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 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 AMICUS CURIE

FILED IN SUPPORT OF APPELLANT'S BRIEF SEEKING REVERSAL OF THE DISTRICT COURT'S DECISION

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CONSENT TO FILING BRIEF

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, Appellants and Appellees have consented in writing to the filing of this amicus brief.

FRAP 29. (c) (5) STATEMENT

The Robinson Rancheria of Pomo Indians counsel, George Forman and Jay Shapiro, authored this Brief of Amicus Curie ("Brief"), although an initial draft of parts of this Brief were provided to the Law Offices of Forman & Associates by the Law Offices of Rapport and Marston, counsel for Appellant.

The Robinson Rancheria of Pomo Indians paid for the preparation of this Brief. No party or a party's counsel contributed money for the preparation or submitting of this Brief.

No person, other than the Robinson Rancheria of Pomo Indians contributed money that was intended to fund preparing or submitting this Brief.

Dated: August 9, 2012

s/ George Forman
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I.
INTEREST OF AMICUS

The Robinson Rancheria of Pomo Indians ("Robinson") is a federally recognized Indian Tribe organized pursuant to the provisions of the Indians Reorganization Act, 25 U.S.C. § 476 ("IRA"), under a written constitution that designates the Robinson Rancheria Citizen's Business Council as Robinson's governing body.

Robinson's original reservation ("Original Reservation") was purchased in 1909 pursuant to the Indian Appropriations Acts of 1906 and 1908. *Duncan v. Andrus*, 517 F.Supp. 1, 2 (N.D. Cal. 1977) ("*Duncan*"). In 1958, Congress passed the California Rancheria Act, Public Law No. 85-671, 72 Stat. 619 (1958) ("Rancheria Act"). *Id*. at 3. The Rancheria Act terminated the federally recognized status of numerous Indian tribes located in California and compelled the distribution of the tribes' lands and assets to individual Indians. *Id.* Termination of a tribe under the Rancheria Act ended the right of its members to receive federal services provided to federally recognized tribes and their members, and the right of the Indians to form and operate tribal governments. *Id.* It also terminated the trust status of tribal reservation land that had been held for the benefit of the terminated tribes, thereby

exposing the Indian owners of the former reservation lands to state and county tax liability and regulation. *Id*. at 1.

Pursuant to the Rancheria Act, the Secretary of Interior ("Secretary") developed a distribution plan for Robinson, which provided for the distribution of the Original Reservation lands to twenty-eight (28) named Indians. *Id*. at 3. The final termination notice was published in the Federal Register on September 3, 1965. *Id*. at 4 (citing 30 Fed. Reg. 11, 330-31 (1965)).

In 1975, former members of Robinson filed suit against the Secretary , seeking a declaration that United States violated the Rancheria Act by failing to provide water and sanitation infrastructure to the distributees of Robinson's Reservation land prior to terminating the Reservation as required by the Act. *Id*. at 1. The former tribal members sought an order from the District Court declaring that the Tribe and its Reservation was not lawfully terminated and directing that the United States publish in the Federal Register a notice stating that the United States maintained a government-to-government relationship with Robinson. *Id*. In 1977, the United States District Court for the Northern District of California found that Robinson had been unlawfully terminated. *Id*. at 6.

The District Court restored Robinson's status as a federally recognized tribe and the trust status of the land of the Original Reservation that was still in Indian ownership. *Id*.

After its restoration, Robinson reconstituted its tribal government by requesting that the Secretary conduct an election on Robinson's behalf pursuant to the IRA to adopt a constitution establishing the Tribal government. The Secretary subsequently called the election and approved Robinson's Constitution.

In 1986, Robinson purchased the land that currently makes up the new Robinson Rancheria ("Reservation"). The Reservation is located in Lake County, California, and consists of approximately 107 acres. Shortly thereafter, the United States government accepted title to Robinson's new Reservation lands in trust for the Tribe.

On September 10, 1999, Robinson entered into a Tribal State Gaming Compact with the State of California, pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq. ("IGRA") and began conducting gaming on its new Reservation.

In 1999, Robinson purchased four (4) parcels of land ("Parcels") located along the shores of Clear Lake in Lake County, California, outside the boundaries of Robinson's current Reservation. Robinson desires to convey the Parcels to the United

States to be held in trust for the benefit of the Tribe. Robinson desires to construct a marina and restaurant on the Parcels and conduct gaming on the site.

In 2010, Robinson purchased a parcel of property within the boundaries of its Original Reservation owned by the United States in trust ("Trust Land") for a member of the Tribe. Robinson has requested that the United States accept title to that property in trust for the Tribe. Robinson anticipates that the United States will accept title to this property in trust for the Tribe within the next ninety (90) days.

Currently, under the regulations adopted by the Secretary at 25 CFR Part 292 ("Regulations"), Robinson would not be eligible to conduct gaming on the Parcels once the Trust Land is accepted into trust for the Tribe. Robinson is currently conducting gaming on its existing Reservation and the Regulations would prohibit the Secretary from taking the Parcels into trust for gaming purposes. The outcome of this case, therefore, will have a direct and significant impact on the interests of Robinson.

As such, Robinson has a direct governmental interest in this case. But for the existing Regulations, Robinson would be eligible to have the Parcels taken into trust for gaming purposes because Robinson would qualify for the restored lands exception set forth in 25 U.S.C. § 2719.

II.

THE DISTRICT COURT ERRED BY FAILING TO APPLY THE INDIAN CANONS OF STATUTORY CONSTRUCTION IN INTERPRETING 25 U.S.C. §2719.

The United States maintains a trust relationship with Indians and Indian tribes. "This principal has long dominated the Government's dealings with Indians." *United States v. Mitchell*, 463 U.S. 206, 225 (1983); see also *United States v. Mason,* 412 U.S. 391, 398 (1973); *Minnesota v. United States,* 305 U.S. 382, 386 (1939); *United States v. Shoshone Tribe,* 304 U.S. 111, 117-118 (1938); *United States v. Candelaria,* 271 U.S. 432, 442 (1926); *McKay v. Kalyton,* 204 U.S. 458, 469 (1907); *Minnesota v. Hitchcock,* 185 U.S. 373, 396 (1902); *United States v. Kagama,* 118 U.S. 375, 382-384 (1886); *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831). The nature of this trust relationship was eloquently stated by the Supreme Court:

> [T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. **Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards**.

Seminole Nation v. United States, 316 U.S. 286, 296-297 (1942) (citations omitted) (emphasis added).

The federal government's fiduciary responsibility toward Indians exists independent of an express provision of a treaty, agreement, executive order or statute. *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 991 (Ct. Cl. 1980).

Since Congress is exercising a trust responsibility when dealing with Indians, courts presume that Congress' intent toward them is benevolent. *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *Morton v. Ruiz*, 415 U.S. 199 (1974); *McNabb v. Bowen*, 829 F.2d 787 (9th Cir. 1987); *White v. Califano*, 437 F.Supp. 543 (D.S.D. 1977); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252 (D.D.C. 1972).

> When the Congress legislates for Indians only, something more than a statutory entitlement is involved. **Congress is acting upon the premise that a special relation is involved, and is acting to meet the obligation inherent in that relationship.**

White, 437 F.Supp. at 557 (emphasis added).

Based on the federal government's fiduciary obligations to Indians and Indian tribes, the Supreme Court has developed canons of construction requiring that federal law must be read as protecting Indian rights and in a manner favorable to Indians ("Indian Canons"). The Supreme Court adheres to "the general rule that statutes

passed for the benefit of the dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 89 (1918); *Montana v. Blackfeet Tribe,* 471 U.S. 759, 766 (1985) ("*Blackfeet")*.

When Indian rights are shown to exist, later federal action which might arguably abridge them is construed narrowly in favor of preserving Indian rights. The Supreme Court requires a "clear and plain indication" of Congressional intent before abrogating Indian treaty rights or Indian rights arising from statutes. *United States v. Santa Fe Pac. R.*, 314 U.S. 339, 354 (1941); see also *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1332 (10th Cir. 1982).

This Court has held that the Indian Canons are

> somewhat more than a canon of construction akin to a Latin maxim, easily invoked and as easily disregarded. It is an interpretive device, early framed by John Marshall's legal conscience for ensuring the discharge of the nation's obligations to the conquered Indian tribes. The Federal government has long been recognized to hold, along with its plenary power to regulate Indian affairs, a trust status towards the Indian - a status accompanied by fiduciary obligations. . . . While there is legally nothing to prevent Congress from disregarding its trust obligations and abrogating treaties or passing laws inimical to the Indians' welfare, the courts, by interpreting ambiguous statutes in favor of Indians, attribute to Congress an intent to exercise its plenary power in the manner most consistent with the nation's trust obligations.

Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 660 (9th Cir. 1975).

Based on the fiduciary obligations of the federal government, the Supreme Court has ruled that courts must apply the Indian canons of statutory construction to resolve ambiguities in statutes passed for the benefit of Indians, rather than canons of construction applicable in other contexts:

> **[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. . . . [S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.

Blackfeet, 471 U.S. at 766 (emphasis added).

The Supreme Court's conclusion that "standard principles of statutory construction" are not to be applied to statutes passed for the benefit of Indians encompasses the deference given to an agency's interpretation of a statute under decisions such as *Chevron U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837 (1984) ("*Chevron*"), decided a year before *Blackfeet*. This is so because the Indian Canons are not merely canons of construction, but a fundamental aspect of the trust relationship between the federal government and Indian tribes.

Beginning with *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Supreme Court recognized that Indians have faced outrageous treatment and deprivations of

property and rights at the hands of officials of the federal government, state governments, and private persons and entities. Federal Courts have repeatedly found that federal officials and agencies cannot be trusted to consistently make fair decisions with regard to the interests of Indians. The Indian Canons arise from the Court's conclusion that Indians and their interests must be protected from, among others, federal officials. See, e.g., *Duncan*, 517 F.Supp. at 1.

Chevron deference is premised on the notion that agencies and their officials have expertise that others, including the courts, lack with regard to the matters within the agencies' jurisdiction. "[An] agency's interpretation is generally accorded *Chevron* deference because the agency has superior expertise in the particular area." *Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997). Allowing that premise to protect federal agency decisions that are damaging to the interests of Indians is in direct conflict with the foundation of the Indian Canons: federal officials *cannot be trusted* to make the right decision on matters of Indian rights and property. See, e.g., *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001).

Chevron deference to interpretations that conflict with the interests of Indians is also incompatible with the fiduciary relationship between the federal government and Indian tribes upon which the Indian Canons are based. As fiduciaries, federal officials are not permitted to interpret treaties, statutes, or regulations to the detriment

of the Indians they are required to protect. To do so would be to violate their fiduciary obligations. *Seminole Nation*, 316 U.S. at 296-297.

The Indian Canons must be applied, moreover, not because the Indians' interpretation is always the best interpretation of the statute, but because the Indian Canons require this Court to adopt the Indians' interpretation.

> Application of the *Blackfeet* presumption is straightforward. We are confronted by an ambiguous provision in a federal statute that was intended to benefit Indian tribes. One construction of the provision favors Indian tribes, while the other does not. We faced a similar situation in the context of Indian taxation in *Quinault Indian Nation v. Grays Harbor County*, 310 F.3d 645 (9th Cir. 2002). In choosing between two characterizations of a tax law "plagued with ambiguity," we adopted the construction that favored the Indian Nation over the one that favored Grays Harbor County, noting that "it is not enough to be persuaded that the County's is a permissible or even the better reading." *Id.* at 647.
>
> Here, we must follow a similar approach. We adopt Defendants' construction, not because it is necessarily the better reading, but because it favors Indian tribes and the statute at issue is both ambiguous and intended to benefit those tribes.

Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 730 (9th Cir. 2003).

The District Court in this case held that Section 2719 of the IGRA was ambiguous and that the ambiguity was not resolved by the plain wording of the statute. At that point, instead of applying the Indian Canons to resolve the ambiguity and accepting Redding Rancheria's ("Redding") interpretation, the District Court

applied the agency deference canon under *Chevron*. In failing to apply the Indian Canon's to resolve any ambiguity in Section 2719 in favor of Redding, the District Court committed a clear error of law.

Interpreting Section 2719 of the IGRA in Redding's favor, furthermore, is consistent with the decisions of the other Circuit Courts of Appeal that have squarely addressed the issue of which canons should be applied to resolve ambiguities in Indian legislation.

In *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997) ("*Lujan*") the Tenth Circuit Court of Appeals specifically held that the Indian Canons, and not the agency deference canon should be applied to resolve ambiguities involving legislation enacted for the benefit of Indians.

> 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. . . . In 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 nontreaty matters involving Indians, are at issue." . . . . Instead, we have held that federal statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit.

Id. at 1461 (citations omitted).

The District of Columbia Court of Appeals in *Cobell v. United States,* 240 F. 3d 1081 (D.C. Cir. 2001), followed the Tenth Circuit's decision in *Lujan*:

> While ordinarily we defer to an agency's interpretations of ambiguous statutes entrusted to it for administration, *Chevron* deference is not applicable in this case. The governing canon of construction requires that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." . . . . Therefore, even where the ambiguous statute is one entrusted to an agency, we give the agency's interpretation "careful consideration" but "we do not defer to it." . . . **This departure from the *Chevron* norm arises from the fact that the rule of liberally construing statutes to the benefit of the Indians arises not from ordinary exegesis, but "from principles of equitable obligations and normative rules of behavior," applicable to the trust relationship between the United States and the Native American people.**

Id. at 1100 (emphasis added). See *Muscogee Nation v. Hodel*, 851 F.2d 1439, 1445 n.8 (D.C. Cir. 1988); *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991); see also *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 576 F. 2d 838, 841-842 (W. D. Mich. 2008).

Prior decisions of this Court in *Navajo Nation v. Department of Health & Human Services,* 325 F.3d 1133, 1136 n.4 (9th Cir. 2003) ("*Navajo*") and *Williams v. Babbitt,* 115 F.3d 657, 663 n.5 (9th Cir. 1997) ("*Babbitt*"), holding that *Chevron* deference should be applied instead of the Indian Canons in resolving ambiguities in

Indian statutes, are inconsistent with the Supreme Court's decision in *Blackfeet* and the decisions of the D.C. Circuit and the 10th Circuit Courts of Appeals. The Court therefore should overrule *Navajo* and *Babbit*.

To the extent that the panel of this Court holds that only an en banc panel of this Court has the authority to expressly overrule *Navajo* and *Babbitt*, this Court should refer this case to this Court sitting en banc. *Navajo*, 325 F.3d at 871 n.2.

III.

THE REGULATIONS RESTRICT THE EXEMPTIONS AND EXCEPTIONS AVAILABLE TO TRIBES, IN VIOLATION OF THE IGRA AND THE INTENT OF CONGRESS.

When Congress included the restriction in 25 U.S.C. § 2719 ("Prohibition") prohibiting the Secretary from taking property into trust for gaming purposes, it was aware that many Indian tribes, such as Redding and amicus, had lost their federally recognized status as a result of misguided federal policies and illegal federal action. Congress was also aware that those tribes were or would be seeking to have their status unterminated or restored. Congress further understood that a substantial number of unrecognized Indian groups would eventually qualify for federal recognition through the federal recognition process. Congress knew that an essential element of the restoration and recognition processes would be the restoration or establishment of a land base for the restored and newly recognized tribes. It

recognized that, unless it made special provision for the circumstances of those tribes, the restored and newly recognized tribes would be prevented from engaging in gaming, because their land bases would be restored or established after October 17, 1988. Congress, therefore, included in the IGRA exemptions from and exceptions to the Prohibition, which allow restored tribes and newly recognized tribes to conduct gaming on lands taken into trust after October 17, 1988. "Indeed, the exceptions in IGRA [25 U.S.C. § 2719(b)(1)(B)] serve purposes of their own, ensuring that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones." *City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003) ("*Roseville II*"). The Exemptions from the Prohibition are set forth in 25 U.S.C. § 2719(a). The Exceptions to the Prohibition are set forth in 25 U.S.C. § 2719(b).

The Department of the Interior ("DOI") does not dispute that Redding is a restored tribe. The land upon which Redding is currently conducting gaming is located within the boundaries of the Redding Reservation, which was established by the United States on August 10, 1922, 41 Stat. 1225, disestablished pursuant to the Rancheria Act, and reestablished by the "Judgment as to Shasta County" in the *Tillie Hardwick* case (discussed in *Hardwick v. United States*, 1994 WL 721578 (N.D. Cal. 1994)). Redding, thus had no reservation on the date of enactment of the IGRA and its land 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." 25 U.S.C. § 2719(a)(ii)(B). Redding is, therefore, authorized by the IGRA to conduct gaming on its after 1988 required trust land.

The Strawberry Fields Property (the "Property") is located just outside of Redding's Reservation. If the Property is taken into trust, it 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." 25 U.S.C. § 2719(b)(1)(B)(iii). Under the plain wording of the IGRA, gaming on the Property is authorized by Section 2719(b)(1)(B)(iii), because Redding is a restored tribe and the Property is restored lands.

Thus, pursuant to the plain wording of the IGRA, Redding is entitled to conduct gaming on both its Reservation trust land and on the Property, because each qualifies under a different provision of Section 2719.

The Regulations, however, prevent Robinson from taking advantage of both the Section 2719(a)(2)(B) Exemption and the Section 2719(b)(1)(B)(iii) Exception. That restriction arises from the definition of "newly acquired lands" set forth in 25 C.F.R. § 292.2 ("Section 292.2") as it is applied to 25 C.F.R. § 292.12 ("Section 292.12").

Section 292.2 states: "Newly acquired lands means land that has been taken, or will be taken, in trust for the benefit of an Indian tribe by the United States after October 17, 1988." That definition, encompasses all land taken into trust after October 17, 1988. It makes no distinction between land that would qualify for the Exemptions set forth in § 2719(a) and the Exceptions set forth in § 2719(b). It also makes no distinction among the Exceptions set forth in § 2719(b).

Section 292.12 states that, in order to qualify for the Restored Lands Exception, a tribe must meet three criteria. The tribe must meet a modern connection to the land in question, Section 292.12(a), an historical connection, Section 292.12(b), and:

> (c) The tribe must demonstrate a temporal connection between the date of the acquisition of the land 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**.

25 C.F.R. § 292.12 (c) (emphasis added).

Applying the definition of "newly acquired lands" set forth in Section 292.2 to Section 292.12(c)(1), a tribe is prohibited from having land taken into trust under the

Restored Lands Exception if Robinson previously has had land taken into trust under any of the § 2719(a) Exemptions or of the § 2719(b) Exceptions. That result is in direct conflict with the plain language of Section 2719, the intent of Congress in including the Exemptions and Exceptions in Section 2719, and the federal court decisions interpreting Section 2719.

In its Order, the District Court summarily rejected Redding's analysis of the relationship between and among the Exemptions and Exceptions:

> The Tribe asserts that such a limitation "is unquestionably a violation of IGRA, which . . . explicitly includes the Restored Lands Exception and the On-Reservation Exemption as separate, independent bases for having land taken into trust for gaming purposes . . . ."
>
> Nevertheless, § 2719 nowhere "explicitly" provides that each Exemption and Exception is a "separate, independent" basis. At best, § 2719 implies that. The interplay of the statute's Exceptions and Exemptions is ambiguous, and so the Court must defer to Interior's construction unless it is manifestly unreasonable or contrary to Congressional intent.

Appellants' Excerpts of Record ("ER"), p. 29.

As the foregoing analysis demonstrates, however, there is no textual basis for concluding that the "interplay" of the Exemptions and Exceptions is ambiguous and no federal court has previously found that Section 2719 is ambiguous with regard to whether the Exemptions and Exceptions are mutually exclusive. The DOI's

interpretation is "manifestly unreasonable." The plain wording of Section 2719 provides no basis for concluding that the Exemptions and Exceptions are mutually exclusive.

All of the Federal Courts that have addressed the issue have concluded that the Exemptions and Exceptions to the Prohibition are not mutually exclusive. "I find no evidence of Congressional intent to establish mutually exclusive categories of exceptions under § 2719(b)(1)(B)." *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Attorney,* 198 F.Supp.2d 920, 934 (W.D. Mich. 2002) ("*Grand Traverse II*"). Accord *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F.Supp.2d 155, 163-164 (D.D.C. 2000) ("*Confederated Tribes*"); *Roseville II*, 348 F.3d at 1028.

The Regulations also conflict with the DOI and National Indian Gaming Commission ("NIGC") interpretations of the Restored Land Exception as it relates to the Exemptions and Exceptions. The NIGC has found that a tribe was eligible to conduct gaming on restored lands even though it was already gaming on other tribal land. *See* July 13, 2007 Memorandum re: Elk Valley Indian Lands Determination.[1]

[1] The NIGC opinions are found at http://www.nigc.gov/Reading_Room/Indian_Land_Opinions.aspx.

Because the Regulations are in direct conflict with the plain wording of Section 2719, the Regulations are not an implementation of the IGRA, but a rewriting of the statute. It is well settled law that an officer or agency may not overturn legislation through the promulgation of regulations. *Morrill v. Jones*, 106 U.S. 466, 467 (1883); *Bong v. Alfred S. Campbell Art Co.*, 214 U.S. 236 (1909); *Roberts v. United States*, 44 Ct. Cl. 411, 418 (Ct. Cl. 1909).

IV.

THE SECRETARY FAILED TO PROVIDE AN EXPLANATION FOR THE DEPARTMENT OF THE INTERIOR'S CHANGE OF INTERPRETATION OF SECTION 2719.

For more than a decade the DOI and the NIGC used the dictionary definition of "restored" lands in analyzing whether a parcel of land qualified under the Restored Lands Exception. In the Regulations, the DOI altered its analysis and dramatically restricted its interpretation of the Restored Lands Exception. An agency is permitted to change its interpretations of a statute, but the agency must provide a reasoned explanation for that change. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983) ("*State Farm*"); *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 513-515 (2009) ("*Fox TV*"). The Secretary failed to provide such an explanation for the changes imposed by the Regulations.

The DOI and NIGC's analysis of restored lands began with the September 19, 1997, legal opinion of DOI on the Pokagon Band of Potawatomi Indians' request to have land taken into trust for gaming purposes.[2] In that opinion, DOI adopted the dictionary definition of "restored". DOI concluded that: "Since the lands proposed for acquisition lie within this ten county area and are thus part of the territory the Bands' predecessors ceded to the U.S. in earlier treaties, these proposed acquisitions made pursuant to the [Pokagon] Restoration Act are properly characterized as 'restored' lands." *Id.* at 7-8.

From that time until the issuance of the Regulations in 2008, with only one exception, the DOI and NIGC applied the plain meaning analysis to the Restored Lands Exception. That divergent opinion, the October 21, 1999, memorandum re: the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians' Hatch Tract, was overturned in December 5, 2001, by a DOI memorandum based on the plain meaning analysis set forth in the *Grand Traverse Band of Ottawa & Chippewa Indians v. United States Attorney*, 46 F.Supp.2d 689 (W.D. Mich. 1999) ("*Grand Traverse I*") and *Confederated Tribes* decisions.

[2] Available at http://www.doi.gov/solicitor/opinions/M-36991.pdf.

From that time until the Federal Register Notice of the promulgation of the Regulations was published, the NIGC and the DOI consistently employed the plain wording analysis in interpreting the Restored Lands Exception based on the *Grand Traverse* decisions and *Confederated Tribes* decisions. During that time, the Secretary, utilizing the *Grand Traverse* decision found that tribal land qualified for the Restored Lands Exception for tribes that were, like Redding, already engaging in gaming on other parcels of tribal trust land. *See, e.g.*, July 13, 2007, memorandum re: Elk Valley Indian Lands Determination.

The only situations in which the NIGC and DOI did not apply the plain wording analysis during this period were cases in which a statute other than the IGRA made the application of the dictionary definition of "restored" irrelevant. *See, e.g.*, November 22, 2002, memorandum re: Ponca Tribe of Nebraska at p.3 ("[W]hen Congress provides 'concrete guidance regarding what lands are to be restored to the tribe pursuant to the restoration act, those lands qualify as 'restored lands' under § 20 'regardless of dictionary definition.'").

After a decade of consistent application of the plain wording analysis, DOI issued the Regulations. The Regulations impose a restrictive interpretation of the Restored Lands Exception and effectively make the Exemptions and Exceptions to the post-October 17, 1988, prohibition mutually exclusive. The Secretary

promulgated the Regulations without any reasoned explanation for these fundamental changes in the Secretary's interpretation of the IGRA. 73 Fed. Reg. 29354-29379.

An agency may not alter its policy or interpretation of a statute without providing a reasoned explanation for such a change. "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962)." Such an explanation must be provided by the agency at the time the decision is made, not in the course of litigation. *Id.* at 50 ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."). See *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006), ("Arbitrary and capricious review 'demands evidence of reasoned decision making *at the agency level*; agency rationales developed for the first time during litigation do not serve as adequate substitutes.'").

In its Opinion below, the District Court sidestepped the issue of whether the DOI failed to provide a legitimate explanation for its change of policy by ruling that the Regulations did not change the DOI's policy:

> Of course, the Court only need reach this issue if Interior changed policy in the first place. The Tribe strenuously asserts that Interior did. . . . Interior does not squarely

> address the point, though language in their briefing can be read to admit it. . . . The Court perceives Interior's change as nothing more than a shift from case-by-case application of the temporal limitation suggested by *Grand Traverse* to a rule-based application of the temporal limitation.

ER, pp. 26-27.

The District Court thus concluded that the Regulations represent merely a change in method, not a substantive change of interpretation. That is not true. The Regulations impose a hard and fast rule that a tribe may not have land taken into trust for gaming purposes under the Restored Lands Exception if the tribe is currently conducting gaming on other tribal trust land. 25 C.F.R. § 292.12(c)(2). No such rigid rule was ever applied by either the federal courts or the federal agencies responsible for the restored lands opinions before the Regulations were promulgated. Contrary to the District Court's suggestion, the restriction is not consistent with the *Grand Traverse* line of cases. The *Grand Traverse* courts ruled that the lands in question qualified under the Restored Lands Exception, despite the fact that the Grand Traverse Band was already gaming on other tribal trust land. *Grand Traverse II*, 198 F.Supp.2d at 926. The District Court's decision also conflicts with more recent lands opinions issued by the DOI. In 2007, for example, the DOI concluded that off-reservation tribal land owned by the Elk Valley Tribe qualified under the Restored Lands Exception even though the Tribe was already gaming on other land

within the boundaries of its old reservation. *See* July 13, 2007, memorandum re: Elk Valley Indian Lands Determination[3].

The District Court also concluded that, even if the DOI has changed its interpretation, the DOI's explanation was sufficient under *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*") and *Fox TV*.

> The preamble to Interior's final rule promulgating the Regulations provides ample evidence of rational and conscious decision-making that is consistent with the purposes of IGRA. See 73 Fed. Reg. 29,354-74 (May 20, 2008). Interior stated that it imposed the temporal limitation to "effectuate[] IGRA's balancing of the gaming interests of newly acknowledged and/or restored tribes with the interests of nearby tribes and the surrounding community." *Id*. at 29,367. Interior demonstrated that in doing so it had contended with prior court decisions, its own previous public statements of policy, and an array of comments submitted by the public. See *id*. at 29,365-66. Moreover, Interior's stated purpose for promulgating the Regulations evinced a permissible intent to clarify its policies and impose consistency on its future determinations. See *id*. at 29,354. These reasons suffice.

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[3] The facts in the Elk Valley case are strikingly similar to this case, except for the outcome. Like Redding, Elk Valley was terminated under the Rancheria Act and then restored under the *Hardwick* Judgment. Like Redding, Elk Valley began conducting gaming within the boundaries of its old reservation on trust land leased from a Tribal member. Like Redding, Elk Valley acquired a parcel of land outside the boundaries of its reservation and sought a DOI opinion that it could do gaming on the land under the Restored Lands exception. Unlike Redding, the DOI held that Elk Valley's after 1988 acquired lands located outside of its reservation qualified for the Restored Lands exception.

ER, p. 27.

Once again, the District Court failed to address the relevant issue. The cited sections of the Federal Register Notice only discuss the bureaucratic motivations behind the issuance of the Regulations.[4] Neither the District Court's analysis nor the Federal Register Notice addresses why the DOI **changed** its interpretation of the statute and imposed restrictions that resulted in the diminishment of the rights of restored Indian tribes that are not contained in the IGRA.

The Federal Register Notice, in fact, does not acknowledge that the DOI had changed its interpretation of Section 2719. Clearly, without an acknowledgment of the change, the DOI cannot have provided a reasoned explanation for that change:

> To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. . . . And of course the agency must show that there are good reasons for the new policy.

Fox TV, 556 U.S. at 515.

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[4] The portions of the Federal Register Notice cited by the District Court do not include any statement that the DOI intended to impose a "bright line rule" in order to "impose consistency on its future determinations." *See* 73 Fed. Reg. 29,354.

Given the absence of any acknowledgment of the change of policy and the absence of any explanation of the reason for the change, the Federal Register Notice fails to meet the standard articulated in *Fox TV*.

The District Court, citing *Fox TV*, also rejected Redding's argument that the DOI's change in interpretation should be given less deference than its original interpretation. ER, p. 25. In *Fox TV*, however, the Supreme Court made it clear that there remain cases where a change in interpretation or policy requires greater justification than the explanation of the reasons for the original policy:

> [T]he agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. **Sometimes it must**–when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or **when its prior policy has engendered serious reliance interests that must be taken into account**. *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996). It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.

Fox TV, 556 U.S. at 515-516 (emphasis added).

The promulgation of the Regulations is a clear example of "a policy that has engendered serious reliance that must be taken into account." Tribes throughout the

country, including Robinson and Redding, based their land purchase, trust transfer, economic development and gaming development decisions on the DOI's interpretation of the Restored Lands Exception and the availability of all of the Exemptions and Exceptions to the Prohibition that existed before the Regulations were promulgated. That reliance is the fundamental basis for Redding's claims. By the standard stated in *Fox TV*, the DOI was required to provide a detailed justification for disregarding the facts, circumstances and legal analyses that underlay the prior policy. That the DOI failed to do.

V.

THE COURT'S CONCLUSION THAT THE REGULATIONS DID NOT HAVE TO BE CONSISTENT WITH THE APPLICABLE CASE LAW WAS AN ERROR OF LAW.

A federal agency is not authorized to overturn judicial decisions through the promulgation of regulations. "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law." *Neal v. United States*, 516 U.S. 284, 295 (1996); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). The Regulations, however, are in conflict with the decisions of the federal courts that were issued before the Regulations were promulgated.

The District Court did not analyze the conflict between the judicial interpretations of the Restored Lands Exception and the Regulations, finding that the DOI was only required to follow existing court interpretations where the court concluded that the statute is unambiguous, citing *Brand X*. The District Court found that the Restored Lands Exception is ambiguous. ER, p. 20-21.

Federal courts addressing the issue have reached conflicting conclusions about whether the Restored Lands Exception is ambiguous. In the *Grand Traverse* litigation, the District Court explicitly concluded that the Restored Lands Exception is not ambiguous. "I . . . disagree with the NIGC's application of the rules of statutory construction to find that the restored-lands clause is ambiguous. . . . [T]he statute cannot be considered ambiguous and the plain meaning must be applied. The court therefore rejects the NIGC's finding of ambiguity." *Grand Traverse II*, 198 F.Supp.2d at 933, n.2. The other *Grand Traverse* decisions implicitly reached the same conclusion. *Grand Traverse I*, 46 F.Supp.2d at 700; see also *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the United States Attorney*, 369 F.3d 960, 971 (6th Cir. 2004) ("*Grand Traverse III*"). A number of courts concluded that the Restored Lands Exception was subject to interpretation based on its plain meaning without specifically addressing the issue of ambiguity. See, e.g., *City of Roseville v. Norton*, 219 F.Supp.2d 130, 158-161 (D.D.C. 2002) ("*Roseville I*"); *Sault*

Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States, 78 F.Supp.2d 699, 706 (W.D. Mich. 1999). A number of other courts concluded that the Restored Lands Exception was ambiguous, but those courts nevertheless concluded that the Restored Lands Exception was subject to interpretation based on its plain meaning, *Confederated Tribes*, 116 F.Supp.2d at 161-164; *Oregon v. Norton*, 271 F.Supp.2d 1270, 1277-1279 (D. Or. 2003).

Under the *Brand X* standard, the DOI and the District Court were required to follow, or at least address, the *Grand Traverse II* court's explicit ruling that the Restored Lands Exception was not ambiguous. *Grand Traverse II*, 198 F.Supp.2d at 933 n.2. Neither did so.

Had the District Court addressed the issue, it would have been forced to recognize that, in all of the decisions that addressed the Restored Lands Exception, including those that stated or suggested that the exception is ambiguous, the court found that the provision is subject to the plain meaning analysis. *Grand Traverse II*, 198 F.Supp.2d at 933 n.2; *Grand Traverse I*, 46 F.Supp.2d at 700; *Grand Traverse III*, 369 F.3d at 971; *Roseville I*, 219 F.Supp.2d at 158-161; *Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States*, 78 F.Supp.2d 706 (W.D. Mich. 1999); *Confederated Tribes*, 116 F.Supp.2d at 161-164; *Oregon v. Norton*, 271 F.Supp.2d at 1277-1279.

The fact the courts addressing the Restored Lands Exception all applied the plain meaning analysis is significant. In explaining why *Neal v. United States*, 516 U.S. 284 (1996) was consistent with its holding, the *Brand X* court stated that *Neal*'s "limited holding accorded with this Court's prior decisions, which had held that a court's interpretation of a statute trumps an agency's under the doctrine of *stare decisis* only if the prior court holding determined a statute's *clear* meaning." *Brand X*, 545 U.S. 967 at 984. Because the courts addressing the Restored Lands Exception all concluded that the plain meaning analysis applies, those courts concluded that the statute's meaning is clear. *Stare decisis* applies and the Regulations are invalid.

CONCLUSION

The Secretary cannot be permitted to rewrite the IGRA through the unauthorized promulgation of regulations that are in conflict with the plain meaning of the IGRA, to overturn the decisions of the federal courts interpreting the IGRA, to drastically alter the NIGC's interpretation of the IGRA without reasoned explanation, or to ignore the evidence and argument presented to the Secretary by Redding in support of their meritorious request to have the Strawberry Fields taken into trust for gaming purposes. Amicus, therefore, respectfully requests that this Court reverse the decision of the District Court and hold that Redding is a restored tribe and that the

Strawberry Fields Property is restored lands within the meaning of Section 2719 of the IGRA.

Respectfully submitted this 9th day of August, 2012.

FORMAN & ASSOCIATES

s/ George Forman
GEORGE FORMAN

s/ Jay Shapiro
JAY SHAPIRO

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Dated: August 9, 2012

s/ George Forman
GEORGE FORMAN, Attorney for
Robinson Rancheria of Pomo Indians, Amicus

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