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En Banc Ninth Circuit Rejects Untimely, Collateral Challenge to Legal Status of Tribe's Trust Lands and Federal Recognition

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On June 4, 2015, the *en banc* Ninth Circuit Court of Appeals held that parties cannot use collateral litigation to challenge the Department of the Interior's decisions to grant federal recognition to an Indian tribe or to accept lands into trust for a tribe. *Big Lagoon Rancheria v. State of California*, Nos. 10-17803 & 10-17878. The Court further held that any challenge to such decisions must be brought under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701, *et seq.*, and within the six-year statute of limitations applicable to APA actions. In so holding, the Court reversed the panel majority decision in *Big Lagoon Rancheria v. State of California*, 741 F.3d 1032 (9th Cir. 2014), and affirmed that the United States Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), did not operate to retroactively divest the United States of trust title to existing trust lands.

Background

Big Lagoon began as a lawsuit by a federally recognized Indian tribe alleging that the State of California had breached its statutory obligation to negotiate in good faith regarding a gaming compact. As an affirmative defense, the State argued that the Indian Gaming Regulatory Act's good faith negotiation requirement did not apply to Big Lagoon Rancheria because the Rancheria was not properly recognized and because the Department of the Interior lacked authority to take land into trust for the Rancheria under *Carcieri*. The district court held that the State was obligated to negotiate in good faith pursuant to IGRA, and a divided panel of the Ninth Circuit reversed, adopting the State's arguments. The Court then granted *en banc* review.

The *En Banc* Decision

The *en banc* Court resoundingly rejected the State's effort to use *Carcieri* to mount an untimely, collateral attack on Interior's recognition and land entrustment decisions. First, it held that *Carcieri* was distinguishable from Big Lagoon's case because the former "involved a timely administrative challenge brought against the Secretary of the Interior" rather than "a belated collateral attack." Slip op. at 12. *Carcieri*, the Court concluded, "does not address whether the BIA's entrustment decisions can be challenged outside an action brought under the APA or outside the statute of limitations for APA actions." *Id*.

Left to resolve these questions of first impression, the *en banc* Court had little difficulty concluding that challenges to federal recognition and land entrustment decisions present "garden variety APA claim[s]." *Id*. (quoting Match-E-Be-Nash-*She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2208 (2012)). Because such challenges are APA claims, the Court held that allowing a party to challenge a tribe's federal recognition or the status of its trust lands in a collateral, non-APA proceeding "would constitute just the sort of end-run [around the APA] that we have previously refused to allow, and would cast a cloud of doubt over countless acres of land that have been

taken into trust for tribes recognized by the federal government." Slip op. at 14. Accordingly, the Court held that the State could not use its collateral litigation against Big Lagoon to challenge the Rancheria's federal recognition or the legal status of its trust lands. *Id*.

The Court went on to hold that even if the State attempted to bring an APA action against the United States to litigate those issues, such a claim would be barred by the six-year statute of limitations applicable to APA actions because the United States granted federal recognition to the Rancheria and accepted its lands into trust more than six years prior to the litigation. *Id*. at 14-15.

In addition to its express holdings that challenges to federal recognition and land entrustment decisions can only be brought through direct, timely APA actions, *Big Lagoon* is significant because of the Court's recognition that, as a matter of law, *Carcieri* did not operate to retroactively divest existing trust lands of their legal status. This holding should, as the Court noted, help to clear up any lingering "cloud of doubt" over the status of lands taken into trust more than six years prior to any *Carcieri*-based challenge. *Id*. at 14.

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