Nos. 10-17803 and 10-17878

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,
NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS, UNITED SOUTH AND EASTERN TRIBES, INC. AND THE NAVAJO NATION IN SUPPORT OF PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(c)(1), *Amici* make the following disclosures. *Amicus* National Congress of American Indians and *Amicus* United South and Eastern Tribes, Inc. (USET) are nonprofit corporations not owned in any part by a publicly held corporation, and neither has a parent corporation. Pursuant to Fed. R. App. P. 26.1(a), the Navajo Nation is not required to file a corporate disclosure statement.

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IDENTITY OF *AMICUS CURIAE*, STATEMENT OF INTEREST, AND AUTHORITY TO FILE

***Amicus* National Congress of American Indians ("NCAI")** is the oldest and largest national organization representing Indian tribal governments, with a membership of more than 250 American Indian tribes and Alaska Native villages. NCAI was established in 1944 to protect the rights of Indian tribes and improve the welfare of American Indians.

The United South and Eastern Tribes, Inc. ("USET") is a non-profit organization representing 26 federally recognized Indian tribes in 12 states stretching from Texas to Maine. Because of their location in the South and Eastern regions of the United States, the USET member tribes have the longest continuous direct relationship with the United States government, dating back to some of the earliest treaties. One of the most significant aspects of this long relationship has been the steady loss of tribal land.

The Navajo Nation is a federally-recognized Indian nation with a treaty relationship with the United States through the Treaty of 1868. It has the largest land base of any Indian tribe in the United States, and acquires land outside its main Reservation to consolidate checker-boarded land holdings and for commercial development. It currently operates four casinos through gaming compacts with the States of Arizona and New Mexico.

Today, Indian tribes exercise jurisdiction over 56 million acres of land, held in trust or otherwise restricted from alienation by the federal government. To put that number in perspective, "[a]bout 90 million acres of tribal land were alienated through allotment and sale of surplus lands by 1934, amounting to approximately two-thirds of the total land held by Indian tribes in 1887." *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 436 n. 1 (1989) [citations omitted]. One of the most important purposes of the Indian Reorganization Act ("IRA") was to address this catastrophic loss of land by providing the Secretary of the Department of the Interior ("Interior") with the administrative authority to acquire new land in trust for the benefit of Indians and Indian tribes for a wide-variety of purposes. The reacquisition and rebuilding of tribal homelands is of critical importance to achieving tribes' goals of economic self -sufficiency as self-governing entities. Regulation, preservation and management of these lands and associated resources are essential functions protected by the federal government's trust responsibility to the tribes. Tribal governments have a keen interest in the decisions of this Court affecting lands held in trust by Interior for the benefit of Indian tribes.

Amici submit this *amicus curiae* brief, accompanied by a motion for leave to file the same, pursuant to Fed. R. App. P. 29(a) and Circuit R. 29-2(a).

RULE 29(C)(5) STATEMENT

No party's counsel authored this Brief in whole or in part; and no person other than *Amici* NCAI, USET and the Navajo Nation, their members, or their counsel

(including no party or party's counsel) contributed money intended to fund preparation or submission of the Brief.

ARGUMENT

I. INTRODUCTION

The question before the panel was straightforward: whether for the purposes of the Indian Gaming Regulatory Act ("IGRA") the State of California acted in good faith when it refused to negotiate a class III gaming compact with Petitioner Big Lagoon Rancheria (the "Tribe") to govern Indian gaming on tribal land held in trust by the United States. The majority opinion veered far afield from the IGRA question properly before it when it considered whether Interior had authority under the IRA to acquire in trust – twenty years ago -- one of the two parcels on which Big Lagoon proposed to game (the "eleven-acre parcel"). Notwithstanding that the State failed to exhaust its administrative remedies when it challenged the acquisition in the 1990s, and that the six-year statute of limitations applicable to the 1994 trust acquisition decision has long since expired, the majority addressed the validity of Interior's 1994 acquisition.[1] It did so on the basis of an incomplete record and argument, concluding that the Tribe was not "under federal jurisdiction" in 1934 without regard to the test

[1] The Tribe also has argued forcefully in its Petition for Rehearing that the majority's decision was unnecessary to a good faith determination, because the State has never questioned the gaming eligibility of the other parcel on which Big Lagoon has proposed to game. The *Amici* agree with this and the other points raised in the Tribe's Petition, and the panel has now called for a response to it.

that Interior has developed for making such determinations. Even were the majority justified in disregarding the established jurisprudence of this Court concerning finality and exhaustion – and it decidedly was not -- it should have referred the matter to Interior in the exercise of its primary jurisdiction, rather than creating a conflict with the federal agency that has expertise in this area .

The majority's opinion directly conflicts with the Court's jurisprudence requiring exhaustion of administrative remedies (*see infra* at II.A) and accruals of actions challenging agency decisions *(see infra* at II.B and II.C). The majority's decision involves a question of exceptional importance because it would permit collateral attacks on trust acquisitions made years and even decades ago, without regard to exhaustion of remedies or the statute of limitations. The decision in this action threatens tribal jurisdiction over millions of acres of land acquired in trust pursuant to the IRA (*See infra* at III). *Amici* respectfully request that the panel reconsider its decision. Should the panel leave its opinion undisturbed with respect to these fundamental issues, *Amici* respectfully submit that the Court should review the opinion *en banc*.

II. THE PANEL DECISION CONFLICTS WITH ESTABLISHED PRECEDENT OF THIS COURT AND OTHER CIRCUITS

A. The Court Requires Exhaustion of Remedies Prior to Obtaining Judicial Review of a Trust Determination.

The majority's opinion conflicts with established precedent of this Court requiring exhaustion of administrative remedies when challenging Interior decisions,

such as the 1994 entrustment. "Since 1975, regulations governing challenges to decisions of the Bureau of Indian Affairs have required an administrative appeal from most BIA decisions before judicial review of such decisions can be obtained." *Stock West Corp. v. Lujan*, 982 F.2d 1389, 1393 (9th Cir. 1993) (*citing* 25 C.F.R. § 2.6(a) and 43 C.F.R. § 4.314(a)). This requirement "permits the development of a factual record, application of agency expertise, and possible resolution of the dispute without resort to federal court." *Id.* at 1394, *citing Joint Bd. of Control v. United States*, 862 F.2d 195, 199 (9th Cir. 1988) and *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988).

It is undisputed that the State did not challenge the initial 1994 entrustment. Although it participated in a later administrative challenge to the validity of Interior's acquisition of trust title to the eleven acres at issue, its claims were rejected, *Big Lagoon Park Co. v. Acting Sacramento Area Director, BIA*, 32 IBIA 309 (1998), and it failed to avail itself of any further judicial review. Under prior decisions of this Court any further challenge to the trust determination is therefore barred. *See, e.g.*, *Stock West Corp.*, 982 F.2d at 1393-1394 (a litigant who failed to bring an appeal of a BIA determination within the time provided cannot obtain judicial review); *United States v. Backlund*, 689 F.3d 986, 1000 (9th Cir. 2012) (failure to exhaust administrative remedies bars further review). If left undisturbed, the majority's opinion will create significant confusion within this Circuit about whether the exhaustion doctrine, and the important purposes it serves, retain their vitality. Absent panel action on

rehearing, *amici* respectfully submit that en banc review is needed to address the conflict.

B. End-Runs Around Procedural Requirements Are Disallowed.

In addition to exhaustion requirements, 28 U.S.C.§ 2401(a) imposes a six year statute of limitations on APA challenges to final agency action. The Court prohibits claimants from making an "end run" around such requirements by disguising untimely claims as collateral attacks or defenses. In *United States v. Lowry*, 512 F.3d 1194,(9th Cir. 2008), the Court rejected an Indian tribal member's collateral attack on a thirteen-year-old denial, under the APA, of her claim to aboriginal title to federal land, finding that to hold otherwise "would effectively circumvent the six-year statute of limitations we have held governs review of such actions." 512 F.3d at 1203. *Lowry* "reflects the eminently reasonable principle that parties may not use a collateral proceeding to end-run the procedural requirements governing appeals of administrative decisions." *Backlund*, 689 F.3d at 1000 (9th Cir. 2012).

The majority relied on *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991) to justify deviating from these precedents. But *Wind River* simply holds that a party may challenge *an agency rule* -- in litigation *involving the agency* -- where the challenge involves the scope of the agency's authority to promulgate the rule and the agency has applied the rule in later proceedings involving the party. 946 F.2d at 715-716. *Wind River* merely stands "for the proposition that an *agency's application of a rule to a party* creates a new, six-year cause of action to challenge to the agency's

constitutional or statutory authority." *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997)((emphasis added).

This principle makes good sense, as "*unlike ordinary adjudicatory orders*, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958); *see also N.L.R.B. Union v. Federal Labor Relations Auth.*, 834 F.2d 191, 196 n.6 (D.C. Cir. 1987) (applying the holding in *Functional Music* in the context of enforcement proceedings brought by the agency). This is a particularly compelling case to apply the principle, because a collateral attack upon an ordinary adjudicatory order, in an action that does not involve the United States as a party, could not be further from the "narrow scope" of the exception to the statute of limitations recognized by *Wind River*, 946 F.2d at 716. The majority's avoidance of the statute of limitations here "render[s] the limitation on challenges to agency orders… meaningless.," *Id.* quoting *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1365 (9th Cir. 1990).

The majority acknowledged that the present case "does not involve an enforcement proceeding in the usual sense," but permitted the collateral attack because it saw "no reason to treat a third party's enforcement of a right stemming from agency action differently from enforcement by the agency itself." Op. 23. But the Tribe's suit against the State to enforce its IGRA rights is neither substantively nor

structurally analogous to an enforcement action by the United States grounded in a previously promulgated rule of general applicability. Unlike such an enforcement action, there can be no meaningful review of Interior's decision, because the agency is not a party here, and the Court does not have before it a full account of the agency's reasons for acting. Moreover, the United States holds title to the land, and therefore has a property interest that cannot be challenged without its participation in the suit. *See* Fed. R. Civ. P. 19(a); *see also* Br. of Petitioner at 10-11. The majority's rationale does not justify the intra-Circuit conflict that its decision has created.

C. *Wind River* Is Inapplicable Where The Challenger Should Have Known Of The Effect Of The Agency Action.

A *Wind River*-type challenge is unavailable where the effect on the plaintiff was "apparent long before" it brought its challenge. *Hells Canyon Pres. Council v. United States Forest Serv.*, 593 F.3d 923, 931-32 (9th Cir. 2010); *see also San Luis Unit Food Producers v. U.S.*, 772 F.Supp.2d 1210, 1228 (E.D. Cal. 2011) (refusing to apply *Wind River* where the effect of the earlier agency action "should have been evident" more than six years prior to the plaintiff's challenge); *cf N. Cnty. Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 743 (9th Cir. 2009) (allowing a challenge where plaintiffs "could have had no idea" that the earlier action "would affect them"). Other circuit courts agree. *See, e.g.*, *Edison Electric Inst. v. ICC,* 969 F.2d 1221, 1230 (D.C. Cir 1992) "When the aggrieved party neither petitions the agency to change the rule nor presents a 'valid excuse' for failing to mount a timely challenge to the initial regulation, considerations

both of finality and of exhaustion dictate that the litigant should be bound by that regulation." *Id.*

The majority's assertion that "the 1994 entrustment, standing alone, might not have caused the State any concern," *Op.* 23, misapprehends the fee-to-trust process and its impact on state jurisdiction. When land is placed into trust for a tribe, the State and local governments are generally divested of jurisdiction, including taxing authority, over the land. "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Alaska v. Native Village of Venetie Tribal Gov't.*, 522 U.S. 520, 527 n.1 (1998) ; 25 U.S.C. § 465. For this reason, Interior regulations require BIA to consider the jurisdictional impact of the trust acquisition on the State and local governments:

> The regulations implementing §465 are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory. Before approving an acquisition, the Secretary must consider, among other things … 'the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls'; and '[j]urisdictional problems and potential conflicts of land use which may arise.'

City of Sherrill, 544 U.S. at 220-21, quoting 25 CFR §151.10(f) (2004).[2] States, including California, routinely bring challenges to fee-to-trust decisions on this basis.

Here, the State indisputably was aware of the potential impact of BIA's decision on its interests. When the Governor petitioned to intervene in the *Big Lagoon* IBIA proceeding in 1997, he challenged BIA's refusal to reconsider the trust acquisition and emphasized both the State's interest in gaming on the lands *(see* Plaint.-Appellee Pet. for Rehearing at 8), and the jurisdictional implications associated with the trust acquisition: "[A]s Chief Executive Officer of the State, the Governor is directly affected by an action which threatens to remove land from state regulation by the California Coastal Commission, the State Regional Water Quality Control Board, the Department of Fish and Game, and the State Department of Parks and Recreation." Appendix E to Pet. at 15.

Thus the State was perfectly well aware of the jurisdictional and gaming-related implications inherent in the United States' acquisition of the eleven acres during the entrustment process. In allowing the State's case nevertheless to proceed , the majority placed itself in direct conflict with the precedent of this Court in *Hells Canyon Pres. Council* and *Edison Electric Inst.* , and thus "undermin[ed] the important interests served by statutes of limitations, including…repose and finality." *Hells Canyon Pres. Council*, 593 F.3d at 933. Unless the panel reconsiders its ruling on rehearing, *amici*

[2] The same considerations identified by the Court in *City of Sherrill* were in force at the time of the 1994 entrustment. *See* 53 Fed. Reg. 21995 (June 13, 1988).

respectfully submit that en banc review will be necessary to avoid significant confusion in this important area of the law. As discussed further below, these interests have particular and exceptional importance for tribes and their trust lands.

III. THE MAJORITY'S DECISION HAS FAR-REACHING IMPLICATIONS FOR TRIBES WITH INDIAN LANDS ACQUIRED UNDER IRA AUTHORITY

The majority's decision threatens far-ranging negative implications for Indian tribes. The IRA was enacted in response to ill-conceived federal policies designed to break up tribal land bases and relocate tribes off of economically productive land. *See, e.g.*, *Readjustment of Indian Affairs, Hearings before the House Committee on Indian Affairs on H.R. 7902*, 73rd Cong. 2nd. Session. at 17 (1934). IRA Section 5 was the "capstone" of the IRA's land-related provisions. Cohen's Handbook of Federal Indian Law, at § 15.07[1][a] (2005 ed). Millions of acres of land lost prior to the IRA have now been restored to trust status. *See Executive Branch Authority to Acquire Trust Lands for Indian Tribes: Oversight Hearing Before the S. Comm. on Indian Affairs*, S. Hrg. 111-136, at 15 (2009) (testimony of Hon. Ron Allen, Secretary, National Congress of American Indians).

While native peoples remain among the most impoverished in American society, the restoration of federally-protected trust land has contributed significantly to tribes' socioeconomic rehabilitation. Trust acquisition can "provide exactly the sort of development- friendly environment needed for a tribe to pursue economic development efforts," Julian Schriebman, *Developments in Policy: Federal Indian Law*, 14 Yale L. & Pol'y Rev. 353, 384 (1996). In the modern era, this development has

allowed for tribal investment in police, health services, and other forms of basic infrastructure historically lacking in Indian country. *See, e.g.*, Jonathan B. Taylor & Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change Between the 1990 and 2000 Censuses* vii, ix-xi (The Harvard Project on American Indian Economic Development, Jan. 2005).

The majority's decision, if left uncorrected, will have devastating impacts throughout Indian country on a wide array of issues that have nothing to do with Indian gaming. By permitting the State of California to "launch a collateral attack upon the designation of trust lands years after its administrative and legal remedies have expired," Op. 31 (Rawlinson, J., dissenting), the majority upends the certainty on which tribal economic development and investment depends. The majority's opinion potentially calls into question the legal status of millions of acres that tribes have painstakingly reacquired through the IRA by allowing challenges to those acquisitions many years, even decades, after the fact, without regard to the statute of limitations, exhaustion of administrative remedies, or even a complete administrative record, thus undermining the stability upon which sound governmental decision-making and necessary infrastructure investments must be based.[3]

[3] While the opinion ostensibly did not "address the validity of the 1994 entrustment in any other respect than its effect on the parties' respective rights under IGRA" (Op. 28 n. 8), the opinion suggests otherwise. For example, at page 25 it states that the eleven-acre parcel's "status unquestionably stems from the BIA's acquisition of the parcel in trust for the tribe." Other litigants already have taken the cue, and relied on

Moreover, this holding has ramifications far beyond land acquisition for tribes. As the Supreme Court has recognized, to "permit state abrogation of the explicit terms of a federal land acquisition [program] would deal a serious blow to the congressional scheme contemplated by… all other federal land acquisition programs." *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580, 597 (1973). The tribal fee-to-trust process is "national in scope," and while "[c]ertainty and finality are indispensable in any land transaction, [] they are especially critical when, as here, the federal officials carrying out the mandate of Congress irrevocably commit scarce funds." *Id.* The majority opinion deals a serious blow to fee-to-trust acquisitions in particular and federal land acquisition programs generally, and should be reconsidered.

IV. INTERIOR'S PARTICULAR EXPERTISE BEST INFORMS QUESTIONS RELATING TO INTERIOR'S IRA AUTHORITY

As detailed in the Tribe's Petition and discussed above, there are compelling reasons why the majority should never have reached the question of whether Interior had authority to acquire trust title to the eleven acres. Without the United States' participation as a party, the question of whether it holds trust title should have been dismissed on Rule 19 grounds alone. Further, complainants who have knowingly failed to exhaust their administrative remedies, or failed to timely file their judicial challenges to final agency actions within the six-year statute of limitations period,

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the majority opinion for just such purposes. *See*, Motion for Leave to File Notice of Supplemental Authority, *Rape v. Porch Creek Band of Indians*, No. 1111250 (Ala. 2014), attached as Appendix A.

should not be allowed to upset the settled expectations of tribal governments whose sovereignty and self-governance are so integrally tied to the lands they govern. For these reasons, the question of whether Interior had authority to take the eleven acres in trust is one that was answered with finality long ago.

However, should the Court agree with the majority that the status of the eleven acres must be determined, the *amici* respectfully request the Court to remand to the district court with an instruction to seek Interior's views (with a delineated time limit) so that the Court may benefit from application of the agency's specialized expertise to the relevant factual and legal questions at hand. In *Carcieri v. Salazar,* 555 U.S. 379, 381-382 (2009), the Supreme Court instructed that Interior's authority to acquire land in trust for an Indian tribe depends on whether it meets the IRA's statutory definition of "tribe," which can be established by showing that a tribe was "under federal jurisdiction" at the time of the IRA's enactment in 1934. But for reasons specific to that case, the *Carcieri* Court did not define the term "under federal jurisdiction." *Id.* at 399. Accordingly, Interior has developed and now regularly employs a comprehensive administrative analysis of the "under federal jurisdiction" question for use when a tribe's status in 1934 may not otherwise be immediately clear. Given the extremely varied historical fact patterns applicable to different tribes in different parts of the country, this analysis is necessarily case-specific and necessarily dependent on the agency's specialized expertise. *See State of New York v. Salazar*, 2012 U.S. Dist. LEXIS

136086, *54-57 (N.D.N.Y. 2012) (remanding decision to BIA for determination whether tribe was "under federal jurisdiction" in 1934 because BIA "has specific expertise that the Court lacks," and resolution of the issue required "an accurate historical record, necessarily crediting and discounting, respectively, various learned sources"). Interior's analytical structure was recently confirmed by a formal "M-Opinion". Solicitor Opinion M-37029, *The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act* (March 12, 2014).[4]

The majority's error of allowing an untimely collateral attack on the trust status of the eleven acres was compounded by its disregard for the administrative law which Interior has developed post-*Carcieri*. The majority conceded that application of the facts to the question of whether the Tribe was "under federal jurisdiction" entails "questions [that] are thorny indeed, and perhaps beyond our competence to answer", *Op.* at 26. It further conceded that the factual record which should have informed any analysis of that question was incomplete (no doubt because the issue it reached out to decide was not one that the parties had focused on in the district court as relevant to the good faith determination). *Op.* at 25, 26 ("The State says further discovery will shed light on the issue", and "We agree with the State that there is much confusion in this narrative"). The majority nevertheless forged ahead with an analysis that – given

[4] Available at http://www.doi.gov/solicitor/opinions/M-37029.pdf (last visited March 17, 2014).

the limitations majority itself acknowledged – is necessarily suspect, when it could instead have drawn on Interior's expertise through invocation of the primary jurisdiction doctrine. *Lyon v. Gila River Indian Community,* 626 F. 3d 1059, 1075 (9th Cir. 2010) (the primary jurisdiction doctrine "applies when 'an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with the regulatory authority over the relevant industry rather than by the judicial branch.'"[citation omitted]); *U.S. v. General Dynamics*, 828 F.2d 1356, 1362-63 (9th Cir. 1987); *Pharm. Research & Mfrs. of Am. v. Walsh,* 538 U.S. 644, 673-74 (2003) (Breyer, J., concurring). In the event the Court decides, notwithstanding *Amici's* arguments to the contrary, that the validity of the 1994 trust acquisition is properly at issue, then referral to Interior would allow the Court to benefit from the agency's considerable expertise in applying the administrative analytical structure to a more fully developed factual record,[5] and further will help ensure cohesion within the body of law that has developed in the aftermath of *Carcieri.*

[5] Referral would be appropriate for yet another reason. The majority never considered whether the land could have been taken into trust pursuant to the IRA's alternative definitions. Interior's section 5 authority also extends to "persons who are descendants of such members [of tribes now under federal jurisdiction] who were, on June 1, 1934, residing within the present boundaries of *any* Indian reservation", or for "persons of one-half or more Indian blood". 25 U.S.C. § 479 (emphasis added). Interior is best equipped to evaluate whether the land could have been acquired under either of these other definitions.

CONCLUSION

For the reasons set forth herein, and in the briefs of appellee and the record herein, amici National Congress of American Indians, United South and Eastern Tribes, Inc. and the Navajo Nation respectfully request the Court to rehear this appeal or, in the alternative, that the Court rehear the appeal *en banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(5)(A) and Circuit Rule 29-2(c)(2), the foregoing brief is proportionately spaced, has a typeface of 14 points or more, and contains 4,132 words, exclusive of those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

By /s/ Samuel F. Daughety

APPENDIX A

No. 1111250

IN THE SUPREME COURT OF ALABAMA

JERRY RAPE,

***Appellant*,**

v.

POARCH BAND OF CREEK INDIANS, ET AL.,

***Appellees*.**

AMICUS CURIAE ESCAMBIA COUNTY TAX ASSESSOR JIM HILDRETH'S MOTION FOR LEAVE TO FILE NOTICE OF SUPPLEMENTAL AUTHORITY AND TO ACCEPT CONDITIONALLY-FILED NOTICE OF SUPPLEMENTAL AUTHORITY

On appeal from the Circuit Court of Montgomery County (CV-2011-901485, Hon. Eugene W. Reese presiding)

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AMICUS CURIAE ESCAMBIA COUNTY TAX ASSESSOR JIM HILDRETH'S MOTION FOR LEAVE TO FILE NOTICE OF SUPPLEMENTAL AUTHORITY AND TO ACCEPT CONDITIONALLY-FILED NOTICE OF SUPPLEMENTAL AUTHORITY

In light of significant legal and factual developments since briefs were filed in this case by the parties and several amici curiae, Amicus Curiae Jim Hildreth, in his official capacity as Escambia County Tax Assessor, respectfully moves for leave to file a Notice of Supplemental Authority and for the Court to accept the Notice of Supplemental Authority conditionally filed with this motion. In support of this motion, Hildreth states the following:

1. Since briefing was completed in this case with the Appellant's Reply Brief on April 30, 2013, the Poarch Band of Creek Indians, along with other Appellees, has filed a Letter to Clerk Enclosing Additional Authority and a Notice of Supplemental Authority.

2. The recent holding in Big Lagoon Rancheria v. California, Nos. 10-17803 & 10-17878, --- F.3d ---- (9th Cir. Jan. 21, 2014), if adopted by this Court, could very well be dispositive of this case. Relying on Carcieri v. Salazar, 555 U.S. 379 (2009), the U.S. Court of Appeals for

the Ninth Circuit held that a parcel taken into federal trust some 20 years ago (pursuant to 25 U.S.C. § 465) and held continuously since then for the benefit of a post-1934 Indian tribe is not "Indian lands," and consequently, the tribe is not eligible for the legal incidents that would otherwise flow therefrom. Equally important to this case, the Ninth Circuit also provided guidance for analyzing whether an Indian tribe was "under federal jurisidction" in 1934 — the threshold inquiry under Carcieri.

3. The Escambia County Tax Assessor's interest in the prompt resolution of the jurisdiction and immunity questions before this Court has gone from theoretical to concrete. To demonstrate the consequence of a ruling in favor of the Poarch Band, Hildreth's Amicus Brief posed a hypothetical case of judicial enforcement of an ad valorem tax assessment. That scenario is no longer hypothetical; Hildreth has notified the Poarch Band of his intent to initiate an audit and to assess for taxation the real and personal property of the Poarch Band in Escambia County.

For the foregoing reasons, Hildreth respectfully requests that this Court accept the Notice of Supplemental Authority conditionally filed with this motion.

Respectfully submitted on this 28th day of January, 2014,

/s/ Bryan M. Taylor

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9th Circuit Case Number(s) 10-17803 and 10-17878

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