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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BIG LAGOON RANCHERIA, a Federally
Recognized Indian Tribe,

Plaintiff,

v.

STATE OF CALIFORNIA,

Defendant.

No. 09-01471 CW

ORDER GRANTING
PLAINTIFF'S
MOTION FOR
SUMMARY JUDGMENT
AND DENYING
DEFENDANT'S
CROSS-MOTION FOR
SUMMARY JUDGMENT
(Docket Nos. 80
and 93)

Over the past several years, Plaintiff Big Lagoon Rancheria (Big Lagoon or the Tribe) has sought to enter into a tribal-state compact with Defendant State of California that permits it to conduct class III gaming. The Tribe alleges that the State has negotiated in bad faith. Big Lagoon moves for summary judgment and an order directing the State to negotiate in good faith, under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701, et seq. The State opposes the motion and cross-moves for summary judgment. The motions were heard on August 12, 2010. Having considered oral argument and the papers submitted by the parties, the Court GRANTS Big Lagoon's motion and DENIES the State's cross-motion.

BACKGROUND

I. Legal Background

In enacting IGRA in 1988, Congress created a statutory framework for the operation and regulation of gaming by Indian tribes. See 25 U.S.C. § 2702. IGRA provides that Indian tribes may conduct certain gaming activities only if authorized pursuant to a valid compact between the tribe and the state in which the gaming activities are located. See id. § 2710(d)(1)(C). If an Indian tribe requests that a state negotiate over gaming activities that are permitted within that state, the state is required to negotiate in good faith toward the formation of a compact that governs the proposed gaming activities. See id. § 2710(d)(3)(A); Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250, 1256-58 (9th Cir. 1994), amended on denial of reh'g by 99 F.3d 321 (9th Cir. 1996). Tribes may bring suit in federal court against a state that fails to negotiate in good faith, in order to compel performance of that duty, see 25 U.S.C. § 2710(d)(7), but only if the state consents to such suit. See Seminole Tribe v. Florida, 517 U.S. 44 (1996). The State of California has consented to such suits. See Cal. Gov't Code § 98005; Hotel Employees & Rest. Employees Int'l Union v. Davis, 21 Cal. 4th 585, 615 (1999).

IGRA defines three classes of gaming on Indian lands, with a different regulatory scheme for each class. Class III gaming is defined as "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. § 2703(8). Class III gaming includes, among other things, slot machines, casino games, banking card games, dog racing and lotteries. Class III gaming is lawful only

1 where it is (1) authorized by an appropriate tribal ordinance or
2 resolution; (2) located in a state that permits such gaming for any
3 purpose by any person, organization or entity; and (3) conducted
4 pursuant to an appropriate tribal-state compact. See id.
5 § 2710(d)(1).

6 IGRA prescribes the process by which a state and an Indian
7 tribe are to negotiate a gaming compact:

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

17 Id. § 2710(d)(3)(A).

18 IGRA provides that a gaming compact may include provisions
19 relating to

20 (i) the application of the criminal and civil laws and
21 regulations of the Indian tribe or the State that are
22 directly related to, and necessary for, the licensing and
23 regulation of such activity;

24 (ii) the allocation of criminal and civil jurisdiction
25 between the State and the Indian tribe necessary for the
26 enforcement of such laws and regulations;

27 (iii) the assessment by the State of such activities in
28 such amounts as are necessary to defray the costs of
regulating such activity;

(iv) taxation by the Indian tribe of such activity in
amounts comparable to amounts assessed by the State for
comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and
maintenance of the gaming facility, including licensing;
and

1 (vii) any other subjects that are directly related to the
2 operation of gaming activities.

3 Id. § 2710(d)(3)(C).

4 If a state fails to negotiate in good faith, the Indian tribe
5 may, after the close of the 180-day period beginning on the date on
6 which the Indian tribe asked the state to enter into negotiations,
7 initiate a cause of action in a federal district court. See id.
8 § 2710(d)(7)(A)(i). In such an action, the tribe must first show
9 that no tribal-state compact has been entered into and that the
10 state failed to respond in good faith to the tribe's request to
11 negotiate. See id. § 2710(d)(7)(B)(ii). Assuming the tribe makes
12 this prima facie showing, the burden then shifts to the state to
13 prove that it did in fact negotiate in good faith. See id.¹ If
14 the district court concludes that the state failed to negotiate in
15 good faith, it "shall order the State and Indian Tribe to conclude
16 such a compact within a 60-day period." Id. § 2710(d)(7)(B)(iii).

17 ¹Specifically, IGRA provides:

18 (i) An Indian tribe may initiate a cause of action
19 [to compel the State to negotiate in good faith] only
20 after the close of the 180-day period beginning on the
21 date on which the Indian tribe requested the State to
22 enter into negotiations under paragraph (3)(A).

23 (ii) In any action [by an Indian tribe to compel the
24 State to negotiate in good faith], upon the introduction
25 of evidence by an Indian tribe that-

26 (I) a Tribal-State compact has not been
27 entered into under paragraph (3), and

28 (II) the State did not respond to the request
of the Indian tribe to negotiate such a compact or
did not respond to such request in good faith,
the burden of proof shall be upon the State to prove that
the State has negotiated with the Indian tribe in good
faith to conclude a Tribal-State compact governing the
conduct of gaming activities.

25 U.S.C. § 2710(d)(7)(B).

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1 If no compact is entered into within the next sixty days, the
2 Indian tribe and the state must then each submit to a court-
3 appointed mediator a proposed compact that represents their last
4 best offer. See id. § 2710(d)(7)(B)(iv). The mediator chooses the
5 proposed compact that "best comports with the terms of [IGRA] and
6 any other applicable Federal law and with the findings and order of
7 the court." See id. If, within the next sixty days, the state
8 does not consent to the compact selected by the mediator, the
9 mediator notifies the Secretary of the Interior, who then
10 prescribes the procedures under which class III gaming may be
11 conducted. See id. § 2710(d)(7)(B)(vii).

12 II. Prior Proceedings

13 This is the second action concerning Big Lagoon's efforts to
14 secure a tribal-state compact for class III gaming. The first
15 lawsuit, Big Lagoon Rancheria v. California (Big Lagoon I), Case
16 No. 99-4995 CW (N.D. Cal.), related to the parties' earlier
17 negotiations, which commenced after the Tribe's March, 1998 request
18 to enter into a compact. In Big Lagoon I, as here, the Tribe
19 alleged that the State did not negotiate in good faith.

20 Because the background of that case is explained in detail in
21 the Court's March 18, 2002 Order on Big Lagoon's second motion for
22 summary judgment, it will not be repeated here in its entirety.
23 The Court recounts, however, facts relevant to the Tribe's current
24 action.

25 On October 5, 2001, Big Lagoon filed a motion for summary
26 judgment and sought an order compelling the State to negotiate in
27 good faith. The Tribe opposed the State's insistence that it enter

1 into a "side letter agreement," under which the Tribe would not
2 have commenced construction of a casino or conducted class III
3 gaming until it had "completed all environmental reviews,
4 assessments, or reports, and received approval for its construction
5 by the State through its agencies." Order of Mar. 18, 2002, at 8,
6 Big Lagoon I. The Court held that, under IGRA, the State "may not
7 impose its environmental and land use regulations on the Tribe
8 absent authority from Congress." Id. at 12-13. However, the State
9 could negotiate for compliance with such regulations "to the degree
10 to which they are 'directly related' to the Tribe's gaming
11 activities or can be considered 'standards' for the operation of
12 and maintenance of the Tribe's gaming facility under [25 U.S.C.]
13 § 2710(d)(3)(C)(vi) and (vii)." Id. at 15. Concerning the side
14 letter agreement, the Court stated,

15 [T]he State's continued insistence that the Tribe agree
16 to this broad side letter agreement would constitute bad
17 faith. The State may in good faith ask the Tribe to make
18 particular concessions that it did not require of other
19 tribes, due to Big Lagoon's proximity to the coastline or
20 other environmental concerns unique to Big Lagoon. The
21 State could demonstrate the good faith of its bargaining
22 position by offering the Tribe concessions in return for
23 the Tribe's compliance with requests with which the other
24 tribes were not asked to comply. However, the State may
25 not in good faith insist upon a blanket provision in a
26 tribal-State compact with Big Lagoon which requires
27 future compliance with all State environmental and land
28 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.

24 Id. at 19. The Court denied without prejudice the Tribe's motion
25 for summary judgment, concluding that a determination of bad faith
26 was premature "due to the novelty of the questions at issue
27 regarding good faith bargaining under IGRA" and because the

1 "Court's March 22, 2000 Order gave the State reason to believe that
2 it could negotiate on environmental and land use issues." Id. The
3 parties were ordered to resume negotiations consistent with the
4 guidance provided in the Court's Order.

5 On April 2, 2003, frustrated by the pace of the negotiations,
6 Big Lagoon filed another motion for summary judgment. The State
7 had offered an alternative proposal, under which it would enter
8 into a compact with the Tribe in exchange for, among other things,
9 a requirement that the Tribe site its gaming facility on a twenty-
10 five-acre parcel that it would purchase from the State. The Court
11 was inclined to grant Big Lagoon's motion. However, in an order of
12 June 11, 2003, the Court stayed its ruling and, instead, set a
13 deadline by which the parties were to finalize a draft compact
14 based on the State's new proposal. The parties failed to meet the
15 deadline.

16 On August 4, 2003, the Court lifted the stay on its decision
17 and denied Big Lagoon's motion without prejudice. Because the
18 delay was attributable to demands made by the Tribe, not the
19 State's intransigence, the Court directed the parties to continue
20 negotiations.

21 Negotiations continued through 2005 and, in the intervening
22 period, the governorship changed hands. On August 17, 2005, the
23 Tribe and the Schwarzenegger administration entered into a
24 settlement agreement, under which Big Lagoon would have been
25 granted a tribal-State compact permitting the Tribe to operate,
26 along with the Los Coyotes Band of Cahuilla and Cupeño Indians, a
27 joint gaming operation in Barstow, California. Under this so-

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1 called "Barstow Compact," Big Lagoon agreed not to establish gaming
2 facilities on its own lands. The execution of the settlement
3 agreement and the Barstow Compact, however, was contingent upon
4 several conditions, one of which was ratification of the Barstow
5 Compact by the California Legislature.

6 The Legislature did not ratify the Barstow Compact in either
7 its 2006 or 2007 legislative sessions. Accordingly, by its terms,
8 the Barstow Compact became null and void in September, 2007.

9 III. Current Round of Negotiations

10 As contemplated by the settlement agreement, Big Lagoon and
11 the State began a new round of negotiations. On September 18,
12 2007, the Tribe sent a letter to the State, indicating its desire
13 to conduct class III gaming "on the trust lands that constitute the
14 Big Lagoon Rancheria contiguous to Big Lagoon along the coastline
15 in Humboldt County." Engstrom Decl., Ex. 2.

16 On November 19, 2007, the State sent a draft compact to the
17 Tribe. In an accompanying letter, the State expressed an interest
18 in siting the Tribe's gaming facilities on off-reservation lands.
19 The draft compact contained a section on "Revenue Contribution,"
20 requiring the Tribe to pay the State a portion of its annual net
21 win. Engstrom Decl., Ex. 3 at BL000684. The draft compact also
22 included a provision for "Exclusivity," which provided that, if the
23 State were to "authorize any person or entity other than an Indian
24 tribe with a federally approved Class III Gaming compact to operate
25 Gaming Devices within" the Tribe's "core geographic market," and
26 such person or entity were to so operate, the Tribe could, subject
27 to restrictions, cease to make the payments required by the revenue
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1 contribution provision discussed above. Id. at BL000688. All
2 subsequent compact proposals contained a requirement for revenue
3 contribution and a provision for exclusivity.

4 On January 31, 2008, the State sent Big Lagoon another
5 proposal, offering the Tribe a compact in exchange for, among other
6 things, siting its gaming operations based on the State's
7 preferences. The State's preferred option was for the Tribe to
8 construct its facilities at the "Highway Site," which was "located
9 adjacent to the highway within five miles of the Big Lagoon
10 Rancheria." Engstrom Decl., Ex. 4 at BL000792. Under the
11 proposal, the Tribe would have been required to develop at the
12 Highway Site, unless precluded from doing so. In other words, the
13 Tribe would have been able to develop on its lands only if, for
14 some reason, it could not develop the Highway Site. The State's
15 preferred on-reservation alternative was the so-called "Five-
16 Acre/Rancheria Site." This plan would allow "a 250-device casino"
17 on a nine-acre parcel comprising the Tribe's "original rancheria,"
18 "a 50-room casino-related hotel . . . on the Tribe's post-1988
19 trust lands" and various support facilities located on an adjacent
20 five-acre parcel that the Tribe owned in fee. Id. at BL000793. In
21 the event that the Tribe could not gain regulatory approval for use
22 of the five-acre parcel, it could build on what the State called
23 the "Rancheria Site." This alternative would allow a "175-device
24 casino on the 9 Acre Parcel and a 50-room hotel on the 11 Acre
25 Parcel along with any other related facilities" Id. at
26 BL000794. If the casino had been sited on either the Five-
27 Acre/Rancheria or Rancheria sites, which were adjacent to

1 environmentally-sensitive lands, the Tribe would have been required
2 to comply with additional "Development Conditions." See id., App.
3 A.

4 The January, 2008 proposal also provided that the Tribe would
5 pay the State a share of its net win, ranging from twelve to
6 twenty-five percent. The actual rate would depend on the Tribe's
7 annual net win and the location of the casino. In exchange for the
8 Tribe's payments, the State would provide "geographic exclusivity
9 of 50 miles." Engstrom Decl., Ex. 4 at BL000794.

10 On March 21, 2008, through its counsel, Big Lagoon sent a
11 letter to the State, which rejected any siting of its proposed
12 gaming operations on locations "other than the Tribe's existing
13 trust lands." Engstrom Decl., Ex. 6 at BL000904. The Tribe
14 proposed that any compact should include a 350-device casino, a
15 120-room hotel and "all amenities (restaurants, spa, meeting rooms,
16 etc.) associated with a modestly-sized, upscale facility." Id.
17 The Tribe also suggested that any compact "should provide for . . .
18 future expansion." Id.

19 On May 2, 2008, the State sent the Tribe a letter, which
20 reiterated its desire to site any gaming operation on a location
21 other than the Tribe's lands. The State emphasized its interest in
22 "preserving and protecting, for present and future generations,
23 environmentally significant State resources located adjacent to the
24 rancheria." Engstrom Decl., Ex 7 at BL000907. The State then
25 proposed a compact that would have permitted the Tribe to operate a
26 99-device casino on the nine-acre parcel within its original
27 rancheria, and a 50-room hotel on the eleven-acre parcel on its
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1 post-1988 trust lands. The proposed compact also provided for
2 geographic exclusivity of fifty miles and payments to the State,
3 ranging from ten to twenty-five percent, depending on the Tribe's
4 annual net win.

5 On October 6, 2008, Big Lagoon, through its counsel, sent a
6 letter to the State, expressing its belief that the geographical
7 exclusivity offered by the State was "meaningless" because its
8 lands were "in an area in which non-Tribal gaming is unlikely to
9 proliferate" Engstrom Decl., Ex. 8 at BL000912. And,
10 although it had considered making payments to the State in earlier
11 proposals, it stated that it was "no longer willing to pay the
12 State what simply amounts to a tax" Id. at BL000913. Big
13 Lagoon stated that any final compact would have to include the
14 right to operate up to 350 gaming devices and a hotel with up to
15 100 rooms. The Tribe also proposed that any payments it made would
16 have to be deposited solely into the Revenue Sharing Trust Fund
17 (RSTF). The RSTF contains "moneys derived from gaming device
18 license fees that are paid . . . pursuant to the terms of
19 tribal-state gaming compacts for the purpose of making
20 distributions to noncompact tribes." Cal. Gov't Code § 12012.75;
21 see also In re Gaming Related Cases (Coyote Valley II), 331 F.3d
22 1094, 1110 (9th Cir. 2003). Big Lagoon stated that, if the parties
23 did not execute a final agreement by November 7, 2008, it would
24 resume its litigation in this Court.

25 On October 31, 2008, the State sent a letter to the Tribe,
26 which contained its final proposal. The State indicated that it
27 was open to siting a 349-device casino on the Tribe's lands.

1 However, because of such a facility's proximity to "a State
2 ecological reserve, a State recreation area, and . . . [a] lagoon,"
3 the State proposed that the compact contain environmental
4 mitigation measures. Engstrom Decl., Ex. 9 at BL000918.

5 The State also proposed that the Tribe make quarterly payments
6 of fifteen percent of its net win; unlike the State's earlier
7 offers, the Tribe's payments would have been based on a flat rate.
8 The State explained that the fifteen-percent rate was consistent
9 with what it received from other tribes. The State also responded
10 that its request for "general fund revenue sharing" was in exchange
11 for providing the Tribe with "the exclusive right to conduct gaming
12 in the most populous state in the union." Id. at BL000916-17.
13 According to the State, the Tribe would "receive significant value
14 from a compact that provides it with a class III gaming monopoly"
15 and that it was only fair for the State to receive "something of
16 value in return." Id. at BL000916. The State also offered to
17 permit the Tribe to continue receiving distributions from the RSTF,
18 so long as Big Lagoon operated less than 349 devices and did not
19 use RSTF funds to defray costs "arising out of, connected with, or
20 relating to any gaming activities." Id.

21 The parties failed to execute a compact. On April 3, 2009,
22 the Tribe filed its complaint, alleging that the State failed to
23 negotiate in good faith, in violation of IGRA.

24 LEGAL STANDARD

25 Summary judgment is properly granted when no genuine and
26 disputed issues of material fact remain, and when, viewing the
27 evidence most favorably to the non-moving party, the movant is

1 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
2 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
3 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
4 1987).

5 DISCUSSION

6 I. State's Requests for General Fund Revenue Sharing

7 Big Lagoon asserts that the State's failure to negotiate in
8 good faith is evidenced by the State's requests for general fund
9 revenue sharing,² insistence that the Tribe comply with various
10 environmental and land use regulations and recommendations that the
11 Tribe site its gaming facility off of its tribal lands.

12 As noted above, in its last offer, the State proposed a
13 tribal-State compact that required the Tribe to pay, on a quarterly
14 basis, fifteen percent of its net win into the State's general
15 fund. Throughout the negotiation process, the State insisted that
16 the Tribe share its revenue. The Tribe claims this is prima
17 facie evidence of bad faith.

18 Under IGRA, "a state may, without acting in bad faith, request
19 revenue sharing if the revenue sharing provision is (a) for uses
20 'directly related to the operation of gaming activities' in
21 § 2710(d)(3)(C)(vii), (b) consistent with the purposes of IGRA, and
22 (c) not 'imposed' because it is bargained for in exchange for a
23 'meaningful concession.'" Rincon Band of Luiseño Mission Indians

24
25 ² The proposed tribe-State compact does not identify the
26 State's general fund to be the beneficiary of the Tribe's payments.
27 However, throughout its papers, the State acknowledges that such
28 revenue contributions would be paid into the State's general fund.
See, e.g., State's Am. Opp'n 6.

1 v. Schwarzenegger, 602 F.3d 1019, 1033 (9th Cir. 2010) (citing
2 Coyote Valley II, 331 F.3d at 1111-15) (emphasis in original).

3 Here, the State's demands for general fund revenue sharing
4 constitute evidence of bad faith. The State does not dispute that
5 its requests were non-negotiable. Indeed, throughout its
6 communications to the Tribe and briefs on this motion, the State
7 asserted its entitlement to seek revenue sharing as consideration
8 for a gaming compact. See, e.g., Engstrom Decl., Ex. 9 at
9 BL000916. Because the State's insistence on general fund revenue
10 sharing amounts to a demand for direct taxation of Big Lagoon, the
11 burden shifts to the State to prove that it nonetheless negotiated
12 in good faith. See Rincon, 602 F.3d at 1030; 25 U.S.C.
13 § 2710(d)(7)(B)(ii).

14 The State makes no effort to do so. It does not argue that
15 the revenue sharing provision is directly related to the operation
16 of gaming activities. Nor does it contend that general fund
17 revenue sharing is consistent with the purposes of IGRA. Instead,
18 the State argues that Rincon was wrongly decided and that, even if
19 the decision stands,³ it is not applicable to this case.

20 As the State acknowledges, the Court is bound to follow
21 Rincon, see Wedbush, Noble, Cooke, Inc. v. SEC, 714 F.2d 923, 924
22 (9th Cir. 1983), and the State fails to demonstrate that Rincon's
23

24 ³ In Rincon, the State petitioned the Ninth Circuit for a
25 rehearing en banc, which was denied. However, the Ninth Circuit
26 stayed the issuance of its mandate pending the filing of the
27 State's petition for a writ of certiorari with the United States
28 Supreme Court. The Supreme Court has not yet ruled on the State's
petition and, accordingly, the Ninth Circuit's stay remains in
effect. Fed. R. App. P. 42(d)(2)(B).

1 teachings are not applicable here. In that case, the Rincon tribe
2 desired to expand its gaming operations, which required it to
3 renegotiate provisions of its 1999 compact with the State. 602
4 F.3d at 1024. Similar to its negotiating position with Big Lagoon
5 here, the State offered to allow the tribe to expand its gaming
6 operations, "but only if Rincon would agree to pay the State 15% of
7 the net win on the new devices, along with an additional 15% fee
8 based on Rincon's total 2004 net revenue." Id. As here, the State
9 offered the tribe an "'exclusivity provision.'" Id.

10 Applying the IGRA burden-shifting framework described above,
11 the Ninth Circuit held that the State did not rebut the tribe's
12 prima facie showing that the demand for general fund revenue
13 sharing evidenced a failure to negotiate in good faith. In
14 particular, the court concluded that contributions to the State's
15 general fund were not, as required by IGRA, "directly related to
16 the operation of gaming activities." Id. at 1033 (citing 25 U.S.C.
17 § 2710(d)(3)(C)(vii)). The court also held that the State's demand
18 was not consistent with the purposes of IGRA. Rincon, 602 F.3d at
19 1035-36. Finally, the Ninth Circuit held that the State did not
20 offer a "meaningful concession" in exchange for its demand of
21 revenue. Id. at 1036. The court explained that Proposition 1A,
22 which amended the State's constitution to "authorize tribal gaming
23 in California" and "effectively gave tribes a state constitutional
24 monopoly over casino gaming in California," id. at 1023, rendered
25 the State's offer of exclusivity meaningless. The Ninth Circuit
26 explained that

27 in the current legal landscape, "exclusivity" is not a
28

1 new consideration the State can offer in negotiations
 2 because the tribe already fully enjoys that right as a
 3 matter of state constitutional law. Moreover, the
 4 benefits conferred by Proposition 1A have already been
 5 used as consideration for the establishment of the RSTF
 6 and SDF [Special Distribution Fund⁴] in the 1999
 7 compact. . . . The State asserts that it would be unfair
 8 to permit Rincon to keep the benefit of exclusivity
 9 conferred by Proposition 1A without holding the tribe to
 10 an ongoing obligation to periodically acquiesce in some
 11 new revenue sharing demand. While we do not hold that no
 12 future revenue sharing is permissible, it is clear that
 13 the State cannot use exclusivity as new consideration for
 14 new types of revenue sharing since it and the collective
 15 tribes already struck a bargain in 1999, wherein the
 16 tribes were exempted from the prohibition on gaming in
 17 exchange for their contributions to the RSTF and SDF.

18 Id. at 1037 (citations omitted).

19 The State attempts to distinguish Rincon by arguing that,
 20 unlike the tribe in that case, the Tribe here has not offered
 21 anything for the rights granted under Proposition 1A. The State
 22 appears to assert that Proposition 1A exclusivity remains a

23 ⁴ The tribes' payments to the SDF may used by the State for
 24 the following purposes:

25 (a) grants for programs designed to address gambling
 26 addiction;

27 (b) grants for the support of state and local government
 28 agencies impacted by tribal gaming;

(c) compensation for regulatory costs incurred by the
 State Gaming Agency and the state Department of Justice
 in connection with the implementation and administration
 of the compact;

(d) payment of shortfalls that may occur in the RSTF; and

(e) "any other purposes specified by the legislature."

Coyote Valley II, 331 F.3d at 1106; see generally Cal. Gov't Code
 § 12012.85. The Coyote Valley II court countenanced the State's
 request for payments to the SDF because the State is restricted on
 what it "can do with the money it receives from the tribes pursuant
 to the SDF provision, and all of the purposes to which such money
 can be put are directly related to tribal gaming." Id. at 1114.

1 meaningful concession as to Big Lagoon because the Tribe has not
2 previously offered consideration for it. This argument is not
3 persuasive. The State does not point to any provision of the
4 California Constitution or indicator of legislative intent that
5 suggests Big Lagoon is required to offer some form of consideration
6 before exercising rights to which it is already entitled. Further,
7 this argument addresses neither the relationship between general
8 fund revenue sharing and gaming operations nor whether such revenue
9 sharing is consistent with the purposes of IGRA; as explained
10 above, both must be established to rebut a prima facie showing of a
11 failure to negotiate in good faith.

12 The State correctly asserts that, under Rincon and Coyote
13 Valley II, it may, in good faith, bargain for some form of revenue
14 sharing. However, that it could have done so does not mean it
15 actually did so here. As explained above, the State can establish
16 that it negotiated in good faith, notwithstanding revenue sharing
17 demands, if it satisfies the requirements set forth in Rincon. The
18 State has not done so. Further, the Coyote Valley II court, which
19 approved of revenue sharing payments by tribes, addressed payments
20 into the RSTF and SDF, not into the general fund. Rincon rejected
21 general fund contributions, which are at issue here.

22 The State offers two additional arguments to justify the
23 propriety of its negotiating position, neither of which are
24 persuasive. First, it maintains that it negotiated in good faith
25 because its revenue sharing requests were consistent with the terms
26 to which the Tribe agreed in the Barstow Compact. However, during
27 the post-Barstow negotiations, the Tribe rejected general fund
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1 revenue sharing. The State does not argue -- nor can it -- that it
2 relied on the Tribe's prior position during the most recent round
3 of negotiations. In addition, as the State emphasizes elsewhere,
4 its subjective beliefs are not relevant as to whether it negotiated
5 in good faith. See Rincon, 602 F.3d at 1041.

6 The State also argues it negotiated in good faith based on the
7 United States Supreme Court's February, 2009 decision in Carcieri
8 v. Salazar, 129 S. Ct. 1058 (2009). There, the Supreme Court
9 concluded that the Indian Relocation Act (IRA) authorizes the
10 Secretary of the Interior to acquire land in trust for a tribe only
11 if the tribe was "under the federal jurisdiction of the United
12 States when the IRA was enacted in 1934." 129 S. Ct. at 1068. The
13 State maintains that Big Lagoon is not such a tribe and that, under
14 Carcieri, the Tribe's eleven-acre parcel was unlawfully acquired by
15 the Secretary of the Interior. Thus, the State reasons, it
16 negotiated in good faith because the public interest would be
17 disserved by siting a gaming facility on land that was "unlawfully
18 acquired in trust for Big Lagoon" State's Am. Opp'n 13.

19 At the hearing on the motions, the State acknowledged the
20 flaws in this argument. The record of negotiations contains no
21 evidence that the State bargained based on an argument that some of
22 the Tribe's lands were unlawfully acquired. Indeed, the State sent
23 its last proposal to the Tribe in October, 2008, almost four months
24 before the Supreme Court issued its decision in Carcieri. The
25 State cannot establish that it negotiated in good faith through a
26 post hoc rationalization of its actions. Cf. Arrington v. Daniels,
27 516 F.3d 1106, 1113 (9th Cir. 2008) (rejecting counsel's post hoc

1 explanations of agency action as a "substitute for the agency's own
2 articulation of the basis for its decision"). At the very least,
3 the State's after-the-fact challenge to the status of some of the
4 Tribe's lands runs afoul of Rincon's teaching that "good faith
5 should be evaluated objectively based on the record of
6 negotiations." 602 F.3d at 1041.

7 Furthermore, the State does not dispute that the Tribe is
8 currently recognized by the federal government or that it has lands
9 on which gaming activity could be conducted. On these facts, the
10 Tribe is entitled to good faith negotiations with the State toward
11 a gaming compact. 25 U.S.C. § 2710(d)(3)(A). That the status of
12 the eleven-acre parcel may be in question does not change this
13 result.

14 Finally, related to its public interest argument, the State
15 maintains that the Court should deny the Tribe relief because it
16 would be inequitable to require the State to negotiate for a
17 compact involving lands that may have been unlawfully acquired in
18 trust. However, the State offers no authority for the Court to act
19 in equity in disregard of congressional intent. IGRA makes clear
20 that, once a court finds that a state has failed to negotiate for a
21 compact in good faith, "the court shall order the State and the
22 Indian Tribe to conclude such a compact within a 60-day period."
23 25 U.S.C. § 2710(d)(7)(b)(iii) (emphasis added).

24 The State's newfound concerns need not go unaddressed. IGRA
25 provides a procedure by which the Secretary of the Interior can
26 disapprove of tribal-state compacts. See 25 U.S.C.
27 § 2710(d)(8)(B). The Secretary could reject a compact between Big
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1 Lagoon and the State if he were to determine that it violated any
2 provision of IGRA, "any other provision of Federal law that does
3 not relate to jurisdiction over gaming on Indian lands" or "the
4 trust obligations of the United States to Indians." Id.

5 Because the status of the Tribe and its eleven-acre parcel has
6 no bearing on whether the State negotiated in good faith, the
7 State's request for a continuance pursuant to Federal Rule of Civil
8 Procedure 56(f) is denied. In addition, the Court denies the
9 State's request to stay the proceedings in this case pending the
10 United States Supreme Court's decision on its petition for a writ
11 of certiorari in Rincon. The State does not establish that a
12 discretionary stay is warranted. See Lockyer v. Mirant Corp., 398
13 F.3d 1098, 1110 (9th Cir. 2005) (providing factors to be considered
14 in determining the propriety of a discretionary stay under Landis
15 v. N. Am. Co., 299 U.S. 248 (1936)).

16 Accordingly, the Tribe is entitled to summary judgment. The
17 State's cross-motion for summary judgment is denied.

18 II. State's Requests for Environmental Mitigation Measures

19 Big Lagoon maintains that, under IGRA, environmental
20 mitigation is not a permissible subject for the compacting process
21 and that the State's negotiating position amounted to an imposition
22 of such measures, evincing the State's lack of good faith.

23 The State's requests for compliance with environmental
24 mitigation measures are not new. During the negotiations at issue
25 in Big Lagoon I, the State made similar requests, to which the
26 Tribe objected. As it does here, the Tribe proffered statements by
27 members of Congress indicating there was no congressional intent

1 that compacts include environmental and land use regulation. See
2 Order of Mar. 18, 2002 at 15, Big Lagoon I (quoting statement of
3 Representative Tony Coelho, 134 Cong. Rec. H8155 (Sept. 26, 1988)).
4 The Court rejected the Tribe's argument that environmental and land
5 use issues were outside the scope of permissible topics under IGRA.
6 With regard to the legislators' comments, the Court stated that

7 a better reading of the legislative history is that it
8 warns against allowing States to regulate tribal activity
9 broadly under the guise of negotiating provisions on
10 subjects that directly relate to gaming activity and may
11 be included in a tribal-State compact under
12 § 2710(d)(3)(C). In other words, the legislative history
13 does not state that issues such as environmental
14 protection and land use may never be included in a
15 tribal-State compact, but only that the State may not use
16 the compacting process as an excuse to regulate these
17 areas more generally.

18 Id. at 16 n.5.

19 Big Lagoon now argues that Rincon requires reconsideration of
20 the Court's earlier conclusion. Specifically, the Tribe points to
21 a footnote in Rincon, in which the Ninth Circuit cites Senator
22 Daniel Inouye's statement that Congress did not intend "that the
23 compacting methodology be used in such areas such as taxation,
24 water rights, environmental regulation, and land use"
25 Rincon, 602 F.3d at 1029 n.10 (quoting 134 Cong Rec. S12643-01, at
26 S12651 (Sept. 15, 1988)). From this citation, the Tribe
27 extrapolates that "Rincon specifically holds" that Congress did not
28 intend that environmental regulation and land use be within the
scope of compact negotiations. Big Lagoon's Reply 5.

The Ninth Circuit did not, by quoting a senator's statement in
a footnote, categorically forbid negotiations over environmental
mitigation measures. It is true that the footnote to which the

1 Tribe refers pertained to the Rincon court's discussion of
2 permissible topics of negotiation under IGRA. However, as stated
3 above, comments like Senator Inouye's merely demonstrate that
4 Congress did not intend states to use the compacting process as a
5 tool for regulating tribes generally. Thus, as the Court stated
6 previously, the State's request for mitigation measures is
7 permissible so long as such measures directly relate to gaming
8 operations or can be considered standards for the operation and
9 maintenance of the Tribe's gaming facility. See 25 U.S.C.
10 § 2710(d)(3)(C)(vi)-(vii). The State must offer concessions in
11 exchange for its request. The Tribe does not dispute that its
12 gaming activities would take place in an environmentally-sensitive
13 area. Nor does it contend that its proposed gaming operations
14 would be carried on without any negative environmental impact,
15 thereby obviating the need for environmental mitigation measures.

16 Coyote Valley II supports the Court's conclusion. There, the
17 court held that a labor relations provision was a permissible topic
18 of negotiation and could be included in a gaming compact because it
19 directly related to gaming operations. 331 F.3d at 1116. The
20 court noted that the State did not insist on "general employment
21 practices on tribal lands," but sought a labor relations provision
22 that pertained to "employees at tribal casinos and related
23 facilities." Id. (emphasis in original).

24 In the alternative, the Tribe appears to argue that no
25 environmental mitigation measure directly relates to gaming
26 activities. It again cites Rincon, where the court rejected as
27 circular "the State's argument that general fund revenue sharing is
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1 'directly related to the operation of gaming activities' because
2 the money is paid out of the income from gaming activities"
3 602 F.3d at 1033. The Ninth Circuit also cited 25 U.S.C.
4 § 2710(d)(4), which limits the type of assessments for which a
5 state may negotiate under IGRA. Rincon, 602 F.3d at 1033. Big
6 Lagoon's reliance on these statements is misplaced. The Rincon
7 court focused primarily on the direct taxation of tribes, which is
8 specifically identified and proscribed under IGRA. See
9 § 2710(d)(4) and (7)(B)(iii)(II). IGRA does not treat
10 environmental mitigation measures similarly.

11 Still relying on Rincon, the Tribe also contends that
12 environmental protections are not consistent with the purposes of
13 IGRA. However, the Rincon court did not address environmental
14 regulation. Nor did it engage in a "potentially complicated
15 statutory analysis" to determine the metes and bounds of IGRA's
16 purposes because the State clearly misinterpreted Coyote Valley II
17 and the congressional intent underlying IGRA. 602 F.3d at 1034.
18 The court stated that the "only state interests mentioned in § 2702
19 are protecting against organized crime and ensuring that gaming is
20 conducted fairly and honestly." Id. (emphasis in original). It
21 did not, however, declare that environmental mitigation measures,
22 based on the location of a tribe's gaming facility, do not promote
23 IGRA's purposes. Compliance with such measures does not run
24 counter to tribal interests. Cf. S. Rep. 100-446, at 15 (1988),
25 reprinted in 1988 U.S.C.C.A.N. 3071, 3085 (stating that, in
26 considering good faith, the committee "trusts that courts will
27 interpret any ambiguities on these issues in a manner that will be
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1 most favorable to tribal interests"). Thus, Big Lagoon does not
2 establish that the State's proposed environmental mitigation
3 measures are so discordant with IGRA's purposes that they amount to
4 prohibited topics of negotiation.

5 This conclusion does not end the inquiry. As the Court has
6 held, to negotiate for environmental mitigation measures in good
7 faith, the State must offer a meaningful concession in exchange.
8 See also Coyote Valley II, 331 F.3d at 1116-17 (explaining that the
9 State's "numerous concessions" in exchange for a labor relations
10 provision demonstrated that it did not act in bad faith). In its
11 briefing, the State points to two: (1) the right to operate up to
12 349 gaming devices and (2) continued receipt of RSTF payments, even
13 though Big Lagoon would no longer be a non-gaming tribe. However,
14 the record of negotiations does not show that either of these
15 offers was related to the proposed environmental mitigation
16 measures; instead, they appear to have been offered in exchange for
17 general fund revenue sharing. See Engstrom Decl., Ex. 9 at
18 BL000915-17. Even if these purported concessions were connected to
19 the request for environmental mitigation measures, the State does
20 not satisfy its burden to show that they were meaningful. Without
21 any context or comparison, the State simply declares that they were
22 valuable. This is not sufficient.

23 Because the Court concludes that environmental mitigation
24 measures are a permissible subject for negotiation under IGRA so
25 long as they meet the definitions of § 2710(d)(3)(C)(vi) or (vii),
26 the State could offer as a meaningful concession gaming rights that
27 are more expansive than allowed to otherwise similarly situated
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1 tribes. The Rincon court noted, "In order to obtain additional
2 time and gaming devices, Rincon may have to submit, for instance,
3 to greater State regulation of its facilities or greater payments
4 to defray the costs the State will incur in regulating a larger
5 facility." 602 F.3d at 1039 (citing 25 U.S.C. § 2710(d)(3)(C)(i,
6 iii)).

7 In sum, the State may request environmental mitigation
8 measures so long as they (1) directly relate to gaming operations
9 or can be considered standards for the operation and maintenance of
10 the Tribe's gaming facility, (2) are consistent with the purposes
11 of IGRA and (3) are bargained for in exchange for a meaningful
12 concession. Because it does not appear that the State offered a
13 meaningful concession in connection with its requests for
14 environmental mitigation measures, it thus far has failed to
15 negotiate in good faith. This further supports summary judgment in
16 favor of Big Lagoon.

17 CONCLUSION

18 For the foregoing reasons, the Court GRANTS the Tribe's motion
19 for summary judgment. (Docket No. 80.) The State's cross-motion
20 for summary judgment is DENIED. (Docket No. 93.)

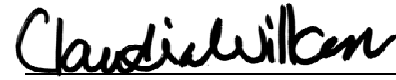
21 Pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii), the Court directs
22 the Tribe and the State to conclude a compact within sixty days of
23 the date of this Order. If they fail to do so, thirty days after
24 the expiration of the sixty-day period, Big Lagoon and the State
25 shall each submit a proposed compact to the Court, along with a
26 joint proposal for a mediator under 25 U.S.C. § 2710(d)(7)(B)(iv).
27 If the parties cannot agree on a mediator, they shall file separate
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1 proposals.

2 A further case management conference is set for March 8, 2011
3 at 2:00 p.m.

4 IT IS SO ORDERED.

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6 Dated: 11/22/2010



CLAUDIA WILKEN
United States District Judge

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