

# GAMING LEGALNEWS

## INDIAN COUNTRY AWAITS 9TH CIRCUIT'S *EN BANC* REHEARING IN *BIG LAGOON* CASE

by Patrick Sullivan

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.

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.



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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.

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## **POJOAQUE'S PLAN TO SEEK AN IMPOSED COMPACT: IS INTERIOR'S PROCESS CONSISTENT WITH IGRA?**

by Dennis J. Whittlesey

The Pueblo of Pojoaque needs a new Class III gaming compact by June 2015 in order to continue operating its casinos which are located north of Santa Fe. However, the Pueblo objected to the financial concessions being demanded by New Mexico's Governor Susana Martinez, concessions similar to those previously accepted by a number of other Pueblos in the state that also were facing the June 2015 expiration date for their compacts.

Pojoaque's refusal to make financial concessions beyond those in its current compact led to a collapse of the negotiations, with each side accusing the other of failure to negotiate in good faith. With that, Pojoaque filed suit in federal court alleging that the Governor had failed to negotiate in good faith in what appeared to be the initial step in a statutory process through which a compact could be imposed on the State. The statutory process is established by the Indian Gaming Regulatory Act at 25 U.S.C. §2710(d)(7) ("IGRA").

New Mexico responded to the federal action by moving to dismiss due to the state's 11th Amendment sovereign immunity that was not waived for the purposes of that action. Following well-established law, the federal court granted New Mexico's motion to dismiss.

The Pojoaque complaint in the federal suit strongly suggests that the tribe knew full well that the action would be dismissed for the reasons cited by the State. However, it also makes clear that Pojoaque already was invoking administrative procedures created through an Interior regulation that would impose a compact on the Tribe and State when negotiations failed. That regulation was promulgated in 1999 and is published at 25 CFR Part 291 – "Class III Gaming Procedures." While some states may not oppose the administrative process, it is significant that Texas did oppose the process and won the legal challenge. That decision was rendered in 2007 by the 5th Circuit Court of Appeals and concluded that Interior did not have legal authority to administratively impose a compact on Texas. *See Texas v. United States*, 497 F.3d 491 (5th Cir. 2007).

The Pojoaque dispute may soon be coming to a head. The Pueblo's Governor announced only a few days ago that the Department of the Interior has determined that his tribe is eligible for the administrative process under which the Pueblo will submit its draft compact to which the State has 60 days in which to respond. If the State proposes an alternative draft, then a mediator would select one of the two submitted drafts, with the mediator's decision subject to final Secretary approval.

Without regard to the Texas litigation in 2007, the question will certainly arise as to whether the Interior Department's "solution" to an *impasse* in compact negotiations is lawful. The matter almost certainly will be decided by carefully following the specific language in IGRA, just as Supreme Court Justice Elena Kagan did in the recent *Bay Mills Indian Community* case involving a tribal gaming facility in Michigan. And special attention will be paid to the statute's apparent requirement that no process for imposing a compact can proceed until a "[federal] court finds that the State has failed to negotiate in good faith with the Indian tribe," according to express factors specified in the law.

That states can cite sovereignty to defeat legal challenges to their failure to negotiate is settled law. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). While the regulation in large part follows the IGRA process, it problematically ignores IGRA's predicate for invoking the subsequent administrative process that a federal court must first have adjudicated the State's failure to negotiate in good faith. Moreover, the Secretary's regulations did not resolve the potentially fatal barrier identified by the Supreme Court in *Seminole Tribe* that the 11th Amendment precludes any adjudication as to "good faith" by the State without consent by the State.

When Interior was drafting the regulation, there was a great deal of debate within Indian Country and the federal government about this matter. In light of this, it must be accepted that attorneys at Interior, Justice, and the National Indian Gaming Commission carefully assessed how best to confront the problem when states simply refuse to deal and then invoke state sovereign immunity to defeat the federal courts' jurisdiction to hear any legal challenge and, consequently, to render any decision as to whether the states' actions were not in good faith.

Despite the ruling in *Texas v. United States*, there almost certainly are good legal arguments in favor of the regulations. How the issues are resolved will be closely watched. In the meantime, the Pojoaque have about 12 months in which to secure a new compact through some process. Litigation can be time consuming, and the Pojoaque clock is ticking.