

## 9th Circ. Restores Certainty To Recognition Of 'Indian Lands'

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On June 4, 2015, the Ninth Circuit Court of Appeals issued its en banc decision in *Big Lagoon Rancheria v. California*, a case in which Big Lagoon Rancheria, a federally recognized Indian tribe, sought to compel the state of California to negotiate a new Class III gaming compact under the Indian Gaming Regulatory Act of 1988. The en banc court affirmed the decision of the district court, which held that California had failed to negotiate in good faith with Big Lagoon as required by the IGRA. The ruling restores certainty to the federal government's recognition of "Indian lands" and states' obligations to negotiate gaming compacts in good faith with tribes.



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### Case Background

Big Lagoon sought to build and operate a new casino on an 11-acre parcel of land that the United States had accepted into trust for Big Lagoon in 1994. The land had been taken into trust under the authority of the 1934 Indian Reorganization Act. Under the IGRA, however, Big Lagoon could only operate Class III gaming (slot machines and table games) on the 11-acre parcel if a compact between Big Lagoon and California authorized such gaming. After years of disagreement over the potential compact, Big Lagoon and California failed to reach an agreement.

Accordingly, on April 3, 2009, Big Lagoon filed suit in the U.S. District Court for the Northern District of California, alleging that California failed to negotiate in good faith in violation of the IGRA. On Nov. 22, 2010, the district court granted Big Lagoon's motion for summary judgment, finding that California had failed to negotiate in good faith under the IGRA and ordering the parties to conclude a compact within 60 days.

California appealed the district court's grant of summary judgment. On Jan. 21, 2014, in a 2-1 decision, the Ninth Circuit reversed the district court's order compelling negotiations and remanded the case for entry of judgment in favor of California. The three-judge panel held that a tribe must have jurisdiction over the particular piece of "Indian lands" where gaming is to be conducted in order to file suit to compel negotiations under IGRA. It further concluded that Big Lagoon's 11-acre parcel was not "Indian lands." According to the panel, Big Lagoon was not a tribe under federal jurisdiction in 1934, when the IRA was passed, because Big Lagoon did not appear on the 1947 Haas Report's list of 258 tribes and

because none of Big Lagoon’s members resided on the 11-acre parcel in 1934. As such, under the U.S. Supreme Court’s decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Bureau of Indian Affairs lacked authority under the IRA to take that land into trust for Big Lagoon in 1994. Because the 11-acre parcel therefore did not qualify as “Indian lands” under the IGRA, Big Lagoon could not compel California to negotiate a new gaming compact.

On June 11, 2014, the Ninth Circuit granted Big Lagoon’s petition for rehearing en banc, vacating the three-judge panel decision. On Sept. 17, 2014, the court heard oral argument. On June 4, 2015, the en banc court affirmed the district court’s ruling, rejecting California’s argument that Big Lagoon could not compel California to negotiate in good faith.

According to the en banc court, California’s challenge of the BIA’s acceptance into trust of the 11-acre parcel amounted to an improper collateral attack on the BIA’s action, because California failed to challenge the action by suing the BIA under the Administrative Procedure Act. Even if California had attempted to bring an APA claim, the APA’s six-year statute of limitations — which began to run when the BIA accepted the 11-acre parcel into trust in 1994 — would have barred it. Likewise, because California failed to bring a timely APA claim, the en banc court rejected California’s argument that the BIA improperly recognized Big Lagoon as an Indian tribe. Accordingly, the 11-acre parcel qualified as “Indian lands” under the IGRA, and Big Lagoon had a right to compel California to negotiate a compact.

### **Implications for Gaming Under IGRA**

The Ninth Circuit’s en banc decision largely restores the status quo. The prior panel decision — now vacated — raised serious questions about the meaning of “Indian lands” under the IGRA, the ability of tribes to compel states to negotiate compacts, the gameability of lands taken into trust for tribes not under federal jurisdiction in 1934, and the means and time limits for challenging gameability of tribal lands. The en banc decision, however, re-establishes that land that the United States has taken into trust for an Indian tribe constitutes “Indian lands” under the IGRA, subject only to an APA challenge filed within the six-year statute of limitations.

Both transactional practitioners and litigators can note that the decision emphasizes that a challenge to the BIA’s acceptance of land into trust for an Indian tribe must be brought pursuant to the APA. If the APA’s six-year statute of limitations has expired, any such challenge is barred. In effect, the en banc court precludes collateral attacks on the status of tribal trust lands and the designation of federally recognized Indian tribes after the expiration of the six-year statute of limitations, thereby returning certainty to tribes and others invested in the gameability of tribal lands.

Because the en banc Ninth Circuit reached its conclusion based on California’s failure to bring an APA claim, however, the court did not speak to all of the questions raised by the panel decision. First, the en banc court did not address the panel’s holding that a tribe must have jurisdiction over the specific “Indian lands” where gaming is to take place. The panel’s decision on this point, if followed by a subsequent court, might require a tribe to select a project site and acquire the land before it can begin negotiating a compact. Second, the en banc court did not address the panel’s new *Carcieri* analysis, which led the panel to conclude that Big Lagoon was not under federal jurisdiction in 1934 based on two specific factors: Big Lagoon’s absence from the Haas List, and lack of residents in 1934. Following the panel on this point could significantly limit the ability of tribes to establish that they were under federal jurisdiction in 1934, thereby limiting the gameability of their lands.

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