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) 210-7889
Fax: (916) 327-2319
E-mail: Jane.Crue@doj.ca.gov
Attorneys for 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 **DEFENDANTS' POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** Date: November 3, 2023 Time: 10:00 a.m. Dept: Courtroom 3, 15th Floor Judge: Hon. Kimberly J. Mueller Trial Date: TBD Action Filed: 8/22/2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

COURT RULES

OTHER AUTHORITIES

Defendants Governor Gavin Newsom and the State of California (collectively, State), submit the following points and authorities in opposition to the motion for summary judgment (Motion) filed by Plaintiff Alturas Indian Rancheria, a federally recognized Indian tribe (Alturas or Tribe).

INTRODUCTION AND SUMMARY OF ARGUMENT

Alturas cannot establish that the State failed to negotiate in good faith under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721 18 U.S.C. §§ 1166-1167, for a new tribal-state class III gaming compact. The Joint Record of Negotiation (JRON) and Joint Statement of Undisputed Facts (JSUF) show a negotiation in its early stages when Alturas withdrew and filed this action against the State in August 2022. The JRON and the JSUF demonstrate that throughout the parties' limited negotiations the State actively negotiated, proposed and modified terms in response to Alturas' requests, 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). Because the negotiations were still in a preliminary stage, Alturas cannot establish, based on the JRON, that the State demanded or insisted on including compact provisions beyond the scope of IGRA.

The State also did not fail to negotiate in good faith under IGRA based on the Ninth Circuit's decision in *Chicken Ranch Rancheria of Me-Wuk Indians v. State of California*, 42 F. 4th 1024 (9th Cir. 2022) (*Chicken Ranch*). For over twenty years, Alturas has operated a Gaming Facility[1] pursuant to its existing tribal-state class III gaming compact (1999 Compact) with the State. Starting in October 2020, the parties began negotiations to complete a new successor compact under IGRA. These negotiations took place, somewhat sporadically (*see infra* Statement of Facts), until the Tribe suddenly withdrew from negotiations and filed this action after the State

[1] Terms that are defined in Alturas' 1999 Compact, or terms that were proposed in the draft compact exchanged between Alturas and State, such as Gaming Facility, are capitalized in this brief.

indicated it was reevaluating its most recent compact offer in light of the *Chicken Ranch* decision (JRON Tab 124 at 3155) and was prepared to make specific substantive changes. JRON Tab 128 at 3164-3165. The record shows that during negotiations with Alturas the State never insisted upon or demanded that Alturas' successor compact include provisions not permitted by IGRA. The record also shows that it was Alturas—not the State—that refused to participate further in ongoing negotiations after the Ninth Circuit decided *Chicken Ranch*.

In addition, the initial use of exemplar compacts from other tribes during preliminary negotiations is not a violation of IGRA. Topics and language in the exemplar compact initially chosen by Alturas to commence negotiations were not demanded by or insisted upon by the State, but rather served as a starting point or guide in the effort to craft a new compact for Alturas in light of the timeframe available in which a new compact could be approved and to avoid expiration of the Tribe's 1999 Compact. *See* JRON Tab 21 at 295, Tab 27 at 314.

Finally, even if this Court rejects the State's arguments and grants summary judgment in Alturas' favor, this Court should avoid issuing a broad and unnecessary advisory opinion. Rather, the Court could issue an order, consistent with *Chicken Ranch,* that requires the parties to proceed pursuant to the remedial process set forth in IGRA, 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii). There is no need for this Court to expend a significant amount of its valuable and limited judicial resources on an advisory opinion beyond the specific topics addressed in the Ninth Circuit's holding in *Chicken Ranch* that would not change the statutory remedy under 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii).

STATEMENT OF FACTS

An objective review of the JRON is necessary to evaluate the State's response to the Tribe's request to negotiate under IGRA. "[T]he function of the good faith requirement and judicial remedy is to permit the tribe to process gaming arrangements on an expedited basis, not to embroil the parties in litigation over their subjective motivations." *Rincon* 602 F. 3d at 1041. As a result, courts evaluate good faith "objectively based on the record of negotiations." *Id.*; *see also In re Indian Gaming Related Cases*, 331 F.3d 1094, 1113 (9th Cir. 2003) (*Coyote Valley II*) ("[T]he good faith inquiry is nuanced and fact-specific, and is not amenable to bright-line rules.").

Alturas alleges that the JRON and the JSUF provide undisputed evidence the State failed to negotiate a compact in good faith. Motion, pp. 1-2. On the contrary, the timeline actually reveals a negotiation that was in its beginning stages and with significant time gaps in the process due to the Tribe's lack of response to the State's multiple requests to continue negotiations. The key pertinent events are as follows:

- **May 7, 2020**, the Tribe requests a meeting with the State to discuss a new tribal-state compact. JRON Tab 1 at 2.
- **October 5, 2020**, the State responds and explains that a mail sorting error had occurred causing delay in responding to the Tribe's request. JRON Tab 2 at 4. The letter advises that the State is willing to meet regarding a new compact. *Id.*
- **October 28, 2020**, as requested by the Tribe, the State emails Alturas a copy of a recent compact as an example the parties could work from. JSUF 11. The State advises the Tribe that it welcomes scheduling a compact negotiation meeting. JRON Tab 13 at 44. Alturas does not respond for ten months. *Compare* JRON Tab 13 at 44, *with* JRON Tab 16 at 284-287.
- **August 31, 2021**, the State follows up with a letter again offering to schedule a compact negotiation meeting. JRON Tabs 16-17 at 284-287, JSUF 12. Alturas does not provide a substantive response for two months. *Compare* JRON Tab 17 at 286-287, *with* JRON Tab 19 at 291.
- **October 22, 2021**, Alturas responds to the State advising that it would like to schedule a meeting. JRON Tab 19 at 291.
- **November 19, 2021**, the State and the Tribe hold their first videoconference negotiation meeting. JRON Tab 25 at 308, JSUF 17.
- **December 22, 2021**, Alturas emails the State a redlined draft of the then recently signed Sherwood Valley Rancheria Compact as its proposed compact. JRON Tabs 44-45 at 564-725.
- **December 30, 2021**, the parties hold their second, and last, videoconference compact negotiation meeting. JRON Tab 41 at 539, JSUF 27.

- **January 18, 2022**, the State provides Alturas its redline compact draft. JSUF 29, JRON Tabs 50-51 at 787-938. The State asks the Tribe for potential dates for a third negotiation meeting. JRON Tab 51 at 787.
- **January 26, 2022**, the Tribe responds that it is "willing to consider moderate revisions to its current 1999 Compact" rather than negotiate a new compact. JRON Tab 53 at 946-955. The Tribe does not provide any further edits to the exchanged draft compact or propose dates for a future negotiation meeting. *Id.*
- **February 17, 2022**, the State responds 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. The State reemphasizes 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.* The State asks Alturas if it would like to schedule another compact negotiation session. JSUF 31. Alturas does not provide a substantive response for five months. *Compare* JSUF 31 *with* JSUF 32.
- **June 30, 2022**, the Tribe's 1999 Compact is extended to December 31, 2023. 87 Fed. Reg. 39,115 (June 30, 2022).
- **July 18, 2022**, the parties agree to a negotiation meeting to be held on August 30, 2022. JSUF 33.
- **July 28, 2022**, Alturas sends 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 and proposes a twenty-year extension of the Tribe's 1999 Compact. JRON Tabs 69-123 at 1027-3153, JSUF 34.
- **August 5, 2022**, the State responds to the Tribe's July 28, 2022 letter. The State cancels the August 30, 2023 negotiation session, 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 explains that it will reach out to the Tribe within 45 days with an updated compact offer and to reschedule the negotiation session. JSUF 35.

- **August 8, 2022**, Alturas advises the State that it does not agree to any review period following *Chicken Ranch* and demands 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, JSUF 36.
- **August 12, 2022**, the State reiterates that in light of *Chicken Ranch*, the State needs to evaluate its prior draft compact offer to Alturas. JRON Tab 126 at 3160. The letter advises 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 reaffirms its commitment to continuing negotiations and providing an updated draft compact for discussion. *Id.*
- **September 19, 2022**, 9:35 a.m, the State provides another update to Alturas. JSUF 39, JRON Tabs 127-128 at 3162-3165. The State advises that it has completed its reevaluation process in light of *Chicken Ranch* and recent compact disapproval letters from the U.S. Department of the Interior. JRON Tab 128 at 3164. As a result of that process, the State was prepared "to make significant changes to its previous compact offer to the Tribe." *Id.* The State's letter details the following changes, while 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.
    - 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.

- 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.

Id. at 3164-3165. The letter concluded with an offer to schedule a negotiation meeting and discuss the next steps to move the negotiations forward (*Id.* at 3165).

- **September 19, 2022**, 10:09 a.m., the Tribe serves its Complaint on the State. JSUF 41.

ARGUMENT

I. THE RECORD OF NEGOTIATION DOES NOT SUPPORT ALTURAS' CLAIMS THAT THE STATE VIOLATED ITS DUTY TO NEGOTIATE IN GOOD FAITH

A. Consistent with *Pauma II*, the Incomplete Negotiations between the Parties Shows that the State did not Violate its Duty to Negotiate in Good Faith

The JRON demonstrates that the State never failed in its duty to negotiate with Alturas in good faith. Instead, a fact-specific inquiry of the JRON illustrates that because the parties' negotiations were clearly incomplete when Alturas commenced its federal litigation, the State never violated IGRA. The Ninth Circuit in *Pauma II* emphasized the need for complete tribal-state compact negotiations. In that case, the record of negotiations showed that the State "remained willing to continue meeting and negotiating with [the Tribe]." *Pauma II*, 973 F. 3d at 962. The same is true here because the JRON shows that the parties held only two negotiation meetings and each party exchanged only one compact proposal.

Specifically, after the second negotiation meeting, the State responded with edits to Alturas' proposed compact draft. JRON Tab 51. The State's draft responded to the Tribe's December 22, 2022 draft by accepting some edits, rejecting others, and proposing alternatives, as is the normal cadence in a complex compact negotiation. Nowhere in the State's compact edits or related correspondence did it indicate that any topic was beyond the scope of the negotiation or that it was a take it or leave it offer. *See Pauma II*, 973 F. 3d at 958. Rather, the State indicated its

commitment to discussing different approaches to particularly challenging sections of the compact in future negotiation sessions. *E.g.*, JRON Tab 51 at 882 (comment explaining the State's position and indicating it was willing to incorporate an alternative approach to environmental review provisions), 919 (comment indicating that the State was willing to consider edits to section regarding minimum wage).

Following the exchange of compact drafts and related correspondence, the State invited the Tribe to schedule an additional compact negotiation meeting. The Tribe did not respond for several months. *Compare* JRON Tab 54 at 957-962 (letter dated February 17, 2022), *with* JRON Tab 69 at 1027-1049 (July 28, 2022 response).

When Alturas finally did respond, on July 28, 2022, its response did not build from the compact drafts that had been exchanged between the parties. Instead, Alturas demanded a 20-year extension of its 1999 Compact. JRON Tab 69 at 1048. This response even admitted that compact negotiations between the parties were not at impasse because the Tribe stressed that "[s]uch extension will *avoid an impasse* over the unlawful provisions described above . . ." *Id.* at 1048-1049 (emphasis added).

Chicken Ranch was released the same day as Alturas' July 28, 2022 letter. In response to the court's ruling the State immediately sought to reevaluate its compact edits in light of the decision. JSUF 35, JRON Tab 124 at 3155. Despite not responding to the State's draft compact for five months, Alturas immediately rejected the State's modest reevaluation period and again demanded a 20-year extension of its 1999 Compact. JSUF 36. The State then informed Alturas that it was not able to agree to its extension request, but was still evaluating its prior draft in light of the newly issued *Chicken Ranch* decision and compact disapprovals, and planned to provide an updated compact draft to the Tribe following the evaluation in order to facilitate further negotiation. JSUF 37, JRON Tab 126 at 3160. The State timely completed its reevaluation and provided a list of significant compact revisions it was willing to make. JSUF 38, 39. Alturas immediately served the State with its civil complaint. JSUF 40.

This JRON shows that at the time Alturas filed this lawsuit, the parties' negotiations were still at an initial stage. The Tribe cannot show that the negotiations were at a standstill or coming

to a close nor that the State was unwilling to continue meeting and negotiating. *Pauma II* found that "the state of negotiations at the commencement of a lawsuit is certainly a relevant factor for courts to consider when analyzing bad faith claims under IGRA." *Pauma II*, 973 F. 3d at 962. Similar to the record in *Pauma II*, the initial redlined compact proposals between the State and Alturas show that the parties were still in the process of exploring one another's compact negotiation positions. As the Ninth Circuit held in *Pauma II*, this is not the point where negotiations should end and litigation should begin. *Id.* Such a rush towards IGRA litigation would require a federal court to insert itself "into incomplete negotiations." *Id.* As a result, like in *Pauma II,* this record simply does not support summary judgment in Alturas' favor.[2]

B. Alturas' Heavy Reliance on *Chicken Ranch* does not Support its Claims of Bad Faith because the Tribe, and not the State, Refused to Engage in Ongoing and Active Negotiations

Alturas' reliance on *Chicken Ranch* (Motion, pp. 5-6) fails to support its claim that the State did not negotiate in good faith. There is no dispute that in *Chicken Ranch* the Ninth Circuit held 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. *Chicken Ranch*, 42 F.4th at 1029, 1037-39. The State's insistence on those provisions were well established in the *Chicken Ranch* record, given that the parties were in ongoing and active negotiations from 2015 to 2019. *Id.* at 1030. As the Ninth Circuit observed, during those multiyear negotiations the parties held "39 days of in-person negotiation sessions, in addition to numerous smaller sessions focused on discrete issues." *Id.* During this period, "the State provided at least twelve full draft compacts to the Compact Tribes Steering Committee (CTSC),[3] and the CTSC offered approximately fourteen drafts of its own." *Id.* Due to this extensive record, the Ninth Circuit was able to conclude that California acted in bad faith "through its insistence on family law, environmental, and tort law provisions . . . ." *Id*. at 1034. In contrast, in

[2] For these same reasons, the Court should reject Alturas' claim that the State engaged in "surface bargaining." Motion, pp. at 18-20. This case's record simply does not support summary judgment on this basis.

[3] In 2014, the plaintiffs in *Chicken Ranch* joined various other Indian tribes with existing 1999 compacts to form the CTSC.

this negotiation the State and Alturas met twice and exchanged draft compacts twice. JSUF 17, 26, 27, 29.

In attempting to show bad faith, Alturas' Motion heavily relies on claims that during compact negotiations, the State "demanded" that the Tribe negotiate over compact provisions that exceed the scope of permissible compact topics under IGRA. Motion, pp. 4-5. Similarly, the Tribe's Motion contends that the State "demanded that Alturas negotiate other topics that are not permitted by IGRA, based on the reasoning in *Chicken Ranch*." *Id.* at 5-6. But the JRON fails to support these claims. Bad faith must be established by the objective record of negotiations between the parties. *Rincon*, 602 F. 3d at 1041. This "good faith inquiry is nuanced and fact-specific, and is not amenable to bright-line rules." *Coyote Valley II*, 331 F.3d at 1113. Here, in stark contrast to the extended record in *Chicken Ranch*, the parties in this case never moved beyond the initial stages of negotiations. Whereas the parties in *Chicken Ranch* held 39 negotiation sessions, and many other smaller meetings, the State and Alturas held only two negotiation sessions. JSUF 17, 27. Whereas the respective parties in *Chicken Ranch* exchanged at least twelve compact drafts, here the parties exchanged only one draft compact each. JSUF 26, 29. Finally, whereas the parties in *Chicken Ranch* had over five years of formal negotiations (*Chicken Ranch*, 42 F.4th at 1030), here the substantive negotiation period was marked by several delays wherein the State requested that the Tribe identify dates for compact negotiations sessions and received no response for months at a time.

The limited record between Alturas and the State shows that the Tribe is wrong to claim that the State demanded impermissible compact provisions. Rather, this case's record shows the parties exchanged just one set of compact edits and held two initial meetings, with the State immediately offering to reevaluate its previous positions following issuance of the Ninth Circuit's decision in *Chicken Ranch* (JRON Tab 124 at 3155). Instead of accepting this reasonable proposal to evaluate and consider the State's post-*Chicken Ranch* positions, Alturas filed its civil complaint seeking to adjudicate the State's good faith based upon incomplete negotiations. Respectfully, the Court should decline the Tribe's invitation to grant it summary judgment on this record, and instead grant the State's summary judgment motion because the record does not show

that the State's actions rose to the level of bad faith negotiations under IGRA. The JRON demonstrates the State's commitment to IGRA's cooperative federalism model through its willingness to adapt the ongoing negotiations and its positions pursuant to the then-recent Ninth Circuit decision and actions by the U.S. Department of the Interior. It was Alturas—not the State—that refused to continue ongoing negotiations following *Chicken Ranch*. The Tribe's tactical decision to rush to the courthouse despite its earlier delays thwarted renewed negotiations continuing and deprives this Court of a complete negotiation process on which to base a decision that the State breached its duty under IGRA to negotiate in good faith.

C. Using Compact Exemplars does not Constitute Bad Faith Negotiations under IGRA

In arguing that the State demanded to negotiate over unlawful subjects of negotiation under IGRA, Alturas cites to another class III gaming compact between the State of California and the Sherwood Valley Rancheria of Pomo Indians of California (Sherwood Valley Compact). Motion, p. 5; JRON Tab 28 at 318-450. This previously negotiated compact between the State and another tribe is one of several exemplar compacts that the State shared with Alturas during the parties' short-lived compact negotiations. But this initial use of exemplar compacts fails to show that the State negotiated in bad faith under IGRA. The State's sharing of the Sherwood Valley Compact with Alturas was not a "demand" to negotiate over any particular topic or to include particular provisions in a final compact. Rather, an examination of the record shows that the Sherwood Valley Compact was merely an agreed-upon starting point to begin discussions between the parties. JSUF 19, 20. This joint decision by the parties to expedite their negotiations by starting with an exemplar compact did not constitute bad faith negotiations by the State.

The JRON shows how and why the Sherwood Valley Compact was initially referenced in the record. This exemplar originated in the State's response to a letter from Alturas. Specifically, on October 22, 2021, John Peebles on behalf of Alturas sent a letter to Nathan Voegeli requesting a meeting "to discuss a compact to replace the 1999 compact." JRON Tab 19 at 291. Mr. Voegeli responded with an email five days later on October 27, 2021. JRON Tab 21 at 295. Mr. Voegeli's email provided three possible meeting dates in November 2021, and discussed the

timelines for having "a new compact in place prior to the June 30, 2022 expiration of the Tribe's current compact." *Id.* Given the deadlines faced by the parties due to the pending expiration of Alturas' 1999 Compact, Mr. Voegeli advised that "the State highly recommends the Tribe and State work off of a previously approved compact and focus primarily on adjustments key to the Tribe's concerns." *Id.* Mr. Voegeli wrote that the "State previously provided the Tribe exemplar copies of the compacts negotiated with the Yurok Tribe and the Hoopa Valley Tribe" and Mr. Voegeli asked if the Tribe wanted to "work off of one of those compacts or perhaps another compact recently ratified by the Legislature . . . ." *Id.*

After the first meeting between the parties, Alturas agreed with the State's suggestion to use an exemplar compact to start the process, and specifically chose the Sherwood Valley Compact as its preferred exemplar. JSUF 19, JRON Tab 26 at 310. Mr. Voegeli then emailed a Word version of this compact to the Tribe's counsel, and invited the Tribe to submit back to the State a redlined version of this exemplar. JRON Tab 27 at 314. The State did not declare any portions of the compact off-limits to edits and not subject to negotiation. *Id*. The Tribe's counsel then provided its redlined version to the State. JRON Tabs 44-45 at 564, 577-725. Approximately 37 days later, the State responded with its own redlined version based upon the Tribe's proposal. JRON Tabs 50-51 at 787, 803-938.

The exchange of redlined compact drafts based upon the Sherwood Valley compact exemplar is not evidence that the State was "demanding" that any particular compact provisions be included in violation of IGRA. Instead, the record demonstrates an unremarkable exchange of preliminary proposals working from an exemplar compact that Alturas itself chose to start the negotiation process. These mutually agreed-upon preliminary discussions and exchanges do not rise to the level of bad faith negotiations by the State. The record shows that the State "remained willing to continue meeting and negotiating with [the Tribe]." *Pauma II*, 973 F. 3d at 962. These initial redlined proposals, based on an agreed-upon exemplar, demonstrate that the parties were still in the process of developing their respective compact proposals and understanding their counterpart's positions. As such, they are, by themselves, not evidence of bad faith negations by the State.

II. THIS COURT NEED NOT AND SHOULD NOT ADJUDICATE ALTURAS' CLAIMS BEYOND THOSE ALLEGED UNDER *CHICKEN RANCH*

In addition to arguing that the State violated its duty to negotiate in good faith by demanding negotiations over topics prohibited by *Chicken Ranch*, Alturas' Motion raises additional claims. These include arguments that the State demanded unlawful taxes, fees, charges, or assessments regarding the Special Distribution Fund, the Revenue Sharing Trust Fund, and the Tribal Nation Grant Fund.[4] Motion, pp. 6-13. Additionally, Alturas asks the Court to find that the comments made by the Secretary of Interior in deemed approved and disapproval letters for other tribes' compacts be given deference under the *Chevron* doctrine and considered precedent in this case.[5] Motion, pp. 14-20. While the State concedes that the Ninth Circuit's holding in *Chicken Ranch* prohibits it from insisting upon or demanding broad environmental, tort, and family law compact provisions that are not directly related to the operation of class III gaming activities (*Chicken Ranch*, 42 F.4th at 1029, 1037-39), the State strongly disputes the

[4] Notably, while the Tribe now asserts in its Motion that the payments demanded by the State were unlawful taxes, fees, charges or assessments and cites the State's compact draft sections 4.3(a)-(b), 4.4(d), and 5.1(a) in support, (Motion, pp. 8-14), the Tribe did not offer many substantive edits to these provisions or voice its current objections in its own draft. *See* JRON Tab 45 at 597-599 (no objection made to the appropriations formula in §4.3(a)-(b), other than objecting to a late payment provision). Specifically, the Tribe now objects to transfers from the Special Distribution Fund to the Revenue Sharing Trust Fund (Motion, p. 11), but failed to delete or comment on that provision in its compact draft. *See* JRON Tab 45 at 600 (no deletion or comment on this language in §4.4(d)). Similarly, the Tribe now argues that transfers from the Revenue Sharing Trust Fund to the Tribal Nation Grant Fund pursuant to the State's compact draft section 5.1 are non-compliant with IGRA (Motion, p. 11-13), but did not offer any edits or comments to this section in its own draft. JRON Tab 45, at 604-605 (showing no edits or comments to § 5.1). The Tribe also did not indicate its objections to these provisions in its January 26, 2022 letter detailing its objections to the State's proposed compact draft. JRON Tab 53 at 946-955.

[5] Alturas does not follow the proper *Chevron* analysis in its argument. In reviewing an agency's interpretation of a statute, a court applies the standard articulated by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Step one of this analysis is determining whether a statute is ambiguous with respect to a specific issue. Here, Alturas makes no showing of ambiguity relevant to the issues. Secondly, Alturas has not established that the Secretary of Interior's comments in unrelated correspondence regarding different compact language are based on a permissible construction of ambiguous language in IGRA, as required by step two of the analysis. *Chevron*, 467 U.S. at 843. It is also notable that the former Assistant Secretary – Indian Affairs Kevin K. Washburn has indicated that deemed approval letters do not merit *Chevron* deference. Kevin K. Washburn, *Agency Pragmatism in Addressing Law's Failure: The Curious Case of "Deemed Approvals" of Tribal-State Gaming Compacts*, 52 Univ. Mich. J. Law Reform 49 (2018).

merits of Alturas' so-called unlawful tax claims and assertion that bad faith can be proven by looking to some, but not all, comments made by the Secretary of Interior in relation to other compacts.[6] Nonetheless, as a matter of judicial economy, those issues need not be adjudicated by this Court to resolve the pending cross-motions for summary judgment.

As a threshold matter, Alturas cannot demonstrate through undisputed material facts that the State insisted upon or demanded negotiation on any topic that violated IGRA. The undisputed material facts show the negotiation's preliminary stage and the State's continued willingness to meet and discuss and negotiate over any topic in the compact.[7]

The State admits its January 28, 2022 compact draft contained language which implicated environmental review and mitigation for a broadly defined set of projects, and broad tort claims coverage. JRON Tab 51 at 882-914 (environmental review and mitigation provisions for a broadly defined set of projects), 919-921 (broad tort claims coverage). As a result of this inclusion, if this Court finds that, despite the preliminary stage of negotiations and the State's willingness to make significant changes (JSUF 39), the State unlawfully demanded or insisted upon environmental review and mitigation for a broadly defined set of projects and broad tort claims coverage that were not directly related to the operation of class III gaming activities in violation of IGRA pursuant to *Chicken Ranch*, then this case is resolved. The Court could then grant summary judgment in Alturas' favor, and issue an order requiring the parties to proceed pursuant to the remedial process set forth in IGRA, 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii). This is the *only* remedy available to Alturas under IGRA. Going beyond these limited topics is, in effect, asking this Court to opine on issues beyond those necessary to secure the only remedy available

---

[6] The Tribe seeks to have the court apply *Chevron* deference to letters disapproving a compact or providing commentary on compacts that have been deemed approved, but the Tribe argues that the same deference is not due letters affirmatively approving a compact, such as the November 17, 2022 letter approving the compact between the State and the Santa Rosa Indian Community of the Santa Rosa Rancheria (https://www.bia.gov/sites/default/files/dup/assets/as-ia/oig/pdf/508_compliant_2022.11.17_santa_rosa_indian_community_tribal_state_gaming_compact.pdf). Motion, pp. 16-17.

[7] Alturas' letter to the State on July 28, 2022, sent less than a month before the Tribe initiated this action, admits that its extension proposal would "avoid an impasse." JRON Tab 69 at 1048-1049. Interpreted in the light most favorable to the non-moving party, this reveals that impasse was not present when Alturas filed suit.

to Alturas under IGRA. This amounts to a request for an advisory opinion, which this Court has no jurisdiction to do. *Vieux v. E. Bay Regl. Park Dist.*, 906 F.2d 1330, 1344 (9th Cir. 1990); *see Yavapai-Prescott Indian Tribe v. Arizona,* 796 F. Supp. 1292, 1297 (D. Ariz. 1992) (finding it was beyond the court's role as contemplated by IGRA to grant declaratory relief for a disputed issue prior to IGRA's 60-day remedial negotiation process). Litigating any further hypothetical violations of IGRA would not change the scope of the remedy provided by Congress under this federal statute. As such, further litigation of Alturas' complex unlawful tax arguments and deference claims would be unnecessary.

Litigation of these issues would require the Court to expend a significant amount of its valuable and limited judicial resources on an advisory opinion that would not change the potential scope of the Tribe's possible remedy under 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii). Accordingly, this Court would be well within its discretion to avoid adjudicating Alturas' unlawful tax and *Chevron* deference arguments. *See, e.g., Dimdim, Inc. v. Williamson*, 2013 WL 12174134, at *1 (N.D. Cal. Jan. 22, 2013) (court denied a motion to strike because "it would be a poor use of judicial resources to render what ultimately could be no more than an advisory opinion on the sufficiency of [the plaintiff's] allegations"); *In re Richardson*, 97 B.R. 161,163 (Bankr. W.D.N.Y. 1989) (court declined to determine the value of a creditor's collateral because the valuation would serve no purpose, and would result in "no more than an advisory opinion" that was not within "the interest of judicial economy"); *Family Trust Services LLC v. Coone*, 2019 WL 1128636, at *2, n.3 (M.D. Tenn. Mar. 12, 2019) (following the court's determination to grant a motion to remand, the court held that any further action "would be little more than an advisory opinion, an exercise on which the Court is not inclined to spend its limited judicial resources").

To the extent the Court wishes further analysis of these additional claims beyond the environmental review and broad tort provisions, the State requests an opportunity to fully brief the Court.

CONCLUSION

For the reasons stated above, Alturas' motion for summary judgment should be denied in its entirety.

Dated: September 22, 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 Defendants

CERTIFICATE OF SERVICE

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

I hereby certify that on September 22, 2023, I caused to be electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANTS' POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S 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 September 22, 2023, at Sacramento, California.

Linda Thorpe	*/s/ Linda Thorpe*
Declarant	Signature