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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)

REPLY TO OPPOSITION TO DEFENDANT'S MOTION TO STAY PROCEEDINGS AND, ALTERNATIVELY, TO CONTINUE DISPOSITIVE MOTION FILING AND HEARING DATES

Date: April 8, 2010
Time: 2 p.m.
Dept: 2, Fourth Floor
Judge: The Honorable Claudia Wilken
Trial Date: n/a
Action Filed: 4/3/2009

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INTRODUCTION

Defendant State of California (State) has alleged an affirmative defense in this action that Plaintiff Big Lagoon Rancheria (Big Lagoon) is not entitled to injunctive relief compelling the State to negotiate a compact authorizing class III gaming on land taken in trust for Big Lagoon after October 17, 1988, the effective date of the Indian Gaming Regulatory Act (IGRA), 18 U.S.C. §§ 1167-1168, 25 U.S.C. §§ 2701-2721, because Big Lagoon is not eligible to be a beneficiary of a trust conveyance pursuant to the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461-494. The United States Department of the Interior, Bureau of Indian Affairs (BIA) is currently deciding whether Big Lagoon was a recognized tribe under federal jurisdiction in 1934, which the Supreme Court in *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009) (*Carcieri*) held is required for the United States to accept land in trust for a tribe under the IRA. The State asks this Court to stay all proceedings in this action, except discovery, to allow the BIA to render a decision concerning Big Lagoon's historical status. Alternatively, the State requests this Court to continue the dispositive motion filing and hearing dates at least six months to allow the parties, and non-party United States, to resolve ongoing discovery disputes, and to allow this Court to decide the State's forthcoming objections to two discovery orders by the magistrate judge.

Big Lagoon opposes the motion because it does not believe the State's affirmative defense is viable, it believes the BIA's pending determination is irrelevant to this litigation, and that the BIA does not have exclusive jurisdiction to determine whether a tribe was under federal jurisdiction. It also believes the State has not demonstrated good cause why the dispositive motion briefing and hearing dates should be continued.

This Court has not entered an order finding that the State's affirmative defense is invalid as a matter of law. Unless and until that occurs, either on Big Lagoon's motion or *sua sponte*, the State should be allowed to pursue discovery and make arguments in support of that defense. Nonetheless, IGRA and *Carcieri* provide the State with a viable affirmative defense. IGRA provides that in determining whether a state has negotiated a class III gaming compact in good faith, the Court may consider the public interest. The State asserts as an affirmative defense that because Big Lagoon was not a recognized tribe under federal jurisdiction in 1934, the United

States lacked authority to acquire in trust for Big Lagoon the land where Big Lagoon proposes to put its gaming facility, and it would be against the public interest to compel the State to negotiate for a class III gaming compact on environmentally sensitive land that should not have been put into trust, or to find that the State has requested too much consideration from Big Lagoon under the circumstances.

The BIA is currently considering, on Big Lagoon's application to accept a separate five-acre parcel into trust, whether Big Lagoon was a recognized tribe under federal jurisdiction in 1934 and, therefore, whether the United States is authorized to accept land in trust for Big Lagoon under the IRA. That determination is directly relevant to the State's affirmative defense. The Court should stay these proceedings to allow the BIA to first make that determination because Congress delegated to the Department of the Interior its plenary authority concerning Indian affairs and relations. In addition, the BIA has subject matter expertise to answer not only the foundational question whether Big Lagoon was a recognized tribe under federal jurisdiction in 1934, but also whether there is a lineal connection between current tribal members and the individuals for whom the United States originally purchased the Big Lagoon Rancheria land, both of which must be demonstrated to obtain IRA benefits, including trust land acquisitions.

Although Big Lagoon claims that the State makes this motion in bad faith to delay proceedings (Opp'n at 1:3-4), it is the BIA that has caused any delay that may result, for had the BIA Pacific Regional Director complied with *Carcieri* when he issued the decision to accept the five-acre parcel in trust for Big Lagoon in October 2009, this motion would be unnecessary. In any event, because of this motion, the ongoing discovery disputes between the parties concerning the State's motion for a protective order, and between the State and the United States concerning outstanding document subpoenas, as well as the State's forthcoming objections to two of the magistrate judge's discovery orders, good cause exists to continue the dispositive motion filing and hearing dates

ARGUMENT

I. THIS ACTION SHOULD BE STAYED PENDING BIA PROCEEDINGS

Big Lagoon argues for the first time in this action that the State's affirmative defense based upon *Carcieri* is invalid as a matter of law. (Opp'n at 2:9-10, 4:5.) Yet Big Lagoon has not filed a motion asking the Court to enter such an order. *See* Fed. R. Civ. P. 7(b)(1). Big Lagoon could have filed a motion to strike the affirmative defense, *see* Fed. R. Civ. P. 12(f), but chose not to do so, and it could have indirectly challenged the affirmative defense by moving to quash the subpoenas duces tecum, *see* Fed. R. Civ. P. 45(c)(3), the State issued to the United States that seek documents necessary for the defense, but chose not to do so. Indeed, Big Lagoon states that it eventually intends to seek such a determination from the Court in its forthcoming motion for summary judgment. (Opp'n at 2 n.2.) But the Court has not entered an order on Big Lagoon's motion or *sua sponte* that the affirmative defense is invalid as a matter of law. Therefore, the State should be allowed to seek discovery and make arguments related to that defense.

A. IGRA and *Carcieri* Provide the State With a Viable Affirmative Defense

IGRA and *Carcieri* provide the State with a legally sufficient affirmative defense for the following reasons.[1] As Big Lagoon notes, it has just over twenty acres of land in trust; the 9.6-acre parcel constitutes Big Lagoon's original rancheria, and the United States acquired the eleven-acre parcel in trust for Big Lagoon after IGRA's effective date of October 17, 1988. (Opp'n at 5:14-16; *see* Big Lagoon's Request for Judicial Not. in Support of Opp'n to State's Mot. to Stay Proceedings, Ex. 1 (Doc. 63-1) at 21:3-8.) The State was willing to negotiate for a

[1] Two of Big Lagoon's arguments can be addressed and rejected. First, Big Lagoon mistakenly argues that the State conflates the provisions of IGRA and the IRA by asserting its affirmative defense that Big Lagoon is not entitled to injunctive relief compelling the State to negotiate a gaming compact authorizing class III gaming on land taken in trust for Big Lagoon after IGRA was enacted because Big Lagoon is not eligible to be a beneficiary of a trust conveyance pursuant to the IRA. (Opp'n at 4-6.) But, as demonstrated in the text, the State does not contend that IGRA incorporates any part of the IRA, or that Carcieri requires the IRA to be incorporated into IGRA.

Second, Big Lagoon argues that it has met IGRA's prerequisites for entering into compact negotiations with the State because Big Lagoon has jurisdiction over "Indian lands," as that phrase is defined by IGRA. (Opp'n at 4:23-5:3, 6:21-22.) But this case is not about whether the State has entered into compact negotiations. Indeed, Big Lagoon unambiguously alleges that the State has entered into compact negotiations. (Compl. (Doc. 1) ¶¶ 2, 44-52.) Rather this case is about whether the State conducted those negotiations in good faith. (*Id.* at ¶¶ 2, 52-59.)

compact authorizing Big Lagoon to operate a class III gaming facility on the 9.6-acre parcel, which was not acquired under the IRA, but Big Lagoon has insisted that the gaming facility be located on the eleven-acre parcel. (*See* Compl. ¶ 48.) IGRA provides that in determining whether a State has negotiated in good faith, the Court may balance the equities and consider, among other things, the public interest. 25 U.S.C. § 2710(D)(7)(B)(iii)(I). In its affirmative defense, the State contends that, in balancing the equities, it is not in the public interest to consider the land where Big Lagoon proposes to locate a gaming facility as eligible lands within the meaning of IGRA, because under *Carcieri* the Secretary of the Interior lacked the authority to acquire that land in trust for Big Lagoon. (Answer (Doc. 8) 5, ¶ 3.) Therefore, the State is entitled to conduct discovery into the status of the relationship between Big Lagoon and the United States at the time Congress enacted the IRA, as evidenced by documents concerning the history of that relationship, and it is entitled here to argue that proceedings should be stayed to allow the BIA to first determine and explain its historical relationship with Big Lagoon.

Although this Court has found in a related action that the eleven-acre parcel is "Indian lands" under IGRA (Doc. 63-1 at 20-23; Doc. 63-2 at 5-6), that finding appears to have been based upon the erroneous belief that the United States was authorized to put land in trust for Big Lagoon under the IRA. Instead, there is an unanswered threshold question whether the United States had authority to do so.[2] Specifically, shortly after the Supreme Court decided *Carcieri*, the Deputy Assistant Secretary in the Department of the Interior's Office of Assistant Secretary—Indian Affairs issued a memorandum to all BIA Regional Directors to provide his office with information identifying tribes that may be impacted by the decision. (Request for Judicial Not. in Support of Def.'s Mot. to Stay Proceedings (State's RJN; filed concurrently with this reply), Ex. A.) The Deputy Assistant Secretary advised that "[o]ne source that can be used to assist in

[2] The State is not here seeking to take the parcel out of trust or to challenge its status as Big Lagoon's trust land. Indeed, such an action may be subject to the Quiet Title Act, 28 U.S.C. § 2409a(a), although there is presently no definitive answer to the question whether the Quiet Title Act bars federal courts from reviewing a completed trust acquisition in a case where, as here, the Secretary of the Interior may have acted unconstitutionally or in violation of federal law. In any event, until the BIA, or a reviewing court, finally determines whether the United States is authorized to accept land into trust for Big Lagoon under the IRA, the State reserves the right to later challenge whether any of Big Lagoon's trust land is "Indian lands" under IGRA.

determining whether a tribe was under Federal jurisdiction is the report *Ten Years Of Tribal Government Under The Indian Reorganization Act* by Theodore H. Haas (1947)" (IRA Publication). (*Id.* at 2.) Although the Deputy Assistant Secretary believed that the IRA Publication is "not the only or finally determinative source," he considered it a "helpful . . . starting point." (*Id.*) Big Lagoon's name does not appear in the IRA Publication, which raises a question about its status in 1934. (*See* State's RJN, Ex. B, IRA Publication.) If the BIA, or a reviewing court, ultimately decides Big Lagoon was not a recognized tribe under federal jurisdiction in 1934, then the public interest would not be served by an order compelling the State to negotiate for construction of a class III gaming facility on land that should not have been put into trust, or by finding, as Big Lagoon asks this Court to do, that the State requested too much consideration from Big Lagoon in seeking to protect valuable environmental resources.

Accordingly, the State's affirmative defense is not, as Big Lagoon portrays it, that IGRA requires land acquired in trust after October 1988 to meet the IRA requirements for trust land acquisitions. It does not matter whether the United States acquired the land in trust via the IRA; all that matters is that the trust acquisition was lawful. IGRA allows the Court to consider in equity whether it is against the public interest to allow class III gaming on land that should not have been taken into trust, and would not otherwise be eligible Indian lands under IGRA. The affirmative defense is legally sufficient because there are factual questions concerning Big Lagoon's historic relationship with the United States, and there is no legal dispute that the Court may consider the public interest in determining whether the State negotiated in good faith. Although the Court's consideration of the public interest is discretionary, 25 U.S.C. § 2710(d)(7)(B)(iii)(I), "'[a] district court's failure to exercise discretion constitutes an abuse of discretion.'" *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1027 (9th Cir. 2000) (*quoting Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990)). Therefore, it would be inappropriate for the Court to refuse to at least consider the State's public interest defense, or to preclude the State from conducting discovery or making arguments related to that defense

B. The BIA's Determination Regarding the Five-acre Parcel is Relevant to the State's Affirmative Defense

Big Lagoon claims that the BIA proceedings are irrelevant.[3] (Opp'n at 6:4-7:2.) The BIA, however, is reconsidering, on remand from the Interior Board of Indian Appeals, the single question whether Big Lagoon was a recognized tribe under federal jurisdiction in 1934. (State's Mem. of Points and Auth. in Support of Mot. to Stay Proceedings (Doc. 50-1) 3:19-4:4.) That determination is central to the State's affirmative defense in this action that the Court may consider the public interest in determining whether the State negotiated in good faith. If the BIA, or a reviewing court, determines that Big Lagoon was not a recognized tribe under federal jurisdiction in 1934, then it would be against the public interest to compel the State to negotiate a compact for a class III gaming facility on environmentally sensitive land that should not have been put in trust and would not otherwise be eligible for gaming under IGRA.

C. The Court Should Allow the BIA to First Determine Whether Big Lagoon was a Recognized Tribe Under Federal Jurisdiction in 1934

Big Lagoon claims the BIA does not have exclusive jurisdiction to determine whether a tribe is under federal jurisdiction. According to Big Lagoon, the State misunderstands the distinction between "federal jurisdiction" and "federal recognition," and this Court has jurisdiction to determine the former. (Opp'n at 7:3-10:2.) The State's affirmative defense is premised upon *Carcieri*, which limited the United States' ability to acquire trust land under the IRA to persons who meet the definition of "Indian" in Section 19 of the IRA, 25 U.S.C. § 479. *See Carcieri*, 129 S. Ct. at 1060-61, 1064-65, 1068. Section 19 defines "Indian" to include "all

[3] As a minor point of clarification, the BIA Pacific Regional Director did not, as Big Lagoon represents, "put the five acres into trust pursuant to the IRA" in October 2009. (Opp'n at 6:6-7.) Instead, there are two distinct steps involved in a trust acquisition. The first step is the *decision* to take land into trust, 25 C.F.R. § 151.12, which is appealable, *id.* at § 2. The second step, which the land acquisition regulations term "Formalization of acceptance," is taken following examination of title evidence and correction of title defects. 25 C.F.R. §§ 151.13, 151.14. The signature of an authorized Departmental official on the formal document of acceptance under section 151.14 effects the transfer of legal title to the United States and establishes a trust relationship between the United States and the Indian beneficiary with respect to the land described in the deed. In October 2009, the BIA Pacific Regional Director merely completed the first step of issuing a *decision* to take the land into trust, which the Governor and the California Coastal Commission appealed, but he did not "put the five acres into trust."

persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction . . . ." 25 U.S.C. § 479. Although *Carcieri* turned on the temporal meaning of the word "now," Section 19 still requires IRA beneficiaries to be members of a recognized tribe that was under federal jurisdiction in 1934. Thus, for purposes of determining whether an Indian is eligible for IRA benefits, there is no distinction between "federally recognized" and "federal jurisdiction," as beneficiaries must have met both requirements, or lineally descend from a qualified beneficiary, in 1934. More specifically, for purposes of determining whether the United States lawfully acquired the eleven-acre parcel in trust for Big Lagoon pursuant to the IRA, it must be decided not only whether Big Lagoon was "under federal jurisdiction" in 1934 but whether it was a "recognized tribe under federal jurisdiction" in 1934.

Big Lagoon's attempt to distinguish *James v. United States Department of Health and Human Services*, 824 F.2d 1132, 1137 (D.C. Cir. 1987) is unavailing. (*See* Opp'n at 7:24-8:15.) While Big Lagoon is correct that the regulations governing "federal recognition" do not also provide a procedure for determining whether a tribe was under "federal jurisdiction," the *James* court noted that determinations regarding federal recognition

> should be made in the first instance by the Department of the Interior since Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations. 25 U.S.C. §§ 2, 9. The purpose of the regulatory scheme set up by the Secretary of the Interior is to determine which Indian groups exist as tribes. 25 C.F.R. § 83.2. That purpose would be frustrated if the Judicial Branch made initial determinations of whether groups have been recognized previously or whether conditions for recognition currently exist.

824 F.2d at 1137; *see also United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986) (noting that 25 U.S.C. § 2 serves "as the source of Interior's plenary administrative authority in discharging the federal government's trust obligations to Indians").[4] It follows that if courts should allow the Department of the Interior to first make determinations on federal recognition because in 25 U.S.C. §§ 2 and 9 Congress delegated to that agency its plenary authority

[4] Big Lagoon tries to distinguish *Eberhardt* because it involved the question whether the Secretary of the Interior had jurisdiction to regulate commercial fishing. (Opp'n at 9:14-15.) The State, however, cites *Eberhardt* for no purpose other than that which was quoted—the indisputable proposition that in 25 U.S.C. § 2 Congress delegated to the Department of the Interior plenary authority to discharge the United States' trust obligations to Indians.

concerning Indian affairs and relations, then the same statutes justify courts allowing that agency to make initial determinations concerning whether a tribe was under federal jurisdiction. As noted, the question whether a tribe has rights under the IRA is determined not only by answering whether it was under "federal jurisdiction" in 1934, but whether it was a "recognized tribe under federal jurisdiction" in 1934. *James* dictates that courts should not make "initial determinations of whether groups have been recognized previously." 824 F.2d at 1137. This is precisely the determination that needs to be made in deciding whether the United States had authority to acquire the eleven-acre parcel in trust for Big Lagoon—a determination that must first be made by the BIA.

Additional longstanding authority exists to allow the BIA to first make the determination. In *Miami Nation of Indians v. Babbitt*, 887 F. Supp. 1158, 1167 (N.D. Ind. 1995), the Secretary of the Interior argued that the federal recognition regulations promulgated in 1978 were designed to answer the question of "what is an Indian tribe?" The court noted that even judicial decisions that predated the 1978 regulations deferred to executive branch officials:

> This is not to say that if there were doubt about the tribal status of the Tribe, the judgments of officials in the federal executive branch might not be of great significance. The Supreme Court has said that, "it is the rule of this court to follow the executive and other political departments of the government, whose more special duty is to determine such affairs." *United States v. Sandoval*, 231 U.S. 28, 47 [34 S. Ct. 1, 6, 58 L. Ed. 107] (1913), *quoting United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419, 18 L. Ed. 182 (1865).

Id. at 1166 (*quoting Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 377 (1st Cir. 1975)). According to *Miami Nation*, the *Passamaquoddy Tribe* case "acknowledges that if there are doubts concerning the tribal status of a purported tribe, the proper course of action would be to defer to the decision of the executive with authority to make such decisions." *Id.*

As discussed above, under 25 U.S.C. §§ 2 and 9, and the Ninth Circuit's decisions in *James* and *Eberhardt*, the Department of the Interior has authority and the expertise to determine whether a person or entity is eligible for IRA benefits. *See also Kahawaiolaa v. Norton*, 386 F.3d 1271, 1274 (9th Cir. 2004) (noting that through broad delegation and acknowledgment regulations, the Department of the Interior has applied its expertise and assumed much of the responsibility for determining whether groups constitute Indian tribes and which tribes have

previously obtained federal recognition) (*citing James*, 824 F.2d at 1138); *Maynor v. Morton*, 510 F.2d 1254, 1258 (D.C. Cir. 1975) (plaintiff sought declaratory judgment of his rights under the IRA, "pursuant to which he was certified by the Department of the Interior as an Indian because extensive investigation had determined that he met the statutory definition of 'Indian'").

As noted, there are questions concerning whether Big Lagoon was a recognized tribe under federal jurisdiction in 1934. There are also questions about the lineal connection between the original person, known as James "Lagoon" Charley, for whom the United States purchased land in 1918 that would come to be known as the Big Lagoon Rancheria, and Big Lagoon's current membership. (*See* State's RJN, Ex. C, Mem. from BIA Superintendent, Northern California Agency, regarding "Request for Solicitor's Opinion on Acquisition of Permanent Road Right of Way to Big Lagoon Rancheria" (Mar. 29, 1983) (noting the United States purchased property for Lagoon Charley in 1918; Lagoon Charley lived on the property until 1945; the property was vacant in 1951; the Williams family started building a house on the property in 1954; the Moorehead family moved onto the property in 1967; and the Williams and Moorehead families were deemed distributees of Big Lagoon Rancheria assets in 1967). Section 19 of the IRA defines eligible "Indians" 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 within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

25 U.S.C. § 479. Therefore, to be eligible for IRA benefits, one must be a member of a recognized Indian tribe under federal jurisdiction in 1934, or be descended from a member of such tribe who lived within reservation boundaries in 1934. In this action, Big Lagoon has admitted that no current Tribal member is known to be related to Lagoon Charley other than by marriage. (Decl. of Randall A. Pinal in Support of State's Mot. to Stay Proceedings (filed concurrently with this reply) Ex. A, Big Lagoon's Response to State's First Set of Requests for Admissions, No. 1.) Given these unresolved questions about Big Lagoon's historical status, the proper course of action would be to allow the executive with authority to first make a decision. *See United States v. Sandoval, 231 U.S.* at 47; *United States v. Holliday*, 70 U.S. at 419; *Joint*

Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d at 377; *Miami Nation of Indians v. Babbitt*, 887 F. Supp. at 1167.

Big Lagoon's argument that in *Carcieri* the Supreme Court Justices envisioned "federal jurisdiction" as something broader than "federal recognition" should also fail. (*See* Opp'n at 8:18-9:2.) In support, Big Lagoon cites to Justice Breyer's concurring opinion, which no other Justice joined, and Justice Souter's opinion concurring in part and dissenting in part, which Justice Ginsburg joined. (*Id.*) That three justices expressed their individual opinions is not controlling because a majority of the Court failed to express agreement with their views. In fact, Justice Breyer joined the majority but wrote a separate concurring opinion. *Carcieri*, 129 S. Ct. at 1060. Because a clear majority did not interpret "federal jurisdiction" as something broader than "federal recognition," as Big Lagoon suggests, there is no need to look to concurring opinions to discern whether the Court's holding is that taken by the most Justices who concurred in the judgment on the narrowest grounds. *See Marks v. United States*, 430 U.S. 188, 193 (1977). In any event, Justice Breyer's observation that "a tribe may have been 'under Federal jurisdiction in 1934 even though the Federal Government did not believe so at the time," *Carcieri*, 129 S. Ct. at 1069 (Breyer, J., concurring), does not signal that Justice Breyer understood there to be a conceptual difference between federal recognition and federal jurisdiction. Indeed, Justice Breyer made no comment about "federal recognition." Even if there is a difference between "federal recognition" and "federal jurisdiction" for purposes of determining IRA eligibility, for reasons discussed above, this Court should first allow the BIA to determine whether Big Lagoon was a recognized tribe under federal jurisdiction in 1934.

In addition, *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975), does not help Big Lagoon. (*See* Opp'n at 9:3-11, 9:21-28.) *Washington* confirms that the Ninth Circuit regards the issues of tribal treaty status and federal acknowledgment as fundamentally different. 520 F.2d at 692-93. That case, however, is inapposite as it involved tribes with ratified treaties with the United States that the federal government did not recognize as organized tribes. *Id.* at 692. The court held that nonrecognition did not impact vested treaty rights, and that the district court could determine whether a group claiming treaty rights is descended from the treaty signatories and has

maintained an organized tribal structure. *Id.* at 692-93. The court later explained that the inquiries into federal acknowledgment and treaty rights are similar, "'[y]et each determination serves a different legal purpose and has an independent effect. Federal recognition is not a threshold condition a tribe must establish to fish under the Treaty of Point Elliott . . . . Similarly, the Samish need not assert treaty fishing rights to gain federal recognition.'" *Greene v. Babbitt*, 64 F.3d, 1266, 1271 (9th Cir. 1995) (*quoting Greene v. United States*, 996 F.2d 973, 976-77 (9th Cir. 1993)). Big Lagoon does not have a ratified treaty with the United States. Determining whether modern tribal members are descended from treaty tribes is a different question from determining whether a tribe was a recognized tribe under federal jurisdiction in 1934. That the United States ratified a treaty with a tribe necessarily means it had some sort of government-to-government relationship with that tribe, and therefore a court would not be required to answer that foundational question. On the other hand, in determining whether a tribe was a recognized tribe under federal jurisdiction in 1934, a court must necessarily determine in the first instance whether the United States had an established, government-to-government relationship with that tribe in 1934. That decision is better left to the agency with expertise in the field.

Moreover, to qualify for IRA benefits, one must be a member, or be descended from a member, of a recognized tribe that was under federal jurisdiction in 1934. 25 U.S.C. § 479. Unlike determining treaty rights, where federal recognition is *not* a threshold question, *Greene v. Babbitt*, 64 F. 3d at 1271, federal recognition *is* a threshold question, along with federal jurisdiction, in determining IRA rights.

Further, to the extent that *Washington* held a district court could determine lineal descent in an action to decide treaty rights, the opinion issued before the Department of the Interior promulgated the acknowledgment regulations in 1978, which were intended to definitively answer the question of "what is a tribe?" *See Miami Nation of Indians v. Babbitt*, 887 F. Supp. at 1167. Even before the Department promulgated the regulations, courts routinely allowed the executive with authority to first make such decisions. *United States v. Sandoval*, 231 U.S. at 47; *United States v. Holliday*, 70 U.S. at 419; *Joint Tribal Council of Passamaquoddy Tribe v.*

Morton, 528 F.2d at 377; *Miami Nation of Indians v. Babbitt*, 887 F. Supp. at 1167. Thus, *Washington* is distinguishable and this matter should be stayed pending BIA proceedings.

II. ALTERNATIVELY, THE COURT SHOULD CONTINUE THE DISPOSITIVE MOTION FILING AND HEARING DATES

After the State filed its opening memorandum for this motion, Magistrate Judge Spero granted in part and denied in part the State's motion to continue the fact discovery completion date, continued the dispositive motion hearing date, and ordered the parties to stipulate to a dispositive motion briefing schedule. (Doc. 60.) The magistrate judge continued the fact discovery completion date for three subpoenas duces tecum the State had issued to the United States but did not continue any other discovery deadlines. (*Id.*) Contrary to Big Lagoon's assertion (Opp'n at 10:9-11), the State has demonstrated good cause why all discovery dates should be continued and, as indicated in the stipulation filed on March 22, 2010, the State intends to file objections to Magistrate Judge Spero's March 17, 2010 decision. (Doc. 66 at 2:27.) The parties have stipulated to a briefing schedule for dispositive motions; however, the parties entered into the stipulation without prejudice to the Court's ruling on this motion, or the parties' rights to request further continuances. (*Id.* at 3:11-13.) The State also made its motion to continue the fact discovery completion date without prejudice to the Court's ruling on this motion. (Doc. 58 at 6:18-21.) The State further believes a continuance is warranted because of an unresolved discovery dispute between the parties, the United States' failure to timely respond to the State's subpoenas, and the State's intention to file objections to the magistrate judge's March 17, 2010 order granting in part and denying in part the State's motion to continue the fact discovery completion date, and to the magistrate judge's March 19, 2010 order denying the State's motion for protective order.[5] (*Id.* at 3:13-16; *see* Docs. 60 & 64.)

Big Lagoon claims the State has failed to demonstrate that its pending discovery is relevant, or likely to lead to the discovery of admissible evidence. (Opp'n at 11:9-16.) But that is not the State's burden in this motion. As noted at the outset of this reply, because the Court has not

[5] The State will have filed the objections before the hearing on this motion.

entered an order finding that the affirmative defense for which the State seeks discovery from the United States is invalid as a matter of law, the State should be allowed to obtain that discovery and make arguments related to that defense. If Big Lagoon wished to test the relevance of the State's discovery, or the legal sufficiency of the State's affirmative defense, it had, and arguably has waived, its opportunity to do so.

Last, Big Lagoon's repeated assertions throughout this action that it has been attempting to negotiate a class III gaming compact with the State for the past fifteen years, including nearly a decade of litigation aimed at compelling the State to negotiate in good faith, and that the State insists on locating Big Lagoon's gaming facility off its trust land are inaccurate and require clarification. First, until March 2000, when the voters ratified Proposition 1A to authorize the Governor to negotiate class III gaming compacts with federally recognized Indian tribes, the State had no obligation to negotiate with Big Lagoon for slot machines or banked or percentage card games. *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 716-18 (9th Cir. 2003); *In re Indian Gaming Related Cases (Coyote Valley Band of Pomo Indians v. California)*, 331 F.3d 1094, 1098-1103 (9th Cir. 2003). Second, Big Lagoon and the State negotiated to conclusion a compact in September 2005. (Compl. ¶¶ 37-40.) The Legislature subsequently failed to ratify the compact and the parties commenced new negotiations in September 2007. (*Id.* at ¶¶ 43-44.) Therefore, the negotiations that are the subject of this action span September 2007 to April 2009, not fifteen years as Big Lagoon asserts. Third, the suggestion that the State insists that Big Lagoon locate its gaming facility off its trust land is belied by allegations in the complaint that the State offered to negotiate for placement of a casino on Big Lagoon's rancheria site. (*Id.* at ¶ 48.)

CONCLUSION

For the foregoing reasons and those set forth in its opening memorandum, the State respectfully requests the Court to stay all proceedings, except discovery, to allow the BIA to complete its determination as to whether Big Lagoon was a recognized tribe under federal

jurisdiction in 1934. Alternatively, the Court should continue the dispositive motion filing and hearing dates at least six months.

Dated: March 25, 2010

Respectfully Submitted,

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