No. _____

In The
Supreme Court of the United States

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, a/k/a PAUMA LUISENO BAND OF MISSION INDIANS, a/k/a PAUMA BAND OF MISSION INDIANS, a federally-recognized Indian Tribe,

Petitioner,

v.

STATE OF CALIFORNIA; CALIFORNIA GAMBLING CONTROL COMMISSION, an agency of the State of California; and EDMUND G. BROWN, JR., as Governor of the State of California;

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

One of the statutory elements for establishing a *prima facie* case of bad faith negotiation against a state under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*., is that "a Tribal-State compact has not been entered into." 25 U.S.C. § 2710(d)(7)(B)(ii)(I). In this case, the United States Court of Appeals for the Ninth Circuit interpreted this language according to the *status quo ante*, holding that an Indian tribe who sought and obtained a declaration rescinding a compact could not pursue a claim for latent bad faith negotiation against a state that induced the compact through material misrepresentations in order to increase its tax receipts (*i.e.*, "revenue sharing") by 2,460%. With this holding seeming to violate deep-rooted principles of retroactivity and interpretive norms for the Indian Gaming Regulatory Act set forth within this Court's precedent, the question presented is:

Whether an Indian tribe can pursue a bad faith negotiation claim against a state under Section 2710(d)(7)(A)(i) of the Indian Gaming Regulatory Act after rescinding a compact induced by misrepresentation or other latent bad faith conduct, and thus bringing its circumstances into compliance with the statutory requirement that "a Tribal-State compact has not been entered into."

PARTIES TO THE PROCEEDING

Petitioner is the Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, a federally-recognized Indian tribe. Respondents are the State of California, the California Gambling Control Commission, and Edmund G. Brown, Jr., as Governor of the State of California.

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SECONDARY AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

The Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation ("Pauma" or "Tribe") respectfully petitions for a writ of certiorari to review the portion of the judgment of the United States Court of Appeals for the Ninth Circuit in this case pertaining to the interpretation of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*.

OPINIONS BELOW

The amended opinion of the Ninth Circuit (*see* App. 1a-43a) awaits publication in the Federal Reporter, but is presently found at 2015 U.S. App. LEXIS 22633 (9th Cir. 2015). The original opinion issued by the Ninth Circuit is reported at 804 F.3d 1031 (9th Cir. 2015). The dispositive order of the district court (*see* App. 44a-57a) is unpublished and unavailable on either major legal research service.

JURISDICTION

The Ninth Circuit entered judgment on October 26, 2015. App. 1a. The court of appeals subsequently reentered judgment on December 18, 2015 after amending its original opinion and denying the petitions for panel rehearing and rehearing *en banc* filed by the parties. App. 1a. On March 10, 2016, Justice Kennedy granted Pauma an extension of time in which to file a petition for writ of certiorari, extending the deadline

to April 18, 2016. The jurisdiction of this Court arises under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2710(d)(7) of IGRA provides in relevant part (*see* App. 70a-72a):

> (A) The United States district courts shall have jurisdiction over –
>
> (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,
>
> (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and
>
> (iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).
>
> (B)
>
> (i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date when the Indian tribe

requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that –

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

INTRODUCTION

This case involves the State of California ("State") misrepresenting the central term of a gaming compact under IGRA and inducing Pauma to execute an amendment that increased its revenue sharing payments to the State by 2,460%. In the opinion below, the Ninth Circuit rescinded the amendment and thereby returned Pauma to a compact that now only has four years remaining on its term. However, the Ninth Circuit sheltered the State from a finding of bad faith negotiation under Section 2710(d)(7) of IGRA that would have enabled the parties to sit down under court supervision and negotiate a successor

compact. *See* 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii) (explaining the remedy for bad faith negotiation involves renewed negotiations or baseball-style arbitration should those fail).

The stated basis for denying Pauma this statutory remedy is that one of the two elements for making out a *prima facie* case of bad faith negotiation under Section 2710(d)(7)(B)(ii) requires that a "Tribal-State compact has not been entered into." 25 U.S.C. § 2710(d)(7)(B)(ii)(I). With rescission universally understood to void a contract from its very inception, the Ninth Circuit simply elected to interpret this statutory language in light of the *status quo ante*. The decision to do this means the prevailing method for interpreting IGRA in the Ninth Circuit conflicts with the one recently used by this Court in *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. ___, 134 S. Ct. 2024 (2014) ("*Bay Mills*"), as well as the inveterate principles regarding the retroactivity of civil holdings articulated in *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993). Not to mention, this method of interpretation has huge practical consequences for tribes – forcing Pauma to re-approach the misrepresenting party to obtain a compact even though the State has accumulated four bad faith findings in the past six years (*see* Reasons § B(2), *infra*), and ensuring that any tribe without an amended compact will simply have to live with the effects of a state's latent bad faith conduct irrespective of its egregiousness.

As to that last point, the startling evidence of bad faith in this case seems to have been the biggest

detriment for Pauma. What started out as a district judge explaining the "writing [was] on the wall" for the State and ordering Pauma to file a motion for summary judgment as soon as possible turned into two transfers and three years of additional litigation when the Tribe began to detail its supporting evidence. Throughout the circuitous path of this lawsuit, neither the district court nor the Ninth Circuit would discuss Pauma's evidence in any of their opinions. As the State admits in its own petition for writ of certiorari (*see California v. Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation*, No. 15-1185, Dkt. No. 1 at p. 15 (U.S. Mar. 17, 2016)), everyone is in agreement about the evidence at this point; rather, it is simply a matter of no one wanting to talk about it. With that said, the evidence *is* crucial for understanding the impact of the Ninth Circuit's interpretation of IGRA, and, thus, this petition will detail key pieces of it below.

STATEMENT OF THE CASE

1. IGRA is an embodiment of cooperative federalism that requires an Indian tribe to negotiate a compact with the surrounding state before offering any slot machines, house-banked card games, or other types of "class III" games at its casino. *See* 25 U.S.C. § 2710(d)(1)(C). During the course of negotiations, a state may request that a tribe agree to pay any amounts that "are necessary to defray the costs of regulating such activity." 25 U.S.C. § 2710(d)(3)(C)(iii). However,

Congress preserved the tribes' traditional immunity from state taxation by inserting a provision into the next subsection of IGRA stating that except for the regulatory assessments mentioned above, "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 . . . to engage in a class III activity." 25 U.S.C. § 2710(d)(4). Thus, the only way a state can lawfully obtain additional monies through compact negotiations is by offering the tribe a "meaningful concession" that goes above and beyond the standard gaming rights guaranteed by IGRA. *See Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010), *cert. denied sub nom. Brown v. Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 564 U.S. 1037 (2011) ("*Rincon II*").

2. The first widespread compact negotiations in California did not occur until more than a decade after the enactment of IGRA, and then only after the voters of the State overwhelmingly approved a proposition that would require the governor to execute a model compact with any interested tribe as a ministerial act within thirty days of receiving a request. *See In re Indian Gaming*, 331 F.3d 1094, 1100-01 (9th Cir. 2003) ("*Coyote Valley II*"). As various interest groups petitioned the California Supreme Court to invalidate the statute created by this proposition, the State began negotiations with more than sixty tribes to devise a compact different from the one recently approved

by the voters. *Id*. at 1102. These negotiations soon reached an impasse, however, as the tribes discovered the State was "exploring the concept of an enormous revenue sharing requirement" that they believed would impose an impermissible tax under IGRA. *Id.* at 1103.

These concerns about taxation caused the State to change its strategy within its final compact proposal, which it provided to the negotiating tribes for the first time at 8:00 pm on the evening before the end of the legislative session *See Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California* ("*Colusa*"), 629 F. Supp. 2d 1091, 1111 (E.D. Cal. 2009) ("*Colusa I*"). The State's negotiating team then informed the assembled tribes that they had until midnight to accept or reject the proposal *en toto*. *Id.* One tribal leader overheard his peers ask the State's lead negotiator to explain the new terms in the offer, which he refused to do. *Id.* Another tribal leader followed the State's negotiator back to the State Capitol to discuss his concerns about the proposal, but was informed "the State's negotiating team was inaccessible" and then escorted from the area. *See Coyote Valley II*, 331 F.3d at 1104.

The final compact offer may have reduced the revenue sharing sought by the State, but it also obscured the total number of slot machines each tribe could operate. Two separate sections of the compact determine this number. The first section (*i.e*., Section 4.3.1) explains that a signatory tribe is authorized to operate a baseline number of machines equivalent to

the greater of 350 or the number the tribe operated immediately before the compact went into effect:

> Sec. 4.3.1 The Tribe may operate no more Gaming Devices than the larger of the following:
>
> (a) A number of terminals equal to the number of Gaming Devices operated by the Tribe on September 1, 1999; or
>
> (b) Three hundred fifty (350) Gaming Devices.

App. 75a. The second section (*i.e.*, Section 4.3.2.2(a)) goes on to explain that a tribe may operate machines in excess of the baseline entitlement in Section 4.3.1 so long as it obtains slot machine licenses, the total number of which is the output of a complex formula in subsection (a)(1):

> Sect. 4.3.2.2. Allocation of Licenses
>
> (a) The Tribe, along with all other Compact Tribes, may acquire licenses to use Gaming Devices in excess of the number they are authorized to use under Sec. 4.3.1, but in no event may the Tribe operate more than 2,000 Gaming Devices, on the following terms, conditions, and priorities.
>
> (1) The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be a sum equal to 350 multiplied by the number of Non-Compact tribes as of September 1, 1999, plus the difference between 350 and the

> lesser number authorized under Section 4.3.1.

App. 77a.

The signatory tribes would compete for these additional slot machine licenses during communal draws structured like a "worst to first" professional sports draft. App. 77a-79a. The first "pick" in each draw goes to the tribe with the smallest preexisting device count, who may then draw a specified number of licenses. App. 78a. From there, a full "round" unfolds, wherein each applicant tribe – in ascending-device-count order – has the opportunity to draw up to a certain number of licenses before a tribe with a better pick can draw again. App. 78a. At the conclusion of the first round, "[r]ounds shall continue until tribes cease making draws, at which time draws will be discontinued for one month or until *the Trustee* is notified that a tribe desires to acquire a license, whichever last occurs." App. 79a (emphasis added).

A week after the execution date of the compacts, the Office of the Governor asked the chairpersons of the signatory tribes to certify the number of machines their tribes had in operation before the compacts went into effect so the State had the necessary data for the Section 4.3.2.2(a)(1) license pool formula. App. 82a-83a. Those certifications appear to have remained within the Office of the Governor, however, as a member of the State Assembly contacted the independent and non-partisan Legislative Analyst's Office ("LAO") approximately a month later to ascertain the

number of slot machines the compacts permitted statewide. App. 85a. Explaining that it could not obtain "verifiable information on the number of machines" the signatory tribes operated before the compacts took effect, the LAO estimated that the compacts created 53,000 baseline entitlements under Section 4.3.1 and another 60,000 licensed machines under Section 4.3.2.2(a)(1). App. 86a-87a.

The two-part methodology the LAO employed for calculating the total number of slot machines received a rebuke from the State's negotiator roughly a month after the transmission of the letter, on December 3, 1999. App. 89a. Rather than sum the outputs of both sections, the State's negotiator insisted that the maximum number of machines was "the product of a simple mathematical calculation set forth in Section 4.3.1," and nothing in Section 4.3.2.2(a)(1) modifies this "absolute cap." App. 89a, 92a. Rather, Section 4.3.2.2 was of limited importance. "Except for foreseeing that the California Gambling Control Commission ['CGCC'] may administer the provisions of Section 4.3.2 acting as a *neutral Trustee*, the State's interests in the statewide cap imposed by Section 4.3.1 are not implicated by Section 4.3.2." App. 94a (emphasis added).

Terminology akin to "neutral trustee" arose again in the procedures for conducting the license draw process. With the CGCC not yet in existence and the compact merely specifying that the "Trustee" would oversee the draws, attorneys for the signatory tribes developed "Gaming Device License Pool Rules" to bring the system designed by the compacts into effect.

App. 98a-103a. Paragraph 5 of the Rules indicated that a certified public accounting firm licensed in California with no recent professional ties to any party to the compact would serve as the "Pool Trustee." App. 99a. After the signatory tribes selected the Sacramento-based firm of Sides Accountancy to act as Pool Trustee, the State's negotiator drafted a letter on behalf of the Office of the Governor to Sides on May 9, 2000, "commend[ing] the Tribes" on reaching agreement on license draw procedures and advising Sides of his duty as "Pool Trustee" to ensure the distribution of slot machine licenses would comply with the limit set forth in the December 3rd letter. App. 104a-108a.

With the inaugural license draw scheduled for May 15, 2000, Pauma executed an engagement letter with Sides on May 5, 2000 specifying the "terms and conditions of [its] engagement as trustee of the Gaming Device License process set forth in Section 4.3.2.2 of the [c]ompact." App. 109a-111a. Returned along with the signed engagement letter was a letter from Pauma to Sides as "Trustees" that requested five-hundred licenses at the forthcoming draw and attached a $625,000 cashier's check to cover the compact-mandated fee for obtaining those licenses. App. 112a-113a. To ensure compliance with the draw participation requirements, Pauma ended the letter by requesting that Sides send notice "if the trustee finds that any item is missing." App. 113a. No further information was necessary, however, as Sides awarded Pauma five-hundred licenses at the May 15, 2000 draw, which it informed the tribe about in a contemporaneous letter

signed by "Sides Accountancy Corporation as trustee under the scope of work document." App. 114a.

Months after this first license draw, the CGCC would come into existence and begin to demand information from Sides. In a letter dated January 16, 2001, the CGCC's inaugural chairman John Hensley requested that Sides turn over data obtained from the signatory tribes during the course of its duties, reminding Sides that as "pool trustee" it has a "fiduciary responsibility" to account for the funds it received from the signatory tribes. App. 115a-116a. Alleged complaints about the transparency of the draw process led the CGCC to circulate an issue paper questioning whether the Commission should "immediately assert its authority as Trustee under the Tribal-State Gaming Compacts and take over the machine licensing function and require accountability from the temporary trustee and the compacted tribes." App. 117a-123a. The issue paper suggested that having the CGCC take over the license draw process and prohibit the distribution of any more licenses would enable "[t]he state . . . to control any further machine growth during future compact negotiations where a finite number could be arrived at." App. 121a. The Office of the Governor followed the recommendation in the issue paper, enacting Executive Order D-31-01 and thereby empowering the CGCC to assume the licensing duties under the compacts. *See Colusa I*, 629 F. Supp. 2d at 1098.

After Sides terminated its "engagement as license trustee" in the wake of the executive order (*see*

App. 124a), Chairman Hensley sent a letter to the Office of the Governor to remind it of the "great deal of resistance [the Commission received] from both the temporary Trustee, Michael Sides Accountancy, and from many of the tribes" when trying to obtain compact payment data before taking over the draw process. App. 125a. With that situation now resolved, the letter proceeded to explain that Hensley intended to follow through on his plan to cap the total number of licenses and was considering utilizing one of two numbers: (1) a reformulation of the number advanced by the State's negotiator in his December 3, 1999 letter to the LAO that accounted for both the baseline entitlements in Section 4.3.1 and the licenses in Section 4.3.2.2(a)(2); or (2) a second formulation the LAO devised after receiving this letter that was similar in structure. App. 126a-127a.

Though Hensley informed the Office of the Governor in his letter that he would "ask for input from tribal leaders [on the issue] so that they can buy into the process and solution" (*see* App. 126a), the CGCC ultimately interpreted the license pool formula unilaterally through a two-step process. The first step involved laying out the guiding principles of compact interpretation, with the CGCC explaining that it would not employ a canon of interpretation related to its trusteeship because "[t]he Commission cannot be regarded as a trustee in the traditional sense, but rather as an administrative agency with responsibilities under the Compacts for administration of a public program in the nature of a quasi-trust." App. 131a-132a.

With any restraining trust principles out of the way, the CGCC then considered three different interpretations of the license pool and chose the smallest option. *See Colusa I*, 629 F. Supp. 2d at 1112. When commenting upon the decision, Commissioner Michael Palmer stated that the CGCC picked the "conservative" and "low-end interpretation" simply because the license pool provision was "imprecise, [and] subject to varying interpretations." App. 134a. As for Hensley, he explained that the selected figure was not an "absolute number," but simply one picked "arbitrarily" by the CGCC that would work in the "interim" until the signatory tribes could renegotiate their compacts with the State. App. 133a-134a.

The first of those renegotiations began only days after the CGCC denied Pauma five-hundred licenses at a December 18, 2003 license draw and explained that the corpus of the license pool had been exhausted. App. 10a. Along with four other tribes, Pauma entered into renegotiations with the State and ultimately executed an amendment that increased the annual revenue sharing fees on its pre-existing 1,050 machines by 2,460% – turning $315,000 in judicially-sanctioned regulatory fees into $7,750,000 of overwhelmingly General Fund payments. App. 12a.

More than three months after the execution of Pauma's amendment, a signatory tribe to the original compact named the Cachil Dehe Band of Wintun Indians filed suit in the United States District Court for the Eastern District of California requesting declaratory relief about the total number of licenses

created by the Section 4.3.2.2(a)(1) formula. *See Colusa*, No. 04-2265 FCD KJM, Dkt. No. 1 (E.D. Cal. Oct. 25, 2004). The case did not initially make it out of the pleading stage, as the district court accepted the State's argument that a court determination on the size of the license pool could potentially harm the sixty-plus signatory tribes who were not involved in the suit and could not be joined because of their sovereign immunity. *See Colusa*, 2006 U.S. Dist. LEXIS 29931 (E.D. Cal. May 16, 2006). After the Ninth Circuit revived the case, the district court issued a dispositive order on April 22, 2009 – four-and-a-half years after the filing of the complaint – holding that the Section 4.3.2.2(a)(1) license pool formula allows for 10,549 more licenses than the CGCC maintained. *See Colusa I*, 629 F. Supp. 2d at 1113.

3. Approximately two weeks after the district court in *Colusa* entered judgment on the declaratory relief claim (*see Colusa*, 2009 U.S. Dist. LEXIS 77757 (E.D. Cal. Aug. 19, 2009)), Pauma filed its original complaint with the United States District Court for the Southern District of California seeking a declaration that its amendment was void and rescinded, restitution of the heightened fees the Tribe paid under the agreement, and the right to pursue two claims for bad faith negotiation after rescission when the Tribe's circumstances complied with the statutory requirements of IGRA. *See* Dist. Ct. Dkt. No. 1 at pp. 20-23. The Clerk of the Court assigned the case to District Judge Larry Burns, who was presiding over a second case questioning the number of licenses

created under Section 4.3.2.2(a)(1) of the compacts. *See San Pasqual Band of Mission Indians v. California*, No. 06-0988 LAB AJB (S.D. Cal. filed on May 3, 2006) ("*San Pasqual*"). Mirroring the outcome in *Colusa I*, Judge Burns also ruled that the Section 4.3.2.2(a)(1) license pool formula permitted an additional 10,549 licenses above the CGCC's total. *See San Pasqual*, Dkt. No. 97 at pp. 8-10 (S.D. Cal. Mar. 29, 2010).

After the release of the dispositive order in *San Pasqual*, Judge Burns held a status conference with the parties on December 15, 2010, whereat he explained the "writing [was] on the wall" for the State and ordered Pauma to file a lone motion for summary judgment as soon as possible. Dist. Ct. Dkt. Nos. 64, 114-1 at ¶¶ 14-17. The supporting memorandum filed by Pauma would detail evidence on the trustee issue obtained from the plaintiff tribe in *Colusa* and argue that the State acted in bad faith during the negotiations for the amendment. *See* Dist. Ct. Dkt. No. 66 at pp. 3-4, 14 & 19. Five days before the scheduled summary judgment hearing, Judge Burns posted a minute order vacating the hearing "[b]ecause the case [was] being reassigned to Judge Anthony Battaglia." Dist. Ct. Dkt. No. 101.

4. The first act by Judge Battaglia was to take Pauma's pending motion for summary judgment off-calendar and schedule a hearing on a motion to dismiss by the State. Dist. Ct. Dkt. No. 109. That motion challenged the bad faith claims by setting forth the statutory elements in Section 2710(d)(7)(B)(ii) of

IGRA for proving a *prima facie* case of bad faith negotiation and then arguing that Pauma could not satisfy these requirements as a matter of law because "federal courts only have jurisdiction to rule upon a 'bad faith' claim under 25 U.S.C. § 2710(d)(7)(A)(i) where a 'Tribal-State compact has not been entered into' (25 U.S.C. § 2710(d)(7)(B)(ii)(I))." Dist. Ct. Dkt. No. 111-1 at pp. 16-17. When the matter came on for hearing, Judge Battaglia began the discussion of bad faith negotiation by laying out the parties competing positions: Pauma "allege[d] that the [amendment] is therefore illegal and void and negotiated in bad faith," while the State contended that "a bad faith claim predicated on IGRA cannot be alleged after a class III gaming compact has been negotiated." App. 60a. After discussing the issue in depth, Judge Battaglia rejected the State's argument, stating that "[t]o say the parties are simply left to fend for themselves [after the conclusion of a compact], I think, defeats the purpose of the law and the spirit." App. 65a-67a.

Prevailing on the bad faith negotiation argument was but a short lived victory for Pauma, as Judge Battaglia concluded the hearing by explaining that he was "not bound by what Judge Burn's instincts were at whatever times" and planned to "call [the case] as he [saw] it." Dist. Ct. Dkt. No. 132 at pp. 47-50. Fearing Judge Battaglia was starting the case anew after more than two years of litigation, Pauma filed an eighty-one page amended complaint with the court, one that set forth in allegation form all of the trustee

evidence acquired up until that point. Dist. Ct. Dkt. No. 130. Shortly thereafter, the clerk for Judge Battaglia called counsel for Pauma and asked that they file some document so the court could address the pending motion for summary judgment as to the First Amended Complaint – a request the district court later confirmed by written order granting Pauma (and Pauma alone) leave to refile a summary judgment motion by November 15, 2011. Dist. Ct. Dkt. No. 141. In succession, Pauma filed its second motion for summary judgment and the district court then denied the State's motion to continue the hearing on the matter since it had "failed to show good cause for yet another delay." Dist. Ct. Dkt. Nos. 144, 171. Yet, just like what occurred a year earlier, Judge Battaglia transferred the case on the cusp of the summary judgment hearing, this time to Judge Cathy Ann Bencivengo. Dist. Ct. Dkt. No. 176.

5. Though nearing the third anniversary of the filing date for the suit, the initial proceedings before the third district judge mirrored those in the second, with Judge Bencivengo taking Pauma's motion for summary judgment off-calendar and scheduling a hearing on a second motion to dismiss by the State instead. Dist. Ct. Dkt. No. 180. The outcome of the hearing was an order denying all eight arguments raised by the State, including one positing that "[t]he use of the term 'trustee' in the 1999 Compact is for a limited purpose and nothing in the 1999 Compact nor any statute supports the conclusion that a trust was created." Dist. Ct. Dkt. No. 142-1 at p. 15. The order

on the State's second motion to dismiss considered this argument meritless, explaining "[t]he 1999 Compact and Gaming Device Pool Rules expressly state that a 'Trustee' is responsible for administering the distribution of gaming device licenses to applicant gaming tribes" and, "[t]hus, [Pauma] sufficiently pleads a trust relationship with the CGCC." Dist. Ct. Dkt. No. 188 at pp. 5-6.

The apparent trustee status of the CGCC would guide the next stage of the proceedings, as Judge Bencivengo set up an expedited discovery period during which the parties would exchange evidence on the trustee topic and one other issue, after which she would hear cross-motions for summary judgment. Dist. Ct. Dkt. No. 182 at pp. 40-43. The first motion in the summary judgment process came from Pauma and included whatever documents the State was voluntarily willing to turn over on the trustee issue (*see* Dist. Ct. Dkt. No. 193), which largely consisted of the CGCC communications detailed herein. Dist. Ct. Dkt. No. 197 at pp. 2-21.

Despite all of the extrinsic evidence on the trustee issue coming from Pauma, the summary judgment hearing began with Judge Bencivengo indicating that she wanted to revisit her prior trustee ruling because she felt that she might have "skipped over" some things during the pleading stage and "assumed a [fiduciary relationship] without a lot of factual support." Dist. Ct. Dkt. No. 225 at p. 4. Along with this, Judge Bencivengo also raised an overarching statute of limitations defense on the State's behalf *sua sponte*

that the State had not raised in any of its summary judgment briefing. Dist. Ct. Dkt. No. 225 at pp. 17-21.

The summary judgment order issued by Judge Bencivengo on March 18, 2013 not only addressed the statute of limitations argument and thus provided the State with an overarching defense to pursue on appeal, but also reached a contrary conclusion on the trustee issue. Dist. Ct. Dkt. No. 227. All the evidence Pauma submitted on the trustee issue disappeared from sight, as the statement of facts simply explained in a footnote that "[t]he background context for the 1999 Compact is set out in the Ninth Circuit's opinion in *Colusa II*." Dist. Ct. Dkt. No. 227 at p. 4. Similarly, the only mention of Pauma's evidence in the analysis section of the order is a sentence that summarily dismisses it by stating "exhibits 1-2, 8-10, 14-16, 26-29, 34-38, 40, 43 and 45 . . . do not meet the standard set out by the Court for the imposition of fiduciary liability on the State." Dist. Ct. Dkt. No. 227 at pp. 23-24. With the extrinsic evidence out of the way, Judge Bencivengo ruled on the trustee issue according to the plain language of the compact, this time taking the exact opposite position after adopting the State's previously-rejected argument that the compact's "reference to 'Trustee' is limited in scope and does not impose trust duties on the State concerning its administration of the Pool." Dist. Ct. Dkt. No. 227 at p. 23.

In terms of remedies, the summary judgment order concluded by awarding Pauma rescission of the amendment on the basis of a single misrepresentation claim and then "declin[ing] to address the

remaining Claims in the cross-motions for summary judgment at this time." Dist. Ct. Dkt. No. 227 at p. 30. Over the next nine months, Judge Benecivengo would issue two related summary judgment orders to address the other remedies flowing from the misrepresentation claim (*see* Dist. Ct. Dkt. Nos. 238, 245), the last of which ordered the State to return the heightened revenue sharing payments it received under the amendment, and then directed the clerk of the court to enter judgment and close the case. Dist. Ct. Dkt. No. 245.

With rescission of the amendment seeming to satisfy the statutory requirement in IGRA that "a Tribal-State compact has not been entered into," counsel for Pauma asked Judge Bencivengo during a subsequent conference call to reopen the case so the Tribe could file a fourth summary judgment motion dealing with its bad faith claims. Dist. Ct. Dkt. No. 248. The district court agreed, vacating the clerk's judgment and setting the hearing date for Pauma's fourth motion for summary judgment as February 6, 2014. Dist. Ct. Dkt. No. 248. The hearing would never take place, though, as Judge Bencivengo took it off-calendar shortly after the filing of Pauma's motion and simply issued a written order denying the motion on three separate technical grounds before directing the clerk of the court to once again close the case. App. 44a-57a. Chief among the three reasons for denying the motion was that "a plain reading of the statute indicates that the procedures do not apply in circumstances where the State and a Tribe actually reach a

compact" – the very argument Judge Battaglia rejected nearly three years earlier when the State raised it in its first motion to dismiss. App. 55a.

6. Seeing the case forcibly closed for a second time led Pauma to file a petition for writ of mandamus with the Ninth Circuit requesting the appellate court to order Judge Bencivengo to decide Pauma's outstanding claims in light of the evidence submitted by both of the parties on summary judgment. *See In re Pauma Band of Luiseno of Pauma & Yuima Reservation*, No. 14-71981, Dkt. No. 1-1 (9th Cir. July 3, 2014) ("*In re Pauma*"). On October 21, 2014, the Ninth Circuit issued an order indicating that "[t]his petition for a writ of mandamus . . . raises issues that warrant a response" and inviting the district court to explain its position within twenty-one days of the date of the order. *In re Pauma*, Dkt. No. 10 (9th Cir. Oct. 2, 2014). With no response from the district court forthcoming, the Ninth Circuit issued a dispositive order on November 7, 2014 dismissing the petition, but permitting Pauma to raise the claims through the direct appeal process. *See In re Pauma*, Dkt. No. 15 (9th Cir. Nov. 7, 2014); App. 14a.

7. Pauma's opening brief on appeal once again argued the merits of the bad faith negotiation claims (C.A. Dkt. No. 29-1 at pp. 63-75), but the Ninth Circuit disposed of them in its October 26, 2015 opinion in precisely the same manner as Judge Bencivengo. First, the panel "refuse[d] to consider any of Pauma's assertions that the State knowingly acted in bad faith or with any kind of evil intent" (*see* App. 17a), instead

limiting the factual recitation to a "quick overview of the weathered past between Native American tribes and the State of California." App. 6a. Against this muted evidentiary backdrop, the Ninth Circuit held that the "IGRA procedures . . . simply do not apply when the State and the Tribe have *actually reached a Compact.*" *See* App. 36a (citing 25 U.S.C. § 2710(d)(7)(B)(ii)(I)). This holding arose even though the opinion failed to address Pauma's argument that the recissionary remedy brought the prevailing circumstances of the case into compliance with the express text of the bad-faith-negotiation claim requirements in IGRA. C.A. Dkt. No. 47-1, pp. 2-8.

REASONS FOR GRANTING THE PETITION

A. The opinion below decides the issue of whether an Indian tribe may pursue a claim for latent bad faith negotiation under IGRA after rescinding the resultant compact in a way that conflicts with this Court's precedent regarding the interpretation of the statute and the retroactivity of civil holdings, as well as universal principles of contract law

1. The opinion by the Ninth Circuit is completely unmoored from fundamental legal concepts and principles of interpretation set out in this Court's precedent. It achieves this by treating Pauma's bad faith negotiation claims as if they existed in a separate universe from all of the others, "refus[ing] to consider

any of Pauma's assertions that the State knowingly acted in bad faith or with any kind of evil intent" when analyzing the availability of rescission and then similarly refusing to consider the effect of rescission when determining the issue of bad faith. As explained, one of the two elements for making out a *prima facie* case of bad faith negotiation under Section 2710(d)(7)(B)(ii)(I) is that "a Tribal-State compact has not been entered into." *See* 25 U.S.C. § 2710(d)(7)(B)(ii)(I). The circumstances of the case should color the interpretation of this provision, but the Ninth Circuit construed the language as precluding a claim for bad faith negotiation as a matter of law if a tribe actually enters into a compact with the State irrespective of what happens afterwards. App. 36a-37a. Yet, at the same time it was taking this position, the Ninth Circuit was also suggesting that rescission is so complete that it even erases the negotiations that precipitated the contract. App. 37a.

The correct answer actually lies in the middle, however. The universally-accepted rule of contract law is that rescission neither leaves the contract in place nor erases the prior discussions about the agreement, but simply "void[s] a contract from its inception, *i.e.*, as if it never existed." *Dow Chem. Co. v. United States*, 226 F.3d 1334, 1346 (Fed. Cir. 2000) (citing 17B C.J.S. Contracts § 456 (1999)). *See, e.g.*, *Griggs v. E. I. DuPont de Nemours & Co.*, 385 F.3d 440, 446 (4th Cir. 2004) ("[A] court of equity grants rescission or cancellation, and its decree wipes out the instrument, and renders it as though it does not exist.");

Monex Int'l, Ltd. v. CFTC, 83 F.3d 1130, 1135 (9th Cir. 1996) (indicating rescission extinguishes a contract "as effectually as if it had never been made" (citing *Williams v. Agribank FCB*, 972 F.2d 962, 966 (8th Cir. 1992))). Both the principal briefing on appeal and the petition for rehearing filed by Pauma raised these authorities, but the opinion simply resolves the issue head-on without accounting for the arguments or the prevailing circumstances of the case.

2. Treating rescission as if it has no external significance actually makes the bad faith negotiation portion of the Ninth Circuit's opinion incompatible with what came before. To explain, the analysis section of the opinion opens by addressing the State's argument that the Section 4.3.2.2(a)(1) license pool formula had the meaning the State ascribed to it until the time the district court in *Colusa I* issued its dispositive order. In other words, the meaning of a contact term can change sporadically over time, shifting with the sentiments of the parties and the reviewing courts no matter how preliminary those impressions might be. In keeping with the declaratory nature of the claim that produced an answer on the license pool issue, the Ninth Circuit explains that the interpretation of an ambiguous contract provision "is and has always been the correct interpretation from its formation." App. 18a; *cf. James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991) (explaining the declaratory theory of the law involves a court finding the law, not making it). Thus, the principle the Ninth Circuit articulates is that if a

contract means something, then it has had that meaning since the very beginning. A natural corollary of this rule is that if a contract means nothing, it also lacked any meaning from the outset as well. This state of affairs is precisely what Pauma requested in the prayer for relief of its original complaint when it asked that "the Court declare the [amendment] void and rescinded." Dist. Ct. Dkt. No. 1 at p. 26.

3. The internal inconsistency of the opinion resulting from the failure to afford rescission full retroactive effect brings the Ninth Circuit's interpretation of Section 2710(d)(7)(B)(ii)(I) of IGRA into conflict with multiple precedents from this Court. The first of these is *Harper*, 509 U.S. 86 (1993), a leading case on the effect of judicial decrees that explains a "fundamental rule of 'retrospective operation' . . . has governed 'judicial decisions . . . for near a thousand years.'" *Id.* at 94 (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)). One notable exception where a court may depart from the realm of retroactivity and engage in the sort of "prospective decisionmaking [that] is incompatible with the judicial role," *see American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 201 (1990), is when it expressly "reserve[s] the question whether its holding should be applied to the parties before it." *Beam*, 501 U.S. at 539. Yet, the Ninth Circuit did no such thing in the present case, as the opinion explains that the State's misrepresentation about the total number of licenses available under the compacts "entitled [Pauma] to rescission of the amendment." App. 38a.

With this preparatory step complete, the retroactivity principles set forth in *Harper* should have led the Ninth Circuit to interpret the "Tribal-State compact has not been entered into" language of Section 2710(d)(7)(B)(ii)(I) of IGRA such that a tribe who successfully rescinded a compact on account of some latent wrongdoing that impaired the integrity of the bargaining process could pursue a bad faith negotiation claim against the State.

4. In fact, retroactively applying a legally significant decision to satisfy one of the statutory requirements of IGRA is the only possible outcome in light of *Bay Mills*, 134 S. Ct. 2024. As background, the section of IGRA that details the grounds for federal jurisdiction and establishing statutory rights includes a number of terms that are actually distinct legal concepts. *See* 25 U.S.C. § 2710(d)(7)(A), (B)(ii). For instance, the second jurisdictional basis listed in Section 2710(d)(7)(A) explains that a district court may only hear a suit brought by a state to enjoin a class III gaming operation conducted by a tribe if such operation is located on "Indian lands." 25 U.S.C. § 2710(d)(7)(A)(ii). Whether or not a parcel of land qualifies as "Indian lands" is a complex legal question, the answer for which traditionally comes from the National Indian Gaming Commission ("NIGC") in an "Indian Lands Opinion" after applying the facts of the matter to the multipronged definitions of the term in IGRA and the Code of Federal Regulations. *See* 25 U.S.C. § 2703(4); 25 C.F.R. § 502.12; *see also* National Indian Gaming Commission, *Indian Lands*

Opinions, http://www.nigc.gov/general-counsel/indian-lands-opinions (last visited Apr. 10, 2016).

Yet, sometimes an Indian Lands Opinion will not issue before the commencement of a suit, possibly because the administrative agency took an inordinate amount of time to render its decision or a tribe simply began constructing a class III gaming facility without obtaining the protective decision beforehand. And that leads into *Bay Mills*, a case in which a tribe from the Upper Peninsula of Michigan surreptitiously opened a casino on a distant parcel of land in the Lower Peninsula of the State that it had purchased using trust funds from a land claim settlement act. *See Bay Mills*, 134 S. Ct. at 2029 (citing Michigan Indian Land Claims Settlement Act, 111 Stat. 2652 *et seq.*)). One of the reasons the opening of the facility was clandestine, and came as a surprise to the State of Michigan, is because Bay Mills circumvented the NIGC process and unilaterally determined that the Lower Peninsula property fell within the codified definitions of Indian lands due to a provision in the settlement act explaining that any land acquired thereunder "shall be held as Indian lands are held." *Bay Mills*, 134 S. Ct. at 2029.

As one would expect, the State of Michigan sued Bay Mills in federal district court shortly thereafter to enjoin the operation of the gaming facility, invoking jurisdiction under the aforementioned Section 2710(d)(7)(A)(ii) of IGRA. *See Bay Mills*, 134 S. Ct. at 2029. However, given the absence of an Indian Lands Opinion, there was an open question at the outset of

the suit whether the Lower Peninsula property on which Bay Mills operated its casino constituted Indian lands under IGRA. Within hours of the filing of the complaint, the NIGC came to the aid of Bay Mills and issued an opinion that the lands in question *did not* constitute Indian lands under IGRA, which seemingly deprived the district court of jurisdiction to hear the case. App. 144a-149a.

When the issue finally reached the apex of the federal court system, this Court agreed with the above assessment and held that "[a] State's suit to enjoin gaming activity *on* Indian lands . . . falls within § 2710(d)(7)(A)(ii); a similar suit to stop gaming activity *off* Indian lands does not." *Bay Mills*, 134 S. Ct. at 2032. The significance of this decision comes from this Court's recognition that a legal decision arising after the filing of a lawsuit can determine whether a plaintiff satisfies the statutory requirements of IGRA. And yet, if the Ninth Circuit panel that authored the opinion below were given the task of ghostwriting *Bay Mills*, the meaning of the term "Indian lands" would have turned upon the *status quo ante*, thus leaving the proceedings in a perpetual state of uncertainty.

5. Hypothesizing about the Ninth Circuit's likely interpretation of Indian lands is unnecessary, though, because the jurisdictional section of IGRA analyzed by this Court in *Bay Mills* also includes terminology influenced by whether or not a tribe has obtained a declaration rescinding its compact. As to that, Indian lands is just one of many elements set forth within

the jurisdictional standard in Section 2710(d)(7)(A)(ii) of IGRA, the full section of which states that the United States district courts shall have jurisdiction over

> any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) *that is in effect*[.]

25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added).

If history had unfolded in just a slightly different manner, this subsection of IGRA could have served as the basis for the State filing a cross-complaint against Pauma; after all, the revenue sharing fees of the amendment were so exorbitant that the Tribe fell behind in payment by two fiscal quarters before filing suit. Dist. Ct. Dkt. No. 130 at p. 30. Given this, the actual configuration of the parties in the district court proceeding could have been Pauma filing a complaint to rescind the amendment amongst other remedies, and the State cross-complaining to enjoin the Tribe's gaming operations due to its failure to remit revenue sharing payments for half a fiscal year. If one were to replicate the holdings from the opinion below in this hypothetical case, the Ninth Circuit would have rescinded the amendment but nevertheless allowed the State to enjoin Pauma's gaming operation under the newly-revived underlying compact simply because the heightened revenue sharing fees of the amendment were in effect before the inception of the suit. In other

words, once a compact is executed, avoiding the reach of Section 2710(d)(7)(A)(ii) would be an impossible Catch-22 situation where the tribe would have to show that the relevant compact is not in effect, even though a rescinded compact is always in effect for statutory analysis purposes. And, in light of *Bay Mills*, this approach to statutory interpretation would render the text of Section 2710(d)(7)(A)(ii) of IGRA wholly inconsistent – forbidding a state from enjoining an off-reservation tribal gaming facility on one hand, but nevertheless allowing it to enjoin an on-reservation casino for violating the terms of a compact that is no longer in effect on the other.

6. This dichotomy highlights why the opinion below is incompatible with the structure of IGRA. As explained, the statute contains a myriad of terms that are either distinct legal concepts or affected by the decisions made by administrative or judicial authorities. Three of these are detailed within this section, but one final example is the provision that is at the very heart of IGRA: the good faith negotiation requirement. One may assume that Congress drafted the jurisdictional grant to allow the federal district courts to hear any case by a plaintiff tribe that simply *alleged* bad faith negotiation by the surrounding state. Yet, the statutory language is actually much more limited than that, instead only covering "any cause of action initiated by an Indian tribe *arising from* the failure of a State . . . to conduct [] negotiations in good faith." 25 U.S.C. § 2710(d)(7)(A)(i) (emphasis added).

The phrasing of this provision makes it sound as if good faith negotiation is something concrete that a party can itself establish before the outset of a suit, and not a legal determination subsequently issued by the federal court. Simply put, the use of declaratory relief claims is essential for satisfying the statutory requirements of IGRA, as is the case with any other statute. The Ninth Circuit is aware of this, however, seeing that it recently allowed the State of Arizona to pursue a declaratory relief claim to determine whether a parcel of land on the outskirts of Phoenix qualifies as Indian lands – a decision that, if answered in the affirmative, would provide the State of Arizona with the basis for seeking injunctive relief under Section 2710(d)(7)(A)(i) according to this Court's opinion in *Bay Mills*. *See Arizona v. Tohono O'odham Nation*, __ F.3d __, 2016 U.S. App. LEXIS 5766 (9th Cir. 2016). Why the Ninth Circuit took a different analytical approach in this case that forecloses consideration of the existing circumstances will forever be the subject of speculation, but this method for interpreting IGRA indisputably conflicts with multiple precedents from this Court – not to mention other Ninth Circuit case law, the reasoning in other parts of the opinion, and universal principles of contract law.

B. Allowing circuit courts to conduct statutory analysis according to the *status quo ante* will throw IGRA litigation into complete disarray and prevent states and tribes from bringing otherwise legitimate claims against one another

1. The sheer number of legal terms in the text of IGRA means the opinion below will have unintended consequences for both tribes and states. The harms imposed on states by interpreting IGRA according to the Ninth Circuit's methodology in this case are evident from the prior section, but are fleshed out more fully by considering how this interpretive style would affect the disposition in *Bay Mills* if the NIGC issued its Indian Lands Opinion somewhat differently. For starters, imagine if the NIGC had come to the opposite conclusion after the start of the suit, finding the Lower Peninsula property qualified as Indian lands under the codified definitions. It is difficult to picture any court within the Sixth Circuit looking at the *status quo ante* to hold the State of Michigan *could not* bring suit under Section 2710(d)(7)(A)(ii) of IGRA simply because the legal status of the land was uncertain before the filing of the suit. The Ninth Circuit would require such a result according to the opinion in this case, however.

It is also worth remembering that administrative decision-making is an imperfect science that can often take many years and multiple attempts before the tribunal reaches its final decision. Considering this,

what happens then if the NIGC issues an opinion that a parcel of land under consideration – which will soon serve as the situs for a tribal gaming facility – is Indian land before reversing course in an attempt to protect the tribe after the surrounding state has filed suit? The interpretive methodology the Ninth Circuit used in this case would allow the state to continue pursuing an injunction against the off-reservation facility, even though doing so would contravene *Bay Mills*. Consider also the complementary scenario where the NIGC issues a denial letter only to change its position in an act of benevolence after the affected tribe defiantly opens a gaming facility on the parcel in question. If this second opinion arose after the surrounding state filed its complaint, the only appropriate disposition in light of the Ninth Circuit's holding in this case is to pay heed to the first opinion and hold that the state has no recourse because of that mystical Catch-22 that turns voids into compacts and Indian lands into non-tribal property for statutory interpretation purposes.

2. The harms posed by the Ninth Circuit's holding are inconvenient for states, but downright devastating for tribes. The federal government recently clarified that the "foremost goal" of IGRA is to "ensure that tribes would have access to gaming procedures" whether "a [s]tate negotiates in good faith, in bad faith, or not at all." *See New Mexico v. U.S. Dep't of Interior*, No. 14-2219, Dkt. No. 01019393892 at pp. 34 & 36 (10th Cir. Mar. 4, 2015). In other words, "Congress drew a map in which all roads lead to some

kind of gaming procedures." *Id.* at p. 34. The outcome of this case is antithetical to the central purpose of IGRA, however, because it strips a compact away without providing the means to obtain a replacement one. Thus, the bad faith conduct at the heart of this suit that the Ninth Circuit appears intent to let go unaddressed completely transformed Pauma's position – taking a tribe with seventeen years left on the term of its compact before the events giving rise to this suit and turning it into one with only four years of gaming rights remaining and a judicial IOU for $36.2 million in misappropriated income.

A tribe that possessed an amended compact like Pauma at least has the "fortune" of returning to the underlying agreement after rescission, but this does little to alleviate the resultant predicament. For Pauma, this scenario means going back to the state that previously misrepresented contract rights for its own financial benefit and asking that it act more dutifully during a second round of negotiations, even though it has amassed four (and what should be five) bad faith holdings in the past six years. *See Big Lagoon Rancheria v. California*, 789 F.3d 947 (9th Cir. 2015); *Rincon II*, 602 F.3d 1019; *Estom Yumeka Maidu Tribe of Enter. Rancheria v. California*, 2016 U.S. Dist. LEXIS 19330 (E.D. Cal. Feb. 17, 2016); *North Fork Rancheria v. California*, 2015 U.S. Dist. LEXIS 154729 (E.D. Cal. Nov. 13, 2015).

After the state invariably demands tax payments in a creatively different manner than before, Pauma will then face the prospect of litigating a bad faith

negotiation claim in the Ninth Circuit, where the typical lifespan of such a case ranges from six to eight years. *See Brown v. Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 564 U.S. 1037 (2011) (declining to review a finding of bad faith negotiation against the State in a case filed in 2004). Requiring a tribe injured by latent bad faith conduct on the part of a state to run a gauntlet that entails seven years of federal litigation to rescind the compact, two years in renewed negotiations with the State, and another six to eight years litigating the bad faith negotiation issue is a far cry from what Congress intended when it delayed the effective date of IGRA for one year so preexisting gaming tribes could either negotiate a compact or obtain gaming procedures in federal court through the IGRA statutory remedy. *See* 25 U.S.C. § 2703(7)(D).

The biggest losers under the Ninth Circuit's interpretation of IGRA are those tribes who are operating gaming facilities pursuant to un-amended compacts and would face the prospect of shuttering their casinos if a court refused to tie the rescissionary and statutory remedies together in order to redress latent bad faith. It is worth remembering that tribes do not have the statutory right to sue a state for bad faith negotiation under IGRA after *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). For tribes in states like California that have waived their sovereign immunity from suit for bad faith negotiation, *see* Cal. Gov't Code § 98005 (1998), life in the post-rescission world would entail halting operations at its casino from the

point in time the rescission award takes effect until the Secretary of the Interior issues regulations under which the tribe can conduct gaming. *See* 25 U.S.C. § 2710(d)(7)(B)(vii). The case would be much worse for tribes in states that have not enacted a general sovereign immunity waiver, but who can at least make a colorable argument that a bad faith negotiation claim should fall under a declaratory relief waiver within the compact. Not recognizing latent bad faith negotiation claims will leave these tribes with a Hobbesian choice: live with the effects of the bad faith conduct or rescind your compact and accept the fact that your tribe lacks both a compact and the ability to sue to obtain one in light of *Seminole*.

Thus, severing a latent bad faith negotiation claim from an attendant rescission remedy will produce a state of affairs where the best case scenario is that a tribe must capitulate to the first offer the state makes – with no assurance that it will be any better than the one procured by latent bad faith. However, more likely than not the practical effect of the decision by the Ninth Circuit is that it forecloses the ability for tribes with standard compacts to get out of those agreements even if they were induced by the most egregious misrepresentations on the part of a state. The opinion below simply shifts the balance of power even further in the State's favor, giving them every incentive to abuse the negotiation process in an attempt to bolster their bottom lines – just as Congress feared when it enacted the statute. *See Rincon II*, 602 F.3d at 1042 (stating Congress anticipated

that states might abuse the compact negotiations). Bringing the intricate system created under IGRA back into homeostasis requires setting aside the portion of the Ninth Circuit's holding that interprets Section 2710(d)(7)(B)(ii)(I) of IGRA to conflict with *Bay Mills, Harper*, and universal principles of contract law.

CONCLUSION

The petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 18th day of April, 2016.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, AKA Pauma Band of Mission Indians, AKA Pauma Luiseno Band of Mission Indians,

Plaintiff-Appellee/ Cross-Appellant,

v.

STATE OF CALIFORNIA; CALIFORNIA GAMBLING CONTROL COMMISSION, an agency of the State of California; EDMUND G. BROWN, JR., as Governor of the State of California,

Defendants-Appellants/ Cross-Appellees.

Nos. 14-56104, 14-56105

D.C. Nos. 3:09-cv-01955-CAB-MDD 3:09-cv-01955-CAB-MDD

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Southern District of California
Cathy Ann Bencivengo, District Judge, Presiding

Argued and Submitted
July 10, 2015—San Francisco, California

Filed October 26, 2015
Amended December 18, 2015

Before: Mary M. Schroeder and
Richard C. Tallman, Circuit Judges, and
John A. Jarvey,* Chief District Judge.

Opinion by Judge Tallman;
Dissent by Chief District Judge Jarvey

SUMMARY**

Indian Law

The panel filed (1) an order amending its opinion and dissent and denying petitions for panel rehearing and rehearing en banc, and (2) an amended opinion and dissent in an action concerning a Tribal-State Gaming Compact.

In its amended opinion, the panel affirmed the district court's summary judgment and held that the Pauma Band of Luiseno Mission Indians was entitled to rescission of the 2004 Amendment to the 1999 Tribal-State Compact governing operation of Class III, or casino-style, gaming on Pauma's land.

The panel held that the interpretation of a Compact license pool provision in *Cachil Dehe Band of*

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* The Honorable John A. Jarvey, Chief United States District Judge for the Southern District of Iowa, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Wintun Indians of the Colusa Indian Cmty. v. Cal., 618 F.3d 1066 (9th Cir. 2010), applied, such that the State of California would be deemed to have misrepresented a material fact as to how many gaming licenses were available when negotiating with Pauma to amend its Compact. The panel held that, unlike a change in judicial interpretation of a statute or law, the doctrine of retroactivity does not apply to contracts. Once there has been a final judicial interpretation of an ambiguous contract provision, that is and has always been the correct interpretation from the document's inception. The panel held that the district court properly granted summary judgment on Pauma's misrepresentation claim.

The panel held that the district court awarded the proper remedy to Pauma by refunding $36.2 million in overpayments, even though the district court mislabeled the remedy as specific performance, rather than rescission and restitution for a voidable contract. The panel held that this equitable remedy fell within the State's limited waiver of its sovereign immunity in the Compacts, and thus was not barred by the Eleventh Amendment.

On cross-appeal, the panel held that Pauma was not entitled to seek redress under the Indian Gaming Regulatory Act because the State and Pauma actually reached a gaming Compact.

Dissenting, Chief District Judge Jarvey wrote that the State did not commit the tort of misrepresentation by interpreting the Compact differently than a

later court decision. He also wrote that, under the language of the Compact, the State did not waive its sovereign immunity with respect to this claim.

COUNSEL

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Cheryl A. Williams (argued) and Kevin M. Cochrane, Williams & Cochrane, LLP, San Diego, California, for Plaintiff-Appellee/Cross-Appellant.

ORDER

The panel has voted to amend its previous opinion and issues the following opinion to replace it. With this amendment, the panel has voted to deny the petitions for panel rehearing and to deny the petitions for rehearing en banc.

The full court has been advised of the petitions for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for panel rehearing and petitions for rehearing en banc are **DENIED**. No future

petitions for rehearing or petitions for rehearing en banc will be entertained.

OPINION

TALLMAN, Circuit Judge:

Sixteen years ago more than sixty Native American tribes entered into Tribal-State Gaming Compacts with the State of California. Sadly, the long and tortured history leading to the culmination of these Compacts did not cease there. Rather, litigation based on ambiguous provisions as to the number of authorized gaming devices has ensued for most of the duration of these Compacts. *See In re Indian Gaming Related Cases*, 331 F.3d 1094, 1095-1107 (9th Cir. 2003) (detailing the entire history before and after the Compacts were enacted). Before us is yet another installment in this ongoing saga, this time between the Pauma Band of Luiseno Mission Indians ("Pauma" or "the Tribe") and the State of California, the California Gambling Control Commission, and Governor Edmund G. Brown, Jr. (collectively "the State").

Pauma sued the State based on our prior decision in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California* ("*Colusa II*"), 618 F.3d 1066 (9th Cir. 2010). We have been asked to determine (1) whether *Colusa II*'s interpretation of the Compacts' license pool provision applies retroactively, such that the State would be deemed to have misrepresented a material fact as to how many

gaming licenses were available when negotiating with Pauma to amend its Compact; (2) whether the district court awarded the proper remedy to Pauma by refunding $36.2 million in overpayments; and (3) whether the State has waived its sovereign immunity under the Eleventh Amendment. We answer each question in the affirmative, although on alternative grounds supporting the relief awarded by the district court with respect to the remedy. On cross-appeal, Pauma also asks us to determine whether the State acted in bad faith under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710. We agree with the district court's finding that IGRA is inapplicable here, and thus Pauma's argument that the State acted in bad faith is irrelevant.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

We begin our journey with a quick overview of the weathered past between Native American tribes and the State of California, and then discuss the complicated procedural history that leads us here.

A

In 1988, Congress attempted to strike a delicate balance between the sovereignty of states and federally recognized Native American tribes by passing IGRA. The purpose of IGRA is well established:

> IGRA was Congress' compromise solution to the difficult questions involving Indian gaming. The Act was passed in order to provide "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" and "to shield [tribal gaming] from organized crime and other corrupting influences to ensure that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. § 2702(1), (2). 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.

Artichoke Joe's Cal. Grand Casino v. Norton, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002), *aff'd*, 353 F.3d 712 (9th Cir. 2003). IGRA creates three classes of gaming, with Class III gaming consisting of "the types of high-stakes games usually associated with Nevada-style gambling." *In re Indian Gaming*, 331 F.3d at 1097. As a result, Class III gaming is subjected to the greatest degree of control under IGRA's regulations. Class III gaming is lawful on Native American lands only if such activities are conducted pursuant to a Tribal-State Compact entered into by the tribe and a state that permits such gaming, and the Compact is approved by the Secretary of the Interior. *Id.* (citing 25 U.S.C. § 2710(d)(1), (3)(B)).

California did not immediately allow Indian gaming within its boundaries after the passage of IGRA. Some gubernatorial administrations were hostile to tribes conducting Class III gaming because it was then prohibited by California's Constitution, and so the State refused to negotiate with the tribes to permit it. *See id.* at 1098-99. In 1998, the people of California spoke by passing the tribes' ballot initiative—Proposition 5 (codified at Cal. Gov't Code §§ 98000-98012). *See Hotel Emps. & Rest. Emps. Int'l Union v. Davis*, 21 Cal. 4th 585, 589 (1999). Proposition 5 contained a model compact purporting to effectuate IGRA's provisions within California. *Id.* at 589-90. But the victory was short-lived. The California Supreme Court found all but one sentence of Proposition 5 unconstitutional.[1] *Id.* at 589, 615. Undeterred, the voters of California responded by amending the California Constitution on March 7, 2000, to create an exception for certain types of Class III Indian gaming notwithstanding the general

[1] The sole surviving provision of Proposition 5 is the statutory waiver of sovereign immunity by the State for claims arising out of violations of IGRA. Cal. Gov't Code § 98005. The California Supreme Court found this provision severable and recognized that the language was meant to effectuate IGRA since the U.S. Supreme Court had recently stripped the Act of its teeth in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). *Hotel Emps.*, 21 Cal. 4th at 614-15; *see also Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1026 n.8 (9th Cir. 2010) ("California has waived its Eleventh Amendment immunity from such suits [brought by tribes under IGRA].").

prohibition on gambling in the State. *In re Indian Gaming*, 331 F.3d at 1103 & n.11.

In September 1999, several tribes began negotiating with the State to enter nearly identical Compacts to operate Class III, or casino-style, gambling (the "1999 Compact"). In April 2000, Pauma joined more than sixty other tribes who ultimately signed the 1999 Compact. The 1999 Compact contains a provision limiting the number of licenses[2] available statewide for tribes based on a formula.[3] As we have previously observed, "[t]he License Pool Provisions that California and [the tribes] included in their Compact as a foundation for establishing Class III gaming in California are murky at best." *Colusa II*, 618 F.3d at 1084. Due to the limited time the tribes had to negotiate with the State, the parties agreed to the 1999 Compact without ever discussing their

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[2] Each license is the equivalent of one slot machine or electronic video gaming device, and each tribe was limited to a maximum of 2,000 licenses.

[3] The formula, which has been the subject of much litigation, is found in section 4.3.2.2(a)(1) and reads:

> The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be a sum equal to 350 multiplied by the number of Non-Compact tribes as of September 1, 1999, plus the difference between 350 and the lesser number authorized under Section 4.3.1.

Section 4.3.1 states tribes may not operate more gaming devices than "the larger of" "(a) A number of terminals equal to the number of Gaming Devices operated by the Tribe on September 1, 1999; or (b) Three hundred fifty (350) Gaming Devices."

radically different interpretations of how many licenses the statewide license pool formula actually produced. *See id.* at 1070-72; *In re Indian Gaming*, 331 F.3d at 1104. It required protracted litigation before we settled the number in *Colusa II*, 618 F.3d at 1082.

By December 2003, the State informed the tribes that the collective license pool had been exhausted—without stating the total number of licenses actually authorized—and Pauma received only 200 licenses in that draw instead of its requested 750. Thus several tribes, including Pauma, began negotiating with the State to amend their Compacts in order to abolish the license pool provision and gain access to an unlimited number of licenses. The State demanded substantially more money per operable license during negotiations, *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1025 (9th Cir. 2010), and only five tribes—including Pauma—ultimately concluded such amendments ("2004 Amendment"). *Colusa II*, 618 F.3d at 1072. At the time, Pauma was set to enter into a contract with Caesars to build a Las Vegas-style casino in place of Pauma's tent facility near San Diego, but needed more gaming licenses to do so.[4]

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[4] For more detail on the unsuccessful deal with Caesars, *see Pauma Band of Luiseno Mission Indians v. Harrah's Operating Co.*, No. D050667, 2009 WL 3069578 (Cal. Ct. App. Sept. 28, 2009). In summary, the Pauma and Rincon tribes are competitors whose casinos are only six miles apart in San Diego County.

(Continued on following page)

Several lawsuits ensued. By 2009-2010, these suits had percolated in the district courts for several years, and culminated in dispositive opinions rendered by our court. *See Colusa II*, 618 F.3d at 1084; *Rincon*, 602 F.3d at 1026 (holding that the State negotiated in bad faith by refusing to remove a provision from the proposed 2004 Amendment for 15% of Rincon's net wins, which we declared an impermissible tax under IGRA). In *Colusa II*, we held that the State miscalculated the number of licenses in the common pool under the 1999 Compact. 618 F.3d at 1080. We found that the formula in the 1999 Compact allows for a statewide total of 40,201 licenses, not the 32,151 that the State had originally calculated. *Id.* at 1082.

B

Shortly after the district court in *Colusa* rendered its decision holding that more licenses existed

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Id. at *2. The Rincon tribe had already paired with Harrah's in building a Nevada-style casino, and was operating 1600 licenses when their negotiations with the State broke down over the proposed 2004 amendments. Pauma intended to enter its contract with Caesars to compete with Rincon, but then Caesars and Harrah's merged in 2004. *Id.* Pauma knew the Rincon's exclusivity agreement with Harrah's would preclude it from building a competing casino and so Pauma backed out of the Caesars deal. *Id.* at *3-4. Pauma continued by negotiating with several other large gaming companies (Hardrock, Foxwood, etc.), but the economic recession of 2008 struck and no deal was ever completed. *Id.* Pauma has never been able to build a larger casino, and still operates its 1,050 licenses out of a tent facility.

than the State had allowed, Pauma filed a complaint asserting eighteen claims attacking the formation of the 2004 Amendment under various theories, including mistake and misrepresentation. Pauma notes that it has remained at roughly 1,050 licenses since December 2003 when the State first asserted that the license pool had been depleted, while two neighboring tribes operate at least 2,000 gaming devices apiece. Pauma executed the 2004 Amendment because it needed to have at least 2,000 licenses in order to secure a viable deal with a Las Vegas-style operator. But after the putative deals fell through, Pauma continued paying California the exorbitantly expensive 2004 Amendment prices for the same machines it acquired under the 1999 Compact provisions. Under the original 1999 Compact, Pauma paid $315,000 annually for the 1,050 machines. Under the 2004 Amendment, Pauma paid $7.75 million annually. Pauma sought reformation, injunctive relief, rescission, and restitution.

In April 2010, the United States District Court for the Southern District of California granted Pauma's request for injunctive relief from the annual $7.75 million payments, permitting Pauma to revert to the 1999 Compact rate. The State appealed. On the prior appeal, No. 10-55713, we left the injunction in place but remanded to the district court for reconsideration of the preliminary injunction factors in light of recent cases, including *Colusa II*. On remand, the case was reassigned to three different district judges

before the court finally ruled on the summary judgment motions, leaving the injunction in place.

Presently before us is the district court's summary judgment ruling in favor of Pauma on its misrepresentation claim. In light of our ruling in *Colusa II*, the district court found the State had misrepresented the number of licenses available in December 2003 when it told Pauma the pool was exhausted; in fact, there were 8,050 remaining. As a result, the district court rescinded the 2004 Amendment, allowed Pauma to return to the 1999 Compact's lower rate, and ordered as specific performance a refund of the difference in payment that Pauma had made as between the higher and lower rates for the 1,050 machines (totaling $36,235,147.01). The district court also held that the State had waived its Eleventh Amendment sovereign immunity in a provision in the 1999 Compact, which the parties had left undisturbed in the 2004 Amendment. The court further held that the State was not entitled to a setoff for the profits Pauma made between 2004 and 2009 because Pauma should have been able to obtain the 1,050 machines under the correctly calculated license formula in the 1999 Compact.

The district court entered final judgment in December 2013, but was immediately asked by Pauma to vacate the order so it could request further relief. Pauma sought a ruling on two additional claims labeled "bad faith/violation of IGRA" so that the Tribe would be entitled to reformation rather than rescission. The district court denied the request

as moot since it would not result in a remedy different from the one already provided to Pauma, and held it would fail on the merits in any event. This ruling triggered Pauma's mandamus petition, which we denied as premature earlier this year.[5] The State's appeal and Pauma's cross-appeal are now ripe for review.

II

We review a district court's grant of summary judgment *de novo*. *Big Lagoon Rancheria v. California*, 789 F.3d 947, 952 n.4 (9th Cir. 2015) (en banc). "Summary judgment is appropriate if there is no genuine issue of material fact and, even making all reasonable inferences in favor of the nonmoving party, the moving party is entitled to judgment as a matter of law." *Rincon*, 602 F.3d at 1026. We also review the following legal determinations *de novo*: interpretation of contracts based on the plain meaning, *Colusa II*, 618 F.3d at 1070; whether negotiations were conducted in good faith under IGRA, *Rincon*, 602 F.3d at 1026; and the applicability of Eleventh Amendment sovereign immunity, *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1042 (9th Cir. 2015).

[5] Pauma's mandamus petition essentially challenged the district court's decision to rule solely on its misrepresentation claim, and refusal to reach any of the other claims—such as the Tribe's bad faith claims under IGRA. We allowed Pauma to assert such claims in its cross-appeal, and Pauma has chosen to do so. We address them below.

"General principles of federal contract law govern the Compacts, which were entered pursuant to IGRA." *Colusa II*, 618 F.3d at 1073 (citation omitted). We "often look to the . . . Restatement when deciding questions of federal common law." *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 93 n.6 (D.C. Cir. 2001). We may also rely on California contract law since there is no practical difference between state and federal law in this area. *Colusa II*, 618 F.3d at 1073.

"We review the district court's choice of remedy for abuse of discretion." *Id.* at 1082. A misapplication of the correct legal rule constitutes an abuse of discretion. *United States v. Hinkson*, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc). Otherwise, we must "determine whether the trial court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Id.* at 1262 (internal quotations omitted).

III

The heart of the State's argument before us focuses on whether there was a "fact in existence" that it misrepresented to Pauma during the 2004 negotiations. Thus, we review whether *Colusa II*'s holding that 40,201 licenses were available—meaning 8,050 remained in December 2003 when the State told Pauma that the license pool had been depleted—constitutes a "fact in existence" giving rise to liability under Pauma's misrepresentation claim. We hold

that, unlike a change in judicial interpretation of a statute or law, the doctrine of retroactivity does not apply to contracts. Once there has been a final judicial interpretation of an ambiguous contract provision, that is and has always been the correct interpretation from the document's inception.

In order to establish its misrepresentation claim, Pauma must demonstrate: (1) the State made a misrepresentation about a fact in existence, (2) that was either fraudulent or material, (3) which induced Pauma to enter into the 2004 Amendment, and (4) Pauma was justified in relying on the State's misrepresentation. *See* Restatement (Second) of Contracts § 164(1) (1981); *see also Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1137 (9th Cir. 2000) (adopting the Restatement definition for misrepresentation). The outcome of this case hinges on the first prong. "A misrepresentation is an assertion that is not in accord with the facts" as they exist at the time the assertion is made. Restatement (Second) of Contracts § 159 & cmt. c. "Such facts include past events as well as present circumstances but do not include future events. An assertion limited to future events . . . may be a basis of liability for breach of contract, but not of relief for misrepresentation." *Id.* § 159 cmt. c.

Furthermore, "an assertion need not be fraudulent to be a misrepresentation" so long as "it is material." *Id.* § 159 cmt. a; *cf. Reliance Fin. Corp. v. Miller*, 557 F.2d 674, 680 (9th Cir. 1977) (referring to this

version as "innocent misrepresentation").[6] A misstated fact is "material if it would be likely to induce a reasonable person to manifest his [or her] assent" to enter a contract. Restatement (Second) of Contracts § 162(2). "A misrepresentation induces a party's manifestation of assent if it substantially contributes to his [or her] decision to" enter the contract. *Id.* § 167. Although a party must have justifiably relied upon the misrepresentation, "the requirement of justification is usually met unless, for example, the fact to which the misrepresentation relates is of only peripheral importance to the transaction. . . ." *Id.*§ 164 cmt. d.

While both parties dispute whether the doctrine of retroactivity applies, that doctrine is a red herring because we are dealing with a contract provision. The State argues that our holding in *Colusa II* does not apply "retroactively." In essence, the State asserts that the district court erred in granting summary judgment for Pauma because the license pool did not expand until mid-2009 when a district court first

[6] We note that the district court had before it Pauma's claims for either innocent/material misrepresentation or fraudulent/negligent misrepresentation—and the court ruled for Pauma solely on the former. Thus, we refuse to consider any of Pauma's assertions that the State knowingly acted in bad faith or with any kind of evil intent. The formula was confusing. We definitively resolved the issue in 2010. Nothing in our decision in *Colusa II* suggests the State *should have known* the correct number of licenses when negotiating with Pauma in 2003-2004, and we refuse to so hold now. We review only whether innocent misrepresentation was properly applicable.

handed down its ruling in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California* ("*Colusa I*"), 629 F. Supp. 2d 1091 (E.D. Cal. 2009). In the State's view, the number of available licenses changed when we handed down *Colusa II* in 2010. Thus, the State contends it could not have misrepresented an existing fact when it denied licenses to tribes beyond a total of 32,151. We reject this argument.

We find that the term "retroactive" is a misnomer in the realm of contract interpretation. Once a court has interpreted an ambiguous contract provision that is and has *always been* the correct interpretation from its formation. Although the cases discussing the retroactivity of judicial decisions interpreting statutes may be instructive, a contract is fundamentally different from a statute or a body of law. A contract is a private agreement formed between two parties to represent their mutual intent. *See* Restatement (Second) of Contracts § 3. Thus, a contract provision has only one true meaning—what it meant when written—even though the parties may later dispute the correct interpretation. By contrast, a statute is enacted by Congress and the understanding of its provisions may evolve over time, often through judicial interpretations or legislative amendments.[7]

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[7] Therefore, the dissent's reliance on *Curtin v. United Airlines, Inc.* is misplaced as it involves the judicial interpretation of a provision of the Warsaw Convention; a legislatively

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"[T]he fundamental goal of contract interpretation is to give effect to the mutual intent of the parties *as it existed at the time* of contracting." *U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 934 (9th Cir. 2002) (emphasis added). This fundamental axiom is widely accepted and uncontested. *See, e.g.*, *Colusa II*, 618 F.3d at 1073 (holding the "court gives effect to the mutual intention of the parties *as it existed at the time* the contract was executed" (emphasis added) (internal quotations omitted)); *Liberty Nat'l Bank & Trust Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 218 F.2d 831, 840 (10th Cir. 1955) ("[T]he basic rule of universal acceptation for the ascertainment of [the parties] intention is for the court, so far as possible, to put itself in the place of the parties when their minds met upon the terms of the agreement. . . ."); 11 Williston on Contracts § 31:9 (4th ed. 2015).

When dealing with interpretation of a contract there is no such thing as a "change in the law"—once a final judicial decision determines what the contested language supports, that is it. The State's argument that *Colusa II* "changed" the number of licenses available under the license pool provision defies logic. As is typical in contract interpretation cases, the dispute was between the parties' competing calculations. Once we decreed that 40,201 licenses were available under the formula provision based on a

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enacted document, similar to a statute, rather than a contract. *See* 275 F.3d 88, 96-97 & nn. 16-20 (D.C. Cir. 2001).

reasonable interpretation of the contract language and the intention of the parties at the time it was formed, we resolved the dispute. *Colusa II,* 618 F.3d at 1081-82. Thus, the number of licenses never "changed" as the State asserts.

In *Colusa II*, we found that the State did not adequately explain why it had chosen 32,151 for the total available licenses since "the foundation for this . . . number is at odds with the plain language of the contract and with an interpretation of part of the formula that is now agreed upon by both parties." *Id.* at 1076; *see also id.* at 1078 nn. 9 & 12. We calculated the correct number of licenses that "were authorized for distribution statewide through the license draw process," to be 40,201, *id.* at 1082, and then we turned to the opinion's prospective effect on other tribes. We recognized that "the remedy deprived the state of its right to litigate the size of the license pool under different facts in other pending and future cases" because we purposefully "anticipated that California would be liable for a single number of licenses in the statewide pool, *not separate numbers for separate litigants* based on their respective situations." *Id.* at 1084 (emphasis added) (internal quotation marks omitted). In sum, our interpretation in *Colusa II* of the 1999 Compact's license pool provision is the final word for all tribes, at all times.

The formula for calculating the license pool never changed—it just took over a decade to reach a final judicial interpretation which settled a longstanding dispute over the number of licenses it authorized.

Innocent misrepresentation of a different number does not require a fraudulent or misleading intent. *See* Restatement (Second) of Contracts § 159 cmt. a. It simply requires a fact, which is material, to be false. *Id.* § 159 cmts. a, c. The formula stated in the 1999 Compact is a fact. The number of tribes with and without Compacts as of the listed date (September 1, 1999) was an ascertainable, existing fact. *See Colusa II*, 618 F.3d at 1073. The number of licenses each tribe with a Compact had as of that date was also an existing fact. *Id.* at 1074. The State had all of the information it needed to calculate its own formula.[8] The State simply miscalculated.

Understandably, the State "expresses a sense of unfairness engendered by the retrospective application of a new judicial interpretation of an [existing contract provision]. But the essence of judicial decisionmaking necessarily involves some peril to individual expectations." *Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1090 (9th Cir. 2010) (internal quotation and alterations omitted). The State could have sought a declaratory judgment much earlier, but it did not. The State also could have

[8] "[I]t is undisputed that the State's negotiation team actually drafted [this provision] in the Compact." *Colusa I*, 629 F. Supp. 2d at 1115. As such, general contract principles also indicate that any ambiguity in "'the language of the contract should be interpreted strongly against the party who caused the uncertainty to exist' [(*i.e.*, the State drafters)]." *Id.* at 1113 (quoting *Buckley v. Terhune*, 441 F.3d 688, 695-96 (9th Cir. 2006)).

simply used fixed numerals in the formula, but it did not. The fact that there was ambiguity in the formula's language or that the State interpreted the total number of licenses in good faith is irrelevant to the analysis. We interpreted the total number of licenses in the license pool to be 40,201 based on a reasonable interpretation of the contract language. Therefore, in December 2003, the State misrepresented an existing fact to the tribes—including Pauma—that no further licenses were available when, in fact, there were 8,050 more licenses under the correct interpretation of the formula.

The State's remaining arguments regarding the misrepresentation claim warrant only brief discussion. First, the State's argument that the license pool provision was not material to the 1999 Compacts borders on the incredible. *See Colusa II*, 618 F.3d at 1069 ("Central to the Compacts is a formula to calculate the number of gaming devices California tribes are permitted to license."). Second, the State's argument that the limited number of licenses did not induce Pauma to enter the 2004 Amendment is equally absurd, considering procurement of more licenses (at least 2,000) was essential to its putative contract with Caesars, dependent on at least that many devices. Finally, Pauma justifiably relied on a fact that was entirely within the State's control (the total number of available licenses). Pauma has, therefore, established that no genuine issue of material fact remains as to its misrepresentation claim,

and the district court properly granted summary judgment.[9]

IV

After granting summary judgment in favor of Pauma on its innocent misrepresentation claim, the district court turned to the appropriate remedy. Since the Compacts include a limited waiver of sovereign immunity that allows for suit seeking an equitable remedy, but not one seeking monetary damages, we must first decide what the correct remedy is. Then we determine whether that remedy is barred by the Eleventh Amendment or if it falls within the State's limited waiver.

A

The district court erred in awarding Pauma $36.2 million under the guise of "specific performance." Specific performance is a remedy associated with breach of contract. Restatement (Second) of Contracts § 357; 81A C.J.S. *Specific Performance* § 4 (2015) ("[A] cause for specific performance ordinarily cannot lie

[9] We note that most tribes have already received their licenses under *Colusa II*, which approved the district court's remedy of re-opening the draw process for the remainder of the licenses. By contrast, Pauma is one of only five tribes who chose to amend its Compact and thus paid higher prices for licenses which it should have been able to obtain under the original 1999 Compact.

until there has been a breach of the contract."). "A party who has avoided a contract on the ground of . . . misrepresentation . . . is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance." Restatement (Second) of Contracts § 376; 1 Witkin, Summary of California Law, Contracts § 1022 (10th ed. 2005) ("A person who pays money under the mistaken belief that he or she is under a duty to do so may recover it."). Furthermore, "[s]pecific performance . . . will not be granted unless the terms of the contract are sufficiently certain to provide a basis for an appropriate order." Restatement (Second) of Contracts § 362.

Where, as here, no breach of a contract has been alleged, but rather a challenge to its formation—*i.e.*, Pauma would not have entered into the 2004 Amendment had it known additional licenses were available at the cheaper 1999 Compact rates—the contract is voidable and the appropriate remedy is rescission and restitution. *See* 1 Witkin, Summary of California Law, Contracts § 307 (10th ed. 2005) (noting innocent misrepresentation is grounds for rescission); *see also Reliance Fin. Corp.*, 557 F.2d at 680 (same); Restatement (Third) of Restitution §§ 52, 54 (2011); Dan B. Dobbs, *Law of Remedies* § 4.1(1) (2d ed. 1993) ("When the contract itself is unenforceable, restitution is usually the *only* remedy available for benefits the plaintiff has conferred upon a defendant in part performance." (emphasis in original)); *id.* § 9.2(2) ("A representation by the defendant, if believed by the plaintiff, would be the equivalent of a

mutual mistake for which rescission would be granted."); *id.* § 9.3(1).

Moreover, one cannot specifically perform something that is not a term in the contract. *Cf.* Restatement (Second) of Contracts § 362. The Compact did not contain a clause for dealing with overpayments. The sole option for returning Pauma to the *status quo ante* was equitable restitution. *Id.* § 376; *see Ambassador Hotel Co. v. Wei-Chuan Inv.*, 189 F.3d 1017, 1031 (9th Cir. 1999). Thus, the district court misapplied the law in labeling the remedy specific performance.

However, in this case, the district court's error in mislabeling the remedy does not require reversal. Neither side disputes the calculation of $36,235,147.01 as the difference between the higher 2004 Amendment payments and the lower 1999 Compact's rates. Rather, the State challenges only whether it is entitled to a setoff for the profits Pauma gained from operating machines it would not have had absent the 2004 Amendment, and Pauma now alleges it is entitled to essentially reform the entire contract under the procedures outlined in IGRA. Since we reject both arguments, we affirm the district court's calculation of the remedy on the alternative grounds of equitable rescission and restitution.

Under general contract principles, "[w]hen calculating restitution, we must offset the Plaintiffs' award by the value of any benefits that Plaintiffs received from the [D]efendant under the contract, so that only

the actual, or net, loss is compensated." *Republic Sav. Bank, F.S.B. v. United States*, 584 F.3d 1369, 1377-78 (Fed. Cir. 2009) (internal quotation omitted); *see, e.g.*, *Cal. Fed. Bank v. Matreyek*, 8 Cal. App. 4th 125, 134 (1992) (holding restitutionary recovery inequitable where the bank would be able to retain both a benefit and a profit); Restatement (Second) of Contracts § 384; Dan B. Dobbs, *Law of Remedies* § 9.3(3) (2d ed. 1993). The State is not entitled to a setoff here because Pauma would have made the same profits by acquiring the same number of machines under the 1999 Compact that it now operates under the 2004 Amendment if the State had not miscalculated the number of available licenses.

The State argues that, although this would return Pauma to the *status quo ante* in theory, in reality it would unjustly enrich Pauma vis-à-vis the other tribes who were parties to the 1999 Compact because the other tribes were unable to obtain "unlimited" machines as Pauma could under the 2004 Amendment and thus did not earn additional profits. Essentially, the State argues that Pauma will receive a windfall of roughly $16 million by sitting on the sidelines during the *Colusa* litigation.

However, the State's argument depends on viewing the situation holistically, in contravention to general litigation principles. The district court correctly stated it must deal solely with the parties before it. *See, e.g.*, *Boating Indus. Ass'ns v. Marshall*, 601 F.2d 1376, 1382 n.7 (9th Cir. 1979) ("Remedy for this injury would depend upon actions of third parties

not before the court in this action."). Under this view, as between Pauma and the State, Pauma is not obtaining a "windfall" because it should never have had to pay the State the $36.2 million in the first place, and it should have been able to obtain the same number of licenses (a total of 1,050) for less money. Thus, the State's argument—to consider Pauma's position in comparison to the other tribes who were unable to obtain further licenses and the attendant profits—must fail. The district court correctly held that the State is not entitled to a setoff.

Pauma's argument for reformation meets a similar fate. On cross-appeal, Pauma requests reformation of the 2004 Amendment—rather than rescission—so that Pauma may keep the amended contract's extended term limit (expiring in 2030 instead of 2020) at the more favorable 1999 Compact price rates. "[H]owever, reformation is proper only in cases of fraud and [mutual] mistake." *Skinner v. Northop* [sic] *Grumman Ret. Plan B*, 673 F.3d 1162, 1166 (9th Cir. 2012); *see* Restatement (Second) of Contracts § 166 (referencing only fraudulent misrepresentation as giving rise to reformation as a remedy); Dan B. Dobbs, *Law of Remedies* § 9.5 (2d ed. 1993) ("Reformation is the appropriate remedy . . . for fraud or mistake in the written expression of the agreement."). This case involves *innocent* misrepresentation, not *fraudulent* misrepresentation. Reformation is thus inappropriate here.

In sum, the district court erred in applying the law of contractual remedies by awarding Pauma

specific performance rather than ordering rescission and restitution. But because neither side challenges the calculation of the remedy, only whether a setoff should be applied or reformation ordered as a superior remedy—both of which we reject—we affirm the district court's award to Pauma of $36,235,147.01 under the equitable remedies of rescission and restitution.

B

Because the State must refund the $36.2 million in overpayments, we next consider whether the district court correctly held that the State had waived its Eleventh Amendment sovereign immunity in this case to permit such relief.

"[T]he rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). The Supreme Court has extended this bar to suits brought by Native American tribes even though they are sovereigns in their own right. *See Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779-82 (1991). In *Edelman*, the Court made clear that a state's sovereign immunity extends even to equitable judgments, particularly if "the award resembles far more closely the monetary award against the State itself . . . than it does the prospective injunctive relief. . . ." 415 U.S. at 665. The Court specifically rejected an individual's claims for

"equitable restitution" based on the state's wrongful withholding of benefits under a public aid program. *Id.* at 656, 665. Thus, the Court held only prospective, nonmonetary relief against state officials is exempt from the Eleventh Amendment bar. *Id.* at 677.

"However, there are exceptions to this general bar." *N.E. Med. Servs., Inc. v. Cal. Dep't Health Care Servs.*, 712 F.3d 461, 466 (9th Cir. 2013). The Supreme Court discussed one such exception at length in *Edelman*—waiver. 415 U.S. at 671-74. *Edelman* recognized that Congress may abrogate a states' sovereign immunity via a clear, express legislative statement, or a state may enter a "compact" by which the state expressly and unequivocally waives its own immunity. *Id.* at 672. "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." *Id.* at 673 (internal quotation and alteration omitted).

Here, the State waived its Eleventh Amendment sovereign immunity through an explicit contractual waiver. The 1999 Compact contains a limited waiver of sovereign immunity on behalf of both the State and the Tribe, which the 2004 Amendment left undisturbed. It reads in relevant part:

> Sec. 9.4. Limited Waiver of Sovereign Immunity.
>
> (a) In the event that a dispute is to be resolved in federal court . . . , the State and the Tribe expressly consent to be sued therein and waive any immunity therefrom that they may have provided that:
>
> (1) The dispute is limited solely to issues arising under this Gaming Compact;
>
> (2) Neither side makes any claim for monetary damages (that is, only injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought);. . . .

This is an express waiver that falls within the exception to the Eleventh Amendment delineated in *Edelman*—but the parties dispute the scope of the waiver. We must determine whether the exclusion for monetary damages in Section 9.4(a)(2) includes authorization to seek the remedy of rescission and restitution.

We hold that the proper remedy here does not trigger the exclusion provision, and thus the State waived its sovereign immunity for Pauma's misrepresentation claim. We begin by analyzing the language of the contract itself. *See Colusa II*, 618 F.3d at 1073. The contractual language establishes a clear dichotomy between claims for monetary damages—which are excluded and thus barred by sovereign immunity—and equitable relief. Although restitution may be considered a legal or equitable remedy, *see*

Restatement (Third) of Restitution § 4(1); Dan B. Dobbs, *Law of Remedies* § 4.1(1) (2d ed. 1993), interpreting the contract as a whole demonstrates that restitution was contemplated by the parties as a potential remedy for which sovereign immunity was waived. Thus, we hold that restitution is included in the waiver "by such overwhelming implications from the text as will leave no room for any other reasonable construction." *Edelman*, 415 U.S. at 673 (internal quotation and alteration omitted).[10]

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[10] The district court relied, as Pauma does on appeal, on *Bowen v. Massachusetts*, 487 U.S. 879 (1988), for the distinction drawn between monetary damages awards (meant to compensate for an injury) and specific monetary relief (meant to reinstate one to his or her original position). *Id.* at 893. But *Bowen* simply reaffirms two steadfast principles: (1) equitable relief, which may take the form of money, is different than monetary damages; and (2) when Congress has specifically provided a waiver of sovereign immunity in a statute that allows for equitable relief (there, the Administrative Procedure Act ("APA")), that may occasionally involve specific relief in the form of money. However, those propositions do not answer the contractual interpretation question presented here.

We have already stated that *Bowen* does "not implicate Eleventh Amendment concerns" since it only analyzed the statutory language of the APA. *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1513 (9th Cir. 1994). Furthermore, although *Bowen* cited approvingly contract cases awarding specific performance, those cases all dealt with a *breach* of contract issue and enforcement of a *contract provision* to pay money—neither of which exist in the present case. Consequently, *Bowen* sheds light on the current case only to the extent it reinforces our conclusion that restitution of the money wrongfully paid by Pauma may still be awarded as an equitable remedy and is not a claim for monetary damages against the State.

"A written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations." *Wapato Heritage, L.L.C. v. United States*, 637 F.3d 1033, 1039 (9th Cir. 2011) (internal quotation omitted); *see* Restatement (Second) of Contracts § 202(2). Here, reading the contract as a whole, the present restitutionary order falls well within the waiver.

The waiver applies "provided that . . . [n]either side makes any claim for monetary damages (that is, only injunctive, specific performance, *including enforcement of a provision of this Compact requiring payment of money to one or another of the parties* [which must mean either Pauma or the State], or declaratory relief is sought)." This clause envisions payment of money to *either* party, and yet the Compact does not contain any provisions requiring payment of money from the State to the Tribe.[11] If this clause did not contemplate the restitutionary remedy ordered by the district court and affirmed herein, then the provision would be operative only as to one party, not both. Excluding restitution as a remedy that the Tribe could seek under this waiver would render this clause null and void. *Cf.* 11 Williston on Contracts § 32:5 (4th ed. 2015) ("An interpretation which gives effect to all provisions of the contract is

[11] The State itself asserts that no provision in the contract required it to pay Pauma money when arguing that specific performance was the wrong remedy. That argument cuts against the State here given the language of the agreement.

preferred to one which renders part of the writing superfluous, useless or inexplicable."). When "that is" is construed to limit waiver only as to the remedies listed, as urged by the dissent, the restitution remedy ordered by the district court still falls within that restrictive interpretation. Thus, the district court properly held that restitution by the State of overpayments by the Tribe was included in the waiver.

In sum, the contractual waiver clearly envisions restitution as falling within its purview, and only actions for monetary *damages* or actions not arising from the Compact itself to be excluded. The proper remedy for Pauma due to the State's misrepresentation of the number of licenses available under the 1999 Compact's formula is rescission of the 2004 Amendment and restitution for the overpayments made. Therefore, the State contractually waived to this extent its Eleventh Amendment sovereign immunity and Pauma was not barred from bringing its misrepresentation claim seeking rescission and restitution.[12]

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[12] In any event, California—unlike many states—has chosen to legislatively enact a broad statutory waiver of sovereign immunity for claims arising out of violations of IGRA. *See* Cal. Gov't Code § 98005; *Hotel Emps.*, 21 Cal. 4th at 615. Because we find the contractual waiver to include the restitutionary remedy sought and recovered here, we need not reach whether the statutory waiver would also apply. We do note, however, that our ruling is supported by the California Supreme Court, which upheld the constitutionality of the waiver

(Continued on following page)

V

On cross-appeal, Pauma asserts the district court erred by denying summary judgment on the Tribe's fifth and sixth claims for relief—styled as bad faith/IGRA violation claims. Pauma provides a lengthy and fact-intensive explanation why it thinks the State acted in bad faith with respect to the entirety of their course of dealings over the last fifteen years. The Tribe relies heavily upon our recent decision in *Rincon*, involving a different California tribe, that upheld a finding of bad faith under IGRA. However, in the process, Pauma ignores the explicit statutory language of IGRA under which it seeks relief. The district court held Pauma's IGRA claims were moot because rescission of the 2004 Amendment had already been granted,[13] judicially estopped as inconsistent with Pauma's earlier position,[14] and

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provision contained in the referendum by the people. *Hotel Emps.*, 21 Cal. 4th at 615.

[13] Neither of the parties briefed this issue so we need not reach it, but we also note the district court's analysis is supported by our recent en banc decision in *Big Lagoon Rancheria*, 789 F.3d at 955 (holding the tribe's cross-appeal was moot regarding bad faith claim since the district court had ruled in the tribe's favor on other grounds).

[14] Pauma's claims are not inconsistent, as the district court found. Although Pauma did not use the words "bad faith" in the body of its complaint with respect to these IGRA claims, it relied heavily on *Rincon*'s holding that the State's request for 15% of the tribe's net wins in its proposed 2004 Amendment was an impermissible tax under IGRA and that the State thus negotiated in bad faith when it refused to remove that provision. *Rincon*, 602 F.3d at 1024-25, 1036, 1042. We did not express an opinion

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barred by the plain language of the IGRA statute. We affirm on the last ground.

The plain language of IGRA does not support Pauma's argument. IGRA states that a Native American tribe "shall request" a state to enter into negotiations for the purposes of entering a Tribal-State Gaming Compact, and "[u]pon receiving such a request, the State *shall negotiate* with the Indian Tribe *in good faith* to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A) (emphasis added). In order to give effect to this language, the statute vests federal district courts with jurisdiction over "any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) *or* to conduct such negotiations *in good faith*[.]" *Id.* § 2710(d)(7)(A)(i) (emphasis added).

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as to the validity of the provision for the five tribes, including Pauma, who successfully negotiated and obtained a 2004 Amendment because their Compacts "were satisfactory to them" and the tribes freely entered into the amendments. *Id.* at 1037 n.17. Since Pauma had the same provision in its 2004 Amendment that was at issue in *Rincon*, Pauma argues that the same result should be applied in its case.

The district court also found that Pauma was requesting different relief, but in fact Pauma had been requesting "reformation" based on IGRA claims five and six in the complaint from the beginning. Pauma merely requested "rescission" and "restitution" in addition, with claim ten (misrepresentation) providing a basis for such relief. Thus, Pauma's claims in its complaint and summary judgment motion are not inconsistent.

The next subsection describes, in detail, the procedure a tribe must follow if a state does not adhere to these mandates. *Id.* § 2710(d)(7)(B). Specifically, the Native American tribe must first introduce evidence that "a Tribal-State compact *has not been entered into* under paragraph (3)," and "the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith[.]" *Id.* § 2710(d)(7)(B)(ii)(I), (II) (emphasis added). Then, IGRA provides a remedy if such an event should occur: "If . . . the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court *shall order* the State and the Indian Tribe *to conclude such a compact* within a 60-day period." *Id.* § 2710(d)(7)(B)(iii) (emphasis added). This same section also lists factors a court may consider when determining whether a State has negotiated in good faith. *Id.*

The detailed procedures set forth in IGRA allow for redress by Native American tribes when a State refuses to negotiate or negotiates in bad faith for a gaming Compact. These procedures, by their own language, simply do not apply when the State and the Tribe have *actually reached a Compact. See id.* § 2710(d)(7)(B)(ii)(I). *Rincon* does not hold otherwise. *Cf.* 602 F.3d at 1026. The Rincon tribe (Pauma's nearby competitor in San Diego) also entered into negotiations with the State in 2003 and 2004—but Rincon *refused to sign* an actual amended Compact

with the State and filed suit instead. *Id.* at 1023, 1026; *see also Big Lagoon Rancheria*, 789 F.3d at 951-52; *In re Indian Gaming*, 331 F.3d at 1110 (holding the State did not negotiate in bad faith with respect to the 1999 Compact's revenue provisions, which the tribe refused to sign). Pauma is thus in a very different position than the Rincon tribe because it actually agreed to the 2004 Amendment and did not challenge the negotiation process under IGRA.

Therefore, the district court correctly concluded: "Although [ ] IGRA may allow a court to reform or rescind an unlawful agreement (which is what Pauma wanted until now), it does not allow the Court to turn back the clock and compel re-negotiation of an agreement actually reached ten years ago, let alone one that has been rescinded and never would have been negotiated in the first place in light of the relief the Court has already granted in this case." The relief Pauma seeks in its cross-appeal is not available under the plain statutory language of IGRA, and we affirm the district court's denial of Pauma's summary judgment motion on this ground.

VI

In conclusion, we hold that once a court's judgment interpreting an ambiguous contract provision becomes final, that is and has always been the correct interpretation from its inception. As such, the State innocently misrepresented a material fact when it erroneously informed Pauma the 1999 Compact's

license pool had been depleted based on its miscalculation of the formula. Since this misrepresentation induced Pauma to enter into the much more expensive 2004 Amendment, the Tribe is entitled to rescission of the amendment and restitution for the $36.2 million in overpayments made to the State. The Eleventh Amendment does not bar this suit because the State contractually waived its sovereign immunity for claims arising out of the Compacts seeking such relief. Finally, Pauma is not entitled on cross-appeal to seek redress under IGRA because the plain language of the statute precludes relief when the Tribe and the State actually enter into a Compact.[15]

AFFIRMED. Each party shall bear its own costs.

JARVEY, Chief District Judge, dissenting:

I agree with the majority's conclusion that courts determine contracting parties' intent as of the time the contract is executed. I disagree, however, that California committed the tort of misrepresentation by interpreting the Compact differently than a later court decision. The provision regarding the number of

[15] Pauma makes conclusory references to the claims it advanced in its mandamus petition, asking the court to vacate the magistrate judge's order denying Pauma's motion to compel discovery and to reassign the case to a different district court judge based on her handling of the IGRA claims. We deny both of these requests as moot in light of our holding foreclosing further pursuit of Pauma's claims under IGRA.

available licenses in the Compact was hopelessly ambiguous. California, the compacting tribes, the district court and this court all interpreted it differently. That this court's opinion differed from that offered by California does not establish that California made "an assertion that [was] not in accord with the facts" as they existed at the time the assertion was made. RESTATEMENT (SECOND) OF CONTRACTS § 159 & cmt. c.

The decision in *Colusa II* was not the result of any judicial fact finding. In fact, this court rejected the parties' extrinsic evidence for contract interpretation purposes and determined the number of available licenses as a matter of law. Because extrinsic evidence was rejected and the number determined as a matter of law, all parties to the Compact were on equal footing with respect to their ability to interpret this ambiguous provision. The majority is correct when it notes that any party could have sued to get more clarity. The tribes in *Colusa II* did, but the plaintiff here chose instead to negotiate for the possibility of receiving more licenses than have ever been available under the 1999 Compact.[1]

On the misrepresentation issue, *Curtin v. United Airlines, Inc.*, 275 F.3d 88 (D.C. Cir. 2001) is analogous and persuasive. *Curtin* involved a provision of

[1] I find it more than ironic that Pauma has received monetary damages as a result of *Colusa II* that were denied to the tribes that won that decision. I find it inequitable.

the Warsaw Convention (a treaty) that established the compensation to be paid by a carrier when passengers' luggage was lost during international travel. The Warsaw Convention provided for a payment of $9.07 per pound up to the maximum of a seventy pound bag, or $635. United Airlines had a practice of paying the maximum amount ($635) for lost international luggage rather than weighing the bags and paying the $9.07 price per pound for the lost luggage. That practice had been interpreted by some courts as permissible, and by others as impermissible. Ultimately, the District of Columbia Circuit Court of Appeals rejected the practice, holding that the Warsaw Convention did not cap liability at $635 where the carrier had failed to weigh the bags as required.

In *Curtin*, passengers who had settled their lost luggage claims for $635 sued claiming, among other things, that the settlement agreements were procured by United's misrepresentation of its obligation under the Warsaw Convention, as later determined by the Court of Appeals. However, the District of Columbia Circuit held that United did not make a misrepresentation by reasonably interpreting the Warsaw Convention differently than the later District of Columbia Court of Appeals decision. This decision is sensible, intuitive and analogous to what happened in the matter now before the court. Because I believe that the State's interpretation of this ambiguous contractual provision does not qualify under the common law definition of a material misrepresentation, I respectfully dissent.

I also do not believe that the State of California waived sovereign immunity with respect to this claim. The 1999 Compact waives immunity as follows:

> Sec. 9.4. Limited Waiver of Sovereign Immunity.
>
> (a) In the event that a dispute is to be resolved in federal court . . . , the State and the Tribe expressly consent to be sued therein and waive any immunity therefrom that they may have provided that:
>
> (1) The dispute is limited solely to issues arising under this Gaming Compact;
>
> (2) Neither side makes any claim for monetary damages (that is, only injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought);. . . .

I agree with the majority that the remedy of specific performance is not available in this case. The majority upholds the award as restitution, concluding that the Compact waives immunity against claims for restitution because the Compact waives immunity against claims for "specific performance, including payment of money to one or another of the parties." I disagree with the majority's reading of the waiver.

The limited waiver of sovereign immunity is well drafted and clear. It states that neither side can make a claim for monetary damages. It then defines the

waiver, beginning with the words "that is." The phrase "that is" is commonly thought of as a shorthand version of the phrase "that is to say." It is used to preface a more specific delineation of the preceding contractual language. Here, to further clarify the limitation of the waiver, the parties stated, "that is, *only* injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought. . . ." (emphasis added). The use of the word "only" is routinely defined to mean alone, solely or exclusively. The waiver's applicability is therefore explicitly confined to the circumstances listed.

The majority infers a waiver of sovereign immunity for restitution from a canon of contract interpretation that prefers interpretations that do not render other terms "superfluous, useless or inexplicable." It finds that reading the language "including payment of money to *one or another* of the parties" as allowing monetary payment only in the context of specific performance would render the clause superfluous because the Compact's payment provisions run only from Pauma to the State. But this reading disregards the explicit text of the clause. The clause makes clear that the parties intended "specific performance" to include monetary payments only when the Compact requires them. This language is the parties' clear recognition of *Bowen v. Massachusetts*, 487 U.S. 879 (1988), which held that a monetary payment can constitute specific performance when a contractual

clause requires such payment. The fact that the waiver includes specific performance of payment provisions does not render it superfluous, useless or inexplicable simply because those particular obligations run only from Pauma to the State. It would be helpful in the event of that kind of breach by Pauma.

The monetary damages awarded here do not qualify as injunctive, specific performance or declaratory relief. Because the law demands that waivers of sovereign immunity ordinarily derive only from "the most express language" or "such overwhelming implications from the text as [will] leave no room for any other reasonable construction," there can be no waiver found here. *Edelman v. Jordan,* 415 U.S. 651, 673 (1974) (citation and internal quotation marks omitted) (alteration in original). The express language of the sovereign immunity does not include suits for restitution, and in fact, explicitly excludes suits for monetary damages outside the context of specific performance. I find no other implications from the text, and certainly not overwhelming implications, of sovereign immunity waiver.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Pauma Band of Luiseno Mission Indians of the Pauma and Yuima Reservation, a/k/a Pauma Luiseno Band of Misson [sic] Indians, a/k/a Pauma Band of Mission Indians, Plaintiff, vs. State of California et al., Defendants.	CASE NO. 3:09-CV-1955-CAB-MDD ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON CLAIMS FIVE AND SIX IN THE FIRST AMENDED COMPLAINT [Doc. No. 249] (Filed Jun. 6, 2014)

This matter is before the Court on Plaintiff's Motion for Summary Judgment on Claims Five and Six in the First Amended Complaint. [Doc. No. 249] For the reasons set forth below, the Motion is DENIED.

I. Background

In their First Amended Complaint (the "FAC"), which is the operative complaint in this case), Plaintiff Pauma Band of Mission Indians ("Pauma") asserted seventeen claims for relief, all of which generally arise out of allegations that Defendants misrepresented the number of gaming device licenses available pursuant to a 1999 Tribal-State Gaming Compact (the "1999 Compact"). Pauma alleged that based on this misrepresentation, it entered into an amended

compact in 2004 (the "2004 Amendment") "solely to obtain the machine rights that should have been available under the 1999 Compact." [Doc. No. 130 at 2:4-5]. The fifth and sixth claims that are the subject of the instant motion relate to the payment terms of the 2004 Amendment, which Pauma argues are illegal. Specifically, the fifth claim is titled "2004 Compact Fees Used for the Non-Gaming Purposes are in Bad Faith/Violation of IGRA," and the sixth claim is titled "2004 Compact Fees Constitute an Illegal Tax in Bad Faith/Violation of IGRA." Both of these claims are premised on Pauma's allegation that the "2004 Amendment fee provisions constitute a State tax on Indian gaming that is prohibited by IGRA." [Doc. No. 130 at 44:11-12, 46:7-8].

On the whole, the FAC prays for various alternative forms of relief all of which equate to reformation or rescission of the 2004 Amendment with the end result being an order that the terms of the 1999 Compact govern and restitution of all additional amounts Pauma paid as a result of the 2004 Amendment. The only relief that the FAC specifically prays for with respect to claims five and six is "That the Court reform the 2004 Amendment to limit the application of the unconscionable heightened financial terms for machines numbered up to 2,000." [Doc. No. 130 at 78:1-3]. On August 31, 2012, Pauma moved for summary judgment on eleven of the seventeen claims, including claims five and six. In the introduction to its Motion, Pauma stated that:

> "Obtaining 'complete justice' from the wrongful acts of the State can only occur in this case if the Court provides [Pauma] with restitution of its heightened revenue sharing payments under the 2004 Amendment . . . , and either:
>
> - An equitable estoppel holding the State to its original promise to provide Pauma with 2,000 machines according to the financial terms of the 1999 Compact . . . ; or, if this remedy is unavailable,
> - Reformation or reshaping of the 2004 Amendment to bring the financial terms for the first 2,000 machines into alignment with those under the 1999 Compact; or, if these remedies are unavailable;
> - Rescission of the 2004 Amendment in either pertinent part or in whole.

[Doc. No. 197 at 1:10-22].

On March 18, 2013, the Court granted Pauma summary judgment on its tenth cause of action for misrepresentation, ordering that Pauma is entitled to complete rescission of the 2004 Amendment. [Doc. No. 227] In the same order, the Court instructed the parties to submit a proposal related to Pauma's request for restitution of the additional payments under the 2004 Amendment. Moreover, because the Court would be awarding Pauma the exact form of relief it sought in its Motion solely as a result of this summary judgment on claim ten, it was unnecessary for the Court to address the arguments for summary judgment on

most of Pauma's other claims, including claims five and six. [Doc. No. 227 at 30:13-16]

After considering multiple submissions from the parties and holding a hearing concerning the amount of the judgment, the Court agreed with Pauma's calculations and ordered specific performance of the 1999 Compact's payment terms. The Court then entered judgment in favor of Pauma for $36,235,147.01, which amount equaled the difference between the amount Pauma paid pursuant to the 2004 Amendment and the amount Pauma actually owed under the 1999 Compact. [Doc. Nos. 245, 246]. Having awarded Pauma the exact relief it sought to, in Pauma's words, "obtain complete justice" for the wrongful acts alleged in the FAC, the Court believed this case was over (at least at the trial level).

Apparently unhappy with judgment that gave it everything it asked for in the FAC and on summary judgment, Pauma asked the Court to vacate the judgment so it could file the instant motion. Although the Court was skeptical that Pauma could possibly be entitled to any additional relief, the Court vacated the judgment and gave Pauma the opportunity to file another motion.

In its motion, Pauma again seeks summary judgment on its fifth and sixth claims. This time around, Pauma asks the Court to "trigger the remedial process set forth in the Indian Gaming Regulatory Act ("IGRA") at 25 U.S.C. § 2710(d)(7) so the Tribe can obtain a successor to [the 1999 Compact]. . . . " [Doc.

No. 249-1 at 1:10-13]. At no point prior to filing the instant motion did Pauma request this form of relief in this lawsuit.

II. Discussion

A. Claims Five and Six Are Moot

The Court need not reach the merits of claims five and six because even if Pauma succeeds, the Court has already made Pauma whole for any wrongdoing by Defendants, rendering the claims moot. "In the Ninth Circuit, a matter becomes moot when the opposing party has agreed to everything the other party has demanded." *See Luman v. Theismann*, 2:13-CV-00656-KJM-AC, 2014 WL 443960, at *5 (E.D. Cal. Feb. 4, 2014). Although Defendants did not voluntarily agree to everything Pauma demanded in this litigation, the Court's prior summary judgment order awarding Pauma the full relief it sought has the same effect. Specifically, throughout this litigation, Pauma's position has been that the 1999 Compact is the only valid agreement between the parties and that the 1999 terms should govern the parties' dealings instead of the terms in the 2004 Amendment. Indeed, although the FAC asserts seventeen claims for relief, each claim is effectively a different angle at obtaining a judgment that the terms of the 1999 Compact governed the parties dealings from 2004 forward with respect to machine licenses. Pauma left no doubt about its goal when it laid out the specific relief required for Pauma to obtain "complete justice" in

Pauma's prior motion for summary judgment (which also sought summary judgment on claims five and six). More importantly, Pauma convinced the Court it is entitled to the exact relief it was requesting.[1]

Notwithstanding the foregoing, Pauma states in its motion that in light of the Court's entry of summary judgment and the rescission of the 2004 Amendment:

> [T]he current landscape bears a closer resemblance to that in 2003 than 2010. But with that being said, turning back the clock and putting the parties in their proper positions requires the Court to do one more thing. While the first part of the case focused on placing Pauma "back in the position [it] ***would have been [in]*** under the 1999 agreement" [Doc. No. 182, 35:25], this final leg deals with putting Pauma in the position that it ***should have been in*** had the State negotiated the 2004 Amendment in good faith.

[Doc. No. 249-1 at 1:5-11] Considering everything that has occurred in this matter to date, the Court finds this argument to defy logic and contradict the gravamen of Pauma's case to this point. The Court's summary judgment order puts Pauma in the position

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[1] Thus, even if the Court had addressed the merits of claims five and six and ruled in Pauma's favor on them in addition to claim ten for misrepresentation, the Court's prior summary judgment order and final judgment would have been identical.

it would have been in under the 1999 Agreement, meaning there would not have been any negotiation of a 2004 Amendment. This is likely why Pauma has consistently argued that rescission of the 2004 Amendment and reinstatement of the 1999 Compact terms, along with repayment by Defendants of excess payments made pursuant to the 2004 Amendment, would make Pauma whole. The Court awarded this exact relief, meaning Pauma is whole, rendering claims five and six moot. *See, e.g.*, *id.* (dismissing complaint for mootness because plaintiffs had been made whole); *cf. Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1097-98 (9th Cir. 2001) (holding that damages claim extracted from general prayer for relief and first made after two years of litigation during which the plaintiff repeatedly stated that it was only seeking declaratory relief did not save case from dismissal for mootness). Further, to allow Pauma to assert this entirely new claim for relief now "would render the pleading requirements of Federal Rule of Civil Procedure 8(a)(3) illusory and certainly prejudice" Defendants. *Seven Words LLC*, 260 F.3d at 1099. On this ground alone, summary judgment can be denied.

B. Judicial Estoppel

In addition, Pauma is judicially estopped from arguing for the relief it seeks here. "Judicial estoppel . . . precludes a party from gaining advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Rissetto*

v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 600 (9th Cir. 1996). There are several factors that courts consider to apply this doctrine, including: (1) whether the later position is "clearly inconsistent" with the earlier position; (2) whether a court accepted the earlier position; and (3) whether the party asserting the inconsistent position would derive an unfair advantage if not estopped. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001).

Here, Pauma's position in the instant motion is inconsistent with its prior positions in several aspects. First, Pauma already moved for summary judgment on claims five and six once and stated the exact relief required to provide Pauma with "complete justice." Although the Court did not get to the merits of summary judgment on claims five and six, the Court provided the exact relief Pauma requested with respect to those claims. Nowhere in its motion did Pauma mention any compelled renegotiation of the 2004 Amendment. Nor could Pauma make such argument because the relief Pauma asked for – restitution of all amounts paid under the 2004 Amendment – is based on the terms of the 1999 Compact applying from 2004 forward. Pauma's prior argument that the 1999 Compact terms should apply from 2004 onward is incompatible with its current request to have the 2004 Compact terms renegotiated to obtain some other payment terms.

Second, perhaps even more incompatible with its current motion is Pauma's position throughout this litigation that Pauma would not have sought the

2004 Amendment at all if not for Defendants' misrepresentation that Pauma could not obtain 2,000 licenses under the 1999 Compact.[2] The Court relied on this evidence and argument when it granted summary judgment and rescission of the 2004 Amendment.[3] As things stand, the 2004 Amendment is rescinded, and Pauma has obtained specific performance of the 1999 Compact from the Court. Thus,

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[2] A quick perusal of the docket reveals a plethora of unequivocal statements from Pauma that there would have been no negotiation of a 2004 Amendment if not for Defendants' misrepresentation as to the number of licenses available under the 1999 Compact. *See, e.g.*, FAC [Doc. No. 130] at 2:4-5 ("Pauma executed the 2004 Amendment with the State solely to obtain the machine rights that should have been available under the 1999 Compact."); FAC at 42:11-12, 43:4-5 ("Pauma would not have entered into the [2004 Amendment] had the truth as to the availability of additional licenses under the 1999 Compact been known."); FAC at 57:3-5 ("Thus, the CGCC's misrepresentations about the license pool were not only a substantial factor in the Tribe's manifestation of assent, but the 'but for' cause of nine months worth of renegotiation and the decision to execute a decidedly more expensive compact."); FAC at 22:19-21 ("Thus, both parties understood that Pauma was at the bargaining table solely for the purpose of securing the necessary authorization to operate 2,000 machines."); Pauma's Motion for Summary Judgment [Doc. No. 197] at 18:26-27 ("Pauma would not have executed the 2004 Amendment but for the need for 2,000 machines."); Pauma's Reply in support of Summary Judgment [Doc. No. 219] at 12:7-9 ("[I]n the aftermath of the failed December 2003 license draw, the Tribe only entered into the 2004 Amendment to attain the 'magic number' of 2000 machines.").

[3] *See* Doc. No. 227 at 27:17-18 ("There is ample evidence that the State's misrepresentations substantially contributed to Pauma's decision to enter into the 2004 Compact.")

there is nothing to renegotiate because Pauma is in the position it would have been in absent the original misrepresentation. This is what Pauma wanted from the beginning of this lawsuit. It is clearly inconsistent for Pauma to claim for the first time now that it is entitled to renegotiation of the 2004 Amendment when Pauma never would have initiated negotiations for an amendment in the first place had the circumstances been as they are now in light of the Court's summary judgment order.

Third, Pauma's current position as to the purpose of claims five and six is inconsistent with the allegations and prayer for relief in the FAC, as well as its arguments opposing motions to dismiss and seeking injunctive relief. Although these claims use the phrase "bad faith" in their titles, the allegations underlying the claims make clear that Pauma is only alleging illegal taxation provisions in the 2004 Amendment and not bad faith negotiation of the amendment itself. Pauma even referred to these claims as "illegal tax" claims when opposing a motion to dismiss, arguing "Pauma's well-pled illegal taxation claim is before a Court with both the necessary jurisdiction and ample remedial authority." [Doc. No. 114 at 24:27-28]. Moreover, Pauma never alleged in the FAC that Defendants *negotiated* the 2004 Amendment in bad faith, and Pauma did not pray for relief in the form of court-ordered triggering of the provisions of the IGRA. To the contrary, Pauma stated that with these claims it "is not asking for a subjective analysis of the State's compliance with its duty of good faith

during the compacting process." [Doc. No. 37:5-6]. Accordingly, it is clear that Pauma's position simply was that the alleged illegal taxation provisions in the 2004 Amendment provided "an additional basis for rescission." [Doc. No. 20 at 16:17][4] Because this position is clearly inconsistent with what Pauma argues in its current motion, and because the 2004 Amendment is already rescinded, the first factor of judicial estoppel is satisfied.

The other factors laid out by the Supreme Court for judicial estoppel are also met here. The Court relied on Pauma's representations both in denying motions to dismiss these claims and in connection with granting Pauma summary judgment on claim ten. Further, to allow Pauma to assert this inconsistent position here would give it an unfair advantage over Defendants, and would harm the integrity of the judicial process. *New Hampshire*, 532 U.S. at 749. Accordingly, the Court finds that Pauma is judicially estopped from seeking the relief it seeks here.

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[4] *See also* Doc. No. 20 at 23-25 ("For these reasons, the Court should find that Pauma has a high probability of success on its unlawful taxation claim, which would allow for rescission of the 2004 Compact.").

C. The Plain Language of the IGRA Does Not Support the Relief Pauma Seeks Here

Finally, even if Pauma's new arguments in the instant motion were not moot and barred by judicial estoppel, the IGRA does not entitle Pauma to the relief it seeks in this motion. Pauma asks the Court to trigger the procedures under 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii), which come into play upon a finding by the court that the State did not negotiate in good faith. However, a plain reading of the statute indicates that these procedures do not apply in circumstances where the State and a Tribe actually reach a compact. Indeed, a prerequisite for shifting the burden to the State to prove that it negotiated in good faith is that "a Tribal-State compact has not been entered into under paragraph (3)." 25 U.S.C. § 2710(d)(7)(B)(ii)(I). Here, there is no dispute that Pauma and the State reached agreement on the 2004 Amendment, and that the 2004 Amendment was approved by the Secretary of the Interior, even though that amendment is now rescinded. Thus, the burden cannot shift to the State to prove it negotiated the 2004 Amendment in good faith, and the Court need not make a determination on that issue. Therefore, in addition to all of the reasons described above, the procedures outlined in Section 2710(d)(7)(B)(iii)-(vii) do not apply.

Pauma attempts to re-characterize this as an issue about jurisdiction, which it claims was already decided at the outset of the case on motions to dismiss when the Court stated that "it defies logic that the IGRA would provide jurisdiction to entertain a

suit to force the State to negotiate a compact, yet provide no avenue of relief where the compact allegedly contained unlawful terms or there were problems with formation, such as those pled here." [Doc. No. 132 at 22:22-23:1][5] However, this is not an issue of jurisdiction. Rather, this is an issue of whether the IGRA entitles Pauma to the relief it seeks here when the parties actually reached agreement on a compact. As stated above, a plain reading of the Section 2710(d)(7) indicates that it does not entitle Pauma to the relief it seeks here.

Although the IGRA may allow a court to reform or rescind an unlawful agreement (which is what Pauma wanted until now), it does not allow the Court to turn back the clock and compel re-negotiation of an agreement actually reached ten years ago, let alone one that has been rescinded and never would have been negotiated in the first place in light of the relief the Court has already granted in this case.[6]

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[5] If anything, this statement from the Court further underscores the inconsistency of Pauma's current argument by showing that the Court, based on Pauma's prior arguments, understood claims five and six to be about reforming or rescinding illegal taxation provisions in the 2004 Amendment itself, and not about any bad faith on the part of the State during the negotiation of that Amendment.

[6] Further, even if claims five and six were the only claims in the FAC, it is unlikely that the remedy Pauma seeks here would be appropriate upon a finding that the 2004 Amendment contained illegal taxation clauses. Rather, the likely remedy would be reformation or rescission, and a refund by the State of all such illegal taxes. In other words, essentially the exact relief the Court has already ordered in this case.

Accordingly, this is yet another reason why Pauma is not entitled to summary judgment.

III. Conclusion

For the foregoing reasons, the Court orders as follows:

1. Pauma's Motion for Summary Judgment on Claims Five and Six in the First Amended Complaint [Doc. No. 249] is **DENIED**;

2. Pauma's *Ex Parte* Motion for Leave to File Separate Joint Statement of Undisputed Facts [Doc. No. 262] and Defendants' Motion Raising Evidentiary Objections to the Majel and Williams Declarations [Doc. No. 266] are **DENIED AS MOOT**;

3. The Clerk of Court is instructed to please enter **JUDGMENT** as instructed in the Court's Order dated December 2, 2013 [Doc. No. 245]; and

4. This **CASE IS CLOSED**.

It is **SO ORDERED**.

DATED: June 6, 2014

/s/ Cathy Ann Bencivengo
CATHY ANN BENCIVENGO
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
ANTHONY J. BATTAGLIA, JUDGE PRESIDING

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, A/K/A PAUMA LUISENO BAND OF MISSION INDIANS, A/K/A PAUMA BAND OF MISSION INDIANS, A FEDERALLY RECOGNIZED INDIAN TRIBE, PLAINTIFF, -V- STATE OF CALIFORNIA; CALIFORNIA GAMBLING CONTROL COMMISSION, AN AGENCY OF THE STATE OF CALIFORNIA; AND EDMUND G. BROWN, JR., AS GOVERNOR OF THE STATE OF CALIFORNIA, DEFENDANTS.	CASE NO. 09CV1955-AJB SAN DIEGO, CALIFORNIA AUGUST 25, 2011 1:40 P.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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* * *

[17] **[THE COURT]** THAT TAKES US TO THE SEVENTH CLAIM FOR RELIEF, ALLEGING 2004 COMPACT FEES USED FOR NON-GAMING PURPOSES BEING IN BAD FAITH VIOLATION OF THE IGRA AND PAUMA'S EIGHTH CLAIM FOR RELIEF ALLEGING THE 2004 COMPACT FEES CONSTITUTE AN ILLEGAL TAX IN BAD FAITH VIOLATION OF THE IGRA.

NOW, IN THE SEVENTH CLAIM FOR RELIEF, PAUMA CONTENDS THAT TWO PROVISIONS OF THE 2004 COMPACT, SECTIONS 4.3.1 AND 4.3.3, REQUIRE PAUMA TO PAY FEES TO THE STATE THAT ARE NOT EARMARKED FOR ANY GAMING-RELATED PURPOSE AND THAT CAN BE DESIGNATED FOR ANY STATE PURPOSE, IN VIOLATION OF THE IGRA.

IN THE EIGHTH CLAIM, PAUMA ALLEGES THAT PAUMA DID NOT RECEIVE MEANINGFUL CONCESSIONS FROM THE STATE IN EXCHANGE FOR [18] THE ONEROUS 2004 COMPACT FEES

WHICH CONSTITUTES A STATE TAX ON INDIAN GAMING THAT IS PROHIBITED BY THE IGRA. AS A RESULT, PAUMA ALLEGES THAT THE 2004 COMPACT IS THEREFORE ILLEGAL AND VOID AND NEGOTIATED IN BAD FAITH.

THE IGRA DOES PROVIDE THAT NOTHING UNDER ITS PROVISIONS SHALL BE INTERPRETED AS CONFERRING UPON A STATE AUTHORITY TO IMPOSE ANY TAX, FEE, CHARGE, OR OTHER ASSESSMENT UPON AN INDIAN TRIBE. THIS IS 25 U.S.C. SECTION 2710(D)(4).

HOWEVER, STATES MAY USE THE COMPACTING PROCESS TO NEGOTIATE FOR PAYMENTS THAT ARE NECESSARY TO DEFRAY THE COST OF REGULATING SUCH ACTIVITY. THAT IS 25 U.S.C. 2710(D)(3)(C)III.

IN THESE REGARDS, SEVERAL SPECIFIC ISSUES ARE RAISED. THE FIRST IS SUBJECT MATTER JURISDICTION OVER THESE CLAIMS IN THE SEVENTH AND EIGHTH CAUSES OF ACTION. THE DEFENDANTS ARE ARGUING IN THE MOTION THAT A BAD FAITH CLAIM PREDICATED ON IGRA CANNOT BE ALLEGED AFTER A CLASS III GAMING COMPACT HAS BEEN NEGOTIATED.

SPECIFICALLY, THE DEFENSE CONTENDS THE IGRA CONFERS FEDERAL JURISDICTION OVER ONLY THE THREE CAUSES OF ACTION SPECIFIED IN SECTION 2710(D)(7), CAPITAL A, SMALL I THROUGH SMALL TRIPLE I.

THESE BEING FIRST AN ACTION ARISING FROM THE FAILURE OF THE STATE TO ENTER INTO NEGOTIATIONS OR CONDUCT NEGOTIATIONS IN GOOD FAITH.

SECOND, AN ACTION TO ENJOIN CLASS III GAMING ACTIVITY [19] ON INDIAN LANDS THAT IS CONDUCTED IN VIOLATION OF A COMPACT.

AND THIRD, AN ACTION TO ENFORCE MEDIATION PROCEDURES IN THE EVENT A COMPACT CANNOT BE REACHED.

THE QUESTION THAT COMES TO MIND – AND I WILL ADDRESS THIS TO THE DEFENSE – IS IF THIS COURT DOESN'T HAVE JURISDICTION TO ADJUST THE CLAIMS BROUGHT IN THIS CASE, WHO DOES?

MS. LAIRD: YOUR HONOR, THE TRIBE HAD CERTAIN REMEDIES IT COULD HAVE INCLUDED IN ITS 2004 COMPACT TO DEAL WITH SUCH SITUATIONS, BUT IT DID NOT. IT'S OTHER REMEDY WOULD BE TO RENEGOTIATE A COMPACT WITH THE STATE. BUT UNDER IGRA, BECAUSE IT SPECIFICALLY LIMITS THIS COURT'S JURISDICTION, I DON'T BELIEVE THE FEDERAL COURTS HAVE JURISDICTION TO DETERMINE WHETHER OR NOT A TRIBAL STATE GAMING COMPACT IS LEGAL AFTER IT'S ALREADY BEEN SIGNED BY THE PARTIES AND APPROVED BY THE NIGC.

THE COURT: OKAY. FROM THE PLAINTIFF'S STANDPOINT, YOU FOLKS WANT TO ADDRESS THAT?

MS. WILLIAMS: YES, YOUR HONOR. THAT INTERPRETATION MAKES NO SENSE WHATSOEVER. IGRA DOES NOT LIMIT JURISDICTION. IT CONFERS JURISDICTION. IT CONFERS STANDING TO TRIBES WHO ARE UNABLE TO NEGOTIATE A COMPACT AND WOULD OTHERWISE HAVE NO RELIEF UNDER IGRA. SO, OBVIOUSLY, IF YOU HAVE AN EXECUTED COMPACT, FEDERAL COURTS HAVE THE RIGHT TO RESOLVE DISPUTES WITH THOSE CONTRACTS THAT ARISE UNDER A FEDERAL STATUTE.

[20] AND THE NINTH CIRCUIT, IN *CABAZON V. WILSON*, DEFINITIVELY DISPOSED OF THE IDENTICAL ARGUMENT THAT THE STATE MADE IN THAT CASE. THERE, THE *CABAZON* COURT SAID THAT IGRA CONFERS JURISDICTION TO FEDERAL COURTS TO ENFORCE COMPACTS AND THE AGREEMENTS CONTAINED THEREIN. AND IN ORDER TO DO THAT, FEDERAL COURTS NEED TO DETERMINE THE RIGHTS AND DUTIES OF THE PARTIES TO THE COMPACT, AND WHETHER THEY COMPLY WITH THE UNDERLYING STATUTES. SO PAUMA'S SEVENTH AND EIGHTH CLAIMS SIMPLY ASK THE COURT TO DO THAT HERE.

JUST LOOKING AT IT IN ANOTHER WAY, THERE IS ALSO THE SEVENTH CIRCUIT'S INTERPRETATION IN *WISCONSIN V. HO-CHUNK*

NATION. AND THERE THE COURT SAID THAT THE FEDERAL COURTS HAVE JURISDICTION TO HEAR CLAIMS RELATED TO THE SEVEN PERMISSIBLE SUBJECTS OF NEGOTIATIONS THAT ARE SET FORTH IN IGRA'S SECTION 2710(D)(3)(C).

AND THREE OF THOSE ARE AT ISSUE HERE. THE FIRST WOULD BE THE ASSESSMENT OF ACTIVITIES IN SUCH AMOUNTS AS ARE NECESSARY TO DEFRAY THE COST OF REGULATING GAMING. SO THE COURT WOULD NEED TO ASSESS WHETHER PAUMA'S FEES ARE, IN FACT, USED FOR THIS PURPOSE BY THE STATE, WHICH IS THE SUBJECT OF THE *RINCON* SUIT.

SECOND, REMEDIES FOR BREACH OF CONTRACTS. THE COURT WOULD NEED TO ADDRESS THE STATE'S BREACH OF THE 1999 COMPACT, WHICH IS ALLEGED AS A PRECURSOR TO THE CONDUCT RESULTING IN THE MISTAKE IN THE AMENDMENT AND THE REMEDIES FOR THAT CONDUCT.

[21] AND THREE, ANY OTHER SUBJECTS DIRECTLY RELATED TO THE OPERATION OF GAMING. THE COURT WOULD NEED TO LOOK AT THE TRIBE'S ABILITY TO DERIVE ANY BENEFIT FROM THE GAMING OPERATION IN LIGHT OF THESE UNCONSCIONABLE FEES. AND THAT IS, ACTUALLY, THE PRIMARY PURPOSE OF

IGRA, TO BENEFIT THE TRIBES'S ECONOMIC DEVELOPMENT.

THE COURT: OKAY. AND WOULD YOU LIKE TO RESPOND TO THAT, MS. LAIRD?

MS. LAIRD: YES, YOUR HONOR. FIRST OF ALL, THE *CABAZON* CASE WAS A BREACH OF CONTRACT CASE. THIS IS NOT A BREACH OF CONTRACT CASE. AND PAUMA HAS NOT ALLEGED BREACH OF CONTRACT AGAINST THE STATE IN ITS COMPLAINT.

ALSO, IN THAT CASE, THE PARTIES SPECIFICALLY SET FORTH THAT THE COURT WOULD HAVE JURISDICTION OVER – OR AT LEAST SET FORTH THE PARAMETERS OF HOW ITS DISPUTE WOULD BE RESOLVED.

AND AGAIN, IN THIS CASE, THERE IS NOTHING IN THE 2004 COMPACT THAT SETS FORTH HOW SUCH A DISPUTE WOULD BE RESOLVED, OR WHETHER IT WOULD BE RESOLVED BY THE FEDERAL COURT. SO WE THINK THE COURT IS LIMITED TO THE ISSUES THAT ARE SET FORTH IN IGRA TO DETERMINE WHETHER A COMPACT HAS BEEN NEGOTIATED IN BAD FAITH OR NOT. THE FACTS – AS ALLEGED, ANYWAY – DO NOT FALL UNDER ANY OF THOSE LIMITATIONS AND, THEREFORE, THE COURT LACKS JURISDICTION TO RESOLVE AT LEAST THESE TWO CLAIMS.

THE COURT: I THINK *CABAZON* IS THE FOCAL POINT FOR [22] THIS ISSUE. I DIDN'T FIND, IN READING *CABAZON*, THAT THE JURISDICTION CLAUSE OR THE VENUE CLAUSE IN THAT CONTRACT WAS THE DETERMINATIVE FACTOR. I MEAN, CERTAINLY, IT'S FACTUALLY DISTINGUISHABLE. BUT THE CIRCUIT CONCLUDED THAT IN *CABAZON* THE DEFENSE – THE STATE – CONSTRUED BOTH FEDERAL-QUESTION JURISDICTION AND IGRA TOO NARROWLY, AND UNDERESTIMATED THE FEDERAL INTEREST AT STAKE. THAT COURT DETERMINED THAT CONGRESS, IN PASSING IGRA OR IGRA, HAD NOT CREATED A MECHANISM WHEREBY STATES CAN MAKE EMPTY PROMISES TO INDIAN TRIBES DURING GOOD FAITH NEGOTIATIONS OF TRIBAL/STATE COMPACTS, KNOWING THAT THEY MAY REPUDIATE THEM WITH IMMUNITY WHENEVER IT SERVES THEIR PURPOSE. NOW, THAT IS SPECIFIC TO THE BREACH OF CONTRACT.

BUT AS I READ THIS – AND THE PURPOSE BEHIND THE PROTECTION FOR THE INDIAN TRIBES – I BELIEVE, ON THE STRENGTH OF *CABAZON*, THAT IGRA WOULD NECESSARILY CONFER JURISDICTION ON FEDERAL COURTS TO ENFORCE TRIBAL/STATE COMPACTS AND AGREEMENTS CONTAINED THEREIN. TO SAY THE PARTIES ARE SIMPLY LEFT TO FEND FOR THEMSELVES, I THINK, DEFEATS THE PURPOSE OF THE LAW AND THE SPIRIT.

IT'S TRUE THAT THIS SPECIFIC QUESTION WAS NOT ADDRESSED IN *CABAZON* PRECISELY, BUT I THINK THE RATIONALE OF THE NINTH CIRCUIT APPLIES EQUALLY IN THIS CIRCUMSTANCE. IT DEFIES LODGE [sic] THAT IGRA WOULD PROVIDE JURISDICTION TO ENTERTAIN A SUIT TO FORCE THE STATE TO NEGOTIATE A COMPACT, YET PROVIDE NO AVENUE OF RELIEF WHERE THE COMPACT ALLEGEDLY CONTAINED [23] UNLAWFUL TERMS OR THERE WERE PROBLEMS WITH FORMATION, SUCH AS THOSE PLED HERE.

AND THE ISSUES OF THE ILLEGALITY OR LAWFULNESS OF THE TERMS WITH REGARD TO IMPERMISSIBLE USE OF FEES AND ILLEGAL TAXATION, CLEARLY AND NECESSARILY, IN MY VIEW, ARISE UNDER IGRA. AND THE COURT FINDS IT HAS JURISDICTION PURSUANT TO 28 U.S.C. SECTIONS 1331 AND 1362.

SO HAVING FOUND JURISDICTION, LET'S MOVE FURTHER FORWARD TO THE PLEADING ISSUE ITSELF. AND I WILL START WITH *RINCON II*, WHERE THE NINTH CIRCUIT CONSIDERED WHETHER THE STATE NEGOTIATED IN BAD FAITH BY CONDITIONING ITS AGREEMENT TO EXPAND RINCON'S CLASS III GAMING RIGHTS ON RINCON'S AGREEMENT TO PAY A PERCENTAGE OF ITS REVENUES TO THE STATE GENERAL FUND.

AND ACCORDING TO THE CALIFORNIA GOVERNMENT CODE SECTION 16300, THE GENERAL FUND CONSISTS OF MONEY RECEIVED INTO THE TREASURY AND NOT REQUIRED TO BE CREDITED TO ANY OTHER FUND. AS THE NINTH CIRCUIT PUT IT, NO AMOUNT OF SEMANTIC SOPHISTRY CAN UNDERMINE THE OBVIOUS: A NON-NEGOTIABLE, MANDATORY PAYMENT OF 10 PERCENT OF THE NET PROFITS INTO THE STATE TREASURY FOR UNRESTRICTED USE YIELDS PUBLIC REVENUE AND IS TAXED.

NOW, PAUMA'S SEVENTH AND EIGHTH CLAIMS FOR RELIEF CONTAIN ALLEGATIONS QUITE SIMILAR TO THOSE CONSIDERED IMPERMISSIBLE IN *RINCON*. THERE ARE CERTAINLY DISTINCTIONS INASMUCH AS *RINCON II* INVOLVED ONLY NEGOTIATIONS AND THIS CASE INVOLVES AN EXECUTED COMPACT. BUT STILL, *RINCON* REMAINS [24] PERVASIVE, AT THE VERY LEAST. ACCORDINGLY, HAVING FOUND JURISDICTION AND WITH RESPECT TO THE AUTHORITY CITED, I AM GOING TO DENY THE MOTION TO DISMISS TO THE SEVENTH AND EIGHTH CLAIMS FOR RELIEF.

* * *

25 U.S.C. § 2710. Tribal gaming ordinances

* * *

(d) Class III gaming activities; authorization; revocation; Tribal-State compact.

* * *

(3) (A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to –

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary

for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) 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. No State may refuse to enter into the negotiations described in paragraph (3) (A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 5 of the Act of January 2, 1951 (64 Stat. 1135) [15 USCS § 1175] shall not apply to any gaming conducted under a Tribal-State compact that –

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7) (A) The United States district courts shall have jurisdiction over –

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)

(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that –

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe [tribe] to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court –

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) 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.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the

date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures –

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this Act, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

* * *

TRIBAL-STATE GAMING COMPACT
Between the PAUMA BAND OF MISSION INDIANS, a federally recognized Indian Tribe,
and the
STATE OF CALIFORNIA

* * *

Sec. 4.3. Sec. 4.3. Authorized number of Gaming Devices

Sec. 4.3.1 The Tribe may operate no more Gaming Devices than the larger of the following:

(a) A number of terminals equal to the number of Gaming Devices operated by the Tribe on September 1, 1999; or

(b) Three hundred fifty (350) Gaming Devices.

Sec. 4.3.2. Revenue Sharing with Non-Gaming Tribes.

(a) For the purposes of this Section 4.3.2 and Section 5.0, the following definitions apply:

(i) A "Compact Tribe" is a tribe having a compact with the State that authorizes the Gaming Activities authorized by this Compact. Federally-recognized tribes that are operating fewer than 350 Gaming Devices are "Non-Compact Tribes." Non-Compact Tribes shall be deemed third party beneficiaries of this and other compacts identical in all material respects. A Compact Tribe that becomes a Non-Compact Tribe may not thereafter return to the status of a Compact Tribe for a period of two years becoming a Non-Compact Tribe.

(ii) The Revenue Sharing Trust Fund is a fund created by the Legislature and administered by the California Gambling Control Commission, as Trustee, for the receipt, deposit, and distribution of monies paid pursuant to this Section 4.3.2.

(iii) The Special Distribution Fund is a fund created by the Legislature for the receipt, deposit, and distribution of monies paid pursuant to Section 5.0. Sec. 4.3.2.1. Revenue Sharing Trust Fund.

(a) The Tribe agrees with all other Compact Tribes that are parties to compacts having this Section 4.3.2, that each Non-Compact Tribe in the State shall receive the sum of $1.1 million per year. In the event there are insufficient monies in the Revenue Sharing Trust Fund to pay $1.1 million per year to each Non-Compact Tribe, any available monies in that Fund shall be distributed to Non-Compact Tribes in equal shares. Monies in excess of the amount necessary to $1.1 million to each Non-Compact Tribe shall remain in the Revenue Sharing Trust Fund available for disbursement in future years.

(b) Payments made to Non-Compact Tribes shall be made quarterly and in equal shares out of the Revenue Sharing Trust Fund. The Commission shall serve as the trustee of the fund. The Commission shall have no discretion with respect to the use or disbursement of the trust funds. Its sole authority shall be to serve as a depository of the trust funds and to disburse them on a quarterly basis to Non-Compact Tribes. In no event shall the State's General

Fund be obligated to make up any shortfall or pay any unpaid claims.

Sec. 4.3.2.2. Allocation of Licenses.

(a) The Tribe, along with all other Compact Tribes, may acquire licenses to use Gaming Devices in excess of the number they are authorized to use under Sec. 4.3.1, but in no event may the Tribe operate more than 2,000 Gaming Devices, on the following terms, conditions, and priorities:

(1). The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be a sum equal to 350 multiplied by the number of Non-Compact tribes as of September 1, 1999, plus the difference between 350 and the lesser number authorized under Section 4.3.1.

(2) The Tribe may acquire and maintain a license to operate a Gaming Device by paying into the Revenue Sharing Trust Fund, on a quarterly basis, in the following amounts:

Number of Licensed Licensed Devices	**Fee Per Device Per Annum**
1-350	$0
351-750	$900
751-1250	$1950
1251-2000	$4350

(3) Licenses to use Gaming Devices shall be awarded as follows:

(i) First, Compact Tribes with no Existing Devices (i.e., the number of Gaming Devices operated by a Compact Tribe as of September 1, 1999) may draw up to 150 licenses for a total of 500 Gaming Devices;

(ii) Next, Compact Tribes authorized under Section 4.3.1 to operate up to and including 500 Gaming Devices as of September 1, 1999 (including tribes, if any, that have acquired licenses through subparagraph (i)), may draw up to an additional 500 licenses, to a total of 1000 Gaming Devices;

(iii) Next, Compact Tribes operating between 501 and 1000 Gaming Devices as of September 1, 1999 (including tribes, if any, that have acquired licenses through subparagraph (ii)), shall be entitled to draw up to an additional 750 Gaming Devices;

(iv) Next, Compact Tribes authorized to operate up to and including 1500 gaming devices (including tribes, if any, that have acquired licenses through subparagraph (iii)), shall be entitled to draw up to an additional 500 licenses, for a total authorization to operate up to 2000 gaming devices.

(v) Next, Compact Tribes authorized to operate more than 1500 gaming devices (including tribes, if any, that have acquired licenses through subparagraph (iv))., shall be entitled to draw additional licenses up to a total authorization to operate up to 2000 gaming devices.

(vi) After the first round of draws, a second and subsequent round(s) shall be conducted utilizing the same order of priority as set forth above. Rounds shall continue until tribes cease making draws, at which time draws will be discontinued for one month or until the Trustee is notified that a tribe desires to acquire a license, whichever last occurs.

(e) As a condition of acquiring licenses to operate Gaming Devices, a nonrefundable one-time prepayment fee shall be required in the amount of $1,250 per Gaming Device being licensed, which fees shall be deposited in the Revenue Sharing Trust Fund. The license for any Gaming Device shall be canceled if the Gaming Device authorized by the license is not in commercial operation within twelve months of issuance of the license.

Sec. 4.3.2.3. The Tribe shall not conduct any Gaming Activity authorized by this Compact if the Tribe is more than two quarterly contributions in arrears in its license fee payments to the Revenue Sharing Trust Fund.

Sec. 4.3.3. 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 Sections 4.3.1 and Section 4.3.2, and their subsections.

SEC. 5.0 REVENUE DISTRIBUTION

Sec. 5.1. (a) The Tribe shall make contributions to the Special Distribution Fund created by the Legislature, in accordance with the following schedule, but only with respect to the number of Gaming Devices operated by the Tribe on September 1, 1999:

Number of Terminals in Quarterly Device Base	Percent of Average Gaming Device Net Win
1-200	0%
201-500	7%
501-1000	7% applied to the excess over 200 terminals, up to 500 terminals, plus 10% applied to terminals over 500 terminals, up to 1000 terminals.
1000+	7% applied to excess over 200, up to 500 terminals, plus 10% applied to terminals over 500, up to 1000 terminals, plus 13% applied to the excess above 1000 terminals.

(b) The first transfer to the Special Distribution Fund of its share of the gaming revenue shall made at the conclusion of the first calendar quarter following the second anniversary date of the effective date of this Compact.

Sec. 5.2. Use of funds. The State's share of the Gaming Device revenue shall be placed in the Special Distribution Fund, available for appropriation by the Legislature for the following purposes: (a) grants, including any administrative costs, for programs designed to address gambling addiction; (b) grants, including any administrative costs, for the support of state and local government agencies impacted by tribal government gaming; (c) compensation for regulatory costs incurred by the State Gaming Agency and the state Department of Justice in connection with the implementation and administration of the Compact; (d) payment of shortfalls that may occur in the Revenue Sharing Trust Fund; and (e) any other purposes specified by the Legislature. It is the intent of the parties that Compact Tribes will be consulted in the process of identifying purposes for grants made to local governments.

* * *

[SEAL]

OFFICE OF THE GOVERNOR

September 16, 1999

Wayne Mitchum
Colusa Indian Community
50 Wintun Road, Dept. D
Colusa, CA 95932

Re: Notice of Number of Machines/Name of County

Dear Chairperson:

As you are aware, Section C. of the Preamble of the Tribal-State Gaming Compact entered into by your Tribe and the State of California provides that you certify the number of Gaming Devices in operation by your Tribe on September 1, 1999 if you are currently operating a tribal gaming casino offering Class III gaming activities on your tribal land.

In the alternative, if your tribe does not currently operate a gaming facility offering Class III gaming activities, but intends to develop and operate a gaming facility, Section C. of the Preamble provides that you state the county in which your reservation land is located.

In order to complete and finalize the compact entered into by your Tribe and the State of California, it is necessary that you provide the State with the above-mentioned information by completing the attached form and returning it to this office in the enclosed stamped self-addressed envelope ***no later***

than close of business on October 4, 1999. Thank you for your cooperation in this matter.

Sincerely,

DEMETRIOS A. BOUTRIS
Legal Affairs Secretary and
Counsel to the Governor

/s/ Shelley Anne W.L. Chang
SHELLEY ANNE W.L. CHANG
Senior Deputy Legal Affairs Secretary

Governor Gray Davis
State Capitol
Sacramento, California 95814

Re: Notice of Number of Machines/Name of County.

Dear Governor Davis:

☒ The Colusa Indian Community is currently operating a tribal gaming casino offering Class III gaming activities on its land. On September 1, 1999 the largest number of gaming Devices operated by the Tribe was 523.

☐ The Colusa Indian Community does not currently operate a gaming facility that offers Class III gaming activities. However, on or after the effective date of the Compact, my Tribe intends to develop and operate a gaming facility offering Class III gaming activities on

its reservation land, which is located in _____ County of California.

Wayne R. Mitchum
(Signature)

Wayne R. Mitchum
(Print name)

Chairman
(Title)

Colusa Indian
Community Council
50 Wintun Road, Ste D
Colusa, CA 95932
(Address)

October 11, 1999
(Date)

Joint Legislative Budget Committee

CHAIR	VICE CHAIR
STEVE PEACE	DENISE MORENO DUCHENY

SENATE	ASSEMBLY
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JOHN VASCONCELLOS	GEORGE RUNNER
CATHIE WRIGHT	RODERICK WRIGHT

[LOGO]

GOVERNMENT CODE SECTIONS 9140-9143

CALIFORNIA LEGISLATURE

LEGISLATIVE ANALYST
ELIZABETH G. HILL
925 L STREET, SUITE 1000
SACRAMENTO, CALIFORNIA 95814
(916) 445-4656

November 9, 1999

Hon. Bruce Thompson
Assembly Member, 66th District
Room 2160, State Capitol
Sacramento, California 95814

Dear Assembly Member Thompson:

You requested that my office provide some information regarding the recently signed gambling compacts between the state and several Indian tribes. These compacts were ratified by the Legislature in

Chapter 874, Statutes of 1999 (AB 1385, Battin). The compacts ratified by Chapter 874 will become effective only if (1) SCA 11 (Proposition 1A) receives voter approval at the March 2000 election and (2) the compacts are approved by the federal Department of the Interior.

Specifically you asked the following:

1. ***How many slot machines does the signed compact allow (statewide)?***

   The maximum number of slot machines allowed is determined by adding: (1) the number of machines authorized for operation, *plus* (2) the number of machines which can be *licensed* (that is, machines subsequently acquired by tribes through a "pool" system).

   Authorized for Operation. Section 4.3.1 of the compact permits each tribe to operate the larger of: (1) the number of machines operated by the tribes as of September 1, 1999 or (2) three hundred fifty (350) machines. To calculate the number of machines allowed by these sections the number of machines each tribe was operating as of September 1, 1999 must be known. We have not been able to obtain verifiable information on the number of machines. According to Professor I. Nelson Rose, however, there were 21,000 machines operating in California in September 1999. Using this figure, we estimate there are roughly 53,000 slot machines authorized for operation.

   Number of Licensed Machines. Section 4.3.2.2(a)(1) sets a statewide total for

the number of machines that could be licensed and is *in addition* to the number authorized by Section 4.3.1. The formula under this section is ambiguous and subject to several interpretations. It appears, however, that his section authorizes an additional 60,000 machines.

Total Number. Thus, our best estimate is that the compact would *allow* about 113,000 machines statewide. We would caution you, however, that different interpretations of the language in the compact could result in significantly different totals.

2. ***Are the formulas for the number of slots and the revenue distributions workable, as currently drafted in the compact?***

As mentioned above, there are two formulas for determining the total number of machines. Both of these formulas require knowing the total number of machines operating in the state as of September 1, 1999. However, should that data become available, the formula in Section 4.3.1 could be easily worked out. The formula in Section 4.3.2.2(a)(1) is less straightforward because the second half of the formula is ambiguous and subject to several interpretations.

The revenue distribution formulas are found in Section 4.3.2.2.(a)(2) and Section 5.0. Although the total revenue distribution depends on the number of machines, once those numbers are known, the formulas can be used to determine the revenue.

We have not had time to discuss the merits of these formulas with other parties.

3. ***Although Section 4.1(c) seems to preclude lotteries conducted on the Internet, is there anything in the compact that may open this issue up again during the 2003 renegotiation process?***

Section 12 of the compact, and related subsections, permit the compact to be amended and renegotiated 12 months after the effective date of the compact. Presumably, the compact and state law could be amended to permit gambling over the Internet. However, it is not clear that this would be permissible under federal law. Further, it is our understanding that a bill currently before Congress would prohibit Internet gambling, including Internet gambling offered by an Indian tribe.

4. ***Can you offer a short summary of the labor agreement that was supposed to be reached by October 13, 1999?***

Our office has not received a copy of the labor agreement referenced in Section 10.7.

Sincerely,

/s/ Mac Taylor
for Elizabeth G. Hill
Legislative Analyst

[SEAL]

OFFICE OF THE GOVERNOR

December 3, 1999

Elizabeth G. Hill, Esq.
Legislative Analyst
925 L Street, Suite 1000
Sacramento, California 95814

Re: Model Tribal-State Gaming Compact

Dear Ms. Hill:

In your letter of November 9, 1999, to the Honorable Bruce Thompson, you responded to the following question raised by Assemblyman Thompson regarding the Model Tribal-State Gaming Compact negotiated by Governor Davis and California Indian Tribes: "How many slot machines does the signed compact allow (statewide)?" I am taking the liberty of responding to your letter in my capacity as Special Counsel to the Governor for Tribal Affairs. In that capacity, I represented the Governor throughout the negotiations that culminated in the Model Compact that is the subject of Assemblyman Thompson's question and your response.

I would like to answer Assemblyman Thompson's question and then explain my answer. The answer is that the maximum number of slot machines allowed by the Model Compact is 44,798. That number is the product of a simple mathematical calculation set forth in Section 4.3.1 of the Model Compact, which provides:

Sec. 4.3. Authorized Number of Gaming Devices

Sec. 4.3.1 The Tribe may operate no more Gaming Devices than the larger of the following:

(a) A number of terminals equal to the number of Gaming Devices operated by the Tribe on September 1, 1999; or

(b) Three hundred fifty (350) Gaming Devices.

Before explaining my answer, I would like to review the status of tribal gaming in California at the time the Model Compact was negotiated.

Sixty-seven (67) of the federally recognized Indian tribes located in California are not in the business of operating slot machines at this time. Of the remaining tribes that operate slot machines, 23 tribes operate more than 350 machines and 16 tribes operate fewer than 350 machines. All but two of the 39 presently gaming tribes have signed the Model Compact.

Until the Model Compact was signed, the parties did not have an exact count of the number of existing machines being operated statewide. The working estimate used during the negotiations was 20,000. The exact count based upon the declarations of the tribes

that have signed the Model Compact proved to be 18,597.*

From the outset of the negotiations, Governor Davis took the position that no tribe should be required to reduce the number of machines it was already operating. Accordingly, existing machines were "grandfathered" by Section 4.3.1(a) of the Model Compact, which authorizes every tribe to continue operating the number of machines it was operating on September 1, 1999. The total number of machines statewide that are "grandfathered" by Section 4.3.1(a) is 18,597.

In addition to authorizing the continued operating of all existing machines, the Model Compact authorizes every tribe the right to operate a minimum of 350 machines. The 350-machine minimum, which is guaranteed in Section 4.3.1(b), has the effect of adding 26,201 new machines to the 18,597 existing machines authorized by Section 4.3.1(a), bringing the total number of machines that may be operated statewide to 44,798. The number of new machines authorized by Section 4.3.1(b) is calculated as follows:

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* All but two of the gaming tribes have signed the model compact. The approximate total of machines operated by these two tribes is 800. An additional tribe recently signed a Tribal-State Gaming Compact with the State. This would increase the total number of machines that may be operated statewide to 44,798.

Total number of machines non-gaming tribes are authorized to operate by Section 4.3.1(b):

350 machines X 67 non-gaming tribes = 23,450

PLUS

Total number of new machines gaming tribes now operating fewer Than 350 machines are authorized to operate as a result of the 350 machine Guarantee in Section 4.3.1(b):

350 X 16 (number of tribes now operating fewer than 350 machines) less the number they are now operating: 2,751

Total number of new machines authorized by Section 4.3.1(b): 26,201

When the 26,201 new machines authorized by 4.3.1(b) are added to the 18,597 existing machines authorized by Section 4.3.1(a), the total number of machines authorized statewide by the Model Compact comes to 44,798. This number is an absolute cap. Nothing in the Model Compact increases this number of machines allowed to be operated statewide.

Your response to Assemblyman Thompson indicates that you believe that Section 4.3.2 could conceivably be interpreted as expressing the intent of the parties to allow more machines to be operated statewide than the 44,798 allowed by Section 4.3.1. With all due respect, nothing in Section 4.3.2 permits such an interpretation.

Sections 4.3.1 and 4.3.2 serve completely different purposes. Section 4.3.1 serves the legitimate

interest of the State in limiting the number of machines that may be operated statewide by specifying the maximum number of machines each tribe may operate. In contrast, Section 4.3.2 serves the legitimate interests of the tribes in providing flexibility in the use of 4.3.1 machines by permitting a reallocation of a limited number of 4.3.1 machines among the various tribes by creating a system of pooling and licensing. Nothing in Section 4.3.2 authorizes the operation of any more machines than are authorized by Section 4.3.1. Rather, 4.3.2 merely allows some, but not all, tribes to produce revenues from their 4.3.1 machines by licensing them to other tribes rather than operating the machines themselves. Thus the pooling and licensing system created by 4.3.2 serves the interests of the tribes in flexibility without impinging on the interest of the State in limiting the machines that may be operated statewide to the number authorized in 4.3.1.

Section 4.3.2 permits only a limited number of tribes to license their 4.3.1 machines. The only tribes permitted to license their machines are those that presently operate no machines or operate fewer than 350. The intended purpose of 4.3.2 is manifestly to give these tribes the flexibility of producing revenue for tribal purposes by licensing their machines rather than operating them in a casino of their own.

Tribes that are not permitted by 4.3.2 to license their machines to others are the tribes now operating more than 350 machines (all of which are grandfathered by 4.3.1(a)). Tribes may acquire licenses to

operate additional machines through the pooling and licensing provisions of 4.3.2. The license fees they pay go into the Revenue Sharing Trust Fund created by 4.3.2 for distribution to tribes that have chosen to raise revenues for tribal purposes by licensing rather than operating the machines that have been allotted to them by 4.3.1.

In sum, Section 4.3.2 does not add to the 44,798 machines that Section 4.3.1 allows to be operated statewide. It merely allows a fraction of the 4.3.1 machines to be reallocated among the tribe by permitting some of the tribes to license their 4.3.1 machines to other tribes. The licensing process is facilitated by a pooling arrangement that includes a method of allocating the licenses on a priority basis. Except for foreseeing that the California Gaming Commission may administer the provisions of Section 4.3.2 acting as a neutral Trustee, the State's interests in the statewide cap imposed by Section 4.3.1 are not implicated by Section 4.3.2. Because the inter-tribal licensing system created by 4.3.2 affects the interests of the tribe only, it is not surprising that the provisions of 4.3.2 were the product of extensive negotiations among the tribes themselves with the State playing only a minor facilitating role. In contrast, the State has a compelling interest in limiting the number of slot machines that may be operated statewide, an interest that is served by Section 4.3.1's precise limit on the number of machines allotted to each tribe.

A series of examples serve to illuminate the different purposes of Sections 4.3.1 and 4.3.2 and how they work together in a way that gives some of the tribes the flexibility to license rather than operate their machines without increasing the number of machines authorized statewide by 4.3.1.

Tribe A. Tribe A is a tribe that is not presently in the business of operating slot machines and prefers to remain out of the business. Tribe A elects to transfer the minimum number of 350 machines allotted to it by 4.3.1(b) to the licensing pool created by 4.3.2 and receive its share of the license fees paid into Revenue Sharing Trust Fund.

Tribe B. Tribe B is also a tribe that is not presently in the business of operating slot machines, but unlike Tribe A, Tribe B elects to open a casino and operate the 350 machines allotted to it by 4.3.1(b). Tribe B is free to expand its casino by adding to its allotted 350 machines by acquiring licenses to operate machines put into the 4.3.2 pool by Tribe A and other tribes that elect to license rather than operate their machines.

Tribe C. Tribe C presently operates 200 machines. It is authorized by 4.3.1(a) to continue operating its 200 machines and authorized by 4.3.1(b) to operate an additional 150 machines to bring its total up to the 350 machine minimum. Because Tribe C presently operates fewer than 350 machines, Tribe C,

like Tribes A and B, may elect either to transfer its machines to the pool and receive its share of the license fees or to operate the machines itself.

Tribe D. Tribe D presently operates 500 machines. It is authorized by 4.3.1(a) to continue operating that number. However, because it operates more than 350 existing machines, it is not permitted by 4.3.2 to license rather than operate its machines. Tribe D is, of course, free to expand its casino operation by licensing machines from the pool. It may not, however, under any circumstances operate more than 2,000 machines. This 2,000-cap on the number of machines that may be operated by any individual tribe, which is found in 4.3.2.2(a), is designed to prevent the licensing process from resulting in an undue concentration of machines in the casinos of a small number of tribes with prime locations. The 2,000 limit on the number of machines any single tribe may operate does not have the effect of increasing the total number of machines allowed statewide by Section 4.2.1.

I hope this analysis serves to clarify the relationship between Sections 4.3.1 and 4.3.2 and show that the answer to Assemblyman Thompson's question is that the Model Compact allows statewide no more than the 44,798 slot machines authorized by Section 4.3.1 of the Model Compact. Please feel free to let me

know if you have any questions or comments [illegible] would welcome them.

Very truly yours,
/s/ William A. Norris
William A. Norris
Special Counsel to the
Governor for Tribal Affairs

GAMING DEVICE LICENSE POOL RULES

DISTRIBUTION OF LICENSES TO OPERATE GAMING DEVICES

1. Except as set forth in the next section, a tribe may operate no more gaming devices than the larger of the following: (a) a number of terminals equal to the number of gaming devices operated by the tribe on September 1, 1999; or (b) three hundred fifty (350) gaming devices.

2. A tribe may acquire licenses from the license pool created under these rules to use gaming devices in excess of the number the tribe is authorized to use under §4.3.1 of its Tribal-State Gaming Compact ("Compact").

3. Solely for the purpose of determining eligibility to draw licenses from the license pool, a "Compact Tribe" is any federally recognized California tribe that has signed a compact with the State that authorizes the operation of gaming devices, whether or not the tribe actually operated any gaming devices on September 1, 1999 or any date thereafter. A Compact Tribe that reduces the number of gaming devices it operates to fewer than 350 may not draw licenses from the pool for a period of two years from the date the tribe first becomes eligible to receive a distribution from the Revenue Sharing Trust Fund.

4. A pool of licenses to operate gaming devices in excess of those authorized to be operated under §4.3.1 of the compacts ratified by or in accordance with Government Code § 12012.25 hereby is created and shall be administered under these rules ("License Pool").

5. The License Pool shall be administered by a certified public accountant licensed in the State of California or a person or entity of comparable qualification who, in the twelve months immediately preceding the first draw of gaming device licenses under these rules, has not, individually or through association with a firm of certified public accountants, performed accounting or audit services for the State of California or for any tribe either drawing licenses from the pool or receiving distributions from the Revenue Sharing Trust Fund ("Pool Trustee"). The Pool Trustee shall be selected by majority vote of the tribes eligible to draw licenses from the pool for a term specified by those tribes, not to exceed three years. All fees and expenses of the Pool Trustee shall be paid by all tribes holding licenses from the pool, in proportion to the number of licenses held.

6. The Pool Trustee shall issue licenses to use gaining devices pursuant to a system of draws from the License Pool pursuant to the following rules:

   a. All Compact Tribes may participate in the receipt of licenses from the License Pool. Except for the first series of draws which shall occur on May 15, 2000, at least twenty-one (21) calendar days prior to each series of draws for gaming device licenses, the Pool Trustee shall mail to each Compact Tribe a written notice of the date, time and place of said series of draws, along with a copy of these rules.

b. Each Compact Tribe intending to participate in a series of draws shall provide written confirmation to the Pool Trustee of its status as a Compact Tribe and the tribe's intent to-participate in the upcoming series of draws. Such confirmation, together with the information set forth in subsection c below, must be provided to the Pool Trustee at least seven (7) calendar days prior to the next scheduled series of draws. Delivery of the notice shall be by certified mail or any other form of delivery for which a receipt of delivery from the Pool Trustee may be obtained.

c. To acquire licenses in the next scheduled series of draws from the License Pool, a Compact Tribe shall submit a written notice to the Pool Trustee by means of delivery and receipt described in the preceding subparagraph. The notice shall provide the following information: 1) the number of gaming devices operated on the day the notice is made, which number shall be certified by the tribe's gaming commission as being true and correct; 2) the number of licenses (if any) currently held by the tribe, and the date(s) of issuance of all such licenses; 3) the number of licensed devices in operation; 4) the number of gaming devices certified to the State as being operated on September 1, 1999; and 5) the number of licenses to be acquired from the License Pool in the next series of draws.

d. The written notice shall be accompanied by a certified or cashier's check in an amount equal to the initial license fee specified in the Compact ($1,250.00) multiplied by the number of licenses being acquired, made payable to the Pool Trustee.

The Pool Trustee shall deposit this check into an escrow account pending the issuance of licenses as a deposit against the licenses to be issued. After the issuance of licenses, the Pool Trustee shall forward, the initial license fees to the State Treasury for deposit into the Revenue Sharing Trust Fund. A tribe may withdraw all or part of its request up to 72 hours prior to the time at which the draw of licenses is scheduled to commence, in which event the tribe shall be entitled to a refund of the unused portion of the deposit.

e. Licenses shall be issued in consecutive rounds of draws, which shall be conducted on the same day, or if not able to be completed on the same day, on consecutive days until completed, in accordance with the priorities set forth in subsection f below. The first round of draws shall occur on May 15, 2000. Subsequent rounds shall be held on the last business day of each following month, at times and locations to be set by the Pool Trustee, alternating between northern and southern California, unless, during such month, the Pool Trustee does not receive from any Compact Tribe a notice of intent to participate in the next round of draws that complies with paragraph 6(c) above. Said notices of intent to draw licenses from the License Pool must be received by the Pool Trustee at least seven (7) calendar days prior to the next round of draws.

f. On the date and time announced for the commencement of draws, the Pool Trustee shall issue licenses in accordance with these rules, starting with the first draw and moving in turn to the next draw. The draws shall be conducted in

the sequence and in accordance with the priority levels set forth below:

i. First, Compact Tribes with no existing devices as of September 1, 1999, may draw up to 150 licenses for a total of 500 gaming devices including the 350 gaming devices that the tribe is entitled to operate without licenses under §4.3.1 of its compact;

ii. Next, Compact Tribes which are authorized to operate up to and including 500 gaming devices, including tribes, if any, operating no devices on September 1, 1999 that have acquired at least 150 licenses through subparagraph (i), may draw up to an additional 500 licenses, to a total of 1000 gaming devices;

iii. Next, Compact Tribes authorized to operate between 501 and 1000 gaming devices, including tribes, if any, that have acquired licenses through the preceding subparagraphs, shall be entitled to draw up to an additional 750 gaming devices;

iv. Next, Compact Tribes authorized to operate up to and including 1500 gaming devices, including tribes, if any, that have acquired licenses through the preceding subparagraphs, shall be entitled to draw up to an additional 500 licenses, for a total authorization to operate up to 2000 gaming devices;

v. Next, Compact Tribes authorized to operate more than 1500 gaming devices, including tribes, if any, that have acquired licenses through the preceding subparagraphs, shall be entitled to draw additional

licenses up to a total authorization to operate up to 2000 Gaming Devices.

7. The license acquired from the License Pool for any gaining device shall be canceled if the gaming device authorized by the license is not placed in commercial operation on the lands of the requesting tribe within twelve months of issuance of the license. A new Initial License Fee shall be required to draw a canceled license from the pool.

8. License fees other than those specified in 6(d) above shall be paid into the Revenue Sharing Trust Fund quarterly, within fifteen (15) calendar days after the end of each calendar quarter, for each license drawn from the License Pool, in accordance with the fee schedule set forth in each tribe's Compact.

STATE OF CALIFORNIA

[SEAL]
OFFICE OF
THE GOVERNOR

[SEAL]
DEPARTMENT
OF JUSTICE
BILL LOCKYER
Attorney General

May 9, 2000

Michael E. Sides, CPA
Sides Accountancy Corporation
5150 Sunrise Boulevard, G-5
Fair Oaks, CA 95628

Dear Mr. Sides:

It is our understanding that the California Indian Tribes have reached an agreement on procedures for drawing machine licenses. We commend the Tribes for their efforts in this regard. In anticipation of the upcoming license drawing scheduled for May 15, 2000, we wish to advise you on behalf of the State of the number of licenses available for draw.

In order to calculate the number of licenses now available for draw, we start with the total number of slot machines authorized statewide by Section 4.3.1 of the Model Tribal-State Compact. This number is 45,206.[1] The number of machines available for draw

[1] *See* letter of December 3, 1999, attached. That letter sets forth an aggregate number of 44,798 machines that the compacts authorize to be operated statewide. Since then, an additional gaming tribe with 408 machines has signed a compact with the State, bringing the statewide total to 45,206. This

(Continued on following page)

is then arrived at by a process of subtraction as follows:

1. Subtract the number 16,156. This is the number of machines being operated by the 22 tribes that have signed compacts and were operating more than 350 machines as of September 1, 1999. These machines may not be placed in the pool for licensing. See Section 4.3.2.2(a)(1) of the Compact.

2. Subtract the number 13,650. This number is the sum of the 5,600 machines that may be operated by the 16 tribes which have signed compacts and were operating no more than 350 machines as of September 1, 1999, and the 8,050 machines that may be operated by the 23 tribes which have signed compacts but were not operating any machines as of September 1, 1999. All 39 of these tribes are eligible to participate in the licensing pool as "Non-Compact Tribes." See Sections 4.3.1(a), 4.3.2(a)(i) and 4.3.2.2(a)(1) of the Compact. However, it is reasonable to presume from the fact that these tribes have signed compacts with the State that they intend to operate all 350 machines alloted [sic] to them under Section 4.3.1(b) of the Compact. Accordingly, unless these tribes

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number does not include approximately 384 machines being operated by an existing gaming tribe that has yet to sign a compact. If this tribe signs a compact, it would increase the statewide total, but would have no bearing on the number of licenses available for placement in the pool because that tribe's machines are not eligible for licensure. *See* section 4.3.2.2(a)(1) of the Compact.

certify to the State before May 15, 2000 that they are electing to place some or all of their 350 machine allotment into the licensing pool, they will be deemed to have elected to operate their entire 350 machine allotment, meaning that none of their machines will be available for licensing for the initial draw. To the extent that any of these tribes certifies to the State that it is electing to place only a portion of its 350 machine allotment in the pool rather than operate them, the number of licenses available for draw will be increased accordingly.

By subtracting the numbers in paragraphs 1 and 2 from 45,206, we arrive at 15,400 licenses now available for the upcoming draw.

With respect to the tribes identified in paragraph 2 above, it is important to keep in mind that the parties never intended to allow double-counting of the economic value of the machines authorized by the Compact. Section 4.3.1 authorizes every tribe to operate the number of machines it was operating as of September 1, 1999, or 350, whichever number is greater. Section 4.3.2 gives tribes then operating 0 to 350 machines the option of placing some or all of the 350 machines allotted to them by Section 4.3.1 into the licensing pool and deriving revenues from those machines by participating in the Revenue Sharing Trust Fund created by Section 4.3.2.1, rather than deriving revenues by operating those machines in their own casinos. None of these tribes, however, may double-count any of its 350 4.3.1 machines by deriving revenue for any one machine from both the

Revenue Sharing Trust Fund and from operating the machine itself. Any such tribe may license a machine or may operate it, but the tribe cannot do both. That would be impermissible double counting.

Those tribes which meet the definition of Non-Compact Tribes under the Compact but have not signed compacts by May 15, 2000, will be deemed to have made an irrevocable election to participate in the Revenue Sharing Trust Fund and place their entire 350-machine allotment under Section 4.3.1 into the licensing pool. If such a Non-Compact Tribe chooses to enter into a compact after May 15, 2000, it may then operate machines only by acquiring licenses from the pool and paying license fees accordingly.

We have included with this letter a list of (i) those tribes which were operating machines as of September 1, 1999, and which have signed compacts with the State, together with the number of machines they have certified to the State as being in operation as of September 1, 1999, and (ii) those tribes which were not operating machines as of September 1, 1999 but which have signed compacts with the State.

We anticipate that your firm, as the Pool Trustee, will monitor the license pool to ensure that no more than the available number of licenses are issued. In addition, consistent with Section 4.3.2.2(a) of the Compact, we expect that in issuing licenses your firm will verify that no individual tribe will be issued licenses that will permit the tribe to operate a total of more than 2,000 machines.

Finally, we request that your firm, as the Pool Trustee, certify to the Division of Gambling Control of the California Department of Justice that the draw complies with the limitations of the compacts.

Thank you for your assistance in this important process. You should feel free to circulate this letter to the tribes as you consider appropriate.

Sincerely,

William A. Norris
Special Counsel to the Governor
Tribal Affairs

Sincerely,

Peter Siggins
Chief Deputy Attorney General

for
Bill Lockyer
Attorney General

Enclosures: As Stated.

[LOGO]

SIDES ACCOUNTANCY CORPORATION
CERTIFIED PUBLIC ACCOUNTANTS

RE: Engagement Letter Between Sides Accountancy Corporation and Pauma/Yuima Band of Mission Indians ("Tribe")

This letter, along with the attached Scope of Work and Pool Rules, shall serve to specify the terms and conditions of our engagement as trustee of the Gaming Device License process set forth in Section 4.3.2.2 of the Compact between the State of California and Tribe.

By signing this letter and returning it, along with a check in the amount of five hundred dollars ($500) payable to Sides Accountancy Corporation Trust Fund for the advance payment of fees to Sides Accountancy Corporation, Tribe agrees to be bound by this engagement letter, the attached Pool Rules and the attached Scope of Work. Tribe further agrees to pay its proportionate share of all costs and fees associated with Sides Accountancy Corporation serving as trustee (including, but not limited to Sides Accountancy Corporation acquiring a fidelity bond) in accordance with the attached Pool Rules and Scope of Work by submitting to Sides Accountancy Corporation an additional five dollars ($5.00) per license requested at the time Tribe asks the trustee to issue said license(s). Sides Accountancy Corporation agrees to deposit the Tribe's five hundred dollar ($500) payment as well as each five dollar ($5) per license

payment in an interest-bearing account from which Sides Accountancy Corporation will deduct its monthly fees. All interest earned on these payments by Tribe shall be credited to Tribe and used to offset Tribe's fees. Tribe will receive a monthly bill from Sides Accountancy Corporation setting forth in detail the costs and fees charged to Tribe and thus deducted from the interest-bearing account to pay Sides Accountancy Corporation for its services as trustee.

Fees charged by Sides Accountancy Corporation for this engagement shall be based on the time spent at the normal hourly rates for the personnel involved. These hourly rates range from $45 to $185 dollars per hour. All costs associated with Sides Accountancy Corporation acting as trustee shall be charged at the actual rate incurred by Sides Accountancy Corporation, with no mark-up whatsoever. If, at the end of Sides Accountancy Corporation's term as trustee, there is a credit balance in the interest-bearing account in which Tribe's payments for costs and fees have been deposited, Sides Accountancy Corporation shall refund this amount to Tribe.

Tribe agrees that Sides Accountancy Corporation is specifically authorized to conduct the Scope of Work attached hereto as an agent of Tribe. Tribe agrees to defend. indemnify, and hold Sides Accountancy Corporation harmless from any legal action, in any court, and/or any arbitration or mediation proceeding, arising from Sides Accountancy Corporation's performing the obligations set forth in this engagement letter and the attached Scope of Work and Pool Rules. Such defense and indemnity shall include, but not be

limited to, payment of Side Accountancy Corporation's attorneys' fees, expert witness fees, court costs, incidental costs, damages except for punitive damages, and if Sides' services are necessary to defend litigation, hourly fees of Sides Accountancy Corporation.

Either party may terminate this agreement by providing the other party written notice a minimum of sixty (60) days in advance of the effective date of termination. Termination of this agreement by Tribe shall not relieve Tribe from paying its share of Sides Accountancy Corporation's fees and expenses in accordance with the Pool Rules. The obligation of Tribe to defend and indemnify Sides Accountancy Corporation as specified in this agreement shall survive the termination of this agreement.

SIDES ACCOUNTANCY CORPORATION

By: /s/ Michael W. Sides
Michael W. Sides, CPA

READ AND ACCEPTED:

/s/ Linda Bojorquez (Name) 5/5/00 (Date)

Linda Bojorquez
(Printed Name)

AUTHORIZED REPRESENTATIVE OF:

Pauma-Yuima Band of Mission Indians
Tribe

Pauma Indian Reservation ESTABLISHED 1893
P.O. BOX 369 • PAUMA VALLEY, CA 92061 •
(760) 742-1289 • FAX 742-3422

May 5, 2000

Sides Accountancy, Inc.
5150 Sunrise Blvd., G-5
Fair Oaks, CA 95628

Dear Trustees:

The Pauma-Yuima Band of Mission Indians hereby represents and certifies that it has entered into a Class III gaming Compact with the State of California.

The number of gaming devices operated by the Tribe today, May 5, 2000, is zero (0). Attached is a certification form [sic] the Tribal Gaming Agency, warranting the number of gaming devices currently operated by the Tribe.

Currently, the Tribe does not hold any licenses to operate gaming devices, and thus there are no licensed devices in operation as of today, May 5, 2000.

The number of gaming devices certified to the State as being operated by the Tribe on September 1, 1999 is zero (0).

On May 15, 2000 the Tribe desires to draw five hundred (500) licenses for additional gaming devices under section 4.3.2.2. of the Tribe's Gaming Compact with the State of California.

The Tribe hereby delivers the total sum of $625,000 via certified check/cashier's check for the above-requested

licenses for gaming Devices, pursuant to section 4.3.2.2. © [sic] of the Tribe's Gaming Compact with the State of California.

In addition, the Tribe hereby delivers the total sum of $3,000 to pay its share of the trustee's fees and expenses.

Although the Tribe trusts that this notice and enclosures fully comply with the Pool Rules, if the trustee finds that any item is missing, notice should be sent to the Tribe at the following facsimile number: 760-746-1815.

Dated: May 5, 2000

PAUMA-YUIMA BAND OF MISSION INDIANS

By: /s/ Linda Bojorquez
Linda Bojorquez,
Vice Chairperson

CERTIFICATION BY TRIBAL GAMING AGENCY

The Pauma-Yuima Band of Mission Indians hereby certifies that on May 5, 2000, the Pauma-Yuima Band of Mission Indians operated zero (0) gaming devices.

Dated: May 5, 2000

PAUMA-YUIMA BAND OF MISSION INDIANS

By: /s/ Linda Bojorquez
Linda Bojorquez,
Vice Chairperson

SIDES ACCOUNTANCY AS TRUSTEE UNDER THE SCOPE OF WORK DOCUMENT

May 15, 2000

Benjamin Magante, Sr., Chairman
PAUMA-YUIMA BAND OF MISSION INDIANS
P.O. Box 369
Pauma Valley, CA 92061

You are hereby issued 500 gaming device license(s) pursuant to Rule 6F of the Pool Rules.

Pursuant to section 7 of the Scope of Work, the license(s) are being sent to you by certified mail.

Sincerely,

SIDES ACCOUNTANCY CORPORATION
AS TRUSTEE UNDER THE SCOPE OF
WORK DOCUMENT

By: /s/ Michael W. Sides
Michael W. Sides, CPA

John E. Hensley, Chairman
J.K. Sasaki
[SEAL] Arlo E. Smith
Michael C. Palmer

STATE OF CALIFORNIA
Gambling Control Commission

1300 I Street
12th Floor
Sacramento, CA 95814

P.O. Box 526013
Sacramento, CA 95852-6013

(916) 322-3095
(916) 322-5441 fax

January 16, 2001

Michael E. Sides
Sides Accounting Corporation
5150 Sunrise Boulevard, G5
Fair Oaks CA 95628

Dear Mr. Sides:

In a conversation with you in October, Commissioner Palmer and myself requested you to furnish the Gambling Control Commission with data obtained in the course of your role in the allocation of gambling devices under the Tribal-State Gaming Compact.

We requested an accounting of the monies received from the tribes. We asked for 1) a breakdown of the specific amount received from each tribe, 2) a breakdown of the basis for the payment, that is, how much of the payment was the fee for the gaming devices allocated to the particular tribe; 3) the number of

machines allocated to each tribe; 4) the portion of the payments attributed to the quarterly payments provided for in the compact as to each tribe.

You indicated that you were unable to furnish the information because of confidentiality agreements with the tribes. You also stated you would draft a letter to the tribes requesting a waiver of the confidentiality agreement and send a copy to us for our comments. Neither the draft letter nor the requested accounting has been received by the commission.

An accounting of the payments and monies received from each tribe and a specification of the purposes for the payments is again requested.

You are reminded that as "pool trustee" you were to ensure that the allocation of machines did not exceed the available number of machines as provided in the compacts and that you were to "certify" that the draw complies with the compacts.

As "pool trustee" you have a fiduciary responsibility to account for the funds received to the Gambling Control Commission as trustee of the revenue sharing trust fund and to the third party beneficiaries of the compacts.

Sincerely,

/s/ John Hensley
JOHN HENSLEY
Chair
Gambling Control Commission

Issue Paper
License Issuance Jurisdiction for Indian Gaming Machines

Issue:

Should the California Gambling Control Commission immediately assert it's [sic] **authority as Trustee under the Tribal-State Gaming Compacts and take over the machine licensing function and require accountability from the temporary trustee and the compacted tribes.**

Background:

Following the passage of state ballot proposition 1-A on gambling, the State of California under the auspices of the Governor's office, entered into agreements (compacts) with some 63 Indian tribes in California. At the conclusion of the negotiation period the tribes and their spokespersons asked to immediately begin putting machines in play or to be guaranteed the right to a certain number of machines. As there was no Gambling Commission in existence at that time, a letter dated May 1999, signed by Judge Norris and Deputy Attorney General Siggins, authorized a private accounting firm promoted by several tribes, to conduct "draws" for machines. The letter (copy attached) outlined certain numerical perimeters and required Sides Accounting Firm to report and certify the results of all of their actions to the State of California.

Since May of 1999, Sides accounting firm has conducted several draws for gambling machines, but has

not reported anything at all to the state. In August 2000, Mr. Sides sent a check for approximately 34 million dollars to the state, allegedly covering license fees and quarterly payments for gaming machines he has issued during his draws. He has not and will not give the state any details as to what tribes are covered under the payment or for what numbers of machines. Both the offices of the Attorney General and the Gambling Control Commission have made requests on several occasions, both verbally and in writing for the needed information. Mr. Sides has refused to provide the needed information, most recently by letter from his attorney (copy attached). Attempts to gain the financial information from the tribes themselves have only been partially successful. Under the compacts, the Gambling Control Commission is the trustee for the Indian Gaming Trust Fund, which is mandated by law to account for all monies associated with the licensing and operation of gambling devices (machines). Additionally, the law requires that the Commission act as trustees of the fund and then distribute the funds to non-gaming tribes after reporting to the state legislature as to the accounting and methodology for distribution of the collected monies. The Commission is unable to comply with the law unless it can control the licensing and financial accounting process on a continuing basis.

The office of the Attorney General has issued an opinion that concurs with the Commission's own legal

opinion that it should be the licensing authority for Indian gaming machines.

Additional Factors:

There were a maximum number of machines available for "draw" arrived at by Judge Norris, which is approximately 45,200. A higher number of machines were listed in a letter issued by the office of the Legislative Analyst later in 2000. The Commission has received information from several sources that one of the reasons for not giving the State the requested information is that the number of "machine permits" is probably in the area of 57,000 to 65,000. Further information indicates that certain tribes and their attorneys wish to get the number as high as possible prior to letting the State have access to the financial data. The other number listed in the compacts is that of a 2000 maximum number of machines per tribe. Mathematically, using the 2000 number times the number of compacted tribes, a much higher total number could be produced if the draw process continues to go uncontrolled. A hand count of machines by state agents conducted last fall indicated that there were approximately 26,000 machines in operation. However that did not count those which were not on the casino floor or were on order. It is the Commission's information that there were hundreds of machines at numerous locations that were not disclosed to the agents who made the visual count.

Another factor further complicating the issue is that of the May 15, 2001 operational deadline date. This date was listed as the 12 month start-up period, after which, those tribes who did not have their machines in operation would lose the right to operate them and also lose their fee money. The lost permits to operate would then revert to the pool for redraw/issuance. This time limit provision has caused an upheaval of concern by citizens groups and California counties as they have sought to work with tribes on safety and environmental issues. Many tribes cite the approaching deadline as a reason for moving forward on construction with minimal interaction with their county counterparts. Several counties and several newspaper editorials have urged that the deadline be relaxed so that the tribes and local governments can better work together on the environmental and safety issues.

Another part of the time limit issue is that of competition, or more properly, non-competition. A strategy being conducted by some tribal attorneys is to delay the Commission from taking action on the licensing issue until after May 15, 2001. That would cause the numbers of machines originally drawn to be reshuffled, allegedly by Sides Accounting, to the point that figuring out who has what would be virtually impossible. From the point of view of certain tribes, it would also remove machines from certain competing Indian casinos that might not be able to meet this deadline.

Lastly, some attorneys for certain tribes have approached the legislature in an attempt to reduce the

Commission's budget in the licensing area and to sway legislators in this area.

Possible Actions:

If the Commission follows the advice of counsel and pursues the licensing authority, it must do so immediately. To assert this authority after May 15, 2001, would be problematic as previously indicated. If this authority is exercised, it could be done in several ways. The Commission could accept the number of machine draws to date subject to documentation that they occurred prior to the Commission exercising its authority. This would raise the number of machines, but not significantly and would be a methodology supported by most, but not all tribes in the state. This would lock in the number to a certain date and assure the state that it would not rise further. The state could control any further machine growth during future compact negotiations where a finite number could be arrived at.

Another methodology could have the Commission assert its authority over the licensing and require a re-draw for all machines. This would bring the number of machines down to the Judge Norris level, but would invite a certain lawsuit and criticism from most of the tribes.

As a natural follow-on to an initial licensing by the State of California, the May 15, 2001 deadline would extend another year from the date of license issuance. This would have the effect of encouraging numerous

tribes to support the state's position. These tribes are about to expend millions of dollars on short term building sites to meet the current deadline. Numerous counties would also be supportive of a new deadline so that they can more properly work with tribes on environmental and related issues. This would also shield the Governor from have to reopen any of the compact issues regarding deadlines.

If the Commission adopts the existing number of machines as issued by Sides Accountancy, the monies paid into the fund will stay constant and no refunds will occur. If the Commission voids the original draws, most likely all monies paid to the state will have to be refunded and new billings will have to occur.

Conclusion:

The Commission and the Attorney General of California feel the California Gambling Control Commission has the legal authority to assume control of the licensing function under the law and the compacts.

The issue should be acted upon expeditiously to avoid the problems associated with the May 15, 2001 deadline.

The best way to proceed with the maximum support from Indian tribes is to accept the number of machines already drawn.

The trust fund will be essentially transparent with those monies already paid staying in place and available for distribution once the necessary information is received.

At such time as the Commission establishes the number of machines allocated, they can either cap the number or allow draws of licenses subject to the original cap if it has not been exceeded.

Until such time as the compacts are renegotiated, the only increases to the cap would occur at the time individual tribe/state compact negotiations are completed under the current rules.

[LOGO]

SIDES ACCOUNTANCY CORPORATION
CERTIFIED PUBLIC ACCOUNTANTS

NOTIFICATION OF TERMINATION OF ENGAGEMENT

November 8, 2001

Dear Compact Tribe:

We hereby advise all compact Tribes that we are terminating our engagement as license trustee under the scope of work and pool rules effective 60 days from today.

Even though your Tribe may not have engaged us to perform services on their behalf, the termination of our engagement could potentially impact a non-engaged Tribe.

It has been an honor and a privilege to serve as the license trustee and we wish you much success in your future endeavors.

Sincerely,

SIDES ACCOUNTANCY CORPORATION

By: /s/ Michael W. Sides
Michael W. Sides, CPA

TO: David Rosenberg
Office of the Governor

FROM: John Hensley
Gambling Control Commission

SUBJECT: Ascertaining the ceiling number of Class III gaming devices operated by California Indian Tribes

In recent months the two burning issues confronting the Gambling Control Commission as they relate to Indian gaming, have been the number of authorized gaming devices and the distribution of monies from the Revenue Sharing Trust Fund.

In the latter issue, the Commission had to determine a number of things, including the number of machines for which license fees were paid, who paid them and what did the payments include (initial payments and/or quarterly fees). This exercise was extremely difficult in that it met a great deal of resistance from both the temporary Trustee, Michael Sides Accountancy, and from many of the tribes. After numerous requests, meetings and correspondences, the Commission has obtained most of the information needed to make an initial distribution of funds to the non-compacted tribes of California. Although the information is un-audited, it establishes a basis to report and recommend to the state legislature a distribution of approximately $300,000 per tribe (there are 84 eligible per the criteria plus one additional tribe if it submits the required information). It was during this process of obtaining information necessary to make a fiscally responsible distribution

of funds that the Commission got a first look at how many gambling devices there are being operated in California by Indian tribes. That number is approximately 50,000.

In seeking to find the answer to the other major question, the number of authorized gambling devices to be operated per the Compact, the Commission has received a large amount of input from the tribes and their attorneys, members of the legislature and interested persons on the subject. From a tribal perspective, it is extremely important that a maximum machine number be arrived at as soon as possible to give them a comfort level and a firm fiscal basis onto which they can project income, loans, etc. At present, there is a continued feeling of distrust towards the State. This distrust has manifested itself in opposition to the Commission's budget and possibly a move to oppose the confirmation of the commissioners themselves. The commissioners also feel it is important to address this important issue and then to move on to other areas of concern such as regulation formulation and implementation, fee calculation, gambling addiction programs and the evaluation of proper advertising by the industry, among others.

The Commission intends to proceed on the issue of gaming device limits as soon as possible and to ask for input from tribal leaders so that they can buy into the process and the solution.

There are several methodologies and machine-cap numbers that have been brought to the attention of

the Commission. They range from the Judge Norris number of 45,244 to the Legislative Analysts number of 113,500 authorized machines. In between are numbers accompanied by assumptions and methodologies that range from 59,000 to 71,000. According to the advocates for each of these numbers, they can be adequately supported. Two approaches to the problem are appealing to me and would be looked at closely by the Commission. One is the original Judge Norris number of 45,244 (now 46,294 as 3 additional tribes are now recognized in CA) plus the inclusion of the *exempted* machines, brings us to the total of approximately 65,000. This would argue that the Norris number was licenses and that inclusion of the exempted machines (in operation prior to 9/1/99) would not change the original number. The other number that I feel has merit is the 61,000 number that was done using alternative assumptions by the office of the Legislative Analyst for Senator Burton. If either of these numbers were found to be the position of the Commission, I believe there would be acceptance by the tribes, especially if they were involved in the process of finding it. If the maximum number of machines were to be in this range (62-65 thousand) it would also leave a cushion of approximately 10-13 thousand for those tribes who still wish to draw licenses.

In the time I have been on the Commission, I have heard a number of concerns expressed by private citizens, organizations and local governments about Indian gaming. They are primarily in the areas of

impacts on damage for roads, water and sewer along with environmental concerns and the appropriate location of casinos within the community. I have not had any concerns expressed to me by individuals or groups regarding the total number of gaming machines.

Accordingly, the Commission anticipates sending a letter to all tribal leaders of compacted tribes this next week asking them to participate in a process to finally define the cap number of authorized gaming machines in the State of California.

Commission Meeting Minutes of May 29, 2002

* * *

ATTACHMENT

PAYMENT METHODOLOGY AND GAMING DEVICE LICENSING UNDER COMPACT SECTION 4.3.2.2

* * *

PRINCIPLES APPLICABLE TO COMPACT INTERPRETATION

As stated by the Tenth Circuit Court of Appeals in *Pueblo of Santa Ana* v. *Kelly* (10th Cir. 1997) 104 F.3d 1546, 1556), a compact is a form of contract. The use of compacts to establish class III gaming rights was intended by Congress to strike a balance between the interests of tribes and of states in class III gaming, for Congress could have permitted Indian tribes to conduct any kind of gaming on Indian lands without any involvement by states (Id., at 1555). The language of the Compacts is to be construed in accordance with the ordinary principles applicable to interpretation of contracts (see *State* v. *Oneida Indian Nation of New York* (N.D.N.Y. 1999) 78 F.Supp.2d 49, 61).

Some of the Tribe's representatives have urged that all ambiguities in the Compacts be construed against the State on the basis of the so-called Indian canon of construction applicable to interpretation of federal statutes, which holds that ambiguous provisions of federal statutes should be interpreted to the benefit

of Indians (see e.g., *Montana* v. *Blackfeet Tribe of Indians* (1985) 471 U.S. 759, 766; cf., *Bryan* v. *Itasca County* (1976) 426 U.S. 373, 392).

No reported judicial decision has, however, applied the canon to the interpretation of a tribal-state gaming compact, which, as contrasted with a statute, is consensual and subject to a specific requirement for good-faith negotiation (25 U.S.C. sec. 2710(d)(3)). Thus, neither decisional law nor logic compel or suggest the use of the Indian canon in interpreting tribal-state class III gaming compacts.

It has also been suggested that the State should be regarded as having drafted the Compacts and that the rule of interpretation should be applied that construes ambiguities against the party that drafted the instrument being interpreted. Generally this rule is employed only when none of the other canons of construction succeed in dispelling uncertainty (see Civ. C. § 1654; *Oceanside 84, Ltd.* v. *Fidelity Fed. Bank* (1997) 56 Cal.App.4th 1441, 1448). Moreover, application of the rule is usually limited to the construction of form contracts, such as contracts of insurance. Discussions with individuals who participated in the 1999 Compact negotiations, however, indicate that tribal attorneys and the State's representatives each participated in the drafting the Compact language, although not necessarily the same portions of the language.

Additionally, each tribe was given an opportunity to request changes in its Compact that differ from the

uniform compact. These changes are shown at the back of each Compact. Under Section 15.4 of the compacts, any compacted tribe is entitled to substitution of the terms of another Tribe's Compact, where there are more favorable provisions in the other Tribe's Compact. Thus, the factual circumstances under which the Compacts were negotiated do not suggest application of the canon of interpretation that provides for construction of ambiguities against the drafter.

The role of the California Gambling Control Commission as the trustee named in the Compacts for the receipt, deposit, and distribution of monies paid to the (Indian Gaming) Revenue Sharing Trust Fund (Compact section 4.3.2(a)(ii)) has been cited by some tribal representatives as requiring the Commission to interpret the Compact language so as to produce the greatest benefit (payments) to the Non-Compact Tribes. However, although the Commission is referred to in the Compacts as a trustee, the Compacts are not conventional trust instruments, but rather an implementation under IGRA of the terms of class III gaming by compacted Indian Tribes in California.

Moreover, the Compacts specifically provide that the Commission has no discretion as to the use or disbursement of the funds in the (Indian Gaming) Revenue Sharing Trust Fund, which, in any event, is subject to any conditions imposed by the California Legislature in appropriating the funds for disbursement in implementation of the Compacts. The Commission cannot be regarded as a trustee in the

traditional sense, but rather as an administrative agency with responsibilities under the Compacts for administration of a public program in the nature of a quasi-trust. Because Compacts impose no express duty upon the Commission to interpret the Compacts so as to maximize the payments made by "Compact Tribes" to the "Non-Compact Tribes" (see Compact sec. 4.3.2(a)(i)), there is no legal basis upon which the Commission could justify such a bias. Interpretation of these provisions of the Compacts must be guided by the same principles that apply to construction of other Compact provisions.

* * *

STATE OF CALIFORNIA
GAMBLING CONTROL COMMISSION
COMMISSION MEETING
JUNE 19, 2002
SACRAMENTO, CALIFORNIA

* * *

[43] CHAIRMAN HENSLEY: *** The Commission, when requested by the governor's office – and we're sure that we will be asked for inconsistent – at least as the Commission sees it, inconsistencies within the compact – we certainly intend to do that, is to work towards recommendations, working with tribes, things that have been identified over this last year and a half, going on two years, where we've been in operation. We certainly intend to do that, and I think many of us have the same views of which sections need to be worked on. So I don't know that that's a big problem.

And in terms of my word "interim," it's with the view that in talking with many tribal leaders and their attorneys, we all expect to fix this, at least parts of it, in March 2003 when that period opens. And I think that was my term in terms of we have to do something now, and I respect your position, but we felt as a Commission, we have to do something. There are tribes out there who are struggling, who need something. We certainly are not the absolute defenders of an absolute number.

We certainly do understand that those numbers can be interpreted in different ways. The staff interpretation that was brought forward is the one that the staff feels most comfortable with, can be justified and defended. It is not the absolute number. That's why we're saying – we're putting this forward at this particular time. We hope that it is clarified, and we think that it should be clarified at renegotiation, as opposed to whether it's a tribe you represent, a tribe someone else represents, or the Commission arbitrarily picking a number. We think that all tribes in their compacts should have the right to sit down at the same table and make the decision. And we hope it's so clear we don't have to do draws. That's just my personal opinion. I agree with you on many of the points you raised.

COMMISSIONER PALMER: I want to just add to what the Chairman said. We stated in the past that a number of these provisions are imprecise, subject to varying interpretations. And that many times we were forced to take more conservative views as an example of a number, because there are a number of different interpretations. I think, from what I've seen, this is the low-end interpretation which would be conservative, consistent with that. I think that in a number of these areas, we can revisit them if, in fact, the parties can come up with an agreement on these issues and different numbers or different ways of dealing with it.

Obviously, the renegotiation is an appropriate time to visit many of these issues, although it doesn't

– in my mind – doesn't preclude them coming up again here at the Commission before that date if there is some agreement.

* * *

[SEAL]

AMENDMENT TO TRIBAL-STATE COMPACT BETWEEN THE STATE OF CALIFORNIA AND PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION

* * *

I. *REVENUE CONTRIBUTION*

A. **Section 4.3.1** is repealed and replaced by the following:

Section 4.3.1.

(a) The Tribe is entitled to operate the following number of Gaming Devices pursuant to the conditions set forth in Section 4.3.3:

(i) 350 Gaming Devices; and

(ii) 700 Gaming Devices operated pursuant to licenses issued in accordance with former Section 4.3.2.2 of the 1999 Compact, which licenses shall be maintained during the term of this Amended Compact pursuant to Section 4.3.2.2 herein.

(b) The Tribe may operate Gaming Devices additional to those specified in subparagraphs (i) and (ii) of subdivision (a) only by paying, in addition to the fees specified in Section 4.3.3, subdivision (a), within 30 days of the end of each calendar quarter to such agency, trust, fund or entity, as the State Director of Finance, pursuant to law, from time to time,

shall specify to the Tribe in writing, the fees specified below for each additional Gaming Device:

Additional Gaming Devices in Operation				Annual Fee Per Gaming Device
(i)	1,051	to	1,500	$ 8,500
(ii)	1,501	to	2,000	$11,000
(iii)	2,001	to	2,500	$12,000
(iv)	2,501	to	3,000	$13,200
(v)	3,001	to	3,500	$17,000
(vi)	3,501	to	4,000	$20,000
(vii)	4,000	to	4,500	$22,500
(viii)	4,500 and above			$25,000

The number of additional Gaming Devices operated each quarter will be calculated based upon the maximum number of Gaming Devices operated during that quarter. If this amendment becomes effective during a calendar quarter, payment shall be prorated for the number of the days remaining in that quarter.

(c) Fee payments pursuant to subdivision (b) shall be accompanied by a written certification of the maximum number of Gaming Devices operated during that calendar quarter. Such certification shall confirm the number of Gaming Devices operated pursuant to subparagraphs (i) and (ii) of subdivision (a), shall specify the number operated during that quarter pursuant to subdivision (b), and shall show the computation for the quarterly fees due for the additional Gaming Devices operated pursuant to subdivision (b), by adding the annual fee due per each additional Gaming Device pursuant to the incremental level applicable to the Gaming Device, as set forth in

subparagraphs (i)-(viii) of subdivision (b), and dividing that sum by 4 (to calculate the quarterly amount).

(d) If any portion of the fee payments under subdivision (b) herein, Section 4.3.2.2, subdivision (a), or Section 4.3.3, subdivision (c) is overdue, the Tribe shall pay to the State Gaming Agency for purposes of deposit into the appropriate fund, the amount overdue plus interest accrued thereon at the rate of 1.0% per month or the maximum rate permitted by state law for delinquent payments owed to the State, whichever is less.

(e) If any portion of the fee payments under subdivision (b) herein is overdue after the State Gaming Agency has provided written notice to the Tribe of the overdue amount with an opportunity to cure of at least 15 business days, and if more than 60 days has passed from the due date, then the Tribe shall cease operating the additional Gaming Devices under subdivision (b) until full payment is made; provided further that if any portion of the fee payments under subdivision (b) is overdue as specified above on more than two occasions, the Tribe shall be required to cease operating the additional Gaming Devices under subdivision (b) for an additional 30 days after full payment of all outstanding amounts has been made. For purposes of this subdivision, the notice herein shall be provided by certified mail to the address provided pursuant to Section 13.0 as well as to the Tribal Gaming Agency at the last address provided to the State Gaming Agency.

B. Sections 2.15, 4.3.2(a)(iii), 4.3.2.3, and **5.0** are repealed.

C. Section 4.3.2.2 is repealed and replaced by the following:

Section 4.3.2.2.

(a) The Tribe shall maintain its existing licenses to operate Gaming Devices by paying to the State Gaming Agency for deposit into the Revenue Sharing Trust Fund the following fee within 30 days of the end of each calendar quarter: (i) until March 31, 2008, $47,604.00 (forty-seven thousand six hundred four dollars); and (ii) after March 31, 2008, or the completion of its new Gaming Facility, whichever comes first, $500,000.00 (five hundred thousand dollars). If this amendment becomes effective during a calendar quarter, payment shall be prorated for the number of days remaining in that quarter.

(b) The Tribe has determined in consultation with other tribes that are parties to amended compacts having the provisions in Sections 4.3.1 and 4.3.3 herein that their contributions to the Revenue Sharing Trust Fund pursuant to this Amended Compact will collectively exceed the aggregate amount they were paying under the 1999 Compact.

D. Section 4.3.3 is repealed and replaced by the following:

Section 4.3.3.

(a) The Tribe shall make annual payments to the State of $5.75 million (five million seven hundred fifty thousand dollars) for 18 years, in the manner provided in subdivisions (b) and (c) below, commencing on January 1, 2005. The Tribe understands that it is the State's intention to assign these and other tribes' revenue contributions totalling at least $100 million annually to a third party for purposes of securitizing the 18-year revenue stream in the form of bonds that can be issued to investors. The payment specified herein has been negotiated between the parties as a fair contribution to be made on an annual basis without reduction for 18 years, based upon market conditions at the location of the Tribe's existing land specified in Section 4.3.5, as of year end 2003, in light of the obligations undertaken in Section 4.3.3, and represents at least 13% of the Tribe's net win in 2003.

(b) The Tribe and the State will use their reasonable efforts and cooperate in good faith to aid the issuance of the bonds referenced in subdivision (a) in accordance with Exhibit B. Commencing January 1, 2005, the Tribe shall remit to such agency, trust, fund or entity, as the State Director of Finance, pursuant to law, from time to time, shall specify to the Tribe in writing, its fixed annual payment referenced in subdivision (a) in four equal quarterly payments due on the

first business day of each January, April, July and October.

(c) Notwithstanding subdivision (b), if the State Director of Finance determines that the bonds cannot be issued successfully, then after providing notice of such determination to the Tribe, the Tribe's payments specified in subdivision (a) shall be made semiannually to such agency, trust, fund or entity, as the State Director of Finance, pursuant to law, from time to time, shall specify to the Tribe in writing, in two equal semiannual payments, due January 1 and July 1 of each year.

(d) Following the conclusion of the Tribe's annual payments for the 18-year period specified in subdivision (a) and for each year during the remaining Compact term as defined in Section 11.2.1 herein, the Tribe shall remit to such agency, trust, fund or entity, as the State Director of Finance, pursuant to law, from time to time, shall specify to the Tribe in writing, the annual payment set forth in subdivision (a), or if it is less, 10% of the annual net win attributable to the Gaming Devices specified in Section 4.3.1, subdivision (a)(i) and (ii). For purposes of this subdivision (d):

(i) The Tribe shall remit two equal semiannual payments to the State Gaming Agency within 30 days of January 1 and July 1 of each year.

(ii) "Net win" means the gross revenue ("drop") less all prizes and payouts, fills, hopper

adjustments and participation fees, and each semiannual payment shall be calculated by multiplying the average net win per Gaming Device for the preceding semiannual period specified in subparagraph (i) by the number of Gaming Devices specified in Section 4.3.1, subdivision (a)(i) and (ii). Participation fees shall be defined as payments made to Gaming Resource Suppliers on a periodic basis by the Gaming Operation for the right to lease or otherwise offer for play Gaming Devices.

(iii) The semiannual payments based upon 10% of the net win attributable to the number of Gaming Devices specified in Section 4.3.1, subdivision (a)(i) and (ii) shall be accompanied by a certification of the net win calculation prepared by an independent certified public accountant who is not employed by the Tribe, the Tribal Gaming Agency, or the Gaming Operation, is only otherwise retained by any of these entities to conduct regulatory audits, and has no financial interest in any of these entities. The State Gaming Agency may audit the net win calculation, and if it determines that the net win is understated, will promptly notify the Tribe and provide a copy of the audit. The Tribe within twenty (20) days will either accept the difference or provide a reconciliation satisfactory to the State Gaming Agency. If the Tribe accepts the difference or does not provide a reconciliation satisfactory to the State Gaming Agency, the Tribe must immediately pay the amount of the

resulting deficiency plus accrued interest thereon at the rate of 1.0% per month or the maximum rate permitted by state law for delinquent payments owed to the State, whichever is less. If the Tribe does not provide a reconciliation satisfactory to the State Gaming Agency, the Tribe, once payment is made, may commence dispute resolution under Section 9.0. The parties expressly acknowledge that the certifications and information related to payments herein are subject to subdivision (c) of Section 7.4.3.

(e) Notwithstanding anything to the contrary in Section 9.0, in the event the bonds specified in subdivision (a) are issued, any failure of the Tribe to remit its fixed annual payment referenced in subdivision (a) pursuant to subdivision (b) will entitle the State to immediately seek injunctive relief in federal or state court, at the State's election, to compel the payments, plus accrued interest thereon at the rate of 1.0% per month or the maximum rate permitted by State law for delinquent payments owed to the State, whichever is less; and further, the Tribe expressly consents to be sued in either court and waives its right to assert sovereign immunity against the State in any such proceeding to enforce said payment obligations. Failure to make timely payment shall be deemed a material breach of this Amended Compact.

* * *

[LOGO]

MEMORANDUM FOR THE CHAIRWOMAN

December 21, 2010

From: Michael Gross, Associate General Counsel, General Law /s/ Michael Gross

cc: Paxton Myers, Chief of Staff
Dawn Houle, Deputy Chief of Staff
Lael Echo-Hawk, Counselor to the Chairwoman
Jo-Ann Shyloski, Associate General Counsel, Litigation and Enforcement

Re: Bay Mills Indian Community Vanderbilt Casino, NIGC Jurisdiction

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INTRODUCTION

On Wednesday, November 3, the Bay Mills Indian Community opened an off-reservation gaming facility in Vanderbilt, Michigan. The considered opinion of the Department of the Interior Solicitor is that the land is not within a reservation, not held in trust, and not held in restricted fee. Accordingly, the Community's new casino is not on Indian lands within the meaning of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701- 2721, and the National Indian Gaming Commission lacks jurisdiction over it. We are obligated, therefore, to refer the matter to the appropriate law enforcement agencies.

BACKGROUND

The Vanderbilt casino sits upon land described as:

> A parcel of land lying on part of the Northwest ¼ of Section 22, Township 32 North Range 3 West, according to the Certificate of Survey recorded in Liber 515, pages 93 and 94, Otsego County Records, Corwith Township, Otsego County, Michigan, described as: Beginning at the Northwest corner of said Section 22; thence South 88°15'18" East, 1321.66 feet along the North line of said Section 22; thence 1099.04 feet along a curve to the left, said curve having a radius of 5844.58 feet and a long chord of 1097.42 feet bearing South 21°33'41" West and being along the Westerly right-of-way line of Limited Access 1-75; thence continuing South 22°56'39" West 440.43 feet along said right-of-way line; thence continuing South 45°47'56" West, 460.00 feet along said right-of-way line; thence North 89°30'40" West 209.68 feet; thence 537.75 feet long curve to the right, said curve having a radius of 1432.69 feet and a long chord of 534.60 feet bearing North 14°48'58" West, being along the center-line of Highway Old 27; thence North 00°05'27" West, 1611.53 feet along the West line of said Section 22 to the point of beginning, containing 47.55 acres more or less.

The Community purchased the land using money from the land trust established by the Michigan

Indian Land Claims Settlement Act of 1997 (MILCSA), P.L. 105-143, 111 Stat. 2652 (Dec. 15, 1997). MILCSA states that "any land acquired with funds from the Land Trust shall be held as Indian lands are held." *Id.* at § 107(a)(3).

DISCUSSION

IGRA defines *Indian lands* as:

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4). NIGC's implementing regulations clarify:

> *Indian lands* means:
>
> (a) Land within the limits of an Indian reservation; or
>
> (b) Land over which an Indian tribe exercises governmental power and that is either –
>
> (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or

> (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. § 502.12. As the Vanderbilt land is neither reservation land nor trust land, it could only be Indian lands under IGRA if it were held in restricted fee. We have enquired of the Solicitor's Office whether the language in MILCSA that this land is to be "held as Indian lands are held" has the effect of making the land Indian land within the meaning of IGRA, and the answer we have received is "no." See letter from Hilary Tompkins, Solicitor, Department of the Interior to Michael Gross, Associate General Counsel, NIGC (December 21, 2010). As the Department of the Interior exercises broad authority over Indian affairs, 25 U.S.C. §§ 2, 9, and has various obligations to the tribes under MILCSA, *see e.g.* §§ 104-106, the statute is the Department's to interpret, and I defer to the Solicitor's opinion. The land is not Indian land within the meaning of IGRA, and as a consequence, NIGC lacks jurisdiction over the Vanderbilt casino.

IGRA, by its terms, applies only to gaming on Indian lands. *See, e.g.*, 25 U.S.C. § 2710(a)(2) ("any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter"); 25 U.S.C. § 2710(b)(1) (requiring approved tribal gaming ordinance for the conduct of Class II gaming on Indian lands); *id.* (requiring tribal licensure of each gaming facility on Indian lands); 25 U.S.C. § 2710(b)(4)(A) (permitting licensure of individually

owned gaming on Indian lands); 25 U.S.C. § 2710(d)(1) (requiring approved tribal gaming ordinance for the conduct of Class III gaming on Indian lands); 25 U.S.C. § 2710(d)(3)(A) (requiring a tribal-state compact for Class III gaming on Indian lands); Sen. Rep. 100-446 at p. A-1. (IGRA "is the outgrowth of several years of discussions and negotiations between gaming tribes, States, the gaming industry, the administration, and the Congress, in an attempt to formulate a system for regulating gaming on Indian lands").

Likewise, the powers IGRA grants the Commission and the Chairwoman extend only as far as Indian lands extend. *See, e.g.*, 25 U.S.C. § 2705(a)(3) (power to approve tribal gaming ordinances for gaming on Indian land); 25 U.S.C. § 2705(a)(4) (power to approve management contracts for gaming on Indian lands); 25 U.S.C. § 2713 (enforcement power for violations of IGRA, NIGC regulations, or tribal gaming ordinances); 25 U.S.C. § 2706(b)(1), (2), (4) (powers to monitor gaming, inspect premises, and demand access to records for Class II gaming on Indian lands); 25 U.S.C. § 2702(3) ("The purpose of this Act is . . . to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming . . . ").

In short, in the absence of Indian lands, IGRA grants neither the Commission nor the Chairwoman

any jurisdiction to exercise regulatory authority over the Vanderbilt casino. Further, when the Commission obtains information that may indicate a violation of federal, state, or tribal statutes, it is obligated to turn that information over to the appropriate law enforcement officials. 25 U.S.C. § 2716(b).

If you have any further questions, please do not hesitate to ask.