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IONE BAND OF MIWOK INDIANS

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

COUNTY OF AMADOR, CALIFORNIA, Plaintiff, vs. THE UNITED STATES DEPARTMENT OF THE INTERIOR; DIRK KEMPTHORNE, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR; CARL J. ARTMAN, ASSISTANT SECRETARY OF INDIAN AFFAIRS; and JAMES E. CASON, ASSOCIATE DEPUTY SECRETARY OF INDIAN AFFAIRS, Defendants; IONE BAND OF MIWOK INDIANS, Defendant-Intervenor.	CASE NO. 2:07-cv-00527-LKK-GGH **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS BY THE IONE BAND OF MIWOK INDIANS Fed. R. Civ. P. 12(b)(1) and 12(b)(6)** Date: December 7, 2007 Time: 10:00 am Place: Courtroom No. 4 Hon. Lawrence K. Karlton

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS BY THE IONE BAND OF MIWOK INDIANS

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I. INTRODUCTION

Amador County wants this Court to review an interlocutory legal opinion that is not final, affects nobody's rights or obligations, has no legal or practical consequences, and pursuant to which no agency has taken any action. But the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* ("APA"), precludes adjudication of such opinions, as do both the standing and ripeness doctrines. Recognizing that its case will be dismissed absent some final agency action, the County tries to persuade this Court to treat as final the Indian lands opinion issued by Defendants Artman and Cason (hereinafter the "Artman/Cason opinion").

The County employs two primary strategies in its quest to establish finality under the two-pronged *Bennett v. Spear* test for "final agency action." *See* 520 U.S. 154, 177-78 (1997). First, the County attempts to divorce the Artman/Cason opinion from the context in which it was issued (review of the Ione Band of Miwok Indians' fee-to-trust application) and the purpose it was intended to serve (assessing whether Ione's plan to use the land for gaming operations is legal), and argues that the opinion marks the consummation of an orphaned inquiry into the land's eligibility for gaming. The Artman/Cason inquiry into the land's eligibility for gaming, however, is part and parcel of the decision whether to grant the Tribe's trust application and cannot logically or legally be extracted from the process of which it is an integral part.

Amador County's second strategy is to try to invest the Artman/Cason opinion with legal force and ascribe practical legal implications to it. But the opinion standing alone has no legal force or practical legal implications. Only when there is subsequent agency action implementing the opinion can it have the consequences required for finality under *Bennett*.

Every one of the cases dealing with finality of legal opinions cited by the County (and by the Tribe and the Federal defendants) shows that unless a legal opinion alters the legal regime upon issuance, it is not "final agency action" for APA purposes until an agency takes action pursuant to the opinion that alters the legal regime or affects rights or obligations. It is the later action – and not the opinion itself – that produces the consequences required under *Bennett*, and vests the legal opinion on which it is based with finality.

The County's struggle to find finality under the present circumstances is an exercise in

futility. When, as here, an opinion does not alter any legal regime and no action has been taken pursuant to that opinion, it lacks finality. This lack of finality thwarts not only the County's APA argument, but also its arguments about standing, ripeness, and the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA").

II. ARGUMENT[1]

A. The Artman/Cason Opinion Is Not "Final Agency Action" and Thus Is Not Subject to Review under the Administrative Procedures Act.

Agency action is "final" under the APA only if two conditions are met. First, the action must "mark the 'consummation' of the agency's decision-making process[;]" it cannot be "of a . . . merely interlocutory nature." *Bennett v. Spear*, 520 U.S. at 177-78 (citation omitted). Second, it must be an action by which "'rights or obligations have been determined' or from which 'legal consequences will flow.'" *Id.* at 178 (citation omitted).

The County argues that the Artman/Cason opinion constitutes "final agency action" because it represents the culmination of a process, outlined in the Memorandum of Agreement ("MOA"), for determining whether lands qualify as "Indian lands" under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA"). This argument is conceptually flawed. The issuance of an Indian Lands Opinion ("ILO") under the MOA is not a stand-alone process. A proper understanding of the MOA and the actions it governs shows that an ILO issued to help the Secretary decide whether to take land into trust is *always* an interlocutory opinion that by definition cannot satisfy even the first prong of the *Bennett* test. *See Miami Tribe of Oklahoma v. U.S.*, 198 Fed.Appx. 686, 690 (10th Cir. 2006); *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F.Supp.2d 295, 322 (W.D.N.Y. 2007).

1. The first prong of *Bennett v. Spear* has not been satisfied: The Artman/Cason opinion does not mark the consummation of any agency's decision-making process.

In an attempt to show that the Artman/Cason opinion is the consummation of something, the County tries to redefine the context in which the opinion was issued and portray it as the end

[1] The County states as fact several *legal conclusions* which need not be accepted as true. Opp'n at 3:10-14; 3:18-19; 4:10-11. *See W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) (courts need not accept as true "legal conclusions . . . cast in the form of factual allegations").

product of an independent process. The County's redefinition, however, relies on a contorted interpretation of the MOA.

a. The MOA recognizes that Indian lands opinions solicited in the course of assessing trust applications are *interlocutory* opinions intended to assist the Secretary in making final agency decisions and taking final agency actions.

Relying on the MOA, the County asserts that the Artman/Cason opinion constitutes the DOI's "settled agency position" about the lands' status under IGRA, and therefore is final under the APA. County Opp'n at 5:16-17 ("Opp'n"). But the County ignores that an agency's reaching a position about the status of land under IGRA is not necessarily "final agency action" for purposes of APA review. The MOA itself shows that opinions about land status issued in the course of assessing a fee-to-trust application are never the final action of any agency.

As a preliminary matter, it is helpful to understand the purpose of an ILO. IGRA restricts the types of land on which Indian tribes may operate gaming, 25 U.S.C. § 2719, and ILOs analyze the status of particular land and opine on whether gaming may be operated thereon. ILOs thus assist agencies like the Department of the Interior and the National Indian Gaming Commission in making determinations and taking final actions that depend, in whole or in part, upon whether land qualifies for gaming under IGRA.

In the MOA, the Commission and Interior acknowledge that both agencies make final decisions that require an opinion on whether tribes may conduct gaming on particular lands, and that they occasionally need legal advice to help them make this determination. *See* MOA ¶ 1; §§ 1 and 2. Because both agencies' legal departments engage in essentially the same analysis when drafting these opinions, they agreed on a division of labor to cut down on duplicative research. Under the MOA, Interior's legal department drafts an ILO when Interior is entrusted with making the final decision for which the analysis is required, and the Commission's legal department drafts an ILO when the final decision is entrusted to the Commision. MOA §§ 3, 4. When complete, an ILO is provided to the Secretary of the Interior or the NIGC Chairman, as appropriate, who then proceeds to take final action on the matter for which the ILO was solicited.

Thus the MOA establishes a process by which interlocutory assessments are generated. Even when followed to completion, the MOA process produces an opinion intended to facilitate

agency decision-making on some other matter. The County's assertion that the MOA "does not prescribe any further steps for consideration of whether . . . . ." the lands qualify as "Indian lands," Opp'n at 7:11-8:2, is irrelevant because consideration of the land's status was, from its inception, an interlocutory analysis. Although the County tries to find finality in the opinion by pointing out that it is now complete, the mere fact of completion does not make the opinion "final agency action." Even agency action that is complete is not final if it is merely interlocutory in nature. *Bennett*, 520 U.S. at 178. When, as here, further agency action is required, finality is lacking and APA review is precluded.[2]

b. When determining whether an Indian lands opinion is final agency action under the APA, it is irrelevant that the inquiry used to determine whether land is "Indian lands" under IGRA is distinct from the inquiry involved in deciding whether to approve a trust application.

The County argues that because opining on the status of "Indian lands" and taking land into trust entail analyses of different federal statutes, each should be deemed a distinct "final agency action" under the APA. Opp'n at 9:16-18. Although issuing a legal opinion on "Indian lands" status may be distinct from deciding whether to take the land into trust in so far as each action entails a different legal analysis, there exist circumstances where the two inquiries are intertwined such that issuing the opinion serves as an interlocutory step in processing a fee-to-trust application. Those circumstances exist when, as here, an ILO is issued to help the Secretary decide whether to take land into trust *for gaming purposes*. Skibine Testimony at 2 ("When the [trust] acquisition is intended for gaming, consideration of the requirements of [IGRA] [is] simultaneously applied to the decision whether to take the land into trust.").[3]

When making a gaming-related trust decision, the Secretary must engage in interlocutory analysis of several factors, one of which is the land's eligibility for gaming. 25 C.F.R. §§ 151.10,

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[2] That the Artman/Cason opinion is interlocutory is evidenced not only by the MOA, but also by the Artman memorandum and Cason letter themselves, which note that they are issued as part of consideration of a trust application. The DOI's Checklist for Gaming Acquisitions, Gaming-Related Acquisitions, and IGRA Section 20 Determinations ("Checklist") also shows that the Artman/Cason opinion is an interlocutory assessment intended to aid the Secretary in taking final action on the Tribe's trust application. For purposes of brevity we refrain from discussing the Checklist but refer the Court to page 11:4-24 of the Tribe's opening brief.

[3] The Skibine Testimony is attached as Exhibit 2 to the County's Request for Judicial Notice.

151.11. After analyzing each factor and considering them all together, the Secretary grants or denies the trust application. While each of these analyses is distinct from the general analysis used to assess the application, each is also an interlocutory component thereof.

2. The second prong of *Bennett v. Spear* has not been satisfied: The Artman/Cason opinion does not determine any rights or obligations and no legal consequences flow from it.

According to the County, two legal consequences flow from the Artman/Cason opinion. Opp'n at 10:5-6; 10:17-19. The County is wrong on both counts.

a. The Secretary has no obligation to conduct a two-part determination. Thus the Artman/Cason opinion does not free the Secretary of any obligation.

The County's assertion that the Secretary has an obligation to make a 2-part determination is wrong.[4] IGRA sets forth seven different conditions under which tribes may conduct gaming on land taken into trust after October 17, 1988 ("post-1988 land"). 25 U.S.C. § 2719. Unless one of those conditions is present, no gaming is permitted. *Id.* Of these seven conditions, six depend on specific factual circumstances relating to the status of the tribe and/or the land. *See id.* If none of those conditions is met, a tribe may still conduct gaming on post-1988 land if

> [t]he Secretary, after consult[ing] with the Indian tribe and appropriate State[] and local officials . . . determines that . . . gaming . . . [1] would be in the best interest of the Indian tribe . . . and [2] would not be detrimental to the surrounding community, but only if the Governor of the State . . . concurs . . . . *Id.* § 2719(b)(1)(A).

The Secretary's determination as to whether these two conditions are satisfied, commonly known as a two-part determination (which the County labels a "2-part analysis"), is a catch-all intended to enable tribes to conduct gaming on post-1988 land even if no other condition applies. It reflects Congress' recognition that certain factual circumstances may justify allowing gaming on post-1988 land, but that even where land is not gaming-eligible by virtue of its history and/or location, a tribe may still operate gaming on the land if the Secretary makes the requisite determination. *See* F. Cohen, Handbook of Federal Indian Law 871 (2005 ed.) (gaming may be

[4] Moreover, this argument begs the very question that the Tribe and Federal Defendants argue cannot yet be adjudicated because it entails the claim that the Artman/Cason opinion is wrong. This is a thinly veiled attempt to drag the Court into adjudication that is foreclosed by the APA.

permitted under a two-part determination when other conditions do not apply).

IGRA does *not* obligate the Secretary to conduct a two-part determination every time a tribe wishes to operate gaming on post-1988 land. That determination is required only when one of the six conditions that independently qualify land for gaming is lacking. More importantly for our purposes, IGRA also does not require the Secretary to consult with the County before determining whether any of those six conditions is present. The County's assertion that it has a right to consultation would read into IGRA words that it does not contain. Moreover, it would lead to the absurd result that the Secretary would have to consult local and state authorities to determine whether he has an obligation to consult them. The Artman/Cason opinion cannot possibly free the Secretary from an obligation that does not exist.

b. The Artman/Cason opinion does not free anyone from any obligation or determine any sovereign rights because, absent further action, it has no legal effect.

Even if the Secretary were under an obligation to make a two-part determination in this case, which the Tribe disputes, the Artman/Cason opinion could not free the Secretary from that obligation. The DOI lacks authority to release itself from obligations imposed upon it by statute. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 481 F.3d 1224, 1234 (9th Cir. 2007) (agency could not avoid obligations imposed by Endangered Species Act). The opinion, at most, may indicate how the Secretary may act in the future with regard to the Tribe's fee-to-trust application, but it cannot release him of statutory obligations that apply to his future actions.

The Ninth Circuit Court of Appeals has defined what it means for consequences to flow from an agency's action. In order to be final, agency action must not only express an agency's opinion, but also put some decision into effect. *Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 985 (9th Cir. 2006). It must immediately affect someone's day-to-day business. *Id.* at 990. The Ninth Circuit also considers whether the action inflicts actual and concrete injury, has the status of law or comparable legal force, or requires immediate compliance with its terms. *Ukiah Valley Med. Ctr. v FTC*, 911 F.2d 261, 264 (9th Cir. 1990) (citations omitted).

The Artman/Cason opinion does not meet any of the finality criteria because no consequences flow from it. The opinion addresses a circumstance that has not yet come to pass

and thus affects no one's day-to-day business. It merely states that *if and when* the land is taken into trust, then, at that time, it would constitute "restored land." Artman Memo at 1; Cason Letter. The condition required for its applicability – the land's being held in trust for the Tribe's benefit – is lacking. Thus, the County cannot possibly be affected by the opinion until some further action gives it practical and/or legal effect.

Furthermore, the opinion does not change any rights or determine any obligations, and it does not implement a new legal regime. The Tribe, the County, the State of California and the Federal government all have today the same rights and obligations they did before the opinion was issued. The County still retains jurisdiction over County land, and the State retains jurisdiction over State land. The Tribe, as before, lacks jurisdiction over the land and cannot conduct gaming on it. The Federal government still has not taken any final action on the trust application and remains subject to the same legal requirements in doing so. Nothing has changed.

The County cites *Kansas v. U.S.*, 249 F.3d 1213 (10th Cir. 2001), to argue that the Artman/Cason opinion somehow influenced the jurisdictional balance among the Tribe, the Federal government, and the State over the land. But the conditions that accounted for the alteration of jurisdictional lines in *Kansas* are not present here. *Cf. id.* at 1219, 1223. The Artman/Cason opinion has not been acted upon by any agency and thus is not final. Moreover, the land is not held in trust by the Federal government, and the Tribe holds no interest in the land. Thus the Artman/Cason opinion effects no change in the jurisdictional status quo, and the County can point to no consequences that flow from the opinion itself.

3. Adequate remedies are available to the County if the Court postpones judicial review of the Artman/Cason opinion.

Under the APA, the Artman/Cason opinion is subject to judicial review only if "there is no other adequate remedy in a court." 5 U.S.C. § 704.

Citing the Quiet Title Act, 28 U.S.C. § 2409a ("QTA"), the County complains that delaying judicial review of the opinion until after the Secretary takes final action on the trust application will divest the County of the opportunity to challenge the opinion in court. Opp'n at 11:8-16. But the QTA does not bar lawsuits challenging "Indian lands" status. The Act only

precludes lawsuits that seek to divest the United States of title it already holds, including suits that seek to nullify an Indian trust acquisition by challenging the United States' fee title to the land. *See* 28 U.S.C. § 2409a; *U.S. v. Mottaz*, 476 U.S. 834 (1986). *See also* Opp'n at 11:14-19.

Yet the argument the County wishes to raise – and that it fears will be foreclosed – focuses on the land's eligibility for gaming under IGRA and not on its title. The County will be able to raise this argument if and after the land is taken into trust. It is well established that lawsuits challenging "Indian lands" status are not barred by the QTA. *See Kansas*, 249 F.3d at 1225; *Citizens*, 471 F.Supp.2d at 318 n.16.[5] Accordingly, Amador County will have a more than adequate remedy – judicial review of the opinion – if the Court dismisses its Complaint.

4. Even the case law that the County cites supports the conclusion that "final agency action" is lacking here.

To support its claim that the Artman/Cason opinion is final agency action, the County cites and quotes a number of cases that actually expose the weaknesses in its argument. These cases are distinguishable because subsequent – and final – agency action was taken pursuant to the opinions at issue that vested them with finality.

Indeed, the cases on which the County relies demonstrate that a legal opinion on "Indian lands" status issued as part of the fee-to-trust process is never final agency action unless an agency takes some other action pursuant to the opinion. In each of those cases, *Bennett*'s twin requirements were met only because some agency had acted on the opinion in a way that immediately changed the governing legal regime and affected the day-to-day business of one of the parties, thereby vesting the opinion with finality. The DOI has yet to take any action on the Artman/Cason opinion, and the opinion has not determined rights or obligations or otherwise changed the governing legal regime. Thus the circumstances required for finality are not present.

The County relies most heavily on *Kansas*, where (1) the agency took action adopting and implementing the opinion, thereby vesting it with finality; (2) IGRA explicitly declared the

[5] As the *Kansas* court noted, "adjudicating . . . whether a tract of land constitutes 'Indian lands' for Indian gaming purposes is 'conceptually quite distinct' from adjudicating title to that land. One inquiry has little to do with the other as land status and land title 'are not congruent concepts' in Indian law." 249 F.3d at 1225 (*citing Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1097 (10th Cir. 1985); *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1475 (10th Cir. 1987)).

action "final" for APA review; and (3) the action had a direct and immediate effect on the Tribe's and state's day-to-day business. 249 F.3d at 1220, 1222, and 1223. But *Kansas* does not support the County's argument because the factors accounting for the finding of finality in *Kansas* are absent from the present case. Here, the DOI has not acted pursuant to the Artman/Cason opinion; the section of IGRA that accounts for the finding of final agency action in *Kansas* does not apply to actions taken by the Secretary of the Interior, 25 U.S.C. § 2714; *Citizens*, 471 F.Supp.2d at 322, 327-28; and the opinion has no direct and immediate effect on anyone.

In addition, the County cites the order issued in *United Keetoowah Band v. Oklahoma*, No. Civ-04-430 (E.D. Okla. Jan. 26, 2006), to support its arguments. But this case is likewise unhelpful to the County because none of the factors that account for the court's holding of finality is present here. The *United Keetoowah Band* court noted repeatedly that the NIGC had acted upon the opinion, *id.*, slip op. at 4, 7, 8, and its action immediately affected the Band by subjecting it to detrimental legal consequences. *Id.* at 10. No comparable action has been taken by DOI in this case, and no comparable legal consequences flow from the Artman/Cason opinion. Absent such consequences "final agency action" is lacking.

The County also relies on *Bennett*. Opp'n at 5:24; 6:25. *Bennett* involved the issuance of something called a "biological opinion" that, despite its name, actually functioned like a permit. *See* 520 U.S. at 170. *Bennett* found that "final agency action" existed because two critical factors were present: (1) the agency had subsequently acted on the opinion and consummated its decision-making process, and (2) the opinion altered the legal regime to which the agency had been subject before it was issued. *Id.* at 178. Neither of those factors is present here.

Next, the County attempts to distinguish *Miami Tribe* and *Citizens*, which deal with ILOs issued by the DOI and are thus directly on point. These cases hold, unequivocally, that such opinions standing alone do not constitute "final agency action" for purposes of APA review because they are only intermediate steps in – or part of – a process that results in final agency action. *See Miami Tribe*, 198 Fed.Appx. at 690; *Citizens*, 471 F.Supp.2d at 322 (citing *Miami Tribe*). Secretarial ILOs, standing alone, "do[] not have a direct or immediate impact . . . ." *Miami Tribe*, 198 Fed.Appx. at 690. In both *Miami Tribe* and *Citizens*, as here, no agency had

taken action to implement or otherwise adopt the position presented in the opinion. *Miami Tribe*, 198 Fed. Appx. at 689-90; *Citizens*, 471 F.Supp.2d at 303. The courts in both cases rejected the plaintiffs' arguments that the ILOs were final agency action, and this Court should do the same.

Faced with the difficulty presented by the holdings in *Miami Tribe* and *Citizens*, the County tries to distinguish these cases by noting that they involved opinions issued under the 2000 MOA between the DOI and the NIGC and not the 2006 MOA. Opp'n at 14:20-15:17. The County claims that the 2006 MOA *delegated* the NIGC's authority to make Indian lands determinations to the Department of the Interior. Opp'n at 15:6-8.

But there is no delegation of authority from the NIGC to the DOI in the 2006 MOA. Both the Chairman of the NIGC and the Secretary of the Interior expressly retain their respective statutory authority. MOA §§ 1-3. The MOA is an agreement between the two agencies that helps them efficiently use their resources and avoid duplicating legal analysis of an issue that each agency confronts in exercising its statutory authority. Nothing in the MOA forces one agency to adopt the interlocutory and non-final conclusions reached by the other.

The County's attempt to distinguish *Miami Tribe* and *Citizens* thus fails. The Artman/Cason opinion is, like the DOI opinions in those cases, interlocutory. *Miami Tribe* and *Citizens* show that an ILO issued by the DOI in the course of reviewing a trust application is only an "intermediate step," *Citizens*, 471 F.Supp.2d at 322, that is "part of the process that will eventually result in . . . ." final agency action. *Miami Tribe*, 198 Fed.Appx. at 690.

The County also cites in a footnote a string of cases where courts found "final agency action" to exist in connection with agency opinions, suggesting that these cases are relevant by analogy. Opp'n at n.2. But the factors that account for the finding of finality in each and every one of those cases are lacking here. The Artman/Cason opinion has no immediate legal effect or significance, nor does it alter the governing legal regime or an agency program.

B. <u>The County Lacks Standing to Challenge the Artman/Cason Opinion.</u>

Realizing that it mistakenly identified as harms events that are both speculative and contingent in its Complaint, the County disavows those harms and now tries to show that it has standing by pointing to two new harms: "(1) the deprivation of rights to 'consultation' under

Section 20's two-part determination, and (2) the inadequacy of environmental review in connection with the Indian Lands determination." Opp'n at 17:11-13. These harms do not satisfy the *Lujan* test because they involve the deprivation of "rights" the County does not have.

1. *Lujan*'s first prong is not satisfied because the County has no right to "consultation" under 25 U.S.C. § 2719 nor a right to NEPA review and thus cannot point to any injury-in-fact.

The section of IGRA that the County claims grants it a "consultation right," 25 U.S.C. § 2719, lists the seven conditions under which tribes can operate gaming on post-1988 land. *See* above at 5:11-6:1. The County argues repeatedly that, as a general rule, local authorities have a right to be consulted as to whether gaming should be allowed on post-1988 land, and claims that by relying on the restored lands condition to opine that Ione may operate gaming on the land once it is taken into trust, the DOI has somehow deprived the County of a right to be consulted. Indeed, the County rests its argument on the notion that it has some overarching right to influence the Federal government's interlocutory analysis of whether the land-use purposes proposed in the Tribe's trust application are practicable.

IGRA grants the County no such right. As explained above at 6:2-10, IGRA sets forth seven different conditions under which post-1988 land can qualify for gaming, only one of which involves consultation with local governments. 25 U.S.C. § 2719. IGRA does not require such consultation when, as here, a tribe seeks to conduct gaming under one of the other six conditions. Nor does it require the Department to consult local governments before opining on whether one of those six conditions exists. Yet this is exactly what the Artman/Cason opinion does. It expresses the DOI's position that one of these six conditions – the restored lands condition – is present. The County's assertion that it has a right to be consulted before the Department expresses that opinion would read into IGRA a requirement that is not there.

The notion that IGRA grants local governments a right to be consulted every time a tribe seeks to operate gaming on post-1988 land turns IGRA on its head. IGRA is aimed mainly at expanding tribal opportunities for self-sufficiency and self-government by providing a range of conditions under which tribes may operate gaming. *See* 25 U.S.C. § 2702(1); 25 U.S.C. § 2701(4) (IGRA was passed to further a policy of "promot[ing] tribal economic development,

tribal self-sufficiency, and strong tribal government"). The County's claim to a generalized consultation right under IGRA would, if accepted, limit and confine tribal gaming and detract from the opportunities that IGRA grants to tribes. *See* S.Rep. No. 100-446, at 1-2, 13.

The County *does* have a right to be consulted, at a *later stage* in the trust process, and to discuss with the Federal government all of its concerns about impacts the Tribe's proposed trust acquisition for gaming purposes might have on the County. Indeed, the Federal government cannot take the land into trust without addressing those concerns. *See* Fed. Defs. Opening Brief at 14:3-22. But that consultation right, which arises under a different statute, should not be confused with the alleged right that the County now tries to assert under IGRA.

The County devotes a single sentence to arguing that it has a right under NEPA of which it was deprived when the Artman/Cason opinion was issued. Opp'n at 16:13-15. However, as explained in the Tribe's opening brief at 15-20, and below at 14:18-15:25, NEPA does not require any environmental review before an interlocutory opinion on "Indian lands" status is issued. The County was not deprived of any right under NEPA and suffered no harm.

2. *Lujan*'s second prong is not satisfied because the County fails to establish a causal connection between an injury and the Artman/Cason opinion.

Even assuming, *arguendo*, that the County could identify some legitimate IGRA-based harm, it does not show any causal connection between such harm and the Artman/Cason opinion. In a futile attempt to establish the requisite causal connection, the County asserts that the Artman/Cason opinion "make[s] the land eligible for gaming under IGRA as soon as it is taken into trust." Opp'n at 16:17-20.

That assertion is wrong because the opinion does not authorize gaming on the land. Two agencies have the power to determine whether the Tribe will operate gaming on the land: The DOI, which has the authority to take the land into trust, and the NIGC, which is the agency that oversees Indian gaming and enforces IGRA. *See* 25 U.S.C. §§ 2705, 2706. Action by both agencies is required to authorize gaming. The DOI must take the land into trust, and the NIGC must determine that gaming may be operated thereon and issue the requisite approvals under IGRA. 25 U.S.C. §§ 2710(d)(2) and 2710(d)(9).

Even if the agencies adopt the Artman/Cason opinion when taking their respective actions, it would be ***the action taken by each*** – and not the opinion or its adoption – that would effect the outcome the County identifies. The opinion, standing alone, does not effect any such outcome.

When, as here, the harms cited by a plaintiff do not emanate from the agency action that is under scrutiny in its lawsuit, the plaintiff lacks standing. *See, e.g., Nuclear Info. and Res. Serv. v. Nuclear Regulatory Comm'n*, 457 F.3d 941, 954 (9th Cir. 2006). With regard to the County's NEPA claim, NEPA does not require any environmental review prior to issuance of the opinion. Thus there can be no legally relevant causal connection.

3. *Lujan*'s third prong is not satisfied because the County fails to establish that it is likely, as opposed to merely speculative, that a favorable decision will redress any cognizable injury.

A decision in the County's favor cannot address the two new alleged harms because neither is cognizable. With regard to the harms alleged in the Complaint, the Court should either view the County as having abandoned its claim to those harms or find that it cannot analyze their redressability. *See* Fed. Defs. Opening Brief at 15:15-16:9.

C. The County Fails to Establish That the Complaint is Ripe for Review.

The County attempts to establish that the Artman/Cason opinion is final and thus ripe for review by repeating arguments made earlier in its Opposition. *See* Opp'n at 21:5-9; 22:5-7. Those arguments are addressed above and, for reasons stated there, are wrong. Because the County has not demonstrated that the challenged governmental action is final, it has not established ripeness. *See US West Communications v. MFS Intelenet, Inc.,* 193 F.3d 1112, 1118-19 (9th Cir. 1999).

The County also asserts that the case is ripe because it "presents a dispute . . . regarding the propriety of already-completed agency actions, the Indian lands determinations." Opp'n at 21:14-15. The DOI may have completed its analysis of the land's status, but the act of completion is not conclusive in ripeness analysis. What *is* conclusive – and what the County ignores – is that finality is lacking because the Artman/Cason opinion is an interlocutory action designed to facilitate final action by the Secretary. The County confuses completion of an action

with the action's "finality" as that term is used in the APA and in ripeness analysis. The Artman/Cason opinion may be complete, but it is not a "final action."

The County analogizes this case to *Texas v. United States*. Opp'n at 21:23-22:4. There, the court found the case ripe for review because the Secretary's action – promulgation of binding regulations – was final since it altered the legal regime to which Texas was subject. Because of the agency's action, the State was immediately required to either participate in a negotiation process it opposed or forego negotiation and risk approval of gaming. *See Texas v. United States*, 497 F.3d 491, 496-97 (5th Cir. 2007). But such finality is lacking in this case. The Artman/Cason opinion is not a regulation and lacks the immediate force of law. It does not create a new process for operating gaming on Indian land, and it certainly does not subject the County or anyone else to a legal regime to which they were not previously subject – as happened in *Texas*. *Texas* does not assist the County in establishing ripeness.

Attempting to demonstrate that it will suffer hardship if judicial review is postponed until final action occurs – the second showing that is required for ripeness – the County repeats the argument that existing regulations do not allow for meaningful challenge. Opp'n at 22:5-12. For reasons explained above at 7:25-8:9, however, the County will not suffer the hardship it claims.

D. The County Fails to Demonstrate a Cognizable Claim under NEPA.

In order for NEPA to apply, a governmental action must: (1) be a "proposal" for (2) a "Federal action" that is (3) "major" and (4) "significantly affect[s]" the quality of the human environment. 42 U.S.C. § 4332(2)(c).

The County's argument that the Artman/Cason opinion is a "federal action," Opp'n at 22:17-23:16, addresses only one of the four criteria the Tribe contends are lacking. The County concedes, because it does not argue otherwise, that there is no "proposal" for action that is "major" or "significantly affect[s] the quality of the human environment," and therefore concedes that NEPA did not require any environmental review prior to issuing the Artman/Cason opinion. The County's NEPA claims should be dismissed for this reason alone. Furthermore, the County's argument about whether the Artman/Cason opinion constitutes "Federal action" under NEPA is baseless because the Artman/Cason opinion is not comparable to any of the examples provided

in the regulation on which the County relies. Opp'n at 23:4-9.

The County's second argument should likewise be rejected. The County argues that because the DOI Checklist recognizes a duty to conduct NEPA review before issuing a determination under IGRA Section 2719(b)(1)(A), the DOI should by analogy be required to conduct such a review when issuing an interlocutory legal opinion in the course of considering a trust application under the Indian Reorganization Act. Opp'n at 23:17-24:4. But the Checklist on which the County relies only requires NEPA review in connection with a final determination under Section 2719(b)(1)(A). Checklist at 9. There is no basis for extending this NEPA obligation to the performance of a completely different and interlocutory function.

Furthermore, the County's assertion that a determination of whether land qualifies for gaming under Section 2719(b)(1)(A) is "functionally equivalent" to the Secretary's analysis of land's eligibility for gaming made while assessing a tribe's trust application is wrong. In the first instance IGRA grants the Secretary final authority to determine whether gaming can be conducted on the land, and the authorized action consists entirely of establishing the land's status. In contrast, the Secretary's interlocutory finding of "restored land" made in the course of reviewing a trust application is only a small part of the larger action. And though IGRA grants the Secretary final authority to make a determination under Section 2719(b)(1)(A), it does not grant him the same authority with regard to Section 2719(b)(1)(b)(iii). Thus the two actions are distinct, and the Court should not apply NEPA to one simply because it applies to the other.

Finally, as the County well knows, the tribe's land will not be taken into trust – and no gaming will be conducted upon it – before NEPA's environmental review requirements are fulfilled. Even as the County filed this lawsuit, the DOI was in the process of preparing the required environmental impact statement. Neither the Tribe nor the DOI seek to avoid NEPA's requirements. Those requirements apply to the trust process as a whole – but not to the interlocutory portion thereof that is at issue in this lawsuit.

III. CONCLUSION

For all of the reasons stated above and in the Tribe's opening brief, the Court lacks jurisdiction to grant the declaratory and injunctive relief sought by the County. The Tribe

respectfully requests that the Court dismiss the County's lawsuit, and that those portions of the Complaint dealing with NEPA be dismissed with prejudice.

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