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. C 09-1471 CW

ORDER DENYING DEFENDANT'S MOTION FOR LEAVE TO FILE A MOTION TO VACATE THE MEDIATOR'S ORDER SELECTING A COMPACT, DIRECTING ENTRY OF JUDGMENT AND GRANTING DEFENDANT'S MOTION TO STAY PENDING APPEAL
(Docket Nos. 139 and 140)

Defendant State of California seeks leave to file a motion to vacate the Mediator's order selecting a compact or, in the alternative, to stay these proceedings pending the completion of the parties' cross-appeals of the Court's November 22, 2010 order granting the motion of Plaintiff Big Lagoon Rancheria (Big Lagoon or the Tribe) for summary judgment and denying Defendant's cross-motion for summary judgment. Big Lagoon opposes both motions. The Court took the State's motions under submission on the papers. Having considered the arguments in the parties' papers, the Court DENIES the State's motion for leave to file an order to vacate the Mediator's order selecting a compact and GRANTS the State's motion to stay pending appeal.

BACKGROUND

Because the background of this case is explained in detail in the Court's November 22, 2010 Order, it will not be repeated here in its entirety. The Court recounts only those facts relevant to the current motions.

On April 3, 2009, the Tribe filed the instant lawsuit, alleging that the State failed to negotiate in good faith in violation of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701, et seq., for a tribal-state compact between the parties that would permit the Tribe to conduct class III gaming.

On November 22, 2010, the Court concluded that the State failed to negotiate in good faith and, accordingly, granted the Tribe's motion for summary judgment and denied the State's cross-motion for summary judgment. The parties were thereby ordered to begin, but not complete, the remedial procedures set forth in IGRA, 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii). In particular, the parties were ordered to conclude a compact within sixty days of the Court's order and, if they were unable to do so, to submit their preferred compacts to the Court, along with a joint proposal for a mediator to be appointed under 25 U.S.C. § 2710(d)(7)(B)(iv).

On December 9, 2010, the State filed a notice of its appeal of the Court's November 22, 2010 Summary Judgment Order and its first motion to stay that Order. On January 27, 2011, this Court denied the State's motion to stay, finding that the State had not

made a strong showing that it was likely to succeed on appeal or to suffer irreparable harm.

On February 3, 2011, the State filed in the Ninth Circuit Court of Appeals an emergency motion to stay further proceedings in this Court. On February 22, 2011, the Ninth Circuit denied the State's emergency motion.

The parties subsequently represented to the Court that they were not able to conclude a compact and, on April 27, 2010, the parties each lodged with the Court proposed compacts and proposals for an IGRA mediator.

On May 4, 2011, the Court appointed the Honorable Eugene F. Lynch (Ret.) of JAMS as the Mediator pursuant to 25 U.S.C. § 2710(d)(7)(B)(iv). The Court stated that "Judge Lynch 'shall select from the two proposed compacts the one which best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of' this Court." May 4, 2011 Order, at 2 (quoting 25 U.S.C. § 2710(d)(7)(B)(iv)). The Court further directed, "Once he decides, Judge Lynch shall submit to the State and the Tribe the compact he selected, id. § 2710(d)(7)(B)(v), and inform the Court of his selection." The Court ordered that, if the State did not consent to the compact Judge Lynch selected in the sixty-day period after he made his selection, "the parties shall immediately inform the Court and the State may renew its motion to . . . stay the proceedings in this case; no further action shall be taken without a further order of the Court." Id.

On September 27, 2011, after both parties provided him with extensive briefing and oral argument, Judge Lynch selected Big Lagoon's proposed compact as the one that best met the Court's direction. See Order Regarding Mediator's Selection of Appropriate Compact.

After the parties represented to the Court that the State would not consent to the compact within the sixty-day period provided by 25 U.S.C. § 2710(d)(7)(B)(vi) and that it intended to renew its motion for a stay of proceedings, the Court directed the State to file its renewed motion for a stay of proceedings by November 23, 2011.

On November 23, 2011, the State filed its renewed motion to stay proceedings pending the resolution of its appeal of the Court's Summary Judgment Order. At that time, the State also filed a separate motion seeking leave to file a motion to vacate Judge Lynch's September 27, 2011 Order selecting a compact.

DISCUSSION

I. The State's Motion for Leave to File a Motion to Vacate the Mediator's Order Selecting a Compact

The State seeks leave to file a motion to vacate the Mediator's order selecting a compact "in accordance with the Court's inherent authority to control proceedings over which it has jurisdiction." Mot. at 1. The State asks this Court to "render its own decision consistent with its previous findings and orders in this case." Id. at 7.

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. § 710(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). If the district court concludes that the state failed to negotiate in good faith, it "shall order the State and Indian Tribe to conclude such a compact within a 60-day period." Id. § 2710(d)(7)(B)(iii). If no compact is entered into within the next sixty days, the Indian tribe and the state must then each submit to a court-appointed mediator a proposed compact

that represents their last best offer. See id. § 2710(d)(7)(B)(iv). The mediator chooses the proposed compact that "best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court." See id. If, within the next sixty days, the state does not consent to the compact selected by the mediator, the mediator notifies the Secretary of the Interior, who then prescribes, in consultation with the Indian tribe, procedures under which class III gaming may be conducted which are consistent with the compact selected by the mediator, the provisions of IGRA, and the relevant provisions of the laws of the State. See id. § 2710(d)(7)(B)(vii).

Thereafter, the Court no longer has jurisdiction to consider further disputes regarding the process, unless the Secretary of the Interior initiates a further cause of action. Id. § 2710(d)(7)(A)(iii). IGRA does not contain any express authorization for the Court to review the Mediator's selection of a compact, and the State does not provide any legal authority to support the Court's jurisdiction to do so. Instead, under the procedures created by Congress, the Secretary of the Interior is required to create procedures under which class III gaming may be conducted that are consistent with that compact, IGRA, and any relevant provisions of California law.

The State's arguments are largely predicated on an understanding that, in selecting a compact, the Mediator was

carrying out duties created by this Court's order, which the State alleges that he violated. However, the Court merely appointed him as the Mediator pursuant to 25 U.S.C. § 2710(d)(7)(B)(iv). His duties as the court-appointed Mediator were not determined by the Court; they were instead set by Congress and codified in statutory language, which this Court quoted in its order. See May 4, 2011 Order, at 2. If the Mediator had not selected a compact at all, the Court could order him to carry out the non-discretionary duty to do so; however, the Court does not have the authority to second-guess his selection of a compact.

The State also premises its arguments on the fact that the Court has retained some amount of jurisdiction over this matter, largely based on the language of the January 27, 2011 Order denying the State's motion to stay. In that Order, the Court questioned whether the summary judgment order was appealable, because "there are issues remaining to be resolved." January 27, 2011 Order, at 2 n.1. At that time, the parties had not negotiated for sixty additional days, formulated their competing proposals, proposed a mediator or been ordered to submit proposals to him or her, and the Court had not selected or appointed a mediator. Id. at 4-5. Thus, at that point, there were still matters that IGRA required this Court to address. Now, however, the Court has taken all actions over which it has jurisdiction and may only choose whether to stay its Order and thus temporarily suspend the IGRA remedial proceedings or order that the IGRA

procedures continue. While the order appointing the Mediator disallowed "further action" if the State did not consent to the mediator-selected compact "without a further order of the Court," May 4, 2011 Order at 2, this was to allow the State an opportunity to renew its motion to stay prior to notification of the Secretary of the Interior. The Court did not purport to "retain jurisdiction" to review the Mediator's selection of a compact, as the State suggests.

While the State cites a number of decisions that uphold the inherent power of a court to take certain actions to control its docket, the State cites no cases that suggest that it is within this Court's inherent power to review and vacate the order issued by the Mediator in furtherance of his statutorily-mandated duties, in the absence of any statutory or other authorization. While a federal court's inherent power "encompasses the power to issue orders necessary to facilitate activity authorized by statute or rule," it "may not take action under the guise of its inherent power when that action either contravenes a statute or rule or unnecessarily enlarges the court's authority." In re Novak, 932 F.2d 1397, 1406 & n.17 (11th Cir. 1991) (finding that a court can utilize its inherent power to fulfill the objectives of Federal Rule of Civil Procedure 16 by requiring defendant's insurer to appear at a settlement conference).

The State also suggests that IGRA mediation is the equivalent of arbitration, because the IGRA mediator is statutorily required

to engage in evaluative mediation and to "select [the better of] the two proposed compacts" rather than to engage in facilitative mediation and help the parties come to an agreement; the State argues that the Mediator's order should be subject to review similar to that of arbitration proceedings. However, there is no indication in IGRA that Congress intended for the process to be so reviewed, and the State provides no case law that supports its argument.

Further, even if they were equivalent, the cases that the State presents do not support its argument that this Court has the inherent authority to review the Mediator's selection. In both In re Y & A Group Securities Litigation, 38 F.3d 380 (8th Cir. 1994), and Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 985 F.2d 1067 (11th Cir. 1993), a district court had entered judgment on an issue that was later raised again in arbitration proceedings. In those cases, the courts found that the All-Writs Act allowed them to enjoin or stay these later arbitration proceedings, not that they had inherent authority to vacate or review past arbitration decisions. In re Y & A Group Sec. Litig., 38 F.3d at 382-383; Kelly, 985 F.2d at 1068-1070. Similarly, the cases that the State cites to argue that arbitration proceedings do not preclude a judicial determination here are readily distinguishable for many reasons. First, unlike the dispute here, each of those cases dealt with an "employee's claim . . . based on rights arising out of a statute designed to provide minimum substantive guarantees to

individual workers." Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 737 (1981) (holding that courts should not give preclusive effect to a grievance arbitration in a suit under the Fair Labor Standards Act); see also McDonald v. City of West Branch, 466 U.S. 284, 290-91 (1984) (holding that courts should not give preclusive effect to an arbitration pursuant to a collective bargaining agreement (CBA) in a civil rights suit under 42 U.S.C. § 1983); Alexander v. Gardner-Denver Co., 415 U.S. 36, 59-60 (1974) (holding that courts should not give preclusive effect to a CBA arbitration in a suit under Title VII). Further, the courts found that Congress had intended for those statutes to be judicially enforceable because the statutes created a cause of action for their enforcement. See, e.g., McDonald, 466 U.S. at 290. Here, while the statute expressly created certain causes of action and gave the district courts jurisdiction over them, see 25 U.S.C. § 2710(d)(7)(A)(i)-(iii), the statute did not create a cause of action for the State to litigate the Mediator's choice of a compact.

Accordingly, the Court DENIES the State's motion for leave to file a motion to vacate the Mediator's order selecting a compact. Even if the State were permitted to file such a motion, the Court notes that the Mediator was not required to explain his selection of a compact and his selection of a compact was not irrational, beyond his powers as set forth in IGRA, or made in violation of the statutorily-mandated criteria.

II. The State's Motion for a Stay Pending Appeal

The State alternatively seeks a stay of proceedings pending appeal of the November 22, 2010 summary judgment order.

"'A stay is not a matter of right, even if irreparable injury might otherwise result.'" Nken v. Holder, 129 S. Ct. 1749, 1760 (2009) (quoting Virginian R. Co. v. United States, 272 U.S. 658, 672 (1926)). Instead, it is "an exercise of judicial discretion," and "the propriety of its issue is dependent upon the circumstances of the particular case." Id. (citation and internal quotation and alteration marks omitted). The party seeking a stay bears the burden of justifying the exercise of that discretion. Id.

"A party seeking a stay must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of relief, that the balance of equities tip[s] in his favor, and that a stay is in the public interest." Humane Soc. of U.S. v. Gutierrez, 558 F.3d 896, 896 (9th Cir. 2009); see also Perry v. Schwarzenegger, 702 F. Supp. 2d 1132, 1135 (N.D. Cal. 2010). The first two factors of this test "are the most critical." Nken, 129 S. Ct. at 1761. Once these factors are satisfied, courts then assess "the harm to the opposing party" and weigh the public interest. Id. at 1762.

An alternative to this standard is the "substantial questions" test, which requires the moving party to demonstrate "serious questions going to the merits and a hardship balance that

tips sharply towards the plaintiff," along with a "likelihood of irreparable injury" and that it is "in the public interest." Alliance for the Wild Rockies v. Cottrell, 622 F.3d 1045, 1053 (9th Cir. 2010) (internal quotation marks omitted); see also Golden Gate Rest. Ass'n v. City & Cnty. of S.F., 512 F.3d 1112, 1116 (9th Cir. 2008).

As in its first motion to stay, the State offers three arguments that it is likely to prevail on appeal: (1) the Court erred by not permitting the State to conduct discovery into the legal status of the Tribe and its lands; (2) the Court erred in following the Ninth Circuit's decision in Rincon Band of Luiseno Mission Indians v. Schwarzenegger, 602 F.3d 1019 (9th Cir. 2010); and (3) the Court misapplied Rincon by requiring the State to offer meaningful concessions to obtain environmental protections and, even if such concessions were required, the State offered them. In making these arguments, the State largely restates points it raised at summary judgment. Thus, for the reasons set forth in the Court's November 22, 2010 Order, the State has not shown that it is likely to succeed on the merits. However, the Court finds that the State has raised serious questions going to the merits of the case.

The State argues that it will be irreparably harmed without a stay, because the Secretary of the Interior could issue procedures through which class III gaming may be conducted, prior to the time that the appeal is concluded, which do not contain the

environmental requirements that the State seeks. Given the length of time that it may take for the State's appeal to become final, it is reasonably likely that the Secretary will promulgate procedures prior to that time. Further, because of the Mediator's selection, it is reasonably likely that the Secretary's procedures will not contain the State's desired environmental regulations. As the State argues, this could render the pending appeal moot, because there is nothing that would require the Secretary to conform his procedures to a subsequent appellate decision or to vacate the procedures if this Court's bad faith finding were reversed. Courts have previously found that the loss of the right to appeal constitutes irreparable harm. See Gonzalez v. Reno, 2000 U.S. App. LEXIS 7025, at *1 (11th Cir.); Population Inst. v. McPherson, 797 F.2d 1062, 1081 (D.C. Cir. 1986). As the State contends, if the Tribe builds its casino and hotel pursuant to whatever procedures the Secretary promulgates, significant damage could occur on "adjacent, environmentally sensitive state lands . . . irreversible damage that no judicial action could remedy, particularly where Big Lagoon's sovereign immunity would prevent the State from recovering damages." Mot. at 16. The harm that the State stands to suffer could be irreparable if the IGRA remedial process continues past this point prior to the conclusion of the pending appeal. See Kansas v. United States, 249 F.3d 1213, 1227-1228 (10th Cir. 2001).

While this Court previously found that harm to the State was speculative, the Court did so with the recognition that the situation would be different once the parties had progressed further into the IGRA remedial process and the Mediator had selected the better compact. The State interests and the realistic possibility of harm thereto outweigh the potential harm to Big Lagoon of delayed construction and revenue from the Class III casino that it may eventually be permitted to build.

The Court also finds that a stay is in the public interest. Big Lagoon appears to argue, without any supporting authority, that the only public interests relevant to this inquiry are those that can be located in the text of IGRA itself. Based on that, the Tribe argues that the paramount "public interest" is "promoting tribal economic development, self-sufficiency and strong tribal government." Opp. at 18. However, Big Lagoon conflates tribal interest with public interest. In this case, the public interest favors delaying the promulgation of Secretarial procedures pending final resolution of the question of whether the State negotiated in good faith, in light of the potential irreversible impact on the environmentally sensitive lands should a stay not be entered.

Accordingly, the Court GRANTS the State's motion to stay its November 22, 2010 order granting Plaintiff summary judgment, pending final disposition of the parties' cross-appeals of that order.

III. Big Lagoon's Requests for Attorneys' Fees

Big Lagoon seeks an award of attorneys' fees to compensate for the expenses it incurred in opposing both motions.

It has long been recognized that "in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel, even though the so-called American Rule prohibits fee shifting in most cases." Chambers v. NASCO, Inc., 501 U.S. 32, 45 (1991) (internal citations and quotations omitted). "One such circumstance is that a court may assess attorney's fees when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" Id. (quoting Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 259 (1975)). See also Hutto v. Finney, 437 U.S. 678, 690 n.14 (1978) ("An equity court has the unquestioned power to award attorney's fees against a party who shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order."). "Generally, an allowance because of bad faith is based on conduct which occurs during the course of the litigation and may fairly be characterized as redressing the 'insult added to injury.'" Straub v. Vaisman & Co., 540 F.2d 591, 600 (3d Cir. 1976) (collecting cases).

The Court finds that Big Lagoon has not persuasively argued that the State acted in bad faith, vexatiously, wantonly, or for oppressive reasons in filing these motions. The Court expressly granted the State permission to file its motion to stay and found

the State's motion meritorious. Further, there is no evidence that the State acted improperly in merely seeking leave to file a motion to vacate the Mediator's order, particularly since Big Lagoon identified no other instance in which a court previously addressed the question the State presented.

Accordingly, the Court DENIES Big Lagoon's requests for attorneys' fees.

CONCLUSION

For the reasons set forth, the Court DENIES the State's motion for leave to file a motion to vacate the Mediator's order selecting a compact (Docket No. 139). Because the Court finds that all outstanding issues before it have been resolved, the Clerk will enter judgment in favor of the Tribe, in accordance with the Court's November 22, 2010 order. Finally, the Court GRANTS the State's motion to stay its November 22, 2010 order pending final resolution of the parties' cross-appeals of that order (Docket No. 140).

IT IS SO ORDERED.

Dated: 2/1/2012

CLAUDIA WILKEN
United States District Judge