pp. 576-725. In response, the State re-inserted the unlawful demands in its January 18, 2022, draft. *See* RON Tab 51 at pp. 802-938. The State even refused to comment on numerous sections of the Tribe's revisions—simply rejecting them without reason. *See* Ron Tab 45 (State's draft) at §§ 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."). Any reasonable person would conclude that by re-inserting the unlawful provisions, the State was demanding and insisting that Alturas accept them. The State then doubled down after the Tribe sent a detailed letter describing the unlawful provisions. The State never suggested that

[5] The *Pauma II* facts are far afield from the course of negotiations here. In *Pauma II*, the Tribe changed course in its negotiations several times, and filed suit before ever responding to the State's proposal. Those circumstances are simply not present here. *See Pauma II*, 973 F.3d at 961 ("Pauma never responded [to the State's first "complete draft compact"]. Instead, it filed this lawsuit a few months later.").

it would consider removing them, and never engaged in substantive justification or negotiation to resolve the Tribe's concerns. There was no fluid give-and-take, as the State contends. State's MPA p. 17:17-19.

The State also contends that the number of draft compacts passed between the parties and the number of negotiation sessions is material. State's MPA p. 17:20-18:3. Alturas agrees, in part, that the negotiations in *Chicken Ranch* and this case are different, but not for the same reasons articulated by the State. State's MPA p. 17:22-23. As a small Indian tribe with limited resources, Alturas was keenly aware of the State's negotiations with the *Chicken Ranch* tribes and others—allowing Indian tribes with greater resources to resolve current issues facing some thirty Indian tribes working to renegotiate their 1999 Compacts. Although Tribal-State compact negotiations are individualized to each Indian tribe, the State's conduct in negotiations, generally, when dozens of Indian tribes are all concurrently negotiating, cannot be disregarded.

For example, the RON in this case shows that the State and Alturas were aware of the *Chicken Ranch* litigation which held (both in the District Court and at the Ninth Circuit) that the State's demands were not in good faith. *See*, *e.g.*, RON Tabs 33 at p. 468 & 76 at pp. 1516-1529. The *Chicken Ranch* tribes were the first in a long line of Indian tribes that complained in federal court that the State refused to negotiate in good faith. At the time Alturas filed this action, no fewer than sixteen tribes had sued the State for the same conduct. Thus, the State's January 18, 2022, draft compact was demonstrably not in good faith, and its subsequent conduct in refusing to withdraw its unlawful demands relieved Alturas from any further obligation to continue a quixotic effort at reaching an agreement. Like in *Chicken Ranch*, the State "refused to accept [a] compact that did not include the challenged topics of negotiation." *Chicken Ranch* 42 F.4th at 1029; State's MPA p. 18:3-4.

As outlined above, the September Letter lends no information to the course of negotiations at the time Alturas initiated this action. Even if the September Letter is considered, it does not undo the State's bad faith. Notably, the State's MPA mischaracterizes the content of the September Letter. The State's change in position, to the extent expressed, was not a "willing[ness] to compromise on key compact terms…." State's MPA p. 18:6. The unlawful provisions were

not "key compact terms" to be negotiated and compromised—they were simply not permitted, and there was no compromise to be had. *See Rincon*, 602 F.3d at 1031 ("to 'impose' in the context of IGRA must therefore relate to something the state does during the negotiation process to extract an improper concession."). Moreover, the proposed "revisions" to those unlawful demands did not "move the compact negotiations forward." State's MPA p. 18:12-15. The State merely addressed the bare minimum it determined the *Chicken Ranch* decision required, without stating any intent to withdraw or revise the other unlawful provisions the Ninth Circuit did not reach.

Ultimately, the State bears the burden of proving to the Court that it negotiated in good faith. After imposing upon Alturas unlawful compact provisions, the State's statements that it would continue negotiating those same unlawful provisions are insufficient to meet its burden. The bare number of compact drafts exchanged, and face-to-face meetings held, while ignoring the detailed intervening written communications, are likewise insufficient to establish that the State was negotiating in good faith. The Tribe's careful consideration of the State's unlawful demands, and its observation of the State's bad faith conduct in negotiations with other Indian tribes, similarly cannot form the foundation for the State's claim that it negotiated in good faith because Alturas delayed negotiations. *See* State's MPA p. 19:8-20. Put simply, the State did not meet Alturas on equal footing in a "sovereign-to-sovereign negotiation approach." State's MPA p. 19:23. Rather, the State attempted to control Alturas through its demands, leaving the Tribe with no option but to request judicial intervention as provided by Congress.

CONCLUSION

The State has failed to meet its burden of demonstrating that it engaged in good-faith negotiations with Alturas. The State has not provided the Court with a sufficient explanation regarding how numerous demands for compact provisions align with the exhaustive list of topics that limit the State's negotiation scope. Furthermore, the State has not successfully rebutted the presumption that its demands for payment were made in bad faith. Even if the State had been able to meet these burdens, its actions cast doubt on the credibility of its claim that it was genuinely willing to negotiate permissible compact terms. The State's Motion for Summary Judgment should be denied.

Respectfully submitted this 22nd day of September, 2023,

John M. Peebles
Patrick R. Bergin
Michael A. Robinson
Tim Hennessy
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