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Indian Country Hopeful Of Another Legal Win As 'Big Lagoon' Reheard

23 Jun, 2014

Dave Palermo, GamblingCompliance

Indian gaming lawyers are cautiously optimistic of a favorable judgment when a full panel of jurists with the 9th Circuit Court of Appeals rehears a controversial January ruling involving Big Lagoon Rancheria and the state of California.

"Tribes in general should feel optimistic about having another bite at the apple," former Interior Department counsel Bryan Newland said of the decision by the 11 appeals court judges to rehear "en banc" the ruling by a three-judge panel that included a visiting jurist.

"But there's certainly no guarantee of any particular outcome," Newland said.

Tribes were angered when the 9th Circuit, in a 2-1 decision authored by Judge Frederic Block of Brooklyn, ruled California was **not obligated to negotiate a tribal-state gambling compact with Big Lagoon**, which was seeking a casino on environmentally sensitive coastal land.

Big Lagoon had argued that California was negotiating in bad faith. But Block cited a 2009 U.S. Supreme Court ruling in *Carcieri v Salazar* that the Department of Interior did not have the authority to place land in trust for tribes not "under federal jurisdiction" with passage of the Indian Reorganization Act of 1934.

The ruling angered tribes in large part because *Carcieri* and the trust status of 11 acres of Big Lagoon land in Humboldt County were not at issue in the legal arguments.

"It wasn't the focus of the litigation," Newland said of Block's decision to bring *Carcieri* into the deliberations.

"The focus of the litigation was good faith negotiations under IGRA [Indian Gaming Regulatory Act]."

The decision left in question not only the trust status of the Big Lagoon property, but raised the possibility other tribes could face litigation over land acquisitions that were finalized years, if not decades, previously.

Big Lagoon and other tribes quickly sought an en banc rehearing, which was granted two weeks ago. No date has been set for oral arguments.

The precedent of the January ruling is left in abeyance pending the rehearing.

Block's Big Lagoon ruling came in the midst of a series of harmful **federal and U.S. Supreme Court decisions** against tribal governments.

The string of court defeats came to at least a temporary halt last month when Supreme Court justices, in a surprise ruling, **upheld the sovereign immunity of the Bay Mills Indian Tribe** against an injunction sought by the state of Michigan.

Tribes now hope to generate further positive momentum in the federal courts when the Big Lagoon case is reviewed.

Attorney Scott Crowell said the fact that the 9th Circuit agreed to rehear the matter is a good sign.

"It [an en banc hearing] is a rare occurrence," Crowell said. "It means a majority of the sitting judges in the 9th Circuit believes the ruling needs to be looked at.

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"The very fact they voted to hear it en banc is an indication the court will change the decision of the three-judge panel."

Newland agreed.

"It's at least a signal that the 9th Circuit recognizes the decision made by the panel was unusual," he said.

But the court has a broad range of options in its review of the Big Lagoon decision.

Tribal lawyers hope jurists will determine *Carcieri* has no relevance to the Big Lagoon deliberations.

"I'm optimistic that out of the en banc review will emerge language that takes *Carcieri* out of the mix of arguments that can be raised for land that has long been in trust status," Crowell said.

"You could get a very narrow result out of the 9th Circuit where they simply say there was no opportunity to evidence or properly brief the impact of *Carcieri* and simply kick the case back" to the district court.

District Judge Claudia Wilken earlier ruled that state officials failed to negotiate with the tribe in good faith and said trust status of the 11 acres was not relevant to the case.

At the very least, Newland said the rehearing will give tribes an opportunity to address the *Carcieri* issue, an option they did not exercise in deliberations by the three-judge panel.

"With an en banc or full panel review I would guess [jurists] will discuss whether *Carcieri* is even relevant to the lawsuit," Newland said. "And, if so, Big Lagoon this time around will have an opportunity to explain why it's not an issue for them.

"Nobody will be caught off-guard."

There may be some consolation in the fact that the 9th Circuit in the landmark, 2010 *Rincon v Schwarzenegger* case ruled that California acted in bad faith when it demanded the Rincon Band of Luiseño Indians pay a share of its gambling revenues in exchange for additional slot machines.

"You obviously have judges on the bench in the 9th Circuit that understand what constitutes bad faith," said Crowell, lead attorney in the Rincon litigation.

"It's very hard to speculate what of the various arguments at the hearing have traction. Different arguments may have had traction with different judges."

One prominent tribal attorney who requested anonymity cautioned against predicting the outcome of a federal court ruling, noting that legal minds were caught off-guard by *Carcieri* and *Bay Mills*.

"We get surprised all the time at what the courts decide," the attorney said.

"It's not a wise tactic to get too vested in what you feel a court of appeals will do, yet alone a whole panel of 9th Circuit judges.

"I wouldn't stick your neck out too far on this."

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