Nos. 10-17803 & 10-17878

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BIG LAGOON RANCHERIA, a Federally Recognized Indian Tribe,

Plaintiff-Appellee/Cross-Appellant,

v.

STATE OF CALIFORNIA,

Defendant-Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA
(HON. CLAUDIA WILKEN)

UNITED STATES' BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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Since 1934, the United States has acquired millions of acres of land in trust for Indian tribes pursuant to the Indian Reorganization Act (IRA), 25 U.S.C. § 465. The United States, tribes, state and local governments, and private citizens rely on the status of trust land in many contexts, such as determining civil and criminal jurisdiction, or for purposes of tribal economic development. The majority's ruling in this case would open the door to time-barred lawsuits, allowing parties to litigate the validity of decades-old trust acquisitions and challenge the United States' property interest in these lands. The decision is particularly troubling because it suggests that parties may litigate the propriety of longstanding decisions to accept land in trust in the absence of the United States and where a challenge is not timely brought under the Administrative Procedure Act. In light of the significant ramifications of the decision for the federal government and Indian tribes, the decision's departure from settled principles, and multiple errors of law, this Court should grant panel rehearing or rehearing en banc.

INTRODUCTION

A divided panel of this Court held that the State of California ("the State") was not barred from asserting an affirmative defense that amounted to a collateral attack on the validity of the United States' 1994 acquisition of an eleven-acre parcel of land in trust for the Big Lagoon Rancheria ("the Tribe"). While acknowledging that the record was incomplete, the majority nonetheless held that that acquisition was invalid because the Tribe was not under federal jurisdiction in 1934 and the Secretary therefore lacked authority to acquire land in trust for the Tribe. Because the panel erred in so holding, the United States is participating as *amicus curiae* to support the Tribe's petition for panel rehearing or rehearing en banc.

Because the State's affirmative defense amounts to a collateral attack on the United States' property interests, the panel should have considered whether it could proceed to hear that claim in the absence of the United States. *See* Fed. R. Civ. P. 19; *Minnesota v. United States*, 305 U.S. 382, 386 (1939); *Carlson v. Tulalip Tribes of Wash.*, 510 F.2d 1337, 1339 (9th Cir. 1975). The majority also erroneously concluded that the State's attack on the 1994 trust acquisition was not time-

barred. Any challenge to the Secretary's 1994 land-into-trust decision should have been brought within six years of that decision. 28 U.S.C. § 2401(a); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991). The majority incorrectly applied *Wind River*'s rule that substantive challenges to an agency decision may be brought within six years of the agency's application of the decision to that challenger. Here, no agency "applied" the decision to the State, the State has not brought a proper challenge to an agency decision, and no agency is even a party to the suit. Finally, as noted by the dissent, the majority erroneously concluded that the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, permits courts to look behind the status of trust lands in the context of gaming disputes, in tension with *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767 (9th Cir. 2008).

The ruling raises issues of exceptional importance regarding the role of the United States in litigation affecting its interests in property held for the benefit of Indian tribes, the review of federal agency action more generally, and the determination of what constitutes "Indian lands." If the Court grants rehearing, supplemental briefing should be allowed to permit the filing of an amicus brief by the United States.

ARGUMENT

I. THE UNITED STATES IS A REQUIRED PARTY BECAUSE THE STATE CHALLENGES ITS PROPERTY INTERESTS.

The State asserts that there are serious questions as to whether an eleven-acre parcel of land is validly held in trust by the United States for the benefit of the Tribe. It contends that this Court should remand the case for further discovery regarding whether the Tribe was under federal jurisdiction in 1934, and whether the United States' 1994 acquisition of the land in trust was unlawful in light of the Supreme Court's holding in *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009).[1] Thus, the State argues, the parcel may not be "Indian lands" as defined by IGRA, and as a result, the State was not required to negotiate in good faith with the Tribe for a compact covering gaming on that parcel. This argument amounts to a collateral attack on the United States' property interests in the parcel. In addressing the State's argument, neither the district court nor the panel considered whether the United States was a

[1] The IRA authorizes the Secretary to acquire land for "Indians"; title to that land is held by the United States in trust for the Indian tribe or individual Indians. 25 U.S.C. § 465. The Supreme Court, evaluating the first of three definitions of "Indian" in the IRA, held that the Secretary may take land into trust only for Indian tribes that were "under federal jurisdiction" in 1934 when the IRA was enacted. *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009).

required party subject to mandatory joinder under Federal Rule of Civil Procedure Rule 19.

The United States has an important interest in defending its title to lands, and in particular its title to land held in trust for a federally recognized tribe, but it cannot protect that interest if it is not a party. *See* Fed. R. Civ. P. 19(a)(1)(B)(i) (providing that a person is a necessary party if that person "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest"). Accordingly, the Supreme Court and this Court have held that the United States is generally a required party under Rule 19(a) to any case where its property interests are challenged.[2] *Minnesota v. United States*, 305 U.S. at 386 ("A proceeding against property in which the United States has an interest is a suit

[2] The United States is not a required party in disputes regarding whether there have been good-faith negotiations of IGRA tribal-state compacts. Nor is the United States a required party in every case that raises the issue of whether, for jurisdictional purposes, a particular parcel of land constitutes "Indian country" as defined in 18 U.S.C. § 1151, where the United States' title to or ownership of land has not been challenged. But because the panel's decision considers whether the trust acquisition was valid, the United States is now a required party to this action.

against the United States."); *United States v. City of Tacoma*, 332 F.3d 574, 579-80 (9th Cir. 2003); *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1254 (9th Cir. 1983); *Carlson*, 510 F.2d at 1339.

Additionally, under Rule 19(b), the panel should not have proceeded to address the State's affirmative defense in the United States' absence.[3] Although the majority's conclusions regarding the validity of the United States' title do not bind the federal government, *Carlson*, 510 F.2d at 1339 ("No decision made in an action in which the United States is not a party can bind the United States."), the decision puts in question the trust status of the parcel. While the majority purports to limit its holding to the parties' respective rights under IGRA, slip op. at 28 n.8, its decision regarding the validity of land title necessarily implicates the interests of the United States, both as the holder of title and as trustee for the Tribe. Thus, the judgment

[3] As we explain in Section III, *infra*, the panel should not have looked behind the trust status of the parcel in the first place.

rendered in the absence of the United States may prejudice not only the parties but also the United States.[4]

II. THE STATE'S CHALLENGE TO THE UNITED STATES' 1994 ACQUISITION OF LAND IN TRUST IS TIME-BARRED.

The majority erred in finding that the State's collateral challenge to the Secretary's 1994 land-into-trust decision is not time-barred. Challenges to trust acquisitions may be brought, if at all, against the Secretary under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2208 (2012) (a challenge to the Secretary's decision to take land into trust is "a garden-variety APA claim"). In the APA, the United States has waived its immunity to suits challenging "final agency action" where another statute does not provide a right to judicial review. 5 U.S.C. §§ 702, 704. A plaintiff has six years from the time of a final agency action to bring an APA claim challenging that action. 28 U.S.C. § 2401(a); *Wind River*, 946 F.2d at 713. Here, the only relevant final agency action is the Secretary's 1994 decision to

[4] The panel's opinion also implicates the status of a federally recognized tribe, slip op. at 25-27, a question at the core of executive branch authority to manage and regulate Indian affairs. 25 U.S.C. § 2.

acquire in trust an eleven-acre parcel for the benefit of the Tribe. Based on the applicable six-year statute of limitations, the State had until 2000 to challenge that trust acquisition.

In fact, the State was on notice of the trust acquisition and the Tribe's intend to conduct gaming on the parcel, and could have filed an APA challenge during the statute of limitations period. The 1994 trust acquisition immediately affected the State by divesting it of some regulatory jurisdiction and altering the basis for its criminal jurisdiction over the lands taken into trust. Recognizing this impact, the State sought to intervene and participated as an amicus in a 1997 challenge to the land-into-trust decision before the Interior Board of Indian Appeals (IBIA), but pursued no further relief when the IBIA rejected that challenge. *Big Lagoon Park Co., Inc. v. Acting Sacramento Area Director, Bureau of Indian Affairs*, 32 IBIA 309 (1998). The State's attempt to renew its challenge to the acquisition falls outside the limitations period, and this Court may not deprive the Secretary's action of its finality by allowing the State to seek review of the trust acquisition now. Accordingly, the district court would lack jurisdiction now to review a challenge to the trust status of the land even if the

State had sought to join the Secretary as a defendant. *Loeffler v. Frank*, 486 U.S. 549, 554 (1988) (absent a waiver of sovereign immunity, the United States and its federal agencies are immune from suit and cannot be named as parties).

Relying on this Court's prior holding in *Wind River Mining Corp. v. United States*, 946 F.2d 710, the majority concluded that the State's challenge to the United States' 1994 trust acquisition was timely because the State contested the acquisition "promptly" in response to the Tribe's lawsuit to compel compact negotiations. Slip op. at 22-24. *Wind River* held that "a substantive challenge to an agency decision alleging lack of agency authority may be brought within six years of the agency's application of that decision to the specific challenger." 946 F.2d at 715-16. *Wind River*, however, has no application here. It addressed the statute of limitations for review under the APA of an agency decision that the agency had recently applied to the specific challenger. *Id.* In this case, there is no recent agency action applying the decision to the State, no APA claim, and no agency as a party.

The majority held that application of *Wind River* was appropriate because it could treat the Tribe's suit to compel the State to enter into

negotiations under IGRA "[no] differently from enforcement by the federal agency itself."[5] Slip op. at 23. But there is a critical difference between this case and *Wind River*. That case—and every subsequent opinion applying its holding on this point—involved an agency action allegedly applying or enforcing a decision, a challenge to that action, and thus the United States' presence as a party. Here, the Department of the Interior has taken no action to "apply" the land-into-trust decision to the State. As the majority acknowledged, "there is no direct agency involvement," slip op. at 24, and neither party has asserted any claims against a federal agency. The majority's ruling thus would be an unprecedented expansion of *Wind River* to cases that do not involve any

[5] Even accepting the majority opinion's faulty reasoning that the statute of limitations should begin to run at the point that the Tribe sought to compel compact negotiations, California's challenge to the 1994 trust acquisition would still not be timely. The majority found that the State "promptly challenged the entrustment" following the Tribe's suit to compel negotiations, slip op. at 24, but the parties commenced compact negotiations in 1998, and the Tribe filed its first lawsuit against the State in 1999. Even under a generous reading of *Wind River*, this Circuit still requires a party to file its claim within six years of discovering that an agency decision negatively impacts its interests. *See N. County Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 743 (9th Cir. 2009) (ruling that the statute of limitations ran from when plaintiffs became aware that gaming would take place on a trust parcel). The majority does not explain why such an exception should be applicable here.

action tantamount to "enforcement" of an agency rule. *Cf. United States v. Backlund*, 677 F.3d 930, 943 (9th Cir. 2012) ("[P]arties may not use a collateral proceeding to end-run the procedural requirements governing appeals of administrative decisions."). Such an expansion would be contrary to the principle that statutes of limitations must be strictly construed because they condition the United States' waiver of sovereign immunity. *United States v. Mottaz*, 476 U.S. 834, 841 (1986); *Soriano v. United States*, 352 U.S. 270, 276 (1957). Further, as explained above and in the Tribe's petition, this is not a situation where the State could not have "discovered the true state of affairs" at an earlier time. *Wind River*, 946 F.2d at 715.

Finally, the State's challenge to the 1994 trust acquisition is time-barred notwithstanding the Supreme Court's 2009 ruling in *Carcieri v. Salazar*. The issuance of a court decision construing the meaning of a federal statute does not toll Section 2401(a)'s statute of limitations, and nothing in *Carcieri*'s holding waives the United States' sovereign immunity to a party's attempt to reopen decades-old trust acquisitions. *See Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 122-23 (1988) (parties who failed to seek review of agency regulation, but sought writ of

mandamus following decision invalidating it, chose to "accept incorrect adjudication" and "are in no different position from any claimant who seeks to avoid the bar of res judicata on the ground that the decision was wrong"); *see also United States v. Lowry*, 512 F.3d 1194, 1202-03 (9th Cir. 2008). Furthermore, there is no reason why the State could not have challenged the Tribe's eligibility as a trust beneficiary on the same theory prior to *Carcieri*. The majority's ruling would "'virtually nullify the statute of limitations'" for challenges to well-settled agency decisions—even where an agency has not sought to apply a decision to a specific regulated entity—thereby undermining the finality of agency actions in general. *See Cedars-Sinai Med. Ctr. v. Shalala*, 177 F.3d 1126, 1129 (9th Cir. 1999) (quoting *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1365 (9th Cir. 1990)).

III. IGRA DOES NOT PERMIT COLLATERAL CHALLENGES TO THE STATUS OF TRUST LANDS.

Even assuming the State's challenge to the United States' 1994 trust acquisition is not time-barred, parties may not challenge the established trust status of land in the context of an IGRA dispute. The majority's holding creates a novel barrier to tribal-state compact negotiations and undermines the availability of IGRA's remedial

provisions by allowing threshold challenges under *Carcieri* to the status of existing trust lands before a tribe can compel a state to engage in good-faith compact negotiations. Nothing in IGRA suggests that such collateral challenges should be permitted.

IGRA permits gaming on "Indian lands," which are defined as

> (A) All lands within the limits of any Indian reservation; and (B) any lands title to which ***is*** either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4) (emphasis added). Tribes must enter into compacts with states in order to conduct Class III gaming. § 2710(d)(1)(C). States must negotiate in good faith; if negotiations are unsuccessful, the tribe may sue the state. § 2710(d)(3)(A), (d)(7)(A)(i).

Here, title to the eleven-acre parcel "*is* [] held in trust by the United States for the benefit of" the Tribe. As Judge Rawlinson correctly reasoned in the dissenting opinion, dissent slip op. at 29-30, the majority's decision to look behind the land status is inconsistent with *Guidiville Band of Pomo Indians v. NGV Gaming*, 531 F.3d 767. In *Guidiville*, this Court ruled that 25 U.S.C. § 81, which requires the Secretary to approve certain contracts with Indian tribes relating to

"Indian lands," "applies only to contracts that affect lands already held in trust by the United States," as opposed to lands that might be held in trust in the future. 531 F.3d at 770. In so ruling, the court looked to that statute's definition of "Indian lands" as, in part, "lands the title to which *is* held by the United States in trust for an Indian tribe," and found that "the statute's unequivocal present tense of the word 'is' does a tremendous amount of [] legwork." *Id.* at 774 (emphasis in original). The *Guidiville* court concluded that "the word 'is' means just that (in the most basic, present-tense sense of the word)." *Id.* at 770. As the dissenting opinion here points out, courts therefore must "look to the present, not the past, to determine if the land is held in trust." Dissent slip op. at 29.

The majority found that *Guidiville* is inapposite because this case concerns "whether a *past* entrustment qualifies [as Indian lands] if it turns out to have been invalid," rather than "land to be entrusted *in the future*," which was at issue in *Guidiville*. Slip op. at 21 (emphases in original). But the logic of *Guidiville*'s holding applies equally to review of past trust acquisitions. Here, the parcel "is held in trust" for the Tribe and thus meets the requirements of IGRA. The appropriate

forum for challenging the validity of a trust acquisition is through a suit filed pursuant to the APA, not in an action by a tribe seeking to enforce IGRA's provisions requiring compact negotiation with a state.

There are compelling reasons for this rule. Most importantly, the Department of the Interior is generally not a party to gaming compact disputes, and thus is not present to defend its land-into-trust decision. *See supra* at Section I. The absence of the United States is particularly troubling because the determination of whether a tribe was "under federal jurisdiction" at a specific time can be a complicated undertaking that is often aided by thorough factual development and a special understanding of the United States' historical relationships with Indian tribes. Even if the Secretary's authority to take the land into trust was properly challenged and there was a need to determine whether the Tribe was "under federal jurisdiction" in 1934, the Department of the Interior should be provided the first opportunity to evaluate the meaning of "under federal jurisdiction" and its application to a particular Indian tribe. *Cf. Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59-61 (2d Cir. 1994) (deferring and remanding to the Bureau of Indian Affairs for determination on pending petition for

federal acknowledgment, and recognizing the agency's experience and expertise in resolving such issues). The Department possesses unique expertise in this area and has developed a framework for examining tribes' "under federal jurisdiction" status. Opinion of the Solicitor, Interior Dep't, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act, No. M-37029 (Mar. 12, 2014).[6] Such determinations are entitled to deference. *E.g.*, *Herman v. Tidewater Pacific, Inc.*, 160 F.3d 1239, 1241 (9th Cir. 1998) ("[T]he court must give deference to the agency's interpretation of statutes that it administers . . . ."); *Stand Up for California! v. U.S. Dep't of the Interior*, 919 F. Supp. 2d 51, 67-70 (D.D.C. 2013) (concluding Interior's interpretation of the phrase "recognized Indian tribe now under federal jurisdiction" and its applicability to tribe at issue was reasonable, supported by agency record, and not arbitrary or capricious).

Under the majority's reasoning, the parties to a straightforward IGRA dispute would be required to develop this potentially complex historical record even though the current trust status of the land is

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

well-established by evidence such as the United States' deed.[7] And courts would be required to perform their own historical analysis on an issue that should be entrusted to the Department of the Interior in the first instance. Accordingly, trust acquisitions should be timely challenged pursuant to the APA, not as collateral issues to an IGRA dispute.

CONCLUSION

For the foregoing reasons, the petition for panel rehearing or rehearing en banc should be granted.

[7] The procedural history of this litigation illustrates this point. The Tribe has not addressed its "under federal jurisdiction" status, *see* Appellee/Cross-Appellant Big Lagoon Rancheria's Combined Principal and Response Br., at 31, and the district court expressly declined to consider the issue, finding that the Tribe's current status was sufficient to support an entitlement to good-faith negotiations. *Big Lagoon Rancheria v. California*, 759 F. Supp. 2d 1149, 1160 (N.D. Cal. 2010). On appeal, the State sought remand so as to further develop the factual record, Appellant/Cross-Appellee State of California's Opening Br., at 42, suggesting that it recognized the inadequacy of the record. And the majority acknowledged that the issues were not "squarely addresse[d]" by either party and are "thorny indeed, and perhaps beyond our competence to answer." Slip op. at 25-26.

Dated: March 17, 2014

Respectfully submitted,

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

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