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## Mere Speculation: Overextending *Carcieri v. Salizar* in *Big Lagoon Rancheria v. California*

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# MERE SPECULATION: OVEREXTENDING *CARCIERI v. SALIZAR IN BIG LAGOON RANCHERIA v. CALIFORNIA*

**Abstract:** On January 21, 2014, in *Big Lagoon Rancheria v. California*, a divided panel of the U.S. Court of Appeals for the Ninth Circuit reversed the order of the U.S. District Court for the Northern District of California directing the State of California to negotiate with the Big Lagoon Rancheria toward the development of a gaming facility on the tribe's trust lands. The issues in *Big Lagoon* arose from a collateral attack, long after land had been taken into trust and administrative and legal avenues to challenge that decision had expired. This Comment argues that the Ninth Circuit's reliance on the 2009 U.S. Supreme Court decision *Carcieri v. Salazar* was improper, as that decision dealt with a timely challenge under the Administrative Procedure Act ("APA"). Further, this Comment urges the en banc panel of the Ninth Circuit to rely on the 2008 U.S. Court of Appeals for the Ninth Circuit's decision in *Guidiville Band of Pomo Indians v. NGV Gaming*. This Comment also asserts that, beyond the legal reasoning, there are a myriad of public policy reasons for which the Ninth Circuit should decline to extend *Carcieri* to *Big Lagoon*.

## INTRODUCTION

On January 21, 2014, in *Big Lagoon Rancheria v. California*, a divided panel of the U.S. Court of Appeals for the Ninth Circuit held that the State of California had no obligation to negotiate in good faith with the Big Lagoon tribe, which was pursuing the development of a gaming facility on tribal lands held in trust by the Federal Government.<sup>1</sup> The court held that, because the Secretary of the Interior ("the Secretary") had lacked the authority to take the land in question into trust in 1994, the State had no obligation to enter into negotiations with the tribe.<sup>2</sup> The court relied largely on the 2009 U.S. Supreme Court

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<sup>1</sup> See *Big Lagoon Rancheria v. California*, 741 F.3d 1032, 1034, 1045 (9th Cir. 2014). The statute under which this purchase was made is based on the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 465 (2012); *Big Lagoon*, 741 F.3d at 1035. The IRA authorizes the Bureau of Indian Affairs ("BIA") to purchase land "for the purpose of providing lands to Indians," with title "taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." 25 U.S.C. § 465; *Big Lagoon*, 741 F.3d at 1035.

<sup>2</sup> See *Big Lagoon*, 741 F.3d at 1034–35, 1045. The IRA gives the Secretary the authority "to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments . . . for the purpose of providing land for Indians." 25 U.S.C. § 465.

decision *Carcieri v. Salazar*.<sup>3</sup> There, the Court held that the Secretary has authority under the Indian Reorganization Act of 1934 (“IRA”) to take land into trust only for those tribes that were federally recognized in 1934.<sup>4</sup>

This Comment argues that the Ninth Circuit relied improperly on *Carcieri*, as it is largely irrelevant to the situation in *Big Lagoon*.<sup>5</sup> *Carcieri* dealt with a timely challenge to a land-into-trust decision, brought under the Administrative Procedure Act (“APA”), whereas *Big Lagoon* addressed a collateral attack launched nearly two decades after the Secretary’s decision.<sup>6</sup> Part I of this Comment discusses the factual and procedural history of *Big Lagoon* and *Carcieri*, as well as the relevant federal statutes and regulations governing tribal land-into-trust procedures and gaming on Indian lands.<sup>7</sup> Part II details the Ninth Circuit’s holding and Judge Rawlinson’s dissent in *Big Lagoon*.<sup>8</sup> Finally, Part III examines the ways in which the Ninth Circuit departed from its own precedent in deciding *Big Lagoon*, as well as the potential implications of its holding for landholding Indian tribes across the United States and why the Ninth Circuit should apply the 2008 Ninth Circuit decision *Guidiville Band of Pomo Indians v. NGV Gaming*, rather than *Carcieri*.<sup>9</sup>

#### I. A DENSE, TANGLED WEB: THE ROOTS OF THE *BIG LAGOON* SAGA, *CARCIERI V. SALAZAR*, AND FEDERAL INDIAN LAW

Since the Supreme Court’s 2009 decision in *Carcieri*, the history of Indian tribes’ relationships with the Federal Government has taken on greater focus

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<sup>3</sup> See *Big Lagoon*, 741 F.3d at 1035, 1044–45. See generally *Carcieri v. Salazar*, 555 U.S. 379 (2009) (holding that the BIA has authority under the IRA to take land into trust only for those tribes that were federally recognized in 1934).

<sup>4</sup> See *Carcieri*, 555 U.S. at 382–83.

<sup>5</sup> See *id.* at 385; *Big Lagoon*, 741 F.3d at 1046 (Rawlinson, J., dissenting); *infra* notes 62–78 and accompanying text.

<sup>6</sup> See 5 U.S.C. § 702 (2012); *Carcieri*, 555 U.S. at 385; *Big Lagoon*, 741 F.3d at 1046 (Rawlinson, J., dissenting); *infra* notes 65–80 and accompanying text (distinguishing between *Carcieri*’s APA timely challenge and *Big Lagoon*’s collateral attack). The APA entitles those “suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute” to judicial review. 5 U.S.C. § 702. Actions can be brought against the United States “seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority.” *Id.*

<sup>7</sup> See *infra* notes 10–39 and accompanying text.

<sup>8</sup> See *infra* notes 40–56 and accompanying text.

<sup>9</sup> See *infra* notes 57–95 and accompanying text. See generally *Guidiville Band of Pomo Indians v. NGV Gaming*, 531 F.3d 767 (9th Cir. 2008) (examining a statute defining “Indian lands” in largely the same way as the Indian Gaming Regulatory Act of 1988 (“IGRA”), concluding that the statute applied to “lands already held in trust by the United States”).

and importance.<sup>10</sup> Section A of this Part describes the history of the Big Lagoon Rancheria, from its modest beginnings as a single family on a Northern California homestead to its formal tribal recognition by the Federal Government.<sup>11</sup> Section B of this Part details the failed negotiations and subsequent ongoing litigation between the tribe and the State of California.<sup>12</sup>

*A. The History of the Big Lagoon Rancheria, from Homestead to Formal Recognition and Entrustment*

The saga of *Big Lagoon* begins in 1918, when the Bureau of Indian Affairs (“BIA”) bought a nine-acre parcel of land as a homestead for James Charley and his family.<sup>13</sup> The land was apparently abandoned and vacant for more than 30 years.<sup>14</sup> In the mid-1950s, Thomas Williams and his wife camped on the property with BIA permission, though they made no ownership claim.<sup>15</sup>

In 1967, Thomas Williams and his wife requested dissolution and distribution of the parcel under the amended California Rancheria Termination Act.<sup>16</sup> A 1968 BIA memorandum stated that the land was not originally acquired for any specific Indian group and that its current inhabitants were not part of a formal tribe.<sup>17</sup> Despite this, the BIA in 1968 approved the distribution

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<sup>10</sup> See 555 U.S. at 382–83; *infra* notes 30–31 and accompanying text (explaining that Big Lagoon’s history with the Federal Government was a key aspect in the State trying to avoid negotiating a gaming compact with the tribe).

<sup>11</sup> See *infra* notes 13–24 and accompanying text.

<sup>12</sup> See *infra* notes 25–39 and accompanying text.

<sup>13</sup> See 741 F.3d at 1034. The BIA is part of the Department of the Interior. 25 C.F.R. § 1.3 (2014). The Ninth Circuit, citing BIA records, stated that the purchase was made with “an appropriation ‘to purchase land for village homes for the landless Indians of California.’” *Big Lagoon*, 741 F.3d at 1034. A 1960 memorandum written by the U.S. Solicitor of Indian Affairs details these appropriations. See Declaration of Randall A. Pinal in Support of Defendant State of California’s Opposition to Plaintiff Big Lagoon Rancheria’s Motion for Summary Judgment and Cross-Motion for Summary Judgment at Exhibit S, *Big Lagoon Rancheria v. California*, 759 F. Supp. 2d 1149 (N.D. Cal. 2010) (No. 09-1471), ECF No. 88.

<sup>14</sup> *Big Lagoon*, 741 F.3d at 1034. During the period 1942–1946, James Charley’s son Robert may have lived on the land. *Id.*

<sup>15</sup> *Id.* Thomas Williams was Robert Charley’s nephew by marriage. *Id.*

<sup>16</sup> See California Rancheria Termination Act, Pub. L. No. 88-419, 78 Stat. 390 (1964); *Big Lagoon*, 741 F.3d at 1034. Congress adopted the California Rancheria Termination Act in 1958. See Pub. L. No. 85-671, 72 Stat. 619. The stated purpose of the Act was, “[T]o provide for the distribution of the land and assets of certain Indian rancherias and reservations in California, and for other purposes.” *Id.* The Act automatically dissolved forty-three rancherias (California’s term for small Indian settlements), some of which were later restored. *Big Lagoon*, 741 F.3d at 1034. The Act was amended in 1964 with a process through which any Rancheria could be dissolved and distributed upon request. Pub. L. No. 88-419, 78 Stat. 390; *Big Lagoon*, 741 F.3d at 1034.

<sup>17</sup> Declaration of Randall A. Pinal, *supra* note 13, at Exhibit T. The memo stated that the land “was not set aside for any specific tribe, band or group of Indians” when originally acquired in 1918, and that the occupants “have not formally organized” and did not have “allotments or formal assignments.” *Id.*

of the land to the Williamses.<sup>18</sup> For unknown reasons, the land was never distributed and the request was withdrawn.<sup>19</sup>

Nevertheless, in 1979 the tribe was first included in the list of “Indian Tribal Entities That Have a Government-to-Government Relationship with the United States.”<sup>20</sup> Membership in what is now the Big Lagoon Rancheria has been based on the BIA’s 1968 land distribution list, with the tribe’s members tracing their ancestry to Thomas Williams.<sup>21</sup> In 1994, the BIA purchased a nearby—but separate—eleven-acre parcel, taking it into trust “for Big Lagoon Rancheria, a Federally Recognized Indian Rancheria” pursuant to the IRA.<sup>22</sup> On this eleven-acre parcel, Big Lagoon subsequently sought to establish “class III” gaming activities.<sup>23</sup> This class of gaming is regulated on Indian lands according to the federal Indian Gaming Regulatory Act of 1988 (“IGRA”).<sup>24</sup>

### *B. Federal Indian Gaming Law, Carcieri v. Salazar, and the Litigation History of Big Lagoon*

The IGRA permits gaming on Indian lands if, among other requirements, the tribe and state create a compact to govern the gaming activities.<sup>25</sup> The IGRA requires that states negotiate such compacts in good faith.<sup>26</sup> In 1998 and 1999, the State of California put forward a model compact for tribes pursuing

<sup>18</sup> *Id.* at Exhibit FF; see *Big Lagoon*, 741 F.3d at 1035. The Williams’ daughter and her husband were also living on the land at the time and were also beneficiaries of the distribution plan. Declaration of Randall A. Pinal, *supra* note 13, at Exhibit DD, EE.

<sup>19</sup> *Big Lagoon*, 741 F.3d at 1035.

<sup>20</sup> Indian Tribal Entities That Have a Government-to-Government Relationship with the United States, 44 Fed. Reg. 7235 (Feb. 6, 1979). This list is today maintained as “Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs,” and Big Lagoon Rancheria continues to be included. 80 Fed. Reg. 1942, 1943 (Jan. 14, 2015).

<sup>21</sup> Declaration of Randall A. Pinal, *supra* note 13, at Exhibit GG.

<sup>22</sup> 25 U.S.C. § 2202 (2012); *Big Lagoon*, 741 F.3d at 1035; Declaration of Randall A. Pinal, *supra* note 13, at Exhibit D; *supra* notes 1–2 and accompanying text. The IRA defines the term “Indian” as:

[A]ll persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and . . . all other persons of one-half or more Indian blood.

25 U.S.C. § 479 (2012).

<sup>23</sup> *Big Lagoon*, 741 F.3d at 1034.

<sup>24</sup> 25 U.S.C. § 2710(d)(1)(C) (2012). Congress enacted the IGRA to establish a framework for the operation and regulation of gaming on Indian lands. *Id.* § 2702(1)–(2) (2012); *Big Lagoon Rancheria v. California*, 759 F. Supp. 2d 1149, 1151 (N.D. Cal. 2010). The IGRA defines “Indian Lands” as “all lands within the limits of any Indian reservation” and “any lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe or individual . . . and over which an Indian tribe exercises governmental power.” 25 U.S.C. § 2703(4) (2012).

<sup>25</sup> 25 U.S.C. § 2710(d) (“Class III gaming activities shall be lawful on Indian lands . . . if such activities are . . . conducted in conformance with a Tribal-State compact . . .”).

<sup>26</sup> *Id.* § 2710(d)(3)(A) (“Upon receiving . . . a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.”).

class III gaming on their lands.<sup>27</sup> Big Lagoon did not accept the proposed compact, and, in 1999, the tribe filed a complaint against the State of California in the U.S. District Court for the Northern District of California, alleging that the State had not negotiated in good faith.<sup>28</sup>

After numerous failed negotiations, Big Lagoon commenced suit for a second time in April 2009.<sup>29</sup> The State, in its answer, acknowledged that Big Lagoon was a federally recognized tribe and the trust beneficiary of lands within Humboldt County, California.<sup>30</sup> But the State also argued that it was not

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<sup>27</sup> *Big Lagoon*, 741 F.3d at 1036. The IGRA sets out three categories or “classes” of gaming. 25 U.S.C. § 2703(6)–(8). Relevant to the *Big Lagoon* case is class III, which includes “slot machines, casino games, banking card games, dog racing and lotteries.” See *Big Lagoon Rancheria*, 759 F. Supp. 2d at 1152.

<sup>28</sup> See CAL. GOV’T CODE § 98004 (West 2014); *Big Lagoon*, 741 F.3d at 1036; Complaint, *Big Lagoon Rancheria*, 759 F. Supp. 2d 1149 (No. 99–4995). Some tribes did, however, accept the compact as proposed. *Big Lagoon*, 741 F.3d at 1036. California is one of the jurisdictions in which tribes can bring suit against the state government for failure to negotiate in good faith. See 25 U.S.C. § 2710(d)(7)(A)(1); CAL. GOV’T CODE § 98005 (West 2014); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996); *Hotel Emps. & Rest. Emps. Int’l Union v. Davis*, 981 P.2d 990, 994 (Cal. 1999). Under the IGRA, tribes can commence an action against states that fail to negotiate in good faith. 25 U.S.C. § 2710(d)(7). In 1996, in *Seminole Tribe of Florida*, however, the U.S. Supreme Court held that this provision runs afoul of the Commerce Clause. See U.S. CONST. art. I, § 8, cl. 3; 517 U.S. at 47 (reasoning that states must consent to actions brought under the ‘good-faith’ requirement of the IGRA, as Congress lacks the power to revoke states’ immunity to such suits). The Court therefore held that such suits could only occur with the consent of the state. See *Seminole Tribe*, 517 U.S. at 47. The State of California has consented to these suits. CAL. GOV’T CODE § 98005; *Big Lagoon Rancheria*, 759 F. Supp. 2d at 1152; *Davis*, 981 P.2d at 994. The IGRA lays out a framework for such actions, which can result in the district court compelling negotiations, forcing mediation, and, if need be, the Secretary of the Interior ultimately proscribing terms. See *Big Lagoon Rancheria*, 759 F. Supp. 2d at 1152–53.

<sup>29</sup> See *Big Lagoon*, 741 F.3d at 1037. Big Lagoon and the State continued to negotiate while litigation moved forward. *Id.* at 1036. In 2005, an agreement was reached under which Big Lagoon, along with another group, would be permitted to operate a casino on non-Indian lands in Barstow, California. *Id.* As part of the settlement, Big Lagoon’s suit against the State was dismissed without prejudice. *Id.* The California legislature, however, failed to ratify the agreement (as required by California law for it to take effect). *Id.* The agreement ultimately lapsed, and in September 2007 the tribe sent the State a request for renewed negotiations to establish class III gaming on Big Lagoon Rancheria trust lands. *Id.* Subsequent negotiations centered on the site of the proposed casino, with the tribe preferring the eleven-acre parcel. See *id.* at 1036–37. The State, in turn, suggested a number of alternatives. See *id.* at 1037. The State’s proposed alternatives included: locating all development on a separate, nearby property; placing the casino on the nine-acre parcel, the hotel on the eleven-acre parcel, and parking on a separate, nearby property; and placing the casino on the nine-acre parcel, the hotel on the eleven-acre parcel, and dividing parking between the two sites. *Id.* For the latter two suggestions, the State would require both environmental mitigation and revenue sharing. *Id.* The tribe agreed to some environmental mitigation steps, but rejected the options that included land other than the tribe’s trust lands and sharing revenue with the State. *Id.* The State then expressed a willingness to permit Big Lagoon to develop a casino and hotel “on the Rancheria,” but would not allow the construction of a tower of the height desired by the tribe and continued to insist on environmental mitigation and revenue sharing. *Id.*

<sup>30</sup> Defendant State of California’s Answer to Complaint Pursuant to the Indian Gaming Regulatory Act at 2, *Big Lagoon Rancheria*, 759 F. Supp. 2d 1149 (No. 09-1471). The State conceded that, “Big Lagoon is currently on a list of federally recognized tribes, [and] that the United States considers

obligated to negotiate with Big Lagoon because the tribe was ineligible to have land taken into trust by the Federal Government on its behalf.<sup>31</sup>

The State asserted this affirmative defense because of the U.S. Supreme Court's February 2009 decision in *Carcieri*.<sup>32</sup> *Carcieri* was brought by the State of Rhode Island as a timely challenge under the APA to the Secretary's decision under the IRA to take land into trust for a Rhode Island tribe.<sup>33</sup> The Court held that the BIA has authority under the IRA to take land into trust only for those tribes that were federally recognized at the time of the IRA's enactment—1934.<sup>34</sup> Citing *Carcieri*, the State of California asserted in *Big Lagoon* that the land in question was “not ‘Indian lands’ eligible for gaming under IGRA” because Big Lagoon was not federally recognized in 1934.<sup>35</sup> The state argued that it was therefore not in the public interest for the state to enter negotiations for gaming on land not lawfully acquired in trust.<sup>36</sup>

In November 2010, the U.S. District Court for the Northern District of California held that the State of California had failed to negotiate in good

the Rancheria to be the trust beneficiary of certain lands the federal government owns in Humboldt County, California . . . .” *Id.*

<sup>31</sup> *Id.* at 5. In its Answer, the State put forward, for the first time, the following “affirmative defense”:

Big Lagoon is not entitled to injunctive relief compelling Governor Arnold Schwarzenegger to negotiate a Compact authorizing class III gaming on land taken in trust for the Rancheria subsequent to October 17, 1988, because Big Lagoon is not eligible to be a beneficiary of a trust conveyance pursuant to 25 U.S.C. § 465 and, thus, was never entitled to a beneficial interest in that land.

*Id.*

<sup>32</sup> See *Big Lagoon*, 741 F.3d at 1041. See generally *Carcieri*, 555 U.S. 379 (holding that the BIA has authority under the IRA to take land into trust only for those tribes that were federally recognized in 1934).

<sup>33</sup> 555 U.S. at 382. The APA allows civil suits against the Federal Government challenging “final agency actions” where judicial review is not otherwise granted by statute. 5 U.S.C. § 702, 704 (2012); Brief for United States as Amici Curiae in Support of Petition for Panel Rehearing and Rehearing En Banc at 7, *Big Lagoon*, 741 F.3d 1032 (No. 10-17803). The APA is the proper forum for challenging a land-into-trust decision. See 5 U.S.C. § 702; Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2208 (2012); *Carcieri*, 555 U.S. at 385; *Kansas v. United States*, 249 F.3d 1213, 1222–23 (10th Cir. 2001); *Alabama v. PCI Gaming Auth.*, No. 2:13-CV-178-WKW, 2014 WL 1400232, at \*1, \*15 (M.D. Ala. Apr. 10, 2014). The general six-year statute of limitations applies to challenges under the APA. 28 U.S.C. § 2401(a) (2012); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991).

<sup>34</sup> See *Carcieri*, 555 U.S. at 382–83. The *Carcieri* decision hinged upon the IRA phrase “now under Federal jurisdiction,” with the Court concluding that the proper interpretation of the word “now” is “when the IRA was enacted in 1934.” See 25 U.S.C. § 479 (2012); 555 U.S. at 395. Because the Narragansett Tribe was not under Federal jurisdiction at the time of the IRA's enactment, the Court held that the Secretary lacked authority to take the land into trust on the tribe's behalf. *Carcieri*, 555 U.S. at 382–83.

<sup>35</sup> *Big Lagoon*, 741 F.3d at 1038.

<sup>36</sup> *Id.* During subsequent oral arguments before the district court, the State asserted that it was only challenging the status of the eleven-acre parcel—not that of the nine-acre parcel. *Id.*

faith.<sup>37</sup> The court granted the tribe's motion for summary judgment, concluding that neither the status of the tribe nor its land affected its right to good-faith negotiations with the state.<sup>38</sup> Both parties appealed the District Court's ruling.<sup>39</sup>

## II. THE NINTH CIRCUIT'S DECISION: *CARCIERI* CONTROLS

In 2014, in *Big Lagoon Rancheria v. California*, a split three-judge panel of the U.S. Court of Appeals for the Ninth Circuit held that Big Lagoon did not have jurisdiction over the land in question and could not request negotiations with the State, relieving the State of any obligation to negotiate in good faith.<sup>40</sup> The Ninth Circuit reasoned that, because Big Lagoon was not federally recognized in 1934, it was not eligible to have land taken into trust on its behalf, and thus did not possess "Indian Lands" under the Indian Gaming Regulatory Act of 1988 (IGRA).<sup>41</sup>

The court further held that the State of California's objection to the 1994 entrustment was permissible despite the applicability of a six-year statute of limitations, citing the 1991 U.S. Court of Appeals for the Ninth Circuit deci-

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<sup>37</sup> *Big Lagoon Rancheria*, 759 F. Supp. 2d at 1162. Citing the 2010 U.S. Court of Appeals for the Ninth Circuit's decision in *Rincon Band of Luiseño Mission Indians v. Schwarzenegger*, the district court held that, while revenue sharing and environmental mitigation were appropriate topics for negotiation, the State's non-negotiable stance on them constituted bad faith. *See id.* at 1159, 1162; *see also* *Rincon Band of Luiseño Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1042 (9th Cir. 2010) (holding that the State's demand for contribution of a portion of tribal gaming revenue for the State's general fund in exchange for expanded class III gaming rights constituted imposition of a tax and evidence of bad faith negotiation).

<sup>38</sup> *See Big Lagoon Rancheria*, 759 F. Supp. 2d at 1160. The district court also held that the *Carcieri* decision had no bearing on the State's obligation to negotiate in good faith because the decision came after the negotiations. *See id.* at 1159–60. The court directed the tribe and the State to either agree to a compact within 60 days, or to submit their proposals to a court-appointed mediator. *Id.* at 1163. The parties continued to negotiate but, unable to reach an agreement, submitted their proposals to a mediator. *Id.* at 1039. The State proposed waiving revenue sharing in exchange for a number of environmental mitigation measures. *Id.* The tribe offered to contribute revenue to gaming-related trust funds and to prepare an environmental impact report and continue to negotiate environmental mitigation with the appropriate State agency. *Id.* After reviewing both proposals, the mediator concluded that "the compact that best comports with the terms of the IGRA, applicable federal law, and [the district court's order]" was Big Lagoon's. *Id.* The court subsequently stayed further proceedings pending appeal. *Id.*

<sup>39</sup> *Id.* at 1038–39.

<sup>40</sup> 741 F.3d 1032, 1034, 1045 (9th Cir. 2014) (reversing the decision of the U.S. District Court for the Northern District of California); *see supra* notes 37–39 and accompanying text.

<sup>41</sup> 25 U.S.C. § 2703(4) (2012); *Carcieri v. Salazar*, 555 U.S. 379, 382–83 (2009); *Big Lagoon*, 741 F.3d at 1045. The court based its reasoning on the U.S. Supreme Court's 2009 decision in *Carcieri*, holding that the tribe did not have jurisdiction over the land in question and could not request negotiations with the State, relieving the State of the obligation to negotiate in good faith. *See Carcieri*, 555 U.S. at 382–83; *Big Lagoon*, 741 F.3d at 1045.



sion in *Wind River Mining Corp. v. United States*.<sup>42</sup> In *Wind River*, the court held that APA challenges of administrative decisions of federal agencies could be brought within six years of an agency's application of its decision to a specific challenger.<sup>43</sup> The *Big Lagoon* court treated the tribe's suit to compel negotiations with the State as akin to the application of an administrative decision, and therefore held that the six-year time limit began to run only when that suit was brought—April 2009.<sup>44</sup>

Finally, the court distinguished *Big Lagoon* from the 2008 U.S. Court of Appeals for the Ninth Circuit decision in *Guidiville Band of Pomo Indians v. NGV Gaming*.<sup>45</sup> In *Guidiville*, the court interpreted the definition of "Indian lands" in a federal statute that gives the U.S. government oversight in contracts and agreements that affect Indian lands.<sup>46</sup> The court held that this statute "applie[d] only to contracts that affect lands already held in trust by the United States."<sup>47</sup> The *Guidiville* court also examined the section of the IGRA at issue in *Big Lagoon*, concluding that the IGRA defines "Indian lands" in largely the same way.<sup>48</sup> The court in *Big Lagoon* held that *Guidiville* was not applicable, however, because it dealt with land to be taken into trust in the future, whereas the decision at issue in *Big Lagoon* was a past entrustment.<sup>49</sup> The court therefore reasoned that *Wind River* was the more analogous case.<sup>50</sup>

The dissenting opinion in *Big Lagoon* argued that *Guidiville*—rather than *Wind River* and *Carciere*—should control.<sup>51</sup> The dissent contended that the def-

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<sup>42</sup> *Big Lagoon*, 741 F.3d at 1043; *Wind River Mining Corp. v. United States*, 946 F.2d 710, 716 (9th Cir. 1991) (concluding that the general six-year statute of limitations for civil actions against the federal government applies to APA actions).

<sup>43</sup> See 5 U.S.C. § 702 (2012); *Wind River*, 946 F.2d at 716. *Wind River* involved a mining company challenge of a land classification decision by the Bureau of Land Management. 946 F.2d at 711–12.

<sup>44</sup> See 741 F.3d at 1037, 1043. The court explicitly noted that it was extending the holding of *Wind River*, which dealt with a direct enforcement action by the decision-making agency, to the third-party enforcement situation at issue in *Big Lagoon*. See *id.* at 1043; *Wind River*, 946 F.2d at 716. The court also observed that the State may not have had sufficient concern to bring a challenge at the time of the 1994 entrustment decision. See *Big Lagoon*, 741 F.3d at 1043.

<sup>45</sup> *Big Lagoon*, 741 F.3d at 1042. See generally *Guidiville Band of Pomo Indians v. NGV Gaming*, 531 F.3d 767 (2008) (examining a statute defining "Indian lands" in largely the same way as the Indian Gaming Regulatory Act of 1988 ("IGRA"), concluding that the statute applied to "lands already held in trust by the United States").

<sup>46</sup> 25 U.S.C. § 81(a)(1) (2012) (defining "Indian lands" as "lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation"); 531 F.3d at 769.

<sup>47</sup> *Guidiville*, 531 F.3d at 770. The court interpreted the word "is" in its most literal, present-tense sense. See 25 U.S.C. § 81(a)(1); *Guidiville*, 531 F.3d at 770.

<sup>48</sup> See *Guidiville*, 531 F.3d at 778.

<sup>49</sup> *Big Lagoon*, 741 F.3d at 1042.

<sup>50</sup> See *id.* at 1042–43.

<sup>51</sup> *Id.* at 1047 (Rawlinson, J., dissenting). The dissent contended that the *Carciere* decision did not overrule the Ninth Circuit's *Guidiville* definition of "Indian lands," but rather simply interpreted a general definition of "Indian" in the IRA and did not address the IGRA in any way. *Id.* at 1046–47;

inition at the heart of *Carcieri* was interpreted in the course of a timely challenge under the APA of a land-into-trust decision.<sup>52</sup> In contrast, the dissent characterized the objection at issue in *Big Lagoon* as a “collateral challenge to the legitimacy of a designation of trust property outside the parameters of the Administrative Procedure Act.”<sup>53</sup> Indeed, the dissent noted, nearly eighteen years passed after the decision to place the land in trust, with no challenge from the State of California.<sup>54</sup> To allow such a challenge after formal administrative and judicial avenues have long expired would fly in the face of precedent, the dissent argued.<sup>55</sup>

On June 11, 2014, the Ninth Circuit ordered that the case be reheard en banc.<sup>56</sup>

### III. *BIG LAGOON*: A DANGEROUS DECISION AND ITS POTENTIAL IMPLICATIONS FOR TRIBES ACROSS THE COUNTRY

The U.S. Court of Appeals for the Ninth Circuit’s 2014 decision in *Big Lagoon Rancheria v. California* is problematic for a number of reasons, most notably its improper overextension of the 2009 U.S. Supreme Court decision *Carcieri v. Salazar* and its departure from established Ninth Circuit precedent.<sup>57</sup> Moreover, the Ninth Circuit’s decision demonstrates the uncertainty tribal trust lands throughout the United States face in the wake of the *Carcieri*.<sup>58</sup> Section A of this Part examines the dubious reasoning employed by the

see 25 U.S.C. § 2703(4) (2012) (“The term ‘Indian lands’ means any lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe . . . .”); 25 U.S.C. § 479 (2012) (“The term ‘Indian’ as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction . . . .”); *Carcieri*, 555 U.S. at 395 (reasoning that “Indian” in the IRA referred to those tribes federally recognized in 1934); *Guidville*, 531 F.3d at 770 (concluding that “Indian lands” in 25 U.S.C. § 81 “applies only to contracts that affect lands already held in trust by the United States”).

<sup>52</sup> *Big Lagoon*, 741 F.3d at 1046; see 5 U.S.C. § 702 (2012); *Carcieri*, 555 U.S. at 385.

<sup>53</sup> *Big Lagoon*, 741 F.3d at 1046; see 5 U.S.C. § 702. The dissent notes that 25 U.S.C. § 465 and its implementing regulations contain provisions to challenge land-into-trust actions. *Big Lagoon*, 741 F.3d at 1046 (Rawlinson, J., dissenting). These include expressly granting state and local governments the chance to object to a tribe’s application. See *id.* The decision can also be challenged both administratively and in federal courts. See *id.*

<sup>54</sup> See *Big Lagoon*, 741 F.3d at 1046.

<sup>55</sup> See *id.* The dissent cites *Wind River*’s holding that a challenge under the APA must be brought within six years of the challenged action. See *id.*; *Wind River*, 946 F.2d at 716.

<sup>56</sup> *Big Lagoon Rancheria v. California*, 758 F.3d 1073, 1073 (9th Cir. 2014).

<sup>57</sup> See 5 U.S.C. § 702; *Big Lagoon Rancheria v. California*, 741 F.3d 1032, 1046–47 (9th Cir. 2014) (Rawlinson, J., dissenting); Brief for Amici Curiae National Congress of American Indians, et al. in Support of Petition for Panel Rehearing and Rehearing En Banc at 6, *Big Lagoon*, 741 F.3d 1032 (No. 10-17803); Brief for United States, *supra* note 33, at 1. See generally *Carcieri v. Salazar*, 555 U.S. 379 (2009) (holding that the BIA has authority under the IRA to take land into trust only for those tribes that were federally recognized in 1934).

<sup>58</sup> See Brief for Nat’l Congress of American Indians, *supra* note 57, at 12; Brief for United States, *supra* note 33, at 12; David Coventry Smith, *Defending Indian Lands After Carcieri*, in EMERGING

court in *Big Lagoon*.<sup>59</sup> Section B of this Part urges the en banc panel of the U.S. Court of Appeals for the Ninth Circuit to decline to continue the overextension of *Carciere* and instead apply the U.S. Court of Appeals for the Ninth Circuit's 2008 decision in *Guidiville Band of Pomo Indians v. NGV Gaming*.<sup>60</sup> Section B of this Part further discusses the potential implications the overextension of *Carciere* could have for lands taken into trust after 1934 and the potentially devastating impact on the already vulnerable economic and social wellbeing of tribes across the country.<sup>61</sup>

### A. How the Ninth Circuit Departed from Precedent and Overextended *Carciere* in Big Lagoon

First, because *Carciere* addressed a timely Indian Reorganization Act of 1934 ("IRA") challenge properly brought under the Administrative Procedures Act ("APA"), the Ninth Circuit erred in applying its holding to the situation before the court in *Big Lagoon*.<sup>62</sup> Indeed, as the dissent in *Big Lagoon* noted, to try to determine how *Carciere* would have been decided if the challenge had been brought outside the timely boundaries of the APA would be mere speculation.<sup>63</sup>

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ISSUES IN TRIBAL-STATE RELATIONS 6, 6 (Aspatore ed., 2014); Rob Capriccioso, *Big Lagoon Rancheria v. California: The Latest Threat to Tribal Land*, INDIAN COUNTRY TODAY MEDIA NETWORK (Feb. 3, 2014), available at <http://indiancountrytodaymedianetwork.com/2014/02/03/big-lagoon-rancheria-v-california-latest-threat-tribal-land-153388>, archived at <http://perma.cc/TY9A-TJH6>; Lael Echo-Hawk, *Big Lagoon Decision Could Seriously Impact Indian Country*, GARVEY SCHUBERT BARER LEGAL UPDATE (Jan. 22, 2014), available at [https://www.gsblaw.com/news/legal\\_update/big\\_lagoon\\_decision\\_could\\_seriously\\_impact\\_indian\\_country](https://www.gsblaw.com/news/legal_update/big_lagoon_decision_could_seriously_impact_indian_country), archived at <https://perma.cc/C7WE-DN58>.

<sup>59</sup> See *infra* notes 62–78 and accompanying text.

<sup>60</sup> See *infra* notes 79–84 and accompanying text.

<sup>61</sup> See *infra* notes 85–95 and accompanying text.

<sup>62</sup> See 25 U.S.C. § 465 (2012) ("The Secretary of the Interior is authorized . . . to acquire . . . any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments . . . for the purpose of providing land for Indians."); *Carciere*, 555 U.S. at 385 (noting that "[p]etitioners sought review of the IBIA decision pursuant to the Administrative Procedure Act"); *Big Lagoon*, 741 F.3d at 1046 (Rawlinson, J., dissenting) (noting that the Supreme Court's ruling in *Carciere* "follow[ed] a timely challenge to the Secretary's decision under the Administrative Procedure Act"); *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147, 1153 (8th Cir. 2013) (stating that a municipal government challenge to a National Indian Gaming Commission decision should have been brought under the APA); *Alabama v. PCI Gaming Authority*, No. 2:13–CV–178–WKW, 2014 WL 1400232, at \*1, \*16–17 (M.D. Ala. Apr. 10, 2014) ("[T]he court rejects the State's *Carciere*-based collateral challenge . . . to the Secretary's decades-old land-into-trust decisions."); Smith, *supra* note 58, at 9 (questioning the *Big Lagoon* court's decision to begin running the statute of limitations in 2009 rather than at the time of the 1994 entrustment).

<sup>63</sup> See *Big Lagoon*, 741 F.3d at 1047 (Rawlinson, J., dissenting) ("[W]e cannot say how the Supreme Court would have ruled if the challenger in *Carciere* had not filed a timely challenge under the Administrative Procedure Act or had sued under a different statute entirely.").

The *Big Lagoon* court essentially permitted an end-run around the established process for challenging a land-into-trust decision.<sup>64</sup> In 1991, in *Wind River Mining Corp. v. United States*, the U.S. Court of Appeals for the Ninth Circuit simply held that an APA challenge could be brought within six years of the application or enforcement of the decision to the challenging party.<sup>65</sup> Stark differences exist, however, between such a scenario and *Big Lagoon*—most glaringly, the absence of agency enforcement.<sup>66</sup> The court in *Big Lagoon* also invokes *Wind River* in observing that the original 1994 entrustment may not have caused the State of California sufficient “concern” to prompt a challenge under the APA.<sup>67</sup> In 1997, however, prior to *Big Lagoon*’s commencement of litigation, the State attempted to intervene in a challenge to the land-into-trust decision.<sup>68</sup> The State, therefore, had the opportunity and the notice to challenge the land-into-trust decision both before and after it was originally made.<sup>69</sup> Yet the State of California chose not to take advantage of either of those well-worn options—as the petitioners in *Carciari* did—for nearly two decades.<sup>70</sup> To permit the State to invoke the APA so long after the original decision, despite the present case’s departure from the holding of *Wind River* and the State’s wasted opportunity to file a timely challenge in the 1990s, would amount to allowing

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<sup>64</sup> See Brief for Nat’l Congress of American Indians, *supra* note 57, at 6 (“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.”); *infra* note 83 and accompanying text.

<sup>65</sup> See 946 F.2d 710, 716 (9th Cir. 1991). It is also curious that the court chose *Big Lagoon*’s 2009 suit to compel negotiations as the commencement of the six-year APA statute of limitations. See *Big Lagoon*, 741 F.3d at 1037, 1043. Even if the court’s extension of *Wind River* to the facts of *Big Lagoon* were proper, and the State was only put on actual notice when the tribe brought suit against it, the court apparently overlooked the fact that the compact negotiations began in 1998, with the tribe first filing suit in 1999. Complaint, *supra* note 28; see *Big Lagoon*, 741 F.3d at 1036; Brief for United States, *supra* note 33, at 10 n.5. Under this timeline, the State’s ability to bring an APA challenge would have expired in 2004 or 2005. See Brief for United States, *supra* note 33, at 10 n.5.

<sup>66</sup> See *Big Lagoon*, 741 F.3d at 1043; Brief for United States, *supra* note 33, at 10–11. The resulting proceedings leave out the Department of the Interior, with no opportunity to complete the record or defend its decision and its property interest. See Brief for Nat’l Congress of American Indians, *supra* note 57, at 7–8; Brief for United States, *supra* note 33, at 15–16.

<sup>67</sup> See *Big Lagoon*, 741 F.3d at 1043. The court made the observation almost in passing, devoting just one sentence to the subject. See *id.*

<sup>68</sup> See *id.* at 1036; Brief for Nat’l Congress of American Indians, *supra* note 57, at 10; Brief for United States, *supra* note 33, at 10.

<sup>69</sup> See *Big Lagoon*, 741 F.3d at 1043; Brief for Nat’l Congress of American Indians, *supra* note 57, at 9–10; Brief for United States, *supra* note 33, at 10. Prior to a final trust decision, federal regulations afford states the opportunity to object to land-into-trust applications. Guidiville Band of Pomo Indians v. NGV Gaming, 531 F.3d 767, 777 (9th Cir. 2008); 25 C.F.R. § 151.10–11 (2014).

<sup>70</sup> See *Carciari*, 555 U.S. at 385; *Big Lagoon*, 741 F.3d at 1046 (Rawlinson, J., dissenting).

an end-run around long-established procedures.<sup>71</sup> The Ninth Circuit has previously prohibited such maneuvers.<sup>72</sup>

Finally, the court employs problematic logic in its choice to turn away from Ninth Circuit precedent, namely the Ninth Circuit's 2008 decision in *Guidiville Band of Pomo Indians v. NGV Gaming*.<sup>73</sup> The court distinguished *Guidiville* from *Big Lagoon* by reasoning that, while *Big Lagoon* concerns a past entrustment, *Guidiville* dealt with a future entrustment.<sup>74</sup> That distinction is irrelevant for purposes of *Big Lagoon*.<sup>75</sup> In *Guidiville*, the court defined "Indian Lands" as meaning real estate "title to [which] must *already* be held by the United States in trust for a tribe."<sup>76</sup> That this was not the case in *Guidiville*—and is in *Big Lagoon*—has little effect on the definition itself or its applicability to the latter case.<sup>77</sup> Indeed, the land in question in *Big Lagoon* clearly meets the *Guidiville* court's definition of "Indian Lands."<sup>78</sup>

### B. The Troubling Implications for Tribes Across the Country if the *En Banc* Court Fails to Follow *Guidiville*

Despite the Ninth Circuit panel's inappropriate application of *Carcieri* to *Big Lagoon*, the Ninth Circuit, in rehearing the case en banc, should look to its own precedent and apply *Guidiville*.<sup>79</sup> *Guidiville* held that "Indian lands" in-

<sup>71</sup> See Brief for Nat'l Congress of American Indians, *supra* note 57, at 6.

<sup>72</sup> See *United States v. Backlund*, 689 F.3d 986, 1000 (9th Cir. 2012); *United States v. Lowry*, 512 F.3d 1194, 1202–03 (9th Cir. 2008); Brief for Nat'l Congress of American Indians, *supra* note 57, at 6.

<sup>73</sup> See *Big Lagoon*, 741 F.3d at 1045 (Rawlinson, J., dissenting); Brief for United States, *supra* note 33, at 14–15. See generally *Guidiville*, 531 F.3d 767 (examining a statute defining "Indian lands" in largely the same way as the Indian Gaming Regulatory Act of 1988 ("IGRA"), concluding that the statute applied to "lands already held in trust by the United States").

<sup>74</sup> See *Big Lagoon*, 741 F.3d at 1042 ("In *Guidiville*, we held that land to be entrusted *in the future* did not qualify as 'Indian lands' . . . Here, by contrast, we are called upon to decide whether a past entrustment qualifies if it turns out to have been invalid."); *Guidiville*, 531 F.3d at 769 (concluding that 25 U.S.C. § 81 "applies only to contracts that affect lands already held in trust by the United States").

<sup>75</sup> Brief for United States, *supra* note 33, at 14–15.

<sup>76</sup> See *Guidiville*, 531 F.3d at 775.

<sup>77</sup> See *Big Lagoon*, 741 F.3d at 1045–46 (Rawlinson, J., dissenting); Brief for United States, *supra* note 33, at 14–15.

<sup>78</sup> See *Big Lagoon*, 741 F.3d at 1047 (Rawlinson, J., dissenting) ("Indian lands for the purpose of IGRA includes lands held in trust for a tribe at the time of the gaming contract."); Brief for United States, *supra* note 33, at 14 ("[T]he parcel 'is held in trust' for the Tribe and thus meets the requirement of IGRA.").

<sup>79</sup> See *Big Lagoon*, 741 F.3d at 1045–46 (Rawlinson, J., dissenting). The dissent notes the high standard for departing from Ninth Circuit precedent. See *id.* at 1047. In the 2012 U.S. Court of Appeals for the Ninth Circuit decision *Lair v. Bullock*, for example, the court held that "as long as [the court] can apply our prior circuit precedent without running afoul of the intervening authority, [it] must do so." 697 F.3d 1200, 1207 (9th Cir. 2012) (citation and internal quotation marks omitted). This standard applies even when "intervening authority creates 'some tension' with . . . or 'cast[s] doubt' on [the court's] precedent." See *Big Lagoon*, 741 F.3d at 1047 (quoting *Lair*, 697 F.3d at 1207). In-

cluded those lands presently held in trust for a tribe.<sup>80</sup> Under this definition, the lands at issue in *Big Lagoon* were “Indian lands” at the time the tribe’s request for compact negotiations was made, and the State was therefore compelled to negotiate in good faith.<sup>81</sup>

Additional public policy concerns support the Ninth Circuit’s reversal of the panel’s decision in *Big Lagoon*.<sup>82</sup> Among these compelling interests is the preservation of the integrity of the avenues for challenge set forth in federal regulations and the APA.<sup>83</sup> To allow California this “end-run” around established forums for orderly challenges to land-into-trust decisions would render

deed, the standard is very high: the intervening authority must be “clearly inconsistent” with Ninth Circuit precedent. *See id.*

<sup>80</sup> *See* 531 F.3d at 778 (stating that the IGRA “defines ‘Indian lands’ in much the same manner as [25 U.S.C. § 81]”); *see also Big Lagoon*, 741 F.3d at 1047 (Rawlinson, J., dissenting).

<sup>81</sup> *See* 741 F.3d at 1047 (Rawlinson, J., dissenting); *Guidiville*, 531 F.3d at 778.

<sup>82</sup> *See* 741 F.3d at 1046 (Rawlinson, J., dissenting); *PCI Gaming*, 2014 WL 1400232, at \*15; Smith, *supra* note 58, at 10 (arguing that “Indian country needs a strong and uniform response to the growing threat to tribal governments by the efforts of states to encroach on Indian lands”); Capriccioso, *supra* note 58 (“The [*Big Lagoon*] ruling has major implications for Indian country beyond the California tribe . . .”); Lael Echo-Hawk, *supra* note 58 (noting that *Big Lagoon* could open up challenges to land-into-trust decisions “EVEN if the statutory time to challenge the action under the Administrative Procedures [sic] Act has expired”).

<sup>83</sup> *See Big Lagoon*, 741 F.3d at 1046 (Rawlinson, J., dissenting); *PCI Gaming*, 2014 WL 1400232, at \*15; Smith, *supra* note 58. The APA is the proper forum for challenging a land-into-trust decision. *See* 5 U.S.C. § 706(2)(A), (C) (2012) (“The reviewing court shall . . . hold unlawful and set aside agency action . . . not in accordance with law [or] in excess of statutory jurisdiction [or] authority . . .”); *see also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2208 (2012) (“[Plaintiff] asserts merely that the Secretary’s decision to take land into trust violates a federal statute—a garden-variety APA claim.”); *Carciere*, 555 U.S. at 385 (noting that “[p]etitioners sought review of the [Interior Board of Indian Appeals] decision pursuant to the Administrative Procedure Act”); *Kansas v. United States*, 249 F.3d 1213, 1222–23 (10th Cir. 2001) (concluding that the APA is the appropriate statute for the State of Kansas to challenge the National Indian Gaming Commission’s decision that a tract of land constitutes “Indian Lands” for purposes of the IGRA); *PCI Gaming*, 2014 WL 1400232, at \*15 (“The APA indisputably provides a proper framework for challenging the Secretary’s land-into-trust decisions.”). Section 2401 states that civil actions against the United States must be commenced within six years of the right of action accruing. 28 U.S.C. § 2401 (2012). The Ninth Circuit has held that § 2401 applies to challenges to federal agency decisions, which “must be brought within six years of the agency’s application of the disputed decision to the challenger.” *Wind River*, 946 F.2d at 716. Furthermore, prior to a final trust decision, federal regulations afford states the opportunity to object to land-into-trust applications. *See* 25 C.F.R. § 151.10–11 (2014); *see also Guidiville*, 531 F.3d at 777 (“With . . . initial information in hand, the Department of the Interior then gives state and local governments the opportunity to object to the tribe’s application . . .”). After receiving a request for reservation lands to be taken into trust, the Secretary is required to notify state and local governments with jurisdiction over the land in question. 25 C.F.R. § 151.10. The state and local governments are then “given 30 days in which to provide written comments as to the acquisition’s potential impacts on regulatory jurisdiction, real property taxes and special assessments.” *Id.* The same process is followed for off-reservation requests. *Id.* § 151.11.

these processes moot and signal open season for challenges of long-past decisions.<sup>84</sup>

More troubling still for hundreds of tribes across the United States is the continuing and growing threat the *Big Lagoon* holding represents.<sup>85</sup> The Bureau of Indian Affairs (“BIA”) currently recognizes 566 tribes.<sup>86</sup> Of these, only 258 appear on a list of federally recognized tribes compiled shortly after passage of the IRA.<sup>87</sup> Some 308 tribes, therefore, stand to potentially lose sovereignty over their trust lands if *Big Lagoon* stands.<sup>88</sup> The Federal Government has taken millions of acres into trust under the IRA since 1934, all of which could become exposed to collateral attack.<sup>89</sup> Such an outcome would be devastating, threatening the economic and social wellbeing of tribes in states across the country.<sup>90</sup> As it stands, the *Big Lagoon* decision has brought great uncer-

<sup>84</sup> See Smith, *supra* note 58, at 6–7, 9–11 (discussing the increase in land-into-trust challenges following *Carcieri*, the looming threat to tribal economic development, and the problematic reasoning employed in applying *Carcieri* to the facts of *Big Lagoon*).

<sup>85</sup> See Brief for Nat’l Congress of American Indians, *supra* note 57, at 12 (“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.”); Brief for United States, *supra* note 33, at 12 (“The majority’s ruling would ‘virtually nullify the statute of limitations’ for challenges to well-settled agency decisions . . . thereby undermining the finality of agency actions in general.” (quoting *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1365 (9th Cir. 1990))); Smith, *supra* note 58, at 6 (noting that *Carcieri* presented “an opportunity to break down the trust barrier that had historically been imposed in gaining access to the lands, personal property and income of individual Indians and tribes”); Capriccioso, *supra* note 58 (arguing that *Big Lagoon* “provides precedent for legal challenges that could remove and/or prevent development on trust lands from all tribes federally recognized after 1934”); Echo-Hawk, *supra* note 58 (“Any tribe who [sic] was recognized post-1934 . . . and had land placed into trust by the BIA prior to or after the *Carcieri* decision, is now vulnerable to having that administrative action challenged.”); see also Katherine J. Florey, *Indian Country’s Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 597 (2010) (“Moreover, tribal land holdings themselves have, over the years, been reduced from their historical levels by ill-conceived government programs and financial pressures.”).

<sup>86</sup> See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 79 Fed. Reg. 4748 (Jan. 29, 2014) (“This notice publishes the current list of 566 tribal entities recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of their status as Indian tribes.”).

<sup>87</sup> See *Carcieri*, 555 U.S. at 398 (Breyer, J., concurring). While this list is recognized as incomplete, it does provide a useful general picture of those tribes the Federal Government considered formally recognized in the 1930s. See *Big Lagoon*, 741 F.3d at 1044.

<sup>88</sup> See Echo-Hawk, *supra* note 58.

<sup>89</sup> See Brief for Nat’l Congress of American Indians, *supra* note 57, at 12; Brief for United States, *supra* note 33, at 1.

<sup>90</sup> See Smith, *supra* note 58, at 1; Capriccioso, *supra* note 58; Echo-Hawk, *supra* note 58. Poverty remains a widespread problem among Native American populations. See Brief for National Congress of American Indians, *supra* note 57, at 11. Indeed, a chief purpose of both the IRA and the IGRA is economic development and independence. See 25 U.S.C. § 2702(1) (2012); *Match-E-Be-Nash-She-Wish*, 132 S. Ct. at 2211. Beyond gaming, the land-into-trust process has allowed tribes to improve health, public safety, and infrastructure on tribal lands. See Brief for National Congress of American Indians, *supra* note 57, at 11–12.

tainty and concern to tribes across the United States.<sup>91</sup> The en banc panel has the opportunity to resolve that uncertainty—or to give it permanence.<sup>92</sup>

Tellingly, in April 2014, in *Alabama v. PCI Gaming Authority*, the U.S. District Court for the Middle District of Alabama declined to allow a strikingly similar collateral attack on a decades-old land-into-trust decision.<sup>93</sup> The en banc panel for the Ninth Circuit should similarly refrain from continuing the dangerous overextension of *Carcieri*.<sup>94</sup> The court should instead look to its own precedent and apply *Guidiville*, and in so doing, order the State of California into good-faith compact negotiations with the Big Lagoon Rancheria.<sup>95</sup>

### CONCLUSION

If the State of California's mode of attack in *Big Lagoon* were timely and brought under the APA, *Carcieri* would offer guidance on the evaluation of its challenge. California's position in *Big Lagoon* is instead very different: it has collaterally attacked a land-into-trust designation as a way to retroactively avoid its statutory obligation to negotiate in good faith. Such an attack is barred by the APA and subsequent case law. Therefore, with *Guidiville*, not *Carcieri*, as its guiding precedent, the en banc Ninth Circuit panel should order the state to enter into good-faith gaming compact negotiations with the Big Lagoon Rancheria. Failure to do so would not only be a continuation of the overextension of *Carcieri*, but would undermine the procedures in place for orderly land-into-trust challenges and threaten millions of acres of Indian lands.

CHRISTIAN VAREIKA

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<sup>91</sup> See Smith, *supra* note 58, at 1; Capriccioso, *supra* note 58; Echo-Hawk, *supra* note 58.

<sup>92</sup> See Brief for Nat'l Congress of American Indians, *supra* note 57, at 12.

<sup>93</sup> See *PCI Gaming*, 2014 WL 1400232, at \*15–16. The court granted the Motion to Dismiss for Defendants Poarch Band of Creek Indians and the gaming company operating casinos on the tribe's behalf. *Id.* at \*5–6. As in *Big Lagoon*, the *PCI Gaming* case arose from a state challenge outside the APA of decades-old land-into-trust decisions for a tribe that was not federally recognized in 1934. See *id.* at \*15. The *PCI* court explicitly stated that it “decline[d] to follow the majority’s reasoning in *Big Lagoon* . . . as it [found] more persuasive *Big Lagoon*’s dissent.” *Id.* at \*17. The court also listed “five reasons to question *Big Lagoon*’s persuasiveness.” *Id.* Among these were concerns that the Department of the Interior was not a party to the action and was unable to provide input to the proceedings. *Id.*

<sup>94</sup> See *Big Lagoon*, 741 F.3d at 1045 (Rawlinson, J., dissenting); Brief for Nat'l Congress of American Indians, *supra* note 57, at 6; Brief for United States, *supra* note 33, at 1.

<sup>95</sup> See *Big Lagoon*, 741 F.3d at 1046–47 (Rawlinson, J., dissenting); *Lair*, 697 F.3d at 1207 (“[A]s long as we can apply our prior circuit precedent without ‘running afoul’ of the intervening authority, we must do so.” (quoting *United States v. Orm Hieng*, 679 F.3d 1131, 1140 (9th Cir. 2012))).