No. 16-5082

[ORAL ARGUMENT HAS NOT BEEN SCHEDULED]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMADOR COUNTY, CALIFORNIA,

Plaintiff-Appellant

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *ET AL.*

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANT'S UNOPPOSED AMENDED PETITION FOR REHEARING *EN BANC*

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STATEMENT REQUIRED BY FEDERAL RULE OF APPELLATE PROCEDURE 35(B)(2)

The Appellant Movant respectfully submits this Unopposed Amended Petition for Rehearing *En Banc* in accordance with Rule 35(b)(2) of the rules of this Court. Counsel for Appellees consents to the filing of this motion, with the expectation that it will be filed within the original 45 day filing period. This proceeding involves one or more questions of exceptional importance that the panel decision conflicts with the reasons recited for the relief denied. The panel decision assumes that the Appellant consented to all tribal activity that might occur, regardless of whether that activity is illegal as a matter of federal law. Appellant respectfully submits that the challenged activity is illegal as a matter of federal law and thus, appropriately raised by Appellant.

I. INTRODUCTION

This Petition for Rehearing *En Banc* is respectfully submitted in response to this Court's Order of November 27, 2017, rejecting Appellant's arguments and ruling in favor of the federal Appellee Defendants (herein known as "November 27 Judgment"). It is timely filed in accordance with DC Cir R. 41 and Fed. R. App. P. 41(b).

Central to this litigation is the fact that the County and the Indian tribe known as the Buena Vista Rancheria (herein known as "Tribe") in 1987, entered

into an agreement for the express purpose of implementing a Stipulated Judgment executed in 1983 by private litigants and the United States resolving litigation known as *Tillie Hardwick, et al. v. United States*, No. C-79-1710 SW (N.C. Cal. Filed Dec. 27, 1979). The earlier document is referred to herein as the "1983 *Hardwick* Stipulation." Correspondingly, the later document is referred to herein as the 1987 *Hardwick* Stipulation.

The Buena Vista Rancheria is located within the boundaries of Amador County.

The 1983 *Hardwick* Stipulation between the federal government and the *Hardwick* Class was executed for the purpose of implementing the California Rancheria Act of August 18, 1958 (Public Law 85-671), which reversed an earlier federal law terminating federal recognition for California Rancheria tribes, including the Tribe. Subsequently, the County and the Tribe entered into discussions to resolve outstanding County tax issues directly associated with matters addressed in the 1983 *Hardwick* Stipulation. The *raison detre* for the County-Tribe negotiation was resolution of substantial unpaid County real property taxes on tribal assets and the Rancheria land that had been assessed during the period of federal termination of the Tribe's federal recognition.

The product of the County-Tribe negotiation was the 1987 *Hardwick* Stipulation Judgment, which dealt with the tax issues between the parties. While the County did not have—and could not have had—any role in whether the Tribe regained federal recognition, it did have standing for resolution of the single issue on its agenda: unpaid County taxes on tribal land. Underscoring this point is the fact that the only County officials at the table were the Amador County Tax Collector, the Amador County Assessor, and their attorney, the Amador County Counsel.

As the November 27 Judgment correctly noted, the 1987 *Hardwick* Stipulation specifically provided that the County would "treat[]" the Buena Vista Rancheria "as any other federally recognized Indian reservation" and that "all of the laws of the United States that pertain to federally recognized Indian Tribes and Indians shall apply" to the Rancheria. Nothing in that Stipulation waived the County's right to challenge unlawful tribal activity, especially activity that violates any applicable federal laws. Among the federal laws covered by the 1987 *Hardwick* Stipulation is the statute pursuant to which Indian gaming may be lawfully conducted: Indian Gaming Regulatory Act of October 17, 1988, 25 U.S.C. §2701, *et seq.* (herein referred to "IGRA").

One of IGRA's most critical elements is that it plainly and strictly defines land on which tribal gaming lawfully may be conducted. And, any Indian tribal gaming conducted on land that does not comply with IGRA is illegal.

The County's litigation has nothing to do with (a) the Tribe's federal recognition of the tribe, (b) the Tribe's right to lawfully conduct gaming or (c) any other lawful activity unique to Indian tribes in the United States. Indeed, it is clear from the 1987 *Hardwick* Stipulation that the County contemplated that tribal activity within the Rancheria would fully comply with—but not violate—"the laws of the United States that pertain to federally recognized Indian Tribes and Indians."

While the County agreed to "treat" the Rancheria as a reservation, it did so in the context of tribal claims that the land indeed had reservation status. A County agreement to "treat" the land as a reservation does not convert the non-reservation land to reservation status. Moreover, such an agreement does not legalize activity on that land which otherwise is illegal under applicable federal law.

Plainly stated, the 1987 Stipulation could not have created federal Indian reservation status for gaming as a matter of law.

The issue for this Court should be whether the land qualifies as reservation land for the purposes of gaming under IGRA as the County asserts. If it does not,

then the Tribe cannot conduct gaming thereon as a matter of federal law until, and unless, it identifies some other "gaming land" category defined by IGRA which is applicable to the site. If none exists, then no tribal gaming can be legally conducted.

The question in this litigation has always been whether the gaming activity proposed by the Tribe is lawful under IGRA. If it is not, then the County is entitled to judgment in its favor.

II. ARGUMENT

A. The County Did not Consent to Illegal Activity Within the Rancheria.

This Court found that the County cannot now challenge the qualification for gaming under an agreement that predated the legalization of Indian gaming and was unforeseeable at the time the agreement was executed.

The County did not waive its right to protect its interest in insuring that any Indian gaming conducted within the County complies with IGRA's requirement that Indian gaming can only be conducted on land that qualifies under that law.

Any reading of the 1987 *Hardwick* Stipulation fails to show the County's intent to be bound by any illegal tribal conduct or even federal approval – whether formal or informal – of illegal activity.

As to the issue of whether gaming on the Rancheria is legal, the parties agree that the Buena Vista Rancheria land is not now, and has never been, in federal trust status. This fact defeats any argument by Defendants that the land satisfies the "trust land" portion of the requirement that the land cannot be used for Indian gaming unless it (i) was in "trust or reservation status" as of October 17, 1988, as required by IGRA Section 20, 25 U.S.C. §2719, or (ii) otherwise qualifies for one of IGRA's other statutory exceptions, none of which are at issue in this litigation. *See* 25 U.S.C. §2719(B)(1)(a)-(b).

Moreover, the federal defendants have never claimed that the land has ever been formally declared to be "reservation" land through either federal legislation or official action by the Secretary of the Interior. To the contrary, the only federal action identified to explain the absence of statutory qualification for gaming on the Rancheria land has come in undocumented assertions in this litigation by the federal attorneys or record that the Secretary has "considered" the land to be in reservation status. Such a casual assumption does not satisfy federal law controlling the Secretary's ability to proclaim reservation status for any land. *See* 25 U.S.C. §467.

The half-hearted and undocumented assertion that the land satisfies the "reservation" requirement is nothing more that a vague and unprecedented

Secretary's "considering" the land to have such status. There is no statutory or judicial foundation supporting such a claim. The fact is that that the land was not in trust or reservation status as of the date on which IGRA became law on October 17, 1988.

The County's agreement was to honor matters that are compliant with the federal laws applicable to Indian tribes. It did not waive its right to challenge any future violation or avoidance of those laws. And nothing in either the 1983 or 1987 *Hardwick* Stipulations contains any language to the contrary.

B. The County's Arguments Are Material and Properly Before This Court.

The November 27 Judgment concluded that the County waived its claims to challenge tribal activity on the Rancheria when it executed the 1987 *Hardwick* Stipulation without even considering the legality of the tribal activity.

This Court's conclusion was derived from the provision that the Rancheria land "shall be treated" by the County as any other federally recognized Indian Reservation without restriction. Again, it is emphasized that the Court failed to acknowledge the fact that the 1987 Stipulation was a tax settlement, as shown by the fact that it was negotiated by the three principal County officials involved in taxation issues: (a) the Amador County Tax Collector, (b) the Amador County Tax Assessor, and their attorney (c) the Amador County Counsel. There was no

consideration of possible gaming on any County land. Indeed, Indian Gaming was not legalized until October 17, 1988, so any Indian gaming was in the future whether legal or illegal. Indeed, Indian gaming was beyond the scope of concern for either the County or the Tribe. For this Court to now define the 1987 *Hardwick* Stipulation as an agreement to ignore future illegal activity by the Tribe bearing no relation to taxation puts the County in an untenable position without ability to challenge tribal activities no matter how egregious.

And it is significant that the November 27 Judgment did not address the question of whether the proposed gaming activity would be legal.

C. The November 27 Judgment Ignored the County's Extensive Briefing of the Federal Laws Defining "Reservation" and the Illegality of Tribal Gaming at the Rancheria.

These issues have been extensively briefed in this litigation, and need not be briefed again for the purposes of this motion.

In its Final Reply Brief filed with the lower court on June 6, 2017, the County addressed the Reservation-centric issues in detail as follows:

> "Reservation" Is a Legal Status and Not a Term Uniformly Applied to Lands Otherwise Characterized as "Indian Country."
>
> The Rancheria Is Not Eligible for Class III Gaming Because It Was Neither Trust Nor Reservation Land as of October 17, 1988.

The November 27 Judgment did not address any of the discussion in these two arguments, an important element to this litigation since each they undermine the Court's determination that the County had waived its right to challenge any tribal activity within the Rancheria without regard to whether the activity is illegal as a matter of the laws of the United States pertaining to Indian tribes.

III. CONCLUSION

The November 27 Judgment erred in its failure to consider the fact that the 1987 *Hardwick* Stipulation was a tax settlement and in the process effectively ruled that the County waived its right to challenge to the legality of any tribal activity within the Rancheria. This potentially means that the Tribe could ignore any need to comply with IGRA and commence Indian gaming without regard to whether the land is legally eligible for that gaming.

The County intended that the 1987 Stipulated Judgment was a tax settlement. To this point, it provided that the County would treat the Rancheria as a federally recognized Indian reservation for the purposes of the tax settlement, an intention that is clear from any reading of the document. There is nothing in that document waiving the County's right to challenge legitimate concerns about what it believes to be violations of federal law. IGRA unequivocally states that the Secretary may not approve gaming on land that was ineligible for gaming on

October 17, 1988. The County certainly could not have lawfully stipulated an eligibility that did not exist, and it did not agree to be bound by unlawful federal actions involving the Rancheria land.

DATED this 13th day of December 2017.

AMADOR COUNTY, CALIFORNIA
By Counsel

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FRAP 31(A)(7) CERTIFICATE OF COMPLIANCE

In compliance with Federal Rule of Appellate Procedure 31(a)(7), I certify that the forgoing contains 1,977 words, excluding parts of the document that are exempted by the Rule.

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all listed counsel of record.

/s/ Dennis J. Whittlesey
Dennis J. Whittlesey

ADDENDUM

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5082 **September Term, 2017**

FILED ON: NOVEMBER 27, 2017

AMADOR COUNTY, CALIFORNIA,
APPELLANT

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:05-cv-00658)

Before: GARLAND, *Chief Judge*, and PILLARD and WILKINS, *Circuit Judges*.

JUDGMENT

This petition for review was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The court has accorded the issues full consideration and determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the district court's order of March 16, 2016 be affirmed.

Amador County challenges the Department of the Interior's authorization of gaming on land, known as the Buena Vista Rancheria, that is owned by the Me Wuk Tribe. Its suit turns on whether the Rancheria is a "reservation" within the meaning of the Indian Gaming Regulatory Act. *See* 25 U.S.C. §§ 2703(4), 2710. In 1987, in *Hardwick v. United States*, No. C-79-1710 (N.D. Cal. Apr. 21, 1987), the County and the *Hardwick* plaintiffs from the Buena Vista Rancheria agreed to a stipulated judgment stating that the County would "treat[]" the Buena Vista Rancheria "as any other federally recognized Indian reservation," and that "all of the laws of the United States that pertain to federally recognized Indian Tribes and Indians shall apply" to the Rancheria. Joint Appendix 31. As the district court found, the agreement's plain language "unambiguously sets forth the parties' intent that the County

would treat the Buena Vista Rancheria as a reservation." 170 F. Supp. 3d 135, 144 (D.D.C. 2016). And as this court noted in an earlier appeal, such a "clear[] manifest[ation of] the parties' intent to be bound in future actions" precludes the County from arguing here that the Rancheria is not an Indian reservation. *See Amador County v. Salazar*, 640 F.3d 373, 384 (D.C. Cir. 2011) (citing *Otherson v. Dep't of Justice*, 711 F.2d 267, 274 n.6 (D.C. Cir. 1983)).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMADOR COUNTY, CALIFORNIA	)	
Appellant,	)	
v.	)	**Case No. 16-5082**
UNITED STATES DEPARTMENT OF THE INTERIOR, *ET AL.*	)	
Appellees.	)	

CERTIFICATE OF PARTIES

Pursuant to Circuit Rule 28(a)(1)(A), Appellant Amador County, California states as follows:

Parties and Amici: The parties who appeared before the District Court and who are parties in this Court are: Plaintiff-Appellant, Amador County, California; Defendant-Appellee, United States Department of the Interior; Defendant-Appellee, Ryan Zinke, in his Official Capacity as Secretary of the Interior; and Defendant-Appellee Michael Black, in his Official Capacity as Acting Assistant Secretary—Indian Affairs. There are no Amici in this appeal.

December 13, 2017

Respectfully submitted,

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