No. 14–12004–DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF ALABAMA,
Plaintiff–Appellant,

v.

PCI GAMING AUTHORITY, *et al.*,
Defendants–Appellees.

On Appeal from the U.S. District Court for the
Middle District of Alabama, No. 2:13–cv–178–WKW–WC

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING DEFENDANTS–APPELLEES

SAM HIRSCH
Acting Assistant Attorney General
Environment & Natural Resources Div.

Of Counsel:
JENNIFER TURNER
Office of the Solicitor
U.S. Department of the Interior
Washington, D.C.

MICHAEL HOENIG
Office of General Counsel
National Indian Gaming Commission
Washington, D.C.

MARY GABRIELLE SPRAGUE
BRIAN C. TOTH
Attorneys
U.S. Department of Justice
Environment & Natural Resources Div.
Appellate Section
P.O. Box 7415
Washington, DC 20044–7415
(202) 305–0639

Alabama Case No. 14–12004–DD

v.

PCI Gaming Authority, et al.
_____/

CERTIFICATE OF INTERESTED PERSONS

The following is a complete list of persons and entities who, to the best of our knowledge, have an interest in the outcome of this case, pursuant to Eleventh Circuit Rules 26.1 and 26.1–3, as amended:

Balch & Bingham LLP

Bettenhausen, Margaret A.

Brasher, Andrew L.

Bryan, Stephanie

Charnes, Adam H.

Flax, Meredith

Fuller, Ben A.

Gehman, David

Harper, Keith M.

Hirsch, Sam

Hoenig, Michael

Hollinger, Sandy

Kilpatrick Townsend & Stockton LLP

Alabama Case No. 14–12004–DD

v.

PCI Gaming Authority, et al.
_____/

Kirkpatrick, Megan A.

Laurie, Robin G.

Manning, Tim

Martin, Keith

Martin, Matthew

McGhee, Kevin

McGhee, Robert

Mothershed, Arthur

Office of the Attorney General of Alabama

Pate, Kelly F.

PCI Gaming Authority

Poarch Band of Creek Indians

Reagan, Henry T., II

Reeves, Mark H.

Reinwasser, Louis B.

Rolin, Deno

Sells, Garvis

Alabama Case No. 14–12004–DD

v.

PCI Gaming Authority, et al.
_____/

Smith, Billy

Smith, David C.

Sprague, Mary Gabrielle

State of Alabama

State of Michigan

Toth, Brian C.

Tullis, Eddie

Turner, Jennifer

The United States

Wasdin, Bridget

Watkins, William Keith

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES:

* Cases upon which we primarily rely are marked by asterisks.

STATUTES:

TABLE OF RECORD REFERENCES IN THE BRIEF

INTEREST OF THE UNITED STATES

The State of Alabama alleges that the Poarch Band of Creek Indians ("Band"), a federally-recognized Indian tribe, is creating a public nuisance in violation of Alabama law by conducting gaming on lands that the Secretary of the Interior took into trust for the Band's benefit approximately twenty years ago. Alabama attempts to indirectly challenge the Secretary's authority to take the lands into trust even though the Secretary is not a party to the suit and direct challenges to the Secretary's decisions to take the lands into trust are time-barred. The United States has a substantial interest in safeguarding title to the property it holds in trust for Indian tribes. *See Minnesota v. United States*, 305 U.S. 382, 386, 59 S. Ct. 292, 294 (1939).

Additionally, the United States has a substantial interest in the administration of the Indian Gaming Regulatory Act ("Gaming Act" or "Act"), 25 U.S.C. 2701–2721, by which Congress "struck a careful balance among federal, state, and tribal interests" in adopting a "comprehensive approach" to tribal gaming. *See Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1247 (11th Cir. 1999). The National Indian Gaming Commission ("Commission") has substantial

responsibilities under the Act, including the approval of tribal gaming ordinances and the exercise of enforcement authority. This appeal concerns whether Alabama may bring a civil action to enjoin gaming activities by the Band on Indian lands that would violate the State's public nuisance law if conducted on non-Indian lands. This brief is filed under FRAP 29(a).

ISSUES PRESENTED

1. Did the district court correctly hold that Alabama cannot indirectly challenge the Secretary of the Interior's decisions to take land into trust for the benefit of the Band through a state-law public nuisance suit to which the United States is not a party and cannot be sued because a direct challenge to the Secretary's decision would be time-barred?

2. Did the district court correctly hold that 18 U.S.C. 1166 does not provide a civil cause of action for Alabama to seek to enjoin gaming on Indian lands as violating state public nuisance law?

STATEMENT OF THE CASE

1. Statement of Facts and Course of Proceedings Below

PCI Gaming Authority ("Authority") is an entity owned and operated by the Band. DE:10 at 2.[1] The Authority operates casinos on three properties in Alabama that the United States took into trust for the Band's benefit in 1984, 1992, and 1995, under the Indian Reorganization Act, 25 U.S.C. 465. DE:10 at 2-3; *see* DE:1-1 at 1-10. Although land taken into trust for an Indian tribe and over which the tribe exercises governmental power is considered "Indian land" within the meaning of the Gaming Act, 25 U.S.C. 2703(4)(B), Alabama contends that Interior acted beyond its authority when it decided to take the land into trust for the Band during the 1980s and 1990s. DE:10 at 7.

In particular, Alabama relies on *Carcieri v. Salazar*, 555 U.S. 379, 129 S. Ct. 1058 (2009), which was a timely direct challenge to a land-into-trust decision in which the Supreme Court held that the Reorganization Act authorizes Interior to acquire land in trust under the first definition of "Indian" in that statute only for tribes that were

[1] Citations are to the district court's numbered docket entries ("DE").

"under Federal jurisdiction" as of 1934, the date that the Reorganization Act was enacted. *Id.* at 395. Alabama contends that because the United States did not formally recognize the Band as an Indian tribe until the 1980s, the Band was not "under Federal jurisdiction" in 1934, and therefore, Interior's decisions taking the lands into trust were invalid, and the Band's gaming activities on those lands are under state jurisdiction.

Alabama sued the Authority and tribal officials in state court alleging that they were engaged in unlawful gambling activities and seeking to enjoin those activities as a public nuisance in violation of Alabama law. DE:1-6 at 3-4. The Band[2] timely removed the case to federal court. DE:1. Alabama did not seek to remand, but instead filed an amended complaint. The amended complaint alleges that the Authority operates electronic "gambling devices" that, while displaying a bingo card, play in several respects like slot machines, which are prohibited by Alabama law, and seeks declaratory relief and a permanent injunction against operation of the devices. DE:10 at 3-5, 9. Count One alleges that the lands on which the gaming is conducted are

[2] We use "the Band" and "the Authority" interchangeably.

not "Indian lands" within the meaning of the Gaming Act and that the operation of the gaming devices is a public nuisance in violation of Alabama law. DE:10 at 6-8. Count Two assumes, in the alternative, that the lands where gaming is conducted are "Indian lands" under the Gaming Act and alleges that Alabama can enforce state public nuisance law against the Band under 18 U.S.C. 1166. *Id.* at 8. The Band moved to dismiss the amended complaint for lack of subject matter jurisdiction based on tribal sovereign immunity and for failure to state a claim.

The district court granted the Band's motion. *Alabama v. PCI Gaming Authority*, — F. Supp. 2d —, 2014 WL 1400232 (M.D. Ala.) (DE:43). The court rejected Alabama's allegation that the casinos were not located on "Indian lands" based on Alabama's contention that Interior lacked authority to take those lands into trust for the Band's benefit. The district court held that the deeds contained in the record demonstrated that the lands were held in trust for the Band and therefore were "Indian lands" within the meaning of the Act. *Id.* at *18. Nor, the district court held, could Alabama challenge Interior's decades-old land-into-trust decisions, principally because Interior is not a party to the suit and Alabama is barred from bringing a direct challenge to

Interior's land-into-trust decisions by the statute of limitations. *Id.* at *16. Additionally, the district court found nothing in the Supreme Court's *Carcieri* decision allowing the Band to challenge Interior's decisions indirectly, either. *Id.* at *18. The district court therefore dismissed Count One for failure to state a claim.[3] Regarding Count Two, the court held that Section 1166 did not provide States with a civil right of action to enjoin gaming conducted in Indian country. *Id.* at *23.

The court also addressed issues concerning tribal sovereign immunity, holding that immunity barred suit against the Authority (*id.* at *8), but that the federal law claims in Count Two could proceed against the tribal officers in their official capacity. *Id.* at *12. The court held, however, that the tribal officers remained immune from suit for violations of state law on Indian lands and that dismissal of Count One was proper on that basis, too. *Id.* at *14.

[3] The court also rejected an alternative theory Alabama presented in district court, but abandons on appeal, that state law applies on Indian lands by its own force, holding instead that the Gaming Act preempts state law governing gaming on Indian lands. *Id.* at *8.

2. Statutory Background

The Gaming Act was enacted to provide a statutory basis for the operation and regulation of gaming by Indian tribes. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 48, 116 S. Ct. 1114, 1119 (1996); *see* 25 U.S.C. 2702. The Act creates a three-member Commission within the Department of the Interior charged with monitoring and regulating certain types of gaming on Indian lands, approving tribal ordinances respecting gaming, and levying fines for unlawful gaming, among other responsibilities. 28 U.S.C. 2704(a); *see also* 28 U.S.C. 2705, 2706.

The Act defines three categories of gaming, Class I, II, and III, and subjects gaming activities in each class to different regulatory arrangements. Class I gaming includes social and traditional forms of gaming connected with tribal ceremonies or celebrations and is regulated exclusively by tribes. *See* 25 U.S.C. 2703(6), 2710(a)(1).

Class II includes bingo, as defined by the Act, which allows for the use of "electronic, computer, or other technologic aids," but which excludes "electronic or electromechanical facsimiles" of any game of chance and "slot machines of any kind." 25 U.S.C. 2703(7). Class II games are within the jurisdiction of Indian tribes but are also regulated

by the Commission under the Act. Specifically, Class II games may be played by tribes only if the State allows them to be played by any person or entity and if the tribe first enacts an ordinance that is approved by the Commission and obtains separate licenses for the gaming locations. 25 U.S.C. 2710(b)(1). Class II gaming must also follow other requirements on the use of gaming revenues, audits, and background checks on managers and employees, among other things. *See* 25 U.S.C. 2710(b)(2), (3), (4).

Class III includes all other gaming not covered by Class I or II and is only lawful if it is conducted in conformance with a compact between the tribe and the State that has been approved by Interior. *See* 25 U.S.C. 2703(8), 2710(d)(1). Tribes may regulate Class III gaming concurrently with a State except to the extent that tribal regulations are less stringent or inconsistent with state laws "made applicable" by any compact. *See* 25 U.S.C. 2710(d)(5).

The Act expressly gives federal district courts jurisdiction over claims by a tribe for a State's failure to negotiate a compact in good faith, claims by a tribe or a State for violations of a compact, and claims by Interior to enforce mediation procedures to form a Tribal-State

compact. *See* 25 U.S.C. 2710(d)(7)(A). The Gaming Act also enacted 18 U.S.C. 1166, which assimilates state gambling laws into federal law in Indian country and gives the United States "exclusive authority" over criminal prosecutions for violations of the assimilated state-law offenses. 18 U.S.C. 1166(a), (d).

SUMMARY OF ARGUMENT

The district court did not err in dismissing Alabama's lawsuit. The deeds to the underlying lands, which are found in the record, properly establish that the lands are held in trust by the United States for the Band's benefit and are therefore Indian lands within the meaning of the Gaming Act. Alabama cannot challenge the trust status of the land here because doing so implicates the real property interest of the United States and thereby makes the government a necessary party to the suit. The United States, however, cannot be sued because a challenge to Interior's decades-old land-into-trust decisions would be time-barred. And case law allowing old agency decisions to be challenged when they are newly applied to a regulated party is inapplicable both because the State could have brought its challenge directly during the limitations

period, and because Interior is not applying the land-into-trust decisions to Alabama through any recent agency action.

Nor does Alabama have a civil action under 18 U.S.C. 1166. That statute fails to mention any civil cause of action by a State, an omission that is particularly telling in light of the historical presumption that Indian lands are free from State regulation absent express congressional direction to the contrary. Notably, the Gaming Act is a "comprehensive" statute governing the regulation of tribal gaming on Indian lands. To find a right of action by States in Section 1166 in these circumstances by implication, especially where the Act expressly gives States a civil action in other limited circumstances, would fly in the face of the historical treatment of State regulation on Indian lands. The district court's order should be affirmed.

ARGUMENT

THE DISTRICT COURT CORRECTLY DISMISSED ALABAMA'S LAWSUIT

I. Alabama's State Law Nuisance Claim Was Correctly Dismissed, Because Alabama Cannot Indirectly Challenge Interior's Authority To Take The Underlying Lands Into Trust

Alabama asserts a nuisance claim under state law alleging that the Band's casinos are not located on Indian lands because, according to Alabama, Interior was not authorized to take land into trust for Indian tribes that were not "under federal jurisdiction and recognized prior to 1934." According to Alabama, the Band failed to meet those criteria when Interior took lands into trust for the Band's benefit in the 1980s and 1990s. DE:10 at 7. Alabama's claim fails, however, because Alabama cannot indirectly challenge the Secretary's authority to take the lands into trust for the Band. The United States is a necessary party to such a suit, which implicates the United States' title to the lands. Moreover, the United States cannot be sued because a direct challenge to the Secretary's the land-into-trust decisions would be barred by the statute of limitations.

The lands at issue were taken into trust by the United States on behalf of the Band in the 1980s and 1990s. That fact is demonstrated by the deeds that the Band filed with its notice of removal. DE:1-1. The Gaming Act provides that any Class II gaming that occurs "on Indian lands" is within the jurisdiction of the Indian tribe, subject to regulation under the Act. 25 U.S.C. 2710(a)(2). The term "Indian lands" is defined by the Act as including, among other things, lands for which title is "held in trust by the United States for the benefit of any Indian tribe or individual" and over which a tribe exercises governmental power. 25 U.S.C. 2703(4)(B). The lands here qualify as "Indian lands" within the meaning of that definition, as the deeds are titled in the name of the United States, held in trust for the benefit of the Band. DE:1-1.[4]

Alabama asserts (DE:10 at 7) that the lands at issue were not properly taken into trust by the Secretary of the Interior because she lacks the authority to take lands into trust for a tribe that was not "under Federal jurisdiction" as of 1934, the time that the statute

[4] If the casinos were not on Indian lands, then Alabama could sue tribal officials under state law to enjoin the casinos' operations. *See Michigan v. Bay Mills Indian Community*, — U.S. —, 134 S. Ct. 2024, 2034-2035 (2014).

authorizing such land transfers was enacted. 25 U.S.C. 479; *see Carcieri*, 555 U.S. at 395, 129 S. Ct. at 1068. According to Alabama, the fact that the Band was not recognized by the federal government in 1934 means that the Band was not "under Federal jurisdiction" at that time and hence, was ineligible for land to be taken into trust on its behalf. DE:10 at 7. That contention is misplaced for several reasons.

First, Alabama's claim directly questions Interior's past decisions taking land into trust as well as the validity of Interior's title. It is well established, however, that the United States is a necessary party to suits that adjudicate the government's rights with respect to its title to real property. *See Minnesota*, 305 U.S. at 386, 59 S. Ct. at 294 (holding that the United States was a necessary party to proceeding by a State to condemn land held in trust for Indians). That principle remains applicable when the government's title is challenged indirectly through a suit against third parties. *Cf. City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147, 1153 (8th Cir. 2013) (declining to consider challenge to the Commission's determination that consent decree violated the Act where the Commission "is not a party to this litigation").

Although the district court's decision does not bind the United States (*see, e.g., United States v. Candelaria*, 271 U.S. 432, 443-44, 46 S. Ct. 561, 563 (1926)), an adverse decision would prevent the Band from enjoying the economic benefits of conducting gaming on the lands at issue. And yet the "central purpose" of the Gaming Act is to provide a basis for tribal gaming as a means of "promoting tribal economic development, self-sufficiency, and strong tribal governments." *Chickasaw Nation v. United States*, 534 U.S. 84, 99 (2001) (quoting 25 U.S.C. 2702(1)). Facilitating tribal self-determination and economic development are also among the reasons Interior takes land into trust. *See* 25 C.F.R. 151.3(a)(3). Indeed, an "overriding purpose" of the Reorganization Act was to help tribes "assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542, 94 S. Ct. 2474, 2478-2479 (1974). A loss for the Band would cast a cloud on the trust status of the lands and thereby frustrate the purposes of these various statutes.[5]

[5] The United States is not a required party in every case raising the issue of whether, for jurisdictional purposes, a particular parcel of land constitutes "Indian country" under 18 U.S.C. 1151, where the United States' title to or ownership of land is unchallenged. Here, however, Alabama's allegation that the United States lacks title is the foundation

So long as Alabama is not claiming ownership of the property or seeking transfer of the title to itself, Alabama could have challenged Interior's decisions to take the lands into trust in federal district court under the Administrative Procedure Act ("APA"), 5 U.S.C. 706. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, — U.S. —, 132 S. Ct. 2199, 2208, 2210 (2012) (such a suit "falls within the APA's general waiver of sovereign immunity" and is a "garden-variety APA claim").[6]

Alabama cannot pursue such an APA suit now, however, because it would be untimely. The latest date that any of the lands at issue was taken into trust is 1995. DE:1-1 at 9-10. Any claims Alabama might have had that Interior lacked authority to take those lands into trust therefore accrued not later than 1995 because that is when Interior last took final agency action. *See U.S. Steel Corp. v. Astrue*, 495 F.3d 1272,

---

for a claim to enjoin the Band from exercising the very rights for which the land is taken into trust. The government must be joined in such circumstances.

[6] Although Alabama cites *Patchak* for the proposition that it may challenge Interior's trust decisions as violating *Carcieri*, (Br. 26), the claim in *Patchak* was a timely, direct challenge brought under the APA. *Patchak* provides no authority for challenging trust decisions indirectly, years after the statute of limitations for a direct challenge has expired.

1280 (11th Cir. 2007). Because Interior's decisions taking land into trust occurred more than six years ago, Alabama's challenge is time-barred under 28 U.S.C. 2401(a). *Id.*

To be sure, a regulation on which an agency relies in taking some later final agency action can be challenged as outside the agency's statutory authority, and therefore void *ab initio*, even if a direct challenge to the regulation would be untimely. *See Legal Envtl. Assistance Found., Inc. v. EPA*, 118 F.3d 1467, 1473 (11th Cir. 1997) (*"LEAF"*) (citing, *inter alia*, *NLRB Union v. Federal Labor Relations Authority*, 834 F.2d 191, 196-97 (D.C. Cir. 1987)). Decisions taking land into trust, however, are not regulations, which are generally applicable to all persons engaged in a certain activity. Rather, land-into-trust decisions are informal adjudications concerning a specific parcel of real property. Unlike adjudications, regulations are "capable of continuing application" to persons who might not have standing to challenge a rule when it is first promulgated. Limiting review in later applications of a rule "would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *NLRB Union*, 834 F.2d at 196.

That rationale from case law allowing "as applied" challenges to regulations outside an agency's statutory authority has little force here, where a State has standing to challenge Interior's decision to take land into trust when the decision is first issued. *See, e.g., South Dakota v. U.S. Dept. of Interior*, 665 F.3d 986, 990 (8th Cir. 2012). That is so because the decision to take land into trust immediately affects the State's authority to exercise its civil and criminal jurisdiction concerning many types of activities on the trust land. *See id.* (State had standing to challenge land-into-trust decision because State would lose property tax revenue as "an immediate consequence of placing the four disputed parcels into trust").

Even if Interior's decisions to take lands into trust were analogous to the promulgation of regulations, however, Alabama does not identify any agency action by Interior applying the land-into-trust decisions to Alabama, much less any final agency action by Interior adversely affecting Alabama that occurred within the past six years. *See Dunn-McCampbell Royalty Interest, Inc. v. National Park Service*, 112 F.3d 1283, 1288 (5th Cir. 1997) ("as applied" challenge to regulation "must rest on final agency action"). *Cf. LEAF*, 118 F.3d at 1473. Because the

APA only provides for review of "final agency action," Alabama has therefore failed to raise any claims against the United States subject to judicial review under that statute. 5 U.S.C. 704; *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882, 110 S. Ct. 3177, 3185 (1990) (challengers under the APA must identify "agency action" affecting them that is "final").[7]

There are compelling reasons for not allowing Alabama to indirectly challenge the United States' title. Most importantly, Interior is generally not a party to gaming disputes, and thus is not present to defend its land-into-trust decisions. The government's absence is

---

[7] Alabama's citation (Br. 33) to *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991), is inapposite. In *Wind River*, the Ninth Circuit held that a substantive challenge to an agency action alleging lack of agency authority "may be brought within six years of the agency's application of that decision to the specific challenger." *Id.* at 715-716. The critical difference here is that Interior is not applying its land-into-trust decision to Alabama, either through an enforcement action, as in *Wind River*, or otherwise. Plus, given that Alabama had standing to challenge Interior's land-into-trust trust decisions when they were issued and would have known about the tax revenue lost from removal of the lands from the State's tax base, this is not a situation where Alabama could not have "discovered the true state of affairs" at an earlier time. *Id.* at 715. Similarly, *Oppenheim v. Campbell*, 571 F.2d 660 (D.C. Cir. 1978), also cited by Alabama (Br. 33), is distinguishable because it concerned a challenge to an agency's interpretation of a statute that was directly applied to the challenger in an agency decision that was timely challenged. *Id.* at 663.

particularly troubling because whether a tribe was "under Federal jurisdiction" at a particular time can be a complicated undertaking that is often aided by thorough factual development and a special understanding of the United States' historical relationship with Indian tribes.[8] Indeed, Interior has considerable expertise in this area. Interior's Solicitor has issued detailed guidance on determining whether a tribe was "under Federal jurisdiction" within the meaning of the Indian Reorganization Act. *See* Solicitor's Opinion M-37029, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act (March 12, 2014).[9] And the Interior Board of Indian Appeals also interprets and applies the meaning of "under Federal jurisdiction" in specific cases. *See, e.g.*, *Village of Hobart, Wisconsin v. Acting Midwest Regional Director*, 57 IBIA 4, 21-25 (2013); *Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62, 71-76 (2011). Such agency interpretations of statutes that agencies are

[8] For example, as Justice Breyer's concurrence in *Carcieri* makes clear, a tribe may have been "under Federal jurisdiction" in 1934 even though it was not formally recognized as an Indian tribe until after that date. 555 U.S. at 397-399, 129 S. Ct. at 1069-70 (Breyer, J., concurring).

[9] Available at http://www.doi.gov/solicitor/opinions/M-37029.pdf.

charged with administering are owed deference. *See Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781-82 (1984).[10]

Moreover, Interior is in a better position than the district court to marshal the historical evidence of the United States' relationship with the Band that is necessary to resolve the issue in the first instance, if that question were properly presented. *See Mississippi Power & Light Co. v. United Gas Pipeline Co.*, 532 F.2d 412, 420 (5th Cir. 1976) ("Development of the factual context by those expert in the area, is an established basis for primary jurisdiction."). Other appellate courts have recognized Interior's expertise in Indian affairs and have deferred to Interior's authority to resolve similar questions in the first instance. *See, e.g., Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59-61 (2d Cir. 1994) (remanding to Interior for determination on pending petition for federal recognition as an Indian tribe). Thus, if Interior's authority to take the land into trust were properly challenged

[10] Alabama asserts (Br. 13-14 n.3) that the United States supports the Band because the Commission receives funding through fees on certain gaming activities. Absent contrary evidence, however, which Alabama fails to present, agency decisionmaking "is entitled to a presumption of regularity." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415, 91 S. Ct. 814, 823 (1971); *see also Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d 1209, 1223 (11th Cir. 2002).

and there were a need to determine whether the Tribe was "under Federal jurisdiction" in 1934, Interior should be allowed to decide that question in the first instance.

Contrary to Alabama's contentions (Br. 28-31), the now-vacated panel decision by the Ninth Circuit in *Big Lagoon Rancheria v. California*, 741 F.3d 1032, *rehearing en banc granted*, — F.3d —, 2014 WL 2609714 (9th Cir. 2014), does not support Alabama's contention that it can indirectly challenge Interior's land-into-trust decisions. In *Big Lagoon*, an appellate panel considered, in the context of a suit by a tribe against a State for failure to negotiate a Tribal-State compact in good faith, an indirect challenge to Interior's authority to take land into trust on behalf of that Tribe. Although Interior was not a party to that case, a majority of the panel held that Interior lacked authority to take the land into trust because, according to the majority, the tribe was not under federal jurisdiction in 1934. *Id.* at 1045. That ruling is incorrect for the reasons explained by the dissenting judge, *id.* at 1045-1047 (Rawlinson, J., dissenting), and by the district court here. *PCI Gaming*, 2014 WL 1400232, at *17-18. Additionally, the Ninth Circuit recently vacated the panel decision and ordered rehearing *en banc*, 2014 WL

2609714, further undermining any persuasive value the panel opinion might have had. Alabama's contention that it can indirectly challenge Interior's land-into-trust decisions here should be rejected.[11]

Finally, Alabama contends that instead of dismissing the case, the district court should have allowed Alabama the opportunity to file an amended complaint raising an APA claim against Interior's past decisions taking land into trust for the Band. Br. 32. As already explained, however, such a claim would be untimely under 28 U.S.C. 2401(a). Moreover, the theories on which Alabama relies to challenge regulations indirectly after the normal limitations period has passed, are inapplicable. Any amended claim therefore would be immediately subject to dismissal. The district court did not err in dismissing the case without leave to amend. *See Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007) (affirming dismissal of a "futile" request to file amended complaint).[12]

---

[11] This Court need not reach the district court's alternative holding that the Band and its officers are immune from state law claims arising on Indian lands because the decision below can be affirmed on the grounds that the status of the lands cannot be challenged.

[12] The district court also rejected Alabama's argument that state law applies of its own force on Indian lands, without regard to 18 U.S.C.

II. The District Court Correctly Dismissed Alabama's Federal Law Nuisance Claim

A. The Gaming Act Does Not Provide Alabama With A Federal Civil Action To Enforce State Law In Indian Country

Alabama asserts in the alternative that if the Band's casinos are located on "Indian lands" within the meaning of the Gaming Act, Alabama may bring a civil action against the Band under 18 U.S.C. 1166. The district court correctly rejected Alabama's claim. *PCI Gaming Authority*, 2014 WL 1400232, at *20-23.

Title 18, United States Code, section 1166, was enacted in Section 23 of the Gaming Act. Pub. L. No. 100-497, 102 Stat. 2467, 2487-2488. The statute assimilates state gambling laws into federal law in Indian country and gives the United States "exclusive authority" over criminal prosecutions for violations of the assimilated state-law offenses.[13] From

---

1166, and explained that the Gaming Act preempts state law. 2014 WL 1400232, at *8. Alabama waived any challenge to that holding by failing to raise the issue in its initial brief.

[13] The phrase "Indian country," defined at 18 U.S.C. 1151, includes land that the United States holds in trust for Indian tribes. *See Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123-125, 113 S. Ct. 1985, 1991 (1993); *see also United States v. John*, 437 U.S. 634, 649, 98 S. Ct. 2541, 2549 (1978).

these provisions, Alabama alleges that it has an express civil right of action to enforce state public nuisance law. That argument is incorrect.

Section 1166 provides that for purposes of federal law, all state laws concerning the licensing, regulation, or prohibition of gambling, including but not limited to applicable criminal sanctions, shall apply in Indian country to the same extent and in the same manner as they apply elsewhere in the State. 18 U.S.C. 1166(a). This assimilation of state law in Section 1166(a) is subject to exceptions for Class I and II gaming and for Class III gaming conducted under an approved Tribal-State compact. *Id.*; *see* 18 U.S.C. 1166(c). The statute gives the United States "exclusive jurisdiction over criminal prosecutions" of violations of state gambling laws made applicable by the statute to Indian country unless other arrangements have been made through an approved Tribal-State compact. 18 U.S.C. 1166(d).

Although Section 1166 does not expressly address the enforcement of civil provisions of state law, that authority also falls exclusively to the United States absent a Tribe's consent to state jurisdiction in a Tribal-State compact. That is so because, as a general principle, federal jurisdiction over Indian lands rests with the United States absent an

Act of Congress affirmatively conferring jurisdiction on a State. *See Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1, 118 S. Ct. 948, 952 (1998); *Oklahoma Tax Comm'n*, 508 U.S. at 123, 113 S. Ct. at 1991 (there is "a deeply rooted policy in our Nation's history of 'leaving Indians free from state jurisdiction and control.'") (internal quotations, citation omitted).

Section 1166 contains no language affirmatively conferring civil enforcement authority on a State. "Nowhere does [Section 1166] indicate that the State may, on its own or on behalf of the federal government, seek to impose criminal or other sanctions against an allegedly unlawful tribal bingo game." *United Keetoowah Band of Cherokee Indians*, 927 F.2d 1170, 1177 (10th Cir. 1991). Yet the omission of any express mention of a civil action by States is significant because the Act is a "comprehensive approach" to the regulation of tribal gaming that strikes "a careful balance among federal, state, and tribal interests" in that subject area. *Seminole Tribe*, 181 F.3d at 1247; *see Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 63 F.3d 1030, 1032-33 (11th Cir. 1995) (calling the Act "a comprehensive statute governing the operation of gaming facilities on Indian lands").

The legislative history of the Act also supports a conclusion that the State cannot bring a civil suit against the Band under Section 1166. As a general matter, the Senate Committee recognized the "well-established principle *** that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands." S. Rep. No. 100-446, at 5 (1988). And in particular, the Senate Report explains that "unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands" through a Tribal-State compact, Congress "will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities." *Id.* at 5-6. The Report therefore supports a conclusion that the Gaming Act did not authorize States to bring civil suits under Section 1166.

Alabama relies on the statute's reference to the United States' exclusive jurisdiction over "criminal prosecutions" and argues that, by negative implication, the statute should be interpreted as indicating that the United States does not have exclusive jurisdiction over civil actions for violations of assimilated law. The interpretative principle upon which Alabama relies, however, *i.e.*, that the expression of one

thing implies the exclusion of another, lacks force when the text of the statute is clear. *See United States v. Castro*, 837 F.2d 441, 442-43 (11th Cir. 1988) ("this principle has its limits and exceptions and cannot apply when the legislative history and context are contrary to such a reading of the statute"); *see also Wilhelm Pudenz, GmbH v. Littlefuse, Inc.*, 177 F.3d 1204, 1209 n.5 (11th Cir. 1999) ("courts rarely rely solely on this canon of statutory construction because it is subject to so many exceptions"). Alabama cannot point to any language in the statute clearly indicating that Congress intended to overturn the well-established presumption that primary authority to regulate Indians rests with the federal government. *See, e.g., Rice v. Olson*, 324 U.S. 786, 789, 65 S. Ct. 989, 991 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history").

Indeed, if any implication is to be drawn from the Gaming Act about whether a State has the civil remedy Alabama alleges, it is that Congress has implicitly foreclosed that remedy. In particular, Congress already provided for a detailed regulatory scheme whereby Class III gaming is only allowed according to a Tribal-State compact. The statutory scheme expressly provides for federal court jurisdiction over

any cause of action by a State to enjoin Class III gaming on Indian lands only if that gaming is "conducted in violation of any Tribal-State compact" in effect. 25 U.S.C. 2710(d)(7)(A)(ii). That Congress expressly provided for such a comprehensive regulatory and remedial scheme allowing suits by States in some limited circumstances forecloses a conclusion that Congress implicitly provided a remedy under the same statute in other circumstances. *Cf. Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S. Ct. 2010, 2015 (1978) (when an act "does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless"); *Tamiami Partners*, 63 F.3d at 1049 (when "legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies") (quotations, citation omitted). Alabama's contention that Section 1166 provides States a cause of action to enjoin Indian gaming that violates assimilated state law should be rejected.

B. Case Law Recognizing A Cause Of Action By The United States Does Not Support Alabama's Position

The case law that Alabama cites in support of its argument for bringing a civil action under Section 1166 (Br. 36-37, 41-42) is not on point. This Court in *Seminole Tribe* noted "some doubt" about whether Section 1166 "would permit a state to bring an action in federal court seeking state-law injunctive relief against a tribe for violating state gambling laws," but ultimately declined to resolve the issue. 181 F.3d at 1246 n.13. *Cf. Bay Mills*, 134 S. Ct. at 2033 n.5 (declining to decide whether 18 U.S.C. 1166 allows civil actions by States concerning gaming in Indian country). Another appellate court recognized a civil action by the United States to enforce an order of the Commission to prevent a tribe from conducting gambling in Indian country. *See United States v. Santee Sioux Tribe*, 135 F.3d 558, 561-562 (8th Cir. 1988).[14]

[14] The district court in *United States v. Seminole Tribe*, 45 F. Supp. 2d 1330, 1331 (M.D. Fla. 1999), also held that the United States could seek civil injunctive relief for tribal gambling that violated state law. On appeal in a related case, however, this Court expressed "no opinion on the correctness of *** the district court's holding" on that issue. *Seminole Tribe*, 181 F.3d at 1244 n.10.

That decision, however, was premised on the assumption that in giving the United States exclusive jurisdiction over assimilated state-law criminal prosecutions for illegal gambling in Indian country under Section 1166, Congress did not intend to limit the broad authority otherwise vested in the Attorney General to conduct litigation in which the United States is interested, under 28 U.S.C. 516. *Id.* at 561-562; *see also Seminole Tribe*, 45 F. Supp. 2d at 1331 (discussing presumption against congressional intent to limit Attorney General's authority). That reasoning, however, does not support Alabama's argument that Congress intended States to have authority to bring civil enforcement actions, absent an approved Tribal-State compact. Indeed, as already mentioned, the statute's text and legislative history are to the contrary, especially given the background presumption that state laws generally do not apply in Indian country.[15]

---

[15] Although one district court has held that a State may bring a civil action under Section 1166, that decision is incorrect because it fails to account for the primary role that the Commission must play in deciding whether the gaming at issue is Class II or Class III, as discussed *supra*. *See United States v. Santa Ynez Band of Chumash Mission Indians*, 983 F. Supp. 1317 (C.D. Cal. 1997). And that makes all the difference in whether the gaming is "gambling," such that state law applies. *See* 18 U.S.C. 1166(c) (defining "gambling").

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

SAM HIRSCH
Acting Assistant Attorney General
Environment & Natural Res. Div.

s/ Brian C. Toth
MARY GABRIELLE SPRAGUE
BRIAN C. TOTH
Attorneys
U.S. Department of Justice
Environment & Natural Res. Div.
Appellate Section
P.O. Box 7415
Washington, DC 20044–7415
(202) 305–0639

Of counsel:
JENNIFER TURNER
Office of the Solicitor
U.S. Department of the Interior
Washington, DC

MICHAEL HOENIG
Office of the General Counsel
National Indian Gaming Commission
Washington, D.C.

September 2014
90–1–24–03568

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because the brief contains 6,180 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Century Schoolbook.

s/ Brian C. Toth
BRIAN C. TOTH
U.S. Department of Justice
Environment & Natural Res. Div.
Appellate Section
P.O. Box 7415
Washington, DC 20044–7415
(202) 305–0639
brian.toth@usdoj.gov

CERTIFICATE OF SERVICE

I electronically filed this document with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on September 17, 2014. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Brian C. Toth
BRIAN C. TOTH
Appellate Section
Environment & Natural Res. Div.
U.S. Department of Justice
P.O. Box 7415
Washington, DC 20044
(202) 305–0639
brian.toth@usdoj.gov