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Winner, Best Appellate Brief in the 2017 Native American Law Student Association Moot Court Competition

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SPECIAL FEATURE

WINNER, BEST APPELLATE BRIEF IN THE 2017 NATIVE AMERICAN LAW STUDENT ASSOCIATION MOOT COURT COMPETITION*

Devon Suarez ** & *Simon Goldenberg* ***

Questions Presented

I. Did the Secretary of the Interior err by authorizing the acquisition of land for the Miseño Band based on a determination that the Miseño meet the first prong of the definition of “Indian” in Section 19 of the IRA?

II. Does Section 5 of the IRA constitute an unconstitutional exercise of Congressional authority to the Secretary that violates the nondelegation doctrine and the Tenth Amendment?

Statement of the Case

I. Statement of Facts

The Miseño people have lived in Southern California since time immemorial. R. at 1. They first had contact with the Spanish in the late-eighteenth century, and a mission was subsequently built. R. at 1. Mexico divided the mission lands into private land for its citizens in 1838, so long as they did not interfere with the Miseño living there. R. at 1. After the Treaty of Guadalupe-Hidalgo, the United States sent Indian Affairs officials to California to negotiate treaties with the tribes in the region, but the

* This brief has been edited from its original form for ease of reading. The record for this brief comes from the 2017 National Native American Law Students Association Moot Court Competition facts, which can be found at: http://media.wix.com/ugd/c50703_769cb94824164c74b817ae43c4cb6a0b.pdf.

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Miseño were never participants in negotiations or mentioned in reports. R. at 1. By 1880, there was only one Miseño village left. R. at 1. The Miseño were removed from that village after a family with title to the land successfully brought suit against them in state court. R. at 1.

Despite their removal, many of the Miseño continued to live in the same area, and still do today. R. at 2. The United States recognized the Miseño as an Indian tribe in 1982. R. at 2. In 2005, the Miseño asked the Secretary of the Interior (“the Secretary”) to obtain land near a former village site and place it in trust. R. at 2. In 2010, the Department of the Interior (“the Department”) produced a record of decision (“ROD”) confirming that the land would be put into trust. R. at 2. The ROD interpreted 25 U.S.C. § 479 in light of the Supreme Court’s recent decision in *Carcieri v. Salazar*. See 555 U.S. 379 (2009); R. at 2. The Department found that the Miseño were “under federal jurisdiction” in 1934. This decision was based on an excerpt from the 1851 Act to Ascertain and Settle Private Land Claims in the State of California, the 1891 Mission Indian Relief Act, the history of Miseño children attending the Sherman Indian Boarding School, and payments the Miseño received under the California Indians Jurisdictional Act and Indian Claims Commission Act. R. at 2-3. Consequently, the land acquisition was lawful. R. at 2.

In 2013, Scream Out for California (“SOFC”) sued the Secretary and the Department asserting that the ROD was a violation of the Administrative Procedures Act (“APA”). R. at 3. SOFC claims there is no evidence of federal Indian agents exerting any jurisdiction over the Miseño. R. at 3. Therefore, the Miseño was not a recognized tribe or under federal jurisdiction in 1934. R. at 3. Furthermore, SOFC argued the land acquisition was an unconstitutional delegation of power to the Secretary because Congress failed to articulate an intelligible principle to guide the Secretary’s discretion. R. at 3; see 25 U.S.C. § 465. Specifically, § 465 violates the Tenth Amendment by intruding on core principles of state sovereignty. R. at 3.

II. Statement of Proceedings

The Miseño Band intervened in the case, and both sides filed motions for summary judgment. R. at 3. In 2014, the District Court for the Central District of California ruled in the Secretary’s favor. R. at 3. In 2015, the Court of Appeals for the Ninth Circuit affirmed the ruling. R. at 3. In 2016, the United States Supreme Court granted certiorari to decide the following: 1) whether the Secretary erred in finding that the Miseño qualify as an “Indian” under § 479; and 2) if § 465 is an unconstitutional use of

legislative authority that violates the nondelegation doctrine or the Tenth Amendment. R. at 3-4.

Argument

I. The Miseño were not a recognized Indian tribe nor under federal recognition in 1934, thus the Secretary of Interior's ROD was arbitrary and capricious and otherwise contrary to law.

Supreme Court precedent demands that lands cannot be taken into trust for tribes that were not under federal jurisdiction in 1934. The Secretary's ROD should not receive deference because Congress spoke unambiguously in 25 U.S.C. § 479 that a tribe must have been recognized and under federal jurisdiction in 1934. Further, even if the ROD receives deference, the Secretary's interpretation of § 479 is unreasonable because Congress spoke unambiguously. Therefore, the ROD should be afforded no deference.

Even if the ROD is entitled to deference, the Secretary was arbitrary and capricious in concluding that the Miseño were under federal jurisdiction in 1934 because the record does not support the Secretary's conclusion. Furthermore, the Miseño do not fall within an exception to the *Carcieri* rule because the Secretary was arbitrary and capricious in issuing an ROD contrary to law.

A. Precedent dictates the Secretary cannot accept the lands into trust.

Once the court has determined the meaning of a statute, it adheres to its "ruling under the doctrine of stare decisis, and [assesses] an agency's later interpretation of the statute against that settled law." *Neal v. United States*, 516 U.S. 284, 295 (1996). "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 983 (2005).

The Court previously held, "for purposes of § 479, 'now under Federal jurisdiction' refers to a tribe that was under federal jurisdiction at the time of the statute's enactment." *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009). Further, "§ 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." *Id.* at 382. In this case, the Miseño were not recognized until 1982. R. at 2. The Miseño were not under federal jurisdiction in 1934 as the *Carcieri* rule requires of an

Indian tribe in order to have land taken into trust. The facts demonstrate that the commissioners sent to California did not document the presence of the Miseño. Further, the Miseño were not part of any treaties or negotiations with the federal government. The record further shows that the U.S. had little-to-no contact with the Miseño until well after 1934. This demonstrates that the U.S. does not hold the Miseño out to be under federal jurisdiction since they did not note any relationship with them. The law is well settled that tribes need to be recognized and under federal jurisdiction by 1934; the Secretary therefore cannot accept land into trust for the Band because of the *Carciari* holding, since the Miseño do not fit the criteria.

B. The ROD should not receive Chevron deference because Congress spoke unambiguously in § 479 and the Secretary's interpretation of the statute is unreasonable.

When reviewing an agency's interpretation of a statute that it administers through its actions and decisions, a court is confronted with two questions: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If Congress has spoken clearly on the issue, "the court as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. The canon of statutory construction of "clear meaning" dictates that if a statute is plain and unambiguous, a court must apply the statute according to its terms and clear meaning. *Caminetti v. United States*, 242 U.S. 470 (1917); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992). The presumption is that Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). Further, the canon of construction requires "the court to give effect . . . to every clause and word of a statute." *Inhabitants of the Twp. of Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). If, in the first prong of the *Chevron* analysis, the court determines that Congress did not speak directly to the issue, "the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Chevron*, 476 U.S. at 843. If the statute does not speak directly to the issue or if the court determines it is ambiguous, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

i. Congress spoke unambiguously in § 479, thus the ROD should not be afforded Chevron deference.

The Secretary's ROD should not be afforded *Chevron* deference because Congress spoke unambiguously in the The Indian Reorganization Act of 1934 ("IRA"). "If the intent of Congress is clear, that is the end of the matter." *Chevron*, 467 U.S. at 842. If Congress has spoken clearly on the issue, "the court as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Thus, to give effect to Congress's intent, the agency and the Court must do exactly what Congress instructs.

In the present case, Congress spoke unambiguously in the IRA that the Secretary is authorized to accept land into trust for "the purpose of providing land for Indians." 25 U.S.C. § 465. For the purposes of that Act, ". . . 'Indian' . . . shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. "[F]or purposes of § 479, 'now under Federal jurisdiction' refers to a tribe that was under federal jurisdiction at the time of the statute's enactment." *Carcieri*, 555 U.S. 379, 382. Further, "§ 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." *Id.* at 382. As *Carcieri* makes clear, it is settled law that "now" in the IRA strictly refers to tribes that were "under federal jurisdiction" in 1934. 25 U.S.C. § 479. Canons of statutory construction inform us that a statute must be given its clear meaning and applied according to its terms. *Estate of Cowart*, 505 U.S. at 476. Consequently, courts must give effect to every word and provision in a statute. *Inhabitants of the Twp. of Montclair*, 107 U.S. at 152.

Using the statute's language, canons of construction, and case law, the meaning of the statute is unambiguous. At the time of the enactment of the IRA, "now" meant "at the present time; at this moment; at the time of speaking." *Carcieri*, 555 U.S. at 388 (quoting Webster's New International Dictionary 1671 (2d ed. 1934)). There is little doubt that "now under Federal jurisdiction" means that a tribe must be under federal jurisdiction in 1934. 25 U.S.C. § 479. The preceding "any recognized Indian tribe" language is equally unambiguous. 25 U.S.C. § 479. The canons of statutory construction require the statute to be read in its totality, giving effect to every word. The phrase, ". . . all persons of Indian descent who are members of any recognized Indian tribe" must therefore be given effect and read in conjunction with "now under Federal jurisdiction" as a singular

clause without a break. 25 U.S.C. § 479. A natural reading of the statute indicates that an “Indian” is a person of Indian descent who is a member of any recognized tribe now under Federal jurisdiction. While “now” modifies and provides temporal constraints on “Federal jurisdiction,” the phrase qualifies “any recognized Indian tribe.” 25 U.S.C. § 479. Thus, “any recognized tribe” must be “now under Federal jurisdiction.” 25 U.S.C. § 479. Therefore, the proper reading of the statute, while giving effect to all parts of it, unambiguously states: an Indian is a person of Indian decent who is a member of any recognized tribe that was under federal jurisdiction in 1934. The whole clause must be given effect and cannot be read as two separate clauses.

As enacted in statute, the Secretary has the authority to take land into trust for recognized Indian tribes that were under federal jurisdiction in 1934; the entire clause is inseparable and must be read together as one. The agency and the court must give effect to Congress’ will because they unambiguously spoke on the issue. Accordingly, because Congress spoke unambiguously in § 479, the Secretary must give effect to Congress’ will and take land into trust only for recognized tribes under federal jurisdiction in 1934. *See Carcieri*, 555 U.S. at 382.

ii. Because the Secretary’s interpretation of § 479 is unreasonable, the ROD should not be afforded Chevron deference.

In the first prong of the *Chevron* analysis, if the Court determines that Congress did not speak directly to the issue, “the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.” *Chevron*, 476 U.S. at 843. If the statute does not speak directly to the issue or if the court determines it is ambiguous, “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* Thus, even if the court concludes that the statute was ambiguous, the court may determine that the agency interpreted the statute unreasonably and should be afforded no *Chevron* deference.

“[F]or purposes of § 479, ‘now under Federal jurisdiction’ refers to a tribe that was under federal jurisdiction at the time of the statute’s enactment.” *Carcieri*, 555 U.S. 379, 382. Further, “§ 479 limits the Secretary’s authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934.” *Id.* at 382. In this case, the Secretary interpreted the statute as requiring him to “determine whether an Indian tribe was ‘under Federal jurisdiction’ in 1934, the year the IRA was enacted, before

the Secretary can acquire land in trust for that tribe.” R. at 2. Further, the Secretary interpreted the statute to mean that “now . . . modifies only the phrase ‘under Federal jurisdiction’” and that a tribe “need only be ‘recognized at the time of the land acquisition.’” R. at 2. While the Secretary is correct that the Court held that “now under federal jurisdiction” meant that the tribe must be under federal jurisdiction in 1934, he misinterprets the preceding language to mean that the tribe need only be recognized before he may take land into trust for the tribe. As *Carcieri* held, “§ 479 limits the Secretary’s authority to tak[e] land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934.” 555 U.S. 379 at 382. The holding is clear that the IRA only grants the Secretary authority to take land into trust for tribes that were under federal jurisdiction in 1934; if a tribe is not under federal jurisdiction, the Secretary may not take land into trust. Not only does *Carcieri* provide precedential influence, it also provides a more reasonable interpretation of the statute than the agency’s current interpretation.

In this case, the Miseño were not a recognized tribe or under federal jurisdiction in 1934 or any time before that. The fact that the Miseño were not federally recognized until 1982 weighs against the tribe because Congress prescribed in the IRA that the secretary may only take land into trust for Indian tribes who are a “. . . recognized Indian tribe now under Federal jurisdiction.” 25 U.S.C. § 479. Like the Narragansett in *Carcieri*, the Miseño were not federally recognized until the 1980s. Further, like the Narragansett, the Miseño were not under federal jurisdiction in 1934. There, the Court held that because the Narragansett were not under federal jurisdiction in 1934, the Secretary lacked the authority to take land into trust. The facts in *Carcieri* are quite similar to the facts here. While the tribe may have had some contacts with the State, the tribe had little to no formal contact with the federal government. There, the Court held that the Secretary could not take land into trust because the tribe was not under federal jurisdiction in 1934. Accordingly, given the Court’s previous interpretation along with canons of statutory construction, the Secretary’s interpretation of the statute is unreasonable.

C. The ROD is arbitrary and capricious.

When reviewing an agency action or decision, “the reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706 (2)(A). Additionally, a court may hold an agency action “unlawful and set aside agency action,

findings, and conclusions found to be . . . unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.” 5 U.S.C. § 706 (2)(F). If Congress has left any ambiguity in a statute, Congress delegates to the agency the authority to give the statute a reasonable interpretation. *Chevron*, 467 U.S. at 843-44. “Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Chevron*, 467 U.S. at 844.

i. Arbitrary and capricious is the appropriate standard of review because the agency engaged in fact finding.

Formal adjudication is, “adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved . . . hearing and decision on notice and in accordance with sections 556 and 557 of this title.” 5 U.S.C. § 554 (1966). An agency’s interpretation and implementation of a statute is afforded *Chevron* deference when, “Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Such delegations can be demonstrated “by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.” *Mead Corp.*, 533 U.S. at 227. Thus, only formal adjudications are afforded *Chevron* deference. To determine whether the agency’s action was arbitrary and capricious, the court must look into “whether the decision was based on a consideration of the relevant factors and whether there had been a clear error of judgment.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

In this case, the agency engaged in informal, adjudicative fact finding. Following the holding of *Mead*, an agency is afforded *Chevron* deference only when it engages in rulemaking and formal adjudication. The informal adjudication here should not receive *Chevron* deference and should be subjected to arbitrary and capricious review. While the agency does have the power to engage in formal adjudication or rulemaking, in the present case, the agency used its authority to engage in informal adjudication in determining the eligibility of the Miseño’s land. This is evidenced by the fact that the statute enabling the Secretary to take land into trust for tribes does not provide for the requirements of 5 U.S.C. §§ 554, 556, and 557. The process of taking land into trust is informal adjudication because the statute does not provide for the requirements of § 554. Accordingly,

Chevron deference is not appropriate and only arbitrary and capricious review should be afforded.

ii. Even if the Secretary's decision is entitled to Chevron deference, the decision is arbitrary and capricious.

To determine whether the agency's decision was arbitrary and capricious, the court must look into "whether the decision was based on a consideration of the relevant factors and whether there had been a clear error of judgment." *Overton Park*, 401 U.S. 402, 416. As long as a regulation exists, it has the force of law. *United States v. Nixon*, 418 U.S. 683, 695 (1974). Thus, an agency is required to follow its regulations because they have the same force of law as a statute. "There is, then, at least a presumption that [congressional policy and agency regulation] will be carried out best if the settled rule is adhered to. From this presumption flows the agency's duty to explain its departure from prior norms." *Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973). The court must look into "whether the decision was based on a consideration of the relevant factors and whether there had been a clear error of judgment." *Overton Park*, 401 U.S. 402, 416 (1971).

When taking land into trust for a tribe, the Secretary must consider:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority; (b) The need of the individual Indian or the tribe for additional land; (c) The purposes for which the land will be used; . . . (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls; (f) Jurisdictional problems and potential conflicts of land use which may arise; and (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

25 C.F.R. § 151.11 (1980). In this case, the Secretary failed to follow the agency regulations and did not consider all relevant factors. First, he failed to fully consider existing statutory authority because the *Miseño* did not qualify for land to be taken into trust. Further, the ROD does not demonstrate that the Secretary fully considered the purpose for which the land will be used, the impact to the State of California, jurisdictional problems, and whether the BIA is equipped to take on the responsibility of the new land acquisition. The ROD is arbitrary and capricious because the

Secretary deviated from the agency's regulations to which he is bound and did not consider all relevant factors in the record.

Additionally, the Secretary made a clear error in judgment. The Miseño, as a tribe, were not under federal jurisdiction in 1934. The fact that the federally appointed Indian agent for California and the sub-agent for Indian Affairs for Southern California never mentioned the Miseño in their reports or documents weighs heavily against the argument that the Miseño were under federal jurisdiction at that time. R. at 1. Further, the Miseño's village was located outside of the land reserved under the 1852 Treaty of Temecula. R. at 1. No Miseño leader took part in the negotiation of, or was a signatory to, any of the nineteen treaties between the federal government and the California Indian people. R. at 1. These facts strongly indicate that the Miseño had little-to-no contact with the federal government. Accordingly, the Miseño were neither recognized nor under federal jurisdiction on or before 1934. Thus, the Secretary's conclusion is arbitrary and capricious.

In arriving at the conclusion that the Miseño were under federal jurisdiction, the Secretary provides the following facts as support: (1) the Miseño fit within categories of the 1851 Act to Ascertain and Settle Private Lands Claims; (2) the Miseño qualified under the 1891 Mission Indian Relief Act; (3) several Miseño children attended the Sherman Indian Boarding School in the 1920s, 1930s, and 1940s; and (4) the Miseño received payments made to California Indians in 1944 and 1974 under the California Indians Jurisdictional Act and Indians Claims Commission Act, respectively. None of these facts are sufficient to support a conclusion that the Miseño were under federal jurisdiction in 1934.

The 1851 Act to Ascertain and Settle Private Lands Claims in the State of California provides that "it shall be the duty of the commissioners . . . to ascertain and report . . . the tenure by which the mission lands are held . . . and also those which are occupied and cultivated by Pueblos or Rancheros Indians." 9 Stat. 631-34 at 634 (1851). If this section applied to the Miseño, it would provide strong support for finding the Miseño under federal jurisdiction. However, the facts are clear that the commissioners appointed to California never mentioned the Miseño in their documents or reports. Further, in the 1891 Mission Indian Relief Act, Congress appointed commissioners "to arrange a just and satisfactory settlement of the Mission Indians residing in the State of California" and authorized the commissioners "to select a reservation for each band or village of the Mission Indians." 26 Stat. 712, 712 (1891). Again, the facts indicate that the commissioners appointed by the Secretary never documented or

reported any contact with the Miseño. If these federal acts never mentioned the Miseño, then the tribe cannot argue that they were under federal jurisdiction at the time.

The Secretary also points to the 1891 Mission Indians Relief Act as a basis for his conclusion, but the Act does support a conclusion that the Miseño were recognized or under federal jurisdiction. The Act authorizes the commissioner “to arrange a just and satisfactory settlement of the Mission Indians residing in [California], . . . to select a reservation for each band or village of the Mission Indians . . . [;]” to set aside allotments for the Bands of Indians; and to defend any claims to Mexican land grants for the Indians.” 26 Stat. 712, 712-14 (1891). While the Secretary points to this Act as a basis for his conclusion, the facts demonstrate that the commissioners appointed to Southern California never documented any contact with the Miseño. Further, the facts show that the federal government did not recognize the Miseño until 1982. The fact that the Secretary points to an Act to support his conclusion from which the Miseño never benefitted indicates an arbitrary and capricious action.

The Secretary proceeds to cite the finding that several Miseño children attended the Sherman Indian Boarding School in the 1920s, 1930s, and 1940s. While the children did attend school prior to 1934, this fact alone is not determinative of federal jurisdiction over the Miseño. For example, it is possible that the children might have been believed to be from a different tribe given the federal government’s relationship with the “Mission Indians” in the region. *Id.* The record does not support the conclusion that Miseño children attended the school because the Miseño were under federal jurisdiction.

The Secretary cites the fact that the Miseño received payments in 1944 and 1974 under the California Indians Jurisdictional Act and Indians Claims Commission Act, respectively. The California Indians Jurisdictional Act provides that “for the purposes of this Act the Indians of California shall be defined to be all Indians who were residing in the State of California on June 1, 1852[,] and their descendants now living in said State.” 45 Stat. 602 (1928). While it may be argued that the payments under this Act demonstrate that the Miseño were either federally recognized or under federal jurisdiction, mere payment under the act does not constitute federal recognition or the status of being under federal jurisdiction. First, the language expressly limits the definition of Indians for the purposes of this Act; conversely, 25 U.S.C. § 479 provides the adequate definition for the present purpose of taking land into trust. Second, the payments under the Act were not made until well after 1934, the date required for federal

jurisdiction provided in § 479. Third, the fact remains that the commissioners never documented any contact with the Miseño which would support the conclusion that the Miseño were either recognized, or under federal jurisdiction. Therefore, the payments made under California Indians Jurisdictional Act do not demonstrate that the Miseño were under federal jurisdiction in 1934.

The Indian Claims Commission Act creates a commission to hear and adjudicate claims made by Indians against the United States. 60 Stat. 1049, 1049-56 (1946). The Secretary cited payments made under this Act to support the conclusion that the Miseño were under federal jurisdiction. However, the Act does not include a definition of “Indian” and only authorizes claims until 1946. Thus, the payments made to the Miseño may have been for claims between 1934 and 1946. The Record is not clear about claims for which those payments were made, but does clearly indicate that there was little-to-no contact between the federal government and the Miseño until the payments were made. Further, the payments were made well after 1934. Accordingly, the Secretary’s reliance on these facts to support his conclusion is arbitrary and capricious.

Finally, the ROD is arbitrary and capricious because the agency departed from its own previous interpretation of the statute. Whenever an agency departs from its prior interpretation of a statute, it must provide a reason for doing so. *Atchison*, 412 U.S. 800. In 1936, Commissioner of Indian Affairs, John Collier, interpreted the term “Indian” in the IRA to mean, “all persons of Indian decent who are members of any recognized tribe that was under Federal jurisdiction at the date of the Act.” *Carcieri*, 555 U.S. 379, 380 (quoting Letter from John Collier, Commissioner, to Superintendents (Mar. 7, 1936)). The Court in *Carcieri* did not defer to this interpretation, but did recognize that the Commissioner had interpreted the statute in that manner. The Secretary’s new interpretation of the statute is at odds with prior interpretations of the statute. The Secretary did not justify a change in definition. Furthermore, the canons of statutory construction instruct an agency and court to give effect to all parts of a statute. Accordingly, the entire clause must be read together and given its full meaning. Because the Secretary does not provide a justifiable basis for departing from its prior interpretation, the agency’s new interpretation in the ROD is arbitrary and capricious.

D. The Misoño's trust land does not fall within an exception to the Carcieri rule.

The baseline rule is that for purposes of § 479, 'now under Federal jurisdiction' refers to a tribe that was under federal jurisdiction at the time of the statute's enactment." *Carcieri*, 555 U.S. at 382. Further, "§ 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." *Id.* at 382. Lower courts have held that the Secretary may take land into trust for tribes so long as the recognition happens before the land is taken into trust. *See Confederated Tribes of the Grand Ronde Cmty. of Oregon v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016).

While the Court in *Grand Ronde* held that the Secretary could take land into trust for tribes so long as the tribe was recognized before the land was taken into trust, it relied on the fact that the Indian Gaming Regulatory Act of 1988 ("IGRA") authorizes the Secretary to take land into trust in certain situations. 25 U.S.C. § 2719(b). For instance, the Secretary may take land into trust for gaming purposes if the land is part of "the initial reservation of an Indian tribe." 25 U.S.C. § 2719(b)(1)(B)(ii). The Secretary may also take land into trust if the land has been acquired 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); *see City of Roseville v. Norton*, 348 F.3d 1020 (D.C. Cir. 2003). Before taking land into trust for gaming purposes, the Secretary must consult with the Governor of the state in concluding that gaming would be beneficial to the tribe and non-detrimental to the surrounding community. 25 C.F.R. § 151.11. Thus, an exception to *Carcieri* exists for tribes to take land into trust: the land must have been initially requested into trust for gaming purposes under IGRA.

In this case, the facts clearly show that the land had not been contemplated as an IGRA acquisition. In order to fall within an exception listed in § 2719, the Secretary should have undertaken the process of consulting with the Governor; and because the process never occurred, the land does not fall within an exception to *Carcieri*. Accordingly, the Secretary has no authority to take the land into trust because the tribe was not under federal jurisdiction in 1934.

II. Section 5 of the IRA, 25 U.S.C. § 465, is an unconstitutional exercise of Congressional authority barred by the nondelegation doctrine and the Tenth Amendment.

The Supreme Court should reach the merits of the case because Congress has granted the Secretary a power that does not conform to an intelligible principle, and therefore violates the nondelegation doctrine. When Congress confers a legislative power to an executive agency, they must adequately define who gets to exercise the power, the purpose behind it, and limit the extent of its use. *Am. Power & Light Co. v. S.E.C.*, 329 U.S. 90, 105 (1946). Congress plainly failed to meet two of these standards in drafting § 465. As a result, the Secretary has been given an unchecked power to take any land into trust on the behalf of Indians, which is an improper delegation of legislative power.

Additionally, the authority of the Secretary to place state land into trust is not written in the Constitution and supersedes the rights of the state of California. While the Indian Commerce Clause has historically granted a wide berth for Congress to manage Indian affairs, it does not mention the land into trust process. The Tenth Amendment specifically reserves those rights to the states if they have not been delegated to the federal government. U.S. Const. amend. X. As a result, courts have been willing to limit the Indian Commerce Clause when it interferes with state land or rights. The Secretary's action of placing state land into trust without California's consent erodes state sovereignty, and runs up against the threshold of the Tenth Amendment, federalism, and the equal footing doctrine.

A. 25 U.S.C. § 465 is an unconstitutional delegation of authority because it fails to provide an adequate intelligible principle for the Secretary.

The Constitution states that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” U.S. Const., art. 1, § 1. Congress violates the nondelegation doctrine when it “delegate[s] its legislative power to another branch of Government.” *Touby v. United States*, 500 U.S. 160, 165 (1991). However, “[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body . . . is directed to conform, such legislative action is not a forbidden delegation of legislative power.” *J.W. Hampton Jr., & Co. v. United States.*, 276 U.S. 394, 409 (1928). The point where Congress has created an intelligible principle has not been precisely defined; however, the Court should consider “if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.”

Mistretta v. United States, 488 U.S. 361, 372-73 (1989) (quoting *Am. Power & Light Co.*, 329 U.S. at 105). Statutes have been struck down for the legislature's failure to properly define the agency's authority in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935); or for overreliance on an ambiguous term like "fair competition" in *A.L.A. Schechter Poultry Corp. v. United States.*, 295 U.S. 495, 531 (1935). The prevailing application of the nondelegation doctrine has been decidedly liberal since these older cases. Nevertheless, the Court has reaffirmed the application of the nondelegation doctrine in a modern context. See *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 543 (1981) (REHNQUIST, J., dissenting). When the legislature delegates power to an agency, they must define the extent of its reach, and failure to do so risks an unconstitutional delegation.

§ 465 provides improperly delegated legislative power because the act does not sufficiently limit the Secretary's discretion with an intelligible principle. The act authorizes the Secretary to take on and off-reservation land into trust for Indians. Under the *Mistretta* factors, the act only satisfies the identification prong since the power is clearly assigned to the Secretary. Congress does not delineate the policy behind the action or the boundaries of the Secretary's delegated authority in § 465. The closest the act comes to providing general policy behind the delegation is that the Secretary may acquire land "for the purpose of providing land for Indians." 25 U.S.C. § 465. At best, this logic is circular. A policy should do more than restate the action that the agency has been permitted to take through legislative delegation. Other courts have claimed the general policy of the land into trust process is plain by citing the legislative history preceding the IRA. See *South Dakota v. U.S. Dept. of Interior*, 423 F.3d 790, 798 (8th Cir. 2005) (The court referred to comments made by Senator Wheeler). The policy behind the act should be apparent, rather than hidden in the legislative history. Congress is expected to provide a clear intelligible principle through "legislative act," rather than the bill's history. *J.W. Hampton Jr., & Co.*, 276 U.S. at 409. On its face, the § 465 language does not frame the policy behind the land into trust process. A party primarily relying on legislative history to demonstrate the policy of an act is standing on shaking ground. After all, "Congress . . . does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).

Furthermore, the act barely provides any stipulations on the Secretary's ability to take land into trust. The Secretary has the discretion "to acquire . . . any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the

purpose of providing land for Indians.” 25 U.S.C. § 465. This language grants unfettered discretion to the Secretary to take any land they see fit into trust. Any land can be taken into trust if done to provide “land for Indians.” *Id.* Under such broad authority, any land acquisition is defensible. Consequently, Justices of the Court have been willing to consider whether the Secretary’s authority to place lands into trust is an unconstitutional delegation of power. *Dept. of Interior v. South Dakota*, 519 U.S. 919, 920 (1996) (SCALIA, J., dissenting). When the Eighth Circuit held § 465 an invalid delegation of power under the nondelegation doctrine in *South Dakota v. U.S. Dept. of Interior*, 69 F.3d 878, 885 (8th Cir. 1995), the Department responded with a regulation on the land into process. *Dept. of Interior v. South Dakota*, 519 U.S. at 920. The Department recognized that their delegated power had not been adequately narrowed. 25 C.F.R. § 151.12 requires the Secretary publish any decision to take land into trust, and permits any party to seek judicial review of the decision. Nevertheless, this action should not override the fact that Congress has the duty to define the boundaries of an agency’s delegated power. The Court has “never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.” *Whitman*, 531 U.S. at 472. In assessing the validity of a nondelegation claim, the Court should examine the act in isolation from subsequent non-legislative changes. In fact, the Department’s self-imposed regulation demonstrates the lackluster job Congress did defining the limits on the Secretary’s discretion. Congress has the sole duty to draft an effective intelligible principle. Therefore, the Department’s relatively recent regulation cannot save § 465 from a nondelegation challenge.

B. 25 U.S.C. § 465 violates the Tenth Amendment because the right to put land into trust is not explicitly granted in the Indian Commerce Clause and is an overreach of Federal power into the state’s sovereignty.

The Indian Commerce Clause has been interpreted by the Court to grant Congress “plenary power to legislate . . . Indian affairs.” *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). Still, the power of the Indian Commerce Clause is not absolute in the face of state’s rights. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996) (holding that Congress’s complete authority over Indian affairs does not preempt state sovereign immunity). § 465 is an example of Congress exceeding its constitutional grant. The Constitution reserves all powers not delegated to the United States to the individual states. U.S. Const. amend. X. It does not

delegate Congress the right to put land into trust without permission from the state where the land is located. The concept that the Secretary can acquire land and put it into trust, thereby transferring land from state to tribal and federal jurisdiction, is contrary to federalism, the Tenth Amendment, and the equal footing doctrine.

The Tenth Amendment states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” *Id.* A natural reading of the amendment demands that any limitation on state’s rights should be clearly stated. Ambiguity should be interpreted in favor of the states and their citizens because any power not delegated to the federal government is reserved to the states. While the Indian Commerce Clause has been interpreted to give all-encompassing authority over Indian affairs to the federal government, courts have been careful about justifying wide-reaching discretion when it conflicts with the integrity of state territory. The Court has said, “Congress cannot, after statehood, reserve or convey submerged lands that ‘ha[ve] already been bestowed’ upon a State.” *Idaho v. United States*, 533 U.S. 262, 280 n.9 (2001). The Court took this notion beyond submerged territory when it suggested that Congress would “raise grave constitutional concerns if it purported to ‘cloud’ Hawaii’s title to its sovereign lands more than three decades after the State’s admission to the Union.” *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 176 (2009). The Secretary’s authority to take land into trust undermines a state’s internal jurisdiction because it allows state sovereign territory to be transferred beyond their jurisdiction without their permission.

A California court ejected the Miseño from their remaining land title in 1881. R. at 1. Thus, California has had authority over their territory since statehood. If California had the right to quiet the Miseño’s title, it is inconsistent to allow the Secretary to restore their territory rather than the state. California may restore the Miseño’s title or other land should they want; however, § 465 permits the Secretary to overreach and act unilaterally, thereby depriving California of a right they had when the Miseño were ejected. The Secretary has a policy to restore tribal lands throughout the country, and it is by no means inconsistent with federalism or the Tenth Amendment, but the current approach is improper. The Secretary should facilitate a working relationship between the Miseño and California, rather than restore the Miseño’s land base more than a century after they had last had any title.

A narrower version of this argument is found in the history between the federal government and the Miseño, or lack thereof. The Indian Affairs

agents for California did not mention the Miseño in any reports, nor the Miseño participate in any treaty between California Indian tribes or the federal government. R. at 1. Until the recognition of the Miseño in 1982, the tribe and the United States did not have a relationship, but they did with California. R. at 2. The Miseño were removed from their last village in 1881 by the state, and continued to live under state jurisdiction for the next century until they gained federal recognition. R. at 1-2. Tribal citizens of a federally recognized tribe have many rights that do not infringe on a state's rights, like health care provisions and political status, but those that affect state jurisdiction may conflict with federalism and the Tenth Amendment. In this instance, where the tribe interacted with the state instead of the federal government since statehood, the risk of infringing on California is even greater. Consequently, the Court should limit the Secretary's ability to put land into trust for newly recognized tribes because the Constitution does not delegate this power to Congress. This is especially the case when the state, rather than the federal government, has historically had jurisdiction over the tribe.

Furthermore, the equal footing doctrine stands for "the constitutional principle that all States are admitted to the Union with the same attributes of sovereignty . . . as the original 13 States." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203 (1999). This argument has been ineffective in cases dealing with treaty rights. *See id.* at 208 (holding the equal footing doctrine does not implicitly abrogate treaty rights); *Washington v. Buchanan*, 138 Wash. 2d 186, 213 (Wash. 1999) (affirming the inapplicability of treaty abrogation via the equal footing doctrine). However, the Miseño are acquiring more than treaty rights that were never abrogated. The Secretary's ROD will grant the Miseño title to land that they have not claimed since the nineteenth century, and a right that the state had extinguished. The fact that California successfully and legally removed the Miseño from the land demonstrates that this land had been regarded as the state's they were admitted to the union. To allow the Secretary to transfer the land after statehood violates the equal footing doctrine by minimizing a key element of California's sovereignty. Ultimately, § 465 is unconstitutional under federalism, the Tenth Amendment, and the equal footing doctrine because the federal government overextends their reach into what has been recognized as crucial aspects of state sovereignty.

Conclusion

For all of the foregoing reasons, the judgment made by the District Court for the Central District of California, and affirmed by the Court of Appeals for the Ninth Circuit should be reversed. The Court should prevent the Secretary from taking land into trust on the behalf of the Misesño.