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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)

PLAINTIFF BIG LAGOON RANCHERIA'S OPPOSITION TO DEFENDANT STATE OF CALIFORNIA'S MOTION FOR A PROTECTIVE ORDER AGAINST PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS

Date: **February 26, 2010**
Time: **9:30 a.m.**
Place: **Courtroom A, 15th Floor**

Federal Building
450 Golden Gate Avenue
San Francisco, CA

Before The Honorable Joseph C. Spero

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

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I. INTRODUCTION

For the past fifteen years, plaintiff Big Lagoon Rancheria, a federally recognized Indian tribe ("Big Lagoon"), has been attempting to negotiate with the State of California to obtain a tribal-state compact permitting Big Lagoon 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"). However, after fifteen years of attempted negotiations, including nearly a decade of litigation aimed at compelling the State to negotiate a compact in good faith, the State and Big Lagoon have yet to finalize a compact. During this time the State has granted demonstrably more generous compacts and amended compact terms to other more politically powerful tribes.

Despite years of attempted negotiations by Big Lagoon, and despite its willingness to work with the State to accommodate many of its concerns, the State has refused to make any legally material concessions in exchange for those offered by Big Lagoon. In this lawsuit, Big Lagoon seeks an order determining that the State has not negotiated in good faith within the meaning of IGRA and, inter alia, compelling the State to conclude a compact with the Tribe within the 60-day period prescribed by IGRA. Big Lagoon has served a document request seeking the basic discovery that will allow it to fully prove its claim that the State has not negotiated in good faith. Big Lagoon intends to establish that, throughout this fifteen-year period the State has engaged in a pattern and practice of "surface bargaining" – going through the motions of negotiating without any real intent to reach an agreement that would allow Big Lagoon to carry out gaming operations on its ancestral lands. The State seeks a protective order that would prevent Big Lagoon from discovering the documents that will lead to admissible evidence needed to prove its claims.

Notwithstanding clear case law that "ascertaining compliance with the duty to bargain in good faith generally requires inquiry into…motive or state of mind during the bargaining process," the State seeks a protective order limiting Big Lagoon's discovery to documents "in the record." Such efforts to prevent Big Lagoon from digging "below the surface" of these bargaining tactics to find the State's true motives and intent should not be countenanced, particularly in a case where the Court has already found that the State has not negotiated in good faith. The motion for protective order should be denied in its entirety.

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II. EVENTS AND PROCEEDINGS LEADING UP TO THE CURRENT LAWSUIT

For more than fifteen years, Big Lagoon Rancheria has sought the opportunity to engage in good faith negotiations with the State to conclude a Tribal-State compact permitting Class III gaming. Over the years, it has encountered a pattern of resistance and delay from the State, as well as disparate treatment compared to other tribes seeking gaming compacts. The long history of Big Lagoon's efforts to conduct negotiations with the State, as well as its prior lawsuits under IGRA, is covered in greater detail in the Tribe's Complaint, filed with this Court on April 3, 2009.

It should be noted that after more than 10 years of litigation, including several summary judgment motions, Big Lagoon's claims have been shown to be more than mere allegations. In prior proceedings, this Court has already found that "it appears that the State has not negotiated with the Tribe in good faith thus far." *Order Denying Cross-Motions for Summary Judgment*, at 19:17-19, dated March 18, 2002, in related case Big Lagoon Rancheria v. State of California, C-99-4995-CW, attached as Exhibit 1 to *Plaintiff Big Lagoon Rancheria's Request to Take Judicial Notice in support of its Opposition to Defendant's Motion for Protective Order ("Big Lagoon's RJN")*. The Court also stated: "[t]he State could demonstrate the good faith of its bargaining position by offering the tribe concessions in return for the Tribe's compliance with requests with which the other tribes were not asked to comply." Id. at 19:7-10. Similarly, at a hearing on another motion in 2003 the Court stated: "I think the length of time is just unworkable. I don't think we can go on any longer." *Transcript of Proceedings from May 30, 2003 Hearing on Big Lagoon's Motion for Summary Judgment*, at 7:20-21, in related case Big Lagoon Rancheria v. State of California, C-99-4995-CW, attached as Exhibit 2 to *Big Lagoon's RJN*.

After many months of further negotiations, the State and Big Lagoon entered into a Settlement Agreement on August 17, 2005. The Settlement Agreement provided a Tribal-State Compact for a Class III gaming facility in Barstow, California ("Barstow Compact") which would be established in partnership with the Los Coyotes Band of Cahuilla and Cupeno Indians. The Barstow property would have to be purchased by Big Lagoon and conveyed in trust to the Secretary of the Interior. Big Lagoon made a number of concessions to the State in the Barstow Compact: it agreed to site its casino facility off its tribal lands; it agreed to share revenue with the State; it agreed

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to contribute to the Revenue Sharing Trust Fund for the benefit of other tribes; and it agreed to various provisions mitigating the off-reservation environmental impacts in Barstow.

The proposed legislation for ratification of the Barstow Compact was introduced during both the 2006 and 2007 legislative sessions, but never made it out of the legislative committee, owing to opposition from politically powerful, already-gaming Southern California tribes who were opposed to the potential competition of a new Indian casino in Southern California. During this time period, the Legislature ratified a number of compacts and compact amendments with other more powerful gaming tribes.

The State and Big Lagoon commenced compact negotiations yet again after the expiration of the Barstow Compact. The State continued to prioritize proposals for off-reservation sites, which would have required Big Lagoon to go through various additional permitting procedures to begin development. The State also insisted on a number of concessions from Big Lagoon that have not been required of other tribes, without providing the meaningful concession to Big Lagoon that the Court previously indicated were appropriate. Negotiations terminated and this lawsuit followed.

III. DISCOVERY AND THE REQUESTED PROTECTIVE ORDER

A. Big Lagoon's Document Requests

Big Lagoon seeks the production of documents that would show the totality of the facts and circumstances behind the State's pattern and practice of "surface bargaining" over the past 15 years, leading up to the most recent negotiations and the current lawsuit. Under the applicable Federal Rules and applicable discovery principles, Big Lagoon has propounded 19 basic document requests that seek both documents that are directly relevant to Big Lagoon's claim that the State has not engaged in good faith negotiations and documents that would lead to the discovery of admissible evidence proving this claim. See, *Plaintiff Big Lagoon Rancheria's First Set of Requests for Production of Documents to Defendant State of California*, served on October 28, 2009; attached as Exhibit A to *Declaration of Bruce H. Jackson in Support of Opposition to State's Motion for Protective Order ("Jackson Decl.")*. For example, document request No. 12 seeks documents pertaining to communications between the State and any other person or entity pertaining to the negotiations for class III gaming with Big Lagoon. These are documents that would show, or lead to

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the discovery of admissible evidence regarding, the underlying state of mind and motives of the State during this attenuated history of negotiations. Given the Court's prior ruling of the relevance of the requested compliance with environmental and land use restrictions with which other tribes have not been asked to comply, Request No. 19 seeks documents regarding such negotiations with other tribes. Requests No. 10-11 seek documents regarding the efforts to obtain legislative ratification of the Barstow Compact. Other requests seek documents regarding Big Lagoon' basic claims and the State's affirmative defenses. There is certainly nothing unusual or overreaching about any of these requests in a case where big Lagoon is required to prove state of mind, intent, and motivation.

B. The Requested Protective Order

The State seeks a protective order regarding seven of these document requests, and seeks to restrict the discovery sought in three ways: (1) to preclude discovery of documents outside of what is referred to as "the record of negotiations"; (2) to preclude discovery of documents preceding the execution of the Barstow Compact and (3) to preclude discovery of documents pertaining to the Barstow Compact Legislative ratification process. The State's motion finds no support in either generally applicable discovery principles or in the law underlying and arising out of the IGRA.

IV. ARGUMENT

A. There is No Basis for Limiting Discovery to the So-Called "Record of Negotiations"

1. The Standards for Discovery and Protective Orders

Discovery in federal proceedings is intended to be liberally construed, and parties are permitted to obtain discovery of "any non-privileged matter that is relevant to any party's claim or defense," as well as "any matter relevant to the subject matter involved in the action." Fed. R. Civ. Proc. 26(b)(1). Relevant information for discovery purposes is not limited to information that may be admissible at trial, "if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. Proc. 26(b)(1). Under the applicable rules, relevant evidence is broadly defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Ev. 401.

In light of this policy permitting a broad scope of discovery, the party seeking the protective

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order bears the burden of making a strong showing of good cause demonstrating the need for the order. See, Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir. 1975). The party seeking the protective order must show that specific prejudice or harm will result absent a protective order. "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning" are not sufficient to warrant issuance of a protective order. Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1130 (9th Cir. 2003). Even if a party demonstrates good cause, the court must balance the interests in permitting discovery to go forward against the burdens imposed by precluding discovery. See, Rivera v. NIBCO, Inc., 364 F.3d 1057, 1063-64 (9th Cir. 2004).

2. There Is No Merit to the State's Argument that the Facts Regarding Big Lagoon's Bad Faith Claim Are Not In Dispute

In a case which compliance with the duty to bargain in good faith requires inquiry into the State's motive or state of mind during the negotiating process, the State makes the rather astounding argument that the relevant facts are not in dispute because they are all "in the record"; that is, "the parties' proposals, judicially noticeable information and evidence related to the State's affirmative defenses." The State further contends that whether a State has failed to negotiate in good faith within the meaning of IGRA raises only legal questions, and that accordingly, discovery should be limited to the formal record of negotiations between the State and Big Lagoon following the expiration of the Barstow Compact. See *State's Memorandum of Points and Authorities in Support of its Motion for Protective Order ("State's MPA") at* 6:3-11. However, the State misconstrues the legal standard contemplated by IGRA and the availability of discovery under IGRA.

The State's position is premised on its contention that a good faith determination under IGRA "raises only legal questions." The State's premise is faulty. A determination of good faith is a "mixed question of law and fact" and is dependent upon the Court's consideration of the full array of admissible evidence. Coyote Valley Band of Pomo Indians v. California (In Re Indian Gaming Related Cases Chemehuevi Indian Tribe), 331 F.3d 1094, 1107 (9th Cir. 2003)(hereinafter referred to as "Coyote Valley II"). Whether a State has acted in good faith or not must be made with reference to specific facts, and by that token, discovery to uncover those facts must be permitted. The Supreme Court in Oppenheimer Fund v. Sanders, a case cited by the State, acknowledged that the

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scope of discovery is broad, and stated that permissible discovery need not be related to the merits of a case or the issues raised by the pleadings, as "discovery itself is designed to help define and clarify the issues." 437 U.S. 340, 351 (1978).

None of the cases cited by the State mandate that the only relevant evidence in an IGRA action is from the formal "record" of negotiations, and that there can be no issue of material fact outside of such record. As will be seen in more detail in the discussion below, since it will be unusual in the extreme for the State's bad faith to be shown directly in its negotiating documents, its motive or state of mind during the bargaining process must necessarily be ascertained from circumstantial evidence, including an examination of the totality of the circumstances. Seattle-First Nat. Bank v. NLRB, 638 F.2d 1221, 1225 (9th Cir. 1981);

3. Discovery under the IGRA Is in No Way Limited to Matters in the So-Called "Record of Negotiations" -- Rather a Determination of Good Faith Requires an Inquiry into All of the Facts As an Integrated Whole

As the State concedes, there can be no dispute that the IGRA requires the State to negotiate with tribes in good faith on class III gaming issues. Furthermore, the legislative history of IGRA indicates that the ability to sue and compel the State to negotiate in good faith was intended to give tribes an opportunity to level the playing field in compact negotiations, where the State has much of the bargaining power. See, S.Rep. No. 100-446 at 14 (1988), *reprinted at* 1988 U.S.C.C.A.N. 3071, 3084; also attached as Exhibit 3 to *Big Lagoon's RJN*. Additionally, the drafters of IGRA intended that the burden of proof in IGRA cases to be as follows – where tribes can make a prima facie case that the State has negotiated in bad faith, the burden will then shift to the State to prove it in fact negotiated in good faith.

The State's argument that the evidence in an IGRA lawsuit should be limited to the "record of negotiations" between the State and Big Lagoon has no merit, and is not supported by binding legal authority. The State cites only one Ninth Circuit case, Coyote Valley II, in support of its contention that IGRA does not provide for discovery, and its argument seems to be based on the premise that no discovery is needed to determine the issue of good faith. *State's MPA* 4:25-52. However, Coyote Valley II does not even deal with the issue of whether the parties are entitled to discovery in IGRA actions, and certainly does not mandate that discovery is not available in IGRA

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suits. In fact, Coyote Valley II, holds that "the good faith inquiry is nuanced and fact-specific and is not amenable to bright-line rules." 331 F.3d at 1113.

While it is true that there is limited authority interpreting or applying the IGRA's good faith requirement, this does not mean the Court is without resources to determine the meaning of "good faith negotiation" or how the lack of such good faith can be established. In particular, courts interpreting the IGRA have looked to decisions arising out of similar good faith bargaining requirements in National Labor Relations Act ("NLRA"). Indeed, this Court in 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)(hereinafter referred to as "Coyote Valley I"), affirmed, 331 F.3d 1094 (9th Cir. 2003) stated: "The Court looks for guidance to case law interpreting the National Labor Relations Act (NLRA). Like IGRA, the NLRA imposes a duty to bargain in good faith, but does not expressly define "good faith"…the Court considers the NLRA case law for guidance in interpreting a standard undefined by the IGRA."

Any analysis must begin by defining the concept of good faith in terms of negotiations under the IGRA. As Justice Frankfurter recognized when considering the NLRA good faith bargaining requirements: Good faith "means more than merely going through the motions of negotiating; it is inconsistent with a predetermined resolve not to budge from an initial position." NLRB v. Truitt Mfg. Co., 351 U.S. 149, 155 (1956). The Ninth Circuit has recognized that what is known as "surface bargaining" – going through the motions of negotiating, without any real intent to reach an agreement -- does not constitute good faith bargaining. K-Mart Corp. v. NLRB, 626 F.2d 704, 706 (9th Cir. 1980). Good faith "presupposes a desire to reach ultimate agreement" and not simply "an attitude of take it or leave it." NLRB v. Ins. Agents International Union, 361 U.S. 477, 485 (1960). What Big Lagoon intends to show in this case is that the State has never negotiated in good faith but rather has engaged in a process of "surface bargaining." By this motion, the State seeks to proscribe its discovery obligations in a manner that would grant it unfettered license to engage in "surface bargaining" by denying Big Lagoon and the Court access to relevant evidence beyond formal correspondence exchanged. Big Lagoon will be denied evidence relevant to proving that the State has gone through the motions of making proposals and counterproposals without any real intention

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of reaching an agreement to allow Big Lagoon to engage in gaming operations on its ancestral lands.

The law is clear: "A determination of good faith or of want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind." NLRB v. Truitt Mfg. Co., 351 U.S. 149, 155 (1956). Thus, proving good faith, or the lack of it, requires gathering evidence – not just of what the State put forth its proposals during the bargaining process, but what was its state of mind and motivation in making those proposals. "Since it would be extraordinary for a party directly to admit a 'bad faith' intention, his motive must of necessity be ascertained from circumstantial evidence...." Continental Ins. Co. v. NLRB, 495 F.2d 44, 48 (2d Cir. 1974). The evidence of the State's good faith or lack thereof is not limited to the proposals made but extends to underlying communications and negotiating positions that will show that the State was intransigent regarding Big Lagoon's desire to conduct gaming operations on its ancestral lands. For example, if discovery disclosed an internal memo elaborating on the State's intention to "surface bargain" this point, to require conditions with no intention of offering any meaningful concessions in return, and/or to enter into a compact with no good faith intention of pursuing legislative approval (and in fact encouraging competing tribes' opposition that would ensure disapproval), this would certainly be relevant and persuasive evidence of a type not likely to be found in the attorney-drafted negotiating proposals themselves.

In the context of labor disputes, courts have held that whether a party has negotiated in good faith will be determined by examining, "the previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations." NLRB v. Dent, 534 F. 2d 844, 846 (9th Cir. 1976); citing, Local 833, UAW-AFL-CIO v. NLRB, 112 U.S. App. D.C. 107, 300, cert denied., Kohler Co. v. Local 833, 370 U.S. 911 (1962). It is not sufficient to look only at negotiating sessions, and as the court noted in NLRB v. Stanislaus Implement and Hardware Co., a "truer picture" of whether a party negotiated in good faith can be seen by looking at events outside of the negotiation meetings, since "[a] state of mind such as good faith is not determined by a consideration of events viewed separately. The picture is created by a consideration of all the facts viewed as an integrated whole." 226 F.2d 377, 381 (9th Cir. 1955). It is not sufficient to look at negotiating proposals alone as evidence of good or bad faith bargaining, and the trier of fact must

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consider the totality of the circumstances surrounding the parties' interactions. See, Seattle-First National Bank v. NLRB, 638 F.2d 1221, 1226 (9th Cir. 1981).

The IGRA itself states that in considering whether a State has acted in bad faith, a district court may look at information illuminating the context of the parties' discussions and proposals:

> [T]he court: (I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities;
>
> (II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

25 U.S.C. § 2710(d)(7)(AB)(iii). The list of factors is not exclusive, as other lawsuits alleging the State has negotiated in bad faith have been brought on different grounds. Nevertheless, materials pertaining to the factors cited in (I) are by their nature outside of the formal record of negotiations between States and Tribes.

Most importantly, the Ninth Circuit's decision in Coyote Valley II provides the most direct recognition of what the IGRA intended in terms of the discovery available to prove a lack of good faith. In referring to the statutory requirements of good faith negotiation, the Ninth Circuit referred to the legislative history as follows: "The Committee notes that it is States not tribes that have crucial information in their possession that will prove or disprove tribal allegations of failure to act in good faith. See, 331 F.3d at 1108, citing, S.Rep. No. 100-446 at 14 (1988), *reprinted at* 1988 U.S.C.C.A.N. 3071, 3085." (emphasis supplied). Clearly, this legislative history shows that the drafters of IGRA did not have in mind that proof of bad faith would come simply from the "record of negotiations" – records quite obviously in the possession of both the state and the tribes – but rather believed that the State alone would have relevant information in its possession. Clearly, the legislature did not intend the factual proof of bad faith to be limited to only what is "in the record" and known to both the State and the tribes and which, in turn, may reflect only the "surface bargaining" position of the State.

Other federal courts have permitted discovery of materials beyond the record of negotiations in IGRA actions. In New York v. The Oneida Indian Nation, the court held that it would be proper to depose state officials involved in settlement negotiations with the Oneida Nation, as their

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testimony about such discussions would be relevant to a finding that the State had acted in bad faith. 2007 U.S. Dist. LEXIS 57469, *38-40 (N.D.N.Y. August 7, 2007). The Nation sought to take the depositions of former officials in the Pataki administration, as part of discovery on its counter-claim that the State failed to negotiate in good faith, in violation of IGRA. Id. The Nation sought to discover evidence of the State's intent in conducting negotiations for a compact amendment, and the court agreed that such discovery was proper. Id. at *39-40. Similarly, in Seminole Tribe v. Florida, where the tribe alleged that the State had acted in bad faith in compact negotiations, the court ordered discovery to be re-opened, and permitted the tribe to conduct discovery on the issue of the State's treatment of non-Indian entities operating gambling cruises. 1993 U.S. Dist. LEXIS 21387, *2 (S.D. Fla. 1993).

4. The Cases Cited by the State Are Not Binding On This Court and Are Themselves Inconsistent with NLRA Decisions to which Courts Have Looked for Guidance

Notably, the State cites no Ninth Circuit or other appellate authority supporting the proposition that discovery in an IGRA suit must be limited to the record of compact negotiations. Indeed, the one Ninth Circuit case it does cite – Coyote Valley II – does not expressly deal with discovery but supports Big Lagoon's position that information regarding the issue of good or bad faith is uniquely in the possession of the State and, therefore, that discovery under the Federal Rules should be broadly allowed to ferret out this information. Moreover, none of the other cases cited by the State constitutes binding authority upon the Northern District of California. The two district court orders cited by the State – *Order Granting Defendant's Motion for Protective Order*, filed April 11, 2006, in Rincon Band of Luiseno Mission Indians v. Schwarzenegger, U.S. District Court, Southern District of California, Case No. 04-cv-1151; and *Order denying Plaintiff's request for reconsideration*, filed May 7, 2009, in Fort Independence Indian Community v. Schwarzenegger, U.S. District Court, Eastern District of California, No. Civ. S-08-432 LKK/KJM – are both unpublished orders. See, Exhibits B and C to *State's MPA*.

In Fort Independence Indian Community v. Schwarzenegger, the court denied the tribe's request to reconsider a magistrate judge's ruling limiting the scope of discovery to the record of negotiations, applying the clearly erroneous standard to the magistrate judge's ruling. The facts in

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that case are quite different from those here, however, as the court obviously appears to have been influenced by the fact that the proposed discovery there was a deposition of the principal negotiator for the State (courts are obviously reluctant to allow depositions of State officials). The court acknowledged the guidance to be taken from cases under the NLRA, and even appears to apply some of those cases, including some of those cited herein. To the extent the Court's decision is not limited to its facts and suggests a broader based holding that all discovery is limited to the "record," that decision is clearly contrary to the legislative history of the IGRA cited above. It is also contrary to a long line of NLRA decisions holding that the determination of good faith requires an inquiry into the "state of mind" and is to be shown by looking at all the facts and circumstances in and surrounding the negotiations, including antecedent events. Furthermore, it should be noted that in a later decision considering the parties cross-motions for summary judgment, the court in Fort Independence qualified its earlier opinion and solicited additional evidence from the parties on the issue of the value of exclusive gaming rights and expected gaming revenue. *Order permitting submission of further evidence and briefing*, filed July 8, 2009, Case No. No. Civ. S-08-432 LKK/KJM, attached as Exhibit 4 to *Big Lagoon's RJN*. The court stated that it did not intend to preclude "introduction of other evidence that was neither an action, offer or counter-offer." Id.

Similarly, Rincon involves a request for protective order regarding the proposed depositions of five individuals, including a justice of the California Court of Appeal and the Governor's legal affairs secretary, as well as his legal counsel and chief negotiator. Obviously, these were extreme facts that undoubtedly influenced the result. As in Fort Independence, the court acknowledges the influence of NLRA decisions, but appears to ignore the clear import of those cases. The court also acknowledged that the Ninth Circuit decision in Coyote Valley II does not deal with discovery, but it then appeared to find some support in that decision for limiting discovery. In fact, as is discussed above, Coyote Valley II supports Big Lagoon's position that potentially admissible evidence is uniquely in the hands of the State. The court also found support for its position in the fact that the IGRA itself does not mention discovery – but this should not be determinative, as this Court is certainly aware that most statutes creating rights and conferring jurisdiction on the federal courts to enforce those rights do not mention discovery. Rather, discovery is a procedural matter that is the

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subject of the Federal Rules of Civil Procedure applicable to all litigation in federal courts.

Rincon and Fort Independence are not binding in any way on this Court and, as set forth above, we respectfully submit that they should not be followed in reaching a decision on this matter.

5. This Court and the State Itself in This Litigation Have Acknowledged That Evidence of Bad Faith May Be Derived from Matters outside of the Formal Record of Negotiations

This Court has previously acknowledged that evidence of bad faith may be found in matters outside "the record" – specifically, in evidence of how the State treated Big Lagoon relative to other gaming tribes:

> Accordingly, the State could in good faith ask the Tribe to make particular concessions that it did not require of other tribes, due to Big Lagoon's proximity to the coastline or other environmental concerns unique to Big Lagoon. The State could demonstrate the good faith of its bargaining position by offering the Tribe concessions in return for the Tribe's compliance with requests with which the other tribes were not asked to comply. The Court declined at that time to make a final determination of bad faith on the part of the State because of the novelty of the issue of good faith bargaining under the IGRA.

See, *Order Denying Plaintiff's Motion for Summary Judgment* , at 4:11-5:24, filed August 4, 2003, in related case Big Lagoon Rancheria v. State of California, Case No. C-99-4995-CW, attached as Exhibit 5 to *Big Lagoon's RJN*. Thus, in earlier proceedings regarding the same matter, this Court expressed its belief that evidence of bad faith could be found in how the State treated Big Lagoon relative to other tribes – what demands it made on Big Lagoon in comparison to other tribes and what concessions it offered Big Lagoon in comparison to other tribes. Such an analysis clearly involves discovery of matters outside "the record."

Furthermore, the State itself has expressed the view that evidence about the claims and defenses in the present litigation can be found outside of the formal record of compact negotiations. In its initial Rule 26 disclosure, of the persons having discoverable information, the State listed some 26 individuals or entities, the majority of whom did not participate in any compact negotiations between Big Lagoon and the State. See, *State of California's Initial Disclosure Pursuant to Federal Rule of Civil Procedure 26(a),* attached as Exhibit C to *Jackson Decl.* Similarly, in its listing of documents it anticipated would support its defenses, the State listed a number of sources of documents outside of the compact negotiations. Id.

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B. The Pattern and Practice of the State During the Entire Fifteen Years of "Surface Bargaining" is Relevant and Admissible to Show a Lack of Good Faith

The State contends that discovery related to events preceding the execution of the Barstow Compact should not be permitted because of limitations imposed by IGRA upon the jurisdiction of the district court to hear suits seeking to compel a State to negotiate in good faith. *State's MPA* at 6:15-7:14. The State contends that the Court has no jurisdiction over pre-Barstow events, because those events led to a Tribal-State compact. The State's attempt to turn this discovery issue into a jurisdictional one is wholly lacking in merit – this lawsuit does not seek relief for a pre-Barstow failure of negotiations.[1] The issue here is whether proof of the current claim can be found in the pattern and practice of negotiations leading up to the current impasse in negotiations, including in the pre-Barstow events.

Nothing in IGRA states that the availability of discovery must be limited to discrete negotiating sessions and, except for its irrelevant jurisdictional argument, the State fails to cite any law supporting its contention that discovery must be limited to the time period after the expiration of the Barstow Compact. To the contrary, evidence regarding the State's long history of continued delays and its failure to offer meaningful concessions to Big Lagoon is clearly relevant and discoverable in an IGRA action. This is particularly true where this Court has already found evidence of bad faith negotiating in the many years leading up to the Barstow Compact. In response to prior summary judgment motions in this case, this Court found that in the course of delayed negotiations over many years "it appears the State has not negotiated with Big Lagoon in good faith thus far." *Order Denying Cross-Motions*, at 19:17-19, attached as Exhibit 1 to *Big Lagoon's RJN*. The Court further determined that "[t]he State could demonstrate the good faith of its bargaining

[1] District courts have jurisdiction to entertain an IGRA lawsuit alleging the State's failure to conduct compact negotiations in good faith where the following conditions are met: (1) over 180 days have elapsed since the Tribe requested that the State enter into compact negotiations; (2) a Tribal-State compact has not been entered into; (3) the State has not responded to the Tribe's request to enter into compact negotiations, or has not responded in good faith. 25 U.S.C. §2710(d)(7)(B). Big Lagoon has met the required criteria for initiating a lawsuit pursuant to these provisions of IGRA – it requested compact negotiations with the State following the expiration of the Barstow Compact, no compact has been entered into, and the State has failed to conduct further compact negotiations in good faith. See, *Complaint of Big Lagoon Rancheria*, filed April 3, 2009.

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position by offering the tribe concessions in return for the Tribe's compliance with requests with which the other tribes were not asked to comply." Id at 19:7-10. However, in subsequent negotiations, including those leading up to the current lawsuit, the State has refused to offer concessions in return for Big Lagoon's requested compliance with environmental and land use restrictions with which other tribes had not been asked to comply. Indeed, the State has insisted that it would offer a compact only if Big Lagoon would agree to build a casino on land elsewhere, away from its trust lands, subject to numerous State and other approvals. Clearly, there is a pattern and practice of bad faith, "surface negotiating" going on here, and Big Lagoon is entitled to go behind the mere "surface" to obtain evidence of the "state of mind" behind this pattern and practice.[2]

There is nothing in the text of IGRA that mandates that discovery must be limited to the most recent session of negotiations. Again, court decisions under the NRLA, to which this court has looked for guidance, are instructive and support Big Lagoon's position. The Ninth Circuit Court of Appeals has stated: "Whether the obligation to bargain in good faith has been satisfied is a question of fact to be determined by examining the circumstances in each case including "[t]he previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations . . . ." NLRB v. Dent, 534 F. 2d 844, 846 (9th Cir. 1976), citing Local 833, UAW-AFL-CIO, etc. v. N.L.R.B., 112 U.S.App.D.C. 107, 300 F.2d 699, 706 (1962), *cert. denied,* Kohler Co. v. Local 833, etc., 370 U.S. 911 (1962) (emphasis supplied). Particularly relevant is the appellate court's decision in Local 833, UAW-AFL-CIO, etc. v. N.L.R.B.. There the appellate court rejected the NLRB's decision to determine good faith based only on the most recent period of negotiations, stating: "We conclude that in the circumstances of this case, the Board improperly ignored the inferences to be drawn from Kohler's pre-1953 labor relations history in assessing its

[2] Evidence of prior acts is relevant to prove motive, intent or knowledge. Fed. R. Evid. 404(b). Evidence of prior acts may be used in civil proceedings where a defendant's intent is at issue. See, Playboy Enterprises, Inc. v. Chen, 1997 U.S. Dist. LEXIS 21916 (C.D. Cal. October 1, 1997); Poling v. Morgan, 829 F.2d 882, 888 (9th Cir. 1987). In the context of NLRA proceedings, events from outside of the statutory limitations period are not actionable, but may be considered when evaluating the "totality of the circumstances" and can be instructive in shedding light on whether negotiations were conducted in bad faith: "[the NLRA] does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge...earlier events may be used to shed light on the true character of matters occurring within the limitations period." Sparks Nugget, Inc. v. NLRB, 968 F.2d 991, 995 (9th Cir. 1992).

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intent at the bargaining table in 1954…Only compelling circumstances could justify disregarding the "antecedent" events in this record – repeated unlawful interference with employees' attempts to organize an independent union and public expressions of hostility to it." Id. at 706. Similarly, there are no compelling circumstances here that would justify disregarding the State's long pre- Barstow history of bad faith negotiations. The State's actions during and prior to negotiations for the Barstow Compact are relevant, as evidence of such actions paints a more complete history of the relationship between the parties, and will show that the State has engaged in a pattern and practice of negotiating in bad faith with Big Lagoon.

C. The State's Arguments Regarding the Legislative Process Are Similarly Misplaced

In an effort to limit discovery in this case, the State contends that "this Court lacks jurisdiction over allegations that the State has negotiated in bad faith because of the Legislature's failure to ratify a negotiated compact." *State's MPA* at 7:18-25. The State further argues that discovery should not be permitted because the State is immune from suit for failure of the Legislature to ratify a contract. Both arguments totally miss the point. The issue is not whether the State is immune from suit on account of the Legislature's activities. This lawsuit is not based on a bad faith claim of failure to ratify. As with the State's earlier argument, the issue here is not jurisdictional – whether there is a cause of action on account of the Legislature's failure to ratify – but whether the activities of the Legislature and the State during that ratification process are discoverable for purposes of showing a continuous pattern and practice of bad faith negotiating.

The issue here is purely a question of discovery – can Big Lagoon seek discovery of documents that would show that the State's activity during the ratification process was part and parcel of its long-term pattern and practice of bad faith negotiation. Again, the State intentionally raises a jurisdictional argument on a discovery question. Even if the Legislature lacks the capacity to be sued, or participate in litigation, documents pertaining to State's involvement in the Legislature's consideration of the Barstow compact are still discoverable. The Federal Rules specifically provide that "relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26 (b)(1). For example, evidence that the State negotiated the Barstow Compact, knowing full well that

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it would actively oppose ratification, that it then, in fact actively opposed ratification and that it, indeed, planned for and in fact enlisted opposition from other tribes in order to defeat ratification, would certainly be relevant, along with all of the other "antecedent events," to show bad faith.

The State fails to point to anything in IGRA that precludes consideration of the State's activities during the ratification process in making a good faith determination. Again, decisions under the NLRA are instructive. As was the case with the history of labor negotiations in Local 833, UAW-AFL-CIO, etc. v. N.L.R.B., evidence that the State for years has intentionally engaged in a negotiation process intended to preclude Big Lagoon from gaming on its ancestral lands, to impose environmental mitigation regulations and various revenue sharing provisions without offering any meaningful concessions and to enter into a compact with every intention to subvert its ratification, should not be disregarded by this Court. Nor should the State be allowed to subvert Big Lagoon's efforts to uncover such evidence.

Furthermore, while Cal. Gov't Code §12012.25(d) designates the Governor as the state officer responsible for negotiating Tribal-State gaming compacts, neither state law nor IGRA preclude the discovery of actions taken by other branches of government, or between those branches and the Governor, as part of a determination whether the State has acted in bad faith. In fact, in Quechan Tribe of the Fort Yuma Indian Reservation v. State of California[3], the Quechan Tribe brought suit against the State of California on the basis that the Legislature's failure to ratify a compact amendment and the Legislature's further involvement in the negotiating process, amounted to negotiation in bad faith.

The Quechan Tribe alleged that after the Governor executed a compact amendment and submitted the amendment to the Legislature, the Legislature refused to ratify the compact amendment, and moreover, instructed the tribe to meet with a number of wealthy, influential gaming tribes to further discuss the compact amendment, and requested that the tribe agree to material changes to the compact amendment. *Plaintiff Quechan Tribe's MPA in opposition to Defendant's*

[3] See, *Big Lagoon's RJN*, Exh. 6 and Exh. 7, *Complaint of Quechan Tribe of the Fort Yuma Indian Reservation v. State of California*, U.S. District Court, Southern District of California, Case No. 06-cv-0156-R CAB, filed January 24, 2006; *Plaintiff Quechan Tribe's memorandum of points and authorities in support of opposition to Defendant's motion to dismiss*, filed August 11, 2006.

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motion to dismiss at 12:27-13:5. Quechan tribe argued that in so doing, the Legislature was acting as a "negotiator" and was thereby subject to the provisions of IGRA.[4] Id.

Here, after it was signed by the Governor, the Barstow Compact stalled in the Legislature for two years. During hearings of the Senate and Assembly Governmental Organizations Committee, various committee members expressed disagreement with provisions of the Barstow compact. The actions of the Legislature, and the evidence of the Governor's interaction with the Legislature, are for a number of reasons relevant to, and may lead to the discovery of admissible evidence regarding, Big Lagoon's claim that the State has acted in bad faith. As in Quechan, the reasons behind the Legislature's stalling tactics, and the communications between the State, the Legislature and the competing tribes, may well lead to admissible evidence supporting Big Lagoon's bad faith claim. In a broader sense, the stalling tactics of the Legislature may well be intimately connected with the pattern and practice of bad faith in the State's negotiations with Big Lagoon.

V. CONCLUSION

Given what the Legislature recognized when enacting IGRA – the unequal access that the State and Big Lagoon have to relevant sources of information about the State's alleged actions in bad faith – the burden imposed on Big Lagoon by preventing it from engaging in discovery is far greater

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[4] The lawsuit in Quechan Tribe was voluntarily dismissed by the parties, and therefore, the tribe's claim that the Legislature negotiated in bad faith has not been adjudicated on the merits.

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than the State's interest in preventing discovery. For all of the reasons set forth above and because the State cannot show that the purported harm it would suffer outweighs Big Lagoon's need for discovery, the State's motion for protective order should be denied in its entirety.

Dated: January 29, 2010

Respectfully submitted,

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