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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FORT INDEPENDENCE INDIAN
COMMUNITY, a federally-
recognized tribe,

NO. CIV. S-08-432 LKK/KJM

Plaintiffs,

v.

O R D E R

STATE OF CALIFORNIA; ARNOLD
SCHWARZENEGGER, Governor of
the State of California;
JERRY BROWN, Attorney General
of the State of California,

Defendants

_____ /

Plaintiff Fort Independence Indian Community, a federally
recognized tribe, brings suit against the State of California and
associated officials (collectively, the "State"). The Tribe's sole
remaining claim alleges that the State has violated its obligation
to negotiate in good faith regarding a Tribal-State gaming compact.
In particular, the Tribe argues that the State has improperly
insisted upon a revenue sharing agreement. Although the Indian
Gaming Regulatory Act is apparently hostile to such agreements,

1 they have become common. These agreements have also been upheld
2 by the Department of the Interior, the agency that administers this
3 aspect of the IGRA.

4 The parties have filed cross motions for summary judgment.
5 The court resolves the matters on the papers, including
6 supplemental briefing, and after oral argument. Questions of
7 material fact remain, but the court grants summary
8 adjudication/partial summary judgment as to several issues.

9 I. BACKGROUND

10 A. Statutory Background

11 The Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq.,
12 divides gaming into three classes.¹ Class III gaming, which
13 includes slot machines and similar devices, is at issue in this
14 case. Under IGRA, a tribe may conduct Class III gaming only in
15 "conformance with a Tribal-State compact entered into by the Indian
16 Tribe and the State and approved by the Secretary of the Interior."
17 Coyote Valley Band of Pomo Indians v. California (In re Indian
18 Gaming Related Cases Chemehuevi Indian Tribe), 331 F.3d 1094, 1097
19 (9th Cir. 2003) (citing §§ 2710(d)(1), (d)(3)(B)) (hereinafter
20 Coyote Valley II). Such gaming must also comply with certain other
21 conditions not relevant here. Id.

22 A tribe seeking to conduct Class III gaming may request that
23 the state "enter into negotiations for the purpose of entering into
24 a Tribal-State compact." § 2710(d)(3)(A). If the state permits

25 ¹ For the remainder of this order, the court cites to IGRA
26 using only the section number.

1 other Class III gaming of the types sought, the state must honor
2 the request and negotiate in "good faith." Id., Rumsey Indian
3 Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250, 1258 (9th Cir.
4 1994), amended by 99 F.3d 321 (9th Cir. 1996). The State may
5 negotiate "regarding aspects of class III tribal gaming that might
6 affect legitimate State interests." Coyote Valley II, 331 F.3d at
7 1097; see also § 2710(d)(3)(C) (enumerating topics that "may" be
8 addressed by compacts).

9 The present dispute principally concerns the extent to which
10 a state may seek money from a tribe. IGRA does not provide
11 authority to "impose any tax, fee, charge, or other assessment"
12 other than assessments necessary to defray the costs of regulating
13 gaming. § 2710(d)(4). However, a state does not "impose" a fee
14 when the state "offer[s] meaningful concessions in return for its
15 demands." Coyote Valley II, 331 F.3d at 1111. IGRA separately
16 provides that "any demand by the State for direct taxation of the
17 Indian tribe" shall be considered as non-conclusive evidence of bad
18 faith. § 2710(d)(7)(B)(iii)(II).

19 IGRA provides a cause of action whereby tribes can enforce the
20 obligation to negotiate in good faith. § 2710(d)(7)(A); see also
21 S. Rep. 100-446, *14-15 (Aug. 3, 1988). Although IGRA does not
22 waive sovereign immunity, California has by statute consented to
23 suit. Cal. Gov. Code § 98005, Seminole Tribe v. Florida, 517 U.S.
24 44 (1996); see also Coyote Valley II, 311 F.3d at 1101 n.9.²

25
26 ² Many other states have not consented to suit, leaving tribes
in those states with little ability to enforce IGRA's requirements.

1 Once a compact has been negotiated, it does not take effect
2 until the Secretary of the Interior affirms that it complies with
3 IGRA. § 2710(d)(8)(B)(I).

4 **B. The 1999 California Compacts**

5 In the gaming context, California's present relationship with
6 tribes is largely the product of 60 compacts negotiated in 1999.
7 The Ninth Circuit provided the history of these negotiations in
8 Coyote Valley II, 331 F.3d at 1100-07, the relevant portions of
9 which are summarized here. Prior to 1999, California prohibited
10 slot machines and other forms of class III gaming sought by the
11 tribes. Accordingly, California was not obliged to negotiate
12 compacts authorizing such gaming, and refused to do so. Rumsey, 64
13 F.3d at 1258, § 2710(d)(3)(A). In 1998, a coalition of tribes
14 introduced a ballot initiative that would compel the State to
15 change this policy. This measure passed, and although it was later
16 invalidated by the California Supreme Court, it set in motion a
17 process culminating in extensive negotiations, further legislation,
18 and an amendment to the California Constitution. The amendment to
19 the Constitution included the following:

20 the Governor is authorized to negotiate and
21 conclude compacts, subject to ratification by
22 the Legislature, for the operation of slot

23 See, e.g., Texas v. United States, 497 F.3d 491, 504 (5th Cir.
24 2007) (Seminole Tribe "produced the unexpected result that a state
25 may 'veto' Class III gaming by exercising its Eleventh Amendment
26 sovereign immunity."), Pueblo of Sandia v. Babbitt, 47 F. Supp. 2d
49, 52 (D.D.C. 1999) (explaining that New Mexico had not consented
to suit under § 2710(d)(7)). The availability of this immunity is
presumably responsible for the dearth of caselaw interpreting
IGRA's good faith provisions.

1 machines and for the conduct of lottery and
2 banking and percentage card games by federally
3 recognized Indian tribes on Indian lands in
4 California in accordance with federal law.
5 Accordingly, slot machines, lottery games, and
6 banking and percentage card games are hereby
7 permitted to be conducted and operated on
8 tribal lands subject to those compacts.

9 Calif. Const. Art IV, § 19(f).³ Concurrent with the effort to pass
10 this amendment, the State negotiated with a group of tribes to
11 produce a template compact. Sixty tribes adopted the template (the
12 "1999 Compact") shortly after the amendment was ratified. Coyote
13 Valley II, 331 F.3d at 1104.

14 The sixty tribes' adoption of this compact, and the
15 contemporarily passed legislation, established the major features
16 of California's present treatment of gaming. Most significantly,
17 tribes are the exclusive operators of slot machines and certain
18 other forms of class III gaming. Prior to 1999, the California
19 constitution had prohibited all slot machines and certain other
20 forms of gaming desired by the tribes. As part of the changes
21 surrounding the 1999 compacts, the constitution was amended to
22 allow tribal gaming, although other gaming remains prohibited.

23 A second major feature is the Revenue Sharing Trust Fund
24 ("RSTF"), which redistributes wealth among the tribes. Tribes
25 adopting the 1999 compacts pay into the fund by purchasing
26 "'licenses' to acquire and maintain gaming devices in excess of"

24 ³ For the remainder of this order, the court uses "gaming" to
25 refer to the types of Class III gaming enumerated in Calif. Const.
26 Art IV, § 19(f), i.e., those forms of gaming which Tribes may be
authorized to conduct, but which are otherwise prohibited in
California.

1 certain quantities. Coyote Valley II, 331 F.3d at 1105. The RSTF
2 pays out to "non-compact tribes," defined as "[f]ederally
3 recognized tribes that are operating fewer than 350 gaming
4 devices." Non-compact tribes each receive up to \$1.1 million
5 annually from the RSTF. The 1999 Compacts explicitly provide that
6 non-compact tribes are third party beneficiaries of the compacts,
7 but also that non-compact tribes have no right to enforce the
8 compacts.

9 Two other features of the 1999 Compacts are pertinent here.
10 The 1999 Compacts called for payments of a percentage of revenue
11 into a "Special Distribution Fund." This fund may be used only to
12 pay expenses related to gaming, including shortfalls in the RSTF.
13 Id. at 1113-14. The 1999 Compacts also obliges tribes to provide
14 a procedure "addressing organizational and representational rights
15 of Class III Gaming Employees and other employees associated with
16 the Tribe's Class III gaming enterprise." Id. at 1116 (quoting
17 section 10.7 of the 1999 Compact). The Ninth Circuit has held that
18 both of these provisions are consistent with IGRA. Id. at 1114,
19 1116.

20 **C. Other State-Tribal Gaming Compacts**

21 California compacts negotiated since 1999 and compacts
22 negotiated by other states contain several additional features
23 pertinent here.

24 The post-1999 California compacts are notable in two ways.
25 First, the State has entered twenty one compacts with "non-compact
26 tribes," allowing them to operate fewer than 350 gaming devices and

1 still receive payments from the RSTF. Conversely, there are no
2 federally recognized California tribes operating fewer than 350
3 class III gaming devices pursuant to a compact that do not receive
4 RSTF payments. Second, many California compacts subsequent to the
5 1999 compacts provide for "revenue sharing" with the state. See,
6 e.g., Tribal-State Compact Between the State of California and the
7 Pinoleville Pomo Nation, executed March 10, 2009, Pl.'s RFJN Ex. 6.
8 These provisions, unlike the "special distribution fund" approved
9 in Coyote Valley II, provide for payment into the State's general
10 fund, such that the funds received may be used for any purpose.
11 Ordinary English would appear to require that a program in which a
12 percentage of revenues must be paid to a state is a tax. However,
13 the arrangements between sovereigns, the State and the Tribes, use
14 the term "revenue sharing" to refer to programs of this type.⁴ This
15 term is used ubiquitously in compacts with California and with
16 other states, and by the Department of the Interior. Accordingly,
17 the court adopts this practice here. In California, compacts use
18 the term "revenue sharing" to refer to sharing of revenue between
19 the tribe and the state, and the acronym "RSTF" to refer to the
20 sharing of revenue between tribes. For the remainder of this
21 order, this court uses the term "unrestricted revenue sharing" to
22 refer to programs wherein a portion of gaming revenues is paid into
23 the state's general fund and the state's use of those payments is

24

25 ⁴ The court assumes that the term is meant to indicate that
26 the payments are negotiated, rather than having been "imposed" or
"demanded," which the IGRA would disfavor.

1 unrestricted.

2 Post-1999 California compacts with unrestricted revenue
3 sharing provisions specify that revenue sharing is offered in
4 exchange for the "meaningful concession" of continued tribal
5 exclusivity. See, e.g., Tribal-State Gaming Compact between The
6 Coyote Valley Band of Pomo Indians and The State of California, §§
7 4.3.1(b), 15.3 (Aug. 24, 2004) (accepted by the Secretary of the
8 Interior at 69 Fed. Reg. 76004) available at
9 http://www.cgcc.ca.gov/compacts/coyote_valley%20Compact.pdf.
10 Notwithstanding the fact that California law presently prohibits
11 all non-tribal gaming, the State promises in these compacts to
12 prohibit non-tribal gaming within a certain region. Id. The
13 revenue sharing provisions become void in the event that non-tribal
14 gaming becomes permitted within this area.

15 Numerous other states have also negotiated compacts with
16 tribes that provide for unrestricted revenue sharing coupled with
17 tribal exclusivity provisions. See, e.g., Pueblo of Sandia v.
18 Babbitt, 47 F. Supp. 2d 49, 52 (D.D.C. 1999) (concerning compact
19 negotiated with New Mexico); see also Coyote Valley II, 331 F.3d at
20 1115 n.17 (noting that Connecticut, New Mexico and New York have
21 entered compacts containing such provisions).

22 **D. Fort Independence's Negotiations**

23 Having provided this background, the court turns to the facts
24 particular to this case. Fort Independence is an Indian tribe
25 located in Inyo County, California, and is recognized by the
26 Secretary of the Interior. See 72 Fed. Reg. 13,648 (March 22,

1 2007). Fort Independence does not currently have a compact with
2 the State, and does not conduct any Class III gaming. As a "non-
3 compact" tribe, Fort Independence (hereinafter the "Tribe")
4 presently receives annual payments of \$1.1 million from the RSTF.

5 From July 2004 to January 2008, the Tribe negotiated with the
6 State regarding formation of a gaming compact. In general, the
7 Tribe argues that the State negotiated in bad faith by requesting
8 unrestricted revenue sharing and that the Tribe relinquish the
9 right to receive RSTF payments. The parties also negotiated the
10 range of geographic exclusivity guaranteed to the Tribe and the
11 number of devices the Tribe would be authorized to operate.
12 Informed by this overview, the court turns to the history of the
13 negotiations.

14 **1. July 2004 Request**

15 In July 2004, Fort Independence formally requested that the
16 State enter into Tribal-State Compact negotiations under the IGRA,
17 25 U.S.C. § 2710(d)(3)(A). In its request to begin negotiations,
18 the Tribe stated:

19 The Fort Independence Tribe agrees with the
20 Governor's belief that Indian Tribes should
21 provide compensation to the state in
recognition of the unique privilege and
benefit that gaming provides.

22 (Pl.'s Statement of Undisputed Facts ("PSUF") 1.)⁵ The Tribe
23 "estimate[d] that the approximately 80 gaming devices the Tribe is
24 seeking would generate a win [to the tribe] per day of about \$80

25 ⁵ Facts taken from the parties' undisputed statements are in
26 fact undisputed.

1 per machine." Id.

2 **2. December 2004 Draft**

3 In response to this request, the Tribe and the State began
4 negotiations in the fall of 2004. (PSUF 2; Def.'s Record of
5 Negotiations ("RN") Ex. B) In December 2004, the Tribe provided a
6 draft compact preamble to the State. This draft preamble mirrored
7 the language of the 1999 compacts, expressly recognizing the
8 benefits the Tribe would gain from its tribal exclusivity, and
9 identifying exclusivity as a "meaningful concession."⁶ (PSUF 6.)
10 The State negotiator incorporated this preamble into a draft
11 compact. (PSUF 8.) The State contends that the terms of this
12 draft compact were based on the parties' negotiations up to that

13 _____
14 ⁶ The unabbreviated passage from the preamble provided:

15 Whereas, the State and the Fort Independence
16 Paiute Tribe recognize that the exclusive
17 rights that the tribe will enjoy under this
18 Compact create a unique opportunity for the
19 Tribe to operate a Gaming Facility in a
20 economic environment free from competition
21 from Class III Gaming on non-Indian lands in
22 California and that this unique economic
23 environment is of great value to the Tribe;
24 and

25 Whereas, the Tribe in consideration of the
26 exclusive rights enjoyed by the Tribe, the
right to operate the desired numbers of Gaming
Devices, and other meaningful concessions
offered by the State in good faith
negotiations, agrees to make a fair revenue
contribution to the State, to enter into
arrangements to mitigate to the extent
possible the off-reservation environmental and
direct fiscal impacts on the local community
and local governments, and to offer consumer
and employee protections.

1 point; the Tribe insists that the State unilaterally proposed the
2 terms. The draft provided for revenue sharing with the State,
3 ranging from 10 to 25 percent of the Tribe's net win. (PSUF 8.)
4 The draft also included a section on the RSTF, but this was marked
5 "[open]" rather than containing any specific provisions. The
6 parties did not discuss the draft or compact again until January
7 26, 2006.

8 **3. Tribe's Disagreement in June and July 2006**

9 In the summer of 2006, the Tribe communicated various
10 objections to the State regarding the State's positions. The Tribe
11 argued that unrestricted revenue sharing was prohibited because the
12 State had offered an inadequate concession. (Decl. of Darcie L.
13 Houck Supp. Pl's Mot., Ex O.) The Tribe further argued that
14 relinquishment of RSTF payments were prohibited, that the State was
15 not permitting enough gaming devices, that the draft provided for
16 too much local control over ancillary issues, and that the
17 environmental provisions were too burdensome. Id.

18 **4. Drafts Prepared by The Tribe**

19 In December of 2006, the Tribe presented a photocopy of the
20 State's draft compact on which the Tribe had made handwritten
21 modifications. (Houck Decl. Ex. S.) This draft, as modified,
22 included the earlier preamble, a schedule for revenue sharing
23 payments to the state, an RSTF section stating "use language
24 similar to other compacts, w/\$10 M threshold --> \$900/machine," and
25 an exclusivity provision prohibiting non-tribal gaming in a 55 mile
26 radius.

1 The Tribe sent the State another draft in February of 2007.
2 (Houck Decl. Ex. U.) This draft retained the earlier preamble.
3 However, it did not provide for revenue sharing, and allowed the
4 Tribe to continue to receive payments from the RSTF, although the
5 draft specified that these payments would only be used for non-
6 gaming activities.

7 In May of 2007, the Tribe made another proposal. (Houck Decl.
8 Ex. X.) This time, the Tribe proposed that it would begin to share
9 revenue once its net revenues, less debt servicing and
10 infrastructure payments, exceeded \$12 million per year. Revenue
11 sharing obligations would be offset by the money the tribe paid for
12 other fees, such as fees to local government for associated
13 infrastructure. Under this proposal, the tribe would continue to
14 receive RSTF payments until the \$12 million cutoff. This proposal
15 provided for geographic exclusivity within 100 miles.

16 **5. The Parties' Fall 2007 Negotiations**

17 In August 2007, the State proposed a compact with some revenue
18 sharing at all net revenue levels, phasing out of RSTF payments,
19 exclusivity for 55 miles, and authorization of up to 349 devices.
20 (Houck Decl. Ex. Z.) The day after receiving this proposal, the
21 Tribe responded by contending that it did not have to negotiate
22 revenue sharing and RSTF payments absent meaningful concessions.

23 The Tribe then counter-proposed a plan with no revenue
24 sharing, continued receipt of the full \$1.1 million RSTF payments,
25 349 devices, and payments to the State only for mitigation of off-
26 reservation impacts. The Tribe supported its proposal with a

1 "gaming market assessment," projecting future revenue under various
2 scenarios. The Tribe asserted that this document showed that any
3 amount of revenue sharing would cause the Tribe to operate at a
4 loss. The State rejected this proposal.

5 Fort Independence then filed the complaint in this action on
6 February 25, 2008. The complaint alleged claims under the IGRA and
7 under the California and United States Equal Protection Clauses.
8 The court granted the State's motion for judgment on the pleadings
9 as to the Equal Protection claims by Order of September 10, 2008.
10 Pending before the court are cross motions for summary judgment on
11 the IGRA good faith claim.

12 **II. STANDARD**

13 Each party has filed a motion styled as a motion for summary
14 judgment. The Tribe asserts that the normal Fed. R. Civ. P. 56
15 standard applies, whereas the State does not discuss the standard
16 applicable to its motion. Courts have varied in their handling of
17 motions to enforce IGRA's good faith obligation. In Indian Gaming
18 Related Cases v. California, 147 F. Supp. 2d 1011, 1020-21 (N.D.
19 Cal. 2001) (Coyote Valley I), affirmed by Coyote Valley II, 331
20 F.3d 1094, the court considered a tribe's "motion for an order
21 requiring Defendant State of California to negotiate," which the
22 court resolved on the papers and after a hearing without discussion
23 of what standard applied. 147 F. Supp. 2d 1011, 1013. The Ninth
24 Circuit affirmed denial of this motion without discussing the
25 posture of the case. In its evaluation, the Ninth Circuit weighed
26 evidence, concluding that the evidence of good faith overcame the

1 evidence of bad.

2 In contrast, in Rincon Band of Luiseno Mission Indians of the
3 Rincon Reservation v. Schwarzenegger, No. 04-cv-1151 (S.D. Cal.
4 April 29, 2008), (hereinafter Rincon Band) the court considered
5 cross motions for summary judgment. The court recited the
6 standards applicable to such motions, and proceeding to resolve all
7 issues presented in that case. That court's resolution of the
8 issues did not require weighing of evidence.

9 Here, where the parties label their motions as motions for
10 summary judgment, the court uses the ordinary standards applicable
11 to such motions, recognizing that this differs from the posture of
12 the Coyote Valley cases.

13 Summary judgment is appropriate when it is demonstrated that
14 there exists no genuine issue as to any material fact, and that the
15 moving party is entitled to judgment as a matter of law. Fed. R.
16 Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157
17 (1970); Poller v. Columbia Broadcast System, 368 U.S. 464, 467
18 (1962); Jung v. FMC Corp., 755 F.2d 708, 710 (9th Cir. 1985); Loehr
19 v. Ventura County Community College Dist., 743 F.2d 1310, 1313 (9th
20 Cir. 1984).

21 Under summary judgment practice, the moving party

22 [A]lways bears the initial responsibility of
23 informing the district court of the basis for
24 its motion, and identifying those portions of
25 "the pleadings, depositions, answers to
26 interrogatories, and admissions on file,
together with the affidavits, if any," which
it believes demonstrate the absence of a
genuine issue of material fact.

1 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the
2 nonmoving party will bear the burden of proof at trial on a
3 dispositive issue, a summary judgment motion may properly be made
4 in reliance solely on the 'pleadings, depositions, answers to
5 interrogatories, and admissions on file.'" Id. Indeed, summary
6 judgment should be entered, after adequate time for discovery and
7 upon motion, against a party who fails to make a showing sufficient
8 to establish the existence of an element essential to that party's
9 case, and on which that party will bear the burden of proof at
10 trial. Id. at 322. "[A] complete failure of proof concerning an
11 essential element of the nonmoving party's case necessarily renders
12 all other facts immaterial." Id. In such a circumstance, summary
13 judgment should be granted, "so long as whatever is before the
14 district court demonstrates that the standard for entry of summary
15 judgment, as set forth in Rule 56(c), is satisfied." Id. at 323.

16 If the moving party meets its initial responsibility, the
17 burden then shifts to the opposing party to establish that a
18 genuine issue as to any material fact actually does exist.
19 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
20 586 (1986); First Nat'l Bank of Arizona v. Cities Serv. Co., 391
21 U.S. 253, 288-89 (1968); Ruffin v. County of Los Angeles, 607 F.2d
22 1276, 1280 (9th Cir. 1979), cert. denied, 455 U.S. 951 (1980).

23 In attempting to establish the existence of this factual
24 dispute, the opposing party may not rely upon the denials of its
25 pleadings, but is required to tender evidence of specific facts in
26 the form of affidavits, and/or admissible discovery material, in

1 support of its contention that the dispute exists. Rule 56(e);
2 Matsushita, 475 U.S. at 586 n.11; First Nat'l Bank, 391 U.S. at
3 289; Strong v. France, 474 F.2d 747, 749 (9th Cir. 1973). The
4 opposing party must demonstrate that the fact in contention is
5 material, i.e., a fact that might affect the outcome of the suit
6 under the governing law, Anderson v. Liberty Lobby, Inc., 477 U.S.
7 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec.
8 Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the
9 dispute is genuine, i.e., the evidence is such that a reasonable
10 jury could return a verdict for the nonmoving party, Anderson, 242
11 U.S. 248-49; Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436
12 (9th Cir. 1987).

13 In the endeavor to establish the existence of a factual
14 dispute, the opposing party need not establish a material issue of
15 fact conclusively in its favor. It is sufficient that "the claimed
16 factual dispute be shown to require a jury or judge to resolve the
17 parties' differing versions of the truth at trial." First Nat'l
18 Bank, 391 U.S. at 290; T.W. Elec. Serv., 809 F.2d at 631. Thus,
19 the "purpose of summary judgment is to 'pierce the pleadings and to
20 assess the proof in order to see whether there is a genuine need
21 for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P.
22 56(e) advisory committee's note on 1963 amendments); International
23 Union of Bricklayers v. Martin Jaska, Inc., 752 F.2d 1401, 1405
24 (9th Cir. 1985).

25 In resolving the summary judgment motion, the court examines
26 the pleadings, depositions, answers to interrogatories, and

1 admissions on file, together with the affidavits, if any. Rule
2 56(c); Poller, 368 U.S. at 468; SEC v. Seaboard Corp., 677 F.2d
3 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party
4 is to be believed, Anderson, 477 U.S. at 255, and all reasonable
5 inferences that may be drawn from the facts placed before the court
6 must be drawn in favor of the opposing party, Matsushita, 475 U.S.
7 at 587 (citing United States v. Diebold, Inc., 369 U.S. 654, 655
8 (1962) (per curiam)); Abramson v. Univ. of Haw., 594 F.2d 202, 208
9 (9th Cir. 1979). Nevertheless, inferences are not drawn out of the
10 air, and it is the opposing party's obligation to produce a factual
11 predicate from which the inference may be drawn. Richards v.
12 Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985),
13 aff'd, 810 F.2d 898, 902 (9th Cir. 1987).

14 Finally, to demonstrate a genuine issue, the opposing party
15 "must do more than simply show that there is some metaphysical
16 doubt as to the material facts. . . . Where the record taken as a
17 whole could not lead a rational trier of fact to find for the
18 nonmoving party, there is no 'genuine issue for trial.'" Matsushita,
19 475 U.S. at 587 (citation omitted).

20 **III. ANALYSIS**

21 The heart of this dispute is the State's request for revenue
22 sharing, and the tension between IGRA's apparent hostility to
23 revenue sharing and the prevalence of revenue sharing agreements.

24 The Tribe first argues that the State has insisted on
25 negotiating topics which are not those that "may" be included in
26 compacts under section 2710(d)(3)(C), and that mere negotiation of

1 these topics violates IGRA. The court concludes that both
2 unrestricted revenue sharing (when tied to exclusivity) and
3 forfeiture of RSTF payments are issues that directly relate to
4 gaming under section 2710(d)(3)(C)(vii), such that provisions
5 relating to these issues "may" be included in compacts under
6 section 2710(d)(3)(C).

7 Second, the Tribe argues that revenue sharing and forfeiture
8 of RSTF payments are taxes which the state has impermissibly
9 imposed or demanded in violation of sections 2710(d)(4) and
10 (d)(7)(B)(iii)(II). The court concludes that forfeiture of RSTF
11 payments is not a tax, but that revenue sharing is, and that there
12 is a triable question as to whether the state has offered a
13 meaningful concession in exchange for the revenue sharing
14 provisions.

15 Third and finally, the remaining evidence does not permit
16 summary judgment as to good or bad faith. The parties separately
17 dispute whether the State has provided evidence sufficient to
18 demonstrate its good faith. Accordingly, the question regarding a
19 meaningful concession is material, and the parties' motions must be
20 denied.

21 **A. Method of Statutory Interpretation**

22 Resolution of this case turns almost entirely on
23 interpretation of IGRA. The court is guided by the principles of
24 deference to agency interpretation of statutes and of interpreting
25 statutes passed for the benefit of tribes in a way that favors
26 tribal interests.

1 The interpretation of statutes that are administered by
2 executive agencies, and concomitant judicial deference to agency
3 interpretation, has received significant recent attention from the
4 courts. See, e.g., Barnhart v. Walton, 535 U.S. 212, 222 (2002),
5 United States v. Mead Corp., 533 U.S. 218, 230 (2001), Chevron
6 U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 842-45 (1984).
7 The cases have established a three step process for "Chevron"
8 interpretation. Wilderness Soc'y v. United States FWS, 353 F.3d
9 1051, 1060 (9th Cir. 2003) (en banc), amended by 360 F.3d 1374
10 (2004). First, the court must determine whether the statutory text
11 is ambiguous. This determination is made with reference to
12 ordinary textual tools of interpretation. For example, when making
13 this threshold determination,

14 "a reviewing court should not confine itself
15 to examining a particular statutory provision
16 in isolation." Rather, "[t]he meaning--or
17 ambiguity--of certain words or phrases may
18 only become evident when placed in context. .
19 . . It is a 'fundamental canon of statutory
20 construction that the words of a statute must
21 be read in their context and with a view to
22 their place in the overall statutory scheme.'"

19 Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644
20 (2007) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S.
21 120, 132-33 (2000)) (internal citations omitted). Second, if the
22 text is ambiguous, the court then determines whether the agency
23 interpretation is of a type entitled to deference under Chevron.
24 Mead Corp., 533 U.S. at 229-30. If the agency interpretation is
25 entitled to Chevron deference, the third step is to determine
26 whether the agency interpretation is a reasonable interpretation of

1 the statute. If so, the court adopts it. If the agency
2 interpretation is not entitled to deference under Chevron, it may
3 nonetheless be entitled to a distinct form of deference under
4 Skidmore v. Swift & Co., 323 U.S. 134 (1944). See Marmolejo-Campos
5 v. Holder, 558 F.3d 903, 909 (9th Cir. 2009) (en banc).

6 A second canon of interpretation is that statutes passed to
7 benefit Tribes should be interpreted in light of this purpose. See,
8 e.g., Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985). When
9 Chevron deference is owed to an agency interpretation, however,
10 Ninth Circuit authority provides that Chevron deference trumps
11 application of the Blackfeet canon. Confederated Salish & Kootenai
12 Tribes v. United States, 343 F.3d 1193, 1198 (9th Cir. 2003)
13 (citing Blackfeet Tribe, 471 U.S. at 766). As discussed below, the
14 court need not decide whether this hierarchy applies when the
15 agency receives Skidmore deference. See Shields v. United States,
16 698 F.2d 987, 991 (9th Cir. 1983).

17 **B. Objections to Topics of Negotiation, § 2710(d)(3)(C)**

18 Section 2710(d)(3)(C) provides that compacts “may include
19 provisions relating to” a list of topics, including “subjects that
20 are directly related to the operation of gaming activities.” §
21 2710(d)(3)(C)(vii). The Tribe argues that both the discontinuation
22 of RSTF payments and the unrestricted revenue sharing provision
23 fall outside this list of topics.

24 As to RSTF payments, the Ninth Circuit has already held that
25 the RSTF program falls within section 2710(d)(3)(C)(vii). Coyote
26 Valley, 331 F.3d at 1111.

1 Congress sought through the IGRA to "promot[e]
2 tribal economic development, self-sufficiency,
3 and strong tribal governments." The RSTF
4 provision advances this Congressional goal by
5 creating a mechanism whereby all of
6 California's tribes--not just those fortunate
7 enough to have land located in populous or
8 accessible areas--can benefit from class III
9 gaming activities in the State.

10 Id. (quoting § 2701(1), emphasis in original). Thus, this topic
11 directly relates to gaming, and no further analysis is required.

12 The Tribe's arguments as to whether unrestricted revenue
13 sharing is "directly related to" gaming raise novel issues
14 regarding the effect of a topic's omission from the list of factors
15 that "may" be included in compacts. The State argues that the
16 revenue sharing is "directly related to" gaming, and that the State
17 may therefore insist upon inclusion of this provision. The Tribe
18 argues that the revenue sharing is not directly related to gaming,
19 and that as a result, either the State cannot insist on negotiating
20 this issue (although the Tribe may agree to do so) or that
21 negotiation of this issue is prohibited.⁷

22 These three positions respectively correspond to the treatment
23 of mandatory, permissive, and prohibited topics of negotiation
24 recognized under the National Labor Relations Act. See Retlaw
25 Broadcasting Co. v. NLRB, 172 F.3d 660, 665 (9th Cir. 1999)
26 (discussing these three categories); see also Coyote Valley I, 147
F. Supp. 2d at 1020-21 (cases interpreting the NLRA provide

⁷ During negotiations prior to the filing of this suit, the
Tribe adopted only the former of these two interpretations. See
Def.'s Record of Negotiations Ex. Z, DD.

1 guidance in interpreting IGRA's good faith provisions, although
2 NLRA caselaw cannot be applied "wholesale"). Under the NLRA,
3 employers and employee representatives have an "obligation . . . to
4 . . . confer in good faith with respect to wages, hours, and other
5 terms and conditions of employment." 29 U.S.C. § 158(d). Courts
6 interpreting this language have recognized a trichotomy of
7 subjects. The subjects about which parties are obliged to confer
8 are "mandatory" subjects. For these, a party may insist on its
9 position relative to these provisions even if doing so leads to
10 impasse. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342,
11 350 (1958). In general, "all other subjects are permissive
12 subjects." Retlaw Boardcasting, 172 F.3d at 665 (quotation
13 omitted). "The parties may bargain collectively on permissive
14 terms, but they are not required to do so." Id. Thus, a party may
15 not "insist on a permissive subject to the point of impasse." Id.
16 (citing Borg-Warner, 356 U.S. at 349). Third, in an exception to
17 the general rule that all un-enumerated subjects are permissive,
18 subjects "proscribed by federal or, where appropriately applied,
19 state law" are prohibited subjects that may not be negotiated.
20 Idaho Statesman v. NLRB, 836 F.2d 1396, 1400 (D.C. Cir. 1988). For
21 example, the NLRA provides that a contract to boycott another
22 employer is unenforceable. NLRA § 8(e), 29 U.S.C. § 158(e).
23 Parties are therefore prohibited from negotiating this topic.

24 Returning to the IGRA, as explained below, this court
25 concludes that topics other than those enumerated by section
26 2710(d)(3)(C) are prohibited topics of negotiation. Enumerated

1 topics may be mandatory or permissive. Accordingly, if
2 unrestricted revenue sharing did not directly relate to gaming,
3 then negotiation of it would be strong, if not determinative,
4 evidence of bad faith.⁸ The court concludes, however, that
5 unrestricted revenue sharing directly relates to gaming within the
6 meaning of 2710(d)(3)(C)(vii).

7 **1. Under Section 2710(d)(3)(C), Negotiation of Topics Not**
8 **Enumerated Is Prohibited**

9 The statutory text of section 2710(d)(3)(C) sharply differs
10 from the NLRA. The NLRA enumerates topics for which parties have
11 an "obligation . . . to . . . confer," 29 U.S.C. § 158(d). The
12 IGRA, in contrast, enumerates topics that "may" be included in
13 compacts, and by extension, that may be negotiated. §
14 2710(d)(3)(C). Under the *inclusio unius est exclusio alterius*
15 canon of construction, both lists are presumed to be exhaustive.
16 See, e.g., United States v. 4,432 Mastercases of Cigarettes, 448
17 F.3d 1168, 1190 (9th Cir. 2006). Thus, while topics not enumerated
18 by NLRA are merely topics for which the parties have no obligation
19 to negotiate (i.e., permissive or prohibited topics), topics not
20 enumerated by IGRA are ones which the parties may not negotiate
21 (i.e., prohibited topics). The statute is not ambiguous in this
22 regard.

23
24 ⁸ Because the court decides that the provisions negotiated
25 here are within section 2710(d)(3)(C), the court does not decide
26 whether unilateral efforts to negotiate a provision outside the
scope of this section would constitute bad faith per se, or whether
such efforts would merely be evidence of bad faith to be weighed
against other evidence.

1 In Seminole Tribe, the Supreme Court stated that “§ 2710(d)(3)
2 . . . describes the permissible scope of a Tribal-State compact,”
3 implying that provisions outside of this section were prohibited.
4 517 U.S. at 49. Similarly, Coyote Valley II concluded that the
5 three compact provisions at issue were within section (d)(3)(C),
6 implying that they would have been prohibited if they were not
7 without stating this point directly. 331 F.3d at 1111, 1114. See
8 also Wisconsin v. Ho-Chunk Nation, 512 F.3d 921, 933 (7th Cir.
9 2008).⁹ These interpretations, while dicta, support the court’s
10 conclusion, and the court is not aware of any opinion squarely
11 addressing the issue.

12 Although the court holds that “may” as used in this section is
13 unambiguous, such that further inquiry is not required, the court
14 notes that this interpretation is consistent with both the
15 legislative history of IGRA and the Department of the Interior’s
16 interpretations and implementation of the statute. According to
17 the Senate’s Select Committee on Indian Affairs’ report, section
18 2710(d)(3)(C) “describes the issues that may be the subject of
19 negotiations between a tribe and a State in reaching a compact. .
20

21 ⁹ But see Coyote Valley I, 147 F. Supp. 2d at 1018. In Coyote
22 Valley I the district court stated that a “State cannot insist that
23 compacts include provisions addressing subjects that are only
24 indirectly related to the operation of gaming facilities.” Id.
25 This statement might imply that such topics are permissive, rather
26 than prohibited. However, even if the court intended this
implication, the implication was dicta in that the court concluded
that it was not confronted with such a provision. Although this
court concludes otherwise, as with so many issues in this case, the
rejected position is not without substance and weight.

1 . . The Committee does not intend that compacts be used as a
2 subterfuge for imposing State jurisdiction on tribal lands." S.
3 Rep. 100-446, *14-15 (Aug. 3, 1988). In like manner, the
4 Department of Interior has held that section 2710(d)(3)(C) "limits
5 the proper topics for compact negotiations to those that bear a
6 direct relationship to the operation of gaming activities." Letter
7 from Principal Deputy Assistant Secretary of Indian Affairs to
8 Kenneth Blanchard, Governor, Absentee Shawnee Tribe of Oklahoma
9 (Dec. 17, 2004) (approving in part the Shawnee-Oklahoma Compact).¹⁰
10 The Department of Interior has enforced this limitation by
11 rejecting a compact provision that would terminate the gaming
12 compact in the event that the Tribe materially breached the terms
13 of a separate tobacco compact, concluding that even though the
14 Tribe and State had agreed to this provision, it violated section
15 2710(d)(3)(C). Id.

16 Thus, the court concludes that parties may not negotiate
17 topics other than those enumerated by IGRA. Turning to those that
18 are enumerated, all such topics may be negotiated without violating
19 section 2710(d)(3)(C). Moreover, a party may in at least some
20 instances insist on its position with respect to negotiation of
21 these topics. Coyote Valley II, 331 F.3d at 1111 ("the State did
22 not lack good faith when it *insisted* that Coyote Valley adopt [the

23
24 ¹⁰ This letter is attached as Plaintiff's Request for
25 Judicial Notice Exhibit 1. Exhibit 2 to plaintiff's request for
26 judicial notice is a Letter from the Acting Assistant Secretary of
Indian Affairs to Janet Napolitano, Governor of the State of
Arizona (January 24, 2003), approving a compact in full. Judicial
notice of both letters is proper.

1 RSTF provision] as a precondition for entering a Tribal-State
2 compact.”) (emphasis added), id. at 1114 (“the State’s insistence
3 on” the Special Distribution Fund was permissible). The panel in
4 Coyote Valley II did not explicitly state that it used “insist” in
5 the sense used under the NLRA, namely, bargaining to impasse. The
6 facts of that case, however, indicate that this is what occurred.
7 Such insistence is not always permissible, as demonstrated by the
8 panel’s treatment of sections 2710(d)(4) and (d)(7)(B)(iii)(II),
9 discussed below. Here, the court merely notes that the topics
10 enumerated by section 2710(d)(3)(C) are either permissive or
11 mandatory as those terms are used under the NLRA.

12 **2. Unrestricted Revenue Sharing and § 2710(d)(3)(C)(vii)**

13 Pursuant to the above analysis, if unrestricted revenue
14 sharing provisions do not directly relate to gaming or otherwise
15 fall within section 2710(d)(3)(C), then such provisions violate
16 IGRA and are prohibited. The court concludes that phrase “directly
17 related to . . . gaming” is ambiguous and that the Department of
18 the Interior’s interpretation of the phrase is not entitled to
19 Chevron deference. Nonetheless, Skidmore deference to the agency,
20 the Blackfoot Tribe canon, and the ordinary tools of statutory
21 interpretation together compel the conclusion that unrestricted
22 revenue sharing provisions that are tied to exclusivity provisions
23 directly relate to gaming within the meaning of section
24 2710(d)(3)(C)(vii).

25 **a. Section 2710(d)(3)(C)(vii) Is Ambiguous**

26 The only subsection of section 2710(d)(3)(C) potentially

1 encompassing unrestricted revenue sharing is subsection (vii), a
2 catch-all provision for "any other subjects that are directly
3 related to the operation of gaming activities." As explained
4 above, in Coyote Valley II, the Ninth Circuit held that both the
5 RSTF and Special Distribution Funds provision of the 1999 Compacts
6 directly related to gaming. The Ninth Circuit's analysis focused
7 primarily on the uses to which the funds would be put. 331 F.3d at
8 1111. This relationship is absent here, where the funds may be
9 used for any purpose. No circuit court has ruled on the lawfulness
10 of an unrestricted revenue sharing provision, and this court is not
11 aware of an district court opinion ruling on this issue. See
12 Wisconsin v. Ho-Chunk Nation, 512 F.3d 921, 932 (7th Cir. 2008)
13 (concluding that the validity of a revenue sharing provision was
14 not before it, but noting that as of mid 2008, no Circuit decision
15 other than Coyote Valley II had addressed revenue-sharing). As the
16 court understands the issue, there are four other potential
17 relationships between revenue sharing and gaming activity. Three
18 of these are plainly outside the scope of the statute, but the
19 statute is unclear as to whether the fourth relationship is
20 "direct."

21 The State argues that revenue sharing directly relates to
22 gaming because it provides an incentive to the State to negotiate
23 and enter compacts on terms that are otherwise favorable to Tribes.
24 According to this argument, revenue sharing provisions thereby
25 increase the amount of gaming that will be conducted, and further
26 the Tribe's ability to profit from gaming. Revenue sharing

1 provisions may in fact have this effect. Nonetheless, the statute
2 cannot be read to encompass this type of relationship. Every
3 conceivable compact provision will affect either the State's or the
4 Tribe's willingness to enter the compact. If this incentivizing
5 effect was sufficient to constitute a "direct relationship" to
6 gaming, then every conceivable provision would satisfy section
7 2710(d)(3)(C)(vii). The court cannot accept this construction of
8 the statute, because it renders a restrictive term a nullity. "[A]
9 statute should be construed so that effect is given to all its
10 provisions, so that no part will be inoperative or superfluous,
11 void or insignificant." Corley v. United States, ___ U.S. ___,
12 ___, 129 S. Ct. 1558, 1563 (2009) (quoting Hibbs v. Winn, 542 U.S.
13 88, 101 (2004)) (internal quotation marks omitted).

14 A more obvious relationship between revenue sharing and gaming
15 is that the revenue comes from gaming. When the statute is read as
16 a whole, however, it is clear that this fact does not bring revenue
17 sharing within the scope of section 2710(d)(3)(C)(vii). See Dolan
18 v. United States Postal Serv., 546 U.S. 481, 485 (2006)
19 ("Interpretation of a word or phrase depends upon reading the whole
20 statutory text, considering the purpose and context of the statute,
21"). Subsection (iii) provides that compacts may include
22 "assessments," a form of revenue sharing, tied to "defray[ment of]
23 the costs of regulating [gaming] activity." § 2710(d)(3)(C)(iii).
24 If all revenue sharing was permitted under subsection (vii), there
25 would be no need for subsection (iii) to permit a specific form of
26 revenue sharing. In addition, IGRA's general hostility to

1 taxation, §§ 2710(d)(4), (d)(7)(b)(iii)(II), indicates that this
2 relationship is not the type envisioned by (d)(3)(C)(vii).¹¹

3 Finally, revenue sharing is related to gaming in that gaming
4 is related to tribal exclusivity, and tribal exclusivity is
5 purportedly related to revenue sharing.¹² The relationship between
6 gaming and exclusivity is clearly direct. "Gaming activity" may
7 refer to all gaming, or only to gaming on tribal lands. If it is
8 the former, then prohibition of non-tribal gaming directly relates
9 to gaming activity. If it is the later, then exclusivity still
10 relates to tribal gaming in that exclusivity makes tribal gaming
11 substantially more profitable. This relationship, although
12 slightly attenuated, is nonetheless as direct as the relationships
13

14 ¹¹ The court further notes that in Coyote Valley II, both the
15 RSTF and Special Distribution Fund provisions involved funding
16 derived directly from gaming revenues, but the Ninth Circuit rested
its conclusion that these provisions directly related to gaming on
other factors.

17 The only possible exception to this characterization of Coyote
18 Valley II consists of one unexplained sentence in which the panel
stated that the RSTF program acted "in a manner directly related
19 to the operation of gaming activities." Coyote Valley II, 331 F.3d
20 at 1111. One reading of this sentence is that the "manner" of the
RSTF's operation is as a license on individual gaming devices, such
21 that a license of that kind is "directly related to gaming
activities." This reading is belied by the remainder of the
panel's opinion, which is inconsistent with the conclusion that a
per-device licensing fee is itself directly related to gaming
operations.

22 Although the panel's general silence as to the significance
23 of the fact that revenue for the RSTF and SDF provisions came from
gaming does not establish that the factor is irrelevant, the court
24 notes that the analysis here is consistent with the panel's opinion
in Coyote Valley II.

25 ¹² To again refer to Coyote Valley II, this is another
26 relationship that was present in that case but that was not
discussed by the Ninth Circuit panel.

1 approved by the Ninth Circuit in Coyote Valley II. Thus,
2 exclusivity directly relates to gaming activity, and the court need
3 not resolve any ambiguity as to the meaning of "gaming activity."¹³

4 The second step is the relationship between exclusivity and
5 revenue sharing. There are two such relationships. The first is
6 the fact that in negotiations, exclusivity was offered in exchange
7 for revenue sharing. The fact that one provision directly relates
8 to gaming cannot mean that any other provision that is offered in
9 exchange also directly relates to gaming, because this would
10 eviscerate the prohibition imposed by section 2710(d)(3)(C). That
11 is, such a construction would allow any provision to be included in
12 a compact simply by connecting it to a permissible provision during
13 negotiations.

14 Here, however, exclusivity and revenue sharing are related by
15 more than the fact that in negotiation one is offered in exchange
16 for the other. Exclusivity causes the state to forgo revenue that
17 could have been raised by taxing non-tribal gaming, and the revenue
18 sharing provision purportedly offsets this loss of revenue.¹⁴ The

19
20 ¹³ It appears that the broader interpretation is more likely.
21 Although the statute is primarily concerned with tribal gaming,
22 other provisions in the statute use the phrase "class III gaming
23 activity on Indian lands." See, e.g., §§ 2710(d)(1), (d)(2)(A),
(d)(2)(C). If "gaming activity" always meant tribal gaming, these
other provisions would not need to specifically refer to gaming on
Indian lands.

24 ¹⁴ Although this is the apparent justification, the court is
25 not aware of any attempt, by the parties to this case or elsewhere,
26 to quantify the amount of non-tribal gaming revenue foregone by the
State.

Payments into the RSTF obviously do not serve to replace the
State's forgone revenue, because the RSTF transfers money to other

1 court cannot conclude that the text of the statute unambiguously
2 indicates that this final relationship is direct or indirect.
3 Unlike the other relationships considered above, the statutory
4 context does not clearly exclude this type of relationship. Absent
5 a blanket exclusion, the statute does not provide a clear answer as
6 to how attenuated a relationship may be while still being direct.
7 The Ninth Circuit's interpretation of the statutory text in Coyote
8 Valley II does not resolve this ambiguity. On one hand,
9 unrestricted revenue sharing is less directly related to gaming
10 than are the SDF and labor provisions accepted by Coyote Valley II.
11 Those provisions involved collecting funds for payment of costs
12 incurred by gaming itself, and for rights of workers employed by
13 gaming facilities. 331 F.3d at 1114, 1116. On the other hand,
14 revenue sharing to offset revenue lost through exclusivity is not
15 obviously less directly related to gaming than the RSTF provision,
16 which is related to gaming in that it reallocates funds raised by
17 gaming in a manner that effectuates IGRA's purpose. Id. at 1111.
18 Although revenue sharing and exclusivity have a less obvious
19 connection to the statute's purpose, the connection to gaming
20 itself is comparable, and the Ninth Circuit neither implied nor
21 concluded that only provisions that further the statute's primary
22 purpose suffice. Accordingly, the statutory text is ambiguous as

23 _____
24 tribes rather than to the State. However, as explained in Coyote
25 Valley II and noted above, the Ninth Circuit has already determined
26 that the RSTF program directly relates to gaming. Accordingly, the
fact that RSTF payments do not replace revenue forgone by
exclusivity is not pertinent.

1 to whether revenue sharing, when offered in connection with
2 exclusivity, is directly related to gaming operations. The court
3 therefore turns to the next step in the Chevron analysis.

4 **b. The Agency Interpretation Is Not Entitled to**
5 **Deference Under Chevron**

6 Once it is determined that a statute is ambiguous, the court
7 must determine whether an agency's interpretation of the statute is
8 entitled to deference under Chevron. In Mead, the Supreme Court
9 established that an agency interpretation receives
10 Chevron deference only when (1) it is reasonable to believe that
11 "Congress delegated authority to the agency generally to make rules
12 carrying the force of law," and (2) "the agency interpretation
13 claiming deference was promulgated in the exercise of that
14 authority." Mead, 533 U.S. at 226-27; see also Marmolejo-Campos,
15 558 F.3d at 908. In interpreting Mead, the Ninth Circuit has held
16 that an interpretation has the force of law only when it has a
17 precedential effect that binds third parties. "[T]he precedential
18 value of an agency action [is] the essential factor in determining
19 whether Chevron deference is appropriate." Marmolejo-Campos, 558
20 F.3d at 909 (quoting Alvarado v. Gonzales, 449 F.3d 915, 922 (9th
21 Cir. 2006)) (emphasis in original). The Ninth Circuit has
22 repeatedly applied this rule. In considering the Bureau of
23 Immigration Appeals' affirmation of an immigration judge's
24 interpretation of the phrase "paroled into the United States" in 8
25 U.S.C. § 1255, the Ninth Circuit declined to extend
26 Chevron deference "[b]ecause the BIA's decision was an unpublished

1 disposition, issued by a single member of the BIA, which does not
2 bind third parties.'" Ortega-Cervantes v. Gonzales, 501 F.3d 1111,
3 1113 (9th Cir. 2007) (quoting Garcia-Quintero v. Gonzales, 455 F.3d
4 1006, 1012 (9th Cir. 2006)). Although the BIA has the authority to
5 establish binding precedent through case-by-case adjudication, the
6 unpublished, single-member decision was not an exercise of that
7 authority. Garcia-Quintero, 455 F.3d at 1012; see also 8 C.F.R. §
8 1003.1(e) (specifying that such decisions are non-precedential).
9 Similarly, the Ninth Circuit has held that the U.S. Fish and
10 Wildlife Service's decision to issue a permit to operate a project
11 in a wilderness area did not "'bespeak the legislative type of
12 activity that would naturally bind more than the parties to the
13 ruling,'" and was not entitled to Chevron deference. Wilderness
14 Soc'y, 353 F.3d at 1067 (quoting Mead, 533 U.S. at 232). See also
15 High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 648 (9th Cir.
16 2004).¹⁵

17
18 ¹⁵ Ninth Circuit cases provide less discussion of the Supreme
19 Court's decision in Barnhart v. Walton, 535 U.S. 212 (2002),
20 decided subsequent to Mead. In Barnhart, the Court deferred to an
21 interpretation of the Social Security Act contained in a regulation
22 promulgated by the Social Security Administration. Id. at 214.
23 The Court held that whether an interpretation was adopted after
24 notice-and-comment rulemaking was not dispositive, and that the
25 agency's interpretation was entitled to deference because of "the
26 interstitial nature of the legal question, the related expertise
of the Agency, the importance of the question to administration of
the statute, the complexity of that administration, and the careful
consideration the Agency has given the question over a long period
of time." Id. at 222. Although the interpretation under
consideration in Barnhart was binding on third parties, in that it
was enacted in a regulation, the Court did not discuss the
significance of this factor. Subsequently decided Ninth Circuit
cases compel this court to conclude that even if the Barnhart
factors are met, an interpretation receives Chevron deference only

1 The Department of the Interior interprets IGRA when it is
2 presented with a compact for approval. In some cases, the agency's
3 approval has been accompanied by an explicit interpretation of
4 section 2710(d)(3)(C). For example, the agency rejected a gaming
5 compact provision that would trigger nullification of a separate
6 tobacco compact. Letter from Principal Deputy Assistant Secretary
7 of Indian Affairs to Kenneth Blanchard, Governor, Absentee Shawnee
8 Tribe of Oklahoma (Dec. 17, 2004). This court is not aware of any
9 explicit interpretation of section 2710(d)(3)(C)(vii) as it
10 specifically applies to revenue sharing. However, the Secretary
11 has repeatedly approved compacts that contain exclusivity and
12 revenue sharing provisions, in California and elsewhere.¹⁶ By so
13 doing, the agency has implicitly concluded that revenue sharing is
14 consistent with IGRA, and thus with section 2710(d)(3)(C)(vii).

15 _____
16 if it binds third parties. Marmolejo-Campos, 558 F.3d at 909.

17 ¹⁶ For example, see the compacts between California and the
18 Yurok Tribe and the Coyote Valley Band of Pomo Indians. The
19 notices of the Secretary's approval of these compacts are published
20 at 72 Fed. Reg. 62264-01 and 69 Fed. Reg. 76004, respectively. The
21 compacts themselves are available at
http://www.cgcc.ca.gov/compacts/yurok_2006_compact.pdf and
http://www.cgcc.ca.gov/compacts/coyote_valley%20Compact.pdf. In
each compact, the revenue sharing agreement is codified at section
4.3.1.

22 The Secretary has also approved compacts providing for
23 unrestricted revenue sharing in New York, Massachusetts,
24 Connecticut, and New Mexico. See, e.g., Pueblo of Sandia v.
25 Babbitt, 47 F. Supp. 2d 49, 52 (D.D.C. 1999) (concerning compact
26 negotiated with New Mexico); see also Coyote Valley II, 331 F.3d
at 1115 n.17 (noting that Connecticut, New Mexico and New York have
entered compacts containing such provisions) (citing Gatsby
Contreras, Exclusivity Agreements in Tribal-State Compacts: Mutual
Benefit Revenue-Sharing or Illegal State Taxation?, 5 J. Gender
Race & Just. 487, 494-507 (2002)).

1 Indeed, the agency has demonstrated that it will reject compacts
2 that it determines violate this provision.

3 The Department of Interior's decisions to approve individual
4 State-Tribal Gaming Compacts appear not to have a precedential
5 effect that binds third parties, although the parties have not
6 briefed this issue. The Department's approvals result from a
7 relatively informal procedure, under which the State and Tribe
8 submit a copy of the compact and documents indicating their
9 approval thereof to the Secretary, who notifies the parties in
10 writing of his decision within 45 days. 25 C.F.R. §§ 293.8 -
11 293.14. Formality of procedures is not determinative, but it is
12 one indication that an interpretation has the force of law. Mead,
13 533 U.S. at 230. In addition, nothing indicates that the agency's
14 approval of one compact establishes a precedent that binds the
15 agency in future cases, and thus also binds third parties.
16 Instead, the agency is apparently able to change its interpretation
17 of IGRA, subject to the ordinary restraints on agency action.
18 Thus, the court concludes that the agency's approval of individual
19 compacts, and the implicit interpretation of section 2710(d)(3)(C)
20 as applied to revenue sharing contained therein, does not bind
21 third parties, and is therefore not entitled to deference under
22 Chevron. Marmolejo-Campos, 558 F.3d at 909.

23 **c. Interpreting IGRA under Skidmore and Blackfeet Tribe**

24 Because the statutory text is ambiguous and the agency
25 interpretation is not entitled to Chevron deference, the court must
26 itself resolve the ambiguity in the statute. Here, the court is

1 primarily guided by two canons of interpretation. Although the
2 agency interpretation is not entitled to deference under Chevron,
3 the court finds deference to be appropriate under Skidmore. And
4 because IGRA was enacted in part to benefit tribes, the Blackfeet
5 Tribe canon directs the court to interpret IGRA in a manner
6 consistent with that purpose. Here, the court concludes that the
7 Blackfeet canon does not squarely support either interpretation,
8 and the court thereby adopts the Department of Interior's position,
9 concluding that unrestricted revenue sharing tied to exclusivity
10 arrangements directly relates to gaming activities.

11 While Chevron deference takes its force from an assumed
12 Congressional delegation of authority to the agency, Skidmore
13 deference reflects the fact that the agency has experience with the
14 statute and is likely to reach a reasoned interpretation regardless
15 of whether Congress intended the agency's interpretation to be
16 binding. Mead, 533 U.S. at 230. In contrast with Chevron
17 deference, Skidmore deference is not all-or-nothing. "The weight
18 [accorded to an administrative] judgment in a particular case will
19 depend upon the thoroughness evident in its consideration, the
20 validity of its reasoning, its consistency with earlier and later
21 pronouncements, and all those factors which give it power to
22 persuade, if lacking power to control." Skidmore, 323 U.S. at 140.

23 In this case, the agency has not provided a detailed
24 explanation of its interpretation. Nonetheless, the interpretation
25 embodied by the approvals is longstanding, and has been frequently
26 and consistently applied. Congress is undoubtedly aware of this

1 interpretation, yet it has not chosen to revisit IGRA. These facts
2 weigh heavily in favor of deference. This court must also
3 acknowledge the extremely disruptive effect that would result from
4 a finding to the contrary. Finally, as discussed above, the
5 agency's interpretation of the statute is plausible. Accordingly,
6 the agency's interpretation of whether section 2710(d)(3)(C)
7 encompasses unrestricted revenue sharing provisions connected to
8 exclusivity is entitled to deference under Skidmore. See also
9 Artichoke Joe's California Grand Casino v. Norton, 216 F. Supp. 2d
10 1084, 1126-27 (E.D. Cal. 2002) aff'd by 353 F.3d 712, 730 (9th Cir.
11 2003).

12 The Blackfeet canon directs courts to interpret ambiguity in
13 statutes passed for tribes' benefit in a way that favors tribes.
14 Here, the Tribe argues that this canon should cause the court to
15 reject the agency's interpretation. Although the Tribe here argues
16 that a prohibition on revenue sharing is in its interest, the issue
17 is the interest of tribes generally. Coyote Valley II, 331 F.3d at
18 1111. These interests are unclear. When IGRA was drafted,
19 Congress concluded that States were in a position of superior
20 bargaining power. S. Rep. 100-446, *14-15. Limiting the scope of
21 permissible negotiations is an apparent aspect of Congress's
22 attempt to prevent States from exploiting this power. Thus,
23 Congress may have concluded that it was in tribes' interests to
24 interpret section 2710(d)(3)(C) narrowly. However, the Supreme
25 Court's decision that IGRA did not abrogate states' sovereign
26 immunity leaves the tribes' interests less clear. Seminole Tribe,

1 517 U.S. at 47. In other states, sovereign immunity has not been
2 waived, and tribes therefore cannot sue to enforce states'
3 obligation to negotiate under IGRA. See Pueblo of Sandia v.
4 Babbitt, 47 F. Supp. 2d 49, 51 (D.D.C. 1999). Some tribes have
5 used revenue-sharing agreements to entice non-waiving and
6 recalcitrant states into negotiations. Id. Concluding that
7 revenue sharing provisions are not directly related to gaming
8 activities, and that revenue sharing is therefore prohibited, would
9 eliminate one of the only tools these tribes have to encourage
10 states to negotiate compacts. Accordingly, it is not at all clear
11 that a statutory prohibition on unrestricted revenue sharing would
12 provide the greatest benefit to tribes generally.

13 Because the Blackfeet canon has no clear application here, the
14 court need not decide the relationship between the Blackfeet canon
15 and Skidmore deference.¹⁷ The court defers under Skidmore to the
16 Department of Interior's longstanding and consistent, albeit
17 implicit, interpretation of the statute. When an unrestricted
18 revenue sharing provision is tied to an exclusivity provision, the
19 revenue sharing is "directly related" to gaming activities, and

20
21 ¹⁷ The Ninth has held that Chevron deference, when
22 appropriate, precludes application of the Blackfeet canon. See,
23 e.g., Williams v. Babbitt, 115 F.3d 657, 663, n.5 (9th Cir. 1997).
24 Although no case has specifically discussed whether
25 Skidmore deference is similarly overriding, several cases decided
26 prior to Chevron held, without citing Skidmore, that similar forms
of agency deference precluded application of the canon favoring
tribes. Shields v. United States, 698 F.2d 987, 991 (9th Cir.
1983) (quoting Assiniboine & Sioux Tribes v. Nordwick, 378 F.2d 426
(9th Cir. 1967)). The court does not express an opinion on this
issue, other than to note that it, like many other issues in this
case, is unclear.

1 therefore within the scope of section 2710(d)(3)(C)(vii). Candor
2 requires the court to acknowledge that there are strong arguments
3 supporting contrary interpretations of this section. Nevertheless,
4 the court holds that the State's efforts to negotiate this topic
5 did not violate section 2710(d)(3)(C).

6 **B. Fee Demands and Meaningful Concessions**

7 The Tribe next argues that the State's conduct amounts to
8 either an "imposition" of or a "demand for" a tax. Under section
9 2710(d)(3)(C)(iii), a state may tax gaming "in such amounts as are
10 necessary to defray the costs of regulating such activity."
11 Section 2710(d)(4) provides that aside from such taxes, IGRA does
12 not provide States with "authority to impose any tax, fee, charge,
13 or other assessment," and "[n]o State may refuse to enter into . .
14 . negotiations . . . based on the lack of [such] authority."
15 Section 2710(d)(7)(b)(iii)(II) provides that a "demand . . . for
16 direct taxation" is "evidence" of bad faith. A compact provision
17 can violate these sections even if it falls within section
18 2710(d)(3)(C). Coyote Valley II, 331 F.3d at 1112.

19 IGRA does not define "impose" and "demand." In ordinary
20 usage, the terms connote difference contexts. Imposition refers to
21 a state acting unilaterally, and compelling a tribe to pay a tax.
22 Demand, on the other hand, refers to behavior during bilateral
23 negotiation. Rather than a compulsion, a demand is insistence on
24 acceptance.

25 As the Ninth Circuit has interpreted the terms, they are
26 functionally equivalent. Without explicitly defining "imposition",

1 Coyote Valley II explained what it was not. Where a state "offers
2 meaningful concessions in return for fee demands, it does not
3 exercise 'authority to impose' anything." Coyote Valley II, 331
4 F.3d at 1112. Even when "the State[] insist[s] on" a tribe's
5 acceptance of a fee in exchange for a meaningful concession offered
6 by the State, the State does not "impose" a fee. Id. at 1114. The
7 Secretary of the Interior apparently concludes that a State imposes
8 a fee whenever a compact includes a fee which is not offset by a
9 meaningful concession. Letter from the Principal Deputy Assistant
10 Secretary of Indian Affairs to Kenneth Blanchard, Governor of the
11 Absentee Shawnee Tribe of Oklahoma (December 17, 2004). Coyote
12 Valley II indicated that imposition of a fee is bad faith per se.
13 When a concession is inadequate, insistence on a fee might "amount
14 to an attempt to 'impose' a fee, and *therefore amount to bad faith*
15 *on the part of a State.*" Coyote Valley II, 331 F.3d at 1112
16 (emphasis added).

17 A "demand" for a fee, on the other hand, is merely evidence of
18 bad faith, and this evidence may be outweighed by evidence of good
19 faith. Coyote Valley II illustrated this distinction by assuming
20 that the State had demanded a fee even though the State did not
21 impose one, only to hold that any evidence of bad faith was
22 outweighed by evidence of good faith. Id. at 1114.¹⁸ Despite this

23
24 ¹⁸ The court explicitly refrained from deciding whether the
25 state had in fact made a demand for a direct tax. Coyote Valley
26 II, 331 F.3d at 1114. Instead, the court held that, assuming that
the requested revenue sharing and RSTF provisions were such
demands, the resulting evidence of bad faith was overcome by
evidence of good faith. Id.

1 distinction, the evidence of good faith and the evidence of a
2 meaningful concession were largely one and the same. The first
3 evidence of good faith with respect to the demand for revenue
4 sharing was that "the tribes receive . . . an exclusive right to
5 conduct class III gaming in the most populous State in the
6 country," which the court had earlier identified as a meaningful
7 concession. The second piece of evidence was that "the terms of
8 the compact restrict what the State can do with the money it
9 receives from the tribes pursuant to the [revenue sharing]
10 provision, and all of the purposes to which the money can be put
11 are directly related to gaming." This language merely reiterates
12 Coyote Valley II's analysis of section 2710(d)(3)(C).¹⁹ As
13 explained above, this court concludes that revenue sharing directly
14 relates to gaming when it is tied to an exclusivity provision.

15 The effect of Coyote Valley II's analysis is that, at least
16 with respect to revenue sharing, the existence of a meaningful
17 concession, together with compliance with section 2710(d)(3)(C), is
18 sufficient to determine both whether a fee is imposed and whether
19
20

21
22 ¹⁹ In the separate discussion of the RSTF provision, Coyote
23 Valley II found additional evidence of good faith in the facts that
24 the RSTF "provision does not put tribal money into the pocket of
25 the State," that the RSTF provision was included at the behest of
26 the tribes, and that Coyote Valley tribe had had an opportunity to
participate in the negotiations giving rise to the RSTF provision.
331 F.3d at 1113. Because these factors were not present with
respect to the revenue sharing provision, id. at 1114-15, it is
clear that these factors are not necessary for a finding of good
faith.

1 the fee demand is itself proof of bad faith.²⁰

2 Despite reaching this conclusion, the court notes that as with
3 many other issues in this case, the relationship between sections
4 2719(d)(4) and (d)(7)(B)(iii)(II) presents a difficult and largely
5 novel question. The court responds to two potential concerns.
6 Coyote Valley II explained, in reference to the weighing of
7 evidence of good and bad faith under section (d)(7)(B)(iii)(II),
8 that “the good faith inquiry is nuanced and fact-specific, and not
9 amenable to bright-line rules.” 331 F.3d at 1113. Here, the court
10 adopts the rule that a demand for a tax is not sufficient to
11 demonstrate bad faith when the demand comports with section
12 2710(d)(3)(C) and the state offers a meaningful concession. This
13 rule comports with Coyote Valley II because, as illustrated below,
14 the question of whether a meaningful concession has been offered is
15 itself “nuanced and fact specific,” and because the broader good
16 faith inquiry, in which the tribe may introduce evidence other than
17 the demand for a tax, lies outside the scope of this rule.

18 A second concern is that treating imposition and demand as
19 near-equivalents renders one statutory provision surplusage.
20 However, the two provisions use different language for different
21 purposes. Section 2710(d)(7)(B)(iii)(II) explains that certain
22 negotiating behavior indicates bad faith, whereas section

23
24 ²⁰ It should go without saying that even when the State offers
25 a meaningful concession and negotiates topics permitted by section
26 2710(d)(3)(C), other factors, beyond a demand for a tax, may
nonetheless demonstrate bad faith. For example, a state may act
in bad faith by engaging solely in “surface bargaining,” as
discussed in part III(C), below.

1 2710(d)(4) explains that the State has no power outside of its
2 power in negotiation.

3 Having laid this groundwork, the court turns to the facts of
4 this case. As explained in the following sections, the court
5 concludes that surrender of the right to receive RSTF payments is
6 not a "tax, fee, charge, or other assessment," within the meaning
7 of section 2710(d)(4) or a "direct tax" within the meaning of
8 section 2710(d)(7)(B)(iii)(II). Unrestricted revenue sharing is
9 such a tax, and the State's offer of exclusivity is a concession,
10 but a triable question remains as to whether this concession is
11 meaningful.

12 **1. Forfeiting Receipt of RSTF Payments Is Not A Tax**

13 The Tribe argues that the forfeiture of the right to receive
14 payments from the RSTF, or diminution of those payments, is a "tax,
15 fee, charge, or other assessment" within the meaning of section
16 2710(d)(4). Neither party has provided any authority on this
17 issue.

18 In ordinary English, a tax, charge, fee or assessment is an
19 obligation to pay out money that one already has. Webster's
20 Dictionary provides the following pertinent definitions:

21 Charge: 5 a : expense, cost <gave the banquet
22 at his own charge> b : the price demanded for
23 something <no admission charge> c : a debit to
an account <the purchase was a charge>

24 Fee: 2 a : a fixed charge b : a sum paid or
charged for a service

25 Tax: 1 a : a charge usually of money imposed
26 by authority on persons or property for public
purposes b : a sum levied on members of an

1 organization to defray expenses
2 Merriam-Webster Online Dictionary (2009). Retrieved November 19,
3 2009, from <http://www.merriam-webster.com/dictionary/>. The Tribe's
4 apparent contention is that, notwithstanding the ordinary usage,
5 there is no bottom line difference between a "debit" to an account
6 and withholding of a deposit. The caselaw has distinguished taxes
7 from penalties, debts, fees, and other charges, but the court is
8 not aware of any authority addressing the antecedent question of
9 whether something is a charge at all.²¹

10 The canons of statutory interpretation used in the preceding
11 sections provide little guidance here. The Department of the
12 Interior has not, to the court's knowledge, interpreted these
13 terms. The Blackfeet canon may support a broad interpretation of
14 "charge" generally. In this case, however, a narrow interpretation
15 of "charge" appears equally likely to benefit tribes, as the
16 withheld RSTF funds would go to other tribes. Without deciding

17
18 ²¹ In general, a "functional examination" is used to determine
19 whether an "exaction . . . is a tax, a penalty, a debt, or
20 something else." George v. Uninsured Emplrs. Fund (In re George),
21 361 F.3d 1157, 1160 (9th Cir. 2004). For example, for purposes of
22 the bankruptcy act, "[a] tax is a pecuniary burden laid upon
23 individuals or property for the purpose of supporting the
24 Government." Id. (quoting United States v. Reorganized CF&I
25 Fabricators of Utah, Inc., 518 U.S. 213, 224 (1996)). In another
26 example, the Ninth Circuit uses a three part test to determine
whether an "assessment" is a tax or a fee for purposes of the Tax
Injunction Act. Qwest Corp. v. City of Surprise, 434 F.3d 1176,
1183 (9th Cir. 2006) (citing Bidart Bros. v. Cal. Apple Comm'n, 73
F.3d 925, 931 (9th Cir. 1996)). See also Welch v. Henry, 305 U.S.
134, 146 (1938) (distinguishing taxes from contractual
obligations), United States v. La Franca, 282 U.S. 568, 572 (U.S.
1931) (distinguishing taxes and penalties).

The distinctions between taxes, fees, charges and other
assessments are not relevant here, as IGRA treats all equally.

1 whether the Blackfeet analysis should be case specific or should
2 instead consider situations not currently before the court, the
3 court simply concludes that Blackfeet does not strongly support the
4 Tribe on this issue.

5 In any event, statutory construction requires that ordinarily
6 words are given their ordinary meaning absent a reason to depart
7 from that meaning. "When terms used in a statute are undefined, we
8 give them their ordinary meaning." Cuomo v. Clearing House Ass'n,
9 L.L.C., ___ U.S. ___, 129 S. Ct. 2710, 2723 (2009) (quoting Asgrow
10 Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995)); see also Gross
11 v. FBL Fin. Servs., ___ U.S. ___, 129 S. Ct. 2343, 2350 (2009).
12 Absent compelling reasons to depart from the ordinary meaning of
13 the words "tax," "fee," "charge," or "assessment," the court
14 concludes that these words cannot be interpreted to encompass
15 surrender of a right to receive payment. Accordingly, forfeiture
16 of RSTF payments is not within the scope of section 2710(d)(4).

17 **2. Revenue Sharing**

18 The parties agree that revenue sharing is a fee, etc. As
19 explained above, insistence on a fee is permissible where the state
20 offers a meaningful concession. Coyote Valley II, 331 F.3d at
21 1112, 1114. Coyote Valley II did not define "meaningful
22 concession," although it stated that the evaluation may turn on
23 "the nature of both the fee demanded and the concessions offered in
24 return." Id. at 1112; see also id. at 1115. The Department of the
25 Interior has concluded that a state offers a meaningful concession
26 when (1) "the State concedes something that it was otherwise not

1 required to negotiate" and (2) this "concession[] result[s] in a
2 substantial economic benefit to the Tribe." Letter from the
3 Principal Deputy Assistant Secretary of Indian Affairs to Kenneth
4 Blanchard, Governor of the Absentee Shawnee Tribe of Oklahoma
5 (December 17, 2004). Insofar as this definition is an
6 interpretation of IGRA distinct from the Ninth Circuit's
7 interpretation, the court grants it Skidmore deference.

8 The State argues that it has offered a "meaningful concession"
9 in the form of "the ability to operate, free from non-Indian
10 competition" certain Class III gaming. Coyote Valley II recognized
11 that the right to operate Class III gaming was distinct from the
12 promise to prohibit non-tribal entities from doing so. On the
13 facts of the 1999 Compact negotiations, the panel concluded that
14 each offered a meaningful concession. The State mistakenly argues
15 that Coyote Valley II thereby established that exclusivity was a
16 meaningful concession as a matter of law. Contrary to the State's
17 argument, Coyote Valley II reached its conclusion after a fact
18 specific analysis, and the facts underlying these purported
19 concessions have changed. On the facts here, the court concludes
20 that only exclusivity constitutes a concession. A triable question
21 exists as to whether this concession provides a meaningful benefit
22 to the Tribe.

23 **a. Permission to Conduct Class III Gaming Is Not A**
24 **Concession**

25 At the time of the 1999 Compact negotiations, California did
26 not permit any slot machines or other class III gaming of the type

1 sought by the tribes. Pursuant to the Ninth Circuit's decision in
2 Rumsey, California therefore had no obligation to honor requests to
3 negotiate compacts for this type of gaming. 64 F.3d at 1258
4 (interpreting § 2710(d)(1)(B)). Moreover, on August 23, 1999,
5 after negotiations had started, the California Supreme Court
6 concluded that state law prohibited the State from permitting
7 tribes to engage in such gaming. Hotel Employees & Restaurant
8 Employees Internat. Union v. Davis, 21 Cal. 4th 585, 589 (1999).
9 Against this background, then-governor Davis's administration
10 proposed a constitutional amendment that would allow the State to
11 permit such gaming. Coyote Valley II, 331 F.3d at 1103. Davis
12 also negotiated with tribes, despite the fact that he was not
13 obliged to do so under the IGRA. Id. The State's willingness to
14 enter negotiations and offer the right to conduct gaming was a
15 concession, which had considerable value to the tribes. Id. at
16 1112.²² Thus, permission to conduct gaming satisfied both steps of
17 the meaningful concession test.

18 In this litigation, the State again asserts that granting the
19 Tribe the right to conduct class III gaming is a meaningful
20 concession. However, in light of the fact that the State now
21 "permits such gaming for any purpose by any person, organization,
22 or entity," § 2710(d)(1)(B), IGRA compels the State to negotiate on
23

24 ²² "[T]he State had no obligation to enter any negotiations at
25 all with Coyote Valley concerning most forms of class III gaming.
26 Nor did the State have any obligation . . . to offer tribes the
right to operate Las Vegas-style slot machines and house-banked
black-jack." Coyote Valley II, 331 F.3d at 1112.

1 this issue. Rumsey, 64 F.3d at 1258; § 2710(d)(3)(A).
2 Accordingly, by offering the right to conduct such gaming, the
3 State does not concede something that it was otherwise not required
4 to negotiate.

5 The Department of the Interior has implicitly joined in this
6 interpretation. Through 2003, "the Department [of the Interior]
7 ha[d] approved payments to a State only when the State has agreed
8 to provide the tribe with substantial exclusivity for Indian
9 gaming." Letter from the Acting Assistant Secretary of Indian
10 Affairs to Janet Napolitano, Governor of the State of Arizona
11 (January 24, 2003). In calculating whether the benefit to the
12 tribe provided by a concession is substantial, the Department has
13 looked to the benefit provided by exclusivity, rather than the
14 benefit of gaming generally. Id., see also Letter from Principal
15 Deputy Assistant Secretary of Indian Affairs to Kenneth Blanchard,
16 Governor, Absentee Shawnee Tribe of Oklahoma (Dec. 17, 2004).
17 Thus, the Department has not considered mere permission to conduct
18 gaming a concession

19 Accordingly, the State's willingness to approve gaming and
20 enter a compact is not a meaningful concession.

21 **b. Exclusivity Is A Concession**

22 The State also offers the Tribe exclusivity, in the form of a
23 ban on non-tribal gaming. The California Constitution currently
24 prohibits non-tribal gaming statewide. Coyote Valley II held that
25 "the State['s] propos[al of] a constitutional amendment protecting
26 tribal gaming enterprises from free market competition by the

1 State" was a meaningful concession. 331 F.3d at 1115. The State
2 has since promised, in compacts with other tribes, to maintain this
3 prohibition with respect to specific geographic areas. The State
4 offers a similar promise here.

5 The Tribe responds that constitutional prohibition on non-
6 tribal gaming has already been enacted, such that the offer of
7 market protection from non-tribal gaming is no longer a concession.
8 However, the State's existing obligations regarding exclusivity
9 differ from its obligations to negotiate and permission to conduct
10 gaming. The latter arise under federal law that is beyond the
11 State's control. The former arise purely under state law. The
12 State could amend its constitution to permit non-tribal gaming.
13 Existing compacts reflect this possibility, stating that in the
14 event non-tribal gaming becomes permitted within the zone of
15 exclusivity offered to the tribe, provisions offered to the State
16 in exchange for this concession will be vacated. See, e.g., Pl.'s
17 Request for Judicial Notice, Ex. 6 (Tribal-State Compact Between
18 the State of California and the Pinoleville Pomo Nation, executed
19 March 10, 2009). Coyote Valley II held that the State's
20 willingness to amend its laws, even when this amendment required
21 voter approval, could be a meaningful concession. 331 F.3d at
22 1115. A State's willingness to preserve its laws is not materially
23 different.²³ To the extent that this conclusion is not compelled

24
25 ²³ But see Rincon Band of Luiseno Mission Indians of the
26 Rincon Reservation v. Schwarzenegger, No. 04-cv-1151 (S.D. Cal.
April 29, 2008) (McCurine, M.J.). Rincon Band was a signatory to
the 1999 Compacts. The Tribe sought to renegotiate portions of

1 by Coyote Valley II, the court notes that it is consistent with the
2 view adopted by the Secretary of the Interior, who has continued to
3 approve, since 2000, of California State-Tribal compacts with
4 revenue sharing provisions premised on the offer of exclusivity as
5 a meaningful concession. See, e.g., Pl.'s RJFN Ex. 6.

6 **c. A Triable Question Exists As To Whether Exclusivity**
7 **Provides A Meaningful Benefit To The Tribe**

8 Under the Secretary's two-step analysis, the second question
9 is whether this concession provides "substantial" benefits to the
10 Tribe. Letter from the Principal Deputy Assistant Secretary of
11 Indian Affairs to Kenneth Blanchard, Governor of the Absentee
12 Shawnee Tribe of Oklahoma (December 17, 2004). This issue presents
13 a triable question.

14 _____
15 their compact, and filed suit objecting to certain provisions
16 sought by the State, including an unrestricted revenue sharing
provision. The Rincon Band court held that

17 the consideration that was already given
18 (exclusivity) for the mutual compact [the 1999
19 compacts] cannot be repeatedly reused as a
20 basis for the State's desire for a new compact
. . . . In this Court's view, the State has
not offered exclusivity because exclusivity
already exists.

21 Id. at 18. The fact that Rincon Band concerned an attempt to
22 renegotiate an existing compact, rather than to adopt a new
23 compact, at least partially distinguishes that case from this one.
24 There, the State had already offered exclusivity to the Rincon
25 Tribe in adopting the prior compact, and the court relied at least
26 in part on this fact rather than on the state's general policy of
prohibiting non-tribal gaming. Id. at 19. However, the court also
expressed skepticism about the idea that refraining from amending
the constitution was a concession. Id. at 20. It appears to this
court to be a much more difficult question than it did to the
Rincon Band court.

1 While the State concedes that the court must evaluate the
2 first step (whether the State has offered a concession), the State
3 argues that only the Secretary of the Interior can answer the
4 second (whether the concession offers meaningful benefits to the
5 Tribe). This argument is belied by Coyote Valley II, wherein the
6 court determined that the concessions provided a fair exchange, 331
7 F.3d at 1115, and by the fact that the Secretary evaluates compacts
8 only after the parties have agreed to them, such that the Secretary
9 does not take part in the good faith analysis.²⁴

10 In Coyote Valley II, rather than evaluate the benefit itself,
11 the court relied on other parties' valuations, notably, the facts
12 that "[t]he tribes who drafted and placed Proposition 5 [containing
13 a model compact] on the ballot thought [the] exchange was fair,"
14 and that "[t]he former Secretary of the Interior also appears to
15 believe [that the] exchange is fair, given that he approved the
16 Davis [1999] Compact in May 2000." Coyote Valley II, 331 F.3d at
17 1115. Here, the Tribe argues that the State's proposals differ
18 from other compacts in a way that precludes comparison to third
19 parties' valuations. The Tribe's primary argument is that no other

21
22 ²⁴ If, as the State argues, the courts are prohibited from
23 evaluating the benefit provided by a concession in the good faith
24 analysis, a Tribe that contends that the benefit is inadequate will
25 be forced to either surrender the possibility of a compact
26 (because, absent a showing of bad faith, the Tribe will not be able
to compel the State to enter a compact) or to agree to a compact
despite this objection in the hopes that the Secretary will
conclude that the agreed-upon compact provides an inadequate
benefit. The State's position thereby frustrates the purpose of
good faith review.

1 Tribe has surrendered the right to receive RSTF payments.²⁵
2 However, the court has determined that forfeiture of RSTF payments
3 is not a "tax, fee, charge, or other assessment," and the adequacy
4 of a concession is determined by reference to "the nature of . . .
5 the fee demanded." Coyote Valley II, 331 F.3d at 1112. The
6 benefit of exclusivity is therefore weighed against the burden of
7 revenue sharing. The Tribe concedes that other compacts have
8 included revenue sharing at levels similar to those proposed here,
9 but argues that exclusivity is worth less in this case than it is
10 to other tribes.

11 Absent an independent evaluation, the court must itself
12 evaluate the benefit. The Secretary appears to evaluate compacts
13 by estimating whether the Tribe stands to realize greater revenue
14 if both revenue sharing provisions and exclusivity are included
15

16 ²⁵ Although the court finds this distinction irrelevant, the
17 undisputed evidence demonstrates that no Tribe operating fewer than
18 350 machines has relinquished RSTF payments and also agreed to make
19 unrestricted revenue sharing payments to the State, and as a
20 result, the Secretary has not evaluated such a forfeiture. C.f.
21 Compact of the Fort Mojave Indian Tribe, 69 Fed. Reg. 76004
22 (compact permits 1,500 gaming devices, calls for relinquishment of
23 RSTF payments, and for payment of at least 12% of annual revenue),
24 Compact of the Pinoleville Pomo Nation, March 10, 2009 (authorizing
25 up to 900 devices, 15% revenue sharing, and payments into the RSTF
26 if the tribe operates more than 700 gaming devices). Instead, the
State has permitted other tribes to operate fewer than 350 devices
and to continue to receive RSTF payments. In particular, the Tribe
points to the Yurok compact, which was also negotiated by the
Schwarzenegger administration. The Yurok compact provides for 99
devices, retention of RSTF payments, and the same schedule of
revenue sharing proposed to Fort Independence on Aug. 30, 2007.
Fort Independence's situation differs in some important regards.
Fort Independence seeks permission to operate up to 349 devices,
rather than 99, and has 150 members, as opposed to the 4,000 in the
Yurok Tribe.

1 than the Tribe would realize if both were omitted. Pl.'s RFJN Ex.
2 1, 2; see also Oversight Hr'g on the Indian Gaming Regulatory Act
3 of 1988 before the Sen. Comm on Indian Affairs, 108th Cong. 67, pt.
4 2, p. 3 (2003) (testimony of Aurene M. Martin, Acting Assistant
5 Secretary-Indian Affairs, Dept. of the Interior, July 9, 2003).
6 The court follows this approach here.

7 If exclusivity is maintained, the parties estimate that the
8 proposed casino will produce between \$5.4 and \$6.8 million in
9 gaming revenue. During negotiations, the Tribe commissioned a
10 "gaming market assessment," which was completed in November of
11 2006. Houck Decl. Ex. AA (Doc. 60-10). The gaming market
12 assessment assumes that the Tribe will operate between 120 to 150
13 machines and will benefit from exclusivity. Id. at FI 937. Based
14 on these assumptions, it predicts that annual revenue will reach
15 \$5.9 million. Id. at FI 396.²⁶ The State adopts this prediction,
16 with the caveat that in 2009 dollars, projected revenue will be
17 \$5.4 million. Declaration of William R. Eadington, ¶ 12 (Doc. No.
18 87-2). The Tribe has commissioned a second study in connection
19 with this motion, which estimates that with exclusivity, annual
20 gaming revenue over the first five years of operation would range
21 from \$6 to \$6.8 million. Declaration of Klas Robinson, Ex. C, 2
22 (Doc. No. 85).

23 The parties' estimates of revenue without exclusivity are not

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25 ²⁶ The assessment predicted annual revenues of \$6.9 million if
26 a proposed competing tribal gaming facility at Bishop Paiute Palace
did not open. Houck Decl. Ex. AA at FI 396. The Paiute Palace
Casino has since been opened.

1 so similar. The Tribe estimates that without exclusivity, revenue
2 would be reduced between \$480,000 and \$1.4 million annually.
3 Robinson Decl. Ex. C, 2. This represents roughly a 7% reduction
4 from the Tribe's "with exclusivity" prediction. The State
5 estimates the reduction at \$4.3 to \$5.1 million, or 80% percent of
6 the State's "with exclusivity" estimate. Eadington Decl. ¶ 16.
7 For purposes of the instant cross motions, the court concludes that
8 both parties' expert testimony is admissible.²⁷ Measured against
9 the State's requested revenue sharing of 10 to 25 percent, under
10 the Tribe's estimate, exclusivity does not provide a substantial
11 benefit, whereas under the State's estimate, exclusivity does.

12 The Tribe also asserts that the court should look to
13 exclusivity's effect on profit, rather than revenue. Because the
14

15 ²⁷ Robinson, the Tribe's expert, bases his estimate on
16 analysis of video lottery machines operated in South Dakota and
17 Montana, after concluding that competitors in this region are
18 unlikely to use other forms of gaming, and that other states
19 permitting similar gaming types do not share similar geographic and
20 demographic characteristics. Robinson Decl. 23-24.

21 Eadington, the State's expert, compares performance of casinos
22 in California, where non-tribal gaming is prohibited, with casinos
23 in Nevada, where there is no such prohibition. Eadington Decl. ¶
24 5. Eadington also relies on the fact that the Tribe is located in
25 a rural area, and estimates that if non-tribal gaming was
26 permitted, potential customers would be likely to visit more
conveniently located non-tribal facilities. Id. ¶¶ 13-14.
Eadington further predicts that the direct decrease in expected
revenue would lead to an additional indirect decrease in
profitability, because lenders, faced with the prospect of lowered
revenues, would provide financing to the Tribe on less attractive
terms. Id. ¶ 15. This final prediction, however, does not appear
to have been incorporated into Eadington's analysis.

The court concludes, for purposes of this motion, that both
declarations are admissible expert testimony. The parties
nonetheless are not barred from challenging these expert opinions
in future proceedings.

1 relationship between revenue and profit is largely under the
2 Tribe's control, it is not clear that this is the proper approach.
3 Even if the court were to adopt this approach, however, the dispute
4 would remain. The Tribe estimates that with neither exclusivity
5 nor revenue sharing, the Tribe will receive between \$212,000 and
6 \$826,000 in annual profit over the first five years of operation,
7 but that with both, the Tribe's effective annual profit will range
8 from \$198,000 to \$402,000 over the same period. Robinson Decl. at
9 2, 22, 29 (scenarios 2 and 5). While the State does not
10 specifically estimate exclusivity's effect on profit, a trier of
11 fact could find that for any reasonable relationship between
12 revenue and profit, and 80% decrease in revenue would also provide
13 a greater than 10 to 25% decrease in profit.

14 Accordingly, there is a dispute as to whether exclusivity is
15 a meaningful concession. Neither party is entitled to summary
16 judgment on the issue of whether the State has sought to impose a
17 tax or whether any demand for a tax was itself bad faith.

18 **C. Other Evidence of Good and Bad Faith**

19 Each party argues that it is entitled to summary judgment even
20 if a question remains as to whether exclusivity is a meaningful
21 concession. The Tribe argues that the State has impermissibly
22 adopted a "take it or leave it" attitude in negotiations. The
23 State argues that because the disputed provisions were initially
24 proposed by the Tribe, the State's continued requests for these
25 provisions is not bad faith. The court addresses each argument in
26 turn, rejecting both.

1 The Tribe cites Seattle-First Nat'l Bank v. NLRB, 638 F.2d
2 1221 (9th Cir. 1981), a case interpreting the NLRA, for the
3 proposition that a "take it or leave it" attitude is evidence of
4 bad faith. Seattle-First Nat'l stated that a party "cannot
5 maintain an attitude of 'take it or leave it.'" Id. at 1227 n.9
6 (citing NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 485
7 (1960)). This statement, however, was made in the context of the
8 court's discussion of "surface bargaining," wherein a party
9 negotiates in bad faith by "going through the motions of
10 negotiating, *without any real intent to reach an agreement.*" Id.
11 (quoting K-Mart Corp. v. NLRB, 626 F.2d 704, 706 (9th Cir. 1980))
12 (emphasis added, internal quotation marks removed). While a "take
13 it or leave it" attitude may be evidence of surface bargaining, and
14 therefore of bad faith, the NLRA caselaw explicitly permits a party
15 to bargain to the point of impasse with respect to mandatory
16 subjects. Borg-Warner, 356 U.S. at 350. Insistence on a position
17 therefore does not itself demonstrate bad faith. C.f. Sparks
18 Nugget, Inc. v. NLRB, 968 F.2d 991, 995 (9th Cir. 1992) ("The
19 failure to compromise, the proposal of a contract that gave
20 management total control of wages, seniority, and work rules, and
21 the unwillingness to schedule long or frequent meetings, support
22 the inference of bad faith and surface bargaining."). In the IGRA
23 context, Coyote Valley II found that the state's insistence on
24 revenue sharing and RSTF provisions consistent with good faith.

25 In this case, the evidence demonstrates that the state
26 insisted upon revenue sharing of at least 10 percent, in that every

1 offer made by the State included at least this level of revenue
2 sharing, and nothing indicates that the State would have accepted
3 a lesser degree of revenue sharing. The evidence would also enable
4 a trier of fact to conclude that the State insisted on forfeiture
5 of RSTF payments, in that each offer made by the State involved
6 eventual surrender of these payments. However, a trier of fact
7 could conversely find that the State would have ultimately been
8 willing to abandon this second request, in light of the State's
9 willingness to negotiate delayed elimination of these payments and
10 the fact that the State has allowed other tribes to retain RSTF
11 payments.

12 Here, the insistence on revenue sharing is insufficient to
13 determine, on summary judgment, that the State engaged in surface
14 bargaining and therefore acted in bad faith. Unlike in Sparks
15 Nugget, the State has demonstrated some willingness to compromise
16 with regard to the precise level of revenue sharing,
17 notwithstanding the fact that all proposals involve revenue sharing
18 of at least ten percent. A material question remains as to whether
19 the state offered a meaningful concession, and thus whether the
20 offer was reasonable. The Tribe has provided no evidence of a
21 procedural failure of negotiation, such as inadequate meeting
22 times. Accordingly, the court cannot conclude that the State's
23 insistence here differs from the insistence in Coyote Valley II,
24 such that it demonstrates surface bargaining.

25 As to the State's remaining argument, the State argues that
26 revenue sharing was initially proposed by the Tribe, in that the

1 Tribe's initial proposal included a preamble stating that revenue
2 sharing was appropriate. However, this "initial proposal" was made
3 in the light of the State's pervasive policy of extracting revenue
4 sharing from Tribes since adoption of the 1999 compacts. Moreover,
5 the quantity of revenue sharing was proposed by the State, not the
6 Tribe. Where the State had established its desire for revenue
7 sharing prior to the commencement of negotiations and where the
8 State has uniformly sought at least ten percent revenue sharing
9 notwithstanding repeated, albeit inconstant, objections by the
10 Tribe, the State cannot attribute the proposal for revenue sharing
11 to the Tribe.

12 IV. CONCLUSION

13 For the reasons stated above, both parties' motions for
14 summary judgment (Doc. Nos. 53 and 54) are DENIED. The court
15 grants summary adjudication as to the following issues:

16 * The State's proposal comport with 25 U.S.C. section
17 2710(d)(3)(C)

18 * Forfeiture of the right to receive RSTF payments is not a
19 tax, fee, charge, or assessment.


20 * The offer of permission to conduct Class III gaming is not
21 a "concession."

22 * The offer of exclusivity is a concession.

23 A material question exists as to whether the concession of
24 exclusivity is meaningful. The matter will proceed for resolution
25 of this issue.

26 IT IS SO ORDERED.

DATED: December 23, 2009.


LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT