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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 **REPLY TO 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 Hon. Claudia Wilken** **Trial Date NA** **Action Filed: April 3, 2009**

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I. INTRODUCTION

In its moving papers, Defendant State of California (State) demonstrated that there is an irreconcilable conflict between the total waiver of the State's sovereign immunity to suits alleging a failure to comply with the good faith negotiation requirements of the Indian Gaming Regulatory Act, 18 U.S.C. §§1166-1168, 25 U.S.C. §§ 2701-2721 (IGRA), set forth in California Government Code § 98005[1] and the later-enacted grant to the Governor, in California Government Code § 12012.5(e),[2] of the authority to determine in each instance whether to waive that immunity. Simply stated, the Governor's ability to determine on a case-by-case basis whether to waive the State's immunity is incompatible with a pre-existing total waiver of that immunity.

This conflict arose as a result of two competing visions regarding gaming in California. Tribal interests sought to establish Las Vegas-style casino gaming in California and to preclude the State from asserting its sovereign immunity to IGRA-based suits seeking to compel the State to execute tribal-state class III gaming compacts (Compact) authorizing such gaming. The tribes attempted to implement their vision through Proposition 5 and California Government Code section 98005. The State Legislature, on the other hand, sought to limit tribal gaming to lottery-style devices consistent with the California Constitution and to allow the Governor to preserve the State's immunity to IGRA-based suits. The Legislature implemented its vision through California Government Code section 12012.5.

After the California Supreme Court invalidated, as unconstitutional, all of Proposition 5 with the exception of section 98005 (*Hotel Employees and Restaurant Employees International Union v. Davis*, 21 Cal. 4th 585 (1999)), the conflict was ultimately resolved by the People at the election of March 7, 2000, when they enacted Proposition 1A, thereby amending the California

[1] All future references to "section 98005" are to California Government Code § 98005, enacted as part of Proposition 5 on November 3, 1998, effective November 4, 1998.

[2] All future references to "section 12012.5" and "section 12012.5(e)" are to California Government Code § 12012.5 and 12012.5(e), respectively, approved by the voters as part of Proposition 29 on March 7, 2000, effective March 8, 2000.

Constitution with article IV, section 19(f), and approved Proposition 29, thereby enacting section 12012.5.[3] As a result, the People agreed with the tribes that more than lottery-style gaming devices should be permissible on Indian lands pursuant to Compacts authorized by IGRA, but agreed with the Legislature that the Governor should be permitted to determine whether to waive the State's immunity to IGRA-based suits seeking to compel the State to enter into such Compacts.

In its moving papers, the State also established the fact that the State's immunity was not waived through the execution of a settlement agreement with Plaintiff Big Lagoon Rancheria (Big Lagoon or Rancheria) terminating bad faith litigation between the parties that was commenced prior to March 8, 2000. Under established law, a waiver of immunity will only be found where there is no room for any other reasonable construction. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). While the settlement agreement in *Big Lagoon Rancheria v. State of California*, No. C-99-4995-CW, waives the State's immunity to suits based upon a breach of that settlement agreement, and additionally contemplates the possibility of a further bad faith suit under IGRA after renewed negotiations, it specifically reserves the State's right to assert "any and all defenses" to such a suit, save one specifically identified defense that is not based on the Eleventh Amendment. Thus, because a reasonable construction of the term "any and all defenses" includes the Eleventh Amendment, there is no basis for concluding that the State waived its immunity to this action. As a consequence, because the Governor has not waived the State's immunity to Big Lagoon's new bad faith IGRA suit, the State is entitled to a judgment dismissing that suit.

[3] The electorate's approval of this constitutional amendment was a condition subsequent for sixty-one compacts (1999 compacts). That approval was necessary to make those compacts effective. Under the terms of the 1999 compacts, the State waived its immunity to suits involving amendments or a breach of those compacts. The lawsuits referenced in Big Lagoon's opposition (Pl. Big Lagoon Rancheria's Opp'n to Def.'s Mot. for J. on Pleadings (Opp'n) 6-7), all involve amendments to 1999 compacts (Rincon Band of Luiseno Mission Indians, Quechan Tribe of the Fort Yuma Indian Reservation, Cachil dehe Band of Wintun Indians of the Colusa Indian Community) or, in the case of the Mechoopda Indian Tribe of Chico Rancheria's suit, a tactical decision by the State to base its motion to dismiss the complaint on grounds that the tribe lacked standing. Contrary to Big Lagoon Rancheria's suggestion, the State's opening brief referenced this compact waiver of immunity. (State's Mem. P. & A. 6 n.3.)

Additionally, the State demonstrated in its moving papers that the Governor, as the only State official authorized to negotiate and execute Compacts under California's Constitution, is a required party because Big Lagoon seeks relief compelling the execution of a Compact and the Governor is the only State official authorized to comply with any such order.

II. ARGUMENT

A. Sections 98005 and 12012.5(e) are in irreconcilable conflict.

In its opposition, the Rancheria argues that there is no conflict between section 98005 and section 12012.5(e). Big Lagoon suggests that even though section 98005 is a total waiver of the State's sovereign immunity to *any* IGRA bad faith negotiation lawsuit, section 12012.5(e) can be reconciled with section 98005 if the Governor's authority to waive the State's immunity is construed to apply solely to "suits arising out of the possibility of continued compact negotiations with" the ten tribes seeking Compact negotiations at the time section 12012.5 was being drafted. Opp'n 10, 11.) In Big Lagoon's view, section 12012.5(e) should not have any "broader effect" because Proposition 5, of which section 98005 was a part, is simply broader in scope than section 12012.5, of which section 12012.5(e) is a part. (*Id.*) In addition, the Rancheria contends that the two statutes should be reconciled because section 12012.5 does not mention section 98005 and because Big Lagoon would be left without a remedy were the Governor able to assert the State's sovereign immunity.[4] (Opp'n 12-13.)

Big Lagoon's attempt to reconcile sections 98005 and 12012.5(e) has no rational basis. Further, the Rancheria is simply wrong when it suggests that it is appropriate to consider Proposition 5 as broader in scope than Proposition 29, that any significance should be given to the fact that neither section 12012.5 nor its legislative history mention section 98005, or that Big

[4] Big Lagoon also suggests that the Court should utilize the Indian Canon of Construction in interpreting California law. (Opp'n 5.) The Indian Canon has no application to a federal court's construction of state law. The canon is premised on the federal government's trust responsibility to Indians and requires federal laws benefiting Indians to be construed liberally in their favor. *Texas v. U.S.*, 497 F.3d 491, 525 n.3 (5th Cir. 2007), *cert. denied*, — U.S. —, 129 S. Ct. 32, 172 L. Ed. 2d 18 (2008). No such trust relationship exists between states and tribes. Thus, the canon has no application to state law.

Lagoon would be deprived of any remedy were this Court to dismiss the Rancheria's bad faith suit.

1. Big Lagoon's interpretation of section 12012.5(e) is contrary to basic principles of statutory construction and inconsistent with the unambiguous scope of its application.

First, Big Lagoon may not assert that section 98005 still constitutes a blanket waiver of the State's sovereign immunity to IGRA bad faith lawsuits, while at the same time contend that the Governor may now assert the State's sovereign immunity to some such suits – just not the Rancheria's suit. Either section 98005 continues to be a blanket waiver of the State's immunity after the enactment of section 12102.5(e), or it does not. Further, assuming that section 12012.5(e) allows the Governor to assert the State's immunity to some IGRA bad faith suits, there is no basis for concluding that this authority only extends to ten tribes where, as here, not only are those tribes not specifically mentioned, but the statute, on its face, is unlimited in its scope. In this regard, section 12012.5(e) states:

> 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 [IGRA].

(Emphasis added.) Under basic principles of statutory construction, there is no basis for considering the legislative history of a statute on a particular point (should it be applied to all tribes or just ten) where the statutory language on that point is unambiguous and the legislative history does "not clearly indicate" that the legislature meant something other than it said. *Stratman v. Leisnoi, Inc.*, 545 F.3d 1161, 1170 (9th Cir. 2008). Here, nothing in the legislative history of section 12012.5(e) clearly indicates that the terms "any" or "tribes" in that section should be limited to ten tribes.[5]

[5] Big Lagoon's argument is no more supported by the legislative history of Proposition 29 than would be a conclusion that, for example, the authorization to the Governor to negotiate Compacts with tribes for banking and percentage card games, slot machines, and lottery games, conferred by article IV, section 19(f) (through the enactment of Proposition 1A on March 7, 2000) was intended to apply only to the 57 tribes with which the Governor had already negotiated the 1999 Compact.

Second, apart from the fact that it is inappropriate to consider the legislative history of section 12012.5(e) with respect to the scope of its application, the scope of section 12012.5(e) on its face is just as broad as the scope of section 98005. Though section 98005 contains more words, it applies to any action brought against the State in federal court arising from an alleged violation of a Compact or an alleged refusal by the State to enter into negotiations for a Compact or Compact amendment, or an alleged refusal to conduct such negotiations in good faith. Section 12012.5(e), on its face, likewise applies to any suit brought in federal court against the State by any Indian tribe involving a Compact or any violation of IGRA.

In addition, a reading of Proposition 5 makes clear that it sought to address all the deficiencies that the tribes opposed to section 12012.5 noted in their opposition to its enactment. (*Compare* State's Req. Jud. Not. Ex. D 153 *with* Prop. 5 text (*id.* at Ex. E 168-179).) Thus, Proposition 5 and section 98005 were designed to address section 12012.5. Viewed in this light, section 12012.5(e) is just as broad in concept as section 98005.[6] It is also clear that section 12012.5 does not address section 98005 because section 98005 did not exist when section 12012.5 was drafted, and because section 98005 was drafted in response to section 12012.5. Thus, contrary to Big Lagoon's repeated suggestion, there are no inferences helpful to the Rancheria to be drawn from the fact that no mention is made of section 98005 in section 12012.5.

Ultimately, the People resolved the dispute between the tribes and the State when, after Proposition 5 was judicially invalidated with the exception of section 98005, they approved the class III gaming provisions of Proposition 1A (amending California's Constitution to permit slot machines, lotteries and banked and percentage card games on Indians lands if the Governor executed and the Legislature ratified a Compact authorizing such activities) and approving Proposition 29 (enacting section 12012.5(e) authorizing the Governor to waive the State's immunity to IGRA bad faith suits).

[6] It is ironic that the Rancheria would suggest that section 98005 implements the broad policy of Proposition 5, when all the policy provisions in that law were invalidated by the California Supreme Court. Indeed, it was section 98005's very separateness from the policy provisions of Proposition 5 that allowed it to remain as the sole surviving artifact of a defunct policy scheme.

At the election of March 7, 2000, the People were presented with policy choices with respect to the scope of gaming in California, as well as the manner in which litigation between tribes and the State over gaming would be handled. They approved a procedure (set forth in article IV, section 19(f) of the California Constitution) whereby certain forms of class III gaming would be permitted if the Governor and the Legislature agreed to Compacts with tribes authorizing such gaming. At the same time, the People approved a provision of California law – section 12012.5(e) – that preserved the State's ability to assert its sovereign immunity to suits seeking to compel the Governor to execute Compacts authorizing such gaming.

2. The federal government has enacted regulations for circumstances where an IGRA bad faith lawsuit is dismissed on Eleventh Amendment grounds.

Finally, in arguing that it would be deprived of any vehicle by which it could lawfully conduct class III gaming were this Court to dismiss its IGRA bad faith lawsuit, Big Lagoon fails to note the existence of the Department of the Interior's regulations regarding class III gaming procedures. Those regulations establish a procedure by which tribes may ask the Secretary of the Interior to establish class III gaming procedures where a federal court has dismissed an IGRA bad faith negotiation suit on Eleventh Amendment grounds. Section 291.3 provides that:

> An Indian tribe may ask the Secretary to issue Class III gaming procedures when the following steps have taken place:
>
> (a) The Indian tribe submitted a written request to the State to enter into negotiations to establish a Tribal-State compact governing the conduct of Class III gaming activities;
>
> (b) The State and the Indian tribe failed to negotiate a compact 180 days after the State received the Indian tribe's request;
>
> (c) The Indian tribe initiated a cause of action in Federal district court against the State alleging that the State did not respond, or did not respond in good faith, to the request of the Indian tribe to negotiate such a compact;
>
> (d) The State raised an Eleventh Amendment defense to the tribal action; and
>
> (e) The Federal district court dismissed the action due to the State's sovereign immunity under the Eleventh Amendment.

25 C.F.R. § 291.3.

In enacting these regulations, the federal government has sought to provide tribes with the same remedy they would have if a tribe were to have prevailed in an IGRA bad faith lawsuit. Indeed, this relief is precisely the relief to which Big Lagoon would ultimately be entitled were it to convince this Court that the State had negotiated in bad faith and the State continued to refuse to execute a Compact with the Rancheria.

While the State disagrees that the federal government has the authority to enact this regulation,[7] the federal government and presumably Big Lagoon disagree. Moreover, the fact that the State disagrees that Big Lagoon will ultimately be entitled to conduct class III gaming pursuant to these procedures, is no different in kind from its disagreement that the Rancheria is entitled to the relief it has sought from this Court by virtue of this action.

Even if the remedy afforded Big Lagoon in the federal government's regulations did not exist, that fact should not affect a decision upholding the State's assertion of its rights under the Eleventh Amendment. Indeed, the Supreme Court rejected a similar contention in finding Congress lacked the authority under the Indian Commerce Clause to deprive states of their Eleventh Amendment immunity. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

B. The State did not waive its sovereign immunity to this action when it executed the settlement agreement

Big Lagoon also argues that even if section 12012.5(e) preserves the State's sovereign immunity, the State waived that immunity when it executed the settlement agreement terminating the Rancheria's bad faith litigation filed in 1999. (Opp'n 13-17.) Big Lagoon asserts that paragraph 16 of that settlement agreement in which the parties mutually agree to waive their sovereign immunity to permit judicial enforcement of that agreement should be read to override the specific provision in paragraph 19 of that agreement, which permits the State to raise "any and

[7] The Fifth Circuit has ruled that the Secretarial procedures are not authorized under IGRA. *Texas v. United States*, 497 F.3d 491. The federal government has apparently determined not to accept this ruling in other circuits. *Alabama v. United States*, Slip Copy, 2008 WL 5071904 (S.D. Ala. 2008) (the district court denying Alabama's challenge to the validity of these regulations without prejudice, on the ground that, because there was no final administrative adjudication of an Alabama's tribe's application for the procedures, the state's suit was not yet ripe for review).

all defenses" to an action such as this. (Opp'n 14-15.) Big Lagoon suggests that the State had an obligation to specifically identify section 12012.5(e) as a defense when it reserved "any and all defenses" (*id.* at 14) and that the preservation of the Rancheria's ability to file an action such as this must necessarily be presumed to constitute the State's waiver of an Eleventh Amendment defense to such an action. It argues that the State's ability to assert its sovereign immunity to this suit would "negate or nullify the previously articulated express waiver and the Tribe's express remedy of filing suit." (Opp'n 15-16.) Thus, Big Lagoon's right under the settlement to file an action such as this would be negated in contravention of basic principles of contract interpretation. (*Id.*)

1. Paragraph 16 of the settlement agreement does not constitute a waiver of the State's immunity under section 12012.5(e)

Paragraph 16 of the settlement agreement does not waive the State's immunity to this suit under section 12012.5(e). Thus, if that section preserves the State's sovereign immunity subject to the Governor's waiver, paragraph 16, by limiting any waiver to the provisions of section 98005, does not waive the State's immunity under section 12012.5(e) to this action. Paragraph 16 provides, in pertinent part:

> This agreement shall enure [sic] to the benefit of and be binding upon the parties and their respective successors and assigns. The Tribal signatory's authority to waive the Tribe's sovereign immunity is set forth in Exhibit C to the Stipulation for Entry of Judgment (Exhibit III to this Agreement). The State has waived its sovereign immunity by virtue of the provisions of Government Code section 98005.

(Def. State of Calif.'s Req. for Judicial Not. in Supp. Mot. for J. on Pleadings (Def. RJN) Ex. F. 000190.)

This paragraph identifies the fact that Big Lagoon waived its sovereign immunity to a suit to enforce the judgment that would be entered pursuant to the settlement agreement as well as the agreement itself. Likewise, it merely identifies the fact that the State had waived its immunity for the same purposes pursuant to section 98005. That paragraph does not say, as Big Lagoon would have the Court construe it, that the State waived its immunity pursuant to section 12012.5(e).

Paragraph 19 of the settlement agreement, on the other hand, specifically and directly addresses a suit contemplated by the settlement agreement. That paragraph provides:

> [I]f 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.

(Def. RJN 000190.)

Under established rules of construction, the specific controls the general. Here, paragraph 16 is a general provision regarding a waiver of sovereign immunity with respect to the enforcement of the settlement agreement that bases the waiver on section 98005, a provision that was amended or repealed by section 12012.5(e). Because the agreement effectuated a settlement of a suit covered by the provisions of section 98005 (the suit was filed prior to March 8, 2000), the reference to the section 98005 waiver was entirely appropriate. Paragraph 19, on the other hand, is a specific provision addressing the State's ability to raise "any and all defenses" to an action such this (filed after March 7, 2000), which does not waive the State's immunity under section 12012.5(e).

2. The State's construction of the settlement agreement is reasonable.

Tellingly, Big Lagoon's opposition, in arguing that the State waived its Eleventh Amendment immunity, fails to discuss the standard a court must utilize in determining whether a state has, in fact, waived its sovereign immunity. Under the rule enunciated in *Edelman v. Jordan,* 415 U.S. at 673, cited in the State's opening brief (State's Mem. P. & A. 13-14):

> 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.'"

In this case, the only reasonable construction of paragraphs 16 and 19 of the settlement agreement is that the State did not waive its immunity under section 12012.5(e). Moreover, even if there were some question in that regard, that conclusion is certainly a reasonable construction of the relationship between the two paragraphs and their ultimate meaning.

Big Lagoon argues, however, that this construction is not reasonable because if the Rancheria were deprived of recourse to litigation, "the State would have no reason to negotiate a

compact in good faith, and no consequences for negotiating in bad faith." (Opp'n 16-17.) This consequence, however, necessarily follows from a successful assertion by the State of any of the affirmative defenses that are reserved to it by the express language of paragraph 19. Thus, the Rancheria's contention that the State is precluded from depriving Big Lagoon of the opportunity to litigate through assertion of the State's sovereign immunity is unaided by this argument. This contention, therefore, ultimately relies on whatever strength it can muster from the Rancheria's argument that the State waived its immunity as a result of paragraph 16. Moreover, as discussed previously, successful assertion of the State's sovereign immunity does not necessarily deprive Big Lagoon of the opportunity to obtain the ability to conduct class III gaming. A resulting dismissal of Big Lagoon's suit on Eleventh Amendment grounds merely sets the stage for the Rancheria to seek the ability to conduct class III gaming pursuant to 25 C.F.R. § 291.3.

Finally, contrary to Big Lagoon's suggestion (Opp'n 15), the State was under no obligation to delineate what defenses it might raise under the "any and all" defense provisions of paragraph 19 of the settlement agreement. During settlement discussions, Big Lagoon had available to it the provisions of section 12012.5(e) and could have asked that the State include in the limitation on the defenses the State would be entitled to assert the State's sovereign immunity under section 12012.5(e). Under established rules of construction, the express inclusion of one limitation necessarily presumes that no other limitation exists.

C. Governor Schwarzenegger is a required party.

Assuming arguendo that the Court were to find that the State has waived its immunity to Big Lagoon's suit, Governor Arnold Schwarzenegger is a required party who has not been joined. As demonstrated in the State's opening brief, the relief Big Lagoon seeks – the negotiation and execution of a Compact – demands this Court's jurisdiction over the only State official authorized to act on behalf of the State to conclude a Compact.

The Rancheria blithely states that "an order against the State of California is effectively an order against the Governor." (Opp'n 18.) Big Lagoon, however, fails to explain how jurisdiction over the State in general translates into jurisdiction over the Governor so that the Court may issue

an order compelling the Governor to conclude a Compact.[8] The cases cited in the State's opening brief, *Hagood v.Southern,* 117 U.S. 52, 69 (1886), and *State v. Superior Court,* 12 Cal. 3d 237, 255 (1974), make it clear that the State can only be reached through its officers. Big Lagoon's suggestion that those cases should not be applied to an IGRA suit was not accepted by the district court in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. State of California,* 2008 U.S. Dist. LEXIS 5183 (E.D. Cal. 2008). That argument should not be accepted here.

III. CONCLUSION

For these reasons and those previously expressed, the State respectfully requests that the Court grant its motion for judgment on the pleadings.

Dated: June 4, 2009

Respectfully Submitted,

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[8] Big Lagoon also suggests that other branches of the State, such as the Legislature which must ratify any Compact negotiated and executed by the Governor, could be found to have "negotiated" in bad faith within the meaning of IGRA. As Big Lagoon well knows, this Court has previously rejected that idea.

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 **June 4, 2009**, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

1. REPLY TO PLAINTIFF BIG LAGOON RANCHERIA'S OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS;

2. [PROPOSED] ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

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

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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 **June 4, 2009**, at San Diego, California.

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

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