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10-17803/10-17878

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BIG LAGOON RANCHERIA, a Federally Recognized Indian Tribe,

Plaintiff and Appellee/Cross-Appellant,

v.

STATE OF CALIFORNIA,

Defendant and Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the Northern District of California

No. CV 09-1471 CW (JCS)
Hon. Claudia Wilken, District Judge

APPELLANT/CROSS-APPELLEE STATE OF CALIFORNIA'S RESPONSE TO PETITION FOR PANEL REHEARING AND REHEARING EN BANC

KAMALA D. HARRIS
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General
PETER H. KAUFMAN
Deputy Attorney General
State Bar No. 52038
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2020
Fax: (619) 645-2012
Email: peter.kaufman@doj.ca.gov
Attorneys for Defendant and Appellant/Cross-Appellee State of California

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

The opinion for which Big Lagoon seeks panel rehearing and rehearing en banc (Opinion) does nothing more than apply a Supreme Court decision, *Carcieri v. Salazar*, 555 U.S. 379 (2009) (holding that a tribe is not eligible to have land taken in trust unless it was a tribe under federal jurisdiction in 1934), in a manner entirely consistent with this Circuit's precedent.

The Opinion construes the Indian Gaming Regulatory Act (IGRA) in light of *Carcieri* and consistent with *Guidiville Band of Pomo Indians v. NGV Gaming LTD*, 531 F.3d 767 (9th Cir. 2008) (*Guidiville*), and holds that a tribe may not compel a state to enter into a compact authorizing class III gaming unless all the land on which the tribe seeks authorization to game is validly held in trust for that tribe by the United States. Consistent with *Wind River Mining Corporation v. United States,* 946 F.2d 710 (9th Cir. 1991) (*Wind River*), the Opinion further holds that a state may defend itself against a suit alleging that the state has negotiated a compact in bad faith by timely asserting that the land on which the tribe seeks authorization to game was not validly taken in trust. Further, the statute of limitations runs from the date of the tribe's suit where the state was not a party to the administrative action to take the land in trust, and the suit is the first cognizable application of the decision to the state. Last, the Opinion finds, on the basis of

undisputed facts, that an eleven-acre parcel on which Big Lagoon sought authorization to game was not lawfully taken in trust for Big Lagoon because it was not a tribe under federal jurisdiction in 1934 and, therefore, that Big Lagoon's IGRA suit had to be dismissed.

It is well established that decisions like *Carcieri* are to be applied to pending cases. In stating the general rule of retroactive application, the Supreme Court has recognized that some settled expectations might be upset. It found, however, that the need for uniform application of its substantive law decisions outweighed any harm to such expectations. Likewise, in extending the statute of limitations for a challenge to the substantive validity of an administrative decision, *Wind River* determined that, notwithstanding potential harm to expectations, the extension is appropriate. To limit any such harm, both the Supreme Court and *Wind River* establish limits on the reach of retroactivity and the extension of a statute of limitations. In this case, the Opinion complies with those limitations.

SUMMARY OF ARGUMENT

The assertion that the Opinion erred in extending the holding in *Wind River,* 946 F.2d at 715-16, to Big Lagoon's attempt to use the decision to take the eleven acres in trust (Entrustment) against the State, and that this error warrants panel or en banc rehearing, has no merit because the Opinion

meets *Wind River's* key criteria for an extension of the statute of limitations. First, the State was not a party to the administrative proceeding challenging the Entrustment (having appeared solely as an amicus) and, second, this suit is the first cognizable attempt to apply the Entrustment to the State because Big Lagoon's earlier IGRA suit was dismissed without prejudice and, thus, has no legal existence. Further, the notion that *Wind River* limits its reach to decisions establishing rules and regulations is contradicted by the express language of that decision. Moreover, the lack of an agency record in this suit on Big Lagoon's status in no way barred Big Lagoon from presenting the district court with evidence of its own history. Big Lagoon not only offered no evidence supporting the proposition it was under federal jurisdiction in 1934, it actually accepted without dispute the facts the State presented on that question.

Joinder of the federal government in a suit over the validity of an entrustment decision is not required where a tribe brings suit to enforce an interest in land because the tribe can adequately represent the interests of the United States.

The idea that the Opinion erred in considering the status of the eleven-acre parcel is inconsistent with *Guidiville*, where Big Lagoon concedes that it sought authorization to game on that parcel.

The contention that the United States is an indispensable party to this suit is inconsistent with this Circuit's precedent where, as here, Big Lagoon seeks to enforce its own interest in land. Further, because the Opinion does not rule on the validity of Big Lagoon's current status as a federally recognized tribe, the federal government's views on that question are unnecessary. Likewise, the United States' expertise is not required on the question of Big Lagoon's status in 1934, where, as here, no factual questions exist and only a question of law remains.

Additionally, because neither res judicata nor a statute of limitations bars the Opinion's consideration of the retroactive application of *Carcieri* to the Entrustment, the Opinion is consistent with Supreme Court and Circuit precedent.

Last, the circumstances of this case are unusual. The claim that the Opinion will upset settled expectations and threatens the interests of hundreds of tribes and the status of millions of acres of land is without merit. While there undoubtedly will be some limited disruption, this is inherent in the accepted practice of retroactive application of Supreme Court decisions and the rule of *Wind River*, which allows the statute of limitations to run from the date a decision is applied to a non-party. Further, the Opinion specifically limits its scope to the "parties' rights under IGRA"—not to any other aspect of a decision to take land into trust. The fact that this Opinion

reached a twenty-year-old Entrustment is indicative only of the peculiar facts of this case—that a prior IGRA suit was dismissed without prejudice—and does not suggest that other entrustment decisions of similar vintage would be similarly affected.

ARGUMENT

I. PANEL REHEARING IS UNWARRANTED

A. Neither the State's Amicus Participation in an Administrative Appeal, Nor an Appearance in an IGRA Suit Dismissed Without Prejudice, Precludes Application of the *Wind River* Extension

Big Lagoon argues that the Opinion failed to recognize that the State had prior opportunities to challenge the validity of the Entrustment in administrative and judicial proceedings before this one. Big Lagoon contends that the Opinion did not account for the fact that the State appeared as an amicus in another party's administrative appeal of the Entrustment, and the State had an opportunity to challenge, and allegedly did challenge, the validity of the Entrustment in a prior IGRA proceeding. It argues that rehearing should be granted because that misunderstanding led the Opinion to conclude that the State's challenge to the Entrustment in this proceeding was timely under *Wind River*.

This argument for panel rehearing has no merit. The Entrustment was administratively noticed and approved for the limited purpose of providing tribal housing on land purchased with a Department of Housing and Urban

Development grant for that purpose. *Big Lagoon Park Company, Inc. v. Acting Sacramento Area Director, Bureau of Indian Affairs,* 32 IBIA 309-10 (1988). The State had no reason to object to a tribal entrustment for housing and, therefore, did not comment or make an appearance in that proceeding. It was not a party to the Entrustment and, consistent with *Wind River*, the State's ability to challenge the decision's substantive validity therefore did not end six years after it was issued. Later, Big Lagoon commenced construction of a casino foundation on the eleven acres, preparatory to seeking a tribal-state gaming compact with the State. The adjacent landowners sought to undo the conveyance on the ground it had been induced by fraud unrelated to the tribe's status. While the State supported the landowner's action, it was not a party to the proceeding because its appearance was only as an amicus. *Miller-Wohl Co., Inc. v. Comm'r of Labor and Industry State of Mont.,* 694 F.2d 203, 204 (9th Cir. 1982). Thus, because it was never a party to administrative proceedings concerning the Entrustment, either before or after the administrative appeal, it is not disqualified from relying upon the *Wind River* extension of time to challenge the Entrustment in response to an IGRA suit. *Wind River* specifically holds that:

> 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.
>
> . . . .
>
> [Thus,] a substantive challenge to an agency decision alleging lack of agency authority may be brought within six years of the agency's application of that decision to the specific challenger.

Wind River, 946 F.2d at 715-16.

Nothing in *Wind River* bars reliance upon this rule simply because of knowledge of the decision. Rather, it permits use of the statute of limitations extension where the true state of the invalidity of the agency's action is not known at the time, but becomes manifest at the time of a decision's application to a non-party. When the Entrustment was made, the State had no reason to know the true state of Big Lagoon's status in 1934, or whether it had been properly recognized in 1979. With more than 100 federally recognized tribes in California, the State simply could not investigate every tribe's history, and particularly the history of a tribe that proposed to use an entrustment only for residential purposes.

The Navajo Nation suggests that decisions in *Hells Canyon Preservation Council v. United States Forest Service,* 593 F.3d 923, 931-32 (9th Cir. 2010), *San Luis Unit Food Producers v. U.S.,* 772 F. Supp. 2d 1210, 1228 (E.D. Cal. 2011), and *North County Community Alliance, Inc. v. Salazar,* 573 F.3d 738 (9th Cir. 2009), support its position that mere

knowledge of the existence of a decision precludes use of the *Wind River* extension. They do not. *Hells Canyon* involves a procedural violation and was not decided on the basis of the *Wind River* extension. The other two cases relate only to when the decisions were considered to have been applied as a factual matter.

The Navajo Nation and California Indian Legal Services propose, however, that anytime a decision to take land in trust is made it should be considered to have been applied to the State, if the State has knowledge of the decision, because the jurisdictional relationship between the State and the tribal beneficiary has been changed. Thus, they contend, the Entrustment was applied to the State for *Wind River* purposes when it was made and the State subsequently became aware of it. This notion obliterates the distinction between an agency decision and its subsequent application. To be reviewable, an agency decision must be final, and to be considered final, it must determine rights and obligations from which legal consequences will flow. *Bennett v. Spear,* 530 U.S. 154, 177-78 (1997). Thus, a final agency decision always alters rights. If an agency decision were considered applied to every person and entity whenever it became final, *Wind River* would have no meaning.

Indeed, the facts of this case demonstrate the wisdom of the *Wind River* extension. Because Big Lagoon's application for the Entrustment was

noticed only for residential purposes, a use that did not implicate the State's interests, the State did not appear in the proceeding by providing comments to the BIA, or objecting to the entrustment. Moreover, the State did not have the option of raising, in an entrustment noticed for residential purposes, the possibility the entrustment might be utilized for gaming because speculation about a possible use is not grounds for opposing an entrustment. *South Dakota v. U.S. Dept. of Interior,* 314 F. Supp. 2d 935, 944-45 (D.S.D. 2004). Further, the State—because it relied on Big Lagoon's misrepresentation that the Entrustment would be used for residential purposes and on that basis decided not to oppose it—lacked standing to file an appeal or mount a judicial challenge. *California v. Acting Pacific Regional Director,* 40 IBIA 70 (2004) (State prevented from challenging entrustment decision on appeal where specific issue not raised in objection to proposed entrustment). Thus, its only option was to appear as an amicus. *Wind River*, however, extends the time for a state to challenge an entrustment until it is applied against the state as a party to an IGRA proceeding. This avoids the need for states and tribes to engage in purely hypothetical disputes that may never crystalize into actual controversies. The Opinion is appropriately limited to that context.

In contrast, the rule advanced by Big Lagoon and the United States would place an unreasonable burden on the State, the courts, and tribes by

forcing the State to object to and litigate every entrustment application—however innocuous it appeared to be at the time—on the mere chance that at some point in the future the entrustment might be applied against it for a different adverse purpose.

Finally, Big Lagoon's attempt to apply the Entrustment against the State in the earlier IGRA proceeding does not preclude the State from relying upon the *Wind River* extension in this suit because, as the Opinion notes (Op. at 9), the prior action was dismissed without prejudice pursuant to a settlement agreement entered into between Big Lagoon and the State. Because a dismissal without prejudice leaves the parties in the same legal position as if the suit had never been filed, *United States v. State of California,* 932 F.2d 1346, 1351 (9th Cir. 1991), *Humphreys v. United States*, 272 F.2d 411 (9th Cir. 1959), the only legally cognizable attempt to apply the Entrustment to the State is in the present action.

B. Big Lagoon's Claim That It Sought Authority to Place a Casino on Both Parcels Is Irrelevant Where Only One Is Gaming Eligible and Big Lagoon Never Proposed to Locate a Casino There

The Opinion focused on the status of the eleven-acre parcel and not the nine-acre parcel. Big Lagoon's other ground for seeking panel rehearing is its assertion that "[t]he record nowhere supports the majority's conclusion

that Big Lagoon insisted on locating a gaming casino on the eleven acres." (Pet. at 5.) This assertion is not correct.

In a March 31, 2008 letter to the State's negotiator, Big Lagoon's negotiator did not accept the State's proposal to put the casino on the nine-acre parcel and the hotel on the eleven-acre parcel and stated that:

> To date, all of the Tribe's plans have been to construct the entire Project on the 11 acre contiguous parcel, and the Tribe continues to believe that this is the best utilization of the Tribe's trust lands. Placing part of the project on the "original" Rancheria, would not only displace the Tribal housing that currently exists there, but by moving the construction closer to the water, it could also have a greater potential of impacting the visual aesthetics of the lagoon's shore.

(E.R. Vol. IV, at 612.) Moreover, in its letter of October 6, 2008, Big Lagoon made a "final" compact proposal in which it described a combined hotel and casino facility and environmental mitigation measures that it had previously submitted. (E.R. Vol. IV, at 619-20.) The only mitigation measures submitted by Big Lagoon were for a combined hotel and casino facility on the eleven-acre parcel. (Big Lagoon SER 79-83.) Thus, the Opinion does not err when it concludes that Big Lagoon insisted on placing a casino on the eleven-acre parcel.

In any event, the nine-acre parcel's eligibility as a casino site is entirely irrelevant where, as Big Lagoon concedes, it seeks the right to construct a casino on more than the nine-acre parcel. By requesting

negotiations for the right to construct a casino on the full twenty acres, Big Lagoon, of necessity, was asking for the right to construct a casino on the eleven-acre parcel. Thus, the status of the eleven-acre parcel was an issue that had to be addressed. The Opinion expressly disagrees with the district court's conclusion that the mere possession of some eligible land allowed Big Lagoon to negotiate for the right to put a casino on any land, irrespective of its eligibility. (Op. at 16-17.)

II. EN BANC REVIEW IS UNWARRANTED

No conflict exists with decisions of the Supreme Court and this Circuit. Further, the reach of this case is limited and it will not have the far-ranging and disruptive effects predicted by Big Lagoon and the United States. Thus, en banc review is not warranted.

A. The Opinion Follows Supreme Court Precedent Compelling Retroactive Application of Civil Decisions

Big Lagoon asserts that the Opinion conflicts with *Carcieri* because the Supreme Court evidenced no intent to apply its holding retroactively. The Opinion's application of *Carcieri* retroactively to the Entrustment, however, is entirely consistent with Supreme Court and Ninth Circuit precedent compelling the retroactive application of Supreme Court civil law decisions, unless such application would be barred by res judicata or a statute of limitations. *Harper v. Virginia Dept. of Taxation,* 509 U.S. 86, 97

(1993) (*Harper*); *Garfias-Rodriquez v. Holder,* 702 F.3d 504, 519 (9th Cir. 2012). The Supreme Court held in *Harper*:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

509 U.S. 86 at 97. The Ninth Circuit followed the Supreme Court's ruling. *Garfias-Rodriquez v. Holder,* 702 F.3d at 519.

As demonstrated *supra*, the State is not bound by any rulings in the administrative appeal of the Entrustment because, as an amicus, it was not a party to the proceedings. Likewise, none of the rulings in the prior IGRA suit are binding because that case was dismissed without prejudice. Thus, there is no res judicata obstacle to the retroactive application of *Carcieri.*

Similarly, there is no statute of limitations bar to the retroactive application of the *Carcieri* holding because the State qualifies for the *Wind River* extension, inasmuch as the dismissal without prejudice of the prior IGRA suit leaves this action as the only cognizable attempt to apply the Entrustment to the State.

B. The Opinion Does Not Conflict With *Backlund* or *Lowry*

Further, permitting the State to raise *Carcieri* as a defense, is not, as Big Lagoon and Amici suggest, inconsistent with the holdings in

United States v. Backlund, 689 F.3d 986 (9th Cir. 2012), or *United States v. Lowry,* 512 F.3d 1194 (9th Cir. 2008). In both those cases, the party who was the subject of an administrative decision elected to challenge the validity of the decision only after the government elected to enforce that decision—rather than in an Administrative Procedure Act (APA) suit immediately after the decision was rendered. In *Lowry* the enforcement proceeding was brought ten years after the administrative decision. In *Backlund*, the enforcement action came within six years of the decision. In *Backlund,* this Court held that a party who is the subject of an administrative agency decision could challenge the validity of that decision in an enforcement proceeding if the challenge was brought within the six-year APA statutory limit. *See also Coleman v. United States,* 363 F.2d 190, 196 (9th Cir. 1966). Those decisions are simply inapplicable to a person or entity that was not the subject of the administrative proceeding, or a party to the proceeding. Instead, as the Opinion notes (Op. at 22-23), when an individual or entity is not a party to an administrative decision, it may challenge that decision within six years of the date the decision is applied to it. *Wind River,* 946 F.2d at 715; *N.L.R.B. Union v. Federal Labor Relations Auth.,* 834 F.2d 191, 196 n.6 (D.C. Cir. 1987).

C. The *Wind River* Extension Is Not Confined to the Adoption of Regulations

Big Lagoon and Amici suggest that the *Wind River* exception is confined to decisions constituting the adoption of regulations and other standards of general applicability. *Wind River*, however, contains no such limitation. Indeed, the Court specifically included challenges not only to the adoption of a regulation, but also to "other agency action." *Wind River,* 946 F.2d at 715.

D. The Opinion Does Not Conflict With the Supreme Court's Decision in *Minnesota v. United States*

Big Lagoon and Amici assert that the Opinion's failure to require joinder of the federal government in a suit over the validity of an entrustment decision creates a conflict in the case law because the United States has an interest in the administration of Indian trust lands and therefore is an indispensable party under the rule enunciated in *Minnesota v. United States*, 305 U.S. 382, 386 (1939). This contention is refuted by this Circuit's decisions in *Lyon v. Gila River Indian Community*, 626 F.3d 1059 (9th Cir. 2010) and *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983). These cases specifically distinguish *Minnesota v. United States,* 305 U.S. 382, and hold that where a tribe brings suit to enforce an interest in land, the tribe can adequately represent the interests of the United States and, thus, that the federal government is not an indispensable party. *Lyon v. Gila*

River Indian Community, 626 F.3d at 1071. Here, the Opinion makes clear that it does not affect any interest other than "the parties' respective rights under IGRA" (Op. at 28 n.8) and no divestment of the United States' interest is sought.

E. The Participation of the United States Is Not Required

Big Lagoon and Amici also argue that the Opinion conflicts with decisions such as *United Tribe of Shawnee Indians v. United States,* 253 F.3d 543, 551 (10th Cir. 2001), requiring courts to allow the Department of the Interior to determine, in the first instance, whether a particular Indian group is entitled to recognition. The Opinion does not rule on Big Lagoon's current status. Thus, this case is not germane.

Similarly, there was no reason to seek the federal government's assistance in resolving a question of law as to the meaning of the phrase "any recognized tribe now under federal jurisdiction." The Court is fully capable of interpreting the Indian Reorganization Act in light of analogous Supreme Court precedent. Further, as this Circuit has noted, a tribe in Big Lagoon's circumstance can adequately represent the interest of the United States, *Lyon v. Gila River Indian Community*, 626 F.3d at 1071, where the tribe seeks to enforce its own interest in the land and the issue involves something wholly within the tribe's expertise—its own history; there is thus no compelling reason to refer the matter to the United States. Indeed, given

the undisputed facts in this case—that Big Lagoon had no tribal existence in 1934—a conclusion by the United States that Big Lagoon was "under federal jurisdiction in 1934" would render the *Carcieri* standard utterly meaningless.

F. The Opinion Does Not Open Old Entrustment Decisions to Review Any More Than Permitted by the Rule of Retroactive Application and *Wind River*

Big Lagoon suggests that the Opinion will open all entrustment decisions to review, thereby upending settled expectations regarding millions of acres. This fear is unwarranted. The Opinion does not open old decisions to review anymore than already permitted by Supreme Court decisions on retroactivity and *Wind River*, and is even more circumscribed than that by limiting its scope to cases involving compact negotiations under IGRA.

In requiring that its civil law decisions be applied retroactively, the Supreme Court valued uniform application of substantive law over case-by-case consideration of the actual reliance on an old rule, or the harm that might stem from application of the new standard. *Harper*, 509 U.S. at 97. The only limitation it imposed was that a case still be open to direct review (meaning no res judicata or statute of limitations bar). *Id.* Likewise, in

Wind River, this Circuit ruled that its extension of the statute of limitations did not throw open the courthouse doors without limitation:

> Within the narrow scope of challenges to agency decisions that we permit, there are still impediments to repeated attacks upon an agency action. The challenge must be brought within six years of the agency's application of the disputed decision to the challenger. As in this case, principles of res judicata will likely bar further challenges to the agency decision once the claimant's first challenge is resolved.

946 F.2d at 716. Here, there are no res judicata or statute of limitations issues, the ruling applies solely to an entrustment relied upon in compact negotiations, and the vintage of the Entrustment is the product of the unusual circumstance in which a prior lengthy IGRA proceeding was dismissed without prejudice. Thus, the Opinion will have no more retroactive impact than otherwise permitted by decisions of the Supreme Court and this Circuit.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny both panel rehearing and rehearing en banc.

Dated: April 2, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General

S/ PETER H. KAUFMAN
PETER H. KAUFMAN
Deputy Attorney General
Attorneys for Defendant and Appellant/Cross-Appellee State of California

S

Certificate of Compliance Pursuant to Circuit Rules 35-4 and 40-1
FOR 10-17803/10-17878

I certify that, pursuant to Circuit Rules 35-4 and 40-1, the attached Appellant/Cross-Appellee State of California's Response to Petition for Panel Rehearing and Rehearing En Banc is: (check applicable option)

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April 2, 2014
Dated

s/ Peter H. Kaufman
Peter H. Kaufman
Deputy Attorney General