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MEMORANDUM

September 17, 2014

TO: TRIBAL CLIENTS

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP

RE: Ninth Circuit Rehearing in Big Lagoon Rancheria v. State of California

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This memorandum is to report to you on the oral argument in the *en banc* rehearing of in *Big Lagoon Rancheria v. State of California,* Nos. 10-17803, 10-17878, in the United States Court of Appeals for the Ninth Circuit held on September 17, 2014. Although it is not possible to predict how a court will rule based on oral argument, it was clear that the court asked far more difficult questions of the State of California than it did of the Big Lagoon Rancheria, and that the argument went very well for the rancheria.

Brief Recap - Original Panel Decision

On January 21, 2014, a split panel of the Ninth Circuit reversed a decision of the district court in *Big Lagoon Rancheria v. State of California, Nos. 10-17803, 10-17878*. Relying on the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), the panel held that the State of California (the "State") was under no obligation to enter into negotiations for a compact with the Big Lagoon Rancheria ("Big Lagoon") pursuant to the Indian Gaming Regulatory Act ("IGRA") because one of the parcels upon which Big Lagoon proposed to conduct gaming had been unlawfully taken into trust in 1994.

In so ruling, the panel engaged in a *Carcieri* analysis, and found (on an admittedly incomplete record) that Big Lagoon was not "under federal jurisdiction" in 1934. Accordingly, the panel found that the Bureau of Indian Affairs ("BIA") was not authorized to make the 1994 trust acquisition. The panel concluded that Big Lagoon's disputed lands are not "Indian lands" as defined by the IGRA and Big Lagoon has no right to request the State to enter Class III compact negotiations, or to sue to compel the State to enter good-faith negotiations, on those lands.

The panel decision was very problematic for tribal interests, in that it subjected a trust acquisition to collateral attack, without the United States as a party, without regard to the passage of time[1] or the doctrine of exhaustion of tribal remedies, and without a

[1] The panel, citing to *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991), recognized that "the government's interest in finality outweighs a late-comer's desire to protest the agency's action as a matter of policy or procedure," but held that under *Wind River*:

complete record or the views of the Department of the Interior. Most notably the decision raised the real possibility of collateral attacks to the status of tribal trust lands well beyond the six-year Administrative Procedure Act ("APA") statute of limitations. For numerous Indian tribes this decision places at risk trust acquisitions previously believed to be final and beyond challenge.

Rehearing Petition and Amicus Briefs

Big Lagoon Rancheria petitioned the Ninth Circuit for rehearing, with a suggestion for rehearing en banc. Amicus briefs supporting the petition were filed by (1) the United States, (2) the National Congress of American Indians ("NCAI"), the United South and Eastern Tribes ("USET"), and the Navajo Nation, and (3) California Indian Legal Services ("CILS"). The principle arguments raised by Big Lagoon and amici were as follows:

1. A trust acquisition is not subject to collateral attack, but can only be challenged in an APA action.

2. Even if the State could mount a collateral attack, a collateral attack cannot be used to do an "end run" around the statute of limitations and the doctrine of exhaustion of administrative remedies, which bar the challenge.

    a. The six-year statute of limitations for APA actions has long since run. *Wind River* (*see* note 1 above) has no application in this suit because the State long ago knew that it was losing jurisdiction over the land, and that the Big Lagoon intended to game on the land.

        i. The State had an interest in the 1994 acquisition, and the statute of limitations therefore accrued in 1994, because the State lost jurisdiction over the lands when they were acquired in trust.

        ii. In any event, the State evinced an interest in the trust status of the

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> If … a challenger contests the substance of an agency decision as exceeding constitutional authority, the challenger may do so later than six years following the decision … . The government should not be permitted to avoid all challenges to its actions, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs.

The panel determined that the State may have had no interest in challenging the trust acquisition, made for housing purposes in 1994, and that therefore under *Wind River* the six-year time limit runs from the "agency's application of the disputed decision to the challenger." Further, the panel held that since there "is no direct agency involvement in this case" the "most apt analogue to application of/enforcement of the 1994 entrustment" is the Tribe's 2009 "suit to compel negotiations."

lands when it filed papers opposing the trust acquisition and arguing for reconsideration of the trust decision in the Interior Board of Indian Appeals ("IBIA") in 1997, and when it opposed the Rancheria's first bad faith lawsuit in 1999.

b. A party opposing a BIA decision such as a decision to acquire trust lands must first bring an administrative appeal to the IBIA, which California did not do.

3. The United States is a necessary party to a case challenging the trust status of Indian land.

4. In the alternative, if the court can consider the validity of the trust acquisition notwithstanding the above arguments, it must first request the views of the Department of the Interior on the legality of the acquisition, under the primary jurisdiction doctrine.

On June 11, 2014, the Ninth Circuit granted the petition for rehearing en banc.

September 17 Oral Argument

In the Ninth Circuit, a case decided en banc is not heard by the full Ninth Circuit, but by the Chief Judge of this circuit and 10 additional judges drawn by lot from the active judges of the Court. The en banc judges are: Chief Judge Alex Kozinski, and Circuit Judges Harry Pregerson, Stephen Reinhardt, Diarmuid O'Scannlain, Susan Graber, William Fletcher, Richard Paez, Jay S. Bybee, Milan Smith, Morgan Christen, and Jacqueline Nguyen. None of the judges on the original panel decision are on the en banc court.

The argument lasted an hour. The State had thirty minutes. Big Lagoon was also allotted thirty minutes, but yielded 15 minutes of its time to the United States.

Peter Kaufman, Deputy Attorney General, argued first for the State of California. The judges asked him very pointed questions regarding why the State had never brought the United States into the case by filing a cross-claim against the United States challenging the trust acquisition, why the State could make a collateral attack against the trust acquisition in this IGRA suit, why the State had not waived the challenge to the trust acquisition by not pursuing it in the case, and why the six-year statute of limitations for APA suits did not apply to the land into trust challenge. Mr. Kaufman admitted, in response to a question by Chief Judge Kozinski, that the *Carcieri* decision was not an event that would resurrect claims barred by the statute of limitations, "in and of itself." Mr. Kaufman's argument was that because under IGRA bad-faith lawsuit provisions action is needed by the Secretary to put class III procedures into place, when the Secretary does so following a bad faith decision by a court, the State can challenge any previous decisions relied on by the Secretary in his decision, including decisions to

include the tribe on the list of federally-recognized tribes, and to acquire trust lands for the tribe.

Following the State's argument, Michael Pollard,[2] of Baker & McKenzie, argued for Big Lagoon. While the judges actively questioned him, the questions were not as pointed as they were to Mr. Kaufman, and appeared designed to assist the Court in how to frame its opinion, rather than going to the heart of the underlying issues. For example, questions dealt with when the 6-year statute of limitations accrued. Mr. Kaufman answered June 29, 1994—the date of the trust acquisition. But he admitted, in response to questioning, that there is no evidence of publication of the decision in the Federal Register. Nonetheless, the record shows that the State knew of the acquisition and of its effects on State sovereignty over the lands, at least as early as March 1997, when it filed in the IBIA case. Mr. Pollard argued that because the State knew these facts at that time, the record is clear that the statute of limitations accrued no later than then, and that the *Wind River* exception to accrual did not apply.

Mr. Pollard suggested two bases for narrow rulings in favor of Big Lagoon. First, the court could uphold the judgment without ruling on whether a state could challenge a trust acquisition collaterally, on the basis that in this case the trust status of the land had nothing to do with the compact negotiations at issue, but was a new argument raised in court after the fact. Second, the record shows that the Big Lagoon Rancheria consists of two parcels of land, one acquired in trust long ago, the trust status of which is not challenged by the State.

Following Mr. Pollard's argument, Sam Hirsch,[3] Acting Assistant Attorney General for the Department of Justice Environment and Natural Resources Division, argued for the United States. Like Mr. Pollard, he argued that the statute of limitations accrued when the land was acquired in trust. He noted evidence in the record that the State had knowledge of the trust acquisition and its impact on the State. He said that the *Wind River* exception does not apply here because of the State's knowledge. Judge Fletcher suggested, and Mr. Hirsch agreed, that even absent a showing of the state's knowledge, the *Wind River* exception does not apply here because that exception is limited to regulations of general applicability, and not to one-time events or decisions like the trust acquisition here. Mr. Hirsch also cited evidence in the record that he suggested showed that the Rancheria was occupied in 1934 or earlier (contrary to the panel decision). Finally, Mr. Hirsch addressed earlier questions by Judges Pregerson and Smith about whether California would be harmed by losing the ability to apply environmental laws to the trust land, saying federal environmental laws generally applied, and that the IGRA compacting process provided for cooperation between the tribe and State on environmental matters.

[2] http://www.bakermckenzie.com/MikePollard/
[3] http://www.justice.gov/enrd/6451.htm (Mr. Hirsch's bio).

If you have questions regarding this memorandum or would like further information, please contact Michael Roy (mroy@hobbsstraus.com), or Adam Bailey (abailey@hobbsstraus.com).

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