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9 IN THE UNITED STATES DISTRICT COURT
 10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 11 OAKLAND DIVISION

13 **BIG LAGOON RANCHERIA, a Federally**
 14 **Recognized Indian Tribe,**

15 Plaintiff,

16 v.

17 **STATE OF CALIFORNIA,**

18 Defendant.

CV 09-1471 CW (JCS)

DEFENDANT STATE OF CALIFORNIA'S OPPOSITION TO PLAINTIFF BIG LAGOON RANCHERIA'S MOTION FOR SUMMARY JUDGMENT; NOTICE OF CROSS-MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Fed. R. Civ. P. 56

Date: August 12, 2010
 Time: 2 p.m.
 Dept: 2, Fourth Floor

1301 Clay Street
 Oakland, CA 94612

Judge: The Honorable Claudia Wilken
 Trial Date: Not set
 Action Filed: 4/3/2009

TABLE OF CONTENTS

1					
2					Page
3	Notice Of Motion And Motion				1
4	Memorandum Of Points And Authorities				1
5	Introduction				1
6	Background				3
7	I. IGRA				3
8	II. Factual Background				4
9	A. 2007 To 2009 Negotiations				4
10	B. Last Proposals				7
11	Legal Standard				9
12	Argument				9
13	I. The State Negotiated In Good Faith For Revenue Sharing				9
14	II. The State Negotiated In Good Faith For Environmental Mitigation And				
15	Land Use Requirements				12
16	A. This Court Previously Found The State May Negotiate On				
17	Environmental And Land Use Issues				12
18	B. Rincon Is Inapposite Because It Did Not Discuss Environmental				
19	Issues				13
20	C. The State Offered Valuable Consideration For Environmental				
21	Concessions				14
22	D. Federal Regulations Envision Use Of Compact Provisions As				
23	Mechanisms To Protect The Environment And Public Health And				
24	Safety				16
25	E. Big Lagoon Previously Agreed To More Restrictive Environmental				
26	Conditions				16
27	III. The State Negotiated In Good Faith Because It Is Against The Public				
28	Interest To Locate A Class III Gaming Facility On Land That The United				
	States Unlawfully Acquired In Trust For Big Lagoon’s Beneficial Use That				
	Otherwise Would Not Be Gaming-Eligible Indian Lands, And That Would				
	Result In Significant Damage To Surrounding State Lands				17
	A. The United States May Only Acquire Land In Trust Under The IRA				
	For Recognized Tribes That Were Under Federal Jurisdiction In				
	1934				17
	B. Big Lagoon Was Not A Recognized Tribe Under Federal				
	Jurisdiction In 1934 And, Therefore, Was Not A Proper Trust				
	Beneficiary				18
	1. James Charley And Family Were Not A Recognized Indian				
	Tribe Under Federal Jurisdiction In 1934				18
	2. Historical Documents Indicate That Big Lagoon’s Members				
	Are Not Descended From James Charley And Family				24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS
(continued)

	Page
C. It Is Not In The Public Interest For The State To Negotiate For A Casino On Land That The United States Unlawfully Acquired In Trust For Big Lagoon.....	24
D. It Is Not In The Public Interest For The State To Negotiate For A Casino On Land That Would Significantly Damage Adjacent State Lands.....	25
IV. Big Lagoon’s Summary Judgment Motion Should Be Denied, Or At Least Continued, To Allow The State To Discover Information Essential To Its Opposition.....	26
A. The Court May Deny Or Continue A Motion For Summary Judgment To Allow The Non-Moving Party To Complete Discovery.....	26
B. Good Cause Exists For The Court To Deny Or Continue The Tribe’s Summary Judgment Motion.....	27
1. The State’s Efforts To Obtain The Evidence.....	27
2. Evidence Obtained To Date.....	29
3. Evidence The State Expects To Receive.....	31
4. Outstanding Evidence Will Defeat The Tribe’s Summary Judgment Motion.....	32
a. There May Be A Material Question Whether There Is A Lineal Connection Between James Lagoon Charley And The Distributees Named In The Rancheria Asset Distribution Plan.....	32
b. There May Be A Material Question Whether The United States Lawfully Considers Big Lagoon A Federally Recognized Tribe.....	34
c. The State May Need To File A Third Party Complaint Against The United States.....	36
Conclusion.....	36

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
<i>Anderson v. Liberty Lobby, Inc.</i> 477 U.S. 242 (1986).....	9, 27
<i>Arizona Public Service Co. v. E.P.A.</i> 211 F.3d 1280 (D.C. Cir. 2000).....	16
<i>Artichoke Joe’s Cal. Grand Casino v. Norton</i> 353 F.3d 712 (9th Cir. 2003).....	4
<i>Artichoke Joe’s v. Norton</i> 216 F. Supp. 2d 1084 (E.D. Cal. 2002).....	10, 15
<i>Big Lagoon Park Company, Inc. v. Acting Sacramento Area Director, Bureau of Indian Affairs</i> 32 IBIA 309 (1998).....	25
<i>Burlington Northern Santa Fe R. Co. v. Assiniboine & Sioux Tribes</i> 323 F.3d 767 (9th Cir. 2003).....	27
<i>Cabazon Band of Mission Indians v. Wilson</i> 37 F.3d 430 (9th Cir. 1994).....	15
<i>Carcieri v. Salazar</i> 129 S. Ct. 1058 (2009).....	2, 17, 23, 25
<i>Celotex Corp. v. Catrett</i> 477 U.S. 317 (1986).....	9
<i>Garrett v. City & County of San Francisco</i> 818 F.2d 1515 (9th Cir. 1987).....	27
<i>Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.</i> 531 F.3d 767 (9th Cir. 2008).....	35
<i>In re Indian Gaming Related Cases</i> (<i>Coyote Valley Band of Pomo Indians v. California</i>) 331 F.3d 1094 (9th Cir. 2003).....	4, 10, 11
<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> 475 U.S. 574 (1986).....	9
<i>Morton v. Mancari</i> 417 U.S. 535 (1974).....	34

TABLE OF AUTHORITIES
(continued)

		<u>Page</u>
3	<i>Rincon Band of Luiseno Mission Indians v. Schwarzenegger</i>	
4	602 F.3d 1019 (9th Cir. 2010).....	passim
5	<i>Tatum v. City & County of San Francisco</i>	
6	441 F.3d 1090 (9th Cir. 2006).....	27
7	<i>United States v. Sandoval</i>	
8	231 U.S. 28 (1913).....	34
9	<i>Van Mechelen v. Portland Area Director, Bureau of Indian Affairs</i>	
10	35 IBIA 122 (2000).....	24
11	<i>Vogenthaler v. Maryland Square, LLC</i>	
12	No. 08-cv-01618-RCG-GWF, 2010 WL 1553417 (D. Nev. Apr. 14, 2010).....	36
13	<i>Wedbush, Noble, Cooke, Inc. v. S.E.C.</i>	
14	714 F.2d 923 (9th Cir. 1983).....	9
15	STATUTES	
16	25 C.F.R.	
17	§ 151.2(c).....	24
18	§ 502.22 (2008).....	16
19	18 U.S.C.	
20	§§ 1166-1168.....	1
21	25 U.S.C.	
22	§ 465.....	2, 17
23	§ 479.....	2, 17, 24
24	§ 1300i-10(b).....	31
25	§§ 2701-2721.....	1
26	§ 2702(1), (2).....	15
27	§§ 2702, 2710(d)(1)(C).....	3
28	§§ 2704-2709.....	16
	§ 2710(d)(3)(A).....	35
	§ 2710(d)(4).....	9
	§ 2710(d)(7)(B)(iii).....	3, 4, 24
	§ 2710(d)(7)(B)(iii)(I).....	17
	§ 2710(d)(7)(B)(iii), (iv).....	12
	§ 2719.....	25
	28 U.S.C.	
	§ 2409a(a).....	25

1
2
3
4
5
6
7
8
9
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14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

Cal. Const. Article IV § 19(f).....	4, 10
--	-------

COURT RULES

Federal Rules of Civil Procedure Rule 56	1, 9
Rule 56(f)	27, 36

OTHER AUTHORITIES

California Rancheria Termination Act.....	33
Hoopa Yurok Settlement Act.....	34
Quiet Title Act	25

1 **NOTICE OF MOTION AND MOTION**

2 TO PLAINTIFF BIG LAGOON RANCHERIA AND ITS ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on August 12, 2010, at 2 p.m., or as soon thereafter as the
4 matter may be heard in Courtroom 2, Fourth Floor, of the above-captioned Court, located at 1301
5 Clay Street, Oakland, California, Defendant State of California (State) will move the Court for
6 summary judgment, pursuant to Federal Rule of Civil Procedure 56 on grounds that there is no
7 genuine issue of material fact and that the State is entitled to judgment as a matter of law because
8 it has negotiated in good faith toward the formation of a compact with Plaintiff Big Lagoon
9 Ranchera (Big Lagoon or Tribe) that governs class III gaming activities as required by the Indian
10 Gaming Regulatory Act (IGRA), 18 U.S.C. §§ 1166-1168, 25 U.S.C. §§ 2701-2721.

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

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **INTRODUCTION**

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

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

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

8 Moreover, it is against the public interest to locate a class III gaming facility on land that
9 the United States unlawfully acquired in trust for the Tribe that otherwise would not be eligible
10 for gaming, and that would result in significant damage to adjacent State lands. The United
11 States holds fee title to a nine-acre parcel that has been designated the Tribe’s rancheria. Big
12 Lagoon wants to put its casino on an eleven-acre parcel adjacent to the rancheria that the United
13 States acquired in trust for the Tribe in 1994 pursuant to 25 U.S.C. § 465 of the Indian
14 Reorganization Act (IRA). Last year, however, the Supreme Court held that the Secretary of the
15 Interior (Secretary) lacks authority to acquire land in trust for a tribe pursuant to the IRA unless it
16 was a recognized tribe under federal jurisdiction in 1934. *Carciere v. Salazar*, 129 S. Ct. 1058,
17 1060-61, 1064-65, 1068 (2009) (*Carciere*). Historical documents obtained by the State to date
18 indicate that Big Lagoon was not a recognized tribe under federal jurisdiction in 1934, and no
19 current members resided and descend from a recognized political sovereign resident on the
20 rancheria in 1934. *See* 25 U.S.C. § 479. Thus, the 1994 acquisition was unlawful and it would be
21 against the public interest to allow the Tribe to conduct gaming on land that otherwise would be
22 ineligible for gaming under IGRA. *Id.* § 2719.

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

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

3 BACKGROUND

4 I. IGRA

5 IGRA, the statutory framework for the operation and regulation of gaming by Indian tribes,
6 provides that Indian tribes may conduct certain gaming activities only if authorized pursuant to a
7 valid compact between the tribe and the state in which the gaming activities take place. 25 U.S.C.
8 §§ 2702, 2710(d)(1)(C). IGRA prescribes the process by which the state and the Indian tribe are
9 to negotiate a gaming compact:

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

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

15 *Id.* § 2710(d)(3)(C).

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

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

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

1 2710(D)(7)(B)(iv). The mediator will choose the proposed compact that “best comports with the
2 terms of [IGRA] and any other applicable Federal law and with the findings and order of the
3 court.” *Id.* If, within the next sixty days, the state does not consent to the compact selected by
4 the mediator, the mediator will notify the Secretary, who will then prescribe procedures under
5 which class III gaming may be conducted. *Id.* § 2710(d)(7)(B)(vii).

6 **II. FACTUAL BACKGROUND**

7 Throughout this action, Big Lagoon has asserted that for fifteen years it has been attempting
8 to negotiate a compact with the State. (*See, e.g.,* Pl.’s Mot. Sum. J. (Mot.) 1:21-24.) In fact,
9 however, the State was under no obligation to negotiate a compact with Big Lagoon for slot
10 machines or banked or percentage card games at any time before March 2000, when the voters
11 ratified Proposition 1A to authorize the Governor to negotiate class III gaming compacts with
12 federally recognized Indian tribes. *Artichoke Joe’s Cal. Grand Casino v. Norton*, 353 F.3d 712,
13 716-18 (9th Cir. 2003); *In re Indian Gaming Related Cases (Coyote Valley Band of Pomo Indians*
14 *v. California)*, 331 F.3d 1094, 1098-1103 (9th Cir. 2003) (*Coyote Valley II*).¹ Also, as this Court
15 is aware, in August 2005 the parties agreed on terms of a class III gaming compact that would
16 have permitted Big Lagoon to partner with another tribe to build a casino in Barstow, California
17 (Barstow Compact). (Jun. 29, 2009 Order (Doc. 21) 4; Decl. of Peter Engstrom in Support of
18 Pl.’s Mot. Sum. J (Engstrom Decl.) Ex. 1A.) State law requires legislative ratification for a
19 compact to take effect, Cal. Const. art. IV, § 19(f), and the Legislature failed to ratify the Barstow
20 Compact (Jun. 29, 2009 Order 4-5). The parties commenced new negotiations in September
21 2007, and stipulated to dismissal of the previous action without prejudice. (Jun. 29, 2009 Order
22 5; Engstrom Decl. Ex. 2.) Therefore, the negotiations at issue here span September 2007 to April
23 2009, not fifteen years as Big Lagoon asserts.

24 **A. 2007 to 2009 Negotiations**

25
26 ¹ Before then, the State had an obligation to negotiate only for lottery games,
27 nonelectronic keno, and horseracing or off-track pari-mutuel wagering facilities, the only forms
28 of class III gaming that were lawful in the State. *See, e.g., Artichoke Joe’s*, 353 F.3d at 716.

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

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

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

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

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

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

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

25 On February 20, 2008, Big Lagoon provided the State with its proposed compact language.
26 (Engstrom Decl. Ex. 5A & 5B.) The Tribe proposed that the project be located on the rancheria,
27 but did not define whether that included the eleven-acre trust parcel. (*Id.* Ex. 5A, Draft Compact
28 § 2.22.) RSTF contributions and the number of gaming devices were to be determined, and the
Tribe eliminated altogether any provisions for revenue sharing or geographic exclusivity. (*Id.* §§
4.1, 4.3, 4.5, 5.2.) The Tribe proposed that evaluating environmental impacts under the National
Environmental Policy Act would be sufficient, and it agreed to enter into intergovernmental
mitigation agreements with local governments, but modified the proposed terms for entering into
and enforcing the agreements. (*Id.* Ex. 5B, Draft Compact §§ 11.1, 11.7-9.)

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

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

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

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

20 **B. Last Proposals**

21 On October 6, 2008, the Tribe indicated it did not need geographic exclusivity and would
22 not share revenue with the State. (Engstrom Decl. Ex. 8.) Without any supporting information or
23 analysis, the Tribe claimed the State's proposed revenue share would "necessarily consume a
24 substantial share" of its profit. (*Id.*) The Tribe *had been* willing to consider revenue sharing but
25 withdrew the offer because it now considered it a tax. (*Id.*) The Tribe proposed that it receive the
26 1999 Compact terms, allowing it to operate up to 350 gaming devices without any fees and
27 participate in the license pool created by the 1999 Compact, or some other mechanism to operate
28 more than 350 gaming devices if the no licenses were available; that payments for between 350

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

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

20 The Tribe had provided the State with no financial data demonstrating the proposed
21 revenue sharing percentages were unaffordable. (*Id.*) Although the Tribe had recently asked the
22 State to consider developing a casino on alternative sites near Eureka and Trinidad, the State was
23 amenable to the rancheria as long as it included "constraints on development inherent in placing
24 an intense urban project adjacent to a State ecological reserve, a State recreation area, and across
25 the lagoon from a State park." (*Id.*) The Tribe had unrealistically asked the State to agree to
26 mitigation measures in advance of presenting the State with an actual project for analysis, but the
27 State agreed to incorporate the Tribe's proposed measures that could be determined immediately,
28

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

3 **LEGAL STANDARD**

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

15 **ARGUMENT**

16 **I. THE STATE NEGOTIATED IN GOOD FAITH FOR REVENUE SHARING**

17 Big Lagoon relies heavily on *Rincon* for the proposition that the State's request for general
18 fund revenue sharing is *per se* failure to negotiate in good faith under IGRA. (Mot. 13-20.) In
19 *Rincon*, the Ninth Circuit recently held that the State failed to negotiate an amendment to a 1999
20 Compact in good faith because it viewed the State's request that the Rincon Tribe contribute part
21 of its net win to the State's general fund as an attempt by the State to tax the tribe in violation of
22 25 U.S.C. § 2710(d)(4). 602 F.3d at 1029-42. The court denied the State's petition for rehearing
23 but stayed issuance of the mandate until September 13, 2010, to allow the State to file a petition
24 for writ of certiorari in the Supreme Court. (Def.'s Request Jud. Not. (Def.'s RJN) Ex. A.) The
25 State recognizes that, for the moment, *Rincon* is controlling, *see Wedbush, Noble, Cooke, Inc. v.*
26 *S.E.C.*, 714 F.2d 923, 924 (9th Cir. 1983); however, the State requests this Court to stay further
27 proceedings in this case until the Supreme Court decides the State's forthcoming writ petition in
28 *Rincon* (*see* Pinal Decl. ¶ 2), or until the Ninth Circuit's stay is dissolved. Indeed, it would make

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

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

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

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

24 ⁴ Section 19(f) provides in full:

25 Notwithstanding subdivisions (a) and (e), and any other provision of state law, the
26 Governor is authorized to negotiate and conclude compacts, subject to ratification by
27 the Legislature, for the operation of slot machines and for the conduct of lottery
28 games and banking and percentage card games by federally recognized Indian tribes
on Indian lands in California in accordance with federal law. Accordingly, slot
machines, lottery games, and banking and percentage card games are hereby
permitted to be conducted and operated on tribal lands subject to those compacts.

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

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

6 *Id.* at 1037.

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

19 Second, the State further recognizes that although *Rincon* held that a request for general
20 fund revenue sharing was a tax in that case, *Rincon* and *Coyote Valley II* confirm that the State is
21 entitled to some form of revenue sharing. *Rincon*, 602 F.3d at 1037; *Coyote Valley II*, 331 F.3d at
22 1111-15. In *Coyote Valley II*, the Ninth Circuit

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

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

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

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

15 **II. THE STATE NEGOTIATED IN GOOD FAITH FOR ENVIRONMENTAL MITIGATION AND** 16 **LAND USE REQUIREMENTS**

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

20 **A. This Court Previously Found the State May Negotiate on Environmental** 21 **and Land Use Issues**

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

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

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

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

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

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

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

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

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

9 The Tribe argues that this and similar portions of IGRA’s legislative history indicate
10 Congress’ intent to prevent States from negotiating and including provisions on
11 subjects such as environmental protection and land use as part of the compacting
12 process. However, a better reading of the legislative history is that it warns against
13 allowing States to regulate tribal activity broadly under the guise of negotiating
14 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.

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

17 **C. The State Offered Valuable Consideration for Environmental Concessions**

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

1 Although the Tribe still desires the 1999 Compact terms⁵—which it could have accepted
2 when the State negotiated en masse with tribes in 1999—the State long ago (August 2003)
3 rejected that proposal because history had shown that the 1999 Compact did not include adequate
4 environmental protections. (Def.’s RJN Ex. V at 2:17-18.) Indeed, the State need not offer the
5 same terms as the 1999 Compact:

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

10 *Artichoke Joe’s v. Norton*, 216 F. Supp. 2d at 1101.

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

25
26 ⁵ In fact, the Tribe wants more than is available to the 1999 Compact tribes, insisting that
27 it be able to operate more than 350 gaming devices even if there are no more licenses available in
28 the statewide pool created by the 1999 Compact, an option which is unavailable to the 1999
Compact tribes. (Engstrom Decl. Ex. 8.)

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

3 The National Indian Gaming Commission (NIGC), created by IGRA and charged with its
4 enforcement, 25 U.S.C. §§ 2704-2709, has promulgated regulations requiring the construction
5 and maintenance of tribal gaming facilities and gaming operations be “conducted in a manner
6 which adequately protects the environment and the public health and safety.” 25 C.F.R. § 502.22
7 (2008); *see also id.* § 599.5; 73 Fed. Reg. 6019, 6023 (Feb. 1, 2008). (Def.’s RJN Ex. W-Y.) A
8 tribe is required to identify and enforce “laws, resolutions, codes, policies, standards or
9 procedures applicable to each gaming place, facility or location that protect the environment and
10 the public health and safety, *including standards under a tribal-state compact* or Secretarial
11 procedures.” *Id.* (emphasis added). Under accepted principles of statutory construction, statutory
12 interpretation by an agency charged with implementing it will be upheld unless unreasonable.
13 *Arizona Public Service Co. v. E.P.A.*, 211 F.3d 1280, 1287 (D.C. Cir. 2000). Here, the NIGC’s
14 construction of IGRA is reasonable and consistent with this Court’s earlier rulings, as it envisions
15 the use of tribal-state compacts to include standards for protecting the environment.

16 **E. Big Lagoon Previously Agreed to More Restrictive Environmental**
17 **Conditions**

18 In the Barstow Compact, the Tribe “agreed to forego gaming and other adverse
19 development on its environmentally sensitive land at its rancheria,” and to mitigate environmental
20 impacts to land surrounding the proposed casino site in Barstow, which would have been the
21 Tribe’s trust land. (Engstrom Decl. Ex. 1A, Settlement Agreement 5-6, Barstow Compact 2 & §§
22 4.3, 11.) The Tribe’s attorney testified before the Legislature that the terms “were freely
23 negotiated at arm’s length between,” and did not infringe on Tribal sovereignty. (Pinal Decl. Ex.
24 C at 81.) The Tribe’s Chairman testified that the Barstow Compact would benefit California’s
25 greater interests “in terms of the environmental concerns.” (*Id.* 85; *see also* Pl.’s RJN Ex. 6 at
26 3:7-9 (acknowledging the Barstow Compact “substantially serves a clear public policy and
27 provides environmental . . . benefits to the State”).) If environmental conditions were appropriate
28 for the Tribe’s rancheria and Barstow parcel when the Tribe planned to build a gaming facility in

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

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

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

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

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

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

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

1 **B. Big Lagoon Was Not a Recognized Tribe Under Federal Jurisdiction in**
2 **1934 And, Therefore, Was Not a Proper Trust Beneficiary**

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

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

13 On July 10, 1918, F. G. Ladd and his wife, Ella H. Ladd, conveyed to the United States a
14 9.24-acre parcel situated on the shore of Big Lagoon. (Pinal Decl. Ex. E.) The general warranty
15 deed conveyed the parcel subject only to a railroad right of way and without any other restriction.
16 (*Id.*) Particularly, the deed did not convey the premises in trust for any person or group, and
17 contained no language imposing any limitation on alienation. There was no language in the deed
18 stating that the interest conveyed in the premises was subject to any limitation, by way of trust or
19 otherwise, either as to use, or as to any person or identifiable group, such as a particular Indian or
20 tribe. Nor were there any recitals in the deed indicating any intent with respect to anticipated use,
21 from which trust intent might be inferred.

22 Just as the Ladds, as grantors, expressed no intent in the deed that the United States utilize
23 the land for the benefit of a particular person or tribe, the United States, as grantee, had no intent
24 to receive the land for the benefit of any particular Indian or tribe. Indeed, the conveyance was
25 the culmination of an internal dialogue that had taken place within the Department of the
26 Interior's Office of Indian Affairs, reflected in an exchange of correspondence concerning the
27 purpose and manner of the land acquisition.
28

1 On April 3, 1917, James Charley sought assistance from the Indian Office concerning his
2 fear that he would be evicted by the owner of the land on which he was then living. (Pinal Decl.
3 Ex. F.) Federal officials investigated and, deciding it would be calamitous for James Charley
4 (also known as Lagoon Charley) and his family to be evicted from what they considered their
5 home, contacted the landowners, the Ladds, to inquire about selling the property. (*Id.* Ex. G.)
6 Indian Services Inspector John J. Terrell advised the Ladds that “Congress has during the past
7 few years made small appropriations⁶to purchase land for village homes for the landless Indians
8 of California” and that “[t]he small appropriations and the large number of landless Indians have
9 precluded the purchase of only small tracts and the paying of excessive prices.” (*Id.* Ex. H (n.
10 added).) Terrell explained the Indian Office’s desire “to protect, if possible, this Indian family in
11 their ‘little cabin home by the sea,’” and asked the Ladds to “be most considerate and generous in
12 making this possible.” (*Id.*) Mr. Ladd eventually stated that he was willing to sell a portion of
13 the land for James Charley’s use (*id.* Ex. I), and by January 1918, the Indian Office focused on
14 the size of the parcel to be purchased and the price to be paid (*id.* Exs. J-M.)

15 The Commissioner’s Office made clear to Terrell that

16 With regard to purchasing ten acres for one family alone, it may be said that the
17 purpose of the appropriation from which the payment would be made is to buy tracts
18 of limited areas on which to locate small bands, with the idea ultimately to divide the
19 land pro rata and give evidence of title to the occupants in the form of patents. This
20 Office does not believe that it would be good policy to attempt to pick out individual
21 families and purchase them a homesite, as seems to be contemplated in the case of
22 Jim Charlie⁷. . . .

23 Will you kindly explain the situation to Jim Charlie and family and have them
24 clearly appreciate the fact that title to the tract will be in the United States and that
25 thereafter should it become necessary to use a part of the purchased lands in caring
26 for other Indians, that they will be expected to make no objection. With such an
27 understanding of the status of the land given the Indians, this Office would have no
28 objection to your closing out the proposed purchase of the ten acres, if you think it is
a good proposition.

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

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

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

2 The Office is advised that on the two different occasions of my visits to the home of
3 these Indians (Charlie, his wife and six quite interesting children, see my letter of July
4 14, 1917), *I made it a point to cause both Charlie and his wife to understand that, in
5 the event of the purchase of any considerable acreage of land to embrace their home
6 and improvements, the title would be in the government and the privilege of other
Indians of his tribe⁸ being landless and homeless, desiring to do so, would be
permitted to establish their homes on some portion of the land purchased, not to
encroach upon the home improvements erected and used by him. [¶] The suggestion
of the Office in this connection is fully understood by Charlie.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 (*Id.* 6.)

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

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

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

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

20 The Deputy Assistant Secretary recently stated that he believed the Haas Report is “not the
21 only or finally determinative source,” but he considers it a “helpful . . . starting point” for BIA
22 staff to determine, after *Carcieri*, whether a tribe was a recognized tribe under federal jurisdiction
23 in 1934.⁹ (Pinal Decl. Ex. Y.) Reading the Haas Report in the context of the historical
24 documents detailed above, there is credible and undisputed evidence that Big Lagoon was not a
25 recognized tribe under federal jurisdiction in 1934.

26 _____
27 ⁹ As this Court is aware, the BIA is currently deciding Big Lagoon’s status in 1934. (*See*
28 Order Denying Def.s’ Mot. to Stay (Doc. 74).)

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

3 Even if the James Charley family constituted a recognized tribe under federal jurisdiction in
 4 1934, to be eligible for an IRA trust acquisition Big Lagoon’s current members must also be
 5 descendant from the James Charley family. *See* 25 U.S.C. § 479. The BIA has interpreted this
 6 provision to mean the descendant “was, on June 1, 1934, physically residing on a federally
 7 recognized Indian reservation.” 25 C.F.R. § 151.2(c); *Van Mechelen v. Portland Area Director,*
 8 *Bureau of Indian Affairs*, 35 IBIA 122 (2000). (Def.’s RJN Exs. Z, AA.) In this case, the
 9 historical documents show that neither James Charley nor anyone from his family resided on the
 10 nine acres in June 1934, and no current Tribal members resided there in 1934. (*See* argument
 11 IV(B)(2), *post.*) Moreover, “Big Lagoon admits that no current member of the Tribe is known to
 12 be related to Jim ‘Lagoon’ Charley other than by marriage.”¹⁰ (Pinal Decl. Ex. Z.) “Descent” is
 13 defined as “hereditary succession.” Black’s Law Dictionary (Abridged 6th Ed. 1991) 306. A
 14 “line of descent” is “[t]he order or series of persons who have descended one from the other or all
 15 from a *common ancestor*, considered as placed in a line of succession in the order of their birth,
 16 the line showing the connection of all the *blood-relatives.*” *Id.* at 307 (emphasis added). Big
 17 Lagoon’s admission demonstrates the current Tribal members do not descend from the James
 18 Charley family because they do not share a common ancestor or blood-relative. Therefore, the
 19 Tribe is not an eligible beneficiary of land acquisitions under the IRA.

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

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

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

1 3084-85. This Court previously found the State’s argument concerning Big Lagoon’s status in
2 1934 “arguably implicates the public interest.” (Order Denying Def.’s Mot. to Stay 5:2-3.) Here,
3 it is against the public interest to allow gaming on land that, under the *Carciere* decision, the
4 United States unlawfully acquired in trust for Big Lagoon. Indeed, the fact that the Supreme
5 Court decided *Carciere* after the trust acquisition occurred does not mean the public interest is not
6 implicated. Irrespective of the date of the *Carciere* decision, the parcel is not “Indian lands”
7 eligible for gaming under IGRA. *See* 25 U.S.C. § 2719 (prohibiting gaming on land acquired in
8 trust for the benefit of an Indian tribe after October 17, 1988, with limited exceptions). Although
9 this Court has found previously that the eleven acres is “Indian lands” under IGRA, that finding
10 was based, in part, on an assumption that the United States was authorized to acquire the land for
11 Big Lagoon under the IRA. (*See* Pl.’s RJN Ex. 2 20-23.) That the State raises the issue for the
12 first time here is occasioned by the recent *Carciere* decision.¹¹

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

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

24 _____
25 ¹¹ The State is not seeking to take the parcel out of trust or to challenge its status as Big
26 Lagoon’s trust land. Indeed, such an action may be subject to the Quiet Title Act, 28 U.S.C. §
27 2409a(a), although there is presently no definitive answer to the question whether the Quiet Title
28 Act bars federal courts from reviewing a completed trust acquisition where, as here, the Secretary
may have acted unconstitutionally or in violation of federal law. *See Big Lagoon Park Company,*
Inc. v. Acting Sacramento Area Director, Bureau of Indian Affairs, 32 IBIA 309, 315-16 (1998).
(Def.’s RJN Ex. BB.)

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

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

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

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

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

16 **B. Good Cause Exists for the Court to Deny or Continue the Tribe’s**
17 **Summary Judgment Motion**

18 **1. The State’s Efforts to Obtain the Evidence**

19 On August 19, 2009, the Court established the fact discovery completion date as January
20 29, 2010, which the parties stipulated to continue to February 26, 2010. (Docs. 30, 35.) On
21 December 18 and 21, 2009, the State issued subpoenas duces tecum to the BIA Pacific Regional
22 Office, the BIA Northern California Agency and the Assistant Secretary of Indian Affairs. (Pinal
23 Decl. Ex. KK.) The subpoenas are identical and seek documents demonstrating a comprehensive
24 historical accounting of the Tribe. (*Id.*) Responses to the subpoenas were due by January 8,
25 2010. (*Id.*) Despite the State’s repeated attempts to contact the BIA and Assistant Secretary, they
26 did not respond until well after the due date. (*Id.* & Ex. LL.) The Court subsequently continued
27 to May 31, 2010, the discovery cutoff date for the documents sought by the three subpoenas to the
28 United States. (Minute Order (Mar. 17, 2010) (Doc. 60).) The BIA Pacific Regional Office and

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

9 At the June 14 meeting, the United States agreed to respond in writing to the State's May
10 27 letter, and to address additional issues raised during the meeting. (Pinal Decl. Ex. UU.) The
11 parties agreed to meet again on June 28, 2010, and, at the United States' request, the State agreed
12 not to take any action to enforce the subpoenas until after July 9, 2010. (*Id.*) The United States
13 subsequently agreed to provide responses to the State by June 25, 2010, except for documents
14 concerning the Hoopa-Yurok Settlement Act, which BIA staff would be unable to review until
15 June 30, 2010. (*Id.* & Ex. VV.) The BIA indicated it would provide the State with a response
16 concerning those documents by July 2, 2010. (*Id.* Exs. UU, VV.)

17 On June 25, 2010, the State received numerous documents from the Assistant Secretary but
18 the documents were incomplete. (Pinal Decl. Ex. WW & ¶ 49.) Several issues are unresolved,
19 however, the Assistant Secretary's Attorney-Advisor with whom the State is coordinating is
20 unavailable until at least July 6, 2010. (*Id.* Ex. WW & ¶ 49.) On June 25, 2010, the State also
21 received a response from the BIA Pacific Regional Office and Northern California Agency
22 indicating they would not produce certain information protected by the Privacy Act, but, as
23 indicated, staff would review files pertaining to the Hoopa Yurok Settlement Act on June 30,
24 2010, and provide a further response on July 2, 2010. (*Id.* Ex. VV.) The parties agreed to meet
25 and confer after July 2, 2010, to determine whether further action is necessary. (*Id.* Ex. UU.) If
26 that meeting does not resolve the dispute, or assure resolution by the end of July 2009, the State
27 will take action to enforce the subpoenas. (*Id.* ¶ 52.)
28

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

4 2. Evidence Obtained to Date

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

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

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

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

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

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

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

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

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

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

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

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

18 3. Evidence the State Expects to Receive

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

24 _____
25 ¹⁴ The surname “Moorehead” sometimes appears in official and other records with the
variant spelling “Morehead.”

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

1 will help explain the relationship between Big Lagoon and the United States, and Big Lagoon and
 2 the Yurok Tribe, particularly in light of evidence obtained to date that suggests James Charley
 3 and his family were Yurok, and that Congress specifically corrected an early draft of the Act to
 4 ensure that Big Lagoon was identified as a rancheria instead of a tribe in recognition that there is
 5 a difference between the two. (*Id.* ¶ 50.) *See* S.Rep. 100-564, at 38 (Sep. 30, 1988). Also
 6 unresolved is BIA’s claim that application folder numbers for various individuals identified in the
 7 1968 California Judgment Enrollment is protected by the Privacy Act.¹⁶ (*Id.* ¶ 51.) Without that
 8 information, which is exclusively within the BIA’s possession, the State cannot complete its
 9 genealogical research. (*Id.*) As for the Assistant Secretary, the State received on June 25, 2010,
 10 several document “excerpts,” which otherwise are non-responsive without more information to
 11 explain their context. (*Id.* ¶ 49.) More importantly, the Assistant Secretary has not produced
 12 documents, as the State requested, explaining how Big Lagoon came to be identified as a
 13 federally recognized tribe. (*Id.*) The Assistant Secretary produced several documents showing
 14 the end result, but no documents explaining how or why it is so identified. (*Id.*)

15 **4. Outstanding Evidence Will Defeat the Tribe’s Summary Judgment Motion**

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

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

19
 20 Based on historical documents to date, Big Lagoon is not entitled to trust land acquisitions
 21 under the IRA because James Charley and his family were not a recognized tribe under federal
 22 jurisdiction in 1934. Based on the Tribe’s admission, there is credible evidence that its members
 23 do not descend from James Charley. (*See* argument III(B), *ante.*) If, however, the Court finds the
 24 State’s evidence insufficient, at this point, to support summary judgment, then additional
 25

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

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

3 Thomas Williams, Lila Green Williams, Theodore R. Moorehead, Beverly Williams
4 Moorehead and their children are the distributees identified on the Big Lagoon Rancheria Asset
5 Distribution Plan prepared by the BIA and approved by the Secretary in 1968 (Pinal Decl. Ex.
6 FF) to terminate Big Lagoon pursuant to the California Rancheria Termination Act, Pub. L. No.
7 85-671, 72 Stat. 619 (1958) (as amended by Pub. L. No. 88-419, 78 Stat. 390 (1964)). The
8 Distribution Plan provides the primary basis for modern Tribal membership. (Pinal Decl. Ex. GG
9 at art. III, § 1.) If the individuals identified on the Distribution Plan are not descended from
10 James Charley and his family, then presumably neither is any current member.

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

24
25 ¹⁷ Legislative history for the Hoopa Yurok Settlement Act indicates Smith River and
26 Tolowa Indians are not historically of Yurok origin. S.Rep. 100-564, at 29 (Sept. 30, 1988).
27 Therefore, historical documents obtained to date show the Moorehead ancestors, who descended
28 from Smith River and Tolowa Indians, did not contribute Yurok Indian blood to the genealogical
makeup of the individuals identified on the Rancheria Asset Distribution Plan, further distancing
those individuals genetically from James and Lottie Charley, who were Yurok Indians.

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

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

18 IGRA permits “an Indian tribe having jurisdiction over the Indian lands” where class III
19 gaming is to be conducted to enter into a compact with a state. 25 U.S.C. § 2710(d)(3)(A).
20 IGRA defines “Indian tribe” as an “Indian tribe, band, nation, or other organized group or
21 community of Indians” that is federally recognized and possesses powers of self-government. *Id.*
22 § 2703(5). If the United States has not lawfully recognized the Tribe, then it would not be an
23 eligible “Indian tribe” with “Indian lands,” as those terms are defined by IGRA, and would not
24 meet IGRA’s jurisdictional requirement to request compact negotiations or to pursue this action.
25 *See Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 778 (9th Cir. 2008)
26 (state need not negotiate with a tribe lacking “Indian lands,” and tribe must have “Indian lands” to
27 file suit under IGRA). At minimum, the evidence presented so far, and the documents the State
28

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

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

5 The State was not on notice that the BIA may have unlawfully placed the Tribe on the list
6 of federally recognized tribes until after discovery commenced in this action, and after the United
7 States first produced responsive documents in March 2010. Therefore, it remains to be
8 determined whether the State must join the United States to this action to challenge the Tribe's
9 placement on the list of federally recognized tribes. The need to further investigate the legitimacy
10 of a third party complaint is proper grounds for extending discovery pursuant to Rule 56(f).
11 *Vogenthaler v. Maryland Square, LLC*, No. 08-cv-01618-RCG-GWF, 2010 WL 1553417, at *4-
12 *5, *10-*11 (D. Nev. Apr. 14, 2010).

13 **CONCLUSION**

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

16 Dated: July 1, 2010

17 Respectfully Submitted,

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Exhibit A

James Lagoon Charley and Distributees and Dependent Members
Listed in Big Lagoon Rancheria Asset Distribution Plan

