Appeal Nos. 10-17803 and 10-17878

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BIG LAGOON RANCHERIA,
a Federally Recognized Indian Tribe,

Plaintiff and Appellee/Cross-Appellant,

v.

STATE OF CALIFORNIA,

Defendant and Appellant/Cross-Appellee

Appeal From the United States District Court, Northern District of California
Hon. Claudia A. Wilken, District Judge, Case No. CV 09-1471 CW (JCS)

APPELLEE/CROSS-APPELLANT BIG LAGOON RANCHERIA'S SUPPLEMENTAL EXCERPTS OF RECORD

VOLUME II of II

BAKER & McKENZIE LLP
Bruce H. Jackson (SBN 98118)
Peter J. Engstrom (SBN 121529)
Irene V. Gutierrez (SBN 252927)
Two Embarcadero Center, 11th Floor
San Francisco, CA 94111
Telephone: (415) 576-3000
Fax No. (415) 576-3099
Emails: bruce.jackson@bakermckenzie.com
peter.engstrom@bakermckenzie.com
irene.gutierrez@bakermckenzie.com

Attorneys for Appellee/Cross-Appellant BIG LAGOON RANCHERIA, a Federally Recognized Indian Tribe

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EDMUND G. BROWN JR.
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General
RANDALL A. PINAL
Deputy Attorney General
State Bar No. 192199
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-3075
Fax: (619) 645-2012
E-mail: Randy.Pinal@doj.ca.gov
Attorneys for Defendant State of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

BIG LAGOON RANCHERIA, a Federally Recognized Indian Tribe,

Plaintiff,

v.

STATE OF CALIFORNIA,

Defendant.

CV 09-1471 CW (JCS)

DEFENDANT STATE OF CALIFORNIA'S SURREPLY TO PLAINTIFF BIG LAGOON RANCHERIA'S OPPOSITION TO CROSS-MOTION FOR SUMMARY JUDGMENT

Date: August 12, 2010
Time: 2 p.m.
Dept: 2, Fourth Floor

1301 Clay Street
Oakland, CA 94612

Judge: The Honorable Claudia Wilken
Trial Date: Not set
Action Filed: 4/3/2009

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INTRODUCTION

Plaintiff Big Lagoon Rancheria (Big Lagoon or Tribe) misunderstands controlling authority and misrepresents Defendant State of California's (State) cross-motion for summary judgment. The State disputes the correctness of the Ninth Circuit's decision in *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010) (*Rincon*) and has credibly distinguished that case. Even *Rincon* recognizes that, under circuit precedent, the State is entitled to recover its "costs of dealing with the fallout of gaming," *id.* at 1035, yet Big Lagoon claims it need not offer the State any consideration for the right to conduct class III gaming in California, or negotiate over the number of gaming devices. Incredibly, the Tribe also insists that the Court should ignore the State's undisputed evidence that the Tribe seeks to conduct gaming on land that should not be in trust, as well as jurisdictional questions concerning whether the Tribe is lawfully recognized and has gaming-eligible Indian lands. In addition, despite this Court's previous determination to the contrary, the Tribe mistakenly claims that the Indian Gaming Regulatory Act (IGRA), 18 U.S.C. §§ 1166-1168, 25 U.S.C. §§ 2701-2721, precludes the State from negotiating for environmental mitigation. The State's evidence is undisputed and it has shown that it negotiated in good faith toward formation of a compact with Big Lagoon. Accordingly, this Court should grant the State's cross-motion for summary judgment and deny the Tribe's motion.

ARGUMENT

I. THE STATE NEGOTIATED IN GOOD FAITH FOR REVENUE SHARING

A. The State Disputes *Rincon*'s Correctness

The Tribe incorrectly claims that the State concedes the Ninth Circuit correctly decided in *Rincon* that a request for general fund revenue sharing is not "directly related to gaming," and, thus, there is "no legal dispute" here that the State acted in bad faith. (Pl.'s Opp'n Cross-motion Sum. J. & Reply (Doc. 94) (Pl.'s Opp'n/Reply) 1-2.) On the contrary, while the State acknowledges that, for the moment, *Rincon* is controlling, it has consistently argued that the decision is flawed for reasons discussed in the State's briefs and the dissenting opinion in that case. (Def.'s Amend. Opp'n Pl.'s Mot. Sum. J. & Cross-motion Sum. J. (Doc. 93) (Def.'s Opp'n/Cross-motion) 8.) In its cross-motion the State incorporated by reference its arguments

made in *Rincon*, and created largely the same record, to preserve the matter for appeal, or further proceedings in this case, should the Supreme Court reach a different conclusion in *Rincon*. For reasons stated in the State's briefs and the dissent in *Rincon*, the State has demonstrated here that it negotiated in good faith for revenue sharing.

B. *Rincon* is Distinguishable

The Tribe contends Rincon is not distinguishable because it matters not whether it is negotiating for an amendment or original compact—it is not obligated to offer the State any consideration for the "right to exclusivity' conferred by Proposition 1A." (Pl.'s Opp'n/Reply 3-4.) The Tribe misunderstands Proposition 1A and its effect.

In Proposition 1A, the voters amended the state constitution to add the following provision:

> Notwithstanding subdivisions (a) and (e) [prohibiting lotteries and Las Vegas-style gaming, respectively], and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.

Cal. Const. art. IV, § 19(f). Contrary to Big Lagoon's contention, the amendment did not give Big Lagoon, and all other California tribes, "class III gaming exclusivity." (Pl.'s Opp'n/Reply 3:17-18.) Instead, the Tribe has the exclusive right to *negotiate* for a compact; however, neither the constitution nor IGRA guarantee that a compact will be reached.[1] At most, IGRA requires the State to negotiate in good faith. *See* 25 U.S.C. § 2710(d)(3)(A).

Moreover, Big Lagoon's suggestion that it need not compensate the State at all for class III gaming exclusivity is incredulous and contrary to law. *Rincon*, 602 F.3d at 1032, and *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1111, 1114-15 (9th Cir. 2003) (*Coyote Valley II*) confirm that the State is entitled to some form of "compensation for the negative externalities caused by gaming" in exchange for the Tribe's exclusive right to conduct class III gaming "in the most

[1] *See* S. Rep. No. 100-446, at 14 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3084 ("Under [IGRA], Indian tribes will be required to give up any legal right they may now have to engage in class III gaming if: (1) they choose to forego gaming rather than to opt for a compact that may involve State jurisdiction; or (2) *they opt for a compact and, for whatever reason, a compact is not successfully negotiated.*" (emphasis added)).

populous state in the country." *See also Rincon*, 602 F.3d at 1035 (noting that *Coyote Valley II* holds that the State is entitled to recover its "costs of dealing with the fallout of gaming," and the State can request a tribe to "contribute funds so the State is not left bearing the costs for gaming-related expenses"). In the 1999 Compacts, the "tribes agreed to share a portion of their expected revenues" in "consideration for the State's efforts in securing the passage of Proposition 1A." *Id.* at 1023. Therefore, the State can request consideration for Proposition 1A exclusivity.

Equally inaccurate is Big Lagoon's contention that "[t]he voters did not require anything in return" for Proposition 1A exclusivity. (Pl.'s Opp'n/Reply 3:18.) While the State did not take "anything significant for itself" in the 1999 Compact, it did take "what was required to protect its citizens from the adverse consequences of gaming, and to fulfill other regulatory and police functions contemplated by IGRA." *Rincon*, 602 F.3d at 1024 (citing *Coyote Valley II*, 351 F.3d at 1110-15). What the State required was tribal contributions to the Special Distribution Fund (SDF) to cover its regulatory costs. *Coyote Valley II*, 351 F.3d at 1113-15; *Rincon*, 602 F.3d at 1037 (noting the 1999 Compact tribes "were exempted from the prohibition on gaming in exchange for their contributions to the [Revenue Sharing Trust Fund] RSTF and SDF"). Yet Big Lagoon offers nothing more than a contribution to the RSTF (Engstrom Decl. Ex. 8), which the State cannot utilize to offset gaming impacts.[2]

Big Lagoon also asserts that "to be meaningful a concession would have to be something that Big Lagoon wants." (Pl.'s Opp'n/Reply 4:2-4.) That is not the test. *See* Cal. Civil Code § 1605.[3] If it were, then there would be no purpose to bargaining—the State would have to give every tribe everything it wants in compact negotiations, otherwise it would be negotiating in bad faith *per se*.[4] There is no authority for such a strained interpretation of good faith under IGRA.

[2] Even the tribe in *Rincon* offered to pay the State fees that would be used to pay "for the costs of regulating gaming, building infrastructure needed to support gaming operations, and mitigating adverse impacts caused by gaming operations." *Rincon*, 602 F.3d at 1025.

[3] California Civil Code § 1605 defines "good consideration" as "[a]ny benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

[4] A statutory obligation to negotiate in good faith does not compel agreement. *N.L.R.B. v. Tomco Communications, Inc.*, 567 F.2d 871, 884 (9th Cir. 1978). Thus, good faith negotiation (continued...)

The Tribe also claims that in submitting to compact negotiations it has already provided the State with consideration in the form of a limited immunity waiver by allowing the State to regulate class III gaming consistent with IGRA. (Pl.'s Opp'n/Reply 4 n.2.) But it was Congress, not the Tribe, which enacted IGRA. Again, if the Tribe is correct, then bargaining would serve no purpose, as Congress would have already provided the State consideration for whatever a tribe wants. This would mean the Tribe would pay nothing for the exclusive right to operate class III gaming in California, contrary to *Coyote Valley II*. Thus, *Rincon* is distinguishable because the Tribe has not compensated the State for the valuable economic benefit of exclusivity.

II. THE STATE NEGOTIATED IN GOOD FAITH FOR ENVIRONMENTAL MITIGATION

The Tribe contends the State "effectively concedes" that its request for environmental mitigation is not directly related to gaming or consistent with IGRA's purpose. (Pl.'s Opp'n/Reply 6:10.) On the contrary, the State offered several reasons why its requests were made in good faith. (Def.'s Opp'n/Cross-motion 10-13.)

A. This Court Has Found That the State May Negotiate Environmental Issues

The Tribe claims the State cannot rely upon this Court's prior rulings that environmental issues are appropriate for compact negotiations because those rulings are not binding here, the issue has been clarified by *Rincon*, and the State's subjective belief as to the legality of its position is irrelevant. (Pl.'s Opp'n/Reply 4-6.) While certain of the Court's prior orders may no longer be controlling, they certainly are instructive and the State reasonably relied upon them. Moreover, although in *Rincon* the court held that the State's subjective belief as to the legality of its bargaining position—which was guided by its own interpretation of IGRA and the significance of the Secretary of the Interior (Secretary) and other tribes accepting compacts with general fund revenue sharing terms—was irrelevant to a good faith determination, *Rincon*, 602 F.3d at 1041-42, in this case, the State relied not on its own analysis but upon this Court's interpretation that, as a matter of law, IGRA allows the State to negotiate for environmental protection.

(...continued)
contemplates the possibility of impasse. *Serramonte Oldsmobile, Inc. v. N.L.R.B.*, 86 F.3d 227, 232 (D.C. Cir. 1996); *see also* n.1, *ante*.

Nor does *Rincon* require this Court to modify its prior analyses or conclusions. Ignoring the obvious distinction that *Rincon* dealt only with revenue sharing and not environmental issues, the Tribe incorrectly argues that *Rincon* "specifically holds" that Congress did not intend compacts to cover environmental regulation and land use. (Pl.'s Opp'n/Reply 5:14.) On the contrary, the *Rincon* court, in a footnote, merely cited IGRA's legislative history for the general proposition that negotiation subjects are limited to those related to gaming. *Rincon*, 602 F.3d 1028-29 & n.10. Indeed, other than in a footnote, the words "environmental regulation" and "land use" appear nowhere else in the opinion. Thus, the Ninth Circuit did not squarely decide that the State cannot negotiate environmental and land use matters.

In addition, this Court has already rejected Big Lagoon's argument that IGRA's legislative history suggests IGRA does not allow the State to negotiate for environmental mitigation:

> The Tribe argues that this and similar portions of IGRA's legislative history indicate Congress' intent to prevent States from negotiating and including provisions on subjects such as environmental protection and land use as part of the compacting process. However, a better reading of the legislative history is that it warns against allowing States to regulate tribal activity broadly under the guise of negotiating provisions on subjects that directly relate to gaming activity and may be included in a tribal-State compact under § 2710(d)(3)(C). In other words, the legislative history does not state that issues such as environmental protection and land use may never be included in a tribal-State compact, but only that the State may not use the compacting process as an excuse to regulate these areas more generally.

(Pl.'s RJN Ex. 2 at 16 n.5 (original emphasis).) Nothing in *Rincon* requires this Court to modify this analysis or the Court's resulting conclusion.

Moreover, IGRA's legislative history confirms the size and capacity of the Tribe's proposed project are proper subjects for negotiation. *See* S. Rep. No. 100-446, at 13, *as reprinted in* 1988 U.S.C.C.A.N. at 3084 ("licensing issues under [25 U.S.C. § 2710(d)(3)(C)(vi)] may include agreements on days and hours of operation, wage and pot limits, types of wagers, and size and capacity of the proposed facility").

B. Federal Regulations Envision the Use of Compact Provisions as Mechanisms to Protect the Environment and Public Health and Safety

The Tribe is correct that the National Indian Gaming Commission (NIGC) "leaves it up to the tribes to identify and enforce relevant environmental regulations." (Pl.'s Opp'n./Reply 5 n.4.) Contrary to the Tribe's assertion, however, the State does not contend that the NIGC regulations

authorize the State to impose regulations on tribal land. (*Id.*) Instead, it is precisely because the NIGC recognizes gaming compacts are appropriate vehicles for tribal compliance with regulatory requirements concerning environmental impacts that environmental and land use issues are proper subjects for compact negotiations. (Def.'s Opp'n/Cross-motion 12-13.)

C. Despite the Tribe Changing its Mind During Negotiations, the State Negotiated Fairly for Environmental Concessions

The Tribe contends that even though it agreed to work with the State on environmental issues, the State was in bad faith merely by "initiating" the discussion. (Pl.'s Opp'n/Reply 6-7.) The record in this case is unclear as to which party "initiated" the discussion about mitigating off-rancheria environmental impacts. The first written record during the 2007-2009 negotiations indicates the Tribe agreed to provide the State with an environmental assessment that it had prepared for its proposed project on the eleven acres. (Pinal Decl. Ex. A.) In any event, discussions about environmental mitigation merely carried over from the Barstow Compact, which included more restrictive conditions than the State proposed in the 2007-2009 negotiations. (Def.'s Opp'n/Cross-motion 13.) That the State drafted the first written proposal for environmental mitigation does not necessarily mean the State "initiated" the discussion.

Regardless, it does not matter which party "initiated" the discussion. As early as March 2008, the Tribe acknowledged the compact should address the State's environmental concerns and suggested the parties rely upon the Tribe's environmental assessment to evaluate the impacts. (Engstrom Decl. Ex. 6.) In August 2008, the Tribe proposed its own mitigation measures. (Pinal Decl. Ex. B.) In its final offer in October 2008, the Tribe was "still willing to abide by the mitigation measures." (Engstrom Decl. Ex. 8.) These acts signaled the Tribe's agreement that at least some form of mitigation was appropriate. The State modified the Tribe's August 2008 proposal and incorporated it into its October 2008 counterproposal, to which the Tribe responded by abandoning negotiations and filing suit. (Engstrom Decl. Ex. 9.) This Court has previously denied the Tribe summary judgment where the State "actively negotiated" in good faith (Pl.'s RJN Ex. 4 at 12 (citing *Coyote Valley II*, 331 F.3d at 1110)), and should do the same here.

In addition, while the Tribe may be able to change its mind during compact negotiations

(Pl.'s Opp'n/Reply 7 n.5), it cannot lead the State into believing there is an agreement in principle that some form of mitigation is appropriate, then change its mind and claim the State is in bad faith for proceeding with a counterproposal that incorporates, and is based upon, the Tribe's proposal. Such conduct puts the State in the impossible position of negotiating with a moving target. The State could never be in good faith if that were the standard under IGRA.

While the State based some of its proposed mitigation measures on state standards, which this Court previously found to be a permissible starting point (Pl.'s RJN Ex. 2 at 15:7-9), the Tribe mischaracterizes the record by claiming the State's proposals would have required the Tribe to "obtain[] approval from various local and state agencies." (Pl.'s Opp'n/Reply 6:27.) On the contrary, this Court previously warned the State that insistence on Tribal compliance with State environmental laws "would constitute bad faith." (Pl.'s RJN Ex. 2 at 19:2-4.) The State subsequently did not insist or request the Tribe to obtain State or local agency permits or approval before building its project, and the record does not support the Tribe's contrary assertion.[5]

D. The State Offered Meaningful Concessions for Environmental Regulation

The Tribe's suggestion that the number of gaming devices and continued receipt of RSTF distributions are not meaningful concessions by the State in exchange for environmental regulation (Pl.'s Opp'n/Reply 7-8) is based upon the faulty premise that the Tribe has a constitutional right to class III gaming exclusivity in California. (*See* argument I(B), *ante*.) In any event, IGRA's legislative history confirms that the "size and capacity" of proposed gaming facilities are permissible negotiation subjects under 25 U.S.C. § 2710(d)(3)(C)(vi). S. Rep. No. 100-446, at 13, *as reprinted in* 1988 U.S.C.C.A.N. at 3084. In addition, the Tribe did not negotiate to receive RSTF distributions in the first instance—the 1999 Compact tribes conferred that benefit upon the Tribe as a third-party beneficiary. Thus, the number of gaming devices and continued receipt of RSTF distributions are separate from basic gaming rights being negotiated here. The Tribe's argument suggests that it should not be required to negotiate over the number of gaming devices. As noted, that suggestion is contrary to law and would render IGRA's

[5] Indeed, the Tribe itself proposed that, among other things, the project would "meet the seismic standards of the 2007 California Building Standards Code." (Pinal Decl. Ex. B.)

negotiation requirement a nullity, as the State would be required to allow the Tribe to operate unlimited devices without consideration. Clearly, that is not the standard.

III. THIS MATTER SHOULD BE STAYED PENDING A FINAL DETERMINATION IN *RINCON*

The Tribe opposes the State's request for a stay pending the Supreme Court's determination of the State's petition for writ of certiorari in *Rincon*, or until the Ninth Circuit's stay is dissolved (Pl.'s Opp'n/Reply 8), yet it fails to explain why it, as a non-party to the *Rincon* case, should be allowed to take advantage of the *Rincon* decision when the plaintiff-tribe in that case cannot even do so. The Supreme Court should be allowed to determine whether the *Rincon* decision is correct before this Court grants the Tribe the requested relief and implements statutory remedies contemplated by IGRA. It would be illogical and wasteful for the parties and the Court to become entrenched in that process if the Supreme Court reaches a different conclusion in *Rincon* that could nullify those efforts.

IV. THE STATE'S PUBLIC INTEREST ARGUMENT FINDS SUPPORT IN IGRA, *CARCIERI*, AND CASE LAW

The State's argument is straightforward, and the evidence is undisputed, that James Charley and family were not a recognized tribe under federal jurisdiction in 1934, and current Tribal members did not live on the rancheria in 1934 and are not descended from the James Charley family. Therefore, under *Carcieri v. Salazar*, 109 S. Ct. 1058 (2009), the Tribe was not a proper beneficiary of the eleven acre trust acquisition where the Tribe proposes to site its casino. (Def.'s Opp'n-Cross-motion 14-18.) Instead of attempting to explain its history, the Tribe ignores it altogether and claims the State's argument that it is against the public interest to put a casino on land unlawfully acquired in trust for the Tribe, and that would damage adjacent State lands, is not supported by law. (Pl.'s Opp'n/Reply 8-14.) Because the State's argument is legally valid, and its evidence undisputed, it is entitled to summary judgment.

A. It is Not in the Public Interest for the State to Negotiate For a Casino on Land Unlawfully Acquired in Trust for Big Lagoon

The Tribe claims there is no authority for the proposition that the State negotiated in good faith because it is not in the "public interest" to allow gaming on lands "unlawfully acquired in trust." (Pl.'s Opp'n/Reply 9-10.) While there is no judicial or administrative decision directly on

point,[6] the authorities demonstrate that the argument is legally valid.

IGRA's legislative history confirms that what a court may consider in determining good faith and a state's public interest "may include issues of a very general nature," S. Rep. No. 100-446, at 14, *as reprinted in* 1988 U.S.C.C.A.N. at 3085, and are not, as the Tribe suggests, limited to positions taken during compact negotiations. Indeed, this Court has found the Tribe's status "arguably implicates the public interest."[7] (Doc. 74 at 5:2-3.) In any event, because the Tribe seeks an order compelling the State to negotiate for a casino on land that should not be in trust, this Court must first determine whether it would be in the public interest to do so.

It is axiomatic that it is in the public interest that laws should be applied correctly and it is against the public interest for that not to occur. In *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 30-31 (D.C. Cir. 2008), the court held that Congress' delegation of authority to the Secretary to obtain land for Indians under the Indian Reorganization Act (IRA) is consistent with other statutes that direct agencies to act in the "'public interest,' ... or in a way that is 'fair and equitable.'" (Citations omitted.) In *Maxam v. Lower Sioux Indian Community*, 829 F. Supp. 277, 284 (D. Minn. 1993), the court found:

> There is an important public interest in implementing the intent of Congress, the elected representatives of the people in our democratic system. Further, there is a public interest in fostering respect for the law and compliance with the laws of our country. The defendants, by failing to comply with the letter of the law embodied in the Indian Gaming Regulatory Act, offend those public interests. Therefore, the public interest reinforces the plaintiffs' claim for injunctive relief.

Here, it is undisputed that the United States incorrectly applied the IRA when it acquired the eleven acres for the Tribe. Applying the IRA, as interpreted in *Carcieri*, and IGRA fairly and equitably should preclude the Tribe from being able to take advantage of this unlawful act.

In addition, in *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 688 (1st Cir. 1994), the court held that a determination whether land was eligible for gaming under IGRA "is tinged

[6] Because the State's argument is occasioned by the recent *Carcieri* decision, it is not surprising that there is no authority deciding directly whether a state need not negotiate for a casino on land unlawfully acquired in trust for a tribe based on *Carcieri*.

[7] The Tribe claims the Court meant that a determination by the Bureau of Indian Affairs (BIA) concerning the Tribe's status "may 'implicate the public interest.'" (Pl.'s Opp'n/Reply 12 n.10.) Irrespective of whether the Court or the BIA makes the determination, it is undisputed that the Tribe's status in 1934 "arguably implicates the public interest."

with more than the usual quotient of public interest, because the Tribe's ability to import casino gambling into Rhode Island likely hangs in the balance." In *Kansas v. United States*, 249 F.3d 1213, 1227-28 (10th Cir. 2001), the court held:

> We believe the State of Kansas' interests in adjudicating the applicability of IGRA, and the ramifications of such adjudication, are sufficient to establish the real likelihood of irreparable harm if the Defendants' gaming plans go forward at this stage of the litigation. [¶] [W]e believe the threatened injury to the State outweighs any harm the preliminary injunction might cause the Government. We are mindful that the Miami Tribe, its officials, and Butler National desire to begin constructing a gaming facility and reaping its economic benefits on a tract of land the Tribe claims as its own. These Defendants will be entitled to proceed with their plans, however, only if the tract qualifies as "Indian lands" under IGRA. The answer to this question will affect the sovereign rights and regulatory powers of all involved.

Similarly, in *Comanche Nation v. United States*, 393 F. Supp. 2d 1196, 1211 (W.D. Okla. 2005), the court found that

> Introduction of class III gaming on the parcel in question (with the resultant state regulatory involvement) prior to a determination of the jurisdictional issues in this case will introduce jurisdictional and other complexities and questions as to the rule of law to be applied to the public at the gaming facility. The court concludes that it is in the interest of the public to have the jurisdictional issues resolved prior to the commencement of the class III gaming activities on the subject property.

Cf. Alabama-Coushatta Tribes v. Texas, 208 F. Supp. 2d 670, 681 (E.D. Tex. 2002) (finding it in the public interest to grant state an injunction against tribal gaming "enterprise that was unlawful from its inception").

These cases involved injunctive relief similar to the statutory remedy the Tribe seeks under IGRA. In determining whether an injunction should issue, each court found paramount the public interest in compliance with the law, irrespective of the tribe's gaming status. Also, the cases confirm it would not be in the public interest to allow the Tribe to import gaming onto a site that but for an unlawful act would not otherwise be gaming-eligible, and this Court should resolve questions about sovereign rights and regulatory powers before deciding any other issues in this case. As the Tribe notes, the "public interest" in IGRA is designed to protect the State against the adverse consequences of gaming. (Pl.'s Opp'n/Reply 10:9-16.) It is difficult to imagine the State suffering consequences more adverse than if gaming were allowed at an otherwise prohibited location but for an unlawful act.

The Tribe also claims the State admitted that the Tribe is federally recognized and has

Indian lands. (Pl.'s Opp'n/Reply 9:14-15.) To clarify, the State admitted in its answer that the Tribe is "currently on a list of federally recognized tribes, [and] that the United States considers the Rancheria to be the trust beneficiary of certain lands the federal government owns in Humboldt County." (Answer (Doc. 8) ¶ 4.) Nothing about that admission has changed. What has changed, however, is that the State has confirmed, through formal discovery, that the trust acquisition was unlawful, as defined by *Carcieri*, and the Tribe's status is questionable.

In addition, to the extent the Tribe complains that for years the State never contended that it was not in the public interest to put a casino on the eleven acres because they were unlawfully held in trust (Pl.'s Opp'n/Reply 9:15-18), during negotiations the State relied exclusively on the Tribe's assertion that the parties were negotiating for gaming on "ancestral" Tribal lands. (*See, e.g.*, Compl. (Doc. 1) ¶¶ 1, 5, 18-20, 36-37, 57.) In any event, *Carcieri* was not decided until February 2009, and it was not until the State received discovery in this case that it learned the Tribe was not a recognized tribe under federal jurisdiction in 1934, the current members did not descend from the original rancheria residents, the original rancheria is not in trust but is instead owned in fee by the United States, and there is a significant question whether the United States lawfully considers the Tribe federally recognized.

B. This Court May Determine Whether the Trust Acquisition Was Lawful

The Tribe claims the Court cannot determine the status of the eleven acres and it has met the necessary requirements for demonstrating it is entitled to relief. (Pl.'s Opp'n/Reply 10-12.) The Tribe appears to emphasize the State's acknowledgment that it is not challenging the eleven acres' trust status. (*Id.* 9 n.6, 11:13-15.) To clarify, the State does not challenge the Tribe's status, or the status of its nine-acre rancheria or the adjacent eleven-acre parcel, in the State's argument concerning the "public interest." (Def.'s Opp'n/Cross-motion, argument III.) If, however, the Court finds the evidence insufficient so as to deny the State's cross-motion, then the State may challenge not only the Tribe's status but the status of its lands as gaming-eligible under IGRA, as explained in argument IV of the State's opposition and cross-motion.[8]

[8] Contrary to the Tribe's assertion, the State did not contend that an action challenging the eleven acres' trust status "should be subject to the Quiet Title Act." (Pl.'s Opp'n/Reply 11:13- (continued...)

Remarkably, the Tribe contends that it need not be "lawfully recognized" to obtain IGRA's benefits. (Pl.'s Opp'n/Reply 11 n.9.) The State does not challenge the Tribe's status in the "public interest" argument in its opposition and cross-motion. Nonetheless, the Tribe again asks this Court to ignore past unlawful acts to grant it a remedy that Congress specifically reserved for federally recognized Indian tribes. The argument repeats a common theme throughout the Tribe's pleadings: That the State must give Big Lagoon everything that it requests without consideration from the Tribe, notwithstanding the fact that it may not be lawfully recognized and may not lawfully have gaming-eligible Indian lands. This Court should not countenance such blatant disregard for the rule of law.

In addition, the Tribe's attempt to distinguish *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 778 (9th Cir. 2008) is unavailing. (Pl.'s Opp'n/Reply 11 n.9.) In *Guidiville*, the court relied upon *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler*, 304 F.3d 616, 618 (6th Cir. 2002), and *Mechoopda Indian Tribe of Chico Rancheria v. Schwarzenegger*, No. Civ. S-03-2327 WBS/GGH, 2004 WL 1103021, at *5 (E.D. Cal. Mar. 12, 2004), for the proposition that a state is not obligated to negotiate with an Indian tribe unless it has Indian lands, and a tribe without Indian lands cannot sue under IGRA.

Further, the Tribe is correct that *Carcieri* does not require retroactive determination of whether the Tribe was recognized and under federal jurisdiction in 1934 (Pl.'s Opp'n/Reply 11-12), but the Tribe misses the point. Although created by statute, the State's "public interest" argument is essentially an equitable defense that it would not be "fair and equitable," *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d at 30-31, to allow the Tribe to conduct gaming on land that but for an unlawful act would not be gaming-eligible. It is also true that IGRA does not require tribes to comply with *Carcieri* or the IRA (Pl.'s Opp'n/Reply 12:7-17), but again the

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(...continued)
15.) Instead, before filing its amended brief, the State acknowledged such an action "may be subject" to the Act, but clarified that "there is presently no definitive answer to the question whether the Quiet Title Act bars federal courts from reviewing a completed trust transaction where, as here, the Secretary may have acted unconstitutionally or in violation of federal law. *See Big Lagoon Park Company, Inc., v. Acting Sacramento Area Director, Bureau of Indian Affairs*, 32 IBIA 309 315-16 (1998). (Def.'s RJN Ex. BB.)" (Doc. 88 at 25 n.11.)

Tribe misses the point. The State does not contend that IGRA incorporates any part of the IRA, or that *Carcieri* requires the IRA to be incorporated into IGRA. The undisputed facts to date show that the Tribe was not a recognized tribe under federal jurisdiction in 1934 and that its current members did not live on the rancheria in 1934 or descend from the James Charley family. Thus, the eleven-acre trust acquisition made under the IRA was unlawful, and, in equity, the public interest would not be served by an order compelling the State to negotiate for a casino on land that should not be in trust. Nor does it matter that the United States acquired the land under the IRA; all that matters is whether the acquisition was lawful.

C. The State's Equitable Argument is Valid on the Merits and as an Affirmative Defense

The Tribe claims the State "cannot have it both ways"—if the Tribe is limited to the "record of negotiations" in proving bad faith, then the State cannot go beyond that record to prove good faith. (Pl.'s Opp'n/Reply 12-13.) The State, however, does not seek to "have it both ways."

The Tribe relies upon the State's reference to *Rincon* and "extra-record" evidence in its motion for reconsideration. (Pl.'s Opp'n/Reply 13.) When read in context of the parties' discovery dispute, the State's reference to "extra-record" evidence was to evidence in its possession that informed but was not included in its official offers and counteroffers, and that disclosed the State's underlying motives and intent, which is what the Tribe seeks in discovery.[9] It is not to be construed, as the Tribe suggests, that the only evidence the Court may consider is the parties' offers and counteroffers during the 2007-2009 negotiations. Instead, throughout this action, the State has consistently argued that the Court may also consider judicially noticeable facts and evidence on affirmative defenses. In any event, there is no support for the Tribe's contention that IGRA's public interest analysis is limited to the official negotiation record. (*See* argument IV(A), *ante*.) Because the analysis is not limited as the Tribe suggests, the Court may consider evidence outside the official negotiation record in assessing the public interest.

[9] The Tribe's reliance upon the Magistrate Judge's July 12, 2010 order is premature. (Pl.'s Opp'n/Reply 13 n.11.) The State has filed objections to the order, arguing that it is contrary to *Rincon* because it allows discovery of documents outside the "official record of negotiations" that disclose the State's subjective motivations and intent. (Doc. 95.)

The Tribe also suggests the State's public interest argument is neither a viable defense on the merits nor an affirmative defense. Pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii)(I), the public interest argument is a valid rebuttal to a finding that the State failed to negotiate in good faith. Alternatively, it is also a valid affirmative defense. In its answer, the State asserted that

> Big Lagoon is not entitled to injunctive relief compelling Governor Arnold Schwarzenegger to negotiate a Compact authorizing class III gaming on land taken in trust for the Rancheria subsequent to October 17, 1988, because Big Lagoon is not eligible to be a beneficiary of a trust conveyance pursuant to 25 U.S.C. § 465 and, thus, was never entitled to a beneficial interest in that land.

(Answer 5 ¶ 3.) Using the Tribe's definition of "affirmative defense" (Pl.'s Opp'n/Reply 13 n.12), even if the Tribe has proved all the allegations in its complaint, the facts and argument asserted in this affirmative defense, and now proved undisputedly, defeat the Tribe's claim for relief because the State should not be required to negotiate, either in the past or in the future, for a casino on land unlawfully acquired in trust.

D. It is Not in the Public Interest for the State to Negotiate For a Casino on Land That Would Significantly Impact Adjacent State Lands

The Tribe claims the State offers no evidence that the Tribe's project would damage State lands. (Pl.'s Opp'n/Reply 14:1-9.) In negotiations, however, the State made clear to the Tribe that it preferred not to have, as the Tribe proposed, the entire project located on the eleven acres, as that would compromise the State's interest in preserving and protecting the environmentally significant adjacent State lands. (*See, e.g.*, Engstrom Decl. Exs. 4, 6-9.) Further, the Tribe's agreement to the Barstow Compact and concession in the last round of negotiations that mitigation measures are appropriate necessarily presume significant off-rancheria environmental impacts would result from a project on the eleven acres. (*See* argument II(C), *ante*.)

Moreover, the State's concern for protecting the environment is in the public interest. In upholding a challenge to the Labor Relations provision in the 1999 Compact, the Ninth Circuit held that it could consider the public interest of the State's concern for the rights of its citizens employed at tribal casinos and that the State negotiated in good faith by insisting that this interest be addressed in the manner provided in the provision. *Coyote Valley II*, 331 F.3d at 1116 (citing 25 U.S.C. § 2710(d)(7)(B)(iii)(I); S. Rep. No. 100-446, at 13, *as reprinted in* 1988 U.S.C.C.A.N.

at 3083 ("A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests"). Similarly, the State has a public interest in protecting and regulating development of environmentally sensitive habitat. Cal. Pub. Res. Code § 30240(a) ("Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas."); *Sec'y of the Interior v. California*, 464 U.S. 312, 330 (1984) (activities exclusively within and directly affecting a coastal zone are subject to state review under the Coastal Zone Management Act). Therefore, the State negotiated in good faith for environmental mitigation in this case. *See also New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 301-02 (E.D.N.Y. 2007) (finding that where state demonstrated anticipated casino construction and operation would have detrimental environmental impact, the public interest is served by ensuring development does not violate zoning laws, other land use regulations, and state's anti-gaming provisions).

V. THE STATE'S REQUEST TO DENY OR CONTINUE THE TRIBE'S SUMMARY JUDGMENT MOTION TO ALLOW THE STATE TO COMPLETE DISCOVERY IS APPROPRIATE

The State's request that the Court deny or continue the Tribe's summary judgment motion to allow the State to complete discovery is not an attempt to circumvent this Court's prior order or obtain a rehearing. (Pl.'s Opp'n/Reply 14.) The Magistrate Judge continued the discovery deadline to allow the State to obtain discovery from the United States (Doc. 60) and, in compliance with the Magistrate Judge's standing order, the State and United States are meeting and conferring to resolve their dispute. The Tribe does not dispute that there may be a material question whether current Tribal members descend from the original rancheria occupants, and whether the United States lawfully recognizes the Tribe. Instead, it claims the questions are irrelevant. (Pl.'s Opp'n/Reply 14-15.) But if the Tribe is not lawfully recognized, then it would not be an eligible "Indian tribe" with "Indian lands" as those terms are defined by IGRA, and would not meet IGRA's jurisdictional requirement to request compact negotiations or pursue this action. 25 U.S.C. §§ 2703(5), 2710(d)(3)(A); *Guidiville*, 531 F.3d at 778. As noted in the cases cited in argument IV(A), *ante*, these jurisdictional issues should be resolved at the outset.

CONCLUSION

For reasons stated above and in the State's opening memorandum, the State respectfully requests the Court to grant the State's cross-motion for summary judgment and deny the Tribe's motion for summary judgment.

Dated: July 22, 2010

Respectfully Submitted,

EDMUND G. BROWN JR.
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General

s/Randall A. Pinal
RANDALL A. PINAL
Deputy Attorney General
Attorneys for Defendant State of California

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Peter J. Engstrom, State Bar No. 121529
peter.engstrom@bakermckenzie.com
Bruce H. Jackson, State Bar No. 98118
bruce.jackson@bakermckenzie.com
Irene V. Gutierrez, State Bar No. 252927
irene.gutierrez@bakermckenziecom
BAKER & McKENZIE LLP
Two Embarcadero Center, 11th Floor
San Francisco, CA 94111-3802
Telephone: +1 415 576 3000
Facsimile: +1 415 576 3099

Attorneys for Plaintiff
BIG LAGOON RANCHERIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

BIG LAGOON RANCHERIA, a Federally Recognized Indian Tribe,

Plaintiff,

v.

STATE OF CALIFORNIA,

Defendant.

Case No. CV-09-01471-CW(JCS)

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE CROSS-MOTION OF DEFENDANT STATE OF CALIFORNIA FOR SUMMARY JUDGMENT, AND IN REPLY TO THE STATE'S OPPOSITION TO BIG LAGOON'S MOTION FOR SUMMARY JUDGMENT

Date: August 12, 2010
Time: 2:00 p.m.
Place: Courtroom 2, 4th Floor

1301 Clay Street
Oakland, CA

Before The Honorable Claudia Wilken

Trial Date: Not Set
Date Action Filed: April 3, 2009

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Baker & McKenzie LLP
Two Embarcadero Center
11th Floor
San Francisco, CA 94111
tel 415 576 3000

Baker & McKenzie LLP
Two Embarcadero Center
11th Floor
San Francisco, CA 94111
+1 415 576 3000

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Baker & McKenzie LLP
Two Embarcadero Center
11th Floor
San Francisco, CA 9411
tl 415 576 3000

I. INTRODUCTION

There is no legal or factual dispute that by repeatedly demanding general fund revenue sharing as a necessary condition of any gaming compact with the Tribe, the State has acted in bad faith. The State's demands that the Tribe comply with State environmental standards, and its failure to offer any meaningful concessions in return, also amount to bad faith. In its Opposition to Big Lagoon Rancheria's Motion for Summary Judgment/Cross-Motion for Summary Judgment[1], the State completely fails to meet its burden in rebutting Big Lagoon's showing that the State acted in bad faith, and fails to carry its burden in showing that it was negotiating in good faith.

The State's Opposition/Cross-Motion demonstrates that the State is yet again attempting to delay these proceedings and preclude Big Lagoon from obtaining relief, as can be seen from the State's request for a stay pending resolution of its Supreme Court *certiorari* petition in Rincon Band of Luiseno Mission Indians v. Schwarzenegger, 602 F.3d 1019 (9th Cir. 2010), and pending resolution of the State's discovery dispute with the Department of the Interior.

Under IGRA and Rincon, Big Lagoon has made a *prima facie* showing the State has acted in bad faith, the State has failed to successfully rebut such a showing; therefore, summary judgment should be entered in Big Lagoon's favor, and the State's Cross-Motion should be denied.

II. ARGUMENT

A. The State's Demand for Revenue Sharing Constitutes Bad Faith Negotiating under IGRA

1. Under Rincon, the State's demand for general fund revenue sharing amounts to an impermissible tax under IGRA and *must* be considered by this Court as evidence of bad faith

The State concedes that the Ninth Circuit's recent decision in Rincon interpreting the standards under IGRA is controlling law here. The State does not dispute that throughout the negotiations at issue in this lawsuit it demanded general revenue fund sharing from Big Lagoon. Rincon holds that such demands constitute an impermissible tax that this Court must consider as evidence of bad faith under IGRA – under the "plain language" of § 2710(d)(7)(B)(iii)(II), a court

[1] At the time Big Lagoon filed this Opposition/Reply, the State had not yet filed a brief conforming with the Court's July 14, 2010 order. Therefore, Big Lagoon directs this brief to the arguments raised in the State's earlier filed Cross-Motion/Opposition.

Baker & McKenzie LLP
Two Embarcadero Center
11th Floor
San Francisco, CA 94111
+1 415 576 3000

must consider any "demand for a tax to be made in bad faith." 602 F.3d at 1030 (emphasis in original). Thus, the Tribe has met its burden under IGRA of making a *prima facie* showing that the State has negotiated in bad faith, and unless the State can rebut such a showing – which it cannot – summary judgment must be granted in Big Lagoon's favor.

2. The State does not even attempt to satisfy two of the required conditions for overcoming the *prima facie* case of bad faith

Rincon holds that when a state has demanded a tax, as it has here, the state "faces a very difficult task to rebut the evidence of bad faith arising from that demand." 602 F.3d at 1032. According to Rincon and In re Gaming Related Cases Chemehuevi Indian Tribe(Coyote Valley II), 331 F.3d 1094 (9th Cir. 2003), to rebut the *prima facie* evidence of bad faith, the state must satisfy all three of the following conditions: (1) establish that the revenue sharing is for uses directly relating to gaming activities; (2) show that it is consistent with the purposes of IGRA and (3) show that it was bargained for in exchange for meaningful concessions. Id. at 1033. While the analysis of Rincon makes clear that a methodical application of all three conditions is required to rebut the *prima facie* case of bad faith, the State totally ignores the first two conditions, rather than making any effort to show it can satisfy them.

With regard to the first condition set forth in Rincon, Big Lagoon demonstrated in its moving papers that the State's demand for revenue sharing is in no way "directly related to gaming activities" as that phrase is clarified in Rincon. The State nowhere addresses this contention and thus concedes its validity. Demands for general fund revenue sharing are in no way "consistent with the purposes of IGRA." IGRA makes clear that its purpose is to provide a framework for regulating gaming activity, "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702. IGRA cannot be read "broadly here to include general fund revenue sharing because none of the purposes outlined in § 2702 includes the State's general economic interests." 602 F.3d at 1034. The only *state* interests mentioned in § 2702 are protecting against organized crime and ensuring that gaming is conducted fairly and honestly. Id. (emphasis supplied); *citing* 25 U.S.C. § 2702(2), S. Rep. No. 100-446, at 2, 4, *as reprinted in* 1988 U.S.C.C.A.N. at 3072-73, 3075. In its Opposition, the State does not dispute that its "general

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Two Embarcadero Center
11th Floor
San Francisco, CA 9411
FL 415 576 3000

economic interests" are not among the purposes of IGRA, nor contend they are among the subjects authorized for negotiation by IGRA. Thus, the State has failed to carry its burden in showing that it has negotiated in good faith. Under these circumstances Rincon requires a finding of bad faith, the granting of summary judgment in favor of Big Lagoon, and denial of the State's Cross-Motion.

3. Rincon is in no way distinguishable from the case at hand on the issue of whether an offer of non-tribal exclusivity constitutes a meaningful concession

Instead of addressing all three conditions required by Rincon to rebut the *prima facie* case of bad faith, the State addresses only one of the conditions -- the requirement that revenue sharing must be bargained for in exchange for "meaningful concessions." However, it is undisputed that the only supposed concession offered to Big Lagoon was non-tribal exclusivity -- something Rincon clearly holds is no concession at all. The State argues in vain that Rincon is distinguishable with regard to this requirement, and fails to distinguish either the facts or holding of Rincon from the present case.

While the argument is somewhat obtuse, what the State seems to suggest is that Rincon's holding that exclusivity benefits conferred by the Legislature cannot be used as consideration for general fund revenue sharing does not apply to Big Lagoon because the Tribe has never provided anything in exchange for the economic benefit of exclusivity. The State's argument totally misses the point – Big Lagoon, as with all other California tribes, has already been given class III gaming exclusivity by the voters of California. The voters did not require anything in return. Whether a tribe was part of the group of tribes that signed onto the 1999 Model Compact, or whether a tribe sought gaming rights after that time makes no difference. Rincon focuses on what the State may offer as a "meaningful concession" in current compact negotiations, and universally applies to all tribes seeking gaming rights, irrespective of whether these tribes signed a 1999 compact. "In the current legal landscape, 'exclusivity' is not new consideration the State can offer in negotiations because the tribe already fully enjoys that right as a matter of state constitutional law." 602 F.3d at 1037 (emphasis supplied). Big Lagoon is not obligated to offer the State any "consideration" for the right to "exclusivity" conferred by Proposition 1A. Cf., *State's Opp.* 11:14-18. The Tribe's right of exclusivity" is protected by the California Constitution, and tribes seeking gaming compacts are not

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Two Embarcadero Center
11th Floor
San Francisco, CA 9411
tl 415 576 3000

required to provide the State with any further consideration to enjoy their right to "exclusivity."[2] Finally, to be meaningful a concession would have to be something that Big Lagoon wants. Yet, throughout compact negotiations, the Tribe emphasized that "exclusivity" was "meaningless" to it, and expressly rejected the offer of territorial exclusivity. **Proposal 6.**

In sum, demands for general fund revenue sharing constitute bad faith and the State cannot meet any, and certainly has not met, all of the three requirements to overcome that bad faith showing. Therefore, summary judgment in favor of Big Lagoon is fully warranted.

B. The State's Demands that the Tribe Comply with Environmental Mitigation and Land Use Restrictions also Constitute Negotiation in Bad Faith

1. The State cannot impose State environmental regulations upon the Tribe under IGRA

It cannot be disputed that each of the compact proposals presented by the State during the latest round of compact negotiations would have required the Tribe to comply with State and local environmental standards. This is an impermissible attempt to use the compacting process as a means of imposing State regulatory standards upon the sovereign Tribe, and constitutes evidence that the State has negotiated in bad faith. The State's response is that its demands for environmental and land use restrictions are supported by prior rulings of this Court in the earlier litigation, *Big Lagoon Rancheria v. State of California*, C-99-4995-CW. However, that earlier action was dismissed without prejudice, and consequently, the Court's orders have no preclusive effect, and do not constitute binding authority in the current case. Moreover, the law required on what is required to overcome a showing of bad faith has now been clarified in Big Lagoon's favor by the Ninth Circuit's decision in Rincon.[3]

The law undeniably prohibits the State from imposing its environmental regulations upon Big

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[2] Indeed, by submitting to the compact negotiation process for class III gaming, tribes have already provided the states with consideration, in the form of a limited waiver of their tribal sovereignty, by allowing states to regulate class III gaming in a manner consistent with IGRA. In designing IGRA, Congress intended to balance the sovereign rights of tribes, against states' interests in regulating organized crime. See, S. Rep. No. 100-446, as reprinted in 1988 U.S.C.C.A.N. 3071, 3075-76. By allowing a limited incursion of state regulation into tribal affairs, the tribes have given states consideration in exchange for a compact enabling class III gaming.

[3] The State also argues that, based on the Court's prior rulings, it reasonably believed that its demands were in good faith. The State made a similar "reasonable belief" argument in Rincon that was rejected by the Ninth Circuit. Rincon holds that the State's subjective beliefs as to the legality of its demands are not relevant to the determination of good faith. 602 F.3d at 1041.

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Two Embarcadero Center
11th Floor
San Francisco, CA 9411
+1 415 576 3000

Lagoon, except where such regulatory authority has been granted by Congress. See, Washington v. EPA, 752 F.2d 1465, 1469 (9th Cir. 1985); McClanahan v. State Tax Comm'n of Az., 411 U.S. 164, 170-71 (1973). As the Ninth Circuit's recent decision in Rincon makes clear, under IGRA the State cannot simply negotiate for anything it wants – the law specifically outlines and limits permissible tribe-state negotiation topics: "IGRA limits permissible subjects of negotiation in order to ensure that tribal-state compacts cover only those topics that are directly related to gaming and are consistent with IGRA's stated purposes." 602 F.3d at 1029. The Ninth Circuit flatly rejected the State's argument in Rincon that its demand for general fund revenue sharing was a permissible negotiation topic because it was directly related to gaming and consistent with the purposes of IGRA. The discussion in Rincon pertaining to whether demands are "directly related to the operation of gaming activities," as well as whether such activities are "consistent with IGRA's stated purposes," applies equally to the State's demands here that the Tribe comply with State environmental and land use regulations. In clarifying the scope of these restrictions on the State's right to negotiate, Rincon specifically holds that Congress did not intend "that the compacting methodology be used in such areas such as taxation, water rights, environmental regulation, and land use" and that the effects of "rapid growth of gaming in Indian country and the threat of corruption and infiltration by criminal elements in class III gaming warranted the utilization of existing State regulatory capabilities in this one *narrow* area;" and furthermore, Congress did not intend for the compacting process to provide for any other "incursion of State law onto Indian lands." 602 F.3d at 1029 n. 10, quoting statement of Sen. Inouye from 134 Cong. Rec. S 12643-01 at S 12651 (1988).[4]

Nothing could be clearer – environmental and land use regulation is out of bounds under IGRA. Rincon confirmed that the purposes of IGRA are to promote "tribal economic development, self-sufficiency, and strong tribal governments," and "to promote tribal development, prevent criminal activity related to gaming, and ensure that gaming activities are conducted fairly." 602 F.3d

[4] The regulations promulgated by the National Indian Gaming Commission (NICG), in particular, 25 C.F.R. 502.22, do not confer any authority upon the State to impose environmental regulations upon tribal lands. The section requires tribes to take the environment into account when developing a gaming facility. However, the section leaves it up to the tribes to identify and enforce relevant environmental regulations, as well as to adopt the standards it deems appropriate given the location of its gaming facilities. Cf., *State's Opp.* 16:1-16.

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11th Floor
San Francisco, CA 9411
+1 415 576 3000

at 1028, 25 U.S.C. § 2702. Rincon rejected the State's argument that promoting the State's general economic interest though revenue sharing was consistent with the purposes of IGRA. "The only *state* interests mentioned in § 2702 are protecting against organized crime and ensuring that gaming is conducted fairly and honestly" and State regulation is limited to this one narrow area. Id. at 1029. Similarly, the State's interest in environmental and land use regulation is not mentioned in and is not "consistent with" the stated purposes of IGRA. Environmental regulation is simply not within the "narrow area" of regulation permitted under IGRA.

Realizing that its arguments are proscribed by the holding in Rincon, the State makes no effort to argue that its demands for environmental regulation are directly related to gaming or consistent with the purposes of IGRA and, thus, effectively concedes the merit of Big Lagoon's arguments on these points. Instead, the State simply argues that the holdings of Rincon are dicta. Clearly, this is not the case – Rincon referenced the legislative history of IGRA in order to support its clarification of the meaning and scope of the "directly related to" and "consistent with the purposes of" restrictions of IGRA and that clarification was essential to its determination in the case.

2. Contrary to the State's contentions, the State has demanded that the Tribe comply with state environmental regulations

The record clearly reflects that in the current round of negotiations, it was the State, not the Tribe, that initiated demands for compliance with environmental mitigation efforts, and insisted that the Tribe comply with such mitigation measures. The State has demanded that the Tribe comply with State environmental standards, which it is prohibited from demanding under IGRA.

The State attempts to characterize its own demands as items specifically requested by the Tribe in August 2008, which the State simply "modified and incorporated into its last proposal." *State's Opp.* 13:19-20. Yet, the record shows that it was the State which first requested environmental mitigation efforts on January 31, 2008. Declaration of Peter Engstrom in Support of Big Lagoon's Motion for Summary Judgment ("Engstrom Decl.") Exh. 4; **Proposal 2.** The State's alternative proposals would have required Big Lagoon to commit to limiting development on its tribal lands, obtaining approval from various local and state agencies; or complying with all the mitigation conditions listed in "Appendix A" to such proposal, which including complying with

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Two Embarcadero Center
11th Floor
San Francisco, CA 9411
+1 415 576 3000

certain state regulatory standards and adhering to various development restrictions. Id. Subsequent proposals made by the State would have also required compliance with the restrictions listed in "Appendix A." **Proposal 5.** Notwithstanding its belief that the State's demands were improper, in the spirit of working to a compromise, the Tribe made efforts to take into account the State's concerns, engaged an architect and environmental engineer to provide input, and provided a mitigation plan based on the environmental study that had been completed. Engstrom Decl. Exh. 8, **Proposal 6.** The mitigation measures proposed by the Tribe were intended to take into account the State's concerns – that the Tribe was willing to negotiate in good faith with the State toward achieving a compromise does not alter the fact that it was the State insisting that Big Lagoon comply with impermissible environmental regulations.

3. Even if environmental regulation were a legitimate subject of the State's negotiation, the State has offered no meaningful concessions in exchange for its demands

Nor can the State satisfy the third requirement of showing that the demands were bargained for in exchange for "meaningful concessions."[5] The State claims that its offer to allow Big Lagoon to operate up to 349 gaming devices and to continue to receive Revenue Sharing Trust Fund ("RSTF") distributions amounted to a meaningful concession. However, as Rincon held in confirming the meaning of "meaningful concessions" – gaming rights that tribes "are entitled to negotiate for under IGRA, like device licensing" cannot serve as consideration, "consideration must be for something 'separate' than basic gaming rights." 602 F.3d at 1039. Furthermore, the State has failed to proffer any law demonstrating that the offer for continued receipt of RSTF payments constitutes a "meaningful concession." As Rincon stated:

> Further, we disagree that the State makes "meaningful concessions" whenever it offers a bundle of rights more valuable than the status quo. As previously explained, IGRA endows states with limited negotiating authority over specific items. Accepting the State's "holistic" view of

[5] That the Tribe previously agreed to relocate casino facilities to Barstow, California as a political and economic compromise in settlement of litigation does not restrict it in any way in the present litigation. The Tribe is entitled to change its mind in evaluating the merits of the proposals in the most recent round of compact negotiations, and is also entitled to ask that the State comply with the restrictions upon its regulatory powers. Additionally, the State mischaracterizes the testimony given by the Tribe's counsel before the legislature – the transcript shows that the discussion was about the Barstow deal in general, rather than environmental restrictions on the Tribe's rancheria lands. See, Pinal Decl. Exh. C at 81, cf., *State's Oppo.* 16:18-28.

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11th Floor
San Francisco, CA 94111
+1 415 576 3000

> negotiations would permit states to lump together proposals for taxation, land use restrictions, and other subjects along with IGRA class III gaming rights. Such a construction of IGRA would violate the purposes and spirit of that law. 602 F.3d at 1040 (emphasis supplied).

The State's proposals to lump gaming rights with demands to impose land use and environmental restrictions clearly exceed the "limited negotiating authority" dictated by IGRA and Rincon.

C. The Tribe has Been Delayed Long Enough, and the Court Should not Stay These Proeeedings

In apparent frustration at its inability to escape the consequences of Rincon, the State makes the rather astounding request (again) that this Court stay further proceedings in the present action, until the Supreme Court decides the State's yet to be filed petition for certiorari in Rincon, or until the Ninth Circuit's stay is dissolved. *State's Opp.* 9:26-28. This gambit is consistent with the State's bargaining position over many years – engage in surface bargaining, make bad faith demands and raise every conceivable argument to justify their bad faith negotiating and to further delay Big Lagoon's right to negotiate a gaming compact in good faith. Rincon has now given this Court all the authority it needs to provide Big Lagoon with the relief it has long sought – an order compelling the parties to complete a compact in 60 days or submit to a determination by a Court-appointed mediator of the terms and conditions that will finally lead to such a compact, based on the parties' proposals.

D. The State's Argument that it Negotiated in Good Faith based on "Public Interest" Factors is not Supported by IGRA or any Applicable Law

As can be seen from the discussion above, the Ninth Circuit's recent decision in Rincon compels the conclusion that the State has negotiated with Big Lagoon in bad faith by demanding general fund revenue sharing and environmental and land use restrictions. Notwithstanding the finding of bad faith that is dictated by the recent decision in Rincon, the State manufactures an argument that this Court should nevertheless find that the State negotiated in good faith because it is against public "interest" to put a casino on land that the United States purportedly unlawfully acquired in trust for Big Lagoon in the distant past. The State provides absolutely no legal support for this argument and it is not supported by the framework used for determining "bad faith" under IGRA, or by any other applicable law. Furthermore, the Supreme Court's decision in Carcieri v.

Baker & McKenzie LLP
Two Embarcadero Center
11th Floor
San Francisco, CA 9411
+1 415 576 3000

Salazar, 129 S. Ct. 1058 (2009), regarding the standards for taking land into trust for tribes, did not involve any interpretation or application of IGRA and does not apply to determinations to be made by this Court under IGRA. Additionally, in proving "good faith," the State is limited by Rincon and its own argument to the "record of negotiations," and may not refer to other, extra-record evidence.

1. There is no authority for the proposition that it is not in the "public interest" to place a casino on land that the United States has purportedly "unlawfully" acquired in trust for Big Lagoon

The requirements of IGRA are straightforward. Through IGRA, Congress created a statutory framework for the operation and regulation of gaming by Indian tribes. See 25 U.S.C. § 2702. Indian tribes may conduct certain gaming activities on their lands only if authorized pursuant to a valid compact between the tribe and the state. Id., § 2710(d)(1)(C). Any "Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity...is to be conducted" can request that the State enter into good faith negotiations with the tribe. 25 U.S.C. § 2710(d)(3)(A).

There is no dispute that Big Lagoon is a federally recognized "Indian tribe" that has "Indian lands" under its jurisdiction that are eligible for gaming. The State admits this in its Answer to Big Lagoon's Complaint and further admits such in its current motion papers.[6] Indeed, the State has negotiated with Big Lagoon for many years regarding the establishment of gaming facilities on these tribal lands and has never contended in the course of these negotiations that it was not in the public interest to place a casino on these lands because they were unlawfully held in trust.

The State cites no authority under IGRA for the proposition that it negotiated with the Tribe in good faith because it is not in the "public interest" to allow gaming tribal lands "unlawfully acquired in trust." *State's Opp.* at 17:8-12. There is no such authority. Rather, as the State acknowledges, the public interest is one of several factors IGRA specifies that a court may consider in reaching a determination of whether a state has negotiated with the Tribe in good faith or bad faith. The factors listed in 25 U.S.C § 2710(d)(7)(B)(iii), which a court may consider in evaluating good faith, including "public interest," focus on positions a state has taken during the negotiations. In reference to the fact that these factors refer to the good faith of positions a state takes during

[6] In its motion papers the State concedes: "the State is not seeking to take the parcel out of trust or to challenge its status as Big Lagoon's trust land." *State's Oppo.* 25, n. 11.

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negotiations, the legislative history of IGRA states: "The Committee notes that it is States not tribes, that have crucial information in their possession that will prove or disprove tribal allegations of failure to act in good faith." S. Rep. No. 100-446, at 15 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3085. IGRA did not intend the "public interest" evaluation of good faith to include a wide-ranging review of matters totally unrelated to the negotiations of the parties, such as the issue of whether Indian lands now held in trust had been improperly taken in trust by the United States Government. Such issue has nothing to do with whether the positions taken by the State during compact negotiations were in good faith.

Furthermore, in response to the State's argument that its insistence on general fund revenue sharing during negotiations was in good faith as a matter of "public interest," Rincon clarified that the terms of IGRA, including the "public interest" factor "clearly apply to protecting the State against the adverse consequences of gaming activities." 602 F.3d at 1032. Any ambiguities in the statue must comply with the "obligation to construe IGRA most favorably towards tribal interests." Id. at 1031 n14. Like revenue sharing, the history of Big Lagoon's trust lands has nothing to do with protecting the State against the adverse consequences of gaming. Moreover, such would not be a construction of the statute favorable to tribal interests, as required by IGRA. Id.

2. The Tribe is currently a federally recognized Indian tribe having jurisdiction over Indian lands and neither Carcieri or any other law permits this Court to re-determine that status

Fundamentally, the State argues that its good faith can be demonstrated by a showing that a portion of Big Lagoon's tribal lands now undisputedly in trust was "unlawfully acquired in trust" by the United States. The State directs its argument specifically to the Tribe's eleven-acre parcel adjacent to its historical Rancheria. *State's Opp.* at 17:17-18; 25:6-8; 33:21. This issue is in no way relevant to the determination of good faith under IGRA, and the status of Big Lagoon's tribal lands is not the legitimate subject of a court's determinations under IGRA. Big Lagoon has met all the necessary requirements for demonstrating that it is entitled to seek relief under IGRA. The State's arguments regarding Carcieri and the "public interest" are red herrings, meant to distract from the fact that the Tribe is fully entitled to relief under IGRA.

Any Indian tribe with qualifying Indian lands can request that a State enter into compact

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negotiations. 25 U.S.C. § 2710(d)(3)(A). District courts have jurisdiction over suits brought by "an Indian tribe" seeking to enforce the requirement that compact negotiations be conducted in good faith. 25 U.S.C. § 2710(d)(7)(A). IGRA simply requires that the Indian tribe be presently recognized, and that such tribe presently have qualifying Indian lands.[7] There is no mandate or mechanism within IGRA for considering issues of whether a tribe was "properly" recognized by the United States, or whether "Indian lands" were properly placed into trust by the United States.

There can be no legitimate dispute that Big Lagoon currently meets the requirements of IGRA that it is an "Indian tribe" with "Indian lands" available for gaming under the meaning of IGRA. The Tribe is presently a federally recognized Indian tribe, and the State does not dispute this in its Cross-Motion.[8] *State's Answer to Big Lagoon's Complaint* at ¶4; *State's Opp.* at 18:3-5, citing, Bureau of Indian Affairs' (BIA) list of "Indian Entities Recognized and Eligible To Receive Services from the United States Bureau of Indian Affairs," 74 Fed. Reg. 40,218 (Aug. 11, 2009). The State itself concedes that the Tribe's lands are now in trust and does not seek to take these parcels out of trust, or to challenge their status as Big Lagoon's trust land, and in fact notes that any such action should be subject to the Quiet Title Act.[9] *State's Opp.* at 25 fn 11.

Nothing in Carcieri requires a different conclusion. Carcieri dealt with whether the Secretary of the Interior could place land into trust for the benefit of an Indian Tribe, pursuant to the Indian Reorganization Act ("IRA"). The Supreme Court concluded that the Secretary could only accept

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[7] 25 U.S.C. § 2703(4)-(5) define "Indian lands" and "Indian tribe" under IGRA, and Big Lagoon indisputably meets both definitions.

[8] In fact, once a tribe is federally recognized, such status may not be terminated except by an act of Congress. Section 103, Pub. L. 103-454, Congressional Findings; *codified following* 25 U.S.C. §479a. Furthermore, the judiciary has "historically deferred to executive and legislative determinations of tribal recognition." Western Shoshone Business Council v. Babbit, 1 F.3d 1052, 1057 (10th Cir. 1993).

[9] The State has failed to point to any authority which shows that IGRA requires a tribe to be "lawfully recognized" or that IGRA provides a forum for revisiting recognition and trust determinations – indeed, Guidiville Band of Pomo Indians v. NGV Gaming, Ltd., 531 F.3d 767, 778 (9th Cir. 2008), cited in *State's Opp.* at 35:22-25 does not support this proposition, since it did not deal with IGRA and arose under a completely different statutory scheme.
Nor is there any dispute that the Tribe has suitable "Indian lands." The Tribe's nine-acre rancheria is indisputably qualifying land under § 2703(4) and is not addressed by the State's argument regarding the eleven acres. While the State disputes that the eleven acre parcel was properly put into trust, there is no real dispute as to the Tribe's current standing, or about the Tribe's sovereign rights over its Rancheria. There is no real dispute that the Tribe is eligible for relief under IGRA.

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land into trust under IRA, if the tribe was a recognized tribe, under federal jurisdiction as of 1934, when the IRA was enacted. Carcieri does not mandate that the Secretary of the Interior review and re-determine all prior acceptances of land in trust for Indian tribes. Furthermore, it does not mandate that the United States review all prior determinations to recognize Indian tribes. Certainly, it does not mandate that this Court conduct such a review. Big Lagoon satisfies the requirements of IGRA in that it currently has Indian lands available for gaming and it is, undisputedly, a federally recognized Indian tribe. Equally as important, Carcieri is not a decision under or about IGRA. Certainly a claim under IGRA is not the proper place or mechanism for reviewing prior decisions of the United States to place land in trust or to recognize Indian tribes. Even if Carcieri mandates retroactive review of lands previously placed in trust, which by its terms it does not, such review should be initiated by the Secretary of the Interior or through some other process for administrative review and not as part of a determination of good faith under IGRA. IGRA contains no requirement that tribes seeking gaming compacts meet the requirements of IRA or Carcieri. Finally, whether or not the Tribe meets the standard set forth in Carcieri permitting the Secretary of the Interior to place new land into trust based on federal recognition in 1934, it does not in any way, bear on this Court's inquiry under IGRA into the issue of whether the State negotiated with Big Lagoon in good faith, taking into account the "public interest" and other factors IGRA indicates a court may consider.[10]

3. The State cannot have it both ways; if Big Lagoon is limited in proving bad faith to the "record of negotiations and cannot use "extra-record evidence," the State is likewise limited in proving good faith

In support of its argument that it has acted in good faith during negotiations, the State introduces voluminous "extra-record" evidence purporting to establish that Big Lagoon's trust land was not properly taken into trust by the United States. This information consists of various historical documents obtained, inter alia, from the Department of the Interior and the Bureau of Indian Affairs (evidence referred to in pages 17 through 36 of the State's Cross Motion).

The State cannot have it both ways. Even if this were an issue relevant to the determination

[10] The State contends that this court has previously determined that Big Lagoon status in 1934 "arguably implicates the public interest" under IGRA. In this regard, the State incorrectly cites this court's order denying the State's prior motion for a stay. In its order, what the Court actually held was that a determination by the Bureau of Indian Affairs on new land to be placed in trust may "implicate the public interest."

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11th Floor
San Francisco, CA 94111
+1 415 576 3000

of the State's good faith negotiating, which it is not, the State has argued to this Court that under Rincon, good faith under IGRA "should be evaluated objectively based solely on the record of negotiations," which the State defines as "the formal exchange of the parties' offers, counter-offers and supporting documentation during negotiations". *State's Reply to Opposition to Motion for Reconsideration*, at 5:7-13. The State further argued:

> [I]t does not matter whether the State tries to use extra-record evidence to prove that it negotiated in good faith, or Big Lagoon tries to use extra-record evidence to prove that the State failed to negotiate in good faith, Rincon is clear that extra-record vidence is not allowed in either situation . . . .

Id. 4:2-5 (emphasis supplied). None of the evidence the State has submitted in support of its asserted "public interest" claim of good faith comes from the formal record of negotiations. Under Rincon, and by the State's own argument, the State is limited to the "formal record of negotiations" in showing that it negotiated in good faith and cannot rely on this extra-record evidence to support its claim of good faith.[11] On this basis alone, the Court should reject this argument.

The State may argue that this evidence can be admitted in support of its so-called "affirmative defenses."[12] But the State apparently recognizes there is no authority supporting affirmative defenses under IGRA, as it does not once mention such defenses in its cross-motion. Here, the State does not present a defense intended to defeat Big Lagoon's claim of bad faith, accepting the truth of such claims, but rather, a defense intended to show Big Lagoon's claim of bad faith is untrue. The State asserts that on this fundamental issue in an IGRA claim the Court should find that "the State has negotiated in good faith." Even if this can be construed as an affirmative defense rather than a pure defense on the merits, under Rincon, and according to the State's own papers, the inquiry into "good faith" or "bad faith" must be based solely on the formal record of negotiations and may not be based on "extra-record" evidence such as the State proffers here.

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[11] In his order of July 12, 2010, granting in part the State's request for reconsideration, Magistrate Judge Spero ruled that the "record of negotiations" may well include other evidence in the State's possession that may be relevant to an objective evaluation of the good faith of the State's bargaining positions. The evidence offered here is not from the State's possession nor does it have anything to do with the good faith of the State's bargaining positions.

[12] An "affirmative defense" is the defendant's "assertion of facts and arguments, that if true, will defeat the plaintiff's...claim, even if all the allegations in the complaint are true" – and must go beyond merely a defendant's attempt to negate a plaintiff's claims. BLACK'S LAW DICTIONARY 451.

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4. The State's other arguments regarding the "public interest" are unavailing

The State's other "public interest" argument regarding the potential environmental impact of the proposed casino is unpersuasive, and the State has cited no legal authority for the proposition that it is not in the "public interest" for the State to negotiate for a casino on land that would "significantly damage adjacent state lands." *State's Opp.* 25:13-17. The State offers no supporting evidence whatsoever its support of its bald contention that the proposed gaming activities on Big Lagoon's tribal lands would "significantly damage" adjacent lands. IGRA was not intended to allow states to circumvent general prohibitions against imposing environmental regulations on tribes, and the State has acted in bad faith by demanding rather than negotiating such regulations.

5. The Parties' Motions Should Not Be Stayed or Denied on the Basis of the State's Supposed Continuing Discovery Dispute with the Department of the Interior

In an effort that can only be seen as compounding the years of bad faith negotiating, the State has failed to make a proper showing which would allow the Court to deny or delay a decision on Big Lagoon's motion for summary judgment, based on the State's ongoing discovery dispute with the United States. In fact, the State's arguments that it should be granted more time to discover evidence pertinent to its summary judgment motion are, in essence, an attempt by the State to circumvent this Court's prior discovery order or obtain a rehearing of the Court's prior order.

The State has already sought a stay or continuance of proceedings so that it may obtain additional time for discovery on issues related to its Carcieri arguments. The Court has already determined that the State had ample time to pursue discovery from the United States, since Carcieri was decided in February 2009, and that the State's own lack of "reasonable diligence" in pursuing discovery resulted in the delay. Order Denying Defendant's Motion to Stay or, in the Alternative, to Continue Dispositive Motion Dates at 5, filed April 16, 2010. It has been three months since the Court's ruling, and the State has had even more time to resolve its discovery disputes. The State has had sufficient time to pursue discovery, and it should not now be granted additional time.

Moreover, for all the reasons discussed above, the evidence the State seeks through additional discovery is simply not relevant to the Court's determination of whether the State negotiated with Big Lagoon in good faith. All the "extra-record" evidence that the State presents

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11th Floor
San Francisco, CA 94111
+1 415 576 3000

and seeks to further discover is simply not admissible to prove the State's contention that it has negotiated in good faith. Based on the State's own arguments and the holding of Rincon, proof of good faith is limited to the record of formal negotiations. The State has explicitly argued that the proof of good faith or bad faith is limited to the record of negotiations, and that "extra-record evidence is not allowed in either situation." *State's Reply to Opposition to Motion for Reconsideration* 4:2-5. The State cannot have it both ways, and it is now limited to the record of negotiations.

III. CONCLUSION

With all due respect, the Court should not further delay the finding compelled by IGRA and Rincon, in a hope that the parties may reach a resolution. IGRA provides a mechanism for doing just that – a 60-day period in which the parties conclude their negotiations and enter into a compact or face the prospects of a mediator making the critical decisions for them on compact terms that best meet the statutory requirements. For the foregoing reasons, Big Lagoon's motion for summary judgment should be granted in its entirety, and the State's cross-motion for summary judgment should be denied in its entirety. The State has negotiated in bad faith, and a finding to that effect is warranted, accompanied by a judgment ordering the parties to conclude a compact within 60 days or submit to a mediator as required by IGRA.

Dated: July 15, 2010

Respectfully submitted,

Peter J. Engstrom
Bruce H. Jackson
Irene V. Gutierrez
BAKER & McKENZIE LLP

By: /s/
Bruce H. Jackson
Attorneys for Plaintiff
BIG LAGOON RANCHERIA

Baker & McKenzie LLP
Two Embarcadero Center
11th Floor
San Francisco, CA 9411
+1 415 576 3000

Exhibit B

Cristi Caspers

From: Jerome.Levine@hklaw.com
Sent: Friday, August 08, 2008 5:02 PM
To: Sylvia Cates
Cc: Andrea Hoch
Subject: Big Lagoon
Attachments: Big Lagoon Mitigation Measures - JL 8-8-08.DOC

Attached are the proposed mitigation measures, as we discussed today. Please call as soon as possible to discuss and schedule a meeting. Thanks.

I. PROJECT MITIGATION MEASURES

The State and the Tribe have participated in a meet and confer process and agree that the mitigation measures listed below will mitigate the Project and the Tribe agrees to implement such mitigation measures.

1.1 Geology and Soils

1.1.1 The Project will meet the seismic standards of the 2007 California Building Standards Code.

1.2.1 Loose soils present under building foundation will be stabilized to the extent recommended and in accordance with the recommendations of a licensed engineer.

1.3.1 Soils in the foundation, parking lot and roadway will be evaluated for structural suitability by a geologist and the geologist's recommendations to reduce the potential for soil expansion, if any, will be implemented.

2.1 Hydrology and Water Quality

2.1.1 The Project will have a Storm Water Pollution Prevention Plan (SWPPP) for the construction phase prepared by a civil engineer. The plan may incorporate the following measures:

2.1.1.1 Using soil stabilization techniques to protect finished graded slopes from erosion, such as straw mulching, hillslope benching erosion control matting, hydroseeding, revegetation or preservation of existing vegetation;

2.1.2.1 Covering of soil stockpiles and excavations with impermeable materials during periods of inclement weather to control movement of sediment;

2.1.3.1 Containment of sediment by using such measures as silt fencing, straw bale sediment barriers, diversion dikes and swales, and sediment traps, and gravel pads at construction equipment exit points from the site;

2.1.4.1 Street sweeping and litter collection within the Project site and along Big Lagoon Road on a routine basis during construction, especially prior to the first winter rains; and

2.1.5.1 A Hazardous Materials Management Plan.

2.2.1 The Project will have a operational SWPPP prepared by a licensed engineer. Such plan may include:

2.2.1.1 Stormwater detention measures that would reduce the peak runoff from the site to levels equal or less than those under pre-development conditions for all storm frequency events up to the 100 year, 24 hour storm and to assist with water quality.

2.2.2.1 Vegetative bioswales;

2.2.3.1 A wet detention pond; and

2.2.4.1 Segregation of roof run-off from parking lot run off and routing of roof run-off to edges of Big Lagoon for water dispersement.

3.1 Biological Resources

3.1.1 The Project will have wildlife proof outdoor trash containers.

3.2.1 The Project will provide for the removal of improperly disposed of food leftovers and wrappers from the Project site on a regular basis.

3.3.1 The Project will have signs educating the public of the adverse effects of littering and feeding native wildlife.

3.4.1 If construction occurs during raptor nesting season (February through July), the following measures will be implemented:

3.4.1.1 A qualified ornithologist will conduct a pre-construction survey for nesting raptors within 30 days of the onset of construction.

3.4.2.1 If nesting raptors are identified on site, the Tribe will implement the appropriate measures, including a set back zone around the nest, recommended by an ornithologist.

4.1 Aesthetics

4.1.1 The Project will use low-intesity sodium vapor lighting or equivalent lighting and have cut off shields on perimeter light standards to the extent reasonable to do so.

4.2.1 The Project will use naturalistic colors and materials on its exterior to the extent reasonable to do so.

4.3.1 The Project will be landscaped with predominantly native species to the extent reasonable to do so.

4.4.1 Buildings included will be limited as follows: no more than 85 feet above grade, underground parking shall be utilized for no less than 300 cars; no more than 120 sleeping rooms shall be used; and the casino gaming floor shall accommodate no more than 300 slot machines.

5.1 Traffic and Transportation

5.1.1 The Tribe will make a good-faith effort to obtain the rights to and to construct an exclusive northbound left-turn lane with a required turn pocket length of approximately 560 feet and an additional 865 feet approach taper on U.S. 101 at Park Road.

6.1 Noise

6.1.1 Limit noise-generating construction activities from 7 am to 7 pm unless otherwise agreed to by residents of the Rancheria.

6.2.1 Maintain and muffle construction equipment powered by internal combustion engines where reasonable to do so.

6.3.1 Prohibit unnecessary idling of construction equipment powered by internal combustion engines where reasonable to do so.

6.4.1 Select quiet construction equipment where reasonable to do so.

7.1 Air Quality

7.1.1 To control construction dust during the grading and excavation phase of the Project, the following or equivalent mitigation measures will be implemented:

7.1.1.1 All material excavated, stockpiled, or graded shall be sufficiently watered, treated, or covered to prevent fugitive dust from leaving the property boundaries and causing a public nuisance or violation of an ambient air standard. Watering should occur at least twice daily, with complete site coverage, preferably in the mid-morning and after work is completed each day.

7.1.2.1 All areas of the site (including unpaved roads) with vehicle traffic shall be watered or have a dust palliative applied as necessary for stabilization of dust emissions.

7.1.3.1 All on-site vehicle traffic shall be limited to a speed of 15 mph on unpaved roads.

7.1.4.1 Access roadways shall be swept if visible soil material is carried out from the construction site.

7.1.5.1 All inactive portions of the construction site shall be covered seeded, or watered until a suitable cover is established.

8.1 Water Supply

8.1.1 Drinking water will meet the Safe Drinking Water Act standards.

8.2.1 The Project will have approximately 300,000 on-site water storage for emergency supply and fire protection.

8.3.1 Wastewater disposal activities will be located a minimum of 100 feet from any active water well.

9.1 Waste Water

9.1.1 The Project's waste water treatment facility will be designed to allow for reuse of tertiary treated waste water for toilets and irrigation.

10.1 Socioeconomics

10.1.1 A public information program consisting of written material warning about the dangers of gaming addiction and listing organizations that help will be made available to patrons.

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Exhibit OO

of response is on occasion; and the estimated time needed to prepare the response is .05 hour per response.

Status of the proposed information collection: Extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: August 4, 2009.

Ronald Y. Spraker,

Acting General Deputy Assistant Secretary for Housing—Deputy Federal Housing Commissioner.

[FR Doc. E9–19240 Filed 8–10–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–62]

Application for HUD/FHA Insured Mortgage "Hope for Homeowners"

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

This information is collected on new mortgages offered by FHA approved mortgagees to mortgagors who are at risk of losing their homes to foreclosure. The new FHA insured mortgages refinance the borrowers' existing mortgage at a significant write-down. Under the program the mortgagors share the new equity and future appreciation with FHA.

DATES: *Comments Due Date:* September 10, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0579) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evalnate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Insured Mortgage "Hope for Homeowners".

OMB Approval Number: 2502–0579.

Form Numbers: HUD–92900–H4H, HUD–92915–H4H, HUD–92916–H4H, and HUD–92917–H4H.

Description of the Need for the Information and its Proposed Use: This information is collected on new mortgages offered by FHA approved mortgagees to mortgagors who are at risk of losing their homes to foreclosure. The new FHA insured mortgages refinance the borrowers' existing mortgage at a significant write-down. Under the program the mortgagors share the new equity and future appreciation with FHA.

Frequency of Submission: On occasion.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	8,000	158		0.723		915,040

Total Estimated Burden Hours: 915,040.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: August 4, 2009.

Lillian Deitzer,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. E9–19243 Filed 8–10–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the current list of 564 tribal entities recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of their status as Indian tribes. The list is updated from the notice published on April 4, 2008 (73 FR 18553).

FOR FURTHER INFORMATION CONTACT: Daisy West, Bureau of Indian Affairs, Division of Tribal Government Services, Mail Stop 4513–MIB, 1849 C Street, NW., Washington, DC 20240. Telephone number: (202) 513–7641.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to section 104 of the Act of November 2, 1994 (Pnb. L. 103–454; 108 Stat. 4791, 4792), and in exercise of authority delegated to the Assistant Secretary—Indian Affairs under 25 U.S.C. 2 and 9 and 209 DM 8.

Published below is a list of federally acknowledged tribes in the contiguous 48 states and in Alaska.

Two tribes have been added to the list since the last publication. Federal relations have been reestablished with Wilton Rancheria pursuant to a court-ordered settlement stipulation. The court order was dated June 8, 2009. Direct government-to-government relations were reestablished with the Delaware Tribe of Indians through its

reorganization under federal statute, the Oklahoma Indian Welfare Act. This reorganization of its tribal government, separate from that of the Cherokee Nation, Oklahoma, is pursuant to a Memorandum of Agreement between the two tribes. The reorganization was effective May 27, 2009.

Other amendments to the list include name changes and name corrections. To aid in identifying tribal name changes, the tribe's former name is included with the new tribal name. To aid in identifying corrections, the tribe's previously listed name is included with the tribal name. We will continue to list the tribe's former or previously listed name for several years before dropping the former or previously listed name from the list.

The listed entities are acknowledged to have the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes. We have continued the practice of listing the Alaska Native entities separately solely for the purpose of facilitating identification of them and reference to them, given the large number of complex Native names.

Dated: July 29, 2009.

Larry Echo Hawk,

Assistant Secretary—Indian Affairs.

Indian Tribal Entities Within the Contiguous 48 States Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs

Absentee-Shawnee Tribe of Indians of Oklahoma
Agua Caliente Band of Cahuilla Indians of the Agua Caliente Indian Reservation, California
Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona
Alabama-Coushatta Tribes of Texas
Alabama-Quassarte Tribal Town, Oklahoma
Alturas Indian Rancheria, California
Apache Tribe of Oklahoma
Arapahoe Tribe of the Wind River Reservation, Wyoming
Aroostook Band of Micmac Indians of Maine
Assiniboina and Sioux Tribes of the Fort Peck Indian Reservation, Montana
Augustine Band of Cahuilla Indians, California (formerly the Augustine Band of Cahuilla Mission Indians of the Augustine Reservation)
Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin
Bay Mills Indian Community, Michigan
Bear River Band of the Rohnerville Rancheria, California
Berry Creek Rancheria of Maidu Indians of California
Big Lagoon Rancheria, California
Big Pine Band of Owens Valley Paiute Shoshone Indians of the Big Pine Reservation, California
Big Sandy Rancheria of Mono Indians of California
Big Valley Band of Pomo Indians of the Big Valley Rancheria, California
Blackfeet Tribe of the Blackfeet Indian Reservation of Montana
Blue Lake Rancheria, California
Bridgeport Paiute Indian Colony of California
Buena Vista Rancheria of Me-Wuk Indians of California
Burns Paiute Tribe of the Burns Paiute Indian Colony of Oregon
Cabazon Band of Mission Indians, California
Cachil DeHe Band of Wintun Indians of the Colusa Indian Community of the Colusa Rancheria, California
Caddo Nation of Oklahoma
Cahuilla Band of Mission Indians of the Cahuilla Reservation, California
Cahto Indian Tribe of the Laytonville Rancheria, California
California Valley Miwok Tribe, California
Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California
Capitan Grande Band of Diegueno Mission Indians of California: Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California
Catawba Indian Nation (aka Catawba Tribe of South Carolina)
Cayuga Nation of New York
Cedarville Rancheria, California
Chemehuevi Indian Tribe of the Chemehuevi Reservation, California
Cher-Ae Heights Indian Community of the Trinidad Rancheria, California
Cherokee Nation, Oklahoma
Cheyenne and Arapaho Tribes, Oklahoma (formerly the Cheyenne-Arapaho Tribes of Oklahoma)
Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota
Chickasaw Nation, Oklahoma
Chicken Ranch Rancheria of Me-Wuk Indians of California
Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana
Chitimacha Tribe of Louisiana
Choctaw Nation of Oklahoma
Citizen Potawatomi Nation, Oklahoma
Cloverdale Rancheria of Pomo Indians of California
Cocopah Tribe of Arizona
Coeur D'Alene Tribe of the Coeur D'Alene Reservation, Idaho
Cold Springs Rancheria of Mono Indians of California
Colorado River Indian Tribes of the Colorado River Indian Reservation, Arizona and California
Comanche Nation, Oklahoma
Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana
Confederated Tribes of the Chehalis Reservation, Washington
Confederated Tribes of the Colville Reservation, Washington
Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians of Oregon
Confederated Tribes of the Goshute Reservation, Nevada and Utah
Confederated Tribes of the Grand Ronde Community of Oregon
Confederated Tribes of Siletz Indians of Oregon (previously listed as the Confederated Tribes of the Siletz Reservation)
Confederated Tribes of the Umatilla Reservation, Oregon
Confederated Tribes of the Warm Springs Reservation of Oregon
Confederated Tribes and Bands of the Yakama Nation, Washington
Coquille Tribe of Oregon
Cortina Indian Rancheria of Wintun Indians of California
Coushatta Tribe of Louisiana
Cow Creek Band of Umpqua Indians of Oregon
Cowlitz Indian Tribe, Washington
Coyote Valley Band of Pomo Indians of California
Crow Tribe of Montana
Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota
Death Valley Timbi-Sha Shoshone Band of California
Delaware Nation, Oklahoma
Delaware Tribe of Indians, Oklahoma
Dry Creek Rancheria of Pomo Indians of California
Duckwater Shoshone Tribe of the Duckwater Reservation, Nevada
Eastern Band of Cherokee Indians of North Carolina
Eastern Shawnee Tribe of Oklahoma
Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria, California
Elk Valley Rancheria, California
Ely Shoshone Tribe of Nevada
Enterprise Rancheria of Maidu Indians of California
Ewiiaapaayp Band of Kumeyaay Indians, California
Federated Indians of Graton Rancheria, California
Flandreau Santee Sioux Tribe of South Dakota
Forest County Potawatomi Community, Wisconsin

Fort Belknap Indian Community of the Fort Belknap Reservation of Montana
Fort Bidwell Indian Community of the Fort Bidwell Reservation of California
Fort Independence Indian Community of Paiute Indians of the Fort Independence Reservation, California
Fort McDermitt Paiute and Shoshone Tribes of the Fort McDermitt Indian Reservation, Nevada and Oregon
Fort McDowell Yavapai Nation, Arizona
Fort Mojave Indian Tribe of Arizona, California & Nevada
Fort Sill Apache Tribe of Oklahoma
Gila River Indian Community of the Gila River Indian Reservation, Arizona
Grand Traverse Band of Ottawa and Chippewa Indians, Michigan
Greenville Rancheria of Maidu Indians of California
Grindstone Indian Rancheria of Wintun-Wailaki Indians of California
Guidiville Rancheria of California
Habematolel Pomo of Upper Lake, California
Hannahville Indian Community, Michigan
Havasupai Tribe of the Havasupai Reservation, Arizona
Ho-Chunk Nation of Wisconsin
Hoh Indian Tribe of the Hoh Indian Reservation, Washington
Hoopa Valley Tribe, California
Hopi Tribe of Arizona
Hopland Band of Pomo Indians of the Hopland Rancharia, California
Houlton Band of Maliseet Indians of Maine
Hualapai Indian Tribe of the Hualapai Indian Reservation, Arizona
Iipay Nation of Santa Ysabel, California (formerly the Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation)
Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California
Ione Band of Miwok Indians of California
Iowa Tribe of Kansas and Nebraska
Iowa Tribe of Oklahoma
Jackson Rancheria of Me-Wuk Indians of California
Jamestown S'Klallam Tribe of Washington
Jamul Indian Village of California
Jena Band of Choctaw Indians, Louisiana
Jicarilla Apache Nation, New Mexico
Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, Arizona
Kalispel Indian Community of the Kalispel Reservation, Washington
Karuk Tribe of California
Kashia Band of Pomo Indians of the Stewarts Point Rancheria, California
Kaw Nation, Oklahoma
Keweenaw Bay Indian Community, Michigan
Kialegee Tribal Town, Oklahoma
Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas
Kickapoo Tribe of Oklahoma
Kickapoo Traditional Tribe of Texas
Kiowa Indian Tribe of Oklahoma
Klamath Tribes, Oregon
Kootenai Tribe of Idaho
La Jolla Band of Luiseno Mission Indians of the La Jolla Reservation, California
La Posta Band of Dieguono Mission Indians of the La Posta Indian Reservation, California
Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin
Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin
Lac Vieux Desert Band of Lake Superior Chippewa Indians, Michigan
Las Vegas Tribe of Paiute Indians of the Las Vegas Indian Colony, Nevada
Little River Band of Ottawa Indians, Michigan
Little Traverse Bay Bands of Odawa Indians, Michigan
Lower Lake Rancheria, California
Los Coyotes Band of Cahuilla and Cupeno Indians, California (formerly the Los Coyotes Band of Cahuilla & Cupeno Indians of the Los Coyotes Reservation)
Lovelock Paiute Triba of the Lovelock Indian Colony, Nevada
Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota
Lower Elwha Tribal Community of the Lower Elwha Reservation, Washington
Lower Sioux Indian Community in the State of Minnesota
Lummi Tribe of the Lummi Reservation, Washington
Lytton Rancheria of California
Makah Indian Tribe of the Makah Indian Reservation, Washington
Manchester Band of Pomo Indians of the Manchester-Point Arena Rancheria, California
Mauzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California
Mashantucket Pequot Tribe of Connecticut
Mashpee Wampanoag Tribe, Massachusetts
Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan
Mechoopda Indian Tribe of Chico Rancheria, California
Menominee Indian Tribe of Wisconsin
Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California
Mescalero Apache Tribe of the Mescalero Reservation, New Mexico
Miami Tribe of Oklahoma
Miccosukee Tribe of Indians of Florida
Middletown Rancheria of Pomo Indians of California
Minnesota Chippewa Tribe, Minnesota (Six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band)
Mississippi Band of Choctaw Indians, Mississippi
Moapa Band of Paiute Indians of the Moapa River Indian Reservation, Nevada
Modoc Tribe of Oklahoma
Mohegan Indian Tribe of Connecticut
Mooretown Rancheria of Maidu Indians of California
Morongo Band of Mission Indians, California (formerly the Morongo Band of Cahuilla Mission Indians of the Morongo Reservation)
Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington
Muscogee (Creek) Nation, Oklahoma
Narragansett Indian Tribe of Rhode Island
Navajo Nation, Arizona, New Mexico & Utah
Nez Perce Tribe, Idaho (previously listed as Nez Perce Tribe of Idaho)
Nisqually Indian Tribe of the Nisqually Reservation, Washington
Nooksack Indian Tribe of Washington
Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana
Northfork Rancheria of Mono Indians of California
Northwestern Band of Shoshoni Nation of Utah (Washakie)
Nottawaseppi Huron Band of the Potawatomi, Michigan (formerly the Huron Potawatomi, Inc.)
Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota
Ohkay Owingeh, New Mexico (formerly the Pueblo of San Juan)
Omaha Tribe of Nebraska
Oneida Nation of New York
Oneida Tribe of Indians of Wisconsin
Onondaga Nation of New York
Osage Nation, Oklahoma (formerly the Osage Tribe)
Ottawa Tribe of Oklahoma
Otoe-Missouria Triba of Indians, Oklahoma
Paiute Indian Tribe of Utah (Cedar Band of Paiutes, Kanosh Band of Paiutes, Koosharem Band of Paiutes, Indian Peaks Band of Paiutes, and Shivwits Band of Paiutes) (formerly Paiute Indian Tribe of Utah (Cedar City Band of Paiutes, Kanosh Band of Paiutes, Koosharem Band of Paiutes, Indian Peaks Band of Paiutes, and Shivwits Band of Paiutes))
Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California

Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada
Paiute-Shoshone Indians of the Lone Pine Community of the Lone Pine Reservation, California
Pala Band of Luiseno Mission Indians of the Pala Reservation, California
Pascua Yaqui Tribe of Arizona
Paskenta Band of Nomlaki Indians of California
Passamaquoddy Tribe of Maine
Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, California
Pawnee Nation of Oklahoma
Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, California
Penobscot Tribe of Maine
Peoria Tribe of Indians of Oklahoma
Picayune Rancheria of Chukchansi Indians of California
Pinoleville Pomo Nation, California (formerly the Pinoleville Rancheria of Pomo Indians of California)
Pit River Tribe, California (includes XL Ranch, Big Bend, Likely, Lookout, Montgomery Creek and Roaring Creek Rancherias)
Poarch Band of Creek Indians of Alabama
Pokagon Band of Potawatomi Indians, Michigan and Indiana
Ponca Tribe of Indians of Oklahoma
Ponca Tribe of Nebraska
Port Gamble Indian Community of the Port Gamble Reservation, Washington
Potter Valley Tribe, California
Prairie Band of Potawatomi Nation, Kansas
Prairie Island Indian Community in the State of Minnesota
Pueblo of Acoma, New Mexico
Pueblo of Cochiti, New Mexico
Pueblo of Jemez, New Mexico
Pueblo of Isleta, New Mexico
Pueblo of Laguna, New Mexico
Pueblo of Nambe, New Mexico
Pueblo of Picuris, New Mexico
Pueblo of Pojoaque, New Mexico
Pueblo of San Felipe, New Mexico
Pueblo of San Ildefonso, New Mexico
Pueblo of Sandia, New Mexico
Pueblo of Santa Ana, New Mexico
Pueblo of Santa Clara, New Mexico
Pueblo of Santo Domingo, New Mexico
Pueblo of Taos, New Mexico
Pueblo of Tesuque, New Mexico
Pueblo of Zia, New Mexico
Puyallup Tribe of the Puyallup Reservation, Washington
Pyramid Lake Paiute Tribe of the Pyramid Lake Reservation, Nevada
Quapaw Tribe of Indians, Oklahoma
Quartz Valley Indian Community of the Quartz Valley Reservation of California
Quechan Tribe of the Fort Yuma Indian Reservation, California & Arizona
Quileute Tribe of the Quileute Reservation, Washington
Quinault Tribe of the Quinault Reservation, Washington
Ramona Band or Village of Cahuilla Mission Indians of California
Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin
Red Lake Band of Chippewa Indians, Minnesota
Redding Rancheria, California
Redwood Valley Rancheria of Pomo Indians of California
Reno-Sparks Indian Colony, Nevada
Resighini Rancheria, California
Rincon Band of Luiseno Mission Indians of the Rincon Reservation, California
Robinson Rancheria of Pomo Indians of California
Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota
Round Valley Indian Tribes of the Round Valley Reservation, California
Rumsey Indian Rancheria of Wintun Indians of California
Sac & Fox Tribe of the Mississippi in Iowa
Sac & Fox Nation of Missouri in Kansas and Nebraska
Sac & Fox Nation, Oklahoma
Saginaw Chippewa Indian Tribe of Michigan
St. Croix Chippewa Indians of Wisconsin
Saint Regis Mohawk Tribe, New York (formerly the St. Regis Band of Mohawk Indians of New York)
Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona
Samish Indian Tribe, Washington
San Carlos Apache Tribe of the San Carlos Reservation, Arizona
San Juan Southern Paiute Tribe of Arizona
San Manuel Band of Mission Indians, California (previously listed as the San Manual Band of Serrano Mission Indians of the San Manual Reservation)
San Pasqual Band of Diegueno Mission Indians of California
Santa Rosa Indian Community of the Santa Rosa Rancheria, California
Santa Rosa Band of Cahuilla Indians, California (formerly the Santa Rosa Band of Cahuilla Mission Indians of the Santa Rosa Reservation)
Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California
Santee Sioux Nation, Nebraska
Sauk-Suiattle Indian Tribe of Washington
Sault Ste. Marie Tribe of Chippewa Indians of Michigan
Scotts Valley Band of Pomo Indians of California
Seminole Nation of Oklahoma
Seminole Tribe of Florida (Dania, Big Cypress, Brighton, Hollywood & Tampa Reservations)
Seneca Nation of New York
Seneca-Cayuga Tribe of Oklahoma
Shakopee Mdewakanton Sioux Community of Minnesota
Shawnee Tribe, Oklahoma
Sherwood Valley Rancheria of Pomo Indians of California
Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California
Shoalwater Bay Tribe of the Shoalwater Bay Indian Reservation, Washington
Shoshone Tribe of the Wind River Reservation, Wyoming
Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho
Shoshone-Paiute Tribes of the Duck Valley Reservation, Nevada
Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota
Skokomish Indian Tribe of the Skokomish Reservation, Washington
Skull Valley Band of Goshute Indians of Utah
Smith River Rancheria, California
Snoqualmie Tribe, Washington
Soboba Band of Luiseno Indians, California
Sokaogon Chippewa Community, Wisconsin
Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado
Spirit Lake Tribe, North Dakota
Spokane Tribe of the Spokane Reservation, Washington
Squaxin Island Tribe of the Squaxin Island Reservation, Washington
Standing Rock Sioux Tribe of North & South Dakota
Stockbridge Munsee Community, Wisconsin
Stillaguamish Tribe of Washington
Summit Lake Paiute Tribe of Nevada
Suquamish Indian Tribe of the Port Madison Reservation, Washington
Susanville Indian Rancheria, California
Swinomish Indians of the Swinomish Reservation, Washington
Sycuan Band of the Kumeyaay Nation
Table Mountain Rancheria of California
Te-Moak Tribe of Western Shoshone Indians of Nevada (Four constituent bands: Battle Mountain Band; Elko Band; South Fork Band and Wells Band)
Thlopthlocco Tribal Town, Oklahoma
Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota
Tohono O'odham Nation of Arizona
Tonawanda Band of Seneca Indians of New York
Tonkawa Tribe of Indians of Oklahoma
Tonto Apache Tribe of Arizona
Torres Martinez Desert Cahuilla Indians, California (formerly the Torres-

Martinez Band of Cahuilla Mission Indians of California)
Tule River Indian Tribe of the Tule River Reservation, California
Tulalip Tribes of the Tulalip Reservation, Washington
Tunica-Biloxi Indian Tribe of Louisiana
Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California
Turtle Mountain Band of Chippewa Indians of North Dakota
Tuscarora Nation of New York
Twenty-Nine Palms Band of Mission Indians of California
United Auburn Indian Community of the Auburn Rancheria of California
United Keetoowah Band of Cherokee Indians in Oklahoma
Upper Sionx Community, Minnesota
Upper Skagit Indian Tribe of Washington
Ute Indian Tribe of the Uintah & Ouray Reservation, Utah
Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah
Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation, California
Walker River Paiute Tribe of the Walker River Reservation, Nevada
Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts
Washoe Tribe of Nevada & California (Carson Colony, Dresslerville Colony, Woodfords Community, Stewart Community, & Washoe Ranches)
White Mountain Apache Tribe of the Fort Apache Reservation, Arizona
Wichita and Affiliated Tribes (Wichita, Keechi, Waco & Tawakonie), Oklahoma
Wilton Rancheria, California
Winnebago Tribe of Nebraska
Winnemucca Indian Colony of Nevada
Wiyot Tribe, California (formerly the Table Bluff Reservation—Wiyot Tribe)
Wyandotte Nation, Oklahoma
Yankton Sioux Tribe of South Dakota
Yavapai-Apache Nation of the Camp Verde Indian Reservation, Arizona
Yavapai-Prescott Tribe of the Yavapai Reservation, Arizona
Yerington Paiute Tribe of the Yerington Colony & Campbell Ranch, Nevada
Yomba Shoshone Tribe of the Yomba Reservation, Nevada
Ysleta Del Sur Pueblo of Texas
Yurok Tribe of the Yurok Reservation, California
Zuni Tribe of the Zuni Reservation, New Mexico

Native Entities Within the State of Alaska Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs

Native Village of Afognak
Agdaagux Tribe of King Cove
Native Village of Akhiok
Akiachak Native Community
Akiak Native Community
Native Village of Akutan
Village of Alakanuk
Alatna Village
Native Village of Aleknagik
Algaaciq Native Village (St. Mary's)
Allakaket Village
Native Village of Ambler
Village of Anaktuvuk Pass
Yupiit of Andreafski
Angoon Community Association
Village of Aniak
Anvik Village
Arctic Village (See Native Village of Venetie Tribal Government)
Asa'carsarmiut Tribe
Native Village of Atka
Village of Atmautluak
Atqasuk Village (Atkasook)
Native Village of Barrow Inupiat Traditional Government
Beaver Village
Native Village of Belkofski
Village of Bill Moore's Slough
Birch Creek Tribe
Native Village of Brevig Mission
Native Village of Buckland
Native Village of Cantwell
Native Village of Chenega (aka Chanega)
Chalkyitsik Village
Cheesh-Na Tribe (formerly the Native Village of Chistochina)
Village of Chefornak
Chevak Native Village
Chickaloon Native Village
Chignik Bay Tribal Council (formerly the Native Village of Chignik)
Native Village of Chignik Lagoon
Chignik Lake Village
Chilkat Indian Village (Klnkwan)
Chilkoot Indian Association (Haines)
Chinik Eskimo Community (Golovin)
Native Village of Chitina
Native Village of Chuathbaluk (Russian Mission, Kuskokwim)
Chuloonawick Native Village
Circle Native Community
Village of Clarks Point
Native Village of Council
Craig Community Association
Village of Crooked Creek
Curyung Tribal Council
Native Village of Deering
Native Village of Diomede (aka Inalik)
Village of Dot Lake
Douglas Indian Association
Native Village of Eagle
Native Village of Eek
Egegik Village
Eklutna Native Village
Native Village of Ekuk
Ekwok Village
Native Village of Elim
Emmonak Village
Evansville Village (aka Bettles Field)
Native Village of Eyak (Cordova)
Native Village of False Pass
Native Village of Fort Yukon
Native Village of Gakona
Galena Village (aka Louden Village)
Native Village of Gambell
Native Village of Georgetown
Native Village of Goodnews Bay
Organized Village of Grayling (aka Holikachuk)
Gulkana Village
Native Village of Hamilton
Healy Lake Village
Holy Cross Village
Hoonah Indian Association
Native Village of Hooper Bay
Hughes Village
Huslia Village
Hydaburg Cooperative Association
Igiugig Village
Village of Iliamna
Inupiat Community of the Arctic Slope
Iqurmuit Traditional Council
Ivanoff Bay Village
Kaguyak Village
Organized Village of Kake
Kaktovik Village (aka Barter Island)
Village of Kalskag
Village of Kaltag
Native Village of Kanatak
Native Village of Karluk
Organized Village of Kasaan
Kasigluk Traditional Elders Council
Kenaitze Indian Tribe
Ketchikan Indian Corporation
Native Village of Kiana
King Island Native Community
King Salmon Tribe
Native Village of Kipnuk
Native Village of Kivalina
Klawock Cooperative Association
Native Village of Kluti Kaah (aka Copper Center)
Knik Tribe
Native Village of Kobuk
Kokhanok Village
Native Village of Kongiganak
Village of Kotlik
Native Village of Kotzebue
Native Village of Koyuk
Koyukuk Native Village
Organized Village of Kwethluk
Native Village of Kwigillingok
Native Village of Kwinhagak (aka Quinhagak)
Native Village of Larsen Bay
Levelock Village
Lesnoi Village (aka Woody Island)
Lime Village
Village of Lower Kalskag
Manley Hot Springs Village
Manokotak Village
Native Village of Marshall (aka Fortuna Ledge)
Native Village of Mary's Igloo
McGrath Native Village
Native Village of Mekoryuk
Mentasta Traditional Council
Metlakatla Indian Community, Annette Island Reserve
Native Village of Minto
Naknek Native Village

Native Village of Nanwalek (aka English Bay)
Native Village of Napaimute
Native Village of Napakiak
Native Village of Napaskiak
Native Village of Nelson Lagoon
Nenana Native Association
New Koliganek Village Council
New Stuyahok Village
Newhalen Village
Newtok Village
Native Village of Nightmute
Nikolai Village
Native Village of Nikolski
Ninilchik Village
Native Village of Noatak
Nome Eskimo Community
Nondalton Village
Noorvik Native Community
Northway Village
Native Village of Nuiqsut (aka Nooiksut)
Nulato Village
Nunakauyarmiut Tribe
Native Village of Nunam Iqua (formerly the Native Village of Sheldon's Point)
Native Village of Nunapitchuk
Village of Ohogamiut
Village of Old Harbor
Orutsararmuit Native Village (aka Bethel)
Oscarville Traditional Village
Native Village of Ouzinkie
Native Village of Paimiut
Pauloff Harbor Village
Pedro Bay Village
Native Village of Perryville
Petersburg Indian Association
Native Village of Pilot Point
Pilot Station Traditional Village
Native Village of Pitka's Point
Platinum Traditional Village
Native Village of Point Hope
Native Village of Point Lay
Native Village of Port Graham
Native Village of Port Heiden
Native Village of Port Lions
Portage Creek Village (aka Ohgsenakale)
Pribilof Islands Aleut Communities of St. Paul & St. George Islands
Qagan Tayagungin Tribe of Sand Point Village
Qawalangin Tribe of Unalaska
Rampart Village
Village of Red Devil
Native Village of Ruby
Saint George Island (See Pribilof Islands Aleut Communities of St. Paul & St. George Islands)
Native Village of Saint Michael
Saint Paul Island (See Pribilof Islands Aleut Communities of St. Paul & St. George Islands)
Village of Salamatoff
Native Village of Savoonga
Organized Village of Saxman
Native Village of Scammon Bay
Native Village of Selawik
Seldovia Village Tribe
Shageluk Native Village
Native Village of Shaktoolik
Native Village of Shishmaref
Native Village of Shungnak
Sitka Tribe of Alaska
Skagway Village
Village of Sleetmute
Village of Solomon
South Naknek Village
Stebbins Community Association
Native Village of Stevens
Village of Stony River
Sun'aq Tribe of Kodiak (formerly the Shoonaq' Tribe of Kodiak)
Takotna Village
Native Village of Tanacross
Native Village of Tanana
Native Village of Tatitlak
Native Village of Tazlina
Telida Village
Native Village of Teller
Native Village of Tetlin
Central Council of the Tlingit & Haida Indian Tribes
Traditional Village of Togiak
Tuluksak Native Community
Native Village of Tuntutuliak
Native Village of Tununak
Twin Hills Village
Native Village of Tyonek
Ugashik Village
Umkumiute Native Village
Native Village of Unalakleet
Native Village of Unga
Village of Venetie (See Native Village of Venetie Tribal Government)
Native Village of Venetie Tribal Government (Arctic Village and Village of Venetie)
Village of Wainwright
Native Village of Wales
Native Village of White Mountain
Wrangell Cooperative Association
Yakutat Tlingit Tribe

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BILLING CODE 4310–4J–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R9-IA-2009-N142; 96300-1671-0000-P5]

Issuance of Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of issuance of permits.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have issued the following permits to conduct certain activities with endangered species and/or marine mammals.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 212, Arlington, Virginia 22203; fax 703/358-2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone 703/358-2104.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on the dates below, as authorized by the provisions of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and/or the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the Fish and Wildlife Service issued the requested permits subject to certain conditions set forth therein. For each permit for an endangered species, the Service found that (1) the application was filed in good faith, (2) the granted permit would not operate to the disadvantage of the endangered species, and (3) the granted permit would be consistent with the purposes and policy set forth in Section 2 of the Endangered Species Act of 1973, as amended.

TABLE: ENDANGERED SPECIES

Permit number	Applicant	Receipt of application FEDERAL REGISTER notice	Permit issuance date
011646	Kootenai Tribe of Idaho	74 FR 21816; May 11, 2009	July 30, 2009
062075, 064075, 068236, 068237, 068238, 068349, 088955, 088956, 088957, 088958, 088959, 088960, 119894, 120319, 213635, 213636, and 213637.	Hawthorn Corporation	74 FR 21817; May 11, 2009	June 30, 2009

CONSTITUTION OF THE
BIG LAGOON RANCHERIA
PREAMBLE

We the Indians of the Big Lagoon Rancheria in California in order to establish a formal constitution and to promote our common welfare, do hereby adopt the following constitution.

ARTICLE I - NAME

The Indians of the Big Lagoon Rancheria shall be known as and operate under the name Big Lagoon Rancheria, hereinafter "Tribe."

ARTICLE II - TERRITORY AND JURISDICTION

The jurisdiction of the tribe, its general council, business council and tribal courts shall extend to the fullest extent permitted by applicable law to the following:

(a) Notwithstanding the issuance of any patent, all lands, water and other resources within the exterior boundaries of the Big Lagoon Rancheria established by Executive Authority of the Secretary of the Interior dated July 10, 1918;

(b) All other lands, water and resources as may be hereafter acquired by the tribe, whether within or without said boundary lines, under any grant, transfer,purchase, adjudication, treaty, Executive Order, Act of Congress or other aoquisition;

(c) All persons within any territory under the jurisdiction of the tribe; and,

(d) All tribal members, wherever located.

ARTICLE III - MEMBERSHIP

Section 1. The membership of the Big Lagoon Rancheria shall consist of:

(a) Those persons whose names are listed on the document entitled Plan of Distribution on the Assets of the Big Lagoon Rancheria dated January, 3, 1968, in accordance with the provisions of P.L. 85-671, as amended by P.L. 88-419;

(b) All lineal descendants of those persons specified in Section 1 (a) above who possess one-eighth (1/8) degree or more Indian blood;

(c) All Indian persons who possess (1/8) degree or more Indian blood upon whom membership is conferred by adoption pursuant to an ordinance to be promulgated by the business council in accordance with applicable federal law.

Section 2. An official membership roll shall be prepared in accordance with an enrollment ordinance which shall be promulgated by the business council. Such ordinance shall provide for an enrollment committee and procedure for keeping the roll current.

Section 3. Withdrawal of Membership. Any person who wishes to withdraw from membership in the Big Lagoon Rancheria must submit his withdrawal in writing to the tribal council chairperson, who shall direct the enrollment committee to adjust its records accordingly.

ARTICLE IV - RIGHTS OF MEMBERS

Subject to the limitations imposed by this constitution, all members of the tribe shall enjoy equal political rights and opportunities to participate in the tribal government, tribal economic resources, tribal assets and all the rights that are conferred upon a tribal citizen, and no member shall be denied freedom of speech, religion, the right to peaceful assembly, or other rights guaranteed by applicable federal law, nor shall any member be denied the right to petition the business council, general council or the tribal courts for redress of grievances against the tribe, or otherwise be deprived of life, liberty or property without notice and an opportunity to be heard.

ARTICLE V - GOVERNING BODY

The governing body of the tribe shall be the general council. In addition, for the orderly transaction of business, there shall be elected from the general council a business council. The general council shall exercise all powers of self-government through the initiative, referendum and recall procedures specified in Article IX of this constitution. The business council shall exercise all powers delegated to it by the general council as set forth in this constitution. The tribal government shall exercise its powers of self-government subject to any express limitations contained herein or imposed by federal law.

ARTICLE VI - GENERAL COUNCIL

Section 1. Electorate

All duly enrolled tribal members eighteen (18) years of age or older shall be members of the general council of the Big Lagoon Rancheria and shall be eligible to vote in all tribal elections.

referendums, recalls, repeals and at all meetings of the general council. For general council meetings a quorum is thirty percent (30%).

Section 2. General Council Reservation of Powers

The following powers shall be exclusively reserved to the general council. No exercise or abridgment of these powers by the business council or by any other agency or officer of the tribe shall be effective unless the general council has given its consent to such action by a two-thirds vote of its eligible voters:

(a) the power of initiative, referendum and recall;

(b) the power to sell or relinquish land owned by the tribe or land held in trust for the tribe by the United States of America. Except that, the tribal council may by majority vote of the entire council authorize grants of rights of way over tribal lands or interests therein for the purpose of providing municipal services, such as water, sewer disposal, electricity, telephone and roads, to and for the benefit of tribal members, or the heirs and descendants of tribal members who hold a land use assignment or lease;

(c) The power to sell or relinquish any tribal hunting or fishing rights;

(d) the power to terminate the Big Lagoon Rancheria;

(e) the power to grant or relinquish any tribal jurisdiction to any other government, agency, organization, or person;

(f) the power to revoke, terminate or diminish a right reserved or delegated to the tribe by federal law;

(g) the power to waive the tribe's immunity from suit.

ARTICLE VII - BUSINESS COUNCIL

Section 1. Business Committee

For the orderly transaction of business, there shall be elected from the general council a business council known as the BIG LAGOON RANCHERIA BUSINESS COUNCIL. It shall be the duty of the business council to govern all people, resources, land, and waters reserved to the Indians of the Big Lagoon Rancheria in accordance with this constitution, such laws as may hereinafter be adopted by the tribe and such limitations as may lawfully be imposed by the tribe and such limitations as may lawfully be imposed by the statutes or the constitution of the United States. All rights, powers and authority, expressed, implied, or

inherent, vested in the Indians of the Big Lagoon Rancheria not expressly referred to in these Articles shall not be hereby abridged but shall be exercised by the business council by the adoption of appropriate amendments, ordinances, laws and agreements.

Section 2. Enumerated Powers

The business council shall have the following powers, to be exercised consistent with this constitution and applicable tribal and federal laws.

(a) On behalf of the tribe, to consult, negotiate, contract, or conclude agreements with federal, state, local and tribal governments and with private persons and organizations;

(b) To employ legal counsel of its choice on behalf of the tribe or for the benefit of tribal members and to fix the fees for such counsel in accordance with federal law;

(c) To make recommendations to the Secretary of the Interior, or to his authorized representative, with regard to all appropriation estimates for all projects which are for the benefit of members of the tribe, prior to the submission of such estimates to the office of Management and Budget and Congress, or to the State of California;

(d) To borrow money from public and private sources and to pledge, mortgage or assign tribal assets except as otherwise provided in this constitution;

(e) To set aside and to spend tribal funds for tribal purposes;

(f) To impose taxes on all persons, property and any business activities located or conducted within tribal jurisdiction; provided no tax shall be imposed on real property in trust by the United States of America;

(g) To regulate the use and development of all tribal lands, whether assigned, or unassigned, and to manage, lease, or otherwise use all unassigned tribal lands in accordance with federal law;

(h) To charter and regulate corporations, cooperatives, associations, special districts, housing authorities, educational and charitable institutions, political subdivisions and other entities;

(i) To license and regulate the conduct of all business activities within tribal jurisdiction;

(j) To establish enterprises as branches or agencies of the tribal government and, otherwise to engage in business activities and projects which promote the economic well-being of the tribe and its members;

(k) To purchase and to acquire in other ways land and other property;

(l) To condemn for tribal purposes real property or interest in real property within tribal jurisdiction; provided that the owners of assignments of property condemned by the tribal council shall be paid fair market value for the assignment or property, and all improvements made thereon by the assignee or owner, and provided further that an assignee of condemned tribal lands shall be assigned alternative tribal lands of comparable condition and value;

(m) To manage, develop, protect and regulate the use of water, minerals, and all other natural resources within tribal jurisdiction;

(n) To enact laws, statues and codes governing conduct of individuals and proscribing offenses against the tribe; to maintain order to protect the safety and welfare of all persons within tribal jurisdiction; and to provide for the enforcement of the laws and codes of the tribe;

(o) To establish tribal courts or courts of Indian offenses, from time to time as may be required, and to provide for the court or courts jurisdiction, procedures, and a method for the selection of judges;

(p) To prescribe conditions under which nonmembers may enter and remain on the reservation and to establish procedures for the exclusion of non-members from any land within the tribe's jurisdiction;

(q) To assert as a defense to lawsuits against the tribe the sovereign immunity of the tribe; except that no waiver of sovereign immunity can be made by the business council without prior approval of the general council;

(r) To regulate the domestic relations of members of the tribe; to provide for the guardianship of minors and incompetent persons within tribal jurisdiction; to provide services for the health, education and welfare of all persons within tribal jurisdiction;

(s) To regulate the inheritance of all lands within tribal jurisdiction and all property owned by persons within tribal jurisdiction; and to provide for escheat of property to the tribe; provided that no law, statute, code or ordinance governing the inheritance of property owned by tribal members shall be in violation of applicable federal law;

(t) To enact ordinances consistent with this constitution establishing procedures for the nomination and election of tribal officers;

(u) To appoint, direct and set the compensation of a tribal business administrator or manager; and to establish policies and procedures for the employment of tribal personnel;

(v) Subject to any limitations contained in this constitution, to delegate any powers vested in the business council to subordinate tribal officers, tribal employees, or other appropriate person; and

(w) To take all actions which are necessary and proper for the exercise of the powers delegated to the business council and to delegate said power to any person or committee under supervision of the business council.

ARTICLE VIII - BUSINESS COUNCIL OPERATIONS

Section 1. Composition

The business council shall consist of five (5) members duly elected to serve two (2) year terms.

The tribal council shall elect from its membership a chairperson, a vice-chairperson, a secretary-treasurer, and may appoint or employ such officers and committees as may be deemed necessary.

Section 2. Qualifications

Members of the tribal council shall be subject to the following rules of eligibility:

(a) Each must be an enrolled member of the Big Lagoon Rancheria and be at least 18 years of age;

(b) Each must reside and have physically resided for the previous year within one hundred (100) miles of the Rancheria.

Section 3. Vancancies and Removal From Office

(a) Vacancies may occur on the tribal council by reason of any of the following:

(i) By death or resignation of the member;

(ii) By a member being convicted of a felony involving dishonesty;

(iii) By a member having been expelled or suspended from the council by a majority vote of the general council at a meeting called for that purpose or by a vote of at least four (4) of the (5) members of the tribal council by reason of neglect of duty, gross misconduct, or because of the member becoming mentally or physically incapable of performing his/her duties. Before any vote for expulsion or suspension is taken, such member or official shall be given a written statement of the charges against him or her at least five days before the meeting of the general council or business council at which the matter of expulsion or suspension is to be decided, and ehall be given an opportunity to answer any and all charges at the designated council meeting.

b) If any member of the business council during his or her term of office shall die, resign, be removed or recalled from office, the business council shall declare the position vacant. If less than twelve (12) months of the term remains, the business council shall fill the vacancy by appointment of a member of the tribe who qualifies for candidacy to the vacant position. If more than twelve (12) months remain in the unexpired term, a special election shall be called to fill the vacant position.

Section 4. Bonding

The business council may require all responsible tribal officials and employees to be bonded. The person responsible for the costs of such bondings to be determined by the business council.

Section 5. Business Council Meetings

All meeting of the business council shall be opened to all tribal members, except in those cases where the matter under discussion would invade the privacy of an individual tribal member. Meetings shall be held in accordance with the following provisions:

(a) Frequency. Regular meetings of the business council shall be held quarterly in the months of January, April, July and October on a day to be designated by the chairperson. The place and time shall be posted at the tribe's office (1) week prior to the date of the meeting. The business council may set more frequent regular meetings as necessary; provided that it shall cause to be published the schedule of all such meetings.

(b) Quorum. A majority of members, that is, three (3) members, shall constitute a quorum at all business council meetings.

(c) Proxy Votes. A proxy vote may be approved by the business council for absences caused only by illness, military service, hospitalization or approved tribal business. Requests to the business council to vote by proxy shall be in writing and signed by the requesting council member.

(d) Meeting Notice. At least seven (7) days notice shall be given to each member by the chairperson, unless a regular time is specified by business council resolution.

(e) Absences. Absences from regular meetings must be excused by a majority vote of the business council members present. More than two successive absences not excused by majority vote of the business committee may be cause for removal of a business council member from office.

(f) Special Meetings. Special meetings of the business council may be called by the chairperson and shall be called when requested by a majority of the business council or upon written request of a majority of eligible voting members of the general council. The notice in regard to any special meeting shall be given at least seven (7) days prior to the meeting and shall specify the purpose of the meeting. Emergency meetings may be provided for in a business council resolution.

(g) Voting. Each member of the business council shall have one (1) vote on all matters, and all matters to be acted on at a business council meeting shall be

approved or disapproved by a majority vote of those present and voting, unless provided to the contrary in this constitution.

(h) Statutes, Code and Resolutions. Copies of all statutes, codes, resolutions or ordinances adopted by the business council, its committees and subcommittees shall be maintained at the tribal office and shall be available for inspection, upon reasonable notice, to all enrolled members of the tribe.

Section 6. Procedures

All meetings of the business council shall be conducted in accordance with Robert's Rules of Order.

ARTICLE IX - ELECTIONS

Section 1. Initial Business Council Election and Term

Within thirty (30) days after the approval of this constitution by the General Council an election shall be called pursuant to the requirements of this constitution, herein to elect the members of the Business Council. Election shall be by secret ballot. The three (3) members receiving the highest number of votes in the first election shall hold office for a period of three (3) years and the two remaining members shall hold office for a two (2) year period. Thereafter, all the terms of office shall be for two (2) years. Council members shall hold office for their term or until their successors are elected, qualified and installed.

Section 2. Election Date

Elections shall be held each year on the first Thursday of November. At the first regularly scheduled meeting following elections conducted pursuant to section 2 above, the business council shall select from among its members a chairperson, vice-chairperson and a secretary/treasurer to serve until their successors are selected as set forth herein.

Section 3. Statement of Intent

Any qualified member of the tribe who desires that his or her name be placed on the ballot as a candidate for the business council shall file with the tribal secretary a statement of intent stating his or her name, address and desire to become a candidate. Such statement shall be filed not less than thirty (30) days prior to the next election; provided, however, if only one or fewer qualified members files a statement of intent for candidacy a special meeting of the general council shall be convened for the purpose of taking nominations from the floor for a candidate or candidates for office.

Section 4. Form of Ballot, Rules of Election

The business council shall enact an ordinance prescribing the form of ballot, rules for calling election, absentee balloting, procedures, selection of election officials, establishment of polling places and other similar matters.

Section 5. Referendum, Initiative and Recall

(a) Referendum - The council shall, upon receipt of a petition signed by thirty percent (30%) of the qualified voters, submit any enacted or proposed tribal legislation to a referendum of the eligible voters. The decision of a majority of the voters voting in the referendum shall be final, providing thirty percent (30%) of the qualified voters voted. The tribal council shall call the referendum within (30) days from the date of the receipt of a valid petition. The vote shall be by secret ballot.

(b) Initiative - The qualified voters of the tribe reserve the power to independently propose tribal legislation. Any proposed initiative measure shall be presented to the business council accompanied by a petition signed by not less than thirty percent (30%) of the eligible voters of the general council. Upon receipt of such a petition, the business council shall call a special election for the purpose of allowing the members of the tribe to vote on the initiative measure. The election shall be held within thirty (30) days from the date a valid petition is presented. The initiative shall be final providing that thirty percent (30%) of the qualified voters have voted in such election.

(c) Recall - Upon receipt of a petition signed by at least thirty percent (30%) of the qualified voters of the tribe demanding a recall of any member of the tribal council, it shall be the duty of the tribal council to call a special election on the question of the recall within thirty (30) days from the date of the filing of the valid petition. The elections shall be held in the manner prescribed in an election ordinance to be promulgated in accordance with Article XI, Section I. Should the business council not call an election within thirty days (30) the office shall be declared vacant. The decision of a majority of the voters voting in the recall shall be final providing at least thirty percent (30%) of the qualified voters voted.

ARTICLE X - DUTIES OF OFFICERS

Section 1. Chairperson

The chairperson shall exercise the following powers as the chief executive officer of the tribe:

(a) To preside over and vote at all meetings of the business council;

(b) Subject to the approval of the business council, to appoint all non-elected officials and employees of the tribal government and direct them in their work, subject only to applicable restrictions embodied in this constitution or in enactments of the business council establishing personnel policies or government personnel management;

(c) Subject to the approval of the business council, to establish such boards, committees, or subcommittees as the business of the business council may require, and to serve an ex-officio member of all such committee and boards;

(d) Subject to the approval of all contracts by the business council, to serve as a contracting officer or agent for the tribe, including authority to retain legal counsel;

(e) Subject to such regulations and procedures as may be prescribed by statute, enacted by the business council, and subject to approval by the business council, to grant pardons or restore tribal members to eligibility for elective office in tribal government;

(f) Subject to the approval of the business council, to appoint tribal judges, tribal law enforcement officials as are from time to time required to assure the administration and enforcement of tribal laws; and

(g) The chairperson shall not engage in private renumerative employment which may pose a conflict of interest with the tribe's enterprises or business activities during his or her term of office.

Section 2. Vice-Chairperson

The vice-chairperson shall, with the consent of the business council, in the absence of the chairperson, perform all duties and assume all the responsibilities vested in the chairperson. The vice-chairperson shall, upon the request of the chairperson, assist in carrying out the duties of the chairperson. The vice-chairperson shall perform such other duties as the chairperson may direct.

Section 3. Secretary/Treasurer

The secretary/treasurer shall have the following powers and duties:

(a) Call the roll, handle all official correspondence of the business council, keep the minutes of all regular and special meetings of the business council and general council, certify to the Superintendent of the Bureau of Indian Affairs the duly elected officers of the business council within fifteen (15) days from the date of any election;

(b) To accept, receipt for, keep and safeguard all funds under the exclusive control of the tribe by depositing them in a bank insured by an agency of the federal government, or in an I.I.M. Account or tribal trust account with the Bureau of Indian Affairs, as directed by the business council and shall keep or cause to be kept an accurate record of such funds and shall report on all receipts and expenditures and the amount and nature of all funds in his or her custody to the business council at regular meetings and at such other times as requested. The secretary/treasurer shall not pay or otherwise disburse any funds in the custody of the business council except when properly authorized to do so by the business council;

(c) The treasurer may be required to give a surety bond satisfactory to the business council; and,

(d) All checks drawn on tribal funds shall be signed and all vouchers shall be approved for payment by the secretary/treasurer and at least one officer or designated check signer of the tribe in accordance with a written procedure approved and adopted by the business council by resolution.

ARTICLE XI - SEVERABILITY

If any provision of this constitution shall in the future be declared invalid by a court of competent jurisdiction, the invalid provision or provisions shall be severed and the remaining provisions shall continue in full force and effect.

ARTICLE XII - AMENDMENTS

This constitution may be amended by a majority vote of the qualified voters of the Rancheria voting at an election called for that purpose by the chairperson of the business council, provided that, at least two thirds of the qualified membership votes. It shall be the duty of the chairperson to call such an election or referendum at the request of a majority of the business council, or upon presentation of a petition proposing an amendment signed by at least fifty percent (50%) of the qualified voters. Amendments shall be effective from the date of approval of the General Council voting at a duly called election. Amendments shall be submitted to the Secretary of the Interior as a courtesy.

ARTICLE XIII - ADOPTION

This constitution, when adopted by the majority of the qualified voters of the Big Lagoon Rancheria voting at an election called for that purpose in which at least two thirds of those entitled to vote shall vote, shall become immediately effective but shall thereafter be submitted to the Secretary of the Interior for his information.

CERTIFICATE OF RESULTS OF ELECTION

Pursuant to an election held on May 14, 19 86, the foregoing Constitution of the Big Lagoon Rancheria, located in Humboldt County, California, was submitted to the qualified voters of the Big Lagoon Rancheria and was duly adopted on that date by a vote of 11 for and 0 against, constituting a majority of all eligible voters, in an election conducted in accordance with Article XIII, above.

Vivian Moorehead
Chairman, Big Lagoon Rancheria

Attest:

Beverly Moorehead
Secretary

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE INDIAN GAMING RELATED CASES

No. C 97-04693 CW

This document relates to:

No. C 99-04995 CW

BIG LAGOON RANCHERIA,

Plaintiff,

v.

STATE OF CALIFORNIA,

Defendant.

/

ORDER STAYING DECISION ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This is one of several related cases before the Court brought by Indian tribes pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721. Plaintiff Big Lagoon Rancheria (the Tribe) has filed a third motion for summary judgment and for an order declaring that Defendant State of California (the State) has been negotiating with Big Lagoon in bad faith under 25 U.S.C. § 2710(d)(7)(B)(iii). The State opposes the motion. The matter

was heard on May 30, 2003.

At the hearing, the parties informed the Court that the details of their Indian gaming compact negotiations have evolved and are substantially different from what was reflected in the exhibits to the parties' motion papers. The State informed the Court that the parties would require thirty days to finalize the draft compact then being discussed. The State further informed the Court that it would require thirty days thereafter to make its final decision regarding approval or disapproval of the compact.

In its March 18, 2002 order denying Plaintiff's second motion for summary judgment, the Court stated: "The Court expects that the parties will move swiftly toward negotiating and executing a tribal-State compact." This did not occur. It has been nearly ten years since compact negotiations between the Tribe and the State began. At this juncture, the Court is inclined to grant Plaintiff's motion. However, and although it may again not transpire, it appears that the parties may be able to execute a final a compact in the near future.

Accordingly, the Court STAYS decision on Plaintiff's motion for summary judgment (Docket No. 122), on condition that the following schedule is met: the parties finalize a draft compact on or before June 30, 2003 and file the draft compact with the Court on that date; the State makes its final decision regarding approval or disapproval no later than thirty days after the parties finalize the draft compact and files with the Court a report of its decision on that date. Plaintiff shall cooperate with the State in preparing the draft compact and shall respond to all reasonable

requests by the State within one business day of the request unless some other agreement between the parties is reached.

The Court further ORDERS the parties to file documents reflecting the status of their negotiations for a final draft compact no later than June 13, 2003.

IT IS SO ORDERED.

Dated: JUN 11 2003

CLAUDIA WILKEN
United States District Judge

Copies mailed to counsel
as noted on the following page

scc

United States District Court
for the
Northern District of California
June 11, 2003

* * CERTIFICATE OF SERVICE * *

Case Number:4:99-cv-04995

Big Lagoon Rancheria

vs

California, State of

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on June 11, 2003, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Peter J. Engstrom, Esq.
Baker & McKenzie
Two Embarcadero Center
Ste 2400
San Francisco, CA 94111

Koji F. Fukumura, Esq.
Cooley Godward LLP
4401 Eastgate Mall
San Diego, CA 92121-9109

Peter H. Kaufman, Esq.
State Attorney General's Office
110 West A Street, Suite 1100
P.O. Box 8266
San Diego, CA 92101

Richard W. Wieking, Clerk

BY: _____
Deputy Clerk

Case: 4:99-cv-04995

Allison Chang
Peter J. Engstrom, Esq.
Baker & McKenzie
Two Embarcadero Center
Ste 2400
San Francisco, CA 94111

RECEIVED
JUN 12 2003
ALLISON CHANG

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE INDIAN GAMING RELATED CASES

No. C 97-04693 CW

This document relates to:

No. C 99-04995 CW

BIG LAGOON RANCHERIA,

Plaintiff,

v.

STATE OF CALIFORNIA,

Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This is one of several related cases before the Court brought by Indian tribes pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721. Plaintiff Big Lagoon Rancheria (Big Lagoon, or the Tribe) has filed a third motion for summary judgment and for an order declaring that Defendant State of California (the State) has not been negotiating with Big Lagoon in good faith for an Indian gaming compact under 25 U.S.C.

§ 2710(d)(7)(B)(iii). The State has opposed the motion. The matter was heard on May 30, 2003. Post-hearing briefing was submitted. Having considered the papers filed by the parties and oral argument on the motions, the Court DENIES the motion without prejudice.

BACKGROUND

I. Legal Framework

IGRA sets out a statutory framework for the operation and regulation of gaming by Indian tribes. See 25 U.S.C. § 2702. IGRA provides that Indian tribes may conduct certain gaming activities only if authorized pursuant to a valid compact between the tribe and the State in which the gaming activities take place. See id. § 2710(d)(1)(C).

IGRA prescribes the process by which a State and an Indian tribe are to negotiate a gaming compact:

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

Id. § 2710(d)(3)(A); see also Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250, 1256-58 (9th Cir. 1994), amended on denial of reh'g by 99 F.3d 321 (9th Cir. 1996). IGRA provides that a gaming compact may include provisions relating to

> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
> (ii) the allocation of criminal and civil jurisdiction

> between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
> (v) remedies for breach of contract;
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
> (vii) any other subjects that are directly related to the operation of gaming activities.

Id. § 2710(d)(3)(C).

If a State fails to negotiate in good faith, the Indian tribe may, after the close of the 180-day period beginning on the date on which the Indian tribe asked the State to enter into negotiations, initiate a cause of action in a federal district court. See id. § 2710(d)(7)(A)(i).[1] In such an action, the tribe must first show that no tribal-State compact has been entered into and that the State failed to respond in good faith to the tribe's request to negotiate. See id. § 2710(d)(7)(B)(ii). Assuming the tribe makes this prima facie showing, IGRA provides that the "burden of proof" then shifts to the State to prove that it did in fact negotiate in good faith. See id. If the district court concludes that the State failed to negotiate in good faith, it "shall order the State and Indian Tribe to conclude such a compact within a 60-day period." Id. § 2710(d)(7)(B)(iii). If no compact is entered into within the next sixty days, the Indian tribe and the State must then each submit to a court-appointed mediator a proposed compact

[1] The State of California has consented to such suits. See Cal. Gov't Code § 98005; Hotel Employees & Rest. Employees Int'l Union v. Davis, 21 Cal.4th 585, 614 (1999).

that represents their last best offer. See id. § 2710(d)(7)(B)(iv). The mediator chooses the proposed compact that "best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court." See id. If, within the next sixty days, the State does not consent to the compact selected by the mediator, the mediator notifies the Secretary of the Interior, who then prescribes the procedures under which class III gaming may be conducted. See id. § 2710(d)(7)(B)(vii).

Factual Background[2]

The tribe and the State have been engaged in IGRA compact negotiations since the fall of 1993. The Court denied the Tribe's first motion for summary judgment in its March 22, 2000 order. In a March 18, 2002 order, which sets forth the facts of this case in greater detail, the Court denied the parties' cross-motions for summary judgment. The Court stated that the Tribe had presented evidence supporting a conclusion that the State had not negotiated in good faith. In particular, the Court noted that the Tribe had offered to sign the Model Compact previously proposed by the State, which the State had entered into with at least fifty-eight other tribes, but the State had refused. The Court also noted the State's continued insistence that the Tribe agree to a broad side-letter agreement that included a blanket provision requiring the Tribe to comply with all State environmental and land use laws and provided the State unilateral authority to grant or withhold

[2] Unless otherwise noted, there is no material dispute between the parties as to the following facts.

approval of the Tribe's gaming facility after the Compact was signed. On the other hand, the Court noted that the construction and operation of a gaming facility, especially one near the coast as it would be if located on the Tribe's land, has direct impacts on environmental and land use concerns. Environmental and land use laws can also be considered "standards for the operation of [gaming] activity and maintenance of the gaming facility" under § 2710(d)(3)(C)(vi).

Therefore, the Court found that the State may negotiate for provisions regarding environmental and land use issues as part of the compacting process, to the degree to which they are "directly related" to the Tribe's gaming activities or can be considered "standards" for the operation and maintenance of the Tribe's gaming facility under § 2710(d)(3)(C)(vi) and (vii). Accordingly, the State could in good faith ask the Tribe to make particular concessions that it did not require of other tribes, due to Big Lagoon's proximity to the coastline or other environmental concerns unique to Big Lagoon. The State could demonstrate the good faith of its bargaining position by offering the Tribe concessions in return for the Tribe's compliance with requests with which the other tribes were not asked to comply. The Court declined at that time to make a final determination of bad faith on the part of the State because of the novelty of the issue of good faith bargaining under the IGRA.

In the months after the issuance of the Court's March 18 order, the parties continued to negotiate for a compact. In June, 2002, the State made an innovative proposal to break the impasse

regarding environmental regulation of a gaming facility in the coastal area. The parties would enter into a compact based on the Model Compact, but the Tribe's gaming facility would be developed on a twenty-five acre State park site off of the Tribe's tribal lands. Under the State's proposal, the Tribe would deed to the State a five-acre parcel owned by the Tribe, which would have required the Tribe to pay down a promissory note secured by a deed of trust. The Tribe would also buy and transfer to the State another nearby eleven-acre parcel, or pay the State the market value of the eleven-acre parcel. The proposal further called for the imposition of numerous restrictions on residential tribal lands on which the gaming facility would not be built. These included lighting and night sky restrictions; siting, height and occupancy limitations for housing; vegetation standards; grading restrictions; and visual and aesthetic guidelines.

The parties negotiated over the State's alternative proposal, and the Tribe delayed refiling its summary judgment motion, apparently optimistic that this proposal would result in an agreement. Eventually, however, frustrated by what it perceived as the State's delay in finalizing the details of the proposal, the Tribe filed its current motion.

Based on the state of the negotiations represented in the motion papers, the Court was inclined to grant the motion, although it found the State's alternative proposal promising. At the May 30 hearing on the Tribe's motion, the parties informed the Court that their discussions had progressed beyond the point described in their motion papers. The parties had begun discussing a variation

of the State's alternative proposal, under which the Tribe would purchase the twenty-five acre State park site from the State, agree not to develop the five acre site and agree not to acquire the eleven acre site. At the hearing, the Tribe's counsel stated, referring to the variation of the State's alternative proposal described above: "We don't have the State's buyoff on the language Mr. Kaufman [the State's counsel] and I agree to in principle." Tr. at 6:12-13. He stated that he did not know whether this was because State officials were withholding approval for political reasons or because the officials were "victims of analysis by paralysis." Id. at 6:13-16. The State's counsel stated that a negotiating committee reviews his work and makes a recommendation to the governor.

Therefore, the Court stayed its decision on Big Lagoon's motion, to allow the State a limited amount of time to finalize the language of the necessary documents implementing its alternative proposal, reach an agreement in principle between the Tribe and the State's negotiators and seek a final decision from the Governor. The stay was conditioned on the State meeting a strict schedule, which in turn depended on the Tribe's cooperation. To allow the State to meet the schedule, the Court asked the Tribe to respond to all reasonable requests by the State within one business day of the request unless the parties reached some other agreement. The parties were to finalize a draft agreement no later than June 30, 2003. The State was then to make its final decision whether to approve the draft agreement thirty days thereafter. In an order dated June 11, 2003, the Court confirmed this schedule and ordered

the parties each to file on June 13, 2003 a report on the status of their negotiations.

Pursuant to the June 11 order, the parties filed their status reports on June 13. The State included with its report a draft copy of a settlement agreement, which would be executed in connection with the execution of a compact based on the Model Compact. The draft agreement called for the Tribe to pay fair market value for the twenty-five acre site, which would then be held in trust by the United States for the Tribe, agree not to develop the five acre site and not to acquire the eleven acre site. This was consistent with the state of the negotiations as described at the hearing. The draft agreement would permit the Tribe to use the five acre site for the Tribe's current cultural practices on the site. However, on June 12, the Tribe had disclosed for the first time that it objected to the aspect of the alternative proposal that the Tribe would not develop the five acre site or acquire the eleven acre site.

On June 30, 2003, the State filed an updated status report stating that no draft agreement had been finalized. According this report, the Tribe raised a number of new demands and objections during the negotiations that took place after the May 30 hearing. As noted above, the Tribe objected to the aspect of the State's alternative proposal that the five acre site not be developed and the eleven acre site not be acquired by the Tribe or developed. The Tribe added a demand that it retain its right to use the five and eleven acre sites for the practice of cultural activities identified and implicit in the Protection and Preservation of

Traditional Religions of Native Americans Act of 1998 and the Native American Free Exercise of Religion Act of 1993. The State contends that this went beyond the Tribe's previous request to be permitted to continue the cultural practices the Tribe had historically conducted on the site. The Tribe also requested several amendments to the Model Compact, including reduced State licensing fees for gaming machines, an increase in the number of gaming machines it would be permitted to operate and an exemption from State liquor laws. According to the State's updated status report, the Tribe discontinued negotiations after the State informed the Tribe that it could not agree to the fundamental alteration of the parameters of the alternative proposal that had been under discussion. The State also claimed that, on more than one occasion, the Tribe had taken more than one business day to respond to the State's proposals.

On July 2, 2003, the Tribe filed a response to the State's updated status report. In its response, the Tribe argues that the State unreasonably refused to consider the new objections and demands the Tribe raised in June. It contends that the State likewise failed to respond to all of the Tribe's proposals within one business day. It also points out that, in June, it learned for the first time that the twenty-five acre site actually contained only twenty-one acres.

The State filed a reply on July 10, 2003. With regard to the twenty-one acre site, the State contends that it was the Tribe that first described the State park site as a "twenty-five acre" parcel. It states that it adopted the Tribe's description of the site for

convenience. It further states that the borders of the site have always been understood, even though the acreage of the site has been determined to be lower than previously thought. The State also points out that, as a result of the lower acreage, the acquisition cost of the site will be commensurately lower.

On July 14, 2003, the Tribe submitted a letter in response to the State's reply. The State's reply and the Tribe's letter raise additional minor disputes regarding each party's account of the June negotiations. Each side contends that the other was responsible for the failure of the negotiations.

Because the parties have not complied with the schedule set by the Court, the Court lifts the stay it previously imposed. The Court DENIES Big Lagoon's motion for summary judgment without prejudice. Events subsequent to the original briefing and hearing have demonstrated that both parties were still actively negotiating the State's alternative proposal and have not finished doing so. The parties' failure to consummate an agreement is not due to the State's delays in drafting documents or obtaining final approval but to new issues raised by the Tribe. The State is not demonstrating bad faith if it continues to negotiate towards its alternative proposal.

DISCUSSION

I. Legal Standards for Summary Judgment

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P.

56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815 F.2d at 1289. The court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); [illegible] v. Hartford Fire & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Where a case would be tried to the Court and not a jury, the Court has broader authority to resolve the case on summary judgment. The Ninth Circuit has stated that

> where the ultimate fact in dispute is destined for decision by the court rather than by a jury, there is no reason why the court and the parties should go through the motions of a trial if the court will eventually end up deciding on the same record.

TransWorld Airlines, Inc. v. American Coupon Exchange, Inc., 913 F.2d 676, 684 (9th Cir. 1990).

II. The Tribe's Motion

The issue on this motion, as on the Tribe's previous motions,

is whether the State has negotiated in good faith as required under the IGRA.

Since the hearing on Plaintiff's motion, the Ninth Circuit has provided some guidance in this area, affirming this Court's order, in one of the cases related to this one, denying the motion of the Coyote Valley Band of Pomo Indians (Coyote Valley Band) for an order requiring the State to negotiate a gaming compact with it pursuant to the IGRA. In re Indian Gaming Related Cases, __ F.3d __, 2003 WL 21349313 (9th Cir. 2003). The Ninth Circuit determined that the State had "actively negotiated" with the Coyote Valley Band and that the provisions to which the Coyote Valley Band objected were not barred under the IGRA. See id. *15-22.

As discussed above, at the May 30 hearing and in its June 11 order, this Court indicated that it was inclined to grant the Tribe's motion. Intervening circumstances have changed the Court's view. At the hearing, the Tribe's counsel represented to the Court that the parties were close to executing an agreement and that an agreement in principle had been reached between counsel. The further briefing filed by the parties shows that the parties were not able to execute a compact because of the new demands made by the Tribe in June. The Tribe made no mention of these issues at the May 30 hearing. In light of these events, the Court cannot conclude that the State has failed actively to negotiate with the Tribe. It is apparent, at least in recent months, that the parties have engaged in a meaningful interactive process, with good faith and timely participation by the State. The Court continues to believe that the State's alternative proposal is a promising avenue

for negotiations and encourages the parties to continue their discussions.

CONCLUSION

For the foregoing reasons, the Tribe's motion (Docket No. 122) is DENIED without prejudice. The Tribe may file a further motion for summary judgment no sooner than ninety days from the date of this order.

IT IS SO ORDERED.

Dated: AUG - 4 2003

CLAUDIA WILKEN
United States District Judge

Copies mailed to counsel
as noted on the following page

FILE COPY

scc

United States District Court
for the
Northern District of California

* * CERTIFICATE OF SERVICE * *

Case Number:4:99-cv-04995

Big Lagoon Rancheria

vs

California, State of

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on AUG 5 [illegible], I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Peter J. Engstrom, Esq.
Baker & McKenzie
Two Embarcadero Center
Ste 2400
San Francisco, CA 94111

Koji F. Fukumura, Esq.
Cooley Godward LLP
4401 Eastgate Mall
San Diego, CA 92121-9109

Peter H. Kaufman, Esq.
State Attorney General's Office
110 West A Street, Suite 1100
P.O. Box 8266
San Diego, CA 92101

Richard W. Wieking, Clerk

BY: _____
Deputy Clerk

I. PROJECT MITIGATION MEASURES

In order to mitigate adverse off-rancheria impacts of the Tribe's Gaming Facility, the Tribe agrees that:

1.1 Geology and Soils

1.1.1 Development and construction of the Project shall minimize cut and fill operations and erosion and sedimentation potentials through construction of temporary and permanent sediment basins, seeding or planting bare soil, diversion of run-off away from graded areas and avoidance of grading during the rainy season (November through April). Any Project-required grading shall follow a grading plan certified by a qualified California licensed Engineer to meet or exceed grading and soil compaction standards set forth in the Applicable Codes, as defined in section 2.1 of this Compact.

1.2.1 Soils in the foundation, parking lot and roadway shall be evaluated for structural suitability by a qualified California licensed geologist and the geologist's recommendations to reduce the potential for soil expansion or liquifaction, if any, shall be implemented.

2.1 Hydrology and Water Quality

2.1.1 The Project will have a Storm Water Pollution Prevention Plan (SWPPP) that meets U.S. Environmental Protection Agency standards for the construction phase prepared by a qualified California licensed civil engineer and which shall be implemented by the construction contractor. The plan shall incorporate the following measures to assure that any release of waters from the Project site shall not exceed the natural rate of runoff:

2.1.1.1 Use of appropriate construction best management practices (BCPs) at the Project construction site to prevent water quality impacts throughout the duration of construction.

2.1.2.1 Using soil stabilization techniques to protect finished graded slopes from erosion, such as straw mulching, hillslope benching erosion control matting, hydroseeding, revegetation or preservation of existing vegetation;

2.1.3.1 Covering of soil stockpiles and excavations with impermeable materials during periods of inclement weather to control movement of sediment;

2.1.4.1 Containment of sediment by using such measures as silt fencing, straw bale sediment barriers, diversion dikes and swales, sediment traps, and gravel pads at construction equipment exit points from the site;

2.1.5.1 A Hazardous Materials Management Plan;

2.1.6.1 Areas disturbed during construction grading within 100 feet of the 18-foot contour line shall be restored to original contours and replanted with native vegetation.

2.2.1 The Project will have an operational SWPPP that meets U.S. Environmental Protection Agency standards prepared by a qualified California licensed engineer. Such plan shall include:

2.2.1.1 Stormwater detention measures that would reduce the peak runoff from the site to levels equal or less than those under pre-development conditions for all storm frequency events up to the 100-year, 24-hour storm and to assist with water quality;

2.2.2.1 Vegetative bioswales;

2.2.3.1 A wet detention pond;

2.2.4.1 Segregation of roof runoff from parking lot run off and routing of roof runoff to edges of Big Lagoon for water dispersement; and

2.2.5.1 Provisions to assure that no more than 25% of the Project site's surface is covered with impervious material.

3.1 Biological Resources

3.1.1 If construction occurs during raptor nesting season (February through July), the following measures shall be implemented:

3.1.1.1 A qualified wildlife biologist will conduct a pre-construction survey for nesting raptors within 30 days of the onset of construction; and

3.1.2.1 If nesting raptors are identified on site, the Tribe shall implement the appropriate measures, including a set back zone around the nest, recommended by the wildlife biologist.

4.1 Aesthetics

4.1.1 Outdoor lighting shall comply with the standards adopted by the California Energy Commission and no lighting beyond the minimum necessary to assure public safety shall be operated. Only low voltage and low wattage systems shall be incorporated in the Project. Shielded and cut-off lighting fixtures shall be utilized so that no light is emitted above the horizontal so that sky glow is effectively reduced. High efficiency lighting shall emit only naturally colored light. Motion-sensing devices, rather than dusk-to-dawn security flood lights shall be utilized. Signage lights shall be aimed solely at the signs.

4.2.1 No sign larger than 40 square feet shall be utilized. No signage shall be directed at or visible from Highway 101, Big Lagoon, the Merlo Recreation Area or

Humboldt Lagoons State Park. No signage for the casino or any related development shall be located closer than 50 feet from any public roadway, including signage located either on or off the Rancheria.

4.3.1 The Project shall utilize building materials and colors that blend with the surrounding natural environment with no glass on the side of the Project's casino structure facing the lagoon or park property. Glass on any hotel structure shall prevent the emission of internal light to the maximum extent practicable with daytime viewing of the exterior environment.

4.4.1 The Project shall be landscaped with native vegetation. Native vegetation means plants from local genetic stocks within Humboldt County. If such plants are not available, then native vegetation from genetic stock outside the local area may be utilized but only if it is from within the adjacent region of the floristic province. No plant species listed as problematic, a "noxious weed" or invasive by the California Native Plant Society, the California Invasive Plant Council, the State of California or the federal government shall be planted or allowed either to interfere with the native vegetation's visual screening function of the Project from the lagoon or the park or adversely affect park, ecological preserve or recreation area resources.

4.5.1 The Project casino and any necessary infrastructure shall be 80% screened from public viewing areas located in the adjacent park and recreation areas, as well as from Highway 101, by the overlapping planting and permanent protection of vegetation 15 to 20 feet high that is native to the area. The Project hotel shall be free standing and separate from the Project casino.

4.6.1 No portion of any Project building or infrastructure shall exceed 30 feet above the highest point of a foundation or three stories in height, whichever is less. With the exception of a 50-car valet parking lot screened from the lagoon by the casino structure, all parking for the Project shall be located below the existing grade of the site;

4.7.1 No portion of any Project structure shall be closer than 100 feet from the 18-foot contour line in the lagoon or 15 feet from any State recreation area property line.

5.1 Traffic and Transportation

5.1.1 Access to the Project from Highway 101 and Park Road shall meet all State and federal standards relevant to a project with the Project's projected traffic volumes.

6.1 Noise

6.1.1 No noise shall be emitted by gaming, other entertainment, food service, or performance activities occurring at the Project at any time that is above current ambient levels.

6.2.1 Quiet construction equipment shall be utilized.

6.3.1 Construction activities shall be limited to the hours from 7am to 7pm.

7.1 Air Quality

7.1.1 To control construction dust during the grading and excavation phase of the Project, the following mitigation measures shall be implemented:

7.1.1.1 All material excavated, stockpiled, or graded shall be sufficiently watered, treated, or covered to prevent fugitive dust from leaving the property boundaries and causing a public nuisance or violation of an ambient air standard. Watering should occur at least twice daily, with complete site coverage, preferably in the mid-morning and after work is completed each day.

7.1.2.1 All areas of the site (including unpaved roads) with vehicle traffic shall be watered or have a dust palliative applied as necessary for stabilization of dust emissions.

7.1.3.1 All on-site vehicle traffic shall be limited to a speed of 15 mph on unpaved roads.

7.1.4.1 Access roadways shall be swept if visible soil material is carried out from the construction site.

7.1.5.1 All inactive portions of the construction site shall be covered seeded, or watered until a suitable cover is established.

8.1 Water Supply

8.1.1 The Project shall have approximately 300,000 gallons of on-site water storage for emergency supply and fire protection.

8.2.1 Wastewater disposal activities shall be located a minimum of 100 feet from any active water well.

9.1 Waste Water

9.1.1 The Project shall have a tertiary wastewater treatment facility. The facility shall meet all state and federal water quality standards applicable to projects in Humboldt County including, but not limited to, leachfields that are able to treat the entire wastewater output of the Project and a reserve leachfield or leachfields of the same size. Both the regular and reserve leachfields shall have a percolation rate capable of safely handling the expected wastewater load. An effective sludge disposal plan shall be implemented. The Project shall be monitored and inspected in accordance with section 12.3(b) of the Compact. The Tribe shall ensure that such inspections occur no less than twice yearly. The Tribe shall comply with any requirements imposed by the inspecting entity. A wastewater system operator shall be present at the site or on call 24 hours a day and present at the site at least

20 hours per week. In the event of a sewage spill, the Tribe shall immediately notify the state, county, and federal health inspectors referenced in section 12.3(b) of the Compact and take immediate corrective action in accordance with applicable law and this Compact.

EXHIBIT 5A

Holland+Knight

Tel 213 896 2400
Fax 213 896 2450

Holland & Knight LLP
633 West Fifth Street, 21st Floor
Los Angeles, CA 90071-2040
www.hklaw.com

Rory E. Dilweg
213 896 2563
rory.dilweg@hklaw.com

February 20, 2008

RECEIVED
FEB 2 2008
Peter J. Engstrom

VIA UPS AND ELECTRONIC MAIL

Andrea Lynn Hoch, Esq.
Legal Affairs Secretary
Office of Governor Arnold Schwarzenegger
State Capitol
Sacramento, CA 95814

Re: Revised Draft Gaming Compact between the State of California and the Big Lagoon Rancheria

Dear Ms. Hoch:

Please find enclosed our revised draft of the proposed gaming compact between the State of California and the Big Lagoon Rancheria in preparation for our negotiation session on February 25, 2008, in Sacramento, California.

This draft compact should not be considered a response to your letter dated January 3, 2008. We will be providing a written response to that letter under a separate cover.

Please let me know if you have any questions or comments.

Sincerely yours,

HOLLAND & KNIGHT LLP

Rory E. Dilweg

Enclosures

cc: Virgil Moorehead, Chairman
Peter J. Engstrom, Esq.
Jerome L. Levine, Esq.

TRIBAL-STATE COMPACT

BETWEEN

THE STATE OF CALIFORNIA

AND THE

BIG LAGOON RANCHERIA

TRIBAL-STATE COMPACT
BETWEEN THE STATE OF CALIFORNIA AND
THE BIG LAGOON RANCHERIA

The Big Lagoon Rancheria (the "Tribe"), a federally recognized Indian tribe, and the State of California (the "State") enter into this tribal-state compact pursuant to the Indian Gaming Regulatory Act of 1988 (IGRA").

PREAMBLE

WHEREAS, the ~~trust lands~~ which constitute the Big Lagoon Rancheria ~~are contiguous to Big Lagoon along the coastline of Humboldt County, contiguous to the Harry A. Merlo Recreation Area, adjacent to the Big Lagoon County Park, and across the lagoon from Humboldt Lagoons State Park~~ ("Rancheria") are located in Humboldt County, California and overlook a lagoon known as "Big Lagoon," and

WHEREAS, the Tribe seeks to establish a resort and casino on the ~~lands that constitute the Big Lagoon~~ Rancheria with respect to the latter, pursuant to the Indian Gaming Regulatory Act of 1988 (P.L. 100-497, codified at 18 U.S.C. Sec. 1166 et seq. and 25 U.S.C. Sec. 2701 et seq.) (hereafter "IGRA"). The specific location of the resort and casino is referenced herein as the "Site"; and

~~[ADDITIONAL LANGUAGE TO BE DEVELOPED]~~

~~WHEREAS, in consideration of the exclusive rights enjoyed by the Tribe to engage in certain Gaming Activities and to operate the Gaming Devices specified herein, and the other meaningful concessions offered by the State in good faith negotiations, the Tribe has agreed, inter alia, to provide to the State, on a sovereign to sovereign basis, a fair revenue contribution from the Gaming Devices operated pursuant~~ ,

WHEREAS, the purposes of IGRA are to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self- sufficiency, and strong tribal governments; to provide a statutory basis for regulation of Indian gaming adequate to shield it from organized crime and other corrupting influences; to ensure that the Indian tribe is the primary beneficiary of the gaming operation; to ensure that gaming is conducted fairly and honestly by both the operator and players; and to declare that the establishment of an independent federal regulatory authority for gaming on Indian lands, the National Indian Gaming Commission, are necessary to meet congressional concerns; and

WHEREAS, the system of regulation of Indian gaming fashioned by Congress in IGRA rests on an allocation of regulatory jurisdiction among the three sovereigns involved: the federal government, the state in which a tribe has land, and the tribe itself. IGRA makes Class III gaming activities lawful on the lands of federally-recognized

Indian tribes only if such activities are: (1) authorized by a tribal ordinance, (2) located in a state that permits such gaming for any purpose by any person, organization or entity, and (3) conducted in conformity with a gaming compact entered into between the Indian tribe and the state and approved by the Secretary of the Interior; and

WHEREAS, the Tribe and the State share a joint sovereign interest in ensuring that tribal Gaming Activities are free from criminal and other undesirable elements; and

WHEREAS, this Compact will afford the Tribe primary responsibility over the regulation of its Gaming Activities and Gaming Facility and will enhance ~~tribal~~Tribal economic development and self-sufficiency; and

WHEREAS, the State and the Tribe have therefore concluded that this Compact protects the interests of the Tribe and its members, the surrounding community, and the California public, and will promote and secure long-term stability, mutual respect, and mutual benefits; and

WHEREAS, the State and the Tribe agree that all terms of this Compact are intended to be binding and enforceable; and

WHEREAS, in consideration for the mutual promises and agreements set forth herein the parties have entered into this Compact;

NOW, THEREFORE, the Tribe and the State agree as set forth herein:

SECTION 1.0. PURPOSES AND OBJECTIVES.

Section 1.1 The terms of this Compact are designed to:

(a) ~~Foster~~foster a mutually respectful government-to-government relationship that will serve the mutual interests of the parties.

(b) ~~Develop~~develop and implement a means of regulating Class III Gaming to ensure its fair and honest operation in a way that protects the interests of the Tribe, the State, its citizens, and local communities in accordance with IGRA and, through such regulated Class III Gaming, enable the Tribe to develop self-sufficiency, promote tribal economic development, and generate jobs and revenue to support the Tribe's government and its governmental services and programs.

(c) ~~Promote~~promote ethical practices in conjunction with such Class III Gaming, through the licensing and control of persons and entities employed in, or providing goods and services to, the Tribe's Gaming Operation, protect against the presence or participation of persons whose criminal backgrounds, reputations, character, or associations make them unsuitable for participation in gaming, thereby maintaining a

EXHIBIT 7

OFFICE OF THE GOVERNOR

May 2, 2008

Via Facsimile: (415) 576-3099, Electronic & U.S. Mail
Peter J. Engstrom, Esq.
Baker & McKenzie
Two Embarcadero Center, 24th Flr.
San Francisco, California 94111-3909
peter.j.engstrom@bakernet.com

Via Facsimile: (213) 896-2430, Electronic & U.S. Mail
Jerome Levine, Esq.
Holland & Knight LLP
633 W 5th St 21st Flr.
Los Angeles, CA 90071-2040
jerry.levine@hklaw.com

Re: Big Lagoon Rancheria

Dear Gentlemen:

Thank you for your letter dated March 21, 2008, wherein you outlined Big Lagoon's position on the location and scope of the Tribe's proposed gaming-hotel facility. Since sending this letter, you have asked for a response in advance of our May 6, 2008 meeting. In response to your request, I am writing this letter. Please be informed that the State's offer contained in this letter is contingent on the Governor's final approval.

In summary, the Tribe proposes that a gaming compact provide for a first phase with room for expansion in subsequent phases. For the first phase, the Tribe proposes; (1) a casino with 350 gaming devices; (2) a lodge with at least 120 guestrooms; and (3) all amenities associated with a modestly-sized, upscale facility. Your letter states that the Project will be no more than 5 stories tall and designed to be compatible with the surrounding landscape at Big Lagoon. You also state that the wastewater treatment and parking would be contained within the

approximately 20 acres of trust land currently held by the Tribe. Your letter also states that the compact should provide for future expansion, but does not include any provisions that address future expansion.

With respect to compact provisions related to the siting of a casino and related development, the State continues to offer the opportunity to explore using a site other than the Tribe's rancheria for the location of a casino and any related development. This preference stems from the State's vital interest in preserving and protecting, for present and future generations, environmentally significant State resources located adjacent to the rancherias. In this regard, the State has been approached with a couple of opportunities. While your letter states, for the first time, that the Chairman is not interested in possible alternative sites, if the Tribe is interested in exploring these opportunities, please let me know. I can arrange a meeting with the interested parties at a mutually-convenient time.

In the State's January 31, 2008 letter, the State offered a unique three-tiered approach, which focused on alternative sites and only addressed the Tribe's rancheria site if the contingencies for the alternative sites did not occur. Based on your March 21, 2008 letter, the Tribe has rejected this approach.

Due to the environmentally sensitive nature of the Tribe's rancheria site, the State is willing to agree to a smaller facility with the following economic provisions:

(1) Authorization to operate up to 99 gaming devices
(2) A 50-room hotel
(3) Geographic exclusivity of 50 miles
(4) Revenue contribution to the State as follows: 10% of annual net win from $0 to $50 million; 14% of annual net win from over $50 to $100 million; 18% of annual net win from over $100 million to $150 million; 22% of annual net win from over $150 million to $200 million; and 25% of annual net win for over $200 million
(5) Tribe continues to receive annual RSTF payments, with the condition that these monies cannot be used for any gaming or gaming-related activities.

With regard to the siting, it appears that the State and the Tribe have a difference of opinion on the eligibility of the 11-acre parcel for gaming. It is the State's offer that the compact provide that a casino could be constructed and operated on the original rancheria ("9 Acre Parcel") and a casino-related hotel on the Tribe's post-1988 trust lands ("11 Acre Parcel"). The State is willing to work with the Tribe on determining the best configuration to minimize the adverse impact on the lagoon.

With regard to any development of the Tribe's rancheria site, the State's January 31, 2008 letter includes a list of Development Conditions attached in Appendix A. Because you have provided us with no new environmental information about the site to suggest otherwise, the State continues to believe that these conditions are necessary for the development of a tribal casino and hotel facility on the Tribe's rancheria due to the environmentally sensitive nature of the site.

Finally, as to the remaining non-economic provisions, the State proposes that the parties use the most recent North Fork compact for its discussions. As you know, the North Fork compact was signed on Monday, April 28, 2008.

Thank you in advance for your consideration of the State's proposals. We look forward to discussing these proposals at our May 6th meeting.

Sincerely,

ANDREA LYNN HOCH
Legal Affairs Secretary

EXHIBIT 3A

OFFICE OF THE GOVERNOR

November 19, 2007

RECEIVED
NOV [illegible] 2007
Peter J. Engstrom

Peter J. Engstrom, Esq.
Baker & McKenzie
Two Embarcadero Center, 24th Flr.
San Francisco, CA 94111-3909

Dear Mr. Engstrom:

At our second compact negotiation session on October 25, 2007, you requested that the State provide the Tribe with proposed language for compact provisions that would be unaffected by the actual siting of the Tribe's Gaming Facility. Responsive to that request, the State has prepared the enclosed working draft for your consideration. Final language and terms will be subject to the Governor's approval.

Presently, we have scheduled our next negotiation session on December 10th. If, after your review, the Tribe has proposed changes to the language in this document, please send the Tribe's proposed changes a few days before the scheduled negotiation session. This will help to facilitate a discussion of those changes.

Regarding the siting of the Tribe's proposed Gaming Facility, you will see that we left a placeholder in the enclosed draft for language to be added once a site for the Gaming Facility is selected. In addition to considering the Tribe's proposed Rancheria site, the State is interested in exploring possible alternative sites and would like to discuss these sites with you at our next meeting. Once we address the siting of a Gaming Facility, the State can propose more detailed compact language addressing the location and related topics.

I would like to reiterate my appreciation for Chairman Moorehead's gracious hospitality, on October 27, 2007, in taking the time to give us a tour of the proposed Rancheria site, the Tribe's 16 acres held in fee located on the lagoon between the Harry Merlo Recreation Area and the County park, and the five acre parcel the Tribe seeks to convey to the United States in trust for the Tribe that is located at the corner of Park Road and Highway 101. Personally viewing the resources at Big Lagoon provided me with a real-life context for discussing the Tribe's proposed Gaming Facility on the Tribe's Rancheria.

Should you have any questions, please feel free to contact me or Sylvia Cates at (916) 445-0873.

Sincerely,

Andrea Lynn Hoch

ANDREA LYNN HOCH
Legal Affairs Secretary

Enclosures

EXHIBIT 4

OFFICE OF THE GOVERNOR

January 31, 2008

Via Facsimile (415) 576-3099, Electronic Mail & U.S. Mail

Peter J. Engstrom, Esq.
Baker & McKenzie
Two Embarcadero Center, 24th Floor
San Francisco, California 94111-3909
peter.j.engstrom@bakernet.com

Via Facsimile (213) 896-2450, Electronic Mail & U.S. Mail

Jerome Levine, Esq.
Holland & Knight LLP
633 W 5th Street, 21st Floor
Los Angeles, California 90071-2040
Jerry.Levine@hklaw.com

Re: Big Lagoon Rancheria

Dear Messrs. Engstrom and Levine:

At our third compact negotiation session on December 10, 2007, we discussed the State's November 19, 2007, proposal for compact language addressing non-economic issues. During the meeting, the State and the Tribe identified some specific provisions that require further discussion and clarification. Also, Mr. Levine indicated that the Tribe may have additional comments after the Tribe and its counsel have completed their review of the State's proposal. He also stated that the Tribe would like to discuss environmental provisions separately. In that regard, if you provide my office with some potential dates for such a meeting, my assistant, Cristi Caspers, will arrange the scheduling.

With respect to compact provisions related to the siting of a casino and related development, as mentioned in our November 19, 2007, offer and discussed in the December negotiation session, the State proposes using a site other than the Tribe's rancheria for the

location of a casino and any related development. This proposal stems from the State's vital interest in preserving and protecting, for present and future generations, environmentally significant State resources located adjacent to the rancheria.

We understand, however, the Tribe's reluctance to embark on another effort to obtain the necessary third-party approvals for a casino site other than on Big Lagoon's trust lands, given its experience with the Barstow proposal. In an attempt to bridge the gap between the Tribe's desire for a compact that will allow it to construct and operate a casino with the least complications, as soon as possible, and the State's desire to protect its unique natural resources and valuable park properties for the enjoyment of this and future generations, the State suggests that the siting provisions of the compact be structured in the following fashion.

The compact would provide for three possible locations for a casino and related development, prioritize each location and establish the separate and unique conditions under which a casino and related development could be built and operated at each location. In our proposal, the compact would give first priority to development and operation of a casino and related development on a parcel we have identified that is located adjacent to the highway within five miles of the Big Lagoon Rancheria ("Highway Site"). We can arrange a meeting with the owner and a site visit to view the parcel. Second priority would go to the construction of a casino on the Tribe's original rancheria and a hotel on the Tribe's post-1988 trust lands with the waste water treatment and all patron and employee parking for the hotel and casino to be located on the five-acre parcel the Tribe owns in fee on Park Road ("Five Acre/Rancheria Site"). The last priority for development would go to a casino project on the Tribe's original rancheria and a hotel on the Tribe's post-1988 trust lands with all related parking and other development to be split between those two parcels ("Rancheria Site").

A casino on the Highway Site would be authorized to operate up to 500 gaming devices, as well as a 100-room hotel and related parking, waste and potable water treatment facilities. The land would be acquired by an appropriate land use conservancy from its present owner and then conveyed to the United States in trust for the Tribe in return for the Tribe's conveyance of the sixteen acres it owns in fee alongside Big Lagoon between the Harry Merlo State Recreation Area and the County Park ("16 Acres"). The Tribe would also make an enforceable commitment to limit development on its existing rancheria and trust lands in the same manner it agreed to do so in return for the right to develop on the Barstow site ("Rancheria Restrictions"). While this site would require a number of third-party approvals, it affords the Tribe a site with significant economic potential, while protecting the resources at Big Lagoon not only for the public at large but for the Tribe itself. Though some environmental constraints (to be negotiated) would no doubt have to be placed on site development and operation, the site's location alongside the

highway would solve the visibility and access constraints the other sites possess. In order to provide the Tribe with assurance of the feasibility of this proposal, before including this site in a compact, the State would provide the Tribe with letters from the property owner, the acquiring conservancy, the staffs of Humboldt County Planning Department, the California Coastal Commission, the Department of Parks and Recreation, and the Department of Fish & Game indicating their support of the necessary conveyances.

With such letters forthcoming, the compact would provide that the Highway Site would be the only site upon which a casino could be constructed and operated unless and until, in the course of executing a multiple escrow agreement, one of the following contingencies occurred: (a) the property owner failed to convey the property to the conservancy upon the Secretary of the Interior's approval of the conveyance of the property to the United States in trust for the Tribe; (b) the conservancy failed to accept that conveyance and provide the required consideration to the property owner upon the Secretary of the Interior's approval of the conveyance of the property to the United States in trust for the Tribe; (c) the conservancy failed to convey the property to the United States in trust for the Tribe upon the Secretary of the Interior's approval of the acquisition of the subject property in trust for the Tribe, the Tribe's conveyance of the 16 Acres to the conservancy; the Secretary's approval pursuant to 25 U.S.C. § 81 of the Rancheria Restrictions and the Secretary's approval and Federal Register Publication of notice of the approval of the compact; (d) the Humboldt County Board of Supervisors failed to approve any required subdivision of the property; (e) the California Coastal Commission failed to approve any required subdivision of the property or any required consistency determination pursuant to the federal Coastal Zone Management Act for conveyance of the property to the United States; or (f) the Governor failed to concur in the conveyance of that property to the United States for the purpose of conducting gaming.

In the event one of those contingencies occurred, the compact would provide that a 250-device casino could be constructed and operated on the original rancheria ("9 Acre Parcel") and a 50-room casino-related hotel could be constructed on the Tribe's post-1988 trust lands ("11 Acre Parcel"), but only if all parking lots for patrons and employees as well as the waste water treatment plant and leach fields for the casino and hotel were located on the five-acre parcel the Tribe owns in fee on Park Road and only if the conditions set forth in Appendix A are met.

If, however, either the California Coastal Commission, Humboldt County or any other State or local agency fails to provide a required approval for the use of the five-acre parcel for parking, a waste water treatment facility, leachfields or the shuttling of patrons and employees to the casino or hotel from that property within two years of the date that agency has received what it deems to be a completed application for such approval from the Tribe (excluding the time for

the conclusion of any litigation that might be filed), the compact shall provide that the Tribe may construct and operate a 175-device casino on the 9 Acre Parcel and a 50-room hotel on the 11 Acre Parcel along with any other related facilities but only so long as all the conditions for development of the Five Acre/Rancheria site set forth in Appendix A are met with the exception of conditions that are specific to that site and the additional requirement that any parking for the casino and hotel is 100 percent screened from public viewing areas located in adjacent park and recreation areas, as well as from Highway 101, by the overlapping planting and permanent protection of vegetation fifteen to twenty feet high that is native to the area.

With respect to the revenue sharing and other economic provisions of a compact, the State proposes the following for each site location:

Highway Site (contingent upon [illegible])

1. The Tribe shall be authorized to operate up to 500 gaming devices.

2. A 100-room hotel shall be authorized at the site.

3. The Tribe shall have geographic exclusivity of 50 miles.

4. In consideration of exclusive rights to operate gaming devices, the Tribe shall pay the State the following percentages of its net win generated from the operation of all gaming devices:

Annual Net Win	Percentage
$0-$25 million	14%
$25 million to $50 million	16%
$50 million to $75 million	20%
$75 million to $100 million	22%
Over $100 million	25%

5. The Tribe shall pay a per-device fee, the amount to be discussed, to the RSTF.

Five-Acre/Rancheria Site

1. The Tribe shall be authorized to operate up to 350 gaming devices.

2. A 50-room hotel shall be authorized at the site.

3. The Tribe shall have geographic exclusivity of 50 miles.

4. In consideration of exclusive rights to operate gaming devices, the Tribe shall pay the State the following percentages of its net win generated from the operation of all gaming devices:

Annual Net Win	Percentage
$0-$25 million	12%
$25 million to $50 million	14%
$50 million to $75 million	20%
$75 million to $100 million	22%
Over $100 million	25%

5. RSTF to be discussed.

Rancheria Site:

1. The Tribe shall be authorized to operate up to 175 gaming devices.

2. A 50-room hotel shall be authorized at the site.

3. The Tribe shall have geographic exclusivity of 50 miles.

4. In consideration of exclusive rights to operate gaming devices, the Tribe shall pay the State the following percentages of its net win generated from the operation of all gaming devices:

Annual Net Win	Percentage
$0-$25 million	12%
$25 million to $50 million	14%
$50 million to $75 million	20%
$75 million to $100 million	22%
Over $100 million	25%

5. RSTF to be discussed.

With respect to class II gaming, the State proposes to include language in the compact similar to the text of section 4.3(a) in the previously-negotiated compact between the Tribe and the State, tailored to these particular sites.

The final terms of a compact are, of course, subject to the approval of the Governor. We look forward to your response to this compact proposal.

Sincerely,

ANDREA LYNN HOCH
Legal Affairs Secretary

Appendix A
Development Conditions
Rancheria Site

1. Patrons and employees are not permitted to drive to the casino or hotel but are required instead to take a shuttle from the parking lot to the casino and hotel.
2. No portion of the casino structure, hotel structures, or any other development is closer than 200 feet from the 18-foot contour line in the lagoon or 30 feet from any State recreation area property.
3. No portion of the casino structure, the hotel structure, or any other development exceeds 30 feet above the existing grade of the property and no structure consists of more than two stories.
4. Any second story of a casino or hotel structure is set back five feet from the side of the first story building facing Big Lagoon.
5. All structures use building materials and colors that blend with the surrounding natural environment with no glass on the side of the casino structure facing the lagoon or park property. Glass on the hotel structure possesses properties that prevent the emission of internal light to the maximum extent practicable with daytime viewing of the exterior environment.
6. The casino and any infrastructure or hotel or casino related structures are100 percent screened and the hotel structure alone is 80 percent screened from public viewing areas located in adjacent park and recreation areas, as well as from Highway 101, by the overlapping planting and permanent protection of vegetation fifteen to twenty feet high that is native to the area.[1]
7. All native vegetation is maintained in good condition throughout the life of the casino and hotel structures. If any of the existing trees or any of the trees and plants to be planted die or become decadent, rotten, or weakened by decay or disease, or are removed for any reason, they are replaced in-kind or with native vegetation that will grow to a similar or greater height.
8. No plant species listed as "problematic," a "noxious weed" or invasive by the California Native Plant Society, the California Invasive Plant Council, the State of California or the federal government is planted on either parcel or allowed either to interfere with the native vegetation's visual screening function or adversely affect State park, ecological preserve or recreation area resources.
9. No more than 25% of either parcel's surface is impervious.
10. Release of storm water to the lagoon does not exceed the natural rate of runoff.
11. Stormwater outfalls and gutters are dissipated.
12. The waste water treatment facility and any leachfields meet Regional Water Quality Control Board Standards. Those standards, include but are not limited to:
    i. Leachfields are able to treat the entire wastewater output of a facility and there must be a reserve leachfield of the same size. Both the regular and

[1] Native vegetation means plants from local genetic stocks within Humboldt County. If such plants are not available, then native vegetation from genetic stock outside the local area, but from within the adjacent region of the floristic province may be used.

reserve leachfields must have a percolation rate capable of safely handling the expected wastewater load.

ii. An effective wastewater sludge disposal plan must be implemented.

iii. A reviewing entity independent of tribal control and equivalent to Regional Water Quality Control Board monitoring of the facility must be in place prior to operation and permitted to inspect the facility at least twice a year.

iv. The following monitoring system must be utilized by the reviewing entity:

1. Wastewater system monitoring

	Parameter	Influent	Effluent
a.			
b.	Flow (gpd)	Continuous	Continuous
c.	BOD(mg/L)	Monthly	Monthly
d.	TSS (mg/L)	Monthly	Monthly
e.	Turbidity (NTU)		Continuous
f.	pH	Monthly	Monthly
g.	Total Kjeldahl Nitrogen (mg/L)		Monthly
h.	Nitrate-Nitrogen (mg/L)		Monthly
i.	Total Coliform (MPN/100ml)		Daily

2. Groundwater Monitoring

Location	Parameter	Frequency
Disposal Areas		
Water wells on site	Water level(ft)	Monthly (winter)
Water wells nearby	Nitrate-Nitrogen(mg/L)	quarterly

3. Surface Water Monitoring

Location	Parameter	Frequency
Outfall of wet detention basin	Total Petroleum Hydrocarbons (ug/L)	after rain
	TSS (mg/L)	after rain

4. System Operator

a. The wastewater system operator must be a licensed class III operator on call 24 hours per day and on site at least 20 hours per week.

b Casino Shutdown

i. The casino must be shut down in the event of a sewage spill

13. Areas disturbed during construction grading within 100 feet of the 18-foot contour line must be restored to original contours and replanted with native vegetation.

14 Development and construction shall minimize cut and fill operations and erosion and sedimentation potentials through construction of temporary and permanent sediment

basins, seeding or planting bare soil, diversion of run-off away from graded areas and avoidance of grading during the rainy season (November through April).

15. Parking, the waste water treatment plant and any other structures on the five-acre parcel are screened from traffic on Highway 101.
16. Outdoor lighting complies with the standards adopted by the California Energy Commission and no lighting beyond the minimum is operated. No lighting designed to attract attention to the facility is utilized. Only low voltage and low wattage systems are incorporated in the facilities. Shielded and cut-off lighting fixtures are utilized so that no light is emitted above the horizontal effectively reducing sky glow. Proper light color and quality of light are utilized with high-efficiency lamps to avoid "unnatural" light. Motion-sensing devices, rather than dusk-to-dawn security flood lights, are utilized. Signage lights are aimed at the signs. No sign larger than 40 square feet is permissible. (See e.g., ligh ing plan adopted by the Desert Diamond Casino near Tucson, Arizona.)
17. No noise that is above current ambient levels is emitted from the casino or hotel by gaming, other entertainment, food service, or performance activities.

EXHIBIT A

PROPOSALS MADE BY STATE AND BIG LAGOON DURING 2007-2009 COMPACT NEGOTIATIONS

No.	Date	From	To	Proposal	Citation
1	11/19/2007	STATE Andrea Hoch	TRIBE Peter Engstrom	**Casino Site** State wished to explore "possible alternative sites." **Gaming Devices** Unspecified (Draft Compact sec. 4.1) **Revenue Sharing with the State** State demanded general fund revenue contribution from the Tribe, amount unspecified (Draft Compact sec. 4.3). **Exclusivity** State offered the Tribe exclusivity within its "core geographic market," with the right to terminate compact, or terminate revenue sharing if such provision breached (Draft Compact sec. 4.5) as purported concession for general fund revenue sharing. **Revenue Sharing Trust Fund (RSTF)** State demanded payments to the Revenue Sharing Trust Fund, amount unspecified (Draft Compact sec. 5.3) **Environmental Mitigation** State required preparation of Tribal Environmental Impact Report to analyze potentially significant "off-reservation" environmental impacts (Draft Compact sec. 11.8.1)	Engstrom Decl., ¶ 4, Exh. 3
2A	1/31/2008	STATE Andrea Hoch	TRIBE Peter Engstrom, Jerome Levine	**Casino Site** In keeping with its efforts to move gaming operations off of the Tribe's lands, State proposed, as a first alternative of a three-part proposal, a "Highway Site." With casino to be located on privately owned property located five miles from Big Lagoon Rancheria and adjacent to highway. Highway site would have to be acquired by Tribe and placed in	Engstrom Decl., ¶ 5. Exh. 4

No.	Date	From	To	Proposal	Citation
				trust. **Gaming Devices** 500 gaming devices **Revenue Sharing with the State** State demanded general fund revenue sharing of "annual net win" as follows: $0-$25 million - 14% $25 million to $50 million - 16% $50 million to $75 million - 20% $75 million to $100 million - 22% Over $100 million - 25% **Exclusivity** State would offer the Tribe "geographic exclusivity" of 50 miles as a concession for general fund revenue sharing. **Revenue Sharing Trust Fund (RSTF)** State demanded a per-device fee to be paid to the RSTF, amount to be discussed. **Environmental Mitigation** State required arrangement of land use conservancy, and "an enforceable commitment to limit development on [the Tribe's] existing rancheria and trust lands in the same manner it agreed to do so in return for the right to develop on the Barstow site." State also required obtaining approvals from Humboldt County Planning Department, California Coastal Commission, the Department of Parks and Recreation, and the Department of Fish and Game. **Hotel Rooms** 100-room hotel	
2B	1/31/2008	STATE Andrea Hoch	TRIBE Peter Engstrom Jerome Levine	**Casino Site** As a second alternative, State proposed "Five-Acre Rancheria Site" - casino would be constructed on the original rancheria, hotel would be constructed on 11-acre parcel, parking lots and wastewater treatment facilities would be located on five-acre parcel.	Engstrom Decl., ¶ 5, Exh. 4

No.	Date	From	To	Proposal	Citation
				Five acre parcel would have to be acquired and placed in trust. **Gaming Devices** 250 gaming devices **Revenue Sharing with the State** State demanded general fund revenue sharing of "annual net win" as follows: $0-$25 million - 12% $25 million to $50 million - 14% $50 million to $75 million - 20% $75 million to $100 million - 22% Over $100 million - 25% **Exclusivity** State offered the Tribe "geographic exclusivity" of 50 miles as a concession for demanding general fund revenue sharing. **Revenue Sharing Trust Fund (RSTF)** Payments into the RSTF would be discussed further. **Environmental Mitigation Efforts and Design Restrictions** The State required that conditions of "Appendix A" are met, which included: the requirement that storm water to the lagoon must not exceed natural run-off; required implementation of wastewater sludge disposal plant; wastewater facilities that meet Regional Water Quality Control Board standards; required that an independent entity must be established to review facility; required limitations on plant species used the site; required that outdoor lighting complies with standards adopted by the California Energy Commission. State also required that casino structures must be set back at least 200 ft from the lagoon and 30 ft from State recreation facilities; structures limited to 30ft/2 stories in height; building materials must blend with surrounding environment; native vegetation must be maintained and replaced; structures must be screened from public view; patrons must use	

No.	Date	From	To	Proposal	Citation
				shuttle buses rather than drive to the site. **Hotel Rooms** 50-room hotel	
2C	1/31/2008	STATE Andrea Hoch	TRIBE Peter Engstrom Jerome Levine	**Casino Site** As a third alternative, the State proposed the "Rancheria Site" - casino would be constructed on the original rancheria, hotel and treatment facilities would be on 11 acre, adjacent parcel. **Gaming Devices** 175 gaming devices **Revenue Sharing with the State** State demanded general fund revenue sharing of "annual net win" as follows: $0-$25 million - 12% $25 million to $50 million - 14% $50 million to $75 million - 20% $75 million to $100 million - 22% Over $100 million - 25% **Exclusivity** State would offer the Tribe "geographic exclusivity" of 50 miles as a concession for demanding general fund revenue sharing. **Revenue Sharing Trust Fund (RSTF)** Payments into the RSTF would be discussed further. **Environmental Mitigation Efforts and Design Restrictions** The State required that conditions of "Appendix A" are met, which included: the requirement that storm water to the lagoon must not exceed natural run-off; required implementation of wastewater sludge disposal plant; wastewater facilities that meet Regional Water Quality Control Board standards; required that an independent entity must be established to review facility; required limitations on plant species used the site; required that outdoor lighting complies with	Engstrom Decl., ¶ 5, Exh. 4

No.	Date	From	To	Proposal	Citation
				standards adopted by the California Energy Commission. State also required that casino structures must be set back at least 200 ft from the lagoon and 30 ft from State recreation facilities; structures limited to 30ft/2 stories in height; building materials must blend with surrounding environment; native vegetation must be maintained and replaced; structures must be screened from public view; patrons must use shuttle buses rather than drive to the site. **Hotel Rooms** 50-room hotel	
3	2/20/2008	TRIBE Rory Dilweg	STATE Andrea Hoch	**Casino Site** Big Lagoon proposes gaming operations on its tribal lands (Draft Compact sec. 2.22) **Gaming Devices** Number of devices unspecified (Draft Compact sec. 4.1) **Revenue Sharing with the State** The Tribe rejected and struck out provisions requiring revenue sharing (Draft Compact sec. 4.3) **Exclusivity** The Tribe rejected and struck out provisions granting exclusivity in "core geographic market" (Draft Compact sec. 4.5) **Revenue Sharing Trust Fund (RSTF)** Payments into the RSTF would be discussed further. **Environmental Mitigation** The Tribe proposed to prepare a Tribal Environmental Impact Report, analyzing potentially significant off-reservation environmental impacts. If federal environmental assessment conducted pursuant to National Environmental Policy Act (NEPA), such report would be deemed	Engstrom Decl., ¶ 6, Exh. 5

No.	Date	From	To	Proposal	Citation
				sufficient. (Draft Compact sec. 11.1)	
4	3/21/2008	TRIBE Rory Dilweg	STATE Andrea Hoch	**Casino Site** Big Lagoon proposes gaming operations on the adjacent 11 acre parcel of its tribal lands. **Gaming Devices** 350 gaming devices **Environmental Mitigation** The tribe proposed to limit the structure to no more than 5 stories tall, and proposed that it be "designed to be compatible with the heavily forested landscape surrounding Big Lagoon." It also proposed that wastewater treatment and parking would be contained within the 20 acres of land held by the Tribe. **Hotel Rooms** 120-room hotel	Engstrom Decl., ¶ 7, Exh. 6
5	5/2/2008	STATE Andrea Hoch	TRIBE Peter Engstrom Jerome Levine	**Casino Site** State again expressed its preference in continuing to explore "alternative sites." State also offered that casino could be constructed on 9-acre site, and the hotel would be placed on the 11-acre parcel, with severely reduced number of gaming devices. **Gaming Devices** 99 gaming devices. **Revenue Sharing with the State** State demanded general fund revenue sharing of "annual net win" as follows: $0-$50 million - 10% $50 million to $100 million - 14% $100 million to $150 million - 18% $150 million to $200 million - 22% Over $200 million - 25% **Exclusivity** State offered "geographic exclusivity" of 50 miles as a purported concession for	Engstrom Decl., ¶ 8, Exh. 7

No.	Date	From	To	Proposal	Citation
				demanding general fund revenue sharing. **Revenue Sharing Trust Fund (RSTF)** State would allow the Tribe to receive RSTF payments, provided that such funds "cannot be used for any gaming or gaming-related activities." **Environmental Mitigation Efforts and Design Restrictions** The State required that conditions of "Appendix A" are met, which included: the requirement that storm water to the lagoon must not exceed natural run-off; required implementation of wastewater sludge disposal plant; wastewater facilities that meet Regional Water Quality Control Board standards; required that an independent entity must be established to review facility; required limitations on plant species used the site; required that outdoor lighting complies with standards adopted by the California Energy Commission. State also required that casino structures must be set back at least 200 ft from the lagoon and 30 ft from State recreation facilities; structures limited to 30ft/2 stories in height; building materials must blend with surrounding environment; native vegetation must be maintained and replaced; structures must be screened from public view; patrons must use shuttle buses rather than drive to the site. **Hotel Rooms** 50-room hotel	
6	10/6/2008	TRIBE Jerome Levine	STATE Andrea Hoch	**Casino Site** Big Lagoon Rancheria **Gaming Devices** 350 gaming devices. **Revenue Sharing with the State** Tribe rejected general revenue sharing. **Exclusivity**	Engstrom Decl., ¶ 9, Exh. 8

No.	Date	From	To	Proposal	Citation
				Tribe rejected exclusivity provision as "meaningless." **Revenue Sharing Trust Fund (RSTF)** Tribe agreed that it would make payments into the RSTF if it operated between 350 and 2000 devices. **Environmental Mitigation** Tribe proposed to set back from the high tide line, similar to other local construction, of 100 feet, and to lowering the height of the gaming facility to 85 feet. **Hotel Rooms** 100-room hotel with room for expansion.	
7	10/31/2008	STATE Andrea Hoch	TRIBE Jerome Levine	**Casino Site** State proposed that it would consider locating casino on Rancheria land, but insisted on compliance with environmental mitigation efforts. **Gaming Devices** 349 gaming devices. **Revenue Sharing with the State** State demanded general fund revenue sharing of at least 15% of the Tribe's annual net win. **Exclusivity** State offered "geographic exclusivity" of 100 miles as a purported concession for demanding general fund revenue sharing. **Revenue Sharing Trust Fund (RSTF)** State would allow the Tribe to receive RSTF payments, if it operates less than 349 slot machines, and provided that such funds are not used for payment of any costs arising out of, connected with, or relating to any gaming activities.	Engstrom Decl., ¶ 10, Exh. 9

No.	Date	From	To	Proposal	Citation
				Environmental Mitigation The State did not agree that all mitigation efforts could be agreed to in advance of knowing the design of the gaming facility. The State required preparation of a TEIR. It did propose to agree to a list of minimum mitigation measures to apply to the project, with the need for additional mitigation measures to be determined through environmental review process. The measures, attached as Exhibit C, included the following: required that the Tribe minimize potential soil erosion and other effects of construction; required Storm Water Pollution Prevention Plan (SWPPP) in keeping with EPA standards; required that the casino make efforts to minimize impact of casino construction on local raptor population; required that outdoor lighting shall comply with standards adopted by the California Energy Commission; required that the structure should be screened from public view and blend into the environment; required that the project should be set back at least 100 ft from the lagoon; required that no structure should be taller than 30 ft; required a wastewater treatment facility that meets all state and federal water quality standards applicable to projects in Humboldt County **Hotel Rooms** Unspecified.	

Big Lagoon Rancheria, Appellee and Cross-Appellant v. State of California, Appellant and Cross-Appellee, Appeal Nos. 10-17803 and 10-17878

CERTIFICATE OF SERVICE BY MAIL

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Two Embarcadero Center, 11th Floor, San Francisco, California 94111-3802. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On March 26, 2012, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

APPELLEE/CROSS-APPELLANT BIG LAGOON RANCHERIA'S SUPPLEMENTAL EXCERPTS OF RECORD, VOLUME II OF II

in a sealed envelope, postage fully paid, addressed as follows:

Randy A. Pinal, Esq. Deputy Attorney General State of California, Dept. of Justice 110 West A Street, Ste. 1100 San Diego, CA 94186	Attorney for Appellant/Cross-Appellee State of California

Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury under the laws of the United States of America that this Certificate was executed by me on March 26, 2012, at San Francisco, California.

Christine von Seeburg