Tribal Casinos Face New Threats After 9th Circ. Curveball

By Natalie Rodriguez 0 Comments Share us on:

Law360, New York (January 24, 2014, 3:17 PM ET) -- A recent Ninth Circuit ruling that freed California from having to negotiate a tribal gambling compact has many Indian law attorneys sounding the alarm that the decision creates a new mechanism to effectively kill tribal casino land deals — even some agreements that are decades old.

In a Tuesday **split decision** reversing a lower court's order, the appeals panel unexpectedly leaned on the U.S. Supreme Court's 2009 Carcieri v. Salazar decision, which says the U.S. Bureau of Indian Affairs cannot put land into trust for tribes that were not federally recognized by 1934. The Ninth Circuit ruled that Big Lagoon Rancheria's proposed casino site had been placed in trust wrongfully and that California officials therefore did not have to negotiate a compact under the Indian Gaming Regulatory Act.

Several Indian gambling attorneys say the decision has far-reaching implications for tribe's rights, opening up a legal battlefront on which cities and states could block a tribal casino project or other major real estate development. It could even allow new challenges to tribal compact deals that were negotiated years ago, according to attorneys.

"The decision will allow states and anti-tribal groups to somehow collaterally attack other tribal projects that they find undesirable, many years — if not decades — after the fact," said Gabriel S. Galanda of Galanda Broadman PLLC.

At the heart of attorneys' concerns is the new test they say the decision creates for tribes. Not only must a tribe have been federally recognized by the time the Indian Reorganization Act of 1934 was passed, **as Carcieri was understood to require**, but it must also have proof that tribal ancestors had been living on a piece of land in 1934 in order to build a casino there.

"This is new and its different from what the BIA has been doing with the Carcieri test. ... The agency has been taking a much more holistic approach," said Lael R. Echo-Hawk, chairwoman of Garvey Schubert Barer's Indian law practice group. Since Carcieri, the BIA has conducted an analysis of the tribe, the land and the tribe's history before making a judgment call on whether or not to take land into trust, she said.

Echo-Hawk noted that many tribes had opted out of the 1934 list referred to in the Ninth Circuit decision, which contained 258 tribes, because of various political reasons. And since that time, the number of federally recognized tribes has nearly doubled to about 566, with several more awaiting recognition.

Furthermore, attorneys say, the Ninth Circuit decision seems to open up indefinitely the timetable in which states can challenge a tribe's land-into-trust proposal. Big Lagoon had the 11-acre parcel at the heart of the lawsuit taken into trust by the BIA in 1994, according to court documents.

California's new ability to question an 18-year-old land-into-trust decision is seen as railroading past a **recent Supreme Court decision** that gave U.S. stakeholders up to six years to challenge a tribal gaming land trust deal by filing a lawsuit under the Administrative Procedure Act. That Supreme Court ruling, in the case known as Match-E-

Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak et al., opened up what had then been a traditional 30-day challenge period.

"The [Big Lagoon] decision is surprising in a bad way. The consensus after the Patchak decision was that an objector would have six years to challenge a Department of Interior acquisition of land in trust for a tribe. The Ninth Circuit seems to be saying that an objector has forever to make such a challenge," said Brian Pierson of Godfrey & Kahn SC.

Tuesday's decision, however, raises some significant questions as to what kind of remedies states might have against in cases where tribes have already been conducting gaming on land, according to Jena A. MacLean, a Perkins Coie LLP partner in Washington, D.C.

"Everybody has been concerned for quite some time what happens to land that was put under trust more than six years ago ... I'm not sure we know the answer yet from this decision," she said.

According to MacLean, other courts could read the decision narrowly, applying it only to cases that follow a similar fact pattern: a tribe that wants to begin gambling activities but that wasn't recognized by 1934 and can't readily prove it lived on the land at that time.

But certain language in the opinion — which was controversially written by New York federal judge Frederic Block, who was sitting on the Ninth Circuit panel by designation — could be used more broadly in reversing land-into-trust deals, according to some.

"Its a very short step from there to say a land trust acquisition is null and void. ... I would be surprised if someone doesn't make that challenge," Perkins Coie partner Benjamin S. Sharp told Law360.

For tribes that are entering into negotiations over existing tribal compacts, the decision throws a new kink into negotiations, according to MacLean and Echo-Hawk. And by casting further doubt on whether a court can turn back the clock on a tribal casino deal, the Big Lagoon decision is expected to have business-side ramifications for Native American developers.

"This decision will certainly further chill tribal lending for any new tribal economic development effort as well," Galanda said.

While the BIA was not a direct party to the Big Lagoon case, the decision may prompt the agency to reassess its documentation process for land-into-trust deals, which has sometimes been cursory — especially for the many California Indian settlements, often known as rancherias, according to attorneys.

"I think the BIA would, certainly in cases involving rancherias, clarify what it means to have land set aside for a tribe," MacLean said.

The agency **has already been working** to address the fallout from the Supreme Court's Patchak and Carcieri decisions. The Big Lagoon decision is expected to further complicate the already complex decision-making process for pending land-into-trust requests that revolve around casino proposals, according to experts.

"This decision makes it even harder for tribal governments to greenfield Indian casinos, and that was already a near-impossible proposition due to the Supreme Court's recent anti-tribal decisions in Carcieri and Patchak," Galanda said.

Tuesday's opinion, however, is not expected to be the last word in the Big Lagoon case. Most likely, the decision will score an en banc rehearing, and could ultimately be modified to have more limited implications, according to MacLean and Sharp. If it does go to en

banc review, Echo-Hawk expects to see several tribal gaming players throw their hats into the ring with amicus briefs.

Others think the case could end up going even further. "I expect a petition to the U.S. Supreme Court for review," Pierson said.

--Editing by Kat Laskowski and Katherine Rautenberg.

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