EDMUND G. BROWN JR.
Attorney General of California
SARA J. DRAKE
Supervising Deputy Attorney General
PETER H. KAUFMAN
Deputy Attorney General
State Bar No. 52038
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2020
Fax: (619) 645-2012
E-mail: peter.kaufman@doj.ca.gov
Attorneys for Defendant State of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BIG LAGOON RANCHERIA, a Federally Recognized Indian Tribe, Plaintiff, **v.** **STATE OF CALIFORNIA,** Defendant.	CV 09-1471 CW **DEFENDANT STATE OF CALIFORNIA'S NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS; AND MEMORANDUM OF POINTS AND AUTHORITIES** Date: June 18, 2009 Time: 2:00 p.m. Courtroom: 2, Fourth Floor Judge The Honorable Claudia Wilken Action Filed: 4/3/2009

TO PLAINTIFF BIG LAGOON RANCHERIA, AND TO ITS ATTORNEY OF RECORD, PLEASE TAKE NOTICE that on June 18, 2009, at 2:00 p.m., or as soon thereafter as the matter may be heard in Courtroom 2, Fourth floor of the above-captioned Court located at 1301 Clay Street, Oakland, California, Defendant State of California (State) will move the Court pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings dismissing the Complaint pursuant to the Indian Regulatory Act filed on April 3, 2009 (Complaint).

The motion will be made on the grounds that:

1. The Court lacks jurisdiction to consider the Complaint in that the Complaint is barred by Defendant State's sovereign immunity under the Eleventh Amendment. As a result, the State is entitled to judgment as a matter of law.

2. The Court lacks jurisdiction to consider the Complaint in that Plaintiff Big Lagoon Rancheria has failed to join Governor Arnold Schwarzenegger, who is a required party within the meaning of Rule 19(a)(1) of the Federal Rules of Civil Procedure. As a result, the State is entitled to judgment as a matter of law.

The motion will be based on this Notice, the Memorandum of Points and Authorities, and upon such other matters as may be adduced prior to or at the hearing on the motion.

Dated: May 12, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
SARA J. DRAKE
Supervising Deputy Attorney General

/s/Peter H. Kaufman
PETER H. KAUFMAN
Deputy Attorney General
Attorneys for Defendant State of California

EDMUND G. BROWN JR.
Attorney General of California
SARA J. DRAKE
Supervising Deputy Attorney General
PETER H. KAUFMAN
Deputy Attorney General
State Bar No. 52038
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2020
Fax: (619) 645-2012
E-mail: peter.kaufman@doj.ca.gov
Attorneys for Defendant State of California

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BIG LAGOON RANCHERIA, a Federally Recognized Indian Tribe, Plaintiff, **v.** **STATE OF CALIFORNIA,** Defendant.	CV 09-1471 CW **MEMORANDUM OF POINTS AND AUTHORITIES** Date: June 18, 2009 Time: 2:00 p.m. Courtroom: 2, Fourth Floor Judge The Honorable Claudia Wilken Action Filed: April 3, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

Page

STATUTES

CONSTITUTIONAL PROVISIONS

COURT RULES

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

INTRODUCTION

Pursuant to his authority under article 4, section 19(f) of the California Constitution, Governor Arnold Schwarzenegger negotiated and executed a tribal-state class III gaming compact (First Compact) authorizing Plaintiff Big Lagoon Rancheria (Big Lagoon or Rancheria) to operate slot machines, lotteries and certain types of banked and percentage card games in California free from non-tribal competition. The execution of that compact, resulted (under the terms of a settlement agreement) in the dismissal of a lawsuit filed by the Rancheria asserting that the State of California (State) had negotiated for that compact in bad faith. (Case No. 99-4995 CW in this Court.) The First Compact expired by its own terms, however, when the California Legislature pursuant to its authority under the same California constitutional provision declined to ratify that compact. Thereafter, in compliance with the settlement agreement, the Rancheria and the State commenced negotiations for a Second Compact.

Dissatisfied with the course of those negotiations, Big Lagoon has commenced this suit alleging that the State has failed to negotiate for a Second Compact in good faith in violation of its purported obligations under the Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166-1168, 25 U.S.C. §§ 2701-2721 (IGRA).

STATEMENT OF FACTS

In *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996), the United States Supreme Court found that Congress was unable to abrogate state immunity from suit under the Eleventh Amendment when it enacted IGRA. It held, therefore, that unless a state has unequivocally waived its immunity to a suit brought by an Indian tribe alleging a violation of IGRA, a state may not be sued in federal court for any such violation.

In 1998, the California Legislature (Legislature) ratified eleven tribal-state class III gaming compacts negotiated by the then Governor, which were known as (and referred to here as) the "Pala Compacts," by enactment of California Government Code § 12102.5. Subsection (e) of section 12012.5 [1] was passed to allow the Governor to assert the State's Eleventh Amendment

[1] All future references to "section 12012.5(e)" are to subsection (e) of California Government Code § 12012.5.

sovereign immunity against tribal suits asserting that the Governor and the State had violated IGRA – thereby assuring that the Governor could not be compelled judicially to negotiate and execute a compact. Certain tribes opposed ratification of the Pala Compacts and enactment of section 12012.5(e). Their opposition to that section was based, in part, on the fact that it did not contain a provision that would allow the Governor to be compelled judicially to negotiate and execute a compact.

Accordingly, while the Legislature was considering section 12012.5(e) and the ratification of the Pala Compacts, certain tribes opposed to ratification of the Pala Compacts and enactment of section 12012.5(e) qualified a statutory initiative known as Proposition 5 for the November, 1998 ballot. This measure authorized a specific tribal-state gaming compact for operation of slot machines, off-track horse race wagering, and banking and percentage card games by Indian tribes, and contained provisions compelling the State to execute a prescribed form of compact for that purpose. It also guaranteed the tribes' ability to enforce the measure through a provision that waived the State's Eleventh Amendment immunity not only to suits enforcing Proposition 5, but also to any suit alleging a violation of IGRA. This waiver was added by Proposition 5 as Government Code section 98005.

Governor Pete Wilson signed the bill containing section 12012.5(e) on August 28, 1998.

After the enactment of Proposition 5, and before that measure could go into effect, certain tribes opposed to the Legislature's action ratifying the Pala Compacts initiated the State's referendum process – thereby asking the People to determine whether the Pala Compacts and section 12012.5(e) should go into effect. That referendum was placed on the March 7, 2000 ballot as Proposition 29.

Meanwhile, at the general election of November 3, 1998, the People of California approved Proposition 5, including California Government Code section 98005[2] containing a waiver of the State's sovereign immunity to suits alleging compact violations or violations of IGRA.

[2] All future references to "section 98005" are to California Government Code section 98005, enacted as part of Proposition 5.

In August 1999, the California Supreme Court struck down, as violative of the California Constitution, every provision of Proposition 5 except section 98005. *Hotel Employees and Rest. Employees Int'l Union v. Davis*, 21 Cal.4th 585, 614 (1999).

Thereafter, however, on March 7, 2000, the People of California approved the provisions of section 12012.5(e) authorizing the Governor to assert the State's Eleventh Amendment sovereign immunity to a suit alleging the Governor and the State have violated IGRA, thereby assuring that the Governor cannot be compelled judicially to negotiate and execute a compact.

SUMMARY OF ARGUMENT

In 1998, a dispute existed between certain California Indian tribes and the Legislature over whether the State should be required by statute to waive its sovereign immunity in all cases so that federal courts would possess jurisdiction to issue an order compelling the Governor to negotiate and execute a compact. The Legislature's limited sovereign immunity waiver view was embodied in section 12012.5(e). The broader waiver of sovereign immunity is found in section 98005. That dispute was ultimately resolved when California voters approved Proposition 29 and section 12012.5(e) in March, 2000.

Though initially the voters supported the blanket waiver of sovereign immunity by enacting Proposition 5 and section 98005 in November, 1998, the California electorate's subsequent approval of Proposition 29 and section 12012.5(e) on March 7, 2000 constitutes the electorate's decision to support the Legislature's view and to either amend or implicitly repeal the blanket waiver of the State's sovereign immunity contained in section 98005. Established rules of statutory construction require that laws must be construed to give them meaning and effect. In this case, section 12012.5(e), granting the Governor the authority, in the exercise of his discretion, to waive the State's sovereign immunity to a suit alleging a violation of IGRA, would have no meaning or purpose if that immunity was already waived as a result of section 98005. Thus, in order to give section 12012.5(e) meaning, that section must be construed to modify the blanket waiver of immunity in section 98005, and allow the Governor to assert that immunity in the exercise of his discretion.

This result is also consistent with the rule that a waiver of sovereign immunity can only be effectuated through an express and unequivocal demonstration of the State's intent to waive its immunity from suit and that no waiver can be implied from a statute unless there is no other reasonable construction of its terms. Thus, while the electorate's action can only be construed as an amendment or repeal of section 98005, even if there were any ambiguity with respect to the electorate's view, that ambiguity must be resolved in favor of the State's immunity from suit because section 12012.5(e) and the California electorate's action with respect to that provision can reasonably be construed to amend or repeal the blanket waiver of the State's sovereign immunity in section 98005.

As a consequence, the electorate's approval of section 12012.5(e) deprives federal courts of jurisdiction to rule on an Indian tribe's assertion that the State has violated IGRA – unless that suit was filed prior to March 8, 2000 (the effective date of section 12012.5(e)), or the Governor has unequivocally waived the State's immunity. In this case, the filing date of this suit is after March 7, 2000, and Governor Schwarzenegger has not waived the State's immunity.[3] Thus, the Rancheria's suit must be dismissed.

Further, the Complaint in this case should be dismissed because it fails to join a required and indispensable party, Governor Arnold Schwarzenegger, who is the only State official with the authority to negotiate and execute a class III gaming compact on behalf of the State. This Court lacks the ability to grant the relief requested by Big Lagoon – an order compelling the State to execute a Second Compact – unless it has jurisdiction over the only official authorized by the California Constitution to negotiate and execute such a compact. The Governor, however, has not been joined and cannot be joined because he has not waived his immunity from suit.

ARGUMENT

I. THE ELEVENTH AMENDMENT BARS BIG LAGOON'S COMPLAINT

[3] The Governor has executed numerous compacts and compact amendments subsequent to March 8, 2000. These compacts contain a limited waiver of the State's sovereign immunity as defined by the terms of those compacts and compact amendments. Thus, a suit to enforce the provisions of those compacts may be filed after March 7, 2000 in the appropriate federal court if that suit is authorized by the waiver provision contained in those same compacts.

The Eleventh Amendment to the United States Constitution establishes a rule of state sovereign immunity in the federal courts. The amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of a Foreign State.

The Eleventh Amendment is best understood as "evidencing and exemplifying" a concept of sovereign immunity implicit in the Constitution broader than the language of the amendment might suggest. *Idaho v. Coeur d'Alene*, 521 U.S. 261, 267-68 (1997); s*ee also Blatchford v. Native Village of Noatak*, 501 U.S. 775-76 (1991). In *College Savings Bank v. Florida*, 119 S. Ct. 2219, 2231 n.4 (1999), the Supreme Court noted: "state sovereign immunity, unlike foreign immunity, is a *constitutional* doctrine that is meant to be both immutable by Congress and resistant to trends."

The Eleventh Amendment bars suits in federal court against a state by its own citizens. *Papasan v. Allain*, 478 U.S. 265, 276 (1986). Furthermore, California's sovereign immunity bars suits by Indian tribes filed against it in federal court. The Supreme Court in *Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261, 268-69 (1997) confirmed that:

> In *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779-82 . . . (1991), we rejected the contention that sovereign immunity only restricts suits by individuals against sovereigns, not by sovereigns against sovereigns. Since the plan of the convention did not surrender Indian tribes' immunity for the benefit of the States, we reasoned that the States likewise did not surrender their immunity for the benefit of the tribes. Indian tribes, we therefore concluded, should be accorded the same status as foreign sovereigns, against whom the States enjoy Eleventh Amendment immunity.

There are, however, two established exceptions to the reach of the Eleventh Amendment bar. First Congress can abrogate the states' immunity when it expresses an unequivocal intent to do so pursuant to its authority under Section 5 of the Fourteenth Amendment. *Seminole Tribe of Florida v. Florida*, 517 U.S. at 55. And second, a state can voluntarily waive its Eleventh Amendment immunity by a statute or constitutional provision that includes an unequivocal indication that the state intends to consent to federal jurisdiction. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239-40 (1985). Neither of these exceptions is applicable here.

It is true that Congress attempted to waive the states' sovereign immunity when it enacted IGRA *See* 25 U.S.C. § 2710(d)(7)(A)(i) & (B)(i). However, the Supreme Court held that this attempt to abrogate the states' sovereign immunity was unconstitutional and ineffective. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47. Specifically, the Supreme Court held that Congress lacked the constitutional authority under the Indian Commerce Clause, the underlying authority for IGRA, to abrogate the states' Eleventh Amendment Immunity. Thus, Congress has not effectively abrogated the State's immunity to suit by an Indian tribe in federal court. *Id.*

Nor has the State, subsequent to the effective date of section 12012.5(e), waived its sovereign immunity. From and after March 8, 2000, the effective date of that statute, only the Governor has authority to waive the State's sovereign immunity to IGRA actions. Section 12012.5(e) specifically provides:

> 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., sec. 1166 et seq. and 25 U.S.C Sec. 2701 et seq.).

The Governor has not waived the State's Eleventh Amendment sovereign immunity to the Rancheria's lawsuit.

A. Section 98005 has no Application to Complaints filed After March 7, 2000.

In its Complaint, Big Lagoon does not mention section 12012.5(e). Instead the Rancheria alleges that:

> Pursuant to California Government Code § 98005, the State has consented to being sued in the courts of the United States under the provisions of IGRA.

(Compl. ¶ 6.)

Section 98005, however, has no application to the facts of this case as a result of the California electorate's approval of Proposition 29 and section 12012.5(e). Once section 12012.5(e) became effective on March 8, 2000, section 98005 became inapplicable to suits filed after March 7, 2000. [4]

[4] Big Lagoon originally filed an action against the State alleging an IGRA violation in (continued…)

This result is consistent with fundamental principles of statutory construction requiring courts: (a) to give meaning and purpose to a statute; (b) to give effect to a later-enacted provision on the same subject where an irreconcilable conflict exists between statutes; and (c) to find a sovereign immune where ambiguity exists as to whether the sovereign intended to waive its immunity from suit and a reasonable construction of the applicable statutes operates to preserve the state's immunity from suit.

B. The Authority Granted the Governor in Section 12012.5(e) Would be Meaningless if the Broad Waiver of the State's Sovereign Immunity to IGRA Suits in Section 98005 were still Applicable. Thus, the Provisions of Section 12012.5(e), the Latest Expression of the People's Will, must Prevail over Those in Section 98005.

In this case, the broad waiver of sovereign immunity in section 98005 to IGRA-based suits is irreconcilable with the grant of authority to the Governor in section 12012.5(e) to waive the State's immunity to such suits, should he so choose. Simply stated, it would be meaningless to invest authority in the Governor to waive the State's immunity in his or her discretion, if that immunity were already waived *in toto*.

Under both California and federal law, where an irreconcilable conflict exists between two statutes, the latest expression of the legislative will prevails. *Branch v. Smith,* 538 U.S. 254, 273 (2003); *Lujan-Armendariz v. I.N.S.*, 222 F.3d 728, 743 (9th Cir. 2000); *Professional Engineers in California Government v. Kempton,* 40 Cal. 4th 1016, 1038-40 (2007). Here, the operative legislature is the People of California acting pursuant to the power reserved to them as the ultimate legislative authority under article 2, sections 9 and 10 of the California Constitution. *Zaremberg v. Superior Court,* 115 Cal. App. 4th 111 (2004). The People initially enacted section 98005 and its blanket waiver of the State's sovereign immunity against IGRA suits through the initiative process on November 3, 1998. The same People, however, subsequently approved section 12012.5(e) on March 7, 2000. (See, State's Req. Jud. Not., Ex. A.)

(…continued)
1997. This suit was dismissed on Eleventh Amendment grounds. Thereafter, the Rancheria filed suit on November 18, 1999, approximately one year after the effective date of section 98005, but prior to the effective date of section 12012.5(e).

Under the California Constitution, an initiative statute such as section 98005 may be amended or repealed by a statute passed by the Legislature that is subsequently approved by popular vote in a referendum election. Article 2, section 10, subsection (c) of the State's constitution specifically provides that:

> The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statue by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.

In this case, a statute passed by the Legislature, section 12012.5(e), that is irreconcilable with section 98005, became effective when approved by the State's electors in an election on March 7, 2000 – more than fifteen months after section 98005 was approved. As a result, because section 12012.5(e) is the latest expression of the electorate's legislative will, and is irreconcilable with section 98005, section 12012.5(e) must prevail over section 98005.

C. The Legislative History of Section 12012.5 and the Circumstances Surrounding the Initiative Enacting Section 98005 Demonstrates the Existence of a Dispute Between the Proponents of each Section that the People Ultimately Resolved Through Their Approval of Section 12012.5(e).

The electorate's approval of section 12012.5(e) resolved a conflict between Indian tribes that sought to subject the Governor, in all circumstances, to a federal court order compelling him to negotiate and execute compacts, and the Legislature which sought to afford the Governor the discretion to determine on a case by case basis whether to submit the State to federal court jurisdiction.

The genesis of section 12012.5(e) in the Legislature was Senate Bill 1502 and Assembly Bill 1442. (State's Req. Jud. Not. Ex. D, at 157.) The language of these two bills was incorporated into Senate Bill 287, which was passed on August 26, 1988 (*id.*) and signed by Governor Pete Wilson on August 28, 1998. (*Id.* at 133.)

When the Legislature's Governmental Affairs Committee considered Senate Bill 1502, it was advised by its staff that one of the things the bill's passage would do would be to allow the Governor to decide whether:

> to waive the state's immunity to suit in federal court in order to [permit that court to potentially be able to] force the Governor to negotiate in good faith as specified under IGRA.

(*See*, Staff Analysis, Sen.Com. Govt. Affrs., State's Req. Jud. Not. Ex. C, at 91.) The Legislature, however, was also informed that tribal and other opponents of the bill were basing their opposition on the fact that the bill:

> does not include provisions to [judicially] compel the Governor to negotiate in good faith with all the tribes seeking a Class III gaming compact.

(*Id.* at 119.)

In its consideration of Assembly Bill 1442, the Senate Rules Committee was, likewise, advised by its staff that the measure's opponents based their opposition, in part, on the fact that the bill did not subject the Governor to a possible federal court order compelling him to negotiate. (*See*, Sen. Rules Comm. Bill Analysis, State Req. Jud. Not. Ex. B, at 39.)

When Senate Bill 287 was amended to incorporate the provisions of Assembly Bill 1442 and Senate Bill 1502, the Legislature was advised that the bill did not subject the Governor to a judicial order compelling him to negotiate with every tribe seeking a compact and that this was one of the reasons opponents wanted to see the measure defeated. (*See*, Comments re S.B. 287, State's Req. Jud. Not. Ex. D, at 160.)

At the same time the Legislature was considering these bills, tribal opponents of these measures were circulating a petition to place what ultimately became Proposition 5 on the November, 1998 ballot. This measure contained provisions compelling the State to execute a form compact and conferring on the tribes the ability to enforce that measure (with what would become section 98005) by waiving the State's Eleventh Amendment immunity not only to suits enforcing Proposition 5, but also to any suit alleging a violation of IGRA. (*See*, Text of Proposition 5, State's Req. Jud. Not. Ex. E, at 178.) Thus, the proponents of this measure sought to accomplish through the electorate what they had been unable to accomplish through the Legislature.

This dispute between the Legislature, on the one hand, and the tribal opponents, on the other, was ultimately resolved when the People, after initially approving Proposition 5's blanket Eleventh Amendment immunity provision in section 98005, determined more than fifteen months

later to approve section 12012.5(e) and to give the Governor the authority, in each instance, to determine whether to waive the State's immunity.

D. The State's Prior Eleventh Amendment Waiver Allowing Enforcement of the Settlement Terminating the Rancheria's IGRA Suit over the First Compact Negotiations does not Constitute an Eleventh Amendment Immunity Waiver for a Suit over the Second Compact Negotiations.

Big Lagoon's Complaint implies that the State waived its sovereign immunity to a new IGRA suit alleging bad faith negotiation for a Second Compact as a result of the settlement agreement leading to the dismissal of the lawsuit over the First Compact. (Compl. ¶¶ 39, 58.) While section N, paragraph 19 of the settlement agreement permits the Rancheria to file suit alleging bad faith negotiation under IGRA 120 days after it requested negotiations, the agreement specifically provides that the State:

> Shall have the right to assert any and all defenses it may have to that suit except that the State hereby waives any right it may have to claim that said suit is premature by virtue of the provisions of 25 U.S.C. § 2710(d)(7)(B)(i).

(State Req. Jud. Not. Ex. F, at 191.) As a consequence, the State, far from agreeing to waive its immunity to an IGRA suit, in fact explicitly reserved its right to raise every defense but the one specifically stated – and that defense has absolutely nothing to do with the Eleventh Amendment.

In a similar situation in *Bennett v. City of Atlantic City*, 288 F. Supp. 2d 675, 682-83 (D.N.J. 2003) (cited with approval in *Antonelli v. New Jersey*, 419 F.3d 267, 272-73 (3rd Cir. 2005)), the court faced a claim that the State of New Jersey had waived its Eleventh Amendment immunity to a suit alleging the state had violated the Fourteenth Amendment when it entered into a consent decree in a previous action. The court rejected that claim, finding that the state's prior consent to suit for one cause of action premised on a federal constitutional provision did not constitute an express waiver of its immunity to any subsequent causes of action based on the same constitution provision, but based on a different set of facts. (*Id.*) Indeed, the court held that, at the most, the consent decree merely waived the state's immunity to a suit to enforce the terms of that decree. (*Id.*)

In the prior litigation between these parties before this Court, the State did not raise its Eleventh Amendment immunity to the Rancheria's IGRA suit over the First Compact. That suit was filed on November 18, 1999 and was subject to the provisions of section 98005, which had been enacted by legislative initiative in November of the previous year. Similarly, the settlement agreement also waives the State's immunity for a suit to enforce its terms. (State's Req. Jud. Not. Ex. F, at 190.) While the settlement agreement contemplates a possible federal court action regarding negotiations over a Second Compact, it specifically reserves any and all State defenses to that action, save the one specifically set forth in the agreement allowing the suit to be filed after only 120 days following the Rancheria's request for negotiations, instead of the otherwise-required 180 days. Thus, the agreement does not contain a waiver of the State's sovereign immunity to an IGRA suit over the Second Compact negotiations; it merely allows Big Lagoon to file such an action earlier than it would otherwise be entitled to do. Second, this suit is not one to enforce the settlement agreement. There is no allegation that the State failed to comply with the terms of that agreement. Thus, there is no support for a finding that the State waived its sovereign immunity to this action by virtue of the settlement agreement.

E. Because the Express Terms of the Settlement Agreement, the Language of Sections 98005 and 12012.5(e), and the Voters' Conduct Regarding Both Statutes May Reasonably Only be Construed to Protect the State's Right to Assert its Eleventh Amendment Immunity to this Suit, this Court Should Find That the State has not Waived its Immunity.

Assuming, however, that the settlement agreement, the language of sections 98005 and 12012.5(e), or the voters' conduct with respect to both, permitted an inference of a waiver of the State's sovereign immunity, that still would not be sufficient to support a judicial finding that the State has waived its immunity to Big Lagoon's suit.

Under established law, a waiver of a state's sovereign immunity to a suit by its citizens in federal court will not be found merely because an argument can be made that there was a waiver. Instead:

> A state will be deemed to have waived its immunity "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' "

Edelman v. Jordan, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)).

In this case, the settlement agreement and the voters' conduct with respect to sections 98005 and 12012.5(e) can only be construed to preserve the State's Eleventh Amendment immunity, but even were ambiguity to exist, the settlement agreement and the electorate's conduct may reasonably be construed to preserve the State's immunity. Thus, this Court should hold that the State's immunity has not been waived.

II. THIS COURT LACKS JURISDICTION TO PROCEED UPON BIG LAGOON'S COMPLAINT BECAUSE GOVERNOR SCHWARZENEGGER IS A REQUIRED AND INDISPENSABLE PARTY WHO HAS NOT BEEN JOINED.

Big Lagoon's Complaint asserts that the State has failed to negotiate a Second Compact in good faith and seeks relief compelling the State to negotiate that compact. Under California law, however, only the Governor is authorized to negotiate and execute a compact. As a result, because the Rancheria has not named or joined Governor Schwarzenegger as a party, this Court cannot grant the requested relief. Thus, even if the State were found to have waived its sovereign immunity to this suit, the action cannot proceed in the Governor's absence because, under Rule 19(a)(1) of the Federal Rules of Civil Procedure, a person must be joined as a party if in that person's absence, the court cannot grant complete relief among the existing parties.

A. Under California Law, Only the Governor is Authorized to Negotiate Class III Gaming Compacts.

Under California law, the power and authority to negotiate the terms of compact has been delegated to the Governor by the California Constitution:

> [T]he Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law.

Cal. Const. art. 4, § 19(f).

This authorization has also been codified:

> The Governor is the designated state officer responsible for negotiating and executing, on behalf of the state, tribal-state gaming compacts with federally recognized Indian tribes located within the State of California pursuant to the federal Indian Gaming Regulatory Act of 1988 (18 U.S.C. Sec. 1166 to 1168, incl., and 25 U.S.C. Sec. 2701 et seq.) for the purpose of authorizing class III gaming, as defined in that act, on Indian lands within this state.

Cal. Gov't Code § 12012.25(d).

B. The Remedy Big Lagoon Seeks can Only be Provided by the Governor.

Big Lagoon seeks injunctive relief in the form of an order directing the State to conclude a Second Compact with the Rancheria. On the basis of the authority cited above, only the Governor is authorized to negotiate such a compact. Under both state and federal law, if the State is named as a defendant, it can only be reached through its officers and agents. *Hagood v. Southern*, 117 U.S. 52, 69 (1886). Indeed, as the California Supreme Court found in *State v. Superior Court*, 12 Cal. 3d 237, 255 (1974), a cause of action for declaratory or injunctive relief does not lie against the State, but must be brought against the agency or officer(s) with the capacity to perform the act to be compelled.

C. Rule 19 Requires the Governor's Joinder.

Under Federal Rule of Civil Procedure 19, a person must be joined as a party if, in that person's absence, the court cannot afford complete relief among the existing parties. As a result, because the Court cannot grant the relief requested by the Rancheria in the Governor's absence, he must be joined as a party.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Complaint be dismissed with prejudice, or, in the alternative, should the Court determine that the State has waived its sovereign immunity, that the Governor be ordered joined as a party.

Dated: May 11, 2009

Respectfully Submitted,

EDMUND G. BROWN JR.
Attorney General of California
SARA J. DRAKE
Supervising Deputy Attorney General

/s/Peter H. Kaufman
PETER H. KAUFMAN
Deputy Attorney General
Attorneys for Defendant State of California

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CERTIFICATE OF SERVICE

Case Name: **Big Lagoon Rancheria v. State of California**

Court: **U.S.D.C, Northern District**
No. **CV 09-1471 CW**

I hereby certify that on **May 12, 2009**, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

1. DEFENDANT STATE OF CALIFORNIA'S NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS; AND MEMORANDUM OF POINTS AND AUTHORITIES

2. DEFENDANT STATE OF CALIFORNIA'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS (Exhibits "A" through "F");

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

Peter J. Engstrom
Peter.j.engstrom@bakernet.com

Irene V. Gutierrez
Irene.v.gutierrez@bakernet.com

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **May 12, 2009**, at San Diego, California.

Peter H. Kaufman	s/Peter H. Kaufman
Declarant	Signature

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