No. 02-

IN THE

Supreme Court of the United States

SUN PRAIRIE, A PARTNERSHIP,

Petitioner,

v.

NEAL A. McCALEB, ASSISTANT SECRETARY – INDIAN AFFAIRS, GALE A. NORTON, SECRETARY OF THE INTERIOR, ROSEBUD SIOUX TRIBE, CONCERNED ROSEBUD AREA CITIZENS, SOUTH DAKOTA PEACE AND JUSTICE CENTER, PRAIRIE HILLS AUDUBON SOCIETY, and HUMANE FARMING ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

An Indian tribe may lease land to a non-Indian party with the approval of the Secretary of the Interior or her designee pursuant to 25 U.S.C. § 415. The Secretary of the Interior must likewise approve any agreement that encumbers Indian lands for that agreement to be valid under 25 U.S.C. § 81. The question presented is:

> Once a lease of Indian lands to a non-Indian party has received federal approval under 25 U.S.C. §§ 81 and 415, does that non-Indian party have prudential standing to challenge a federal agency's attempt to void the lease by unilaterally withdrawing the previous federal approval.

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Petitioner Sun Prairie, A Partnership, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 286 F.3d 1031. The opinion of the district court (App. B) is reported at 104 F. Supp.2d 1194.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 5, 2002. The court of appeals denied a timely petition for rehearing on August 14, 2002. (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of Title 25 of the United States Code, Sections 81 and 415, are set forth in the appendix. (App. D).[1]

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1. Section 81 was revised in 2000 by Pub. L. No. 106-179, 114 Stat. 46; Section 415 was amended in 2000 by Pub. L. No. 106-216, 114 Stat. 343. Both pre- and post-revision versions are reproduced in the Appendix. While the legislative history surrounding the revision to Section 81 provides insight into the intent of Congress when it originally promulgated these statutes and how the statutes have operated in practice (as discussed and cited briefly *infra*), neither change impacts the question presented here.

STATEMENT OF THE CASE

This case involves a lease on tribal trust property between an Indian tribe – the Rosebud Sioux Tribe ("Tribe") – and a non-Indian party – Sun Prairie, A Partnership ("Sun Prairie"), which lease was federally approved as required by law. The question posed is whether a non-Indian party to such a lease has prudential standing to challenge a federal agency's attempt to void the lease, after the non-Indian party is in possession of the leased property, by unilaterally withdrawing its previous approval.

In 1998 Sun Prairie and the Tribe entered into a 15-year lease ("Lease") as part of a hog farming operation. The Lease gave effect to the agreement between the Tribe and Sun Prairie to develop up to thirteen (13) hog-raising facilities on Tribal trust land in South Dakota (the "Project"). The Project, as approved by the parties, included plans for state-of-the-art facilities, with private investment of more than $100 million and employment of over 200 permanent employees on the Rosebud reservation, which the record in the trial court reflects is a severely economically depressed area with almost 90 percent unemployment, more than 43 percent of families below the poverty level, and a per capita income of less than $7800.[2]

Because the Lease involved Indian lands as defined by Title 25 of the United States Code, the Lease was

2. *See also* U.S. Census Bureau; *Income and Poverty in 1999: 2000, (Table) GCT-P14, Data Set: Summary File 3 (SF 3); Geographic Area: United States-American Indian and Alaska Native Area, and Alaska Native Regional Corporation* (last visited November 6, 2002) <http://factfinder.census.gov/bf/_lang=en_vt_name=DEC_2000_SF3_U_GCTP14_US14_geo_id=01000US.html>

subject to approval by the Secretary of the Interior or an authorized designee (in this case the Bureau of Indian Affairs). *See, e.g.*, 25 U.S.C. §§ 1(a), 81, and 415. Acting pursuant to these statutes, the BIA approved the Lease on September 16, 1998. This approval came after the completion of environmental review under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, and the BIA's issuance and publication of a finding of no significant impact for the Project, which meant that the Project would not have a significant effect on the human environment and therefore required no further environmental review. *See* 40 C.F.R. § 1508.13. The BIA rules allow any interested party to challenge or appeal from a lease approval within 30 days, 25 C.F.R. Part 2, but no such challenge or appeal was taken by anyone.

Once the Lease approval became final, and in reliance on its rights under the approved Lease, Sun Prairie was given access to and possession of the subject property by the Tribe and immediately began work. Within the first few months, Sun Prairie spent several million dollars in constructing the first farm of the Project. Eventually, prior to the court of appeals' ruling presented here for review, Sun Prairie secured bank financing to construct a state-of-the-art agricultural facility, invested millions of dollar in private funds with no government subsidy, spent over $20 million building physical improvements, completed construction of two farms, together comprising 48 buildings with an overall capacity of 96,000 hogs at any one time, and employed tribal and non-tribal employees (reaching an average of 40 permanent employees, almost all of whom are tribal members, for ongoing

operations; and over 100 workers, mostly tribal members, during construction).[3]

On November 23, 1998, some 2½ months after the BIA's final approval of the Lease, after several million dollars had been spent, and after work on the Project was well underway, a group of Project opponents, led by animal-rights activists in California and Colorado, filed suit against the BIA in federal district court for the District of Columbia (the "D.C. litigation"). These opponents, who eventually became the Intervenor Defendants in the case below and are among the Respondents here, had participated in the Lease approval process described above by submitting comments to BIA but never challenged or appealed the Lease approval. Now, however, they sought to overturn the Lease approval and enjoin development of the Project through the D.C. litigation, alleging that NEPA procedures had not been followed. Neither the Tribe nor Sun Prairie were made parties to the D.C. suit.

The BIA filed an answer in the D.C. litigation on January 26, 1999, denying that any NEPA violations had occurred. Less than 24 hours after filing the answer, however, and after reaching an oral agreement to settle the case with the Project opponents, Kevin Gover, then-Assistant Secretary – Indian Affairs, issued a seven-sentence letter in which he claimed unilaterally to void BIA's approval of the Lease on the purported ground that the agency had failed to comply with

3. This Rosebud investment is part of a credit facility in excess of $40 million, secured by, among other things, personal guarantees of the Sun Prairie individual partners and leasehold mortgages held by several banks. The Project, when fully built, contemplates a private investment in excess of $100 million.

NEPA. (App. E). The D.C. complainants and the BIA filed a joint stipulation of dismissal without prejudice, which was entered by the district court, disposing of the D.C. litigation.

Prior to its agreement to settle with the D.C. complainants, the BIA had repeatedly urged both the Tribe and Sun Prairie to stay out of the litigation for "tactical" reasons. Sun Prairie initially honored this request but later became aware that the BIA was having settlement talks with the D.C. complainants from which Sun Prairie and the Tribe were being excluded. Sun Prairie ultimately filed a motion to intervene, but before the court could address the intervention on its merits, the BIA issued its January 27th letter claiming to void the Lease and executed the joint stipulation for dismissal. The district court then denied Sun Prairie's motion as moot concurrent with its dismissal of the D.C. litigation.

The BIA's letter purporting to "void" the previously approved Lease came without any hearing or administrative proceeding, without any notice to Sun Prairie, without any opportunity for Sun Prairie or the Tribe to participate or be heard, and without following established BIA procedures for revocation or cancellation of a lease. The regulations, 25 C.F.R. Part 162, would have required notice, an opportunity to be heard, and appeal rights.

In response to the BIA's letter purporting to void the Lease, Sun Prairie and the Tribe immediately filed suit in the U.S. District Court for the District of South Dakota. The complaint sought judicial review of the agency's action under the federal Administrative Procedure Act, 5 U.S.C. §§ 701-

706, and alleged violations of, among other things, Sections 81 and 415 of Title 25 of the United State Code.[4]

Sun Prairie and the Tribe initiated the South Dakota suit as co-plaintiffs against Mr. Gover, then-Assistant Secretary – Indian Affairs, and Bruce Babbitt, then-Secretary of the Interior (the "Federal Defendants"),[5] arguing that the Federal Defendants acted without any authority when they published the letter purporting to revoke the earlier approval, thus voiding the Lease. The Federal Defendants argued that they had "inherent authority" under 25 U.S.C. §§ 81 and 415 unilaterally to reconsider and revoke their lease approval decisions after the fact and outside of recognized statutory or regulatory procedures. Certain interest groups[6] sought and were granted leave to intervene as defendants in the district court (the "Intervenor Defendants").

After a full trial on the merits, the district court agreed with Sun Prairie and the Tribe, and entered an order that enjoined the Federal Defendants' unauthorized actions in attempting to void the Lease. The court determined that "the Assistant Secretary's actions were arbitrary, capricious,

4. Additional statutes relied upon by the Tribe and Sun Prairie included NEPA and the National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq*. The district court had jurisdiction based on 28 U.S.C. § 1331.

5. The court of appeals substituted current officeholders in the caption pursuant to Fed. R. App. P. 43(c)(2). A similar substitution has been made for this petition pursuant to this Court's Rule 35.3.

6. Concerned Rosebud Area Citizens, South Dakota Peace and Justice Center, Prairie Hills Audubon Society, and Humane Farming Association.

an abuse of discretion and otherwise not in accordance with the law," and also held that "his actions were unlawful under the doctrine of equitable estoppel, this being the rare case for the application of such doctrine against the federal government." (App. 38a). Among other things, the court found:

> [T]he Assistant Secretary's unilateral decision to void the lease, with or without authority, after the period within which to appeal had expired, without providing any findings of fact or conclusions of law to justify or explain his decision, and without extending adequate due process to plaintiffs constitutes the requisite "affirmative misconduct" [for equitable estoppel against the government]. Further affirmative misconduct occurred in the Assistant Secretary filing a pleading in federal court one day and the next day taking the very opposite position, especially after having not reviewed any significant portion of the administrative record.

See 104 F. Supp.2d at 1205-6 (App. 38a). The Federal Defendants and the Intervenor Defendants appealed the district court's permanent injunction. No stays, however, were sought by any party pending appeal; accordingly, the construction already underway on the two original farms for the Project was completed, and the farms continued to operate.

During the appeal, the Tribe moved to realign as an appellant. This occurred after a tribal election victory by a group that no longer favored the Project. Over Sun Prairie's

objection, the court of appeals granted the Tribe's realignment motion, leaving Sun Prairie as the sole plaintiff-appellee. Also on appeal, Intervenor Defendants raised for the first time the issue of Sun Prairie's prudential standing – this issue not having been raised at any time, by any party, during the district court proceedings.[7]

Argument was heard on the appeal of the permanent injunction in February 2001. Fourteen months later, on April 5, 2002, the court of appeals issued its decision, holding that Sun Prairie lacked prudential standing to challenge the BIA's action when it attempted to void the Lease. The court of appeals recognized that Sun Prairie had "considerable" interests involved, (App. 9a), that these "interests . . . are threatened by the Assistant Secretary's actions," (App. 7a), and that it was "concede[d] that Sun Prairie has satisfied the constitutionally-mandated elements of standing," (App. 6a). Nonetheless, with regard to Sun Prairie's claims under Title 25 of the United State Code, the court of appeals held that Sun Prairie lacked prudential standing because "Sun Prairie's asserted interests, while considerable, are not arguably with the zone of interest to be protected or regulated by the Indian statutes." (App. 9a). In support of this holding, the court offered the following rationale:

> Because the statutes relied upon by Sun Prairie were enacted to protect Indian interests, we believe it would be inconsistent to interpret them

7. Since it was not raised before the district court, Intervenor Defendants' prudential standing argument should not have been entertained on appeal. *See Pershing Park Villas Homeowners Ass'n v. United States Pacific Ins. Co.*, 219 F.3d 895, 899-90 (9th Cir. 2000), *citing Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 538 (9th Cir. 1995).

> as giving legally enforceable rights to non-tribal or non-governmental parties whose interests conflict with the tribes' interest.

(App. 9a).

Sun Prairie sought en banc reconsideration of this determination. Notably, the Federal Defendants (although adverse to Sun Prairie on the merits of the underlying action) agreed with the request for reconsideration of the panel's prudential standing determination, advising the court of appeals that:

> We agree that Sun Prairie possesses prudential standing under the particular statutory provisions at issue, 25 U.S.C. 81 and 415, insofar as the Secretary of the Interior has invoked the authority under these provisions to reconsider the initial lease approval. . . .
>
> . . . We believe the Court should now hold that Sun Prairie does have prudential standing.

Federal Appellants' Response to Sun Prairie's Petition for Rehearing En Banc ("Fed. En Banc Resp.") at 3, 7. Nonetheless, the court of appeals denied the petition for rehearing, with one judge dissenting. (App. C).

REASONS FOR GRANTING THE PETITION

This case presents a fundamental question concerning commercial development on Indian land: whether a non-Indian party to a federally approved lease of tribal trust land has standing to challenge federal agency actions attempting

to invalidate that lease by unilaterally withdrawing the federal approval after the non-Indian party is in possession of the leased property. The court of appeals' answer is that the non-Indian party has no standing even to assert that challenge, an answer that runs afoul of this Court's precedent (explained in more detail in Section B below). The court of appeals' decision of course has very serious consequences for Sun Prairie and others involved in the Project, including the loss of local (mostly tribal) jobs, default on over $40 million of loans, the loss of leasehold mortgages held by multiple lenders, and the ripple effect of Project shutdown on suppliers and those companies who have contracted to receive hundreds of thousands of hogs from the Project annually. Most importantly, it has grave implications for the future commercial development of tribal trust property nationwide.

I. THIS CASE CONCERNS A THRESHOLD QUESTION OF FUNDAMENTAL IMPORTANCE TO THE DEVELOPMENT OF TRIBAL TRUST PROPERTY

The Executive Branch, the U.S. Congress, tribal governments, and the private sector have worked for decades to create business-friendly environments on Indian reservations to spur economic development there. Because of a perception that many Indian tribal governments do not have the legal infrastructure to make agreements enforceable and to guard against unreasonable regulation of business operations, many in the private sector have been reluctant to invest in and do business on Indian lands. In response, federal and tribal governments have encouraged the adoption of tribal laws and the establishment of dispute resolution mechanisms and reliable regulatory schemes. These actions have begun

to elicit a belated but growing infusion of private sector capital and commercial activity on Indian reservations in recent years. This economic development approach has been a bipartisan federal policy for the past several decades, and strong support for Indian reservation economic development continues to be a keystone of that policy.[8]

In addition to Executive Branch policy, several statutes specifically charge the United States with the duty of fostering and supporting economic development on Indian reservations. *See* Indian Reorganization Act, 25 U.S.C. §§ 461 *et seq.*; Indian Financing Act, 25 U.S.C. §§ 1451 *et seq.*; Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*; Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 *et seq.*; Native American Housing Assistance and Self-Determination Act, 25 U.S.C. § 4101; Native American Business Development, Trade Promotion, and Tourism Act of 2000, 25 U.S.C. §§ 4301 *et seq.*

The Native American Business Development, Trade Promotion, and Tourism Act of 2000 is the most recent statement of the federal policy favoring economic development on Indian lands. It expressly recognizes that the interests of private sector partners of Indian tribes are among the interests to be protected. In this Act, Congress found that –

> (T)he capacity of Indian tribes to build strong and vigorous economies is hindered by the inability

8. *See, e.g.*, Presidential Proclamation No. 7500, 3 C.F.R. 305, 306 (2001) ("My Administration will continue to work . . . to provide Native Americans with new economic and educational opportunities. . . . We will . . . help to stimulate economic development in reservation communities.").

> of Indian tribes to engage communities that surround Indian lands and outside investors in economic activities on Indian lands.

25 U.S.C. § 4301(a)(7).

Congress in the same Act declared as federal Indian policy that –

> (T)he United States has an obligation to assist Indian tribes with the creation of appropriate economic and political conditions with respect to Indian lands to – (A) encourage investment from outside sources that do not originate with the tribes; and (B) facilitate economic ventures with outside entities that are not tribal entities;
>
> (T)he economic success and material well-being of Native American communities depends on the combined efforts of the Federal government, tribal governments, the private sector, and individuals. . . .

25 U.S.C. § 4301(a)(9-10).

Congress declared that the purpose of this Act was –

> (1) To revitalize economically and physically distressed Native American economies by – (A) encouraging the formation of new businesses by eligible entities, and the expansion of existing businesses; and (B) facilitating the movement of goods to and from Indian lands and the provision of services by Indians.

> (2) To promote private investment in the economies of Indian tribes. . . .

25 U.S.C. § 4301(b)(1-2).

Clearly, it is in the interest of both the United States and of the Indian tribes to promote the reliability, predictability, and enforceability of commercial agreements between non-Indian investors and Indian tribes.

In the instant case, the court of appeals' decision has severely undermined all of these efforts in a stunningly ironic fashion. Instead of tribal law or tribal courts failing a non-Indian investor, it is federal law and the federal courts that cannot be relied upon even to provide a forum for a challenge to unilateral action taken by federal officials. As a consequence, prudent private sector financial interests will not venture near Indian reservations if the conduct of business thereon is conditioned on a federal approval, since, under the court of appeals' ruling, that approval can be removed at the arbitrary and capricious whim of a federal official, without legal cause or authority, without notice and due process, and with no accountability to law or policy.

Because the court of appeals' ruling directly undermines federal policy, it is important. Because, as the next section will show, the decision is based on a failure to follow this Court's precedents, it is precisely the type of important lower court decision which this Court should review.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S PRECEDENT

This Court has explained that "[t]he question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). All concede that Sun Prairie has constitutional standing under Article III. The sole question presented is whether Sun Prairie has prudential standing.

For prudential standing, a plaintiff who challenges government action under the Administrative Procedure Act, 5 U.S.C. § 702, must state an interest "arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." *See Ass'n of Data Processing Service Orgs. Inc. v. Camp*, 397 U.S. 150, 153 (1970). The "arguably protected by" and "arguably regulated by" prongs of the test are disjunctive, and a party can gain standing by satisfying either. *See, e.g., Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 922 (D.C. Cir. 1989). The zone of interest test "is not meant to be especially demanding." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987).

With respect to Sun Prairie's standing under Title 25, the court of appeals misapplied the "zone of interest" test in at least two respects: (1) it ignored the "arguably regulated by" prong of the zone of interest analysis, and (2) it failed to consider the interests of Sun Prairie, which are protected under the statute.

A. Sun Prairie Has Standing As A Regulated Party

A party regulated under a statute has standing to challenge decisions made under that statute. *See Data Processing*, 397 U.S. at 153. The rationale for this ruling is clear:

> As a general matter, there are two types of parties with the right incentives to police an agency's enforcement of the laws it administers. First, those whom the agency regulates have the incentive to guard against any administrative attempt to impose a greater burden than that contemplated by Congress. Second, those whom the agency was supposed to protect have the incentive to ensure that the agency protects them to the full extent intended by Congress.

Hazardous Waste Treatment Council, 885 F.2d at 922, *citing Clarke*, 479 U.S. at 397, 399.

At the heart of the prudential standing analysis at issue here is the difference between a "would-be" lessee – that is, a non-Indian party seeking to enter into a lease controlled by 25 U.S.C. §§ 81 and 415 but not yet approved – and an "actual" lessee – a party that has entered a lease after all appropriate governmental approvals. Some jurisdictions have found that a "would-be" lessee lacks prudential standing to challenge a decision by the Department of Interior not to approve a lease on Indian lands. *See, e.g., Sessions Inc. v. Morton*, 348 F. Supp. 694, 700 (C.D. Cal. 1972), *judgment aff'd*, 491 F.2d 854 (9th Cir. 1974).

Once the lease is approved, however, that status changes fundamentally. At that point the non-Indian party has become an actual lessee and is therefore actually regulated by the suite of statutes and regulations that control the lease (including, in this circumstance, Sections 81 and 415 of Title 25 of the United States Code, and 25 C.F.R. Part 162). Under Title 25, a non-Indian entity must obtain a BIA-approved lease before taking possession of tribal trust land. The BIA then ensures, through its powers to inspect and to enforce, that both parties comply with the lease terms; BIA rules also set forth requirements the agency must follow to revoke or cancel a lease.[9]

These laws and regulations provide both Indian and non-Indian parties with a process to assure compliance with the lease and set forth procedural and substantive standards that the BIA must follow in exercising its regulatory duties. (Indeed, a pernicious effect of the court of appeals' decision

9. This is true under both the pre- and post-amendment versions of §§ 81 and 415 (App. D) and the implementing regulations. *Compare* 25 C.F.R. Part 162 (1998) (providing that BIA (i) had power to enforce terms of lease and take action upon violation of lease, *see* § 162.14; (ii) could require non-Indian lessee to provide surety bond and pay fees in addition to rental payments, *see* §§ 162.5(c) and 162.13; and (iii) had oversight and approval power over subleases, assignments and other encumbrances), *with* 25 C.F.R. Part 162 (2002) (providing that BIA (i) has power to ensure non-Indian tenants meet payment obligations and operating requirements through inspection and enforcement, *see* § 162.108; and (ii) may take action to recover possession from tract occupied without appropriate authorization, *see* § 162.106). *Compare also* 25 C.F.R. Part 162 (1998) (providing that BIA, among other things, must provide (i) written notice of any violation, *see* § 162.14; (ii) a reasonable opportunity to cure or provide reasons why the lease should not be cancelled, *id.*; and (iii) written notice of appeal rights, *id.*), *with* 25 C.F.R. §§ 162.618-619 (2002) (same).

is that it encourages the BIA not to follow its own revocation and cancellation rules: under the lower court's holding, the effect of failure to follow BIA revocation and cancellation rules is to render the non-Indian party without standing to challenge the voiding of the lease, whereas, under BIA procedures, there must be notice, an opportunity to be heard, and appeal rights. *See* 25 C.F.R. Part 162.)

Sun Prairie is, in fact, not only directly regulated by the BIA under Title 25, it also has contracted with a party that is directly regulated (the Tribe). The "regulated by" prong of the test covers both those entities directly regulated *and* those who contract with regulated parties. *Cotovsky-Kaplan Physical Therapy Associates, Ltd. v. United States*, 507 F.2d 1363, 1367 (7th Cir. 1975), *quoting Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407, 422 (1942).

In sum, once BIA's lease approval has become final, the non-Indian party to the lease, just like the Indian party, is "regulated" under Title 25; both parties have an interest that the lease not be voided haphazardly by a federal agency, and both have an interest in the opportunity to be heard regarding any contemplated action to void the lease. *See Bennett*, 520 U.S. at 176; *see also Stock West Corp. v. Lujan*, 982 F.2d 1389, 1397 (9th Cir. 1993) (holding a non-Indian party to a contract controlled by § 81 had prudential standing to challenge the agency's refusal to hear the merits of its administrative appeal). It therefore follows that, once a lease has been approved, if the government later seeks to void the lease, a non-Indian party who is an actual lessee has prudential standing to defend the lease under the "arguably regulated by" prong of the zone of interest test.

The Secretary of the Interior and the Assistant Secretary – Indian Affairs, the federal officials charged with implementation of the statutes at issue, agree with this analysis, and so stated in the court below:

> [R]egardless of the fact that Sun Prairie would not have had prudential standing to challenge an initial decision not to approve the lease under the explicit terms of 25 U.S.C. §§ 81 and 415, we believe that it did have prudential standing to challenge the decision to withdraw the initial lease approval under those statutory provisions' implicit terms.

Fed. En Banc Resp. at 7.

The court of appeals simply, and impermissibly, ignored the relevant legal question,[10] namely, whether the interest of a lessee in a BIA-approved lease, as a party affected by BIA

10. None of the cases cited by the court of appeals reached or even involved the "regulated by" prong of the prudential standing analysis in a context where a non-Indian lessee sought to defend its leasehold interest after the agency's approval of the lease under § 415 had become final. *See Schmit v. Int'l Finance Management Co.*, 980 F.2d 498 (8th Cir. 1992) (plaintiff was not a party to the contract at issue); *Webster v. United States*, 823 F. Supp. 1544, 1545 (D. Mont. 1992) (same); *W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1054 (10th Cir. 1993) (contract was between private entities and no BIA approval had been given or was required); *San Xavier Dev. Auth. v. Charles*, 237 F.3d 1149, 1151-52 (9th Cir. 2001) (transaction was a sublease between non-tribal parties for which no BIA approval had been acquired); *Chuska Energy Co. v. Mobil Explor. & Produc. N. Am., Inc.*, 854 F.2d 727, 729 (5th Cir. 1988) (addressing the removal of a state-court action involving the sublease of a mineral agreement under 25 U.S.C. § 396d).

action purporting to exercise regulatory power under Title 25, is "arguably in the zone of interest that is . . . regulated by" that statute. *Data Processing*, 397 U.S. at 153. The answer is clearly yes, and the court of appeals erred in not so holding.

B. Sun Prairie Has Statutorily Protected Interests

A "protected interest" also enjoys standing under the *Data Processing* test. 397 U.S. at 153. Such an interest, however, does not equate to the concept of a "benefited party" under a statute, and only the former is required to satisfy prudential standing. For a plaintiff's interests to be "arguably within the zone of interest" there need not be an "indication of congressional purpose to benefit the would-be plaintiff." *See Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492-93 (1998) (holding that although the Federal Credit Union Act was passed to establish a place for credit unions within the country's financial market and banks were not intended beneficiaries, banks had standing to sue under the act because it impacted their economic interests). This Court has clearly defined the appropriate inquiry:

> [I]n applying the "zone of interest" test, we do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff. Instead, we first discern the interest "arguably . . . to be protected" by the statutory provision at issue; we then inquire whether the plaintiff's interests affected by the agency action in question are among them.

Id. at 492.

Here, the court of appeals found that Title 25, including specifically §§ 81 and 415, was intended to protect Native Americans, and therefore could not provide a basis for prudential standing for a non-tribal party:

> Because the statutes relied upon by Sun Prairie were enacted to protect Indian interests, we believe it would be inconsistent to interpret them as giving legally enforceable rights to non-tribal or non-governmental parties whose interests conflict with the tribes' interest.

(App. 9a). This analysis mistakenly looked exclusively at the intended beneficiaries of the statute (and even then too narrowly), not the nature of the interests arguably protected.

The legislative history of the Indian Long-Term Leasing Act, codified as amended at 25 U.S.C. §§ 396, 415-415d, evidences a strong federal intent to promote economic development on tribal land. *See, e.g.*, H.R. Rep. No. 84-1093, at 2691-92 (1955) (justifying the expansion of leasing authority, in part, by the fact that private-party lessees would be unwilling to undertake expensive improvements unless "guaranteed tenure by a long-term lease").[11] Indeed, the

11. Equally compelling is the legislative history under the recent Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. No. 106-179, 114 Stat. 46, which reiterates the policy to encourage Indian economic development and to provide for the disclosure of Indian tribal sovereign immunity in contracts. *See, e.g.*, H.R. Rep. No. 106-501 (2000), *reprinted in* 2000 U.S.C.C.A.N. 69-74.

approval considerations mandated by §§ 81 and 415 explicitly benefit and protect both the tribal and non-tribal parties to a lease.[12]

Nothing in Title 25 indicates a congressional intent to preclude review of the Assistant Secretary's action by a non-Indian party. Rather, there is "sound reason to infer," *see Clarke*, 479 U.S. at 403, from the legislative history, statutory language, and implementing regulations noted above, that Sun Prairie is among the class of plaintiffs with at least some protected interests.

In short, the court of appeals' decision – which begins and ends with the obvious, but incomplete, conclusion that Title 25 benefits Indians – ignores other critical interests protected by the statute. While §§ 81 and 415 promote tribal interests in entering into leases, they also are intended to further economic development by preventing economic dislocation in Indian lands produced by unauthorized tribal or federal actions. *Compare Bennett*, 520 U.S. at 176-77 (finding standing and noting that, in addition to preserving species, another objective of the Endangered Species Act is

12. Again, this is true under both the pre-and post-revision versions. *Compare* 25 U.S.C. § 81 (West 1998) (requiring a tribe to disclose the scope of tribal authority and reasons for exercising that authority), *with* 25 U.S.C. § 81(d)(2) (2002) (prohibiting approval unless the contract (i) provides remedies for breach of contract and (ii) discloses the tribe's ability to assert sovereign immunity or provides an express waiver of sovereign immunity) (App. 66a and 62a, respectively); *compare also* 25 U.S.C. § 415 (West 1998) (requiring that the Secretary consider the availability of a judicial forum for actions arising on leased lands and environmental effects), *with* 25 U.S.C. § 415 (West 2002) (same) (App. 68a and 64a respectively).

"to avoid the needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives"). If a private investor can claim no right to defend an approved lease that it has entered on tribal land, there can be no doubt that such dislocation will occur, for who could afford to take the risk that their approved lease could simply be voided by BIA at any time, without process and without standing to be heard to defend it?

The court of appeals' decision is in conflict with fundamental standing principles articulated by this Court, a conflict made all the more important here by the deleterious effect the decision will have on federal policy if left uncorrected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX