ORAL ARGUMENT HELD SEPTEMBER 14, 2010

No. 09-5324

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID PATCHAK,

Plaintiff-Appellant,

v.

KENNETH LEE SALAZAR, in his official capacity as Secretary of the United States Department of the Interior; LARRY ECHO HAWK, in his official capacity as Assistant Secretary of the United States Department of the Interior,

Defendants-Appellees,

and

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS,

Intervenor Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia, Case No. 1:08-cv-1331-RJC, Hon. Richard J. Leon

INTERVENOR DEFENDANT-APPELLEE MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS' PETITION FOR REHEARING OR REHEARING EN BANC

CONLY J. SCHULTE
SHILEE T. MULLIN
FREDERICKS PEEBLES & MORGAN LLP
3610 North 163rd Plaza
Omaha, NE 68116
(402) 333-4053

SETH P. WAXMAN
EDWARD C. DUMONT
BRIAN H. FLETCHER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000

March 7, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

CASES

Page(s)

* Authorities on which Intervenor Defendant-Appellee chiefly relies are marked with asterisks.

STATUTES, REGULATIONS, AND LEGISLATIVE MATERIALS

RULE 35 STATEMENT

In January 2009, the Secretary of the Interior accepted title to a parcel of land in southwestern Michigan to be held in trust for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, also known as the Gun Lake Tribe. The Tribe now operates a casino on the property. Plaintiff David Patchak, a local resident, seeks to have the Secretary's decision to accept title to the land set aside under the Administrative Procedure Act, arguing that the Secretary erred in treating the Tribe as eligible for land acquisition under the Indian Reorganization Act of 1934 (IRA). The panel's decision to allow Patchak's suit to proceed incorrectly resolves two questions of exceptional importance:

1. Whether—as every other Circuit to consider the issue has held—the Quiet Title Act's limited waiver of sovereign immunity, which expressly excludes suits involving "trust or restricted Indian lands," also impliedly reserves immunity from APA suits that seek to divest the United States of title to Indian trust lands.

2. Whether an individual has "zone of interests" standing to challenge an Indian tribe's eligibility for benefits under the IRA solely because his interest in preventing gaming on a specific parcel of land, although otherwise unrelated to the IRA, would be incidentally advanced by a decision holding the tribe ineligible.

BACKGROUND

1. The Gun Lake Tribe descends from a band of Pottawatomi Indians that

historically lived near present-day Kalamazoo, Michigan. Although the Tribe had treaty relations with the United States in the 18th and 19th centuries, by 1836 it had been stripped of tribal lands. The Tribe nonetheless maintained its identity as a distinct community, and its tribal status was never terminated by Congress. In 1998, the Secretary confirmed that the Tribe is "entitled to the privileges and immunities available to other federally recognized historic tribes by virtue of their government-to-government relationship with the United States," 25 C.F.R. § 83.12(a). *See* 63 Fed. Reg. 56,936 (1998).

The Indian Reorganization Act grants the Secretary discretion to acquire property "for the purpose of providing land for Indians." 25 U.S.C. § 465. In 2005, the Secretary agreed to exercise this authority to acquire trust title to a 147-acre parcel of land near the Tribe's historic settlement as its only trust land. The Secretary also determined that the land was eligible for gaming under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719. In accordance with IGRA's express purposes, gaming revenue will promote self-sufficiency, a strong tribal government, and employment for the Tribe's members. *See* 25 U.S.C. § 2702(1). Conversely, without the land, the Tribe has no way to achieve these objectives.

2. State and local officials overwhelmingly supported the Tribe's plan to operate a casino (which, among other benefits, has now brought some 900 new jobs to an economically depressed community), and the Tribe negotiated a gaming

compact with Michigan's Governor and secured approval by the State Legislature and the Secretary. *See* 74 Fed. Reg. 18,397 (2009). In June 2005, however, a local group challenged the Secretary's decision under IGRA and on other grounds, but raised no claim under the IRA. That suit failed. *Michigan Gambling Opposition (MichGO) v. Norton*, 477 F. Supp. 2d 1 (D.D.C. 2007), *aff'd*, *MichGO v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1002 (2009). While it was pending, the Secretary did not take the land into trust.

In early 2008, the Supreme Court granted review in *Carcieri v. Salazar*, a suit by a State involving the statutory language defining what Indian tribes are eligible for benefits under the IRA. MichGO then sought to add that issue to its case, but this Court refused. Plaintiff David Patchak, who owns land three miles from the Tribe's parcel, then belatedly filed the present challenge to the Secretary's 2005 decision. Patchak's suit raised only a *Carcieri* claim, arguing that IRA benefits are limited to tribes that were "under Federal jurisdiction" in 1934. *See* 25 U.S.C. § 479. The Tribe intervened and moved for judgment on various grounds, including that the Tribe plainly satisfies any such requirement.

The district court denied Patchak's request for an order barring the Secretary from taking the Tribe's land into trust during his suit. In January 2009, after the Supreme Court denied review in *MichGO*, the Secretary accepted trust title to the land. The Tribe has since borrowed and invested millions of dollars to transform

an abandoned lawn-products factory into a thriving tribal gaming facility.

In February 2009, the Supreme Court held that the IRA applies only to tribes that were "under Federal jurisdiction" in 1934. *Carcieri v. Salazar*, 129 S. Ct. 1058, 1068 (2009). In August 2009, the district court declined to reach the merits of Patchak's *Carcieri* claim, holding that he "lack[ed] prudential standing to challenge Interior's authority" under the IRA. *Patckak v. Salazar*, 646 F. Supp. 2d 72, 76 (D.D.C. 2009). It explained that "[t]he purpose and intent of the IRA is to enable tribal self-determination, self-government, and self-sufficiency" and that Patchak's claimed injuries, relating to alleged effects of a gaming facility on enjoyment of his property, "could not be further divorced from these objectives." *Id.* at 77. The court also noted (*id*. at 78 n.12) that the Secretary's completed acquisition of the land put the court's continuing jurisdiction "seriously in doubt," in light of the interaction between the APA's waiver of sovereign immunity—which does not apply if another statute "expressly or impliedly forbids the relief which is sought," 5 U.S.C. § 702(2)—and the Quiet Title Act, which allows certain suits challenging title to government lands but specifically reserves immunity against suits involving "trust or restricted Indian lands," 28 U.S.C. § 2409a(a).

3. In January 2011, a panel of this Court reversed. As to sovereign immunity, the panel's opinion begins with the premise that "[t]he proper question" is, "did Patchak bring a Quiet Title Act case?" Slip op. 13. If not, it reasons, "the

Quiet Title Act does not forbid the relief Patchak seeks, and the APA has waived the government's immunity from suit." *Id.* The opinion then concludes that, although Patchak's suit seeks to force the Secretary to relinquish title to the Tribe's land, the QTA's Indian lands exception is irrelevant because Patchak "mounts no claim of ownership" himself and thus has not brought a quiet-title action. *Id.* at 14.

The panel would also reverse the district court's holding that Patchak lacks "zone of interests" standing. It does not find that Patchak's interest in preventing gaming in his community is among those Congress sought to protect in the IRA, or that allowing parties in his position to sue would systematically advance statutory goals. *See* slip op. 5-6. Instead, it appears to hold that Patchak is a "proper part[y] to enforce the IRA's restrictions" simply because his interest, although otherwise unrelated to the IRA, would be incidentally served if he could establish a violation of the statute's eligibility provisions in this particular case. *Id.* at 6. The panel also invokes an entirely different statute, reasoning that here "[t]he IRA provisions are linked to [IGRA]," and that "[t]aken together" those statutes "arguably protected Patchak from the 'negative effects' of an Indian gambling facility." *Id.* at 8.

ARGUMENT

I. The Full Court Should Review The Creation Of A Circuit Conflict Over The Interaction Between The APA And The Quiet Title Act

The panel concludes that Patchak may proceed with his challenge to the Secretary's decision to take land into trust for the Tribe despite the fact that the

Secretary has already accepted title to the land. The panel acknowledges that its holding would create a direct conflict with the well-established positions of at least three other circuits. Slip op. 18; *see Iowa Tribe of Kan. & Neb. v. Salazar*, 607 F.3d 1225, 1230-1233 (10th Cir. 2010); *Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956, 961-963 (10th Cir. 2004); *Metropolitan Water Dist. of S. Cal. v. United States*, 830 F.2d 139, 143-144 (9th Cir. 1987), *aff'd by equally divided Court*, *California v. United States*, 490 U.S. 920 (1989); *Florida Dep't of Bus. Regulation v. DOI*, 768 F.2d 1245, 1253-1255 (11th Cir. 1985). It also conflicts with *Shawnee Trail Conservancy v. USDA*, 222 F.3d 383, 387 (7th Cir. 2000), which endorses "the Ninth Circuit's broad reading of the exclusivity of the QTA." Creation of such a conflict on an important question of sovereign immunity under the APA warrants review by the full Court.

In 1976, Congress amended the APA to include a general waiver of federal immunity from suits "seeking relief other than money damages." 5 U.S.C. § 702. In so doing, however, it added a specific qualification: "Nothing herein … confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Id.* § 702(2).

The Quiet Title Act, enacted in 1972, consents to suits against the United States "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). It also expressly limits that consent,

including by specifying that "[t]his section does not apply to trust or restricted Indian lands." *Id.* This "Indian lands" exception was included at the request of the Executive Branch, which explained that the limitation "was necessary to prevent abridgement of 'solemn obligations' and 'specific commitments' that the Federal Government had made to the Indians regarding Indian lands" and that the government should not unilaterally "subject those lands to suit without the Indians' consent." *United States v. Mottaz*, 476 U.S. 834, 843 n.6 (1986).

In assessing whether the QTA is an "other statute that … expressly or impliedly forbids the relief … sought" by Patchak under the APA, the panel's opinion incorrectly reasons that unless "Patchak br[ought] a Quiet Title Act case"—*i.e.*, "an action … claiming an interest in real property contrary to the government's" (slip op. 16)—the QTA's Indian lands exception does not forbid the relief he seeks. *Id.* at 13. It is true that if Patchak *had* sought to bring such an action under the APA, the QTA and its Indian lands exception would *expressly* bar relief. *Cf. Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286 n.22 (1983) (same analysis as to QTA time limitations). But Patchak's failure to assert any ownership claim does not end the inquiry. Rather, it leads to the question whether the QTA nonetheless *impliedly* forbids relief.

"Impliedly" was added to the statute at the request of the Department of Justice, which noted that Congress had enacted earlier waivers against a general

backdrop of sovereign immunity and thus had no reason to refer expressly to any relief it did not intend to permit. H.R. Rep. No. 94-1656, at 27-28 (1976). The Department explained that such limited waivers should be read as implicitly barring any further relief in areas that Congress had addressed. *Id.* This would mean that, even after passage of the APA waiver, "in most if not all cases where statutory remedies already exist, these remedies will be exclusive." *Id*. That result would be "no distortion, but simply an accurate reflection of the legislative intent in these particular areas in which the Congress ha[d already] focused on the issue of [appropriate] relief." *Id.*; *see also* S. Rep. No. 94-996, at 27 (1976) (same). By ending its inquiry after finding that the QTA does not *expressly* bar Patchak's suit, the panel ignores this history and reads the word "impliedly" out of the statute.

Cases challenging "title to real property in which the United States claims an interest" (28 U.S.C. § 2409a(a)) were one "particular area[]" in which Congress had already "focused on the issue" of relief before enacting the general APA waiver in 1976. Indeed, the House and Senate Reports accompanying the APA waiver specifically noted that Congress enacted the QTA because it viewed plaintiffs with adverse claims to title as particularly sympathetic:

> Perhaps the only situation under recent case law, other than suits for damages, where it was fairly predictable—and intended by Congress—that a court would uphold a claim of sovereign immunity, involved disputed title to real property. The results in those cases were so obviously unjust that in 1972 … Congress enacted legislation to permit actions to quiet title to be brought against the United States.

H.R. Rep. No. 94-1656, at 8 (footnote omitted); *see also* S. Rep. No. 94-996, at 7-8 (same). Yet even as to these favored plaintiffs, the QTA retained sovereign immunity in suits involving Indian lands. And it gave no consent to suits by parties who sought to disturb government title but claimed no interest in a property themselves. *See* slip op. 19.

Congress's decision not to grant any broader waiver for cases affecting federal title is precisely the sort of implied bar contemplated by § 702(2). Moreover, through the Indian lands exception, Congress took care to protect such lands even from suits brought by plaintiffs asserting their own adverse claims—the *most* sympathetic category of claimants. "If Congress was unwilling to allow a plaintiff claiming title to land to challenge the United States' title to trust land," it is "highly unlikely Congress intended to allow a plaintiff with no claimed property rights to challenge the United States' title to trust land." *Neighbors*, 379 F.3d at 962.

The panel's opinion fails to consider these necessary implications of the QTA, concluding instead that "it is enough that the terms of the Quiet Title Act do not cover Patchak's suit." Slip op. 21. That approach contrasts sharply with the reasoning of other circuits on the precise question at issue here.[1] Those courts

[1] *See Florida*, 768 F.2d at 1254 ("Although technically the suit … is not one to quiet title, … Congress' decision to exempt Indian lands from the waiver of sovereign immunity impliedly forbids the relief sought here."); *see also Shawnee Trail*, 222 F.3d at 386 (rejecting claim that plaintiffs challenging the government's title can avoid the QTA's limits "as long as they do not seek to quiet title in

have not "extended the reach of the Quiet Title Act beyond its text" or failed to consider the APA's general policy of "easing restrictions on judicial review of agency actions." *Id.* at 20. They simply recognize that the APA itself subordinates that general policy to specific decisions Congress made elsewhere, when it limited the scope of immunity waivers in particular contexts. In so doing, other courts—unlike the panel—also respect the settled principle that waivers of sovereign immunity must be construed "'strictly in favor of the sovereign,'" *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992), resolving any ambiguity "in favor of immunity," *United States v. Williams*, 514 U.S. 527, 531 (1995).

In addition to creating a circuit conflict, the panel's decision would betray this basic principle of sovereign immunity; disregard the textual limits of § 702; and threaten just the sort of abridgement of federal commitments to Indian tribes that Congress sought to avoid in framing the QTA. It warrants further review.

II. The Panel Decision Radically Expands "Zone Of Interests" Standing

Even aside from sovereign immunity, the district court correctly held that Patchak is not within the "zone of interests" protected by the IRA. The panel's contrary holding departs from precedent in confusing and unsustainable ways. Its reasoning would effectively permit an APA suit by any party alleging Article III injury from an agency action. To the extent the panel seeks to cabin its holding at

---

themselves"); *Metropolitan Water*, 830 F.2d at 143 (rejecting claim "that the QTA does not apply here because [the plaintiff] is not seeking to quiet title in itself").

all, it engrafts onto the IRA a zone of interests based on IGRA—a different statute enacted 50 years later. Absent further review, these erroneous expansions of APA standing will distort every future zone-of-interests case.

APA plaintiffs must show they have been "adversely affected or aggrieved … within the meaning of a relevant statute." 5 U.S.C. § 702. "[T]his language establishes a regime under which a plaintiff may not sue unless he 'falls within the "zone of interests" sought to be protected by the statutory provision whose violation forms the basis for his complaint.'" *Thompson v. North Am. Stainless, LP*, 131 S. Ct. 863, 870 (2011). The plaintiff must show that he is an "intended beneficiar[y]" of a statute or that his interests, "while not in any specific or obvious sense among those Congress intended to protect, coincide with the protected interests." *Hazardous Waste Trtmt. Council v. Thomas*, 885 F.2d 918, 922 (D.C. Cir. 1989).

The IRA was enacted in 1934 "'to rehabilitate the Indian's economic life.'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973). Its "overriding purpose" was to help tribes "assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). The Act provides various benefits, including authorizing the Secretary to acquire land in trust "for the purpose of providing land for Indians." 25 U.S.C. § 465. Under *Carcieri*, the Act's benefits extend to "tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." 129 S. Ct. at 1068.

Patchak's suit seeks to enforce this definition of eligibility for IRA benefits. The only interests he claims, however, are associated with "the 'negative effects of building and operating a casino' in his community." Slip op. 8. The panel opinion does not conclude that the 1934 Congress intended to protect these alleged aesthetic, environmental, or economic interests. *See id.* at 5-6. Instead, it holds that Patchak is among those "'who in practice can be expected to police the interests that the statute protects.'" *Id.* at 6 (quoting *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C. Cir. 2005)). The panel reasons (*id.* at 8) that Patchak is an appropriate party to "police" IRA interests because denying statutory benefits to Gun Lake would happen to serve his purposes in this particular case:

> When [the IRA provision limiting benefits to tribes under federal jurisdiction in 1934] blocks Indian gaming, as Patchak claims it should have in this case, the interests of those in the surrounding community—or at least those who would suffer from living near a gambling operation—are arguably protected. And because of their interests, they are proper parties to enforce the IRA's restrictions.

This reasoning would effectively eliminate the zone-of-interests test. Any plaintiff with Article III standing has, by definition, some personal interest that would be served by prevailing in a given case. Thus, as this Court explained long ago, "a rule that gave any … plaintiff standing merely because it happened to be disadvantaged by a particular agency decision would destroy the requirement of prudential standing; any party with constitutional standing could sue." *Hazardous Waste Trtmt. Council v. EPA*, 861 F.2d 277, 283 (D.C. Cir. 1988).

Both this Court and the Supreme Court have squarely rejected this approach.[2]

A party claiming standing to "police" statutory limits thus must show that its interests coincide "systematically, not fortuitously[,] with the interests of those whom Congress intended to protect." *Hazardous Waste*, 885 F.2d at 924. It must "demonstrate that its interest and the interest served by the statute have, by their 'very nature,' an 'unmistakable' link,'" so that there is "an inevitable congruence" between them. *Mova Pharm.*, 140 F.3d at 1075 (quoting *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492-493 & n.6 (1998)).

The panel does not—and could not—find "inevitable congruence" between Patchak's interests and those generally protected by the IRA. On the contrary, his interests run directly counter to the Act's purposes of promoting tribal economic development and self-sufficiency and restoring a tribal land base depleted—or, in the Tribe's case, completely lost—by years of depredation. Indeed, his claim—that Gun Lake is not an IRA "tribe" at all—cuts to the heart of the Tribe's identity and legal status. It seeks to disrupt a government-to-government relationship clearly recognized by the United States and to make the Tribe once again landless.

---

[2] *See, e.g.*, *Air Courier Conf. of Am. v. American Postal Workers Union*, 498 U.S. 517, 524 (1991) ("This view is mistaken, for it conflates the zone-of-interests test with injury in fact."); *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 494 n.7 (1998) (rejecting view that, "in order to have standing under the APA, a plaintiff must merely have an interest in enforcing the statute in question"); *Hazardous Waste*, 861 F.2d at 283; *cf. Thompson*, 131 S. Ct. at 869-870 (contrasting "zone of interests" standing with Article III standing).

Likewise, while it is unclear exactly what specific interests Congress sought to protect by limiting IRA benefits to tribes that were "under Federal jurisdiction" in 1934, Patchak cannot claim any "inevitable congruence" between those interests and his own. He wants to stop operation of a casino. Beyond that, he is unaffected by whether the Tribe qualifies for IRA benefits, or has and uses trust land in his community for non-gaming purposes. Thus, any relationship between Patchak's interest and his (incorrect) claim about the Tribe's status in 1934 is pure happenstance. Such a "merely incidental beneficiar[y]" has no zone-of-interests standing. *National Credit Union Admin.*, 522 U.S. at 494 n.7; *see also Hazardous Waste*, 861 F.2d at 283 ("[J]udicial intervention may defeat statutory goals if it proceeds at the behest of interests that coincide only accidentally with those goals.").

In an apparent attempt to connect Patchak's gaming-specific interest to the IRA, the panel looks beyond that statute, asserting that in this case it is "linked" to IGRA (the statute that supplies standing in many gaming-related cases, as it did in *MichGO*). Slip op. 8. The panel thus disobeys the Supreme Court's clear instruction that, for zone-of-interests purposes, the "relevant statute" (5 U.S.C. § 702) "is the statute whose violation is the gravamen of the complaint." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 886 (1990); *see Air Courier*, 498 U.S. at 529 (same). The result shows the wisdom of the Court's warning that any broader "level of generality in defining the 'relevant statute' could deprive the zone-of-

interests test of virtually all meaning." *Air Courier*, 498 U.S. at 529-530.[3]

It is unclear from the panel's opinion how its invocation of IGRA to confer IRA standing relates to its earlier declaration that Patchak has "police" standing merely because success in this case would happen to serve his interests.[4] But both aspects of the opinion depart from settled precedent, and both will undoubtedly be invoked by a wide variety of future APA plaintiffs. The panel's treatment of this fundamental and recurrent issue warrants review by the full Court.

CONCLUSION

The Court should grant rehearing or rehearing en banc.

[3] In suggesting that IGRA is "linked" to the IRA (slip op. 8), the panel cites *Air Courier*, 498 U.S. at 530. The intended reference is unclear. At pages 529-530 the Court does address language from *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 396-397, 401 (1987), which might have suggested a broader view of "relevant statute." As *Air Courier* explains, *Clarke* involved "two sections of the National Bank Act" (498 U.S. at 530), one of which created an exception to the other. In that limited context, the zone-of-interests test was properly applied in light of both provisions. The IRA and IGRA bear no similar relationship to each other. They are more like the two postal statutes at issue in *Air Courier*—as to which the Court held that relying on one for standing and one on the merits, *id*. at 529, would "stretch[] the zone-of-interests test too far," *id*. at 530.

[4] The panel also briefly refers to regulations addressing the Secretary's exercise of his discretion to acquire land under the IRA. *See* slip op. 9. As the panel acknowledges, however, both the APA and the Supreme Court "require the litigant's interests to be measured by statutes not regulations." *Id.* Moreover, the rules on which the panel relies do not purport to interpret any provision of the IRA, much less the definition of eligibility for benefits that Patchak seeks to invoke.

Respectfully submitted,

/s/ Seth P. Waxman

SETH P. WAXMAN
EDWARD C. DUMONT
BRIAN H. FLETCHER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000

Attorneys for Intervenor Defendant-Appellee Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians

CONLY J. SCHULTE
SHILEE T. MULLIN
FREDERICKS PEEBLES & MORGAN LLP
3610 North 163rd Plaza
Omaha, NE 68116
(402) 333-4053

CERTIFICATE OF SERVICE

I certify that on this 7th day of March, 2011, I caused a copy of the foregoing Petition for Rehearing or Rehearing En Banc to be served electronically on the following parties via this Court's CM/ECF system:

Daniel P. Ettinger
WARNER NORCROSS & JUDD LLP
111 Lyon Street, N.W.
900 Old Kent Building
Grand Rapids, MI 49503

Attorney for Plaintiff-Appellant

Aaron P. Avila
U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
P.O. Box 23796, L'Enfant Plaza Station
Washington, D.C. 20026

Attorney for Defendants-Appellees

/s/ Seth P. Waxman
Seth P. Waxman