



## An Agricultural Law Research Article

### ***Rosebud Sioux Tribe v. McDivitt*, 286 F.3D 1031, Hog Farm Corporation in Indian Country Lacks Standing in Federal Court to Challenge BIA Action Voiding Land Lease**

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# ROSEBUD SIOUX TRIBE V. MCDIVITT, 286 F.3D 1031, HOG FARM CORPORATION IN INDIAN COUNTRY LACKS STANDING IN FEDERAL COURT TO CHALLENGE BIA ACTION VOIDING LAND LEASE

RAIN ARCHAMBEAU<sup>†</sup>

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## I. INTRODUCTION

Most tribes encourage economic development ventures on their reservations in order to alleviate poverty and create opportunities for their members. When proposed developments also threaten the natural environment, however, controversy among the tribal membership and opposition from environmental groups often results. One goal for tribes is to recruit sound economic development that will not cause significant damage to their precious lands. In this case, the Rosebud Sioux Tribal Council made a powerful and contentious decision to lease tribal trust land to a pork production company, for construction of a massive hog farm facility. This case is unique in that the tribe became realigned from plaintiff to defendant on appeal to the Eighth Circuit, indicating their ultimate opposition to the hog farm.

It is also unique in that the Assistant Secretary was acting as fiduciary to protect the tribe from its own imprudent decision. Title 25 of the United States Code was primarily enacted to assist the government in carrying out this trust duty.<sup>1</sup> The trust is derived from legislation and federal common law namely the Trade and Intercourse Act of 1790 and was further reinforced in *U.S. v. Oneida Nation of New York* and other federal cases.<sup>2</sup>

*Rosebud Sioux Tribe v. McDivitt*<sup>3</sup> was an Eighth Circuit appeal from the decision by the United States District Court for the District of South Dakota, brought by the Rosebud Sioux Tribe, the United States Department of Justice, Environment and Natural Resource Division,<sup>4</sup> Concerned Rosebud Area Citizens,<sup>5</sup> Humane Farming Association, Prairie Hills Audubon Society, and South Dakota Peace and

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1. See 25 U.S.C.A. § 1, annotation, Notes of Decisions, "Fiduciary relationship" and "Transfers within title" (stating that under the Trade and Intercourse Act of 1790, 1 Stat. 137, a fiduciary relationship is owed to Indians by the government and providing that "the United States Government assumed responsibility to protect Indians in all their land transactions except those with the United States Government itself," and citing *United States v. Oneida Nation of New York*, 477 F.2d 939, 942, 201 Ct.Cl. 546 (1973)).

2. *Oneida Nation*, 477 F.2d at 944 (reaffirming previous cases that found the Trade and Intercourse Act established a fiduciary trust duty by the federal government owed to Indians). See *infra* text 23-25 (discussing three federal cases the Eighth Circuit analyzed).

3. *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031 (8th Cir. 2002), *petition for cert. denied*, (U.S. February 24, 2003). This case is complicated because there was a title change in the case name. In the original district court case, *Rosebud Sioux Tribe v. Gover*, 104 F.Supp.2d 1194 (D.S.D. 2000) the then acting Assistant Secretary was Kevin Gover. His interim successor, James McDivitt, took his position in 2000 and the party names changed according to rule of Fed. R. App. P. 43(c)(2). On appeal to the Eighth Circuit the Rosebud Sioux Tribe became realigned from plaintiff to appellant, essentially on the same side as the Federal Appellants and Intervenor. The case name *Rosebud Sioux Tribe v. McDivitt* is misleading, as the only plaintiff on appeal was Sun Prairie, the pork production corporation.

4. The Department of Justice, Environment and Natural Resources Division appealed this case to determine whether the National Environmental Protection Act of 1969 (NEPA) 42 U.S.C. §§ 4321, 4332, providing for Bureau of Indian Affairs' (BIA) responsibility to comply with NEPA, was adequately followed for this federal action on tribal trust land. See also Federal Appellant's Eighth Circuit Brief at 4-5, *Rosebud Sioux Tribe v. Gover*, 104 F.Supp.2d 1194 (D.S.D. 2000) (Nos. 00-2468 and 00-2471) [hereinafter Federal Appellant's Eighth Circuit Brief] (explaining process for the BIA's involvement in NEPA compliance).

5. Concerned Rosebud Area Citizens (CRAC) which initiated the first litigation involved in this case, was the plaintiff in the federal district court litigation in D.C. and became one of the Intervenor in this appeal. The founders of CRAC are Oleta Medansky and Eva Iyotte, Rosebud Sioux tribal members. Their initial lawsuit in this conflict was instrumental in stopping the construction of the hog farm. In *McDivitt*, the Intervenor's attorney, James B. Dougherty, put forth the prudential standing argument that persuaded the Eighth Circuit.

Justice Center.<sup>6</sup> The district court had enjoined any interference with the further operation of the hog farm and declared the Assistant Secretary's action voiding the lease was an abuse of discretion under the Administrative Procedures Act (APA) arbitrary and capricious standards.<sup>7</sup>

A three-judge panel of the Eighth Circuit decided in favor of the tribe, Intervenor, and Federal Appellants, finding that Sun Prairie, the pork production company, lacked standing.<sup>8</sup> In reversing the district court's decision which upheld the lease, the appellate court decided this case primarily on the prudential standing questions and did not rule on Sun Prairie's APA claims.<sup>9</sup> The court ruled Sun Prairie lacked standing because its complaint was not within the zone of interests protected or regulated by the "Indian contracting and tribal land lease statutes" under title 25 of the United States Code involving contracts with non-Indian corporations.<sup>10</sup>

#### A. GROUNDS FOR DENYING STANDING

There were several bases for denying standing.<sup>11</sup> First, the court held the tribe lacked standing to sue under 25 U.S.C. §§ 1(a), 81 and 415 which imposed limitations for contracts and leases in Indian Country.<sup>12</sup> Second, the court held under the National Environmental Policy Act (NEPA) and the National Historical Preservation Act (NHPA), Sun Prairie lacked standing because it did not assert an interest in protecting the environment or cultural or historic resources.<sup>13</sup> Under the three sections of the Indian statutes, NEPA and NHPA the court held that Sun Prairie's interests were not within the "zone of interests" protected or regulated by those statutes.<sup>14</sup> Lastly, the court held the procedural harm Sun Prairie alleged did

6. CRAC, Humane Farming Association, South Dakota Peace and Justice Center, and Prairie Hills Audubon Society, are collectively the Intervenor in this litigation [hereinafter Intervenor will refer to these collective parties]. See also *Concerned Rosebud Area Citizens v. Babbitt*, 34 F.Supp.2d 775 (D.D.C. 1999) (seeking an injunction to stop the project and void the lease for lack of NEPA compliance). See also *McDivitt*, 286 F.3d at 1035 (stating the D.C. case was dismissed without prejudice by joint stipulation of the parties when the Assistant Secretary voided the lease). See also *Gover*, 104 F.Supp.2d at 1213-14.

7. *Gover*, 104 F.Supp.2d at 1204; see also *Administrative Procedure Act*, 5 U.S.C. §§ 701-706 (1946).

8. *McDivitt*, 286 F.3d at 1035.

9. *Id.*; see Appellee Sun Prairie's Eighth Circuit Brief at x-xi, *Rosebud Sioux Tribe v. Gover*, 104 F.Supp.2d 1194 (D.S.D. 2000) (Nos. 00-2468 and 00-2471) [hereinafter Appellee Sun Prairie's Eighth Circuit Brief] (including Sun Prairie's APA claims that the Assistant Secretary acted without authority, that his actions were untimely and procedurally flawed, an abuse of discretion, and that he acted arbitrarily and capriciously).

10. See 25 U.S.C. §§ 1 (a), 81, 415 [hereinafter "Indian contracting and tribal land lease statutes" refers to 25 U.S.C. §§ 1 (a), 81, 415 collectively]; see also *McDivitt*, 286 F.3d at 1037; see also *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (stating the zone of interests test).

11. *McDivitt*, 286 F.3d at 1036-37.

12. *Id.*; see also 25 U.S.C. § 1(a) (providing the Secretary of the Interior may delegate authority for decision making to the Assistant Secretary of the Interior, who may in turn delegate authority to BIA officials); § 81 (stating, in part, tribal contracts or leases involving tribal trust land that are for seven or more years must be approved by the Secretary); § 415 (stating, in part, for agricultural land leases on restricted Indian land, including trust land, no lease may be longer than twenty five years and must be approved by the Secretary).

13. *McDivitt*, 286 F.3d at 1037-39; NEPA 42 U.S.C. § 4321 *et seq.*, 40 C.F.R. §§ 1500-1508; National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*; see also Appellee Sun Prairie's Eighth Circuit Brief at 15 (stating the section numbers and claims for relief under the aforementioned statutes).

14. *McDivitt*, 286 F.3d at 1037, 1039.

not suffice to establish prudential standing.<sup>15</sup>

*McDivitt* is a significant case because of its implications for future non-Indian economic ventures in Indian Country.<sup>16</sup> Some non-Indian businesses may be reluctant to invest on reservations for fear of being denied legal enforcement of their leases.<sup>17</sup> The case also supports an evolving precedent in federal courts that in Indian Country, non-Indian companies whom execute leases with tribes, may not hide under those contractual relationships to confer standing under section 702 of the APA or Indian contracting and tribal land leasing laws; because those entities' interests are not within the "zone of interests" protected or regulated by those Indian laws.<sup>18</sup>

This casenote will analyze the zone of interests test, including the "protected by" and "regulated by" prongs. This analysis will also examine federal common law involving Indian tribes and non-Indian contracting parties and their ability to access federal courts for review of agency action under the APA.<sup>19</sup>

## II. FACTS AND PROCEDURE

### A. HOG FARM PROJECT HISTORY

This case began in the spring of 1998 when the Rosebud Sioux Tribe leased tribal trust land in Mellette County, South Dakota, to Sun Prairie for the building of a pork production facility.<sup>20</sup> The facility was designed to hold 859,000 pigs per year as a fattening site and would generate more waste than all of South Dakota's residents combined.<sup>21</sup> At the time the lease was negotiated, the Tribal Council supported the proposed hog farm, but this soon changed with the election of a new Council.<sup>22</sup>

The BIA, including all agency officials, is charged by law with the fiduciary trust duty<sup>23</sup> to review all federal actions that implicate NEPA on tribal trust lands.<sup>24</sup>

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15. *Id.* at 1040.

16. Appellee Sun Prairie's Eighth Circuit Petition for Rehearing *En Banc* at 2, (Nos. 00-2468 and 00-2471) [hereinafter Appellee Sun Prairie's Eighth Circuit Petition for Rehearing *En Banc*] (stating "[t]he ruling is diametrically opposed to the federal policy of fostering investment in Indian reservations and . . . [t]he harsh truth is the private sector has been reluctant to do business on Indian lands because of a perception that tribal governments do not have the legal infrastructure to make agreements enforceable").

17. *Id.*

18. *McDivitt*, 286 F.3d at 1036-37.

19. *See infra* text p. 25-27.

20. *Id.* at 1035.

21. Appellant Intervenor's Eighth Circuit Brief at 3, *Rosebud Sioux Tribe v. Gover*, 104 F.Supp.2d 1194 (D.S.D. 2000) (Nos. 00-2468 and 00-2471) [hereinafter Appellant Intervenor's Eighth Circuit Brief].

22. *McDivitt*, 286 F.3d at 1035.

23. The trust duty is engaged by the nature of the relationship created by the United States holding land in trust for Indians as the beneficiary. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 224-26 (1983) (holding BIA had the fiduciary duty in managing allottees' timberlands). *See also Idaho v. U.S.*, 533 U.S. 262 (2001) (providing U.S. brought suit as trustee to quiet title, against the state, to submerged lands held in trust for the tribe as beneficiary). *See also Department of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1, 11 (2001) (describing that BIA's fiduciary relationship "has been compared to one existing under a common law trust, with the United States as trustee, the Indian tribes or individuals as beneficiaries, and the property and natural resources managed by the United States as

This trust duty has been described as fiduciary when it is applied to the United States' holding of Indian land or monies in trust.<sup>25</sup> The Assistant Secretary has the trust responsibility to act as a fiduciary on behalf of tribes in matters such as these involving non-Indian contracts on tribal trust lands.<sup>26</sup> This fiduciary duty includes reviewing all leases entered into by tribes according to federal law.<sup>27</sup> The Superintendent of the Rosebud Agency BIA issued the Finding of No Significant Impact (FONSI) to facilitate the project's NEPA compliance.<sup>28</sup> NEPA compliance is invoked by a federal agency action on federal land.<sup>29</sup> Here the construction on and lease of tribal trust land constituted a federal action on behalf of the federal BIA agency.<sup>30</sup> The Tribal Council approved the lease and subsequently the BIA Aberdeen Area Director approved the lease according to NEPA and title 25 of the United States Code.<sup>31</sup> Any interested party had thirty days to appeal the BIA's administrative decision according to the BIA Manual on NEPA requirements.<sup>32</sup> All opposed missed the deadline including Intervenor and the EPA.<sup>33</sup>

## B. THE RISE OF TRIBAL OPPOSITION

Opposition to the hog farm developed within the Rosebud Reservation communities and the tribe held its biennial elections.<sup>34</sup> The new election brought

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the trust corpus" and is not in question). See also *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) (describing the fiduciary trust responsibility the government, thus BIA, owes tribes in administering Indian affairs). See also FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 220-28, 728-36 (Rennard Strickland et al. eds. 3d ed. 1982) (explaining the federal fiduciary trust responsibility). See also Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTLR 1471, 1495-97, 1478-79 (stating that "the modern form of the trust obligation is the federal government's duty to protect this separatism by protecting tribal lands, resources, and the native way of life").

24. *McDivitt*, 286 F.3d at 1034 (stating BIA's duty to review leases for NEPA compliance). See also 30 BIA Manual (BIAM), Supplement 1, NEPA Handbook [hereinafter 30 BIAM NEPA Handbook] providing guidelines for BIA's responsibility to prepare an Environmental Assessment for projects on tribal trust land which constitute a federal action). The 30 BIAM NEPA Handbook is available at the Aberdeen Area BIA Office. See also Indian Affairs Manual available at <http://library.lp.findlaw.com/library/federal/doi/pdf/59iam.pdf> (last visited November 17, 2002).

25. See *United States v. Mitchell* *supra* note 23.

26. *Gover*, 104 F.Supp.2d at 1204-05 (providing "[a] significant factor that must be weighed under the particular facts of this case is the tribal trust relationship and the need for economic development on Native American reservations"). See also *Seminole Nation*, 316 U.S. 286, 296 (stating "this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people").

27. 25 U.S.C. § 81(b) (providing that the Secretary or designee must approve all leases encumbering tribal land for more than seven years). See also 25 U.S.C. § 415 (providing that the Secretary may approve leases of tribal trust land involving farming).

28. Appellee Sun Prairie's Eighth Circuit Brief at 7.

29. 42 U.S.C. § 4332(2)(C), 40 C.F.R. §§ 1500-1508 (requiring all federal agencies to comply with NEPA and the regulations imposed by the Council on Environmental Quality). See also *Gover*, 104 F.Supp.2d at 1208 (citing 30 BIAM NEPA Handbook).

30. *McDivitt*, 286 F.3d at 1034.

31. *Id.* at 1035; see generally 30 BIAM NEPA Handbook. See also 25 U.S.C. §§ 81 and 415 (providing that the Secretary or designee must approve all tribal trust land leases with corporations).

32. *Gover*, 104 F.Supp.2d at 1201; see also 30 BIAM NEPA Handbook (stating BIA's guidelines for the thirty day administrative appeals process).

33. See also Appellee Sun Prairie's Eighth Circuit Brief at 7, 37 n.12 (stating that no appeal was taken within the thirty day timeframe).

34. *McDivitt*, 286 F.3d at 1035; see also Rosebud Sioux Tribal Constitution (on file with the Rosebud Sioux Tribe President's office) (providing that the Rosebud Sioux Tribe holds elections for

into power a Tribal Council that opposed the hog farm project.<sup>35</sup> Subsequently, in the Eighth Circuit the tribe petitioned and was granted permission to switch sides and join Federal Appellants and Intervenor to uphold the Assistant Secretary's decision voiding the lease.<sup>36</sup> The tribe sought the realignment based on community awareness of the environmental ramifications and the new Council policy and tribal referendum in opposition to the corporate hog farm.<sup>37</sup>

In the United States District Court for the District of Columbia, Concerned Rosebud Area Citizens<sup>38</sup> sought to overturn the decision by the BIA, which approved the lease, alleging violations of NEPA.<sup>39</sup> In *Concerned Rosebud Area Citizens v. Babbitt* the parties entered a "joint stipulation of dismissal" when the issue became moot by the Assistant Secretary's action to void the lease.<sup>40</sup> While the litigation in the District of Columbia was pending, the Assistant Secretary reviewed the BIA Superintendent's decision that issued the FONSI.<sup>41</sup> After review, the Assistant Secretary declared NEPA was violated because the Environmental Assessment (EA) was inadequate and a more comprehensive Environmental Impact Statement (EIS) should have been conducted.<sup>42</sup> The Assistant Secretary became persuaded to void the lease for NEPA violations when that litigation was pending and as a result of comments received from other federal and state administrators.<sup>43</sup>

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President every two years, with the primary election in August and the general election in November).

35. *McDivitt*, 286 F.3d at 1035.

36. *Id.*

37. *Id.*; see also Rosebud Sioux Tribal Referendum of tribal membership (556 voted against hog farm, 451 voted in favor) (May 2000) (on file at the Rosebud Sioux Tribe President's Office).

38. The Concerned Rosebud Area Citizens, the only plaintiff in the district court case in D.C. later became one of the Intervenor in *Gover*, 104 F.Supp.2d 1194 and *McDivitt*, 286 F.3d. 1031.

39. See *Concerned Rosebud Area Citizens*, 34 F.Supp.2d 775, 775 (seeking to determine if BIA violated NEPA when they issued the final agency action ordering the finding of no significant impact and determining whether an injunction to stop the project should be granted).

40. *Concerned Rosebud Area Citizens*, 34 F.Supp.2d at 776 (stating that "Assistant Secretary Gover's position on behalf of the Department of the Interior is that the United States will use all of its powers to cease any further construction beyond the eight buildings in progress and to prevent any operations from commencing until after plaintiffs' motion for preliminary injunction has been resolved, regardless of which court decides it"). Shortly after that case was heard Kevin Gover voided the lease. See also *Gover*, 104 F.Supp.2d at 1198 (stating that *Concerned Rosebud Area Citizens* was dismissed without prejudice).

41. Appellant Intervenor's Eighth Circuit Brief at 6; see also *infra* note 43 and accompanying text, Letter from Kevin Gover, Assistant-Secretary.

42. *McDivitt*, 286 F.3d at 1034-35; see also *infra* note 43 and accompanying text, Letter from Kevin Gover, Assistant-Secretary (stating the reasons for voiding the lease). See also *Central South Dakota Cooperative Grazing District v. Secretary of the U.S. Department of Agriculture*, 266 F.3d 889, 893 n. 3 (8th Cir. 2001) (describing that "[a]n Environmental Assessment (or EA) is a more concise document than an EIS but must provide sufficient evidence and analysis for determining whether an EIS must be prepared for the proposed action, or whether the proposed action will have no significant impact on the environment").

43. Appellant Intervenor's Eighth Circuit Brief at 4-6 (stating "[a]t this juncture BIA began seriously to reassess its views regarding the adequacy of the EA . . . BIA came to agree with the D.C. Plaintiffs that the EA was illegal, and thus that its approval of the project lease was invalid"). See also Letter from Kevin Gover, Assistant Secretary-Indian Affairs, United States Department of the Interior, Office of the Secretary, to Norman G. Wilson, President, Rosebud Sioux Tribe (Jan. 27, 1999) (on file with the BIA, Washington, D.C.) Assistant Secretary Kevin Gover writes:

As you are aware, over the past few months, the Bureau of Indian (BIA) has been working closely with the Rosebud Sioux Tribe and the Bell Farming Group to address various issues related to the environmental review, construction and operation of the Rosebud Pork Production Facility. Unfortunately, despite these cooperative efforts, I have concluded that the August 14, 1998, *Environmental Assessment for Proposed Pork Production Facility* (EA) does not fully comply with the

C. LOWER COURT DECISION IN ROSEBUD SIOUX TRIBE V. GOVER<sup>44</sup>

In *Rosebud Sioux Tribe v. Gover*, the tribe, then on the same side as Sun Prairie,<sup>45</sup> sought action in federal district court in South Dakota to challenge the Assistant Secretary's decision and authority to invalidate the lease under the doctrine of equitable estoppel<sup>46</sup> and under section 706(2)(A) of the APA.<sup>47</sup> The plaintiffs claimed the Assistant Secretary lacked statutory and regulatory authority to void the lease unilaterally and that he violated due process principles of adequate notice and hearing.<sup>48</sup> The district court decided the Assistant Secretary had acted arbitrarily and capriciously and ordered a preliminary injunction, and later a permanent injunction.<sup>49</sup> The permanent injunction enjoined the BIA and Intervenor from acting in any way that "would have the purpose or consequence of interfering or attempting to interfere with the construction or operation of the project."<sup>50</sup> The Intervenor's motion to the district court to modify its order to exclude the Intervenor from the injunction was denied.<sup>51</sup> The Intervenor sought that motion because there was no evidence they violated any law or posed a threat for interference with construction of the facility.<sup>52</sup>

The United States District Court ruled that (1) BIA was equitably estopped from reconsidering the FONSI decision;<sup>53</sup> (2) the Area BIA's initial FONSI was

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requirements of the National Environmental Policy Act (NEPA) and, therefore, is an insufficient basis for BIA's August 14, 1998, Finding of No Significant Impact (FONSI). Since BIA's approval of the *Land Lease between Rosebud Sioux Tribe and Sun Prairie* is based, in part, on the FONSI and since compliance with NEPA is a prerequisite to approving the lease, my conclusion that the EA does not fully comply with NEPA and, therefore, does not support the FONSI, consequently means that *BIA's lease approval is void*. Therefore, and regretfully, I am hereby giving notice to you that BIA's September 16, 1998, approval of the *Land Lease* is, and always has been void for failure to comply with NEPA. See *Sangre de Cristo Development Co., Inc. v. United States*, 932 F.2d 891, 894 (10th Cir. 1991). In reaching this conclusion, I want to be perfectly clear that my decision regarding BIA's lease approval is based on my conclusion that the EA does not fully comply with NEPA and does not reflect BIA's judgment of the technical or environmental soundness of the project. Since I believe this project can be designed, constructed and operated in a manner that is environmentally sound and because I continue to support the Tribe's efforts to bring economic opportunities to the reservation, I encourage you to resubmit to BIA a proposal to develop this project based on a lease arrangement with the Bell Farming Group or Sun Prairie. If you have any questions or would like to discuss this matter further, please contact me at (202) 208-7163.

*Id.* (emphasis added).

44. This case name is explained *supra* note 3.

45. *McDivitt*, 286 F.3d at 1034, 1035 (granting the tribe's realignment as Appellant, leaving Sun Prairie as sole Appellee of the district court decision, on appeal to the Eighth Circuit, due to new Tribal Council in opposition to hog farm).

46. *Gover*, 104 F.Supp.2d at 1205-06 (stating that the Assistant Secretary's decision to unilaterally void the lease after its original lease approval was arbitrary and capricious and the BIA was equitably estopped from such action).

47. *Gover*, 104 F.Supp.2d at 1203 (stating "[t]he question is whether he [Kevin Gover] properly exercised any such authority . . . [t]he standard of review to be applied is whether his decision was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'").

48. *Gover*, 104 F.Supp.2d at 1200 (stating "[a]ssistant Secretary did not follow the appropriate procedures—i.e. providing written notice to the parties and to appropriate agency personnel, requesting and reviewing the administrative record, and providing a written decision"). See also 43 C.F.R. § 4.5(C) (allowing "the Secretary and Director to assume jurisdiction over a matter or to review decisions made by lower ranking officials").

49. *Gover*, 104 F.Supp.2d at 1204, 1214 (stating Sun Prairie's order for permanent injunction against the Assistant Secretary and the Intervenor was granted).

50. *Id.* at 1213-14.

51. Appellant Intervenor's Eighth Circuit Brief at 7.

52. *Id.* at 11.

53. *Gover*, 104 F.Supp.2d at 1204.



valid and the Assistant Secretary's subsequent action voiding the lease was enjoined; (3) preparing an EIS was unnecessary; and the Area BIA decision issuing the FONSI was not "arbitrary and capricious."<sup>54</sup> *McDivitt*, the Eighth Circuit case was decided in favor of the tribe, Intervenor and Federal Appellants.<sup>55</sup> The district court's opinion was vacated and the case was remanded with directions to dismiss Sun Prairie's complaint for lack of jurisdiction.<sup>56</sup> The Appellee Sun Prairie petitioned for a rehearing from the panel and a rehearing *en banc*, which was denied and has subsequently petitioned for certiorari to the United States Supreme Court.<sup>57</sup>

### III. BACKGROUND

#### A. STANDING

Standing is defined as "the legal right of a person or group to challenge in a judicial forum the conduct of another, especially with respect to government conduct."<sup>58</sup> Federal court jurisdiction in a case such as this requires the plaintiff to establish both constitutional and prudential standing.<sup>59</sup> Constitutional standing was met in this case by satisfying constitutional Article III requirements which include demonstrating that plaintiff has "suffered injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision."<sup>60</sup> In addition to constitutional standing, prudential standing for federal court jurisdiction requires that "the interests sought to be protected are within the zone of interests meant to be protected or regulated by the statutory or constitutional guarantee in question."<sup>61</sup> Sun Prairie could not satisfy the prudential standing requirements, based partly on a series of federal cases involving non-Indian entities' contracts with Indians.<sup>62</sup>

#### B. ZONE OF INTERESTS TEST

Suits brought under the APA for judicial review of agency action must show a

54. *Id.*, at 1213-14.

55. *McDivitt*, 286F.3d at 1040.

56. *Id.* at 1035, 1040.

57. See *Rosebuds Sioux Tribe v. McDivitt*, Nos. 00-2468 and 00-2471, Order Denying Petition for Rehearing and for Rehearing *En Banc* (8th Cir. Aug. 14, 2002) [hereinafter Eighth Circuit Order Denying Rehearing]. See also *Sun Prairie v. McCaleb*, petition for cert. filed, 2002 WL 31600815, 71 USLW 3367 (U.S. Nov 12, 2002) (No. 02-751) (text not available on Westlaw) (petition on file with author) [hereinafter Petition for Cert.].

58. BARRON'S LAW DICTIONARY 460-461 (3d ed. 1991).

59. *McDivitt*, 286 F.3d at 1036; see also BLACK'S LAW DICTIONARY 1413 (7th ed. 1999) Defining standing as:

A party's right to make a legal claim or seek judicial enforcement of a duty or right. \* To have standing in federal court, a plaintiff must show (1) that the challenged conduct has caused the plaintiff actual injury, and (2) the interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question.

60. *McDivitt*, 286 F.3d at 1036 (citing U.S. CONST. art. III, § 2, cl. 1).

61. See BLACK'S LAW DICTIONARY definition *supra* note 59.

62. *McDivitt*, 286 F.3d at 1036-38; see Part IV B. Federal Common Law Interpreting Non-Indian Entities' Standing Under Title 25 of the United States Code Involving Contracts and Leases of Indian Land *infra* text of this casenote at 24-26.

violation under a separate statute.<sup>63</sup> Sun Prairie had to "show the grievance arguably" fell within the "zone of interests protected or regulated by the statutory provision invoked in the suit."<sup>64</sup> The Supreme Court first established this two prong zone of interests test in *Association of Data Processing Service Organizations v. Camp*<sup>65</sup> and *Barlow v. Collins*.<sup>66</sup> The Supreme Court has recently clarified this doctrine in the 1997 *Bennett v. Spear*<sup>67</sup> and 1998 *National Credit Administration v. First National Bank and Trust* decisions which are not inconsistent with the two prong *Data Processing* test.<sup>68</sup>

### C. SUMMARY OF SUN PRAIRIE'S PRUDENTIAL STANDING ARGUMENT

First, Sun Prairie argued it established standing because it had a protected interest based on its contractual relationship with the tribe and as a regulated party under the Indian contracting and tribal land lease statutes.<sup>69</sup> For Sun Prairie's "protected by" argument under the Indian statutes it argued that *Yavapai-Prescott Indian Tribe v. Watt*<sup>70</sup> demonstrated that non-Indian businesses have a protected interest under those statutes. The court was not persuaded by that case because the tribe brought suit and not a non-Indian party as in *McDivitt*.<sup>71</sup> For the "regulated by" argument under the Indian statutes Sun Prairie argued *Cotovsky-Kaplan Physical Therapy Association, Ltd. v. United States*,<sup>72</sup> a Seventh Circuit case involving non-Indian litigants that asserted a regulated party and those that contract with it are

63. *McDivitt*, 286 F.3d at 1036; see also APA 5 U.S.C. §§ 701-706.

64. *McDivitt*, 286 F.3d at 1036 (citing *Bennett v. Spear*, 520 U.S. 154, 162).

65. *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970) (challenging Comptroller's rules as violation of Bank Service Corporation Act of 1962).

66. *Barlow v. Collins*, 397 U.S. 159 (1970) (challenging regulations of Department of Agriculture which affected subsidy payments as exceeding department's jurisdiction). See also WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW § 10.06, at 289 (4th ed. 2000) (providing the two-part zone of interests test is conjunctive and provides that plaintiff's must allege: "1. the defendant's acts have caused plaintiff personal injury in fact-economic or otherwise; and 2. the plaintiff is arguably within the zone of interests to be protected by the statute or constitutional provision in question").

67. *Bennett*, 520 U.S. at 162-66.

68. *National Credit Union Administration v. First National Bank and Trust*, 522 U.S. 479 (1998). This case involved a close 5-4 decision. The Supreme Court relied upon *Data Processing* language and provided that "in applying the 'zone of interests' 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 interests '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.

69. *McDivitt*, 286 F.3d at 1035; see also Appellee Sun Prairie's Eighth Circuit Brief at 16-18 (stating "Sun Prairie is a signatory to the lease and has built very substantial improvements on the leased property . . . Sun Prairie has committed to a 15-year business arrangement). See also Appellee Sun Prairie's Eighth Circuit Petition for Rehearing *En Banc* at 9-10.

70. *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (9th Cir.1983) (holding that tribe may not unilaterally void a lease that Assistant Secretary approved under 25 U.S.C. § 415).

71. *Id.*

72. *Cotovsky-Kaplan Physical Therapy Association, Ltd. v. United States*, 507 F.2d 1363, 1366 (7th Cir. 1975) (involving the Secretary who regulates under Medicare statutes home health agencies, which subcontract with non-profit corporations, such as the plaintiffs, are within the zone of interests "[s]ince the 'zone of interests' test merely requires that plaintiffs' interests in contracting with nonprofit home health agencies be 'arguably' within the regulated zone under the statute, the standard is easily met in this case"). That case was distinguished because the plaintiff and the defendant had similar interests under the Medicare statutes, and in *McDivitt* under the Indian contracting statutes Sun Prairie and the Rosebud Sioux Tribe did not have the same interests, and Sun Prairie's interests were not within the zone regulated by those Indian statutes. See *McDivitt*, 286 F.3d at 1037.

within the zone of interests of a particular statute.<sup>73</sup> That case, however, did not involve the Indian statutes.<sup>74</sup>

For its "protected by" argument under NEPA and NHPA Sun Prairie argued it had significant economic interests that were entitled to consideration under NEPA, and were within the zone of interests protected under that statute.<sup>75</sup> Sun Prairie only cited the NHPA to rebut the tribe's argument that the Act had been violated.<sup>76</sup> The Eighth Circuit rejected all Sun Prairie's arguments to establish prudential standing under the APA by ruling that its interests did not fall within the zone of interests that the Indian statutes, NEPA, and NHPA sought to protect or regulate.<sup>77</sup>

#### IV. STANDING ANALYSIS IN ROSEBUD SIOUX TRIBE V. MCDIVITT

##### A. PRUDENTIAL STANDING ARGUMENTS

Sun Prairie argued that to establish prudential standing, the correct "zone of interests" test is a disjunctive two prong test including the tests for being "arguably" "protected by" and "regulated by" the statute in question.<sup>78</sup> The Eighth Circuit declared that Sun Prairie had to establish under the APA that the injury alleged fell within the "zone of interests sought to be protected by the statutory provision" in question.<sup>79</sup> Although the court relied upon the zone of interests test under *Bennett*,<sup>80</sup> which is two pronged or disjunctive, the court did not expressly rule Sun Prairie was not regulated, but did away with the "regulated by" argument by interpreting the specific statutes in question and showing the absence of non-Indian business regulation language.<sup>81</sup> The court also decided that the overriding question was whether Sun Prairie's economic interests in reversing BIA agency action were within the zone arguably protected or regulated by the legislation in question; and in this case Sun Prairie's interests were not covered, protected or regulated by that intent.<sup>82</sup> This analysis will first address the "protected by" arguments and court's analysis, then the "regulated by" argument and analysis by other courts.

73. Appellee Sun Prairie's Eighth Circuit Brief at 16.

74. *Cotovsky*, 507 F.2d 1363, 1366.

75. *McDivitt*, 286 F.3d at 1037-39.

76. Appellee Sun Prairie's Eighth Circuit Brief at 15 (stating that "[p]laintiffs asserted in their 38-page complaint that the Assistant Secretary, when he attempted to void the lease, acted in violation of . . . the NHPA). Sun Prairie asserted "[t]he Tribe's allegation that the . . . NHPA was not followed is both irrelevant and false." *Id.* at 60.

77. *McDivitt*, 286 F.3d at 1035, 1037, 1039; *see also* Appellee Sun Prairie's Eighth Circuit Brief at 17.

78. Appellee Sun Prairie's Eighth Circuit Petition for Rehearing *En Banc* at 7.

79. *McDivitt*, 286 F.3d at 1036 (citing *Bennett*, 520 U.S. at 162-63).

80. *Bennett*, 520 U.S. at 175-76 (stating "[w]hether a plaintiff's interest is 'arguably . . . protected by the statute' within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question . . . but by reference to the particular provision of law upon which the plaintiff relies").

81. *McDivitt*, 286 F.3d at 1036-37 (stating "Sun Prairie's asserted interests, while considerable, are not arguably within the zone of interests to be protected or regulated by the Indian statutes").

82. *Id.*

## B. "PROTECTED BY" AND "NATURE OF THE INTERESTS" ARGUMENT

To rule the statutes in question did not protect Sun Prairie's interests the court gave weight to the language in *Bennett* that stated plaintiff must cite as the basis for the complaint a statutory provision that protects its interests.<sup>83</sup> The court also relied on language in *Bennett* that focused on the intent of Congress which gave the court guidance when looking at the Indian legislation in question.<sup>84</sup>

Intervenors argued that when a non-Indian party seeks review of BIA's decision to approve leases and contracts with tribes under federal statutes, the non-Indian party lacks prudential standing because those laws are designed to protect Indian interests, and none of Sun Prairie's interests are within the zone of interests sought to be protected or regulated by those statutes.<sup>85</sup> Sun Prairie failed to show it was protected under title 25, section 1(a), 81, and 415 of the United States Code.<sup>86</sup> The first section simply authorizes the Secretary of the Interior, or designee, to aid in the administration of Indian laws.<sup>87</sup> The court held that under this section Sun Prairie's interests were not within the zone of interests.<sup>88</sup> Section 81 gives the Secretary of the Interior the authority to refuse to approve agreements and contracts of tribes with corporations.<sup>89</sup> That section does not address protection or regulation of the corporation, but rather only the administration of the Secretary's authority and responsibility to protect the tribal interests.<sup>90</sup> Section 415 also does not express any language implying protection or regulation of the corporation, except for the requirement that the Secretary must approve such leases involving farming of restricted Indian lands.<sup>91</sup>

The Indian statutes were clearly designed to protect only Indian tribes<sup>92</sup> and this factor outweighed Sun Prairie's argument that it satisfied the second "regulated by" prong of the zone of interests test.<sup>93</sup> Sun Prairie failed to provide persuasive case law on point supporting its argument that standing should be granted to it as a party with

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83. *Id.* at 1036.

84. *Bennett*, 520 U.S. at 163 (stating "Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated") (emphasis added).

85. Appellant Intervenors' Response to Petition for Rehearing *En Banc* at 2.

86. *McDivitt*, 286 F.3d at 1037.

87. 25 U.S.C. § 1(a).

88. *McDivitt*, 286 F.3d at 1036-37.

89. 25 U.S.C. § 81, amended by Indian Tribal Economic Development and Contracts Encouragement Act of 2000, Pub.L. No. 106-179.

90. 25 U.S.C. § 81(d) (stating "[t]he Secretary (or a designee of the Secretary) shall refuse to approve an agreement or contract that is covered under subsection (b) if the Secretary (or a designee of the Secretary) determines that the agreement or contract—(1) violates Federal law").

91. 25 U.S.C. § 415 (providing in part, "[a]ny restricted Indian lands . . . tribally . . . owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for . . . business purposes . . . as determined by said Secretary [and] [a]ll leases so granted shall be for a term of not to exceed twenty-five years").

92. *McDivitt*, 286 F.3d at 1036-37. See e.g. *In re Sanborn*, 148 U.S. 222, 227 (1893) (providing that 25 U.S.C. §§ 81, 83 were designed to protect tribes from improvident and unconscionable contracts with non-Indians).

93. *McDivitt*, 286 F.3d at 1036 (citing *Clarke v. Securities Industry Association*, 479 U.S. 388, 399 (1987) (stating "the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit").

protected interests under the zone of interests test involving Indian statutes.<sup>94</sup> The legislative history is clear that these sections of title 25 are crafted to protect tribes and tribal land.<sup>95</sup>

Sun Prairie contended that it was protected because it contracted with the tribe and that relationship of protection for the tribe under the statute extended to them.<sup>96</sup> Sun Prairie cited a Seventh Circuit decision *Cotovosky-Kaplan Physical Therapy Associates, Ltd. v. United States*, to advance this argument.<sup>97</sup> That case did not involve a tribe where the court granted standing to a non-regulated party, challenging agency regulation, that had contracted with a regulated party.<sup>98</sup> *Cotovosky* is distinguishable because the plaintiffs, who contracted with the regulated party, had similar economic interests they were advancing under a specific statutory provision.<sup>99</sup> Here, Sun Prairie's economic interest was diametrically opposed to the tribal interest in upholding the Secretary's action voiding the lease for violation of NEPA.<sup>100</sup> In *Cotovosky* the court stated "[t]o focus on whether the plaintiffs are directly regulated themselves is to read the *Data Processing* test too narrowly. The test is not whether these plaintiffs are regulated by the statute but whether the interests asserted by them arguably fall within the zone of interests regulated."<sup>101</sup> That case implied the test included not only the regulatory and protected status of the party, but also the "nature of the interests" it sought to protect.<sup>102</sup> Sun Prairie argued the zone of interests test required the court to look at the nature of the interests, which it claimed was distinguished from the intended beneficiary or protected interests test.<sup>103</sup> That is the correct characterization of the zone test, but the Eighth Circuit ruled that the nature of Sun Prairie's interests were still not protected or regulated under the statutes in question.<sup>104</sup> Although Sun Prairie

94. Sun Prairie Appellee's Eighth Circuit Brief at 17-18 (citing *Coteau Properties v. Department of Interior*, 53 F.3d 1466, 1472 (8th Cir. 1995) (providing company standing to challenge Office of Surface Mining permit approval reconsideration)). That case is distinguishable because there was no tribe involved in the litigation.

95. See 25 U.S.C.A. § 81, annotation, Notes of Decisions, "Contracts with government, contracts within section" (stating "[t]he restrictions and regulations placed upon the making of transactions with Indians by this section and §§ 82 to 84 of this title, are designed for the protection of such Indians in their dealings with other persons" and citing 18 Op. Att'y Gen. 181, 183 (1885)) (emphasis added). See also Navajo Nation Trust Land Leasing Act of 2000, Pub.L. No. 106-568 (H.R. 5528) Title XII, Section 1202 Congressional Findings and Declaration of Purposes (stating in reference to an amendment to 25 U.S.C. § 415 that the "purposes of this title [is] . . . [t]o ensure that the United States is faithfully executing its trust obligation . . . by maintaining Federal supervision through oversight of and record keeping related to leases of . . . tribal trust lands"). That statement established that the purpose of § 415 is to protect and promote self-sufficiency of Indian Nations which supports that Sun Prairie's interests are not within the legislative intent of this portion of the United States Code.

96. Appellee Sun Prairie's Eighth Circuit Petition for Rehearing *En Banc* at 8-9.

97. *Id.* (citing *Cotovosky*, 507 F.2d 1363, 1367 (quoting *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 422 (1942))).

98. *Cotovosky*, 507 F.2d at 1367.

99. See generally *Cotovosky*, 507 F.2d 1363.

100. *McDivitt*, 286 F.3d at 1036.

101. *Cotovosky*, 507 F.2d at 1366.

102. Intervenor's Response Brief to Petition for Rehearing *En Banc* at 11 n.10 (stating "[e]ven the case chiefly relied upon by Sun Prairie in this respect, *Cotovosky* . . . reveals that [it] is not a party's regulatory status, but the nature of its interests, that determine whether it has prudential standing"). See also *Cotovosky*, 507 F.2d at 1365 (stating "for we are satisfied that plaintiffs' interests, as described in their complaint, are arguably within the zone regulated by the statute") (emphasis added).

103. Appellee Sun Prairie's Eighth Circuit Petition for Rehearing *En Banc* at 12.

104. *McDivitt*, 286 F.3d at 1037.

cited *Cotovsky*, that case supported the Intervenor's claim because the nature of Sun Prairie's interests were not within the zone of interests under the provisions of title 25.<sup>105</sup>

The Eighth Circuit gave significant weight to Congress' intent regarding the interests to be protected or regulated by the Indian legislation in question and determined Sun Prairie's interests were not among those covered by the statute.<sup>106</sup> The court basically ruled that the nature of the interests is not a separate analysis but falls within the "protected by" prong of the two part analysis, because it is the interests to be protected which are the concern, not whether the parties are the beneficiaries.<sup>107</sup>

The court also relied a great deal upon *Clarke v. Securities Industry Association* to decide the "nature of the interests test."<sup>108</sup> *Clarke* specified that those with whom the administrative agency was meaning to protect are those who have the incentive to ensure the agency is fulfilling the intent of Congress.<sup>109</sup> This is another area where Sun Prairie's interests failed to line up with congressional intent in the Indian statutes, NEPA and NHPA.<sup>110</sup>

Sun Prairie asserted the "nature" of its interests was in line with that of the tribe because both parties wanted the smooth application of the laws under the Indian statutes.<sup>111</sup> It is evident by the court's denial of Sun Prairie's petition for rehearing that the court was not persuaded by that argument.<sup>112</sup> If the parties had the same interests there would not be reason for litigation.<sup>113</sup> The interests the tribe was advancing were the correct application, by the BIA as trustee, of the Indian contracting and tribal land lease statutes, NEPA and NHPA.<sup>114</sup> The court determined Sun Prairie was only seeking to protect its economic interests and had no desire to void the lease for violation of the Indian statutes, NEPA or the NHPA.<sup>115</sup> The tribe's and Sun Prairie's interests differed and Sun Prairie failed to show it had interests protected or regulated under the statutes it sought to invoke for judicial review.<sup>116</sup>

Although some cases have allowed for parties' interests to be counter to the

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105. *Id.*; see also *Cotovsky*, 507 F.2d 1365; see also *supra* note 102; see also *McDivitt*, 286 F.3d at 1036 (implying Congress' intent in the statute in question is the driving force behind the zone of interests test).

106. *McDivitt*, 286 F.3d at 1036-37.

107. *National Credit Union Administration v. First National Bank and Trust*, 522 U.S. 479, 480 (1998) (stating "[i]n applying the 'zone of interests' test, the Court does not ask whether Congress specifically intended the statute at issue to benefit the plaintiff. . . . [i]nstead, it discerns the interests 'arguably . . . to be protected' by the statutory provision and inquires whether the plaintiff's interests affected by the agency action in question are among them") (citing *Clark*, 479 U.S. 388, at 399-400).

108. *McDivitt*, 286 F.3d at 1036; *Clarke*, 479 U.S. at 399.

109. *Clarke*, 479 U.S. at 397, 399; see also *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 922 (D.C. Cir. 1984) (stating "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").

110. *McDivitt*, 286 F.3d at 1036-39.

111. Appellee Sun Prairie's Eighth Circuit Petition for Rehearing *En Banc* at 12-13.

112. See Eighth Circuit Order Denying Rehearing *supra* note 57.

113. See generally *McDivitt*, 286 F.3d 1031.

114. *Id.* at 1036-1039.

115. *Id.*

116. *Id.*

statute's overall purpose, a party must still claim a statutory provision in which its interests are protected.<sup>117</sup> Sun Prairie could not claim any such provisions.<sup>118</sup>

### C. "REGULATED BY" ARGUMENT

Sun Prairie also argued that the zone of interests test was a disjunctive two-part test and a party need only satisfy one of the two prongs, either the "regulated by" or the "protected by;" and that the court failed to recognize that it was regulated.<sup>119</sup> The test is disjunctive, but this did not save Sun Prairie.<sup>120</sup> Sun Prairie argued it was regulated by title 25 of the United States Code, and relied on *Hazardous Waste Treatment Council v. Thomas*, to prove that regulation rises to the level of protection.<sup>121</sup> In that case the D.C. Circuit Court stated, "[a] party is 'regulated' for purposes of the 'zone' test only if it is regulated by the particular regulatory action being challenged."<sup>122</sup> The regulatory action being challenged was the Secretary's voidance of the lease for violation of NEPA under 25 U.S.C. § 81.<sup>123</sup> The court seemed to infer without expressly stating that it was the tribe that was regulated and not Sun Prairie.<sup>124</sup> That case also defined two types of parties who may satisfy the two part test for prudential standing where it stated:

As 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.<sup>125</sup>

In *Hazardous Waste Treatment Council*, however, the plaintiffs were denied standing on the grounds that the party in question was not regulated or protected by the statute in question.<sup>126</sup> The Eighth Circuit did not expressly rule on whether Sun Prairie was regulated but was convinced that congressional intent and the nature of the interests were the focus of the zone of interests test.<sup>127</sup> Irrespective of whether Sun Prairie was regulated, there was no doubt to the court that the Indian statutes

117. See *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1126 (8th Cir. 1999) (providing an economic interest was considered in the zone of interests of a pro-conservation statute, because the statute had a specific provision for protecting those economic interests).

118. *McDivitt*, 286 F.3d at 1036-39.

119. Appellee Sun Prairie's Eighth Circuit Petition for Rehearing *En Banc* at 7 (stating "[t]he 'regulated by' prong of the test, moreover, covers not only those entities directly regulated but also those that contract with regulated parties") (citing *Cotovsky*, 507 F.2d at 1367).

120. *McDivitt*, 286 F.3d at 1037.

121. *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 922 (D.C. Cir. 1984). See also Appellee Sun Prairie's Eighth Circuit Brief at 16-17.

122. *Hazardous Waste Treatment Council*, 885 F.2d at 922 (quoting *Hazardous Waste Treatment Council v. U.S. EPA*, 861 F.2d 277, 284 (D.C. Cir. 1988)).

123. See 25 U.S.C. § 81(d) (stating Secretary can refuse to approve an agreement for violation of federal law, which includes NEPA). See also Assistant Secretary, Kevin Gover's Letter *supra* note 43 (stating his action to void the lease).

124. *McDivitt*, 286 F.3d at 1036 (referring to tribal interests).

125. *Hazardous Waste Treatment Council*, 885 F.2d at 927.

126. *Id.* at 921-22.

127. *McDivitt*, 286 F.3d at 1037.

under title 25 were uniquely written to protect only Indian interests and that congressional intent<sup>128</sup> outweighed any possible regulation interests under the zone test.<sup>129</sup>

The court also relied on *Clarke v. Securities Industry Association*, to assert that Sun Prairie was not a regulated party, nor were its interests marginally related to the purpose of the statute.<sup>130</sup> That case stated "[i]n cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."<sup>131</sup>

Sun Prairie also argued the Ninth Circuit case *Yavapai-Prescott Indian Tribe v. Watt*,<sup>132</sup> supported that it was a regulated party with standing under section 415, the "leases of restricted lands" statute.<sup>133</sup> The Eighth Circuit, however, found that case not on point because the tribe and not a non-Indian business was seeking review of the Assistant Secretary's action, after the tribe had unilaterally voided a lease and was overruled by the Assistant Secretary who upheld the lease.<sup>134</sup>

Although in its later brief for rehearing, Sun Prairie did point to more specific implementing regulations under title 25, it failed to do this in its initial appellate Eighth Circuit brief; hence the Eighth Circuit was not persuaded by the late argument.<sup>135</sup> Even though no case law supports Sun Prairie's argument that it was a regulated party entitled to invoke standing under sections 25 U.S.C. §§ 1(a), 81 and 415,<sup>136</sup> the implementing regulations may suggest that non-Indian businesses are "arguably" regulated under the Indian contracting and tribal land lease statutes.<sup>137</sup> Those regulations specifically outline what the BIA may do in the event the non-

128. See *Bennett*, 520 U.S. at 163; see *supra* note 84 and accompanying text. Although the court did not expressly rule that Sun Prairie was or was not regulated by the Indian statutes, it did seem to conclude that the "protected by" prong or the congressional intent of the statutes outweighed the "regulated by" prong of the test.

129. *McDivitt*, 286 F.3d at 1037 (stating "[a] non-Indian party to a contract does not have the right to employ statutory remedies enacted to protect Indian tribes and their members" (quoting *Data Processing*, 397 U.S. at 153)). See also *Western Shoshone*, 1 F.3d at 1056 (stating that "[o]f course plaintiff... is 'regulated' by § 81, but the undisputed purpose of the statute is to protect tribal lands, not... to create either administrative right of review or a contract cause of action for non-Indian contractors. Given the overtly paternalistic cast of § 81, we conclude that 'it cannot reasonably be assumed that Congress intended to permit the suit,'... by non-Indian contractors (quoting in part *Clarke*, 479 U.S. at 399)).

130. *McDivitt*, 286 F.3d at 1036 (quoting *Clarke*, 479 U.S. at 399).

131. *Clarke*, 479 U.S. at 399.

132. *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (9th Cir.1983) (holding that tribe may not unilaterally void a lease that Assistant Secretary approved under 25 U.S.C. § 415).

133. *McDivitt*, 286 F.3d at 1037; see also Appellee Sun Prairie's Eighth Circuit Brief at 18.

134. *McDivitt*, 286 F.3d at 1037.

135. Appellee Sun Prairie's Eighth Circuit Petition for Rehearing *En Banc* at 9 (stating under 25 C.F.R. § 162.104 (d) "non-Indian entity must obtain a BIA-approved lease before taking possession of tribal trust land"; under 25 C.F.R. § 162.106 "if possession is taken without a lease, BIA may take action to recover possession and 'pursue any additional remedies available under applicable law'"; under 25 C.F.R. § 162.108 "[t]hrough inspection and enforcement actions, BIA ensures that both parties to the lease comply with the requirements in their agreement"; under 25 C.F.R. § 162.618-619 "[t]he rules set forth requirements the agency must follow to revoke or cancel a lease").

136. Appellant Intervenor's Response to Petition for Rehearing *En Banc* at 8.

137. See 25 C.F.R. §§ 162.104(d), 162.108, 162.618-619, *supra* note 102.



Indian party breaches its legal obligation to the tribe.<sup>138</sup> If Sun Prairie had argued the Code of Federal Regulation's implementing regulations in its initial Appellate Eighth Circuit Brief, instead of after the ruling in its brief for rehearing, it would have been difficult for the court to rule that Sun Prairie was not regulated.<sup>139</sup> Nevertheless, even if Sun Prairie proved to be regulated, its economic interests were so in conflict with those intended to be protected and regulated under the Indian statutes that the result would not have been different.<sup>140</sup> The court was more concerned with whether the nature of the interests Sun Prairie sought to protect were within the zone to be protected by the statutes in question.<sup>141</sup>

A recent American Bar Association administrative law article sheds light upon this confusing area involving the zone of interests test and the "protected by" and "regulated by" prongs of the two prong test.<sup>142</sup> It provides:

A plaintiff who is a member of either (1) the group *directly* regulated by, or (2) the group intended as beneficiaries of, the relevant statute is indisputably within its zone of interests. Membership in either of these groups can be established by considering the particular statutory provision forming the basis of suit, even if the goals of that provision appear in tension with the overall purposes of the statute generally. Thus, a party having an economic interest in avoiding stringent environmental regulation can be within the zone of interests of a generally pro-conservation statute if he is suing to enforce a *specific provision the purpose of which* is to avoid unnecessary economic impact... as with members of the regulated and intended beneficiary communities, congruence between their *interests* and the statutory purposes can be assessed under the particular statutory provision forming the basis of their challenge, even if these interests do not align with what appear to be the statute's overall objectives.<sup>143</sup>

According to this black letter law, the Eighth Circuit decision is sound because Sun Prairie was not able to show a specific provision by which it was regulated, nor was it able to show its economic interests were within the scope of any statutory provision.<sup>144</sup> In addition, even though Sun Prairie cited implementing regulations in its Brief for Rehearing that showed it was regulated, the statutory sections cited in its original Eighth Circuit Appellate Brief were too general and did not suffice as evidence it was a regulated party.<sup>145</sup>

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138. See *supra* note 134.

139. See generally Appellee Sun Prairie's Eighth Circuit Brief; see also Eighth Circuit Petition for Rehearing *En Banc* at 9.

140. *McDivitt*, 286 F.3d at 1037.

141. *Id.* at 1037, 1039.

142. SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE OF THE AMERICAN BAR ASSOCIATION APPROVED BY THE SECTION COUNCIL, *SPECIAL FEATURE A BLACK LETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW*, 54 ADMIN. L. REV. 17, 56-57 (2002).

143. *Id.* (emphasis added).

144. *McDivitt*, 286 F.3d at 1036-39.

145. Appellee Sun Prairie's Eighth Circuit Brief at 15; see also Appellee Sun Prairie's Eighth Circuit Petition for Rehearing *En Banc* at 9; see also *McDivitt*, 286 F.3d at 1036-39 (stating specifically the court was hampered in its review of NEPA because Sun Prairie failed to cite specific provisions showing it had protected interests).

D. FEDERAL COMMON LAW INTERPRETING NON-INDIAN ENTITIES' STANDING UNDER TITLE 25 INVOLVING CONTRACTS AND LEASES OF INDIAN LAND

Although, it would seem that Sun Prairie was a regulated party under the Indian contracting and tribal trust land leasing statutes, federal case law is consistent that non-Indian corporations lack standing to sue under those statutory provisions designed to protect Indian tribes, even if they appear to be regulated under them.<sup>146</sup> The emphasis of the zone of interests test appears to be on the congressional intent of the overall statutory scheme, as a backdrop to both the "protected by" and "regulated by" prongs, especially with respect to the Indian statutes in title 25.<sup>147</sup>

The Eighth Circuit followed court decisions that interpreted standing under Indian contracting and tribal land lease statutes.<sup>148</sup> The most important cases were *Western Shoshone Business Council for and on behalf of Western Shoshone Tribe of Duck Valley Reservation v. Babbitt*,<sup>149</sup> *San Xavier Development Authority v. Charles*,<sup>150</sup> and *Schmit v. International Finance Management Co.*<sup>151</sup>

The *Western Shoshone* case supports the proposition that federal courts give more weight to the overall intent of Congress even if they find a party to be regulated.<sup>152</sup> In *Western Shoshone*, the court found the non-Indian corporation to be regulated by one of the same statutes in question in this litigation, 25 U.S.C. § 81, yet ruled that based on federal common law, the intent of Congress in enacting that legislation to protect tribes outweighed any interest the non-Indian contracting party may have to sue under the same statute.<sup>153</sup>

The Eighth Circuit also relied on *San Xavier Development Authority* which provided the "principle that a non-Indian party to a contract does not have the right to employ statutory remedies enacted to protect Indian tribes and their members."<sup>154</sup> In that case a non-Indian business, development authority, did not have standing as a

146. See *San Xavier Development Authority v. Charles*, 237 F.3d 1149, 1152-53 (9th Cir. 2001).

147. See *Clarke*, 479 U.S. 388, 400 (stating that "at bottom [under the APA] the reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed").

148. *McDivitt*, 286 F.3d at 1036-1037; see also Appellant Intervenor's Response to Petition for Rehearing *En Banc* at iii, *Rosebud Sioux Tribe v. Gover*, 104 F.Supp.2d 1194 (D.S.D. 2000) (Nos. 00-2468 and 00-2471) [hereinafter Appellant Intervenor's Response to Petition for Rehearing *En Banc*].

149. *Western Shoshone Business Council for and on behalf of Western Shoshone Tribe of Duck Valley Reservation v. Babbitt*, 1 F.3d 1052, 1055-56 (10th Cir. 1993) (holding that non-Indian business could not establish prudential standing and rejecting 'regulated by' argument in favor of Congressional intent of statute and providing 25 U.S.C. § 81 protected Indians from unconscionable and improvident contracts).

150. *San Xavier Development Authority*, 237 F.3d at 1152-53, 1154 (9th Cir. 2001) (holding that 25 U.S.C. § 416 does not confer standing to non-Indian business entity). See also *McDivitt*, 286 F.3d at 1037 n.5 (explaining § 416 is the same as § 415, except that § 415 is specific to the Rosebud Sioux Tribe, and § 416 is specific to San Xavier Tribe).

151. *Schmit v. International Finance Management Co.*, 980 F.2d 498, 498 (8th Cir. 1992) (per curiam) (providing that non-Indian corporation lacked standing challenging BIA decisions under 25 U.S.C § 81).

152. *Western Shoshone*, 1 F.3d at 1055-56; *supra* note 149.

153. *Id.* at 1055-56 (reiterating that courts have held that non-Indian corporations are not within the zone of interests sought to be protected by Congress under 25 U.S.C. § 81). See also *Schmit*, 980 F.2d 498, 498 (providing that non-Indian corporation lacked standing challenging BIA decisions under 25 U.S.C § 81).

154. *San Xavier Development Authority*, 237 F.3d 1149, 1152-53 (citing *Chuska Energy Company v. Mobil Exploration & Producing North America, Inc.*, 854 F.2d 727, 732 (5th Cir. 1988)).

lessee of allotted land, under 25 U.S.C. § 416 because its interests were not within the zone protected by that statute.<sup>155</sup>

*Schmit v. International Finance Management Co.* was a recent case from Nebraska involving a non-Indian individual, Schmit, who brought suit against a finance company alleging it did not receive the requisite approval of the Secretary of Interior to operate a bingo hall on Winnebago tribal land.<sup>156</sup> The Eighth Circuit held that Schmit did not have standing under 25 U.S.C. § 81 because his interests were not within the zone protected by that provision of the Code.<sup>157</sup>

#### E.. PRUDENTIAL STANDING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

The court easily disposed of Sun Prairie's NEPA argument for standing because the interests it sought to protect were purely economic and not environmental.<sup>158</sup> Sun Prairie argued that its economic interests were enough to support standing relying on *Friends of the Boundary Waters Wilderness v. Dombeck*.<sup>159</sup> There, plaintiffs also asserted environmental interests along with their commercial claim.<sup>160</sup> The court agreed with the Intervenor that *Dombeck* was distinguished from Sun Prairie's argument, because the plaintiffs were challenging an EIS, and in this case there was no such EIS.<sup>161</sup> If there was no EIS, then the NEPA provision entitling review of economic interests of parties was not invoked.<sup>162</sup> The specific provision invoked under NEPA must allow for economic interests to be considered.<sup>163</sup> The court also noted that Sun Prairie referred too broadly to NEPA in its Eighth Circuit Appellate Brief and did not cite a specific violation of any provision.<sup>164</sup>

Sun Prairie also cited *Robinson v. Knebel*, another Eighth Circuit case that allowed pecuniary interests in part to be considered under a NEPA challenge.<sup>165</sup> The court distinguished that case from Sun Prairie's because the plaintiffs in *Robinson* also asserted environmental claims along with their economic claims and there was an EIS in that case and only an EA here.<sup>166</sup> The Intervenor pointed out that, even if Sun Prairie could link its economic interests to an environmental concern, it would still lack standing because additional NEPA studies were not the remedy sought in

155. *San Xavier Development Authority*, 237 F.3d at 1151-53. Section 416 of title 25 is similar to section 415, in that they both involve the lease of restricted Indian lands, except that 416 is specific to the San Xavier Reservation.

156. *Schmit*, 980 F.2d 498, 498.

157. *Id.*

158. *McDivitt*, 286 F.3d at 1037.

159. Appellee Sun Prairie's Eighth Circuit Brief at 17 n. 6; *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115 (8th Cir. 1999).

160. *Dombeck*, 164 F.3d at 1125.

161. *McDivitt*, 286 F.3d at 1038.

162. *Id.* (citing *Dombeck*, 164 F.3d at 1125-26).

163. *Id.*

164. *Id.*; see also Appellee Sun Prairie's Eighth Circuit Brief at 15 (citing 42 U.S.C. §§ 4321 *et seq.*, 40 C.F.R. §§ 1500-1508).

165. *McDivitt*, 286 F.3d at 1038 (citing *Robinson v. Knebel*, 550 F.2d 422, 425 (8th Cir. 1977) (stating landowners had standing to challenge the EIS, because along with their claim for lost tillable land they also asserted an environmental claim for loss of wild game at hunting grounds)).

166. *McDivitt*, 286 F.3d at 1038 (citing *Robinson*, 550 F.2d at 425).

this appeals case.<sup>167</sup>

The court relied upon its most recent decision involving NEPA standing, *Central South Dakota Cooperative Grazing District v. Secretary of the U.S. Department of Agriculture*, which rejected a plaintiff rancher's standing argument based solely on economic interests.<sup>168</sup> The facts of the case were similar to Sun Prairie's in that a FONSI had been issued and no EIS was conducted.<sup>169</sup> The first section analyzed under NEPA in *Grazing* allowed for economic interests to be considered only when an EIS was prepared,<sup>170</sup> but because a FONSI was issued and no EIS was conducted, that section was not relevant to the plaintiffs in *Grazing* or to Sun Prairie to establish standing.<sup>171</sup> The second section of NEPA analyzed required "federal agencies to consider environmentally sound alternatives to proposed actions without reference to the human environment and, thus, to economic interests."<sup>172</sup> That section speaks for itself and allows agencies to disregard economic interests when considering alternatives to actions, and does not support Sun Prairie's claim.<sup>173</sup> The third section is a broad policy statement for the delegation of a national policy for environmental protection.<sup>174</sup> In *Grazing*, the court held this section of NEPA was too broad to imply standing, just because the party challenging an agency action sought to protect economic interests.<sup>175</sup> The court was hampered in its review of specific NEPA provisions because Sun Prairie failed to assert them; thus, the court held NEPA did not authorize standing for parties seeking to remedy commercial interests only.<sup>176</sup>

#### F. PRUDENTIAL STANDING UNDER THE NATIONAL HISTORIC PRESERVATION ACT

Sun Prairie simply failed to develop its argument under NHPA.<sup>177</sup> It did not establish that its economic interests fell within the zone of interests protected by or

167. Appellant Intervenor's Eighth Circuit Brief at 31 n.11 (stating "[e]ven if its commercial interests might somehow be advanced by additional NEPA studies, that is not a possible outcome of this litigation).

168. *McDivitt*, 286 F.3d at 1038-39 (citing *Grazing*, 266 F.3d 889, 895-97 (8th Cir. 2001) (holding grazing association lacked standing because its interests under the zone of interests test were purely economic and any asserted environmental claims were not relevant to the association's goals).

169. *Grazing*, 266 F.3d at 896; *McDivitt*, 286 F.3d at 1039.

170. *Grazing*, 266 F.3d at 896-97 (providing that where no EIS had been conducted the *Grazing District's* claim of injury to economic interests under NEPA § 4332(2)(C) could not establish standing because that section covers situations only where an EIS was conducted and § 4332(2)(E) did not call for an inquiry into the human environment or economic interests and thus the District's interests were not within the zone to establish standing).

171. *McDivitt*, 286 F.3d at 1038.

172. *Grazing*, 266 F.3d at 896 (referring to § 4332(2)(E)); *McDivitt*, 286 F.3d at 1039.

173. *Id.* at 1039.

174. *Id.* (citing 42 U.S.C. § 4331(a)).

175. *Grazing*, 266 F.3d at 895-97; see also *McDivitt*, 286 F.3d at 1039; see also 42 U.S.C. § 4331(a) (stating "it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans") (emphasis added).

176. *McDivitt*, 286 F.3d at 1039.

177. *Id.*; see also Appellee Sun Prairie's Eighth Circuit Brief at 14-15, 60 (citing NHPA 16 U.S.C. §§ 470 *et seq.*).

regulated by NHPA, which has as its purpose, historical preservation.<sup>178</sup> Sun Prairie only cited NHPA to rebut the tribe's argument that NHPA had been violated.<sup>179</sup> It cited in its Eighth Circuit Appellate Brief that it had complied with NHPA, but this did not suffice to show that it had protected interests under NHPA.<sup>180</sup>

#### G. PROCEDURAL STANDING

Sun Prairie claimed the Assistant Secretary failed to provide them with adequate notice or an opportunity to be heard based on case law for timely notice and that it should be afforded procedural standing.<sup>181</sup> The Intervenor and the tribe argued Sun Prairie was put on notice prior to the letter sent on January 27, 1999, based on knowledge of comments sent to the Assistant Secretary and its close relationship with the former Tribal President, who informed them of pending litigation.<sup>182</sup> Sun Prairie generally argued it was denied adequate notice and opportunity to be heard by the Assistant Secretary's actions and that this procedural right fell within the zone of interests protected by the statutes in question.<sup>183</sup> Not persuaded, the court, cited *Douglas County v. Babbitt*, to support its conclusion that Sun Prairie must show that those interests are within the zone protected under the claimed statutes, in addition to procedural standing, which it could not.<sup>184</sup> That case stated that the underlying interests in procedural standing must also fall within the zone of interests protected by the claimed statute.

#### V. CURRENT STATUS OF THE CASE

Sun Prairie petitioned for rehearing *en banc* on the grounds that the court ignored the "regulated by" prong of the zone of interests test and that Sun Prairie was regulated by the Indian statutes in question and had statutorily protected interests.<sup>185</sup> That petition was denied on August 14, 2002.<sup>186</sup> Sun Prairie sought a stay of the mandate and petitioned for certiorari to the United States Supreme Court.<sup>187</sup> If certiorari is granted, one of the issues for the Court to decide will be whether Sun Prairie was regulated under title 25 and whether the contractual relationship as lessee confers standing under the regulated by prong of the zone test.<sup>188</sup> If the Supreme Court denies certiorari, then the United States District Court for the District of South Dakota will be directed to dismiss the case for lack of jurisdiction and the lease will be null and void.<sup>189</sup>

178. *McDivitt*, 286 F.3d at 1039; see also Appellee Sun Prairie's Eighth Circuit Brief at 14-15, 60.

179. Appellee Sun Prairie's Eighth Circuit Brief at 60.

180. *McDivitt*, 286 F.3d at 1039; see also Appellee Sun Prairie's Eighth Circuit Brief at 14-15, 60.

181. Appellee Sun Prairie's Eighth Circuit Brief at 39.

182. Appellant Rosebud Sioux Tribe's Eighth Circuit Brief at 21-22.

183. Appellee Sun Prairie's Eighth Circuit Brief at 39; see also *McDivitt*, 286 F.3d at 1039-40.

184. *McDivitt*, 286 F.3d at 1039; *Douglas County v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir. 1995).

185. Appellee Sun Prairie's Eighth Circuit Petition for Rehearing *En Banc* at 8-14; see also Eighth Circuit Order Denying Rehearing *supra* note 57.

186. Eighth Circuit Order Denying Rehearing *supra* note 57.

187. See *Rosebud Sioux Tribe v. McDivitt*, Nos. 00-2468 and 00-247, Plaintiff Sun Prairie's Motion for Stay of Mandate (Aug. 16, 2002). See also Petition for Cert. *supra* note 57.

188. Petition for Cert. at 15-19 (on file with author).

189. *McDivitt*, 286 F.3d at 1040.

As for the fate of the hog farm project, the Rosebud Sioux Tribal President William Kindle would not comment as to further operation of the existing facility, until the Supreme Court rules on the certiorari petition.<sup>190</sup> If the Supreme Court denies certiorari one option for the tribe would be to allow the existing operations to remain and further development to full capacity to be halted. Another option for the tribe would be to evict Sun Prairie from the premises on the basis of the voided lease.

## VI. PENDING NEW LITIGATION

Back in federal district court in South Dakota a new case was filed by Sun Prairie with fourteen claims, including those for declaratory and injunctive relief against the Assistant Secretary of Indian Affairs and the Secretary of the Interior in their official capacities.<sup>191</sup> There are also supplemental claims against the Rosebud Sioux Tribe which present a sovereign immunity question.<sup>192</sup> The lease does contain an express waiver, but the tribe could argue the lease is void *ab initio*, and the waiver void, because the lease violated federal law by non-compliance with NEPA, as declared by the former Assistant Secretary.

In addition, 25 U.S.C. § 81, states that the Assistant Secretary shall refuse to approve leases if they violate federal law, or if the tribe expressly waives its sovereign immunity defense.<sup>193</sup> Here the Assistant Secretary found the lease void for violation of federal law, expressly NEPA. The outcome of this district court case will also have significant implications for non-Indian economic ventures in Indian Country, depending on the ability of alleged non-Indian aggrieved parties to recover damages for unilaterally voided leases by fiduciaries carrying out their trust responsibilities.

## VII. CONCLUSION

When a non-Indian lessee, Sun Prairie, sought review of agency BIA-action under section 702 of the Administrative Procedure Act, its interests were required to be within the zone of interests "protected" or "regulated by" a separate statute to satisfy prudential standing.<sup>194</sup> Here Sun Prairie lacked protection and was found not

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190. Telephone Interview with Rosebud Sioux Tribal President, William Kindle's Aide, Gwen Herman, (November 14, 2002).

191. See Sun Prairie's Complaint, *Sun Prairie v. Neal McCaleb* (D.S.D. Aug. 15, 2002) (CIV 02-3030).

192. *Id.* See also Land Lease and Leasehold Mortgage, Rosebud Farms Pork Production Facility, ¶ 30 (a), at 20 (Doc. No. 345-54214 and 345-54215) (on file with the Land Titles and Records Office, United States Department of the Interior, Bureau of Indian Affairs, Aberdeen Area Office) (stating tribal waiver of sovereign immunity). For a discussion on tribal sovereign immunity from suit, see generally *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978) (stating that Indian Civil Rights Act suits against the tribe are barred by its sovereign immunity). See also *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754-55 (1998) (stating "[t]o date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred . . . [n]or have we yet drawn a distinction between governmental and commercial activities of a tribe").

193. 25 U.S.C. § 81(d)(2)(C); see also Sun Prairie's Complaint, *Sun Prairie v. Neal McCaleb* (D.S.D. Aug. 15, 2002) (CIV 02-3030).

194. *McDivitt*, 286 F.3d at 1036 (citing *Preferred Risk Mutual Insurance Co. v. United States*, 86 F.3d 789, 792 (8th Cir.1996) and *Bennett*, 520 U.S. at 162-63). See also APA, 5 U.S.C. § 702.

to be regulated under specific provisions of the Indian contracting and tribal land lease statutes of title 25 of the United States Code, NHPA and NEPA.<sup>195</sup>

In the future when non-Indian businesses seek review of agency action for voiding leases approved by the Secretary of Indian Affairs, they must point to statutes which protect their interests and under which they are regulated. Those specific provisions will not likely be under the Indian contracting and tribal land lease statutes. Legislative history and federal common law support that the policy of Congress in drafting those sections of the code protects only Indian interests and not those with whom they contract.<sup>196</sup> At the core of the zone of interests test, is still the congressional intent of the legislation in question according to the Fifth, Eighth, Ninth, and Tenth Circuits and other federal courts, specifically when title 25 of the United States Code is the legislation in question.<sup>197</sup> Non-Indian businesses assume the risk of being denied access to the federal courts when seeking to enforce contracts in Indian Country under section 702 of the APA.

The most positive aspect of this case from the tribe's perspective was the Assistant Secretary of Indian Affairs' application of his fiduciary trust obligation to protect the tribe and tribal trust land from potentially environmentally damaging endeavors, including those resulting from an improvident decision by the tribe itself.<sup>198</sup> The trust obligation owed by the United States to tribes has been interpreted as a moral obligation of the highest degree.<sup>199</sup> This Eighth Circuit case demonstrates a rare accomplishment by the highest BIA official to fulfill that trust duty with success. However, this tribal victory is not without drawbacks. Some will argue that tribal sovereignty can be undermined by the Assistant Secretary's action to unilaterally void a lease against a tribe's wishes. This action by the Assistant Secretary can be interpreted as promoting the government's paternalism over tribes and undermining tribal autonomy to govern its own affairs. As of today this case ended well for the Rosebud Sioux Tribe which was successful in escaping a potentially environmentally disastrous agreement with an exploiting corporate hog farm industry.

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195. *McDivitt*, 286 F.3d at 1036-40.

196. *McDivitt*, 286 F.3d at 1036-37. For Congressional Findings and Declaration of Purposes, see 25 U.S.C.A. § 81, annotation, Notes of Decisions, *supra* note 95.

197. See *Clarke*, 479 U.S. at 399-400. Circuit Court cases involving non-Indian contracts and leases with tribes the Eighth Circuit followed: *Western Shoshone*, 1 F.3d 1052 (10th Cir. 1993); *San Xavier*, 237 F.3d 1149 (9th Cir. 2001); *Schmit*, 980 F.2d 498 (8th Cir. 1992); and *Chuska Energy Company*, 854 F.2d 727 (5th Cir. 1988).

198. See *Menominee Tribe v. United States*, 101 Ct.Cl. 22 (1944) (discussing the extent the federal government should protect tribes from their own mismanagement of tribal resources and stating "[t]he fact that the Government delegated a part of that management to the Business Committee of the tribe does not exonerate the Government from its responsibility"). The Assistant Secretary in *McDivitt* acted in the same manner as the federal government did in *Menominee*, by extending the federal trust duty to the "protection of Indians from their own improvidence." See also *Seminole*, 316 U.S. 286, 296-97.

199. See DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR. *FEDERAL INDIAN LAW CASES AND MATERIALS* 350 n.12 (3d ed. 1993) (quoting Justice Cordozo's statement that "[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior . . . [o]nly thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd"); see also FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 220-28 (Rennard Strickland et al. eds. 3d ed. 1982).