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BIG LAGOON RANCHERIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

BIG LAGOON RANCHERIA, a Federally Recognized Indian Tribe,

Plaintiff,

v.

STATE OF CALIFORNIA,

Defendant.

Case No. CV-09-1471-CW

PLAINTIFF BIG LAGOON RANCHERIA'S OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Date: **June 25, 2009**
Time: **2:00 p.m.**
Courtroom: **2, Fourth Floor**
Judge: **The Honorable Claudia Wilken**

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I. INTRODUCTION

Defendant State of California would have the Court dismiss this action based on legal arguments it did not see fit to assert during nearly ten years of litigation in the related case, Big Lagoon Rancheria v. State of California, Case No. CV-99-4995-CW. There is no basis for the State's new contention that while a federally recognized Indian tribe can require a state to enter into negotiations for a compact for Class III gaming, the tribe has no recourse under the Indian Gaming Regulatory Act to remedy bad faith negotiations by the state. A similarly new contention, and also one unasserted in the previous decade of litigation before this Court, is the State's argument that the Governor is an indispensable party. The Governor's joinder is not required, and is easily enough cured by amendment – and the State's insistence begs the question why the Governor is indispensable now, when he and his predecessors were not so for the previous decade? The State's bad faith in compact negotiations, in denying the Tribe a means to promote tribal economic development and self-sufficiency as it has granted dozens of other tribes in California, has carried over into this case in the form of spurious and dilatory defenses and motion practice. The State's motion for judgment on the pleadings is meritless and should be denied, so that this case can be expeditiously prosecuted and the State's bad faith can be adjudicated once and for all.

II. STATEMENT OF FACTS

As described in greater detail in Plaintiff Big Lagoon Rancheria's Complaint (see Complaint Pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, filed on April 3, 2009, at ¶¶ 1-52), Big Lagoon and the State have been engaged in attempted negotiations and/or litigation for the past fifteen years, aimed at concluding a tribal-state compact permitting the Tribe to conduct Class III gaming on its ancestral lands, according to the provisions of the federal Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. ("IGRA").

On August 17, 2005, Big Lagoon and the State entered into a conditional Settlement Agreement, for the purpose of settling their ongoing litigation in this Court. (See Agreement between the State of California and the Big Lagoon Rancheria for the Settlement of Litigation, Location of a Class III Gaming Facility and Restrictions on the Use of Lands Contiguous to the Big Lagoon, "Settlement Agreement," attached to Defendant State of California's Request for Judicial

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Notice in Support of Its Motion for Judgment on the Pleadings, dated May 12, 2009, at Exhibit F). Under the Settlement Agreement, the parties agreed to execute a tribal-state compact permitting class III gaming, for ratification by the California Legislature, in exchange for the Tribe acceding to various development and operating conditions requested by the State. (See id., at ¶ 6.)

The Settlement Agreement expressly contemplated the possibility of further litigation, in the event that the Legislature did not ratify that compact (referred to as the "Barstow Compact), and the Tribe failed to obtain a new compact, and specifically provided that Big Lagoon could sue the State under the provisions of IGRA. (Id. at § N, ¶ 19.) Stated verbatim,

> "If a new compact is not executed between the State and the Tribe within 120 days of the date these compact negotiations commence, notwithstanding the provisions of 25 U.S.C. § 2710(d)(7)(B)(i) the Tribe shall have the right to file suit pursuant to the provisions of 25 U.S.C. § 2710(d)(7)(B)(i) and the State shall have the right to assert any and all defenses it may have to said suit, except that the State hereby waives any right it might have to claim that said suit is premature by virtue of the provisions of 25 U.S.C. § 2710(d)(7)(B)(i)."

(Id.) The parties' Agreement also provided an explicit waiver of the State's sovereign immunity, as part of accepting the benefits and binding effect of the Agreement: "The State has waived its sovereign immunity by virtue of the provisions of Government Code section 98005." (Id. at § K, ¶ 16.)

Indeed, that the Tribe and the State both contemplated the resumption of litigation under IGRA is supported by papers filed by both sides following conclusion of the Settlement Agreement. In the Joint Case Management Statement filed on September 8, 2006, and signed by the Attorney General's office, the parties stated that the Legislature had failed to ratify the compact during its 2006 legislative session, and that Big Lagoon intended to prepare for litigation under the provisions of IGRA. (See Joint Case Management Statement, filed on September 8, 2006, attached as Exhibit 1 to Big Lagoon's Request for Judicial Notice.) While the State disagreed with Big Lagoon's proposed schedule for resuming litigation, it acknowledged that litigation could resume if any of the triggering events provided by the Settlement Agreement, such as the failure to conclude a new compact, occurred. (Id.) The State acknowledged the Tribe's right to file a supplemental complaint,

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pleading any additional facts that had developed since the filing of the Tribe's original complaint. (Id.)

This agreement and recognition were reiterated by both parties in a further Joint Case Management Statement, filed on March 19, 2007. (See Joint Case Management Statement, filed on March 9, 2007, attached as Exhibit 2 to Big Lagoon's Request for Judicial Notice.) Here again, the State said that the Tribe would have the right to resume litigation, upon the happening of certain events; and that the Tribe would be able to file a supplemental complaint. Id.

Thereafter, on November 13, 2007, Big Lagoon and the State filed a joint stipulation, dismissing the action without prejudice, for the purposes of resuming further compact negotiations. (See Joint Case Management Statement, filed on November 9, 2007, attached as Exhibit 3 to Big Lagoon's Request for Judicial Notice; Stipulation of Dismissal, filed on November 13, 2007, attached as Exhibit 4 to Big Lagoon's Request for Judicial Notice). The stipulated dismissal was expressly without prejudice, in keeping with the Settlement Agreement's agreed sequence of resumed compact negotiations, and as is necessary to return to court under IGRA.

III. ARGUMENT

A. Legal Standard for Ruling on Rule 12(c) Motion

The standard for ruling on a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings is essentially the same as the standard for ruling on a Fed. R. Civ. P. 12(b)(6) motion to dismiss. Judgment on the pleadings will only be appropriate where the movant is entitled to judgment as a matter of law. Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1990). The court must assume the truthfulness of all the material facts alleged in the complaint, and all inferences reasonably drawn from these facts must be construed in favor of the responding party. General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church, 887 F.2d 228, 230 (9th Cir. 1989). If a complaint raises issues of fact, that if proved, would support a plaintiff's recovery, a defendant will not be entitled to judgment on the pleadings. Id. at 230.

If matters outside of the pleadings are presented to the court, the motion for judgment on the pleadings "must be treated as one for summary judgment under Rule 56." See, Fed. R. Civ. P. 12(d),

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Hal Roach, 896 F.2d at 1550. Declarations setting forth additional evidence, or other items of evidence, not incorporated by the complaint, will be considered "matters outside the pleadings." See Hal Roach, 896 F.2d at 1550 (the Ninth Circuit held that the motion at issue was properly styled as a motion for summary judgment, since the trial court had considered an attorney's declaration and evidence extraneous to the complaint in reaching its decision).

Summary judgment is only appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Accordingly, if there is any genuine dispute of material fact, then a motion for summary judgment may not be granted.

The present motion filed by the State is incorrect as a matter of law, and also implicates disputed questions of fact arising out of the parties' intent in entering into a Settlement Agreement, if not the voters' and Legislature's intent in passing ballot initiatives and enacting legislation. Whether the Court determines that the State's motion is properly styled as a motion for judgment on the pleadings, or a motion for summary judgment, either way, the State's motion must be denied.

B. Big Lagoon's Complaint is Not Barred By the Eleventh Amendment

The State argues that Big Lagoon's suit is barred by the provisions of the Eleventh Amendment and the enactment of Cal. Gov't Code § 12012.5(e). The State's novel argument glosses over the fact that various courts within the Ninth Circuit have acknowledged the continuing validity of Cal. Gov't Code § 98005, and gives short shrift to the reality that the State explicitly consented to suit in its Settlement Agreement with Big Lagoon. The State's attempts to argue that, under the principles of statutory interpretation, § 12012.5(e) should take precedence over § 98005, are flawed. Section 12012.5(e) contains no language repealing the provisions of § 98005, nor does its legislative history indicate any such intent. In the absence of such language in the text of the statute and legislative history, courts have routinely rejected the "implied repeal" of earlier enacted statutes.

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1. The provisions of Cal. Gov't Code § 98005 make clear that the State of California has consented to being sued under the provisions of IGRA, and Cal. Gov't Code § 12012.5(e) does not alter the effect of § 98005

During the time that Big Lagoon was seeking compact negotiations with the State more than a decade ago, there were several developments in the law concerning regulation of Indian gaming rights. The two most pertinent developments for purposes of the State's present motion were the passage of Proposition 5 and Proposition 29. Proposition 5 was placed on the November 3, 1998 ballot. The proposition contained provisions creating a model compact for class III gaming, defining its terms and conditions, as well as provisions requiring "the Governor to negotiate with an Indian tribe for a compact that differs from the one defined in the measure if so requested by a tribe." (See Proposition 5: Official Title and Summary Prepared by the Attorney General, attached to State's Request for Judicial Notice, Exhibit E at 165.) The Proposition passed, and was codified at Cal. Gov't Code § 98005. The statute provided for the following waiver of sovereign immunity, in cases brought to enforce Indian gaming rights:

> The State of California also submits to the jurisdiction of the courts of the United States in any action brought against the state by any federally recognized California Indian tribe asserting any cause of action arising from the state's refusal to enter into negotiations with that tribe for the purpose of entering into a different Tribal-State compact pursuant to IGRA or to conduct those negotiations in good faith, the state's refusal to enter into negotiations concerning the amendment of a Tribal-State compact to which the state is a party, or to negotiate in good faith concerning that amendment, or the state's violation of the terms of any Tribal-State compact to which the state is or may become a party.

Government Code § 98005 remains on the books and is good law. Indeed, while other language in § 98005 was later invalidated, this provision stood.

Section 98005 is clear enough on its face to obviate the need for a legislative history lesson as urged by the State. "Employing the traditional tools of statutory construction – the statute's plain language governs unless it is ambiguous, legislative history should only be consulted if the plain language is ambiguous or renders a tortured reading of the statute, and statutes benefiting Indian tribes are construed liberally in their favor," Artichoke Joe's v. Norton, 216 F.Supp.2d 1084, 1120 (E.D. Cal. 2002), the Court should find that the State has in § 98005 waived its sovereign immunity

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with respect to "bad faith" suits brought under IGRA, such as the present suit. Section 98005's plain language is unambiguous, and the inquiry can stop there.

Proposition 29 was placed on the March 7, 2000 ballot. Passage of the proposition would allow eleven compacts approved by the Governor and the Legislature in 1998 to go into effect (the "Pala Compacts"). The Proposition also contained a provision discussing the Governor's ability to waive the State's sovereign immunity. More specifically, the provision stated:

> the Governor is authorized to waive the state's immunity to suit in federal court in connection with any compact negotiated with an Indian tribe or any action brought by an Indian tribe under the Indian Gaming Regulatory Act (18 U.S.C. § 1166 et seq. and 25 U.S.C. § 2701 et. seq.).

(See Proposition 29: Official Title and Summary Prepared by the Attorney General, attached to State's Request for Judicial Notice, Exhibit A.) Proposition 29 passed, and the language of the Proposition was codified at Cal. Gov't Code § 12012.5. Proposition 29 did not repeal or nullify Proposition 5.

Nevertheless, the State argues that when Cal. Gov't Code § 12012.5(e) became effective on March 8, 2000, it somehow overwrote the provision of Cal. Gov't Code § 98005. (Memorandum of Points and Authorities in support of Motion for Judgment on the Pleadings 9:15-16, *hereinafter referred to as* "State's MPA" 8:23-26). The State's new-found position is extreme, as it would have the effect of barring all suits brought against the State pursuant to IGRA by sovereign immunity, unless these suits were filed before March 8, 2000. This result is untenable, and unsupported by the law.

In its motion, the State overlooks the fact that there have been a number of cases filed after March 8, 2000, against the State of California under the provisions of IGRA, including suits brought by tribes against the State alleging bad faith negotiations pursuant to IGRA, and following the enactment of § 12012.5[1]. In none of these cases did the courts determine that the Eleventh Amendment barred the tribes' suits.

[1] The following suits were all filed after March 8, 2000; and regardless of the ultimate disposition of the actions, none of them were held to be barred by the State's sovereign immunity. See, Cachil Dehe Band of Wintun Indians v. California, Case No. 2:07-CV-01069-FCD-KJM, filed in the Eastern District of California on June 4, 2007; Mechoopda Indian Tribe of Chico Rancheria v. Schwarzenegger, Case No. CIV-S-03-2327 WBS/GGH, filed in the Eastern District of California on

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Indeed, in numerous IGRA "bad faith" cases, and in other cases related to gaming rights in California, courts have explicitly recognized that § 98005 continues to have validity and permits the State of California to be sued for violations of IGRA, even in suits filed after March 8, 2000. See, e.g., Mechoopda Indian Tribe of Chico Rancheria v. Schwarzenegger, 2004 U.S. Dist. LEXIS 8334 (E.D. Cal. 2004) (acknowledging that § 98005 applies to suit filed on November 6, 2003, with no argument by the State to the contrary); Artichoke Joe's v. Norton, 216 F.Supp.2d 1084 (E.D. Cal. 2002) (stating that California has consented to suit under provisions of IGRA by passage of § 98005); Artichoke Joe's v. Norton, 333 F.3d 712, 716 n7 (9th Cir. 2003); see also, Cachil Dehe Band of Wintun Indians v. California, 2008 U.S. Dist. LEXIS 5183 (E.D. Cal. 2008); Flynt v. California Gambling Commission, 104 Cal.App.4th 1125 (Cal. Ct. App. 2002); Rincon Band of Luiseno Mission Indians v. Schwarzenegger, 290 Fed. Appx 60 (9th Cir. 2008) (unpublished opinion, in which the State was represented by Deputy Attorney General Peter H. Kaufman, noting that the waiver effected by Sec. 98005 still valid in appropriate circumstances).

Like the plaintiffs' suits in the foregoing cases, the present litigation between Big Lagoon and the State falls squarely into the categories envisioned by the statute as to when the State's waiver of sovereign immunity applies, as the suit is based on a "cause of action arising from the state's refusal to enter into negotiations with that tribe for the purpose of entering into a different Tribal-State compact, pursuant to IGRA or to conduct those negotiations in good faith." See Cal. Gov't § 98005. Under a compact for class III gaming under IGRA, the federal government cedes its primary regulatory oversight role, and permits states and Indian tribes to develop joint regulatory schemes through the compacting process. See generally, Artichoke Joe's, 216 F.Supp.2d at 1093. But with that civil regulatory scheme comes the State's obligation to negotiate a compact in good

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November 6, 2003; and Quechan Tribe of the Fort Yuma Indian Reservation v. California, case no. 06-CV-0156-RCAB, filed in the Southern District of California on January 24, 2006. (See Exhibits 5-8 to Big Lagoon's Request for Judicial Notice.)

In Quechan, the dispute between the Tribe and the State was resolved by a Stipulated Dismissal, and the Tribe and the State ultimately concluded a compact. (See Exhibits 9-11 to Big Lagoon's Request for Judicial Notice.) If suits under IGRA are in fact barred by sovereign immunity, the State need not have resolved its dispute with the Quechan by agreeing to dismiss the action and concluding an amended compact.

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faith, 25 U.S.C. § 2710(d)(3)(A),[2] or be sued in federal court for not doing so, 25 U.S.C. § 2710(d)(7)(B). Accordingly, the State's motion should be denied, and Big Lagoon should be permitted to continue with this IGRA "bad faith" litigation against the State.

2. Cal. Gov't Code § 98005 and § 12012.5(e) when read together continue to enable suits against the State of California for violations of IGRA

The State interprets the two provisions of Cal. Gov't Code § 98005 and Cal. Gov't § 12012.5 as existing in conflict with each other, and argues that where a conflict exists between two statutes, the latest expression of the legislative will should prevail. (See State's MPA 9:15-16).

First and foremost, nothing in the text or legislative history of § 12012.5 indicates that it was intended to repeal or overwrite § 98005. Second, in the absence of clear guidance from the legislature, the relevant canons of statutory interpretation strongly disfavor "implied repeals" and mandate that statutes be read, where possible, to co-exist with each other. Finally, considerations of equity and fairness weigh in favor of enabling the remedy provided by § 98005.

The State would have this Court read § 12012.5 to overwrite § 98005 – an outcome that was not intended by either the California Legislature or the electorate, that is contrary to well-accepted principles of statutory interpretation, and that goes against state and federal policies aimed at promoting Indian gaming rights.

a. The language of § 12012.5 does not explicitly repeal § 98005, and was not intended to repeal the earlier enacted statute

The State argues that § 12012.5(e) repeals § 98005. Yet, it is not clear from the plain language and legislative history of § 12012.5(e) what effect the provision was intended to have upon § 98005. § 12012.5 does not state that it effectively repeals § 98005, nor does it explicitly state that it restores the State's immunity from suit waived by the earlier provision.

In the absence of such express language in the text of the statute, the State looks to various pieces of legislative history to divine the intent of the electorate. Yet, the legislative history is less than clear, and none of the material clearly indicates that the intent behind Proposition 29 was to

[2] In such tribal/state negotiations over the conduct of class III gaming, the tribe is recognized as a sovereign entity entitled to negotiate on roughly equal footing with the State. Flynt v. California Gambling Control Commission, 104 Cal.App.4th 1125, 1135 (2002).

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retract the State's earlier, explicit, consent to be sued, as given and enacted by Proposition 5. If the legislative history indicates anything about the intended effect of § 12012.5, it shows that the provision was drafted during a time when the State was engaged in compact negotiations with the Pala Band of Mission Indians, and some ten other tribes seeking class III gaming compacts at the time, and that the provision was primarily intended to apply to those eleven tribes.

To support its argument that the electorate intended to overwrite § 98005, the State points to the fact that one of the arguments raised in opposition to SB 1502, whose text was adopted for use in Proposition 29, was that "the bill does not include provisions to compel the Governor to negotiate in good faith with all the tribes seeking a Class III gaming compact." (See State's MPA, 11:1-6; Bill Analysis of SB 1502, amended June 18, 1998; see State's Req. for Jud. Not. Ex. C. at 119). Yet that language is not a definite indication that the State withdrew its consent to be sued in any and all suits pertaining to tribal gaming. While the bill may not have included provisions to require the Governor to negotiate, the language of the bill was silent about the intended interaction of the provision with IGRA and § 98005.

If anything, the legislative history associated with AB 1442/SB 1502/SB 287 indicates that the bills, and the ballot proposition based on such bills, were primarily intended to address the implementation of the compact with the Pala Tribe, and to deal with some ten other similarly situated tribes who were seeking class III gaming rights outside of the Pala Compact at the time. During the time that the Legislature was developing what would become § 12012.5, the State was engaged in compact negotiations with some ten other tribes, who wanted class III gaming rights comparable to those given to the Pala Band. (Bill Analysis of SB 1502, amended June 18, 1998; see State's Req. for Jud. Not. Ex. C. at 116-118). Several tribes concluded compacts with the State in July and August 1998. Id. At the time that SB 1502 was being reviewed by the State Senate, three San Diego tribes – the Viejas Band of Kumeyaay Indians, the Barano Band of Mission Indians, and the Sycuan Band of Mission Indians – were still negotiating compacts with the State. Id. Even after these tribes concluded compacts with the State, they were given the option to terminate their compacts and to enter into the alternative compact set forth by Proposition 5 in the November 1998 ballot. (Bill Analysis of SB 287, amended August 25, 1998; see State's Req. for Jud. Not. Ex. C. at

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158). This history shows that the language of § 12012.5 was developed during a time when the State was actively engaged in negotiations with a small group of tribes, and indicates that the language of the provision enabling the Governor to waive the State's immunity was primarily intended to address suits arising out of the possibility of continued compact negotiations with these ten tribes, and was not intended to have broader effect.

b. Under well-accepted principles of statutory interpretation, the "implied repeal" of statutes is expressly disfavored

The State argues that because § 12012.5 is the latest expression of "the electorate's legislative will," and because it is supposedly irreconcilable with § 98005, it must prevail over the earlier enacted statute. (State's MPA 10:10-12). But § 12012.5 is not irreconcilable with § 98005, as it may be read to have a limited application. Additionally, the State's argument that § 12012.5 prevails over § 98005 as a later-enacted statute is similarly questionable, because it ignores relevant canons of statutory interpretation, which disfavor "implied repeals" of earlier enacted statutes.

The State's argument ignores other fundamental principles of statutory interpretation. Where a later statutory provision appears to conflict with an earlier statutory provision, but fails to comment specifically on its effect on the earlier provision, courts have expressly disfavored the "implied repeal" of the earlier statute. Additionally, where two statutory provisions appear to conflict, courts will try to read the two provisions in a "holistic" fashion, so as to enable their co-existence. "When two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Morton v. Mancari, 417 U.S. 535, 551 (1974); WILLIAM ESKRIDGE, PHILIP FRICKEY AND ELIZABETH GARRETT, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1099 (2007).

"Implied repeals" are expressly disfavored by the courts. See, Morton v. Mancari, 417 U.S. 535, 549-50 (1974); Nigg v. United States Postal Serv., 555 F.3d 781 (9th Cir. 2009). If the statute itself, and the associated legislative history are silent, an implied repeal should not take effect. Morton, 417 U.S. at 550. Implied repeals may occur if two statutes are in "irreconcilable conflict;" however, it is not sufficient that two statutes compel differing results, and the earlier statute will only be deemed repealed if there is a "repugnancy between the words or purposes of the two statutes."

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Nigg, 555 F.3d at 788 (internal citations omitted). Finally, as the Supreme Court noted in Morton, that where an earlier statute has very specific provisions, and arises out of a specific policy context, a later enacted, more general statute cannot control the earlier one.[3] "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." Id. at 550.

In the present case, § 12012.5 contains no language explicitly repealing § 98005, nor does its legislative history evidence any intent to override the earlier enacted statute. The two statutes should not be read as in irreconcilable conflict or repugnant to each other, as the relevant legislative history and case law show that the two statutes were enacted with different intentions about the extent of their application.

Proposition 5 was put on the ballot as part of an effort to create a broad statutory scheme to resolve uncertainties with regard to class III gaming in the State of California, and to balance the objectives of the State and tribes seeking gaming rights. See, Cal. Gov't Code § 98001; Hotel Employees and Restaurant Employees Int'l Union v. Davis, 21 Cal.4th 585 (1999). A key part of that scheme was to provide tribes with the ability to sue the State under the provisions of IGRA – something that the California Supreme Court recognized in Hotel Employees, and chose to preserve, even while striking down other provisions of § 98005. The Court stated that § 98005 "is obviously intended to restore to California tribes the remedy provided in IGRA" that had been nullified by Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996). Id. By contrast, the legislative history of Proposition 29 is silent about its intention to override the provisions of § 98005, and contains only general language concerning the State's waiver of immunity. Furthermore, its legislative history indicates that it was put forward primarily as a means of implementing the tribal-state compact with the Pala Band, and regulating discussions with other tribes seeking class III gaming rights at the time.

The text of § 98005 – as stated explicitly in the code, and as confirmed repeatedly by the courts – was enacted as part of a broad statutory scheme to regulate Indian gaming rights in

[3] In Morton, the statute at issue was intended to create hiring preferences for Native Americans in the Bureau of Indian Affairs, and the Supreme Court held that a later enacted statute, with more general anti-discrimination provisions, did not take precedence over the earlier statute. Id.

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California, and a key part of that scheme was the specific intention to provide tribes in California the ability to sue the State under the provisions of IGRA. By contrast, § 12012.5 and its legislative history are silent about the intended effect upon the right to sue the State under the provisions of IGRA, as conferred by § 98005. Consequently, consistent with the principles of statutory interpretation outlined by the Supreme Court in Morton and other cases, the general language of § 12012.5 should not be read to override § 98005.

c. Considerations of Equity and Fairness Mandate that the Relevant Code Sections Be Read so as to permit suits against the State of California brought pursuant to the provisions of IGRA

As discussed above, § 98005 establishes that the State of California has made an explicit commitment to permitting itself to be sued in actions related to tribes' rights under IGRA. The State argues that the passage of § 12012.5 overwrites California's consent to suit conferred by § 98005. Yet to interpret § 12012.5(e) as prohibiting all suits brought under IGRA, unless such suits were brought before March 8, 2000, would leave any tribe seeking to enforce its statutory rights without a remedy. This result is inconsistent not only with the earlier and clearly expressed intent of California's electorate, to permit the State to be sued for violations of IGRA, but is inconsistent with the policy goals of IGRA and general principles of equity and fairness.

IGRA was enacted to provide a framework for regulating the gaming activities of Indian tribes – and a crucial part of this framework was to give Indian tribes a means of compelling states to negotiate gaming compacts, in exchange for giving the states the ability to regulate Indian gaming. The legislative history of the statute shows that its provisions were intended to balance the interests of tribes and states – namely, the tribes' interest in self-governance, and the states' interest in enforcing state gaming laws and regulating crime. See, United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1300 (9th Cir. 1998). Following the Supreme Court's decision in Seminole Tribe, and prior to the enactment of § 98005, the Ninth Circuit Court of Appeals considered whether Congress would have enacted IGRA, had it known that it would leave tribes without recourse if states failed to engage in good faith bargaining. See id. The Ninth Circuit concluded that Congress specifically designed IGRA with "interlocking checks and balances" to account for both state and tribal interests, and that Congress did not intentionally create a regulatory scheme that would leave a

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tribe with "no legal recourse against a state that allegedly hasn't bargained in good faith." Id. at 1301-1302.

Subsequent to the Ninth Circuit's decision in Spokane Tribe, the California electorate approved Proposition 5 in November 1998, expressly providing California's willingness to be sued for violations of IGRA, and restored the system of checks and balances envisioned by Congress in IGRA. See also, Hotel Employees, 21 Cal.4th 585. As discussed in greater detail above, Proposition 29 was approved in March 2000, but contained no language providing a blanket revocation of the State's consent to suit. Without any clear indication regarding the scope of § 12012.5, it should not be read to contravene § 98005, which explicitly harmonizes California law with Congress' intent in enacting IGRA.

Additionally, to read the provisions of § 98005 and § 12012.5 as the State argues – to excise the former and preclude suits related to IGRA for enforcement of compact terms, unless further consent is obtained from the Governor – would contravene maxims of California jurisprudence intended to promote fairness and equity. California law provides that "for every wrong there is a remedy," and that "an interpretation which gives effect is preferred to one which makes void." Cal. Civ. Code §§ 3523, 3541. The State's interpretation of the Government Code ignores these fundamental principles and would mean that the State is effectively shielded from any litigation involving Indian gaming rights, such that the State could conduct compact negotiations without any accountability for negotiations conducted in bad faith. This result is contrary to Congressional intent in enacting IGRA, is contrary to the intent of the California electorate to align California law with IGRA's goals, and would leave California tribes without any remedy for wrongs committed by the State. In sum, § 98005 has not been invalidated to the courts, repealed by the voters, or amended by the Legislature. It remains the law in California.

3. The Settlement Agreement between the Tribe and the State explicitly provides that the State has waived its sovereign immunity.

Even without ruling on the proper interpretation of the relationship between § 98005 and § 12012.5, the Court should deny the State's motion, as the Settlement Agreement contains an explicit waiver of the State's sovereign immunity which applies to the present litigation. The State

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argues that the Settlement Agreement provides no waiver of the State's sovereign immunity, and that it has reserved the right to raise the defense of sovereign immunity in any later litigation. (State's MPA 13:6-15). Yet, the Settlement Agreement expressly provides that the State waives its sovereign immunity as a condition of accepting the benefits and obligations of the Agreement; one of which is that Big Lagoon shall have the right to bring suit against the State, upon the failure of further compact negotiations. The present suit arises out of precisely the situation contemplated by the Settlement Agreement – Big Lagoon elected to resume litigation after the failure of the original Barstow compact, and subsequent failure of further compact negotiations – consequently, the provisions of the Agreement waiving the State's immunity should apply.

Paragraph 6 of the Settlement Agreement provides an explicit waiver of the State's sovereign immunity, enumerating that by accepting the benefits and obligations of the Agreement, among which are the right to resume litigation after failure of a second round of compact negotiations, "The State has waived its sovereign immunity by virtue of the provisions of Government Code section 98005." (See Settlement Agreement, State's Request for Judicial Notice, Exh. F, at ¶ 19.) It is difficult to conceive of any waiver more explicit. Additionally, it is worth noting that the Settlement Agreement was entered into on August 17, 2005 – long after the provisions of section 12012.5(e) purportedly took effect so as to bar suits against the State. The statement of waiver is clear and unambiguous. It is an express declaration, and it is not couched by any reference to § 12012.5. The State's waiver is as much a statement of the law as a reflection of it. The statement regarding waiver is accompanied by the State's acknowledgments in the Settlement Agreement that the Agreement embodies the entire agreement of the parties (id., ¶ 14), that the State had ample time to investigate the facts and was represented by counsel and relied on the advice of counsel in entering into the Agreement (id., ¶ 15), and that the person signing the Agreement on the State's behalf had authority to do so (id., ¶ 16). The person who signed the Settlement Agreement on behalf of the State, with its waiver of sovereign immunity, is none other than Deputy Attorney General Peter H. Kaufman – the same Peter Kaufman who signed the brief in support of the State's present motion for judgment on the pleadings.

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Moreover, the Settlement Agreement expressly contemplates that the Tribe could resume litigation against the State, in the event that subsequent rounds of compact negotiations failed to yield a new compact. In paragraph 19 of the Settlement Agreement, under the heading "Subsequent Negotiations," the State and Big Lagoon agreed that the Tribe would be entitled to file suit under IGRA if a new compact was not executed within 120 days of the commencement of resumed compact negotiations:

> [The State and Tribe] agree that if a new compact is not executed between the State and the Tribe within 120 days of the date these compact negotiations commence…the Tribe shall have the right to file suit pursuant to the provisions of 25 U.S.C. § 2710(d)(7)(B)(i) and the State shall have the right to assert any and all defenses it may have to said suit, except that the State hereby waives any right it might have to claim that said suit is premature by virtue of the provisions of 25 U.S.C. § 2710(d)(7)(B)(i).

(Settlement Agreement, ¶ 16, see State's Request for Judicial Notice, Exh. F at 191).[4]

Surely it could not have been Mr. Kaufman's or the State's hidden intention in entering into the Settlement Agreement to have expressed a waiver of sovereign immunity, and agreed to new IGRA litigation in the event resumed compact negotiations failed following a stipulated dismissal of the earlier suit, all the while planning to assert the Eleventh Amendment in such a subsequent case. Such subterfuge would have amounted to an actionable promise without intention to perform, perhaps even a fraud upon the Court in the context of a judicially supervised settlement.

Moreover, the State's proffered interpretation of the Settlement Agreement flies in the face of basic contract principles. See Mechoopda Indian Tribe of Chico Rancheria v. Schwarzenegger, 2004 U.S. Dist. LEXIS 8334, *27 (decided March 12, 2004); Jeff D. v. Andrus, 899 F.2d 753, 759-60 (9th

[4] The State argues that the holding in Bennett v. City of Atlantic City, should inform the present case. 288 F.Supp.2d 675, 682-83 (D.N.J. 2003). In Bennett, the court held that a consent decree resulting from civil rights litigation brought by the United States against the State of New Jersey did not function as a waiver of New Jersey's sovereign immunity in a later anti-discrimination suit brought by individual firefighters. Id. The court held that the consent decree could be interpreted as waving immunity for suits regarding compliance with the decree, but that the decree did not effect a broader waiver of the State's immunity. Id. at 683. However, Bennett is distinguishable from the present dispute, since identical parties are involved, and Big Lagoon's claims arise out of the settlement agreement. Section N of the Settlement Agreement clearly contemplates that if the State and Tribe engage in new compact negotiations, following the failure of the original Barstow Compact, and that if this additional round of negotiations fails to yield another compact, that the Tribe will be able to bring suit against the State under the provisions of IGRA.

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Cir. 1990); Kinzli v. City of Santa Cruz, 539 F.Supp. 887, 900 (N.D. Cal. 1982). The Settlement Agreement is to be interpreted "so . . . as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Cal. Civ. Code, § 1636. "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Cal. Civ. Code, § 1641. The court "must presume that the provisions [of the Settlement Agreement] were intended to be consistent." Pinoleville Indian Cmty. V. Mendocino County, 684 F.Supp. 1042, 1046 (N.D. Cal. 1988).

In the Settlement Agreement, the parties agreed to a reticulated sequence of conditions and events to resolve a dispute and govern subsequent events, to wit: execute a Settlement Agreement, enter into a compact for class III gaming at an alternative site, seek approval of the compact by the Secretary of the Interior and ratification by the Legislature as of a date certain, commence new compact negotiations if any of the stated contingencies occur (such as the Legislature failing to ratify), and failing execution of a new compact have the Tribe file suit pursuant to IGRA, 25 U.S.C. § 2710(d)(7)(B)(i). The State's strained interpretation now would not give effect to the parties' intentions in the Settlement Agreement, and would not give effect to, inter alia, the waiver of sovereign immunity in paragraph 16 or the provision for a new IGRA lawsuit in paragraph 19. It cannot be the State's argument that its reservation in paragraph 19 of the right to assert defenses includes by implication a sovereign immunity defense, as this would negate or nullify the previously articulated express waiver and the Tribe's express remedy of filing suit.

Well-established contract principles prevent this outcome. The remedies provided by the Settlement Agreement would be meaningless, if the Tribe was precluded from suing the State on account of the State's reservation of its sovereign immunity. It is a well-settled rule of contract interpretation that a contract should be interpreted so as to give meaning to each of its provisions, "since an agreement is interpreted as a whole, it is assumed in the first instance that no part of it is superfluous." Brinderson-Newberg Joint Venture v. Pac. Erectors, 971 F.2d 272, 277 (9th Cir. 1992); citing, Cal. Civ. § 1641; RESTATEMENT (SECOND) OF CONTRACTS § 203(a) cmt. B (1979). The contract here should be interpreted so as to give effect to all of its provisions, which permit Big

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Lagoon to sue the State under the provisions of IGRA. Absent such recourse, the State would have no reason to negotiate a compact in good faith, and no consequences for negotiating in bad faith.

In the end, while the State is of course entitled to assert the appropriate defenses to this suit, that does not alter the fact that the parties expressly agreed that the Tribe would have the right to file suit pursuant to IGRA after the failure of subsequent compact negotiations, and that the State waived its sovereign immunity. At the very least, the argument between the State and the Tribe as to the intended effects of the Settlement Agreement, shows that there is a factual dispute between the parties regarding interpretation of the Agreement, making resolution of this matter inappropriate via a motion for judgment on the pleadings, or motion for summary judgment. Accordingly, the State's motion should be denied.

C. The Failure to Name Governor Schwarzenegger as a Party is Not Fatal to Big Lagoon's Suit Against the State of California

1. Big Lagoon is not required to name Governor Arnold Schwarzenegger as a party to the complaint

The State observes that under California law, only the Governor of the State is empowered to negotiate gaming compacts. (State's MPA 14:10-17). It takes the position that pursuant to Fed. R. Civ. P. 19(a)(1), Big Lagoon must join the Governor in this suit, since without the Governor, the Tribe supposedly cannot otherwise obtain relief on its claims. Id. This is an argument the State did not consider there to be grounds for in the parties' previous related case, spanning 1999 to 2007.

The party requesting dismissal for failure to join a necessary and indispensable party bears the burden of persuasion. See, Artichoke Joe's v. Norton, 216 F.Supp.2d 1084, 1118 (E.D. Cal. 2002). Courts will not require joinder, unless they cannot provide "meaningful relief" in the absence of the party sought to be joined. Northrop Corp. v. McDonnell Douglas Corp., 705 F. 2d 1030, 1043-44 (9th Cir. 1983). Even if joinder is required, pursuant to Rule 15, permission to amend the complaint and join a necessary party should be "freely given when justice so requires." See, Cachil Dehe Band of Wintun Indians v. California, 2008 U.S. Dist. LEXIS 5183 (E.D. Cal. 2008) (granting leave to add governor in IGRA bad faith suit). The State fails to meet its burden of showing that the Governor is a necessary or indispensable party, and does not show that this Court cannot provide

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"meaningful relief" in the absence of naming the Governor as a party. In any event, the Governor can be added as a defendant if need be.

The State argues that the Governor alone has exclusive authority to negotiate and execute tribal-state gaming compacts, pursuant to authority granted to him under Art. 4, § 9(f) of the California Constitution and Cal. Gov't Code § 12012.25(d). These provisions do indeed provide the Governor with the authority to negotiate gaming compacts with Indian tribes. Nevertheless, these provisions do not require that the Governor must be joined as a "necessary" or "indispensable" party to every action seeking relief under IGRA. Indeed, there are situations where "bad faith" could be imputed to branches of the State, other than the Executive, and where suit is properly brought against other branches of the State.[5] Regardless, if the Governor is the only State official with authority to negotiate gaming compacts, then an order against the State of California is effectively an order against the Governor, and any relief necessary can be obtained by such an order.

The State also argues that if the State is named as a defendant, it can only be reached through its officers and agents, and that a cause of action for declaratory or injunctive relief can only be brought against the agency or officer(s) with the capacity to perform the act to be compelled. (State's MPA 15:7-15, citing Hagood v. Southern, 117 U.S. 52, 69 (1886); State v. Superior Court, 12 Cal.3d 237, 255 (1974)). The State's reliance on Hagood is misplaced, as it does not stand for the proposition that the State can only be sued through its officers and agents. Hagood considers the extent of the State's Eleventh Amendment immunity, and concludes that the State there had not consented to suit, and that it in fact cannot be sued through its officers under the circumstances of that case. 117 U.S. at 71. Here, given that the State has consented to suit under IGRA, pursuant to

[5] For example, in Quechan Tribe of the Fort Yuma Indian Reservation v. State of California, 06-CV-0156-RCAB, the Quechan Tribe alleged that the State Legislature of California engaged in "bad faith" under IGRA by failing to ratify an amendment to the Tribal-State compact, despite considering such an amendment for nearly two years. (See Complaint Pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §2701 et seq., Quechan Tribe of the Fort Yuma Indian Reservation v. State of California, 06-CV-0156-RCAB, filed in the Southern District of California on January 24, 2006.; attached as Exhibit 8 to Big Lagoon's Request for Judicial Notice).

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§ 98005, Hagood has no bearing upon the present case, and certainly has no bearing upon whether the Governor must be joined as a party.[6]

Moreover, a two-part test applies to motions to dismiss for failure to join a necessary and indispensable party. See Artichoke Joe's, 216 F.Supp. at 1118; Washington v. Daley, 173 F.3d 1158, 1167 (9th Cir. 1999). First, the court must decide if the party is necessary to the suit, i.e., if complete relief is not possible among those already parties to the suit; second, if the party is necessary, and if he cannot be joined, the court must decide if he is "'indispensable,' so that in 'equity and good conscience' the suit should be dismissed." Artichoke Joe's, at 1118. The inquiry is a practical one and fact specific, and is designed to avoid the harsh results of rigid application. Id. Here, Governor Schwarzenegger is not necessary, as an order finding the State (which negotiates through him) has failed to negotiate in good faith, and compelling the State to conclude a tribal-state compact (which he would negotiate), necessarily implicates him. Nor is the Governor indispensable, as the State of California, represented by the Attorney General, can adequately represent his legal interests.

2. Even if Big Lagoon is required to join Governor Schwarzenegger as a party, the Court has the discretion to permit Big Lagoon leave to amend its complaint

Even if Big Lagoon were required to join Governor Schwarzenegger as a party, Fed. R. Civ. P. 15(b) provides that the Court has the discretion to permit a plaintiff to amend its complaint, and that the Court "should freely give leave when justice so requires." The alleged pleading defect asserted by the State is thus easily enough cured.

This principle has been applied in other cases brought under IGRA – and specifically, has been used in suits brought after March 8, 2000, to permit the joinder of the Governor of California, when the Governor was not named in the original complaint. See, Cachil Dehe Band of Wintun

[6] In State v. Superior Court, the underlying dispute involved a denial of a zoning permit by a state zoning commission – the California Supreme Court upheld demurrers granted by the trial court in favor of the State and commission employees, stating that the demurrers were properly granted, since only the Commission could provide relief. 12 Cal.3d 237, 255. The case does not mandate the joinder of the Governor in IGRA cases, nor does it establish that effective relief cannot be obtained from the State of California in IGRA cases. Accordingly, in bringing suit against the State pursuant to IGRA, it is sufficient for a tribe to name the State.

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Indians v. California, 2008 U.S. Dist. LEXIS 5183 (E.D. Cal. 2008)(permitting leave to amend to add the governor as a party).

The State's argument that Big Lagoon's complaint should be dismissed because it fails to join a required and indispensable party, the Governor of California, is meritless. (See State's MPA 6:16-22.) At worst, Big Lagoon should be granted leave by the Court to amend its complaint to add the Governor as a party. Dismissal of a suit for failure to join a party is a "drastic remedy," and one that "should be employed only sparingly." See, Teamsters Local Union No. 171 v. Keal Driveaway Co., 173 F.3d 915, 918 (4th Cir. 1999). There would be no prejudice to the State by providing Big Lagoon with leave to amend its complaint.

IV. CONCLUSION

Understandably, the State of California does not want to lose this case. But for the State to attempt to avoid having to litigate this case is less comprehensible, especially in light of the grounds asserted in its motion. Undeniably, the State has waived its sovereign immunity, either by unambiguous statute or by express contract. For the State to now assert that it cannot be sued for bad faith negotiations is inexplicable, and this aspect of its motion must be rejected and denied.

Similarly, whether or not the Governor is a necessary and indispensable party defendant is of no practical moment, as the Governor can be joined easily enough by amendment, without any prejudice to the State. Accordingly, his absence is not grounds to dismiss the suit.

For the foregoing reasons, the Court should deny the State's motion.

Dated: May 28, 2009

Respectfully submitted,

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