UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RINCON BAND OF LUISENO MISSION INDIANS OF THE RINCON RESERVATION, a/k/a RINCON SAN LUISENO BAND OF MISSION INDIANS a/k/a RINCON BAND OF LUISENO INDIANS,

Plaintiff,

vs.

ARNOLD SCHWARZENEGGER, Governor of California; WILLIAM LOCKYER, Attorney General of California; STATE OF CALIFORNIA,

Defendant.

CASE NO. 04cv1151 WMc

ORDER: DENYING IN PART AND GRANTING IN PART CROSS MOTIONS FOR SUMMARY JUDGMENT;[DOC. NOS. 173 and 176]

On June 1, 2007, the Rincon Band of Luiseno Indians ("Plaintiff" or "Rincon") and the State of California ("Defendant" or "State") filed cross motions for summary judgment. [Doc Nos. 173-183 and Doc. Nos. 186 and 187.] The parties each seek summary judgment with respect to breach of contract claims, both substantive and procedural, asserted in Plaintiff's First Amended Complaint.[1]

[1]The Federal District Court previously certified for interlocutory appeal the dismissal of two claims reasserted by Plaintiff in its First Amended Complaint solely for the purpose of "preserv[ing] these claims pending resolution at the Ninth Circuit Court of Appeals." [Doc. No. 108 at 4:3-12.] Accordingly, the Court does not consider Plaintiff's Fourth Claim (Declaratory Judgment - Cap of Gaming Device License) and Sixth Claim (Detrimental Reliance) for relief in its determination of the motions for summary judgment. In addition, Plaintiff's Third Claim for relief (Declaratory Judgment - Reversion of Licenses) is not under consideration by the Court as Judge Whelan previously ruled in this matter on

[Doc. No. 108.] Oral argument was held on August 13, 2007. [Minute Entry No. 184 on Docket.] On September 13, 2007, Rincon requested and received authorization to file supplemental briefing in support of its cross motion for summary judgment, and said supplemental briefing was filed on September 19, 2007. [Doc. No.186.] The State filed its reply to the supplemental brief on October 4, 2007. Doc. No. 187.] On February 22, 2008, the Court held a telephonic conference to request additional briefing from both parties regarding the impact, if any, of Propositions 94, 95, 96 and 97 on the issues presented in the parties' cross-motions for summary judgment. [Doc. No. 189.] The parties submitted briefing on the issue in accordance with the Court's request on March 7, 2008 and March 14, 2008.[2] [Doc. Nos. 190-195.]

For the reasons set forth below, Plaintiff's motion for summary judgment is granted in part and Defendant's motion for summary judgment is granted in part.

I.

FACTUAL AND PROCEDURAL BACKGROUND

A. Indian Gaming Regulatory Act: Class III Tribal-State Gaming Compacts

In 1988, Congress enacted the Indian Gaming Regulation Act ("IGRA" or the "Act"), which sets forth a statutory basis for Indian tribes to offer gaming as a way to encourage tribal economic development, tribal self-sufficiency, and strong tribal government. 25 U.S.C. § 2701(4). IGRA also grants states a role in the regulation of Indian gaming. *Artichoke Joe's v. Norton*, 353 F.3d 712, 715 (9th Cir. 2003). ("IGRA is an example of cooperative federalism in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.") (quoting *Artichoke Joe's v. Norton*, 216 F.Supp. 2d 1084, 1092 (E.D. Cal. 2002).

IGRA creates three classes of gaming. 25 U.S.C. § 2703(6)-(8). Class III gaming, at issue in

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September 21, 2004, that third-party tribes are necessary and indispensable parties to claims affecting other tribal compacts who cannot be joined due to sovereign immunity. [Doc No. 36 at 13:8.] The Court's prior Order is final and the law of the case "govern[ing] the same issue in subsequent stages of the same case." *Christianson v. Colt. Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)).

[2] After reviewing the supplemental briefing regarding Propositions 94, 95, 96 and 97 (the "Propositions"), the Court will not consider the outcome of the popular vote on the Propositions in the instant ruling. The Court finds that the Propositions are not a part of the administrative record and are irrelevant to the good faith determination to be made by the Court. Because of the Propositions' irrelevance to the determination of good faith, the Court further finds no need to expand the administrative record to include information concerning the Propositions.

the instant action, is the most heavily regulated. Under the Act, Class III gaming is lawful on Indian lands only if three conditions are met: (1) authorization by an ordinance or resolution of the governing body of the Indian tribe and the Chair of the National Indian Gaming Commission; (2) location in a state that permits such gaming for any purpose by any person, organization, or entity; and (3) the existence of a Tribal-State compact approved by the Secretary of the Interior. *Id*. at § 2710(d)(1).

IGRA's Tribal-State compact requirement allows states to negotiate with tribes within the state on issues presented by Class III gaming that affect state interests. *Id*. at § 2710(d)(3)©). IGRA also requires states to negotiate in good faith. *Id*. at § 2710(d)(3)(A). Tribes are allowed under the statute to enforce the state's obligation in federal court. *Id*. at § 2710(d)(7)(A)(I) and (B)(I).[3]

Under IGRA, the court, in determining whether a State has negotiated in good faith:

- *may* take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and
- *shall* consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

Id. at § 2710(d)(7)(B)(iii)(I)-(II) (italics added).

If the court finds that the state has not negotiated in good faith, the court is required to order the State and the Indian tribe to conclude a compact within a 60-day period. *Id*. at § 2710(d)(7)(B)(iii). If the State and Indian tribe fail to conclude a compact within the 60-day period, the Indian tribe and the State shall each submit to a court-appointed mediator a proposed compact that represents their last best offer for a compact. The mediator will then select the compact which best comports with the terms of IGRA, Federal law and applicable court orders. *Id*. at § 2710(d)(7)(B)(iv).

B. Tribal-State Compact Approval Process

In September 1999, former California Governor Gray Davis entered into Tribal-State Compacts with approximately 57 federally recognized California Indian tribes - including Rincon. These materially similar Compacts allowed the Tribes, consistent with IGRA, to engage in Class III

[3]The state of California has consented to such suits by waiving sovereign immunity expressly under California Government Code § 98005. ("[T]he state of California hereby . . . submits to the jurisdiction of the court of the United States in any action brought against the state by any federally recognized Indian tribe asserting any cause of action arising from the state's refusal to enter into negotiations . . . or to conduct those negotiations in good faith, the state's refusal to enter into negotiations concerning the amendment of a Tribal-State compact to which the state is a party, or to negotiate in good faith concerning that amendment . . . .") Cal. Gov't Code § 98005.

gaming. In order for the Compacts to become effective, voters had to approve Proposition 1A, a voter initiative to amend the California Constitution to address the California Supreme Court's constitutionality concerns articulated in *Hotel Employees and Restaurant Employees Int'l Union v. Davis*, 21 Cal. 4th 585 (1999).

On September 10, 1999, the California Legislature passed Proposition 1A. On March 7, 2000, California voters approved Proposition 1A, amending the California Constitution to provide:

> " . . . the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts."

Cal. Const. Art IV § 19(f); *see also* 25 U.S.C. § 2710(d)(8).

On May 5, 2000, the United States Secretary of the Interior approved the Compacts pursuant to 25 U.S.C. § 2710(d)(8)(A). The Compacts were then published in the Federal Register and took effect.[4] *See* Fed. Reg. 31189 (May 16, 2000); *See e.g. Indian Gaming Related Cases* (Coyote Valley II), 331 F.3d 1094, 1103 (9th Cir. 2003).

C. The Compact Amendment Process: Negotiations between the State and Rincon

Section 4.3.3 of Rincon's Compact with the State expressly states that either a Tribe or the State may request to renegotiate the Compact on the following issues: (1) the number of authorized gaming devices; (2) revenue sharing with non-gaming tribes; (3) the revenue sharing trust fund; and (4) the allocation of gaming device licenses. [Admin. Record, Exh. 42.]

On February 28, 2003, the Davis Administration sent a letter to Rincon and all the Tribes who were a party to the Tribal-State Class III gaming contracts in order to request negotiations to amend Section 10.8 of the Compact. Specifically, Section 10.8 [5] of the Compacts provides a mechanism for

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[4] An additional five compacts, also identical to the Proposition 1A Compacts, were executed before the Governor's submission of the Compacts to the Department of Interior for federal approval. *See* Federal Register March 16, 2000, July 6, 2000 and October 14, 2000.

[5] Section 10.8.3 of the Rincon Compact provides: "(a) The Tribe and the State shall, from time to time, meet to review the adequacy of this Section 10.8, the Tribe's ordinance adopted pursuant thereto, and the Tribe's compliance with its obligations under Section 10.8.2, to ensure that significant adverse impacts to the off-Reservation environment resulting from projects undertaken by the Tribe may be avoided or mitigated. (b) At any time after January 1, 2003, but not later than March 1, 2003, the State may request negotiations for an amendment to this Section 10.8 on the ground that, as it presently reads, the Section has proven to be inadequate to protect the off-Reservation environment from significant adverse impacts resulting from Projects undertaken by the Tribe or to ensure adequate mitigation by the Tribe of significant

the State and the Tribes to periodically address the adverse effects of off-reservation environmental impacts. [Admin. Record, Exhs. 42 and 44.]

Section 4.3.3 [6] of Rincon's Compact provides the state and the Tribe with a mechanism for renegotiating the Compact on the issues of the authorized number of gaming devices and revenue sharing. [Admin. Record, Exh. 42.] A request for negotiation under Section 4.3.3 had to be made between March 7, 2003 and March 31, 2003. *Id*. On March 8, 2003, Rincon made a formal request to the Davis administration under Section 4.3.3 to negotiate provisions concerning the authorized number of gaming devices, revenue sharing and the allocation of licenses for additional gaming devices. [Admin. Record, Exh. 43.] On March 28, 2003, the Davis Administration also formally requested renegotiation of its Compact with Rincon over a variety of issues, including revenue sharing with the State and the authorized number of gaming devices. [Admin. Record, Exh. 45.]

In October 2003, the California electorate recalled Governor Gray Davis and elected Arnold Schwarzenegger as Governor. Due to the change in administrations, the Davis Administration withdrew its request for renegotiation of Section 10.8 on November 14, 2003. [Admin. Record, Exh. 1.]

On November 21, 2003, Rincon and nine other tribes wrote to the Schwarzenegger Administration to express an interest in continuing the Compact renegotiations previously undertaken with the Davis Administration. [Admin. Record, Exh. 2.] On December 16, 2003, the State of California wrote to Rincon and the nine additional tribes to acknowledge receipt of the November 21, 2003, letter. *Id*.

On January 7, 2004, the Governor appointed Daniel M. Kolkey as the State's compact

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adverse off-Reservation environmental impacts and, upon such a request, the Tribe will enter into such negotiations in good faith. ©) On or after January 1, 2004 the Tribe may bring an action in federal court under 25 U.S.C. Sec. 2710(d)(7)(A)(I) on the ground that the State has failed to negotiate in good faith, provided that the Tribe's good faith in the negotiations shall also be in issue. In any such action, the court may consider whether the State's invocation of its rights under subdivision (b) of this Section 10.8.3 was in good faith. If the State has requested negotiations pursuant to subdivision (b) but, as of January 1, 2005, there is neither an agreement nor an order against the State under 25 U.S.C. Sec.2710(d)(7)(B)(iii), then, on that date, the Tribe shall immediately cease construction and other activities on all projects then in progress that have the potential to cause adverse off-Reservations impacts, unless and until an agreement to amend this Section 10.8 has been concluded between the Tribe and the State."

[6] Section 4.3.3 of the Rincon Compact provides: "If requested to do so by either party after March 7, 2003, but not later than March 31, 2003, the parties will promptly commence negotiations in good faith with the Tribe concerning any matters encompassed by Section 4.3.1 and Section 4.3.2, and their subsections."

negotiator. [Admin Record, Exh. 9.] Shortly after his appointment, Mr. Kolkey commenced negotiations on behalf of the State with a group of five tribes (the "Five Tribes"), *not including* Rincon. The Five Tribes contacted Mr. Kolkey directly and sought amendments to their Compacts. *Id.*

On February 26, 2004**,** Rincon sent a meet-and-confer letter to the State in accordance with Section 9.1 [7] of the Compact to address the timing of negotiations, Section 10 of the Compact, licensing pool issues and the potential for off-track betting on Rincon's land. [Admin. Record, Exh. 3.]

On April 7, 2004, Rincon attended a negotiation session between the State's negotiator, Mr. Kolkey, and a coalition of various tribes. [Admin. Record, Exh. 9.] However, the April 7, 2004 session was limited to the issue of non-economic modifications to the compacts. *Id.* On April 21, 2004, Rincon requested separate compact negotiations with the State's negotiator. *Id.*

On or about May 12, 2004, the State replied telephonically to Rincon's February 26, 2004 request to meet-and-confer and proposed an available date of June 2, 2004 on which to meet. [Admin. Record, Exh. 4.] On June 2, 2004, Rincon participated in a meet-and-confer session pursuant to Section 9.1 of its Compact with the State's Chief Deputy of Legal Affairs Secretary, Paul Dobson. [Admin Record, Exhs. 7 and 48.] During the session, Rincon discussed its concerns with regard to: (1) the State's alleged failure to comply with Compact Section 4.3.3; (2) the impact of the Davis

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[7] Section 9.1 of the Rincon Compact provides in pertinent part: "Voluntary Resolution; Reference to Other Means of Resolution. In recognition of the government-to-government relationship of the Tribe and the State, the parties shall make their best efforts to resolve dispute that occur under this Gaming Compact by good faith negotiations whenever possible. Therefore, without prejudice to the right of either party to seek injunctive relief against the other when circumstances are deemed to require immediate relief, the parties hereby establish a threshold requirement that disputes between the Tribe and the State first be subjected to a process of meeting and conferring in good faith in order to foster a spirit of cooperation and efficiency in the administration and monitoring of performance and compliance by each other with the terms, provisions, and conditions of this Gaming Compact as follows: (a) Either party shall give the other, as soon as possible after the event giving rise to the concern, a written notice setting forth, with specificity, the issues to be resolved. (b) The parties shall meet and confer in a good faith attempt to resolve the dispute through negotiation not later than 10 days after receipt of the notice, unless both parties agree in writing to an extension of time. c) If the dispute is not resolved to the satisfaction of the parties within 30 calendar days after the first meeting, then either party may seek to have the dispute resolved by an arbitrator in accordance with this section, but neither party shall be required to agree to submit to arbitration. (d) Disagreements that are not otherwise resolved by arbitration or other mutually acceptable means as provided in Section 9.3 may be resolved in the United States District Court where the Tribe's Gaming Facility is located, or is to be located, and the Ninth Circuit Court of Appeals, (or, if those federal courts lack jurisdiction, in any state court of competent jurisdiction and its related courts of appeal). The disputes to be submitted to court action include, but are not limited to, claims of breach or violation of this Compact , or failure to negotiate in good faith as required by the terms of this Compact. . . ."

Administration's withdrawal of the request to renegotiate Compact Section 10 .8; (3) the number of gaming device licenses available under the 1999 Compacts; (4) administration of the licensing pool and (5) off-track wagering.[8] [Admin. Record, Exh. 7.]

On June 4, 2004, Mr. Kolkey held a compact negotiation session with Rincon. [Admin. Record, Exh. 9.] A date of July 1, 2004 or July 2, 2004 was proposed for Rincon to attend a further compact negotiation session; however, the meeting ultimately did not go forward. *Id., see also* Admin. Record, Exh.8.] On June 9, 2004, Rincon filed its original complaint in federal court. [Doc. No. 1.]

In a letter dated June 16, 2004 in response to Rincon's concerns about the withdrawal of the Davis Administration's renegotiation request under Compact Section 10.8, the State confirmed that "[it] will not require the Band to cease construction and other activities on projects in progress pursuant to Compact Section 10.8.3©), on the ground that no agreement amending Section 10.8 has been concluded by the Band by January 1, 2005 as provided by that section." [Admin Record, Exh. 7.]

On November 4, 2005, the parties attended a settlement meeting in San Francisco. [Admin. Record, Exh. 16.] At that meeting, the State made an offer to Rincon to enter into an amendment to the existing Compact. The November 4, 2005 offer modified terms discussed at Rincon's first compact negotiation session with Mr. Kolkey on June 4, 2004. The new offer was as follows:

> "1. The State would agree to allow the Tribe to operate an additional 900 Gaming Devices outside of the licensing pool established in the Tribe's existing compact as long as the total number of Gaming Devices in operation by the Tribe do not exceed 2500 Gaming Devices;
>
> 2. The Tribe would be required to maintain its existing Gaming Device licenses, but the parties would negotiate over the amount of the contributions made by the Tribe to the Revenue Sharing Trust Fund in connection therewith;
>
> 3. The Tribe would pay annually to the State 15% of the average net win for each of the additional Gaming Devices outside of the licensing system that it operates pursuant to the compact amendment, provided that the average net win is calculated on the basis of all Gaming Devices operated by the Tribe;
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> 4. The Tribe would pay to the State, for the duration of the compact term, an annual fee equal to 15% of the net win in Fiscal Year 2004 from the Gaming Devices in operation at the Tribe's casino;

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[8] Rincon is no longer asserting a claim based on an alleged failure of the State to negotiate a codicil to the Compact regarding off-track betting. [Doc. No. 108, 4:13-14.]

5. The term of the amended compact would be the same as that of the existing compact;

6. A portion of the Tribe's payment to the State could be designated for San Diego County and CalTrans, which amount would be negotiated between the Tribe and the State. Your letter to Mr. Kolkey suggests that those payments to San Diego County and CalTrans would be pursuant to an intergovernmental agreement with each governmental entity. Although not part of our offer, we are open to negotiating such an arrangement;

7. Except as set forth in paragraphs 5 and 8, the amendment would contain the same non-economic provisions as the Pala Compact Amendment;

8. The Tribe will be afforded an exclusivity provision, the terms of which will be subject to further negotiation. Your letter suggests that the exclusivity provisions would be 'similar' to the Pala compact amendment. While we did not specifically offer that, we are open to negotiations on that point."

[Admin. Record, Exhs. 16, 50.]

On January 25, 2006, Rincon responded to the State's offer proposing an increase in gaming machines from 1,000 up to 2,500 with a fee of $4,350 per device. [Admin. Record. Exhs. 19, 20, 50 and 51.] In addition, Rincon proposed that such fees paid be disbursed as follows:

"First, a portion of the fee representing the Tribe's proportional share of all actual and reasonable regulatory costs (the CGCC budget and the DGC budget) shall be deducted and disbursed to the appropriate State agency.

Second, the remaining fees shall be deposited into an escrow account from which disbursements may only be made pursuant to intergovernmental agreements between the Tribe and eligible local governments and State agencies.

Disbursements can only be made for purposes directly related to mitigation or infrastructure development.

Intergovernmental agreements shall also allow for payment for tribally provided services directly related to additional mitigation, infrastructure development and problem gambling related services."

[Admin. Record, Exh. 19.]

To the extent devices exceeded 2,500, Rincon similarly proposed a $4,350 fee per device with an ability on behalf of the State to renegotiate for a higher rate if such fees were inadequate to cover costs directly related to Rincon Tribal gaming. Rincon also proposed "[c]larifying amendments to Section 4 consistent with CGCC interpretations regarding licenses for devices 351 through 1600." *Id.*

On January 27, 2006, the State informed Rincon by detailed letter that it could not accept its January 25, 2006 proposal. [Admin. Record, Exh. 20.] On May 5, 2006, Rincon submitted a revised offer to the State in response to the State's January 27, 2006 letter. [Admin. Record, Exh. 21.] In the

letter, Rincon identified the differences between the May 5, 2006 offer and the previous January 25, 2006 offer, writing: "The major changes in the offer from the offer on January 25, 2006 are:

> - The request for machine 1,601 to 2,500 @ $4,350 per device has been replaced with two tiers: (1) machines 1,601 to 2,000 @ $4,350 per device per year; and (2) machines 2,001 to 2,500 @ 6,000 per device per year. . . .
>
> - The provision that allows for the funds to be used to pay for or reimburse the Tribe for Tribally funded improvements and programs has been removed.

[Admin. Record, Exh. 21.]

On July 28, 2006, Rincon provided a further letter to the State setting forth additional topics for discussion and resolution between the parties which included the following issues: (1) dispute resolution, (2) local government mitigation of off reservation impacts, (3) tort liability, (4) patron disputes, (5) health and safety, building codes and inspection, (6) financing flexibility, (7) labor, (8) term of the compact, and (9) gaming device testing. [Admin. Record, Exh. 22.]

On September 12, 2006, Rincon attended a compact negotiation session with the State. [Admin. Record, Exh. 29.] Rincon and the State met again on October 5, 2006. [Admin. Record, Exh. 31.] On October 23, 2006, the State extended a revised offer to Rincon by letter indicating that "[t]he terms of this proposal are similar to those accepted by the Pauma and Pala Bands (tribes, like Rincon, that face similar competitive constraints given their location and proximity to the Pechanga band's casino complex) . . . .": [Admin. Record, Exh.35.]

> "A. The State would agree to allow the Band to operate an additional 900 Gaming Devices outside of the licensing pool established in the Band's existing compact as long as the total number of Gaming Devices in operation by the Band does not exceed 2,500 Gaming Devices.
>
> B. The Band would be required to maintain its existing Gaming Device licenses, but the parties would negotiate over the amount of the contributions made by the Band to the RSTF in connection therewith.
>
> C. The Band would pay annually to the State 15% of the average net win for each of the additional Gaming Devices outside of the licensing system that it operates pursuant to the compact amendment, i.e., flat percentage, sliding scale based on the net win for certain numbers of devices, sliding scale based on levels of net win, etc. provided that the average net win is calculated on the basis of all Gaming Devices operated by the Band.
>
> D. The Band would pay to the State, for the duration of the compact term, an annual payment equal to approximately 10% of the net win in calendar year 2005 from the Gaming Devices in operation at the Band's casino.
>
> E. The term of the amended compact would be extended to December 31, 2025.
>
> F. The State would consider deducting from the Band's payment to the State a portion of such funds designated for San Diego County and/or the California Department of Transportation

for mitigation of off-reservation impacts, which amount would be negotiated between the Band and the State.

G. Except as set forth in paragraphs E and H, the amendment would contain non-economic provisions similar to those in the Pala Compact Amendment, with the understanding that the final terms of each provision shall be subject to negotiation by the Band and the State.

H. The Band would be afforded an exclusivity provision, the terms of which would be subject to further negotiation."

[Admin. Record, Exh.35.]

On October 31, 2006, the State submitted an alternative proposal to Rincon in response to an email inquiry made by Rincon on October 26, 2006. [Admin. Record, Exhs. 36 and 37.] The State offered:"[w]ith no extension of the term of the existing Compact and in consideration of the authorization to operate 400 additional Gaming Devices the Band is not authorized to operate under its existing Compact in order to assure the financial health of the RSTF, the Band would make a flat annual payment to the RSTF of $2,000,000 to maintain its existing 1,250 Gaming Device licenses. In addition, the Band would make an annual revenue sharing payment to the State of 25% of the net win on those 400 additional Gaming Devices." [Admin. Record, Exh. 37.] On November 3, 2006, Rincon informed the State by detailed letter that it could not accept its October 31, 2006 proposal. [Admin. Record, Exh. 38.]

II.

STANDARD: MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate under Rule 56 (c) where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as matter of law. *See* Fed. R. Civ. P. 56 (c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Freeman v. Apaio*, 125 F.3d 732, 735 (9th Cir. 1997). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party can satisfy this burden

in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *Id.* at 322-23. "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.)

"The district court may limit its review to the document submitted for the purpose of summary judgment and those parts of the record specifically referenced therein." *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001). Therefore, the court is not obligated "to scour the record in search of a genuine issue of triable fact." *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996) (citing *Richards v. Combined Inc. Co.*, 55 F.3d 247, 251 (7th Cir. 1995). If the moving party fails to discharge this initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

If the moving party meets this initial burden, the nonmoving party cannot defeat summary judgment merely by demonstrating "that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) (citing *Anderson*, 477 U.S. at 252) ("The mere existence of a scintilla of evidence in support of the nonmonving party's position is not sufficient.") Rather, the nonmoving party must "go beyond the pleadings and by her own affidavits or by 'the depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56 (e)).

When making this determination, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *See Matsushita*, 475 U.S. at 587. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] he [or she] is ruling on a motion for summary judgment." *Anderson*, 477 U.S. at 255.

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III.

DISCUSSION

A. Good Faith In Compact Amendment Negotiations - Procedural Issues

1. Delay In Responding To Rincon's Request To Meet-And-Confer

Rincon contends that, although it contacted the State to express an interest in negotiations in accordance with the procedure set forth in its Compact, the State was dilatory and cavalier in responding to Rincon even though the State initially acknowledged receipt of Rincon's request and indicated that a representative of the State would "contact you shortly to schedule a meeting." [Rincon Motion, 38-41; Rincon Opposition, 24:4-10; Admin. Record, Exh. 2.] During the period of delay, which lasted approximately three to four months, Rincon contends the landscape of gaming in California changed based on expansive compact amendments negotiated early on between the State and tribes with locations and markets unlike that of Rincon. (Rincon Motion, 38:15-21.)

2. Delay In Contacting The State And Responding To The State's Requests For Information

The State argues that Rincon is responsible for the delays in the negotiation process by failing to contact the State's newly appointed compact negotiator, failing to submit timely proposals and other information needed to hold a productive negotiation session and taking various three-month intervals in which to respond to the State's multiple offers. (State's Motion 16:16-17:25.)

3. No Procedural Breach Of The Duty To Negotiate In Good Faith

From a careful review of the total history of negotiations as documented by the joint administrative record, the Court does not find a procedural violation of the duty to negotiate in good faith. The record demonstrates that both parties were, at times, less than prompt in responding to each other as well as in providing background material to assist in the negotiations. Justifiable delays were caused in November and December of 2003 (a time when Rincon first made its request for negotiations to the Schwarzenegger Administration) due to the transition from the Davis Administration to the new regime. Moreover, Rincon's November 2003 request to negotiate, made under Section 4.3.3 of the Compacts, does not set forth a concrete time period in

which the parties must begin negotiations. Thus, although the Schwarzenegger Administration indicated in its December 16, 2003 letter that it would "shortly" schedule a negotiation meeting with Rincon and the other tribes who co-signed the November 21, 2003 request to negotiate, the Schwarzenegger Administration was under no specific deadline to respond. [Admin. Record, Exh. 2.]

With respect to Rincon's February 26, 2004 meet-and-confer letter to the State under Section 9.1 of the Compact, the State was required to respond to Rincon within 10 days, but apparently failed to do so until May 12, 2004. [Admin. Record, Exhs. 3-4.] From the joint administrative record, it appears the long delay resulted from the parties' mutual attempts to compile documents for the requested meet-and-confer session (Rincon's Motion, 7:5-9, State's Motion 6:7-14, Admin. Record, Exh. 47.) It is clear, however, that despite the delay, the parties did finally meet-and-confer on June 2, 2004. [Admin. Record, Exhs. 5-6.] Because the parties were able to meet and confer in June 2004, as well as meet with the state negotiator in the months and years thereafter, the Court does not find procedural bad faith on the part of the State.

Furthermore, there is no evidence to suggest that, even if the parties had met within 10 days of the February 26, 2004 request to meet and confer, their disagreements over the substantive issues that are the crux of the parties' present impasse would have been resolved. Indeed, because the heart of this litigation lies in the parties' failure to achieve agreement about substantive issues, the Court declines to find procedural bad faith based on the State's initial delay in responding to Rincon's meet-and-confer request under Section 9.1 of the Compact, especially when it appears from the Joint Administrative Record that the parties were communicating by telephone regarding the request and preparing materials necessary for the meet-and-confer session. [Admin. Record, Exh. 47.] *See e.g. Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094,1109-1110 (9th Cir. 2003) (declining to find procedural bad faith as a result of dilatory tactics where the substance of plaintiff's bad faith allegation lay in its objections to substantive compact provisions.)

B. Good Faith In Compact Amendment Negotiations - Substantive Issues

In determining whether a State has negotiated in good faith under IGRA, the Court: (1) *may* take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and (2) *shall* consider any demand by the State

for direct taxation of the Indian tribe or on any Indian lands as evidence that the State has not negotiated in good faith. 25 U.S.C. § 2710(d)(7)(B)(iii)(I)-(II).

1. The State's Insistence On Additional Revenue Sharing With Its General Fund

The primary argument advanced by Rincon is that the substance of the offers made by the State during compact re-negotiations amount to an attempt to assess an illegal tax on the Tribe expressly prohibited by Section 2710 (d)(4) of the IGRA**.** Specifically, Rincon contends the State's insistence on revenue sharing is in bad faith because the State knowingly failed to offer meaningful concessions in exchange for an increased share of the Tribe's gaming revenue. (Rincon's Motion, 25:22-27:11.) Specifically, Rincon argues the State cannot contend it is giving the Tribe exclusivity in Class III gaming in return for revenue sharing because such exclusivity was already conferred by the State in exchange for revenue sharing through the Revenue Sharing Trust Fund and Special Distribution Fund *Id.* at 14:13-25. Rincon also argues the added exclusivity the State offered is not a meaningful concession as the Tribe, in its current compact, already has the option of terminating or renegotiating its Compact with respect to revenue sharing in the event Class III gaming is made available to non-Indian enterprises. *Id*. at 16:25-17:4. Moreover, Rincon asserts that even if the State has made a meaningful offer warranting revenue sharing, such shared revenue may not be directed to the State's general fund under the IGRA. (Rincon's Reply, 9:8-16.)

2. The State's Offers

The State argues its offers do indeed include meaningful concessions. Specifically, the State contends its ability to provide Rincon with an amendment to its current compact is a meaningful concession because without a compact Rincon is not entitled to offer Class III gaming. (State's Motion, 26:20-27:2.) Moreover, the State contends it is not precluded from requesting revenue contributions to the State's general fund if meaningful concessions have been given. *Id.* at 27:3-11. As further evidence of its good faith and its offer of a meaningful concession, the State argues it offered Rincon enhanced remedies to protect the Tribe's exclusivity, including the benefit of being excused from specific revenue sharing requirements in the event non-Indian gaming is allowed in California. *Id*. at 28:24-29:3.

3. The State's Insistence On Revenue Sharing With Its General Fund Was In Bad Faith

In *Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, (9th Cir. 2003), the Ninth Circuit recognized the IGRA's legislative history provides guidance for courts determining whether a party has negotiated in good faith. It noted:

> "In the [Senate] Committee's view, both State and tribal governments have significant governmental interests in the conduct of class III gaming. State and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe and States. This is a strong and serious presumption that must provide the framework for negotiations. A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with 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 1108-09.

The joint administrative record reveals that both Rincon and the State have held fast to their positions during the course of the negotiations. Despite the exchange of offers and information during the negotiation process, these two equal sovereigns have not been able to strike the right balance between the amount or type of benefits to flow between them in exchange for an amended compact.[9] *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 735 (9th Cir. 2003) ("Congress created the mechanism of Tribal-State compacts to resolve the conflicting interests of the tribes and the states, which it acknowledged as "two equal sovereigns.") As explained in detail below, this Court finds the State's insistence on an exchange of revenue *earmarked for the State's general fund* in return for an amended compact with Rincon was in bad faith.

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[9]This Court finds the case law involving good faith in the collective bargaining context is not instructive and only marginally helpful in that none of the cases cited by the parties involve negotiations between sovereigns. Employers and unions are not sovereigns; rather they are persons/entities within the meaning of the law who are both subject to the same sovereign, namely, the federal government. In those cases, the sovereign defines the lawful parameters of the negotiations. Each party has redress to the sovereign if the other party tries to impose an unlawful condition. The IGRA is a complicated statutory scheme which recognizes that states and tribes are equally sovereign. Accordingly, one sovereign cannot impose a tax on another sovereign. 25 U.S.C. § 2710(d)(4). Even if similarly situated sovereigns accept the tax, the tax is not permitted under the IGRA for any tribe which objects to it. *See e.g. Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1102 (9th Cir. 2006) ("The fact that other tribes have accepted a package of benefits and burdens when they voluntarily amended their compacts does not change the terms of the Compact between the Tribes and Idaho [which retained the prohibition against taxes].")

a.) IGRA's Prohibition on Taxation, Directly or Indirectly

Section 2710 (d)(4) of the IGRA states in pertinent part: " Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity." *Id*. at § 2710(d)(4). The imposition of a tax by the State upon an Indian tribe engaged in gaming is a factor the Court may take into consideration when conducting its good faith inquiry. As the Ninth Circuit explained in *Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, "[d]epending on the nature of both the fees demanded and the concessions offered in return, such demands might, of course, amount to an attempt to impose a fee, and therefore amount to bad faith on the part of a State. If, however, offered concessions by a State are real, § 2710(d)(4) does not categorically prohibit fee demands. Instead, courts should consider the totality of that State's actions when engaging in the fact-specific good-faith inquiry IGRA generally requires." *Id*. at 1112 (citing 25 U.S.C. § 2710(d)(7)(B)(iii)).

b.) A Meaningful Concession To Rincon Is Required In Return For An Amendment To The Current Compact Authorizing Revenue Sharing Directly With The State

A significant stumbling block for the parties has been each side's divergent interpretations of the effects of the exclusivity provision in the California Constitution which allows Class III gaming to be conducted by Indian Tribes on Indian lands. Rincon argues that the State cannot offer exclusivity as a meaningful concession for the grant of an amendment to the existing Compact because a monopoly over Class III gaming was already conveyed in exchange for the current Compact. (Rincon's Motion, 14:12-25.) In response, the State contends the constitutional exemption from California's prohibition on Class III gaming is not self-executing, but depends on the existence of a signed compact with the Governor and ratification by the legislature. Based on the fact that a compact is required before gaming may be conducted, the State argues that a meaningful concession is conveyed whenever the State offers a federally-recognized tribe the ability to provide additional games and machines for an extended period of time free from non-

Indian competition. (State's Motion, 26:7-27:11.)

Section 19(f) of the California Constitution states in pertinent part, " . . . the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts." Cal. Const. Art. IV § 19(f). The plain language of the California Constitution makes clear that authorization is given to the governor of the state to negotiate and conclude tribal gaming compacts, and that tribal gaming may only be conducted *subject to* a compact. As the Court explained in *Artichoke Joe's v. Norton*, 216 F.Supp. 2d 1084, 1093 (E.D. Ca. 2002), "[t]he Tribal-State **compact is the key** to class III gaming under IGRA. Under such a compact, the federal government cedes its primary regulatory oversight role over class III Indian gaming, and permits states and Indian tribes to develop joint regulatory schemes through the compacting process. In this way, the state may gain the civil regulatory authority that it otherwise lacks, and a tribe gains the ability to offer class III gaming." *Artichoke Joe's v. Norton*, 216 F.Supp. 2d 1084, 1093 (E.D. Ca.. 2002) (emphasis added.).

Here, Rincon and the State already have an existing Compact that both Rincon and the State want to amend. Rincon seeks additional gaming machines and an extension of its Compact term by 25 years to year 2045, while the State seeks substantial revenue sharing directly from the Tribe to the State's general fund. The existing Compact does authorize revenue sharing. However, the shared revenue: (1) flows between gaming tribes and non-gaming tribes through the Revenue Sharing Trust Fund ("RSTF") and (2) is available for limited use by the state legislature through the Special Distribution Fund ("SDF") for gaming-related purposes including, (a) programs to address gambling addiction, (b) support for government agencies impacted by tribal gaming, ©) compensation for regulatory costs associated with the administration of the compact, (d) potential shortfalls in the RSTF and (e) other gaming related purposes identified by the legislature. *See Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, 1106 (9th Cir.2003). All these purposes clearly comply with the IGRA and promote its objectives. Thus, the

existing Compact does *not* authorize a revenue stream from gaming tribes directly to the State's general fund for the State's use unrelated to: (1) compensating the State for regulatory costs associated with Indian gaming, (2) mitigating adverse social impacts of gaming or (3) economically benefitting non-gaming tribes.

In order to come to terms with the two revenue sharing provisions in the current Compact, the State had to provide meaningful concessions to avoid the IGRA's prohibition on direct taxation. Specifically, the Ninth Circuit found that "[i]n return for its insistence on the RSTF provision" during the initial negotiations for the current Compact, the State of California made two meaningful and real concessions: (1) the "amend[ment] [of] its constitution to grant a monopoly to tribal gaming establishments" and (2) the "offer [to] tribes [of] the right to operate Las Vegas-style slot machines and house-banked blackjack." *Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, 1112. (9th Cir.2003) (explaining that "[a]s part of its negotiations with the tribes, the State offered to do both things.") Similarly, the Ninth Circuit found that the State's insistence on the inclusion of the SDF during negotiations for the current Compact was also in exchange for "an exclusive right to conduct class III gaming in the most populous State in the country." *Id.* at 1115. It is therefore clear that in exchange for revenue contributions to the RSTF and the SDF, which are provided for in the current Compact, the State has already given a monopoly to tribal gaming establishments, including Rincon. In light of the Ninth Circuit's analysis, this Court finds the consideration that was already given (exclusivity) for the mutual compact cannot be repeatedly reused as a basis for the State's desire for a new compact where the proposed terms of the new compact include an improper taxation to which the other sovereign (Rincon) objects. In this Court's view, the State has not offered exclusivity because exclusivity already exists. As discussed in detail below, the State has simply offered more devices and time in exchange for its revenue sharing request.

In order to amend the existing Compact to properly allow for the State's new revenue sharing proposal, the State must provide other meaningful concessions to Rincon. The need for

other meaningful concessions is not only required under basic contract law principles[10] governing modification, but required under the Ninth Circuit's interpretation of Section 2710(d). In short, the Ninth Circuit requires a meaningful concession in return for fee demands. *Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, 1112. (9th Cir.2003) ("We do not hold that the State could have, without offering anything in return, taken the position that it would conclude a Tribal-State compact with Coyote Valley only if the tribe agreed to pay into the RSTF. Where, as here, however, a State offers meaningful concessions in return for fee demands, it does not exercise authority to impose anything. Instead, it exercises its authority to negotiate, which the IGRA clearly permits."); s*ee also Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1101 (9th Cir. 2006) ("It is also true that, despite this statutory prohibition [Section 2710(d) in the IGRA], States and tribes have negotiated compacts that provided for payments by the tribes to the states. (citation omitted.) The theory on which such payments were allowed, however, was that the parties *negotiated* a bargain permitting such payments in return for meaningful concessions from the state (such as a conferred monopoly or other benefits). Although the state did not have *authority* to exact such payments, it could bargain to receive them in exchange for a quid pro quo conferred in the compact.")(Emphasis in original.) Building on that analysis, it is clear that the failure to offer meaningful concessions causes a State to exceed its authority to negotiate and is, in fact, an attempt to impose a tax.

Although the State now argues in opposition to Rincon's motion that it could offer, for a second time, the exclusivity (already given in exchange for the RSTF and SDF) toward a *new* revenue sharing provision, it appears from the State's offers that the State was aware the monopoly it originally conferred could not again be considered a new and meaningful concession because the State offered Rincon a negotiable "exclusivity provision" in exchange for direct revenue sharing. [Admin. Record, Exhs. 16 and 35.] The additional exclusivity provision offered by the State did not have specific terms. However, the State explains in its motion that in general, the offered provision "provide[s] that if a non-Indian Individual or entity is allowed to operate class III

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[10] *See New York v. Oneida Indian Nation of New York*, 78 F. Supp.2d 49, 60-61 (N.D.N.Y. 1999) ("The Supreme Court has stated that a compact is akin to a contract. Thus, in interpreting the Compact, the Court is guided by ordinary principles of contract interpretation."); *See* 17A Am. Jur. 2d Contracts § 507 ("A valid modification of a contract must satisfy all the criteria essential for a valid original contract, including offer, acceptance, and consideration.")

gaming within a specified market area, the adversely affected tribe would be excused from specific revenue sharing requirements in the amended Compact." (State Opposition at 15, fn. 6.) The Court notes that the citizens of California would have to amend the State Constitution in order to allow non-Indian gaming.[11]

In conjunction with the modified exclusivity provision, the State offered Rincon: (1) the ability to provide more machines over and above the limit set in connection with the original Compact in furtherance of the State's public policy in favor of containing casino style gambling, and (2) a five-year extension of its current Compact term. [Admin. Record, Exhs. 16 and 35.] Other than the Ninth Circuit's pronouncement in *Idaho v. Shoshone-Bannock Tribes*, which found the grant of a "monopoly or other benefits" to be a meaningful concession, there is little authority available on the issue of what constitutes a meaningful concession. *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1101 (9th Cir. 2006). Thus, this Court is left to first decide whether the State's new offers of modified exclusivity, additional machines and a 5-year term extension constitute meaningful concessions. The State has made some concessions in that there is some benefit in the State's willingness to: (1) "lock in" reduced revenue sharing fees in advance of any future event that would erode the exclusivity presently enjoyed by gaming tribes; (2) expand the outlines of the State's long-standing public policy against casino-style gambling, and (3) provide Rincon with a longer Compact term, which gives the Tribe more time to operate its gaming facilities. However, the issue is whether, under the totality of the circumstances, the fees demanded in light of the concessions offered amount to the imposition of a fee. *Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, 1112 ("Depending on *the nature of both the fees demanded and the concessions offered in return*, such demands might, of course, amount to an attempt to impose a fee, and therefore amount to bad faith on the part of a State.") (italics added.) When the amount and type of fees demanded by the State are added to the equation, this Court finds the fees constitute an attempt to impose a tax in violation of Section 2710 (d)(4) of the

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[11] In order for non-Indian tribes to operate gaming devices in California, a new state Constitutional Amendment would have to pass requiring one of three of the following events: (1) a legislative proposal supported by a supermajority vote of the Legislature and a majority vote of the citizenry, (2) a constitutional convention, or (3) an initiative petition signed by eight percent of the voters and then a majority vote of the citizens of California. Cal. Const. Art. II § 8(b), art. 18 §§ 1, 2, 3, 4.

IGRA.

Specifically, on October 23, 2006, the Stated asked for an annual flat fee based on ten percent of gross gaming revenue on all gaming devices for fiscal year 2005 and an additional amount equal to 15 percent of the average net win for each gaming device over 1,600 machines. [Admin. Record, Exh. 35.] Under the analysis conducted by the State's own expert, Professor William Eadington, the State's October 23, 2006 offer allowing Rincon an additional 900 machines would provide the State with an unrestricted fee for use in its general fund of *$37.9 million dollars* while Rincon would make only *$1,716,000* from adding 900 machines to its current 1,600 machine operation. [Admin. Record., Exh. 37 at p. 5 of Exhibit B; State's Motion at 21:813; Rincon's Motion, 27:1-6.] This substantial fee, 37 times greater than what Rincon receives, is unreasonable compared to the balance struck in the first compact negotiation between the tribes and the State where an actual monopoly was conferred in exchange for millions of dollars of fees to be funneled to gaming-related impacts covered by the RSTF and SDF.[12] In the parties' newest negotiations for an amendment to the current Compact, the State demands 10 to 15 percent of revenue from Rincon's existing gaming devices as well as from the 900 new devices sought. In exchange for this estimated revenue stream of $37.9 million dollars, Rincon would not receive a monopoly, but an agreement to reduce its fee payment in the future should gaming one day be opened up to non-tribal gaming establishments (a scenario the Court finds speculative and unlikely given the State's established public policy against casino-style gaming), 900 more machines and five additional years to operate under its Compact. [Admin. Record, Exh. 35.]

In holding that the Special Distribution Fund did not violate the IGRA's prohibition against taxation of tribes or tribal lands, the Ninth Circuit found that limited revenue sharing for specific purposes related to tribal gaming was a reasonable exchange for the exclusivity granted to tribes. *Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, 1115. ("We do not find it inimical to the purpose or design of IGRA for the State, under these circumstances, to ask for a reasonable share of tribal gaming revenues for the specific purposes identified in the SDF

[12] Rincon currently pays a fee of $1.335 million per year into the RSTF. [Joint Admin. Record, Exh. 21 at p. 7.] Rincon does not contribute to the SDF because it was not conducting Class III gaming before September 1, 1999. [Defendant's Opp'n, p. 16, fn. 7.]

provision.") Here, however, the State has demanded Rincon pay a fee directly to the state that is unrelated to gaming and has no limitations on its use in return for a fee-reduction provision that has decidedly less value than the original exclusivity provision given to the tribes, which already provides a monopoly to tribal gaming interests. Such a fee demand falls outside the scope of 25 U.S.C. § 2710(d)(3)(C)(iii), which only allows assessments by the State in order to defray the costs of regulating gaming activity.[13] The State has not only refused to connect the new revenue sharing provision to gaming-related interests, but provides no evidence to show that it needs the proposed additional revenues needed to regulate gaming activity or mitigate adverse impacts therefrom. Instead, the State argues additional revenue sharing is warranted to balance the economic interests between the Sate and the Tribe because the State is foregoing revenue it could have obtained from non-Indian gaming operators, if such non-Indian operators were allowed to game in California. (State's Opp'n at 10:19-11:5.) Furthermore, the State's rationale for requiring such a large revenue sharing fee is another indication to this Court that the State's fee demands constitute an improper attempt to impose a tax on Rincon in lieu of being able to levy a tax on non-existent non-Indian gaming operators. It is difficult to regard the State's proposed plan as anything more than a tax when it functions as a tax.[14]

The Court also notes that the increased fee demanded by the State will not benefit non-gaming tribes. Indeed, under the State's last offer, the parties would negotiate over the amount of the contributions made by Rincon to the RSTF, and Rincon would simply be required to maintain its current contribution of $1.335 million per year into the RSTF. [Admin. Record, Exhs.21 and 35.]

Without an acceptable nexus between the fee demanded and the IGRA-sanctioned uses to which it is put, this Court finds that the revenue sharing insisted upon by the State violates Section (d)(4), which prohibits states from taxing tribes. Accordingly, the Court finds that the State's insistence on the payment of such a large fee to its general fund in return for concessions of

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[13] Section 2710(d)(3)(C)(iii) of the IGRA provides that any Tribal-State compact negotiated under Section 2710(d)(3)(A) may include provisions relating to: "the assessment by the State of such activities in such amounts in such amounts as are necessary to defray the costs of regulating such [gaming] activity."

[14] As defined by Black's Law Dictionary, a tax is a "monetary charge *imposed* by the government on persons, entities, transactions, or property to yield *public revenue*." Black's Law Dictionary 1496 (18th ed. 2005) (emphasis added).

markedly lesser value was in bad faith in light of the prohibition against taxation set forth in the IGRA and the parameters discussed in the Ninth Circuit's *Coyote Valley II* decision, which only approved limited and reasonable revenue sharing and made no decision as to the legality of placing revenue derived from tribal gaming into a state's general fund. *See Indian Gaming Related Cases (Coyote Valley II)*, 331 F.3d 1094, 1115, fn. 17, (9th Cir. 2003).

C. Negotiations On Non-Economic Issues Under Section 10.8 Of The Compact

1. Section 10.8 Negotiations Were Not Concluded

Rincon contends that the State has not concluded section 10.8 negotiations in good faith despite the fact that: (1) former Governor Gray Davis withdrew his administration's request to negotiate before Governor Schwarzenegger took office; and (2) the State warranted in writing that it would not enforce the cease and desist provisions of section 10.8. [Admin. Record, Exhs. 1, 7 and 8.] Rincon insists that despite the doctrine of equitable estoppel, the Davis Administration's November 14, 2003 rescission letter and the State's June 16, 2004 letter indicating that "the State will not require the Band to cease construction and other activities on projects in progress pursuant to Compact Section 10.8.3©)" are insufficient to protect it, should the State choose to disregard its statements. (Rincon Motion, 41:9-42:16.) Further, Rincon argues that because the State did not offer to: (1) amend the Compact to vacate the cease and desist date, or (2) stipulate to a judgment finding a failure to negotiate Section 10.8 in good faith, the State has revealed its bad faith. (*Id*. at 42:17-23.)

2. The Request for Negotiations Under Section 10.8 Were Not Concluded Because The Request Was Rescinded

The State argues there is nothing for the Court to adjudicate with respect to Section 10.8 of the Compact because: (1) the Davis Administration rescinded its request for negotiation, and (2) the Schwarzenegger Administration has repeatedly indicated in writing that it would not prevent Rincon from completing construction already in progress as of January 1, 2005 on the basis that the parties did not conclude negotiations triggered by Section 10.8. (State Motion, 41:10-20.) Further, the State contends that the Davis Administration's rescission and the State's agreement not to enforce the cease and desist provision of Section 10.8 are not evidence of bad faith negotiation in as far as the State has continued to negotiate and set forth offers with respect to non-

economic issues in its proposals of November 10, 2005, October 23, 2006 and October 31, 2006. (State's Reply Brief, 14:13-18; Admin. Record, Exhs. 16, 35 and 37.)

3. Failure to Conclude Negotiations On Non-Economic Issues Does Not Constitute Bad Faith On The Part Of The State

While the Court recognizes Rincon may be apprehensive about the future enforceability of the State's pronouncements that it will not act on the cease and desist provisions of Section 10.8, the Court finds the issue of whether estoppel would be applicable to prevent the State from invoking Section 10.8.3©) is not ripe for adjudication. As a general rule, "a federal court normally ought not resolve issues involving contingent future events that may not occur as anticipated, or indeed may not occur at all." *Clinton v. Acequia, Inc*., 94 F.3d 568, 572 (9th Cir. 1996) (breach of contract claim presented no live case or controversy where the claim hinged on future conduct by a party to the contract.) Here, the Davis Administration rescinded its request for renegotiation of non-economic terms and there has been no attempt by the present administration to enforce Section 10.8.3©). The effectiveness of equitable estoppel to prevent the State from seeking to enforce the cease and desist provisions of Section 10.8.3©) is too hypothetical and abstract at this time for evaluation.

The Court further finds that in light of the past administration's rescission letter, the current administration's multiple assurances that it would take no action under Section 10.8.3©) and the State's willingness to continue to negotiate over non-economic impacts without the benefit of Section 10.8.3(c)'s cease-and-desist provision does not constitute bad faith on the part of the State.

IV.

CONCLUSION AND ORDER THEREON

In light of the foregoing, the Court **DENIES in part and GRANTS in part**, the parties' cross-motions for summary judgment. **It is hereby ordered,** pursuant to the Indian Gaming Regulation Act, 25 U.S.C. § 2710(d)(7)(B)(iii), that the State and Rincon shall conclude an amended compact within 60 days from the date of this Court's Order. If the State and Indian tribe fail to conclude a compact within the 60-day period, the Indian tribe and the State shall each submit a proposed compact to a court-appointed mediator that represents their last best offer for a compact. The mediator will then select the compact which best comports with the terms of IGRA,

Federal law and applicable court orders. *Id*. at § 2710(d)(7)(B)(iv).

It is further ordered that the Court will hold a Status Conference at the conclusion of the 60-day period on **July 1, 2008, at 2:00 p.m.** in the chambers of the Hon. William McCurine, Jr., United States Magistrate Judge, 940 Front St., San Diego, CA 92101.

IT IS SO ORDERED.

DATED: April 29, 2008

Hon. William McCurine, Jr.
U.S. Magistrate Judge
United States District Court

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ALL PARTIES AND COUNSEL OF RECORD