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BIG LAGOON RANCHERIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

BIG LAGOON RANCHERIA, a Federally Recognized Indian Tribe,

Plaintiff,

v.

STATE OF CALIFORNIA,

Defendant.

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

***Related Case No.* C 99-04995-CW**

PLAINTIFF LAGOON RANCHERIA'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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

1301 Clay Street
Oakland, CA

Before The Honorable Claudia Wilken

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

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NOTICE OF MOTION AND MOTION

TO DEFENDANT STATE OF CALIFORNIA AND ITS ATTORNEY OF RECORD:

NOTICE IS HEREBY GIVEN that on August 12, 2010, at 2:00 p.m., or as soon thereafter as counsel may be heard by the above-entitled Court, located at 1301 Clay Street, Courtroom 2, Fourth Floor, Oakland, CA 94612, Plaintiff Big Lagoon Rancheria will and hereby does move the Court for summary judgment.

The motion for summary judgment is made in accordance with Federal Rule of Civil Procedure 56, on the ground that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law for the following reasons: The undisputed facts establish that Plaintiff Big Lagoon Rancheria is entitled to summary judgment in its favor on its claims under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq.("IGRA") and against Defendant the State of California. This Court should determine that the State has not negotiated in good faith within the meaning of IGRA, and should issue an order compelling the State to conclude a compact with the Tribe within the 60-day period prescribed by IGRA.

This motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Peter J. Engstrom, the Request for Judicial Notice, the Proposed Order, all the pleadings and papers on file in this action, and upon such any other matters as may be presented to the Court at the time of hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

For the past fifteen years, plaintiff Big Lagoon Rancheria, a federally recognized Indian tribe ("Big Lagoon" or the "Tribe"), has negotiated with the State of California in an effort to obtain a tribal-state compact permitting the Tribe to conduct class III gaming on its ancestral reservation lands, pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. ("IGRA"). Those fifteen years of negotiations have included nearly a decade of litigation in this Court aimed at compelling the State to negotiate a compact in good faith, and two years during which a compromise tribal-state compact languished before the State Legislature without being ratified.

In the most recent round of negotiations, commencing in September, 2007, the State has

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continued its pattern and practice of bad faith negotiations with the Tribe. Most significantly, it is undisputed that, as a condition for agreeing to a compact, the State has unwaveringly demanded that the Tribe pay at least 10% of its annual net winnings to the State's general fund. Pursuant to the recent holding of the Ninth Circuit Court of Appeals in Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger, Nos. 08-55809, 08-55914 (9th Cir. April 20, 2010), the State's demand for revenue sharing constitutes a "demand for a tax" that this Court must consider to be made in bad faith. As Rincon makes clear, having made a bald demand for general fund revenue sharing, the State "faces a very difficult task to rebut the evidence of bad faith arising from that demand." Id. at 5896. Indeed, it is a task the State cannot perform.

According to Rincon, to rebut that prima facie evidence of bad faith, the State must satisfy all of the following conditions: (1) establish that the revenue sharing is for uses directly relating to gaming activities; (2) show that it is consistent with the purposes of IGRA and (3) show that it was bargained for in exchange for meaningful concessions. Id. at 5898. The State can satisfy none of these conditions. Significantly, as was the case regarding the State's negotiating position in Rincon, it is undisputed that the only concession the State has offered to the Tribe throughout is exclusivity from non-tribal gaming. The Tribe has made it clear throughout these negotiations that exclusivity was and is of no value, and not something the Tribe desires or needs. More importantly, Rincon holds that "exclusivity" is not a meaningful concession as a matter of law. "In the current legal landscape, exclusivity is not a new consideration the State can offer in negotiations because the tribe already enjoys that right as a matter of state constitutional law." Id. at 5906.

Additionally, in ostensibly attempting to negotiate a compact, the State consistently proposed alternative off-reservation sites, as distinct from the Tribe's existing trust lands, and has sought to impose numerous environmental, land use and other restrictions. Under Rincon, these requests are also improper – they are not directly related to gaming, not consistent with the purposes of IGRA, and are not made with any offer of meaningful concessions in return.

This pattern of bad faith negotiations is evident from the latest round of compact negotiations between the Tribe and the State, and it is also supported by the history of prior dealings between the Tribe and State. While this Court previously found evidence of bad faith on the part of the State, the

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Court ordered the parties to continue negotiating in the hope that, with the Court's guidance on these matters, the parties could reach a resolution. That has not occurred, however, because the State has continued its pattern of bad faith by making proposals that would push the Tribe off of its tribal lands, would require revenue sharing with the State and would require environmental regulation and land use restrictions – all negotiating positions that the Ninth Circuit has now definitively ruled are not permissible and constitute bad faith under IGRA. The undisputed facts establish that Big Lagoon is entitled to summary judgment in its favor on its claims under IGRA. We respectfully submit that further delays are not warranted. The time has come for the Court to determine that the State has not negotiated in good faith within the meaning of IGRA, and to issue an order compelling the State to conclude a compact with the Tribe within the 60-day period prescribed by IGRA.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that 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); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir. 1987). The moving party bears the burden of showing that there is no material factual dispute. The court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815 F.2d at 1289. The court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991).

III. BACKGROUND FACTS

A. Previous Compact Negotiations and IGRA Litigation Between Tribe and State

The Tribe first attempted to commence compact negotiations with the State on September 22, 1993. The State failed to make any good faith response, and accordingly, the Tribe filed a lawsuit to compel the State to negotiate in good faith, entitled Big Lagoon Rancheria v. Governor Pete Wilson, State of California, CIV-S-97-0651 WBS (GGH). This lawsuit was eventually dismissed on Eleventh Amendment Immunity grounds, since it was only with the passage of Proposition 5 in

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1 1998, that California consented to suit in IGRA actions.

2 In 1998-1999, as the State was negotiating gaming compacts with other tribes in California,
3 Big Lagoon renewed its efforts to obtain gaming rights. On November 18, 1999, the Tribe filed a
4 lawsuit in the Northern District of California, captioned Big Lagoon Rancheria v. State of California,
5 Case No. C-99-4995–CW, seeking to compel the State to conclude a tribal-state compact. The Tribe
6 also sought to concurrently pursue further compact negotiations, and on March 24, 2000, transmitted
7 to the Governor's office a further request to enter into compact negotiations. Exhibit A to Koji F.
8 Fukumura's Declaration in Support of Big Lagoon's Motion for an Order Pursuant to 25 U.S.C.
9 §2710(d)(7)(b)(iii), filed October 5, 2001, Big Lagoon Rancheria v. State of California, No. C-99-
10 4995-CW, attached as Exhibit 1 to Big Lagoon's Request for Judicial Notice in Support of its
11 Motion for Summary Judgment ("RJN").

12 Throughout the parties' compact negotiations, the State insisted on numerous forms of
13 environmental, land use and other kinds of regulatory oversight over Big Lagoon's tribal lands not
14 permitted under federal law, nor required of other gaming tribes, but failed to offer any reciprocal
15 concessions to the Tribe in return. When negotiations between the parties stalled, the Tribe filed a
16 motion for summary judgment on October 5, 2001, seeking to compel the State to negotiate in good
17 faith. In ruling on the parties' cross-motions for summary judgment, this Court found that "it
18 appears that the State has not negotiated with the Tribe in good faith thus far" but held that a final
19 determination of bad faith was premature in light of the novelty of issues regarding good faith
20 bargaining. Order Denying Cross Motions for Summary Judgment at 19:17-19, filed March 18,
21 2002, RJN Exh. 2.

22 The parties then resumed compact negotiations, during which time the State continued to
23 insist on environmental, land use and other kinds of regulatory oversight over Big Lagoon's tribal
24 lands, still without offering Big Lagoon any concessions in exchange for submitting to such
25 regulation over its sovereign lands. The State also proposed for the first time, an off-reservation
26 gaming arrangement.

27 Due to a lack of progress in these negotiations, the Tribe filed a further motion for summary
28 judgment on April 2, 2003. In ruling on Big Lagoon's motion for summary judgment, the Court

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stated: "It has been nearly ten years since the compact negotiations between the Tribe and the State began. At this juncture, the Court is inclined to grant Plaintiff's motion," but stayed a decision on the motion and ordered that the parties follow a Court-mandated schedule for drafting a gaming compact and negotiating with each other. Order Staying Decision on Plaintiff's Motion for Summary Judgment at 2:13-16, filed June 11, 2003, RJN Ex. 3. Later, on August 4, 2003, the Court denied the motion for summary judgment, in light of the fact that the parties were still considering an alternative proposal by the State for Big Lagoon to purchase a 25-acre site from the State, develop a gaming operation on that property, and agree not to develop a casino on its rancheria site. Order Denying Plaintiff's Motion for Summary Judgment, filed August 4, 2003, RJN Exh. 4.

Following the Court's order, the Tribe sought to renew compact discussions with the State, and suggested that the parties sign the Model Compact, just as the State has previously done with a number of other California tribes, to develop a casino on the Tribe's existing lands, taking into account the State's concerns about the environmental impact. Exh. A to Declaration of Peter J. Engstrom in Support of Further Motion for Summary Judgment by Plaintiff Big Lagoon Rancheria, executed on January 15, 2004, RJN Exh. 5. The State rejected the Tribe's proposal, and insisted that relocating the casino to an alternative site remained the most promising avenue for negotiations. Exh. C., Id.

Negotiations between the parties dragged on, until the Tribe encountered further delays from the State in the Fall of 2003, when the State indicated that due to the impending transition to Governor Arnold Schwarzenegger's administration, it would need additional time to familiarize itself with the pertinent issues. Exh. T., Id.

B. Agreement to Sign the Barstow Compact

On August 17, 2005, after many months of negotiations, including with another Indian tribe the State wished Big Lagoon to partner with at yet another location, the Tribe and the State entered into a Settlement Agreement pursuant to which the parties agreed to execute a tribal-state compact permitting class III gaming by the Tribe. Settlement Agreement between State of California and Big Lagoon Rancheria; attached as Exhibit 1 to Declaration of Peter Engstrom in Support of Big Lagoon's Motion for Summary Judgment, filed June 17, 2010 ("Engstrom Decl."). The Tribe

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agreed not to develop its ancestral reservation lands at Big Lagoon, in exchange for a tribal-state compact permitting off-site gaming in Barstow, California and the Governor's backing of the project. The Settlement Agreement provided for joint development of the Barstow casino with the Los Coyotes Band of Cahuilla and Cupeno Indians ("Los Coyotes"), effectively combining two separate tribes' proposed class III gaming operations into one. The Barstow property would have had to be purchased by the tribes, and then conveyed in trust to the Secretary of the Interior.

The Settlement Agreement and Barstow Compact provided that if certain conditions were not met, such as the Secretary of the Interior not approving the Settlement Agreement or Compact, or the Secretary declining to accept the designated Barstow property site into trust for the benefit of the tribes, or the Compact not being ratified by the California Legislature before a specified date in 2007, the parties' obligations under the Agreement would terminate and the Compact would become null and void and new compact negotiations and, if necessary, litigation pursuant to IGRA would follow. Id.

Governor Schwarzenegger announced the conclusion of the Barstow Compact on September 9, 2005. Proposed legislation for the ratification of the Barstow Compact was introduced at the start of the 2006 legislative session. However, the Compact was not ratified during the 2006 legislative session. The Compact was also not ratified during the 2007 legislative session. The State Legislature refused to approve the Compact that the Governor had entered into. The parties agreed to extend the time for legislative ratification of the Compact to September 17, 2007 – but as the Compact was not ratified by that date, it expired according to its terms. Joint CMC Statement, filed March 9, 2007; RJN Exh. 6.

C. Latest Round of Compact Negotiations Between the Tribe and State

As contemplated by the terms of their Settlement Agreement, the Tribe and the State commenced new compact negotiations, pursuant to the Tribe's written request dated September 18, 2007. Engstrom Decl., ¶3, Exh. 2. For the Court's ease of reference, a table describing the written proposals and counterproposals ("**Proposals**") made during these most recent negotiations is attached to this memorandum as **Exhibit A** (the correspondence underlying the proposals is attached to and identified by the separate declaration of Peter Engstrom).

1. The State's Insistence on General Fund Revenue Sharing

Throughout the latest round of compact negotiations between the parties, the State was adamant that any compact must include a provision obligating the Tribe to contribute part of its casino revenues to the State's general fund. The very first of the communications from the State regarding compact provisions included revenue sharing obligations to be imposed upon the Tribe. Draft Tribal-State Compact at 4.3, attached to November 19, 2007 letter from Andrea Hoch; **Proposal 1**.

The State's demand for revenue sharing continued through all subsequent compact proposals. In its January 2008 proposal, the State required that the Tribe pay into the State's general fund "percentages of its net win generated from the operation of all gaming devices," which would have ranged from 12% to 25% of net winnings, and would be scaled according to the Tribe's annual net win. January 31, 2008 Letter from Andrea Hoch; **Proposal 2**. As a purported "concession," the State offered the Tribe "geographic exclusivity of 50 miles," and stated that it was entitled to revenue sharing, "in consideration of exclusive rights to operate gaming devices." Id. Under the Highway Site proposal, the State took away the Tribe's right to receive RSTF payments, and the Tribe would have been required to contribute to the Revenue Sharing Trust Fund (RSTF). In its May 2008 proposal, the State again demanded revenue contribution to the State's general fund ranging between 10% to 25% of the Tribe's annual net winnings, offering the Tribe geographic exclusivity of 50 miles in exchange. May 2, 2008 Letter from Andrea Hoch; **Proposal 5**. The Tribe emphasized throughout the course of compact negotiations that it had no interest in exclusivity. As the Tribe stated in its October 2008 letter: "it has no need or desire for any 'exclusivity' protection provisions and sees no justification for sharing its revenue with the State." October 6, 2008 Letter from Jerome Levine; **Proposal 6**. The Tribe emphasized that "exclusivity" was "meaningless" to it, as it was in an area where non-tribal gaming was unlikely to proliferate, and that moreover, some 40 other California tribes had concluded compacts with no revenue sharing requirement. Id. In the interest of achieving a conclusion to compact negotiations, the Tribe had been willing to consider revenue sharing of less than 10% of annual net wins – but noted that, in light of the State's unwillingness to "compromise by deviating from the amount of its arbitrary and apparently

1 minimum uniform tax rate on tribal slot machine revenues," it was no longer willing to consider
2 revenue sharing with the State. Id.

3 **2. Continued Efforts to Force Big Lagoon Off of its Tribal Lands**

4 At the outset of these further compact negotiations, and notwithstanding the Tribe's express
5 desire to negotiate a compact for gaming on its trust lands as envisaged by IGRA, the State
6 immediately renewed its proposal to pursue alternative off-reservation sites, rather than the Tribe's
7 existing trust lands. On January 31, 2008, the State presented the Tribe with a proposal for three
8 alternative casino sites. **Proposal 2 A, B and C**. The Tribe rejected the State's proposals for off-
9 reservation sites which, while located in Humboldt County, would nonetheless have required the
10 Tribe to go through additional time-consuming and extensive and uncertain administrative
11 proceedings, federal and local, to enable development on those sites, and would have added an
12 estimated three to five years before development on the sites could commence. March 21 Letter
13 from Rory Dilweg; **Proposal 4**.

14 The State's first priority site would have required the Tribe to arrange the acquisition of a
15 new parcel of off-reservation property, adjacent to the highway ("Highway Site."). **Proposal 2A**.
16 The State's second priority would have allowed construction of the casino on the rancheria site, with
17 a hotel on the Tribe's post-1988 trust lands, but removed the employee and patron parking and waste
18 water treatment facilities off site, to a five-acre parcel owned by the Tribe in fee, i.e., not held in
19 trust ("Five Acre/Rancheria Site"). **Proposal 2B**. The State's third priority would site the casino on
20 the Tribe's original rancheria and the hotel on post-1988 trust lands, and would split parking and
21 other developments between the two parcels ("Rancheria Site"). **Proposal 2C**. Additionally, the
22 Rancheria Site proposal would mandate the location of the casino project on-site in such a way as to
23 require relocation of existing tribal housing, and to uproot the Tribe's resident members. Under the
24 State's punitive proposal, each of these prioritized sites would have to be pursued in sequence, along
25 with numerous federal, state, county, local, and third-party approvals not otherwise required of
26 competing tribes.

27 In each case, the closer the Tribe's desired casino project came to being located on the
28 Tribe's trust lands, the smaller the casino project proposed by the State: the Highway Site would

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have permitted 500 gaming devices and a 100 room hotel; the Five Acre/Rancheria Site would have permitted 250 gaming devices and a 50 room hotel; and the Rancheria Site would be permitted 175 gaming devices and a 50 room hotel.

The State and Tribe met for a negotiating session in Sacramento on February 25, 2008. Following the in-person negotiating session, in which the Tribe reiterated that it was unwilling to suffer the added delay, cost and uncertainty of pursuing off-reservation sites – which the State has no legal right to impose – the Tribe repeated its concerns about the proposed limitations placed by the State on the number of gaming devices it could operate, and the cap on the number rooms in the planned casino hotel. **Proposal 4**. The Tribe expressed its belief that such restrictions would not allow it to remain competitive with other similarly situated casinos, since "Humboldt County has seen an increase in the quantity and quality of gaming facilities since the Tribe began this project." Id. The Tribe proposed that the State allow a casino with 350 gaming devices and a 120-room hotel, conceding some design restrictions, and agreed that it would limit the height of the development to five stories, and ensure that the development was compatible with the local landscape. Id.

On May 2, 2008, the State replied with yet another proposal that emphasized its desire to explore a site other than the Tribe's existing rancheria. **Proposal 5**. The State indicated that it would be willing to consider a casino on the rancheria site, but only with an even more limited plan than had been contemplated in earlier proposals from the State – under this proposal, the Tribe would have been allowed to operate but 99 gaming devices, and open only a 50 room hotel. Id.

3. The State's Insistence on Imposing Environmental and Land Use Requirements and Restrictions

In the latest round of negotiations between the parties, the State also sought to impose a number of environmental and land use restrictions and regulations upon Big Lagoon's sovereign lands, without actually negotiating, and without offering the Tribe any meaningful concessions in return. The State vigorously sought to push development of the casino site off of the Tribe's lands, and for any potential casino construction located on the Tribe's lands, the State would have subjected the Tribe to various State regulatory standards. For example, in various draft compact proposals, the State insisted that development on the rancheria site must comply with conditions

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listed in an "Appendix A" to the draft compact, among which included the following environmental restrictions: a requirement that the Tribe implement a wastewater treatment facility that meets Regional Water Quality Control Board Standards; a requirement for establishment of facilities for waste water, ground water and surface water monitoring, with a further requirement that these facilities undergo independent monitoring at least twice a year; a requirement that plant species not be listed as "problematic" or "noxious weeds" by the State of California; a requirement that storm water to the lagoon not exceed natural run-off; a requirement that a wastewater sludge disposal plant be implemented; a requirement that the outdoor lighting of the casino comply with standards adopted by the California Energy Commission. **Proposals 2, 5**. The State contended that such restrictions "are necessary for the development of a tribal casino and hotel facility on the Tribe's rancheria due to the environmentally sensitive nature of the site." **Proposal 2**. Additionally, the State sought to impose land use restrictions on the design of the casino facilities – it insisted that the casino structures be set back a minimum distance from the lagoon; that the structures be limited to a maximum height; that building materials blend with the surrounding environment; that native vegetation be maintained and replaced; that structures be screened from public view; that patrons and employees not be allowed to drive to the facility but be required to use shuttle buses and that the number of hotel rooms be restricted. **Proposals 2, 5.**

The State also sought to limit the Tribe's ability to freely develop on its own lands. Under an early proposal, the Tribe would have acquired a separate parcel of land on which to conduct gaming, and would have agreed to convey its rancheria lands to the State by land use conservancy, and would have also agreed to limits on the development of its lands. **Proposal 2**. This proposal also would have required the Tribe to obtain approvals from state agencies, such as the Humboldt County Planning Department, the California Coastal Commission, the Department of Parks and Recreation and the Department of Fish and Game. Id.

4. Final Exchange of Proposals

On October 6, 2008, the Tribe made a final proposal, for the class III gaming casino development to be situated at the Rancheria Site, with a 100 room hotel, some restrictions on the height of the casino and set-backs from the high-tide line, the right to operate up to 350 gaming

devices, and any requested payments to be made into the RSTF alone. **Proposal 6**. The Tribe indicated that if the parties could not come to an agreement by November 7, 2008, the Tribe would resume litigation in accordance with the Settlement Agreement. Id. The Tribe did not request any exclusivity. Id.

The State's response failed to accommodate the Tribe's concerns, and gave short shrift to the accommodations that the Tribe was willing to make to the State's various demands. **Proposal 7**. Perhaps most significantly, the State refused to consider a compact that did not require general fund revenue sharing, stating:

> The Tribe will receive significant value from a compact that provides it with a class III gaming monopoly. In return for its agreement to provide the Tribe with that monopoly, the State seeks consideration in the form of general fund revenue sharing. The amount of that revenue sharing remains negotiable, but to be consistent with the consideration requested of other tribes, our proposal is that the Tribe pay to the State's general fund fifteen percent of its net win on a maximum of 349 slot machines.

Id.[1] The State argued that the Tribe had no entitlement to a class III gaming monopoly in California; and moreover, that "as with any contract, the Tribe must offer the State something of value in return for what it is receiving, the exclusive right to conduct gaming in the most populous state in the union." Id. The State indicated that it was willing to locate the casino on the Rancheria, nevertheless, it continued to insist that the Tribe go through a further environmental review process, and comply with various environmental mitigation measures. Id.

The parties failed to come to an agreement as to a mutually acceptable compact proposal, and compact negotiations closed. On April 3, 2009, Big Lagoon filed a complaint to re-commence the present action. By order dated April 16, 2009, this action was deemed a related case to Case No. C-99-4995-CW. Big Lagoon Rancheria v. State of California, 09-CV-01471-CW, Docket No. 5.

[1] Earlier in negotiations, the State offered the Tribe "geographic exclusivity" within a fifty mile radius of the proposed casino site, which, in the event that the State authorized "a person or entity other than an Indian Tribe" to operate class III gaming devices within the Tribe's core geographic market, would have allowed the Tribe to either terminate the Compact altogether, or continue gaming, but cease making payments to the State's general fund. See, Draft Tribal-State Compact at §4.5, attached to November 19, 2007 letter from Andrea Hoch to Peter Engstrom, Engstrom Decl., ¶4, Exh. 3; see also, Proposals 2, 5, 7. But the Tribe had repeatedly declined any such exclusivity, such that it was "meaningless," and not constituting consideration at all. Proposal 6.

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IV. ARGUMENT

A. Relevant Standards Under the Indian Gaming Regulatory Act[2]

In enacting IGRA in 1988, Congress created a statutory framework for the operation and regulation of gaming by Indian tribes. See 25 U.S.C. § 2702. IGRA provides that Indian tribes may conduct certain gaming activities on their lands only if authorized pursuant to a valid compact between the tribe and the state in which the gaming activities are located. See id., § 2710(d)(1)(C).

If an Indian tribe requests that a state negotiate over gaming activities that are permitted within that state, the state is required to negotiate in good faith toward the formation of a compact that governs the proposed gaming activities. See id., § 2710(d)(3)(A); Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250, 1256-58 (9th Cir. 1995), amended on denial of reh'g by 99 F.3d 321 (9th Cir. 1996). Tribes may bring suit in federal court against a state that fails to negotiate in good faith, in order to compel performance of that duty, and the State of California has consented to suit. See, 25 U.S.C. § 2710(d)(7); Cal. Gov't Code § 98005; Hotel Employees & Rest. Employees Int'l Union v. Davis, 981 P.2d 990, 1010-11 (Cal. 1999); In re: Indian Gaming Related Cases ("Coyote Valley II"), 331 F.3d 1094, 1101 (9th Cir. 2003); Order Denying Defendant State of California's Motion for Judgment on the Pleadings at 11:15, filed June 29, 2009, Docket No. 21.

If a state fails to negotiate in good faith, the Indian tribe may, after the close of the 180-day period beginning on the date on which the Indian tribe asked the state to enter into negotiations, initiate a cause of action in a federal district court. See 25 U.S.C. § 2710(d)(7)(A)(i). In such an action, the tribe must first show that no tribal-state compact has been entered into and that the state failed to respond in good faith to the tribe's request to negotiate. Id., § 2710(d)(7)(B)(ii). After the tribe makes this prima facie showing, the burden then shifts to the state to prove that it did in fact negotiate in good faith. Id. Any demand by the state for "direct taxation" will be deemed evidence that the State did not negotiate in good faith. 25 U.S.C. 2710(d)(7)(B)(iii)(II).

[2] The discussion in this section has been adapted from this Court's Order Denying Defendant State of California's Motion for Judgment on the Pleadings, filed June 29, 2009.

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Any ambiguities in determining whether a state acted in bad faith will be interpreted in "a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes." 1988 U.S.C.C.A.N. at 3084.

If the district court concludes that the state failed to negotiate in good faith, it "shall order the State and Indian Tribe to conclude such a compact within a 60-day period." Id., § 2710(d)(7)(B)(iii). If no compact is entered into within sixty days, the Indian tribe and the state must then each submit to a court-appointed mediator a proposed compact that represents their last best offer. 25 U.S.C. § 2710(d)(7)(B)(iv). The mediator chooses the proposed compact that "best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court." See id. If, within the next sixty days thereafter, the state does not consent to the compact selected by the mediator, the mediator notifies the Secretary of the Interior, who then prescribes the procedures under which class III gaming may be conducted. See id., § 2710(d)(7)(B)(vii).

B. The State Has Negotiated with Big Lagoon Rancheria in Bad Faith

The facts establish that throughout an attenuated 15-year plus period, and particularly during the most recent negotiating sessions, the State has failed to negotiate in good faith, as is required by IGRA. This is evidenced by the following actions, among other things: (1) the State has demanded general fund revenue sharing; (2) the State has insisted on numerous forms of environmental, land use and other kinds of regulatory oversight over Big Lagoon's tribal lands not required under federal law, nor required of other gaming tribes and (3) the State at various times has also proposed relocating the Tribe's casino to an off-reservation site, notwithstanding that it has no authority to require such relocation. As to all of these demands, the State has failed to offer any meaningful concessions to Big Lagoon in exchange for accepting the State's demands.

1. Demanding general fund revenue sharing amounts to an impermissible tax under IGRA and must be considered by this Court as evidence of bad faith

a. Big Lagoon has made a prima facie showing that the State has negotiated in bad faith

It is undisputed that throughout the course of negotiations following the failure of the Barstow Compact, the State has insisted that Big Lagoon contribute at least 10% of its annual net winnings to the State's general fund, just as it did with the tribe in Rincon. Throughout the course of

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negotiations, the State has been unwilling to compromise on its demand for general fund revenue sharing, notwithstanding Big Lagoon's continuous objection to revenue sharing. The State's demand for revenue sharing is a undisputedly a demand for a "tax" prohibited by IGRA, and constitutes evidence that the State has negotiated in bad faith with the Tribe.

In negotiating for a gaming compact under IGRA, states are expressly prohibited from imposing upon a tribe a "tax, fee, charge, or other assessment." 25 U.S.C. §2710(d)(4). In assessing whether a state has negotiated in bad faith under IGRA, the statute requires courts to treat any demand by the state for "direct taxation" as evidence that the state has negotiated in bad faith. 25 U.S.C. §2710(d)(7)(B)(iii).

The Ninth Circuit Court of Appeal has now unequivocally held that a demand by the State that a tribe contribute a percentage of its gaming profits to the State's general fund is an impermissible tax, and constitutes evidence of negotiating in bad faith. Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger, Nos. 08-55809, 08-55914 at 5893 (9th Cir. April 20, 2010). The Ninth Circuit has explicitly held that IGRA contains no statutory basis for authorizing tribal state negotiations over general fund revenue sharing. Rincon, at 5900. As stated by the Ninth Circuit, "a non-negotiable, mandatory payment of 10% of net profits into the State treasury for unrestricted use yields public revenue, and is a tax." Id.at 5892. As the Ninth Circuit clarified in Rincon, "under § 2710(d)(7)(B)(iii)(II), a court *must* consider any "demand for a tax to be made in bad faith." Id. at 5892 (emphasis in original)("under the plain language of §2710(d)(7)(B)(ii)(II), the State's demand for the payment of a tax is evidence of the State's bad faith.").

The State cannot dispute that throughout the latest round of negotiations it has consistently demanded that the Tribe make payments to the State general fund as an essential condition of any gaming compact with the Tribe.[3] As in Rincon, the State's repeated insistence that the Tribe `contribute a portion of its revenue to the State's general fund constitutes a demand for a "direct tax"

[3] The payments requested were indisputably destined for the State's general fund – the State specifically indicated in its negotiating correspondence with the Tribe that the payments were intended for the general fund, and RSTF payments were separately requested during the course of negotiations.

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flatly contrary to the provisions of IGRA. The Tribe has met its burden under IGRA of making a *prima facie* showing that the State has negotiated in bad faith, and unless the State can rebut such a showing – which it cannot – summary judgment must be granted in Big Lagoon's favor.

b. The State cannot rebut the Tribe's showing that it has acted in bad faith

Under IGRA, after a tribe has made a *prima facie* showing that the state has negotiated in bad faith, the burden shifts to the state to demonstrate that it has in fact negotiated in good faith. When a state has demanded a tax, as it has here, the state "faces a very difficult task to rebut the evidence of bad faith arising from that demand." Rincon at 5896. According to Rincon and Coyote Valley II, the state may attempt to rebut this evidence of bad faith by demonstrating that the revenue demanded was to be used for "the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities." § 2710(d)(7)(B)(iii). Failing that, to rebut the *prima facie* evidence of bad faith, the state must satisfy all of the following conditions: (1) establish that the revenue sharing is for uses directly relating to gaming activities; (2) show that it is consistent with the purposes of IGRA and (3) show that it was bargained for in exchange for meaningful concessions. Id. at 5898. Here, the State can satisfy none of these conditions.

i. Demands for general revenue fund sharing are not on the list of negotiating items recognized by IGRA

Generally, a state might rebut evidence of bad faith by showing that it was negotiating for compact terms permitted under IGRA, and that the revenue demanded was to be used for "the public interest, public safety, criminality, financial integrity and adverse economic impacts on existing gaming activities" as permitted under §2710(d)(7)(B)(iii). Rincon, at 5896. However, the Ninth Circuit has explicitly stated that "general tax revenues" are not among the list of permitted subjects on which a State may negotiate in good faith. Id. at 5897. See also, Wisconsin v. Ho-Chunk Nation, 512 F.3d 921, 933 (7th Cir. 2008)(declining ruling on validity of general fund revenue sharing, but noting that the legislative history of IGRA does not contemplate general fund revenue sharing as a permissible subject of negotiation).

Here, the State has undisputedly demanded that Big Lagoon contribute a portion of its net winnings to the State's general fund. The record of negotiations indicates that in requesting

payments to be made to the State's general fund, the State never claimed that the revenue sharing proceeds would be used for the public interest, public safety, criminality or the other negotiating topics permitted by IGRA. **Proposal 7**. The State's request for general fund revenue sharing does not fall within the list of negotiating topics permitted by IGRA, and the State cannot rebut the showing of bad faith by arguing that it was negotiating for compact terms permitted by IGRA.

ii. Demands for general revenue fund sharing are not directly related to gaming activities

Under Rincon, to demonstrate that a demand for revenue sharing was not made in bad faith, the State must first show that general fund revenue sharing is "directly related to the operation of gaming activities." Rincon, at 5898. Rincon holds, as a matter of law, that general fund revenue is not used for purposes directly related to the operation of gaming activities. Id. at 5899. Moreover, the facts are undisputed that throughout the course of negotiations with Big Lagoon, the State never claimed that the payments into the State's general fund would be used for purposes directly related to Indian gaming. Therefore, the State cannot meet the first condition required by Rincon, and cannot rebut the showing that it has acted in bad faith.

In examining whether a revenue sharing demand is "directly related to the operation of gaming activities," a court must look to "the use to which revenue will be put." Rincon at 5899.[4] By California statute, the State's general fund is not allocated for any particular purpose. See, Cal. Gov't Code §16300. Even prior to Rincon, the Ninth Circuit had recognized that there is no direct relationship between general fund revenue sharing and the operation of Indian gaming activities. See, Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430, 435 (9th Cir. 1994).

General fund revenue sharing can never be directly related to the operation of gaming activities. The essential facts in the present case are no different than those before the court in Rincon in this respect. The State has explicitly demanded that the Tribe contribute at minimum 10% of its net winnings to the State's "general fund." There can be no factual dispute that the State was demanding general fund revenue sharing, which is not "directly related to the operation of gaming

[4] By contrast, in Coyote Valley II, revenue sharing arrangements requiring contribution into the RSTF and SDF were permissible, as both funds are specifically allocated to address issues directly related to gaming activities. See, Rincon at 5899; Coyote Valley II, 331 F.3d at 1111, 1114.

activities," and that this constitutes "bad faith" under the provisions of IGRA.

iii. Demands for general revenue fund sharing are not consistent with the purposes of IGRA

Rincon also requires that a State seeking to rebut a showing of bad faith must demonstrate that its revenue sharing demand was "consistent with the purposes of IGRA." Rincon, at 5901. However, a State's "general economic interests" are not a subject consistent with the purposes of IGRA, and a demand for general fund revenue sharing cannot be consistent with the purposes of IGRA. Id.

The text of IGRA states that its purpose is to provide a framework for regulating gaming activity, "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. §2702. Additionally, the regulatory framework was intended to address, "organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly." Id. The State's "general economic interests" are not among the purposes of IGRA, nor the subjects authorized for negotiation by IGRA. Rincon at 5901. Tribes were intended to be the primary beneficiaries of gambling enterprises regulated by IGRA, and a State's pursuit of its "general economic interests" by demanding revenue sharing is not consistent with the purposes of IGRA.[5] Id. at 5903.

iv. The State's offer of non-tribal exclusivity is not a meaningful concession in exchange for demands for general fund revenues sharing

Finally, Rincon requires that the State show it has offered "meaningful concessions" in exchange for its demand for revenue sharing. Rincon, at 5904.; Idaho v. Shoshone-Bannock Tribes, 465 F.3d 1095, 1101 (9th Cir. 2006). The State cannot establish that it has offered any meaningful concessions, within the meaning of the law, to Big Lagoon and therefore, it cannot rebut the showing of bad faith.

[5] This distinction was also recognized by the Ninth Circuit in Coyote Valley II, where the Court found that the State's request to contribute to the RSTF was consistent with the purposes if IGRA, as in addition to the fact that the State offered the tribe meaningful concessions in exchange for revenue sharing, the revenue was intended to "redistribute gaming profits to other Indian tribes," and "does not put tribal money in the pocket of the State." 331 F.3d at 1113.

In Coyote Valley II, "exclusivity" was deemed a "meaningful concession" for Revenue Sharing Trust Fund ("RSTF") and Special Distribution Fund payments ("SDF") – it was "exceptionally valuable and bargained for," because exclusivity was not a right then guaranteed to the tribes under State law. Rincon at 5906. After the passage of Proposition 1A, tribes were guaranteed the right to conduct gaming free from non-tribal competition – therefore, "exclusivity" fails to provide any kind of value to tribes in current gaming negotiations. Id. Offering a party something to which "he already has an absolute right" does not constitute due consideration. Rincon at 5906, citing, Salmeron v. United States, 724 F.2d 1357, 1362 (9th Cir. 1983). Furthermore, any value inherent to "exclusivity" was already used as consideration for establishment of the RSTF and SDF. Rincon at 5906.

Early in the negotiations, the State offered the Tribe "geographic exclusivity" within a fifty mile radius of the proposed casino site, which, in the event that the State authorized "a person or entity other than an Indian Tribe" to operate class III gaming devices within the Tribe's core geographic market, would have allowed the Tribe to either terminate the compact altogether, or continue gaming but cease making payments to the State's general fund.[6] **Proposals 1, 2, 5, 7**. In the latest round of compact negotiations, it is undisputed that the only concession the State offered in exchange for general fund revenue sharing was "geographic exclusivity," in other words, the right to be free from non-tribal gaming.[7] Yet, this purported concession is no concession at all, since the State has only offered the Tribe something to which it is already entitled under State law.

Moreover, although the State has held out its offer of geographic exclusivity as proof that it was willing to make concessions to the Tribe during the course of compact negotiations, the Tribe at all times rejected the State's offer of "exclusivity," which provided little value for Big Lagoon as it

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[6] The pertinent language of the exclusivity provision of the early Draft Compact presented by the State is set forth more fully as follows: "In the event the State authorizes any person or entity other than an Indian tribe with a federally approved Class III Gaming compact to operate gaming devices within [ ] ('core geographic market')…the Tribe shall have the right to: (i) terminate this Compact, in which case the Tribe will lose the right to operate Gaming Devices and other Class III Gaming and shall immediately cease all Gaming Activities, or (ii) continue under this Compact, in which case the Tribe shall be relieved of its obligations to make payments to the State specified in section 4.3…"

[7] The State's proposals consistently stated: "In consideration of exclusive rights to operate gaming devices, the Tribe shall pay the State . . . ." and "In return for its agreement to provide the Tribe with that monopoly, the State seeks consideration in the form of general fund revenue sharing".

is located in a region where a number of other gaming operations (tribal) already exist. Accordingly, the State's proposal to give Big Lagoon "exclusivity" against non-tribal competition would not give the tribe any meaningful economic benefit.

The Tribe made its position abundantly clear to the State during the course of the parties' negotiations. Early on in negotiations, the Tribe struck from a draft tribal-State compact provisions pertaining to revenue sharing and exclusivity. February 20, 2008 Letter from Rory Dilweg to Andrea Hoch; **Proposal 3**. The Tribe stated explicitly in negotiating correspondence that it believed that the request for revenue sharing constituted a tax and it "has made it clear that it has no need or desire for any 'exclusivity' protection provisions and sees no justification for sharing its revenue with the State." **Proposal 6**. Furthermore, the Tribe is located in an area where "non-Tribal gaming is unlikely to proliferate," rendering the value of protection from non-tribal gaming meaningless.[8] Id. It is a well-established principle of law that "something which is completely worthless cannot constitute a valid consideration." Louisville Title Ins. v. Surety Title & Guar. Co., 60 Cal. App. 3d 781, 791 (1976). Here, the only consideration that the State has offered the Tribe is worthless – "exclusivity" was not desired by the Tribe, nor did it believe that "exclusivity" would give it anything of value.

The State has failed to offer any other meaningful concession in exchange for the payments that it has sought to exact from the Tribe. At best, the State has offered the Tribe an "exclusivity" provision which would allow it the right to operate its casino free from non-tribal competition – a concession that is meaningless, as under the California Constitution, Indian tribes are already entitled to a gaming monopoly. A meaningful concession must be something more than simply reaffirming a tribe's right to conduct gaming free from non-tribal competition. The State can point to no other concessions that it has offered the Tribe, and therefore, fails to rebut the showing that it has negotiated in bad faith.

The "geographic exclusivity" provision offered to – or in other words, foisted upon – the

[8] Additionally, the Tribe noted that even a 10% revenue sharing requirement, the minimum amount of revenue sharing requested by the State, would consume a substantial share of the Tribe's profits, and make it difficult to achieve "any real economy of scale as to labor, equipment costs and facilities development and maintenance." Proposal 6.

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Tribe parallels that offered to the tribe in Rincon. As in Rincon, the State has not offered anything to the Tribe other than a right to which it is already entitled under the California Constitution, that is, the right to operate free from non-tribal competition. As a matter of law under Rincon and preceding cases, "geographic exclusivity" does not constitute a "meaningful concession" that would provide consideration for the State's attempt to impose a tax upon Big Lagoon. Additionally, it is undisputed that the Tribe itself did not want "exclusivity," or believe that exclusivity would give it any tangible benefit. In fact, the Tribe believed that the revenue sharing demanded by the State would result in economic hardship to the Tribe. Undeniably, the State has failed to offset its demand for revenue sharing from Big Lagoon by any meaningful concession, and has thereby failed to rebut the showing of bad faith made by the Tribe. Therefore, Big Lagoon is entitled to summary judgment in its favor.

2. The State has no authority to impose environmental and land use restrictions upon the Tribe

In addition to trying to impose an impermissible tax, the State has pressed Big Lagoon, a federally reorganized sovereign Indian tribe, to submit to the jurisdiction of various State and local regulatory agencies, and has insisted that all development on the Tribe's site be conditioned upon compliance with certain environmental and land use restrictions and regulations, all without offering the Tribe any meaningful concessions in return. The State's attempts to impose its environmental regulations, as well as various restrictions on the zoning and use of the Tribe's lands, constitutes a misuse of the negotiating process, and amounts to a showing that the State has negotiated in bad faith.

States cannot exercise regulatory jurisdiction over Indians on their reservation lands, except where Congress has clearly expressed an intention to permit such regulation. See, Washington v. EPA, 752 F.2d 1465, 1469 (9th Cir. 1985); McClanahan v. State Tax Comm'n of Az., 411 U.S. 164, 170-71 (1973)("State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply."). Federal policy favors tribal self-regulation in environmental matters. Washington, 752 F.2d at 1471 (noting that EPA policies emphasize importance of tribal self-regulation in environmental matters). Here, IGRA does not contain any authority allowing states to impose their environmental regulations on tribes – the

text of IGRA does not confer any such authority. Indeed, IGRA prohibits States from using the compacting process as a means of subjecting tribes to state laws and regulations that do not directly pertain to regulating tribal gaming and its effects. See, 25 U.S.C. §2710(d)(3)(C). The legislative history of IGRA also indicates that Congress did not intend "that the compacting methodology be used in such areas such as taxation, water rights, environmental regulation, and land use…" Rincon at 5891 n. 10, quoting statement of Sen. Inouye from 134 Cong. Rec. S12643-01 at S12651 (1988).

> The Committee does view the concession to any implicit tribal agreement to the application of State law for class III gaming as unique and does not consider such agreement to be precedent for any other incursion of State law onto Indian lands.

S. Rep. No. 100-446 at 14, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084. It is clear that Congress did not intend IGRA to be used as a platform for imposing environmental or land use regulation on Indian tribes.

a. Demands for environmental and land use regulation are not directly related to gaming activities

Rincon reaffirms that IGRA limits permissible subjects of negotiation in order to ensure that tribal-state compacts cover only those topics that are directly related to gaming and are consistent with IGRA's stated purposes. Furthermore, the Ninth Circuit in Rincon clarified what is meant by "directly related to gaming activities," as a permissible subject of negotiation by the State. Rincon at 5899. There, the State argued that imposing a general fund fee for the operation of slot machines was "directly related" to the operation of gaming activities because the money was paid out of the income from gaming activities. Id. at 5898. Notwithstanding that the imposition of slot machine fees coming directly from gaming revenues is much more "related to" gaming activities than is regulation of the environment, the Court in Rincon rejected the State's contention, stating that its reasoning is "circular." Id. In other words, just because the environmental issues perceived by the State "derive from" the operation of the facility in which gaming is conducted does not make environmental regulation a subject directly relating to gaming operations. The environmental issues perceived by the State arise from the construction of a facility, which could as well be a hotel, a restaurant or a manufacturing plant – they do not relate to gaming. Congress intended the required relationship to gaming activities to be much more direct.

b. Demands for environmental regulation are not consistent with the purposes of IGRA

In addition to being limited to the subjects of negotiation listed in IGRA, a state's compact negotiation demands must be consistent with the purposes of IGRA, which are: to promote "tribal economic development, self-sufficiency, and strong tribal governments," and "to promote tribal development, prevent criminal activity related to gaming, and ensure that gaming activities are conducted fairly." Rincon, at 5901, 25 U.S.C. §2702. Rincon rejected the State's argument that promoting the State's general economic interest was consistent with the purposes of IGRA. "The only state interests mentioned in §2702 are protecting against organized crime and ensuring that gaming is conducted fairly and honestly" and State regulation is limited to this one narrow area. Rincon at 5901. [9] Similarly, the State's interest in environmental and land use regulation is not mentioned in and is not "consistent with" the stated purposes of IGRA. Id.

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

The State cannot point to any meaningful concessions it has offered the Tribe in return for the environmental and land use restrictions and regulation it has sought to impose upon the Tribe. Indeed, it has offered nothing, but rather has simply taken the position that such regulation is "necessary for the development of a tribal casino and hotel facility on the Tribe's Rancheria." It offered exclusivity as a purported concession for revenue sharing, not for environmental regulation but, as demonstrated above, "exclusivity" is not a meaningful concession in any event. The State might argue that it has offered the Tribe various proposals that would have given it additional gaming devices in exchange for submitting itself to State regulation. However, as noted above, both

[9] Rincon relies on the legislative history of IGRA in support of its decision: "Gaming by its very nature is a unique form of economic enterprise and the Committee is strongly opposed to the application of the jurisdictional elections authorized by this bill to any other economic or regulatory issue that may arise between tribes and States in the future." S. Rep. No. 100-446, at 14, *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3084. *See also* 134 Cong. Rec. S12643-01, at S12651 (1988) ("There is no intent on the part of Congress that the compacting methodology be used in such areas such as taxation, water rights, environmental regulation, and land use. . .. The exigencies caused by the rapid growth of gaming in Indian country and the threat of corruption and infiltration by criminal elements in class III gaming warranted the utilization of existing State regulatory capabilities in this one *narrow* area**.**") (statement of Sen. Inouye). Rincon at 5891, n. 10 (emphasis added except for word "narrow").

the Ninth Circuit and the Secretary of the Interior have indicated the offer of additional gaming devices does not constitute a meaningful concession. Rincon, at 5910-11.

Worse yet, the State demonstrated a calculated reluctance to offer the Tribe a profitable number of gaming devices for casino projects on the Tribe's own Rancheria: in an early proposal, the State would have offered the Tribe 500 devices for an off-site gambling facility, but only 175 devices for a casino development located entirely on the Tribe's lands. **Proposal 2**. In its final proposal to Big Lagoon, the State offered the Tribe up to 349 gaming devices; but, it would have taken away the right to receive additional income from RSTF payments if the Tribe amended the Compact for the right to use additional gaming devices. **Proposal 6**.

The State's insistence that the Tribe comply with various State regulatory standards, and its failure to offer the Tribe any meaningful concessions in exchange for doing so, amounts to a showing that the State has negotiated with the Tribe in bad faith – a showing that cannot be rebutted by the State.

3. The State has engaged in a pattern and practice of "surface bargaining," which amounts to bad faith bargaining under the provisions of IGRA

The State's conduct during the course of its negotiations with Big Lagoon – its repeated insistence on revenue sharing, its intransigence regarding environmental and land use restrictions and regulation, as well as its repeated efforts to re-locate Big Lagoon's gaming operations off of its ancestral lands – shows that it has been engaging in a pattern of bad faith bargaining prohibited by IGRA.

Because IGRA provides comparatively little by way of guidance as to what constitutes "bad faith," courts in interpreting the provisions of IGRA have looked to how the good faith bargaining requirement has been interpreted under statutes such as the NRLA. For example, in Coyote Valley I, the Northern District stated that while interpretation of the NLRA should not be imported wholesale into interpretation of IGRA, it still provided guidance, and that good faith bargaining "requires more than a willingness to enter upon a sterile discussion of the parties' differences," and requires that the parties "enter into discussions with an open and fair mind." Coyote Valley Band of Pomo Indians (In re Indian Gaming Related Cases) v. California, 147 F. Supp. 2d 1011, 1020-21 (N.D. Cal. 2001);

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1 see also, Court's March 18, 2002 Order Denying Parties' Cross-Motions for Summary Judgment,
2 RJN Exh. 2. "Surface bargaining" – going through the motions of negotiating, without any real
3 intent to reach an agreement – does not constitute good faith bargaining. K-Mart Corp. v. NLRB,
4 626 F.2d 704, 706 (9th Cir. 1980). Good faith "presupposes a desire to reach ultimate agreement"
5 and not simply "an attitude of take it or leave it." NLRB v. Ins. Agents International Union, 361
6 U.S. 477, 485 (1960). In considering whether a party has negotiated in good faith, courts may
7 examine "the previous relations of the parties, antecedent events explaining behavior at the
8 bargaining table, and the course of negotiations." NLRB v. Dent, 534 F. 2d 844, 846 (9th Cir.
9 1976). Additionally, in determining good faith under the NLRA, a court should take into account
10 "all the facts viewed as an integrated whole," and consider the "totality of the circumstances." See,
11 Seattle-First National Bank v. NLRB, 638 F.2d 1221, 1225-26 (9th Cir. 1981).

12 The totality of the circumstances shows that the State has failed to negotiate with the Tribe in
13 good faith. It has repeatedly attempted to move the Tribe off of its ancestral lands – lands on which
14 Big Lagoon is indisputably entitled to seek a gaming compact – first with the Barstow Compact, and
15 then again in the latest round of compact negotiations with the Tribe. Even in its last negotiating
16 sessions and notwithstanding the Tribe's desire to negotiate for a casino located on the Tribe's
17 rancheria, the State re-raised various off-site gaming proposals, including a proposal that the Tribe
18 transfer its gaming rights to another gaming tribe, in exchange for a percentage of that tribe's
19 revenue. **Proposal 7**. And for both on-site and off-site proposals, the State has insisted that the
20 Tribe comply with numerous State regulations, and insisted that compliance be a condition of any
21 gaming operations to take place on the Tribe's rancheria. Additionally, throughout the latest round
22 of compact negotiations, the State has insisted that the Tribe share at minimum 10% of its net
23 gaming revenue, a demand that has been held to be an impermissible tax, inconsistent with the
24 provisions of IGRA.

25 Despite making numerous, onerous demands of the Tribe, the State has failed to offer the
26 Tribe any meaningful concessions, other than the hollow "exclusivity" or freedom from non-tribal
27 competition, a right which Big Lagoon is already entitled to under the provisions of the California
28 Constitution. The State has been unwilling to put aside conditions such as environmental mitigation

requirements and revenue-sharing requirements, despite the Tribe making it clear that it was not obligated to comply with such conditions and that the State had offered it nothing that would make compliance with such conditions worthwhile. The State's behavior makes clear that it has been unwilling to work towards reaching an ultimate agreement with the Tribe, and that throughout the latest round of compact negotiations, it has been engaging in little more than "surface bargaining" with the Tribe. The State's behavior throughout the course of the parties' negotiations shows that it has bargained in bad faith with Big Lagoon, and the Tribe is entitled to summary judgment in its favor.

V. CONCLUSION

For the foregoing reasons, this Court should grant Big Lagoon's motion for summary judgment, and should order the parties to commence with the procedures specified in IGRA for negotiating a tribal-state compact. Perhaps when faced with the imminent prospect of having its proposed compact terms scrutinized by a court-appointed mediator, the State will at last negotiate a compact that comports with IGRA.

Dated: June 17, 2010

Respectfully submitted,

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EXHIBIT A

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

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

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

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

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

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

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

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

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

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