Appeal Nos. 10-17803 and 10-17878

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BIG LAGOON RANCHERIA,
a Federally Recognized Indian Tribe,

Plaintiff and Appellee/Cross-Appellant,

v.

STATE OF CALIFORNIA,

Defendant and Appellant/Cross-Appellee

Appeal From the United States District Court, Northern District of California
Hon. Claudia A. Wilken, District Judge, Case No. CV 09-1471 CW (JCS)

APPELLEE/CROSS-APPELLANT BIG LAGOON RANCHERIA'S COMBINED PRINCIPAL AND RESPONSE BRIEF

BAKER & McKENZIE LLP
Bruce H. Jackson (SBN 98118)
Peter J. Engstrom (SBN 121529)
Irene V. Gutierrez (SBN 252927)
Two Embarcadero Center, 11th Floor
San Francisco, CA 94111
Telephone: (415) 576-3000
Fax No. (415) 576-3099
Emails: bruce.jackson@bakermckenzie.com
peter.engstrom@bakermckenzie.com
irene.gutierrez@bakermckenzie.com

Attorneys for Appellee/Cross-Appellant BIG LAGOON RANCHERIA, a Federally Recognized Indian Tribe

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Ninth Circuit Rule 26.1, the undersigned counsel for Appellee/Cross-Appellant Big Lagoon Rancheria states that Big Lagoon Rancheria is a federally recognized Indian tribe, *see* 25 U.S.C. § 479a-1 and 75 Fed.Reg. 60,810 (Oct. 1, 2010), and as such it is not a nongovernmental corporate party (and there is thus no stock or shares in it that could be owned by any parent corporation or publicly held corporation).

Dated: March 26, 2012

Respectfully submitted,

BAKER & McKENZIE LLP
Bruce H. Jackson
Peter J. Engstrom
Irene V. Gutierrez

By: s/ Peter J. Engstrom
Peter J. Engstrom
Attorneys for Appellee/Cross-Appellant BIG LAGOON RANCHERIA, a Federally Recognized Indian Tribe

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No(s).

CASES

STATUTES

MISCELLANEOUS

I. INTRODUCTION

Appellee and Cross-Appellant Big Lagoon Rancheria, a federally recognized Indian tribe (hereinafter, "Big Lagoon" or the "Tribe"), files this Combined Principal and Response Brief following the Appellant/Cross-Appellee State of California's Opening Brief (hereinafter, "AOB").

With respect to the State's appeal, the District Court did not abuse its discretion in denying the State, which it had expressly found to be dilatory, additional time to conduct further discovery prior to ordering summary judgment. Nor did the District Court err in determining there to be no genuine issue of material fact as to Big Lagoon's Indian tribe status or Indian lands. The Court's judgment should be affirmed.

With respect to the Tribe's cross-appeal, the District Court erred as a matter of law in ruling that the State may use class III gaming compact negotiations under the Indian Gaming Regulatory Act for the purpose of imposing environmental mitigation and land use measures on the Tribe and its sovereign land. The District Court's ruling should be reversed in this limited respect, and summary judgment should be entered in favor of the Tribe on this alternative ground too.

II. JURISDICTIONAL STATEMENT

A. Jurisdiction of the District Court

The District Court had original jurisdiction over this civil action pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*., which

authorizes United States district courts to hear causes of action initiated by Indian tribes arising from the failure of a state to enter into negotiations with the Indian tribe for the purpose of entering into a tribal-state compact for class III gaming, or to conduct such negotiations in good faith. 25 U.S.C. § 2710(d)(7)(A)(i). Pursuant to 28 U.S.C. § 1331, the District Court had subject matter jurisdiction over this civil action arising under the laws of the United States, namely, IGRA.

B. Jurisdiction of the Court of Appeals

On November 22, 2010, the District Court, Judge Claudia A. Wilken, entered an Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Cross-Motion for Summary Judgment, thereby finding that the State of California had failed to negotiate in good faith for a tribal-state compact for class III gaming, ordering summary judgment in favor of Big Lagoon Rancheria, awarding Big Lagoon complete relief on its IGRA complaint, and disposing of all the parties' claims and defenses. (*See* Appellant/Cross-Appellee State of California's Excerpts of Record (hereinafter, "ER") 025-050.)

On December 9, 2010, the State filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit, No. 10-17803, seeking review of the Court's summary judgment order. (ER 022-024.) On December 21, 2010, Big Lagoon filed a notice of cross-appeal to the Court of Appeals, No. 10-17878, challenging a part of the Court's summary judgment order, specifically the portion

holding that environmental regulation of the Tribe's sovereign land is a permissible subject for gaming compact negotiations under IGRA. (*See* Appellee/Cross-Appellant Big Lagoon Rancheria's Supplemental Excerpts of Record (hereinafter, "Supp. ER") 001-030.)

This Court of Appeals has jurisdiction to review a final decision by the District Court pursuant to 28 U.S.C. § 1291.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. The primary issue on the State's appeal in this case is whether the District Court abused its discretion, in denying the State's request under former Rule 56(f) of the Federal Rules of Civil Procedure to deny or continue the Tribe's summary judgment motion so that the State could conduct additional discovery.

2. A second issue on the State's appeal is, according to the State, whether there existed a genuine issue of material fact as to the Tribe's recognized Indian tribe status or Indian lands, such that summary judgment should not have been granted.

3. The issue on the Tribe's cross-appeal in this case is whether the District Court erred in ruling that the State may use class III gaming compact negotiations under IGRA for the purpose of imposing environmental mitigation measures and land use regulation on the Tribe and its sovereign land.

IV. STATEMENT OF THE CASE

This is a case under the Indian Gaming Regulatory Act, a reticulated federal statute that embodies a framework for the operation and regulation of casino-style gaming by sovereign Indian tribes. Owing to the United States' exclusive trust relationship with and responsibility for Indians, Congress in IGRA allowed states only a limited and narrow role in the regulation of Indian gaming, through the mechanism of a negotiated tribal-state compact to implement oversight and regulation to protect against the influence of criminal elements and to ensure the financial integrity of gaming for the public and the tribes. Where a state fails to negotiate with a tribe in good faith for a compact, the IGRA statute provides for resort to the federal courts as part of a "carefully crafted and intricate remedial scheme."[1]

Here, as envisaged by IGRA, following extended compact negotiations Big Lagoon Rancheria commenced in April 2009 an action seeking a determination that the State of California had failed to negotiate for a compact in good faith, in

[1] As explained thoroughly below, *infra* pp. 54-55, Congress adopted IGRA to promote tribal economic development, tribal self-sufficiency, and strong tribal governments. 25 U.S.C. § 2702 ("Declaration of policy. The purpose of this chapter is – (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting economic development, self-sufficiency, and strong tribal governments; (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences . . .."); *see also Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1028 (9th Cir. 2010), *cert. denied sub nom*, 131 S.Ct. 3055, 3056, 180 L.Ed.2d 886 (2011).

violation of the statute. In November 2010, the District Court granted Big Lagoon summary judgment against the State, finding the State had negotiated in bad faith on two separate and independent grounds: (1) by demanding that the Tribe pay a percentage of gaming revenues into the State's general fund, which amounts to imposition of a tax on the sovereign Tribe in violation of IGRA, and (2) by insisting upon environmental mitigation measures by the Tribe without offering meaningful concessions in return, also in violation of IGRA.

The State has appealed the District Court's summary judgment. The State does not, however, seek appellate review of either of the Court's alternative bases for finding it in bad faith under IGRA. The State no longer contests the District Court's conclusions that it negotiated in bad faith. Instead the State seeks a review only on the issue of whether the District Court abused its discretion in not allowing the State more time to conduct discovery with which to somehow challenge the Tribe's federally recognized Indian tribe status and Indian lands. This is notwithstanding the ample time allowed for discovery under the District Court's case management orders, repeated discovery and dispositive motion extensions and continuances allowed to the State, and the Court's express finding that the State was not reasonably diligent in seeking discovery – a finding that the State's opening brief neglects to mention. Moreover, the further discovery sought by the

State was and is ultimately inconsequential in this IGRA bad faith case, and thus not relevant.

The State also is attempting to establish that there existed genuine issues of material fact as to the Tribe's federally recognized Indian tribe status and Indian lands, even though (a) the State did not dispute these facts below, and (b) the facts are not genuinely disputable. The State further endeavors to recast this argument under the rubrics of "standing" and "jurisdiction," though to no avail.

In the end, this case is now about whether the District Court abused its discretion in not allowing the State more time to pursue a fishing expedition in search of information with which to somehow (or somewhere) challenge the Tribe's longstanding federal recognition, which only an Act of Congress may terminate, and tribal trust lands status – evidence which in well more than a decade of IGRA litigation against the Tribe the State did not manage to conjure – as a desperate means to prevent Indian gaming on the Tribe's present lands for legally baseless reasons driven by a sovereignty-impinging environmental agenda. These issues of Indian affairs are not, respectfully, for this Court to decide in any event, as they are political questions that belong instead to the plenary jurisdiction of the United States Congress and as delegated to the Executive Branch, more specifically the Department of the Interior.

While the District Court ruled that the State improperly sought environmental and land use regulation without offering meaningful concessions in return, Big Lagoon's cross-appeal concerns whether the District Court erred in ruling that such regulation is even a permissible subject of compact negotiation under IGRA.

V. STATEMENT OF FACTS

The District Court's summary judgment order summarizes both the pertinent provisions of the Indian Gaming Regulatory Act and the extensive record of the parties' litigation and compact negotiations. (ER 26-29 and 29-36.) That background, which dates back to the 1990s when Big Lagoon first sought a compact and had to commence litigation against the State (ER 29), need not be repeated here, particularly as it is not directly relevant to the State's discovery issue submitted for review.

What is relevant is that Big Lagoon commenced this IGRA action in April 2009. (ER 673-690.) The District Court immediately set case management dates for initial disclosures, a discovery plan, and an initial case management conference, among other things. (*See* Civil Docket for Case No. 4:09-cv-01471-CW, N.D. Cal. (hereinafter, "DC Docket"), No. 3.)

The State filed its answer twenty days later in April 2009, admitting that Big Lagoon is on the United States' statutorily mandated list of federally recognized

Indian tribes, and further admitting that the United States considers the Tribe to be the trust beneficiary of its Indian lands, but alleging as an affirmative defense infirmities in the United States' ownership of these lands or the Tribe's beneficial trust interest therein. (ER 666-672, at 666, 667 and 670.)

In the parties' initial joint case management statement, filed in August 2009, the State itself suggested a January 2010 discovery cut-off date. (DC Docket No. 28.) The District Court adopted the suggestion and set January 29, 2010 as the deadline to complete discovery, with June 3, 2010 as the last day for hearing dispositive motions. (DC Docket No. 30.)

In December 2009, more than eight months after the case was commenced and barely a month before the discovery cut-off deadline, the State served subpoenas duces tecum on the United States Department of the Interior and its Bureau of Indian Affairs. (ER 301-343.)

Also in December 2009, the parties stipulated to a one-month continuance of the discovery completion deadline, to February 26, 2010, which the District Court granted. (DC Docket Nos. 32 and 35.)[2]

The State then moved – on February 26, 2010, the day of the discovery completion deadline – for a six-month continuance of the deadline, citing as

[2] Meanwhile, the State was disputing its discovery obligations to the Tribe and filed a motion for protective order, which was referred by the District Court along with all further discovery motions to the Hon. Magistrate Judge Joseph C. Spero for resolution. (DC Docket No. 33.)

grounds its delay in obtaining documents from the United States. (DC Docket No. 48.)

A week later, on March 3, 2010, the State filed with the District Court yet another motion, this time to stay all proceedings in the case except for discovery, or alternatively to continue for at least six months the case-dispositive (summary judgment) motion filing and hearing dates, which had been established by Court order seven months earlier. (DC Docket No. 50.)

Pending resolution of the two motions, the Tribe stipulated with the State to continue the dispositive summary judgment briefing schedule and hearing date by approximately one month. (DC Docket Nos. 52 and 57.)

By order dated March 17, 2010, Magistrate Judge Spero granted in part and denied in part the State's motion to continue the discovery completion date; the Magistrate Judge allowed the State another three months, through May 31, 2010, to complete its discovery of the United States, and continued the dispositive motion hearing date to August 19, 2010, with the briefing schedule to be adjusted accordingly. (DC Docket No. 60.) By stipulation and further order the briefing schedule was so adjusted. (DC Docket Nos. 66 and 67.)

On April 16, 2010, the District Court denied the State's motion to stay the proceedings or, in the alternative, to continue the dispositive motion dates. (ER 660-665.) In its reasoned order, the District Court cited the well-established

authority for a court's inherent power, in determining whether to stay proceedings, "to control the disposition of the cases on its docket with economy of time, effort for itself, for counsel, and for litigants," citing Ninth Circuit decisions. (ER 662-663.) In finding no good cause for the State's continuance request, the District Court expressly found, "*it does not appear that the State was reasonably diligent in seeking discovery from the BIA*," that is, from the United States Department of the Interior, Bureau of Indian Affairs. (ER 664 (emphasis added).)[3]

Two months later, and more than a year after the case had been commenced, the dispositive motion briefing proceeded on the Tribe's and State's cross-motions for summary judgment. (*See, e.g.*, ER 542-571, 572-627, 628-659, 051-082, 083-295, 296-446, 447-518 and 519-541, and Supp. ER 059-077 and 039-050.)

In its summary judgment opposition, the State argued (again), in addition to its substantive IGRA good faith compact negotiation arguments, that the Tribe's summary judgment motion should be denied or continued under Fed.R.Civ.P. 56(f)

[3] Meanwhile, the State was continuing to dispute its own discovery obligations to the Tribe, having had its motion for a protective order denied by the Magistrate Judge (DC Docket No. 64), and its objections to that order deemed denied by the District Court (DC Docket No. 75), from which the State sought reconsideration (DC Docket No. 76) which was subsequently granted in part (DC Docket No. 91). The State's sustained efforts to delimit or obstruct discovery by the Tribe are not at issue on appeal. But they are germane insofar as they demonstrate both the State's vigor, when it chooses, to aggressively conduct discovery, as well as the District Court's extensive time and patience given to managing discovery and the docket below.

to allow the State more time to conduct additional discovery pursuant to its subpoenas issued to the United States. (ER 051-082.)

On November 22, 2010, the District Court granted the Tribe's motion for summary judgment and denied the State's cross-motion for summary judgment. (ER 025-050.) The Court found that the State had failed to negotiate in good faith with the Tribe, and ordered that the next steps in IGRA's statutory remedial scheme should proceed. (ER 049-050.)

In granting summary judgment the District Court determined there was no genuine issue of material fact with respect to the Tribe's recognized Indian tribe status and Indian lands for gaming:

> Furthermore, the State does not dispute that the Tribe is currently recognized by the federal government or that it has lands on which gaming activity could be conducted. On these facts, the Tribe is entitled to good faith negotiations with the State toward a gaming compact. 25 U.S.C. § 2710(d)(3)(A). That the status of the eleven-acre parcel may be in question does not change this result.

(ER 043.)

The Court also denied the State's request for a Rule 56(f) continuance or stay:

> Because the status of the Tribe and its eleven-acre parcel has no bearing on whether the State negotiated in good faith, the State's request for a continuance pursuant to Federal Rule of Civil Procedure 56(f) is denied. In addition, the Court denies the State's request to stay the proceedings in this case pending the United States

> Supreme Court's decision on its petition for a writ of certiorari in *Rincon*. The State does not establish that a discretionary stay is warranted. *See Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (providing factors to be considered in determining the propriety of a discretionary stay under *Landis v. N. Am. Co.*, 299 U.S. 248 (1936)).

(ER 044.)

The State's appeal to the Ninth Circuit followed, as did Big Lagoon's cross-appeal. (ER 022-024; Supp. ER 001-030.)

At no time in the lengthy proceedings in the District Court did the State move for a show cause order or otherwise seek judicial assistance to enforce the subpoenas it served upon the United States, or take any depositions of the United States (or anyone else for that matter). Nor did the State file a counterclaim against the United States or seek leave of court to join the United States as a party.

VI. SUMMARY OF ARGUMENT

I. The District Court did not abuse its discretion in denying the State's request under former Rule 56(f) of the Federal Rules of Civil Procedure for a continuance to seek additional third-party discovery. The District Court, which is entitled to deference on this issue, acted well within its considerable discretion to manage its docket and discovery, especially as the State had previously been granted two continuances of the party-agreed and Court-ordered discovery completion deadline, as well as two continuances of the dispositive motion briefing

and hearing dates. Moreover, the State still has not explained why it waited nine months before serving subpoenas on the United States Department of the Interior, with a return date falling virtually on the discovery completion deadline, a delay which the Court expressly found to be dilatory. Finally, the discovery the State supposedly sought was not essential to its defenses or summary judgment opposition in any event, as Big Lagoon's Indian tribe status and Indian lands are admitted by the State, and it is not within the province of the courts to revisit those determinations in this IGRA bad faith compact negotiations case.

II. The District Court did not err in determining there to be no genuine issue of material fact as to Big Lagoon's federally recognized Indian tribe status and Indian lands. (The State is no longer contesting that it negotiated for a compact in bad faith, which was the focus of the summary judgment cross-motions below.) The United States Congress, which has plenary authority over Indian affairs, requires that the Secretary of the Interior publish in the Federal Register, pursuant to the Federally Recognized Indian Tribe List Act, a list of all federally recognized Indian tribes, and Big Lagoon is on that list. This listing is dispositive, and a recognized tribe may not be terminated except by an Act of Congress. What the State thinks 'should be' cannot overcome what 'is' a fact. Moreover, the State has repeatedly admitted that Big Lagoon is an Indian tribe with Indian lands, in the case proceedings below, in its opening brief on appeal, and over the course of more

than a decade of compact negotiations. The State is wrong to couch this issue as one of 'standing' or 'jurisdiction.' Finally, the political question doctrine bars this Court, or the District Court, from adjudicating Big Lagoon's Indian tribe status or Indian lands; judicial deference to the executive and legislative determinations of those factual realities is required.

III. With respect to the cross-appeal, the District Court erred as a matter of law in ruling that the State may use compact negotiations under the Indian Gaming Regulatory Act for the purpose of imposing environmental mitigation measures and land use regulation on the Tribe and its sovereign land. The longstanding principles of federal Indian law and tribal sovereignty make clear the policy of leaving Indians free from state jurisdiction and oppression, except where Congress has clearly expressed an intention to permit such state regulation; IGRA does not contain any such Congressional consent. Indeed, the express policy and purposes of IGRA provide that the Act is intended to provide for Indian tribes a means of promoting economic development, self-sufficiency, and strong tribal governments, while shielding Indian gaming from organized crime and assuring that gaming is conducted fairly. IGRA does not allow broad regulatory authority to states, and prohibits states from using the compacting process as a means to subject tribes to states' laws and regulations. Instead, IGRA limits permissible subjects of compact negotiations to topics that are consistent with IGRA's stated

purposes and are directly related to gaming activities. The Act's legislative history makes abundantly clear that "[t]here is no intent on the part of Congress that the compacting methodology be used in such areas as[, inter alia,] environmental regulation and land use". This Court's decision in *Rincon* echoes the point. Yet, the environmental mitigation measures and land use restrictions the State has sought to impose via compact negotiations are neither consistent with the purposes of IGRA nor directly related to gaming activities within the meaning of the law. The District Court erred in ruling otherwise.

VII. STANDARD OF REVIEW

The standard of review for the District Court's Rule 56(f) denial of a continuance for further discovery is abuse of discretion. *Morton v. Hall*, 599 F.3d 942, 945 (9th Cir. 2010). "We review the decision not to permit additional discovery under Rule 56(f) for abuse of discretion." *Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003) (summary judgment motion brought less than a month after filing suit).

The standard of review for the District Court's determination that there exists no genuine issue of material fact under Rule 56 as to Big Lagoon's recognized Indian tribe status and Indian lands is de novo. *Ventura Packers v. F/V Jeanine Kathleen*, 305 F.3d 913, 916 (9th Cir. 2002); *Steen v. John Hancock Mut.*

Life Ins. Co., 106 F.3d 904, 910 (9th Cir. 1997); *Robi v. Reed*, 173 F.3d 736, 739 (9th Cir. 1999).

The standard of review on the cross-appeal, as to the District Court's ruling on the purely legal issue of whether environmental mitigation measures are a permissible subject for compact negotiations under IGRA, is also de novo. *Steen, supra*, 106 F.3d at 910; *Geurin v. Winston Indus. Inc.*, 316 F.3d 879, 882 (9th Cir. 2002).

VIII. RESPONSE ARGUMENT ON APPEAL

The factual and legal history in this case demonstrates two constant strains that make transparent the State of California's motivation in persisting with this appeal. First, the State has forever, and virtually unalterably, been opposed to the development of an Indian gaming casino on the Big Lagoon Tribe's rancheria site, owing to its concerns about the environmental sensitivity of the surrounding off-reservation area.[4] Second, the State has proven itself willing to try just about anything, or everything, to prevent gaming and development at the Tribe's site,

[4] The State long ago admitted it had reached the conclusion "that the site currently proposed by the Tribe cannot meet the state's critical [environmental] concerns." (DC Docket No. 142 at Exh. L, p. 5 n. 6.) "As a consequence, the central thrust of the State's proposal is the need to move the gaming facilities." (*Id.*)

both in court and out.[5] Given this history, it should not be a surprise that the State's appeal to this Court is misplaced and without merit, as explained below.

A. The State is Not Appealing the District Court's Finding that it Negotiated for an IGRA Compact in Bad Faith.

Following a year and a half of hard-fought litigation – preceded by several years of litigation in a related IGRA bad faith case, *Big Lagoon Rancheria v. State of California*, No. 99-4995 CW (N.D. Cal.) (*see* ER 029) – on November 22, 2010 the District Court (Judge Wilken) entered her summary judgment order, therein finding that the State of California had failed to negotiate in good faith for a tribal-state compact for class III gaming, ordering summary judgment in favor of Big

[5] In this latest case alone, the State unsuccessfully filed a motion for judgment on the pleadings (asserting sovereign immunity, notwithstanding the State's statutory waiver of sovereign immunity in Cal. Gov't Code § 98005) (DC Docket No. 21), unsuccessfully moved for a protective order to block discovery (DC Docket No. 64), unsuccessfully objected to the Magistrate Judge's order denying a protective order (DC Docket No. 75), unsuccessfully moved to stay the proceedings pending further discovery (DC Docket No. 74), unsuccessfully opposed Big Lagoon's motion for summary judgment (ER 025-050), unsuccessfully interposed a cross-motion for summary judgment (ER 025-050), unsuccessfully moved the District Court to stay its summary judgment order pending appeal (ER 660-665), unsuccessfully moved the Ninth Circuit Court of Appeals for a stay of proceedings in the District Court pending appeal (Appellant/Cross-Appellee State of California's Motion for Stay Pending Appeal, No. 10-18903 (9th Cir. Feb. 1, 2011), Docket No. 6-1), unsuccessfully questioned the statutory scope of the court-appointed IGRA mediator's role (DC Docket No. 142 at Exhs. F-J and K), unsuccessfully sought to have its proposed compact, instead of the Tribe's, selected by the court-appointed mediator as that which best comports with IGRA, other applicable federal law, and the findings and order of the court (DC Docket No. 136), and unsuccessfully sought to have the IGRA mediator's compact selection "vacated" by the District Court (ER 003-012).

Lagoon Rancheria, awarding Big Lagoon complete relief on its IGRA complaint, and disposing of all the parties' claims and defenses. (ER 025-050.) Judge Wilken granted summary judgment on two alternate grounds, as follows:

> 1. State's Requests for General Fund Revenue Sharing
>
> Big Lagoon asserts that the State's failure to negotiate in good faith is evidenced by the State's requests for general fund revenue sharing [fn. omitted], insistence that the Tribe comply with various environmental and land use regulations and recommendations that the Tribe site its gaming facility off of its tribal lands.
>
> * * *
>
> Under IGRA, 'a state may, without acting in bad faith, request revenue sharing *if* the revenue sharing provision is (a) for uses 'directly related to the operation of gaming activities' in § 2710(d)(3)(C)(vii), (b) consistent with the purposes of IGRA, and (c) not 'imposed' because it is bargained for in exchange for a 'meaningful concession.'' *Rincon Band of Luiseño Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1033 (9th Cir. 2010) (*citing Coyote Valley II*, 331 F.3d at 1111-15) (emphasis in original).
>
> Here, the State's demands for general fund revenue sharing constitute evidence of bad faith. The State does not dispute that its requests were non-negotiable. Indeed, throughout its communications to the Tribe and briefs on this motion, the State asserted its entitlement to seek revenue sharing as consideration for a gaming compact. *See*, *e.g.*, Engstrom Decl., Exh. 9 at BL000916. Because the State's insistence on general fund revenue sharing amounts to a demand for direct taxation of Big Lagoon, the burden shifts to the State to prove that it nonetheless negotiated in good faith. *See Rincon*, 602 F.3d at 1030; 25 U.S.C. § 2710(d)(7)(B)(ii).

> The State makes no effort to do so. It does not argue that the revenue sharing provision is directly related to the operation of gaming activities. Nor does it contend that general fund revenue sharing is consistent with the purposes of IGRA. Instead, the State argues that *Rincon* was wrongly decided and that, even if the decision stands [fn. In *Rincon*, the State petitioned the Ninth Circuit for a rehearing en banc, which was denied. However, the Ninth Circuit stayed the issuance of its mandate pending the filing of the State's petition for a writ of certiorari with the United States Supreme Court. The Supreme Court has not yet ruled on the State's petition and, accordingly, the Ninth Circuit's stay remains in effect. Fed. R. App. P. 42(d)(2)(B).], it is not applicable to this case.
>
> As the State acknowledges, the Court is bound to follow *Rincon, see Wedbush, Noble, Cooke, Inc. v. SEC,* 714 F.2d 923, 924 (9th Cir. 1983), and the State fails to demonstrate that *Rincon*'s teachings are not applicable here.
>
> * * *
>
> Accordingly, the Tribe is entitled to summary judgment. The State's cross-motion for summary judgment is denied.

(ER 037-044.)

2. State's Requests for Environmental Mitigation Measures

> Big Lagoon maintains that, under IGRA, environmental mitigation is not a permissible subject for the compacting process and that the State's negotiating position amounted to an imposition of such measures, evincing the State's lack of good faith.
>
> * * *
>
> . . . [However,] as the Court stated previously, the State's request for mitigation measures is permissible so long as such measures directly relate to gaming operations or can be considered standards for the operation and maintenance of the

Tribe's gaming facility. *See* 25 U.S.C. § 2710(d)(3)(C)(vi)-(vii).

* * *

This conclusion does not end the inquiry. As the Court has held, to negotiate for environmental mitigation measures in good faith, the State must offer a meaningful concession in exchange. *See also Coyote Valley II*, 331 F.3d at 1116-17 (explaining that the State's 'numerous concessions' in exchange for a labor relations provision demonstrated that it did not act in bad faith). In its briefing, the State points to two: (1) the right to operate up to 349 gaming devices and (2) continued receipt of RSTF payments, even though Big Lagoon would no longer be a non-gaming tribe. However, the record of negotiations does not show that either of these offers was related to the proposed environmental mitigation measures; instead, they appear to have been offered in exchange for general fund revenue sharing. *See* Engstrom Decl., Ex. 9 at BL000915-l7. Even if these purported concessions were connected to the request for environmental mitigation measures, the State does not satisfy its burden to show that they were meaningful. Without any context or comparison, the State simply declares that they were valuable. This is not sufficient.

* * *

In sum, the State may request environmental mitigation measures so long as they (1) directly relate to gaming operations or can be considered standards for the operation and maintenance of the Tribe's gaming facility, (2) are consistent with the purposes of IGRA and (3) are bargained for in exchange for a meaningful concession. Because it does not appear that the State offered a meaningful concession in connection with its requests for environmental mitigation measures, it thus far has failed to negotiate in good faith. This further supports summary judgment in favor of Big Lagoon.

(ER 044-049.)

However, the State is no longer seeking appellate review of either of these alternative grounds for the District Court finding bad faith by the State and granting summary judgment in favor of Big Lagoon.

It is not insignificant that the State is no longer appealing the District Court's finding and determination that the State failed to negotiate in good faith with the Tribe toward a class III gaming compact. Indeed, the State's entire appellate argument comes under the following heading: "I. The district court erred by denying the State an opportunity to develop its defense that Big Lagoon may not be lawfully recognized, or that Big Lagoon may not have gaming-eligible Indian lands." (AOB i and 13.) The State thus concedes, "[t]he details of the [compact] negotiations are not relevant to the limited issue raised in this appeal . . .." (AOB 10.) Instead, the greatly limited premise of the State's appeal now is that "[t]he district court erred by denying the State's request under former Federal Rule of Civil Procedure 56(f), now Rule 56(d), to deny or continue Big Lagoon's motion so the State could complete discovery and fully develop its defense that Big Lagoon lacks standing to bring this action." (AOB 11.)[6]

[6] It is for this reason, as discussed above, that the "mixed question of law and fact" standard of review posited by the State (AOB 11-12) is incorrect. While it may be true that "[w]hether the State negotiated in good faith is a mixed question of law and fact that is reviewed de novo" (AOB 12), the State by its own admission is not seeking review of the District Court's determination that it failed to negotiate in good faith. (AOB 10, 11, 13.)

Given the procedural background of this case, both old and recent, it is noteworthy (though on the underlying merits, not surprising) that the State is no longer contesting the District Court's determination that it failed to conduct compact negotiations with the Tribe in good faith. The State's opening brief scarcely mentions the *Rincon* case, or the District Court's first alternative ground for granting for summary judgment, finding the State's request for general revenue sharing as a compact provision constituted evidence of bad faith because such insistence amounted to a demand for direct taxation of the Tribe in violation of the law. (*Cf.* AOB 2, 12 and 33.) This is notwithstanding that in the summary judgment proceedings below, the State had argued that *Rincon* was wrongly decided by the Ninth Circuit and accordingly stood to be reversed by the Supreme Court in response to the then-pending petition for a writ of certiorari, and that *Rincon's* teachings were inapplicable to the Big Lagoon compact negotiations fact scenario in any event. (ER 063-064.)[7] That of course did not happen, as the State's writ petition was denied. *Rincon*, *supra,* 131 S.Ct. 3055, 3058, 180 L.Ed.2d 886.

[7] The State's Ninth Circuit Civil Appeals Docketing Statement states, "The State appeals the Order finding that it failed to negotiate in good faith for a class III tribal-state gaming compact," and expressly notes "the Order relies *principally* on this Court's recent decision in Rincon Band of Luiseno Mission Indians v. Schwarzenegger, Nos. 08-55809, 08-55914. The State's petition for a writ of certiorari in that case is pending." (United States Court of Appeals for the Ninth Circuit Civil Appeals Docketing Statement, No. 10-17803 (9th Cir. Dec. 14, 2010), Docket No. 3 (emphasis added)).

Nor is there any mention in the opening brief of the District Court's second alternative ground for granting summary judgment, namely, that the State's attempted negotiation for environmental mitigation measures was not in good faith because the State had failed to offer meaningful concessions in exchange for those environmental demands. (*Cf.* AOB i-ii and 10-11 *with* ER 049.) Thus, the State is no longer even pretending to maintain that it offered the Tribe meaningful concessions, so as to justify the environmental mitigation measures requested by it. (*Cf.* AOB 10-11.) Rather, it is Big Lagoon which has cross-appealed this aspect of the District Court's summary judgment ruling, for the reason that environmental and land use regulatory measures are not an appropriate subject for class III gaming compact negotiations at all. *See infra* pp. 46-62.

In summary, the substantive bases for the District Court's finding of bad faith negotiations by the State and resulting entry of summary judgment are unchallenged on appeal.[8]

[8] What is surprising is not that the State has at last given up on its *Rincon* revenue taxation and environmental concessions arguments, but that only three months ago, in renewed motion papers filed in the District Court seeking a stay of the statutory IGRA remedial procedures pending appeal, the State had represented to the Court that there existed serious questions as to both of these supposed arguments on appeal. (DC Docket No. 150; *see also* DC Docket No. 140.) But once the District Court had issued its stay order on February 1, 2012 (ER 03-18), the State in its February 10, 2012 appellant's opening brief abandoned the very arguments (two of the three asserted) upon which the District Court's stay order was based. (*Cf.* AOB.)

B. The District Court Did Not Abuse its Discretion in Denying the State's Rule 56(f) Request for a Continuance to Seek Additional Discovery.

Former Federal Rule of Civil Procedure 56(f), now renumbered Fed.R.Civ.P. 56(d) (effective December 1, 2010), read as follows: "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Fed.R.Civ.P. 56(f). Here, it cannot be said that the State did not have ample opportunity to conduct discovery and present affidavits in opposition to the Tribe's motion for summary judgment. Nor are the supposed "facts" it was seeking to discover essential. The District Court did not abuse its discretion in denying the State additional time for more discovery.

District court decisions are most commonly reviewed for abuse of discretion where the issue involves either the management of district court proceedings or the court's equitable powers. *See, e.g., United States v. State of Washington*, 157 F.3d

---

Perhaps not coincidentally, the State's opening brief on appeal was originally due to be filed on January 27, 2012, before the District Court's stay order was issued, but the State asked to have that filing deadline postponed by two weeks, to February 10, 2012. (*See* Appellant/Cross-Appellee State of California's January 23, 2012 Letter regarding Briefing Schedule, No. 10-17803 (9th Cir. Jan. 23, 2012), Docket No. 16-1.) Had the opening brief filing deadline not been postponed, the State would have filed its opening brief earlier and been obligated to inform the District Court that the guts of its serious questions arguments had been abandoned.

630, 642 (9th Cir. 1998). "The abuse of discretion standard is deferential, and properly so, since the district court needs the authority to manage the cases before it efficiently and effectively. In these days of heavy caseloads, trial courts . . . routinely set schedules and establish deadlines to foster the efficient treatment and resolution of cases. Those efforts will be successful only if the deadlines are taken seriously by the parties . . .." *Wong v. Regents of the Univ. of Calif.*, 410 F.3d 1052, 1060 (9th Cir. 2005).

Abuse of discretion has been described as "a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *Wing v. Asarco Inc.*, 114 F.3d 986, 988 (9th Cir. 1997). "When reviewing for abuse of discretion, we cannot reverse unless we have a 'definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" *Id.* (citation omitted). The appellate court will not substitute its judgment for that of the district court simply because it would have reached a different result; the appellate court will reverse for abuse of discretion only when it "is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances." *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000).

Stated otherwise, "the standard means that within substantial margins the district court could be upheld had it determined the issue one way or another."

Speiser, Krause & Madole P.C. v. Ortiz, 271 F.3d 884, 887 (9th Cir. 2001); *see Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 383-385, 128 S.Ct. 1140, 1144-1146 (2008) (describing deference to the district court as the "hallmark of abuse-of-discretion review").

In the case below there was plenty of opportunity for the State to conduct timely discovery. The pleadings were framed in April 2009. (ER 673-690 and 666-672.) A joint discovery schedule was agreed to in August 2009 and ordered by the District Court that same month. (DC Docket Nos. 29 and 30.) The State propounded written discovery to Big Lagoon in October 2009, and in return resisted the discovery served on it by Big Lagoon. (DC Docket Nos. 33, 44, 70, etc.) Moreover, the discovery cut-off deadline was extended twice, first by stipulation of the parties (DC Docket No. 32) and then again by order of the Magistrate Judge (DC Docket No. 60). The dispositive motion deadline was likewise twice continued, once by stipulation of the parties (DC Docket Nos. 52 and 57) and then yet again by order of the Magistrate Judge (DC Docket No. 60).

Still, the State was dilatory in conducting discovery, and inexcusably so. It identified 26 individually-named potential witnesses in its September 2009 Fed.R.Civ.P. 26(a) initial disclosures, including five from the United States, but did not seek to depose a single one of them. Perhaps more pertinent here, the State waited until December 2009 to serve subpoenas duces tecum on the United States

– more than eight months after this case was commenced, and barely a month before the discovery cut-off deadline. (ER 301-343.)

In summary, even after an agreed discovery schedule and case management plan, the two continuances of the discovery completion date, and two like continuances of the dispositive motion schedule, the State had not diligently completed its discovery of the United States. Nor did the State at any time seek judicial assistance to obtain or expedite discovery from the United States, filing no motion(s) to enforce the subpoenas.[9] The State's self-serving and conclusory assertions that it "had difficulty obtaining documents in response to the subpoenas issued to the federal government," that "the government's failure to timely comply with the subpoenas thwarted the State's ability to complete discovery," and that "the State and federal government were actively trying to resolve their discovery dispute" (AOB 30) deserve to fall upon deaf ears.

Tellingly, in describing the District Court's ruling on its Rule 56(f) request for a denial or continuance, the State wholly neglects to mention that the District Court had previously denied a request by it for a stay or continuance of the proceedings to conduct additional discovery. That is, as chronicled above, in

[9] There is no doubting that the State knew how to seek the District Court's intervention in discovery disputes, filing multiple different discovery-related motions, not counting its motions for a continuance. *See supra* p. 8 n. 2 and p. 10 n. 3.

March 2010 the State filed with the District Court a motion to stay all proceedings in the case, except for discovery, or alternatively to continue for at least six months the summary judgment motion filing and hearing dates. (DC Docket No. 50.) In addition, just a week before that, the State had filed with the assigned Magistrate Judge a motion for a six-month continuance of the discovery completion date. (DC Docket No. 48.) In response to that earlier motion, the Magistrate Judge granted the State another three months to complete its discovery of the United States, and continued the dispositive motion hearing and briefing dates. (DC Docket No. 60.) But a month later, the District Court denied the State's further motion to stay the proceedings or, in the alternative, to continue the dispositive motion dates. (ER 660-665.) Critically, in exercising its discretion and finding no good cause for the State's stay or continuance request, the District Court expressly found, "It does not appear that the State was reasonably diligent in seeking discovery from the BIA." (ER 664.) The State's opening brief neglects to apprise the Ninth Circuit of these judicial rulings and express finding. Instead, it focuses only on the Court's summary judgment order. This omission is material, owing to the following law.

A Rule 56(f) motion is not justified if the party seeking further discovery has been dilatory in conducting discovery. *See Landmark Dev. Corp. v. Chambers Corp.*, 752 F.2d 369, 372-73 (9th Cir. 1985) (affirming district court's refusal to

permit further discovery before ruling on motions for summary judgment, where plaintiffs had ten months for discovery prior to the court's ruling but failed to take depositions within the agreed discovery schedule); *U.S. v. All Assets and Equip. of West Side Bldg. Corp.*, 58 F. 3d 1181, 1190-1191 (7th Cir. 1995) ("A party who has been dilatory in discovery may not use Rule 56(f) to gain a continuance where he has made only vague assertions that further discovery would develop genuine issues of material fact."); *Burlington v. Assiniboine, supra*, 323 F.3d at 773-774 (Rule 56(f)-based continuance of a motion for summary judgment should not be granted if the non-moving party has not diligently pursued discovery of the evidence). Yet this is exactly what the State was – and what the District Court in its informed discretion determined it to be here – dilatory. A trial court's exercise of such discretion will rarely be disturbed. *Garrett v. City and County of San Francisco*, 818 F.2d 1515, 1518 (9th Cir. 1987).

In the end, and entirely justifiably, the District Court found the State to be dilatory in pursuing discovery, and denied the State's request to deny or continue the Tribe's summary judgment motion. This was and is a proper exercise of the Court's discretion. The State's dilatoriness in the proceedings below, notwithstanding ample opportunity to conduct discovery and prepare its defenses or opposition, ought not be rewarded now.[10]

[10] It bears reminding that the State and the Tribe have been in compact

C. The District Court Did Not Err in Determining There Are No Genuine Issues of Material Fact as to the Tribe's Standing as a Federally Recognized Indian Tribe or the Status of its Indian Trust Lands.

There is no genuinely disputing that Big Lagoon Rancheria was at the time of the compact negotiations, and is now, an Indian tribe, or that it has Indian lands on which to conduct gaming. The State did, and does, admit this. Still, the State summarily asserts that there exists a factual dispute whether Big Lagoon was "lawfully" recognized as an Indian tribe or "lawfully" has Indian lands on which to conduct class III gaming. (AOB 41-42.)[11] There are several independent reasons why this argument is without merit, including the following.

---

negotiations, in one form or another, for more than fifteen years, and have been engaged in IGRA litigation since 1997. Almost a full decade ago, in 2003, the District Court stated, "It has been nearly ten years since compact negotiations between the Tribe and the State began." (DC Docket No. 85 at Exh. 3.) As the State describes it, "[t]his is the fourth lawsuit filed by Big Lagoon to secure rights to conduct class III gaming." (AOB 9.) And in the immediately preceding lawsuit alone, the District Court entertained "multiple summary judgment motions by the parties." (AOB 9.) It would not be unreasonable to think that the State knew everything important about the Tribe's tribal status and Indian lands by the time this latest case was commenced in April 2009. Yet, the State asserts its ignorance.

[11] Strictly speaking, IGRA does not, as the State asserts, explicitly say that "[t]o have standing to pursue an IGRA bad faith negotiation suit, a tribe must demonstrate it is federally recognized and has lands eligible for class III gaming." (AOB 10.) The good faith litigation and remedial scheme in IGRA do not mention "standing." *Cf.* 25 U.S.C. § 2710(d)(7)(A)-(B). Instead, the issues of whether a tribe meets the definition of "Indian tribe" in IGRA, 25 U.S.C. § 2703(5), and whether that Indian tribe has jurisdiction over the "Indian lands" upon which a class III gaming activity is to be conducted, 25 U.S.C. § 2710(d)(3)(A), are at most relevant to whether a state is obligated to negotiate in good faith with the tribe. Here, as the District Court below observed, the State did not raise either of these

1. The United States dispositively recognizes (and has long listed) Big Lagoon to be an Indian tribe, and to have Indian lands.

Big Lagoon is a federally recognized Indian tribe. Period. The United States has long acknowledged so. And only an Act of Congress can decide otherwise.

The Federally Recognized Indian Tribe List Act of 1994 ("List Act"), Pub. L. No. 103-454, §§ 101-104, 108 Stat. 4791 (1994), codified at 25 U.S.C. § 479a *et seq.*, provides that the Secretary of the Interior shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians. List Act, Pub. L. No. 103-454, § 104(a) (entitled "Publication of List of Recognized Tribes"); *see Cherokee Nation of Oklahoma v.*

---

arguments in contending that it had negotiated in good faith with the tribe. (*See* ER 043.) Nor did it dispute them in opposition to summary judgment. (*Id.*)

Indeed, as the District Court expressly noted, in response to the State's assertion that it negotiated in good faith based on the United States Supreme Court's February 2009 decision in *Carcieri v. Salazar*, 555 U.S. 379, 129 S.Ct. 1058 (2009), "[a]t the hearing on the motions, the State acknowledged the flaws in this argument, the record of negotiations contains no evidence that the State bargained based on an argument that some of the tribe's lands were unlawfully acquired. . . . The State cannot establish that it negotiated in good faith through a post hoc rationalization of its actions. *Cf. Arrington v. Daniels*, 516 F.3d 1106, 1113 (9th Cir. 2008)". (ER 042.) "At the very least, the State's after-the-fact challenge to the status of some of the Tribe's lands runs afoul of *Rincon's* teaching that 'good faith should be evaluated objectively based on the record of negotiations.'" (ER 043.)

Norton, 389 F.3d 1074, 1076 (10th Cir. 2004). Big Lagoon Rancheria is recognized on that list in the Federal Register, at 75 Fed.Reg. 60,810 (Oct. 1, 2010), listed alphabetically right between the Berry Creek Rancheria of Maidu Indians and the Big Pine Band of Owens Valley Paiute Shoshone Indians. This is indisputable. The "list is dispositive." *See Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993); *see also Warren v. United States*, 2012 U.S. Dist. LEXIS 33686, at *47 (W.D.N.Y. March 12, 2012) (describing the fact of a tribe's recognition on the BIA's list of federally recognized Indian tribes as "indisputable evidence" of the tribe's status and sovereignty).[12]

The List Act sets forth a number of important Congressional findings, including "the constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs," Pub. L. No. 103-454, § 103(1), and "ancillary to that authority, the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes," *id.*, § 103(2). Indeed, "Congress has expressly repudiated the policy of terminating recognized Indian tribes". *Id.*, § 103(5).

[12] The definition of "Indian tribe" under IGRA, 25 U.S.C. § 2703(5), essentially mirrors that in the List Act, Pub. L. No. 103-454, § 102(2).

Critically, "a tribe which has been recognized in one of these manners [set forth in § 103(3)] may not be terminated except by an Act of Congress." Pub. L. No. 103-454, § 103(4); *see also* H.R. No. 103-781, at 1 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3768.[13]

So, while the State might wish Big Lagoon were not a federally recognized Indian tribe, or even question the history or circumstances of Big Lagoon's federal recognition, this does not change the fact that, as a matter of law, Big Lagoon *is* a recognized Indian tribe, and has been for decades. Absent an Act of Congress, this tribal recognition, codified by statute, is dispositive. This dispositive reality alone is enough to warrant, and indeed compels, rejecting the State's appeal and affirming the District Court's summary judgment. There is no genuine issue of material fact, just as there would have been nothing to be gained in this case by further discovery below as to the Tribe's recognized status.

2. The District Court clearly found Big Lagoon to be an Indian tribe with Indian lands.

The District Court correctly observed, "the State does not dispute that the Tribe is currently recognized by the federal government or that it has lands on which gaming activity could be conducted." (ER 043.) These facts were and are

[13] The State (at AOB 33) mischaracterizes *United States v. Sandoval*, 231 U.S. 28 (1913), citing it for the proposition that Congress cannot create a tribe. In truth *Sandoval* provides that Congress may grant federal recognition to a tribe, so long as it does not do so arbitrarily. 231 U.S. at 46.

undisputed. "On these facts, the Tribe is entitled to good faith negotiations with the State toward a gaming compact. 25 U.S.C. § 2710(d)(3)(A)." (ER 043.)

Yet, in attempting to reformulate its argument or shoehorn it into an ostensibly more palatable sounding tenor, the State contends "[t]he district court incorrectly allowed Big Lagoon to pursue its claim despite the State having presented a material factual dispute concerning Big Lagoon's standing." (AOB 1 and 2-3.) The State thus now asserts that there exists a genuine issue of material fact as to the Tribe's "standing" to have brought this IGRA lawsuit. (AOB 13 *et seq.* and 38-39.) Continuing, "Historical records that the State obtained from the federal government for the first time during discovery in this case suggest the government unlawfully acquired in trust for Big Lagoon the land where Big Lagoon proposes to build a casino, and that Big Lagoon may not be a lawfully recognized Indian tribe." (AOB 1.)[14] Regardless, the State is confusing what *is*, i.e., what the undisputed material facts *are*, with what it believes *should be*. There is no basis in the law for such attempted obfuscation.

In fact, the seemingly straightforward question whether the word "is" really means "is" – as in "*is* an Indian tribe" or "*are* Indian lands – has been addressed by

[14] There is simply no mandate or mechanism within IGRA for a court considering anew questions whether a tribe was "lawfully" recognized by the United States, or whether Indian lands were "lawfully" placed into trust by the United States. These are questions for another body or forum. *See supra* pp. 31-33 and *infra* pp. 42-44.

this Court in the context of Indian law. *See Guidiville Band of Pomo Indians v. NGV Gaming*, 531 F.3d 767 (9th Cir. 2008) (holding that 25 U.S.C. § 81's definition of the term "Indian lands" in part as "lands the title of which *is* held by the United States in trust for an Indian tribe" (emphasis in original) means lands currently held in trust, not to-be-acquired lands that might eventually be held in trust). "[W]e conclude that the word 'is' means just that (in the most basic, present-tense sense of the word) . . .." *Guidiville*, 531 F.3d at 770. The Ninth Circuit's analysis in *Guidiville* began with the plain language of the statute, "not only because that is the natural starting point dictated by all accepted canons of statutory construction but also because the statute's unequivocal present-tense use of the word 'is' does a tremendous amount of the legwork in settling one of the main questions on this appeal." *Id.* at 774. "Had Congress intended [that the statute mean something other than the present tense], it would have been the simplest of matters to word the statute differently. That it did not do so is not a linguistic decision to be treated lightly." *Id.* at 775.

Consequently, the State's contention here that "[t]he district court should have first determined whether Big Lagoon lawfully met IGRA's jurisdictional requisites before deciding any other issues in this case" (AOB 35) is both wrong and misleading. The District Court *did* determine that Big Lagoon met IGRA's baseline requisites to negotiate for a compact, that is, that it is an Indian tribe and

that it has jurisdiction over Indian lands eligible for gaming. (ER 043.) The Court correctly determined what *is* – Big Lagoon's Indian tribe status and Indian lands – which renders moot what the State thinks "should be."[15]

3. The State manifestly did not dispute below that Big Lagoon is an Indian tribe with Indian lands.

To reiterate, there was no dispute below that Big Lagoon meets the compact negotiating requirements of IGRA section 2710(d)(3)(A) that it be an Indian tribe and that it have jurisdiction over Indian lands for gaming under IGRA. Demonstrably, the State did not dispute this in its answer below or in the cross-motions for summary judgment. (ER 666-672; DC Docket No. 88 at pp. 18:3-5 ("Big Lagoon now appears on the Bureau of Indian Affairs' (BIA) list", *citing*

[15] Given that Big Lagoon is an Indian tribe, and has Indian lands upon which to conduct gaming, there are no supposed "jurisdictional issues" to be resolved. (*Cf.* AOB 14-16.) Moreover, the cases cited by the State with respect to "jurisdictional issues" are procedurally inapposite and factually distinguishable. (AOB 14-16.) And, they have all already been briefed, extensively, before the District Court below. The only points worth highlighting are that in *Rhode Island v. Narragansett Tribe of Indians*, 816 F.Supp. 796 (D.R.I. 1993), *aff'd sub nom*, 19 F.3d 685 (1st Cir. 1994), the court rejected the state's argument that the tribe did not have jurisdiction over the lands targeted for class III gaming, and held that the fact that the tribe was federally acknowledged, by virtue of being listed in the Federal Register, helped establish that the tribe possessed jurisdiction over its lands, 816 F.Supp. at 805-806. Also, *Comanche Nation v. United States*, 393 F.Supp.2d 1196 (W.D. Okla. 2005), which was not a bad faith suit under IGRA but rather involved a challenge under the Administrative Procedures Act to the Bureau of Indian Affairs' decision to take land into trust, demonstrates why land, trust and federal recognition decisions need to be made by the Department of the Interior and the Bureau of Indian Affairs, and not by courts as part of an IGRA bad faith action.

Bureau of Indian Affairs' list of "Indian Entities Recognized and Eligible To Receive Services from the United States Bureau of Indian Affairs," 74 Fed. Reg. 40,218 (Aug. 11, 2009)).) The State also conceded that the Tribe presently has lands in trust and/or in the United States' name, and that it did not seek to take these parcels out of trust, or to challenge their status as Big Lagoon's trust land, and in fact noted that any such action should be subject to the Quiet Title Act, 28 U.S.C. § 2409a(a). (DC Docket No. 88 at p. 25 n. 11.) (There are of course no Quiet Title Act claims by the State in this, or any other, proceeding.[16]) The State Attorney General's office further admitted this in open court at the oral argument on the cross-motions for summary judgment. (Supp. ER 036 and 037 (Deputy Attorney General Pinal: "we are not challenging the nine acres"; "the parties can negotiate for a casino and all development on the nine acres"; "we are not challenging the tribe's status as a recognized tribe, we're not challenging the 9-acre status").) The State repeated its admissions again, after the District Court granted summary judgment, in briefing on its original motion to stay the proceedings

[16] The State makes the assertion that "under the compulsory counterclaim doctrine, the State was required to bring those claims against the United States in this case." (AOB 11, 36 and 37.) Why the State asserts this is not obvious. Nevertheless, the fact is that the State did not bring, or seek leave to bring, a compulsory counterclaim against the United States in the court below. Perhaps this is because the State appreciates that only an Act of Congress can terminate a tribe's federal recognition. Or perhaps this is because, absent a Quiet Title Act or other such proceeding, the status of the Indian lands cannot be challenged. Or perhaps it is because such claims would be barred by statutes of limitations.

pending appeal. (DC Docket No. 102 at p. 4 ("Big Lagoon is currently recognized by the United States and the eleven-acre parcel is currently in trust for the Tribe").) Time and again, the State thus judicially admitted what *is*: Big Lagoon is a federally recognized Indian tribe with Indian lands.

4. The State repeatedly conceded over the course of more than a decade of compact negotiations that Big Lagoon is an Indian tribe with Indian lands.

Also as was noted in the proceedings below, the State's contentions that Big Lagoon should not be considered a federally recognized Indian tribe or should not be considered to have Indian lands is belied by the facts that the State previously had "offered Big Lagoon the same model compact it offered tribes in 1998 and 1999" (AOB 9), as well as that later "the parties entered into a settlement agreement, under which Big Lagoon and another tribe would have been allowed to build and operate a joint gaming operation in Barstow, California" (AOB 9), and that subsequently "[t]he parties engaged in extensive compact negotiations from September 2007 through October 2008 (AOB 10). Even in the course of the compact negotiations immediately preceding this IGRA lawsuit, the State (Governor's office and Attorney General's office) did not doubt the Tribe's Indian tribe status and acknowledged without question its Indian lands. (Supp. ER 130-134, 135-138, 139-141, and 142-151 (draft compact referring to "trust lands", and letters from Governor's office referring to "20 acres of trust land currently held by

the Tribe" and "the Tribe's post-1988 trust lands" and "the Tribe's proposed rancheria site" and "Big Lagoon's trust lands, respectively").) Surely the State would not have engaged in these repeated and sustained compact negotiation efforts had it believed Big Lagoon's tribal status to be unlawful, or its trust lands to be illegitimate.[17]

5. The State inescapably has re-admitted on appeal that Big Lagoon is an Indian tribe with Indian lands.

The District Court did not find, as the State wishes, that "the State presented credible and undisputed evidence . . . indicating the trust acquisition and tribal federal recognition may be unlawful." (*Cf.* AOB 11 *with* ER 042-044.) Nor could it have, as a matter of law. Indeed, in addition to all of its previous admissions of the undeniable, the State in its opening brief on appeal plainly admits, "Big Lagoon has appeared on each list [of 'Indian Tribal Entities That Have a Government-to-government Relationship With the United States,' published by the federal government in the Federal Register] through the most recent iteration published in

[17] In response to the District Court's description of the State's *Carcieri*-based challenge re the eleven acres as a *post hoc* rationalization of its actions during compact negotiations (ER 42-43), the State argues that "[d]uring compact negotiations the State relied exclusively on Big Lagoon's now-apparently inaccurate assertion that the parties were negotiating for gaming on Big Lagoon's 'ancestral lands.'" (AOB 38.) Regardless of the State's false characterization of Big Lagoon's tribal history, the fact of the matter is that the State has admitted, by its words and conduct, repeatedly over a lengthy period of time, that Big Lagoon is both a federally recognized Indian tribe and that it has control of Indian lands eligible for gaming.

October 2010. *See* 75 Fed.Reg. 60,810 (Oct. 1, 2010) ('Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs')." (AOB 8.) The State thus concedes, elsewhere in its brief, that "Big Lagoon currently appears on a list of Indian entities entitled to receive services from the federal government, and the federal government holds in trust for Big Lagoon the land where Big Lagoon proposes to build and operate a class III gaming casino." (AOB 10-11.) Also, "the United States currently recognizes Big Lagoon and holds the eleven-acre parcel in trust for Big Lagoon." (AOB 13-14.) The State has no choice but to admit these indisputable realities.

Given this, for the State to simultaneously assert "that there is a material question concerning Big Lagoon's status as a federally recognized tribe" (AOB 33) is preposterous. There is no such question under federal law or in the mind of the United States, 25 U.S.C. § 479a-1 and 75 Fed.Reg. 60,810, and the State cannot point to any evidence or facts to suggest that the United States is doubting its recognition of the Tribe, much less that Congress has terminated Big Lagoon's tribal status.

While the State posits that over several decades of tribal history there may exist arcane or even confusing questions, there is no reason to think, much less any suggestion whatsoever by the State, that the federal government is unaware of the

Tribe's history.[18] And there is no reason for this Court, nor for the District Court, to delve into or reconstruct that long history. It is not a genuine issue in this case. Nor is it, respectfully, within the Court's province to do so. The State's assertion that "the issue is whether the recognition and trust acquisition were lawful" (AOB 14) simply misses the mark. The Tribe's admitted status as a federally recognized Indian tribe, and jurisdiction over Indian lands held for it by the United States, are plainly not disputed facts, much less genuinely disputed.

This Court ought not, respectfully, be misled by the State's after-the-fact, hoped-for and speculative interpretation of selected historical data, especially when that same data – which has largely come from the United States – has done nothing

[18] The United States is certainly not unaware of the long history of Big Lagoon-State compact negotiations or related IGRA litigation. For example, on August 21, 2003, the United States Department of the Interior weighed in on a previous compact proposal by the State and thrashed it. In that instance, the Department of the Interior, having reviewed of the State's proposal at that time to move Tribal gaming off-site and impose numerous obligations and restrictions on both the Tribe and the federal government, concluded that the State's "proposed agreement exceeds what Congress intended for inclusion as part of gaming compacts under the Indian Gaming Regulatory Act," and opined that "the proposal is contrary to Federal Indian policy and the Secretary's fiduciary responsibility to protect Federal Indian lands." (DC Docket No. 142, Exh. L at 8.)

The United States Solicitor later reiterated that the Department of the Interior's August 21, 2003 letter "concludes that the framework for the settlement negotiations between the Tribe and the State regarding the Tribal-State Class III Gaming Compact and the litigation departs from Congressional intent underlying the Indian Gaming Regulatory Act (IGRA) and is contrary to the Secretary's fiduciary responsibility with respect to federal Indian lands." (DC Docket No. 142, Exh. L at 8.)

to change the Tribe's longstanding status as a federally recognized Indian tribe nor the fact that Indian lands are held by the United States for the benefit of the Tribe, both of which undeniable facts the State has admitted repeatedly and admits even now. There is no basis to overturn the District Court's summary judgment.

D. The State's Contention that the Court of Appeal Should Adjudicate, or Reverse and Remand to the District Court for Adjudication, Big Lagoon's Status as an Indian Tribe with Indian Lands Runs Afoul of the Political Question Doctrine.

Respectfully, both this Court and the District Court must defer to Congress and the Secretary of the Interior's primary jurisdiction and administrative process, by which the federal government's list of federally recognized Indian tribes was promulgated, under 25 U.S.C. §§ 479a and 479a-1, at 75 Fed.Reg. 60,810 and previous versions of that list.

When Congress has found that a tribe exists, courts are not to disturb that determination. For more than a century, such a determination has been recognized as a political question outside the scope of judicial review. *See United States v. Rickert*, 188 U.S. 432, 445, 23 S.Ct. 478, 483, 47 L.Ed. 532 (1903); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419, 18 L.Ed. 182 (1866). *See generally Baker v. Carr*, 369 U.S. 186 (1962). Judicial deference to findings of tribal existence is still warranted by the extensive nature and exercise of congressional power in the field. The judiciary has thus "historically deferred to executive and legislative determinations of tribal recognition." *Western Shoshone, supra*, 1 F.3d at 1057,

citing *United States v. Rickert, supra*, 188 U.S. at 445, 23 S.Ct. at 483, and *United States v. Holliday, supra*, 70 U.S. (3 Wall.) at 419, 18 L.Ed. 182. No congressional or executive determination of tribal status has been overturned by the courts. Cohen's Handbook of Federal Indian Law, 2005 Edition, § 3.02[4], p. 142.

Congress has specifically authorized the Executive Branch to regulate Indian affairs, and the Department of the Interior has developed procedures expressly for determinations of tribal status. *Western Shoshone, supra*, 1 F.3d at 1058, citing *James v. United States Dep't of Health & Human Services*, 824 F.2d 1132, 1137 (D.C. Cir. 1987). "That purpose would be frustrated if the Judicial Branch made initial determinations of whether groups [of Indians] have been recognized previously or whether conditions for recognition currently exist. [Citation.]" *Western Shoshone*, 1 F.3d at 1058.

Again, the State's efforts to draw both this Court and the District Court into revisiting the Secretary of the Interior's listing under 25 U.S.C. § 479a-1 of Big Lagoon as an Indian tribe in 75 Fed.Reg. 60,810, or trampling Congress' plenary jurisdiction over Indian affairs, runs afoul of the political question doctrine.

It is cynical for the State to hypothesize that "the district court's finding suggests that the State is forever bound by the perceived status of Big Lagoon and the eleven acres at the time of compact negotiations." (AOB 39.) This is not what the District Court said. Rather, the District Court found and ruled that those facts

had been established in the proceedings below. Whether the State could go to Washington and somehow prevail upon the United States Congress to terminate the Tribe's status, and bring to an end 100 years of federal trust oversight of the Big Lagoon tribe, its forebears, and its lands, is not an issue that was before the District Court under IGRA, and, respectfully, it is not an issue before this Court. It bears noting that there is no evidence in the record that the State has pursued any such proceedings before the Department of the Interior or the United States Congress.

E. The IGRA Remedial Process Has Worked, and Deserves to be Brought to its Conclusion.

In this case, Big Lagoon, in keeping with the IGRA remedial scheme, has done everything that the governing federal law required of it. The Tribe (1) requested the State to enter into negotiations for the purpose of entering into a tribal-state compact governing the conduct of class III gaming activities, (2) negotiated with the State for well in excess of the minimum 180-day period (more than a year, in fact), (3) initiated a cause of action in federal district court arising from the State's failure to conduct such negotiations in good faith, (4) introduced evidence that no tribal-state compact had been entered into and that the State did not negotiate in good faith, (5) obtained a district court finding (and summary judgment ruling) that the State failed to negotiate in good faith, (6) negotiated for another 60-day period to conclude a compact with the State,

albeit to no avail, (7) submitted to a court-appointed IGRA mediator a proposed compact that represented its last best offer for a compact, and (8) had its compact selected by the court-appointed mediator, instead of the State's, as that which best comports with the terms of IGRA, other applicable federal law, and the findings and order of the court. (AOB 3-4, ER 004-006, and DC Docket No. 136.) The State did not consent to the proposed compact selected by the IGRA mediator, which under the statute triggers the requirement that the mediator is to notify the Secretary of the Interior who shall prescribe, in consultation with the Indian tribe, procedures under which class III gaming may be conducted on the Indian lands, which are consistent with the proposed compact selected by the mediator, as required by 25 U.S.C. § 2710(d)(7)(B)(vii). (AOB 41 n. 15 and DC Docket No. 137.)[19] It is high time for this IGRA case to be brought to its rightful

[19] While the State's opening brief attempts to castigate Big Lagoon for the parties' failure to consummate a negotiated compact under IGRA (*see* AOB 9, 10 and 16), "the Act gives states multiple chances to negotiate a compact governing the conduct of such gaming. As the district court observed, it is '[o]nly after rejecting several opportunities to involve itself in the negotiation process [that] the Act terminate[s] the State's opportunity to participate.'" *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1555 (10th Cir. 1997) (quoting *Pueblo of Santa Ana v. Kelly*, 932 F.Supp. 1284, 1293 (D.N.M. 1996)). Stated otherwise, "If IGRA negotiations break down between a state and a tribe because the state does not come to the bargaining table in good faith, IGRA specifically provides that courts, and the Secretary of the Interior, can intervene to impose a gaming arrangement without the affected state's approval." *Rincon, supra*, 602 F.3d at 1031 (citing 25 U.S.C. § 2710(d)(7)(B)(iii-vii)). It is because of the State's judicially determined bad faith and continuing intransigence that a judgment was rendered against it, that the court-appointed mediator selected the Tribe's proposed compact, and that the

conclusion. There are no grounds for the State's appeal of the District Court's bad faith finding and judgment. That judgment should be affirmed.

IX. PRINCIPAL ARGUMENT ON CROSS-APPEAL

A. The District Court Erred in Ruling that Environmental and Land Use Regulations are Permissible Subjects of Compact Negotiation Under IGRA.

In its motion for summary judgment, Big Lagoon contended that the State negotiated for a compact in bad faith because, *inter alia*, the State was using the IGRA negotiating process in an effort to impose environmental mitigation measures and land use regulation on the Tribe's sovereign Indian land. In exchange for a gaming compact, the State was demanding that the Tribe submit to extensive environmental and land use regulation by the State – subjects that are neither directly related to gaming nor consistent with the purposes of IGRA.[20]

Secretary of the Interior will ultimately be required to prescribe procedures for gaming.

[20] The environmental and land use restrictions sought to be imposed by the State via a compact before this IGRA action was commenced included, in summary, the following: a limit on the number of hotel rooms to be built, a 30-foot (two-story) height limit on the gaming and hotel facility, a 200-foot setback from the lagoon, restrictions on the use of building materials and colors, vegetative screening from public viewing areas, native vegetation maintenance, stormwater gutter dissipation, off-site parking and water treatment facilities, outdoor lighting standards, signage limitations, etc. (Supp. ER 149-151 ("Development Conditions")), as well as extensive and detailed project mitigation measures re geology and soils, hydrology and water quality, biological resources, aesthetics, traffic and transportation, noise, air quality, water supply, waste water, and socioeconomics (Supp. ER 078-083 and

While the District Court correctly found that the State had negotiated in bad faith for other reasons, the Court denied this aspect of Big Lagoon's motion, ruling that the State's environmental demands were permissible subjects of negotiation under IGRA. (ER 044-049.)

It is well established that states cannot exercise regulatory jurisdiction over Indians on their reservation lands, except where Congress has clearly expressed an intention to permit such regulation. Nowhere in IGRA did Congress provide consent for state laws to be imposed via a compact. Indeed, IGRA makes clear that its narrow provisions for tribal-state compact negotiations were not intended as a platform from which states could launch broad regulation in areas such as environmental and land use regulation. Thus, The District Court's ruling in this respect is erroneous and should be reversed.

125-129), all subject to a CEQA-like "Tribal Environmental Impact Report" process aimed at addressing off-reservation environmental and economic impacts, which would have required the Tribe to submit to land use and environmental regulation that exceeds federal law and would have mandated the Tribe's entry into binding "Intergovernmental Agreements" with a host of local regulatory agencies covering a multitude of areas, all subject to binding third-party arbitration notwithstanding the Tribe's sovereign immunity (*see* DC Docket No. 84 at BL000993-BL001001). (The court-appointed IGRA mediator later decided that TEIR and related provisions proposed by the State were not consistent with IGRA or directly related to gaming, as a result of which he selected Big Lagoon's proposed compact as that which best comports with IGRA, other applicable federal laws, and the findings and order of the Court. (DC Docket No. 136.))

1. Tribal lands are sovereign territory and states may not exercise regulatory control over those lands absent federal consent.

a. Federal Indian law and tribal sovereignty.

Against two centuries of Indian law in the United States, IGRA is a relatively recent development, as chronicled below, *infra* pp. 52-54. But the principles governing resolution of the question of whether a state can assert jurisdiction and control over Indian land are not new: "the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789, 65 S.Ct. 989 (1945); *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2, 96 S.Ct. 2102, 2105 n.2 (1976).[21]

---

[21] The history informing these principles is long and ignominious. "From the advent of colonists in North America, the new arrivals promptly began encroaching on Indian lands, and frequently treating Indians unfairly. To protect against further 'great Frauds and Abuses' perpetrated by the colonists against the Indians, and to avoid war, the British Crown assumed ultimate authority over Indian affairs. 1-1 Cohen's Handbook on Fed. Indian Law § 1.02 (Matthew Bender 2009). When our nation was formed, the federal government essentially took the place of the Crown, with Congress being granted the power to 'regulate Commerce . . . with the Indian tribes,' *U.S. Const. art. I, § 8, cl. 3*, and the President being given the power to make treaties (including with Indian tribes) with the consent of the Senate. *U.S. Const. art. II, § 2, cl. 2*." *Rincon*, 602 F.3d at 1026-27.

"According to the Supreme Court, the federal government's relationship to the tribes was that of a 'ward to his guardian.' *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Nevertheless, promises and treaties were repeatedly broken or ignored as Indians were swept from their lands and homes by states, hoards of settlers, and sometimes even by the 'guardian' federal government itself, when they wanted the lands or resources possessed by those Indians. *See* Cohen's, *supra*, at §§ 1.02-1.03." *Rincon*, 602 F.3d at 1027.

The United States Supreme Court first articulated this policy in 1832 when Chief Justice Marshall held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States." *Worcester v. Georgia*, 31 U.S. 515, 557, 6 Pet. 515, 557 (1832). From this concept of Indian reservations as "separate, although dependent nations," it followed "that state law could have no role to play within the reservation boundaries." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168, 93 S.Ct. 1257 (1973). The paramount federal power over Indian matters "derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." *McClanahan*, 411 U.S. at 172 n.7 (citing U.S. Const. Art. I, § 8, cl. 3; Art. II, § 2, cl. 2). A preemption analysis gives effect to the plenary and exclusive power of the federal government to deal with Indian tribes. *See Board of Comm'rs v. Seber*, 318 U.S. 705, 715-716, 63 S.Ct. 920 (1943).

"Accompanying the broad congressional power is the concomitant federal trust responsibility toward the Indian tribes." *State of Washington Department of Ecology v. U.S. Environmental Protection Agency*, 752 F.2d 1465, 1471 (9th Cir. 1985) (citing *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 660 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 731 (1977)). The trust

"responsibility arose largely from the federal role as a guarantor of Indian rights against state encroachment." *State of Washington*, 752 F.2d at 1470 (citing *United States v. Kagama*, 118 U.S. 375, 383-84, 6 S.Ct. 1109 (1886)).[22] "Respect for the long tradition of tribal sovereignty and self-government also underlies the rule that state jurisdiction over Indians in Indian country will not be easily implied." *State of Washington*, 752 F.2d at 1470 (citations omitted).

In *Santa Rosa Band of Indians v. Kings County*, *supra*, the Ninth Circuit made clear that "states may not regulate or tax Indian use of the reservation absent Federal consent." 532 F.2d at 658-59 (affirming holding that county was without jurisdiction to enforce its zoning ordinance or building code on Indian reservation

[22] In *Kagama*, the Supreme Court explained the trust status as follows:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States – dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive, and by Congress, and by this court, whenever the question has arisen.

118 U.S. at 383-84, 6 S.Ct. at 1114 (emphases in original).

trust lands).[23] Similarly, the "application of state or local zoning regulations to Indian trust lands threatens the use and economic development of the main tribal resource . . . and interferes with tribal government of the reservation." *Id.*, at 667-68.[24]

Thus, states cannot exercise regulatory jurisdiction over Indians on their reservation lands, except where Congress has clearly expressed an intention to permit such regulation. *See State of Washington*, 752 F.2d at 1469; *McClanahan*, 411 U.S. at 170-71 ("State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply").

---

[23] The Supreme Court qualified this rule in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15, 107 S.Ct. 1083, 1090-91 (1987) (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983)) (distinguishing general rule stated in *McClanahan*), stating: "[U]nder certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and … in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." However, there are not "exceptional circumstances" here that would warrant application of State regulations to the Tribe itself. The District Court recognized that the cases that have permitted states to regulate tribes in the absence of express Congressional authority are distinguishable. (DC Docket No. 85, Exh. 2.)

[24] Federal policy favors tribal self-regulation in environmental matters, even vis-à-vis the federal government. *State of Washington*, 752 F.2d at 1471 (noting that EPA policies emphasize importance of tribal self-regulation in environmental matters).

In summary, Indian tribes are subject to the exclusive power and trust oversight of the federal government and meant to be free from state interference and oppression. As discussed in more detail in the next section, IGRA does not contain any express authority allowing states to impose their environmental regulations on tribes. Indeed, its expressions are directly to the contrary.

b. IGRA and the policies that underlie it.

i. IGRA's genesis.

The foregoing principles of Indian sovereignty are important to understanding the evolution of the law on Indian gaming. To repeat, "Indian tribes retain 'attributes of sovereignty over both their members and their territory,' *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717 (1975), and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.' *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154, 100 S.Ct. 2069, 2081 (1980)." *California v. Cabazon Band of Mission Indians, supra*, 480 U.S. at 207, 107 S.Ct. at 1087. "State law may be applied to tribal Indians on their reservations, however, [only] if Congress has expressly consented or under certain other limited circumstances when it does not interfere with or is not 'incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to

justify the assertion of state authority.'" *Cabazon*, 480 U.S. at 215-217, 107 S.Ct. at 1091-92.

"In the 1980s various Indian tribes began to seek authority for legalized gambling as a way to earn revenue. As sovereigns, Indian tribes are subordinate only to the Federal Government. *Cabazon*, 480 U.S. at 207, 107 S.Ct. at 1087. State laws, however, 'may be applied to tribal Indians on their reservations if Congress has expressly so provided.' *Id.*" *Texas v. U.S.*, 497 F.3d 491, 493 (5th Cir. 2007).

IGRA was enacted by Congress in 1988 in the wake of the *Cabazon* case, following the Supreme Court's ruling in *Cabazon* that neither the State of California nor the County of Riverside had any authority to enforce their gambling laws within Indian reservations. IGRA was meant to "balance the states' interest in regulating high stakes gambling within their borders and the Indians' resistance to state intrusions on their sovereignty." *Pueblo of Santa Ana*, *supra*, 932 F.Supp. at 1289 (citing S.Rep. No. 100-446, at 13). IGRA established a statutory framework for the Indian gaming industry which "expressly pre-empt[s] the field of governance of gaming activities on Indian lands." *Id.* (quoting S. Rep. No, 100-446 at 6). "[I]n light of traditional notions of Indian sovereignty," the Supreme Court in *Cabazon* emphasized important federal interests, namely the congressional goal of Indian self-government, including its "overriding goal" of

encouraging tribal self-sufficiency and economic development. *Cabazon*, 480 U.S. at 216 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 334-335, 103 S.Ct. at 2386-87). IGRA was the result of many years of effort by Congress to balance the competing interests of tribes, states, and the federal government. (*See* S. Rep. No. 100-446 at 1-2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3071-72.)

ii. The policy and purposes of IGRA.

The primary authority for the purposes and the goals of IGRA is, of course, the statute itself. *See* 25 U.S.C. § 2702. "Declaration of policy. The purpose of this chapter is – (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting economic development, self-sufficiency, and strong tribal governments; (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players". *Id.*, § 2702(1) and (2); *see also Rincon*, 602 F.3d at 1028. The states' interests are not the primary mission of IGRA. Indeed, states are not mentioned at all in the purpose clause of IGRA.

It is within the context of these express policies or purposes declared by Congress that the State's overreaching desire to impose environmental and land use regulation via a compact must be evaluated.

2. IGRA does not provide federal consent for states to impose environmental and land use restrictions on Indian land.

IGRA provides a statutory basis for Indian tribes to operate gaming enterprises as a means to promote tribal economic development, to promote tribal self-sufficiency, and to produce strong tribal governments, under a federal regulatory scheme designed to insure law enforcement and to protect the integrity of the gaming. 25 U.S.C. § 2702. As is noted above, states are not mentioned at all in the purpose clause of IGRA. Yet, for the many years that Big Lagoon has tried to negotiate a compact for class III gaming on its Indian lands, the State has obstructed that effort by trying to move the proposed gaming off the Tribe's land or, more pertinent here, by requiring extensive and draconian environmental and land use restrictions. The State claims these restrictions are legitimate subjects of negotiation under IGRA because they are necessary to protect the State's broad interests. But, imposing burdensome environmental review processes and project-threatening project design measures does not further IGRA's purposes. Instead, as discussed below, what the State was seeking to "negotiate" is contrary to the Tribe's economic development, self-sufficiency, and governance, and contrary to

the stated purposes of IGRA. Fortunately, this Court has seen this same defendant making essentially this same argument before.

In *Rincon*, the State argued that general fund revenue sharing was a legitimate subject of compact negotiation under IGRA, because the revenue demanded was necessary to protect the State's interest of achieving financial well-being for its citizens. However, as this Court confirmed in *Rincon*, IGRA does not confer any such broad authority, but instead prohibits states from using the compacting process as a means of subjecting tribes to state laws and regulations that do not directly pertain to regulating tribal gaming and its effects. 602 F.3d at 1032 and 1045; *see* 25 U.S.C. § 2710(d)(3)(C). As this Court's decision in *Rincon* makes clear, under IGRA the State cannot simply negotiate for anything it wants – the statute specifically outlines and limits permissible tribe-state compact negotiation topics, and provides an important qualifier to further circumscribe the negotiations: "IGRA limits permissible subjects of negotiation in order to ensure that tribal-state compacts cover only those topics that are directly related to gaming *and* are consistent with IGRA's stated purposes." 602 F.3d at 1029 (emphasis added). For this reason, the Court rejected the State's argument in *Rincon* that its compact demand for general fund revenue sharing was a permissible negotiation topic ostensibly because it was directly related to gaming and consistent with the purposes of IGRA. 602 F.3d at 1034-36.

The analysis in *Rincon* pertaining to whether general fund revenue demands are "directly related to the operation of gaming activities," as well as whether such demands are "consistent with IGRA's stated purposes," applies equally to the State's demands here that the Tribe accede to State environmental and land use regulation. As in *Rincon*, these demands are neither consistent with the purposes of IGRA nor directly related to gaming.

a. Pursuant to this Court's decision in *Rincon*, the State's use of the compacting methodology to impose environmental and land use regulation on the Tribe is not consistent with the purposes of IGRA.

Under IGRA, a state may negotiate for compact provisions only if they are consistent with the purposes of the Act. *Rincon*, 602 F.3d at 1029. Imposing environmental mitigation measures and land use regulation via a compact is not consistent with the purposes of IGRA.

In clarifying the scope of Congress' intended limits on a state's right to negotiate and what negotiation topics are consistent with the purposes of IGRA, the Court in *Rincon* looked to the legislative history of IGRA. Consistent with IGRA's expressly stated purposes, that legislative history makes clear that Congress did not intend to authorize, nor intend to allow, a state's use of the compact negotiating process to impose broad regulation on a tribe's sovereign land. Rather, Congress intended to provide a legal framework within which tribes could engage in gaming – an enterprise that holds out the hope of providing tribes

with the economic prosperity that has so long eluded their grasp – "while setting boundaries to restrain aggression by powerful states." *See* S. Rep. No. 100-446, at 33 (1988) (statement of Sen. McCain), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3103; 134 Cong. Rec. at S12654 (statement of Sen. Evans). IGRA is designed for the specific purpose of using gaming as a mechanism for raising the level of economic activity throughout the tribal economy (S. Rep. No. 100-446, at 2-3), while allowing the states a mechanism for protecting against criminal infiltration of Indian gaming. *Id.*, at 15.[25]

In this regard, the Senate Report succinctly states: "Gaming by its very nature is a unique form of economic enterprise and the Committee is strongly opposed to the application of the jurisdictional elections authorized by this bill to any other economic or regulatory issue that may arise between tribes and States in the future." S. Rep. No. 100-446, at 14, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084. More specifically, Senator Inouye stated:

> There is no intent on the part of Congress that the compacting methodology be used in such areas such as taxation, water rights, *environmental regulation, and land use*. . . . The exigencies caused by the rapid growth of gaming in Indian country and the threat of corruption and

[25] The Senate Report on IGRA also sets forth the Indian Affairs Committee's view that "[the Committee] trusts that courts will interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes." S. Rep. No. 100-446, at 15, *reprinted in* 1988 U.S.C.C.A.N. at 3085.

> infiltration by criminal elements in class III gaming *warranted the utilization of existing State regulatory capabilities in this one narrow area.*

134 Cong. Rec. S12643-01, at S12651 (1988) (emphasis added). Similarly, Representative Coelho, in discussing IGRA, remarked:

> It is important to make clear that the compact arrangement set forth in this legislation is intended solely for the regulation of gaming activities. It is not the intent of Congress to establish a precedent for the use of compacts in other areas, such as water rights, *land use*, *environmental regulation* or taxation. Nor is it the intent of Congress that States use negotiation on gaming compacts as a means to pressure Indian tribes to cede rights in any other area.

134 Cong. Rec. H8155 (Sept. 26, 1988) (emphasis added).

In citing this legislative history with approval, *Rincon* reaffirmed that Congress did not intend "that the compacting methodology be used in such areas such as taxation, water rights, *environmental regulation,* and *land use*." *Rincon*, 602 F.3d at 1029 n.10, quoting statement of Sen. Inouye from 134 Cong. Rec. S12643-01 at S12651 (1988) (emphasis added). *Rincon* thus reinforces that Congress did not intend IGRA to be used as a platform for imposing environmental or land use regulation on sovereign Indian tribes historically subject to the plenary and exclusive power of the federal government and protected by the concomitant federal trust responsibility which accompanies that power. Rather, *Rincon* rejected the State of California's argument that promoting the State's general economic interest though revenue sharing was consistent with the purposes of IGRA,

emphasizing that: "[t]he only state interests mentioned in § 2702 are protecting against organized crime and ensuring that gaming is conducted fairly and honestly" and State regulation is *limited to this one narrow area*. *Id.* at 1029.

It is clear – environmental and land use regulation in a compact is not consistent with the purposes of IGRA and is out of bounds for a compact negotiation. Environmental and land use regulation is simply not within the "narrow area" of criminal infiltration and gaming fairness regulation that is enumerated among the purposes of, and permitted under, IGRA.

b. Pursuant to this Court's decision in *Rincon*, demands for environmental and land use regulation are not directly related to gaming activities under IGRA.

Not only must the topic of compact negotiation be consistent with the purposes of IGRA, but it also must be directly related to gaming. *Rincon*, 602 F.3d at 1029; 25 U.S.C. § 2710(d)(3)(C)(vii). The State's environmental and land use demands also fail this test.

Rincon, again, reaffirmed that IGRA limits the permissible subjects of negotiation in order to ensure that tribal-state compacts cover only topics that are directly related to gaming. This Court in *Rincon* clarified what is meant by "directly related to gaming activities," as a permissible subject of negotiation by the State. 602 F.3d at 1033-1034. In that case, the State had argued that imposing a general fund fee for the operation of slot machines was "directly related" to the

operation of gaming activities because the money was paid out of the income from gaming activities. *Id.* at 1033. Notwithstanding that the imposition of slot machine fees coming directly from gaming revenues is much more "related to" gaming activities than is regulation of the environment or the size and design of a casino building, this Court in *Rincon* rejected the State's contention, dismissing its reasoning as "circular." *Id.* The similarly circuitous reasoning underlying the State's demand for environmental and land use regulation here is discredited as well. Just because the environmental impact or land use issues perceived by the State "derive from" the construction and operation of a facility in which gaming is conducted, does not render them "directly related" to gaming operations. The environmental and land use implications perceived by the State arise from the construction of a facility, which could as well be a hotel, a restaurant or a manufacturing plant – they do not derive from gaming *per se*. Congress intended the required relationship to gaming activities to be much more direct – "protecting against organized crime and ensuring that gaming is conducted fairly and honestly".

Lest there be any doubt, any ambiguity in a statute that is enacted for the benefit of Indians, such as IGRA, implicates a well-known canon of construction known as the *Blackfeet* presumption, in reference to *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 2403-04 (1985), which holds that

"statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.*, 471 U.S. at 766; *see also Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003). This presumption, also known as the trust doctrine, grew out of the trust obligation that Congress owes to Indian tribes. *Artichoke Joe's*, 353 F.3d at 729. Against this Indian canon of construction, the State's argument that IGRA section 2710(d)(3)(C)(vii) extends to environmental and land use regulation cannot be countenanced.

The District Court's conclusion that environmental mitigation measures are fair game for a state to seek in the compacting process fails to account adequately for the principles of Indian law and tribal sovereignty, does not pay heed to the policies and purposes of IGRA, misperceives the statute's legislative history, and is inconsistent with this Court's decision and ruling in *Rincon*. In countenancing the State's use of the IGRA compacting process to assert its environmental and land use regulation, the District Court committed error.

X. CONCLUSION

Big Lagoon Rancheria respectfully urges this Court of Appeals to affirm the District Court's summary judgment in favor of Big Lagoon. The order granting summary judgment based on the State of California's bad faith is the correct decision under the law and the evidence.

On its cross-appeal, Big Lagoon respectfully asks this Court to reverse the District Court's ruling that environmental and land use measures are a permissible subject for a state to impose in compact negotiations, and order that summary judgment also be entered in favor of the Tribe on this alternative basis for finding bad faith in negotiations by the State.

Dated: March 26, 2012

Respectfully submitted,

BAKER & McKENZIE LLP
Bruce H. Jackson
Peter J. Engstrom
Irene V. Gutierrez

By: s/ Peter J. Engstrom
Peter J. Engstrom
Attorneys for Appellee/Cross-Appellant BIG LAGOON RANCHERIA, a Federally Recognized Indian Tribe

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rule of Appellate Procedure 28.1(c)(2), and Ninth Circuit Rule 28.1(c)(2), Big Lagoon Rancheria's combined brief complies with the type volume limitation of Federal Rule of Appellate Procedure 28.1(c)(2), the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it is proportionately spaced, has a typeface of Times New Roman 14 points or more and contains 16,456 words.

Dated: March 26, 2012

Respectfully submitted,

BAKER & McKENZIE LLP
Bruce H. Jackson
Peter J. Engstrom
Irene V. Gutierrez

By: s/ Peter J. Engstrom
Peter J. Engstrom
Attorneys for Appellee/Cross-Appellant BIG LAGOON RANCHERIA, a Federally Recognized Indian Tribe

STATEMENT FOR ORAL ARGUMENT

Pursuant to Rule 34(a)(1) of the Federal Rules of Appellate Procedure, Big Lagoon Rancheria respectfully requests that oral argument be permitted. This appeal addresses important questions of whether a court in an IGRA bad faith action can revisit or adjudicate the United States' decisions that an Indian tribe is federally recognized as such and has jurisdiction over Indian lands. Also, the cross-appeal addresses the important question of whether a state may use gaming compact negotiations under IGRA for the purpose of imposing environmental mitigation measures and land use regulation on an Indian tribe and its sovereign land.

Dated: March 26, 2012

Respectfully submitted,

BAKER & McKENZIE LLP
Bruce H. Jackson
Peter J. Engstrom
Irene V. Gutierrez

By: s/ Peter J. Engstrom
Peter J. Engstrom
Attorneys for Appellee/Cross-Appellant BIG LAGOON RANCHERIA, a Federally Recognized Indian Tribe

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28–2.6, I, Peter J. Engstrom, certify that I am not aware of any related cases pending in this Court.

Dated: March 26, 2012

Respectfully submitted,

BAKER & McKENZIE LLP
Bruce H. Jackson
Peter J. Engstrom
Irene V. Gutierrez

By: s/ Peter J. Engstrom
Peter J. Engstrom
Attorneys for Appellee/Cross-Appellant BIG LAGOON RANCHERIA, a Federally Recognized Indian Tribe

ADDENDUM

25 U.S.C. § 2701

§ 2701. Findings

The Congress finds that--

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 2103 of the Revised Statutes (25 U.S.C. 81) requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency , and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. § 2702

§ 2702. Declaration of policy

The purpose of this Act is--

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 479a

§ 479a. Definitions

For the purposes of this title [25 USCS § 479a and note and § 479a-1]:

(1) The term "Secretary" means the Secretary of the Interior.

(2) The term "Indian tribe" means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.

(3) The term "list" means the list of recognized tribes published by the Secretary pursuant to section 104 of this *title* [25 USCS § 479a-l].

25 U.S.C. § 479a-1

§ 479a-1. Publication of list of recognized tribes

(a) Publication of list. The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United State s to Indians because of their status as Indians.

(b) Frequency of publication. The list shall be published within 60 days of enactment of this Act [enacted Nov. 2, 1994], and annually on or before every January 30 thereafter.

Pub. L. No. 103-454, 108 Stat. 4791 (1994)

SEC. 101. SHORT TITLE.

This title may be cited as the "Federally Recognized Indian Tribe List Act of 1994".

SEC. 102. DEFINITIONS.

For the purposes of this title:

(1) The term "Secretary" means the Secretary of the Interior.

(2) The term "Indian tribe" means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.

(3) The term "list" means the list of recognized tribes published by the Secretary pursuant to section 104 of this title.

SEC. 103. FINDINGS.

The Congress finds that-

(1) the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs;

(2) ancillary to that authority, the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes;

(3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" or by a decision of a United States court;

(4) a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress;

(5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated;

(6) the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes;

(7) the list published by the Secretary should be accurate, regularly updated, and regularly published, since it is used by the various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States; and

(8) the list of federally recognized tribes which the Secretary publishes should reflect all of the federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

SEC. 104. PUBLICATION OF LIST OF RECOGNIZED TRIBES.

(a) PUBLICATION OF THE LIST. – The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(b) FREQUENCY OF PUBLICATION. – The list shall be published within 60 days of enactment of this Act, and annually on or before every January 30 thereafter.

U.S. Court of Appeals for the Ninth Circuit
Case Nos. 10-17803 and 10-17878

****

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on **March 26, 2012.**

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system

Signature: /s/ Peter J. Engstrom
Peter J. Engstrom

****

CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date)

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature: _____