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,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether California may refuse to engage in compact negotiations on mandatory subjects of bargaining under the Indian Gaming Regulatory Act (IGRA) unless the tribe with which it is negotiating agrees to pay a share of all gaming revenue to the State's general fund for uses unrelated to mitigating the impact of tribal gaming activities.

2. Whether the district court correctly found that California failed to satisfy the duties imposed by IGRA when the State refused to negotiate a compact amendment unless the Rincon Band agreed to pay 95% of new gaming revenues into the State's general fund for uses unrelated to gaming.

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INTRODUCTION

The Ninth Circuit's fact-intensive application of the Indian Gaming Regulatory Act (IGRA) in this case is not worthy of this Court's review. As the State acknowledges, the decision below does not conflict with any decision of this Court or any court of appeals. The case presents questions that – while important to the Rincon Band – are not recurring or generally important. It involves only whether California engaged in bad faith bargaining in connection with this particular negotiation for the addition of slot machines and the extension of the compact between Rincon and the State. Indeed, this case has less importance even to Rincon than it did when the Ninth Circuit resolved it; a subsequent decision of the Ninth Circuit enlarged the pool of available slot machines; and, under that decision, Rincon will receive most of the machines it sought to obtain in the negotiation. *See infra* at n.4. And, the case has limited importance to the states, because most states have not waived their sovereign immunity from suit under IGRA. This point is underlined by the fact that no state has filed an amicus brief in support of California's petition. Finally, the Ninth Circuit's decision that the State acted in bad faith is fully supported by the facts in this record.

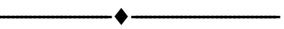
Contrary to the petition, the court below did not hold "that negotiation for general fund revenue sharing constitutes a demand for direct taxation." Pet. 22. First, IGRA does not forbid a State only to tax – it broadly prohibits states to impose "any tax,

fee, charge, or other assessment upon an Indian tribe" authorized to conduct class III gaming activity. 25 U.S.C. § 2710(d)(4) (emphasis added). Second, the Ninth Circuit did not preclude states from seeking general fund revenue in negotiations; it forbade this demand only if the State unequivocally conditions the relevant gaming rights on the provision of general fund revenue and fails to offer real consideration or meaningful value in exchange. The Ninth Circuit's decision does not cast doubt on the validity of any compact where the tribe and state freely negotiated revenue sharing provisions in exchange for real consideration. Thus, the Ninth Circuit's decision is focused on the unique facts of the Rincon-California negotiation; it does not have broad implications for other compacts.

Nor did the court below "weigh the value of concessions" offered by the State. Pet. 27. Instead, it found that the State impermissibly insisted upon receipt of general fund revenue as a condition of negotiating about the increase in slot machines and extension of the compact, and that it did not offer real consideration in exchange. Indeed, the State offered only what the Rincon already possessed – tribal exclusivity over the offering of certain gambling activities. In any event, the court's conclusion that the State's demand – that it receive 95% of all new revenue generated by the compact amendment for its general fund – constituted evidence of bad faith bargaining is correct. *See* 25 U.S.C. § 2710(d)(7)(B)(iii)(II) (the court "shall consider any demand by the State for direct taxation of the Indian tribe . . . as evidence that

the State has not negotiated in good faith"). Again, the court's decision that the State acted in bad faith is tightly focused on the specific facts of this negotiation. It does not suggest that courts should weigh the value of consideration – only that courts should be cognizant of facts suggesting that no real consideration was offered, particularly where the negotiation may involve a potentially illegal demand under IGRA. And, the Secretarial decisions that the State claims reflect a conflict simply illustrate that different conclusions may be reached based on the unique circumstances presented by different negotiations.

This Court's criteria for certiorari under Supreme Court Rule 10 are not met in this case, and the petition should be denied.



STATEMENT

I. The IGRA Good Faith Negotiation Requirement and the Prohibition on Revenue-Sharing Demands.

States have no inherent authority to regulate gaming activity on tribal lands. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). State involvement in tribal gaming derives exclusively from the Indian Gaming Regulatory Act (IGRA), in which Congress provided that tribal-state negotiations over the conduct of gaming would be a prerequisite for Secretarial approval of tribal casino gaming activities. 25 U.S.C. § 2710(d)(3), (d)(8).

IGRA does not vest states with the discretion to refuse to negotiate for a compact permitting tribal-state gaming. Instead, if a state permits casino-style gaming anywhere within its boundaries, IGRA requires that state, upon request by a tribe, to negotiate in good faith to reach a compact permitting tribal casino gaming. 25 U.S.C. § 2710(d)(1), (d)(3)(A). If a state refuses to negotiate or fails to negotiate in good faith *and* has waived its sovereign immunity to suits filed under IGRA, the tribe may sue in federal court for an order requiring the state to participate in additional negotiations and, if necessary, to participate in a mediation proceeding to determine compact terms.[1] 25 U.S.C. § 2710(d)(7); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996) (finding Congress lacked authority to abrogate state sovereign immunity in IGRA).

IGRA permits negotiations over a range of subjects relating to the operation of gaming activities, including payments by the tribe to mitigate off-reservation gaming impacts. 25 U.S.C. § 2710(3)(C). However, it did not change the governing law that states lack authority to impose taxes on on-reservation economic activities, including gaming activities. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S.

[1] California has waived its sovereign immunity pursuant to a voter-approved measure requiring the State to enter into gaming compacts with requesting tribes and again in the terms of its compact with the Rincon Band. Cal. Gov't Code § 98005; Tribal-State Compact § 9.4.

450, 458 (1995). Instead, IGRA expressly states that the states lack "authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III [gaming activity]." 25 U.S.C. § 2710(d)(5). In addition, states may not refuse to enter into compact negotiations "based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment." *Id.*

IGRA provides two separate mechanisms for the enforcement of its prohibition on state revenue demands. First, the Secretary of the Interior may disapprove compacts that violate IGRA, including compacts that impose state taxes, fees, charges, or other assessments on tribal gaming activities. *See* 25 U.S.C. § 2710(d)(8)(B). Second, a tribe faced with state revenue demands can bring suit in federal court alleging a failure to negotiate in good faith, and the court evaluating that claim "shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith." 25 U.S.C. § 2710(d)(7)(B)(iii)(II). This remedy is only available to those tribes negotiating with states that have waived their sovereign immunity from suits under IGRA.

IGRA's prohibition on revenue-sharing demands has not, however, prevented states and tribes from *negotiating* in good faith to share revenue derived from gaming activities. Under Rincon's existing

compact with California, for example, Rincon has agreed to share gaming revenue with other tribes in the state who either do not game or have very small gaming operations. Tribal-State Compact Between the State of California and the Rincon San Luiseno Band of Mission Indians § 4.3.2.1 (Sept. 10, 1999), *available at* www.cgcc.ca.gov/documents/compacts/original_compacts/Rincon_Compact.pdf (Compact).

The Ninth Circuit has upheld this type of revenue sharing. *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1112 (9th Cir. 2003) ("*Coyote Valley II*") (upholding revenue sharing among tribes and to offset state's gaming-related costs in 1999 California compacts, based on exchange of exclusivity for revenue sharing). The Ninth Circuit has also noted that additional revenue sharing may be lawful when it is a negotiated term exchanged for meaningful value on a subject other than those on which IGRA requires states to negotiate. *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1101 (9th Cir. 2006) (revenue sharing is permissible as a bargained-for *quid pro quo* supported by consideration other than mandatory subjects of bargaining).

The Department of the Interior has also adopted this view in its review process, approving or allowing compacts in which a state has provided a tribe with something of value that is not a required subject of negotiations – such as exclusivity of tribal gaming – but disapproving compacts where the state has offered only to exchange "terms that are routinely negotiated by the parties as a part of the regulation of gaming activities, such as duration, number of gaming devices, hours of operation, and wager limits." App. 5.

Applying this standard, the Department has approved compacts, in California and elsewhere, in which a state has provided tribes with exclusive gaming rights in exchange for a share of tribal gaming revenue.[2]

II. The State's Prior Negotiations and Existing Compact with Rincon.

California's demand for a share of Rincon's gaming revenue arose in the context of negotiations to amend Rincon's existing gaming compact.

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[2] Each of the compacts cited by the dissenting opinion below involved such an express exchange of tribal exclusivity to support the negotiated and agreed payments of revenue sharing to states. *See* Mashantucket Pequot Memorandum of Understanding at ¶ 1 (Apr. 30, 1993), *available at* www.ct.gov/dosr/lib/dosr/Memorandum_Of_Understanding_Foxwoods.pdf (last visited Nov. 9, 2010); Mohegan Tribe Memorandum of Understanding ¶ 1 (May 17, 1994), *available at* www.ct.gov/dosr/lib/dosr/Memorandum_Of_Understanding_Mohegan.pdf (last visited Nov. 9, 2010); Seminole Tribe of Florida Compact pts. XI & XII, *available at* www.flgov.com/pdfs/20100824_seminole.pdf (last visited Nov. 9, 2010); Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan Compact § 15 (May 9, 2007), *available at* www.michigan.gov/documents/mgcb/Gunlake_Compact_276443_7.pdf (last visited Nov. 9, 2010); Seneca Nation of Indians Compact § 12(b) (Apr. 12, 2002), *available at* www.ncai.org.ncai/resource/agreements/ny_gaming-seneca_nation-4-12-2002.pdf (last visited Nov. 9, 2010); New Mexico Tribal-State Class III Gaming Compact § 11(A) & (D) (2007), *available at* www.nmgcb.org/tribal/2007%20compact.pdf (last visited Nov. 9, 2010); Oklahoma Tribal-State Gaming Act Model Tribal Gaming Compact, 3A Okla. Stat. § 11; Amendments to the Menominee Indian Tribe of Wisconsin Compact § 33 (Apr. 2003), *available at* www.doa.state.wi.us/docview/asp?docid=2147 (last visited Nov. 9, 2010); *cf.* App. 103-106 nn.12-18 (citing these compacts).

Rincon's existing gaming compact, which dates back to 1999, was itself the product of significant negotiations and litigation. After IGRA was passed in 1988, California tribes attempted to negotiate gaming compacts with the State without success. *See Hotel Employees & Restaurant Employees Int'l Union v. Davis*, 21 Cal. 4th 585, 590 (1999). After a decade of attempted negotiations and litigation between the tribes and the State, California's voters approved a statutory initiative authorizing the Governor of California to enter into a gaming compact with any federally-recognized tribe in California that wished to game under IGRA. *Id.*

However, California's constitution contains an anti-casino provision, and the California Supreme Court struck down all but one of the provisions of the voter-approved initiative on constitutional grounds.[3] *Davis*, 21 Cal. 4th at 615. After some negotiations, Governor Davis offered interested tribes a form compact, the provisions of which were not subject to negotiation. *See Coyote Valley II*, 331 F.3d at 1104. Rincon and fifty-six other tribes accepted. *Id.*

The 1999 form compacts were conditioned on voter approval of a constitutional amendment permitting tribal casino gaming, which passed on March 7,

[3] The surviving provision, Cal. Gov't Code § 98005, waives the State's sovereign immunity from suits in federal court over compact-related disputes. *See Davis*, 21 Cal. 4th at 615 (declining to strike down sovereign immunity waiver).

2000. *See Coyote Valley II*, 331 F.3d at 1107. As amended, the California constitution permits only tribal casino gaming:

> (a) The Legislature has no power to authorize lotteries and shall prohibit the sale of lottery tickets in the State.
>
> . . . .
>
> (e) The Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey.
>
> (f) Notwithstanding subdivisions (a) and (e) and any other provisions of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.

CAL. CONST. art. 4 § 19. Once this constitutional provision was approved, the compacts became effective upon publication in the Federal Register. 65 Fed. Reg. 31189-01 (May 16, 2000).

III. Compact Amendment Negotiations.

Under the terms of the 1999 compacts, each signatory tribe could draw licenses permitting operation of up to 2000 gaming devices out of a limited statewide pool. Compact § 4.3. Based on the State's interpretation of the provisions setting the size of the pool, some tribes – including Rincon – have not been able to draw enough licenses to reach the 2000-device maximum.[4]

The compact also permitted signatory tribes to request renegotiation of the compact sections regarding the number of available licenses, if such request was made during a particular time period in the winter of 2003. Compact §§ 4.3.3., 9.1.

The Rincon Band requested renegotiation of the number of permitted devices during the required timeframe. CR165. Negotiations began, but were delayed by the recall of Governor Davis in October 2003. CR160.

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[4] The Ninth Circuit has subsequently determined that the State's interpretation of the 1999 form compact was incorrect and that the license pool is larger. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 618 F.3d 1066 (9th Cir. 2010), *petition for rehearing pending*. As a result, Rincon has now been able to draw additional licenses and operate a total of 2000 machines. However, prior to that recent decision, the only way Rincon could obtain additional licenses was through a renegotiation of the compact. Rincon asserted that the State's insistence on the now-discredited interpretation resulting in a lower number was further evidence of the State's failure to negotiate in good faith. CR108.

After Governor Schwarzenegger took office, he began negotiations regarding compact amendments, but he did not include all tribes who sought to participate. Instead, his negotiation team focused on a selected group of tribes who were willing to agree to substantial revenue-sharing payments in exchange for unlimited gaming device licenses. CR12 at 4:24-26; CR160. When Rincon learned of these negotiations, it requested the opportunity to participate or to negotiate independently with the State, invoking a provision of the compact that requires a meeting on disputes within ten days. CR160. The State did not meet with Rincon until more than ninety days after receiving its request. *Id.*

By the time the State met with Rincon, it had nearly completed negotiation of amended compacts with five tribes under which those tribes would pay substantial percentages of gross revenue into the State's general fund for the State's discretionary use, in exchange for unlimited gaming device licenses. CR160. The State planned to use that revenue to finance public bonds to support general public uses unrelated to gaming, with the bonds guaranteed by the flow of anticipated revenue from the new amended compacts. Press Release, Office of the Governor, *Governor Schwarzenegger Signs Renegotiated Gaming Compacts with Five Indian Tribes* (June 26, 2004), *available at* http://gov.ca.gov/index.php?/press-release/2987/.

Significantly, the 1999 form compacts contain a "most favored tribe" provision requiring the State to

offer an amendment negotiated with any tribe to any other requesting tribe. Compact § 15.4. Under that provision, if the State were to negotiate with Rincon provisions different from those it had negotiated with the tribes who agreed to revenue sharing, the State would be required to offer those terms to the other tribes, potentially jeopardizing the funding stream underlying its bonds.

Consistent with the position it had taken in negotiating the amended compacts, the State proposed that Rincon should pay a percentage of all its gaming revenue – including revenue derived from existing machines – directly to the State's general fund for unrestricted use, in exchange for any new devices. CR162. Under the terms of the State's proposal, Rincon would be required to pay $20 million per year on its *existing* gaming machines, before adding any new machines to its gaming floor. *Id.*

Rincon filed suit in June 2004, alleging that the State had failed to negotiate in good faith because of its insistence on revenue sharing, its refusal to timely meet with Rincon, and its refusal to negotiate over the meaning of the compact provisions setting the size of the statewide pool (which provisions reduced the number of licenses available to Rincon below the 2000-license cap provided in the compact). CR1, 108.

Negotiations continued during the litigation. Throughout the negotiations, the State refused to consider any compact amendment that did not include payments by Rincon to the State's general fund

for unrestricted use. CR161, CR164, CR165. In October 2006, two weeks before the deadline to close the administrative record for review by the district court, the State made its final offer of the terms on which it would agree to additional gaming devices and an extended compact term: Rincon would be required to pay to the State 10% of the gross gaming revenue on all of its existing machines, plus 15% on any new machines, as well as a payment of $2 million into the Revenue Sharing Trust Fund to be shared with non-gaming tribes.[5] CR164. The State's expert determined that this proposal would provide the State with an additional $37.9 million per year in unrestricted general fund revenue from Rincon's new machines, while Rincon would receive only $1.7 million of the new revenue annually. CR164.

Rincon's proposals did not include any unrestricted general fund payments. Rincon offered to increase the fees paid for additional machines only, with the funds to be used to defray regulatory costs and off-reservation impacts directly related to the Tribe's gaming operations.[6] CR162, CR163. Rincon

[5] Three days before the close of the administrative record, the State made an alternative proposal that would have brought Rincon up to the 2000-device cap in exchange for an annual $2 million RTSF payment and annual payments to the State general fund of 25% of the gross gaming revenue on the new devices. CR164.

[6] These amounts would be in addition to Rincon's existing mitigation agreements with surrounding communities, under

(Continued on following page)

offered to increase the fees even further if the State demonstrated that additional increases were necessary to cover the actual regulatory and mitigation costs. *Id.*

IV. District and Circuit Court Proceedings.

When the State and Rincon could not reach agreement by the deadline to close the administrative record, the district court evaluated the State's conduct based on the paper record of negotiations between the parties. The district court found that the State's insistence on payments of gaming revenue to its general fund for unrestricted use constituted a demand for a tax in violation of IGRA's prohibition on imposing taxes, fees, charges, or assessments on gaming activities. Pet. App. 154-168.

Applying the *Coyote Valley II* case, the district court noted that revenue sharing payments are permissibly negotiated, rather than impermissibly imposed, only when they are accompanied by meaningful and real concessions, such as exclusivity of tribal gaming. Pet. App. 160. Because the State had already granted tribes exclusivity in exchange for the revenue sharing provisions in the 1999 compacts, the district court reasoned, neither IGRA nor contract law would permit the State to rely on that same

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which it provides support for regulatory, public safety, and infrastructure costs associated with its gaming operations.

exclusivity to support further revenue-sharing demands. Pet. App. 160-161.

The district court then turned to the question of whether the new consideration offered by the State was sufficient to support its position that it was engaged in permissible negotiations. It found that the State's demand that it receive 95% of the new revenue for general fund uses supported a finding that the State was seeking to impose a tax in violation of IGRA. Pet. App. 164-166. The district court found further support for this conclusion in the State's representations, during summary judgment briefing, that revenue sharing was necessary to compensate the State for the revenue it is foregoing because non-tribal gaming operations (which could have been taxed) are not permitted. Pet. App. 167. Because there was no nexus between the revenue-sharing and permissible uses such as defraying regulatory costs or mitigation of gaming impacts, the district court held that the demand was a tax and that the State had failed to negotiate in good faith.[7] Pet. App. 168.

The district court ordered the State and Rincon to resume negotiations and attempt to conclude a compact amendment within 60 days or, if unsuccessful, to participate in a mediation proceeding to set

[7] The district court did not address Rincon's alternative argument that the State's restrictive interpretation of the total number of gaming devices available statewide, coupled with its refusal to negotiate about the meaning of the statewide pool provisions, also constituted failure to negotiate in good faith.

compact terms. Pet. App. 172 (citing 25 U.S.C. §§ 2710(d)(7)(B)(iii), 2710(d)(7)(B)(iv)).

The State appealed to the Ninth Circuit, which affirmed. The court of appeals confirmed the lawfulness of revenue sharing, but found that California's particular demands of the Rincon violated IGRA's requirement of good-faith negotiations.

Relying on the 2003 Ninth Circuit decision that upheld revenue sharing in the 1999 form compacts to which Rincon was a signatory, the majority opinion acknowledged that a state may request revenue sharing without acting in bad faith. To do so, however, the state's demand must meet three criteria: "the revenue sharing provision is (a) for uses 'directly related to the operation of gaming activities' in § 2710(d)(3)(C)(vii), (b) consistent with the purposes of IGRA, and (c) not 'imposed' because it is bargained for in exchange for a 'meaningful concession.'" Pet. App. 29. The State's offers to Rincon failed on each of these three prongs.

With regard to the first criteria, the court noted that it is the *use*, not the *source*, of the funds that must be related to the operation of gaming for a compact provision to comply with 25 U.S.C. § 2710(d)(3)(C)(vii). Pet. App. 30-31 (citing *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 435 (9th Cir. 1994); *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 932 (7th Cir. 2008)). While the State proposed to derive revenue from funds generated by gaming, it was not willing to agree to limit its use of

those funds for gaming-related expenditures such as regulatory or mitigation costs, or even in payments to non-gaming tribes. Pet. App. 30-31. Therefore, the court held, the State's revenue-sharing demand sought to include provisions beyond those permitted by IGRA. *Id.*

The court also rejected the State's argument that raising general fund revenue for the State is among IGRA's purposes. Pet. App. 32-36. Examining the legislative history cited by the State, the panel set forth the cited passage in full, as follows:

> A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens. It is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.

Pet. App. 34 (quoting S. Rep. No. 100-446, at 13, *as reprinted in* 1988 U.S.C.C.A.N. at 3083). Read in context, and considered along with other statements in the legislative history, the court found that this reference was intended to capture a State's interest in maintaining its other gaming systems (such as state lotteries), rather than a broader economic interest in harnessing tribal gaming revenue for its own funding

purposes. Pet. App. 34-35 (citing 25 U.S.C. § 2710(d)(7)(B)(iii)(I); S. Rep. No. 100-446 at 1-2, 14, *as reprinted in* 1988 U.S.C.C.A.N. at 3071-72, 3084). Indeed, the court reasoned, reading the legislative history to permit states to further their economic interests through compacts would be inconsistent with IGRA's express ban on state taxation or assessment of tribal gaming revenues. Pet. App. 35 (citing 25 U.S.C. § 2710(d)(4)); Pet. App. 19 n.10. Therefore, California's pursuit of general fund revenues unrelated to regulatory or mitigation costs associated with gaming was not consistent with IGRA's purposes.

Lastly, the court examined the possibility that the State's actions could be justified as a permissible negotiation of optional terms. In this regard, the court again turned to Circuit precedent, noting that revenue sharing demands may be supportable if they are not a unilateral attempt to impose a tax or assessment but instead an offer of meaningful concessions to support the proposed terms. Pet. App. 37-38. Like the district court, the court of appeals found that exclusivity could not support the State's revenue-sharing demand, because exclusivity had already been provided in exchange for the revenue-sharing provisions of the 1999 compact as well as the California constitution. Pet. App. 39-40 (citing common law rule that new consideration must be given to support contract modifications); Pet. App. 41-44, 47-48 (finding specific exclusivity proposals to add no meaningful value to the constitutional guarantee of total exclusivity).

Relying on the position of the Secretary of the Interior and Ninth Circuit precedent, the court also found that state revenue-sharing demands cannot be supported by concessions on subjects that are mandatory in any gaming compact, such as the number of devices and the duration of the compact. Pet. App. 44-46. Finally, the court noted the disproportionate economic gains the State would receive under its proposal – $38 million in new revenue compared to $2 million for the Tribe – as further evidence of the State's lack of good faith. Pet. App. 43.

The court noted the existence of other compacts where the signatory tribes, unlike Rincon, had agreed to revenue sharing, and made clear that it was not expressing any opinion regarding the validity of those compacts. App. 40 at n.1. It also made clear that it was not the "hard line" nature of the State's stance that constituted bad faith, but rather its insistence on conditions that are outside the permissible scope of 25 U.S.C. § 2710(d)(3)(C) and (d)(4) as a condition of any compact amendment. Pet. App. 43-44.

The State petitioned for rehearing and *en banc* review of the decision, both of which were denied.

REASONS TO DENY THE PETITION

I. The Decision Below Will Not Cause Disruption in the Law or the Relationship Between States and Tribes, and this Court's Intervention is Therefore Unnecessary.

The petition recognizes that this case does not involve any conflict among the lower courts or with any decision of this Court. Instead, it argues that the case decided issues of broad importance incorrectly and that the decision will have a substantial, disruptive impact. The State is wrong.

First, the decision below will not have a wide impact. Two factors separate this case from the circumstances faced by other tribes and states around the country: California has waived its sovereign immunity to suit under IGRA and California's constitution guarantees exclusivity of tribal gaming. Those two factors, combined, ensure that the Ninth Circuit's decision will have minimal, if any, impact on other compacts or other states.

Both the petition and the dissenting opinion on which it relies express concern that the court of appeals' decision will lead to disarray in tribal-state relations, with tribes seeking to renegotiate existing compacts and disturb settled economic relationships. Even assuming that tribes have an incentive to disrupt their own gaming activities by demanding a renegotiated compact and subjecting themselves to the risk of Secretarial disapproval, the possibility of

real disruption resulting from the decision below is remote.

As a practical reality, after this Court's decision in *Seminole Tribe*, only those tribes located in states that have waived their sovereign immunity for IGRA litigation have any ability to take advantage of a change in the law regarding the state's duty to negotiate in good faith. Tribes in states that have not waived sovereign immunity do not have an available forum to protest a state's revenue demands as inconsistent with IGRA. *See Seminole Tribe*, 517 U.S. 44, 47; *see also Texas v. United States*, 497 F.3d 491 (5th Cir. 2007) (invalidating Secretarial regulations remedy for tribes in states that have not waived sovereign immunity).

Even in the limited number of states that are subject to suit for failure to negotiate in good faith under IGRA,[8] there is no reason to believe there will

[8] Indeed, of the eight states cited in the petition and the dissent below as having some revenue-sharing provisions in their compacts, five expressly disclaim any general waiver of sovereign immunity, opting instead for private dispute resolution mechanisms or waiving immunity only for enforcement of the tribal-state compact. *See* Seminole Tribe of Florida Compact pts. XIII ¶ D (limited waiver); Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan Compact § 7(B) (no waiver of sovereign immunity); Seneca Nation of Indians Compact § 14(i) (limited waiver); New Mexico Tribal-State Class III Gaming Compact § 7(B) (no waiver of sovereign immunity); Oklahoma Tribal-State Gaming Act Model Tribal Gaming Compact, 3A Okla. Stat. § 12 (limited waiver). Only one other state provides for a general waiver of sovereign immunity, and it

(Continued on following page)

be meaningful disruption. The panel's decision was consistent with all other authority that has considered revenue sharing – two prior Ninth Circuit decisions, commentary in a Seventh Circuit decision, and the repeated statements of the Secretary of the Interior during the compact review process.

All three of the Ninth Circuit's decisions – including the decision below – stand for the same proposition. They hold that states may request revenue sharing when it is (1) consistent with the provisions of IGRA and (2) supported by state concessions on subjects other than the mandatory subjects of bargaining in any IGRA compact. App. 39; *Coyote Valley II*, 331 F.3d at 1111-15; *Shoshone-Bannock*, 465 F.3d at 1101.

The only other published decision regarding tribal-state revenue sharing, out of the Seventh Circuit, was decided on different grounds. However, it included a discussion fully consistent with the view of the Ninth Circuit that revenue sharing must relate to either advancing IGRA's purposes or mitigating the externalities of tribal gaming. *Ho-Chunk Nation*, 512 at 932.

This position is likewise reflected in the views of the Secretary of the Interior, expressed in the compact review process, that states may not demand

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does so in the compact rather than in statute as California has. *See* Amendments to the Menominee Indian Tribe of Wisconsin Compact § 23(F) & (G); *cf.* Cal. Gov't Code § 98005.

revenue sharing as a prerequisite to reaching agreement on "terms that are routinely negotiated by the parties as a part of the regulation of gaming activities, such as duration, number of gaming devices, hours of operation, and wager limits."[9] App. 5. Indeed, the court relied on this Secretarial interpretation in reaching its own conclusion. *See also* Pet. App. 179-180.

The decision in this case did not conflict with any of the other cases regarding permissible negotiation topics under IGRA. Because existing compacts were presumably adopted in light of the existing law, and there has been no change in that law, there is no likelihood of disruption based on the Ninth Circuit's decision.

II. The Court of Appeals' Substantive Analysis Does Not Require this Court's Intervention.

The petition also contends that this Court's intervention is required because the court of appeals'

[9] The State suggests that Secretarial review decisions after the issuance of the opinion below have been inconsistent. Pet. at 29-31. That speculation rests only on the fact that Florida's compact with the Seminole Tribe was approved, while California's compact with Upper Lake was disapproved. The petition does not examine the differences between the compacts – including the Seminole compact's express exchange of exclusivity for negotiated revenue sharing – or the actual basis for the Secretary's analysis. Like the decision of the court of appeals, the Secretary's decisions regarding approval are highly fact intensive.

legal analysis was incorrect. Pet. at 31-38. This Court does not generally engage in error correction. In any event, the court of appeals did not err in applying IGRA and established precedent to the unique facts of the State's negotiations with Rincon.

a. IGRA Forbids States from Refusing to Conclude a Compact Unless they Are Paid a Share of Tribal Gaming Revenue.

The petition attempts to distinguish the "imposition" of a tax and negotiation for revenue sharing payments, contending that asserting a negotiation position cannot impose a tax. Pet. at 32-33 (citing BLACK'S LAW DICTIONARY 1594 (9th Ed. 2009)).

Initially, IGRA does not forbid imposition only of a "tax." It forbids imposition of any governmental charge on gaming activities, whether that charge be in the form of a "tax, fee, charge, or other assessment." 25 U.S.C. § 2710(d)(4). The meaning of this statutory language does not turn on the technical definition of what makes a government charge a "tax" rather than another kind of assessment on economic activity.

Moreover, IGRA does not simply prohibit imposition of taxes, fees, charges and assessments. It also forbids states from refusing to engage in compact negotiations "based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment." 25 U.S.C. § 2710(d)(4).

In its negotiations with Rincon, the State refused to enter into any compact amendment unless Rincon agreed to pay some percentage of its gross gaming revenue into the State's general fund for unrestricted use. CR162. There is no factual dispute that this was the State's negotiating position and that the State was unwilling to consider any compact amendment that involved only payments directed to regulatory or mitigation costs associated with gaming. CR162.

While IGRA may permit "hard-line bargaining," Pet. App. 113, it does not permit states to refuse to compact based only on the tribe's refusal to allow the state to assess percentage charges on tribal gaming revenue. 25 U.S.C. § 2710(d)(4). That is what California did in its negotiations with Rincon, and IGRA's text instructs that this behavior is evidence of failure to negotiate in good faith. 25 U.S.C. § 2710(d)(7)(B)(iii)(I).

b. The State's Insistence on Revenue Sharing Necessitated Scrutiny of the Value It Offered in Return.

The petition also contends that federal courts cannot – under either contract law or appropriate deference to Secretarial review – evaluate the adequacy of consideration offered by a state during compact negotiations. But it is the State's insistence on revenue sharing as a condition of any compact amendment that required the analysis about which it now complains.

Under the few available precedents, including the Secretary's own interpretations during the compact review process, revenue sharing with a state may be upheld as lawful only when it is supported by some meaningful exchange of value involving some term that IGRA does not require the state to bargain over, such as exclusivity of tribal gaming.[10] *Coyote Valley II*, 331 F.3d at 1112; *Shoshone-Bannock*, 465 F.3d at 1101; App. 5. It is the offer of supporting value that converts the state's bargaining position from an unlawful attempt to impose a tax or charge on gaming revenue to a permissible position in bilateral negotiations.

Examining the value of the state's offer, in this context, is not an impermissible examination of the adequacy of agreed-upon consideration, as the petition suggests. Pet. at 36. That common-law doctrine arises from the idea that, if private parties to an agreement believe the consideration was enough for their purposes, the courts should not interfere. *See* RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981). Here, the parties *have never* agreed that the consideration is adequate – Rincon has contended that the State's offer of value to support its revenue-sharing

[10] The question of whether revenue sharing that is supported by an exchange of meaningful value may be used by the state for purposes other than regulatory or mitigation costs associated with gaming has not been resolved. However, that issue is not presented by this case because of the lack of meaningful value offered by the State in exchange for its revenue demands, as addressed below.

demand is essentially worthless in light of the existing California constitutional provisions guaranteeing exclusivity of tribal gaming absent a further popular vote and the provisions of the 1999 compact providing remedies for any breach of the exclusivity agreement.[11] Cal. Gov't Code § 98005; Compact § 9.4.

Even under the common law of contracts, courts are permitted to determine whether consideration is nominal or a "sham." 4 Joseph M. Perillo, *et al.*, CORBIN ON CONTRACTS §§ 5.14, 5.17 (2d ed. 1995) (cited in Pet. at 36, Pet. App. 92-93). Where the state's only defense to a charge of failure to negotiate in good faith is that it was making a lawful offer supported by value, this analysis is not only permitted but required.

The State's real concern is that both the district court and the Circuit Court rejected its arguments regarding consideration on their merits, not that they lacked jurisdiction to do so. *See* Pet. at 37 (contending that State's offered concessions were meaningful as required to support its request for revenue sharing).

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[11] Under the analysis adopted by both the Secretary of the Interior and the Circuit Court, the State's offers of additional devices and additional time cannot support a demand for revenue sharing, because the State is required to negotiate over those terms and cannot refuse to do so based on Rincon's refusal to pay a tax or assessment on its gaming revenue. 25 U.S.C. § 2710(d)(4).

In this regard, the State's unique circumstances shaped the analysis of the lower courts. California's voters (and the Governor's predecessor) had already granted Rincon and other tribes the exclusive right to engage in casino gaming. Indeed, the grant of exclusivity was the basis on which the Ninth Circuit upheld the revenue sharing provisions in California's 1999 form compacts. *Coyote Valley II*, 331 F.3d at 1112.

As a matter of contract law, once California had used tribal gaming exclusivity as consideration in the 1999 form compacts, exclusivity could not serve as consideration for future compact amendments. *See* 4 WILLISTON ON CONTRACTS § 8:9 (4th ed.) ("something which has been given before the promise was made and, therefore, without reference to it, cannot, properly speaking, be legal consideration"); RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981). Thus, the State could not offer exclusivity as consideration for a compact amendment, and it makes no attempt to argue that some "additional" exclusivity promises supported its bargaining demands. Pet. at 37.

Without exclusivity as a bargaining chip, the State was left only with its offers of additional devices or compact duration as value to support its revenue sharing demand. Both the Secretary of the Interior and the Circuit Court have been clear that concessions on subjects mandatory to any gaming compact – such as the duration of the compact and the number of gaming devices – cannot be used to support revenue sharing. *Coyote Valley II*, 331 F.3d at 1112;

Shoshone-Bannock, 465 F.3d at 1101; App. 5. Thus, under the governing law, the State's offers of devices and time could not serve as consideration for its revenue demands.

But even if they could, the sheer magnitude of the State's demands, when compared to the value Rincon would receive from additional licenses and time, could not support a finding of good faith negotiation here.

In its negotiations with Rincon, the State insisted that it be paid a share of the gross revenue generated, not just on any new machines, but on all of the existing machines permitted under the 1999 compact. CR162. This insistence was apparently based on the current administration's belief that its predecessor should not have given away the possibility of revenue sharing on the devices authorized under the prior compacts.[12]

The effect of the State's position, combined with Rincon's position in a crowded gaming market, was such that the State would capture the overwhelming majority of any new revenue derived from the compact amendment. The State's economic analysis

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[12] A commitment to make tribes "pay their fair share" into the public treasury was one of the current governor's campaign platforms during the recall election. *See Arnold Schwarzenegger Ad Watch*, L.A. TIMES (Sept. 24, 2003); Michelle Morgante, *Schwarzenegger rallies opposition to two gambling initiatives*, ASSOCIATED PRESS STATE & LOCAL WIRE (Oct. 14, 2004).

projected that the State would receive $37.9 million per year of the new revenue generated by the additional machines, while Rincon would receive only $1.7 million. CR164. The State would be permitted to use all of this money for unrestricted general fund purposes, rather than to offset regulatory or mitigation costs associated with gaming. CR162. Indeed, the State's proposals did not address the actual costs of regulation and mitigation at all, let alone relate them to the size of the State's revenue demand.

As the State acknowledges, IGRA requires that tribes remain the primary beneficiaries of tribal gaming operations. 25 U.S.C. § 2702(2). In light of this statutory requirement, a proposal that allocates 95% of new revenue to the State and 5% to the Tribe cannot be viewed as anything other than sham consideration insufficient to support the good faith of the State's bargaining position. The lower courts did not err in applying IGRA's good faith analysis to these facts.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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[SEAL]

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

APR 25 2003

Honorable Harold "Gus" Frank
Chairman, Forest County Potawatomi Community
P.O. Box 340
Crandon, Wisconsin 54520

Dear Chairman Frank:

On February 20, 2003, we received the 2003 Amendments (Amendments) to the Forest County Potawatomi Community of Wisconsin (Community) and State of Wisconsin Gaming Compact of 1992, as amended December 3, 1998, executed on February 19, 2003. On April 4, 2003, we received amendments to the original submission deleting a proposed 50-mile radius exclusivity zone aimed at other Class III Indian gaming facilities, and modifying proposed Section IV.A.8. of the Compact by deleting references to gaming facilities in neighboring states.

Under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710(d)(8)(C), the Secretary of the Interior (Secretary) may approve or disapprove the Amendments within forty-five days of their submission. If the Secretary does not approve or disapprove the Amendments within forty-five days, IGRA provides that the Amendments are considered to have been approved, but only to the extent that they are

consistent with the provisions of IGRA. Under IGRA, the Secretary can disapprove the Amendments if she determines that the Amendments violate IGRA, any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligations of the United States to Indians.

We have completed our review of the Amendments, along with the submission of additional documentation submitted by the parties and a number of third parties. Pursuant to Section 11 of IGRA, we have decided to allow the 2003 Amendments to take effect without Secretarial action for the following reasons.

Scope of Granting

Under the 2003 Amendments, Section IV.A of the Compact is amended by adding, *inter alia*, electronic keno, roulette, craps, poker and similar non-house banked card games, and games played at blackjack style tables. We need to determine whether the inclusion of these gaming activities in the Compact complies with the requirements of Section 11(d)(1)(B) of IGRA. In our view, whether the addition of electronic keno and casino table games complies with Section 11(d)(1)(B) of IGRA, 25 U.S.C. § 2710(d)(1)(B), which requires that such gaming activities be permitted in the State of Wisconsin "for any purpose by any person, organization, or entity" is an unsettled issue. As you are well aware, the scope of gaining question is one of the issues raised in the state court litigation in *Dairyland Greyhound Park v. Doyle*,

No. 01-CV-2906. In addition, we understand that a petition has been filed with the Wisconsin Supreme Court on April 2, 2003, by the Majority Leader of the Wisconsin Senate and the Speaker of the Wisconsin Assembly seeking a declaratory judgment on several issues relating to the 2003 Amendments, including the permitted scope of gaming in the State. Although we are mindful that in the *Dairyland* case, the Dane County Circuit Court has ruled in favor of the Governor, the decision has been appealed to an intermediate court which is unlikely to be the final appeal of the case within the State court system. As a result, we believe that the best alternative available to the Department of the Interior (Department) under IGRA is to have the 2003 Amendments go into effect by operation of law.

Revenue-Sharing Provisions

As you may be aware, the Department has sharply limited the circumstances under which Indian tribes can make direct payments to a State for purposes other than defraying the costs of regulating Class III gaming activities. To date, the Department has approved payments to a State only when the State has agreed to provide the tribe with substantial exclusivity for Indian gaming, *i.e.*, where a compact provides a tribe with substantial economic benefits in the form of a right to conduct Class III gaming activities that are on more favorable terms than any rights of non-Indians to conduct similar gaming activities in the State.

The 2003 Amendments substantially modify Section XXXI of the Compact. When Section XXXI (Payment to the State) was added to the 1992 Compact as part of the 1998 Amendments, it provided for a payment of $6,375,000 per year for the duration of the term of the Compact (five years) in exchange for exclusive rights to conduct electronic games of chance (with mechanical or video displays), blackjack, and pull-tabs. Section XXXI.G. of the 2003 Amendments requires the Community to pay considerably more money to the State in exchange for the exclusivity agreement in proposed amended Section XXXI.B. of the Compact, *i.e.*, the addition of variations to the game of blackjack, pari-mutuel wagering on live simulcast of horse, harness, and dog racing events, electronic keno, and certain casino table games. We are uncertain whether the addition of these Class III gaming activities is worth the payment of $34,125,000 in 2004, $43,625,000 in 2005 (in addition to payments of $6,375,000 in 2003 and 2004). Starting in 2005, the Community is required to pay between 6% and 8% of net win, depending on the year, until 2011, when a permanent 6.5% payment of net win takes effect. The Community has reassured us that it will receive the benefit of the bargain, and has provided credible financial projections that indicate that it will be able to afford the payments.

The financial projections provided by the Community indicate that net revenues are expected to substantially increase under the 2003 Amendments. However, it is not clear to us that this increase is

solely due to the exclusivity agreement in Section XXXI.B. of the Compact. We believe that it may also be due to the proposed modifications of other sections of the Compact, especially the elimination of the ceiling on the number of electronic gaming devices. In this context, we note that gaming revenues have tripled as a result of the increased number of machines and tables authorized in the 1998 Amendments, which had no change in the scope of gaming. It is the position of the Department to permit revenue-sharing payments in exchange for *quantifiable* economic benefits over which the State is not required to negotiate under IGRA, such as substantial exclusive rights to engage in Class III gaming activities. We have not, nor are we disposed to, authorize revenue-sharing payments in exchange for compact terms that are routinely negotiated by the parties as part of the regulation of gaming activities, such as duration, number of gaming devices, hours of operation, and wager limits.

We are pleased that the parties removed the proposed amendment to Section XXXI.B of the Compact which was designed to protect the Potawatomi Bingo and Casino on the Menomonee Valley Land from competition within a 50-mile radius, including competition from other Indian tribes. As we stated in our November 12, 2002, letter to Governor Pataki and President Schindler, refusing to affirmatively approve the proposed Class III gaming compact between the State of New York and the Seneca Nation of Indians, we find a provision excluding other Indian gaming

anathema to basic notions of fairness in competition and inconsistent with the goals of IGRA. We are also pleased that the parties engaged in a productive dialogue with us regarding this matter during consideration of the 2003 Amendments by the Department.

Conclusion

Our decision to neither approve nor disapprove the 2003 Amendments within 45 days means that the 2003 Amendments are considered to have been approved, "but only to the extent they are consistent with the provisions of [IGRA]." The 2003 Amendments will take effect when notice is published in the FEDERAL REGISTER pursuant to Section 11(d)(3)(B) of IGRA, 25 U.S.C. § 2710(d)(3)(B).

Sincerely,

/s/ Aurene M. Martin
[Acting] Assistant Secretary
– Indian Affairs

Similar letter sent to: Honorable Jim Doyle
Governor of Wisconsin
State Capitol
Madison, Wisconsin 53707