No. 15-1185

In The Supreme Court of the United States

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,

Petitioners,

v.

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,

Respondent.

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

BRIEF FOR THE PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION IN OPPOSITION

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QUESTION PRESENTED

Whether a state can invoke Eleventh Amendment immunity to retain "revenue sharing" it acquired through a series of *ultra vires* acts and should have deposited into special, non-public funds for purposes consistent with the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*., where it waived whatever immunity it may have possessed by contract, statute, and its deliberate litigation strategy to withhold the defense for the first eighteen months of the proceeding so it could pursue a massive damages offset that would trump any adverse restitution award.

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BRIEF IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

Section 98005 of the California Government Code provides in relevant part (*see* App. 50a):

> Without limiting the foregoing, the State of California also submits to the jurisdiction of the courts of the United States in any action brought against the state by any federally recognized California Indian tribe asserting any cause of action arising from the state's refusal to enter into negotiations with that tribe for the purpose of entering into a different Tribal-State compact pursuant to IGRA or to conduct those negotiations in good faith, the state's refusal to enter into negotiations concerning the amendment of a Tribal-State compact to which the state is a party, or to negotiate in good faith concerning that amendment, or the state's violation of the terms of any Tribal-State compact to which the state is or may become a party.

INTRODUCTION

At the heart of the petition by the State of California ("State") lies the question of whether the Supreme Court of the United States will sanction gross abuses of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, and provide states with another

victory in their never-ending quest to tax Indian tribes. The present case rests at the confluence of two previous ones that this Court declined to hear. The first concerned the State grossly misrepresenting contract language it drafted to limit the number of slot machines signatory tribes could operate under their gaming compacts. *See, e.g.*, *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 536 F.3d 1034 (9th Cir. 2008), *cert. denied sub nom. California v. Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty.*, 556 U.S. 1182 (2009) (generally "*Colusa*"). The second dealt with the State trying to resell these licenses in amendment negotiations so it could exact astronomical amounts of tax revenues from the tribes. *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*").

This final entry in the saga looks at the consequences for the State after the Pauma Band of Mission Indians ("Pauma" or "Tribe") took the bait and mistakenly executed an amendment in order to obtain slot machine licenses that it thought were unavailable under its original compact. At this juncture, the State does not contest either the misrepresentation under the original compact or the rescission of the amendment. Rather, the only thing the State challenges is whether it should have to disgorge its ill-gotten gains given the protections afforded by the Eleventh Amendment. The argument in support of this position, however, simply argues that the United States Court of

Appeals for the Ninth Circuit committed an analytical error when interpreting a waiver within the compacts while largely ignoring the four other exceptions to sovereign immunity that either do or should support the decision below.

With alleged errors of this sort generally not providing a compelling reason for review, the State tries to draw attention to its case by engaging in the sort of histrionic fear-mongering that it did in its petition in *Rincon*, suggesting other tribes may file suit to hold the State liable for a misrepresentation disclosed over seven years ago even though not a single one has done so within that time period. Applicable statutes of limitation undermine this argument, but the State is correct in suggesting that sovereigns are owed a "special solicitude" – it is simply that preferential treatment should not apply when a state takes money through a series of *ultra vires* acts in contravention of federal law and then refuses to return the funds despite waiving immunity by contract, statute, and its deliberate litigation conduct.

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 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 aside from 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 II*, 602 F.3d at 1036-40.

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 p.m. on the evening before the end of the legislative session. *See Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 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. 51a. The second section (*i.e.*, Section 4.3.2.2(a)) proceeds 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):

> 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.

App. 53a.

The signatory tribes would then compete for these additional slot machine licenses during communal draws structured like a "worst to first" professional sports draft. App. 53a-55a. 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. 54a. 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 higher pick can draw again. App. 54a. At the conclusion of the first round, further "[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. 55a.

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. 58a-59a. 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. 61a. 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. 62a-63a. 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. 65a-73a. 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. 65a, 68a. 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. 70a.

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. 74a-79a. Paragraph 5 of the Rules indicated that a certified public accounting firm licensed in California with no recent professional ties to any of the compacting parties would serve as the "Pool Trustee." App. 75a.

After the signatory tribes selected the Sacramento-based firm of Sides Accountancy to serve as Pool Trustee, the State's negotiator, acting on behalf of the Office of the Governor, drafted a letter 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. 80a-84a.

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. 85a-87a. 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. 88a-89a. 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. 89a. 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. 90a.

More than half a year after this first license draw, the CGCC came into existence and began 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. 91a-92a. 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. 93a-99a. 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. 97a. 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. 100a), 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. 101a. With that situation now resolved, the letter went on 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 its 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. 102a-103a.

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. 102a), 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. 107a-108a. 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 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. 110a. As for Hensley, he explained that the selected figure was not an "absolute number," but simply an "arbitrarily" chosen one that would work in the "interim" until the signatory tribes could renegotiate their compacts with the State. App. 109a-110a.

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 the license pool was exhausted. Pet. 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 payments, the majority of which the State contends it simply dumped into the General Fund. Pet. App. 12a.

Over 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 make it out of the pleading stage initially, 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 for sovereign immunity reasons. *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 suit – 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 issuance of the opinion in *Colusa I*, Pauma conveyed a settlement letter to the Office of the Governor raising the supervening decision and arguing that it showed the amendment resulted from mistake and was subject to judicial rescission. App. 120a-123a. Nearly seven weeks later, on June 22, 2009, the Office of the Governor responded, disagreeing with Pauma's assessment of the impact of *Colusa I* and stating that "even if rescission were granted, it is possible that Pauma may not benefit from such a determination given that rescission of the Band's compact could leave it with no compact at all." App. 122a. Moreover, "assuming Pauma's suit for rescission could overcome the State's sovereign immunity," the Office of the Governor threatened that "any financial restoration obligation [arising from a lawsuit] would not rest solely upon the State, but could require the band to disgorge all benefits it has received from the ability to operate class III gaming under its compact." App. 122a. After posing this deterrent to

suit, the Office of the Governor terminated the discussion by explaining that it "did not believe it would be fruitful to continue the meet and confer process to discuss the matter further." App. 122a-123a.

After trying in vain to revive the settlement talks over the next two months, Pauma filed its original complaint with the United States District Court for the Southern District of California on September 4, 2009. Dist. Ct. Dkt. No. 1. Amongst other remedies, the prayer for relief in the complaint requested rescission of the amendment and "restitution of unlawful or inequitable compact fees or other such compact fees Pauma paid to the State that constitute unjust enrichment." Dist. Ct. Dkt. No. 1 at p. 22. In keeping with its pre-suit plan to transform an adverse restitution award into an even larger damages remedy for itself, the State refrained from raising a sovereign immunity defense in its first motion to dismiss that it filed on October 9, 2009. Dist. Ct. Dkt. No. 11-1. Similarly, the State also said nothing about sovereign immunity in its opposition to Pauma's motion for preliminary injunction that it filed more than five months later on March 22, 2010. Dist. Ct. Dkt. No. 30.

The preliminary injunction motion filed by Pauma sought to reduce the revenue sharing fees of the amendment to the prior rates of the original compact for the duration of the suit. Dist. Ct. Dkt. No. 34. Just weeks before the hearing, the presiding district judge – Judge Larry Alan Burns – issued a dispositive order in a second case questioning the number of slot machine licenses created by the original compacts. *See*

San Pasqual Band of Mission Indians v. California, No. 06-0988, Dkt. No. 97 (S.D. Cal. Mar. 29, 2010) ("*San Pasqual*"). Mirroring the decision in *Colusa I*, Judge Burns interpreted the Section 4.3.2.2(a)(1) license pool formula as authorizing another 10,549 licenses after finding the State's interpretation of the contract provision was "unreasonable" on multiple grounds. *See San Pasqual*, Dkt. No. 97 at pp. 8-10.

When the hearing on Pauma's motion for preliminary injunction began, Judge Burns referenced his recent decision in *San Pasqual* and explained that the "handwriting's on the wall" for the State, as Pauma was "entitled" to both 2,000 machines under its original compact and the right to rescind the amendment. Dist. Ct. Dkt. No. 56 at pp. 4-5, 17. Since he saw things "so clearly," Judge Burns wanted to dispense with preliminary relief and render a final judgment instead. Dist. Ct. Dkt. No. 56 at pp. 4-5, 11. However, a last-ditch request from the State to conduct discovery persuaded Judge Burns to go to "Plan B" and issue the injunction requested by Pauma. Dist. Ct. Dkt. No. 56 at pp. 9-10. The order on Pauma's motion for preliminary injunction came out the day after the hearing and explained in the discussion therein that "[i]f, as appears likely, Pauma prevails, the [S]tate would be required to make restitution so the larger payments would ultimately not benefit it, resulting in a deadweight loss." App. 48a.

4. The litigation strategy pursued by the State in the wake of the injunction hearing was to forego discovery in favor of filing an interlocutory appeal of the

injunction order. Dist. Ct. Dkt. No. 50. During the three weeks between the injunction hearing and the filing of the notice of appeal, the Ninth Circuit issued its opinion in *Rincon II*, a suit by another tribe alleging that the State negotiated in bad faith by demanding copious amounts of revenue sharing within a compact the State admitted was "similar to [that] accepted by [] Pauma." *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 2008 WL 6136699, *6 (S.D. Cal. 2008). In holding that the State negotiated in bad faith, the Ninth Circuit ruled that "[t]he State's demand for 10-15% of Rincon's net win, to be paid into the State's general fund, is simply an impermissible demand for the payment of a tax by the tribe." *Rincon II*, 602 F.3d at 1042 (citing 25 U.S.C. §§ 2710(d)(3)(C)(iii), (d)(4)).

Believing the decisions in *Colusa I* and *Rincon II* removed any doubt about the outcome of the case, Pauma asked the Ninth Circuit to address the merits of the claims – and not just its likelihood of success on the merits – by applying the legal holdings in the aforesaid cases and awarding the tribe, amongst other remedies, rescission of the amendment and restitution of the heightened revenue sharing fees paid thereunder. *See Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, No. 10-5571, Dkt. No. 34-1 at p. 3 (9th Cir. July 13, 2010) ("*Pauma*"). Faced with this request, the State once again said nothing about immunity from restitution during the entire interlocutory appeal. Ultimately, the Ninth Circuit resolved the appeal on November 30, 2010 – days

before the fifteen-month anniversary of the suit – with an order that kept the injunction in place subject to further proceedings before the district court. *See Pauma*, Dkt. No. 64 (9th Cir. Nov. 30, 2010).

5. Once the case returned to the district court, the first event after remand was not a motion for summary adjudication on the sovereign immunity issue by the State, but a series of telephonic status conferences in which the court directed Pauma to file a lone motion for summary judgment. Dist. Ct. Dkt. Nos. 64, 114-1 at p. 4-5. During the second conference call that occurred on December 15, 2010, Judge Burns explained that he saw the merits of Pauma's case even more clearly than he had at the injunction hearing, again indicating that "the writing was on the wall" for the State. Dist. Ct. Dkt. No. 114-1 at p. 5. Given that, Judge Burns ordered Pauma to file a summary judgment motion as soon as possible, a date that turned out to be January 24, 2011. Dist. Ct. Dkt. No. 114-1 at p. 5. After Pauma filed its motion on the deadline and again sought remedies that included restitution (*see* Dist. Ct. Dkt. No. 66 at p. 1-2), the State submitted its opposition on March 7, 2011 and for the very first time mentioned sovereign immunity – raising the argument just days into the nineteenth month of the case. Dist. Ct. Dkt. No. 92 at pp. 24-25. Accompanying this argument was a reiteration of the State's pre-suit position that any restitution award successfully circumventing Eleventh Amendment immunity would still require Pauma "to restore to the State everything of value it received under the 2004 Compact." Dist. Ct. Dkt. No. 92 at p. 25.

One thing Pauma's motion for summary judgment did differently than prior briefs was to detail all the evidence on the trustee issue that the Tribe had obtained up until that point. Dist. Ct. Dkt. No. 66 at pp. 3-4. And yet, with the briefing on the motion complete and the hearing a mere five days away, Judge Burns filed a minute order vacating the hearing "[b]ecause the case [was] being reassigned to Judge Anthony Battaglia." Dist. Ct. Dkt. No. 101. Proceedings after the transfer took on a decidedly different tone, with Judge Battaglia taking Pauma's motion for summary judgment off-calendar and setting a hearing for the State's first motion to dismiss instead – one that would only take place after the parties re-briefed the motion in order to make it current. Dist. Ct. Dkt. Nos. 109, 110.

6. With the suit appearing to start over, the State reverted to its earlier practice of staying mum on sovereign immunity, withholding the defense from a succession of briefs that included the revised iteration of its first motion to dismiss, its answer, and a second motion to dismiss. Dist. Ct. Dkt. Nos. 111-1, 129, 142-1. Harkening back to its practice before Judge Burns, the State's only invocation of sovereign immunity during the second stage of the district court proceeding arose in opposition to summary judgment on December 15, 2011, months after Judge Battaglia granted Pauma (and Pauma alone) leave to refile its prior motion. Dist. Ct. Dkt. Nos. 141, 168. Thus, only one invocation of sovereign immunity occurred during the first twenty-seven months of the suit and that arose after the first district judge ordered Pauma to file a singular motion

for summary judgment and explained that the State would have to pay restitution if it lost.

7. Following a second transfer of the case on the cusp of Pauma's summary judgment hearing, the third district judge – Judge Cathy Ann Bencivengo – would ultimately address the State's sovereign immunity argument after granting Pauma rescission of the amendment on the basis of a single misrepresentation claim. Dist. Ct. Dkt. No. 227. At the restitution hearing on May 29, 2012, Judge Bencivengo raised three different ways in which she thought the State waived its sovereign immunity from repaying the heightened revenue sharing it received under the rescinded amendment. App. 3a-5a. First, there was the waiver in Section 9.4(a)(2) of the compacts, which provides that the parties waive whatever immunity from suit in federal court that they may have so long as "[n]either side makes any claim for monetary damages (that is, only injunctive, specific performance, including enforcement or a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought)." Pet. App. 28a. According to Judge Bencivengo, "the Tribe has overpaid and is entitled to get the property back . . . [a]nd I don't think [the overpayments are] money damages in the sense that they're outside of the enforcement of the compact." App. 4a.

The second waiver was the one within Section 98005 of the Government Code that provides in pertinent part that the State "submits to the jurisdiction of the courts of the United States in any action brought

against the state by any federally-recognized Indian tribe asserting any cause of action arising from . . . the state's violation of the terms of any Tribal-State compact to which the state is or may become a party." App. 50a. After referencing this language, Judge Bencivengo explained, "That's exactly what happened here. The State did not properly determine the number of licenses. They were entitled to licenses under the '99 Compact. There was [sic] licenses available. They should have gotten them under the terms of that compact. It was a violation, and the money should be returned." App. 4a-5a.

As for a potential third waiver, Judge Bencivengo also raised the State's litigation conduct, remarking that it was "kind of odd" that the State appeared to be raising a sovereign immunity defense "now for the first time" when it was not "even in [its] answer." App. 5a. Ultimately, Judge Bencivengo issued an order on June 11, 2013, finding that the State "contractually waived any immunity to contest the remedy of specific performance [under Section 9.4(a)(2) of the compacts], which here results in the State having to return money belonging to Pauma." Pet. App. 48a. Along with this, the language of the order also tracks the text of Section 98005 of the Government Code by explaining that "[t]he State violated the terms of the 1999 Compact when . . . it misrepresented the Pool to be exhausted of licenses and refused to issue 550 licenses to Pauma on that basis." Pet. App. 47a.

8. On appeal, the Ninth Circuit denied the State's sovereign immunity defense similarly to Judge

Bencivengo. First, the opinion explains that the return of a revenue sharing overpayment falls within the portion of the Section 9.4(a)(2) waiver covering the "enforcement of a provision of this Compact requiring payment of money to one or another of the parties," even though the appellate court phrased the remedy as restitution rather than specific performance. Pet. App. 30a-31a. Then, the panel bolstered its decision by indicating that its ruling "is supported by the California Supreme Court, which upheld . . . the waiver" in Section 98005 of the Government Code. Pet. App. 32a.

REASONS FOR DENYING THE PETITION

A. The first waiver of sovereign immunity in Section 9.4(a)(2) of the compacts permits no other construction than one recognizing that the return of an overpayment is not "monetary damages," but a specific remedy resulting from the "enforcement of a provision of the Compact requiring payment of money to one or another of the parties"

1. The crux of the State's argument is that the Ninth Circuit misapplied the sovereign immunity rules in *Edelman v. Jordan*, 415 U.S. 651 (1974), by interpreting the waiver in Section 9.4(a)(2) of the compacts to require restitution of a contractual overpayment without considering whether there is another reasonable construction of the provision that would protect the State from disgorging its ill-gotten gains. Pet. 11. In fact, the interpretations issued by the Ninth

Circuit and the district court in this action are the only ones that give effect to all the terms within the waiver, and thus the only reasonable constructions of the provision. To explain, the waiver in Section 9.4(a) of the compacts states in material part that the parties waive whatever immunity from suit in federal court they may have provided that

> (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)[.]

Pet. App. 28a.

Reviewing this language in a case involving the rescission of an amendment to an earlier contract means there are different ways to frame a monetary remedy designed to restore the *status quo ante*. Though the terminology used by the Ninth Circuit and the district court is dissimilar, the remedies are actually one and the same. The Ninth Circuit simply chose to conduct the analysis in one step, classifying the specific monetary remedy at issue as restitution and tying it to the rescission of the amendment. Pet. App. 22a-23a. Whereas the district court engaged in a two-step process, first rescinding the amendment and then granting Pauma specific performance of the original compact. Pet. App. 46a-47a.

2. Both courts agreed on two things, however. The first is that the remedy – whether labeled as restitution or specific performance – was not "monetary damages" (*see* Pet. App. 29a, 48a), a conclusion that aligns with the universally-held perception of the terms throughout the federal court system. *See, e.g.*, *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) ("Our cases have long recognized the distinction between an action at law for damages . . . and an equitable action for specific relief – which may include an order providing for . . . 'the recovery of specific property or monies. . . .'" (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 699 (1949))); *United States v. Balistrieri*, 981 F.2d 916, 928 (7th Cir. 1993) ("The word 'damages' has a commonly understood meaning: it generally connotes a payment in money for a plaintiff's losses caused by a defendant's breach of duty and is something different from equitable restitution.").

The second is that the restitutionary remedy, however classified, fits within the clause in the waiver allowing for the "enforcement of a provision of this Compact requiring payment of money to one or another of the parties." Pet. App. 30a-31a, 48a. The only provisions under either the original compact or the amendment that require the payment of monies are those obligating Pauma to pay the State revenue sharing in exchange for the right to operate slot machines within its gaming facility. App. 53a, 56a, 112a-116a. The revenue sharing fee attached to a particular slot machine is a concrete sum, irrespective of whether it is

a flat fee or a certain percentage of the revenues generated by the machine. App. 53a, 56a. Given this, either party has the ability to enforce the revenue sharing terms of the operative compact if the amount paid somehow deviates from the specified total: the State can file an action in the event of an underpayment while a tribe like Pauma can conversely seek to recoup an overpayment if it mistakenly paid too much into the system. With rescission being the preparatory step for other remedies, the restitution award in this case is simply the Ninth Circuit voiding the amendment and enforcing the appropriate amount of revenue sharing that Pauma should have paid under the original compact while the amendment was in effect.

3. Thus, the analyses conducted by the Ninth Circuit and the district court both conclude that the specific monetary remedy at issue in this case avoids the prohibition on "monetary damages" *and* fits within a clause permitting the enforcement of a provision of a compact requiring the payment of monies. The State contends, however, there is another "reasonable construction" of this waiver that involves deleting the aforementioned clause and limiting the provision to seemingly prospective forms of "injunctive, specific performance . . . or declaratory relief." Pet. 13. Reading terms out of a contract does not yield a reasonable construction of the affected provision, though. *See, e.g.*, *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1080 (9th Cir. 2010) ("*Colusa II*") (stating an interpretation that disregards the text of the compact is not reasonable).

Assuming, *arguendo*, that the conclusion reached by the Ninth Circuit is incorrect, the error would still relate to nothing more than the misapplication of a correctly-stated rule of law to the text of a waiver that the State has already phased out of the most recent tribal/State compacts. *See* Office of Governor Edmund G. Brown, Jr., *Tribal-State Compact between the State of California and the Pala Band of Mission Indians* § 13.4(a) (indicating the new waiver precludes claims for either monetary damages *or* restitution), *available at* https://www.gov.ca.gov/docs/5.9.16_Compact.pdf (last visited May 12, 2016). Petitions raising analytical errors of this sort are "rarely granted" according to the Court's own rules. *See* Sup. Ct. R. 10. Further, the rare grant of review presumably arises in cases with prejudicial errors and not situations like this one where upwards of four additional grounds support the remedy being challenged. This fact alone warrants denying the State's petition.

B. A second waiver of sovereign immunity in Section 98005 of the California Government Code supports the Ninth Circuit's decision despite the State's cursory treatment of the issue

1. Buried largely within a footnote at the end of the petition is a passing mention of a waiver of sovereign immunity in Section 98005 of the Government Code that was allegedly never raised on appeal and only repeals the State's immunity for claims alleging bad faith negotiation under IGRA. Pet. 17. Only the

second contention holds a kernel of truth, as Section 98005 does indeed enable tribes to sue the State in federal court to pursue the IGRA statutory remedy. *See Rincon II*, 602 F.3d at 1026. The waiver does not stop there, though, as it says in relevant part that the State of California

> submits to the jurisdiction of the courts of the United States in any action brought against the state by any federally recognized California Indian tribe asserting any cause of action arising from the state's refusal to enter into negotiations with that tribe for the purpose of entering into a different Tribal-State compact pursuant to IGRA or to conduct those negotiations in good faith, the state's refusal to enter into negotiations concerning the amendment of a Tribal-State compact to which the state is a party, or to negotiate in good faith concerning that amendment, or the state's violation of the terms of any Tribal-State compact to which the state is or may become a party.

App. 50a. The California Supreme Court had the opportunity to analyze the constitutionality of this provision in 1999, and in so doing interpreted the scope of the waiver as covering any claims brought by a tribe "concerning the negotiation, amendment, and performance of compacts." *Hotel Employees & Rest. Employees Int'l Union v. Davis*, 21 Cal. 4th 585, 614 (1999).

Shifting away from the bad faith negotiation clause and to the "violation of the terms of any Tribal-State compact" language reveals the reason why the

State discussed an abridgement of the statute. A violation of a contract is synonymous with a breach (*see* Black's Law Dictionary 200 (8th ed. 2004)), and a breach is "a pure and simple question of contract interpretation . . . whether you are on the sunny shores of California or enjoying a sweet autumn breeze in New Jersey." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1262-63 (11th Cir. 2004), *cert. denied sub nom. UnitedHealth Group, Inc. v. Klay*, 543 U.S. 1081 (2005) (citation omitted). In other words, the failure to properly interpret the license pool formula in Section 4.3.2.2(a)(1) of the original compact was a breach of the agreement (as the final decision in *Colusa II* proves), and the revenue sharing Pauma improperly paid the State under the amendment *arose* therefrom. These two indisputable facts are all that Pauma has to prove under the violations clause, which means the restitution award falls squarely within the statutory waiver.

In fact, Judge Bencivengo made this clear when she discussed the merits of the State's sovereign immunity defense at the restitution hearing on May 29, 2013. App. 4a-5a. After explaining the return of an overpayment falls within the waiver in Section 9.4(a)(2) of the compacts, Judge Bencivengo turned her attention to the violations clause in Section 98005 of the Government Code and stated rather emphatically, "That's exactly what happened here. The State did not properly determine the number of licenses available. They were entitled to licenses under the '99 Compact. There was licenses available. They should have gotten

them under the terms of that compact. It was a violation, and the money should be returned." App. 4a-5a. These sentiments then found their way into the order waiving the State's sovereign immunity, with Judge Bencivengo reiterating that "[t]he State violated the terms of the 1999 Compact when . . . it misrepresented the Pool to be exhausted of licenses and refused to issue 550 licenses to Pauma on that basis." Pet. App. 47a.

The Ninth Circuit may have been hesitant to draw unnecessary attention to the applicability of Section 98005 of the Government Code after already finding the restitution award fell within the waiver in Section 9.4(a)(2) of the compacts, but it nevertheless indicated that the California Supreme Court's interpretation of the statutory provision "supported" its decision. Pet. App. 32a. How much support it provides, again, was made clear by the district court when it indicated both orally and in writing that the State's unreasonable calculation of the license pool formula that has been *res judicata* for nearly six years now suffices to satisfy the elements for establishing a waiver under the violations clause of Section 98005. As such, this statutory waiver serves as an alternate basis for the restitution award, and the State's failure to meaningfully contest the applicability of the provision is additional reason to deny the petition.

C. A third waiver of sovereign immunity that the Ninth Circuit did not address but Pauma will continue to pursue on remand if the judgment is overturned arises from the State's tactical decision to refrain from asserting sovereign immunity for the first eighteen months of the suit so it could pursue a massive damages award

1. The two waivers discussed by the Ninth Circuit are just a portion of those raised by Pauma on appeal. One of the other waivers pertained to the State withholding the defense during the litigation until it had a clear indication that it was going to lose, but the Ninth Circuit deflected consideration of the waiver at oral argument by incorrectly suggesting that this Court has disallowed waivers in the litigation context under one of its most recent opinions on the subject. *See* United States Court of Appeals for the Ninth Circuit, Video Recording of Oral Argument in *Pauma Band of Luiseno Mission Indians v. State of California* at 31:11, *available at* http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000007990 (last visited May 13, 2016).

In actuality, members of this Court have been concerned for some time with the unfair advantage a state can derive by litigating a case and then belatedly raising a sovereign immunity defense in order to avoid an adverse decision. For instance, Justice Kennedy articulated this concern nearly twenty years ago when he explained the Court should adopt a rule that a state

defendant should raise an Eleventh Amendment immunity defense at the outset of the proceeding. *See Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 395 (1998) (Kennedy, J., concurring). The sentiments behind this standard soon took hold, as the Court found that permitting waiver in the litigation context comported with the twin aims of the Eleventh Amendment to promote consistency and prevent unfairness, attributes that would be undermined if a state entity was able to "selective[ly] use" immunity to achieve tactical "litigation advantages." *Lapides v. Bd. of Regents*, 535 U.S. 613, 620-21 (2002). This standard mirrors the one used by the Ninth Circuit that precludes a state from engaging in litigation conduct that is "incompatible with an intent to preserve [Eleventh Amendment] immunity," such as by making a "tactical decision to delay asserting the sovereign immunity defense." *Johnson v. Rancho Santiago Cmty. College Dist.*, 623 F.3d 1011, 1021-22 (9th Cir. 2011), *cert. denied sub nom. Bertalan v. Rancho Santiago Cmty. College Dist.*, 563 U.S. 936 (2011).

"Tactical" is the only way to describe the State's decision to keep its sovereign immunity defense in reserve in this case. Three months before the inception of the suit, the Office of the Governor tried to deter Pauma from filing a complaint by explaining that a favorable outcome could actually harm the Tribe by requiring it "to disgorge *all* benefits it has received from the ability to operate class III gaming under its compact." App. 122a. Pursuing a damages offset that would

actually swallow the underlying restitution award necessitates withholding an Eleventh Amendment immunity defense. And this is exactly what the State did throughout the first twenty-seven months of the litigation in three rounds of motion to dismiss briefing, an answer, an opposition to preliminary injunctive relief, and all of its briefing in an interlocutory appeal that concerned Pauma's likelihood of success on the merits. *See, e.g.*, Dist. Ct. Dkt. Nos. 11-1, 30, 111-1, 129, 142-1. The *only* time during this initial twenty-seven-month period that the State mentioned sovereign immunity was at the eighteen-month mark in opposition to Pauma's motion for summary judgment. Dist. Ct. Dkt. No. 92 at p. 24-25. However, even then, the defense was simply a last minute effort to stave off an adverse judgment after Judge Burns ordered Pauma to file a lone motion for summary judgment following his earlier explanation that the State would have to pay restitution if it lost. App. 48a; Dist. Ct. Dkt. No. 64.

A declaration of intent to be sued hardly comes any clearer, and this is the antithesis of the situation where a state entity preserved its immunity from a certain remedy by raising the defense in its answer a month after the inception of the suit. *See Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 546-47 (2002). Though the Ninth Circuit may have avoided discussing waiver by litigation conduct, the State's deliberate strategy in this case easily satisfies the standard test and provides yet another reason for denying the petition for certiorari.

D. Two additional exceptions to sovereign immunity apply because the State committed a series of *ultra vires* acts to obtain exponentially more "revenue sharing" from Pauma, all of which was earmarked to go into non-public funds for uses consistent with IGRA

1. A discussion of waivers of sovereign immunity assumes the defense applies in the first place, which is not the case when a party does something it cannot legally do to acquire monies it cannot legally obtain. One of the enduring principles of Eleventh Amendment law is that a suit for the return of specific property does not offend the sovereign immunity of a state if the plaintiff claims that a public official acted beyond its authority or in an unconstitutional manner. *See Florida Dep't of State v. Treasure Salvors*, 458 U.S. 670, 696-97 (1982) (citing *Larson*, 337 U.S. at 701). The history of this dispute involves the CGCC forcibly taking over administration of the license pool under the original compacts, and then unilaterally interpreting the meaning of this contract provision. Taking this second action was a step too far according to the court in *Colusa I*, which explained that

> [t]he authority to administer the draw process does not give the Commission concomitant authority to interpret the Compact. While interpretation issues may and have arisen throughout the draw process, the Commission's role as Trustee does not grant deferential review to its interpretation.

Colusa I, 629 F. Supp. 2d at 1108 n.15.

This conclusion that the CGCC lacked the authority to interpret the compact is sound under both contract and trust law. As to the former, contract interpretation is a judicial function (*see Colusa II*, 618 F.3d at 1073 (citation omitted)), and as such the "meaning of a contract is ordinarily decided by the court, rather than by a party to the contract, let alone the party that drafted it." *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 330 (7th Cir. 2000) (Posner, J.). A trustee does not inherently possess interpretive powers above and beyond a normal contracting party, and as a consequence may only construe disputed or doubtful terms if the trust instrument expressly provides as much. *See Firestone Tire & Rubber v. Bruch*, 489 U.S. 101, 111 (1989). Given these rules, the instigating event in the negotiation of Pauma's amendment was an *ultra vires* act by a named State defendant in this suit. Everything thereafter occurred outside the bounds of lawful authority, as the Office of the Governor leveraged its statutorily-conferred ability to negotiate under IGRA to resell preexisting rights. On top of which, if one takes the State's word at face value, the negotiation process ended with another clear-cut *ultra vires* act when the State took the bulk of the regulatory payments that Pauma made under the amendment and funneled them directly into the General Fund (*see, e.g.*, Pet. App. 14-15), even though doing so is an act that is "neither authorized by IGRA nor reconcilable with its purposes." *Rincon II*, 602 F.3d at 1036.

2. The talk of general fund revenue sharing should not detract from the fact that the payments

Pauma made under the amendment were anything but discretionary revenues for the State. The original compacts created two different funds into which signatory tribes would make payments. Certain baseline machine entitlements under Section 4.3.1 carried a revenue sharing obligation, and those payments went into the Special Distribution Fund ("SDF") to cover the expenses incurred by the State in regulating Indian gaming. App. 56a. Conversely, all licensed machines under Section 4.3.2.2(a)(1) carried a specified annual fee ranging from $0 to $4,350 that would go into the Revenue Sharing Trust Fund ("RSTF") to provide each of the non-gaming tribes in the State with $1.1 million of annual financial support. App. 52a-53a.

This arrangement remained in place under the 2004 Amendment with Pauma making annual payments of $2,000,000 into the RSTF and $5,750,000 into an undisclosed SDF-like account, the corpus of which the State was supposed to use as security for the issuance of regulatory bonds. App. 115a-116a. The identity of these accounts is significant because the limitation on monetary remedies in *Edelman* only pertains to liabilities which must be paid from "public funds" in the state treasury. *See Edelman*, 415 U.S. at 663. What we have here, however, are two "special funds" devoted to purposes that are "consistent" with IGRA and from which the State is not supposed to derive "general tax" revenues. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 840-41 (1995) (explaining a student activity fee did not constitute "public funds" since it went into a special account for uses consistent

with the University's educational mission rather than to provide general tax revenue).

With the State simply acting as an intermediary for the payments flowing through the compact scheme, the accounts into which Pauma should have paid – and can recover – its monies do not contain public funds as that term is understood in *Edelman* and *Rosenberger*. With that said, the invalidation of all five waivers and exceptions to Eleventh Amendment immunity discussed above would still not prevent Pauma from arguing on remand that it can use the $36.2 million restitution award as a credit against future revenue sharing obligations. *See Elephant Butte Irrigation Dist. v. Dep't of Interior*, 160 F.3d 602, 612 (10th Cir. 1998), *cert. denied sub nom. Salisbury v. Elephant Butte Irrigation Dist.*, 526 U.S. 1019 (1999) (explaining the loss of future revenues under a contract does not offend a state's sovereign immunity).

E. The supposed harms created by the decision below ring hollow and are just like the ones the State raised in its petition for writ of certiorari in *Rincon* that proved to be wildly inaccurate

1. Before ending the petition, the State raises the specter that the decision below could expose the California treasury to liabilities far exceeding $36.2 million on account of copycat suits filed by some of the other fifty-six signatory tribes that executed the original compacts in 1999. Pet. 14-15. This parade of horribles argument sounds just like the one the State

raised in its *Rincon* petition in an attempt to convince this Court to overturn the Ninth Circuit's holding that general fund revenue sharing is "not an authorized subject of negotiation under" IGRA. App. 126a-141a; *see Rincon II*, 602 F.3d at 1034. Within this prior petition, the State detailed how general fund revenue sharing provisions are found within compacts from California to Connecticut. App. 127a. The ubiquity of these compacts meant that the consequences flowing from the Ninth Circuit decision were "difficult to exaggerate" and quite easy to predict in the view of the State. App. 135a. The perceived reality was that "[l]iterally hundreds of millions of dollars in general fund revenues [was] at stake" because "litigation will likely be filed in the Second, Sixth, Tenth, and Eleventh Circuits to unsettle dozens" of compacts that the opinion in *Rincon II* called into question. App. 135a, 140a-141a.

This grandiose claim that *Rincon II* would produce an unprecedented and uncontrollable domino effect was the epitome of hyperbole, as not a single tribe filed suit to rescind or reform a compact requiring general fund revenue sharing in the aftermath of the Ninth Circuit's decision. As for this case, the key fact to remember is that the dispositive order in *Colusa I* disclosing that the State had grossly misrepresented contract rights came out on April 22, 2009 – or more than seven years ago. *See Colusa I*, 629 F. Supp. 2d 1091. The final appellate opinion issued just a year after that. *Colusa II*, 618 F.3d 1066. Thus, if another tribe were to file suit to hold the State liable for its misrepresentations after all of this time, it would

undoubtedly run into a grave statute of limitations problem under either federal or state law. *See, e.g.*, Cal. Civ. Proc. Code § 337 (specifying a four-year statute of limitations for an action upon any contract, including one for rescission). Raising this defense in future suits against presently nonexistent plaintiffs is a much more equitable way to quell concerns about spillover effects than to deprive an actual victim of redress. And even if the State fails to raise the defense in a future hypothetical suit, it can rest assured knowing that the district court may well raise the defense on its behalf, just as it did in this suit when the State withheld the defense because it conflicted with its theory of the case. Pet. App. 52a.

CONCLUSION

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED this 20th day of May, 2016

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UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, AKA PAUMA LUISENO BAND OF MISSION INDIANS, AKA PAUMA BAND OF MISSION INDIANS, A FEDERALLY RECOGNIZED INDIAN TRIBE, PLAINTIFF, VS. 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-CAB (MDD) SAN DIEGO, CALIFORNIA MAY 29, 2013 RESTITUTION AND CREDIT CLAIMS HEARING

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE CATHY ANN BENCIVENGO
UNITED STATES DISTRICT COURT JUDGE

[2] APPEARANCES:

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[3] SAN DIEGO, CALIFORNIA; WEDNESDAY; MAY 29, 2013; 10:00 A.M.

THE CLERK: WE ARE ON THE RECORD THIS MORNING ON CASE 09CV1955-CAB (MDD), PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION VERSUS STATE OF CALIFORNIA, ET AL. AND WE ARE ON CALENDAR FOR A HEARING REGARDING RESTITUTION AND CREDIT CLAIMS. IF WE COULD PLEASE HAVE COUNSEL STATE THEIR APPEARANCE, BEGINNING WITH THE PLAINTIFF.

MS. WILLIAMS: GOOD MORNING, YOUR HONOR CHERYL WILLIAMS ON BEHALF OF PLAINTIFF, PAUMA.

THE COURT: THANK YOU.

MR. COCHRANE: GOOD MORNING. KEVIN COCHRANE ALSO ON BEHALF OF THE PLAINTIFF, PAUMA BAND OF MISSION INDIANS.

MS. LAIRD: GOOD MORNING. MICHELLE LAIRD ON BEHALF OF THE STATE DEFENDANTS.

MR. HOUSTON: GOOD MORNING, YOUR HONOR. NEIL HOUSTON ON BEHALF OF THE STATE DEFENDANTS.

THE COURT: THANK YOU.

GOOD MORNING. WE'RE HERE TO TALK ABOUT THE ORDER WITH REGARD TO ANY RETURN OF FUNDS PAID BY THE PLAINTIFFS TO THE DEFENDANTS UNDER THE 2004 COMPACT THAT THE COURT FOUND NOT ENFORCEABLE IN THIS CASE AND RETURNED THE PARTIES TO THEIR POSITION UNDER THE 1999 COMPACT. AND I HAD HOPED YOU WERE GOING TO WORK THIS OUT. IT SEEMED LIKE A MATH ISSUE TO ME, BUT A WHOLE BUNCH OF OTHER ISSUES GOT RAISED IN THE INTERIM.

AND I WANT TO JUST GIVE THE STATE AN OPPORTUNITY, [4] WELL, BOTH PARTIES AN OPPORTUNITY TO ADDRESS THIS QUESTION OF THE ELEVENTH AMENDMENT SOVEREIGN IMMUNITY ISSUE. I DON'T ACCEPT THAT ARGUMENT. THERE IS A WAIVER OF SOVEREIGN IMMUNITY IN THE COMPACT, THE 1999 COMPACT, BETWEEN THE PARTIES. IT ALLOWS FOR

LAWSUITS BETWEEN THE PARTIES FOR SPECIFIC PERFORMANCE, INJUNCTIVE RELIEFS, THE ENFORCEMENT OF A PROVISION OF THE COMPACT REQUIRING PAYMENT OF MONEY TO ONE OR ANOTHER OF THE PARTIES FOR DECLARATORY RELIEF.

UNDER THOSE PROVISIONS, I THINK THE ISSUE THAT IS BEFORE THE COURT HERE IS ONE WHERE THE COURT HAS FOUND THAT THE 1999 COMPACT IS THE APPROPRIATE PROVISIONS BETWEEN THE PARTIES, AND AS A CONSEQUENCE, THE TRIBE HAS OVERPAID AND IS ENTITLED TO GET THE PROPERTY BACK THAT THEY GAVE THE STATE UNNECESSARILY TO HAVE THEIR GAMING MACHINES. AND I DON'T THINK IT'S MONEY DAMAGES IN THE SENSE THAT THEY'RE OUTSIDE OF THE ENFORCEMENT OF THE COMPACT.

THE STATE HAS ALSO REFERENCED THE GOVERNMENT CODE SECTION THAT SAYS THAT SOVEREIGN IMMUNITY IS WAIVED SOLELY AS TO ACTIONS ASSERTING CAUSES OF ACTION ARISING FROM THE STATE'S ALLEGED VIOLATIONS OF THE TERMS OF THE CONTRACT. THAT'S EXACTLY WHAT HAPPENED HERE. THE STATE DID NOT PROPERLY DETERMINE THE NUMBER OF LICENSES AVAILABLE. THEY WERE ENTITLED TO LICENSES UNDER THE '99 COMPACT. THERE WAS LICENSES AVAILABLE. THEY SHOULD HAVE GOTTEN THEM UNDER THE

TERMS OF THAT COMPACT. IT WAS A VIOLATION, AND THE MONEY SHOULD BE [5] RETURNED.

SO IT ALSO SEEMS KIND OF ODD BECAUSE IT'S BEING RAISED NOW FOR THE FIRST TIME. IT ISN'T EVEN IN YOUR ANSWER. SO I'LL LET YOU PUT WHATEVER ELSE YOU WANT ON THE RECORD ABOUT IT, BUT THE COURT IS NOT GOING TO BAR THIS RECOVERY BASED ON SOVEREIGN IMMUNITY AND THE ELEVENTH AMENDMENT. SO GO AHEAD, AND I'LL LET THE STATE PUT WHATEVER ELSE THEY WANT TO ON THE RECORD.

MS. LAIRD: VERY WELL, YOUR HONOR. YOU FIRST INDICATED IT'S THE COMPACT LANGUAGE ITSELF IN SECTION 9.4 THAT PROVIDES THE WAIVER FOR THE REMEDY THAT THE COURT IS CONSIDERING HERE, WHICH IS RESTITUTION. AND, YOU KNOW, I DON'T KNOW, I THINK WE OBVIOUSLY DISAGREE ABOUT THE MEANING OF THAT LANGUAGE.

THE WAY WE READ IT IS THAT NO CLAIM OR AWARD OF MONETARY DAMAGES CAN RESULT FROM ANY CLAIM BROUGHT BY EITHER SIDE, NO MATTER HOW IT'S LABELED. IT'S A PAYMENT OF MONEY FROM THE STATE TREASURY, IT CONSTITUTES A MONETARY DAMAGE FROM THE STATE – YOU KNOW, MONETARY DAMAGES UNDER THE TERMS OF THE COMPACT. AND THAT IS AFFIRMED IN THE *EDELMAN* DECISION, WHICH WE CITED TO COURT, IN WHICH THE

COURT SAID THAT EQUITABLE RESTITUTION IS THE SAME AS A REQUEST FOR MONEY DAMAGES IN TERMS OF A STATE SOVEREIGN IMMUNITY.

THERE IS ALSO A BRAND NEW DECISION OUT OF THE NINTH CIRCUIT, WHICH I WOULD LIKE TO BRING THE COURT'S ATTENTION TO WHICH AFFIRMS *EDELMAN*, OR AT LEAST APPLIES *EDELMAN*. IT'S [6] CALLED *NORTHEAST MEDICAL SERVICES, INC. V. CALIFORNIA DEPARTMENT OF HEALTHCARE SERVICES*. AND YOU CAN FIND THAT AT 712 F.3D 461. IN THAT CASE, THE COURT AGREES THAT *EDELMAN* SAYS THAT THE ELEVENTH AMENDMENT BARS THE MONETARY AWARD EVEN TO COMPENSATE A LOSS RESULTING FROM AN ALLEGED VIOLATION OF FEDERAL LAW.

AND IN THIS CASE, IT WAS A REQUEST FOR A CLAIM FOR RESTITUTION, WHICH, AGAIN, THE COURT SAID IS THE SAME THING. AND IT SETS OUT A COUPLE OF EXCEPTIONS TO THAT RULE HERE, SUCH AS WHEN A COURT IS – WHEN THE STATE IS HOLDING PROPERTY FOR THE BENEFIT OF A PARTY. FOR EXAMPLE, I THINK IN CASES WHERE THE CONTROLLER'S OFFICE WILL HOLD FUNDS IN A BANK ACCOUNT THAT HAS BEEN CLOSED, FOR EXAMPLE, THAT MONEY, YOU KNOW, ALSO WAS THE PROPERTY OF THE CLAIMANT. IT NEVER ISSUED TO THE STATE. SO IN THOSE LIMITED CIRCUMSTANCES,

A COURT WOULD FIND THE EXCEPTION TO THE RULE THAT I'M REFERRING TO.

BUT EVEN IN A CASE WHERE A COURT WRONGFULLY WITHHELD TAXES, A CLAIMANT CANNOT OVERRIDE THE STATE'S IMMUNITY FOR A REFUND IN RESTITUTION OF THOSE TAX PAYMENTS.

THE COURT: I UNDERSTAND THAT. I READ THE *EDELMAN* CASE, AND IT ALSO SITES TO, I BELIEVE IT'S THE *FORD* CASE, THE TREASURY CASE. BUT IN NONE OF THOSE CASES WAS THERE A CONTRACT BETWEEN THE PARTIES TO WAIVE SOVEREIGN IMMUNITY. THOSE WERE MATTERS, *EDELMAN*, IN PARTICULAR, WAS AN INDIVIDUAL WHO SUED A STATE REPRESENTATIVE ON BEHALF OF, I BELIEVE IT WAS A HEALTH [7] SERVICES, SOMETHING TO DO WITH DISABILITY PAYMENTS, SAYING THAT THEY HAD APPLIED IT WRONGLY, AND THE COURT FOUND, THE SUPREME COURT, FOUND IT APPROPRIATE TO GIVE PROSPECTIVE RELIEF, TO SAY THAT IN THE FUTURE, THEY HAVE TO OPERATE IN A CERTAIN WAY THAT WOULD AFFORD THESE PEOPLE THE BENEFITS THEY WEREN'T GETTING, BUT THE STATE HAD NOT AGREED TO BE SUED.

AND THE STATE WAS THE REAL PARTY IN INTEREST BECAUSE THE MONEY WAS COMING FROM THE STATE. AND THAT'S ALL WELL AND GOOD, BECAUSE THE STATE WAS SORT OF AN

INDIRECT PARTY TO THAT CASE. THEY HAD NOT AGREED TO BE SUED, THEY HAD NO CONTRACT WITH THIS INDIVIDUAL. THE SAME THING WOULD APPLY IN THE TAX REFUND CASES.

HERE, THE TWO PARTIES AT ISSUE IN THE CASE, THE STATE AND THE TRIBE, ENTERED INTO A VERY SPECIFIC AGREEMENT TO HAVE THESE COMPACTS AND WAIVED IN THAT AGREEMENT, IT'S A LIMITED WAIVER, BUT IT'S A WAIVER OF SOVEREIGN IMMUNITY. AND IF THE TRIBE WAS LOOKING TO, SAY, GET DAMAGES CONSEQUENTIAL OR INCIDENTAL DAMAGES BECAUSE THEY WEREN'T ABLE TO GO FORWARD WITH THEIR CONTRACTS TO BUILD THIS LARGER CASINO, I WOULD SAY, YES, THE LIMITED WAIVER HERE WOULD NOT ALLOW FOR THAT SORT OF MONETARY DAMAGE AWARD, SOME KIND OF CONSEQUENTIAL DAMAGE.

BUT WHETHER IT'S CALLED RESTITUTION OR SPECIFIC PERFORMANCE HERE, THE MONEY WAS COLLECTED PURSUANT TO THIS CONTRACT, AND IT WAS OVER-COLLECTED BECAUSE IT WAS MISINTERPRETED, WHICH RESULTED IN THE ENTERING OF THE 2004 [8] COMPACT. IT'S ALL WELL WITHIN THE TERMS OF THE AGREEMENTS BETWEEN THE PARTIES TO ALLOW FOR THESE GAMING MACHINES TO PAY MONEY IN RESPONSE TO THEM. AND I DON'T SEE IT AS MONETARY DAMAGES AND EXEMPT FROM THE WAIVER HERE.

AND THE CASES, WHILE I UNDERSTAND THESE ARE LIMITED WAIVERS, I DON'T THINK THE CIRCUMSTANCES OF THOSE CASES, AND I DON'T KNOW THE CIRCUMSTANCES OF THIS CURRENT NINTH CIRCUIT CASE, BUT IF, FACTUALLY, YOU CAN TELL ME THEY HAD A CONTRACT WITH A LIMITED WAIVER OF IMMUNITY AND SOMEHOW THE COURT FOUND THAT THE DAMAGES THERE WEREN'T COVERED, I WOULD BE MORE INTERESTED TO READ IT. I'M SUSPECTING IT'S MORE ALONG THE LINES OF *EDELMAN* AND *JORDAN* WHERE THE MONEY IS COMING FROM THE STATE TO PAY SOMETHING COMING OUT OF THE HEALTH AND HUMAN SERVICES DEPARTMENT.

MS. LAIRD: THE MONEY WAS PAID – EXCUSE ME, YOUR HONOR. THE MONEY WAS PAID BY NORTHEAST MEDICAL SERVICES TO THE STATE, AND THEY WERE SEEKING, IN ESSENCE, A REFUND FROM THE STATE. AND IN THOSE CIRCUMSTANCES, THE COURT SAID THAT THEY'RE NOT ENTITLED BECAUSE IT'S MONEY THAT IS NOW IN THE STATE TREASURY.

THE COURT: RIGHT.

MS. LAIRD: AND I THINK WHAT THIS KIND OF BOILS DOWN TO IN OUR DISCUSSION HERE IS A DIFFERENCE OF OPINION AS TO HOW YOU READ THE LIMITED WAIVER IN SECTION 9.4. WE READ MONETARY DAMAGES TO MEAN ANY KIND OF MONEY PAYMENT FROM THE

STATE TO THE [9] TRIBE. AND I THINK THAT'S – THAT FOLLOWS, YOU KNOW, HOW *EDELMAN* VIEWS MONETARY DAMAGES BECAUSE RESTITUTION IS THE SAME THING.

AND SPECIFIC PERFORMANCE, MY UNDERSTANDING OF SPECIFIC PERFORMANCE IN CONTRACT LAW IS THAT THAT MEANS SPECIFIC PERFORMANCE IS THAT THE PARTIES MUST COMPLY WITH A TERM THAT THEY AGREED TO, ONE OF THEIR PROMISES IN THE CONTRACT. SPECIFIC PERFORMANCE DOESN'T MEAN A PAYMENT OF ANYTHING THAT'S NOT REQUIRED UNDER THE CONTRACT THAT THE PARTIES ARE PARTIES TO. YOU KNOW WHAT I'M SAYING? SO –

THE COURT: BUT IT WOULD BE RATHER ONE-SIDED TO SAY THAT THE STATE WOULD BE ENTITLED TO SPECIFIC PERFORMANCE THAT THE TRIBE WOULD HAVE TO PAY, INCLUDING THE ENFORCEMENT OF A PROVISION OF THE CONTRACT REQUIRING PAYMENT OF MONEY. SO THIS LIMITED WAIVER, IT CERTAINLY DISCUSSES MONEY BEING PART OF THE WAIVER. AND THE FACT THAT MONEY IS CHANGING HANDS HERE DOESN'T MAKE IT MONETARY DAMAGES NECESSARILY.

AND SO IF THERE WAS AN OVERPAYMENT BECAUSE THE STATE WRONGLY INTERPRETED THE CONTRACT AND THEY PAID EXTRA MONEY, IT WOULD SEEM INHERENTLY UNFAIR, WELL, OH, WELL, WE GET TO KEEP THAT. WHEREAS, IF

YOU HAD UNDER-INTERPRETED AND THEY OWED YOU MONEY, YOU WOULD BE ABLE TO SEEK ENFORCEMENT OF THE SUBSEQUENT PAYMENT TO YOU.

MS. LAIRD: WELL, A COUPLE POINTS ON THAT. IT WAS UNFAIR IN *EDELMAN*, AND IT WAS PROBABLY UNFAIR IN THIS CASE AS [10] WELL, BUT THAT WASN'T ENOUGH FOR THE COURT TO OVERRIDE THE STATE'S SOVEREIGN IMMUNITY. AND THE LIMITED WAIVER IN SECTION 9.4, IT'S A MUTUAL LIMITED WAIVER, SO IT DOES GO BOTH WAYS. AND THE LANGUAGE SPECIFICALLY SAYS IN §§(A)(2) THAT SPECIFIC PERFORMANCE CAN REQUIRE THE PAYMENT OF MONEY TO ONE OR ANOTHER OF THE PARTIES UNDER – HOWEVER UNDER A PROVISION OF THE COMPACT.

WHAT THE COURT IS TALKING ABOUT DOING IS A REFUND OF MONEY THAT WAS PAID UNDER THE COMPACT. IT'S NOT REQUIRED TO BE PAID UNDER THE TERMS OF THE COMPACT. AND I THINK THAT'S WHERE – WHERE, PERHAPS, WE'RE HAVING AN ARGUMENT.

THE COURT: THAT'S WHERE WE'RE HAVING A DISAGREEMENT. I THINK IN ENFORCING THE 1999 COMPACT AS TO WHAT THEY OWED YOU, THE PAYMENT OF MONEY FROM ONE TO THE OTHER IN THIS CASE, FROM THE STATE BACK TO THE TRIBE, BECAUSE THEY OVERPAID IS COVERED UNDER THIS WAIVER.

AND I SUPPOSE IF IT GOES THAT FAR, THE NINTH CIRCUIT OR SUPREME COURT CAN TELL ME, NO. BUT I DO THINK IT'S DISTINGUISHABLE FROM CASES WHERE THERE IS NO CONTRACT, THERE IS NO LIMITED WAIVER.

AND, YES, INEQUITABLE AND UNFORTUNATE THINGS HAPPEN. PEOPLE PAY MONEY TO STATES OR DON'T GET MONEY FROM SERVICES STATES PROVIDE, BUT WITHOUT THE STATE HAVING CONTRACTED TO ALLOW FOR THE WAIVER OF THEIR IMMUNITY, THAT IS THE RESULT. HERE, I THINK THE WAIVER COVERS THE SPECIFICS OF THIS CASE.

SO I'D LIKE TO PROCEED FROM THAT. I DON'T KNOW IF YOU [11] WANT TO ADD ANYTHING OR PUT ANYTHING ON THE RECORD. I'LL CERTAINLY GIVE YOU AN OPPORTUNITY AT THIS TIME ON THIS IMMUNITY ISSUE.

MS. WILLIAMS: WELL, WE ABSOLUTELY AGREE WITH YOUR INTERPRETATION OF THE COMPACT SECTION, AND WE DON'T WANT TO ARGUE AGAINST OURSELVES.

THE COURT: OKAY.

MS. WILLIAMS: BUT I JUST WANTED TO POINT OUT THAT GOVERNMENT CODE §98005 IS A BROAD WAIVER, AND IT'S NOT LIMITED TO ANY SPECIFIC REMEDY, AND IT WAS ENACTED TWO YEARS BEFORE THE COMPACT WAS, BEFORE THE COMPACT WAS EXECUTED. AND THE

COMPACT DOES SAY IT WAIVES WHATEVER IMMUNITY THE PARTIES MAY HAVE, AND I ASSUME THAT MEANS, INCLUDES REMAINING AFTER APPLICATION OF THE GOVERNMENT CODE SECTION.

ALSO WITH RESPECT TO THE *EDELMAN* CASE, THAT CASE WAS – THE IMMUNITY ISSUE THERE WAS SPECIFICALLY ABROGATED BY *WISCONSIN DEPARTMENT OF CORRECTIONS V. SCHACHT*, 524 U.S. 381 AND THE *HILL* CASE CITED IN OUR BRIEFS, AND BOTH OF THOSE SAYING THAT THE DEFENSE IS WAIVABLE, AND THAT WE, OF COURSE, WERE SAYING THAT THAT HAS BEEN DONE HERE.

THE COURT: OKAY. AND I SUPPOSE, I THINK IT'S A DEFENSE THAT NEEDS TO BE RAISED EXPLICITLY, AND THERE IS NO AFFIRMATIVE DEFENSE IN THE ANSWER THAT THE COURT SAW WHERE THE ELEVENTH AMENDMENT WAS ASSERTED THERE. THERE ARE FAILURE TO STATE A CLAIM AND LACK OF SUBJECT MATTER JURISDICTION, BUT THAT [12] REALLY DOES NOT PUT THE TRIBE ON NOTICE THAT YOU'RE RAISING AN ELEVENTH AMENDMENT CLAIM OF SOVEREIGN IMMUNITY HERE.

MS. LAIRD: YOUR HONOR, YOU RAISED AN ISSUE WHEN YOU MENTIONED GOVERNMENT CODE SECTION 98005 REGARDING THE PROVISION THAT ALLOWS A CAUSE OF ACTION ARISING FROM THE STATE'S VIOLATION OF THE

TERMS OF A TRIBAL STATE COMPACT. FIRST OF ALL, THIS IS NOT AN ACTION FOR VIOLATION OF THE '99 COMPACT. WHEN PAUMA CAME TO THIS COURT AND FILED THEIR COMPLAINT, THEY WERE A PARTY TO THE 2004 COMPACT, NOT THE '99 COMPACT. AND REMEMBER, THE 2004 COMPACT DOESN'T HAVE THE LICENSE POOL IN IT, AND THE STATE WAS NOT – IT WAS NOT CLAIMED THAT THE STATE HAD VIOLATED THE 2004 COMPACT, NOR COULD THE TRIBE HAVE SAID THE STATE VIOLATED THE '99 COMPACT BECAUSE THEY WEREN'T A PARTY TO IT AT THE TIME. SO I DON'T THINK THE VIOLATION PROVISION OF SECTION 98005 PROVIDES THE WAIVER THAT THE COURT HAS FOUND HERE.

IN ADDITION, THERE IS LANGUAGE IN SECTION 9.4, AGAIN AT §§(C) WHICH SAYS THAT "EXCEPT AS STATED HEREIN OR ELSEWHERE IN THIS COMPACT, NO OTHER WAIVERS FOR CONSENTS TO BE SUED, EITHER EXPRESS OR IMPLIED, ARE GRANTED BY EITHER PARTY."

NOW I READ THAT TO MEAN THAT THE ONLY WAIVER, THE ONLY LIMITED MUTUAL WAIVER IS THAT SET FORTH IN THE COMPACT. IT EXCLUDES 98005 THEN BECAUSE NO OTHER WAIVERS ARE RECOGNIZED, OTHER THAN THE ONE THAT IS IN THE COMPACT ITSELF. SO I THINK FOR THOSE TWO REASONS WHATEVER WAIVER IS PROVIDED IN 98005 DOES [13] NOT APPLY TO THE FACTS HERE.

AND SPEAKING TO THE ISSUE – LET ME JUMP TO THE ISSUE OF WAIVER IN GENERAL, BECAUSE YOU ALSO MENTIONED THAT TOWARD THE END OF YOUR OPENING REMARKS. ACTUALLY, I ACTUALLY INTERPRET THE EXISTENCE OF THE WAIVER IN THE CONTRACT THE OPPOSITE TO HOW THE COURT DOES, SO I THINK THAT IT'S ASSERTED BY VIRTUE OF THE COMPACT. THE IMMUNITY IS ASSERTED BY VIRTUE OF THE COMPACT, AND NO CONDUCT THAT THE STATE ENGAGES IN IN THE CONTEXT OF LITIGATION CAN WAIVE THE TERMS THAT PARTIES AGREE TO IN THIS COMPACT. SO THAT IN AND OF ITSELF – THIS IS THE ASSERTION RIGHT HERE OF THE IMMUNITY.

AND WITH RESPECT TO THE STATE'S ANSWER, THE ORIGINAL ANSWER INCLUDED AN AFFIRMATIVE DEFENSE RAISING SUBJECT MATTER JURISDICTION. AND COURTS STILL DO TALK ABOUT ELEVENTH AMENDMENT IMMUNITY, BOTH IN TERMS OF BEING SUBJECT MATTER JURISDICTION AND AS AN AFFIRMATIVE DEFENSE. SO IT'S NOT NECESSARILY – NOT AN INDICATION THAT THE STATE IS RAISING ITS SOVEREIGN IMMUNITY BY SAYING IT'S SUBJECT MATTER JURISDICTION. BUT THERE WAS A SUBSEQUENT FIRST AMENDMENT COMPLAINT, AND THE STATE FILED AN ANSWER TO THAT. AND IN THERE, WE DID SPELL OUT THE SOVEREIGN IMMUNITY DEFENSE. BUT –

THE COURT: DO YOU HAVE A DOCKET NUMBER FOR THAT? BECAUSE I DIDN'T FIND IT. I WILL LOOK FOR IT, BUT . . .

MS. LAIRD: IT WAS LATE IN THE CASE. I'M GOING TO SAY TOWARD THE END OF THE 2010, OR, NO, THE END OF 2011.

[14] THE COURT: AND THAT'S THE ANSWER I LOOKED AT.

MS. LAIRD: HOWEVER, THE STATE FAR BEFORE THAT RAISED THEIR IMMUNITY TO AWARD OF DAMAGES IN OPPOSITION TO THE TRIBE'S FIRST MOTION FOR SUMMARY JUDGMENT, WHEN PAUMA BASICALLY LAID OUT ON THE TABLE THAT THEY WERE SEEKING RESTITUTION OF THE HEIGHTENED PAYMENTS THEY WERE PAYING UNDER THE 2004 COMPACT, THE STATE, YOU KNOW, INCLUDED AN ARGUMENT IN THERE RAISING *EDELMAN V. JORDAN* CLAIMING THAT THEY WEREN'T ENTITLED TO IT BECAUSE OF THE TERMS OF THE COMPACT. AND BEFORE THAT, IN PAUMA'S OWN MOTION FOR PRELIMINARY INJUNCTION, FILED ONLY MONTHS INTO THE CASE, THEY THEMSELVES CONCEDED THAT THEY WERE NOT ENTITLED TO DAMAGES.

AND HERE'S WHAT THEY SAY SPECIFICALLY, THIS WAS FILED FEBRUARY 2010. AT PAGE 10 OF PAUMA'S MOTION, THEY SAY QUOTE "THE STATE ENJOYS SOVEREIGN IMMUNITY FROM SUIT. WHILE THE 2004 COMPACT WEIGHS SOVEREIGN IMMUNITY FOR PAUMA'S CLAIMS

ARISING FROM THE COMPACT, IT SPECIFICALLY EXEMPTS ANY CLAIMS FOR DAMAGES OR COMPENSATORY RELIEF." AND THEY MADE THAT ADMISSION TO MEET THE STANDARD FOR ISSUANCE OF INJUNCTION, ASSERTING THAT IT WOULD BE IRREPARABLY HARMED AND THAT THE REMEDY LAWS WERE INADEQUATE PRECISELY BECAUSE THEY WOULD BE UNABLE TO RECOVER THE MONEYS PAID TO THE STATE DUE TO ITS IMMUNITY.

THIS MEANS TWO THINGS. THEY'RE NOW JUDICIALLY ESTOPPED FROM CLAIMING WAIVER OF IMMUNITY WHEN THEY CONCEDED AND RELIED ON THE VERY EXISTENCE OF THAT IMMUNITY IN THEIR OWN [15] MOTION IN THIS COURT TO ITS BENEFIT BECAUSE THE PRELIMINARY WAS, INDEED, ISSUED. BUT, SECONDLY, IT HIGHLIGHTS THAT THERE'S REALLY AT THAT POINT –

THE COURT: NONE OF THIS WAS IN YOUR PAPERS, JUST TO BE CLEAR, BECAUSE I DON'T KNOW THAT THEY'RE GOING TO BE PREPARED TO RESPOND TO WHETHER OR NOT THEY MADE A REPRESENTATION. THEY DIDN'T MAKE THAT REPRESENTATION TO ME. I'M NOT SAYING IT DOESN'T COUNT BECAUSE IT WAS MADE TO JUDGE BURNS, BUT, OBVIOUSLY, I DIDN'T HEAR THAT CASE AND – OKAY. SO YOU'VE GOT YOUR ANSWER. DOCUMENT 191,

FILED AUGUST 3RD, 2012. AFFIRMATIVE DEFENSE 3 IS YOUR SOVEREIGN IMMUNITY CLAIM. SO IT IS IN YOUR AMENDED ANSWER.

MS. LAIRD: SO BASICALLY –

THE COURT: BUT THAT WOULD HAVE BEEN USEFUL FOR ME TO HAVE IN YOUR PAPERS, BECAUSE TO THE EXTENT THAT THEY MAY HAVE ACKNOWLEDGED EARLIER THAT THERE WAS NO RECOVERY HERE OF MONETARY DAMAGES AND TOOK THAT POSITION TO GET INJUNCTIVE RELIEF, THAT WOULD WEIGH MORE HEAVILY IN THE COURT'S INTERPRETATION OF THE CONTRACT NOW THAN JUST READING THE CONTRACT COLD AND BASED ON THE CASE LAW THAT YOU PROVIDED, WHICH I THINK IS DISTINGUISHABLE FROM THIS SET OF CIRCUMSTANCES –

MS. LAIRD: SURE.

THE COURT: – SO IT'S A LITTLE BIT NOT FAIR, GETTING BACK TO THAT NASTY WORD, FOR YOU TO PULL THAT ONE OUT TODAY.

[16] MS. LAIRD: THE THING IS, WE RAISED THE IMMUNITY, YOU KNOW, BECAUSE WE RAISED IT IN OPPOSITION TO EACH OF THE THREE MOTIONS FOR SUMMARY JUDGMENT, AND BECAUSE THE FIRST TWO WEREN'T HEARD, WE DIDN'T GET A RULING ON IT. IN THE THIRD ONE, YOUR HONOR ISSUED A LENGTHY DECISION, BUT IT DID NOT ADDRESS OUR

CLAIM THAT THE TRIBE WAS NOT ENTITLED TO RESTITUTION. SO IT'S KIND OF BEEN HANGING OUT THERE, AND SO THAT'S WHY WE INCLUDED IT ONCE AGAIN IN THE COURT'S REQUEST THAT WE FILE A PROPOSAL AS TO THE FORM OF RESTITUTION.

WE INCLUDED IT IN THERE. OF COURSE, WE DIDN'T GET INTO ISSUES OF WAIVER BECAUSE WE DIDN'T FEEL THAT WE WAIVED. AND WHEN THE COURT PROVIDED PAUMA AN OPPORTUNITY TO RESPOND TO THAT, THAT'S WHEN ALL THESE ISSUES IN MANY WAYS THAT PAUMA BELIEVES THAT THE COURT WAIVED – THAT THE STATE WAIVED SOVEREIGN IMMUNITY CAME UP. SO THAT'S WHY THESE ISSUES ARE BEING PRESENTED TO YOU, AND I'M TRYING TO MAKE THE RECORD HERE AND HOPEFULLY PROVIDING YOU WITH THE INFORMATION THAT YOU NEED TO MAKE YOUR FINAL DECISION ON THIS.

ONE MORE PLACE IN WHICH THE STATE ASSERTED ITS SOVEREIGN IMMUNITY WAS AFTER JUDGE BURNS ISSUED THE PRELIMINARY INJUNCTION. BUT BASICALLY GOING BACK TO THAT POINT IN TIME, IN EARLY 2010, THE PARTIES ARE BASICALLY ON THE SAME PAGE. PAUMA IS CONCEDING THAT THE STATE HAS IMMUNITY FROM PAYING DAMAGES. THERE IS NO REASON FOR US TO SAY, HEY, IMMUNITY, BECAUSE CLEARLY, THERE IS NO ARGUMENT THAT THE STATE HAS IMMUNITY TO [17] PAY.

JUDGE BURNS ISSUED THE PRELIMINARY INJUNCTION IN FAVOR OF PAUMA, AND THE STATE APPEALED. A DAY OR TWO LATER, THE STATE ASKED JUDGE BURNS TO EITHER TEMPORARILY STAY THE OPERATION OF THE PRELIMINARY INJUNCTION OR TO STAY IT UNTIL THE NINTH CIRCUIT FINALLY DETERMINED THE APPEAL. AND IN THERE, THE STATE, CITING TO, AGAIN, THE LIMITED MUTUAL WAIVER IN SECTION 9.4 SAID QUOTE, "ALTHOUGH PAUMA IS BARRED FROM SEEKING DAMAGES AGAINST THE STATE, ITS 2004 COMPACT PERMITS A COURT OF COMPETENT JURISDICTION TO ISSUE OTHER CORRECTIVE RELIEF IN THE FORM OF SPECIFIC PERFORMANCE INJUNCTIVE AND DECLARATORY RELIEFS."

SO AGAIN, IT WAS RAISED EARLY ON. THERE IS NO WAIVER IN TERMS OF, YOU KNOW, WHAT PAUMA IS CLAIMING OUR PARTICIPATION IS IN THE LITIGATION. WE'RE EITHER ON THE SAME PAGE OR WE'RE ASSERTING IT EARLY ON IN THE CASE. SO THAT'S OUR RESPONSE TO ANY CLAIM THAT THE STATE HAS WAIVED ITS IMMUNITY BY PARTICIPATING IN THE LITIGATION AND ALLEGEDLY NOT RAISING IT IN TIME.

THE COURT: I READ ALL THE MOTION PAPERS ON THE INJUNCTION, AND I READ JUDGE BURNS' ORDER, AND DESPITE WHAT YOU'RE INDICATING WAS SAID IN THE PAPERS THAT THEY DIDN'T THINK THEY COULD COLLECT A RESTITUTION NOW, IN HIS ORDER,

JUDGE BURNS WROTE AT PAGE 1, LINE 17 THROUGH 19, "IF, AS IT APPEARS LIKELY, PAUMA PREVAILS, THE STATE WOULD BE REQUIRED TO MAKE RESTITUTION [18] SO THE LARGER PAYMENTS WOULD ULTIMATELY NOT BENEFIT IT, RESULTING IN A DEADWEIGHT LOSS." I'M NOT EXACTLY SURE WHAT HE MEANT BY THAT, BUT HE CERTAINLY INDICATED WHERE HE WAS HEADED AT THE TIME WAS THAT IF THEY COULD ESTABLISH THERE WAS – THE CAUSE OF ACTION OF EITHER THE NEGLIGENT OR THE MISTAKE THAT LED TO THE ENTERING INTO THE 2004 COMPACT AND EVERYTHING REVERTED TO THE TERMS OF THE '99 COMPACT, HE ANTICIPATED RESTITUTION OF THOSE LARGER PAYMENTS.

MS. LAIRD: HE SAID IT WAS LIKELY. IT'S DICTA. IT'S NOT A FINDING THAT WAS REQUIRED IN ORDER TO ISSUE THE PRELIMINARY INJUNCTION. AND, AGAIN, HE IS NOW DISAGREEING WITH PAUMA AS TO WHAT REMEDY THEY'RE ENTITLED TO, SO I DON'T KNOW WHAT WEIGHT REALLY THAT CARRIES. IT WAS NOT A FINAL FINDING THAT THE STATE WAS GOING TO PAY RESTITUTION TO THE TRIBE.

IN RESPONSE TO THAT, HE STAYED THE CASE, SO THERE WERE NO FURTHER PROCEEDINGS BEFORE HIM, AND IT WENT UP ON THE PRELIMINARY INJUNCTION AS TO THE ISSUE OF WHETHER JUDGE BURNS PROPERLY APPLIED THE *WINTER* TEST TO THE FACT. IT WAS

REMANDED, AND, OF COURSE, THE CASE WAS REASSIGNED.

THE COURT: ALL RIGHT. NOW DO YOU WANT TO PUT SOMETHING ON THE RECORD? BECAUSE THEY'VE RAISED SOME ADDITIONAL POINTS.

MR. COCHRANE: SURE. I MEAN, THERE'S A LOT TO RESPOND TO. I'M NOT SURE I'M GOING TO BE ABLE TO COVER IT ALL. IT SEEMS LIKE A BIG POINT WAS THIS JUDICIAL ESTOPPEL ARGUMENT, [19] WHICH, IN TURN, JUST KIND OF TURNS ON THE DISTINCTION BETWEEN DAMAGES AND RESTITUTION, WHICH WE THINK NEEDS TO BE CLEARED UP JUST A LITTLE BIT. WE DID MENTION SOME OF THESE CASES IN OUR RESTITUTION BRIEF.

WE OBVIOUSLY, DUE TO SPACE LIMITATIONS, WEREN'T ABLE TO SPELL OUT WHAT THE RELEVANT LANGUAGE WAS THAT SHOW THAT DAMAGES AND RESTITUTION DIFFER ELEMENTALLY, BUT THIS IS THE CONCEPTION THAT WE'VE HAD SINCE WE FILED THE ORIGINAL CLAIM, WHICH MENTIONS IN PARAGRAPH 7 TO THE PRAYER FOR RELIEF THAT WE SPECIFICALLY WANTED RESTITUTION OF THE AMOUNTS THAT WE PAID. IF YOU TAKE A LOOK AT *UNITED STATES V. BALISTRERI*, 981 F.2D 916, 928, IT'S A SEVENTH CIRCUIT CASE, IT SAYS "THE WORD DAMAGES HAS A COMMONLY UNDERSTOOD

MEANING. IT GENERALLY CONNOTES A PAYMENT OF MONEY FOR PLAINTIFF'S LOSSES CAUSED BY A DEFENDANT'S BREACH OF DUTY AND IS SOMETHING DIFFERENT FROM EQUITABLE RESTITUTION."

THERE'S ANOTHER CASE OUT OF THE SOUTHERN DISTRICT OF NEW YORK WHERE IT'S QUOTING DOBBS LAW OF REMEDY –

(COURT REPORTER INTERRUPTION.)

MR. COCHRANE: I'M SORRY.

THERE'S ANOTHER CASE CALLED THE *UNITED STATES V. TAYLOR* OUT OF THE SOUTHERN DISTRICT OF NEW YORK, AND IT SAYS IN SHORT "RESTITUTION IT [sic] NOT DAMAGES. RESTITUTION IS A RESTORATION REQUIRED TO PREVENT UNJUST ENRICHMENT." SO BECAUSE OF THAT, RESTITUTION AND DAMAGES DIFFER ELEMENTALLY FROM ONE [20] ANOTHER BY DEFINITION AND BY FUNCTION.

AND, YOU KNOW, WE HAVE ANOTHER PAGE OF CASES THAT RECOGNIZE THIS DISTINCTION, WHETHER IT'S FROM THE SUPREME COURT OR A CIRCUIT COURT. SO THERE MAY HAVE BEEN A STATEMENT IN OUR PRELIMINARY INJUNCTION BRIEF WHERE WE SAID THAT WE COULDN'T GET DAMAGES UNDER THE WAIVER OF THE '99 COMPACT. YOU KNOW, WE SAID THAT WITH THIS UNDERSTANDING IN MIND, THAT WE CAN STILL SEEK RESTITUTION BECAUSE

THOSE ARE TWO VERY SIMILAR CONCEPTS FROM ONE ANOTHER.

IN TERMS OF THE LITIGATION CONDUCT THAT HAPPENED IN THE CASE AND WHETHER OR NOT THAT WOULD PROVIDE A WAIVER, I THINK THERE'S SORT OF A LITTLE BIT OF INFERRING FROM ARGUMENTS THAT WERE MADE IN VARIOUS BRIEFS TO TRY TO DISCERN WHETHER OR NOT, YOU KNOW, THE AFFIRMATIVE DEFENSE HAD BEEN RAISED. WE THINK IT NEEDS TO BE RAISED MORE EXPLICITLY THAN THAT. AS WE ARGUED IN OUR BRIEF, IT WAS SOMETHING THAT WE RAISED WITH THE GOVERNOR'S OFFICE FOUR MONTHS BEFORE THE INCEPTION OF THE SUIT.

WE HAD MOTION TO DISMISS BRIEFING AND WE HAD MOTION FOR PRELIMINARY INJUNCTION PROCEEDINGS, WE HAD AN ENTIRE APPEAL, REQUEST FOR DISCOVERY. THERE WAS 19 MONTHS BEFORE THERE WAS ANY MENTION WHATSOEVER THAT THERE MIGHT BE A SOVEREIGN IMMUNITY CONCERN. AND THEN THE MOMENT THIS CASE GOT TRANSFERRED FROM JUDGE BURNS TO JUDGE BATTAGLIA AND IT LOOKED LIKE THERE WAS NEW LIFE IN THE CASE, ALL OF THAT WENT AWAY.

THERE WAS THE ADDITIONAL ANSWER AND TWO ADDITIONAL [21] MOTIONS TO DISMISS WHICH MADE NO MENTION OF SOVEREIGN IMMUNITY. AND IT ALL RELATES BACK TO THE

ORIGINAL ARGUMENT THAT THE STATE HAD THAT THE GOVERNMENT MADE IT CLEAR TO US BEFORE THIS CASE EVEN STARTED WAS THAT THEY WEREN'T GOING TO ARGUE SOVEREIGN IMMUNITY BECAUSE IF THEY ENDED UP LOSING ON THAT ISSUE THAT THEY WANTED IT TO BE A VEHICLE THAT WHICH IF THEY COULD ACTUALLY OBTAIN MONEY DAMAGES FROM THE TRIBE BASED UPON THE NET WIN OF THE MACHINES THEY OPERATED UNDER THE 2004 AMENDMENT.

AND NOW NOTHING HAS CHANGED. I MEAN, WE'VE SEEN IN THE STATE'S RESTITUTION PROPOSAL THAT THEY STILL WANTED THE NET WIN OFF THOSE MACHINES. SO, YOU KNOW, THE GAME PLAN HAS STAYED IN PLACE, AND IT WAS VERY MUCH A TACTICAL DECISION NOT TO RAISE THAT DEFENSE UNTIL QUOTE/UNQUOTE "THE HANDWRITING WAS ON THE WALL" IN JUDGE BURNS' LANGUAGE. SO I THINK THOSE WOULD BE THE TWO MOST IMPORTANT POINTS TO BRING UP AT THIS POINT.

THE COURT: ALL RIGHT, THANK YOU.

I WANT TO MOVE PAST THIS ISSUE, AND LET'S MOVE FORWARD WITH THE ASSUMPTION THAT THE COURT FINDS THAT THE SOVEREIGN IMMUNITY ISSUE DOES NOT APPLY HERE AND THAT THE RETURN OF FUNDS TO THE TRIBE IS APPROPRIATE UNDER THE COMPACT, THE LANGUAGE, THE WAIVER, AND IT'S PERFECT RELIEF

IN THIS CASE. AND THE DEFENDANTS SORT OF PUT IT OUT NICELY, THE OBJECTIVE HERE IS TO RETURN THE PARTIES AS NEARLY AS PRACTICABLE TO THE SITUATION IN WHICH THEY FOUND THEMSELVES BEFORE THEY MADE THE CONTRACT. AND THAT IS THE ENTIRE POINT OF THIS.

[22] WHEN THE TRIBE ASKED FOR ADDITIONAL LICENSES IN 2004, 2003 AND WERE TOLD THAT THERE WERE NO MORE LICENSES AVAILABLE BASED ON THE STATE'S INTERPRETATION OF THE '99 COMPACT AND THE NUMBER OF LICENSES AVAILABLE. THE COURT HAS FOUND THAT THAT WAS WRONG. THE APPELLATE COURT FOUND THAT THAT WAS WRONG. THIS COURT HAS ADOPTED THAT DECISION. IT WAS A WRONG ANALYSIS. IT WAS AN UNREASONABLE ANALYSIS, ACCORDING TO THE APPELLATE COURT, AND, THEREFORE, WE NEED TO PUT THE TRIBE BACK TO WHERE THEY WOULD HAVE BEEN WHEN THEY ASKED FOR THOSE ADDITIONAL LICENSES IN 2003, '4. AND THE NUMBER THEY ASKED FOR WAS WELL BELOW THE 2000 CAP THAT THEY WOULD HAVE BEEN ALLOWED UNDER THE LICENSE.

AND SO IT MAKES ENTIRE SENSE TO THE COURT TO LOOK AT THE ANALYSIS THAT WAS DONE FOR THE PRELIMINARY INJUNCTION WHERE THE TRIBE COMPARED WHAT THEY HAD PAID UNDER THE 2004 COMPACT, WHICH

THE COURT HAS VACATED AS UNENFORCEABLE HERE, AND WHAT THEY WOULD HAVE PAID UNDER THE 1999 COMPACT FOR THE YEARS LEADING UP TO THE INJUNCTION, AND THE DIFFERENCE IS THE MONEY THAT SHOULD BE RETURNED. I DON'T SEE ANY RELEVANCE TO THIS WHOLE ANALYSIS AS TO THE BENEFIT THEY GOT FROM THOSE GAMING MACHINES, BECAUSE THEY WOULD HAVE HAD THOSE GAMING MACHINES UNDER THE '99 COMPACT.

AND THERE WAS NO ENTITLEMENT TO OFFSET FOR THE NET WIN THEY GET FROM THEM. THEY HAD A FEE THEY HAD TO PAY, IT'S VERY STRAIGHTFORWARD, AND THEY OVERPAID, AND THEY SHOULD GET THE [23] MONEY BACK THAT THEY OVERPAID, THAT THEY WOULD NOT HAVE PAID UNDER THE '99 COMPACT.

THE CHART THAT WAS PROVIDED, EXHIBIT 2 TO PAUMA'S PROPOSAL, WHICH CAME FROM DR. WALKER IN THE PRELIMINARY INJUNCTION, SETS FORTH HIS ANALYSIS OF THE DIFFERENCES OF WHAT THEY WOULD HAVE PAID AND WHAT THEY DID PAY. AND IT'S NOT UP TO THE RELEVANT DATE, AND IT WOULD NEED TO BE BROUGHT FORWARD TO THE DATE OF THE ENTRY OF THE INJUNCTION, WHICH WAS OCTOBER -I'M SORRY, APRIL 12TH, 2010 FOR ANY PAYMENTS THAT WERE MADE BEYOND WHAT HE CALCULATED HERE. AND THAT'S THE WAY I WANT TO PROCEED.

I WANT A FINAL DECLARATION PROVIDED BY THIS INDIVIDUAL OR SOMEBODY WHO USES HIS UNDERLYING WORK TO GIVE ME THE AMOUNT THAT'S RELEVANT. AND WITH REGARD TO ANY INTEREST, I THINK THAT THE PRIME RATE IS AN APPROPRIATE INTEREST RATE IN THIS CASE. AND THAT'S A CALCULATION THAT IS EASILY DONE BY A FORENSIC ACCOUNTANT TO LOOK AT WHAT PRIME RATE WAS IN THE RELEVANT TIME PERIODS AND APPLY IT.

THE COURT WILL COMPOUND IT ANNUALLY. LARGELY BECAUSE OF THE DELAY IN BRINGING THE LAWSUIT, I THINK IT WOULD BE PUNITIVE PERHAPS TO DO SOMETHING MORE THAN AN ANNUAL COMPOUNDING, TO DO QUARTERLY OR SOMETHING. BUT THAT WOULD PUT YOU BACK TO THE VALUE OF WHAT THE MONEY WOULD HAVE BEEN HAD YOU HAD IT AND NOT PROVIDED IT WRONGFULLY TO THE STATE OR IMPROPERLY TO THE STATE.

[24] I DON'T WANT TO TALK ABOUT THIS OFFSETS FOR WINS. I DON'T THINK ANY OF THAT IS RELEVANT HERE. WE'RE NOT LOOKING AT THE 2004 CONTRACT. THEY WOULD HAVE AND SHOULD HAVE HAD THE MACHINES THAT THEY GOT UNDER THE 1999 AGREEMENT. THERE WERE PLENTY OF LICENSES AVAILABLE FOR THE NUMBER OF MACHINES THAT THE TRIBE REQUESTED, AND IT'S REASONABLE TO CONCLUDE THAT THEY WOULD HAVE GOTTEN THE MACHINES THEY REQUESTED IN THIS

TIMEFRAME, SO I REALLY WANT TO LIMIT THE DEFENDANTS' RESPONSE HERE TO WHAT'S WRONG WITH THIS ANALYSIS THAT WAS DONE BY DR. WALKER.

MS. LAIRD: I'M GOING TO LET MY CO-COUNSEL, MR. HOUSTON, ADDRESS THAT ISSUE.

THE COURT: OKAY.

MR. HOUSTON: YOUR HONOR, IF I MAY, I HAVE TO GO A LITTLE BIT DEEPER THAN THAT BECAUSE WHAT WE SEE HAPPENING HERE IS A MIXTURE OF TWO DIFFERENT REMEDIES, THE INTERLOCUTORY ORDER THAT IS PENDING IN THE COURT RIGHT NOW IS RESCISSION OF THE 2004 COMPACT, AND THE RESTITUTION FLOWS FROM THAT RESCISSION. I THINK WE'RE ALL ON THE SAME PAGE WITH RESPECT TO THAT AT THIS POINT. BUT WHAT'S HAPPENING, WHEN YOU TALK ABOUT WHERE THE TRIBE WOULD – WHAT THE STATUS QUO WOULD HAVE BEEN AFTER RESCISSION IF THE CONTRACT HAD NOT BEEN ENTERED INTO AT ALL, WHICH IS THE TEXTBOOK DEFINITION OF A RESCISSION.

YOU'RE TALKING ABOUT PUTTING PAUMA BACK TO A POINT WHERE IT WAS DEALING WITH THE COMMISSION AND DEALING WITH THE [25] COMMISSION'S NOW ADJUDICATED, INCORRECT DETERMINATION OF SIZE OF LICENSE POOL. AND THE FACT IS, IF PAUMA WERE PUT BACK TO THE PLACE IT WAS AT BEFORE IT

SIGNED THE 2004 COMPACT, IT WOULD NOT HAVE GOTTEN ANY OTHER LICENSES BECAUSE THERE WERE NO LICENSES AVAILABLE.

THE COURT: THAT'S WRONG. COUNSEL, WE'RE NOT GO TO REARGUE THAT. THERE WERE LICENSES AVAILABLE. THAT WAS THE MISTAKE, THE WRONG CALCULATION. THE LICENSES WERE AVAILABLE. THE APPELLATE COURT HAS ALREADY DETERMINED THAT. THEY WOULD HAVE GOTTEN LICENSES.

WE'RE NOT GOING TO REARGUE THAT QUESTION. IT IS RETROACTIVE. THIS IS, AGAIN, TRYING TO REARGUE THE FACT THAT YOUR POSITION IS YOU MADE A MISTAKE AND YOU SHOULDN'T BE RESPONSIBLE FOR IT. BUT THE NINTH CIRCUIT HAS SAID THAT THE CALCULATION THE STATE MADE WAS UNREASONABLE. THERE WERE LICENSES AVAILABLE, AND IF WE HAVE TO CREATE A HYPOTHETICAL SITUATION THAT WOULD PUT THEM BACK WHERE THEY WOULD HAVE BEEN, THEY WOULD HAVE GOTTEN THE LICENSES THEY REQUESTED.

AND I'M NOT CHANGING MY MIND ON THAT. I'M NOT GOING TO GO BACK AND FIND THEY WOULD HAVE GOTTEN NOTHING IN 2004, THEREFORE, THEY'RE OWED NOTHING. THEY SHOULD HAVE GOTTEN THOSE LICENSES UNDER THE '99 COMPACT. THERE WERE LICENSES. THERE WERE PLENTY IN THE POOL. THERE WERE THOUSANDS BEYOND WHAT THE STATE

TOLD THEM WHEN THEY SAID THERE WERE NONE.

MR. HOUSTON: WELL, YOUR HONOR, I WANT TO JUST POINT [26] OUT FOR THE RECORD – I UNDERSTAND YOUR POSITION. I WANT TO POINT OUT FOR THE RECORD, THAT THE RELIEF THIS COURT IS PROPOSING TO GRANT GOES VASTLY BEYOND THE RELIEF THAT WAS GRANTED IN THE *COLUSA* CASE AND HAS A NUMBER OF EFFECTS THAT GO GROSSLY BEYOND WHERE *COLUSA* WENT. THE FIRST IS THAT THE RELIEF IN *COLUSA* EXTENDED FROM OCTOBER 5TH, 2009 FORWARD FOR ALL '99 COMPACT TRIBES AND MAKES NO MENTION WHATSOEVER OF ANY RELIEF FOR ANY COMPACT TRIBE AT ANY DATE PRIOR TO THE DRAW THAT JUDGE DAMRELL ORDERED IN OCTOBER OF 2009.

IN FACT, NONE OF THE TRIBES, INCLUDING THE TRIBES THAT PICKED UP THE LABORING OAR AND LITIGATED THE ISSUE OF THE SIZE OF THE LICENSE POOL, GOT LICENSES AT ANY POINT PRIOR TO 2009. AND HERE WE HAVE, BECAUSE OF THE SORT OF ARCHITECTURE OF THE CASE, I SUPPOSE THE EXISTENCE OF THE AMENDED COMPACT ON TOP OF THE '99 COMPACT, PUTTING PAUMA IN A POSITION WHERE PAUMA BENEFITS NOT ONLY FROM THE WORK OF THESE OTHER TRIBES THAT LITIGATED THE

LICENSE POOL ISSUE, BUT BENEFITS BY GETTING LICENSES THAT THOSE TRIBES DIDN'T GET AND COULDN'T HAVE GOT.

AND, IN FACT, IN BETWEEN 2004 AND 2009, NO TRIBES GOT ANY SIGNIFICANT AMOUNT OF LICENSES EXCEPT SOME THAT DRIBBLED BACK INTO THE LICENSE POOL FROM TIME TO TIME AND THEN WERE ISSUED IN SMALL DRAWS THAT OCCURRED DURING THAT TIME PERIOD. AND SO WHAT THIS COURT IS DOING IS GIVING A REMEDY THAT GIVES PAUMA A FAR GREATER REMEDY, A DRAW FROM THE EXPANDED LICENSE POOL DEEMED TO HAVE TAKEN PLACE SOME FIVE YEARS BEFORE THE [27] EXPANDED LICENSE POOL EVEN CAME INTO EXISTENCE, AND, IN FACT, BEGINNING – BEFORE THE LAWSUIT WAS EVEN FILED THAT LED TO THE ENLARGEMENT OF THE LICENSE POOL THAT THIS ENTIRE CASE IS BASED UPON. I JUST WANT TO STATE THAT FOR THE RECORD.

I ALSO WANT TO SAY THAT THE REMEDY IS ALSO CONTRARY TO THE DECISION IN THE *COLUSA* TRIAL COURT WHERE JUDGE DAMRELL ISSUED SUMMARY JUDGMENT IN FAVOR OF THE STATE ON BREACH CLAIMS THAT HAD BEEN BROUGHT BY *COLUSA* INVOLVING LICENSE POOL DRAWS, REQUESTED DRAWS THAT HAD BEEN MADE. IN 2006, IN 2007 *COLUSA* ALLEGED, WELL, BECAUSE THE LICENSE POOL WAS BIGGER THAN THE STATE, SAID THE COMMISSIONER WAS IN BREACH. JUDGE DAMRELL

RULED IN FAVOR OF THE STATE ON THOSE CLAIMS, AND THE *COLUSA* TRIAL COURT DECISION HAS THAT IN ITS JUDGMENT, IN ITS FINAL JUDGMENT.

AND SO THE REMEDY THAT YOU'RE PROPOSING HERE LEAPFROGS OVER THAT, IT GOES BACK AND SUBSTANTIALLY EXTENDS THE REACH OF THE *COLUSA* DECISION BACK INTO THE PAST AND BACK INTO A PERIOD OF SORT OF RECONFIGURING THE PAST. AND I UNDERSTAND THAT TO DEEM THE LICENSE POOL NUMBER TO HAVE BEEN INCORRECT AT THE OUTSET BASED UPON THE ANALYSIS THAT THE *COLUSA* II COURT MADE MAKES SENSE IN TERMS OF FINDING THAT THE REPRESENTATION MADE BY THE COMMISSION IN 2002 WAS A MISREPRESENTATION. IT MAKES SENSE FOR THAT BASIS.

IT MAKES SENSE TO SAY, OKAY, THAT WAS WRONG, AND, THEREFORE, PAUMA IS ENTITLED TO RESCIND ITS COMPACT, ITS 2004 [28] COMPACT, WHICH WE ENTERED INTO ON THE BASIS OF THAT. BUT IT'S ANOTHER THING, A MUCH BIGGER THING TO EXTEND THAT INTO, SAY, NOT ONLY DO THEY RESCIND THE 2004 COMPACT, BUT WE ARE GOING TO INTERPRET THE '99 COMPACT ON THE BASIS OF THE FACT THAT THERE ACTUALLY WERE MORE LICENSES AVAILABLE AT THIS TIME, AND IN OUR VIEW, THAT GOES WELL BEYOND THE NORMAL PARAMETERS OF RESCISSION AND RESTITUTION.

AND, IN FACT, WE'RE IN A SITUATION WHERE THAT ALLOWS PAUMA TO HAVE ITS CAKE AND EAT IT TOO, AND THAT IS SOMETHING THAT NO OTHER TRIBE HAS EVER HAD THE OPPORTUNITY TO DO.

THE COURT: ALL RIGHT. ANYTHING ELSE? ALL RIGHT. WE'RE GOING TO HAVE TO LOOK A LITTLE FURTHER AT THE IMMUNITY ISSUE BASED PRIMARILY ON REPRESENTATIONS THAT WERE MADE TODAY ABOUT WHETHER THE TRIBE TOOK A POSITION EARLIER BEFORE THE COURT THAT THEY WEREN'T ENTITLED TO RESTITUTION, TO GET INJUNCTIVE RELIEF. I DON'T HAVE THE DOCUMENTS IN FRONT OF ME, SO I DON'T KNOW WHAT YOU SAID, AND I DON'T KNOW IF IT WAS LIMITED TO THE IDEA THAT YOU COULDN'T GET ANY ADDITIONAL DAMAGES, BUT YOU COULD GET A REFUND. OBVIOUSLY YOU PLED THAT, AND IT WOULD SEEM ODD IF YOU SAID, NO, WE CAN'T GET OUR MONEY BACK EITHER. BUT WE'RE GOING TO HAVE TO LOOK AT THAT.

I WILL TAKE INTO CONSIDERATION THE COMMENTS YOU MADE ABOUT WHETHER THEY'RE GETTING BETTER OR MORE RELIEF THAN THE OTHER TRIBES, BUT I HAVE TO LOOK AT THE PARTIES THAT ARE BEFORE ME IN THIS COURT, NOT WHAT OTHER PEOPLE HAVE GOT OR WHAT THEY [29] RAISED OR DIDN'T RAISE IN OTHER LAWSUITS. IN THIS CASE, THE DETERMINATION THAT HAS BEEN MADE IS THAT THEY

WOULD NOT HAVE ENTERED THE 2004 AGREEMENT IF THEY HAD BEEN TOLD AT THE TIME THAT THERE WERE LICENSES AVAILABLE WHEN, IN FACT, THERE WERE LICENSES AVAILABLE. THEY DID TAKE LICENSES UNDER THAT AGREEMENT, AND THEY SHOULD BE RESPONSIBLE TO PAY UNDER THE TERMS OF THE '99 CONTRACT FOR THOSE LICENSES.

AND IF THEY OVERPAID, I STILL THINK THAT THEY'RE ENTITLED TO BE REIMBURSED FOR WHAT THEY OVERPAID. IF THEY HAD GOTTEN THOSE MACHINES UNDER THE '99 CONTRACT WHEN THEY ASKED FOR THEM IN THE TIME PERIODS THAT THEY ASKED FOR THEM, THAT MIGHT SET THEM APART AS DIFFERENT THAN EVERYBODY ELSE, BUT NOT EVERYONE ELSE ENTERED THE 2004 COMPACT AND PAID THESE EXTRAORDINARY FEES BECAUSE OF THE MISTAKE THAT WAS MADE ON THE PART OF THE STATE.

AND SO ALSO TO SAY, WELL, NOBODY ELSE GOT LICENSES, GOT MACHINES BETWEEN 2002 WHEN THEY SAID THERE WERE NO MORE MACHINES AVAILABLE AND 2009 WHEN THE COURT FOUND THERE HAD BEEN AN IMPROPER ALLOCATION OF THE NUMBER OF LICENSES AVAILABLE. I DON'T KNOW WHO ELSE WAS A PART TO THE 2004 CONTRACT. AS FAR AS I KNOW, NONE OF THOSE PEOPLE ARE BEFORE THIS COURT. THEY'RE CERTAINLY NOT BEFORE THIS COURT IN THIS ACTION SEEKING RELIEF.

THIS IS A VERY LIMITED CASE TO THIS ONE TRIBE SEEKING TO GET MONEY BACK THAT THEY PAID UNDER A CONTRACT THAT THE COURT FOUND THEY ENTERED INTO UNDER MISTAKE AND SHOULD NOT BE [30] HELD RESPONSIBLE FOR IT. THEY STILL HAVE TO BE RESPONSIBLE TO PAY FOR THE MACHINES THEY GOT, THEY SHOULD PAY FOR THEM UNDER THE COMPACT THAT IS THE ENFORCEABLE COMPACT IN THE CASE, AND IF THAT RESULTS IN THEM HAVING OVERPAID, I STILL THINK IT'S APPROPRIATE THAT THEY GET REIMBURSED FOR THAT BECAUSE THE PERFORMANCE OF THE '99 COMPACT ONLY ENTITLES THE STATE TO SO MUCH MONEY, AND THEY COLLECTED WAY MORE THAN THEY WOULD BE ENTITLED TO. SO AGAIN, WE'LL LOOK AT THE COMMENTS YOU RAISED REGARDING THE *COLUSA* CASE.

MR. HOUSTON: YOUR HONOR, CAN I MAKE ONE FINAL COMMENT JUST TO CLARIFY WHERE I WAS GOING WITH ALL OF THAT? I'M NOT ARGUING HERE TODAY THAT PAUMA SHOULD NOT GET MONEY BACK. WHAT I'M ARGUING HERE TODAY IS THAT RESCISSION OF THE 2004 COMPACT SHOULD REIMBURSE PAUMA FOR ITS ACTUAL NET LOSS FOR ENTERING INTO THE 2004 COMPACT ON THE BASIS OF THE MISREPRESENTATION THAT WAS MADE, AND IN ORDER TO DO THAT, PAUMA NEEDS TO DISGORGE THE BENEFITS THAT IT RECEIVED UNDER THE 2004 COMPACT. AND THAT'S WHAT

WE ARGUED IN OUR RECENT PAPERS, AND THAT IS, THEY OFFSET IN THE AMOUNT OF THE NET WIN FROM THE ADDITIONAL MACHINES THAT WERE OPERATED SOLELY ON THE BASIS OF THE 2004 COMPACT.

THAT'S A BIGGER NUMBER THAN THE NUMBER THEY WOULD HAVE PAID FOR THOSE MACHINES UNDER '99 COMPACT, BUT THE FACT REMAINS, THE ACTUAL, PHYSICAL FACT REMAINS THAT IF PAUMA HAD NOT ENTERED INTO THE 2004 COMPACT, IT WOULD NOT HAVE GOTTEN ANY [31] OTHER LICENSES, AND IT WOULD HAVE OPERATED THE LESSOR NUMBER OF LICENSES, IT WOULD NOT HAVE REALIZED THAT ADDITIONAL NET WIN DURING THE YEARS THAT ARE INVOLVED HERE WOULD HAVE HAPPENED, AND THAT TO ALLOW THEM TO RECOVER ALL THE MONEY BACK FROM THE STATE THAT THEY PAID UNDER THE 2004 COMPACT AND KEEP $16 MILLION AT A MINIMUM NET WIN FROM THOSE MACHINES IS A DOUBLE RECOVERY, NOT WHAT'S CONTEMPLATED BY RESCISSION.

THE COURT: OKAY, I WANT TO BRING THIS TO A CLOSE BECAUSE WE CAN GO BACK AND FORTH FOR A WHILE. BUT IF THEY HAVE NOT BEEN A PARTY TO THE '99 COMPACT AND THEY HAD JUST COME AND SAID, WE WANT MACHINES IN 2004 AND WE WANT TO ENTER THE '99 COMPACT, AND YOU HAD SAID, NO, THERE'S NO LICENSES LEFT UNDER THAT COMPACT, SO

HERE, WE'LL DO ONE WITH YOU THAT WILL GIVE YOU MACHINES, AND YOU HAVE NO RIGHTS UNDER ANY PRIOR AGREEMENT BETWEEN US, THIS IS THE ONLY AGREEMENT BETWEEN US, AND THEN THE COURT DETERMINED THAT THEY ENTERED THAT ON A FALSE REPRESENTATION, THAT THERE WERE NO LICENSES AVAILABLE AND THERE WAS NO PRIOR HISTORY BETWEEN THE PARTIES, THEN I THINK YOUR ARGUMENT WOULD HAVE MORE MERIT WITH THE COURT THAT WHATEVER THEY GOT TO UNRAVEL IT WOULD BE LIMITED TO AN INTERPRETATION OF THE 2004 CONTRACT, WHAT DID THEY HAVE GOING IN, WHAT DID THEY GET OUT OF IT, WHAT DID THEY DO TO PUT EVERYBODY BACK WHERE THEY SHOULD HAVE BEEN.

BUT TO PUT EVERYBODY BACK TO WHERE THEY SHOULD HAVE BEEN, WHICH IS, AGAIN, A HYPOTHETICAL EXERCISE BECAUSE WE CAN'T [32] GO BACK IN TIME, PUTS THEM BACK IN THEIR PRIOR AGREEMENT WITH THE STATE WHERE THEY PUT IN A REQUEST FOR LICENSES. IT WAS NOT A REQUEST THAT WAS GOING TO PUT THEM ANYWHERE OVER THE CAP OF LICENSES AVAILABLE, IT WAS ACTUALLY A SMALL REQUEST FOR LICENSES, AND THEY DIDN'T GET IT BECAUSE THEY WERE TOLD THERE WEREN'T ANY.

AND I UNDERSTAND YOUR POINT SAYING, WELL, NOBODY ELSE GOT ANY EITHER, BUT I

HAVE TO LOOK AT WHERE THEY ARE AND WHERE THEY WOULD HAVE BEEN HAD THE CONTRACT, WHICH IS THE ROOT OF THIS WHOLE THING, THE '99 COMPACT WAS IMPROPERLY INTERPRETED AND THEY WERE TOLD THERE WEREN'T ANY, AND, THEREFORE, THEY ENTERED THE 2004 COMPACT WHICH THEY NEVER WOULD HAVE DONE HAD THEY BEEN TOLD IN 2002 AND 2003 THERE WERE, IN FACT, LICENSES AVAILABLE AND THEY WOULD HAVE GOTTEN THEM IN DUE COURSE.

SO IT'S NOT SIMPLY A QUESTION OF SAYING TWO PEOPLE ENTERED A CONTRACT AND WE'RE UNDOING THE CONTRACT TO PUT YOU BACK WHERE YOU WERE. WELL, WHERE YOU WERE, FOR THE TRIBE, WAS IN THE '99 COMPACT, SO THAT'S THE COURT'S PERSPECTIVE ON THIS.

MS. LAIRD: YOUR HONOR, JUST ONE MORE SMALL REFERENCE.

THE COURT: SURE.

MS. LAIRD: AGAIN, JUST TO MAKE SURE THAT YOU AND THE COURT KNOWS WHERE IN THE MOTION OUR PRELIMINARY INJUNCTION LANGUAGE APPEARS THAT I'M RELYING ON, IT'S AT PAGE 10 WHERE THE QUOTE COMES FROM THAT I READ TO THE COURT. AND IN THAT SAME PARAGRAPH, LATER ON, PAUMA DOES SAY THAT EVEN IF, EVEN IF THE [33]

COURT COULD ORDER RESTITUTION, SOMETHING TO THE EFFECT THAT IT WOULD NOT MAKE UP FOR THE IRREPARABLE INJURY THAT IT'S GOING TO SUFFER IF IT DOESN'T GET THE PRELIMINARY INJUNCTION ISSUED. SO I THINK THAT'S CLEAR IN THERE THAT THEY RECOGNIZE THERE'S A PROBLEM. THEY'RE USING IT IN ORDER TO GET THE PRELIMINARY INJUNCTION, AND NOW THEY WANT TO CHANGE DIRECTION –

THE COURT: ALL RIGHT.

MS. LAIRD: – FOR PURPOSES OF THIS PROCEEDING.

THE COURT: I MAY ASK FOR ADDITIONAL BRIEFING ON THIS ISSUE AFTER I LOOK AT WHAT WAS SAID. I KNOW THIS CAME UP AND YOU WEREN'T EXPECTING THAT THIS WAS GOING TO BE AN ISSUE BEFORE THE COURT, AND I GAVE YOU A LIMITED AMOUNT OF PAGES TO RESPOND BECAUSE THEY WENT INTO IT VERY BRIEFLY IN THEIR PAPERS. IT WAS A PRIMARY FOCUS, BUT IT WAS ONLY, LIKE, TWO PAGES OF THEIR BRIEF. SO THE COURT MAY REQUEST OR ALLOW FOR SOME ADDITIONAL BRIEFING ON THE SUBJECT, BUT I DO WANT TO LOOK AT WHAT YOU'VE CITED ME TO TODAY ON THAT.

MS. WILLIAMS: COULD I JUST ADDRESS A HOUSEKEEPING ISSUE BRIEFLY?

THE COURT: SURE.

MS. WILLIAMS: WE'RE JUST A LITTLE BIT CONCERNED ABOUT WHETHER OR NOT YOU'RE GOING TO ISSUE A SEPARATE ORDER ON THE RESTITUTION ISSUE, BECAUSE THERE IS SUPREME COURT AUTHORITY OUT THERE SAYING THAT A DENIAL OF THE SOVEREIGN IMMUNITY DEFENSE IS IMMEDIATELY APPEALABLE, SO WE'RE HOPING YOUR INTENT IS TO ISSUE [34] JUDGMENT PURSUANT TO RULE 54(B) AND SORT OF INCLUDE EVERYTHING TOGETHER.

THE COURT: I WANT TO HAVE ONE FINAL JUDGMENT AND BE DONE WITH THIS, SO YOU CAN APPEAL THE WHOLE THING. I DON'T SEE ANY POINT TO DOING THIS PIECEMEAL. IT NEEDS TO GET WRAPPED UP AND FINISHED, AND THAT WAY THE ENTIRE ISSUE, TO THE EXTENT ANYONE WANTS TO APPEAL IT UP TO THE NINTH CIRCUIT, YOU CAN DO IT ALL. BECAUSE I WOULD HATE TO HAVE IT GO UP AND HAVE THEM SAY, IT'S NOT FINAL, BECAUSE WE HAVEN'T FINISHED, AND THEN YOU APPEAL AND YOU'RE BACK HERE SAYING, IT'S NOT A FINAL JUDGMENT.

AND RATHER THAN CERTIFY THE UNDERLYING DECISION ABOUT THE RESCISSION OF THE CONTRACT AND THEN DEAL WITH THIS ISSUE LATER, I WOULD RATHER JUST WRAP THE WHOLE THING UP IN ONE THING BECAUSE, IN ESSENCE, I THINK THE GOING FORWARD RELIEF – I'M SURE YOU HAVE DISAGREEMENTS

WITH COURT'S ORDER, BUT TO THE EXTENT THAT THAT'S NOT A SOVEREIGN IMMUNITY ISSUE, IF THE CONTRACT IS DONE, IT'S DONE, AND YOU GO BACK TO THE '99 COMPACT WITH THESE FOLKS. THAT DOESN'T INVOLVE THE SOVEREIGN IMMUNITY ISSUE.

WHETHER OR NOT YOU'RE ENTITLED TO BE REIMBURSED IS A SEPARATE ISSUE, BUT IT'S AN IMPORTANT ISSUE. IT RAISES A CONSTITUTIONAL QUESTION, AND I WOULD RATHER HAVE EVERYTHING GO AT ONE TIME. WE WILL ADDRESS THIS NOW THAT IT'S FRESH IN YOUR MINDS AND TRY TO RESOLVE THIS AS QUICKLY AS POSSIBLE.

IF I FEEL I NEED ADDITIONAL BRIEFING FROM THE [35] PLAINTIFFS ON THIS ISSUE, I'LL LET YOU KNOW.

MR. HOUSTON: YOUR HONOR, IF I MAY?

THE COURT: YES.

MR. HOUSTON: I WOULD LIKE TO SUGGEST THAT THE ISSUE OF RESTITUTION, THE ISSUE OF OFFSET ARE – THEY INVOLVE SUBSTANTIAL AMOUNTS OF MONEY, AND WE WERE FRUSTRATED TRYING TO DEAL WITH THIS ISSUE IN A PART OF A JOINT BRIEF. WE ALSO – WE FEEL FOR THE PROCESS TO BE FAIR IN TERMS OF ARRIVING AT REALLY WHAT THE FORM THE RESTITUTION CLAIM SHOULD BE, WHAT THE FORMULA IS, WHAT NUMBERS ARE GOING TO

GET PLUGGED INTO IT, THAT IT'S WORTH AN ACTUAL ROUND OF FORMAL BRIEFING BETWEEN THE PARTIES SO THAT EVERYBODY GETS A FAIR CHANCE TO EXPRESS THEIR POSITION, BECAUSE THE WAY THIS HAS PLAYED OUT SO FAR HAS BEEN SOMEWHAT ONE-SIDED.

THE COURT: THAT WAS THE POINT OF TODAY, AND INSTEAD, I GOT COMPLETELY – YOU KNOW, A WHOLE BUNCH OF STUFF THAT CAME IN THAT WAS NOT WHAT I ASKED THE PARTIES TO DO, BUT I DON'T WANT TO BE PICKING SOME NUMBER RANDOMLY. IT HAS TO BE A RELEVANT NUMBER THAT IS RELATED ON A SPECIFIC FORMULA. AND THE CLOSEST THING I HAVE RIGHT NOW IS THE INJUNCTIVE FORMULA THAT THIS DOCTOR DID, DR. WALKER.

IF YOU WANT TO GIVE ME AN ALTERNATIVE – YOU KNOW WHAT? LET ME DEAL WITH THE IMMUNITY ISSUE. WE'LL LAY OUT A FORMULA THAT WE THINK IS APPROPRIATE IF WE'RE GOING TO GO FORWARD WITH RESTITUTION, AND THEN WE WILL GET YOU TO GIVE US [36] NUMBERS, PROPOSED NUMBERS, WHICH I WOULD LIKE SUBMITTED BY WHATEVER ACCOUNTANT OR HOWEVER YOU WANT TO HANDLE THAT BASED ON THE RECORDS OF WHAT WAS PAID, WHAT MACHINES THEY HAD, AND WHEN THEY HAD THEM, AND I ASSUME WILL REFLECT GENERALLY THE NUMBERS THAT WERE USED FOR THE INJUNCTION, THAT THESE WERE BASED ON THE NUMBERS OF MACHINES THEY GOT

WHEN THEY WERE LICENSED AND HOW MUCH THEY PAID FOR THEM.

MR. HOUSTON: I DON'T SEE THAT THE STATE IS GOING TO HAVE THE OPPORTUNITY TO SAY ANYTHING MORE ON THE SUBJECT OF THE APPROPRIATENESS OF THE PARTICULAR OFFSET, FOR EXAMPLE –

THE COURT: YOU CAN INCLUDE IT IF YOU THINK IT'S APPROPRIATE. AGAIN, I DON'T THINK WE'RE UNDOING THE 2004 AGREEMENT TO PUT EVERYBODY BACK IN A NONCONTRACTUAL RELATIONSHIP. WE'RE UNDOING THE 2004 AGREEMENT TO PUT YOU BACK IN THE CONTRACTUAL RELATIONSHIP YOU WERE IN IN '99. SO THE MACHINES THEY GOT SUBSEQUENT TO BEING TOLD THERE WEREN'T ANY AND GOT UNDER THE 2004 AGREEMENT, THEY NEED TO PAY FOR UNDER THE '99 COMPACT. THEY NEED TO PAY FOR IT UNDER THOSE TERMS.

MR. HOUSTON: THAT'S AN ISSUE WE WOULD VERY MUCH LIKE TO BRIEF.

THE COURT: WELL –

MR. COCHRANE: YOUR HONOR, COULD I JUST REALLY QUICKLY? I JUST WANTED TO BASICALLY SHOW HOW EASY AND SIMPLE THE PROCESS SHOULD BE OF CALCULATING WHAT THE RESTITUTION AMOUNT IS GOING TO BE. WE ACTUALLY HAD THE FINANCE DEPARTMENT [37] AT THE CASINO LOOK INTO THIS

OVER THE PAST WEEK OR TWO AND JUST TRY TO GIVE US SOME PRELIMINARY FIGURES.

AND THEY HAVE ALREADY PREPARED, FOR THE MOST PART, WHAT'S ACCURATE, JUST A SPREADSHEET OF ALL THE CHECKS THAT PAUMA SENT TO THE STATE FOR THE THREE DIFFERENT REVENUE SHARING PAYMENTS THAT WERE PAID UNDER THE 2004 AMENDMENT. THERE WAS A $5.7 MILLION BOND PAYMENT, WHICH WENT FOR THE 1050 MACHINES. NOW THAT CORRESPONDS WITH $315,000 PAUMA PAID UNDER THE 1999 COMPACT. IF YOU OPERATE A MACHINE ON TOP THAT, THERE'S A FEE UNDER THE 2004 AMENDMENT AND A MUCH SMALLER FEE UNDER THE '99 COMPACT. BOTH THOSE THINGS ARE EASY TO CALCULATE. AND THEN YOU HAD THE ISOLATED $2 MILLION IRCF [sic] PAYMENT WHICH DIDN'T HAVE AN EQUIVALENT UNDER THE '99 COMPACT.

SO IT REALLY IS JUST CREATING A TALLY OF ALL THESE CHECKS THAT PAUMA PAID, WHICH THE STATE SHOULD HAVE AS WELL, FIGURING OUT WHAT THE DIFFERENCE IS, AND THEN JUST APPLYING THE INTEREST RATE YOU MENTIONED. AND, YOU KNOW, WE'RE MORE THAN HAPPY TO GET ON THAT. AND WE FIGURE IT'S SOMETHING THAT, ONCE WE SPEAK WITH MR. WALKER, WILL PROBABLY BE DONE WITHIN A MATTER OF WEEKS.

THE COURT: ALL RIGHT. THAT'S WHAT I WANT YOU TO DO. PROVIDE IT TO THEM, AND THEN YOU CAN PROVIDE YOUR RESPONSE TO THAT. THIS THING IS JUST GOING TO BE GOING AROUND IN CIRCLES AGAIN, AS IT HAS IN THE PAST, WITHOUT SOME DEFINITE DATES. I KNOW I HAVEN'T MADE A FINAL DECISION ON THE IMMUNITY ISSUE, [38] BUT, AGAIN, YOU GUYS WANT THE MONEY, SO DO THE HOMEWORK. SO BY TWO WEEKS, BY JUNE 12TH, I WANT THE PLAINTIFFS TO PROVIDE THE ANALYSIS YOU JUST DESCRIBED TO THE STATE AND SUBMIT IT TO THE COURT AS YOUR REQUEST FOR RESTITUTION IN THIS CASE.

AND THEN BY JUNE 26TH, THE STATE CAN PROVIDE WHATEVER RESPONSE TO THAT THEY WANT FOR THE COURT TO CONSIDER. AND THEN ONCE I GET THEM, I'LL DECIDE IF WE NEED TO HAVE ANY FURTHER ARGUMENT ON THIS. I'LL PROBABLY DECIDE IT ON THE PAPERS. IN THE INTERIM, WE WILL GET OUT A DECISION ON THE IMMUNITY ISSUE. ALL RIGHT, THANK YOU.

MS. LAIRD: THANK YOU.

MR. COCHRANE: THANK YOU.

MS. WILLIAMS: THANK YOU, YOUR HONOR.

(COURT IN RECESS AT 11:03 A.M.)

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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, vs. STATE OF CALIFORNIA; CALIFORNIA GAMBLING CONTROL COMMISSION, an agency of the State of California; and ARNOLD SCHWARZENEGGER, as Governor of the State of California, Defendants.	Case No.: 09CV1955 LAB AJB **ORDER GRANTING PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF REGARDING COMPACT PAYMENTS** (Filed Apr. 12, 2010)

ORDER

Plaintiff, the Pauma Band of Mission Indians ("Pauma"), has moved for an order, pursuant to Rule 65 of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), seeking injunctive relief ("Motion") against Defendants the State of California, the California

Gambling Control Commission and Governor Arnold Schwarzenegger ("Defendants") to: (a) prevent Defendants and their agents, employees and attorneys from enforcing the payments required of Pauma by the Amendment to Tribal-State Compact Between the State of California and Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation ("2004 Compact") and (b) prevent any default of the 2004 Compact based on non-payment by Pauma until the legal issues in connection with the instant suit are resolved.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Counsel, Inc.*, 129 S.Ct. 365, 374 (2008). Pauma has made a strong showing of likelihood of success on the merits, and the Court finds the remaining three factors are satisfied to a lesser but satisfactory extent. The payments required under the 2004 Compact are far larger than were required under the previous compact, and are likely to impose an onerous and perhaps unsustainable burden on Pauma and secondarily to Pauma's members who rely on it for services. If, as appears likely, Pauma prevails, the state would be required to make restitution so the larger payments would ultimately not benefit it, resulting in a deadweight loss.

The Court, having considered the papers and argument submitted in support of and in opposition to Plaintiff's Motion, hereby ORDERS as follows:

The Court intends to rule on the merits of the action in an expedited manner. In the interim, the Court GRANTS a preliminary injunction as follows:

(1) Until the Court rules on the merits of the action, Pauma shall pay only those payments required under the terms of the original compact between the parties prior to execution of the 2004 Compact known as the Tribal-State Gaming Compact Between the State of California and the Pauma Band of Mission Indians.

(2) Defendants and their agents, employees and attorneys are enjoined during the pendency of this action from enforcing the payments required of Pauma under the 2004 Compact and from defaulting Pauma under the terms of the 2004 Compact for failure to make such payments.

IT IS SO ORDERED.

Dated: 4-12-10 /s/ Larry A. Burns
THE HON. LARRY A. BURNS
United Stated District Judge

California Government Code § 98005

The Gaming Compact offered in Section 98004 shall, to the extent permitted by law, be deemed agreed to, approved, and executed by the State of California in the event a request therefor is duly made by a federally recognized Indian tribe in accordance with Section 98002 and it is not executed by the Governor within the time prescribed in this chapter, provided that, in the event this provision is deemed to be unlawful or ineffective for any reason, or if the tribe in its discretion seeks to compel execution of the Gaming Compact through court action, the State of California hereby submits to the jurisdiction of the courts of the United States in any action brought against the state by any federally recognized Indian tribe asserting any cause of action arising from the state's refusal to execute the Gaming Compact offered in Section 98004 upon a tribe's request therefor. Without limiting the foregoing, the State of California also submits to the jurisdiction of the courts of the United States in any action brought against the state by any federally recognized California Indian tribe asserting any cause of action arising from the state's refusal to enter into negotiations with that tribe for the purpose of entering into a different Tribal-State compact pursuant to IGRA or to conduct those negotiations in good faith, the state's refusal to enter into negotiations concerning the amendment of a Tribal-State compact to which the state is a party, or to negotiate in good faith concerning that amendment, or the state's violation of the terms of any Tribal-State compact to which the state is or may become a party.

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/ Shelleyanne W.L. Chang
SHELLEYANNE 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
STEVE PEACE

VICE CHAIR
DENISE MORENO DUCHENY

SENATE	ASSEMBLY
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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.

* * *

[SEAL]

OFFICE OF THE GOVERNOR

GOVERNOR ARNOLD SCHWARZENEGGER •
SACRAMENTO, CALIFORNIA 95814 •
(916) 445-2841

June 22, 2009

Via Electronic and U.S. Mail

Robert A. Rosette
Cheryl A. Williams
Rosette & Associates
565 West Chandler Boulevard, Suite 212
Chandler, Arizona 85225

Re: Meet and Confer and Amended Compact Proposal

Dear Mr. Rosette and Ms. Williams:

Thank you for your May 5, 2009 letter, in which you ask that the Governor's Office and the Pauma Band of Luiseno Indians (Pauma or Band) continue to discuss the Band's March 6, 2009, request to meet and confer. Additionally, you ask that we consider the Band's proposal, as set forth in an April 9, 2009 letter, that the Governor agree to relieve Pauma of certain compact obligations and allow Pauma to pay half its yearly commitment to the Revenue Sharing Trust Fund and to accept $4.75 million less each year in payments to certain State accounts until such time as the Band is able to complete "its casino expansion as contemplated by the Band." To accomplish this end, Pauma suggests that the Governor either utilize his

discretion to refrain from prosecuting compact violations or agree to an amended compact that accomplishes the same result.

In our May 21, 2009 telephone conversation, I advised that the Governor was unwilling to agree [sic] a permanent or temporary suspension or deferral of the Band's compact obligations, either through a compact amendment or an exercise of discretion to refrain from prosecuting compact violations.

As you know, the Governor and Chairman Devers met on June 17, 2009, to discuss the Tribe's request for relief from the payments due to the State under the compact. In this meeting, the Governor was disinclined to change the payment terms of the compact. As the Band's request to be relieved from its payments obligations will have an impact on the state's budget, the Governor informed the Chairman that he would need to discuss the Band's request with the legislative leaders.

Separate from the Governor's meeting with Chairman Devers, I am writing to respond to your May 5, 2009 letter, regarding the meet and confer process.

We have reviewed the legal theories regarding rescission advanced in your letters, including your most recent letter of May 5th. The Governor's Office, however, continues to disagree that the Band's compact with the State is subject to judicial rescission. The district court decision in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. State of*

California, et al. regarding the number of Gaming Device licenses authorized by the 1999 Compacts is not yet final and may be appealed should it become final. Even if the district court's conclusions regarding the number of authorized licenses were affirmed as a result of a final appellate decision, we do not believe that the existence of that decision would justify rescission of the compact given, among other things, the advantages Pauma obtained as a result of its compact and the reasons it was unable to build an expanded Gaming Facility. In addition, even if rescission were granted, it is possible that Pauma may not benefit from such a determination given that rescission of the Band's compact could leave it with no compact at all.

Finally, in order to obtain judicial rescission under California Civil Code section 1691, the party seeking rescission must return everything of value it has received as a result of the agreement so that the parties are restored to their prior positions. Thus, assuming Pauma's suit for rescission could overcome the State's sovereign immunity, any financial restoration obligation would not rest solely upon the State, but could require the Band to disgorge all the benefits it has received from the ability to operate class III gaming under its compact.

Based upon the foregoing, our March 19, 2009 meeting, our letter of April 2, 2009, our May 21, 2009 telephone conversation, and this letter, it seems clear that the parties remain in dispute over the issue raised in your March 6th, April 9th, and May 5th, 2009 letters. Thus, given our respective positions on this issue,

we do not believe it would be fruitful to continue the meet and confer process to discuss the matter further. Moreover, we believe that our obligation to meet and confer pursuant to the compact has been fulfilled.

We hope that in considering all possible options for dealing with the difficult situation it faces, the Band will consider all possible alternatives, eschew litigation and continue complying with the terms of its compact. We understand the toll that the current economic climate has had on all forms of government and hope that the Band is able to overcome any financial hardships and ultimately continue with its planned casino expansion.

Although we were unable to resolve this dispute through the meet and confer process, we continue to believe that open communication between the State and the Band is vital and look forward to working with you in the future.

Sincerely,

/s/ Andrea Lynn Hoch
ANDREA LYNN HOCH
Legal Affairs Secretary

(Filed Sep. 3, 2010)

No. 10-330

In The Supreme Court of the United States

ARNOLD SCHWARZENEGGER,
Governor of California; State of California,

Petitioners,

v.

RINCON BAND OF LUISENO MISSION INDIANS of the Rincon Reservation, aka RINCON SAN LUISENO BAND OF MISSION INDIANS, aka RINCON BAND OF LUISENO INDIANS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Indian Gaming Regulatory Act of 1988 ("IGRA") compels federally recognized Indian tribes to enter into compacts with states to set the terms by which tribes may conduct casino-style gaming on their Indian lands. IGRA's compact requirement did not abrogate Indian tribes' immunity to state taxation, and provides that a state's demand for direct taxation in compact negotiations is evidence of bad faith. This petition for a writ of certiorari presents the following questions:

1. Whether a state demands direct taxation of an Indian tribe in compact negotiations under Section 11 of the Indian Gaming Regulatory Act, when it bargains for a share of tribal gaming revenue for the State's general fund.

2. Whether the court below exceeded its jurisdiction to determine the State's good faith in compact negotiations under Section 11 of the Indian Gaming Regulatory Act, when it weighed the relative value of

concessions offered by the parties in those negotiations.

* * *

REASONS FOR GRANTING THE PETITION

A. The decision below presents urgent, important and recurring issues concerning the permissible scope of tribal-state negotiations under IGRA, and the authority of the Executive and Judicial Branches to intercede in tribal-state compact negotiations

1. Whether negotiations for general fund revenue sharing constitute a demand for direct taxation is an important and recurring issue demanding immediate resolution

The majority has thrown the law of tribal-state compact negotiations into disarray by holding that negotiation for general fund revenue sharing constitutes a demand for direct taxation in violation of IGRA. This conclusion is irreconcilable with the numerous existing tribal-state relationships where general fund revenue sharing is an element of a settled gaming compact. In the dissent's words, the majority "does not just upset the apple cart – it derails the whole train." App. 56.

The majority's bad faith holding is not only remarkable for its sweeping impact on California's ability to negotiate with Indian tribes, but it will also have dramatic practical implications around the Nation. There are 562 recognized Indian tribes in the United

States and gaming is currently conducted in 28 states.[6] General fund revenue sharing provisions are found in the fifteen compacts California has negotiated or renegotiated with tribes over the last six years, and in tribal-state compacts negotiated in Connecticut, Florida, Michigan, New York, New Mexico, Oklahoma, and Wisconsin. App. 103-106 (Bybee, J., dissenting). In every instance, these compacts have been approved by the Secretary of the Interior, in an exercise of the federal government's trust responsibility over Indian tribes. § 2710(d)(8)(B).

Indian gaming is an expanding industry, and at any given time states and tribes are engaged in expensive and time-consuming compact negotiations that may take months or years to conclude. These negotiations are typically extraordinarily delicate and, when concluded, reflect a political accommodation between the sovereigns that is not entered into lightly. A compact must be entered in accordance with the law of each sovereign. See *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1548 (10th Cir. 1997) (Interior Secretary may not approve a tribal-state gaming compact entered into by state governor in violation of state law). In California, negotiations are conducted by the Governor, and any resultant compact must be ratified by the California Legislature. Cal. Const., Art. IV, § 19,

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[6] General information related to Indian gaming is available at the National Indian Gaming Commission's Internet site. See http://www.nigc.gov/About_Us/Frequently_Asked_Questions.aspx, last visited Aug. 26, 2010.

subd. (f). Tribes also enter into compacts through a formal act of tribal government, § 2710(d)(1)(A), and significant tribal government resources are expended to engage the State in negotiations.

If the majority decision is allowed to stand, it will create an incentive for revenue sharing tribes to avoid paying millions, tens-of-millions, or even hundreds-of-millions of dollars in revenue-sharing to their respective states, by seeking to void or renegotiate their compacts. Indeed, the dissent recognizes the likely impact of the majority decision, and describes the result as "chaos as tribe after tribe seeks to reopen negotiations concluded and duly approved." App. 56. It may take years of further litigation in the federal courts to unwind disputes that are the fruit of the decision below. And for tribes without compacts, this decision will likely frustrate efforts to develop significant gaming operations because states, once denied any meaningful benefit from tribal gaming, will have a powerful incentive to limit it.

The Court should grant review to consider the questions presented here because the decision below raises important and recurring issues demanding immediate resolution in order to preserve existing tribal-state compact relations, preserve the ability to conduct meaningful negotiations under IGRA, and to prevent enormous resources from being expended in litigation over the status of the existing general fund revenue sharing compacts that have been concluded in eight different states.

2. Whether federal courts have jurisdiction to weigh the value of concessions offered by the parties in tribal-state compact negotiations is an important and recurring issue demanding immediate resolution

The majority's analysis exceeded a legitimate inquiry into the State's good faith and went beyond the jurisdiction of the federal courts established by Congress in IGRA, and usurped authority more appropriately exercised by the Executive Branch. IGRA authorizes courts to determine only whether a state "has failed to negotiate in good faith. . . ." § 2710(d)(7)(B)(iii). When a court looks beyond the question of a state's good faith, and weighs the relative value of concessions offered by the parties, it assumes a policy making role Congress never envisioned. It is not for the federal courts to develop federal Indian policy on a circuit-by-circuit basis.

IGRA does not define "good faith," but the Ninth Circuit has recognized that it is appropriate to look at the closest analog to IGRA's good faith requirement, the National Labor Relations Act ("NLRA"), for guidance in interpreting the standard. *Coyote Valley II*, 331 F.3d at 1094. Under the NLRA there is an obligation to bargain collectively, defined as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in *good faith* with respect to wages, hours, and other terms and conditions of employment. . . ." 29 U.S.C. § 158(d). Under cases interpreting the NLRA, the duty of good faith bargaining does not require the

parties to make particular concessions, or even to reach agreement. See *Livadas v. Bradshaw*, 512 U.S. 107, 117 n. 11 (1994) (Under the NLRA the obligation to bargain in good faith does not compel either party to agree to a proposal or require the making of a concession.) (citing 29 U.S.C. 158(d)).[7] It does envision, however, "a sincere, serious effort to adjust differences and to reach an acceptable common ground." *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1187 (D.C. Cir. 1981). An employer engages in bad faith or surface bargaining when it conducts negotiations "as a kind of charade or sham, all the while intending to avoid reaching an agreement. . . ." *Continental Ins. Co. v. NLRB*, 495 F.2d 44, 48 (2nd Cir. 1974).

In this case, the majority did not attempt to determine whether the State's conduct of negotiations was a sincere effort to reach agreement or was a charade, or sham. Instead, after erroneously concluding that the State had demanded direct taxation of the Tribe, the majority looked to the relative value of the concessions the State offered in exchange for general fund revenue

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[7] Similarly, IGRA's Senate Report indicates that the compact negotiation process was not intended to guarantee the successful conclusion of negotiations:

> Under this act, Indian tribes will be required to give up any legal right they may now have to engage in class III gaming if: (1) they choose to forgo gaming rather than to opt for a compact that may involve State jurisdiction; or (2) they opt for a compact and, for whatever reason, a compact is not successfully negotiated.

S. Rep. No. 100-446, at 14 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3084.

sharing. But this inquiry has little relevance to whether the State engaged in a sincere effort to reach agreement. Indeed, nowhere does IGRA's text or legislative history suggest that federal courts were expected to weigh the value of concessions negotiated in the course of tribal-state compact negotiations. To the contrary, this valuation is, in the first instance, left expressly "between [the] two equal sovereigns." § 2710(d)(1)(C); S. Rep. No. 100-446, at 13, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083. This is appropriate, because the concessions made in tribal-state compact negotiations, in the furtherance of the sovereigns' governmental interests, are essentially political in nature.

The majority's intrusion into these negotiations not only impinged upon the sovereignty of the Rincon Band and the State, but also invaded the province of the Secretary of the Department of Interior, which is responsible for implementing federal Indian policy. IGRA provides that a tribal-state compact may go into effect only following approval by the Secretary. The Secretary may disapprove a compact if it violates federal law, or "the trust obligations of the United States to Indians." § 2710(d)(8)(B). If there is authority in IGRA to intrude upon the political process of compact negotiations, it resides in the Secretary's authority to disapprove a compact for a violation of the federal trust obligation. Moreover, where the Secretary disapproves a compact in an exercise of the federal government's trust obligations, the remedy under IGRA is a *bilateral*

determination by the parties to return to compact negotiations. IGRA does not provide an express judicial remedy. Accordingly, under IGRA, any federal intrusion into the compact relationship is very narrow. The federal government has no seat at the table.

Accordingly, the majority decision violates the principle that federal courts, do not engage political questions, a doctrine that arises from the separation of powers and from prudential concerns regarding the respect courts owe the political departments, and restrains courts "from inappropriate interference in the business of the other branches of Government." See *Nixon v. U.S.*, 506 U.S. 224, 252-53 (1993) (Souter, J., concurring) (quoting *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990), and citing *Goldwater v. Carter*, 444 U.S. 996, 1000 (1979) (Powell, J., concurring in judgment). Construing IGRA to prohibit federal courts from weighing the value of concessions offered in negotiations would protect courts from incursion into political processes and avoid any resultant separation of powers concern.

The majority's misinterpretation of IGRA already caused mischief in the real world. On August 17, 2010, the United States Department of the Interior disapproved a compact, pursuant to § 2710(d)(8), that had been negotiated between the State of California and the Habemotolel Pomo of the Upper Lake ("Upper Lake Compact") and submitted for Secretarial approval on July 6, 2010. App. 175. Relying on the decision below, the Interior Department concluded that the fifteen percent general fund revenue sharing agreed to

by the Tribe, is a tax. App 178-179. It then acknowledged that the exclusive gaming rights provided to Indian tribes under California law, and the cap of 700 slot machines authorized in the Upper Lake compact, were both "meaningful concessions" granted by the State. App. 182-183. Nevertheless, the Interior Department arrived at the inexplicable conclusion that these "meaningful concessions" did not "confer a *substantial* economic benefit on the Tribe *proportional* to the value received by the State." App. 183, 186 (emphasis added). While this decision appears to be an exercise of the Secretary's trust responsibility under § 2710(d)(8), the timing of this decision, its reasoning, and its incompatibility with earlier compact approvals, demonstrate that the majority's erroneous construction of IGRA has led the Secretary to reach a baseless and far-reaching precedent, and stray from the deference that is due these dual-sovereign negotiations.

Notwithstanding the Secretary's disapproval of the Upper Lake compact, on the same day it was submitted for approval, the Secretary published notice of *approval* of another gaming compact between the Seminole Tribe of Florida and the State of Florida. See Notice of Approved Tribal-State Class III Gaming Compact, 75 Fed. Reg. 38833-02 (Jul. 6, 2010). Significantly, this twenty-year compact provides for general fund revenue sharing under which Florida anticipates receiving at least $1.2 billion from the Tribe for the Florida's public schools. See *Seminole Tribe celebrates new gaming compact with Florida*, Broward News and Entertainment Daily (May 6, 2010) (available at

http://browardnetonline. com/2010/05/seminole-tribe-celebrates-new-gaming-compact-with-florida, last viewed Sept. 1, 2010).[8] It is not apparent from the Secretary's notice of approval, or from a review of the two compacts, what meaningful basis there is for the Secretary to approve the Seminole compact on the one hand, but disapprove the Upper Lake compact on the other – in both cases the Tribes have accepted compacts under which they will operate class III gaming free of non-Indian competition. Together, these decisions demonstrate that as a result of the majority decision, IGRA is no longer being applied uniformly across the nation.

The majority's assumption of responsibility for valuing the parties' proposed concessions offends the dual-sovereign nature of tribal-state compact negotiations under IGRA, and asserts authority more properly exercised by the Secretary. The federal courts are not in a position to know intimately the unique nature of a tribal-state relationship, the course of negotiations, local economic conditions and myriad other factors that may inform the value of concessions. The Secretary, in its role as trustee over Indian tribes, is in a more appropriate position to make such valuations, and to do so in furtherance of federal Indian policy. The decision below has misconstrued the respective roles of the Judicial and Executive Branches in the tribal-state

[8] The Seminole compact is available on Governor of Florida's Internet site at the URL, http://www.flgov.com/pdfs/20100824_seminole.pdf, last viewed Sept. 1, 2010.

compact process under IGRA. This is an important federal question that implicates important rights and obligations of all three sovereigns, and deserves urgent attention from this Court.

B. The court of appeals finding of bad faith was erroneous, and prudential considerations weigh heavily in favor of granting the petition

As the dissent ably points out, the majority's errors are many, with consequences for states that are difficult to exaggerate. Literally hundreds of millions of dollars in general fund revenues are at stake, as are stable political relations between dozens of states and the tribes located within their boundaries.

1. Negotiations for revenue sharing do not constitute a demand for direct taxation

IGRA provides that its compacting provisions shall not be interpreted as "conferring upon a State . . . authority to *impose* any tax, fee, charge, or other assessment upon an Indian tribe," and that this lack of authority is not a basis for a State's refusal to enter negotiations. § 2710(d)(4) (emphasis added). Without any consideration of what it would mean for the State to "impose" taxation on a sovereign tribe,[9] the majority

[9] Indeed, at oral argument the author of the majority opinion characterized as "ludicrous" and "ridiculous" the State's contention that tribes exercise sovereign powers in compact negotiations under IGRA.

concluded that the State's bargaining for revenue sharing violated § 2710(d)(4): "No amount of semantic sophistry can undermine the obvious: a non-negotiable, mandatory payment of 10% of net profits into the State treasury for unrestricted use yields public revenue, and is a 'tax.'" App. 21-22. However, taxation involves three elements: (1) a monetary contribution; (2) imposed by the government; (3) to yield public revenue. Black's Law Dictionary 1594 (9th ed. 2009). The majority ignored the second, most essential, element; it "simply sidesteps the 'imposition' requirement by slapping the conclusory labels 'nonnegotiable' and 'mandatory' on proposed revenue sharing payments that are neither." App. 77. (Bybee, J., dissenting).

Revenue sharing was certainly contemplated by Congress which recognized that "[a] state's governmental interests with respect to class III gaming on Indian lands include . . . impacts on the State's regulatory system, *including its economic interest in raising revenue for its citizens,*" and encouraged States and tribes "to conduct negotiations *within the context of the mutual benefits that can flow to and from tribe* [sic] and states." S. Rep. No. 100-446, at 13, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083 (emphasis added). More importantly, Congress expressly authorized revenue sharing tied to income from the operation of slot machines, because such revenue is directly related to the operation of gaming. § 2710(d)(3)(C)(vii).

In *Coyote Valley II*, the Ninth Circuit recognized that state authority to negotiate for revenue sharing

was expressly provided for in IGRA, provided the revenue stream was "directly related" to the Tribe's class III gaming operations. *Coyote Valley II*, 331 F.3d at 1111 (citing § 2710(d)(3)(C)(vii)). Here, as in *Coyote Valley II*, the State sought revenue sharing derived from, and so directly related to, the operation of the Tribe's class III slot machines. Notwithstanding this clear authority, the majority ruled that the notion the proposed revenue sharing was directly related to the Tribe's gaming operations was "circular," and rejected it.[10] App. 29. The majority simply erred in ruling that the State sought to "impose" anything; it merely engaged in good faith negotiations, as IGRA requires it to do.

2. The majority's analysis of what constitutes a "meaningful concession" sufficient to justify a demand for direct taxation violates contract law, and usurps the role of the Secretary

Having concluded that the State demanded direct taxation in negotiations with the Rincon Band, the majority applied § 2710(d)(7)(B)(iii)(II) to establish a presumption that the State had negotiated in bad faith.

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[10] To support its construction of § 2710(d)(3)(C)(vii), the majority relied upon the "Indian canon" of statutory construction, which canon requires courts to construe *ambiguous* statutes in the manner most favorable to tribal interests. App. 18-19 n. 9; *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985). However, in *Coyote Valley II*, the Ninth Circuit ruled that § 2710(d)(3)(C)(vii) is "unambiguous." *Coyote Valley II*, 331, F.3d at 1111. Again, the majority erred. App. 100 n. 9.

The majority then applied its own subjective valuation of the concessions offered in negotiations to conclude that the State had failed to offer meaningful concessions sufficient to rebut this presumption of bad faith negotiation. This analysis was erroneous in both its approach and its application.

Earlier Ninth Circuit decisions demonstrate an understanding that the federal court's jurisdiction to determine a State's good faith is much narrower than the majority has conceived it. *Coyote Valley II* and *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095 (9th Cir. 2006), both stand for the proposition that a State does not exercise authority to "impose" a tax on a tribe when it engages in negotiations for revenue sharing and offers in exchange a meaningful concession. *Coyote Valley II* concerned a challenge to revenue sharing and other provisions proposed in the 1999 negotiations between California and the Coyote Valley Band of Pomo Indians. In *Coyote Valley II*, the revenue sharing provisions were either to fund tribes with small or no casinos for *general* tribal *uses*, or to fund the State's efforts to mitigate the impacts of, and regulate, tribal gaming. *Coyote Valley II*, 331 F.3d at 1105-06. The Ninth Circuit did not consider whether the revenue sharing sought in those negotiations constituted a direct tax, because "[w]here, as here, . . . a State offers meaningful concessions in return for fee demands, it does not exercise 'authority to impose' anything. Instead, it exercises its authority to negotiate, which IGRA clearly permits." *Coyote Valley II*, 331 F.3d at 1112. Significantly, the *Coyote Valley II* court defined a

"meaningful concession" as something merely "real," a conception that comports which the application of the common-law doctrine of consideration. *Id*. See also *Shoshone-Bannock Tribes*, 465 F.3d at 1101 (indicating that while a "state [does] not have authority to exact [revenue sharing] payments, it [may] bargain to receive them in exchange for a *quid pro quo* conferred in the compact"). These cases indicate that a meaningful concession is nothing more than "consideration" within the meaning of common law contract law.[11] Under the common law, however, courts do not weigh the adequacy of consideration, but will only determine whether putative consideration is nominal or a "sham." App. 92-93 (Bybee, J., citing 4 Joseph M. Perillo, et al., Corbin on Contracts §§ 5.14, 5.17 (2d ed. 1995)). It is for the good reason that the valuation of consideration is left to private action because the parties are "better able than others to evaluate the circumstances of particular transactions. . . ." Restatement (Second) of Contracts § 79 (1981).

The majority departs from *Coyote Valley II*'s sensible construction of IGRA, and denies that the State offers a meaningful concession when it "offers a bundle of rights more valuable than the status quo," as the State certainly did in this case. App 47-48. The dissent

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[11] It is undisputed that the common law of contracts applies to the construction and interpretation of tribal-state gaming compacts. See § 2710(d)(3)(C) (noting that compacts may include "remedies for breach of contract"); see also *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1556 (10th Cir. 1997) (stating that a tribal-state compact "is a form of contract" and citing *Texas v. New Mexico,* 482 U.S. 124, 128 (1987)).

appropriately concluded that "[t]he majority's novel conception of 'meaningful concessions' finds no support in IGRA and conflicts with our explanation of 'meaningful concessions' in *Coyote Valley II,* the Department of the Interior's reading of the Act, and centuries of contracts jurisprudence as well." App. 91.

The majority also erred in the application of its own conception of what constitutes a meaningful concession, by concluding that neither of the State's two separate compact offers in October 2006, would provide a meaningful concession in exchange for general fund revenue sharing. Even in the majority's cramped view of the State's offers, the State offered a bundle of rights significantly more valuable than the *status quo*. The State's concessions included a five-year extension of the compact's term, an additional layer of protection for tribal gaming exclusivity, and an increase in the number of slot machines the Tribe could offer. These amounted to substantially more than mere consideration necessary for compact formation, and should have satisfied even the majority's conception of a "meaningful concession."

Although the decision below is the first federal court of appeals to consider whether general fund revenue sharing constitutes an impermissible tax under IGRA, it would be a mistake for this Court to await a split between circuit court decisions before considering the questions presented by this petition. The majority decision departs from prior decisions of the Ninth Circuit Court of Appeals, and threatens chaos in tribal-state gaming relations. If the decision below is

not reversed, litigation will likely be filed in the Second, Sixth, Tenth, and Eleventh Circuits to "unsettle dozens of mutually beneficial revenue sharing provisions that have fed both tribal coffers and revenue-hungry state treasuries." App. 127 (Bybee, J., dissenting). Multiple litigation of these questions would consume vast federal, state, and tribal resources, and unnecessarily extend the period of uncertainty in tribal-state gaming relations the decision below has guaranteed. And this uncertainty may not ultimately be resolved in favor of tribal gaming interests.

Notwithstanding the serious implications of the majority's decision, whether general fund revenue sharing constitutes direct taxation under IGRA is a relatively straightforward question of statutory construction that has been amply explored in the lengthy majority and dissenting opinions below. Accordingly, there is no reason for this Court to delay consideration of the important and urgent questions presented here.

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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