CHRISTOPHER E. BABBITT (SBN 225813)
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 663-6000
Facsimile: (202) 663-6363
E-mail: christopher.babbitt@wilmerhale.com

JOHN A. MAIER (SBN 191416)
MAIER PFEFFER KIM GEARY & COHEN LLP
1440 Broadway, Suite 812
Oakland, CA 94612
Telephone: (510) 835-3020
Facsimile: (510) 835-3040
E-mail: jmaier@jmandmplaw.com

Attorneys for Plaintiff
NORTH FORK RANCHERIA OF MONO
INDIANS OF CALIFORNIA

**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| NORTH FORK RANCHERIA OF MONO INDIANS OF CALIFORNIA,<br><br>Plaintiff,<br><br>v.<br><br>STATE OF CALIFORNIA,<br><br>Defendant. | Case No. _____<br><br>**COMPLAINT** |

Plaintiff NORTH FORK RANCHERIA OF MONO INDIANS OF CALIFORNIA alleges as follows:

## NATURE OF THIS ACTION

1. The Indian Gaming Regulatory Act ("IGRA") requires states, upon request by an Indian tribe, to "negotiate with the Indian tribe in good faith to enter into" "a Tribal-State compact governing the conduct of gaming activities" on the tribe's "Indian lands." 25 U.S.C. § 2710(d)(3)(A). IGRA also confers jurisdiction on this Court over "any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith." *Id.* § 2710(d)(7)(A)(i). This action is brought pursuant to § 2710(d)(7)(A)(i) and seeks a declaration that Defendant the State of California ("the State" or "California") has failed to comply with § 2710(d)(3)(A)'s requirement that the State negotiate in good faith with Plaintiff North Fork Rancheria of Mono Indians of California ("the Tribe") to enter into an enforceable tribal-state gaming compact, and an order directing the State to conclude an enforceable compact with the Tribe within 60 days or submit to mediation, *see id.* § 2710(d)(7)(B)(iii)-(iv).

2. Plaintiff is a federally recognized Indian tribe, listed in the Federal Register as the Northfork Rancheria of Mono Indians of California, that has lived in and around what is today known as Madera County, California from time immemorial. Lacking usable tribal land for economic development, the Tribe sought to have approximately 305 acres of land located in an unincorporated portion of Madera County ("the Madera Parcel") taken into trust on its behalf pursuant to the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465, to construct a gaming facility as contemplated by IGRA.

3. After consultation with appropriate State and local officials, the U.S. Secretary of the Interior determined, pursuant to IGRA, that such a gaming facility "would be in the best interest of the [Tribe] and its members, and would not be detrimental to the surrounding community," 25 U.S.C. § 2719(b)(1)(A). *See* Secretary of the Interior, Letter Regarding Two-Part Determination (Sept. 1, 2011) (a copy of which is attached as Ex. B).[1] The Governor of California concurred in that determination. *See* Letter from Governor Brown to Secretary Salazar (August 30, 2012) (a copy of which is attached as Ex. C). The federal government accordingly took the Madera Parcel into trust on the Tribe's behalf on February 5, 2013, and the Tribe now exercises jurisdiction over the Madera Parcel. The Madera Parcel is "Indian land[]" within the meaning of IGRA, 25 U.S.C. § 2703(4)(B), and is eligible for gaming pursuant to 25 U.S.C. § 2719(b)(1)(A).

4. Pursuant to IGRA, the Tribe requested that the State negotiate with it to enter into a tribal-state gaming compact that would govern the conduct of class III gaming activities on the Madera Parcel. *See* 25 U.S.C. § 2710(d)(3)(A). The Tribe and California's Governor negotiated and concluded a gaming compact on August 31, 2012. California's Legislature ratified the compact by statute on June 27, 2013. On July 16, 2013, the State forwarded the compact to the Secretary of the Interior for her review and approval under IGRA. Because the Secretary of the Interior took no action within 45 days of the submission of the compact, the compact was "considered to have been approved … to the extent consistent with" IGRA. 25 U.S.C. § 2710(d)(8)(C). On October 22, 2013, the Secretary published notice in the Federal Register that the compact was considered to have been approved and that it was therefore "taking effect." 78 Fed. Reg. 62,649.

[1] An index of all exhibits attached to this Complaint is attached as Exhibit A.

5. Thereafter, a referendum on the statute ratifying the compact was placed on the November 4, 2014 ballot. On that date, the California electorate voted to reject the referendum, thus purporting to reject the Legislature's ratification of the compact.

6. Following the referendum, the State has taken the position that the compact has not been ratified in accordance with California law and that the State therefore has not entered into a compact with the Tribe. The State is thus refusing to honor the compact.

7. Both before and after the referendum, the Tribe renewed its request that the State negotiate with it in good faith to conclude an enforceable tribal-state gaming compact to govern gaming on the Madera Parcel. *See* Letter from John A. Maier, Counsel for North Fork, to Joginger S. Dhillon, Senior Advisor for Tribal Negotiations, Office of the Governor (June 27, 2014) (a copy of which is attached as Ex. D); Letter from John A. Maier to Joginger S. Dhillon (January 2, 2015) (a copy of which is attached as Ex. E).

8. The State has refused to do so, stating that, in light of the results of the November 2014 referendum, "entering into negotiations for a new compact for gaming on the Madera parcel would be futile." *See* Letter from Joginger S. Dhillon to John A. Maier (July 8, 2014) (a copy of which is attached as Ex. F); Letter from Joginger S. Dhillon to John A. Maier (Jan. 16, 2015) (a copy of which is attached as Ex. G).

9. By refusing to honor the existing compact and refusing to negotiate to enter into a new tribal-state gaming compact, the State has breached its obligation under IGRA to "negotiate with the [Tribe] in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A). Accordingly, pursuant to 25 U.S.C. § 2710(d)(7), the Tribe is entitled to a declaration that the State has failed to negotiate in good faith with the Tribe, as required by § 2710(d)(3)(A), and an order requiring the State to conclude

an enforceable gaming compact with the Tribe within 60 days, failing which a compact will be selected by a mediator, and providing that if the State fails to consent to the compact selected by the mediator within 60 days, the Secretary of the Interior shall prescribe, in consultation with the Tribe, the procedures under which the Tribe may conduct gaming on the Tribe's Indian lands, pursuant to 25 U.S.C. § 2710(d)(7)(B).

## JURISDICTION AND VENUE

10. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 25 U.S.C. § 2710(d)(7)(A)(i).

11. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

## PARTIES

12. Plaintiff the North Fork Rancheria of Mono Indians of California is a federally recognized Indian tribe listed in the Federal Register as the Northfork Rancheria of Mono Indians of California. The Tribe exercises jurisdiction over the Madera Parcel, which is "Indian land[]" pursuant to IGRA, 25 U.S.C. § 2703(4)(B), that is eligible for gaming pursuant to 25 U.S.C. § 2719(b)(1)(A).

13. The defendant is the State of California. The State has waived its sovereign immunity and consented to being sued in the courts of the United States "by any federally recognized California Indian tribe asserting any cause of action arising from the state's refusal to enter into negotiations with that tribe for the purpose of entering into a … Tribal-State compact pursuant to IGRA or to conduct those negotiations in good faith." Cal. Gov. Code § 98005.

## LEGAL BACKGROUND

### A. IGRA's Provisions Regarding Class III Gaming

14. In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083 (1987), the Supreme Court held that states have no inherent authority to

regulate gaming on Indian lands. *See id.* at 207, 222, 107 S. Ct. at 1087, 1095. In response, Congress enacted IGRA to provide a statutory framework for Indian tribes to engage in gaming and to provide a limited role for states in regulating tribal gaming.

15. IGRA's aim is to facilitate "the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). "Congress enacted IGRA to provide a legal framework within which tribes could engage in gaming—an enterprise that holds out the hope of providing tribes with the economic prosperity that has so long eluded their grasp—while setting boundaries to restrain aggression by powerful states." *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1027 (9th Cir. 2010).

16. IGRA provides that class III gaming activity (sometimes called "casino-style" gaming) on Indian lands is lawful if, among other things, such activity is "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B). California law permits class III gaming. *See* Cal. Const. art. IV, § 19(f) ("[T]he Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.").

17. IGRA authorizes class III gaming "on Indian lands." 25 U.S.C. § 2710(d)(1). The statute defines "Indian lands" as "all lands within the limits of any Indian reservation" and "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or

individual subject to restriction by the United States . . . and over which an Indian tribe exercises governmental power." *Id.* § 2703(4).

18. In general, IGRA provides that class III gaming "shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988," the effective date of IGRA. 25 U.S.C. § 2719(a). But Congress created several exceptions to the general bar on gaming on such "after-acquired" lands. *See id.* § 2719(b). One such exception permits tribes to conduct gaming on after-acquired lands when: (i) the Secretary of the Interior "determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community," and (ii) the "Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." *Id.* § 2719(b)(1)(A).

**B. Tribal-State Gaming Compacts And The Duty To Negotiate In Good Faith**

19. IGRA contemplates that a tribe will typically conduct class III gaming pursuant to a tribal-state gaming compact with its home state. It accordingly provides that "[a]ny Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity … is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." 25 U.S.C. § 2710(d)(3)(A). And IGRA requires that "[u]pon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact." *Id.* IGRA imposes this duty to negotiate in good faith towards an enforceable agreement on the State as a whole, not just individual state officials or bodies. 25 U.S.C. § 2710(d)(3)(A), (d)(7).

20. IGRA governs and constrains the terms of permissible negotiations between states and tribes, setting forth and limiting the provisions that may be included in any compact. 25 U.S.C. § 2710(d)(3)(C). A State may negotiate with a

tribe over, and a compact may include provisions relating to, only seven topics: (i) the application of state and tribal laws and regulations "directly related to, and necessary for, the licensing and regulation" of class III gaming; (ii) the allocation of criminal and civil jurisdiction between the state and the tribe to enforce those laws and regulations; (iii) the state's "assessment" of gaming activity "in such amounts as are necessary to defray the costs of regulating such activity"; (iv) the tribe's taxation of gaming activity; (v) remedies for breach of the compact; (vi) standards for operation of gaming activity and maintenance and licensing of gaming facilities; and (vii) "any other subjects that are directly related to the operation of gaming activities." *Id.* "IGRA limits permissible subjects of negotiation in order to ensure that tribal-state compacts cover only those topics that … are consistent with IGRA's stated purpose[]" to provide a basis for Indian gaming "'as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.'" *Rincon Band*, 602 F.3d at 1028-29 (quoting 25 U.S.C. § 2702(1)).

21. Congress intended that "the compact requirement for class III [gaming] not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes." *Rincon Band*, 602 F.3d at 1035. States may not, for example, exclude a tribe from gaming on the basis that another tribe is already permitted to operate a casino, because IGRA "was not designed to give states complete power over tribal gaming such that each state can put the opportunity to operate casinos up for sale to the tribe willing to pay the highest price." *Id.* (citing 25 U.S.C. § 2702). Nor may a state take a "hard line" position in negotiations, making a "take it or leave it offer" that would require the tribe either to accept provisions "outside the permissible scope" of IGRA or to go without a compact. *Id.* at 1039.

22. Pursuant to IGRA, compact negotiations are not voluntary. "In IGRA, Congress took from the tribes collectively whatever sovereign rights they might have had to engage in unregulated gaming activities, but imposed on the states the obligation to work with tribes to reach an agreement under the terms of IGRA permitting the tribes to engage in lawful class III gaming activities." *Rincon Band*, 602 F.3d at 1030. Accordingly, if a state fails to comply with its obligation to negotiate—or fails to negotiate in good faith—with a tribe to enter into a tribal-state gaming compact, IGRA provides a remedy. Specifically, IGRA permits a tribe to bring suit against a state "arising from the failure of [the] State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact … or to conduct such negotiations in good faith." 25 U.S.C. § 2710(d)(7)(A)(i). Such a suit may be brought 180 days after the tribe has requested that the State negotiate with it over a compact. *Id.* § 2710(d)(7)(B)(i).

23. In such a suit, "upon the introduction of evidence by an Indian tribe" that "a Tribal-State compact has not been entered into" and "the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith," "the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities." 25 U.S.C. § 2710(d)(7)(B)(ii).

24. IGRA further provides that if, in such a suit, "the court finds that the State has failed to negotiate in good faith … the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period." 25 U.S.C. § 2710(d)(7)(B)(iii). If the State and tribe fail to conclude a compact within that period, the court appoints a mediator, who chooses between compacts submitted by the state and the tribe; the state has 60 days to consent to the compact chosen by the mediator. *Id.* § 2710(d)(7)(B)(vi). If the state still does not consent, the Secretary of

the Interior shall prescribe, in consultation with the tribe, procedures under which class III gaming may occur in the absence of a compact. *Id.* § 2710(d)(7)(B)(vii).

25. The purpose of IGRA's good-faith negotiation requirement—and the short deadlines it imposes for states to comply—is to ensure that states cannot simply refuse to reach agreement with tribes over otherwise lawful class III gaming—or insist on impermissible or unreasonable terms for such an agreement—and thus thwart IGRA's overall objective of furthering tribal economic development. If a tribe cannot reach agreement with the state expeditiously, the tribe has the right to Secretarial procedures that will permit it to conduct class III gaming on its Indian lands. *Cf. Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024, 1033 (2d Cir. 1990).

26. It is well-established that parties subject to a duty of good-faith negotiation must work not only toward an agreement in principle or on paper, but a binding, *enforceable* agreement. *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 523-26, 61 S. Ct. 320, 325-26 (1941). Otherwise, the good-faith negotiation requirement would be toothless.

27. The duty to negotiate in good faith encompasses several other basic tenets. Parties must restrict their negotiations to terms and considerations permitted by the controlling statutory framework. *Rincon Band*, 602 F.3d at 1022. Parties must communicate points of disagreement and offer counterproposals, so that differences can be addressed in the negotiating process. *NLRB v. Indus. Wire Prods. Corp.*, 455 F.2d 673, 676-79 (9th Cir. 1972). Parties may not unreasonably prolong negotiations or delay approval. *NLRB v. Nat'l Shoes*, 208 F.2d 688, 692 (2d Cir. 1953). And once the parties have reached agreement on all the substantive terms of an agreement, one side's refusal to sign or enter into the agreement violates the duty of good faith. *H.J.*

*Heinz Co*., 311 U.S. at 525, 61 S. Ct. at 325-26; *NLRB v. Todd Co*., 173 F.2d 705, 707 (2d Cir. 1949).

28. Furthermore, a failure to negotiate at all constitutes a breach of the duty to negotiate in good faith. *N. Arapaho v. Wyoming*, 389 F.3d 1313 (10th Cir. 2004) ("When a state wholly fails to negotiate … it obviously cannot meet its burden of proof to show that it negotiated in good faith."); *Mashantucket Pequot Tribe*, 913 F.2d at 1032-33.

29. A state's subjective belief that it is not required to negotiate or that it is doing so in good faith does not excuse a failure to negotiate or to do so in good faith. *Mashantucket Pequot Tribe*, 913 F.2d at 1033. "[G]ood faith should be evaluated objectively based on the record of negotiations, and … a state's subjective belief in the legality of its requests" does not excuse improper actions. *Rincon Band*, 602 F.3d at 1041.

## FACTUAL BACKGROUND

### A. History Of The Tribe And Its Land

30. The North Fork Rancheria of Mono Indians of California is a federally recognized Indian tribe headquartered in the town of North Fork in Madera County, California.

31. In the mid-1800s, non-Indian settlers began to displace California's Indians, including the Tribe's forebears, from their ancestral lands. In 1916, the United States purchased for the Tribe an approximately 80-acre parcel of land near the town of North Fork, which became known as the North Fork Rancheria. Purchase of Land signed by Bo Sweeney (Sept. 20, 1916) (a copy of which is attached as Ex. H).

32. In the 1950s, the Tribe's government-to-government relationship with the United States was terminated as part of the federal government's later-abandoned allotment and assimilation policy, and the North Fork Rancheria was distributed to

individual Indians residing on the Rancheria. In the 1970s, suit was brought against the United States for unlawful termination. In 1983, a judgment issued in *Tillie Hardwick v. United States*, No. C-79-1710 (N.D. Cal.), confirmed and restored the Tribe's relationship with the United States. In 1987, the original boundaries of the North Fork Rancheria were restored and all land within the restored boundaries was declared Indian Country, with the land remaining in the hands of its preexisting individual Indian owners. All land within the boundaries of the North Fork Rancheria was subsequently placed in trust for the benefit of these individual Indians, not for the Tribe, and remains so today. (A copy of a letter from the Madera County Assessor's Office regarding the status of the North Fork Rancheria land is attached as Ex. I.)

33. Other than the Madera Parcel, the only trust land that the Tribe itself possesses is a 61.5-acre parcel in North Fork known as the HUD Tract, which the United States placed in trust for the Tribe in 2002. The United States placed the HUD Tract in trust so that the Tribe could use it to build a community center, a youth center, and several homes, which the Tribe has done.

34. Accordingly, other than the Madera Parcel, the Tribe does not own or hold beneficial title to any land eligible for gaming.

35. Today, the Tribe has about 2,000 citizens. The Tribe's average household income is very low. About 69% of its citizens live below the federal poverty line and some 16% of its labor force is unemployed. Aside from its potential gaming project on the Madera Parcel, the Tribe has no economic development activities and no source of revenue other than federal grants and distributions from the California Revenue Sharing Trust Fund.

**B. Approval Of The Proposed Project**

***The Tribe Seeks Approval Of Gaming On The Madera Parcel***

36. In 2004, the Tribe acquired rights to purchase the Madera Parcel, comprised of approximately 305 acres of land in unincorporated Madera County, California, for the purpose of developing a gaming resort to promote tribal self-determination and economic self-sufficiency. *See* 25 U.S.C. § 2702(1).

37. In 2005, the Tribe submitted a fee-to-trust application to the U.S. Department of the Interior, seeking to have the Madera Parcel taken into trust for its benefit pursuant to the Indian Reorganization Act, 25 U.S.C. § 465, to facilitate tribal self-determination and economic development as set forth under 25 C.F.R. § 151.3. In 2006, the Tribe supplemented its trust application with a written request for a so-called "two-part determination" by the Secretary of the Interior. If the Secretary issued a favorable two-part determination and California's Governor concurred in that determination, the Madera Parcel would be eligible to be taken into trust for gaming purposes. *See* 25 U.S.C. § 2719(b)(1)(A).

38. The Tribe's trust application and request for a two-part determination were subject to a lengthy environmental review process. In August 2010, the Department of the Interior published notice of the final environmental impact statement for the proposed trust acquisition and gaming project. *See* 75 Fed. Reg. 47,621 (Aug. 6, 2010).

***The Secretary Of The Interior Approves The Tribe's Plan***

39. On September 1, 2011, the Secretary of the Interior issued a favorable two-part determination under IGRA, 25 U.S.C. § 2719(b)(1)(A), determining that a gaming establishment on the Madera Parcel would be in the best interest of the Tribe and its members and would not be detrimental to the surrounding community. *See* Ex. B. Pursuant to IGRA, the Secretary requested that the Governor of California concur

in the two-part determination, which the Governor did by letter dated August 30, 2012. *See* Ex. C.

40. As reflected in the Secretary's letter to the Governor, the Secretary concluded that the proposed gaming facility on the Madera Parcel would provide numerous benefits to the Tribe. The project would provide jobs and educational opportunities for the Tribe's citizens, as well as revenues that would enable the Tribe to expand its governmental services, including those focused on improving the health, education, and welfare of the Tribe. *See* Ex. B. The Secretary also concluded that the proposed gaming facility would provide benefits for local governments and Madera County generally, including "a much needed boost to the local commercial economy" and "increased tax and other revenues." *Id.* at 27.

41. On November 26, 2012, the Secretary made a final determination under the IRA to take the Madera Parcel into trust for gaming purposes for the Tribe. The Secretary published notice of the determination on December 3, 2012. 77 Fed. Reg. 71,611.

42. In December 2012, two sets of plaintiffs challenged the Secretary's IGRA and IRA decisions in the United States District Court for the District of Columbia. One group is led by the organizational plaintiff Stand Up for California! and consists of various California citizens and organizations. The other plaintiff is the Picayune Rancheria of Chukchansi Indians, an Indian tribe that owns a gaming facility called the Chukchansi Gold Resort and Casino about 30 miles from the Madera Parcel (the facility is closed pursuant to a court order at the time of this filing). On January 29, 2013, the court denied the Stand Up plaintiffs' motion for a preliminary injunction barring the Secretary from taking the Madera Parcel into trust, determining, among other things, that "the plaintiffs have not established a likelihood of success on the merits of any of their claims." *Stand Up for California! v. U.S. Dep't of the Interior*,

919 F. Supp. 2d 51, 81 (D.D.C. 2013) The Tribe has intervened in the litigation, and cross-motions for summary judgment are pending.

43. On February 5, 2013, the Department of the Interior took the Madera Parcel into trust on behalf of the Tribe. Bureau of Indian Affairs' Acceptance of Conveyance (a copy of which is attached as Ex. J). Accordingly, the Tribe has had jurisdiction over the Madera Parcel since February 5, 2013.

***The Tribe Negotiates A Gaming Compact With The Governor***

44. In July 2004, the Tribe began negotiating a gaming compact with representatives of then-Governor Schwarzenegger for the Madera Parcel. Over the next few years, the Tribe exchanged several drafts of a compact with the State. Finally, in April 2008, Governor Schwarzenegger and the Tribe executed a gaming compact ("2008 Compact"). (A copy of the 2008 Compact is attached as Ex. K.) As reflected in the agreement executed in 2012 (discussed below), however, the Governor and the Tribe "agreed to wait for the Legislature to consider ratification of that compact until the Secretary of the Interior made a final determination to take the 305-Acre Parcel into trust for the benefit of the Tribe." (A copy of this compact ("2012 Compact" or "Compact") is attached as Ex. L.)

45. In August 2012, instead of presenting the 2008 Compact to the Legislature for ratification, the State and the Tribe negotiated a new compact. The negotiations coincided with the approach of the one-year deadline under 25 C.F.R. § 292.23(2)(b) for Governor Brown to concur in the Secretary's two-part determination of September 1, 2011. At no point during the negotiations did Governor Brown or his staff object to the Tribe's right to negotiate a gaming compact under IGRA.

46. On or around August 24, 2012, Sara Drake of the California Attorney General's Office transmitted a draft compact to the Tribe's representatives. She

continued to circulate drafts to the Tribe's representatives over the next several days. During the last weeks of August, a representative of the Tribe also regularly discussed the compact's potential provisions with Jacob Appelsmith, a Senior Advisor to the Governor.

47. The final proposed changes to substance and language were made in the course of email correspondence between the parties. The State and the Tribe executed the compact on August 31, 2012. *See* Ex. L.

***The Gaming Compact Is Ratified and Approved***

48. Following the execution of the compact on August 31, 2012, Governor Brown's Office forwarded it to the Legislature for ratification. On June 27, 2013, the Legislature passed Assembly Bill No. 277 ("AB 277"), which ratified the 2012 Compact between the State and the Tribe, as well as another compact between the State and the Wiyot Tribe. Cal. Gov. Code § 12012.59 (a). AB 277 was signed by the Governor on July 3, 2013, and chaptered as Chapter 51 of Statutes of 2013.

49. Pursuant to Cal. Gov. Code § 12012.25(f), upon receipt of the executed 2012 Compact and ratifying statute, the California Secretary of State, Debra Bowen, forwarded a copy of the Compact and other materials to the Secretary of the Interior for review and approval pursuant to 25 U.S.C. § 2710(d)(8).

50. On October 22, 2013, following the expiration of the 45-day period for the Secretary to take action on the Compact under IGRA, 25 U.S.C. § 2710(d)(8)(C), the Secretary published notice in the Federal Register that the Compact was considered to be approved to the extent it is consistent with IGRA and that it was therefore "taking effect." 78 Fed. Reg. 62,649 (Oct. 22, 2013).

**C. The State Referendum To Unwind The Preceding Negotiations**

***Gaming Opponents Organize A Referendum Campaign***

51. On or about July 8, 2013, under the letterhead of Stand Up for California!, the organization's director Cheryl Schmit submitted to the office of the California Attorney General a request for title and summary for a "proposed statewide referendum of AB 277." On July 19, 2013, the Attorney General issued a title and summary, entitling the measure "Referendum to Overturn Indian Gaming Compacts." On November 20, 2013, the California Secretary of State certified that the Referendum petitions had been signed by a sufficient number of registered voters to qualify for the November 2014 general election ballot.

52. On August 13, 2014, the California Secretary of State certified the official voter information guide for the general election on November 4, 2014. The voter information guide contained several pages of information about Proposition 48. The official title and summary prepared by the California Attorney General explained that a "'yes' vote approves, and a 'No' vote rejects, a statute that: [r]atifies tribal gaming compacts between the state and the North Fork Rancheria of Mono Indians and the Wiyot Tribe." (A copy of the guide is attached as Ex. M.)

53. The voter information guide also included a section entitled "Argument Against Proposition 48" that began as follows: "VOTE NO ON PROP. 48. Keep Indian gaming on tribal reservation land only. Years ago, California Indian Tribes asked voters to approve limited casino gaming on Indian reservation land. They promised Indian casinos would ONLY be located on the tribes' original reservation land. PROP. 48 BREAKS THIS PROMISE. While most tribes played by the rules, building on their original reservation land and respecting the voters' wishes, other tribes are looking to break these rules and build casino projects in urban areas across California. VOTE NO ON PROP. 48 TO STOP RESERVATION SHOPPING. Prop.

48 would approve a controversial tribal gaming compact that would allow the North Fork Tribe to build an off-reservation, Vegas-style 2,000 slot-machine casino more than an hour's drive from the tribe's established reservation land, closer to major freeways and Central Valley communities. PROP. 48 WILL START A NEW AVALANCHE OF OFF-RESERVATION CASINO PROJECTS. There are already over 60 casinos in California. Enough is enough. Vote NO on Prop. 48." *See* Ex. M.

54. According to the State's Fair Political Practices Commission, committees opposed to Proposition 48 raised over $18,500,000 to overturn the North Fork and Wiyot Tribe compacts. FPPC, Top Contributors to State Ballot Measure Committees Raising At Least $1,000,000, *available at* http://fppc.ca.gov/topcontributors/past_elections/nov2014/index.html. Among those providing funds to overturn the compacts were Brigade Capital Management, a private investment firm that has invested in Picayune Rancheria's casino, which contributed over $3,500,000, *see* Ian Lovett, Tribes Clash as Casinos Move Away from Home, N.Y. TIMES (Mar. 3, 2014), *available at* http://www.nytimes.com/2014/03/04/us/tribes-clash-as-casinos-move-away-from-home.html; the Table Mountain Rancheria, an Indian tribe that operates the Table Mountain Casino near Fresno, California, which alone contributed over $12,000,000; and five other Indian tribes with existing casinos, including the Picayune Rancheria, which together contributed over $2,250,000. In contrast, the State's Fair Political Practices Commission reported that supporters of Proposition 48 and the compacts contributed less than $1,000,000, the minimum reportable amount.

***The State Refuses To Honor The Compact***

55. In the November 4, 2014, election, the electorate voted to reject Proposition 48.

56. The State now takes the position that the rejection of Proposition 48 means that the State has not entered into a gaming compact with the Tribe under

IGRA. In particular, in briefing filed in the Madera County Superior Court before the referendum vote was held, the State took the position that "[t]he North Fork compact's ratification under AB 277 is not the law of California, and its fate now belongs to the voters." Defendants' Reply To Plaintiffs' Opposition To Demurrers To First Amended Complaint at 9, *Stand Up for California!, et al. v. Edmund G. Brown Jr., et al.*, No. MCV062850 (Madera Cty. Super. Ct. Feb. 6, 2014). In briefing filed in the California Court of Appeal following the referendum, the State has taken the position that "[b]ecause the voters rejected AB 277, neither the North Fork Compact nor its ratification statute ever went into effect under California law…. [N]o ratified compact . . . exists for [the State] to implement or enforce." Respondents' Brief at 14, *Stand Up for California!, et al. v. State of California, et al.*, No. F069302 (Cal. Ct. App. 5th Dist. Dec. 17, 2014). Accordingly, it is refusing to honor the 2012 Compact.

**D. The State Refuses To Negotiate Over New Compact**

***Refusal To Negotiate During Pendency Of Referendum***

57. On June 27, 2014, the Tribe's counsel sent a letter on behalf of the Tribe to Joginder S. Dhillon, the Governor's Senior Advisor for Tribal Negotiations, requesting the State to enter into negotiations for the purpose of entering into a new compact for class III gaming activities to be conducted on the Madera Parcel to prepare for the possibility that the referendum would be held to invalidate the 2012 Compact. *See* Ex. D.

58. On July 8, 2014, Mr. Dhillon sent a letter to the Tribe's counsel declining the request for compact negotiations, indicating that the request was premature until the referendum process had been exhausted, since the existing Compact would take effect the day after the election if the voters approved the referendum. *See* Ex. F.

***Refusal To Negotiate After The Referendum***

59. On January 2, 2015, the Tribe's counsel sent another letter on behalf of the Tribe to Mr. Dhillon to determine whether the State was prepared to negotiate a new compact with the Tribe for class III gaming on the Madera Parcel, or whether the Governor had concluded that such negotiations would be futile in light of the November 2014 referendum. *See* Ex. E.

60. On January 16, 2015, Mr. Dhillon responded on behalf of the State in a letter to the Tribe's counsel, stating that "[g]iven that the people have spoken, entering into negotiations for a new compact for gaming on the Madera parcel would be futile." The letter goes on to state that "[e]ven if we concluded that further negotiations on the Madera parcel could be productive, a compact with terms similar to the last one would face an uncertain fate in the Legislature and, if approved, almost certainly would be subjected to another referendum or even litigation, particularly given the likelihood of renewed opposition from the well-capitalized opponents of the casino." *See* Ex. G.

**E. The State's Violation Of Its Negotiation Obligations Under IGRA**

***The State's Failure To Negotiate The 2012 Compact In Good Faith***

61. More than 180 days have passed since the Tribe requested that the State negotiate with it to enter into a tribal-state compact for gaming on the Madera Parcel. The State takes the position that it has not entered into a tribal-state gaming compact with the Tribe. The State's conduct, viewed objectively and in its totality, does not constitute good-faith negotiation within the meaning of IGRA.

62. The Governor of California and the Tribe initially negotiated and executed a compact and the California Legislature passed legislation to ratify the compact. The State's position, however, is that because California electors subsequently voted to reject the legislation ratifying the compact, the State has not entered into a valid gaming compact with the Tribe.

63. The obligation to negotiate in good faith, by definition, is an obligation to negotiate toward an *enforceable* compact. *See NLRB v. Berkley Mach. Works & Foundry Co.*, 189 F.2d 904, 909 (4th Cir. 1951). A party who negotiates reasonably until the moment it is time to execute a contract and render the contract enforceable, and then refuses to do so, has not negotiated in good faith. *H.J. Heinz Co.*, 311 U.S. at 525, 61 S. Ct. at 325-26; *Ariel Offset Co., Inc.*, 149 NLRB 1145, 1153 (1964). The Governor's and Legislature's conduct, therefore, cannot by itself satisfy the good-faith negotiation obligation that IGRA imposes upon the State as a whole.

64. The State's refusal to honor the 2012 Compact, based on its position that the voters' rejection of the referendum validly "unratified" the Compact, violates the State's obligation to negotiate in good faith. The State's position is particularly incompatible with IGRA's requirements where, as here, the State subjected the Compact to a referendum vote more than a year after the State submitted the Compact to the Secretary of the Interior for approval under 25 U.S.C. § 2710(d)(8).

65. The referendum was not premised on any permissible consideration under IGRA. To the contrary, the voters were told that they should vote against the referendum because Indian gaming should be limited to existing reservations. But IGRA specifically permits gaming on after-acquired land pursuant to a two-part determination like that here, 25 U.S.C. § 2719(b)(1)(A), and naked hostility to so-called "off-reservation gaming" permitted by IGRA is not a permissible reason to refuse to enter into a compact. Congress intended "that the compact requirement for class III [gaming] not be used as a justification by a State for excluding Indian tribes from such gaming." S. Rep. No. 100-446 at 13; *see also, e.g.*, *Rincon Band*, 602 F.3d at 1030 (IGRA "was not designed to give states complete power over tribal gaming").

66. Nor has the State communicated permissible concerns about the 2012 Compact or new proposed terms to the Tribe. If negotiating parties do not

communicate their objections and demands, meaningful bargaining cannot proceed. IGRA establishes a mutual negotiation scheme, not a one-way process in which the obligation to compromise rests solely on the Tribe.

***The State's Refusal To Negotiate A New Compact***

67. More than 180 days have passed since the Tribe requested that the State negotiate with it over a new compact if the voters rejected the referendum regarding the 2012 Compact.

68. During that period, the State has refused to negotiate at all with the Tribe over potential terms of a new compact. Indeed, the Governor's Office has expressly stated that it will not negotiate a new compact because further negotiations "would be futile" in light of the outcome of the referendum. But IGRA does not permit States to opt out of the requirement to negotiate tribal-state compacts. The State's outright refusal to negotiate violates 25 U.S.C. § 2710(d)(3).

**COUNT I**

**(Claim for failure to negotiate in good faith (IGRA, 25 U.S.C. § 2710(d)(7)))**

69. The Tribe incorporates the preceding paragraphs as if fully set forth herein.

70. More than 180 days have elapsed since the Tribe's request for the negotiations that resulted in the 2012 Compact. 25 U.S.C. § 2710(d)(3)(A), (d)(7)(B)(i).

71. The State takes the position that it has not entered into a tribal-state compact with the Tribe. 25 U.S.C. § 2710(d)(7)(B)(ii)(I).

72. Although the Governor of California and the Tribe initially negotiated and executed the 2012 Compact and the California Legislature passed legislation to ratify the 2012 Compact, the State's refusal to honor the 2012 Compact based on the subsequent referendum violates the duty to negotiate in good faith toward an

*enforceable* agreement. Moreover, the referendum was based on impermissible considerations—namely, hostility toward "off-reservation" gaming specifically permitted by IGRA—rather than on any legitimate negotiation of the 2012 Compact's terms.

73. Accordingly, the Tribe is entitled under IGRA to (a) a declaration that the State has failed to negotiate in good faith, as required by IGRA and (b) an order requiring the State to conclude a gaming compact with the Tribe within 60 days pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii), failing which a compact will be selected by a mediator pursuant to 25 U.S.C. § 2710(d)(7)(B)(iv), and providing that if the State fails to consent to the compact selected by the mediator within 60 days, the Secretary of the Interior shall prescribe, in consultation with the Tribe, the procedures under which the Tribe may conduct gaming on the Tribe's Indian lands, pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii).

**COUNT II**

**(Claim for failure to negotiate tribal-state gaming compact (IGRA, 25 U.S.C. § 2710(d)(7)))**

74. The Tribe incorporates the preceding paragraphs as if fully set forth herein.

75. After the conclusion of the referendum process, the State of California has failed to negotiate with the North Fork Rancheria of Mono Indians for the purpose of entering into a tribal-State compact, in violation of IGRA. *See* 25 U.S.C. § 2710(d)(3)(A), (d)(7).

76. More than 180 days have elapsed since the Tribe's June 27, 2014 request for negotiations to address the possibility that the referendum would be held to invalidate the 2012 Compact. 25 U.S.C. § 2710(d)(3)(A), (d)(7)(B)(i).

77. The State takes the position that it has not entered into a tribal-state compact with the Tribe. 25 U.S.C. § 2710(d)(7)(B)(ii)(I).

78. Following the referendum, the State has outright refused to negotiate toward a new compact, stating that such negotiations would be futile.

79. Accordingly, the Tribe is entitled under IGRA to (a) a declaration that the State has failed to negotiate, or to negotiate in good faith, with the Tribe in violation of IGRA, and (b) an order requiring the State to conclude a gaming compact with the Tribe within 60 days pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii), failing which a compact will be selected by a mediator pursuant to 25 U.S.C. § 2710(d)(7)(B)(iv), and providing that if the State fails to consent to the compact selected by the mediator within 60 days, the Secretary of the Interior shall prescribe, in consultation with the Tribe, the procedures under which the Tribe may conduct gaming on the Tribe's Indian lands, pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii).

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays that this Court issue the following:

80. A declaration that the State has not negotiated in good faith with the Tribe, and has failed to negotiate with the Tribe, to enter into a tribal-state gaming compact, in violation of 25 U.S.C. § 2710(d)(3).

81. An order requiring the State to conclude a gaming compact with the Tribe within 60 days pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii), failing which a compact will be selected by a mediator pursuant to 25 U.S.C. § 2710(d)(7)(B)(iv), and providing that if the State fails to consent to the compact selected by the mediator within 60 days, the Secretary of the Interior shall prescribe, in consultation with the Tribe, the procedures under which the Tribe may conduct gaming on the Tribe's Indian lands, pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii).

82. Any other relief that this Court deems just and appropriate.

DATED: March 17, 2015

Respectfully submitted,

By: /s/ Christopher E. Babbitt

Attorneys for THE NORTH FORK RANCHERIA OF MONO INDIANS, CALIFORNIA