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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' REPLY TO ALTURAS' OPPOSITION TO STATE DEFENDANTS' 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

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Defendants, Governor Gavin Newsom and the State of California (collectively, State), submit the following reply to Plaintiff Alturas Indian Rancheria's (Alturas or Tribe) Opposition to Defendant's Motion for Summary Judgment (Pl. Opp. to Def. Mot. for Summ. J., (Pl. Opp.) ECF 50; State Defendants' Memo P. & A. Mot. Summ. J., (Def. Mot.) ECF 49-1).

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the joint record of negotiation clearly shows that the State negotiated with Alturas in good faith for a new successor compact under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, 18 U.S.C. §§ 1166-1167. Joint Record of Negotiation, ECF 45-1 to 45-6 (JRON). The JRON shows that the State attempted to move negotiations along in order to avoid an expiration of the Tribe's current 1999 compact. The record further shows the State's willingness to discuss and revise the draft compact exchanged between the parties—despite several extended delays by the Tribe—so as to continue meaningful discussions. Finally, the JRON shows that the State offered to make substantial revisions to the draft compact following issuance of *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024 (9th Cir. 2022) (*Chicken Ranch)* and by taking into account the then-recent decisions by the Secretary of Interior.

Despite the State's willingness to further negotiate, Alturas insisted the State was negotiating in bad faith, but this claim is not supported by the JRON. The JRON shows that Alturas' actual goal was to obtain an extension of its 1999 compact for an additional twenty years or execute a substantially similar compact rather than negotiate for a new compact. When the State indicated its wish to continue negotiating for a new compact, the Tribe ended negotiations and filed suit. The joint statement of undisputed facts and the JRON together evidence how the State negotiated in good faith under IGRA. Joint Statement of Undisputed Facts, ECF 48-3 (JSUF).

The State did not demand or insist on provisions outside of IGRA's scope and unfailingly maintained a willingness to further discuss and flexibly negotiate any disagreements. The entire record demonstrates the State's ongoing willingness to support tribal gaming and participate in IGRA's cooperative federalism process, and that it negotiated in good faith. *See, e.g.*, JRON Tab

47 at 741 (State's email to Alturas describing its efforts to move negotiations forward); JRON Tab 50 at 787 (State's email to Alturas with draft compact edits and asking if the Tribe would like to schedule a negotiation session); JRON Tab 54 at 957-962 (State's letter to Alturas responding to Tribe's concerns and asking again if the Tribe would like to schedule a negotiation meeting); JRON Tab 124 at 3155 (State's letter to Alturas indicating it was reevaluating its compact offer in light of the *Chicken Ranch* decision). If Alturas desired a compact exemplar or initial draft that differed from the one it chose from among multiple options, then it should have indicated this to the State. Alturas cannot claim that the State negotiated in bad faith based on the content of an exemplar compact that it explicitly chose as a starting point for the negotiations. Alturas has not provided evidence that the State was unwilling or refused to continue negotiations or accept Alturas' desired compact revisions. Lastly, the State's correspondence to Alturas dated September 19, 2022, is a part of the record of negotiation, relevant to the negotiation process between the parties, and admissible evidence in this proceeding.

ARGUMENT

I. THE RECORD DOES NOT SUPPORT A FINDING THAT THE STATE NEGOTIATED IN BAD FAITH IN VIOLATION OF IGRA

Alturas' Opposition argues that the State failed to negotiate in good faith during the brief, incomplete compact negotiations held between the parties. The record shows otherwise. Alturas completely fails to dispute critical facts evidencing the State's good faith. Alturas' Opposition does not adequately address its own failure to authentically engage in negotiations with the State to conclude a tribal-state compact. Alturas failed to respond to the State's requests for specific compact proposals and to schedule further negotiation sessions, refused to negotiate to impasse, and now asserts that the State negotiated in bad faith. This assertion of bad faith is not supported by the record. Therefore, the State is entitled to summary judgment in its favor on all of Alturas' IGRA claims.

A. Alturas Chose the Sherwood Valley Compact as a Template for Negotiations

Alturas alleges that the State "pressured it into beginning negotiations based on a recent compact the State had negotiated with another Indian tribe." Pl. Opp at 9. Further, Alturas claims that instead of a new compact, "the Tribe hoped to negotiate modest changes to its successful 1999 Compact." *Id.* Alturas also claims that it never intended to begin negotiations for a new successor compact despite its request to the State for exactly that, and that its choice of an exemplar compact was coerced by the State. JSUF 8, JRON Tab 1 at 2. The State's Motion, the JSUF and the JRON detail the process between the parties in commencing negotiations for a new compact and this record does not support the Tribe's assertions.

First, the State never insisted on any one starting point for negotiations. In October 2020, the parties discussed the appropriate starting point for negotiations. JSUF 10. After these discussions, Alturas requested a copy of the compact that the State had negotiated with the Yurok Tribe. JRON Tab 12 at 40. In response, the State indicated that while it was open to beginning from the Yurok compact, it proposed beginning from a compact the State had entered with the Hoopa Valley Tribe as it contained lesser rates of payments and would be more beneficial to the Tribe. JSUF 11, JRON Tab 13 at 44; *see* JRON Tab 14 at 47. The Tribe never responded with an edited version of this compact, or any compact, until prompted by the State a year later in October 2021. JSUF 11-13. By the time the Tribe reengaged with the State, its 1999 compact was due to expire in little more than a year. JSUF 7. The record clearly shows that the State again suggested using a prior compact as a starting point or exemplar to begin discussions based on the short time frame remaining to get a new compact through the approval process before Alturas' current compact expired.[1] JRON Tab 21 at 295. During the parties' discussions, several exemplar

[1] As the State wrote in its October 27, 2021 letter, "Given the limited time before January, 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. The State previously provided the Tribe exemplar copies of the compacts negotiated with the Yurok Tribe and the Hoopa Valley Tribe. It would be helpful to discuss at this initial meeting if the Tribe would like to work off of one of those compacts or perhaps another compact recently ratified by the Legislature, such as that for the Middletown Rancheria of Pomo Indians of California. Specifically, it is crucial that the State learn from the Tribe its preferred economic terms and its

compacts were discussed but the final decision was left up to the Tribe. The Tribe's suggestion that the State pressured or somehow insisted that the Tribe work from the Sherwood Valley compact has no support in the record. *See* JSUF 14, JRON 21 at 295. If Alturas had desired a compact offer that did not use another tribe's compact as a starting point then it could have addressed this matter with the State in negotiations. It did not. It would be an absurd interpretation of IGRA and *Chicken Ranch* to find the State negotiated in bad faith immediately upon the commencement of negotiations because the parties mutually decided to begin negotiations using an exemplar compact chosen by the Tribe. This outcome would unnecessarily handicap all future tribal-state compact negotiations by restricting the parties from mutually deciding to begin negotiations from another completed compact to conserve time and effort.

B. The State Never Demanded or Insisted on Unlawful Provisions

Alturas advances an extreme view of the *Chicken Ranch* decision. Per prior Ninth Circuit precedent, each negotiation should be analyzed based upon its own record of negotiation when determining whether a state acted in good faith. *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1041 (9th Cir. 2010). The "good faith inquiry is nuanced and fact-specific, and is not amenable to bright-line rules." *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1113 (9th Cir. 2003). Alturas' view imposes a bright-line rule where a state acts in bad faith if even a single draft mentions a topic that may fall outside the range of IGRA's permissible subjects. This interpretation ignores the extensive negotiation record before the court in *Chicken Ranch* as well as the ruling's emphasis on the State's continued insistence on provisions within that record. *Chicken Ranch*, 42 F.4th at 1034. "We hold that through its *insistence* on family law, environmental law, and tort law provisions, California substantially exceeded IGRA's limitation that any Class III compact provision be directly related to the operation of gaming activities (emphasis added). Indeed, the central problem with California's approach was this: it *for years demanded* that the Tribes agree to compact provisions relating to family law, environmental regulation, and tort law that were unrelated to the operation of gaming

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desired approach regarding the environmental review process in the compact." JRON Tab 21 at 295.

activities and far outside the bounds of permissible negotiation under IGRA." *Id.* at 1029. (emphasis added). Alturas ignores the extensive record in *Chicken Ranch* which was the decision's predicate. The record in this case is not analogous to *Chicken Ranch* but is rather very comparable to the facts in *Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation v. Cal.*, 973 F.3d 953 (9th Cir. 2020) (*Pauma II*) as detailed in the State's Motion. *See* Def. Mot. at 18; *See also* Def's P. & A. in Opp. to Pl.'s Mot. for Summ. J., (Def. Opp.) ECF 51 at 6.

As the State explained in its Motion, as well as in the State's Opposition to Plaintiff's Motion for Summary Judgment, the record demonstrates that the parties' negotiations were clearly incomplete when Alturas commenced this litigation. *E.g.*, Def. Mot. at 10-11; Def. Opp. at 6. The record shows that at the time Alturas filed suit the parties' negotiations were still at an initial stage. *See* Def. Mot. at 10 (explaining that the parties only exchanged one compact draft each and participated in two compact negotiation meetings); *see also* JSUF 31-38 (State asking the Tribe to further clarify or refine the draft compact language and to suggest any other edits, which Tribe never did). The Tribe's response does not attempt to dispute this or offer any reasonable explanation for its premature withdrawal from negotiations.

Alturas' desire for an extension of its 1999 compact or a sort of modified version of it rather than attaining a new compact was first briefly suggested in correspondence from the Tribe after the parties had exchanged redlined copies of a draft compact. JRON Tab 54 at 953. After the State responded to the Tribe's letter, Alturas again corresponded with the State. This time, however, the Tribe made it clear that the only acceptable outcome to the negotiations with the State was a twenty-year extension of its current 1999 compact. JRON Tab 69 at 1027-1049. The Tribe attempted to provide a foundation for this demand by falsely claiming that the State had acted in bad faith despite its offer to continue negotiating and discussing all compact provisions. In its correspondence with the State, Alturas made statements such as, "[t]he State has continuously refused to negotiate fundamental provisions of the Tribal-State compact," "[t]he State must exhibit a willingness to discuss substantial revisions to all parts of the Tribal-State compact with Alturas," "the State has repeatedly rejected Alturas' proposed revisions," and "the

State has given Alturas a 'take it or leave it' demand." *Id*. at 1046-1047. The record in this case clearly shows that none of these allegations are true. *See* JSUF 14 (agreeing that the State asked for the Tribe's preferred economic terms and approach regarding environmental terms); *see also* Def. Mot. at 10 (providing examples of the State's willingness to negotiate compact provisions, acceptance of the Tribe's edits, ongoing requests for further negotiations and absence of any demands or ultimatums). Alturas concluded that it "does not believe there is any reason to continue negotiations for a Tribal-State compact materially different from the 1999 Compact" and gives the State an ultimatum: either extend the Tribe's current 1999 compact for twenty years or execute a new compact with the same terms as the 1999 compact for twenty years. JRON Tab 69 at 1047-1048. Alturas then constructively withdrew from negotiations for a new compact.[2] *Id*.

It is clear that the State was willing to discuss and revise compact provisions in the negotiations up to and including the day it was served with Alturas' complaint in this matter. At no time did the State refuse to negotiate revisions or give the Tribe a take-it or leave-it ultimatum.

II. THE STATE'S SEPTEMBER 19, 2022, LETTER IS RELEVANT AND ADMISSIBLE

In this case, the JRON is the basis for the Court's good faith analysis. *See Rincon Band of Luiseno Indians v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010). Therefore, the entire record of negotiation, including the State's September 19, 2022, letter is relevant and should be considered by the Court. Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. Fed. R. of Evid. 401. As conceded by Alturas, the State's letter was sent prior to the service of the Tribe's complaint. Alturas provides no authority or basis for its claim that the JRON should be considered closed on August 22, 2022, when the State had no

[2] "If the State elects to not extend Alturas' 1999 Compact for another 20 years, then Alturas hereby requests that the Governor execute a new Tribal-State compact with the same material terms as the Tribe's 1999 Compact for an additional 20 years." JRON Tab 69 at 1048. "Even though Alturas requested negotiations under subdivision (c), once Alturas withdraws from such negotiations because the State insists on negotiating materially different Tribal-State compact provisions which cannot be approved by the Secretary because they violate IGRA, the State's duty of good faith requires the State to execute a Tribal-State compact that is identical in all material respects to the pre-ratified 1999 Compacts under subdivision (b). Thus, if the Governor declines to extend the 1000 [sic] Compact, he owes Alturas a duty to execute a Tribal-State compact that is materially identical to its 1999 Compact and submit it to the Legislature for its 30-day review." JRON Tab 69 at 1048.

knowledge of, or notice of, the Tribe's lawsuit. Additionally, the State's September 19, 2022, letter is of consequence in this matter. Unfortunately, the Tribe chose to prematurely end negotiations and file suit after the State clearly stated that it intended on closely scrutinizing the July 28, 2022, *Chicken Ranch* decision and the Secretary's compact decision letters with the intent of reevaluating its compact offer to Alturas, and in fact did so. *See* JRON Tab 128 at 3163. The Tribe has not provided any reasonable explanation or contradictory evidence to refute the fact that it instigated litigation knowing that the State intended on complying with *Chicken Ranch* and discussing changes to its offer with the Tribe after a short review period. It was Alturas' choice to file its complaint prior to receiving the State's post-*Chicken Ranch* review correspondence even though the State had said it was forthcoming in its August 5, 2023, and August 12, 2023, letters indicating it was taking forty-five days to review the *Chicken Ranch* decision. *See* JRON Tab 124 at 3154*; see also* JRON Tab 126 at 3159. This action by Alturas does not make the State's September 19, 2022, letter irrelevant or inadmissible. This letter is part of the negotiation record and should be considered by the Court. The Tribe even stipulated to the letter's content in the JSUF. *See* JSUF 39. Regardless, the record of negotiation shows, even if the Court does not consider the September 19, 2022, letter to be a part of that record, the State never insisted or demanded unlawful compact provisions and remained willing to negotiate with the Tribe.

CONCLUSION

The JRON illustrates an incomplete negotiation. "[G]ood faith should be evaluated objectively based upon the record of negotiations. *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1041 (9th Cir. 2010). IGRA requires a tribe to first demonstrate that a state did not respond to a request to negotiate a compact in good faith. 25 U.S.C. § 2710(d)(7)(B)(ii)(I)–(II). Here, the State responded to the Tribe's request to negotiate by continually seeking to engage with the Tribe to exchange compact drafts, schedule additional meetings, and propose alternative language to solve difficult issues. While this record is unique, it bears similarity to the incomplete record in *Pauma II*. There, "[t]he State openly identified areas that needed further negotiation and, before sending the draft, advised Pauma that the

document was meant to guide future discussions. The State did not throw in the towel as Pauma insists—it was Pauma that refused to engage with the State any further." *Pauma II*, 973 F.3d at 976-977. The State's compact draft and repeated correspondence in this matter similarly discussed areas that needed further negotiation and discussion, but instead Alturas filed suit. As this negotiation record is incomplete like *Pauma II*, Alturas cannot demonstrate that the State did not respond to its request to negotiate in good faith. The State respectfully requests this Court to grant summary judgment in its favor.

Dated: October 6, 2023

Respectfully submitted,

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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 October 6, 2023, I caused to be electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

STATE DEFENDANTS' REPLY TO ALTURAS' OPPOSITION TO STATE DEFENDANTS' 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 October 6, 2023, at Sacramento, California.

Linda Thorpe	*/s/ Linda Thorpe*
Declarant	Signature