Case No. 15-17253

In the United States Court of Appeal
For the Ninth Circuit

COUNTY OF AMADOR, CALIFORNIA
Plaintiff - Appellant,

v.

UNITED STATES DEPARTMENT OF INTERIOR, *et al.*,
Defendants - Appellees,

IONE BAND OF MIWOK INDIANS,
Intervener/Defendant - Appellee.

PETITION OF AMADOR COUNTY, CALIFORNIA, FOR REHEARING *EN BANC*

On Appeal from the United States District Court
for the Eastern District of California
The Honorable Troy L. Nunley, Presiding
District Court Case No. 2:12-cv-01710-TLN-CKD

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REQUEST FOR *EN BANC* REVIEW

Amador County ("County") respectfully requests *en banc* review of the Panel decision. That decision conflicts with decisions of the Supreme Court and of this Court. *E.g.*, *Carcieri v. Salazar*, 555 U.S. 379 (2009) ("*Carcieri*"), *United States v. John*, 437 U.S. 634 (1978), and *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2013) (en banc). Thus, consideration by the full Court is necessary to secure and maintain uniformity of decision. Fed. R. App. Proc. 35(a).

The County also seeks review because the Panel decision raises questions of exceptional importance, in that it conflicts with authoritative Supreme Court decisions that have addressed the meaning and application of the 1934 Indian Reorganization Act ("IRA"), 25 U.S.C. § 5101 *et seq.*, and with congressional intent in adopting the IRA and the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"). Fed. R. App. Proc. 35(b).

Specifically, this petition raises the following issues:

1. Whether the Panel's decision upholding the Department's conclusion that the Band was "under federal jurisdiction" in 1934 within the meaning of the IRA and the Supreme Court's decision in *Carcieri*, is correct, in view of the fact that: (a) the Department's decision was based on an internal Solicitor

memorandum, M-37029, construing *Carcieri* incorrectly, and (b) the Department's own senior official, Deputy Secretary James Cason, acknowledged in congressional testimony on July 13, 2017, that the Solicitor's memorandum is drafted so broadly it could justify the approval of nearly any land-into-trust application, and that its criteria do not "respond very particularly to the Supreme Court [*Carcieri*] decision"?

2. Whether the Panel erred in concluding the Secretary may take land into trust under Section 5 of the IRA for a purported "tribe" that was admittedly not "recognized" in a formal, political way in 1934?

3. Whether the Panel erred in upholding the Department's decision to "grandfather" the 2006 Indian Lands Determination, because it did not apply the factors that this Court has adopted for determining whether an agency may refuse to enforce new regulatory rules retroactively, when that refusal is contrary to congressional intent, and whether the Panel improperly accepted the Department's determination on retroactivity, contrary to this Court's *en banc* precedents?

STATEMENT OF THE CASE

The County seeks to set aside the Record of Decision of the Department of Interior ("Department") taking land in Amador County into trust for the Ione Band to operate a large-scale casino, which would be the third such casino in the County approved by the Department. Fearing casinos would overwhelm the County's 39,000 residents, limited resources, and roadways with traffic and public safety problems, the County opposed the Band's land-to-trust request, and when the Department issued a decision agreeing to accept the land, the County filed suit in the Eastern District of California. The district court granted summary judgment in favor of Interior, without a hearing. The County appealed to this Court. A Circuit panel affirmed. This timely Petition follows.

In pursuit of its goal of bringing another casino to Amador County, the Band applied to the Secretary of Interior ("Secretary")[1] in 2005 to have certain lands in the County known as the Plymouth Parcels[2] taken into trust

[1] The Secretary of Interior ("Secretary") heads the Department, which is the executive department responsible for the federal government's dealings with Indian tribes. Within the Department is housed the Bureau of Indian Affairs ("Bureau" or "BIA").

[2] The Plymouth Parcels consist of several parcels of land totaling 228 acres and located both within the City of Plymouth and in the unincorporated area of Amador County. These parcels are not currently owned or occupied by the Band. (*See* E.D. Cal. Dkt. #59, ¶ 17, sentence 1; E.D. Cal. Dkt. #46, ¶ 17, sentence 1.)

on the Band's behalf pursuant to the Secretary's authority under Section 5 of the IRA, 25 U.S.C. § 5129 (AA1-3). (AR002751-3482.)

However, merely having lands taken into trust is not enough to enable the Band to conduct gaming on the Plymouth Parcels. To prevent the opportunistic siting of casinos in unforeseen (and profitable) locales near population centers, the IGRA prohibits gaming on Indian lands acquired in trust for an Indian tribe after October 17, 1988, unless one of several exceptions applies. 25 U.S.C. § 2719(a) (AA11-12). Since the Plymouth Parcels would be acquired in trust for the Ione Band after that date, gaming is prohibited unless one of the IGRA exceptions applies.

One such exception permits Indian gaming on lands acquired after 1988 if the Band complies with a two-part administrative process (the "Two-Part Test"). This process requires that both the Secretary and California's Governor conclude that gaming would be "in the best interest of the Indian tribe and its members" and would "not be detrimental" to the surrounding community. 25 U.S.C. § 2719(a), (b)(1)(A). By imposing these requirements, IGRA protects local interests like those of Amador County, which as a small rural county will be drastically and adversely affected by additional large-scale gambling operations, by requiring the Secretary to "consult with the Indian tribe and appropriate State and local officials, including officials of

other nearby Indian tribes." 25 U.S.C. § 2719(b)(1)(A). This "Two-Part Test," designed to give affected local interests a role in the process for authorizing additional gaming, is the exception that must, as a matter of law, be satisfied before the Plymouth Parcels may be used for gaming.

The Ione Band, however, refused to satisfy the Two-Part Test. Instead, it has sought to invoke another exception, which permits gaming on lands that are taken into trust after October 17, 1988, 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). To this end the Band also filed a request for an "Indian Lands Determination" ("ILD"), asserting that the Plymouth Parcels should be deemed "restored lands" in connection with its Fee-to-Trust Application for those parcels. (AR001401-2532.) Were it applicable (and the County does not believe it is), this "restored lands of a restored tribe" exception would permit gaming on the Plymouth Parcels without affording Amador County and its residents the protections of the Two-Part Test.

This action challenges the Record of Decision ("ROD"), issued on May 24, 2012, by Donald E. Laverdure, Acting Assistant Secretary of Indian Affairs, that, among other things, determined to take the "Plymouth Parcels" into trust for the Band; and determined that the Plymouth Parcels qualify as "restored lands of a restored tribe" on which the Ione Band may conduct

gaming under IGRA, without proceeding through the Two-Part Test. (PER139-141.) Both decisions are contrary to law.

First, the Department's determination is contrary to Congress's plain intention in adopting IGRA, which the Department has acknowledged was to preclude informally-recognized "tribes" like the Band from being deemed a "restored tribe." Such tribes may only obtain off-reservation gaming by proceeding through the Two-Part Test.

The Department's determination also exceeds the Secretary's authority to take land into trust under Section 5 of the IRA. That statute only authorizes the acquisition of land on behalf of tribes that were both "recognized" and "under federal jurisdiction" in 1934, when the IRA was enacted. *Carcieri*, 555 U.S. at 379. The Band was neither "recognized" nor "under federal jurisdiction" in 1934.

ARGUMENT

A. The Panel's Decision Adopts A Standardless Interpretation Of The Phrase "Under Federal Jurisdiction" In The IRA That Is Inconsistent With The Supreme Court's Decision In *Carcieri*, And Which Even The Department's Own Deputy Secretary Recently Admitted, In Congressional Testimony, Is Extremely Broad And Does Not "Respond Very Particularly To The Supreme Court's Decision" In *Carcieri*.

It is no secret that the Department opposed and has actively resisted the *Carcieri* decision, representing, as it does, a limitation on the Department's authority.[3] Thus, the Department immediately started interpreting the terms "recognized" and "under federal jurisdiction" so generously as to eviscerate the limits Congress intended.

Consistent with this goal, the ROD, in determining that the Band was "under federal jurisdiction" within the meaning of the IRA (and could therefore have land taken into trust on its behalf), adopted an open-ended, standardless interpretation of that phrase, later incorporated into an opinion of the Department's Solicitor (Opinion M-37029). The Department

[3] *See* Tr. of BIA Carcieri Tribal Consultation: Arlington, Va., Wed., July 8, 2009, p. 17:6-11 (Comments of Acting Principal Assistant Secretary for Indian Affairs George Skibine), *online at* https://www.bia.gov/sites/bia.gov/files/assets/as-ia/pdf/idc-001871.pdf (last visited Nov. 18, 2017) (stating the Department's intention "make sure that all recognized—federally recognized Indian tribes have the same opportunity to acquire land into trust and to make sure that the *Carcieri* decision ... is not an impediment, cannot be—is not impediment for such a goal.").

determined that a Band can demonstrate it was "under federal jurisdiction" in 1934 if on or before that date the federal government had purportedly "taken an action or series of actions—through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members—that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government." The Panel improperly accepted this interpretation.

The open-ended, standardless nature of this interpretation is well-demonstrated by this case. The ROD relied exclusively on the government's abortive efforts to take lands into trust for landless Indians near Ione between 1915 and 1930. There was never a ratified treaty between the Band and the federal government; no federal services were ever provided to the "Band" or its members prior to 1970 (at least); and the Department never exercised the authority to approve contracts with the Band—in fact, it refused to do so. *See* AR000811-13 (IBIA decision affirming refusal of Sacramento Area Director to review economic development agreement between Band and development company "on the grounds that appellant is not a Federally recognized Indian tribe."). Even more significantly, the Secretary did not invite the Band to conduct a special election in 1934-1935 on the question of whether to accept the terms of the IRA, though Section 18 of the Act as

initially adopted required that the Secretary conduct such elections on behalf of every tribe under its jurisdiction as of the date of the Act. In Amador County, the Jackson and Buena Vista tribes each voted to accept the terms of the IRA (PER738). If these facts—an unrealized proposal to obtain land and nothing more—are enough to create "jurisdiction," then it is hard to imagine a tribe that could not meet this criterion.

Nevertheless, the Panel accepted the ROD's incorrect interpretation of the phrase "under federal jurisdiction" as reflected in the M-37029 opinion. The Panel did not decide whether *Chevron* deference was owed to the Department's interpretation,[4] but gave that interpretation "Skidmore" deference, concluding the relevant "factors counsel in favor of giving Interior's interpretation 'great respect.' Interior's reasoning is thorough and careful, and it includes an analysis of the IRA's historical context, legislative history, and purpose. Employing its institutional expertise gleaned from years of administering the IRA, the agency situates the statute in the larger context of the history of Indian law and, in doing so, arrives at an interpretation of 'under Federal jurisdiction' that fits with the rest of the

[4] *Chevron* deference would have conflicted with Supreme Court and *en banc* Ninth Circuit case law, as discussed in the County's reply brief. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000); *Wilderness Society v. United States FWS*, 353 F.3d 1051, 1068 (9th Cir. 2003) (en banc).

statute and makes sense in historical context." (Opinion, p. 26; footnotes omitted.)

The Department's interpretation is a transparent end-run around the IRA that does not comport with *Carcieri*, and the Panel's acceptance of it is ironic, as just a day before oral argument *the Department itself* acknowledged that its prior interpretation is flawed. Deputy Secretary Cason, in congressional testimony on July 13, described the M-37029 opinion as incorporating criteria that were "pretty loose."[5] He said it was written so broadly that it could be used to justify approval of nearly any land-into-trust application. He told the House Subcommittee on Indian, Insular and Alaska Native Affairs that "[m]y concern about the Solicitor's opinion is that the criteria are very wide and that it doesn't respond very particularly to the Supreme Court decision" in *Carcieri*, and that he was unaware of any tribe that had been found not to qualify. "So we have concerns about the current advice in the Solicitor's opinion, about being specific enough to actually distinguish between applications."[6] Again, the facts of this case amply

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[5] *See* https://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=402340 (last visited Nov. 20, 2017), at 42:00-43:20.

[6] *Id*. at 54:00-55:00.

demonstrate Mr. Cason's point. Under these circumstances, *en banc* review is particularly warranted.

The judicial, legislative and administrative background of the IRA provide conclusive evidence that the term "federal jurisdiction" as used in that Act was understood by those responsible for its drafting and enactment to apply only to tribes with a reservation set aside on its behalf (at least absent a specific treaty or legislation). For example, a 1933 letter from then-Superintendent of the Sacramento Indian Agency, O.H. Lipps, to then-Commissioner of Indian Affairs John Collier, described the Indians near Ione thus: "The situation of this group of Indians is similar to that of many others in this Central California area. They are classified as non-wards under the rulings of the Comptroller General because they are not members of any tribe having treaty relations with the Government, *they do not live on an Indian reservation or rancheria*, and none of them have allotments in their own right held in trust by the Government. They are living on a tract of land located on the outskirts of the town of Ione." (PER339-340 [emphasis added].) This reference to "non-wards" refers to a 1925 Comptroller General's opinion concluding, "There exists no relation of guardian and ward between the Federal Government and Indians who have no property held in trust by the United States, have never lived on an Indian reservation, belong

to no tribe with which there is an existing treaty, and have adopted the habits of civilized life and become citizens of the United States by virtue of an act of Congress." (AA75.)[7]

In his *Carcieri* concurrence, Justice Breyer gave specific examples of "a 1934 relationship between the Tribe and Federal Government that could be described as jurisdictional": "for example, a treaty with the United States (in effect in 1934), a (pre-1934) congressional appropriation, or enrollment (as of 1934) with the Indian Office." This, like the legislative history, case law, and administrative practice discussed in briefing before the Panel, clearly anticipates that the Ione Band must have been a formal ward of the federal government as of 1934. Mere discussions are not enough.

Finally, the Panel's conclusion that this interpretation had to be accepted because the County's reading of the IRA—that "under federal jurisdiction" required that the federal government actually own land on a tribe's behalf (absent a treaty or specific legislation)—would render the word "recognized" to be surplusage, on the theory that any tribe "under federal

[7] In light of this contrary contemporaneous administrative interpretation, even Skidmore deference was inappropriate in this case. *See Carcieri*, 555 U.S. at 396 (Breyer, J., concurring) (Secretary's current interpretation of "now under federal jurisdiction" not even entitled to *Skidmore* deference because contradictory to interpretation at the time of IRA's enactment).

jurisdiction" must be recognized, is just wrong. Accepting the theory articulated by Justice Breyer in his concurrence, that a tribe could be "under federal recognition" in 1934 without the government realizing it, such tribes could have been under federal jurisdiction at the time and then—accepting the Panel's own (incorrect) interpretation (about which more below)—"recognized" at a later date.

B. The Panel's Interpretation Of The IRA's Requirement That Tribes Be "Recognized" As Permitting Recognition At Any Time, Was Also Inconsistent With Congressional Intent.

To take land into trust, the IRA requires that the tribe be "a *recognized* tribe now under federal jurisdiction." The ROD admits that the Ione Band was not "recognized" until 1972 (at the earliest), and in fact, as late as the 1990s the Department asserted in litigation that the Band was not and never had been federally recognized. *Ione Band of Miwok Indians v. Burris*, No. S-90-0993-LKK/EM (E.D. Cal.); PER397-467, PER775-889. The Panel below accepted the Department's determination that this is no impediment to accepting land into trust because a tribe could be "recognized" at any time, and the tribe is recognized now. But this construction was also contrary to law. It is clear that the phrase "now under Federal jurisdiction" modifies the term "recognized Indian tribe." It follows that the Act requires the tribe to be

"recognized" at the same time at which it was "under Federal jurisdiction"—in 1934. That is because the temporal limitation of the modifying term ("now under Federal jurisdiction") necessarily applies to the modified term ("recognized Indian tribe"). A tribe cannot be a "recognized Indian tribe now under Federal jurisdiction" in 1934 if it was not a "recognized Indian tribe" in 1934.

The Panel nevertheless concluded that "[g]iven the IRA's text, structure, purpose, historical context, and drafting history—and Interior's administration of the statute over the years—the better reading of § 5129 is that recognition can occur at any time. We therefore hold that a tribe qualifies to have land taken into trust for its benefit under § 5108 if it (1) *was* 'under Federal jurisdiction' as of June 18, 1934, and (2) *is* 'recognized' at the time the decision is made to take land into trust."

Curiously, prior to *Carcieri*—and the consequent pressure on the Department to evade that decision—every court to address this issue concluded otherwise. *See John*, 437 U.S. at 650 ("The 1934 Act defined 'Indians' ... as 'all persons of Indian descent who are members of any recognized [*in 1934*] tribe now under Federal jurisdiction.'");[8] *Maynor v.*

[8] Curiously, the Panel decision dismisses this discussion in *John* as dicta, while relying on the decision elsewhere.

Morton, 510 F.2d 1254, 1256 (D.C. Cir. 1975) ("the IRA was primarily designed for tribal Indians, and neither Maynor nor his relatives had any tribal designation, organization, or reservation *at that time*"—*i.e.*, when the IRA was enacted in 1934); *United States v. State Tax Commission of Mississippi*, 505 F.2d 633, 642 (5th Cir. 1974) ("The language of Section 19 positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words 'any recognized Indian tribe now under Federal jurisdiction' and the additional language to like effect."); *City of Sault Ste. Marie v. Andrus*, 532 F. Supp. 157, 161 n.6 (D.D.C. 1980) ("the IRA was intended to benefit only those Indians federally recognized at the time of passage.").

The Panel's interpretation makes the term "recognized" meaningless, violating the rule that courts "are obliged to give effect, if possible, to every word Congress used." *Carcieri*, 555 U.S. at 391. If the language of Section 19 were understood to permit "recognition" at any subsequent time, the word "recognized" would not, in any way, qualify the word "tribe," because the mere decision by the government to accept land into trust would effectively recognize that tribe. Thus, Section 19 would be no different if it simply read, "The term 'Indian' ... shall include all persons of Indian descent who are members of any ~~**recognized**~~ Indian tribe now under Federal jurisdiction."

The IRA's first definition of Indian originally included only the "recognized Indian tribe" requirement, and not the phrase "now under federal jurisdiction." Yet addressing that original version, Chairman Wheeler—the IRA's Senate sponsor—stated that the IRA was being enacted "to take care of the Indians *that are taken care of at the present time*," PER163; he again stated that Indians of "less than half blood" would not qualify as "Indian" "unless they are enrolled [with the Indian Office] *at the present time*," PER164; Commissioner Collier stated that Indians would not qualify unless they "are actually residing within the present boundaries of an Indian reservation *at the present time*," *id.*; and the IRA's House sponsor explained that the IRA's "definition of 'Indian'" "recognizes the status quo of the present reservation Indians"[9] (emphases added). All this discussion preceded Commissioner Collier's proposal to add the language "now under federal jurisdiction," PER166, meaning the temporal limitation was understood to be implicit in the notion of a "recognized tribe" even before "now" was added to the statute.

[9] *Kahawaiolaa v. Norton*, 222 F. Supp. 2d 1213, 1220 n.10 (D. Haw. 2002), *aff'd*, 386 F.3d 1271 (9th Cir. 2004) (quoting congressional debate on Wheeler-Howard Bill (1934) in THE AM. INDIAN AND THE UNITED STATES, Vol. III. (Random House 1973)) (emphasis in original).

C. The Department Acted Arbitrarily & Capriciously In "Grandfathering" The 2006 Indian Lands Determination, Despite Acknowledging That Congress Did Not Intend For Informally Recognized Tribes Like The Ione Band To Be "Restored" Tribes Under IGRA.

Leaving aside whether the Department could take land into trust on the Band's behalf at all, there is the question of whether it could do so for gaming purposes without complying with the Two-Part Test. The Department's conclusion that it could was contrary to law, and the Panel's acceptance of that conclusion is contrary to this Court's *en banc* precedents.

If the Ione Band were to initiate a land-to-trust application today, there is no question it would be unable to take advantage of the "restored lands" exception under IGRA, because in 2008 the Secretary of Interior adopted regulations (25 C.F.R., Part 292, the "Part 292 Regulations") that foreclose a "tribe" that was administratively recognized outside the formal Part 83 Acknowledgment Process (as the Ione Band indisputably was) from availing itself of that exception. Specifically, 25 C.F.R. § 292.10 (AA13), provides that to qualify as a "restored tribe" the tribe must have been restored by (1) congressional legislation, (2) a judgment or settlement agreement in a federal court case, to which the United States is a party, or (3) recognized "*through the administrative Federal Acknowledgment Process under § 83.8 of this chapter [Part 83.]*"

The exclusion of informally-recognized tribes from Section 292.10's definition of "restored tribe" was no oversight; it was a conscious choice, designed to implement Congress's acknowledged intention in adopting IGRA. Following publication of the draft Part 292 regulations, the Secretary received comments suggesting that the regulations be amended to include tribes (like the Ione Band) that were purportedly "restored" pursuant to agency action outside the Part 83 regulations. The Secretary rejected those suggestions, stating: "We believe Congress intended restored tribes to be those tribes restored to Federal recognition by Congress or through the part 83 regulations. ***We do not believe that Congress intended restored tribes to include tribes that arguably may have been administratively restored prior to the part 83 regulations."*** 73 Fed. Reg. 29354, 29363 (May 20, 2008) (emphasis added) (AA38).

The ROD in this case was issued after the regulations were adopted, and the Ione Band indisputably did not fall within the regulator definition of a restored tribe. Nevertheless, the Department purported to retain the power to disregard Congress's plain intent. Its regulations contain a provision that a tribe could qualify as a "restored" tribe if—prior to the date of the adoption of the regulations—the tribe had a preliminary, non-binding opinion from the Department that it was a restored tribe, even if the opinion squarely

conflicted with the criteria of the regulation quoted above and the congressional intention that it seeks to implement. *See* 25 C.F.R. § 292.26(b). This was contrary to D.C. Circuit case law articulating the narrow circumstances in which an agency may "grandfather" past administrative practices that run contrary to congressional intent, in *Natural Res. Defense Council, Inc. v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988) (hereafter "*NRDC*"), and *Retail, Wholesale & Dept. Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) ("*Retail Union*"). This Court has "adopted the framework set forth by the D.C. Circuit in *Retail Union*" and *NRDC*. *Garfias-Rodriguez*, 702 F.3d at 518 (9th Cir. 2013) (en banc).

Nevertheless, the Panel accepted the Department's grandfather clause, but the Panel's decision is incongruous. It essentially found that even though (1) the Department specifically concluded that administrative "restoration" meant restoration through the formal part 93 process, and expressly rejected suggestions that tribes restored through an informal administrative process (like the Band) should not be included in that definition, *see* 73 Fed. Reg. at 29363, (2) because the Department could have reasonably reached the opposite conclusion, (3) grandfathering is okay. Essentially, the Panel deferred to an interpretation that the Department didn't pick, which is an unfathomable application of deference.

The Panel's reasoning also conflicts with the established rule that an administrative agency cannot maintain two inconsistent interpretations of a statute simultaneously. When agencies contemporaneously "set forth two inconsistent interpretations of the very same statutory term," as the Department has done, they act arbitrarily and capriciously. *United States Dep't of the Treas. IRS Office of Chief Counsel Wash., D.C. v. Fed. Lab. Rel. Auth.*, 739 F.3d 13, 21 (D.C. Cir. 2014); *Port of Seattle v. FERC*, 499 F.3d 1016, 1034 (9th Cir. 2007), *cert. denied*, 558 U.S. 1136 (2010).

CONCLUSION

For the foregoing reasons, en banc review is respectfully requested.

Respectfully submitted,

Dated: November 20, 2017

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