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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

CLUB ONE CASINO, INC., dba CLUB ONE CASINO; GLCR, INC., dba THE DEUCE LOUNGE AND CASINO,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR; RYAN ZINKE, in his official capacity as Secretary of the Interior; and MIKE BLACK in his official capacity as Acting Assistant Secretary of the Interior – Indian Affairs,

Defendants.

No. 1:16-cv-01908-AWI-EPG

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION TO SUPPLEMENT THE RECORD

Hearing Date: TBD
Time:
Location:

INTRODUCTION

Defendants' response to plaintiffs' motion to supplement misses the point and misstates plaintiffs' argument. There is no dispute as to the standards that govern a request to supplement the record in an APA case. But that said, there *is* a major issue here regarding when and how territorial jurisdiction transfers from a state to the federal government, and whether defendants properly analyzed that IGRA prerequisite when they issued the Secretarial Procedures challenged here.

Defendants are authorized to issue Secretarial Procedures for the operation of Tribal casino gaming *only* if the gaming will be on Indian lands "over which the tribe has jurisdiction." 25 U.S.C. § 2710(d)(7)(B)(vii); see also 25 U.S.C. §§ 2710(d)(1) and 2710(d)(3)(A). The determination of jurisdiction over the property requires a review of the ownership history of the land. The fact that the deeds and other requested documents were readily available, yet not included in the administrative record, demonstrates that the defendants did not evaluate the relevant factor of territorial jurisdiction.

Case law allows supplementation of the administrative record "to determine whether the agency has considered all relevant factors and has explained its decision." *Lands Council v. Forester of Region One of the U.S. Forest Service*, 395 F.3d 1019, 1030 (9th Cir. 2004); see also *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197-198 (D.D.C. 2005); *Pac. Shores Subd. Calif. Water Dist. v. United States Corps of Engineers*, 448 F. Supp. 2d 1, 5-6 (D.D.C. 2006)(same rule applies to submission of extra record materials; court commented that "[c]onsideration of extra-record information is appropriate when simply reviewing the administrative record is not enough to resolve the case").

Plaintiffs request that the deed history be considered for this limited purpose.

ARGUMENT

1. Plaintiffs Do Not Challenge Defendants' Decision To Take the Land Into Trust. The Issue Is The Effect Of That Decision.

Despite defendants' protestations, this is not a case in which plaintiffs seek to "collaterally challenge" prior decisions made by the Department of the Interior. There is no contention that the federal government could not, or did not, acquire title to the subject property and place it in trust for the North Fork Tribe. The issue is the *effect* of that action. The parties have a fundamental disagreement over the effect of the instant trust acquisition, but not the fact that the land transfer and trust designation occurred.

The merits question for the court is simple and straightforward: when and how does territorial jurisdiction shift from the State of California to the United States government? Defendants contend it occurs automatically when property is placed in trust for a tribe. Plaintiffs contend, and are prepared to brief in a motion for summary judgment, that the federal government can secure territorial jurisdiction over land within a state's border in only three ways: (1) upon a state's admission to the Union; (2) when the United States exercises its constitutional rights under the Enclaves Clause (U.S. Const., Art. I, sec. 8, cl. 17); or (3) when the state affirmatively cedes jurisdiction to the federal government. See *Ft. Leavenworth RR Co v. Lowe*, 114 U.S. 525 (1885); 40 U.S.C. §3112. None of those things occurred here.

The territorial jurisdiction issue is central to this case, just as it is central to IGRA. A tribe cannot engage in Class III gambling, unless and until it first acquires territorial jurisdiction over the casino site. (Parenthetically to illustrate the point, a tribe cannot even request that a state negotiate a compact for Class III gambling unless it has territorial jurisdiction; see 25 U.S.C. § 2710(d)(3)(A). A fortiori, the Secretary cannot issue Class III gaming procedures under section 2710(d)(7)(B)(vii) unless the territorial jurisdiction prerequisite is in place.)

2. Plaintiffs' Motion Enables the Court to Assess Whether Defendants Properly Considered the Jurisdiction Issue.

Plaintiffs' motion to supplement enables the court to have before it a full and complete record upon which to assess whether defendants properly considered the jurisdiction issue. And for there to be a complete record, the work defendants have done to analyze the proposed casino site—including work that was included and summarized in the two Records of Decision ("RODs") that plaintiffs' seek to add to the record—must be included.

a. Records of Decision (RODs).

Although there are references in the Administrative Record to the first ROD, issued in 2011 (the so-called "2719 determination"), the reference is only partial (i.e., to excerpts) and contained in a letter sent by Larry Echo-Hawk, the Assistant Secretary – Indian Affairs to Governor Brown. That letter, in turn, is itself an exhibit to a letter submitted by the Chukchansi Tribe protesting this project. See AR 143-144 (Chukchansi letter) and 240-291 (Echo-Hawk letter).

If the defendants and the court agree plaintiffs can cite to those ROD excerpts as they presently exist in the record for the purpose of making arguments on the merits,[1] we accept that determination, but still suggest that it is preferable to have the entire source document in the record for the parties and the court, rather than snippets clipped from it. Plaintiffs' concern in referencing an exhibit to a third party's letter, or excerpts of an original document, is the possible argument regarding authenticity or the level of consideration that was given to the ROD.

The second ROD (the 2012 land-to-trust decision) is indeed included in the record, but it, too, is merely an exhibit submitted by the Chukchansi Tribe. See AR at 159-227. Again, and as

[1] See defendants' opposition memorandum, ECF 25 at p. 1, line 23 through p. 2, line 3.

noted immediately above, plaintiffs are simply preserving their right to make their case from the actions taken by defendants that led up to the challenged Secretarial Procedures. If plaintiffs can cite to the 2012 ROD re the land-to-trust decision as presently situated in the record, that is satisfactory for our purposes.

b. Deed History of the Property.

As we explained in our earlier memorandum (see plaintiffs' opening memorandum, ECF 22 at p. 9), judicial analysis of the issue of territorial jurisdiction necessarily requires reviewing the history of the land in question, particularly "the long history of state sovereign control over the territory." *City of Sherrill v. Oneida*, 544 U.S. 197, 214 (2005); see also *Rosebud Sioux Tribe v. Kneip*, supra, 430 U.S. 584, 605 (1977). Without such a review, there is no way to show whether jurisdiction ever shifted from California to the federal government. If defendants had analyzed the territorial jurisdiction issue, these deeds would be included in the administrative record.

The documents should now be considered under the "relevant factor" exception.

c. Station Casinos Documents.

The documents pertaining to Station Casinos should be added to the record in order to update information previously presented by defendants. As submitted by defendants, the administrative record does not accurately indicate who transferred the property to the federal government. To illustrate, the record states that as of September 1, 2011, the casino site was owned by Fresno Land Acquisitions, LLC, an affiliate of SC Madera Development, LLC (see AR 244). However, prior to that time—and specifically on June 23, 2011—the land had already been transferred to another entity, NP Fresno Land Acquisitions, LLC. There is no reference in the record alluding to that transfer or to the affiliation of the transferee with Station Casinos. It was NP Fresno Land Acquisitions, LLC that eventually deeded the property to the United States.

The documents relating to the deed history of the subject property and identity of the parties who combined to donate the property to the federal government in 2013 are also relevant to the jurisdiction issue. They demonstrate that the property has never been occupied or governed by a tribe and that the land was not purchased by the tribe; it was bought by a Nevada gaming company seeking to cross the border and engage in activity that would be illegal except on lands under Indian jurisdiction.

3. Defendants' Opposition Memorandum Incorrectly Asserts That Jurisdiction Transfers Upon the Recording of A Deed

As a closing observation, and perhaps as prelude to the discussion that will soon follow on summary judgment, we note that defendants are wrong when they assert in their opposition memorandum that territorial jurisdiction shifts automatically upon the transfer of title.[2] The federal government has acknowledged elsewhere that this is not the law. "Acquisition of land and acquisition of federal jurisdiction over that land are two different things." *See* Principles of Federal Appropriations Law (Ofc. the General Counsel, U.S. Gov't Acct'g Ofc., 3d ed. (2008), vol. III, ch. 13, p. 13-101 (the "GAO Report") (available at http://www.gao.gov/special.pubs/d08978sp.pdf (last accessed May 3, 2017).)

The GAO Report also notes: "When we talk about jurisdiction over federal land, we are talking about the federal-state relationship. The first point is that, whether the United States has acquired real property voluntarily (purchase, donation) or involuntarily (condemnation), *the mere fact of federal ownership does not withdraw the land from the jurisdiction of the state in which it is located…." Id.* (emphasis added).

[2] See defendants' opposition memorandum, ECF 25 at p. 2, lines 11-12; p. 8, lines 8-10 and n.2

In addition, the cases cited by defendants on the jurisdiction point readily illustrate the problem with their approach, for the cases involve lands that never were subject to a state's territorial jurisdiction. Thus, in *Williams v. Lee*, 358 U.S. 217 (1959), the land in question was a Navajo reservation before Arizona became a state. The same pattern followed in *Nevada v. Hicks*, 533 U.S. 353 (2001), which involved an Indian reservation created on land that was reserved out in the admission statute that created Nevada's statehood. In *United States v. John*, 437 U.S. 634 (1978), there was a long history of Indian occupation of the land in question, including before Mississippi became a state. The same is true of *United States v. Pelican*, 232 U.S. 442 (1914)(Colville reservation, established by Executive Order in 1872, prior to Washington's admission to the Union in 1889, and further protected from state jurisdiction by subsequent statutory enactments and Executive Orders).

In short, the cases cited by defendants are consistent with the rule cited above that the federal government can reserve jurisdiction over lands when admitting a state, or obtain it via cession thereafter. None of these cases supports the unfounded notion that a state's historic territorial jurisdiction changes upon the recording of a deed transferring property within state borders to the federal government. Indeed, the cases cites by defendants are a world apart from the situation at issue here, which involves land that was governed by the State of California for well over a century prior to the transfer to the United States.

The jurisdiction analysis in this case involves a careful review of the history of the subject property, with a focused eye looking for evidence whether the State of California ever formally surrendered all or part of its territorial jurisdiction. That is why we submit that the history of the subject property is important and should be included in the record.

CONCLUSION

While we appreciate the fact that defendants' opposition has helped frame the issue on the merits for the court, their opposition to the motion to supplement should be rejected. The proposed documents should be made part of the instant administrative record.

The record should show the full history of the subject property so this court (and any appellate court should there be an appeal) has a proper basis on which to adjudicate when and how territorial jurisdiction leaves a sovereign state and shifts to the federal government, and through the federal government, to an Indian tribe.

Needless to say, this is an issue of major dimension and it deserves a proper record. We respectfully request that the plaintiffs' motion to supplement be GRANTED.

Dated: August 17, 2017

SLOTE LINKS & BOREMAN, LLP

By: _____/s/_____
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