

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.

No. C 09-1471 CW

ORDER DENYING
DEFENDANT'S MOTION
FOR LEAVE TO FILE
A MOTION TO VACATE
THE MEDIATOR'S
ORDER SELECTING A
COMPACT, DIRECTING
ENTRY OF JUDGMENT
AND GRANTING
DEFENDANT'S MOTION
TO STAY PENDING
APPEAL
(Docket Nos. 139
and 140)

Defendant State of California seeks leave to file a motion to vacate the Mediator's order selecting a compact or, in the alternative, to stay these proceedings pending the completion of the parties' cross-appeals of the Court's November 22, 2010 order granting the motion of Plaintiff Big Lagoon Rancheria (Big Lagoon or the Tribe) for summary judgment and denying Defendant's cross-motion for summary judgment. Big Lagoon opposes both motions. The Court took the State's motions under submission on the papers. Having considered the arguments in the parties' papers, the Court DENIES the State's motion for leave to file an order to vacate the Mediator's order selecting a compact and GRANTS the State's motion to stay pending appeal.

BACKGROUND

Because the background of this case is explained in detail in the Court's November 22, 2010 Order, it will not be repeated here in its entirety. The Court recounts only those facts relevant to the current motions.

On April 3, 2009, the Tribe filed the instant lawsuit, alleging that the State failed to negotiate in good faith in violation of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701, et seq., for a tribal-state compact between the parties that would permit the Tribe to conduct class III gaming.

On November 22, 2010, the Court concluded that the State failed to negotiate in good faith and, accordingly, granted the Tribe's motion for summary judgment and denied the State's cross-motion for summary judgment. The parties were thereby ordered to begin, but not complete, the remedial procedures set forth in IGRA, 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii). In particular, the parties were ordered to conclude a compact within sixty days of the Court's order and, if they were unable to do so, to submit their preferred compacts to the Court, along with a joint proposal for a mediator to be appointed under 25 U.S.C. § 2710(d)(7)(B)(iv).

On December 9, 2010, the State filed a notice of its appeal of the Court's November 22, 2010 Summary Judgment Order and its first motion to stay that Order. On January 27, 2011, this Court denied the State's motion to stay, finding that the State had not

1 made a strong showing that it was likely to succeed on appeal or
2 to suffer irreparable harm.

3 On February 3, 2011, the State filed in the Ninth Circuit
4 Court of Appeals an emergency motion to stay further proceedings
5 in this Court. On February 22, 2011, the Ninth Circuit denied the
6 State's emergency motion.

7 The parties subsequently represented to the Court that they
8 were not able to conclude a compact and, on April 27, 2010, the
9 parties each lodged with the Court proposed compacts and proposals
10 for an IGRA mediator.

11 On May 4, 2011, the Court appointed the Honorable Eugene F.
12 Lynch (Ret.) of JAMS as the Mediator pursuant to 25 U.S.C.
13 § 2710(d)(7)(B)(iv). The Court stated that "Judge Lynch 'shall
14 select from the two proposed compacts the one which best comports
15 with the terms of [IGRA] and any other applicable Federal law and
16 with the findings and order of' this Court." May 4, 2011 Order,
17 at 2 (quoting 25 U.S.C. § 2710(d)(7)(B)(iv)). The Court further
18 directed, "Once he decides, Judge Lynch shall submit to the State
19 and the Tribe the compact he selected, id. § 2710(d)(7)(B)(v), and
20 inform the Court of his selection." The Court ordered that, if
21 the State did not consent to the compact Judge Lynch selected in
22 the sixty-day period after he made his selection, "the parties
23 shall immediately inform the Court and the State may renew its
24 motion to . . . stay the proceedings in this case; no further
25 action shall be taken without a further order of the Court." Id.

1 On September 27, 2011, after both parties provided him with
2 extensive briefing and oral argument, Judge Lynch selected Big
3 Lagoon's proposed compact as the one that best met the Court's
4 direction. See Order Regarding Mediator's Selection of
5 Appropriate Compact.

6 After the parties represented to the Court that the State
7 would not consent to the compact within the sixty-day period
8 provided by 25 U.S.C. § 2710(d)(7)(B)(vi) and that it intended to
9 renew its motion for a stay of proceedings, the Court directed the
10 State to file its renewed motion for a stay of proceedings by
11 November 23, 2011.

12 On November 23, 2011, the State filed its renewed motion to
13 stay proceedings pending the resolution of its appeal of the
14 Court's Summary Judgment Order. At that time, the State also
15 filed a separate motion seeking leave to file a motion to vacate
16 Judge Lynch's September 27, 2011 Order selecting a compact.

17 DISCUSSION

18 I. The State's Motion for Leave to File a Motion to Vacate the
19 Mediator's Order Selecting a Compact

20 The State seeks leave to file a motion to vacate the
21 Mediator's order selecting a compact "in accordance with the
22 Court's inherent authority to control proceedings over which it
23 has jurisdiction." Mot. at 1. The State asks this Court to
24 "render its own decision consistent with its previous findings and
25 orders in this case." Id. at 7.

1 In enacting IGRA in 1988, Congress created a statutory
2 framework for the operation and regulation of gaming by Indian
3 tribes. See 25 U.S.C. § 2702. IGRA provides that Indian tribes
4 may conduct certain gaming activities only if authorized pursuant
5 to a valid compact between the tribe and the state in which the
6 gaming activities are located. See id. § 710(d)(1)(C). If an
7 Indian tribe requests that a state negotiate over gaming
8 activities that are permitted within that state, the state is
9 required to negotiate in good faith toward the formation of a
10 compact that governs the proposed gaming activities. See id.
11 § 2710(d)(3)(A); Rumsey Indian Rancheria of Wintun Indians v.
12 Wilson, 64 F.3d 1250, 1256-58 (9th Cir. 1994), amended on denial
13 of reh'g by 99 F.3d 321 (9th Cir. 1996). Tribes may bring suit in
14 federal court against a state that fails to negotiate in good
15 faith, in order to compel performance of that duty, see 25 U.S.C.
16 § 2710(d)(7), but only if the state consents to such suit. See
17 Seminole Tribe v. Florida, 517 U.S. 44 (1996). The State of
18 California has consented to such suits. See Cal. Gov't Code
19 § 98005; Hotel Employees & Rest. Employees Int'l Union v. Davis,
20 21 Cal. 4th 585, 615 (1999). If the district court concludes that
21 the state failed to negotiate in good faith, it "shall order the
22 State and Indian Tribe to conclude such a compact within a 60-day
23 period." Id. § 2710(d)(7)(B)(iii). If no compact is entered into
24 within the next sixty days, the Indian tribe and the state must
25 then each submit to a court-appointed mediator a proposed compact
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1 that represents their last best offer. See id.

2 § 2710(d)(7)(B)(iv). The mediator chooses the proposed compact
3 that “best comports with the terms of [IGRA] and any other
4 applicable Federal law and with the findings and order of the
5 court.” See id. If, within the next sixty days, the state does
6 not consent to the compact selected by the mediator, the mediator
7 notifies the Secretary of the Interior, who then prescribes, in
8 consultation with the Indian tribe, procedures under which class
9 III gaming may be conducted which are consistent with the compact
10 selected by the mediator, the provisions of IGRA, and the relevant
11 provisions of the laws of the State. See id.

12 § 2710(d)(7)(B)(vii).

13
14 Thereafter, the Court no longer has jurisdiction to consider
15 further disputes regarding the process, unless the Secretary of
16 the Interior initiates a further cause of action. Id. §
17 2710(d)(7)(A)(iii). IGRA does not contain any express
18 authorization for the Court to review the Mediator’s selection of
19 a compact, and the State does not provide any legal authority to
20 support the Court’s jurisdiction to do so. Instead, under the
21 procedures created by Congress, the Secretary of the Interior is
22 required to create procedures under which class III gaming may be
23 conducted that are consistent with that compact, IGRA, and any
24 relevant provisions of California law.
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27 The State’s arguments are largely predicated on an
28 understanding that, in selecting a compact, the Mediator was

1 carrying out duties created by this Court's order, which the State
2 alleges that he violated. However, the Court merely appointed him
3 as the Mediator pursuant to 25 U.S.C. § 2710(d)(7)(B)(iv). His
4 duties as the court-appointed Mediator were not determined by the
5 Court; they were instead set by Congress and codified in statutory
6 language, which this Court quoted in its order. See May 4, 2011
7 Order, at 2. If the Mediator had not selected a compact at all,
8 the Court could order him to carry out the non-discretionary duty
9 to do so; however, the Court does not have the authority to
10 second-guess his selection of a compact.
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12 The State also premises its arguments on the fact that the
13 Court has retained some amount of jurisdiction over this matter,
14 largely based on the language of the January 27, 2011 Order
15 denying the State's motion to stay. In that Order, the Court
16 questioned whether the summary judgment order was appealable,
17 because "there are issues remaining to be resolved." January 27,
18 2011 Order, at 2 n.1. At that time, the parties had not
19 negotiated for sixty additional days, formulated their competing
20 proposals, proposed a mediator or been ordered to submit proposals
21 to him or her, and the Court had not selected or appointed a
22 mediator. Id. at 4-5. Thus, at that point, there were still
23 matters that IGRA required this Court to address. Now, however,
24 the Court has taken all actions over which it has jurisdiction and
25 may only choose whether to stay its Order and thus temporarily
26 suspend the IGRA remedial proceedings or order that the IGRA
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1 procedures continue. While the order appointing the Mediator
2 disallowed "further action" if the State did not consent to the
3 mediator-selected compact "without a further order of the Court,"
4 May 4, 2011 Order at 2, this was to allow the State an opportunity
5 to renew its motion to stay prior to notification of the Secretary
6 of the Interior. The Court did not purport to "retain
7 jurisdiction" to review the Mediator's selection of a compact, as
8 the State suggests.

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10 While the State cites a number of decisions that uphold the
11 inherent power of a court to take certain actions to control its
12 docket, the State cites no cases that suggest that it is within
13 this Court's inherent power to review and vacate the order issued
14 by the Mediator in furtherance of his statutorily-mandated duties,
15 in the absence of any statutory or other authorization. While a
16 federal court's inherent power "encompasses the power to issue
17 orders necessary to facilitate activity authorized by statute or
18 rule," it "may not take action under the guise of its inherent
19 power when that action either contravenes a statute or rule or
20 unnecessarily enlarges the court's authority." In re Novak, 932
21 F.2d 1397, 1406 & n.17 (11th Cir. 1991) (finding that a court can
22 utilize its inherent power to fulfill the objectives of Federal
23 Rule of Civil Procedure 16 by requiring defendant's insurer to
24 appear at a settlement conference).

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27 The State also suggests that IGRA mediation is the equivalent
28 of arbitration, because the IGRA mediator is statutorily required

1 to engage in evaluative mediation and to “select [the better of]
2 the two proposed compacts” rather than to engage in facilitative
3 mediation and help the parties come to an agreement; the State
4 argues that the Mediator’s order should be subject to review
5 similar to that of arbitration proceedings. However, there is no
6 indication in IGRA that Congress intended for the process to be so
7 reviewed, and the State provides no case law that supports its
8 argument.
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10 Further, even if they were equivalent, the cases that the
11 State presents do not support its argument that this Court has the
12 inherent authority to review the Mediator’s selection. In both In
13 re Y & A Group Securities Litigation, 38 F.3d 380 (8th Cir. 1994),
14 and Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 985 F.2d
15 1067 (11th Cir. 1993), a district court had entered judgment on an
16 issue that was later raised again in arbitration proceedings. In
17 those cases, the courts found that the All-Writs Act allowed them
18 to enjoin or stay these later arbitration proceedings, not that
19 they had inherent authority to vacate or review past arbitration
20 decisions. In re Y & A Group Sec. Litig., 38 F.3d at 382-383;
21 Kelly, 985 F.2d at 1068-1070. Similarly, the cases that the State
22 cites to argue that arbitration proceedings do not preclude a
23 judicial determination here are readily distinguishable for many
24 reasons. First, unlike the dispute here, each of those cases
25 dealt with an “employee’s claim . . . based on rights arising out
26 of a statute designed to provide minimum substantive guarantees to
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individual workers.” Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 737 (1981) (holding that courts should not give preclusive effect to a grievance arbitration in a suit under the Fair Labor Standards Act); see also McDonald v. City of West Branch, 466 U.S. 284, 290-91 (1984) (holding that courts should not give preclusive effect to an arbitration pursuant to a collective bargaining agreement (CBA) in a civil rights suit under 42 U.S.C. § 1983); Alexander v. Gardner-Denver Co., 415 U.S. 36, 59-60 (1974) (holding that courts should not give preclusive effect to a CBA arbitration in a suit under Title VII). Further, the courts found that Congress had intended for those statutes to be judicially enforceable because the statutes created a cause of action for their enforcement. See, e.g., McDonald, 466 U.S. at 290. Here, while the statute expressly created certain causes of action and gave the district courts jurisdiction over them, see 25 U.S.C. § 2710(d)(7)(A)(i)-(iii), the statute did not create a cause of action for the State to litigate the Mediator’s choice of a compact.

Accordingly, the Court DENIES the State’s motion for leave to file a motion to vacate the Mediator’s order selecting a compact. Even if the State were permitted to file such a motion, the Court notes that the Mediator was not required to explain his selection of a compact and his selection of a compact was not irrational, beyond his powers as set forth in IGRA, or made in violation of the statutorily-mandated criteria.

II. The State's Motion for a Stay Pending Appeal

The State alternatively seeks a stay of proceedings pending appeal of the November 22, 2010 summary judgment order.

"A stay is not a matter of right, even if irreparable injury might otherwise result.'" Nken v. Holder, 129 S. Ct. 1749, 1760 (2009) (quoting Virginian R. Co. v. United States, 272 U.S. 658, 672 (1926)). Instead, it is "an exercise of judicial discretion," and "the propriety of its issue is dependent upon the circumstances of the particular case." Id. (citation and internal quotation and alteration marks omitted). The party seeking a stay bears the burden of justifying the exercise of that discretion. Id.

"A party seeking a stay must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of relief, that the balance of equities tip[s] in his favor, and that a stay is in the public interest." Humane Soc. of U.S. v. Gutierrez, 558 F.3d 896, 896 (9th Cir. 2009); see also Perry v. Schwarzenegger, 702 F. Supp. 2d 1132, 1135 (N.D. Cal. 2010). The first two factors of this test "are the most critical." Nken, 129 S. Ct. at 1761. Once these factors are satisfied, courts then assess "the harm to the opposing party" and weigh the public interest. Id. at 1762.

An alternative to this standard is the "substantial questions" test, which requires the moving party to demonstrate "serious questions going to the merits and a hardship balance that

tips sharply towards the plaintiff," along with a "likelihood of irreparable injury" and that it is "in the public interest." Alliance for the Wild Rockies v. Cottrell, 622 F.3d 1045, 1053 (9th Cir. 2010) (internal quotation marks omitted); see also Golden Gate Rest. Ass'n v. City & Cnty. of S.F., 512 F.3d 1112, 1116 (9th Cir. 2008).

As in its first motion to stay, the State offers three arguments that it is likely to prevail on appeal: (1) the Court erred by not permitting the State to conduct discovery into the legal status of the Tribe and its lands; (2) the Court erred in following the Ninth Circuit's decision in Rincon Band of Luiseno Mission Indians v. Schwarzenegger, 602 F.3d 1019 (9th Cir. 2010); and (3) the Court misapplied Rincon by requiring the State to offer meaningful concessions to obtain environmental protections and, even if such concessions were required, the State offered them. In making these arguments, the State largely restates points it raised at summary judgment. Thus, for the reasons set forth in the Court's November 22, 2010 Order, the State has not shown that it is likely to succeed on the merits. However, the Court finds that the State has raised serious questions going to the merits of the case.

The State argues that it will be irreparably harmed without a stay, because the Secretary of the Interior could issue procedures through which class III gaming may be conducted, prior to the time that the appeal is concluded, which do not contain the

1 environmental requirements that the State seeks. Given the length
2 of time that it may take for the State's appeal to become final,
3 it is reasonably likely that the Secretary will promulgate
4 procedures prior to that time. Further, because of the Mediator's
5 selection, it is reasonably likely that the Secretary's procedures
6 will not contain the State's desired environmental regulations.
7 As the State argues, this could render the pending appeal moot,
8 because there is nothing that would require the Secretary to
9 conform his procedures to a subsequent appellate decision or to
10 vacate the procedures if this Court's bad faith finding were
11 reversed. Courts have previously found that the loss of the right
12 to appeal constitutes irreparable harm. See Gonzalez v. Reno,
13 2000 U.S. App. LEXIS 7025, at *1 (11th Cir.); Population Inst. v.
14 McPherson, 797 F.2d 1062, 1081 (D.C. Cir. 1986). As the State
15 contends, if the Tribe builds its casino and hotel pursuant to
16 whatever procedures the Secretary promulgates, significant damage
17 could occur on "adjacent, environmentally sensitive state lands .
18 . . irreversible damage that no judicial action could remedy,
19 particularly where Big Lagoon's sovereign immunity would prevent
20 the State from recovering damages." Mot. at 16. The harm that
21 the State stands to suffer could be irreparable if the IGRA
22 remedial process continues past this point prior to the conclusion
23 of the pending appeal. See Kansas v. United States, 249 F.3d
24 1213, 1227-1228 (10th Cir. 2001).

1 While this Court previously found that harm to the State was
2 speculative, the Court did so with the recognition that the
3 situation would be different once the parties had progressed
4 further into the IGRA remedial process and the Mediator had
5 selected the better compact. The State interests and the
6 realistic possibility of harm thereto outweigh the potential harm
7 to Big Lagoon of delayed construction and revenue from the Class
8 III casino that it may eventually be permitted to build.
9

10 The Court also finds that a stay is in the public interest.
11 Big Lagoon appears to argue, without any supporting authority,
12 that the only public interests relevant to this inquiry are those
13 that can be located in the text of IGRA itself. Based on that,
14 the Tribe argues that the paramount "public interest" is
15 "promoting tribal economic development, self-sufficiency and
16 strong tribal government." Opp. at 18. However, Big Lagoon
17 conflates tribal interest with public interest. In this case, the
18 public interest favors delaying the promulgation of Secretarial
19 procedures pending final resolution of the question of whether the
20 State negotiated in good faith, in light of the potential
21 irreversible impact on the environmentally sensitive lands should
22 a stay not be entered.
23

24 Accordingly, the Court GRANTS the State's motion to stay its
25 November 22, 2010 order granting Plaintiff summary judgment,
26 pending final disposition of the parties' cross-appeals of that
27 order.
28

III. Big Lagoon's Requests for Attorneys' Fees

Big Lagoon seeks an award of attorneys' fees to compensate for the expenses it incurred in opposing both motions.

It has long been recognized that "in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel, even though the so-called American Rule prohibits fee shifting in most cases." Chambers v. NASCO, Inc., 501 U.S. 32, 45 (1991) (internal citations and quotations omitted). "One such circumstance is that a court may assess attorney's fees when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" Id. (quoting Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 259 (1975)). See also Hutto v. Finney, 437 U.S. 678, 690 n.14 (1978) ("An equity court has the unquestioned power to award attorney's fees against a party who shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order."). "Generally, an allowance because of bad faith is based on conduct which occurs during the course of the litigation and may fairly be characterized as redressing the 'insult added to injury.'" Straub v. Vaisman & Co., 540 F.2d 591, 600 (3d Cir. 1976) (collecting cases).

The Court finds that Big Lagoon has not persuasively argued that the State acted in bad faith, vexatiously, wantonly, or for oppressive reasons in filing these motions. The Court expressly granted the State permission to file its motion to stay and found

1 the State's motion meritorious. Further, there is no evidence
2 that the State acted improperly in merely seeking leave to file a
3 motion to vacate the Mediator's order, particularly since Big
4 Lagoon identified no other instance in which a court previously
5 addressed the question the State presented.

6 Accordingly, the Court DENIES Big Lagoon's requests for
7 attorneys' fees.
8

9 CONCLUSION

10 For the reasons set forth, the Court DENIES the State's
11 motion for leave to file a motion to vacate the Mediator's order
12 selecting a compact (Docket No. 139). Because the Court finds
13 that all outstanding issues before it have been resolved, the
14 Clerk will enter judgment in favor of the Tribe, in accordance
15 with the Court's November 22, 2010 order. Finally, the Court
16 GRANTS the State's motion to stay its November 22, 2010 order
17 pending final resolution of the parties' cross-appeals of that
18 order (Docket No. 140).
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20 IT IS SO ORDERED.

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22 Dated: 2/1/2012

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CLAUDIA WILKEN
United States District Judge