Appeal Nos. 10-17803 and 10-17878
Published Opinion issued Jan. 21, 2014
Stephen S. Trott and Johnnie B. Rawlinson, Circuit Judges,
and Frederic Block, District Judge

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

Appeal from the United States District Court, Northern District of California,
Hon. Claudia A. Wilken, District Judge, Case No. CV-09-1471 CW (JCS)

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff and Appellee/Cross-Appellant Big Lagoon Rancheria ("Big Lagoon" or "the Tribe") hereby certifies that it is a federally recognized Indian tribe, not a corporation, and therefore that there is no parent corporation or any publicly held corporation that owns any part of or has any pecuniary interest in the Tribe.

Dated: March 6, 2014

Respectfully submitted,

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INTRODUCTION

In a 2-1 decision, the panel majority reversed a decision of the District Court granting summary judgment to Plaintiff and Appellee/Cross-Appellant Big Lagoon Rancheria ("Big Lagoon" or "the Tribe") in its bad faith lawsuit against the State of California (the "State") under the Indian Gaming Regulatory Act ("IGRA"). (Opinion attached as Appendix A.)[1] Pursuant to Federal Rules of Appellate Procedure 35 and 40, Big Lagoon hereby petitions for panel rehearing, with a suggestion for rehearing *en banc*, of the panel majority's decision in this case. Panel rehearing is necessary to correct fundamental mistakes of fact and law that have resulted in a miscarriage. Alternatively, *en banc* rehearing is required to secure or maintain uniformity of the Court's decisions, and also to address questions of exceptional importance.

Under IGRA, an Indian tribe having jurisdiction over "Indian lands" – including lands acquired in trust for it by the United States – may request a state to enter into negotiations for a compact to allow class III gaming on those lands, which negotiations the state must conduct in "good faith." 25 U.S.C. § 2710(d)(3)(A). If a state fails to negotiate in good faith, the Indian tribe can enforce its rights by filing suit in federal court, which is precisely what occurred here. 25 U.S.C. § 2710(d)(7)(A)(i). Yet, what the State has ultimately conceded

[1] For ease of reference, important supporting documents are attached in an Appendix to this Petition.

was bad faith negotiating, the majority decision now sanctions based on a collateral attack on Indian lands status of an eleven-acre parcel placed in trust by the United States for Big Lagoon in 1994. While that eleven-acre parcel (and an adjacent nine-acre parcel) is concededly in trust now, the majority's decision resolves the case by determining the trust acquisition to have been invalid. As the dissent correctly notes, the majority's published decision permits a collateral attack in private litigation on the United States' title to lands held in trust for a tribe, without a timely challenge of those agency decisions under the Administrative Procedure Act (the "APA") and notwithstanding the fact that the United States is not a party to these proceedings. In reaching out to decide that issue two decades after the trust acquisition and despite the State's prior unsuccessful challenges to the entrustment in 1997 and 1999, the majority threatens devastating consequences not only for Big Lagoon, but for tribes around the country as well as for the federal government. There simply will be no finality of federal land-into-trust acquisitions (for both Indian and non-Indian purposes) if the majority's decision remains intact.

Moreover, the majority's decision re-opens any agency adjudication, including but not limited to trust designations, to collateral attack in private litigation without regard to the presence of the United States as a defendant or the availability *vel non* of an APA challenge. Such a decision cannot be reconciled with the APA or with the precedents of the Supreme Court and this Court, most

particularly, *United States v. Backlund*, 689 F.3d 986 (9th Cir. 2012) (prohibiting use of collateral proceedings to end-run the procedural requirements governing appeals of administrative decisions), *Guidiville Band of Pomo Indians v. NGV Gaming Ltd.*, 531 F.3d 767 (9th Cir. 2008) (construing the meaning of "Indian lands," the title to which "is" held in trust for an Indian tribe), and *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991) (addressing the statute of limitations applicable to the APA). Due to the exceptional importance and unanticipated impacts of the majority's decision, *amicus curiae* support on these issues is anticipated.

As elaborated below, the serious conflicts with Circuit law and sweeping consequences threatened by the majority decision amply warrant *en banc* review. But matters should never have to proceed to that stage. The majority's decision is based on outcome-determinative factual misconceptions: one about the parcel of land properly at issue here, and the other about whether the State previously had occasion to challenge the 1994 trust acquisition. If the panel were to correct either one of these misconceptions, an affirmance of the District Court decision would follow as a matter of course, and the need for *en banc* review would be averted.

ARGUMENT

I. Petition for Panel Rehearing

The panel decided this case on review of a decision arising out of cross-

motions for summary judgment – without the development of a full factual record – and with respect to a collateral issue that had not been the focus of the parties' or the District Court's attention. It is perhaps for these reasons that the majority's decision is based on two fundamental misconceptions about the facts and posture of this case. The correction of either one of these misconceptions would call for affirmance of the District Court's decision and would avoid the need to address the broader problems created by the majority's opinion.

A. The Majority's Misunderstanding of Material Facts Led to Its Erroneous Conclusion that Only the Eleven-Acre Parcel Is Relevant.

The United States holds title to two contiguous parcels of land for the benefit of Big Lagoon, a nine-acre parcel acquired in 1918 (which the State concedes to be Indian lands eligible for gaming, as the majority acknowledged) and an eleven-acre parcel acquired in 1994, which Indian lands together constitute the Tribe's twenty-acre rancheria. The majority's decision is premised on the fundamental misunderstanding that Big Lagoon "insisted" on conducting gaming on the eleven-acre parcel (exclusively) and that the State agreed to that under compulsion from the District Court. The majority found that "Big Lagoon's insistence that gaming be conducted on the eleven-acre parcel tells us that it is the status of that parcel that matters." (Opinion at 17-18.) Ultimately, the majority concludes, "Big Lagoon cannot demand negotiations to conduct gaming on the eleven-acre parcel". (Opinion at 27.) Erroneously, the majority demurred, "[w]e express no opinion as

to whether Big Lagoon's conceded jurisdiction over the nine-acre parcel would entitle it to request good-faith negotiations – and to bring suit to compel such negotiations, if necessary – for a casino on that site." (Opinion at 28 n. 8.)

The record nowhere supports the majority's conclusion that Big Lagoon insisted on locating a gaming casino on the eleven acres. As the majority notes, when Big Lagoon requested renewed compact negotiations in September 2007, the request was for "gaming activities **on the trust lands that constitute the Big Lagoon Rancheria**," i.e., the full twenty acres.[2] (Opinion at 9 (emphasis supplied)) (ER 609) (Appendix B). In the same way, both the Tribe's final compact proposal dated October 6, 2008 as well as the State's last proposal dated October 31, 2008, which are ultimately the only compact proposals material to this IGRA lawsuit, proposed gaming on Big Lagoon's twenty acres of rancheria lands, without specifying a particular parcel. (ER 615-620, and ER 622-627 and 701, D.C. Docket No. 84) (Appendix C). Accordingly, the majority's statement that "[i]n a letter dated October 6, 2008, [Big Lagoon] demanded permission to operate a 350-device casino and 100-room hotel on the eleven-acre parcel" (Opinion at 11) is simply not supported by the record.

[2] While it is true that at times during the negotiations Big Lagoon expressed a preference for a casino on the eleven-acres, it never insisted on the eleven acres. At various times throughout the negotiations the parties discussed siting the gaming operations either on the eleven acres or on the nine acres. (Opinion at 10.)

A correct understanding of these facts warrants affirmance because, as the majority observed, "[i]n contrast to the eleven-acre parcel, the State has explicitly conceded that the nine-acre parcel is Indian land. We hold the State to that concession." (Opinion at 19 n. 5.) Even if the majority were correct that that the eleven-acre parcel is somehow ineligible for compact negotiations, Big Lagoon was entitled to good faith negotiations on the uncontested nine-acre parcel.

The District Court correctly parsed this precise issue in response to the State's eleven-acre challenge:

> THE COURT: What about the nine acres?
>
> MR. PINAL [Deputy Attorney General]: **We are not challenging the nine acres**.
>
> THE COURT: **Then they get to have a casino on their nine acres.**
>
> ***
>
> THE COURT: **So that's a good answer to the 11-acre problem**.
>
> MR. PINAL: **Correct**.

(Supp. ER 035-037 (emphasis supplied)) (Appendix D).

Since the State's bad faith was directed at both parcels,[3] the District Court rightly concluded that the presence of the uncontested nine-acre parcel of Indian lands entitled Big Lagoon to good faith negotiations it did not receive, and that the

[3] The State in bad faith insisted on illegal revenue sharing and on unilateral land use restrictions regardless of where a casino was to be located. (Opinion at 10; ER 032-ER 049.) Thus, when the State negotiated over the nine acres, it did so in bad faith.

contested status of the eleven-acre parcel was "irrelevant" to the bad faith determination. The majority's erroneous focus on the eleven-acre parcel led it instead to engage in an entirely unnecessary and highly incomplete examination of Big Lagoon's history (without an adequate record having been developed regarding that history), to impair the United States' title to land in a matter to which the United States is not even a party, and to create significant conflict with other decisions of this Court regarding finality under the APA. These sweeping consequences of the majority decision can all be avoided if the panel's decision is revised to affirm – reflecting a correct factual focus on Big Lagoon's lands in their entirety, rather than the eleven-acre parcel that simply has never been the sole focus of Big Lagoon's bad faith lawsuit.

B. <u>The Majority Overlooks the State's Prior Knowledge of and Challenges to the Eleven-Acre Trust Acquisition and Instead Allows the State Yet Another Bite at the Apple.</u>

While recognizing the basic rule that a six-year statute of limitations applies to actions brought under the APA to challenge agency actions – such as land-into-trust decisions – the majority's decision relies on a limited exception where the time begins to run not from final agency action, but from the "the agency's application of the disputed decision to the challenger." (Opinion at 24.) However, in seeking to identify and apply an "apt analogue" to agency enforcement of the 1994 entrustment decision against the State, the majority misunderstands the

critical history of that entrustment process. It speculates that "[t]he 1994 entrustment, standing alone, might not have caused the State any concern," contrasting its understanding of the situation in *Carcieri v. Salazar*, 555 U.S. 379 (2009), "in which the State of Rhode Island was aware that the entrustment was proposed by the Narragansett Indian Tribe with the express purpose of 'free[ing] itself from compliance with local regulations.'" (Opinion at 23, citing 555 U.S. at 385.)

Contrary to the majority's speculation, however, the State not only was well aware of and "concerned" that the 1994 entrustment freed the Tribe from compliance with local regulations, **but went so far as to petition to intervene and file, in 1997, two amicus briefs in an appeal to the Interior Board of Indian Appeals ("IBIA") regarding the 1994 entrustment.** (ER 701, D.C. Docket No. 88 at Exh. BB, cited at Supp. ER 054, *Big Lagoon Park Company, Inc. v. Acting Sacramento Area Director, Bureau of Indian Affairs*, 32 IBIA 309 (1998) (Request for Judicial Notice ("RJN"), Exhs. 1-4) (Appendix E). And, consistent with the situation in *Carcieri*, the State was well aware of the proposal for gaming and argued vigorously that the entrustment profoundly affected vital interests of the State as it "resulted in a transfer to the Tribe of all local and some, if not all, state regulatory control over development on the subject property" (RJN, Exh. 4) (Appendix E) and impeded the State's ability to regulate "the impacts of the

gambling casino" (RJN, Exh. 2) (Appendix E). The statute of limitations thus began to run in 1994 or, at the very latest, by the date of the denial of an administrative appeal in 1998. "Under federal law, a cause of action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis for his action." *Cline v. Bursett*, 61 F.2d 108, 110 (9th Cir. 1981); *Shiny Rock Min. Corp. v. United States*, 906 F.2d 1362, 1364-65 (9th Cir. 1990).

Alternatively, even ignoring the foregoing and crediting the majority's conclusion that an "apt analogue" is this IGRA bad faith lawsuit filed in 2009, the majority's decision overlooks the significance of the fact that Big Lagoon previously filed suit against the State under IGRA in 1999 (Opinion at 9), seeking the same relief it seeks here. (RJN, Exh. 5) (Appendix F). In that related case,[4] the State asserted and litigated defenses regarding the status of the eleven acres, which arguments the District Court rejected, twice. (Ninth Circuit Docket No. 26, Exh. D at 20-23) (RJN, Exh. 6 and 7) (Appendix G). Again the State was on notice of the 1994 entrustment and that decision's application against it. Consequently, the more apt analogue (if any) is the 1999 IGRA lawsuit which, under the majority's

[4] Case No. CV-99-4995-CW, dismissed without prejudice in 2007, was deemed related by the District Court to the case below, No. CV-09-1471-CW. (ER 692, D.C. Docket No. 5.)

reasoning, would have triggered the statute of limitations such that it would have run in 2005.[5]

Because of its misunderstanding of the State's prior knowledge of and challenges to the 1994 entrustment, the panel majority has sanctioned the State's second (or even third or fourth) bite at the apple regarding the 1994 acquisition. There is nothing just or consistent with the law about such a conclusion. Based on a proper appreciation for the extent to which the State was fully aware of the implications of the 1994 acquisition and acted on that knowledge, the panel should reverse its determination that the State can sustain yet another challenge to the 1994 trust acquisition, and it should accordingly affirm the District Court.

II. Suggestion for Rehearing En Banc

A. The Majority's Decision to Allow Collateral Attack on the Current Status of Indian Lands Held in Trust for Big Lagoon by the United States Cannot Be Reconciled with the APA or Precedents of the Supreme Court and this Court.

1. The Validity of Federal Land-Into-Trust Decisions Cannot Be Challenged Through Private Proceedings in Which the United States Is Not a Party.

The United States is a required party where, as here, a party seeks to challenge its property interests. *See Minnesota v. United States*, 305 U.S. 382, 386 (1939); Fed. R. Civ. P. 19(a). Decisions by the United States to take land into trust

[5] A statute of limitations is not tolled by the filing of a complaint subsequently dismissed without prejudice because the original complaint is treated as if it never existed. *Humphreys v. United States*, 272 F.2d 411, 412 (9th Cir. 1959).

for Indian tribes are adjudicatory orders and may be judicially challenged, if at all, by way of a timely petition for review under the APA, 5 U.S.C. §§ 701 *et seq.*, proceedings in which the United States has waived its sovereign immunity. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2208 (2012) (challenge to the Secretary's decision to take land into trust is a "garden-variety APA claim"); *Carcieri*, 555 U.S. at 385-86.

This Court has previously held that a party "may not use a collateral proceeding to end-run the procedural requirements governing appeals of administrative decisions." *United States v. Backlund*, 689 F.3d 986, 1000 (9th Cir. 2012); *see also United States v. Lowry*, 512 F.3d 1194, 1203 (9th Cir. 2008). But this is precisely what the majority decision sanctions. In doing so, it creates a direct conflict with this Court's decision in *Backlund*, and significantly impairs the interests of the United States and trustee tribes alike. *En banc* review is called for under these circumstances.

And there is more. There is no dispute in this case that Big Lagoon currently has lands held in trust for its benefit by the United States. As the dissent emphasizes, this Court's decision in *Guidiville* is controlling. As taught in *Guidiville*, the eleven acres at issue here are Indian lands within the meaning of IGRA because title to the lands "*is* … held in trust by the United States for the benefit of any Indian tribe or individual." *See* 531 F.3d 777, 778 (holding that "is"

in Title 25 means "is now" and that an Indian tribe may sue under IGRA if it currently has jurisdiction "over the Indian lands upon which a class III gaming activity . . . is to be conducted" (quoting 25 U.S.C. § 2710(d)(3)(A)).

The majority's contrary holding is irreconcilable with *Guidiville*. There is no dispute that Big Lagoon's eleven acres are Indian lands now. Instead, the majority goes behind what undeniably *is* and allows a collateral attack based upon a claim that the eleven acres *should not be* considered Indian lands, ostensibly owing to the Supreme Court's decision in *Carcieri*. As the dissent correctly observes, however, *Carcieri* – which involved a garden-variety contemporaneous APA challenge against the federal government – does not authorize collateral attacks in private litigation on the legitimacy of a trust designation.[6] In light of *Backlund* and *Guidiville*, as the dissent concludes, "[s]urely it cannot be the case that the State of California can launch a collateral attack upon the designation of trust lands years after its administrative and legal remedies have expired." (Opinion at 31.) Yet, that is exactly what the majority decision authorizes. If the panel does not bring its decision into conformity with Circuit law, *en banc* review will be necessary to resolve the conflict.

[6] *Carcieri* provides no basis for a challenger to end-run 25 U.S.C. § 465 together with its implementing regulations, including the "extensive process that precedes the designation of lands as trust property". (Opinion at 30, citing *Guidiville*, 531 F.3d at 777.)

Under its approach, the majority runs headlong into the problems of permitting collateral attacks on trust designations. The majority forthrightly acknowledges that the question whether Big Lagoon was "under federal jurisdiction" in 1934 (such that, pursuant to *Carcieri*, today the Secretary would be authorized under the IRA to take land into trust for it) is one that "neither party squarely addresses how we should go about deciding." (Opinion at 25.) The majority further acknowledges that the application of the term "under federal jurisdiction in 1934" within the meaning of *Carcieri* is "thorny indeed, and perhaps beyond our competence to answer." Remarkably, however, the majority then ignores its own cautions and purports to resolve the question despite the existence of "much confusion in this [historical] narrative," and without the presence in the case of the United States, whose considered administrative agency decision placed the land in trust in the first place. (Opinion at 26.)

This is contrary to a long line of authority holding that determinations regarding Indian tribes, Indian lands and what constitutes "under federal jurisdiction" are uniquely within the agency expertise of the Department of the Interior. In matters of tribal recognition and sovereign-to-sovereign relationships, the Department of the Interior has special expertise to which courts give substantial deference. *See, e.g., United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 551 (10th Cir. 2001). That special expertise was brought to bear here in 1994.

The District Court rightly recognized that such determinations are beyond the bounds of this IGRA bad faith case; the majority erroneously does not. And in so acting the majority has created irreconcilable conflicts with *Backlund* and *Guidiville* requiring *en banc* reconsideration.

2. Based on a Correct Reading of this Court's Precedent, the State's Challenge Is Time-Barred.

Notwithstanding the absence of the United States, the majority permitted a collateral attack on the trust designation based upon a significant misreading of this Court's decision in *Wind River*. In *Wind River*, this Court recognized the general rule that the right to bring an APA challenge to agency action accrues "upon the completion of administrative proceedings," and that a challenge to final agency action is subject to a six-year statute of limitations. 946 F.2d at 716 (Opinion at 23-24). The agency action here is the Department of the Interior's trust acquisition of the eleven acres made in 1994, and the applicable statute of limitations on a judicial challenge to that 1994 entrustment accordingly expired in 2000.

Wind River also recognized an exception to the general rule permitting a party to challenge an agency rule – **in litigation involving the agency** – after the limitations period has run, where (1) the challenger contests the substance of an agency decision as exceeding statutory authority and (2) the challenger had no reason to have an "interest in" the original agency decision. 946 F.2d at 715-16. *Wind River* did not, however, hold that a party may collaterally attack an agency

adjudication without regard to the APA or the applicable statute of limitations whenever an agency order is relevant to a claim of right or a defense in private litigation. Yet, that is precisely what the majority here permitted.

The majority seriously misapplies *Wind River* in two respects. First, and for reasons discussed in more detail above (Section I.B), the State not only had reason to, but in fact did, "take interest in" the 1994 entrustment and subsequent administrative proceedings on account of the acquisition's immediate impact on the State and, furthermore, actually objected vigorously to the entrustment at the time.[7] Thus, the limitations period closed six years after the entrustment.

Second, the majority erred by permitting a collateral attack when the United States is not, and cannot be, a party to the litigation.[8] *Wind River* opens a narrow window to review of agency action when the United States or one of its agencies seeks to enforce a rule of general applicability against a particular party. The majority's decision extends *Wind River*, without any authority whatsoever, to private collateral attacks, **on fact-specific agency adjudications**, reasoning that

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[7] As is discussed in more detail in Section I.B above, the majority appears to have entirely misunderstood the history of the State's involvement in the 1997-1998 IBIA proceedings challenging the 1994 entrustment, as well as the State's involvement in a 1999 IGRA lawsuit involving the eleven acres.

[8] Unsurprisingly, federal courts have regularly held that final agency action "is not subject to collateral attack through individual lawsuits." *Bank of America, N.A. v. FDIC*, 2013 WL 4505424 (D.D.C. Aug. 26, 2013) (citing, *inter alia*, *Deutsche Bank Nat'l Trust Co. v. Fed. Deposit Ins. Co.*, 854 F.Supp.2d 756, 760 n. 2 (C.D. Cal. 2011)).

the "most apt analogue to application/enforcement of the 1994 entrustment" is a private suit to compel IGRA negotiations. (Opinion at 24.) This is clear error, as for good reason there can be no legally acceptable analogue to agency enforcement proceedings. The majority's decision is premised upon the faulty proposition that, because a regulated party may challenge an agency rule whenever the agency applies the rule in an enforcement proceeding, so too a regulated party may challenge an agency rule whenever it is the predicate for a claim in private litigation. But there is a significant distinction between challenge to an agency rule of general applicability and to a fact-specific agency adjudication, and *Backlund* expressly prohibits end-runs around the APA rules governing challenges to the latter. And so too is there a significant distinction between bringing a challenge to agency action through an agency enforcement proceeding as opposed to through private litigation. In an enforcement proceeding the agency can address any alleged faults and explain its reasoning, thus creating an adequate record for review that is missing (as is the case here) in the private enforcement context. The majority's "apt analogue" rationale plainly provides no warrant for the significant conflicts in Circuit law that its decision has created.

B. <u>The Majority's Decision Raises Issues of Exceptional Importance.</u>

The majority's decision raises questions of exceptional importance, as opening this door to collateral attacks on federal trust designations that have stood

for decades frustrates the finality and repose necessary where property and jurisdictional interests are at stake, in derogation of Congress' plenary and exclusive authority, under the Constitution's Indian Commerce Clause, over Indian affairs. Furthermore, nothing in the majority's holding is limited to Indian lands trust designations. Instead, under the majority's holding, every agency adjudicatory order is not final unless and until a court signs off on it, even years or decades after the agency's decision. The majority's decision stands to affect many other Indian tribes in California and across the country, as well as the United States and federal trust lands other than Indian lands. Land use planning, property and investment decisions, and jurisdictional determinations have all settled around these previous designations. To re-open them would be to undermine the federal trust responsibility to Indian tribes. *En banc* review is necessary to guard against the fundamental and sweeping effects of the panel majority's decision, and we anticipate significant *amicus* support on these issues.

CONCLUSION

With respect, the majority's decision goes well beyond what this tribe-specific IGRA bad faith compact negotiations case was about, and ventures into areas that were not properly before the Court. The decision conflicts with Ninth Circuit precedent. For the foregoing reasons, panel rehearing or rehearing *en banc* ought to be granted.

Dated: March 6, 2014

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Certificate of Compliance Pursuant to Circuit Rules 35-4 and 40-1

I certify that, pursuant to Circuit Rules 35-4 and 40-1, the attached Petition for Panel Rehearing and Rehearing En Banc is: (check applicable option)

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Dated: March 6, 2014

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