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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

BIG LAGOON RANCHERIA, a Federally Recognized Indian Tribe, Plaintiff, **v.** **STATE OF CALIFORNIA,** Defendant.	CV 09-1471 CW (JCS) **DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR RECONSIDERATION** Courtroom: A, 15th Floor Federal Building 450 Golden Gate Avenue San Francisco, CA 94102 Judge The Honorable Joseph C. Spero Trial Date: Not Set Action Filed: April 3, 2009

INTRODUCTION

In opposition to Defendant State of California's (State) motion for reconsideration, Plaintiff Big Lagoon Rancheria (Big Lagoon) attempts to distinguish the discovery dispute in this case from the Ninth Circuit's recent holding in *Rincon Band of Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1041 (9th Cir. 2010) (*Rincon*) that a determination whether a state has negotiated

a class III gaming compact in good faith "should be evaluated objectively based on the record of negotiations." Big Lagoon's challenge falls short because the intervening *Rincon* decision is dispositive of the parties' discovery dispute. Essentially, Big Lagoon makes here the same argument that the State made and the Ninth Circuit rejected in *Rincon*—that the Court may rely upon evidence outside the objective negotiation record to determine whether the State negotiated in good faith for a class III gaming compact under 25 U.S.C. § 2710(d)(3)(A) of the Indian Gaming Regulatory Act (IGRA).[1] Therefore, the State respectfully requests this Court to reconsider its order denying the State's motion for a protective order, and grant the motion in full.

ARGUMENT

I. THE INTERVENING *RINCON* DECISION IS DISPOSITIVE OF THE PARTIES' DISCOVERY DISPUTE

Big Lagoon claims the decision in *Rincon* regarding relevant evidence of bad faith should be limited to the facts of the case. (Big Lagoon's Opp'n to State's Mot. for Reconsideration (Doc. 78) (Opp'n to Reconsideration) 3-5.) The State disagrees because, as Judge Wilken noted, the Ninth Circuit in *Rincon* rejected the State's argument that evidence outside the negotiation record could be considered in determining whether the State negotiated in good faith. (Order Granting Def.'s Mot. for Leave to File Mot. for Reconsideration (Doc. 77) (Order) 1:27-2:4.) To the extent the State is precluded from relying upon extra-record evidence to demonstrate its subjective intent, so too is Big Lagoon precluded from relying upon similar evidence outside the negotiation record.

In *Rincon*, the State argued that it had negotiated in good faith because it reasonably believed its negotiation position was authorized by controlling Ninth Circuit authority, had been approved by the Department of the Interior in other tribal-state gaming compacts, and other tribes had accepted its position. *Rincon*, 602 F.3d at 1041. The Ninth Circuit disagreed, holding that what the State thought about its negotiation position was irrelevant:

[1] The Ninth Circuit denied the State's petition for rehearing in *Rincon* but stayed issuance of the mandate until September 13, 2010, to allow the State to file a petition for writ of certiorari in the United States Supreme Court.

> IGRA does not provide express guidance about whether good faith is to be evaluated objectively or subjectively. However, we are influenced by the factors outlined in § 2710(d)(7)(B)(iii), which lend themselves to objective analysis and make no mention of unreasonable beliefs. Further, the structure and content of § 2710(d) make clear that the function of the good faith requirement and judicial remedy is to permit the tribe to process gaming arrangements on an expedited basis, not to embroil the parties in litigation over their subjective motivations. We therefore hold that *good faith should be evaluated objectively based on the record of negotiations*, and that a state's subjective belief in the legality of its requests is not sufficient to rebut the inference of bad faith created by objectively improper demands.

Id. (emphasis added; citation omitted). As Judge Wilken observed (Order 2), the Ninth Circuit did not address directly the scope of discovery under IGRA, but noted:

> Interestingly, on the question of the scope of discovery permissible in IGRA negotiations, the State has taken the position that good faith should be proved based on the objective course of negotiations. *See also Fort Independence Indian Cmty v. California*, No. Civ. S-0/8-432, 2009 WL. 1283146, at *3 (E.D. Cal. May 7, 2009) (agreeing with the State that good faith should be evaluated on objective factors). The State cannot have it both ways. If the State wants to avoid discovery and limit review of good faith to the official record of negotiations, the State cannot defend itself on the good faith question by claiming its objectively improper demands were made with an innocent intent.

Id. at 1041 n.25. Even if the Ninth Circuit did not directly answer the question, the implication is inescapable: If the State "cannot have it both ways," and the court ruled against the State in its attempt to "defend itself on the good faith question by claiming" that what the court found to be "its objectively improper demands" were made with an innocent intent, then the court necessarily agreed with the State that discovery is limited to the negotiation record.[2]

In other words, if the State, which has the burden of proving that it negotiated in good faith, 25 U.S.C. § 2710(d)(7)(B)(ii), cannot rely upon evidence outside the negotiation record to demonstrate it held a subjectively reasonable belief that its negotiation position was lawful under IGRA, then, conversely, Big Lagoon cannot rely upon evidence of the "totality of facts and circumstances" (Big Lagoon's Opp'n to State's Mot. for Protective Order (Doc. 37) (Opp'n to

[2] To be clear, the State's position is not, as Big Lagoon suggests, that there should be "no discovery." (Opp'n to Reconsideration 1:13-14.) Nor has the State "attempted to preclude discovery of documents pertaining to the State's affirmative defenses." (*Id.* 2:4-5.) Instead, the State has consistently acknowledged that evidence concerning its affirmative defenses is discoverable, and has provided that evidence to Big Lagoon. In addition, the State's argument concerning *Rincon*'s dispositive impact on the instant discovery dispute is made without prejudice to the State's argument in subsequent proceedings in *Rincon* challenging the decision.

Protective Order) 3:17-19) outside the negotiation record to establish that the State failed to negotiate in good faith. Therefore, it does not matter whether the State tries to use extra-record evidence to prove that it negotiated in good faith, or Big Lagoon tries to use extra-record evidence to prove that the State failed to negotiate in good faith, *Rincon* is clear that extra-record evidence is not allowed in either situation and that discovery is limited to the objective negotiation record.

Moreover, Big Lagoon's argument here that "it does not care about and is not seeking to learn the State's subjective belief as to whether it was acting in good faith" (Opp'n to Reconsideration 3:18-23; *see also id.* 5:1-4) is belied by its previous argument that it seeks discovery of documents that "would show, or lead to the discovery of admissible evidence regarding, the underlying state of mind and motives of the State during this attenuated history of negotiations" (Opp'n to Protective Order 3:3-4:2; *see also id.* 1:26 (seeking documents reflecting the State's "true motives and intent"); *id.* 3:17-19 (seeking "documents that would show the totality of the facts and circumstances behind the State's pattern and practice of 'surface bargaining'"). Curiously, Big Lagoon previously misunderstood that it is "required to prove [the State's] state of mind, intent, and motivation" (*id.* 4:8) yet now concedes that *Rincon* stands for the proposition that "[e]vidence of the State's bad faith could be derived from the negotiating correspondence between the parties, without delving into the state of mind of the State's negotiators" (Opp'n to Reconsideration 4:12-13).

In any event, Big Lagoon acknowledges that its purpose in obtaining the requested documents is to demonstrate the State's subjective intent, albeit through objective evidence. (*Id.* 7:27-8:6.) But *Rincon* makes clear that the State's subjective intent is irrelevant, which applies here irrespective of which party makes the offer of proof.

II. THE RECORD OF NEGOTIATIONS INCLUDES ONLY THE PARTIES' FORMAL OFFERS, COUNTER-OFFERS AND ACCOMPANYING DOCUMENTATION

Although Big Lagoon acknowledges that the *Rincon* decision means that "[e]vidence of the State's bad faith could be derived from the negotiating correspondence between the parties, without delving into the state of mind of the State's negotiators" (Opp'n to Reconsideration 4:12-13), Big Lagoon argues that the "record of negotiations" is undefined and should include more

than the correspondence between the parties (*id.* 5-7). In support, Big Lagoon relies upon IGRA's legislative history, which suggests "that it is States not tribes that have crucial information in their possession that will prove or disprove tribal allegations of failure to act in good faith," S. Rep. No. 100-446 at 14 (1988), *reprinted at* 1988 U.S.C.C.A.N. 3071, 3085, and cases interpreting the National Labor Relations Act (NLRA). Whatever weight Big Lagoon or this Court give to IGRA's legislative history, *Rincon* is currently the controlling authority in this circuit to discuss what evidence should be considered in determining whether the State has negotiated in good faith, and the related scope of discovery under IGRA, holding that the evidence is limited to the official negotiation record. 602 F.3d at 1041 & n.25.

Except in this case, in each case where the scope of discovery in determining whether the State negotiated a class III gaming compact in good faith has been litigated, the State has prevailed in arguing that the record should be limited to the formal exchange of the parties' offers, counter-offers, and supporting documentation during negotiations. (*See* State's Mot. for Protective Order (Doc. 33-1) 5 (citing *Rincon Band of Mission Indians v. Schwarzenegger*, U.S. District Court, S.D. Cal. No. 04CV1151 (WMc); *Fort Independence Indian Cmty v. California*, U.S. District Court, E.D. Cal. No. S-08-432 LKK/KJM); *see also Rincon*, 602 F.3d at 1041 n.25 (citing *Fort Independence Indian Cmty. v. California*, 2009 WL 1283146, at *3 (agreeing with the State that good faith should be evaluated on objective factors).) As discussed above, the Ninth Circuit in *Rincon* suggested that either the State was correct in its assertion that there is no discovery and review is limited to the "official record of negotiations," or the State was correct in its assertion that it negotiated in good faith because it believed its demands were lawful—one or the other was true but the "State cannot have it both ways." *Rincon*, 602 F.3d at 1041 n.25. Ultimately the court decided the State's latter assertion was incorrect, leaving the inescapable conclusion that the State's former assertion was correct, and that the "record of negotiations" is limited to the "official record of negotiations," which, as the State has argued in each bad faith litigation case to date, includes only the parties formal offers, counter-offers and accompanying documents. That the *Rincon* court did not address IGRA's legislative history or the NLRA cases

cited by Big Lagoon,[3] which, unlike *Rincon*, in no way involve an interpretation or application of IGRA, does not make the decision any less controlling.

III. BIG LAGOON SEEKS DISCOVERY OUTSIDE *RINCON*'S PARAMETERS

Big Lagoon argues that in keeping with the parameters established by *Rincon*, it is entitled to seek discovery from the State, as long as it is "geared towards information contributing towards 'objective analysis' rather than an inquiry into the State's subjective motivations." (Opp'n to Reconsideration 7:14-17.) As an example, Big Lagoon contends that

> If the State has within its possession documents showing that the State NEVER intended to agree to "on site" gaming and, to that end, intentionally proposed onsite gaming restrictions so onerous that they would never be accepted, such information should be discoverable, as "objective evidence" of the State's bad faith "surface bargaining."

(*Id.* 8:2-6.) According to Big Lagoon, it "would not be seeking 'subjective' evidence of the State's motivations, it would be seeking 'objective' evidence of the State's bad faith bargaining position." (*Id.* 8:7-8.)

Big Lagoon's assertion that it would not be seeking subjective evidence of the State's motivation is belied by statements elsewhere that it would ask the Court to consider "the full picture of the parties' negotiations and what drove them" (*id.* 7:3-4), that it seeks discovery of documents that "would show, or lead to the discovery of admissible evidence regarding, the underlying state of mind and motives of the State during this attenuated history of negotiations" (Opp'n to Protective Order 3:3-4:2), that it seeks documents reflecting the State's "true motives and intent" (*id.* 1:26), and that it seeks "documents that would show the totality of the facts and circumstances behind the State's pattern and practice of 'surface bargaining.'" (*id.* 3:17-19). As noted, Big Lagoon previously insisted that its requested discovery is appropriate because it is "required to prove [the State's] state of mind, intent, and motivation." (*Id.* 4:8.) It is disingenuous for Big Lagoon now to assert that it does not seek evidence of the State's motivations, when it has consistently taken a contrary position throughout this discovery dispute.

[3] The State previously distinguished the NLRA cases cited by Big Lagoon. (*See* State's Reply to Pl.'s Opp'n to Mot. for Protective Order (Doc. 44) 7-8.)

Whether the State "proposed gaming restrictions so onerous that they would never be accepted" is to be determined objectively from the formal negotiation record. Indeed, in this case, as in *Rincon*, the State made similar compact proposals to Big Lagoon that it made to other tribes and that the Department of the Interior and other tribes accepted. The *Rincon* court found the State's proposals to be objectively unreasonable, and it did not matter what the State's subjective intent, motive or state of mind was is making its proposals. Therefore, each of Big Lagoon's discovery requests that seek documents outside the parties' offers and counter-offers seeks evidence reflecting the State's subjective intent, which is otherwise prohibited by *Rincon*.

CONCLUSION

The State respectfully requests this Court to reconsider its order denying the State's motion for protective order and grant the motion in full. Big Lagoon seeks to do exactly what the Ninth Circuit said should not occur in good faith litigation. Indeed, the court noted IGRA's good faith requirement is intended not to embroil the parties in litigation over their subjective motivations, which is precisely what Big Lagoon has accomplished here. As requested in the State's Motion for Protective Order, discovery should be limited to the parties' offers, counter-offers and accompanying documents exchanged during the 2007-2009 Negotiations, and evidence concerning the State's affirmative defenses. (Doc. 44 at 2.)

In addition, as Big Lagoon indicates, the parties have met and conferred on discovery issues while this motion is pending. (Opp'n to Reconsideration 2-3.) Following an in-person meeting on June 3, 2010, the State has agreed to attempt to provide additional information by June 16, 2010. The State requests expedited resolution of this motion to provide certainty as to whether further compliance the Court's existing discovery order is necessary.

Dated: June 16, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case Name: **Big Lagoon Rancheria v. State of California** No. **CV 09-1471 CW (JCS)**

I hereby certify that on June 16, 2010, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR RECONSIDERATION

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 16, 2010, at San Diego, California.

Rosario Asensio
Declarant


Signature

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