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

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

This appeal centers on whether the Secretary may prohibit an otherwise eligible tribe from gaming under the restored lands exception solely because the tribe is "already gaming on other lands" ("numeric restriction" herein). The numeric restriction cannot be reconciled with judicial interpretations of the restored lands exception or the Secretary's obligation to employ the Indian canons of construction. This Court accordingly should reverse the district court, strike the numeric restriction and direct the Secretary to approve the Tribe's restored lands application.

II. ARGUMENT

A. Contrary to the Government's Portrayal, the Tribe is Pursuing a Targeted Challenge to the Numeric Restriction Contained in 25 CFR 292.12(c)(2).

The government falsely characterizes the Tribe's challenge as a broad attack on the 2008 regulations that would require a complete rewrite of its interpretation of the "restored lands exception." For instance, the government argues that the Indian canons of construction cannot apply in this case because the Tribe has not offered its own, competing interpretation of "restored lands" for the Court to consider. Answering Brief, p. 17, 39. Similarly, the government argues that the interpretation of the restored lands exception in the 2008 regulations is largely consistent with the *Grand*

Traverse cases because it requires a tribe to demonstrate historic, modern and temporal connections to the parcel. Answering Brief, p. 34-36.

The problem with the government's arguments is that the Tribe is not challenging Secretary's entire interpretation of the restored lands exception. Instead, throughout this litigation, the Tribe has consistently challenged a very specific component of the Secretary's interpretation: the requirement set forth in 25 C.F.R. § 292.12(c)(2) that a tribe must not "already be gaming on other lands."

Those points upon which the parties agree best demonstrate the narrow divide between the government and the Tribe concerning a proper interpretation of the "restored lands" exception. The Tribe and the government agree that the Tribe qualifies as a "restored" tribe for purposes of the restored lands exception. December 22, 2010 Correspondence from Del Laverdure to the Honorable Jason Hart (Indian Lands Determination or "ILD" herein), ER 268, p. 272. The government agrees that the Tribe has established a "historical" and "modern" connection to the site. ER 268, p. 273-74. The government also agrees that the Tribe has established a "temporal" connection to the site *but for* the fact that the Tribe is "already gaming" on its former reservation lands. ER 268, p. 274. The numeric restriction is the only obstacle to the Secretary's approval of the Tribe's

restored lands application and is the only portion of the Secretary's interpretation to which the Tribe takes quarrel.

B. The Numeric Restriction is not Based on a Permissible Interpretation of the Restored Lands Exception.

The government argues that the Secretary's interpretation of the restored lands exception is entitled to *Chevron* deference. Answering Brief, p. 20, 22. However, *Chevron* does not vest the Secretary with unbridled discretion. Instead, the numeric restriction must be based on a "permissible" interpretation of the restored lands exception. *Chevron U.S.A., Inc. v. Natural Resources Def. Council*, 467 U.S. 837, 843 (1984). To determine whether an agency's interpretation is "permissible," courts "look to the plain and sensible meaning of the statute, the statutory provision in the context of the whole statute and case law, and to the legislative purpose and intent." *Natural Resources Defense Council v. U.S. E.P.A.*, 526 F.3d 591 (9th Cir. 2008).

Additionally, courts will take into account the consistency of an agency's position over time. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993). While an agency is not disqualified from changing a prior interpretation, "the consistency of an agency's position is a factor in assessing the weight that position is due. " *Good Samaritan Hosp.*, 508 U.S. at 417. As the Supreme Court has stated: "an agency interpretation of a

relevant provision which conflicts with the agency's earlier interpretation is entitled to considerable less deference than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, (1987).[1]

In its answering brief, the government argues that the 2008 regulations are consistent with case law interpreting the restored lands exception to require that tribes demonstrate a "modern connection," a "significant historical connection" and a "temporal connection" to the parcel. Answering Brief, p. 34. These courts understood that reestablishment of a restored tribes lands base is a complex, multiyear process requiring tribes to develop resources to locate, acquire and place lands into trust. *See, e.g. Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan* (*Grand Traverse I*), 46 F. Supp. 689, 701 (W.D. Mich. 1999); *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*

[1]The district court and the government rely on *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) for the proposition that an agency interpretation may be permissible under *Chevron* even if it conflicts with a prior judicial interpretation (unless the judicial interpretation was based on a determination that the statute was unambiguous). The issue here, however, is the amount deference this Court should afford the numeric restriction, which directly conflicts with the Secretary's prior interpretation of the term "restoration of lands."

for the Western District of Michigan (*Grand Traverse II*), 198 F. Supp.2d 920, 936 (W.D. Mich. 2002). For many tribes, gaming is the most effective means to fund its land reestablishment program. It is not surprising then, that many restored tribes have sought to game under the restored lands exception even though they are "already gaming on other lands." None of the decisions the government relies on interpreted the term "restoration of lands" to include any restriction that the applicant tribe must not already be gaming on other lands. In fact, the opposite is true.

For instance, the *Grand Traverse* courts determined the parcel at issue qualified under the restored lands exception, even though the Band was already gaming on its former reservation lands. *Grand Traverse II*, 198 F.Supp.2d at 926. The court described the tribe's on-reservation facility as providing "important revenues and employment opportunities," but noted that the band "continued to have significant unmet economic and noneconomic needs." *Id*. Similar to this case, the government advanced a restrictive interpretation, arguing that such Congress must expressly identify a tribe's potentially restored lands. *Grand Traverse I*, 46 F.Supp.2d at 700. As with the case, the government attempted to limit the number of gaming operations to prevent restored tribes from being placed in a "comparatively advantageous position vis-à-vis tribes, which were not restored." *Id*. at 700.

While acknowledging ambiguity in the term "restoration of lands," the court rejected the government's restrictive interpretation, thus enabling the tribe to open a second gaming operation on its "restored lands." *Id.* at 700. *See also Confederated Tribes of Coos, Lower Umqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155 (Dist. D.C. 2000) (rejecting the government's "overly narrow" interpretation of the term "restoration of lands").

The government attempts to distinguish *Grand Traverse II* by pointing out the court was called upon to interpret the term "tribe restored to federal recognition" as opposed to "restoration of lands." In *Grand Traverse II*, the court squarely held that the "clearly defined purpose of [IGRA] 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 at 933-934 (citations omitted). The court accordingly rejected an interpretation that would have limited the term "restored tribe" to only those tribes expressly restored by Congressional act. The court rejected this restrictive interpretation, concluding instead that Congress intended the plain meaning of the term "restore" and "restoration" to apply. *Grand Traverse II*, 198 F. Supp. 2d at 931. Nowhere did the *Grand Traverse II* court suggest that such a restrictive interpretive approach would somehow be appropriate

when defining the term "restoration of lands" - which appears in the same sentence of the statute.

The government similarly fails in its attempt to harmonize the Secretary's denial of the Tribe's restored lands application with prior agency decisions. Consistent with the *Grand Traverse* cases, the Department and the NIGC have long required a tribe to demonstrate "modern" and "significant historical" connections to the land and a "temporal connection" between the date of the acquisition of the land and the date of the tribe's restoration. However, none of those administrative decisions interpreted the term "restoration of lands" to include a restriction that the application tribe must not already be gaming on other lands. In fact, the opposite is true.

For instance, on July 13, 2007, under factual circumstances remarkably similar to this case, the Department determined that the Tolowa Indians of the Elk Valley Rancheria were eligible to have land taken into trust for gaming purposes pursuant to the restored lands exception, even though the tribe was already gaming on its former reservation land. Indian Land Determination for the Elk Valley Rancheria (*Elk Valley*), July 13, 2007.[2] As with the *Grand Traverse* courts, the Department viewed Elk

[2] Pursuant to FRE 201, the Tribe requests the Court to take judicial notice of the Agency's Indian Lands Determination for Elk Valley, which is located at www.nigc.gov/Reading_Room/Indian_Land_Opinions.

Valley Rancheria's existing gaming operation as a critical component of the Tribe's land restoration program:

> The Tribe produced financial information demonstrating it did not have the ability to purchase lands immediately upon restoration. It was not until 1995, after the Tribe commenced gaming on the Green allotment, that it could reacquire property to build a tribal land base.

Id. at 6. With the revenue obtained from gaming on the Green Allotment within Elk Valley's former reservation, the Tribe was able to acquire the Martin Ranch Tract – 203.50 acres parcel approximately one mile south of the Tribe's reservation. *Id.* at 1. The government attempts to distinguish *Elk Valley* by pointing out that the Tribe's gaming operation within its former reservation lands is located on trust land owned by a tribal member and leased by the Tribe. This distinction is not relevant. Elk Valley's operation clearly constitutes on "other lands." IGRA's definition of Indian lands expressly includes lands held in trust for individual members. 25 U.S.C. § 2703(4)(B). The numeric restriction at issue in this case thus would have precluded approval of Elk Valley's restored lands application.

Despite the government's attempt to establish otherwise, the numeric restriction at issue cannot be squared with the *Grand Traverse* cases. While those courts recognized modern, historic and temporal limitations to the restored lands exception, no court recognized the numeric limitation at issue in this case. Instead, those courts consistently rejected narrow

interpretations of the restored lands exception – including interpretations advanced by the government - as inconsistent with Congress' intent in enacting IGRA. Further, as demonstrated by the *Elk Valley* decision, the numeric limitation dramatically departs from DOI's prior restored lands determinations. The *Grand Traverse* cases have sufficiently determined Congress' intent in enacting the restored lands exception to preclude the Secretary's imposition of a numeric restriction onto the restored lands exception that would categorically limit a restored tribe to a single gaming operation.

C. Section 2719 does not Support the Secretary's Mutually Exclusive Interpretation of the Former Reservation Exemption and the Restored Lands Exception.

In this case, the Secretary took land into trust that is located within the Tribe's former reservation. The tribe's gaming facility on that property is therefore allowed under § 2719(a)(1) – the former reservation exemption. Subsequently, the tribe sought to have the Strawberry Fields and the Adjacent 80 Acres taken into trust and to conduct gaming thereon pursuant to § 2719(b)(1)(B)(iii) – the restored lands exception. Section 2719 contains no language to suggest Congress intended to preclude this result. Tellingly, federal courts have consistently rejected interpretations of § 2719 that would render the exemptions and exceptions mutually exclusive. *See, e.g. Grand*

Traverse II, 198 F. Supp. 2d at 934 (W.D. Mich. 2002); *Confederated Tribes of Coos, Lower Umqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155, 161-164 (D.D.C. 2000); *City of Roseville v. Norton*, 348 F.3d 1020, 1026-1027 (D.C. Cir. 2003); *Oregon v. Norton*, 271 F. Supp. 2d 1270, 1279-1280 (D. Ore. 2003).

In arguing that the numeric restriction does not render the former reservation exemption and the restored lands exception mutually exclusive, the government points out that the numeric restriction would not have precluded the Tribe from gaming in both locations if the Tribe had *first* gamed on its restored lands and *later* on its former reservation lands. Answering Brief, p. 37. Yet the government offers no justification for why the sequence in which a restored tribe takes land into trust should determine whether a restored tribe is able to game at one locale under a single exemption or at two locales under an exemption and an exception. That is particularly true when such a restriction radically departs from the Secretary's prior interpretations of the same statutory provision, as demonstrated by the Secretary's decision in *Elk Valley*. Such disparate results cannot be squared with the Secretary's duty under 25 U.S.C. 476(f) to treat similarly situated tribes similarly.

D. *Chevron* Deference does not Insulate the Numeric Restriction from the Indian Canons.

Yet another area in which the 2008 regulations depart from the case law is the Secretary's failure to employ the Indian canons of construction when interpreting the term "restoration of lands." In its answering brief, the government offers three principal reasons why the Indian canons do not apply: (1) the Tribe fails to offer a competing definition of "restored lands"; (2) the term "restoration of lands" is incapable of being defined in a manner that benefits all federally recognized tribes; and (3) it is "black letter" 9th circuit law that *Chevron* trumps the Indian canons. For the reasons set forth herein, the government's arguments are not persuasive. Answering Brief, p. 23-49.

The government claims that the Tribe is missing "the single argument necessary for the Tribe to prevail in this case: a specific, alternative interpretation of the statutory term "part of the restoration of lands" as used by Congress in the "restored lands exception" of IGRA." Answering Brief, p. 17, 39. Throughout this litigation, the Tribe has clearly articulated that the Department's specific requirement under 25 CFR 292.12(c)(2) that a tribe must "not already be gaming on other lands" violates the Indian canons of construction. Thus, Tribe has provided the "competing interpretation" the government seeks: (1) that the phrase "already be gaming on other lands"

must be stricken from 25 C.F.R. 292.12 (c)(2)

Next, the government contends that restored tribes would somehow be unfairly advantaged in relation to other federally recognized tribes if allowed to game in more than one locale. Answering Brief, p. 17. However, the government offers no support for this assertion. In fact, many tribes, Ho-Chunk being one notable example, operate multiple facilities in multiple locales both on and off reservation.[3] As recently as 2007, the Department approved Elk Valley's restored lands application, even though that tribe was "already gaming" on its former reservation lands. In that approval, the Department failed to express its current concern that an approval under such circumstance would create an "unfair advantage" for the applicant tribe.

The government also contends that the Indian canons cannot be applied in this case because there is no universal definition of restored lands that would equally favor all federally recognized tribes. Answering Brief, p\p. 17-18, 23. The district court agreed with the government, concluding that the Indian canons are "not implicated" in this case because "the ambiguity [of the restored lands exception] leads to a reading that could favor one set of Indians relative to another." ER at 22-23. Such a

[3]Additional examples include the Colville and Spokane tribes in Washington State, the Agua Caliente Tribe in California, the Navajo Tribe in New Mexico, the Forest County Potawatomi Tribe in Wisconsin, and the Seminole Tribe in Florida.

proposition would eviscerate the Indian canons, since Congress often enacts legislation intended to benefit particular groups of Indians. Tellingly - despite nearly two hundred years of Supreme Court Indian canons jurisprudence - the government and the district court fail to cite any authority for the proposition that the Indian canons must be abandoned absent a definition of "restored lands" that would benefit all Indians equally.

Instead, courts have consistently employed the Indian canons when called upon to interpret the restored lands exception. *See, e.g. Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan* (*Grand Traverse III*), 369 F.3d 960, 971 (6th Cir. 2004) (employing the Indian canons to resolve ambiguity in term "restored tribe"); *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003) (employing Indian canons to broadly interpret the phrase "restoration of lands"); *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). The district court failed to similarly employ the Indian canons in this case to preclude the government from attempting yet again to impose a restriction on the restored lands exception that contorts the "temporal connection" requirement to restrict a tribe from gaming in more than one locale.

Finally, the government argues that the application of the Indian canons in this case "is directly foreclosed by controlling precedent from this Court." The government relies upon *Shields v. United States*, 689 F.2d 987 (9th Cir. 1983), *Haynes v. United States*, 891 F.2d 235 (9th Cir. 1985) and *Williams v. Babbitt*, 115 F.2d 657 (9th Cir. 1990) for its proposition "it is black-letter law in the Ninth Circuit that the Indian canons of construction "must give way" to *Chevron* deference because *Chevron* is a substantive rule of law."[4] Answering Brief p. 16, 23. However, *Haynes* and *Babbitt* both rely upon *Shields* as authority for the sweeping proposition that *Chevron* categorically trumps the Indian canons. The decision in *Shields* does not fairly stand for that proposition.

The court in *Shields* determined that the Secretary's interpretation of a provision within the Alaska Native Allotment Act comported with Congressional intent. *Shields v. United States*, 698 F.2d 987, 988-90 (1983),

[4] The government relies on *Assiniboine & Sioux Tribes v. Nordwick*, 378 F.2d 426 (9th Cir. 1967) to argue that "this Court has consistently held for at least 45 years that it must defer to an agency's interpretation of a statute it administers, notwithstanding any contrary Indian canon of statutory construction." Answering Brief, p. 23. The government reads too much into the holding in *Nordwick*. The interpretation advanced by the tribes in *Nordwick* would have disrupted long held property rights expectations under which "many thousands of acres have been patented." *Id*. at 432. The court instead opted for an interpretation consistent with the agency's preexisting and "longstanding" practice, "which seemingly reflects a uniform contemporaneous interpretation of the Act by persons presumably familiar with its background and purpose." *Id*. at 432.

cert. denied, 464 U.S. 816 (1983). Consequently, the court unremarkably held that "[t]he [Indian] canons of construction cannot be used by the courts to accomplish what Congress did not intend." *Id*. at 990. If, as the government contends, 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.

Recent 9th Circuit decisions have acknowledged this tension in its jurisprudence, including its departure from the law of other circuits. For instance, the government dismisses the Ninth Circuit's treatment of the Indian canons as applied to IGRA in *Artichoke Joe's v. Norton*, 353 F.3d 712 (9th Cir. 2003). In that case, the Ninth Circuit expressly determined that the interpretation of "permitted" gaming by the Secretary was consistent with the Indian canons, and thus *Chevron* and the Indian canons "point to the same result." *Id.* at 729-30. The government similarly downplays the decision in *Navajo Nation v. Dep't of Health & Human Services*, 325 F.3d 1133 (9th Cir. 2003), in which the *en banc* panel vacated the panel decision, which relied upon the *Shields, Haynes, Williams* authority, leaving "for another day consideration of the interplay between the *Chevron* and *Blackfeet* presumptions.

That day has come, as the issues in this appeal require the Court to determine whether the Secretary can rely on *Chevron* deference to interpret a statute intended to benefit Indians in a manner that clearly detriments restored tribes. Endorsing the United States' restrictive views of the Indian canons embraces an absurd result: that the Department of the Interior can employ *Chevron* to abandon its trust responsibility to tribes under the guise of interpretive regulations.

III. CONCLUSION

Congress did not intend IGRA to be interpreted in a manner that requires a tribe restored to federally recognized status to abandon its legitimate governmental agenda of restoring its land base upon the opening of a gaming facility. The acquisition of the Strawberry Fields parcel is clearly a part of the restoration of Tribe's land base, with clear modern, historical and temporal connections between the parcel and the Rancheria. Accordingly, the Strawberry Fields parcel qualifies under IGRA's restored lands provision but for the numeric restriction set forth in the 2008 regulations.

Bedrock principles of administrative law prohibit the Secretary from utilizing regulations to disguise a *de facto* substantive amendment to IGRA. The numerical restriction is not a permissible interpretation under *Chevron*

because it cannot be squared with prior judicial determinations of Congressional intent and it dramatically departs from prior agency interpretations of the restored lands exception. Furthermore, because IGRA is a statute enacted to benefit Indians, the Indian canons cabin the Secretary's discretion and preclude him from imposing a numeric restriction to preclude an otherwise eligible tribe because it is "already gaming" on lands that independently qualify under a separate section 2719 exemption. This Court accordingly should reverse the district court's decision affirming the Secretary's negative restored lands determination.

Respectfully submitted this 29th day of October, 2012.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 3,667 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Word 2010 and contains 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2012, I electronically filed the foregoing Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage pre-paid to the following non- CM/ECF participants.

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