10-17803/10-17878

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BIG LAGOON RANCHERIA, a Federally Recognized Indian Tribe,

Plaintiff and Appellee/Cross-Appellant,

v.

STATE OF CALIFORNIA,

Defendant and Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the Northern District of California

No. CV 09-1471 CW (JCS)
Hon. Claudia Wilken, District Judge

APPELLANT/CROSS-APPELLEE STATE OF CALIFORNIA'S COMBINED REPLY AND RESPONSE BRIEF

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INTRODUCTION AND ARGUMENT SUMMARY

The Indian Gaming Regulatory Act (IGRA) requires a federally recognized "Indian tribe" to enter into a compact with a state to conduct class III gaming on "Indian lands." 25 U.S.C. §§ 2703(4)-(5), 2710(d)(1)(C). This case concerns a small group of Indians that wants to build a class III gaming facility next to environmentally-sensitive state lands located on the shoreline of a naturally functioning coastal lagoon in California. Appellant/Cross-Appellee State of California (State) could not agree to compact terms with the Indians—Appellee/Cross-Appellant Big Lagoon Rancheria (Big Lagoon)—and Big Lagoon filed suit, claiming the State failed to negotiate in good faith as required by 25 U.S.C. § 2710(d)(7)(B). But the State learned for the first time during discovery in this case that Big Lagoon may not be lawfully recognized by the United States, and may not lawfully have a beneficial interest in the land where it wants to build the gaming facility, both of which are required to request negotiations for a tribal-state gaming compact and to have standing to seek judicial relief under IGRA. Instead of confronting the inconvenient truths about Big Lagoon's history presented by the State, or simply explaining how an Indian family residing on fee land owned by the United States eventually became a federally recognized Indian tribe with attributes of political

sovereignty (*see* Appellant's Opening Brief (Doc. No. 17-1) (AOB) 18-20, 27-29), Big Lagoon attempts to misdirect this Court's attention to matters the district court did not decide or rejected on the parties' cross-motions for summary judgment, or were too undeveloped by Big Lagoon to permit decision by the district court and thus are waived.

For instance, Big Lagoon claims the district court properly denied the State's request to deny or continue Big Lagoon's summary judgment motion to allow the State to complete discovery pursuant to former Federal Rule of Civil Procedure 56(f)—now Rule 56(d)—because the State was dilatory in conducting discovery. But the district court did not deny the State's request for that reason and instead rejected Big Lagoon's argument to that effect. Thus, Big Lagoon's emphasis on an earlier, unrelated discovery order is a red herring.

Similarly, the district court did not find, nor did Big Lagoon meaningfully argue to the district court as it does here for the first time, that the status of Big Lagoon and its land are nonjusticiable political questions. Big Lagoon may have vaguely suggested as much in a short footnote in the district court, but it provided no analysis, effectively waiving the argument. Moreover, Big Lagoon inappropriately attempts to litigate here the defenses it speculates the federal government might assert against a counterclaim by

the State. Nonetheless, the federal government may be sued for violating the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, if it exceeded its authority, or acted arbitrarily or capriciously, in placing Big Lagoon on the list of federally recognized tribes. The State could also seek declaratory and injunctive relief in challenging Big Lagoon's status. Big Lagoon cites no authority indicating the State's separate challenge to whether the eleven-acre parcel is lawfully in trust and subject to IGRA is also a nonjusticiable political question. Instead, Big Lagoon mistakenly conflates the State's distinct tribal and land status challenges, both of which may be resolved judicially.

In the end, although Big Lagoon suggests the State's appeal is a desperate attempt to salvage a losing case, it is Big Lagoon's failed attempts at misdirection and avoidance of questions concerning its status and land, which must be answered before Big Lagoon can engage in class III gaming, that confirm the real desperation lies with Big Lagoon.

Further, Big Lagoon's cross-appeal is moot and should be dismissed. Big Lagoon claims the district court erred in finding the State could negotiate for environmental protection in a class III gaming compact and asks this Court to reverse and order that summary judgment also be entered in Big Lagoon's favor on this alternative basis. (Big Lagoon Combined

Principal & Response Br. (Doc. No. 32-1) (Big Lagoon Br.) 63.) But Big Lagoon concedes it has already received "complete relief on its IGRA complaint" (*id.* at 2, 18), and the district court's substantive reasons for finding the State failed to negotiate in good faith are unchallenged on appeal (*id.* at 23). Thus, there is no further relief that this Court can provide on the cross-appeal, and no basis for this Court to order the district court *also* to enter summary judgment on an alternative theory.

Even if this Court decides the cross-appeal, the district court correctly found the State could negotiate for environmental protection. Again, Big Lagoon betrays the facts in a misguided attempt to portray the State as overreaching. Contrary to Big Lagoon's argument, the State did not seek to impose compliance with any state environmental or land use laws, and it was Big Lagoon that proposed and agreed, at least in principle, to many of the mitigation measures it now claims the State could not request during compact negotiations. Nonetheless, IGRA's plain language and legislative history, properly interpreted by the district court and the National Indian Gaming Commission (NIGC), confirms that Congress contemplated IGRA's compacting process could be utilized to negotiate provisions to protect the off-reservation environment from negative impacts caused by class III gaming activities, which includes the construction, operation and

maintenance of a gaming facility. This Court's decision in *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010) (*Rincon*), does not require a different result, as that case dealt with the wholly separate question whether the State could request revenue sharing payments from a tribe that went into the State's general fund, and did not decide whether the State could negotiate for environmental protection.

Accordingly, the State respectfully requests this Court to reverse the district court's order granting summary judgment for Big Lagoon and remand with directions either to enter summary judgment for the State, or allow the State to complete discovery relative to its jurisdictional defenses. The State further requests this Court to dismiss Big Lagoon's cross-appeal as moot, or, alternatively, affirm the district court's finding that the State may negotiate for environmental protection in the IGRA compacting process.

REPLY ARGUMENT ON APPEAL

For whatever reason, Big Lagoon goes to great lengths to castigate the State for electing not to pursue on appeal two arguments the State initially proposed to challenge the district court's summary judgment order, and which the State advocated to obtain a stay in the district court. (Big Lagoon Br. 16-23.) Yet Big Lagoon does not explain why it is insufficient that the State is pursing on appeal at least one argument the district court found

constitutes a "serious question" justifying the stay.[1] It is also unclear why Big Lagoon selectively recounts this case's procedural history, other than to suggest, without authority, that the State is on a losing streak that must continue here. (*Id.* at 17 n.5.) While Big Lagoon ignores years of its own failed lawsuits to obtain class III gaming rights (*see* State Mot. Judicial Notice (Doc. No. 18-1) (State MJN) Ex. A at 9), none of its limited narrative is relevant to the jurisdictional question presented in the State's appeal. Nor is it relevant or appropriate for Big Lagoon to attempt to litigate here its separate motion to vacate the district court's stay order, or to speculate, contrary to the facts, that the State acted with ulterior motives when it requested to continue the briefing schedule.[2] (*See* Big Lagoon Br. 23 n.8.)

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[1] In granting the stay, the district court found the State's three arguments why it is "likely" to prevail on appeal, including the first argument that "the Court erred by not permitting the State to conduct discovery into the legal status of the Tribe and its lands," "raised serious questions going to the merits." (Doc. No. 22-5, Ex. 7 at 12.) The State is pursuing the first argument here.

[2] Big Lagoon cites no authority for the proposition that had the deadline to file the opening brief not been continued, the State would have "been obligated to inform the District Court that the guts of its serious questions arguments had been abandoned." (Big Lagoon Br. 23 n.8.) Regardless the State did not abandon the "guts of its serious questions argument," as it is pursuing here at least one question the district court found serious enough to justify a stay. Moreover, there was no reason to know when the district court would rule on the State's motion to stay, let alone that (continued…)

With that clarification, the State will now deconstruct Big Lagoon's misguided attempt to distract this Court from the jurisdictional issues in the State's appeal.

I. THE DISTRICT COURT ERRED IN DENYING THE STATE'S RULE 56(F) REQUEST FOR A CONTINUANCE TO CONCLUDE OUTSTANDING DISCOVERY

A. The district court's determination regarding subject matter jurisdiction is reviewed de novo.

Big Lagoon's statement of issues is only partially accurate. (*See* Big Lagoon Br. 3.) At issue is not just the district court's denial of the State's request for a Rule 56(f) continuance, which ordinarily is reviewed for abuse of discretion (*see id.* at 24-26), but also the broader question stated in the State's opening brief—whether the district court erred by failing to consider credible, undisputed evidence that Big Lagoon may not meet IGRA's jurisdictional requirements (AOB 2-3). A district court's determination of subject matter jurisdiction under IGRA is reviewed de novo. *Wisconsin v.*

(…continued)
it would grant the motion, or what reasons it might give in support. Instead, the reasons for the requested extension, as explained to the Court clerk and Big Lagoon's attorney, were the State's counsel's sudden and unexpected increase in workload resulting from additional duties he assumed while his supervisor was on bereavement leave, and his absence from the office due to an illness suffered by his newborn daughter. (Doc. No. 37-2 at ¶¶ 2-11.) It is unclear why Big Lagoon would misrepresent those reasons so cynically, other than to disparage the State with conjecture and hyperbole.

Ho-Chunk Nation, 512 F.3d 921, 929 (7th Cir. 2008); *see also In re Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 755 (8th Cir. 2003); *Kansas v. United States*, 249 F.3d 1213, 1221-22 (10th Cir. 2001); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 691-94 (1st Cir. 1994).[3] Although this Court has not squarely addressed the jurisdictional question in an IGRA context, it routinely reviews de novo the question whether a district court has subject matter jurisdiction under a federal statute. *See, e.g.*, *Ass'n. of Flight Attendants v. Mesa Air Group*, 567 F.3d 1043, 1046 (9th Cir. 2009) (Railway Labor Act); *Gupta v. Thai Airways Int'l, Ltd.*, 487 F.3d 759, 765 (9th Cir. 2007) (Foreign Sovereign Immunities Act); *United States v. Catholic Healthcare West*, 445 F.3d 1147, 1151 (9th Cir. 2006) (False Claims Act); *Moe v. United States*, 326 F.3d 1065, 1067 (9th Cir. 2003) (Federal Tort Claims Act); *Hall v. Norton*, 266

[3] Big Lagoon's reliance upon *Rhode Island v. Narragansett Tribe of Indians*, 816 F. Supp. 769 (D.R.I. 1993), *aff'd sub nom. Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 is misplaced. (Big Lagoon Br. 36 n.15.) The district court in that case did not find, as Big Lagoon suggests, that the tribe's inclusion on the list of federally recognized tribes was by itself dispositive of whether the tribe exercised jurisdiction over its lands. Instead, the listing was among several factors the district court relied upon to find: "While all of this does not conclusively demonstrate that the Tribe 'exercises governmental power' or possesses 'jurisdiction' under [IGRA], it points to substantial governmental authority on the part of the Tribe over its lands." 816 F. Supp. at 805-06.

F.3d 969, 974 (9th Cir. 2001) (Clean Air Act). Because the more important jurisdictional question predominates the Rule 56(f) issue, this Court should review the district court's decision de novo rather than for an abuse of discretion.[4]

B. The district court did not deny the State's request for a Rule 56(f) continuance because the State was dilatory in conducting discovery.

Big Lagoon claims that because the district court found the State had been dilatory in conducting discovery, it properly denied the State's request for a Rule 56(f) continuance. (Big Lagoon Br. 24-29.) The argument is misdirected and misleading, as the district court did not deny the State's Rule 56(f) motion for that reason. The district court's previous finding that the State may not have been reasonably diligent in *initiating* discovery, which Big Lagoon misrepresents and mistakenly emphasizes, had no bearing on the district court's Rule 56(f) ruling. Consequently, Big Lagoon's argument is a red herring.

Pursuant to Rule 56(f), the State asked the district court to deny or continue Big Lagoon's summary judgment motion to allow the State to

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[4] Indeed, Big Lagoon recognizes the district court's determination whether a material factual question exists concerning Big Lagoon's status and lands is reviewed de novo. (Big Lagoon Br. 15-16.)

complete outstanding discovery with the United States relevant to the question whether Big Lagoon had standing to file suit under IGRA. (Excerpts of Record (Doc. No. 20) (ER) 75-80.) In opposition, Big Lagoon urged the district court to deny the request because the court previously found the State had been dilatory in conducting discovery. (Big Lagoon Supplemental Excerpts of Record (Big Lagoon SER) (Doc. No. 34) 76-77.) The district court denied the State's request, not because it had been dilatory, but because "the status of [Big Lagoon] and its eleven-acre parcel has no bearing on whether the State negotiated in good faith." (ER 44.) According to the district court, because Big Lagoon is currently recognized by the federal government and has land on which gaming activity could be conducted, it "is entitled to good faith negotiations with the State toward a gaming compact. 25 U.S.C. § 2710(d)(3)(A). That the status of the eleven-acre parcel may be in question does not change this result." (ER 43-44.) Thus, the district court found the additional evidence sought by the State was not relevant to the question before it. It did not, as Big Lagoon requested, reject the State's Rule 56(f) request because the State had been dilatory in conducting discovery. Thus, Big Lagoon raises an issue that does not exist.

C. This Court cannot make a factual finding that the State had been dilatory in conducting discovery.

The district court's failure to make a factual finding on the State's Rule 56(f) motion that the State was dilatory in conducting discovery precludes this Court from doing so here. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) ("If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings."); *United States v. 1.377 Acres of Land*, 352 F.3d 1259, 1267 (9th Cir. 2003) (remanding for factual determination district court chose not to make); *Von Kennel Gaudin v. Remis*, 282 F.3d 1178, 1183-84 (9th Cir. 2002) (finding this Court is "ill-equipped" to resolve a factual dispute, and remanding to the district court for evidentiary hearing); *McKenzie v. Day*, 57 F.3d 1461, 1474 (9th Cir. 1995) ("Appellate courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed."). If this Court entertains Big Lagoon's misdirected procedural gambit, then the remedy is to remand to the district court for the appropriate factual finding.

D. Big Lagoon misrepresents the district court's prior discovery ruling.

Although irrelevant and apparently meant to distract this Court from questions concerning Big Lagoon's history and land, the State clarifies and

puts into proper context the district court's April 16, 2010 discovery ruling emphasized by Big Lagoon. In that instance, the State had requested the district court to stay or continue dispositive motion dates while the Department of the Interior, Bureau of Indian Affairs (BIA) determined a factual question central to the State's defense. (District Court Doc. No. 74 at 2-3.) The district court denied the State's motion, finding the State had not been "reasonably diligent in seeking discovery from BIA," and that it was possible that "the BIA may respond to the subpoenas in advance of July 1, [2010], the deadline for the State's opposition and cross-motion." (*Id.* at 5.) The district judge noted the magistrate judge had continued the discovery deadline to allow the State to obtain documents responsive to outstanding subpoenas that the State had issued to the BIA. (*Id.* at 3.) But the district court did not *thereafter* find that the State had been dilatory in *completing* discovery and obtaining the subpoenaed documents from BIA. Nor, as noted, did the district court deny the State's Rule 56(f) request because the State had been dilatory in conducting discovery.

In fact, as explained to the district court, the State was complying with the magistrate judge's standing order by meeting and conferring with the United States to resolve informally any discovery dispute before bringing it to the magistrate judge. (ER 75-76, 89-91, 296-446; Big Lagoon SER 57;

State Mot. Judicial Notice in Support of Combined Reply/Response Br. (State MJN Reply/Response) Ex. A at 2 ¶ 8.) Because the State's meet and confer with the United States had not yet reached impasse, the State had no need to enforce the subpoenas, as suggested by Big Lagoon.[5] (Big Lagoon Br. 12, 27.)

It appears Big Lagoon would have this Court punish the State for exercising caution and obtaining sufficient information before filing a compulsory counterclaim against the United States to challenge the status of Big Lagoon or its land. (*See*, *e.g.*, Big Lagoon Br. 12, 26-28, 37 n.16.) The State is sensitive to such a lawsuit's consequences and would not challenge a tribe's sovereign status lightly. Indeed, it would be irresponsible for the State, as a governmental entity, to sue another governmental entity without first determining whether the suit was warranted. *See also* Fed. R. Civ. P. 11(b) (requiring reasonable inquiry before counsel presents a pleading to the court); *Cooter & Gell v. Hartmarx, Corp.*, 496 U.S. 384, 398 (1990). ("The filing of complaints, papers, or other motions without taking the necessary

[5] Contrary to Big Lagoon's argument that the State did not seek to depose potential witnesses (Big Lagoon Br. 12, 26), the State intended to conduct depositions but could not do so once the district court declined to continue the discovery completion date for that purpose (District Court Nos. 48-1 at 3 & 60).

care in their preparation is a separate abuse of the judicial system, subject to separate sanction"; noting Rule 11's "incentive to 'stop, think and investigate more carefully before serving and filing papers'"). But based upon the preliminary evidence obtained by the State so far, and the documents it expects to receive from the United States, at some point and in some proceeding the federal government must explain how Big Lagoon became a federally recognized Indian tribe and how, in light of *Carcieri v. Salazar*, 555 U.S. 379 (2009) (*Carcieri*), the eleven acres is lawfully in trust for Big Lagoon and eligible for gaming. Under the compulsory counterclaim doctrine and the authorities cited in the State's opening brief, those questions should be answered here. (*See* AOB 14-16, 36-41.)

E. Reversal is warranted even under the abuse-of-discretion standard.

Even if this Court reviews the district court's summary judgment order for an abuse of discretion, reversal is warranted. It is error to grant a motion for summary judgment while pertinent discovery requests, seeking potentially favorable information, are outstanding. *Garrett v. City & County of San Francisco*, 818 F.2d 1515, 1518-19 (9th Cir. 1987). "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx, Corp.*, 496 U.S. at 398; *Icicle*

Seafoods, Inc. v. Worthington, 475 U.S. at 714 ("If [the Court of Appeals] believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment.").

Here, the district court denied the State's Rule 56(f) request because it found the additional evidence irrelevant as a matter of law. (ER 44.) Its finding was an abuse of discretion because the need to further investigate the legitimacy of a third party complaint is proper grounds for extending discovery under Rule 56(f), *Voggenthaler v. Maryland Square, LLC*, No. 18-cv-01618-RCG-GWF, 2010 WL 1553417, at *4-*5, *10-*11 (D. Nev. Apr. 14, 2010), and the compulsory counterclaim doctrine requires the State to litigate the status of Big Lagoon and its land in this action (AOB 36-38). Indeed, providing the opportunity for affected parties to present their arguments in court is a longstanding principle of due process. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 309, 314 (1950). Although currently Big Lagoon appears on the list of federally recognized tribes and the United States holds in trust the land where Big Lagoon proposes to build its casino, if Big Lagoon is not lawfully recognized, or the land is not lawfully in trust or is not gaming-eligible, then Big Lagoon would not be an "Indian tribe" and the land would not be "Indian lands," as

defined by IGRA, and Big Lagoon would not meet IGRA's jurisdictional requirement to request compact negotiations or pursue this action. (*See* AOB 35-42.) The State presented preliminary evidence suggesting there is a material question about the status of Big Lagoon and its land, and the State was awaiting additional discovery from the United States in this regard as part of its investigation into whether a third party complaint against the United States would be appropriate. (*Id.* at 36.) Neither the district court nor Big Lagoon distinguished *Voggenthaler* or explained why the compulsory counterclaim doctrine is inapplicable.[6] (*See* AOB 36-38.) Accordingly, the district court abused its discretion by basing its decision on an erroneous view of the law.

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[6] Indeed, the only basis for this Court to affirm on the State's appeal is to find the compulsory counterclaim doctrine inapplicable, and that the State must challenge Big Lagoon's status and land elsewhere. Yet Big Lagoon offers no argument why the doctrine would not apply here. Nor does Big Lagoon distinguish *Kansas v. United States*, 249 F.3d at 1227-28 (holding that "adjudicating the applicability of IGRA" and determining whether a tribe has eligible "Indian lands" must be done first), *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 778 (9th Cir. 2008) (citing *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler*, 304 F.3d 616, 618 (6th Cir. 2002) (Indian tribe must show that it has "Indian lands" as defined by IGRA at the time of filing)), or the district court's finding in 2000, contrary to its finding here, that resolving the question "whether the lands on which Big Lagoon proposed to build its casino were Indian lands over which Big Lagoon properly had jurisdiction to conduct gaming activities . . . [is] part of the negotiations contemplated by IGRA." (AOB 14-15, 39-40.)

II. THE DISTRICT COURT ERRED IN FINDING THERE IS NO GENUINE ISSUE OF MATERIAL FACT CONCERNING BIG LAGOON'S STANDING AS A FEDERALLY RECOGNIZED TRIBE OR THE STATUS OF ITS LAND

Big Lagoon claims the State cannot challenge Big Lagoon's status or whether the eleven-acre parcel is lawfully in trust and subject to IGRA. (Big Lagoon Br. 30-46.) In doing so, Big Lagoon inappropriately attempts to litigate here arguments the United States may or may not make in defense of a compulsory counterclaim by the State. Until advanced by the United States and their validity determined by the district court, the arguments are speculative and premature, and should not be substantively decided here.

In any event, Big Lagoon's argument is based upon the mistaken premise that questions concerning its status and land are reserved for another forum. (Big Lagoon Br. 36-38 & 37 n.16.) On the contrary, federal courts can decide these questions and, as noted above, the federal government ultimately will have to answer them. The issue avoided by Big Lagoon is whether judicial economy and the compulsory counterclaim doctrine require they be answered here.

Preliminarily, the State refutes Big Lagoon's misleading suggestion that the State did not argue it negotiated in good faith because Big Lagoon is not an "Indian tribe" with "Indian lands." (Big Lagoon Br. 30 n.11.) Big

Lagoon plainly ignores that the State could not have raised these questions during compact negotiations because the Supreme Court did not decide *Carcieri* until after Big Lagoon abandoned negotiations, and it was not until discovery in this case that the State learned there were questions concerning Big Lagoon's status and land. (*See id.* at 39-42; AOB 16-17, 37-41.) Nor is it accurate for Big Lagoon to suggest the State knew or should have known everything important about Big Lagoon's status and land by the time Big Lagoon filed this action. (Big Lagoon Br. 29 n.10.) Instead, during compact negotiations the State relied exclusively upon Big Lagoon's now-apparently inaccurate assertion that the parties were negotiating for gaming on Big Lagoon's "ancestral" lands. (AOB 38.)

It is also unclear how, as Big Lagoon suggests, the question whether it is an "Indian tribe" with "Indian lands" is "at most" relevant to whether the State was required to negotiate in good faith with Big Lagoon but is irrelevant to the question whether Big Lagoon would have standing to file this action. (Big Lagoon Br. 30 n.11.) If the State is not obligated to negotiate with a tribe that is not lawfully recognized or does not have "Indian lands," then it stands to reason that tribe would also lack standing to seek judicial relief under IGRA. In any event, Big Lagoon makes no attempt to distinguish *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531

F.3d at 778, where this Court relied upon *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler*, 304 F.3d at 618, and *Mechoopda Indian Tribe of Chico Rancheria v. Schwarzenegger*, No. Civ. S-03-2327 WBS/GGH, 2004 WL 1103021, at *5 (E.D. Cal. Mar. 12, 2004), for the proposition that a state is not obligated to negotiate with an Indian tribe unless it has Indian lands, and a tribe without Indian lands cannot sue under IGRA.

Big Lagoon's remaining arguments are waived, or, alternatively, lack merit.

A. Big Lagoon waived the argument that only Congress can terminate Big Lagoon's status as a federally recognized tribe.

Big Lagoon claims that under the Federally Recognized List Act of 1994 (List Act), Pub. L. No. 103-454, §§ 101-104, 108 Stat. 4791 (1994) (codified at 25 U.S.C. § 479a et seq.), only Congress can terminate Big Lagoon's status as a federally recognized tribe, thus Big Lagoon's status as an "Indian tribe with Indian lands" is a nonjusticiable political question. (Big Lagoon Br. 31-33, 42-44.) Big Lagoon failed to meaningfully develop this argument in the district court and thus has waived it on appeal.

In opposition to the State's cross-motion for summary judgment, Big Lagoon included the following two-sentence footnote:

> In fact, once a tribe is federally recognized, such status may not be terminated except by an act of Congress. Section 103, Pub. L. 103-454, Congressional Findings; *codified following* 25 U.S.C. § 479a. Furthermore, the judiciary has "historically deferred to executive and legislative determinations of tribal recognition." *Western Shoshone Business Council v. Babbit* [sic], 1 F.3d 1052, 1057 (10th Cir. 1993).

(Big Lagoon SER 73.)

This Court reviews only issues that are argued "specifically and distinctly," requires "contentions to be accompanied by reasons," and finds waived arguments where a party simply makes a "bold assertion" of error, with "little if any analysis to help the court in evaluating its legal challenge." *Indep. Towers of Washington v. Washington*, 350 F.3d 925, 929-30 (9th Cir. 2003); *Hibbs v. Dep't of Human Res.*, 273 F.3d 844, 873 n.34 (9th Cir. 2001) (finding an assertion of error was "too undeveloped to be capable of assessment"). Following this precedent, district courts routinely find waived conclusory arguments, including those raised in a footnote, with no analysis to assist the district court in evaluating the claim. *See,* e.g., *Ferrell v. ConocoPhillips Pipe Line Co.*, No. 5:09-cv-00431-RRP-OP, 2010 WL 1946896, at *7 n.6 (C.D. Cal. May 12, 2010); *see also Wells Fargo Bank, N.A. v. Renz*, 795 F. Supp. 2d 898, 911 (N.D. Cal. 2011); *De Pulido v. Comm'r of Social Sec.*, No. 1:10–cv–01799 LJO JLT, 2012 WL 253327, at

*8 n.3 (E.D. Cal. Jan. 25, 2012); *AmeriTitle Inc. v. Gilliam County*, No. CV 09–318–SU, 2011 WL 4760811, at *11 (D. Or. Apr. 26, 2011); *Garcia v. GMAC Mortgage, LLC*, No. CV-09-0891-PHX-GMS, 2009 WL 2782791, at *1 (D. Ariz. Aug. 31, 2009).

That Big Lagoon transformed a thirty-four word footnote in the district court into six pages of argument in its appellate brief, and the district court's failure to address the buried argument, confirms it was "too undeveloped to be capable of assessment" by the district court. Accordingly, Big Lagoon cannot present for the first time on appeal an argument that it failed to meaningfully develop in the district court.

B. The State can judicially challenge Big Lagoon's status as a federally recognized tribe.

In IGRA, tribal status is a prerequisite for requesting negotiations for a class III gaming compact and district courts having jurisdiction over tribal claims that a state failed to negotiate in good faith. 25 U.S.C. §§ 2703(5), 2710(d)(1)(C), (7)(A)(i). The State presented evidence demonstrating a material question exists whether Big Lagoon is lawfully recognized by the federal government. (AOB 31-35.) In response, Big Lagoon incorrectly asserts that pursuant to the List Act only Congress can terminate an Indian

tribe that appears on the list of federally recognized tribes published by the Secretary of the Interior (Secretary).[7] (Big Lagoon Br. 31-33.)

The List Act specifies that only Congress can terminate "a tribe which has been recognized" in one of the three manners set forth in the Act. Pub. L. No. 103-454, § 103(4). The Act provides Indian tribes may be recognized by: (1) an "Act of Congress;" (2) "the administrative procedures set forth in [title 25,] part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" or (3) "a decision of a United States court." *Id.* § 103(3). Big Lagoon does not fall within these categories. Indeed, understanding how Big Lagoon came to be placed on the list of federally recognized tribes is central to the State's defense, particularly when the BIA did not recognize the rancheria residents as a political entity as recently as 1968. (AOB 34-35.) Thus, contrary to Big Lagoon's contention, the List Act does not

[7] IGRA's "Indian tribe" definition does not "essentially mirror" the List Act's definition. (*See* Big Lagoon Br. 32 n.12; *compare* 25 U.S.C. § 2703(5) *with* Pub. L. No. 103-454, § 102(2).)

preclude the Secretary[8] or a federal court from removing from the list a tribe that was unlawfully included in the first instance.

Instead, the APA confers jurisdiction on federal district courts to review final agency decisions. 5 U.S.C. § 702. The Department of the Interior is subject to the APA, and its decision to place a tribe on the list of federally recognized tribes is judicially reviewable. *Id.* § 701(b)(1) (defining "agency"); *Cherokee Nation v. Norton*, 389 F.3d 1074 (10th Cir. 2004) (APA review of Department of the Interior's decision regarding tribal recognition). In *Cherokee Nation*, the BIA did not follow any established procedures for putting a tribe on the list, which the court set aside as unlawful. 389 F.3d at 1087. In this case it is unknown what procedures, if any, the United States followed in putting Big Lagoon on the list. (*See* AOB 33-35.)

[8] Big Lagoon claims there is no evidence to suggest the federal government doubts Big Lagoon's status, or is unaware of its history. (Big Lagoon Br. 40-41 & n.18.) Big Lagoon references a letter from the Department of the Interior concerning the parties' previous compact negotiations, which fails to answer, or indicate the United States considered, the questions whether Big Lagoon is lawfully recognized, or the eleven acres is lawfully in trust or subject to IGRA, based upon evidence obtained by the State for the first time in this case. Big Lagoon's questionable tribal history is not coextensive with the history of the parties' compact negotiations. Nonetheless, Big Lagoon misses the point, as the compulsory counterclaim doctrine indicates these questions should be resolved here.

Moreover, Congress specified that "the list published by the Secretary should be accurate." Pub. L. No. 103-454, § 103(7). In a counterclaim against the United States, the State would seek to determine the list's accuracy. Given the evidence the State received in discovery, and would receive from the federal government on remand, that Big Lagoon merely appears on the list is not dispositive of the question whether it was placed there lawfully.[9] (*See* Big Lagoon Br. 33.)

Big Lagoon also misunderstands the State's reliance upon *United States v. Sandoval*, 231 U.S. 28 (1913). (AOB 33; Big Lagoon Br. 33 n.13.) In *Sandoval*, the Supreme Court held that while tribal recognition normally is a political question, "it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe." 231 U.S. at 43. Thus, if Big Lagoon was improperly added to the list of federally recognized tribes, then a federal

[9] According to Big Lagoon, "the State posits that over several decades of tribal history there may exist arcane or even confusing questions," which Big Lagoon summarily dismiss as "false." (Big Lagoon Br. 39 n.17, 40.) Yet neither here nor in the district court did Big Lagoon offer contrary evidence. It should be relatively simple to explain how or why the federal government placed a group of Indians on the list of federally recognized tribes. Indeed, the List Act describes only three ways for that to occur. But Big Lagoon has not answered, and apparently cannot answer, that seemingly simple question.

court would have jurisdiction to declare it so, whether it be an APA violation, *Cherokee Nation*, 389 F.3d at 1087, or an act in excess of congressional authority, *Sandoval*, 231 U.S. at 43, for which the State could seek declaratory and injunctive relief, *see* Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution.").

Last, Big Lagoon's reliance upon *Western Shoshone Business Council v. Babbitt*, 1 F.3d at 1058 (Big Lagoon Br. 43), is misplaced. As Big Lagoon already appears on the list of federally recognized tribes, the State would not ask the district court to make an "initial determination" whether Big Lagoon should be federally recognized.

C. Land status is not a political question and is subject to judicial review.

Big Lagoon mistakenly conflates the question concerning Big Lagoon's status with the separate question whether the eleven acres is lawfully in trust and subject to IGRA. Big Lagoon asserts both are nonjusticiable political questions but fails to cite any authority, and therefore does not seriously contend, that land status questions are reserved for the political branches.

In any event, regulation of Indian gaming explicitly depends on the nature of the land where the gaming occurs and when that land was acquired. *See* 25 U.S.C. §§ 2710(d)(1), 2719. The Indian Reorganization Act (IRA), 25 U.S.C. §§ 465, 479, limits the Indians for whom the Secretary can move land into trust to those who constituted a recognized tribe under federal jurisdiction in 1934. *Carcieri*, 555 U.S. at 381-83, 388-91, 394-96. The Secretary's decision to accept land in trust is judicially reviewable, as is the federal government's decision that land is eligible for gaming under IGRA. *See*, *e.g.*, *id.*; *Patchak v. Salazar*, 632 F.3d 702, 704-07 (D.C. Cir. 2011) (finding neighboring landowner has standing to challenge Secretary's decision to take land into trust under IRA, which would allow tribe to proceed with plans for gaming under IGRA), *cert. granted*, 132 S. Ct. 845 (U.S. Dec. 12, 2011) (No. 11-247); *Nebraska ex rel. Bruning v. United States Dep't of Interior*, 625 F.3d 501, 503-10 (8th Cir. 2010) (state's APA challenge to federal agency's determination that land acquired in trust under IRA is subject to IGRA); *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 463-65 (D.C. Cir. 2007) (finding citizens group has standing to challenge Secretary's decision that trust land acquired under IRA qualified for an exception to IGRA's general prohibition on gaming on trust lands acquired after Oct. 17, 1998); *Kansas v. United States*, 249 F.3d

at 1220, 1227-28 (finding state likely to succeed on APA challenge to federal agency's decision re "Indian lands" subject to IGRA. *Sac & Fox Nation v. Norton*, 240 F.3d 1250,1260-67 (10th Cir. 2001) (state's APA challenge to Secretary's decision that trust land is subject to IGRA); *Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d 1193, 1201-03 (D. Kan. 2006) (APA challenge to federal agency's decision that tribe could not conduct gaming on land held in trust for tribe); *Comanche Nation v. United States*, 393 F. Supp. 2d 1196, 1201-03 (W.D. Okla. 2005) (issuing preliminary injunction on APA challenge to Secretary's decision to accept land into trust for gaming).[10] The Secretary has also withdrawn land acquisitions from trust to permit the correction of administrative process under federal regulations, 25 C.F.R. § 151.12(b), and judicial review under the APA. (State MJN Reply/Response Ex. C at 2 n.2, 31-33 & Ex. 1 & Ex. D at 4-6.) In addition, similar to a challenge concerning Big Lagoon's status

[10] Big Lagoon's attempt to distinguish *Comanche Nation v. United States*, 393 F. Supp. 2d 1196, on the grounds that it "demonstrates why land, trust and federal recognition decisions need to be made by the Department of the Interior and the Bureau of Indian Affairs, and not by courts as part of an IGRA bad faith action," fails because it ignores the compulsory counterclaim doctrine and the decisions cited in the text recognizing the interrelation between trust acquisitions under the IRA and gaming rights under IGRA. (Big Lagoon Br. 36 n.15.)

as a federally recognized tribe, the State could seek declaratory or injunctive relief concerning the eleven acres. (*See supra*, pp. 24-25.)

Big Lagoon also misrepresents that the State conceded any challenge to Big Lagoon's land "should be subject to the Quiet Title Act, 28 U.S.C. § 2409a(a)." (Big Lagoon Br. 37 & n.16.) Big Lagoon's contention is wrong for at least three reasons. *First*, Big Lagoon cites a version of the State's brief that the district court rejected for filing. (*See* District Court Doc. Nos. 87, 88, 92.) The version the district court accepted for filing appears at ER 51-82, and does not include the footnote suggested by Big Lagoon. Thus, Big Lagoon mistakenly relies upon a footnote that the district court did not consider.

Second, in the brief the district court rejected for filing, the State acknowledged such an action "*may* be subject" to the Quiet Title Act but clarified that "there is presently no definitive answer to the question whether the Quiet Title Act bars federal courts from reviewing a completed trust transaction where, as here, the Secretary may have acted unconstitutionally or in violation of federal law." (District Court Doc. No. 88 at 25 n.11.) With this qualification, the State's comment was not as definitive as Big Lagoon suggests.

Third, after the district court issued its summary judgment order in this case, the District of Columbia Circuit decided *Patchak v. Salazar*, 632 F.3d at 707-11, holding a neighboring private landowner's suit challenging the Secretary's decision to take land into trust under the IRA, which would have allowed the tribe to proceed with plans for gaming under IGRA, is not barred by the Quiet Title Act.[11] The court reasoned the Act applies only when "the plaintiff would seek to establish his rightful title to the real property," and the plaintiff in that case made no "claim of ownership" of the subject land.[12] *Id.* at 709. Similarly, in *Kansas v. United States*, 249 F.3d at

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[11] Notwithstanding the Secretary's position in *Patchak*, the Department of the Interior has not viewed the Quiet Title Act as an obstacle to undoing a trust acquisition. For instance, after the Eight Circuit held the Department had unlawfully accepted certain land into trust, the Department promulgated a new regulation allowing for judicial review of trust acquisitions, 25 C.F.R. § 151.12(b), and successfully petitioned the Supreme Court for writ of certiorari vacating the appellate court's decision with directions that the matter be remanded "to the Secretary of the Interior for reconsideration of his administrative decision," *United States Dep't of Interior v. South Dakota*, 519 U.S. 919, 919-20 (1996), in light of the new regulation, *South Dakota v. United States Dep't of Interior*, 423 F.3d 790, 793 (8th Cir. 2005). Seven months later, the Department removed the land from trust status. *Id.* (*See also* State MJN Reply/Response Ex. C at 2 n.2, 31-33 & Ex. 1; & Ex. D at 4-6.)

[12] To the extent *Patchak* references contrary authority from this Court, 632 F.3d at 711 (citing *Metro. Water Dist. of S. Cal. v. United States*, 830 F.2d 139, 143-44 (9th Cir. 1987)), presumably the Supreme Court will resolve the conflict when it decides *Patchak*. In any event, it does not

(continued…)

1224-25, the Tenth Circuit held a state's challenge to a federal agency's determination that certain land was "Indian lands" under IGRA was not precluded by the Quiet Title Act. The court reasoned that "only disputes pertaining to the United States' ownership of real property fall within the parameters of the [Act]," and "adjudicating the question of whether a tract of land constitutes 'Indian lands' for Indian gaming purposes is 'conceptually quite distinct' from adjudicating title to that land. . . . Such a determination 'would merely clarify sovereignty over the land in question.'" *Id.* (citation omitted). Here, in a compulsory counterclaim against the federal government, the State would not claim title to the eleven acres adverse to the United States. Instead, it would challenge whether the trust acquisition was lawful and the land is subject to IGRA. Indeed, Big Lagoon correctly asserts that the State has not made a Quiet Title Act claim here (Big Lagoon Br. 37), nor would it. Thus, the counterclaim would not be barred by the Quiet Title Act.

(…continued)
appear that *Metropolitan Water District* would apply here. In that case, the plaintiff did not seek to quiet title to the land in itself but the effect of a successful challenge would have been to quiet title in others. 830 F.2d at 143. Here, the State would not seek to quiet title in anyone. It would merely seek a determination whether the land is lawfully in trust for Big Lagoon and subject to IGRA.

Equally misleading is Big Lagoon's selective quotation of the State's counsel's statements during oral argument on the cross-motions for summary judgment. (Big Lagoon Br. 37.) When viewed as a whole, including the statements omitted by Big Lagoon, the State's counsel indicated that in the State's first three written arguments to the district court (*see* ER 62-74), the State was not challenging the status of Big Lagoon or its land (Big Lagoon SER 36-37). But if the district court rejected the State's first three arguments, then the State would challenge the status of Big Lagoon and its land as set forth in the State's fourth argument[13] (*id.*; *see* ER 74-80), which was consistent with the State's briefing in the district court (*see* District Court Doc. No. 96 at 11), and here.

Also, Big Lagoon vaguely suggests the State's compulsory counterclaim against the United States could be barred by the statute of limitations. (Big Lagoon Br. 37 n.16.) Big Lagoon cites no supporting authority, rendering its assertion unclear and not entitled to consideration.

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[13] The State's four arguments in the district court were (1) the State negotiated in good faith for revenue sharing; (2) the State negotiated in good faith for environmental mitigation; (3) it is against the public interest to put a casino on land unlawfully acquired in trust for Big Lagoon that otherwise would not be gaming-eligible, and that would damage surrounding State lands; and (4) Big Lagoon's summary judgment motion should be denied or continued to allow the State to discover information essential to its opposition. (ER 51-81.)

See Indep. Towers of Washington v. Washington, 350 F.3d at 929-30; *Hibbs v. Dep't of Human Res.*, 273 F.3d at 873 n.34. Nonetheless, in *Wind River Mining Corporation v. United States*, 946 F.2d 710 (9th Cir. 1991), this Court held the general six-year statute of limitations for civil actions brought against the United States, *see* 28 U.S.C. § 2401(a), applies to APA suits against the Department of the Interior, but "a substantive challenge to an agency decision alleging lack of agency authority may be brought within six years of the agency's application of that decision to the specific challenger." *Id.* at 712-16. In this case, while the federal government has not made a decision that applies to the State concerning Big Lagoon's status as a federally recognized tribe, or whether the eleven acres is subject to IGRA, the State learned for the first time through documents produced in discovery in this case that there are material questions concerning the status of Big Lagoon and its land. Thus, Big Lagoon's statute of limitations argument lacks merit.

RESPONSE ON CROSS-APPEAL

The State agrees with Big Lagoon's jurisdictional statement and standard of review for the cross-appeal. (*See* Big Lagoon Br. 1-3, 16.)

STATEMENT OF ISSUES

1. Whether the cross-appeal is moot and should be dismissed because Big Lagoon has received complete relief on its complaint, and there is no basis for this Court to order the district court also to enter summary judgment on an alternative theory when the State is not challenging the district court's substantive reasons for finding the State failed to negotiate in good faith.

2. Whether, in class III gaming compact negotiations under IGRA, the State may negotiate for terms to mitigate the impacts that tribal gaming activities would have on the adjacent environment.

STATEMENT OF FACTS

Big Lagoon's rancheria is located on the shoreline of the Big Lagoon in Humboldt County, contiguous to the Harry A. Merlo Recreation Area, adjacent to the Big Lagoon County Park, and across the lagoon from Humboldt Lagoons State Park. (ER 576-77, 591, 595, 603.) The Big Lagoon, a State ecological preserve managed by the California Department of Fish and Game, is one of the few remaining naturally functioning coastal lagoons in California. (ER 603.) It is an important part of a fragile ecosystem that functions to support diverse populations of species, including three species listed under the federal Endangered Species Act, and is an

environmentally sensitive habitat area within the meaning of the California Coastal Act. (*Id.*; *see also* State Supplemental Excerpts of Record (State SER) 68-86.) As the district court observed, Big Lagoon "does not dispute that its gaming activities would take place in an environmentally-sensitive area. Nor does it contend that its proposed gaming operations would be carried on without any negative environmental impact, thereby obviating the need for environmental mitigation measures." (ER 22.) Consequently, throughout compact negotiations with Big Lagoon, the State endeavored to mitigate the impact that development of a casino on Big Lagoon's land would have on adjacent State lands while complying with IGRA's policy of promoting tribal economic development. *See* 25 U.S.C. 2702(1).

In negotiating the Barstow Compact (*see* AOB 9), Big Lagoon agreed to "forgo 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 Big Lagoon's trust land had the proposal been approved. (ER 580-81, 604, 606-07; State SER 1-9; AOB 9-10.) Big Lagoon agreed to enter into "Intergovernmental Agreements" with local governments to mitigate impacts caused by its gaming operation in Barstow, and subsequently entered into the required mitigation agreement with the City of Barstow.

(State SER 5-9; State MJN Reply/Response Ex. E.) Big Lagoon's attorney testified before the Legislature that the Barstow Compact terms "were freely negotiated at arm's length," and did not infringe upon tribal sovereignty. (State SER 65-66.) Big Lagoon's Chairman testified that the Barstow Compact would benefit California's greater interests "in terms of the environmental concerns." (*Id.* at 67.) Thus, Big Lagoon conceded that development conditions on its land in Humboldt County and the land where it would conduct gaming in Barstow were appropriately negotiated in a class III gaming compact.

Even during the compact negotiations at issue here, Big Lagoon conceded that environmental impact mitigation measures could and should be included in a compact. In March 2008, Big Lagoon acknowledged the compact should address the State's environmental concerns. (ER 612.) Big Lagoon had suggested the parties rely upon its environmental assessment to evaluate the impacts but acknowledged the document "did not contain an in-depth look at the combined impacts of a proposed casino-hotel facility." (*Id.*) Big Lagoon also proposed to enter into enforceable written intergovernmental agreements with local governments, and to submit to binding arbitration if it could not reach agreement with those entities. (State SER 11-12, 18, 25-27.) Throughout negotiations, Big Lagoon insisted on

constructing the entire casino-hotel project and supporting infrastructure on the eleven-acre trust parcel and would not consider utilizing any part of the adjacent nine-acre fee parcel. (ER 612.) In August 2008, Big Lagoon proposed its own "Project Mitigation Measures" to address impacts that a gaming development on the eleven acres would have on various adjacent, off-reservation environmental components. (Big Lagoon SER 79-83.) In its final offer, Big Lagoon was "still willing to abide by the mitigation measures" it had proposed, and agreed "to clarify language in the mitigation measures to ensure that compliance was mandatory." (ER 619.) Thus, Big Lagoon agreed that not only was environmental mitigation appropriate, it could be required. The State modified Big Lagoon's mitigation proposal and incorporated it into a counterproposal (*compare* Big Lagoon SER 79-83 (Big Lagoon's Project Mitigation Measures) *with* ER 625-26 & Big Lagoon SER 125-29 (State's Project Mitigation Measures)), to which Big Lagoon responded by abandoning negotiations and filing suit.

ARGUMENT

I. BIG LAGOON'S CROSS-APPEAL IS MOOT AND MUST BE DISMISSED

Big Lagoon claims the district court erred in finding the State could negotiate for environmental protection in a class III gaming compact under

IGRA. (Big Lagoon Br. 46-63.) Buried in the last sentence of its brief, Big Lagoon asks this Court to reverse the district court's ruling and order that summary judgment also be entered in Big Lagoon's favor "on this alternative basis for finding bad faith negotiations by the State." (*Id.* at 63.) Big Lagoon cites no authority for the requested relief. Indeed, it would be anomalous for this Court to decide the cross-appeal and grant Big Lagoon's requested relief on an alternative theory when Big Lagoon acknowledges it has received "complete relief on its IGRA complaint" (*id.* at 2, 18), and "the substantive bases for the District Court's finding of bad faith negotiations by the State . . . and are unchallenged on appeal" (*id.* at 23).

Federal courts lack jurisdiction to give opinions upon moot questions. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997) (setting aside this Court's judgment after it refused to stop adjudication when facts making the case moot came to its attention); *Iron Arrow Honor Soc. v. Heckler*, 464 U.S. 67, 69-73 (1983) (per curiam) (vacating judgment where court of appeals had ruled on the merits although case had become moot during appeal). "A case is moot on appeal if no live controversy remains at the time the court of appeals hears the case." *NASD Dispute Resolution, Inc. v. Judicial Council of Cal.*, 488 F.3d 1065, 1068 (9th Cir. 2007). "The test for

whether such a controversy exists is 'whether the appellate court can give the appellant any effective relief in the event that it decides the matter on the merits in his favor.'" *Id.*; *see also IRS v. Pattullo*, 271 F.3d 898, 901 (9th Cir. 2001) ("If an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal is moot and must be dismissed.").

Because Big Lagoon has received "complete relief on its IGRA complaint" (Big Lagoon Br. 2, 18), this Court cannot give Big Lagoon any further effective relief on the cross-appeal. Other than the State's jurisdictional challenges, the district court's substantive reasons for finding the State failed to negotiate in good faith are not at risk. (*See id.* at 23.) Thus, there is no basis, or legal authority cited by Big Lagoon, for this Court to order the district court to *also* enter summary judgment for Big Lagoon on an alternative basis.

This is true no matter how the Court decides the State's appeal because there would be no further compact negotiations under any circumstances. When the district court entered its summary judgment order, it also ordered the parties to continue negotiations to conclude a compact pursuant to IGRA. (ER 49-50.) The parties were unable to reach agreement and the district court ordered them to submit their last best compact proposals to a

mediator. (ER 19-21.) *See* 25 U.S.C. § 2710(d)(7)(B)(iv). The mediator selected Big Lagoon's compact proposal, which does not include the environmental mitigation measures requested by the State. (ER 5-6; *see* District Court Doc. Nos. 129, 136.) The State did not consent to the mediator-selected compact. (ER 6.) Ordinarily, IGRA requires the mediator to notify the Secretary of the mediator's compact selection, and the Secretary would then prescribe procedures, without consulting the State, that are consistent with the proposed compact. 25 U.S.C. § 2710(d)(7)(B)(vii). But here the district court stayed further proceedings pending the parties' cross-appeals. (ER 13-18.) If the district court's summary judgment order is affirmed on the State's appeal, then the district court will terminate the stay and order the mediator to notify the Secretary of his compact selection, pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii). (ER 1-2, 13-18.) If that occurs, then the Secretary will prescribe procedures consistent with Big Lagoon's compact proposal, which excludes the environmental provisions sought by the State, and the parade or horribles and sovereignty violations asserted in Big Lagoon's cross-appeal. There would be no further negotiations between the parties and a decision on whether the State could negotiate for the mitigation measures it sought here would be moot because Big Lagoon has already received the relief sought in its complaint and cross-appeal.

Similarly, if this Court reverses and remands on the State's appeal, it would be for the limited purpose of determining the narrow jurisdictional questions whether Big Lagoon is a lawfully recognized tribe, and the eleven-acres is lawfully in trust for Big Lagoon and eligible for gaming. There would be no more compact negotiations, no matter how the district court decides the jurisdictional questions. If the district court determines it lacks jurisdiction, then Big Lagoon would not be entitled to any relief under IGRA. If the district court finds Big Lagoon meets IGRA's jurisdictional requirements, then, absent an appeal by the State and a stay pending appeal, the IGRA remedial procedures would resume with the mediator referring the matter to the Secretary to prescribe class III gaming procedures for Big Lagoon pursuant to 25 U.S.C. § 2710(d)(7)(B)(vi). (*See* ER 13-18.)

Nor would special circumstances exist that might warrant this Court deciding the cross-appeal. Appellate courts sometimes entertain "attacks on practices that no longer directly affect the attacking party, but are 'capable of repetition' while 'evading review.'" *Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009) (citations omitted). Yet here, as in *Alvarez* where the Supreme Court declined to find special circumstances existed to save an otherwise moot appeal, nothing suggests that Big Lagoon will likely again prove subject to the State's requests for environmental mitigation. *See id.*

Accordingly, the cross-appeal is moot and must be dismissed.

II. THE DISTRICT COURT CORRECTLY FOUND THE STATE COULD NEGOTIATE FOR ENVIRONMENTAL PROTECTION

Big Lagoon, unlike any tribe in the State, proposed to locate a casino open all days and hours on the coastal shoreline, in direct view of both a dark sky State park and wilderness recreation area, and immediately adjacent to a State ecological preserve containing threatened and endangered species. Consequently, the State requested Big Lagoon comply with certain reasonable mitigation measures, many of which Big Lagoon proposed and agreed to make mandatory during the compact negotiations at issue here.

Contrary to Big Lagoon's position during compact negotiations, and despite its failure to indicate to the State that environmental mitigation could not be negotiated under IGRA, Big Lagoon argued to the district court that the State did not negotiate in good faith because it demanded environmental protection. The district court did not begin with a clean slate—as it rejected the same argument from Big Lagoon three times before—only this time Big Lagoon added that this Court's intervening decision in *Rincon* was dispositive. Recognizing *Rincon* is inapplicable because it did not involve or decide the question whether a state could negotiate for environmental protection, the district court again correctly rejected Big Lagoon's argument.

Preliminarily, the State clarifies several factual misrepresentations infecting Big Lagoon's argument. *First*, Big Lagoon ignores that during compact negotiations it proposed and agreed to make mandatory the environmental mitigation measures it now claims are outside the permissible scope of negotiations. (*See* Big Lagoon Br. 46 n.20.) For instance, Big Lagoon acknowledged the compact should address the State's environmental concerns (ER 612), and Big Lagoon proposed compact terms obligating it to prepare a "Tribal Environmental Impact Report," enter into intergovernmental agreements with local governments, and enter into binding arbitration if it could not reach agreement with those entities. (State SER 11-12, 18, 21-27.) Big Lagoon also proposed its own "Project Mitigation Measures" to address project-specific environmental impacts, which the State modified and incorporated it into its final counterproposal. (*Compare* Big Lagoon SER 79-83 (Big Lagoon's Project Mitigation Measures) *with* ER 625-26 & Big Lagoon SER 125-29 (State's Project Mitigation Measures).) In its final correspondence with the State before filing suit, Big Lagoon confirmed it was "still willing to abide by the mitigation measures" it had proposed, and agreed "to clarify language in the mitigation measures to ensure that compliance was mandatory." (ER 619.) At no time did Big Lagoon suggest the State could not negotiate for

environmental protection. On the contrary, Big Lagoon agreed it was appropriate and could be required.[14]

While Big Lagoon may be able to change its mind during compact negotiations, it cannot lead the State into believing there is an agreement in principle that mitigation is appropriate, then file suit claiming the State is in bad faith for proceeding with a counterproposal that incorporates, and is based upon, terms to which Big Lagoon agreed. *Cf. Adler v. Fed. Republic of Nig.*, 219 F.3d 869, 876-77 (9th Cir. 2000) ("The unclean hands doctrine 'closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.'"). This puts the State in the impossible position of negotiating with a moving target. The State could never be in good faith if that were the standard under IGRA.

Second, the State did not seek to impose state law, regulation, or authority upon Big Lagoon. (*See* Big Lagoon Br. 46-47, 52-53, 55-57, 62.) The district court previously found the State could not insist upon a blanket provision requiring tribal compliance with all state environmental and land

[14] Big Lagoon had no difficulty negotiating environmental provisions and entering into similar terms in the Barstow Compact, including entering into an intergovernmental agreement with the City of Barstow to mitigate environmental impacts caused by its gaming project. (*See supra*, pp. 34-35.)

use laws. (State SER 47.) The State complied with that order during the negotiations at issue and did not insist or ask Big Lagoon to obtain state or local agency permits or approval for its project. Instead, Big Lagoon proposed project-specific mitigation measures, which the State modified and incorporated into a counterproposal. (*Compare* Big Lagoon SER 79-83 (Big Lagoon's Project Mitigation Measures) *with* ER 625-26 & Big Lagoon SER 125-29 (State's Project Mitigation Measures).) The measures were as narrowly tailored as the State could conceive, given the limited information Big Lagoon provided regarding its intended facility design. (*See* ER 612.) Indeed, Big Lagoon fails to cite *any* state law or regulation with which the State insisted it must comply. Big Lagoon alleges, but fails to explain how, the proposed measures are "CEQA-like." (Big Lagoon Br. 46 n.20.) This undeveloped assertion is not entitled to consideration. *See Indep. Towers of Washington v. Washington*, 350 F.3d at 929-30; *Hibbs v. Dep't of Human Res.*, 273 F.3d at 873 n.34. Nonetheless, even if the State's proposed mitigation measures were based upon state environmental and land use law, the district court found that to be a permissible starting point. (State SER 43.) Moreover, *demanding* Big Lagoon be subjected to broad state jurisdiction, as Big Lagoon falsely suggests occurred here, is categorically different from *negotiating* project-specific mitigation requirements,

particularly when Big Lagoon agreed to and proposed the measures about which it now complains.

Third, Big Lagoon does not specify which mitigation measures would be "extensive and draconian," "burdensome," or "project-threatening," or explain why its characterization is justified. (Big Lagoon Br. 46 n.20.) Big Lagoon did not make this argument in the district court, and it is too undeveloped here to warrant consideration. *See Indep. Towers of Washington v. Washington*, 350 F.3d at 929-30; *Hibbs v. Dep't of Human Res.*, 273 F.3d at 873 n.34. Regardless, as noted, the environmental provisions in the State's final proposal were based upon Big Lagoon's proposals. Only on summary judgment did Big Lagoon argue, contrary to its representations to the State during negotiations and contrary to the allegations in the complaint,[15] that the State could not even ask Big Lagoon

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[15] Big Lagoon did not allege in the complaint that the State failed to negotiate in good faith because it requested environmental mitigation but that "[t]he State has insisted upon environmental mitigation regulations, above and beyond those imposed on any tribe operating a casino in California." (ER 688.) Thus, Big Lagoon did not file suit on the theory that environmental mitigation could not be included in a compact under IGRA, but rather the State had simply asked too much from Big Lagoon in exchange for mitigation. Big Lagoon did not amend its complaint to seek relief based upon the State's requests for environmental mitigation, and the district court granted Big Lagoon complete relief on its complaint (Big

(continued…)

to mitigate off-reservation environmental impacts caused by its gaming operation.

With those clarifications, the State turns to Big Lagoon's argument.

A. IGRA contemplates negotiation of environmental impact provisions in class III gaming compacts.

IGRA provides that a class III gaming compact may include provisions related to, among other things,

> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
>
> (vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C).

Here, the district court found "the State's request for mitigation measures is permissible so long as such measures directly relate to gaming operations or can be considered standards for the operation and maintenance of [Big Lagoon's] gaming facility. *See* 25 U.S.C. § 2710(d)(3)(C)(vi)-(vii)." (ER 46.) The district court correctly based its conclusions upon its decision

(…continued)
Lagoon Br. 2, 18), finding the State failed to offer meaningful concessions in exchange for the requested mitigation (ER 48-49).

in an earlier case rejecting the same argument by Big Lagoon, and the *Coyote Valley*[16] cases decided by this Court and the same district court.

This is the fourth time the district court rejected Big Lagoon's argument that the State cannot negotiate for environmental protection in the compacting process. (*See* State MJN Ex. A at 11-16; State SER 42-48, 61-63.) In denying Big Lagoon's motion for summary judgment in 2002, the district 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)" because "[t]he construction and operation of a gaming facility has direct impacts on many environmental and land use concerns." (State SER 42-43.) The district court found that "[e]nvironmental and land use laws can also be considered 'standards for the operation of [gaming] activity and maintenance of the gaming facility' under § 2710(d)(3)(C)(vi)." (*Id.* at 43.) Here, the district court correctly rejected Big Lagoon's argument for the same reasons. (ER 44-45.)

It also correctly found separate support in this Court's decision in *Coyote Valley II*, which affirmed the same district court's broad

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[16] *See In re Indian Gaming Related Cases*, 147 F. Supp. 2d 1011 (N.D. Cal. 2001) (*Coyote Valley I*), *aff'd*, 331 F.3d 1094 (9th Cir. 2003) (*Coyote Valley II*).

interpretation of "subjects that are directly related to the operation of *gaming activities*" in 25 U.S.C. § 2710(d)(3)(C)(vii) (emphasis added), "to include any subject that is directly connected to the operation of *gaming facilities,*" *Coyote Valley I*, 147 F. Supp. 2d at 1017-18 (emphasis added). As the district court noted, in *Coyote Valley II* this Court

> held that a labor relations provision was a permissible topic of negotiation and could be included in a gaming compact because it directly related to gaming operations. 331 F.3d at 1116. The court noted that the State did not insist on "general employment practices on tribal lands," but sought a labor relations provision that pertained to "employees at tribal casinos and related facilities." *Id.* (emphasis in original).

(ER 46.)

Tellingly, Big Lagoon does not challenge—or even acknowledge—the district court's rationale. Indeed, Big Lagoon here and in previous compact negotiations[17] agreed to many of the environmental conditions which it now claims cannot be negotiated. (*See supra*, pp. 34-36, 42-43.) Accordingly, the district court correctly found IGRA allows the State to negotiate for environmental mitigation.

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[17] If environmental conditions were appropriate for Big Lagoon's rancheria and Barstow parcel when Big Lagoon planned to build a casino in Barstow (*see supra*, pp. 34-35), then they are equally appropriate, if not more so, for a project on Big Lagoon's environmentally-sensitive land in Humboldt County.

B. IGRA's legislative history does not indicate Congress intended to preclude states from negotiating for environmental protection.

In 2002, Big Lagoon cited, as it did here, IGRA's legislative history to suggest Congress did not intend to authorize states to use the compacting process to impose broad regulation on sovereign tribal land. (*See* Big Lagoon Br. 57-59.) The district court rejected Big Lagoon's contention here for the same reasons it rejected them in 2002:

> [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.

(ER 45 (emphasis in original).) Again, Big Lagoon fails to acknowledge or challenge the district court's sound rationale.

Moreover, IGRA's legislative history confirms that the size and capacity of a proposed gaming facility are proper subjects for negotiation. S. Rep. No. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084 ("licensing issues under [25 U.S.C. § 2710(d)(3)(C)(vi)] may include agreements on days and hours of operation, wage and pot limits, types of

wagers, and size and capacity of the proposed facility"). In *Rincon*, 602 F.3d at 1039, this Court construed the above-quoted excerpt from the Senate Report to mean tribes are "entitled" to negotiations on topics like device licensing and time. If tribes are entitled to such negotiations, then so too is the State entitled to negotiations on the size and capacity of a proposed gaming facility.

The Senate Report also confirms a state's "significant . . . governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests." S. Rep. No. 100-446, at 13, *reprinted in* 1988 U.S.C.C.A.N. at 3083. Here, the State has a public interest in protecting and regulating development of environmentally sensitive habitat. Cal. Pub. Res. Code § 30240(a) ("Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas."); *Sec'y of Interior v. California*, 464 U.S. 312, 330 (1984) (activities exclusively within and *directly affecting* a coastal zone are subject to state review under the Coastal Zone Management Act); *see also California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 590-93 (1987); *New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 301-02 (E.D.N.Y. 2007) (finding that where

state demonstrated anticipated tribal casino construction and operation would have detrimental environmental impact, the public interest is served by ensuring development does not violate zoning laws, other land use regulations, and state's anti-gaming provisions). Here, "the construction and operation of a gaming facility has direct impacts on many environmental and land use concerns." (State SER 43.) Unquestionably, larger facilities with more slot machines attract more patrons, which in turn causes exponentially increased impacts to various environmental components, such as hydrology and water quality, biological resources, visual and aesthetic resources, traffic and transportation, noise, air quality, water supply, wastewater treatment and disposal, utilities, and public services, including law enforcement, fire and emergency medical services.

Accordingly, IGRA's legislative history confirms Congress intended to allow states to negotiate for measures designed to mitigate off-reservation environmental impacts caused by tribal class III gaming facilities.

C. *Rincon* does not require a different result.

In *Rincon*, this Court held the State failed to negotiate an amendment to a class III gaming compact in good faith because it viewed the State's request for general fund revenue sharing as an attempt to tax the tribe in violation of 25 U.S.C. § 2710(d)(4). *Rincon*, 602 F.3d at 1029-42. *Rincon*

is inapposite because the issue was whether the State could request general fund revenue sharing, not whether it could negotiate for environmental protection. This Court's passing reference to environmental issues in the context of discussing IGRA's legislative history in general is dicta. *See id.* at 1029 n.10, 1040. The district court rejected again Big Lagoon's argument that IGRA's legislative history suggests the State cannot negotiate for environmental protection, and correctly found this Court's decision in *Rincon* does not require a different result.

1. *Rincon* did not hold a state's use of the compacting methodology to negotiate for environmental protection is inconsistent with IGRA's purpose.

Big Lagoon claims the State's request for environmental mitigation is inconsistent with IGRA's purposes, and that in citing Senator Inouye's comments with approval, this Court in *Rincon* "reinforced" that Congress did not intend IGRA to be used as a platform for imposing environmental or land use regulation on tribal land. (Big Lagoon Br. 57-60.) As the district court rightly explained,

> The Ninth Circuit did not, by quoting a senator's statement in a footnote, categorically forbid negotiations over environmental mitigation measures. It is true that the footnote to which [Big Lagoon] refers pertained to the *Rincon* court's discussion of permissible topics of negotiation under IGRA. However, as stated above, comments like Senator

> Inouye's merely demonstrate that Congress did not intend states to use the compacting process as a tool for regulating tribes generally.

(ER 45-46.) Big Lagoon does not challenge the district court's reasoning. The district court accurately described IGRA's legislative history as prohibiting states from using "the compacting process as a tool for regulating tribes *generally*," whereas here the State requested Big Lagoon to agree to very *specific* measures designed to mitigate environmental impacts caused by the construction and operation of its gaming facility. The State did not utilize the compacting process to impose State *jurisdiction* on Big Lagoon's land. (*See supra*, pp. 43-45; S. Rep. No. 100-446, at 14, *reprinted in* 1988 U.S.C.C.A.N. at 3084 ("The Committee does not intend that compacts be used as a subterfuge for imposing State *jurisdiction* on tribal lands." (Emphasis added.)).)

Moreover, the district court correctly found *Rincon* inapposite because it "did not address environmental regulation." (ER 47.) The district court further noted this Court in *Rincon* did not

> engage in a "potentially complicated statutory analysis" to determine the metes and bounds of IGRA's purposes because the State clearly misinterpreted *Coyote Valley II* and the congressional intent underlying IGRA. 602 F.3d at 1034. The court stated that the "only <u>state</u> interests mentioned in § 2702 are protecting against organized crime and ensuring that gaming is conducted

> fairly and honestly." *Id.* (emphasis in original). It did not, however, declare that environmental mitigation measures, based on the location of a tribe's gaming facility, do not promote IGRA's purposes. Compliance with such measures does not run counter to tribal interests. *Cf.* S. Rep. 100-446, at 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3085 (stating that, in considering good faith, the committee "trusts that courts will interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests"). Thus, Big Lagoon does not establish that the State's proposed environmental mitigation measures are so discordant with IGRA's purposes that they amount to prohibited topics of negotiation.

(ER 47-48.) The State agrees with the district court's rationale, which Big Lagoon failed to acknowledge or challenge on appeal.

2. ***Rincon* did not hold that negotiations for environmental protection are not directly related to gaming activities under IGRA.**

Big Lagoon claims the State's request for environmental protection is prohibited because it is not directly related to gaming activities. (Big Lagoon Br. 60-62.) In support, Big Lagoon cites *Rincon*, where this Court dismissed as "circular" the State's argument that general fund revenue sharing is directly related to the operation of gaming activities because the money is paid out of the income from gaming activities. (*Id.* at 60-61.) Big Lagoon incorrectly claims the State's request for environmental mitigation is similarly circular: "Just because the environmental impact or land use issue

perceived by the State[[18]] 'derive from' the construction and operation of a facility in which gaming is conducted, does not render them 'directly related' to gaming operations." (*Id.* at 61 (n. added).)

The district court correctly concluded that "Big Lagoon's reliance on these statements is misplaced. The *Rincon* court focused primarily on the direct taxation of tribes, which is specifically identified and proscribed under IGRA. *See* § 2710(d)(4) and (7)(B)(iii)(II). *IGRA does not treat environmental mitigation measures similarly*." (ER 47 (emphasis added).) Thus, while Big Lagoon claims—without explanation—that imposing "slot machine fees coming directly from gaming revenues is much more 'related to' gaming activities than is regulation of the environment or the size and design of a casino building" (Big Lagoon Br. 61), *Rincon*'s discussion of "directly related to gaming activities" was in the context of general fund revenue sharing only, and not in the context of environmental protection.

Moreover, as noted, the district court's standard involves mitigation that directly relates to Big Lagoon's gaming operations or can be considered

[18] Although Big Lagoon cavalierly dismisses the environmental impacts as "perceived" only by the State, Big Lagoon does not dispute that its land is in an environmentally-sensitive area, nor does it contend environmental mitigation is unnecessary because it would conduct gaming operations without any negative environmental impact. (ER 22.)

standards for the operation and maintenance of the gaming facility. (ER 46.) This standard relates to more than just the operation of gaming itself, and includes impacts stemming from the entire gaming operation and how Big Lagoon's gaming facility is built, operated and maintained. (*See supra*, pp. 46-48.) Lest there be any doubt, IGRA's legislative history confirms the size and capacity of a proposed gaming facility are proper subjects for negotiation. S. Rep. No. 100-446, at 13, *reprinted in* 1988 U.S.C.C.A.N. at 3084.

Big Lagoon further misrepresents that the State's concerns "arise from the construction of a facility, which could as well be a hotel, a restaurant or a manufacturing plant—they do not derive from gaming *per se*." (Big Lagoon Br. 61.) Big Lagoon does not propose to build just any "facility"—it proposes to build, operate and maintain a class III "gaming facility," which it agreed to broadly define as including "all rooms, buildings, and areas, including, but not limited to, hotels, parking lots, and walkways, a principal purpose of which is to serve the activities of the Gaming Operation." (State SER 16; *see also* District Court Doc. No. 129-1 at § 2.10.) The State's role may be limited if Big Lagoon were to build something other than a class III

gaming facility,[19] but that is not what Big Lagoon proposes. It is because Big Lagoon seeks to build a class III gaming facility that IGRA allows the State to negotiate for environmental mitigation measures in a class III gaming compact.

D. Federal regulations envision the use of compact provisions as mechanisms to protect the environment and public health and safety.

The NIGC, created by IGRA and charged with its enforcement, 25 U.S.C. §§ 2704-2709, has interpreted IGRA in a manner consistent with the district court. The NIGC promulgated regulations requiring that 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.* § 559.5; 73 Fed. Reg. 6019, 6020, 6022-23 (Feb. 1, 2008). A tribe must 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." 25 C.F.R. § 502.22

[19] In certain situations the State may assert jurisdiction over the on-reservation activities of tribal members. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215-17 (1987).

(emphasis added). Statutory interpretation by an agency charged with implementing it will be upheld unless unreasonable. *Arizona Pub. Serv. Co. v. E.P.A.*, 211 F.3d 1280, 1287 (D.C. Cir. 2000). Because the NIGC recognizes gaming compacts are appropriate vehicles for tribal compliance with regulatory requirements concerning environmental impacts, environmental protection is a proper subject for compact negotiations. The district court, consistent with the NIGC's reasonable construction of IGRA, correctly envisioned the use of tribal-state compacts to include environmental protection standards.

E. The Indian canon does not apply here and would not help Big Lagoon in any event.

Big Lagoon mistakenly contends this Court must apply the Indian canon of statutory construction, which requires "'statutes to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" (Big Lagoon Br. 61-62 (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)).) But the Indian canon applies only when there is statutory ambiguity. *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003); *see also* S. Rep. No. 100-446, at 15, *reprinted in* 1988 U.S.C.C.A.N. at 3085 ("The Committee . . . trusts that courts will interpret *ambiguities* on these issues in a manner that will be

most favorable to tribal interests" (emphasis added)). Big Lagoon has not argued, nor did the district court find, that 25 U.S.C. § 2710(d)(3)(C)(vi) or (vii) are ambiguous.

Moreover, this Court has held that contemporaneous administrative construction by the agency charged with the statute's administration defeats the Indian canon. *See Williams v. Babbitt*, 115 F.3d 657, 663 n.5 (9th Cir. 1997); *Seldovia Native Ass'n, Inc. v. Lujan*, 904 F.2d 1335, 1342 (9th Cir. 1990); *Haynes v. United States*, 891 F.2d 235, 239 (9th Cir. 1989). Thus, given the NIGC's reasonable interpretation of IGRA to allow class III gaming compacts to include environmental protection standards (*supra*, pp. 57-58), this Court should accord it deference notwithstanding the fact that Congress enacted IGRA to benefit Indian tribes.

More importantly, this Court has "refused to apply the presumption favoring tribes where doing so would contradict the plain words of the statute." *Artichoke Joe's*, 353 F.3d at 729 (citing *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257 (9th Cir. 1994)). Here, the district court found the State could negotiate for environmental mitigation under either 25 U.S.C. § 2710(d)(3)(C)(vi) *or* (vii). (ER 46.) Section 2710(d)(3)(C)(vi) plainly authorizes negotiations for "standards for the operation of [class III gaming] activity and *maintenance of the gaming*

facility, including licensing." (Emphasis added.) Because environmental and land use provisions can also be considered standards for the operation of gaming activities and maintenance of a gaming facility, the district court correctly found the State could request environmental protection in compact negotiations. (ER 46; State SER 42-43.) Thus, pursuant to *Rumsey*, the Indian canon is inapplicable because it would contradict section 2710(d)(3)(C)(vi)'s plain language.

The same result should obtain under section 2710(d)(3)(C)(vii), which allows for compact negotiations over "any other subjects that are directly related to the operation of gaming activities." In *Rincon*, this Court held that whether revenue sharing fits into section 2710(d)(3)(C)(vii)'s unambiguous phrase "directly related" "is a subject of significant dispute between the parties," warranting application of the Indian canon as this Court did in *Coyote Valley II*. *Rincon*, 602 F.3d at 1028 n.9. Here, the parties dispute not what "directly related" means but rather what the phrase "operation of gaming activities" means. "Gaming activities" in section 2710(d)(3)(C)(vii) includes "any subject that is directly connected to the operation of gaming facilities." *Coyote Valley I*, 147 F. Supp. 2d at 1017-18. Because construction, operation and maintenance of a gaming facility has direct impacts on many environmental and land use concerns (State SER 42-43),

the district court correctly found the State could request environmental mitigation under section 2710(d)(3)(C)(vii). (ER 46.) Big Lagoon reads the provision too narrowly and limits its application to the act of playing class III games only. (Big Lagoon Br. 60-61.) That the parties dispute how a statute should be interpreted does not necessarily make it ambiguous. Nonetheless, Big Lagoon's construction contradicts section 2710(d)(3)(C)(vii)'s plain language, as interpreted by the district court in *Coyote Valley I* and affirmed by this Court in *Coyote Valley II*, because it excludes the entire gaming operation and instead focuses only on the conduct of gaming.

In any event, the Indian canon does not help Big Lagoon. The district court correctly found that compliance with environmental protection measures, based on the location of a tribe's gaming facility, does not run counter to tribal interests *notwithstanding* the Indian canon. (ER 47-48.) Big Lagoon does not challenge this finding. This Court reached a similar conclusion in *Coyote Valley II* where it held section 2710(d)(3)(C)(vii) is not ambiguous, and alternatively upheld tribal contributions to the Revenue Sharing Trust Fund *notwithstanding* the Indian canon. *Coyote Valley II*, 331 F.3d at 1111.

CONCLUSION

For the reasons given here and in the State's opening brief, the State respectfully requests this Court to reverse the district court's order granting summary judgment for Big Lagoon and remand with directions either to enter summary judgment for the State, or allow the State to complete discovery. The State further requests this Court to dismiss Big Lagoon's cross-appeal as moot, or, alternatively, affirm the district court's finding that the State may negotiate for environmental protection in the IGRA compacting process.

Dated: April 26, 2012 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 10-17803/10-17878

I certify that: (check (x) appropriate option(s))

[X] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached response and reply brief is

[X] Proportionately spaced, has a typeface of 14 points or more and contains _13,975_ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

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[ ] 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

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☐ Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

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April 26, 2012
Dated

s/Randall A. Pinal
Randall A. Pinal
Deputy Attorney General

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ADDENDUM

FEDERAL STATUTES AND REGULATIONS

Administrative Procedure Act
5 U.S.C. § 701-706

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that--

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory

right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

25 U.S.C. § 2704. National Indian Gaming Commission

(a) Establishment

There is established within the Department of the Interior a Commission to be known as the National Indian Gaming Commission.

(b) Composition; investigation; term of office; removal

(1) The Commission shall be composed of three full-time members who shall be appointed as follows:

(A) a Chairman, who shall be appointed by the President with the advice and consent of the Senate; and

(B) two associate members who shall be appointed by the Secretary of the Interior.

(2)(A) The Attorney General shall conduct a background investigation on any person considered for appointment to the Commission.

(B) The Secretary shall publish in the Federal Register the name and other information the Secretary deems pertinent regarding a nominee for membership on the Commission and shall allow a period of not less than thirty days for receipt of public comment.

(3) Not more than two members of the Commission shall be of the same political party. At least two members of the Commission shall be enrolled members of any Indian tribe.

(4)(A) Except as provided in subparagraph (B), the term of office of the members of the Commission shall be three years.

(B) Of the initial members of the Commission--

(i) two members, including the Chairman, shall have a term of office of three years; and

(ii) one member shall have a term of office of one year.

(5) No individual shall be eligible for any appointment to, or to continue service on, the Commission, who--

(A) has been convicted of a felony or gaming offense;

(B) has any financial interest in, or management responsibility for, any gaming activity; or

(C) has a financial interest in, or management responsibility for, any management contract approved pursuant to section 2711 of this title.

(6) A Commissioner may only be removed from office before the expiration of the term of office of the member by the President (or, in the case of associate member, by the Secretary) for neglect of duty, or malfeasance in office, or for other good cause shown.

(c) Vacancies

Vacancies occurring on the Commission shall be filled in the same manner as the original appointment. A member may serve after the expiration of his term of office until his successor has been appointed, unless the member has been removed for cause under subsection (b)(6) of this section.

(d) Quorum

Two members of the Commission, at least one of which is the Chairman or Vice Chairman, shall constitute a quorum.

(e) Vice Chairman

The Commission shall select, by majority vote, one of the members of the Commission to serve as Vice Chairman. The Vice Chairman shall serve as Chairman during meetings of the Commission in the absence of the Chairman.

(f) Meetings

The Commission shall meet at the call of the Chairman or a majority of its members, but shall meet at least once every 4 months.

(g) Compensation

(1) The Chairman of the Commission shall be paid at a rate equal to that of level IV of the Executive Schedule under section 5315 of Title 5.

(2) The associate members of the Commission shall each be paid at a rate equal to that of level V of the Executive Schedule under section 5316 of Title 5.

(3) All members of the Commission shall be reimbursed in accordance with Title 5 for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties.

25 U.S.C. § 2705. Powers of Chairman

(a) The Chairman, on behalf of the Commission, shall have power, subject to an appeal to the Commission, to--

(1) issue orders of temporary closure of gaming activities as provided in section 2713(b) of this title;

(2) levy and collect civil fines as provided in section 2713(a) of this title;

(3) approve tribal ordinances or resolutions regulating class II gaming and class III gaming as provided in section 2710 of this title; and

(4) approve management contracts for class II gaming and class III gaming as provided in sections 2710(d)(9) and 2711 of this title.

(b) The Chairman shall have such other powers as may be delegated by the Commission.

25 U.S.C. § 2706. Powers of Commission

(a) Budget approval; civil fines; fees; subpoenas; permanent orders

The Commission shall have the power, not subject to delegation--

(1) upon the recommendation of the Chairman, to approve the annual budget of the Commission as provided in section 2717 of this title;

(2) to adopt regulations for the assessment and collection of civil fines as provided in section 2713(a) of this title;

(3) by an affirmative vote of not less than 2 members, to establish the rate of fees as provided in section 2717 of this title;

(4) by an affirmative vote of not less than 2 members, to authorize the Chairman to issue subpoenas as provided in section 2715 of this title; and

(5) by an affirmative vote of not less than 2 members and after a full hearing, to make permanent a temporary order of the Chairman closing a gaming activity as provided in section 2713(b)(2) of this title.

(b) Monitoring; inspection of premises; investigations; access to records; mail; contracts; hearings; oaths; regulations

The Commission--

(1) shall monitor class II gaming conducted on Indian lands on a continuing basis;

(2) shall inspect and examine all premises located on Indian lands on which class II gaming is conducted;

(3) shall conduct or cause to be conducted such background investigations as may be necessary;

(4) may demand access to and inspect, examine, photocopy, and audit all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this chapter;

(5) may use the United States mail in the same manner and under the same conditions as any department or agency of the United States;

(6) may procure supplies, services, and property by contract in accordance with applicable Federal laws and regulations;

(7) may enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission and, to the extent feasible, contract the enforcement of the Commission's regulations with the Indian tribes;

(8) may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission deems appropriate;

(9) may administer oaths or affirmations to witnesses appearing before the Commission; and

(10) shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter.

(c) Omitted

(d) Application of Government Performance and Results Act

(1) In general

In carrying out any action under this chapter, the Commission shall be subject to the Government Performance and Results Act of 1993 (Public Law 103-62; 107 Stat. 285).

(2) Plans

In addition to any plan required under the Government Performance and Results Act of 1993 (Public Law 103-62; 107 Stat. 285), the Commission shall submit a plan to provide technical assistance to tribal gaming operations in accordance with that Act.

25 U.S.C. § 2707. Commission staffing

(a) General Counsel

The Chairman shall appoint a General Counsel to the Commission who shall be paid at the annual rate of basic pay payable for GS-18 of the General Schedule under section 5332 of Title 5.

(b) Staff
The Chairman shall appoint and supervise other staff of the Commission without regard to the provisions of Title 5 governing appointments in the competitive service. Such staff shall be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay payable for GS-17 of the General Schedule under section 5332 of that title.

(c) Temporary services

The Chairman may procure temporary and intermittent services under section 3109(b) of Title 5, but at rates for individuals not to exceed the daily equivalent of the maximum annual rate of basic pay payable for GS-18 of the General Schedule.

(d) Federal agency personnel

Upon the request of the Chairman, the head of any Federal agency is authorized to detail any of the personnel of such agency to the Commission to assist the Commission in carrying out its duties under this chapter, unless otherwise prohibited by law.

(e) Administrative support services

The Secretary or Administrator of General Services shall provide to the Commission on a reimbursable basis such administrative support services as the Commission may request.

25 U.S.C. § 2708. Commission; access to information

The Commission may secure from any department or agency of the United States information necessary to enable it to carry out this chapter. Upon the request of the Chairman, the head of such department or agency shall furnish such information to the Commission, unless otherwise prohibited by law.

25 U.S.C. § 2709. Interim authority to regulate gaming

Notwithstanding any other provision of this chapter, the Secretary shall continue to exercise those authorities vested in the Secretary on the day before October 17, 1988, relating to supervision of Indian gaming until such time as the Commission is organized and prescribes regulations. The Secretary shall provide staff and support assistance to facilitate an orderly transition to regulation of Indian gaming by the Commission.

28 U.S.C. §§ 2201-2202 Declaratory Judgment Act

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505

or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 U.S.C. § 2401

Time for commencing action against United States

(a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any per- son under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2409a Quiet Title Act

§ 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for nation- al defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be--

(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reason- ably calculated to put the claimant on notice of the Federal claim to the lands, or

(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

(l) For purposes of this section, the term “tide or submerged lands” means “lands beneath navigable waters” as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse pos- session.

Federal Rule of Civil Procedure 11

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name--or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) Requirements for an Order. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

25 C.F.R. § 151.12. Action on requests.

(a) The Secretary shall review all requests and shall promptly notify the applicant in writing of his decision. The Secretary may request any additional information

or justification he considers necessary to enable him to reach a decision. If the Secretary determines that the request should be denied, he shall advise the applicant of that fact and the reasons therefor in writing and notify him of the right to appeal pursuant to part 2 of this title.

(b) Following completion of the Title Examination provided in § 151.13 of this part and the exhaustion of any administrative remedies, the Secretary shall publish in the Federal Register, or in a newspaper of general circulation serving the affected area a notice of his/her decision to take land into trust under this part. The notice will state that a final agency determination to take land in trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published.

25 C.F.R. § 502.22. Construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety.

Construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety means a tribe has identified and enforces 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. Laws, resolutions, codes, policies, standards or procedures in this area shall cover, at a minimum:

(a) Emergency preparedness, including but not limited to fire suppression, law enforcement, and security;

(b) Food and potable water;

(c) Construction and maintenance;

(d) Hazardous materials;

(e) Sanitation (both solid waste and waste-water); and

(f) Other environmental or public health and safety standards adopted by the tribe in light of climate, geography, and other local conditions and applicable to its gaming facilities, places or locations.

25 C.F.R. § 559.5. What must a tribe submit to the Chairman with the copy of each facility license that has been issued or renewed?

(a) A tribe shall submit to the Chairman with each facility license an attestation certifying that by issuing the facility license:

(1) The tribe has identified and enforces the environment and public health and safety laws, resolutions, codes, policies, standards or procedures applicable to its gaming operation;

(2) The tribe is in compliance with those laws, resolutions, codes, policies, standards, or procedures, or, if not in compliance with any or all of the same, the tribe will identify those with which it is not in compliance, and will adopt and submit its written plan for the specific action it will take, within a period not to exceed six months, required for compliance. At the successful completion of such written plan, or at the expiration of the period allowed for its completion, the tribe shall report the status thereof to the Commission. In the event that the tribe estimates that action for compliance will exceed six months, the Chairman must concur in such an extension of the time period, otherwise the tribe will be deemed noncompliant. The Chairman will take into consideration the consequences on the environment and the public health and safety, as well as mitigating measures the tribe may provide in the interim, in his or her consideration of requests for such an extension of the time period.

(3) The tribe is ensuring that the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety.

(b) A document listing all laws, resolutions, codes, policies, standards or procedures identified by the tribe as applicable to its gaming facilities, other than Federal laws, in the following areas:

(1) Emergency preparedness, including but not limited to fire suppression, law enforcement, and security;

(2) Food and potable water;

(3) Construction and maintenance;

(4) Hazardous materials;

(5) Sanitation (both solid waste and wastewater); and

(6) Other environmental or public health and safety laws, resolutions, codes, policies, standards or procedures adopted by the tribe in light of climate, geography, and other local conditions and applicable to its gaming places, facilities, or locations.

(c) After the first submission of a document under paragraph (b) of this section, upon reissuing a license to an existing gaming place, facility, or location, and in lieu of complying with paragraph (b) of this section, a tribe may certify to the Chairman that it has not substantially modified its laws protecting the environment and public health and safety.

California Public Resources Code § 30240. Environmentally sensitive habitat areas; adjacent developments

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

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NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

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

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