DOCKET NO. 12-15817

In the

United States Court of Appeals

For the

Ninth Circuit

REDDING RANCHERIA,

Plaintiff-Appellant,

v.

KENNETH SALAZAR, in his official capacity as the Secretary of the United States Department of the Interior, and LARRY ECHO HAWK, in his official capacity as the Assistant Secretary for Indian Affairs for the United States Department of the Interior,

Defendants-Appellees,

Appeal from a Decision of the United States District Court for the Northern District of California, No. 3:11-cv-01493-SC • Honorable Samuel Conti

BRIEF OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Required by Rule 26.1 of Federal Rules of Appellate Procedure

The undersigned, counsel of record for Appellant, Redding Rancheria, hereby certifies that neither Redding Rancheria, nor any parent company, subsidiary, or affiliate thereof has issued any shares of capital stock to the public.

August 2, 2012

/s Scott Crowell
Scott Crowell

TABLE OF CONTENTS

CASES:

STATUTES

I. JURISDICTIONAL STATEMENT

The district court's jurisdiction arises under 28 U.S.C. §§ 1331, 1361, 1362, and 5 U.S.C. §§ 702, 704, and 706. On February 16, 2012, the district court entered an order granting the Government's cross motion for summary judgment and denying the Tribe's motion for summary judgment, which disposed of all claims between the parties. ER 1-2. On April 10, 2012, the Tribe timely filed a notice of appeal. ER 35-36. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

II. STATEMENT OF THE ISSUES

1. Whether the district court erred in concluding that *Chevron* deference trumps the Indian canons of construction?

2. Whether the district court erred in concluding that the defendants may properly eschew the plain meaning interpretation Congress intended to apply to the term "restored land?"

3. Whether the district court erred in affirming the Secretary's determination that a tribe already gaming on other lands cannot avail itself of the "restored lands" exception to IGRA's general prohibition against gaming on lands taken into trust after October 17, 1998?

4. Whether the district court erred in finding that approval of the Tribe's restored lands application would result in the tribe gaming at two separate locations?

III. STATEMENT OF THE CASE

This case arises from defendants' December 22, 2010 denial of the Redding Rancheria's ("Tribe") request to place 230 acres of land located in Shasta County, California into trust and to approve gaming activity thereon pursuant to the "restored lands" exception to the Indian Gaming Regulatory Act's general prohibition against gaming on lands taken into trust after October 17, 1988. 25 U.S.C. § 2719(b)(1)(B)(iii). Despite the lack of textual support in the Act and despite the lack of legislative history to suggest Congress intended to so diminish tribal sovereignty, the defendants' determined that the "restored" lands exception restricts the Tribe to gaming only upon the first parcel of land the government placed into trust for the Tribe since its restoration to federal recognition in 1984.

On March 28, 2011, the Tribe filed its complaint in the United States District Court of Northern California, claiming that the December 22, 2010 decision violates the Indian Gaming Regulatory Act and the Administrative Procedures Act, and seeking declaratory and injunctive relief. ER XX. The party's filed cross motions for summary judgment on September 30, 2011.

ER XX (Tribe's Motion for Summary Judgment); ER (United States' Cross Motion for Summary Judgment). On February 16, 2012 the district court entered its order denying the Tribe's motion and granting the defendant's cross motion. ER 42-90. On April 12, 2012, the Tribe filed its notice of appeal. ER 35-37.

IV. STATEMENT OF FACTS

As with most Indian law cases, history matters in this appeal. In 1958, long before the emergence of Indian gaming, Congress enacted the California Rancheria Act, Pub. L. No. 85-671, 72 Stat. 619 (1958), which set forth a process for the federal government to follow when terminating the federal trust relationship with California's Indian tribes.[1] Among those tribes identified for termination was the Redding Rancheria, a small tribe located on a 31 acre reservation in rural northern California.[2]

Before termination, each of the Tribe's families occupied a house and land upon which they grew crops. Animals grazed on community-shared

[1] Termination is the process by which the United States no longer recognizes a tribe as a government and terminates the reservation status of the lands that the tribe owns.

[2] The United States created the Reservation on August 10, 1922, through the purchase of land located in Shasta County, California, with funds appropriated by Congress pursuant to the Act of March 3, 1921, 41 Stat. 1225. The Reservation was established for local Wintu Indians who had been made homeless when settlers usurped their land. ER 148-157 (AR 5446-5455).

land. The Tribe's members were poor and frequently faced discrimination from members of the surrounding community, but they had persevered by maintaining a close-knit tribal community. ER 96 ¶ 6 (Declaration of Barbara Murphy in Support of Tribe's Motion for Summary Judgment, September 30, 2011); ER 92 ¶ 6-7 (Declaration of Leon Benner in Support of Tribe's Motion for Summary Judgment, September 29, 2011).

By 1962, the federal government completed the process of terminating the Tribe's federally recognized status. 27 Fed. Reg 1542 (June 13, 1962). The effects of termination were devastating. The Secretary of the Interior ("Secretary") divided the Redding Indian Rancheria ("Reservation") into eighteen parcels of land and allotted each parcel to an individual adult member of the Tribe, called a "distributee," to be owned by each in private fee ownership. ER 158-163 (AR 5457-5462). As a result of the distribution of the reservation land to individuals in fee, the land became subject to local property tax and local land use regulations. Over the years, the overwhelming majority of the distributees lost their allotments from an inability to pay property taxes or failure to bring their homes into compliance with uniform building and zoning standards. All but landless, the majority of the Tribe's members moved off the reservation to find work. The Tribe's members were dispersed. The tribal community was decimated.

ER 98; ER 93 ¶ 8.

In 1979, former members of the Tribe, together with former members of sixteen other California tribes, sued officials of the federal government, seeking the restoration of the their tribes' federal recognition and the restoration of their tribal land bases. *Tillie Hardwick v. United States*, Case No. C-79-1710 SW (N.D. Cal. 1983). Confronted with the disastrous consequences of termination and the government's failure to comply with the minimal obligations imposed on it by the Rancheria Act, obligations that were a pre-condition to termination, the federal defendants settled the case. On December 22, 1983, the Tribe's status as a federally-recognized tribe was restored pursuant to the order approving entry of final judgment in *Hardwick*. ER164 (AR 6240).

When the *Hardwick* judgment was entered in 1983, the Tribe had no government, no resources, no money, and no land. Non-Indians owned the majority of the land within the boundaries of the original reservation boundaries. Only a handful of parcels were still owned by individual Tribal members in fee.

The Tribe's members - all of whom were low income in 1983 – were nevertheless determined to re-establish the Tribe's government, land base,

and community. ER 93 ¶ 10. That process was long and challenging.[3] The only land within the Reservation potentially available to restore the Tribe's land base were the few parcels owned by individual tribal members in fee,[4] because the non-Indian owners of land within the boundaries of the Reservation were unwilling to sell their land back to the Tribe.

The *Hardwick* judgment included a requirement that, upon request, the United States would take land into trust for any individual Indian "who received or presently owns fee title to an interest in any former trust allotment by reason of the distribution of the assets" of the Rancheria. ER 165-177 (AR 6241-6253). Between October 14, 1985, and April 10, 1986, the United States accepted title to three parcels of land within the boundaries of the Rancheria: "Lot 4" in trust for Arthur Hayward, ER 178 (AR 5471-5472), "Lot 5" in trust for tribal members Arthur Hayward, Mac Hayward, Orval Hayward, William Hayward and Karen Hayward Hart, ER 190-191 (AR 5468-5469), and "Lot 6" in trust for tribal member Lorena Forman

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3 It was not until May 20, 1992 that the boundaries of the Rancheria were restored pursuant to the stipulation for entry of judgment ("Judgment as to Shasta County") in *Hardwick*. ER 183-189 (AR 6105-6111).

4 Despite the commitment in the *Hardwick* Stipulation to take the individual distributees' land back into trust, the BIA made returning land to trust difficult and time consuming. A number of members were never able to put their land back in trust because of property tax delinquencies, which they could not afford to pay and which the federal government refused to pay as part of the settlement stipulation. ER 97-98 ¶ 14, 15.

Butler, ER 192-194 (AR 5644-5646).

On October 1, 1988, Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq*. ("IGRA"), which reaffirmed the inherent right of Indian tribes to engage in various forms of gaming on their Indian lands. In enacting IGRA, Congress also imposed restrictions on that inherent right, including a general prohibition against gaming on lands taken into trust after October 17, 1988, subject to certain exemptions or exceptions set forth in 25 U.S.C. § 2719. One of the exemptions is for land located within the boundaries of the Indian tribe's former reservation, if it had no reservation on October 17, 1988. 25 U.S.C. § 2719(a)(2)(B). One of the exceptions applies to "the restoration of lands for an Indian tribe that is restored to federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii).

Between 1962 and 1988, the United States took land into trust for several tribes that had not been terminated by the United States, including parcels of land located beyond the exterior boundaries of the requesting tribe's reservation. ER 39-40 ¶ ¶ 5-7 (Declaration of Lester J. Marston in Opposition to the Defendant's Motion for Summary Judgment); *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 576 F. Supp. 2d 838, 841-842 (W.D. Mich. 2008). An example is the Ho-Chunk Nation of Wisconsin, which acquired and had taken into trust multiple parcels of "off

reservation" land across the southern part of Wisconsin. ER 39-40 ¶ ¶ 5-7. Upon passage of the IGRA, the Ho-Chunk Nation constructed and began operating four casinos on its trust lands. *Id.* Today, the Ho-Chunk Nation operates a total of six casinos in the State of Wisconsin, including in the City of Madison, the State Capitol. *Id.*

Upon the restoration of its federal recognition pursuant to *Hardwick*, Redding pursued a policy of land acquisition and development based on its priorities of self-governance, meeting the social and economic needs of its members, and economic development. ER 99-100 ¶ ¶ 26, 27. The Tribe resolved to address community health needs, young children's early education needs, and basic governmental operations. *Id.*

However, the Tribe's land base restoration efforts to restore have been thwarted by the unavailability of land within its original reservation boundaries. In 1992, the Tribe acquired beneficial ownership of lots 4, 5, and 6, which together comprise approximately 4 acres of land.[5] ER 198 (AR 5474). That same year, the Secretary approved the trust-to-trust transfer of the three lots to the Tribe. ER 196-197 (AR 5477-5478). In 1996, the Tribe

[5] The Tribe purchased the beneficial ownership of Lot 6 and, on November 2, 1992, the United States approved the trust-to-trust transfer of Lot 6 to the Tribe. ER 195 (AR 5644). The Tribe purchased beneficial ownership of Lots 4 and 5 and, on October 7, 1992, the United States approved the trust-to-trust transfer of Lots 4, and 5 to the Tribe. ER 196-197 (AR 5477-5478).

submitted its first fee-to-trust (as opposed to trust-to-trust) acquisition request for the parcel that houses the Tribe's Head Start facility. ER 202 n. 4 (AR 6651).

On September 10, 1999, the Tribe entered into a Class III gaming compact with the State of California. Pursuant to the Compact, the Tribe constructed its Win River Casino on Lots 4,5, and 6. ER 206-240 (AR 6415-6474).

In 2000, the Tribe submitted a fee-to-trust acquisition request for a 0.5-acre site known as the Memorial Parcel or the Tribal Burial Grounds, along with three other parcels that currently serve as a parking lot for the Tribe's Win River Casino. ER 202 n. 4. In April 2009, the Tribe submitted a fee-to-trust request for the 3.65 acre parcel that houses the Tribe's administration building. ER 202. All of these parcels are located within the boundaries of the original Reservation. *Id.* All three of the fee-to-trust trust acquisition requests were explicitly made for non-gaming purposes. *Id*. The Secretary took the parcel for the Head Start facility into trust in 2009. *Id.* The Tribal Burial Grounds and the administration building parcels were taken into trust in 2010. *Id.*

Since its restoration in 1983, the Tribe has managed to purchase a mere 11.41 acres of land within the original reservation boundaries - about

37% of the Tribe's original land base. Of that land, the United States has only taken about 8.5 acres into trust. ER 249-251 (AR 5424-5426). To meet its growing governmental, housing, and economic development needs, the Tribe was compelled to purchase land outside of the original reservation boundaries.

In November 2003, the Tribe adopted Tribal Council Resolution No. 055-11-12-03 for submittal to the United States as the Tribe's request that the United States accept land that the Tribe was then in the process of purchasing, commonly referred to as the "Strawberry Fields" property, in trust for the Tribe. ER 264-265 (AR 5651-5652). The Strawberry Fields property consists of five parcels totaling approximately 152 acres and is located in the unincorporated area of Shasta County, California. ER 266-267 (AR 5670-5671). The Strawberry Fields are located a mere 1.6 miles from the Reservation. ER 268 (AR 5405).

The Strawberry Fields fee-to-trust acquisition request is the Tribe's first request for land outside the original reservation to be taken into trust. ER 199 (AR 6648).

In 2008, five years after the Tribe submitted its fee-to-trust acquisition request for the Strawberry Fields, the Secretary issued final notice ("Federal Register Notice") of the promulgation of the Regulations Implementing the

Restored Lands Exception, 25 C.F.R. Part 292 (the "2008 regulations"). ER 268-276 (AR 23-50). The 2008 regulations prohibited the Secretary from taking land into trust for gaming purposes under the "restored lands" exception if the tribe is currently gaming on other tribal land.

Prior to DOI's promulgation of the 2008 regulations, the Tribe had no reason to think that its land acquisition and development policy would preclude the Tribe from having land taken into trust pursuant to the Restored Lands Exception. The Act's plain language, interpretative case law and administrative decisions did not restrict gaming to the first parcel of land taken into trust for restored tribe or otherwise provide that the Restored Lands Exception and the exemption for gaming on land inside the boundaries of a tribe's reservation were mutually exclusive.

On December 18, 2008, the Tribe submitted a letter and supporting documentation to Paula Hart, Acting Director for the United States Department of the Interior, Office of Indian Gaming, Bureau of Indian Affairs ("BIA"), requesting an opinion that the Strawberry Fields property qualified for the Restored Lands Exception. ER 241-267 (AR 5416-5437).

On April 2, 2010, the Tribe purchased two parcels adjacent to the Strawberry Fields property in order to provide improved ingress and egress to the Strawberry Fields property, as well as additional space for the Tribe's

economic development activities. That property is commonly referred to as the "Adjacent 80 Acres." ER 305-308 (AR 6068-6071). On July 27, 2010, the Tribe submitted another letter to Paula Hart amending the December 22, 2008 request to include the Adjacent 80 Acres. *Id.*

On November 15, 2010, members of the Tribe's Council attended a meeting with Donald Laverdure, Deputy Assistant Secretary - Indian Affairs, United States Department of the Interior. ER 309 (AR 6812). The Tribe's Council discussed the Tribe's fee-to-trust acquisition request for the Strawberry Fields and Adjacent 80 Acres, including the difficulties inherent in re-acquiring the Tribe's original reservation land base and the significant barriers to reservation development. The Tribe pointed to instances in which DOI took land into trust for a restored tribe more than once for gaming purposes, both within and outside the boundaries of existing reservations. Tribal officials explained that the Tribe relied upon these decisions when developing and implementing the Tribe's overall plan for the restoration of its land base. ER 310-312 (AR 6813-6815). Next, Tribal Council members advised Laverdure that the Strawberry Fields and Adjacent 80 Acres properties would be used to relocate the Tribe's existing casino facility, and that the Tribe did not intend to operate multiple gaming facilities, and specifically offered to "memorialize this intent in an agreement with the

Department." *Id.*

On December 22, 2010, Laverdure issued the written Decision that the Strawberry Fields and Adjacent 80 Acres properties do not qualify as restored lands under the IGRA, because the Tribe was already gaming "on other lands." ER 268-275 (AR 5405-5413).

On March 28, 2011, the Tribe filed a complaint in the United States District Court of Northern California, claiming that the December 22, 2010 decision violates the IGRA and the Administrative Procedures Act, and seeking declaratory and injunctive relief. ER 313-327. In its motion for summary judgment, the Tribe argued that the Strawberry Fields qualified as "restored lands" because federal courts have previously determined that Congress intended the plain meaning of the term to apply, as opposed to the defendants' technical and restrictive interpretation. Second, the Tribe argued that the Secretary lacks authority under the Act to promulgate regulations relating to the restored lands exception. Third, the Tribe argued that, to the extent the term "restored lands" is ambiguous and Congressional intent cannot otherwise be determined, the defendants erred by failing to employ the Indian canons of construction to resolve the ambiguity in favor of tribal rights.

In its opposition and cross motion, the government maintained that the 2008 regulations are a permissible interpretation of statutory ambiguity pursuant to *Chevron U.S.A. v. Natural Res. Def. Council,* 467 U.S. 837 (1984). Next, while acknowledging that IGRA is a statute intended to benefit tribes, the government argued that *Chevron* deference trumps the Indian law canons of construction.

On February 16, 2012, the district court entered its order denying the Tribe's motion and granting the government's cross-motion. ER 1. As a threshold matter, the district court agreed with the government that the Indian canons of construction "must give way to agency interpretations that deserve *Chevron* deference." ER 13. That determination colored the district court's disposition of all remaining issues. The district court applied "*Chevron* principals" to determine that the Secretary has authority under the Act to promulgate regulations governing restored lands eligibility determination under IGRA. ER 15. The district court also determined that the restrictions on the restored lands exception reflected in the 2008 regulations were "permissible" under *Chevron*. ER 22.

On April 12, 2012 the Tribe filed its notice of appeal. ER 35-36.

V. SUMMARY OF ARGUMENT

The district court concluded that, in the Ninth Circuit, the Indian law canons of construction "must give way to agency interpretations that deserve *Chevron* deference."[6] ER 13 (*citing Williams v. Babbitt*, 115 F.3d 657, 663 N. 5 (9th Cir. 1997); *Seldovia Native Ass'n Inc. v. Lujan*, 904 F.2d 1335, 1342 (9th Cir. 1990). By definition, allowing *Chevron* to trump the Indian cannons results in judicial deference to an agency's diminishment of Indian rights in situations in which Congressional intent is far from clear. Such a result violates core principles of federal Indian law: that only Congress may abrogate Indian rights and its intent to do so must be clear. The district court decision on this issue conflicts with 190 years of Supreme Court case law, reveals an inconsistency in the decisions of this Circuit, and conflicts with the decisions of at least two other circuits.

The district court also erred by determining that the Indian canons otherwise do not apply in this case because the restored lands exception somehow pits tribes against tribes. First, the record is bereft of any evidence

[6] The district court's conclusion that *Chevron* deference should trump the Indian canons when interpreting IGRA is at odds with the Act's legislative history. For example, Rep. Moe Udall, IGRA's primary House sponsor, called upon courts interpreting IGRA to apply "the Supreme Court's time-honoring rule of construction that any ambiguities in legislation enacted for the benefit of Indians will be construed in their favor." 134 Cong. Rec. 25369, 25377 (1988).

to support the district court's determination: no tribe objected to Redding's proposal to relocate its gaming operations a mere 1.6 miles from its existing trust lands. Second, federal courts and DOI have consistently determined that IGRA does not protect existing tribal gaming operations from tribal competition. Third, the district court fails to provide any authority for its conclusion that the Indian canons are somehow inapplicable if a statute lends itself to an interpretation that could potentially lead to conflict between tribes.

By applying *Chevron* to the exclusion of the Indian law canons, the district court erroneously deferred to the defendant's interpretation of their own authority to promulgate regulations pertaining to the restored lands exception. By applying *Chevron* to the exclusion of the Indian law canons, the district court also erroneously deferred to the defendants' restriction of the "restored lands" exception to tribes that are not already gaming on other lands.

VI. ARGUMENT

A. Standard of Review

The Tribe's appeal from the district court's grant of summary judgment to the defendants is reviewed de novo by this Court. *Davis v. Las Vegas*, 478 F.3d 1048, 1053 (9th Cir. 2007). Under the de novo standard, a

reviewing court should make an independent determination of the issues and should not give any special weight to the prior determination of a lower court. *United States v. Raddatz*, 447 U.S. 667, 690, 100 S. Ct. 2406 (1980). Thus, to affirm the district court, this Court must independently determine, after construing all facts and reasonable inferences in the light most favorable to the Tribe, that there is no genuine issue as to any material facts and that defendants are entitled to judgment as a matter of law. *In re Ilko*, 651 F.3d 1049 (9th Cir. 2011).

B. The District Court Erred by Failing to Employ the Indian Canons of Construction.

1. Since *Worcester v. Georgia*, the Supreme Court has Employed the Indian Canons to Ensure that Diminishment of Indian Rights only Occurs Pursuant to Clear Congressional Intent.

Indian law cannons of construction first surfaced in Supreme Court jurisprudence in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551 (1832). The Court read the treaties protecting the Cherokees from Georgia's encroachment liberally in the Indian's favor, specifically pointing out that the treaties should be interpreted as the Indians themselves would have understood them, *Id.* at 515, and that "language used in treaties with the Indians should never be construed to their prejudice," *Id.* at 582. *Worcester* thus articulated two Indian law canons: that treaties should be interpreted as

the Indians understood them and that treaties should be interpreted liberally in the Indians' favor. *Id.* 551, 582.

Since *Worcester*, the Court has consistently employed the Indian law canons of construction when confronted with ambiguity in treaties or statutes affecting Indian tribes. For instance, in the *Kansas Indians* cases, 72 U.S. (5 Wall) 737 (1866), the Court rejected Kansas' attempt to tax land held by Indians under patents issued to them by treaties. The Court specifically invoked *Worcester* to support its holding that "enlarged rules of construction are adopted in reference to Indian treaties" *Id.* at 760. In 1902, the Court applied the Indian law canons to uphold Indian claims to land that the government had previously set aside from public schools in the act admitting Minnesota to the Union. *Minnesota v. Hitchock*, 185 U.S. 373, 402 (1902).

The Court's decision in *Lone Wolf v. Hitchcock*, while dealing a devastating blow to Indian country on the merits, actually solidified the substantive underpinnings of the Indian canons. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). At issue in *Lone Wolf* was whether Congress could act unilaterally to distribute Indian lands.[7] The Court declared that Congress had "plenary" power over the Indians and stressed the dependent nature of

[7] By the time *Lone wolf* was decided in 1903, the General Allotment Act, ch. 119, 24 Stat. 388 (1887), was well underway.

the Indians as wards of the United States. Because the Act at issue ratified an agreement whereby the United States specifically desired to gain rights to Indian lands, there was little room for interpretation, as Congress clearly intended to abrogate Indian land rights.[8]

Two years after deciding *Lone Wolf,* the Court issued its decision in *United States v. Winans.* The Court was required to interpret an 1859 treaty that reserved exclusive fishing rights in streams on or bordering the reservation, as well as "the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory." 1859 Treaty Between the United States and the Yakama Nation, art. 3, June 9, 1855, 12 Stat. 951. The non-Indian land owners, who took title by U.S. patents, argued that this language conferred only those rights that any citizen of the Territory would have, and thus obstructed the Indians from fishing on their lands bordering the Columbia River. *Winans,* 198 U.S. at 379. In reversing the lower court

[8] Although the Court's decision in *Lone Wolf* is roundly criticized, it was not the first time the Court had sanctioned diminishment of Indian rights upon a finding of clear Congressional intent. *E.g.*, *Cherokee Tobacco,* 78 U.S. (11 Wall.) 616, 620 (1870) (determining that Congress intended to impose a federal tobacco tax upon tobacco produced and disposed of within the Cherokee nation); *Southern Kansas Railway,* 135 U.S. 641 (1890) (upholding the federal government's exercise of imminent domain over Indian lands pursuant to the Act of July 4, 1884 entitled "An act to grant the right of way through Indian Territory to the Southern Kansas Railway Company and for other purposes"); *Spalding v. Chandler,* 160 U.S. 394, 405-07 (1896) (finding that Congress intended the act at issue to intrude upon treaty rights).

decree enjoining the Indians from exercising fishing rights, the Court said that to hold otherwise would be "an impotent outcome to negotiations and a convention which seemed to promise more and give the word of the nation for more." *Id.* at 380. The Court stated that the treaty provision must be interpreted as the Indians would have understood it. The Court next unveiled what would become a critical component of federal Indian law: that "the treaty was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted." *Id.* at 381-82.

In *Winters v. United States*, 207 U.S. 564 (1908), the Court clearly articulated the third Indian law canon of construction: that ambiguities are to be resolved in favor of the tribes. The issue in *Winters* was whether the Assiniboine and Sioux tribes had reserved water rights to the Milk River in addition to land rights reserved in the Fort Belknap Reservation in Montana under an 1888 agreement. *Id.* at 565. Noting that the land was arid and useless without water, the Court found it unlikely that that the Indians would have given up their pre-existing right to necessary water. The Court then declared: "by a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians." *Id.* at 576. The Court thus held that the 1888 agreement implied tribal water rights to the Milk River for irrigation purposes. *Id.* at 577.

In *Choate v. Trapp*, 224 U.S. 665 (1912), the Court was not called upon to interpret an Indian treaty in light of a federal or state statute. Instead, *Choate* marks the first case in which the Court applied the Indian canons to interpret statutes themselves. *Choate* involved a conflict between opposing statutes in deciding whether Oklahoma could tax Indian lands that Congress had specified would be nontaxable for certain periods of time and under certain conditions. *Id.* at 665. Oklahoma argued that the tax exemption was separate from the land, or at least subject to the general rule that tax exemptions are to be strictly construed and subject to repeal unless the contrary is clearly established. *Id.* at 674-75. The Court acknowledged the strict tax exemption canon and then said:

> But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation. . . . This rule of construction has been recognized, without exception, for more than a hundred years and has been applied to tax cases.

Id. at 674-75. Thus, not only did the Court apply the canons in favor of the Indians, it determined that the Indian law cannon trumped the conflicting tax canon.

Six years later in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), the Court employed the Indian canons to a treaty reserving "that

body of lands known as the Annette Islands" for the Metlakatla Indians to include adjacent waters and submerged lands. The Court relied upon *Choate v. Trapp* and declared "the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918).

In *Carpenter v. Shaw*, 280 U.S. 363 (1930), the Court rejected Oklahoma's attempt to tax royalty interests from Indian lands, again determining that a conflicting tax canon must give way to the Indian canons: "while in general tax exemptions are to be presumed and statutes conferring them are to be strictly construed, the contrary is the rule to be applied to tax exemptions secured to the Indians by agreement between them and the national government." *Id.* at 366.

Within one hundred years of the Court's decision in *Worcester v. Georgia*, the Indian canons were firmly embedded in the Court's Indian law jurisprudence. Throughout this period, the Court consistently employed the canons to prevent an inadvertent loss of Indian rights, reflecting the Court's longstanding recognition of inherent tribal sovereignty, and the duty

assumed by the United States in safeguarding those rights.[9] The cases also reflect the Court's recognition of Congress' plenary power over Indian affairs, including Congress' ability to unilaterally abrogate Indian rights. Importantly, the Court applied the Indian canons to ensure that diminishment occurs only when clearly intended by Congress. Thus, in *Worcester*, *Kansas Indians*, *Minnesota*, *Winters*, *Choate*, *Alaska Pacific Fisheries*, and *Carpenter*, the Court applied the Indian law canons to resolve ambiguities in favor of the Indians, thereby safeguarding Indian rights. In *Cherokee Tobacco*, *Southern Kansas Railway*, *Spalding*, and *Lone Wolf*, the Court determined that Congress intended to abrogate Indian rights, and therefore the Indian canons gave way to clear expressions of Congress' plenary power.

In the second century of Indian law canon jurisprudence, the Court has not wavered in requiring clear Congressional intent to abrogate Indian rights, and has continued to employ the Indian canons when evidence of clear Congressional intent is lacking. In more recent decisions, the Court

[9] As Justice Marshall explained in *Worcester*: "By various treaties, the Cherokees have placed themselves under the protection of the United States. … But such engagements do not divest them of the right of self-government. . . . [The Indians] may exercise the powers not relinquished, and bind themselves as a distinct and separate community. . . . The inquiry is not, what station shall now be given to the Indian tribes in our country? But, what relation have they sustained to us, since the commencement of our government?" *Worcester*, at 581-82.

has expanded the means by which it may determine Congressional intent to diminish Indian rights, and consequently has been criticized for finding Congressional intent where such intent was arguably unclear. Those criticisms, however, address the means by which the Court has determined congressional intent. The Court has never waivered from its substantive requirement that diminishment can only occur pursuant to clear congressional intent. When clear Congressional intent cannot be found, the Court has continued to employ the Indian canons.

The recent Court's most forceful expression of the Indian law canons in the context of statutory interpretation appears in *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985). At issue was Montana's attempt to tax Indian royalty interests under oil and gas leases issued to non-Indian lessees pursuant to the Mineral Leasing Act of 1938 ("MLA"). *Id.* at 761. The district court held that the state taxes were authorized by a 1924 statute, and that the 1938 statute failed to repeal this authorization. *Blackfeet Tribe*, 471 U.S. at 761-62. On rehearing, the Ninth Circuit held that the 1938 Act did not incorporate the tax provisions of the 1924 Act, and that the 1924 provisions were inconsistent with the policies of the Indian Reorganization Act of 1934. *Id.* at 762. The Supreme Court affirmed this decision, rejecting the State's argument that it had the power to tax Indian royalty interests

generated by leases issued pursuant to the MLA. *Blackfeet Tribe*, 471 U.S. at 766. Specifically, the Court declared:

> [T]he standard principles of statutory construction do not have their usual force in cases involving Indian law.... [T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.... [F]irst, the States may tax Indians only when Congress has manifested clearly its consent to such taxation; second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.

Id.

The Court has also employed the Indian canons to statutes in which clear Congressional intent to abrogate is found to ensure that the *scope* of that abrogation is narrowly construed. For instance, in *Bryan v. Itasca County*, 426 U.S. 373 (1976), the Court was called upon to interpret Public Law 280 – which clearly intended to diminish tribal sovereignty by allowing for state assumption of criminal and certain forms of civil jurisdiction in Indian country. 18 U.S.C. § 1360. In rejecting Minnesota's attempts to tax on-reservation Indian property, the Court found that Public Law 280 was primarily focused on providing for state criminal jurisdiction over crimes committed by or against Indians on reservations, not for providing taxing authority. *Id.* at 380-81. Because Public Law 280 did not clearly indicate congressional intent to allow such taxes, the Court construed the "admittedly

ambiguous" statute liberally, interpreting doubtful expressions in favor of the Indians. *Id.* at 392-93.

In *Yakima v. Confederated Tribes of the Yakama Reservation*, 502 U.S. 251 (1992), the Court interpreted the General Allotment Act as permitting Washington State to impose an ad valorem tax on Indian lands, but not an excise tax on the sale of those lands. *Id.* at 270. The Court determined that "Congress in the Burke Act proviso manifested a clear intention to permit the state to tax such Indian lands." *Id.* at 259. However, the Court determined that "the excise tax on sales of fee land is another matter." *Id.* at 268. The Court acknowledged that the phrase "taxation of land" could be reasonably construed to include taxation on the proceeds from sale of land. Nevertheless, because "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit" the Court concluded that the Burke Act did not allow for the imposition of the excise tax. *Id.* at 269. Thus, the Court employed the Indian law canons to ensure that the state's taxing power was limited only to that which Congress clearly intended.

In *United States v. Dion*, 476 U.S. 734 (1986), the Court unanimously affirmed the Indian canons and extensively discussed the standard for finding congressional intent. The Court found that Congress intended to

abrogate treaty rights reserved by the Yankton Sioux Tribe when enacting the Bald Eagle Protection Act. Justice Marshall, writing for the Court, clarified that tribes should not prevail every time Indian rights conflict with legislation. The outcome hinges on whether Congress considered the Indian rights and still took action diminishing those rights. If that showing cannot be made, any ambiguity should be resolved in the Indians' favor. *Id.* at 739-40.

Likewise, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Court held that the Indian Civil Rights Act ("ICRA") did not authorize private civil causes of action against tribes or its officials in federal court. While the ICRA was clearly intended to diminish tribal sovereignty, the Act did not expressly authorize such suits. While the Court affirmed Congress' ability to impose ICRA requirements upon tribes, the Court concluded "unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty . . . we are constrained to find that [the ICRA] does not impliedly authorize [such] actions." *Id.* at 72.

In *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), the Court employed the Indian canons when determining that President Taylor's 1850 Executive Order compelling the removal of the Chippewa from its ancestral lands and extinguishing the Tribe's

usufructuary treaty hunting and fishing rights. The Court determined that the Removal Act, which authorized President Taylor to convey land west of the Mississippi to tribes that chose to exchange and remove there, did not specifically authorize the nonconsensual removal order regarding the Chippewa. *Id.* at 189. Because Minnesota could not point to another source of Presidential authority for the Order, the Court held the Order was invalid in its entirety. *Id.* at 296. The majority criticized the dissent's view that the removal order ought to be severable from the order purporting to extinguish Chippewa usufructuary rights because of the strong presumption supporting the legality of executive action that has been authorized expressly or by implication:

> In this context however, any general presumption about the legality of executive action runs into the principle that treaty ambiguities are to be resolved in favor of the Indians. We do not think the general presumption relied upon by the Chief Justice carries the same weight when balanced against the counter presumption specific to Indian treaties.

Id. at 195, n. 5.

During this second century of Indian law canon jurisprudence, the Court has remained true to the fundamental rule that diminishment of Indian rights can only be legitimized by clear congressional intent. Although the Court has been criticized for finding clear congressional intent in situations in which such intent seems far from clear, the Court has not waivered from

conditioning a finding of diminishment only upon a showing of that intent. *See, e.g. Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99, 112 (1960) (finding it "entirely clear" that the definition of "reservation" in the Federal Power Act applied only to lands owned by the United States and not the lands owned in fee simple by the Tribe); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 587 (1977) (looking to prior discussions and other circumstances to find that the three Acts at issue "clearly evidence congressional intent" to diminish the Tribe's reservation); *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978) (finding that the "surrounding circumstances and legislative history" evidence that Congress did not intend to allow the Tribe to retain criminal jurisdiction over non-Indians when entering into the 1855 Treaty of Point Elliot); *Chickasaw Nation v. United States,* 534 U.S. 84, 89, 93-94 (2001) (determining that in enacting a subsection of the Indian Gaming Regulatory Act, Congress did not intend to extend to tribes an exemption from paying gambling-related taxes which states need not pay, and that the canons must give way to congressional intent).

The Court's cases from 1960 to present continue to employ the Indian canons of construction when confronted with ambiguities in statutes affecting Indians unless Congressional intent to diminish Indian rights is

clear. The Court refined its jurisprudence, particularly when employing the Indian canons to ensure that the scope of congressional diminishment is narrowly interpreted. While in more recent decisions the Court has expanded the methods by which it determines congressional intent, the Court has consistently employed the Indian canons when congressional intent is unclear.

2. The District Court's Decision Cannot be Squared with the Supreme Court's Indian Law Canon Jurisprudence.

In this case, the district court determined that the term "restored lands" as it appears in Section 20 is IGRA is ambiguous. In agreeing with the government that the Secretary had authority to adopt a restrictive interpretation of the term to the Tribe's clear detriment, the district relied upon *Williams v. Babbitt*, 115 F.3d 657 (1997) and *Seldovia Native Ass'n Inc. v. Lujan*, 904 F.2d 1335 (9th Cir. 1990) to support its conclusion that, in the Ninth Circuit, when a court discerns an ambiguity in a statute governing Indian tribes, the Indian canons must give way to agency interpretations that deserve *Chevron* deference. ER 13. However, the district court failed to address the Ninth Circuit's more recent en banc decision in *Navajo Nation v. Department of Health and Human Services*, which vacated a Panel decision that also relied upon *Williams* and *Seldovia*, and expressly left "for another

day consideration of the interplay between the two presumptions." *Navajo Nation v. Department of Health and Human Services*, 325 F.3d 1133, 1137 n. 4 (9th Cir. 2003).

The Panel in *Williams v. Babbitt*, 115 F.2d 657 (9th Cir. 1990) held that the Reindeer Act of 1937 does not prohibit reindeer herding by non-natives in Alaska. *Id.* at 661. The Panel determined that the agency's interpretation of the Act raised grave constitutional questions under the equal protection clause (which the court described as a "race-based ban), and adopted less constitutionally troubling construction. *Id.* at 666. In so holding, the Panel first refused to defer under *Chevron* to the agency interpretation, which was favorable to the Indians. *Id.* at 663 n. 5. The Panel then refused to construe the statute liberally in favor of the Indians, stating:

> While at least one of our sister circuits regards this [Indian] liberal construction rule as a substantive principle of law, we regard it as a mere "guideline and not substantive law." We have therefore held that the liberal construction rule must give way to agency interpretations that deserve *Chevron* deference because *Chevron* is a substantive rule of law.

Id. The only authorities cited by the Panel were *Haynes*, *Shields* and the Justice dissent in *Blackfeet Tribe.*

At issue in *Haynes v. United States*, 891 F.2d 235 (9th Cir. 1989) was the Alaska Native Claims Settlement Act, which states that the Secretary of

the Interior "may convey to a Native, upon application . . . the surface estate in not to exceed 160 acres of land occupied by the Native as a primary place of residence." The Secretary argued that the permissive language of the statute allowed him to convey only 4 acres, with a special use permit for the remaining 156 acres to protect a wildlife refuge on the property. *Id.* at 237. Haynes argued that the language was ambiguous and argued that the Indian canons required an interpretation that did not permit the Secretary to convey a lesser amount. *Id.* at 239. While agreeing that the statute was ambiguous and congressional intent was unclear, the Panel concluded "while this court has recognized this canon of construction . . . it has also declined to apply it in light of competing deference given to any agency charged with the statute's administration." *Id.* at 239. The only authority cited by the Panel was *Shields v. United States*, 698 F.2d 987 (1983), *cert. denied*, 464 U.S. 816 (1983).

Shields involved a dispute over an application for land under the 1906 Alaska Native Allotment Act. *Id.* at 988. Under the Act, Natives could receive allotments of up to 160 acres if the claim was "founded on occupancy of the land prior to the establishment of the particular forest." *Id.* The government argued that the statutory language required applicants to have personally occupied the land. Shields argued that ancestral occupancy

was sufficient. *Id.* at 989. The Panel examined the legislative history of the Act and determined that Congress intended to require actual occupancy of the land. *Id.* at 989-90. It is in this context, that the Panel concluded "the canon is but a guideline and not a substantive law" because "[t]he canon of construction cannot be used by the courts to accomplish what Congress did not intend." *Id.* at 990. In other words, because the Secretary's regulation comported with congressional intent, the court appropriately refused to employ the canons. To hold otherwise would allow courts to use the canons to "accomplish what Congress did not intend." *Id.*

Navajo Nation v. Department of Health and Human Services, 325 F.3d 1133 (9th Cir. 2003) is the Ninth Circuit's most recent case involving the conflict between *Chevron* and the Indian canons. At issue was whether the Temporary Assistance to Needy Families ("TANF") statute qualified as a program passed "for the benefit of Indians." *Id.* at 1136. If TANF qualified as such a program, the Tribe would be entitled to apply for program administration funding under the Indian Self Determination and Education Assistance Act ("ISDEAA"). The *En Banc* Panel concluded that a "plain reading of the language" established that TANF is clearly a general welfare program that only benefits Indian collaterally, and is not a statute

passed for the Indians under the Indian Self Determination and Education Assistance Act ("ISDEAA") definition. *Id.*

The original panel, on the other hand, found the statutory language to be ambiguous. After acknowledging the Supreme Court's recent affirmation of the Indian canons in *Blackfeet,* the court said:

> Thus, to some extent, the *Chevron* rule of statutory interpretation and the *Blackfeet Tribe* rule of statutory interpretation conflict with one another in this case. We have dealt with this conflict by discarding the *Blackfeet Tribe* rule in favor of the *Chevron* rule whenever these two general rules of interpretation intersect in the same case.

Navajo Nation v. Dep't of Health & Human Services., 285 F.3d 864, 870 (9th Cir. 2002), *rev'd on reh'g*, 325 F.3d 1133 (9th Cir. 2003). The only authority the original panel cited to was *Williams, Seldovia,* and *Haynes.* The original panel acknowledged that its holding was in conflict with at least two other circuits, but declared "only a panel sitting *en banc* may overturn existing Ninth Circuit precedent." *Id.* at 871 n. 2.

Because the *en banc* panel found the statutory clarity that had eluded the original panel, "neither *Chevron* nor the *Blackfeet Tribe* presumption in favor of Indian tribes is implicated. Thus, we leave for another day consideration of the interplay between the *Chevron* and *Blackfeet Tribe* presumptions." *Navajo Nation v. Department of Health and Human Services*, 325 F.3d 1133, 1137, n. 4 (9th Cir. 2003) (citations omitted). The

en banc panel's conclusion that a finding of statutory clarity (and hence clear congressional intent) precludes the application of the Indian canons is in sync with 190 years of Supreme Court Indian canon jurisprudence: the Indian canons do not apply when congressional intent is clear. The Indian canons only apply when congressional intent cannot be ascertained, to safeguard against the inadvertent loss of Indian rights and to serve the substantive goal of ensuring that the diminishment of Indian rights occurs only at the hands of Congress. Thus, the *en banc* panel's decision is consistent with the conclusion in *Shields* that the Indian canons must give way to clear congressional intent.

The district court also failed to address the decision in *Artichoke Joe's v. Norton*, 353 F.3d 712 (9th Cir. 2003), issued shortly after *Navajo Nation*, in which the Panel employed the Indian canons to resolve an ambiguity within an unrelated section of IGRA. At issue in *Artichoke Joe's* was whether tribal-state compacts that effectuated the California Constitution's grant of tribal exclusivity for "casino style" gambling violated IGRA's requirement that tribal Class III gaming activities can only occur on Indian lands that are "located in a State that permits such gaming for any purpose," 25 U.S.C. § 2710(d)(1)(B). *Id.* at 720. The court determined the language to be ambiguous and could not otherwise determine Congressional intent

after perusing the Act's legislative history *Id.* at 725-28. Because an agency interpretation of the ambiguity was also at issue, the Panel noted the potential conflict between the Indian canons and *Chevron* deference, and stated:

> Assuming, without decision, that the Secretary's interpretation of 25 U.S.C. § 2710(d)(1)(B) is entitled to deference under *Chevron,* that interpretation likewise adopts Defendant's construction of the statute and favors Indian tribes. In other words, the [Indian canons] and the doctrine of agency deference point to the same result.

Id. at 730.

The district court's categorical rejection of the Indian canons in favor of *Chevron* deference in this case cannot be squared with the panel's determination in *Artichoke Joe's* to first employ the Indian canons to determine whether a potential conflict exists.

In this case, the district court failed to address *Navajo Nation* and *Artichoke Joe's,* and instead cited to *Williams* and *Seldovia Native Ass'n* as authority to support its conclusion that *Chevron* categorically trumps the Indian Canons. However, the *Williams* and *Soldovia* courts relied upon the decision in *Haynes,* which incorrectly cited *Shields* to support the sweeping proposition that the Indian canons must give way to *Chevron* deference. The decision in *Shields* does not fairly stand for that proposition and the subsequent decisions relying on *Shields* do not offer analysis to support their

conclusions. Thus, if the law of this Circuit is that *Chevron* categorically trumps the Indian canons, that law rests upon repeated citations to a case that does not even support the proposition.

3. The District Court's Decision Conflicts with the Law of Other Circuits.

The D.C. and Tenth circuits have squarely rejected the notion that *Chevron* categorically trumps the Indian canons. Consistent with the Supreme Court's Indian canon jurisprudence, the D.C. and Tenth Circuits employ the Indian canons to prevent agencies from diminishing Indian rights when congressional intent to do so is not clear. In such instances, both Circuits have determined that *Chevron* deference must give way to the Indian canons.

a. DC Circuit

In *Muscogee Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), the D.C. Circuit held that the Indian law canons trump Chevron deference when the statute at issue is written for the express benefit of tribes. In *Muscogee*, the Muscogee Nation passed an ordinance authorizing the Creek Tribal Court to enforce civil and criminal jurisdiction over Tribal members and subsequently sought funding from the BIA for the Tribal Court and law enforcement program. The BIA denied the request for funds, maintaining that the Tribe had no power to establish tribal courts with civil and criminal

jurisdiction pursuant to the Curtis Act. The district court agreed. The D.C. Circuit reversed and held that the Indian tribes involved had the power to establish tribal courts because the prohibition on tribal courts set by the Curtis Act was repealed when the tribes acted to adopt a constitution and set up courts to enforce laws pursuant to the Oklahoma Indian Welfare Act of 1936 ("OIWA"). In rejecting the government's argument that the court should give deference to the agency's interpretation, the court said:

> [Interior] fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law.... "[T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." ... If there is any ambiguity as to the inconsistency and/or the repeal of the Curtis Act, the OIWA must be construed in favor of the Indians, i.e., as repealing the Curtis Act and permitting the establishment of Tribal Courts. The result, then, is that if the OIWA can reasonably be construed as the Tribe would have it construed, it must be construed that way.

Id. at 1444. The D.C. Circuit viewed the Indian law canon, rooted in the trust relationship, as controlling. *Id. a*t 1446. The court concluded: "The legislative history is not clear and the language of Section 503 can be easily construed as permitting the establishment of Tribal Courts. For this very reason, this Court *must* construe the OIWA to benefit the Tribe." *Id.* (emphasis added). *See also*,

Albuquerque Indian Rights v. Lujan, 930 F.2d 49 (D.C. Cir. 1991) (acknowledging the split between the Ninth and D.C. Circuits).

b. The Tenth Circuit

The Tenth Circuit has also squarely held that *Chevron* will not trump the Indian canons when ambiguity exists and the agency advocates for an interpretation that diminishes Indian rights. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997),[10] required the court to interpret the amount of funding the BIA must provide to tribes for self-determination contracts under the Indian Self-Determination and Education Assistance Act. The court acknowledged that "when faced with an ambiguous federal statute, we typically defer to the administering agency's interpretation as long as it is based on a permissible construction of the statute at issue." *Id.* at1461. However, "[i]n cases involving Native Americans, however, we have taken a different approach to statutory interpretation, holding that 'normal rules of construction do not apply when Indian treaty rights, or even non-treaty matters involving Indians, are at issue."' *Id.* at 1461. Ultimately, the court determined that the purposes of the Act – to promote tribal self-determination – are consistent with the purposes of the Indian canons, and

[10] The Supreme Court recently determined that the underlying contracts between the parties addressed the issue, and held that the Government must pay each tribe's contract support costs in full. *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2195, __ U.S. __ (June 18, 2012).

therefore concluded, "for purposes of this case . . . the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes." *Id.* at 1462. *See also*, *E.E.O.C. v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir.1989).

The Tenth Circuit has also held that *Chevron* and the Indian canons can co-exist in instances in which an agency interprets a statutory ambiguity in favor of Indian rights. In *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Com'n.*, 327 F.3d 1019 (10th Cir. 2003), the court was required to interpret provisions of the Johnson Act and IGRA. Following the issuance of the NIGC's opinion that the game in question was Class III, the United States Attorney for the Northern District of Oklahoma threatened to bring an enforcement action against the three tribes for conducting unauthorized use of gambling devices in violation of the Johnson Act. Regarding the NIGC's determination, the court determined an ambiguity existed within IGRA's statutory provisions. The court concluded that the NIGC's interpretation resolved the ambiguity in favor of the tribes and is therefore "consistent with the *Blackfeet* canon, under which federal statutes

are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit."[11] *Id.* at 1038.

4. This Court Should Employ the Indian Canons in this Case.

The district court's decision and the questionable authority upon which it relies departs from an unbroken chain of Supreme Court jurisprudence spanning over 190 years and squarely conflicts with the law of at least two other circuits. The Supreme Court has not waivered from its application of the Indian canons when confronted with an ambiguity in order to protect a fundamental principal of federal Indian law: only Congress can diminish Indian rights, and Congress' intent to do so must be clear. Consequently, the D.C. and Tenth Circuits have refused to allow *Chevron* to trump the Indian canons because it would result in judicial deference to an agency diminishment of tribal rights in a situation in which, by definition, Congressional intent to do so is not clear. The district court's decision, on the other hand, would allow administrative agencies to govern the sovereign-to-sovereign relationship between Indian tribes and the United States, a duty that lies exclusively with Congress by virtue of its plenary power. *See*

[11] Agency interpretations of statutory ambiguities that honor the Indian canons are also consistent with the Agency's discharge of its overall trust responsibility to Indian tribes – a ". . . principle [that] has long dominated the Government's dealings with Indians." *U.S. v. Mitchell*, 463 U.S. 206, 225-26, 103 S. Ct. 2961, 2972 (1983).

United States v. Lara, 124 S.Ct. 1628, 1633 (2004) (referring to Congressional power over Indians as "plenary and exclusive"). Accordingly, the district court should be reversed on this issue, and the Indian canons should be employed to resolve the admitted ambiguity in the term "restored lands."[12]

C. The District Court Erred in Determining that the Indian Law Canons Otherwise do not Apply in this Case because the Restored Lands Exception Pits Tribes Against Each Other.

The district court attempted to avoid the applicability of the Indian law canons in this case. ER 21-22. The district court determined that the term "restored lands" is capable of being interpreted in a manner that "could favor one set of tribes relative to another, if not for regulations balancing their respective interests." *Id*. Consequently, the district court reasoned, "the *Blackfeet* presumption has no force because it gives no guidance as to which set of Indians the Restored Lands Exception should benefit." *Id.*

First, the district court's presumption that the Tribe's proposal to relocate its gaming operations a mile and a half from its existing facility somehow pits tribes against each other enjoys no support in the record. No tribe objected to Redding's modest proposal. Second, the record contradicts

[12] If the Panel concludes that Circuit precedent precludes reversal on this issue, the Tribe urges the court to encourage *en banc* review in the text of its decision.

the district court's determination that the ability of a restored tribe to game in more than one location would somehow create an advantage compared to "more established" tribes. *Id*. Prior to 1988, the United States took land into trust for several tribes that had not been terminated by the United States, including parcels of land located beyond the exterior boundaries of the requesting tribe's reservation. Many of those tribes, including the Ho-Chunk Nation of Wisconsin, are now each operating multiple gaming facilities on those "pre-1988" lands. ER 39-40 ¶ ¶ 6-7.

Next, the district court erred in concluding that IGRA requires DOI to insulate existing tribal operations from tribal competition. At least one Circuit has concluded otherwise. *See, e.g. Sokaogon Chippewa Community v. Babbit*, 214 F.3d 941 (7th Cir. 2000) (IGRA does not guarantee existing tribal gaming operations protection from tribal competition). Finally, DOI has consistently adopted the Seventh Circuit's interpretation in its implementation of Section 2719, including several recently-issued Indian Land Determinations. As then Assistant Secretary Echohawk stated in his September 1, 2011 Indian Land Determination the involving the Enterprise Rancheria, who was seeking gaming approval pursuant to 25 U.S.C. §2719(b)(1)(A), "… competition from the Tribe's proposed gaming facility in an overlapping gaming market is not sufficient, in and of itself, to

conclude that it would result in a detrimental impact to [the opposing tribe]." September 1, 2011 DOI Indian Land Determination for the Enterprise Rancheria of Maidu Indians of California ("Enterprise ILD"), p. 32; September 1, 2011 DOI Indian Land Determination for the North Fork Rancheria of Mono Indians p. 51. Assistant Secretary Echohawk further concluded, "IGRA does not guarantee that tribes operating existing facilities will continue to conduct gaming free from both tribal and non-tribal competition." Enterprise ILD, p. 32, (*citing Sokaogon Chippewa Community v. Babbit*, 214 F.3d 941 (7th Cir. 2000)).

The district court's attempt to circumvent the Indian canons is unavailing, as it enjoys no support in the record and conflicts with prior judicial decisions, which have been embraced by DOI. The issues raised in this litigation require the resolution of the tension in this Circuit between the Indian law canons and *Chevron* deference.

D. The District Court Erred in Concluding that Defendants May Eschew the Plain Meaning Interpretation of "Restored Lands" Intended by Congress.

Of course, neither *Chevron* nor the Indian canons can displace congressional intent. Several courts have been called upon to interpret the term "restored lands," and all but one court determined that Congress intended the plain meaning of the term to apply. Consistent with those

decisions, federal agencies, including DOI and the National Indian Gaming Commission have employed a plain meaning interpretation of restored lands.

In 1999 and 2004, the United States District Court for the Western District of Michigan issued two path-marking decisions interpreting the restored lands exception, which the Sixth Circuit affirmed in 2004. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 46 F. Supp.2d 689 (W.D. Mich. 1999) ("*Grand Traverse I"*); *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Attorney of the W. Dist. of Mich.*, 198 F. Supp. 2d 920 (W.D. Mich. 2002) ("*Grand Traverse II*"); *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the United States Atty.*, 369 F.3d 960 (6th Cir. Mich. 2004) ("*Grand Traverse III*"). The *Grand Traverse* litigation arose from the United State's threatened enforcement action against the Grand Traverse Tribe for operating a gaming operation on lands placed into trust after 1988. The government argued that the post-1988 trust lands did not fall within any of the exemptions or exceptions contained within 2719. Grand Traverse argued that its lands qualified under the restored lands exception.

The *Grand Traverse* court determined that Congress intended the plain meaning of the term "restore" to apply: to give back, to return, or bring back or put into a former or original state. *Grand Traverse I,* 198 F. Supp. 2d 920, 928 (W.D. Mich. 1999); *Grand Traverse II*, 46 F. Supp. 2d 920, 933, at

n. 2. (W.D. Mich. 2002). The district court determined:

> Congressional use of the words appears to have occurred in a descriptive sense only, in conjunction with action taken by Congress to accomplish a purpose consistent with the ordinary meaning of the words. In no sense has a proprietary use of the term "restore" or "restoration" been shown to have occurred.

Grand Traverse II, 198 F. Supp. 2d 920, 931 (W.D. Mich. 2002). *Accord*, *TOMAC v. Norton*, 193 F. Supp. 2d 182, 193-4 (D.D.C. 2002); *Oregon v. Norton*, 271 F. Supp. 2d 1270, 1279 (D. Ore. 2003).

The *Grand Traverse* court also determined that the plain meaning interpretation comports with Congressional intent in enacting IGRA:

> As Congress clearly stated, the purpose of the IGRA was not to limit the proliferation of Indian gaming facilities. Instead, it was to provide express statutory authority for the operation of such tribal gaming facilities as a means of promoting tribal economic development, and to provide regulatory protections for tribal interests in the conduct of such gaming. . . . The clearly defined purpose of the statute creates no basis for presuming that Congress intended to narrow the right to game except where that intent is clearly stated. . . . As a result, the chronological limitation on the ability of tribes to game [Section 2719(a)] must itself be deemed an exception to the grant of general authority to game and the stated purpose to authorize gaming as a method of promoting tribal economic development and self-sufficiency.

Grand Traverse II, 198 F. Supp. 2d at 933-934 (citations omitted). In enacting Section 2719, the court determined Congress intended to allow tribes that were unrecognized or who lacked a land base at the time IGRA

was enacted[13] to enjoy the benefits of the statute:

> Tribes which are belatedly recognized or acknowledged . . . have not had the ability to have lands placed in trust by the Secretary for the purpose of establishing or preserving a reservation. As a result, the statute appears to allow belatedly recognized tribes to have lands exempted by way of certain other exceptions.

Grand Traverse II, 198 F. Supp. 2d at 931.

Finally, the *Grand Traverse* court determined that, to the extent any doubt exists concerning Congress' intent in enacting Section 2719, the Indian law canons apply. *Grand Traverse II*, 198 F. Supp. 2d at 934; *Grand Traverse III*, 369 F.3d at 971 (6th Cir. 2004).

Other courts called upon to interpret the term "restored lands" have adopted the *Grand Traverse* analysis. For instance, the district court in *Oregon v Norton*, 271 F. Supp. 2d 1270 (D. Ore. 2003) rejected the State of Oregon's argument that "restore" is a term of art limited to the Congressional act of restoring federal recognition to an Indian tribe, and that "restoration of lands" is thus limited to those lands identified by Congress within a particular restoration act. *Id.* at 1279. The district court expressly adopted the "sound reasoning and analysis" in *Grand Traverse II* and determined that the terms "restore" and "restoration of lands" should be construed in accordance with their ordinary meaning. *Id*. *Accord*, *City of*

[13] As with Ho Chunk of Wisconsin, many of these tribes offer gaming in more than one local by virtue of pre-1988 off-reservation trust lands.

Roseville v. Norton, 348 F.3d 1020, 1030-31 (D.C. Cir. 2003); *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbit,* 116 F. Supp. 2d 155, 163 (D.D.C. 2000).

Since at least 2001, DOI and NIGC have embraced the *Grand Traverse* court's analysis.[14] Relying on the plain meaning of the restored lands exception, DOI has taken land into trust for gaming purposes even though the application tribes were already gaming on other lands. For example, July 13, 2007, DOI determined that the Tolowa Indians of the Elk Valley Reservation were eligible to have land taken into trust for gaming purposes outside its existing reservation pursuant to the restored lands exception, even though the tribe was already gaming on other reservation land. July 13, 2007 Indian Land Determination for the Elk Valley Rancheria, p. 6-7.

In this case, the district court attempted to distinguish the *Grand Traverse* cases because they "did not foreclose Interior's discretion to promulgate regulations" to resolve ambiguities inherent in the terms "restored tribe" and "restoration of lands." ER 25. However, the *Grand Traverse* cases *do* foreclose the restrictive interpretation contained within the

[14] In promulgating the 2008 regulations, DOI failed to provide a "reasoned explanation" for its dramatic departure from *Grand Traverse*, as required under *Motor Vehicle Mfs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983). *See also Federal Communications Commission v. Fox TV Stations, Inc.*, 556 U.S. 502, 513-15 (2009).

2008 regulations because it conflicts with Congressional intent. The district court erred in concluding that this restrictive interpretation of "restoration of lands" is somehow less offensive to Congressional intent because it is advanced by an agency under the guise of interpretive regulations.

E. The Defendants' Mutually Exclusive Interpretation of the Exemptions and Exceptions is Inconsistent with Congressional Intent and the Indian Law Canons of Construction.

In this case, the defendants agree that Redding is a "restored tribe." The defendants also agree that Redding has established historical and modern connections to the Strawberry Fields parcel such that it would qualify under the restored lands exception but for two facts: 1) this is not the Tribe's first request for lands to be taken into trust since its restoration and 2) the tribe is already gaming on other lands. These restrictions are found in 25 CFR § 292.12(c):

> (c) The tribe must demonstrate a temporal connection between the date of the acquisition of the lands and the date of the tribe's restoration. To demonstrate this connection, the tribe must be able to show that either:
> (1) The land is included in the tribe's first request for newly acquired lands since the tribe was restored to Federal recognition; or
> (2) The tribe submitted an application to take the land into trust within 25 years after the tribe was restored to Federal recognition and the tribe is not gaming on other lands.

The application of these restrictions to the facts of this case preclude the

Tribe from benefiting from the restored lands exception even though its existing gaming operations independently qualify under a separate exemption from 2719's prohibition against gaming on post-1988 trust lands.

The Tribe's Win River Casino lands "are located in a state other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located." 25 U.S.C. § 2719(a)(1)(B). Thus, with respect to Redding's Strawberry Fields request, the 2008 regulations render 25 U.S.C. § 2719(a)(1)(B) and the restored lands exception mutually exclusive.

Section 2719, when read as a whole, does not support the mutually exclusive interpretation advanced by the defendants. 25 U.S.C. 2719 provides:

> (a) Prohibition on lands acquired in trust by Secretary. Except as provided in subsection (b), gaming regulated by this Act shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after the date of enactment of this Act [enacted Oct. 17, 1988] unless-
> (1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on the date of enactment of this Act [enacted Oct. 17, 1988]; or
> (2) the Indian tribe has no reservation on the date of enactment of this Act [enacted Oct. 17, 1988] and--
> (A) such lands are located in Oklahoma and–
> (I) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or
> (ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or
> (B) such lands are located in a State other than Oklahoma and

> are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.
> (b) Exceptions.
> (1) Subsection (a) will not apply when--
> (A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or
> (B) lands are taken into trust as part of--
> (I) a settlement of a land claim,
> (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or
> (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

Section 2719 does not include any language that could reasonably be interpreted to mean that a tribe is permitted only to conduct gaming on land taken into trust after October 17, 1988 under **either** a Section 2719(a) exemption **or** a Section 2719(b) exception, **but not both**. Section 2719 does not provide that a tribe is permitted to conduct gaming on land taken into trust after October 17, 1988 under **only one** of the Section 2719(b) exceptions.

Given the structure of Section 2719, courts have consistently rejected interpretations that would render its exceptions and exemptions mutually exclusive. For instance, the *Grand Traverse* court rejected the argument that

the exemptions and exceptions within Section 2719 are mutually exclusive. *Grand Traverse II*, 198 F. Supp 2d 920, 934 (W.D. Mich. 2002). Instead, the court determined that the language of § 2719(b)(1)B)(iii) "implies a process rather than a specific transaction, and most assuredly does not limit restoration to a single event." *Id.* at 936. As a result, the *Grand Traverse* court determined that the parcel qualified under the restored lands exception, even though the Band was already conducting gaming on another parcel of trust land. *Id.* at 940. *See also Confederated Tribes*, 116 F. Supp. 2d at 161-164; *City of Roseville v. Norton*, 348 F.3d 1020, 1026-1027 (D.C. Cir. 2003); *Oregon v. United States*, 271 F. Supp. 1270, 1279-1280 (D. Ore. 2003). Consistent with *Grand Traverse*, the district court in *City of Roseville* determined that the restored lands exception remains available to a tribe even though land has previously been taken into trust within the tribe's former reservation. *Id.*, at 1027-1028. The courts rejected the mutually exclusive interpretations advanced in those cases because "the clearly defined purpose of the statute creates no basis for presuming that Congress intended to narrow the right to game except where that intent is clearly stated." *Grand Traverse II*, 198 F. Supp. 2d 920, 933-934 (W.D. Mich. 2002).

In rejecting mutually exclusive interpretations of exemptions and exclusions, *Grand Traverse* and other courts employed the Indian canons to

resolve any remaining doubt. As the Sixth Circuit determined:

> Finally, even assuming, *arguendo*, that the State has "muddied the waters" with respect to the meanings of the terms "restored" and "acknowledged," the Supreme Court repeatedly has held that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit . . . The State has pointed to no evidence of Congressional intent that would forbid this Court from invoking the canon of statutory construction affecting Indians and their trust relationship with the United States. Indeed, the only evidence of intent strongly suggests that the thrust of the IGRA was to promote Indian gaming, not to limit it.

Grand Traverse III, 369 F.3d 960, 971 (6th Cir. 2004) (citations and internal quotations omitted). In rejecting the City of Roseville's narrow interpretation of the restored lands exception, the D.C. Circuit concluded:

> Finally, were there any remaining doubt that Congress intended IGRA's "restoration of lands" exception to be ready broadly, to encompass more than a tribe's former reservation as of the date of the termination of its federal recognition . . . the Indian Canon of statutory construction would resolve any doubt . . . IGRA is designed to promote the economic viability of Indian tribes . . .. In this context, the Indian canon requires the court to resolve any doubt in favor of the tribe.

City of Roseville v. Norton, 348 F.3d 1020, 1032 (D.C. Cir. 2003). *See also Oregon v. Norton*, 271 F. Supp. 2d 1270, 1275 (D. Ore. 2003) (concluding that the Indian law canons of construction apply to the court's review of DOI's interpretation of the restored lands exception).

In this case, the Tribe's Win River casino is located within the boundaries of the Tribe's Reservation, which was established by the United

States on August 10, 1922, 41 Stat. 1225, disestablished pursuant to the California Rancheria Act, and reestablished by the "Judgment as to Shasta County" in the *Hardwick* case in May 20, 1992. ER 180-182. The Tribe thus had no reservation on the date of enactment of the IGRA and Win River is "located in a State other than Oklahoma and [is] within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located." The Tribe therefore is authorized to conduct gaming on that land pursuant to 25 U.S.C. § 2719(a)(ii)(B).

The Strawberry Fields parcel is located just outside of the Tribe's reservation. If those parcels are taken into trust, they would be "lands [that] are taken into trust as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition" pursuant to 25 U.S.C. § 2719(b)(1)(B)(iii).[15] Contrary to Congress' intent in enacting Section 2719, the regulations prevent the Tribe from taking advantage of both the Section 25 U.S.C. § 2719(a)(2)(B) Exemption and Section 2719(b)(1)(B)(iii) Exception. If there is any doubt concerning Congressional intent, the Indian law canons of construction do not allow for the defendants' mutually exclusive application of the "last reservation" exemption and the "restored

[7] The Strawberry Fields parcel would also be the Tribe's first land taken into trust pursuant to the Restored Lands Exception. ER 199.

lands" exception.

F. The District Court Erred In Finding that Approval of the Strawberry Fields Parcel's Trust Application Would Result in the Tribe Operating Multiple Gaming Facilities.

In its order, the district court summarized this case as follows:

> This case is about an Indian tribe's efforts to build a new casino. Plaintiff Redding Rancheria ("the Tribe") currently operates the Win-River Casino on its eight-and-a-half acre reservation in Shasta County. The Tribe seeks to expand its gaming operations by building a second casino on 230 acres of undeveloped riverfront lands.

Order, p. 1. However, the record reveals that, in the course of applying for an opinion that the Strawberry Fields Parcel qualifies under the Restored Lands Exception, the Tribe repeatedly made it clear to the Federal Officials that the Tribe did not intend to build a second casino and operate two casinos simultaneously. ER 310-312. The Tribe advised defendants that it intended to move its operations from the current site within the Reservation boundaries to the Strawberry Fields Property and terminate all gaming operations on the current site. *Id*. Tribal officials offered to enter into a binding agreement that would commit the Tribe to conducting gaming at only one site. *Id*.

Nowhere in the Order does the Court acknowledge this fact. On the contrary, the Court's summary compels the conclusion that the Court found

that the Tribe is seeking to conduct gaming at both locations. However, there is no evidence in the record to support that conclusion.

The fact that the Tribe demonstrated to the Federal Defendants that the Tribe plans to close its current casino and only operate the casino on the Strawberry Fields property is significant for two reasons. First, by agreeing to terminate its gaming operations at its current facility, the Tribe effectively complied with the Regulations. The Regulations are intended to prevent gaming on multiple parcels of land taken into trust after October 17, 1988. While the Tribe contends that there is no provision of the IGRA that would support such a limitation, the Tribe's willingness to limit its operation to one site is consistent with the Regulations.

Second, when applying the 2008 regulations to the facts and circumstances of this case, the defendants acted arbitrarily in refusing to consider the Tribe's plan to relocate its gaming operation. The Tribe is not trying to expand its gaming activities to as many parcels of land as it can buy. Under the Tribe's long term development plan, which was initiated years before the Regulations were promulgated, the relocation of its gaming operations to the Strawberry Fields Property would allow the Tribe to use its limited Reservation lands for governmental purposes and would remove the gaming operations from the residential community in which it is presently

located. *Id*. The transfer of its gaming operation to the Strawberry Fields location would promote the Tribe's efforts not only to develop its own community in a rational way, but would promote the interests of the surrounding community as well. *Id*.

The district court's clear factual error poisoned the well regarding the crux of the district court's analysis. Rather than reviewing the regulations with the eye of enabling a restored tribe to secure a position for gaming comparable to tribes that have were not wrongfully terminated, the district court viewed the Tribe as attempting to secure an added advantage. Manifesting and implementing Congressional intent is the overarching objective in the district court's review of the statute and regulations at issue. This factual error, standing alone, warrants remand to the district court with directions to reconsider its analysis in light of the true facts.

VII. CONCLUSION

The Defendants' application of the 2008 regulations to preclude the Tribe from gaming on the Strawberry Fields parcel because the Tribe is already gaming within its former reservation boundaries cannot be squared with Congress' intent in enacting Section 2719. Instead, the district court's affirmance of the defendants' application of the 2008 regulations effectively results in a rewrite of IGRA in which a restored tribe's legitimate

governmental agenda of restoring a land base ends when gaming begins. Only Congress, in the exercise of its plenary authority over Indian tribes, could embrace such a counter-intuitive policy, and190 years of Supreme Court jurisprudence dictates that Congress must clearly express its intent to do so. The decision of the district court should accordingly be reversed.

Respectfully submitted this 2nd day of August 2012.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font and contains 12,535 words.

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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