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 REPLY BRIEF

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I. INTRODUCTION

Appellee and Cross-Appellant Big Lagoon Rancheria, a federally recognized Indian tribe (hereinafter, "Big Lagoon" or the "Tribe"), files this Reply Brief in reply to the Response on Cross-Appeal portion of Appellant/Cross-Appellee State of California's Combined Reply and Response Brief (hereinafter, "ARB," at 32-62).

The State argues, first, that Big Lagoon's cross-appeal is moot and must be dismissed, as the State has now conceded its bad faith in the gaming compact negotiations that were at the heart of the District Court's summary judgment ruling. Big Lagoon agrees that, now that the State has dropped its appeal of the bad faith findings, this Court's affirmance of the District Court decision will indeed mean the Court need not reach the cross appeal. However, the State neglects that, in the event of reversal of the summary judgment, it is not beyond purview that the parties end up back in compact negotiations. Absent a ruling by this Court on the Tribe's cross-appeal, the State will continue to insist on negotiating for environmental protections in the compact and a live controversy will persist.

The State then argues, second, that the District Court correctly ruled the State could seek to impose environmental regulation in an IGRA class III gaming compact negotiation, notwithstanding the conscious limitations of the statute and

the legal boundaries borne of the Tribe's Indian sovereignty. That argument, however, dances around, but does not come to grips with, the very clear Congressional intent, including as expressed in IGRA's legislative history that the statute, which was intended to regulate only gaming, in particular "to shield it from organized crime and other corrupting influences" and "to assure that gaming is conducted fairly and honestly," 25 U.S.C. § 2702(2), was expressly not intended to be used as a tool to allow states to expand their regulatory oversight and assert jurisdiction over Indians on their reservation lands, by imposing environmental and land use restrictions via a gaming compact. Quite to the contrary, the primary purpose of IGRA, 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," 25 U.S.C. § 2702(1), was not intended to be subject to, or subjugated by, state regulators seeking to protect asserted state interests not related to gaming or not consistent with IGRA's stated purposes, nor to interfere with the plenary and exclusive power of the federal government – not states – to deal with Indian tribes.

None of the State's arguments is sufficient to overcome Big Lagoon's cross-appeal. The State in its quest to impose environmental regulation, via the gaming compact negotiation process, overstepped the bounds of IGRA -- contrary to

Congress' clear intent. Respectfully, the District Court erred in concluding otherwise.

II. REPLY TO RESPONSE ARGUMENT ON CROSS-APPEAL

A. Big Lagoon's Cross-Appeal is Not Moot.

The State observes that Big Lagoon has received "complete relief on its IGRA complaint." (ARB 37 and 38.) The State thus takes the position that "[o]ther than the State's jurisdictional challenges, the district court's substantive reasons for finding the State failed to negotiate in good faith are not at risk." (ARB 38.) Big Lagoon agrees that the State's concession of the validity of the bad faith findings means that if this Court affirms, it need not reach the cross-appeal. However, the State further contends, "[t]his is true no matter how the Court decides the State's appeal because there would be no further compact negotiations under any circumstances." (ARB 38.) But this is not necessarily true. It is not beyond purview that in the unlikely event of reversal of the District Court's summary judgment – which, for all the reasons set forth in Big Lagoon's Combined Principal and Response Brief (hereinafter, "BLR's Combined Brief"), there is no cause for – the parties to end up back in compact negotiations pursuant to IGRA. The procedural possibilities in the event of reversal are numerous. The critical question of whether the State may seek to impose environmental and land

use regulation in the context of IGRA gaming compact negotiations remains very much a live question.[1]

B. IGRA Was Not Intended by Congress to be Used by States to Impose Environmental/Land Use Regulatory Jurisdiction over Sovereign Indian Tribes and their Federal Trust Lands via Gaming Compact Negotiations.

The State's response brief fails to recognize the nearly two centuries of federal Indian law that firmly establishes the bedrock principle that states cannot exercise regulatory jurisdiction over Indians on their reservation lands, or stated otherwise that Indians are to be left free from state jurisdiction and control, *except where Congress has clearly expressed an intention to permit such regulation*. (*Cf.* BLR's Combined Brief 48-52, discussing, *inter alia*, *State of Washington Department of Ecology v. U.S. Environmental Protection Agency*, 752 F.2d 1465, 1469 (9th Cir. 1985), and *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-71, 93 S.Ct. 1257, 1261 (1973) ("State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply").) The State does not dispute this basic principle of Indian sovereignty, and it is thus conceded for the purposes of this

[1] The State has described what, instead, should happen in this case: the District Court's summary judgment should be affirmed, after which the court-appointed IGRA mediator who selected the compact proposed by Big Lagoon, which the State did not consent to, shall notify the Secretary of the Interior of his compact selection, pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii), and the Secretary shall then prescribe procedures for gaming in accordance with IGRA, in lieu of a negotiated compact. (ARB 39.)

cross-appeal.[2] Nor does the State acknowledge IGRA's very genesis, and the express policies and purposes which, in establishing the statutory framework meant to "pre-empt the field of governance of gaming activities on Indian lands," upheld the longstanding policy of leaving Indians free from state jurisdiction and control and severely delimited the states' interests and scope of gaming compact negotiations. (*Cf.* BLR's Combined Brief 52-55.)

Even more remarkably, the State heedlessly dismisses, or attempts to dismiss, the perhaps most important authority supporting Big Lagoon's position – namely, the precise and unambiguous language in IGRA's legislative history. Not only did Congress not "expressly consent" in IGRA to state regulatory jurisdiction over sovereign Indian lands, it explicitly declared that IGRA compact negotiations are not to be misused as a means of establishing environmental and land use regulation of Indians and their lands. This conclusion is plain. It is unambiguous. It could not be more clear. And it comes verbatim out of IGRA's legislative history.

[2] Instead, the State dismisses all this precedent and jurisprudential guidance as a mere "parade of horribles and sovereignty violations asserted in Big Lagoon's cross-appeal." (ARB 39.)

1. Congress Did Not Expressly Provide, Nor did it Intend, that Gaming Compacts Could be Used by States for Environmental and Land Use Regulation.

The State effectively concedes that there is nothing in IGRA that expressly creates an exception for environmental or land use regulation of sovereign Indian lands. Based on the overarching legal principles outlined in Big Lagoon's earlier brief (BLR's Combined Brief 48-52), absent that express Congressional exception, no such regulation is permitted.

Rather, the State engages in unpersuasive explication of IGRA terminology such as "directly related to gaming activities" and "public interest". In doing so, the State takes pains to ignore the plain language of the statute itself and its legislative history. (*Cf.* BLR's Combined Brief 57-60.) Tellingly, the State in its response fails to account for the only, or most, express statement of Congressional intent as it relates to environmental and land use regulation recorded in the legistlative history of IGRA:

> 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 (daily ed. Sept. 26, 1988) (statement of Rep. Coelho) (emphases added). Similarly, Senator Inouye stated at the time IGRA was enacted:

> 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 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 (daily ed. Sept. 15, 1988) (statement of Sen. Inouye) (emphasis added) (cited with approval in *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1029 n. 10 (9th Cir. 2010)).

Moreover, as 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. Comm. on Indian Gaming Regulatory Act, S. Rep. No. 100-446, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084 (emphasis added).

Thus, the pointed express statements of Congressional intent are diametrically contrary to the State's position and the District Court's ruling. Plainly, Congress did not intend in enacting IGRA to consent to or allow for states to use the compacting process to begin regulating environmental and land use

issues on sovereign Indian lands.[3]

The foregoing declarations from Congress could hardly be clearer. Yet, despite this clear and repeated statement of intent and admonition that the IGRA compacting methodology should "solely" be utilized in the "one narrow area" of "the threat of corruption and infiltration by criminal elements in class III gaming," the State has historically ignored, and continues to ignore, Congress' intent. The State's compact negotiations undeniably were not directed at this one narrow area of regulating "gaming activities," but rather were admittedly aimed more broadly

[3] The State tries to shoehorn the limitless panoply of environmental and land use conditions it sought to impose on Big Lagoon here under the rubric of "standards for the operation of gaming activity" and other subjects "directly related to the operation of gaming activities" (ARB 46 *et seq.*), and seeks refuge in the words "size and capacity of the proposed facility," as mentioned in the legislative history (ARB 49). But these references must be read within the context of the entirety of the legislative history discussed above. For example, in regards to the "size and capacity" reference, had the State, in the compact negotiations below, simply said to Big Lagoon "we want your facility to be limited to X-hundred gaming devices" or, potentially, "Y-thousand square feet," and not otherwise attempted to regulate environmental and land use issues via a compact, it might well have been a much different negotiation. But, as is undisputed, the State's compact demands here went far beyond the mere size and capacity of the proposed gaming operation or anything else related to "standards" for the operation of gaming or "maintenance" of a gaming facility They included all manner of other requirements aimed at "protecting and regulating development of environmentally sensitive habitat." (*Cf.* BLR's Combined Brief 46 n. 20.) Regardless, the State is not arguing on appeal merely that compact negotiations under IGRA may appropriately include the "size and capacity" of the proposed gaming facility, but instead that they may include environmental protections and land use restrictions in the broadest sense.

at "protecting and regulating development of environmentally sensitive habitat." (ARB 50.)[4]

It is instructive to consider that this is not the first time, or the first way in which, the State has sought to use the IGRA compacting process improperly. Similar overzealous efforts were the subject of this Court's decision in *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010), *cert. denied sub nom*, 131 S.Ct. 3055, 180 L.Ed.2d 886 (2011). While the *Rincon* case did not focus on State attempts at environmental and land use regulation, *Rincon's* reasoning is applicable here as this Court considered there similar arguments advanced by the State in support of its efforts to justify general fund revenue sharing – namely, that these taxation requirements were somehow "directly related to gaming activities" and in the asserted "public interest." This Court rejected those State arguments in *Rincon*, as it should again here, for the Court's analysis there is equally applicable here.

[4] It bears reiterating that IGRA was struck as a compromise between and among Indian tribes, the federal government, and states partly in order to address the states' concerns about infiltration of organized crime and unfair gaming practices. (BLR's Combined Brief 52-54.) Yet, the size of a casino's signage, the building materials and colors, the thickness of the vegetation planted on the premises, the kinds of light bulbs it uses, and so forth (*see id.* 46 n. 20) have absolutely nothing to do with regulating gaming per se. Those types of restrictions serve a totally different State agenda than protecting the integrity of gaming, and one that is wholly outside the intended scope of IGRA.

As this Court confirmed in *Rincon*, IGRA does not confer any such broad authority for use of the compacting methodology, 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 potential adverse criminal effects. *See* 602 F.3d at 1032 and 1045; *see also* 25 U.S.C. § 2710(d)(3)(C). *Rincon* thus held: "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 1028-29. Still, as it did in *Rincon*, the State argues here that demanding environmental and land use regulation is in the "public interest". There are doubtless countless things any state would consider to be in the public interest, but which Congress deliberately did not intend states to be able to regulate through the vehicle of a compact negotiation. Hence this Court specifically rejected these same "state interest" arguments in *Rincon*. Having quoted Senator Inouye's intentional comments about the "one narrow area" of legitimate State interest recognized in IGRA[5], this Court stated:

[5] *Rincon* 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. (*Cf.* BLR's Combined Brief 55-60.)

> According to § 2702, IGRA is intended to promote tribal development, prevent criminal activity related to gaming, and ensure that gaming activities are conducted fairly. In *Coyote Valley II* we construed the meaning of subjects "directly related to the operation of gaming" in § 2710(d)(3)(C)(vii) broadly to include revenue sharing because the RSTF is consistent with the plain language of § 2702 (listing tribal economic self-sufficiency as one of IGRA's purposes). *See Coyote Valley II*, 331 F.3d at 1111. By contrast, we cannot read § 2710(d)(3)(C)(vii) broadly here to include general fund revenue sharing because none of the purposes outlined in § 2702 includes the State's general economic interests. *The only state interests mentioned in § 2702 are protecting against organized crime and ensuring that gaming is conducted fairly and honestly.* § 2702(2); *see also* S. Rep. No. 100-446, at 2, 4, *as reprinted in* 1988 U.S.C.C.A.N. at 3072-73, 3075.

602 F.3d at 1034 (emphasis added).[6] Under this same analysis, neither can the statute be read so broadly as to include the State's environmental and land use interests.

[6] The State does not like this Court's decision in *Rincon*, and seems still to be litigating that case. The State there argued a position contrary to this Court's conclusion in that case, i.e., a losing argument. The State then petitioned for a writ of certiorari from the Supreme Court in response to that decision, unsuccessfully. And that decision was one of the legal bases for the District Court's determination here that the State had failed to negotiate for a compact in good faith. Regardless, *Rincon* is sound precedent. It cannot be either relitigated or ignored. Yet, the State would minimize much of *Rincon*, and one key aspect in particular, as mere "dicta." (ARB 52.) But in fact this Court's reference in *Rincon* to Senator Inouye's statements captured in the legislative history of IGRA, *supra* p. 7, were relevant to the issues before the Court in *Rincon*, including the fundamental requirement that "IGRA limits permissible subjects of negotiation in order to ensure that tribal-state compacts cover only those topics that are related to gaming and are consistent with IGRA's stated purposes". 602 F.3d 1028-29 (citing, *inter alia*, 25 U.S.C. § 2702,

In summary, the State's argument that IGRA provides some general basis for a state to negotiate for anything that it considers to be in "the public interest" would eviscerate or emasculate IGRA. Congress was clear: compacts are not to be used by states to regulate Indian tribes "in other areas such as taxation, land use, environmental, and water rights." The State's continuing contention that the public interest generally gives it sway to insist upon things that have nothing directly to do with the express policies and purposes of IGRA is without legal basis. It is contrary to the clear Congressional intent of the statute, as recognized in *Rincon*.

2. The District Court's Ruling re Environmental and Land Use Regulation via Compact Negotiation Does Not Accord with Congress' Intent in IGRA.

The principal legal support for the State's contention that the District Court did not err in concluding that environmental and land use issues are proper subjects for gaming compact negotiations under IGRA is, perhaps not surprisingly, the District Court's decision itself. (ARB 41, 46-48, 49, 52-53, 55.) Indeed, the State contends that the District Court must be right, insofar as she ruled four times that environmental mitigation could be an appropriate subject for gaming compact negotiations. (ARB 47.) But a mistaken conclusion does not become any less mistaken by virtue of it simply being repeated more stridently or loudly. And in

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and 134 Cong. Rec. S12643-01, and S12651 (1988) ("There is no intent on the part of Congress that the compacting methodology be used in such areas as taxation, water rights, environmental regulation, and land use. . . .")).

throwing all its weight behind the District Court's conclusion in this respect, the State is neglecting to truly account for the clear legislative history, discussed above, including as it is highlighted in the *Rincon* decision.

The District Court's restrictive interpretation of the applicability of IGRA's legislative history, and scope of *Rincon*, is, respectfully, wrong, as is the State's continued reliance on that interpretation. The District Court read into the legislative history, and *Rincon*, limitations that simply are not there, e.g., "In other words, the legislative history does not state that issues such as environmental protection and land use may *never* be included in a tribal-State compact, but only that the State may not use the compacting process as an excuse to regulate these areas more generally." (ER 45 (emphasis in original).)[7] But the legislative history is unambiguous and contains no such "regulating more generally" limitation. Rather, that recorded history states directly and forcefully, among other things, "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*

[7] The State's assertion that in the compact negotiations it "did not seek to impose state law, regulation, or authority upon Big Lagoon" (ARB 43) warrants a response. The exceptionally long list of matters or areas over which the State was seeking to impose environmental and land use regulation and oversight through a compact is highlighted in Big Lagoon's combined brief. (BLR's Combined Brief 46 n. 20, citing Supp. ER 149-151 ("Development Conditions") and Supp. ER 078-083 and 125-129.) If this extensive list of conditions does not constitute environmental and land use law, regulation, or authority, then what does?

land use". *Supra* pp. 6-7.[8] Similarly, though the District Court intimated that environmental mitigation measures based on the location of a tribe's gaming facility represent a state interest (ER 047), *Rincon* holds otherwise: "*The only state interests mentioned in § 2702 are protecting against organized crime and ensuring that gaming is conducted fairly and honestly.*" 602 F. 3d at 1034. In each of these respects, the District Court's reasoning is diametrically opposed to the clear legislative history and case law.[9]

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[8] The State's attempt to distinguish its proposed compact terms here, by describing them as "very specific" measures designed to mitigate environmental impacts caused by the construction and operation of the gaming facility (ARB 53), as distinct from something evidencing the State's intention to "use the compacting process as a tool for regulating tribes generally" (*id.*), posits a distinction without a difference. Under the State's rationale, it could simply identify and negotiate for, in the context of a proposed compact, specific mitigations or conditions intended to address every conceivable environmental impact and land use implication under the law, or every conceivably applicable state law, and say that such a comprehensive "specific" approach does not constitute regulating a tribe "generally". This makes no sense. Instead, the State through its use of specific design measures and other environmental restrictions, including the extensive "Tribal Environmental Impact Report" process and requirement of "Intergovernmental Agreements" with various State and local agencies, has sought to do what Congress declared should not be done: "The Committee does not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands." S. Comm. on Indian Gaming Regulatory Act, S. Rep. No. 100-446, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 3084 (quoted at ARB 53). When a state seeks to impose environmental and land use measures via a compact, as the State has done here, the compact is being used as a subterfuge for imposing state jurisdiction on tribal lands.

[9] Likewise, respectfully, the conclusory logic expounded by the District Court below that "compliance with [environmental mitigation] measures does not run counter to tribal interests" (ARB 53-54) is both unreasoned and tautological. The

Another indicia of the District Court's erroneous determination that environmental protection may appropriately be negotiated by a state in the compacting process is rooted in the Court's earlier conclusion, in 2002, that "environmental and land use issues are subjects that may be 'directly related to the gaming activities' under § 2710(d)(3)(C)(vii)" because "[t]he construction and operation of a gaming facility has direct impacts on many environmental and land use concerns." (ARB 47.) Based on this reasoning, the District Court held that "[e]nvironmental and land use laws can also be considered 'standards for the operation of [gaming] activity and maintenance of the gaming facility' under § 2710(d)(3)(C)(vi)." (ARB 47.) Respectfully, however, these conclusions are not well taken. Environmental and land use concerns are not directly related to the operation of gaming activities; they may be directly related to the construction of a building, such as a casino or a hotel, yet not even under the "but for" test espoused by the State – i.e., "but for" a class III gaming compact, there ostensibly would not be a casino built at Big Lagoon, and there would be no resulting environmental impacts, etc. – could they even arguably be said to directly relate to the operation

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Court's unarticulated rationale seems to have been that if agreeing to environmental regulation gets a tribe a compact, that is good for the tribe and in its best interests, or that whatever is good for the environment is also good for the tribe. But by definition, State regulation, where it interferes with a tribe's tribal government, self-sufficiency and economic development, *cf.* 25 U.S.C. § 2702, runs counter to tribal interests.

of gaming activities. In point of fact, as has been admitted by the State,[10] and repeatedly recognized by it and others in state legislative hearings and other proceedings (BLR's Combined Brief 61 and DC Docket No. 142 at Exh. O, p. 18 n. 14), if Big Lagoon decided to build a hotel on its rancheria property today, it could do so, with no environmental and land use regulation or intrusion by the State. Similarly, if Big Lagoon decided to construct a class II gaming facility on the site – which under IGRA does not require a gaming compact with the State, *cf.* 25 U.S.C. § 2710(b)(1), *with* 25 U.S.C. § 2710(d)(1)(C) – it could do so, and in doing so could conduct such gaming activities on the site without environmental or land use regulation or intrusion by the State. Thus, under the State's attenuated "but for" argument, Big Lagoon would be free to design, construct, and operate a multi-story class II gaming casino and hotel project, with hundreds of class II gaming devices and thousands of daily visitor patrons, and remain wholly exempt from any State or local environmental and land use regulatory interference or oversight; but if Big Lagoon wanted to include a single class III gaming device and thus needed a class III gaming compact with the State, then the State would be free to impose its regulatory and environmental land use jurisdiction across the entire

[10] The State admits that the "State's role may be limited if Big Lagoon were to build something other than a class III gaming facility." (ARB 56-57.) And, the State contends, "[i]t is because Big Lagoon seeks to build a class III gaming facility that IGRA allows the State to negotiate for environmental mitigation measures in a class III gaming compact." (ARB 57.)

project. This is nonsensical. More importantly, this illustrates what Congress intended when it said that gaming compacts are not to be used for other areas such as land use and environmental regulation, and why IGRA "set[s] boundaries to restrain aggression by powerful states." S. Comm. on Indian Gaming Regulatory Act, S. Rep. No. 100-446, at 33 (1988) (statement of Sen. McCain), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3103.

3. The Parties' Previous Compact Negotiations Do Not Alter Congress' Intent in IGRA.

To provide necessary context, it bears observing that the State in its response brief is speaking out of both sides of its mouth. On the one hand, it asserts that Big Lagoon in the underlying compact negotiations "fail[ed] to indicate to the State that environmental mitigation could not be negotiated under IGRA." (ARB 41.) On the other hand, the State points out repeatedly, District Judge Wilken four times "rejected Big Lagoon's argument that the State cannot negotiate for environmental protection in the compacting process," three of these rulings coming in the related IGRA bad faith case before the latest round of compact negotiations which concluded in late 2008. (ARB 47 and 41.) The point is, of course Big Lagoon found itself across the bargaining table from the State which was insistent upon negotiating environmental conditions, because the District Court had ruled as early as 2002 that environmental issues could be an appropriate subject for compact negotiations, and Big Lagoon thus had no choice but to entertain the State's

environmental demands. No judgment was entered, however, until November 2010, and there was thus until then no final judgment from which to take an appeal.[11] Stated otherwise, having essentially been ordered by the District Court, three times according to the State, that it had to negotiate over environmental mitigation sought by the State, Big Lagoon had no choice but to engage on that topic in negotiations at the State's insistence. Still, there is no question that Big Lagoon disputed, over the course of more than a decade's worth of IGRA litigation and compact negotiations, the State's right to use the compacting process to impose environmental and land uses restrictions on the Tribe and its sovereign land. (*See, e.g.*, ER 542-571, Supp. ER 059-077, and State's Supp. ER 11 and 13-16.) There is also no disputing that the District Court took a contrary view, as early as the year 2002, which cabined the Tribe in its subsequent negotiations with the State. There is thus absolutely no significance, much less damaging admissions, to be drawn from the fact that the parties compact negotiations circa 2008 included the topic.

[11] It was not until November 2010 that the District Court finally entered summary judgment, for either party, when she granted Big Lagoon's motion for summary judgment based on the finding that the State had negotiated in bad faith insofar as (1) it was seeking to impose a tax on the sovereign Tribe in violation of IGRA by demanding that the Tribe pay a percentage of its gaming revenues into the State's general fund, and, alternatively, (2) it was insisting upon environmental mitigation measures by the Tribe without offering meaningful concessions in return, also in violation of IGRA. (ER 025-050.)

Nevertheless, the State argues that because Big Lagoon was potentially willing to accept, as part of a negotiated compact, some environmental mitigation measures, *ipso facto* the law must allow states to require such measures. (ARB 42 *et seq*.) But the law is clear that a tribe is entitled to negotiate on a government-to-government arms-length basis, in the exercise of its sovereignty, things that it is not otherwise required to accept. *See, e.g.*, *Rincon*, 602 F.3d at 1042 ("tribal governments [may] elect to relinquish rights in a tribal-State compact that they might have otherwise reserved") (citations omitted). Nor should it be at all surprising that Big Lagoon, or other tribes for that matter, have found themselves in a position of having to negotiate over, and in some instances accept, compact terms insisted upon by the State of California, perhaps especially given the aggressive way the State has attempted to employ its power and position in such negotiations. As an example, as this Court well knows (and as touched on above), the State had previously insisted upon, and extracted from many other tribes unwilling or unable to spend a decade in IGRA litigation, a commitment to pay a share of gaming revenues into the State's general revenue fund; this ploy, however, was outlawed in *Rincon*, wherein the Ninth Circuit determined that the State's initiative to "make tribes pay their fair share" through such general revenue fund contributions was in violation of IGRA. *See* 602 F.3d at 1019. In much the same way the State, dating back to the Schwarzenegger administration, has made it an

objective to impose through compact negotiations regulatory measures to mitigate off-reservation environmental impacts. (*Cf.* DC Docket No. 88 at Exh. N, pp. 62-70.) That equally lawless stratagem is at the heart of this cross-appeal.

In conclusion, that Big Lagoon was willing to consider possible environmental mitigation measures after the District Court's 2002 ruling, whether in the context of the Barstow compact or otherwise,[12] or before *Rincon* was decided, or for that matter even after *Rincon* in the interest of demonstrating its sensitivity to the issues and being seen as a good neighbor, does not change IGRA or its legislative history.

[12] The Barstow compact and circumstances in 2005 are distinguishable from the current facts, though the State would like to contend they somehow establish controlling precedent. Yet, as the District Court recognized, just because the Tribe was willing to agree to certain terms in the Barstow compact several years ago, does not mean that the State could in good faith negotiate for those same terms in post-Barstow negotiations or rely on the Tribe's prior position. (ER 041-042.) Plus, there are significant distinguishing features of the Barstow compact and circumstances that minimize whatever comparative relevance or importance the State would now ascribe to it, including the sheer magnitude of the planned Barstow project, with 4,500 gaming devices (2,250 per tribe), and more than 100,000 square feet of gaming (among nearly 400,000 total square feet of development), and projected annual revenues upwards of $100 million (perhaps as high as $200 million), which made the costs of various administrative reviews and agreements, as well as any potential environmental mitigation in the comparatively resource-free setting of Barstow, financially bearable. (DC Docket No. 142 at Exh. O, pp. 3-4.) By comparison, the market opportunities in Humboldt County are magnitudes less significant, as the potential economic development from a gaming development project there is but a fraction of what Barstow had to offer. (*Id.*) Simply said, a project on the Tribe's historical rancheria lands will not generate enough revenue to fund the level of burdens and commitments the Barstow project would have paid for, even if IGRA allowed them or the Tribe were agreeable to them.

In continuing its argument, the State says "it did not insist or ask Big Lagoon to obtain state or local agency permits or approval for its project." (ARB 44.) In point of fact, the State's proposed compact would have required Big Lagoon to conduct negotiations with countless and unidentified State and local agencies covering a multitude of areas, toward consummation of binding "Intergovernmental Agreements" which would have, to the State's or local agencies' satisfaction, satisfied their environmental and land use and other requirements. (BLR's Combined Brief 47 n. 20, citing DC Docket No. 84 at BL000993-BL001001.) Moreover, failing contractual agreements with those countless and unidentified State and local regulatory agencies, under the State's compact proposal the Tribe would have had to subject itself to, and waive its tribal sovereign immunity in, binding third-party arbitration. (*Id.*) The State-conceived "Tribal Environmental Impact Report" compact provisions and mechanism were a transparent and not so subtle way of attempting to impose environmental, land use and other regulation over the sovereign Tribe and its federal trust lands, while ostensibly not running afoul of the District Court's previous orders, but in any event obtaining regulatory authority over land use and environmental issues in direct contravention of the express Congressional intent underlying IGRA. In some respects, the State's insistence that Big Lagoon subject itself to the future effective jurisdiction of various unnamed State and local regulatory agencies is

more offensive to IGRA and Congress' intent than the State's initial insistence, a decade ago, before the District Court instructed it otherwise, that Big Lagoon simply comply with all state laws and regulations. (*Cf.* State's Supp. ER 8, 12-13 and 15.)

In the end, the historical course of compact negotiations in this case, against the backdrop of the District Court's prior orders, does not alter Congress' intent.

4. The NIGC Has Not Departed From Congress' Intent in IGRA.

The State has confused the role, purpose, or relevance of the National Indian Gaming Commission with respect to compact negotiations. (ARB 57-58.) It is indeed true that the NIGC has promulgated regulations to implement a system of oversight to carry out its (the NIGC's) responsibilities with regard to requiring that tribal gaming facilities be constructed and maintained and that gaming operations be "conducted in a manner which adequately protects the environment and the public health and safety." 25 C.F.R. § 502.22 (2008). However, those regulations require that *tribes themselves* enforce such laws, not states, and expressly envisages standards, laws, codes, policies, etc. *adopted by the tribe*. *See* 25 C.F.R. § 502.22(f). Furthermore, the regulation's language that refers to "standards under a tribal-state compact or Secretarial procedures" indicates only that such compacts or Secretarial procedures for gaming standards are included within the list of possible "laws, resolutions, codes, policies, standards or procedures" listed

previously in the regulation. It cannot be interpreted to suggest or require that a state may in an IGRA compact compel negotiation of things that IGRA does not allow. Indeed, the rulemaking history is directly contrary to what the State is positing about 25 C.F.R. § 502.22. That history reaffirms that the Commission was meant to oversee and monitor environmental, public health and safety plans conceived by tribal governments, submitted by tribal governments, implemented by tribal governments, and self-enforced by trial governments. *See* National Indian Gaming Commission, Environment, Public Health & Safety, 73 Fed. Reg. 6019 (Feb. 1, 2008). The NIGC in its proposed rules analysis said nothing about requiring gaming compacts to include environmental regulation, nor allowing states a role in environmental enforcement. The State's false inference that the NIGC has reached an administrative interpretation that IGRA was somehow meant to require that class III gaming compacts include environmental protections (ARB 59) is wrong.

5. The Indian Canon of Construction Requires Liberal Deference to Congress' Intent as Indicated in IGRA and Reinforced in the Legislative History.

The State devotes much of its response to trying to distinguish and prevent the application of the Indian canon of statutory construction, also known as the "*Blackfeet* presumption" (*cf.* ARB 58-61, *with* BLR's Combined Brief 61-62), perhaps indicates how fearful of the canon the State is. Regardless, and more

importantly, the State's argument that the canon applies only where there is statutory ambiguity, and that there supposedly exists no such ambiguity here, is belied by the State's own arguments elsewhere. Indeed, the State's entire argument in favor of the attempted application of environmental and land use mitigation measures in an IGRA compact negotiation is premised upon its asserted interpretation *and expansion of* 25 U.S.C. § 2710(d)(3)(C), subparts (vi) and (vii), which refer, respectively, to the "standards for the operation of such activity and maintenance of the gaming facility, including licensing" and "any other subjects that are directly related to the operation of gaming activities." (ARB 46.) The State's argument, in short, is that environmental and land use measures should fall within the meaning of "standards for the operation of such activity and maintenance of the gaming facility" and "any other subjects that are directly related to the subject of gaming activities," and/or serve the "public interest." (ARB 46 *et seq.*, 50 and 59-60.) The State is thus urging an asserted ambiguity, by attempting to shoehorn into the statute environmental and land use regulation, which are mentioned nowhere in IGRA and indeed which are expressly forbidden by the legislative history.

Just as in *Rincon*, where this Court held that whether gaming revenue sharing fits into section 2710(d)(3)(C)(vii)'s phrase "directly related" was the subject of significant dispute between the parties, thereby warranting application of

the Indian canon of construction,[13] so too here is there a pitched dispute as to whether land use and environmental mitigation measures are directly related to the operation of gaming activities within the meaning of the statute, or "standards for the operation and maintenance" can be considered within the statute. Again, it is only through an asserted ambiguity about what subparts (vi) and (vii) mean or are meant to include, that the State can even attempt to insinuate land use and environmental conditions and regulation into a compact negotiation notwithstanding IGRA's directly contrary legislative history. *Cf. Rincon*, 602 F.3d at 1028 n. 9. The Indian canon of construction compels a contrary reading of IGRA, a presumption that the statute is to be construed liberally in favor of the Tribe and "most favorably" towards its interests, consistent with Congress' intent and the trust responsibility and obligation owed by the federal government to Indians.

III. CONCLUSION

The telltale signal why Big Lagoon's cross-appeal is necessary and well-grounded in the law is found in the very first sentence of the State's argument

[13] *E.g.*, "construing those terms [including 'public interest'] broadly in favor of the State's interests would be inconsistent with our obligation to construe IGRA most favorably towards tribal interests." *Rincon*, 602 F.3d at 1032 (citing *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 728-30 (9th Cir. 2003) (discussing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985)); *see also* S. Rep. No. 100-446, at 15, *as reprinted in* 1988 U.S.C.C.A.N. at 3085).

section on environmental protection: "Big Lagoon, unlike any tribe in the State, proposed to locate a casino open all days and hours on the coastal shoreline, in direct view of both a dark sky State park and wilderness recreation area, and immediately adjacent to a State ecological preserve containing threatened and endangered species." (ARB 41.) This argumentative point by the State, however, is irrelevant in the context of IGRA compact negotiations and IGRA bad faith litigation. IGRA was intended to allow states a narrow opportunity to regulate *gaming*, not to regulate *environmental* and *land use* issues.

On its cross-appeal, Big Lagoon respectfully asks this Court, in the event of reversal of the District Court's summary judgment in favor of Big Lagoon, to reverse the District Court's ruling that environmental and land use mitigation measures are a permissible subject for a state to impose in compact negotiations.

Dated: May 10, 2012

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), Big Lagoon Rancheria's reply brief complies with the type volume limitation of Federal Rule of Appellate Procedure 28.1(e)(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 6,795 words.

Dated: May 10, 2012

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