10-17803/10-17878

IN THE 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.

On Appeal from the United States District Court
for the Northern District of California

No. CV 09-1471 CW (JCS)
Hon. Claudia Wilken, District Judge

APPELLANT/CROSS-APPELLEE STATE OF CALIFORNIA'S OPENING BRIEF

KAMALA D. HARRIS
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
Email: Randy.Pinal@doj.ca.gov
Attorneys for Appellant/Cross-Appellee State of California

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

The district court erred in granting Plaintiff-Appellee Big Lagoon Rancheria's (Big Lagoon) motion for summary judgment against Defendant-Appellant State of California (State), and denying the State's cross-motion for summary judgment, on the issue of whether the State negotiated in good faith for a tribal-state gaming compact under the Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. § 2710(d)(7). The district court incorrectly allowed Big Lagoon to pursue its claim despite the State having presented a material factual dispute concerning Big Lagoon's standing. Historical records that the State obtained from the federal government for the first time during discovery in this case suggest the government unlawfully acquired in trust for Big Lagoon the land where Big Lagoon proposes to build a casino, and that Big Lagoon may not be a lawfully recognized Indian tribe. If either proves false, then Big Lagoon would lack standing to seek relief under IGRA. The State respectfully requests this Court to reverse and remand to allow the State to develop its jurisdictional defense.

JURISDICTIONAL STATEMENT

Big Lagoon filed a complaint against the State seeking a determination that the State violated IGRA by failing to negotiate in good faith for a tribal-state gaming compact. (Excerpts of Record (ER) 673-90.) The district court

asserted jurisdiction under 25 U.S.C. § 2710(d)(7)(A) and 28 U.S.C. § 1331. On November 22, 2010, the district court granted Big Lagoon's motion for summary judgment, denied the State's cross-motion for summary judgment, and, pursuant to IGRA's remedial procedures, ordered the parties to conclude a compact within sixty days. (ER 25-50.) The order is a permanent injunction that provided Big Lagoon complete relief on its complaint. The State timely filed a notice of appeal on December 9, 2010. (ER 22-24.) This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1). *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1026 (9th Cir. 2010) (*Rincon*).

ISSUE PRESENTED

IGRA compels federally recognized Indian tribes to enter into compacts with states before they may conduct casino-style gaming on their Indian lands. This appeal presents the following question:

Whether, when presented with credible, undisputed evidence that a tribe may lack standing to obtain any relief under IGRA, either because the United States unlawfully considers the tribe to be federally recognized, or the United States unlawfully acquired in trust the land where the tribe proposes to build a casino, a district court must first determine whether the tribe has been lawfully federally recognized and whether the land on which

it proposes to build its class III gaming facility is lawfully eligible for that purpose.

STATEMENT OF THE CASE

On April 3, 2009, Big Lagoon filed suit in the district court on the single claim for relief that the State violated IGRA by failing to negotiate in good faith for a tribal-state gaming compact. (ER 673-90.)

On December 18 and 22, 2009, the State issued identical document subpoenas to various offices within the United States Department of the Interior. (ER 303-314, 317-328, 331-343.) Responses were due by January 8, 2010, but the government did not begin responding until much later. (ER 303, 317, 331, 402-04.) The State and federal government continued working toward resolving their discovery disputes through briefing on the cross-motions for summary judgment. (ER 89-91, 297-446.)

On June 16, 2010, Big Lagoon filed a motion for summary judgment, seeking an order directing the State to negotiate in good faith under IGRA's remedial procedures. (ER 542-71.) The State opposed the motion and filed a cross-motion for summary judgment. (ER 51-82.) On November 22, 2010, the district court granted Big Lagoon's motion and denied the State's cross-motion. (ER 25-50.) The court initiated IGRA's remedial procedures and ordered the parties to conclude a compact within sixty days. (ER 49-

50.) The State filed a notice of appeal on December 9, 2010 (ER 22-24), and unsuccessfully asked the district court and this Court to stay the matter pending appeal (*see* Case No. 10-17803, Doc. No. 11).

The parties were unable to conclude a compact and, pursuant to IGRA, the district court ordered the parties to submit their last best compact proposals to a court-appointed mediator. (ER 19-21.) The mediator selected Big Lagoon's compact and the State, with the district court's permission, renewed its motion to stay proceedings pending appeal. (*See* ER 3-6, 15.) The State also requested permission to file a motion to vacate the mediator's decision. (ER 6.) The district court granted the motion to stay and denied the State's other motion. (ER 3-18.)

STATEMENT OF FACTS

I. IGRA

Congress enacted IGRA to, among other things, "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 government." 25 U.S.C. § 2702(1). It also granted states a role in the regulation of Indian gaming. *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 715 (9th Cir. 2003); *Pueblo of Santa Ana v. Kelly*, 104 F.3d

1546, 1554 (10th Cir. 1997) (citing S. Rep. No. 100-446, at 6, 13 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3076, 3083).

IGRA divides gaming into three classes. 25 U.S.C. § 2703(6)-(8). Class III gaming, at issue here, involves "high-stakes games usually associated with Nevada-style gambling," including slot machines and banked card games. *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1104-05 (9th Cir. 2003) (*Coyote Valley II*). Class III gaming can be conducted on "Indian lands" only if, among other things, the gaming complies with a compact entered into by a federally recognized "Indian tribe" and the state. 25 U.S.C. § 2710(d)(1)(C).

The term "Indian lands" means

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4).

The term "Indian tribe" means

> any Indian tribe, band, nation or other organized group or community of Indians which—

> (A) is recognized as eligible by the Secretary [of the Interior] for the special programs and services provided by the United States to Indians because of their status as Indians, and
>
> (B) is recognized as possessing powers of self-government.

25 U.S.C. § 2703(5).

To obtain a compact, a federally recognized 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).

IGRA provides that a class III 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 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 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.

25 U.S.C. § 2710(d)(3)(C).

To demonstrate bad faith, a tribe must 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. 25 U.S.C. § 2710(d)(7)(B)(ii). The burden then shifts to the state to prove that it negotiated in good faith. *Id.* In determining good faith, courts "may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities," and "shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith." *Id.* § 2710(d)(7)(B)(iii)(I)-(II).

If a court finds the state failed to negotiate in good faith, it orders the parties to conclude a compact within sixty days. 25 U.S.C. § 2710(d)(7)(B)(iii). If no compact is entered into within that time, the parties then each submit to a mediator a proposed compact that represents their last

best offer. *Id.* § 2710(d)(7)(B)(iv). The mediator chooses and submits to the state for its consent the compact that "best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court." *Id.* § 2710(d)(7)(B)(iv)-(v). If the state does not consent to the compact selected by the mediator, then the Secretary of the Interior (Secretary) prescribes procedures for conducting class III gaming. *Id.* § 2710(d)(7)(B)(vii).

II. BIG LAGOON

Big Lagoon, which has eighteen members, appeared on the first list of "Indian Tribal Entities That Have a Government-to-government Relationship With the United States," published by the federal government in 1979. 44 Fed. Reg. 7235 (Feb. 6, 1979). (ER 94.) Although the publication has been titled differently since then, Big Lagoon has appeared on each list through the most recent iteration published in October 2010. *See* 75 Fed. Reg. 60,810 (Oct. 1, 2010) ("Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs"). Big Lagoon's rancheria, located on the shoreline of the Big Lagoon in Humboldt County, consists of an eleven-acre parcel acquired by the United States in trust for housing for Big Lagoon in 1994, and an

adjacent nine-acre fee parcel purchased by the United States in 1918. (ER 96-99, 101-02, 576-77, 588-95.)

III. PRIOR PROCEEDINGS

This is the fourth lawsuit filed by Big Lagoon to secure rights to conduct class III gaming. (*See* State's Motion for Judicial Notice (MJN) Ex. A at 9.) The State had offered Big Lagoon the same model compacts it offered tribes in 1998 and 1999,[1] but Big Lagoon rejected the offers and instead filed suit. (ER 637-38.) In the immediate preceding lawsuit, filed in 1999, Big Lagoon claimed the State failed to negotiate in good faith for a class III gaming compact. (ER 29-32.) After the district court denied multiple summary judgment motions by the parties (*id.*), the parties entered into a settlement agreement, under which Big Lagoon and another tribe would have been allowed to build and operate a joint gaming operation in Barstow, California (ER 31, 576-607). Under the so-called "Barstow Compact," Big Lagoon agreed not to establish gaming facilities on its rancheria. (ER 580-81, 604-07.)

Legislative ratification is required for a compact to take effect in California, Cal. Const. art. IV, § 19(f), and the Legislature did not ratify the

[1] For a comprehensive discussion of the history of Indian gaming in California, *see Coyote Valley II*, 331 F.3d at 1098-1107.

Barstow Compact (ER 609). Consequently, by its terms, the Barstow Compact became null and void in September 2007. (*Id.*) The parties agreed to dismiss the previous action without prejudice and immediately commenced new negotiations. (*Id.*)

IV. COMPACT NEGOTIATIONS AT ISSUE

The parties engaged in extensive compact negotiations from September 2007 through October 2008. (ER 32-36.) The details of the negotiations are not relevant to the limited issue raised in this appeal, except to note that Big Lagoon insists on building a class III casino on the eleven-acre parcel. (ER 612.) On October 6, 2008, Big Lagoon made what turned out to be its final compact offer to the State, promising to file suit if there was no agreement by November 7, 2008. (ER 615-20.) On October 31, 2008, the State responded with a counterproposal and urged Big Lagoon to continue with negotiations. (ER 622-27.) Big Lagoon did not respond and instead filed suit.

ARGUMENT SUMMARY

To have standing to pursue an IGRA bad faith negotiation suit, a tribe must demonstrate it is federally recognized and has lands eligible for class III gaming. Although Big Lagoon currently appears on a list of Indian entities entitled to receive services from the federal government, and the

federal government holds in trust for Big Lagoon the land where Big Lagoon proposes to build and operate a class III gaming casino, the State presented credible and undisputed evidence, obtained from Big Lagoon and the federal government for the first time during discovery in this case, indicating the trust acquisition and tribal federal recognition may be unlawful. The district court erred by denying the State's request under former Federal Rule of Civil Procedure 56(f), now Rule 56(d), to deny or continue Big Lagoon's motion so the State could complete discovery and fully develop its defense that Big Lagoon lacks standing to bring this action. Indeed, under the compulsory counterclaim doctrine, the State was required to bring those claims against the United States in this case, and it was error for the district court to cut short the State's ability to do so. Nothing in IGRA purports to award federal government tribal status decisions and trust acquisitions preclusive effect in the face of material questions as to their validity, or to bar a State's right to bring a compulsory counterclaim in an IGRA bad faith negotiation lawsuit when that claim calls into question the jurisdiction to potentially issue orders adverse to the State's interests.

STANDARD OF REVIEW

The district court erred in granting summary judgment against the State, and denying the State's cross-motion for summary judgment, on the

issue of whether the State negotiated in good faith pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii). Whether the State negotiated in good faith is a mixed question of law and fact that is reviewed de novo. *Rincon*, 602 F.3d at 1026.

Summary judgment is appropriate if there is no genuine issue of material fact and, even making all reasonable inferences in favor of the nonmoving party, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (*Celotex*). The moving party bears the burden of showing that there is no material factual dispute. 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, and the court must draw all reasonable inferences in favor of the opposing party, *Matsushita Electric Industrial Company, Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 587 (1986). Material facts that would preclude entry of summary judgment are those that, under applicable substantive law, may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (*Anderson*).

Federal Rule of Civil Procedure 56(d), formerly Rule 56(f), allows a court to deny or continue a summary judgment motion to allow an opposing party to complete discovery. Rule 56(d) requires discovery "where the non-moving party has not had the opportunity to discover information that is

essential to its opposition." *Anderson*, 477 U.S. at 250 n.5; *Garrett v. City & County of San Francisco*, 818 F.2d 1515, 1518-19 (9th Cir. 1987) ("summary judgment should not be granted while opposing party timely seeks discovery of potentially favorable information").

ARGUMENT

I. THE DISTRICT COURT ERRED BY DENYING THE STATE AN OPPORTUNITY TO DEVELOP ITS DEFENSE THAT BIG LAGOON MAY NOT BE LAWFULLY RECOGNIZED, OR THAT BIG LAGOON MAY NOT HAVE GAMING-ELIGIBLE INDIAN LANDS

Under former Federal Rule of Civil Procedure 56(f), now Rule 56(d), the State asked the district court to deny or continue Big Lagoon's summary judgment motion to allow the State to complete discovery for evidence demonstrating that Big Lagoon lacked standing to bring an action under IGRA. In denying the State's request, the district court found that "the status of the Tribe and its eleven-acre parcel has no bearing on whether the State negotiated in good faith." (ER 44.) According to the district court, because Big Lagoon is currently recognized by the federal government and has land on which gaming activity could be conducted, it "is entitled to good faith negotiations with the State toward a gaming compact. 25 U.S.C. § 2710(d)(3)(A). That the status of the eleven-acre parcel may be in question does not change this result." (ER 43-44.) Although the United States

currently recognizes Big Lagoon and holds the eleven-acre parcel in trust for Big Lagoon, the issue is whether the recognition and trust acquisition were lawful. If, as the State's undisputed preliminary evidence suggests, the land should not be in trust or Big Lagoon is not lawfully recognized, then Big Lagoon would not be an eligible "Indian tribe" with "Indian lands," as those terms are defined by IGRA, 25 U.S.C. §§ 2703(4)-(5), 2710(d)(3)(A), and would not meet IGRA's jurisdictional requirement to request compact negotiations, or be entitled to any relief under IGRA, *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 778 (9th Cir. 2008) (citing *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler*, 304 F.3d 616, 618 (6th Cir. 2002)) (state need not negotiate with a tribe lacking "Indian lands," and tribe without "Indian lands" cannot sue under IGRA).

A. Jurisdictional issues should be resolved first.

Courts routinely resolve these jurisdictional questions before deciding any other issues. For example, in *Rhode Island v. Narragansett Tribe of Indians*, 816 F. Supp. 796, 800, 806 (D. R.I. 1993), *aff'd sub nom. Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994), the court first decided the complicated "Indian lands" question before ordering the state to submit to initial compact negotiations. *See Rhode Island v.*

Narragansett Indian Tribe, 19 F.3d at 688 (holding that a determination whether land is eligible for gaming under IGRA "is tinged with more than the usual quotient of public interest, because the Tribe's ability to import casino gambling into [the state] likely hangs in the balance").

In *Kansas v. United States*, 249 F.3d 1213, 1227-28 (10th Cir. 2001), the court held that determining whether a tribe has eligible "Indian lands" is paramount:

> 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.*

(Emphasis added.)

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 jurisdiction 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 class III gaming activities on the subject property*.

(Emphasis added.) *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").

B. The State's preliminary evidence suggests that, after *Carcieri v. Salazar*, the eleven-acre parcel is not eligible for gaming under IGRA.

1. The *Carcieri* decision.

After Big Lagoon abandoned compact negotiations, the Supreme Court in *Carcieri v. Salazar*, 555 U.S. 379, 381-83, 388-91, 394-96 (2009) (*Carcieri*), held that the Secretary could acquire land into trust under the Indian Reorganization Act (IRA), 25 U.S.C. § 465,[2] only for recognized

[2] The IRA authorized the Secretary to acquire land in trust "for the purpose of providing land for Indians," 25 U.S.C. § 465, and defined "Indian" to

> include all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction, and all persons who are descendants of

(continued…)

tribes that were under federal jurisdiction when Congress enacted the IRA in 1934. Big Lagoon proposes to build a casino and hotel on an eleven-acre parcel that the Secretary acquired in trust for Big Lagoon under the IRA in 1994. (ER 96-99, 612.) But the State's preliminary, undisputed evidence confirms that Big Lagoon was not a proper beneficiary of the trust acquisition because it was not a recognized tribe under federal jurisdiction in 1934, and its current members did not live on the rancheria in 1934 or descend from the original rancheria occupants. (ER 69-80.)

2. Big Lagoon was not a recognized tribe under federal jurisdiction in 1934 and, therefore, was not a proper trust beneficiary in 1994.

The preliminary historical records obtained from the federal government in this case demonstrate that the family for whom the government purchased the nine acres was not a recognized Indian tribe under federal jurisdiction in 1934.

(…continued)

> such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all persons of one-half or more Indian blood.

Id. § 479.

In 1918, F. G. Ladd and his wife conveyed to the United States a 9.24-acre parcel on the shore of the Big Lagoon. (ER 101-02.) The general warranty deed conveyed the parcel without any restriction other than a railroad right of way. (*Id.*) The deed did not convey the premises in trust for any person or group, and contained no language imposing any limitation on alienation, or any recitals indicating any intent with respect to anticipated use, from which trust intent might be inferred. Similarly, internal correspondence confirms the United States had no intent to receive the land for the benefit of any particular Indian or tribe.

In 1917, James Charley, also known as Lagoon Charley, sought assistance from the Indian Office concerning his fear that he would be evicted from the land where he was living. (ER 104.) Finding eviction would be calamitous for James Charley and his family, federal officials contacted the landowners, the Ladds, about selling the property. (ER 106-07.) Indian Services Inspector John J. Terrell advised the Ladds that "Congress has during the past few years made small appropriations[[3]]to purchase land for village homes for the landless Indians of California" and that "[t]he small appropriations and the large number of landless Indians

[3] *See, e.g.*, Act of Jun. 21, 1906, 34 Stat. 325, 333; Act of Apr. 30, 1908, 35 Stat. 76; Act of Aug. 1, 1914, 38 Stat. 582, 589.

have precluded the purchase of only small tracts and the paying of excessive prices." (ER 109 (n. added).) Mr. Ladd eventually agreed to sell a portion of the land for James Charley's use. (ER 111-29.)

The Commissioner's Office made clear to Inspector Terrell that

> With regard to purchasing ten acres for one family alone, it may be said that the purpose of the appropriation from which the payment would be made is to buy tracts of limited areas on which to locate small bands, with the idea ultimately to divide the land pro rata and give evidence of title to the occupants in the form of patents. This Office does not believe that it would be good policy to attempt to pick out individual families and purchase them a homesite, as seems to be contemplated in the case of Jim Charlie[4]. . . .
>
> Will you kindly explain the situation to Jim Charlie and family and have them clearly appreciate the fact that title to the tract will be in the United States and that thereafter should it become necessary to use a part of the purchased lands in caring for other Indians, that they will be expected to make no objection. With such an understanding of the status of the land given the Indians, this Office would have no objection to your closing out the proposed purchase of the ten acres, if you think it is a good proposition.

(ER 133-34 (n. added).) Inspector Terrell responded that James Charley and his wife understood that title would remain in the United States and that

---

[4] *See also* ER 131 ("It is somewhat questionable as to the propriety of buying individual families a home, although I believe we have done so in one or two instances. The appropriation namely was obtained to buy tracts on which small bands could be located.").

other landless and homeless Indians could be permitted to live there. (ER 136.) Inspector Terrell doubted that "the few other Indians of Charlie's tribe[5] that are landless, if any," would want to live there, noting that two of "Charlie's" brothers already had homes nearby. (*Id.*) Given James Charley's understanding of the federal government's reservation of rights, the Indian Office instructed Inspector Terrell to make the purchase. (ER 136B.) In June 1918, Inspector Terrell advised the Ladds that the purchase was approved and instructed them that "[t]he deed should convey to the 'United States of America.'" (ER 138.)

An opinion of the Solicitor of the Department of the Interior suggests that even if the government had indicated intent to limit the use of rancheria lands for the benefit of specific persons or groups, which was not the case here, these circumstances would not render rancherias trust lands for the benefit of any tribe, person or group:

> The "background" data submitted to and published by the Senate Committee occasionally states that the title to particular rancheria land is "in the name of the United States Government in trust for the Indians of California" (See Auburn, Big Sandy, etc.); or that the lands "are held in trust by the United States Government for the Indians of California" (Blue Lake);

[5] James Charley and his wife, Lottie, were Yurok Indians. (*See infra* p. 26.)

> or that it is "trust land" (Cache Creek). (See Report No. 1974, 85th Cong., 2d Sess.) These references do not connote a trust in which the United States holds merely a legal title, with equitable ownership elsewhere, as in the case of Indian lands generally; the intention was to indicate that the land, although acquired in fee, was purchased for a specific purpose. This is shown both by congressional and administrative action. For instance, the Secretary generally ordered the purchase of a particular California tract "for the use of the band of Indians referred to" in the special agent's report (see file, Ruffey's Band). A special form of "proposal for sale of lands" was employed which states that "_____ hereby propose to sell to the United States, for the use and occupancy of the _____ Indians (but without restrictions in deed) the following described lands: . . . ." (See Paskenta.) (Underlining added for emphasis) The Government's voucher authorizing payment generally contains the language "to the purchase of _____ land in _____, said tract to be used for the benefit of the _____ band of homeless Indians . . ." (See Mark West.) The deeds issued to the United States contain no restriction, and are in the form of absolute conveyances.

(ER 145-46 (underscore in original).)

The Ladds conveyed the nine acres to the United States in the same circumstances described by the Solicitor's opinion, that is, received by the government without restriction, having been granted by an absolute conveyance, and not held in trust for a particular tribe, person or group. With respect to such absolute conveyances, the Solicitor's opinion states:

> It has been decided, administratively, that these lands are not allottable, even to the members of the band for

> whom acquired, and that they could not be sold without legislation, even if the purpose was to acquire land more suitable for the same band (see Ruffey's Band, File 74408/07/311). They could be used for any landless California Indians, and not merely for the specific band for whom purchased, since neither the deed conveying the property to the United States nor the act appropriating the purchase money contained "any limitation or provision as to what Indians should be settled thereon." (See Marshal and Sebastopol File 310, Part 21, letter Comm., July 6, 1937.)

(ER 146.)

This functional description of unrestricted conveyances characterizes the Ladds' conveyance, where the government's ability to situate homeless Indians there was made explicit by antecedent internal correspondence. Although the immediate cause of the purchase was to protect the Charley family from feared eviction, and the land would be occupied by the Charley family, it was also clear that the government intended the land "could be used for any landless California Indians" that the government might choose. Indeed, as the government's documents confirm, it would have been anomalous for the United States to purchase a home solely for a family when the appropriations were intended for the purchase of tracts on which "small bands," not small families, could be located. (*See* ER 126-31.) The Department of the Interior, Bureau of Indian Affairs (BIA) later confirmed this intent in 1968 when it noted that the "Big Lagoon Rancheria was

purchased in 1918 for landless California Indians and was not set aside for any specific tribe, band or group of Indians." (ER 158.)

Shortly after the government purchased the nine acres, "Lagoon Charlie died, and his widow and children moved to Trinidad, about ten miles distant, where they resided" as of September 1921. (ER 161.) His widow and her four children continued to live in Trinidad in the summer of 1929. (ER 451, 455.) Documents produced by the United States do not show anyone living on the parcel again until James and Lottie Charley's son Robert lived there from 1942 to 1946.[6] (ER 163.)

In 1947, the Indian Service published a report, "Ten Years of Tribal Government Under I.R.A." (IRA Report), reviewing the IRA's impact on tribal self-government. (ER 166-213.) The report includes a list of "Indian Tribes, Bands and Communities Which Voted to Accept or Reject the Terms of the Indian Reorganization Act, the Dates When Elections Were Held, and the Votes Cast." (ER 181-89.) As detailed above, staff from the Hoopa Valley Indian Agency arranged for the United States to purchase the nine acres, which the government currently considers part of Big Lagoon's

[6] On the contrary, documents the State obtained from the National Archives and Records Administration indicate Robert was living in Klamath as of October 1944. (ER 509-10, 512-13.)

rancheria, yet Big Lagoon's name does not appear on the list of Indians within the Hoopa Valley Agency's jurisdiction that voted to accept or reject the IRA. (*Id.*) Nor is Big Lagoon identified in a June 1935 letter from Indian Agency staff to the Commissioner detailing IRA election results for "all California jurisdictions." (ER 214A-230.) The Deputy Assistant Secretary recently stated that he believes the IRA Report is "not the only or finally determinative source" but it is a "helpful . . . starting point" for BIA staff to determine, after *Carcieri*, whether a tribe was a recognized tribe under federal jurisdiction in 1934.[7] (ER 241-42.) Reading the IRA Report in the context of the historical documents detailed above, there is credible and undisputed evidence that neither the James Charley family nor Big Lagoon was a recognized tribe under federal jurisdiction in 1934.

3. Big Lagoon's members are not descended from the James Charley family.

Even if the James Charley family constituted a recognized tribe under federal jurisdiction in 1934, which it did not, to be eligible for an IRA trust acquisition Big Lagoon's current members must descend from that family. *See* 25 U.S.C. § 479. "Descent" is defined as "hereditary succession."

[7] The BIA is currently considering Big Lagoon's status in 1934 in the context of another proposed land acquisition. (ER 660-64.)

Black's Law Dictionary (Abridged 6th Ed. 1991) 306. A "line of descent" is "[t]he order or series of persons who have descended one from the other or all from a *common ancestor*, considered as placed in a line of succession in the order of their birth, the line showing the connection of all the *blood-relatives*." *Id.* at 307 (emphasis added). Here, Big Lagoon admitted "that no current member of the Tribe is known to be related to Jim 'Lagoon' Charley other than by marriage."[8] (ER 246.) This admission demonstrates the current members do not descend from the James Charley family because they do not share a common ancestor or blood-relative. Therefore, Big Lagoon is not an eligible beneficiary of land acquisitions under the IRA.

In addition, the BIA has interpreted 25 U.S.C. § 479 to mean the descendant "was, on June 1, 1934, physically residing on a federally recognized Indian reservation." 25 C.F.R. § 151.2(c); *Van Mechelen v. Portland Area Director, Bureau of Indian Affairs*, 35 IBIA 122 (2000). (MJN Exs. B & C.) Here, the historical records show that neither James

[8] The admission may be contrary to historical documents. If the unspecified marriage is between James Charley's son, Robert Charles, and Ada Waukell, the admission raises a material factual dispute because Robert Charles' death certificate, and the testimony of Ada Waukell's mother, Nettie Waukell, indicate Robert and Ada were never married. (ER 509, 522.)

Charley nor anyone from his family or any current Big Lagoon members[9] lived on the nine acres in June 1934.

James Charley's wife, Lottie, was a full-blood Yurok Indian. (ER 451-52.) Their son, Robert Charlie, also known as Robert Charles,[10] is identified as a full-blood Yurok Indian (ER 451-52, 522), meaning James Charley was also a full-blood Yurok Indian. None of the James Charley family is reported to have been living on the nine-acre parcel as of 1934, James having died shortly after the government purchased the land and his widow and children having moved away by September 1921. (ER 161.) Robert Charles, James Charley's son, apparently returned to the parcel and lived there from 1942 to 1946. (ER 163; *but see supra* note 6.)

Robert Charles lived with Ada Waukell, a full-blood Indian of the Lower Klamath Tribe. (ER 458-63, 509-10, 512-13.) Ada Waukell and her sister Ida were born to Harry and Nettie Waukell, both full-blood Klamath

---

[9] The record includes a chart summarizing the relationship between the James Charley family and the distributees and dependents listed in the Big Lagoon Rancheria Asset Distribution Plan, which is the principal basis for modern membership in Big Lagoon. (ER 82.)

[10] At some point, James Charley's wife began to spell her married name, and the surnames of her sons by James, as Charlie rather than Charley. (ER 451-56.) Later, she and her sons had apparently again modified the surname, this time to Charles. (ER 509-10, 512-13, 522.)

Indians. (ER 465-70, 509-18.) The modern Yurok Tribe was historically known as the Klamath River Indians. (ER 249.) Ida Waukell identified herself as "4/4 Yurok." (ER 465-70.) Ida Waukell and Thomas Williams had a son named Thomas Williams. (ER 465-70, 524-25.) The elder Thomas Williams was non-Indian, as evidenced by Ida Waukell's formal identification of her son Thomas as being one-half Indian blood, and the younger Thomas being identified on his birth certificate as one-half Klamath Indian. (ER 465-70, 539, 541.) All further references to Thomas Williams are to the younger Thomas Williams.

In February 1949, Thomas Williams—the nephew of Ada Waukell, who lived with Robert Charles—is reported to have expressed an interest in acquiring the nine-acre parcel that had lain vacant for some time. (ER 163-64.) But Thomas Williams did more than simply inquire about the property—he moved himself onto it. Although the BIA granted Williams permission to camp there (ER 164), he started building a house instead. In 1951, BIA staff discovered his unauthorized activity, calling it a "trespass," and left a note for Williams to stop construction immediately. (ER 254-57.)

Thomas Williams may have been married to Lila Green, whose father was one-half blood Yurok Indian, and mother was one-half blood Chimariko Indian. (ER 163, 472-78.) BIA staff identified Lila Green, aka "Mrs.

Thomas Green Williams," as "an unallotted and unassigned Yurok Indian." (ER 256.) Thomas Williams and Lila Green had a daughter, Beverly Williams. (ER 541.) Following a brief marriage that produced three sons—Franklin, Dale and Peter Lara (ER 259, 533, 535, 537)—Beverly Williams married Theodore R. Moorehead,[11] born to Theodore and Isabel Moorehead of Crescent City in Del Norte County (ER 480-98, 506-07). The elder Theodore Moorehead was one-half Indian blood of the Smith River Band, and Isabel Moorehead was three-quarters Indian blood of the Tolowa and Smith River Band. (ER 480-504.) Theodore R. Moorehead and Beverly Williams were reported to be living on the nine acres in 1967. (ER 265.) Their children are Roger, Virgil and Holly Moorehead. (ER 527, 529, 531.) Virgil Moorehead has been Big Lagoon's chairman since 1984. (ER 93-94.)

In 1958, Congress enacted the California Rancheria Termination Act, Pub. L. No. 85-671, 72 Stat. 619 (1958) (as amended by Pub. L. No. 88-419, 78 Stat. 390 (1964)), to distribute rancheria lands to individual Indians. *Williams v. Gover*, 490 F.3d 785, 787 (9th Cir. 2007). "The Act provided for the conveyance of rancheria assets, with unrestricted title, to the individual Indians living there, if a majority of the Indians voting approved."

[11] The surname "Moorehead" sometimes appears in official and other records with the variant spelling "Morehead."

Id. Thomas Williams, Lila Green Williams, their daughter Beverly Williams Moorehead, her husband Theodore R. Moorehead, and their children are the distributees identified on the Big Lagoon Rancheria Asset Distribution Plan that the BIA prepared to terminate Big Lagoon pursuant to the Act. (ER 268-75.) Being identified as a distributee in the Asset Distribution Plan provides the primary basis for membership in Big Lagoon. (ER 277-78.) Regardless, if the distributees are not descended from the James Charley family, then presumably neither is any current member.

Therefore, not only, as Big Lagoon admits, is no member descended from the James Charley family, the historical documents show that neither James Charley nor anyone from his family, or any current Big Lagoon member, lived on the nine acres in June 1934, making Big Lagoon ineligible for trust acquisitions under the BIA's interpretation of 25 U.S.C. § 479. Thus, the State's preliminary evidence suggests Big Lagoon is not an eligible beneficiary of trust acquisitions under the IRA, including the eleven-acre parcel.

C. The outstanding discovery would defeat Big Lagoon's summary judgment motion, and result in summary judgment for the State.

1. Evidence the State expects to receive from the United States.

The State had difficulty obtaining documents in response to subpoenas issued to the federal government to ascertain Big Lagoon's status in 1934, and the connection between James Charley and the individuals listed on the Big Lagoon Rancheria Asset Distribution Plan. (ER 89-91, 296-446.) Although the government's failure to timely comply with the subpoenas thwarted the State's ability to complete discovery before filing its opposition and cross-motion for summary judgment, the State and federal government were actively trying to resolve their discovery dispute. (*Id.*)

The information the State was still trying to obtain included documents explaining why Congress included a provision in the Hoopa Yurok Settlement Act, 25 U.S.C. § 1300i-10(b), giving Big Lagoon the option to vote to merge with the Yurok Tribe. (ER 90-91, 439-40, 442-44.) The documents would help explain the relationship between Big Lagoon and the United States, and Big Lagoon and the Yurok Tribe, particularly in light of evidence indicating the James Charley family were Yurok Indians, and that Congress specifically corrected an earlier draft of the Act to ensure that

Big Lagoon was identified as a "rancheria" instead of a "tribe," recognizing the terms are distinct. (ER 90-91.) *See* S. Rep. No. 100-564, at 38 (Sep. 30, 1988). Also unresolved is BIA's claim that information about various individuals identified in the 1968 California Judgment Enrollment is protected by the Privacy Act. (ER 91.) Without that information, which is exclusively within the BIA's possession, the State could not complete its research. (*Id.*) Also, after Big Lagoon filed its summary judgment motion, the State received from the Assistant Secretary several document "excerpts," which otherwise are non-responsive without more information to explain their context. (ER 90.) More importantly, the Assistant Secretary has not produced responsive documents explaining how Big Lagoon came to be identified as a federally recognized tribe. (*Id.*)

Because the State and United States were actively trying to resolve their discovery dispute, the district court should have denied or continued Big Lagoon's summary judgment motion to allow the State to complete discovery.

2. There is a material question whether current Big Lagoon members descend from James Lagoon Charley and family.

To the extent the district court found the State's evidence insufficient to support summary judgment for the State, or to preclude summary judgment

for Big Lagoon, additional discovery was necessary to ascertain the genealogical connection, if any, between current Big Lagoon members and the James Charley family. The historical documents obtained by the State so far indicate the distributees named in the Big Lagoon Rancheria Asset Distribution Plan, which is the foundation for current membership in Big Lagoon, descended from Yurok, Lower Klamath (presently known as Yurok), Chimariko, Smith River and Tolowa Indians, instead of a unique, recognized Indian tribe resident on the nine-acre fee parcel in 1934. But a more complete genealogical picture will be informed by the records that the BIA prevented the State from researching. In addition, documents the United States has yet to provide that pertain to the Hoopa Yurok Settlement Act will help explain the historic relationships between the United States and Big Lagoon, and the Yurok Tribe and Big Lagoon. If this additional evidence affirmatively demonstrates that Big Lagoon members do not descend from the James Charley family, then Big Lagoon is not a lawful beneficiary of trust-land acquisitions under the IRA, the Secretary should not have accepted the eleven acres in trust in 1994, and it would be against the public interest[12] for the State to negotiate to put a casino on land acquired in

[12] A court may consider the public interest in determining whether a (continued…)

trust unlawfully that otherwise would not be eligible Indian lands under IGRA.

3. There is a material question whether the United States lawfully considers Big Lagoon a federally recognized tribe.

In addition to questions surrounding the eleven acres, the State learned for the first time through documents produced in discovery by the United States that there is a material question concerning Big Lagoon's status as a federally recognized tribe. "Federal regulation of Indian tribes . . . is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians' . . . ." *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974). Moreover, Congress cannot create a tribe. *United States v. Sandoval*, 231 U.S. 28, 43 (1913). BIA documents show that no entity existed on the nine acres that the government could have

---

(…continued)
state negotiated in good faith. 25 U.S.C. § 2710(d)(7)(B(iii). This "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 3084-85. The district court previously found Big Lagoon's status "arguably implicates the public interest." (ER 664.) IGRA's public interest component is designed to protect the State against the adverse consequences of gaming. *Rincon*, 602 F.3d at 1032. 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.

recognized as a sovereign political community that pre-dated non-Indian settlement. (*See supra* Argument I.B.2-3.)

Moreover, when Congress enacted and amended the California Rancheria Termination Act it did not identify Big Lagoon as among the rancherias to be terminated. *See* Pub. L. No. 85-671, § 1, *as amended* Pub. L. No. 88-419. (ER 281-89.) It is unclear how Big Lagoon became subject to the Act. Nonetheless the BIA conditionally approved the Asset Distribution Plan in January 1968.[13] Then in June 1968 the BIA confirmed that the "Big Lagoon Rancheria was purchased in 1918 for landless California Indians and was not set aside for any specific tribe, band or group of Indians. The residents have not formally organized and there is no official membership roll." (ER 158.) Thus, even after the BIA approved the Asset Distribution Plan, it recognized that it never considered Big Lagoon to be an organized political sovereign. Yet Big Lagoon somehow appeared on the first list of "Indian Tribal Entities that Have a Government-to-government Relationship with the United States," published in 1979. 44 Fed. Reg. 7235 (Feb. 6, 1979). The State's defense turns on understanding how the BIA went from not recognizing any political entity for Big Lagoon

[13] The residents later revoked their request to be terminated. (ER 290A.)

up to 1968, to placing Big Lagoon on the first list of recognized tribes published in 1979.

D. The State should not be forced to negotiate for a casino located on land unlawfully acquired in trust, or with a tribe that may not be lawfully recognized.

The district court should have first determined whether Big Lagoon lawfully met IGRA's jurisdictional requisites before deciding any other issues in this case. If Big Lagoon is not lawfully recognized, or the eleven acres is not lawfully in trust, then Big Lagoon would not be an eligible "Indian tribe" and the eleven acres would not be "Indian lands," as those terms are defined by IGRA, and Big Lagoon would not meet IGRA's jurisdictional requirement to request compact negotiations or to pursue this action. *See* 25 U.S.C. §§ 2703(4)-(5), 2710(d)(3)(A); *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d at 778. The evidence presented, and the documents the State expects to receive,[14] show a material question exists that may affect the outcome of this case. *See Anderson v.*

[14] After briefing concluded on the cross-motions for summary judgment, the federal government produced a document confirming that it was an anomaly to have purchased the nine acres for a family rather than a recognized band of Indians, and new information concerning a central figure in Big Lagoon's history that is critical to the State's genealogical research. (MJN Exs. D & E.) This new information will further demonstrate that Big Lagoon lacks standing.

Liberty Lobby, Inc., 477 U.S. at 248. Consequently, the district court erred by refusing to deny or continue Big Lagoon's motion for summary judgment to allow the State to conduct further discovery for this defense so that it could determine whether to file a claim against the United States to resolve here any dispute about the status of Big Lagoon or the eleven acres. *See, e.g., Voggenthaler v. Maryland Square, LLC*, No. 18-cv-01618-RCG-GWF, 2010 WL 1553417, at *4-*5, *10-*11 (D. Nev. Apr. 14, 2010) (the need to further investigate the legitimacy of a third party complaint is proper grounds for extending discovery under former Rule 56(f)). The effect of establishing the truth of each of these claims would either deprive Big Lagoon of standing to pursue its IGRA claim, or establish that it would not be in the public interest (*see supra* note 12) for the district court to order the State to negotiate with Big Lagoon for a casino on the eleven acres, even if the State had negotiated in bad faith.

E. The State is bound by the compulsory counterclaim doctrine to bring these claims in this action.

A compulsory counterclaim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. R. Civ. P. 13(a). In determining whether a claim is compulsory, this Court applies the liberal "logical relationship test" and "analyze[s] whether the essential facts

of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues should be resolved in one lawsuit." *Pochiro v. Prudential Ins. Co. of America*, 827 F.2d 1246, 1249 (9th Cir. 1987). Claim preclusion "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988) (quotations omitted). The purpose of this rule is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." *S. Constr. Co. v. Pickard*, 371 U.S. 57, 60 (1962). A defendant that fails to bring a compulsory counterclaim is barred from asserting that claim in a future proceeding. *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974).

It is from documents belatedly produced by the United States in discovery in this action that the State first became aware of questions concerning Big Lagoon's status and the eleven-acre trust acquisition. Because Big Lagoon must be a lawfully recognized "Indian tribe" and have eligible "Indian lands," as those terms are defined by IGRA, before it can obtain relief in this action, the essential facts of Big Lagoon's action and a claim by the State against the United States are logically related. Rule 56(d),

in addition to considerations of judicial economy, convenience, and fairness to the litigants, required the district court to continue the motion to allow the State to discover information essential to its opposition. Instead, the district court mistakenly ignored past unlawful acts by the United States and significant questions about Big Lagoon's status to grant Big Lagoon a remedy that Congress specifically reserved for lawfully recognized Indian tribes with lawfully acquired trust land.

F. The State raised the jurisdictional issue at the first opportunity; nonetheless it may be raised at any time.

The district court's suggestion that the State's *Carcieri*-based challenge is a post hoc rationalization of its actions during compact negotiations (ER 42-43) misunderstands that the State could not have raised the challenge sooner. During compact negotiations the State relied exclusively on Big Lagoon's now-apparently inaccurate assertion that the parties were negotiating for gaming on Big Lagoon's "ancestral" lands. (*See*, *e.g.*, ER 674-75, 678-79, 683, 688.) The Supreme Court did not decide *Carcieri* until February 2009—four months after Big Lagoon abandoned compact negotiations—and it was not until the State received discovery in this case in 2010 that it learned there were questions concerning Big Lagoon's status and the trust acquisition. In any event, the district court ignored settled law that

a challenge to Article III standing may be raised at any time, even on appeal after failing to raise it in the district court, *Renee v. Duncan*, 623 F.3d 787, 796 (9th Cir. 2010), or by a court sua sponte if the parties have failed to do so, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990).

Moreover, the district court's finding suggests the State is forever bound by the perceived status of Big Lagoon and the eleven acres at the time of compact negotiations. (ER 43.) If that were true, then even if the federal government, or a federal court, determines Big Lagoon should not be federally recognized, or the eleven acres is not lawfully in trust, Big Lagoon still would be entitled to relief in this action. Surely, Congress did not intend such an unjust result.

Indeed, the district court previously understood Big Lagoon's ability to conduct gaming at its proposed site was within the permissible scope of negotiations contemplated by IGRA. In denying Big Lagoon's summary judgment motion in 2000, the district court stated:

> [I]n June, 1986, Big Lagoon and the State held telephone discussions and exchanged correspondence. See Tagawa Dec., Ex. C. Among other things, they discussed the environmental impact of Big Lagoon's proposed new casino, and *whether the lands on which Big Lagoon proposed to build its casino were Indian lands over which Big Lagoon properly had jurisdiction to conduct gaming activities*, within the meaning of 25 U.S.C. § 2710(d)(3)(A). See id. Unless Big Lagoon

> addressed these concerns, the State suggested, the tribe might not be entitled to engage in class III gaming activities at the proposed site. See id. Big Lagoon characterizes this as the State setting conditions precedent to negotiations. To the contrary, *these issues are part of the negotiations contemplated by IGRA*. In considering whether a State has negotiated in good faith, courts "may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities." 25 U.S.C. § 2710(d)(7)(B)(iii)(I). The State's concerns regarding the environment and *legal restrictions that might limit Big Lagoon's right to conduct gaming activities at its proposed site are consistent with the scope of negotiations contemplated by IGRA*.

(MJN Ex. A at 13-14 (emphasis added).)

The "proposed site" was previously at issue because there was a question whether the eleven acres—which Big Lagoon purchased with monies received from the Department of Housing and Urban Development to provide tribal housing, and the United States acquired in trust for housing—could be utilized for gaming. (MJN Ex. F, Tagawa Decl. Ex. C at 1-2.) Now, a new question has arisen concerning the land's eligibility for gaming, occasioned by the *Carcieri* decision, which also requires resolution and is likewise consistent with the scope of negotiations contemplated by IGRA, if not retroactive to the negotiations before the Court, then at least prospectively in negotiations, and any other remedy, prescribed in IGRA's

remedial procedures. *See* 25 U.S.C. § 2710(d)(7)(B)(iii) (requiring the court, after finding a state failed to negotiate in good faith, to order the state and tribe to conclude a compact within a sixty-day period).[15]

G. Alternatively, even without additional discovery, the State's evidence was sufficient to withstand summary judgment.

The State's evidence identified a factual dispute whether Big Lagoon was lawfully recognized or could lawfully conduct class III gaming on the eleven-acre parcel. Material facts that would preclude entry of summary judgment are those that, under applicable substantive law, may affect the outcome of the case. *Anderson*, 477 U.S. at 248. Even without additional discovery responses pending from the federal government, the evidence the

[15] The district court ordered the parties to negotiate further to conclude a compact within a sixty-day period, but the parties were unable to do so. (ER 19.) The district court further ordered the parties to submit their last best offers to a mediator, who subsequently selected Big Lagoon's compact as that which best comports with IGRA, other applicable federal law, and the district court's order. (ER 6, 19-20.) Because the State did not consent to the mediator-selected compact, the mediator is to notify the Secretary of his selection and the Secretary will promulgate gaming procedures for Big Lagoon. *See* 25 U.S.C. § 2710(d)(7)(B)(vi)-(vii). But the district court has stayed notification to the Secretary pending this appeal. (ER 1, 14.) Presumably, should this Court reverse and remand, the district court may order the mediator not to notify the Secretary of his compact selection and the parties, depending upon the outcome of the State's challenge to the status of Big Lagoon and the eleven acres, may be required to conduct further negotiations.

State offered concerning Big Lagoon's status, and that of the eleven-acre parcel, raised material questions of fact that should have, by itself, precluded summary judgment for Big Lagoon. *See Celotex*, 477 U.S. at 322 (non-moving party may defeat summary judgment motion by producing sufficient specific facts to establish a genuine issue of material fact for trial).

CONCLUSION

For the foregoing reasons, the district court erred in granting summary judgment for Big Lagoon and denying the State's cross-motion for summary judgment. The State respectfully requests the Court to reverse and remand with directions either to grant summary judgment for the State, or allow the State to complete discovery relative to its jurisdictional defense.

Dated: February 10, 2012 Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General

/S/ RANDALL A. PINAL

RANDALL A. PINAL
Deputy Attorney General
Attorneys for Appellant/Cross-Appellee State of California

SA2010304157
31406679.doc

10-17803/10-17878

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BIG LAGOON RANCHERIA, a Federally Recognized Indian Tribe,

Plaintiff and Appellee,

v.

STATE OF CALIFORNIA,

Defendant and Appellant.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: February 10, 2012

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General

/S/ RANDALL A. PINAL

RANDALL A. PINAL
Deputy Attorney General
Attorneys for Appellant/Cross-Appellee State of California

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 10-17803/10-17878

I certify that: (check (x) appropriate option(s))

[X] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

[X] Proportionately spaced, has a typeface of 14 points or more and contains 10,862 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words)

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains ____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

[ ] 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

[ ] This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

or

[ ] This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

[ ] Proportionately spaced, has a typeface of 14 points or more and contains _____ words,

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains __ pages or __ words or __ lines of text.

[ ] 3. Briefs in **Capital Cases**.
This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

[ ] Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words).

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains __ words or __ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

☐ 4. **Amicus Briefs**.

☐ Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

or is

☐ Monospaced, has 10.5 or few characters per inch and contains not more than either 7,000 words or 650 lines of text,

or is

☐ Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed.R.App.P. 32 (a)(1)(5).

February 10, 2012
Dated

/s/ RANDALL A. PINAL
Randall A. Pinal
Deputy Attorney General

ADDENDUM

ADDENDUM

FEDERAL STATUTES, REGULATIONS AND PUBLIC LAW

25 U.S.C. § 465

§ 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 479

§ 479. Definitions

The term “Indian” as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934,

residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

25 U.S.C. § 1300i-10
§ 1300i-10. Special considerations

. . . .

(b) Rancheria merger with Yurok Tribe

If a majority of the adult members of any of the following Rancherias at Resighini, Trinidad, or Big Lagoon, vote to merge with the Yurok Tribe in an election which shall be conducted by the Secretary within ninety days after October 31, 1988, the tribes and reservations of those rancherias so voting shall be extinguished and the lands and members of such reservations shall be part of the Yurok Reservation with the unallotted trust land therein held in trust by the United States for the Yurok Tribe: Provided, however, That the existing governing documents and the elected governing bodies of any rancherias voting to merge shall continue in effect until the election of the Interim Council pursuant to section 1300i-8 of this title. The Secretary shall publish in the Federal Register a notice of the effective date of the merger.

. . . .

25 U.S.C. § 2703
§ 2703. Definitions

For purposes of this chapter—

. . . .

(4) The term "Indian lands" means—

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which—

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

(B) is recognized as possessing powers of self-government.

. . . .

25 U.S.C. § 2710
§ 2710. Tribal gaming ordinances

. . . .

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

. . . .

(3)(A) 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.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) 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.

. . . .

(7)(A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe [FN2] to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

. . . .

25 C.F.R. § 151.2
§ 151.2 Definitions.

. . . .

(c) Individual Indian means:

(1) Any person who is an enrolled member of a tribe;

(2) Any person who is a descendent of such a member and said descendant was, on June 1, 1934, physically residing on a federally recognized Indian reservation;

(3) Any other person possessing a total of one-half or more degree Indian blood of a tribe;

(4) For purposes of acquisitions outside of the State of Alaska, Individual Indian also means a person who meets the qualifications of paragraph (c)(1), (2), or (3) of this section where "Tribe" includes any Alaska Native Village or Alaska Native Group which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs.

. . . .

PL 85-671, August 18, 1958, 72 Stat. 619
An Act to provide for the distribution of the land and assets of certain Indian rancherias and reservations in California, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the lands, including minerals, water rights, and improvements located on the lands, and other assets of the following rancherias and reservations in the State of California shall be distributed in accordance with the provisions of this Act: Alexander Valley, Auburn, Big Sandy, Big Valley, Blue Lake, Buena Vista, Cache Creek, Chicken Ranch, Chico, Cloverdale, Cold Springs, Elk Valley, Guidiville, Graton, Greenville, Hopland, Indian Ranch, Lytton, Mark Vest, Middletown, Montgomery Creek, Mooretown, Nevada City, North Fork, Paskenta, Picayune, Pinoleville, Potter Valley, Quartz Valley, Redding, Redwood Valley, Robinson, Rohnerville, Ruffeys, Scotts Valley, Smith River, Strawberry Valley, Table Bluff, Table Mountain, Upper Lake, Wilton.

SEC. 2. (a) The Indians who hold formal or informal assignments on each reservation or rancheria, or the Indians of such reservation or rancheria, or the Secretary of the Interior after consultation with such Indians, shall prepare a plan for distributing to individual Indians the assets of the reservation or rancheria, including the assigned and the unassigned lands, or for selling such assets and distributing the proceeds of sale, or for conveying such assets to a corporation or other legal entity organized or designated by the group, or for conveying such assets to the group as tenants in common. The Secretary shall provide such assistance to the Indians as is necessary to organize a corporation or other legal entity for the purposes of this Act.

(b) General notice shall be given of the contents of a plan prepared pursuant to subsection (a) of this section and approved by the Secretary, and any Indian who feels that he is unfairly treated in the proposed distribution of the property shall be given an opportunity to present his views and arguments for the consideration of the Secretary. After such consideration, the plan or a revision thereof shall be submitted for the approval of the adult Indians who will participate in the distribution of the property, and if the plan is approved by a majority of such Indians who vote in a referendum called for that purpose by the Secretary the plan shall be carried out. It is the intention of Congress that such plan shall be completed not more than three years after it is approved.

(c) Any grantee under the provisions of this section shall receive an unrestricted title to the property conveyed, and the conveyance shall be recorded in the appropriate county office.

(d) No property distributed under the provisions of this Act shall at the time of distribution be subject to any Federal or State income tax. Following any distribution of property made under the provisions of this Act, such property and any income derived therefrom by the distributee shall be subject to the same taxes, State and Federal, as in the case of non-Indians: Provided, That for the purpose of capital gains or losses the base value of the property shall be the value of the property when distributed to the individual, corporation, or other legal entity.

SEC. 3. Before making the conveyances authorized by this Act on any rancheria or reservation, the Secretary of the Interior is directed:

(a) To cause surveys to be made of the exterior or interior boundaries of the lands to the extent that such surveys are necessary or appropriate for the conveyance of marketable and recordable titles to the lands.

(b) To complete any construction or improvement required to bring Indian Bureau roads serving the rancherias or reservations up to adequate standards comparable to standards for similar roads of the State or subdivision thereof. The Secretary is authorized to contract with the State of California or political subdivisions thereof for the construction or improvement of such roads and to expend under such contracts moneys appropriated by Congress for the Indian road system. When such roads are transferred to the State or local government the Secretary is authorized to convey rights of way for such roads, including any improvements thereon.

(c) to install or rehabilitate such irrigation or domestic water systems as he and the Indians affected agree, within a reasonable time, should be completed by the United States.

(d) To cancel all reimbursable indebtedness owing to the United States on account of unpaid construction, operation, and maintenance charges for water facilities on the reservation or rancheria.

(e) To exchange any lands within the rancheria or reservation that are held by the United States for the use of Indians which the Secretary and the Indians affected agree should be exchanged before the termination of the Federal trust for non-Indian lands and improvements of approximately equal value.

SEC. 4. Nothing in this Act shall abrogate any water right that exists by virtue of the laws of the United States. To the extent that the laws of the State of California are not now applicable to any water right appurtenant to any lands involved herein they shall continue to be inapplicable while the water right is in Indian ownership for a period not to exceed fifteen years after the conveyance pursuant to this Act of an unrestricted title thereto, and thereafter the applicability of such laws shall be without prejudice to the priority of any such right not theretofore based upon State law. During the time such State law is not applicable

the Attorney General shall represent the Indian owner in all legal proceedings, including proceedings before administrative bodies, involving such water right, and in any necessary affirmative action to prevent adverse appropriation of water which would encroach upon the Indian water right.

SEC. 5. (a) The Secretary of the Interior is authorized to convey without consideration to Indians who receive conveyances of land pursuant to this Act, or to a corporation or other legal entity organized by such Indians or to a public or nonprofit body, any federally owned property on the reservations or rancherias subject to this Act that is not needed for the administration of Indian affairs in California.

(b) For the purposes of this Act, the assets of the Upper Lake Rancheria and the Robinson Rancheria shall include the one-hundred and-sixty-acre tract set aside as a wood reserve for the Upper Lake Indians by secretarial order dated February 15, 1907.

(c) The Secretary of the Interior is authorized to sell the five hundred and sixty acres of land, more or less, which were withdrawn from entry, sale, or other disposition, and set aside for the Indians of Indian Ranch, Inyo County, California, by the Act of March 3, 1928 (45 Stat. 162), and to distribute the proceeds of sale among the heirs of George Hanson.

SEC. 6. The Secretary of the Interior shall disburse to the Indians of the rancherias and reservations that are subject to this Act all funds of such Indians that are in the custody of the United States.

SEC. 7. Nothing in this Act shall affect any claim filed before the Indian Claims Commission, or the right, if any, of the Indians subject to this Act to share in any judgment recovered against the United States on behalf of the Indians of California.

SEC. 8. Before conveying or distributing property pursuant to this Act the Secretary of the Interior shall protect the rights of individual Indians who are minors, non compos mentis, or in the opinion of the Secretary in need of assistance in conducting their affairs, by causing the appointment of guardians for such Indians in courts of competent jurisdiction, or by such other means as he may deem adequate, without application from such Indians, including but not limited to the creation of a trust for such Indians' property with a Trustee selected by the Secretary, or the purchase by the Secretary of annuities for such Indians.

SEC. 9. Prior to the termination of the Federal trust relationship in accordance with the provisions of this Act, the Secretary of interior is authorized to undertake, within the limits of available appropriations, a special program of education and training designed to help the Indians to earn a livelihood, to conduct their own affairs, and to assume their responsibilities as citizens without special

services because of their status as Indians. Such program may include language training, orientation in non-Indian community customs and living standards, vocational training and related subjects, transportation to the place of training or instruction, and subsistence during the course of training or instruction. For the purposes of such program, the Secretary is authorized to enter into contracts or agreements with any Federal, State, or local governmental agency, corporation, association, or person. Nothing in this section shall preclude any Federal agency from undertaking any other program for the education and training of Indians with funds appropriated to it.

SEC. 10. (a) The plan for the distribution of the assets of a rancheria or reservation, when approved by the Secretary and by the Indians in a referendum vote as provided in subsection 2 (b) of this Act, shall be final, under the distribution of assets pursuant to such plan shall not be the basis for any claim against the United States by an Indian who receives or is denied a part of the assets distributed.

(b) After the assets of a rancheria or reservation have been distributed pursuant to this Act, the Indians who receive any part of such assets, and the dependent members of their immediate families, shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall be inapplicable to them and the laws of the several States shall apply to them in the same manner as they apply to other citizens or persons within their jurisdiction. Nothing in this Act, however, shall affect the status of such persons as citizens of the United States.

SEC. 11. The constitution and corporate charter adopted pursuant to the Act of June 18, 1934 (48 Stat. 984), as amended, by any rancheria or reservation subject to this Act shall be revoked by the Secretary of the Interior when a plan is approved by a majority of the adult Indians thereof pursuant to subsection 2 (b) of this Act.

SEC. 12. The Secretary of the Interior is authorized to issue such rules and regulations and to execute or approve such conveyancing instruments as he deems necessary to carry out the provisions of this Act.

SEC. 13. There is authorized to be appropriated not to exceed $509,235 to carry out the provisions of this Act.

Approved August 18, 1958.

PL 88-419, August 11, 1964, 78 Stat. 390
An Act to amend the Act entitled "An Act to provide for the distribution of the land and assets of certain Indian rancherias and reservations in California, and for other purposes", approved August 18, 1958 (72 Stat. 619).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the first section of the Act entitled "An Act to provide for the distribution of the land and assets of certain Indian rancherias and reservations in California, and for other purposes," approved August 18, 1958 (72 Stat. 619), is amended to read as follows: "the lands, including minerals, water rights, and improvements located on the lands, and other assets of the rancherias and reservations lying wholly within the State of California shall be distributed in accordance with the provisions of this Act when such distribution is requested by a majority vote of the adult Indians of a rancheria or reservation or of the adult Indians who hold formal or informal assignments on the rancheria or reservation, as determined by the Secretary of the Interior. The requirement for a majority vote shall not apply to the rancherias and reservations that were at any time named in this section."

(b) Section 2(a) of such Act is amended by deleting "The Indians who hold formal or informal assignments on each reservation or rancheria, or the Indians of such reservation or rancheria, or the Secretary of the Interior after consultation with such Indians," and by substituting "When the Indians of a rancheria or reservation request a distribution of assets in accordance with the provisions of this Act, they, or the Secretary of the Interior after consultation with them".

(c) Section 2(a) of such Act is further amended by changing the period at the end of the first sentence to a colon and adding: "*Provided*, That the provisions of this section with respect to a request for distribution of assets shall not apply to any case in which the requirement for such request is waived by section 1 of this Act, and in any such case the plan shall be prepared as though request therefore had been made."

(d) Section 2(b) of such Act is amended by changing the period at the end of the penultimate sentence to a colon and adding: "*Provided*, That the provisions of such plan may be modified with the approval of the Secretary and consent of the majority of the distributees."

(e) Section 3(c) of such Act is amended to read as follows:

"(c) To construct, improve, install, extend, or otherwise provide, by contract or otherwise, sanitation facilities (including domestic and community water supplies and facilities, drainage facilities, and sewage and waste-

disposal facilities, together with necessary appurtenances and fixtures) and irrigation facilities for Indian homes, communities, and lands, as he and the Indians agree, within a reasonable time, should be completed by the United States: *Provided*, That with respect to sanitation facilities, as hereinbefore described, the functions specified in this paragraph, including agreements with Indians with respect to such facilities, shall be performed by the Secretary of Health, Education, and Welfare in accordance with the provisions of section 7 of the Act of August 4, 1954 (58 Stat. 674), as amended (42 U. S. C. 2004a)."

(f) Section 3(e) of such Act is amended by deleting the word "non-Indian".

(g) Section 5 of such Act is amended by adding a new subsection as follows:

"(d) Any rancheria or reservation lying wholly within the State of California that is held by the United States for the use of Indians of California and that was not occupied on January 1, 1964, by Indians under a formal or informal assignment shall be sold by the Secretary of the Interior and the proceeds of the sale shall be deposited in the Treasury of the United States to the credit of the Indians of California. Any rancheria or reservation lying wholly within the State of California that is held by the United States for a named tribe, band, or group that was not occupied on January 1, 1964, may be sold by the Secretary of the Interior and the proceeds shall be deposited to the credit of the tribe, band, or group."

(h) Section 10(b) of such Act is amended (1) by inserting after the words "their immediate families" the words "who are not members of any other tribe or band of Indians", (2) by inserting after "because of their status as Indians", the words "all restrictions and tax exemptions applicable to trust or restricted land or interests therein owned by them are terminated," and (3) by adding at the end of section 10(b) the following sentence: "The provisions of this subsection, as amended, shall apply in the case of a distribution of assets made either before or after the amendment of the subsection."

(i) Section 11 of such Act is amended by inserting immediately after the words "as amended," the words "or any other authority,".

(j) Section 13 of such Act is amended by deleting "not to exceed $509,235" and by substituting "such sums as may be necessary".

Approved, August 11, 1964.