No. 15-17189

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO CASINO IN PLYMOUTH and
CITIZENS EQUAL RIGHTS ALLIANCE,
Plaintiffs-Appellants,

v.

RYAN K. ZINKE, Secretary, U.S. Department of the Interior; *et al.*
Defendants-Appellees,

and

IONE BAND OF MIWOK INDIANS,
Intervenor-Defendant-Appellee

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-01748-TLN-CMK

INTERVENOR-DEFENDANT-APPELLEE IONE BAND OF MIWOK INDIANS' RESPONSE TO APPELLANTS' PETITION FOR REHEARING OR REHEARING *EN BANC*

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I. INTRODUCTION

Plaintiffs-Appellants No Casino in Plymouth and Citizens Equal Rights Alliance (collectively "NCIP") filed the instant Appellants' Petition for Rehearing or Rehearing *En Banc* (Docket Entry ("DE") 71, the "Petition") seeking review of the October 6, 2017 Memorandum disposition (Docket Entry ("DE") 67-1, the "Memorandum") issued by the Panel (Gaber and Friedland, Circuit Judges, and Fogel, District Judge, sitting by designation) in this Administrative Procedures Act, 5 U.S.C. §§ 701-706 ("APA") litigation. The Memorandum remanded the case to the district court with instructions to vacate its judgment for lack of subject-matter jurisdiction. *See* at 4. The instruction was based on the failure by NCIP to adequately demonstrate that they met the organizational qualifications necessary to establish their Article III standing to bring this action when the case was filed. Memorandum at 4.

NCIP argue that the Panel's decision was erroneous in that it purportedly required NCIP to establish their standing only through "sworn declarations." *See* Petition at 1. NCIP argue that they met the standing test through "other evidence," including the administrative record (the "AR"), the complaint's allegations, and a "statement of undisputed facts" submitted in connection with summary judgment motions in the district court. (Petition at 1.)

NCIP misstate the basis of the Panel's ruling, however, which did not limit the acceptable evidence of standing to sworn declarations. Instead, the Panel correctly and unremarkably held that NCIP did not present sufficient competent evidence to establish their standing, as is required at this stage of a case, and that therefor the court lacked subject matter jurisdiction to proceed. No issues of "exceptional importance" or any potential to interfere with an "overriding need for national uniformity" arises from the panel's fact-specific decision. Fed. R. App. Proc. 35; Ninth Cir. R. 35-1.

II. BACKGROUND

This case arises under the APA from a final decision by the Defendant-Appellee Department of the Interior ("DOI") to take land into trust for the Defendant-Intervenor-Appellee Ione Band of Miwok Indians, a federally recognized Indian Tribe (the "Tribe"). DOI officially recorded and published that trust land acquisition decision in a May 2012 Record of Decision ("ROD") (ISER0739-0806),[1] following its consideration of an administrative record ("AR") numbering more than 20,000 pages and dating back to the 1800's, through a process which lasted many years and involved a number of government officials,

[1] Citations to Intervenor-Defendant-Appellee Tribe's Supplemental Excerpts of Record filed with the Ninth Circuit Court of Appeals are given as "ISERXXXX."

studies, reports, public hearings and legal opinions. *See generally* the AR. In the ROD the DOI also determined that the lands to be acquired in trust would be eligible for the conduct of tribal governmental gaming under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*. ("IGRA"). (ISER0790-0792.) The ROD observed that the Tribe had been recognized by the federal government at least dating back to 1915 (and perhaps for decades before that), with formal recognition coming in 1972. (ISER0801-0802.) The Tribe suffered a *de facto* termination of its recognized status at the hands of the federal government from approximately the mid-1970s up through the early 1990s. (ISER0703-0708). Its recognized status was reaffirmed and restored by the then-Assistant Secretary-Indian Affairs Ada Deer, in 1994. *Id.* Assistant Secretary Deer instructed that the Tribe be added to the list of federally-recognized tribes published in the Federal Register, where the Tribe continues to this day to be officially and justifiably listed among other tribes recognized as tribal governments by the United States. *See* Bureau of Indian Affairs, Notice, Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 82 F.R. 4915 (Jan. 17, 2017). The restoration of the Tribe's federally recognized tribal status became final years ago and was never challenged.

Following the issuance of the ROD, NCIP filed suit in federal district court in 2012 challenging the ROD under the APA. (District Court Case No. 2:12-cv-

01748-TLN-CMK ("NCIP Dist. Case"), DE 1.) A similar suit was filed at about the same time by the County of Amador, California (District Court Case No. 2:12-cv-01710-TLN-CKD ("County Dist. Case."), DE 1.) Both actions were eventually assigned to District Court Judge Troy Nunley. The Tribe was granted intervenor status by the court in 2013. (NCIP Dist. Case, DE 46.)

On September 2015, following cross-motions for summary judgment, Judge Nunley issued the court's opinions granting judgment against the plaintiffs in both cases and upholding the ROD. (NCIP Dist. Case, DE 100; County Dist. Case, DE 95.) An appeal in both cases followed. (NCIP Dist. Case, DE 102; County Dist. Case, DE 97.)

On July 14, 2017, this Court heard oral argument in both cases. During the argument in this case the Court questioned NCIP's counsel about the Article III standing of his clients, as two organizations purporting to represent the interests of their members. He replied that the AR established his clients' standing, although during that inquiry the Court observed that those clients' last participated in the administrative proceeding in 2010, two years prior to the filing of the complaint (NCIP Dist. Case, DE 1), and questioned whether, assuming the AR documents met the test, some inference would still need to be drawn that the tests for standing continued to be met two years later when the case was filed. Counsel could not

(and still cannot) cite a case or point to a specific document in the record that permits such an inference

Two weeks following oral argument in 2017, NCIP's counsel transmitted a letter to the Ninth Circuit Court Clerk requesting that it be brought to the attention of the Panel. (DE 65 at 1). He cited several cases that purportedly provided authority for his position, which the Tribe disputes. (DE 65 at 1-2). He also offered to submit a "response" to the Court's questions on behalf of both Appellant organizations and identified the proposed responder as a Mr. Cranford, "a long-time resident of Plymouth, and member of both Appellant organizations who "is more than willing to respond on behalf of both groups" and to let him know "if the Court wants such an affidavit from Mr. Cranford." (DE 65 at 2). Neither the Tribe nor its counsel are aware of any response from the Court.

A few weeks after transmitting that letter, NCIP's counsel electronically filed a purported sworn declaration of Mr. Cranford. (DE 66 at 1-5). The document is basically a statement that Mr. Cranford opposes the Tribe's efforts and is based on repeated conclusory, unsupported statements claiming that the proposed Tribal project will cause economic damage. (*Id*.)

No specifics are provided, and his generalities, opinions and conclusory statements, virtually entirely without percipient, time-related or expert foundation, would never suffice as testimonial evidence. There are no statements

demonstrating his specific knowledge or proximity to the proposed project, either then or five years earlier in 2012 when the action was filed. Indeed, the purported declaration evidences a lack of first-hand knowledge, relies on hearsay, and expresses opinions and conclusions without foundation. It is thus patently inadmissible. If an objection is necessary, this will constitute that objection and a motion to strike the document on the grounds that the statements therein, each and all, lack a foundation, fail to establish the declarant's competency or expert qualifications to opine, lack any showing of first-hand knowledge about the matters about which he is speaking, and are apparently only true and correct "to the best of [his] knowledge and information," not upon information he knows of his own personal knowledge or as to which he is competent to testify or would or could testify if called upon to do so. It is not a declaration "under oath" that would be admissible as is required. Fed. R. Civ. P. 56(c).

On October 6, 2017, the Ninth Circuit Court of Appeals affirmed the district court's decision in the Amador County Case but remanded this case as noted above. The Panel concluded that "neither Plaintiff has met its burden of showing that it has organizational standing." (Memorandum at 2). The Panel held,

> [N]either Plaintiff has 'set forth' by affidavit *or other evidence* 'specific facts' to show that any of its members would have had standing to sue in his or her own right at the time the complaint was filed." *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (holding that, in order to oppose summary judgment successfully, a plaintiff "must 'set forth' by affidavit *or other evidence* 'specific facts,' which for purposes of … summary judgment

> motion will be taken to be true (citation omitted)). (Memorandum at 3); *see also* Fed. R. Civ. P. 56(c)(2).

As a result, the Panel concluded that it had no subject matter jurisdiction, ordered the matter vacated and remanded with instructions to dismiss, and awarded costs on appeal to the Appellees. (Memorandum at 4.) NCIP's Petition (and a similar request in the County case on appeal, Case No. 15-17253, DE 67-1) followed.

Notwithstanding the foregoing deficiencies, NCIP argue in their Petition that "more than one member of NCIP has 'suffered sufficient injury to satisfy the "case or controversy" requirement of Article III of the Constitution." (Petition at 10-11.) NCIP point to several letters in the AR from Elida Malick, "a founding member of No Casino in Plymouth", to the Secretary of the Interior as support for Appellants' organizational standing. (Petition at 11.) Again, all of such letters predated the filing of the complaint by two or more years. And the letters are more of the merely general opposition comments to the Tribe's request that NCIP urges should satisfy standing at this point. They do not.

Following the filing of the Petitions, this court ordered that Appellees respond. This response is to the No Casino case Petition. A response to the Amador County case petition is being filed simultaneously in that matter.

III. ARGUMENT

A. The Petition in This Case Asserts Erroneous Bases for Granting a Rehearing or En Banc Review

In their Petition, NCIP contend that they are two organizations working for the interests of the citizens of Plymouth, California. (Petition at 6-7.) As organizations, Appellants must have standing to sue on behalf of its members at the time the complaint is filed. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989). The test for establishing standing for an organization differs from that applicable to individuals. The entity must show that (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to vindicate are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 950 n.19 (9th Cir. 2013). In addressing the standing issue, the party asserting its standing bears the burden of proof. *Lujan.*, 504 U.S. at 561.

The party invoking federal jurisdiction bears the burden of establishing these elements. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). However, the test is different at the pleading stage than, as here, on a motion for summary judgment. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 114–115 and n. 31 (1979); *Constitution Party of South Dakota v. Nelson*, 639 F.3d 417 (8th Cir.

2011); Fed. R. Civ. P. 56(e). Because standing is central to a court's ongoing responsibility to be assured that it has subject matter jurisdiction (*id.*), the courts recognize that at the pleading stage the test is merely to determine the likelihood that standing, and thus jurisdiction, exists, while as the case progresses and gets closer to a definitive ruling, such as here after 5 years of litigation and summary judgment is sought, a party when called upon to do so must face a higher bar. *Lujan*, 504 U.S. at 561. While at the pleading stage mere allegations in a complaint might suffice, at this point, if that subject is still an issue, each element of standing must be established "in the same way as any other matter on which the plaintiff bears the burden of proof," by setting forth in affidavit or other competent evidence "specific facts." *Id.* This is particularly so for the purposes of a summary judgment motion, where the assertion of those elements if properly presented will be taken to be true. *Id.* On a motion for summary judgement, the party asserting its standing must do so through the presentation of specific facts through competent evidence. *Id.*

Fed. R. Civ. P. 56(c) sets forth the methods of proof for showing the existence or absence of facts on summary judgment. A party may show a fact is in dispute by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

In addition to the traditional Article III standing requirements, an APA plaintiff must also show "(1) that there has been final agency action adversely affecting the [party], and (2) that, as a result, it suffers legal wrong or that its injury falls within the zone of interests of the statutory provision the [party] claims was violated." *DBSI/TRI IV Ltd. P'ship v. United States*, 465 F.3d 1031, 1038 (9th Cir. 2006). To survive summary judgement, an APA plaintiff must also establish these two additional elements through competent evidence. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 885-889 (1990); Fed. R. Civ. P. 56(c); *Lujan*, 504 U.S. at 561. Thus, while an APA case relies on reference to the AR and whether or not the administrative body making the final determination did so on a basis that was not arbitrary or capricious – that is, it had a reasonable basis for reaching its conclusion – it does not permit a relitigation *de novo* by the court of the underlying question that was before the agency. The question of Article III standing is thus a separate issue that goes directly to the court's subject matter jurisdiction and that was likely not in issue in the underlying proceeding. If there is AR material that is useful on the standing question, it must obviously meet the evidentiary tests for determining standing, including at this point, the requirements under Rule 56. NCIP have failed to do so.

In order for a court to recognize a party's Article III standing, it must exist at the time the case was filed. *Newman-Green, Inc., supra*, 490 U.S. at 830. The Petition references some of the AR material, such as the letters in the record cited above. (Petition at 6-7.) NCIP also briefly address the issue in its brief in opposition to the motion for summary judgement. (Dist. Ct. Case No. 2:12-cv-01748-TLN-CMK, DE 93, the "Opposition.") The Opposition discusses standing at page 23, but again is completely devoid of *any and all cites to competent evidence such as affidavits or declarations*. *Id*. at 23. Without such evidence, NCIP's discussion of standing is merely academic in that it does not meet the evidentiary requirements of Fed. R. Civ. P. 56.

NCIP's Opposition also attempts to analogize to *Match-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012). Opposition at 23. NCIP point out that the plaintiff in *Patchak*, an individual, had standing because "taking land into trust for Indian gaming 'will cause him economic, environmental, and aesthetic harm' as a property owner near a casino." *Id*. NCIP state that their "interest in the environmental and economic well-being of Plymouth, Amador County and the State of California are identical to Mr. Patchak['s]" and therefore that they have standing. *Id*. NCIP's reliance on *Patchack* is misplaced. The *Patchak* plaintiff had standing as *an individual*, not as an organization. *Patchak*, 567 U.S. at 225, 228. Moreover, unlike what occurred before the district court in

Patchak's early stages, NCIP provided the district court with no competent declarations, affidavits, stipulations, or other admissible evidence providing the missing details now needed to support their blanket assertion of standing in 2012. *See* DE 52, Plaintiff's Motion for Summary Judgment, *Patchak v. Salazar*, No. 1:08-cv-01331-RJL, 2008 WL 11316647 (D.D.C. Aug. 19, 2009) (*filed sub nom as Patchak v. Kempthorne*), *rev'd* 632 F.3d 702 (D.C. Cir. 2011), *aff'd* 567 U.S. 209.

Just as NCIP previously stated, "the Court should not be required to scour the 20,000 page [administrative record] to determine which evidence" supports standing. Opposition at 7:22-23. NCIP bear the burden of showing organizational standing by citing to the record. Failure to do so – whether by producing and relying on an alternate, allegedly "factual" record or by citing to declarations made on appeal – is fatal. Relying on those submissions requires that they establish that any referenced condition bears on the standing issue (e.g., residence proximity, injury in fact, and so forth) and, if submitted two years prior to filing the complaint, will necessarily continue to exist in the future. Alternatively those statements must lend themselves to an inference that they do so, and that there is some legal basis for making that inference.

Here none of those conditions have been met. There are no references to specific facts in the AR suggesting that the plaintiffs' members' residence or interests that are pertinent to the likelihood of an injury will in fact be in existence

in 2012, nor would there likely be. Technology to reliably predict the future is still to be developed. Nor is there any reference to any fact in the AR, in admissible form or otherwise, from which one could *infer* that the NCIP members had standing in 2012, even with a current look backwards. Finally, there is no legal authority cited that permits such inferences as a matter of law.

NCIP try to cure their lack of evidence on standing by attempting to rely on a supposed Statement of Undisputed Facts. (Petition at 8-9.) Fundamentally, there is no such "fact" recited in that document that establishes NCIP members' individual standing in 2012 or any other recitation that meets the three-prong test for organizational standing. Moreover, that document was not prepared in a form that could be deemed to be admissible evidence. And it was not executed under oath or by any stipulation that could, even under the best of circumstances, be considered to be an "admission" in evidentiary terms.

B. Appellants Do Not Meet The Standard for *En Banc* or Panel Rehearing

Panel rehearing is appropriate if the panel overlooked a material point of law or fact or there was a change in law after submission to the panel. Fed. R. App. P. 40; Ninth Cir. R. 40-1. NCIP argue that the panel overlooked "(b) allegations in

the complaint, (c) unopposed statements of undisputed facts, and (d) Dueward W. Cranford II's declaration." (Petition at 2.)

The allegations in the complaint are irrelevant to the issue of establishing the facts supporting standing at this point. Likewise, as discussed *supra*, NCIP's statement of "undisputed facts" was also irrelevant. Indeed, the statement of undisputed facts is superfluous on summary judgment in an APA case, since review is confined to the AR to determine the legal question of reasonableness of agency action. *Occidental Eng'g Co.*, 753 F.2d 766, 769-70 (9th Cir. 1985). The statement of undisputed facts would not serve as the factual record in the case because that is confined to the administrative record compiled by the agency. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Cranford's declaration, aside from being written *after* oral arguments on July 14, 2017 and long after NCIP's Opposition before the district court, is also problematic for its absence of the required particularized detail as to proximity, time and injury. Panel rehearing is therefore inappropriate.

Finally, a petition for rehearing *en banc* must present a question of exceptional importance or the panel decision must conflict with United States Supreme Court or Ninth Circuit decisions such that rehearing is necessary to "secure and maintain uniformity of the court's decisions." Fed. R. App. P. 35; Ninth Cir. R. 35-1 to 35-3. Questions of exceptional importance include when a

panel decision conflicts with controlling decisions from other United States Courts of Appeals on the same issue (Fed. R. App. P. 35(b)(1)(B)), or when a panel decision "directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity". Ninth Cir. R. 35-1. The result of this case is fact-specific. None of those conditions exist.

IV. CONCLUSION

The Memorandum correctly analyzed NCIP's failure to demonstrate its standing, and therefore no rehearing or hearing *en banc* is justified. For the reasons stated herein, Intervenor-Defendant-Appellee Tribe respectfully asks this court to DENY Appellants' Petition for Rehearing or Rehearing *En Banc*.

Dated: December 22, 2017

Respectfully submitted,

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