No. 17-15245

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY, a federally recognized Indian Tribe,
Plaintiff-Appellant,

v.

RYAN ZINKE, Secretary of the Interior, *et al*.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA (No. 2:12-cv-03021-TLN-AC)

PLAINTIFF-APPELLANT'S PETITION FOR PANEL REHEARING

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Pursuant to F.R.App.P. 40(a)(1)(B) and (C), Appellant, the Cachil Dehe Band of Wintun Indians of the Colusa Indian Community ("Colusa") hereby petitions the panel for a rehearing of the Opinion entered in the above-entitled action on May 2, 2018. This petition is based on the following grounds:

1. The Opinion failed to address and consider the legal significance of the fact that the Department of the Interior ("Interior") failed to consult with Colusa, as a nearby Tribe that Interior knew would be adversely impacted by the proposed Enterprise project, at any time between August 13, 2002, when Enterprise first applied to have the Yuba site taken into federal trust for a casino, and promulgation of 25 C.F.R. Part 292 in September, 2008, when Interior formally shrank the previous radius for mandatory consultation from 50 miles (73 Fed. Reg. 29354, 29357) to 25 miles; and

2. The Opinion failed to address and consider Colusa's argument that Interior, as Colusa's trustee, had a duty to treat Colusa's June 23, 2009 letter requesting consultation as a sufficient request for consultation, given that Enterprise and Interior knew from Exhibit M to the DEIS that the proposed Enterprise casino would deprive Colusa of more than $100 Million in gaming revenues over a 25-year period.

ARGUMENT

I. THE OPINION FAILED TO ADDRESS AND CONSIDER THE LEGAL SIGNIFICANCE OF THE FACT THAT INTERIOR FAILED TO CONSULT WITH COLUSA AS A "NEARBY TRIBE" BEFORE SHRINKING THE RADIUS FOR CONSULTATION FROM 50 TO 25 MILES.

The panel affirmed Interior's determination that Colusa was not entitled to mandatory consultation about Enterprise's application for a two-part determination because Colusa is located more than 25 miles from the Yuba site. However, even as the Opinion recited the history of the application, it failed to address the fact that Interior did not shrink the radius for mandatory consultation until very late in its review of the application.

Specifically, in mid-2001, Enterprise's proposed gaming developer, Gerald Forsythe, established Yuba County Entertainment LLC ("Enterprise's Developer"), a Delaware limited liability company, the sole member of which is his racing corporation. That same year, Forsythe commissioned a study by The Innovation Group that found that a casino on Yuba County land already owned by Forsythe would be profitable by "cannibalizing" the casino business of several nearby tribes, including Colusa. ARN 0000389 (EOR Vol. 4, p. EOR-000735), 0000428 (EOR Vol. 4, p. EOR-000737). The crux of the 2001 study – that cannibalization of other Indian tribal governments' casinos would provide more than half of the

gaming revenues at a Yuba County casino – remained unchanged through the last economic report included in the FEIS on which Interior based its decisions to approve the land for gaming and to accept the land into federal trust for that purpose.

A second report was prepared by Gaming Market Advisors for Enterprise's Developer and Analytical Environmental Services in June 2006, and estimated that $76.8 Million out of $132 Million in expected gaming revenues would come from cannibalizing the income of other tribal casinos. ARN 24810-812 (EOR Vol. 4, pp. EOR-000738-EOR-000742).

When the Gaming Market Advisors analysis that became Appendix M to the FEIS was prepared, Colusa, located only about 31 miles from Forsythe's Yuba County property, was considered by Interior to be a "nearby Indian Tribe" for purposes of consultation under 25 U.S.C. § 2719(b)(1)(A). *See*, *e.g.*, 65 Fed. Reg. 55471-74 (9/13/2000), formally proposing a 50-mile radius for mandatory consultation, rather than 100-mile radius then being utilized.

Not until 2006 did Interior propose a formal rule that would shrink to 25 miles the radius within which it would consider a Tribe to be "nearby" for purposes of mandatory consultation in connection with Secretarial two-part determinations to take after-acquired off-Reservation lands into trust for gaming.

That rule, 25 C.F.R. Part 292, did not become final until September, 2008. 73 Fed. Reg 29354.

It is undisputed that at no time between August, 2002 and September, 2008 did Interior even offer to consult with Colusa about the Enterprise project, even though Colusa was a "nearby Tribe" entitled to consultation. Instead, Interior waited until after the shrunken radius took effect to move forward with the project. The Opinion completely overlooked that omission.

Simply put, even assuming – without conceding – that Interior validly reduced the radius for mandatory tribal from 50 to 25 miles, during the entire six-year period preceding the effective date of that definition in September, 2008, Colusa clearly was a "nearby Tribe" entitled to consultation. Interior's failure to consult with Colusa despite Interior's knowledge that the project would have a significant adverse impact on the revenues of Colusa's casino (*see* federal defendants' Answer, ECF Doc. 63, at ¶ 32), and thus on Colusa's government, prejudicially violated 25 U.S.C. § 2719(b)(1)(A), rendering the Part 292 ROD arbitrary, capricious and contrary to law.

II. THE OPINION FAILED TO ADDRESS AND CONSIDER COLUSA'S ARGUMENT THAT, INTERIOR, AS COLUSA'S TRUSTEE, HAD A DUTY TO TREAT COLUSA'S JUNE 23, 2009 LETTER REQUESTING CONSULTATION AS A SUFFICIENT REQUEST FOR CONSULTATION.

When the Bureau of Indian Affairs ("BIA") in Sacramento initiated its consultation process for the Enterprise project in January, 2009, BIA did not include notice to Colusa because, as the Opinion noted, under the regulations applicable to two-part determinations that took effect in September, 2008, Colusa's Reservation is located more than 25 miles from the Yuba site.

By letter dated June 23, 2009, Colusa formally requested consultation, but instead of granting Colusa's request, the BIA simply offered Colusa the opportunity to "submit comments and/or documents that establish that your governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment."

As noted in the preceding section of this Petition, prior to September, 2008, Colusa without question was a "nearby Tribe" with which Interior was obligated to consult concerning the proposed Enterprise project, a fact that the Opinion failed to consider. However, Interior failed to consult with Colusa despite the undisputed fact that the BIA already possessed sufficient information from Appendix M to the DEIS to conclude that Colusa would be "directly, immediately and significantly impacted by the proposed gaming establishment."[1]

[1] Interior could not seriously have assumed that diversion to Enterprise of more than $100 Million in Colusa's casino revenues, and thus from its government, over the anticipated 25-year term of either a Tribal-State gaming

DOI's trust obligations to every Indian tribe and its members must be judged by "the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). "The federal government owes a fiduciary obligation to all Indian tribes as a class." *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 788 (9th Cir. 2006) (emphasis added).

Interior owed Colusa at least the same fiduciary duty to avoid deliberately depriving Colusa of the benefits of the Indian Gaming Regulatory Act as it owed to Enterprise to facilitate access to those benefits. See *Redding Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015) ["The government owes the same trust duty to all tribes." *Confederated Tribes of Chehalis Indian Reservation v. Washington.*, 96 F.3d 334, 340 (9th Cir. 1996). It cannot favor one tribe over another."] However, by requiring Colusa to petition for consultation, rather than treating Colusa's letter as a sufficient request based on information already possessed by Interior, Interior clearly favored Enterprise over Colusa to Colusa's extreme detriment.

Just as ambiguities in federal enactments concerning Indian Tribes should

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compact or Class III Secretarial Procedures would not have a direct, immediate and significant impact on Colusa's government's revenues and its ability to perform vital governmental functions.

be liberally construed in favor of Indians,[2] so should the BIA have construed Colusa's letter as a sufficient request for consultation, rather than requiring Colusa to surmount additional obstacles for the purpose of providing information the BIA already had. Indeed, had the BIA responded to Colusa's letter by agreeing to consult with Colusa in 2009, Colusa would have had the opportunity to commission the costly Meister study and report[3] and submit its proprietary information to the BIA on a confidential basis long before Interior issued either the Part 292 or Part 151 ROD.

Colusa does not contend that the Indian Gaming Regulatory Act guarantees Colusa or any other Tribe a geographic monopoly against *fair* competition from other tribes. Rather, Colusa contends that 25 U.S.C. § 2719(b)(1)(A) evidences Congressional intent that Interior, as the trustee for all Tribes, not actively use the two-part determination process to deliberately target a Tribe or Tribes for economic harm to benefit yet another Tribe, as occurred in this case, or to subject a request for consultation by a Tribe such as Colusa, which Interior knows will be

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[2] *See, e.g.*, *Choate v. Trapp*, 224 U.S. 665 (1912); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

[3] The District Court struck the summary as outside the Administrative Record, and this Court affirmed that ruling.

adversely impacted by the approval of a two-part determination, to a hypertechnical interpretation based on a regulation newly promulgated late in the review process, and after Interior failed to consult with Colusa during the preceding six years that Colusa clearly qualified as a nearby Tribe entitled to mandatory consultation about Enterprise's application. Interior's treatment of Colusa's letter not only violated Interior's trust obligation to Colusa, but was arbitrary and capricious as well.

CONCLUSION

Interior violated the Indian Gaming Regulatory Act by failing to consult with Colusa as a "nearby Tribe" during the six years that preceded the narrowing of the radius for mandatory consultation in September, 2008, and Interior violated its trust obligation to Colusa by rejecting Colusa's June 23, 2009 request for consultation as insufficient, given Colusa's previous status as a "nearby Tribe" that Interior knew would be significantly adversely impacted by the proposed Enterprise casino project.

For these reasons, the panel should revise its Opinion to incorporate the foregoing determinations, the district court's judgment should be reversed, and the matter should be remanded to the district court with instructions to vacate Interior's Part 292 and 151 Records of Decision and remand the matter to Interior

for consultation with Colusa on the Part 292 ROD, and because the Part 151 ROD was premised on the favorable Part 292 ROD, further consideration of the Part 151 ROD in light of those consultations.

Dated: June 15, 2018

Respectfully submitted,

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