Nos. 11-15631, 11-15633, 11-15639, 11-15641, 11-15642

In the
United States Court of Appeals
for the Ninth Circuit

GILA RIVER INDIAN COMMUNITY, et al.,

Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA; et al.

Defendants – Appellees,

On Appeal from the United States District Court for the District of Arizona
Cause Nos. 2:10-cv-01993-DGC, 2:10-cv-02017-DGC, 2:10-cv-02138-DGC

AMICUS BRIEF OF SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY IN SUPPORT OF APPELLANTS

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AUTHORITY TO FILE AND RULE 29(C)(5) STATEMENT

Salt River Pima-Maricopa Indian Community ("**Salt River**") files this *amicus* brief pursuant to Rule 29(a), Fed. R. App. P. All parties to the appeal have consented to the filing of this *amicus* brief.

Pursuant to Rule 29(c)(5), Fed. R. App. P., Salt River states that no part of this brief was authored by counsel for any party to this appeal, and neither a party, nor counsel for a party, nor any other person or entity aside from Salt River contributed any money to fund the preparation or submission of this brief.

STATEMENT OF INTEREST

Salt River is a federally recognized Indian Tribe organized under a constitution adopted on February 28, 1990 and approved by the Secretary of the Interior on March 19, 1990, pursuant to Section 16 of the Indian Reorganization Act of June 18, 1934. The 53,000-acre Salt River Reservation is located east of Scottsdale within the exterior boundaries of the State of Arizona. Salt River has approximately 8,700 members.

Salt River now operates two gaming facilities on its reservation, and for more than a decade has invested heavily in its gaming operations. Salt River has pledged its gaming revenues as collateral for other projects to benefit its members. The gaming operations generate much-needed funding which Salt River has used to upgrade overall living conditions, provide much improved health care and

education to its members, and provide economic opportunities and cultural facilities for the use of its members.

In 1999, Salt River joined a coalition of 17 tribes, including the Tohono O'odham Nation (the "**Nation**") and began joint negotiations with the Arizona Department of Gaming and Arizona's Governor to create a new gaming compact pursuant to the Indian Gaming Regulatory Act ("**IGRA**"), Pub. L. 100-497, 25 U.S.C. § 2701 *et seq*. During these negotiations, the parties agreed to new limits on the number and location of gaming facilities. As a result of these negotiations, the tribes located near urban areas agreed to reduce the number of gaming facilities allocated to them under the previously negotiated gaming compacts, with the exception of the Nation, which kept its full allocation of four facilities. ER 205.[1] Salt River agreed to this because it believed, as did the State of Arizona, that no new casinos would be built in the greater Phoenix metropolitan area. ER 214, 238. Salt River would not have agreed to the standard compact if the Nation had revealed its plan to build a casino in the Phoenix area, because a new casino would reduce the value of the investments Salt River made in its own gaming operations.[2]

[1] All ER citations refer to the Appellants' Excerpts of Record.

[2] Salt River is a plaintiff, along with Gila River and the State of Arizona, in another action that seeks to enforce the promises the Nation made during the compact negotiations. That case is currently pending before Judge Campbell in the United States District Court for the District of Arizona, No. 2:11-CV-00296-DGC.

The agreement between the State and the tribes was incorporated into a ballot initiative – Proposition 202 – put to the voters in the 2002 general election. The campaign materials that the tribes paid for collectively, the statements of tribal officials, and the statements of Arizona's Governor consistently informed voters that Proposition 202 would permit no additional gaming facilities in the Phoenix metropolitan area. *Id.* In this context, the voters approved Proposition 202, the tribes subsequently executed their new compacts, and Salt River made further investments and plans in reliance on the bargain that had been struck.

Unbeknownst to the other tribes and the State, however, the Nation was secretly planning to acquire land in the Phoenix area under the Gila Bend Indian Reservation Lands Replacement Act ("**Gila Bend Act**" or "**Act**"), Pub. L. 99-503, 100 Stat. 1798, to use as a location for a new casino. In August 2003, the Nation bought approximately 135 acres at 91st Avenue and Northern Avenue in Glendale, Arizona ("**Parcel 2**"), but the Nation concealed this purchase for over five years by using Seattle-based front company, Rainier Resources, Inc., to purchase the land. ER 236-237. In January 2009, the Nation took title to the land in its name, and asked the Department of the Interior ("**Interior**") to determine that Parcel 2 was eligible for gaming and to take Parcel 2 into trust. ER 25.

The appellants brought this case to prevent the Nation from building a casino on Parcel 2, an effort Salt River now joins as *amicus curiae*. As described

more fully in the Appellants' briefs, one important question is whether Section 6(c) of the Gila Bend Act ("**Section 6(c)**") bars Interior from accepting Parcel 2 into trust. Salt River had no communications with Interior about the Section 6(c) issue during the administrative proceedings.

Because gaming revenue is so crucial to the health and well-being of its people, Salt River has a significant interest in the comprehensive regulatory scheme for Indian gaming in the State of Arizona adopted by the voters. In making the governmental investments and expenditures described above, Salt River has relied on the agreement reached between the State of Arizona and the Arizona gaming tribes concerning the overall number of gaming facilities that would operate in the greater Phoenix metropolitan area. For these reasons, Salt River has a significant interest in this case and offers a perspective it believes the Court will find helpful.

ISSUE ADDRESSED

Salt River agrees with the Appellants that the Section 6(c) question was not waived in the administrative proceeding — indeed, that the question *could not* be waived in such a proceeding — and endorses the arguments set forth in their respective briefs. Brief of Appellant Gila River Indian Community ("**Gila River Brief**") at 15-32; Brief of Appellants Delvin John Terry, Celestino Rios, Brandon Rios, Damon Rios, and Cameron Rios ("**Terry/Rios Brief**") at 5-10; Brief for

Plaintiffs-Appellants State of Arizona, City of Glendale, Michael Socaciu, and Gary Hirsch ("**Glendale/State Brief**") at 21-25.

In this *amicus* brief, Salt River addresses one aspect of the waiver issue: Did the district court err in holding that no exceptional circumstances justify judicial review of whether the land at issue satisfies the requirements of Section 6 (c) of the Gila Bend Act?

ARGUMENT

Although Congress gave the Nation the power to acquire additional lands to be taken into trust, it expressly limited that power by placing an overall cap on the amount of land the Nation could acquire with the funds provided under the Gila Bend Act. *See* Gila River Brief at 20-23. Notwithstanding the plain language of the Act, the district court decided that the aggregate cap did not matter because the issue had been waived for failure to raise it during the administrative proceeding. ER 8-11.

As noted above, Salt River agrees with the Appellants that the Section 6 (c) question was not waived for all the reasons addressed in their briefs. The informal *ex parte* administrative proceeding used in this case is not the kind of proceeding for which waiver should ever apply. *See* Gila River Brief at 25-32; Glendale/State Brief at 21-25. This is particularly true when newly discovered evidence informs the proper interpretation of a statute. *See* Gila River Brief at 19-23. Waiver

certainly should not apply to parties that do not participate in such informal proceedings where the agency gives no public notice. *See* Terry/Rios Brief at 5-10.

Even leaving those arguments aside, however, the district court erred because even if the Section 6 (c) issue could be waived, the waiver doctrine is not absolute and unbending. "When reviewing the decision of an administrative agency, [courts] will entertain an issue not raised before the agency if 'exceptional circumstances' warrant such review." *Johnson v. Dir., Office of Workers' Comp. Programs*, 183 F.3d 1169, 1171 (9th Cir. 1999).

The district court held, without analysis, that no exceptional circumstances apply in this case. ER 10-11. In reaching this conclusion, the district court explicitly, and erroneously, divorced the legal question raised by Gila Bend Act from the context of this case. While the Section 6 (c) issue may seem narrow and legal in isolation, the implications of the decision are exceptionally important because of the Nation's effort to use the Gila Bend Act to acquire land for gaming. Gaming has brought tremendous benefits to Salt River, Gila River, and other tribes, and the Nation now attempts to use the Gila Bend Act to the detriment of other tribes.

When the factors of the exceptional circumstances test are properly balanced, the interests of the tribes and the State of Arizona in judicial review of

Interior's decision far outweigh Interior's interest in shielding their decision from review. This Court should therefore require that the Section 6 (c) issue be addressed on the merits to ensure that Gila River, Salt River, and the other tribes are not negatively impacted in a manner that runs contrary to what Congress intended.

I. The District Court Erred by Divorcing the Important Policy Questions of Indian Gaming from the Waiver Issue.

In holding that the Section 6 (c) argument had been waived for failure to raise it during the administrative proceeding, the district court recognized the "exceptional circumstances" exception to the general waiver rule but summarily stated, without analysis, that no exceptional circumstances applied. ER 10-11. The district court did, however, make it clear that the broader context of this case — and the very reasons this case matters to Salt River — played no role in its analysis:

> At the outset, it is important for the Court to note what is *not* at issue in this case. This case does not concern appropriate limits on Indian gaming. * * * This case is not about who promised what to whom when gaming laws and compacts were adopted in the past. * * * The questions this Court must decide are narrow and legal: was the Department's decision to take the land into trust for the benefit of the Nation "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and did it violate the United States Constitution or the Indian Gaming Regulatory Act?

ER 2. Yet it is precisely this broader context of Indian gaming and promises during compact negotiations that creates "exceptional circumstances" in this case.

When Congress passed the Gila Bend Act in 1986, the purchase of replacement lands by the Nation and holding those lands in trust was important to the Tohono O'odham people, but had virtually no impact on anyone else. After the passage of IGRA in 1988 and Proposition 202 in 2002, the stakes could not be higher. Gaming on Indian lands has lifted countless people from the many tribes in Arizona out of poverty, and brought vast improvements to their communities through infrastructure and social programs.

The decision below could potentially reverse some of that progress, particularly for Salt River. After the passage of Proposition 202, Salt River invested heavily in its gaming operations, and now the revenue generated by those operations is critical to the community. The greater Phoenix area, however, can produce only a finite amount of gaming revenue. *See* Arizona Joint Legislative Budget Committee, *Fiscal Analysis of Ballot Proposition #202*, July 18, 2002 (conducting market saturation analysis for Arizona gaming).[3] An agency action that could lead to an additional casino in the Phoenix metropolitan area will upset the market balance negotiated by the tribes, benefitting one tribe — the Nation — at the expense of the other Phoenix-area gaming tribes.

[3] *Available at* http://www.azleg.gov/jlbc/prop202.pdf (last visited July 22, 2011).

The district court's refusal to consider the broader context led to legal error. Ignoring the Nation's motivations for its secret acquisition of Parcel 2 meant ignoring the Nation's interest in preventing full consideration of all of the relevant issues in the administrative process. Gila River Brief at 15-25. More significantly, the district court failed to properly balance the full range of agency interests and private interests to determine whether "exceptional circumstances" exist to justify judicial review of Interior's decision notwithstanding the waiver doctrine. ER 10-11.

Interior's decision to accept this land into trust under the Gila Bend Act was wrong, and if this case arose in 1987 before the passage of IGRA there might be little harm if the courts overlooked that fact. But the erroneous decision adversely affects too many other people for the judicial branch to ignore what really happened in this case and refuse to determine whether this acquisition truly satisfies the Act's legal requirements. This is particularly true in this case because Interior considered the trust acquisition to be mandatory, ER 28-29, and therefore did not consider the lengthy list of discretionary factors usually required for off-reservation acquisitions. *See* 25 C.F.R. § 151.11. When Interior's action is considered in the proper context, the district court's finding of waiver can only be seen as an unequivocal error.

II. The Section 6(c) Issue Should Be Reviewed On the Merits Because the Traditional Factors Demonstrating Exceptional Circumstances Exist in This Case.

Even if waiver could apply to the Section 6 (c) issue, the district court's refusal to consider the importance of properly interpreting the Gila Bend Act in light of the Nation's intentions to operate a casino on this property led to the court's erroneous determination that no exceptional circumstances exist to justify judicial review. In general, whether exceptional circumstances warrant review of an issue not raised in an administrative proceeding requires "balancing [1] the agency's interests 'in applying its expertise, correcting its own errors, making a proper record, enjoying appropriate independence of decision and maintaining an administrative process free from deliberate flouting, and [2] the interests of private parties in finding adequate redress for their grievances.'" *Johnson*, 183 F.3d at 1171 (quoting *Litton Indus., Inc. v. FTC,* 676 F.2d 364, 369-70 (9th Cir. 1982)) (bracketed numbers added). In this case, the agency's interests do not support the district court's conclusion, and the broader context, which the district court explicitly eschewed, demonstrates that the private interests and other public interests at stake are very high.

A. Judicial Review of the Section 6 (c) Issue Does Not Undermine or Even Implicate Interior's Interests.

Interior's interests in supporting its decision regarding Parcel 2 do not outweigh the interests justifying judicial review of the 6 (c) issue. As a threshold

matter, and as noted above, the Section 6 (c) issue involves no administrative policymaking, but rather involves a pure question of statutory interpretation more appropriate for judicial review. *Mesa Verde Const. Co. v. N. Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1140 (9th Cir. 1988) (when administrative proceeding raises pure statutory interpretation question, a court "must make its own independent judgment as to the meaning of the statute"). Moreover, Section 6(c)'s explicit acreage limitation is not the kind of question "properly understood as delegated by Congress to an expert and accountable administrative body." *Negusie v. Holder*, 129 S. Ct. 1159, 1172 & n.3 (2009) (discussing the difference between statutory language admitting of judicial construction and language admitting of agency exposition, and noting that the Administrative Procedures Act gives courts a greater role in statutory interpretation). As a consequence, the issue does not implicate Interior's interest in applying its expertise, making a record, or preserving its independence. *See Beard v. GSA*, 801 F.2d 1318, 1321 (Fed. Cir. 1986) (finding exceptional circumstances on issue of statutory interpretation that "does not require the development of a factual record, the application of agency expertise, or the exercise of administrative discretion"). Nor does it implicate Interior's interest in correcting its own error as the issue is ultimately one for the courts to decide in any case. *Mesa Verde*, 861 F.2d at 1140.

Interior's strong interest in ensuring that its procedures are not flouted militates toward reversing the district court's waiver holding. No evidence suggests that the parties now raising the Section 6 (c) issue chose to flout the process by strategically refusing to raise the issue during the administrative proceeding. Rather, the record suggests that Nation successfully precluded other parties from raising the issue by hiding the purchase of the land in question from Arizona tribes and government officials. Gila River Brief at 6-9. In the context of this case, permitting review of the Section 6 (c) issue actually supports Interior's interest in having its procedures respected.

B. The Private Interests at Stake, Which the District Court Refused to Consider, Weigh in Favor of Judicial Review.

Against Interior's virtually nonexistent interests in avoiding review of the Section 6 (c) issue weigh the monumental interests of the parties who otherwise lack any redress. If the Nation succeeds in its effort to operate a casino on the property at issue here, Interior's decision will result in an injustice to Gila River, Salt River, and all other tribes that participated in the joint negotiations with the State of Arizona to bring about the standard compact that limits and regulates Indian gaming in Arizona. As part of balancing each tribe's interests, the Nation received a favorable deal that relied on the fact that it would not operate any casinos in the Phoenix area; unlike other tribes near urban areas, the Nation was

not forced to reduce its allocation of gaming facilities from the previous standard compact. ER 205.

As noted above, Salt River and other Phoenix-area tribes invested heavily in its gaming operations and they now depend on the revenue generated by their facilities. Should Interior's decision to take the land into trust ultimately lead to gaming on Parcel 2, the Phoenix-area tribes inevitably will see a decrease in their gaming revenues — and a concomitant decrease in their ability to continue improving the lives of their members.

Moreover, Interior's action disrupts the overall legislative scheme. When the passage of Proposition 202 enacted the language of the standard compact with its allocation of gaming facilities and devices, Arizona's voters approved a comprehensive regulatory scheme governing Indian gaming operations throughout the state. *See* A.R.S. § 5-601.02. Allowing Interior's decision to stand without judicial review could eventually upset the careful balance struck in the multi-party negotiations and enacted by the voters, implicating the private interests of every Arizona citizen.

These private interests are both widespread and significant. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1253 (9th Cir. 1994) ("In passing IGRA, Congress knew that states and tribes both had important interests at stake.") If an administrative agency is going to take an action that dramatically

affects the important public policy considerations behind Indian gaming regulatory schemes, the courts should ensure that the agency is acting within its authority, even if a particular issue was not raised during the decisionmaking process.

Viewed in the proper context, bypassing the Section 6 (c) issue does not serve Interior's interests and the private and public interests favoring review are broad and important. On balance, the factors suggesting that exceptional circumstances exist outweigh the factors suggesting that the Section 6 (c) issue should be considered waived.

CONCLUSION

Although the interpretation of Section 6 (c) was neither raised nor addressed during the administrative proceedings, exceptional circumstances exist in this case to permit the Court to consider the issue. The district court erred in summarily dismissing the existence of exceptional circumstances. The Court should reverse the district court's waiver holding and remand the case for consideration of the statutory interpretation question on the merits.

RESPECTFULLY SUBMITTED this 22nd day of July, 2011.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,221 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word in Times New Roman 14 point font.

Date: July 22, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 22, 2011.

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

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