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 AMENDED OPPOSITION TO PLAINTIFF BIG LAGOON RANCHERIA'S MOTION FOR SUMMARY JUDGMENT; NOTICE OF CROSS-MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** **Fed. R. Civ. P. 56** 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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NOTICE OF MOTION AND MOTION

TO PLAINTIFF BIG LAGOON RANCHERIA AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 12, 2010, at 2 p.m., or as soon thereafter as the matter may be heard in Courtroom 2 of the above-captioned Court, located at 1301 Clay Street, Oakland, California, Defendant State of California (State) will move the Court for summary judgment, pursuant to Federal Rule of Civil Procedure 56 on grounds that there is no genuine issue of material fact and that the State is entitled to judgment as a matter of law because it has negotiated in good faith toward the formation of a compact with Plaintiff Big Lagoon Rancheria (Big Lagoon or Tribe) that governs class III gaming activities as required by the Indian Gaming Regulatory Act (IGRA), 18 U.S.C. §§ 1166-1168, 25 U.S.C. §§ 2701-2721. This motion is based on this notice of motion, the following memorandum of points and authorities, the accompanying declarations and request for judicial notice, all pleadings and papers on file in this action, and other matters as may be presented at the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

After a failed previous agreement, Big Lagoon and the State have not reached agreement on a new class III gaming compact. The Tribe asserts the State has not negotiated in good faith, and sued to compel the State to do so. The Court should grant the State's cross-motion for summary judgment and deny the Tribe's summary judgment motion because the State is entitled to request revenue sharing from the Tribe as consideration for the benefit of the exclusive right to operate class III gaming. While the Ninth Circuit recently found revenue sharing terms similar to those proposed here constituted a prohibited tax when the State negotiated for a compact amendment, the negotiation here is different because the Tribe has no compact and, therefore, has not provided the State any consideration for exclusivity. In any event, the State is entitled to receive revenue to cover its "costs of dealing with the fallout of gaming." *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1035 (9th Cir. 2010) (*Rincon*).

Also, this Court has found that the State may negotiate for environmental and land use conditions. The State offered valuable consideration for proposed concessions in the form of the

number of gaming devices, and there is no evidence to suggest that any entity other than the Tribe would be its gaming operation's primary beneficiary, consistent with IGRA's purpose.

Moreover, it is against the public interest to locate a class III gaming facility on land that the United States unlawfully acquired in trust for the Tribe that otherwise would be ineligible for gaming, and that would result in damage to adjacent State lands. The United States holds in fee a nine-acre parcel designated as the Tribe's rancheria. The Tribe wants its casino on an adjacent eleven-acre parcel acquired in trust for the Tribe in 1994 pursuant to 25 U.S.C. § 465 of the Indian Reorganization Act (IRA). Last year the Supreme Court held that the Secretary of the Interior (Secretary) lacks authority to acquire trust land for a tribe pursuant to the IRA unless it was a recognized tribe under federal jurisdiction in 1934. *Carcieri v. Salazar*, 129 S. Ct. 1058, 1060-61, 1064-65, 1068 (2009) (*Carcieri*). Historical documents indicate Big Lagoon was not a recognized tribe under federal jurisdiction in 1934, and no current members resided and descend from a recognized sovereign residing on the rancheria in 1934. *See* 25 U.S.C. § 479. Thus, the 1994 acquisition was unlawful and it would be against the public interest to allow the Tribe to conduct gaming on land that otherwise would be ineligible for gaming under IGRA. *Id.* § 2719.

Alternatively, the Court should deny the Tribe's motion to allow the State to complete discovery. The State is actively trying to resolve a discovery dispute with the United States. The evidence obtained by the State so far indicates there is no lineal connection between the original rancheria residents and current members, making the Tribe ineligible for the 1994 trust acquisition, and also raising a material question whether the United States lawfully considers the Tribe federally recognized.

BACKGROUND

I. IGRA

IGRA provides that Indian tribes may conduct certain gaming activities only if authorized by a valid compact between the tribe and the state where the gaming activities take place. 25 U.S.C. §§ 2702, 2710(d)(1)(C). To obtain a 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). IGRA also specifies various provisions that a gaming compact may include. *Id.* § 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. *Id.* § 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. *Id.* § 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 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.* If the state does not consent to the compact selected by the mediator, the Secretary will prescribe procedures for conducting class III gaming. *Id.* § 2710(d)(7)(B)(vii).

II. FACTUAL BACKGROUND

The Tribe claims it has been attempting to negotiate a compact for fifteen years. (Pl.'s Mot. Sum. J. (Mot.) 1:21-24.) But the State was under no obligation to negotiate a compact with Big Lagoon for slot machines or banked or percentage card games before March 2000, when the voters ratified Proposition 1A to authorize the Governor to negotiate class III gaming compacts with Indian tribes. *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 716-18 (9th Cir. 2003); *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1098-1103 (9th Cir. 2003) (*Coyote Valley II*). Also, as the Court knows, in August 2005 the parties agreed on terms of a class III gaming compact that would have permitted Big Lagoon to build a casino in Barstow, California (Barstow Compact). (Doc. 21 at 4; Engstrom Decl. Supp. Pl.'s Mot. Sum. J. (Engstrom Decl.)

Ex. 1A.) Legislative ratification is required for a compact to take effect, Cal. Const. art. IV, § 19(f), and the Legislature failed to ratify the Barstow Compact (Doc. 21 at 4-5). The parties commenced new negotiations in September 2007, and stipulated to dismissal of the previous action without prejudice. (Doc. 21 at 5; Engstrom Decl. Ex. 2.) Thus, the negotiations at issue span September 2007 to April 2009—not fifteen years.

A. 2007 to 2009 Negotiations

Negotiations commenced on October 5, 2007. The Tribe proposed a casino with 250 to 600 gaming devices, to be located beneath a five-story, seventy-room hotel on the eleven acres. (Pinal Decl. Supp. Def.'s Opp'n Pl.'s Mot. Sum. J. & Def.'s Cross-motion Sum. J. (Pinal Decl.) Ex. A.) The parties met again on October 25, 2007. (Engstrom Decl. Ex. 3A.) Thereafter, the State provided the Tribe with an initial draft compact with open provisions for casino location. (*Id.*) The State was interested in exploring alternative sites. (*Id.*) The State proposed the Tribe contribute a portion of its net win to the State,[1] in an amount to be determined, and that if it authorized anyone other than a tribe to operate class III gaming devices within the Tribe's "core geographic market," the Tribe could terminate the compact or forego revenue sharing contributions except for regulatory costs if it operated a minimum number of gaming devices. (*Id.* §§ 4.3, 4.5) The Tribe previously agreed to these terms in the Barstow Compact. (*Id.* Ex. 1A, Barstow Compact §§ 4.3.3, 4.4.)

The next meeting occurred on December 10, 2007. (Engstrom Decl. Ex. 4.) On January 31, 2008, the State proposed three location options that "stem[med] from the State's vital interest in preserving and protecting, for present and future generations, environmentally significant State resources located adjacent to the rancheria." (*Id.*) The options included:

> (1) The **Highway Site**, located adjacent to Highway 101 within five miles of the rancheria. The Tribe could operate up to 500 gaming devices and a 100-room hotel, with geographic exclusivity. The Tribe would pay the State 14% to 25% of its net win and an undetermined fee into the Revenue Sharing Trust Fund (RSTF). The land would be transferred to federal trust for the Tribe. In return, the Tribe would convey to the State sixteen acres of Tribal-owned fee land and limit development on its rancheria and trust

[1] The revenue sharing provision stated: "The Tribe shall remit to such agency, trust, fund, or entity, as the State Director of Finance, pursuant to law, from time to time, shall specify to the Tribe in writing, the payments referenced in subdivision (a) in quarterly payments." (Draft Compact § 4.3(b)(1).)

lands the same as in the Barstow Compact. Before including the proposal in the compact, the State would obtain support letters from necessary third parties. If any contingency failed, the Tribe could conduct gaming on the second option. (*Id.*)

(2) The **Five Acre/Rancheria Site**, where a casino with up to 250 gaming devices would be located on the nine acres, a 50-room hotel would be located on the eleven acres, and supporting facilities (e.g., parking and wastewater treatment) would be located nearby on five-acres of Tribal-owned fee land. The State proposed conditions designed to address the project's very specific off-rancheria environmental impacts. (*See id.* App. A.) The Tribe would receive geographic exclusivity and pay the same fees as the Highway Site, with RSTF provisions left open. If any specified contingency failed, the Tribe could conduct gaming on the third option. (Engstrom Decl. Ex. 4.)

(3) The **Rancheria Site**, where a casino with up to 175 gaming devices would be located on the nine acres, a 50-room hotel would be located on the eleven acres, with parking and supporting facilities split between the parcels. This option required specific development conditions designed to mitigate impacts to the off-rancheria environment, and the Tribe would receive geographic exclusivity and pay the same revenue sharing, with RSTF provisions left open. (*Id.*)

On February 20, 2008, the Tribe provided the State proposed compact language, proposing the project be located on the rancheria, but not defining whether that included the eleven acres. (Engstrom Decl. Ex. 5, Draft Compact § 2.22.) RSTF contributions and the number of gaming devices were left open, and the Tribe eliminated all provisions for revenue sharing or geographic exclusivity. (*Id.* §§ 4.1, 4.3, 4.5, 5.2.) The Tribe proposed that evaluating environmental impacts under the National Environmental Policy Act would be sufficient, and it agreed to enter into intergovernmental mitigation agreements but modified the proposed terms. (*Id.* §§ 11.1, 11.7-9.)

The next negotiations occurred on February 25, 2008, and March 21, 2008; the Tribe rejected each proposed site except the eleven acres. (Engstrom Decl. Ex. 6.) Claiming the State's proposed gaming device and hotel limitations would not allow it to compete, and that it had always planned for a casino on the eleven acres, the Tribe proposed a casino on the eleven acres with at least 350 gaming devices, a lodge with at least 120 rooms and related amenities, and parking at unspecified locations on twenty acres of "trust land." (*Id.*)

The State responded on May 2, 2008, in advance of the parties' next meeting scheduled for May 5, 2008. (Engstrom Decl. Ex. 7.) New opportunities for alternative sites had arisen and, despite having been advised, "for the first time, that the Chairman is not interested in possible alternative sites," the State offered to explore the new options if the Tribe was interested. (*Id.*) Respecting the Tribe's desire for a project on its rancheria, and due to the site's "environmentally

sensitive nature," the State proposed a casino on the nine acres with up to 99 gaming devices, a 50-room hotel on the eleven acres, 50-mile geographic exclusivity, and revenue sharing from 10% to 25% of the Tribe's net win. (*Id.*) The Tribe would continue to receive $1.1 million in annual RSTF distributions provided it did not use the money for gaming-related activities. (*Id.*) The Tribe offered no new information about the nine acres to suggest the State's proposed development conditions were improper, and the State continued to consider them necessary. (*Id.*) In August 2008, the Tribe proposed project mitigation measures. (Pinal Decl. Ex. B.)

B. Last Proposals

On October 6, 2008, the Tribe indicated it did not need geographic exclusivity and would not share revenue with the State. (Engstrom Decl. Ex. 8.) Without any supporting information, the Tribe claimed the State's proposed revenue share would "necessarily consume a substantial share" of its profit. (*Id.*) The Tribe *had been* willing to consider revenue sharing but withdrew the offer because it now considered it a tax. (*Id.*) The Tribe proposed that it receive the 1999 Compact terms, allowing it to operate up to 350 gaming devices without any fees and participate in the license pool created by the 1999 Compact, or some other mechanism to operate more than 350 gaming devices if licenses were unavailable; that payments for between 350 and 2000 gaming devices go to the RSTF; that the project be located on the rancheria; that the Tribe be allowed to build a hotel with up to 100 rooms with room to expand; and that the Tribe's proposed mitigation measures be considered sufficient. (*Id.*) The Tribe indicated it would file suit if there was no agreement by November 7, 2008. (*Id.*)

On October 31, 2008, the State responded that the 1999 Compact terms have, in this instance, always been unacceptable to the State. (Engstrom Decl. Ex. 9.) In return for a class III gaming monopoly, the State requested general fund revenue sharing of 15% of net win on a maximum 349 gaming devices, consistent with consideration requested of other tribes, and to which the Tribe had previously agreed in the Barstow Compact and the Secretary had expressly approved in other compacts. (*Id.*) The Tribe's refusal to provide any revenue sharing other than RSTF contributions under the 1999 Compact terms amounted to no revenue sharing at all because the Tribe would operate fewer than 350 gaming devices (1999 Compact tribes operating 700

gaming devices or less contribute nothing to the RSTF), and RSTF contributions alone were not full consideration for class III exclusivity because the money goes solely to Non-compact Tribes. (*Id.*) The Tribe could continue to receive its RSTF distribution if it operated no more than 349 gaming devices and did not use the RSTF money for gaming-related costs, and it could request a compact amendment if it wanted to operate more devices. (*Id.*)

The Tribe gave the State no financial data demonstrating the proposed revenue sharing was unaffordable. (*Id.*) Although the Tribe had recently asked the State to consider alternative sites near Eureka and Trinidad, the State agreed to the rancheria as long as it included "constraints on development inherent in placing an intense urban project adjacent to" environmentally sensitive State lands. (*Id.*) The Tribe had asked the State to agree to mitigation measures without presenting an actual project for analysis, but the State agreed to incorporate the Tribe's proposed measures that could be determined immediately, with the need for additional measures to be demonstrated through an environmental review process for the specific project. (*Id.*) The State urged the Tribe to continue to negotiate. (*Id.*)

LEGAL STANDARD

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

ARGUMENT

I. THE STATE NEGOTIATED IN GOOD FAITH FOR REVENUE SHARING

Big Lagoon relies heavily on *Rincon* for the proposition that a request for general fund revenue sharing is *per se* failure to negotiate in good faith under IGRA. (Mot. 13-20.) In *Rincon*, the Ninth Circuit held that the State failed to negotiate an amendment to a 1999 Compact in good faith because it viewed the State's request for general fund revenue sharing as an attempt to tax the tribe in violation of 25 U.S.C. § 2710(d)(4). 602 F.3d at 1029-42. The court denied the State's petition for rehearing but stayed issuance of the mandate until September 13, 2010, to allow the State to file a petition for writ of certioriari. (Def.'s Req. Jud. Not. (Def.'s RJN) Ex. A.) The State recognizes that, for the moment, *Rincon* is controlling, *see Wedbush, Noble, Cooke, Inc. v. S.E.C.*, 714 F.2d 923, 924 (9th Cir. 1983); however, the State requests this Court to stay further proceedings in this case until the Supreme Court decides the State's forthcoming writ petition in *Rincon* (Pinal Decl. ¶ 2), or until the Ninth Circuit's stay is dissolved. Indeed, it would make little practical or equitable sense if Big Lagoon were allowed to take advantage of a decision in *Rincon* when the Rincon Tribe cannot even do so. The *Rincon* decision is flawed for reasons discussed in the State's briefs on appeal, and the well-reasoned dissenting opinion in that case. (Def.'s RJN Exs. B-C.) *Rincon*, 602 F.3d at 1042-73 (Bybee, J., dissenting). For reasons set forth therein and incorporated here by reference,[2] the State is entitled to summary judgment here.

Even if the decision stands in *Rincon*, it is not dispositive here. First, it is distinguishable because it involved an amendment to an existing compact where the tribe was already sharing revenue in exchange for exclusive rights to conduct class III gaming in the most populous state in the country. 602 F.3d at 1024; *see Coyote Valley II*, 331 F.3d at 1114-15. Proposition 1A amended the state constitution to afford federally recognized tribes the exclusive right to negotiate with the Governor for limited class III gaming compacts, subject to legislative ratification. Cal. Const. art. IV, § 19(f). The court in *Rincon* held that putting Proposition 1A on the table in 1999 was an "exceptionally valuable and bargained for" concession at the time but,

[2] The State's position in *Rincon* that it had negotiated in good faith was based, in part, on its genuine belief that general fund revenue sharing was authorized because the Secretary and other tribes had accepted compacts with such terms. *Rincon*, 602 F.3d at 1041. Here the State requests judicial notice of compacts entered into by federally recognized tribes, which include general fund revenue sharing and have been approved by the Secretary. (Def.'s RJN Exs. D-U.)

that "[b]y contrast, in the current legal landscape, 'exclusivity' is not a 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 1036-37. But the court carefully noted:

> While we do not hold that no future revenue sharing is permissible, it is clear that the State cannot use exclusivity as new consideration for new types of revenue sharing since it and the collective tribes already struck a bargain in 1999, wherein the tribes were exempted from the prohibition on gaming in exchange for their contributions to the RSTF and SDF.

Id. at 1037.

Thus, *Rincon* confirms that some form of revenue sharing is permissible. *Rincon*'s holding that "the benefits conferred by Proposition 1A have already been used as consideration for the establishment of the RSTF and SDF in the 1999 Compact," *id.*, even if upheld, does not apply here because Big Lagoon, unlike the 1999 Compact tribe in *Rincon*, has not previously provided *anything* in exchange for the valuable economic benefit of Proposition 1A exclusivity. While "[i]t is elementary law that giving a party something to which he already has an absolute right is not consideration to support that party's contractual promise," *id.*, the constitution gives Big Lagoon the exclusive right to *negotiate* for a compact. The Tribe has provided no consideration, so it is not in the same position as the Rincon Tribe and does not have the same "absolute right" that the court found existed for 1999 Compact tribes. Thus, the State can request revenue sharing as consideration for initial exclusivity.

Second, although *Rincon* held that a request for general fund revenue sharing was a tax in that case, *Rincon* and *Coyote Valley II* confirm that the State is entitled to some form of revenue sharing. *Rincon*, 602 F.3d at 1033-37; *Coyote Valley II*, 331 F.3d at 1111-15. Thus, even if *Rincon* is affirmed, the parties here may still negotiate to determine what form and amount of revenue sharing is appropriate, which must be more than the Tribe's proposal only to make RSTF contributions, which in this case would mean that the Tribe would pay nothing to the State for the exclusive right to game in the most populous state in the country. Moreover, it would be difficult to find the State failed to negotiate in good faith by requesting the same revenue sharing terms to which Big Lagoon previously agreed in the Barstow Compact. (Engstrom Decl. Ex. 1A, Barstow Compact § 4.3.3(b); *see also id.* 3 (acknowledging contribution was "fair").)

Third, even if this Court orders the parties to conclude a compact within sixty days, or if the

parties ultimately submit to mediation, the parties and the mediator must have guidance from this Court as to compact parameters that best comport with IGRA and any other applicable federal law. *See* 25 U.S.C. § 2710(d)(7)(B)(iii)-(iv). As discussed *post*, several dispositive questions remain, which this Court must answer before ordering the parties to mediation.

II. THE STATE NEGOTIATED IN GOOD FAITH FOR ENVIRONMENTAL MITIGATION

The Tribe argues that IGRA does not authorize the State to "impose" environmental regulations on the Tribe. (Mot. 20:27-28.) The Tribe mischaracterizes the record. In any event, the State is entitled to summary judgment for the following reasons.

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

Three times this Court has rejected the same argument the Tribe makes here and found that the State may negotiate for provisions regarding environmental and land use issues as part of the compacting process. On March 18, 2002, the Court found that "environmental and land use issues are subjects that may be 'directly related to the operation of gaming activities' under § 2710(d)(3)(C)(vii)[,]" and that "[e]nvironmental 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)." (Pl.'s Req. Jud. Not. (Pl.'s RJN) Ex. 2 at 15:3-9.) At the time, the Court found the State's continued insistence on Tribal execution of a side agreement requiring compliance with State environmental laws and regulations "would constitute bad faith," but the Court denied summary judgment and set parameters for future negotiations:

> The State may 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 other tribes were not asked to comply. However, the State may not in good faith insist upon a blanket provision in a tribal-State compact with Big Lagoon which requires future compliance with all State environmental and land use laws, or provides the State with unilateral authority to grant or withhold its approval of the gaming facility after the Compact is signed, as it proposed in the side letter agreement.

(*Id.* 19:4-16; *see also id.* 20:4-8 (finding March 22, 2000 Order "provided the State with a reasonable basis for its belief that it could negotiate environmental and land use issues with the Tribe in good faith").) Again on March 17, 2004, the Court noted that it had "previously held that

the State could negotiate in good faith regarding the on-site alternative by offering the Tribe specific concessions in return for requests that the Tribe comply with environmental regulations." (Def.'s RJN Ex. V 7:17-20 (*citing* Mar. 18, 2002 Order 18).)

Further, contrary to the Tribe's unsupported assertion (Mot. 20:13-17), in the last negotiations the State did not insist or ask the Tribe to obtain State or local agency permits or approval before building its project. Instead, *the Tribe* proposed specific project mitigation measures in August 2008 that the State modified and incorporated into its last proposal. (Pinal Decl. Ex. B; Engstrom Decl. Ex. 9A.) The measures were as tailored as the State could conceive, given the limited information the Tribe provided regarding its intended facility design. To the extent any of the State's proposed mitigation measures are *based on* state environmental and land use law, this Court has found that to be a permissible starting point. (Pl.'s RJN Ex. 2 at 15:7-9.)

B. *Rincon* is Inapposite Because it Did Not Discuss Environmental Issues

The Tribe contends that because the court in *Rincon* held that a general fund fee to operate slot machines was not directly related to gaming activities, neither is environmental regulation of a gaming facility directly related and, thus, the State may not request environmental conditions. (Mot. 21:14-28.) But *Rincon* is inapposite because the issue was whether the State could request general fund revenue sharing, not whether it could negotiate for environmental conditions. The court's passing reference to environmental issues in the context of discussing IGRA's legislative history generally is dicta. *See Rincon*, 602 F.3d at 1029 n.10, 1040. Indeed, this Court previously rejected Big Lagoon's argument that IGRA's legislative history suggests the State cannot negotiate for environmental mitigation. (Pl.'s RJN Ex. 2 at 16 n.5.) Nothing in *Rincon* requires this Court to modify its analysis or resulting conclusion.

C. The State Offered Valuable Consideration for Environmental Concessions

The Tribe claims the State requested environmental conditions without offering meaningful consideration. (Mot. 20:16-17.) The State would allow the Tribe to operate up to 349 gaming devices and continue to receive $1.1 million in annual RSTF distributions as long as it did not operate more than 349 devices and did not use RSTF money to pay gaming-related costs. (Engstrom Decl. Ex. 9.) The Tribe did not respond to the proposal, which had improved from the

State's previous offer, and instead filed suit. That Big Lagoon abandoned the negotiation process without exploring the possibility of different terms does not mean the State failed to negotiate in good faith. (*See* Pl.'s RJN Ex. 4 at 12 (*citing Coyote Valley II*, 331 F.3d at 1110) (denying Tribe's summary judgment motion in part because State "actively negotiated" in good faith).)

Although the Tribe still desires the 1999 Compact terms,[3] the State long ago rejected that proposal because history had shown that compact included inadequate environmental protections. (Def.'s RJN Ex. V 2:17-18.) Indeed, the State need not offer the same terms as the 1999 Compact. *See Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1101 (E.D. Cal. 2002).

The Tribe also suggests the State's "calculated reluctance to offer the Tribe a profitable number of gaming devices for casino projects on the Tribe's own Rancheria" demonstrates bad faith. (Mot. 23:3-9.) But the State is not required to offer compact terms that ensure a profitable gaming operation. IGRA's purposes include ensuring that tribes are the primary beneficiaries of gaming and protecting gaming as a means of generating tribal revenue. 25 U.S.C. § 2702(1)-(2); *see Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994). There is no evidence that the State's position would preclude the Tribe from being its gaming operation's primary beneficiary. (*See* Engstrom Decl. Exs. 8-9.)

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

The National Indian Gaming Commission (NIGC), created by IGRA and charged with its enforcement, 25 U.S.C. §§ 2704-2709, promulgated regulations requiring the construction and maintenance of tribal gaming facilities and gaming operations be "conducted in a manner which adequately protects the environment and the public health and safety." 25 C.F.R. § 502.22 (2008); *see also id.* § 599.5; 73 Fed. Reg. 6019, 6023 (Feb. 1, 2008). (Def.'s RJN Exs. W-Y.) A tribe must enforce "laws, resolutions, codes, policies, standards or procedures applicable to each gaming place, facility or location that protect the environment and the public health and safety, *including standards under a tribal-state compact* or Secretarial procedures." *Id.* (emphasis

[3] In fact, the Tribe wants more than is available to the 1999 Compact tribes, insisting that it be able to operate over 350 gaming devices even if licenses are unavailable in the pool created by that compact, an option unavailable to the 1999 Compact tribes. (Engstrom Decl. Ex. 8.)

added). Statutory interpretation by an agency charged with implementing it will be upheld unless unreasonable. *Arizona Public Service Co. v. E.P.A.*, 211 F.3d 1280, 1287 (D.C. Cir. 2000). Here, the NIGC's construction of IGRA is reasonable and consistent with this Court's rulings, as it envisions the use of tribal-state compacts to include environmental protection standards.

E. The Tribe Earlier Agreed to More Restrictive Environmental Conditions

In the Barstow Compact, the Tribe "agreed to forego gaming and other adverse development on its environmentally sensitive land at its rancheria," and to mitigate environmental impacts to land surrounding the proposed casino site in Barstow, which would have been the Tribe's trust land. (Engstrom Decl. Ex. 1A, Settlement Agmt. 5-6, Barstow Compact 2 & §§ 4.3, 11.) The Tribe's attorney testified before the Legislature that the terms "were freely negotiated at arm's length" and did not infringe on Tribal sovereignty. (Pinal Decl. Ex. C at 81.) The Tribe's Chairman testified that the Barstow Compact would benefit California's greater interests "in terms of the environmental concerns." (*Id.* 85; *see also* Pl.'s RJN Ex. 6 at 3:7-9 (acknowledging the Barstow Compact "substantially serves a clear public policy and provides environmental . . . benefits to the State").) If environmental conditions were appropriate for the Tribe's rancheria and Barstow parcel when the Tribe planned to build a facility in Barstow, then they are equally appropriate, if not more so, for a project on the Tribe's environmentally sensitive rancheria and trust land. Accordingly, the State negotiated in good faith on environmental and land use issues.

III. IT IS AGAINST THE PUBLIC INTEREST TO PUT A CASINO ON LAND UNLAWFULLY ACQUIRED IN TRUST FOR BIG LAGOON THAT OTHERWISE WOULD NOT BE GAMING-ELIGIBLE, AND THAT WOULD DAMAGE SURROUNDING STATE LANDS

The public interest is one of many factors that IGRA allows the Court to consider in determining whether the State negotiated in good faith. 25 U.S.C. § 2710(d)(7)(B)(iii)(I). Here, the State negotiated in good faith because it is not in the public interest to put a casino on land that, under the *Carcieri* decision, the United States unlawfully acquired in trust for Big Lagoon, and where the Tribe insists on siting a casino and all related development without adequate mitigation of environmental impacts to adjacent State lands. Thus, the State is entitled to summary judgment and the Tribe's summary judgment motion should be denied.

A. The United States May Only Acquire Land in Trust Under the IRA for Recognized Tribes That Were Under Federal Jurisdiction in 1934

In 1994, pursuant to the IRA, the Secretary acquired in trust for Big Lagoon the eleven-acre parcel where the Tribe insists on locating its gaming facility. (Pinal Decl. Ex. D.) The IRA, enacted in 1934, 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 such members who were, on June 1, 1934, residing with the present boundaries of any Indian reservation, and shall further include all persons of one-half or more Indian blood.

Id. § 479. Last year the Supreme Court held that because the term "now under federal jurisdiction" in § 479 unambiguously refers to those tribes that were under federal jurisdiction when Congress enacted the statute, the Secretary has authority to take land in trust only for recognized tribes that were under federal jurisdiction when the IRA was enacted in June 1934. *Carcieri*, 129 S. Ct. at 1060-61, 1064-65, 1068.

B. Big Lagoon Was Not a Recognized Tribe Under Federal Jurisdiction in 1934 And, Therefore, Was Not a Proper Trust Beneficiary in 1994

1. James Charley and Family Were Not a Recognized Indian Tribe Under Federal Jurisdiction in 1934

On July 10, 1918, F. G. Ladd and his wife conveyed to the United States a 9.24-acre parcel on the shore of Big Lagoon. (Pinal Decl. Ex. E.) The general warranty deed conveyed the parcel subject only to a railroad right of way and without any other restriction. (*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 sought assistance from the Indian Office concerning his fear that he would be evicted from the land where he was living. (Pinal Decl. Ex. F.) Finding eviction would be calamitous for James Charley (also known as Lagoon Charley) and his family, federal officials contacted the landowners, the Ladds, about selling the property. (*Id.* Ex. G.) Indian Services Inspector John J. Terrell advised the Ladds that "Congress has during the past few years made

small appropriations[4]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 have precluded the purchase of only small tracts and the paying of excessive prices." (*Id.* Ex. H (n. added).) Mr. Ladd eventually stated that he was willing to sell a portion of the land for James Charley's use, and by January 1918 discussions focused on the size and price of the parcel. (*Id.* Exs. I-M.)

The Commissioner's Office made clear to 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[5]. . . .
>
> 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.

(Pinal Decl. Ex. O (n. added).) Terrell responded that James Charley and his wife understood that title would remain in the United States and that other landless and homeless Indians could be permitted to live there. (*Id.* Ex. P.) Terrell doubted that "the few other Indians of Charlie's tribe[6] that are landless, if any, will desire to make a permanent home on any portion of the 10 acres named in Mr. Ladd's proposition," and added that two of "Charlie's" brothers, George and Frank, already had homes nearby. (*Id.*) Given James Charley's clear understanding of the United States' reservation of rights, the Indian Office instructed Terrell to make the purchase. (*Id.* Ex. Q.) In June 1918, Terrell advised Mr. Ladd's lawyers that the purchase was approved and instructed them, among other things, that "[t]he deed should convey to the 'United States of America.'" (*Id.* Ex. R.)

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[4] *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.

[5] *See also* Pinal Decl. Ex. N ("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.").

[6] James and Lottie Charley were Yurok Indians. (*See* argument IV(B)(2), *post*.)

An opinion of the Solicitor of the Interior Department suggests that even if the United States had indicated intent to limit the use of rancheria lands for the benefit of specific persons or groups, 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); 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.

(Pinal Decl. Ex. S at 5-6 (underscore and parenthesis 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.)

(*Id.* 6.)

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 Acts were intended for the purchase of tracts on which "small bands," not small families, could be located. (*See* Pinal Decl. Exs. L-N.) The BIA later confirmed this intent in 1968 when it explained 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." (*Id.* Ex. T.)

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 21, 1921. (*Id.* Ex. U.) His widow and her four children continued to live in Trinidad in summer 1929. (Brandt Decl. Supp. Def.'s Opp'n to Pl.'s Mot. Sum. J. & Def.'s Cross-motion Sum. J. (Brandt Decl.) Ex.A.) Preliminary documents do not show anyone living on the parcel until James and Lottie Charley's son Robert lived there from 1942 to 1946. (Pinal Decl. Ex. V.)

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. (Pinal Decl. Ex.W.) 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." (*Id.* Table A.) As detailed above, staff from the Hoopa Valley Indian Agency arranged for the United States to purchase the nine acres, yet the Tribe'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 does Big Lagoon's name appear on a June 1935 letter from Indian Agency staff to the Commissioner detailing IRA election results for "all California jurisdictions." (*Id.* Ex. X.) The Deputy Assistant Secretary recently stated that he believed the IRA Report is "not the only or finally determinative source," but he considers it a "helpful . . . starting point" for BIA staff to determine, after *Carcieri*, whether a tribe was a recognized tribe under federal jurisdiction in

1934.[7] (*Id.* Ex. Y.) Reading the IRA Report in the context of the historical documents detailed above, there is credible and undisputed evidence that Big Lagoon was not a recognized tribe under federal jurisdiction in 1934.

2. Historical Documents Indicate The Tribe's Members Are Not Descended From James Charley and Family

Even if the James Charley family constituted a recognized tribe under federal jurisdiction in 1934, to be eligible for an IRA trust acquisition Big Lagoon's current members must also descend from that family. *See* 25 U.S.C. § 479. The BIA has interpreted § 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). (Def.'s RJN Exs. Z-AA.) Here, the historical documents show that neither James Charley nor anyone from his family or any current Tribal members lived on the nine acres in June 1934. (*See* argument IV(B)(2), *post*.) Moreover, "Big Lagoon admits that no current member of the Tribe is known to be related to Jim 'Lagoon' Charley other than by marriage."[8] (Pinal Decl. Ex. Z.) "Descent" is defined as "hereditary succession." 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). Big Lagoon's 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, the Tribe is not an eligible beneficiary of land acquisitions under the IRA.

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

The Court may consider the public interest in determining whether the State negotiated in good faith. 25 U.S.C. § 2710(d)(7)(B(iii). This "may include issues of a very general nature." S.

[7] The BIA is currently deciding Big Lagoon's status in 1934. (*See* Doc. 74.)

[8] The admission may be contrary to historical documents. If the unspecified marital relationship is between Robert Charles and Ada Waukell, the Tribe's admission raises a material factual dispute because Robert Charles' death certificate indicates he was never married. (Thorpe Decl. Supp. Def.'s Opp'n Pl.'s Mot. Sum. J. & Cross-motion Sum. J. (Thorpe Decl.) Ex. A.)

Rep. No. 100-446, at 14 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3084-85. This Court has found the State's argument about the Tribe's status "arguably implicates the public interest." (Doc. 74 at 5:2-3.) It is against the public interest to allow gaming on land that, under the *Carcieri* decision, the United States unlawfully acquired in trust for the Tribe. That the Supreme Court decided *Carcieri* after the trust acquisition occurred does not mean the public interest is not implicated. Irrespective of the date of the *Carcieri* decision, the parcel is not "Indian lands" eligible for gaming under IGRA. *See* 25 U.S.C. § 2719 (prohibiting gaming on land acquired in trust after October 17, 1988, with limited exceptions). Although this Court has found that the eleven acres is "Indian lands" under IGRA, that finding was based, in part, on an assumption that the United States was authorized to acquire the land for Big Lagoon under the IRA. (*See* Pl.'s RJN Ex. 2 at 20-23.) That the State raises the issue for the first time here is occasioned by the recent *Carcieri* decision.

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

The State has a vital interest in protecting environmentally sensitive State resources located adjacent to the rancheria and trust land. (*See* Engstrom Decl. Ex. 4.) Respecting the Tribe's desire to build the project on its trust land, balanced with the State's desire to protect its natural resources, the State proposed that the Tribe site the casino on the nine acres, with the hotel on the eleven acres, and parking and other supporting facilities allocated between the parcels. (*Id.* Ex. 9A.) But the Tribe refused and, other than exploring various alternative sites, has insisted that the entire project be located on the eleven acres only. This doubling-up of a casino, hotel and supporting infrastructure on a single parcel exacerbates the off-rancheria environmental impacts beyond a level tolerable to the State. It would be against the public interest to negotiate for a project under these circumstances, or to find that the State requested too much consideration from the Tribe in seeking to protect valuable natural resources. Accordingly, the State is entitled to summary judgment and the Tribe's summary judgment motion should be denied.

IV. BIG LAGOON'S SUMMARY JUDGMENT MOTION SHOULD BE DENIED OR CONTINUED TO ALLOW THE STATE TO DISCOVER INFORMATION ESSENTIAL TO ITS OPPOSITION

The State has had difficulty obtaining documents in response to subpoenas issued to the BIA and the Assistant Secretary of Indian Affairs to ascertain the Tribe's status in 1934, and the connection between James Charley and the individuals listed on the Big Lagoon Rancheria Asset Distribution Plan. The documents are necessary to the State's defense because even if James Charley and his family were a recognized tribe under federal jurisdiction in 1934, the Tribe that acquired a beneficial interest in the eleven acres must descend from the James Charley family to be eligible for an IRA acquisition. If the Court finds the Tribe's admission that its members are not related to James Charley insufficient to grant the State summary judgment, additional discovery is needed to prove the lack of any lineal connection. The United States' partial document production raised for the first time the question whether it lawfully recognized the Tribe. If Big Lagoon is not lawfully recognized, it would not meet IGRA's jurisdictional prerequisite for compact negotiations, or pursuing this action. Because the State and United States are actively trying to resolve their discovery dispute, the Tribe's summary judgment motion should be denied, or continued, to allow the State to complete discovery.

A. The Court May Deny or Continue a Motion for Summary Judgment to Allow the Non-moving Party to Complete Discovery

Federal Rule of Civil Procedure 56(f) allows a court to deny or continue a summary judgment motion to allow an opposing party to complete discovery. Rule 56(f) requires discovery "where the non-moving party has not had the opportunity to discover information that is essential to its opposition." *Anderson v. Liberty Lobby, Inc.*, 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").

B. Good Cause Exists for the Court to Deny or Continue the Tribe's Summary Judgment Motion

1. The State's Efforts to Obtain the Evidence

On August 19, 2009, the Court set the fact discovery completion date as January 29, 2010, which the parties stipulated to continue to February 26, 2010. (Docs. 30, 35.) On December 18 and 21, 2009, the State issued identical subpoenas duces tecum to the BIA Pacific Regional Office, the BIA Northern California Agency and the Assistant Secretary of Indian Affairs. (Pinal

Decl. Ex. KK.) Responses were due by January 8, 2010, but the United States did not respond until much later. (*Id.* & Ex. LL.) The Court continued to May 31, 2010, the discovery cutoff date for the subpoenaed documents. (Doc. 60.) The State's effort to obtain the documents since then is detailed in the Pinal Declaration at paragraphs 44 through 52 and Exhibits MM through WW. The State has diligently attempted to obtain the documents; however, the United States' failure to timely comply with the subpoenas has thwarted the State's ability to complete discovery earlier.

2. Evidence Obtained to Date

In addition to the discussion in argument III(B), *ante*, the State has obtained information concerning the relationship between the rancheria's original and subsequent occupants.[9] James Lagoon Charlie's wife, Lottie, was a full-blood Yurok Indian. (Brandt Decl. Ex. A.) Their son, Robert Charlie, also known as Robert Charles, is identified as a full-blood Yurok Indian. (*Id.* Exs. A & M; Thorpe Decl. Ex. A.)[10] Robert Charles apparently lived on the Big Lagoon parcel from 1942 to 1946. (Pinal Decl. Ex. V.) He lived with Ada Waukell, a full-blood Indian of the Lower Klamath Tribe. (Brandt Decl. Exs. B, J , K.) Ida Waukell was Ada Waukell's sister. (Brandt Decl. Ex. C.) Ida and Ada were daughters of Harry and Nettie Waukell, who were full-blood Klamath Indians. (*Id.* Exs. J-L, N at sheet 3, lines 1-2.) The Yurok Tribe was historically known as the Klamath River Indians. (Pinal Decl. Ex. AA at 1.) In adulthood, Ida Waukell identified herself as "4/4 Yurok." (Brandt Decl. Ex. C.) Ida Waukell and Thomas Williams had a son named Thomas Williams. (*Id.*; Thorpe Decl. Ex. B.) 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. (Brandt Decl. Ex. C; Thorpe Decl. Exs. I-J.) All further references to Thomas Williams are to the younger Thomas Williams.

[9] Attached hereto as Exhibit A is a chart summarizing the relationship between the James Charley family and the distributees and dependents listed in Big Lagoon's Distribution Plan.

[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. (*See, e.g.*, Brandt Decl. Ex. A.) Later, she and her sons had apparently again modified the surname, this time to Charles. (*See id.* Ex. M.)

Thomas Williams may have been married to Lila Green, the daughter of a one-half blood Yurok, George Green, and his wife Laura, a one-half blood Chimariko Indian. (Pinal Decl. Ex. V; Brandt Decl. Ex. D.) 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. (Pinal Decl. Ex. V.) Thomas Williams, however, did more than simply inquire about the property—he moved himself onto it, having first managed to obtain permission from BIA to camp there. (*Id.*) Eventually Thomas Williams started building a house there. In 1951, BIA staff discovered this unauthorized activity, calling it a "trespass," and left a note for Williams to stop construction at once. (*Id.* Ex. BB.) In another memorandum documenting Thomas Williams' trespass, staff was advised by "Mrs. Thomas Green Williams, an unallotted and unassigned Yurok Indian," that

> she called many times at the Hoopa Office trying to get an assignment on one of the rancherias and was never able to get a satisfactory answer, only that such a program was not ready at the time. She was finally given permission to camp on Big Lagoon, so they built a cabin in order to lock up their belongings when they were away.

(*Id.* Ex. CC.)

Thomas Williams and Lila Green had a daughter, Beverly Williams. (Thorpe Decl. Ex. J.) Following a brief marriage that produced three sons—Franklin, Dale and Peter Lara (Pinal Decl. Ex. DD; Thorpe Decl. Exs. F-H.)—Beverly Williams married Theodore R. Moorehead, aka Theodore R. M. Moorehead, aka Ted Moorehead,[11] born to Theodore and Isabel Moorehead of Crescent City in Del Norte County.[12] (Brandt Decl. Exs. E-F.) 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. (*Id.* Exs. E-H.) Theodore R. Moorehead and Beverly Williams were reported to be living on the nine acres in 1967. (Pinal Decl. Ex. EE.) Their children are Roger, Virgil and Holly Moorehead. (Thorpe Decl. Exs. C-E.)

3. Evidence the State Expects to Receive

The United States has yet to produce documents explaining why Congress included a

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

[12] Theodore and Isabel Moorehead lived in Crescent City in 1929, were living in Blue Lake, in Humboldt County, as late as 1949, and in Smith River in 1969. (Brandt Decl. Exs. E-G.)

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. (Pinal Decl. Exs. UU, VV, ¶ 50.) The documents will help explain the relationship between Big Lagoon and the United States, and Big Lagoon and the Yurok Tribe, particularly in light of evidence suggesting James Charley and family were Yurok, and that Congress specifically corrected an early draft of the Act to ensure that Big Lagoon was identified as a rancheria instead of a tribe in recognition that there is a difference between the two. (*Id.* ¶ 50.) *See* S.Rep. 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. (*Id.* ¶ 51.) Without that information, which is exclusively within the BIA's possession, the State cannot complete its research. (*Id.*) Also, on June 25, 2010, the State received from the Assistant Secretary several document "excerpts," which otherwise are non-responsive without more information to explain their context. (*Id.* ¶ 49.) More importantly, the Assistant Secretary has not produced responsive documents explaining how Big Lagoon came to be identified as a federally recognized tribe. (*Id.*)

4. Outstanding Evidence Will Defeat the Tribe's Summary Judgment Motion

a. There May be a Material Question Whether Current Tribal Members Descend From James Lagoon Charley and Family

If the Court finds the State's evidence insufficient, at this point, to support summary judgment for the State, then additional discovery is necessary to ascertain the genealogical connection, if any, between current Tribal members and the James Charley family. Thomas Williams, Lila Green Williams, Theodore R. Moorehead, Beverly Williams Moorehead and their children are the distributees identified on the Big Lagoon Rancheria Asset Distribution Plan prepared by the BIA (Pinal Decl. Ex. FF) to terminate the Tribe pursuant to 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)). The Distribution Plan provides the primary basis for Tribal membership. (Pinal Decl. Ex. GG at art. III, § 1.) If the distributees are not descended from the James Charley family, then presumably neither is any current member.

The current historical documents indicate the relevant individuals were descended from

Yurok, Lower Klamath (presently known as Yurok), Chimariko, Smith River and Tolowa Indians,[13] instead of a unique, recognized Indian tribe resident on the nine acres in 1934. But a more complete genealogical picture will be informed by the records that the BIA has 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 Tribal members do not descend from the James Charley family, then the Tribe is not a lawful beneficiary of IRA trust acquisitions, the Secretary should not have accepted the eleven acres in trust in 1994, and it would be against the public interest for the State to negotiate to put a casino on land acquired in trust unlawfully that otherwise would not be eligible Indian lands under IGRA.

b. There May be a Material Question Whether the United States Lawfully Considers Big Lagoon a Federally Recognized Tribe

The State learned for the first time through documents produced by the United States that there is a material question concerning the Tribe's status. "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 recognized as a sovereign political community that pre-dated non-Indian settlement.

Moreover, when Congress enacted the Rancheria Termination Act it did not identify the Tribe as among the rancherias to be terminated. Pub. L. No. 85-671, § 1. Nor did the BIA consider the Tribe among the rancherias to be terminated by an amendment to the Act, Pub. L. No. 88-419. (Pinal Decl. Ex. HH.) It is unclear how the Tribe was subject to the Act but the BIA

[13] Legislative history for the Hoopa Yurok Settlement Act indicates Smith River and Tolowa Indians are not historically of Yurok origin. S.Rep. 100-564, at 29 (Sept. 30, 1988). Therefore, historical documents obtained to date show the Moorehead ancestors, who descended from Smith River and Tolowa Indians, did not contribute Yurok Indian blood to the genealogical makeup of the individuals identified on the Rancheria Asset Distribution Plan, further distancing those individuals genetically from James and Lottie Charley, who were Yurok Indians.

conditionally approved the Distribution Plan in January 1968.[14] In June 1968, however, 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 if no official membership roll." (Pinal Decl. Ex. T.) Thus, even after the BIA approved the Distribution Plan, it had not considered Big Lagoon to be an organized political sovereign. Yet Big Lagoon appeared on the first list of "Indian Tribal Entities That Have a Government-to-government Relationship With the United States," published in the Federal Register on February 6, 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 the Tribe in 1968 to placing the Tribe on the BIA's first list of recognized tribes in 1979.

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 to pursue this action. *See* 25 U.S.C. §§ 2703(5), 2710(d)(3)(A); *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 778 (9th Cir. 2008) (state need not negotiate with tribe lacking "Indian lands"; tribe must have "Indian lands" to sue under IGRA). The evidence presented, and the documents the State expects to receive, show a material question exists that must be resolved before this action can proceed.

c. The State May Need to File a Third Party Complaint Against the United States

The State was not on notice that the BIA may have unlawfully placed the Tribe on the list of federally recognized tribes until after discovery commenced in this action. It remains to be determined whether the State must join the United States to this action to challenge that action. The need to further investigate the legitimacy of a third party complaint is proper grounds for extending discovery pursuant to Rule 56(f). *Voggenthaler v. Maryland Square, LLC*, No. 08-CV-01618, 2010 WL 1553417, at *4-*5, *10-*11 (D. Nev. Apr. 14, 2010).

[14] The residents later revoked their request to be terminated. (Pinal Decl. Ex. II.)

CONCLUSION

For the foregoing reasons, 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 15, 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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James Lagoon Charley and Distributees and Dependent Members Listed in Big Lagoon Rancheria Asset Distribution Plan