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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, Defendant.	Case No.: 2:22-cv-01486-KJM-DMC **PLAINTIFF'S REPLY TO PLAINTIFF'S 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: August 22, 2022

Although the Governor and the State of California ("State") ask this Court to consider the course of negotiations, they gloss over the only salient point reiterated by the Ninth Circuit in *Chicken Ranch*. The State proposed compact terms that are not within the seven exhaustive topics the State is permitted to negotiate. It does not matter whether the State proposed unlawful terms once, twice, or ten times. The Indian Gaming Regulatory Act ("IGRA") prohibits the State from attempting to negotiate compact provisions that are outside of the topics at 25 U.S.C. §

2710(d)(3)(C). End of analysis. *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 1034 (9th Cir. 2022) ("*Chicken Ranch*").

I. *Pauma II* Does Not Apply in This Context.

The State's defense relies on its measured success in *Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation v. California*, 973 F.3d 953 (9th Cir. 2020) ("*Pauma II*"). In *Pauma II*, the Ninth Circuit determined that the State negotiated in good faith based on the course of negotiations over the types of class III gaming Pauma could operate—a permissible topic of negotiation. *Pauma II* does not apply to the record in this case because it did not overrule *In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003) ("*Coyote Valley II*") or *Rincon Band of Luiseno Mission Indians v. Schwarzenegger* 602 F.3d 1019 (2010) ("*Rincon*") which recognize the State is prohibited from negotiating unlawful topics. Nor can the State use *Pauma II* to un-ring the bell after the Ninth Circuit clarified those two opinions in *Chicken Ranch*.

Neither *Coyote Valley II* nor *Rincon* were unclear that the State could not attempt to negotiate topics that are prohibited by IGRA. But, in the two decades since *Coyote Valley II*, that is exactly what the State has done. California, the most powerful state in the nation and the fifth largest economy in the world, used its overwhelming might to disregard the words written by Congress and demand that Indian tribes give up their sovereignty to the State in exchange for the opportunity to develop tribal economies, provide basic subsistence for Indian people, and attempt to reverse the effects of the State's racist past. *See* Executive Order N-15-19. That kind of coercion is expressly prohibited by IGRA. 25 U.S.C. §§ 2710(d)(4); 2710(d)(7)(B). It was not authorized by the Ninth Circuit in *Coyote Valley II*, *Rincon*, or *Pauma II*.

Resolving all doubt, if anyone but the State had any, the Ninth Circuit was clear and unequivocal in *Chicken Ranch* that the State's attempt to negotiate topics which exceed IGRA is on its own and without any further analysis not in good faith. *Chicken Ranch* at 1043, 1045-46, 1048. The court's analysis did not turn on how many times the State insisted on the unlawful provisions. *Cf.* D's Opp. p. 8:16-18. Nor did the court's analysis turn on how many drafts were passed between the parties. *Cf.* D's Opp. p. 8:20-22. While it is true the Ninth Circuit described the course of negotiations for background (*see* D's Opp. pp. 8:16-9:19), the court stated that

"California crossed the line" by exceeding the "*only* permitted topics of negotiation." *Chicken Ranch*, 42 F.4th at 1034. More specifically, the court described that "IGRA creates a limited exception to states' general lack of power to regulate Indian tribes on Indian lands." *Id*. at 1035. And the court focused on whether the "disputed topics exceeded IGRA's bounds," not on how many times the State introduced them. *Id*. at 1036.

The *Chicken Ranch* court also did not consider that even before the State made unlawful proposals to Alturas Indian Rancheria (the "Tribe") in this case, it already had been adjudged in bad faith for making the same unlawful proposals to other Indian tribes. The State lost at the trial court in *Chicken Ranch* on May 27, 2021, which was more than seven months before it made the same proposals to the Tribe in this case. To the extent that the trial court's decision was unclear, the State also did not propose any meaningful concessions. Both the State and the Tribe knew the topics proposed by the State were unlawful, yet the State proposed negotiating the unlawful topics anyway.

Pauma II, decided by the Ninth Circuit only two years before *Chicken Ranch*, does not state otherwise. There, the Ninth Circuit merely addressed—once it reached an open question of the State's bad faith—whether the State's permissible negotiations were in bad faith. Under *Pauma II*, an Indian tribe must make some reasonable effort to negotiate permissible topics before suing the State for bad faith negotiations. *See Pauma II*, 973 F.3d at 958 ("A hard line stance is not inappropriate so long as the conditions insisted upon are related to legitimate state interests regarding gaming and the purposes of IGRA." [emphasis added; quotations omitted]). Nothing in *Pauma II* requires an Indian tribe to negotiate unlawful topics, of which the State's introduction is *per se* bad faith.

The problem with the State's argument is that it wants the Court to jump over whether the State proposed to negotiate unlawful topics and reach whether the Tribe engaged in "enough" negotiations. That is not what *Pauma II* requires, nor is it in accordance with the explicit language in *Chicken Ranch*. The timeline of negotiations is not relevant to the Court's determination that the State proposed to negotiate unlawful topics—to use its coercive power to rob an Indian tribe of its sovereignty. *See Chicken Ranch*, 42 F.4th at 1035 ("Congress intended to prevent compacts

from being used as subterfuge for imposing State jurisdiction on tribes concerning issues unrelated to gaming.").

The State attempts to escape its proposal to negotiate unlawful topics by claiming that the use of "compact exemplars" which include unlawful topics is not in bad faith. D's Opp. pp. 10:9-11:28. What the State fails to explain to the Court, however, is that the State re-inserted (or did not delete) the unlawful topics in its subsequent proposal to the Tribe during negotiations. On December 22, 2021, the Tribe sent the State substantial edits to one of the "compact exemplars." Joint Record of Negotiations ("RON") Tabs 44-45. Among other revisions, the Tribe removed or revised unlawful provisions related to: (1) the scope of tribal employees the Compact may regulate; (2) the scope of tribal facilities the Compact may regulate; (3) the scope of environmental provisions; (4) the State's use of Special Distribution Funds; (5) the scope of tribal records accessible to the State; (6) the application of State food and beverage handling and water quality standards; and (7) the application of State tort laws. On January 18, 2022, the State responded by re-inserting in whole or in substantial part the unlawful topics of negotiation. RON Tabs 50-51. So, the State's use of "compact exemplars" as a starting point is irrelevant because the State intentionally proposed the unlawful topics of negotiation on January 18, 2022. It is also irrelevant whether the State indicated that unlawful topics were "beyond the scope of negotiation or that it was a take it or leave it offer" because the State's proposal to negotiate unlawful topics is… unlawful. D's Opp. p. 6:25-27; *Chicken Ranch* 42 F.4th at 1034 ("We further hold that when… a state seeks to negotiate for compact provisions that fall well outside IGRA's permissible topics of negotiation, the state has not acted in good faith." [emphasis added]).

Moreover, the State's holding out for a decision on its appeal in *Chicken Ranch*, and then demanding a lengthy interlude in negotiations to "reevaluate" its proposals cannot form the basis of good faith negotiations. D's Opp. p. 7:16-18; RON Tab 124. As noted above, when the State proposed the unlawful terms, it had already been adjudicated in bad faith for the same conduct toward other tribes. The State's demand for a delay in negotiations provided no indication that the State would reverse direction on its unlawful terms. Nor did the State's response to the Tribe's objection to the delay in negotiations offer the Tribe any assurances that it would address the

substance of the *Chicken Ranch* decision, instead of merely tinkering with the specific provisions the Ninth Circuit used as examples of unlawful terms. The Tribe objected to the State's lengthy delay because "the Court's determination of the issues presented was not new information to the State and is directly in line with both the positions long stated by Alturas and with numerous prior decisions of the Secretary of the Interior." RON Tab 125. The State had also filed a motion for the Ninth Circuit to reconsider *Chicken Ranch*, which further indicated that the State did not intend to change course. As described above, the *Chicken Ranch* decision should not have been a surprise.

Ultimately, under IGRA it is the Court's duty to protect the Tribe from the State's unlawful intrusion into its sovereignty. The "limited record" in this case (D's Opp. p. 9:20) is because the State attempted to coerce the Tribe into accepting unlawful provisions that exceed the permissible topics of negotiation, and the Tribe refused to be coerced. Once the Tribe was unable to convince the State that its proposals were unlawful, it appropriately sought judgment that the State's unlawful demands were not in good faith. That course of action is precisely what Congress intended when it strictly limited the State's authority and permitted Indian tribes to sue the State for exceeding that authority if the State persisted. The mere act of a State proposing unlawful provisions violates IGRA because of the imbalance of power between the State and the Tribe. Here, the Tribe afforded the State several opportunities to change course, which the State refused. *See, e.g.*, RON Tabs 44-45, 53, 69, 125.

This is not a case of the Court inserting itself "into incomplete negotiations." D's Opp. p. 8:7-8 (citing *Pauma II*). It is a case where the oppressed Indian tribe is requesting assistance from the Federal Court to defend its sovereignty from the bully-State as required by Congress and the United States trust responsibility toward its ward.

II. Adjudicating the Tribe's Claims Is Not an Advisory Opinion.

In an effort to preserve the State's putative ability to continue proposing unlawful topics for negotiation, it claims that adjudicating the Tribe's claims that go beyond the two topics decided by the *Chicken Ranch* court "amounts to a request for an advisory opinion." D's Opp. pp. 13:12-14:2. The basis for the State's theory is that only the issues specifically described in the *Chicken Ranch* opinion need to be decided to afford the Tribe its remedy under IGRA. D's Opp. pp. 13:20-

14:1. Not only are Alturas' remaining claims properly before the Court, a decision on those claims is necessary for the State and the Tribe, and potentially a mediator, to succeed in IGRA's remedial procedures.

Contrary to the State's argument, IGRA does not grant the Tribe only one remedial opportunity. Rather, it creates a series of steps to preserve tribal sovereignty, promote government-to-government relations, and preserve the cooperative federalism model. After a determination that the State did not negotiate in good faith, the State and the Tribe go back to the negotiating table for not less than sixty days. 25 U.S.C. § 2710(d)(7)(B)(iii). During these negotiations, there is no further opportunity for the State or the Tribe to request judgment on whether State proposals are unlawful, or within the topics allowed by IGRA. Absent such a judgment before the State and the Tribe enter into negotiations, the parties are likely to remain at loggerheads thereby defeating the purpose of further negotiations.

IGRA contemplates that the Court may adjudicate all contested issues before ordering negotiations under section 2710(d)(7)(B)(iii), because the order finding the State did not negotiate in good faith is later used to guide a court-appointed mediator if the parties fail to reach a negotiated agreement. 25 U.S.C. § 2710(d)(7)(B)(iv) (requiring the mediator to select a compact "which best comports with… the findings and order of the court."). Moreover, the mediator's selected compact is submitted to the State for its review and approval, as a last-ditch effort to promote a government-to-government agreement between the State and the Tribe. 25 U.S.C. § 2710(d)(7)(B)(v). The State would presumably review the Court's decision in determining whether to approve such a compact.

Thus, adjudicating all of the Tribe's claims fulfills IGRA's purposes of promoting government-to-government relations between the State and the Tribe, and fulfills IGRA's purposes that absent an agreement between the parties a court-appointed mediator comply with the Court's determination regarding which of the State's negotiations were not in good faith. The Court's direction may also influence the State's decision whether to approve the mediator's selected compact before IGRA removes the State from negotiating compact provisions altogether, pursuant

to Secretarial Procedures. *See* 25 U.S.C. § 2710(d)(7)(B)(vii) ("the Secretary shall prescribe, in consultation with the Indian tribe, procedures….").

The State's reliance on *Yavapai-Prescott Indian Tribe v. State of Arizona* (*Yavapai*), 796 F.Supp. 1292 (D. Az. 1992), has no bearing on this case, because the Tribe has not asked this Court to declare whether the State must negotiate terms within the scope of IGRA's permissible subjects. *Id*. at 1294 ("Plaintiff seeks an order declaring that electronic or electromechanical facsimiles of any game of chance are games which are permitted in the State of Arizona… The parties agree that the video gaming at issue falls within class III."). Rather, all of the Tribe's claims are that the State proposed provisions that are not permitted by IGRA.

Nothing in IGRA prohibits a State from negotiating for class III gaming, even if the State does not permit such games to be operated by any other person. The question before the court in *Yavapai* was whether the state was required to negotiate for a particular game which was admittedly within the scope of class III gaming; the question was not whether the state was prohibited by IGRA from negotiating a topic that was not related to class III gaming. Furthermore, in this case the State does not have an interest in "the unique opportunity for examination and input as to the interplay of Indian gaming within the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens." *Id*. at 1297. These interests are described at 25 U.S.C. § 2710(d)(7)(B)(iii)(I). As stated by the Ninth Circuit in *Chicken Ranch*, the Court may not consider these interests when determining whether the State's provisions exceed the permissible topics of negotiation at 25 U.S.C. § 2710(d)(3)(C). *Chicken Ranch*, 42 F.4th at 1042-1043 ("Treating a violation of § 2710(d)(3)(C) as definitive proof that a state did not fulfill its good-faith duty is, therefore, the only way to give proper meaning to § 2710(d)(3)(C).").

That the State's reliance on *Vieux v. East Bay Region Park District*, 906 F.2d 1330 (9th Cir. 1990) is inapposite requires little examination. This case does not involve "purely hypothetical" issues. *Id*. at 1344. There exists an "actual case or controversy" because the State did, in fact, propose unlawful topics of negotiation, and the Tribe has, in fact, objected to those negotiations. *Id*. The State's proposals are not hypothetical, they are well-reflected in the record

of negotiations. *Cf.* D's Opp. p. 14:5-8. The State does not, and cannot, claim that the Tribe's request that this Court resolve these issues run afoul of the "ripeness doctrine." *Id.* And, although the remedial process under IGRA may be the same, D's Opp. p. 14:6, the nature of the remedy is clearly influenced by the amount of direction the State, the Tribe, and a mediator are given by the Court. Therefore, the resolution of the parties' dispute is not an advisory opinion.

Finally, the Tribe objects to the State's request for additional briefing regarding the Tribe's claims that the State proposed unlawful provisions. D's Opp. p. 14:23-25. First, the Tribe's claims were well documented and explained in its Complaint and were well explained to the State prior to this suit. The State has had ample opportunity to address the holding in *Chicken Ranch* in its Motion for Summary Judgment, and in its Opposition to this motion. Second, instead of consuming three pages of its opposition brief on a specious argument that the Court's resolution of the Tribe's claims would be an advisory opinion, the State could have confronted the issues head-on. Third, the Court's application of IGRA and its explanation in *Chicken Ranch* to the Tribe's remaining claims is straightforward—was the State's proposal directly related to the Tribe's operation of class III gaming? Because the analysis is an objective one, the State's subjective intent or justification, or unwritten limits, are not relevant. *Chicken Ranch*, 42 F.4th at 1037. The Court need only review the language of IGRA, the applicable State statutes which are cited by the Tribe, the State's proposed compact provisions, and the Ninth Circuit's opinions.

The Tribe respectfully requests that the Court decide all claims that the State did not negotiate in good faith because its proposals violate 25 U.S.C. § (d)(3)(C)'s limits. A decision on all claims will greatly benefit all California Indian tribes, because the State continues to attempt to "divide and conquer" tribal governments by refusing to abide by the Ninth Circuit's analysis—instead insisting that only single-issue claims decided by the court are binding. Absent the Court's determination whether the State negotiated in good faith on each claim presented, the State and Indian tribes will continue to experience high conflict in compact negotiations as tribes struggle to preserve their sovereign integrity. That conflict is also likely to persist in this case during the 60-day remedial negotiating period under IGRA absent the Court's determination of all claims.

III. Conclusion.

For the foregoing reasons, the Tribe respectfully requests the Court grant the Tribe's motion for summary judgment on all claims in full.

Respectfully submitted this 6th day of October 2023,

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