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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FORT INDEPENDENCE INDIAN
COMMUNITY, a federally-
recognized tribe,

NO. CIV. S-08-432 LKK/KJM

Plaintiffs,

v.

O R D E R

STATE OF CALIFORNIA; ARNOLD
SCHWARZENEGGER, Governor of
the State of California;
JERRY BROWN, Attorney General
of the State of California,

Defendants

_____ /

Plaintiff Fort Independence Indian Community, a federally
recognized tribe, brings suit against the State of California and
associated defendants alleging that defendants have violated their
obligation to negotiate a Tribal-State Compact in good faith. The
magistrate assigned to this case recently denied a motion to compel
certain discovery brought by plaintiff, and plaintiff has requested
reconsideration of this order. For the reasons explained below,
plaintiff's request for reconsideration is denied.

1
2 **I. BACKGROUND**

3 **A. Statutory Background**

4 The Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq.,
5 provides that certain types of gaming on Indian lands may be
6 conducted only in "conformance with a Tribal-State compact entered
7 into by the Indian Tribe and the State and approved by the
8 Secretary of the Interior." Coyote Valley Band of Pomo Indians v.
9 California (In re Indian Gaming Related Cases Chemehuevi Indian
10 Tribe), 331 F.3d 1094, 1097 (9th Cir. 2003) (citing 25 U.S.C. §
11 2710(d)(1), (3)(B)) (hereinafter Coyote Valley II). Such gaming
12 must also comply with certain other conditions not relevant here.
13 Id.

14 A tribe seeking to conduct such gaming may request that the
15 state "enter into negotiations for the purpose of entering into a
16 Tribal-State compact" governing the activity. 25 U.S.C.
17 2710(d)(3)(A). The state must honor such a request and negotiate
18 in good faith. Id. Tribes may enforce this obligation through a
19 federal suit, provided that the state has waived sovereign
20 immunity, which California has done. § 2710(d)(7)(A), Coyote
Valley II, 311 F.3d at 1097. IGRA provides that

21 In determining in such an action whether a
22 State has negotiated in good faith, the
court--

23 (I) may take into account the public
24 interest, public safety, criminality,
25 financial integrity, and adverse economic
impacts on existing gaming activities,
and

26 (II) shall consider any demand by the State

1 for direct taxation of the Indian tribe
2 or of any Indian lands as evidence that
3 the State has not negotiated in good
4 faith.

5 25 U.S.C. § 2710(d)(7)(B)(iii)(I)-(II). If no compact has been
6 entered, or the tribe introduces evidence of bad faith, the state
7 bears the burden of proving good faith. § 2710(d)(7)(B)(ii).

8 In interpreting this good faith standard, courts have taken
9 some guidance from cases interpreting negotiation obligations
10 imposed by the National Labor Relations Act ("NLRA"). Indian
11 Gaming Related Cases v. California, (Coyote Valley I) 147 F. Supp.
12 2d 1011, 1020-21 (N.D. Cal. 2001), affirmed by Coyote Valley II,
13 331 F.3d 1094. However, the NLRA and IGRA differ in some important
14 aspects. For example, claims of bad faith negotiation under the
15 NLRA are first reviewed by an administrative agency (the National
16 Labor Review Board), see Nat'l Labor Relations Bd. v. Tomco
17 Communications, Inc., 567 F.2d 871, 876 (9th Cir. 1978). Under the
18 IGRA, the initial determination is made by the court. Thus, while
19 the NLRA caselaw provides some useful guidance, courts have not
20 applied it to the IGRA "wholesale." Coyote Valley I, 147 F. Supp.
21 2d at 1021.

22 **B. Factual and Procedural Background**

23 Fort Independence is an Indian tribe, located in Inyo County,
24 California, and is recognized by the Secretary of the Interior.
25 See 72 Fed. Reg. 13,648 (March 22, 2007).

26 In July 2004, Fort Independence requested that the State of
California enter into Tribal-State Compact negotiations under the

1 IGRA, 25 U.S.C. § 2710(d)(3)(A). After initiation of compact
2 negotiations, several meetings took place to discuss the terms of
3 the proposed compact. According to the tribe, an impasse was
4 reached regarding two conditions sought by the State. The State
5 requested that the tribe pay a percentage of its gaming revenue to
6 the state, and that the tribe cease its collection from the
7 "Revenue Sharing Trust Fund." See Coyote Valley II, 331 F.3d at
8 1105 (discussing these aspects of California's system of Tribal-
9 State compacts). These negotiations ceased, without producing a
10 compact, on January 25, 2008.

11 Fort Independence filed the complaint in this action on
12 February 25, 2008. The complaint alleged claims under the IGRA and
13 under the California and U.S. equal protection clauses. This court
14 granted the State's motion for judgment on the pleadings as to the
15 equal protection clause claim by Order of September 10, 2008.

16 On January 16, 2009, Fort Independence noticed a deposition
17 for Andrea L. Hoch, who had been the State's principal negotiator.
18 This deposition was noticed for January 30, 2009. The State
19 informed Fort Independence that it believed that no such deposition
20 was permitted. The parties submitted this dispute to the
21 magistrate assigned to the case, as a motion to compel and cross-
22 motion for a protective order. On March 5, 2009, the magistrate
23 issued a brief order, holding that

24 1. Defendants have not met their burden of
25 demonstrating that any material sought by
26 plaintiff is the subject of the
deliberative process privilege; however,

1 2. The court finds discovery in this matter
2 is limited to the administrative record;
3 and

4 3. Accordingly, plaintiffs' motion to compel
5 is denied and defendant's motion for [a]
6 protective order is granted.

7 Order of March 5, 2009, at 2.

8 Fort Independence filed a motion seeking reconsideration of
9 the magistrate's holding that discovery should be limited to the
10 administrative record. Although the discovery dispute concerned
11 certain written discovery in addition to the deposition of Andrea
12 Hoch, the request for reconsideration concerns only the deposition.
13 See Pl.'s Proposed Order, Doc. No. 45-1. The State filed an
14 opposition to this request.

15 **II. STANDARD FOR RECONSIDERATION OF A MAGISTRATE JUDGE'S ORDER**

16 Federal Rule of Civil Procedure 72(a) provides that non-
17 dispositive pretrial matters may be decided by a magistrate judge,
18 subject to reconsideration by the district judge. See also Local
19 Rule 72-303(f). The district judge shall, upon reconsideration,
20 modify or set aside any part of the magistrate judge's order which
21 is "found to be clearly erroneous or contrary to law." Id.; see
22 also 28 USC § 636 (b) (1) (A).

23 Discovery motions are non-dispositive pretrial motions within
24 the scope of Rule 72(a) and 28 USC § 636(b) (1) (A), and thus subject
25 to the "clearly erroneous or contrary to law" standard of review.
26 Rockwell Intern., Inc. v. Pos-A-Traction Industries, Inc., 712 F.2d
1324, 1325 (9th Cir. 1983) (per curiam). "A finding is 'clearly
erroneous' when although there is evidence to support it, the

1 reviewing court on the entire evidence is left with the definite
2 and firm conviction that a mistake has been committed." United
3 States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Anti-
4 Monopoly, Inc. v. General Mills Fun Group, Inc., 684 F.2d 1316,
5 1318 (9th Cir. 1982).

6 **III. ANALYSIS**

7 **A. "Administrative Record" Is A Harmless Misnomer**

8 In denying Fort Independence's motion to compel, the
9 magistrate stated that "discovery in this matter is limited to the
10 administrative record." Order at 2. The most common claims in
11 which review is limited to the administrative record are those
12 brought under the Administrative Procedure Act. See 5 U.S.C. §§
13 702, 706. Fort Independence's present motion repeatedly argues
14 that the APA does not apply to the IGRA claim.

15 It is clear that the APA does not apply. The APA applies only
16 to federal agencies, and not the State of California. 5 U.S.C. §
17 551(a), Lake Mohave Boat Owners Ass'n v. National Park Serv., 78
18 F.3d 1360, 1369 (9th Cir. 1995). Even if the APA did regulate the
19 State, the APA does not provide a cause of action where, as here,
20 the action is made reviewable by a separate provision of the IGRA
21 and not made specifically reviewable under the APA. 5 U.S.C. §
22 704.

23 It is equally clear, however, based on a review of the
24 magistrate's order and the transcript of the associated hearing,
25 that the magistrate did not intend to implicate the APA. Instead,
26 the magistrate merely adopted defendant's argument that "review is

1 limited to the 'objective facts'" constituting the record of
2 negotiation, and also adopted defendant's practice of using
3 "administrative record" to refer to this collection of documents.
4 Order, 1.

5 To avoid further confusion, I use the term "record of
6 negotiation." I now turn to the question of whether the
7 magistrate's decision to limit discovery to this record was proper.

8 **B. "Good Faith" Is Determined Based on The Record of Offers and**
9 **Negotiations**

10 The State argues, and the magistrate held, that a court's
11 determination as to whether a state negotiated in good faith is
12 based on objective factors, including the offers made, etc.

13 As noted above, the IGRA provides several factors that may or
14 must be considered in the evaluation of good faith. The statute
15 does not, however, explain what evidence may be offered to
16 establish the presence or absence of these factors. Fort
17 Independence notes that Coyote Valley II held that this evaluation
18 must be fact specific. 331 F.3d at 1112 (inquiry based on "the
19 totality of [the] State's actions"), id at 1113 ("the good faith
20 inquiry is nuanced and fact-specific, and is not amenable to
21 bright-line rules."). However, that case did not explicitly
22 discuss which facts should be considered, and the factors it relied
23 on where of the objective type identified by the magistrate here.
24 Id. at 1113, 1115-16; see also Coyote Valley I, 147 F. Supp. 2d.
25 at 1021-22 (looking to particular offers made, whether provisions
26 were introduced unilaterally or through negotiations, whether

1 counter-offers that the State refused were unreasonable or based
2 on legal incorrect positions, and willingness to engage in further
3 negotiation). Similarly, the two NLRA cases cited by Fort
4 Independence, both of which held that the good faith inquiry was
5 fact specific, did not define the scope of the factual inquiry, and
6 both solely discussed similarly objective facts relating to the
7 record of negotiations. NLRB v. Dent, 534 F.2d 844, 846 (9th Cir.
8 1976), NLRB v. Stanislaus Implement & Hardware Co., 226 F.2d 377,
9 381 (9th Cir. 1955).

10 The parties provide only two district court opinions, both
11 unpublished, which directly address the propriety of depositions
12 in a claim that a state failed to negotiate in good faith. Rincon
13 Band of Luiseno Misson Indians of the Rincon Reservation v.
14 Schwarzenegger, No. 04-cv-1151, 16-17 (S.D. Cal. April 10, 2006),¹
15 New York v. Oneida Nation of New York, No. 95-CV-05554 (LEK/RFT),
16 2001 WL 1708804 (N.D.N.Y. Nov. 9, 2001). The former opinion
17 adopted the magistrate's position, concluding that "good faith will
18 be determined by such objective factors as conduct and actions,
19 offers and counter-offers, not motives or other subjective factors
20 that leave too much room for misinterpretation and are far too
21 productive of conflict and dissension and much less productive of
22 concord and results." Rincon Band, 04-cv-1151 at 16 (citing Coyote
23 II, 331 F.3d 1094). Ondeida Nation, on the other hand, allowed
24 depositions of certain state officials. 2001 WL 1708804 *7. The

25
26 ¹ This case is not available through either Westlaw or
Lexisnexis.

1 court's analysis considered the availability of various privileges,
2 but did not discuss the preliminary question of what facts should
3 be considered in making the good faith determination. Id. at *2-
4 *7.

5 Rincon Band better comports with the Ninth Circuit cases
6 considering the record of negotiation in evaluating good faith.
7 In light of these cases' resolution of the good faith question
8 solely with reference to evidence of this type, the magistrate
9 permissibly concluded that such information is not discoverable.
10 Fed. R. Civ. P. 26(b). This decision is analogous to the rule that
11 when APA claims will be resolved on the administrative record,
12 discovery beyond that record is ordinarily unnecessary and will not
13 be permitted. Accordingly, the magistrate's decision to grant the
14 State's request for a protective order limiting the scope of
15 discovery to the record of negotiations was a permissible exercise
16 of the magistrate's discretion. See Fed. R. Civ. P. 26(c), Martin
17 v. D.C. Metropolitan Police Dept., 812 F.2d 1425, 1437 (D.C. Cir.
18 1987) rehearing granted, opinion vacated in part on other grounds
19 817 F.2d 144.

20 **C. Deposition of A High Ranking Official**

21 In light of the court's conclusion above, the court does not
22 address the State's separate argument that Fort Independence had
23 failed to make the showing required prior to deposing a high
24 ranking official. Kyle Engineering Co. v. Kleppe, 600 F.2d 225,
25 231 (9th Cir. 1979). Accordingly, the court denies as moot Fort
26 Independence's motion to strike the State's argument on this point.

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IV. CONCLUSION

For the reasons stated above,

1. Plaintiff's motion for reconsideration, Doc. No. 45, is DENIED.
2. Plaintiff's motion to strike portions of defendants' reply to the motion for reconsideration, Doc. No. 51, is DENIED.

IT IS SO ORDERED.

DATED: May 7, 2009.


LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT