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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

BIG LAGOON RANCHERIA, a Federally Recognized Indian Tribe, Plaintiff, **v.** **STATE OF CALIFORNIA,** Defendant.	CV 09-1471 CW (JCS) **DEFENDANT STATE OF CALIFORNIA'S OPPOSITION TO PLAINTIFF BIG LAGOON RANCHERIA'S MOTION FOR SUMMARY JUDGMENT; NOTICE OF CROSS-MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** **Fed. R. Civ. P. 56** Date: August 12, 2010 Time: 2 p.m. Dept: 2, Fourth Floor 1301 Clay Street Oakland, CA 94612 Judge: The Honorable Claudia Wilken Trial Date: Not set Action Filed: 4/3/2009

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NOTICE OF MOTION AND MOTION

TO PLAINTIFF BIG LAGOON RANCHERIA AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 12, 2010, at 2 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 for summary judgment, pursuant to Federal Rule of Civil Procedure 56 on grounds that there is no genuine issue of material fact and that the State is entitled to judgment as a matter of law because it has negotiated in good faith toward the formation of a compact with Plaintiff Big Lagoon Ranchera (Big Lagoon or Tribe) that governs class III gaming activities as required by the Indian Gaming Regulatory Act (IGRA), 18 U.S.C. §§ 1166-1168, 25 U.S.C. §§ 2701-2721.

This motion is based on this notice of motion, the following memorandum of points and authorities, the accompanying declarations of Randall A. Pinal, Linda Thorpe and Patty Brandt, the State's request for judicial notice, all pleadings and papers on file in this action, and upon such other matters as may be presented to the Court at the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Following a failed previous agreement, Big Lagoon and the State have not been able to reach a new agreement on a class III gaming compact. Big Lagoon asserts that the State has not negotiated in good faith and filed the present lawsuit in April 2009 to compel the State to do so. The State's cross-motion for summary judgment should be granted and the Tribe's motion for summary judgment should be denied because the State is entitled to request revenue sharing from the Tribe as consideration for the valuable economic benefit of the exclusive right to operate class III gaming in the most populous state in the country. Although the Ninth Circuit recently found that revenue sharing terms similar to those proposed here would constitute a prohibited tax if the State were negotiating with a tribe for an amendment to a 1999 Compact that already includes revenue sharing, the State's negotiation with Big Lagoon is markedly different. The Tribe does not have a 1999 Compact and, therefore, has not previously agreed to provide the State with any consideration for exclusivity. In any event, even if the State's revenue sharing requests here

amount to imposition of a tax, which they do not, the State is entitled to receive some form of revenue to cover its "costs of dealing with the fallout of gaming." *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1035 (9th Cir. 2010) (*Rincon*).

Also, this Court previously found that the State may negotiate for environmental and land use conditions. The State offered valuable consideration for proposed concessions in the form of the number of gaming devices, and there is no evidence to suggest that any entity other than the Tribe would be its gaming operation's primary beneficiary, consistent with IGRA's purpose.

Moreover, it is against the public interest to locate a class III gaming facility on land that the United States unlawfully acquired in trust for the Tribe that otherwise would not be eligible for gaming, and that would result in significant damage to adjacent State lands. The United States holds fee title to a nine-acre parcel that has been designated the Tribe's rancheria. Big Lagoon wants to put its casino on an eleven-acre parcel adjacent to the rancheria that the United States acquired in trust for the Tribe in 1994 pursuant to 25 U.S.C. § 465 of the Indian Reorganization Act (IRA). Last year, however, the Supreme Court held that the Secretary of the Interior (Secretary) lacks authority to acquire land in trust for a tribe pursuant to the IRA unless it was a recognized tribe under federal jurisdiction in 1934. *Carcieri v. Salazar*, 129 S. Ct. 1058, 1060-61, 1064-65, 1068 (2009) (*Carcieri*). Historical documents obtained by the State to date indicate that Big Lagoon was not a recognized tribe under federal jurisdiction in 1934, and no current members resided and descend from a recognized political sovereign resident on the rancheria in 1934. *See* 25 U.S.C. § 479. Thus, the 1994 acquisition was unlawful and it would be against the public interest to allow the Tribe to conduct gaming on land that otherwise would be ineligible for gaming under IGRA. *Id.* § 2719.

Alternatively, if the Court denies the State's cross-motion it should also deny the Tribe's motion to allow the State to complete discovery. The State is actively involved in the meet and confer process with the United States to resolve disputes related to the United States' response to various subpoenas duces tecum. The evidence obtained by the State so far indicates that there is no lineal connection between the original rancheria residents and current members, making the Tribe ineligible for the 1994 trust acquisition, and may also raise a material question whether the

United States lawfully considers Big Lagoon a federally recognized tribe and whether the State must join the United States in this action.

BACKGROUND

I. IGRA

IGRA, the statutory framework for the operation and regulation of gaming by Indian tribes, provides that Indian tribes may conduct certain gaming activities only if authorized pursuant to a valid compact between the tribe and the state in which the gaming activities take place. 25 U.S.C. §§ 2702, 2710(d)(1)(C). IGRA prescribes the process by which the state and the Indian tribe are to negotiate a gaming compact:

> Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

Id. § 2710(d)(3)(A). IGRA also specifies various provisions that a gaming compact may include. *Id.* § 2710(d)(3)(C).

To demonstrate a state has failed to negotiate in good faith, a tribe must first show that no tribal-state compact has been entered into and that the state failed to respond in good faith to the tribe's request to negotiate. *Id.* § 2710(d)(7)(B)(ii). If the tribe makes this *prima facie* showing, the "burden of proof" then shifts to the state to prove that it did in fact negotiate in good faith. *Id.*

In determining whether a state has negotiated in good faith, courts "may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities," *id.* § 2710(d)(7)(B)(iii)(I), and "shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith," *id.* § 2710(d)(7)(B)(iii)(II).

If a court concludes that the state failed to negotiate in good faith, it must order the state and the tribe to conclude a compact within sixty days. 25 U.S.C. § 2710(d)(7)(B)(iii). If no compact is entered into within that time, the tribe and the state must then each submit to a court-appointed mediator a proposed compact that represents their last best offer. *Id.* §

2710(D)(7)(B)(iv). The mediator will choose the proposed compact that "best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court." *Id.* If, within the next sixty days, the state does not consent to the compact selected by the mediator, the mediator will notify the Secretary, who will then prescribe procedures under which class III gaming may be conducted. *Id.* § 2710(d)(7)(B)(vii).

II. FACTUAL BACKGROUND

Throughout this action, Big Lagoon has asserted that for fifteen years it has been attempting to negotiate a compact with the State. (*See, e.g.*, Pl.'s Mot. Sum. J. (Mot.) 1:21-24.) In fact, however, the State was under no obligation to negotiate a compact with Big Lagoon for slot machines or banked or percentage card games at any time before March 2000, when the voters ratified Proposition 1A to authorize the Governor to negotiate class III gaming compacts with federally recognized Indian tribes. *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 716-18 (9th Cir. 2003); *In re Indian Gaming Related Cases* (*Coyote Valley Band of Pomo Indians v. California*), 331 F.3d 1094, 1098-1103 (9th Cir. 2003) (*Coyote Valley II*).[1] Also, as this Court is aware, in August 2005 the parties agreed on terms of a class III gaming compact that would have permitted Big Lagoon to partner with another tribe to build a casino in Barstow, California (Barstow Compact). (Jun. 29, 2009 Order (Doc. 21) 4; Decl. of Peter Engstrom in Support of Pl.'s Mot. Sum. J (Engstrom Decl.) Ex. 1A.) State law requires legislative ratification for a compact to take effect, Cal. Const. art. IV, § 19(f), and the Legislature failed to ratify the Barstow Compact (Jun. 29, 2009 Order 4-5). The parties commenced new negotiations in September 2007, and stipulated to dismissal of the previous action without prejudice. (Jun. 29, 2009 Order 5; Engstrom Decl. Ex. 2.) Therefore, the negotiations at issue here span September 2007 to April 2009, not fifteen years as Big Lagoon asserts.

A. 2007 to 2009 Negotiations

[1] Before then, the State had an obligation to negotiate only for lottery games, nonelectronic keno, and horseracing or off-track pari-mutuel wagering facilities, the only forms of class III gaming that were lawful in the State. *See, e.g.*, *Artichoke Joe's*, 353 F.3d at 716.

The parties conducted their first negotiation session on October 5, 2007. Big Lagoon proposed that it be allowed to build and operate a single-story casino with 250 to 600 gaming devices, to be located underneath a five-story, seventy-room hotel on the Tribe's eleven-acre trust parcel adjacent to its nine-acre rancheria. (Decl. of Randall A. Pinal in Support Def.'s Opp'n Pl.'s Mot. Sum. J. & Def.'s Cross-motion Sum. J. (Pinal Decl.) Ex. A.) The parties met again on October 25, 2007. (Engstrom Decl. Ex. 3A.) Thereafter, the State provided the Tribe with an initial draft compact with open provisions for gaming facility location. (*Id.*) In addition to exploring the Tribe's proposed rancheria site, the State was interested in exploring alternative sites. (*Id.*) The casino's location, the number of gaming devices, and whether the Tribe would contribute to, or continue to receive distributions from, the Revenue Sharing Trust Fund (RSTF) created by the 1999 Compacts, were left open. (*Id.* Draft Compact §§ 2.21, 4.1, 5.) The State's draft compact included language proposing the Tribe contribute a portion of its net win to the State,[2] in an amount to be determined. (*Id.* § 4.3.) It also proposed that if the State authorized any entity or person other than an Indian tribe to operate class III gaming devices within the Tribe's "core geographic market," the Tribe could terminate the compact or forego revenue sharing contributions except for actual and reasonable regulatory costs if it operated a minimum number of gaming devices. (*Id.* § 4.5) The Tribe previously agreed to each of these terms in the Barstow Compact. (Engstrom Decl. Ex. 1A, Barstow Compact §§ 4.3.3, 4.4.)

The parties held a third negotiation session on December 10, 2007. (Engstrom Decl. Ex. 4.) On January 31, 2008, the State submitted a three-tiered proposal to the Tribe concerning casino and hotel location. (*Id.*) The "proposal stem[med] from the State's vital interest in preserving and protecting, for present and future generations, environmentally significant State resources located adjacent to the rancheria." (*Id.*) The options included:

> (1) The **Highway Site**, located on land adjacent to Highway 101 within five miles of the rancheria, where the Tribe could operate up to 500 gaming devices and a 100-room hotel, with 50 miles geographic exclusivity. The Tribe would pay the State fourteen

[2] The revenue sharing provision stated: "The Tribe shall remit to such agency, trust, fund, or entity, as the State Director of Finance, pursuant to law, from time to time, shall specify to the Tribe in writing, the payments referenced in subdivision (a) in quarterly payments." (Draft Compact § 4.3(b)(1).)

to twenty-five percent of its net win and an undetermined per-device fee into the RSTF. The land would be purchased in conservancy and transferred to federal trust for the Tribe. In return, the Tribe would convey to the State sixteen acres of Tribal-owned fee land located between a county park and state recreation area, and agree to limit development on its rancheria and trust lands in the same manner it agreed to in the Barstow Compact. Before including the proposal in the compact, the State would provide the Tribe with support letters from the necessary third parties. If any contingency failed, the Tribe could conduct gaming on the second option. (*Id.*)

(2) The **Five Acre/Rancheria Site**, where a casino with up to 250 gaming devices would be located on the nine-acre rancheria, a 50-room hotel would be located on the eleven-acre trust parcel, and supporting facilities (e.g., parking and wastewater treatment) would be located nearby on five-acres of Tribal-owned fee land. The State proposed conditions designed to address the project's very specific off-rancheria environmental impacts. (*See id.* Appendix A.) The Tribe would receive the same geographic exclusivity and pay the same revenue sharing as the Highway Site, with RSTF provisions to be determined. If any specified contingency failed, the Tribe could conduct gaming on the third option. (Engstrom Decl. Ex. 4.)

(3) The **Rancheria Site**, where a gaming facility with up to 175 gaming devices would be located on the nine-acre rancheria, a 50-room hotel would be located on the eleven-acre trust parcel, with parking and other supporting facilities split between the parcels. This option was subject to specific development conditions designed to mitigate impacts to the off-rancheria environment, and the Tribe would receive the same geographic exclusivity and pay the same revenue sharing, with RSTF provisions to be determined. (*Id.*)

On February 20, 2008, Big Lagoon provided the State with its proposed compact language. (Engstrom Decl. Ex. 5A & 5B.) The Tribe proposed that the project be located on the rancheria, but did not define whether that included the eleven-acre trust parcel. (*Id.* Ex. 5A, Draft Compact § 2.22.) RSTF contributions and the number of gaming devices were to be determined, and the Tribe eliminated altogether any provisions for revenue sharing or geographic exclusivity. (*Id.* §§ 4.1, 4.3, 4.5, 5.2.) The Tribe proposed that evaluating environmental impacts under the National Environmental Policy Act would be sufficient, and it agreed to enter into intergovernmental mitigation agreements with local governments, but modified the proposed terms for entering into and enforcing the agreements. (*Id.* Ex. 5B, Draft Compact §§ 11.1, 11.7-9.)

The parties held their fourth negotiation session on February 25, 2008. (Engstrom Decl. Ex. 6.) On March 21, 2008, the Tribe rejected each proposed site except the eleven acres. (*Id.*) The Tribe claimed the State's proposed gaming device and hotel limitations were too restrictive and would not allow the Tribe to compete. (*Id.*) The Tribe proposed a casino on the eleven acres with at least 350 gaming devices, a lodge with at least 120 rooms and related amenities (*id.*), and

parking at unspecified locations on the Tribe's twenty acres of "trust land." (*Id.*) The Tribe asserted that it had always planned for a casino on the eleven acres and a casino on the nine acres would displace existing tribal housing. (*Id.*)

The State responded on May 2, 2008, in advance of the parties' fifth negotiation session scheduled for May 5, 2008. (Engstrom Decl. Ex. 7.) The State continued to offer the opportunity to explore alternative sites, stemming from its "vital interest in preserving and protecting . . . environmentally significant State resources located adjacent to the rancheria." (*Id.*) The State indicated that new opportunities for alternative sites had arisen and, despite having been advised, "for the first time, that the Chairman is not interested in possible alternative sites," the State offered to explore the new options if the Tribe was interested. (*Id.*) Nonetheless, respecting the Tribe's preference for a project on its rancheria, and due to the site's "environmentally sensitive nature," the State proposed a casino on the nine-acre rancheria with up to ninety-nine gaming devices, a fifty-room hotel on the eleven acres, fifty-mile geographic exclusivity, and revenue sharing from ten percent to twenty-five percent of the Tribe's net win. (*Id.*) The Tribe would continue to receive $1.1 million in annual RSTF distributions provided it did not use the money for gaming-related activities. (*Id.*) The Tribe offered no new information about the nine acres to suggest the State's proposed development conditions were improper, and the State continued to consider them necessary. (*Id.*)

In August 2008, the Tribe proposed project mitigation measures. (Pinal Decl. Ex. B.)

B. Last Proposals

On October 6, 2008, the Tribe indicated it did not need geographic exclusivity and would not share revenue with the State. (Engstrom Decl. Ex. 8.) Without any supporting information or analysis, the Tribe claimed the State's proposed revenue share would "necessarily consume a substantial share" of its profit. (*Id.*) The Tribe *had been* willing to consider revenue sharing but withdrew the offer because it now considered it a tax. (*Id.*) The Tribe proposed that it receive the 1999 Compact terms, allowing it to operate up to 350 gaming devices without any fees and participate in the license pool created by the 1999 Compact, or some other mechanism to operate more than 350 gaming devices if the no licenses were available; that payments for between 350

and 2000 gaming devices go to the RSTF; that the project be located on the rancheria; that the Tribe be allowed to build a hotel with up to 100 rooms with room to expand; that the project not exceed 85 feet in height and would not be located more than 100 feet from the mean high tide line; and that the Tribe's proposed mitigation measures be considered sufficient. (*Id.*) The Tribe indicated it would file suit if there was no agreement by November 7, 2008. (*Id.*)

On October 31, 2008, the State responded that the 1999 Compact terms have, in this instance, always been unacceptable to the State. (Engstrom Decl. Ex. 9.) In return for its agreement to provide the Tribe with a class III gaming monopoly, the State requested general fund revenue sharing of fifteen percent of net win on a maximum 349 gaming devices, consistent with consideration requested of other tribes, and to which the Tribe had previously agreed in the Barstow Compact and the Secretary had expressly approved in other compacts. (*Id.*) The State noted that the Tribe's refusal to provide any revenue sharing other than RSTF contributions under the 1999 Compact terms amounted to no revenue sharing at all because the Tribe would operate fewer than 350 gaming devices (1999 Compact tribes operating 350 licensed gaming devices or less contribute nothing to the RSTF), and RSTF contributions alone were not full consideration for class III exclusivity because the money goes solely to Non-compact Tribes. (*Id.*) The Tribe could continue to receive its RSTF distribution if it did not operate more than 349 gaming devices and did not use the RSTF money to pay gaming-related costs, and it could request a compact amendment if it wanted to operate more devices. (*Id.*)

The Tribe had provided the State with no financial data demonstrating the proposed revenue sharing percentages were unaffordable. (*Id.*) Although the Tribe had recently asked the State to consider developing a casino on alternative sites near Eureka and Trinidad, the State was amenable to the rancheria as long as it included "constraints on development inherent in placing an intense urban project adjacent to a State ecological reserve, a State recreation area, and across the lagoon from a State park." (*Id.*) The Tribe had unrealistically asked the State to agree to mitigation measures in advance of presenting the State with an actual project for analysis, but the State agreed to incorporate the Tribe's proposed measures that could be determined immediately,

with the need for additional measures to be demonstrated through an environmental review process for the specific project. (*Id.*) The State urged the Tribe to continue to negotiate. (*Id.*)

LEGAL STANDARD

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party bears the burden of showing that there is no material factual dispute. Therefore, the Court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. *Celotex*, 477 U.S. at 324. The Court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Material facts that would preclude entry of summary judgment are those that, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

ARGUMENT

I. THE STATE NEGOTIATED IN GOOD FAITH FOR REVENUE SHARING

Big Lagoon relies heavily on *Rincon* for the proposition that the State's request for general fund revenue sharing is *per se* failure to negotiate in good faith under IGRA. (Mot. 13-20.) In *Rincon*, the Ninth Circuit recently held that the State failed to negotiate an amendment to a 1999 Compact in good faith because it viewed the State's request that the Rincon Tribe contribute part of its net win to the State's general fund as an attempt by the State to tax the tribe in violation of 25 U.S.C. § 2710(d)(4). 602 F.3d at 1029-42. The court denied the State's petition for rehearing but stayed issuance of the mandate until September 13, 2010, to allow the State to file a petition for writ of certioriari in the Supreme Court. (Def.'s Request Jud. Not. (Def.'s RJN) Ex. A.) The State recognizes that, for the moment, *Rincon* is controlling, *see Wedbush, Noble, Cooke, Inc. v. S.E.C.*, 714 F.2d 923, 924 (9th Cir. 1983); however, the State requests this Court to stay further proceedings in this case until the Supreme Court decides the State's forthcoming writ petition in *Rincon* (*see* Pinal Decl. ¶ 2), or until the Ninth Circuit's stay is dissolved. Indeed, it would make

little practical or equitable sense if Big Lagoon were allowed to take advantage of a decision in *Rincon* when the Rincon Tribe cannot even do so.

In any event, the *Rincon* decision is flawed for reasons discussed in the State's briefs on appeal, and the well-reasoned dissenting opinion in that case. (Def.'s RJN Exs. B & C.) *See Rincon*, 602 F.3d at 1042-73 (Bybee, J., dissenting). For reasons set forth therein and incorporated here by reference,[3] the State is entitled to summary judgment here.

Even if the Ninth Circuit's opinion stands as the final word in *Rincon*, it is not dispositive here. First, it is distinguishable because, unlike this case, it involved an amendment to an existing compact where the tribe was already sharing revenue in exchange for exclusive rights to conduct class III gaming in the most populous state in the country. 602 F.3d at 1024; *see Coyote Valley II*, 331 F.3d at 1114-15; *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, (E.D. Cal. 2002) ("There is no dispute that by permitting tribes to exercise gaming rights on Indian land free from non-tribal competition, they are provided with a valuable economic benefit."). Proposition 1A amended the state constitution to afford federally recognized Indian tribes the exclusive right to negotiate with the Governor for limited class III gaming compacts, subject to legislative ratification. Cal. Const. art. IV, § 19(f).[4] The court in *Rincon* held that the State having put Proposition 1A on the table in 1999, when it had no obligation to allow class III gaming, let alone negotiate for it, was an "exceptionally valuable and bargained for" meaningful concession at the time but, that "[b]y contrast, in the current legal landscape, 'exclusivity' is not a new

[3] The State's position in *Rincon* that it had negotiated in good faith was based, in part, on its genuine belief that general fund revenue sharing was authorized because the Secretary and other tribes had accepted compacts with such terms. *Rincon*, 602 F.3d at 1041. In substantiation thereof, the State requests judicial notice of those other compacts entered into by other federally recognized tribes in California, and elsewhere, which provide for general fund revenue sharing and have been approved by the Secretary. (Def.'s RJN Exs. D-U.)

[4] Section 19(f) provides in full:

> Notwithstanding subdivisions (a) and (e), and any other provision of state law, the 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. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.

consideration the State can offer in negotiations because the tribe already fully enjoys that right as a matter of state constitutional law." 602 F.3d at 1036-37. But the court carefully noted:

> While we do not hold that no future revenue sharing is permissible, it is clear that the State cannot use exclusivity as new consideration for new types of revenue sharing since it and the collective tribes already struck a bargain in 1999, wherein the tribes were exempted from the prohibition on gaming in exchange for their contributions to the RSTF and SDF.

Id. at 1037.

Thus, *Rincon* confirms that some form of revenue sharing is permissible. *Rincon*'s holding that "the benefits conferred by Proposition 1A have already been used as consideration for the establishment of the RSTF and SDF in the 1999 Compact," *id.*, even if upheld, does not apply here because Big Lagoon, unlike the 1999 Compact tribe in *Rincon*, has not previously provided *anything* in exchange for the "valuable economic benefit" of Proposition 1A exclusivity. While "[i]t is elementary law that giving a party something to which he already has an absolute right is not consideration to support that party's contractual promise," *id.*, the constitution gives Big Lagoon the exclusive right to *negotiate* for a compact. Big Lagoon has provided no consideration, so it is not in the same position as the Rincon Tribe and does not have the same "absolute right" that the Ninth Circuit found existed for 1999 Compact tribes. Because Big Lagoon does not have a compact, and thus no exclusivity, the State can request revenue sharing as consideration for initial exclusivity, subject to renegotiation for additional gaming devices.

Second, the State further recognizes that although *Rincon* held that a request for general fund revenue sharing was a tax in that case, *Rincon* and *Coyote Valley II* confirm that the State is entitled to some form of revenue sharing. *Rincon*, 602 F.3d at 1037; *Coyote Valley II*, 331 F.3d at 1111-15. In *Coyote Valley II*, the Ninth Circuit

> decided only whether the State could require the tribes to pay into the SDF to cover the government's costs of dealing with the fallout of gaming. It is one thing to ask the tribes to contribute funds so the State is not left bearing the costs for gaming related expenses; it is quite another to ask the tribes to help fix the State's budget crisis.

Rincon, 602 F.3d at 1035. In *Rincon*, the court held that "compensation for the negative externalities caused by gaming are subjects directly related to gaming, and the RSTF and SDF were the means chosen by the parties to the 1999 compacts to deal with those issues." *Id.* at 1033

(*citing Coyote Valley II*, 331 F.3d at 1111, 1114). Therefore, even if *Rincon* is affirmed, the parties here may still negotiate to determine what form and amount of revenue sharing is appropriate, which must be something more than the Tribe's proposal only to make RSTF contributions, which in this instance would mean that the Tribe would pay nothing to the State for the exclusive right to game in the most populous state in the country. (*See* Engstrom Decl. Ex. 9.) Indeed, it would be difficult to find the State failed to negotiate in good faith by requesting the same general fund revenue sharing terms to which Big Lagoon previously agreed in the Barstow Compact. (*Id.* Ex. 1A, Barstow Compact § 4.3.3(b); *see also id.* 3 (acknowledging revenue contribution was "fair").)

Third, even if this Court orders the parties to conclude a compact within sixty days, or if the parties ultimately submit to mediation, the parties and the mediator must have guidance from this Court as to compact parameters that best comport with IGRA and any other applicable federal law. *See* 25 U.S.C. § 2710(d)(7)(B)(iii), (iv). As discussed *post*, several dispositive questions remain, which this Court must answer before ordering the parties to mediation.

II. THE STATE NEGOTIATED IN GOOD FAITH FOR ENVIRONMENTAL MITIGATION AND LAND USE REQUIREMENTS

Big Lagoon argues that IGRA does not authorize the State to "impose" environmental regulations on the Tribe. (Mot. 20:27-28.) Big Lagoon is incorrect and the State is entitled to summary judgment for the following reasons.

A. This Court Previously Found the State May Negotiate on Environmental and Land Use Issues

Three times this Court has rejected the same argument made by Big Lagoon here and found that the State may negotiate for provisions regarding environmental and land use issues as part of the compacting process. On March 18, 2002, the Court found that

> environmental and land use issues are subjects that may be "directly related to the operation of gaming activities" under § 2710(d)(3)(C)(vii). *The construction and operation of a gaming facility has direct impacts on many environmental and land use concerns*. Environmental and land use laws can also be considered "standards for the operation of [gaming] activity and maintenance of the gaming facility" under § 2710(d)(3)(C)(vi).

(Pl.'s Request Jud. Not. (Pl.'s RJN) Ex. 2 at 15:3-9 (emphasis added).) At that time, the Court found that continued insistence by the State on Tribal execution of a side agreement requiring compliance with all State environmental laws and regulations "would constitute bad faith," but the Court denied summary judgment and set parameters for future negotiations:

> The State may in good faith ask the Tribe to make particular concessions that it did not require of other tribes, due to Big Lagoon's proximity to the coastline or other environmental concerns unique to Big Lagoon. The State could demonstrate the good faith of its bargaining position by offering the Tribe concessions in return for the Tribe's compliance with requests with which other tribes were not asked to comply. However, the State may not in good faith insist upon a blanket provision in a tribal-State compact with Big Lagoon which requires future compliance with all State environmental and land use laws, or provides the State with unilateral authority to grant or withhold its approval of the gaming facility after the Compact is signed, as it proposed in the side letter agreement.

(*Id.* 19:4-16; *see also id.* 20:4-8 (finding the March 22, 2000 Order "provided the State with a reasonable basis for its belief that it could negotiate environmental and land use issues with the Tribe in good faith").) Again on March 17, 2004, the Court noted that it had "previously held that the State could negotiate in good faith regarding the on-site alternative by offering the Tribe specific concessions in return for requests that the Tribe comply with environmental regulations." (Def.'s RJN Ex. V at 7:17-20 (*citing* Mar. 18, 2002 Order 18).)

Contrary to the Tribe's unsupported assertion (Mot. 20:13-17), in the last round of negotiations the State did not insist or even ask the Tribe to obtain State or local agency permits or approval before building its project. Instead, *the Tribe* proposed specific project mitigation measures in August 2008 that the State modified and incorporated into its last proposal. (Pinal Decl. Ex. B; Engstrom Decl. Ex. 9A.) The measures were as tailored as the State could conceive given the limited information provided by the Tribe concerning its intended gaming facility design. Moreover, to the extent any of the State's proposed mitigation measures are *based on* state environmental and land use laws, this Court has found that to be a permissible starting point. (Pl.'s RJN Ex. 2 at 15:7-9.)

B. *Rincon* is Inapposite Because it Did Not Discuss Environmental Issues

Big Lagoon contends that because the court in *Rincon* held that a general fund fee for the operation of slot machines was not directly related to gaming activities, neither is environmental

regulation of a gaming facility directly related and, therefore, the State may not request environmental or land use conditions. (Mot. 21:14-28.) But *Rincon* is inapposite because the issue was whether the State could request general fund revenue sharing, not whether it could negotiate for environmental or land use conditions. The court's passing reference to environmental issues was in the context of discussing IGRA's legislative history generally and is otherwise dicta. *See Rincon*, 602 F.3d at 1029 n.10, 1040. Indeed, this Court has already rejected Big Lagoon's argument that IGRA's legislative history suggests IGRA does not allow the State to negotiate for environmental mitigation:

> The Tribe argues that this and similar portions of IGRA's legislative history indicate Congress' intent to prevent States from negotiating and including provisions on subjects such as environmental protection and land use as part of the compacting process. However, a better reading of the legislative history is that it warns against allowing States to regulate tribal activity broadly under the guise of negotiating provisions on subjects that directly relate to gaming activity and may be included in a tribal-State compact under § 2710(d)(3)(C). In other words, the legislative history does not state that issues such as environmental protection and land use may never be included in a tribal-State compact, but only that the State may not use the compacting process as an excuse to regulate these areas more generally.

(Pl.'s RJN Ex. 2 at 16 n.5 (original emphasis).) Nothing in *Rincon* requires this Court to modify this analysis or the Court's resulting conclusion.

C. The State Offered Valuable Consideration for Environmental Concessions

Big Lagoon claims the State requested environmental and land use concessions without offering meaningful consideration in return. (Mot. 20:16-17.) The State proposed to allow Big Lagoon to operate up to 349 gaming devices and request a compact amendment should it desire more devices. (Engstrom Decl. Ex. 9.) The State also offered to allow the Tribe to continue to receive its $1.1 million annual RSTF distributions as long as it did not operate more than 349 gaming devices and did not use RSTF money to pay any gaming-related costs. (*Id.*) Big Lagoon did not respond to the proposal, which had improved from the State's previous offer, and instead filed suit. That Big Lagoon abandoned the negotiation process without exploring the possibility of different terms does not mean the State failed to negotiate in good faith. (*See* Pl.'s RJN Ex. 4 at 12 (*citing Coyote Valley II*, 331 F.3d at 1110) (denying Tribe's summary judgment motion in part because State "actively negotiated" in good faith).)

Although the Tribe still desires the 1999 Compact terms[5]—which it could have accepted when the State negotiated en masse with tribes in 1999—the State long ago (August 2003) rejected that proposal because history had shown that the 1999 Compact did not include adequate environmental protections. (Def.'s RJN Ex. V at 2:17-18.) Indeed, the State need not offer the same terms as the 1999 Compact:

> The substantive legal issues presented in this lawsuit [challenging the 1999 Compacts], and the greater policy and empirical issues that lie behind this litigation, are of such magnitude and complexity that it cannot be assumed that a responsible state officer would automatically continue to enter into further, identical compacts no matter the accumulation of experience, the pressures against permitting urban tribal gaming establishments, public opinion, and other potentially relevant economic and legal developments.

Artichoke Joe's v. Norton, 216 F. Supp. 2d at 1101.

The Tribe also suggests the State's "calculated reluctance to offer the Tribe a profitable number of gaming devices for casino projects on the Tribe's own Rancheria" demonstrates bad faith. (Mot. 23:3-9.) But the Tribe cites no authority, nor is the State aware of any, that requires a state to offer compact terms that ensure a profitable gaming operation. IGRA's stated purposes include ensuring that tribes are the primary beneficiaries of gaming and ensuring that gaming is protected as a means of generating tribal revenue. 25 U.S.C. § 2702(1), (2); *see Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994). There is no evidence here that the State's negotiation position would preclude the Tribe from being the primary beneficiary of its gaming operation. Although the Tribe accused the State of requesting revenue sharing that it knew was unaffordable, the Tribe failed to provide the State, or this Court, with any supporting data. (Engstrom Decl. Exs. 8, 9.) The same is true for the number of gaming devices. The Tribe did not inform the State of the minimum number of gaming devices it believed necessary to achieve profitability, and it offers no evidence here that with 349 gaming devices, and the State's proposed revenue share, the Tribe would not be the gaming operation's primary beneficiary.

[5] In fact, the Tribe wants more than is available to the 1999 Compact tribes, insisting that it be able to operate more than 350 gaming devices even if there are no more licenses available in the statewide pool created by the 1999 Compact, an option which is unavailable to the 1999 Compact tribes. (Engstrom Decl. Ex. 8.)

D. Federal Regulations Envision Use of Compact Provisions as Mechanisms to Protect the Environment and Public Health and Safety

The National Indian Gaming Commission (NIGC), created by IGRA and charged with its enforcement, 25 U.S.C. §§ 2704-2709, has promulgated regulations requiring the construction and maintenance of tribal gaming facilities and gaming operations be "conducted in a manner which adequately protects the environment and the public health and safety." 25 C.F.R. § 502.22 (2008); *see also id.* § 599.5; 73 Fed. Reg. 6019, 6023 (Feb. 1, 2008). (Def.'s RJN Ex. W-Y.) A tribe is required to identify and enforce "laws, resolutions, codes, policies, standards or procedures applicable to each gaming place, facility or location that protect the environment and the public health and safety, *including standards under a tribal-state compact* or Secretarial procedures." *Id.* (emphasis added). Under accepted principles of statutory construction, statutory interpretation by an agency charged with implementing it will be upheld unless unreasonable. *Arizona Public Service Co. v. E.P.A.*, 211 F.3d 1280, 1287 (D.C. Cir. 2000). Here, the NIGC's construction of IGRA is reasonable and consistent with this Court's earlier rulings, as it envisions the use of tribal-state compacts to include standards for protecting the environment.

E. Big Lagoon Previously Agreed to More Restrictive Environmental Conditions

In the Barstow Compact, the Tribe "agreed to forego gaming and other adverse development on its environmentally sensitive land at its rancheria," and to mitigate environmental impacts to land surrounding the proposed casino site in Barstow, which would have been the Tribe's trust land. (Engstrom Decl. Ex. 1A, Settlement Agreement 5-6, Barstow Compact 2 & §§ 4.3, 11.) The Tribe's attorney testified before the Legislature that the terms "were freely negotiated at arm's length between," and did not infringe on Tribal sovereignty. (Pinal Decl. Ex. C at 81.) The Tribe's Chairman testified that the Barstow Compact would benefit California's greater interests "in terms of the environmental concerns." (*Id.* 85; *see also* Pl.'s RJN Ex. 6 at 3:7-9 (acknowledging the Barstow Compact "substantially serves a clear public policy and provides environmental . . . benefits to the State").) If environmental conditions were appropriate for the Tribe's rancheria and Barstow parcel when the Tribe planned to build a gaming facility in

Barstow, then they are equally appropriate, if not more so, for a project on the Tribe's environmentally sensitive land in Big Lagoon. Accordingly, the State negotiated in good faith on environmental and land use issues. The State is entitled to summary judgment and the Tribe's summary judgment motion should be denied.

III. THE STATE NEGOTIATED IN GOOD FAITH BECAUSE IT IS AGAINST THE PUBLIC INTEREST TO LOCATE A CLASS III GAMING FACILITY ON LAND THAT THE UNITED STATES UNLAWFULLY ACQUIRED IN TRUST FOR BIG LAGOON'S BENEFICIAL USE THAT OTHERWISE WOULD NOT BE GAMING-ELIGIBLE INDIAN LANDS, AND THAT WOULD RESULT IN SIGNIFICANT DAMAGE TO SURROUNDING STATE LANDS

The public interest is one of many factors that IGRA allows the Court to consider in determining whether the State negotiated in good faith. 25 U.S.C. § 2710(d)(7)(B)(iii)(I). Here, the State negotiated in good faith because it is not in the public interest to put a casino on land that, under the *Carcieri* decision, the United States unlawfully acquired in trust for Big Lagoon, and where the Tribe insists on siting a casino and all related development without adequate mitigation of environmental impacts to adjacent State lands. Thus, the State is entitled to summary judgment and the Tribe's summary judgment motion should be denied.

A. The United States May Only Acquire Land in Trust Under the IRA for Recognized Tribes That Were Under Federal Jurisdiction in 1934

In 1994, pursuant to the IRA, the Secretary acquired in trust for Big Lagoon the eleven-acre parcel where the Tribe insists on locating its gaming facility. (Pinal Decl. Ex. D.) The IRA, enacted in 1934, authorized the Secretary to acquire land in trust "for the purpose of providing land for Indians," 25 U.S.C. § 465, and defined "Indian" to

> include all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing with the present boundaries of any Indian reservation, and shall further include all persons of one-half or more Indian blood.

Id. § 479. Last year the Supreme Court held that because the term "now under federal jurisdiction" in § 479 unambiguously refers to those tribes that were under federal jurisdiction when Congress enacted the statute, the Secretary has authority to take land in trust only for recognized tribes that were under federal jurisdiction when the IRA was enacted in June 1934. *Carcieri*, 129 S. Ct. at 1060-61, 1064-65, 1068.

B. Big Lagoon Was Not a Recognized Tribe Under Federal Jurisdiction in 1934 And, Therefore, Was Not a Proper Trust Beneficiary

Although Big Lagoon now appears on the Bureau of Indian Affairs' (BIA) list of "Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs," 74 Fed. Reg. 40,218 (Aug. 11, 2009), it was not a "recognized Indian tribe under federal jurisdiction" in 1934. In addition, even if there were a recognized tribe under federal jurisdiction in 1934, the preliminary historical documents indicate that current Big Lagoon members do not descend from any person who may have resided on the original rancheria in 1934. Historical documents obtained to date concerning the purchase and subsequent use and occupancy of the nine-acre rancheria appear to support the Tribe's status.

1. James Charley and Family Were Not a Recognized Indian Tribe Under Federal Jurisdiction in 1934

On July 10, 1918, F. G. Ladd and his wife, Ella H. Ladd, conveyed to the United States a 9.24-acre parcel situated on the shore of Big Lagoon. (Pinal Decl. Ex. E.) The general warranty deed conveyed the parcel subject only to a railroad right of way and without any other restriction. (*Id.*) Particularly, the deed did not convey the premises in trust for any person or group, and contained no language imposing any limitation on alienation. There was no language in the deed stating that the interest conveyed in the premises was subject to any limitation, by way of trust or otherwise, either as to use, or as to any person or identifiable group, such as a particular Indian or tribe. Nor were there any recitals in the deed indicating any intent with respect to anticipated use, from which trust intent might be inferred.

Just as the Ladds, as grantors, expressed no intent in the deed that the United States utilize the land for the benefit of a particular person or tribe, the United States, as grantee, had no intent to receive the land for the benefit of any particular Indian or tribe. Indeed, the conveyance was the culmination of an internal dialogue that had taken place within the Department of the Interior's Office of Indian Affairs, reflected in an exchange of correspondence concerning the purpose and manner of the land acquisition.

On April 3, 1917, James Charley sought assistance from the Indian Office concerning his fear that he would be evicted by the owner of the land on which he was then living. (Pinal Decl. Ex. F.) Federal officials investigated and, deciding it would be calamitous for James Charley (also known as Lagoon Charley) and his family to be evicted from what they considered their home, contacted the landowners, the Ladds, to inquire about selling the property. (*Id.* Ex. G.) Indian Services Inspector John J. Terrell advised the Ladds that "Congress has during the past few years made small appropriations[6]to purchase land for village homes for the landless Indians of California" and that "[t]he small appropriations and the large number of landless Indians have precluded the purchase of only small tracts and the paying of excessive prices." (*Id.* Ex. H (n. added).) Terrell explained the Indian Office's desire "to protect, if possible, this Indian family in their 'little cabin home by the sea,'" and asked the Ladds to "be most considerate and generous in making this possible." (*Id.*) Mr. Ladd eventually stated that he was willing to sell a portion of the land for James Charley's use (*id.* Ex. I), and by January 1918, the Indian Office focused on the size of the parcel to be purchased and the price to be paid (*id.* Exs. J-M.)

The Commissioner's Office made clear to Terrell that

> With regard to purchasing ten acres for one family alone, it may be said that the purpose of the appropriation from which the payment would be made is to buy tracts of limited areas on which to locate small bands, with the idea ultimately to divide the land pro rata and give evidence of title to the occupants in the form of patents. This Office does not believe that it would be good policy to attempt to pick out individual families and purchase them a homesite, as seems to be contemplated in the case of Jim Charlie[7]. . . .
>
> Will you kindly explain the situation to Jim Charlie and family and have them clearly appreciate the fact that title to the tract will be in the United States and that thereafter should it become necessary to use a part of the purchased lands in caring for other Indians, that they will be expected to make no objection. With such an understanding of the status of the land given the Indians, this Office would have no objection to your closing out the proposed purchase of the ten acres, if you think it is a good proposition.

[6] *See, e.g.*, Act of Jun. 21, 1906, 34 Stat. 325, 333; Act of Apr. 30, 1908, 35 Stat. 76; Act of Aug. 1, 1914, 38 Stat. 582, 589.

[7] *See also* Pinal Decl. Ex. N, Handwritten Note ("It is somewhat questionable as to the propriety of buying individual families a home, although I believe we have done so in one or two instances. The appropriation namely was obtained to buy tracts on which small bands could be located.").

(Pinal Decl. Ex. O (n. added).) To which Inspector Terrell responded:

> The Office is advised that on the two different occasions of my visits to the home of these Indians (Charlie, his wife and six quite interesting children, see my letter of July 14, 1917), *I made it a point to cause both Charlie and his wife to understand that, in the event of the purchase of any considerable acreage of land to embrace their home and improvements, the title would be in the government and the privilege of other Indians of his tribe*[8] *being landless and homeless, desiring to do so, would be permitted to establish their homes on some portion of the land purchased*, not to encroach upon the home improvements erected and used by him. [¶] The suggestion of the Office in this connection is fully understood by Charlie.

(*Id.* Ex. P (emphasis & n. added).) In the same letter, Terrell expressed doubt that "the few other Indians of Charlie's tribe that are landless, if any, will desire to make a permanent home on any portion of the 10 acres named in Mr. Ladd's proposition," and added that two of "Charlie's" brothers, George and Frank, already had homes nearby. (*Id.*)

The Indian Office responded to Terrell and instructed him as follows:

> You are advised that it was the intention of the Office that you should close the option of purchase on the land offered by Mr. Ladd on the instructions given you in Office letter of April 20, 1918, subject however to the limitations mentioned therein, namely, that it should be clearly understood by Jim Charlie and the other Indians, that *the Office and Department reserve the right to remove to the purchased tract any Indians who may care to make their homes thereon, regardless of the wishes of the few Indians who lived there at the time of the purchase*, and in case you regard the proposed purchase as a good proposition.

(Pinal Decl. Ex. Q (emphasis added).)

On June 19, 1918, Inspector Terrell advised Mr. Ladd's lawyers that the Indian Office had accepted his recommendation to purchase the property, and instructed them, among other things, that "[t]he deed should convey to the 'United States of America.'" (Pinal Decl. Ex. R.)

As noted, the warranty deed is devoid of language indicating any conveyance in trust or any intended purpose in the sale or purchase. The grantor and grantee, however, understood that at least one purpose for the purchase was to protect James Charley's home as then situated on the land. This purpose was foremost in the minds of those at the local level who initiated the purchase, and correspondence confirms the grantor also understood this to be the government's intent. But as the internal correspondence shows, it was always the intention of the

[8] The historical documents discussed in detail in argument IV(B)(2), *post*, confirm that James Charley and his wife Lottie were Yurok Indians.

decisionmakers within the Department of the Interior not to limit the use of the land to the benefit of James Charley and his family. On the contrary, those decisionmakers were firm in their intent that it would be open to the government to situate such other Indians as the government saw fit, irrespective of tribal affiliation, without permissible objection from any of those on the premises at the time of purchase. Moreover, they instructed their local representatives to ensure that understanding on the part of the Charley family, and made their approval of the purchase contingent on, among other things, that specific understanding, and they were careful to instruct the grantor that the land was to be conveyed to the "United States of America."

Presumably, either incident to its acceptance of the conveyed land, or after taking possession, the government could have voluntarily limited its rights in the land by a trust declaration for the benefit of a person or group, but there is apparently no evidence that it did so. Interestingly, an opinion of the Solicitor of the Department of the Interior suggests that even if there had been governmental action indicating its intent, as grantee, to limit the use of rancheria lands for the benefit of specific persons or groups, these circumstances would not impart a trust character to the lands, for the benefit of any tribe, person or group. The Solicitor's opinion specifically distinguishes between deed references denoting trust character, and deeds like the Ladd deed of 1918, the form of an absolute trust conveyance with indication of trust intent—if any—being indicated elsewhere:

> The "background" data submitted to and published by the Senate Committee occasionally states that the title to particular rancheria land is "in the name of the United States Government in trust for the Indians of California" (See Auburn, Big Sandy, etc.); or that the lands "are held in trust by the United States Government for the Indians of California" (Blue Lake); or that it is "trust land" (Cache Creek). (See Report No. 1974, 85th Cong., 2d Sess.) These references do not connote a trust in which the United States holds merely a legal title, with equitable ownership elsewhere, as in the case of Indian lands generally; the intention was to indicate that the land, although acquired in fee, was purchased for a specific purpose. This is shown both by congressional and administrative action. For instance, the Secretary generally ordered the purchase of a particular California tract "for the use of the band of Indians referred to" in the special agent's report (see file, Ruffey's Band). A special form of "proposal for sale of lands" was employed which states that "_____ hereby propose to sell to the United States, for the use and occupancy of the _____ Indians (but without restrictions in deed) the following described lands: . . . ." (See Paskenta.) (Underlining added for emphasis) The Government's voucher authorizing payment generally contains the language "to the purchase of _____ land in _____, said tract to be used for the benefit of the _____ band of homeless Indians . . ." (See

> Mark West.) The deeds issued to the United States contain no restriction, and are in the form of absolute conveyances.

(Pinal Decl. Ex. S at 5-6 (underscore and parenthesis in original.)

The Ladds conveyed the Big Lagoon parcel to the United States in the precise kind of circumstances described by the Solicitor's opinion, that is, received by the government without restriction, having been granted by an absolute conveyance, and not held in trust by the government for a particular tribe, or any particular person or group. With respect to such absolute conveyances, the Solicitor's opinion states:

> It has been decided, administratively, that these lands are not allottable, even to the members of the band for whom acquired, and that they could not be sold without legislation, even if the purpose was to acquire land more suitable for the same band (see Ruffey's Band, File 74408/07/311). They could be used for any landless California Indians, and not merely for the specific band for whom purchased, since neither the deed conveying the property to the United States nor the act appropriating the purchase money contained "any limitation or provision as to what Indians should be settled thereon." (See Marshal and Sebastopol File 310, Part 21, letter Comm., July 6, 1937.)

(*Id.* 6.)

This functional description of unrestricted conveyances characterizes the Big Lagoon property conveyed by the Ladds, as to which the government's ability to situate homeless Indians was made explicit by the Indian Office's internal correspondence predating the actual conveyance in July 1918. Although the immediate cause of the purchase was to protect James Charley and family from feared ouster or eviction, and the land under government ownership would be occupied by James Charley and family, it was also clear that the government intended the land "could be used for any landless California Indians" that the government might choose. Indeed, as the internal correspondence recognized, it would have been anomalous for the United States to purchase a home solely for a family, such as that of Lagoon Charley, when the Appropriations Acts were intended to allow the government to buy tracts on which "small bands," not small families, could be located. (*See* Pinal Decl. Exs. L & N.) The BIA later confirmed this intent in 1968 when it explained that the "Big Lagoon Rancheria was purchased in 1918 for landless California Indians and was not set aside for any specific tribe, band or group of Indians. The

residents have not formally organized and there is no official membership roll. Further, no allotments or formal assignments have been made to any individual." (*Id.* Ex. T.)

Shortly after the United States purchased the Big Lagoon parcel, "Lagoon Charlie died, and his widow and children moved to Trinidad, about ten miles distant, where they resided" as of September 21, 1921. (Pinal Decl. Ex. U.) His widow and her four children continued to live in Trinidad as late as summer 1929. (Decl. of Patty Brandt in Support Def.'s Opp'n to Pl.'s Mot. Sum. J. & Def.'s Cross-motion Sum. J. (Brandt Decl.) Ex.A.) Thereafter preliminary documents do not show anyone living on the parcel until James and Lottie Charley's son Robert lived there from 1942 to 1946. (Pinal Decl. Ex. V at 1.)

In 1947, the United States Indian Service published a report, "Ten Years of Tribal Government Under I.R.A.," by Theodore H. Haas, Chief Counsel (Haas Report), that reviewed the IRA's impact on tribal self-government. (Pinal Decl. Ex.W.) The report includes a list of "Indian Tribes, Bands and Communities Which Voted to Accept or Reject the Terms of the Indian Reorganization Act, the Dates When Elections Were Held, and the Votes Cast." (*Id.* Table A.) As detailed above, staff from the Hoopa Valley Indian Agency arranged for the United States to purchase the nine-acre parcel, yet the Tribe's name does not appear on the list of Indians within the Hoopa Valley Agency's jurisdiction that voted to accept or reject the IRA. (*Id.*) Indeed, Big Lagoon's name does not appear on a June 1935 letter from Indian Agency staff to the Commissioner detailing IRA election results for "all California jurisdictions." (*Id.* Ex. X.)

The Deputy Assistant Secretary recently stated that he believed the Haas Report is "not the only or finally determinative source," but he considers it a "helpful . . . starting point" for BIA staff to determine, after *Carcieri*, whether a tribe was a recognized tribe under federal jurisdiction in 1934.[9] (Pinal Decl. Ex. Y.) Reading the Haas Report in the context of the historical documents detailed above, there is credible and undisputed evidence that Big Lagoon was not a recognized tribe under federal jurisdiction in 1934.

[9] As this Court is aware, the BIA is currently deciding Big Lagoon's status in 1934. (*See* Order Denying Def.s' Mot. to Stay (Doc. 74).)

2. Historical Documents Indicate That Big Lagoon's Members Are Not Descended From James Charley and Family

Even if the James Charley family constituted a recognized tribe under federal jurisdiction in 1934, to be eligible for an IRA trust acquisition Big Lagoon's current members must also be descendant from the James Charley family. *See* 25 U.S.C. § 479. The BIA has interpreted this provision to mean the descendant "was, on June 1, 1934, physically residing on a federally recognized Indian reservation." 25 C.F.R. § 151.2(c); *Van Mechelen v. Portland Area Director, Bureau of Indian Affairs,* 35 IBIA 122 (2000). (Def.'s RJN Exs. Z, AA.) In this case, the historical documents show that neither James Charley nor anyone from his family resided on the nine acres in June 1934, and no current Tribal members resided there in 1934. (*See* argument IV(B)(2), *post*.) Moreover, "Big Lagoon admits that no current member of the Tribe is known to be related to Jim 'Lagoon' Charley other than by marriage."[10] (Pinal Decl. Ex. Z.) "Descent" is defined as "hereditary succession." Black's Law Dictionary (Abridged 6th Ed. 1991) 306. A "line of descent" is "[t]he order or series of persons who have descended one from the other or all from a *common ancestor*, considered as placed in a line of succession in the order of their birth, the line showing the connection of all the *blood-relatives*." *Id.* at 307 (emphasis added). Big Lagoon's admission demonstrates the current Tribal members do not descend from the James Charley family because they do not share a common ancestor or blood-relative. Therefore, the Tribe is not an eligible beneficiary of land acquisitions under the IRA.

C. It is Not in the Public Interest for the State to Negotiate For a Casino on Land That the United States Unlawfully Acquired in Trust for Big Lagoon

IGRA allows the Court to consider the public interest in determining whether the State negotiated in good faith. 25 U.S.C. § 2710(d)(7)(B(iii). This "may include issues of a very general nature." S. Rep. No. 100-446, at 14 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071,

[10] The admission may be contrary to the historical documents the State has received so far. If, as the State suspects, the unspecified marital relationship is between Robert Charles and Ada Waukell, the Tribe's admission raises a material factual dispute because Robert Charles' death certificate indicates he was never married. (Decl. of Linda Thorpe in Support of Def.'s Opp'n to Pl.'s Mot. Sum. J. & Cross-motion Sum. J. (Thorpe Decl.) Ex. A.)

3084-85. This Court previously found the State's argument concerning Big Lagoon's status in 1934 "arguably implicates the public interest." (Order Denying Def.'s Mot. to Stay 5:2-3.) Here, it is against the public interest to allow gaming on land that, under the *Carcieri* decision, the United States unlawfully acquired in trust for Big Lagoon. Indeed, the fact that the Supreme Court decided *Carcieri* after the trust acquisition occurred does not mean the public interest is not implicated. Irrespective of the date of the *Carcieri* decision, the parcel is not "Indian lands" eligible for gaming under IGRA. *See* 25 U.S.C. § 2719 (prohibiting gaming on land acquired in trust for the benefit of an Indian tribe after October 17, 1988, with limited exceptions). Although this Court has found previously that the eleven acres is "Indian lands" under IGRA, that finding was based, in part, on an assumption that the United States was authorized to acquire the land for Big Lagoon under the IRA. (*See* Pl.'s RJN Ex. 2 20-23.) That the State raises the issue for the first time here is occasioned by the recent *Carcieri* decision.[11]

D. It is Not in the Public Interest for the State to Negotiate For a Casino on Land That Would Significantly Damage Adjacent State Lands

As discussed in argument II, *ante*, the State has a vital interest in preserving and protecting environmentally sensitive State resources located adjacent to the rancheria and trust land. (*See* Engstrom Decl. Ex. 4.) Out of respect for the Tribe's desire to build the project on its trust land, balanced with the State's desire to protect its natural resources, the State proposed that the Tribe site the casino on the nine-acre rancheria, with the hotel on the eleven-acre trust parcel, and parking and other supporting facilities allocated between the parcels. (*Id.* Ex. 9A.) But the Tribe refused and, other than exploring various alternative sites, has insisted that if the project is to be located on or near its rancheria, then the entire project must be located on the eleven acres only. This doubling-up of a casino, hotel and supporting infrastructure on a single parcel exacerbates

[11] The State is not seeking to take the parcel out of trust or to challenge its status as Big Lagoon's trust land. Indeed, such an action may be subject to the Quiet Title Act, 28 U.S.C. § 2409a(a), although there is presently no definitive answer to the question whether the Quiet Title Act bars federal courts from reviewing a completed trust acquisition where, as here, the Secretary may have acted unconstitutionally or in violation of federal law. *See Big Lagoon Park Company, Inc. v. Acting Sacramento Area Director, Bureau of Indian Affairs*, 32 IBIA 309, 315-16 (1998). (Def.'s RJN Ex. BB.)

the off-rancheria environmental impacts beyond a level tolerable to the State. (*See also* argument II(E), *ante*.) It would be against the public interest to negotiate for a project under these circumstances, or to find that the State requested too much consideration from the Tribe in seeking to protect valuable natural resources. Accordingly, the State is entitled to summary judgment and the Tribe's summary judgment motion should be denied.

IV. BIG LAGOON'S SUMMARY JUDGMENT MOTION SHOULD BE DENIED, OR AT LEAST CONTINUED, TO ALLOW THE STATE TO DISCOVER INFORMATION ESSENTIAL TO ITS OPPOSITION

As the Court knows, the State has had difficulty obtaining documents from the United States in response to subpoenas issued to the BIA and the Assistant Secretary of Indian Affairs to ascertain Big Lagoon's status in 1934, and the connection between James Charley and the individuals listed on the Big Lagoon Rancheria Asset Distribution Plan. (Def.'s Mot. to Cont. Fact Discovery Completion Date (Docs. 48, 58).) The documents are necessary to the State's defense here because even if James Charley and his family were a recognized tribe under federal jurisdiction in 1934, the Big Lagoon members that acquired a beneficial interest in the eleven-acre parcel must descend from the James Charley family to have been eligible for an acquisition under the IRA. If the Court finds the Tribe's admission that its members are not related to James Charley, as discussed in the previous argument, insufficient to grant the State summary judgment, then additional discovery is needed to prove affirmatively the lack of any lineal connection. Moreover, the partial document production from the United States raises for the first time the question whether the United States lawfully considers the Tribe federally recognized, but they do not definitely answer the question. If Big Lagoon is not lawfully recognized, it would not meet IGRA's jurisdictional prerequisite for entering into compact negotiations with the State, or pursuing this action, because it would not be an eligible "Indian tribe," or have jurisdiction over "Indian lands," as those terms are defined in IGRA. Because the State and United States continue to meet and confer to resolve their differences over the subpoenas, the Tribe's summary judgment motion should be denied, or continued, to allow the State to complete discovery.

A. The Court May Deny or Continue a Motion for Summary Judgment to Allow the Non-moving Party to Complete Discovery

Federal Rule of Civil Procedure 56(f) provides that if a party opposing a summary judgment motion "shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) deny the motion; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any other just order." Rule 56(f) requires, rather than merely permits, discovery "where the non-moving party has not had the opportunity to discover information that is essential to its opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986); *see also Burlington Northern Santa Fe R. Co. v. Assiniboine & Sioux Tribes*, 323 F.3d 767, 773-74 (9th Cir. 2003) (*citing Berkeley v. Home Ins. Co.*, 68 F.3d 1409, 1414 (D.C. Cir. 1995) (describing "the usual generous approach toward granting Rule 56(f) motions"); *Garrett v. City & County of San Francisco*, 818 F.2d 1515, 1518-19 (9th Cir. 1987) ("summary judgment should not be granted while opposing party timely seeks discovery of potentially favorable information"). A party requesting denial or continuance must identify "the specific facts that further discovery would reveal and explain why those facts would preclude summary judgment." *Tatum v. City & County of San Francisco*, 441 F.3d 1090, 1100-02 (9th Cir. 2006) (*citing* Rule 56(f)).

B. Good Cause Exists for the Court to Deny or Continue the Tribe's Summary Judgment Motion

1. The State's Efforts to Obtain the Evidence

On August 19, 2009, the Court established the fact discovery completion date as January 29, 2010, which the parties stipulated to continue to February 26, 2010. (Docs. 30, 35.) On December 18 and 21, 2009, the State issued subpoenas duces tecum to the BIA Pacific Regional Office, the BIA Northern California Agency and the Assistant Secretary of Indian Affairs. (Pinal Decl. Ex. KK.) The subpoenas are identical and seek documents demonstrating a comprehensive historical accounting of the Tribe. (*Id.*) Responses to the subpoenas were due by January 8, 2010. (*Id.*) Despite the State's repeated attempts to contact the BIA and Assistant Secretary, they did not respond until well after the due date. (*Id.* & Ex. LL.) The Court subsequently continued to May 31, 2010, the discovery cutoff date for the documents sought by the three subpoenas to the United States. (Minute Order (Mar. 17, 2010) (Doc. 60).) The BIA Pacific Regional Office and

Northern California Agency produced some documents on March 3 and April 16, 2010, but refused to produce other documents on April 7, 2010. (Pinal Decl. Exs. MM, NN, OO.) On April 30, 2010, the State received from the Assistant Secretary a letter purporting to attach documents responsive to the subpoena but none were included. (*Id.* ¶ 44 & Ex. PP.) The Assistant Secretary subsequently provided the documents on May 25, 2010. (*Id.* ¶ 44.) On May 27, 2010, the State responded by noting various deficiencies in each of the United States' responses, and initiated the meet and confer process in advance of the discovery cutoff, scheduling an in-person meeting on June 14, 2010, to resolve the dispute. (*Id.* Exs. QQ, RR, SS, TT.)

At the June 14 meeting, the United States agreed to respond in writing to the State's May 27 letter, and to address additional issues raised during the meeting. (Pinal Decl. Ex. UU.) The parties agreed to meet again on June 28, 2010, and, at the United States' request, the State agreed not to take any action to enforce the subpoenas until after July 9, 2010. (*Id.*) The United States subsequently agreed to provide responses to the State by June 25, 2010, except for documents concerning the Hoopa-Yurok Settlement Act, which BIA staff would be unable to review until June 30, 2010. (*Id.* & Ex. VV.) The BIA indicated it would provide the State with a response concerning those documents by July 2, 2010. (*Id.* Exs. UU, VV.)

On June 25, 2010, the State received numerous documents from the Assistant Secretary but the documents were incomplete. (Pinal Decl. Ex. WW & ¶ 49.) Several issues are unresolved, however, the Assistant Secretary's Attorney-Advisor with whom the State is coordinating is unavailable until at least July 6, 2010. (*Id.* Ex. WW & ¶ 49.) On June 25, 2010, the State also received a response from the BIA Pacific Regional Office and Northern California Agency indicating they would not produce certain information protected by the Privacy Act, but, as indicated, staff would review files pertaining to the Hoopa Yurok Settlement Act on June 30, 2010, and provide a further response on July 2, 2010. (*Id.* Ex. VV.) The parties agreed to meet and confer after July 2, 2010, to determine whether further action is necessary. (*Id.* Ex. UU.) If that meeting does not resolve the dispute, or assure resolution by the end of July 2009, the State will take action to enforce the subpoenas. (*Id.* ¶ 52.)

The State has been diligently attempting to obtain evidence that is not otherwise available elsewhere; however, the United States' failure to timely comply with subpoenas for documents essential to the State's defense has thwarted the State's ability to complete discovery earlier.

2. Evidence Obtained to Date

In addition to the discussion in argument III(B), *ante*, about the historical documents surrounding the purchase and subsequent use and occupancy of the nine-acre rancheria, the State has obtained the following evidence through discovery and investigation independent of its attempted discovery from the United States.[12]

James Lagoon Charlie's wife, Lottie, was a full-blood Yurok Indian of the Yaw-h-ter Band. (Brandt Decl. Ex. A.) Robert Charlie, a full-blood Yurok born to James and Lottie, eventually became known as Robert Charles. (*Id.* Exs. A at 1, M; Thorpe Decl. Ex. A.)[13] He lived with Ada Waukell, a full-blood Indian of the Lower Klamath Tribe. (Brandt Decl. Exs. B at 1-2, J at 1, K at 2.) Robert Charles apparently lived on the Big Lagoon parcel from 1942 to 1946. (Pinal Decl. Ex. V at 1.)

Ida Waukell was Ada Waukell's sister. (Brandt Decl. Ex. C at 1.) Ida and Ada were daughters of Harry and Nettie Waukell. (*Id.* Exs. J at 2, K at 1, L at 1.) Both Harry and Nettie Waukell were full-blood Klamath Indians. (*Id.* Ex. N at sheet 3, lines 1-2.) The Yurok Tribe was historically known as the Klamath River Indians. (Pinal Decl. Ex. AA at 1.) In adulthood, Ida Waukell identified herself as "4/4 Yurok." (Brandt Decl. Ex. C at 1.) Ida Waukell and Thomas Williams had a son named Thomas Williams. (*Id.*; Thorpe Decl. Ex. B.) The elder Thomas Williams was non-Indian, as evidenced by Ida Waukell's formal identification of her son Thomas Williams as being one-half Indian blood, and the younger Thomas Williams being identified on

[12] For the Court's convenience, attached hereto as Exhibit A is a flow chart summarizing the relationship between the James Charley family and the distributees and dependent members listed in Big Lagoon's Asset Distribution Plan.

[13] At some point, James Charley's wife began to spell her married name, and the surnames of her sons by James, as Charlie rather than Charley. (*See, e.g.*, Brandt Decl. Ex. A at 1.) By the time of her death, she and her sons by James had apparently again modified the surname, this time to Charles. (*See id.* Ex. M.)

his children's birth certificates as one-half Klamath Indian. (Brandt Decl. Ex. C at 1; Thorpe Decl. Exs. I, J.) All further references to Thomas Williams are to the younger Thomas Williams.

Thomas Williams may have been married to Lila Green, the daughter of a one-half blood Yurok, George Green, and his wife Laura, a one-half blood Chimariko Indian. (Pinal Decl. Ex. V at 1; Brandt Decl. Ex. D at 1-2.) After World War II, Thomas Williams is reported to have expressed an interest in acquiring the nine-acre Big Lagoon parcel that had lain vacant for some time. BIA file notes from February 1949 indicate that "Tom Williams, about 36, *nephew of Mrs. Robert Charles* [Ada Waukell], willing to pay $600. Indian married to Lyle [sic] Green, an Indian woman. Woodsman, his wife and 1 child, worked for Hammond 12-15 years. Address Trinidad, c/o Big Lagoon Park." (Pinal Decl. Ex. V at 1 (emphasis and bracketed text added).) Thomas Williams, however, did more than simply inquire about the Big Lagoon property. He moved himself onto it, having first managed to obtain permission from BIA to camp there.

In 1951, BIA staff found the land was unoccupied but were informed that Thomas Williams was believed to have bought the property, and had recently occupied it in a tent. (Pinal Decl. Ex. V at 2.) Staff recommended the "land be sold and funds given to heirs or turned over to California Indians, depending on policy adopted." (*Id.*) Eventually Thomas Williams occupied the parcel outright, and commenced construction of a house. In an internal memorandum entitled, "Trespass on Big Lagoon Rancheria," BIA staff noted this unauthorized activity, along with the fact that the dilapidated cabins that had been on the property for so long had been burned to the ground, and that staff left a note to stop all construction at once. (*Id.* Ex. BB.) In a separate memorandum entitled "Big Lagoon Trespass," BIA staff stated, "After many fruitless trips to Big Lagoon I have finally been able to contact the builder of the houses on this rancheria, Mr. and Mrs. Tom Williams, P.O. Box 25 Trinidad, California . . . . These are the people that were given permission by this office to camp on the rancheria, but ended up building a cabin." (*Id.* Ex. CC at 1.) Staff wrote:

> Mr. Williams works in a mill at Orick, California, so I was not able to talk to him, but I did contact his wife and have the following explanation as told by Mrs. Williams: Mrs. Thomas Green Williams, an unallotted and unassigned Yurok Indian, states that she called many time at the Hoopa Office trying to get an assignment on one of the rancherias and was never able to get a satisfactory answer, only that such a

> program was not ready at the time. She was finally given permission to camp on Big Lagoon, so they built a cabin in order to lock up their belongings when they were away.

(*Id.*) The writer closed by saying, "Possibly this could be the subject of a Sacramento conference, as I definitely feel that we should go into this problem in its entirety and come up with some answers, as I stated before I believe this is just the beginning of such unauthorized occupying of rancheria land." (*Id.* 2.)

Before the unlawful occupancy of the Big Lagoon parcel became a concern, Thomas Williams and Lila Green had a daughter, Beverly Williams. (Thorpe Decl. Ex. J.) Following a brief marriage that produced three sons—Franklin, Dale and Peter Lara (Pinal Decl. Ex. DD at 1 Latham Mem. to BIA Area Dir. (Jun. 30, 1967) 1; Thorpe Decl. Exs. F-H.)—Beverly Williams married Theodore R. Moorehead, aka Theodore R. M. Moorehead, aka Ted Moorehead,[14] born to Theodore and Isabel Moorehead of Crescent City in Del Norte County. (Brandt Decl. Exs. E at 1, F at 1.) The elder Theodore Moorehead was one-half Indian blood of the Smith River Band, and Isabel Moorehead was three-quarters Indian blood of the Tolowa and Smith River Band.[15] (*Id.* Exs. E at 2, F at 2, G, H.) Theodore R. Moorehead and Beverly Williams were reported to be living on the Big Lagoon parcel in 1967. (Pinal Decl. Ex. EE at 1.) Their children are Roger, Virgil and Holly Moorehead. (Thorpe Decl. Exs. C-E.)

3. Evidence the State Expects to Receive

Several unresolved discovery issues exist between the State and United States. For instance, the BIA Pacific Regional Office and Northern California Agency staff have yet to review their files concerning the State's request for documents pertaining to a provision in the Hoopa Yurok Settlement Act, 25 U.S.C. § 1300i-10(b), wherein Congress gave Big Lagoon the option to vote to merge with the Yurok Tribe. (Pinal Decl. Exs. UU, VV, ¶ 50.) The documents

[14] The surname "Moorehead" sometimes appears in official and other records with the variant spelling "Morehead."

[15] Theodore and Isabel Moorehead lived in Crescent City in 1929, were living in Blue Lake, in Humboldt County, as late as 1949, and in Smith River in 1969. (Brandt Decl. Exs. E at 2, F at 2, G at 1-2.)

will help explain the relationship between Big Lagoon and the United States, and Big Lagoon and the Yurok Tribe, particularly in light of evidence obtained to date that suggests James Charley and his family were Yurok, and that Congress specifically corrected an early draft of the Act to ensure that Big Lagoon was identified as a rancheria instead of a tribe in recognition that there is a difference between the two. (*Id.* ¶ 50.) *See* S.Rep. 100-564, at 38 (Sep. 30, 1988). Also unresolved is BIA's claim that application folder numbers for various individuals identified in the 1968 California Judgment Enrollment is protected by the Privacy Act.[16] (*Id.* ¶ 51.) Without that information, which is exclusively within the BIA's possession, the State cannot complete its genealogical research. (*Id.*) As for the Assistant Secretary, the State received on June 25, 2010, several document "excerpts," which otherwise are non-responsive without more information to explain their context. (*Id.* ¶ 49.) More importantly, the Assistant Secretary has not produced documents, as the State requested, explaining how Big Lagoon came to be identified as a federally recognized tribe. (*Id.*) The Assistant Secretary produced several documents showing the end result, but no documents explaining how or why it is so identified. (*Id.*)

4. Outstanding Evidence Will Defeat the Tribe's Summary Judgment Motion

There are several reasons why the documents yet to be obtained from the United States will assist the State to defeat the Tribe's motion for summary judgment.

a. There May be a Material Question Whether There is a Lineal Connection Between James Lagoon Charley and the Distributees Named in the Rancheria Asset Distribution Plan

Based on historical documents to date, Big Lagoon is not entitled to trust land acquisitions under the IRA because James Charley and his family were not a recognized tribe under federal jurisdiction in 1934. Based on the Tribe's admission, there is credible evidence that its members do not descend from James Charley. (*See* argument III(B), *ante*.) If, however, the Court finds the State's evidence insufficient, at this point, to support summary judgment, then additional

[16] BIA's assertion is suspect as the State seeks only the application file numbers that are on an index in BIA's sole possession, so it can locate the files that are no longer in the BIA's possession and are publicly available at National Archives, and for which National Archives staff will determine whether and to what extent the Privacy Act applies. (Pinal Decl. ¶ 51.)

discovery is necessary to ascertain the genealogical connection, if any, between James Charley and his family and current Big Lagoon members.

Thomas Williams, Lila Green Williams, Theodore R. Moorehead, Beverly Williams Moorehead and their children are the distributees identified on the Big Lagoon Rancheria Asset Distribution Plan prepared by the BIA and approved by the Secretary in 1968 (Pinal Decl. Ex. FF) to terminate Big Lagoon pursuant to the California Rancheria Termination Act, Pub. L. No. 85-671, 72 Stat. 619 (1958) (as amended by Pub. L. No. 88-419, 78 Stat. 390 (1964). The Distribution Plan provides the primary basis for modern Tribal membership. (Pinal Decl. Ex. GG at art. III, § 1.) If the individuals identified on the Distribution Plan are not descended from James Charley and his family, then presumably neither is any current member.

While the current historical documents indicate the relevant individuals were descended from Yurok, Lower Klamath (presently known as Yurok), Chimariko, Smith River and Tolowa Indians,[17] instead of a unique, recognized Indian tribe with members resident on the nine-acre rancheria in 1934, a more complete genealogical picture will be informed by the 1968 California Judgment Enrollment records that the BIA has to date prevented the State from researching. In addition, documents the United States has yet to provide that pertain to the Hoopa Yurok Settlement Act will help explain the historic relationships between the United States and Big Lagoon, and the Yurok Tribe and Big Lagoon. If this additional evidence affirmatively demonstrates that Big Lagoon members do not descend from James Charley and his family, then Big Lagoon is not a lawful beneficiary of trust land acquisitions under the IRA, the Secretary should not have accepted the eleven-acre parcel into trust in 1994, and it would be against the public interest for the State to negotiate to put a casino on land acquired in trust unlawfully that otherwise would not be eligible Indian lands under IGRA.

[17] Legislative history for the Hoopa Yurok Settlement Act indicates Smith River and Tolowa Indians are not historically of Yurok origin. S.Rep. 100-564, at 29 (Sept. 30, 1988). Therefore, historical documents obtained to date show the Moorehead ancestors, who descended from Smith River and Tolowa Indians, did not contribute Yurok Indian blood to the genealogical makeup of the individuals identified on the Rancheria Asset Distribution Plan, further distancing those individuals genetically from James and Lottie Charley, who were Yurok Indians.

b. There May be a Material Question Whether the United States Lawfully Considers Big Lagoon a Federally Recognized Tribe

Although the State entered into the Barstow Compact with Big Lagoon, and offered Big Lagoon a compact to allow class III gaming on the rancheria, the State learned for the first time here through documents produced by the United States that there is a material question concerning Big Lagoon's status.

"Federal regulation of Indian tribes . . . is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians' . . . ." *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974). Moreover, Congress cannot create a tribe. *United States v. Sandoval*, 231 U.S. 28, 43 (1913). In this case, BIA documents show that no entity—sociological, political, economic or otherwise—existed on the rancheria that the government could have recognized as a sovereign political community that pre-dated non-Indian settlement. The United States purchased the land for the use of James Charley and his family and others in 1918. James died and his widow and her children had moved off the property by September 1921. James' son Robert lived on the parcel from 1942 to 1946. The next activity occurred when Thomas Williams and his wife Lila trespassed on the land in the early 1950s and built a cabin without the government's authorization. Theodore R. Moorehead and his wife, Beverly, Thomas Williams' daughter, were reportedly living on the land in 1967.

When Congress enacted the California Rancheria Termination Act in 1958, it did not identify Big Lagoon as among the forty-one rancherias to be terminated. Pub. L. No. 85-671, § 1. Even after Congress amended the Act in 1964 to include all "rancherias and reservations lying wholly within the State of California," Pub. L. No. 88-419, a special Rancheria Review Committee created within the BIA to recommend policy for managing terminated rancherias did not identify Big Lagoon as among the additional rancherias terminated by the amendment. (Pinal Decl. Ex. HH.) Nonetheless, the BIA conditionally approved the Big Lagoon Rancheria Asset Distribution Plan in January 1968.[18] It is unclear how Big Lagoon became subject to the

[18] The residents later revoked their request to be terminated. (Pinal Decl. Ex. II.)

California Rancheria Termination Act. In any event, in June 1968 the BIA confirmed that the "Big Lagoon Rancheria was purchased in 1918 for landless California Indians and was not set aside for any specific tribe, band or group of Indians. The residents have not formally organized and there if no official membership roll." (Pinal Decl. Ex. T.) Thus, even after the BIA conditionally approved the Distribution Plan, it did not consider Big Lagoon to be an organized political sovereign as recently as June 1968.

Yet Big Lagoon appeared on the first BIA list of "Indian Tribal Entities That Have a Government-to-government Relationship With the United States," published in the Federal Register on February 6, 1979. 44 Fed. Reg. 7235 (Feb. 6, 1979). In March 1972, the BIA published a document entitled, "American Indians and Their Federal Relationship," which identifies Big Lagoon as among the "Indian organizations without written governing documents that are served by the Bureau of Indian Affairs." (Pinal Decl. Ex. JJ.) At minimum, it is paramount to the State's defense here to ascertain from documents within the United States' possession (1) the significance of Big Lagoon's designation in the March 1972 publication as an "Indian organization" that is "served" by the BIA; and (2) how the BIA went from not recognizing any political entity for the Tribe in 1968 to placing the Tribe on the BIA's first administrative list of recognized tribes in February 1979.

IGRA permits "an Indian tribe having jurisdiction over the Indian lands" where class III gaming is to be conducted to enter into a compact with a state. 25 U.S.C. § 2710(d)(3)(A). IGRA defines "Indian tribe" as an "Indian tribe, band, nation, or other organized group or community of Indians" that is federally recognized and possesses powers of self-government. *Id.* § 2703(5). If the United States has not lawfully recognized the Tribe, then it would not be an eligible "Indian tribe" with "Indian lands," as those terms are defined by IGRA, and would not meet IGRA's jurisdictional requirement to request compact negotiations or to pursue this action. *See Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 778 (9th Cir. 2008) (state need not negotiate with a tribe lacking "Indian lands," and tribe must have "Indian lands" to file suit under IGRA). At minimum, the evidence presented so far, and the documents the State

expects to receive from the United States, show a material question exists that must be resolved before this action can proceed.

c. The State May Need to File a Third Party Complaint Against the United States

The State was not on notice that the BIA may have unlawfully placed the Tribe on the list of federally recognized tribes until after discovery commenced in this action, and after the United States first produced responsive documents in March 2010. Therefore, it remains to be determined whether the State must join the United States to this action to challenge the Tribe's placement on the list of federally recognized tribes. The need to further investigate the legitimacy of a third party complaint is proper grounds for extending discovery pursuant to Rule 56(f). *Voggenthaler v. Maryland Square, LLC*, No. 08-cv-01618-RCG-GWF, 2010 WL 1553417, at *4-*5, *10-*11 (D. Nev. Apr. 14, 2010).

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to grant the State's cross-motion for summary judgment and deny the Tribe's motion for summary judgment.

Dated: July 1, 2010

Respectfully Submitted,

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Exhibit A

James Lagoon Charley and Distributees and Dependent Members

Listed in Big Lagoon Rancheria Asset Distribution Plan