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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BIG LAGOON RANCHERIA, a Federally Recognized Indian Tribe, Plaintiff, **v.** **STATE OF CALIFORNIA,** Defendant.	CV 09-1471 CW (JCS) **REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR A PROTECTIVE ORDER AGAINST PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS** Date: February 26, 2010 Time: 9:30 a.m. Dept: San Francisco, Courtroom A, 15th Floor Judge The Honorable Joseph C. Spero Trial Date n/a Action Filed: 4/3/2009

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INTRODUCTION

In September 2005, Plaintiff Big Lagoon Rancheria (Big Lagoon) and Defendant State of California (State) entered into a class III gaming compact (Barstow Compact), as authorized by the Indian Gaming Regulatory Act (IGRA), 18 U.S.C. §§ 1166-1168, 25 U.S.C. §§ 2701-2721. The Legislature failed to ratify the Barstow Compact, as required by state law for the compact to be effective, and in September 2007 the parties commenced negotiations for a new compact (2007-2009 Negotiations). The State demonstrated in its opening memorandum (State's Mem. of Points & Auth. in Support of Mot. for Protective Order [Doc. 33-1] (State's Mem.)) why this Court should grant a protective order against portions of Big Lagoon's broad request for documents other than those containing the parties' offers, counter-offers and proposals during the 2007-2009 Negotiations, and those that the State may use to support its affirmative defenses. Specifically, no additional discovery is necessary because the relevant facts in the record of negotiations are undisputed; the Court lacks jurisdiction under IGRA to find that a state failed to negotiate a compact in good faith when a compact has been entered into; and the Legislature's failure to ratify the Barstow Compact does not support an IGRA bad faith negotiation claim.

Despite having entered into a compact with the State in 2005, Big Lagoon opposes the motion on the theory that for fifteen years it has been trying to negotiate a compact with the State but has been unable to do so. Ignoring that the State's last offer was for a gaming facility located on Big Lagoon's Rancheria site, Big Lagoon argues that throughout this period, the State has engaged in a pattern and practice of so-called "surface bargaining" without any real intent to reach an agreement that would allow Big Lagoon to operate a gaming facility on its ancestral land. According to Big Lagoon, because analogous case law interpreting the National Labor Relations Act (NLRA) allows courts to consider a party's motive or state of mind during the bargaining process to ascertain compliance with a duty to bargain in good faith, it should be allowed to "dig[] 'below the surface'" of the State's bargaining positions over the last fifteen years to find the State's true motives. (Big Lagoon's Opp'n to State's Mot. for Protective Order [Doc. 37] (Opp'n) at 1:22-28.)

Whether the State conducted the 2007-2009 negotiations in good faith may be determined from the record of negotiations, judicially noticeable facts and evidence supporting the State's affirmative defenses. Because the State has already produced these documents to Big Lagoon, no further discover is necessary. Moreover, courts interpreting IGRA's good faith requirement have limited the reviewable evidence to objective facts discernable from the current negotiation records, and have disallowed discovery into irrelevant historical events. Even the NLRA cases cited by Big Lagoon confirm that the circumstantial evidence to be considered in assessing a party's state of mind during negotiations includes objective matters only. For these reasons and those asserted in the State's opening memorandum, the State respectfully requests this Court grant the requested protective order.

ARGUMENT

I. THE RELEVANT FACTS NECESSARY TO DETERMINE WHETHER THE STATE ACTED IN GOOD FAITH ARE UNDISPUTED, LEAVING ONLY THE LEGAL QUESTION WHETHER THE STATE HAS SATISFIED IGRA'S GOOD FAITH NEGOTIATION REQUIREMENT

Big Lagoon claims that by arguing that a good faith determination under IGRA raises only legal questions, the State misconstrues the appropriate legal standard and the availability of discovery. (Opp'n at 5:18-22.) In *In re Indian Gaming Related Cases* (*Coyote Valley Band of Pomo Indians v. California*), 331 F.3d 1094, 1107 (9th Cir. 2003) (*Coyote Valley II*), the Ninth Circuit held that in reviewing this Court's denial of a tribe's motion for an order requiring the State to negotiate in good faith, it reviewed "mixed questions of law and fact" de novo. "A mixed question of law and fact exists where the relevant facts are undisputed and the question is whether those facts satisfy the applicable legal rule." *Id.* As in *Coyote Valley II*, the relevant facts here concerning the record of the 2007-2009 Negotiations are undisputed, so the only remaining issue is the legal question whether the State has satisfied IGRA's good faith requirement

While discovery is generally "designed to help define and clarify the issues," *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351 (1978), the issues here do not require further definition or clarification. This case requires a straightforward determination of whether the State satisfied IGRA's good faith requirement during the 2007-2009 Negotiations. (*See* Compl. [Doc. 1] ¶¶ 44,

58.) The record of those negotiations is undisputed. Evidence relevant to determine whether the State acted in good faith will also include judicially noticeable facts and evidence supporting the State's affirmative defenses. Because there is no dispute about the relevant facts, the only question that remains, as noted by *Coyote Valley II*, is purely legal.

II. DISCOVERY SHOULD BE LIMITED TO THE RECORD OF NEGOTIATIONS, JUDICIALLY NOTICEABLE FACTS AND EVIDENCE SUPPORTING THE STATE'S AFFIRMATIVE DEFENSES

Big Lagoon misrepresents the State's position to be that evidence in an IGRA bad faith action should be limited to the record of negotiations. (Opp'n at 6:22-23.) Instead, the State believes the Court need only consider the parties' proposals, judicially noticeable information and evidence related to the State's affirmative defenses. (State's Mem. at 6:5-8.)

In addition, Big Lagoon misconstrues *Coyote Valley II*. (*See* Opp'n at 7:1-2.) While the court indicated "the good faith inquiry is nuanced and fact-specific, and is not amenable to bright-line rules," 331 F.3d at 1113, it did not explicitly discuss which facts should be considered, and the factors it relied upon were objective only. The court did not hold, as Big Lagoon suggests, that evidence outside the negotiation record, beyond judicially noticeable facts and evidence supporting the State's affirmative defenses, should be considered, and certainly not in the scope Big Lagoon proposes here. Similarly, in *In re Indian Gaming Related Cases* (*Coyote Valley Band of Pomo Indians v. California*), 147 F. Supp. 2d 1011, 1021-22 (N.D. Cal. 2001) (*Coyote Valley I*), this Court looked only to objective factors such as the particular offers made, whether the provisions were introduced unilaterally or through negotiations, whether counter-offers that the State refused were unreasonable or legally incorrect positions, and the State's willingness to engage in further negotiation.

At bottom, this discovery dispute is about how wide a net Big Lagoon may cast in gathering evidence to support its claim that the State failed to negotiate in good faith during the 2007-2009 Negotiations. Big Lagoon claims relevant evidence "can be found in the pattern and practice of negotiations leading up to the current impasse in negotiations, including the pre-Barstow events" (Opp'n at 13:9-11) and the "State's involvement in the Legislature's consideration of the Barstow Compact" (*id.* at 15:24-25). Although the scope of discovery under the federal rules is generally

broad, *see Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. at 350, there are limits to what a party may seek via discovery. Federal Rule of Civil Procedure 26(c) "was enacted as a safeguard for the protection of parties and witnesses in view of the broad discovery rights authorized in Rule 26(b)." *United States v. Columbia Broad. Sys., Inc.*, 666 F.2d 364, 368-69 (9th Cir. 1982). "District courts need not condone the use of discovery to engage in 'fishing expedition[s].'" *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1072 (9th Cir. 2004); s*ee also Cuomo v. Clearing House Ass'n, LLC*, 129 S. Ct. 2710, 2719 (2009) ("Judges are trusted to prevent 'fishing expeditions' or an undirected rummaging through bank books and records for evidence of some unknown wrongdoing"); *Blackie v. Barrack*, 524 F.2d 891, 906 n.22 (9th Cir. 1975) ("district judge may reasonably control discovery to keep the suit within manageable bounds, and to prevent fruitless fishing expeditions with little promise of success"). Indeed, the Advisory Committee Notes for the 2000 amendment to Federal Rule of Civil Procedure 26(b)(1) direct parties and courts to "focus on the actual claims and defenses involved in the action" in determining relevance for purposes of discovery. Fed. R. Civ. P. 26 Advisory Comm. Notes, 2000 Amend., Subd. (b)(1).

Big Lagoon's single claim for relief in this action is whether the State negotiated in good faith for a class III gaming compact from September 2007 to April 2009. Big Lagoon admits "this lawsuit does not seek relief for a pre-Barstow [Compact] failure of negotiations" (Opp'n at 13:8-9) and "is not based on a bad faith claim of failure to ratify" (*id.* at 15:15-16), yet it seeks documents concerning pre-Barstow Compact negotiations and the Legislature's failure to ratify that compact, which is precisely the type of fishing expedition prohibited by the federal rules. Specifically, Big Lagoon speculates that

> 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.

(*Id.* at 8:9-17.) If any such memorandum exists, it likely would be protected by, among others, the official information privilege, the attorney-client privilege or the attorney work product doctrine. Nonetheless, Big Lagoon offers nothing to substantiate that any such memorandum

possibly exists, and instead merely hopes such evidence could be found after an exhaustive, time-consuming and expensive document review by the State.

Big Lagoon further speculates that relevant evidence may be found with respect to the Barstow Compact negotiations and ratification:

> For example, evidence that the State negotiated the Barstow Compact, knowing full well that 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.

(Opp'n at 15:28-16:3.) This theory is belied by the allegation that Governor Schwarzenegger publicly hailed the benefits of the Barstow Compact (Compl. ¶ 40), and the noticeable absence of any allegation that the Governor acted in collusion with other tribes to defeat a compact that he publicly endorsed and his negotiating team worked tirelessly to finalize.

In addition, Big Lagoon hopes its broad discovery request will yield incriminating evidence from the Legislature:

> [T]he 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.

(Opp'n at 17:8-12.) These assertions are based upon mere guesswork that such evidence might exist. The courts, however, have counseled against undirected rummaging through documents to prevent fruitless fishing expeditions with little promise of success. *See Cuomo v. Clearing House Ass'n, LLC*, 129 S. Ct. at 2719; *Blackie v. Barrack*, 524 F.2d at 906 n.22.

The Supreme Court has indicated that the definition of relevancy, for discovery purposes, "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. at 350. The only issue that is or may be in this case is whether the State negotiated in good faith from 2007 to 2009. Yet Big Lagoon seeks documents dating back to its first negotiation in 1993 (Compl. ¶ 7), and claims that since then the State has engaged in "surface bargaining" (Opp'n at 1:16-20). Until March 2000, however, 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.[1] *See Coyote Valley II*, 331 F.3d at 1098-1103; *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d at 716-18.

Further, as demonstrated in the State's opening memorandum and undisputed by Big Lagoon, IGRA provides a remedy for a State's failure to negotiate a compact in good faith only where a compact has not been entered into. (State's Mem. at 7.) Here, the parties entered into the Barstow Compact in September 2005. Therefore, there is no basis in IGRA for the court to award relief based on negotiations that preceded the executed Barstow Compact. Nor does anything that occurred during those negotiations bear upon whether the State conducted the "new compact negotiations" (Compl. ¶ 44) in good faith.

III. WHETHER THE STATE HAS NEGOTIATED IN GOOD FAITH IS DETERMINABLE THROUGH EXAMINATION OF THE RECORD OF NEGOTIATIONS, INCLUDING COMPACT PROPOSALS MADE IN THE COURSE OF NEGOTIATIONS, NOT THROUGH IMPOSITIONS ON PRIVILEGED COMMUNICATIONS

Big Lagoon looks to case law interpreting the NLRA to suggest that it should be allowed to conduct broad discovery into the State's motive and intent during the bargaining process to support its assertion that the State has been engaged in longstanding "surface bargaining." (Opp'n at 7:3-9:2.) To the extent Big Lagoon seeks discovery concerning events that occurred before the latest negotiations commenced in September 2007 (*see* Compl. ¶ 58), the NLRA cases are inapposite because they involve negotiations where employers and unions failed to reach agreement, whereas the State and Big Lagoon entered into the Barstow Compact in September 2005. In addition, other than the record of the 2007-2009 Negotiations and documents supporting the State's affirmative defenses, which the State has already produced to Big Lagoon, the documents Big Lagoon seeks are privileged. Also, to the extent case law interpreting the NLRA suggests that bad faith must be ascertained from circumstantial evidence, the parties' proposals

[1] Before then, the State had an obligation to negotiate only for lottery games, nonelectronic keno, and horseracing or off-track pari-mutuel wagering facilities, the only forms of class III gaming that were then lawful in the State. *See, e.g., Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 716 (9th Cir. 2003).

and counter proposals during negotiations is precisely the type of circumstantial evidence appropriate for judicial consideration.

Big Lagoon's discovery requests and opposition to this motion are based on a faulty premise—because good faith is a state of mind, the State's subjective motive and intent during the bargaining process necessarily must be ascertained from circumstantial evidence, including examination of the totality of circumstances. (Opp'n at 1:22-23, 4:8, 6:7-10.) While good faith is a state of mind, case law involving the good faith negotiation requirement in the NLRA context demonstrates that state of mind is determined not by investigating the negotiator's deliberative process or eviscerating evidentiary privileges, but rather by inferring state of mind from the parties' conduct and the statements and proposals they have made in the negotiation process.

In *Coyote Valley I*, this Court "looked for guidance" on how to construe IGRA's good faith negotiation requirement to case law interpreting similar provisions in the NLRA because the term good faith is not defined in IGRA. 147 F. Supp. 2d at 1021. This Court, however, cautioned against importing NLRA cases wholesale into an IGRA good faith analysis, because "the relationship of employers to unions is not analogous of that of the States to tribes." *Id.* In any event, NLRA cases make clear that the good faith standard is to be determined from the parties' conduct and statements as opposed to an examination of their real reasons and private thoughts.

In *Seattle-First National Bank v. N.L.R.B.*, 638 F.2d 1221, 1226 (9th Cir. 1981), the court held, "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." In *N.L.R.B. v. Holmes Tuttle Broadway Ford, Inc.*, 465 F.2d 717, 719 (9th Cir. 1972) (*quoting N.L.R.B. v. Insurance Agents Union*, 361 U.S. 477, 498 (1960)), the court recognized "that the 'Board has been afforded flexibility to determine . . . whether . . . conduct at the bargaining table evidences a real desire to come into agreement," and "[t]his determination is made by 'drawing inferences from the conduct of the parties as a whole.'" "The problem is essentially to determine from the record [of negotiations] the intention or the state of mind of [the parties] in the matter of their negotiations." *N.L.R.B. v. Fitzgerald Mills Corp.*, 313 F.2d 260, 266 (2nd Cir. 1963). This is precisely what

occurred in *Coyote Valley I* and *II* where the courts examined only the record of the negotiations, including the precise terms of offers made and accepted.

Big Lagoon, however, seeks to prove its case not by drawing inferences from objective facts but rather by attempting to look behind those facts for documents that disclose what was on the State negotiator's mind and by asking the Governor, his negotiators and his legal counsel to disclose privileged communications about what reasons the State might have had for the actions taken other than those set forth in the State's formal proposals. The cases cited by the State—which do not evaluate the scope of discovery in the context of the NLRA but instead focus on the appropriate scope of the evidence necessary to determine whether a state has complied with IGRA's good faith requirement—restrict the inquiry to the record of the negotiations. (State's Mem. at 5:3-6:2 (*citing Cheyenne River Sioux Tribe v. South Dakota*, 830 F. Supp. 523 (D.S.D. 1993) (*Cheyenne River*); *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, U.S. Dist. Ct., S.D. Cal., No. 04CV1151 (WMc) (*Rincon*); *Fort Independence Indian Cmty. v. California*, U.S. Dist. Ct., E.D. Cal., No. S-08-432 LKK/KJM (*Fort Independence*).) Notably, Big Lagoon made no effort to distinguish *Cheyenne River*, which held that an IGRA good faith determination should be decided on negotiation transcripts, and not with reference to positions taken outside the negotiating process. 830 F. Supp. at 527.

As discussed above, the documents that Big Lagoon speculates may exist necessarily would disclose the thought processes of the Governor, his staff, advisors, negotiators, and attorneys, as well as those of state legislators. The deliberative process privilege, attorney-client privilege and official information privilege all preclude discovery regarding that information. Also, because Big Lagoon previously filed a lawsuit challenging the State's good faith negotiation, the documents might also be protected by the attorney work product doctrine.

None of the NLRA cases cited by Big Lagoon (*see* Opp'n at 8) define the scope of the factual inquiry, and each focuses not on subjective factors such as motive or intent, but on objective factors in the record of negotiations (*e.g.*, were offers made, the terms of offers, etc.). Notably, in *N.L.R.B. v. Stanislaus Implement and Hardware Company*, 226 F.2d 377, 381 (9th Cir. 1955), when the court held that "state of mind such as good faith is not determined by

consideration of events viewed separately" but that the "picture is created by a consideration of all facts viewed as an integrated whole," it was referring to negotiations on the whole versus an isolated incident during negotiations.

In this case, the parties met and conferred on several occasions and memorialized their positions in written offers and counter-offers. This negotiation record is precisely the type of circumstantial evidence the NLRA cases suggest this Court may consider in determining whether the State acted in good faith. The references in NLRA cases to circumstantial evidence and viewing all facts on the whole does not mean that Big Lagoon should be allowed to conduct an expensive fishing expedition, or ascertain the State negotiator's intent or motive by looking beyond the record of the 2007-2009 Negotiations. Instead, the negotiation record itself constitutes the "circumstantial evidence," as that term is defined by Black's Law Dictionary: "Testimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved." Black's Law Dictionary, Abridged 6th Ed. (1991) 166.

Nor are the other cases cited by Big Lagoon helpful. (*See* Opp'n at 9:26-10:10.) In *New York v. Oneida Nation*, No. 95-CV-05554 (LEK/RFT), 2001 WL 1708804, *7 (N.D.N.Y. Nov. 9, 2001), an unreported decision, the court allowed depositions of certain state officials involved in compact negotiations. The court considered the availability of various privileges, but did not discuss the preliminary question of what facts should be considered in making the good faith determination. *Id.* at *2-*7; *see* State's Mem., Ex. C at 8:23-9:4 (Judge Karlton finding *Oneida Nation* unpersuasive). In *Seminole Tribe v. Florida*, No. 91-6756-CIV-MARCUS, 1993 U.S. Dist. LEXIS 21387, *2 (S.D. Fla. 1993), another unpublished decision, the court merely granted the tribe's motion to reopen discovery with no indication whether the request was for information outside the negotiation record.

IV. IGRA'S CONTEMPLATES THAT GOOD FAITH WILL BE DETERMINED BY OBJECTIVE FACTORS, NOT MOTIVES OR OTHER SUBJECTIVE FACTORS

Big Lagoon claims that IGRA allows a court to look at information illuminating the context of the parties' discussions and proposals in determining whether a state acted in good faith.

(Opp'n at 9:3-12.) In support, Big Lagoon cites 25 U.S.C. § 2710(d)(7)(B)(iii), which provides a court:

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

Contrary to Big Lagoon's assertion, materials pertaining to the factors cited in paragraph (I) are not necessarily found outside the negotiation record because, presumably, to the extent a party was concerned with any of these factors, it would have discussed them in formal negotiations.

Moreover, the court in *Rincon* noted that with respect to these provisions:

> The Act envisions that good faith will be determined by such *objective* factors as conduct and actions, offers and counter-offers, not motives or other subjective factors that leave too much room for misinterpretation and are far too productive of conflict and dissension and much less productive of concord and results. As a result the negotiations are generally conducted on the record with a full tape recording of all the proceedings, except where, as here, the parties stipulate to record only specific portions of the negotiations or to have no recording at all. The recordings, offers, counter-offers and other documents that are part of the negotiations constitute the evidence the Court will consider to determine the issue of good faith.

(*Rincon*, Order, State's Mem. at Ex. B, 16:14-21 (original italics).)

The *Rincon* court also noted the procedure in IGRA that a tribe must follow to enforce a state's obligation to negotiate a compact in good faith

> is completely silent as to discovery and appears based on the premise that no discovery is needed or contemplated. The Act calls for a *political solution*, not a litigation solution. Even though the Act allows a party to the negotiations to sue in federal court, the purpose of the suit is to compel the parties to arrive at a *political solution*.

(*Id.* at 15:19-24 (original italics).) The court further observed that because IGRA allows a federal action does not necessarily mean that discovery is automatically available. (*Id.* at 16:3-4.) The court noted that administrative actions are routinely filed in federal court and decided on the administrative record without any discovery. (*Id.* at 16:4-8 (*citing, e.g.*, cases filed under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1101 et seq., "where discovery is rarely allowed and the case is decided on the administrative record").

Further, the isolated comment in IGRA's legislative history that states, not tribes, possess crucial information that will prove or disprove tribal allegations of failure to act in good faith

(Opp'n at 9:13-25) is inconsequential here because IGRA is not a discovery statute, it makes no provisions for discovery and, as the *Rincon* court observed, apparently calls for no discovery whatsoever but a political solution instead of a litigation solution. Moreover, in this case the State has already produced all evidence that Big Lagoon could possibly use to prove its claim.

V. BIG LAGOON'S ATTEMPT TO DISTINGUISH *FORT INDEPENDENCE* AND *RINCON* ARE UNAVAILING

Big Lagoon claims that *Fort Independence* and *Rincon* are distinguishable because those courts were "obviously" influenced by the fact that the proposed discovery was depositions of the State's principal negotiator and other high-ranking officials, and "courts are obviously reluctant to allow depositions of State officials." (Opp'n at 11:1-3, 17-20.) Big Lagoon may not be seeking to depose high-ranking state officials or the State's negotiator, but it is high-ranking state officials, the State's negotiator, the Governor, the Governor's staff, consultants and attorneys that would be in possession of the requested documents. Thus, Big Lagoon seeks evidence from the same officials, albeit in a different form, which does not lessen the invasive nature of the request. To the extent the court in *Fort Independence* later requested additional briefing and evidence concerning the value of exclusive gaming rights (*id.* at 11:15-16), Big Lagoon does not seek such information here. That order is factually limited to an unsolicited request for additional information by the court, and the statement that the court "did not intend to preclude 'introduction of other evidence that was neither an action, offer or counter-offer'" (*id.*), is entirely consistent with the State's position here that the evidence the Court may consider is the record of negotiations, judicially noticeable information, and the evidence supporting the State's affirmative defenses.

VI. NEITHER THIS COURT NOR THE STATE HAVE MADE COMMENTS IN THIS LITIGATION THAT SUGGEST THE OVERLY BROAD AND INTRUSIVE DISCOVERY SOUGHT BY BIG LAGOON IS WARRANTED

Big Lagoon asserts that how the State treated Big Lagoon relative to other tribes involves matters outside the negotiation record that this Court could consider in determining whether the State acted in good faith. (Opp'n at 12:16-20.) The State agrees that such matters are outside the negotiation record. To be clear, however, the State believes discovery in this case should be

limited to the record of negotiations, as well as judicially noticeable facts and evidence supporting the State's affirmative defenses. The State has provided Big Lagoon with all compacts that it has negotiated with other federally recognized Indian tribes, which are judicially noticeable and which the State may rely upon in proving its affirmative defenses. What is not discoverable, however, are documents concerning the negotiations with other tribes that culminated in executed compacts. Just as the State's negotiations with Big Lagoon were confidential, all other tribal-State compact negotiations were confidential by agreement among the parties.

Big Lagoon posits that this Court has already found that the State has not negotiated in good faith. (Opp'n at 1:27.) Clearly, this Court has not found in *this case* that the State failed to conduct the 2007-2009 Negotiations in good faith. Nor did it find in previous litigation filed by Big Lagoon that the State had failed to negotiate in good faith—had it done so Big Lagoon would not have filed the instant action. Instead, this Court found that "it appeared" that the State had not negotiated with Big Lagoon in good faith "thus far" (*id.* at 2:10-11) but it never entered an order adjudicating that the State had failed to negotiate in good faith. Indeed, as Big Lagoon alleged in the complaint, the Court denied the parties' cross-motions for summary judgment because "a final determination of bad faith is premature at this time due to the novelty of the questions at issue regarding good faith bargaining under IGRA." (Compl. ¶ 16.) Further, this Court's comment in the previous litigation that the matter had been litigated for an "unworkable" length of time (*see* Opp'n at 2:17-21) is inconsequential here as subsequently the parties entered into the Barstow Compact. As demonstrated in the State's opening memorandum, there cannot be a finding of bad faith under IGRA when there is a negotiated compact.

Big Lagoon further notes that the State has identified in its initial Rule 26 disclosure individuals or entities that did not participate in the 2007-2009 Negotiations, and documents that are outside the negotiation record. (Opp'n at 12:21-28.) That identification was merely a precaution against the possibility that the Court might, over the State's objection, permit live testimony in this case, instead of limiting the evidence to the record of negotiations, as in *Coyote Valley I*, *Coyote Valley II*, *Cheyenne River*, *Rincon* and *Fort Independence*. Moreover, the State may use individuals and documents that were not part of the 2007-2009 Negotiations to prove its

affirmative defenses. To the extent the State intends to make use of those documents, it has already provided them to Big Lagoon.

VII. BIG LAGOON MAY RELY UPON THE RECORD OF THE 2007-2009 NEGOTIATIONS AND JUDICIALLY NOTICEABLE FACTS TO ATTEMPT TO SHOW THAT THE STATE ENGAGED IN "SURFACE BARGAINING" DURING THAT TIME PERIOD

Big Lagoon contends that its broad discovery request should be allowed so it can prove that for fifteen years the State has engaged in "surface bargaining," which shows a lack of good faith. (Opp'n at 13:1-15:8.) The State, however, was under no obligation to negotiate a compact with Big Lagoon for slot machines or banked or percentage card games at any time before March 2000, when the voters ratified Proposition 1A to authorize the Governor to negotiate class III gaming compacts with federally recognized Indian tribes. *See Coyote Valley II*, 331 F.3d at 1098-1103; *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d at 716-18. In any event, "surface bargaining" is defined as "'going through the motions of negotiating,' without any real intent to reach an agreement." *K-Mart Corp. v. N.L.R.B.*, 626 F.2d 704, 706 (9th Cir. 1980). By definition, the State could not have been "surface bargaining" when it in fact entered into a compact with Big Lagoon in September 2005. (*See* Opp'n at 2:22-25.) Thus, it is an overstatement to suggest that Big Lagoon has been attempting to negotiate a compact for fifteen years, or that the State has been "surface bargaining" since then.

Also, Big Lagoon's assertion that the State insists that it would offer a compact only if Big Lagoon agreed to build an off-reservation casino (Opp'n at 14:5-7) is belied by allegations in the complaint that the State offered to negotiate for placement of a casino on Big Lagoon's Rancheria site (Compl. ¶ 48). Thus, there is no point to conducting discovery into past negotiations when the State has clearly altered its course. Despite the State's former position before or during the 2007-2009 Negotiations that Big Lagoon's gaming facility be located off-reservation, it cannot be negotiating in bad faith when its last bargaining proposal permitted a casino on the Rancheria.

Big Lagoon further contends that IGRA does not mandate that discovery be limited in the manner proposed by the State, and that the NLRA cases again support its position. (Opp'n at 14:10-15:8.) For reasons discussed above, the NLRA cases are inapposite in this respect. Big Lagoon places particular emphasis upon *Local 833, UAW-AFL-CIO, etc. v. N.L.R.B.*, 300 F.2d

699, 706 (D.C. Cir. 1962), which held that the NLRB may consider a company's labor relations history in assessing its intent at a subsequent bargaining session. (Opp'n at 14:18-15:8.) Like other NLRA cases cited by Big Lagoon, *Local 833* does not address the scope of discovery, and focuses not on subjective but objective factors to determine whether bad faith existed. Further, this case is very much unlike the facts in *Local 833*, where the company had previously repeatedly and unlawfully interfered with employees' attempts to organize a union. 300 F.2d at 706. The parties entered into a collective bargaining agreement, the agreement expired, and while the parties were negotiating a subsequent agreement the company committed three additional unfair labor practices unrelated to the negotiations. *Id.* The court held that compelling circumstances could justify disregarding antecedent events, but not under the circumstances of that case. *Id.* Here, the State has not interfered with Big Lagoon's attempt to organize its members, nor has there ever been a finding that the State failed to negotiate in good faith with Big Lagoon. In addition, there has been no finding that during the 2007-2009 Negotiations the State in any way separately violated Big Lagoon's rights.

Even if *Local 833* is extended beyond its facts, which it should not be, the court noted that compelling circumstances could justify disregarding antecedent events. Those circumstances exist here. First, specifically in the IGRA good faith context, the courts in *Coyote Valley I*, *Coyote Valley II*, *Cheyenne River*, *Rincon* and *Fort Independence* focused on present conduct in determining whether good faith existed. Second, as this Court noted in *Coyote Valley I*, NLRA decisions should not be imported wholesale into an IGRA good faith analysis. *Coyote Valley I*, 147 F. Supp. 2d at 1021. This is precisely the situation envisioned by the Court in *Coyote Valley I* where the government-to-government relationship between a tribe and State is unique from that of the employer-union relationship in NLRA cases. *See id.* The NLRA process provides an administrative and judicial remedy, whereas IGRA calls for a political solution, not a litigation solution, as noted by the court in *Rincon*.

VIII. IGRA'S JURISDICTIONAL LIMITATIONS JUSTIFY A PROTECTIVE ORDER HERE

Big Lagoon claims the State misses the point by arguing that the Court lacks jurisdiction over allegations that the State failed to negotiate the Barstow Compact in good faith or that the

Legislature failed to ratify the Barstow Compact. (Opp'n at 13:3-15; 15:9-17:12.) Consideration of IGRA's jurisdictional limits is entirely appropriate in determining whether Big Lagoon may embark upon a discovery fishing expedition for privileged documents that have no bearing upon the 2007-2009 Negotiations. It is this Court's lack of jurisdiction over any claims arising from events that may have happened before the 2007-2009 Negotiations that demonstrate antecedent events are irrelevant. *Coyote Valley I*, *Coyote Valley II*, *Cheyenne River*, *Rincon*, and *Fort Independence* all focus on present conduct and a limited record in deciding whether a state has complied with IGRA's good faith requirement. The State asks this Court to do the same.

Big Lagoon also suggests that nothing precludes the discovery of actions taken by other branches of government, or between those branches and the Governor. (Opp'n at 16:13-16.) In fact, the documents sought by Big Lagoon could be protected by, among others, the official information privilege and the deliberative process privilege.

Last, *Quechan Tribe v. California*, United States District Court, Southern District of California, No. 06 CV0156 R CAB is inapposite. (Opp'n 16:16-17:2.) The tribe argued in opposition to the State's motion to dismiss that during the ratification process the Legislature instructed the tribe to meet with other tribes that opposed the compact, asked the tribe to agree to material amendments to the compact, and sought payment from the tribe on matters unrelated to gaming. (Big Lagoon's Request for Jud. Not., Ex. 7, Quechan Tribe's Opp'n to State's Mot. to Dismiss, at 12-13.) The tribe asserted that it had evidence of specific conversations in which state legislators told the tribe to consult with other tribes. (*Id.* at 13 n.3.) Pleadings by a party in an unrelated action are neither controlling nor persuasive in this Court. Nonetheless, as in this case, the State responded that legislative ratification was not reviewable under IGRA.[2] More importantly, unlike the Quechan Tribe, Big Lagoon makes no offer of proof to substantiate its speculation that incriminating documents might possibly exist.

[2] A true and correct copy of the State's reply is attached hereto as Exhibit A.

CONCLUSION

For the foregoing reasons and those set forth in its opening memorandum, the State respectfully requests that the Court grant its motion for a protective order.

Dated: February 5, 2010

Respectfully Submitted,

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