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Big Lagoon Rancheria v. State of California

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Big Lagoon Rancheria v. State of California, Nos. 10-17803, 10-17878, ___ F. 3d ___, 2015 WL 3499884, 2015 U.S. App. LEXIS 9312 (9th Cir. June 4, 2015) (en banc)

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The Ninth Circuit's en banc opinion in *Big Lagoon Rancheria v. California* is, thus far, perhaps the most important Indian law decision in 2015. Rejecting its three-judge panel's opinion, the Ninth Circuit, en banc, affirmed the importance of defending tribal sovereignty against invidious state actions. The court denounced California's use of *Carcieri* to de-recognize the Big Lagoon Rancheria and rescind the trust status of its land, characterizing it as "a belated collateral attack" on the Tribe and an "end-run" around the APA.

I. INTRODUCTION

Big Lagoon Rancheria v. California concerned whether the State of California ("State") could invoke *Carcieri v. Salazar*[1] to invalidate the Secretary of the Interior's ("Secretary") decision to take an eleven-acre parcel of land into trust for the Big Lagoon Rancheria ("Tribe"), eighteen years after the entrustment.[2] Sitting en banc, the United States Court of Appeals for the Ninth Circuit found that *Carcieri* did not provide the State with standing to challenge the entrustment of the Tribe's land.[3] The Ninth Circuit held that the State's challenge to the Secretary's decision to take an eleven-acre parcel of land into trust represented merely "'a garden-variety'" Administrative Procedure Act ("APA") claim, not a substantive challenge to an agency action.[4] The court decried the State's challenge to the entrustment as "a belated collateral attack" on the Tribe.[5] Indeed, the court viewed the State's suit as an "end-run" around the APA, noting that the State's claim far surpassed the APA's six-year statute of limitations.[6]

The Indian Gaming Regulatory Act ("IGRA") provides the framework by which gaming within Indian country is regulated.[7] The IGRA was passed because tribes, as sovereign nations, were not subject to state gaming regulations.[8] The IGRA requires tribes and states to enter into compacts

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[1] Carcieri v. Salazar, 555 U.S. 379 (2009).

[2] Big Lagoon Rancheria v. California, Nos. 10-17803, 10-17878, ___ F.3d ___, 2015 WL 3499884, at *3 (9th Cir. June 4, 2015) (en banc) [hereinafter *Big Lagoon V*].

[3] *Id*. at *4.

[4] *Id*. (quoting Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2208 (2012)).

[5] *Id*.

[6] *Id*. at *5

[7] *See* Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 and 18 U.S.C. §§ 1166-1168 (1988).

[8] *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

concerning the regulation of class III gaming,[9] thus creating "a 'cooperative federalis[t]' framework" for the regulation of gaming.[10] The IGRA mandates that states negotiate these compacts in good faith with tribes.[11] Gaming facilities must be located on "Indian lands."[12] Under the IGRA, Indian lands means "any land within the limits of any Indian reservation . . . [and] any lands . . . held in trust by the Unites States."[13] The Indian Reorganization Act ("IRA")[14] grants the Secretary the authority to take land in to trust "for the purpose of providing land for Indians."[15] The IRA was passed in 1934 to provide tribes with the tools necessary to promote tribal self-governance and self-determination.

Carcieri has severely curtailed the Secretary's authority to take land in to trust for many tribes. In 2009, the Supreme Court of the United States ruled that the Secretary could not acquire land to be held in trust for tribes which were not federally recognized in 1934 – the year the IRA was passed.[16] *Carcieri* involved the State of Connecticut's APA challenge to the Secretary's decision to take land into trust for the Narragansett Tribe.[17] The Supreme Court ruled that the phrase "now under Federal Jurisdiction" in § 19 of the IRA[18] "unambiguously" extends the benefits of the IRA – and in particular 25 U.S.C. § 465 – only "to those tribes that were under the federal jurisdiction of the Unite States when the IRA was enacted in 1934."[19] Since the Narragansett Tribe was not "under Federal jurisdiction" in 1934, the Supreme Court determined the Secretary's entrustment of thirty-one acres was invalid.[20]

II. FACTUAL AND PROCEDURAL BACKGROUND

The Big Lagoon Rancheria, a federally recognized Indian tribe in Northern California, consists of two adjacent parcels of land.[21] The Bureau of Indian Affairs ("BIA") purchased a nine-acre parcel for James Charley in 1918.[22] Charley was an Indian, and following his death, the family moved off the land.[23]

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[9] 25 U.S.C. § 2710(d)(1)(C), (3)(A). "Class III gaming . . . involves 'the types of high-stakes games usually associated with Nevada-style gambling.'" *Big Lagoon V*, 2015 WL 3499884, at *1 (quoting *In re* Gaming Related Cases, 331 F.3d 1094, 1097 (9th Cir. 2003)).

[10] *Big Lagoon V*, 2015 WL 3499884, at *1 (bracket in original).

[11] 25 U.S.C. § 2710(d)(3)(A).

[12] *Id*. at § 2710(d)(1).

[13] *Id*. at § 2703(4).

[14] 25 U.S.C. §§ 461-479 (1934).

[15] *Id.* at § 465.

[16] *Carcieri*, 555 U.S. at 395.

[17] *Id*. at 385.

[18] 25 U.S.C. § 479 ("The term 'Indian' as used in this Act shall include all persons of Indian decent who are members of any recognized 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." *Id*. (emphasis added)).

[19] *Carcieri*, 555 U.S. at 395.

[20] *Id*. at 385.

[21] *Big Lagoon V*, 2015 WL 3499884, at *2.

[22] *Id*.

[23] *Id*.

Robert Charley, one of Charley's sons, was thought to have lived on the land between 1942 and 1946; otherwise, the land sat vacant.[24] Sometime later, Robert Charley's nephew obtained permission from the BIA to camp on the land.[25] The nephew viewed the land as a Rancheria, as in 1967 they applied for dissolution and termination under the California Rancheria Termination Act.[26] The Big Lagoon Rancheria first appeared as a federally recognized tribe in 1979.[27]

In 1994, the Secretary acquired an eleven-acre parcel of land adjacent to the original parcel and placed it in to trust.[28] In an attempt to establish a class III gaming facility on the eleven-acre parcel, the Tribe entered into exhaustive negotiations with the State.[29] When negotiations broke down in 1999, the Tribe sued, alleging that the State had negotiated in bad faith.[30] The Tribe and the State settled in 2005, and negotiated a compact that allowed the tribe to build a casino and hotel.[31] However, in 2007, the State legislature failed to ratify the compact.[32] New negotiations proved futile, and in 2009 the Tribe brought this case, again alleging the State had negotiated in bad faith.

Initially, the United States District Court for the Northern District of California ruled in favor of the Tribe.[33] On appeal, a three-judge panel of the Ninth Circuit reversed the district court.[34] Relying on *Carcieri*, the panel found that since the tribe was not "under Federal jurisdiction" in 1934, the entrustment of the eleven-acre parcel was invalid.[35] Accordingly, the court determined that the State did not act in bad faith as the Tribe lacked standing under the IGRA to compel negotiations.[36]

III. ANALYSIS

A. Carciere v. Salazar*: Administrative or Substantive Challenge?*

Citing *Carcieri*, the Ninth Circuit originally determined that since the Tribe did not appear under Federal Jurisdiction until 1979, it could not have land taken into trust by the Secretary.[37] The Tribe argued that the State needed to

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[24] *Id*.

[25] *Id*.

[26] *Id*. (discussing Pub. L. 85-671, 72 Stat. 619 (1958)).

[27] *Id.*; *see* Indian Tribal Entities that Have a Government-to-Government Relationship with the United States, 44 Fed. Reg. 7235 (Feb. 6, 1979).

[28] *Big Lagoon V*, 2015 WL 3499884, at *2.

[29] *Id*. at **2-3.

[30] *Id.* at *3.

[31] *Id*.

[32] *Id*.

[33] Big Lagoon Rancheria v. California, 759 F. Supp. 2d 1149 (N.D. Cal. 2010) [hereinafter *Big Lagoon I*].

[34] Big Lagoon Rancheria v. California, 741 F.3d 1032 (9th Cir. 2014) [hereinafter *Big Lagoon III*].

[35] *Id*. at 1044-45.

[36] *Id*. at 1045.

[37] *Id.*

challenge the entrustment as a final agency action under the APA.[38] Since the six-year APA statute of limitations had expired, the Tribe argued the State's challenge was untimely.[39] The thee-judge panel disagreed.

> "[S]ubstantive challenges to agency action–for example, claims that agency action is unconstitutional, *that it exceeds the scope of the agency's substantive authority*, or that it is premised on an erroneous interpretation of a statutory term–have no time bars."[40]

Finding the entrustment exceeded the Secretary's "substantive authority, the court allowed the State's challenge, even after the statute of limitations expired.[41]

However, en banc, the Ninth Circuit firmly rejected this interpretation.[42] The court distinguished the present case from *Carcieri*, noting *Carcieri* had "involved a timely administrative challenge" to the Secretary's entrustment of thirty-one acres for the Narragansett Tribe.[43] The court stated that *Carcieri* did not address whether the secretary's entrustment of land can be challenged outside the APA and after the expiration of the statute of limitations.[44]

The court determined that a challenge to the Secretary's entrustment of land "is 'a garden-variety APA claim.'"[45] The court stated that "[t]he proper vehicle" to challenge the Sectary's action "is a petition for review pursuant to the APA."[46] The court emphasized that the State had not challenged the entrustment under the APA.[47] The court viewed "[t]he instant case [as] a *belated collateral attack*" on the Tribe and an "*end-run*" around the APA.[48] The Court stated that the State could not use "'collateral proceedings to end-run the procedural requirements'" of the APA.[49] The court noted that regardless of the claim being "time barred," the State failed to join the United States and the Secretary.[50]

B. Further Holdings

The court also dismissed the State's challenge to the tribe's Federal recognition.[51] While the court acknowledging "that it [was] unclear" how the

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[38] *Id*. at 1042.

[39] *Id*.

[40] *Id*. at 1043 (quoting Schiller v. Tower Semiconductor Ltd., 449 F.3d 286, 293 (2d Cir. 2005)) (emphasis added).

[41] *Id*.

[42] *Big Lagoon V*, 2015 WL 3499884, at **4-5.

[43] *Id*. *4.

[44] *Id*.

[45] *Id*. (quoting *Patchak*, 132 S. Ct. at 2208).

[46] *Id*.

[47] *Id*. at *5.

[48] *Id*. **4, 5 (emphasis added).

[49] *Id.* at *4 (quoting United States v. Backlund, 689 F.3d 986, 1000 (9th Cir. 2012)).

[50] *Id*.

[51] *Id*.

Tribe gained federal recognition, it noted that the State had not brought an APA challenge to the Secretary's recognition of the Tribe.[52] The court also dismissed the State's challenge of the district court's refusal to grant a continuance to put off compact negotiations until the case was ultimately resolved.[53] The Ninth Circuit found that a continuance might have been appropriate if the State had filed a timely APA challenge.[54] Since the Tribe was "properly recognized," the court determined that the properness of the entrustment was "irrelevant" in the context of determining if the State had negotiated in bad faith.[55] The Ninth Circuit additionally dismissed the Tribe's claims against the State on appeal as moot.[56] Ultimately, the Ninth Circuit affirmed the district court's grant of summary judgement, determining that the State had not negotiated in good faith, and ordering the parties conclude a compact.[57]

IV. CONCLUSION

En banc, the Ninth Circuit firmly rejected the notion that *Carcieri* provides states with a collateral attack on the very sovereignty of tribes. While the en banc opinion relies on a highly textual reading of *Carcieri* and the APA, its broad implications cannot be downplayed. *Carcieri* represents a serious challenge to smaller, newer recognized tribes, by failing to take into consideration the history of the systematic termination of tribes throughout United States. Indeed, the IRA was past as a tool to promote tribal self-governance and self-determination. *Carcieri*'s holding circumscribes recently recognized tribes' sovereignty. The Ninth Circuit, however, recognized the reality these tribes face in asserting self-governance and fostering economic development. The court recognized that such collateral attacks "would cast doubt over countless acres of land that have been taken into trust for tribes recognized by the federal government."[58] The en banc opinion has the potential to protect numerous tribes from such collateral attacks. Indeed, Alabama is currently attempting to use *Carcieri* and *Big Lagoon III* to halt the ongoing gaming operations of three casinos owned by the Poarch Band of Creek Indian.[59] Alabama's attempt was not successful with the United States District Court for the Middle District of Alabama.[60] Alabama's appeal is pending before the United States Court of Appeals for the Eleventh Circuit.

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[52] *Id*.

[53] *Id*. at * 5-6.

[54] *Id*. at *6.

[55] *Id*. (discussing *Big Lagoon I*, 759 F. Supp. 2d at 1160).

[56] *Id*.

[57] *Id*. at *7.

[58] *Id*. at *5.

[59] *See* Alabama v. PCI Gaming Auth., 15 F. Supp. 3d 1161, 1182-84 (M.D. Ala. 2014); *see* Appellant's Br. at 27-30, Alabama v. PCI Gaming Auth., 2014 WL 3389116 (11th Cir. July 7, 2014) (No.14-12004-DD).

[60] *PCI Gaming*, 15 F. Supp. 3d at 1183-84.