THE
NATIONAL LAW REVIEW

Indian Country Awaits 9th Circuit's En Banc Rehearing in Big Lagoon Case

Tuesday, July 1, 2014

In January, a split 9th Circuit panel **shocked Indian Country** with its holding in ***Big Lagoon Rancheria v. California*** that the State's failure to negotiate in good faith for a tribal-state gaming compact with the Big Lagoon Rancheria of California **did not violate the Indian Gaming Regulatory Act of 1988** ("IGRA") because the lands at issue were not "Indian lands" under *Carcieri*. The Court held that the proposed gaming parcel was improperly accepted into trust due to the Supreme Court precedent of *Carcieri v. Salazar*, which held that the Indian Reorganization Act of 1934 only authorizes the Government to take land into trust status for those tribes "under federal jurisdiction" as of June 18, 1934. Because IGRA only requires good-faith negotiations for gaming on *Indian lands*, the Ninth Circuit dismissed the good-faith suit.

Article By Dickinson Wright PLLC
Patrick Sullivan DW Gaming Law Blog

Tribal Law / Indigenous Peoples
Entertainment, Art & Sports
Antitrust & Trade Regulation
Tax
Communications, Media & Internet
Litigation / Trial Practice
Administrative & Regulatory
9th Circuit (incl. bankruptcy)
California

The panel decision threatens a Pandora's box of litigation by opening the door to collateral *Carcieri* attacks on agency fee-to-trust decisions. But *Big Lagoon* is only the latest in a litany of decisions which threaten Indian tribes' ability to restore land.

First, the 2009 *Carcieri* decision placed hard limits on the ability of the Bureau of Indian Affairs ("BIA") to restore land to tribes that could not prove they were "under federal jurisdiction" as of the date upon which the Indian Regulatory Act became law in 1934. Then, the 2012 *Patchak v. Salazar* decision subjected BIA fee-to-trust decisions to review under the Administrative Procedure Act, expanding the litigation exposure of every new trust acceptance from the previous 30-day challenge period to the 6-year APA statute of limitations.

And now, *Big Lagoon* threatens to roll back *all of the rights associated with trust* status for post-1934 tribes – even those that have held land in trust status for decades. This threat to the Indian land restoration process set off alarm bells throughout Indian Country. Big Lagoon Rancheria responded with a motion for *en banc* rehearing, and a flurry of *amicus* briefs supporting rehearing and reversal were filed. Those submitting briefs as *amici* included the United States Department of Justice, the National Congress of American Indians, the Navajo Nation, California Indian Legal Services, and the United South and Eastern Tribes, a coalition of 26 federally recognized Indian tribes in 12 states.

The 2-1 majority opinion was written by a visiting Judge Block from the Eastern District of New York. The panel decision is widely seen as overreaching and poorly executed, with one Native American legal writer calling Block's analysis "stunningly and thoroughly poor." The dissenting judge noted that the decision contradicted 9th Circuit precedent holding that the State could not collaterally attack the BIA's designation of trust lands years after the expiration of administrative and legal remedies.

On June 11, the Court granted the Tribe's petition for *en banc* review. The order granting rehearing ordered that the panel opinion should not be cited as precedent by or to any court in the 9th Circuit. In most federal appeals courts, *en banc* rehearing involves rehearing by the entire bench. But, because the Court is by far the largest with

29 active judges, *en banc* review will be performed by a randomly selected 11-judge panel.

Interestingly, IGRA's cause of action allowing Indian tribes to sue states failing to negotiate in good faith for Class III gaming compacts had been struck down by the Supreme Court in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), which held that the Constitution's 11th Amendment rendered states immune from federal lawsuits under IGRA. Accordingly, a state may only be subject to an IGRA action to compel it to negotiate in good faith if it has consented to such suit. However, in 1998 the voters of California passed Proposition 5, a ballot initiative which (1) required the California Governor to enter into a standard Class III compact with any tribe that was willing to accept the agreement, (2) required the California Governor to negotiate a different tribal-state compact with any tribe that wanted one, and (3) contained a waiver of 11th Amendment immunity that effectively reinstated IGRA's good-faith cause of action in California.

The resolution of *Big Lagoon* will have major repercussions in Indian Country and beyond, as the precedent of the panel decision subjects the final decisions of the BIA, and *every other federal agency*, to collateral attack in litigation for years or even decades – an outcome that the federal government cannot countenance.